

Contracts

FOR DESIGNERS WHO HATE CONTRACTS

Ross Kimbarovsky

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Contents

Introduction	4
What is Copyright?	5
Freelance Work and Copyright	6
A Few Words About Logos and Copyright	7
Important Terms	8
- Work-for-hire	9
- Preliminary versus final designs	11
- Third-party content and content from client	12
- What rights you give up/retain	13
Independent Contractor Agreement	14
About the Author	20

Introduction

Every designer creates original work that is protected by copyright. To avoid ambiguity and confusion, you and your client should decide who owns the intellectual property rights to your work and how each of you may use the work.

Know your rights

I wrote this e-book to help you understand your intellectual property rights and to help you write a written agreement when you freelance for clients.

Let's first briefly review copyright and how it applies to design...

What is Copyright?



Copyright is a form of legal protection provided to those who create original works. When you create original graphic designs, your work is entitled to copyright protection.

Under the 1976 Copyright Act (United States), the copyright owner has the exclusive right to reproduce, adapt, distribute, publicly perform and publicly display the work. Any or all of these rights can be licensed, sold or donated to another party.

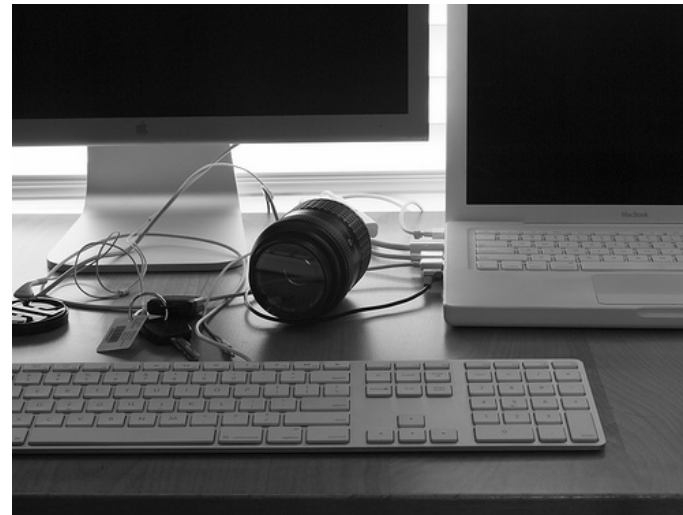
Copyright laws around the world can differ in significant ways. Most countries are signatories to various international treaties and agreements governing copyright protection (such as the Berne Copyright Convention). Under the Berne Copyright Convention, if your work is protected by copyright in your own country, then your work is protected by copyright in every other country that signed the Berne Copyright Convention.

Freelance Work And Copyright

Under U.S. copyright law and the laws of most countries, the designer owns the files and the original artwork he or she creates for a client.

Any or all of the designer's rights can be transferred to the client or to another person. Typically, the designer and the client sign a written agreement, which, among other things, transfers some or all rights from the designer to the client.

Clients prefer to acquire full rights to the designs. They want full control over their use of the designs and they want to make sure that the designer doesn't license or sell the same work to another client. Designers prefer to retain as many rights as possible to their own designs.



A Few Words About Logos and Copyright

A logo created for a company might be protected by copyright law, but it is not protected by trademark law unless it is actually used in commerce. This is because trademark rights arise only when a logo is used in commerce (for example: in connection with the sale of products or services). When used in commerce, however, the trademark rights belong to the person (or party) using the logo, not to the designer who created it.

This can be a problem. The company could acquire trademark rights to the logo design even if the designer never transferred copyright to the company. The designer could not have acquired any trademark rights – even though it was their work - and the designer could not sell or license that work to another party. This explains why most designers generally retain limited rights to their logo designs and why most clients insist on acquiring the broadest rights possible for logo designs.



Important Terms In The Independent Contractor Agreement

To protect yourself and to make sure that your rights to your work are never in doubt or dispute, you should always, even when you work for free, enter into a written agreement with your client.

More sophisticated projects may require more complex written agreements and you should consult an attorney, especially in projects where you will receive a large fee and/or which will take a long time and substantial effort to complete. This e-book focuses on simple design projects, although you certainly can use the template contract in this e-book as a starting point and expand it to cover more complex work.

The following summary explains the key terms of the independent contractor agreement that appears at the end of this e-book. To help you understand why your clients might request different terms, I've included a short table following each section that looks at the term from the point of view of the designer and the client. Knowing how the other party feels about a particular term, and why it's important to them, will help you to negotiate an agreement that's fair and reasonable.

Work-for-hire

The phrase “work-for-hire” comes from U.S. copyright law. It refers to the original work of an employee within the scope of their job (copyright ownership automatically belongs to the employer). This phrase also refers to the original work of an independent contractor.

Remember that the author of an original work owns the copyright. When a client hires an independent contractor, the parties need to determine what rights will transfer from the contractor to the client. If the parties want the work by the independent contractor to be work-for-hire – in which case full rights would transfer to the client, they must specifically state so in a written agreement and the work must fall within one of nine categories:

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

Contracts FOR DESIGNERS WHO HATE CONTRACTS

If the work doesn't fit into one of the nine categories, or the parties don't execute a written document specifying that the work is "work-for-hire", it's not work-for-hire. In that case, the designer would continue to own the copyright for the work.

Client's point-of-view	Designer's point-of-view
The client wants to acquire full intellectual property rights to the designs and will often require that the work be deemed a "work-for-hire". If they hire a freelancer to create a logo, for example, failure to acquire rights to the logo design might limit their ability to make changes to the design and might limit how they could use the design.	The designer wants to retain appropriate rights to their own work so that they can reuse portions of it in future designs or to allow them to license the work for uses that are not being licensed to this specific client. The designer also wants the right to display the work in their portfolio. When a work is deemed "work-for-hire" these rights could be limited or eliminated – so be cautious.

Preliminary vs. final designs

When freelancing for a client, you'll often create sketches, visualizations or comps. Most preliminary concepts will be rejected or modified in significant ways. Typically, the client will be purchasing just a single concept – the design that you'll complete as a finished design. Therefore, you'll want to clearly state in your written agreement whether the client is purchasing rights to all designs, or just to the finished designs.

Client's point-of-view	Designer's point-of-view
The client wants to acquire full intellectual property rights to the designs. However, they typically are most interested just in the final designs. On the other hand, they might like elements of your other designs and might ask you to include those elements with your final work.	Since you'll include many elements in your preliminary designs that won't make it into the final designs, you'll want to retain full ownership of all your preliminary designs unless the client pays you separately to acquire rights to those designs or unless you've agreed with the client that they will receive such rights.

Third-party content and content from client

Your designs may include stock art, photo or illustrations created by someone else. You'll want to clearly disclose this to your client and make sure that the client understands any usage restrictions placed on that third party content. For example, when you purchase a stock photo to use in a design, the rights may be limited and the rights you can convey to your client can be no greater than the rights you purchased. Also, make sure that there's no ambiguity about who will purchase and pay for third-party content. Before purchasing any third-party content, you should have the client agree – in writing – to reimburse you (unless you've already included the cost of that content in your project fee). You should also make sure that the client is permitted to use any names, content, graphics, stock images, or other content that they ask you to incorporate into your design(s).

Client's point-of-view	Designer's point-of-view
The client wants to know which elements of the design are created by someone else and wants to understand the usage restrictions. If the design includes elements that restrict use, the client may not be able to fully use the design as they intended.	The designer wants to clearly and fully disclose the use of any third-party content in the design so that the client understands which elements of the design are original and which are created by a third-party and licensed for use in the design. The designer also wants to be sure that the client is permitted to use anything that the client asks the designer to incorporate into the design.

What rights you give up/retain

Because you own your original designs, you can assign to the client as few or as many rights as you want. For example, you can assign rights to use the designs only on certain products (such as on product packaging only), in specific media (such as in print or online), in certain geographic regions (U.S. only), or for specific periods of time. You can also control whether the client is allowed to modify your work or license/sell your work to a third-party without your approval.

You should carefully consider the rights that you are assigning when you determine the price you'll charge the client for the work. You'll generally want to charge higher fees for projects when you are assigning your rights in full.

Clients will nearly always want to acquire the broadest rights possible. When negotiating this provision, take the time to understand WHY the client needs broader rights. And remember that when creating logos, it's common to assign full rights to the client, since you can't re-use the designs for any other client (see page 7 if you don't remember why).

Client's point-of-view	Designer's point-of-view
The client wants to acquire full intellectual property rights to the designs and would like to have the fewest restrictions possible. If their rights are limited, they'll need to find the designer in the future, negotiate a separate license, and pay additional fees for that license.	The designer wants to provide the client with a fair and reasonable license and to retain rights to their own work so that they can reuse portions of it in future designs or to allow them to license the work for uses that are not being licensed to this specific client. The designer also wants the right to display the work in their portfolio.

Independent Contractor Agreement

You, _____ (“Client” or “You”) asked me, _____ (“Designer” or “I”) to design something for you.
This is our Agreement for this project:

What I agree to do:

1. Scope of Work. I will do the following within ____ days after I receive a signed copy of this Agreement and fifty (50) percent of the payment from you: [Here, you should list what you’ll do, how many different concepts/comps you’ll provide, when you’ll provide them, what and how many changes you’ll make. In this section, you want to fully define the scope of the project]

2. Final Files. I will deliver to you, via electronic mail (or a downloadable hyperlink), within ____ days after you approve the final design(s), digital files containing the final design(s), in the following format(s): [Here, you should specify the file formats you’ll include. You should include formats that your clients will be able to easily view (such as .png, .jpg or .pdf) and vectorized formats that they’ll need (such as .eps or .ai). If you will be including printed work, you should specifically list it here, as well as any other deliverables that you will be expected to provide to the Client]

What I promise you:

3. Original Work/Conflicts/Confidentiality. I promise that, except for anything that you gave me to incorporate into the design(s): (a) my work will be original and will not be copied in whole or in part from any other work; (b) I own the rights that I am giving you under this Agreement, or I have secured such rights to any third-party content incorporated into my final design(s); and (c) my work does not violate the patent, copyright, trade secret or other property right of any person,

firm or entity. I promise that this Agreement does not conflict with any other contract, agreement or understanding to which I am a party. Finally, I promise that I'll hold and maintain in strict confidence any confidential information that you provide me (such as proprietary technical or business information), and I will not disclose such information to any third party except as may be required by a court or governmental authority.

What you promise me:

4. Pay Me For My Work. You promise to pay me the total sum ("Fee") of \$_____ (U.S. Dollars) in two payments. Fifty (50) percent of the Fee will be due when you and I sign this Agreement and before I begin. The remaining fifty (50) percent of the Fee will be due immediately before I send you final files containing the final design(s) you approved. Payment will be made using _____. If you ask me to use any third-party content (such as stock photos) in the design(s), you promise to pay me the actual cost of licensing that third-party content for use in the design(s). You agree that until you pay me in full, you will not acquire the rights or license to use or transfer ownership of any design(s) that I create for you under this Agreement.

[Here, you'll want to specifically state how payment will be made. For example, the Client could pay via PayPal, Moneybookers, by check, etc. You should also state who will pay for the transactional costs for making the payment].

5. Pay Me For Extra Work. I agree that the Fee you owe me will cover in full all of the work listed in paragraph 1 of this Agreement. You agree that if you ask me to make changes or do other work for you that is not covered by this Agreement, you'll pay me an hourly rate of \$_____ per hour and this payment will be in addition to all other amounts you owe me under this Agreement. You also agree that if you ask me to do work outside the scope of this Agreement, I may have extra time to send you the final files for the design(s).

6. You Have Rights To The Client Content. You promise that: (a) You own the rights to use anything you give me

("Client Content"); and (b) using such Client Content does not violate the patent, copyright, trade secret or other property right of any person, firm or entity. You grant me a nonexclusive, nontransferable license to use, reproduce, modify, display and publish the Client Content solely in connection with my work for you under this Agreement and my limited promotional uses as allowed by this Agreement. You also affirm and represent that this Agreement does not conflict with any other contract, agreement or understanding to which you are a party.

7. You Promise To Provide Feedback. You agree that I cannot send you final files unless you give me timely feedback and approve the final proofs I'll send you. You agree to provide timely feedback so that I can understand your concerns, objections or corrections to the design(s). I agree to listen to your feedback and make changes to the design(s) in response to your feedback. You promise not to unreasonably withhold acceptance of the final design(s). Finally, you agree that my work on this project will be complete and the Agreement will end after I deliver to you final files containing the final design(s) that you've approved.

What rights each of us will have:

8. Rights Before You Pay Me In Full. You understand and agree that until you pay me in full, I own full rights to each and every original design I create for you under this Agreement. If you don't pay me in full, you agree that I can complete, exhibit, use and sell the design(s) at my sole and absolute discretion. You also agree that I own all of the concepts created before you select the final design(s).

9. Rights After You Pay Me In Full. I understand and agree that after you pay me in full, you will own rights (as defined in this Agreement) to the final design(s) that you approve and I create for you. You understand and agree that I own all of the concepts/preliminary designs created before you select the final design(s), except for elements in those concepts that are incorporated into the final design(s) that I deliver to you. You will receive rights for the final design(s) only. You agree that I will retain the right to use the final design(s) and all preliminary designs in design competitions, publications on

design, educational purposes and in marketing my design business. You will be solely responsible to make sure that the design(s) I create for you will be available for use in commerce and protectable under trademark law.

10. Right To Make Changes. I agree that after you pay me in full, you may make any changes or additions to the design(s) I create for you under this Agreement, which you in your discretion may consider necessary, and you may engage others to make any such changes or additions, without further payments to me. You agree that if you ask me to make changes or additions to the design(s) after you approve the final files, you and I will negotiate a separate additional payment for my time to make such changes.

[If you do NOT want the client to have the right to make any changes, include the following language instead: **10. No Right To Make Changes.** You agree that you may not make any changes or additions to the design(s) I create for you under this Agreement, without my express written permission. You may however, change the size of the design(s) if you need to make it smaller or larger for printing or display purposes.]

11. Rights For Logo Designs. If the work I am doing for you includes the design of a logo, I give you the full rights to use the logo design I create in any and all media without restrictions of any kind. Additionally, I agree that after you pay me in full, I will cooperate with you and execute any additional documents reasonably requested by you to evidence such assignment of rights.

12. Rights For Designs Other Than Logos. For any non-logo design(s) that I create for you, I give you the following rights: [Here, you should talk about what specific rights you're giving the client. For example, are you providing one time reproduction rights, geographically limited rights, rights to use only in print media or only online, etc. Be specific.]

If you want to purchase a right that's not listed in this paragraph, you and I will need to negotiate a separate license for such additional rights, and you'll pay me a separate fee.

Miscellaneous terms:

13. Entire Agreement. This Agreement constitutes the complete and exclusive agreement between you and I concerning the work on this project, and it supersedes all other prior agreements, proposals, and representations, whether stated orally or in writing. We can modify this agreement in writing, if both you and I sign that modification.

14. I Am An Independent Contractor. You agree that I am an independent contractor and not your employee. Although you will provide general direction to me, I will determine, in my sole discretion, the manner and ways in which I will create the design(s) for you. The work that I create for you under this Agreement will not be deemed a “work-for-hire”, as that term is defined under U.S. Copyright Law. Whatever rights I grant you are contained in this Agreement.

By signing below, you and I agree: (a) to all of the terms and conditions of this Agreement and (b) that we have the full authority to enter into this Agreement. The Agreement is effective as of the most recent date that appears below.

Contracts FOR DESIGNERS WHO HATE CONTRACTS

DESIGNER:

Designer's Signature Date

Name: _____

Address: _____

E-Mail: _____

Phone: _____

CLIENT:

Client's Signature Date

Name: _____

Title: _____

Address: _____

E-Mail: _____

Phone: _____

You can download a free, editable copy of this Agreement in the following formats: [PDF](#), [RTF](#), or [Microsoft Word](#).

About the author



Ross Kimbarovsky is entrepreneur. In 2007, he co-founded [crowdSPRING](http://crowdSPRING.com) an online marketplace for buyers and sellers of creative services. Prior to crowdSPRING, for 13 years as a successful attorney, Ross counseled and represented clients (from small internet startups to Fortune 100 companies) in complex disputes involving intellectual property in United States state and federal courts and before the World Intellectual Property Organization. In 2006, Ross was named one of “40 Illinois Attorneys Under Forty to Watch”, for his experience with intellectual property and complex commercial litigation. Ross frequently writes in [crowdSPRING's blog](http://crowdSPRING.com/blog) and also in his own blog at <http://www.rosskimbarovsky.com> You can email Ross [here](mailto:ross@crowdSPRING.com) and follow him on Twitter [here](https://twitter.com/rosskimbarovsky).

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crowdSPRING provides a level playing field for tens of thousands of talented designers and offers small and mid-size businesses real choice for their graphic design needs.

