

# Deconstructing the Guidelines

Are institutional fair dealing guidelines still relevant?

Do they need updating?

Can we live without them?

# Post-Secondary Fair Dealing Guidelines

A very brief history...

# ***CCH Canadian Ltd. v. Law Society of Upper Canada***

2004 SCC 13

- Library staff copying works on behalf of individual patrons
- Use of “guidelines” to cover what copying would be done under their custom copying service.
- Court acknowledges use of guidelines for fair dealing assessments.

***Alberta (Education) v. Canadian Copyright  
Licensing Agency (Access Copyright)***  
2012 SCC 37

- Teachers copy materials for entire classes of students
- From Paragraph 23:

“Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of “instruction”; they are there to facilitate the students’ research and private study.”
- At the time, “education” was not yet a separate “fair dealing” purpose under s. 29

# Association of Universities and Colleges Canada (AUCC)

- Suite of fair dealing policies to be adopted or be used as models (2013)
- Specific guidelines for copying by post-secondary institutions under fair dealing
- Defines “short excerpt” (including the 10% guideline)
- No mention of CCH six factor test

## Fair Dealing Guidelines

### Preamble

The **Copyright Act** contains a **Fair Dealing** exception, which permits the use of copyright-protected works without permission from the copyright owner or the payment of royalties. To qualify for Fair Dealing, two tests must be passed:

- i. The **dealing** must be for one of the following purposes enumerated in the *Copyright Act*: research, private study, education, parody, satire, criticism, review, or news reporting; and
- ii. The dealing must be **fair**. The fairness of the dealing is assessed in accordance with a number of specific factors outlined by the Supreme Court of Canada.

The purpose of these Guidelines is to provide a simple and straightforward approach to making determinations of the application of the Fair Dealing exception in particular circumstances. While the Guidelines are not intended to be a replacement for the full analysis outlined by the Supreme Court of Canada, use of the Guidelines is expected to yield a result consistent with such a full analysis in the vast majority of applicable cases.

### Guidelines

These Guidelines apply to all reproductions of copyright-protected works under the university's **Use of Copyright Materials Policy** and **Procedure**. They are not intended to apply to reproductions made outside the scope of that Policy. Additionally, these Guidelines are not intended to limit reproductions of works in which the university holds the copyright nor reproductions made in accordance with the terms of licence agreements that apply to specific resources.

### Under these Guidelines:

1. Course instructors, faculty, researchers, and university employees (**users**) may reproduce and communicate short excerpts from a copyright-protected work for the purposes of **research, private study, education, parody, satire, criticism, review, or news reporting**.
2. Reproductions or communications of short excerpts for the purpose of news reporting, criticism or review must mention the source and, if given in the source, the name of the author or creator of the work.
3. Users may copy the following **short excerpts** under these Guidelines:
  - a. up to ten (10) per cent of a copyright-protected work (including a literary work, musical score, sound recording, or an audiovisual work) [Note: in cases where the work is in an anthology or collection that includes complete works that are otherwise available in separate volumes, this may not be applicable. In such cases, contact the Copyright Office for clarification];
  - b. an entire chapter from a book;
  - c. an entire article from a periodical publication;
  - d. an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, or plan) from a copyright-protected work containing other artistic works;
  - e. an entire newspaper article or page;
  - f. an entire single poem or musical score from a copyright-protected work containing other poems or musical scores; and
  - g. an entire entry from an encyclopedia, annotated bibliography or similar reference work;

provided that in each case, no more of the copyright-protected work is copied than is required in order to achieve the allowable purpose.

4. Users may NOT reproduce the following:
  - a. unpublished works;
  - b. proprietary workbooks, work cars, assignment sheets, tests and examination papers;
  - c. instruction manuals;
  - d. newsletters with restricted circulation intended to be restricted to a fee paying clientele;
  - e. business cases which are made available for purchase; or
  - f. multiple short excerpts from the same copyright-protected work, with the intention of reproducing or communicating substantially the entire work.

The **Copyright Office** can provide assistance with questions about the implementation or interpretation of these Guidelines.

# Q1 How confident are you explaining the fair dealing guidelines to your colleagues?

Very confident

Somewhat confident

Not sure

Not confident

These are questions I ignore  
for as long as possible.

My institution does not use  
fair dealing guidelines.



# Post-Secondary Fair Dealing Guidelines

## Why have Guidelines?

- Instructor POV: A practical tool to allow for quick and easy determinations of fairness that will cover a broad range of cases.
- Institution POV: Helps mitigate risk by following a standardized “custom or practice within a particular trade or industry” (*CCH*, 55)



# Guidelines in Practice

- Guidelines are intended as a shortcut to a determination of the fairness of dealing in a significant percentage of applicable cases
- Guidelines are intended to cover Institutional Copying/Use rather than Private Copying/Use (i.e., cases where there should be Institutional responsibility for any infringement)]
- Guidelines should not be a replacement for a full fair dealing analysis in all cases

# Successful Guidelines

- Not complicated to understand
- Not time-consuming to apply
- Yield a “fair” result in a large percentage of instances across a broad range of applications

# Fairness Remains the Standard

- Guidelines are only a tool, they do not define fairness
- Guidelines should be seen as a shield (for those individuals applying them on behalf of the institution) rather than a sword (that can be used to support unfair outcomes)
- Where application of the guidelines appear to yield an unfair result, then fairness should trump the guidelines
- But ... who's watching? The ever-present issue of oversight over how the guidelines are being used

# ***CCH Canadian Ltd. v. Law Society of Upper Canada***

2004 SCC 13

From Paragraph 63:

“Dealing” connotes not individual acts, but a practice or system... Persons or institutions relying on the [s. 29](#) fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. **They may do this either by showing that their own practices and policies were research-based and fair**, or by showing that all individual dealings with the materials were in fact research-based and fair.

[emphasis added]

# Determining Overall Fairness

- Guidelines are contextual – they serve a particular range of uses for certain purposes within a timeframe.
- What is the “standard” type of institutional copying? What is normal or usual? Should be designed to cover those cases (but applied in all cases?).
- What does it mean to say a set of guidelines is “fair” or “unfair”?
- Likelihood of an unfair outcome – what should the target be?

# ***CCLA (aka Access Copyright) v. York University***

## **2017 FC 669**

[305] In a copying regime based on policy or guidelines, part of the fairness analysis must consider the fairness of the delineated amounts and types. **The Court must be able to examine the rationale for these thresholds.** It is incumbent on the user institution to explain the basis for the delineated amounts and types (the thresholds) and to explain why they are, in and of themselves or in combination with other features, fair.

[emphasis added]

# Rationale for Guideline Thresholds

What might that rationale look like?

What is a reasonable argument in favour of 10% (rather than 5% or 15%)?

# Short Excerpts under the AUCC Guidelines

A short excerpt means:

- (a) up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work)
- (b) one chapter from a book
- (c) a single article from a periodical
- (d) an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works
- (e) an entire newspaper article or page
- (f) an entire single poem or musical score from a copyright-protected work containing other poems or musical scores
- (g) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work

provided that in each case, no more of the work is copied than is required in order to achieve the allowable purpose.

(from <https://www.univcan.ca/media-room/media-releases/fair-dealing-policy-for-universities/>)



# Q2 Rank the short excerpts from least likely to be consistently fair (top) to most likely to be consistently fair (bottom)?

up to 10% of a copyright-protected work

one chapter from a book

a single article from a periodical

an entire artistic work from a copyright-protected work containing other artistic works

an entire newspaper article or page

an entire single poem or musical score from a copyright-protected work containing other poems or musical scores

an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work



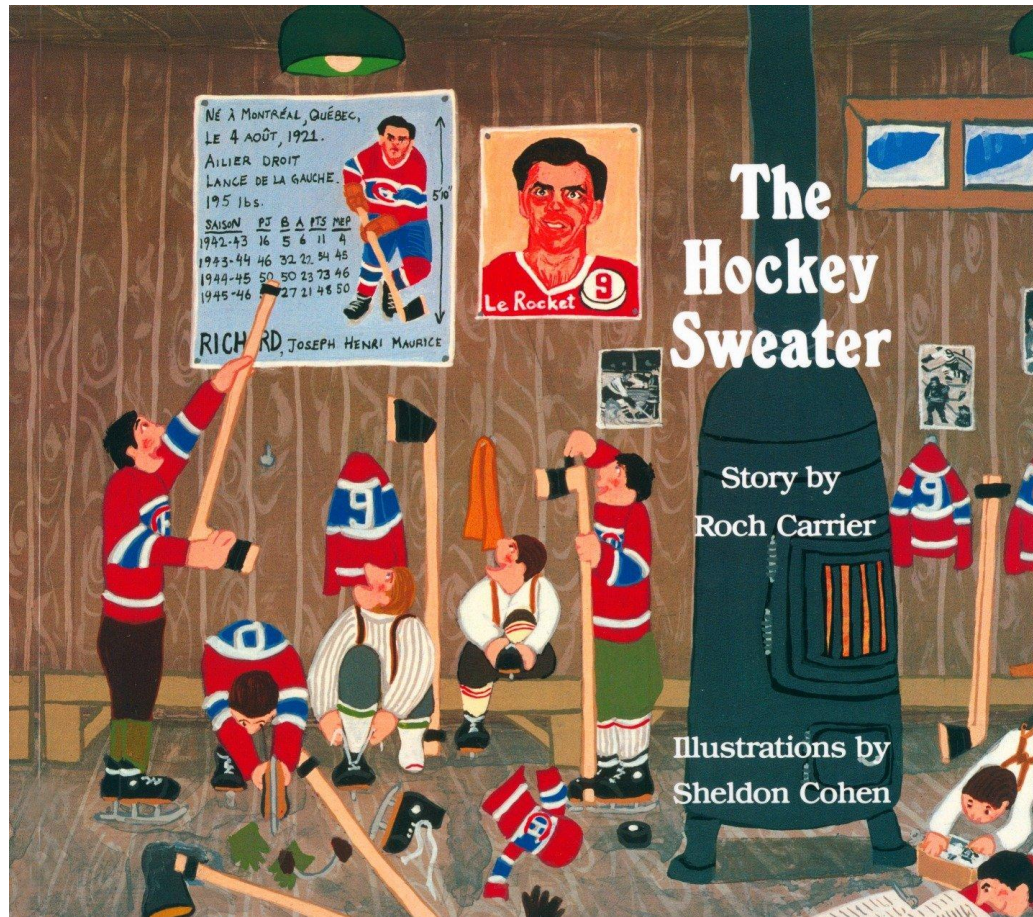
# ***CCLA (aka Access Copyright) v. York University***

**2017 FC 669**

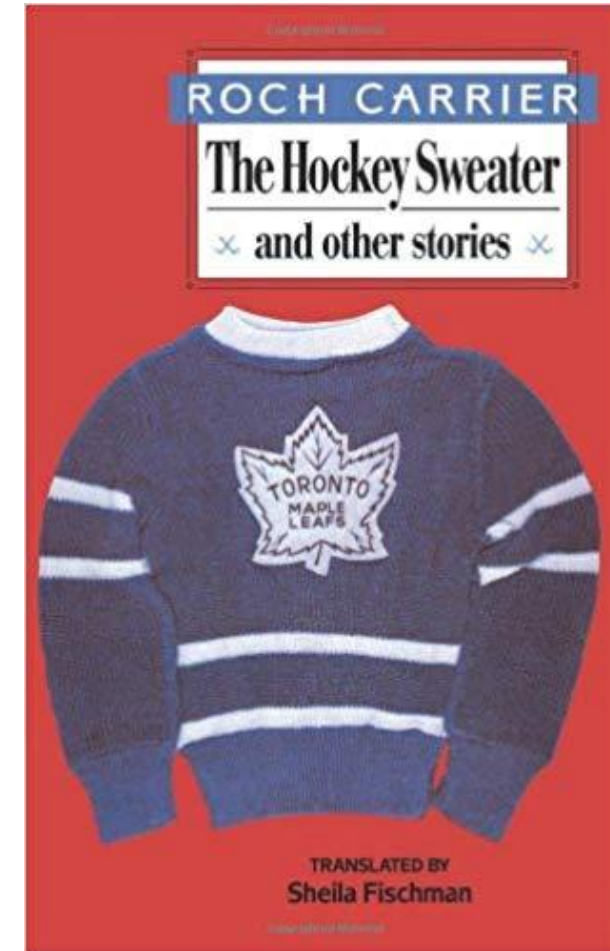
Concerning results applying the Guidelines?

[310] As became apparent during the course of the trial and as is clear from the terms of the Guidelines, the permitted copying can, in fact, be 100% or such a large part of a work as to appropriate the whole (e.g. for a journal article in a periodical, a short story in an anthology, or a chapter in an edited book).

# *The Hockey Sweater* by Roch Carrier



[amazon.ca](https://www.amazon.ca)



[amazon.ca](https://www.amazon.ca)



# Short Excerpts under the AUCC Guidelines

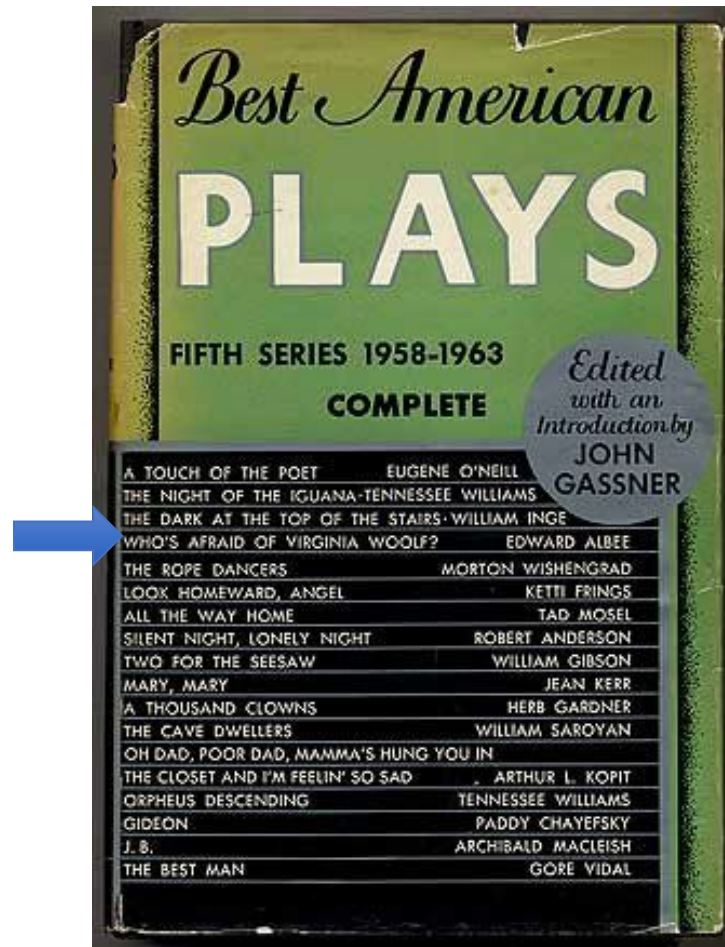
A short excerpt means:

- (a) up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work)
- (b) one chapter from a book
- (c) a single article from a periodical
- (d) an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works
- (e) an entire newspaper article or page
- (f) an entire single poem or musical score from a copyright-protected work containing other poems or musical scores
- (g) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work

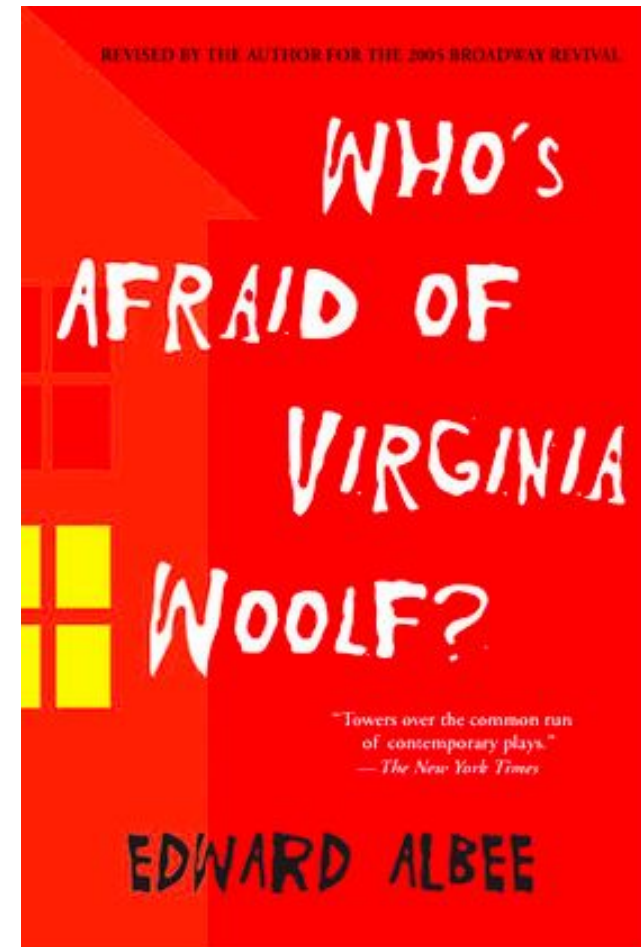
provided that in each case, no more of the work is copied than is required in order to achieve the allowable purpose.

(from <https://www.univcan.ca/media-room/media-releases/fair-dealing-policy-for-universities/>)

# What about Anthologies?



[amazon.com](https://www.amazon.com)

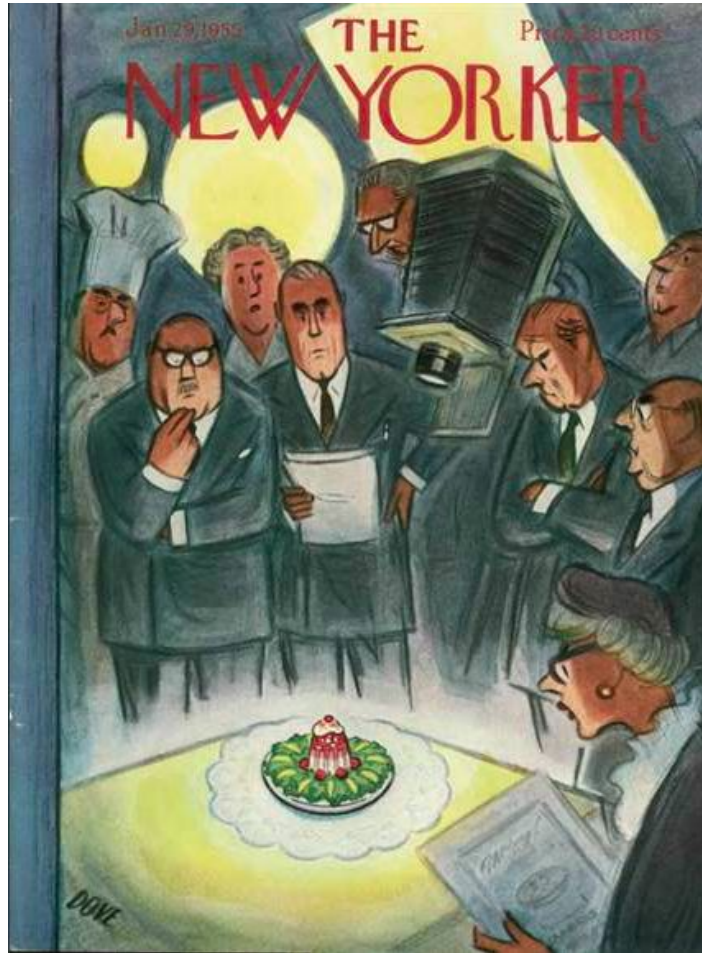


[penguinrandomhouse.com](https://www.penguinrandomhouse.com)

# What about Anthologies?

<b>Six factor test (CCH)</b>	
<b>Purpose?</b>	<b>Fair</b>
<b>Character?</b>	<b>Fair</b>
<b>Amount?</b>	<b>Not fair</b>
<b>Nature?</b>	<b>N/A</b>
<b>Alternatives?</b>	<b>Not fair</b>
<b>Effect on the work?</b>	<b>Not fair</b>

# Single Article from a Periodical?



[newyorker.com](http://newyorker.com)

Franny  
and Zooey

J.D. Salinger

[littlebrown.com](http://littlebrown.com)

# ***CCLA (aka Access Copyright) v. York University***

**2017 FC 669**

Concerning results applying the Guidelines?

[336] Not all the works at issue are written by scholars and faculty who do so as part of their academic duties. Many of the works covered by the Guidelines are written by professional writers or by academics acting beyond their purely academic role. The works are published by professional commercial publishers. Most of these people are attempting to make a living from writing and publishing.



# Guidelines in Practise

Potential issues with guidelines: Entire works copied from anthologies, no distinction between scholarly and non-scholarly works nor between fiction and non-fiction.

\*\*\*\*\*

How significant are these issues in the context of copying on behalf of post-secondary institutions?

Are they significant enough to warrant a revision of the guidelines to address these issues?

# Is a formal review warranted?

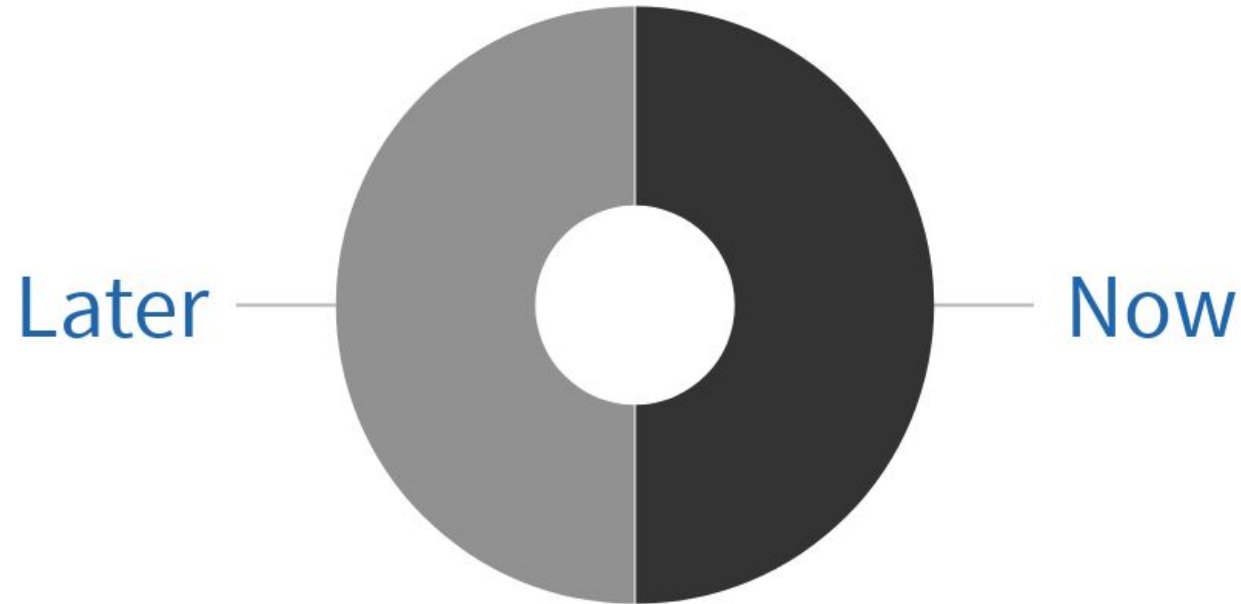
- Does a formal review and revision/updated of the guidelines suggest that the current guidelines are unfair?
- A review might explore whether the guidelines are working as intended and whether new developments have impacted their operation in unanticipated ways
- Guidelines must be respectful of rights-holders and must be perceived to be respectful. Might a regular review of practices be an important part of taking the fairness of the guidelines seriously?

# (Some) factors affecting timing for a review.

Review now	Review later
Updates: To consider changes in the nature of course materials since 2012 (e.g., digital and big packages, OER, etc.)	Pending FCA case ( <i>AC v. York</i> ) that is evaluating fairness of the guidelines
Regular review demonstrates seriousness about fairness	No clear path or procedure for review
?	?

# Q3 When should the fair dealing guidelines be reviewed?

Now A Later B



# Q4 Who should be responsible for the review of the guidelines?

Each individual institution

Consortia (e.g., a group of universities)

Association (e.g., CIPan, Universities Canada, etc.)

Government-affiliated body (e.g., parliament, Copyright Board, etc.)

None of the above but I have an idea I want to share in the discussion.



# Summary

- History: case law providing direction
- Current rationale for Fair Dealing Guidelines: simple application, risk management
- Significance of and potential for unfair outcomes?
- Reviewing the Fair Dealing Guidelines: who, what, when, where, why, how?

Discussion and questions?

# Thank you

Adrian Sheppard  
Director, Copyright Office, U of A  
[adrian.sheppard@ualberta.ca](mailto:adrian.sheppard@ualberta.ca)  
@adrsherp

Amanda Wakaruk  
Copyright Librarian, U of A  
[amanda.wakaruk@ualberta.ca](mailto:amanda.wakaruk@ualberta.ca)  
@awakaruk