

DISCUSSION DRAFT APRIL 7, 2014
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Liblicense Model License Agreement & Commentary

INTRODUCTION

This Liblicense Model License Agreement (“LMLA”) has been prepared to assist information professionals, executives, and others who regularly acquire digital content. The intent of this LMLA is to present information professionals with a sound and realistic template of the key issues involved in negotiating a license to acquire or use digital content.

While LMLA may be used in most digital content licensing situations, it has been drafted with a particular focus on licensing issues in higher education. LMLA’s terms and conditions are based on United States common and statutory law, and references to US law would need to be changed if used in other jurisdictions. This document may be used as a template for a license or as a reference document that assists professionals in negotiating (or preparing to negotiate) digital content license agreements.

Several LMLA provisions (including the jurisdiction and warranty provisions) likely will require modification in order to serve your organization’s purposes. If you plan to use LMLA as the basis for your institution’s license agreement, Liblicense editors strongly recommend that you review and amend this model agreement with the assistance of a capable attorney or other licensing professional who has experience in dealing with commercial contracts, licensing, and institutional policy. This LMLA does not constitute legal advice.

A previous iteration of the LMLA included a Short Form Agreement. With the emergence of the Shared E-Resource Understanding (“SERU”)¹ that is a NISO recommended best practice, Liblicense editors have discontinued the Short Form Agreement.

This LMLA is Version 4.0, and is effective May 2014. It supersedes previous LMLA versions. For comments, please contact the Liblicense editors.

EDITORIAL NOTES

1. Editorial notes are enclosed in curly brackets and italicized like this: *{editorial notes in italics between curly brackets}*. These comments should not appear in an actual license agreement.
2. Where a clause requires one or more parties to enter information, those options are delineated by the open, square brackets around bold faced type like this: **[enter necessary information between square brackets]**. These comments should be replaced by the required text, without brackets, in an actual license agreement.
3. Footnotes are used exclusively to list Web site uniform resource locators, and are provided for convenience only. Neither the footnote markers nor the footnote text should appear in any final agreement. If your final agreement references external Web sites, the uniform resource locators (URLs) for those sites should be incorporated into the appropriate clauses.

¹ <http://128.8.237.133/committees/SERU/index.html>

**DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU**

4. Version 4.0 of the LMLA is available as a Word document and in Adobe™ Portable Document Format (.pdf).
5. Following common contract drafting practices, terms are defined the first time they appear, and are capitalized thereafter. For example, Authorized Users in section 3.

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**DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU**

**DISCUSSION DRAFT
MODEL AGREEMENT**

This License Agreement, along with any appendices or attachments (the "Agreement"), is made effective as of [enter date] (the "Effective Date") between [Enter publisher's official corporate name, address, city, state, and postal code] the "Licensor") and [Enter licensing institution's official corporate or entity name, address, city, state, and postal code] (the "Licensee").

In consideration of the mutual promises this Agreement contains, and other valuable and sufficient consideration, the Licensor and Licensee agree as follows:

1. GRANT OF LICENSE

1.1. Nature of Materials. The materials that are the subject of this Agreement consist of [describe licensed materials with reasonable specificity] (the "Licensed Materials").

1.2. Grant of License. Licensor grants to Licensee non-exclusive, perpetual, worldwide access to and use of the Licensed Materials, and the right to provide the Licensed Materials to Authorized Users (which are defined in Section 4, below) in accordance with this Agreement's terms and conditions.

1.3 Ownership of Intellectual Property. The Licensee and its Authorized Users (which are defined in Section 4, below) acknowledge that the Licensor or its suppliers retain ownership of the Licensed Materials' copyright and any trademarks or service marks related to the Licensed Materials. Licensor agrees not to restrict re-use for any content in the Licensed Materials that are in the public domain in the United States and no longer protected by copyright.

Ownership of the Licensed Materials may be subject to terms, conditions, or exceptions set forth elsewhere in this Agreement.

2. FEES

2.1 Fees and Payment. Licensee shall pay Licensor for the Licensed Materials pursuant to the terms set forth in Schedule 1, which is attached hereto.

2.2 Notice of price increases. Licensor shall provide Licensee with a price list for all Licensed Materials no less than sixty (60) days prior to end of the current term.

3. AUTHORIZED USERS AND USES

3.1 Authorized Users. The Licensor and Licensee define "Authorized Users" as the following:

- a. The Licensee's full-time and part time students, regardless of their physical location;
- b. The Licensee's fulltime and part-time employees (including faculty, staff, affiliated researchers and independent contractors), regardless of their physical location; and

DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU

c. Patrons not affiliated with Licensee who are physically present at Licensee's site(s) ("Walk-ins").

3.2 Authorized Uses. The Licensee and the Authorized Users may access and use the Licensed Materials in ways that are consistent with this Agreement's terms and conditions and the Copyright Act of 1976 (17 U.S.C. § 101, et seq.) (the "Copyright Act"), including the Copyright Act's limitations on exclusive rights provisions, such as 17 U.S.C. § 107: Fair use. Additionally, the Licensee and Authorized Users may access or use the Licensed Materials for the following purposes:

- a. *Usage Rights.* Licensee and Authorized Users may electronically display, download, digitally copy and print a reasonable portion of the Licensed Materials. Licensee may charge a reasonable fee to cover costs of copying or printing portions of Licensed Materials for Authorized Users.
- b. *Course reserves (Print and Electronic).* Licensee and Authorized Users may use a reasonable portion of the Licensed Materials for use in connection with specific courses of instruction offered by Licensee or its parent institution.
- c. *Education, Teaching and Research.* Licensee and Authorized Users may extract and use information contained in the Licensed Materials for educational, scientific, or research purposes, including extraction and manipulation of information or images for the purpose of illustration, explanation, example, comment, criticism, teaching, research, and analysis.
- d. *Electronic Links.* Licensee may provide hyperlinks from the Licensee's web page(s) or web site(s) to individual units of content within the Licensed Materials.
- e. *Caching.* Licensee and Authorized Users may make such local digital copies of the Licensed Materials as are necessary to ensure efficient use by Authorized Users' appropriate browser or other software. For the avoidance of doubt, the cached copy is not a derivative work.
- f. *Scholarly Sharing.* Authorized Users may transmit to a third party colleague, in hard copy or electronically, reasonable amounts of the Licensed Materials for personal, scholarly, educational, scientific, or research uses, but in no case for resale or commercial use. In addition, Authorized Users have the right to use, with appropriate credit, figures, tables and brief excerpts from the Licensed Materials in the Authorized User's own scientific, scholarly and educational works
- g. *Interlibrary Loan.* Licensee may fulfill requests from other institutions, a practice commonly called Interlibrary Loan. Licensee agrees to fulfill such requests in accordance with Sections 107 and 108 of the U.S. Copyright Act. Requests may be fulfilled using electronic, paper, or intermediated means.
- h. *Bibliographic citations.* Licensee and Authorized Users may use citation and abstract information in faculty profiling systems, in lists of publications on faculty and institution web pages, and to create bibliographies.
- i. *Authors' own works.* Notwithstanding any terms or conditions to the contrary in any author agreement between authors and Licensor, authors who are

**DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU**

Authorized Users of Licensee (“Authors”) whose work (“Content”) is accepted for publication by Licensor during the Term shall retain the non-exclusive, irrevocable, worldwide, royalty-free right to use their Content for scholarly and educational purposes, including self-archiving or depositing the Content in institutional, subject-based, national or other open repositories or archives (including the author’s own web pages or departmental servers), and to comply with all grant or institutional requirements associated with the Content.

For the avoidance of doubt, it is the intent of the parties to this License Agreement that Licensee’s Authors are third party beneficiaries of this provision of the Agreement. Nothing in this section shall eliminate or limit any other rights that Licensee or any Author may have to deposit, host or make available Content published by Licensor.

Scholarly and educational purposes encompass teaching, research, and institutional needs, including but not limited to the right to (a) use, reproduce, distribute, perform, and display the Content in connection with teaching, conference presentations, and lectures; (b) make full use of the Content in future research and publications; (c) republish, update or revise the Content in whole or in part for later publication; (d) meet requirements and conditions of research grants or publishing subventions provided by government agencies or non-profit foundations, and; (e) grant to the Author’s employing institution some or all of the foregoing rights, as well as permission to use the Content in connection with administrative activities such as accreditation, mandated reports to state or federal governments, and similar purposes. In all cases, the Author and/or the Author’s employing institution will be expected to provide proper citation to the published version.

- j. *Text and Data Mining.* Authorized Users may use the Licensed Materials to perform and engage in text or data mining activities for academic research, scholarship and other educational purposes, and to utilize and share the outputs of text and data mining in their scholarly work. Licensor will cooperate with Licensee and Authorized Users in making the Licensed Materials available in a manner and form most useful to the Authorized User. Any Licensor fees for provision of copies will be on a time and materials basis only.
- k. *Backup Copy.* Upon request of Licensee, Licensor shall provide to Licensee or Licensee may create one (1) copy of the entire set of Licensed Materials to be maintained as a backup copy. The backup copy will be stored in a dark archive that is not accessible to Authorized Users. In the event that the Agreement is terminated, Licensee may exercise any perpetual license rights granted in this Agreement. If no perpetual license rights are granted, Licensee will destroy all backup copies within ten (10) business days of termination of this Agreement.

4. DELIVERY AND ACCESS

4.1 Delivery. Licensor will provide or otherwise make available the Licensed Materials to the Licensee through telecommunications, network, or Web-based connections between one or more of Licensor’s physical, online, or virtual locations, and one or more of Licensee’s authorized physical, online, or virtual locations. Licensor will use reasonable efforts to ensure that Licensed Materials will be accessible and inter-operable with prevailing web browsers including at a minimum, the most recent two major releases (current release and one release prior) and all the associated subsets. Any

**DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU**

upgrades or functional changes to the Licensor's software and servers will be implemented in a manner that ensures that, at a minimum, the most recent two major releases and all of the associated subsets of prevailing web browsers at that time will continue to inter-operate with the Licensor's software and servers and be able to access, retrieve and display the Licensed Materials.

4.2 Access and Authentication. Licensor will allow the Licensee and its Authorized Users to have access to the Licensed Materials pursuant to the terms, conditions, and specifications set forth in Schedule 2, which is attached hereto. Licensor will use reasonable efforts to provide authentication methods which are current industry standards.

4.3 Restrictions.

Licensor and Licensee agree to the following use and access restrictions on the Licensed Materials.

- a. *Unauthorized Use.* Except as specifically provided elsewhere in this Agreement, Licensee shall not knowingly or intentionally permit anyone other than Authorized Users to use the Licensed Materials.
- b. *Modification of Licensed Materials.* Licensee shall not modify or create a derivative work of the Licensed Materials without the Licensor's express, prior, and written permission, except as provided for in this Agreement.
- c. *Removal of Copyright or Trademark Notice.* Licensee may not remove, obscure or modify any copyright, trademark or other notices included in the Licensed Materials.
- d. *Commercial Purposes.* Other than as specifically permitted in this Agreement, Licensee may not use the Licensed Materials for commercial purposes. This restriction expressly prohibits the Licensee from selling the Licensed Materials.

5. PERFORMANCE OBLIGATIONS

5.1 Licensor Performance Obligations. The Licensor agrees that its performance always will meet or exceed reasonable standards of the industry. Additionally, the Licensor agrees to the following performance standards.

- a. *Availability of Licensed Materials.* The Licensor will make the Licensed Materials available to the Licensee and Authorized Users within [enter time period] of the Effective Date.
- b. *Discovery of Licensed Materials.* Licensor shall make the Licensed Materials available through Licensee's Discovery Service System(s) for indexing and discovery purposes. Licensor shall provide to Licensee's discovery service vendors on an ongoing basis the citation metadata (including all subject headings and keywords), abstract and full-text content necessary to facilitate optimal discovery of the content for the benefit of Licensee and Authorized Users.

Discovery Service Systems: User interface and search systems for discovering and displaying content from local, database and web-based sources.

DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU

- c. *Persistent Linking.* Licensor will comply with the OpenURL standard, and will provide a mechanism for persistent links to content.
- d. *“Click-Through” License Terms.* In the event that Licensor requires Authorized Users to agree to terms relating to the use of the Licensed Materials before permitting Authorized Users to gain access to the Licensed Materials (commonly referred to as “click-through” or “clickwrap” licenses), or otherwise attempts to impose such terms on Authorized Users through mere use or viewing of the Authorized Materials, Licensor shall provide Licensee with notice of and an opportunity to comment on such terms prior to their implementation. In no event shall such terms materially differ from the provisions of this Agreement. In the event of any conflict between the terms and conditions of a clickwrap or online agreement and this Agreement, the terms of this Agreement shall prevail.
- e. *Disabilities Compliance.* Licensor shall comply with the Americans with Disabilities Act (ADA), by supporting assistive software or devices such as large print interfaces, text-to-speech output, voice-activated input, refreshable braille displays, and alternate keyboard or pointer interfaces in a manner consistent with the Web Accessibility Initiative Web Content Accessibility Guidelines.² Licensor shall provide Licensee current completed Voluntary Product Accessibility Template (VPAT) to detail compliance with the federal Section 508 standards.
- f. *Documentation.* Licensor will provide full, complete, and up-to-date help and operational documentation for Licensee and Authorized Users in an electronic format. Additionally, Licensor will make this documentation available in a location on its Web site that does not require Authorized Users to log in, use, or otherwise access the Licensed Materials.
- g. *Support.* Licensor will provide activation and installation support, including assisting with the implementation of any Licensor software. Licensor will offer reasonable levels of continuing support to assist Licensee and Authorized Users in use of the Licensed Materials. Licensor will make its personnel available by email, phone or fax during Licensee’s regular business hours, Monday – Friday, [or enter another time period] for feedback, problem-solving, or general questions.
- h. *Training.* Licensor will provide appropriate training to Licensee’s staff relating to the use of the Licensed Materials and any Licensor software. Licensor also will provide additional training to Licensee staff made necessary by any updates or modifications to the Licensed Materials or any Licensor software.
- i. *Updates.* Licensor will provide regular system and project updates to Licensee as they become available.
- j. *Quality of Service.* Licensor shall use reasonable efforts to ensure that the Licensor’s server or servers have sufficient capacity and rate of connectivity to provide the Licensee and its Authorized Users with a quality of service comparable to current standards in the online information industry in the Licensee’s locale. Licensor shall use reasonable efforts to provide continuous service with an average of 98% up-time per month. The 98% up-time includes

² <http://www.w3.org/WAI/guid-tech.html>

**DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU**

periodic unavailability due to server maintenance; software installation or testing; loading or making available additional Licensed Materials as they become available; unavailability because of service or equipment failure outside the Licensor's control (including problems with public or private telecommunications services, or Internet nodes or facilities). Licensor may schedule brief unavailability periods, but will do so only where (1) it has given at least 48 hour notice to Licensee, and (2) in ways and at times that minimize inconvenience to Licensee and its Authorized Users, regardless of when notice has been given.

- k. *Licensed Materials Problems.* If the Licensed Materials fail to operate, display, load or render in conformance with the terms of this Agreement, Licensee shall immediately notify Licensor, and Licensor shall promptly use reasonable efforts to restore access to the Licensed Materials as soon as possible. In the event that the non-conformity materially affects the Licensee's or Authorized Users' use of the Licensed Materials, and Licensor fails to repair the nonconformity within five (5) business days, Licensor shall reimburse Licensee for such problems in an amount that is proportional to the total fees Licensor owes pursuant to Section 2 and Schedule 1 of this Agreement.
- l. *Transfer of Titles.* If any portion of the Licensed Materials are transferred to or acquired from another party, Licensor shall use best efforts to ensure that Licensee does not lose access to content as a result of the transfer or acquisition and that any archival and perpetual access rights that have been granted shall be honored whether the Licensor is acting as the transferring or acquiring party. Licensor agrees to communicate with the other party to exchange such relevant payment and rights information. For journal titles, Licensor will use best efforts to comply with the Transfer Code of Practice.³
- m. *Completeness of Content.* Where applicable, Licensor will inform Licensee of instances where online content differs from the print versions of the Licensed Materials. Licensor will cooperate with Licensee to identify and correct content errors or omissions, and when necessary, the Licensor shall use reasonable efforts to ensure that the online content:
 - a. is at least as complete as print and other physical format versions of the Licensed Materials; and
 - b. represents complete, accurate and timely replications of the corresponding content contained within the print and other physical format versions of such Materials.

If online content is a digitized version of print content and differs from the print or other physical format versions of Licensed Materials so as to be substantially less useful to the Licensee or its Authorized Users, the Licensee may treat such content errors or omissions as a material breach subject to the Term, Renewal and Termination provisions of this Agreement at Section 6, below.

In order to facilitate the assessment of completeness of content, Licensor will provide upon request of Licensee a report of the content in the Licensed Materials at the issue, chapter or item level. Licensor will disclose to Licensee

³ <http://www.uksg.org/transfer>

DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU

content known or found to be missing from the Licensed Materials, including but not limited to images, pages, issues, and chapters.

- n. *Notification of Modifications of Licensed Materials.* From time to time, Licensor may add, change, or modify portions of the Licensed Materials, or migrate the Licensed Materials to other formats. When such changes, modifications, or migrations occur, the Licensor shall give notice of any such changes to Licensee no less than 30 days in advance of modification. If any of the changes, modifications, or migrations render the Licensed Materials substantially less useful to the Licensee or its Authorized Users, the Licensee may treat such modifications as a material breach subject to the Term and Renewal provisions of this Agreement at Section 6, below.
- o. *Withdrawal of Licensed Materials.* Licensor reserves the right to withdraw from the Licensed Materials any item or part of an item for which it no longer retains the right to publish, or which it has reasonable grounds to believe infringes copyright or is defamatory, obscene, unlawful or otherwise objectionable. Licensor shall give written notice to the Licensee of such withdrawal no later than [time period] following the removal of any item pursuant to this section. If any such withdrawal renders the Licensed Materials less useful to Licensee or its Authorized Users, Licensor shall reimburse Licensee in an amount that the withdrawal is proportional to the total Fees owed by Licensee under this Agreement. If any such withdrawal renders the Licensed Materials substantially less useful to Licensee or its Authorized Users, Licensee may seek to terminate this Agreement pursuant to the early termination provisions of Section 6 and may seek any appropriate legal or equitable remedy.
- p. *Itemized Holdings List.* At least annually or upon request, the Licensor will provide to the Licensee prior to beginning of calendar year within the current term, an itemized holdings report that specifies the titles included in the Licensed Materials for the next subscription term. Publisher will make a good faith effort to update holdings. If the Licensed Materials include journal titles, itemized holdings will be reported in KBART-compliant format.
- q. *Usage Statistics.* Licensor regularly shall provide to Licensee usage statistics for the Licensed Materials. Statistics shall meet or exceed the project COUNTER Codes of Practice Release 4 or later, including but not limited to the provisions on customer confidentiality. Licensor shall not provide Licensee's usage statistics in any form to any third party without the Licensee's written authorization. In all cases, the disclosure of such data shall fully protect the anonymity of individual users and the confidentiality of their searches, and is not contrary to applicable privacy laws. The Licensor shall not disclose or sell to other parties statistical usage information about the Licensee or its Authorized Users without the Licensee's express permission or as required by law.
- r. *Confidentiality of Personally Identifiable Information.* Licensor shall treat as confidential, and not disclose to third parties, usage and other data collected about Licensee including, but not limited to, personally identifiable information of Authorized Users and patterns of use.
- s. *Notice of the Use of Digital Rights Management Technology.* In the event that Licensor utilizes any type of digital rights management technology to control access to or the usage of the Licensed Materials, Licensor agrees to notify

DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU

Licensee of the name, contact information and any technical specifications for the digital rights management technology utilized.

- t. *Notice of Use of Digital Watermarking Technology.* In the event that Licensor utilizes any type of digital watermarking technology for any element of the Licensed Materials, Licensor agrees that watermarks will not be visible to the human eye and will not degrade image quality. These watermarks shall not contain user-related information such as account number or IP address. If digital watermarking technology is used, Licensor agrees to notify Licensee, in advance, of the name, contact information, and any technical specifications for the technology used.
- u. *Open Access Option.* In the event that Licensor offers an open access option to its authors, Licensor agrees to annually review the number of open access articles published in the Licensed Materials under the open access option. For all Licensed Materials in which such articles are published, Licensor will share with Licensee the number of articles published under the open access option by all authors, and number of articles and citations by authors at Licensee's institution, listed by journal title.

Licensor will enter into good faith discussions with Licensee concerning mechanisms by which open access publication fees can offset the subscription fees paid by Licensee and other subscribers of Licensed Materials, with a goal of reducing subscription fees in proportion to the revenue received through such open access publication fees.

5.2 Licensee Performance Obligations. The Licensee agrees that its performance always will meet or exceed reasonable standards of the industry.

Additionally, the Licensee agrees to the following performance standards.

- a. *License Terms Notice.* Licensee shall make reasonable efforts to provide Authorized Users with appropriate notice of the terms and conditions under which access to the Licensed Materials is granted under this Agreement including any restrictions on the use of the Licensed Materials.
- b. *Protection from Unauthorized Use.* Licensee will use reasonable efforts to ensure that only Authorized Users can access the Licensed Materials.
- c. *Maintaining Confidentiality of Access Passwords.* Where access to the Licensed Materials is to be controlled by use of passwords, Licensee shall use reasonable efforts to inform Authorized Users they should not divulge their numbers and passwords to any third party. Licensee shall also use reasonable efforts to maintain the confidentiality of any institutional passwords provided by Licensor.

5.3. Mutual Performance Obligations. In addition to their respective, specific performance obligations, the Licensor and Licensee agree to be bound by the following performance standards.

- a. *Confidentiality of User Data.* Licensor and Licensee agree to maintain the confidentiality of any data relating to the usage of the Licensed Materials by Licensee and its Authorized Users. Such data may be used solely for purposes directly related to the Licensed Materials and may only be provided to third

**DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU**

parties in aggregate form. Raw usage data, including but not limited to information relating to the identity of specific users and /or uses, shall not be provided to any third party.

- b. *Implementation of Developing Security Protocols.* Licensee and Licensor shall cooperate in the implementation of security and control protocols and procedures as they are developed during the term of this Agreement.
- c. *Notification of Unauthorized Use.* In the event the Licensee has notice of an unauthorized use of the Licensed Materials, the Licensee shall notify the Licensor. Any unauthorized use that is considered a breach of obligations under this Agreement shall be subject to Section 6.3, below, including the cure period.

In the event the Licensor has notice of unauthorized use of the Licensed Materials, the Licensor may

- i. terminate such Authorized User's access to the Licensed Materials;
or
- ii. terminate the access of the Internet Protocol ("IP") address(es) from which such unauthorized use occurred. In such circumstances, the Licensor will notify the Licensee of its decision to terminate such access promptly after having done so; or
- iii. Licensee may terminate such Authorized User's access to the Licensed Materials upon Licensor's request.

Licensor shall take none of the steps described in this paragraph without first providing reasonable notice to Licensee (in no event less than [time period]) and cooperating with the Licensee to avoid recurrence of any unauthorized use.

6. TERM, RENEWAL AND TERMINATION

6.1 Agreement Term. This Agreement shall be in effect from the Effective Date until [enter specific time and time zone] on [enter date].

6.2 Renewal. This Agreement shall be renewable at the end of the current term for a successive [length of time] term unless either party gives written notice of its intention not to renew [time period] before expiration of the current term, provided that notification of non-renewal is no less than thirty (30) days after Licensor notifies Licensee of prices for the next term as provided for in Section 2.32

6.3 Early Termination for Financial Exigency. The Licensee may terminate this Agreement without penalty if sufficient content acquisitions funds are not allocated to enable the Licensee, in the exercise of its reasonable administrative discretion, to continue this Agreement. In the event of such financial circumstances, Licensee agrees to notify Licensor of the intent to terminate the Agreement as soon as is reasonably possible, but in any case, no less than [X days] prior to next payment date. *{Licensee editors suggest that this clause may be most appropriate for multiple year Agreements.}*

6.4 Termination for Breach. If either party believes that the other has materially breached any obligations under this Agreement, such party shall so notify the other party of the alleged breach in writing.

**DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU**

The breaching party shall have [enter cure time period, such as thirty (30) days] from the receipt of notice to cure the alleged breach and to notify the non-breaching party in writing that cure has been effected. If the breach is not cured within the [enter cure time period, such as thirty (30) days], the non-breaching party shall have the right to terminate the Agreement without further notice. Once this Agreement ends, by early termination or otherwise, the Licensor may terminate (or cause termination of) access to the Licensed Materials by Licensee and Authorized Users subject to Section 8, Perpetual License and Archives. In addition, authorized copies of Licensed Materials made by Authorized Users may be retained for educational purposes and used subject to the terms of this Agreement.

6.5 Refunds. In the event of early termination as permitted by this Agreement, Licensee shall be entitled to a refund of any fees or pro-rata portion thereof paid by Licensee for any remaining period of the Agreement from the date of termination.

7. DISPUTE RESOLUTION

7.1 Dispute Resolution. In the event any dispute or controversy arising out of or relating to this Agreement, the parties agree to exercise their best efforts to resolve the dispute as soon as possible. The parties shall, without delay, continue to perform their respective obligations under this Agreement that are not affected by the dispute. If the Licensor and Licensee cannot resolve their dispute after reasonable effort and a reasonable period of time, the parties agree to resolve the dispute using one of the following methods in lieu of litigation. *{The mediation clause and arbitration clauses may be chosen together, or the arbitration clause may be chosen by itself.}*

a. *Mediation.* The Licensor and Licensee may submit their dispute to a neutral, non-binding mediation prior to the commencement of arbitration, litigation, or any other proceeding before a trier of fact. The parties to the dispute or claim agree to act in good faith to participate in mediation, and to identify a mutually acceptable mediator. (If a mediator cannot be agreed upon by the parties, each party shall designate a mediator and those mediators shall select a third mediator who shall act as the neutral mediator, assisting the parties in attempting to reach a resolution.) The Licensor and Licensee will share equally in the cost of the mediator(s), and commit to completing at least four hours of mediation before seeking any other dispute resolution method, legal remedy, or equitable remedy. If the mediation is successful, its resolution will be documented by a written agreement executed by all parties. If the mediation does not successfully resolve the dispute or claim, the mediator shall provide written notice to both parties. At this point, the Licensee and Licensor may seek another alternative form of resolution of the dispute or claim, consistent with the remaining terms of this agreement and other legal rights and remedies, or commence litigation.

b. *Arbitration.* If mediation does not resolve a controversy or dispute between the Licensor and Licensee, the parties shall resolve the dispute by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties shall select a mutually acceptable arbitrator knowledgeable about issues relating to the subject matter of this Agreement. (In the event the parties are unable to agree to such a selection, each party will select an arbitrator and the arbitrators in turn shall select a third arbitrator.) The arbitration shall take place at a location that is reasonably centrally located between the parties, or otherwise mutually agreed upon by the parties. All

**DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU**

documents, materials, and information in the possession of each party that are in any way relevant to the claim(s) or dispute(s) shall be made available to the other party for review and copying no later than [enter time period] after the notice of arbitration is served.

The arbitrator(s) shall not have the authority, power, or right to alter, change, amend, modify, add, or subtract from any provision of this Agreement or to award punitive damages. The arbitrator shall have the power to issue mandatory orders and restraining orders in connection with the arbitration. The award rendered by the arbitrator shall be final and binding on the parties, and judgment may be entered thereon in any court having jurisdiction. The agreement to arbitration shall be specifically enforceable under prevailing arbitration law. During the continuance of any arbitration proceeding, the parties shall continue to perform their respective obligations under this Agreement.

8. PERPETUAL LICENSE AND ARCHIVES

8.1 Perpetual License. Notwithstanding anything else in the Agreement, Licensor grants to Licensee a nonexclusive, royalty-free, perpetual license to use any Licensed Materials that were accessible during the term of this Agreement. Such use shall be in accordance with the provisions of this Agreement, which provisions shall survive any termination of this Agreement. The means by which Licensee shall have access to such Licensed Materials shall be in a manner and form substantially equivalent to the means by which access is provided under this Agreement.

8.2 Archival Copy. Upon request of Licensee, Licensor shall provide to Licensee or Licensee may create one (1) copy of the entire set of Licensed Materials to be maintained as an archival copy. Licensor shall provide an archival copy without any digital rights management in a mutually agreeable medium suitable to the content and any fees for provision of copies will be on a time and materials basis only.

In the event the Licensor discontinues or suspends selling or licensing the Licensed Materials, the Licensee may use such archived Licensed Materials under the same terms as this Agreement.

8.3 Third Party Archiving Services. Licensor acknowledges that Licensee may engage the services of third-party trusted archives and/or participate in collaborative archiving endeavors to exercise Licensee's rights under this section of the Agreement. Licensor agrees to cooperate with such archiving entities and/or initiatives as reasonably necessary to make the Licensed Materials available for archiving purposes. Licensee may perpetually use the third-party trusted system to access or store the Licensed Materials, so long as Licensee's use is otherwise consistent with this Agreement. Licensor further acknowledges and agrees that, in using the third-party archival system, Licensed Materials may be made available to other system participants who indicate a right to those Licensed Materials.

9. WARRANTIES & IDEMNIFICATION

9.1 Warranties. The Licensor warrants the following:

a. Licensor warrants it has all necessary legal and equitable rights, permissions, and clearances to license the Licensed Materials to the Licensee for the purposes outlined in this Agreement, and that use of the Licensed Materials by Authorized

**DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU**

Users in accordance with the terms of this Agreement shall not infringe the copyright of any third party;

b. Licensor shall indemnify and hold harmless the Licensee and any Authorized Users for any losses, claims, damages, awards, penalties, or injuries they incur (including reasonable attorney's fees) which arise from any third party claim that alleges contract breach, copyright infringement, or other intellectual property infringement arising from the Licensee's or an Authorized User's use or access of the Licensed Materials. Additionally, Licensor agrees that no liability limitation that may appear elsewhere in this Agreement applies to, overrides, or cancels this indemnification.

c. Licensor warrants that any physical object, medium, or container that contains the Licensed Materials is will be free from defects for a period of [enter time period] from delivery.

9.2 Warranty Disclaimers. Notwithstanding anything else in this Agreement,

a. Neither party shall be liable for any indirect, special, incidental, punitive or consequential damages, including loss of data, business interruption, or loss of profits that arises from the use of the Licensed Materials, or inability to use the Licensed Materials.

b. Except for the express warranties stated elsewhere in this Agreement, Licensor disclaims any and all other warranties, conditions, or representations (express, implied, oral or written), relating to the Licensed Materials or any part thereof, including, without limitation, any and all implied warranties of quality, performance, merchantability or fitness for a particular purpose.

9.3 Indemnities. Both Licensor and Licensee agree to indemnify and hold harmless the other party for any losses, claims, damages, awards, penalties, or injuries incurred by any third party (including reasonable attorney's fees) that arise from any alleged breach of the indemnifying party's representations and warranties made under this Agreement, so long as the indemnifying party is promptly notified of any such claims. The indemnifying party shall have the sole right to defend such claims at its own expense. The other party shall provide, at the indemnifying party's expense, such assistance in investigating and defending such claims as the indemnifying party may reasonably request. This indemnity shall survive the termination of this Agreement.

10. MISCELLANEOUS PROVISIONS

10.1 Assignment and Transfer. Neither party may assign, directly or indirectly, all or part of its rights or obligations under this Agreement without the prior written consent of the other party.

Neither party to this Agreement may unreasonably withhold or delay such written consent.

10.2 Governing Law. This Agreement shall be interpreted and construed according to, and governed by, the laws of [venue convenient to Licensor and Licensee], excluding any such laws that might direct the application of another jurisdiction's laws. The federal or state courts located in [venue convenient to Licensor and Licensee] shall have jurisdiction to hear any dispute under this Agreement.

**DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU**

10.3 Force Majeure. Neither party shall be liable in damages or have the right to terminate this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control, including Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections, labor strikes and /or any other cause beyond the reasonable control of the party whose performance is affected.

10.4 Entire Agreement. This Agreement constitutes the entire agreement of the parties and supersedes all prior communications, understandings and agreements relating to the subject matter hereof, whether oral or written.

10.5 Amendment. No modification or claimed waiver of any provision of this Agreement shall be valid except by written amendment signed by authorized representatives of Licensor and Licensee.

10.6 Severability. If any provision or provisions of this Agreement shall be held to be invalid, illegal, unenforceable or in conflict with the law of any jurisdiction, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

10.7 Waiver of Contractual Right. Waiver of any provision herein shall not be deemed a waiver of any other provision herein, nor shall waiver of any breach of this Agreement be construed as a continuing waiver of other breaches of the same or other provisions of this Agreement.

10.8 Notices. All notices given pursuant to this Agreement shall be in writing and shall be sent to the contract addresses noted in the first paragraph of this Agreement. All notices may be hand delivered, or shall be deemed received within [enter time period] after mailing if sent by registered or certified mail, return receipt requested. If any notice is sent by facsimile or electronic mail, confirmation copies must be sent by mail or hand delivery to the specified address. Either party may from time to time change its Notice Address by written notice to the other party.

10.9 Survivability. Sections 1, 3, 7, 8, 9, 10.1, and 10.2 hereof, all indemnification obligations and perpetual license rights shall survive the expiration or termination of the Agreement.

SIGNATURES

IN WITNESS WHEREOF, the parties have executed this Agreement by their respective, duly authorized representatives as of the Effective Date.

Licensor:

By: _____
Signature of Authorized Signatory for Licensor

Date

[Printed Name]
[Title]
[Address]
[Telephone Number]
[Email Address]

DISCUSSION DRAFT APRIL 7, 2014
COMMENTS TO AOKERSON@CRL.EDU

Licensee:

By: _____ Date _____
Signature of Authorized Signatory for Licensee

[Printed Name]
[Title]
[Address]
[Telephone Number]
[Email Address]

DRAFT

