

DESIGN BUSINESS + ETHICS

AIGA | the professional association for design

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AIGA represents an authority on professionalism within the design disciplines. Its mission includes educating designers, clients and the public about ethical standards and practices governing design. The *AIGA Design Business and Ethics* series was created to establish consistent professional standards and define the relationship among designers, clients and content.

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INTRODUCTION

The *AIGA Design Business and Ethics* series represents statements on the most important issues related to professionalism, principles and best practices among working designers. This edition, the third to date, has been updated to reflect changes in the business environment since it was first published in 2001. Together these chapters comprise AIGA's statement of professional standards.

For the first time, this edition of *Design Business and Ethics* has been consolidated into a single publication, rather than printed as separate brochures in a binder. This new format responds to members' recommendations to minimize the resources used in the publication, both in consideration of the environment and the current economic challenges.

Every new member receives *Design Business and Ethics* because AIGA holds that adherence to a common set of principles is critical to establishing design as a true profession, with an ethos based on respect for clients, other designers, audiences, society and the environment. In addition, this document provides the basis for a common language with clients, so that together designers can redefine clients' expectations of designers. Consistency is critical in establishing the foundation for understanding, respect and integrity.

Each chapter is also available individually, at no cost and for unrestricted use, at www.aiga.org/design-business-and-ethics, so that designers can adapt and republish these standards as part of their own proposals and conditions for clients.

AIGA's position is consistent with practices upheld by designers around the globe. In fact, while the legacy of design's practice comes from the guilds of our international peers, today other countries look to AIGA to set the benchmark, since AIGA is the largest professional association of communication designers in the world and represents a dynamic community of (often pioneering) designers. *AIGA Design Business and Ethics* has been translated into Mandarin and widely distributed in China,

where AIGA China has an as advisory office to assist Chinese designers, educators and students on the expectations of the global design economy. This, de facto, reinforces the global nature of AIGA's standards.

We hope you will find the information useful and appropriate. And we welcome any comments, additions or revisions for future publications at business_ethics@aiga.org.

A handwritten signature in black ink, appearing to read 'Richard Grefé', with a stylized, looping flourish at the end.

Richard Grefé
Executive director
AIGA | the professional association for design

A CLIENT'S
GUIDE
TO DESIGN:

HOW TO
GET THE MOST
OUT OF
THE PROCESS

If you represent a corporation, institution, advertising agency, investor or public relations firm, or you are an individual in need of graphic design, you've landed exactly where you need to be. Welcome.



A Client's Guide to Design: How to Get the Most Out of the Process

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Unlike so much in today's business world, graphic design is not a commodity. It is the highly individualized result of people coming together to do something they couldn't do alone. When the collaboration is creative, the results usually are, too. This chapter is about how to get creative results. Developed by AIGA, the discussion that follows will give you realistic, useful information about the design process—from selecting a design firm to providing a clear understanding of objectives, evaluating cost and guiding a project to a desired end. It is a kind of "best practices" guide based upon the best thinking of many different designers with very different specializations and points of view, as well as clients of design who have a long history of using it successfully for their companies. The fundamental premise here is that anything worth doing is worth doing well, but if it's to be done well, it must first be valued.

The value position

Design—good design—is not cheap. You would be better served to spend your money on something else if you don't place a high value on what it can achieve. There's a view in Buddhism that there's no "good" karma and no "bad" karma, there's just karma. The same can't be said for design. Karma is a universal condition. Design is a human act (which often affects conditions) and, therefore, subject to many variables. When the word "design" is used here, it is always in the context of good design.

A lot of famous people have written many famous books on the importance of design and creativity. The subject matter ranges from using design and creativity to gain a strategic advantage or make the world a more livable place—and more. Much more. The focus here is on how to make the process of design work in the business environment so that the end product lives up to its potential.

We live in a time of sensory assault. Competing for "eyeballs"—which is to say, customers—is more than just an internet phenomenon. The challenge for companies everywhere is to attract consumers to their products and services and keep them in the face of fickle markets.

The answer to this challenge starts with each company's people, products and services, but it doesn't end there. How companies communicate to their markets and constituencies is becoming the primary means of differentiation today. Never, in fact, has effective communication been more important in business. And it has increased the pressure within companies to establish environments and attitudes that support the success of creative endeavors, internally and externally. More often than not, companies that value design lead the pack.

Books designers read:

- *6 Chapters in Design*, Saul Bass
- *AIGA: Professional Practices in Graphic Design*, AIGA
- *Blur: The Speed of Change in the Connected Economy*, Stan Davis & Christopher Meyer
- *Bradbury Thompson: The Art of Graphic Design*, Bradbury Thompson
- *The Cluetrain Manifesto: The End of Business as Usual*, Christopher Locke
- *The Death of Distance*, Francis Cairncross
- *Jamming: The Art and Discipline of Corporate Creativity*, John Kao
- *The Lexus and the Olive Tree*, Thomas L. Friedman
- *Looking Closer: Classical Writings on Graphic Design*, ed. Michael Bierut
- *New Rules for the New Economy*, Kevin Kelly
- *Orbiting the Giant Hairball: A Corporate Fool's Guide to Surviving With Grace*, Gordon MacKenzie
- *Thoughts on Design*, Paul Rand

What design is and isn't

Design often has the properties of good looks, which perhaps is why it's often confused with style. But design is about the underlying structure of communicating—the idea, not merely the surface qualities. The late, great designer Saul Bass called this “idea nudity”—messages that stand on their unadorned own. Certainly, it's possible for a good idea to be poorly executed. But bad ideas can't be rescued. When, for example, a global fashion house put verses from the Koran on the back pockets of its designer jeans for all the world to sit on, that was a bad idea before it was ever designed and produced. And the outcry of indignant Muslims worldwide loudly attested to this. Using a different color or type style wouldn't have changed the outcome.

Ideas give design its weight, its ability to influence audiences positively, negatively or not at all.

The objects of design

Design is about the whole, not the parts. If you wear your \$2,500 Armani suit with the wrong pair of shoes, you are apt to be remembered for the shoes and not the suit. Inconsistency raises doubt, and doubt makes people wary. This might not matter much if customers didn't have alternatives, but they do. And they know it.

So?

So, it isn't enough for a company to have a great logo if the communications effort isn't carried out across the full spectrum of the company's interaction with its marketplaces—from how the telephone is answered to corporate identity; branding; packaging; print materials; advertising; internet, intranet, interactive multimedia and web-related communications; and environmental graphics. The “swoosh” didn't make Nike a successful company. Nike made the “swoosh” an iconic reflection of a carefully orchestrated approach to the marketplace. (For better or worse, the marketplace is now deluged with “swoosh”-like shapes, identifying companies ranging from sportswear to software. It's the frame of reference for what many think of when visualizing the word “mark.”) It's unlikely the “swoosh” would be so memorable had it stayed confined to, say, hangtags on shoes.

Finding the right designer

People with a great deal of experience—both as designers and as clients—will tell you that if you really do your homework in the selection process, the chances are excellent that what follows will bring about the hoped-for results.

Where to look

There are more than 22,000 members of AIGA, and there are hundreds, if not thousands, of other businesses providing graphic design that aren't members. There are also other graphic design associations with their own memberships. And this is just the United States. It's a big community and, as with all businesses, design is increasingly global. Where do you start?

The membership lists of AIGA and other design organizations are available to the public. They are a good place to begin, especially if you're starting from ground zero. You will find the lists arranged by city and state, so that if location is an issue for you, you can define your search geographically. Start with AIGA's online membership directory at www.aiga.org/directory.

The AIGA Design Archives, designarchives.aiga.org, the largest searchable online archive of curated communication design selections in existence, represents selections from AIGA design exhibition catalogues dating back to 1924. The goal of the online archive is to provide access to examples of design excellence from AIGA competitions, which are central to the history of the design profession, and to promote discovery. Visitors are able to create lightboxes of images, annotate them for reference and share them with others.

Design industry publications are another source. They are both numerous and accessible. Not only do they publish the work of designers on a regular basis, many also publish design annuals that display what the publications judge to be the best design in a variety of categories. These publications will not only show you what designers are capable of producing, but also how companies of all sizes and from every sector of industry are using design to communicate effectively.

Reviewing them is a fairly easy way to see a lot of work quickly. Doing so may also tell you something about where your own design comfort zone lies. And while your personal comfort zone isn't necessarily the right yardstick for making a selection, knowing it will help you in the "briefing" process (more on this shortly).

Still another way to find designers is to look around at what other companies are doing; call the companies whose efforts you admire and ask for their recommendations. Companies that are doing a good job of communicating are companies who care about it, and they're typically willing to discuss the subject. Furthermore, if they're doing good work, it usually means they are good clients. Find out from them what makes a design client a good client.

Designers themselves are also good sources. Ask them whom they respect within their field. There's nothing wrong with getting them to name their competition. While it might make choosing tougher, when you make the final selection from among designers who are peers, you usually come out better than when you don't. (And if the relationship doesn't work, well, you have some future contenders you already know something about.)

What to look for

Locating designers to interview is a fairly uncomplicated proposition. What to look for among the potential candidates—what makes one or the other the right firm for you—is more complex. It's not a beauty contest. Seeing work that you like is important and altogether appropriate as a point of departure. But it's not enough to warrant a marriage proposal.

The nature and technology of what is designed today is changing and expanding, and so is the discipline of design. As with many businesses and professions today, there's more to know, and the knowledge itself has a shrinking shelf life. Some design firms have organized themselves to do everything, adding new capabilities as the demand warrants. Others do related things, such as corporate identity and annual reports. And still others do one thing—web design, for example.

If you have a retail packaging project, a firm that designs only environmental graphics might not be your best choice. Why? Well, the reasons have less to do with design than with technical requirements, vendor knowledge, pricing and scheduling. The designer who knows how paint and materials hold up in weather or how signage is viewed from a moving vehicle may not know a thing about seam wraps and how products are treated on retail shelves.

Still, there is no litmus test to say one firm can do the job and the other can't, or that a firm without a certain kind of experience can't learn. In fact, some companies see a real benefit in hiring a design firm that brings neither prior experience nor preconceptions to their project. If you've identified a firm you'd like to work with and are comfortable making a leap of faith, you probably should.

The “discovery” process is where you can make that determination. And the more thorough you are, the more likely you are to find a firm with whom you can achieve great—who knows, perhaps even spectacular—results. So ask questions. Lots of them.

What’s the design firm like to work with? What is its culture and how does that match up with your company’s? How flexible is it? Does it want lots of direction? Or lots of latitude? And how much of either are you prepared to give? Who are its clients? And how did it get them? Does it have a thorough understanding of their businesses? What kind of working relationships does it have with them? And with its vendors—from writers to photographers, printers, web consultants and fabricators? Is it a specialist? Or generalist? Does it have the manpower and technical capabilities to do what you need? How does it arrive at design solutions?

And don’t stop there.

How effective has the design firm’s work been from project to project? Does it even know? And does it know why? Can the firm demonstrate that it has done what it promised in terms of budgets and schedules? Are you talking with the people who will do the work for you? Are they the ones who did the work you liked? If not, have you seen their work? Does the firm share the credit—good and bad—for its work? Does it exhibit a good grasp of business and does the condition of the company reflect this? Do you feel that you will enjoy working with the people you’ve met?

Some of these questions are subjective, intuitive. Most have concrete answers. If, for example, a firm can’t tell you what its clients were trying to achieve or how it arrived at its solutions, chances are it doesn’t deal in ideas. If it isn’t adept at running its own business, it probably won’t be good at running your project. If it talks only about itself, it may not be a good listener.

To get your answers, go first to the design firms you are considering. Then check out external references, especially clients—and not just the references provided. Get comfortable with the honesty of the firms you are talking to. Find out if their experiences and those of their clients gel. Trust is essential when you are handing over your wallet and your image to someone else.

If you find yourself wondering whether all of this is really necessary, ask yourself how seriously you want to compete in the marketplace. Because that is exactly what a good designer will help you do.

Top 10 questions

1. How does the firm like to work?
2. Who are its clients?
3. How knowledgeable is it about them?
4. How is it viewed by them? By its peers?
5. What is its design process?
6. What kind of design experience does it have?
7. What kind of results has it achieved?
8. Who will work on your project?
9. Does the firm understand the business?
10. Do you like the people you’ve met?

What about design competitions and spec work?

There are differing views on these two closely related subjects. Some designers are absolutely opposed to design competitions and speculative work. Period. Others are open to them, provided they are compensated fairly for their work (i.e., according to the market value of the work).

The design competitions being discussed here are those that require design firms to do original work for a company in an effort to get that company's business—not the kind held by nonprofit professional organizations, such as AIGA, for the purpose of recognizing design excellence.

Consider this real-world scenario: A multibillion-dollar, publicly held global corporation with huge brand awareness surveys the work of several dozen graphic design firms for the purpose of selecting one to design its annual report. After narrowing the field to a half-dozen candidates, the company offers each design firm \$25,000 to provide it with a mock design of the report, issuing well-defined design parameters. Assuming the compensation reflects the effort required (it did), this isn't an unreasonable way to approach the selection process. And many designers would opt to participate. Yes, speculation is involved, but so is reciprocal value—up front. Real though it is, however, this scenario isn't the norm. There

aren't that many multibillion-dollar companies, for one thing. For another, few companies cast such a wide net in search of design. The more common speculative scenario includes noncompensated competitions and work that's commissioned but paid for only upon approval. In either case, the situation is the same: little or no value is placed upon the designer as a professional, as someone whose purpose is to give trusted advice on matters significant to the company.

Please visit www.aiga.org/position-spec-work for more information about AIGA's position on spec work.

Egalitarian or just too eager?

A typical design competition can be drawn from experience with the International Olympic Committee, the U.S. government or even business enterprise, and it usually goes something like this: A competition is announced for a new logo and identity. No creative brief outlines the communication challenges or objectives from the perspective of the client. A jury will select the winner and a prize may be given (recent examples include a color TV and stipends of \$15 and \$2,000). Often the client indicates one of the "rewards" will be the use of the design by the client—i.e., exposure. The rules of competition include granting the client ownership of the selected entries. (In one recent competition, the client asked for ownership even of designs that were not selected.) Once a design is chosen, development of it may or may not involve the designer.

A competition like this prevents the client from having the benefit of professional consultation in framing and solving a communication problem. The client receives artwork at a cost below market value, owns the intellectual or creative property and can exploit the work without involvement

from its creator. Who loses? The designer, the client and the profession. The designer gives up creative property without a fair level of control or compensation. The client fails to get the full benefit of the designer's talent and guidance. The profession is misrepresented, indeed compromised, by speculative commercial art.

Unpaid design presentations are fraught with economic risk—risk that is absorbed entirely by the designer. Why, then, do some design firms agree to participate?

Sometimes a new firm or a firm without strong design abilities will offer the excuse that this is the only way for it to get work or exposure. A slump in business might make a designer more willing to gamble. Whatever the reason given, this short-term approach to hiring a design firm is not in the best interests of either party.

But the issues go beyond economics. The financial burden borne by the design team translates into risk for the client. To protect their "investment" in a design competition, competing firms often play it safe, providing solutions that don't offer fresh, new ideas—in which case, the client gets what it paid for.

You wouldn't ask a law firm or management consultant to provide you with recommendations prior to hiring them. A design firm, no less than a law firm or management consultant, has to know its client thoroughly if it's to give valid advice. This takes time and commitment from both sides. Design competitions—even paid ones—just don't allow for this level of participation.

Comparisons sometimes are made with design competitions held for the purpose of selecting architects or advertising agencies. Where these analogies fall short is in the initial effort required versus future potential. Architects and advertising agencies typically present design alternatives in order to win assignments that represent substantial future billings and ongoing consulting services to the client.

The "product" comes at the end of a long engagement (in the case of architecture) or is the cumulative effect of a long engagement (as in advertising campaigns). Either way, initial design represents only a small part of the project's total value to both client and architect or agency. Not so with graphic design. The design approach represents the real value offered by the design firm, and the bulk of the work may well be completed at the front end of a project.

The design brief

A design brief is a written explanation given by the client to the designer at the outset of a project. As the client, you are spelling out your objectives and expectations and defining a scope of work when you issue one. You're also committing to a concrete expression that can be revisited as a project moves forward. It's an honest way to keep everyone honest. If the brief raises questions, all the better. Questions early are better than questions late.

Why provide a design brief?

The purpose of the brief is to get everyone started with a common understanding of what's to be accomplished. It gives direction and serves as a benchmark against which to test concepts and execution as you move through a project. Some designers provide clients with their own set of questions. Even so, the ultimate responsibility for defining goals and objectives and identifying audience and context lies with the client.

Another benefit of the design brief is the clarity it provides you as the client about why you're embarking on a project. If you don't know why, you can't possibly hope to achieve anything worthwhile. Nor are you likely to get your company behind your project. A brief can be as valuable internally as it is externally.

If you present it to the people within the company most directly affected by whatever is being produced, you not only elicit valuable input, but also pave the way for their buy-in.

When you think about it, the last thing you want is for your project to be a test of the designer's skills. Your responsibility is to help the design firm do the best work it can. That's why you hired the firm. And why you give it a brief.

How to write one

A brief is not a blueprint. It shouldn't tell the designer how to do the work. It's a statement of purpose, a concise declaration of a client's expectations of what the design should accomplish. And while briefs will differ depending upon the project, there are some general guidelines to direct the process. Among them:

- Provide a clear statement of objectives, with priorities
- Relate the objectives to overall company positioning
- Indicate if and how you'll measure achievement of your goals
- Define, characterize and prioritize your audiences
- Define budgets and time frames
- Explain the internal approval process
- Be clear about procedural requirements (e.g., if more than one bid is needed from fabricators, or if there's a minimum acceptable level of detail for design presentations)

In the final analysis, design briefs are about paving the way for a successful design effort that reflects well on everyone involved.

Budgeting and managing the process

If the briefing effort is thorough, budgeting and managing a project is easier. It takes two to budget and manage a design project: the client and the designer. The most successful collaborations are always those where all the information is on the table and expectations are in the open from the outset.

Design costs money

As one very seasoned and gifted designer says, “There is always a budget,” whether it is revealed to the design team or not. Clients often are hesitant to announce how much they have to spend for fear that if they do, the designer will design to that number when a different solution for less money might otherwise have been reached. This is a reasonable concern and yet, it’s as risky to design in a budgetary vacuum as it is to design without a goal. If your utility vehicle budget stops at four cylinders, four gears and a radio, there’s no point in looking at Range Rovers.

If you have \$100,000 to spend and you’d really like to dedicate \$15,000 of it to something else, giving the design team that knowledge helps everyone. Then you won’t get something that costs \$110,000 that you want but cannot pay for. The trust factor is the 800-pound gorilla in the budgeting phase. Without trust, there isn’t a basis for working together.

The ideal approach is to bring in your designer as early as you can. The design team can then help you arrive at realistic cost parameters that relate to your objectives in lieu of an arbitrary budget figure. At this stage it is quite feasible to put together a budget range based upon a broad scope of a project or program. Individual estimates can be provided, for example, for design concepts, design develop-

ment and production, photography, illustration, copywriting and printing for a print piece (or, in the case of a website, estimates for programming, proprietary software and equipment).

The more informed you are as a client about what things cost, the more effective you can be in guiding a project. You should know, for instance, that if your design firm hires outside talent such as writers, photographers and illustrators and pays them, it is standard policy to mark up (generally, 20 percent) the fees charged by these professionals. You can choose to pay these contributors directly to avoid the markup, but this should be addressed at the time they’re hired. Printing, historically, has been treated the same way.

You should also be aware that photographers, illustrators and writers are generally paid a “kill fee” if a project is cancelled after work has started. That’s because talent is in constant demand and accepting one project often means turning other work away. In the case of photography, expect to pay when a photo shoot is cancelled. And remember that unless you stipulate otherwise, you are buying one-time usage of the photographs—not the work itself—and that copyright laws are in force the moment the shutter trips. If you want unlimited use, you will have to negotiate and pay for it.

Who leads? Who follows?

It is the client’s responsibility to lead a project and the designer’s to design and manage the design process. Don’t confuse leadership with involvement. As the person representing the client, you might want a great deal of involvement, or very little. If you provide leadership, your participation can be whatever you want it to be.

“The first responsibility of a leader is to define reality. The last is to say thank you.”
*Max DePree, CEO,
Herman Miller, Inc.,
Leadership as an Art*

There are countless volumes on the subject of leadership, so we won’t presume to give leadership lessons here. The same general principles apply. In a design project, leadership requires that you give clear direction at the outset. You must be available when needed by the design team and ready to make decisions in a timely manner. You should understand how the design supports your objectives (so you can sell it). And you’ll need to monitor major delivery points and be prepared to get the necessary approvals. On this last point, some designers are excellent presenters, and, in fact, like to present their work to the final authority. But while they can be persuasive, they are not the ones to get the final sign-off. As the leader of the team, you are the deal-maker, the closer.

If you identify and articulate your objectives, establish your process early, see that the design team has access to what it needs from you, have a detailed budget and schedule to measure progress with, and lead the process from beginning to end, there is no reason that you won’t be able to enjoy the design process as much as the end product.

At least, that’s how many of our members and their clients see it.

Standards of professional practice

A professional designer adheres to principles of integrity that demonstrate respect for the profession, for colleagues, for clients, for audiences or consumers, and for society as a whole.

These standards define the expectations of a professional designer and represent the distinction of an AIGA member in the practice of design.

The designer's responsibility to clients

A professional designer shall acquaint himself or herself with a client's business and design standards and shall act in the client's best interest within the limits of professional responsibility.

A professional designer shall not work simultaneously on assignments that create a conflict of interest without agreement of the clients or employers concerned, except in specific cases where it is the convention of a particular trade for a designer to work at the same time for various competitors.

A professional designer shall treat all work in progress prior to the completion of a project and all knowledge of a client's intentions, production methods and business organization as confidential and shall not divulge such information in any manner whatsoever without the consent of the client. It is the designer's responsibility to ensure that all staff members act accordingly.

A professional designer who accepts instructions from a client or employer that involve violation of the designer's ethical standards should be corrected by the designer, or the designer should refuse the assignment.

The designer's responsibility to other designers

Designers in pursuit of business opportunities should support fair and open competition.

A professional designer shall not knowingly accept any professional assignment on which another designer has been or is working without notifying the other designer or until he or she is satisfied that any previous appointments have been properly terminated and that all materials relevant to the continuation of the project are the clear property of the client.

A professional designer must not attempt, directly or indirectly, to supplant or compete with another designer by means of unethical inducements.

A professional designer shall be objective and balanced in criticizing another designer's work and shall not denigrate the work or reputation of a fellow designer.

A professional designer shall not accept instructions from a client that involve infringement of another person's property rights without permission, or consciously act in any manner involving any such infringement.

A professional designer working in a country other than his or her own shall observe the relevant Code of Conduct of the national society concerned.

Fees

A professional designer shall work only for a fee, a royalty, salary or other agreed-upon form of compensation. A professional designer shall not retain any kickbacks, hidden discounts, commission, allowances or payment in kind from contractors or suppliers. Clients should be made aware of markups.

A reasonable handling and administration charge may be added, with the knowledge and understanding of the client, as a percentage to all reimbursable items, billable to a client, that pass through the designer's account.

A professional designer who has a financial interest in any suppliers who may benefit from a recommendation made by the designer in the course of a project will inform the client or employer of this fact in advance of the recommendation.

A professional designer who is asked to advise on the selection of designers or the consultants shall not base such advice in the receipt of payment from the designer or consultants recommended.

Publicity

Any self-promotion, advertising or publicity must not contain deliberate misstatements of competence, experience or professional capabilities. It must be fair both to clients and other designers. A professional designer may allow

a client to use his or her name for the promotion of work designed or services provided in a manner that is appropriate to the status of the profession.

Authorship

A professional designer shall not claim sole credit for a design on which other designers have collaborated.

When not the sole author of a design, it is incumbent upon a professional designer to clearly identify his or her specific responsibilities or involvement with the design. Examples of such work may not be used for publicity, display or portfolio samples without clear identification of precise areas of authorship.

The designer's responsibility to the public

A professional designer shall avoid projects that will result in harm to the public.

A professional designer shall communicate the truth in all situations and at all times; his or her work shall not make false claims nor knowingly misinform. A professional designer shall represent messages in a clear manner in all forms of communication design and avoid false, misleading and deceptive promotion. A professional designer shall respect the dignity of all audiences and shall value individual differences even as they avoid depicting or stereotyping people or groups of people

in a negative or dehumanizing way. A professional designer shall strive to be sensitive to cultural values and beliefs and engages in fair and balanced communication design that fosters and encourages mutual understanding.

The designer's responsibility to society and the environment

A professional designer, while engaged in the practice or instruction of design, shall not knowingly do or fail to do anything that constitutes a deliberate or reckless disregard for the health and safety of the communities in which he or she lives and practices or the privacy of the individuals and businesses therein. A professional designer shall take a responsible role in the visual portrayal of people, the consumption of natural resources, and the protection of animals and the environment.

A professional designer shall not knowingly accept instructions from a client or employer that involve infringement of another person's or group's human rights or property rights without permission of such other person or group, or consciously act in any manner involving any such infringement.

A professional designer shall not knowingly make use of goods or services offered by manufacturers, suppliers or contractors that are accompanied by an obligation that is substantively detrimental to the best interests of his or her client, society or the environment.

A professional designer shall refuse to engage in or countenance discrimination on the basis of race, sex, age, religion, national origin, sexual orientation or disability.

A professional designer shall strive to understand and support the principles of free speech, freedom of assembly and access to an open marketplace of ideas, and shall act accordingly.

Business expectations for a professional designer

In today's information-saturated world, where an organization's success is determined by the power of its brand, professional designers become even more important in ensuring that companies communicate effectively—an imperative with bottom-line impact. Furthermore, a professional designer's ability to execute communications projects efficiently and economically is more critical than ever.

When a client invests in the services of a professional designer, he or she hires an individual who aspires to the highest level of strategic design, ensuring a higher return on investment. If a designer meets the following criteria, he or she will demonstrate the integrity and honor of the professional designer.

Experience and knowledge

A professional designer is qualified by education, experience and practice to assist organizations with strategic communication design. A professional designer has mastered a broad range of conceptual, formal and technological skills.

A professional designer applies his or her knowledge about physical, cognitive, social and cultural human factors to communication planning and the creation of an appropriate form that interprets, informs, instructs or persuades.

Strategic process

A professional designer combines creative criteria with sound problem-solving strategy to create and implement effective communication design.

A professional designer solves communication problems with effective and impactful information architecture.

A professional designer becomes acquainted with the necessary elements of a client's business and design standards.

A professional designer conducts the necessary research and analysis to create sound communication design with clearly stated goals and objectives.

A professional designer will submit an initial communication strategy to an organization's

management for approval and meet with a client as often as necessary to define ongoing processes and strategy.

Compensation and financial practices

A professional designer provides the client with a working agreement or estimate for all projects.

A professional designer will not incur any expenses in excess of the budget without the client's advance approval.

A professional designer may apply reasonable handling and administrative charges to reimbursable items that pass through the designer's account with the knowledge and understanding of the client.

A professional designer does not undertake speculative work or proposals (spec work) in which a client requests work without providing compensation and without developing a professional relationship that permits the designer sufficient access to the client to provide a responsible recommendation.

Ethical standards

A professional designer does not work on assignments that create potential conflicts of interest without a client's prior consent. A professional designer treats all work and knowledge of a client's business as confidential.

A professional designer provides realistic design and production schedules for all projects and will notify the client when unforeseen circumstances may alter those schedules.

A professional designer will clearly outline all intellectual property ownership and usage rights in a project proposal or estimate.

Clients can expect AIGA members to live up to these business and ethical standards for professional designers. Through consistently professional work, AIGA members have documented substantial bottom-line contributions to corporations and organizations. For more information and case studies about how professional designers have produced excellent business results, visit www.aiga.org.

USE OF FONTS

Fonts are creative, intellectual property, similar to designers' creative work or to proprietary business products. Since type is so ubiquitous and fonts are so easy to share among computer users, the legal and moral issues of the simple process of using a font are often overlooked.



There are four good rules that guide ethical practice in font licensing:

- If you are using a font, whether it's on your computer or that of someone else, make sure you have a license to use the font.
- If you want to use a font that is not installed on your computer, you must either ensure that you or your employer has a license to install the font on your computer or else acquire a license to use it.
- If you have any questions about your font license, contact the foundry or supplier of the font. (If you do not know the foundry or supplier, almost any foundry or supplier can help you identify the source.)

- Don't lend or give fonts to others to use. Your friends, clients and colleagues need to acquire the rights to use them. When it comes to licensing fonts, ethical practice makes sense legally and financially. Violating the terms of a license agreement puts the designer, the client and future business relationships at risk. An ethical approach to font use and font licenses is therefore both good business practice and good business.

Fonts are creative, intellectual property.

Typefaces are collections of letterforms. They endow written communications with a style that ultimately reflects the character and style of the originator of the communication, whether a corporation or an individual. Typefaces are the result of extensive research, study and experimentation, and for some designers, the creation of typefaces is a full-time occupation. The training and expertise required to develop a typeface qualifies the product as intellectual property and merits its protection under copyright law in many countries.

A font is the software that describes the characters in a typeface. Digital fonts, like any software, are intellectual property and may be subject to federal copyright and trademark laws.

For additional guidance on software use and management, you can refer to the "Use of Software" chapter in this book, on page 54.

You do not own a font. You license it for limited uses.

Fonts are not bought. The right to reproduce them is licensed, and the license to use them states specific terms.

The right to use a font designed by someone else is acquired from the foundry that created the font and is granted in the form of an end-user license agreement, or EULA. Some foundries will allow a supplier to administer the license agreements for a font, but the agreement itself is always between the licensee and the foundry that created the font.

The terms of use described by an end-user license agreement vary from foundry to foundry and may vary depending on the scope of the desired use. Licenses usually grant permission for the licensee to install a given font on a certain number of computers. However, licenses can also specify use on printers, periods of exclusivity for custom typefaces and distribution rights. If you have questions about what you may or may not do with the font you are using, the best thing to do is to contact the foundry or supplier of the font.

You need permission to alter a font for use in your design.

Because the software that describes a typeface is automatically subject to copyright protection upon its creation, any version of the original font is considered a “derivative work” under copyright law. The revision should not be considered an authorized derivative work because the adaptation is derived from copyrighted software. It cannot be used for commercial purposes without violating the copyright.

Some font licenses allow the licensee to alter the characters in a font or to convert the font to other formats. Other foundries do not allow derivative works at all without permission. Therefore, many designers, when asked to create a derivative work, have made it standard ethical practice to get permission from the font designer before altering any font data.

If you need to find out who designed the font you want to alter, you should contact the foundry or font supplier.

You cannot share a font with someone who does not have his or her own license to use it.

Font software may not be given or loaned to anyone who does not also have a license to use it. Therefore, misuse or unauthorized copying of a font that belongs to a client or your employer is an infringement of the designer’s rights and could subject you to legal action.

When the client is the “end user” of the license agreement, the designer may not take the font with him or her when the project is over, even though it may mean another license must be purchased for the next job.

You can embed a font in a file to have it viewed or printed by others.

A font may only be sent with a job to a service bureau, consultant or freelancer if the contractor has a license for the font or if the license agreement makes provision for it. When necessary, it can be acceptable for font data to be embedded in file formats such as EPS and PDF only for printing and previewing purposes, but not for editing. However, embedding is not allowed by all foundries, so an additional license may need to be purchased.

This is an issue of ethics, respect and law.

There are tangible and intangible consequences of using a font without a license. If caught using a font without the proper license, the user will have to purchase the correct license for the font and in some cases pay damages to the originating foundry. More importantly, using a font without the proper license could prevent a professional designer from being fully compensated.

It is the value of the intellectual property of a colleague that is ultimately at stake in the licensing of fonts. To purchase the proper license for a font, especially as a practicing design professional, is to recognize the value of a colleague’s work, to respect the practice of another designer and to uphold the integrity of the design profession.

USE OF ILLUSTRATION



AIGA supports the use of original illustration in design solutions. Illustration can provide a unique sensibility to certain projects. This chapter offers insight into professional practices and ethical considerations within the illustration community.

Illustration offers visual solutions to design challenges.

Illustration can transcend the limits of the written word. It is an art of opposites, an intricate dance between art and commerce that is created by people who find freedom in solving visual riddles and in filling dictated space with inventiveness, creativity and added value.

Each illustrator brings a different perspective, vision and idea to play that, when married with great design, becomes an original art form. Illustration brings spontaneity, freshness and a unique point of view to the design of content. It helps to communicate both simple and complex messages while enhancing a design through the unique vision and skill of the selected illustrator.

When a designer selects an illustrator to use, he or she is not only receiving the rights to reproduce the finished piece, but is also receiving the fruits of years of exploration and the development of an individual style. This individual style becomes the core of the product, the individual service offered and the asset that embodies the completed creative work. This intellectual and creative property is no different from other proprietary business products and services. It is developed—and protected—to enhance the value of the finished user.

Select an illustrator based on previous work.

There are countless ways to locate the perfect illustrator for a particular project. Many buyers turn to annuals, sourcebooks and the internet, along with local illustration clubs, organizations and personal recommendations.

Typically, a buyer will either request a portfolio or review the work online. It is not appropriate to ask for original sketches for an assignment without compensating the illustrator (asking for “spec” or speculative work). The selection should be based on seeing previous work and discussing the assignment with the illustrator.

There are also archives available of pre-existing illustration commonly referred to as “stock” and “royalty-free” illustration. In many instances, it may not be possible to commission a unique illustration, so a designer may decide to license this existing art to illustrate a project.

It’s a safe assumption to state that a client is best protected—in terms of the quality of the work and assurances on the limited availability of the work—when illustrations are licensed directly from the illustrator or his or her authorized representative. The alternative is to license the work through a stock agency.

Within the illustration community, the most reputable stock agencies are considered those whose pricing and usage are handled by the creator, whose fees are fair and reasonable to creators and who recognize the creator with credit lines for the illustration. There is some concern over agencies that fail to protect the client from acquiring an illustration without a clear measure of how broadly the image is already being used, from acquiring an image for which the rights are not available and from acquiring illustrations that misappropriate an original artist’s style. In other words, it is important for the client to work with intermediaries who demonstrate the same respect for the integrity of illustration as intellectual property as the client would expect in the treatment of its own assets. This protects the value of both the illustrator’s and the client’s finished property.

Although convenient, stock does not always serve the creative process. Many believe it is an alternative best utilized when there are no other options.

Illustration sources

Annuals:

365: AIGA Year in Design
The Society of Illustrators
American Illustration
Communication Arts
Illustration Annual
Print Magazine

Sourcebooks:

The Workbook
The Alternative Pick
The Blackbook
The Directory of Illustration

Websites:

www.theispot.com
www.workbook.com
www.directoryofillustration.com

Price is directly related to use.

There are many considerations for pricing a piece of illustration. One common misperception is that fees are based on whether it is original or stock art. The fee for the use of illustration should be based on the use of an illustration and the exclusivity of its use, not on whether it is original or stock. The fee will vary based on how exclusive the use of the image is in the use that is contemplated for it, and whether the client wants rights for all uses for a set period of time (which is a licensing equivalent to purchasing the illustration).

Specification of the anticipated use must be clearly stated in a written agreement. A troubling ambiguity often exists, however, about whether an image licensed for use in a print medium is then included in the internet version of the print piece. Unless the usage was specified, the rights are not automatically granted. As in any agreement, it is important to clearly state all usage for purchase in detail; otherwise the rights not specifically purchased remain the property of the illustrator.

Every agreement should exist in writing.

Once the appropriate talent has been selected, negotiations begin taking into account the following criteria: rights, usage, schedule, exclusivity, complexity, extended rights and, in some cases, the reputation of the talent selected.

Written and signed documentation should be completed before work is begun (even on a rush project) to ensure that everyone has the same understanding. This document should outline in detail the usage, deadlines, level of corrections allowed before incurring additional charges, potential kill fees, payment details, form of delivery for final art, expenses, etc.

Typically there is one sketch submitted unless otherwise negotiated. If the project requires more than this standard, then this must be communicated and negotiated beforehand. Often "corrections" or small adjustments are made, but only to the original agreed-upon concept. These guidelines stand for computer-generated illustrations as well. Although the work is created in a different manner, the same considerations are adhered to.

"Changes" reflect new ideas that are brought into the sketch or finish stages. These are negotiated before the changes begin and are added as an addendum to the contract.

Original artwork belongs to the illustrator.

There are concerns that the buyer and illustrator must keep in mind to protect the value of the work, both within and outside the context of the contracted usage. These issues are understood within the industry and are adhered to by professionals on both ends of the creative exchange.

An artist's copyright is owned by the artist and is protected from the moment it is created by the 1976 Copyright Act. This protection covers the work for the artist's lifetime plus 70 years. If agreed to in writing, the copyright may be assigned elsewhere.

Original artwork belongs to the illustrator, regardless of the use rights that are licensed. Original artwork is provided temporarily to licensees for reproduction. Even the purchase of "exclusive rights" represents rights to reproduce the artwork only. The original illustration remains the property of the illustrator unless it is purchased explicitly and separately from the rights.

Original artwork cannot be changed without the creator's approval. Changes to an illustrator's work must be made by the illustrator, unless permission is secured from the illustrator first. It constitutes creating a derivative work from copyrighted material, which, intentionally or not, violates federal law and places the buyer at risk. Many are simply not aware of this law and unintentionally violate it, so please be aware.

For additional up-to-date information about the copyright law, please visit www.copyright.gov/title17.

It is important to work with professional integrity.

Dealing respectfully with another member of the design profession goes far in ensuring a more stable business environment for practitioners and clients alike. It also supports one of the oldest and most basic tenets of our profession: the autonomy and freedom necessary to create our own professional independence.

Respect for the rights of illustrators is a matter of practice, ethics and law. It is the value of the intellectual property of a colleague—and within the body of the intended user—that is ultimately at stake in many of these concerns. To deal honorably with illustrators is to recognize the value of a colleague's work, to respect the practice of another creative professional and to uphold the integrity of the design profession.

Illustrators invest substantially in the research and development of their technique and style. This, in turn, is the basis of their business and reputation. To ask an illustrator to mimic the style of another illustrator is not considered ethical or, in some instances, even legal. There is a difference between finding illustrators who are influenced or inspired by other artists versus talent who directly infringe on copyrighted material. (In recent years, a number of illustrators have won copyright infringement lawsuits based on theft of an illustrator's intellectual property.)

Illustrations should not be used without gaining permission from the creator. Accessing and using illustrations from print, portfolios, the web or other materials—whether for mock-ups, comps or final designs—without first securing permission and establishing a basis for use rights is illegal and the most common law broken by clients, whether knowingly or unknowingly. (Refer to the 1976 Copyright Act for more details.)

Make sure you are acquiring illustration from an accountable and respectable source. For many within the illustration community, royalty-free illustration is considered a questionable practice. Royalty-free distributors do not generally license work from creators and do not always compensate creators adequately (or at all) for giving up rights to their work. Many collections have been gathered through unwilling and/or unknowing sources over the years and simply do not compensate the talent that created them. In other instances, royalty-free work is often produced by artists who have inadequate concern for the integrity of how the work is used, or who have no bargaining power to defend their rights in a competitive marketplace.

In addition, much of this work is imitative, since the creative professional is being asked to create and sell images without sustained accountability, and some of the work may cross the line of plagiarism. Although there are appropriate sources and uses of royalty-free work, it is the exception and otherwise may have some risk associated with its use. When there is no accountability for the history of usage, you are lowering the value of the design.

Illustration is a value-added commodity, while royalty-free and stock serve a more decorative function. If you take an illustration out of its intended use and use it to simply fill space, you have lessened the value of the final product.

An illustrator can serve as a creative consultant.

The possibility of unbound creativity in the digital age is endless. It is commonly known that imagery is the newest commodity in the current economy. Who better to recognize quality and develop the potential of this commodity than the creators of the imagery? Illustrators are being retained as creative consultants for virtually every stage of conceptual work. At one time, art directors developed sketches of their ideas and hired artists to execute their ideas. Today, illustrators often assume the role as consultants to art directors and clients in developing the concepts for communicating content, as well as executing the ideas.

This involvement of an illustrator from concept to execution on a project takes full advantage of an artist's creativity and experience in integrating illustration into the intended outcomes. Additional roles include, but are not limited to: animator, storyboard artist, production designer, logo designer, character developer, illustrative journalist, internet artist and mock-up/comp artist, among many others.



USE OF SOFTWARE

Just as design is a designer's creative property, computer software is intellectual property that is owned by the people who created it. Without the expressed permission of the manufacturer or publisher, it is illegal to use software no matter how you got it. That permission almost always takes the form of a license from the publisher, which accompanies authorized copies of software.

When you buy software, what you're really doing in almost every case is purchasing a license to use it. Rather than owning the software, you acquire limited rights to use, reproduce and distribute the program according to the terms spelled out in the license.

Using software for which you have not acquired a license is wrong.

A program can be installed and used on only one computer at a time, although there are usually provisions allowing you to make a “backup” copy for archival or disaster-recovery purposes. If you don’t comply with the terms of the license—for example, by installing the same copy of a single-user program on several computers—that’s software piracy. The publisher can take legal action against you or your business.

The license isn’t the only way in which software is protected. Copyright and sometimes patent law protect software from unauthorized copying, distribution and sale. The law also recognizes the internet and prohibits users from uploading, downloading or transmitting unauthorized copies of software online. An individual who breaks these laws—or a company that looks the other way when an employee does—is liable to civil and criminal action. The consequences range from public embarrassment through adverse publicity to significant civil damages, criminal fines and even the possibility of imprisonment.

Illegal software carries hidden risks.

Software publishers offer their legitimate customers a wide array of products and services in addition to the actual program: user manuals and other documentation, notification of problems, training, support services, repairs and upgrades. A legitimate copy also ensures you that you’re getting the quality product produced by the rightful owner of the program.

An illegal copy enjoys none of these benefits. Further, it could well be an outdated version of the software, a test copy with bugs, an improperly made copy that can damage data or hide a damaging virus. Any one of these problems could quickly escalate into costly damage recovery far more expensive than the money you “saved” by purchasing illegal software.

Illegal software cheats its creators out of their fair reward for the innovation they have created and cheats your company out of the full value of the software. And it could well damage your data, tarnish your business reputation, subject you to fines or even land you in prison. In many respects, the most important issue is your integrity. You cannot fairly advocate the protection of what you create without respecting the comparable rights of others.

Software is an asset: Learn to manage it.

Before anything else, your company culture must be one in which all your employees understand the value of software, learn the difference between legal and illegal use and pledge their commitment to the proper use of software. To do this, you must have a clear statement of policy. The statement should express the company’s goals to manage software for maximum benefit, deal only in legally licensed software from an authorized dealer and spell out the company’s procedure for acquiring legal software. An effective software purchase procedure consists of the following:

- Centralize all your purchases through a single professional on your staff
- Ensure the software being requested is on the company’s list of supported software
- Buy only from reputable, authorized sellers
- Work only with reputable application service providers (ASPs) and ensure you maintain all relevant licenses and documentation with that ASP
- Get original user materials (manuals, registration cards, etc.), licenses and receipts with each purchase

- Don’t permit employees to buy software directly or charge it to their expense accounts
- Ensure that software cannot be downloaded from the internet by employees without special approval

Whatever your policy, make sure that it is included in any information given to new employees, distributed to all current employees, posted on company bulletin boards and available on company computer networks. Every employee needs to acknowledge the statement of policy and the consequences of violating it. In turn, employers must take steps to educate employees on what constitutes illegal use of software.

Sample Software Management Policy

1. (Organization) licenses the use of computer software from a variety of outside companies. (Organization) does not own this software or its related documentation and, unless authorized by the software developer, does not have the right to reproduce it except for backup purposes.
2. With regard to Client/Server and network applications, (Organization) employees shall use the software only in accordance with the license agreements.
3. (Organization) employees shall not download or upload unauthorized software over the internet.
4. (Organization) employees learning of any misuse of software or related documentation with the Company shall notify their manager.
5. According to applicable copyright law, persons involved in the illegal reproduction of software can be subject to civil damages and criminal penalties. (Organization) does not condone the illegal duplication of software. (Organization) employees who make, acquire or use unauthorized copies of computer software shall be disciplined as appropriate under the circumstances. Such discipline may include termination.

6. Any doubts concerning whether any employee may copy or use a given software program should be raised with a responsible manager before proceeding.

I am fully aware of the software use policies of (Organization) and agree to uphold those policies.

(Employee signature and date)

Take inventory of your software.

Once you have a policy, your next step is to take inventory of your software assets. Only by knowing what programs are installed on all the computers in your organization—desktops, laptops and any copies of programs from work installed by employees on their home computers—can you determine how to proceed. An accurate inventory can answer the following questions:

- Are we using the most recent or most suitable version of programs we need?
- Are we using outdated or unnecessary programs that can be deleted?
- Are there other programs we should obtain to become more productive or efficient?
- Does each employee have the correct set of programs available to him or her?
- Are employees properly trained to use the software we have?
- Do we have illegal, unauthorized or unlicensed programs or copies in our business?

No matter what tools you use, make sure to collect product name, version number and serial number for each copy of software installed on each computer.

You should also take an inventory of material related to software on your computers, including:

- All original CDs or other storage media used to install the programs on your computers
- All original manuals and reference documentation
- All license documentation
- All invoices, proofs of purchase and other documents proving the legitimacy of your software. This includes invoices for computer systems that were sold to you with software already installed.

Once the inventory is completed, you should carefully store the documentation, original copies of your software and other material in a secure place. That way, you can take advantage of services, upgrade offers and the like from publishers and be more easily able to reinstall software in case of a disaster.

With your inventory in hand, you can compare the software that's installed on your company's computers to what's allowed under the terms of your licenses. (Remember that some licenses allow you to make a certain number of copies of a program from a single source, or to have a limited number of employees use the software at the same time from a network. The original license will tell you how many.) Also remember that simply having an original CD or DVD for the software doesn't necessarily mean you have authorized copies. Only the original license spells out the terms and gives you the right to use the software.

Once you have identified any illegal software copies in your business, you should delete them from your computers. This is also an ideal time to remind employees about the company's software policy and the dangers associated with using illegal software.

Next, compare the legitimate copies of software that remain on your computers with the needs of your company that you identified when taking the inventory. You can make informed decisions about which software you legally have that you want to keep, upgrade or discard. Programs can be moved from computers where they are not needed to computers where they are. Programs can be upgraded, if necessary, so that everyone is using the version of the program that's most appropriate for your company. And you can purchase only the new, legitimate software you need.

Based on the inventory, upgrades, new purchases and input from employees, you can now create a formal list of the software that your company will allow its employees to use. It should include program names, serial numbers, version numbers, number of copies or users permitted by the license, the computers on which the copies are installed and plans to add, upgrade or discard the software in the future.

Follow through on software management.

Effective software management is a continual process. You need to monitor employee adherence, guard against the introduction of illegal software, keep your list of supported software up to date and plan ahead for the next three years. It makes sense to have someone within your studio responsible for the process in order to centralize the job.

Periodically, it's a good idea to perform spot checks on individual computers to make sure illegal software has not been inadvertently or deliberately installed. It also makes sense to conduct an inventory every year, as you might for other valuable assets. When employees leave the company, make sure the software they worked with remains with your company and that they do not take or keep copies. Prevent piracy from damaging the operations or integrity of your studio.

After you've put your software assets in good order, you'll still need to monitor your workplace for illegal software. There are five common types of end-user piracy, and understanding each will help you and your employees avoid the problems of illegal software.

End-user piracy

End-user piracy occurs when an employee of your company reproduces copies of software without authorization. End-user piracy can take the following forms:

- Using one licensed copy to install a program on multiple computers
- Copying disks for installation and distribution
- Taking advantage of upgrade offers without having a legal copy of the version to be upgraded
- Acquiring academic or other restricted or nonretail software without a license for commercial use
- Swapping disks in or outside the workplace

Client-server overuse

Client-server overuse occurs when too many employees on a network are using a central copy of a program at the same time. If you have a local-area network (LAN) and install programs on the server for several people to use, you have to be sure your license entitles you to do so. If you have more users than allowed by the license, that's "overuse." You can correct this problem by making sure employees understand the restrictions, by installing "metering" software that ensures only the licensed number of users have access or by purchasing another license that covers the number of users you need.

Internet piracy

The software industry plays a leading role in ensuring that the internet reaches its full potential. To date, software publishers have contributed in countless ways to the internet's success, providing the means by which content can be created, displayed and exchanged, and providing some of the most desired content itself. However, intellectual property theft on the internet constrains the software industry and significantly reduces its positive impact on economies throughout the world. There are thousands of fraudulent websites selling a variety of illegitimate software products. Internet piracy represents a serious threat to electronic commerce.

While there are many publishers that offer authorized versions of their software for sale online, there are also numerous pirate operations to be aware of on the internet as well:

- Websites that make software available for free downloading or in exchange for uploaded programs
- Internet auction sites that offer counterfeit, out-of-channel or nontransferable software that infringes on copyrights
- Peer-to-peer networks that enable unauthorized transfer of copyrighted programs

The same purchasing rules should apply to online software purchases as for those bought in traditional ways. Organizations should have a clear policy as to when, whether or with whose authorization employees may download or acquire software from websites.

Below are some tips to help ensure that the public and businesses are purchasing legal software on auction sites:

- If a price for a software product seems too good to be true, it probably is.
- Be wary of software products that come without any documentation or manuals.
- Beware of products that do not look genuine, such as those with hand-written labels.
- Beware of sellers offering to make "backup" copies.
- Watch out for products labeled as academic, OEM, NFR or CDR.
- Be wary of compilations of software titles from different publishers on a single disk.
- Do not give out your credit card details unless you know it's a secure transaction.
- Check with organizations such as the Business Software Alliance (www.bsa.org) should you become a victim of software fraud.

Hard-disk loading

Hard-disk loading occurs when the business that sells you a new computer loads illegal copies of software onto its hard disk to make the purchase of the machine more attractive. The same concerns and issues apply when you engage a value-added reseller (VAR) to sell or install new software onto computers in your office. You can avoid purchasing such software by ensuring that all hardware and software purchases are centrally coordinated through your organization and all purchases are made through reputable suppliers. Most importantly, require receipt of all original software licenses, disks and documentation with every hardware purchase.

Software counterfeiting

Software counterfeiting is the illegal duplication and sale of copyrighted material with the intent of directly imitating the copyrighted product. In the case of packaged software, it is common to find counterfeit copies of the CDs incorporating the software program, as well as related packaging, manuals, license agreements, labels, registration cards and security features. Sometimes it is clear the product is not legitimate, but often it is not. Look for the following warning signs:

- You're offered software whose price appears "too good to be true."
- The software comes in a CD jewel case without the packaging and materials that typically accompany a legitimate product.
- The software lacks the manufacturer's standard security features.
- The software lacks an original license or other materials that typically accompany legitimate products (original registration card, manual, etc.).
- The packaging or materials that accompany the software have been copied or are of inferior print quality.
- The software is offered on an auction site.

- The CD has a gold, blue or blue-green appearance, as opposed to the silver appearance that characterizes legitimate product.
- The CD contains software from more than one manufacturer or programs that are not typically sold as a "suite."
- The software is distributed via mail order or online by sellers who fail to provide appropriate guarantees of legitimate product.

The guiding principle: Respect intellectual and creative property rights—they could be yours. Designers know from their own experience the importance of respecting intellectual and creative property rights. Designers also know the difference between ownership and use rights. The design profession should respect the rights of other professionals because it is right, because it is the law and because any failure to do so undermines the moral standing of the profession in arguing for its own rights.



SALES TAX

This review of sales tax practices in New York and California was commissioned by AIGA based on success in clarifying the issue in these bellwether states through legal and administrative proceedings. The intention of this chapter is to provide information to all AIGA members and to allow members in other states to use the New York and California examples as support in clarifying their sales tax liability in their own states.



As tax agencies more aggressively enforce the sales tax laws, more are eager to audit for possibly overlooked revenue. Designers can best protect themselves from unexpected tax liability by learning when they are and are not required to collect sales tax on the work they provide for clients.

Sales tax is a state—and occasionally a local—matter, which prevents AIGA from pursuing a single national clarification of the issue. Statutes and the practice of the taxing authority will vary somewhat from jurisdiction to jurisdiction. In addition, design services are seldom addressed explicitly in state sales tax laws. The many things that design embraces—design services, illustration, printing specifications and delivery of printed matter or digital files—are viewed as different forms of property and are treated and grouped differently for tax purposes from state to state. While AIGA offers a general guide to sales tax principles, dealing with sales tax should be worked out in consultation with an accountant.

You should be aware, however, that many accountants, even those “familiar with sales tax issues,” may have no idea whatsoever what the sales tax issues are with regard to this poorly defined area of the design profession, and may suggest the safest course (but most costly to designers): to charge tax on everything. A better course will be for designers to contact an accountant, and armed with this document, raise their consciousness of this issue, and then get their advice on how this affects your personal situation.

A key distinction: Is your work tangible or intangible?

The basic divide that determines what is subject to sales tax is the sometimes-blurry line between the tangible and the intangible. Transfers of tangible goods are generally taxed, unless specifically exempted by statutes or regulations; services and intangible property are generally exempt from tax, unless statutes or regulations specifically render them taxable. Designers typically provide services that are in most cases nontaxable, and grant or license to clients the right to reproduce their work. Licenses are considered intangible personal property, and transfers of such are generally not subject to tax. Designers may, however, also provide their clients with tangible personal property such as finished printed matter or a disk that contains the intangible personal property—a reproduction rights transfer—that is the substance of the contract. Tangible personal property is generally subject to tax. While tangible printed matter should be presumed taxable, treatment of disks or other layout transfers may vary widely from jurisdiction to jurisdiction.

The designer, then, must consider what is being done, and what is being transferred, in the various elements of each client contract, and separate out a job’s taxable elements from its nontaxable elements as precisely as possible in all contracts or invoices,

according to the laws of the home jurisdiction.

Services

Services, as noted above, are usually not subject to tax unless specifically included in a statute or regulation. This is the general category under which to group charges for time and labor; billable time for producing concepts and designs, scanning and manipulation, time spent on press, time spent building and encoding a website and similar billables should be calculated as services and so noted in all contracts and invoice terms.

Intangible property

Copyright licenses are intangible property, as opposed to the intangible services of time and labor. Designers, unlike illustrators, tend not to treat their client commissions as copyright licensing transactions. The images that a designer creates, however—whether the logo, which is clearly a free-standing image, or the larger images created by arranging type, illustrations and photographs in a brochure or package or poster design—are copyrightable works of graphic art that the designer licenses to the client. This is not the place for a lengthy examination of the copyrightability of design. But the designer who registers designs when appropriate and who, with or without registration, makes clear to the client that he or she is acquiring a license, not

purchasing ownership of either the original design itself or the boards or disks on which the design is embodied, is better able to retain control of the design and its integrity. Regarding sales tax, a clear paper trail that indicates the design is a copyright property being licensed to the client makes clear to a taxing authority that the portion of a job not tax-exempt as “services” is a nontaxable transfer of intangible property.

Tangible property

Printed matter, such as brochures, stationery or posters, is taxable as tangible property if the designer sells them to the client. If, however, the designer simply acts as the client’s agent in dealing with the printer, with the client paying the printer directly, the transfer to the client will still be subject to tax; in this instance the printer, not the designer, will have to collect the tax. The issue that arises when the designer transfers tangible personal property to the client in addition to performing services and licensing the design is how, and where, the line will be drawn between the intangible, nontaxable portion of the transaction and the tangible, taxable portion. Taxing authorities are typically concerned that in a transaction of this nature the bulk of the value will be loaded into the nontaxable portion of the transaction as an exercise in tax evasion, which is why a clear paper trail—differentiating the value of the intangible services

(however calculated) and the licenses granted, from the taxable costs of the tangible printing and production, is essential to avoid unnecessary tax liability.

What is less clear: Is design tangible?

While most states do not tax intangible services or copyright transfers, the state laws and regulations may not be clear as to whether or not “design” falls within provision of services and copyright license transfers or is merely a production adjunct of the printing trade. Many state laws are woefully out of date—having been drafted long before the adoption of the current copyright law, in the era of engraving houses, hot type and keylining—and do not even recognize the existence of the designer independent from a printing or typesetting establishment. As an auditor’s knowledge of the industry may well consist entirely of regulations that describe the industry as of 20 or more years ago, it falls entirely on the designer to provide clarification within the relevant laws and regulations, no matter how out of date, to explain why design should be exempt from collection of tax in the event of an audit.

The New York example

Nowhere in these classifications does the designer, as such, clearly appear. Under New York tax law, then, a designer’s services and licenses are potentially exempt from tax, but the designer must know in which category to classify different jobs.

New York exempts grants of the right to reproduce an “original image” from sales tax and also exempts “the services of an advertising agency or other persons acting in a representative capacity.” Thus creation of an original work, such as a logo or creative services of a consulting nature, appears to be excluded.

New York does not, however, extend that exemption to what it terms a “license to use.” Licensing of “original work”—i.e., created by the licensor—is a transfer of reproduction rights under New York law, and not subject to tax, if it is used as is. If, however, one is merely licensing the use of another’s work, that is a “license to use” and subject to tax. It is also considered a taxable “license to use” if the licensee retouches or alters the work. The taxable “license to use” may apply to the designer who licenses an image from an archive or stock house, where the archive or stock house is not the creator of the work. If the designer manipulates the image in the sense of retouching it, the license paid by the designer is also a taxable “license to use”

rather than a license of “reproduction rights.”

Nonetheless, designers generally license original work to the client. Even if the original work of an annual report, book jacket design or brochure design incorporates illustrations or photography which are someone else’s original work, the end result which the designer licenses to the client is an original work in itself, in the form of a collective work which arranges the type, images, colors, paper, etc., into a different whole. The designer may have to pay tax on a “license to use” a stock image that he or she manipulates to create the original design licensed to the end client, but the designer’s end design, if reproduced as is, is a license of reproduction rights and not taxable. If the client, rather than the designer, adapts it and manipulates it, then it would appear the end client is licensing to “use” rather than to “reproduce,” and must pay tax.

This would seem to be a strong incentive for both designers and clients to not have the client “adapt and apply” a design, but rather license it for straight reproduction. Not only does the client avoid paying tax, as does the designer avoid having to collect it, but the designer retains a greater level of control over his or her work.

“Original work,” even that incorporating the licensed work of others, is the property of the designer whether the designer is a sole proprietor, or whether the designer is a commercial entity such as a partnership or corporation. In the latter instance, the original work of authorship—“the design”—is a work-for-hire work of authorship owned by the commercial entity. True, the term “work-for-hire” raises the hackles on every creator, but if a work of authorship is created by several creatives in a company, and the end result is licensed by the company rather than an individual, the work is a “work for hire” owned by the company, and the company is the author.

In New York, design fees are not taxable, but transfers of tangible personal property such as layouts, printing plates, catalogues and promotional handouts are. If you actually hand over design in a tangible form, rather than allowing the client to transfer design electronically for specified uses (without leaving a disk or tangible product), you are less likely to be liable for tax on a tangible product.

The designer may sometimes act as an advertising agency, or as an “other person acting in a representative capacity,” avoiding tax on fees charged in both cases. A designer may also, however, grant a license to reproduce an original image—as in the case of a logo—or may license, or sublicense,

images that the designer has retouched or otherwise manipulated. In the case of the logo, the designer’s grant of reproduction rights is clearly not subject to tax; in the case of manipulated images, to avoid tax liability under a “license to use,” it would be necessary for the designer to be able either to classify the job as being done in the role of an “advertising agency or other person acting in a representative capacity,” or as the grantor of rights in the original derivative image, of which the designer is in fact the author.

Explanations in New York sales and use tax law

§165-018 (f) “Reproduction rights”
(1) The granting of a right to reproduce an original painting, illustration, photograph, sculpture, manuscript or other similar work is not a license to use or a sale, and is not taxable, where the payment made for such right is in the nature of a royalty to the grantor under the laws relating to artistic and literary property.

(2) Mere temporary possession or custody for the purpose of making the reproduction is not deemed to be a transfer of possession which would convert the reproduction right into a license to use. See *Howitt v. Street and Smith Publications, Inc.*, 276 NY 345 and *Frissell v. McGoldrick*, 300 NY 370.

(3) Where some use other than reproduction is made of the original work such as retouching or exhibiting a photograph, the transaction is a license to use, which is taxable.

Example 1: A person contracts with an artist for a right to reproduce one of the artist’s paintings on a book cover. No other right is given by the artist for the use of his or her painting. The person who obtains the reproduction right to the painting may have copies made and returns the painting to the artist without alteration, change or correction, and without having destroyed or publicly exhibited the painting. The transfer is not held to be a transaction subject to the sales tax, as a rental, lease or license to use.

Example 2: A photographer takes photographs and furnishes the same to a magazine publisher for the purpose of reproduction. In the course of reproduction, the publisher retouches the photograph. After reproduction, the photograph is returned to the photographer. The receipts from such a transaction are subject to the tax as a license to use.

Example 3: A dealer collects photographs and photographic prints. He or she furnishes the prints to a magazine publisher for the purpose of further reproduction. After reproduction the prints are returned to the dealer. The prints may or may not be

changed or altered. The receipts from such transactions are subject to the tax. Since the dealer merely collects the photographic prints and does not have the right to grant the right to reproduce the original, the transaction is deemed a license to use tangible personal property.

§ 165-033 (b)(5) “Exclusions”
Fees for the services of advertising agencies or other persons acting in a representative capacity are excluded from the tax. Advertising services consist of consultation and development of advertising campaigns, and placement of advertisements with the media without the transfer of tangible personal property. The furnishing of a personal report containing information derived from information services, by an advertising agency to its client for a fee, is not a taxable information service. However, if an advertising agency is engaged only for the purpose of conducting a survey or if a survey is separately authorized and billed to the customer, the taxability of such survey is determined in accordance with the provisions of subdivision (a) of this section and the other provisions of this subdivision. Sales of tangible personal property such as layouts, printing plates, catalogs, mailing devices or promotional handouts, tapes or films by an advertising agency for its own account are taxable sales of tangible personal property.

Example 4: An advertising agency is hired to design an advertising program and to furnish artwork and layouts to the media. The fee charged by the agency to its clients for this service is not subject to the tax. However, if the layout and artwork are sold by the advertising agency to the customer for his or her use, the advertising agency is making a sale of tangible personal property which is subject to the sales tax.

The California example

Unlike New York, California does directly refer to designers in its regulations, but the understanding of the design industry reflected there has traditionally rendered most finished work liable to tax. California in the past has exempted what it calls “preliminary art”—conceptual work, sketches and preliminary layouts—but subjected “total charges for finished art”—used for actual reproduction—to sales tax. Until recently, California’s sales tax authority consistently refused to recognize the concept of licensing or reproduction rights as applied to images, though it did recognize these rights with regard to written works of authorship.

In the decision of *Preston v. State Board of Equalization*, the California Supreme Court rejected the state’s traditional application of sales tax to image-based transfers of rights. In that case, an illustrator successfully sued the board for applying tax to payments for the copyright licenses she transferred to various publishers, and to the royalties she was subsequently paid. As a result of this favorable decision, brought about largely through an amicus brief filed by the Graphic Artists Guild and strongly supported by AIGA, the California sales tax regulations have been extensively redrafted. The redrafted regulations discuss rights transfers in terms of “technology transfer agreements,” a California concept which evolved

during the development of Silicon Valley, and which exempts transfers of intangible rights to images but does impose a minimal sales tax when such rights are transferred even temporarily in a tangible medium. The regulations affected include California sales and use tax regulations 1528, 1540, 1541 and 1543, and new regulation 1507; the most important for designers are regulations 1507, which discusses the technology transfer concept, and 1540, which applies that concept to design, but most designers will at some time or other have to familiarize themselves with regulations 1528 (photography), 1541 (printing) and 1543 (publishing).

In brief, images transferred in intangible form—e.g., by modem—are wholly exempt from tax, but when the rights to an image are transferred using tangible means, such as flat art, boards or disks, the rights transfer itself is exempt from tax, but the transfer of the tangible medium remains taxable, even if the transfer is temporary. Calculation of the amount subject to tax begins with a rebuttable presumption. If payment is received in a lump sum without distinguishing between “conceptual services” (which include all preliminary sketches and presentation pieces) and “finished art” (the final used for reproduction), it is presumed that 75 percent of the job fee is for conceptual services, leaving only 25 percent of the fee subject to tax.

This presumption of a taxable 25 percent can be reduced in three ways. (1) If the designer’s contract or invoice states the fee for the copyright license separately from the sale price for permanent transfer of the tangible material, or the lease price for temporary transfer of the tangible material, the copyright license is nontaxable and the sale or lease price is the amount on which tax is due. (2) If the contract or invoice does not separately state the charge for transferring the tangible work, the designer can calculate this taxable amount by referencing the taxable amounts of similar work done in the past. (3) The third option is to calculate the taxable amount at 200 percent of the costs of materials and third-party labor.

Under this last option, if a designer has no third-party labor costs (e.g., is a sole proprietor without employees or other assistance) and does the work on a computer, the sole taxable amount would be 200 percent of the cost of materials (i.e., of the disk or CD on which the final files are recorded and turned over to the client). Thus, with good record keeping, the actual tax burden can be calculated so as to be reduced to almost nothing.

Sales tax venue

Sales tax applies only to business conducted within the designer's home state, with two exceptions. A few contiguous states, usually adjoining, have reciprocal agreements; the designer living in a state that has one of these agreements should consult an accountant to determine if tax is due on transactions with clients in the reciprocal state. Also, if an out-of-state client has a substantial business nexus such as a store or branch office in the designer's home state, tax will apply if due. If the designer is having printing done out of state for an in-state client, the shipping of the completed printed matter from out of state will still be subject to tax if the designer, not the printer, bills the client.

The designer's role in collecting sales tax

Clients, understandably, do not want to pay tax if they can avoid doing so, and frequently attempt to evade sales tax by the simple expedient of refusing to pay or ignoring the line item on the invoice. The designer, however, is liable to the state for the tax owed, whether or not the client pays—and so should stress to the client that sales tax is “charged” by the state, not the designer, who merely collects it on behalf of the state, as mandated under state law.

Contract language that clarifies the tax status

The contract or proposal should contain language permitting the designer to pass through to the client any sales tax he or she must pay on a project and protecting the designer in the event that any taxing authority assesses sales tax on audit. The following wording should be in all contracts for nontaxable transactions and grants of rights for one-time reproduction of designs only: “Client is liable for sales tax paid by [the designer] to vendors or freelancers for services rendered or materials purchased relating to the execution of this project. The client shall also pay any sales, use or other transfer taxes that may be applicable to the services provided, including any tax that may be assessed on subsequent audit of [the designer's] books of accounts.”

On projects where the client is being provided the grant of a right for one-time reproduction of the designs only, all mechanicals and disks sent to the client must be marked with a stamp or label that provides the following message to avoid appearing to be a taxable transaction: “Ownership and title of all drawings, artwork, electronic files and other visual presentations at all times remains the property of [the designer]. Temporary transfer of possession is granted only for the purpose of reproduction after which all materials must be returned,

unaltered and unretouched to [the name and address of the designer].”

The following wording should be in all contracts for taxable projects: “This estimate does not include sales tax. Sales tax will be charged for that portion of the job delivered in [State] when the job is invoiced.”

Recommendations to minimize sales tax liability

Most states fall somewhere between New York and California in their application of sales tax to designers. The statutes and regulations may or may not recognize designers as such, or the existence and intangibility of reproduction rights, but most states—including California, once the regulatory revisions are complete—exempt most aspects of design transactions except for the delivery of tangible printed matter. The designer who wishes to avoid needlessly collecting tax, and to avoid unnecessary liability for sales tax if audited, must be aware of how his or her home state statutes and regulations are configured, and adjust contracts and billing to clearly distinguish tangibles from intangibles, and taxable transfers from nontaxable, in a manner that conforms to them. Initial consultation with an accountant familiar with sales tax can provide the designer with a template for design transactions that will enable the designer to avoid unpleasant surprises.

To minimize your sales tax liability, you should consider the following practices:

- Differentiate on your invoices the fees for design services (consulting), intangible products (use licenses) and tangible products (boards and disks, which should be treated as a commodity rather than as a specialized product to which all of the value of your creativity accrues). This may not be sufficient. An even more explicit approach would be to execute separate contracts for tangible and intangible products and services.
- Clarify in your written agreement with the client that you are providing the rights to use your work, but not the ownership of the work itself.
- Specify on your boards or disks that they are the property of your studio and should be returned.
- Have clients pay directly for tangible products, such as printing, so that you do not have to assume the sales tax collection role.



GUIDE TO COPYRIGHT

Copyright defines the ownership of work created by a designer. Copyright is what allows a designer to control whether or not a work may be copied. If the designer permits a work to be copied, it is the copyright that gives the designer the right to negotiate for fees or royalties. If the client of a designer is to be protected from the theft of designs by competitors, it is because the copyright law gives such protection. Furthermore, an understanding of copyright is necessary if the designer is to obtain for the client appropriate licenses of copyright from suppliers such as photographers, illustrators and authors.

What is copyrightable?

Work must be original and creative to be copyrightable. Here, "originality" simply means that the designer created the work and did not copy it from someone else. If, by some incredible chance, two designers independently created an identical work, each work would be original and copyrightable. "Creative," in the Copyright Office's definition, means that the work has some minimal aesthetic qualities. A child's painting, for example, could meet this standard. Although the Copyright Office has sometimes shown a limited understanding of the artistry of graphic design, especially when uncopyrightable elements are arranged to create a new design, most graphic design should be copyrightable.

Ideas, titles, names and short phrases are usually not copyrightable because they lack a sufficient amount of expression. Ideas can sometimes be protected by an idea disclosure agreement, which expressly provides compensation if the idea is used by the party to which it is submitted. Style is not copyrightable, but specific designs created as the expression of a style are copyrightable. Utilitarian objects are not copyrightable, but a utilitarian object incorporating an artistic motif, such as a lamp base in the form of a statue, can be copyrighted to protect the artistic material. Basic geometric shapes, such as squares and circles, are not copyrightable,

but artistic combinations of these shapes can be copyrighted. Typeface designs are also excluded from being copyrightable (see the chapter "Use of Fonts," page 40). Calligraphy would appear to be copyrightable if expressed in artwork, especially insofar as the characters are embellished, but oddly, may not be copyrightable alone, if merely expressed in the form of a guide such as an alphabet. Computer programs and the images created through the use of computers are both copyrightable.

Exclusive rights

The designer, as the copyright owner, has the exclusive rights to reproduce work; license work; prepare derivative works, such as a poster copied from a design; perform work; and display work. However, the owner of a copy of the work can also display it. Anyone who violates these rights is an infringer whom the designer can sue for damages and prevent from continuing the infringement. If the designer were to have trouble proving actual damages, which include the designer's losses and the infringer's profits, the law provides for statutory damages that are awarded in the court's discretion in the amount of \$750 to \$30,000 for each infringement. If the designer can prove that the infringement was willful, the court, under the copyright law, can award up to \$150,000 in statutory damages. Infringers can also be required to pay attorney's fees. However, to be eligible for statutory damages and attorney's fees, designs or other works must be registered with the Copyright Office prior to the commencement of the infringement. For newly published works, registration within three months of publication will be treated as having taken place on the publication date for purposes of eligibility for statutory damages and attorney's fees. It should be noted that the copyright law defines publication as the distribution of a work to the public by sale, other transfer of ownership, rental, lease or lend-

ing. Offering to distribute copies to a group of persons for further distribution or public display also constitutes publication. Exhibiting a work on the internet would also be a publication.

Fair use

Fair use is a limited exception to the exclusive power of the designer (or client, if the designer has transferred rights to the client) to control the uses of designs. Fair use permits someone to use work without permission for a purpose that is basically not going to compete with or injure the market for the work, such as using a design in an article about the designer's career. The court's tests for whether a use is fair or infringing turns on the following factors:

- The purpose and character of the use, including whether or not it is for profit
- The nature and character of the copyrighted work
- The amount and substantiality of the portion used, not only in relation to the copyrighted work as a whole, but also, in some cases, in relation to the defendant's work (and this can be a qualitative as well as quantitative test)
- The effect the use will have on the market for the copyrighted work or the actual value of the copyrighted work

Transfers and terminations

The copyright law explicitly states that copyrights are separate from the physical design, such as a mechanical or, more recently, digital storage media. Selling the physical design would not transfer the copyright, because any copyright or any exclusive right of use of a copyright must always be transferred in a written instrument signed by the designer. Only a nonexclusive right can be transferred verbally, such as when the designer licenses a design to one client, such as a wallpaper company, but doesn't make the transfer exclusive so that it can also be licensed to another client, such as a placemat company. Both exclusive transfers of copyrights or parts of copyrights and nonexclusive licenses of copyrights can be terminated by the designer during a five-year period starting 35 years after the date of publication or 40 years after the date of execution of the transfer, whichever period ends earlier. This right of termination is an important right, but it does not apply to works for hire or transfers made by will.

Copyright notice

The copyright notice is Copyright, Copr. or ©; the designer's name, an abbreviation for the name or an alternate designation by which the designer is known to the public; and the year of publication. For example, notice could take the form of © Jane Designer 2009. Copyright notice is now optional, but it should not be considered unimportant. The designer has a copyright as soon as a work is created and is no longer required to place copyright notice on the design at the time of publication. However, placing the copyright notice on the work, or requiring that it appear with the work when published, has certain advantages. If notice is omitted when a design is published, an infringer may convince the court to lower the amount of damages on the grounds that the infringement was innocent; that is, the infringer wasn't warned off by a copyright notice. In addition, copyright notice informs the public as to the designer's creative authorship of the work. The best course is simply to place the copyright notice on the design before it leaves the studio and make certain that copyright notice accompanies the design when published, even if, in some cases, the copyright notice on publication may be the client's rather than the designer's.

Copyright duration

Designers now have federal copyright as soon as a design is created—without putting a copyright notice on it or registering it with the Copyright Office. Copyrights created after January 1, 1978, as well as those already existing in works not published or registered, will last for the designer's life plus 70 years. If the designer is an employee, the copyright term will be 95 years from the date of first publication or 120 years from the year of creation, whichever expires first. In this case, however, the design will belong to the employer, since it was created as a work-for-hire.

Registering creative work

Almost all designs can be registered, whether published or unpublished. One might ask why one should pay the application fee (currently \$35) if copyright protection already exists simply by creating the design. There are several reasons: almost all designs must be registered in order to sue, except if the design is not of United States origin; registration is proof that the statements in the Certificate of Registration are true, such as that the designer is the creator of the design; and registration is necessary for the designer to be entitled to the statutory damages and attorney's fees discussed earlier with respect to infringement. Registration allows the artist to make a record of the design and have that record held by a neutral party—the Copyright Office. Since registration is so significant if a lawsuit is necessary, the deposit materials that accompany the application are especially important. It is these

deposit materials that will show what the designer, in fact, created. Groups of unpublished designs can be registered for a single fee using an alternative form of deposit, such as slides or copies of the designs. This greatly reduces the expense of registration, since the designs will not have to be registered again when published.

The Copyright Office maintains a website at www.loc.gov/copyright. Included on the site are downloadable application forms and a great deal of information about copyright, including the latest fee schedules.

The copyright forms

Most designs would be registered on Form VA (which stands for "visual arts"). If a designer wants to register a work with both text and design, Form VA should be used if the design predominates and Form TX if the text predominates. Since these classifications are only for administrative purposes, rights will not be lost if an error is made in choosing the correct classification.

Form VA is a simple two-page form with step-by-step directions explaining how to fill it out. The filing fee and copies of the work being registered should be sent with the application form to the Copyright Office, Library of Congress, Washington, D.C. 20559. There is also a Short Form VA that is even simpler than the Form VA and can be used when the designer is the only author, the design is not work-for-hire and the work is completely new. Registration is effective as of the date when an acceptable application, deposit and fee have all arrived at the Copyright Office. Although the certificate of registration will be mailed later, this will not change the effective date. If there is an error in a completed registration or if information should be amplified, Form CA for supplementary registration should be used.

Group registration

Unpublished works may be registered as a group under a single title for a single registration fee. This will dramatically reduce the expense of registration, and no copyright notice need be placed on unpublished work. The following conditions must be met to allow for group deposit:

- The deposit materials must be assembled in an orderly form.
- The collection must have a single title identifying the work as a whole, such as "Collected Designs of Jane Designer, 2009."
- The person claiming copyright in each work forming part of the collection must be the person claiming copyright in the entire collection.
- All the works in the collection must be by the same person or, if by different people, at least one of them must have contributed copyrightable material to each work in the collection. No limit is placed on the number of works that can be included in such a collection.

It is important that a work registered when unpublished need not be registered again when published. But, if new material is added to the work or it is changed into a new medium—creating a substantially different work from that registered—it would be wise to register the work again to protect the changed version.

Work-for-hire

Work-for-hire is a highly problematic provision of the copyright law. If a designer provides services as a work-for-hire, or if a designer hires a supplier as a work-for-hire, the party executing the work under the work-for-hire status loses all rights, including the right to terminate the rights transferred after the 35-year period provided under copyright law. The work-for-hire status can come into existence in two ways: 1) an employee creating a copyright in the course of the employment; or 2) a freelancer creating a specially ordered or commissioned work, if the work falls into one of several categories defined under copyright law and both parties sign a written contract agreeing to consider the artwork as a work-for-hire.

For a design firm this can create some problems. For example, since most design firms are businesses, this means that the partners in design firms do not own the copyrights for the work they create. Since most partners are employees of the firm, the firm owns those copyrights, just as it owns the copyrights created by any other employee.

If a partner wants rights to what he or she has created, a special contract will be necessary. Also, a salaried employee may request or negotiate a written contractual agreement that allows the employee to retain some copyright ownership.

For freelancers, the categories of specially ordered or commissioned works that can be work-for-hire include: a contribution to a collective work, such as a magazine, newspaper, encyclopedia or anthology; a contribution used as part of a motion picture or other audiovisual work; and a supplementary work, which includes pictorial illustrations done to supplement a work by another author, a compilation, an instructional text, test or answer material for a test or work for use in an atlas.

Commissioned design rarely falls into a category that can be work-for-hire, as defined under the copyright law. Corporate attorneys often rely on work-for-hire because they lack complete understanding of the tradition of creative rights or experience in defining the limited rights that their employers actually need. On the other hand, some firms may use work-for-hire with the intent of reselling the design in some form.

Contractual safeguards

Often the term "work-for-hire" is loosely used to mean a buyout or the transfer of all rights. It is important to understand that work-for-hire is defined in the copyright law, but neither "buyout" nor "all rights" has a universally agreed upon definition. To avoid ambiguity, designers should spell out the rights transferred by type of use, media of use, dura-

tion of use, geography of use and any other description that makes clear what the parties intend. Ownership of any physical objects contained in the work should also be clarified, and may have a bearing on whether sales tax has to be charged.

Unless generous compensation is given to cover all conceivable future uses, the designer should seek to transfer only limited rights to the client. The client's desire for work-for-hire or all rights is often for the purpose of preventing the client's competitors from using the design or images in the design. The client can be protected against such competitive use by a simple clause in the contract stating: "The designer agrees not to license the design or any images contained therein to competitors of the client." This might be accompanied by the client's right of approval over some or any licensing of the design and incorporated images. The designer would then have to include similar restrictions in contracts with suppliers.

Sources of copyright information

Legal Guide for the Visual Artist (Tad Crawford) contains an extensive discussion of copyright. *Business and Legal Forms for Graphic Designers* (Eva Doman Bruck, Tad Crawford) has forms for copyright applications, copyright transfers, licensing and specifying rights either with a client or a supplier.

The Copyright Office makes available free information and application forms such as Form VA for a work in the visual arts. To obtain this information, the designer should request the Copyright Information Kit for the visual arts. The application forms and Copyright Information Kit are available from the Copyright Office, Library of Congress, Washington, D.C. 20559. Forms from the Copyright Office can also be requested by calling a telephone hotline: 202 707 9100. The public information number for the Copyright Office is 202 707 3000. Also, as mentioned earlier, the Copyright Office has a website at www.loc.gov/copyright that offers information about copyright and the functioning of the Copyright Office as well as downloadable forms.



USE OF PHOTOGRAPHY

Use of photography in design work involves choice and responsibilities. With the growth of digital libraries of images, stock photography has become far more accessible to every designer, although there are also strong reasons to commission photography specifically for a project. This chapter reviews the options available to designers, considerations in contracting for the rights for use of photographic images and the means of using photography while fully respecting the intellectual property rights of the photographer.

Contracting with a photographer

It is important to decide whether the designer or the client will contract with the photographer, since the contracting party will be liable for any money owed to the photographer. If the client contracts directly, many of the points made in this chapter would be relevant to the client instead of the designer. The designer's willingness to be the contracting party will depend on such factors as whether the photography budget is relatively small compared to the total design budget and whether the client has proven to be reliable with respect to paying the designer in the past. Certainly the designer should not take the risk of paying for photography if there is any risk the client won't reimburse the designer.

Specifications and deadlines

To begin with, specifications for the images should be as clear and detailed as possible. What is the subject to be photographed? Will the art director or designer give a sketch to the photographer or be present during the shoot for approvals? Should the images be in black-and-white or in color? How many images are to be delivered? In what format will the images delivered—positive, negative, digital file?

The photographer must work on schedule. Failure to do this should be a reason for the designer to terminate the contract. If the designer's schedule allows some flexibility with respect to the photographer's deadline, then illness or other unavoidable delays might extend the photographer's deadline. However, there must be a deadline for when the work should be delivered or else the designer may use another photographer. If even a short delay would be damaging, the designer might consider making "time of the essence" in the contract, in which case the deadline will have no leeway. The designer will want the contract to require that the assignment satisfy the designer, while the photographer will want to include that the satisfaction be "reasonable" to avoid having to do endless work to accommodate an unreasonable designer.

At the same time, the designer needs protection against the situation in which the designer is satisfied with the photography but the client is not. Client, designer and photographer all should make certain that each party will be fairly treated and benefit from the project. One way to do this is to involve the client in the decision-making process with respect to the photography.

Any changes in the assignment should be documented in writing. Even in the rush of meeting deadlines and finishing work, the careful practice is always to have a written confirmation of any changes. This helps avoid disagreements as to whether the assignment as delivered meets the specifications. If the changes aren't written down, it is easier to forget exactly what was discussed or misinterpret what was intended.

Fees and rights

A professional photographer sells a license to use a photograph in particular circumstances; he or she does not sell the photograph itself or the copyright to it. The photographer owns the opportunity to use or sell the image in all other uses, unless he or she sells the copyright in writing prior to the photoshoot.

There must be agreement as to the fee and what is purchased for the fee. Most photographers seek to sell only limited rights. If greater rights are desired, they will ask for a higher fee. If the designer is sensitive to this, the best approach may be to ask for limited rights. This should avoid paying for usage rights that will not be exploited.

On the other hand, the designer must obtain all of the rights that his or her client needs. In the first instance, the designer must consider what rights will be transferred to the client. Rights can be limited in many ways, including the duration of use, geographic area of use, type of product or publication, title of the product or publication, and whether the use is exclusive or nonexclusive. An important aspect of the grant of rights is whether the work may be used in electronic media (such as on a website or a DVD) as well as in traditional media. In electronic media, each category of use (such as a banner ad, email blast or website) is considered discrete use.

A photographer working on assignment will expect reimbursement for direct expenses incurred in producing the images. The designer should carefully review the expenses to be reimbursed to avoid the possibility of a dispute arising. Whether a cap can be placed on expenses, such as stating that expenses shall not exceed the estimate by 10 percent, will have to be negotiated along with whether a markup is to be charged by the photographer on some or all of the expenses. (The designer will face the same issues of cap and markups when billing the client.) If the designer requires changes and this causes reshoots, expenses may increase dramatically. The designer has to be careful to not get caught in a squeeze between a client with a limited budget and an image cost which exceeds that budget because of changes. When expenses will be very substantial, an advance against expenses may become part of the contract (in which case the designer would want an advance from the client sufficient to cover what is being paid on account to the photographer). Whether or not sales tax will have to be paid, and who will be expected to pay it, should also be resolved in the contract.

All rights and work-for-hire

A client may want an all rights contract. Having all rights would mean the client could use the work in any conceivable way. However, on questioning the client, it often develops that the client does not need all rights. Rather, the client wants to prevent competitors from using the photography (and, of course, the design). One approach would be for the designer to promise by contract that no use will be made of the design in certain markets without first obtaining the written consent of the client. Another might be to agree that the client has exclusive rights in those markets where the client faces competitors, but that the client will not unreasonably withhold from the designer (or photographer) the right to resell the image or design in a noncompetitive way.

The designer may sometimes act as an intermediary—and, perhaps, as a mediator of sorts—between the demands of the client and the desire of the photographer to retain rights and earn more money for greater usage. Designers must be careful to make certain that their contracts for rights with photographers and illustrators conform to the rights that the designers have contractually agreed to give their clients. Ideally, therefore, designers will resist clients that demand all rights or work-for-hire—both for themselves and for

the allied creative professionals who will be asked to work on the design project. Work-for-hire vests the copyright in the client who is treated as the creator of the work and gains all the copyright benefits that would normally belong to the creator. This type of contract lowers standards protective of artists' rights, has a negative impact on the ability of creators to earn a livelihood and can have a demoralizing effect with respect to creativity.

In all cases, the designer would be wise to use a written limited rights contract so that both parties know exactly what deal is being agreed to.

Payments and cancellations

Standard practices should be documented in a written agreement and should call for payment to the photographer within a certain number of days after delivery of the assignment (not publication or printing of the images in the designer's final work). This time period is often set at 30 days. Any advances are subtracted from the total bill, which should then be paid in a timely manner to the photographer.

Provision should also be made for what will happen if the assignment is cancelled. The designer should be able to terminate the assignment without liability unless the photographer will be damaged in some way. This would be the case if work has com-

menced or if, due to the short notice of the cancellation, the photographer will be unable to find other assignments for the days that had been set aside for the designer.

A different cancellation issue arises if work is unsatisfactory. Should the photographer be given the first opportunity to do a reshoot? Will there be any additional fee in that case? If the designer uses another photographer, should the first photographer be paid anything for the unsatisfactory work? These can be difficult situations to resolve, even when both parties make their best efforts to be fair.

Authorship credit and copyright notice

There should be agreement as to whether the photographer will receive authorship credit for the photography that appears in the final design. This would be expected in editorial or nonprofit work, but is less likely for advertising or corporate assignments. The same holds true for copyright notice, which would be much more likely for editorial or nonprofit usages than for advertising or corporate assignments. Again, the designer will have to ensure that the client and the photographer share the understanding as to what will be done with respect to authorship credit and copyright notice.

A typical photo credit would appear as: "Photograph by Sarah Photographer." If the photographer is to receive a copyright notice, this could take the form of "© Sarah Photographer 2009." Other forms of copyright notice are also possible, such as "copyright" or "copr." The photo credit and copyright notice would ideally be placed adjacent to the image, whether horizontal or vertical, but can also be placed elsewhere as long as the reader will be able to relate them to the image. If copyright notice is not adjacent to the image, it might be wise to add the word "photograph" in front of the copyright notice.

Releases, warranties and stock photography

Assignments often require photographing people. If these images are used for advertising or trade purposes (such as on a product or for product packaging), a release must be obtained from the person. This is true whether or not the person is a professional model. The release should be in writing. Although the photographer will obtain the release, the release should protect the client and the designer as well as the photographer. If either the designer or client is uncomfortable with the language in the photographer's release, it would be wise to ask for a second release to be signed for the designer or client (or both).

The client or the designer may also want the photographer to give a warranty that the work is original and not an infringement of copyright, an invasion of privacy, libelous or otherwise unlawful. If the photographer gives such a warranty, the photographer will be subject to damages if any of the warranties are found to not be true.

The use of pre-existing images is another possibility for the designer. Use of stock images avoids the many contractual issues that may arise when photography is done on assignment. In using stock images the designer has to be careful not to exceed the license from the stock agency. If additional usage is needed, the designer has to go back to the agency and clear the rights by paying an additional fee. In some cases the stock agency may limit use of photographs because releases have not been obtained from models. Ignoring the agency's restrictions as to use for advertising or trade in such a case is inviting an invasion of privacy lawsuit against the designer and the client.

Ownership

Unless there is a special reason to obtain ownership of preliminary materials used to create the photograph, these would remain the property of the photographer. The photographer would also keep ownership of any physical materials submitted to the designer and expect these to be returned,

including not only valuable original transparencies but also storage media that contained digital versions of the work. If any physical object is to be transferred in addition to the transfer of rights, the contract should specify the ownership transfer.

Assignment of money and duties

The designer will need to be able to assign rights to the client. Since the photographer has been used based on his or her unique style, it won't be acceptable for the photographer to assign the work under the contract to another photographer.

A creative relationship

The relationship between designer and photographer can be highly creative. It can lead to visual solutions that are stunning and exceed the client's expectations. For creative relationships to thrive, however, there must be a basic business understanding. A careful discussion of the creative goals and the business issues should be followed by the signing of a written contract. Such a contract grounds both parties by resolving ambiguities and clarifying expectations. It is an important step in the shaping of a harmonious partnership that leads to the creation of work of the highest excellence.

Resources

Legal Guide for the Visual Artist (Tad Crawford) and *Business and Legal Forms for Graphic Designers* (Eva Doman Bruck, Tad Crawford) both offer sample contracts accompanied by extensive discussion. *Pricing Photography* (Michal Heron) gives instruction with respect to negotiation and includes pricing charts for different stock usages. *The Graphic Designer's Guide to Pricing, Estimating and Budgeting* (Theo Stephan Williams) discusses how to create a successful relationship with suppliers such as photographers. *AIGA Professional Practices in Graphic Design* (AIGA, Tad Crawford) gives information on fees, negotiating and dealing with suppliers. For more information and resources, please go to AIGA's website at www.aiga.org.

STANDARD FORM OF AGREEMENT FOR DESIGN SERVICES

Every design project is different and the best will result from trust between the client and the designer. The most effective way to assure trust meets both client and designer expectations in an engagement is to codify the relationship with a written agreement. The standard agreement is adaptable to unique circumstances while still drawing from the best proven practices based on mutual respect and clarity. It is a modular approach that recognizes the different needs and requirements of different types of engagements.



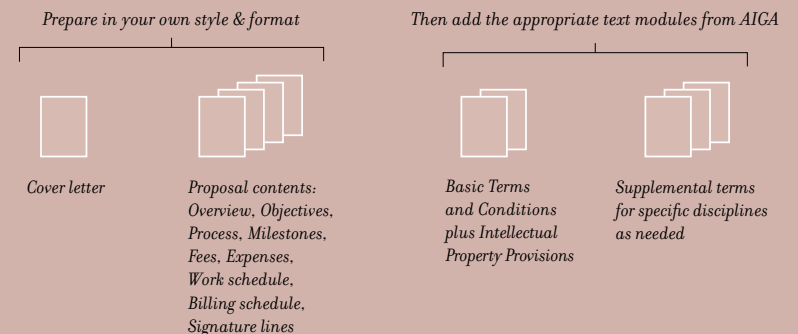
Standard Form of Agreement for Design Services

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Introduction: AIGA Standard Form of Agreement

Welcome to the latest version of the *AIGA Standard Form of Agreement for Design Services*. If you're familiar with the previous versions, you'll notice that this one is quite different. It does not take a one-size-fits-all approach, and it is not an extensive pre-printed document where you simply fill in the blanks. Instead, it acknowledges that most design firms develop their own custom proposal document for each project and are looking for an appropriate set of terms and conditions to attach to it. When put together and signed, the custom proposal document and its attached terms and conditions comprise the binding agreement with the client.

With this in mind, the new focus of the *AIGA Standard Form of Agreement* is on those terms and conditions. AIGA members are involved in many different design disciplines. Because of this, the recommended terms and conditions have been prepared in a modular format. This also helps to keep individual agreements down to a more manageable size. The first two modules, *Basic Terms and Conditions* and *Intellectual Property Provisions*, should be used for all design assignments. An additional three modules are provided as supplements that can be added to the agreement as needed: *Print-Specific Terms and Conditions*, *Interactive-Specific Terms and Conditions* and *Environmental-Specific Terms and Conditions*.



This new format for the *AIGA Standard Form of Agreement for Design Services* was developed by a team of industry experts: Don Brunsten (intellectual property attorney, Don Brunsten & Associates), Jim Faris (co-founder of The Management Innovation Group and former AIGA national board member), Linda Joy Kattwinkel (intellectual property attorney, Owen, Wickersham & Erickson), Frank Martinez (intellectual property attorney, The Martinez Group) and Shel Perkins (design management consultant, former AIGA treasurer and past president of AIGA San Francisco).

It is being provided as a reference to all AIGA members. However, this information is not a substitute for personalized professional advice from an attorney. If you have specific legal questions, you should always seek the services of appropriate legal counsel.

How to use it

In general, the process of drafting, negotiating and finalizing an agreement with a client will follow this sequence of activities:

- Advance preparation and information gathering about the client and the potential project
- Internal planning of budget and schedule
- Drafting a custom proposal document that the client will see
- Attaching these AIGA modules for all design projects: *Basic Terms and Conditions* and *Schedule A: Intellectual Property Provisions*
- Adding these AIGA supplements as needed: *Print-specific Terms and Conditions*, *Interactive-specific Terms and Conditions*, *Environmental-specific Terms and Conditions*
- Reviewing the final AIGA checklist of options in the terms and conditions
- Presenting the agreement to the client and answering any questions
- Negotiating any modifications requested by the client
- Finalizing the agreement with authorized signatures

The following pages offer practical advice on the overall process and discuss the important legal and financial issues to be addressed in the “fine print” of any agreement. To help you with the jargon involved, basic explanations of legal terms are included. However, these notes can only serve as a brief introduction to the issues involved. Depending on the type of work that you do and the size of your projects, some of the contractual issues can become rather complex. When finalizing an agreement with a client, you will of course want to have it reviewed by your attorney. With that in mind, these notes end with some pointers on how to find the right attorney and make the best use of his or her time and expertise.

Advance preparation and project planning

A proposal is a detailed project document that defines the scope of work, the process, the schedule, and the total price (usually in the form of a fixed fee). It is a discussion document where the designer puts forward a recommended course of action for the client to consider. Many proposals go through several rounds of changes and negotiations before they are finalized. Some negotiations with the client may relate to project specifications while other discussions might focus on the legal terms and conditions. The final goal is to have one comprehensive document that, when accompanied by an appropriate set of terms and conditions and signed by both parties, serves as your agreement for the project.

INITIAL STEPS FOR YOU

Start with some general preparation that is relevant to all of the work done by your firm:

- Think about your creative process. Write down the ideal sequence of activities—phases, steps and milestones—that allows you to produce your best work. If you are active in more than one practice area, you may have several variations. Your own creative process should be the framework that you use for planning and managing projects.
- Calculate a standard hourly rate. This is an important internal tool that you need in order to sketch out initial budgets. Rates vary from firm to firm based on the amount of overhead being carried, the number of hours available to devote to client projects and the target profit margin included in the calculation. (A sample format for calculating an hourly rate can be found in the *Graphic Artists Guild Handbook: Pricing and Ethical Guidelines*.)
- Become familiar with standard terms and conditions appropriate to the type of work that you are selling.

Now you can zero in on the particular project that you are bidding on:

- Gather as much information as possible on the potential project. If the client has provided you with an RFP document (a request for proposal), review all of the details carefully. Beyond this, you may want to complete your own form of project questionnaire to make sure that no important details are overlooked. This may involve additional discussions with your client contact and possibly others at the client company in order to learn more.
- Now you're ready to prepare a preliminary project plan and budget. Even though you may be allergic to spreadsheets, it's important to get in the habit of using an internal planning worksheet to calculate a

“suggested retail” price for the project. This ballpark number has to be based on the scope of work required, your own step-by-step design and implementation process, the size of the team that will be required, an estimated number hours for each team member (valued at your standard hourly rate) and estimated outside purchases (including a standard markup). Now you have to make a judgment call: adjust the totals as needed in order to reflect market conditions and the ultimate value of the work to the client.

- You’ll also need to draft a preliminary work schedule that shows the number of work days or work weeks required (don’t forget to factor in your prior commitments to other clients). A good approach is to do this as a Gantt chart that shows blocks of time and indicates project activities that can happen concurrently. Whenever possible, it’s best to avoid locking in specific start dates, approval dates or completion deadlines, because all of them are sure to change. It’s better to plan the schedule in terms of the elapsed time necessary.

This internal preparation and planning has been just for you. The next step is to begin drafting a document that the client will see.

Proposal document

INFORMATION THAT IS SENT TO THE CLIENT

Written proposals include specific details which vary quite a bit based on the individual project and the creative firm. However, there is a fairly standard structure for the proposal document itself. Typical components include:

- An overview of the client situation (their industry and competitive challenges)
- A description of the scope of work and specific objectives for this project (the immediate need that must be addressed and the specific targets that must be achieved)
- The process that you are recommending (for each individual phase, spell out what is included and what is not — describe the sequence of steps, the deliverables and milestones, the number of creative directions that you will be showing, the number of revisions or refinements that are included, the format for delivery, the necessary timeframe and a subtotal of fees and expenses; along the way, be sure to clarify the client’s responsibilities and explain how the client will be integrated into the process)
- A recap of the total timeframe, total fees and total expenses (plus any applicable taxes)
- A billing plan (a simple list of invoice amounts and when they will occur during the project — the payment terms will be explained in the terms and conditions)
- Appropriate terms and conditions (discussed in detail below)
- Two lines for authorized signatures at the end of the document (submitted by and accepted by)

You may want to include some extra items, particularly if the client’s approval process involves routing the proposal to an executive who has not met you:

- Capsule bios of senior team members
- Background information on your design firm’s capabilities and your credentials

When finalizing a proposal package, always include a cover letter. It will be written last. Keep it short, professional and enthusiastic. Don’t repeat any of the details that are in the proposal itself. The letter is simply an invitation for a follow-up conversation and it should indicate your willingness to update or revise the scope of work if necessary.

Next, consider the best way of getting the proposal package to the client. Whenever possible, present it in person. This allows you to explain the contents, to address any concerns that the client might have, and to begin building a positive professional relationship.

Notes on basic terms and conditions

This first module of the AIGA system includes general terms and conditions that apply to all creative disciplines, addressing such essential issues as payment terms, client changes and portfolio usage. These shared issues are discussed in detail below. Some descriptions of related concepts are included as well in order to provide additional context.

Definitions

Important terms such as “Agreement” and “Deliverables” need to be used in a consistent way in both the proposal document and the attached terms and conditions. Internal conflicts in terminology will cause confusion and weaken the agreement from a legal standpoint. After a term has been defined, it will be capitalized each time that it is used.

Proposal

The terms and conditions should not restate any of the project specifications already included in the body of your proposal document, but they should include an expiration clause. This is a statement of how long the unsigned offer will remain valid. If the client sits on the proposal for a month or two, you may need to update the document to reflect changes in your pricing or availability.

Fees

If you are charging for your services on a fixed-fee basis, the total amount will be specified in the body of the proposal.

Taxes

It’s a good idea to state that the client is responsible for any applicable sales or use taxes, even if they are calculated after the fact (for example, during a subsequent audit of the designer’s tax returns).

Expenses and additional costs

Every project will involve at least a few expenses. They may be small like reimbursements for photocopies or taxi rides, or they may be large like the purchase of photography. You should spell out for the client exactly how project expenses will be handled and whether or not estimated amounts for those expenses have been included in your proposal. Some clients may want to receive photocopies of receipts for reimbursable

expenses while others may simply request the right to audit your project records if they ever feel it’s necessary to do so. It’s not unusual for a client to require pre-approval if a purchase exceeds a certain amount. If you are requesting a mileage reimbursement for automobile use, you may want to use the standard rate published each year by the Internal Revenue Service (available at www.irs.gov). In most design firms, out-of-pocket travel expenses for projects are passed through at cost but all other expenses are subject to a markup. State what percentage you use for your standard markup (20 percent is common). If a client wants to avoid a markup on a large expense, consider allowing them to purchase it directly. However, your fee for services must cover the time that you put into vendor sourcing and quality control. Many design firms do not want to take on the potential legal liabilities of brokering expensive third-party services. If something goes wrong with a third-party service such as printing, it’s much safer for the designer if the client made the purchase directly.

Invoices

Your schedule for project billings should be stated in the body of the proposal. Progress billings can be based on phases or milestones, or they can be weekly or monthly. You might also want to specify that you will print hard copies in duplicate and send them via regular mail to the accounts payable address given to you by the client.

Payment terms

When you send an invoice to a client, full payment is due within a certain number of days, counting from the day that the invoice was issued. For example “Net 30” means that the client must get full payment to you within 30 days. Some corporate clients stretch this a bit by saying that the days should be counted from the date they receive the invoice. It’s common for design firms to establish client payment terms of “Net 15” because client cash must be received in time for the design firm to pay for related project supplies purchased from vendors on terms of “Net 30.” Related to this, you may want to put a limit on the amount of credit that you are willing to extend to a new client. This would be a judgment call based on the client’s credit history and your own financial needs. You should state that a project may be put on credit hold if required payments are not made.

Late payment penalties

Most design firms charge clients interest on overdue payments. The standard rate is 1.5 percent per month (which is the equivalent of 18 percent per year). Separate invoices are not generated for the interest amounts. Instead, they appear as line items on monthly statements sent to clients to remind them of unpaid invoices. When client payments are received, the funds are applied first to the interest charges, and then to the unpaid balance on each open invoice, starting with the oldest.

Full payment

If you have agreed that you will be transferring some or all rights to your client, you should definitely make any transfer of rights contingent upon receipt of full payment from the client for your services.

Changes

It's fairly common for minor client changes to be billed on a time-and-materials basis, so your standard hourly rate(s) will be listed here. You might also want to state that your standard rates will not change without 30 days advance notice to the client. When a client requests additions or modifications, you should respond with a change order form. A change order is a document drafted by the designer to acknowledge a client request that is outside of the original scope for the project. The designer describes the amount of additional time and money required and sends the change order to the client for review and an authorized signature. It is essentially a mini-proposal. You'll want to reference the original proposal and state that the same terms and conditions will apply. Compensation for a change order can be calculated on a time-and-materials basis or as a fixed fee. As the work involved is completed, each change order should be invoiced separately. If a client requests substantial changes, however, it's sometimes cleaner and less confusing to start all over with a new proposal for the entire project. You may want to define a substantive change as being anything that exceeds a certain percentage of the original schedule or budget (such as 10 percent) or a certain dollar amount (such as \$1,000), whichever is greater.

Timing

It's paradoxical that the typical client will negotiate for a very tight schedule yet, in the middle of the project, that same client may cause serious delays by failing to provide necessary information, materials or approvals. Most design firms specify that if a client causes a lengthy delay it will result in a day-for-day extension of the project's final deadline. During that client delay, you may also have to reassign some of your resources to other projects, if you have any. You might have cleared the decks for the fast-track project by delaying or turning down other assignments. The danger for you as a businessperson is that an unexpected delay could mean that you're temporarily unable to produce billable hours. To offset this risk, some creative firms attempt to charge a delay penalty or a restart fee. You may want to raise this issue as a negotiating point. However, most clients are not very receptive to the idea.

Testing and acceptance

All work that you deliver to the client should be considered accepted unless the client notifies you to the contrary within a specified period of time (usually 5–10 days).

Cure

Related to testing and acceptance is the concept of cure. If the client notifies you that the work is not acceptable, you should have the opportunity to effect a cure. This means to repair, correct or re-design any work that does not conform to the project specifications in order to make it acceptable to the client.

Client responsibilities

If a client has never purchased creative services before, they may not be aware of how extensive and important their own involvement in the process will be. You'll want to point out what is required of them in terms of information, content, schedules, decision-making and approvals.

Accreditation/promotions

This has to do with receiving proper credit for the work and being able to add it to your design portfolio. You should ask for a credit line to be included in the work itself. You should state that, once the project has been completed and introduced to the public, you will have the right to add the client's name to your client list and the right to enter the work into design competitions. You'll also want to be able to show and explain portions of the completed project to other companies when you are pitching new business. Sometimes clients who are in highly competitive industries have concerns about this. They may ask for the right to review and approve such promotional activity on a case-by-case basis. If you have licensed the final art to the client rather than making a full assignment of rights, and the work does not fall within the category of work-for-hire (defined below), you are legally entitled to show the work in your portfolio. As a professional courtesy, however, you will want to be sensitive to client concerns. (For more information about ownership and licensing, see Schedule A: Intellectual Property Provisions.)

Confidential information

In order for these terms and conditions to be complete and comprehensive, confidentiality should be included here even if you've already signed a separate confidentiality and non-disclosure agreement (perhaps during your very first meeting with the client). Depending on the type of work that you do, you may want confidentiality and non-disclosure to be mutual so that your own proprietary information is protected as well.

Relationship of the parties

Your agreement should reiterate the fact that you are not an employee of your client and you are not forming a joint venture or partnership with them. As an outside supplier of services, you are functioning as an independent contractor. You will also want the ability to bring in your own assistants or agents as needed.

Work made for hire

Discussions with your client about independent contractor status and about ownership and use of project deliverables are sometimes complicated by confusion over the related concept of work-for-hire. This phrase comes from U.S. copyright law. It refers to original work made by an employee within the scope of his or her job, in which copyright ownership automatically belongs to the employer. However, it can also refer to original work made by an independent contractor or a design firm, in which copyright ownership might automatically belong to the client. This is only true if the work meets very specific criteria—it must be specially ordered or commissioned, and it must fall within one of nine categories:

- A contribution to a collective work (such as a magazine, an anthology or an encyclopedia)
- A work that is part of a motion picture or other audiovisual work (such as a website or multimedia project)
- A translation
- A supplement prepared as an adjunct to a work created by another author (such as a foreword, an appendix or charts)
- A compilation (a new arrangement of pre-existing works, such as a catalog)
- An instructional text (whether it is literary, pictorial or graphic)
- A test
- Answer material for a test
- An atlas

Also, a written agreement must be signed by both parties saying that it is a work made for hire. If the project doesn't meet all of these criteria, work-for-hire does not apply. Copyright will belong to you unless you assign it to your client. (More information about copyright is available in the chapter "Guide to Copyright," page 78, and directly from the U.S. Copyright Office at www.copyright.gov.)

No solicitation

It doesn't happen very often, but sometimes a client is so pleased with the work of a particular member of the designer's team that they will seek to establish a direct relationship with him or her. Some people refer to this as "cherry picking." If a client recruits one of your team members away from you, you should at least be entitled to a placement fee for having made the introduction. Beyond that, you should also consider the impact on your operations. If your most experienced and productive team member is no longer available, your business may be damaged by the unexpected interruption to your activities.

No exclusivity

You may want to add that the relationship between you and the client is not an exclusive one. You sell services to a range of clients and some of them may be competitors. If a company wants to be your only client in a particular category, your pricing will have to reflect that. An exclusive relationship would require you to turn down projects from similar firms. Higher rates are necessary in order to offset that lost business.

Warranties and representations

A warranty is a promise in a contract. It is a written guarantee that the subject of the agreement is as represented. As a designer, you might warrant that your work is free from defective workmanship or that it is original and does not infringe the intellectual property of others. If some portion of the work turns out to be defective (for example, a problem with some line of custom computer code in an interactive project) then it is your responsibility to repair or replace it. Legal issues related to originality can be a bit more challenging. You can only infringe a copyright if you knowingly copy someone else's work. However, trademark, trade dress and patent rights can be infringed even if you create your work independently. Thus, it's best to limit your warranty of non-infringement to "the best of your knowledge." If you are going to provide a guarantee of non-infringement without such limitation, then at some time before the end of the project a formal search should be conducted to determine whether or not your work inadvertently resembles a third party's trademark or patent ("prior art"). It's best to place responsibility for this type of prior art search on the client. If you agree to arrange for the search, then your schedule and budget for the project must include the hiring of an attorney or legal service to actually carry it out. It's best for warranties and representations to be reciprocal. The client should make the same promises to you for any project components that they supply.

Infringement

Infringement is the unauthorized use of someone else's intellectual property. It is the opposite of seeking and receiving permission, using correct notice of ownership, and contracting for payment of a royalty or fee. Even though the infringement may be accidental (you may independently create a logo for your client that looks like someone else's trademark), there may be infringement liability, and the infringer may be responsible for paying substantial damages and stopping the use of the infringing work.

Disclaimer of warranties and use of ALL CAPS

If an agreement includes a disclaimer of any warranty, many states require by law that the disclaimer language be sufficiently "conspicuous"

in the document. It needs to stand out in such a way that any reasonable consumer would notice it. This usually means that the disclaimer must be printed in all capital letters, or in type that is larger or in a contrasting color. If you do not follow these guidelines, you run the risk of making the disclaimer invalid.

Indemnification

In the event that you breach any warranty that you have given, you agree to provide security against any hurt, loss or damage that might occur. You would have to make the client “whole” by giving them something equal to what they have lost or protecting them from any judgments or damages that might have to be paid to third parties, along with attorney’s fees. For example, you might be asked to provide indemnity against third-party infringement claims. At the same time, however, you need to have the client indemnify you against any breach of warranties that they have made. Indemnification is a very important issue for designers because the scope of potential liability can be considerable.

Liability

Liability means legal responsibility for the consequences of your acts or omissions. Your accountability to the client may be enforced by civil remedies or criminal penalties. For example, a web developer who has agreed in writing to complete an e-commerce site by a specific date will have liability to the client if the project is not completed on time.

Limitations on liability and use of ALL CAPS

Again, if an agreement includes a limitation on liability, many states require by law that the limitation language be sufficiently “conspicuous” in the document. It needs to stand out in such a way that any reasonable consumer would notice it. This usually means that the limitation must be printed in all capital letters, or in type that is larger or in a contrasting color. If you do not follow these guidelines, you run the risk of making the limitation invalid. It’s smart for a designer to ask a client to agree that they may not recover any damages from you in excess of the total amount of money agreed to in the proposal. While it’s possible for you to limit the amount that each of you might owe to the other in this way, you should keep in mind that you cannot contract away the rights of any third party to make a claim.

Remedy

A remedy is the legal recourse available to an injured party. It may be stipulated in an agreement or a court may order it. A remedy might require that a certain act be performed or prohibited, or it might involve the payment of money.

Damages

Damages are financial compensation for loss or injury suffered by a plaintiff (the person suing). The amount of money awarded in a lawsuit can vary greatly. There are several different categories of damages, including the following: actual damages, such as loss of money due on a contract; general damages, which are more subjective and might relate to loss of reputation or anticipated business; and punitive damages, which may be awarded if the defendant acted in a fraudulent way.

Term and termination

The normal term of a project will begin with the signing of a written agreement and end with the client’s acceptance of your completed services. If something happens in the meantime to make cancellation necessary, the agreement must describe in advance the process for doing that, from notification through calculation of your final invoice. That final billing might cover time and materials for actual services performed through the date of cancellation, or it might be a lump-sum cancellation fee, or perhaps a combination of the two. Cancellation also raises questions about ownership of the unfinished work. Typically the designer will retain all preliminary art, including any studies and comps already rejected by the client, while the client might receive the most recent approved version of the work in process.

General items

Most of the legal issues addressed in this section of the terms and conditions are fairly self-explanatory. However, the following information may be helpful.

Force majeure

This is a French term that means “superior force.” It refers to any event or effect that cannot be reasonably anticipated or controlled. If such an event occurs (for example, a war, a labor strike, extreme weather or an earthquake) it may delay or terminate the project without putting the designer or client at fault.

Governing law

This has to do with jurisdiction. You must identify the state whose laws will govern the signed agreement. Your client will usually request the state where their main office is located.

Dispute resolution

There are three standard types of dispute resolution. Here is a brief description of each one:

- Mediation is a non-binding intervention between parties in an informal setting in order to promote resolution of a dispute. It involves the active participation of a third party (a mediator) who facilitates discussion in order to clarify issues, find points of agreement and encourage cooperation. A commitment to mediation is often included in contracts. There are professional mediators and lawyers who offer mediation services.
- The next step beyond mediation is arbitration, in which an impartial third party (an arbitrator) hears both sides of the dispute in an out-of-court setting. The arbitrator is an attorney who acts much like a judge, listening to both sides of the story but not actively participating in discussion. You and your opponent will have the opportunity to present evidence and witnesses. After hearing the facts, the arbitrator will make a decision. In your contract, you will specify whether the decision of the arbitrator is binding or non-binding. Binding arbitration imposes a legal obligation on the parties to abide by the decision and accept it as final. Arbitration proceedings are held in an attempt to avoid a court trial. However, contract-required arbitration may later be converted into a legal judgment on petition to the court. The fees involved might be large (depending on the dispute, they could easily range from \$3,000 to \$20,000 or more), but usually they are less than those involved in pursuing a lawsuit. For the sake of convenience, many contracts identify a large, national arbitration service to be used in the event of a dispute. However, it may be preferable for you to replace this national name with a local name, particularly if you can find a service that is geared toward the arts.
- Litigation means that you are pursuing a lawsuit through the court system in order to resolve a dispute. The time and expense involved may be considerable.

Attorneys' fees

When a decision has been reached concerning a dispute, either through arbitration or litigation, the losing side may be liable to pay the winning side's costs and attorneys' fees. Under copyright law, a winning plaintiff is entitled to recover his or her attorneys' fees if the copyright was registered before the infringement occurred. For other types of liability, the obligation to pay the prevailing party's legal expenses must be established in your contract.

Notes on schedule A: Intellectual property provisions

Every designer produces original work that is covered by copyright protection, and additional work that could possibly be registered under trademark or patent laws. Because of this, every design contract needs to address the issues of ownership and usage of intellectual property. These can be negotiated in a variety of ways, based on the nature of the work and the specific needs of the client.

Preliminary art versus final art

There is an important distinction to be made between preliminary and final art. Early in each project, a designer may produce a lot of discussion materials (such as sketches, rough layouts, visualizations or comps). These are prepared solely for the purpose of demonstrating an idea or a message to the client for acceptance. Normally the client does not receive legal title to or permanent possession of these items, so it's important for your contract to be clear on this point. Many preliminary concepts will later be modified or rejected entirely. Usually only one concept will be taken through to completion and it is only the approved and finished final art that will be delivered to the client.

Third-party materials

If intellectual property owned by a third party is to be used in a project (for example, an illustration or a photograph), the designer should state that the client is responsible for respecting any usage limitations placed on the property. You may even want the client to negotiate usage rights with the third party and make payments directly to them.

Trademarks

Issues related to trademarks are discussed in the warranties and infringement sections above.

Designer tools

This deals with the issue of background technology. If any code that is proprietary to the designer is necessary to develop, run, display or use the final deliverables, then the designer needs to retain ownership of it while granting a non-exclusive license for the client to copy and use it. This way you can use that same technology on any other clients' projects.

License

A license is a limited grant by a designer to a client of rights to use the intellectual property comprising the final art in a specified way.

Scope of license

The extent of the license that you grant will vary based on the type of work involved. The rights may be limited to use on certain products, in particular media, in a certain territory, and/or for a specified time period. Other basic limitations include whether or not you will allow the client to modify your work in any way, or to turn around and license the work to a third party without your permission. If the client later decides that they need additional rights, they will have to come back to you, renegotiate and pay additional fees.

Exclusive license

If a license is exclusive it means that even though you have retained ownership of the work, you will not be giving permission to anyone else to use it. This means that you will not be able to generate additional licensing income from other sources. Because of this, designers need to negotiate higher prices for exclusive licenses.

Liquidation for unlicensed use

When licensing rights, you may want to consider agreeing in advance on the amount of damages that would be payable by the client upon a breach of contract. These are called liquidated damages. At some point in the future, the client may be tempted to exceed the original scope of the license that you have granted. Instead of coming back and renegotiating with you as they should, they might just begin unlicensed usage. (It's a challenge that is faced all the time by stock photography businesses and illustrators.) Since you can't know in advance the extent of the actual damages that would be caused by the unlicensed usage, the amount of money to be paid is calculated as a multiple of the original contract price (300 percent is common). An agreement on liquidated damages can help to avoid potential lawsuits and serve as an incentive for the client not to exceed the scope of the license. However, you'll want to weigh your other options carefully. If you reserve the right to sue for breach of contract or infringement, it's conceivable that the amount of money awarded to you in a lawsuit could be higher.

Assignment of rights

An assignment is a full transfer of intellectual property rights to your client. It might include copyright, patent, trademark, trade dress or other types of intellectual property. For example, when a new corporate identity is developed and sold to a client, the sale typically includes an assignment of all rights. The client will go on to complete U.S. and international registration of copyright, trademark, patent and other rights in its own name. Designers should charge a higher fee for any project that involves a full assignment of rights.

Notes on supplements

Beyond the basic issues discussed above, additional language may be needed in the agreement to clarify issues that are specific to a particular design discipline. For example, web developers have particular concerns that are different from those of packaging designers. Out of the many possible variations, we have focused in on three areas that we feel will be most relevant to the majority of AIGA members. Most of the items in the supplements are fairly self-explanatory. However, the following information may be helpful.

SUPPLEMENT 1: PRINT-SPECIFIC TERMS AND CONDITIONS

Samples

You will want to specify the number of printed samples to be provided to you.

Finished work

In the printing industry, it's not unusual to encounter slight variations of specifications or materials (for example, substitution of a comparable paper stock due to limited availability) as well as a variance of plus or minus 10 percent on the final, delivered quantity. These should be considered normal and acceptable. Much more information is available about standard trade practices in the printing industry from organizations such as the PIA (Printing Industries of America) and the Graphic Arts Technical Foundation.

SUPPLEMENT 2: INTERACTIVE-SPECIFIC TERMS AND CONDITIONS

Support services

If you're bidding on a website and the scope of services described in your proposal includes testing, hosting and/or maintenance, you are taking on additional legal responsibilities that need to be described in the agreement. Try to limit any additional liability as much as possible. On all interactive projects, you'll want to be very specific about how much support or maintenance you will provide after delivery, and whether or not those services will be billed in addition to the original contract price.

Compliance with laws

Section 508 of the Workforce Investment Act of 1998 is of particular importance to user interface designers as well as software and hardware developers. This law requires electronic and information technology purchased by the U.S. government to be accessible for people with disabilities. It sets accessibility and usability requirements for any websites, video equipment, kiosks, computers, copiers, fax machines

and the like that may be procured by the government, thereby essentially affecting all such products in the American market. (The United Kingdom and Japan have also put accessibility guidelines into place.)

SUPPLEMENT 3: ENVIRONMENTAL-SPECIFIC TERMS AND CONDITIONS

Photographs of the project

After completion of an environmental/3-D project (such as a signage system, a trade show booth, a retail interior or an exhibit) you need the right to photograph the result. This involves being able to access it and take your photographs under optimal circumstances.

Additional client responsibilities

Environmental design projects often require various types of government approval, such as building permits or zoning reviews. Be sure to state that the client is responsible for these.

Engineering and implementation

You will be providing specifications for materials and construction details that will be interpreted by other professionals, such as architects, engineers and contractors. Typically the client will contract and pay for such implementation services directly. Your agreement should include a disclaimer that you are not licensed in those fields and that responsibility for the quality, safety, timeliness and cost of such work is the responsibility of the client and the architect, engineer or contractor involved. The client should indemnify you against any claims in this regard.

Compliance with laws

Your project may be subject to the Americans with Disabilities Act (ADA), which is a civil rights act that affects private businesses as well as governmental organizations. ADA requirements are of particular importance to industrial designers, interior designers and architects.

Client insurance

Ask your client to provide you with proof that they have adequate insurance coverage in place for the duration of the project (one million dollars is a common minimum amount).

Final checklist

Before you send the draft agreement to the client, look through it one more time for quality control purposes. In the terms and conditions pages, there are several blanks that need to be filled in and some very important options need to be selected.

Basic Terms and Conditions

- 2. Number of days that the unsigned proposal will remain valid.
- 3.2 Standard markup percentage for expenses (and perhaps standard rate for mileage reimbursement).
- 3.4 Number of days allowed for payment of invoices.
- 4.1 Hourly billing rate to be used for general client changes.
- 4.2 Percentage of original project schedule or budget that will be used to determine whether or not changes are substantive instead of general.
- 12.5 Name of state identified for governing law.
- 12.8 Identify which supplements are attached, if any.
- Last Add your name, signature and date.

Schedule A: Intellectual Property Provisions

Choose only one of these three options:

IP 2.A (1) (a) and IP 2.1

- A license for limited usage, client may not modify the work.
- Indicate whether it is for print, interactive or environmental.
- Describe the category, medium, duration, territory and size of initial press run.
- Indicate whether the license is exclusive or nonexclusive.

IP 2.A (1) (b) and IP 2.2

- A license for unlimited usage, client may not modify the work.
- Indicate whether it is for print, interactive or environmental/3-D.
- (This license is exclusive.)

IP 2.A (1) (c) and IP 2.3

- A license for unlimited usage, client may modify the work.
- Indicate whether it is for print, interactive or environmental/3-D.
- (This license is exclusive.)

And, with any of the three options above, be sure to include the following liquidation clause just in case the client later exceeds the usage rights that you have granted:

IP 2.A (2) and IP 2.4

Fill in the percentage that will be used to calculate the amount of additional compensation.

Or skip all of the above and go directly to:

IP 2.B and 2.5

This assigns all rights to the client, with no limitations.

Supplement 1: Print-specific Terms and Conditions

P 1. Enter the number of printed samples that you want to receive.

Supplement 2: Interactive-specific Terms and Conditions

I 1.1 Enter the number of months in the warranty period and enter the number of support hours to be provided at no additional cost.

I 1.2 Enter the number of months in the maintenance period and enter the flat fee to be charged per month, or the hourly billing rate for maintenance.

Supplement 3: Environmental-specific Terms and Conditions

3D 6. Insurance requirement for the client: enter a dollar amount.

Negotiating

Present the draft agreement to the client in person, if possible, so that you can explain the contents and answer any questions. Don't be surprised if they ask for modifications or additional items to be included. Here are some of the issues that may come up:

Pricing

Often the initial client response will be to ask for a lower price. It's best for you to avoid getting into a discussion of standard hourly rates. Discuss the scope of work instead. Focus on the main objectives. Can portions of the project be scaled back? Are there components that can be broken out as later projects? Reducing the scope of work will reduce the overall price.

Deposits

Whenever possible, you should ask for a deposit at the beginning of a project. There are different approaches to this. Some designers apply the deposit to the first progress billing (making it essentially a pre-payment of phase 1). Others state that the deposit will be held until the end of project and applied to the final billing. If that's the case, point out that no interest will be paid while it is being held. If the project is cancelled, the deposit will be refunded less any amounts due to the designer.

Product liability

If you are working on the development of a product that will eventually be sold to the public, this will be an important issue. Your client may ask to have it included in the agreement. Product liability refers to the legal responsibility of product designers, manufacturers, distributors and sellers to deliver products to the public that are free of any defects that could harm people. If a product is defective, the purchaser will probably sue the seller, who may then bring the distributor or manufacturer or product designer into the lawsuit. Any one of the parties may be liable for damages or may have to contribute toward a judgment.

Designer insurance

Large clients often specify minimum insurance levels for the designer's business. Standard business requirements include general liability, workers comp and automobile coverage. In addition, you may need to carry professional liability insurance to cover such things as intellectual property infringement or errors and omissions. You'll need to analyze your own needs in this area and do some research with an independent insurance agent. Certain types of professional liability coverage may be limited in scope and rather expensive. If designer insurance requirements are added to the agreement, you must provide proof of coverage in the form of a certificate of insurance that is sent from your insurance agent directly to the client.

ADDENDUM TO THE AGREEMENT

There are two ways to record the changes that result from your negotiations with the client. The most direct is to go back into the body of the agreement and change the original language. This is, in fact, what you should do for all changes that relate to the scope and specifications in the proposal document at the front of the agreement. However, things can become quite confusing if you start to rewrite the attached terms and conditions. It is sometimes better to list negotiated changes to the terms and conditions on a separate sheet, called an addendum. The addendum must clearly describe exactly what is being changed and it must not create any contradictions or ambiguities. If you do you go back into the original terms and conditions and make the changes directly, then you must be cautious when you are drafting your next client agreement. If you're in a hurry, it's all too easy to copy the modified terms by mistake. Be sure that you always go back to the standard language and not your most recent adaptation. The original text must always be your starting point—otherwise you can stray quite far from the original intent.

NEGOTIATING JUST ONCE FOR THE ENTIRE RELATIONSHIP

Terms and conditions can be negotiated separately for each and every project, or they can be negotiated just once for the entire relationship. If you start with a complete set and state that it will apply to all projects, then future proposals can just refer back to it. This can save on paper-work, time and legal expenses for both you and your client.

Finding and working with an attorney

It can be a challenge to find the right attorney and to use his or her time in an efficient way. Most attorneys specialize in a single category of law, such as real estate or labor law. As a creative professional, you need to find an attorney who specializes in issues related to intellectual property (copyrights, trademarks, patents, trade secrets and moral rights). Attorneys are licensed state by state, so you need to find one in your own area. Start your search by visiting these online directories:

- Volunteer Lawyers for the Arts
www.vlany.org
(A nonprofit listing of legal resources for artists in 25 states in the United States, plus Canada and Australia)
- Martindale-Hubbell
www.lawyers.com
(A commercial directory of U.S. and Canadian attorneys that you can search by specialty and location)
- FindLaw
www.findlaw.com
(A searchable commercial database of attorneys, along with articles on various legal topics)

It's a good idea to look for an attorney who has other designers as clients. Speak with established members of your own design community—one of them may be able to provide you with a local recommendation. Seek out an appropriate attorney when you are first establishing your business. Getting preventative advice on basic issues is much better than waiting until you're already in some sort of legal difficulty.

Initial discounts are sometimes available through groups such as Volunteer Lawyers for the Arts, but in general legal services are not inexpensive. Attorneys may charge a flat fee for assisting with certain basic transactions such as setting up an LLC, but for the most part services are billed on a time-and-materials basis. For this reason, you need to be efficient in the way that you interact. Make the best use of your attorney's time by being very well prepared. Bring copies of any correspondence that you have already

received from or sent to the client. Gather sample documents from your industry and become familiar with the basic legal issues relevant to the creative services that you offer. You may be able to use one of these reference documents as a draft for further discussion with your attorney. Be completely honest and ask questions about anything that is not clear to you. Together you will then craft a final version to send to your client.

If your client is a small business, they may respond with some basic questions that you will have no trouble answering. With large clients though, you may find that your document is routed to an in-house legal department. If questions come to you from an in-house attorney, consider having that person negotiate the fine points directly with your own lawyer. If the in-house counsel is a specialist in some other area of law, your intellectual property attorney can explain the context for the agreement language that you are requesting. Attorney-to-attorney negotiation creates additional expense, but if the resulting terms and conditions can be accepted as the basis of an ongoing relationship, then you won't have to go through the process a second time.

Basic Terms and Conditions

1. DEFINITIONS

As used herein and throughout this Agreement:

- 1.1 *Agreement* means the entire content of this Basic Terms and Conditions document, the Proposal document(s), Schedule A, together with any other Supplements designated below, together with any exhibits, schedules or attachments hereto.
- 1.2 *Client Content* means all materials, information, photography, writings and other creative content provided by Client for use in the preparation of and/or incorporation in the Deliverables.
- 1.3 *Copyrights* means the property rights in original works of authorship, expressed in a tangible medium of expression, as defined and enforceable under U.S. Copyright Law.
- 1.4 *Deliverables* means the services and work product specified in the Proposal to be delivered by Designer to Client, in the form and media specified in the Proposal.
- 1.5 *Designer Tools* means all design tools developed and/or utilized by Designer in performing the Services, including without limitation pre-existing and newly developed software including source code, Web authoring tools, type fonts, and application tools, together with any other software, or other inventions whether or not patentable, and general non-copyrightable concepts such as website design, architecture, layout, navigational and functional elements.
- 1.6 *Final Art* means all creative content developed or created by Designer, or commissioned by Designer, exclusively for the Project and incorporated into and delivered as part of the Final Deliverables, including and by way of example, not limitation, any and all visual designs, visual elements, graphic design, illustration, photography, animation, sounds, typographic treatments and text, modifications to Client Content, and Designer's selection, arrangement and coordination of such elements together with Client Content and/or Third Party Materials.

1.7 *Final Deliverables* means the final versions of Deliverables provided by Designer and accepted by Client.

1.8 *Preliminary Works* means all artwork including, but not limited to, concepts, sketches, visual presentations, or other alternate or preliminary designs and documents developed by Designer and which may or may not be shown and/or delivered to Client for consideration but do not form part of the Final Art.

1.9 *Project* means the scope and purpose of the Client's identified usage of the work product as described in the Proposal.

1.10 *Services* means all services and the work product to be provided to Client by Designer as described and otherwise further defined in the Proposal.

1.11 *Third Party Materials* means proprietary third party materials which are incorporated into the Final Deliverables, including without limitation stock photography or illustration.

1.12 *Trademarks* means trade names, words, symbols, designs, logos or other devices or designs used in the Final Deliverables to designate the origin or source of the goods or services of Client.

2. PROPOSAL

The terms of the Proposal shall be effective for _____ days after presentation to Client. In the event this Agreement is not executed by Client within the time identified, the Proposal, together with any related terms and conditions and deliverables, may be subject to amendment, change or substitution.

3. FEES AND CHARGES

3.1 *Fees*. In consideration of the Services to be performed by Designer, Client shall pay to Designer fees in the amounts and according to the payment schedule set forth in the Proposal, and all applicable sales, use or value added taxes, even if calculated or assessed subsequent to the payment schedule.

3.2 *Expenses*. Client shall pay Designer's expenses incurred in connection with this Agreement as follows: (a) incidental and out-of-pocket expenses including but not limited to costs for telephone calls, postage, shipping, overnight courier, service bureaus, typesetting, blueprints, models, presentation materials, photocopies, computer expenses, parking fees and tolls, and taxis at cost plus Designer's standard markup of _____ percent (___%), and, if applicable, a mileage reimbursement at _____ per mile; and (b) travel expenses including

transportation, meals, and lodging, incurred by Designer with Client's prior approval.

3.3 *Additional Costs*. The Project pricing includes Designer's fee only. Any and all outside costs including, but not limited to, equipment rental, photographer's costs and fees, photography and/or artwork licenses, prototype production costs, talent fees, music licenses and online access or hosting fees, will be billed to Client unless specifically otherwise provided for in the Proposal.

3.4 *Invoices*. All invoices are payable within _____ (___) days of receipt. A 1.5 percent monthly service charge is payable on all overdue balances. Payments will be credited first to late payment charges and next to the unpaid balance. Client shall be responsible for all collection or legal fees necessitated by late or default in payment. Designer reserves the right to withhold delivery and any transfer of ownership of any current work if accounts are not current or overdue invoices are not paid in full. All grants of any license to use or transfer of ownership of any intellectual property rights under this Agreement are conditioned upon receipt of payment in full which shall be inclusive of any and all outstanding Additional Costs, Taxes, Expenses and Fees, Charges or the costs of Changes.

4. CHANGES

4.1 *General Changes*. Unless otherwise provided in the Proposal, and except as otherwise provided for herein, Client shall pay additional charges for changes requested by Client which are outside the scope of the Services on a time and materials basis, at Designer's standard hourly rate of _____ per hour. Such charges shall be in addition to all other amounts payable under the Proposal, despite any maximum budget, contract price or final price identified therein. Designer may extend or modify any delivery schedule or deadlines in the Proposal and Deliverables as may be required by such Changes.

4.2 *Substantive Changes*. If Client requests or instructs Changes that amount to a revision in or near excess of _____ percent (___%) of the time required to produce the Deliverables, and/or the value or scope of the Services, Designer shall be entitled to submit a new and separate Proposal to Client for written approval. Work shall not begin on the revised services until a fully signed revised Proposal and, if required, any additional retainer fees are received by Designer.

4.3 *Timing*. Designer will prioritize performance of the Services as may be necessary or as identified in the Proposal, and will undertake commercially reasonable efforts to perform the Services within the time(s) identified in the Proposal. Client agrees to review Deliverables

within the time identified for such reviews and to promptly either, (i) approve the Deliverables in writing or (ii) provide written comments and/or corrections sufficient to identify the Client's concerns, objections or corrections to Designer. The Designer shall be entitled to request written clarification of any concern, objection or correction. Client acknowledges and agrees that Designer's ability to meet any and all schedules is entirely dependent upon Client's prompt performance of its obligations to provide materials and written approvals and/or instructions pursuant to the Proposal and that any delays in Client's performance or Changes in the Services or Deliverables requested by Client may delay delivery of the Deliverables. Any such delay caused by Client shall not constitute a breach of any term, condition or Designer's obligations under this Agreement.

4.4 *Testing and Acceptance.* Designer will exercise commercially reasonable efforts to test Deliverables requiring testing and to make all necessary corrections prior to providing Deliverables to Client. Client, within five (5) business days of receipt of each Deliverable, shall notify Designer, in writing, of any failure of such Deliverable to comply with the specifications set forth in the Proposal, or of any other objections, corrections, changes or amendments Client wishes made to such Deliverable. Any such written notice shall be sufficient to identify with clarity any objection, correction or change or amendment, and Designer will undertake to make the same in a commercially timely manner. Any and all objections, corrections, changes or amendments shall be subject to the terms and conditions of this Agreement. In the absence of such notice from Client, the Deliverable shall be deemed accepted.

5. CLIENT RESPONSIBILITIES

Client acknowledges that it shall be responsible for performing the following in a reasonable and timely manner:

- (a) coordination of any decision-making with parties other than the Designer;
- (b) provision of Client Content in a form suitable for reproduction or incorporation into the Deliverables without further preparation, unless otherwise expressly provided in the Proposal; and
- (c) final proofreading and in the event that Client has approved Deliverables but errors, such as, by way of example, not limitation, typographic errors or misspellings, remain in the finished product, Client shall incur the cost of correcting such errors.

6. ACCREDITATION/PROMOTIONS

All displays or publications of the Deliverables shall bear accreditation and/or copyright notice in Designer's name in the form, size and location as incorporated by Designer in the Deliverables, or as otherwise directed by Designer. Designer retains the right to reproduce, publish and display the Deliverables in Designer's portfolios and websites, and in galleries, design periodicals and other media or exhibits for the purposes of recognition of creative excellence or professional advancement, and to be credited with authorship of the Deliverables in connection with such uses. Either party, subject to the other's reasonable approval, may describe its role in relation to the Project and, if applicable, the services provided to the other party on its website and in other promotional materials, and, if not expressly objected to, include a link to the other party's website.

7. CONFIDENTIAL INFORMATION

Each party acknowledges that in connection with this Agreement it may receive certain confidential or proprietary technical and business information and materials of the other party, including without limitation Preliminary Works ("Confidential Information"). Each party, its agents and employees shall hold and maintain in strict confidence all Confidential Information, shall not disclose Confidential Information to any third party, and shall not use any Confidential Information except as may be necessary to perform its obligations under the Proposal except as may be required by a court or governmental authority. Notwithstanding the foregoing, Confidential Information shall not include any information that is in the public domain or becomes publicly known through no fault of the receiving party, or is otherwise properly received from a third party without an obligation of confidentiality.

8. RELATIONSHIP OF THE PARTIES

8.1 *Independent Contractor.* Designer is an independent contractor, not an employee of Client or any company affiliated with Client. Designer shall provide the Services under the general direction of Client, but Designer shall determine, in Designer's sole discretion, the manner and means by which the Services are accomplished. This Agreement does not create a partnership or joint venture and neither party is authorized to act as agent or bind the other party except as expressly stated in this Agreement. Designer and the work product or Deliverables prepared by Designer shall not be deemed a work for hire as that term is defined under Copyright Law. All rights, if any, granted to Client are contractual in nature and are wholly defined by the express written agreement of the parties and the various terms and conditions of this Agreement.

8.2 *Designer Agents.* Designer shall be permitted to engage and/or use third party designers or other service providers as independent contractors in connection with the Services ("Design Agents"). Notwithstanding, Designer shall remain fully responsible for such Design Agents' compliance with the various terms and conditions of this Agreement.

8.3 *No Solicitation.* During the term of this Agreement, and for a period of six (6) months after expiration or termination of this Agreement, Client agrees not to solicit, recruit, engage or otherwise employ or retain, on a full-time, part-time, consulting, work-for-hire or any other kind of basis, any Designer, employee or Design Agent of Designer, whether or not said person has been assigned to perform tasks under this Agreement. In the event such employment, consultation or work-for-hire event occurs, Client agrees that Designer shall be entitled to an agency commission to be the greater of, either (a) 25 percent of said person's starting salary with Client, or (b) 25 percent of fees paid to said person if engaged by Client as an independent contractor. In the event of (a) above, payment of the commission will be due within 30 days of the employment starting date. In the event of (b) above, payment will be due at the end of any month during which the independent contractor performed services for Client. Designer, in the event of nonpayment and in connection with this section, shall be entitled to seek all remedies under law and equity.

8.4 *No Exclusivity.* The parties expressly acknowledge that this Agreement does not create an exclusive relationship between the parties. Client is free to engage others to perform services of the same or similar nature to those provided by Designer, and Designer shall be entitled to offer and provide design services to others, solicit other clients and otherwise advertise the services offered by Designer.

9. WARRANTIES AND REPRESENTATIONS

9.1 *By Client.* Client represents, warrants and covenants to Designer that (a) Client owns all right, title, and interest in, or otherwise has full right and authority to permit the use of the Client Content, (b) to the best of Client's knowledge, the Client Content does not infringe the rights of any third party, and use of the Client Content as well as any Trademarks in connection with the Project does not and will not violate the rights of any third parties, (c) Client shall comply with the terms and conditions of any licensing agreements which govern the use of Third Party Materials, and (d) Client shall comply with all laws and regulations as they relate to the Services and Deliverables.

9.2 *By Designer*

(a) Designer hereby represents, warrants and covenants to Client that Designer will provide the Services identified in the Agreement in a professional and workmanlike manner and in accordance with all reasonable professional standards for such services.

(b) Designer further represents, warrants and covenants to Client that (i) except for Third Party Materials and Client Content, the Final Deliverables shall be the original work of Designer and/or its independent contractors, (ii) in the event that the Final Deliverables include the work of independent contractors commissioned for the Project by Designer, Designer shall have secure agreements from such contractors granting all necessary rights, title, and interest in and to the Final Deliverables sufficient for Designer to grant the intellectual property rights provided in this Agreement, and (iii) to the best of Designer's knowledge, the Final Art provided by Designer and Designer's subcontractors does not infringe the rights of any party, and use of same in connection with the Project will not violate the rights of any third parties. In the event Client or third parties modify or otherwise use the Deliverables outside of the scope or for any purpose not identified in the Proposal or this Agreement or contrary to the terms and conditions noted herein, all representations and warranties of Designer shall be void.

(c) EXCEPT FOR THE EXPRESS REPRESENTATIONS AND WARRANTIES STATED IN THIS AGREEMENT, DESIGNER MAKES NO WARRANTIES WHATSOEVER. DESIGNER EXPLICITLY DISCLAIMS ANY OTHER WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR COMPLIANCE WITH LAWS OR GOVERNMENT RULES OR REGULATIONS APPLICABLE TO THE PROJECT.

10. INDEMNIFICATION/LIABILITY

10.1 *By Client.* Client agrees to indemnify, save and hold harmless Designer from any and all damages, liabilities, costs, losses or expenses arising out of any claim, demand, or action by a third party arising out of any breach of Client's responsibilities or obligations, representations or warranties under this Agreement. Under such circumstances Designer shall promptly notify Client in writing of any claim or suit; (a) Client has sole control of the defense and all related settlement negotiations; and (b) Designer provides Client with commercially reasonable assistance, information and authority necessary to perform Client's obligations under this section. Client will reimburse the reasonable out-of-pocket expenses incurred by Designer in providing such assistance.

10.2 *By Designer.* Subject to the terms, conditions, express representations and warranties provided in this Agreement, Designer agrees to indemnify, save and hold harmless Client from any and all damages, liabilities, costs, losses or expenses arising out of any finding of

fact which is inconsistent with Designer's representations and warranties made herein, except in the event any such claims, damages, liabilities, costs, losses or expenses arise directly as a result of gross negligence or misconduct of Client provided that (a) Client promptly notifies Designer in writing of the claim; (b) Designer shall have sole control of the defense and all related settlement negotiations; and (c) Client shall provide Designer with the assistance, information and authority necessary to perform Designer's obligations under this section. Notwithstanding the foregoing, Designer shall have no obligation to defend or otherwise indemnify Client for any claim or adverse finding of fact arising out of or due to Client Content, any unauthorized content, improper or illegal use, or the failure to update or maintain any Deliverables provided by Designer.

10.3 *Limitation of Liability.* THE SERVICES AND THE WORK PRODUCT OF DESIGNER ARE SOLD "AS IS." IN ALL CIRCUMSTANCES, THE MAXIMUM LIABILITY OF DESIGNER, ITS DIRECTORS, OFFICERS, EMPLOYEES, DESIGN AGENTS AND AFFILIATES ("DESIGNER PARTIES"), TO CLIENT FOR DAMAGES FOR ANY AND ALL CAUSES WHATSOEVER, AND CLIENT'S MAXIMUM REMEDY, REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, TORT OR OTHERWISE, SHALL BE LIMITED TO THE NET PROFIT OF DESIGNER. IN NO EVENT SHALL DESIGNER BE LIABLE FOR ANY LOST DATA OR CONTENT, LOST PROFITS, BUSINESS INTERRUPTION OR FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, EXEMPLARY OR PUNITIVE DAMAGES ARISING OUT OF OR RELATING TO THE MATERIALS OR THE SERVICES PROVIDED BY DESIGNER, EVEN IF DESIGNER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.

11. TERM AND TERMINATION

11.1 This Agreement shall commence upon the Effective Date and shall remain effective until the Services are completed and delivered.

11.2 This Agreement may be terminated at any time by either party effective immediately upon notice, or the mutual agreement of the parties, or if any party:

- (a) becomes insolvent, files a petition in bankruptcy, makes an assignment for the benefit of its creditors; or
- (b) breaches any of its material responsibilities or obligations under this Agreement, which breach is not remedied within ten (10) days from receipt of written notice of such breach.

11.3 In the event of termination, Designer shall be compensated for the Services performed through the date of termination in the amount of (a) any advance payment, (b) a prorated portion of the fees due, or (c) hourly fees for work performed by Designer or Designer's agents as of the date of termination, whichever is greater; and Client shall pay all Expenses, fees, out of pockets together with any Additional Costs incurred through and up to, the date of cancellation.

11.4 In the event of termination by Client and upon full payment of compensation as provided herein, Designer grants to Client such right and title as provided for in Schedule A of this Agreement with respect to those Deliverables provided to, and accepted by Client as of the date of termination.

11.5 Upon expiration or termination of this Agreement: (a) each party shall return or, at the disclosing party's request, destroy the Confidential Information of the other party, and (b) other than as provided herein, all rights and obligations of each party under this Agreement, exclusive of the Services, shall survive.

12. GENERAL

12.1 *Modification/Waiver.* This Agreement may be modified by the parties. Any modification of this Agreement must be in writing, except that Designer's invoices may include, and Client shall pay, expenses or costs that Client authorizes by electronic mail in cases of extreme time sensitivity. Failure by either party to enforce any right or seek to remedy any breach under this Agreement shall not be construed as a waiver of such rights nor shall a waiver by either party of default in one or more instances be construed as constituting a continuing waiver or as a waiver of any other breach.

12.2 *Notices.* All notices to be given hereunder shall be transmitted in writing either by facsimile or electronic mail with return confirmation of receipt or by certified or registered mail, return receipt requested, and shall be sent to the addresses identified below, unless notification of change of address is given in writing. Notice shall be effective upon receipt or in the case of fax or email, upon confirmation of receipt.

12.3 *No Assignment.* Neither party may assign, whether in writing or orally, or encumber its rights or obligations under this Agreement or permit the same to be transferred, assigned or encumbered by operation of law or otherwise, without the prior written consent of the other party.

12.4 *Force Majeure.* Designer shall not be deemed in breach of this Agreement if Designer is unable to complete the Services or any portion thereof by reason of fire, earthquake, labor dispute, act of God or public enemy, death, illness or incapacity of Designer or any local, state, federal, national or international law, governmental order or regulation or any other event beyond Designer's control (collectively, "Force Majeure Event"). Upon occurrence of any Force Majeure Event, Designer shall give notice to Client of its inability to perform or of delay in completing the Services and shall propose revisions to the schedule for completion of the Services.

12.5 *Governing Law and Dispute Resolution.* The formation, construction, performance and enforcement of this Agreement shall be in accordance with the laws of the United States and the state of _____ without regard to its conflict of law provisions or the conflict of law provisions of any other jurisdiction. In the event of a dispute arising out of this Agreement, the parties agree to attempt to resolve any dispute by negotiation between the parties. If they are unable to resolve the dispute, either party may commence mediation and/or binding arbitration through the American Arbitration Association, or other forum mutually agreed to by the parties. The prevailing party in any dispute resolved by binding arbitration or litigation shall be entitled to recover its attorneys' fees and costs. In all other circumstances, the parties specifically consent to the local, state and federal courts located in the state of _____ . The parties hereby waive any jurisdictional or venue defenses available to them and further consent to service of process by mail. Client acknowledges that Designer will have no adequate remedy at law in the event Client uses the deliverables in any way not permitted hereunder, and hereby agrees that Designer shall be entitled to equitable relief by way of temporary and permanent injunction, and such other and further relief at law or equity as any arbitrator or court of competent jurisdiction may deem just and proper, in addition to any and all other remedies provided for herein.

12.6 *Severability.* Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect and the invalid or unenforceable provision shall be replaced by a valid or enforceable provision.

12.7 *Headings.* The numbering and captions of the various sections are solely for convenience and reference only and shall not affect the scope, meaning, intent or interpretation of the provisions of this Agreement nor shall such headings otherwise be given any legal effect.

12.8 *Integration.* This Agreement comprises the entire understanding of the parties hereto on the subject matter herein contained, and supersedes and merges all prior and contemporaneous agreements, understandings and discussions between the parties relating to the subject matter of this Agreement. In the event of a conflict between the Proposal and any other Agreement documents, the terms of the Proposal shall control. This Agreement comprises this Basic Terms and Conditions document, the Proposal, Schedule A, and the following documents as indicated by the parties' initials:

- ___ ___ Supplement 1: Print-specific Terms and Conditions
- ___ ___ Supplement 2: Interactive-specific Terms and Conditions
- ___ ___ Supplement 3: Environmental-specific Terms and Conditions

By their execution below, the parties hereto have agreed to all of the terms and conditions of this Agreement effective as of the last date of signature below, and each signatory represents that it has the full authority to enter into this Agreement and to bind her/his respective party to all of the terms and conditions herein.

DESIGNER:	CLIENT:
[Designer name]	[Client name]
[Address]	[Address]
Signed: _____	Signed: _____
Date: _____	By: [Client officer name]
	Title: _____
	Date: _____

Schedule A: Intellectual Property Provisions

IP 1. RIGHTS TO DELIVERABLES OTHER THAN FINAL ART

- IP 1.1 *Client Content.* Client Content, including all pre-existing Trademarks, shall remain the sole property of Client or its respective suppliers, and Client or its suppliers shall be the sole owner of all rights in connection therewith. Client hereby grants to Designer a nonexclusive, nontransferable license to use, reproduce, modify, display and publish the Client Content solely in connection with Designer's performance of the Services and limited promotional uses of the Deliverables as authorized in this Agreement.
- IP 1.2 *Third Party Materials.* All Third Party Materials are the exclusive property of their respective owners. Designer shall inform Client of all Third Party Materials that may be required to perform the Services or otherwise integrated into the Final Art. Under such circumstances Designer shall inform Client of any need to license, at Client's expense, and unless otherwise provided for by Client, Designer shall obtain the license(s) necessary to permit Client's use of the Third Party Materials consistent with the usage rights granted herein. In the event Client fails to properly secure or otherwise arrange for any necessary licenses or instructs the use of third party art, Client hereby indemnifies, saves and holds harmless Designer from any and all damages, liabilities, costs, losses or expenses arising out of any claim, demand, or action by a third party arising out of Client's failure to obtain copyright, trademark, publicity, privacy, defamation or other releases or permissions with respect to materials included in the Final Art.

- IP 1.3 *Preliminary Works.* Designer retains all rights in and to all Preliminary Works. Client shall return all Preliminary Works to Designer within thirty (30) days of completion of the Services and all rights in and to any Preliminary Works shall remain the exclusive property of Designer.
- IP 1.4 *Original Artwork.* Designer retains all right and title in and to any original artwork comprising Final Art, including all rights to display or sell such artwork. Client shall return all original artwork to Designer within thirty (30) days of completion of the Services.
- IP 1.5 *Trademarks.* Upon completion of the Services and expressly conditioned upon full payment of all fees, costs and out-of-pocket expenses due, Designer assigns to Client all ownership rights, including any copyrights, in and to any artworks or designs comprising the works created by Designer for use by Client as a Trademark. Designer shall cooperate with Client and shall execute any additional documents reasonably requested by Client to evidence such assignment. Client shall have sole responsibility for ensuring that any proposed trademarks or Final Deliverables intended to be a Trademark are available for use in commerce and federal registration and do not otherwise infringe the rights of any third party. Client hereby indemnifies, saves and holds harmless Designer from any and all damages, liabilities, costs, losses or expenses arising out of any claim, demand, or action by any third party alleging any infringement arising out of Client's use and/or failure to obtain rights to use or use of the Trademark.
- IP 1.6 *Designer Tools.* All Designer Tools are and shall remain the exclusive property of Designer. Designer hereby grants to Client a nonexclusive, nontransferable (other than the right to sublicense such uses to Client's web hosting or internet service providers), perpetual, worldwide license to use the Designer Tools solely to the extent necessary with the Final Deliverables for the Project. Client may not directly or indirectly, in any form or manner, decompile, reverse engineer, create derivative works or otherwise disassemble or modify any Designer Tools comprising any software or technology of Designer.

IP 2. RIGHTS TO FINAL ART

Final Art ownership options: choose A-License (either limited usage, exclusive license with no modification rights, or exclusive license with modification rights—all licenses include liquidation for unlicensed use) or B-Assignment. Check appropriate media for each provision:

IP 2.A (1) (a) License for limited usage, no modification rights:

- IP 2.1 For ___ print, ___ online/interactive, ___ three-dimensional media: Upon completion of the Services, and expressly subject to full payment of all fees, costs and out-of-pocket expenses due, Designer grants to Client the rights in the Final Art as set forth below. Any additional uses not identified herein require an additional license and may require an additional fee. All other rights are expressly reserved by Designer. The rights granted to Client are for the usage of the Final Art in its original form only. Client may not crop, distort, manipulate, reconfigure, mimic, animate, create derivative works or extract portions or in any other manner, alter the Final Art.
- Category of use: _____
- Medium of use: _____
- Duration of use: _____
- Geographic territory: _____
- Initial press run: _____
- With respect to such usage, Client shall have (check one)
 ___ Exclusive / ___ Nonexclusive rights

OR

IP 2.A (1) (b) Exclusive license, no modification rights:

- IP 2.2 For ___ print, ___ online/interactive, ___ three-dimensional media: Designer hereby grants to Client the exclusive, perpetual and worldwide right and license to use, reproduce and display the Final Art solely in connection with the Project as defined in the Proposal and in accordance with the various terms and conditions of this Agreement. The rights granted to Client are for usage of the Final Art in its original form only. Client may not crop, distort, manipulate, reconfigure, mimic, animate, create derivative works or extract portions or in any other manner, alter the Final Art.

OR

IP 2.A (1) (c) Exclusive license, with modification rights:

IP 2.3 For ____ print, ____ online/interactive, ____ three-dimensional media:
Designer hereby grants to Client the exclusive, perpetual and worldwide right and license to use, reproduce, adapt, modify and display the Final Art solely in connection with the Project as defined in the Proposal and in accordance with the terms and conditions of this Agreement.

AND

IP 2.A (2) Liquidation for unlicensed use:

IP 2.4 Client's use of the Final Art shall be limited to the usage rights granted herein for the Project only. Use of the Final Art, Deliverables or any derivative works thereof by Client at any other time or location, or for another project or outside the scope of the rights granted herein require an additional fee and Designer shall be entitled to further compensation equal to ____ percent (____%) of the original Project fee unless otherwise agreed in writing by both parties. In the event of non-payment, Designer shall be entitled to pursue all remedies under law and equity.

OR

IP 2.B Assignment:

IP 2.5 Upon completion of the Services, and expressly subject to full payment of all fees, costs and out-of-pocket expenses due, Designer hereby assigns to Client all right and title in and to the Final Art. Designer agrees to reasonably cooperate with Client and shall execute any additional documents reasonably required to evidence such assignment.

Supplement 1: Print-specific Terms and Conditions

- P 1. *Samples.* Client shall provide Designer with ____ (number) of samples of each printed or published form of the Final Deliverables, for use in Designer's portfolio and other self-promotional uses. Such samples shall be representative of the highest quality of the work produced.
- P 2. *Finished Work.* The printed work, and the arrangement or brokering of the print services by Designer, shall be deemed in compliance with this Agreement if the final printed product is within the acceptable variations as to kind, quantity, and price in accordance with current or standard trade practices identified by the supplier of the print and print-related services. Whenever commercially reasonable and if available, Designer shall provide copies of the current or standard trade practices to Client. Notwithstanding, Designer shall have no responsibility or obligation to negotiate changes or amendments to the current or standard trade practices.

Supplement 2: Interactive-specific Terms and Conditions

I 1. SUPPORT SERVICES

- I 1.1 *Warranty Period.* “Support Services” means commercially reasonable technical support and assistance to maintain and update the Deliverables, including correcting any errors or Deficiencies, but shall not include the development of enhancements to the Project or other services outside the scope of the Proposal. During the first _____ (insert number) months following expiration of this Agreement (“Warranty Period”), if any, Designer shall provide up to _____ (insert number) hours of Support Services at no additional cost to Client. Additional time shall be billed at Designer’s regular hourly rate, then in effect upon the date of the request for additional support.
- I 1.2 *Maintenance Period.* Upon expiration of the Warranty Period and at Client’s option, Designer will provide Support Services for the following _____ (insert number) months (the “Maintenance Period”) for a monthly fee of \$ _____ [or Designer’s hourly fees of \$ _____ per hour]. The parties may extend the Maintenance Period beyond one year upon mutual written agreement.

I 2. ENHANCEMENTS

During the Maintenance Period, Client may request that Designer develop enhancements to the Deliverables, and Designer shall exercise commercially reasonable efforts to prioritize Designer’s resources to create such enhancements. The parties understand that preexisting obligations to third parties existing on the date of the request for enhancements may delay the immediate execution of any such requested enhancements. Such enhancements shall be provided on a time and materials basis at Designer’s then in effect price for such services.

I 3. ADDITIONAL WARRANTIES AND REPRESENTATIONS

I 3.1 *Deficiencies.* Subject to the representations and warranties of Client in connection with Client Content, Designer represents and warrants that the Final Deliverables will be free from Deficiencies. For the purposes of this Agreement, "Deficiency" shall mean a failure to comply with the specifications set forth in the Proposal in any material respect, but shall not include any problems caused by Client Content, modifications, alterations or changes made to Final Deliverables by Client or any third party after delivery by Designer, or the interaction of Final Deliverables with third party applications such as Web browsers other than those specified in the Proposal. The parties acknowledge that Client's sole remedy and Designer's sole liability for a breach of this Section is the obligation of Designer to correct any Deficiency identified within the Warranty Period. In the event that a Deficiency is caused by Third Party Materials provided or specified by Designer, Designer's sole obligation shall be to substitute alternative Third Party Materials.

I 3.2 *Designer Tools.* Subject to the representations and warranties of the Client in connection with the materials supplied by Client, Designer represents and warrants that, to the best of Designer's knowledge, the Designer Tools do not knowingly infringe the rights of any third party, and use of same in connection with the Project will not knowingly violate the rights of any third parties except to the extent that such violations are caused by Client Content, or the modification of, or use of the Deliverables in combination with materials or equipment outside the scope of the applicable specifications, by Client or third parties.

I 4. COMPLIANCE WITH LAWS

Designer shall use commercially reasonable efforts to ensure that all Final Deliverables shall be designed to comply with the known relevant rules and regulations. Client, upon acceptance of the Deliverables, shall be responsible for conformance with all laws relating to the transfer of software and technology.

Supplement 3: Environmental-specific Terms and Conditions

3D 1. PHOTOGRAPHS OF THE PROJECT

Designer shall have the right to document, photograph or otherwise record all completed designs or installations of the Project, and to reproduce, publish and display such documentation, photographs or records for Designer's promotional purposes in accordance with Section 6 of the Basic Terms and Conditions of this Agreement.

3D 2. ADDITIONAL CLIENT RESPONSIBILITIES

Client acknowledges that Client shall be responsible for performing the following in a reasonable and timely manner:

- (a) Communication of administrative or operational decisions if they affect the design or production of Deliverables, and coordination of required public approvals and meetings;
- (b) Provision of accurate and complete information and materials requested by Designer such as, by way of example, not limitation, site plans, building plans and elevations, utility locations, color/material samples and all applicable codes, rules and regulation information;
- (c) Provision of approved naming, nomenclature; securing approvals and correct copy from third parties such as, by way of example, not limitation, end users or donors as may be necessary;
- (d) Final proofreading and written approval of all project documents including, by way of example, not limitation, artwork, message schedules, sign location plans and design drawings before their release for fabrication or installation. In the event that Client has approved work containing errors or omissions, such as, by way of example, not limitation, typographic errors or misspellings, Client shall incur the cost of correcting such errors;

(e) Arranging for the documentation, permissions, licensing and implementation of all electrical, structural or mechanical elements needed to support, house or power signage; coordination of sign manufacture and installation with other trades; and
(f) Bid solicitation and contract negotiation; sourcing, establishment of final pricing and contract terms directly with fabricators or vendors.

3D 3. ENGINEERING

The Services shall include the selection and specifications for materials and construction details as described in the Proposal. However, Client acknowledges and agrees that Designer is not (if correct) a licensed engineer or architect, and that responsibility for the interpretation of design drawings and the design and engineering of all work performed under this Agreement (“Engineering”) is the sole responsibility of Client and/or its architect, engineer or fabricator.

3D 4. IMPLEMENTATION

Client expressly acknowledges and agrees that the estimates provided in the Proposal, at any time during the project for implementation charges such as, including, but not limited to, fabrication or installation are for planning purposes only. Such estimates represent the best judgment of Designer or its consultants at the time of the Proposal, but shall not be considered a representation or guarantee that project bids or costs will not vary. Client shall contract and pay those parties directly responsible for implementation services such as fabrication or installation (“Implementation”). Designer shall not be responsible for the quality or timeliness of the third-party Implementation services, irrespective of whether Designer assists or advises Client in evaluating, selecting or monitoring the provider of such services.

3D 5. COMPLIANCE WITH LAWS

Designer shall use commercially reasonable efforts to ensure that all Final Deliverables shall be designed to comply with the applicable rules and regulations such as the Americans with Disabilities Act (“ADA”). However, Designer is not an expert and makes no representations or warranties in connection with compliance with such rules, codes or regulations. The

compliance of the Final Deliverables with any such rule, codes or regulations shall be the responsibility of Client. Designer shall use commercially reasonable efforts to ensure the suitability and conformance of the Final Deliverables.

3D 6. CLIENT INSURANCE

Client shall maintain, during the term of this Agreement, at its sole expense, construction and maintenance liability, product liability, general business liability and advertising injury insurance from a recognized insurance carrier in the amount of at least _____ million dollars (\$____,000,000.00) per occurrence. Such insurance shall name Designer individually as an additional named insured. Client shall provide a copy of said insurance policy to Designer at Designer’s request.

ABOUT AIGA

AIGA, the professional association for design, is the oldest and largest membership association for design professionals engaged in the discipline, practice and culture of designing. AIGA's mission is to advance designing as a professional craft, strategic tool and vital cultural force.

Founded in 1914, AIGA is the preeminent professional association for communication designers, broadly defined. In the past decade, designers have increasingly been involved in creating value for clients (whether public or business) through applying design thinking to complex problems, even when the outcomes may be more strategic, multidimensional and conceptual than what most would consider traditional communication design. AIGA now represents more than 22,000 designers of all disciplines through national activities and local programs developed by 64 chapters and more than 240 student groups.

AIGA supports the interests of professionals, educators and students who are engaged in the process of designing. The association is committed to stimulating thinking about design, demonstrating the value of design, and empowering success for designers throughout the arc of their careers.

OFFICIAL AIGA SPONSORS



AIGA DESIGN BUSINESS AND ETHICS SPONSOR



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