December 18, 2015

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

Dear Ms. Leu:

I submit these comments on behalf of the Association of American Publishers (AAP) in response to the Department of Education's Notice of Proposed Rulemaking ("NPRM"), *"Open Licensing Requirement for Direct Grant Programs"* (Docket ID: ED–2015–OS–0105), which was published in the *Federal Register* on November 3, 2015.

AAP is the principal national trade association of the U.S. book publishing industry, with some 400 member companies and organizations that include most major commercial educational, professional, scholarly, and consumer/general interest publishers of books, textbooks, digital content – including interactive instructional materials – journals, and other text-based and multimedia products in the United States. AAP members also include many small and non-profit publishers, university presses and scholarly societies. AAP members publish state-of-the-art content in both print and digital formats, as well as content integrated into learning platforms and tools for use by students and their parents and instructors.

Members of AAP's K-12 and Higher Education divisions are the leading developers and providers of educational materials, platforms and assessments in a world of dramatically expanding choices for online and other digitally-based learning solutions that include affordable and pedagogically-advanced interactive multimedia content for customized use by students. The products and services these learning companies provide to the market through platforms and materials are helping our nation's schools, instructors and administrators meet the increasingly challenging tasks of helping students at all grade levels to stay in school, become more fully engaged in learning, and significantly improve academic outcomes and graduation rates.

Summary

Upon initial review of the NPRM, it was extremely disappointing to find no reference to creators and providers of copyrighted educational resources, including AAP members, when the Department repeatedly invoked the "stakeholders" whom it contends would benefit from its Proposed Rule, including local educational agencies (LEAs), State educational agencies (SEAs), institutions of higher education (IHEs), students, nonprofit educational organizations, "and others beyond direct grant recipients."[1] Clearly, such creators and publishers of educational resources – including a significant number of AAP member companies – are also stakeholders in the education ecosystem, whether their impact is viewed at a local, regional, national or global level.

But, assuming that the Department does recognize such education companies as stakeholders in its mission "to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access,"[2] the omission of these companies from the list of beneficiaries in the NPRM more likely reflects the Department's off-hand but disturbing acknowledgement that the Proposed Rule will *harm*, rather than benefit, these stakeholders by establishing the Federal Government as a direct competitor to their organizations, employees and investors in creating and producing educational resources.[3] For AAP, the crux of this matter is the Department's proposal to effectively use its grant recipients as surrogates to facilitate government-funded competition from which the Department's own employees are barred.

To be clear, AAP and its members do not object to open educational resources ("OER"). We believe that a wide variety of materials and operating models increases competition in the market and recognize that some users will have preferences for one type of content over another for a variety of reasons. At the same time, AAP feels strongly that government interference in the marketplace through demanding that Department grantees offer their creative works to the market only under certain, restrictive conditions constitutes an unwarranted intrusion that will cause potential harm to learning companies and leave students, educators and administrators with fewer choices.

In view of the diverse and robust array of private sector actors and activities that currently develop, produce and make available a wide range of open educational resources, as well as

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[1] Notice of Proposed Rulemaking, "Open Licensing Requirement for Direct Grant Programs," 80 Fed. Reg. 67672, 67673 (proposed Nov. 3, 2015) (to be codified at 2 C.F.R. pt. 3474) [hereinafter *NPRM*].

[2] DEP'T OF EDUC., MISSION STATEMENT (2011), http://www2.ed.gov/about/overview/mission/mission.html.

[3] *See* NPRM at 67675 ("In addition, publishers and other third parties may incur loss of revenue since their commercial product will potentially compete with freely available versions of a similar product.").

high-quality copyrighted curriculum materials created by education companies and learning solution providers, the Proposed Rule is an unnecessary and inappropriate exercise of federal regulation by which the Department plans to use taxpayer funding and obliged grantees to compete with the private sector investment and employment that already fuels and sustains competition and innovation in a well-established marketplace of commercial and non-commercial providers. According to Creative Commons, there are more that 76,000 OER materials already available online under its licenses, although that number does not by any means encompass all such materials.[4] There simply is no justification for an agency of the Federal Government to place its thumb on the economic scales of the market for educational resources in this manner.

Moreover, as set forth and explained in the NPRM, the Proposed Rule has been crafted by the Department under its discretionary grant process with new requirements that raise serious questions both about its compliance with the spirit and letter of several federal statutes and its failure to heed important public policy directives issued by the Executive Office of the President throughout the course of the Obama Administration. Specifically, the Proposed Rule appears to be inconsistent with key aspects of federal laws on copyright, education, and the proper use of funding agreements for assistance and procurement activities. It also fails to comply with Executive Office directives on ensuring data quality and the critical need for "evidence-based" establishment and implementation of new federal regulatory programs and policies. For these reasons, we strongly oppose the Proposed Rule in its current form and look forward to addressing our concerns with the Department.

I. The Proposed Rule Could Adversely Affect the Marketplace for Educational Resources

Although the Department purports to have conducted a "Regulatory Impact Analysis" of the Proposed Rule under Executive Order 12866, its conclusion that the Proposed Rule constitutes a "significant regulatory action subject to review by OMB" under Section 3(f) of that Order fails to indicate which standard in Section 3(f) provided the basis for that determination.[5] While AAP agrees with the Department's conclusion, we believe it is important to note that prongs (1) and (4) of Section 3(f) provide separate and distinct bases for that conclusion.

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[4] *See* Creative Commons, *State of the Commons*, https://stateof.creativecommons.org/2015/data.html#from-research-to-cute-cat-photos-the-commons-offers-a-treasure-trove-of-content (Data based on OER materials available from only four platforms – Boundless, Skills Commons, MIT OpenCourseWare and Internet Archive).

[5] NPRM at 67674.

Section 3(f) (1), in relevant part, defines a "significant regulatory action" to be one that is likely to result in a rule that may "adversely affect a sector of the economy, productivity, competition, [or] jobs... in a material way (also referred to as an 'economically significant rule')."

As previously noted, AAP member learning companies and resource providers are important stakeholders and contributors in our nation's education ecosystem. Their very business is to create and provide instructional and testing materials for use by LEAs, SEAs and IHEs. Ignoring their critical, longstanding role in advancing teaching and learning practices and goals reflects the Department's apparent misunderstanding – or, even worse, dismissal – of how the industry operates. Excluding education companies from the list of affected stakeholders also indicates an alarming lack of attention to the various legal and policy precepts that underpin the industry and protect publishers from unfair and unwarranted intrusion into commercial markets by the Federal Government.

U.S. education companies invest hundreds of millions of dollars annually to provide high-quality, print and digital instructional and testing materials that are integrated with innovative platforms and delivery systems to meet the varied requirements of our educational institutions and the diverse needs of students, teachers and administrators. As with other U.S. businesses, learning companies can continue to make such investments only if they can reasonably anticipate recouping them through the sale and licensing of their products and services. The continued ability of these businesses to understand and meet current market demands depends in no small part on recovering those costs.

Learning companies operate in competitive commercial markets in every state and overseas. For example, AAP members produce thousands of PreK-12 learning materials in all formats to serve the 13,500 school districts, 98,500 schools, 3 million teachers and 50 million students identified by the National Center for Education Statistics.[6] Publishers, both within and outside of the AAP membership, also offer 500,000+ titles for higher education learning in all print and digital formats and at numerous price points.[7]

AAP members' production of such goods and services contributes significantly to the nearly 200,000 jobs[8] for highly-skilled workers across the U.S. in creative, editorial and digital

[6] National Center for Education Statistics, Fast Facts: 2015 Back to School Statistics, http://nces.ed.gov/fastfacts/display.asp?id=372.

[7] *Fifth Annual VitalSource/Wakefield Survey Finds College Students Want More - and Better - Classroom Technology*, PRNEWSWIRE (Jul. 30, 2015), http://www.prnewswire.com/news-releases/fifth-annual-vitalsourcewakefield-survey-finds-college-students-want-more--and-better--classroom-technology-300121015.html?tc=eml_cleartime (*See* "About VitalSource").

[8] Based on AAP 2015 Survey of AAP members.

functions. Last year, the American publishing sectors generated $28 billion in net revenue, representing 2.7 billion units in e- and print formats.[9]

As stated earlier, AAP members have no objection to open publishing models, including products and services offered at no charge and under little or no restrictions on further use. They strongly believe that competitive markets result in better products and services, as well as increased choices, for education consumers. They have confidence that their investments in research, development and production capabilities that infuse their products and services with quality and innovation will help them successfully compete in free and fair markets. They also believe, however, that markets cannot remain efficient and competitive if the Federal Government intervenes in ways that unduly and inappropriately favor certain kinds of products, services and providers over others.

Under the Proposed Rule, the Department would provide grant funding to incentivize various, non-specifically identified entities to produce educational resources that would be publicly available to SEAs, LEAs, IHEs and others without cost under Department-imposed "open licensing" requirements. Such licenses would, moreover, permit the subsequent acquisition, use, adaptation and re-purposing of materials without permission of the grantee. For those grantees who may not be incentivized to produce new works of authorship under grants, the Proposed Rule effectively would transform "copyrightable modifications made to pre-existing content," made in whole or in part with Department grant funds, into openly licensed educational resources.[10]

The Proposed Rule looks to subsidize production of educational resources with new works created or adapted by entities that need not risk any substantial investment of their own funds, nor concern themselves with obtaining revenues from the sale or licensing of such works to recover their costs in production and distribution. Such new works would be available for use by SEAs, LEAs, IHEs and other customers in the education market without cost or permission requirements. In this manner, the Proposed Rule would do double-duty in disadvantaging commercial and other private producers in the market by empowering both a government-favored class of producers and targeting customers at the expense of competing products and services from organizations and authors who are not Department grantees.

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[9] Association of American Publishers, U.S. Publishing Industry's Annual Survey Reveals $28 Billion in Revenue in 2014 (Jun. 10, 2015), http://publishers.org/news/us-publishing-industry%E2%80%99s-annual-survey-reveals-28-billion-revenue-2014.

[10] NPRM at 67673.

In these ways, the Proposed Rule is likely to "adversely affect" the "sector of the economy" comprised of commercial and other private actor education companies. Specifically, the effects of this significant change could skew fair competition in that sector, thereby hampering the ability of education companies to contribute to the U.S. economy and generate and maintain jobs.

II. The Proposed Rule is Inconsistent with Federal Statutes and Executive Office Policies

Section 3(f) (4), another relevant prong of the provision in Executive Order 12866 cited by the Department for its conclusion that the NPRM is a "significant regulatory action," addresses any regulatory action that is likely to result in a rule that may "[r]aise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in" the Executive Order. Unfortunately, the Proposed Rule meets this standard in several troubling ways.

First, the Proposed Rule appears to be inconsistent with, and may "raise novel legal or policy issues arising out of legal mandates" regarding, federal statutes that establish key legal principles in two areas – copyright and the proper use of funding agreements for federal assistance and procurement activities.

Second, the Proposed Rule similarly appears to have been devised by the Department in direct contravention of important policy directives issued by the Executive Office of the President on ensuring data quality and on the critical need for "evidence-based" establishment and implementation of new federal regulatory programs and policies.

a. Copyright Law and the Proper Use of Federal Funding Agreements

The federal Copyright Act, which is a direct exercise by Congress of its constitutionally-sanctioned power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries," explicitly grants to copyright owners a number of exclusive rights to do – or to authorize anyone else to do – certain things with respect to those owners' original works of authorship.[11] Among others, these exclusive rights cover the right to reproduce such works in copies, the right to distribute copies of such works to the public, and the right to prepare derivative works based on their original creations.[12]

[11] U.S. Const. art.I, §8, cl. 8; 17 U.S.C. § 106 (2011).

[12] 17 U.S.C. § 106 (2011).

The fundamental right to publish a work in the first instance – which is embraced within the exclusive right to distribute copies, or to offer to distribute copies, to the public and is freighted with its significant relationship to the First Amendment's protection of freedom of speech – is a right that a copyright owner may choose not to exercise, even if that means denying the public access to that work.[13] The Copyright Act also empowers copyright owners with the exclusive right to authorize others to make uses of their works that fall within any of the exclusive rights of copyright,[14] commonly accomplished through licensing agreements. Similarly, copyright owners have no obligation under the law to authorize uses of their works that fall within any of the exclusive rights of copyright.[15] Although authors do not have a specific right under the Act to be credited as the creator of their works, an author's rights are considered to be violated if, without their consent, a work is falsely attributed to them when they did not in fact create it.[16]

The Proposed Rule would broadly require that any grantee awarded direct competitive grant funds by the Department "must openly license to the public new copyrightable materials created in whole, or in part, with" such funds, as well as "copyrightable modifications made to pre-existing content using" such funds.[17] Moreover, it would require the license to be "worldwide, non-exclusive, royalty-free, perpetual, and irrevocable," and to "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."[18]

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[13] *See* 17 U.S.C. § 106(3) (2011); Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 555 (1985) (The Copyright Act "accords the copyright owner the 'right to control the first public distribution' of his work...").

[14] 17 U.S.C. § 106 (2011) ("... the owner of copyright under this title has the exclusive rights to do *and to authorize* any of the following:...") (emphasis added).

[15] *See, e.g.,* Lloyd Jassin, *Ten Common Copyright Permission Myths*, COPYLAW.COM, http://www.copylaw.com./new_articles/copy_myths.html ("Copyright owners have the unfettered right not to grant you permission."); Salinger v. Colting, 607 F.3d 68, 74 (2d Cir. 2010) ("Although the Court recognized that Salinger has publicly disclaimed any intention of authorizing a sequel, the Court noted that Salinger has the right to change his mind and, even if he has no intention of changing his mind, there is value in the right *not* to authorize derivative works.") (emphasis in original); Castle Rock Entmt Inc. v. Carol Publ'g Grp., 150 F.3d 132, 145 (2d Cir. 1998) ("Although Castle Rock has evidenced little if any interest in exploiting this market for derivative works. . . , the copyright law must respect that creative and economic choice").

[16] 1 DAVID NIMMER, NIMMER ON COPYRIGHT, §8D.03 (2015).

[17] NPRM at 67677.

[18] *Id.*

In proposing such a rule, the Department is assuming powers in regard to copyright that belong to Congress under the Constitution, and is exercising them in a manner that is inconsistent with both the letter and spirit of the Congressional exercise of those powers in the enactment of the Copyright Act. AAP acknowledges and supports special statutory limitations and exceptions with respect to the exclusive rights of copyright owners that Congress has instituted in regard to certain educational uses of copyrighted works. However, it is clear that neither the Constitution nor the Copyright Act authorizes federal agencies or departments to issue regulations that restrict or eliminate the exercise of such exclusive rights by copyright owners, including as conditions for the receipt of federal funding or in any other regulatory context. Yet the Proposed Rule would do exactly that with respect to all of the exclusive rights of copyright in materials created by grantees.

Additionally, the Proposed Rule's requirement for those downstream users of a grantee's work who adapt or transform it to "give attribution to the designated authors of the intellectual property" will foster confusion by effectively requiring an authorial credit that is false to the extent that the substantive alterations of the work by downstream users are not attributed to those users but instead to the grantee. It is unclear to whom the phrase "designated authors" refers, and there is no requirement in the Proposed Rule for downstream users to identify their subsequent contributions to the grantee's original work and distinguish them from those of the grantee. The original author may find those contributions to be contrary to the purpose and message of the original work or objectionable in some other manner that makes their attribution to the grantee harmful to the grantee's intent and reputation.

The imposed grant conditions for compelled open licensing and attribution, along with the likely prospect for compelled distribution that is implied by the Department's basis for requesting comments on that issue in the NPRM,[19] implicate further questions of inconsistency with the Copyright Act. Those conditions also raise the possibility that the Department has crossed the line for permissible conditions on federal funding assistance into the area of potentially "unconstitutional conditions" by inappropriately imposing compelled speech on a grantee author of copyrighted works who is forced by these

[19] NPRM at 67674 ("We note that nothing in the proposed regulations would require a grantee to distribute work that a grantee would be required to openly license under proposed §3474.20. In the *Invitation to Comment* section, we include specific questions to help us inform whether such a distribution requirement should be included in the final § 3474.20; or, alternatively, whether we should use non-regulatory approaches such as technical assistance and guidance to help facilitate distribution.").

requirements to host or accommodate another speaker's message that may adversely affect the grantee's own message.[20]

In short, the Department is using its sizable competitive grant funding to select who will speak, compel them to speak, and through exerting control over how materials are distributed, selecting who may hear. This is not merely an alarming interference with the marketplace for learning materials; it is a trespass on the marketplace of ideas.

The legislative history of Section 105 of the Copyright Act, a statutory provision which generally denies copyright protection to any work prepared by an officer or employee of the U.S. Government as part of that person's official duties, makes clear that Congress "deliberately avoids making any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant."[21] Instead, the legislative history of the Act noted that:

> "There may well be cases where it would be in the public interest to deny copyright in the writings generated by Government research contracts and the like; it can be assumed that, where a Government agency commissions a work for its own use merely as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld. However, there are almost certainly many other cases where the denial of copyright protections would be unfair or would hamper the production and publication of important works. Where, under the particular circumstances, Congress or the agency involved finds that the need to have a work freely available outweighs the need of the private author to secure copyright, the problem can be dealt with by specific legislation, agency regulations, or contractual restrictions."[22]

The Proposed Rule does not appear to constitute a case "where a Government agency commissions a work for its own use merely as an alternative to having one of its own

[20] While Congress "is free to attach reasonable and unambiguous conditions to federal financial assistance that [recipients] are not obligated to accept," Grove City College v. Bell, 465 U.S. 5555, 575-576 (1984), the Supreme Court has recognized limits on Congress' ability to place conditions on the receipt of funds, holding that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected... freedom of speech even if he has no entitlement to that benefit." Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006). This ruling further notes that the Court's decisions holding "compelled speech" to be prohibited by the First Amendment are not limited to "the principle that freedom of speech prohibits the government from telling people what they must say," but also apply to "the government's ability to force one speaker to host or accommodate another speaker's message," especially when "the complaining speaker's own message was affected by the speech it was forced to accommodate." (547 U.S. at 61, 62). Clearly, the Department should not attempt to mandate what Congress itself is constitutionally prohibited from compelling.

[21] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 59 (1976) (emphasis added).

[22] *Id.*

employees prepare the work."[23] It is more the case that the denial of copyright protections "would hamper the production and publication of important works" by facilitating government-sponsored competition that will dampen entry and investment in the market for education resources by private commercial and non-commercial education companies. In any event, the Department has made no showing, nor has it referenced in the NPRM, where "under the particular circumstances...the agency involved finds that the need to have a work freely available outweighs the need of the private author to secure copyright...."

It is also noteworthy that nowhere in the plain language of Section 105 or its legislative history did Congress indicate that it intended or anticipated that a federal agency would compel a grantee to assert copyright or, as here, dictate the terms under which the exclusive rights of copyright would be exercised in offering the work to the general public. This important distinction is reinforced in the Office of Management and Budget's ("OMB") Circular A-110, which provides the authority for the Department's explicit reservation of rights to use the work "for Federal purposes, and to authorize others to do so."[24]

OMB Circular A-110 – last amended in 1998 – prescribes guidance on administrative requirements for grants and agreements for all federal agencies, unless specifically exempted under statute. In the same provision that authorizes the Department's reservation of rights, the Circular states:

> "The recipient may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award.[25]

Although the phrase "otherwise use the work for Federal purposes" in the Circular is undefined, it is broad enough to provide that the funding agency's required reservation of rights encompasses its ability to make the work available worldwide, without limitation.

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[23] The Federal Grant and Cooperative Agreements Act of 1977 (31 U.S.C. Section 6301 et seq.) was intended, among other things, to "prescribe criteria for executive agencies in selecting appropriate legal instruments" and "promote increased discipline in selecting and using procurement contracts, grant agreements, and cooperative agreements. . . " (31 U.S.C. § 6301 (2) & (3) (LexisNexis 2015)). The mandates imposed as conditions for funding under the Proposed Rule, especially if they eventually include one for the distribution of the materials created by recipients, would seem more appropriate for cooperative agreements, rather than grants, because "substantial involvement is not expected between" the funding agency and the recipient of funds "when carrying out the activity contemplated in" the latter but is "expected" with the former. *Compare* 31 U.S.C. §6304(2)(LexisNexis 2015) *with* 31 U.S.C. § 6305(2) (LexisNexis 2015).

[24] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-110, UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH INSTITUTIONS OF HIGHER EDUCATION, HOSPITALS AND OTHER NON-PROFIT ORGANIZATIONS (1999), https://www.whitehouse.gov/omb/circulars_a110/.

[25] *Id.* at Subpart C – Post-Award Requirements, Property Standards - § 36(a).

However, nothing in the Circular regarding the unqualified statement on a grant recipient's exertion of rights provides an agency with authority to demand that grantees offer works to the public under particular terms and conditions in exercising their exclusive rights of copyright; nor does it specify any limitations or conditions regarding how those works are made available to the public.[26]

Again, the Proposed Rule imposes restrictions on the copyright owner's exercise of its exclusive rights that only Congress may enact. While Congress has added some "compulsory license" provisions to the Copyright Act that provide for the use of certain works by certain users regardless of the wishes of the copyright owners, it has done so only in rare circumstances of apparent market dysfunction, typically with clear prohibitions on alteration of the works by the licensees, and always while providing for compensation to the copyright owners.[27] In contrast, the Proposed Rule would apply its open license requirement to allow any user to access and use any work in any manner (including unbounded alteration of the original content to make derivative works) without compensation to the original copyright owner.

b. The NPRM Ignores Executive Directives on Data Quality & Evidence-Based Regulation

Nowhere in the NPRM does the Department cite studies, surveys or any other source of empirical data to support a rationale for the Proposed Rule's introduction and facilitation of fully government-funded competition to private sector investment and employment in the marketplace for educational resources. The assertion that the public "rarely requested access" to copyrighted resources produced by Department grantees under its current policy was "*possibly due to* administrative barriers, lack of clarity regarding permissible uses, or lack of information about available products" might just as well be attributed to "lack of interest" or even concern regarding the Department's influence on such materials.[28] Indeed,

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[26] The potential scope of the undefined phrase "otherwise use the work for Federal purposes" is itself a troubling assertion of Executive Branch authority that could make the agency's regulation and its reserved license under the Proposed Rule, both of which are based upon and mandated by OMB Circular A-110, subject to challenge under the First Amendment for vagueness and overbreadth insofar as it restricts the exercise of the exclusive rights of copyright established by statute; at a minimum, notwithstanding its basis in the Circular, it may be subject to challenge under the Administrative Procedures Act, 5 U.S.C. § 553 (LexisNexis 2015), as an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (A) (LexisNexis 2015).

[27] *See, e.g.*, 17 U.S.C. § 115 (LexisNexis 2015) (mechanical reproduction of non-dramatic musical works); 17 U.S.C. § 111 (cable carrier retransmission of broadcast signals); and, 17 U.S.C. § 119 (LexisNexis 2015) (satellite carrier retransmission of broadcast signals).

[28] NPRM at 67673 (emphasis added). Insofar as the NPRM references the current "products" of its grants as including "lesson plans, instructional plans, professional development tools, and other teaching and learning

the NPRM is rife with assumptions, suppositions, conjectures, hypotheses, and speculative statements of belief similarly lacking in any citation to foundational evidence in the Department's attempts to explain the Proposed Rule's purpose and impact. For example (each with emphasis added):

- "While the Department recognizes that commercial incentives can often encourage the development of high-quality materials, we *believe* that the public should have access to works created under a Department direct competitive grant with public funds at the lowest cost possible."[29]

- "We *believe* this access would accelerate innovation and improve quality in education by enabling others to test and build upon Department-funded work, and by stimulating a market of derivative works."[30]

- "We *believe* that an open licensing requirement would improve the quality of educational resources…"[31]

- "We also *expect* that an open licensing requirement would stimulate innovation in the development of educational resources by encouraging commercial adaptation and derivatives and supporting large-scale adoption of grant products…"[32]

- "We are issuing these proposed regulations only on a *reasoned determination* that their benefits would justify their costs."[33]

This last statement represents the Department's assertion that it has complied with President Obama's Executive Order 13563, which requires all agencies to base their

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resources," it is plausible that some potential users may regard the Department's current policy – and the more prescriptive Proposed Rule – as violating the spirit, if not the letter, of multiple Congressional enactments barring Federal Agencies from directing, supervising, or controlling elementary and secondary school curriculum, programs of instruction, and instructional materials. *See* Gen. Educ. Provisions Act, 20 U.S.C. § 1232a (LexisNexis 2015); Dep't of Educ. Org. Act, 20 U.S.C § 3403(b) (LexisNexis 2015); and, Elementary and Secondary Educ. Act of 1965, 20 U.S.C. § 7907(a) (LexisNexis 2015).

[29] NPRM at 67673.

[30] *Id.*

[31] NPRM at 67674.

[32] *Id.*

[33] NPRM at 67675.

regulatory frameworks on "the best available science."[34] However, the Department seems to have conceived and put forward the Proposed Rule without adhering to the mandates in a series of memoranda issued by the Office of Management and Budget on behalf of President Obama to guide fiscal year budget requests by federal agencies during his terms in office.

In each instance, the OMB guidance was intended to reiterate a major priority of the President which, in relevant part, applies directly to the action undertaken by the Department regarding the Proposed Rule:

> "The Administration is committed to a broad-based set of activities to better integrate evidence and rigorous evaluation in budget, management, operational, and policy decisions, including... adopting more evidence-based structures for grant programs..."[35]

In addition, the Department seems to have ignored the statutory mandate of the Data Quality Act. That law requires OMB to issue guidelines under the Paperwork Reduction Act "that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of" that Act.[36] While the Data Quality Act manifests strong Congressional encouragement for the Executive Branch's information dissemination efforts, including specifically under statutes like the Paperwork Reduction Act, it was intended to build upon what Congress viewed as the agencies' existing responsibility to ensure information quality.[37]

The OMB Guidelines issued pursuant to the Data Quality Act recognize that federal agencies disseminate many types of information in many different ways. While seeking to avoid

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[34] Exec. Order No. 13563, Improving Regulation and Regulatory Review,3 C.F.R. 13563 (2011), available at https://www.whitehouse.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review.

[35] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, "EVIDENCE AND EVALUATION," https://www.whitehouse.gov/omb/evidence, containing links to OMB M-10-32, EVALUATING PROGRAMS FOR EFFICACY AND COST-EFFICIENCY (Jul. 29, 2010); OMB M-12-4, USE OF EVIDENCE AND EVALUATION IN THE 2014 BUDGET (May 18, 2012); and, OMB M-13-17, NEXT STEPS IN THE EVIDENCE AND INNOVATION AGENDA (Jul 26, 2013).

[36] Treasury and Gen. Gov't Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515(a), 114 Stat. 821, 822 (2001).

[37] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, GUIDELINES FOR ENSURING AND MAXIMIZING THE QUALITY, OBJECTIVITY, UTILITY, AND INTEGRITY OF INFORMATION DISSEMINATED BY FEDERAL AGENCIES, FINAL GUIDELINES WITH REQUEST FOR COMMENTS (Sep. 24, 2001), https://www.whitehouse.gov/omb/fedreg_final_information_quality_guidelines.

detailed, prescriptive, "one-size-fits-all" information quality standards, however, they state that "agencies shall have a basic standard of quality (including objectivity, utility, and integrity) as a performance goal...." The guidelines further explain "quality" as the encompassing value of which the other qualities are constituents, clarifying that "utility" refers to "the usefulness of the information to the intended users;" "objectivity" focuses on "whether the disseminated information is being presented in an accurate, clear, complete, and unbiased manner;" and, "integrity" refers to "security – the protection of information from unauthorized access or revision."[38]

The NPRM lacks information indicating that the Department has taken the steps necessary to comply with these guidelines. To the extent that the Department affirmatively seeks to use direct competitive grant funding to create and disseminate information to be used as educational resources, it should recognize its obligation to ensure that all of the components of this "basic standard of quality" are met.

III. Additional Questions and Comments on the NPRM and the Proposed Rule

1. The Proposed Rule addresses "new copyrightable materials *created in whole, or in part, with* Department grant funds and copyrightable modifications made to pre-existing content *using* Department grant funds...." Throughout the NPRM, the Department variously refers to such materials "created *with*," "created *by*," and "created *under*" Department funds (emphases added). In addition, while specifying that its "open licensing" mandates apply to grantees awarded "direct competitive grant funds," the Proposed Rule states that those mandates do not apply to grants that either provide "funding for general operating expenses" or "support to individuals (e.g., scholarships, fellowships)," but it leaves the Department's reservation of a license to "use the work for Federal purposes, and to authorize others to do so," fully applicable to the latter kinds of "funding" and "support."

It would be useful if the Department could more precisely explain what kind of funds and what permissible use of them (i.e., the relationship of the funding to the grantee's actions in creating new copyrightable materials or making modifications to pre-existing content), as specified in the grant instrument, would trigger open licensing mandates, and why the other referenced kinds of funding would not.

It would also be useful if the Department could clarify whether "pre-existing content," which apparently would not include "existing copyrightable intellectual property," refers only to non-copyrighted materials that have been produced by the grantee or would also include materials produced by others.

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[38] *Id.*

2. The Proposed Rule requires the Department, as the fund-awarding agency, to reserve the "Federal purpose" license mandated under 2 CFR Part 200.315(b), which is a regulation required for compliance with Section 36(a) of Subpart C of OMB Circular A-110 and which, according to the NPRM, the Department currently exercises "only in rare cases where a grantee fails to implement its copyright or prices its product at an unacceptably high cost that educators cannot afford to pay."[39]

Insofar as the phrase "Federal purpose" is not defined either in the Circular or the Department regulation, it would be useful if the Department could explain what it understands to be the meaning and scope of this term and what authority it relies on for that understanding. In addition, it would be helpful to understand what the Department means by a grantee's failure to "implement its copyright" (fails to license any or all uses of a copyrightable work developed under the grant?) and the standard by which it measures whether the grantee's pricing of its product is "at an unacceptably high cost that educators cannot afford to pay" (by whom and using what data to create this standard?)

3. In stating its rationale for revising its current policy through the Proposed Rule, the Department notes that a copyrightable work produced by a grantee "may only be commercially available, requiring the public to incur additional costs for their use."[40] In the very next paragraph, the NPRM states that, "[w]hile the Department recognizes that commercial incentives can often encourage the development of high-quality materials, we believe that the public should have access to works created under a Department direct competitive grant with public funds at the lowest cost possible."

It would be useful if the Department would explain its rationale and authority for imposing an open licensing requirement on the basis of these observations.

4. The NPRM solicits comments on whether the Proposed Rule should require grantees to distribute their grant-developed copyrightable works or, alternatively, whether the Department "should use non-regulatory approaches such as technical assistance and guidance to help facilitate distribution."[41] Yet the Department's statements in the NPRM seem to assume distribution through its expectation that open licensing "would stimulate innovation in the development of educational resources by encouraging commercial adaptation and derivatives and supporting large-scale adoption of grant products...."[42]

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[39] NPRM at 67673.

[40] *Id.*

[41] NPRM at 67674.

[42] *Id.*

If the Proposed Rule were to mandate distribution, what requirements does the Department anticipate this would entail? If distribution is not mandated, what kind of "technical assistance or guidance" does the Department anticipate it would provide to help facilitate distribution? How would such "assistance or guidance" ensure that the government is not interfering in or otherwise manipulating the marketplace for educational and instructional materials?

5. In its "Summary of Potential Costs and Benefits,"[43] the NPRM unequivocally states that the open licensing requirement "will not impose significant costs on entities that receive assistance through the Department's direct competitive grant programs," noting both the voluntary nature of the participation in the program and that "the costs of meeting the requirements will be paid for with program funds and therefore will not be a burden for grantees, including small entities."

However, the NPRM then notes that, while an open license "does not preclude the grantee or any individual from developing commercial products and derivatives from the grant funded material, it does remove the competitive advantage that these grantees currently possess as the exclusive copyright holder." "In addition," the NPRM continues, "publishers and other third parties may incur loss of revenue since their commercial product will potentially compete with freely available versions of a similar product."

Why wouldn't the grantees' loss of "competitive advantage", resulting from their inability under the Proposed Rule to assert exclusive rights, be considered by the Department to constitute a "significant cost," especially for those that are small enterprises?

Similarly, isn't it another "significant cost" of the Proposed Rule that, as the Department acknowledges, learning companies and other third parties may incur a loss of revenue as a result of competing with freely available grant-funded material? Doesn't this weigh against mandating open licensing for such material?

6. Under its section on "Initial Regulatory Flexibility Act Analysis,"[44] the NPRM states that the Secretary "certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities." It then notes, however, that "the Department acknowledges that it is difficult to quantify the impact of this proposed regulation on small entities..."

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[43] NPRM at 67675.

[44] *Id.*

Is the Department aware that many learning companies in the education marketplace qualify as "small businesses" under federal standards?[45] The Department's above-quoted acknowledgement that education companies and other third parties "may incur loss of revenue" due to their commercial products having to compete with grant-funded products should be considered in assessing whether the proposed regulations would have a significant economic impact on a substantial number of small entities.

Conclusion and Recommendations

For the reasons noted above, AAP strongly opposes the Proposed Rule in its current form and looks forward to addressing our concerns with the Department.

AAP has no objections to the availability of open educational resources and respects the Department's desire to provide assistance in making OER materials more widely and readily available for teaching and learning. Such assistance should not, however, result in the Department's use of taxpayer funding and obliged grantees to compete with the private sector investment and employment that fuels and sustains competition and innovation in a well-established marketplace of commercial and non-commercial providers. On that point, it is worth repeating that there simply is no justification for a federal agency to thwart or distort fair market competition by placing its thumb on the economic scales of the market for educational resources as the Proposed Rule would do.

The Department should be able to reasonably and responsibly achieve its goal of expanding options for suitable educational resources, while "broadening the impact of its investments by allowing stakeholders... to benefit from these investments, even if they are not themselves recipients of Department funds." The Department could take steps to ensure that its Proposed Rule is based on evidence supporting the need for the kind of assistance it seeks to provide, recognizes the necessary and appropriate limits that must be placed on its regulatory approach in providing such assistance, and does not sacrifice the same pedagogical requirements for quality and relevance that other market providers must meet with respect to the materials its assistance helps to produce and provide.

To that end, although AAP strongly opposes the Proposed Rule, we recognize that the Department might ultimately proceed with development of a Final Rule. If that is the case,

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[45] *See* U.S. SMALL BUSINESS ADMINISTRATION, TABLE OF SMALL BUSINESS SIZE STANDARDS MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES 28 (Jul. 14, 2014), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf (Book Publishers with less than 500 employees qualify as a small business for purposes of Federal Government programs - NAICS Code 511130).

we strongly urge the Department to work with learning companies and other stakeholders to ensure that any Final Rule will:

- Have a solid evidentiary foundation regarding the kinds of educational resources that are needed but not already reasonably available in the marketplace, so that its proposed assistance may be specifically targeted to help meet those needs, rather than merely facilitate government-funded competition to private sector providers of the resources;

- Allow, rather than mandate, open licensing or other options for permitting the uses of grant funded materials that are subject to the exclusive rights of copyright;

- Make clear that the Department's assistance is not intended to express a Federal Government endorsement or preference for OER, whether or not produced with Federal assistance, over commercially-produced education materials; and

- Make clear that the Department does not intend to require the adoption of OER, whether or not produced with its assistance, as a condition of receiving other types of grant funds in the future.

In addition, AAP would urge that any Final Rule:

- State that the Department does not intend for OER to be used in the classroom or assigned to students if materials have not been subject to any required State or local adoption review process, as well as other quality review and standards alignment assessments required by State and local officials;

- Make clear that any OER materials developed by its grantees would be subject to any required accessibility standards and procedures that apply to adopted educational materials, including those mandated by the Individuals with Disabilities Education Act Amendments of 2004[46], as well as any state-created accessibility requirements;

- Advise SEAs, LEAs, and IHEs to consider all of the likely costs involved in using such materials, including not only the costs of acquisition but also the costs of maintenance, updates and upgrades, corrections and other revisions, necessary

[46] Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2648, §§ 612 (a) (23), 613 (a) (6), 674 (e) (2004).

professional training and development, technical support, etc., that will still require funding on a regular or periodic basis; and

- Further advise SEA's, LEAs, and IHEs to consider whether the OER materials:

    - conform to technical standards supporting the usability of the material across different platforms and systems, such as the specifications of the IMS Global Learning Consortium;

    - support adaptive learning, whereby the student receives the material dynamically in installments based upon what the student already knows and should learn next; and

    - have undergone a rigorous peer-review process for quality and academic integrity.

On behalf of AAP and its members, I want to thank you for carefully considering these comments. We would be pleased to engage in further dialogue about this NPRM and to work with the Department so that it may avoid potentially running afoul of important federal laws and policies in facilitating its desire to provide assistance that will expand State and local options for acquiring high-quality, compliant educational resources.

Respectfully submitted,

Allan Robert Adler

General Counsel
Vice President for Government Affairs
Association of American Publishers
455 Massachusetts Ave., NW, 7th Floor
Washington, D.C. 20001
(phone) 202/220-4544
(fax) 202/347-3690
(email) adler@publishers.org