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Distribution Agreement

This agreement is a bundling agreement used by a multimedia publisher where the OEM intends to manufacture from a golden master provided by the publisher.

This Agreement, effective _____, 2____, is made between _____, a _____ Corporation with its principal place of business at _____ (“Publisher”) and Distributor, a _____ corporation with its principal place of business at _____ (“Distributor”).

Recitals:

Publisher has expended considerable time, effort, and resources in the development and/or publishing of certain unique, copyrighted and proprietary interactive multimedia products and software, and the documentation and packaging materials related thereto (the “Publisher Products” as defined below);

Distributor desires to act as a distributor of the Publisher Products bundled together with the products of Distributor or of third parties, and represents to Publisher that Distributor has sufficient expertise, resources, and personnel to perform its obligations under this Agreement;

Distributor further desires to manufacture the Publisher Products for purposes of such distribution; and

Publisher desires to have Distributor act as a manufacturing distributor of the Publisher Products on the terms and conditions set forth herein.

Therefore, in consideration of the mutual covenants and promises contained herein, the parties hereto agree as follows:

A. DEFINITIONS

1. “Publisher Products” shall mean the products identified in Exhibit A attached hereto, together with any accompanying documentation, packaging, or other materials identified on Exhibit A (if any). Publisher, in its sole discretion, reserves the right to add Publisher Products to or delete Publisher Products from Exhibit A on thirty (30) days notice.
2. “Bundles” shall mean the combination of the Publisher Products with hardware and/or software distributed as a unit by Distributor, as described in Exhibit C.
3. “Proprietary Rights” shall mean all rights of Publisher and its licensors in the Publisher Products including, without limitation, copyright, patent, design patent, trademark, trade dress, trade secret, and publicity rights, arising under applicable law and international conventions.
4. “Territory” shall be defined as the world.

B. GRANT OF LICENSES

1. Distribution License. Publisher grants to Distributor a nontransferable and non-exclusive license during the term of this Agreement to include the Publisher Products in Bundles and to distribute Bundles directly or through distributors and

retailers to end-users located in the Territory. In addition to the other terms and conditions of this Agreement, these licenses to distribute are expressly subject to the following conditions:

- a. Distributor's distribution to end-users, whether directly or through distributors and retailers, shall be made only pursuant to the end-user license included with the Publisher Products, and each license of an Publisher Product by Distributor to an end-user will be allowed only in jurisdictions where an enforceable copyright covering the Publisher Products exists; and
- b. Distributor's distribution to any entity other than end-users, including without limitation distribution to retailers or other distributors or sub-distributors, shall be made pursuant to written agreement(s) with Distributor which (i) comply with all of the terms of this Agreement, (ii) are no less protective of Publisher's rights than the terms of this Agreement, and (iii) expressly make Publisher a third party beneficiary.
- c. Distributor shall be entitled to distribute only those Publisher Products manufactured by Distributor.

2. Manufacturing License. Subject to the terms of this Agreement, Publisher grants to Distributor and Distributor accepts, for the term of this Agreement, the nonexclusive right to manufacture the Publisher Products only in the United States and only for distribution as otherwise provided in this Agreement, subject to the following limitations:

a. Distributor may manufacture the Publisher Products, provided that such manufacturing is at Distributor's own cost and in accordance with this Agreement and otherwise prudent in protecting Publisher's and its Licensors' Proprietary Rights. Any and all copies of the Publisher Products manufactured by Distributor shall contain security coding in a form acceptable to Publisher. Distributor shall indemnify and pay Publisher for any unauthorized copies of the Publisher Products manufactured by Distributor or at its authorized facilities at the full retail price of such Publisher Products.

b. Distributor shall manufacture the Publisher Products in accordance with strict security procedures and shall keep detailed manufacturing and distribution records for all units manufactured. Distributor's manufacturing facilities and manufacturing and distribution records shall be open to Publisher's inspection without notice.

c. Distributor shall include with all copies of the Publisher Products manufactured by Distributor an end-user license in the form provided by Publisher. Changes to the terms of the end-user license shall be subject to approval by Publisher, in its sole discretion.

d. Distributor shall manufacture the Publisher Products from production masters of the Publisher Products (including without limitation production masters of packaging and related materials) provided by Publisher in accordance with the schedule set forth on Exhibit B. Distributor agrees not to alter the Publisher Products (including without limitation their packaging) without Publisher's prior written consent.

3. Prohibited Acts. Neither Distributor nor anyone to whom Distributor distributes the Publisher Products has the right to distribute or sell the Publisher Products except as part of Bundles within the Territory, without the express prior written approval of Publisher. Anyone who unbundles any Publisher Products shipped to Distributor for inclusion in Bundles shall be liable for the full wholesale price of all such unbundled Publisher Products plus all applicable attorneys' fees and costs incurred in investigating and prosecuting an action against the unbundling party. Distributor shall notify those to whom it distributes the Publisher Products in Bundles that unbundling is specifically prohibited, and that anyone who unbundles any Bundled Publisher Products shipped to or through Distributor shall be liable for the full wholesale price of all such unbundled Publisher Products plus all applicable attorneys' fees and costs incurred in investigating and prosecuting an action against the unbundling party.

4. Limitations. Title to the Publisher Products and all associated patents, copyrights, trademarks, trade dress, trade secrets and other proprietary rights shall remain with Publisher and its licensors. Except as expressly authorized by Publisher in writing, Distributor will not, and will cause its employees, agents and distributors not to: (i) modify, translate, reverse engineer, decompile, disassemble, create derivative works of or copy the Publisher Products or related documentation; (ii) remove, alter, or cover any copyright or trademark notices or other proprietary rights notices placed or embedded by Publisher on or in the Publisher Products.

5. Non-Exclusivity. The licenses granted in this Agreement are non-exclusive. Accordingly, nothing in this Agreement shall be construed as limiting in any manner Publisher's marketing or distribution activities (including without limitation the distribution of Publisher Products upgrades and Publisher Products to end users of

Bundles) or Publisher's appointment of other dealers, distributors, value-added resellers, original equipment manufacturers, licensees or agents in the Territory.

6. Packaging, Advertising and Promotion.

a. Packaging. Distributor shall not alter the packaging in which the Publisher Products are provided, including without limitation production masters for manufacturing of packaging.

b. Promotion and Advertising. Publisher shall have the right to approve any advertising or promotional materials regarding or including the Publisher Products which incorporates any original artwork not provided by Publisher. Any such advertising or promotional materials shall be submitted to Publisher for approval, in its sole discretion, and Publisher shall have seven (7) business days in which to approve or disapprove the advertising or promotional materials. Publisher's failure to approve or disapprove the materials within seven (7) business days shall constitute approval of the materials. Distributor shall not provide any copies of the Publisher Products or other materials to magazines, newspapers or other publications for review purposes.

7. Reserved Rights. Except as expressly provided in this Agreement, Publisher does not grant any right to Distributor to (a) use, print, copy, or display (except for promotional purposes) the Publisher Products; (b) assign, sublicense, or otherwise transfer its rights or delegate its obligations under this Agreement or any of the rights, licenses, software, Publisher Products, or materials to which it applies; or (c) modify, amend, rewrite, translate to another language or otherwise vary the Publisher Products. Publisher shall at all times retain all right, title and interest to the Publisher Products. Publisher reserves the right at any time to terminate Distributor's rights to manufacture or distribute any particular Publisher Product on thirty (30) days notice. Upon the receipt of such notice, Distributor shall cease its manufacturing, marketing, selling, distribution, import and export of such Publisher Product within the time period specified in such notice.

C. COMPENSATION and STATEMENTS

1. License Fees. For each copy of the Publisher Products which Distributor manufactures, Distributor shall pay Publisher the license fees set forth in Exhibit B. Payment shall be made by Distributor within thirty (30) days of purchase order date.

2. Minimum License Fees. At a minimum, Distributor shall be obligated to pay Publisher the minimum license fees set forth in Exhibit B, in the amounts and on the schedule and terms set forth in Exhibit B.

3. Purchase Orders. Distributor shall use its standard form purchase orders to indicate to Publisher the number of copies of the Publisher Products that Distributor will manufacture. Distributor shall be entitled to manufacture no more than the number of units of the Publisher Products shown on the Distributor purchase orders received by

Publisher. No other term or condition of the Distributor purchase orders shall have any force or effect. Distributor shall be obligated to pay license fees for all units indicated on the purchase orders. The first three purchase orders, totaling 30,000 units, are attached to this Agreement as Exhibit E. Distributor shall pay license fees for these units based on the dates of the purchase orders.

4. Content Royalties. The initial payment and additional license fees shall include all royalties to be paid to third parties ("content royalties"). It will be Publisher's responsibility to ensure that all content royalties are paid when due.

5. Audit. Publisher shall have the right, upon reasonable request, to review those records of Distributor necessary to verify the units manufactured and license fees paid. Any such audit will be conducted at Publisher's expense and at such times and in such a manner as to not unreasonably interfere with Distributor's normal operations; provided, however, that if any such audit reveals an error of at least 5% in the payment of royalties, then Distributor shall pay the costs of the audit. If a deficiency is shown by such audit, Distributor shall immediately pay that deficiency. Non-payment of any deficiency within thirty (30) days of the date on which Distributor receives notice of such deficiency shall constitute a material breach of this Agreement.

D. WARRANTY

1. Warranty. Publisher warrants to Distributor that, for a period of one (1) year from the shipment to Distributor (or, if earlier, termination of this Agreement), the Publisher Product masters will conform substantially to Publisher's published specifications. If Distributor discovers a material defect in the master for the Publisher Products within the warranty period, Distributor will promptly notify Publisher. Publisher's entire obligation and Distributor's sole remedy will be for Publisher to use its best efforts promptly to correct any discovered defect and provide Distributor with a corrected version of the master for the Publisher Products.

2. Limited Warranty on Media. Publisher warrants the diskettes and/or compact disc on which the masters of the Publisher Products are recorded to be free from defects in materials and workmanship under normal use for a period of ninety (90) days from the date of delivery. Publisher's entire liability and Distributor's exclusive remedy regarding master diskettes and/or compact discs not meeting Publisher's limited warranty and which are returned to Publisher shall be replacement of the master disk or diskette or credit against future orders of Publisher Products, at Publisher's option. Publisher will have no responsibility to replace or credit a diskette/disc damaged by accident, abuse or misapplication.

3. Disclaimer. EXCEPT FOR THE ABOVE EXPRESS LIMITED WARRANTIES, Publisher MAKES AND DISTRIBUTOR RECEIVES NO WARRANTIES ON THE Publisher PRODUCTS, EXPRESS, IMPLIED, STATUTORY, OR IN ANY OTHER PROVISION OF THIS AGREEMENT OR COMMUNICATION WITH DISTRIBUTOR, AND Publisher SPECIFICALLY DISCLAIMS ANY IMPLIED

WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. Publisher DOES NOT WARRANT THAT THE OPERATION OF THE Publisher PRODUCTS WILL BE UNINTERRUPTED OR ERROR FREE.

E. TRADEMARKS

1. Use. During the term of this Agreement, Distributor shall have the right to indicate to the public that it is an authorized distributor of the Publisher Products and to advertise (within the Territory and solely in connection with Bundles) the Publisher Products under the trademarks, marks, and trade names that Publisher and its licensors may adopt from time to time for the Publisher Products ("Trademarks"). Distributor will not, and will ensure that its distributors and dealers will not, alter or remove any Trademark, or affix, without the prior written permission of Publisher, any other trademarks, marks or other logos on the Publisher Products. Nothing herein shall grant to Distributor any right, title or interest in the Trademarks. At no time during or after the term of this Agreement shall Distributor challenge or assist others to challenge the Trademarks or the registration thereof or attempt to register any trademarks, marks or trade names confusingly similar to those of Publisher and its licensors for the Publisher Products.

2. Approval. All representations of the Publisher Trademarks that Distributor intends to use shall first be submitted to Publisher for approval (which shall not be unreasonably withheld) of design, color, and other details relating to the Trademarks.

F. INTELLECTUAL PROPERTY INDEMNITY

1. Publisher will defend at its expense any action brought against Distributor to the extent that it is based on a claim that the Publisher Products or any part thereof, when used within the scope of this Agreement, infringes a United States copyright or a United States patent issued and known to Publisher as of the date of this Agreement, and Publisher will pay any settlements and any costs, damages and attorneys' fees finally awarded against Distributor in such action which are attributable to such claim; provided, the foregoing obligation shall be subject to Distributor notifying Publisher promptly in writing of the claim, giving Publisher the exclusive control of the defense and settlement thereof, and providing all reasonable assistance in connection therewith. Publisher shall have no liability for any claim of infringement arising out of (i) the use of other than a current unaltered release of the Publisher Products or (ii) the use or combination of the Publisher Products with non-Publisher programs, data or equipment if such infringement was caused by such use or combination, and (iii) Publisher shall have the right, upon either the occurrence of or the likelihood (in the opinion of Publisher) of the occurrence of a finding of infringement to: (a) procure for Distributor the right to continue distributing the Publisher Products or (b) replace the relevant portions of the Publisher Products with other equivalent, non-infringing portions. If Publisher is unable to accomplish either (iii)(a) or (b) above, then at Publisher's option, Publisher shall remove the Publisher Product in issue and refund to Distributor the amount paid to Publisher under this Agreement relating to that Publisher Product. THE FOREGOING IS IN LIEU OF ANY WARRANTIES OF NONINFRINGEMENT, WHICH ARE HEREBY

DISCLAIMED, AND SETS FORTH Publisher'S ENTIRE LIABILITY FOR ANY INFRINGEMENT BY THE Publisher PRODUCTS OR ANY PART THEREOF.

G. TERMINATION

1. This Agreement shall terminate automatically without notice, one year from the effective date first set forth above, unless the parties have mutually agreed in writing to renew it for an additional term.

2. Publisher may terminate this Agreement for any reason or no reason on thirty (30) days' written notice. Until Distributor has fulfilled its minimum purchase commitment for the term of this Agreement as set forth in Section C above, Distributor shall be entitled to terminate this Agreement only upon Publisher's breach of a material provision of this Agreement, which breach has not been cured within thirty (30) days of Distributor giving written notice of such breach. After Distributor has satisfied its minimum purchase commitment for the term of this Agreement, Distributor may termi-

nate this Agreement for any reason or no reason on thirty (30) days' notice.

3. This Agreement may be terminated automatically, without notice, (i) upon the institution by or against Distributor of insolvency, receivership or bankruptcy proceedings or any other proceedings for the settlement of Distributor's debts, (ii) upon Distributor's making an assignment for the benefit of creditors, or (iii) upon Distributor's dissolution.

4. Effect of Termination. Upon the termination of this Agreement, the rights and licenses granted to Distributor pursuant to this Agreement (including without limitation the right to manufacture and the right to distribute the Publisher Products through distributors) will automatically cease, provided that all existing sublicenses to end users will continue for the duration of such sublicense. All payments owing from Distributor to Publisher shall become immediately due and payable upon termination. All Publisher trademarks, marks, trade names, patents, copyrights, designs, drawings, formulae or other data, photographs, samples, literature, and sales aids of every kind shall remain the property of Publisher. Within thirty (30) days after the termination of this Agreement, Distributor shall prepare all such items in its possession for shipment, as Publisher may direct, at Publisher's expense. Distributor shall not make or retain any copies of any confidential items or information which may have been entrusted to it. Effective upon the termination of this Agreement, Distributor shall cease to use the Trademarks.

5. Sell-Off Period. Notwithstanding the provisions of section G.4 above, if termination occurs because the term set forth in section G.1 above has expired, and not because of any breach of material provisions of this Agreement by Distributor or any other reason, Distributor shall be entitled to sell-off remaining Publisher Products manufactured in the ordinary course of business and currently in Distributor's inventory as of the date of termination as part of Bundles according to the terms of this Agreement for a period of thirty (30) days, provided that Distributor has paid any additional license fees owed for the manufacture of such Publisher Products. At the end of this sell-off period,

Distributor shall, at Publisher's sole option, destroy all remaining copies of the Publisher Products in its inventory or return such copies to Publisher for a refund of license fees paid or payment of manufacturing costs (as may be applicable) for the copies returned in saleable condition. If termination occurs because of a breach of any material provision of this Agreement, or for any other reason other than expiration of the term of the license set forth in section G.1 above (including termination by Publisher at its option under section G.2 above), then all of Distributor's rights under this Agreement shall immediately terminate as provided in section G.4, and Distributor shall have no right to sell off remaining Publisher Products in its inventory, which shall, at Publisher's sole option, be destroyed or returned to Publisher for a refund of license fees paid or payment of manufacturing costs (as may be applicable) for the copies returned in saleable condition.

6. Survival Provisions. If this Agreement is terminated for any reason, those provisions which by their nature would survive such termination will survive termination. Termination shall not effect any other rights which either party may have at law or in equity.

H. CUSTOMER SUPPORT

1. Publisher will be responsible for providing reasonable and customary customer and technical support for the Publisher Products.

I. LIMITATION OF LIABILITY

1. IN NO EVENT WILL Publisher BE LIABLE FOR COSTS OF PROCUREMENT OF SUBSTITUTE PRODUCTS OR SERVICES, LOST PROFITS, OR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, OR INCIDENTAL DAMAGES, HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY, ARISING IN ANY WAY OUT OF THIS AGREEMENT OR THE TERMINATION THEREOF, WHETHER OR NOT Publisher HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGE, AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY PROVIDED IN THIS AGREEMENT.

J. INDEMNIFICATION OF Publisher

1. Except for the warranty and infringement claims based on the Publisher Products discussed above, Distributor agrees to indemnify and hold Publisher and its licensors harmless against any cost, loss, liability, or expense (including attorneys' fees) arising out of third party claims against Publisher as a result of Distributor's or its distributors' or retailers' promotion or distribution of the Publisher Products or Bundles, including, without limitation, providing unauthorized representations or warranties to its customers regarding the Publisher Products or breaching any term, representation or warranty of this Agreement.

K. GENERAL TERMS

1. Nonassignability and Binding Effect. Distributor agrees that its rights and obligations under this Agreement may not be transferred or assigned directly or indirectly without the prior written consent of Publisher. Publisher may assign its rights and obligations under this Agreement without Distributor's consent. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

2. Notices. Notices under this Agreement shall be sufficient only if personally delivered, delivered by a major commercial rapid delivery courier service, delivered by facsimile transmission confirmed by first class mail, or mailed by certified or registered mail, return receipt requested, to a party at its address first set forth above or as amended by notice pursuant to this subsection. If not received sooner, notice by any of these methods shall be deemed to occur seven (7) days after deposit.

3. Import and Export Controls. Distributor will comply with all export laws and restrictions and regulations of the Department of Commerce or other United States or foreign agency or authority, and will not export, or allow the export or reexport of any Publisher Products in violation of any such restrictions, laws or regulations.

4. Governing Law and Legal Actions. This Agreement shall be governed by and construed under the laws of the State of California without regard to choice of laws principles. The parties consent to the jurisdiction of the state and federal courts located in San Francisco, California, and agree that process may be served in the manner provided herein for giving of notices or otherwise as allowed by law.

5. Partial Invalidity. If any provision of this Agreement is held to be invalid, then the remaining provisions shall nevertheless remain in full force and effect, and the invalid or unenforceable provision shall be replaced by a term or provision that is valid and enforceable and that comes closest to expressing the intention of such invalid or unenforceable term or provision.

6. No Agency. The parties hereto are independent contractors. Nothing contained herein or done in pursuance of this Agreement shall constitute either party the agent of the other party for any purpose or in any sense whatsoever, or constitute the parties as partners or joint venturers.

7. No Waiver. No waiver of any term or condition of this Agreement shall be valid or binding on either party unless the same shall have been mutually assented to in writing by both parties. The failure of either party to enforce at any time any of the provisions of this Agreement, or the failure to require at any time performance by the other party of any of the provisions of this Agreement, shall in no way be construed to be a present or future waiver of such provisions, nor in any way effect the ability of either party to enforce each and every such provision thereafter.

8. Force Majeure. Nonperformance by either party shall be excused to the extent that performance is rendered impossible by strike, fire, flood, earthquake, or governmental acts, orders or restrictions; provided that any such nonperformance shall be cause for termination of this Agreement by the other party if the nonperformance continues for more than sixty (60) days.

9. Attorneys' Fees. The prevailing party in any legal action brought by one party against the other and arising out of this Agreement shall be entitled, in addition to any other rights and remedies it may have, to reimbursement for its expenses, including costs and reasonable attorneys' fees.

10. Entire Agreement. This Agreement sets forth the entire agreement and understanding of the parties relating to the subject matter herein and merges all prior discussions between them. No modification of or amendment to this Agreement, nor any waiver of any rights under this Agreement, shall be effective unless in writing signed by the parties.

11. Counterparts. This Agreement may be executed in two or more counterparts and all counterparts so executed shall for all purposes constitute one agreement, binding on all parties hereto.

PUBLISHER _____

By: _____

DISTRIBUTOR _____

By _____

Print Name: _____

Title: _____

EXHIBIT A

Publisher Products

(with documentation, packaging, and other materials, if any, as identified herein)

Publisher reserves the right to add Publisher Products to or delete Publisher Products from this Exhibit on thirty (30) days' notice.

EXHIBIT B

Licensed Manufacturing Quantities Schedule

Publisher shall deliver the Production Masters of the Publisher Products as follows:

Publisher Product

Delivery Date for Production Masters On or Before

Subject to the terms and conditions of the Agreement and provided that Distributor attaches purchase orders to this Agreement in Exhibit E for the units set forth below, Distributor shall be entitled to manufacture the Publisher Products as follows:

Publisher Product

Quantity Authorized for Manufacture

License Fee Per Copy Manufactured

Minimum manufacturing commitments for subsequent months shall be as follows:

Month

Products available for Manufacturing

Quantity of Each Product

Total Minimum

License Fees to be Paid

EXHIBIT C

Approved Bundles

EXHIBIT D

Territory

EXHIBIT E

Purchase Orders