


LAW 101 FOR FILMMAKERS

Addressing a few basic legal issues before jumping in

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You recently hit upon a winning idea for a new film, and you have a clear vision about how to translate it successfully to the big screen. Your creative tendencies are pushing you to head straight for production, but before you jump it would be prudent to consider a few basic legal issues that should be addressed up front.

One of the most important things you can do from a legal perspective is to form a limited liability entity through which to manage your project. Stop running your business - even informally - as a sole proprietorship in your own name. By forming a limited liability entity you will be taking a significant step towards shielding yourself from personal liability.

The most common choices of limited liability entities are (1) a limited liability company (LLC), (2) a C-corporation (C-Corp), and (3) a S-corporation (S-Corp). While all three of these entities shield their principals from personal liability, there are significant differences in how they are taxed. A C-Corp is taxed both on income at the corporate level when monies are received by the company, and again when distributions are made to shareholders. LLCs and S-Corps, on the other hand, are both deemed to be pass-through entities for tax purposes (which means that only the principals, and not the company itself, are taxed on income received). Keep in mind that S-Corps have certain restrictions; for instance, they can only issue one class of stock and cannot have another company as a shareholder.

In my experience, the most common type of entity used for production companies is a LLC, due to the fact that it has the benefits of being a pass-through for tax purposes and is more flexible to manage than a S-Corp. That said, you must first discuss the various options with your tax advisor before deciding on what type of entity to form, since miscalculating about this issue can result in significant negative tax ramifications. And remember, whichever type of entity you decide to use, make sure to - once and for all - avoid entering into agreements in your own name, as doing so will defeat the purpose of having formed a limited liability entity in the first place.

Another important issue to focus on is the systematic securing of all rights held by everyone involved in the project, and in making sure that all of these rights are assigned to your company (rather than to you personally). This means that you should have written agreements with all cast, directors, writers, editors, crew, etc. Set the example by assigning all rights that you currently hold as an individual in the project to your company as well (this will not only encourage others to follow your lead but will also help to shield you from personal liability). Securing all rights in the project is crucial,

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as you want to reduce the chance of someone involved in the project making a claim to such rights after filming has commenced (or even worse once the film has become a big success). And your investors who are financing the film (and who in many cases are the co-equity owners in your company) will want assurances that that the potential upside of their investment is really held by the company.

Since your company in many cases will be engaging independent contractors (rather employees) to perform project tasks, you will need to be especially careful about the issue of securing rights. The presumption under U.S. copyright law is that work performed by an independent contractor is owned by that independent contractor (even if you have paid for it!), unless you otherwise reverse that presumption by contract. This means that if you want to own work product created by an independent contractor, you need to specify in writing that such work created is to be considered a "work made for hire" in favor of the production company. Because the default presumption under copyright law is counter-intuitive, many people unwittingly miss this issue. One of my former law firms once represented a client who paid over \$100,000 to an independent contractor for developing a website and who unfortunately had a rather difficult time claiming that it owned the designs created, as no work for hire agreement had been signed. Don't let that happen to you.

Obtaining form agreements for your business which secure rights from everyone involved does not have to be a complicated, intimidating or expensive undertaking. In most cases a simple work-for-hire agreement with certain related provisions will be sufficient, though there are nuances to look out for which may require tweaking such a form agreement on a case-by-case basis. In any event, there is no reason why these agreements need to be lengthy or overly complex (a simple 1-2 page form should do the trick), but you do need to be careful about making sure that everyone signs them and that any special circumstances have been considered.

The above is intended only as brief overview, as there are many other legal and tax issues to consider in running a production company. For example, the way in which you raise money (either by an equity or debt investment) and from what sources, raises various issues and may very well influence what type of entity you decide to form and how it is structured. And you will also want to consider how best to take advantage of any available tax credits; the IRS and many states offer various tax incentives to producers in the form of credits against qualifying production costs. As to these two issues in particular among others, you should consult with your tax and legal advisors before making any moves.