

now publishers inc.

LICENCE AGREEMENT

BETWEEN

now publishers Inc, whose principal business address is [redacted]
USA, Tel: [redacted], ("the Licensor"); and

Name of Institution ("the Licensee") The University of California, San Diego
Address [redacted]

| | |
|----------------------------|--|
| Licensed Content | The Licensor will make the modules of Licensed Content specified in Schedule 1 available to the Licensee and to its Authorised Users as a web-based, hosted service on the attached terms and conditions. |
| Effective Date | The date from which the Licensed Content will be made available to the Licensee and its Authorised Users is <u>October 15, 2008</u> |
| Period of Agreement | This Agreement will come into force on the Effective Date and continue for an initial period of 12 months , subject to renewal in accordance with clause 2 of the attached Terms and Conditions. |
| Fees | The fees payable by the Licensor are set out in Schedule 2 . |
| This Agreement | The terms of the Licence Agreement consist of the key terms set out on this page and the attached Terms and Conditions and schedules. |

SIGNED

[redacted signature]
By

[redacted signature]
by

Tony A. Harvell
For and on behalf of Licensee

ZACHARY ROLNIK
For and on behalf of Now Publishers inc

DATED

Oct 15, 2008

OCTOBER 24, 2008

TERMS AND CONDITIONS

1. DEFINITIONS

- 1.1. The following expressions will have the following meanings when used in this Agreement:

| | |
|----------------------------|---|
| "Authorised Users" | <p><u>Persons Affiliated with Licensee.</u> Full and part time students and employees (including faculty, staff, affiliated researchers and independent contractors) of Licensee and the institution of which it is a part, regardless of the physical location of such persons.</p> <p><u>Walk-in Users.</u> Library patrons not affiliated with Licensee who are physically present at Licensed Premises.</p> |
| "Commercial Use" | <p>Use for the purposes of monetary reward (whether by or for the Licensee or an Authorised User) by means of the sale, resale, loan, transfer, bulk reproduction, making available online, hire or by any other form of commercial exploitation of the Licensed Content in any form - print, online, fixed electronic media or otherwise.</p> |
| "Fee" | <p>The fees payable by the Licensor to the Licensee as specified in Schedule 2 for the right to use the Licensed Content.</p> |
| "Licensed Content" | <p>The module(s) of Licensed Content to be made available to the Licensee and its Authorised Users as specified in Schedule 1, subject to such additions and changes as the Licensor and the Licensee may agree in writing from time to time.</p> |
| "Licensed Premises" | <p>The Licensee's physical locations at which it provides computer terminals or other electronic devices from which Authorised Users may access the Site.</p> |
| "Permitted Uses" | <p>The uses of the Licensed Content, which Authorised Users are permitted to make as specified in clause 4.</p> |

2. **AGREEMENT**

- 2.1. The Licensor will make the Licensed Content available to the Licensee's Authorised Users from the Site as a browser-based service with effect from the Effective Date in accordance with these terms and conditions.
- 2.2. This Agreement will come into force on the Effective Date and continue for an initial period of **12 months**.
- 2.3. Following the expiry of the initial period, this Agreement will be automatically extended for a further period of **12 months** unless either party gives to the other not less than [two] months' notice in writing to expire before the end of the initial period.
- 2.4. In addition, this Agreement shall be subject to early termination for cause as specified in clause 12 below.

3. **ACCESS TO THE SITE & LICENSED CONTENT**

- 3.1. The Licensor will enable the Licensee and its Authorized Users to access the Licensed Content via the Internet.
- 3.2. The Licensee and its Authorized Users shall be granted access to the Licensed Content using IP addresses. Authorized Users shall be identified and authenticated by the use of Internet Protocol ("IP") addresses provided by Licensee to Licensor.
- 3.3. The Licensor reserves the right to introduce appropriate technical protection measures to control access and/or use of the Licensed Content in accordance with the License Agreement provided that no such measure shall adversely affect the Licensee's rights under this agreement.

4. **AUTHORISED USE OF LICENSED CONTENT**

- 4.1. The Licensor hereby permits Authorised Users on a non-exclusive basis to access the Site and to use the Licensed Content in accordance with the permitted uses set out in clause 4.3, subject to the restrictions on use set out in clause 5.
- 4.2. Nothing in this Agreement will limit in any way anything that an Authorised User may do under any applicable copyright or similar laws relating to fair dealing, fair use or equivalent exceptions to copyright or any such similar laws.
- 4.3. The Licensee and its Authorised Users may use the Licensed Content for the following non-commercial purposes:
 - 4.3.1. ***Display***. The Licensee and Authorized Users shall have the right to electronically display the Licensed Content.
 - 4.3.2. ***Digitally Copy***. The Licensee and Authorized Users may download and digitally copy a reasonable portion of the Licensed Content.
 - 4.3.3. ***Print Copy***. The Licensee and Authorized Users may print a reasonable portion of the Licensed Content.
 - 4.3.4. ***Recover Copying Costs***. The Licensee may charge a fee to cover costs of copying or printing portions of Licensed Content for Authorized Users. The commercial use of the Licensed Content by the Licensee or Authorized Users is expressly prohibited.
 - 4.3.5. ***Archival/Backup Copy***. Upon request of the Licensee, the Licensee may receive from the Licensor and/or create one (1) copy of the entire set of the Licensed Content to be maintained as a backup or archival copy during the

term of this Agreement or as required to exercise the Licensee's rights under clause 12.3 of this Agreement.

- 4.3.6. **Course Packs.** The Licensee and Authorized Users may use a reasonable portion of the Licensed Content in the preparation of [print only] Course Packs or other educational materials.
- 4.3.7. **Electronic Reserve.** The Licensee and Authorized Users may use a reasonable portion of the Licensed Content for use in connection with specific courses of instruction offered by the Licensee and/or its parent institution.
- 4.3.8. **Databases.** If the Licensed Content consists of a database, compilation, or collection of information, Authorized Users shall be permitted to extract or use information contained in the database for educational, scientific, or research purposes, including extraction and manipulation of information for the purpose of illustration, explanation, example, comment, criticism, teaching, research, or analysis.
- 4.3.9. **Electronic Links.** The Licensee may provide electronic links to the Licensed Content from the Licensee's web page(s), and is encouraged to do so in ways that will increase the usefulness of the Licensed Content to Authorized Users. The Licensor's staff will assist the Licensee upon request in creating such links effectively. The Licensee may make changes in the appearance of such links and/or in statements accompanying such links as reasonably requested by the Licensor.
- 4.3.10. **Caching.** The Licensee and Authorized Users may make such local digital copies of the Licensed Content as are necessary to ensure the efficient use by Authorized Users via appropriate browser or other software.
- 4.3.11. **Indices.** The Licensee may use the Licensed Content in connection with the preparation of or access to integrated indices to the Licensed Content, including author, article, abstract and keyword indices.
- 4.3.12. **Scholarly Sharing.** Authorized Users may transmit to a third party colleague in hard copy or electronically, minimal, insubstantial amounts of the Licensed Content for personal use or scholarly, educational, or scientific research or professional use but in no case for Commercial Use. In addition, Authorized Users have the right to use, with appropriate credit, figures, tables and brief excerpts from the Licensed Content in the Authorized User's own scientific, scholarly and educational works.
- 4.3.13. **Interlibrary Loan.**

Where the Licensee is an academic institution or part of a not-for-profit organization, the Licensor grants the Licensee the non-exclusive right to supply a single paper copy (whether by post, fax or secure electronic transmission equivalent to Ariel whereby the electronic file is deleted after printing) of an individual article from the Licensed Materials to another academic institution or not-for-profit organization in the same country as the Licensee for non-commercial use in the purposes of research or private study. The delivery of the Licensed Materials to for-profit institutions or directly to individuals is not permitted.

Licensee agrees to fulfill such requests in compliance with the applicable copyright laws.

5. **RESTRICTIONS ON USE OF LICENSED CONTENT**

- 5.1. **Unauthorized Use.** Except as specifically provided elsewhere in this agreement, the Licensee shall not knowingly permit anyone other than Authorized Users to use the Licensed Content.
- 5.2. **Modification of Licensed Content.** Neither the Licensee nor any Authorized User shall modify, adapt, abridge or create a derivative work of the Licensed Content without the prior written permission of the Licensor.
- 5.3. **Removal of Copyright Notice.** The Licensee may not remove, obscure or modify any copyright or other notices included in the Licensed Content nor any metadata or digital rights management information that may be associated with the Licensed Content..
- 5.4. **Commercial Use.** Other than as specifically permitted in this Agreement, neither the Licensee nor any Authorised User may use the Licensed Content for Commercial Use.

6. **LICENSOR PERFORMANCE PROVISIONS**

- 6.1. **Availability of Licensed Content.** The Licensor shall make the Licensed Content available to the Licensee and Authorised Users upon receipt of payment of fees, Online Registration Materials, and the signed agreement. Online Registration Materials include the Licensee's contact person information (i.e. name, address, phone number) and the Licensee's IP ranges.
- 6.2. **Accessibility.** The Licensor will use its reasonable endeavours to ensure that its server has adequate capacity and bandwidth to support the usage of the Licensee at a level commensurate with the standards of availability for information services of similar scope operating via the World Wide Web, as such standards evolve from time to time over the term of this Licence.
- 6.3. **Performance.** The Licensor will use its reasonable endeavours to make the Licensed Content available to the Licensee and to Authorised Users at all times [and on a twenty-four hour basis], save for routine maintenance, and to restore access to the Licensed Content as soon as possible in the event of an interruption or suspension of the service.
- 6.4. **Notification of Modifications of Licensed Content.** The Licensee understands that from time to time the Licensed Content may be added to, modified, or deleted from by the Licensor and/or that portions of the Licensed Content may migrate to other formats.
- 6.5. **Withdrawal of Licensed Content.** The Licensor reserves the right to withdraw from the Licensed Content 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.
- 6.6. **Usage Data.** The Licensor shall provide to Licensee statistics regarding the usage of the Licensed Content by the Licensee and/or its Authorised Users.

7. **LICENSEE OBLIGATIONS**

- 7.1. **Provision of Notice of License Terms to Authorised Users.** The Licensee shall make reasonable efforts to provide Authorised Users with appropriate notice of the terms and conditions under which access to the Licensed Content is granted under this Agreement including, in particular, any limitations on access or use of the Licensed Content as set forth in this Agreement.

- 7.2. ***Protection from Unauthorised Use.*** The Licensee shall use reasonable efforts to inform Authorised Users of the restrictions on use of the Licensed Content. In the event of any unauthorised use of the Licensed Content by an Authorised User, (a) the Licensor may terminate such Authorised User's access to the Licensed Content, (b) the Licensor may terminate the access of the Internet Protocol ("IP") address(es) from which such unauthorised use occurred, and/or (c) the Licensee may terminate such Authorised User's access to the Licensed Content upon the Licensor's request. The Licensor shall take none of the steps described in this paragraph without first providing reasonable notice to the Licensee (in no event less than 60 days) and cooperating with the Licensee to avoid recurrence of any unauthorised use.
- 7.3. ***Maintaining Confidentiality of Access Passwords.*** Where access to the Licensed Content is to be controlled by use of passwords, the Licensee shall issue log-on identification numbers and passwords to each Authorised User and use reasonable efforts to ensure that Authorised Users do not divulge their numbers and passwords to any third party. The Licensee shall also maintain the confidentiality of any institutional passwords provided by Licensor.

8. **LICENCE FEES**

- 8.1. The Licensor shall pay the licence fees calculated and payable in accordance with the provisions of Schedule 2.
- 8.2. All fees are exclusive of value added tax and any other equivalent sales taxes. All such taxes shall be payable by the Licensee.

9. **WARRANTIES & INDEMNITIES**

- 9.1. The Licensor warrants to the Licensee that it has the right to license the rights granted under this Agreement to use Licensed Content, that it has obtained any and all necessary permissions from third parties to license the Licensed Content, and that use of the Licensed Content by Authorised Users in accordance with the terms of this Agreement shall not infringe the copyright of any third party.
- 9.2. The Licensor shall indemnify and hold the Licensee and Authorised Users harmless for any losses, claims, damages, awards, penalties, or injuries incurred, including reasonable legal fees, which arise from any claim by any third party of an alleged infringement of copyright or any other property right arising out of the use of the Licensed Content by the Licensee or any Authorised User in accordance with the terms of this Agreement. This indemnity shall survive the termination of this agreement. The Licensor shall have sole control over the legal proceedings in respect of any such claim, including any decision to compromise or settle any such claim. NO LIMITATION OF LIABILITY SET FORTH ELSEWHERE IN THIS AGREEMENT IS APPLICABLE TO THIS INDEMNITY.
- 9.3. In addition to the indemnity given by the Licensor in clause 10.1, each party shall indemnify and hold the other harmless for any losses, claims, damages, awards, penalties, or injuries incurred by any third party, including reasonable attorney's fees, which arise from any alleged breach of such indemnifying party's representations and warranties made under this Agreement, provided that the indemnifying party is promptly notified of any such claims.
- 9.4. In relation to the indemnities contained in clauses 10.2 and 10.3, the indemnifying party shall have the sole right to defend the legal proceedings in respect of such claims at its own expense, including the right to compromise or settle any such claim. 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. EXCLUSIONS & LIMITATIONS OF LIABILITY

- 10.1. The sole warranties given by the Licensor are those contained in clauses 6.2 and 6.3 and in clause 9.1.
- 10.2. If the Licensor fails or is unable to comply with its obligations as regards accessibility and performance as set out in clauses 6.2 and 6.3, and the Licensor is unable to remedy the problem within a reasonable period, the Licensees' sole remedy for any breach of warranty shall be to be reimbursed on a pro rata basis for the period of interruption.
- 10.3. Except for the express warranties stated in this Agreement, the Licensed Content are provided on an "as is" basis, and the Licensor disclaims any and all other warranties, conditions, or representations (express, implied, oral or written), relating to the Licensed Content or any part thereof, including, without limitation, any and all implied warranties of quality, performance, merchantability or fitness for a particular purpose. The Licensor makes no warranties respecting any harm that may be caused by the transmission of a computer virus, worm, time bomb, logic bomb or other such computer program. All such implied provisions are hereby excluded to the full extent permitted by law.
- 10.4. Neither party shall be liable for any indirect, special, incidental, punitive or consequential damages, including but not limited to loss of data, business interruption, or loss of profits, arising out of the use of, or the inability to use, the Licensed Content.
- 10.5. Save in respect of the indemnity contained in clause 9.2, the Licensor's liability in respect of any claim made by the Licensee under this Agreement shall be limited to two hundred per cent (200%) of the total amount of fees paid by the Licensee up to the date that the claim is made.

11. INTELLECTUAL PROPERTY RIGHTS

- 11.1. The Licensor reserves all its intellectual property rights in the Licensed Content in respect of copyright, database right, trade mark rights or otherwise.
- 11.2. The Licensee shall at the request and expense of the Licensor do all such things as may be reasonably required to assist the Licensor in taking or resisting any legal proceedings in relation to any such infringement.

12. TERMINATION & EFFECT OF TERMINATION

- 12.1. Either party may terminate this Agreement immediately by giving written notice to the other in any of the following events:
 - 12.1.1. if the other party commits any breach of any of the terms and conditions of this Agreement and fails to remedy that breach (if capable of remedy) within 60 days after notice from the other party giving full particulars of breach and requiring it to be remedied; or
 - 12.1.2. if the other Party enters into liquidation, whether compulsory or voluntary (except for the purposes of bona fide reconstruction or amalgamation with the prior approval of the other party), or compounds with or makes any arrangements with its creditors or makes a general assignment for the benefit of its creditors, or if it has a receiver, manager, administrative receiver or administrator appointed over the whole or substantially the whole of its undertaking or assets, or if it ceases or threatens to cease to carry on

its business, or makes any material change in its business, or if it suffers any analogous process under any foreign law.

- 12.2. The Licensor hereby grants to the Licensee a nonexclusive, royalty-free, perpetual licence to use any Licensed Content 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 Licensor shall facilitate the Licensee's ongoing access to such Licensed Content by such method as it deems appropriate.

13. **GENERAL**

- 13.1. **Assignment.** The Licensee may not assign or transfer, directly or indirectly, all or parts of its rights or obligations under this Agreement without prior written consent of the Licensor.
- 13.2. **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, but not limited to Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections and/or any other cause beyond the reasonable control of the party whose performance is affected.
- 13.3. **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.
- 13.4. **Modifications.** No modification or claimed waiver of any provision of this Agreement shall be valid except by written amendment signed by authorised representatives of the Licensor and the Licensee.
- 13.5. **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.
- 13.6. **Waiver.** 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.

14. **GOVERNING LAW AND DISPUTE RESOLUTION**

- 14.1. This agreement and any disputes or claims arising out of or in connection with its subject matter are governed by and construed in accordance with the law of **the State of California.**
- 14.2. 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, which are not affected by the dispute.
- 14.3. **Arbitration.** Any controversies or disputes arising out of or relating to this Agreement shall be resolved by binding arbitration in accordance with the then current Commercial Arbitration Rules of the American Arbitration Association. The parties shall endeavor to 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.

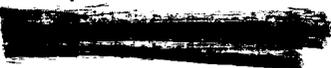
All documents, materials, and information in the possession of each party that are in any way relevant to the claim(s) or dispute(s) shall be made available to the other party for review and copying no later than sixty (60) days after the notice of arbitration is served.

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.

14.4. Nothing in this clause or in the Rules of the International Chamber of Commerce shall prevent either party from applying to the Court of any jurisdiction for such provisional or protective measures as are available under the laws of that jurisdiction.

15. **NOTICES**

15.1. All notices, requests, consents and other communications which are required or permitted hereunder shall be in writing and shall be deemed given (a) when delivered in person at the time of such delivery or by telecopy with confirmed receipt of transmission at the date and time indicated on such receipt; or (b) when received if given by an internationally recognised express courier service to the address specified below; or (c) when received if given by email to the address specified below; provided, however, any notices declaring a breach of or terminating this Agreement shall be given only in person or by an internationally recognised express courier service. Notice of change of address shall be given in the same manner as other communications.

If to Licensor:
now publishers Inc.


If to Licensee:
licensee Univ of Calif., San Diego
Address: Electronic Resources
Acquisitions Dept


Fax: 

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