

## Make a (Nonprofit) Film

By Arthur M. Rieman, Esq.

As way of furthering their careers, many actors decide to produce a short or feature-length film. As anyone who has tried knows, one of the most daunting tasks facing a would-be independent film maker is raising the money. Potential investors know there is a slim-to-none chance they will ever see their money again.

If you're open to it, however, an alternative does exist that guarantees your supporters at least a partial "return" on their "investment." What is that alternative? Making your film through a nonprofit organization.

Most actors do not realize that independent films can be produced using a nonprofit, but they should. As most of us know, the vast majority of theatre companies are nonprofits, and in many critical ways indie film is not that different from theatre. The Internal Revenue Service recognizes that, like theatre companies, independent film production companies that are organized to produce or present "dramatic, musical, motion picture, and other performances," can qualify for tax exempt – or, more colloquially, nonprofit status. (The IRS is the arbiter of what organizations are tax exempt.)

What exactly is a nonprofit? It is an entity, usually a corporation, created in order to fulfill an educational or other charitable purpose as defined under Section 501(c)(3) of the Internal Revenue Code. The arts in general, and film making in particular, are classified by the IRS as educational.

Once the corporation is created, it must apply for and obtain tax-exempt status from the IRS before it is considered a charitable, or 501(c)(3), organization. The application must detail the activities and purposes of the organization. The critical criterion for exemption, which must be described in the application, is that the organization not be "organized or operated" for private benefit or gain. This

distinction between a public versus private purpose is the fundamental difference between a nonprofit and a for profit business.

A nonprofit can be set up to produce one film or many. It must have a board of directors that legally controls the entity. At least some of the directors – ideally a majority – must be financially and familially independent of the film makers. In essence, nonprofits are intended to prevent private benefit. There are additional formalities you may want to discuss with a competent attorney.

Nonprofits can be like magic for your supporters. Their appeal is that contributions – as opposed to investments – are fully tax-deductible as charitable donations by the contributors. For middle income contributors – especially those living in high taxing states such as California and New York – the charitable deduction write-off may exceed 40 percent or more of their contribution. For example, after taxes a \$10,000 contribution to your film may cost the donor just \$6,000 after taxes.

Donors of film stock and other equipment and supplies also are entitled to a deduction worth the fair market value of the items donated. Unfortunately, donated time and services is not deductible yet, though legislation recently introduced in Congress could change that.

There is a catch, best explain by another analogy to theatre: How many small theatre companies do you know that make

profits on their productions? The likelihood is: not very many. Likewise, how many indie films have made money for their producers or backers?

The catch is that a nonprofit has no owners. Thus, you are not likely to get rich should your indie film become a hit – but, realistically, would you expect otherwise anyway? Often, the film itself, as well as any profits it generates, will be owned by the nonprofit. By law, those profits may not be distributed to the film makers as if they were profit participants.

Like all good catches, there are exceptions. People who lend intellectual property, such as a screenplay or story concept, to a nonprofit production can receive royalty payments or license fee. In some cases, a nonprofit may even be able to support an independent film maker's production and allow him or her to retain full or partial ownership of the film. This requires that very careful arrangements be in place to avoid self-dealing and conflicts of interest.

Producing an independent film through a nonprofit production company may not be for everyone. For many, however, the advantages will outweigh disadvantages. In particular, if your supporters can benefit from the tax deduction their contribution to your movie provides, it may make the difference in acquiring the necessary funds to get your film made. If this is so, and if your primary goal is to get your film made and you are less concerned with the back-end deal, then using a nonprofit to produce your film may be just the ticket.

*Arthur Rieman is managing attorney of The Law Firm for Non-Profits, P.C. This article first appeared in Back Stage East and Back Stage West, November 17-23, 2005. © Copyright 2005 by Arthur Rieman. All Rights Reserved.*

**This article does not, and is not intended to, constitute legal advice, does not create an attorney-client relationship, nor does it substitute for obtaining legal advice.**

The Law Firm for Non-Profits, P.C. exclusively advises nonprofit organizations and their boards and donors on legal matters that grow out of, and are often inherent in, the conduct of their activities. We counsel nonprofit executives, directors and their professional advisors on such matters as: changes in organization structural and governing documents; avoiding and ameliorating conflicts of interest and self-dealing; mergers, acquisitions and conversions; commercial activity; formation and obtain tax exemption; executive, contractor and board member compensation; commercial activity, lobbying and political activity; dissolution; director liability and fiduciary duty; and funder and sponsor relationships, among others.