

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.



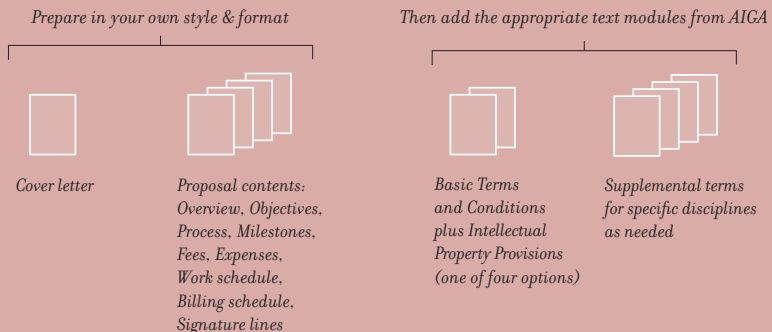
Standard Form of Agreement for Design Services

Introduction: AIGA Standard Form of Agreement	6
Basic Terms and Conditions	38
Schedule A: Intellectual Property Options	
1. License for Limited Usage	50
2. Exclusive License	54
3. Assignment of Rights	58
4. Work Made for Hire	60
Supplement 1: Print-Specific Terms and Conditions	64
Supplement 2: Interactive-Specific Terms and Conditions	66
Supplement 3: Environmental-Specific Terms and Conditions	68
Supplement 4: Motion-Specific Terms and Conditions	72

Introduction: AIGA Standard Form of Agreement

Welcome to the latest version of the *AIGA Standard Form of Agreement for Design Services*. Just as in the prior update, 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 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 four modules are provided as supplements that can be added to the agreement as needed: *Print-Specific Terms and Conditions*, *Interactive-Specific Terms and Conditions*, *Environmental-Specific Terms and Conditions*, and *Motion-Specific Terms and Conditions*.



This update to the *AIGA Standard Form of Agreement for Design Services* was prepared by Linda Joy Kattwinkel (intellectual property attorney, Owen, Wickersham & Erickson) and Shel Perkins (design management consultant, former AIGA national treasurer and past president of AIGA San Francisco). It builds on the prior version which they developed in collaboration with additional 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), and Frank Martinez (intellectual property attorney, The Martinez Group). 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* (choose just one of the four available options)
- Adding these AIGA supplements as needed: *Print-Specific Terms and Conditions*, *Interactive-Specific Terms and Conditions*, *Environmental-Specific Terms and Conditions*, *Motion-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. (Sample formats for calculating an hourly rate can be found in the *Graphic Artists Guild Handbook: Pricing and Ethical Guidelines* and through the AIGA Center for Practice Management.)
- 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 time frame, 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 a late fee on overdue payments. The standard rate tends to be 1.5 percent per month (which is the equivalent of 18 percent per year), but there are legal limits to the rate in some states. Separate invoices are not generated for the penalty 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 penalty 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. For example, it's the client's responsibility to make sure their advertising and promotional claims are accurate and legal.

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. Whether you have licensed the final works to the client or the client owns copyright by assignment or work-made-for-hire, you have a fair use right under copyright law to show final, published works in your portfolio. Many clients do not understand this, however, so it is important to explicitly describe your portfolio rights in your agreement. And, as a professional courtesy, you will want to be sensitive to client concerns. Although this form provides portfolio rights for all deliverables, your client may want to limit your portfolio use to final works after they've been made publicly available.

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.

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 your firm, 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 a 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 or all bold

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, boldface, 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 or all bold

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, boldface, 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 (often called a "kill fee" or "early termination 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. Check to see if there are any limitations or special requirements for binding arbitration in your state. 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 may 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 protected by copyright. Your work may also be protectable under trademark or patent laws. Client content and third party materials may also be protected as intellectual property. Because of this, every design contract needs to address 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.

Many clients assume that when they pay a designer as an independent contractor to do work for them, the client will automatically own all intellectual property rights in the designer's work product. This is not correct. The designer retains ownership of the intellectual property in her/his work unless and until the designer signs a written agreement that transfers ownership of the intellectual property to the client.

Instead of assigning intellectual property to the client, the designer can keep intellectual property ownership and grant a license to the client. A license is a limited permission given by a designer to the client to use the intellectual property comprising the work product in a certain way. The extent of the license you grant will vary based on the type of work involved.

This section provides four different — and mutually exclusive — options for intellectual property ownership of your work product. Options 1 and 2 represent licenses, in which the designer retains ownership of the underlying intellectual property while granting the client rights to use the work within certain parameters. Options 3 and 4 represent different ways in which intellectual property ownership is transferred to the client. These options are on a scale: Option 1 represents the most rights retained by the designer and the lowest fees charged to the client. Option 4 represents the most rights given up by the designer and the highest fees charged to the client.

- Option 1: License for limited usage
- Option 2: Exclusive license
- Option 3: Assignment of rights
- Option 4: Work made for hire

Choose just one option to include in your agreement. See the comments associated with each option below for guidance in deciding which option best fits your project. In addition to ownership/licensing provisions, each option includes appropriate provisions on the following intellectual property issues...

Provisions common to all options

Trademarks

Trademarks are names, logos, corporate identities, or designs that function like a brand — they tell the public who is offering the goods or services shown in the work. If your client expects to use elements of your deliverables as trademarks, your client will want to own those parts of your work product. If so, this section should be included. Rather than granting a limited usage license, this section assigns all intellectual property rights in the branding elements of your work to your client. You will not be able to re-use or re-license those elements. So make sure you are paid adequately for this assignment. (If the entire scope of your work involves trademarks, it is generally better to use Option 3.)

Trademarks can be infringed if a similar mark is adopted for confusingly similar goods or services, even if you were unaware of the allegedly infringed mark. The final sentences in this section are important because they shield you from liability if someone claims that a trademark you created for your client infringes another company's trademark rights.

Client content

In most projects, you will be working with text, images or trademarks provided by your client. This section simply recites that the client retains intellectual property ownership in those elements. Section 9.1 of the Basic Terms and Conditions ensures that you are not held responsible for any intellectual property infringements arising out of use of client content in your work.

Third-party materials

If your work includes content from other vendors (e.g., stock illustration, photography, software), this section states that intellectual property ownership for those materials remains with those "third party" vendors. Under all four intellectual property options, the rights granted to your client do not cover those third party materials, and your client is responsible for ensuring that it has the appropriate licenses to use them.

"Third party" does not include freelancers or other design firms that you have contracted to work on this project. Those are called your "Design Agents" in the Basic Terms and Conditions. You need to get intellectual property licenses or assignments from your independent contractors to match the rights you are granting to your client.

Preliminary works/working files

This is an issue that clients are often unclear about. There is an important distinction to be made between preliminary and final work product.

Early in each project, a designer may produce a lot of discussion materials (such as sketches, rough layouts, visualizations, demos or comps). These are prepared solely for the purpose of demonstrating an idea or a potential direction for the client's consideration. Normally the client does not receive rights to or permanent possession of these preliminary materials. Many preliminary concepts will later be modified or rejected entirely. Usually only one concept will be taken through to completion, and the deliverables for that selected direction are the "Final Works" to be delivered to the client. Under Options 1, 2 and 3, the client receives the licensed or assigned intellectual property rights only to those Final Works. Only in cases of work-made-for-hire (Option 4,) should the client receive rights in preliminary works.

Similarly, except for work-made-for-hire (Option 4), the client is not entitled to receive all of the designer's underlying working files. Only the files that the client needs to exercise its rights in the Final Works should be delivered. For example, if you have checked the second paragraph under "Modification" in section IP 1.1 of Option 1 or 2, your client will need working files sufficient to enable it to make changes. If not, a PDF or other final format of the final work product will normally be sufficient. Working files for your preliminary materials should never be delivered to the client under a license or assignment that is limited to Final Works.

It is important to ensure that your client understands and agrees to this section. Many disputes occur because clients mistakenly believe they are entitled to receive and re-use all of your work product, including preliminary materials and working files for directions that were not chosen, even if the contract grants rights only in Final Works. It is often helpful to explain that a full buyout of all of your work product would be much more expensive, and is more than the client needs. The client is getting a lower fee to match the licensed usage or assignment of rights appropriate for this project.

Original artwork

This section is relevant if you have created original works of art as part of the project (such as a painting or photograph). Under Options 1, 2 and 3, your grant of intellectual property rights does not include ownership of your physical work of art. Under Option 4, original artwork belongs to your client as part of your work-made-for-hire.

Designer tools

This provision deals with background technology, or any other "know-how" that you have developed as a designer, and insures that you are not

assigning away any or your rights in such “Designer Tools” to the client. For example, if you have developed code that is necessary to run, display or use the final deliverables, this section ensures that you retain ownership of that code while granting a non-exclusive license for your client to copy and use it. This way you can use the same technology on other clients’ projects.

Liquidation rights

When licensing rights (Option 1 or 2), you may want to consider agreeing in advance on the amount of money (“damages”) that the client must pay if it breaches the terms of the license. These are called liquidation 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 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, the amount of money awarded to you in a successful lawsuit could be higher.

OPTION 1: LICENSE FOR LIMITED USAGE

When granting a limited usage license, the rights your client receives 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 your client to modify your work.

When to choose Option 1

Option 1 works best for small, one-time projects that will have a limited life span, and typically a minimal fee: for example, print advertisements, brochures, annual reports, editorial illustrations or photography. The client is paying a relatively small fee for limited rights to use your work. You retain the intellectual property rights in your work so you can re-purpose it and re-license it to other clients.

This works especially well for clients with limited budgets, or if your client is unsure if the work will be applicable to other projects.

The client can delay paying for expanded use beyond the original project until that need arises.

Final works

Describe specifically the type of use the client may make of your work, as indicated in this section. Be sure to include a time frame (e.g., one year, or the time frame anticipated for your client's project) under "Duration of Use."

Exclusivity

Most clients want to be the only one using your work during the project time frame. If that is true for this project, check "exclusive." If not, check "non-exclusive."

Modification

If you do not want your client to change your work, check the first paragraph. If client modifications are okay, check the second.

Trademarks

For clients with a limited budget, some designers make an exception to the general rule that trademarks should be assigned to the client. In that case, you can use this Option 1 to grant a limited license to the trademarks, but delete the first two sentences of the "Trademarks" provision. That way the trademarks will be part of the "Final Works" subject to the limited usage license under IP 1.1. If your client wants to continue using the trademarks for other projects, you will be entitled to additional fees.

OPTION 2: EXCLUSIVE LICENSE

If a license is exclusive, it means that even though you are retaining your copyright ownership of your work, you will not be giving permission to anyone else to use it. This means you will not be able to generate additional licensing income by re-purposing the work for other clients. Because of this, designers need to negotiate higher fees for exclusive licenses.

When to choose Option 2

Option 2 works best for larger, ongoing projects that have a wide scope or a long life span: for example, websites and advertising campaigns across many media. The client is paying a higher fee to be the only one able to commercially use your work.

Final works

This section gives broad rights to use your work, but is still limited to the scope of the client's Project (as defined in your Project Proposal).

Modification

If you do not want your client to change your work, check the first paragraph. If client modifications are okay, check the second.

OPTION 3: ASSIGNMENT OF RIGHTS

An assignment is a full transfer of intellectual property rights to your client. This is also known as a "full buyout." The assignment will typically include copyright and trademark rights, and sometimes, patent or design rights.

When to choose Option 3

Option 3 works best for projects that involve corporate identities or very long-term use: for example, logos, packaging, advertising campaigns involving new mascots or slogans, and websites. This is also the option if your client insists on owning all rights to your work. Designers should charge a higher fee for any project that involves a full assignment of rights. Note that even in the context of a full buyout/assignment, your agreement should ensure that you retain rights in your preliminary works and designer tools, as reflected in the language of this option.

Final works

Since your client is gaining full ownership of the works, the client is entitled to modify the works as it sees fit. Thus, you will be delivering the relevant working files. Note, however, that the client is gaining ownership and working files only for the Final Works, not your preliminary concepts or materials (see IP 2.1).

OPTION 4: WORK MADE FOR HIRE

"Work made for hire" is a specific concept under U.S. copyright law (other countries do not recognize this concept). Work made for hire means that the employer is automatically considered the "author" and copyright owner of creative works that employees create within the scope of their employment. Work made for hire can also apply to work done by independent contractors, but only in certain limited circumstances. For a client to be deemed the author and copyright owner of a freelance designer's work as work made for hire, the following requirements must be met: (1) There must be a written agreement, signed by the designer,

stating explicitly that the designer's work is "work made for hire"; and (2) The work must be specially commissioned (not a pre-existing work); and (3) The work must fit one of the following statutory 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, multimedia or motion design 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

When to choose Option 4

Option 4 should not be used unless your work actually qualifies as work made for hire under the statutory requirements listed above. Even then, AIGA does not recommend defining your work as work made for hire except in very limited circumstances. This is because if you agree to designate your work as work made for hire, all new work you create for the project, including preliminary works and working files, will become the exclusive property of your client. You will not be able to re-purpose or adapt any of this work for other projects, even the directions that your client rejected. And, your client can reuse all of that work, without any further compensation to you.

Work made for hire is appropriate if you are working on-site in your client's location, using your client's equipment, for example, if you are doing motion design or website design. It would also be appropriate if you are working as an independent contractor on-site at a design studio.

Some clients insist on work made for hire language without understanding what the phrase means. They may be merely using it as a shorthand for a full buyout. You can explain to such clients that an assignment (Option 3) is sufficient for their needs, and less expensive (see the notes under Option 3, IP 2.3 above). Because work made for hire gives your client all rights in all of your work product, it should always be the most expensive option.

Work product

This is the section that defines your work as work made for hire. There is also a fall-back assignment provision which is standard in work made for hire agreements. In case a court determines that some of the work does not meet the statutory categories for work made for hire, this provision gives copyright ownership of the work to the client through the alternate assignment.

Trademarks

Note that it is still important to include this provision, which ensures that your client understands the client has responsibility for clearing trademarks against potential infringement.

Licensed rights

Note that it is still important to include provisions ensuring that your client understands it does not receive ownership rights in third party materials or your Designer Tools.

Notes on discipline-specific supplements

Beyond the basic issues just discussed, 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 four 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.) The client should be ultimately responsible for compliance.

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. The client should be ultimately responsible for compliance.

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).

SUPPLEMENT 4: MOTION-SPECIFIC TERMS AND CONDITIONS

Services such as motion design and visual effects are typically provided as work made for hire, so if you use this supplement you will also be using intellectual property Option 4.

Warranty of compliance

As a professional, you are making a promise that the work you deliver will meet all technical requirements specified by the client in the project's statement of work (for example, your final files might be in high-definition streaming and broadcast-suitable formats).

Non-union labor

The standard legal language used in visual effects and motion design contracts will usually address issues related to the use of union labor and the obligations of signatories. A signatory is a company (for example, a film studio or a video production company) that has signed a union agreement. Typically, design firms are not signatories.

No live action

This is a clarification that the designer's work will not include the production of any new live-action footage.

Trade secrets

Clients are very careful about protecting proprietary information. In the entertainment industry, this includes such things as plot details and casting decisions. This section is written so that the obligations are reciprocal — the designer's confidential information is protected as well as the client's.

Kill fee

It's standard for motion design and visual effects contracts to include a lump-sum cancellation fee. This is usually called a "kill fee" or "early termination fee." In the event that an active project is terminated by the client, the designer will send an invoice for the kill fee, rather than just a progress billing that covers actual time and materials up through the date of cancellation.

Content restrictions/mature content

Most creative firms have already made some decisions about client industries they do not want to work with (for example, many designers avoid accounts related to alcohol, tobacco, or firearms).

If you're working with a client whose industry is acceptable to you, the next issue is whether or not you are comfortable working with specific content that they provide for a project. For example, if you're working on motion design elements that will be incorporated into a feature film, a cable television program, or a video game, it's possible that the assets provided to you by the client might include strong language, mature humor, nudity, or sexual content. The assets might also

include references to or depictions of such things as substance abuse, criminal activity or violence.

Having this particular section in your contract is a way to surface content-related issues during your initial negotiations. If you are not comfortable working with mature content, you should include that restriction. On the other hand, if you do accept mature content, you must assure your client that your team members are adults who will not be offended by it.

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 discipline-specific supplements are attached, if any. This list of attachments has short lines for you to write your initials. Your client's initials will later be written next to yours.
- Last Add your name, signature and date.

SCHEDULE A: INTELLECTUAL PROPERTY PROVISIONS

Choose only one of these four options:

Option 1: License for Limited Use

- IP 1.1 Enter the scope of the permitted usage, whether it is exclusive or nonexclusive for the duration of this limited license, and whether or not the client may modify the work.
- IP 3.1 Indicate the percentage to be used for calculation of liquidated damages in the event of unlicensed usage.

Option 2: Exclusive License

- IP 1.1 Indicate whether or not the client may modify the work.
- IP 3.1 Indicate the percentage to be used for calculation of liquidated damages in the event of unlicensed usage.

Option 3: Assignment of Rights

Option 4: Work Made for Hire

DISCIPLINE-SPECIFIC SUPPLEMENTS

Attach these only as needed:

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.

Supplement 4: Motion-Specific Terms and Conditions

M 8 Enter the dollar amount of the kill fee.

M 9 Choose just one option to indicate whether or not you are placing restrictions on client content for the project.

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. It is preferable to have the client carry product liability insurance and include the designer as an additional named insured. That can be done less expensively than having the designer take out a new policy, and it is more appropriate for the client to carry this risk where the client is controlling manufacture and commercial implementation of the designer's work.

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 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 paperwork, 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 approximately 30 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 / Thomson Reuters
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, factual, promotional, or other advertising claims, 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 Works* means all creative content developed by Designer, or commissioned by Designer, exclusively for the Project and incorporated in the Final Deliverables, including, but not limited to, any and all visual elements, graphic design, illustration, photography, animation, motion design, audio-visual works, 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 creative content 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 Works.

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.

1.13 *Working Files* means all underlying work product and digital files utilized by Designer to create the Preliminary Works and Final Works other than the format comprising the Final Deliverables.

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 monthly service charge of 1.5 percent (or the greatest amount allowed by state law) 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 lateness 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;
- (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 ; and

(d) ensuring that all information and claims comprising Client Content are accurate, legal and conform to applicable standards in Client's industry.

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. 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 is accurate, legal, conforms to ethical standards of the Client’s industry, 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 Works 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 *Settlement Approval.* The indemnifying party may not enter into any settlement agreement without the indemnified party's written consent.

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

11.2 *Termination.* This Agreement may be terminated for convenience at any time by either party effective immediately upon notice, or the mutual agreement of the parties, or for cause 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. In the event of termination for convenience by Client, Client shall pay in addition to the above an early termination fee equal to 25% of the total project fee. Schedule A shall not be effective, and Client shall not have rights to use Deliverables except upon written consent from Designer provided after such termination.

11.4 In the event of termination for convenience by Designer or for cause 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 (by automated confirmation or substantive reply by the recipient).

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 except that this Agreement may be transferred or sold as part of a transfer or sale of the assigning party's entire business or portion thereof relating to the Project.

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, flood, hurricane or other severe weather, labor dispute, act of war, terrorism, riot or other severe civil disturbance, 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. Any other ambiguities shall be resolved with the most reasonable and legally valid construction, without regard to authorship of such provisions. 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

___ ___ Supplement 4: Motion-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: _____

By: [Client officer name]

Date: _____

Title: _____

Date: _____

Schedule A: Intellectual Property Provisions

Option 1: License for Limited Usage

IP 1. RIGHTS IN THE FINAL DELIVERABLES

IP 1.1 *Final Works*. Upon completion of the Services, and expressly conditioned upon full payment of all fees and costs due, Designer grants to Client *limited usage rights* in the Final Works as set forth below. Any additional uses will require separate pricing. All other rights, including Copyrights, are reserved by Designer.

Category of use: _____

Medium of use: _____

Duration of use: _____

Geographic territory: _____

Initial press run: _____

Exclusivity: For the Duration of Use, Client shall have (check one)

Exclusive

OR

Nonexclusive rights as set forth above.

Modification: (check one)

The rights granted to Client are for usage of the Final Works in their original form only. Client may not crop, distort, manipulate, reconfigure, mimic, animate, edit, extract portions, intentionally alter the color of the Final Works, or otherwise create derivative works based on the Final Works.

OR

The rights granted to Client include the rights to adapt, modify

and create derivative works based on the Final Works solely in connection with the Project and usage rights set forth herein.

- IP 1.2 *Trademarks.* Upon completion of the Services, and expressly conditioned upon full payment of all fees and costs due, Designer assigns to Client all of Designer's rights, including trademark and Copyright, in and to Trademarks created by Designer. 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 Trademarks do not infringe the rights of third parties, and Client shall 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 alleging trademark infringement, or arising out of Client's failure to obtain trademark clearance or permissions, for use of Trademarks.
- IP 1.3 *Client Content.* Client Content, including 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 trademark, trade secrets, patents, Copyrights, and other rights in connection therewith. Client hereby grants to Designer a non-exclusive, nontransferable license to use, reproduce, modify, display and publish the Client Content solely in connection with Designer's performance of the Services and promotional uses of the Deliverables as authorized in this Agreement.
- IP 1.4 *Third Party Materials.* Intellectual property rights in Third Party Materials shall be owned by the respective third parties. Designer shall inform Client of all Third Party Materials to be procured by Designer that Client may need to license at Client's own expense, and unless otherwise arranged by Client, Designer shall obtain a license for Client to use the Third Party Materials consistent with the usage rights granted herein. Client shall 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 Client's failure to obtain copyright, trademark, publicity, privacy, defamation or other releases or permissions with respect to materials included in the Final Works at Client's request.

IP 2. RIGHTS RESERVED TO DESIGNER

- IP 2.1 *Preliminary Works/Working Files.* Designer retains all proprietary rights, including property ownership, intellectual property rights and Copyrights, in and to all Preliminary Works and Working Files, and Client shall return to Designer all Preliminary Works and Working Files in Client's possession within thirty (30) days of completion of the Services.
- IP 2.2 *Original Artwork.* Designer retains property ownership in any original artwork comprising Final Works, 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 2.3 *Designer Tools.* Designer Tools and all intellectual property rights therein, including Copyrights, shall be owned solely by Designer. Designer hereby grants to Client a nonexclusive, nontransferable (other than the right to sublicense such uses to Client's publisher, web hosting or Internet service providers), perpetual, worldwide license to use the Designer Tools solely with the Final Deliverables for the Project. Client may not directly or indirectly, in any form or manner, decompile, reverse engineer, or otherwise disassemble or modify any Designer Tools comprising software or technology.

IP 3. LIQUIDATION RIGHTS

- IP 3.1 *Liquidation for Unlicensed Use.* Client's use of the Deliverables shall be limited to the usage rights granted herein for the Project only. In the event Client, or its agents, uses Final Works or other Deliverables, including Preliminary Works and Working Files, or any derivative works thereof, for another project or outside the scope of the rights granted herein, Designer shall be entitled to further compensation equal to _____ percent (____%) of the original Project fee unless otherwise agreed in writing by both parties.

Schedule A: Intellectual Property Provisions

Option 2: Exclusive License

IP 1. RIGHTS IN THE FINAL DELIVERABLES

- IP 1.1 *Final Works.* Upon completion of the Services, and expressly conditioned upon full payment of all fees and costs due, Designer hereby grants to Client the exclusive, perpetual and worldwide right and license to use, reproduce and display the Final Works solely in connection with the Project as defined in the Proposal. Any additional uses will require separate pricing. All other rights, including Copyrights, are reserved by Designer.

Modification: (check one)

The rights granted to Client are for usage of the Final Works in their original form only. Client may not crop, distort, manipulate, reconfigure, mimic, animate, edit, extract portions, intentionally alter the color of the Final Works, or otherwise create derivative works based on the Final Works.

OR

The rights granted to Client include the rights to adapt, modify and create derivative works based on the Final Works solely in connection with the Project and usage rights set forth herein.

- IP 1.2 *Trademarks.* Upon completion of the Services, and expressly conditioned upon full payment of all fees and costs due, Designer assigns to Client all of Designer's rights, including trademark and Copyright, in and to Trademarks created by Designer. 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 Trademarks do not infringe the rights of third parties, and Client shall 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 alleging trademark infringement, or arising out of Client's failure to obtain trademark clearance or permissions, for use of Trademarks.

IP 1.3 *Client Content.* Client Content, including 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 trademark, trade secrets, patents, Copyrights, and other 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 promotional uses of the Deliverables as authorized in this Agreement.

IP 1.4 *Third Party Materials.* Intellectual property rights in Third Party Materials shall be owned by the respective third parties. Designer shall inform Client of all Third Party Materials to be procured by Designer that Client may need to license at Client's own expense, and unless otherwise arranged by Client, Designer shall obtain a license for Client to use the Third Party Materials consistent with the usage rights granted herein. Client shall 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 Client's failure to obtain copyright, trademark, publicity, privacy, defamation or other releases or permissions with respect to materials included in the Final Works at Client's request.

IP 2. RIGHTS RESERVED TO DESIGNER

IP 2.1 *Preliminary Works/Working Files.* Designer retains all proprietary rights, including property ownership, intellectual property rights and Copyrights, in and to all Preliminary Works and Working Files, and Client shall return to Designer all Preliminary Works and Working Files in Client's possession within thirty (30) days of completion of the Services.

IP 2.2 *Original Artwork.* Designer retains property ownership in any original artwork comprising Final Works, 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 2.3 *Designer Tools.* Designer Tools and all intellectual property rights therein, including Copyrights, shall be owned solely by Designer. Designer hereby grants to Client a nonexclusive, nontransferable (other than the right to sublicense such uses to Client's publisher, web hosting or Internet service providers), perpetual, worldwide license to use the Designer Tools solely with the Final Deliverables for the Project. Client may not directly or indirectly, in any form or manner, decompile, reverse engineer, or otherwise disassemble or modify any Designer Tools comprising software or technology.

IP 3. LIQUIDATION RIGHTS

IP 3.1 *Liquidation for Unlicensed Use.* Client's use of the Deliverables shall be limited to the usage rights granted herein for the Project only. In the event Client, or its agents, uses Final Works or other Deliverables, including Preliminary Works and Working Files, or any derivative works thereof, for another project or outside the scope of the rights granted herein, Designer shall be entitled to further compensation equal to _____ percent (____%) of the original Project fee unless otherwise agreed in writing by both parties.

Schedule A: Intellectual Property Provisions

Option 3: Assignment of Rights

IP 1. RIGHTS IN THE FINAL DELIVERABLES

- IP 1.1 *Final Works.* Upon completion of the Services, and expressly conditioned upon full payment of all fees and costs due, Designer *assigns* to Client all of Designer's Copyrights in and to the Final Works, including Trademarks, and Designer shall deliver to Client all Working Files related to the Final Works. Designer shall cooperate with Client and shall execute any additional documents reasonably requested by Client to evidence such assignment, and Client shall reimburse Designer for Designer's reasonable time and out-of-pocket expenses in connection therewith.
- IP 1.2 *Trademarks.* Client shall have sole responsibility for ensuring that Trademarks do not infringe the rights of third parties, and Client shall 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 alleging trademark infringement, or arising out of Client's failure to obtain trademark clearance or permissions, for use of Trademarks.
- IP 1.3 *Client Content.* Client Content, including 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 trademark, trade secrets, patents, Copyrights, and other rights in connection therewith. Client hereby grants to Designer a nonexclusive, nontransferable license to use, reproduce, modify, dis-

play and publish the Client Content solely in connection with Designer's performance of the Services and promotional uses of the Deliverables as authorized in this Agreement.

- IP 1.4 *Third Party Materials.* Intellectual property rights in Third Party Materials shall be owned by the respective third parties. Designer shall inform Client of all Third Party Materials to be procured by Designer that Client may need to license at Client's own expense, and unless otherwise arranged by Client, Designer shall obtain a license for Client to use the Third Party Materials consistent with the usage rights granted herein. Client shall 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 Client's failure to obtain copyright, trademark, publicity, privacy, defamation or other releases or permissions with respect to materials included in the Final Works at Client's request.

IP 2. RIGHTS RESERVED TO DESIGNER

- IP 2.1 *Preliminary Works/Working Files.* Designer retains all proprietary rights, including property ownership, intellectual property rights and Copyrights, in and to all Preliminary Works and Working Files, and Client shall return to Designer all Preliminary Works and Working Files in Client's possession within thirty (30) days of completion of the Services.
- IP 2.2 *Original Artwork.* Designer retains property ownership in any original artwork comprising Final Works, 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 2.3 *Designer Tools.* Designer Tools and all intellectual property rights therein, including Copyrights, shall be owned solely by Designer. Designer hereby grants to Client a nonexclusive, nontransferable (other than the right to sublicense such uses to Client's publisher, web hosting or Internet service providers), perpetual, worldwide license to use the Designer Tools solely with the Final Deliverables for the Project. Client may not directly or indirectly, in any form or manner, decompile, reverse engineer, or otherwise disassemble or modify any Designer Tools comprising software or technology.

Schedule A: Intellectual Property Provisions

Option 4: Work Made for Hire

IP 1. CLIENT'S INTELLECTUAL PROPERTY OWNERSHIP

IP 1.1 *Work Product.* Upon completion of the Services, and expressly conditioned upon full payment by Client of all fees and costs due to Designer:

(a) *Work Made for Hire.* Subject to Section IP 2.2 below, to the extent that the Deliverables include any work of authorship entitled to protection under U.S. Copyright Law that has been newly created by Designer for the Project ("Work Product"), the parties agree that the Work Product has been specially ordered and commissioned by Client for a collective work, a supplementary work or other category of work eligible to be treated as a work made for hire under the United States Copyright Act; the Work Product shall be deemed a commissioned work and a work made for hire to the greatest extent permitted by law; and Client shall be the sole author of the Work Product according to the United States Copyright Act;

(b) *Assignment.* To the extent that any Work Product is not properly characterized as a work made for hire, Designer hereby assigns to Client all rights, title and interest in such Work Product, including but not limited to Copyrights, in perpetuity and throughout the world; and

(c) *Documentation.* Designer shall deliver to Client all Working Files related to the Work Product. Designer shall cooperate with Client and shall execute any additional documents reasonably requested by Client to secure Client's rights in and to the

Work Product as set forth herein, and Client shall reimburse Designer for Designer's reasonable time and out-of-pocket expenses in connection therewith.

IP 1.2 *Trademarks.* Upon completion of the Services, and expressly conditioned upon full payment of all fees and costs due, Designer assigns to Client all of Designer's rights, including trademark and Copyright, in and to Trademarks created by Designer. 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 Trademarks do not infringe the rights of third parties, and Client shall 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 alleging trademark infringement, or arising out of Client's failure to obtain trademark clearance or permissions, for use of Trademarks.

IP 1.3 *Client Content.* Client Content, including 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 trademark, trade secrets, patents, Copyrights, and other 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 promotional uses of the Deliverables as authorized in this Agreement.

IP 2. LICENSED RIGHTS

IP 2.1 *Third Party Materials.* Intellectual property rights in Third Party Materials shall be owned by the respective third parties. Designer shall inform Client of all Third Party Materials to be procured by Designer that Client may need to license at Client's own expense, and unless otherwise arranged by Client, Designer shall obtain a license for Client to use the Third Party Materials consistent with the usage rights granted herein. Client shall 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 Client's failure to obtain copyright, trademark,

publicity, privacy, defamation or other releases or permissions with respect to materials included in the Final Works at Client's request.

- IP 2.2 *Designer Tools.* Designer Tools and all intellectual property rights therein, including Copyrights, shall be owned solely by Designer. Designer hereby grants to Client a nonexclusive, nontransferable (other than the right to sublicense such uses to Client's publisher, web hosting or Internet service providers), perpetual, worldwide license to use the Designer Tools solely with the Final Deliverables for the Project. Client may not directly or indirectly, in any form or manner, decompile, reverse engineer, or otherwise disassemble or modify any Designer Tools comprising software or technology.

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

1.1. SUPPORT SERVICES

- 1.1.1 *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.
- 1.1.2 *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.

1.2. 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.

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, Designers 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 relevant rules and regulations known to Designer; however, Client, upon acceptance of the Deliverables, shall be solely responsible for conformance with all rules, regulations, and laws relating to Client's use thereof, including without limitation, relating to the transfer of software and technology, and compliance with the Americans with Disabilities Act and Section 508 of the Workforce Investment Act.

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 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.

Supplement 4: Motion-Specific Terms and Conditions

M 1. ADDITIONAL WARRANTIES AND REPRESENTATIONS

M 1.1 *Warranty of Compliance.* Designer represents, warrants and covenants that the deliverables will comply with Client's technical requirements and applicable industry standards for final output, such as duration, file format, resolution, and color specifications.

M 1.2 *Standard of Care.* Designer represents, warrants and covenants that the Deliverables shall be artistically produced with direction, photography, sound, art, animation, synchronization and other physical and aesthetic content of a technical quality equal to current standards for multimedia development services of similar character and purpose.

M 2. NON-UNION LABOR

Designer is not a signatory to any union or guild agreement. Designer acknowledges that this Agreement is not subject to any collective bargaining agreements.

M 3. NO LIVE ACTION

Client acknowledges that no new live-action footage will be produced by Designer, whether in studio or on location.

M 4. SCREEN CREDITS

For film and television projects, Client is responsible for approving the content and placement of all screen credits and assuring their compliance with any applicable union or guild requirements.

M 5. PRODUCTION INSURANCE

Designer carries standard business insurance only. No additional production insurance will be provided by the Designer for this Project.

M 6. DEFECTS IN CLIENT CONTENT

Designer is not responsible for any defects or problems with components provided to Designer by Client, including but not limited to:

- (a) Production footage, including physical effects (such as models, puppets, prosthetics, et cetera) and/or mechanical effects (also known as “special effects,” such as rain, wind, crashes, explosions, et cetera);
- (b) Visual effects (such as animations, matte shots, computer-generated images, et cetera); and
- (c) Designer is not responsible for any federal, state or local licenses, certifications, insurance, union or guild requirements related to any components provided by Client.

M 7. TRADE SECRETS

M 7.1 *Definition.* Each Party’s “Trade Secrets” shall mean a Party’s proprietary property, including information, ideas, patterns, compilations, data, lists, documents, memoranda, processes, programs, devices, methods, techniques, formulas or improvements, whether or not patentable, which meets the following criteria:

- (a) the other Party becomes aware of the property as a consequence of performing its obligations under this Agreement;
- (b) the property has independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and
- (c) the Party has made reasonable efforts under the circumstances to maintain the secrecy of the property. Each

Party acknowledges that the other Party's' Trade Secrets are Confidential Information subject to the Confidentiality provisions of this Agreement.

- M 7.2 *Client's Trade Secrets.* Client's Trade Secrets include, by way of illustration but without limitation:
- (a) Client's customer and vendor information, including, but not limited to, identity, contacts, decision makers, financial and legal dealings;
 - (b) customer files, records, or images from any Client project (whether on film, paper, digital or other media); and
 - (c) third-party materials entrusted to Client as confidential, such as scripts, story boards, story ideas, identity of actors, and identity of technical resources involved in Client projects or potential projects;
 - (d) Clients' business plans, business opportunities, business partners, contracts, negotiations, personnel, finances, legal matters, research, development, information systems, product and software concepts.

- M 7.3 *Designer's Trade Secrets.* Designer's Trade Secrets shall include, by way of illustration but without limitation:
- (a) Designer Tools;
 - (b) Designer's customer and vendor information, including, but not limited to, identity, contacts, decision makers, financial and legal dealings;
 - (c) Designer's business plans, business opportunities, business partners, contracts, negotiations, personnel, finances, legal matters, research, development, information systems, product and software concepts.

M 8. KILL FEE

Client acknowledges and agrees that Designer has reserved availability of Designer and/or Designer's employees and/or sub contractors (collectively "Designer's personnel") to work on each Proposal for the projected time required for the Services, and that by reserving such availability, Designer's personnel necessarily forgo opportunities to work on other projects for other clients. Accordingly, Client agrees that, in the event a Project is canceled for any reason other than a material breach by Designer, Client agrees that it would be impracticable and extremely difficult to calculate the actual damages resulting from such lost opportunities, and Client agrees to pay to Designer

a kill fee in the amount of \$ _____, which Client agrees represents reasonable compensation for such lost opportunities. This provision replaces and supersedes Section 11.3, except with respect to termination for a material breach by Designer as set forth in Section 11.2(b), of the Basic Terms and Conditions of this Agreement.

M 9. CONTENT RESTRICTIONS

Client understands and agrees that Designer will not perform or be asked to perform Services with respect to content comprising adult entertainment, gambling, violence, sexuality, nudity, politics, religion, vulgarity, obscenity, or alcohol or substance abuse.

OR

M 9 MATURE CONTENT

M 9.1 Designer understands that explicit and graphic expressions, including depictions of or language relating to violence, sexuality, nudity, politics, religion, vulgarity and obscenity, substance abuse, or other such content which some segments of the populace may find offensive (collectively "Mature Content"), are inherent to the nature of the creative process in Client's entertainment business. Designer waives any claim Designer may have against the Client, its officers, directors, shareholders and employees, affiliates and successors-in-interest, based upon, arising from or related to the Designer's exposure to, or performing Services on, any such Mature Content.

M 9.2 Designer's employees or subcontractors must be 18 years of age or older.

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 23,000 designers of all disciplines through national activities and local programs developed by 67 chapters and more than 146 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



ARCTIC PAPER

Arctic Paper produces and markets high-quality graphic paper from its mills in Sweden, Germany and Poland. The company's grade lines include Amber, Arctic, Munken, Pamo and L-print. Arctic Paper prides itself on being a top producer of sustainable and eco-friendly products. The company has 1,150 employees and sales offices in 15 countries worldwide. Additional information is available at arcticpaper.com or through its North American offices at ifpcorp.com.

CREDITS

AIGA | the professional association for design
164 Fifth Avenue, New York, NY 10010
212 807 1990 www.aiga.org

PUBLISHER

Richard Grefé, AIGA

EDITORIAL CONTENT

A Client's Guide to Design:

Joanne Stone and Lana Rigsby

Use of Fonts:

Allan Haley

Contributing editors: Sam Berlow,
Matthew Carter, Jonathan Hoefler,
Zusana Licko and Frank Martinez

Use of Illustration:

Brad Holland and Tammy Shannon

Use of Software:

Business Software Alliance

Sales Tax:

Daniel Abraham and Marci Barbey

Guide to Copyright:

Tad Crawford

Use of Photography:

Tad Crawford

Standard Form of Agreement for Design Services:

Shel Perkins and Linda Joy Kattwinkel

Disclaimer: Legal information is not legal advice. This publication provides information about the law designed to help designers safely cope with their own legal needs. But legal information is not the same as legal advice — the application of law to an individual's specific circumstances. Although AIGA goes to great lengths to make sure our information is accurate and useful, we recommend that you consult a lawyer if you want professional assurance that our information, and your interpretation of it, is appropriate to your particular situation.

IN-KIND PAPER PARTNER

Arctic Paper

arcticpaper.com

Cover: Munken Polar, 300 g/m

Text: Munken Lynx, 130 g/m

PARTIAL IN-KIND PRINTING PARTNER

Blanchette Press

Richmond, BC, Canada

blanchettepress.com

DESIGN

Grant Design Collaborative, Atlanta

PHOTOGRAPHY

Jerry Burns, StudioBurns, Atlanta

FONTS

Interstate and Filosofia

COPYRIGHT

© 2013 AIGA

First edition published in 2001.

SPONSORED BY



ARCTIC PAPER

