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Dear Ms. Leu,

The University of Texas at Arlington (UTA) Libraries is pleased to submit these Reply Comments in response to the Department of Education’s Notice of Proposed Rulemaking on Open Licensing Requirement for Direct Grant Program. We thank the Department of Education for undertaking this important inquiry and their interest in making publicly funded research more available to the general public.

UTA was founded in 1895 and has grown to be the second largest university in the University of Texas System, which consists of nine universities and six health institutions. It is in the center of the Dallas–Fort Worth–Arlington metro area, which is the fourth largest metro area in the United States. UTA has the fifth most diverse undergraduate population in the U.S.\(^1\) Recently, UTA was recognized as a Hispanic Serving Institution by the U.S. Department of Education.\(^2\) We have a student body population of approximately 50,000 supported by over 2,000 faculty and staff members. Over 50% of our students work 20 or more hours per week. Our campus exemplifies the educational shift of collegiate student populations becoming increasingly urban, working students.

UTA Libraries applauds the Department of Education’s continued desire to broadly disseminate grant-funded materials and resources. However, we believe that this proposed rulemaking is not narrowly tailored enough in one instance to achieve its objectives, and the proposed rulemaking

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is too narrow in another area. This reply comment responds to the first question from the Notice of Proposed Rulemaking, “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?” Additionally, this reply comment responds to the second question “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?” Finally, this reply comment responds to the third question: “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?”

Below we share our concerns and thoughts on the proposed rule.

1) Not All Works Protected by Copyright Need Public Distribution or Open Licensing

The Notice of Proposed Rulemaking focuses on the unavailability of grant-funded resources and the desire to make those materials broadly disseminated to the public.\(^3\) The Notice of Proposed Rulemaking seeks to accomplish this goal by applying an open or public license to all copyrightable intellectual property.\(^4\) However, the current rule is too broad for its objectives.

Copyright law protects all “. . . original works fixed in a tangible medium of expression.”\(^5\) The threshold for originality is low and is merely requires a “modicum of creativity.”\(^6\) Letters of individuals are protected by copyright,\(^7\) as are emails, internal reports, drafts of final products, and doodles on documents would also likely be protected by copyright. These kinds of materials do not appear to advance the stated objectives of the Department of Education in its Notice of Proposed Rulemaking. Instead, the Department of Education should focus on requiring an open or public license on final products of materials and resources. This narrower rule would be consistent with other open access mandates\(^8\) and would achieve the stated objectives of the Department of Education without being overly broad.

2) By not using the language of the Copyright Code, the stated goals of the Department of Education may still not be met.

The proposed regulation does not allow users of the materials and resources to use and reuse the materials to the fullest extent that copyright law could allow. Copyright law gives the rights holders the following exclusive rights: (1) the right to reproduce the work, (2) the right to

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\(^3\) 80 Fed. Reg. 67672, 67673 (November 3, 2015)

\(^4\) Id.

\(^5\) 17 USC 102 (2012)


\(^7\) Salinger v. Random House, Inc., 811 F. 2d 90, 92 (2nd Cir, 1987)

\(^8\) Other open access mandates only require public dissemination (or an open or public license) for materials that are published in a peer-reviewed journal.
prepare derivative works, (3) the right to distribute copies of the work, and (4) the right to publicly perform or display the work.\textsuperscript{9} The way that the proposed regulation is written, the Department of Education receives only a nonexclusive license to distribute and publicly display the work to the public via the database that the Department of Education selects. The current license does not allow educators to take full advantage of the materials and resources that were created using grant funds. As the simplest example, by not allowing the right to create a derivative copy, the work can only be accessed within its original language.\textsuperscript{10} An instructor who specializes in English as a second language may still be liable for copyright infringement by violating the derivative right of the author, if the instructor translated the work from English into another language such as Spanish. By changing the language of the proposed rulemaking to a nonexclusive license to all rights as currently listed in the copyright code, the works could be more broadly disseminated and used by educators. Without the ability to adapt a work for stated educational objectives, the broadly disseminated work still may not be utilized the way that the Department of Education hopes.

3) A Distribution Requirement Should Be Included in Proposed Regulation \textsuperscript{§ 3474.20}

As stated in Point 1, UTA Libraries believes that the proposed regulation is currently too broad, although we support an open access resolution to broadly distribute materials and resources created from federal funds. When the Department of Education creates a more narrow regulation that captures its intended purpose, the Department of Education should promulgate its rules within the Code of Federal Regulations (CFR). By including the distribution requirement in the CFR, the rule would be consistent with other promulgated rules when the federal government takes a nonexclusive license of the copyright when they have provided a federal grant.\textsuperscript{11} While public dissemination rules have not been promulgated in the CFR the way that other copyright rules have promulgated, UTA Libraries believes that this requirement provides consistency, clarity, and harmony within the legal structure.

4) The Department of Education should work with the Copyright Office to broaden distribution of materials and resources created using grant funds.

As the Copyright Office proposes new changes to copyright law, the Department of Education should work closely with the Copyright Office to make sure that the efforts by the Department of Education to provide broad public access are not undermined by changes in copyright law. As one recent example, the Copyright Office recently had a Request for Public Comments to add new statutory rights for copyright holders. Those rights would have included both “a making available” and “communication to the public” rights as modeled after legislation from the

\textsuperscript{9} 17 USC 106 (2012)
\textsuperscript{10} 17 USC 101 (2012) (defining a derivative copy as one in which the work is translated.)
European Union. Courts in the European Union have interpreted the statutory right of “making available” to include hyperlinking to legitimate resources. At this point, there have been no proposed changes to American legislation to include a separate statutory right for “a making available” as exists in European legislation. However, the Department of Education needs to be on guard against these types of legislative changes as they may undermine efforts to broadly disseminate publicly funded materials.

5) Conclusion

While UTA Libraries applauds the Department of Education’s continued commitment to broad dissemination of resources and materials created using federal grants, this proposed regulation does not achieve the desired outcome because it is overbroad and under inclusive. By requiring a public license for all materials that are protectable by copyright, many materials and resources that are of little interest to the public would require grant compliance and management plans and costly long-term storage requirements. The Department of Education could achieve its goal by requesting public dissemination of a narrow class of copyrighted items, primarily focusing on the end product intended for public consumption and learning. The proposed regulation is also under inclusive because it only requires that the materials be publicly disseminated. Copyright law could prevent the Department of Education from achieving its stated objectives if it only requires public dissemination. Instead, the Department of Education should create broader nonexclusive license that would include the right of reproduction, the right of distribution, the right to create derivative copies, and the right of public performance or public display. The University of Texas at Arlington Libraries wishes to support the regulation, but for the reasons stated above, we cannot at this time. We request that the Department of Education reconsider its proposed regulation.

Thank you for considering these suggestions. We encourage you to contact UTA Libraries with any questions.

13 Court of Justice of the European Union (2014). “The owner of a website . . . may, without the authorisation [sic] of the copyright holders, redirect internet users, via hyperlinks, to protected works available on a freely accessible basis on another site.” This is so even if the internet users who click on the link have the impression that the work is appearing on the site that contains the link [Press Release]. Retrieved from http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/cp140020en.pdf
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