

## **INDEPENDENT CONTRACTOR 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 new media producer retains the services of an independent contractor for the production of a new media project. The position and services for which the contractor is retained, the main terms of the agreement, the type of new media project, the fees and other provisions of such an agreement may vary widely from project to project depending on the circumstances. Therefore, the reader should not assume that the Agreement will be applicable to all situations. 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 either party 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 sample 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 that the “New Media Producer” is a new media producer with experience in developing and producing interactive properties whose new media project has been “green lit” for financing and production. The New Media Producer is retaining the Contractor’s professional services on a “fee for services” basis to develop and produce some element of, or provide some service necessary for the production of an interactive, web based adaptation of a television program (the “Web Project”). In this fact scenario, it is assumed that the Contractor is a corporation though which its principle carries on business rather than an individual whose services are personally retained. It is imperative for the New Media Producer to ensure that it will own all intellectual property rights in the work product produced by the Contractor and to ensure that the original creators of the work product waive their moral rights therein in order for the New Media Producer to commercially exploit the Web Project. It will probably be equally important to the New Media Producer that the Contractor be required to keep the business of the New Media Producer and the Web Project strictly confidential as the Contract is likely to work for the New Media Producer’s competitors simultaneously or in the future.*

## **INDEPENDENT CONTRACTOR AGREEMENT**

**NEW MEDIA PRODUCTIONS INC. (“New Media Producer”)**  
a corporation incorporated under the laws of the Province of X,

THE FIRST PARTY,

- and -

**INDEPENDENT CONTRACTOR LTD. (“Contractor”)**  
a corporation incorporated under the laws of the Province of X,

THE SECOND PARTY,

WHEREAS the New Media Producer desires to retain the services of the Contractor and the Contractor wishes to provide certain services to New Media Producer (the “Services”) for the specific new media project(s) (the “Project”) described in Schedule 1, attached hereto,

*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 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 16 below.*

*The details of the Services and the Project are described in a separate schedule to allow the New Media Producer to use the same basic contract for a number of independent contractors by simply adapting the changes to the party, role, services and projects in the Schedule rather than change the main terms of the Agreement itself. It is in the interests of both parties that the scope of work, the kind of services to be provided is described as precisely as possible to ensure both parties have a clear understanding of the expectations and there is a meeting of the minds.*

THEREFORE, in consideration of the mutual covenants and agreements herein and other good and valuable consideration, the sufficiency of which is hereby acknowledged, New Media Producer and the Contractor (hereinafter collectively referred to as 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.*

**Term**

1. The term of this Agreement shall commence on the \_\_\_\_day of \_\_\_\_\_, and shall conclude on the \_\_\_\_day of \_\_\_\_\_, (the “Term”) or as otherwise described in Schedule 1, subject to section 10 herein and any extension or amendment to the Term as mutually agreed in writing by the Parties.

*DISCUSSION: Unlike a contract of employment which typically is entered into for an indefinite period of time, a contract for services typically has a “Term” that specifies when the provision of*

*services of the Contractor shall begin and end. In this case due to the unpredictability of the production schedule it is expressly acknowledged that the Term may be amended or extended by written agreement. The Term is also made subject to the parties' respective rights of termination in section 11.*

## **Services**

2. The Contractor agrees it shall provide its Services hereunder under the direction of and to the satisfaction of the New Media Producer or the supervisor designated for the Project as specified in Schedule 1.

*DISCUSSION: It's prudent that the Contractor be required to provide its services under the direction and control of some representative of the New Media Producer.*

## **Payment of Fees**

3. The fees payable to the Contractor for the Services provided hereunder shall be paid by the New Media Producer as set forth in Schedule 2, attached hereto.

*DISCUSSION: The payment of fees by the New Media Producer to the Contractor is part of the "valuable consideration" that makes the contract binding on the parties.*

## **Non-Exclusive**

4. The Contractor shall provide the Services to New Media Producer on a non-exclusive basis and shall be free to provide its services to third parties during the Term of this Agreement, provided however that the Contractor shall not provide such services to third parties in such a way that is inconsistent with any provisions hereof, or that so occupy the Contractors time and efforts as to impair or diminish the quality, professionalism or first priority performance of the Services provided to New Media Producer hereunder.

*DISCUSSION: As an independent company working in the new media industry, it is likely that the Contractor may simultaneously be providing its services to other clients. Consequently, it is important to the Contractor that it be expressly stated that the services being provided to the New Media Producer in relation to the Web Project are non-exclusive. However, from the point of view of the New Media Producer, it is important that the Contractor not over tax its resources and time working for these other clients in such a way as to diminish the quality of the services provided to the Web Project.*

## **Ownership of Intellectual Property and Work Product**

5. The Contractor acknowledges and agrees that all materials, including but not limited to any and all written material, graphs, diagrams, drawings, software, software packages, data, correspondence and other documents, artwork, photographic images, video or audio materials and/or recordings, in digital form or magnetically or optically encoded materials prepared by the Contractor in relation to New Media Producer operations and/or in the delivery of the Services for the Project in all forms of media whatsoever whether now known or hereafter devised (the "Work Product(s)"), shall be the sole and exclusive property of New Media Producer. The Contractor hereby grants to New Media Producer throughout the world and in perpetuity, all right, title and interest that the Contractor has or will have in the future, including but not limited to copyright, in and to

the Work Product(s) developed by the Contractor hereunder and Contractor hereby waives any and all moral rights Contractor has or will have in such Work Product(s).

6. For the certainty of the Parties, the Contractor acknowledges and agrees that New Media Producer shall own exclusively and in perpetuity throughout the world, all right, title and interest existing now or in the future of every kind and character in and to the Work Product(s) developed pursuant to this Agreement. All such rights shall vest in New Media Producer immediately upon the creation of the Work Product(s) and the provision of the Services by the Contractor and shall remain vested in New Media Producer in perpetuity whether this Agreement expires in its normal course or is terminated by either party as provided for herein.
7. Upon termination of the Project and/or the expiry in the normal course or the termination of this Agreement, or at the request of New Media Producer prior to such expiry or termination, the Contractor shall promptly return and/or deliver to New Media Producer any and all software programs, documents, books, disks and diskettes, drawings, graphs, photographs, magnetic tapes and microfilms, video or audio materials or any other materials of any kind or nature, and/or any and all Work Product(s) of any kind in its possession which are the property of New Media Producer, including but not limited to any and all copies of the Work Product(s) developed hereunder and resulting from the Services provided hereunder.

*DISCUSSION: Under Canadian copyright law, the copyright ownership in a creative work automatically vests in the "author" or creator of the work. In a traditional employment relationship, the employer under law will own all the copyright in the work of its employees. However, in the case of independent contractors, the creator (in this case, the Contractor) will be deemed to be the owner of the work, unless there is an express written agreement to the contrary. Therefore, perhaps more important than any other provision of this agreement, the New Media Producer must have the Contractor grant all intellectual property rights and ownership rights, including copyright, in the product of its work to the New Media Producer. Otherwise the New Media Producer will not actually own the work product it paid for under the Agreement. Ownership of the copyright in the work product is critical to the New Media Producer, as it will be a requirement of any potential partners, financiers or licensees of the Web Project that the New Media Producer own all right and title to it, unfettered by any third party claims. Indeed, the New Media Producer will be required in any contracts related to the exploitation of the Web Project to make specific representations and warranties regarding the New Media Producer's ownership of all rights, including copyright. A critical supplement to the transfer of all copyright from the Contractor to the New Media Producer is the waiver of any moral rights the Contractor may have in the work product. Moral rights are the rights of the creator to prohibit certain uses, associations and changes to the work. Moral rights cannot be assigned, but only waived in writing by the creator and such waiver will not be presumed to occur in a grant of copyright in the work. Therefore any grant of copyright must include a waiver of the moral rights of the Contractor as well, otherwise the New Media Producer and its licensees and assigns may be prohibited from taking such steps as are necessary to commercially exploit the work. The grant of copyright right and waiver of moral rights is accompanied by the agreement by the Contractor to provide all copies of materials provided by the New Media Producer to the Contractor in the latter's possession and any and all work product.*

## Confidential Information

8. The Contractor may receive, in the course of providing the Services and developing the Work Product(s) hereunder, respecting the Project or the business of New Media Producer generally, information which is confidential or which constitutes trade secrets with respect to the operation and business of New Media Producer and/or the Project. Such information may include, without limiting the generality of the foregoing, business plans, financial information, customer data, computer programs, proprietary software or information regarding other projects (the "Confidential Information"). The Contractor agrees it shall not use, permit the use and/or divulge any Confidential Information of any kind that it obtained in the course of the Project or the development of the Work Product(s) and the provision of the Services, unless specifically authorized by New Media Producer to do so in writing. The Contractor shall be bound by this Agreement throughout the entire Term and [X] years following the expiry or termination of this Agreement. However, the confidentiality obligations to which the Contractor is bound under this Agreement shall not apply if the Confidential Information becomes generally available to the public through no fault of the Contractor.
9. The Contractor shall treat all the information obtained from a client, employee, contractor or representative of New Media Producer or a partner or financier of the Project as Confidential Information as defined in this Agreement.

*DISCUSSION: The Contractor will likely be required to work closely with the New Media Producer. Indeed, depending on the nature of the services to be performed, the Contractor may be in a position to gain intimate knowledge of the New Media Producer's business and the specific Project. As well, the Contractor may be part of the team that develops proprietary software to be used in the Project. As mentioned, the Contractor very likely does business with companies that may be in competition with the New Media Producer. Therefore, it is critical to the New Media Producer that the Contractor be obliged to keep important and confidential information secret during the Term of the Agreement and for a period in the future. Consequently, the Independent Contractor Agreement should contain a confidentiality provision to address these concerns. In addition to its own concerns related to confidential information related to its business and the Project, financiers, partners and licensees will require that the New Media Producer take such steps as are necessary to keep the terms of any agreements entered into in relation to the Project confidential.*

## Termination

10. New Media Producer may terminate this Agreement and cancel the Contractor's Services hereunder at any time without cause and without further obligation to the Contractor except for payment due for Services performed to the date of such termination. The Contractor may terminate this agreement for any reason upon giving New Media Producer two weeks notice of the intent to terminate. The Contractor agrees that upon termination by either party, the Contractor shall promptly return to New Media Producer all notes, memoranda, specifications, designs, documents and any and all materials of any kind or form of media used in the provision of the Services or development of the Work Product and any material containing or disclosing any Confidential Information pursuant to section 9 herein.

*DISCUSSION: If the services performed by the Contractor are not satisfactory, the New Media Producer may need to replace the Contractor as soon as possible to continue to abide by the production schedule. Likewise, if for some reason production must cease, the New Media Producer will want to be able to terminate the agreement immediately rather than to continue paying fees for services that are no longer needed. Consequently the New Media Producer is given the right to terminate agreement without notice provided that the Contractor is paid for the services provided up to the time of termination. In contrast, the Contractor is required to give the New Media Producer notice of its intent to terminate to allow the New Media Producer time to find a replacement. This obviously favours the interests of the New Media Producer and a Contractor may decide not to agree to such provision. However the terms of any agreement are often the result of the respective bargaining power of the parties.*

## **Representations and Warranties**

11. The Contractor hereby represents, warrants and covenants to New Media Producer that:
  - 11.1. it has the right and capacity to enter into this Agreement and fully perform all of its obligations hereunder;
  - 11.2. is a Canadian corporation properly constituted and incorporated under the laws of Canada or its provinces;
  - 11.3. any and all Work Product(s) developed hereunder and any and all Work Product(s) of the Services provided hereunder, in relation to the Project or otherwise, shall be wholly original with the Contractor, or the Contractor has acquired the necessary rights from third parties to contribute such Material to the Project with the written consent of New Media Producer, and shall not violate any laws of Canada or its provinces and shall not infringe upon or violate any rights of any third party, including without limitation rights of privacy, publicity, trademark, trade name, patent, copyright and trade secret, and shall not constitute libel or slander against any third party;
  - 11.4. it shall not incur any cost expense, liability or obligation in the name of or on the credit of the Project or New Media Producer, except in accordance with written instructions and authorization of New Media Producer;
  - 11.5. any and all software developed by the Contractor hereunder shall not contain any clock, timer or other limiting or disabling code, design or routine that would cause damage to, impair, erase or render inoperable the Project and/or any other software program.

*DISCUSSION: Generally, the New Media Producer wants to ensure that the Contractor represents and warrants that work product arising from Services performed is original to the Contractor or that the Contractor has the necessary intellectual property rights to include them in the work product that will be incorporated into the Project. The New Media Producer will license or assign the Project to third parties who will require in turn similar representations and warranties from the New Media Producer. Hence, the New Media Producer needs to rely on the representations and warranties from the Contractor to exploit the Project. The New Media Producer will want the Contractor's representations and warranties to be as strong and unequivocal as possible, because it has no way of knowing whether the Contractor's work is original or whether it has acquired all the necessary rights to incorporate the work product in the*

*Project. Generally speaking, the Contractor should be in a position to make these representations and warranties. Likewise, the New Media Producer wants to have confidence that any software developed by the Contractor will not contain any virus or time bomb that could corrupt systems or otherwise fail to operate. The New Media Producer will also want to ensure that the Contractor is a Canadian corporation for the purposes of tax credits and potential sources of funding.*

**Indemnification**

- 12. The Contractor shall indemnify New Media Producer, and its successors, licensees and assigns, harmless from and against any and all losses, costs, liabilities, damages and expenses (including reasonable lawyers' fees) resulting from any breach of any representation, warranty and/or covenant made by the Contractor in this Agreement.

*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.*

**Notice**

- 13. Any notice required or permitted to be given hereunder shall be given by personal delivery or registered mail and shall be deemed given (i) when delivered personally to any officer of the party being notified; or (ii) on the third business day after being sent by registered mail and addressed as follows:

To New Media Producer: [Address & Contact Information]

To the Contractor: [Address & Contact Information]

*DISCUSSION: It is prudent to include how notice is to be given and when it is deemed to have been given to the other party.*

**No Assignment**

- 14. This Agreement is non-assignable by the Contractor. This Agreement shall inure to the benefit of New Media Producer's successors, assignees, licensees, grantees and associated, affiliated and subsidiary companies. New Media Producer and any subsequent assignee may freely assign this Agreement, in whole or in part, to any party provided that such party assumes and agrees in writing to keep and perform all of the obligations of New Media Producer hereunder.

*DISCUSSION: The New Media Producer is likely retaining the services of the Contractor because the Contractor has some special qualifications or expertise need for the Project. Therefore the New Media will not want the Contractor to be able to sell or assign the Agreement to any other party. In contrast however, the New Media Producer may require the right to assign the Agreement to a single purpose production company that it incorporates to produce the Project or to some other entity, however any party to whom the Agreement is assigned must assume the obligations of the New Media Producer.*

## Severance

15. Any Section or Subsection or any other provision of this Agreement which is, or becomes, illegal, invalid or unenforceable shall be severed herefrom and shall be ineffective to the extent of such illegality, invalidity or unenforceability and shall not affect or impair the remaining provisions hereof which shall continue in full force and effect.

*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.*

## Entire Agreement

16. This Agreement, including the recitals, schedules and written amendments jointly agreed to in writing contained herein, constitutes the entire agreement between the Parties pertaining to the subject matter hereof and supersedes all prior agreements, understandings, negotiations, and discussions, whether oral or written, of the Parties in the event of discrepancy between them. No amendment, modification or waiver of this Agreement shall be binding unless duly executed in writing 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.*

## Independent Contractors

17. This Agreement sets for the agreement between independent contractors and shall not be construed or interpreted as constituting a partnership or joint venture or employment relationship between the Parties or to make either Party an agent or employee of the other.

*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.*

## Waiver

18. No waiver of any breach of any provision of this Agreement will be effective or binding unless in writing and signed by the parties. No waiver of any of the provisions of this Agreement shall be deemed to constitute a waiver of any other provisions unless otherwise expressly provided in writing by the Parties.

*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.*

### **Governing Law**

19. This Agreement shall be governed by and interpreted and construed in accordance with the laws of the Province of X and the country of Canada.

*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.*

### **Counterparts**

20. This Agreement may be executed in counterparts in the same form and such parts as so executed shall together form one original document and be read together and construed as if one copy of this Agreement had been executed. 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.*

### **Legal Counsel**

21. Each Party acknowledges that it has read and understood the Agreement in its entirety and signs this Agreement voluntarily, having had the opportunity to seek independent legal advice on the matters contained herein.

*DISCUSSION: When dealing with an individual or entity that may not be very sophisticated in contractual matters and/or who may be perceived as having less bargaining power in the relationship, it is prudent to include such a clause to protect the party having greater sophistication or bargaining power from the other party's claim that the Agreement is unenforceable because there was no meeting of the minds or the unsophisticated party was coerced into signing or did not understand the consequences and obligations contained in the terms and conditions of the Agreement.*

**IN WITNESS WHEREOF, the Parties have executed this Agreement effective the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_ .**

**INDEPENDENT CONTRACTOR LTD.**

Per: \_\_\_\_\_

**NEW MEDIA PRODUCTIONS INC.**

Per: \_\_\_\_\_

**Schedule 1 – to the Agreement dated the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_,  
Between New Media Productions Inc. and Independent Contractor Inc.**

Contractor Services for the Project(s)

1. Project Name & Description:
2. Project Supervisor
3. Description of Services

NEW MEDIA PRODUCER hereby engages the Contractor to provide his services in the following manner:

The Contractor shall:

- a) fulfill the role of [\_\_\_\_\_] on the Project(s) named above.
- b) provide such Services for a [\_\_\_\_\_] month period beginning [date of commencement or Term] to [end of Term];
- c) consult with New Media Producer and provide such guidance, advice and assistance from time to time as New Media Producer may request with respect to the Services;
- d) deliver any results, proceeds and all Work Product(s) arising from the provision of such Services to New Media Producer; and
- e) comply with the directions and requirements of New Media Producer and make all revisions, corrections or amendments to the services required by New Media Producer under this Agreement.

**Schedule 2 – to the Agreement dated the \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_\_\_  
Between New Media Productions Inc. and Independent Contractor Inc.**

Fees for Services

NEW MEDIA PRODUCER shall pay the Contractor up to the amount of [amount expressed in words] (\$\_\_\_\_\_ ) as follows:

(a) [insert payment terms]

Payment due hereunder is conditional on New Media Producer's written acceptance of the Services and the Work Product(s).

The Contractor shall supply to New Media Producer a monthly written invoice for the total amount due for that time period and payment shall be made upon satisfactory delivery and acceptance of the Services and Work Product(s).