

Contracts

FOR SOFTWARE DEVELOPERS WHO HATE CONTRACTS

Ross Kimbarovsky

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Introduction

Software developers create original works that are protected by intellectual property rights, including copyright. The legal issues surrounding software development (including software developed for the Web and stand-alone applications) can be complex and confusing.

Know your rights

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

Let's first briefly review the basics of intellectual property and how they apply to software...

What is Intellectual Property?

Things you can touch, such as your computer, your cellular phone and your car, are tangible goods. “Intellectual property” describes the ownership of ideas – intangible goods. Software, designs and websites are just three of the many examples of intellectual property. Inventions, product names, text, music, and movies are other examples of intellectual property.

Intellectual property can be bought and sold just like real property, but there are real differences between real property and intellectual property, especially when it comes to ownership of the intellectual property. We’re not going to explore those differences, but you should generally know that software code can be protected in a variety of different ways, including: patent law, copyright law, trade secret law and trademark law.

Because we will be discussing copyright law, it would help for you to understand the basics of copyright law. Copyright is a form of legal protection provided to those who create original works. When you create original software code, your work is entitled to copyright protection. Under the 1976 Copyright Act (United States), the copyright owner has the exclusive right to reproduce, adapt, distribute, publicly perform and publicly display the work. Any or all of these rights can be licensed, sold or donated to another party. Software does not need to be registered (with a copyright office) to be protected by copyright law.



Copyright doesn't protect an idea, system or process (you would need to obtain patent protection for those). So, you would generally be unable to protect under copyright law the algorithms, methods, systems, ideas or functions of your software (your code, however, is protected – nobody can sell or distribute your code without your permission).

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

Freelance Work And Copyright

Under U.S. copyright law and the laws of most countries, the software developer owns the code he or she creates for a client.

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

Some clients prefer to acquire full rights to the code – particularly if you're working on a custom application only for that client. They want full control over their use of the code and they want to make sure that the developer doesn't license or sell the same work to another client. Other clients are interested only in a license to the code to enable them to use the code for a specific purpose.

This e-book and the contract template are written primarily from the developer's point of view. I've tried to include useful information to help you understand your client's perspective.



Why You Should Set Project Milestones

Although it's tempting to complete the project in one phase, you're nearly always better off splitting any software development project into discrete phases (often called "milestones"). At each milestone, you present the client with an acceptable product and the client "signs off" on that milestone.

- Milestones may help avoid complicated disputes at the conclusion of the project about the inadequacy of certain portions of the work.
- Milestones allow you to deal with your client's changing needs and wants, so that you can adjust your efforts based on constant feedback in response to each milestone.
- Milestones allow you to split the payment so that you can receive a portion of the payment after a customer approves each milestone.



There's no magic about how to split the project into phases. At a minimum, you'll want a specification phase (where you create specifications and your client approves/accepts them) and a development phase (where you write the code after your client approves the specifications). You can include other types of milestones, such as a design phase (where the client approves any graphic designs), or a deployment phase (where you'd deploy the code to a hosting server after it's written). Consider how you actually like to work and try to break the project into logical pieces.

Incorporating Open Source Code In Your Software

Licensing of “open source” software differs in many important ways from licensing of proprietary software. This is a complicated topic, and we won’t cover it in great detail. However, since you might incorporate open source code in your work, it’s important that you understand how doing so impacts your rights.

The Free Software Foundation has a good [list of the many different open source licenses](#). The most popular is the General Public License (GPL). If you’d like to learn more about GPL, I’ve found this resource helpful: [Frequently Asked Questions about the GNU Licenses](#).

The most important fact you should remember about GPL is that if you use the modified software (incorporating the GPL licensed code) privately (for your own use, including for your own commercial use), you do not ever have to release the source code. However, if you release the modified version to the public in some way, you must also publicly release, under the GPL, the modified source code.

There are ways to incorporate GPL code with your own proprietary code without having to disclose all the source code. Many of these methods are complicated and for this reason, most people do not include any third party code that is licensed under the GPL. For a short but helpful article about interfacing proprietary code with GPL code, I recommend you read a [post by Chris Kleisath](#), senior Director of Engineering for SQL Anywhere.

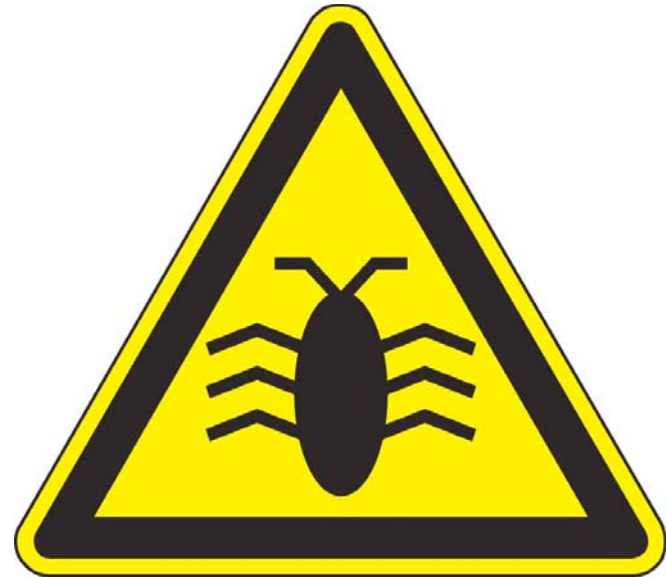


Warranties

A warranty is a promise about the quality, quantity, performance or legal title of something (a good or service) that you are selling or licensing. When you buy a television, you typically receive a warranty from the manufacturer, promising to repair the television if it stops working within one year from the date of purchase. Custom software development often includes warranties too, because customers want some assurance that the software will work as expected.

Express warranties are actual promises, whether made orally or in writing, about how the software will work. An express warranty is created when words such as “guarantee” or “warrant” are used, but no specific words are necessary to create an express warranty. Your clients will typically want you to expressly warrant that the software is free from defects (no bugs) and that it will meet all functional and design specifications. Your clients will also often want you to guarantee that the software will not infringe any third party patent, copyright, trade secret, or other intellectual property rights.

Implied warranties are warranties that are assumed to be made by the “seller” in a commercial transaction, even if no words are written or spoken by the parties. The warranties are implied by state law based on the Uniform Commercial Code (UCC) – a set of model laws written by a group of legal scholars and adopted by 49 of the 50 states (Louisiana is the sole exception). Most courts have found that the UCC applies to custom software sales.



There are four implied warranties that automatically exist in contracts for the sale of goods. Unless your agreement expressly disclaims them, they are assumed to be part of your agreement.

Implied warranty of title – a promise that the seller is transferring legal title, that they have the right to make the transfer, and that the “goods” they are transferring are not subject to any liens, encumbrances or security interests (meaning that some other person can claim rights to those “goods”).

Implied warranty against infringement – a promise that the software will not infringe a third party’s patent, copyright, trade secret or other intellectual property rights.

Implied warranty of merchantability – a promise that the software will perform in a minimally acceptable manner (at least average quality) for its intended purpose.

Implied warranty of fitness for a specific purpose - a promise that the software will work for a specific purpose. For example, if a client needs to have a mailing list sent out every 5 days to more than 100,000 users, your software will need to meet that requirement, even if that specification isn’t part of your agreement.

You should never provide warranties for things that you cannot/do not control. For example:

- Don’t promise that the software will be completely error-free. All software contains some bugs. The most you should ever promise is that the software won’t contain “material” defects.

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- Don't promise to fix ALL bugs for free. You should absolutely fix bugs that prevent the software from working. But some simple bugs that aren't material could take a significant amount of time to fix and it isn't absolutely necessary in most cases that those bugs be fixed.
- Don't promise that the software will perform exactly as stated in the specifications. There will be some variations. Instead, warrant that the software will perform in "substantial conformance" with the specifications.

Keep in mind that in most states, you do not need to provide ANY warranties, whether express or implied. You can expressly disclaim all warranties in your written agreement, and such disclaimers are generally lawful if they are "conspicuous" (printed in italics, large type and/or boldface). However, your prospective clients will think twice about hiring you if you don't warranty your work in some manner. Therefore, you'll want to make certain that you promise specific things about your work but expressly disclaim any implied warranties that you do not want to automatically apply to your agreement. The contract template below contains such a hybrid provision.

Protecting Against Infringement Claims

Most of your clients will want to make sure that the software you write for them will be original and will not violate the patent, copyright, trade secret, trademark or other intellectual property rights of third parties.

As a software developer, you take enormous risk unless you expressly include in your contracts, limits on your liability. After all, your customer can suffer serious financial losses if your software stops working or doesn't work properly, and those losses can easily exceed the amount you're paid for the work. The template contract in this e-book includes a limitations of liability provision.

Tip: Although most of you will not have insurance that covers your liability, some of you might. Your Comprehensive General Liability Insurance (CGL) policy may cover intellectual property infringement claims, or you might have specific coverage for intellectual property infringement. Don't forget to check your policy if such a claim is made against you.

Negotiating and Presenting the Contract

Some people are good negotiators. Others are not. This e-book isn't about negotiation, but I wanted to include five tips about negotiating.

- **Listen.** Listen to the other side - don't simply advance your own agenda. Understand what your client wants/needs and WHY they believe they want/need it.
- **Educate.** Many of your clients will have little experience with software development agreements. Take a little time to educate them about milestones, warranties, and other important terms. You'll nearly always develop credibility when you take the time to educate your prospective client, and this will help you when you negotiate those terms.
- **Agree.** You should agree when you can. Many minor issues are not worth disagreement. Think about your client's points from THEIR perspective and find ways to acknowledge their points and concerns.
- **Reframe.** Whenever you can, find ways to reframe issues instead of rejecting them. If you reject something your client proposes, you'll put them on the defensive. Find ways to reframe their ideas or points and to move the conversation further. If you're not sure how to reframe something, ask your client to clarify and in that process, ask questions that help you to reframe the conversation.
- **Know Your Limits.** You should always know your walk-away position. In every negotiation, you'll have terms that you can concede and others that you cannot. Understanding this in advance of the negotiation will help you to better articulate your views and to avoid wasting a lot of time. Make such terms clear to your client but don't make every point a deal-breaker – you may lose the client if you insist they have to take the contract as is.

If you're looking for good books about negotiation, I recommend: [Getting To Yes](#) and [Getting Past No](#).

Important Terms In The Independent Contractor Agreement

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

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

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

Work-for-hire

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

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

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

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

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Client's point-of-view	Developer's point-of-view
<p>The client wants to acquire full intellectual property rights to the software and will often require that the work be deemed a “work-for-hire”. This will be especially true for higher paying projects or where the client will want more flexibility to change the software in the future.</p>	<p>The Developer wants to retain appropriate rights to their own work so that they can reuse portions of it in future software or to allow them to license the work for uses that are not being licensed to this specific client. The Developer also wants the right to display the work in their portfolio. When a work is deemed “work-for-hire” these rights could be limited or eliminated – so be cautious.</p>

Preliminary vs. final code

When freelancing for a client, you'll often create preliminary code, or code that doesn't make it into the final product. Typically, the client will be purchasing the final deliverables. Therefore, you'll want to clearly state in your written agreement whether the client is purchasing rights to all the code that you write for the client, or just to the code represented in the final files that you provide to your client.

Client's point-of-view	Developer's point-of-view
<p>The client wants to acquire full intellectual property rights to the software. However, they typically are most interested just in the final code. On the other hand, they might like elements that don't make it into the final code (such as website pages that might have been rejected) and might ask you to include those elements with your final work.</p>	<p>Since you'll include many elements in your preliminary work (including preliminary designs) that won't make it into the final deliverables, you'll want to retain full ownership of all your preliminary work unless the client pays you separately to acquire rights to that work or unless you've agreed with the client that they will receive such rights.</p>

Third-party content and content from client

Your software may include stock art, photo, illustrations, or software code created by someone else. You'll want to clearly disclose this to your client and make sure that the client understands any usage restrictions placed on that third party content. For example, when you purchase a stock photo to use in a design, the rights may be limited and the rights you can convey to your client can be no greater than the rights you purchased.

Make sure that there's no ambiguity about who will purchase and pay for third-party content. Before purchasing any third-party content, you should have the client agree – in writing – to reimburse you (unless you've already included the cost of that content in your project fee). You should also make sure that the client is permitted to use any names, content, graphics, stock images, software code or other content that they ask you to incorporate into your software.

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

What rights you give up/retain

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

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

You should understand that clients will nearly always want to acquire the broadest rights possible. When negotiating this provision, take the time to understand WHY the client needs broader rights.

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

Independent Contractor Agreement

You, _____ (“Client” or “You”), with a principal place of business at _____ [ADDRESS] have asked me, _____ (“Developer” or “I”), with a principal place of business at _____ [ADDRESS], to create custom software for you. This is our Agreement for this project:

What I agree to do:

1. Scope of Work. The scope of my work for you is listed on Exhibit A to this Agreement. I will start working on this project within ____ days after I receive a signed copy of this Agreement and fifty (50) percent of the total payment from you. If the scope of work changes after we sign this Agreement, you and I agree to negotiate and sign an amended Exhibit A.

[Here, you should list what you’ll do, how many different concepts/comps you’ll provide if design is included as part of your work, what and how many changes you’ll make. In this section, you want to fully define the scope of the project, including any planning time. For example, if you’ll be doing both front-end and back-end development website work, clearly define what you will/will not be doing. Pay particular attention to portions of the work that will be performed by third parties and be very clear about whether the Client or you will manage the work of those third parties. Also be very clear about ancillary services, such as installation and/or deployment of code to a webserver or hosting provider, submission of an application to the App Store, etc.]

2. Project Milestones. We have agreed that I will work on this project in phases. Exhibit B to this Agreement lists the milestones that we’ve agreed will apply to each phase of my work for you. If the scope of work changes after we sign this Agreement, you and I agree to negotiate and sign an amended Exhibit B.

3. Final Deliverables. I will deliver to you, via electronic mail [or a downloadable hyperlink or on CD-Rom or DVD], within ____ days after you approve the final deliverable(s), digital files containing my work for you under this Agreement. Specifically, I will provide you with the following:

[What you provide your Client will depend on the type of work you'll be doing. For example, if you're developing an iPhone application, you'll be delivering an executable file – and probably source code too. If you are developing a website, you'll deliver html/css, designs, etc. and you may also need to deliver back-end connectivity and/or the ancillary software necessary to support the website –such as to a CMS (Drupal, WordPress, etc.) or database (SQL, MySQL). Set expectations very carefully and clearly here – make sure your client isn't expecting something you will not be providing and make sure to identify anything for which the client will have to pay separately – whether to you or to a third party.]

What I promise you:

4. Original Work/Conflicts/Confidentiality. I promise that, except for anything that you give me to incorporate into the software I will create for you: (a) my work will be original and will not be copied in whole or in part from any other work; (b) I am the sole and exclusive owner of all intellectual property rights, including patent, copyright, trade secret and other proprietary rights in and to the software I create for you, or I have secured such rights to any third-party content incorporated into my final code; and (c) my work does not violate the patent, copyright, trade secret or other property right of any person, firm or entity. I promise that this Agreement does not conflict with any other contract, agreement or understanding to which I am a party. Finally, I promise that I'll hold and maintain in strict confidence any confidential information that you provide me (such as proprietary technical or business information), and I will not disclose such information to any third party except as may be required by a court or governmental authority.

5. Training. The Fee you'll pay me for this project includes ___ hours of training in the use of the software I create for you. Training will be conducted remotely using a screen sharing software. If you ask me to train you onsite, you agree to pay my actual costs of traveling to your location, including but not limited to transportation, lodging, and food expenses.

What you promise me:

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

[Here, you'll want to specifically state how payment will be made. For example, the Client could pay via PayPal, Moneybookers, by check, etc. You should also state who will pay for the transactional costs for making the payment. If you and the Client agree to an hourly fee, you should still estimate the number of hours the project is likely to take and request that the client pay you a portion of the anticipated fee in advance. Remember that there isn't any right way to agree about payment. You can ask for a smaller percentage before you start work, you can split the payments into four parts, etc. However you define payment, just make sure that you protect yourself and receive periodic payments, and even more importantly, make sure you receive final payment before you provide the final code. If your Client is having difficulty paying you in full before you provide the final files, agree on an amount – 10%, for example – that they can withhold from the final payment until they approve the work and then specify how many days after that approval they'll pay you the remaining 10%].

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

8. Feedback and Acceptance. You agree that I cannot complete my work for you or meet the milestones to which we've agreed unless you give me timely feedback. You agree to provide timely feedback so that I can understand your concerns, objections or corrections, and you promise not to unreasonably withhold acceptance of the deliverables I'll provide you at each milestone.

We've agreed to the following acceptance process: I will test the software that I create for you to make sure that it's working properly. In turn, you promise that you will evaluate the deliverables I provided to you at each milestone listed in Exhibit B to this Agreement and let me know in writing, within ten (10) calendar days after you receive each deliverable, whether you accept or reject it. If you reject a deliverable, I will correct any errors and again ask you to accept or reject the corrected deliverable – which you promise to do within ten (10) calendar days after you receive the corrected deliverable. This process shall continue until you accept the deliverable or 10 calendar days have passed and you have not accepted or rejected a deliverable (at which point it will be deemed accepted). Once you've accepted a deliverable, I'll proceed to do work on the next milestone.

When I deliver the final files to you and complete my work for you under this Agreement, you agree that you'll test the software in its entirety to determine if I completed the work I promised you. You promise to let me know in writing within

fifteen (15) calendar days after I deliver the final files whether you accept or reject the final files. If you reject the final files, I will correct any errors and again ask you to accept or reject the corrected deliverable – which you promise to do within fifteen (15) calendar days after you receive the corrected deliverable. This process shall continue until you accept the deliverable or 15 calendar days have passed and you have not accepted or rejected a deliverable (at which point it will be deemed accepted). Finally, you agree that my work on this project will be complete and the Agreement will end after you've approved the final files.

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

What rights each of us will have:

10. Rights Before You Pay Me In Full. You understand and agree that until you pay me in full, I own full rights to everything I create for you under this Agreement. If you don't pay me in full, you agree that I can complete, exhibit, use and sell the software at my sole and absolute discretion (except that I will not be able to use Client Content in such work).

11. Rights After You Pay Me In Full.

[ALTERNATIVE 1: CLIENT WILL OWN ALL FINAL WORK]

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After you pay me in full, I assign to you my right, title and interest in the copyrights for the final software that I create for you under this Agreement – contained in the final files that I'll send to your for approval. You agree that I will retain and you will not receive any right, title or interest to the preliminary work or preliminary designs that are included with the work I create for you. If you'll need some additional documentation, I'll sign any further documents reasonably necessary to make sure that the rights I'm giving you under this Agreement are properly assigned to you. You agree that I may use your name/company name and trademarks as a reference in my promotional materials. You also agree that I may include, when referencing my work for you, a general description of the work under this Agreement.

[ALTERNATIVE 2: DEVELOPER WILL OWN ALL WORK]

After you pay me in full, I grant you a nonexclusive, fully paid, worldwide, royalty-free license to install, use and copy the software I create for you (as specified in Exhibit A to this Agreement and as contained in the final files I deliver to you), and all related documentation, in accordance with the terms and conditions of this Agreement. I will retain all copyright, patent, trade secrete and other intellectual property rights in the work that I create for you. You promise that you will not remove, alter, or cover any copyright notice, trademark or other proprietary rights notice that I include with the software.

[I can't predict what type of software you'll be writing, so I can't offer language that will suit every situation. Depending on the nature of the agreement, you'll want to modify this language to reflect the rights you are providing. For example, if you're creating a website, you could give your client a license to operate the site, update/revise/republish the site, and advertise or promote the site. On the other hand, if you're licensing software that the client might sell, you'll need to including in the list of permissions the ability of the client to sell that software and the channels through which they are authorized to sell – such as via the Apple Apps store.]

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

[If you do NOT want the client to have the right to make any changes, include the following language instead: **12. No Right To Make Changes.** You agree that you may not make any changes or additions to the software I create for you under this Agreement, without my express written permission.]

13. Rights To Know-How. I may incorporate into the software I create for you various preexisting development tools, routines, subroutines, programs, data or materials (Know-How). You agree that I retain all rights, title and interest, including all copyright, patent, and trade secret rights to that Know-How. I agree that after you pay me in full, you'll receive a nonexclusive, perpetual, worldwide license to use the Know-How in the software that I created for you under this Agreement. However, you shall not resell or make use of that Know-How in any other manner other than in connection with the software you receive under this Agreement.

14. Warranty. I promise you that software I create for you shall perform substantially in accordance with the specifications listed in Exhibit A and that it will not contain material defects. In the event the software does not perform in accordance with Exhibit A, I will, within thirty (30) days from when you give me written notice, correct the software so that it performs substantially in accordance with Exhibit A. I also promise you that to the best of my knowledge, the software will not contain any virus, worm, trap door, back door, Trojan Horse, timer or clock that would erase data or programming or otherwise cause the software to become inoperable or incapable of being used. I do not promise that the functions

contained in the software will meet your specific requirements (unless I've agreed to this on Exhibit A to this Agreement) or that the operation of the software will be uninterrupted or error free.

EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, THE SOFTWARE I CREATE FOR YOU IS PROVIDED WITHOUT ADDITIONAL WARRANTY OF ANY KIND, EITHER EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ANY ORAL OR WRITTEN REPRESENTATIONS, PROPOSALS OR STATEMENTS MADE PRIOR TO THIS AGREEMENT. I HEREBY EXPRESSLY DISCLAIM ANY REPRESENTATION OR WARRANTY OF ANY KIND WITH RESPECT TO THE SOFTWARE, INCLUDING WITHOUT LIMITATION, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE SOFTWARE IS WITH YOU. THE REMEDIES PROVIDED IN THIS AGREEMENT ARE YOUR SOLE AND EXCLUSIVE REMEDIES.

15. Limitations of Remedies.

I SHALL NOT, UNDER ANY CIRCUMSTANCES, BE LIABLE TO YOU FOR CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE, OR EXEMPLARY DAMAGES OR LOSSES ARISING OUT OF OR RELATED TO THIS AGREEMENT, EVEN IF I AM ADVISED OF THE LIKELIHOOD OF SUCH DAMAGES OCCURRING. MY CUMULATIVE LIABILITY FOR ANY DAMAGES ARISING OUT OF OR IN ANY MANNER RELATED TO THIS AGREEMENT (INCLUDING, BUT NOT LIMITED TO, CLAIMS FOR BREACH OF CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY, OR TORT, SHALL BE LIMITED TO THE AMOUNT OF THE FEE PAID BY YOU TO ME UNDER THIS AGREEMENT.

Miscellaneous terms:

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

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

THE FOLLOWING ARE ADDITIONAL TERMS THAT YOU CAN ADD AFTER PARAGRAPH 17:

___ **Termination.** Either you or I may terminate this Agreement, in addition to any other remedies available to us under this Agreement, if: (i) the non-terminating party has failed to perform or meet any material obligation, condition or term in this Agreement and failed to remedy the default within thirty (30) days after the receipt of written notice from the terminating party; (ii) the non-terminating party becomes bankrupt, involuntary, voluntary or adjudicated, or shall cease to function as a going concern by suspending or discontinuing their/its business for any reason except for periodic shutdowns in the ordinary course of business and interruptions caused by strike, labor dispute or any other events over which the non-terminating party has no control.

___ **Force Majeure.** Both you and I recognize that sometimes, things outside of our control might impact our ability to perform our respective obligations under this Agreement. For example, one of us might not be able to do something required of us because of fire, flood, governmental acts or orders or restrictions, or other similar reason where our failure to perform is beyond the control and not caused by negligence. We've agreed that if an external event makes it difficult for one of us to perform, that person will give prompt notice to the other party and will make all reasonable efforts to perform. Provided notice was timely given and the party makes all reasonable efforts to perform, that party shall not be liable for any loss, delay, or failure to perform because of such an event.

___ **Your Responsibility To Review.** You promise to review all deliverables I provide you to confirm that the representations, express or implied, about your company or organization, business products or services are accurate and (i) do not mischaracterize your or your competitor's products or services, (ii) do not violate proprietary or personal rights of others, and (iii) are not libelous.

___ **Proprietary Rights Indemnity.** In the event your right to use the software I create for you under this Agreement is enjoined by a court of competent jurisdiction or if I, in the reasonable exercise of my discretion, tell you to stop using any such software in order to mitigate or lessen potential damages arising from a claimed infringement, you promise to stop using such software. If you stop using any such software, (other than by reason of a temporary restraining order), I promise to: (i) replace the software with equally suitable non-infringing software (ii) modify the software so that your use of the software ceases to be infringing or wrongful (iii) procure for you the right to continue using the software or (iv) after reasonable efforts under clauses (i), (ii), and (iii) of this sentence, pay to you a pro rata portion of the Fee you paid me under this Agreement. OTHER THAN AS EXPRESSLY STATED IN THIS PARAGRAPH, I SHALL HAVE NO LIABILITY WHATSOEVER TO YOU FOR ANY LOSS OR DAMAGES (INCLUDING WITHOUT LIMITATION FOR ANY CONSEQUENTIAL, INCIDENTAL, SPECIAL OR EXEMPLARY DAMAGES) ARISING OUT OF OR RELATED TO ANY ALLEGATION OR DETERMINATION THAT YOUR USE OF THE SOFTWARE INFRINGES OR CONSTITUTES WRONGFUL USE OF ANY INTELLECTUAL PROPERTY RIGHT.

___ **Non-Solicitation.** During the term of this Agreement and for a period of one (1) year after, you promise not to solicit, directly or indirectly the employment of, employ, or contract with any of my current or former employees. If you breach this section, you promise to pay me as liquidated damages, and not as a penalty, the sum of \$50,000 per individual.

___ **Attorney Fees.** If any litigation is necessary to enforce this Agreement, the prevailing party shall be entitled to reasonable attorneys fees, costs and expenses.

___ **Definitions.** Certain terms in this agreement shall have the following meaning:

[It is sometimes helpful to define certain key terms to make sure there is no confusion about what they mean. If you'll do that, include this provision in the Agreement]

___ **Controlling Law.** This Agreement and performance hereunder shall be governed by and construed in accordance with the laws of [your state or country].

___ **Severability.** In the event that any provision in this Agreement is found invalid or unenforceable pursuant to judicial decree or decision, the remainder of this Agreement shall remain valid and enforceable according to its terms. IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT EACH AND EVERY PROVISION OF THIS AGREEMENT WHICH PROVIDES FOR A LIMITATION OF LIABILITY, DISCLAIMER OF WARRANTIES OR EXCLUSION OF DAMAGES IS INTENDED BY THE PARTIES TO BE SEVERABLE AND INDEPENDENT OF ANY OTHER PROVISION AND TO BE ENFORCED AS SUCH. FURTHER, IT IS EXPRESSLY UNDERSTOOD AND AGREED THAT IN THE EVENT ANY REMEDY IS DETERMINED TO HAVE FAILED OF ITS ESSENTIAL PURPOSE, ALL LIMITATIONS OF LIABILITY AND EXCLUSIONS OF DAMAGES SHALL REMAIN IN EFFECT.

About the author



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

<http://www.rosskimbarovsky.com> You can email Ross [here](mailto:ross@crowdSPRING.com) and follow him on Twitter [here](https://twitter.com/rosskimbarovsky).

About crowdSPRING

On [crowdSPRING](http://www.crowdSPRING.com), buyers who need a new logo, website, marketing materials, product design or other creative content simply post what they need, when they need it and how much they’ll pay. Once posted, creatives from around the world submit actual work – not bids or proposals. Buyers are able to review, rate, provide feedback and collaborate with multiple creatives until they pick their favorite.

crowdSPRING provides a level playing field for tens of thousands of talented Developers and offers small and mid-size businesses real choice for their graphic design needs. As of August 2009, thousands of buyers from 50+ countries have posted design projects and over 36,000 creatives from 150+ countries work on [crowdSPRING.com](http://www.crowdSPRING.com).

