

Hybrid Delivery-EJO SUBSCRIPTION AGREEMENT

This Agreement is entered as of the ____ day of _____, 199_ by and between:

_____, (“Publisher”), notices for whom should be sent to ____ or to such address as Publisher may inform Subscriber of in writing;

and Wright State University, with offices at 3640 Colonel Glenn Highway, Dayton, OH 45435, an Ohio not-for-profit educational institution acting as authorized fiscal agent for Ohio Library and Information Network, a publicly funded consortium of educational institutions authorized by the Ohio Board of Regents, with offices at 2455 North Star Road, Suite 300, Columbus, OH 43221, (“Subscriber”), notices for whom should be sent to the current Executive Director at the address identified previously or to such address as Subscriber may hereafter inform Publisher of in writing.

WHEREAS, the parties hereto agree that it is useful, in the context of the transition from print/paper publishing products to electronic publishing services, to consolidate their agreements or arrangements, and the terms and conditions under which they currently operate, with respect to both print/paper and electronic products and services, and

WHEREAS, Ohio Library and Information Network, (“OhioLINK”) is the duly authorized agent and representative for its members and for participating Institutions, and WSU is duly authorized to act as the agent of OhioLINK and its members and participating Institutions for purposes of this Agreement,

NOW, THEREFORE, the parties agree as follows:

SECTION 1. LICENSE TO ELECTRONIC VERSIONS OF PUBLICATIONS.

1.1 Authorized Users. The following categories of users of the Licensed Materials on the Network are recognized as Authorized Users for purposes of this Agreement: Faculty members (including temporary or exchange faculty for the duration of their assignment), graduate and undergraduate students, staff members, and contractors directly involved in educational and research activities (provided they have been informed of, and agree to abide by, the terms of this Agreement) of the Institutions listed in Appendix 1 of the Agreement.

1.2 Basic License. Publisher hereby grants to Subscriber and its Authorized Users (as defined above) the right and license to:

- Access, as available, the retrospective(back) and current electronic files of journals contained in Appendix 2, incorporated herein (the “Licensed Materials”) on the Publisher’s information system (the “System”) serving the Sites listed in Appendix 1. Appendix 2 lists all of Publisher’s publications that are available to Subscriber hereunder electronically and the extent to which electronic back files are available. Subscriber has the option to purchase all titles offered in electronic files included in Appendix 2 at prices specified in Appendix 5; and
- Include, as available, the retrospective(back) and current electronic files of the bibliographic and abstract data, (“catalog data”), for indexing and viewing purposes, and the full text, for

indexing purposes only, for journals contained in Appendix 2, incorporated herein on the Subscriber's information system (the "Network") serving the Sites listed in Appendix 1.

- permit Authorized Users to search, view and browse the catalog data of the Licensed Materials on the Network or System or the Licensed Material itself on the System ;
- permit Authorized Users to print or download the Licensed Materials resulting from searches of the Licensed Materials for all purposes as allowed by this license. All printing and downloading by Authorized Users shall be for their research and scholarly purposes, except as otherwise specifically provided for in this Agreement. Incidental and non-systematic sharing of the Licensed Material by Authorized Users with non-authorized individuals for collaborative research and scholarly purposes shall be permitted, and
- permit Authorized Users to obtain remote access to the Licensed Materials through secure access procedures established by Subscriber and/or Publisher.
- Permit Subscriber to add additional Ohio-based academic or other Ohio-based non-commercial higher education sites as they become members or participants of OhioLINK, provided that Subscriber supplies Publisher with a list of such sites for invoicing purposes thirty (30) days prior to such proposed additions. Such additions shall be according to the terms and conditions set forth in Appendix 5.
- Institutions are permitted to provide access to and permit copying from the Licensed Materials (subject to the limitations set forth in this Agreement) by members of the public for their scholarly, research, educational and personal use by means of workstations located at the library facilities. Remote access to the Licensed Materials by members of the public is not permitted.

1.3 *Coursepacks.* Subscriber may include copies (hardcopy or downloaded) of items from the Licensed Materials in anthologies (coursepacks) in print or digital form for distribution to the Authorized Users for their use in connection with classroom instruction. The parties agree that the foregoing grant of rights regarding coursepacks will apply to the corresponding print issues of Licensed Material pre-dating the effective date of the Licensed Material provided under this Agreement.

1.4 *Usage Restrictions and Rights, Interlibrary Lending.* Except as expressly permitted in Section 1.3 above, the Licensed Materials may not, directly or indirectly, be used for any:

- Substantial or systematic reproduction;
- re-distribution, re-selling or sub-licensing in any manner including in connection with fee-for-service use;
- systematic supply or distribution in any form to anyone other than an Authorized Users;

For those publications to which an individual institution subscribed in print in 1998, prior to execution of this Agreement (which publications are listed in Appendix 3 to this Agreement for all member and participating institutions), and for which the site no longer receives a print version, Subscriber is granted the following license: Subscriber may use the digital form of these publications for the purpose of producing a hard copy for supplying inter-library loan requests from non-OhioLINK member sites in accordance with the Interlibrary Loan provisions of Section

108 of the United States Copyright Act and the CONTU Guidelines promulgated thereunder.
Subscriber will periodically provide data on ILL transactions filled to non-OhioLINK sites

With respect only to the authorized, OhioLINK member and participating institutions included in Appendix 1, inter-library loan requests, received between these sites for Publisher's materials held in their print collections published prior to the first year of this Agreement, can be filled without being subject to the quantity limits of Section 108 of the United States Copyright Act or the CONTU guidelines. Such copies may not be provided to any other than to another OhioLINK member and participating institution for one of its Authorized Users.

- 1.5 *Alteration; Notices.* Neither Subscriber nor its Authorized Users may modify, adapt, transform, translate or create any derivative work based on any materials included in the Licensed Materials, or otherwise use any such materials in a manner that would infringe the copyright or other proprietary rights therein. Any copyright notices, other notices or disclaimers included by Publisher in the Licensed Materials may not be removed, obscured or modified in any way. Subscriber shall post appropriate notices informing Authorized Users of the applicability of United States Copyright Act to the reproduction of the Licensed Materials. In the event of violation of prohibitions of this Agreement or of applicable copyright law, Publisher and Subscriber agree to consider the imposition of further restrictions on access to and retrieval of the Licensed Materials, including additional limitations on printing and downloading.

SECTION 2. PUBLISHER OBLIGATIONS.

- 2.1 *Delivery.* Publisher will provide to the Subscriber, in the media, format and in the time frequency noted on Appendix 4 the catalog data and full text of the Licensed Material. Publisher will provide to the Subscriber's Authorized Users the Licensed Material directly via searching of the System through searches originating on the Network with links from the catalog data to the Licensed Material on the System. Publisher will provide Internet IP address-based access to the System based on IP ranges for participating Institutions as supplied to the Publisher by the Subscriber and as modified and maintained from time to time.
- 2.2 *Upgrade of Formats or Media.* Publisher will use its best efforts to notify Subscriber at least six (6) months in advance of an intended specification change applicable to the electronic form of the catalog data as provided to the Subscriber, but in no event will Subscriber receive less than ninety (90) days notice of such specification change.
- 2.3 *Other Products or Services.* Publisher will promptly inform Subscriber of any new journals offered in electronic form or discontinued journals to Appendix 2 or of the availability of other Publisher products or services. If, in its discretion, Publisher elects to discontinue publication of any given journal or journals, or otherwise discontinues any other products, or any service, for, by way of example, any of the following reasons:
- Publisher ceases publication or transfers ownership, or is unable to obtain electronic rights to a given publication, or
 - Publisher is required to do so to comply with any judicial rule or order, or
 - Publisher determines, in its sole discretion, that continuing publication may result in some liability accruing to Publisher,

Publisher will grant Subscriber a pro rata credit for the discontinued product or service. The pro rata credit will be calculated by multiplying the then current price of a title by the number of print subscriptions to that title held by OhioLINK libraries in 1998, prior to the start of this license, as listed in Appendix 3.

- 2.4 *Orion Agreement.* The Subscriber utilizes software of Orion Scientific Systems, Inc. especially designed for use in connection with the Licensed Materials so that Subscriber may use the electronic material licensed hereunder in the most efficient manner. Publisher will provide Orion Scientific Systems Inc. all necessary specifications of the format of the catalog data and full text of Licensed Materials for the duration of this Agreement and provide reasonable technical consultation to Orion and OhioLINK to facilitate the loading of and maintenance of the catalog data and full text of Licensed Materials and the linking of the data to the Licensed Material at the System.

SECTION 3. LICENSE FEE.

- 3.1 *Annual Fees.* Subscriber agrees to pay annual License Fees as set out in Appendix 5. In principle, the fee for electronic access to the Licensed Materials and continued receipt of print copies listed in Appendix 3 is calculated as a percent of the fee for the print subscriptions listed in Appendix 3, less consideration made for cancelled print copies. For each year of this Agreement, the total annual fee payable by OhioLINK in consideration of access to the Licensed Materials and continued receipt of print copies and will be calculated as defined in Appendix 5.
- 3.2 *Additional Publications.* Subscriber may, in its discretion, elect to include in this Agreement the electronic form of other publications of the Publisher which may be available electronically which are not otherwise included in Appendix 2 by paying an applicable increase in the License Fee as defined in Appendix 5..

SECTION 4. PRINT SUBSCRIPTIONS.

- 4.1 *Options by Subscriber.* Subscriber may choose to add or subtract print subscriptions from the Licensed Material with the impact on the License Fee as described herein.
- 4.2 *Termination of Print Subscriptions Only:* If a **participating Institution** wishes to terminate the print subscription for a publication or publications, while maintaining the electronic license for that publication or publications, Publisher will credit Subscriber, pro rata, at a rate of ten percent (10%) **of the net reduction in Publisher revenue from the affected Institution based on** the published 1998 catalogue price, plus applicable annual increases, for each print copy discontinued for the relevant print publication(s). Such credit will accrue to Subscriber beginning in the year the cancellations(s) occur and also for each year thereafter remaining in the term of this Agreement, as described in Appendix 5.
- 4.3 *Use of Print Copies.* The print copies of Publisher's publications may be used by Subscriber and its Authorized Users in accordance with their usual and customary policies and practices consistent with applicable copyright laws, including providing access to library patrons without regard to their status as Authorized Users and the making of interlibrary loans in accordance with Section 108 of the United States Copyright Act and similar provisions under other national laws.

SECTION 5. IMPLEMENTATION, SECURITY, EVALUATION.

- 5.1 *Network system security (generally).* Subscriber recognizes that maintaining the integrity of the Licensed Material made accessible by Publisher and ensuring that use of the Licensed Material is limited to Authorized Users are important obligations, and that Publisher may terminate this Agreement if routine violations of these security principles or Publisher's intellectual property rights are substantiated. The Subscriber will take reasonable measures to detect misuse of the Licensed Material and make its best efforts to corrective actions.
- 5.2 *Security protection.* Internet Protocol ("IP") addresses will be used as the basis for securing the Licensed Material. Subscriber will restrict access to the Licensed Materials by maintaining a list of the IP addresses of Authorized Users for which access to the Licensed Material will be permitted when access originates from the Network. Direct access to the System is controlled by the Publisher based on IP addresses supplied by the Subscriber.
- 5.3 *Analysis and Reporting.* Collection and analysis of data on usage of the Licensed Materials will assist both Publisher and Subscriber to understand the impact of this overall Agreement, the infrastructures provided by Subscriber and Publisher, and possible improvements in the program. Such usage data will be compiled by Subscriber and Publisher, consistent with applicable privacy laws and written confidentiality requirements of the parties, and will be reported at least quarterly to each other by Subscriber and Publisher. The data will include the number of articles downloaded by ISSN by library.

SECTION 6. TERM AND TERMINATION.

- 6.1 *Term.* Unless terminated by either party for breach of any of the important obligations identified in this Agreement (on thirty (30) days notice if not resolved within that period), the term of this Agreement shall be for three (3) subscription years, with the first renewal beginning January 1, 1999. Publisher will notify Subscriber nine (9) months before the expiration of such term, and Subscriber may thereupon renew upon similar terms and conditions as contained in this Agreement or the parties may negotiate a new Agreement. In the event of expiration or termination, Subscriber may retain indefinitely materials delivered to it prior to termination under this Agreement, **excepting materials published before July 1, 1997.** At such time, to the extent required by the Subscriber, Publisher will provide a complete set of Licensed Material on a medium and a format to be mutually agreed to at that time.
- 6.2 *Termination of Individual Institutions Only:* Subscriber may, from time to time, request that individual institutions be terminated as Subscribers hereunder, provided, however, that such individual terminations do not, in the aggregate, cause Subscriber's annual License Fee payable in any given year of this Agreement to decrease below ninety percent (90%) of the anticipated License Fee ~~<delete-for such year>~~ of this Agreement.
- 6.3 *Effect of Termination.* In the event this Agreement terminates because of expiration of the term or termination as set forth in Paragraph 6.1, Subscriber will be able to retain the electronic form of the Publications as delivered to Subscriber pursuant to this Agreement provided that the Subscriber continues to observe its obligations with respect to security (as set out in Section 5) and the restrictions on usage (as set out in Section 1).

SECTION 7. REPRESENTATIONS, WARRANTIES AND INDEMNITIES.

- 7.1 *Publisher warranties.* Publisher warrants that it will use commercially reasonable efforts in its production of tapes or optical media for delivery of the catalog data and Licensed Materials to the Subscriber, that use by Subscriber of the Licensed Materials will not infringe the rights of third parties, and agrees to indemnify Subscriber in the event such a claim of infringement is made.
- 7.2 *Subscriber warranties regarding security and access.* Subscriber warrants that it will use reasonable efforts to ensure the integrity of the Licensed Materials and the security of the Network especially as regards access by parties other than Authorized Users.
- 7.3 *Subscriber warranties as to its authorization to make this Agreement.* Wright State University has the authority to enter into this Agreement as the duly authorized agent of OhioLINK and to carry out the transactions contemplated hereby and perform the obligations hereunder. This Agreement and all actions contemplated hereby which require the approval of OhioLINK's and/or Wright State University's directors or governing body have duly received the required approval.
- 7.4 *Disclaimers.* Notwithstanding the foregoing, however, Publisher will not be responsible for any claim, loss or liability attributable to errors, inaccuracies or other defects in the Licensed Materials or any part thereof arising from any act or omission or (to the maximum extent permitted by relevant laws) any negligence and **BOTH PARTIES EXPRESSLY EXCLUDE ANY LIABILITY FOR BREACH OF ANY IMPLIED OR EXPRESS WARRANTY AS TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE**, save that Publisher will replace any defective media delivered by it to Subscriber under this Agreement. Subscriber shall not be liable to Publisher for breach of the terms of this Agreement by any Authorized User so long as Subscriber did not intentionally assist in or encourage such breach or permit such breach to continue after having actual notice thereof.

SECTION 8. GENERAL

- 8.1 *Force Majeure.* Publisher's failure to perform any term or condition of this Agreement as a result of conditions beyond its control such as, but not limited to, war, strikes, fires, floods, governmental restrictions, power failures, or damage or destruction of any network facilities or servers, shall not be deemed a breach of this Agreement.
- 8.2 *Severability.* In the event that any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this Agreement, but this Agreement shall be construed as if such invalid, illegal or unenforceable provisions have never been contained herein, unless the deletion of such provision or provisions would result in such a material change so as to cause completion of the transactions contemplated herein to be unreasonable. The parties agree that this Agreement will be construed according to the laws of the State of Ohio.

8.3 *Taxes.* All amounts payable by Subscriber hereunder shall be exclusive of any sales, use, value added or similar taxes which shall be the sole responsibility of the Subscriber.

IN WITNESS WHEREOF, the parties have set their hands as of the date first written above.

(VENDOR)

SUBSCRIBER

Title of signatory goes here

Tom Sanville
Executive Director

APPENDIX 1 – List of all institutions subject to this Agreement. Updated as needed based on the terms to add institutions.

APPENDIX 2 – Complete title list of all Publisher titles from the 1998 price list. All titles, as they become available in electronic form, are subject to the terms of Appendix 5. This Appendix needs a column officially designating its availability status in a given year if not immediately available

APPENDIX 3 – The title list of Appendix 2 with all known Appendix 1 library paid 1998 subscriptions, listed by library. Can be updated as Appendix 1 is expanded with eligible schools.

APPENDIX 4 – Technical requirements for data delivery- timing, format, etc.

APPENDIX 5 – Pricing terms and calculations.