



THE SCHOLARLY PUBLISHING  
& ACADEMIC RESOURCES COALITION

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

December 18, 2015

Re: Docket ID ED-2015-OS-0105

Dear Ms. Leu,

On behalf of SPARC, the Scholarly Publishing and Academic Resources Coalition, I am writing to comment on proposed 2 C.F.R. § 3474.20) for “Open Licensing Requirement for Direct Grant Programs.” We are grateful for the opportunity to provide input on this proposed regulation and its implementation.

SPARC, the Scholarly Publishing and Academic Resources Coalition, is an international alliance of academic and research libraries working to create a more open system of scholarly communication. SPARC believes that faster and wider sharing of the outputs of the scholarly research process increases the impact of research, fuels the advancement of knowledge, and increases the return on research investments. SPARC focuses on taking action in collaboration with stakeholders – including authors, publishers, and libraries – to build on the unprecedented opportunities created by the networked digital environment to advance the conduct of scholarship.

We applaud the Department for taking this critical step toward ensuring that educational resources created with Department discretionary grant funds are openly licensed for the public to freely use, share, and build upon. The proposed policy will help maximize taxpayers’ investments, expand access to educational materials, and provide a platform for institutions and entrepreneurs to build upon.

## **MAINTAIN STRONG DEFINITION OF OPEN LICENSE TERMS IN FINAL REGULATION**

SPARC strongly supports the language in proposed § 3474.20(a) defining the terms of the open license to be used for copyrightable works, which reads:

*The license must be worldwide, non-exclusive, royalty-free, perpetual, and irrevocable, and must grant the public permission to access, reproduce, publicly perform, publicly display, adapt, distribute, and otherwise use, for any purposes, copyrightable intellectual property created with direct competitive grant funds, provided that the licensee gives attribution to the designated authors of the intellectual property.*

This definition will ensure that students, faculty, schools, and other members of the public can make full use of the materials without limitations, while also ensuring that authors and copyright holders are attributed for their work. This maximizes the value of materials created through the Department's investments, and enables the public to get the full benefit from materials their taxpayer dollars went to create. We urge the Department to maintain the strength of this definition in the final regulation.

## **SPECIFY A STANDARD OPEN LICENSE IN GRANT CONTRACTS**

To comply with Executive Orders 12866 and 13563 and reduce the regulatory burden of implementing the proposed policy, we recommend that the Department provide specific direction on which license to use in applicable grant solicitations. For non-software works, the Department should specify the exact license to be used, and for software works the Department should provide the appropriate level of guidance to ensure grantees select a compliant license that maximizes the usability of the work. This level of specificity will reduce the burden on grantees, since they will be aware of the license prior to applying for the grant and not need to devote time or resources to developing one of their own. This also reduces the burden on the Department, since it will avoid the potentially time consuming process of verifying whether grantees have used a compliant license, and can enable the Department to provide more efficient technical support by limiting the number of licenses involved.

When selecting a license, we urge the Department to consider not only compliance with the terms specified under § 3474.20(a), but also features that will be maximally useful to grantees and the public. It is important for grantees to be able to easily apply and signal the license for applicable materials, and it is important for users to be able to identify and understand the license terms. It is also important for the license to be appropriate for a broad range of contexts and jurisdictions.

The Creative Commons Attribution License (CC BY) would be a natural fit for the Department to adopt for licensing educational materials and other non-software works. The CC suite of licenses is the global standard for open content licensing, and is currently used for more than 1 billion works [1]. CC uses an easily-recognizable system for marking licensed works, which includes icons and "human readable" text to communicate the license terms. CC BY is well aligned to the terms specified under § 3474.20(a), and is already widely-used by the Federal government for open licensing,

including content on the White House website and the Department of Labor's Trade Adjustment Assistance Community College and Career Training (TAACCCT) program.

The use of CC BY would also address an important concern that frequently arises about adaptations. Authors rightly want to protect their respective reputations, and therefore may worry that users of adaptations created under an open license could be misled to believe that the original author has endorsed the adaptation. Under the attribution term of the CC BY license, users who create adaptations must state that the work is an adaptation and may not in any way imply the author's endorsement. Authors also retain the right to have their names removed from adaptations entirely if they wish. This safeguards authors against potential misunderstandings while still empowering members of the public to make full use of the resource.

## **MAKE OPEN LICENSING THE DEFAULT FOR ALL RESOURCES**

We believe that open licensing should be the default rule for all publicly funded resources. Therefore, we encourage the Department to strike the exceptions listed in § 3474.20(c), and avoid writing any other exceptions into the regulation text. While we recognize that the Department has provided justifications for these exceptions, we are concerned that codifying broad exclusions could unintentionally overlook materials that would be of value to the public. We believe it is more consistent with the public interest and the Department's stated goals to make any necessary exceptions through the Secretary's authority pursuant to 2 CFR 3474.5 and 2 CFR 200.102, rather than through the regulation itself.

We are particularly concerned that proposed § 3474.20(c)(3) would exempt peer-reviewed research articles arising from grants funded by the Institute for Education Sciences (IES). In the *Notice for Proposed Rulemaking* (NPRM), the Department explains that this exemption is because these resources are already covered by IES's Public Access Policy. However, the IES policy simply ensures that the public can access these articles, and does not address their licensing or reuse terms. SPARC strongly believes that research articles should not only be made freely accessible to the public, but also released with full reuse rights to ensure the broadest possible dissemination and use. This new proposed regulation provides an opportunity ensure that these important resources are licensed uniformly along with other Department assets, including the Gates Foundation[2].

The IES's Public Access policy was adopted in response to the 2013 Executive Directive on Increasing Access to the Results of Federally Funded Scientific Research from the White House Office of Science and Technology Policy[3], which requires the top research funding agencies to provide free public access to articles arising from its research within 12 months of publication in a peer-reviewed journal. The Directive sets a floor rather than a ceiling on public access, and we believe that the proposed rule would complement IES's Public Access Policy and help achieve the goals of the Directive, including accelerating scientific discovery and fueling innovation. Other research funders have adopted a CC BY requirement on research articles for just these reasons.

Finally, we wish to recognize that the scope of the proposed rule is limited to direct competitive grant funds, which represents a subset of the grant funds the Department awards. While we fully support the Department's adoption of an open licensing policy for

this portion of its funds, we believe the policy should be the default for all public funds. We hope that the proposed rule is the start of a positive trend in this direction not only at the Department, but in the Federal government as a whole.

## **THE DEPARTMENT SHOULD REQUIRE GRANTEES TO DISTRIBUTE WORKS TO THE PUBLIC**

We strongly recommend that the Department require grantees to distribute works to the public, as this is the only way to fully enable public access and reuse. SPARC hears frequently from practitioners on our member campuses that one of the greatest challenges to adopting open educational resources is being able to easily locate them. We also have first-hand knowledge of the value of this kind of requirement through our work with the National Institutes of Health (NIH) and their biomedical journal article database PubMed Central (PMC).

In an ideal world, the Department would require materials to be archived in a central repository where the public could easily find them. For example, the NIH requires its grantees to deposit a copy of any manuscripts reporting on the results of its funded research into PMC, to be made freely accessible to the general public. The database is an invaluable resource containing more than three million articles reporting on the entire spectrum of NIH funded research, and is widely accessed – more than one million unique individual users access PMC each and every day. However, we recognize that the scope of materials covered by this policy will be much wider, both in terms of the types of resources, and also their subject matter and intended audience. We encourage the Department to consider how it can build or contribute to infrastructure that could ensure the discoverability, accountability, and long-term preservation of these publicly-funded resources over time.

We recommend that the Department take the first step in this direction by adding a requirement in § 3474.20(a) that requires grantees to post a barrier-free, digital copy of the final product of all works covered by the policy on the public Internet, and provide the link(s) to these works to the Department in their final grant report. This will ensure that the works are available to the public and to the Department for use under the open license, while not adding significant administrative burden or complexity to grantees responsibilities.

We also recommend that the Department provide technical assistance to encourage best practices. From SPARC's perspective, the best practices for distributing educational resources fall into three categories. First, materials will need to be properly marked with the open license to ensure that the legal status is clearly communicated to users. Second, materials should be released in formats that facilitate adaptation and reuse. For example, if a resource is published as a PDF, it should also be made available as a text document that can be edited. Similarly, if a resource is published in a format that requires proprietary software to open, it should also be provided in an open format. Third, the material should be published in a place where it can be easily discovered and accessed by the public. .

## **WORKS SHOULD BE OPENLY LICENSED UPON PUBLICATION**

The Department specifically asked for comments on whether grantees should be required to openly license works prior to the end of the grant period, and whether this would impact the quality of the final product. To meet the Department's stated goal of ensuring the broadest impact of its investments, as a general rule, works covered by the policy should be openly licensed as soon as reasonably possible. Our recommendation would be to require open licensing as soon as works are published in a forum where members of the public can gain access to them, or the end of the grant period, whichever comes first. This leaves it up to the grantee to determine when a work is of high enough quality to publish, while also ensuring that the public can get the full benefits of using the work immediately once it is.

The legal status of a work as openly licensed is unrelated to the content of the work itself, so the timing of the license should have no effect on the quality of the final product one way or another. If anything, open licensing would result in improved quality by creating opportunities for other experts and users to make and share adaptations, which the grantee might choose to incorporate into the final work.

## **RESPONSES TO THE DEPARTMENT'S QUESTIONS**

The Department posed a set of questions in the NPRM, which we have addressed in our general comments above. For the sake of clarity, we summarize our responses below.

1. Should the Department require that copyrightable works be openly licensed prior to the end of the grant period as opposed to after the grant period is over? If yes, what impact would this have on the quality of the final product?
  - Yes. We recommend that resources should be openly licensed either upon publication in a forum accessible to the public, or upon the end of the grant, whichever is earlier.
  - The legal status of the material as openly licensed has no direct effect on the quality of the material, so it should not matter.
2. Should the Department include a requirement that grantees distribute copyrightable works created under a direct competitive grant program? If yes, what suggestions do you have on how the Department should implement such a requirement?
  - Yes. There should be a requirement added to § 3474.20(a) that materials must be posted on the public Internet under the open license by the end of the grant period.
3. What further activities would increase public knowledge about the materials and resources that are created using the Department's grant funds and broaden their dissemination?
  - In an ideal world, the Department would establish a repository where the public can easily find resources licensed and distributed under this rule. We recognize that this is a longer term goal and encourage the Department to consider how it can build or contribute to infrastructure that could ensure the discoverability and long-term preservation of these publicly-funded resources over time.
4. What technical assistance should the Department provide to grantees to promote broad dissemination of their grant-funded intellectual property?

- The Department should provide technical support to grantees to correctly apply open licenses, to most effectively format and mark resources for public distribution, and to successfully post the resources in a forum where the public provides access.
5. What experiences do you have implementing requirements of open licensing policy with other Federal agencies? Please share your experiences with these different approaches, including lessons learned and recommendations that might be related to this document.
- SPARC has worked closely with organizations involved in supporting implementation of open licensing policies. Our primary observation is the importance of adopting a standard open license, such as the Creative Commons Attribution License, which maximizes the usability of the resources.

In closing, we recognize that some concerns have been raised by members of the higher education community. As the Department reviews comments concerning this proposal to amend its regulations, there is great value in engaging in continued dialog with the higher education community to ensure that any concerns that may arise can be discussed and/or addressed. SPARC looks forward to the opportunity to work with the Department in promoting access to knowledge.

Sincerely,



Heather Joseph  
Executive Director  
SPARC

## REFERENCES

- [1] <https://stateof.creativecommons.org/2015/>
- [2] <http://www.gatesfoundation.org/How-We-Work/General-Information/Open-Access-Policy>
- [3] [https://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp\\_public\\_access\\_memo\\_2013.pdf](https://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp_public_access_memo_2013.pdf)