

**Confused by copyright?**

**You are not alone.**

**We can help.**

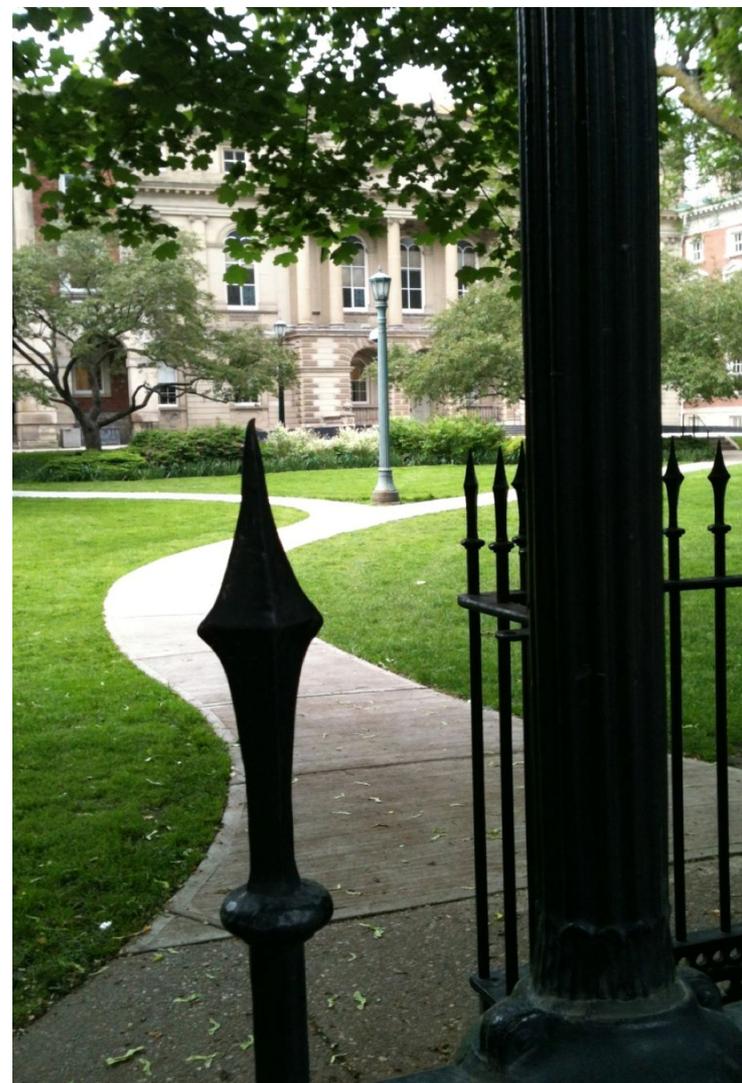
NEOS Miniconference, June 9, 2017



Scott Day and Amanda Wakaruk

# The Plan

- Short history of copyright & fair dealing
- Supreme Court: CCH, Pentalogy
- Copyright Modernization Act
- Libraries, fair dealing and user rights
- Copyright Q & A
- Importance of 2017 Copyright Act review
- Questions



# What is copyright?

- Covers copying or communication of a *substantial part* of an *original literary, dramatic, musical or artistic* expression
- **Performances** are copyrighted
- **Ideas, facts and news** are not copyrightable
- Copyright is national and is automatic in Canada
- **Moral rights** protect the right of creators to have their name on a work (or not) and protects the integrity of the work

# Copyright is limited

- Copyright was created for **public interest purposes** and protections are limited
- It is not “property” as traditionally defined - copyright owners have a **limited monopoly**
- Limited by **time** (50 years after the death of the creator in Canada)
- Limited also by **fair dealing and exceptions** in the *Copyright Act*

# Fair dealing

- Fair dealing key to providing **balance** in copyright
- **What is *fair* is not defined in the Copyright Act** - it is purposely flexible
- Restrictively applied before 2004
- Supreme Court has provided significant guidance since 2004 on purpose and application of fair dealing
- Update of the *Copyright Act* in 2012 affirmed the direction of the court

***CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339**

- Fair dealing is a **user right**
- If a dealing is fair, **it does not infringe copyright**
- Owners rights and control must not be over-emphasized
- Institutional practices and policy are important
- Availability of a licence or work for sale does not preclude fair dealing
- Two-step test provided to assist assessments of fair dealing

# Great Library

Osgoode Hall



*CCH*: Supreme Court rules...

**“research must be given a **large and liberal** interpretation in order to ensure that users’ rights are not unduly constrained, and is not limited to a non-commercial or private context”**

## *CCH*: Institutional practice and policy matters

“Persons or institutions relying on the...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.”

## *CCH*: Two-part test

### **Part 1: Is the dealing for one of the allowable purposes?**

- Research
- Private study
- Criticism
- Review
- News reporting

# *CCH*: Two-part test

## **Part 2: Six step test - Is the dealing fair?**

1. The purpose of the dealing
2. The character of the dealing
3. The amount of the dealing
4. Alternatives to the dealing
5. The nature of the work
6. The effect of the dealing on the work

## 2012: “Pentalogy”

### **Supreme Court rules on 5 copyright cases in July 2012**

- Fair dealing approach in *CCH* is reinforced
- Principle of **technological neutrality** outlined
- Fair dealing assessments are from the **user perspective**
- **Others may act** on behalf of a user for fair dealing

## *SOCAN v Bell - [2012] 2SCR 326*

**Supreme Court rules in a case involving song previews:**

**“Limiting **research** to creative purposes would also run counter to the ordinary meaning of ‘research’, which can include many activities that do not demand the establishment of new facts and conclusions. **It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest.**”**

## *SOCAN v Bell - [2012] 2SCR 326*

- The purpose of “research” is analyzed from the **user perspective**, not the online service provider.
- “Research” is defined so broadly as to mean **all users are eligible for fair dealing**
- This, along with the other guidance from the SCC, means that **Canada operates like a “fair use” country**

*Alberta Education v Access - [2012] 2SCR 345*

**In a ruling addressing teacher copying for students:**

**“...the relevant perspective is that of the user...There is no separate purpose on the part of the teachers in this case. They have no ulterior or commercial motive when providing copies to students.... The teacher/copier shares a symbiotic purpose with the student/user who is engaging in research or private study.”**

## *Alberta Education v Access - [2012] 2SCR 345*

- **Teachers can act on behalf of students** to exercise their fair dealing rights
- **Librarians can act on behalf of library users** - can copy anything that a user can copy under fair dealing
- Copying is based on the **user perspective**, not the aggregate number of copies by a library or an institution

# 2012: Copyright Modernization Act

- **Education, parody, satire** added as fair dealing purposes
- **No PPR required** [29.5(d)]
- Libraries can convert from formats **becoming obsolete** [30.1]
- Digital ILL provision [30.1(5)]
- Internet exception [30.04]
- Digital distribution of lessons (with a destruction requirement) [30.01]
- Reduced statutory damages for non-commercial infringement from \$20,000 per work to a **total maximum of \$5,000** [38.1]
- Allows for user-generated content or as mash-ups [29.21]
- Digital locks or technical protection measures (TPMs) trump everything else [41]

# 2012: Copyright Modernization Act

## **What the changes mean**

- Fair dealing is a broadly available right
- Changes support the direction of the Supreme Court
- Education added as a fair dealing purpose
- Technological neutrality supports broad uses of works online
- Fair dealing should be the foundation for library activities
- There is a “fair dealing gap” because of digital locks

# Policy and institutional practice

## Fair dealing policy

- 2012: educational sector broadly adopts common Fair Dealing Policy
- Addresses copying by **teachers, faculty and staff on behalf of students**
- **“Safe harbour”** interpretation of fair dealing, providing institutional **authorization** to copy
- Safeguards are provided for content owners
- Policy requires a **designated person** (evaluator) to provide assessments when uses exceed the guidelines
- **Fair dealing applies in many other contexts not addressed by the policy**
  - *restricting to 10% or one chapter is likely not appropriate*

# Libraries, fair dealing and user rights

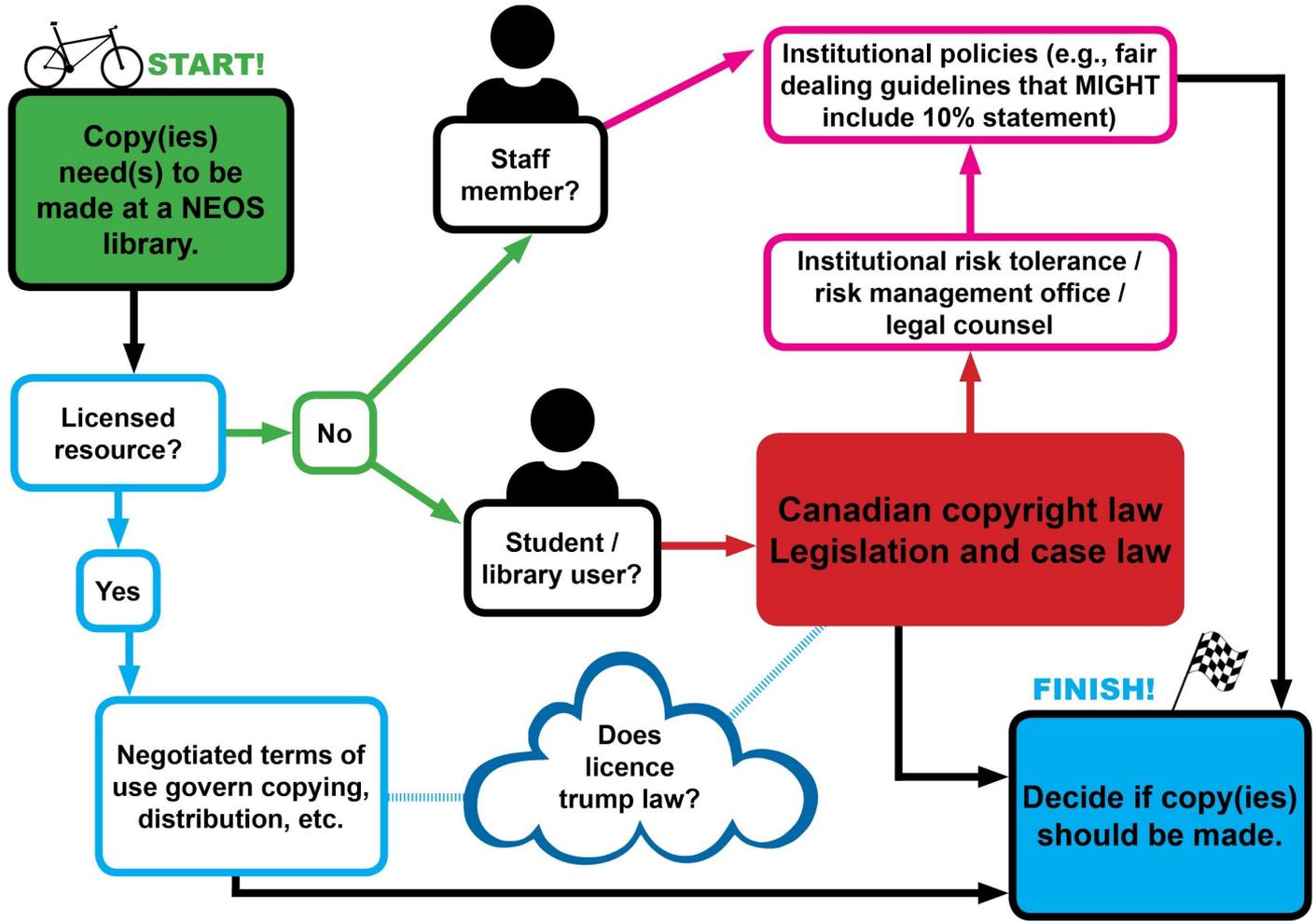
## Policy and practice

- Research and education given a broad interpretation: **all library patrons qualify for fair dealing**
- **Libraries can do anything on behalf of a patron that a patron can do for themselves** under fair dealing - Risk is low
- Restrictive practices are not needed - **if fair dealing applies, you do not need to refer to *Copyright Act* LAM exceptions and conditions**
- **Single copies** made for a patron's research is different than multiple copies made for class distribution - **a larger amount may be appropriate**
- **Libraries are not responsible for downstream uses** of works (or for photocopying behaviour) - **you do not have to police users**

# Libraries, fair dealing and user rights

## Database contracts

- Digital content accessed and purchased can be subject to restrictive contract terms - **sometimes more restrictive than fair dealing** - despite the fact we are paying for it
- A paper copy can be scanned and distributed online through an LMS or eReserves - but often the equivalent database copy may not be provided
- **Can rights be contracted away? Fair dealing as a user right** should at least be acknowledged in contract terms
- Crucial to preserve fair dealing in the digital future



**START!**

**Copy(ies) need(s) to be made at a NEOS library.**

**Licensed resource?**

**Yes**

**Negotiated terms of use govern copying, distribution, etc.**

**No**

**Staff member?**

**Student / library user?**

**Institutional policies (e.g., fair dealing guidelines that MIGHT include 10% statement)**

**Institutional risk tolerance / risk management office / legal counsel**

**Canadian copyright law Legislation and case law**

**Does licence trump law?**

**Decide if copy(ies) should be made.**

**FINISH!**



# Copyright Big Picture

## Purpose of copyright

- Supreme Court provided a “correction” of Canadian copyright, emphasizing **balance** with fair dealing as a core provision
- A **vibrant public domain** is necessary for a healthy society
- **Innovation** requires copyright flexibility - for business and culture
- **Creativity** and building on the past - from quoting to sampling
- **Engagement** with the culture for criticism, debate and understanding - essential for a functioning civil society
- **Copyright maximalism and excessive control** does not fit these larger purposes

# Q&As

**Harvard Business Review is notorious for having very restrictive database terms - no posting and no linking. An instructor wants to use several articles from the HBR and post them to eReserves. Do we have to say no?**

- Contract law trumps fair dealing rights?
- **Database terms apply** as access restrictions for the database, but do not preclude fair dealing from other sources
- A **paper copy** of the HBR may be **scanned and posted** in eReserves
- An **ILL copy** of the articles can be used to access copies if your library does have a print subscription
- Can a student exercise their fair dealing rights with the database content?

# Q&As

**A library user is working on a project. She is needing two articles from a journal and two chapters from a book. She has requested an ILL of these items from your library. Can you provide them?**

- Follow your library policy or guideline - If the policy doesn't cover what she needs - send the request to the designated evaluator for a fair dealing assessment
- **Single copies** made for a limited research project can likely **use more** than the Fair Dealing Policy applying to **multiple copies** for class use
- 10% or one chapter is not a reasonable restriction in this context
- **Research can be for any purpose, including personal interest**

# Q&As

**An instructor wants to include an article from the internet in his eReserves course. The site has a notice that indicates that the content “cannot be used for any purpose whatsoever without the permission of the website owner.” Does a notice have the same force as a contract?**

- **No. Standard copyright notices do not trump fair dealing** or use under an educational exception such as the Internet exception
- Fair dealing would likely allow the use of the article and the Internet exception will cover the use in an educational institution
- Contracts require an affirmative agreement - a **signature or a click-through** agreement

# Q&As

**AHS would like to host a consumer health education session open to the public using parts of articles, books and video clips. Can they do this?**

- **Yes. Education** as a fair dealing purpose is not restricted to educational institutions. It can apply to individuals, non-profit and for-profit organizations.
- **Research** would be another fair dealing purpose that could apply.
- AHS has **fair dealing guidelines** similar to the educational Fair Dealing Policy to provide advance guidance on what may be used.
- If more than guideline amounts are used, the **fairness would need to be assessed** by a designated evaluator, taking into account the six fair dealing factors

# Q&As

**An instructor would like to use a 40 year old book that is long out of print. We have not been able to find the copyright owner. Can we still use it?**

- **Yes.** Make a good faith effort to track down the copyright owner. Keep records.
- **The Supreme Court stated that it may be fair to deal with a whole work.** **Fair dealing** would likely support using this type of orphaned work for this purpose.
- Copyright protects the economic interests of copyright owners. There is less immediate economic interest in out-of-print orphaned works.

# Q&As

**An instructor wants to post a movie and CDs online for his course. Can this be done?**

- **Maybe.** Legal copies of movies and music can be performed in a classroom. A newer provision in the *Copyright Act* allows the posting of **parts of a lesson** for educational purposes in an LMS or eReserves [30.01 + 29.5] but requires that copies downloaded by students have **TPMs that keep copies from being shared** and that copies be **destroyed** after
- Most DVDs have **digital access locks** that may not be broken, even to make a copy for a legal purpose. CDs mostly do not have locks.
- **Screen capture** after a lock has been **legally decrypted** may be an option

# Copyright Modernization Act

**S.C. 2012, c. 20**

Assented to 2012-06-29

An Act to amend the Copyright Act

## SUMMARY

This enactment amends the *Copyright Act* to

(a) update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards;

(b) clarify Internet service providers' liability and make the enabling of online copyright infringement itself an infringement of copyright;

→ (c) permit businesses, educators and libraries to make greater use of copyright material in digital form;

→ (d) allow educators and students to make greater use of copyright material;

(e) permit certain uses of copyright material by consumers;

(f) give photographers the same rights as other creators;

→ (g) ensure that it remains technologically neutral; and

→ (h) mandate its review by Parliament every five years.

[http://lois-laws.justice.gc.ca/eng/AnnualStatutes/2012\\_20/page-1.html](http://lois-laws.justice.gc.ca/eng/AnnualStatutes/2012_20/page-1.html)

# Canadian *Copyright Act* Review

November 7, 2012: most new provisions in current *Copyright Act* came into force

The changes most relevant to libraries included:

1. scope of the fair dealing exception broadened to specifically include **education**, parody, and satire (in addition to research, private study, criticism and review)
2. broadened exceptions for educational institutions (might not apply to all NEOS members) including **displaying works** in the classroom, reproducing **works available on the Internet**, **communication of lessons**, etc.
3. libraries can make copies for collection if **technological obsolescence** prevents usage

*Item 1 is broad. Items 2 and 3 come with conditions.*

# *Copyright Act (s92): Mandatory 5 year review (expected) 2017 - 2018 timeline*

- November 2016: *Senate Committee on Banking, Trade and Commerce* published report, “[Copyright Board: A Rationale for Urgent Review.](#)”
- November 7, 2017: deadline for Parliament of Canada to start review
- January - September?, 2018 (estimate): Parliamentary / Govt of Canada consultations, studies, reports (likely federal departments: Heritage; Innovation, Science and Economic Development (formerly Industry))
- Fall 2018 (estimate): final report from Parliament / Govt of Canada
- 2019: changes to the Act, if any; likely a federal election
- *ongoing*: various [federal lobbying activities](#) by stakeholders



HEATHER MENZIES

# The copyright act needs to be edited – for writers’ survival

HEATHER MENZIES

Special to The Globe and Mail

Published Thursday, Jan. 14, 2016 5:07PM EST

<http://www.theglobeandmail.com/opinion/f/article28197828/>

# COPYRIGHT DECISION IGNORES CULTURAL



## THE HILL TIMES

Press Release

News Opinion Global Power & Influence Politics Policy Br

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## Copyright disagree educational secto

'Boiled down, the concern is this—Canada's  
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anyone else providing a professional good or service to a customer, we require compensa

# Kate Taylor: Kids will suffer if Canada’s copyright legislation doesn’t change

KATE TAYLOR

The Globe and Mail

Published Friday, Apr. 22, 2016 2:25PM EDT

Last updated Friday, Apr. 22, 2016 2:28PM EDT

<http://www.theglobeandmail.com/arts/books-and-media/kate-taylor-kids-will-suffer-if-canadas-copyright-legislation-doesnt-change/article29720114/>



By JOHN DEGEN

PUBLISHED : Wednesday, March 2, 2016 2:48 PM

"This <http://www.hilltimes.com/2016/03/02/copyright-disagreement-between-educational-sector-and-writers-ongoing/52640>

<http://www.writersunion.ca/news/copyright-board-decision-ignores-cultural-damage>

# Fair Duty

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AUTHORS, FAIR DEALING, HEATHER MENZIES

## in defense of fair dealing

*In Posts on January 18, 2016 at 5:18 am*

*A response to Heather Menzies and the Globe and Mail.*

FAIR DEALING, JOHN DEGEN, THE HILL TIMES

## omitting facts, ignoring logic

*In Posts on March 3, 2016 at 7:18 pm*

Yesterday John Degen (poet, novelist and executive director of The Writers' Union of Canada) presented his views concerning copyright and education via *The Hill Times*. The publication is behind a paywall, making it less than easy to acquire, read, or rebut. But if one is trying to lobby Parliament, the venue of publication is appropriate.

ACCESS COPYRIGHT, KATE TAYLOR, OER

## wrapping copyright in the maple leaf

*In Posts on April 24, 2016 at 7:21 am*

On Friday, *The Globe and Mail* published "Kids will suffer if Canada's copyright legislation doesn't change" by Kate Taylor. I usually enjoy reading Taylor's work; her capacity to grasp the heart of an issue by delving into underlying facts is often impressive. Unfortunately, on this occasion, her exploration is incomplete and emotion is presented as analysis.

<https://fairduty.wordpress.com/>

OPINION

## Time to fix (

Each year since 2012, when th  
Canadian universities have cl  
their own controversial inter



**jkdegen**  
@jkdegen

Occasionally, the work of  
rights with our lawmakers  
brilliant sunshine. Thank y



RETWEET 1 LIKES 7

By JOHN DEGEN

PUBLISHED : Monday, May 8, 2017 12:00 AM

Some weeks ago, scholars at Concordia University in Montreal were caught infringing copyright in what appeared to be acts of wholesale book piracy.



**Focus On Creators**  
@FocusOnCreators

Following

Writers are l  
Copyright Ac  
share [ow.ly/](https://ow.ly/)



**Focus On Creators**  
@FocusOnCreators

Following

Author Sidney Allinson is concerned about the work of authors being used without payment. [ow.ly/zlvE30bna8l](https://ow.ly/zlvE30bna8l)



RETWEETS 3 LIKES 2

4:55 AM - 14 May 2017



RETWEETS 3 LIKES 4

9:15 AM - 24 May 2017

# Copyright Act (s92): Parliamentary Review 2017/2018

- Stakeholders (expected to contribute to the consultations):
  - Rights holders (creators, publishers, sound recording companies, etc.)  
*Your PERSONAL responsibility?*
  - Collective Agencies (Access Copyright, SOCAN, Re:Sound, etc.)
  - Educators (K-12, universities and colleges, etc.) *Your EMPLOYER's responsibility?*
  - Libraries/library staff (CARL, CFLA, CALL, CHLA, others?) *Your PROFESSIONAL responsibility?*
  - Public *Your DEMOCRATIC responsibility?*
  - Others?

# *Copyright Act* provisions/changes being talked about

- Fair dealing (s29)
- Digital locks / TPM
- Orphan works
- Library community as a permanent intervenor with the Copyright Board of Canada
- Works available through Internet (s30.04) should not be limited to educational institutions
- Clarity about priority between licensing and *Copyright Act* provisions
- Clarity about indigenous knowledge and copyright
- Crown copyright (s12)

# **fixcrowncopyright.ca**

Sign the petition to make government publications public property.

Did you know that you have to ask permission to copy, re-use, or distribute publicly disseminated publications that your tax dollars paid for?

Help take this issue to parliament. Sign the petition.

# Staying Current

Take your copyright point person out for lunch!

Blogs, social media:

- Meera Nair, NAIT Copyright Officer : <https://fairduty.wordpress.com/>
- Howard Knopf, IP Lawyer (Ottawa) : <http://excesscopyright.blogspot.ca/>
- Michael Geist, IP Professor (Ottawa) : <http://www.michaelgeist.ca/>

Library Stakeholder Organizations, including:

- Canadian Association of Research Libraries:  
<http://www.carl-abrc.ca/influencing-policy/copyright/>
- Canadian Federation of Library Associations / Library Association of Alberta: <http://cfla-fcab.ca/en/programs/copyright/>

# Questions?



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