

**From:** [REDACTED]@ithaka.org>  
**Sent:** Tuesday, January 25, 2011 9:46 PM (GMT)  
**To:** Heymann, Stephen (USAMA) <Stephen.Heymann@usdoj.gov>  
**Cc:** [REDACTED]@ithaka.org>  
**Subject:** JSTOR license agreement  
**Attach:** T&C pdf.msg; JSTOR Publication License Agreement v.08.03.10.doc

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Hi Steve and [REDACTED],

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Re the EULA, key provisions at issue here are whether the pirate was an Authorized User, as defined in Section 1, and the ways in which the activities violated Sections 2.2 d, f, g, and i.

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[REDACTED]

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THIS LICENSE AGREEMENT (this "Agreement") is entered into by and between JSTOR, a part of ITHAKA, a not-for-profit corporation formed under the laws of the State of New York ("JSTOR"), and the Licensor specified above ("Licensor") as of the date of last signature (the "Effective Date").

WHEREAS, there exists a significant social and educational need in the United States and throughout the world to preserve scholarly journals and other scholarly materials for posterity and advancement of research; and

WHEREAS, there is a pressing need to make the information in such journals and other scholarly materials more accessible to teachers, researchers, scholars, and students; and

WHEREAS, it can be wasteful of precious resources to have to store such journals and other scholarly materials in printed form in libraries; and

WHEREAS, Licensor is in the business of publishing journals and/or other scholarly materials, owns certain rights in such journals and/or other scholarly materials, and wishes to preserve them and increase accessibility to them through electronic means;

NOW, THEREFORE, in consideration of the premises and the mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. DEFINITIONS

"Publication Archive" means:

- i. For journals: those issues of Publication converted into digitized format by JSTOR that are dated prior to the year designated by the Moving Wall (as hereafter defined);
- ii. For monographs (if applicable): the series identified on the first page of this Agreement converted into digitized format by JSTOR.

"Document Delivery" means using the Publication Archive to provide copies of articles or chapters from Publication to individuals upon such individuals' request.

"Electronic Technologies" means technologies including but not limited to online, local area network, wide area network, distributed media, CD-ROM, magnetic tape, satellite broadcast, and technologies now known or hereafter developed.

"License" means the rights granted to JSTOR by Licensor pursuant to Section 2 hereof.

"Moving Wall" means that delay between current issues and the issues of Publication included in the Publication Archive, as indicated on page one of this Agreement. The delay shall be on a calendar year basis or as otherwise agreed upon in writing by JSTOR and Licensor. For example, if the Moving Wall is three (3) years, and the present year is 2010, all issues of Publication dated through the end of 2006 may be included in the Publication Archive.

"Materials" means the digitized versions of the Publication created or acquired by JSTOR in the form of OCR text files (ASCII) and searchable PDFs.

"Projects" means specified projects of a scholarly nature undertaken by Licensor in consultation with JSTOR using portions of the Materials, including, for example, anthologies of articles or chapters from Publication.

“JSTOR Archive” means the online resource containing digital images of publications of various publishers (licensors), of which the Publication Archive will form part, with search capacity and other tools and software, created and maintained by JSTOR in fulfillment of its mission to preserve such publications for scholarship and to advance research and teaching.

## 2. GRANT OF LICENSE

Licensor hereby grants to JSTOR a non-exclusive, worldwide license (a) to create the Publication Archive, including the rights to scan the Publication and to convert the information and images in the Publication into ASCII, to tag or mark up such ASCII text in SGML or its equivalent, to produce a computer searchable index of or including the Publication, and to store the Publication by means of Electronic Technologies, (b) to use, and to authorize use by third parties of, the Publication Archive by means of Electronic Technologies, including rights to reproduce, display, transmit and distribute the Publication in connection with producing, transmitting, distributing and marketing the Publication Archive, and (c) to combine the Publication Archive with other publications in an electronic database. Licensor also grants to JSTOR an exclusive, irrevocable, world-wide license to use the ASCII version of Publication created by JSTOR in any manner that is consistent with the terms of this Agreement and to enforce its rights under this Agreement against third parties. Royalties and/or distributions to be provided in connection with the licenses granted herein shall be set forth in the Revenue Sharing Rider attached hereto.

## 3. PRESERVATION AND DISTRIBUTION OF PUBLICATION

JSTOR shall create the Publication Archive at its sole expense. It is JSTOR's intent to create a faithful electronic replication of the Publication in all respects, including text, look and formatting and to add issues of Publication to the Publication Archive on a calendar year or volume basis.

JSTOR shall maintain the Publication Archive at its sole expense, and shall update the Publication Archive to ensure that the Publication Archive remains accessible as technologies evolve by, for example, providing improved user interfaces, search engines, and printer applications.

JSTOR, at its sole expense, shall make the Publication Archive available to users through libraries and other entities, and to individuals, pursuant to agreements with such entities or individuals. JSTOR, at its sole expense, shall provide Licensor with access to data on usage of the Publication Archive.

It is JSTOR's intent to include the Publication Archive in a database to be stored centrally, in one or more locations, and to deliver the Publication Archive to users by means of online or other network technologies. In some cases, due to inadequate infrastructure at JSTOR participant sites, it may be necessary to deliver the Publication Archive on CD-ROM or other Electronic Technologies.

All aspects of the preservation and distribution of the Publication pursuant to this Section 3, including but not limited to scanning and other methods of production, compression, storage, promotion, distribution and provision of the Publication Archive and of usage data pertaining to the Publication Archive, shall be under the exclusive control of JSTOR. Notwithstanding the foregoing, JSTOR may provide access to the Publication Archive to users through links from third-party websites in a manner consistent with the terms of this Agreement. The distribution of printed copies of the Publication, other than copies printed from the JSTOR Archive, shall remain exclusively with Licensor.

Licensor shall have free access to the Publication Archive through the JSTOR Archive from computer terminals located in Licensor's offices, and may use such access to verify the integrity of the Publication Archive. Licensor shall notify JSTOR of any errors it finds in the Publication Archive and supply JSTOR with the information necessary to correct such errors.

Licensor shall inform JSTOR of Licensor's intent to develop Projects. At Licensor's request, JSTOR shall provide to Licensor on a reasonable basis portions of Materials for Projects.

Licensors may perform Document Delivery at Licensor's discretion. If requested by Licensor, JSTOR agrees to cooperate with Licensor to establish a means for Licensor to perform Document Delivery from JSTOR's server(s). If requested by JSTOR, the parties agree to discuss a reasonable fee to be paid to JSTOR in connection with such Document Delivery.

4. INTELLECTUAL PROPERTY OWNERSHIP; NOTICE

Licensor shall retain all copyright rights in the Publication and Materials, subject to the License granted to JSTOR herein. JSTOR shall own all other information and content used in, or in connection with, the Publication Archive and the JSTOR Archive, subject to the intellectual property rights of third parties (such as licensors of software programs used in the development of the JSTOR Archive), including but not limited to software, search engines, computer searchable indices, user interfaces, source code and the JSTOR compilation.

Each party shall have the right to register and effect renewal of its respective copyright rights as set forth in this Section 4, in the United States and throughout the world.

JSTOR will include a copyright notice with each article in the Publication Archive, viewable online, (a) indicating Licensor as owner of copyright in Publication, or (b) subject to space constraints, such copyright ownership as designated by Licensor in writing. The JSTOR Archive shall also contain a notice prohibiting users from systematically printing out, downloading, and bulk reproducing or distributing publications, or portions thereof, without Licensor's permission, and such other notice information as JSTOR shall determine.

In the event of a dispute with respect to the electronic distribution of any article in the Publication Archive, JSTOR may remove such article from the JSTOR Archive.

5. LIMITED TRADEMARK LICENSE

Each party hereby grants to the other a nonexclusive, royalty-free, worldwide right and license to use and incorporate such party's trademarks in connection with the promotion of the Publication Archive and the JSTOR Archive during the term of this Agreement. Each party agrees to adhere to standards consistent with the high level of quality associated with such trademarks, and to provide the other party with samples of any literature produced containing the trademarks. In addition, each party agrees to notify the other of the URL of web pages it creates containing such trademarks or links to the other's web site(s), and of substantive changes made to any such web pages. Each party agrees to cooperate in making changes to such web pages as reasonably requested by the other party.

6. REPRESENTATIONS AND WARRANTIES

Licensor represents and warrants that (a) it possesses all rights in the Publication as a collective work or compilation necessary to grant the License, and (b) it is authorized to grant the License to JSTOR. Licensor further represents and warrants that it has caused this Agreement to be executed by an authorized representative.

Licensor shall effect or obtain all non-U.S. governmental or regulatory filings, registrations and approvals required in connection with the grant of the License, if applicable, and shall pay any costs associated therewith. Licensor shall inform JSTOR of any laws or regulations of Licensor's country that require any change to this Agreement.

Licensor agrees that it will not use, license or assign the Materials during the term of this Agreement in such a way that competes, directly or indirectly, with JSTOR. It is understood that mutually agreed upon Projects and Document Delivery are not in competition with JSTOR. This provision is not intended to restrict Licensor from creating its own electronic version of Publication and using such electronic version in any way.

Licensors agree to assume full responsibility for securing any needed permissions in connection with Licensors' use of Materials, including in Projects and Document Delivery. Licensors shall indemnify and hold harmless JSTOR, its affiliates and its and their directors, officers, employees, agents, successors, assigns, licensees and distributors against any and all judgments, settlements, penalties, costs and expenses, including attorneys' fees, paid or incurred in connection with any action, suit, claim, and/or proceeding by any party which arises from Licensors' use of the Materials, including in Projects and Document Delivery. In connection with the foregoing, JSTOR will give Licensors prompt written notice of all actions, suits, claims, and/or proceedings, provide reasonable cooperation in the investigation and defense of same, and permit Licensors to defend such matters at its expense with legal counsel of its choice. Except as otherwise provided in this paragraph, each party shall pay its respective costs and/or losses in the event of a claim by a third party relating to the subject matter of this Agreement.

**EXCEPT AS OTHERWISE PROVIDED HEREIN, NEITHER PARTY MAKES ANY WARRANTY TO THE OTHER, EXPRESS OR IMPLIED, INCLUDING ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. JSTOR MAKES NO WARRANTIES RESPECTING THE PERFORMANCE AND AVAILABILITY OF THE JSTOR ARCHIVE, OR ANY HARM THAT MAY BE CAUSED BY THE TRANSMISSION OF A COMPUTER VIRUS, WORM, TIME BOMB OR OTHER SUCH COMPUTER PROGRAM. JSTOR FURTHER MAKES NO WARRANTY RESPECTING IMPROPER USAGE OF THE PUBLICATION ARCHIVE BY USERS.**

7. TERM

Either party has the right to terminate this Agreement upon giving at least six (6) months prior written notice to the other party. Notwithstanding the foregoing, Licensors shall not give notice of termination of the Agreement earlier than six (6) months following public release of the Publication Archive. In the event that Licensors terminates this Agreement, (a) Licensors hereby grants to JSTOR a non-exclusive, world-wide license to continue to store the Publication Archive and to distribute it to all entities, and only those entities, that had elected to participate in JSTOR prior to such termination, and (b) Licensors will not use, license, assign, sell, or distribute the Materials for a period of three (3) years from the date of such termination. In the event that JSTOR ceases to operate, JSTOR agrees to give Licensors one (1) complete set of CD-ROMs (or their equivalent at JSTOR's option) containing the Materials.

8. DELIVERY OF PUBLICATION

Licensors shall make all reasonable efforts to collect or obtain a printed copy of all issues of Publication, including current issues, and to deliver such issues to JSTOR. In addition, Licensors shall add JSTOR to Licensors' subscription or other mailing list such that JSTOR shall receive forthcoming issues of Publication on an ongoing basis. All deliveries of Publication shall be made to the JSTOR delivery address specified on Schedule A attached hereto, or such other address as JSTOR may designate by notice to Licensors. The costs of delivering Publication to JSTOR in accordance with this Section 8 shall be borne by JSTOR. JSTOR shall provide shipping instructions if Licensors is able to deliver issues of Publication. If Licensors fails to deliver all issues of Publication to JSTOR, JSTOR may independently acquire them in any medium.

9. GOVERNING LAW

This Agreement shall be interpreted and construed according to, and governed by, the laws of the State of New York or United States Federal law, as applicable, excluding any such laws that might direct the application of the laws of another jurisdiction. The parties expressly exclude, if applicable, the application of the United Nations Convention on Contracts for the International Sale of Goods.

The English language version of this Agreement shall be controlling over any other version.

10. NOTICES

All notices given pursuant to this Agreement shall be in writing and in English, and sent to the Notice Address specified on Schedule A hereof. Notices may be delivered by hand, by overnight carrier, or shall be deemed to be received within five (5) business days after mailing if sent by registered or certified mail, postage prepaid. If any notice is sent by facsimile, then confirmation copies must be sent as specified above. Either party may from time to time change its Notice Address by written notice to the other party.

11. MISCELLANEOUS

11.1 This Agreement constitutes the entire agreement of the parties and supersedes all prior communications, understandings and agreements relating to the subject matter hereof, whether oral or written. No modification or claimed waiver of any provision of this Agreement shall be valid except by written amendment signed by authorized representatives of JSTOR and Licensor.

11.2 This Agreement and any amendments may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one agreement.

11.3 Nothing contained herein shall be deemed to create an agency, joint venture, or partnership relationship between the parties.

11.4 Neither party shall be liable in damages or have the right to cancel this Agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections, strikes, fires, floods, work stoppages, unavailability of materials, carriers or communications facilities, and/or any other cause beyond the reasonable control of the party whose performance is affected.

11.5 Waiver of any provision herein shall not be deemed to be a waiver of any other provision herein, nor shall waiver of any breach of this Agreement be construed as a continuing waiver of other breaches of the same or other provisions of this Agreement.

11.6 If any provision or provisions of this Agreement shall be held to be invalid, illegal, unenforceable or in conflict with the law of any jurisdiction, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

11.7 The parties hereto agree to execute, acknowledge, and deliver all such further instruments, and to do all such other acts, as may be necessary or appropriate in order to carry out the intent and purposes of this Agreement.

11.8 Neither party may assign, directly or indirectly, all or part of its rights or obligations under this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld or delayed.

11.9 Without limiting any provision of this Agreement, Licensor recognizes that JSTOR retains third party independent contractors, consultants, service providers and distributors (collectively, "Consultants"), to perform technology and distribution services for JSTOR. Licensor hereby authorizes the Consultants to use the Publication to the extent of JSTOR's rights therein, subject to all of the other terms and conditions of this Agreement, and solely for purposes of performing their respective obligations to JSTOR.

**SCHEDULE A  
CONTACT INFORMATION**

**Licensor Notice Address:**  
*(for notices pursuant to this Agreement)*

**Attn:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Telephone:** \_\_\_\_\_

**Facsimile:** \_\_\_\_\_

**E-Mail:** \_\_\_\_\_

**JSTOR Notice Address:**

**Attn:** [REDACTED]

ITHAKA

[REDACTED]  
USA

**Telephone:** [REDACTED]

**Facsimile:** [REDACTED]

**E-Mail:** [REDACTED]

**Licensor Content and Subscription Contact:**  
*(responsible for content delivery)*

**Attn:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Telephone:** \_\_\_\_\_

**Facsimile:** \_\_\_\_\_

**E-Mail:** \_\_\_\_\_

**JSTOR Content Contact:**

**Attn:** [REDACTED]

JSTOR

[REDACTED]  
USA

**Telephone:** [REDACTED]

**Facsimile:** [REDACTED]

**E-Mail:** [REDACTED]

@ithaka.org

**Subscriptions and Back Issues Delivery Address:**

**Attn:** [REDACTED]

JSTOR

[REDACTED]  
USA

## Revenue Sharing Rider

This Revenue Sharing Rider (“the Rider”) is an addendum to and incorporates by reference all of the terms of the Agreement entitled JSTOR PUBLICATION LICENSE AGREEMENT (the “Agreement”) between JSTOR and \_\_\_\_\_ (“Licensor”).

### **DEFINITIONS:**

“Annual Access Fees” shall mean recurring annual fees collected by JSTOR from academic and non-commercial organizations for participation in the JSTOR Collections identified in the Collections Schedule of this Revenue Sharing Rider attached hereto, as updated periodically by JSTOR.

“Available Publications” shall mean journals and/or monographs available to users as part of the JSTOR Archive before August 1<sup>st</sup> of any given year and which have a Moving Wall of less than or equal to seven (7) years as specified in the Agreement.

“Vested Publications” shall mean journals and/or monographs with Moving Walls less than or equal to seven (7) years that have been available to users as part of the JSTOR Archive for at least five (5) years. For example, for the year 2010, publications that were released in 2005 or earlier would constitute Vested Publications.

### **PART I: Publisher Revenue Pool**

JSTOR will distribute to Licensor, or such other entity as Licensor may designate, on an annual basis, a portion of the Publisher Revenue Pool (as defined below) on the following terms:

1. The Publisher Revenue Pool, to be established at the beginning of each calendar year, will equal fifteen percent (15%) of the total gross Annual Access Fees paid during the preceding calendar year.
2. Available Publications are eligible to receive a distribution from the Publisher Revenue Pool at the beginning of the following calendar year. For example, a publication with a 5-year moving wall made available in the JSTOR Archive on or before July 31, 2010 shall receive payment in the beginning of 2011.
3. Each Available Publication’s distribution of the Publisher Revenue Pool will be calculated as follows:

Step 1: Each Available Publication will be assigned a page unit based on the following scale: A publication containing up to 20,000 pages shall be assigned one (1) page unit, a publication containing from 20,001 to 40,000 pages shall be assigned two (2) page units, and a publication containing more than 40,000 pages shall be assigned three (3) page units.

For example: Publication ABC, comprised of 18,000 pages, has 1 page unit.

Step 2: Each Available Publication will be assigned a number of shares of the Publisher Revenue Pool (“Pool Shares”) by multiplying the number of page units by the number of participating institutions with access to such publication.

For example: If 300 institutions have access to Publication ABC, then Publication ABC has 300 Pool Shares (300 institutions x 1 page unit).

Step 3: The monetary value of a single Pool Share will be determined by dividing the Publisher Revenue Pool by the total Pool Shares for all Available Publications.

For example: If the Publisher Revenue Pool is \$100,000 and there is an aggregate of 50,000 Pool Shares, then the value of a single Pool Share is \$2.00.

Step 4: Finally, each Available Publication's distribution of the Publisher Revenue Pool will be calculated by multiplying such Publication's Pool Shares by the monetary value of a single Pool Share.

For example: Publication ABC's distribution will be \$600 (\$2.00 x 300 Pool Shares).

## **PART II: Moving Wall Supplemental Payment**

If during the preceding calendar year, total Annual Access Fees are equal to or greater than \$13 million, JSTOR shall make an additional payment for all Available Publications with a Moving Wall equal to or less than 5 years as specified in the Agreement. This additional payment shall equal \$2,000 for Available Publications with a Moving Wall of 0-3 years and \$1,300 for Available Publications with a Moving Wall of 4-5 years.

## **PART III: Distribution from Additional Publisher Revenue Pool**

If during the preceding calendar year, the total Annual Access Fees are equal to or greater than \$24 million, JSTOR shall make an additional distribution for all Vested Publications. The distribution shall be made from the Additional Publisher Revenue Pool, which shall equal five percent (5%) of gross Annual Access Fees from the preceding calendar year. This distribution will consist of two components:

1. Twenty percent (20%) of the Additional Publisher Revenue Pool will be designated as the Additional Publisher Revenue Pool Page Count Component, and will be divided among Vested Publications whose back runs are longer than 80,000 pages. These Vested Publications will be assigned to Page Tiers, as follows:

- Over 320,000 pages equals Page Tier I
- 160,001-320,000 pages equals Page Tier II
- 80,001-160,000 pages equals Page Tier III

Each page tier will receive thirty-three and one-third percent (33.33%) of the Page Count Component. Publications in each tier will receive an allocation based on the percentage of pages they represent to that tier.

For example: If the Page Count Component equals \$240,000, each page tier will receive an allocation of \$80,000. Publication ABC has 165,000 pages in the archive and comprises 1% of the pages in Page Tier II. It will receive \$800 from the Page Count Component.

2. Eighty percent (80%) of the Additional Publisher Revenue Pool will be designated as the Additional Publisher Revenue Pool Usage Component, and will be divided among Vested Publications based on usage. For the years 2008 and 2009 Vested Publications will be assigned to Usage Tiers, as follows:

- More than 1,000,000 Publication Usages per year equals Usage Tier I
- 500,001-1,000,000 Publication Usages per year equals Usage Tier II
- Less than or equal to 500,000 Publication Usages per year equals Usage Tier III

Beginning in 2010 and going forward Usage thresholds shall change each calendar year based on the percentage increase or decrease of average Publication Usage per publication in a three-year period.

For example: If average Publication Usage for the years 2007, 2008, and 2009 equals 100,000 and the average Publication Usage for the years 2008, 2009, and 2010 equals 110,000, then for the year 2010, the above-described Usage Tiers shall be increased by 10%.

Each usage tier will receive thirty-three and one-third percent (33.33%) of the Usage Component. Vested Publications in each tier will receive an allocation based on the percentage of usage they represent to that tier.

For example: If the Usage Component equals \$960,000, each usage tier will receive an allocation of \$320,000. Publication ABC has 530,000 Publication Usages for calendar year 2008 and comprises 1% of the total Publication Usages in Usage Tier II. It will receive \$3,200 from the Usage Component.

3. Each Vested Publication with page counts of over 80,000 pages shall receive the sum of its share of the Page Count Component and its share of the Usage Component as its allocation from the Additional Publisher Revenue Pool.

4. Each Vested Publication with page counts less than or equal to 80,000 pages shall receive its share of the Usage Component as its allocation from the Additional Publisher Revenue Pool.

#### **DISTRIBUTION OF PAYMENTS:**

Any distributions made to Publication(s) are in consideration for Licensor's ongoing participation in JSTOR, the inclusion of Publication(s) as a collective work in the JSTOR Archive, and the furtherance of JSTOR's mission.

Any distributions shall be made in accordance with the information provided by Licensor on the Payment Information form or as otherwise designated in writing and provided to JSTOR by Licensor. JSTOR reserves the right to deduct from all distributions payable to certain non-U.S. Licensors any sums which it is obliged by law to deduct by way of withholding taxes. Where applicable, JSTOR shall provide non-U.S. Licensors with forms that may provide an exemption from this requirement or significantly reduce the amount of tax withheld. Notwithstanding the foregoing and to the extent applicable, Licensor shall be responsible for fulfilling its income and related tax obligations with respect to any distributions. JSTOR reserves the right to modify the provisions of this Rider on reasonable notice to Licensor.

All other terms of the Agreement shall remain in full force and effect.

**Collections Schedule A:  
List of Available JSTOR Collections**

Arts & Sciences I  
Arts & Sciences II  
Arts & Sciences III  
Arts & Sciences IV  
Arts & Sciences V  
Arts & Sciences VI  
Art & Sciences VII  
Arts & Sciences VIII  
Arts & Sciences IX  
Arts & Sciences X  
Arts & Sciences XI  
Biological Sciences  
Business I  
Business II  
Business III  
Ecology & Botany  
Health & General Sciences  
Language & Literature  
Life Sciences  
Mathematics & Statistics  
Music  
Public Library I  
Public Library II

**Payment Information**

JSTOR shall make distribution checks payable to:

\_\_\_\_\_

Address to which payments shall be sent:

Organization: \_\_\_\_\_

Contact: \_\_\_\_\_

Street: \_\_\_\_\_

City/State/Zip code: \_\_\_\_\_

Country: \_\_\_\_\_

Telephone: \_\_\_\_\_

Fax: \_\_\_\_\_

Email: \_\_\_\_\_