



December 18, 2015

Sharon Leu
U.S. Department of Education
400 Maryland Avenue SW, Rm 6W252
Washington, D.C. 20202

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

Dear Ms. Leu:

Thank you for the opportunity to submit comments to the Department of Education's (Department) Notice of Proposed Rulemaking regarding the Open Licensing Requirement for Direct Grant Programs. Creative Commons is a 501(c)(3) nonprofit corporation dedicated to making it easy for people to share and build upon the work of others, consistent with the rules of copyright. CC provides standard, free, open licenses and other legal tools to mark creative work with the freedoms the creator wants it to carry.

Creative Commons licenses—and policies requiring CC licensing—are in play around the world. Governments require CC licensing, such as the Department of Labor Trade Adjustment Community College and Career Training (TAACCCT) grant program, the Australian Governments Open Access and Licensing Framework, and the Polish Ministry of Infrastructure and Development. Intergovernmental organizations such as the World Bank and World Health Organization have adopted Creative Commons licensing for some of their publications and datasets. Major scientific and scholarly research funders require Creative Commons licensing for articles resulting from their funding, including the Research Councils UK and the Bill & Melinda Gates Foundation. Millions of websites use CC licensing, including Wikipedia, Europeana, and the Public Library of Science. There are over 1 billion CC licensed works available on the web.

Published in 2013, the Creative Commons 4.0 licenses are the worldwide standard for sharing copyrighted resources under open terms that are understood and accepted globally. The licenses were developed over a three-year period and involved input from legal experts, educators, governments, businesses and CC affiliates in more than 70

jurisdictions. As a result of this extensive consultation process, these licenses are the most international, robust, and legally-sound public licenses that are used by the public, governments, and intergovernmental organizations for making works openly available under standard, recognized terms.

We applaud the Department for taking this critical step to ensure that educational resources created with Department direct competitive grant funds are openly licensed for the public to freely use, share, and build upon. The proposed policy will help maximize taxpayers' investments, expand access to educational materials, and provide rich content for institutions and entrepreneurs to build upon.

We understand that while the Department retains a nonexclusive and irrevocable license to reproduce, publish, or otherwise use its grant-funded project materials for government purposes, agencies rarely exercise this federal purpose license to provide the public free and legal access to those publicly funded resources. The adoption of an open licensing requirement clarifies to the public how they may access, use, and adapt Department-funded resources.

There are many benefits to adopting standard open licenses on copyrightable works created using funds from direct competitive grant programs.

- Reducing access, cost, language, and format barriers to Department funded education and training resources;
- Ensuring educators have the legal rights to reuse, revise, remix and redistribute Department funded educational resources as needed, without having to ask permission of the government or grantee;
- Improving the quality of educational resources and sustain innovations beyond the grant period by encouraging subject matter experts and other users to build upon the grant products;
- Ensuring that grantees / authors receive attribution (credit) when others use their work;
- Increasing transparency and efficiency of Department grant funds spent on education and related resources by reducing duplicate projects and promoting reuse of existing openly licensed content;
- Promoting commercial adaptations and innovation and supporting large-scale adoption of grant products, even after the grant period is completed.

We answer your specific questions below.

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?

The Department should require that grantees distribute copyrightable works created under a direct competitive grant program. The public should have free, open access to the works created with Department grant funds. A standard open license should be applied at the time of distribution or publication, typically at the completion of the grant period. This way, the public will be provided clear notice that they are freely permitted to reuse the work with only a minimal set of conditions (e.g., providing attribution to the author). Further, the grantee will have adequate time to prepare the deliverables for publication under the open license by the time the grant period has concluded.

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?

We applaud the Department's open license definition:

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

If the Department policy is enacted, grantees subject to the open license would be required to share materials created using grant funds under an open license that meets the definition. While not specifically mentioned, we note that this definition most closely aligns with the permissions and conditions of the [Creative Commons Attribution International 4.0 license](#) (CC BY), and the Department might consider addressing specific licensing options in its implementation of the proposed rule.

There are several features of Creative Commons licenses that are beneficial to both grant recipients (licensors) and users of the licensed works (licensees). The CC licenses respect the existing contours of copyright law—licensors retain copyright in their creations. The licenses have been collaboratively developed and vetted by experts in intellectual property law— they are legally robust and enforceable. The licenses are

perpetual (for the duration of copyright) and irrevocable. The CC licenses are easy to apply, and there are thousands of projects and websites that already integrate open licensing into their online platforms, making works easy to share, discover, and use.

There are specific benefits to creators that share under CC licenses. All CC licenses require that users of licensed materials must give appropriate credit to the creator of the work. Users may give credit in any reasonable manner, but not in such a way that suggests that the author endorses the use. The license requires that a user provide a link to the license, and also indicate if changes to the work were made.

In turn, there are important advantages for users of CC licensed works. By sharing works under CC licenses, the creators allow users to access and use the work under terms more liberal than the “all rights reserved” default copyright. By providing these permissions in advance, users can bypass the requirement to clear their intended use of the works with the creator, because the creator has already given permission (with limited conditions, such as attribution) under the license.

It’s valuable and practical for the Department to consider CC BY as the default licensing solution that meets the definition described in the NPRM. CC BY is widely recognized and well-understood, and it’s already in use for materials created under other federal grant programs such as TAACCCT and other Department of Labor and Department of State grants. Department funded resources shared under CC BY can be easily be used and adapted within other initiatives where CC BY is already the default licensing rule. These include open courseware projects at major universities and colleges, K-12 school curricula, innovative open textbook offerings, and diverse educational materials published by leading philanthropic foundations such as the William and Flora Hewlett Foundation, the Ford Foundation, and the Bill & Melinda Gates Foundation. CC BY meets the objective that the public should be granted liberal rights to access and reuse the materials created as a result of its tax dollars, including for innovative and entrepreneurial commercial purposes.

CC BY can also be remixed with the maximum number of other CC licenses. Adding share-alike (SA) or non-commercial (NC) conditions to an open license requirement is not ideal as additional license conditions: (1) reduce the potential remix with other CC licensed works, (2) creates confusion among educators who may think their use is commercial (e.g., “my community college charges tuition”) when it is not, and (3) reduces the public’s ability to make maximum use of publicly funded education and information resources.

It will be helpful to grantees for the Department to be clear about which open license the Department requires them to use (at least in the implementation guidance if not in the rule itself). Doing so will prevent grantees from writing their own licenses that are not interoperable with the existing one billion (and growing) CC-licensed works.

Regarding software covered by the open licensing requirements, the Department's draft policy states:

“a grantee that is awarded direct competitive grant funds must openly license all computer software source code developed or created with these grant funds under an intellectual property license that allows the public to freely use and build upon computer source code created or developed with these grant funds.”

In order to provide more clarity to grantees about what types of software licenses are expected, the Department should consider using language from the TAACCCT program, which mentions standardized open licensing definitions that will be familiar to software developers.

“Further, the Department requires that all computer software source code developed or created with TAACCCT funds will be released under an intellectual property license that allows others to use and build upon them. Specifically, the grantee will release all new source code developed or created with TAACCCT grant funds under an open license acceptable to either the Free Software Foundation and/or the Open Source Initiative.”

Analogous to the open licensing recommendations for content, the Department could recommend a similarly permissive license with regard to software.

What further activities would increase public knowledge about the materials and resources that are created using the Department's grant funds and broaden their dissemination?

In addition to the direct competitive grants, we encourage the Department to build upon this idea and make open licensing of publicly-funded educational resources the default for all Department funds. Regardless of whether the Department decides to do this, it should provide better information online about which of their grants would be covered by the open licensing requirement. New America reports that the Department “does not maintain a comprehensive list of annual competitive funding.” In lieu of this, New America has estimated—by relying on the most current budget information—that

the Department will award approximately \$2.8 billion in competitive grants in 2015. It will be helpful for prospective grantees and the public to know which grants will be subject to the open licensing policy.

What technical assistance should the Department provide to grantees to promote broad dissemination of their grant-funded intellectual property?

In order to increase public knowledge about the materials and resources that are created using Department grant funds, we suggest the Department include information to grantees about standard open licensing, publishing expectations and other best practices. This might include guidance on how to properly mark a work under a standard open license, advice on finding and reusing existing openly licensed educational resources before creating new materials, sharing editable content so that it may be adapted by the public, and suggestions (or requirements) about publicly accessible, online repositories where the grant-funded resources can be published, shared, and archived. For TAACCCT, Creative Commons provides technical support services to grantees. Many of the topics relevant to open licensing compliance and best practices can be seen in the TAACCCT Round 4 SGA.

It is important to provide standard open licensing, repository and other requirements as early as possible in the grant process so Department grantees know what is expected of them. The TAACCCT program was initially silent about where grant-funded content should be published, and this caused confusion among grantees. Eventually, the Department of Labor alerted its grantees that all TAACCCT grant deliverables covered under the open licensing policy must be submitted to this open educational resources repository: <https://www.skillscommons.org>.

What experiences do you have implementing requirements of open licensing policy with other Federal agencies? Please share your experiences with these different approaches, including lessons learned and recommendations that might be related to this document.

CC has worked with the Departments of State (including USAID), Labor and Education in implementing open licensing policies. For a full list, see the “US: Department” open policies at: https://wiki.creativecommons.org/wiki/Category:OER_Policy_Registry

CC worked with the Department of Labor on implementing its open licensing policy for the TAACCCT and other grant programs. By requiring all of the educational resources built or revised with TAACCCT grant funds to be licensed under a Creative Commons

Attribution 4.0 International license (CC BY), the Department of Labor made sure the resources created with its grant funds can be easily discovered and legally reused and revised by the public.

We've seen several interesting examples of how openly licensed content is being incorporated into this program, and reused by other projects. One is a TAACCCT grantee that was about to spend significant grant funds to create wind technology training videos and found a set of resources already created by a National Science Foundation (NSF) grantee that fit their needs. The problem was the NSF-funded resources were marked "all-rights-reserved copyright." Creative Commons and the TAACCCT grantee contacted the NSF grantee and persuaded the NSF grantee to release their videos under the CC BY license so that it would be easier for TAACCCT grantees to reuse and remix the videos for their own purposes. This example demonstrates why it's important for publicly funded resources to be marked with a standard open copyright license.

A second TAACCCT example (also CC BY licensed) is the Northeast Resiliency Consortium - developing a psychological trauma prevention training curriculum to address a gap in EMS training. Working with industry partners, this Department of Labor grantee discovered "EMS practitioners are often a patient's first contact into the healthcare system, and this curriculum provides a great opportunity to fill a much needed gap in psychological trauma prevention." Working with publisher Jones & Bartlett Learning and adaptive learning pioneer Smart Sparrow, the National Association of Emergency Medical Technicians will integrate the curriculum into its learning material, which will be offered to EMS training centers across the country. Because of Labor's CC BY open licensing requirement, these materials are OER. "This open educational content will be available to everyone and the Psychological Trauma Prevention curriculum and the eSCAPE protocol has the opportunity to impact an entire first responders industry," said Paul Casey, director of the Northeast Resiliency Consortium.

In order to increase efficiency by leverage existing openly-licensed materials, the Department of Labor also required its round 3 and 4 grantees to reuse CC BY licensed resources created in earlier rounds of the TAACCCT program, stating:

"Applicants will also incorporate existing Open Educational Resources (OER), including those resources developed in previous TAACCCT projects, into their programs, as appropriate to reduce program costs, including the cost of program development. This reduction in program costs could include savings to

students for learning materials, textbooks, and other resources whether required or recommended for the program of study.” (p. 11, Round 4 SGA)

Finally, the Department exempts the following from the proposed open licensing requirement:

“Peer-reviewed research publications that arise from scientific research funded, either fully or partially, from grants awarded by the Institute of Education Sciences that are already covered by the Institute's public access policy found at <http://ies.ed.gov/funding/researchaccess.asp>.”

The grants awarded by the Institute of Education Sciences should be covered under the Department’s proposed open licensing policy. We don't believe that the Department should remove a single set of materials from their open licensing policy simply because there is already another policy in place. The public access policy already adopted by the Institute of Education Sciences is weaker than the Department’s proposed open licensing policy because it does not contain an open licensing requirement. The Department has still not yet released its plan for how it will “support increased public access to the results of research funded by the Federal Government” as directed by the Office of Science and Technology Policy on February 23, 2013. In any case, the OSTP directive sets a floor—not a ceiling—on how “open” publicly-funded research articles can be. There is already a strong preference for CC BY for research article outputs, as demonstrated by the policies adopted by institutions such as the Research Councils UK and the Bill & Melinda Gates Foundation. We hope that the Department’s plan, once released, will take a progressive stance toward open licensing peer-reviewed research publications in addition to grant-funded resources.

We applaud the Department for their commitment in working toward an open licensing policy for copyrightable works created using funds from direct competitive grant programs. We are happy to assist in any way we can.

Sincerely,

Ryan Merkley, CEO
Cable Green, Director of Global Learning
Timothy Vollmer, Manager of Public Policy
Creative Commons