

# **OverDrive Digital Library Reserve Consortium Access Agreement**

## **1. Digital Library Reserve Application Services**

1.1 OverDrive will create and host a Consortium Website for the Participating Libraries use of the Application Services. OverDrive shall provide the Application Services to the Consortium and Participating Library under the terms of the Consortium Agreement Form, Participating Library Form and this Access Agreement (collectively referred to as the "Agreement").

1.2 OverDrive shall create an account in OverDrive's content selection platform, OverDrive Marketplace, for each Participating Library to select Digital Content to make available at the Consortium Website to Authorized Patrons and to access reports. Individual Participating Libraries may enroll in the OverDrive Advantage program to allow Digital Content access to Authorized Patrons of its' library only. OverDrive Advantage is subject to the terms and conditions of the OverDrive Advantage Order Form.

1.3 OverDrive will use commercially reasonable efforts to make the Application Services perform substantially in accordance with the terms herein. From time to time, OverDrive may make modifications or updates to the operation, performance, or functionality of the Application Services as it sees fit or as required by OverDrive's suppliers. Consortium may be required to complete additional forms, documents or other associated materials provided by OverDrive and shall use commercially reasonable efforts to complete the documents in a timely manner.

1.4 OverDrive will use commercially reasonable efforts to provide Secondary Support to Consortium.

1.5 Any current OverDrive standalone system customer shall not be eligible to join the Consortium. Notwithstanding the foregoing, OverDrive shall have sole discretion to approve any and all new libraries that seek to join Consortium. OverDrive shall have sole discretion to honor any prior version of an order form, participation form or related material completed by a Participating Library. OverDrive may require a Participating Library to complete an updated version of the same.

1.6 If Consortium seeks a modification of the Application Services or integration of the Application Services beyond those offered on the Order Form, the Parties shall cooperate to agree on the specifications for the additional services and any associated terms and conditions.

1.7 Nothing under the Agreement grants any right to Consortium to the use of, or access to, any Application Services source code. Consortium does not have the right to reproduce the Application Services, to distribute copies or versions of any modules of the Application Services to any third parties including its Authorized Patrons, or to make and/or sell variations or derivative works of the Application Services. Sole ownership of copyrights and other intellectual proprietary rights shall remain solely with OverDrive or its suppliers. OverDrive reserves the right, at its sole discretion, to display its branding, trademarks, logos, and/or third party marketing or promotional materials on the Consortium Website.

## **2. Consortium Website**

2.1 Consortium shall use commercially reasonable efforts to ensure that use of the Applications Services, the Consortium Website and the Digital Content are in compliance with this Agreement and with permitted uses as communicated by OverDrive to Consortium. Consortium shall use commercially reasonable efforts to prevent unauthorized use of the Digital Content from OverDrive by their users and Authorized Patrons.

2.2 OverDrive grants the Consortium, Participating Library and/or Authorized Patrons a non-assignable, non-transferable, limited license to use the Digital Content provided by OverDrive's suppliers for personal, non-commercial use. All Digital Content available at the Consortium Website shall have at least a seven (7) day lending period, or other minimum lending period as otherwise required by suppliers or publishers of Digital Content.

Consortium, Participating Library and/or Authorized Patrons may access and/or download, the Digital Content:

- (a) On Participating Library-issued devices or computers with exclusive and individual unique user accounts;
- (b) On Participating Library-issued devices which are circulated in accordance with the OverDrive Test Drive program;
- (c) On Authorized Patrons personal devices directly;
- (d) On shared Participating Library computers which employ an application that restores the computer to its original configuration after use by an individual Authorized Patron (e.g. Deep Freeze, Windows SteadyState, or other similar application); and
- (e) For any use consistent with the relevant fair use doctrine or similar law in your jurisdiction.

2.3 Consortium and Participating Library shall reasonably cooperate with OverDrive to limit access to the DLR Service to end users who are Authorized Patrons. In the event a Participating Library or Consortium desires to provide access to the DLR Service to users other than Authorized Patrons, OverDrive reserves the right to limit availability of certain Digital Content, as may be required by supplying publishers. Online library card applications, with or without fees, which provide access, temporary or permanent, to the DLR Service to users who do not otherwise qualify as Authorized Patrons shall not be permitted.

2.4 OverDrive will create and implement a Consortium Website for Consortium and Participating Library's use of the Application Services that will include search function (by title category, author, keyword), multiple categories with multiple listing option, auditing and reporting functions and access to a protected web portal to manage the Consortium's catalog of Digital Product. Subject to OverDrive's approval, which shall not be unreasonably withheld, OverDrive will incorporate the Consortium's name and logos in accordance with design suggestions as provided by Consortium. Consortium will have the ability to manage and promote Digital Products from a password protected Digital Library Reserve administrative web portal.

2.5 Consortium represents and warrants that it will not make any representations or create any warranties, expressed or implied, concerning the Application Services and Digital Content, and will take reasonable steps to ensure that its employees, agents, and others under its direction abide by the Agreement.

2.6 Each Participating Library shall include a direct hyperlink and/or logo linked to the Consortium Website its' home page and other appropriate sub-pages. Such link or logo shall be featured no less prominently than other electronic resources or services including but not limited to EBSCOhost, Recorded Books, Ingram and 3M.

2.7 Participating Library agrees to perform Primary Support for its Authorized Patrons, unless Participating Library has completed the Front Line Tech Support Order Form and paid for Front Line Tech Support services. OverDrive will provide Participating Library with training and documentation for Participating Library's provision of Primary Support. Participating Library will cooperate with OverDrive to implement customer support practices recommended by OverDrive, including but not limited to directing Authorized Patrons to OverDrive-supplied FAQs and support pages on its Consortium Website.

2.8 During the Agreement and any renewal periods, Consortium will reasonably cooperate with OverDrive to achieve OverDrive's and its publishers' and suppliers' objectives of protecting certain intellectual property interests relating to OverDrive supplied Digital Products. Each Participating Library shall establish policies and procedures to abide by the Digital Content usage guidelines as described in Section 2.2. Participating Library shall provide OverDrive access to a test Patron account for purposes of validating the systems' performance relating to the Application Services. Participating Library will reasonably cooperate with OverDrive to correct or adjust systems as may be required to compensate for any errors or omissions disclosed by such test. Any such test will be conducted by OverDrive at its own expense and during regular business hours and in such a manner as not to interfere with Participating Library's normal activities. Nothing in this Section shall entitle OverDrive to any patron data or information relating to the identity of Patrons accessing any components of the Application Services.

2.9 Consortium shall not access the Application Services in a manner not explicitly permitted by the Agreement, including but not limited to scraping the Consortium Website and/or web traffic or data to and

from the Consortium Website, intercepting, redirecting, capturing or holding OverDrive-initiated email or other electronic communications, nor shall it allow any third party to access the Application Services in a manner as described in this paragraph.

2.10 OverDrive may employ commercially reasonable efforts to monitor and maintain the availability of its Application Services, including review of traffic for request volume levels, unusual behaviors or patterns, attempts to create a denial of service response, and/or excessive or abusive usage as determined by OverDrive, in its sole discretion.

### **3. Payments**

3.1 Participating Library and/or Consortium shall make payment to OverDrive for all Annual Participation Fees, Content Service fees and Digital Product costs according to OverDrive within thirty (30) days from Library's receipt of valid invoice. During the term of this Agreement, Participating Libraries may select Digital Content subject to standard terms and pricing. In the event of Consortium and/or Participating Library's late or non-payment of any and all amounts due to OverDrive for Application Services fees and cost of Digital Content, OverDrive may suspend access to the Application Services until such time as Consortium and/or Participating Library's account becomes current.

3.2 Consortium and the Participating Libraries assume the responsibility for providing a suitable network and Internet system for integration of Application Services into the Consortium Website or other systems. All parties acknowledge that any expenditures or commitments are made at the risk of the party making such expenditures or commitments. Participating Library agrees that it shall be responsible for its own expenses and costs under this Agreement, including MARC records, SIP or similar protocol, or any other costs, and that OverDrive shall have no obligation to reimburse Participating Library for any expenses or costs incurred by Participating Library in the preparation, systems integration, use of the Application Services, or for any performance of Participating Library's duties hereunder.

3.3 Each Participation Form is a commitment of the current revenues only of the named Participating Library. Such Participating Library represents and warrants that it has appropriated and budgeted the necessary funds to make all payments required pursuant to its' Participation Form for the remainder of the fiscal year in which the payment term commences; and that it currently intends to make payments for the full contract term as scheduled in the Consortium Participation Form if funds are appropriated for the payment in each succeeding fiscal year by its governing body. The Participating Library reasonably believes that monies in an amount sufficient to make all payments can and will lawfully be appropriated. If the Participating Library's governing body fails to appropriate sufficient funds in any fiscal year for payments due and if other funds are not legally appropriated for such payment, then a non-appropriation event shall be deemed to have occurred. If a non-appropriation event occurs, (1) Participating Library shall give OverDrive immediate notice of such non-appropriation event and provide written evidence of such failure by Participating Library's governing body; and (2) this Participation Form shall terminate on the first day of the fiscal year in which funds are not appropriated.

### **4. Term and Termination**

4.1 The Term of the Agreement shall be governed by the OverDrive Digital Library Reserve Consortium Agreement between OverDrive and Consortium.

4.2 Either party shall have the right to terminate this Agreement as a result of a material breach of the Agreement by the other party that is not cured within thirty (30) days after written notice of such breach.

4.3 Upon termination of this Agreement, the access granted to Consortium by this Agreement shall be terminated immediately and Consortium shall make no further use of all or any part of the Application Services, or any confidential information received from OverDrive.

4.4 If a Participating Library withdraws from Consortium prior to the expiration of Agreement with OverDrive, all content, products, and services that have been purchased with the Participating Library's monetary and in-kind contributions to Consortium shall remain with Consortium.

## **5. Warranties and Indemnification**

5.1 The parties represents and warrants to that each has the necessary permissions, ownership and intellectual property rights and licenses related to performance under this Agreement.

5.2 THE WARRANTIES SET FORTH UNDER THIS AGREEMENT ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. IN NO EVENT SHALL OVERDRIVE BE LIABLE TO LIBRARY OR ITS AUTHORIZED PATRONS AND OR END USERS FOR ANY DAMAGES ARISING FROM OR RELATED TO FAILURE OR INTERRUPTION OF THE APPLICATION SERVICES, OR FOR INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES, OR FOR LOSS OF PROFIT OR OPPORTUNITY, LOSS OF USE OR OTHER FINANCIAL LOSS ARISING OUT OF OR IN CONNECTION WITH THE LICENSE OR USE OF THE APPLICATION SERVICES. IN NO EVENT SHALL OVERDRIVE'S LIABILITY HEREUNDER EXCEED THE TOTAL AMOUNT RECEIVED BY OVERDRIVE UNDER THIS AGREEMENT.

5.3 OverDrive agrees to indemnify Consortium against liability and expense, including reasonable attorney fees, arising from any breach of OverDrive's warranty that it has the required rights to the Application Services and that the Application Services does not infringe any ownership or intellectual property right of a third party, provided that OverDrive: (1) is notified immediately after a Participating Library receives notice of such claim (ii) is solely in charge of the defense of and any settlement negotiations with respect to such claim; (iii) received Consortium and/or Participating Library's cooperation in the defense or settlement of such claim; (iv) has the right, upon either the occurrence of or the likelihood (in the opinion of OverDrive) of the occurrence of a finding of infringement, either to procure for Participating Libraries the right to continue use of the Application Services, or to replace the relevant portions of the Application Services with other equivalent, non-infringing portions. If OverDrive is unable to accomplish either of the options set forth in (iv) above, at OverDrive's option OverDrive shall either remove the portion of the Application Services in issue and refund to each Participating Library the value of such portion, or remove the entire Application Services and refund to each Participating Library the entire amount paid pro-rata under this Agreement as it relates to the incident that gave rise to the claim.

5.4 OverDrive shall have no obligation to Consortium to defend or satisfy any claims made against a Participating Library that arise from use, marketing, licensing, or disposition of the Application Services by the Participating Library other than as permitted by this Agreement. OverDrive shall not be responsible to indemnify Consortium for claims arising from the use or license of third party software including DRM where OverDrive is not afforded such corresponding indemnification from said third party vendor. In the event a claim arises from use of non- OverDrive technology, where the vendor of such product or technology does not indemnify OverDrive, then OverDrive is not liable to extend indemnification under this section to Consortium for any such claims.

## **6. General Terms**

6.1 Confidential Information. The parties acknowledge that each will receive confidential information from the other relating to the Application Services, technical and operational affairs of the other. Subject to any state and/or federal laws and regulations permitting public access to documents and information that are considered public, each party agrees that all confidential information of the other party shall be held in confidence and shall not be disclosed to any third party. Consortium and the Participating Libraries shall not share its passwords and login credentials of its' account in OverDrive's content selection portal with anyone, including any third party. Consortium and Participating Libraries shall take reasonable steps to prevent unwarranted intrusion into such information.

6.2 Taxes. Consortium and each Participating Library shall at its own expense comply with all applicable laws in connection with the use of the Application Services. The payment obligations under this Agreement are exclusive of any federal, state, municipal or other governmental taxes, sales taxes, excise taxes or tariffs now or hereafter imposed on the production, storage, sale, transportation, import, export, licensing or use of the Application Services.

6.3 No Waiver. The failure of either party to exercise any right or the waiver of either party of any breach, shall not prevent a subsequent exercise of such right or be deemed a waiver of any subsequent breach of the same of any other term of the Agreement.

6.4 Notice. All notices required to be given pursuant to the Agreement shall be in writing and shall be deemed to have been given, if sent by registered or certified mail, return receipt requested, postage prepaid, addressed to OverDrive at its' current address, Attention: General Counsel or addressed to Consortium at the address provided on the Consortium Agreement, Attention: Consortium Primary Contact (as designated on the Consortium Agreement), or as otherwise agreed by the parties.

6.5 Assignment. OverDrive may assign this Agreement. This Agreement may not be assigned by Consortium, nor any duty hereunder delegated by Consortium without the prior written consent of OverDrive, which shall not be unreasonably withheld. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties to this Agreement and their respective heirs, legal representatives, successors and permitted assigns.

6.6 Entire Agreement. The Consortium Agreement Form, Participation Form and this Access Agreement constitutes the entire Agreement and understanding of the parties and supersedes all prior and contemporaneous Agreements, understandings, negotiations and proposals, oral or written. Section headings are provided for convenience purposes only and do not provide any modifications or substantive meaning to the terms and conditions of this Agreement. OverDrive may modify the Consortium Agreement Form, Participation Form and/or Access Agreement from time to time.

6.7 All Disputes Arising From the Agreement. This Agreement shall be governed by the laws of the State of Ohio, United States of America without regard to any conflict of laws principles. Any dispute regarding this Agreement or the relationship that has been established by this Agreement shall be brought in the state or federal courts residing in the State of Ohio, USA, and the local laws of Ohio will apply to any such action related to the above. Both parties submit to venue and jurisdiction in these courts.

## **7. Definitions**

As used throughout the Agreement, the following definitions shall apply:

7.1 "Application Services" or "DLR Service" shall mean the Consortium Website and digital content distribution service provided to Consortium and Participating Libraries, which utilize OverDrive<sup>®</sup> and other third party technologies and services.

7.2 "Authorized Patron(s)" shall mean those individuals who provide proof of residency, ownership of property, employment, or enrollment in school or similar institution in a Participating Library's service area and which the Participating Library authorizes to download and/or access Digital Content from the Library Website or otherwise utilize the Application Services.

7.3 "Consortium" or "Library" shall mean all of the Participating Libraries, collectively.

7.4 "Consortium Website" shall mean the Internet-based application that provides Authorized Patrons access to Digital Products operated in association with Digital Library Reserve and as a component of the Consortium's website address (URL).

7.5 "Digital Content" shall mean the digital titles (e.g. eBooks, audiobooks, music and video) made available from OverDrive at the Library Website.

7.6 "Effective Date" shall mean the date upon which the Consortium Website is made available for public access.

7.7 "Participating Library" shall mean the organization or entity identified in the Participating Library Information section of the Participation Form.

7.8 "Participation Form" shall mean the OverDrive Digital Library Reserve Consortium Participation Form completed by the Library.

7.9 "OverDrive" shall mean: OverDrive, Inc., a Delaware Corporation, and its subsidiaries and affiliates.

7.10 “Primary Support” shall mean the services provided by Participating Library to its Authorized Patrons for its day-to-day help, support, technical aid and other assistance for their use of the Consortium Website and Digital Content.

7.11 “Secondary Support” shall mean the technical support services provided by OverDrive to Participating Library including reasonable efforts to assist Participating Library in providing Primary Support.