

THE FREEDOM TO PUBLISH / THE FREEDOM TO DISCLOSE RISKS

Note: This is an updated bargaining advisory on freedom to publish – replacing Number 16 issued November 2004.

A commitment to the unfettered transmission of knowledge is a core value in the academic community. As important as this value is to scholarship, education and research, it has been challenged at various times by religious, political, state and commercial interests. Today, concern about terrorism has led to a resurgence in state demands for research secrecy. As universities and colleges are encouraged to commercialize, pressure is also growing to accommodate the private sector need for secrecy – secrecy to deter competition, suppress negative product information and ensure patentability of research results.

The Problem of Secrecy

The desire for secrecy has led external sponsors of academic research to impose, as a condition of funding, contractual restrictions on the publication rights of researchers. This climate of secrecy reduces collegial interaction amongst faculty and students and places a chill on peer evaluation and the presentation of new knowledge at conferences, public seminars and in journals. At its worst, the trend towards secrecy has manifested itself in attempts to suppress research that produces commercially unfavourable results. For academic staff, restrictions on publication rights can have negative career implications, especially in rapidly advancing fields where even minimal publication delays can have deleterious consequences.

Bargaining Response

Collective agreement language is needed to protect the freedom of academic staff to publish research and disclose risks. A few pioneering associations have already attempted this, inserting “right to publish” language into intellectual property and academic freedom articles. On its face, this language often appears very strong. A typical example provides:

Article X - Academic Freedom

X.X Members have the right to publish the results of their research without interference or censorship by the institution, its agents or others.

Unfortunately, such language, negotiated before the commercialization era, does not provide adequate protection. It presents the freedom to publish as a right that is available if the member

chooses to enforce it, leaving the member vulnerable to coercion to acquiesce to restrictions on publication. If the member is presented with a choice between funding with publication restrictions or no funding at all, the freedom to publish as expressed in this language may prove of little use.

The practical ramifications of this are demonstrated in a study published in the *New England Journal of Medicine* (October 24, 2002 - Vol. 347, No. 17, page 1335) where the authors found that U.S. academic institutions rarely ensure that their academic staff have the right to publish their findings when dealing with external research funders. The authors also noted that survey respondents felt powerless in their contract negotiations with external sponsors. No comparable research has been done in Canada, but anecdotal evidence suggests results would be similar here.

Better Protection for the Freedom to Publish

Existing language to protect the freedom to publish places the onus to defend scholarly communication on individuals who may have limited bargaining power *vis-à-vis* external funders. This is inadequate. The responsibility to ensure the open exchange of information must lie with the university as a whole. CAUT recommends that the following clause be negotiated into your collective agreement.

X.X Freedom to Publish

The University is an open environment for the pursuit of scholarly work. Academic freedom and critical inquiry depend on the communication of the findings and results of intellectual investigation. The Employer shall not interfere with a member's freedom to publish the results of scholarly inquiry and research, except for limitations imposed by duly constituted university research ethics boards.¹

The Employer shall not enter into or administer any research requiring permission or approval of government, industry or other sponsors for the researchers to publish the results of their work. The only exception shall be a publication delay of no more than sixty days from the conclusion of a research project to allow the statutory protection of intellectual property.

Allowable publication delays currently found in collective agreements and university policy range from 6 months to an unlimited duration. The rationale for such delays is that they are necessary to patent intellectual property arising from research, as ideas can only be patented if kept secret.

In practice 30 days is more than adequate time to file a patent application and the lengthy or open-ended delays tolerated at Canadian institutions are unjustifiable. In the United States, for example, at both MIT and the University of California, external sponsors are provided a generous 60 to 90 days to review research findings and apply for patents. In this context the 60 day delay suggested in the above model language is appropriate.

¹ This language is now contained in the Northern Ontario School of Medicine (NOSM) collective agreement.

Freedom to Publish - Dangerous Language from the Administration

The degree to which some administrations are pushing the commercialization of research at the expense of the higher principle of free and open intellectual exchange is illustrated in language being put forward at some institutions. This language cautions academic staff against publishing their research results. It typically reads:

X.X Members must be aware that publication of research results may become a hindrance to the exploitation of the Intellectual Property. Members should consult with the employer prior to submitting for publication/presentation any material which may be patentable or for which registration or copyright is advisable.

This language is inappropriate in an academic environment and should be rejected if tabled by the employer. If it has been previously agreed to, then it should be removed from the collective agreement.

Protection for the Freedom to Disclose Risks

Protecting the freedom to publish through the ordinary channels of scholarly communication (academic journals, conference proceedings, etc.) is necessary, but so too is protecting the freedom of academic staff to immediately disclose, through the news media or otherwise, any risks to public health and safety that they may become aware of during the course of research. Associations are just now achieving language securing this right. CAUT recommends the negotiation of the following clause into your collective agreement.

X.X Freedom to Disclose Risks

Members shall have an absolute right to publically disclose information about risks to research participants or the general public or threats to the public interest that become known in the course of their research.

This language reflects the true nature of academic research and the proper role of universities and colleges, in which the public interest outweighs commercial gain.

In the NOSM collective agreement, the following language has been negotiated:

1.3 Academic Freedom

...

(4) The Board is committed to protecting the Integrity of Research, to abiding by ethical principles in all its research and to prohibiting conflicts of interest arising from relationships between researchers and third parties from affecting research.

(5) With respect to risks associated with research involving human subjects, all contracts, protocols or investigator agreements for industrial sponsorship shall be deemed to provide that investigators shall not be prevented by the sponsor or anyone else from informing participants in the study, members of the research group, physicians administering the treatment, research ethics boards, regulatory agencies and the scientific community, and the public of risks to participants or threats to the public interest that the investigators identify during the research. These provisions also apply to any risks from a treatment so identified following the conclusion of a trial if there are patients being administered the treatment in a non-trial setting. The term "risk" includes but is not limited to the inefficacy of the treatment and direct safety concerns.

(6) All research contracts and all protocols or investigator agreements for sponsorship of clinical or other trials or for participation in trials shall reproduce this Article.

Final Words

As the efforts to impose state interests or commercial values on universities and colleges increase, academic staff must protect those things which make their institutions such rare and important places. In this struggle, the protection of the freedom to publish and disclose risks is among the highest priorities, for the advancement of human knowledge and the protection of public safety requires the free flow of information.