

## **CONFIDENTIALITY AND NON-DISCLOSURE 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 enters into a Confidentiality and Non-Disclosure Agreement to protect the confidential information that may be shared with a potential partner or contractor related to the production of an interactive project. The specific obligations of the parties, the main terms of the agreement, the type of confidential information that is to be share may vary and require specific provisions customized for the special needs and concerns of the parties. 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, the author assumes that the “New Media Producer” is a new media producer who has acquired the rights to develop and produce an interactive, web based adaptation of the Program (the “Web Project”). However, it is assumed that it will be necessary for the New Media Producer to collaborate with or hire the services of other companies or individuals to produce the Web Project. Before entering into any formal partnership or professional services agreements, the New Media producer and the other potential collaborator will enter into discussions about the terms of their intended relationship and the nature of work, software development, business plan and other details about the Web Project. The potential collaborators will likely need to disclose confidential information to each other to establish whether they will be able to work together, whether each has necessary skills for Web Project and/or desire to enter into the business relationship. For example, the New Media Producer’s plans for the Web Project may include a function or feature that will require the development of new customized software. In order for the parties to establish whether a particular software development company is the appropriate company to retain for the job, the New Media Producer may have to disclose confidential information about the Web Project, including such information about concept, design, business plans, proprietary software, partners, financial matters and other sensitive information. The potential collaborator may also be required to disclose confidential information to the New Media Producer. The purpose of a Confidentiality and Non-Disclosure Agreement is to provide the parties some protection against the unauthorized disclosure of the confidential information it is necessary to disclose to the other party during and after the period of time the parties are discussing entering into a business relationship with each other. Since these discussions are occurring prior to any decision by the parties to enter into a formal agreement, the parties can’t rely on the confidentiality provisions normally contained in partnership, co-production or production services agreements. This Confidentiality and Non-Disclosure Agreement is specifically designed to contractually oblige the parties to protect the confidentiality of the information provided by the other in the course of these preliminary discussions. Since the parties may choose not to do business together, but have nevertheless disclosed confidential information in the discussions leading up to that decision, the confidentiality obligations must be drafted in such a way to be binding regardless of whether the parties do business together or not and to continue in force even after the discussions have been completed. This Confidentiality and Non-Disclosure Agreement is drafted to achieve reciprocal rights and obligations on both the parties, since both parties may*

*be required to disclose confidential information and generally reciprocal agreements are more easily negotiated and accepted by the parties.*

**CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT**

**THIS AGREEMENT** made as of the \_\_\_ day of \_\_\_\_\_ the “Agreement”).

**B E T W E E N:**

**NEW MEDIA PRODUCTIONS INC.  
 (“New Media Producer”)**

- and -

**[NAME OF COMPANY]  
 (“Company”)**

**WHEREAS** the parties to this Agreement wish to exchange certain confidential and proprietary information for the purpose of entering into discussions regarding a potential business relationship related to the development and production of a web based interactive project (the “Purpose”);

*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 in section 16 below.*

**NOW THEREFORE**, in consideration of one dollar (\$1.00) in Canadian funds and of the mutual promises, covenants and obligations contained in this Agreement, 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. In this situation, since the parties may choose not to enter into a formal business relationship, it is prudent to include a nominal dollar amount to give effect to the actually passing of one to the other some form of “consideration” that will bind the parties to the Agreement.*

1. For the purposes of this Agreement:

**“Confidential Information”** includes, but is not limited to, any information, “know-how”, data, patent, copyright, trade secret, process, technique, program, design, formula, marketing, advertising, financial, commercial, sales or programming data, written materials, compositions, drawings, diagrams, computer or software programs, studies, work in progress, visual demonstrations, business plans, budgets, forecasts, customer data, ideas, concepts, characters, story outlines and other data, in oral, written, graphic, electronic, or any other form or medium whatsoever, which may be exchanged between the parties in pursuance of the Purpose or otherwise. The term “Confidential Information” shall not include the following:

- (i) information which is now or which hereafter becomes publicly known or available through no act or failure on the part of Recipient;
- (ii) information which is actually known to Recipient prior to the time of receipt of such Confidential Information as can be established by evidence that would be acceptable to a Court of competent jurisdiction; or
- (iv) information which is independently developed by Recipient without use of or reference to the Confidential Information of Owner that does not otherwise contravene the terms and provisions of this Agreement, and which such independent development can be established by evidence that would be acceptable to a Court of competent jurisdiction.

*DISCUSSION: It is prudent to try to define what will constitute confidential information for the purposes of this Agreement. The list of the types of information that is to be considered Confidential Information in this situation is long and varied, but is also not exhaustive in order to give the broadest possible protection. The purpose is to provide protection even though the parties may not know at the beginning of their discussions exactly what may be required to be disclosed to the other to achieve their purpose of deciding whether to do business together. The definition includes written and oral communications, as well as proprietary software, “know-how”, trade secrets, business plans, etc. However, the kind of information that will be considered confidential shall not include information that is already or will be made public, information that is known to the Recipient before receiving the same information from the Owner and information that’s developed independently by the Recipient without the use of the Confidential Information. Therefore the Agreement is implicitly acknowledging that it would be unfair to hold the Recipient responsible for keeping confidential such information since it is not actually confidential under the circumstances described. Sometimes, parties will specifically name information that is to be considered either confidential or to which the confidentiality obligations are not to apply. Some confidentiality agreements will require that any information that is to be considered confidential be marked and identified as such, but that can lead to onerous paperwork and the chance that something that is in fact sensitive and confidential information is disclosed due to an inadvertent failure to identify it as confidential.*

**“Owner”** means the party hereto which possesses the intellectual property rights or other proprietary rights in and to an item of Confidential Information, as the context requires, and includes, without limitation, an owner, possessor, developer and licensee of such Confidential Information.

**"Recipient"** means the party hereto who receives or is otherwise privy to, or comes into possession of, an item of Confidential Information of which it is not the Owner.

*DISCUSSION: Since this Agreement is meant to be reciprocal, the identities of the Owner and the Recipient will apply to both parties and be interchangeable depending on the particular piece of Confidential Information at issue and which party is giving and receiving it.*

2. All Confidential Information constitutes the sole and exclusive property and the Confidential Information of the Owner, which the Owner is entitled to protect. Recipient shall only use the Confidential Information strictly for the Purpose. Recipient shall hold and maintain all Confidential Information of the Owner in trust and confidence for the Owner and shall use commercially reasonable efforts to protect the Confidential Information from any harm, tampering, unauthorized access, sabotage, access, exploitation, manipulation, modification, interference, misuse, misappropriation, copying or disclosure.

*DISCUSSION: This provision stipulates the ownership of the Confidential Information and imposes obligations on the Recipient to maintain the secrecy of such information for the benefit of the Owner and use commercially reasonable efforts to protect it from unauthorized disclosure, use or harm.*

3. Recipient shall not, without the prior written consent of the Owner, disclose any Confidential Information to any person or entity other than:
  - a. to such of its employees, officers, directors, contractors, agents and professional advisors, as applicable, and in such event only to the extent necessary for the Purpose and provided that Recipient shall, prior to disclosing the Confidential Information to such employees, officers, directors, contractors, agents and professional advisors, issue appropriate instructions to them to satisfy its obligations herein and obtain their agreement to receive and use the Confidential Information on a confidential basis on the same conditions as contained in this Agreement; or
  - b. as required pursuant to any law, court order or other legal compulsion, provided that, prior to such disclosure, Recipient shall first notify Owner in writing of such disclosure requirement and assist the Owner in protecting such Confidential Information from disclosure.
  - c. The Recipient shall be fully responsible to ensure that each of its employees, officers, directors, contractors, agents and professional advisors that receive the Confidential Information from the Recipient, handles the Confidential Information as required by this Agreement, and Recipient shall be liable for any loss or damage resulting from any failure to do so. The Recipient shall notify the Owner promptly of any unauthorized use, disclosure or possession of the Confidential Information that comes to the Recipient's attention.

*DISCUSSION: This provision prohibits the Recipient from disclosing the Confidential Information to anyone other than its employees, contractors and professional advisors and only to the extent necessary for the Purpose provided that it obtain the agreement of such authorized recipients to abide by the same obligations of confidentiality contained in the Agreement. Under this clause, the Recipient shall be held responsible for any failure of its employees and professional advisors authorized to receive the Confidential Information to keep it confidential. It also obligates the Recipient to notify the owner of any unauthorized activities relating to the Confidential Information it becomes aware of*

4. The Confidential Information shall not be copied, reproduced in any form or stored in a retrieval system or data base by the Recipient without prior written consent of the Owner, except for such copies and storage as may reasonably be required internally by Recipient for the Purpose.

*DISCUSSION: The Recipient may only keep copies of the Confidential Information as is reasonably required within its organization for the Purpose.*

5. Upon request of the Owner, Recipient shall immediately return to the Owner all Confidential Information, including all records, summaries, analyses, notes or other documents and all copies thereof, in any form whatsoever, under the power or control of the Recipient and destroy the Confidential Information from all retrieval systems and databases. The return of such documents to the Owner shall in no event relieve the Recipient of its obligations of confidentiality set out in this Agreement with respect to such returned Confidential Information.

*DISCUSSION: The Recipient is required to return all copies of the Confidential Information to its Owner upon request. Nevertheless the confidentiality obligations survive notwithstanding the Recipient is no longer in possession of the Confidential Information.*

6. In the event that the business relationship contemplated by this Agreement does not occur, neither party will use or permit the use of any of the Confidential Information of which it is the Recipient for its own benefit, nor for the benefit of any third party or for any other purpose that the Purpose defined herein. Regardless of whether the business relationship contemplated by this Agreement occurs, the rights and obligations set out in this agreement shall survive from the date of this Agreement and continue for a period of X years.

*DISCUSSION: The intent of this provision is to ensure that even if the parties decide not to enter into a business relationship with each other, that it is clear the obligations contained in this Agreement continue to bind the parties for a period of time after the closing of discussions. The Confidential Information received in the course of discussions will not be used by either the Recipient or any other party.*

7. Neither this Agreement nor the disclosure of any Confidential Information to Recipient shall be construed as granting to Recipient any rights in, to or in respect of the Confidential Information.

*DISCUSSION: This expressly states that the Agreement and the act of receiving the Confidential Information do not provide the Recipient with any rights in it.*

8. The provisions hereof are necessary to protect the trade, commercial and financial interests of the parties. The parties acknowledge and agree that any breach whatsoever of the covenants, provisions and restrictions herein contained by either party shall constitute a breach of that party's obligations to the other party which may cause serious damage and injury to the non-breaching party which cannot be fully or adequately compensated by monetary damages. The parties accordingly agree that in addition to claiming damages, either party not in breach of this Agreement may seek interim and permanent equitable relief, including without limitation interim, interlocutory and permanent injunctive relief, in the event of any breach of this Agreement. All such rights and remedies shall be cumulative and in addition to any and all other rights and remedies whatsoever to which either party may be entitled.

*DISCUSSION: The purpose of this provision is to expressly state that a breach of the Agreement could constitute serious damage and injury to the non-breaching party that will not be fully compensated by monetary damages and expressly acknowledges the injured party's right to seek other additional remedies, such as a court injunction to prohibit the unauthorized use or disclosure of the Confidential Information.*

9. The parties agree that the execution of this Agreement does not in any way constitute a partnership or joint venture or binding commitment on the part of either party to enter into or complete negotiations or any transaction with the 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 and acknowledges that the execution of the Agreement does not constitute a commitment to enter into a business relationship with the other.*

10. This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes and overrides any prior or other agreements, representations, warranties, understandings and explanations between the parties hereto with respect to the subject matter of this Agreement.

*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. It prevents either party from relying on anything external to the written Agreement, such as oral promises or inducements.*

11. This Agreement shall be binding upon the trustees, receiver, heirs, executors, administrators, successors and assigns of the parties.

*DISCUSSION: Both parties will want the confidentiality obligations to bind any successors in interest or assignees.*

12. This Agreement shall be exclusively governed by, and construed in accordance with, the laws of the province of X and the laws of Canada applicable therein. The parties hereby submit and attorn to the exclusive jurisdiction of the courts of the province of X.

*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.*

13. The invalidity or unenforceability of any provision or part thereof of this Agreement shall not affect the validity or enforceability of any other provision and such invalid or unenforceable provision shall be deemed severed from the remaining provisions herein and such remaining provisions 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.*

14. No waiver of any breach of any provision of this Agreement will be effective or binding unless in writing and signed by 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.*

15. 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: However this clause contemplates the possibility that the Parties may prefer to sign the execution pages of the Agreement in counterparts 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.*

16. The recitals to this Agreement are hereby incorporated into and form part of this Agreement.

*DISCUSSION: See notes above related to recitals.*

**IN WITNESS WHEREOF** New Media Productions Inc. and Company have executed this Agreement as of the date first above written.

**NEW MEDIA PRODUCTIONS INC.**

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

**[NAME OF COMPANY]**

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