

BROADCASTER WEBSITE LICENSE AGREEMENT

INTRODUCTORY COMMENTS: *This sample agreement assumes a certain fact scenario and is not meant to be representative of, or intended to create standards for, every possible agreement whereby a broadcaster acquires a license to certain rights in an interactive new media project. The number of parties, the main terms of the license, the type of new media project, the financial structure, the fees and other provisions of such an agreement may vary widely from project to project depending on the circumstances. Moreover, the terms and conditions included in the following agreement are generally drafted from the point of view of the new media producer for educational purposes only. Although based on examples of real transactions, by no means should the reader conclude that the Agreement reflects commercial reality currently in existence in Canada or that Canadian Broadcasters will accept all the provisions as drafted. The comments provided herein are for educational purposes only and should not be construed as providing any legal advice whatsoever. Anyone contemplating using this template agreement for commercial purposes should consult an experienced lawyer for advice and guidance. It should not be used as a substitute for consulting with legal counsel and receiving advice based on the circumstances of a particular transaction. Due to the pace of technological change, business practices, distribution methods and the law applicable to new media is constantly and rapidly changing. Many of the legal principles discussed below are subject to exceptions and qualifications that may not be mentioned and case law and legislation may vary from jurisdiction to jurisdiction.*

In the following Agreement, it is assumed for the purposes of discussion that the “Producer” is a new media producer who has acquired the rights from a television producer to create an interactive adaptation (the “Web Project”) based on a television program (the “Program”), the broadcast rights to which have been licensed to a Canadian broadcaster (the “Broadcaster”). The Producer is granting the Broadcaster a license to exhibit the interactive adaptation that is designed to add value to the television Program by enhancing and enriching the experience of viewers of the Program. This Agreement assumes that the arrangement between the new media Producer and the television producer has been dealt with in a separate contract. Therefore, as owner of the Web Project, the new media Producer is assumed to be an applicant to the Bell Broadcast and New Media Fund (the “Bell Fund”) for financing.

It is important to note that in some instances the owner and producer of the interactive new media project may also be the owner and producer of the companion television program. In such cases the license to the broadcaster relating to the new media project may be dealt with in the terms of the license agreement dealing with the broadcast rights to the television program. It is also assumed for the purposes of discussion that the license for the Web Project contemplates that the Broadcaster is acquiring the rights to exhibit it on its network website, however readers should be aware that the deployment of an interactive new media project may take a variety of forms and use different modes of distributing content, such as text messaging, ITV application via set top boxes, cellular phones, email, etc. Alternatively, the new media project may be web-based but hosted on independent servers to which the broadcaster’s websites may, or may not, be linked. In such situations the terms of the license agreement could differ considerably from the terms of the sample Agreement provided below. Therefore, the reader should not assume that the Agreement will be applicable to all situations where a broadcaster licenses rights in an interactive new media project

BROADCASTER WEBSITE LICENSE AGREEMENT

THIS AGREEMENT effective as of [DATE], [YEAR]

BETWEEN:

NEW MEDIA PRODUCTIONS INC. (“Producer”)
a corporation incorporated under the laws of [X – PROVINCE],

THE FIRST PARTY,

- and -

BROADCASTING COMPANY OF CANADA LTD. (“Broadcaster”)
a corporation incorporated under the *Canada Business Corporations Act*,

THE SECOND PARTY,

WHEREAS Producer owns or has licensed all the necessary rights to develop and produce an interactive web-based new media project based on the documentary television program entitled, “Stranger than Fiction” (the “Program”) designed to promote and complement the television broadcast of the Program tentatively entitled “Stranger than Fiction Interactive” (the “Web Project”); and

WHEREAS Producer is producing the Web Project in accordance with the Project Specifications and New Media Production Budget (attached hereto as Schedule “A”) as submitted to the Bell Fund on [date of submission]; and

WHEREAS Broadcaster has acquired a license to the exclusive rights to broadcast the Program in Canada (the “Broadcast License”) and wishes to acquire a license from the Producer to include the Web Project on the official Broadcaster website with the URL of www.bcc.ca (the “Broadcaster Website”) during the term of the Broadcast License;

DISCUSSION: The “Whereas” clauses are known as “recitals” and are not considered technically part of the terms and conditions of the contract, unless expressly made so within the contract terms. The role of recitals is to provide some background and context to assist in explaining of the identity of parties and the objectives of the agreement. They are often used to include definitions of key terms that are defined and identified by capitalization. The question of whether recitals should be made part of the terms of the agreement will depend on their contents and drafting. For example, some recitals may include language that is overly broad, vague or too optimistic in describing the objectives of the parties to be prudent to include as terms of the agreement. In this case, the recitals were expressly incorporated as part of the Agreement pursuant to section 25 below.

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the premises, mutual covenants and agreements herein and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties agree as follows:

DISCUSSION: The inclusion of this standard language is prudent, because it makes express mention of the fact that the Parties, by executing the contract, agree that some form of “valuable consideration” is passing between them and they acknowledge that it is sufficient to bind each of them to the terms of the agreement. “Valuable consideration” may consist of some right, interest, profit or benefit accruing to one party, or some detriment, loss or responsibility given suffered or undertaken by the other. A contract must include some form of “consideration” to be binding on its parties rather than be interpreted as a bare promise that is under law unenforceable.

1) License of Rights

- a) In consideration for the license fee set forth in section 3, Producer hereby grants to Broadcaster a non-exclusive license to make available and exhibit the Web Project on the Broadcaster Website throughout the world, provided however that such non-exclusive license shall be exclusive against any other website hosted on a server located in Canada and/or that targets or is intended to target an audience or users located in Canada; and
- b) In addition to the grant of license above, Producer grants to Broadcaster a non-exclusive license to use the source and/or object code, applications, tools, methods and software programs (collectively, the “Software”) created by Producer for the Web Project solely in connection with the Web Project to be made available on the Broadcaster Website; and
- c) Broadcaster is prohibited from sub-licensing any of the rights licensed hereunder to non-Affiliate third parties and any Affiliates that target an audience outside Canada. For the purposes of this Agreement, “Affiliate” shall mean an entity with which Broadcaster shares common ownership or control (together with section 1(a) and 1(b) shall be referred to herein as the “License”).

DISCUSSION: Section 1(a) - The grant of rights in this agreement is in the form of a license. In exchange for the payment of a fee or other form of consideration, the Producer of the Web Project is granting the Broadcaster the “License” (permission) to exhibit the Web Project on the Broadcaster’s website(s) and make it available to users for a specified period of time known as the license “Term”. Key issues in any license involving a website that is associated with a television program are territory and exclusivity. Television program licenses are generally sold to broadcasters by territory. Different broadcasters will typically acquire the exclusive rights to broadcast a program within a geographic territory for which it has regulatory approval to carry its broadcast signal, which in this fact scenario is Canada. However, since the Broadcaster’s website is available to anyone with Internet access throughout the world, there is no practical way to limit the territory of the Web Project license to match the territorial limit of the broadcast license for the television Program. Therefore the license to exhibit the Web Project must be for the territory of “the world”. With regard to exclusivity, since the new media Producer will want to retain the right to sell licenses to the Web Project to foreign broadcasters who license the broadcast rights to the companion television Program, and since there is no practical way to limit access to websites within territorial limits, this License must not be exclusive to the Canadian Broadcaster, otherwise the new media Producer would be breaching the Agreement with the Broadcaster when it makes subsequent foreign sales during the License Term. Therefore the License must be non-exclusive. However, in this fact scenario, the Broadcaster wants to ensure that at least within its broadcast territory, its Canadian competitors will not be able offer the Web Project to Canadians. Consequently, the License has been crafted to

attempt a compromise by being non-exclusive to deal with the global scope of the Internet, but exclusive as against any other website hosted on a server in Canada and/or targeting a Canadian market.

Section 1(b) - In this scenario, the Web Project that will appear on the Broadcaster's website incorporates the Producer's proprietary Software in addition to the creative content. Therefore, in addition to licensing the right to exhibit the Web Project on the Broadcaster's website, the Producer also grants a license to allow the Broadcaster to use the Software in conjunction with the exhibition of the Web Project during the License Term.

Section 1(c) – The Producer wants to retain control over the commercialization and distribution of the Web Project and wants to prohibit the Broadcaster from eroding the Producer's market by sublicensing the Web Project to any third party. However, in this scenario, we assume the Broadcaster has a variety of websites promoting a variety of networks upon which the Program may be aired. Therefore, the Broadcaster may want the right to exhibit the Web Project on any website that promotes a network that broadcasts the television Program. The Producer wants to ensure that the Broadcaster does not use this right to circumvent the prohibition against sublicensing the Web Project and hurt international sales. Consequently, the Broadcaster's right to "share" the Web Project among networks is limited to its affiliates who target Canadian audiences.

2) Term of License

- a) The term of the License shall commence on the commencement date of the Broadcast License of the Program, or in any event no later than [SPECIFIC DATE], and continue for a period of X (X) years (the "Term"), unless otherwise extended pursuant to the terms herein.
- b) *[In the event that the Broadcaster exercises its right to acquire the exclusive license to broadcast additional seasons of the Program, the parties agree that the Term shall be extended for an additional X (X) year period (the "License Extension") upon the payment by the Broadcaster of an additional [X](\$[X]) Canadian dollars or [X] percent ([X]%) of the Fee paid hereunder for each additional one (1) year License Extension.]*

DISCUSSION: Since this Web Project is intended to enhance the viewer's experience of the television Program, the Term of the License will likely correspond to term of the broadcast license for the Program. Likewise, since it is possible that the Broadcaster may desire to license additional seasons of the Program and retain the rights during that period to exhibit the Web Project, the Term for the Web Project license includes the possibility of an extension for an additional fee based on a percentage of the Fee. Subsection 2(b) provides an example provision showing how such an extension may be dealt with contractually. Alternatively, the parties may simply agree to negotiate in good faith any extension to the Term. The issue related to the exclusivity of the Web Project license may become complicated in the event that there are nonexclusive second and third windows for the Program to other broadcasters within the same territory.

3) Consideration

- a) In consideration of the License granted herein, Broadcasters shall pay Producer a fee of (\$ [X]) Canadian dollars (the "Fee"), payable 50% (\$ [X]) upon execution of this Agreement and 50% (\$ [X]) upon delivery of the Web Project to Broadcaster.

DISCUSSION: The amount of the license fee will vary widely depending on the term, exclusivity, any potential equity interest by the broadcaster, the new media production budget and perceived added value of the new media product. The staggered payment of portions of the total license fee may be attached to a Program of deliverables. However, it's prudent for the Producer to ensure that it receives at least some of the Fee on the execution of the Agreement to assist in cash flow during the production phase.

4) Ownership of Intellectual Property and Technology

- a) The Parties hereto acknowledge and agree that, subject to the grant of License in section 1, Producer owns all right, title and interest throughout the world and in perpetuity in and to all copyrights, trade-marks, trade secrets and all applications, registrations and other intellectual property rights in and to the Web Project and the Software, or has licensed the necessary rights to produce the Web Project and Software and make the grant of rights and perform its obligations hereunder. For clarity, subject to Broadcaster's limited right to modify the Web Project and the Software described in subsection 4(b), Broadcaster is prohibited from altering or modifying the Web Project and Software and the Parties hereto expressly acknowledge and agree that the Producer has not waived its moral rights therein.
- b) Notwithstanding the forgoing, Producer grants Broadcaster the limited right to modify the Web Project at Broadcaster's expense solely for the purposes of meeting Broadcaster's technical standards and requirements, provided that Broadcaster receives Producer's prior approval and Broadcaster shall not remove credits and copyright notices.

DISCUSSION: The purpose of this provision is to acknowledge the Producer's intellectual property right in the Web Project and the proprietary Software incorporated therein and to prohibit the Broadcaster from modifying either. It expressly states that the Producer is not waiving its "moral rights" which would make any modification, association or failure to credit the Producer as the creator a breach of the Producer's moral rights. Notwithstanding the prohibition, Section 4(b) acknowledges that the Broadcaster may need to make minor alterations to the Web Project and/or the Software to meet its technical standards and provides that limited right with Producer's approval. However, Broadcasters are often concerned about retaining the ability to make modifications to any new media project that is going to be hosted on its website(s) particularly in circumstances where the Web Project may contain an application that could impact or impair the operation of the Broadcaster's own systems. Consequently, in some situations the ability of the broadcaster to make changes to the new media project can become very important and a subject of considerable negotiation.

5) Hosting and Maintenance of Web Project

- a) The Parties agree that Broadcaster shall be responsible for all hosting costs associated with exhibiting the Web Project on Broadcasters' websites, including but not limited to the official Broadcaster website with the URL of www.bcc.ca/strangerthanfiction for the duration of the Term and any License Extension.
- b) The Parties agree that Producer shall be responsible for all maintenance costs and services for Web Project to maintain, repair and keep the Web Project "live" and current in accordance with the Project Specifications and Production Budget in Schedule "A", for a period of one year after the commencement of the Term, but does not include any

costs and services related to the design or production of new or expanded content beyond that described in Schedule "A". Following the expiry of the one year period, Broadcaster agrees to retain and Producer agrees to provide its professional services to maintain, repair and upgrade the Web Project and/or the Software during the Term and any License Extensions for an additional fee of [X] (\$[X]) Canadian dollars per year.

- c) *[In furtherance paragraph 5(b), the Parties agree to enter into a Software Maintenance and Source Code Escrow Agreement, the terms of which shall be negotiated in good faith between the Parties.]*

DISCUSSION: The costs related to hosting and maintenance is always the subject of negotiation between a Broadcaster and a Producer of an interactive new media property. The production budget template used by the Bell Fund provides for line items to cover the costs of hosting and maintenance, but only for a one year period. Consequently the question of who should absorb such costs following the remainder of the Term are matters that must be negotiated between the Broadcaster and the Producer and will vary from project to project, depending on the expected traffic and amount of bandwidth required, among many other considerations. In this case, the Broadcaster agrees to be responsible for the hosting costs and the Producer agrees to be responsible for the costs of maintaining and upgrading the Web Project for the first year in accordance with the Production Budget, after which the parties agree to enter into a maintenance agreement whereby the producer provides the services for a fee. Not all broadcasters will agree to such an arrangement and indeed may wish to acquire the rights to maintain and modify the interactive new media project itself or have the producer absorb the costs of the maintenance for the entire term of the license.

For the purposes of this example, it is assumed that the Producer is the developer of proprietary software which it wishes to keep confidential. Subsection 5(b) and 5(c) are examples of how the Producer might set out provisions designed to protect its intellectual property rights in the proprietary software. In this example, it is assumed that the Producer will deliver the application for the Web Project in object code to guard its trade secrets and proprietary interest in the Software. "Object Code" is a term for the programming instructions that are readable by a computer, but are not easily read by people unless reverse engineered, disassembled or decompiled. However, software is almost always written first in "Source Code" which is readable by people and then translated into object code to protect the owner's trade secrets and proprietary software. In this scenario, since the Producer is delivering the application in object code to protect its proprietary Software, the Broadcaster will not be able to upgrade or maintain the Software because its employees won't be able to read the code. Consequently, the Parties agree to enter into a Software Maintenance Agreement whereby the Producer shall maintain the Web Project and the Software for an additional fee. Since the Broadcaster will not have access to the source code to be able to maintain the Web Project independently, it will want to ensure that it will have the ability to access the source code to continue maintenance in the event that circumstances arise (such as the Producer's bankruptcy) that prevent the Producer from fulfilling its maintenance contract. Therefore, part of the maintenance contract will include an escrow agreement, whereby the Producer agrees to deposit a copy of the source code into the custody of an independent third party for safe keeping during the duration of the Term. Should certain specified events occur that prevent the Producer from maintaining the software, the escrow agent will release the source code to the Broadcaster to allow it to maintain the Web Project and continue to exercise its licensed rights. Software Escrow Agreements are discussed more fully in a separate module.

6) Promotion of Web Project

- a) Broadcaster agrees to promote the Web Project in conjunction with its promotion of the Program (“Broadcaster Promotion”), including but not limited to the following:
 - i) The production, at Broadcaster’s expense, of [X] number of television promotional spots promoting the Web Project and the broadcast of same on the Broadcaster’s network, including related networks;
 - ii) The inclusion of the name of the Web Project and any URL for any of the Broadcaster’s website(s) exhibiting the Web Project on any print promotional materials promoting the broadcast of the Program and
 - iii) The approval to allow the inclusion of the URL for the Web Project in the tail credits of the Program;
 - iv) The Parties acknowledge and agree that the costs associated with the production, distribution and exhibition of the Broadcaster Promotion shall be the sole responsibility of Broadcaster. Producer agrees to license to Broadcaster at no charge the right to use any creative content, including but not limited to any images, outtakes, film clips, photographic and sound assets, music and other materials, incorporated into the Web Project in the production of the Web Project Promotion throughout the world in all form of media during the Term and the duration of any License Extension hereunder.
- b) The Producer shall, at its own expense, produce promotional and marketing materials and take such steps as it deems necessary to promote and market the Web Project in accordance with the “Promotion and Marketing” activities set out in the Production Budget in Schedule “A” (the “Producer Promotion”).
 - i) The Parties acknowledge and agree that the costs associated with the production, distribution and exhibition of the Producer Promotion shall be the sole responsibility of Producer. Broadcaster agrees to license to Producer at no charge the right to use, solely for the purposes herein, the Broadcaster’s logo(s) and/or trademarks in the production, distribution and exhibition of the Producer Promotion with the prior approval of the Broadcaster throughout the world in all form of media during the Term and the duration of any License Extension hereunder.

DISCUSSION: Although, marketing and promotion are line items included in the Bell Fund Production Budget template, the Producer will also want the Broadcaster to promote the Web Project, preferably in conjunction with its promotion of the Program. Some of the obligations on the Broadcaster in this section may be considered too onerous by some broadcasters and may not be accepted in their entirety, in any actual transactions. The subsections are provided merely as examples of potential promotional activities that could be considered in a license to a Broadcaster and should not be viewed as reflective of standards in the industry. This provision places specific obligations on the Broadcaster to promote the Web Project at its own expense and provides a grant of license from the Producer to use the creative content incorporated into the Web Project in any promotional materials produced by the Broadcaster. It also contains a grant of license from the Broadcaster to the Producer for the right to use its logo and trademark in the promotional materials it produces. However, since all companies diligently protect their

trademarks, it is assumed that the Broadcaster will require prior approval before granting such rights.

7) Sponsorship and Advertising of the Web Project

- a) The parties acknowledge that Broadcaster shall be responsible for securing sponsorship and advertising for the Web Project during the Term and the duration of any License Extension and the Broadcaster shall be entitled to retain all revenues derived from such sponsorship and advertising.

DISCUSSION: In this scenario, it is assumed that the Web Project will be offered to users free of charge, but the Parties contemplate potential revenue arising from the sale of advertising on the website(s) exhibiting the Web Project and/or sponsorship, which shall be retained by the Broadcaster.

8) Credits

- a) Broadcaster shall ensure that Producer's credit as producer of the Web Project together with its corporate logo shall be acknowledged in a form acceptable to Producer in any and all advertising, promotion or publicity in respect of the Web Project and on the official Broadcaster website and on any affiliated websites upon which the Web Project shall be exhibited.
- b) Producer's credit shall be prominently positioned immediately preceding or immediately following the credit afforded to the producer of the Program as follows:
 - i) "The Stranger Than Fiction Interactive Web Project is Produced by
New Media Productions Inc.
(Producer Corporate Logo)"
- c) Broadcaster shall ensure that any and all credits and corporate logos of funding organizations that financed the Web Project shall be included on the official Broadcaster website and on any affiliated websites upon which the Web Project shall be exhibited.

DISCUSSION: The Producer will want to ensure that it receives appropriate credit and the contract should ideally stipulate how the credit will appear, how prominent it will be relative to other parties and include the Producer's corporate logo. The Producer will also require the Broadcaster to include the logo of any funding organization that financed the production of the Web Project in the credits. The Producer will also want to be included in the tail credits of the Program, but that is more appropriately dealt with in the Producer's agreement with the television Program producer.

9) Promotion and Publicity of Producer

- a) The Parties agree that the Producer may, subject to Broadcaster's prior approval, not to be unreasonably withheld, do the following:
 - i) include Broadcaster as a licensee/client of Producer in any marketing, advertising or promotional materials promoting Producers' services and/or projects in perpetuity in any form of media now known or hereafter devised and Broadcaster grants to

Producer the license to use Broadcaster's trademarks, service marks, trade names, or logos associated with any network that broadcasts the Program.

- ii) include a link from Producer's corporate website to the official Broadcaster website with the URL of www.bcc.ca or upon any Broadcaster affiliated website upon which the Web Project is exhibited for the duration of the Term and any License Extension; and

DISCUSSION: The Producer will want to use the Web Project and its association with the Broadcaster to promote its company's services even after the expiry of the License. The Producer will want to acquire a license from the Broadcaster to exhibit the latter's logo on the company website, but Broadcaster will likely only do so with its prior approval, if at all. For the duration of the License, the Producer may also want to acquire the right to link its own company website to the Broadcaster's website that exhibits the Web Project.

10) Deliverables

- a) Producer shall deliver the Web Project and Software, and all accompanying documentation and materials ("Deliverables") to Broadcaster on CD or DVD or via FTP on or before the delivery date of [DELIVERY DATE], in any event prior to the commencement of the Term as set out in paragraph 2 herein.
- b) Upon the expiry of Broadcaster's rights granted hereunder, Broadcaster shall remove the Web Project and the Software from its official Broadcaster website and any and all affiliated websites upon which the Web Project was exhibited pursuant to the terms of this Agreement and return forthwith to the Producer any and all copy(s) of the Web Project, Software and accompanying documentation and materials in the Broadcaster's custody or control.
- c) Concurrent with the execution of this Agreement, the Parties agree to enter into an escrow or producer holdback agreement in lieu of a completion bond whereby the Producer shall, at the discretion of the Broadcaster, either:
 - i) Deposit \$_____ from Producer Fees into the safekeeping of a mutually agreed upon third party to guarantee delivery of the Deliverables and upon the delivery by the Producer to the Broadcaster of the Deliverables the Broadcaster will notify the third party to release to the Producer the escrowed funds; or
 - ii) Provide a written guarantee it shall holdback and not draw upon or disburse \$_____ amount of its Producer's Fees, as defined in the approved production budget for the Web Project, until written confirmation is received by the Producer from the Bell Broadcast and New Media Fund that the Web Project has been completed in accordance with its specifications.

DISCUSSION: It is not uncommon for deliverables to be set out in a separate schedule that is incorporated into the contract by reference. Deliverables can be very detailed and describe technical as well as creative elements to be delivered over a period of time on set dates, which may or may not be tied to a Program of payments of portions of the license fee. Although it is implicit in the License that upon its expiry the right of the Broadcaster to exhibit the Web Project and use the Software ends, it is prudent for the Producer to explicitly require the Broadcaster to remove the Web Project and Software from its website(s) and return any copies of the

Deliverables to the Producer upon the expiry of the License. Finally, since completion bonds are rarely available or extremely expensive for new media projects, the License may include a clause that requires the Producer to put a certain percentage or all of its producer and/or contingency fees in escrow to guarantee the delivery of the Deliverables to the Broadcaster in lieu of a completion bond. This section provides two options. Subsection 10(a) requires the Producer to deposit funds into the hands of an escrow agent and subsection 10(b) requires the Producer to agree that it will not pay itself its Producer Fees until the Bell Fund confirms the project is completed in accordance with the specifications included in the application for funding. Both are intended, absent the comfort of a completion bond, to protect financiers' investments and provide some assurance that the project will be completed and delivered. The latter is more typical of arrangements currently made for projects that receive Bell Fund financing.

11) Representation and Warranties

a) Producer hereby represents and warrants to Broadcaster that:

- i) it has the right to enter this Agreement and fulfill its obligations hereunder;
- ii) the Web Project and Software (excluding the contributions to the Web Project from the television producer of the Program for which the Producer is reliant on its grant of rights from the television producer of the Program) shall not violate or infringe any trade mark, trade name, copyright or patent, civil contract or privacy right of any person or contain any defamatory material; and
- iii) for the duration of the Term and any License Extension, the exhibition of the Web Project pursuant to the terms of this Agreement shall not give rise to any obligation on the part of the Broadcaster for any royalty payments or dues payable to any union, guild or trade association or any payments to any person or entity of any kind, and in the event that such payments are payable, the Producer warrants and represents that such amounts owed have been, or shall be, paid in full by the Producer as of the commencement of the Term for its duration and that of any License Extension;
- iv) there are no liens or other encumbrances against the Web Project or the Software which would derogate from or be inconsistent with the rights accorded to Broadcaster under this Agreement, and there are no actions, claims or litigation pending or threatened that may adversely affect Producer's right or title to the Web Project or Software.
- v) the Web Project and the Software will be produced in a workmanlike manner with professional skill and diligence and will not contain disabling devices, crash bugs or viruses designed to disable or corrupt its components or the systems of the Broadcaster.

b) Broadcaster hereby represents and warrants to Producer that:

- i) it has the right to enter this Agreement and fulfill its obligations hereunder;
- ii) subject to Broadcaster's limited rights to modify the Web Project and the Software as described in subsection 4(b), it shall not nor shall it permit or authorize any other

person to alter, modify, decompile or reverse engineer the Web Project and/or the Software; and

- iii) it shall not, nor shall it permit or authorize any other person to, infringe Producer's intellectual property rights in the Web Project and/or the Software, including but not limited to any trade mark, trade name, copyright or patent.

DISCUSSION: The representations and warranties that the Producer may be required to make in a license with the Broadcaster can be extensive and detailed. Generally, the Broadcaster wants to ensure that the Producer has acquired all the necessary intellectual property rights and clearances of content to produce the Web Project and make the grant of License to the Broadcaster. The Broadcaster knows that as publisher of the Web Project it will be included as a defendant in any litigation brought by third parties as a result of the Producer's negligence or failure to acquire the necessary intellectual property rights. If the new media Producer is a small company, the Broadcaster is aware that in the event of a serious breach that leads to litigation brought by a third party, the Producer may not have sufficient resources to indemnify the Broadcaster against the damages it may suffer in defending itself. The Broadcaster will want the Producer's representations and warranties to be as strong and unequivocal as possible, because as licensee it has no way of knowing whether the Producer has acquired all the necessary rights and taken the appropriate steps. Generally speaking, the Producer should be in a position to make these representations and warranties. In contrast, the Producer will want to qualify its representations as much as possible and is sometimes able to negotiate the inclusion of language that makes the Producer's representations and warranties "to the best of Producer's knowledge and belief". Some broadcasters will agree to this qualification, since they will want to minimize its risks as much as possible. Representation and Warranties provisions are often the subject of considerable negotiation and the outcome may come down to which of the Parties has the greatest bargaining power in the transaction. Additionally, the Broadcaster will not want to be responsible for the payment of any residuals, royalties or union or guild payments over and above the license fee. Finally, the Broadcaster wants to have confidence that the Web Project and Software will not contain any virus or time bomb that could corrupt its systems or otherwise fail to operate. Since subsection 11(a)(v) deals with deliberate acts of sabotage rather than simple defects, and to the extent that the Producer includes such a representation and warranty in any license for software it incorporates into the Web Project or in any contract for the services of any developer it hires, the Producer should be in a position to make this representation and warranty

The Broadcaster, as licensee, typically makes fewer representations and warranties than the Producer in these situations since the former's obligations are often limited to the payment of a fee. However, in this case the Producer wants to ensure that the Broadcaster represents and warrants that it will not reverse engineer the Software, nor permit any of its employees to do so, since the Producer wants to protect its proprietary interests in the software. The Producer also wants to protect the creative integrity of the Web Project and therefore has required the Broadcaster to represent and warrant that it will not modify the Web Project and the Software.

12) Limitation of Liabilities

- a) The representations and warranties expressed in this Agreement are in lieu of all other warranties and conditions, express or implied. Producer specifically disclaims all implied warranties including but not limited to the implied warranties or conditions of merchantability, merchantable quality, fitness for a particular purpose, and those arising

by statute or otherwise in law or from the course of dealing or the usage of trade. Except as explicitly stated herein, Producer does not represent or warrant that the Web Project and/or the Software will meet any particular requirement, operate error free or uninterrupted or that the Web Project and/or Software do not include any programming errors. Producer's liability and any of its employees, agents, independent contractors or representatives to Broadcaster for claims arising out of or relating to this Agreement will be restricted to actual damages only. In no event shall Producer be liable for any loss of data or profits or any other special, incidental, consequential, indirect or punitive damages howsoever caused regardless of theory of liability.

DISCUSSION: No software is 100% error free and it is risky for the Producer to make any representations or warranties that it will function perfectly, especially in a project involving new technology. Unless expressly disclaimed, the law may impose certain implied warranties so it is critical to explicitly disclaim all implied warranties other than those expressly stated in the contract. Likewise, it is crucial that the liability of the Producer be limited to the actual damages cause by any breach by the Producer of any representation and warranty.

13) Indemnifications

- a) Each of the Parties agree to indemnify and save harmless the other Party, and their respective officers, directors, employees, successors, licensees and assigns, from and against any and all damages, losses, judgments, costs and expenses (including reasonable legal fees) sustained or suffered as a result of any breach by the indemnifying Party of any of the warranties, representations, covenants or agreements made hereunder.

DISCUSSION: A party that makes a representation and warranty will typically be required to "indemnify" or reimburse the other party for any losses the latter may suffer as a result of the first party breaching its representations and warranties. In this case, both parties made representations and warranties so the agreement to indemnify the other upon breach is reciprocal.

14) Termination

- a) The Parties shall be entitled to terminate this Agreement upon written notice given by the party initiating the termination and delivered to the other party, without further compensation or obligation to each other, if any of the following events occur:
 - i) If there is any material breach of this Agreement by either party not cured within 15 days of the other party delivering written notice thereof to the party in breach; and
 - ii) If either party becomes insolvent, or unable to pay its debts or ceases operations in the ordinary course of business, or makes an assignment in bankruptcy, is liquidated or dissolved.
- b) The parties hereto expressly acknowledge and agree that the terms of this Section 14 are made without prejudice to any other right or remedy at law that either party may have for termination arising out of the other party's breach of this Agreement.

DISCUSSION: Termination clauses are critical to both parties to allow each to treat the contract as at an end upon the occurrence of a specified event, to cut its losses and avoid throwing good

money and effort after bad. It is important that termination be for “material” or important breach, since a party who is generally complying with the terms of the Agreement does not want the other party to be able to treat minor or frivolous breaches as sufficient to terminate the entire Agreement and avoid its obligations. Also, it is prudent to include a “curing” period to allow a party notified of a breach to fix it to the satisfaction of the other party before the termination will be effective. Finally, adequate notice should be provided to allow the party in breach a meaningful opportunity to solve the problem before the termination takes effect. The provision expressly states that these rights of reversion shall not act to prejudice any claim made by either party for damages or other remedy arising out of a breach of the Agreement by the other party.

15) Notice

- a) Any demand or notice to be given in connection with this Agreement shall be given in writing and delivered by fax transmission, personal delivery or registered mail or commercial courier and shall be deemed to have been delivered on the day of actual delivery to the recipient if sent via fax transmission with confirmation of receipt or delivered personally, or on the third business day after the notice was sent if sent by mail or courier, as follows:

i) **BROADCASTING COMPANY OF CANADA LTD.**

Address

Contact Name

ii) **NEW MEDIA PRODUCTIONS INC.**

Address

Contact Name

DISCUSSION: The effective date of notice is critical for establishing when the clock will begin to tick for the curing period before termination for breach will be effective, among other contractual obligations for which notice is required. In this instance a faxed or personally delivered notice will be deemed to have been delivered on the date it was sent while a longer period is allowed if the notice is sent by less instantaneous means. The date of notice is also critical for the deadline to respond to a legal suit or any communication of import

16) Assignment

- a) Except as expressly provided in this Agreement, neither of the Parties hereto may assign its rights or obligations under this Agreement without the prior written consent of the other party.

DISCUSSION: Neither party will want the other to be able to “assign” or sell the Agreement to another party with whom it has no knowledge, experience or prior relationship without prior approval.

17) Confidentiality

- a) This Agreement shall be treated by the Parties as confidential other than as may be disclosed by either party to prospective and actual financiers, accountants and lawyers giving advice to the party, or in the course of enforcement of any provision hereof; and

- b) Due to the nature of the services being provided hereunder, each party may come into possession, be exposed to or gain access to confidential information about the business of the other party, including but not limited to information about proprietary software and/or systems and trade secrets, and the Parties hereby agree not to disclose the terms of this Agreement or any confidential information about the other party to any unauthorized party during the course of this Agreement or after the expiration of its Term and any extension thereof.

DISCUSSION: Confidentiality clauses are common in almost all commercial Agreements, but in this case it is important to acknowledge that other parties crucial to the project, such as financiers or legal counsel, may require disclosure of what would otherwise be confidential information or even require a copy of the actual Agreement, otherwise such disclosure would put the disclosing party in breach. For example, applicants to the Bell Fund are required to submit a copy of all agreements related to the new media project it finances. Due to the fact that this Agreement contemplates the development of proprietary Software by the Producer to function on the Broadcaster's systems, a considerable amount of collaboration and disclosure of trade secrets and confidential information will be required if the project is to be a success. Both Parties will want to ensure that the other party is obliged to keep any such critical information confidential both during the Term and after its expiry. Confidentiality clauses sometimes define information that is not to be considered confidential, such as information that becomes public knowledge through no act of the other Party, after which the information ceases being confidential for the purposes of the Agreement.

18) No Waiver

- a) No waiver of any breach of any provision of this Agreement will be effective or binding unless in writing and signed by the party purporting to give the same, and will be limited to the specific breach waived unless otherwise provided in the written waiver.

DISCUSSION: This clause contemplates the possibility of one party agreeing to waive or ignore a breach by the other party of any term of the Agreement and continue to treat the Agreement as in effect and binding on the Parties, so long as such waiver is in writing. However, this clause also operates to ensure that such a waiver cannot be construed as a waiver of any other breach and protects the waiving party's right to enforce the non-waived provisions.

19) No Partnership

- a) This Agreement shall not be construed as constituting a partnership or joint venture between the parties or make either party an agent or employee of any other party.

DISCUSSION: This purpose of this provision is to expressly define the relationship between the Parties as being an agreement between independent contractors for reasons related to liability. Both parties could be exposed to greater liability if the Agreement is interpreted as an agreement creating a partnership or employment relationship.

20) Entire Agreement

- a) This written Agreement is the entire understanding of the parties with respect to the ownership, development, production, and exploitation of the Web Project and Software, and supersedes and replaces all previous understanding, whether written or oral; and may not be amended unless in writing signed by the parties.

DISCUSSION: The purpose of this clause is to explicitly exclude any oral or written representations, agreements or communications that may have taken place between the Parties, from the binding terms of the written Agreement. This is important since there may have been extended negotiations between the Parties prior to them reaching a final meeting of the minds and reducing the terms to the written Agreement. It prevents either party from relying on anything external to the written Agreement, such as oral promises or inducements. It also specifies that any amendment to the Agreement must be made in writing and signed by both Parties.

21) Severability

- a) If any provision of this Agreement is determined to be invalid, unenforceable, or illegal in whole or in part, such invalidity or unenforceability shall not affect any other provision hereof, and all other provisions shall continue in full force and effect, construed as if the invalid or illegal provision had been omitted.

DISCUSSION: The purpose of this clause is to allow the Parties to have certainty that the Agreement will remain in effect and binding, notwithstanding one or more of its provisions is found to be unenforceable or illegal under law. Should one provision be found to be so, the Parties agree to "sever" that provision from the rest of the Agreement and remain bound by the surviving terms.

22) Force Majeure

- a) Except with respect to payments under this Agreement, neither party shall be liable to the other for any delay or failure to perform obligations under this Agreement due to labour disputes, riots, storms, floods, explosions, fire, acts of God, acts of governmental authority, war, or any cause or causes which are beyond the responsible control of such party.

DISCUSSION: This clause is intended to protect both parties from their respective failure to perform its obligations as a result of an "act of God" over which it has no control. In this instance, the exception of the payment obligations from this provision is to the benefit of the Producer, who is obviously the only party receiving payments under the Agreement.

23) Counterpart

- a) This Agreement may be executed in counterparts with the same effect as if both parties hereto had signed the same document. Each counterpart shall be as valid and binding as each other counterpart and all counterparts shall be construed together and shall constitute one agreement. Execution and delivery of this Agreement by fax transmission shall constitute legal and binding execution and delivery of this Agreement.

DISCUSSION: Under ideal circumstances, it is best for both Parties to sign the same original document to have absolute certainty that it understands the agreement it is bidding itself to. However this clause contemplates the possibility that the Parties may prefer to sign the execution pages of the Agreement via fax transmission for reasons of expediency and convenience. It expressly states that the Parties have agreed that such form of execution will be considered valid and binding as if they had both signed the same document.

24) Governing Law

- a) The laws of the Province of [X] and of Canada applicable in the Province of [X] shall apply to this Agreement and the parties hereby attorn to the exclusive jurisdiction of the courts of the province of [X] in any dispute arising under this Agreement.

DISCUSSION: The courts' interpretation of law in Canada and the applicable provincial legislation can vary from jurisdiction to jurisdiction. Therefore each of the Parties wants to ensure it understands how the terms of the Agreement will likely be interpreted and what provincial law may apply to the circumstances. Consequently, the Parties expressly state which laws will apply to the contract. Also, in the event that there is a dispute that ends up in court, each of the Parties will want to ensure that the jurisdiction in which it will litigate is the most convenient to its head office and/or most favourable in terms of law. Most parties to agreements will prefer both the governing law and the jurisdiction of the province in which its head office is located since it is most likely to understand the local law and it is very expensive to travel and retain legal counsel for litigation taking place in a foreign jurisdiction. In this fact scenario, the issue is not controversial since both Parties have head offices located in the province of Ontario.

25) Recitals

- a) The recitals to this Agreement are hereby incorporated into and form part of the Agreement.

DISCUSSION: See comments on page 2 related to "Recitals".

IN WITNESS WHEREOF the Parties have executed this Agreement.

NEW MEDIA PRODUCTIONS INC.

Per: _____
Authorized Signatory

- and -

BROADCASTING COMPANY OF CANADA LTD.

Per: _____
Authorized Signatory