MUSIC LICENSING FOR THE BROADWAY THEATRE

By:

Todd Brabec

Jeff Brabec

Broadway and the Road, a 2 billion dollar business in the United States, can generate fortunes for some and multi-million dollar losses for others. Each year, Broadway produces many new musicals in addition to revivals of musicals from the past. Most of these shows never recoup their financial investment but when a WICKED, KINKY BOOTS, JERSEY BOYS, PHANTOM OF THE OPERA, LION KING or MAMMA MIA appears, the financial returns can be staggering. And for the composers, lyricists, songwriters and music publishers involved, a lifetime of earnings is many times guaranteed.

This article will discuss the many different types of music licensing deals, contracts and practices that govern music in the theatre.

TYPES OF BROADWAY MUSICALS

Musicals can take many forms with the particular form many times dictating the type of contract and royalty structure received by composers, lyricists, songwriters and music publishers. The most common types of musicals are a new show with original music and lyrics (WICKED, SOUTH PACIFIC, KINKY BOOTS, PHANTOM OF THE OPERA), a "catalogue musical" which uses pre-existing songs and sometimes master recordings (MOTOWN the MUSICAL, MAMMA MIA , ROCK OF AGES, JERSEY BOYS) and shows that combine new compositions with pre-existing works. In many cases, an additional royalty participant will also be involved in cases where the show is adapted from a work in another media (books, feature films, television programs, etc.).

WEEKLY COSTS OF A BROADWAY MUSICAL

The starting point for most royalty calculations, whether it’s a DGA Approved Production Contract show or a Royalty Pool situation, is the weekly operating costs of the musical. These costs are many and determine whether the show is making money, losing money or breaking even on a weekly basis. Most Broadway musicals’ weekly operating costs are in the area of $400,000-$700,000 but some shows are known to exceed $1,000,000 in a week.

Some of the more important continuing costs are the theater's percentage of receipts, the salaries of cast and stage crew, the producer's fee, newspaper, radio, TV and Internet advertising and publicity, press agents, legal fees, insurance, payroll services, office operating costs, musicians, instrument rental, accounting and royalties (book writer, composer, lyricist, choreographer, director, etc.) among others.

It is important to note also that there is a huge amount of money expended prior to the show's "opening night" and first week's operating costs. Those are the figures involved when you hear that a musical costs 10 to 20 million dollars in investors’ money just to get the show to the Broadway opening. This is the total amount that investors need to recoup prior to the musical returning a profit. These costs include any option fees paid (book writer, lyricist, composer) scenery, props, costumes, sound, creative fees (lighting, sound, costume and scenic designers, musical supervisor, dance music arranger, orchestrator, choreographer, director, etc.), production fees (general manager, casting directors, production managers, accounting, legal, etc.), rehearsal salaries and fees, theatre rental, hauling and storage and general and administrative costs (executive producer and production consultant fees, office operating costs, payroll service, insurance, etc.). In some cases, the theatre itself has to be reconstructed which can lead to additional costs over and above those related directly to the musical.

MUSIC LICENSING AGREEMENTS

There are three basic contracts/license arrangements that cover most situations on Broadway. They are (1) the Dramatists Guild of America (DGA) Approved Production Contract (APC), (2) Royalty Pool arrangements and (3) Fixed Dollar royalty shows. Variations of these are found in practically all Broadway productions from original shows, to revivals to "catalogue musicals".

1. DGA /APC:

The Dramatists Guild of America is the primary "professional organization which advances the interests of playwrights, composers, lyricists and librettists for the stage". As part of its role, the DGA provides model contracts for all levels of production (Broadway, the road, amateur, etc.). These contracts are quite comprehensive and are designed to make sure creators receive adequate and fair compensation as well as significant control over their works. They cover every important area including advance payments, option periods, copyright ownership, royalty adjustments, production rights and subsidiary rights, among others.

The APC contract deals with what happens to productions before, during and after they are produced. When a Producer becomes interested in a property, he or she will acquire an option to produce the play from the book writer, composer and lyricist. This option provides exclusive rights to produce the play as well as the time frame within which to do so. The APC requires certain minimum payments prior to the actual Broadway opening. The minimum option payments are $18,000 total for the Author (composer, lyricist and book writer) for the first year, $9,000 total for the 2nd option year and $900 total per month for the 3rd year.

For the first 12 out of town performance weeks prior to the Broadway opening, the composer, lyricist and book writer are guaranteed a total of $4,500 for each full performance week. Commencing with the 13th week, the three creative participants receive 4.5% of the gross weekly box office (GWBO) until such time as all production costs are recouped(again, most Broadway shows never recoup their full investment).

Once the show recoups its entire investment (normally a figure of 110% of the total), the 4.5% figure is increased to 6% of the Gross Box Office Receipts.

There are some additional royalty clauses including how the initial writer guarantees are treated as well as the possibility of additional payments to the writers based on the amount of capitalization of the show. Keep in mind also that the DGA contract is a model contract and not mandatory although the provisions are followed by many. Also, depending on the stature of the writer, "everything is negotiable".

A good example of how the DGA APC formula works is as follows: A new show opens on Broadway and is a smash hit and has weekly box office grosses of 1.5 million dollars. The composer and lyricist would receive 3% of this total (2/3 of the 4.5 % royalty figure) prior to full recoupment and 4% of the total (2/3 of the 6% royalty figure) once the show finally recoups its total investment. In this example, the total weekly composer and lyricist pre-recoupment dollar figure would be $45,000 with the weekly post recoupment number at $60,000(less some minor deductions).

1. Royalty Pools:

The most common type of formula being used on Broadway today is the "Royalty Pool" arrangement whereby all royalty participants (for example, music and lyric writers, book writer, director, choreographer, etc.) share in an agreed upon percentage of the weekly operating profits of the musical with certain guaranteed minimum per-point royalties. The total amount of money in the royalty pool is based on a show's operating profits, which is the difference between the gross weekly box office receipts and the actual weekly running expenses of the show.

For example, a show grossing 1 million dollars in weekly box office receipts with operating costs of $600,000 would have operating profits of $400,000. If the royalty pool percentage for this show was 35%, the royalty participants would receive a total of $140,000 (35% of $400,000) with the investors receiving $240,000 (65% of $400,000).

Once the royalty pool % number is known, all royalty participants are assigned points in the fund and distributions are made based on the number of points each participant has. If there were a total of 20 points and the composer and lyricist had 4 each with the director and author having 5 each and the choreographer 2, the royalty split on $140,000 would be $28,000 each to the composer and lyricist, $35,000 each to the director and the author and $14,000 to the choreographer.

In addition, there is a minimum royalty that must be paid to all royalty participants if the show is not running a weekly profit. This royalty is based on a set dollar value for each point that a participant has in the pool. If the minimum per point value was $500, each party would multiply their points by $500 and that would be their respective royalty for that week. These calculations are usually made on a monthly basis. Finally, the royalty pool percentage can be increased once a show achieves 100-110% full investor recoupment of total capitalization. For example, it can go from a 35% pool to a 40% pool.

1. Fixed Dollar Shows/Combination with Royalty Pool:

In situations where the Broadway show is using pre-existing songs, the producer sometimes may try to negotiate a specified weekly dollar payment (e.g. $600 per song per week). Under such a plan, the Producer does not have to deal with a percentage of box office receipts formula or a royalty pool. Whether the show is a hit or a flop, the figure remains the same. These payments are normally based on an eight performance week and are reduced proportionally if there are less than eight.

In the case of so called "Catalogue Musicals", many times two formulas will be used. Well known songs and songs integral to the story may be paid on a Royalty Pool basis or a percentage of box office receipts calculation (DGA APC) whereas other songs in the show receive Fixed Dollar weekly amounts. Obviously, this is an area for negotiation as it can have a significant effect on the amount of royalties a music publisher and songwriter receives especially if the show is a hit

Subsidiary Rights/Producer Vesting:

It is important to remember that the Author (book writer, composer and lyricist) owns and controls the play and has the right to exploit the work in other media or in other ways, apart from First Class live stage performances, including audio visual productions(motion pictures, television, soundtrack albums), commercial use products (toys, games, clothes), stock, amateur and ancillary performances and performances in other territories as well as remakes, prequels, sequels and spinoffs after the expiration of the Producer's right to produce the play in the territory.

When a Producer has presented the show within a specified territory for a specific number of First Class Performances (a combination of out of town, previews, opening and regular performances), the Producer becomes “Vested” in subsidiary rights and becomes entitled to certain decision making, consultation, financial participation and permission rights with respect to the disposition of Subsidiary Rights in the territory and in some cases, the world. The "Vesting" concept recognizes the contribution that a Producer's successful production has made to the value of other rights in the play.

Grand Rights Song License Agreement:

When a Producer wants to use a pre-existing composition in a musical, the negotiated agreement between the copyright owner (usually the music publisher) and the Producer is referred to as a Grand Rights License Agreement. This 8-10 page agreement grants the live stage rights (grand and dramatic) to the Producer for a specific Broadway or Off-Broadway production. The publisher grants an "exclusive option" to present an initial First Class (or Second Class) production in the United States and Canada within a specified period of time with advances many times paid if option periods are involved. If the Producer presents the required number of public theatrical performances, Producer will have "Vested" and will have the right to license additional productions throughout the territory.

The royalty structure for the pre-existing composition can either be a fixed dollar amount per week, a royalty pool arrangement with a minimum weekly guarantee or a Gross Box Office Receipts formula pursuant to the Dramatists Guild APC contract. The Producer will also negotiate a Subsidiary Rights clause with specified fees and royalties if the production is licensed for presentation in motion pictures, radio, television, cast albums or any other audio visual format. The Producer also has the right to arrange the composition provided it does not alter the fundamental character of the composition. Warranties and dispute resolution procedures are also set forth in the agreement.

1. Development Deals / Use of Pre-Existing Songs:

Since it often takes years to develop a musical for presentation as a first run commercial production, there will be a development period provided for in the agreements for any pre-existing songs that a producer wants to use. For example, an agreement might read that the producer will have two (2) years to have the musical open on Broadway or other first run venue. During this period, the theatrical use of the compositions will be many times exclusive to the producer for live theatrical use and there will be a payment made to secure these rights (sometimes in the form of an advance, recoupable from future royalties).

Since you never know how long it is going to take to fully develop a theatrical musical to say nothing of securing the necessary financing, the producer usually has an option to extend the development period for an additional period of time (one year, two years, etc.); again with payment of an additional advance to the composers and lyricists (or music publisher, if applicable).

It should also be noted that, depending on the amount of money being paid for the commitment to be able to use the composition or compositions in the “to be developed musical,” the rights may or may not be exclusive since exclusivity ties up the composition for use in this area for a period of time with no guarantee that the show will actually be produced. Thus, the money being paid can be a very important issue when “exclusivity” as opposed to “the right to use to composition” enters into the negotiations and final terms of an agreement in this area.

7. Competitive Use Restrictions on Existing Songs:

If the musical intends to utilize a number of existing songs from a particular writer’s catalogue, there may be a provision that allows the writer or the writer’s music publisher to license the dramatic musical rights to one composition or a very limited number of compositions to another stage musical during the development period. This type of provision, however, is purely negotiable; once again depending upon the bargaining power of the respective parties, the payments being made and the time periods involved.

ADDITIONAL SOURCES OF INCOME

In addition to the composer/lyricist provisions for theatrical performances of a Broadway musical (e.g., 3% of the pre-recoupment adjusted gross weekly box office receipts and 4% following recoupment of 110% of production costs or, in the alternative, a royalty pool based on a percentage of the weekly operating profits of the show), there are a number of other money related items contained in the agreement that the writer signs with the producer.

The following represents a brief description of some of the more important potential additional income sources related to the Broadway musical.

* 1. Touring Productions:

Since the composer/lyricist compensation is many times based on a royalty pool arrangement, there is usually a minimum dollar compensation guarantee provided for with respect to each four week performance period regardless of the operating profits of the show for each particular accounting period. For example, the producer might guarantee each of the authors $4,000, etc., without regard to how the show is performing financially during a particular accounting period.

2. Cast Albums:

The composer/lyricist will share in a percentage of the monies received by the producer of the musical from the applicable record company for sales of the Broadway show cast album (e.g., 10%, 15%, etc.).

3. Mechanical Royalties:

There will also be a mechanical royalty for sales of the cast album and single tracks taken from the show. For example, these songwriter/music publishing royalties are many times paid at the statutory rate with a song cap for albums and a full 100% statutory rate for digital downloads. In the United States, the statutory mechanical rate is 9.1 cents per composition (or 1.75 cents per minute if the composition is over 5 minutes in duration).

For sales outside the United States, mechanical royalties will be paid in conformance with the rules and regulations of the applicable society (many times a percentage of the wholesale or price to the dealer with respect to albums). For example, in the UK the physical product rate is 8.5% of the purchased price to the dealer with an 8% of gross revenue rate for permanent downloads.

The above mechanical rate calculations will also apply if the musical is made into a film or television production if there is a new soundtrack album or tracks released from these new versions of the play. These royalties can be significant especially in the area of musicals made into motion pictures. For example, the soundtrack sales in the United States alone for Les Miserables and Rock Of Ages were over 650,000 and 320,000 respectively. Doing the math, the monies that can be earned can be substantial especially since the mechanical royalties from digital sales will be at statutory as opposed to any reduced statutory controlled composition rate provided for in the soundtrack agreement. This does not even take into account the individual track sales which can be large.

4. Merchandise:

There will a royalty paid to the writers for sales of merchandise relating to the musical which is sold in the theatre itself. This percentage is negotiable and is based on the revenues received by the producer from such area.

5. Motion Picture Rights To The Musical:

If the musical is made into a theatrical motion picture, the composer and lyricist will many times be entitled to share in a percentage of the actual purchase price received by the producer from the film company. In most cases, this will equate to a small percentage of the final budget of the motion picture. There is usually a floor and a ceiling to the amount and there also may be a continuing participation in the back end profits of the motion picture company provided for. Obviously, the negotiations in this area are complicated because of the various formulae and/or practices of the particular film company, industry understandings, court cases, and the terms of the actual contract that is signed with respect to the definition of what constitutes backend profits and the calculation thereof.

In many cases, there is a separate synchronization fee payable for each composition being put into the movie; especially when dealing with pre-existing compositions not written for the play. If this is the case, there is usually an agreed upon fee specified in the initial rights agreement so there is certainty for all parties as to the cost rather than a “to be negotiated in the future” provision.

6. Theme Parks, Ice Shows And Other Live Versions:

These type of shows are licensed on either a one-time flat fee (with sometimes additional payments if the version continues to run for a set period of years) or on a royalty basis.

7. Television Rights:

If the musical is made into a television production, there will be a flat fee payment to the composers and lyricists which can be based on the duration of the program.

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10. Performance Royalties

ASCAP, BMI and SESAC license only the non-dramatic performance right of copyrighted musical works and therefore are not involved in the licensing of live musical theater on the stage. This is a dramatic right reserved for licensing by the copyright owner who in most cases is the Author (book writer, composer and lyricist) or the music publisher in the case of pre-existing songs. But if the musical is broadcast on television (network, local, cable, etc.) or songs from the show are played on the radio or performed in other licensed media, writer and publisher performance earnings can prove substantial over the life of the copyright. It's not unusual for a major hit song to generate well over 1 million dollars in writer and publisher earnings during its initial chart activity period.

To put this area into perspective, total combined annual receipts of the three U.S. performing rights organizations ASCAP, BMI and SESAC are in the area of 2 billion dollars with combined television and radio license fees accounting for over 1 billion dollars of that total. In addition, approximately 700 million dollars represents primarily writer money coming in from foreign countries for performances of U.S. writer's works with an additional 200 million dollars collected from the general licensing and live performance area. Successful musical compositions from the theatre share significantly in the distributions from all major and minor licensed media as well as distribution channels.

As many successful musicals have a worldwide market, performance royalties from foreign countries can be substantial, particularly if there is a feature film version of the show or individual songs released. Foreign country Performing Right Organizations(i.e. PRS for Music in the U.K., SOCAN in Canada, APRA in Australia/New Zealand, SACEM in France, IMRO in Ireland, GEMA in Germany, etc.) not only license television, radio and Internet performances(among others) , they also license movie theaters for all of the music contained in films being shown in their territory. This latter income source can prove substantial for musicals made into feature films as most Societies license movie theaters on a percentage of box office gross receipts (1% on the average) less certain deductions.

CONCLUSION

Musical theatre—expensive to get into, difficult to write and many times very costly to get out of. But for the composer and lyricist of new musicals, past successful shows and songwriters and music publishers of pre-existing compositions in "catalogue" musicals and dramatic plays, the theatre can be a significant source of income.

Though Broadway hits are "where the money is", there are many examples of shows which never recouped their initial Broadway investment but have lived on for decades in stock, regional, resident, dinner, university, concert, amateur and foreign country performances providing continuing royalties to all those involved. The size and scope of those royalties though are many times determined by the original contract signed. Contracts and licensing arrangements can be, and are, very different based on the type of show, the particular music use and the negotiating tactics, knowledge, experience and bargaining power of the respective parties.

The Musical Theatre world is, in many respects, unlike any other in the world of Entertainment Law contracts, licensing and dealing. There is a tradition, there is a history unlike any other and there is a way of doing business-elements not to be taken lightly for those dealing in the area. Changes have occurred and are occurring in this field not only in the areas of contracts, licenses, audiences, theatre prices and focus groups but also subject matter and contemporary creators who reflect the needs and interests of new audiences to the theatre experience.

As we said at the start of this article, investor fortunes can be won or lost in this field. But for the composer and lyricist, financial returns can be significant even if the show is not a major hit. Know your contracts, your license agreements and know the field you are dealing in. Without that, "fame and fortune may very well be fleeting".

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