



## **Term sheet for negotiating program distribution December 2008**

### **Introduction**

This document provides AIR members with a term sheet intended to guide negotiations for distribution. A term sheet is a document that often precedes a more formal contract, and will help the parties identify areas of convergence and divergence.

When completed, an agreed-to term sheet between you and the other party will make it easier — and less expensive — for an attorney to draft a more formal contract. Do not allow your work to be broadcast or otherwise used by others without having a signed agreement beforehand. An executed agreement — unfortunate term of art — is as essential to your work as an independent producer as a quality microphone and a decent recorder.

Each situation is different. While this guide provides terms for a range of situations, there may be unique conditions or specifications that are not included. This guide most clearly applies to a relationship between you as the producer of content and another party — a network, station, or other party interested in acquisition, broadcast, or distribution of your work. It's always a good idea to consult an attorney before signing an agreement. This guide should not be construed as legal advice: Please do consult with an attorney, whose job it is to protect your interests.

Most distributors have a standard agreement they may offer to you, the producer. If so, this guide may be helpful to make sure that the standard agreement includes terms appropriate to your particular circumstances, and what, if any, amendments to the standard agreement you may wish to suggest.

This document provides the most common discussion areas, including information and advice that we hope will educate and inform producers as they approach a negotiation. It is intended for producers approaching a broadcast network or station as a potential distributor of their work. It is also intended for producers who are seeking to engage colleagues in a work-for-hire relationship.

### **Timing of Negotiation**

It is important to enter negotiations with enough lead time to properly develop a program, market it, and publicize it. Consider that an average negotiation will take one to three months to complete. In the case of stand-alone programs or series, remember that Program Directors need at least three months' advance notice in order to consider scheduling the program. An additional one to three months of planning is required to adequately develop a marketing and visibility plan. This means that ideally you should have a distribution agreement in place six months prior to initial release of the program. Depending on the circumstances, you may move ahead with development of the program before negotiations are complete and a contract is executed. But you ought to have an executed agreement before beginning marketing to stations.

### **Negotiating with the Decision Maker**

The two people who are negotiating the terms of the agreement should have parity in terms of their "yes-no" authority with respect to terms of an agreement. If you are the final decision-maker, you should hold your discussion with someone who has equal authority.



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## Terms

Following are suggested key discussion points to include in order to arrive at a comprehensive term sheet – points of agreement. A lawyer can use these points to draft a more formal agreement. We’ve included sample language on the right, with descriptions of some options and other points to consider on the left.

This is but one of many variations on possible structures for an agreement. There are as many variations as there are lawyers. But it is a basic guide. Heartfelt thanks are due reviewers Jonathan Miller, Greg Britz, Jim Russell, Todd Melby, and Moira Bucciarelli. To Wesley Horner, who spearheaded this effort, AIR extends its most sincere gratitude for the many hours he’s spent cajoling and primping this document into shape.

<b>Introduction and Definitions</b>	State the legal name and contact information for the parties to the agreement, and the subject of the agreement.	This agreement (the “Agreement”), made on the 10 day of January 2008, by and between Big City Public Radio with its principal place of business at 1200 Central Avenue, Big City, Missouri (“Distributor”), and Joseph Audiogeek d.b.a. Geek Productions with its principal place of business at 25 Hightone Lane, Smalltown, Rhode Island (“Producer”). Distributor and Producer shall be referred to herein collectively as the “Parties” or individually as the “Parties.” The Agreement shall establish the understanding among the Parties concerning the production and distribution of a new series of radio documentaries about swimming in the Atlantic Ocean. Said project, tentatively titled “Swimming,” shall consist of 13 hourlong radio documentaries as well as 13 five-minute audio features and shall be collectively referred to herein as the “Series.”  The terms and conditions of this Agreement are set forth below:
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<p><b>Responsibilities of the Parties</b></p>	<p>This describes who does what, when: What services will be provided, with deadlines attached to each service.</p> <p>If appropriate (for example, in an agreement between a producer and a distributor), you may want to include the dates the program(s) will be released by the Distributor to stations, the number of minutes or hours the Producer will create (although that might be better included in definitions, above), the format, and the frequency the Producer will make the material available.</p> <p>Details of services to be provided can be included in an Appendix; for example, marketing services provided by a distributor.</p> <p>If there is to be an online component of the Series, specify here which party has responsibility for creating or providing Series-related Web content.</p>	<p><b>Responsibilities of the Parties</b></p> <ol style="list-style-type: none"> <li>1. Producer shall produce the series and be solely responsible for all research, recording of all elements, editing, scripting, and final assembly of the Series.</li> <li>2. Producer shall produce the Series in stereo at a level of technical quality acceptable to the Distributor as described in the Technical Standards Attachment to this Agreement.</li> <li>3. Producer shall deliver the Series to the Distributor on a timely basis on a mutually agreeable schedule, no later than April 1, 2010.</li> <li>4. Distributor shall make the Series available to all noncommercial public radio stations within the United States and its territories (the Stations), for broadcast without limitation.</li> <li>5. Distributor shall provide marketing services to promote the Series to the Stations, as described in detail in Appendix B, included by reference herein.</li> </ol>
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<p><b>Credits</b></p> <p>An optional section, but an issue that is certainly better to have clarified in writing beforehand.</p>	<p><b>Other Options:</b></p> <ol style="list-style-type: none"> <li><b>Ongoing Series Credit:</b> “Each segment in the Series will be identified during the host introduction as part of [NAME OF SERIES] from [NAME OF PRODUCER] from [PRODUCER’S ORGANIZATIONAL AFFILIATION].”</li> <li><b>Producer Credit or Identification:</b> “The Producer will be identified on air and in all materials related to the Series as “independent producer [NAME OF PRODUCER].”</li> <li><b>Funder Credit:</b> The Producer has secured funding for [NAME OF PROJECT]. Distributor agrees to credit the Series funders once (or more if mutually agreed) during the program in which [NAME OF PROJECT] is included. The funders will be identified as being associated with the [NAME OF PROJECT]. Producer and Distributor agree to work together to ensure that credit language complies with Distributor’s standards for crediting funders and Producer’s obligations to the funders.</li> <li><b>Service Marks and Logo:</b> Distributor will include a program credit and the Producer’s logo on all printed and electronically Web-based materials related to the programming.</li> </ol>	<p><b>Credits</b></p> <ol style="list-style-type: none"> <li>Credits for broadcast of the hourlong documentaries shall include credit to Producer as producer of the Series and Distributor as distributor of the series.</li> <li>The Parties agree that the credit language described in paragraph (1) above will also appear on any other form of distribution of the Series (including podcasts, websites, etc.) as well as on all promotional, marketing, ancillary materials, and any other activities related to the Series.</li> <li>Distributor agrees to, with respect to internal identification and database categorization, seek from the Producer and provide to appropriate staff accurate designation of Producer as “independent.”</li> </ol>
<p><b>Rights</b></p>	<p>It’s essential to define who owns what rights. We suggest defining not only who owns the rights,</p>	<p><b>Rights</b></p>



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	<p>but also what licenses are granted to whom by the rights owners, and for what purpose, and whether those rights are granted on an exclusive or nonexclusive basis. The latter protects the rights owner by giving the rights owner the greatest flexibility to grant other licenses to others, presumably with additional license fees.</p> <p>The scope and terms of rights granted should be specific. Are the terms for a limited time period (for example, five years) or in perpetuity? Are there restrictions as to which media and in what territories, for example terrestrial broadcast within the United States and its territories? (Given that most terrestrial broadcasters also stream their signals on the Web, that would be unrealistic.)</p> <p>If the Distributor wishes to acquire rights to the Series for other uses, such as compilation (for example, including the Series together with other content in a "Best of ..." CD), podcasts, streaming on the Web or any other use, the Producer's grant of rights for those ancillary uses, and the period of time for each use, should be specified here.</p> <p>If the Producer is allowing the Distributor use of any copyrighted titles or logos, the terms of use by the Distributor should be included.</p>	<ol style="list-style-type: none"><li>1. Producer shall own all rights, title, and interest, including copyright in the Series.</li><li>2. Producer agrees to grant to Distributor an exclusive license to distribute the Series for broadcast without limitation to noncommercial public radio stations throughout the United States and its territories for the period of five years, commencing September 1, 2010.</li></ol>
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<b>Fees and Compensation</b>	<p>A simple way to cover the matter of fees and compensation is to include language such as the example shown, with a payment schedule tied to clear steps.</p> <p>If the Distributor will reimburse the Producer for travel or other expenses, estimated expenses can be included in an appendix and included by reference in the body of the Agreement.</p> <p>If the Distributor is commissioning the content and chooses not to air or make other use of the content, the Producer may require a kill fee, usually equal to the amount agreed to for acquisition of rights to the content. Specify in the Agreement whether the amount of the kill fee will be the full amount expected for completion of the Series (an extremely unlikely \$100,000 in the sample language shown), some smaller percentage, or some other amount, perhaps based on the amount of work completed to date. A kill fee usually applies only to a short Series or most often, to a single short program segment.</p>	<b>Compensation</b>  <p>For the rights granted by Producer to Distributor described in "Rights," above, Distributor agrees to compensate Producer in the amount of \$100,000 (One Hundred Thousand Dollars), payable as follows: 20 percent (\$20,000) upon execution of this Agreement, 60 percent (\$60,000) upon delivery to Distributor by Producer of the completed Series, and 20 percent (\$20,000) upon initial distribution of the Series by Distributor.</p> <p>Distributor shall reimburse Producer for travel expenses, estimated in Appendix A. Producer shall invoice Distributor for actual expenses, not to exceed estimated expenses without prior written approval of Distributor.</p>
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<p><b>Boilerplate: Indemnification, Assignment, Termination, Notices, and Miscellaneous (governing laws)</b></p>	<p>This is the stuff lawyers get paid to learn how to write. Lawyers have spent a great deal of time and money to learn how to write it; it's only fair that you compensate your lawyer for the service of providing you this boilerplate language to include in your formal agreements. And it sounds great.</p> <p>That said, it's important when choosing your attorney to make sure that he or she is familiar with the peculiarities of entertainment or broadcast contracts, and can clearly explain to you what these sections mean.</p>	<p><b>Indemnities</b></p> <p>Each of the Parties hereby agrees to indemnify, defend, and hold harmless the other, its officers, directors, agents, and employees, from and against any and all claims, damages, liabilities, costs, and expenses, including reasonable attorney's fees, arising out of or relating to the breach or alleged breach of any warranty, representation, or agreement made by it herein.</p> <p><b>Assignment</b></p> <p>Distributor shall not assign this Agreement without the prior written consent of Producer, which shall not be unreasonably withheld, delayed, or conditioned.</p> <p><b>Termination for Cause</b></p> <p>Any one of the Parties may terminate this Agreement thirty (30) days after providing notice of a failure by any one of the other Parties to perform any of the covenants and agreements herein agreed to by each of the Parties, provided that written notice of any such failure has been provided to the offending Party and said failure continues without cure for thirty (30) days after receipt of said notice.</p> <p><b>Notices</b></p> <p>Notices required hereunder shall be given by registered mail, postage prepaid, or by delivery by a nationally recognized delivery service, addressed to the relevant Party or Parties at the address written above or at such addresses as may hereafter be furnished by notice thereof.</p> <p><b>Waivers</b></p>
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		<p>Failure of either of the Parties to complain of any act or omission by any one or both of the other Parties, no matter how long the same may continue, shall not be deemed a waiver of any rights hereunder.</p> <p><b>Miscellaneous</b></p> <p>This Agreement shall be governed by and construed in accordance with the laws of the State of Rhode Island without regard to principles of conflicts of laws. This Agreement contains the entire and exclusive agreement between the Parties with respect to the subject matter hereof, and supersedes and terminates all prior or contemporaneous arrangements, understandings, and agreements, whether oral or written. This Agreement may not be modified or amended (and the terms hereof may not be waived) except in writing signed by the Party or Parties against whom enforcement is sought. If any court or governmental authority holds any provision in this Agreement invalid, illegal, or unenforceable under any applicable law, then, so long as no Party is deprived of the benefits of this Agreement in any material respect, this Agreement shall, insofar as possible, be construed with the invalid, illegal, or unenforceable provision deleted, and the validity, legality, and enforceability of the remaining provisions contained herein shall not be affected or impaired thereby. The headings used herein are used only for convenience of reference and are not to be considered a part of this Agreement or used in determining the intent of the Parties hereto. This Agreement may be executed in multiple counterparts and by counterpart signature pages each of which shall be deemed to be an original.</p>
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<b>Liability</b>	<p>This type of clause does not always appear in contracts, but it's important to pay attention if an acquirer wants to include it. The purpose is to specify that if the public radio entity were ever sued as a result of something aired as part of a production, that producer would be responsible for the cost of defense and any damages. In practical terms, this is not likely to happen – lawsuits are rare.</p>	<p>Producer represents and warrants to the best of his ability that: (i) Producer is the sole author of the Series; (ii) the Series is created by Producer originally; (iii) Producer has the right to grant the foregoing rights to Distributor; and in so far as Producer knows, (iv), all facts and statements in the Series are true; (v) the Series does not defame any person or entity; (vi) the Series does not infringe upon any copyright, trademark, intellectual property rights, right of privacy, right of publicity, proprietary right, or other right of any person or entity; (vii) Producer has all rights necessary to publicly perform or otherwise use any spoken text, written works, musical compositions, songs, sounds, or other materials used in the Series; and (viii) Producer has obtained all necessary written releases from any third parties who contributed to, who appear in, or whose material appears in or is used to create the Series; Producer shall supply such written third-party releases to Distributor upon request. Producer and Distributor shall indemnify and hold each other harmless against any and all claims, actions, suits, costs, liabilities, losses, damages, or expenses including, but not limited to, attorneys' fees and legal expenses incurred by Distributor by reason of your breach of any of these representations and warranties. In the event any complaints, claims, or litigation arise against Distributor regarding the Series, Producer shall cooperate with Distributor in the investigation and defense of such complaints, claims, or litigation.</p>
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<b>Signatures</b>	Make sure those signing have the authority to do so, and are accurately identified.	<b>ACCEPTED AND AGREED:</b>  <b>For Distributor:</b>  Signature: _____ Date: _____  Title: _____  <b>Producer:</b>  Signature: _____ Date: _____  Title: _____
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<p><b>Contacts</b></p>	<p>You may wish to include the names of persons other than those who are party to the agreement and who are relevant contacts. For example, the assignment editor or the program manager at a distributor.</p>	
<p><b>Editorial Process, Ongoing Relationship</b></p>	<p>If the Producer will have an ongoing or continuous editorial relationship with the Distributor, you may want to include specifics concerning the frequency and quantity of material the Producer will “pitch” to the Distributor, and an acceptable lapse time between the pitch and a response from the Distributor.</p> <p>Part of that process may include a grant by the Producer to the Distributor of a Right of First Refusal for a specified period of time. If the Distributor has not responded to a pitch by the specified period of time, the Producer retains the right to pitch the same idea elsewhere.</p> <p>Similarly, the Producer may wish to reserve the right to withdraw any produced content and pitch it elsewhere if the Distributor has not broadcast or distributed the content within a specified period of time.</p>	
<p><b>Placement</b></p>	<p>Include detail here concerning the day or days the Producer’s material will be aired, during which program segment, or during which daypart.</p>	
<p><b>Noncompete</b></p>	<p>Producer and Distributor can agree that Distributor will not distribute competing</p>	



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<b>Agreement</b>	programs for a specified period of time.  If the Producer is using a celebrity or other high-profile host, the Producer may also wish to ask that the Distributor ask for permission from the Producer before Distributing other series with the same host, for a specified period of time.	
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