



University of Toronto Faculty Association

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Professor Cheryl Misak
Vice-President and Provost
University of Toronto
Simcoe Hall, Room 225
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Dear Cheryl:

We are writing on behalf of the faculty association to express some concerns and ask some questions about the contract with Access Copyright that you signed on January 30, 2012. Many of these concerns and questions are informed by and shared with members of the university community; numerous similar concerns have also been expressed within the Canadian academic community more widely.

It is our understanding that the administrations at both the University of Toronto and the University of Western Ontario, in signing this agreement, have taken a course quite different from that being taken by most other university administrations in Canada. In that context, the contract came as something of a surprise. Despite your explanation at the February 16 Governing Council meeting, questions remain as to why this contract was signed, the timing of the signing, and whether or not, in the context of ongoing debate about the scope of fair dealing rights in higher education in Canada, too much was conceded to Access Copyright.

Fair dealing rights that enable reproduction and use of copyrighted materials without fee or permission when it is fair to do so are particularly important in the university, especially inasmuch as fair dealing enables the free flow of knowledge in research; private study; criticism and review; and the reproduction and use of copyrighted materials for educational and scholarly purposes.

And as you know, these rights are currently in flux. The 2004 Supreme Court of Canada case on fair dealing involving the Law Society (CCH Canadian Ltd. v. Law Society of Upper Canada) resulted in a more expansive interpretation of fair dealing. And Bill C-11 – An Act to Amend the Copyright Act – is now before federal Parliament. This proposed legislation includes specific language that would expand fair dealing explicitly to include education and add additional rights for educators to use copyrighted material in digital form. Additional copyright decisions are also pending from the Supreme Court of Canada that promise to clarify and potentially further widen fair dealing rights in educational uses of copyrighted material. In this context, we welcome a chance to discuss with you why you believe this

contract confers justifiable control over copyrighted materials to Access Copyright vis-à-vis the use of such materials by students, teachers, and scholars in our university. More generally, it would be extremely helpful to the university community if you could clarify the Administration's interpretation of the scope of fair dealing rights and any plans by your office to advocate publicly for an expansive interpretation of these rights in higher education in Canada. This might include, for instance, any plans you have to revisit the new contract in light of pending developments in the interpretation and implementation of fair dealing rights and copyright law more broadly in Canada.

At a more specific level, one of the provisions of the new agreement with Access Copyright involves expansion of the definition of "copy" to include digital storage, email distribution of electronic copies, electronic or URL links to materials, etc. We are very concerned and unclear about the possible implications of this expanded definition for restricting (or enabling) current practices by many of our colleagues, including downloading and storing journal articles on office computers, laptops, and home-office computers. How might the provisions of the contract enable or constrain the transmission of these electronic copies to students and colleagues at U of T and elsewhere in the scholarly and educational community? To cite one example, section 4(c) of the contract could be interpreted as conceding that faculty and librarians will not store electronic versions of scholarly journal articles on their own computers. What is the exact implication of this and other similar provisions in the agreement? And how will these provisions be enforced? UTFA has real concerns about these and any other terms of the contract that would restrict the use by faculty and librarians of copyrighted material under the aforementioned "fair dealings" provisions of the Copyright Act.

UTFA also has serious questions and concerns about the possible implications of this contract for faculty and librarian privacy and academic freedom in teaching and research. Specifically, section 11 of the contract includes language on the surveillance of activities relevant to the reproduction of copies (including electronic copies as defined earlier in the agreement) and the provision of this information to Access Copyright. In order to comply with the contract, it would seem that some method will be required for, among other things, monitoring email correspondence among faculty and librarians at U of T, between faculty and librarians on the one hand and students on the other, and indeed between faculty and librarians at U of T and members of the wider scholarly community. While section 11(c) stipulates that existing privacy and principles of academic freedom will be upheld, and notwithstanding language in the Preamble section of the contract, we would like to understand better how these seemingly contending imperatives will be reconciled as the agreement is implemented. We would welcome some kind of statement from you in this regard. From UTFA's perspective, the email of faculty and librarians is subject to their exclusive custody and control and cannot be monitored by the Administration without explicit consent from the individuals in question.

Given these concerns and questions, it is important for me to convey that UTFA is committed to upholding the letter and the spirit of academic freedom as it has been practiced at the University of Toronto in both teaching and research and that is inseparable from the mission of this institution. In our view this includes but is not limited to Article 5 of the Memorandum of Agreement, including clauses a, b, and c protecting the freedom of faculty and librarians to "examine, question, teach, and learn" and also to freely disseminate information and knowledge in a manner conducive to these activities. In this context, UTFA is also committed to the broadest interpretation and exercise of fair dealing rights in higher

education and we hope that this is a disposition shared by the Administration. We would welcome a chance to discuss our concerns with you. We also welcome a clear public statement from you regarding the specific steps you will be taking to uphold academic freedom for faculty and librarians given the new contract with Access Copyright.

It also bears mentioning that some faculty and librarians at the U of T receive royalties as a consequence of the activities of Access Copyright in monitoring the reproduction and distribution of copyrighted materials, and in collecting associated fees. It would be helpful to know how many faculty and librarians now receive such royalties, the size of that revenue stream, and how the new agreement will affect this flow of revenue. It would also be very helpful to know how you see balancing the material interests of authors and creators of copyrighted materials among our community with the broader goal of facilitating free circulation of scholarly and creative materials for research and educational purposes within the university. Reconciling these potentially conflicting interests is of concern to the entire academic community.

Finally, we have a general question about equity and fairness vis-à-vis students. This deal will hand over to Access Copyright \$27.50 per full time equivalent student to pay for access to the Access Copyright repertoire. We would welcome a clear explanation as to how you view this agreement to be good, fair, and equitable for our students. We would also like to understand how the new deal has government approval given that it effectively changes the Mandatory Ancillary Fee in addition to increasing tuition for students.

Cheryl, we would genuinely welcome the opportunity to discuss with you and with our members your responses to these queries. We look forward to hearing from you regarding this important matter.

Sincerely,

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