

UNITED STATES TAX COURT

In The Matter Of:)
LEE & WILLIAM STOREY,)
Petitioners,) Docket No. 10230-10
v.)
COMMISSIONER OF INTERNAL)
REVENUE,) BRIEF OF AMICI CURIAE
Respondent.) INTERNATIONAL DOCUMENTARY
ASSOCIATION, FILM INDEPENDENT,
NATIONAL ASSOCIATION OF LATINO
INDEPENDENT PRODUCERS, WOMEN
MAKE MOVIES, NATIONAL ALLIANCE
FOR MEDIA ART AND CULTURE, AND
UNIVERSITY FILM AND VIDEO
ASSOCIATION IN THE INTEREST OF
THE DOCUMENTARY FILM INDUSTRY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to *Erwin v. Commissioner of Internal Revenue*, T.C. Memo 1986-474 and Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* the International Documentary Association, Film Independent, National Association of Latino Independent Producers, Women Make Movies, National Alliance for Media Art and Culture, and University Film and Video Association certify as follows:

The International Documentary Association, Film Independent, National Association of Latino Independent Producers, Women Make Movies, National Alliance for Media Art and Culture, and University Film and Video Association are non-profit membership organizations.

Amici have no parent corporations, and no publicly held corporation owns ten percent or more of any *amici* organization's stock.

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The International Documentary Association, Film Independent, National Association of Latino Independent Producers, Women Make Movies, National Alliance for Media Art and Culture, and University Film and Video Association respectfully submit this memorandum of law, as *amici curiae*.¹ *Amici* urge the court not to categorically deem documentary filmmaking a non-profit business, and to recognize the process and expenses incurred in making documentary films.²

¹ *Amici* wish to acknowledge the invaluable assistance of law students Sara Heum and Flora Rostami in the preparation of this brief.

² This brief was prepared on a pro-bono basis. *Amici* hereby confirm that no party's counsel authored any part of this brief. No party or any other person, other than the *amici curiae*, its

The International Documentary Association (IDA) was founded in 1982 as a non-profit membership organization dedicated to supporting the efforts of non-fiction film and video makers throughout the United States and the world; promoting the documentary form; and expanding opportunities for the production, distribution, and exhibition of documentaries. Over the past twenty-nine years, IDA has served as a forum and voice for documentarians around the world. IDA currently serves over 14,000 members and community users in more than fifty countries.

Film Independent (FIND) is a non-profit organization dedicated to helping independent filmmakers make their films, building the audience for independent film, and increasing diversity in the film industry. Every year, FIND provides its 4,000 members with over 250 hours of film education programming, more than a hundred free preview screenings of the latest independent films, substantial production rental discounts, and fellowship and grant opportunities totaling over \$240,000.

The National Association of Latino Independent Producers (NALIP) is a twelve-year-old media arts service organization dedicated to increasing the quality and quantity of images by and about Latinos. NALIP works to promote the advancement, development, and funding of Latino/Latina film and media arts in

members, personnel and/or counsel, contributed money that was intended to fund the preparation or submission of this brief.

all genres. NALIP is the only national organization committed to supporting both grassroots and community-based producers and media makers, along with publicly funded and industry-based content creators. NALIP has over 1,200 members in the United States, Canada, Puerto Rico, and the Dominican Republic. Its constituency includes writers, producers, directors, executives, representatives, broadcasters and advocates who work in film, television, documentaries and new media.

Women Make Movies (WMM) is a multicultural, multiracial, non-profit media arts organization that facilitates the production, promotion, distribution, and exhibition of independent films and videotapes by and about women. WMM was established in 1972 to address the underrepresentation and misrepresentation of women in the media industry. WMM currently distributes over 500 films created by women filmmakers.

The National Alliance for Media Art and Culture (NAMAC) consists of 225 organizations that serve over 300,000 artists and media professionals nationwide. Members include community-based media production centers and facilities, university-based programs, museums, media presenters and exhibitors, film festivals, distributors, film archives, youth media programs, community access television, and digital arts and online groups. NAMAC's mission is to foster and fortify the culture and

business of the independent media arts. NAMAC believes that all Americans deserve access to create, participate in, and experience art. NAMAC co-authored the Documentary Filmmakers' Statement of Best Practices in Fair Use and has advocated for orphan works reform.

University Film and Video Association (UFVA) is an organization of over 1,000 professionals and institutions involved in the production and study of film, video, and other media arts. UFVA is an international organization where media production and writing meet the history, theory, and criticism of the media. UFVA members are image-makers and artists, teachers and students, archivists and distributors, college departments, libraries and manufacturers.

ARGUMENT

I. DOCUMENTARY FILMMAKING IS OVERWHELMINGLY UNDERTAKEN IN PURSUIT OF PROFIT.

At the conclusion of the hearing for the present case held on March 9, 2011, Judge Kroupa remarked, "I'm also intrigued by the concept of a documentary. By its very nature, a documentary to me means that it's not for profit. You're doing it to educate. You're doing it to expose" ³ The Court's comments present the issue of whether the production of documentary films can be a for-profit business entitling documentarians to business expense deductions pursuant to I.R.C. §162, or whether documentary filmmaking is a non-profit activity, thereby disqualifying documentarians under I.R.C. §183 from deducting their filmmaking expenses.

A judicial pronouncement that documentary filmmakers are not engaged in a profit-making activity would have a chilling effect on the documentary filmmaking industry, as documentarians would no longer be able to claim deductions for their business expenses pursuant to I.R.C. §162. Instead, this honorable Court should recognize that documentary filmmaking is an enterprise overwhelmingly pursued for profit.

³ Trial Tr. vol. 3, 397:1-4 (Mar. 9, 2011).

A. Traditional sources for the definition of documentary film do not define documentary film in terms of profit.

It is of utmost importance that the documentary film industry not be categorically labeled as non-profit. The district court in *Psenicska v. Twentieth Century Fox Film Corp.* quoted the New Oxford American Dictionary to define the word "documentary:"

'[D]ocumentary,' as an adjective, means '(of a movie, a television or radio program, or photography) using pictures or interviews with people involved in real events to provide a factual record or report...;' as a noun... means 'a movie or a television or radio program that provides a factual record or report.'⁴

The Academy of Motion Picture Arts and Sciences⁵ ("The Academy") defines a documentary as, "a theatrically released non-fiction motion picture dealing creatively with cultural, artistic, historical, social, scientific, economic or other subjects."⁶ Patricia Aufderheide, an American University professor in the School of Communication and noted documentary

⁴ 2008 U.S. Dist LEXIS 69214 at 17 (S.D.N.Y. 2008).

⁵ The Academy of Motion Picture Arts and Sciences is a professional honorary organization dedicated to the advancement of the arts and sciences of motion pictures and is best known for their annual Academy Awards ceremony. See *History of the Academy*, The Academy of Motion Picture Arts and Sciences, <http://www.oscars.org/academy/history-organization/history.html> (last visited June 2, 2011).

⁶ *Rule Twelve: Special Rules for the Documentary Awards*, The Academy of Motion Picture Arts and Sciences, <http://www.oscars.org/awards/academyawards/rules/84/rule12.html> (last visited June 2, 2011).

film historian and critic, defines a documentary as a film that "tells a story about real life, with claims to truthfulness."⁷ None of these definitions refer to the profitability of a documentary film. Indeed, documentary films grossed over \$2 billion domestically between 1995 and 2011, producing more gross revenue than certain narrative film genres, including westerns and musicals.⁸

Furthermore, in order for a documentary to be eligible for an Academy Award, The Academy requires that a feature documentary complete at least two commercial theatrical releases, and that a short documentary complete at least one commercial theatrical release.⁹ This speaks directly to the fact that documentary filmmaking, in general, is a commercial and for-profit business.

B. Many documentary film industry figures attest to the fact that documentary filmmaking is generally a for-profit activity.

Robert Kenner is an Academy Award-nominated and Emmy-winning producer, director and writer. Kenner's most recent documentary film, *Food, Inc.*, was nominated for an Academy Award in 2010 and grossed approximately \$4.5 million during its U.S. theatrical release. Kenner states that:

⁷ Patricia Aufderheide, *Documentary Film: A Very Short Introduction 2* (Oxford Univ. Press 2007).

⁸ *Top-Grossing Genres 1995-2011*, The Numbers, <http://www.the-numbers.com/market/Genres/> (last visited June 3, 2011).

⁹ *Rule Twelve*, *supra* note 6.

For over 25 years, I've been making documentary films and it never occurred to me that this was not a profit-making business. I've been making a good living doing it since I entered the field. I've been able to put my kids through college on the money I've made, and am proud to say they both have decided to enter this profession. My daughter graduated magna cum laude from Berkeley, and rather than go into law school, decided that documentary films were for her. My son was working in finance making a six-figure salary, and decided that he, too, wanted to enter this field.¹⁰

Since entering the work force, Academy-Award nominated, Sundance Grand Jury Prize-winning, and Emmy Award-winning producer and director Liz Garbus has dedicated her entire career to documentary filmmaking. In 1998 she and partner Rory Kennedy co-founded Moxie Firecracker Films and have sustained the company solely through the production and distribution of documentary films. Garbus says:

I consider myself a professional in the entertainment industry. I have been making documentaries for 15 years and have achieved financial stability and success through this career. My husband and I are both in this business, and neither of us regards it as a not-for-profit enterprise. We have two children in private schools, we take vacations and we live in a nice house in a great neighborhood. We are deeply committed to social change and inspiring such discourse through filmmaking but we do not regard this as a charity. Indeed it is our "day job" through which we make a comfortable living and yes, our films turn a profit.¹¹

¹⁰ Letter from Robert Kenner to author (May 26, 2011).

¹¹ Letter from Liz Garbus, Moxie Firecracker Films, to author (June 1, 2011).

Annie Roney is founder and Managing Director of ro*co Films International, a leading international distributor of documentary films that also serves as a pipeline for Oprah Winfrey's Documentary Club for her OWN television network. In asserting that documentary filmmaking is, in fact, a business, Roney states that:

Our for-profit company, ro*co Films International LLC, exists entirely from creating profit for documentary films. In fact, our business handles no other kind of film. Furthermore, it should be noted that there are five employees at ro*co, and we earn our livings on just a small portion (just 25-30%) of the profits we create for our clients from international and educational sales of their films (and we've done so since 2000).¹²

Meyer Shwarzstein, President of Brainstorm Media, also affirms the great profit that documentary films produce for his company. Founded in 1995, Brainstorm Media is a sales agent for a variety of independent movies and is one of the largest independent distributors of movies for video-on-demand (VOD) and new media in the United States. Shwarzstein states that:

Our company, Brainstorm Media, has handled over one thousand movies in the United States. During the last several years, we've focused on the growing video-on-demand business. After having released dozens of movies on VOD, the best-performing and most profitable film we've taken out was a documentary, earning hundreds of thousands of dollars for the filmmaker.¹³

¹² Letter from Annie Roney, Managing Director, ro*co Films, to author (May 12, 2011).

¹³ Letter from Meyer Shwarzstein, President, Brainstorm Media, to author (May 26, 2011).

It is clear that many individuals, from filmmakers to producers to distributors, rely exclusively on documentary filmmaking as their sole source of income. This demonstrates that documentary filmmaking can be a profitable enterprise.

C. The goals of educating audiences and making a profit are not mutually exclusive.

The fact that documentary films are generally of educational or social importance does not negate their capacity to serve as profitable ventures. In fact, there are many for-profit industries that "educate" and "expose." Two such industries are for-profit colleges and the news industry.

For-profit higher education institutions educate students while reaping profits. For example, ITT Educational, which provides undergraduate and graduate degree programs,¹⁴ made nearly \$1.6 billion in gross profit in 2010.¹⁵ Apollo Group, which owns the University of Phoenix, received \$2.8 billion in gross profit in 2010.¹⁶

In addition, newspapers and television news programs, whose sole mission is to educate and expose, cannot exist without

¹⁴ *Investor Relations Overview*, ITT Educational Services, <http://www.ittesi.com/phoenix.zhtml?c=94519&p=irol-IRHome> (last visited June 3, 2011).

¹⁵ *ITT Educational Services Income Statement*, YCharts, http://ycharts.com/financials/ESI/annual_income_statement (last visited June 7, 2011).

¹⁶ *Apollo Group Income Statement*, YCharts, http://ycharts.com/financials/APOL/annual_income_statement (last visited June 7, 2011).

being profitable. This is evidenced by the numerous newspapers which have had to shut down, cut staff, or file for bankruptcy due to declining advertiser revenue.¹⁷

The highly popular news program *60 Minutes* specializes in exposés on important public concerns while generating substantial revenue. The program averaged 11.7 million viewers per week in 2010 and is considered "the revenue engine of CBS News."¹⁸ These are just a few examples of the many enterprises that exist purely to "educate" and "expose" while generating profit.

In documentary filmmaking, there is no distinction between raising awareness of issues and generating profit from entertaining audiences. In fact, in order to best educate and expose, films must be entertaining to attract large audiences. In recent years, documentaries such as *March of the Penguins*, *Earth*, and *Oceans*, which exclusively address environmental topics, have earned millions of dollars during their domestic

¹⁷ See Preethi Dumpala, *The Year the Newspaper Died*, Business Insider, July 4, 2009, <http://www.businessinsider.com/the-death-of-the-american-newspaper-2009-7> (discussing how in the first half of 2009 105 newspapers went out of business, 100,000 newspaper jobs were lost, and print ad sales dropped by 30%).

¹⁸ Emily Guskin, Tom Rosenstiel & Paul Moore, *Network News: Durability & Decline*, The State of the News Media 2011, <http://stateofthemedias.org/2011/network-essay/> (last visited June 3, 2011).

theatrical releases.¹⁹ The commercial success of films like *Fahrenheit 9/11* and *Super Size Me* has changed the public's perception of documentaries in terms of their profitability.²⁰ Indeed, the proven commercial success of documentary films has encouraged the financing of high-profile documentary projects such as *An Inconvenient Truth*.²¹

Academy Award-winner Rob Epstein reiterates that the twin goals of raising awareness and creating profit are complementary to each other. Epstein currently serves as the Chair of the Board of Governors of the Academy of Motion Picture Arts and Sciences Documentary Branch. He writes:

Most of my documentary films have focused on issues intended to bring about change -- to educate and expose injustices in our world, and to entertain, delight, inspire and inform, all at the same time. For that is the beauty of documentary. Those same films all made healthy profits for me and my partners, had long lives in theaters, on television and in the DVD market, and continue to serve both masters well -- generating continued profit for us, many years after initial release, and serving as historical documents of movements in our collective history which can be used to educate and inspire new generations. I have never experienced any

¹⁹ *Documentary: Total Grosses*, Box Office Mojo, <http://www.boxofficemojo.com/genres/chart/?view=main&id=documentary.htm&p=.htm> (last visited June 3, 2011).

²⁰ See Drew Greaves, *The Influence of Documentaries Over Time*, Weekend, Oct. 6, 2010, <http://www.idsnews.com/news/weekend/story.aspx?id=77471>.

²¹ George T. Fournier, *Secondhand Showings*, The Harvard Crimson, Mar. 22, 2011, <http://www.thecrimson.com/article/2011/3/22/nbsp-films-movie-film/> (quoting Associate Professor Art Simon of Montclair State University).

conflict between these two goals. And I would not have been able to sustain a professional career in this industry for all these years, if it were any different.²²

Data on documentary film earnings demonstrates the capacity of films in this genre to generate considerable revenue. Box Office Mojo is an online movie publication and box office reporting service that tracks the aggregate total earnings from paying customers for every film. According to its website, the top ten highest grossing documentary films each generated between \$14.5 million and \$119 million from U.S. and Canada theatrical releases alone.²³ Further, domestic box office receipts represent only a little over 20% of the total revenue earned from documentaries.²⁴ It is estimated that for every \$1 generated by a documentary film in box office sales, an additional \$0.63 will be made from DVD and Blu-ray Disc purchases, and \$0.80 will be made on video rentals from companies such as Netflix.²⁵

A new documentary film by Morgan Spurlock of *Super Size Me* fame exemplifies the very idea of a profit-seeking documentary film that addresses important societal issues. Spurlock's *Pom*

²² Letter from Rob Epstein, Chair of the Board of Governors of the Academy of Motion Picture Arts and Sciences Documentary Branch, to author (Apr. 26, 2011).

²³ *Documentary: Total Grosses*, *supra* note 19.

²⁴ Data provided by Nash Information Services, LLC (www.nashinfoservices.com).

²⁵ *Id.*

Wonderful Presents: The Greatest Movie Ever Sold follows the director as he approaches brands, and advertising and marketing experts, to obtain financing for his film through product placement. Spurlock has said that one of the film's goals was to "become a documentary blockbuster, or 'docbuster.'"²⁶

In fact, in order for Spurlock to receive a \$1 million investment from his funder Pom Wonderful for its participation in the film, he contractually stipulated that "the movie must gross \$10 million at the box office (high for a documentary), sell 500,000 DVDs and downloads, and generate 600 million 'media impressions.'"²⁷ However, Spurlock also stated that he wants the film to explore "the impact of marketing and advertising on society."²⁸ Thus, the film simultaneously explores the overlap and relationship between the dual goals of making money and providing social commentary.

Academy Award nominated documentary filmmaker Eddie Schmidt further affirms the notion that educational intent and profit are not mutually exclusive targets. Since 2009, Schmidt has served as President of the Board of Directors of the

²⁶ Kelly Anderson, *Hot Docs Preview: Birth of a Salesman*, Realscreen, Apr. 28, 2011, <http://realscreen.com/2011/04/28/hot-docs-preview-birth-of-a-salesman/>.

²⁷ Stephen Holden, *The Hidden Persuaders Come Out in Full Force*, N.Y. Times, Apr. 21, 2011, <http://movies.nytimes.com/2011/04/22/movies/pom-wonderful-presents-greatest-movie-ever-sold-review.html>.

²⁸ Anderson, *supra* note 26.

International Documentary Association (IDA), and is best known for producing the documentaries *Twist of Faith* and *This Film is Not Yet Rated*. Schmidt states that:

The fact that documentaries are generally made to appeal to hearts and minds rather than fists and loins does not diminish the intent of their creators - which is to say, the very same intent as creators of any kind of mass entertainment: reaching a maximum number of potential eyeballs. Paying customers, in other words.²⁹

Academy Award-nominated documentary filmmaker Jeffrey Blitz also believes that an educational purpose and a profit motive can easily co-exist in filmmaking. Blitz self-funded, directed, and co-produced the documentary *Spellbound*, which grossed nearly \$6,000,000 from its domestic theatrical release.³⁰ Blitz writes:

Documentary films are as varied in approach, in audience, and in purpose as TV programs or non-fiction books. This is not to say that such films never have a cultural or educational purpose; some do, some do not. The unifying thread isn't educational purpose but rather that the storytelling is made up from a conveyance of the real world. As with any good book of history or culture, or as with many reality TV shows, such purpose is not at odds with a vision of these projects as for-profit.³¹

Thus, it is universally understood throughout the documentary filmmaking world, and the entertainment industry as a whole,

²⁹ Letter from Eddie Schmidt, President of the Board of Directors, International Documentary Association, to author (Apr. 26, 2011).

³⁰ *Documentary: Total Grosses*, *supra* note 19.

³¹ Letter from Jeffrey Blitz to author (Apr. 22, 2011).

that films can be socially important and educational, as well as entertaining and profitable.

II. THE PRODUCTION OF A DOCUMENTARY FILM INVOLVES A GREAT AMOUNT OF TIME AND MONEY IN THE EARLY PHASES OF DEVELOPMENT PRIOR TO THE GENERATION OF ANY REVENUE FROM THE FILM.

Another important aspect of documentary filmmaking that was mentioned by the Court is the amount of work and time filmmakers spend creating a film before ever receiving any revenue. As Judge Kroupa noted, "in other contexts, the Court has found that there is a formation stage and has allowed expenses in the beginning years even though there was no income."³² *Amici* believe that the Court should recognize that the documentary filmmaking process involves expenses in the formation stages of their films that are critical to the production of every documentary film. It is therefore important to understand what the formation stage of documentary filmmaking entails.

A. The process of creating a documentary film involves numerous stages.

All filmmaking requires multiple stages, including a development period, a pre-production period, a production period, and a post-production period. The first stage involves securing the material that is the basis for the film.³³ The next stage is development, where, with respect to a documentary, the documentarian decides how to approach the secured material.³⁴ In pre-production, the documentarian prepares for filming by hiring

³² Trial Tr. vol. 3, 396:22-25 (Mar. 9, 2011).

³³ *Id.* at 285: 11-16.

³⁴ *Id.* at 285: 17-21.

the crew; obtaining insurance; and determining the budget, schedule, subjects, and locations.³⁵

In the documentary film process, one shoots original footage, such as interviews and on-location cinema verité, during the production stage.³⁶ However, for a documentarian, the post-production stage is the largest phase. During post-production, the documentarian must tackle the task of pulling together footage from various sources, such as archive film footage, historical material, and original interviews, to create a single cohesive film.³⁷

These stages generally coalesce as the documentarian further delves into the filmmaking process. Unlike a scripted film where there is a blueprint of the script that an editor follows, in a documentary, a documentarian often finds their structure in the material.³⁸

The rough cut of the documentary, which is made during the post-production stage, is "really the first cut of a very long series of cuts as you reshape, reorganize the material and try and find the best way to tell the story."³⁹ As a result, the production period overlaps with the post-production period in a series of flights of shooting and editing.⁴⁰ Therefore, the documentary continues to be created well into the post-production phase.

³⁵ *Id.* at 285: 22-25.

³⁶ *Id.* 286: 2-3.

³⁷ *Id.* 286: 17-25; *id.* at 286: 1-6.

³⁸ *Id.* 287: 8-11.

³⁹ *Id.* 286: 15-22.

⁴⁰ *Id.* 286: 8-15.

B. In most cases, a documentarian must complete her film before she can secure a buyer or obtain any form of financial support.

A documentarian incurs numerous expenses during all stages of the documentary filmmaking process. IDA President Eddie provides an overview of the various costs associated with documentary filmmaking.⁴¹ Among the expenses documentary filmmakers may accrue are:

- Purchasing options on important components such as source material and life stories;
- Research materials such as books, videos, and archival footage;
- Travel expenses in connection with meeting the people who will participate in the film;
- Shooting test footage of possible subjects in several different communities before committing to follow one or more of their stories;
- Travel expenses in connection with meeting potential funders, investors, and distributors;
- Equipment such as laptops, cameras, and lights;
- Legal expenses, such as incorporation costs;
- Crew for the film;
- Basic office expenses necessary to do business, such as office rent, phone, internet, fax, and shipping; and
- Travel expenses in connection with promoting the film at film festivals.⁴²

In order to pay for these expenses, a documentarian must obtain financial support either through commission, or as is far

⁴¹ Schmidt, *supra* note 29.

⁴² *Id.*

more common, through independent means. IDA President Eddie Schmidt explains that media outlets open to independent producers generally prefer "to wait until a film is brought to fruition on the screen, rather than take the greater risk of funding it at the idea stage."⁴³ Accordingly, documentarians often must independently develop their films from beginning to end.

Academy-award winning filmmaker Rob Epstein, who has worked in the documentary film industry for over 35 years, describes the long life span of a documentary film as "an often grueling cycle of raising basic finances, leading to the actual production and filming of the story, often over multiple years of real life playing out."⁴⁴ Epstein continues to explain a documentarian's laboring tasks:

From there, the filmmaker may have to do painstaking archival research, secure music deals, court industry attention and finish post production and editing before being able to secure a great premiere -- which in many cases is the first significant opportunity a film has to attract potential buyers and distributors and start the revenue generating process.⁴⁵

Thus, a documentary filmmaker usually does not sell her documentary until the finished product is delivered, or until her project evolves to an advanced state that resembles a completed film.⁴⁶ In almost every case, documentary filmmakers

⁴³ *Id.*

⁴⁴ Epstein, *supra* note 22.

⁴⁵ *Id.*

⁴⁶ Schmidt, *supra* note 29.

have to expend a significant amount of money and time to complete their project before they ever recoup their expenses.⁴⁷

C. Notable documentarians attest to the fact that it can take many years to complete a film, and even more to generate profit.

Eddie Schmidt states:

Documentaries may require years of hard work and effort (both creative and physical) to get to their end goal of successful distribution and exhibition. Again, however, this is no different than narrative films like 2011's multiple Oscar-winning *The King's Speech*, which required the expended efforts of writers and producers over the course of decades to bring it to the screen.⁴⁸

The making of the successful documentary *Exit through the Gift Shop* provides an example of the years of work filmmakers invest in a film before it produces profit. *Exit through the Gift Shop* was nominated for a 2011 Academy Award in the "Best Documentary Feature" category. Additionally, the film won 16 awards, including "Best Documentary" at the 2011 Film Independent Spirit Awards.

The film's producer, Jaimie D'Cruz, explains that the film utilized archived footage filmed independently of the production from 1996 to 2000.⁴⁹ The filmmakers filmed a present-tense narrative between February 2008 and June 2008.⁵⁰ The filmmakers reviewed and edited the archived material between April 2008 and

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Letter from Jaimie D'Cruz to author (Apr. 23, 2011).

⁵⁰ *Id.*

November 2009, and filmed interviews with contributors between April 2008 and May 2009.⁵¹ D'Cruz writes, "*Exit Through the Gift Shop* was independently financed from the outset in February 2008. No revenue was received into the production until the release of the film in March/April 2010."⁵²

Similarly, Jeffrey Blitz, director and co-producer of the Academy Award-nominated documentary *Spellbound*, spent considerable time and money on his film before receiving revenue from it. Blitz and his co-producer self-funded the documentary because there was no obvious market for *Spellbound*.⁵³ They filmed it in 1999 and spent years working on it.⁵⁴ Blitz writes:

By 2002, we had a finished version of the film and began taking it around to film festivals hoping to sell it there to a buyer. Much of the work and equipment had been donated. Regardless, we racked up over \$100,000 in credit card debt.⁵⁵

In March 2002 the *Spellbound* filmmakers rejected an offer by HBO to buy the film because the deal did not include a theatrical release for the movie.⁵⁶ Instead, six months later, the filmmakers found a theatrical distributor to release the film in a single theater in New York in 2003.⁵⁷ The film proved to be a hit, ultimately grossing nearly \$6,000,000 during its U.S. and Canada theatrical release, and taking in additional

⁵¹ *Id.*

⁵² *Id.*

⁵³ Blitz, *supra* note 31.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

monies through the TV, DVD, and international markets.⁵⁸

Spellbound now ranks as one of the top grossing non-music documentaries of all time.⁵⁹

Blitz's experience reflects the great risk documentarians take on to make their films. It is also reflective of the years of labor documentary filmmakers generally pour into their films in order to achieve commercial success.

The films referenced thus far are not unusual samples. The law firm for *amici* provided counsel on eight documentaries that were screened at the Sundance Film Festival in January 2011. To see how representative the above filmmaker stories are, it is helpful to look at the history of these eight films, which were selected for the festival based on their quality and not for any other reason. All of these films were made in the anticipation that one day they would earn back their costs and some profit.

Each of the eight documentaries were made for the purpose of informing the public about an issue; four concerned social issues and four concerned historical issues. Only three of the documentaries were commissioned; that is to say, that only three of the filmmakers received production money from a broadcast or cable entity in an amount sufficient to pay for the costs of production and provide a modicum of income to the filmmaker. The remaining five documentaries were paid for by family and friends who believed that the subject was important enough to help finance the movie. All five of the non-commissioned films eventually sold, but the first monies from those sales have

⁵⁸ *Id.*

⁵⁹ *Id.*

still not flowed to the filmmaker as of this writing. The longest production cycles were on two films, both entirely paid for by the filmmaker and the filmmaker's family and friends. One began production six years before Sundance; the other began production seven years before Sundance.

In summary, many years may elapse from a documentary film's inception to its conclusion. Filmmakers often have to finance and make their films in order to sell them and receive income. Thus, it is common for a long period of time to transpire before a filmmaker recoups his or her expenses. It is therefore imperative that the Court recognize that documentary filmmakers incur critical expenses during the formation stages of their documentaries and before their films produce income.

CONCLUSION

A judicial affirmation that categorically labels documentary filmmaking a non-profit activity could have a devastating impact on documentary filmmakers. Therefore, *amici* respectfully urge the Court, in rendering its ruling, to recognize that documentary filmmaking is overwhelmingly undertaken in pursuit of profit.

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Amici also urge the Court to recognize the significant time and expenses the vast majority of documentary filmmakers incur long before their films generate income.

Respectfully submitted,

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June 8, 2011

Counsel for Amici Curiae

UNITED STATES TAX COURT

In The Matter Of:)
)
) Docket No. 10230-10
)
LEE & WILLIAM STOREY,)
Petitioners,)
) BRIEF OF AMICI CURIAE
) INTERNATIONAL DOCUMENTARY
) ASSOCIATION, FILM INDEPENDENT,
v.) NATIONAL ASSOCIATION OF LATINO
) INDEPENDENT PRODUCERS, WOMEN
COMMISSIONER OF INTERNAL)
REVENUE,) MAKE MOVIES, NATIONAL ALLIANCE
Respondent.) FOR MEDIA ART AND CULTURE, AND
) UNIVERSITY FILM AND VIDEO
) ASSOCIATION IN THE INTEREST OF
) THE DOCUMENTARY FILM INDUSTRY
)

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing BRIEF OF AMICI CURIAE INTERNATIONAL DOCUMENTARY ASSOCIATION, FILM INDEPENDENT, NATIONAL ASSOCIATION OF LATINO INDEPENDENT PRODUCERS, WOMEN MAKE MOVIES, NATIONAL ALLIANCE FOR MEDIA ART AND CULTURE, AND UNIVERSITY FILM AND VIDEO ASSOCIATION IN THE INTEREST OF THE DOCUMENTARY FILM INDUSTRY was served on counsel for Respondent and counsel for Petitioners by mailing the same on June 8, 2011 in a postage-paid wrapper addressed as follows:

Chris J. Sheldon
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Dated: June 8, 2011

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