Business Structures for Filmmakers

Filmmaking can be undertaken by one person, or a small group, or with an extensive cast and production and post-production crew managed by a number of ‘producers’ with different job descriptions and titles. The choice of a business structure will be influenced by the complexity of the production and the risk of things going wrong in the production. This information sheet considers the advantages and disadvantages of the following business structures: operating as a sole trader; as a partnership; and as a company. Each of these business structures will be considered as well as the procedure for establishing each business structure.

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For simplicity this information sheet refers to films and filmmakers although the information is also relevant to computer games developers. Australian courts have held that computer games that present a series of images as a moving picture – such as where the events represented on the screen vary according to the actions of the player of the game – constitute a “cinematograph film” as defined in the *Copyright Act 1968*.

1. Getting started – who is the ‘maker’ of the film?

The implementation of a business structure, with written contracts that work with that a business structure, is the primary means of establishing certainty as to what person or what legal entity owns the copyright in the film.

The Copyright Act does not refer to the ‘producer’ of a film; rather the Act refers to the ‘maker’ of a film. The significance of the ‘maker’ of a film is that it is the maker of the film who owns the copyright in the film.

The Act describes the “making of a cinematograph film” as being “the doing of the things necessary for the production of the first copy of the film” and the ‘maker’ of a film as being “the person by whom the arrangements necessary for the making of the film were undertaken”. In other words, the strongest claim to be the ‘maker’ of a film, and therefore the first owner of the copyright, is the person or people who carried out the arrangements and organized the production of the film; including the business and financial arrangements to make the film. This is typically the producer of the film. Providing services as the scriptwriter, director, director of photography, camera operator,

editor or leading actor do not, in themselves, result in that person being a ‘maker’ of the film.[2] For more information, see Arts Law’s information sheet on Copyright.

Emerging filmmakers sometime overlook the need to document the service contracts for people involved writing and production a film. *The Copyright Act* requires the legal transfer of copyright to be in writing, signed by the person transferring the copyright.[3] Screen Australia or the State and Territory funding bodies and other film financiers invariably require the recipients of funding to properly document all arrangements that deal with copyright including arrangements with service providers. Funding can be held up or rejected if the applicant for funding cannot establish that they own or control the copyright in the project being funded. This is the so-called ‘chain of title’ to the script or novel or other work that is to be adapted to make the film. The need to document the use of copyright material in an appropriate licence or grant of copyright is an important responsibility of filmmakers.

The choice as to which business structure to use will determine how the chain of title is documented and how the producer will secure rights of ownership of the copyright in the elements used to make the film including the synopsis or treatment

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(which is a ‘literary work’), the script (which is a ‘dramatic work’) and the audiovisual material (which is a ‘cinematographic film’).

2. Which structure is best?

The choice as to which business structure is appropriate to make a particular film will be influenced by the following factors: the set-up and operational costs; and risk management and the exposure to legal claims; the expectation of financiers and sponsors of the film. The following is a brief summary – for more information on particular structures, see Arts law’s Business Structures and Governance: A Practical Guide for the Arts.

2. **Sole trader**

A person conducting a business, as an individual operator of that business, is described as a ‘sole trader’. Some projects, after an assessment of the risks, may be viewed as suitable for production as a sole trader, such as a where the same person is the writer, director and producer.

A sole trader operates the business either using their own name or under a business name (which must be registered – see below). A sole trader takes direct responsibility for the conduct of the business and enters into contracts under their own name; although where they trade under a business name it is usual practice to sign under their “[legal name] trading as [XYZ]”.

2.1.1.Advantages and disadvantages of operating as a sole trader

Operating as a sole trader has the benefit of having minimal set-up costs and the operational costs of conducting the business are essentially the legal and accounting costs the sole trader chooses to incur in completing tax returns and otherwise complying with statutes and regulations that govern the operation of the business.

A major disadvantage of operating as a sole trader is that the individual is personally responsible for any debts of the business and is directly exposed to the risks of whatever unforeseen events that may occur in the conduct of the business. The producer operating as a sole trader has an unlimited exposure to legal action arising from those unforeseen events and will be responsible for the negligence of any employees and contractors working in the business. The unlimited personal liability of the sole trader means that any assets they own could be claimed for the purpose of meeting any successful legal claim. It is particularly important that the sole trader secures insurance against risks involved in film production, however insurance cover may be limited so that the sole trader remains exposed to risks that are not covered by insurance. For more information, see Arts Law’s Information sheet Liability and Insurance.

A solo filmmaker will need to carry out a risk assessment to determine whether they want to carry out film project as a sole trader. Some film funding entities will not provide finance to a sole trader.

2. **Partnership**

Where there are a group of people working together on a film project it’s important to consider who is to be the ‘maker’ of the film – that is the first owner of copyright – as discussed above. A partnership is a possible business structure for a group of people, each of whom wants to be a ‘maker’ of the film with a share of ownership of copyright; an alternative business structure is for the group of filmmakers to incorporate a company (which is discussed below).

A partnership describes the relationship exists between persons carrying on a business in common with the view of making a profit – whether or not any profit is ever made. A group of people working together on a film project may actually be operating as partnership even if the members of the group have never in fact discussed, or thought about, partnerships. A partnership may or may not operate under a business name (eg Cornetto Films) which must be registered.

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The partnership legislation of each State or Territory sets out for rules to determine whether a partnership does or does not exist;[4] and the legislation may preserve rules of equity and of common law applicable to partnerships. The partnership legislation usually provides for an upper limit of not more than 20 members.

A common filmmaking partnership might involve the director and the producer, maybe also the scriptwriter. It is always sensible to document the partnership agreement otherwise the law may imply terms and conditions which do not reflect expectations.

2.2.1.Advantages and disadvantages of a partnership

There are no costs to setting up a partnership although Arts Law recommends getting legal advice and preparing a formal partnership agreement.

Entering into a formal partnership agreement allows the partners to set out clearly the terms and conditions of their relationship including how copyright in the film will be held. A partnership agreement can describe the job descriptions of each partner and how the partnership will be managed including how the decisions will be made and what happens when one partner wants to leave the partnership. An important function of a partnership agreement is to allow the partners to set out limits to the authority of each partner to act for the whole partnership. A film partnership agreement should also specify how ownership of the copyright will be held and how any profits will be distributed.

A partnership is not a separate entity for tax purposes; as each partner has an individual responsibility for the tax due on their share of any partnership income. Contracts entered into by the partnership will usually need to be signed by each partner. If the copyright is to be owned by the whole partnership, chain of title documents should identify each of the partners.

A major disadvantage of operating as a partnership is that each partner is recognized as agent of the other partners for the purpose of the business of the partnership. This means that each partner can make contractual commitments that are binding on the other partners; so partners will be personally responsible for any debts and other commitments of other partners. The partnership legislation may provide for an exception to liability in the circumstances where the partner has no authority to act in the particular matter, and the person with whom the partner is dealing either knows that the partner has no authority, or does not know or believe the partner to be a partner.

Each partner is also directly exposed to the risks of whatever unforeseen events that may occur in the conduct of the business conducted by the partnership including legal liability for negligence of other partners and the negligence of employees and contractors hired by the partnership. The unlimited personal liability of each partner means that any individual assets they own could be claimed for the purpose of meeting any successful legal claim against the partnership. It is of course possible to insure against risks involved in film production, however insurance cover may be limited so that individual partners exposed to risks that are not covered by insurance.

A filmmaker will need to carry out a risk assessment to determine whether they want to carry out film project as partnership. Some film funding entities may not provide finance to a partnership.

3. Company

Another way for a group of filmmakers to conduct their activities is through a company. This is also a useful structure for a solo filmmaker who wishes to reduce the risks of personal liability associated with operating as a sole trader. A company is a legal entity incorporated under the *Corporations Act 2001 (Cth)* which can enter into contracts in its own name. The copyright in a film can be held by the company.

Most companies established to make films are privately owned or ‘proprietary companies’ (identified by ‘Pty Ltd’). A ‘public company’ means a company that is not privately owned (identified by ‘Ltd’) in which shares are usually owned by members of the public and may be traded on the stock exchange.

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The Australian Securities and Investments Commission (ASIC) is responsible for the administration of the Corporations Act and operates the business name and company name registry. The ASIC is the regulator of activities of companies, including compliance with accounting standards and the financial reporting obligations.

See the ASIC guide: Starting a company – How to start a company

3. **Advantages and disadvantages of a company**

The costs of establishing a company are higher than the costs of setting up a partnership or sole trading business. Generally it's necessary to retain a firm of lawyers or accountants or another organisation whose business is to provide all the necessary documentation to operate a company.

A proprietary company can be established with one director and one shareholder; and can have up to 50 non-employee shareholders. A company is a separate legal entity to the individual shareholders so it enables the management of business risks by the company, so that the individual shareholders are sheltered from those risks. If the company fails for any reason the individual shareholders may lose the value of their investment in the company but can avoid the exposure of their private assets (unless the shareholder has provided a personal guarantee for the performance of the company in some transaction).

A director of a company has duties under the Corporations Act, and under general law, so that a director can become personally exposed for their actions or failure to act to meet the standard of behaviour expected of a director.[5] The Income Tax Assessment Act places duties on directors regarding the payment for tax and other obligations of a company. Directors also have obligations under Workplace Health and Safety Legislation and other statutes.

As a consequence of reporting obligations some information about a company is disclosed to the public in the database of the ASIC. The Corporations Act provides for different reporting obligations for a 'small' proprietary company as compared to a 'large' proprietary company.[6]

3. **Shareholders agreement**

The rules for a company are usually set out in its 'constitution', a document that may limit the company's powers and set out objects of the business of the company.[7] It is also common practice for the shareholders to enter into a Shareholders Agreement. This is an important document for the participants in the filmmaking enterprise who own shares in the company. It can set out rules to manage the operation of the business of the company, including decision making and the conduct of directors meetings.

3. **A holding company, subsidiary company and a special purpose vehicle (SPV)**

The same filmmaker or filmmaking group may work on several different film projects. It is possible for a single company to carry out the various projects through internal divisions of that company, with each division having a separate business name.

A more complex company structure can involve a 'holding' company owning a number of 'subsidiary' companies through which it operates. The role of each subsidiary company may be to carry out some aspect of the business, for example there may be a separate subsidiary company for each film project with the filmmaker(s) owning the shares in the holding company. This can be useful to separate the financial liabilities and successes of each film project.

Such a wholly owned subsidiary is sometimes called a 'special purpose vehicle' (SPV) which is a company specifically set up to produce the film. A SPV may also be used to describe a company in which the shareholding of the SPV is shared between different entities that are producing the film as a joint venture.

4. Joint venture

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The earlier discussion of a partnership identifies a major disadvantage of operating as a partnership being that the each partner is recognized as agent[8] of all the other partners for the purpose of the business of the partnership, with individual partners being exposed to the debts and other liabilities incurred by other partners.

A 'joint venture' is a contractual arrangement between the participants in a business venture. A joint venture may take the form of a joint venture partnership, however joint venture agreements often contain a provision that asserts the arrangement is not a partnership or an agency relationship in order to attempt to limit the authority of each participant to commit the other participants in the joint venture and thus to avoid the negative effects of liability between partners in a partnership.[9]

It is possible for two legal entities to contract with each other to make a film as a joint venture which is not a partnership. However 'joint venture' does not have a settled meaning so that joint venture arrangements require particular care in drafting. As such an arrangement does not create a separate legal entity, such an arrangement would be an unincorporated joint venture. The contractual arrangements between the joint venturers will determine how that business operates.

In film production, because a SPV is a requirement to manage the "Producer Offset" financing of film production, it is usual for the joint venture to operate through a SPV. The shareholding and appointments of the board of directors of the SPV are allocated between the joint venturers.

5. Business names

There are differences between business names, company names, and trade marks. The company name is the legal name of the company registered the ASIC. Where a company (or a person) trades under different name to their legal name, that name is called the 'business name' and it must be registered with ASIC. The ASIC database of names can be searched in order to determine whether a business or company name is available. The choice of a business name is subject to the approval of the ASIC.

Trade marks are names and logos that are used to identify the source of goods or services. A business may own several trade marks which could include the business name and the brands of particular products such as particular films or film production services. The *Trade Marks Act 1995 (Cth)* provides for the registration of trade marks. A business name which is registered as a trade mark does not also need to be registered with ASIC. For more information, see Arts Law's Information Sheet Trade marks.

6. Information and legal resources

In order to assist emerging film makers Arts Law publishes information sheets, find these using our guided pathway at www.artslaw.com.au. These information sheets cover a range of topics including copyright, insurance issues and an explanation of some of the jargon used in legal contracts. Arts Law also publishes sample agreements relevant to film production at www.artslaw.com.au.

Further information

Other Arts Law publications relevant to choosing a business structure include:

- Business Structures and Governance: A Practical Guide for the Arts
- Contracts: an introduction
- Contracts: getting it write/right
- Contracts: A glossary of jargon
- Crowdfunding
- Film financing

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- Liability and insurance
- Protecting your professional name

Sample agreements:

- Film/video partnership deed
- Film/video sample agreements pack – Option A (Low Budget)
- Film/video sample agreements pack – Option B (No Budget)
- Producer and director agreement

Other publications that may be useful are:

- Copyright Council fact sheet Film and Copyright
- Screen Australia's info guides on getting stated: Information for Filmmakers (2008); Getting Started in Film, TV & Interactive Digital Media (2015)

[1] There are other possible business structures including a Trading Trust; Limited Partnership or Incorporated Limited Partnership (ILP) that is set up under State or Territory partnership legislation or non-profit organisations structured as incorporated associations or as incorporated co-operatives. These business structures are not considered in this information sheet.

[2] Although a director of a film that is not a commissioned film has a right to receive royalties generated from free-to-air retransmission of the film, writers and directors have the benefit of moral rights in their work, and actors have the performers' protections described in Arts Law's Information Sheet: Performers' rights.

[3] The requirement for the transfer of copyright to be in writing and signed by the person transferring the copyright is described in s. 196 of the Copyright Act as an "assignment of copyright".

[4] s.2 Partnership Act 1892 (NSW); s.2 Partnership Act 1891 (SA); s. 6 Partnership Act 1958 (Vic); s.7 Partnership Act 1963 (ACT); s.6 Partnership Act 1997 (NT); s.6 Partnership Act 1891 (Qld); s.7 Partnership Act 1891 (Tas).

[5] Chapter 2D, Part 2D.1, Corporations Act 2001 (Cth) – Officers and employees – Duties and powers.

[6] ss.45A & 113 Corporations Act 2001 (Cth).

[7] 'Constitution' is defined s. 9 and referred to in s. 125 Corporations Act 2001 (Cth).

[8] See Arts Law Information Sheet: Agency agreements.

[9] See Arts Law Information Sheet: Agency agreements.

Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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