SOFTWARE ESCROW 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 software developer agrees to place in escrow copies of its proprietary software for the benefit of a new media producer who has licensed the right to use the software in a new media project. 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. Indeed, it is unlikely that the parties would contemplate incurring the costs associated with an escrow agreement unless the proprietary software was very valuable and it was critical to protect the source code and other confidential aspects of the software and there was no other means of doing so. Software escrow agreements are used when the software developer does not want to provide the source code to the licensee of the software in order to protect its trade secrets and valuable proprietary software. Typically, the software license will have included a maintenance agreement whereby the software developer provides its services to update, maintain and repair the software licensed to the Licenses, since the Licensee will be unable to perform those services without the source code. However, should the developer go out of business or is otherwise unable to provide such maintenance services, the Licensee will not be able to maintain the software it has properly licensed absent the source code. The purpose of the escrow agreement is to protect the Licensee's right to access the source code should certain triggering events occur during the term of the license. The developer deposit a copy of the source code in the hands of an independent third party who is contractually obliged to keep it safe and confidential during the term of the license and to release it to the Licensee if the developer goes out of business or is otherwise unable to continue to maintain it for the Licensee.

In the following Agreement, it is assumed that New Media Productions Inc. ("Licensee") has licensed certain proprietary software from the "Developer" for use in an interactive new media project ("Web Project") the Licensee is producing. The Developer has not given the Licensee the source code. Together they have agreed to enter into a Software Escrow Agreement with an Escrow Agent. 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.

SOFTWARE ESCROW AGREEMENT

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

BETWEEN:

NEW MEDIA PRODUCTIONS INC. ("Licensee")

a corporation incorporated under the laws of the Province of X,

- and -

SOFTWARE DEVELOPMENT LTD. ("Developer")

a corporation incorporated under the laws of the Province of X,

THE SECOND PARTY,

-and -

ESCROW AGENCY LTD. ("Escrow Agent")

a corporation incorporated under the laws of the Province of X,

THE THIRD PARTY

WHEREAS Developer has entered into a license agreement dated ______ (the "License") with Licensee wherein Developer has licensed the use of certain materials and proprietary software (the "Materials") in connection with the development and production of an interactive web-based new media project tentatively entitled "Stranger than Fiction Interactive" (the "Web Project"); and

WHEREAS Developer wishes to protect the confidentiality of its Materials while providing Licensee with access to the Materials in the event that certain circumstances described in this Agreement occur; and

WHEREAS Developer wishes to deposit such Materials in escrow to be held by Escrow Agent in accordance with the terms and conditions of this Agreement.

DISCUSSION: The "Whereas" clauses are known as "recitals" and are not considered technically part of the terms and conditions of the contract, unless expressly made so within the contract terms. The role of recitals is to provide some background and context to assist in explaining of the identity of parties and the objectives of the agreement. They are often used to include definitions of key terms that are defined and identified by capitalization. The question of whether recitals should be made part of the terms of the agreement will depend on their contents and drafting. For example, some recitals may include language that is overly broad, vague or too optimistic in describing the objectives of the parties to be prudent to include as terms of the agreement. In this case, the recitals were expressly incorporated as part of the agreement pursuant to section 14 below.

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

DISCUSSION: The inclusion of this standard language is prudent, because it makes express mention of the fact that the Parties, by executing the contract, agree that some form of "valuable consideration" is passing between them and they acknowledge that it is sufficient to bind each of them to the terms of the agreement. "Valuable consideration" may consist of some right,

interest, profit or benefit accruing to one party, or some detriment, loss or responsibility given suffered or undertaken by the other. A contract must include some form of "consideration" to be binding on its parties rather than be interpreted as a bare promise that is under law unenforceable.

1. Appointment of Escrow Agent and Escrow Fees

- (a) Developer and Licensee hereby appoints Escrow Agent to hold the Materials as defined herein in accordance with the terms and conditions of this Agreement and Escrow Agent agrees to act in such capacity.
- (b) In consideration for the services to be performed hereunder, Developer shall pay to Escrow Agent a monthly escrow fee of \$[X] dollars. In the event of non-payment of escrow fees, Escrow Agent will give Developer and Licensee sixty (60) days notice of default. In the event that the sixty (60) day notice period elapses without Escrow Agent having received payment, Escrow Agent shall have the right, without further notice being required and without any liability to any party whatsoever, to terminate this Agreement and destroy the Materials or, at the request of the Licensee, release and deliver the Materials to the Licensee.

DISCUSSION: The Developer and the Licensee agree to appoint the Escrow Agent and to pay the applicable fees for the services. In this case, the Developer is paying the escrow fee, but the question of who will pay such fees is often the subject of negotiation between the developer and the licensee of software and sometimes the cost of the service is shared between them. In this case, the Escrow Agent has a powerful tool to force the Developer to pay the fees, since in the event the Distributor defaults, the Escrow Agent can destroy or release the Materials to the Licensee.

2. Term of this Agreement

(a) The term of this Agreement shall commence on the date of this Agreement and shall continue in full force and effect so long as the License remains in full force and effect, unless this Agreement is terminated as hereinafter set out.

DISCUSSION: The term of the Software Escrow Agreement should coincide with the term of the software license between the Developer and the Licensee.

3. **Materials Deposited in Escrow**

(a) Developer agrees to deposit with Escrow Agent one copy of all the constituent elements of the proprietary software including but not limited to text, data, images, animation, graphics, video and audio segments and source and object code and user and system documentation of all software licensed to Licensee in connection with the Web Project (collectively, the "Materials")

DISCUSSION: The Developer deposits into the safe keeping of the Escrow Agent a copy of the software, including source code.

4. Modifications to Materials to be Deposited

(a) Developer may, from time to time, update, improve or modify the Materials used by the Licensee in connection with the Web Project. Developer agrees to deposit or cause to be deposited with the Escrow Agent, at the time such updates, improvements or modifications are made, one copy of such modified Materials which shall be deemed part of the Materials deposited in escrow under this Agreement.

DISCUSSION: Any modifications or updates made to the software licensed to the Licensee should also be put in escrow with the original deposited material.

5. Release and Delivery of Materials by Escrow Agent

- (a) The occurrence of any of the following events ("Release Events") shall provide to the Licensee the right to request the Escrow Agent to release and deliver the Materials held in escrow to the Licensee:
 - (i) Developer ceases to carry on business;
 - (ii) Developer becomes bankrupt, insolvent or the subject of receivership;
 - (iii) Developer commits a material breach of the License.

DISCUSSION: The nature and number of "triggering" events that the parties agree should cause the release of the software to the Licensee can be extensive and detailed and are often the subject of extensive negotiation between the Developer and the Licensee. Generally, however, the nature of the event is related to the Developer going out of business, becoming bankrupt or breaching the software license agreement.

6. Notice of Release Event

(a) Should Licensee wish the Escrow Agent to release and deliver to the Licensee the Materials held in escrow upon the occurrence of any of the Release Events, the Licensee shall give thirty (30) days written notice to the Escrow Agent and Developer specifying the Release Event in question. If Developer wishes to refute the occurrence of the Release Event, it shall give written notice to Escrow Agent and Licensee prior to the expiry of the thirty (30) day period and this Agreement will remain in full force and effect. If Developer does not give written notice of its refutation to Escrow Agent and Licensee prior to the expiry of the thirty (30) day period, Escrow Agent shall release and deliver the Materials held in escrow to Licensee.

DISCUSSION: If any of the specified events occurs, the Licensee is required to give notice to the Escrow Agent and Developer notice, and upon receipt the Escrow Agent is required to release the escrowed materials to the Licensee.

7. Termination

(a) In the event that Developer wishes to terminate this Agreement, Developer shall give thirty (30) days written notice to Escrow Agent and Licensee. If Licensee wishes to object to the termination, it shall give written notice of its objection to Escrow Agent and Developer prior to the expiry of the thirty (30) day period and this Agreement will remain

in full force and effect. If Licensee does not give written notice of its objection to Escrow Agent and Developer prior to the expiry of the thirty (30) day period, this Agreement shall be deemed terminated and Escrow Agent shall release and deliver the Materials held in escrow to Developer.

DISCUSSION: Both the Developer and the Licensee must agree to terminate the Agreement. Presumably they would agree to terminate if the License was terminated and neither required the protection offered by the Escrow Agreement. However, in the event that the Licensee objects to terminating the Agreement, the Agreement will remain in effect.

8. Representations, Warranties and Indemnifications

- (a) Escrow Agent represents and warrants that:
 - (i) Other than being a party to this Agreement, it is an independent third party in respect to the Developer and Licensee and is not an affiliated, associated or related entity to Developer or Licensee;
 - (ii) It has the right and capacity to enter into this Agreement and fully perform all of its obligations and provide the services hereunder;
 - (iii) It shall use commercially reasonable efforts to keep the Materials in safe keeping and perform its obligations as Escrow Agent in accordance with the terms of this Agreement;
 - (iv) It shall not disclose to any third party or make use of the Materials without the express written approval of Developer and Licensee;
 - (v) It shall takes such steps as are reasonably necessary and desirable to protect the confidentiality of the Materials and prevent the unauthorized disclosure thereof, including without limitation storing the Materials in such away to preserve the confidentiality of the Materials and restrict disclosure of and access to the Materials.
- (b) Escrow Agent shall indemnify and save harmless Developer and the Licensee from any and all damages, costs, liability, expenses, including reasonable legal fees, suffered by Developer and/or Licensee as result of any breach of its representations and warranties. Notwithstanding the forgoing, Escrow Agent shall not be held responsible or liable for any acts of Developer and/or Licensee and Escrow Agent shall have no liability under this Agreement whatsoever except for its acts of negligence, misconduct or a material breach of this Agreement. Developer and Licensee shall indemnify and save harmless Escrow Agent from any and all damages, costs and liability suffered by Escrow Agent arising as result of the breach of this Agreement or the License or breach or infringement any law or right of any third party by Developer and/or Licensee.

DISCUSSION: The Escrow Agent will be required to represent and warrant that it has the capacity to enter the Agreement and perform its services, that it will protect the confidentiality of the Materials held in escrow by it, and that it will not use the Materials for any other purpose than fulfilling its obligations under the Agreement. The Escrow Agent agrees to indemnify the other parties for any damages they suffer as a result of its breach of its representations and warranties, however it specifically disclaims any responsibilities or liabilities relating to the

relationship between the Developer and the Licensees. Likewise, the Developer and the Licensee agree to indemnify the Escrow Agent from any damages it suffers as a result of their breach of the Agreement or the License.

9. **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 Developer: [Contact Name]

SOFTWARE DEVELOPMENT LTD.

[Address]

[Phone & Fax Number]

To Licensee: [Contact Name]

NEW MEDIA PRODUCTIONS INC.

[Address]

[Phone & Fax Number]

To Escrow Agent: [Contact Name]

ESCROW AGENCY 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.

10. Force Majeure

(a) No party hereto shall be responsible for any losses or damages to any other party occasioned by delays in the performance or non-performance of any of its 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 non-performing party.

DISCUSSION: This clause is intended to protect each of the parties from their respective failure to perform its obligations as a result of an "act of God" over which it has no control.

11. 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.

12. **Assignment**

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

DISCUSSION: None of the parties will want the others to be able to "assign" or sell the Agreement to a third party with whom it has no knowledge, experience or prior relationship without prior approval.

13. **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 by the Escrow Agent for all its clients, the governing law will likely be the province in which the Escrow Agent locates its head office.

14. Entire Agreement

(a) This Agreement, including the recitals, 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 any 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 all the Parties.

15. **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 all the 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 Agreement in counterparts 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 all signed the same document.

effective this			WHEREOF y of		have	executed	this	Agreement
SOFTWARE	DE'	VELOPME	NT LTD.					
Per:Autho	orized	d Signatory						
NEW MEDIA	PR	ODUCTIO	NS INC.					
Per:Autho	orized	d Signatory						
ESCROW A	GEN	NCY LTD.						
Per:Autho	orized	d Signatory						