

## **NEW MEDIA PRODUCTION 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 arrangement whereby a new media producer acquires the rights from a television producer to produce a web based interactive adaptation of a television program. The specific roles and obligations of the parties, the main terms of the agreement, the type of new media project, the financial structure, the revenue sharing arrangements and other provisions of such an agreement may vary widely from project to project depending on the circumstances. For the purposes of this Agreement it is assumed that the new media project is designed to be published on a website over the Internet, 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 through set top boxes, cellular phones, email, gaming platforms, CDROM, DVDROM. In such situations the terms of a new media production 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. 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 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, the author assumes that the “New Media Producer” is a new media producer with experience in developing and producing interactive properties who is acquiring the interactive rights in a television program (the “Program”) produced by the “Television Producer” who owns all rights in the Program. The New Media Producer intends to develop and produce an interactive, web based adaptation of the Program (the “Web Project”). Therefore the underlying creative property is the television Program from which the Web Project is adapted. That is not always the case, however. In some instances, the property is developed as an interactive new media project first and is adapted as a television production in which case a new media producer would either produce the television program itself, hire the production services of a television producer or enter into a co-production agreement with a television producer. In this fact scenario, however, the New Media Producer must acquire the rights to produce the Web Project from the Television Producer.*

*In contrast to what is known as a “Co-Production” where the ownership of the Web Project is typically shared between the parties, in this Agreement the New Media Producer will own all rights in the completed Web Project but will share with the Television Producer the revenue generated from the commercial exploitation of the Web Project, in exchange for the creative and business contributions of the Television Producer and the grant of interactive rights to allow the New Media Producer to actually produce the Web Project. Since this Web Project is an interactive adaptation of the television program that is intended to enhance the viewers’ experience of the program, the Television Producer’s involvement, cooperation and creative contribution is integral to the success of the Web Project. Additionally, since the Web Project is intended to be associated with the Program in the minds of viewers and broadcasters, the*

*Television Producer has a direct interest in ensuring the Web Project follows the creative integrity and vision of the Program. Consequently, the Television Producer's rights of approval and consultation are important and relevant considerations. That being said, the New Media Producer as producer and owner of the Web Project, will control the financing, development and production of the Web Project, particularly since the New Media Producer has the expertise and skills in producing interactive projects, which the Television Producer may lack. For example, this Agreement assumes that the New Media Producer, as owner of the Web Project, will be the applicant to the Bell Broadcast and New Media Fund (the "Bell Fund") for financing. Likewise, as owner of the Web Project, in this scenario the New Media Producer will self distribute by entering into licenses with broadcasters directly or grant the distribution rights to a third party distribution company that is distributing the television Program or to the Television Producer's affiliated distribution company.*

## **NEW MEDIA PRODUCTION AGREEMENT**

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

**BETWEEN:**

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

THE FIRST PARTY,

- and -

**TELEVISION PRODUCTIONS LTD. ("Television Producer")**  
a corporation incorporated under the laws of the Province of X,

THE SECOND PARTY,

**WHEREAS** Television Producer is the producer of, and owns all right title and interest, including copyright, in and to, a television program tentatively entitled "Stranger Than Fiction" (the "Program"); and

**WHEREAS** New Media Producer wishes to develop and produce an interactive web-based adaptation based on the Program designed to promote and complement the television broadcast of the Program tentatively entitled "Stranger than Fiction Interactive" (the "Web Project"); and

**WHEREAS** Television Producer wishes to collaborate with and grant the necessary rights to New Media Producer to develop and produce the Web Project; and

**WHEREAS** New Media Producer and Television Producer wish to set out in writing their respective rights and obligations with respect to the ownership, production, distribution and exploitation of the Web Project;

*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.*

**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) Production of Web Project**

- a) The parties agree that New Media Producer shall develop, produce, distribute and exploit the Web Project in accordance with this Agreement.
- b) New Media Producer shall produce the Web Project substantially in accordance with the approved production budget and project scope set out in the application for funding from the Bell Broadcast and New Media Fund (the “Fund”) submitted on the [date of submission] and attached as schedule A.

*DISCUSSION: This provision generally states that the Agreement will govern how the Web Project will be developed, produced and exploited. It specifically provides that the Web Project must be produced in accordance with the projects scope and production budget submitted to the Bell Broadcast and New Media Fund (the “Fund”) and those documents are incorporated into the terms of the Agreement and attached as a schedule to the agreement. This fact scenario assumes that the parties are entering into the Agreement after having submitted an application for funding from the Fund, although some production agreements are entered into by the parties in advance. Prior to the submission of the application, the New Media Producer would, in consultation with the Television Producer, have defined the nature and design of the Web Project and how it would function. The project scope and description, along with the budget, assist both parties in defining as precisely as possible what the finished product will consist of. This is important in understanding the extent of the resources and assets that both parties will be required to contribute to successfully produce the Web Project and is also a requirement of the financiers, including the Fund.*

## 2) Authority of New Media Producer

- a) Pursuant to the grant of rights herein, New Media Producer shall have the exclusive right to develop, produce and exploit the Web Project and shall have sole authority, discretion and control over the following matters:
  - i) Securing all financing for the production of the Web Project, including but not limited to preparing and submitting applications for funding from the Fund in addition to other sources of financing; and
  - ii) Hiring, supervising and coordinating all services, personnel, materials, technology and software required to design, program and produce the Web Project in accordance with this Agreement;
- b) New Media Producer agrees to consult with Television Producer on the following matters:
  - i) Managing production budgets and all accounting and business affairs of the Web Project related there to; and
  - ii) Developing and producing original creative elements to be included in the Web Project.
- c) Provided New Media Producer is successful in its application for funding from the Fund, New Media Producer shall assist Television Producer in securing the receipt of the Fund's top up contribution to the Program production budget.

*DISCUSSION: The New Media Production Agreement will generally set out the respective contributions required by the parties. As discussed, as owner of the Web Project, the New Media Producer will control financing and production of the Web Project. In this fact scenario, the New Media Producer will have control over whom it hires to develop software and creative elements of the Web Project. The Television Producer is given consultation rights in two key areas, budgeting and accounting, as well the production of creative elements to be incorporated into the Web Project. These are important matters to the Television Producer as it has a direct interest in the budgeting and accounting practices as a revenue sharing partner. It also has an overriding interest in protecting the television property's "brand" and ensuring that the creative aspects of the Web Project enhance rather than detract from the creative integrity and vision of the Program. In some instances, the Television Producer will insist on approval rights over these matters. Finally, although the applicant to the Fund in this case is the New Media Producer, the television Program benefits directly from the addition of the Fund's cash contribution to the budget of the television program. Here, the New Media producer agrees to assist the Television Producer in obtaining the funds if the application for funding is successful. In this case, the New Media Producer is not paying a purchase price for the rights to create the Web Project, although it's conceivable that it could. Rather, the "payment" to the Television Producer will be in the form of revenue sharing and the benefit of the top up contribution to the television production budget from the Bell Fund in addition to the enhanced value that the Web Project is designed to add to the Program.*

### 3) Services and Deliverables to be Provided by Television Producer

- a) Television Producer shall provide the following services, creative content, assets and facilities, including but not limited to the following:
  - i) Grant the interactive rights in the Program to New Media Producer that are necessary to produce the Web Project, in accordance with the grant of intellectual property rights as specifically set out in section 4 herein;
  - ii) Provide to New Media Producer certain creative content from the Program to be used and incorporated in the Web Project, including but not limited to images, outtakes, film clips, photographic and sound assets, access to talent, music and other materials and the appropriate rights clearances thereof at no charge;
  - iii) Provide commercially reasonable efforts to promote the Web Project in connection with any promotional and advertising activities undertaken for the Program;
  - iv) Provide commercially reasonable efforts to sell or procure a license for the Web Project when selling or licensing the broadcast rights in the Program to any broadcasters; and
  - v) Consult with New Media Producer on the creative development, writing and producing of the Web Project as necessary.

*DISCUSSION: The two key contributions that the Television Producer will be required to make to the Web Project are the granting of the intellectual property rights in the television Program to the New Media Producer necessary to produce the Web Project, together with the delivery of the creative materials from the television Program to be incorporated in the Web Project, and the rights to do so. The actual grant of intellectual property rights is set out in a separate provision below.*

*Other contributions of the Television Producer may vary widely depending on the nature of the project and the business arrangement between the parties. The Television Producer may not agree to provide all of the contributions listed. For instance, the Television Producer may own an affiliated distribution company through which it distributes its television productions rather than rely on the services of a third party distribution company. In some circumstances, the parties may wish to assign the distribution rights in the Web Project to the affiliated distribution company or a third party that distributes the television Program. This makes sense in this scenario since the Web Project is designed to enhance the value of the television Program and they are integrally associated with each other. However, the Television Producer may not want to be contractually obligated to license the rights to the Web Project with every license agreement it enters into for the broadcast rights in the Television Program. This is not a consideration particularly relevant to the Canadian market, as a key requirement for financing from the Fund is that there is a broadcaster committed to licensing the Web Project. However, this is a concern in relation to foreign markets that may include broadcasters who are not interested in licensing an interactive enhancement, but only the broadcast rights to the Program for traditional media. Consequently in this provision the Television Producer is required to use "commercially reasonable efforts" to procure a license for the Web Project when licensing the broadcast rights to the television Program. This particular form of Agreement contemplates that the New Media Producer has retained the distribution rights in the Web Project and shall either*

*enter into license agreements directly with the broadcasters who license the television Program from the Television Producer or enter into a distribution agreement with a distributor.*

*Another key concern for the New Media Producer is that the Television Producer agrees to use “commercially reasonable” efforts to promote the Web Project in association with the Program. In the real world it is not necessarily true that “if you build it, they will come”. To maximize the potential of the Web Project, it will be important to harness some of the promotional resources and efforts used in promoting the Program.*

*Finally, the New Media producer will need the collaboration of the Television Producer in the development of the creative aspects of the Web Project.*

#### **4) Grant of Rights and Copyright Ownership**

- a) New Media Producer acknowledges that the Program and all the intellectual property rights in and to the Program shall remain, in so far as New Media Producer is concerned and subject to the grant of rights herein, entirely vested in the Television Producer.

*DISCUSSION: This provision states that the Television Producer remains the owner of the television production, notwithstanding the grant of certain rights in the Program to the New Media Producer necessary for the production of the Web Project. Such granted rights are set out in detail below.*

- b) Television Producer hereby grants to New Media Producer the exclusive, right to develop, adapt, produce, publish, distribute, promote and commercially exploit in all languages, in perpetuity and throughout the world a rich-media, digital, web-based interactive property as more specifically described in Schedule A hereto (the “Web Project”) based in whole or in part on the Program, and Television Producer hereby waives its moral rights in the Program (collectively the “Interactive Rights”) in accordance with this Agreement and subject to the rights of reversion on termination as set out in section 12 herein.

*DISCUSSION: As owner of the television Program, it is critical that the Television Producer grants the necessary intellectual property rights to allow the New Media Producer to produce and exploit the Web Project and waives its moral rights therein to allow such adaptation. This license of the interactive rights is limited to the purposes set out in the Agreement and is subject to the rights of reversion on termination of the Agreement*

- c) Television Producer hereby licenses to New Media Producer the non-exclusive license to use and exhibit images, outtakes, film clips, photographic and sound assets, music and other materials including but not limited to characters, titles, trademarks and logos (the “Licensed Materials”) from the Program in connection with the production, promotion and exploitation of the Web Project, and hereby waives its moral rights in such Licensed Materials, subject to the necessary clearances for such use in accordance with the terms of this Agreement and subject to the rights of reversion on termination as set out in section 12 herein.

*DISCUSSION: The Web Project is an adaptation of the television program produced and owned by the Television Producer. In order for the New Media Producer to create the Web Project based on the Program, the Television Producer will be required to provide certain creative elements from the Program to be included in the Web Project and grant to the New*

*Media Producer the intellectual property rights together with the waiver of moral rights in the materials to do so. This provision qualifies the grant of license somewhat by making it subject to the clearance of rights in each specific creative element incorporated into the Web Project.*

- d) New Media Producer shall own all right, title and interest, including but not limited to copyright, in and to all original and pre-existing source code, site files, applications, tools, methods, programs, software and know-how created or used by New Media Producer in the production of the Web Project (the “New Media Producer Technology”) and all original creative elements developed and produced by the New Media Producer (the “New Media Producer Content”) from the inception of the creation thereof and in perpetuity and have the right to exploit the New Media Producer Technology independently from the Web Project with no payments being due or payable to Television Producer from such exploitation.

*DISCUSSION: In the process of producing the Web Project, the New Media Producer may develop proprietary software and/or original creative content which the parties intend to be incorporated into or used in relation to the Web Project. The New Media Producer will want make it clear that it owns the proprietary software and has the right to use it in other projects and exploit it separately from the Web Project with no revenue sharing of by the Television Producer.*

- e) New Media Producer shall own all right title and interest, including copyright in and to the Web Project, as a compilation of the Licensed Materials, the New Media Producer Technology and the New Media Producer Content, as a separate copyrightable work as defined in the *Copyright Act* of Canada, from the inception of the creation thereof and in perpetuity.

*DISCUSSION: The Web Project will be made up of many elements, including those licensed from the Television Producer and those owned by the New Media Producer. However, Canadian law recognizes that a compilation consisting of many different copyright protected works can result in a new creative work entitled to separate copyright protection. Consequently, the parties acknowledge that the Web Project, as a compilation, will be owned exclusively by the New Media Producer in this instance.*

## **5) Credits**

- a) Provided that the Web Project is produced, the parties agree as follows:
  - i) Television Producer shall provide New Media Producer with a credit in the end credits of the Program in substantially the following form:
    - (1) “Stranger than Fiction Interactive produced by New Media Productions Inc.”
  - ii) New Media Producer shall provide Television Producer with an on-line credit in the Web Project in substantially the following form:
    - (1) “Based on the television program ‘Stranger than Fiction’ produced by Television Productions Ltd.”

- b) Each party's credit shall appear wherever the other party's credit appears in the Web Project and in the Program and in all advertising, publicity and promotion of the Web Project and the Program where such credits appear.
- c) The parties agree to comply with all provisions related to credits to be provided to third party financiers and funding organizations in all financing agreements with such third parties.

*DISCUSSION: It is prudent to set out the location and appearance of each of the parties' respective production credits as precisely as possible to avoid disputes later. In this instance, the New Media Producer is provided a credit as the producer of the Web Project in the end credits of the television Program, and the Television Producer is provided an online credit in the Web Project as producer of the television Program upon which the Web Project is based. It should be noted that the credits are subject to the licensing Broadcaster's approval.*

## **6) Net Profits**

- a) The parties agree that all Net Profits from the exploitation of the Web Project shall be shared as follows: \_\_\_\_% to New Media Producer and \_\_\_\_% to Television Producer.
- b) "Net Profits" shall be defined as meaning all gross revenues actually received by or on behalf of the parties from all sources worldwide of commercial exploitation of the Web Project produced hereunder, following the deduction of any distribution expenses or third party distributor fees, hosting, installation or other fees and expenses, deferrals related to the Web Project including all financing costs and interest charges, provided that the definition of Net Profits shall, in any event, be defined no less favourably for either party and shall apply to both parties equally.
- c) Notwithstanding the forgoing, the parties acknowledge and agree that the New Media Producer has the unfettered right to exploit any New Media Producer Technology developed in the course of the production of the Web Project independently from the Web Project and the Television Producer shall not have any right of any kind to share in the revenue generated from the exploitation of New Media Producer Technology, which shall be for the sole and exclusive benefit of the New Media Producer.

*DISCUSSION: The New Media Producer as owner of the Web Project is in control of its exploitation and therefore is the logical party to collect and remit the revenue according to the revenue sharing arrangement with the Television Producer. The parties agree to share the "Net Profits" which are defined as being all gross revenues following the deduction of the various costs and expenses set out. The provision also expressly excludes New Media Producer Technology from the revenue sharing agreement.*

## **7) Records and Accounts**

- a) New Media Producer shall keep or cause to be kept at its principle place of business all books of account and records, and all contracts for the business and operations of the Web Project.
- b) New Media Producer shall provide to Television Producer bi-annually a report of all gross revenues and Net Profits derived from the commercial exploitation of the Web Project.



- c) Television Producer shall have the right to examine, inspect, audit and make copies of the books and records of the New Media Producer pertaining to the financial matters relating to this Agreement, such inspection to take place at the Television Producer's expense at the New Media Producer's place of business during normal working hours on business days upon one week written notice to New Media Producer, the frequency of such shall not exceed once annually.

*DISCUSSION: It is prudent to ensure that the party in control of the transaction giving rise to revenue to be shared with the other party be contractually obliged to keep satisfactory accounts, provide statements of any revenue received and pay the appropriate portion of the revenue to the other party on a regular basis. The party that is reliant on the other party in control should ensure that it has the right to inspect the accounts of the controlling party in order to protect its interests and enforce its rights under contract to receive its share of revenue earned. However, the party whose obligation it is to keep the records will not want the inspecting party to be able to disrupt its business operations on a whim or too frequently, so the number of inspections allowed per year is limited.*

## **8) Representations and Warranties**

- a) New Media Producer represents and warrants to Television Producer that:
  - i) It has the right and capacity to enter into this Agreement and fully perform all its obligations hereunder;
  - ii) It is a taxable Canadian corporation and shall at all material times continue to be resident in Canada and the province of \_\_\_\_\_, for the purposes of the *Income Tax Act* (Canada);
  - iii) The Web Project (other than the Licensed Rights which remain the sole and exclusive responsibility of Television Producer) and the New Media Producer Content and the New Media Producer Technology shall be wholly original to New Media Producer or the New Media Producer has acquired or will acquire the necessary rights from third parties to contribute same for use in the Web Project;
  - iv) The Web Project (other than the Licensed Rights which remain the sole and exclusive responsibility of Television Producer) and the New Media Producer Content and the New Media Producer Technology shall not violate any law or infringe upon or violate any right of any nature or kind of any person, firm, corporation or other entity, including without limitation rights of privacy, publicity, trademark or copyright and shall not constitute a libel or slander against any third party;
  - v) It has obtained or shall obtain waivers for any and all moral rights and any rights of a similar nature in connection with the Web Project from and on behalf of its principles, employees, contractors and other contributors to the Web Project;
- b) Television Producer represents and warrants to New Media Producer that:
  - i) It has the right and capacity to enter into this Agreement and fully perform all its obligations hereunder;

- ii) It is a taxable Canadian corporation and shall at all material times continue to be resident in Canada and the province of \_\_\_\_\_, for the purposes of the *Income Tax Act* (Canada);
- iii) It owns all right, title and interest in and to the Program and the Licensed Materials, including but not limited to copyright and the Program and the Licensed Materials are or shall be wholly original to Television Producer or the Television Producer has acquired or will acquire the necessary rights from third parties to contribute same for use in the Web Project;
- iv) It has not granted the rights granted hereunder to any other party;
- v) The Program and the Licensed Rights shall not violate any law or infringe upon or violate any right of any nature or kind of any person, firm, corporation or other entity, including without limitation rights of privacy, publicity, trademark or copyright and shall not constitute a libel or slander against any third party;
- vi) It has obtained or shall obtain waivers for any and all moral rights and any rights of a similar nature in connection with the Program, the Licensed Materials and the Web Project from and on behalf of its principles, employees, contractors and other contributors to the Program, Licensed Materials and the Web Project;

*DISCUSSION: The representations and warranties that the each of the New Media Producer and the Television Producer may be required to make in a production agreement can be extensive and detailed. Normally the purchaser of or licensee of intellectual property rights is not expected to make extensive representations and warranties, since it's obligations are often fulfilled by the payment of the license fee or purchase price. Rather it is the grantor or licensor of the rights that is expected to make extensive representations and warranties. However, in this instance, the representations and warranties are fairly reciprocal and mirror each other. That's because the both parties have an interest in ensuring that the Web Project will not breach any law or any third party's rights since they are revenue sharing partners. Also, it is very important for the Television Producer to protect its "brand" in the Program, so the New Media Producer is required to make more representations and warranties than a simple licensee or purchaser might in different circumstances. In any case, both parties know that each will likely be named in any third party suit brought against the Web Project, and therefore the representations and warranties become a critical part of the negotiations since each agrees to indemnify the other for any costs or losses associated with a breach. Generally, the Television Producer wants to ensure that the New Media Producer has the right and authority to perform the Agreement, that the software and creative materials it creates or incorporates into the Web Project are original to the New Media Producer or have been properly licensed for inclusion in the Web Project and will not violate any legal rights of any third party or any law. The New Media Producer will want to ensure that the Television producer has the right to perform the Agreement, owns the intellectual property rights in the television program necessary to grant the interactive rights to the New Media Producer to produce the Web Project, and has obtained all necessary clearances for the creative materials from the television Program that will be incorporated into the Web Project.*

## 9) Indemnifications

- a) Each party shall indemnify and save harmless the other party from and against all losses, damages and expenses, including reasonable legal fees and disbursements, resulting from any claim, action or proceeding arising from a breach of any of the warranties made by the breaching party in section 8 (a) and (b) above.

*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.*

## 10) Special Damages and Loss of Profits

- a) Neither party shall be liable hereunder for any loss of profits or any special, indirect, incidental or consequential damages, whether arising in contract, tort or otherwise. Each party's liability and any of its respective employees, agents, independent contractors or representatives, to the other for claims arising out of or relating to this Agreement will be restricted to actual damages only.

*DISCUSSION: 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, the liability of each of the parties is limited to the actual damages cause by any breach by the other party of any representation and warranty.*

## 11) Termination

- a) Subject to section 12, 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) In the event that, at the date of the first broadcast of the Program, New Media Producer is unable to secure financing for the production of the Project and the parties mutually agree not to proceed with production of the Project.
  - ii) 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/or
  - iii) If either party becomes insolvent, or makes an assignment in bankruptcy, is liquidated or dissolved.

*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.*

## **12) Ownership and Reversion of Rights on Termination**

- a) Upon termination of this Agreement, without prejudice to any other rights at law, each party shall continue to own its respective right, title and interest in and to the elements and materials it contributed in respect of the Web Project, and the copyright therein and thereto, subject to the following:
  - i) In the event this Agreement is terminated in accordance with the conditions identified in the previous subsection 12(a)(i), Television Producer shall be free to develop and produce either on its own or in conjunction with a third party, an interactive adaptation of the Program, without further obligation to New Media Producer.
  - ii) In the event this Agreement is terminated in accordance with the conditions in subsections 12(a)(i)-(iii) above, the parties agree as follows:
    - (1) The Program shall remain the sole and exclusive property of the Television Producer, including but not limited to copyright, subject to the limitations of applicable third party licenses.
    - (2) The Interactive Rights in the Program together with the rights to the Licensed Materials granted to New Media Producer hereunder shall automatically revert to Television Producer without further agreement or written instrument being required.
    - (3) All New Media Producer Technology and New Media Producer Content originally created by New Media Producer for the development and production of the Web Project shall remain the sole and exclusive property of New Media Producer, including but not limited to copyright, subject to the limitations of applicable third party licenses.
- b) The parties hereto expressly acknowledge and agree that the terms of this Section 13 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: The purpose of this provision is to make clear that upon termination of the Agreement the respective parties shall retain ownership of all of the assets and intellectual property rights it had prior to entering into the Agreement with the other party and to set out how the various grants of rights and licenses made pursuant to this Agreement will revert automatically to the grantor upon termination. 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.*

## **13) Notice**

- a) Any notice required or permitted to be given hereunder shall be in writing 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 or certified mail, postage prepaid, facsimile telecopier, addressed as follows:

To Television Producer: [Contact Name]  
TELEVISION PRODUCTIONS LTD.  
[Address]  
[Phone & Fax Number]

To New Media Producer: [Contact Name]  
NEW MEDIA PRODUCTIONS INC.  
[Address]  
[Phone & Fax Number]

*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 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.*

#### **14) Confidentiality**

- a) This Agreement and the business of the Parties with respect to the Web Project shall be treated by the Parties as strictly confidential other than as may be disclosed by either Party to mutually approved prospective and actual financial participants in the Web Project, accountants and lawyers giving advice to the Parties, or in the course of enforcement of any provision hereof.

*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. 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.*

#### **15) Independent Contractors**

- a) The parties hereto are independent contractors and neither shall act as the other's agent, nor shall either party be deemed an agent or employee of the other nor shall this Agreement be interpreted as creating an employment relationship, partnership or joint venture or otherwise. Neither party shall incur any obligation on the other's behalf, nor commit the other in any manner without the other's prior written consent.

*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.*

## 16) Force Majeure

- a) Neither party hereto shall be responsible for any losses or damages to the other occasioned by delays in the performance or non-performance of any of said party's obligations when caused by Acts of God, strike, acts of war, inability of supplies or material or labor or any other cause beyond the reasonable control of the said party at any time for performance of any services or shall be extended by the period of such delay.

*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.*

## 17) Severability

- a) In the event any portion of this Agreement is deemed to be invalid or unenforceable, such portion shall be deemed severed and the parties agree that the remaining portions of this Agreement shall remain 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.*

## 18) Assignment

- a) Neither party may assign or otherwise transfer this Agreement without the written consent of the other party. This Agreement shall enure to the benefit of and bind the parties hereto and their respective legal representatives, successors and assigns.

*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.*

## 19) Governing Law

- a) This Agreement shall be governed by 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.*

**20) Entire Agreement**

- a) This Agreement, including the recitals and Schedules, sets forth the entire agreement between the parties with respect to the subject matter hereof and shall be amended only by a 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) Counterparts**

- a) This Agreement may be executed in counterparts in the same form and such parts so executed shall together form one original document and be read and construed as if one copy of the 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 biding 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.*

IN WITNESS WHEREOF the parties hereto have executed this Agreement effective this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**TELEVISION PRODUCTIONS LTD.**

Per: \_\_\_\_\_  
Authorized Signatory

**NEW MEDIA PRODUCTIONS INC.**

Per: \_\_\_\_\_  
Authorized Signatory

**Schedule A – to the New Media Production Agreement dated the \_\_\_\_ day of \_\_\_\_\_, 20\_\_ . Between New Media Productions Inc. (“Producer”) and Television Productions Ltd. (“Client”)**

SERVICES

1. Name and Description of Web Project:
  
2. Project Scope of Web Project and Specifications

PRODUCTION BUDGET