

## **DISTRIBUTION 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 the owner of an interactive new media property grants the distribution rights to a distributor. Indeed there are very few precedents or industry standards for the distribution of new media projects like the interactive new media property described below, which is an interactive adaptation based on a television program that is designed to enhance and add value to the program. In fact, many producers who apply to the Bell Broadcast and New Media Fund don't enter into a separate distribution agreement with a distributor, but rather sometimes add provisions dealing with the distribution of the new media project directly into their Co-Production Agreements. Sometimes the distributor is added as a third co-production partner in exchange for a distribution cash advance to assist with the production budget. Where the owner and producer of the new media project is also the television producer of the program, it may be sufficient to merely add clauses dealing with the distribution of the interactive project in an agreement with the distributor who is distributing the television program. Additionally, some new media production companies and television production companies operate distribution companies that are used to distribute their own new media and television works. Therefore, although the sample distribution agreement provided below is based on examples of real transactions, by no means should the reader conclude that the Agreement reflects the entire commercial reality currently in existence in Canada, that it will apply to all circumstances or that a distributor will accept all the provisions as drafted. The comments provided herein are for educational purposes only and should not be construed as providing any legal advice whatsoever. Anyone contemplating using this template agreement for commercial purposes should consult an experienced lawyer for advice and guidance. It should not be used as a substitute for consulting with legal counsel and receiving advice based on the circumstances of a particular transaction. Due to the pace of technological change, business practices, distribution methods and the law applicable to new media is constantly and rapidly changing. Many of the legal principles discussed below are subject to exceptions and qualifications that may not be mentioned and case law and legislation may vary from jurisdiction to jurisdiction.*

*In the following Agreement, it is assumed that the "Producer" is a new media production company that is producing and owns all rights in a web based interactive property ("Web Project") that is based on a television program (the "Program") and is designed to enhance the viewers' experience of the Program. For the purposes of this sample agreement, it is assumed that the Web Project has little or no market independent from the Program and that they are inextricably linked. (This is not always the case. There may be many potential formats in which a new media project could be deployed and distributed independently from the Program. Also, some properties are developed as interactive new media projects first and are adapted as television productions, in which case a different distribution model might be used.) However, for the purposes of this fact scenario, it is assumed that the intention is to distribute the Web Project in association with the Program. It may be important to link their distribution if the deployment of content in the new media project could reveal plot developments in episodes of a television series, were they not coordinated and appropriately timed to work together. Also, since this Web Project is based on a television Program, it may make sense to grant distribution rights in the Web Project to the same party that distributes the Program, as one of the formats that the Web Project is designed for is exhibition on the website of the broadcaster who licenses the broadcast rights to the Program. In this fact scenario, it is assumed that the television producer has granted the distribution rights in the Program to the Distributor in a separate agreement. Consequently, the new media Producer, who is assumed to own all rights in the*

*Web Project, is entering into a distribution agreement directly with the Distributor of the Program to distribute the Web Project in association with the Program. Indeed, the Distributor may be a wholly owned subsidiary or related company to the television production company that produced the Program. In any case, any Distributor will have standard form agreements that it uses for all the programs and new media projects it distributes. Therefore, this sample Agreement is based on template distribution agreements that exist in the Canadian marketplace, but modified to reflect the different considerations arising from the distribution of a new media project being distributed in association with a television program.*

**DISTRIBUTION AGREEMENT**

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

**BETWEEN:**

**WORLDWIDE DISTRIBUTING LTD. (“Distributor”)**  
a corporation incorporated under the laws of the Province of X,

THE FIRST PARTY,

- and -

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

THE SECOND PARTY,

**WHEREAS** Distributor is in the business of distributing television, film and new media properties throughout the world; and

**WHEREAS** Distributor has entered into an agreement to distribute the television production entitled “Stranger than Fiction” (the “Program”); and

**WHEREAS** Producer is the producer of, and owns all right title and interest, including copyright, in and to, an interactive web-based righ-media property tentatively entitled “Stranger Than Fiction Interactive” based on the Program ( the “Web Project”); and

**WHEREAS** Producer wishes to retain the services of Distributor to distribute the Web Project in association with the Program;

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

*describing the objectives of the parties to be prudent to include as terms of the agreement. In this case, the recitals were expressly incorporated as part of the agreement pursuant to section 19 below. As discussed above, it is assumed that the Distributor has already acquired the distribution rights to the Program upon which the Web Project is based.*

**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. Grant of Distribution Rights**

- (a) The Producer grants to the Distributor the exclusive right, license and privilege to distribute the Web Project in all languages and versions and digital formats in all media now known or in future devised, including all upgrades, enhancements, modifications and functional substitutions therefore, throughout the Territory for the applicable Term, as defined hereunder, including but not limited to the right to license the Web Project or components thereof to broadcasters or other licensees.

*DISCUSSION: In this fact scenario, the grant of distribution rights to the Web Project will likely mirror the grant of distribution rights of the Program. However, distribution rights can be carved up in a multitude of ways, based on different digital formats such as websites, interactive television, gaming platforms, CDROM, DVDROM and systems of distribution such as set top box, cellular phone, hand held devices, PC, console, kiosk, digital display units, television and the Internet. The new media Producer may want to place limiting language in relation to the grant of rights if there is a possibility the Web Project could be adapted into another format that is potentially marketable and to which it may wish to reserve rights. The new media Producer will want to ensure that the Distributor has the necessary market expertise and contacts to distribute the Web Project in the particular formats in which the Web Project may be deployed before granting those specific rights. In some cases, the new media Producer may want to reserve (or retain) certain rights in specific formats and systems of distribution. Alternatively, it may want to reserve the right to distribute in specific markets or territories. The specifics of the grant of distribution rights can be complicated and detailed, may vary widely from project to project depending on the nature of the new media property, and will depend on the negotiations between the parties. In this fact scenario, the new media Producer has not reserved any rights.*

## **2. Term and Territory**

- (a) The Term of this Agreement shall be [X] years commencing on [the completion of the Web Project currently schedule for (Date)] [the execution of this Agreement] unless sooner terminated in accordance with this Agreement and upon the expiry of the Term the contract shall automatically renew without further documentation or agreements being necessary for successive terms of the same duration, unless either party wishes to

terminate upon written notice to the other to be given not less than ninety (90) days prior to the date of the expiration of the Term or any successive term.

- (b) The Territory of this Agreement shall be the world.

*DISCUSSION: In this situation, it is logical that the Term of the Agreement should coincide with the Term of the Distribution Agreement for the television Program, since they will be distributed in association with each other. However, the new media Producer may want to exercise caution if the distributor has no track record in distributing new media productions. In such a case, a new media Producer may want to limit the length of the Term to discover whether the Distributor can be an effective distributor of interactive products. Terms for distribution agreements vary in the industry. Some distributors require terms of 20 years or more. This Agreement contains what is known as an "evergreen" clause, in that it is assumed to contain a shorter Term that will automatically renew for successive terms of the same duration unless the Agreement is terminated. Not all distributors will be willing to agree to shorter terms.*

### 3. **Distribution**

- (a) The Distributor agrees to use commercially reasonable efforts consistent with industry standards to distribute the Web Project in association with the Program.
- (b) Notwithstanding the forgoing, the Producer acknowledges and agrees that not all purchasers of the Program will necessarily wish to purchase the rights to the Web Project. Therefore, the Producer acknowledges and agrees that the Distributor has the right to distribute the Program independently from the Web Project.
- (c) Where necessary to complete a sale of the Web Project, Producer agrees to provide its services to install the Web Project for use on the purchasers' servers, provided however that the Producer is paid a minimum fee of \$[X] for its services and the sale that requires the installation services generates a minimum of \$[X].
- (d) In the event that the Web Project requires versioning and localization to complete a sale, the Distributor agrees to use commercially reasonable efforts to procure from purchasers of the Web Project a first right of refusal to the Producer to provide such versioning and localization services for the Web Project, the terms of the agreement to provide such services shall be negotiated in good faith, based upon industry standard hourly rates.
- (e) In the event that the purchaser may require ongoing maintenance and technical services for the Web Project, the Distributor agrees to use commercially reasonable efforts to procure from purchasers of the Web Project a first right of refusal to the Producer to provide such maintenance and technical services for the Web Project, the terms of the agreement to provide such services shall be negotiated in good faith, based upon industry standard hourly rates.

*DISCUSSION: The Distributor should be expected to use reasonable commercial efforts to distribute the Web Project in association with the Program. However, since the license fee for the Program is likely to be higher than for the Web Project, the Distributor will not want to lose sales of the Program to purchasers who are unwilling to also license the Web Project. Therefore the Distributor may want to preserve the ability to license the Program independently from the Web Project. Since the new media Producer knows the software and design of the Web Project intimately, it is the appropriate party to perform the installation for the purchaser.*

*Indeed the new media Producer may wish to do so to protect proprietary software imbedded in the Web Project and/or achieve an additional source of revenue for the company. However, the new media Producer wants to ensure that it is not obliged to commit its resources unless it is paid a certain fee and that the revenue generated from the sale to which it is entitled a share is for a sum large enough to make the provision of the service financially viable and worth the effort. International sales may require the Web Project to be “versioned” or translated into foreign languages. Versioning of an interactive new media project may involve the translation of text, re-record of audio voice performances, substitution of music and reprogramming efforts involved in replacing the original language content with the foreign language content. “Localization” is the act of graphical and technical changes that are made to the Web Project to conform to local tastes and include such things as adding branding, broadcaster advertising materials, incorporating or deleting materials, adapting video content for lower or higher speed downloads and adapting existing website infrastructure. Since the Producer has the most intimate understanding of both the content and the design of the Web Project, the Producer would likely be the party best suited to provide such services to the purchaser. Likewise, the purchaser of the Web Project may need ongoing maintenance and technical services after the Web Project is delivered and installed. Here, the Distributor agrees to use commercially reasonable efforts to procure a first right of refusal for the Producer to provide such services to the purchaser on terms to be negotiated in good faith.*

#### **4. Gross Receipts**

- (a) “Gross Receipts” is defined as meaning all monies actually received by Distributor from the distribution of the Web Project throughout the Territory during the Term and shall include all sub-agent and sub-distributor fees, any such sub-agent and sub-distributor fees to be paid out of the Distributor’s share of Gross Receipts.

*DISCUSSION: It is typical that “Gross Receipts” will include all sub-agents and sub-distributor fees, but that such fees should be paid out of the Distributor’s share of the Gross Receipts.*

#### **5. Adjusted Receipts**

- (a) “Adjusted Receipts” is defined as meaning Gross Receipts less the costs of installing or customizing the Web Project in circumstances where such installation or customization services are necessary to complete a sale of a license to the Web Project.

*DISCUSSION: Sometimes it is necessary to customize interactive projects for the specific requirements of the licensee’s website. Therefore this Agreement contemplates that possibility and deducts the cost of such installation to arrive at “Adjusted Receipts” since the Gross Receipts and Adjusted Receipts will be divided between the parties in accordance with the terms of this Agreement.*

#### **6. Distribution Expenses**

- (a) “Distribution Expenses” is defined as meaning any and all bona fide out of pocket expenses and costs incurred by Distributor that are directly related to the promotion, marketing and distribution of the Web Project, including but not limited to publicity sheets, promotional brochures, festival entries, telephone and courier charges incurred specifically relating to the distribution of the Web Project as such costs are standard in the industry.

- (b) All Distribution Expenses incurred by Distributor shall be reimbursed to the Distributor from Gross Receipts or Adjusted Receipts as applicable.

*DISCUSSION: In order to generate sales, the Distributor will incur expenses related to the promotion and marketing of the Web Project. The list of expense that the Distributor will be entitled to deduct from Gross Receipts is typically quite long and not exhaustive. However, the new media Producer should pay attention to how such expenses are defined as it will impact the amount of money it will realize from the sale and it should try to negotiate the inclusion of some limiting language that will make the expenses "bona fide" and consistent with industry standards.*

## **7. Distributor's Commission**

- (a) Distributor shall be entitled to retain thirty percent (30%) of Gross Receipts or Adjusted Receipts, as applicable, as its distribution commission earned for the sale ("Commission").
- (b) For clarity, such Commission shall be inclusive of any sub-distribution or sub-agency fees.

*DISCUSSION: Typically, a distributor will charge a commission fee of 20% to 40% for distributing television and film properties, and sometimes more depending on the specific territory and nature of the market. Consequently, it is assumed in this fact scenario that the fee for distributing the Web Project will likely mirror the fees for distributing the television Program.*

## **8. Remittance of Net Receipts**

- (a) "Net Receipts" is defined as meaning all Gross Receipts or Adjusted Receipts, as applicable, less the Distributor's Commission and after the deduction of Distribution Expenses and the recoupment of Distributor's distribution advance, if any.
- (b) The Distributor shall remit to the Producer on a quarterly basis within thirty (30) days from the end of each quarterly period, the Net Receipts earned on the distribution of the Web Project together with the Report for that period.

*DISCUSSION: This provision reflects the typical arrangement whereby the parties to a distribution agreement share revenues. The Distributor is entitled to deduct its Distribution Expenses and Commission Fee from the Gross (or Adjusted) Receipts to arrive at "Net Receipts". If the Distributor also provided a distribution advance (rare for new media projects but sometimes occurs), the Distributor will be entitled to recoup the advance before sharing any receipts with the Producer. The remaining Net Receipts are paid to the new media Producer on a quarterly basis.*

## **9. Reports**

- (a) The Distributor shall provide the Producer on a quarterly basis setting out the amounts realized on the distribution of the Web Project including the name of the purchaser, the Gross Receipts, the Adjusted Receipts if applicable, the Commission, the Distribution Expenses and the Net Receipts.

*DISCUSSION: Normally, a distributor will provide its customers with Reports on sales with the payment to the Producer. The Producer should ensure that the Report contains all the relevant information it will require to verify the proper calculation of Net Receipts to ensure it is being paid appropriately.*

#### **10. Inspection of Books and Records**

- (a) The Distributor shall maintain in the province of [X] proper books and records in relation to the matters set out in this Agreement and in accordance with generally accepted accounting principles. For the purposes of verifying the accuracy of the Reports and the remittance of Net Receipts, the Producer or its authorized agent shall be entitled, during normal business hours and upon 48 hours prior notice, to examine at its own expense such books and records, and may at any time and at its own expense require an audit of such books and records.

*DISCUSSION: It is prudent for the Producer to ensure that the Distributor has a contractual obligation to keep proper records and accounts consistent with generally accepted accounting principles and that Producer has a right to inspect the records of the Distributor. Sometimes such right of inspection and audit is made to be at the expense of the Distributor, if such inspection or audit reveals that the Producer has not been paid what it is owed and provided the variance isn't about a trivial amount.*

#### **11. Producer's Representations and Warranties**

- (a) The Producer represents and warrants to the Distributor:
  - (i) that it owns all right title and interest, or has acquired all the necessary licenses and grants of rights, including but not limited to copyright, in and to the Web Project and has the right to enter into this Agreement and to grant the Distributor the distribution rights herein granted;
  - (ii) that no part of the Web Project or the exercise by the Distributor of the rights herein granted will violate or infringe upon any rights of any third party, including but not limited to copyright, trademark rights, or any other proprietary right or interest of any kind; and
  - (iii) that the Web Project does not contain any defamatory or illegal material or violate any law.

*DISCUSSION: Typically the Distributor will make few or no representations and warranties to the Producer. However, the Distributor will want to ensure the Producer has the necessary rights in the Web Project to grant the distribution rights to the Distributor and that the Web Project does not contain any unlawful content or will infringe upon any third party's rights.*

#### **12. Indemnification**

- (a) Producer shall indemnify and save harmless the Distributor, its assigns and licensees from and against any and all losses, damages, actions or causes of action, suits, claims, demands, penalties and interest arising in connection with or out of the Producer's breach of any representation and warranty.

*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.*

**13. Termination**

- (a) Pursuant to section 2(a), either party may terminate this Agreement upon written notice to the other to be given not less than ninety (90) days prior to the date of the expiration of the Term or any successive term.
- (b) Bankruptcy or insolvency, the appointment of a private or court ordered receiver of Distributor or non-payment of Producer's share of Gross or Adjusted Receipts shall be deemed grounds for termination of this Agreement by Producer upon ten (10) days written notice.

*DISCUSSION: Subsection 13(a) reflects the abilities of both parties to terminate the agreement during the last 90 days of the Term or any successive term to bring an end to the automatic renewal discussed in Subsection 2(a). The termination right given to the Producer in Subsection 13(b) is unusual and not all distributors will agree to its inclusion. However, the Producer will not want its distribution rights to be tied up with a company that goes bankrupt or is failing to pay the Producer the share of revenue to which it is entitled.*

**14. 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 the Producer:      [Contact Name]  
NEW MEDIA PRODUCTIONS INC.  
[Address]  
[Phone & Fax Number]

To Distributor:      [Contact Name]  
WORLDWIDE DISTRIBUTING LTD.  
[Address]  
[Phone & Fax Number]

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

**15. 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.

*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.*

**16. 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.*

**17. 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.*

**18. Governing Law**

- (a) This Agreement shall be governed by and construed in accordance with the laws of the Province of X in 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. However, since this Agreement is likely to be a standard form template to be used with all its producers, the governing law will likely be the province in which the Distributor locates its head office.*

**19. 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 the Agreement 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.*

**20. 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.

*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.*

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

**WORLDWIDE DISTRIBUTING LTD.**

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

**NEW MEDIA PRODUCTIONS INC.**

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