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STM Response to the Request for Information Regarding Federal Technology Transfer Authorities and Processes

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STM welcomes this opportunity to respond to the “Request for Information Regarding Federal Technology Transfer Authorities and Processes,” as published on May 1, 2018 in 83 FR 19052, Docket Number: 180220199-819-01. As requested, we have listed the RFI questions next to our responses to indicate which questions we are answering below.

(1) What are the core Federal technology transfer principles and practices that should be protected, and those which should be adapted or changed?

The Federal government’s investment in research and development has been critical to the competitiveness and national security of the United States, and the private sector has been a key partner in enhancing and enabling the broadest possible impact of that investment. STM Publishers support the efforts of NIST, OSTP, and the Administration to address challenges and opportunities in practices, policies, regulations, and laws that promote the application of Federal technologies, including through commercialization.

The framework of the Bayh-Dole Act of 1980 has been central to the success of American researchers and research institutions in bringing new ideas and new products to the public, and should be maintained. This framework has enabled the research community and the private sector to partner with Federal government funders to ensure the greatest return on the government’s investment in research, ensuring that the latest discoveries become real knowledge, innovation, and products that can improve people’s lives.

STM Publishers have long been committed to partnering with the research community and its funders to ensure the widest possible use and impact of the latest research discoveries. This commitment to scholarly communication is central to our mission. Publishers invest, innovate, and evolve their services to meet researchers' needs in order to best facilitate further discoveries and innovations. Such services include the development and provision of new delivery methods and options for scholarly literature.

Copyright an essential right to enhance effective transfer of technology, knowledge, and capabilities

We applaud NIST's recognition in the RFI that copyrighted works that report on or derive from federally-funded research face challenges to commercialization due to uncertainty with respect to grantee or contractor rights and agency-imposed license terms. The certainty provided by the Bayh-Dole Act for patentable discoveries has been a catalyst for broadening the impact of federally-funded research and development, ensuring the same rights for copyrighted works could similarly expand the commercialization and impact of knowledge developed with Federal funds.

While patents and copyrights are different forms of intellectual property, the legal structures governing intellectual property provide structures and incentives that promote the widest and most equitable dissemination of knowledge. In his 2013 paper, *How Copyright Drives Innovation: A Case Study of Scholarly Publishing in the Digital World*, George Mason University Law professor Adam Mossoff reinforced this idea, saying the "dynamic development of innovative distribution mechanisms requires substantial investment in both people and resources [and] makes the commercialization policy an essential feature of copyright law (and of all intellectual property doctrines)." Similar to patents, copyrights incentivize intermediaries to invest in and create new mechanisms for distributing knowledge to the public. The Bayh-Dole Act seeks to harness this strength of intellectual property to incentivize such distribution. Similarly, copyrights on software or any other digital product derived from federally-funded research should be promoted to similarly strengthen their impact, just as the government protects the right of the researcher to assert their patents on life-saving drugs or mobile computing technologies.

This core principle, that the best way to ensure the widest possible reach and impact of intellectual property related to federally-funded research is to give researchers the rights and incentives inherent in that intellectual property, is one worth protecting and strengthening as the Administration continues to work to improve the return on investment of its R&D enterprise. STM also supports any efforts, as suggested by the introductory remarks in the Gaithersburg public forum, to better improve the awareness and understanding of intellectual property rights, both in the general public and in the research and use community.

(2) What are the issues that pose systemic challenges to the effective transfer of technology, knowledge, and capabilities resulting from Federal R&D? Please consider those identified in the RFI as well as others that may have inhibited collaborations with Federal laboratories, access to other federally funded R&D, or commercialization of technologies resulting from Federal R&D.

As noted in the RFI and mentioned by many commenters at the public forums set up pursuant to the RFI, inconsistent practices across the Federal government and uncertainty for researchers with respect to their intellectual property rights to license or commercialize their works hinders the use

and commercialization of federally-funded research. STM publishers recommend that the government provide funded researchers an explicit right to copyright software and other digital products that report on or derive from federally-funded research, and to harmonize the inconsistent interpretation of government rights to IP that work in the opposite direction of the principle of removing barriers to the commercialization of intellectual property.

An example of such counter-productive practices is reflected by the US Department of Education's Open Licensing Requirement for Competitive Grant Programs, which, counter to the principle of the Bayh-Dole Act discussed above, actively prevents the commercialization of intellectual property created by a grant recipient. The rule seems to be based on a misinformed view that copyright exists only as an incentive to create content, rather than a full view of copyright's critical role as a catalyst for dissemination, use, and innovation through commercialization. Despite several comments to the initial proposed rule for the Open Licensing Requirement that emphasized the contradiction between this policy and to tech transfer practices made possible by the Bayh-Dole Act, the Department of Education finalized the rule on January 19th 2017. The rule says that copyrighted works developed with any Department of Education competitive grant funding must be made available under a license that authorizes nearly unlimited reuse of any such works, undermining the rightsholder's ability to best ensure its widest use and impact through commercialization. The rule applies to the recipients of competitive grants whether the Department's funding was used for one small part of the content or the entire copyrighted work. Scholastic, the creators of *Clifford the Big Red Dog* children's television series, *Sesame Street*, and other well-known educational programming creators may now need to look elsewhere for investment in content they intend to license to organizations such as HBO and Netflix because they believe that the best way to ensure the wide use of the content is inconsistent with the government's demand that they give up exclusive intellectual property rights as a condition of accepting any funding. This limits the government's ability to support high-quality and high-impact educational material.

(3) What is the proposed solution for each issue that poses a systemic challenge to the effective transfer of technology, knowledge, and capabilities resulting from Federal R&D? Please consider the approaches identified in the RFI.

Removing barriers to commercialization of intellectual property derived from federally-funded grants was precisely the problem the Bayh-Dole Act intended to solve, but such barriers still remain with respect to copyrighted works. We urge NIST, OSTP, and the Administration to address this oversight going forward.

Very truly yours,



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