

Purchase Agreement Digital Archive Collections

1. PARTIES

THIS PURCHASE AGREEMENT ("Agreement"), is entered into by and between The Gale Group, Inc. (herein referred to as "Thomson Gale"), a Thomson Corporation company with offices at 27500 Drake Road, Farmington Hills, MI 48331-3535 and The Regents of the University of California, (hereinafter referred to as the "Customer"), with offices at California Digital Library, 415 20th Street, 4th Floor, Oakland, CA 94612-2901 USA.

THE PARTIES AGREE AS FOLLOWS:

2. DEFINITIONS

2.1 In this Agreement, the following definitions shall apply:

- a. "Collections" shall mean the database(s) taken as a whole, that are available for purchase from Thomson Gale in an electronic format as defined in Exhibit A attached hereto and made a part of hereof.
- b. "Authorized Sites" shall mean the following University of California campuses: Berkeley, Davis, Irvine, Los Angeles, Merced, Riverside, San Diego, San Francisco, Santa Barbara, Santa Cruz.
- c. "Authorized User" means all currently enrolled full and part-time students, or remote learners registered for classes or programs with Customer, faculty and other employees of Customer, Customer's classroom users, walk-in patrons of Customer, each of whose access to the Collection is authenticated by a secure server and/or system of Customer and whose use of the Collection is bound by obligation of terms of use with regard to the Collection that are no less restrictive than those set forth in this Agreement with respect to Customer, and the following other designated users, if any, including remote users who are authenticated by the University of California server(s) and/or systems, and teachers, students and staff.
- d. "Shipping Point" shall mean the point of mailing from Thomson Gale's distribution location."
- e. "Designated Location" shall mean Customer's designated delivery location for the Collections as further defined in Exhibit A.
- f. "F.O.B" shall mean freight on board

3. TECHNICAL REQUIREMENTS

- 3.1 To utilize the Collection(s) (as identified in Exhibit A) on Customer's server(s) and/or system, Customer will obtain at its cost, all telecommunications and other equipment and software together with all relevant software licenses necessary.
- 3.2 If Customer elects to load the content identified in Exhibit A on the Customer's own server(s) and/or system(s), the Customer may use the content in accordance with the terms and conditions of this Agreement.
- 3.3 Upon delivery of Collection(s) to the Customer's Designated Location, Thomson Gale shall not provide Customer with further support and maintenance necessary to assure the on-going support of the Collection(s).

4. PURCHASE TERMS

- 4.1 Customer may not: (i) sell, distribute, publicly display or in any other way exploit (commercially or otherwise) the Collection(s) (or any component thereof) of the Collection(s) or (ii) transfer, assign or sublicense any the Customer's rights or obligations under this Agreement. Under the terms of this Agreement, Customer is authorized to make further copies in perpetuity, as it may deem necessary for purposes of preservation, refreshing, or migration, including migration to other formats so long as the purpose of such copying is solely for continued access to and/or archival retention. Notwithstanding the

foregoing and subject to the terms and conditions of this Agreement, Thomson Gale hereby grants Customer and its Authorized Users the non-transferable, non-exclusive, non-sub licensable, worldwide perpetual right to download, display, reproduce and store only insubstantial portions of the Product(s), resulting from specific searches thereof, for personal non-commercial or scholarly research only. Nothing contained in this Section 4 shall be construed as permitting the Customer or its Authorized Users to, under any circumstance, provide a third party with access to, or a copy of, the Collection(s) in such a manner that such access and/or copy would supplant such third party's need to obtain a license to access and use the Collection(s) from Thomson Gale. Customer may, upon request, receive from Thomson Gale one copy of the entire set of Collections to be maintained as a backup or archival copy, or as required to exercise Customer's grant of perpetual rights in this Agreement.

4.2 Customer may not duplicate, nor shall it knowingly permit third parties to duplicate, the Collections in hardcopy or machine-readable form without prior written authorization from Thomson Gale, except as provided below:

- a. Redistribution and Interlibrary Loan. Customer may reproduce limited portions of the Collections and redistribute the results of searches among the Authorized Users, and perform interlibrary loan of materials from the Collections in accordance with U.S. copyright law and the Commission on New Technical Uses (CONTU) guidelines, which shall apply to both analog and digital copying and redistribution.
- b. Personal and classroom use: Customer is granted permission to reproduce small, discrete portions of the Collections that do not contain a significant segment of the Collections and to redistribute free of charge or on a cost-recovery basis the results of searches for classroom and personal use by Authorized Users. Customer may make one or more hard copies of the output of any Collections search; Customer may not sell or distribute such copies to anyone other than an Authorized User. Customer may make one or more copies of any search output on diskette or downloaded to hard disk; but Customer may not distribute such copies to anyone who is not an Authorized User.
- c. Electronic Links: The University of California is committed to the use of emerging OpenURL standard to allow linking to related materials in other locations. If Thomson Gale does not use the OpenURL standard, Thomson Gale staff will provide information to Customer upon request to assist the Customer in creating links directly from the University of California's library catalogs and licensed resources to the content at the journal issue and article levels. Customer may incorporate parts of the Collection in electronic reserves for use of Authorized Users in the course of instruction. Each such item shall carry appropriate acknowledgement of the source, listing title and author of extract, title and author of work, and publisher. The electronic copy of such items shall be deleted by the Customer when no longer required for such purpose.

5. FEES/PAYMENT

In consideration for the services to be provided, Customer shall pay Thomson Gale according to the schedule more fully set forth in Exhibit A attached hereto and made a part hereof.

6. WARRANTIES

- 6.1 Ownership Warranty. Thomson Gale warrants that it owns and has the right to sell the goods to the Customer and that the goods are sold free and clear of all encumbrances but makes no representations and gives no warranties as to merchantability of the goods or as to their fitness for any particular purpose or as to their safe use.
- 6.2 Infringement. Customer's use of the Content as presented in this Agreement will not infringe on any

intellectual property, patent, copyright, trademark, or service mark or misappropriate any trade secrets or other proprietary right of any party, including Thomson Gale, any employee or contractor of Thomson Gale or any third party.

- 6.3 No Worms, Bombs or Backdoors. Based on appropriate due diligence by Thomson Gale, and to the best of Thomson Gale's knowledge, the Collections provided by Thomson do no and shall not include any feature or function which may enable Thomson Gale or any third party (i) To discontinue Customer's effective use of the product; (ii) To erase, destroy, corrupt or modify any data of Customer without the consent of Customer; or (iii) To bypass any internal or external software security measure to obtain access to any hardware or software of Customer without the consent and knowledge of Customer.
- 6.4 Disclaimer. Although Thomson Gale believes the Collection(s) to be reliable, Thomson Gale does not guarantee or warrant any information or materials contained in or produced by the Collection(s), or the accuracy, completeness or reliability of the Collection(s). Any data or information contained in or provided in connection with the Collection(s) may be incomplete or condensed. EXCEPT FOR THE EXPRESS WARRANTIES STATED IN THIS AGREEMENT, THOMSON GALE PROVIDES THE COLLECTION(S) ON AN "AS IS" BASIS WITHOUT WARRANTY OF ANY KIND AND THOMSON GALE DISCLAIMS ANY AND ALL WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY OR FITNESS OR A PARTICULAR PURPOSE. IN NO EVENT SHALL THOMSON GALE BE LIABLE FOR: INDIRECT, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES INCLUDING FOR LOST PROFITS, LOST DATA, OR OTHERWISE. IN NO EVENT SHALL THOMSON GALE'S LIABILITY HEREUNDER, WHETHER ARISING IN CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE, EXCEED THE AMOUNT OF FEES PAID HEREUNDER FOR THE PURCHASE OF THE COLLECTION(S).
- 6.5 Digital Watermarking Technology. If Thomson Gale utilizes any type of digital watermarking technology for any element of the Collections, Thomson Gale agrees that watermarks will not be visible to the human eye and will not degrade image quality. These watermarks shall not contain user-related information such as account number or IP address. If digital watermarking technology is used, Thomson Gale agrees to notify Customer, in advance, of the name, contact information, and any technical specifications for the technology used.

7. INDEMNIFICATION

Thomson Gale shall defend, indemnify, and hold harmless Customer, their officers, agents and employees from all damages, liabilities, costs, fees, including, but not limited to, attorneys' fees, resulting from any judgment or settlement agreement arising out of the claim of a third party that Thomson Gale's sale of the Collection(s) to Customer or Customer's use of said the Collection(s) constitutes an infringement of any patent, copyright, trademark, trade name, trade secret, or other proprietary or contractual right of any third party. NO LIMITATION OF LIABILITY SET FORTH ELSEWHERE IN THIS AGREEMENT IS APPLICABLE TO THIS INDEMNIFICATION. Customer shall give prompt notice of an infringement claim to Thomson Gale, provide such cooperation and assistance to Thomson Gale as is reasonably necessary to defend the claim, and shall allow Thomson Gale to have sole control of the defense, provided, however, that Customer retains the right to participate in the defense at its own expense.

8. PROPRIETARY RIGHTS

Nothing contained in this Agreement gives the Customer or any Authorized User any rights in the intellectual property or confidential information of Thomson Gale and/or any third party in the materials published or otherwise made available through the Collection(s). The Customer further acknowledges that, as between the Customer and Thomson Gale, any and all right in and to the Collection(s), including, but not limited to the copyright in the collective work, is, and shall remain at all times, the sole and exclusive property of Thomson Gale.

9. **COPYRIGHTED WORKS**

Customer acknowledges and agrees that the copyrights to the Collection(s) are owned by Thomson Gale and its licensors. All rights in respect thereof are reserved to Thomson Gale and such licensors. By purchasing the Collection(s) hereunder, Customer obtains certain limited rights to the Collection(s) pursuant to this Agreement, but Customer does not obtain or own any rights in the copyrights or any other intellectual property rights that may be associated with such Collection(s). All such copyrights and intellectual property rights remain the property of Thomson Gale and its licensors.

10. **SCOPE, AMENDMENT AND INTERPRETATION**

- 10.1 Entire Agreement. This document contains the entire Agreement of the parties. Any enlargement, alteration or modification requires a written amendment signed by both parties.
- 10.2 Severability. If any provision of this Agreement is invalid, illegal, or unenforceable under any applicable statute or rule of law, the provision shall be deemed omitted to the extent that it is invalid, illegal, or unenforceable. In such a case, the remainder of the Agreement shall be construed in a manner as to give greatest effect to the original intention of the parties hereto.
- 10.3 Force Majeure. Either party shall be excused from performance hereunder and to the extent that it is prevented from performing any obligation pursuant thereto, in whole or in part, as a result of delays caused by the other party or any cause beyond its control, and such nonperformance shall not be a default hereunder or a ground for termination hereof.
- 10.4 Waiver. The waiver of failure of either party to exercise in any respect any right provided in this Agreement in any instance shall not be deemed to be a waiver of such right in the future or a waiver of any other right under this Agreement.
- 10.5 Relationship of the Parties. The relationship of the parties hereto shall be that of independent contractors. Nothing herein shall be construed to create any partnership, joint venture, or similar relationship or to subject the parties to any implied duties or obligations respecting the conduct of their affairs, which are not expressly stated herein. Neither party shall have any right or authority to assume or create any obligation or responsibility, either express or implied, on behalf of or in the name of the other party, or to bind the other party in any matter or thing whatsoever.

11. **EXECUTION**

The parties through their authorized agents have executed this contract on the dates set out below.

The Gale Group

The Regents of the University of California

Date

Date

**EXHIBIT A
DIGITAL COLLECTION, FEES AND PAYMENT**

A. Digital Archive Collections. Gale shall provide the following Digital Archive Collection(s) to Customer:

▪ **Eighteenth Century Collections Online, Modules 1 - 7**

Module 1: History and Geography
Module 2: Social Sciences and Fine Arts
Module 3: Medicine, Science and Technology
Module 4: Literature and Language
Module 5: Religion and Philosophy
Module 6: Law
Module 7: General Reference

B. Designated Location. Pursuant to Section 3.3 and 4.1, Thomson Gale shall deliver, upon request of Customer, to location set forth below, the Collection(s) in current standard data formats and on media best suited the content. Delivery shall be F.O.B Shipping Point.

Designated Location

**California Digital Library
415 20th Street, 4th Floor
Oakland, CA 94612-2901**

C. Fees. In consideration for the Digital Archive Collection(s) to be provided, the Customer shall pay Thomson Gale according to the following schedule:

List Price: Eighteenth Century Collections Online, Modules 1 - 7

D. Payment Schedule. Full payment for the Collection shall be invoiced and payable per the payment schedule below. The fee is due within thirty- (30) days after invoice date. Gale's obligation to deliver the Collection set forth above is absolute. The right of the non-paying campuses to access the Collection is contingent upon payment of the annual access fee and in no way constitutes an acquisition or perpetual rights. Under the terms of this Agreement, Customer may obtain perpetual license rights to the Collection for the remaining non-paying campus locations at any time during the licensed period. The cost for the non-paying campuses to purchase the Collection shall be list price (as defined above) less a 30% group discount (no other discounts, credits or adjustments shall apply to this offer).

Bill to contact:

Bill to address:

Geisel Library
University of California
9500 Gilman Drive, 0175A
La Jolla, CA 92093-0175

E. Payments shall be mailed to:

**Thomson Gale
P.O. Box 95501
Chicago, IL 60694-5501**

F. Non-Refundable. Customer's obligation to pay the fee set forth in exchange for the Digital Archive Collection is absolute and non-refundable.

G. Taxes. Customer is exempt from the payment of all sales, use, or excise taxes. In the event that CDL is charged applicable sales, use, excise, or similar taxes, Gale will reimburse Customer the full cost of the taxes within 60 days of payment due date.

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