

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,



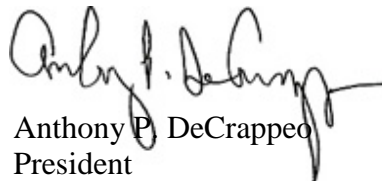
Hunter R. Rawlings III
President
Association of American Universities



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