

SCGC Model Deal Memo

*THE WORD DOCUMENT VERSION OF THIS DEAL MEMO HAS
PARAGRAPHS AND SECTIONS NUMBERED AUTOMATICALLY.
THIS WAS A REQUEST FROM THE MEMBERSHIP.*

*IF A PARAGRAPH IS DELETED OTHERS WILL RENUMBER.
USE CARE WHEN EDITING OR DELETING.*

While not as commonly used this deal memo is meant for projects that will take a long time to complete or those that require a lot of back and forth negotiations. The deal memo gives both parties a signed document that allows work to proceed while the main contract continues to be hammered out. The deal memo is NOT a substitute for the actual contract.

Subject: Composer Deal Memorandum

Project: _____ (Current Title of Project) (the “Production”)

Duration/Episodes: _____ (Projected Duration of Project x No. Episodes, if applicable)

The composer should include any additional information they may have which gives more detail regarding, for example: number of episodes; how much music has been agreed to; etc.

PRODUCER: [PROD CO. NAME]
[PROD CO. ADDRESS]

CONTRACTOR: [COMPOSER NAME]
[OR COMPOSER’S LOAN OUT COMPANY]
[OR COMPOSER NAME d/b/a COMPANY NAME]
[ADDRESS]
[CAVCO #]
[HST #]
[SCGC #]

Date: _____

If the composer offers his/her services as a company, he/she must sign a “letter of inducement” authorizing the loan out of the composer’s personal services to Producer. The letter of inducement can be found in Schedule C of the model contract agreement.

It is quite common in this day and age for producers to request one or two source cues from the score composer. However, it is also very common for a producer to wind up in a situation where they had planned on licensing a certain amount of source music/songs for the production and then discover they can't afford the required licensing fees. At this point, they may ask the composer to write a bunch of sound-a-likes and simply count this extra music as part of the score. This can require a great deal of extra time and money that needs to be negotiated separately from the original terms.

The producer might also ask the composer if they have any pieces available in their archives that could serve the same purpose. This can be a win-win situation but it is suggested that in this type of scenario the pieces be contracted on an a la carte basis using the song license agreement.

The parties agree to execute a long form agreement incorporating the following material terms at a later date TBD. The parties agree to negotiate all additional terms in good faith and in a timely manner.

Engagement: Producer agrees to engage Contractor to compose, arrange, orchestrate, produce and deliver an original score and master soundtrack recording (collectively, the “Music Score”), timed for synchronization with the picture version of the Production provided by the Producer. The Producer acknowledges and agrees that Contractor is engaged as an independent contractor and not as an employee of the Producer.

In an employer/employee relationship, employer ownership of the copyright in works created by an employee is referenced in the Canadian Copyright Act as “work made in the course of employment”. In order for an employer to obtain this copyright however, there must be a genuine employee/employer relationship: i.e. CPP, UIC, Tax Withholding, provision of a workplace, etc. In most cases in the Canadian Industry, composers are independent contractors. This is important distinction, especially in the U.S. context in which the concept of “work made for hire” contained in the US Copyright law, deems the employer to be the author of the work for copyright purposes. Such language is not applicable in the Canadian situation.

If the Production is a television series, it is important to specify whether Contractor is being engaged for all episodes produced during the current production season, or for some lesser number of guaranteed episodes, or whether Producer can terminate the engagement at any time.

In some cases additional rights may be required for works not created by the Contractor. Such rights include but are not limited to the so called “derivative right” of a copyright owner to control arrangements of works based upon their copyrights. In this case consider the following language:

Producer hereby acknowledges and agrees that, in addition to the fees paid to Contractor when acting as arranger/orchestrator of works not created by the Contractor, rights clearance and/or other fees may also be payable to the owner(s) or representative(s) of the owner(s) of the original musical works that are the subject of the arrangement/orchestration services provided by the Contractor herein. Producer shall be responsible for the payment of any and all such additional fees and/or clearances required, and agrees to hold harmless and indemnify the Contractor for the payment of any such additional fees and any related claims, without limitation.

Fee: In consideration of the services to be rendered by the Contractor pursuant to this Agreement, the Producer shall pay to the Contractor the total amount of CDN \$_____ plus HST and any other applicable taxes, to be paid in accordance with the following payment schedule:

Producer shall pay to the Contractor the total amount of CDN \$_____ plus HST and any other applicable taxes, to be paid as follows:

- (a) \$ _____, representing _____ % of the total fee, on commencement of Contractor's provision of services;
- (b) \$ _____, representing _____ % of the total fee, on [delivery or other date or milestone agreed by the parties]; and
- (c) \$ _____, representing _____ % of the total fee, on the earliest of [date or delivery and acceptance of the Music Score in its entirety]

Costs: The parties agree that Contractor shall use a facility of Contractor's choice to produce the Music Score and that Contractor shall be the sole performer of the Score. In the event that Producer requires Contractor to use any other recording facility or hire any additional performers or music editors, Producer shall be responsible for, and pay to the Contractor, any additional costs incurred.

This clause is intended to establish a default position that the composer will be "doing it all", and that any extras such as additional players or a different studio facility should be part of a negotiation between composer and producer, not an assumption on the part of producers.

It is a good idea, particularly in lower budget productions, to place reasonable limits on the expectation of live musicians to be used in the recorded score. For example: number of live musicians other than composer not to exceed 5 players.

[OPTIONAL FOR UNION GIGS:]

Performer Fees: Contractor shall pay, in connection with the creation of the Music Score, all fees and/or other costs due pursuant to any applicable industry agreement that is in force at the time of execution of this Agreement. Contractor's obligations in this respect are limited to those uses of the Music Score specifically described in the long form agreement TBD.

For clarity, this clause means that while the Producer may be paying for additional per-formers, studios, etc., the composer will be the one who deals with actually "signing the cheques".

If the production is eligible to be contracted under the CFM buyout agreement, then a letter of adherence must be obtained from the CFM and signed by the producer.

If hiring non-union performers, composers should get each non-union performer to sign a waiver for any further compensation from the Contractor beyond what has been paid for the session fees. Sometimes the producer will specifically ask for this but not always. One simple way to deal with this is to have each performer include the phrase "buyout of all rights for all territories" on their invoice.

Grant of Rights: Subject to the reservations of rights described below, Contractor agrees to assign all right, title and interest in the Music Score for the duration of the copyright term and any extension thereof, throughout the world.

Reservation of Rights: The following rights shall be retained by the Contractor:

- (a) **Performing rights.** Contractor's performing rights in the Music Score are subject to any pre-existing assignment to a performing right society or any other entity, and thus cannot be legally assigned or otherwise granted to Producer.
- (b) **Neighbouring rights.** Contractor retains his or her right to receive equitable remuneration or such other compensation for the performance in public, making available and communication to the public by telecommunication of the Music Score, to the extent recognized by law and in accordance with the administration of such rights by any neighbouring rights organization of which Contractor is a member.

- (c) **Reversionary rights:** All rights granted to the Producer pursuant to this Agreement shall be subject to any statutory reversion rights and other reversionary rights agreed by the parties in good faith.
- (d) **Moral rights:** The Producer acknowledges and agrees that the Contractor shall be the author of the Music Score and this Agreement does not constitute or include any waiver of the Contractor's rights of attribution.

It is important that the Composer understands the scope of the above grants: In this agreement, the Composer (as Contractor) assigns the ownership of music score to the Producer for the purposes of allowing the Producer to have a free hand in maximizing the distribution of the Production. However, the Reservation of Rights specifically maintains the ability of the Composer to continue to receive the Royalties from various sources that would have flowed if the Composer had not assigned the copyright.

- (e) **Assurance:** For greater certainty, the parties acknowledge and agree that, notwithstanding anything in this Agreement, other than Producer's obligation to pay Contractor's fee for services the Producer shall retain, for the duration of the copyright in the Music Score, the non-exclusive right to continue using the Music Score in synchronization with the Production and in any publicity or promotional material for the Production, without any additional payment to Contractor.

This clause assures the Producer that, regardless of other parts of this contract, such as the reversion rights, they will continue to have the non-exclusive right to use the score as long as the payments due under this contract are made in full.

Revenue Sharing: Producer shall have the right to receive revenues generated from the exploitation of the Music Score, subject to the Contractor's right to receive royalties or other revenues payable to Contractor by music or other rights organizations with which Contractor is affiliated, as follows:

- (a) **Performing rights.** The Contractor and the Producer shall be entitled to the following allocations of all royalties attributable to the public performance of the Music Score, as determined and distributed by the performing rights society to which Contractor has assigned the performing rights:
- Of the "writer share": Contractor receives one hundred percent (100%)

- Of the “publisher share”: Producer receives (.....) percent (.....%)
Contractor receives (.....) percent (.....%)

In order for the above clause to be relevant, it is imperative that the composer be a member of a performing rights organization (PRO) such as SOCAN. Without a PRO membership, no cue sheet can be filed for the score and no performance royalties can be collected.

It is standard PRO practice in North America to divide performance royalties into an equal split of writer's and publisher's share. In this particular scenario, the writer's share makes up 50% of the total performance royalties and the publisher's share makes up the other 50%. While the writer's share must remain entirely with the writer(s), the publishers share is often a matter of negotiation and can be either shared between the producer and writer or belong entirely to one or the other. In lower budget situations, it is quite common for the composer to negotiate a larger portion of, or even the entire publisher's share.

In other territories the 50/50 division is not standard practice. When possible, it is advisable to find out which territories will be airing a given project as this can greatly help inform the negotiated splits and fees up front. For example, if it is known that a series is already pre-sold to France, or England, the back end revenue for the show becomes more significant than if the show was only airing domestically.

- (b) **Neighbouring rights.** The Contractor and the Producer shall be entitled to the following allocations of all royalties attributable to neighbouring rights in the Music Score, as determined and distributed by the neighbouring rights organization representing Contractor:

- Of the “performer share”: Contractor receives one hundred percent (100%)
- Of the “maker share”: Producer receives (.....) percent (.....%)
Contractor receives (.....) percent (.....%)

“Neighbouring Rights” are a set of rights created under the Copyright Act. These rights create a copyright in the musicians’ performances embedded in the master recordings. The performers and the owners of the masters will share in royalties payable from these growing revenue streams. (similar to the way SOCAN and other PRO’s administrate public performance royalties paid from conventional broadcasters to writer/publishers).

- (c) **Soundtrack sales.** Producer agrees to pay to Contractor a percentage of the suggested retail list price (or the equivalent) of any soundtrack

album containing the Music Score to be negotiated by the parties in good faith.

The percentage to be paid on a soundtrack is widely negotiable. A suggested lower end threshold is 15%.

- (d) **Mechanical rights.** Producer and Contractor shall each be entitled to receive fifty percent (50%) of all mechanical rights royalties payable by any collective society, agent or other organization administering the collection and distribution of mechanical royalties, or any other reproduction royalties relating to the use of the Music Score. Producer shall remit to Contractor any mechanical royalties it receives on the Contractor's behalf semi-annually.
- (e) **Sheet music sales.** Producer agrees to pay to the Contractor a percentage of the suggested retail list price (or the equivalent) of Music Score sheet music sales to be negotiated by the parties in good faith.
- (f) **Other Revenue.** Producer and Contractor agree that all other revenue generated by the use of the Music Score shall be shared between the parties as follows:
 - Producer receives [.....] percent [.....%]
 - (b) Contractor receives [...] percent [.....%]

Part (g) is an important catch all clause to cover any future unforeseen revenues not mentioned in the agreement. It is suggested that this be negotiated and not exceed other splits in the contract. So for example, if it was agreed that the composer would keep all of the writer's share and the producer all the publisher's share, this would be a 50/50 split and could also be applied to "other revenue". In addition to the revenue participation, composers may wish to negotiate for participation in a production's revenue (i.e. "points" in the production's modified adjusted gross receipts ("MAGR")). In other circumstances, composers may negotiate for a deferred fee (or fees) payable on a date or milestone agreed by the parties.

The SCGC is aware of the current climate of concern over Cultural Appropriation in works of art including Audio Visual projects. Members are encouraged to consider language that indemnifies them from any legal action with regard to the works being commissioned by the producer included in any legal action brought against the production as a matter of cultural appropriation. When boilerplate language exists to properly deal with this it will be updated in these documents.

Composer Credit: Producer shall provide Contractor with a “composer credit” on a separate card in the main/opening titles (tied on a no less favourable basis with respect to grouping, size, boldness and duration to the credit afforded the Production’s Screenwriter).

IN WITNESS OF WHICH this agreement has been executed by the parties as of the date written above.

(Producer Name)

PRODUCER

(Composer Name)

COMPOSER