



## Publisher Leveling Agreement

This Publisher Leveling Agreement (the “Agreement”) is entered into by and between \_\_\_\_\_ (“Publisher”), having a place of business at \_\_\_\_\_,

and Heinemann, a division of Greenwood Publishing Group, LLC, (“Heinemann”) having a place of business at 145 Maplewood Ave, Suite 300, Portsmouth, New Hampshire 03801. Heinemann and Publisher are collectively referred to herein as the “Parties.”

This Agreement sets forth the terms under which: (a) Publisher may submit texts published by Publisher (each a “Work”) through the Web site (the “Site”) for leveling using Heinemann's proprietary leveling system known as the “F&P Text Level Gradient™ Leveling System” (the “System”); (b) Publisher shall submit Electronic Copies (defined below) of such Works to Heinemann by uploading such Works to the Site; (c) Heinemann will level such Works in accordance with the System, if applicable; (d) Publisher shall pay the Leveling Fee (defined below) for any Work leveled by Heinemann; (e) Publisher can monitor the progress of, and generate reports regarding, the Works it has submitted for leveling; and (f) Publisher may be required to cite the System on any Work leveled by Heinemann and in connection with any marketing of Works leveled under the System, as more fully set forth below.

1 Definitions. The terms defined in this Section 1 and throughout the Agreement, whether used in the singular or plural, shall have the meanings set forth herein.

“Electronic Copy” means a digital file containing a Work (or portions thereof) in a readable format required by Heinemann (as set forth on the Site) that is uploaded or supplied by Publisher via the Site for access or downloading by Heinemann for use in connection with providing the leveling services for such Work under the System.

“Heinemann Database” means the database maintained by Heinemann that catalogs and maintains the Work Data with respect to Works submitted by Publishers and leveled by Heinemann, and that may be accessed and used by Heinemann, Publisher, and authorized customers of Heinemann.

“Heinemann Server” means a server controlled by Heinemann or its subcontractors and on which Heinemann maintains the Site and Heinemann Database.

“Levelers” mean educators, trained by Irene Fountas and Gay Su Pinnell, who have a deep and comprehensive understanding of and use of *The Literacy Continuum* and the ten text characteristics that undergird the F&P Text Level Gradient™.

“Permitted User” means any employee or consultant of Publisher who has been authorized by Publisher to use and access the Site and who has created or uses a user name and authorization code and/or password created by Publisher when accessing the Site in order to submit a Work for leveling under the System, check the status of a

Work, or generate a report regarding a Work, all in accordance with the terms set forth herein or on the Site.

“Work Data” means information about a Work, including but not limited to data regarding the title, author, illustrator, ISBN number, copyright date, publication date, print status, format, Publisher name, genre, page count and any other information requested or required by Heinemann as set forth on the Site, in the submission process or as otherwise requested by Heinemann. All Work Data shall be submitted by Publisher in an Excel spreadsheet format or such other format that is required by Heinemann and shall be stored on a Heinemann Server.

## 2 Obligations of Heinemann.

### 2.1 Leveling Services. During the Term, Heinemann or its subcontractors shall:

(a) use commercially reasonable efforts to have Levelers review and level a Work submitted by Publisher, provided however that Heinemann makes no representation whatsoever with respect to its completing any leveling services of a Work within a specific time period. Furthermore, Publisher acknowledges and agrees that certain Works may not be suitable for leveling under the System and nothing in this Agreement shall require Heinemann to level a particular Work of a Publisher. **Books intended for use as assessment may not be submitted for leveling.** In the event that Heinemann, in its sole discretion, determines that a Work is not appropriate for leveling under the System, Heinemann shall notify Publisher of such determination and shall destroy the Electronic Copy and Work Data for such Work. Publisher acknowledges that the Leveling Fee (defined below) may still be charged to Publisher for any submitted Work, even if such Work is deemed by Heinemann to be not appropriate for leveling under the System. If a Publisher revises a title and re-submits for leveling, Publisher will be charged the full fee for re-leveling.

(b) provide access to the Site, *provided, however*, that from time to time, Heinemann or its subcontractors may perform scheduled or unscheduled maintenance as may be necessary to maintain the proper operation of the Site, and Publisher acknowledges and agrees that access to the Site and information regarding Works submitted may be impaired or interrupted while such maintenance is being performed.

2.2 Security. Heinemann (or its subcontractors) shall use commercially reasonable efforts to implement and provide industry standard security for the Heinemann Servers storing the Electronic Copies, Work Data for the Works, and any passwords or similar authentication mechanism to which it has access or control with respect to Permitted Users of the Site, and to protect against the unauthorized access to such Heinemann Servers. The parties expressly recognize that, although Heinemann shall take such commercially reasonable steps to prevent security breaches, or cause such commercially reasonable steps to be taken, it is impossible to maintain flawless security. Except with respect to Heinemann’s express obligations in this Section 2.2, Heinemann shall not be responsible for any damage caused by unauthorized destruction, loss, interception, or alteration of an Electronic Copy or Work Data by unauthorized persons unless due to the gross negligence or willful misconduct of Heinemann.

2.3 Reports. Heinemann acknowledges and agrees that, at intervals determined by Heinemann or upon the reasonable request by Publisher, Heinemann may provide to Publisher a Work Data report for a particular Work or Works within the Heinemann Database in a format reasonably determined by Heinemann. Work Data is also available in Publisher’s on-line account via an export button and shows all titles leveled for Publisher via the F&P Text Level Gradient™ Leveling System.

### 2.4 Destruction of Electronic Copies. Heinemann acknowledges and agrees that, subject to Section

3.2 with respect to Work Data, it shall use commercially reasonable efforts to destroy or delete from the Heinemann Servers any Electronic Copy of a Work submitted by Publisher within a reasonable period of time after completion of the leveling of such Work in accordance with the System, or, in the event Heinemann determines that such Work is not appropriate for leveling under the System, within a reasonable period of time after such decision is made by Heinemann.

2.5 Technical Support. Heinemann shall provide reasonable support to Publisher for technical and use-related questions in accordance with and as further described on the Site.

2.6 Expenses. Heinemann shall be solely responsible for all of its direct and indirect costs and expenses incurred in performing its duties under this Agreement.

### 3 Publisher Obligations.

3.1 Registration at Site. In accordance with the terms set forth on the Site, Publisher agrees to create a registered account with an authorization code and/or password. Publisher agrees that it shall not use another Publisher's authorization information or share such information with any other user or entity, except for Permitted Users of Publisher. Publisher agrees to provide current, complete, and accurate information when registering with the Site, and will update such information as necessary to keep it current, complete, and accurate. Publisher is solely responsible for the activity that occurs on its account. Publisher shall notify Heinemann immediately of any breach of security or unauthorized use of its account.

3.2 Submission of Works. In connection with Heinemann performing the leveling services, Publisher agrees to submit an Electronic Copy of each Work and all Work Data required to Heinemann in accordance with the terms of this Agreement and in accordance with the procedure set forth on the Site, which may be revised by Heinemann from time to time in its discretion. By submitting a Work through the Site to Heinemann, Publisher hereby grants Heinemann the right to store and access the Electronic Copy of the Work and Work Data on the Heinemann Server and permit Levelers to access the Work in connection with their performance of the leveling services in accordance with the System. Publisher acknowledges and agrees that Heinemann is solely responsible for the determination of the appropriate level for a particular Work and that Heinemann reserves the right to revise, remove, or discontinue specific levels within the System or the System itself at any time.

3.3 Rights to Works. Publisher covenants, represents and warrants that Publisher has the right to submit any Work to Heinemann through the Site for leveling and hereby grants Heinemann permission to copy and store each Electronic Copy and the Work Data of such Works on the Heinemann Server, include such Work in the Heinemann Database solely for purposes of performing the leveling services in connection with such Work, and publish the results of such leveling of a Work in print form or on the *Fountas & Pinnell Leveled Books Web site* for use by customers of Heinemann. Publisher shall promptly notify Heinemann of any allegation that Work submitted for leveling through the Site infringes the intellectual property rights of any third party.

3.4 Publisher's Internet Access and Use of Site. Publisher shall be solely responsible, at its expense, for establishing, maintaining, and operating Publisher's connection to the Internet (the speed of which may have a significant impact on the responsiveness of the Site), including all access lines, all Internet service provider connection charges, and any long distance telephone charges. Except as permitted and intended by the

functionality of Site, Publisher shall not access, attempt to access, copy, modify, nor interfere with the Heinemann Server or Heinemann Database. Publisher shall be responsible for keeping secure its administrative login information, which is used by Permitted Users to access the Site and submit Works to Heinemann, and Heinemann shall not be responsible for damages caused by a third party gaining access to Electronic Copies or Work Data for Works due to a failure by Publisher to keep such information secure.

3.5 Expenses. Publisher shall be solely responsible for all of its direct and indirect costs and expenses incurred in performing its duties under this Agreement.

3.6 Attribution of System. For any Work submitted by Publisher that is leveled by Heinemann in accordance with the System, Publisher acknowledges and agrees that, if Publisher determines (in its discretion) that it wants to include the leveling system grade on the Work or any marketing or promotional materials for the Work, then it shall include the System Mark (defined below in 6.3) and the following citation on such Work and any marketing or promotional materials (both print and electronic) of such Work:

***“This book has been officially leveled using the F&P Text Level Gradient™ Leveling System.”***

#### 4 Payment.

4.1 Fees. In consideration for the leveling services performed by Heinemann for each Work submitted by Publisher to Heinemann in accordance with this Agreement, Publisher agrees to pay to Heinemann the current leveling service fee for such Work (as determined by Heinemann in its sole discretion) in accordance with and by the payment method set forth on the Site (the “Leveling Fee”). Leveling Fee is currently \$30 per title submitted by Publisher and reviewed by Heinemann.

4.2 Payments. Heinemann may discontinue performance under this Agreement if Publisher fails to pay any sum due and fails to cure such failure within thirty (30) days of receiving written notice from Heinemann, after which time the account may go to collection.

4.3 Taxes. All payments due hereunder shall be net of any applicable sales, use, and other taxes, and Publisher agrees to pay (or reimburse Heinemann, as the case may be) any taxes due in connection with this Agreement, excluding taxes on Heinemann’s income, for which Heinemann is solely responsible.

#### 5 Term; Termination.

5.1 Term. This Agreement shall commence upon the later of the two signature dates below and continue unless terminated as provided below (the “Term”).

5.2 Termination. Either party has the right to terminate this Agreement at any time for any or no reason upon providing thirty (30) days prior written notice to the other party. This Agreement shall automatically terminate in the event that Heinemann, in its sole discretion, determines to discontinue the System.

5.3 Effect of Termination. In the event this Agreement is terminated for any reason, except for discontinuance of the System by Heinemann, Heinemann agrees to continue to perform leveling services, if appropriate in its sole discretion, for any Works submitted by Publisher prior to termination and Publisher shall remain obligated to pay the Leveling Fee for such Works.

5.4 Survival. In addition, the following terms and conditions shall survive any termination or this

Agreement: Sections 1, 6, 7, 8, 9, 10.3, and 10.5. Furthermore, upon termination for any reason, Heinemann shall continue to have the right to list Works leveled prior to termination on the *Fountas & Pinnell Leveled Books Web site* and maintain the Work Data with respect to such Works in the Heinemann Database, and Publisher shall continue to have the right to identify a Work as being leveled in accordance with the System.

## 6 Intellectual Property.

6.1 System and Site. Heinemann and its licensors are the sole owners of the System and the Site including without limitation all copyright, trade secret, patent, trademark, and other intellectual property rights therein, and this Agreement does not provide Publisher with title to or ownership of the System or the Site, but only a right of limited use under the terms and conditions of this Agreement.

6.2 Publisher Works. Publisher owns or has a license to all copyrights, trade secrets, patents, trademarks, and other intellectual property rights in and to the Works and Electronic Copies thereof, and this Agreement does not provide Heinemann with title to or ownership of the Works or any Electronic Copies thereof, but only a right to use the Works, Work Data, and Electronic Copies solely to fulfill its obligations under the terms and conditions of this Agreement.

6.3 Trademark and System Mark. Publisher acknowledges and agrees that it has no right, title or interest in the trademark, “F&P Text Level Gradient™” (the “Trademark”) and Publisher shall have the limited right and license to use the System Mark/Logo (see attachment A for logo sample) solely in accordance with this Agreement and suggested usage. For purposes of clarity, except as set forth herein, Publisher may not use Heinemann’s name, the names or initials of Fountas and Pinnell, the Trademark, or the System Mark in connection with any Works not leveled specifically by Heinemann in accordance with the System, even if Publisher or a third party leveled such Work in accordance with the System criteria and methods, without the express prior written consent of Heinemann.

## 7 Representations and Warranties; Disclaimers of Warranty.

7.1 Both Parties. Each party represents, warrants and covenants that: (a) it has the legal right and power to enter into this Agreement and to fully perform its obligations under this Agreement; (b) it has not made and will not make any commitments to others in conflict with its rights or obligations under the Agreement; (c) it has obtained all necessary approvals to enter into the Agreement; and (d) it will comply with all applicable laws, rules, regulations, and other legal and administrative requirements, including without limitation all applicable privacy laws, in connection with the exercise of its rights and its performance of its obligations under the Agreement.

7.2 Disclaimers of Warranty. Except as expressly stated in this Section 7, Heinemann disclaims any and all representations and warranties, express or implied, by operation of law or otherwise, regarding or relating to the System or the leveling services performed and delivered under this Agreement. Heinemann specifically disclaims all implied warranties, including without limitation any warranties of merchantability or fitness for a particular purpose (irrespective of any previous course of dealing between the parties or custom or usage of trade), non-infringement, or that the services or Site will be uninterrupted or error free.

8 Limitation of Liability. Except with respect to indemnification and confidentiality obligations under this Agreement, in no event shall either party be liable for special, incidental, exemplary, or consequential damages, or for any claims or demands, regardless of whether such party has been previously advised of the possibility of such damages, claims or demands. Furthermore, the maximum aggregate liability of Heinemann arising out of

or relating to this Agreement shall not exceed the total fees paid by Publisher to Heinemann hereunder.

9 Indemnification. Publisher agrees to indemnify, defend, and hold Heinemann, its affiliates, Levelers, and their respective officers, directors, employees, and agents, successors, and assigns, harmless from all liabilities, claims, damages, losses, costs, expenses, demands, suits and actions of third parties (including without limitation reasonable attorneys' fees) arising from or in connection with (a) Publisher's breach of its representations, warranties and obligations herein, (b) any claim that the Works infringe the intellectual property rights of another party; or (c) any grossly negligent or willful act or omission by Publisher in its performance under this Agreement.

10 Miscellaneous.

10.1 Assignment. Neither party may assign this Agreement without the prior written consent of the other party, provided that a party may assign this Agreement without such consent to: (i) an affiliate; or (ii) to a successor pursuant to a merger, sale of stock, or a sale of all or substantially all of the assets of the line of business to which this Agreement relates.

10.2 Publicity. Notwithstanding the provisions of Section 3.3 above, Heinemann may reference Publisher's use of the System in its marketing and promotional materials for the Fountas & Pinnell Leveled Books Website as well as any Work Data.

10.3 Non-disparagement. Publisher agrees and covenants that during and after the Term, Publisher shall not disparage Heinemann, the System, or any services provided under this Agreement.

10.4 Notices. Unless expressly stated otherwise herein, any notice, demand, request or delivery required or permitted to be given by a party pursuant to the terms of this Agreement shall be in writing and shall be deemed given (a) when delivered personally or by electronic mail to the appropriate contact at such party, (b) on the next business day after timely delivery to an overnight courier, (c) on the third business day after deposit in the U.S. mail (certified or registered mail return receipt requested, postage prepaid), and (d) upon confirmation of receipt by facsimile transmission; in each case addressed to the party at their principal place of business (to the attention of, in the case of Heinemann, the Vice President, Publisher: Fountas & Pinnell, with a copy to the attention of Legal, or, in the case of Publisher, the signing officer) or as subsequently modified by the receiving party pursuant to written notice.

10.5 Governing Law. All questions concerning the validity, operation, interpretation, and construction of this Agreement will be governed by and determined in accordance with the substantive laws of the Commonwealth of Massachusetts, without regard to its conflicts of law provisions. Any action brought pursuant to or in connection with this Agreement shall be brought only in the state or federal courts within the Commonwealth of Massachusetts. In any such action, both parties submit to the personal jurisdiction of such state and federal courts and waive any objections to venue of such courts.

10.6 Entire Agreement. The parties hereto acknowledge that this Agreement, together with all Site terms hereby incorporated herein, is the complete and exclusive statement of agreement respecting the subject matter hereto and supersedes any and all agreements and proposals (oral or written), understandings, representations, conditions, and other communications between the parties relating hereto. This Agreement may be amended only by a subsequent writing that specifically refers to this Agreement and is signed by Heinemann and Publisher.

**IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives on the date(s) shown below.**

|                  |   |
|------------------|---|
| <b>Publisher</b> | <b>Heinemann, a division of<br/>Greenwood Publishing Group, LLC</b> |
| <b>By:</b>       | <b>By:</b>  |
| <b>Name:</b>     | <b>Name:</b> Samantha Garon   |
| <b>Title:</b>    | <b>Title:</b> VP Publisher, Fountas & Pinnell                       |
| <b>Date:</b>     | <b>Date:</b>  |

## Attachment A: Trademark Notice, System Mark and Citations

*Please adhere to the following guidelines for use of the Trademark, System Mark, and Citations.*

1. Publisher shall include, whenever possible, in a prominent location within on-line and printed materials:
  - the trademark notice and citations noted below
  - the System Mark (logo) as noted below, whenever appropriate
  - a disclaimer that neither Heinemann nor Fountas and Pinnell have produced the Publisher's Catalogue or product and they do not endorse/sponsor and are not otherwise affiliated with the Publisher and are not responsible for the Catalogue, service, or product.
2. Publisher will include the appropriate trademark notice and citations:
  - When referring to one title: ***"This book has been officially leveled by using the F&P Text Level Gradient™ Leveling System."***
  - When referring to multiple titles: ***"These titles have been officially leveled by using the F&P Text Level Gradient™ Leveling System."***
  - When listing titles that have not been officially leveled using the F&P Text Level Gradient™, use a symbol, mark, or designation to make a distinction between titles that have been officially leveled and those that have not (e.g. GR level vs. F&P level).
3. Publisher will, when possible, print the System Mark/logo. See next page for images.
  - The mark can be used in Black and White or Color but should not be used smaller than 1-inch in diameter. [Publisher can request .pdf high resolution files of logos in black-and-white and color.]
  - Do not apply any patterns, strokes, or gradations to these elements.
4. Publisher may not use Heinemann's name, the names or initials of Fountas and Pinnell, Trademark, or System Mark in connection with any titles not leveled specifically by Heinemann and/or Fountas and Pinnell using the F&P Text Level Gradient™, without the express prior written consent of Heinemann, even if Publisher or a third party leveled such work in accordance with the criteria and methods of the F&P Text Level Gradient™.
5. For up to date information regarding the F&P Text Level Gradient™ and/or Fountas and Pinnell's Guided Reading resources published by Heinemann, please visit the links below. We encourage you to provide these links to your customers for further reading:

<https://fp.pub/leveledbooks>

<https://fp.pub/community>



