

## **SUBSCRIBER AND SOFTWARE LICENSE AGREEMENT FOR SMARTMUSIC®**

THIS SUBSCRIBER AND SOFTWARE LICENSE AGREEMENT ("AGREEMENT") WAS LAST UPDATED ON DECEMBER 1, 2009.

PLEASE READ THIS AGREEMENT BELOW AND INDICATE YOUR ACCEPTANCE BY CLICKING THE "I ACCEPT" BUTTON AT THE END OF THIS AGREEMENT. BY INSTALLING AND/OR USING THE SMARTMUSIC SOFTWARE PROGRAMS CONTAINED IN ANY DOWNLOAD FROM THE SMARTMUSIC WEB SITE OR DISK PACKET (COLLECTIVELY, THE "SOFTWARE") AFTER DECEMBER 1, 2009, YOU ARE AGREEING TO BE BOUND BY THIS AGREEMENT, INCLUDING ALL FUTURE AMENDMENTS.

From time to time, MakeMusic may change the terms in this Agreement. The changes will appear in this document, which you can access at any time through the [smartmusic.com](http://smartmusic.com) website in Terms and Conditions. If you do not agree to be bound by the changes, you should not use SmartMusic again and you should cancel your subscription to SmartMusic. If you use SmartMusic again, your use will constitute acceptance of the changes.

The terms of this Agreement are in addition to the Website Terms of Use at the [smartmusic.com](http://smartmusic.com) website in Terms and Conditions, which also constitute a valid and binding agreement between you and MakeMusic.

### **PRIVACY INFORMATION**

Please review our Privacy Statement at the [smartmusic.com](http://smartmusic.com) website in Terms and Conditions, which also governs your visit to SmartMusic to understand how we collect and use information about you.

### **FEES AND PAYMENTS**

The fees for your subscription(s) will be billed to you via your authorized credit card or an invoice. Purchase orders may be used only for Educator or prepaid Student Subscriptions (those purchased by the teacher). You agree to pay or have paid all fees and charges, including any applicable taxes incurred in connection with your account for SmartMusic, and for all Student Subscriptions contracted for, at the rates in effect when the charges were incurred. Upon advance notice to you, MakeMusic may change fees and charges for your subscription(s); provided, however, that such changed fees and/or charges will only be effective upon your renewal of your subscription. MakeMusic shall not be responsible for any fees or charges that you incur to access the internet (such as the fees or charges that you may incur with your internet access provider or other third party service) to access SmartMusic.

### **GRANT OF LICENSE**

MakeMusic grants you a nonexclusive license to use the Software under the terms and limitations of this Agreement.

For Educator Subscribers, this Agreement grants you access to the SmartMusic Gradebook™ service. Only one individual educator is authorized to use the SmartMusic Gradebook™ service per purchased license of the Software. Individual educators responsible for grading individual students must obtain their own license to the Software; provided, however, that individual classes that are taught by multiple educators may share access to one license of the SmartMusic Gradebook™ service.

### **UPDATE YOUR SUBSCRIPTION**

At the end of your subscription term, or at the beginning of any renewal term, you must connect to the internet to update your subscription. If you do not update your subscription, MakeMusic, will have the right to interrupt your access to the repertoire of accompaniments.

## **TERM AND RENEWAL**

Except as expressly set forth herein, a subscription applies to a specific personal computer (each subscription is authorized for use on an individual computer). Subscription term length and renewal depends on the type of subscription selected:

1. EDUCATOR Subscribers (SITE-SUBSCRIPTION) choose a term end date during the subscription process that is at least six (6) months from the order date. This subscription type does not automatically renew. In the event a renewal subscription order is placed, you must update your subscription at the beginning of such renewal term by connecting to the internet.
2. EDUCATOR Subscribers (NON-SITE SUBSCRIPTION) choose a term end date during the subscription process that is at least six (6) months from the order date. If you elect to automatically renew at the time of your subscription purchase, your school and practice room subscriptions will renew automatically at the end of each term until you cancel your subscription. You must update your subscription at the beginning of each renewal term by connecting to the internet.
3. STUDENT Subscriptions (SITE-SUBSCRIPTION) choose a term end date during the subscription process that is at least six (6) months from the order date. This subscription type does not automatically renew. In the event a renewal subscription order is placed, you must update your subscription at the beginning of such renewal term by connecting to the internet.
4. STUDENT Subscriptions (PREPAID) are purchased by the teacher on behalf of the student. A term end date is chosen during the subscription process, and is at least six (6) months from the order date. This subscription type does not automatically renew. In the event a renewal subscription order is placed, you must update your subscription at the beginning of such renewal term by connecting to the internet.
5. STUDENT Subscriptions (NON-SITE SUBSCRIPTION) have a term of at least one (1) year from the order date. At the time of order, the student can choose to have student subscriptions renew automatically each year until you cancel your subscription. You must update your subscription at the beginning of each renewal term by connecting to the internet.
6. INDIVIDUAL MONTHLY Subscriptions are for one (1) month from the subscription order date, and automatically renew each month until you cancel your subscription. You must update your subscription at the beginning of each renewal term by connecting to the internet.
7. ORGANIZATION-SPECIFIC subscription term lengths, renewal policy and other restrictions are determined by the organization and are detailed in the organization's order page.

## **TERMINATION AND REFUND**

MakeMusic may discontinue or change SmartMusic, or its availability to you, at any time, and you may always terminate your subscription at any time. If you wish to terminate your subscription, please contact MakeMusic online at [www.smartmusic.com/support](http://www.smartmusic.com/support). If you terminate your subscription prior to the end of its term you will not receive a refund for any reason. Your subscription will terminate without notice if you breach this Agreement.

## **USE OF SERVICE/CONTENT/SOFTWARE LICENSED, NOT SOLD; RESTRICTIONS ON USE**

The content available through SmartMusic is the property of MakeMusic or its licensors and is protected by copyright and other intellectual property laws. CONTENT AVAILABLE TO YOU THROUGH SMARTMUSIC MAY BE USED ONLY FOR YOUR PERSONAL, NON-COMMERCIAL USE. YOU MAY NOT SELL THE PROPERTY OBTAINED THROUGH SMARTMUSIC. You own the documentation materials and the media on which the Software is recorded, but MakeMusic retains all ownership and rights in the Software, including all rights in any portion(s) of the Software present in any output of the Software. This Agreement is not a sale of the Software.

The Software is specific to the computer on which it is loaded, and you may not transfer the Software under this Agreement to another computer or anyone else; provided, however, that you may move your subscription under this Agreement to another machine owned by you a maximum of ten (10) times during the subscription so long as each copy that you make and distribute contains this Agreement and the same copyright and other proprietary notices pertaining to the Software that appear in the Software. You

agree that you will not use SmartMusic to infringe the copyrights or other intellectual property rights of others in any way. Without limiting the foregoing, you agree not to reproduce, retransmit, distribute, disseminate, sell, publish, broadcast or circulate the content received through SmartMusic to anyone, including but not limited to others in the same company or organization, without the express prior written consent of the copyright holder(s) and MakeMusic; provided, however, that subject to the Limitation of Liability and Indemnification sections below, you may distribute copies of your recorded performances along with SmartMusic Accompaniments to your teachers, your family members or friends, but only for (1) noncommercial and (2) educational or evaluation purposes, and provided that you include all copyright and other proprietary rights notices with any portion of the content in the same form in which the notices appear in SmartMusic and the phrase "Used with permission from MakeMusic, Inc." ANY OTHER DISTRIBUTION IS PROHIBITED. UNDER NO CIRCUMSTANCES MAY RECORDED PERFORMANCES OF SMARTMUSIC ACCOMPANIMENTS WITHOUT AN INDIVIDUAL PERFORMING BE MADE FOR THE PURPOSE OF USING SMARTMUSIC WITHOUT A SUBSCRIPTION. To request consent for other matters, please contact MakeMusic, (952-937-9611).

To protect MakeMusic's copyrights in the Software, you may not adapt or make alterations to the Software, decompile, disassemble, translate, convert to another programming language or otherwise reverse engineer the Software or digital files created by the Software.

You may not sell the Software without the written permission of MakeMusic. In no event may you rent, lease, grant sublicenses or any other rights in the Software to others on a temporary basis, including renting the Software and CPU together to other users. You may dispose of the Software on a permanent basis without the written permission of MakeMusic.

#### **SOFTWARE DISCLAIMER OF WARRANTY AND LIMITED WARRANTY FOR MEDIA**

THE SOFTWARE AND ACCOMPANYING DOCUMENTATION MATERIALS (THE "MATERIALS") ARE PROVIDED SOLELY ON AN "AS IS" BASIS, WITHOUT WARRANTY OF ANY KIND. THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE MATERIALS IS WITH YOU. YOU ASSUME ALL RESPONSIBILITY FOR SELECTION OF THE MATERIALS TO ACHIEVE YOUR INTENDED RESULTS, AND FOR THE INSTALLATION, USE, AND RESULTS OF THE SOFTWARE. IF THE MATERIALS PROVE TO BE DEFECTIVE, YOU, AND NOT MAKEMUSIC NOR ANY OF ITS AFFILIATES, AGENTS, DEALERS, DISTRIBUTORS, EMPLOYEES OR LICENSORS (COLLECTIVELY, "MAKEMUSIC AND ITS AFFILIATES") ASSUME THE ENTIRE COST OF ANY AND ALL NECESSARY SERVICING, REPAIR, OR CORRECTION. EXCEPT AS EXPRESSLY PROVIDED ABOVE, MAKEMUSIC AND ITS AFFILIATES MAKE NO WARRANTIES REGARDING THE MATERIALS EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NO ORAL OR WRITTEN INFORMATION OR ADVICE PROVIDED BY MAKEMUSIC AND ITS AFFILIATES SHALL CREATE ANY WARRANTY OR INCREASE IN ANY WAY THE SCOPE OF THIS WARRANTY, AND YOU MAY NOT RELY ON SUCH INFORMATION OR ADVICE. THIS LIMITED WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS, AND YOU MAY ALSO HAVE OTHER RIGHTS THAT VARY FROM STATE TO STATE.

#### **LIMITATION OF LIABILITY**

MAKEMUSIC AND ITS AFFILIATES SHALL NOT BE LIABLE TO YOU OR ANYONE ELSE FOR ANY LOSS OR INJURY RESULTING DIRECTLY FROM USE OF SMARTMUSIC CAUSED IN WHOLE OR PART BY ITS NEGLIGENCE OR CONTINGENCIES BEYOND ITS CONTROL IN PROCURING, COMPILING, INTERPRETING, OR DELIVERING SMARTMUSIC AND ANY CONTENT THROUGH SMARTMUSIC. IN NO EVENT WILL MAKEMUSIC AND ITS AFFILIATES BE LIABLE TO YOU OR ANYONE ELSE FOR ANY DECISION MADE OR ACTION TAKEN BY YOU IN RELIANCE ON SUCH CONTENT OR SMARTMUSIC (INCLUDING, WITHOUT LIMITATION, YOUR DISTRIBUTION OF COPIES OF YOUR RECORDED PERFORMANCES ALONG WITH SMARTMUSIC ACCOMPANIMENTS TO YOUR TEACHERS, YOUR FAMILY MEMBERS OR FRIENDS, OR ANYONE ELSE). MAKEMUSIC AND ITS AFFILIATES SHALL NOT BE LIABLE TO YOU OR ANYONE ELSE

FOR ANY DAMAGES RESULTING FROM ANY CLAIM OTHER THAN DIRECT DAMAGES (INCLUDING, WITHOUT LIMITATION, CONSEQUENTIAL, SPECIAL, INCIDENTAL, INDIRECT, OR SIMILAR DAMAGES, OR LOST PROFITS) EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. MAKEMUSIC AND ITS AFFILIATES ALSO SHALL NOT BE LIABLE FOR CHANGES TO ANY FINALE FAMILY NOTATION FILES THAT MAY OCCUR UPON CONVERSION TO THE SOFTWARE. YOU AGREE THAT THE LIABILITY OF MAKEMUSIC AND ITS AFFILIATES, IF ANY, ARISING OUT OF ANY KIND OF LEGAL CLAIM WHETHER IN CONTRACT, TORT OR OTHERWISE IN ANY WAY CONNECTED WITH SMARTMUSIC OR THE CONTENT IN SMARTMUSIC SHALL NOT EXCEED THE AMOUNT YOU PAID TO MAKEMUSIC AND ITS AFFILIATES FOR THE USE OF SMARTMUSIC IN THE 12 MONTHS IMMEDIATELY PRECEDING THE EVENT GIVING RISE TO SUCH CLAIM. SOME STATES DO NOT ALLOW THE LIMITATION OR EXCLUSION OF INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU.

### **INDEMNIFICATION**

You may not use SmartMusic for any unlawful purpose. You agree to indemnify MAKEMUSIC AND ITS AFFILIATES for any damages, costs, and attorney's fees, and hold MAKEMUSIC AND ITS AFFILIATES harmless, if you misuse SmartMusic (including but not limited to your distribution of copies of your recorded performances along with SmartMusic Accompaniments to your teachers, family members or friends, or anyone else).

### **DATA COLLECTION**

You hereby grant MakeMusic permission to, at its option and whenever you are using SmartMusic, access, review, analyze, gather, and otherwise use any information relating solely to your use of SmartMusic and for the purpose of MakeMusic calculating and paying royalties and other fees to third-parties from whom MakeMusic licenses certain copyrighted works (herein, "Data Collection"). You agree not to use any program, routine, devise, code or instructions or other feature on your machine which would block or otherwise not allow MakeMusic to perform Data Collection as set forth in this Section.

### **GENERAL PROVISIONS**

If any provision in this Agreement is invalid or unenforceable under applicable law, the remaining provisions will continue in full force and effect. This Agreement, your rights and obligations, and all actions contemplated by this Agreement shall be governed by the laws of the United States of America and the State of Minnesota, as if this Agreement was a contract wholly entered into and wholly performed within the State of Minnesota. Any disputes arising out of this Agreement shall be venued in the state or federal courts sitting in the State of Minnesota. This Agreement will not be governed by the United Nations Convention on Contracts for the International Sales of Goods. All provisions of this Agreement shall survive any termination or expiration of this Agreement.

### **NOTICES**

If you have questions or comments about this Agreement, please contact MakeMusic at [www.smartmusic.com/support](http://www.smartmusic.com/support), or send us a letter by First Class Postage Prepaid U.S. Mail or overnight courier to the following address:

-----  
SmartMusic Customer Support  
7615 Golden Triangle Drive  
Suite M  
Eden Prairie, MN 55344-3848  
USA  
-----

I HAVE READ AND UNDERSTAND THIS AGREEMENT AND AGREE TO BE BOUND BY ALL OF THE TERMS.