

OverDrive Digital Library Reserve Access Agreement

1. Digital Library Reserve Application Services

1.1 OverDrive will create and host a Library Website for Library's use of the Application Services. OverDrive shall provide the Application Services to the Library under the terms of the Order 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 Library to select Digital Content to make available at the Library Website to Authorized Patrons and to access reports.

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. Library may be required to complete additional forms, documents or other associated materials provided by OverDrive. Library 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 Library.

1.5 OverDrive shall have sole discretion to approve any and all libraries that seek to participate in Library's DLR Service, as well as approve any other terms and conditions related to such expansion of the DLR Service to additional libraries. OverDrive shall have sole discretion to honor any prior version of an order form, participation form or related material completed by Library. OverDrive may require Library to complete an updated version of the same.

1.6 If Library 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 Library to the use of, or access to, any Application Services source code. Library 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 Library Website.

2. Library Website

2.1 Library shall use commercially reasonable efforts to ensure that use of the Applications Services, the Library Website and the Digital Content are in compliance with this Agreement and with permitted uses as communicated by OverDrive to Library. Library 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 Library and Authorized Patrons a non-assignable, non-transferable, limited license to use the Digital Content provided by OverDrive's suppliers for personal, non-commercial use.

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

- (a) On Library-issued devices or computers with exclusive and individual unique user accounts;
- (b) On Library-issued devices which are circulated in accordance with the OverDrive Test Drive program;
- (c) On Authorized Patrons personal devices directly;
- (d) On shared 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 Library shall reasonably cooperate with OverDrive to limit access to the DLR Service to end users who are Authorized Patrons. In the event Library 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, that 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 Library 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.

2.5 Library agrees to perform Primary Support for its Authorized Patrons, unless Library has completed the Front Line Tech Support Order Form and paid for Front Line Tech Support services. OverDrive will provide Library with training and documentation for Library's provision of Primary Support. 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 Library Website.

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

2.7 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

Library shall make payment to OverDrive for all Application Services fees and Digital Product costs according to OverDrive within thirty (30) days from Library's receipt of valid invoice. OverDrive, in its sole discretion, may require payment by Library of any initial or outstanding invoices before OverDrive will set the DLR Service live. In the event of 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 Library's account becomes current, or in OverDrive's sole discretion, terminate access to the Application Services.

4. Term and Termination

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

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 Library by this Agreement shall be terminated immediately and Library shall make no further use of all or any part of the Application Services, or any confidential information received from OverDrive.

5. Warranties

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.

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. Library shall not share its passwords and login credentials of Library's account in OverDrive's content selection portal with anyone, including any third party. Library shall take reasonable steps to prevent unwarranted intrusion into such information.

6.2 Taxes. 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 Library at the address provided on the Order Form, Attention: Primary Contact (as designated on the Order Form), or as otherwise agreed by the parties.

6.5 Assignment. OverDrive may assign this Agreement. This Agreement may not be assigned by Library, nor any duty hereunder delegated by Library 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 Order 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 Order Form and 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 New Mexico, 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 New Mexico, USA, and the local laws of New Mexico 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 Library Website and digital content distribution service provided to Library, which utilize OverDrive® 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 the Library's service area and which the Library authorizes to download and/or access Digital Content from the Library Website or otherwise utilize the Application Services.
- 7.3 "Digital Content" shall mean the digital titles (e.g. eBooks, audiobooks, and video) made available from OverDrive at the Library Website.
- 7.4 "Library" shall mean the organization or entity identified in the Library Information section of the Order Form.
- 7.5 "Library Website" shall mean the Internet-based application hosted and operated by OverDrive that provides Authorized Patrons access to Digital Content.
- 7.6 "Order Form" shall mean the OverDrive Digital Library Reserve Order Form completed by the Library.
- 7.7 "OverDrive" shall mean: OverDrive, Inc., a Delaware Corporation, and its subsidiaries and affiliates.
- 7.8 "Primary Support" shall mean the services provided by Library to its Authorized Patrons for its day-to-day help, support, technical aid and other assistance for their use of the Library Website and Digital Content.
- 7.9 "Secondary Support" shall mean the technical support services provided by OverDrive to Library in the English language, including reasonable efforts to assist Library in providing Primary Support.

City of Santa Fe (Library) and OverDrive (OverDrive) ADDENDUM

8. **INDEMNIFICATION**

OVERDRIVE shall indemnify, hold harmless and defend the LIBRARY from all losses, damages, claims or judgments, including payments of all attorneys' fees and costs on account of any suit, judgment, execution, claim, action or demand whatsoever arising from OVERDRIVE's performance under this Agreement as well as the performance of OVERDRIVE's employees, agents, representatives and subcontractor.

9. **NEW MEXICO TORT CLAIMS ACT**

Any liability incurred by the LIBRARY in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1, et. seq. NMSA 1978, as amended. The LIBRARY and its "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

10. **APPLICABLE LAW; CHOICE OF LAW; VENUE**

OVERDRIVE shall abide by all applicable federal and state laws and regulations, and all ordinances, rules and regulations of the LIBRARY of Santa Fe. In any action, suit or legal dispute arising from this Agreement, the OVERDRIVE agrees that the laws of the State of New Mexico shall govern. The parties agree that any action or suit

arising from this Agreement shall be commenced in a federal or state court of competent jurisdiction in New Mexico. Any action or suit commenced in the courts of the State of New Mexico shall be brought in the First Judicial District Court.

11. APPROPRIATIONS

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the LIBRARY for the performance of this Agreement. If sufficient appropriations and authorization are not made by the LIBRARY, this Agreement shall terminate upon written notice being given by the LIBRARY to OVERDRIVE. The LIBRARY's decision as to whether sufficient appropriations are available shall be accepted by OVERDRIVE and shall be final.

12. RELEASE

OVERDRIVE, upon acceptance of final payment of the amount due under this Agreement, releases the LIBRARY, its officers and employees, from all liabilities, claims and obligations whatsoever arising from or under this Agreement. OVERDRIVE agrees not to purport to bind the LIBRARY to any obligation not assumed herein by the LIBRARY unless OVERDRIVE has express written authority to do so, and then only within the strict limits of that authority.

13. INSURANCE

OVERDRIVE shall maintain professional liability insurance throughout the term of this Agreement providing a minimum coverage in the amount required under the New Mexico Tort Claims Act. OVERDRIVE shall furnish the LIBRARY with proof of insurance of OVERDRIVE's compliance with the provisions of this section as a condition prior to performing services under this Agreement.

14. THIRD PARTY BENEFICIARIES

By entering into this Agreement, the parties do not intend to create any right, title or interest in or for the benefit of any person other than the LIBRARY and the OVERDRIVE. No person shall claim any right, title or interest under this Agreement or seek to enforce this Agreement as a third party beneficiary of this Agreement.

15. SEVERABILITY

In case any one or more of the provisions contained in this Agreement or any application thereof shall be invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein and any other application thereof shall not in any way be affected or impaired thereby.

16. AMENDMENT

This Agreement shall not be altered, changed or modified except by an amendment in writing executed by the parties hereto.

This agreement incorporates the additional terms and conditions in the addendum between Overdrive and the Library.

Signature Lines required:

CITY OF SANTA FE:

Jarel LaPan Hill
Jarel LaPan Hill (Aug 11, 2021 18:16 MDT)

JAREL LAPAN HILL, CITY MANAGER

DATE: Aug 11, 2021

OVERDRIVE:

DocuSigned by:
Erica Lazzaro
SOF278BA627AA80...

NAME & TITLE Erica Lazzaro

Executive Vice President, Publisher Services & General Counsel

DATE: 7/13/2021

ATTEST:

Kristine Mihelcic
Kristine Mihelcic (Aug 11, 2021 20:22 MDT)

KRISTINE BUSTOS MIHELICIC, CITY CLERK

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XIV

CITY ATTORNEY'S OFFICE:

Marcel Martinez
Marcel Martinez (Jul 12, 2021 09:37 MDT)

SENIOR ASSISTANT CITY ATTORNEY

APPROVED FOR FINANCES:

Mary McCoy

MARY T. MCCOY, FINANCE DIRECTOR