



# Basic Law for Web Designers - No. 1: Introduction to Contracts

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16 Aug 2011

## What is a Contract?

A contract is a legally binding agreement. It may be made orally, in writing, or partly orally and partly in writing. A contract can be made expressly – that is to say by signing a written agreement, accepting an offer, making some gesture such as a handshake or nowadays clicking a mouse. It can also be made impliedly by boarding a bus or using a service.

In common law countries, such as England and Wales, the promises that the parties exchange are known as “consideration”. Unless the parties sign a contract “as a deed” each party has to offer consideration. The consideration that one party offers need not be worth as much as that of another party but it must have some value. Thus, a promise to do something that has already been done has no value because any benefit from that service has already been conferred.

## Do I need a Contract when I agree to design a Website?

What you probably mean is do I need a *written* contract because you will usually have a contract whether you like it or not whenever you agree to design a website for money or moneysworth. The answer to that question is almost always “yes.”

## Why so I need a Written Contract?

There are three reasons. First, a written contract provides clarity. Many disputes arise because the parties have different views as to what they have agreed. A written instrument reduces that uncertainty. Secondly, a written contract helps you to manage risks such as non-payment by customers or claims of copyright infringement by third parties. Thirdly,

you can negative or vary many of the terms that would otherwise be implied by statute, previous dealings with your customer or the customs and practices of your industry.

## Do I have to pay a Lawyer to draft a Contract? Why can't I just copy somebody else's?

Under no circumstances should you copy another company's contract terms. First, **copying is wrong**. A contract is just as much a copyright work as your code or graphics. You know how you feel when someone copies your work without your permission. Well a lawyer has also spent time and effort and someone has paid his fee. Secondly, **copying can be dangerous**. Using terms that have been drafted for someone else's business is rather like putting on someone else's clothes. In all likelihood they won't fit and they won't suit you. Some of the terms that you need will not be in another person's terms. Many of the terms that someone else needs will be irrelevant or even unsuitable for you.

## What should a Web Design Contract look like?

Ideally it should set out the terms that you and your customer have agreed. These will vary from customer to customer and transaction to transaction. Most web design contracts will contain at least some of the following provisions:

- (1) The names, descriptions and contact details of the parties;
- (2) Recitals or numbered or lettered paragraphs setting out how the contract



- came to be made and the parties' expectations;
- (3) The operative words of agreement such as "it is agreed as follows";
  - (4) Interpretation: definitions and other interpretative provisions on such matters as references to the singular or plural number or the masculine or feminine gender;
  - (5) The affirmation (or, more likely, negation) of any promises or statements of fact or opinion made by one party to another;
  - (6) The hardware and software platform that the customer will provide;
  - (7) A promise by the supplier to supply code or perform services detailed in one or more specifications (which specifications are usually annexed to the agreement);
  - (8) Acceptance tests or other criteria by which the supplier's performance may be gauged;
  - (9) The customer's promise to accept the supplier's performance upon satisfying those acceptance tests or other criteria;
  - (10) The fees or other consideration to be paid to the supplier;
  - (11) The times and manner in which payment is to be made and, in particular, whether a deposit is to be taken or instalments may be retained;
  - (12) Whether interest is to be charged on late payment and if so at what rate;
  - (13) The procedure for resolving minor disputes such as service of default notices and counter-notices;
  - (14) Provisions for terminating the agreement early on a party's insolvency, repudiation or fundamental breach;
  - (15) Indemnities against ascertainable risks such as claims by third parties for infringement of their copyright or other intellectual property rights;
  - (16) Who is to own the copyright and other intellectual property in the code, graphics, content and other work;
  - (17) Provisions releasing a party from liability to the other for delays or non-performance caused by circumstances outside its reasonable control such as strikes or destruction of property sometimes called *force majeure*;
  - (18) Waiver of equitable remedies;
  - (19) A severance clause excluding terms that turn out to be void or voidable without invalidating the whole contract;
  - (20) Exclusion of the rights of third parties to enforce the contract;
  - (21) Provisions for the service of notices and notifications;

(22) A choice of law and jurisdiction clause; and

(23) Dispute resolution provisions: that is to say whether disputes will be settled by litigation, arbitration, mediation, expert determination or otherwise.

Sometimes these provisions are set out in one big document. At other times they will appear in terms and conditions that are incorporated by reference.

### What if a party breaches the contract?

It depends on the breach. The usual remedy is *damages*, that is to say compensation, for non-performance of the contract. If a customer fails to pay your fee you can sue him for that amount plus interest. If you do not deliver what you promised your customer can sue you for such loss or damage as could reasonably have been contemplated at the time you made your contract. If you threaten to do something that you have promised not to do, such as use or disclose confidential information to a third party, the court may *injunction* (that is to say, order) you not to do that act and punish any disobedience with a fine or imprisonment. Sometimes it is possible for the court to direct *specific performance* of a contract.

In the absence of any agreement to the contrary, disputes are resolved by *litigation*, that is to say court proceedings. As litigation can be slow and expensive parties may prefer to refer disputes to a neutral known as an *arbitrator* or settle them through negotiation possibly facilitated by a trusted third party known as a *mediator*.

### How can you help me?

I can help keep you out of trouble by drafting contract terms that meet your precise requirements. That usually requires a visit or conference call to learn about your business, understand best practice, identify risks and assess countermeasures. I can review and advise you on your suppliers' or customers' contract terms so that you can assess your rights and possible liabilities. Should a dispute arise I can advise you how to resolve it as fast, cost-effectively and satisfactorily as possible. If you require representation, I can negotiate on your behalf in party to party negotiations or mediation or present your case effectively to a judge, arbitrator or other tribunal. □