



MUSIC LICENCE FOR FILM EXPLANATORY NOTES

USING THE EXPLANATORY NOTES

The Explanatory Notes are intended to give more detailed explanations of certain clauses in this **sample agreement** or to give more detail about the law involved.

The Explanatory Notes **DO NOT** form part of the agreement and should not be included in your final redrafted version.

It may be useful to separate the Explanatory Notes from the actual agreement when you are redrafting it to suit your particular situations.

The Explanatory Notes provide general information only, and are not legal advice on any specific situation. You can contact Arts Law for legal advice.

PARTIES

The agreement should clearly identify the name, address and preferably the telephone and fax numbers, of the persons or entities who enter it – called the ‘parties’. Throughout the rest of the agreement, the parties are referred to or "defined" by shorthand terms for ease of reference, for example Composer. Other terms could be used, or the parties could simply use their own names.

If a party has an Australian Business Number (**ABN**), Australian Company Number (**ACN**) or Australian Registered Body Number (**ARBAN**), the number must be included. The ABN is important for GST purposes.

If either party is a company, its ACN and the address of its registered office must be stated.

RECITALS

The Recitals section is a summary of the intentions of the parties entering the agreement and a statement of what the agreement is intended to achieve.

Before entering the agreement the Composer should ask for information about the nature, structure and style of the Film, how much of the Music is to be used and how it is going to be used. This information could be given in writing and either referred to in the Recitals or attached to the agreement as an annexure.

LICENCE (CLAUSE 1)

Clause 1 sets out the rights that the Composer grants to the Producer in the Music and any sound recording of the Music (**Master**) in order for the Producer to include them in the Film.

There are potentially three separate copyrights that the Producer may need to deal with: (1) copyright in the music; (2) copyright in any lyrics; and (3) copyright in the sound recording of



the music. The music and any lyrics are collectively referred to as "Music" in the agreement. If the owner of the copyright in the lyrics is different to the owner of the copyright in the Music, the agreement will require amendment to reflect this.

Clause 1 grants the basic rights to synchronise the Music and any Master to the soundtrack of the Film. Usually, synchronisation licences for existing music are granted on a non-exclusive basis. This means that the copyright owner and third parties can also use the music, whether in another film or any other medium. If the Producer obtains an exclusive licence (i.e. the Producer alone can use the licensed material, to the exclusion of the copyright owner and third parties), clause 1.1 should be amended and any payment to the Composer should reflect this exclusivity. The parties need to change the agreement if the licence does not include a licence to use a master recording of the Music.

The agreement does not include the following rights:

- The right to arrange and/or re-record the Music; and
- The right to make or authorise the making of a soundtrack album that incorporates the Music. This right is expressly excluded.

The parties need to amend clause 1 if the Producer wishes to acquire any additional rights not expressly mentioned in that clause, in particular the rights mentioned above. As a general rule, a composer should not license more rights than the producer is likely to use. Similarly, a producer may not want to pay for more rights than the producer is likely to need.

The parties must agree:

- how long the licence will last (usually the remainder of the term of copyright in the Music and the Master unless the Film is only to be distributed for a shorter period – for example a promotional film or commercial),
- the territory in which the rights can be used (in other words, the territory in which the film will be distributed – if online distribution is envisaged then this is normally the world. If, on the other hand, the project is very specific, Australian rights on limited media may be sufficient (eg. a promotional video for the local Rotary Club), and
- the media in which the film will be distributed - for example, is the use of the Music limited to use in a Film distributed on DVD, or does it cover big screen and digital online distribution? Does the Producer get rights in relation to technology yet to be invented or commercialised or does the Composer wish to exclude these rights and instead give the Producer an option to purchase them once the technology is available?

The Producer (and usually investors and funders of the film) will usually want all these aspects of the licence to be as broad as possible, while the Composer may want to restrict them, or at least increase any payment he/she receives if the rights that are granted are extensive.

COMPOSER'S CREDIT AND MORAL RIGHTS (CLAUSE 2)

Moral rights are personal rights of an artist, provided for under Part IX of the *Copyright Act 1968* (Cth). They cannot be purchased or assigned (i.e. sold). They belong to a creator regardless of whether that creator (ie composer or lyricist) is still the copyright owner. Moral rights apply to artistic, literary, dramatic and musical works and films. Since 26 July 2007, moral rights have also existed for performers in sound recordings of live performances of



musical works. If the sound recording of the Music is of a live performance, the Producer will need to consider performers' moral rights.

In Australia there are 3 moral rights, namely the right of a creator:

1. to be named as the work's author or creator (*the right of attribution*);
2. not to have his/her work (falsely) attributed to another (*the right against false attribution*); and
3. to protect his/her work from unauthorised alteration, distortion or other derogatory treatment that prejudices his/her honour and reputation (*the right of integrity*).

Sometimes contracts ask creators to waive (i.e. give up) their moral rights. Arts Law recommends that creators avoid signing any contract that requires them to give up their moral rights without first getting legal advice. The *Copyright Act* does not specifically allow for the "waiver" of moral rights. However, it does contemplate that creators can give consent in writing to the future infringement of their moral rights. A wholesale general consent to infringements of moral rights may be unfair and may be open to attack under federal and State legislation regulating contracts and industrial relations.

Nevertheless, in some circumstances it may be necessary or appropriate for a creator to consent to certain acts or omissions in respect to his/her moral rights. For example, in a film project, the Producer will generally require the Composer to consent to not always being attributed (in trailers for example) or to the Producer altering the Music in some way (see clause 2.1). Creators should always carefully consider any moral rights consent and seek advice if uncertain of the terms of the consent.

Clause 2.1 implements the Producer's legal obligation to respect the Composer's moral right of attribution by providing that the Composer should be credited in the manner agreed.

If the Music is a prominent feature of the film (eg. in a short film about the Composer), the Composer should also seek a credit, where appropriate, in advertising for the Film.

Clause 2.3 provides for a partial consent to an infringement of the Composer's right of attribution where the Producer, without fault or negligence, fails to credit the Composer. Where necessary, this clause could be varied to include details about the credit to be given to the lyricist and any musical performers.

Clause 2.4 incorporates the terms of the "Industry Accord on provisions which by consent may be incorporated in contracts" (**Industry Accord on Moral Rights**). The Industry Accord on Moral Rights is a voluntary film industry standard (available for download from the Screen Australia website at http://afcarchive.screenaustralia.gov.au/downloads/moralrights_industryaccord.pdf which acknowledges an author's moral rights, but provides for the author's consent to certain acts which would, in the absence of consent, infringe those moral rights.

PAYMENT (CLAUSE 3)

The agreement provides for the Composer to receive payment in exchange for the Producer's right to use the Music and/or Master. The payment may not necessarily be an upfront payment – it may be a royalty payable only if the film is a commercial success, or just a credit in a particular form, or something else such as a copy of the Film. This agreement assumes there is a single financial payment (**Fee**).



The quantum of the Fee can vary according to a number of factors such as the Film's budget, its duration, the prominence of the Music in the Film, and the Composer's reputation.

This clause requires the parties to specify when the Composer should receive the Fee. For example, the Producer may not be able to pay any fees until the Producer receives production funding, which may not be until the first day of principal photography.

GOODS AND SERVICES TAX (CLAUSE 4)

The parties to the agreement must consider their obligations with respect to taxation and other statutory fees and charges.

GST is a general tax on goods and services supplied in Australia. Most supplies for arts businesses made for consideration (e.g. money or payment in kind) will be subject to GST. Clause 4 provides that payments are *exclusive* of GST. If this does not suit your situation, you will need to consider an alternative clause.

You should obtain specific professional advice on your GST and tax position and obligations under the agreement and generally.

For more information contact the Australian Taxation Office on 13 28 66 or visit the website www.ato.gov.au. In addition, the Australia Council for the Arts has published [Artefacts: the Arts and Tax - a practical tax workbook for the arts sector](#) which can be downloaded free from the Australia Council website.

DELIVERY AND RETURN OF THE MASTER (CLAUSE 5)

Clause 5 deals with the Composer's responsibility for delivering the Master to the Producer, and the Producer's responsibility for returning it to the Composer, after completion of the Film.

As one of the Producer's primary obligations is to ensure that the Film is made on time, the Producer can terminate the agreement under clause 9.2 if the Composer is late with delivery of the Master. If the Producer is responsible for making the sound recording, then clause 5 can be deleted.

NAME, LIKENESS, VOICE AND BIOGRAPHY (CLAUSE 6)

Clause 6 deals with the Producer's right to use the Composer's name, likeness, voice or biography. The parties must select one of the options and delete the one they do not use.

Under the first option in clause 6.1, the Producer obtains broad rights to use the Composer's name, likeness, voice or biography. The only limitation is that the Composer must consent, on a case by case basis, to any use that may amount to an endorsement. The alternative option in clause 6.2 provides that all uses (beyond the credit in clause 2) must be agreed with the Composer on a case by case basis. The parties should choose the second option if the Composer wants to retain greater control on the use of his/her name, likeness, voice or biography.

The parties may want to include a provision in the agreement requiring the Composer to provide approved and updated biographical information and photos to the Producer for use under this clause.



COMPOSER'S REPRESENTATIONS, WARRANTIES AND INDEMNITY (CLAUSE 7)

Clause 7 is important to ensure that the Producer acquires all rights necessary to produce and exploit the Film without infringing the rights or interests of any other individual or organisation. In practice, the Producer is usually required to demonstrate that it has acquired all necessary rights and interests to government funding bodies, other investors and distributors – these warranties assist the Producer to show this.

An indemnity is a promise to reimburse a person if that person suffers loss or damage in the circumstances that are the subject of the indemnity. Clause 7.2 imposes on the Composer an obligation to indemnify the Producer for any loss or damage of the Producer resulting from a breach of the Composer's representations or warranties under clause 7.1.

The Composer is responsible for obtaining signed releases from all performers whose musical performances are contained on the Master which permit the use of their musical performances in the Film and assigning any copyright interests that they may have in the Master to the Producer. A sample **Performer's Release** is available from Arts Law. Also see Arts Law's Information Sheet [Performers Rights](#) for further information.

PRODUCER'S AND COMPOSER'S OTHER OBLIGATIONS (CLAUSE 8)

The parties can include any additional requirements in this clause. For example, the Producer has the duty to lodge music cue sheets with APRA to assist APRA's collection of performance royalties to the Composer.

TERMINATION AND REMEDIES (CLAUSE 9)

Under clause 9.1, the Composer can terminate the agreement if payment is not received or if the Producer has not in fact used the Music in the Film. This enables the Composer to pursue other opportunities to licence the Music.

In clause 9.2, the Producer may terminate the agreement and recover any amount already paid for the use of the Work if the Composer fails to deliver the Master to the Producer within a certain period after receiving a written request.

It is important for the parties to be clear about when and how the agreement will end, and what remedies they will each be entitled to in the event of termination. The Producer will not want the Composer to be able to terminate the Producer's right to incorporate Music and any Master in the soundtrack of the Film once the Producer has incorporated them in the Film, or to stop the Producer from producing the Film according to the Producer's other contractual obligations or distributing the finished Film. The Producer may not want to be obliged give the Composer lengthy periods of time to fix any breach of the agreement, as the production of the Film could be severely affected if strict timetables are not met. In fact, the Producer may want "time to be of the essence," which means that adhering to timing is essential. If so, the Producer would need to insert such a provision into the agreement.

If the Producer wants to be able to terminate the agreement for any reason at any time (not just breach), the agreement needs to be amended to reflect this.

DISPUTES (CLAUSE 10)

It is almost never worth going to court to resolve a dispute, but not every problem can be solved easily. Clause [x] provides that a party which wants to access the dispute resolution



procedure in the contract must first send a written notice of the dispute to each other party. This starts a timetable for resolving the dispute. The parties must make a good faith effort to sort out their dispute themselves, but if that isn't successful must then attend a mediation arranged through the Arts Law mediation service (at least one party must subscribe to access this service). Compared to litigation and arbitration, mediation is an informal and less expensive dispute resolution process, in which an independent person helps the parties in conflict to formulate their own solution. For more information see Arts Law's information sheet: [Mediation and the Arts Law Mediation Service](#).

The Arts Law mediation service expects that the parties will be able to agree on the person to be appointed as the mediator. If however that is not possible, the contract provides that the Arts Law Centre will appoint a mediator. Instead of the Arts Law Centre, the parties may wish to nominate another independent body within their industry such as Screenrights or APRA|AMCOS. Only after the parties have attempted mediation, can the dispute be the subject of court proceedings.

GENERAL PROVISIONS (CLAUSE 11)

Clause 11.1 defines the relationship between the Composer and the Producer as one of independent contractor as distinct from, among other things, one of employment. It indicates the intention of the parties but may not be legally effective if in reality the Composer is in fact an employee or partner of the Producer.

Clause 11.2 specifies how notices under the agreement can be given, and when they are considered to be served (i.e. received).

Clause 11.3 is included to ensure that if any responsibilities are to be delegated or subcontracted, the parties agree about the subcontractors and their obligations.

A legally enforceable agreement can comprise both written and verbal (oral) terms. Oral terms can be expressly stated or implied from the circumstances. In the interests of certainty, clause 12.4 seeks to ensure that the written agreement contains all relevant terms. Anything that might have been canvassed during negotiations which is not actually set out in the agreement will generally be excluded by this clause. However, there are exceptions, for example, where terms cannot be excluded by statute and where one party has made deliberate or negligent misrepresentations on which the other party relied in entering the agreement.

Clause 11.5 addresses possible future changes to the law in favour of Indigenous rights. It provides that the parties to the agreement will comply with the law as enacted. As mentioned earlier, if ICIP is contained in the Music or the Master, a specific ICIP clause should be included consistent with the existing protocols on the use of Indigenous music and performances.

Clause 11.6 requires any changes to this agreement to be in writing signed by both parties. This avoids confusion over the terms of the agreement and prevents a party arguing that an agreement was varied orally.

Clause 11.7 specifies that the validity of the agreement as a whole and of its individual clauses is not affected by the invalidity of any clause, unless that invalidity has an impact on any other clause.



Complete clause 11.8 to state the appropriate governing law for the agreement and the place where possible litigation should be conducted if the parties fail to resolve any conflict under clause 10. This is particularly important if the agreement is between people in different States or different countries where laws may vary.

Signing the agreement

Individual parties should sign their name and write in the date of signing where indicated at the bottom of the agreement. This is sometimes called "executing" the agreement.

If a company or association rather than an individual is a party to the agreement, the organisation's rules and relevant laws determine who is authorised (for example a director, a secretary), and how many authorised signatories (for example two directors, or a director and a secretary) are required, to sign the agreement. It may also be necessary to stamp or "affix" the document with the company's or association's seal if this is required under its constitution or articles of association. In that situation, replace the existing wording "Signed for and on behalf of ..." as follows:

"The Common Seal of the [party] was fixed to this agreement ..."

If someone else is signing on behalf of either party as that party's agent, you should insert the following sentence into the signature section:

"I am the authorised agent for ..."

If any of the parties is under the age of 18, that party's parent or legal guardian will need to sign the agreement "on behalf" of the child. This does not mean that the parent or legal guardian becomes a party to the agreement in the parent's or legal guardian's own right.

If there is a change to the agreement at the last minute before signing, you can either type up a new agreement, or make the change in handwriting and have each party initial next to the change before signing at the bottom of the agreement. You may also wish to initial each page in order to make sure no new pages can be inserted after you have signed, but this is not strictly necessary.

Keep records of your agreement

Signing the agreement is evidence that you agreed to its written terms. You will usually be bound to perform the agreement as it is written. For this reason it is a good idea to get the same number of identical originals of the agreement as there are parties to it and have all originals signed by all parties. Each party then keeps a fully signed copy. At the very least, however, make sure you have a copy of the original agreement so that you can remember what you have signed.

Stamp duty

Stamp duty is a tax that is enforced and collected by State and Territory governments on certain "instruments" (i.e. documents) and transactions relating to property such as partnership interests or shares, or in some cases, intellectual property such as copyright. You should check with the Office of State Revenue in your State or Territory as to what stamp duty, if any, may be payable on your document or transaction.