



December 18, 2015

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

**Re: Open Licensing Requirement for Direct Grant Programs (Docket ID ED-2015-OS-0105)**

Dear Ms. Leu:

The Public Broadcasting Service (“PBS”),<sup>1</sup> Corporation for Public Broadcasting (“CPB”),<sup>2</sup> Association of Public Television Stations (“APTS”),<sup>3</sup> and Twin Cities Public Television (“TPT”)<sup>4</sup> (collectively, “PTV”) welcome this opportunity to comment on the

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<sup>1</sup> PBS, with its 350 member stations, offers all Americans the opportunity to explore new ideas and new worlds through television and online content. Each month, PBS reaches more than 103 million people through television and over 33 million people online, inviting them to experience the worlds of science, history, nature, and public affairs; to hear diverse viewpoints; and to take front row seats to world-class drama and performances. Teachers of children from pre-K through 12th grade turn to PBS for content and services that help bring classroom lessons to life.

<sup>2</sup> CPB is a private, non-profit corporation created and authorized by the Public Broadcasting Act of 1967 to facilitate and promote a national system of public telecommunications. Pursuant to its authority, CPB has provided millions of dollars in grant monies for support and development of public broadcasting stations and programming.

<sup>3</sup> APTS is a non-profit organization whose membership comprises the licensees of nearly all of the nation’s CPB-qualified noncommercial educational television stations. The APTS mission is to support the continued growth and development of a strong and financially sound noncommercial television service for the American public.

<sup>4</sup> TPT is a public television station based in St. Paul, Minnesota that reaches over 1.7 million people each month through multiple broadcast and online channels. The mission of TPT is to enrich lives and to strengthen its community through the power media. Educational readiness of children and engaging a new generation in the power of public media are two areas of particular focus for TPT. TPT is a direct recipient of the 2015 Ready-to-Learn grant, which will fund the production of *Superhero School: Harnessing the Power of Science, Literacy, and Media* (w/t). This five-year transmedia initiative will engage children ages 5 to 8 from low-income families nationwide in building key science and literacy skills.

Department of Education’s (the “Department”) *Notice of Proposed Rulemaking* regarding proposed amendments to the regulations in 2 C.F.R. § 3474 that would implement an open licensing requirement for direct grant programs (the “Notice”).<sup>5</sup> PTV supports the goals of the proposal and has long worked under the Department’s Ready-to-Learn Television Program and through our broader work to make noncommercial educational content as widely and freely available as possible. If the proposed rules are put in place, they would dramatically curtail PTV’s ability to continue creating and distributing this uniquely curriculum-driven television and digital content for children. Therefore, PTV urges the Department to add public television entities to the limited exceptions provided for in the rule. The Department should modify the proposal by adding the following provision as 2 C.F.R. § 3474(c)(4): “Grants that provide funding for public television entities.” Adopting the proposal without this modification would have significant unintended consequences as detailed below.

**I. BROAD DISTRIBUTION AND AVAILABILITY OF GRANT-FUNDED READY-TO-LEARN CONTENT IS ENSURED UNDER CURRENT DEPARTMENT REQUIREMENTS.**

PTV has worked with the Department of Education for over 20 years to deploy Ready-to-Learn grant funds in the development of curriculum-aligned content for unserved and underserved children. At the core of this work is the mission – and programmatic requirement – to broadly distribute and make available the content so that children, parents, and teachers all across the country can benefit from these investments.

The Notice rests in part on the assumption that the “educational materials created through the Department’s discretionary competitive grants should be shared *more* broadly with the

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<sup>5</sup> Department of Education, Open Licensing Requirement for Direct Grant Programs, *Notice of Proposed Rulemaking*, Docket ID ED-2015-OS-0105 (Nov. 3, 2015) [hereinafter “Open Licensing Notice”].

public.”<sup>6</sup> The Notice goes on to make note of the fact that there is no requirement for “a grantee to distribute work,” so the Department considers whether to add a “distribution requirement” or to adopt new approaches in order to “help facilitate distribution.”<sup>7</sup> This discussion in the Notice does not appear to contemplate the Department’s Ready-to-Learn Television Program. None of these issues or concerns are remotely applicable to the educational materials that PTV has long developed with Ready-to-Learn grant funds because those materials are all distributed on myriad platforms and are readily available as broadly as possible.

The Notice’s goal of ensuring extensive distribution and broad availability of grant-funded content is shared by PTV, as a result of its universal service mission,<sup>8</sup> and that goal is being achieved under current Department requirements. The Ready-to-Learn Television Program is actually premised upon such distribution, as the notice inviting applications sought applicants that would specifically “take advantage of common mass media consumer technologies in order to reach children” as well as “parents, caregivers, and early learning providers,” which is exactly what PTV does by ensuring universal access to everything that it creates.<sup>9</sup> This aligns with the authorizing legislation for the Ready-to-Learn program, which established the distribution of educational programming to preschool and elementary school children as a core purpose of the grant.<sup>10</sup> In fact, eligibility for the grant requires a “public telecommunications entity that is able to demonstrate ... capacity for the development and

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<sup>6</sup> *Id.* at 67673 (emphasis added).

<sup>7</sup> *Id.* at 67674.

<sup>8</sup> Universal service and distribution have been part of public broadcasting’s DNA going all the way back to the Public Broadcasting Act of 1967, which established as part of PTV’s core mission that it provide services “throughout the United States” and “for all citizens of the Nation.” 47 U.S.C. § 396(a)(5), (7).

<sup>9</sup> Department of Education, Notice Inviting Applications for New Awards; Ready-to-Learn Television, CFDA Number 84.295A (Mar. 25, 2015).

<sup>10</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, Sec. 2431(a)(1)(A) (codified at 20 U.S.C. § 6775).

national distribution” of content.<sup>11</sup> This commitment to ensuring that programming funded by Ready-to-Learn is “widely available” was recently reaffirmed when Congress reauthorized the program in December 2015.<sup>12</sup> The cooperative grant agreement between CPB and the Department puts these distribution and outreach requirements into effect. The Ready-to-Learn grant program is remarkable in the extent to which it is founded upon and has continually embraced the broad distribution and wide availability of grant-funded content.

For instance, grant-funded content is distributed over-the-air by 350 public television stations that reach almost every household in America. This content is redistributed by cable and satellite carriers, including on dedicated kids multicast channels that are carried under unique relationships that public television has established. PBS member stations reach more children ages two to five and more children from low-income families than any other children’s television network, and 71 percent of all children ages two to eight watch PBS.<sup>13</sup> In addition, PTV pursues a transmedia approach to content development, so Ready-to-Learn grant funds help create free mobile applications that advance the underlying educational mission. This grant-funded content is also made available through a number of online portals, such as: (i) PBS LearningMedia, which provides over one million educators with digital classroom resources designed to improve teacher effectiveness and student achievement; (ii) PBS KIDS Lab, which serves as an online hub for parents and educators seeking grade-appropriate content and resources; and (iii) PBS KIDS Island, a virtual island filled with free reading and literacy games for preschoolers.<sup>14</sup> PBS KIDS averages 413 million video streams per month across all digital platforms, and streaming

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<sup>11</sup> *Id.* at Sec. 2431(a)(3)(A).

<sup>12</sup> Every Student Succeeds Act, Pub. L. No. 114-95, Sec. 4643(a)(2) (reauthorizing the Elementary and Secondary Education Act of 1965). *See also id.* at Sec. 4643(a)(1), (a)(3).

<sup>13</sup> Nielsen NPOWER®, Sept. 22, 2014 – Sept. 20, 2015.

<sup>14</sup> *See* [www.pbslearningmedia.org](http://www.pbslearningmedia.org), [www.pbskids.org/lab](http://www.pbskids.org/lab), and [www.pbskids.org/island](http://www.pbskids.org/island).

on PBS KIDS accounted for more than half (53 percent) of all time spent watching children’s videos online in October 2015.<sup>15</sup> As these examples illustrate, broad distribution and availability of Ready-to-Learn content is being achieved under the existing Department framework.

## **II. THE QUALITY AND SUSTAINABILITY OF MATERIALS CREATED WITH GRANT FUNDS WOULD BE DRASTICALLY UNDERMINED BY THE PROPOSAL.**

PTV has always made sure to build into its Ready-to-Learn work comprehensive plans to ensure that the educational materials developed with Department grant funds are of the highest quality and to provide for the long-term sustainability of the materials. These twin goals of quality and sustainability underlie all of the curriculum-driven content that PTV has developed with seed funding from the Department for over two decades. The rules proposed in the Notice would most likely preclude the use of Department grant funds for any future production of educational children’s programming by PTV through the proven public-private model described below.

The Notice anticipates that the “proposed regulation would ensure the quality and long-term sustainability of innovations created through grant funds,”<sup>16</sup> but the exact opposite would be the case for the innovative educational programming created by PTV under the Ready-to-Learn Television Program due to the way in which such programming is financed and developed. The Notice further proposes that copyrightable materials “created in whole, or in part, with Department grant funds” would be covered by the rule change and that the public license would

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<sup>15</sup> Google Analytics, Nov. 2014 – Oct. 2015; comScore Video Metrix, Oct. 2015.

<sup>16</sup> Open Licensing Notice at 67675.

need to be “worldwide” and “perpetual.”<sup>17</sup> These concepts are inapposite to the approach that the Department has taken in working with PTV for over 20 years.

Department grant funds have provided an essential seed for the creation of new educational children’s television series and transmedia suites. While these grant funds are a critical piece of the funding pie, they typically represent 25 to 45 percent of a PBS series budget in recent years, which means that there is always a multi-million dollar deficit that needs to be covered by other funding sources for each program. It would be fundamentally inequitable to the other funders that finance the majority of such content for the Department to implement the proposed open licensing requirement. In fact, producers would not be able to secure the necessary funding upfront or subsequently recoup substantial production deficits if faced with ceding all rights in and control over the content to the general public, making it entirely infeasible to continue to develop the high-quality content that has long been created through the Ready-to-Learn grant program.

Implementing the proposed open licensing requirement would fundamentally disrupt the public-private business model that has worked so successfully for decades to create uniquely educational children’s content. This model has already faced a number of challenges in recent years with a significant reduction in revenue sources that have customarily defrayed production costs, such as merchandise and consumer product sales, foundation support, and traditional home video sales. As these other funding sources have diminished, PBS and CPB have had to invest additional discretionary funds in order to close the funding gap. But the combination of the Ready-to-Learn grant and the CPB and PBS discretionary commitments cannot suffice to cover

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<sup>17</sup> *Id.* at 67677.

100 percent of these production costs.<sup>18</sup> Therefore, producers must rely on advances and revenue from the license of international, home entertainment, publishing, and other ancillary rights to cover their sizable production deficits. Producers are still often left with multi-million dollar funding gaps requiring the deferral or deficit financing of millions of dollars in expenses. There are no guarantees that producers will ever recoup these deficits or deferred fees, which means that producers assume significant financial risks when green-lighting production.<sup>19</sup>

Any requirement that copyrightable material created or enhanced with Ready-to-Learn grant funds be subject to an open licensing requirement would make it *virtually impossible* to generate the third-party funding required to produce these series. Without copyright protections, no third-party licensee is going to pay six or seven figure advances for non-exclusive distribution rights. An open licensing requirement would result in the loss of millions of dollars in funding and revenue that PBS, CPB, and children's producers rely on to launch new series and to sustain these series beyond the initial season order. Moreover, children's educational content created with Ready-to-Learn grant funds also may incorporate pre-existing copyrightable elements, such as music or sound effects, which the producers would not have the authority to permit third parties to use in the broad manner dictated by the proposed rule.

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<sup>18</sup> See United States Government Accountability Office, *Issues Related to the Structure and Funding of Public Television*, GAO-07-150, 54–55 (Jan. 2007) (finding that PTV needs to “contribute modestly to up-front program development and production,” that producers “must leverage these funds with funds from other organizations,” and that increasing the proportion of up-front investment is “beyond the financial capacity of CPB and PBS and could expose the organizations to significant risks”).

<sup>19</sup> The Notice suggests that the open licensing requirement would encourage “commercial adaptation” of grant products. Open Licensing Notice at 67674. This result would be eminently inequitable to the producers that deficit fund curriculum-aligned educational content that is otherwise lacking in the children's content landscape. Furthermore, given the established model for recouping such deficits, allowing commercial adaptation underscores the fact that this content could simply no longer be funded and created if for-profit third parties could freely modify and exploit the content.

In addition to the negative impact on funders, an open licensing requirement would make it extremely challenging for Ready-to-Learn recipients to partner with experienced production companies whose participation is critical in order to produce top quality educational series that meet Ready-to-Learn standards. With respect to TPT's plans to produce a 40-episode animated series, it is essential that TPT partner with a production company that has the experience and the capacity to assist TPT in achieving the Ready-to-Learn grant requirements. Grant recipients like TPT are able to attract experienced producers in their niche field, in part, due to opportunities for leveraging the intellectual property created to benefit both parties.

The content creation model for curriculum-driven public broadcasting content has depended on copyright licensing for decades, both in the initial development stages and for the long-term sustainability model. This model has facilitated the production of the recent award-winning series *Peg + Cat* and *Odd Squad* in conjunction with The Fred Rogers Company.<sup>20</sup> Over the past 20 years, the Ready-to-Learn Television Program has also facilitated the development of such iconic and well-known educational series as *Reading Rainbow*, *Super WHY!*, The Jim Henson Company's *Sid the Science Kid*, and *Between the Lions* and *Martha Speaks* with the WGBH Educational Foundation. The proposed open licensing requirement would very likely preclude any future production of educational children's television content using Department grant funds. As is evident from these examples, the content created under the Ready-to-Learn program is remarkably distinct from the type of materials envisioned by the Notice. Broadcast and digital programming that uses characters and narrative for educational purposes is a qualitatively different type of copyrightable content than the manuals and other

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<sup>20</sup> See, e.g., Wolfe, Jennifer. "Fred Rogers Co's 'Peg + Cat' Wins 3 Daytime Emmys." *Animation World Network*, June 25, 2014, available at [www.awn.com/news/fred-rogers-cos-peg-cat-wins-3-daytime-emmys](http://www.awn.com/news/fred-rogers-cos-peg-cat-wins-3-daytime-emmys); Dos Santos, Filipe. "Sinking Ship wins three Daytime Emmy Awards." *Playback*, Apr. 27, 2015, available at [www.playbackonline.ca/2015/04/27/sinking-ship-wins-three-daytime-emmy-awards](http://www.playbackonline.ca/2015/04/27/sinking-ship-wins-three-daytime-emmy-awards).



materials that might be used by local and state educational agencies under other Department programs. The Notice does not appear to contemplate this critical distinction. As a result, the Notice's goal of ensuring that grant funds support the quality and long-term sustainability of educational content would be seriously undermined by the text of the proposed rules unless public television is carved out as recommended herein.

### **III. THE IMPACT OF THE PROPOSAL WOULD EXTEND FAR BEYOND THE COSTS IDENTIFIED BY THE DEPARTMENT AND WOULD BE FELT BY MANY SMALL ENTITIES.**

PTV values the Ready-to-Learn Television Program for the Department's unique ability to help kick start the initial content creation process for educational programming that appears on all distribution platforms and is closely aligned to curriculum standards. In discussing the potential costs of the proposal, the Notice focuses on the fact that there "may be some instances of lost revenue" and that "relatively few grantees develop and market copyrighted content paid for with Department funds."<sup>21</sup> The true impact of the proposal would extend far beyond simply lost revenue, but rather would encompass a broad array of lost educational content altogether. New educational series and subsequent seasons to existing series are created with seed funding provided by the Ready-to-Learn grant. Without this funding, and the ability to pair this funding with copyright revenue to fill significant producer deficits, the educational content would not exist. This is not simply a matter of lost revenue, but rather of lost educational opportunities and resources for disadvantaged children altogether.

The impact would extend well beyond educational television programming and would encompass the large array of related materials that PTV develops. For instance, Ready-to-Learn grant funds have supported the development of the recently launched PBS KIDS version of the

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<sup>21</sup> Open Licensing Notice at 67675.

ScratchJr mobile application, which enables children to practice early science thinking and technology coding skills by combining various graphical programming blocks to create their own interactive stories and games featuring characters from PBS KIDS programs (many of which were developed with Ready-to-Learn funding from the Department).<sup>22</sup> Grant funds also support the creation of lesson plans and teacher guides, video tutorials and “teaching tip” modules for professional development, as well as a wide variety of mobile learning and other out of school resources. TPT’s current Ready-to-Learn project, for example, will focus on applying emerging technology in game analytics to the educational gaming space. TPT plans to develop and distribute an array of educational media products that will be available to educators free of charge, including videos drawn from a new broadcast television series along with a collection of digital games, mobile applications, nonfiction eBooks, comic eBooks, digital tools for writing and drawing, and hands-on activities and non-digital games. These resources will all be accessible and organized by show topics into collections that will be available on an innovative new online platform for both formal and informal educators.

Educators are already able to use all of these resources in the classroom and to repurpose them in accordance with the fair use provisions of copyright law. In all of PTV’s testing and research to ensure the educational effectiveness of grant-funded materials, there has been no indication that a further need for educators to create derivative works exists beyond what is already permitted under fair use. In addition, PBS works closely with the PBS KIDS Next Generation Media Advisory Board, and the CPB-PBS Ready-to-Learn initiative collaborates with a learning and engagement advisory council, both of which are comprised of experts across

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<sup>22</sup> See, e.g., Hogan, Samantha. “Familiar PBS characters appear in new coding app for kids.” *Current*, Dec. 16, 2015, available at [www.current.org/2015/12/familiar-pbs-characters-appear-in-new-coding-app-for-kids](http://www.current.org/2015/12/familiar-pbs-characters-appear-in-new-coding-app-for-kids).

the children's education and child development landscape, in order to incorporate the input of educators up front into the development of all of these grant-funded materials.<sup>23</sup>

The Notice also indicates an expectation that the "proposed regulations would not have a significant economic impact on a substantial number of small entities."<sup>24</sup> In fact, the proposal would have an enormous impact on a large number of small entities. Across the country, 148 public television PBS member stations are operated by 97 small entity licensees as defined in the Notice (i.e., independently owned and operated with total annual revenue below \$7,000,000).<sup>25</sup> These stations broadcast at least 7 hours of educational children's programming per weekday and this programming exists in large part due to Ready-to-Learn grant funds. The pipeline of educational children's content and the continued ability of that copyrighted content to be created depend on the Department. In addition, the impact on small entities would extend beyond their broadcast service; these small entities also rely on educational children's material to conduct local outreach with community organizations that serve disadvantaged youth. These partnerships with local organizations are currently made possible by the shared mission to broadly disseminate the educational content funded by the Department. If such content is no longer able to be produced, it would reduce the programming available for stations to air and severely constrain stations' ability to engage with and serve their local communities, and ultimately degrade community and foundation financial support for stations. This would be a direct and foreseeable consequence of the Notice.

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<sup>23</sup> See PBS KIDS Announces Next Generation Advisory Board, Apr. 25, 2006, *available at* [www.pbs.org/about/blogs/news/pbs-kids-announces-next-generation-advisory-board-april-25-2006](http://www.pbs.org/about/blogs/news/pbs-kids-announces-next-generation-advisory-board-april-25-2006); PBS KIDS Welcomes New Members to the PBS KIDS Next Generation Media Advisory Board, June 3, 2011, *available at* [www.pbs.org/about/blogs/news/pbs-kids-welcomes-new-members-to-the-pbs-kids-next-generation-media-advisory-board](http://www.pbs.org/about/blogs/news/pbs-kids-welcomes-new-members-to-the-pbs-kids-next-generation-media-advisory-board).

<sup>24</sup> Open Licensing Notice at 67676.

<sup>25</sup> *Id.*

## **CONCLUSION**

PTV strongly supports the goals embodied in the Notice's proposal and the examples above illustrate the ways in which PTV has long pursued those goals. At the same time, PTV urges the Department to add an additional exception for public television to those already provided for in the Notice. PTV recommends that the Department modify the proposal by adding the following provision as 2 C.F.R. § 3474(c)(4): "Grants that provide funding for public television entities." Adopting the proposal without this modification would have far-reaching negative unintended consequences as detailed above.

Respectfully submitted,

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