

TO: All MUNFA Members

FROM: MUNFA Executive

DATE: April 27, 2012

SUBJECT: Issues of Copyright and Fair Dealing

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Please find attached a memo we have sent to David Wardlaw, Provost and Vice-President (Academic) concerning a recent model license agreement that the Association of Universities and Colleges of Canada (AUCC) signed with Copyright Canada. MUNFA is advocating that MUN not sign this model license agreement because it has grave consequences for faculty and for students (not least of that which is considered "copying") including transmission of a URL to a published work and the provisions for surveillance to ensure compliance. You will find attached to the memo an analysis of the agreement developed by the Canadian Association of University Teachers (CAUT).

We encourage you to make your opinion known to the MUN administration and to share this information with students who undoubtedly will be effected.

Cc: MUNSU  
GSU  
LUMUN  
TAUMUN  
GCSU

TO: David Wardlaw  
Provost and Vice President (Academic)

FROM: Ross A. Klein  
President

DATE: April 25, 2012

SUBJECT: AUCC Model License with Access Canada

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I write on behalf of the MUNFA Executive to encourage the University to not agree to the model license proposed by AUCC for the university's use of copyrighted material. We are concerned, as we expressed in our March 5, 2012 letter to MUN's President (see attached), that the University signing the model license will undermine the principles of fair dealing by giving Access Canada authority over copyrighted material over which they do not have control. This weakens challenges presently before the Canadian courts. Further, we find the model license to be intrusive in its surveillance procedures, and draconian in what it considers to constitute copying (i.e., the transmission to a colleague of a URL to a published work, or the sharing by an author with a colleague of a published article). Finally, we find it troubling that the cost for entering into the model license will be borne by MUN students, having the per student charge increase from \$3.75 under the old regime to \$26.00 under the new model license.

I have attached for your information a copy of an analysis of the model license that has been developed by the Canadian Association of University Teachers. We believe the document effectively conveys the key reasons why Memorial University of Newfoundland should refuse to sign the model license.

I am available to discuss this matter at any time, if so desired.

C: Mr. Morgan Cooper, Faculty Relations

Encl.



Canadian Association of University Teachers  
Association canadienne des professeurs et professeures d'université

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April 17, 2012

## **A Bad Deal: AUCC/Access Copyright Model License Agreement**

The organization representing Canada's university presidents announced an agreement yesterday with Access Copyright on a model copying license to cover the reproduction of paper and digital content on university campuses. The Association of Universities and colleges of Canada (AUCC) agreement harms the interests of academic staff and students, fails to reflect current law and undermines efforts to create better ways of accessing, using and sharing educational and research material. CAUT urges institutions to refuse to enter into the model license.

### **Background**

For many years universities purchased licenses from Access Copyright so students and faculty could reproduce copyrighted works. Over time the academic community began to object to the administrative burden, surveillance and perceived aggressive behaviour that accompanied Access Copyright's presence on campus. Access Copyright's lobbying for copyright legislation harmful to the post-secondary sector compounded this concern.

When the current license expired, Access Copyright proposed costly and invasive changes, a number of began to opt out of arrangements with Access Copyright. The academic community also began to develop alternative ways of creating, accessing and sharing works through means such as fair dealing, open access publishing and site licensing directly with publishers.

On January 30, 2012, this progress was set back when the University of Western Ontario and the University of Toronto broke ranks with other educational institutions and signed an ill-advised deal that surrendered to Access Copyright's demands. The model licensing agreement reached between AUCC and Access on yesterday is very similar to the Western/Toronto deal.

### **Problems with the AUCC/Access Copyright Agreement**

**1. Fees** - The model agreement levies a \$26 flat rate charge against each full time student or equivalent. The existing flat rate was \$3.75. Students would traditionally pay an additional amount in per page fees for course packs that bumped the average total to approximately \$25. Given that this existing levy was rendered overpriced by the decline in course pack use and the rise of fair dealing, open access and site licensing, there is no justification for an increase in fees. In fact fees should have been significantly reduced.

**2. Definition of Copying** - The model license creates new rights to the benefit of Access Copyright that do not exist in copyright law, specifically by defining copying to include “posting a link or hyperlink to a digital copy.” Given the Supreme Court of Canada’s ruling (*Crookes v. Newton*) that hyperlinks do not constitute the communication or publishing of content, this concession by AUCC is inexplicable. AUCC draws inappropriate comfort from a sub-clause in the model license that states the parties do not agree linking constitutes copying, when in fact section 1(k) of the license does exactly that.

**3. Paying for Existing Rights** - Under the Copyright Act members of the academic community enjoy broad rights to copy works without permission or payment (fair dealing) and specific exceptions allowing, *inter alia*, the reproduction of works for archival purposes, classroom display, and the creation of alternate formats to assist the visually impaired. Institutions also purchase site licenses that provide the right to use, copy and transmit materials. The model license agrees to pay Access Copyright to re-secure these exact rights.

**4. Surveillance** - Section 11 of the license mandates the creation of survey instruments to monitor the particular works utilized on campus and the volume of that use. Because the license defines copying to include transmission by electronic mail and storing, posting, displaying, uploading and linking to digital files, the survey instruments will require intrusive monitoring of professors, librarians, researchers and students. In response to the criticism of the Toronto/Western agreements the model license contains language suggesting that the survey will respect privacy policies and academic freedom. That is not possible if academic staff and student emails are to be monitored by the university.

**5. Restraint on Scholarly Communication** - Section 4(a) of the license limits the personal transmission of copies to students and staff members within an institution. This appears to mean that even though the Agreement allows one to copy a journal article, it cannot be shared with a colleague from another institution, even if that colleague is a co-author.

**6. Restraint on Usage of Scholarly Material** - Section 4(c) of the license prohibits the storage or indexing of copies of articles and other material, an activity fundamental to scholarly work.

**7. Restraint on Routine Use of Modern Technology** - Section 5(a) and (b) state that copies shall not be transmitted to posted or uploaded to, or stored on any computer network other than one operated or controlled by the university – meaning that storage of copies of material on personal storage media such as local hard drives, USB drives and cloud computing services is now prohibited.

**8. Coercion to Remain under License** - Section 5(d) provides that if the institution does not renew the license it must prevent access to all copies made while the license was in place.

**9. Bad Timing** – Canada’s Parliament is about to pass Bill C-11 – an amendment to the Copyright Act. The legislation contains copyright provisions beneficial to educational institutions. Similarly, copyright decisions are pending from the Supreme Court of Canada which may further expand fair dealing rights. It was simply bad judgment to have proceeded with an agreement prior to the conclusion of these legislative and judicial proceedings.

**10. Interaction with Copyright Board Proceedings** - Many universities have chosen to end their relationships with Access Copyright or contest Access’s demands at the Copyright Board.

The announcement of the model license presents serious challenges to both these options. The creation of the model license does not conclude the proceedings at the Board but allows them to continue, albeit with the university side considerably weakened. Instead of a serious challenge, disunited university administrations are now unlikely to be able to present a coherent legal strategy. Access Copyright must be acknowledged as having leveraged an initially poor hand against AUCC into a credible bid to coerce universities back into unfair arrangements with it.

## **What To Do**

Across Canada a new culture of scholarly communication is being developed by the academic community, one reliant on innovative ways to create and to access copyrighted works. This effort combines the ingenuity and determination of students, researchers, librarians and professors as well as administrative, technical and managerial personnel. Unfortunately, the model license between Access Copyright and AUCC undermines this collective effort and the progress being made towards a better future for education in Canada.

CAUT urges that institutions reject the model license and instead continue to build just, and modern systems of educational communication. This process will involve careful, inclusive and meaningful on-campus consultation. Thus far decision making about Access Copyright has largely been conducted by a handful of senior administrative figures relying exclusively on the advice of a small group of private sector lawyers who act interchangeably for the publishing industry and, occasionally, for university administrations. This approach is contrary to traditions of collegial governance and, by excluding an enormous amount of institutional copyright expertise, has proven self-defeating.

Beyond the necessity of engaging in genuine consultation and collective decision making, it is also essential for the academic community to address the negative role played by the Copyright Board of Canada in achieving just copyright solutions. The Board, by its structure and legislative foundation, currently acts as an enforcement mechanism for Access Copyright. Until this changes, institutions will face unrelenting coercive pressure to enter into one-sided agreements such as the model license. The time has come to begin advocacy work with the Federal government to address this unacceptable situation. In the coming weeks, CAUT will organize a national consultation to commence this process.

For more information:

James L. Turk, Executive Director (613) 277-0488 (cell)  
Paul Jones, Professional Officer (613) 726-5181

March 5, 2012

Dr. Gary Kachanoski  
President  
Memorial University

**as sent**

Dear Dr. Kachanoski:

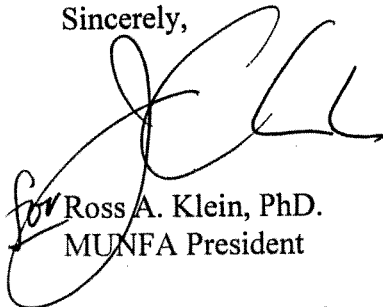
Excellence in teaching and research depends on the ability of professors, librarians and students to openly access, study, share and create knowledge. Fair dealing, the right to copy works without permission or payment when it is fair to do so, is a critical component of this virtuous cycle.

In this regard we strongly urge you to promulgate as university/college policy the *Guidelines for the Use of Copyrighted Material* created by the Canadian Association of University Teachers (CAUT). The document, a copy of which is attached, sets out in simple accessible language the nature of the fair dealing right and how it can best be practiced. A link to the guidelines is also available from the Association website at [http://www.caut.ca/uploads/Copyright\\_guidelines.pdf](http://www.caut.ca/uploads/Copyright_guidelines.pdf).

To determine the nature and strength of fair dealing, courts will rely in part on existing custom and practice at this and other institutions. The robust and principled understanding of fair dealing set out in the CAUT guidelines will strengthen the position of the university/college community in this regard.

If you wish to discuss this matter further we would be pleased to meet with you.

Sincerely,



Ross A. Klein, PhD.  
MUNFA President

c: Ms. L. Busby, University Librarian

Encl.