



DOE Seeks Comment on Proposed New Copyright Policy for Grantees

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On November 3, 2015, the U.S. Department of Education published a [Notice of Proposed Rulemaking](#) (NPRM), which – if adopted – would require grantees of the Department’s “competitive discretionary grant programs” to provide an open license for all copyrightable work created under the grant. The Department has determined that a move to open licensing would better support its stated goal of increasing access to works created by public funding and more broadly disseminating the academic research it funds.

Currently, the Department allows grantees “to retain unlimited rights to copyright and royalty income” from works created with Department grant monies. At the same time, the Department retains “a royalty-free, non-exclusive, and irrevocable right to reproduce, publish, or otherwise use, and to authorize others to use without cost” works created under Department grants. While members of the public always have had the right to request copies of grant-funded works created and used for federal government purposes, studies examined by the Department suggest that such requests are infrequent, “possibly due to administrative barriers, lack of clarity regarding the scope of Federal Government purposes, or lack of information about available products.” The Department believes that removing these administrative barriers and releasing clear information about usage rights will increase public use of materials created under public grants.

The new open licensing policy would have certain limits. Under the proposed rule, licensees still would be required to provide attribution to the grantee as the author and/or copyright holder of the work. In addition, the government would retain its royalty-free, non-exclusive and irrevocable right to reproduce, publish, or otherwise use the work for federal purposes, and to authorize others to do the same.

Further, the Department has included a number of discrete exceptions to the proposed rule. The open license requirement would not apply to current grants or existing copyrightable material – only to newly created copyrightable materials or copyrightable modifications made to pre-existing content using funds awarded after the effective date of the final regulation. The open license requirement also would not apply to grants that fund general operating expenses or those that support individuals (e.g., scholarships and fellowships). Nor would it apply to peer-reviewed scientific research publications based on research funded by grants from the Institute of Education Sciences, which has its own public access policy. The Secretary of Education also would retain some discretion to establish other exceptions.

The proposed rule has the potential to affect a wide range of projects that seek Department of Education funding. Most significantly, the open license requirement could diminish the commercial incentives for developing new works with grant funding. In addition, as the NPRM itself notes, the free availability of future grantee work could mean that “publishers or other third parties may incur a loss of revenue” because their commercial product will compete with free versions of a similar product. Materials and programs that require a long-term investment and funds beyond those provided by Department grants are at risk when the creators are unable to seek a return on their investment.

The NPRM is part of the wider “Go Open” [campaign](#), which the Department of Education launched in late October in partnership with Creative Commons. The Department’s stated goal is to



promote Open Educational Resources (“OER”) by mandating that certain publications accept Creative Commons licenses. According to the Department, one driver of this proposed change is the increasing cost of textbooks, which can prevent underfunded school districts from investing in updated materials.

The full Proposed Rule is available [here](#).

Interested parties can submit comments to the Department by December 3, 2015. Comments may be submitted via postal mail or online, through the web portal www.regulations.gov. Comments submitted in response to this NPRM become part of the public record.

For further guidance or insight on this potential change to the DOE’s grant requirements, please contact [Glenn Pudelka](#) or [Andy Anderson](#).

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