

DISTRIBUTION AGREEMENT FOR NON-PROFIT USES

This DISTRIBUTION AGREEMENT FOR NON-PROFIT USES (the "Agreement") is entered into by and between Google Inc., a Delaware corporation with its principal offices at 1600 Amphitheatre Parkway, Mountain View, CA 94043 ("Google"), and University of Massachusetts, Amherst, with its principal offices at W.E.B. Du Bois Library, 154 Hicks Way, Amherst, MA 01003. ("Institution"), and is effective as of the date signed by Google below (the "Agreement Effective Date"). Google and Institution herein are sometimes referred to hereinafter individually as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, the University of Michigan ("U of M") wishes to provide certain digital copies of public domain works that were digitized by Google (the "Public Domain Digital Copies") to Institution for research, scholarly, or academic purposes. The Public Domain Digital Copies received by Institution from U of M and all further digital copies thereof made by Institution shall be referred to in this Agreement as the "Institution Digital Copy."

WHEREAS, Google and U of M are parties to an agreement (the "Google – U of M Agreement") that requires Institution to enter into an agreement with Google governing the use and distribution of the Institution Digital Copy prior to receiving the Public Domain Digital Copies from U of M.

NOW THEREFORE, in consideration of the mutual covenants set forth herein, Google and Institution hereby agree as follows:

TERMS

1. USE OF INSTITUTION DIGITAL COPY BY INSTITUTION.

Institution agrees that as a condition of, and in consideration for, Google's consent to U of M's distribution of the Public Domain Digital Copies to Institution, Institution will: (1) use the Institution Digital Copy only for research, scholarly, or academic purposes; (2) not share, provide, license, or sell the Institution Digital Copy to any third party (beyond providing or making content available to scholars and other users for educational or research purposes) nor specifically charge, receive payment or other consideration for the use of the Institution Digital Copy; (3) not use the Institution Digital Copy to provide commercial search or hosting services substantially similar to those provided by Google, including but not limited to those services substantially similar to Google Book Search; provided, however, that the foregoing prohibition shall not prevent Institution from using the Institution Digital Copy to provide search and hosting services for research, scholarly, or academic purposes; and (4) (A) use reasonable efforts to prevent third parties from bulk downloading any portion of the Institution Digital Copy, and (B) implement technological measures (e.g., through use of the robots.txt protocol) to restrict automated access to any part of Institution's website where substantial portions of the Institution Digital Copy are available.

2. TERM AND TERMINATION

2.1 Term. This Agreement is effective as of the Effective Date and continues in full force and effect, unless earlier terminated as provided herein.

2.2 Termination. Either Party may terminate this Agreement if the other Party materially breaches any material term or condition of this Agreement and fails to cure such breach within thirty (30) days after receiving written notice thereof (if such breach is subject to cure).

2.3 Effect of Expiration or Termination. The following sections shall survive termination of this Agreement: 1, 2.3, 3, 4, and 5.

3. WARRANTIES AND DISCLAIMER

3.1 Mutual Warranties. Each Party represents and warrants to the other that (a) it has full power and authority to enter into this Agreement and to perform its obligations hereunder; and (b) this Agreement constitutes its valid and binding obligation, enforceable against it in accordance with its terms.

3.2 Disclaimer. THE WARRANTIES EXPLICITLY SET FORTH ABOVE ARE THE ONLY WARRANTIES PROVIDED HEREIN AND ARE IN LIEU OF ALL OTHER WARRANTIES BY THE PARTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, GOOGLE SPECIFICALLY DISCLAIMS ANY WARRANTY REGARDING NON-INFRINGEMENT OF THIRD PARTY INTELLECTUAL PROPERTY.

4. LIMITATION OF LIABILITY

EXCEPT FOR DAMAGES ARISING FROM BREACH OF SECTION 1 OR INDEMNIFICATION PAYMENT OBLIGATIONS TO THIRD PARTIES UNDER SECTION 5, (A) IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY FORM OF INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES OF ANY CHARACTER FROM ANY CAUSES OF ACTION OF ANY KIND WITH RESPECT TO THIS AGREEMENT, WHETHER BASED ON BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, AND WHETHER OR NOT THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE, AND (B) EACH PARTY'S LIABILITY UNDER THIS AGREEMENT SHALL BE LIMITED TO TEN THOUSAND DOLLARS (\$10,000). The Parties agree that (i) the mutual agreements made in this Section 4 reflect a reasonable allocation of risk, and (ii) that each party would not enter into the Agreement without these limitations on liability.

5. INDEMNITY

Consistent with, and to the extent permitted by Massachusetts law, Institution shall defend, or at its option, settle any third party lawsuit brought against Google (its affiliates, employees or agents) or proceeding that relates to Institution's use or distribution of the Institution Digital Copy in violation of that party's copyrights or other legal rights. The Institution shall have the sole responsibility for defense of such actions and for payment of any attorney's fees, damage awards or settlement costs that may be incurred solely as a result of the Institution's use or distribution of the Institution Digital Copy. University agrees that Google may participate in the defense with counsel of its own choice, at its own expense. The foregoing shall not be interpreted as a waiver of the sovereign immunity of the Commonwealth of Massachusetts, nor assumption by the University of any liability or obligation for the acts or omissions of Google or for the acts or omissions of others contrary to state law governing the Institution as an agency of the Commonwealth of Massachusetts.

6. GENERAL PROVISIONS

(a) Assignment. Neither Party may assign or transfer any part of this agreement without the written consent of the other party, except to an affiliate but only if (a) the assignee agrees in writing to be bound by the terms of this agreement and (b) the assigning party remains liable for obligations under the agreement. Any other attempt to transfer or assign is void.

(b) No Waiver and Severability. Failure to enforce any provision will not constitute a waiver. If any provision of this agreement is found unenforceable, the balance of the agreement will remain in full force and effect.

(c) Equitable Relief. Nothing in this Agreement will limit either party's ability to seek equitable relief, including but not limited to specific performance and injunctive relief.

(d) Amendments. Any amendment must be in writing and expressly state that it is amending this agreement.

(e) Counterparts. The parties may execute this agreement in counterparts, including facsimile, PDF, and other electronic copies, which taken together will constitute one instrument.

(f) Entire Agreement. This Agreement is the parties' entire agreement relating to its subject and supersedes any prior or contemporaneous agreements on that subject.

(g) Other Rights. This Agreement does not affect any right that either Party would have had, or shall have, independent of the Agreement under applicable law.

IN WITNESS WHEREOF, this Agreement has been executed by persons duly authorized as of the "**Effective Date**," which shall be the date written by Google below.

