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## **VI. MUTUAL PERFORMANCE OBLIGATIONS**

**Notification and Cure of Unauthorized Use.** In the event the Licensee has notice of an unauthorized use of the Licensed Materials and cannot promptly remedy it, the Licensee shall promptly notify the Licensor. In the event the Licensor has notice of unauthorized use of the Licensed Materials, the Licensor will promptly notify Licensee.

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## **VII. LICENSOR PERFORMANCE OBLIGATIONS**

The Licensor will use reasonable efforts to ensure that its performance will meet or exceed industry standards and practices. Additionally, the Licensor agrees to the following performance standards.

**Availability of License Materials.** Upon the Effective Date of this Agreement, Licensor will make the Licensed Materials available to the Licensee and Authorized Users.

**Persistent Linking.** Licensor will comply with the most current version of the OpenURL standard (ANSI/NISA Z39.88), and will provide a mechanism for persistent links to content.

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**Documentation.** Licensor will provide complete and up-to-date help and operational documentation for Licensee and Authorized Users in an electronic format.

**Support.** Licensor will provide activation and installation support, including assisting Licensee and Authorized Users with the implementation of any Licensor software. Licensor will offer reasonable levels of continuing support to assist Licensee and Authorized Users in use of the Licensed Materials. Licensor will make its personnel available by email and/or phone during Licensee’s regular business hours, Monday through Friday, for feedback, problem-solving, or general questions and will respond in a timely manner.

**Training.** Licensor will provide to Licensee and Authorized Users appropriate training relating to the use of the Licensed Materials and any Licensor software. Licensor also will provide additional training to Licensee staff if made necessary by any updates or modifications to the Licensed Materials or any Licensor software.

**Updates.** Licensor will provide regular system and project updates to Licensee as they become available.

**Quality of Service.** Licensor shall use reasonable efforts to ensure that the Licensor’s server or servers have sufficient capacity and rate of connectivity to provide the Licensee and its Authorized Users with a quality of service comparable to current standards in the on-line information provision industry in the Licensee’s locale. Licensor shall use reasonable efforts to provide continuous service seven (7) days a week with an average of 98% up-time per month. The 2% down-time includes periodic unavailability due to server maintenance; software installation or testing; loading or making available additional Licensed Materials as they become available; and unavailability because of service or equipment failure outside the control of Licensor (including problems with public or private telecommunications services, or Internet nodes or facilities).

**Problems with Licensed Materials.** If the Licensed Materials fail to operate, display, load, or render in conformance with the terms of this Agreement, Licensee shall immediately notify Licensor, and Licensor shall promptly use best efforts to restore access to the Licensed Materials as soon as possible.

In the event that the non-conformity materially affects the Licensee's or Authorized Users' use of the Licensed Materials, and Licensor fails to repair the nonconformity within thirty (30) business days, Licensor shall reimburse Licensee for such problems in an amount that is proportional to the total Fees owed by Licensee under this Agreement.

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<sup>1</sup> [http://www.projectcounter.org/code\\_practice.html](http://www.projectcounter.org/code_practice.html)

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## **VIII. LICENSEE PERFORMANCE OBLIGATIONS**

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## **IX. TERM**

This Agreement shall be in effect from the Effective Date through the expiration date as set out in Appendix A unless terminated earlier in accordance with the provisions in Section XI.



## X. RENEWAL

This agreement shall be renewable at the end of the current term for a successive one (1) year term unless either party gives written notice of its intention to cancel thirty (30) days before expiration of the current term. In the event of a price increase for a subsequent term as provided for in Section III, Licensee shall have no less than sixty (60) days from the date of notification of the price increase to notify Licensor of Licensee's intent to cancel or renegotiate.

## XI. EARLY TERMINATION

Termination for Breach. If either party believes that the other has materially breached any obligations under this Agreement, such party shall so notify the breaching party in writing. The breaching party shall have sixty (60) days from the receipt of notice to use all reasonable means to cure the alleged breach and to notify the non-breaching party in writing that cure has been effected. If the breach is not cured within the sixty (60) day period, the non-breaching party shall have the right to terminate the Agreement without further notice. Once this Agreement ends, by early termination or otherwise, the Licensor may terminate access to the Licensed Materials by Licensee and Authorized users, subject to Section XII, below. In addition, authorized copies of Licensed Materials made by Authorized Users may be retained for educational purposes and used subject to the terms of this Agreement.

Refunds. In the event of early termination permitted by this Agreement, except for termination for a material breach by the Licensee, Licensee shall be entitled to a refund of any fees or pro-rata portion thereof paid by Licensee for any remaining period of the Agreement from the date of termination.

## XII. <THIS SECTION INTENTIONALLY REMOVED>

## XIII. WARRANTIES

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#### **XIV. LIMITATIONS ON WARRANTIES**

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#### **XV. <THIS SECTION INTENTIONALLY REMOVED>**

#### **XVI. ASSIGNMENT AND TRANSFER**

Neither party may assign, directly or indirectly, all or part of its rights or obligations under this Agreement without the prior written consent of the other party, except as otherwise provided in Section VII. Neither party to this Agreement may unreasonably withhold or delay such written consent.

#### **XVII. GOVERNING LAW**

This Agreement shall be interpreted and construed according to, and governed by, the laws of California, excluding any such laws that might direct the application of the laws of another jurisdiction.

#### **XIX. 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, labor strikes or other work stoppages, and/or any other cause beyond the reasonable control of the party whose performance is affected.

## **XX. 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. For the avoidance of doubt, online terms and conditions as defined in Section VII shall not modify the terms of this Agreement.

## **XXI. AMENDMENT**

No modification or claimed waiver of any provision of this Agreement shall be valid except by written amendment signed by authorized representatives of Licensor and Licensee.

## **XXII. 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.

## **XXIII. WAIVER OF CONTRACTUAL RIGHT**

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.

## **XXIV. NOTICES**

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[Text deleted]

New York  
NY  
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10001

Phone: [Text deleted]

Email: [Text deleted]

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La Jolla, CA 92093- [Text deleted]

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Phone: [Text deleted]

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**IN WITNESS WHEREOF**, the parties have executed this Agreement by their respective, duly authorized representatives as of the date first above written.

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DATE: 8/22/2017

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## APPENDIX A: BUSINESS TERMS

### **Licensed Materials:**

- Artifex Press
- All published titles.
- Contemporary Artist catalogues raisonne. Database access. Up to date and accurate.

**Contract Term:** Three (3) Years, payable in 3 annual payments.

**Access Conditions:** Unlimited simultaneous users access

**Authentication:** IP authentication (See Appendix C for IP addresses)

### **Fees and Negotiated Discounts:**

- [Text deleted]

**Payment Terms:** Licensor will issue invoices on an annual basis.

### **Funding Contingency:**

The University of California, San Diego reasonably believes that funds can be obtained sufficient to pay all monies due during the term of this Agreement and hereby covenants that it will do all things lawfully within its power to obtain, maintain, and properly request and pursue funds from which payments for this transaction may be made, including making provisions for such payments to the extent necessary in each budget submitted for the purpose of obtaining funding, using its bona fide best efforts to have such portion of the budget approved and exhausting all available administrative review and appeals in the event such portion of the budget is not approved. It is the University of California, San Diego's intent to make payments for the full term of this transaction. The University of California, San Diego represents that the use of the materials under this transaction are essential to its proper, efficient and economic operation.

In the event no funds or insufficient funds are appropriated and budgeted and are not otherwise legally available by any means whatsoever in any fiscal period for payments due under this transaction, the University of California, San Diego will immediately notify Licensor of such occurrence and this transaction shall terminate on the last day of the subscription period for which payment has been made without penalty of expense to the University of California, San Diego of any kind whatsoever, except as to the portions of payments herein agreed for which funds shall have been appropriated and budgeted or otherwise available.