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May 2006

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02

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05

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06

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07

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07

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## Feature: Howdy partner? Don't be a cowboy when it comes to business partnerships.

By Alida Stanley, Arts Law Centre of Australia

Film making is rarely a lone pursuit. However once in while, a lone ranger will take on the challenges of the film making savannahs – *auteurs* such as Woody Allen or George Clooney, for whom combining the roles of producing, directing, script writing and acting in a single project ensures maximum control. But for most film makers, film and video production is a collaborative process in which production control and ownership of the resulting film or video may be shared. There are no hard and fast rules which govern how such collaborations should work on a film or video project. Mostly, it comes down to the individuals involved; particularly each individual's creative and/or financial contribution to the film or video. Common collaborations include projects between two or more producers or a writer and a producer or a coproducer/writer and a co-producer/director, just to mention a few such permutations.

The success of collaborations of this kind will inevitably come down to the relationships between the collaborators. Often, film and video collaborators have preexisting relationships either because they are friends or because they have worked together in the past.

At some level, they are likely to have a common vision, or what they think is a common vision, for the film or video project. Making a film or video can certainly seem like an exciting adventure. But if you are contemplating riding off into the sunset with a fellow collaborator to make your film or video – don't get carried away with the romanticism of the journey before you get a few things sorted out.

### Business structures in Australia

Australian law recognises a number of different types of business structures including companies, trading trusts, sole traders and partnerships. Each of these structures is subject to different regulations which determine their formation and operation. When considering the most suitable business structure, it is appropriate to be guided by the purpose and nature of the business. For collaborators on film and video productions, particularly those with low budgets who may be working together on a single venture or just starting out, the partnership structure is often the best option. The remainder of this article looks at the pros and cons of entering into a partnership arrangement if you are a film or video maker and considers how partnerships differ from other business relationships.

### You may be in partnership already .... whether you know it, like it, or not

Under Australian law, if people are carrying on a business in common with a view to profit and they are not doing so through the medium of a separate independent incorporated entity, they are in partnership. This is the case regardless of whether or not they have entered into a written partnership agreement or deed. When a partnership arrangement has not been agreed in writing, under Australian law, the terms which govern the partnership will be regulated by the *Partnership Acts* of the various States. For example, partners are presumed to own the partnership in equal shares if there is no written agreement otherwise. Furthermore, even if partners have entered a written partnership agreement, this legislation will govern any issue that is not addressed in that written partnership agreement. So, collaborators on film and video projects carrying on a business in common with a view to profit are most likely to be partners, regardless of whether or not they have entered into a written partnership agreement or deed.

### Carrying on a business in common with a view to profit

Film and video makers may see themselves as primarily concerned with the creative enterprise of their work. However, few would deny the commercial realities that necessarily accompany that creative enterprise. Film and video productions,



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May 2006

even those with low budgets, require funding. Funding bodies are generally reluctant to fund projects unless recipients can certify in writing that they have own or have rights to use all the components of the film or video projects. The legislation defines the term 'business' as including 'every trade, occupation, or profession'. Furthermore, the courts have held that 'carrying on a business' may be a single venture or a continuing relationship between partners. Accordingly, collaborators on a single film or video project may be in partnership even if they do not intend to continue collaborating after the completion of the project.

The requirement that the business must be carried on 'in common' means that the business is being carried on by or on behalf of the partners. The courts apply the following test: Does the person carrying on the business, do so as agent for the partnership? Finally, the requirement that the business be conducted 'with a view to profit' is satisfied even if the project operates at a loss. Indeed, the law will still recognise a partnership if the intention of the collaborators to make a profit is unreasonably optimistic. While there may be a few film and video makers whose motivations are purely altruistic, a significant majority would satisfy the requirement that the business is conducted with a view to profit.

## Partnership is a contractual relationship

As mentioned above, the *Partnership Acts* will infer a partnership between certain people carrying on a business in common with a view to profit regardless of whether or not those people have entered a written partnership agreement or deed. This is because partnership at its most basic, is a contractual relationship. Like many other contracts, it does not need to be in writing to be enforceable. However for collaborators on film and video productions, there are significant advantages to entering a written partnership agreement or deed.

## Advantages of entering a written partnership agreement or deed

A written agreement or deed can clearly define the partners' rights, duties and responsibilities.

- A written agreement or deed is evidence of the collaborator's intention to operate as partners and will define the means by which they agree to conduct themselves as partners.
- A written agreement or deed may modify certain provisions of the relevant *Partnership Act* or provide for circumstances which are not covered by the legislation including: defining a business plan and budget; capital contribution; decision making; profit sharing; the introduction of new partners; departure of partners; identification of partnership property and the distribution of the partnership assets, including the intellectual property in a film or video after the dissolution of the partnership.
- A written agreement or deed may provide a mechanism for dispute resolution.

## Partnership is more than just a contractual relationship

While partnership is essentially a contractual relationship, it is also much more than that. The law assumes that partnership is a special relationship which requires that the partners owe extraordinary responsibilities to each other. These responsibilities - known as 'fiduciary duties' - are characterised by a relationship of trust, confidence and full disclosure.

*Duty to act in the partnership's best interest:* Partners are required to act in the best interest of the partnership. Accordingly, partners are not allowed to divert business opportunities from the partnership to themselves or take advantage of information they learn through the partnership for their own benefit, without the consent of the other partners. Partners must put the partnership interests ahead of their own personal interests. Similarly, partners are not allowed to engage in activity that potentially competes with the partnership business, without the consent of the other partners.

*Duty of confidentiality:* Partners are not allowed to disclose the confidential information of the partnership including information about the business finances. This duty continues even after the partnership comes to an end.

*Duty of disclosure:* Partners must pass on to the other partners any relevant information that will either benefit the business or, if not disclosed, will put the business at risk.

May 2006

## The Downside: Joint liability

As mentioned above, a defining characteristic of a partnership is the partners' right to act as agents of the partnership. This means that a single partner has the power to bind the partnership and hence, the other partners, to certain obligations. This is referred to as 'joint liability'. Accordingly, if a partnership incurs debt, each partner is personally liable for the entire debt or obligation. This unlimited liability can mean that if there are insufficient partnership assets to meet those debts or obligations, a creditor can sue each partner personally. Moreover, each partner may be personally sued for the full amount of the debt, not just an amount which is equivalent to the partner's proportion of the partnership.

## The Alternative: Companies

For film and video collaborators, the most common alternative business structure to partnership is a proprietary limited company. Unlike a partnership composed of individuals bound together by contract, a proprietary limited company is a separate legal entity. This means that a company has limited liability and its shareholders will not be liable for debts incurred by the company; the most the shareholder can lose is the value of their shares. Companies are able to own property in their own right and they are able to sue and be sued.

However, the administrative burdens of forming a company are significantly more onerous than forming a partnership. As noted above, partnerships can be formed with or without a written partnership agreement or deed. By contrast, forming a company involves a process of incorporation in accordance with the *Corporations Law* (Cth). Shareholders must first apply for business name registration and then submit an application for incorporation. While the process can be costly, once incorporated, company directors are subject to specific directors' duties, ongoing reporting requirements and regulation under the *Corporations Law* as administered by the Australian Securities and Investment Commission. This structure is generally more appropriate for established film and video producers with ongoing business interests, rather than one-off projects.

## The good, the bad and the ugly

For film and video collaborators who come together for a single venture or are just starting out, partnership is likely to be the easiest means by which to structure a project. Once a partnership is well established, it may then be appropriate to consider taking on the administrative challenges of incorporation.

However, a word of caution to collaborators who think they can get away without documenting their partnership arrangement. It is true that the law will recognise a partnership if you are carrying on a business in common with a view to profit. However, if you chose this path, you will expose yourselves to a world of uncertainty if you rely entirely on the legislation. Without an agreement or deed, you are more likely to find yourself in a dispute about an issue you did not foresee when you began your venture. Ultimately, you may be faced with the unnerving prospect of consulting a lawyer when it all gets too ugly. The best course is to arm yourself well in advance – define your relationship in a written partnership agreement or deed from the outset, clarify your rights, responsibilities, budget, business plan, funding and exit strategies. That way, you stand a better chance of avoiding a show-down so you can join forces to face the challenges of the film and video production frontiers together.

### End note:

- The Arts Law Centre of Australia assists low-income creators and arts organisations with legal matters. You can download a sample Film/Video Partnership Deed for a small fee from our website at [www.artslaw.com.au](http://www.artslaw.com.au)
- NSW, *Partnership Act 1892*, s.1; Vic, *Partnership Act 1958*, s.5; SA, *Partnership Act 1891*, s.1; Qld, *Partnership Act 1891*, s.5; WA, *Partnership Act 1895*, s.7; Tas, *Partnership Act 1891*, s.6; ACT, *Partnership Act 1963*, s.6; NT, SA *Partnership Act 1891* applies.
- Whether documentation of partnership takes the form of an agreement or a deed will often depend on whether the partners are making a capital contribution to the partnership business upon formation of the partnership.

May 2006

If so, this capital contribution may be sufficient consideration to support an agreement. The difference between a deed and an agreement is that a deed is a contract under which there is no consideration (money or promises) exchanged between the parties. In the event that there is no capital contribution by the partners upon the formation of the partnership, it is advisable to agree the terms of the partnership in the form of a deed. Unlike an agreement which just requires the signatures of both parties, a deed needs to be signed and witnessed, sealed and delivered.

- NSW, s.1; Vic, s.5; SA, s.1; Qld., s.5; WA, s.7; Tas,s.6; ACT, s.6; NT, SA applies. *Lang v James Morrison & Co Ltd* (1911) 13 CLR 1 *per* Griffiths CJ (at 11).  
Graw, Stephen: *An Outline of the Law of Partnership* (2001) The Law Book Company.

## ISAN launch

Find out more about how you can improve efficiencies in audio-visual rights management at the launch of ISAN Australasia to be held in Sydney on June 15.

ISAN (International Standard Audiovisual Number) is a unique, internationally recognised and permanent reference number for audio visual works such as films, games, commercials and videos, and their derivatives. Providing greater accuracy than identification by title, its uses include improved efficiencies in rights management, royalty management and antipiracy measures.

Founded by Screenrights and APRA/AMCOS, ISAN Australasia has been declared the ISAN Registration Agency for Australia, New Zealand and English speaking "Pacific Island Nations".

Giving the keynote address at the launch, Patrick Attallah, CEO of ISAN International, will talk about:

- what ISAN can do for the industry;
- the specific benefits of ISAN for your business;
- how to obtain an ISAN and use it.

Patrick has been very active promoting ISAN to the audiovisual industry, partnering with well-known organisations such as the Motion Picture Association of America (MPAA) and Microsoft. He has extensive business and technology experience in both Europe and the USA, with more than 15 years in business development, consulting and senior management roles. His background includes in-depth knowledge of IT and telecommunications.

### Launch details are as follows:

**Date:** Thursday 15 June

**Time:** 10.30am registration

**Session 1:** Launch: 10.45 to 11.30am

**Session 2a:** Technical briefing: 11.45am to 12.30pm

**Session 2b:** Media briefing 11.45am to 12.30pm

**Venue:** Trackdown Scoring Stage, adjacent to Fox Studios  
Moore Park, Sydney.

If you would like to attend, register online at [www.australasia-isan.org](http://www.australasia-isan.org)  
or email [events@australasia-isan.org](mailto:events@australasia-isan.org)

Media partner: Screen Hub

May 2006

## Government announces major amendments to copyright law

On 14 May 2006, the Federal Government announced significant changes to the Australian Copyright Act. An exposure draft Bill is to be released shortly with the opportunity for comment and consultation with interested persons prior to the introduction of the Bill which is expected in the Spring sittings of Parliament.

The reforms are based on the outcome of a number of reviews of the Copyright Act including the recent fair use review and the review of the Digital Agenda Act.

The Government has stated that its intention is to make the laws fairer for consumers and tougher on copyright pirates. To this end the following changes are foreshadowed:

### Fair use

A US style fair use provision will not be introduced in Australia, instead the existing fair dealing defences are to be amended allowing the following:

**"Private use"** – new fair dealing exceptions to allow consumers to make a time shift recording of television and radio broadcast to allow a program to be viewed or listened to once at a later time; consumers will also be able to make a format shift copy for private use of audio works and newspapers. The Government is to review in two years whether this format shifting exception should also apply to films.

**"Non commercial use"** – libraries, educational institutions and people with disabilities are to be given additional rights in a "flexible dealings exception" which will allow some "non-commercial uses" of copyright material. The Government has given a clear assurance that the new extended dealing exception will not apply to uses where an existing exception or statutory licence already operates and that any new use covered by the exception must comply with the standards in Australia's international treaty obligations.

**"Parody or satire"** – a new fair dealing exception to allow use of copyright material for parody or satire is to be introduced.

## Strengthening the copyright enforcement regime

New enforcement measures to combat piracy are to be introduced. These will include on the spot fines, proceeds of crime remedies and changes to legal presumptions to make proving copyright piracy easier.

## Digital Agenda review reforms

The Government's response to the three year review of the 2001 Digital Agenda copyright reforms has now been published and is available at [www.ag.gov.au](http://www.ag.gov.au)

There will be specific provisions to expand the rights of libraries and archives in relation to preservation copying. In addition, there will be provisions designed to impact on educational institutions in relation to online material, including provisions designed to allow educational institutions to use audio-visual material from free to air broadcasts posted on the internet and to allow the use of certain distributed communications technologies for teaching purposes.

May 2006

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Screenrights International collects royalties in Europe, the United States and Canada. Registration is simple and free. Just email [international@screenrights.org](mailto:international@screenrights.org) and the appropriate forms will be sent to you. Alternatively, you can download them from our website homepage: [www.screenrights.org](http://www.screenrights.org)

## Code of Conduct: Call for submissions

Screenrights' and other collecting societies' compliance with a voluntary Code of Conduct is soon to be the subject of an independent annual review being conducted by former Federal Court judge Mr James Burchett QC.

As part of this review, Screenrights' members and licensees can make submissions directly to the Code Reviewer at the following address:

The Code Reviewer

Suite 704

4 Young Street

Neutral Bay NSW 2089

Email: [codereviewer@screenrights.org](mailto:codereviewer@screenrights.org)

Submissions should be made between 1 June 2006 and 31 July 2006.

A copy of the Code can be found on Screenrights homepage: [www.screenrights.org](http://www.screenrights.org)