

EBRARY® ORDER TERMS AND CONDITIONS
(version 082605)

The order form that references this document (“Order Form”), together with the terms herein, shall upon execution by Institution and acceptance by Ebrary constitute a contract (the “Agreement”) between the Institution and Ebrary, a California corporation with its principal place of business at 318 Cambridge Avenue, Palo Alto, CA 94306-1505 (“Ebrary”). The Institution and Ebrary are referred to herein as the parties.

1. Definitions. Capitalized terms will have the meaning ascribed to them in the Section in which they first appear.
 - 1.1. “Authorized Users” are individuals authorized by Institution to use the Ebrary Site, which may include both (i) walk-in users of computers on Institution’s premises, and (ii) users included in Institution’s calculation of its FTE or among its regular or visiting faculty or staff, regardless of whether they access the Ebrary Site from Institution’s premises or remotely.
 - 1.2. “Brand Features” of a party means such party’s trademarks, trade names, service marks, service names, logos and other distinct brand elements or presentation that appear from time to time in such party’s properties, ventures and services worldwide, together with any modifications to the foregoing made by such party during the term of this Agreement.
 - 1.3. “Collections” are collections of electronic versions of books, journals, or other works selected by Ebrary, with a shared characteristic such as subject or language. Ebrary updates and revises its collections from time to time, and reserves the right to add or remove any title in its sole discretion.
 - 1.4. “Copy or Print Transactions” means transactions involving the printing or copying and pasting of the Electronic Titles.
 - 1.5. “Ebrary Site” means the web site hosted by Ebrary, as specified in Section 2.2, through which Ebrary will provide the tools necessary to access a primary collection of Electronic Titles.
 - 1.6. “Ebrary Content” means the materials, graphics, HTML, XML and other browser-based content, data and information made available by Ebrary through the Ebrary Site, excluding the Electronic Titles.
 - 1.7. “Ebrary Corporate Site” means the web site owned and operated by Ebrary, and located primarily at <http://www.ebrary.com>, and any successor web site thereto.
 - 1.8. “Electronic Titles” means the electronic versions of books, journals, and other works licensed by Ebrary and made available to Institution through the Ebrary Site. Electronic versions may differ from print versions of the same title.
 - 1.9. “FTEs” are to be determined as follows, unless otherwise specified on the Order Form: A school, college, or university’s FTEs include all full-time students or the equivalent; A public library’s FTEs include all cardholders; and a special library’s FTEs include the number of desktops from which Authorized Users are expected to access the Ebrary Site.
 - 1.10. “Hosting” consists of Ebrary’s services, for a fixed period of time, hosting and providing access to Purchased Books, and providing associated customer service and technical support. Hosting fees are distinct from the Purchase Price.
 - 1.11. “Intellectual Property Rights” means all rights in and to trade secrets, patents, copyrights, trademarks, know-how, as well as moral rights and similar rights of any type under the laws of any governmental authority, domestic or foreign, including rights in and to all applications and registrations relating to any of the foregoing.
 - 1.12. “Launch Date” means the date on which the Ebrary Site is made available to Institution’s end-users.
 - 1.13. “Institution Website” means a Web site owned and operated by Institution or its agent.
 - 1.14. “Institution” means the purchasing entity, as set forth in the Order Form.
 - 1.15. “Link” means a URL hidden behind a formatting option that may take the form of a colored item of text (such as a URL description), logo or image, “button” or graphic box, and which allows an end-user to automatically move to or between web pages, web sites or within a web page.
 - 1.16. “Perpetual License” is a license of unlimited duration, to access and use a Purchased Book(s), subject to all of the end user terms and security requirements set forth herein.

- 1.17. “Purchased Books” refers to Titles for which the Institution pays a one-time, non-refundable fee in exchange for a Perpetual License to access and use such Titles.
- 1.18. “Purchase Price” is the one-time fee paid by Institution for a Perpetual License to use the Purchased Books. It does not include Hosting services, which are available for a separate Hosting fee.
- 1.19. “Service Term” refers to the requested time period during which Ebrary will service a Subscription and/or or host a Purchased Book(s), as set forth in an Order Form.
- 1.20. “Subscription” refers to the payment of fees in exchange for the right to access certain Titles for a limited period of time.
- 1.21. “User Data” means personally identifiable information provided by users of the Ebrary Site to gain access to or use the Ebrary Site.
- 1.22. “Vendor” means the reseller, regional network, consortium, or other entity, if any, specified in the Order Form, through which Institution has placed its order. If no Vendor is specified in the Order Form, this Section 1.21 does not apply. If a Vendor is specified, the following terms apply:
 - 1.22.1. If “Pay Vendor” is marked, then payment, taxes, and late fees shall be as agreed between Institution and Vendor. The provisions of Section 4.1 (“Payment, Taxes, and Late Fees”) shall only apply to the extent that Institution and Vendor have not agreed to different terms regarding payment, taxes, and late fees. In that case, Vendor shall have the rights otherwise reserved to Ebrary under that Section.
 - 1.22.2. If “Vendor Support” is marked, then Vendor, rather than Ebrary, will perform the second level customer support described in Section 5.3, and Institution will inform Vendor, rather than Ebrary, regarding customer service issues as described in that Section.
2. Subscriptions and Hosting. This Section 2 applies for the duration of the applicable service period, if Institution has purchased a Subscription and/or Hosting services.
 - 2.1. Site Construction. Using technical profile information provided by Institution or its agent, Ebrary will construct a standard Ebrary Site for use by Institution’s patrons and will generate custom MARC record sets for Institution’s use of the Ebrary Site. At Institution’s option, Institution or its agent may design and host a customized banner, subject to Ebrary’s technical specifications, which will appear on Institution’s Ebrary Site.
 - 2.2. Site Specifications. The site will be accessible from Internet-enabled computers running supported platforms, using reader software that can be pre-installed on patrons’ terminals or installed on demand as needed. The site will include the use of Ebrary’s InfoTools™ technology, which enables end users to interact with content at the word level, and to link to knowledge resources such as definitions, biographical information, maps and translations, as well as other digital resources within the library.
 - 2.3. Updates and Enhancements. Ebrary will provide to Institution such free updates, enhancements, and future releases as Ebrary may choose to make available to its library customer base as a whole.
 - 2.4. Operation and Maintenance. Ebrary will, at its own expense, provide and manage all servers, telecommunications, facilities maintenance, and operations related to the hosting of the Ebrary Site on a cluster of high-availability, redundant servers in a secure, high-performance data center. In the event problems arise materially affecting the operation of the Ebrary Site, Ebrary will use commercially reasonable efforts to correct such problems as soon as reasonably practicable.
 - 2.5. Launch Date. Ebrary will endeavor to make the Ebrary Site available to Institution’s patrons within five (5) business days of receiving complete and accurate technical profile information from Institution or its agent, or on the first day of the Service Term (whichever is later). If Ebrary fails to do so, the Initial Term will be extended by the same number of days as the number of days by which the Launch Date has been delayed, at no additional charge to Institution.
 - 2.6. Access and Simultaneous Use. The Ebrary Site will permit multiple users to view, print, and copy and paste the Purchased Books and the Electronic Titles contained in the Collections to which the Institution has a Subscription, as specified in the Order Form(s). Titles obtained through a Subscription may be accessed by multiple users simultaneously, unless otherwise indicated in the Order Form. Purchased Books may be accessed by multiple users simultaneously or may have access limited to a single user at a time, as indicated in the Order Form.
3. Purchased Books. This Section 3 applies to Purchased Books.

- 3.1. Hosting Required. Purchased Books in raw digital format are not suitable for re-distribution to end users. Rather, Purchased Books must be provided to end users through the use of content hosting software designed to protect valuable digital content from theft and mis-use. Hosting is not included with Purchased Books, but is instead listed in the Order Form as a distinct product with a separate fee.
- 3.2. Correction of Purchased Books. Should Ebrary learn that a Purchased Book contains significant error(s), or should Ebrary become aware of copyright infringement or other legal issues that may result in the imposition of liability on Ebrary or its suppliers, Ebrary reserves the right to stop hosting such Purchased Book, provided that Ebrary will: (i) replace the Purchased Book with a corrected version or with a replacement of comparable value acceptable to the Institution, or (ii) refund the Purchase Price within sixty (60) days.
- 3.3. Secure Archives. Ebrary will deposit a digital copy of each Purchased Book in a secure archive protected and maintained by Ebrary or a reputable third party. Archived digital copies do not include InfoTools or other functionality provided by Ebrary through its Hosting services.
4. Fees and Payments.
 - 4.1. Payments, Taxes, and Late Fees. Institutions ordering through a Vendor should refer to Section 1.21. Unless otherwise specified in the Order Form: (i) All payments shall be made to Ebrary in U.S. Dollars within thirty (30) days of invoice; (ii) All fees are subject to adjustment by Ebrary under Section 4.2; (iii) Institution is responsible for all related taxes and withholding except for taxes based on Ebrary's income; (iv) Ebrary reserves the right to charge a late fee of the lesser of one percent (1%) monthly or the maximum amount allowed by law on overdue amounts, and to discontinue services if any fees are more than thirty (30) days overdue.
 - 4.2. Updated FTEs. Institution represents that the FTE count specified in the Order Form is reasonably accurate, and agrees to provide updated figures annually upon Ebrary's request. If Institution's FTEs change, Ebrary reserves the right to charge or credit Institution, no more than once annually, to reflect the changed FTEs.
 - 4.3. Fee Allocations. Unless otherwise specified on the Order Form, all fees associated with content collections aggregated by Ebrary are allocated as follows: (i) One half of the combined fees represents a "Technology License Fee," which entitles Institution to receive the Institution-specific standard Ebrary Site set-up, use of proprietary Ebrary software as made available by Ebrary through the Ebrary Site, Institution-specific MARC records, customer service and other benefits, as specified in this Agreement, and to use the Ebrary Site (exclusive of Electronic Titles) and InfoTools, subject to the terms and conditions of this Agreement and the notices that appear on the Ebrary Site and any software that Ebrary may provide. (ii) The other half of the combined fees represents a "Content Usage Fee," which entitles Institution and its patrons to use the Electronic Titles, subject to the terms and conditions herein and the terms of use and copyright, privacy, and other legal notices that appear on the Ebrary Site and/or are embedded in the Electronic Titles.
5. Additional Obligations of the Parties.
 - 5.1. Linking and Marketing Obligations. Institution or its agent will display Ebrary's graphic Brand Features in a mutually agreeable manner and location on the Institution Website. This display will include a Link to the Ebrary Site. The parties may issue joint press releases and mutual endorsements of the Ebrary Site. However, neither party will issue any separate press release related to the Ebrary Site without obtaining the other party's prior written approval. Institution agrees to make a good faith effort to promote the Ebrary Site to Institution's user base, by means Institution deems appropriate.
 - 5.2. Usage Restrictions.
 - 5.2.1. Authorized Users. Institution will use commercially reasonable means to ensure that only Authorized Users obtain access to the Ebrary Site through Institution's systems. Institution will offer access to the Ebrary Site to Authorized Users through IP authentication and will provide Ebrary with all information necessary to implement such IP authentication. Ebrary may also, in its sole discretion and subject to review by its security team, permit Institution to offer access to its patrons through other secure mechanisms (such as certain proxy servers behind firewalls) that meet Ebrary's technical and security requirements, provided that Institution shall be solely responsible for their configuration and support, and for the

maintenance and administration of end user passwords or other security mechanisms reasonably required by Ebrary.

- 5.2.2. Terms of Service Binding on End Users. Institution and its Authorized Users must at all times comply with the current Terms of Service and other legal notices then posted on the Site. A copy of the current Terms of Service is attached as Exhibit A. Ebrary reserves the right to update such notices from time to time.
- 5.2.3. Abuse of Site. Ebrary reserves the right to temporarily or permanently disable access from an IP address or range of IP addresses to stop unauthorized use of the Ebrary Site in violation of this Agreement or the applicable Terms of Service, or any other hostile action including port scanning, denial of service or intrusion attempts originating from or routed through Institution's computers or network (all of the foregoing, collectively, "Abuse"). The parties will work together in good faith to promptly identify the source of suspected or confirmed Abuse, including by investigating their own respective user logs and other electronic records. Institution will diligently investigate suspected or confirmed cases of Abuse, and will make commercially reasonable efforts to identify the individual(s) responsible, secure for Ebrary's inspection any software tools used to effect the Abuse and any electronic files or other materials obtained through Abuse, and ensure the appropriate disposal of any improperly obtained files or materials. Upon receiving adequate assurances from Institution that Abuse has been resolved to Ebrary's satisfaction and will not resume, Ebrary will restore service without unnecessary delay.
- 5.2.4. Interlibrary Loan. Institution may not use Electronic Titles for purpose of interlibrary loans.
- 5.3. Customer Support. Institutions ordering through a Vendor should refer to Section 1.21. Institution will designate two (2) qualified customer service contacts, who will provide first level customer support to its patrons regarding the use and functionality of the Ebrary Site, including but not limited to questions about the plugin, viewing, searching, sorting, browsing, navigation and content. Ebrary will provide Institution's designated customer service contacts with ongoing support consistent with Ebrary's standard support policies. In the event that Institution receives any complaint about the Ebrary Site, Institution will forward it to Ebrary customer support within 24 hours, and will inform Ebrary of any action taken or response made by Institution.
- 5.4. Usage Data. Ebrary will provide Institution with monthly reports summarizing the usage of its Ebrary Site.
6. Grant of Licenses by Ebrary.
 - 6.1. Purchased Books. Subject to any further restrictions set forth in the Order Form, Ebrary grants to Institution a perpetual, irrevocable, worldwide, non-exclusive, royalty-free license to make each Purchased Book available to Institution's Authorized Users, subject to the following restrictions:
 - 6.1.1. Access will be limited as set forth in the Order Form (e.g., single viewer titles may be viewed by only one person at a time); and
 - 6.1.2. Purchased Books may only be made available to end users in electronic format via a hosted service with digital rights management (DRM) technology designed to protect valuable digital content ; and
 - 6.1.3. Should Institution ever obtain an archived copy of a Purchased Book(s), or a copy thereof, (i) Institution will take commercially reasonable steps to protect and secure such copy; (ii) Institution will only make such copy available to end users through a hosted service with commercially reasonable digital rights management (DRM) and security features; and (iii) Institution's access to and use of such copy will be strictly limited to access and use that are necessary to enable the Institution to obtain the benefit of its Perpetual License of the Purchased Book under this Agreement. Institution may not otherwise use or permit the Purchased Book to be used without permission of the copyright holder(s), except as permitted under the "fair use" provisions of United States copyright law. Institution may be required to certify its compliance with the foregoing requirements, and its inability to access its Purchased Books through the Ebrary site, before receiving access to an archived copy of a Purchased Book.
 - 6.1.4. Should Institution obtain a replacement Title under Section 3.1, Institution's license to the replaced Title shall be deemed void upon Institution's acceptance of the replacement

Title. All terms and conditions herein that applied to the replaced Title shall be deemed to apply to the replacement Title.

- 6.2. Subscriptions. Subject to any further restriction set forth in the Order Form, Ebrary grants to Institution a revocable, worldwide, non-exclusive, royalty-free, limited-duration license to permit its Authorized Users to access and use the Collections and/or individual Electronic Titles specified in the Order Form during the Service Term.
- 6.3. Brand Features. Ebrary hereby grants to Institution a nonexclusive, royalty-free, worldwide license with no right to sublicense to use, reproduce, publicly display, publicly perform, distribute and transmit the Ebrary Brand Features on the Institution Website solely for the purposes of complying with its promotional and other obligations set forth in the Agreement. Any display of Ebrary's Brand Features will comply with Ebrary's brand usage guidelines, as made available to Institution from time to time.
7. Confidentiality. Ebrary and Institution hereby acknowledge that in the course of activities under this Agreement each of them may have access to non-public and proprietary information which relates to the other party's marketing, business, and technology (the "Confidential Information"). Each party agrees to: (a) preserve and protect the confidentiality of the other party's Confidential Information with the same degree of care it uses to protect its own Confidential Information of like nature, but in no event less than reasonable care; (b) refrain from using the other party's Confidential Information except as contemplated herein; and (c) not disclose such Confidential Information to any third party except to employees as is reasonably required in connection with the exercise of its rights and obligations under this Agreement. Notwithstanding the foregoing, either party may disclose Confidential Information of the other party which is: (i) already publicly known through no fault of the receiving party; (ii) discovered or created by the receiving party without reference to the Confidential Information of the disclosing party, as shown in records of the receiving party; (iii) otherwise known to the receiving party through no wrongful conduct of the receiving party, or (d) required to be disclosed by law or court order. Moreover, any party hereto may disclose any Confidential Information hereunder to such party's agents, attorneys and other representatives or any court of competent jurisdiction or any other party empowered hereunder as reasonably required to resolve any dispute between the parties hereto. Each party will treat the terms of this Agreement as "Confidential Information."
8. Ownership.
 - 8.1. By Institution. Institution will have and retain full and exclusive right, title and ownership interest in and to: (i) the Institution Brand Features, (iii), the Institution Website and (iv) any and all Intellectual Property Rights to each and all of the foregoing.
 - 8.2. By Ebrary. Ebrary, its licensors and suppliers will have and retain full and exclusive right, title and ownership interest in and to: (i) the Ebrary Brand Features, (ii) the Ebrary Content (iii) the Ebrary Site and Ebrary Corporate Site, and (vi) any and all Intellectual Property Rights to each and all of the foregoing.
 - 8.3. Usage Data Associated With The Ebrary Site. Each party will comply with the terms of its own privacy policy with respect to the use of the Ebrary Site. Except as reasonably necessary to perform its obligations under this Agreement or to comply with applicable laws, neither party will disclose, transfer, sell or rent any User Data which could reasonably be used to identify a specific named individual to any third party nor will either party use such User Data on behalf of any third party except as expressly disclosed to users in such party's privacy policy. Each Party will comply with all applicable laws in using or releasing the User Data.
9. Term and Termination.
 - 9.1. Term. This Agreement will be effective during an "Initial Term" to begin on the date the Order Form is approved by Ebrary ("Effective Date") and to end on the last day of the Service Term specified in the Order Form, unless sooner terminated as provided below. Thereafter, this Agreement will renew automatically for successive one (1) year renewal terms ("Renewal Terms") unless either party notifies the other in writing at least sixty (60) days prior to the end of a given Initial or Renewal Term of its intent not to renew the Agreement.
 - 9.2. Termination. This Agreement may be terminated at any time by a party, effective immediately if the other party: (a) becomes insolvent; (b) files a petition in bankruptcy, (c) makes an assignment for the benefit of its creditors, or (d) breaches any of its material responsibilities or obligations

under the Agreement which breach is not remedied within thirty (30) days from receipt of written notice of such breach.

- 9.3. Effect of Termination. Upon expiration or termination of this Agreement: (a) each party will return or, at the disclosing party's request destroy, the Confidential Information of the other party, (b) all licenses granted herein will terminate, except irrevocable Purchased Book licenses, (c) each party will within 15 days return all assets (digital, proprietary or otherwise) belonging to the other, (d) without limiting the foregoing, Institution will immediately and permanently terminate use of the Ebrary Site and all Links which reference "Ebrary" or any derivations thereof, and (e) the following Sections will survive: 1, 4.1(iii-iv) (but only as to unpaid amounts), 6.1-6.1.3 (but only as to Purchased Books), 7 (for a period of two years from termination), 8.3 (only as to User Data), 9.3, 10, 11, and 12.
10. Representation and Warranties.
- 10.1. By Each Party. Each party represents and warrants to the other that: (a) such party has the full corporate right, power and authority to enter into this Agreement and to perform the acts required of it hereunder; (b) the execution of this Agreement by such party, and the performance by such party of its obligations and duties hereunder, do not and will not violate any agreement to which such party is a party or by which it is otherwise bound; (c) when executed and delivered by such party, this Agreement will constitute the legal, valid and binding obligation of such party, enforceable against such party in accordance with its terms; and (d) to its knowledge, such party possesses all Intellectual Property Rights necessary to fulfill its obligations under this Agreement. Each signator hereto represents that he or she is a duly authorized officer or representative of the party on whose behalf he or she purports to enter into this Agreement.
- 10.2. No Additional Warranties. EXCEPT AS EXPRESSLY SET FORTH IN SECTION 10.1 ABOVE, NEITHER PARTY MAKES, AND EACH PARTY HEREBY SPECIFICALLY DISCLAIMS, ANY REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, REGARDING THE EBRARY SITE, THE EBRARY CORPORATE SITE, THE INSTITUTION SITE, OR THE ELECTRONIC TITLES, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT OF ANY THIRD PARTY RIGHT.
- 10.3. Disclaimer as to Partner Products. From time to time, at Institution's request, Ebrary may in its discretion assist Institution in purchasing products provided by third parties with whom Ebrary has a business relationship. As to any such products, which are identified in a Purchase Order as "Partner Products," EBRARY IS SERVING AS A BILLING CONDUIT ONLY FOR SUCH PARTNER PRODUCT(S), FOR THE CONVENIENCE OF THE INSTITUTION AND THE THIRD PARTY. EBRARY MAKES NO REPRESENTATIONS OR WARRANTIES WHATSOEVER REGARDING SUCH PARTNER PRODUCT(S), AND ASSUMES NO LIABILITY IN CONNECTION WITH SUCH PARTNER PRODUCT(S) OR THEIR OPERATION IN CONJUNCTION WITH EBRARY'S PRODUCTS. THE INSTITUTION ACKNOWLEDGES THAT IT IS SOLELY RESPONSIBLE FOR CONTRACTING DIRECTLY WITH THE SUPPLIER OF SUCH PARTNER PRODUCTS, AND THAT INSTITUTION'S SOLE RECOURSE IN THE EVENT SUCH PARTNER PRODUCT(S) FAIL TO FUNCTION PROPERLY, IS TO THE SUPPLIER OF SUCH PARTNER PRODUCT(S) AND NOT TO EBRARY.
11. Limitation of Liability. UNDER NO CIRCUMSTANCES WILL EITHER PARTY OR ITS LICENSORS OR SUPPLIERS BE LIABLE TO THE OTHER PARTY FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR EXEMPLARY DAMAGES (EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES), ARISING FROM ANY PROVISION OF THIS AGREEMENT, SUCH AS, BUT NOT LIMITED TO, LOSS OF REVENUE OR ANTICIPATED PROFITS OR LOST BUSINESS. IN NO EVENT WILL THE CUMULATIVE LIABILITY OF EBRARY AND ITS LICENSORS AND SUPPLIERS, FOR CLAIMS ARISING UNDER OR RELATED TO THIS AGREEMENT DURING ANY CALENDAR YEAR, EXCEED THE FEES RECEIVED BY EBRARY UNDER THIS AGREEMENT DURING THAT CALENDAR YEAR. THESE LIMITATIONS ARE ESSENTIAL TO THIS AGREEMENT, ARE REFLECTED IN THE PRICING OF THE SERVICES PROVIDED, AND WILL APPLY TO THE MAXIMUM EXTENT PERMITTED BY LAW, NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE.

12. Miscellaneous.

12.1. Notices. Any notice or other communication regarding termination or breach of this Agreement will be in writing and given either (a) by postpaid registered or certified mail return receipt requested, (b) by courier service, (c) by hand, or (d) by facsimile or electronic mail with a copy concurrently sent by one of the above methods. All other communication to be given hereunder may be by electronic mail or in writing given by any commercially reasonable method. Notices will be deemed effective on the date actually received. Notices will be directed to Institution at the address specified in the Order Form and to Ebrary as follows, or to such other address as either party may specify in writing from time to time:

Address:	Ebrary – URGENT Legal Notice 318 Cambridge Avenue Palo Alto, CA 94306-1505 USA
Phone:	(650) 475-8700
Fax:	(650) 475-8881
E-mail:	salesnotice.ebrarian@ebrary.com

12.2. No Joint Venture or Agency. Nothing in this Agreement will constitute or create a joint venture, partnership, or any other similar arrangement between Ebrary and Institution. Neither party is authorized to act as agent or bind the other party except as expressly stated in this Agreement.

12.3. Assignment. Neither party will transfer or assign any rights or delegate any obligations hereunder, in whole or in part, whether voluntarily or by operation of law, without the written consent of the other party, not to be unreasonably withheld or delayed. Notwithstanding the foregoing, however, either party may assign this Agreement to a successor in interest (or its equivalent) of all or substantially all of its relevant assets, whether by sale, merger, or otherwise.

12.4. Headings; Construction. Sections, titles or captions in no way define, limit, extend or describe the scope of this Agreement nor the intent of any of its provisions. The parties agree that this Agreement will not be construed against a party by reason of the drafting or preparation of such Agreement.

12.5. Severability. Any provision of this Agreement that is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining portions hereof or affecting the validity or enforceability of such provision in any other jurisdiction to the fullest extent consistent with the intent of this Agreement.

12.6. Entire Agreement. This Agreement together with the Order Form (which is expressly incorporated herein) contains the entire agreement of the parties with respect to the subject matter hereof, and supersedes all prior and/or contemporaneous agreements or understandings, written or oral, between the parties with respect to the subject matter hereof. All of the parties' respective obligations in connection with Electronic Titles previously licensed to Institution by Ebrary, including Purchased Books and those obtained by Subscription, shall henceforth be governed by these Terms and Conditions.

12.7. Dispute Resolution. In the unlikely event that a dispute arises between the parties that cannot be quickly and informally resolved, each party will elevate the matter to an appropriate individual within its organization who is authorized and capable of resolving the dispute. Such individuals will meet and confer promptly to determine whether the matter can be resolved informally or through voluntary mediation. Notwithstanding the foregoing, if either party requires immediate injunctive relief to protect against imminent irreparable harm (e.g., from threatened disclosure of Confidential Information or intellectual property infringement), it may seek judicial intervention, without first attempting mediation. This Agreement is deemed executed in Santa Clara County, California, where Ebrary is headquartered and where the computer systems delivering the Ebrary Site are located. The parties consent to personal jurisdiction and exclusive venue in the federal and state courts located in Santa Clara County, California. Disputes between the parties will be resolved by application of California law, without regard to choice of law provisions or principles.

- 12.8. Amendment. This Agreement may not be amended or modified by the parties in any manner, except by an instrument in writing signed on behalf of each of the parties to which such amendment or modification applies by a duly authorized officer or representative.
- 12.9. Waiver. Neither party will be deemed, by any act or omission, to have waived any of its rights or remedies hereunder unless such waiver is in writing and signed by the waiving party, and then only to the extent specifically set forth in such writing. A waiver with reference to one event will not be construed as continuing or as a bar to or waiver of any right or remedy as to a subsequent event.
- 12.10. Recovery of Costs and Expenses. If either party brings an action against the other party to enforce its rights under this Agreement, the prevailing party will be entitled to recover its costs and expenses, including, without limitation, attorneys' fees and costs incurred in connection with such action, including any appeal thereof.
- 12.11. Force Majeure. No party will be responsible for any failure to perform due to causes beyond its reasonable control, including but not limited to acts of God, war, riot, embargoes, acts of civil or military authorities, fire, floods, accidents, strikes, shortages of transportation facilities, fuel, energy, or materials or failures of telecommunications or electrical power supplies. A party whose performance is affected by a force majeure condition will be excused from such performance to the extent required by the force majeure condition so long as such party takes all reasonable steps to avoid or remove such causes of nonperformance and immediately continues performance whenever and to the extent such causes are removed.
- 12.12. Counterparts; Facsimile Signatures. This Agreement may be executed in counterparts which taken together will be regarded as one and the same Agreement. Either party's facsimile signature will be deemed a binding acceptance of this Agreement by such party.

EXHIBIT A

ebrary Terms of Service

Please read this entire Agreement carefully, as it explains the conditions on which you may use the ebrary Web site. You may not use the ebrary site unless you are willing to accept these conditions.

1. Rights, Restrictions, and Respecting Copyrights

(a) The text, images, and other materials available on this site (collectively, the "Materials") are protected by United States copyright and other applicable laws. You may not engage in any acts inconsistent with the principles of copyright protection and fair use (see the United States Code, 17 USC Sections 106-110). For example, you may not copy, print, reproduce, distribute, transmit, modify, display, or otherwise use the Materials or copies of the Materials, except that, subject to the other terms of this Agreement:

- You have a non-exclusive, non-transferable, revocable, limited license to access and use this site for noncommercial research purposes, in strict accordance with this Agreement and as permitted via instructions on the site.
- You may make limited noncommercial use of small portions of the Materials to the extent permitted under United States law pursuant to the doctrine of fair use.
- You may electronically display the Materials to one person at a time. If you are affiliated with an educational institution, you may also display Materials to multiple individuals during class time for teaching and demonstration purposes to the extent permitted under United States law pursuant to the exemption of certain performances and displays.
- You may copy and print small portions of the Materials using the copy and print features available on this site to the extent permitted under United States law pursuant to the doctrine of fair use.
- Any other use requires that you obtain written permission from the copyright holder.

(b) You may not re-distribute the Materials in any manner, including by posting any Materials on the Internet, distributing them via e-mail, on paper, or otherwise, except as expressly permitted above.

(c) You must interact with the site manually, using a Web browser and the ebrary Reader™ software. You may not use other computer programs or any other automated method of accessing or obtaining materials or information from this site. You may not circumvent limitations on the number of pages you are allowed to display, copy, or print.

(d) You may not make any false or fraudulent statements, or use anyone else's user name or password, in your use of or to gain access to the site. You may not permit anyone else to access the site using your user name and password.

(e) All proprietary rights, title, and interest in the Materials belong entirely to ebrary or its suppliers. You acquire no proprietary interest or right in the Materials or any portion of them.

(f) ebrary reserves the right to change any aspect of this site, including adding or withdrawing features or Materials, without notice.

(g) You may not reverse engineer, reverse assemble, decompile, disassemble, translate or otherwise alter, the ebrary Reader™, the data stream generated by your use of this site, or any other software provided by ebrary or its licensors or suppliers in connection with your use of this site.

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