MODEL AGREEMENT FOR A LICENCE ON DIGITISATION OF OUT OF PRINT WORKS

THIS LICENCE is made on [date]

BETWEEN: [full name of the Licensor / his organisation and its authorised representative signing it] of [full address including fax number and email where this is to be the method of communication] ("the Licensor")

AND: [full name of the licensee's organisation and its authorised representative signing it] of [full address including fax number and email where this is to be the method of communication] ("the Licensee")

RECITALS

A) WHEREAS the following agreement is to be understood as a practical solution to be agreed by the different stakeholders to solve issues raised by digitisation, including the request made by libraries and other cultural establishments,

B) AND WHEREAS the following agreement intends to take into account the national usages and best practices in the respective fields in each of the European Union Member States,

C) AND WHEREAS the following agreement is designed to implement the concept advanced by item 6(b) of the European Commission Recommendation of 24th August 2006 whereby the mechanisms intended to facilitate the use of such works should in principle be established or promoted on a voluntary basis,

D) AND WHEREAS libraries may be authorised by law to digitise a work (i.e. under an exception or limitation to the exclusive right of reproduction), in accordance with Articles 2 and 3 and Recitals 21-24 and 40 of the EC Directive 2001/29 the right of reproduction, the right of communication to the public and the right to make available are separate rights, each of them requiring separate permission from the Rightsholders concerned,

E) AND WHEREAS the following agreement is designed to allow acts that are not already covered by statutory or licensing arrangements,

F) AND WHEREAS it is recognised that the Rightsholder shall have the liberty to choose to digitise a work him/herself and that consequently access to the work including that of the library could be obtained from the Rightsholder.

G) AND WHEREAS it is recognised that the Rightsholder may at his sole discretion decide that a work shall be treated as a work in print if there are other editions commercially available, whether on- or offline, and the making available of the out-of-print edition would conflict with the legitimate interest of the Rightsholder in the commercialising of the alternative edition,

IT IS AGREED AS FOLLOWS:

1. DEFINITIONS

1.1. Access on site	Allow Authorised Users access to the Licensed Material and/or Digitised Version on terminals on the library premises.
1.2. Author	The natural person(s) who created the Work.
1.3. Authorised user	A person, whether natural or legal, who is authorised to use the particular service of the library according to its regulations and on the conditions specified in this agreement through which he obtains access to the Licensed Material.
1.4 Digitisation	Technical process which produces a faithful copy of the Licensed Material in a machine readable form
1.5. Digitised Version	A faithful copy in machine readable form of the Licensed Material produced within the framework of this agreement
1.6. Document Delivery	(Physical) delivery or (electronic) communication of a Work to a remote client on the client's request
1.7 End use	The legitimate uses by the last natural or legal person in the chain of uses that are permitted by or through this agreement.
1.8. End users	Person, whether natural or legal, which has legitimately received access to use the Work according to this agreement.
1.9 Licensed Material	Out-of-Print Works that are subject to this agreement, (and listed in Annex 1) as well as copies thereof if they are produced within the framework of this agreement
1.10 Licensee	The licensed library which is authorised to act under this agreement
1.11. Licensor	The Licensor is the person, whether natural or legal, authorised to license the uses subject to this agreement either by reason of being a Rightsholder owning or holding the rights necessary to grant the requisite licence or by being so authorised by the Rightsholder as his representative.
1.12. Making available to the public	Making the Licensed Material available by way of an interactive on-demand transmission being characterised by the public being offered access to it from a place and at a time individually chosen by them.
1.13. Open network	A network that is not a Secure Network.
1.14. Out-of-Print Work	A Work which the Rightsholder has decided is no longer commercially available regardless of the existence of tangible copies of the Work in libraries and among the public.
1.15 Out-of-Print	The date which the Work was declared an Out-of-Print Work as

Date	specified in Annex 1.
1.16. Purpose of this agreement	This agreement is only valid for non-commercial purposes. This means that the Licensee must not obtain a commercial advantage from it, whether directly or indirectly. Commercial use is subject to (a) supplementary agreement(s)
1.17. Right of communication to the public	The exclusive right as defined in Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
1.18. Right of Making available	The exclusive right as defined in Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
1.19. Right of reproduction	The exclusive right as defined in Article 2 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
1.20. Rightsholder	The individual or legal person having the requisite rights necessary to grant the Licensee this licence. Whether this person is the Author, the publisher or other depends upon the circumstances of the contractual agreements/the applicable law.
1.21 Secure Network	A network (whether standalone or virtual, whether within the internet, in the form of an intranet or extranet or otherwise) access to which is restricted to Authorised Users by effective controls such as effective password controls or IP address validation.
1.22. Work	A poem, a novel, an article etc. as well as its manifestation in a physical or electronic format (for example as a book, a journal, a magazine, an e-book, a CD, film, a piece of music etc).
1.23. Work in Copyright	Work as defined in Definition 1.22 protected by copyright laws
1.24. Work out of Copyright	A Work as defined in Definition 1.22 that is not protected by copyright laws irrespective of the reasons for not being so protected (whether for example because the term of protection has expired or because the work is of a type that cannot benefit from copyright protection at all).

2. PARTIES TO THE AGREEMENT

2.1. The Licensor is authorised to license the uses subject to this agreement by reason of [ADD THE APPROPRIATE AND DELETE THE REMAINING CHOICES:]

being the author of the work(s) in question and owning all rights necessary to grant the requisite licence for the uses subject to this agreement

being the publisher of the work(s) in question and holding all rights necessary to grant the requisite licence for the uses subject to this agreement

being a representative authorised by the Rightsholder with respect to all rights necessary to grant the requisite licence for the uses subject to this agreement.

2.2. The Licensee is at liberty to subcontract any such third parties as it may deem fit to carry out technical work, such as digitisation, for it. The Licensee is and remains, however, fully responsible and liable towards the Rightsholder to ensure that this agreement is complied with in letter and spirit as regards its own actions as well as those of any third parties, employees, servants, agents or others that it may use for the purposes of this agreement.

3. THE AGREEMENT

3.1. The Licensor grants the Licensee a non-exclusive and non-transferable licence to perform all Permitted Uses of the Licensed Material as set out under clause 4 for the term of this Agreement for the Purposes of this agreement against a payment of [INSERT DETAILS] due within [INSERT TIME] provided the Licensee complies with its obligations set out under 6 (Procedure) and 7 (other Obligations), subject to the limitations in clause 5.

3.2. Where the Rightsholder waives payment, the parties agree that this agreement shall remain fully enforceable by both parties and will both undertake all such steps as are necessary to keep it enforceable.

3.3. Copyright Status in the Licensed Material and Digitised Version.

3.3.1. For the avoidance of doubt, the Rightsholder retains all intellectual property rights in the Licensed Material including the Digitised Version and any metadata created by the Rightsholder relating to it already in existence when this contract was concluded.

3.3.2. In case applicable law should regard it as a separate work, the Licensee hereby transfers the copyright in the Digitised Version to the Rightsholder.

3.4. The Licensor may decide to revoke this licence at any time to withdraw the Licensed Material entirely or any item or part of an item from it if the Licensor no longer retains the right necessary for this Licence, or if it has reasonable grounds to believe that the withdrawn whole or part infringes copyright or is defamatory, obscene, unlawful or otherwise objectionable or if it decides to re-commercialise the whole Licensed Material or any item or part of an item of it.

3.4.1. The Licensor shall act in accordance with the procedure under clause 6.3 of this agreement.

3.4.2. If the material withdrawn under 3.4. represents more than ten per cent (10%) of a title in the Licensed Material the Licensee may claim from the Licensor such costs as the Licensee can demonstrate to have incurred to digitise the Licensed Material and make available the Digitised Version, pro rata, taking into account the amount of material withdrawn.

4. PERMITTED USES

4.1. The Licensee may digitise the Licensed Material.

4.2. The Licensee may access the Digitised Version.

4.3. The Licensee may reproduce the Digitised Version on paper or electronically in appropriate numbers of copies necessary for the sole purpose of back-up or preservation subject to exceptions under applicable law and existing licences for the Purposes of this agreement

4.4. The Licensee may store the Digitised Version in a systematic way so as to facilitate its search and retrieval.

4.5. The Licensee may provide access to the Digitised Version on site to Authorised users.

4.6. The Licensee may provide access to the Digitised Version through Secure Networks to Authorised Users.

4.7. Authorised Users may:
4.7.1. search, view, retrieve and display the Digitised Version
4.7.2. electronically save parts of the Digitised Version for personal use [AS AGREED BETWEEN THE LICENSOR AND THE LICENSEE IN A SEPARATE AGREEMENT] or [AS PERMITTED BY LAW. LAW [SPECIFY APPLICABLE LAW TAKING INTO CONSIDERATION ARTICLE 10.1.1 OF THIS AGREEMENT]] [KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]
4.7.3. Print off single copies of parts of the Digitised Version [AS AGREED BETWEEN THE PARTIES TO THE AGREEMENT [INSERT DETAILS],] or [AS PERMITTED BY LAW [SPECIFY APPLICABLE LAW TAKING INTO CONSIDERATION ARTICLE 10.1.1 OF THIS AGREEMENT]]. [KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]
4.7.4. The Authorised user may not forward a part or the whole of the digitized version of the work to anyone.

4.8. The Licensee may provide other libraries with on-line access to the Digitised Version so that they may make it available to their respective Authorised Users for the Purposes of this agreement provided there is a specific agreement thereto in a separate licence with the Licensor which is/is not [DELETE WHAT IS REDUNDANT] annexed to this agreement.

4.9. The Licensee may provide third parties with on-line access to the Digitised Version in the framework of this agreement provided there is a specific agreement thereto in a separate licence thereto with the Licensor which is/is not [DELETE WHAT IS REDUNDANT] annexed to this agreement.

4.10. Nothing in this Licence shall constitute a waiver of any statutory rights or benefits from statutory exceptions to copyright applicable to the Licensee.

4.11 [KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]

The Licensee may charge a fee to the user only at the level necessary to cover its costs, which may in particular include the licensing fee as set out in article 3 of this agreement;

Or:

The Licensee may charge a fee to the user which can exceed the level necessary to cover its costs. Therefore, the Licensee may achieve a net income from any use of the work.

Or:
The Licensee may charge a fee to the user which can exceed the level necessary to cover its costs. Therefore, the Licensee may achieve a net income from the following uses of the work [LIST USES]:

Or:
The Licensee will not charge any fee to the user taking into consideration Article 3 of this agreement.

5. LIMITATIONS

5.1. The Licensee may not provide access to the Licensed Material or the Digitised Version over Open Networks to anyone.

5.2. Neither the Licensee nor Authorised Users may remove or alter authors' names or publisher's copyright notices or other means or identification or disclaimers as they appear in or on the Licensed Material.

5.3. Neither the Licensee nor Authorised Users may alter, abridge, adapt or modify the Licensed Material, except to the extent necessary to make it perceptible on a computer screen, or as otherwise permitted in this agreement, to Authorised Users. For the avoidance of doubt, no alteration of the words or their order is permitted.

5.4. This agreement does not include a right for the Licensee to produce subsequent digitisations of the Licensed Material or the Digitised Version in other formats, except as provided in clause 4.3 or in so far as is necessary to allow continued use of the material in the light of changes in standards for operating systems, software applications or data format.

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6. PROCEDURES

6.1. Digitisation Procedures

[ALTERNATIVE A: WHERE THE LIBRARY CARRIES OUT THE DIGITISATION:]

6.1.1. The Licensee organises the digitisation of the Licensed Material in any way that appears practical to it as long as it can assure compliance with this agreement.

6.1.2. The Licensee will usually own a copy of the Licensed Material in paper form and digitise this. In case the Licensee does not own a copy of the Licensed Material or any part of it, the Licensor will name a source for the Licensee to obtain a copy for digitisation.

6.1.3. The Licensee will ensure that the Digitised Version will be accessible upon request to associations officially designated to represent Visually Impaired Persons or with a strong representativity of Visually Impaired Persons, or as provided by law taking into consideration Article 10.1.1 of this agreement,

provided adequate measures are utilised by the Licensee to protect from unauthorised use of the work.

6.1.4. The Licensee will provide the Licensor with a copy of the Digitised Version.

6.1.5. The Licensee will moreover provide the Licensor with access to the Digitised Version in its systems provided that no conflict would thereby arise with other agreements that the Licensee has entered into.

6.1.6. The Licensee will use previously available metadata on the Work if appropriate and if the Licensee creates any additional metadata for the Licensee's own purposes it will be created in a format to be agreed between the Licensee and the Licensor and made available upon request to the Licensor.

[ALTERNATIVE B: WHERE THE RIGHTSHOLDER CHOOSES TO CARRY OUT THE DIGITISATION ITSELF]:

6.1.7. The Licensor organises the digitisation of the Licensed Material in any way that appears practical to it as long as it can assure compliance with this agreement.

6.1.8. The Licensor will ensure that the Digitised Version will be accessible to Visually Impaired Persons.

6.1.9. The Licensor will cooperate with the Licensee to enable it to link to the Licensor's resources containing the Digitised Version.

6.1.10. The Licensor will deliver any metadata on the Licensed Material and the Digitised Version to the Licensee in a format to be agreed between them.

6.2. Procedures to make work accessible

6.2.1. The Licensee will use the metadata on the Licensed Material and Digitised Version mentioned under 6.1

6.3. Procedures for withdrawal of edition

6.3.1. According to 3.4 the Licensor is at liberty to decide at any time to terminate its licence under this agreement e.g. with a view to commercialise the Licensed Material in any way it sees fit.

6.3.2. The Licensor must give the Licensee [INSERT TIME: i.e. NUMBER OF MONTHS OR CLEAR CALENDAR DAYS ETC] written notice and the Licensee may claim from the Licensor such costs as he can demonstrate to have incurred to digitise the Licensed Material and make available the Digitised Version.

6.3.3. The Licensee must deliver up the Digitised Version to the Licensor in such a form as will be agreed between the parties. Provided that the Digitised Version remains lawful (as regards libel, etc.) it may be retained by the Licensee for on-site use only. As to any refund of costs as stipulated in Article 3.4.2 of this agreement, the part of the costs to be refunded shall be decided by the Licensee and the Licensor by common agreement annexed to this licence. Any replacement of the delivered work will have to be agreed between the Licensee and the Licensor in a separate agreement.

6.3.4. When appropriate, the Licensor will provide the Licensee with the new Digitised Version on terms to be agreed upon and which takes into account clause 6.3.3 of this agreement.

7. OTHER OBLIGATIONS OF THE LICENSEE

7.1. The Licensee will inform the Licensor every [INSERT FREQUENCY: E.G. ONCE A YEAR, MONTH, EVERY SIX MONTHS ETC.] of:

7.1.1. the frequency in which the Digitised Version is accessed,

7.1.2. [OTHER TYPES OF INFORMATION THAT MIGHT BE SPECIFIED IN INDIVIDUAL AGREEMENTS]

7.2. With the exception of costs that incur under Article 10 of this agreement, the Licensee will bear all costs relating to this agreement, save as otherwise agreed in writing.

7.3. The Licensee shall:

7.3.1. Use all reasonable endeavours to ensure that all Authorised Users are appropriately notified of the importance of respecting the intellectual property rights in the Licensed Material and of the sanctions for failing to do so;

7.3.2. Use all reasonable endeavours to ensure that Authorised Users are made aware of and undertake to abide by the terms and conditions of this agreement; use all reasonable endeavours to monitor compliance and immediately on becoming aware of any unauthorised use or other breach, inform the Licensor and take all reasonable steps, including, where appropriate disciplinary action, both to ensure that such activity ceases and to prevent any recurrence;

7.3.3. Use all reasonable endeavours to ensure that only Authorised Users are permitted access to the Digitised Version.

8. TERM AND TERMINATION

8.1. This agreement is terminated [KEEP WHAT IS APPROPRIATE, DELETE WHAT IS REDUNDANT]
at a date agreed by the parties to the agreement [INSERT DATE]. It is automatically renewed for [INSERT NUMBERS OF MONTHS OR YEARS] unless written notice to the contrary has ben given [INSERT NUMBER OF MONTHS] prior to the expiry of the agreement.

Or:
at the expiry of copyright in the Licensed Material.

8.2. The agreement may also be terminated by the Licensor if the Licensor gives the Licensee [INSERT TIME] written notice. Upon the termination of the agreement, any intellectual property rights subsisting in any metadata created by the Licensee are automatically assigned to the Licensor, though this provision shall not affect the Licensee's continued gratis use of such metadata for catalogue purposes.

8.3. On termination all rights and obligations of the parties automatically terminate, except 8.2. and 9.1.

9. WARRANTIES AND INDEMNIFICATION

9.1. The Licensor warrants to the Licensee that it owns, holds or is sufficiently authorised with respect to the rights necessary to grant the Licensee the licence stipulated in clause 3.1 and that the Permitted Uses of the Licensed Material used as contemplated in this licence do not infringe any copyright or other proprietary or intellectual property rights of any natural or legal person. The Licensor shall indemnify and hold the Licensee harmless from and against any loss, damage, cost, liability or expense (including reasonable legal and

professional fees) arising out of any legal action taken against the Licensee claiming actual or alleged infringement of such rights. This indemnity shall survive the termination of this agreement for any reason. This indemnity shall not apply if the Licensee has amended or used (or allowed others to do either of these) the Licensed Material in any way not permitted by this agreement.

10. MISCELLANEOUS

10.1. Dispute Resolution

10.1.1. The parties agree that they will attempt to settle any disputes amicably and in good faith, and where it cannot be so solved within reasonable time that either party may commence alternative dispute resolution as set out in Article 10.1.2 below

10.1.2. [SELECT THE APPROPRIATE OPTION AND DELETE THE REMAINING OPTION.]

[OPTION A]

[Any difference between the parties arising under, out of or relating to this Licence Agreement, including the rights and liabilities of the parties thereto, and any subsequent amendments of this License Agreement shall in the first instance be referred to expert determination in accordance with the WIPO Expert Determination Rules. Unless the parties have expressly agreed otherwise, the expert's determination shall not be binding upon the parties nor prevent either party from pursuing its interest further in court as specified in Article 10.1.1 below. The costs of the expert determination shall be borne by the parties in such proportions as the expert may determine to be fair and reasonable in the light of all the circumstances and the outcome of the expert determination, or, if no such determination is made, in equal portions. The language to be used in the expert determination shall be [SPECIFY LANGUAGE].]

[OPTION B: AVAILABLE <u>ONLY</u> WHERE THE LICENSEE AND THE LICENSOR ARE BOTH REGISTERED AND OPERATE IN THE SAME COUNTRY, AND WHERE THE EFFECT OF THIS LICENSE AGREEMENT IS LIMITED TO SUCH COUNTRY. PARTIES MAY EITHER (a) AGREE TO ADOPT OPTION "A" AS SET OUT ABOVE, OR (b) AGREE TO ADOPT A DIFFERENT ALTERNATIVE DISPUTE RESOLUTION PROCEDURE RECOGNISED BY THE RELEVANT NATIONAL LAW AND LEGAL TRADITION TO BE SPECIFIED BELOW.]

[Any difference between the parties arising under, out of or relating to this Licence Agreement, including the rights and liabilities of the parties thereto, and any subsequent amendments of this Licence Agreement shall in the first instance be referred to [INSERT DESCRIPTION OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURE TO BE ADOPTED]. The costs of the alternative dispute resolution shall be borne by the parties in such proportions as the decision-maker may determine to be fair and reasonable in the light of all the circumstances and the outcome of the alternative dispute resolution, or, if no such determination is made, in equal portions. The language to be used in the alternative dispute resolution shall be [SPECIFY LANGUAGE].]

10.2. Applicable Law and forum

10.2.1. The parties agree that, subject to the provisions in Articles 10.1.1 and 10.1.2 above, any dispute arising out of or in connection with this Licence Agreement shall be subject to and within the jurisdiction of the [NATIONAL] courts.

10.2.2. This Licence Agreement shall be governed and construed in accordance with [NATIONAL] law.

[WHERE THE LICENSOR AND THE LICENSEE ARE GOVERNED BY DIFFERENT NATIONAL LAWS, THE LICENCE AGREEMENT SHALL BE GOVERNED BY THE LAW OF THE LICENSEE.]

10.3. Words in the feminine form equally denote to the masculine form and the single to the plural as and where appropriate.

10.4. Non-assignability:

10.4.1. This Licence may not be assigned by either party to any other person or organisation, without the prior written consent of the other party, which consent shall not unreasonably be withheld.

10.4.2. If rights in all or any part of the Licensed Material are assigned to another publisher or pass on death of the author to his estate, the terms and conditions of this Licence shall survive the assignment.

10.5. If any provision of this agreement shall be adjudged by a court of competent jurisdiction to be void or unenforceable but which provision would be valid and enforceable if it were varied or modified then such provision shall apply with such variation or modification as shall be necessary to make it valid or enforceable. In case such variation or modification is not possible, the clause shall be struck out of the agreement. The fact that one clause has been held void or unenforceable, will not affect the validity of the remaining agreement in any event.

10.6. Alterations to this agreement and to the Annexes to it (which may be altered separately from the body of this agreement without affecting the validity of the agreement as a whole) are valid only if they are recorded in writing and signed by both parties.

[SIGNED ETC]

Annex: list of works to be digitised / made available in digital format, specifying the Out-of-Print Date per Work.