

Model Digitization Agreement*

DIGITIZATION AGREEMENT

[NAME OF LIBRARY]

This AGREEMENT is entered into as of the ____ day of _____, 20____ (“Effective Date”), between [Library Name] (“The Library”), acting on behalf of [University Name] (the “University”), with principal offices at [university address] and _____ (the “Publisher”), with principal offices at _____.

WHEREAS, the Publisher desires to make digital copies of selections from certain Collections in the [NAME OF COLLECTION, DEPARTMENT, OR LIBRARY] (“the Selection”); and

WHEREAS, the Publisher desires to incorporate the digitized images of the Selection in an electronic commercial product (“the Publication”) To authorized users so that they can access, display, refine, and print images from the Selection for research and private study, and

WHEREAS, the Library desires to preserve and enhance the accessibility of the Selection to the academic community and the general public in a manner in accordance with the Library’s public service and educational mission, and consistent with the “ARL Principles to Guide Vendor/Publisher Relations in Large-Scale Digitization Projects of Special Collections Materials of June 2010” (http://www.arl.org/bm~doc/principles_large_scale_digitization.pdf) and the terms and conditions set out below;

THEREFORE, in recognition of mutual consideration, the Library and the Publisher (collectively the “Parties”) enter into this Agreement to allow the Publisher to access and make Digital Copies of selected Works from the collections of the Library as described in this Agreement in accordance with the terms set forth below. A general description of the project is set forth in Appendix A.

1. License to Access the Library Collections and to Make Digital Copies

(a) As the holder/owner of certain rare or special collections, the Library grants to the Publisher, during the Term, as defined in Paragraph 2(a) below, access to the Library’s collections for the purposes of researching and selecting works to be included in Publisher’s digitization project. Access will be granted to the collections of the Library during the times as specified in Appendix A.

(b) In its capacity as the holder/owner of certain rare or special collections, and subject to the terms and conditions of this Agreement, the Library grants to Publisher the nonexclusive right to digitize those works from the Library’s collections (the “Digital Copies”) That the Publisher selects and that the Library agrees to provide (the “Works”).

* This model agreement is made available by the Association of Research Libraries with the understanding that ARL is not rendering legal advice. Please consult an appropriate professional for legal services. If you are using this document in connection with a contract or other actual transaction, please treat it as if copyright had been waived per Creative Commons Zero (CC0). If you are using this document or a variation of it as a model or template, please treat it as licensed under the Creative Commons Attribution (CC-BY) 3.0 Unported License. ARL suggests the following attribution: *Courtesy of the Association of Research Libraries, based in part on a model digitization agreement developed by the Copyright Advisory Office of Columbia University Libraries, Kenneth D. Crews, Director.*

(c) Nothing in this Agreement prevents the Library from digitizing any or all of the materials included in the Works and making them freely available to the public, or permitting third parties to digitize or otherwise reproduce the Works and making them available to third parties.

(d) Neither Party, nor any agent or person or entity acting on behalf of any Party in the execution of this Agreement, shall claim any copyright or other literary or legal right in or to the Digital Copies, reproductions, metadata, compilations, or images of the Works, except as may be specified in Appendix A.

2. Term and Termination

(a) The term of this Agreement (the “Term”) shall commence on the Effective Date and end at the end of the _____ day of _____, 20____. The Parties may by written agreement extend the end date of the Term. Expiration or termination of the Agreement shall not terminate the right of the Parties to continue using the Digital Copies already created pursuant to this Agreement at the time of expiration or termination, except that if termination is due to Publisher’s material breach of the Agreement, Publisher shall cease all use of its Digital Copies if so requested by the Library.

(b) Either Party may terminate this Agreement for material breach by the other Party and failure to cure such breach within ten (10) days. At any time during the Term, either Party may terminate this Agreement without cause upon thirty (30) days’ written notice to the other Party.

(c) The following Paragraphs of this Agreement shall survive the expiration or termination of this Agreement: Paragraphs 1(d), 4(e)-(k), 5, 6, 7, 9, and 10.

3. Rights and Responsibilities of the Library

(a) The Library shall permit the Publisher to use the websites and search engines of the Library as allowed for use by the public or as otherwise consistent with agreements with third parties. The Library will use reasonable efforts to locate and pull the Works identified by the Publisher, or cause the Works to be located and pulled by a third-party contractor.

(b) As the Works are selected, the Library shall make reasonable efforts to provide the Publisher with metadata as specified in Appendix A, when such metadata is available to the Library.

(c) Digitization will occur on-site in the Library, using specialized equipment approved the Library as per the instructions specified in Appendix A. Scanning may only be done by contractors selected and/or approved by the Library. In certain cases, it may be possible to conduct scanning in an off-site secure facility that meets appropriate standards and if the collections are appropriately ensured when not in the Library.

(c) The Library may choose to exclude any of the Works designated by Publisher, if the Library determines in its sole discretion, for any reason, that such Works are unsuitable or unavailable for scanning or digitizing. The Library shall notify the Publisher if it makes such a determination and such material will not be included among the Works to be digitized. The Library is under no duty to explain the reasons for its refusal to digitize particular materials to the Publisher.

4. Rights and Responsibilities of the Publisher

(a) The Publisher shall select those Works that it wishes to be digitized by periodically submitting a list of such Works to the Library. It shall be Publisher’s obligation to determine it has the legal authority to digitize the work. If the Publisher wishes only to digitize works in the public domain, it is the Publish-

er's obligation to make such determination prior to selecting a particular Work for digitization. If the Publisher elects to digitize in-copyright works, it will ensure that it has the legal basis to do so.

(b) In consideration for the rights and license granted by the Library hereunder, the Publisher shall pay fees to the Library in accordance with the fee schedule set forth in Appendix A. In addition, the Publisher shall pay all taxes, duties, and any assessments imposed by any foreign, U.S. federal, state, local, municipal, or other government.

(c) The Publisher shall ensure that all Digital Copies meet the quality standards and technological requirements as specified in Appendix A. The Publisher shall bear all costs of making the Digital Copies, including all labor, equipment, materials, and other costs. The Library reserves the right to approve the types of equipment that will be used to digitize the Works. The Publisher shall, upon reasonable request by the Library at any time during the Term, permit the Library to examine samples of the Digital Copies to assess their quality. Publisher will make whatever changes are reasonably needed in its digitization process if the Library determines that the samples do not meet such quality standards and / or technological requirements.

(d) The Publisher shall provide the Library with a Digital Copy of each Work on a delivery schedule as specified in Appendix A.

(e) The Publisher may use its set of Digital Copies as part of its products or services and may permit its customers or patrons to use the Digital Copies as permitted under applicable law. The Parties may specify in Appendix A any conditions or limits on the use of the Digital Copies by the Publisher.

(f) The Publisher hereby grants free online access to the Library faculty, students, staff, and other affiliates of the University, to all products and services of the Publisher that include any of the Digital Copies.

(g) The Publisher shall adhere to the Library guidelines for the handling of the physical materials, as specified in Appendix A.

(h) The Publisher shall use its best efforts to protect the editorial integrity, completeness, and appearance of the Works. Any product or service of the Publisher that includes the Digital Copies shall meet prevailing commercial and research standards for layout, file formatting, and quality. All Digital Copies shall include an appropriate publication citation information or relevant metadata, including credit for the source of the original material as follows: _____ [*the collection name*], [*name of Library*] ("*Citation*"). If Publisher makes Digital Copies available to any third parties, Publisher shall require such third parties to retain the Citation in the Digital Copies.

(i) The Publisher shall return the Works from its on-site or off-site facility to the Library promptly upon the earlier of (i) completion of making the Digital Copies, (ii) Publisher's decision not go forward with digitization of the Works in question, (iii) Publisher's receipt of a request from the Library to return the Works in question, or (iv) _____ months after receipt of the Works from the Library.

(j) The Publisher shall bear the risk of loss or damage to the Works from the digitization process. If the Library determines that a Work was not returned in substantially the same condition as when it was delivered to the Publisher, the Publisher shall, at the Library's discretion, replace the Work or pay the Library for the repair or replacement of the Work.

(k) The Publisher will hold in confidence any personally-identifiable information associated with the use of images scanned from the Library's collection. The Publisher will regularly remove all personally-identifiable information associated with the use of scanned images from its log files and content man-

agement systems. Alternatively, the Publisher can offer users the option of reading and working anonymously.

5. The Library's Use of the Digital Copies

Following receipt of the Digital Copies from the Publisher, the Library may use the Digital Copies in any manner that it deems appropriate, consistent with applicable law. Among other things, the Library may, without limitation: (i) permit any users of the Library's services to access, search, download, print, and otherwise use the Digital Copies; and (ii) provide copies of the Digital Copies to other libraries and nonprofit institutions, including digital archiving repositories, and permit such entities to similarly use the Digital Copies. The Parties may specify in Appendix A any conditions or limits on the use of the Digital Copies by the Library.

6. Representations and Warranties

(a) THE LIBRARY IS MAKING THE WORKS AVAILABLE TO PUBLISHER "AS IS," AND MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY TYPE WHATSOEVER, INCLUDING ANY WARRANTY THAT THE USE, SCANNING, OR DIGITIZATION OF THE WORKS WILL NOT INFRINGE UPON THE RIGHTS OF ANY THIRD PARTY.

(b) Publisher shall be solely responsible for copyright infringement, invasion of privacy, or other legal liability arising from the Publisher's use of the Works and Digital Copies.

(c) Publisher shall be solely responsible for its arrangements with its customers and any other third party to whom it makes available any part of the Digital Copies, including for any claims, damages, injuries, and losses of any type whatsoever that such parties may assert as a result of Publisher's inclusion of Digital Copies in any content provided by Publisher to third parties or any use made by such third parties of Digital Copies or the Works.

(d) Each Party shall notify the other promptly if the Party has reason to believe that an infringement claim has occurred or is likely to occur with respect to any of the Digital Copies. The Parties are not, under this Agreement, required to utilize the "notice and takedown" provisions of Section 512 of the U.S. Copyright Act or similar provisions of the laws of any other countries. However, each Party shall notify the other promptly upon receipt of any such "takedown notice" with respect to any of the Digital Copies.

(e) The Library's decision to deliver any of the Works, or to otherwise permit the Publisher to copy any of the Works, shall not be construed as legal advice or as a legal opinion.

(f) Each Party represents and warrants that it has the full authority to enter into this Agreement and to perform all of its obligations and responsibilities herein.

7. Indemnity

(a) Publisher will indemnify, hold harmless and defend the Library, its Trustees, officers, faculty, students, agents, and employees against any and all damages, suits, claims, liabilities, judgments, costs and expenses arising out of or relating to (i) any personal or bodily injury (including death) or property damage caused by Publisher's negligent, unlawful, or willful acts or omissions or breach of this Agreement; (ii) any infringement or misappropriation of any third party intellectual property or proprietary rights (including, without limitation, trademark, trade secret, copyright or patent) in connection with

the Works; or (iii) any claim or action of any type whatsoever by any customers or subcontractors of Publisher.

(b) NEITHER PARTY WILL BE LIABLE TO THE OTHER FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR EXEMPLARY DAMAGES OF ANY KIND, INCLUDING BUT NOT LIMITED TO ANY LOST PROFITS OR LOST SAVINGS, HOWEVER CAUSED, WHETHER FOR BREACH OR REPUDIATION OF CONTRACT, TORT, BREACH OF WARRANTY, NEGLIGENCE, OR OTHERWISE, WHETHER OR NOT THE PARTIES WERE ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES ARISING FROM OR RELATING TO THIS AGREEMENT. IN NO EVENT WILL THE LIBRARY'S TOTAL LIABILITY EXCEED IN THE AGGREGATE \$10,000.

8. Insurance *(Note: Some institutions may elect not to include information on insurance in the digitization agreement itself, but reserve it for a digitization plan)*

(a) Publisher will secure and maintain (or cause any third parties performing services hereunder to secure and maintain, as applicable) the following coverages, with the following minimum limits of coverage:

(i) Workers' compensation insurance and statutory disability insurance as required by law for all persons employed in connection with the project, including, as a minimum, employer's liability limits of \$500,000 each accident / \$500,000 each employee for bodily injury or by disease / \$500,000 policy limit, with coverage (except for disease) to be included in the underlying schedule of any excess policy;

(ii) Commercial general liability insurance (which may be basic and umbrella coverage) with respect to injuries and death to persons and / or damage to property, written on an "occurrence" basis, with a combination single limit of not less than \$3,000,000 covering the project;

(iii) Professional liability insurance in an amount not less than \$3,000,000 per occurrence; and

(iv) Property insurance in an amount of not less than \$250,000 per occurrence (Publisher shall be responsible for any deductibles on this and any other insurance policy).

(b) Each of the foregoing shall name the Library and its trustees, officers, employees, and agents as additional insureds (to the extent of the contractual liability assumed by Publisher in this Agreement) with respect to general liability, professional liability, property, and umbrella insurance; name the Library as loss payee with respect to the property insurance; and contain a waiver of subrogation by Publisher's insurer with respect to the Library and the above-referenced additional insureds (with respect to general liability, professional liability, umbrella, property and worker's comp insurance). The Publisher may meet these insurance requirements through either (1) commercial insurance; (2) self-insurance; or (3) a combination of commercial insurance and self-insurance, at the Publisher's discretion.

9. Force Majeure

If either Party is delayed in the performance of its obligations under this Agreement by force majeure, this Agreement shall be suspended until such cause has ceased.

10. General

(a) Neither Party shall directly or indirectly sell, transfer, assign, convey, pledge, encumber, or otherwise dispose of its rights or obligations under this Agreement without prior written consent from the other Party.

(b) The Parties are independent contractors and nothing contained in this Agreement shall be construed as creating any agency, partnership, or other form of joint enterprise between them.

(c) The failure of either Party to require performance by the other Party of any provision of this Agreement shall not affect the full right to require such performance at any time thereafter; nor shall the waiver by either Party of a breach of any provision hereof be taken or held to be a waiver of the provision itself.

(d) Notices under this Agreement will be sufficient only if in writing and delivered as specified in Appendix A.

(e) Amendments to this Agreement shall not be effective unless in writing and signed by both Parties.

(f) If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, such determination shall not affect the validity or enforceability of any other part or provision of this Agreement.

(g) This Agreement shall be governed by and construed in accordance with the laws of the State of [Name] applicable to agreements made and fully performed in [Name].

(h) This Agreement constitutes the full and complete understanding of the Parties regarding the subject matter hereof.

IN WITNESS WHEREOF, the Library and the Publisher have caused this Agreement to be executed by their duly authorized representatives as of the day and year first written above.

[NAME OF UNIVERSITY]

By _____

[Title of authorizing official]

[NAME OF PUBLISHER]

By _____

Title _____

Appendix A

General Description of the Project [insert here].

Paragraph 1(a): Times and hours of access to the Library collections.

Paragraph 1(b): Description of targeted collections of the Library.

Paragraph 1(d): Materials to which the Parties may claim copyright ownership.

[Note: the general desire is that neither the Publisher nor the Library will claim copyright in the Digital Copies or in the descriptive metadata. However, it is conceivable that the parties might choose to retain copyright on such substantive elements as abstracts and bibliographic notes that could be part of the metadata. To the extent that such assertions of rights are desirable, they should be itemized here. Nothing in this provision affects rights in the original works that any person might hold.]

Paragraph 3(b): Schedule for pulling and sending Works to the Publisher.

Paragraph 3(d): Description of metadata to be provided by the Library to the Publisher.

[Note: Add general description of the available metadata, e.g., data available in MARC records for each title.]

Paragraph 4(b): Fees to be paid by the Publisher to the Library and schedule of payments.

Paragraph 4(c): Standards for the Digital Copies.

[Note: Add technical details for the quality and standards for the Digital Copies. NARA's digitization strategy provides some examples: <http://www.archives.gov/digitization/strategy.html>.]

Paragraph 4(d): Schedule for making and delivering the Digital Copies.

Paragraph 4(e): Limits on uses of the Digital Copies by Publisher.

Paragraph 4(f): Guidelines for handling of physical materials.

Paragraph 5: Limits on uses of the Digital Copies by the Library.

Paragraph 10(d): Addresses for Notices.

[Note: Add mailing addresses and other contact information for the Parties.]