

## TERMS AND CONDITIONS

### 1 DEFINITIONS As used in this Agreement:

- 1.1 **Authorized Use** means use of or access to the Product(s) for which CUSTOMER has purchased a license or applicable access rights in the manner specified in the Documentation and the applicable Order between CUSTOMER and CYBRARY.
- 1.2 **Documentation** means any specification and use documentation made available by CYBRARY to its end user customers generally regarding the Products or the Platform Services.
- 1.3 **Open Source Platform** means computer Platform owned by third parties, licensed under the terms of various published license agreements and redistributed by CYBRARY to its customers as integrated with the Products.
- 1.4 **Products** means a combination of Platform and Open Source Platform.
- 1.5 **Platform Services** means the online access to the Products provided by CYBRARY in hosted form pursuant to Section 5 of this Agreement.
- 1.6 **Services** means either the Platform Services, the Technical Support Services or the Professional Services, alone or in conjunction.
- 1.7 **Platform** means CYBRARY's Platform identified in the applicable Order, in object code format, including, without limitation, all related documentation and manuals, and any Updates provided by CYBRARY to CUSTOMER under this Agreement. The term "Platform" shall not be deemed to include any Open Source Platform.
- 1.8 **Subscription Term** shall have the meaning given such term in an Order.
- 1.9 **Technical Support Services** means (a) the prepaid CYBRARY maintenance and support services for the Platform described, and upon such terms as may be contained, in CYBRARY's then current published Technical Support Services offerings, and (b) professional services pursuant to CYBRARY'S Statement of Work standard terms and conditions, (c) any other mutually agreed to terms by the parties, or (d) any other work to be performed by CYBRARY for CUSTOMER as specified in a CUSTOMER purchase order or other separate agreement accepted by CYBRARY.
- 1.10 **Updates** means minor improvements to existing features; minor additions in functionality compared to the previous issuance, error corrections, bug fixes and/or patches to the Platform made available by CYBRARY to its commercial customers that receive Technical Support Services from CYBRARY. An Update shall be identified by the numeral change to the right of the first decimal point (e.g. a change from version 1.5 to 1.6 or from 1.4.1 to 1.4.2). For purposes of clarification, Updates do not include the introduction of any new features or functionality to the Platform or Products.

- 1.11 **User** or **Use** means a person and/or device that is authorized by CUSTOMER to use, or who has access to or receives any benefit of exposure to, the applicable Products, Platform and/or the Platform Services, regardless of whether the individual is actively using the Platform or accessing the Platform Services at any given time. For purposes of clarification, each instance of the Platform accessed by a person is considered a Use. So, if a single person uses, has access to or receives any benefit of exposure to multiple instances of the Platform, then such person would be considered a User for each such instance, and access to or use of each such instance would each be counted as a Use.
- 2 **ORDERS.** CUSTOMER may purchase (a) a license to the Platform and Products, (b) Technical Support Services and/or (c) the SaaS Service, in each case, by submitting a written and signed purchase order (which term, for purposes of this Agreement, shall be deemed to include order forms prescribed by CYBRARY, if any) (each, an “**Order**”) for written acceptance by CYBRARY. Each Order shall specify the Platform Services ordered, the items and license terms of Platform and/or the Technical Support Services being ordered and, in each case, the applicable pricing. Upon acceptance of the Order by CYBRARY and the acceptance by CUSTOMER of this Agreement, the license of the Platform, the access to the Platform Services and the provision of Technical Support Services shall be governed by the terms of this Agreement. Fees payable for the Platform Services, the Technical Support Services and licenses shall be as set forth in accepted Order issued under this Agreement. Any preprinted provisions of CUSTOMER’s purchase orders or other terms not expressly included in this Agreement or an Order shall not apply, and as between CYBRARY and CUSTOMER the terms set forth in this Agreement shall be applicable and control. Each Order shall be governed by and incorporated into this Agreement, and any reference to this Agreement shall be default include all applicable Orders. In the case of conflict between an Order and this Agreement, the terms of this Agreement shall govern unless the Order terms explicitly indicate an intent to override any conflicting provisions in this Agreement. CYBRARY reserves the right to change its prices and related terms and conditions at any time without notice, provided that any such changes shall not affect Orders already accepted. All Platform, Open Source Platform and Documentation shall be delivered via electronic download. No hard copies shall be provided. All Products and the Platform Services shall be deemed accepted by CUSTOMER upon the earlier of delivery or when made available.
- 3 **PAYMENT.** An Order, once accepted by CYBRARY, cannot be subsequently changed without the written agreement of the parties. All license fees and payments for Services shall be nonrefundable regardless of whether the CUSTOMER uses the Platform, accesses the Platform Services. CUSTOMER shall promptly remit payment in U.S. Dollars to CYBRARY for all amounts due under this Agreement and any related Order payable upon receipt of the invoice. Amounts not paid within such thirty (30) day period shall bear interest at the rate of one and one-half percent (1.5%) per month or at the highest lawful rate, whichever is less, from the date such amount is due until payment is received. The claimed failure of CYBRARY to perform any obligation under this Agreement will not justify or

empower CUSTOMER to withhold such fees or amounts by way of setoff or otherwise. To the extent permitted under the law, CUSTOMER will reimburse CYBRARY for all costs and expenses incurred, including but not limited to attorneys' fees, in collecting any overdue amounts. Payment terms may be revised by CYBRARY at any time with prior written notice upon any adverse change in CUSTOMER's payment history or financial status. CYBRARY shall have the right to cancel any Order placed, refuse or delay its delivery or performance hereunder or suspend any Platform Services, in each case, for failure of CUSTOMER to make any payments due CYBRARY in accordance with the terms of this Agreement. CUSTOMER will pay all sums equal to taxes (including, without limitation, sales, withholding, value-added, and similar taxes) and any duties paid or payable, however designated, levied or based on amounts payable to CYBRARY under this Agreement, but exclusive of United States federal, state, and local taxes based on CYBRARY's net income, and will reimburse CYBRARY for any such sum that CYBRARY is required to collect or pay with respect to transactions under this Agreement.

#### **4 LICENSES AND CONDITIONS**

##### **4.1 Products.**

- 4.1.1 Subject to the terms and conditions of this Agreement, CYBRARY hereby grants to CUSTOMER a limited, nonexclusive, revocable, personal, non-sublicenseable and non-transferable license under CYBRARY's intellectual property rights to use the Platform solely for Authorized Uses in its internal business operation during the applicable license term purchased by CUSTOMER. CUSTOMER may only use the Platform subject to the maximum User limitations, if any, that are indicated on the applicable Order. The license granted in this [Section 4.1.1](#) above for each Platform product shall remain in effect only during the applicable license term for that Platform, and upon the expiration or termination of that term such license shall automatically terminate in accordance with the provisions of [Section 10](#) below. CUSTOMER agrees (a) to respect and observe and not to alter, remove, or conceal any copyright, trademark, trade name, or other proprietary marking that may appear on or in the Products, and (b) that CUSTOMER is responsible for itself obtaining any additional Platform, hardware, or technologies not provided by CYBRARY under this Agreement and required to operate the Products, including but not limited to communications devices and Internet access services. CUSTOMER may make one (1) copy of the Products and the Documentation for archival and backup purposes, provided that CUSTOMER will reproduce on or in such copy any copyright, trademark, trade name, or other proprietary marking that may appear on or in the Products or Documentation copied.
- 4.1.2 CUSTOMER may permit its authorized contractors to access the Products solely in connection with the performance of services for CUSTOMER, provided that (i) CUSTOMER shall be liable for the acts and omissions of any such contractors, and that (ii) CUSTOMER shall cause such contractors

to abide by the provisions of this Agreement, and shall indemnify and defend CYBRARY for their failure to do so.

- 4.1.3 The Products include proprietary information and intellectual property owned by CYBRARY and its third-party licensors, and the Platform and the Documentation are provided to CUSTOMER solely under license and not by sale. CYBRARY and its third party licensors will continue to own their respective interests and intellectual property rights in and to the Products and will be entitled to terminate this Agreement in accordance with [Section 10](#) below, and demand the return of their respective Products, upon any failure of CUSTOMER to comply with the terms of this Agreement or the conditions or restrictions imposed by third parties and referred to in [Section 4.2](#) below.
- 4.1.4 CYBRARY reserves the right to make any changes to any Products it deems necessary or appropriate in its sole discretion, including without limitation whenever such changes, (a) are required for safety, (b) facilitate performance in accordance with specifications, or (c) represent substitutions and modifications in accordance with applicable product performance specifications, provided however that such changes shall not impede CUSTOMER's Authorized Use of any Products then under license pursuant to this Agreement.
- 4.1.5 CUSTOMER shall not itself, or through any affiliate, agent, or third party: (a) decompile, disassemble, or otherwise reverse engineer any Platform or the Platform Services, or attempt to reconstruct or discover any source code, underlying ideas, algorithms, file formats or programming interfaces of any Platform or the Platform Services by any means whatsoever, except to the extent applicable laws specifically prohibit such restrictions, (b) modify, adapt, translate, or create derivative works based upon any Platform or the Platform Services, (c) transfer, lease, loan, sublicense, sell, resell for profit, distribute, or otherwise grant any rights (including but not limited to a right to access or use) in any Platform or the Platform Services in any form to any other party, (d) use any Platform or the Platform Services on a commercial time-sharing, rental, or service bureau basis, or in any manner or for any purpose other than an Authorized Use, or (e) disclose to any third party any underlying ideas or algorithms, performance information, test results or analyses learned by CUSTOMER or created by or for CUSTOMER (including, without limitation, benchmarks) relating to any Platform or the Platform Services. CUSTOMER shall only have the rights with respect to the Products or the Platform Services expressly set forth in this Agreement; all other rights are expressly reserved to CYBRARY and its licensors. In the event CUSTOMER believes that an action by it under [Section 4.1.6](#) above would be warranted and permitted by applicable law, it shall give CYBRARY not less than ninety (90) days prior written notice of such belief to enable CYBRARY and any affected licensor of CYBRARY to evaluate whether such laws' requirements necessitate such action.
- 4.1.6 CUSTOMER acknowledges that the Products and the Platform Services, and all trade secret, copyright, patent, trademark, trade name, and other intellectual and proprietary rights in the

Products and the Platform Services, are and at all times shall remain the valuable property of CYBRARY and its licensors, or their respective successors or assigns. CUSTOMER agrees that, except as provided in this [Section 4](#), nothing contained in this Agreement shall be construed as granting or conferring by implication, estoppel, or otherwise, any license or right under any patent, trademark, copyright, or other proprietary right, whether now existing or hereafter obtained, and no such license or other right shall arise from this Agreement or from any acts or omissions in connection with the execution of this Agreement or the performance of the obligations of the parties.

4.1.7 CUSTOMER agrees to promptly notify CYBRARY of any violation of any of the terms of this [Section 4.1](#) by CUSTOMER or others of which CUSTOMER becomes aware.

4.2 **Open Source Platform.** CYBRARY will redistribute certain Open Source Platform items to CUSTOMER for CUSTOMER's use with the Platform Services. As a condition of its use of the Open Source Platform, CUSTOMER represents and warrants that it will familiarize itself with, and comply with and be responsible for observing, the conditions and restrictions required of Platform users by the owners of such Open Source Platform services.

## 5 PLATFORM SERVICES.

5.1 **Right of Access.** Subject to the terms and conditions of this Agreement and during the Subscription Term, CYBRARY shall provide CUSTOMER with access to the Platform Services solely in accordance with applicable Documentation provided by CYBRARY. CUSTOMER understands that this [Section 5](#) grants certain rights of access only, and that nothing in this [Section 5](#) may be interpreted to require delivery of a copy of any of the CYBRARY Products to CUSTOMER or installation of a copy of any Platform upon any computers or systems under CUSTOMER's control.

5.2 **Procedures and Technical Protocols.** CYBRARY will specify to CUSTOMER in writing procedures according to which CUSTOMER and its Users may establish and obtain access to and use the features and functions of the Platform Service, including, without limitation, provision of any access codes, passwords, technical specifications, connectivity standards or protocols, or any other relevant procedures, to the limited extent any of the foregoing may be necessary to enable CUSTOMER's Users to obtain access to the SaaS Service via the Internet (together with relevant portions of the Documentation, the "**Access Protocols**").

## 6 SUPPORT SERVICES

6.1 **Availability.** Support Services shall be provided to CUSTOMER by CYBRARY in accordance with the terms and prices of CYBRARY's then current published Support Services offerings. CYBRARY will not be responsible for providing Support Services for (a) any third-party Platform, or (b) any Platform that is not configured in accordance with the specifications set forth in the applicable Order.

6.2 **Conditions.** Support Services to be provided by CYBRARY under this Agreement require cooperation between CUSTOMER and CYBRARY, and CUSTOMER recognizes and accepts

certain responsibilities. These CUSTOMER responsibilities include but are not limited to (a) providing CYBRARY with specific details regarding CUSTOMER's business requirements and operating procedures as they relate to the application of the Support Services to be performed by CYBRARY, (b) development and signing of subscription order form agreements where appropriate, (d) assignment of appropriate personnel to coordinate Support Services delivery with CYBRARY in a timely manner, and (e) agreeing on a timely basis to relevant delivery schedules.

## **7 LIMITED WARRANTY**

7.1 **Platform.** CYBRARY warrants that the Platform delivered to CUSTOMER by CYBRARY will for a period of the contracted subscription will perform when utilized in an Authorized Use substantially as specified in the applicable Documentation. If CUSTOMER satisfactorily demonstrates to CYBRARY within such thirty (30) day period that an item of Platform does not so perform then, as CYBRARY's sole and exclusive liability and as CUSTOMER's sole and exclusive remedy, CYBRARY shall at its sole option either (a) correct the errors reported by CUSTOMER, or (b) refund the price paid for the nonconforming Platform. CYBRARY does not warrant the results of its correction or replacement services or that all errors will be corrected. Correction or replacement and the issuance of any corrections, patches, bug fixes, workarounds, or Updates by CYBRARY, shall not be deemed to begin a new, extended, or additional warranty period. The Platform will be warranted for the remainder of the original warranty period. The foregoing warranty shall not apply: (i) if any modifications are made to the Platform by CUSTOMER or any third party, (ii) to errors in the Platform due to accident, abuse, abnormal stress or environment or improper use by CUSTOMER, or (iii) to Platform provided on a no charge or evaluation basis

7.2 **No Other Warranties.** THE LIMITED WARRANTY IN SECTION 7.1 ABOVE IS IN LIEU OF ALL OTHER WARRANTIES FOR ANY PRODUCTS OR SERVICES PROVIDED UNDER OR IN CONNECTION WITH THIS AGREEMENT, EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR NONINFRINGEMENT, AND ANY WARRANTY ARISING BY STATUTE OR OTHERWISE IN LAW, OR FROM A COURSE OF DEALING OR USAGE OF TRADE. CYBRARY SPECIFICALLY BUT WITHOUT LIMITATION DOES NOT WARRANT THAT: (I) THE PLATFORM OR THE SERVICES SHALL MEET ALL OF CUSTOMER'S REQUIREMENTS OR SHALL OPERATE IN ALL THE COMBINATIONS WHICH MAY BE SELECTED FOR USE BY CUSTOMER, (II) THE OPERATION OF THE PLATFORM OR PERFORMANCES OF THE SERVICES SHALL BE ERROR-FREE OR UNINTERRUPTED, (III) ALL ERRORS OR DEFECTS IN THE PLATFORM OR THE SERVICES SHALL BE CORRECTED, OR (IV) ANY SECURITY MECHANISMS IMPLEMENTED BY THE PLATFORM OR THE SERVICES WILL NOT HAVE INHERENT LIMITATIONS. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF IMPLIED WARRANTIES SO THAT THE ABOVE EXCLUSIONS MAY NOT APPLY TO CUSTOMER.

THIS WARRANTY GIVES CUSTOMER SPECIFIC LEGAL RIGHTS. CUSTOMER MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM JURISDICTION TO JURISDICTION.

- 7.3 **Exclusions.** THE OPEN SOURCE PLATFORM AND ANY EVALUATION PRODUCTS ARE PROVIDED TO CUSTOMER “AS IS” WITHOUT WARRANTY OF ANY KIND BY CYBRARY, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NONINFRINGEMENT. No representation or other affirmation of fact, whether made by CYBRARY employees or otherwise, shall be deemed a warranty by CYBRARY for any purpose or give rise to any liability of CYBRARY whatever unless contained in this Agreement.

## 8 INFRINGEMENT

- 8.1 **Indemnity by CYBRARY.** If a third party acting against CUSTOMER claims, threatens to claim, or obtains a judicial or administrative determination that any Platform infringes its patent, copyright, or trade secret rights, CYBRARY shall defend CUSTOMER at CYBRARY’s expense and pay all damages that a tribunal finally awards. CYBRARY shall also have the right at its sole option and expense to (a) obtain for CUSTOMER the right to continue using the infringing item, (b) replace the infringing item or modify it so that it shall become non-infringing with no substantial degradation, or (c) remove the infringing portion of the Platform and refund the proportional fee that CUSTOMER paid for such portion, pro rata, on a one-year straight-line depreciation basis, provided that CUSTOMER shall promptly notify CYBRARY in writing of the claim, and allow CYBRARY to control, and cooperate with CYBRARY in, the defense and any related settlement negotiations. In no event shall CYBRARY’s liability under this Section 8 exceed the amount paid by CUSTOMER to CYBRARY for any allegedly infringing Products.
- 8.2 **Exceptions.** Notwithstanding the provisions of Section 8.1 above, CYBRARY shall have no obligation to CUSTOMER for any claim arising from the license or use of any Platform or any Service (a) that has been modified by a party other than CYBRARY, (b) used to practice any process, or used in combination with other products not provided by CYBRARY where such infringement would not have occurred but for such use in combination with such other products, (c) from failure of CUSTOMER to use updated Platform or Services provided by CYBRARY for avoiding such infringement, or (d) that is part of any Evaluation Products. CYBRARY shall not be bound by any settlement of any charge of infringement made without the prior written consent of CYBRARY. CUSTOMER shall indemnify and hold CYBRARY harmless from any loss, cost, or expense in connection with any claim, suit, or proceeding brought against CYBRARY or CUSTOMER insofar as it is based on a claim that the use of any Platform infringed because of the way it was modified or altered by parties other than by CYBRARY, or because it was used in a manner for which it was not designed or for a use not an Authorized Use.
- 8.3 **Limitation.** THIS SECTION 8 STATES THE ENTIRE LIABILITY OF CYBRARY TO CUSTOMER AND ANY AND ALL THIRD PARTIES, WHETHER FOR DAMAGES OR OTHERWISE, FOR

INFRINGEMENT OF ANY COPYRIGHT, PATENT, TRADE SECRET, OR OTHER INTELLECTUAL PROPERTY RIGHT WITH RESPECT TO ANY PRODUCTS, THE PLATFORM SERVICES OR OTHER SERVICES FURNISHED BY CYBRARY UNDER THIS AGREEMENT.

## **9 LIMITATION OF LIABILITY**

- 9.1 **Limitation.** It is expressly agreed that each party's maximum liability for damages to the other party under or in connection with this Agreement, regardless of the form of legal action, whether in contract or in tort, including negligence, shall in no event exceed the actual payments received by CYBRARY for the Products, the Platform Services or Support Services that are directly related to the cause of action, except that no such limitation on damages shall apply to losses due to either party's breach of Section 11.10 or CUSTOMER's breach of any of the licenses, access rights or restrictions set forth in this Agreement.
- 9.2 **No Consequential Damages.** IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR PUNITIVE, SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES INCLUDING, BUT NOT LIMITED TO, LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF USE, OR LOSS OF DATA, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH LOSS, OR, IF REASONABLY FORESEEABLE, INCURRED BY THE OTHER PARTY OR CLAIMED AGAINST THE OTHER PARTY BY ANY OTHER PARTY, EXCEPT THAT NO SUCH LIMITATIONS ON CONSEQUENTIAL DAMAGES SHALL APPLY IN THE EVENT OF BREACH BY EITHER PARTY OF OR BREACH BY CUSTOMER OF ANY OF THE LICENSES, ACCESS RIGHTS OR RESTRICTIONS CONTAINED IN THIS AGREEMENT. NEITHER PARTY'S LIABILITY FOR DEATH OR PERSONAL INJURY RESULTING FROM THE NEGLIGENCE OF A PARTY OR THAT OF ITS EMPLOYEES OR AGENTS OR IN RELATION TO ANY OTHER LIABILITY THAT MAY NOT BY APPLICABLE LAW BE EXCLUDED OR LIMITED IS EXCLUDED OR LIMITED AND NOTHING IN THIS AGREEMENT SHALL BE CONSTRUED AS AN ATTEMPT TO EXCLUDE OR LIMIT SUCH LIABILITY.
- 9.3 **Reasonability.** The parties agree that the provisions of this Agreement fairly allocate the risks between CYBRARY, on the one hand, and CUSTOMER on the other. CUSTOMER acknowledges and agrees that its pricing reflects the allocations of risk and the limitations of liability specified in this Agreement, and that CYBRARY would not enter into this Agreement without such allocations and limitations.

## **10 TERM; TERMINATION**

- 10.1 **Term.** Unless otherwise specifically indicated and mutually agreed to on CUSTOMER's accepted Order or other written agreement between the parties, this Agreement shall be effective from the Effective Date and shall continue in full force and effect for a period of one year from the Effective Date plus any renewals that may be executed and unless and until terminated as set forth elsewhere in this Agreement.

- 10.2 **General.** Upon any material breach or default of this Agreement by either party, the other party shall have the right to terminate this Agreement, any or all licenses granted, any access to the Platform Services, and Support Services to be performed under it and their respective terms effective on thirty (30) days' prior written notice. Such termination shall become automatically effective unless the breaching or defaulting party shall have cured any material breach or default prior to the expiration of the thirty (30) day period. This Agreement, any Order and the term of any or all licenses may also be terminated immediately upon (a) bankruptcy, insolvency, or placing of the assets or the business of the other party in the hands of a receiver or trustee, (b) filing of a petition for bankruptcy or reorganization by or against the other party, (c) dissolution or liquidation of the other party, or (d) failure of CUSTOMER to pay any sum when due under or in connection with this Agreement. Neither party shall be liable to the other for its failure to perform its obligations under this Agreement, except for payment obligations, during any period in which such performance is delayed or rendered impracticable or impossible due to circumstances beyond its reasonable control.
- 10.3 **Consequences.** In the event of termination of this Agreement or any Order for any reason, CUSTOMER shall promptly (a) discontinue all use of the Platform and Documentation; (b) erase or destroy any Platform and Documentation contained in the computer memory or data storage apparatus under the control of CUSTOMER, (c) return to CYBRARY all copies of the Platform and Documentation provided by CYBRARY in CUSTOMER's possession or control, and (d) certify in writing to CYBRARY, within thirty (30) days of termination of this Agreement, that CUSTOMER has complied with the foregoing. Upon termination of this Agreement any sums owed to CYBRARY under this Agreement will be immediately due and payable, and all licenses granted in this Agreement shall terminate without the necessity of any further action by CYBRARY. Sections 3, 4, 4.1.2, 4.1.5, 4.1.6, 7 through 10, and 11 shall survive any termination of this Agreement.

## 11 GENERAL

- 11.1 **Notices.** All notices required or permitted under this Agreement will be in writing and will be deemed given: (a) when delivered personally, (b) when sent by confirmed facsimile, (c) five (5) days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one (1) day after deposit with a commercial overnight carrier specifying next day delivery, with written verification of receipt. All communications will be sent to the principal office of each party or to such other address as may be designated by a party by giving written notice to the other party pursuant to this Section 11.1. If the communication is from CUSTOMER to CYBRARY, it shall be addressed to "Attn: CEO." If the communication is from CYBRARY to CUSTOMER, it shall be addressed to the Chief Executive Officer of CUSTOMER.
- 11.2 **Assignment.** CUSTOMER may not assign, delegate or otherwise transfer this Agreement or any of its licenses, rights or duties under this Agreement, whether by operation of law or otherwise, without the prior written consent of CYBRARY. Any attempt to transfer or assign this Agreement without such

written consent will be null and void. If the Platform is a valid Update, a permitted transfer may be made only in conjunction with the prior version(s) of the Platform. CYBRARY may assign this Agreement without CUSTOMER's consent to any affiliate or to a person or entity into which it has merged or which has otherwise succeeded to all or substantially all of its business and assets to which this Agreement pertains, by merger, reorganization or otherwise, and which has assumed in writing or by operation of law its obligations under this Agreement. Subject to the previous sentence, the rights and liabilities of the parties hereto will bind and inure to the benefit of their respective successors, executors, and administrators, as the case may be.

- 11.3 **Waiver.** The failure of either party to enforce in any one or more instances any of the terms and conditions of this Agreement shall not be construed as a waiver of future performance of any such term or condition. Waiver of any term or condition shall only be deemed to have been made if expressed in writing by the party granting such waiver.
- 11.4 **Severability.** If any provision of this Agreement shall be held by a court of law of competent jurisdiction to be illegal, invalid, or unenforceable, that provision shall be reformed, construed, and enforced to the maximum extent permissible and the remaining provisions shall remain in full force and effect.
- 11.5 **Governing Law and Jurisdiction.** This Agreement shall be governed by and construed under the laws of the State of Texas without regard to conflict of laws provisions. The federal and state courts sitting in Texas shall have exclusive jurisdiction and venue to adjudicate any dispute arising out of this Agreement. Each party hereto expressly consents to the personal jurisdiction of the courts of Texas and service of process being effected upon it by registered mail sent to the respective addresses referred to in Section 11.1 above. The United Nations Convention on Contracts for the International Sale of Goods does not apply. THE PARTIES SPECIFICALLY WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY COURT WITH RESPECT TO ANY CONTRACTUAL, TORTIOUS, OR STATUTORY CLAIM, COUNTERCLAIM, OR CROSS-CLAIM AGAINST THE OTHER ARISING OUT OF OR CONNECTED IN ANY WAY TO THIS AGREEMENT, BECAUSE THE PARTIES HERETO, BOTH OF WHOM ARE REPRESENTED BY COUNSEL, BELIEVE THAT THE COMPLEX COMMERCIAL AND PROFESSIONAL ASPECTS OF THEIR DEALINGS WITH ONE ANOTHER MAKE A JURY DETERMINATION NEITHER DESIRABLE NOR APPROPRIATE.
- 11.6 **Entire Agreement.** This Agreement and its Exhibits, including all Orders, and any separate CYBRARY agreement referenced elsewhere in this Agreement constitute the entire understanding between the parties, and supersede all prior discussions, representations, understandings or agreements (including any pre-existing nondisclosure agreement, except as to its surviving terms), whether oral or in writing, between the parties with respect to the subject matter of this Agreement. Any preprinted or otherwise prescribed provisions of CUSTOMER's purchase orders required by CUSTOMER other than quantity, price, and the like, shall not apply, exception to such provisions

and terms is hereby given by CYBRARY, and the terms set forth in this Agreement shall be applicable and control. Any modification or amendment to this Agreement must be in writing and signed by authorized representatives of both parties. Except as otherwise provided in Section 4.2 above regarding Open Source Platform, any item or service furnished by CYBRARY in furtherance of this Agreement, although not specifically identified in it or in an Order referencing this Agreement, shall nevertheless be covered by this Agreement unless specifically covered by some other written agreement executed by CUSTOMER and an authorized representative of CYBRARY. The headings and captions used in this Agreement are for convenience only, and shall not affect the interpretation of the provisions of this Agreement.

- 11.7 **U.S. Government Restricted Rights.** CUSTOMER may not acquire the Platform on behalf of the U.S. Government unless CYBRARY has consented to such acquisition in writing. If the Platform is being acquired by or on behalf of the U.S. Government or by a U.S. Government prime contractor or subcontractor at any tier, then the Platform and the accompanying Documentation are to be considered “commercial computer Platform” and “commercial computer Platform documentation,” respectively, as such terms are used in 48 C.F.R. 12.1212 and 48 C.F.R. 227.7202. Except for any arrangements or agreements that CYBRARY may have with U.S. Government or agency thereof with respect to the Platform or intellectual property rights therein, the U.S. Government’s rights in the Platform and any accompanying Documentation will be only as set forth in this Agreement, in accordance with 48 C.F.R. 227.7201 through 227.7202-4 (for Department of Defense (DOD) acquisitions) and with 48 C.F.R. 2.101 and 12.212 (for non-DOD acquisitions). The Platform is provided with RESTRICTED RIGHTS. The Platform is comprised of “commercial computer Platform” and “commercial computer Platform documentation” as such terms are used in 48 C.F.R. 12.212 and is provided to the Government (i) for acquisition by or on behalf of civilian agencies, consistent with the policy set forth in 48 C.F.R. 12.212; or (ii) for acquisition by or on behalf of units of the Department of Defense, consistent with the policies set forth in 48 C.F.R. 227.7202-1 and 227.7202-4.11.8
- Export Control. CUSTOMER acknowledges that the Platform licensed herein is subject to the export control laws and regulations of the United States of America (the “U.S.”) and any amendments to them. CUSTOMER confirms that with respect to the Platform, it will not export or re-export it, directly or indirectly, either to: (a) any countries that are subject to U.S. export restrictions, (b) any end user who CUSTOMER knows or has reason to know will utilize it in the design, development, or production of nuclear, chemical or biological weapons, or (c) any end user who has been prohibited from participating in U.S. export transactions by any federal agency or the government of the U.S.. CUSTOMER further acknowledges that the Platform may include technical data subject to export and re-export restrictions imposed by U.S. law. CUSTOMER agrees to indemnify CYBRARY, to the fullest extent permitted by law, from and against any fines or penalties that may arise as a result of CUSTOMER’s breach of this provision. This export control clause shall survive termination of this Agreement.

- 11.8 **Use of CUSTOMER Name.** CUSTOMER agrees that CYBRARY may use CUSTOMER's name in CYBRARY's customer list and may publish information identifying CUSTOMER as a user of CYBRARY products in advertisements, news releases and releases to professional and trade publications. CUSTOMER will have the right to approve each such release prior to its placement, but agrees not to unreasonably withhold its approval.
- 11.9 **Independent Contractors.** The relationship of CYBRARY and CUSTOMER established by this Agreement is that of independent contractors, and nothing contained in the Agreement will be construed to constitute the parties as partners, joint venturers, co-owners, or otherwise as participants in a joint or common undertaking. For a period of one (1) year following the completion of any Support Services performed for CUSTOMER under this Agreement, CUSTOMER shall not directly or indirectly employ, solicit for employment or contract with any CYBRARY personnel performing such Support Services for CUSTOMER under this Agreement.
- 11.10 **Confidential Information.** Each party acknowledges that by reason of its relationship to the other party under the provisions of this Agreement it may have access to certain non-public information and material concerning the other party's business, plans, customers, technology, and products that are confidential and of substantial value to the disclosing party ("**Confidential Information**"), which value would be impaired if such Confidential Information were disclosed to third parties. Each party agrees to maintain all Confidential Information received from the other, both orally and in writing, in confidence and agrees not to disclose or otherwise make available such Information to any third party without the prior written consent of the disclosing party. Each party further agrees to use the Confidential Information only for the purpose of performing this Agreement. No information shall be deemed confidential unless so marked if given in writing or, if given orally, identified as confidential orally prior to disclosure, except that CUSTOMER agrees that any information in whatever form relating to (a) the terms of this Agreement, the Documentation and the underlying ideas, algorithms, techniques, knowhow, design, architecture, functionality, operational methods or coding of the Platform, including but not limited to any complete or partial source or object code versions or related patent applications, and (b) performance information, test results, algorithms, techniques, product roadmap and knowhow or analyses created by or for CUSTOMER (including, without limitation, benchmarks) relating to the Products, shall be deemed Confidential Information of CYBRARY regardless of the presence or absence of any confidential markings or identification.

The obligations of non-disclosure under this Agreement shall not apply to information which: (a) is or becomes a matter of public knowledge through no fault of or action by the receiving party; (b) was rightfully in the receiving party's possession prior to receipt from the disclosing party without restriction; (c) subsequent to disclosure, is rightfully obtained by the receiving party from a third party who is lawfully in possession of such information without restriction; (d) is independently developed by the receiving party without resort to Confidential Information; or (e) is required to be disclosed by

law or judicial order, provided that prior written notice of such required disclosure is furnished to the disclosing party as soon as practicable in order to afford the disclosing party an opportunity to seek a protective order and that if such order cannot be obtained disclosure may be made without disclosing party liability. The receiving party shall promptly notify the disclosing party upon discovery of any loss or unauthorized disclosure of disclosing party's Confidential Information. Whenever requested by the disclosing party, the receiving party shall immediately return to the disclosing party all manifestations of its Confidential Information or, at the disclosing party's option, shall destroy all such Confidential Information as the disclosing party may designate. Recipient's obligation of confidentiality shall survive this Agreement for a period of seven (7) years from the date of its termination, and thereafter shall terminate and be of no further force or effect. ALL CONFIDENTIAL INFORMATION IS PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND.

Each party acknowledges that any breach of any of its obligations with respect to the other party's Confidential Information hereunder may cause or threaten irreparable harm to such party. Accordingly, each party agrees that in such event each party shall be entitled to seek equitable relief to protect its interests, including but not limited to temporary restraining orders, preliminary and permanent injunctive relief, as well as money damages.

11.11 **Audit.** While this Agreement is in effect and for a period of one (1) year after it terminates, CYBRARY will have the right not more often than twice during any calendar year, on reasonable notice to CUSTOMER and during normal business hours, to conduct an audit of CUSTOMER's books, records, and supporting documentation that relate to any of CUSTOMER's obligations under this Agreement. Any underpayment revealed by the audit will promptly be remitted by CUSTOMER in a manner designated by CYBRARY. In the event of an underpayment to CYBRARY of five (5%) or more, CUSTOMER will also reimburse CYBRARY for the reasonable cost of such audit. On CYBRARY's written request, but not more frequently than annually, CUSTOMER will furnish CYBRARY with a statement signed by an officer authorized to legally bind CUSTOMER verifying that the Platform is being used in full compliance with the provisions of this Agreement.

**Cybrary's Digital Media Copyright Act (DMCA):** [Read more about Cybrary's Digital Media Copyright Act \(DMCA\) Policy, as well as the process of Submitting a Digital Media Copyright Act \(DMCA\) Notice and Submitting a Digital Media Copyright Act \(DMCA\) Counter Notice.](#)