



September 19, 2017

Hilary Malawer
400 Maryland Avenue SW Room 6E231
Washington DC 20202

Submitted via U.S. Mail and Regulations.gov

The Association of American Universities (AAU) and the Council on Governmental Relations (COGR) appreciate the opportunity to comment on Department of Education regulations that may be appropriate for repeal, replacement or modification in accordance with Executive Order 13777, “Enforcing the Regulatory Reform Agenda” (82 FR 28431). We write specifically with regard to 82 FR 7376, the Department of Education’s (Department) Open Licensing Requirement for Competitive Grant Programs, which requires open licensing to the public of copyrightable grant deliverables created with Department competitive grant funds. Previously, in December 2015 and February 2017, our associations together with others submitted comments (attached) on 82 FR 7376 and 82 FR 8346, respectively.

Our following comments are supplementary to, and do not supersede, any other comments made by one or more of our associations to the Department under the auspices of Executive Order 13777.

First, we note with gratitude the Department’s responsiveness, during the rulemaking process, to several of the concerns we have expressed about this open licensing requirement and its ongoing willingness to address issues we have raised about its implementation. Discussions between our associations and Department representatives have been productive.

However, despite a number of improvements the Department made to the final rule, we remain concerned that this regulation is overly broad and prescriptive, and that the rule will limit the ability of our member institutions to form productive partnerships with the private sector to develop and disseminate Department-funded materials (please see our attached comments in regards to 82 FR 8376)

Given the broad and diverse nature of educational materials funded by the Department, we maintain a “one size fits all” rule is inappropriate. In our view, licensing decisions should be made at the local level by Department grantees, who are most familiar with their materials and best understand how and when to distribute those materials. Accordingly, we believe the ability to choose strategically from a menu of distribution models, including a range of open licensing arrangements and non-exclusive and/or exclusive copyright licensing, better serves program



goals and the stakeholder community. Although the final rule thoughtfully added a number of exemptions, case-by-case decisions on waiver requests inevitably will impose bureaucratic burdens on grantees and Department staff alike and create uncertainties and possible inconsistencies across the stakeholder community.

For the aforementioned reasons, we urge the Department to substantially revise or rescind the rule. We stand ready to explore ways in which stakeholders such as our institutions and their faculty can participate more fully in defining problems and developing appropriate solutions.

Again, thank you for providing this opportunity for us to comment. Please feel free to contact Bob Hardy at rhardy@cogr.edu or Jessica Sebeok at Jessica.sebeok@au.edu should you have any questions.



ASSOCIATION
OF AMERICAN
UNIVERSITIES



ASSOCIATION OF
PUBLIC &
LAND-GRANT
UNIVERSITIES



ATTACHMENTS

February 15, 2017

Secretary Betsy DeVos
Department of Education
400 Maryland Ave SW
Washington, DC 20202

Dear Secretary DeVos:

AAU is an association of sixty U.S. and two Canadian preeminent research universities organized to develop and implement effective national and institutional policies supporting research and scholarship, graduate and undergraduate education, and public service in research universities. APLU is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities in the U.S., Canada, and Mexico. With a membership of 235 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU's agenda is built on the three pillars of increasing degree completion and academic success, advancing scientific research, and expanding engagement. Annually, member campuses enroll 4.9 million undergraduates and 1.3 million graduate students, award 1.2 million degrees, employ 1.3 million faculty and staff, and conduct \$43.8 billion in university-based research. AUTM is a nonprofit organization dedicated to bringing research to life by supporting and enhancing the global academic technology transfer profession through education, professional development, partnering and advocacy. AUTM's more than 3,200 members represent managers of intellectual property from more than 300 universities, research institutions and teaching hospitals around the world, as well as numerous businesses and government organizations. COGR is an association of over 190 research-intensive universities in the United States. COGR works with federal agencies and research sponsors to develop a common understanding of the impact that policies, regulations and practices may have on the research conducted by the membership.

On January 19 2017 the Department of Education published a final rule requiring open licenses to the public of copyrightable grant deliverables created with Department competitive grant funds (82 FR 7376; <https://www.federalregister.gov/documents/2017/01/19/2017-00910/open-licensing-requirement-for-competitive-grant-programs>). We understand the final rule is currently subject to the Regulatory Freeze announced in the White House Memorandum of January 20 (<https://www.federalregister.gov/documents/2017/01/24/2017-01766/memorandum-for-the-heads-of-executive-departments-and-agencies-regulatory-freeze-pending-review>).

We would like to take this opportunity to encourage the Department to reconsider some of the provisions included in the final rule. While we support the objectives of the rule to encourage wide dissemination of

Department-funded educational materials, we discussed a number of concerns with the rule when it was proposed in our comments submitted on December 14, 2015 (attached).

We appreciate that the final rule sought to be responsive to some of our concerns. It somewhat narrows the scope and clarifies the rights of various parties, including third parties whose materials may be incorporated in the grant deliverables. It also increases the number of individual programmatic exemptions, and adds two new broad exemption options based on a grantee's dissemination plans or when compliance would compromise the grantee's intellectual property rights. Under the new broad exemptions, grantees could be exempted from the new requirements if the Secretary determines the grantee's dissemination plan would likely achieve meaningful dissemination equivalent to or greater than open licensing, or that compliance would impede the grantee's ability to form necessary partnerships (3474.20(d)(1)(vii)). Grantees could also be exempted from the open licensing requirements if compliance would conflict with, or materially undermine, the ability to protect or enforce the grantee's other intellectual property rights or obligations of (3474.20(d)(1)(viii)). While these are steps in the right direction, we are concerned the final rule does not provide significant clarity and direction on the implementation of these exemptions.

In our view the dissemination plan exemption as written is likely to result in lengthy delays and uncertainties in implementation. It is not clear how the Secretary will make determinations, on what criteria they will be based or who in the Department will be responsible for advising the Secretary on the effectiveness of the submitted dissemination plans. We believe much more specificity is needed as to the submission and approval process. Based on our members' experience with other federal agencies, the review and approval process for dissemination and commercialization plans needs to be clear and transparent to all involved parties to be successful.

We appreciate the broad nature of the exemption in cases of potential compromise of a grantee's intellectual property rights. Much like the dissemination plan exemption, we are also concerned about the lack of clarity or predictability of the exemption process and who in the Department makes the determination. The examples provided in the rule (i.e. computer software with elements that may be protected under copyright laws, patent laws, and trade secret laws) heighten these concerns since it is not clear how determinations will be made about potential compromises of rights in such cases.

Another serious concern relates to the issue of validation. The validation of educational technologies is extremely important, especially when developed with government funding. As we pointed out in our original comment letter, the developers of educational tools often must validate those tools through rigorous follow-on assessments and interventions necessary for proper implementation and delivery. There is a critical need for evidence based assessments that are peer reviewed and published. (e.g. "What Works Clearinghouse" <https://ies.ed.gov/ncee/wwc/>). Open licensing could result in modifications without the necessary follow-on review and validation by the original developers, which could lead to undesirable and possibly dangerous outcomes. We disagree with the assertions in the final rule that the ability to freely modify, adapt and disseminate materials with few restrictions generally should outweigh concerns about misunderstandings or misuse. One size does not fit all. The analogies to open access research publications or frameworks established by private foundations are not necessarily applicable to educational materials created with Department funding.

We urge that the final rule be reconsidered with more of our concerns addressed. While the Department has responded to some of our concerns, we do not believe that an open licensing requirement should be the default in all cases that do not fall under the specified exemptions. These decisions are best made at the local level. Researchers are the parties most familiar with their materials and how they might best serve the public. Grantees should have the ability on a case-by-case basis to propose dissemination appropriate for the particular grant objectives or nature of the materials, subject to the peer review process. In some cases, this might well include open licensing, as is now the case. If individual Department programs believe open licensing will best achieve their goals, this should be clearly stated in solicitation documents with the ability of grantees to propose alternative approaches to the management of intellectual property created under the grants.

We hope you will consider our comments. Please feel free to contact Bob Hardy at rhardy@cogr.edu or Jessica Sebeok at jessica.sebeok@aau.edu should you have any questions.

AAU Association of American Universities
APLU Association of Public Land-grant Universities
AUTM Association of University Technology Managers
COGR Council on Governmental Relations

December 14, 2015

Sharon Leu
U.S. Department of Education
400 Maryland Avenue SW, Room 6W252
Washington DC 20202-5900

Electronic: www.regulations.gov

Reference: Docket ID ED-2015-OS-0105

Subject: Open Licensing Requirement for Direct Grant Programs

Dear Ms. Leu:

On behalf of the Association of American Universities (AAU), the Association of Public Land-grant Universities (APLU), the Association of University Technology Managers (AUTM), and the Council on Governmental Relations (COGR), we write to comment on changes recently proposed by the Department of Education that would require recipients of grant funding from the Department to openly license all copyrightable intellectual property to the public (RIN 1894-AA07; Docket ID ED-2015-OS-0105). We appreciate the opportunity to comment, in advance, on these proposed changes to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

AAU is an association of sixty U.S. and two Canadian preeminent research universities organized to develop and implement effective national and institutional policies supporting research and scholarship, graduate and undergraduate education, and public service in research universities. APLU is a research, policy, and advocacy organization with a membership of 238 public research universities, land-grant institutions, state university systems, and affiliated organizations. APLU's agenda is built on the three pillars of increasing degree completion and academic success, advancing scientific research, and expanding engagement. AUTM is a nonprofit organization dedicated to bringing research to life by supporting and enhancing the global academic technology transfer profession through education, professional development, partnering and advocacy. AUTM's more than 3,200 members represent managers of intellectual property from more than 300 universities, research institutions and teaching hospitals around the world, as well as numerous businesses and government organizations. COGR is an association of over 190 research-intensive universities in the United States. COGR works with federal agencies and research sponsors to develop a common understanding of the impact that policies, regulations and practices may have on the research conducted by the membership.

Universities have had long-standing policies and practices that conform to the Bayh-Dole Act (PL 96-517, Patent and Trademark Act Amendments of 1980) related to patents, as well as distinct institutional

policies permitting their authors to claim copyrights to their work, consistent with the Department's current policy. We support the salutary objectives of the Notice of Proposed Rulemaking (NPRM) – namely, to stimulate wide dissemination to the public of educational materials created under Department grants and to broaden the impact of the Department's and thus the public's investments. Indeed, our member institutions already routinely use open licenses to make available educational and other materials that they create.

However, we are concerned that the change proposed in the NPRM to amend the Department's regulations to require recipients of grant funds to openly license materials in all cases goes too far by adopting a "one size fits all" approach to disseminating copyrightable works. This approach would apply open licensing, not always appropriately or effectively, to many different kinds of materials, including curricula, manuals, videos, art, photography, software, and webpages, to provide just a few examples.

Consistent with current Department policy, universities strategically choose from a menu of distribution models, including a range of open licensing models, and non-exclusive or exclusive copyright licensing. Many universities also maintain internal repositories of copyrightable works and also deposit datasets to widely used repositories such as the one maintained by the Interuniversity Consortium for Social and Political Research at the University of Michigan. Open licensing is not a suitable, much less optimal, strategy in all cases, especially when the technologies in question are disruptive or require curation and quality control for successful, scalable implementation.

Because of our overarching concerns about the proposed rule, we have chosen not to focus on the specific questions posed in the NPRM, and instead offer the following general observations.

Our principal concern with the Department's proposed policy is that it would limit the ability of our institutions to transfer tested and validated educational technologies to the private sector, because exclusive or non-exclusive copyright licenses and stewardship by the author and institution are what attract the private investment necessary for value-added further development, refinement, and effective marketing and distribution of those technologies. By removing incentives for such investment, the policy would result in grantees releasing early-stage, untried materials and technologies that would be, at best, of less utility to the public. This outcome would be counter to the goal of the policy of broadening the impact of such Department-funded technologies without compromising the quality of those technologies. A blanket open licensing mandate also removes the ability of an institution to disseminate materials in whatever manner best maintains their integrity and state-of-the-art quality.

Moreover, the proposed rule may frustrate the government's commercialization initiative, which seeks to encourage entrepreneurship and startup formation to advance economic growth as well as public-private partnerships. The government has repeatedly emphasized that commercialization of federally-funded IP is a high priority. With this in mind, universities have worked to develop successful relationships with startup companies – we are happy to provide examples – to bring disruptive educational technologies to fruition. Startup companies are often best-equipped to do this, because established companies generally have little interest in disrupting their current markets. And startups typically require investments in further development, training, and support that would not be supplied without a copyright license.

We are also concerned about a number of other questions raised by the proposed requirement that the NPRM fails to answer. For example, in most cases, funding from the Department of Education covers only a portion of the teaching and learning materials created, yet the NPRM does not explain how the rights of other funding entities, including commercial, non-profit, and other governmental sources, would be treated under the new rule. Although the NPRM states that the requirement would not apply to existing

copyrightable IP, in many cases it may not in fact be possible to separate the background IP from the copyrightable materials covered by the proposed policy in order to make such a distinction.

In addition, an open licensing mandate may jeopardize the quality of any derivatives of the materials developed with Department funding. Often the developers of educational tools – for example, tools intended to promote standards for teaching in defined contexts – must validate those tools through rigorous follow-on assessments and interventions necessary for proper implementation and delivery, particularly in high-stakes learning environments. Open licensing could result in modifications without the necessary follow-on review and validation by the original developers, which could lead to undesirable and possibly dangerous outcomes. Indeed, there may also be reputational risks for the creators if they are associated with alterations to their materials even though they have no authority over those modifications. At the same time, there is nothing to prevent third parties from marketing derivatives or modifications for personal gain, with the result that the products ultimately become costlier. The NPRM does not address how the open licensing directive would be enforced on such third parties.

We also question whether the Department has the legal authority under 35 USC 212 to issue a requirement to openly license all computer software source code developed with grant funds. Given that software also is potentially patentable subject matter, this policy creates a conflict with the Bayh-Dole Act. Educational platforms may involve licensing of a bundle of rights, including both copyrighted and patented software, funded not only by the Department, but also by a variety of other sources. It is not clear how open licensing would apply in such cases.

Finally, we note that the NPRM rests on a number of assumptions without presenting concomitant data to support those assumptions. It states, for example, that although there may be some instances of lost revenue or added costs related to the loss of commercial benefit derived from copyright protections, the open licensing requirement will not impose significant costs on entities that receive assistance from the Department. The NPRM offers no indication or analysis of these costs. Our member institutions typically incur costs in performing federally supported projects significantly greater than the federal funding provided.

The NPRM also notes, based on the experiences of the Department's program offices, that relatively few grantees develop and market copyrighted content paid for with Department funds. Again, no empirical evidence is cited to support this proposition. In our view, a policy change of this magnitude should be supported by a clearly demonstrated, empirically grounded need or benefit. If one accepts the assertions made in the NPRM, solutions to the presumed problems could entail a more robust user-friendly Department website or repository of materials coupled with a broad-based marketing campaign, and indexing and curation of content rather than an across-the-board open licensing requirement imposed on various types of copyrightable materials developed by diverse grantees.

We commend the Department for exempting peer-reviewed publications arising from scientific research grants funded by the Institute of Education Sciences from the open licensing requirement. By continuing the Institute's current public access policies, the treatment of peer-reviewed publications will remain in accord with the 2013 public policy directive of the Office of Science and Technology Policy (OSTP), which we strongly support. The OSTP policy directive is an excellent example of public access policy, advancing public benefit by expanding access to federally funded research while appropriately accommodating journal publisher subscription business models. We believe comparable balance can be achieved in expanding the public access to and benefit from copyrighted intellectual property resulting from Department of Education competitive grants through open licensing, while preserving exceptions to open licensing in circumstances where alternative IP provisions better serve the long-term public interest.

Accordingly, we urge the Department to pause to reconsider the proposed rule and to explore ways in which stakeholders such as our institutions and faculty can directly participate in helping to define the problems the Department is seeking to address and in developing appropriate solutions, perhaps through negotiated rulemaking.

Again, we support the principles that motivate the proposed rule. But we ask for an opportunity to work with the Department to develop a more carefully calibrated set of provisions that would expand free or low-cost access to and use of Department-funded copyrightable materials without jeopardizing quality control or foreclosing proprietary management of copyrightable materials when that is the best option for ensuring the development and distribution of the materials for the public's benefit.

Thank you again for the opportunity to comment. Please feel free to contact Bob Hardy at rhardy@cogr.edu or Jessica Sebeok at jessica.sebeok@au.edu should you have any questions.

Sincerely,



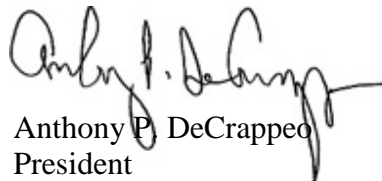
Hunter R. Rawlings III
President
Association of American Universities



Peter McPherson
President
Association of Public Land-grant Universities



Fred Reinhart
President
Association of University Technology Managers



Anthony P. DeCrappeo
President
Council on Governmental Relations