



July 3, 2012

Professor Scott Prudham
President, UTFA

Dear Scott,

Thank you for your letter regarding Access Copyright. I have been answering similar questions in various fora and am happy to answer them in this forum as well.

First, let me say that the University of Toronto's signing a new agreement with Access Copyright was an extension and a renewal of an agreement that we, and other universities, had with Access Copyright for many years. We, along with AUCC, were trying to re-negotiate our license and, once it was clear that those negotiations were not proceeding in a timely fashion, and in view of the very significant concerns about an unsatisfactory ruling from the Copyright Board, the University of Toronto and Western took the lead and signed the first agreement that covered the digital realm as well as the old photocopy realm. The alternative was to remain in costly, intrusive and risky litigation with the prospect of a much greater rate, perhaps even imposed retrospectively. As you know, AUCC has taken a similar approach on behalf of its other members and some universities are adopting the AUCC template, which is very like that that negotiated by the University of Toronto and Western.

Your assertion that 'too much was conceded to Access Copyright' is, of course, a matter upon which there is no settled agreement. They had asked for \$45 per student, not inclusive of coursepack copyright fees. In the end, we settled with them for \$26 per student, inclusive of coursepack copyright fees. We think that we struck a good deal, which protects our students and faculty members. With respect to your query about fairness, we believe that the new License has the potential to reduce costs for many students. The annual cost to students will be approximately \$1.9 million. The University of Toronto Press (Bookstore) course pack sales are approximately \$1.2 million per year, and an even more significant amount of course pack copying occurs at licensed copy shops, as well as through the UTSC copy centre. The royalty component of these costs becomes unnecessary under the new License, and the copying component will be reduced if more faculty choose to upload copyrighted course content to Blackboard. Thus, we expect students in the aggregate to benefit materially. Finally, it should be noted that the only real comparable figure we have in Canada is in Quebec and that license fee is very much in line with what we negotiated with Access Copyright.

With respect to your concerns about the survey provisions, please be assured that the survey regime, had we not entered into this agreement, and had it instead been ordered by the

Copyright Board, was likely to be much more worrying than that which will be the result of the working group in which we will structure a survey that respects the privacy of our faculty and students. Access Copyright had demanded that universities preserve the data in course management systems such as Blackboard, and there was a risk that this would be ordered by the Board. Preserving those data could have cost hundreds of thousands of dollars and could have made available a great deal of data that will be kept private under our current agreement. Indeed, there was a concern that under a Copyright Board Order, Access Copyright would have been able to look at everything in Blackboard. We could have fought such an Order in court, but the outcome would have been very uncertain given the constraints of the law of judicial review of administrative tribunal Orders, and we would still have incurred the significant cost of the court case and of preserving the data. When I say 'we', I know that you understand that incurring substantial and unexpected costs like these hurts the whole of our community – faculty, staff, and students.

In addition, please be assured that our agreement does not provide for the viewing of emails - indeed, we think it prevents it – and the University has no intent of allowing this under any survey agreement it may reach. As you know, the University has been vigilant regarding protection of academic freedom and privacy, and nothing in the License diminishes these protections.

With respect to your question about how much by way of royalties our faculty and librarians currently receive from Access Copyright and how they would be reduced if we and other universities exited from Access Copyright, I'm afraid that we do not have access to such data. We assume that if universities exited from Access Copyright or if a wider definition of fair dealing were to be adopted and upheld by the courts, those royalties would be reduced. However, this is an uneven playing field, because many faculty members do not register with Access Copyright either as a point of principle or through lack of awareness. In short, while the administration acknowledges that many faculty creators receive royalties under the current dispensation, I hope we can agree that our policy decisions here have to be driven by the wide and long-term interests of our academic community.

Finally, the renewal of the agreement makes it much easier for faculty to use the material they need to teach without worrying about liability for violating the intellectual property rights of others or the ethical considerations in doing that. We have heard stories of faculty waiting 6 weeks or more for permissions at universities who are trying to obtain one-off permissions from publishers outside of Access Copyright. If such wait-times are occurring, they seem to us to create a real barrier to effective teaching and learning.

As you note, changes to copyright law are on the immediate horizon. Bill C-11 has been passed by the House of Commons and it is now before the Senate. That is one reason we entered into a very short agreement with Access Copyright and declined to extend the duration of the agreement to the longer period in the AUCC template. If the legal, regulatory and compliance landscape changes over the next year and a half and if it is to our advantage we will not renew the current license when it expires in December 2013.

I agree with you that the University needs to maximize its use of fair dealing, particularly once Bill C-11 passes and the educational use provisions are added. It will take some time and effort to educate our faculty, staff and students regarding the rights and obligations under the new Act. It will also be necessary to monitor, carefully, what happens in the courts and at the Copyright Board. The legislative changes and evolution of the jurisprudence may indeed result in a decreased need to rely on the indemnity and an increased comfort with fair dealing and other permitted uses. If this occurs, and is accompanied by increased compliance, the need for an indemnity such as that offered by Access Copyright will diminish.

But it is important to stress that there is a concern that copyright compliance at the University is not fully satisfactory. For example, we are aware that faculty have placed scans of book chapters and journal articles on Blackboard in a manner that does not comply with current copyright law and with content that has not been licensed by the Library. In a recent sample of 15 files, for instance, two were scans of material in copyright that had not been licensed by the Library.

During the term of this renewed License we will be working to enhance our compliance. We are funding and currently recruiting a Scholarly Communication Librarian. That will give us greater capacity to work with faculty members to find alternatives to Access Copyright while complying with copyright law. It will also help us work with faculty to build more awareness and understanding of the complex scholarly communication issues and to find open access and other alternatives for publishing that may make Access Copyright and similar collectives obsolete over time. We will be consulting with faculty regarding whether they think that the compliance component of alternatives to Access Copyright is feasible, and whether Access Copyright in general continues to represent a fair and effective way of dealing with competing rights in a rapidly evolving area.

Yours sincerely,



Cheryl Misak
Vice-President and Provost