

Who Do You Think You're Dealing With?

What you need to know about contracting with a corporate author

by Steve Gillen

Most of your authors work independently—as individuals. Consequently, the form of publishing contract you have developed for your publishing business undoubtedly reflects that, calling for your author's personal name and residence address in the preamble or recitals.

But every once in a while, you may run into an author who wants you to write the publishing contract not in his or her personal name, but in the name of a company. These authors have been advised to set up a corporation or limited liability company for tax or estate planning purposes. This is typically an author making at least \$100,000 a year from his or her writing activities. Or it's someone with higher net worth. Or it's a relatively senior someone with sophisticated estate planning objectives or complex family dynamics (a second marriage, step-children, or no natural still-living descendants).

The financial planning entities they set up to accomplish their objectives go by various names—"loan out" or "personal services" companies—which reflect the fact that they are set up to treat the owner of the business as also an employee of that business rather than an independent contractor and to lend that employee, or make that employee's personal services available, to your company. They might be organized as limited liability companies or as C-corps or S-corps.

These authors use these strategies to accomplish a number of objectives, including:

- **Asset protection:** using the limited liability feature of corporations and LLCs to shield personal assets from certain creditors ▶

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- **Fiscal year tax planning:** offsetting entity income from personal income across more than one tax year
- **Income shifting:** moving income from the author to other family members in lower tax brackets
- **Retirement planning:** sheltering income for retirement in ways not available to self-employed individuals
- **Medical and other benefits planning:** reducing taxable income by converting what might otherwise be a personal expense to an expense of the business

As a publisher, you can accommodate a request like this without additional risk to your business, but it's not as simple as adding "Inc." or "LLC" to the author's name on the blank line at the top of your standard contract form.

Here are the steps you need to take to be sure to modify your contracts correctly for an author who has his or her own legal entity:

At the end of the day, you want to know that it is the human being you have been dealing with who will actually write your book, rather than some other employee of the company named at the top of your contract.

STEP 1

You want to correctly identify the entity you are being asked to contract with. Is it a limited liability company or a corporation? Your signed contract will provide you little comfort if the party you thought you were dealing with is not correctly identified at the top of your contract, in the body of the document in sections that are sometimes referred to as the preamble or as the recitals.

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"Kevin Kamen works relentlessly. Whenever he speaks about the publishing business or companies, I pay close attention."
—Paul Tash (Chairman of the Pulitzer Board and Chairman/CEO of the Tampa Bay Times)

STEP 2

You also want to memorialize at the top of your contract the state in which the entity was formed and the address of its principal place of business (see sample on p. 34). These are both places where you could get jurisdiction of the company in the unlikely, but very unhappy, event you need a court's assistance to get the company and its owner's attention to a matter of concern. Capturing this information at the top of your contract will make finding it a snap if you need it.

STEP 3

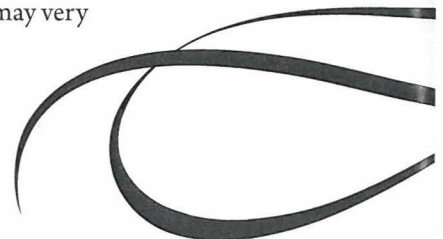
You want to confirm that you have the official name of the company correct and that it has, in fact, been legally formed before the date on which you sign a contract that purports to bind them. Authors get this wrong more often than you would think, because they don't appreciate the consequences of a mistake or because of less-than-perfect

communication with their financial advisers. How do you check? Once formed, these companies will be registered with the secretary of state's office in the state in which they were formed. You can find this information online through the appropriate secretary of state website. In most cases, this information is free.

Check to be sure you have the correct name and address, and that the initial registration date is before the effective date and the signature date on your contract. A corporation or limited liability company has no legally cognizable existence or authority before it is formed and registered. If you enter a contract with the wrong name or wrong address or before the company actually came into legal existence, you will have created uncertainty about whom you contracted with. Getting the answer to this question after the fact will certainly be expensive and it may very well prove to be unsatisfying.

STEP 4

Although you may be perfectly happy to help your author accomplish his or her financial



planning objectives, at the end of the day, you want to know that it is the human being you have been dealing with who will actually write your book, rather than some other employee of the company named at the top of your contract. And you also want to know that, if it is necessary for you to look to your contracting partner for indemnification of third-party claims asserted against you for copyright infringement or the like, that you can look to all of the personal assets of that human being and not just the assets being retained in some shell company. To do this, you will need to add language to your form contract regarding a personal services commitment and personal indemnity (see p. 34).

STEP 5

Although your author may solicit your comments or advice about the strategy recommended by his or her financial advisers, don't succumb to the temptation to offer advice or to try to dissuade them from the strategy he or she is being advised to implement. These financial and tax planning strategies can in some cases be complicated and susceptible to challenge or unintended consequences. For example, the doctrine of constructive receipt can thwart an author's tax objectives if he or she has not been properly and timely advised—more specifically, under certain circumstance, an author's effort to shift income from him or herself to a corporation for tax purposes may not be recognized by the IRS.

As another example of what could go wrong, working as an employee for a personal services corporation rather than as an independent contractor for a publishing company can render unavailable certain important default protections for authors otherwise available under US copyright law—such as, for example, the statutory right that all individual authors have to revoke a prior grant of rights after 35 years. You don't want to be in the line of fire if an author's strategy later proves to be ineffective or not carefully considered.

STEP 6

Finally, be sure that the capacity in which the author signs the contract is clearly and correctly indicated. If the author is signing on behalf of a personal services company, it should be clear in the signature block that this is the case (see p. 34). Also, be sure to get the correct tax identification number for your reporting purposes. In the case of an author acting in his or her personal capacity, this will be the individual's social security number. In the case of a personal services corporation, this will be an employer identification number.

In sum, don't be afraid to accommodate an author's financial planning strategy. But do know who you're dealing with and make sure your contract reflects this accurately. ■



Steve Gillen is a lawyer and partner in the intellectual property firm of Wood Herron & Evans and has focused his practice on publishing and media matters for 35 years. Gillen is a member of IBPA and a frequent contributor to the *Independent*. He can be reached at sgillen@whe-law.com or 513-707-0470.



Here are some specimen contract provisions (italicized) with some explanatory language.

PREAMBLE

The preamble is the paragraph at the top of the contract where the parties are identified, the date of the agreement is noted, and sometimes the purpose is described. Below is a typical preamble in a book contract:

This Agreement, effective this _____ day of _____, 20____, between [publisher name], a [specify state] corporation, having its principal place of business at [publisher address], (the "Publisher") and [name of entity], a [specify state] [corporation/limited liability company], having its principal place of business at [entity address], (the "Author").

PERSONAL SERVICES COMMITMENT AND PERSONAL INDEMNITY

The personal services commitment and personal indemnity is a provision, generally inserted toward the top of the agreement, but below the recitals and after the language that says "Now Therefore, the parties hereby agree as follows: . . ." It is the language that permits you to contract with one party—a company—and at the same time, look to an individual for personal delivery of services and a personal guarantee of any indemnity obligation:

It is understood and agreed that [author's personal name] is an employee of [name of author's personal services company], that it is within the scope of his duties as an employee to prepare copyrightable works, and that he will personally prepare the manuscript for each Work and will personally perform the other services to be provided by [Author's Company] hereunder. [Author's Name] further agrees to promptly execute any documents reasonably requested by the Publisher to give effect to or memorialize the grant of rights set forth above. It is further understood and agreed that [Author's Name] is and shall be jointly and severally liable with [Author's Company] for the representations, warranties, and indemnities set forth in Section X below. If for any reason [Author's Name] ceases to be employed by [Author's Company] or to prepare the manuscripts or perform the other services described herein before all of the Works are completed and published, this Agreement shall be terminable at the election of the Publisher by notice to the [Author's Company], in which event any amounts theretofore advanced to [Author's Company] shall be promptly refunded to the Publisher notwithstanding any provision to the contrary elsewhere herein.

SIGNATURE BLOCK

The contract will close with a signature block where each party signifies its/his/her assent to the terms of the contract.

In witness whereof, the Author and Publisher have signed this contract on the dates following their signatures.

Author:

By: _____

Signature

Name/Title: _____

Date: _____

Publisher:

By: _____

Signature

Name/Title: _____

Date: _____

The only significant thing to watch here is to be sure that the identification of the party signing for the author matches what is set out in the recitals; i.e., if the author is entering the contract in her personal capacity, that she signs as an individual and provides her personal tax ID number; and that if she is entering the contract through a personal services company, that she signs not in her personal capacity but in her capacity as an authorized representative of the company and provides not her personal tax ID but the employer identification number for her company.