Exit Stage Left, Enter Stage Right: Theater Trends Over the Past 25 Years

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We have been asked to review legal and business trends in the commercial theater industry over the past 25 years, and to make some predictions of where the industry is heading in the 25 years to come. In undertaking this exercise, we find a few specific areas particularly worthy of discussion.

Theatrical productions are much more expensive to mount and maintain than they were in 1988, and the industry has had to adjust over the years to survive. Liberalization of fundraising practices has helped, as have ongoing negotiations with the various unions representing the many trades employed by Broadway producers and theaters, and also adjustments in the way royalty participants—such as the dramatists and directors—are paid. Producers recently have started embracing new technologies and marketing strategies to reach a wider target audience more efficiently, and they are experimenting with new pricing paradigms. Producers also are mitigating risk by engaging celebrities in both creative and non-creative roles, and they are adapting to the live stage readily recognizable properties, such as films and music catalogues, in greater numbers. We see these trends of tapping new sources of income, controlling costs and mitigating risks as continuing, hopefully with the result of continuing to both grow and maintain the accessibility and relevance of live theater for the next 25 years and beyond.

Fundraising

Although the costs of professionally producing live theater have skyrocketed over the past 25 years, in some ways raising money for these productions has become less burdensome, at least from the legal and regulatory viewpoints.

When a producer sells an equity interest in a show to a passive investor, that producer is selling a security interest, requiring compliance with applicable state and federal securities laws. Most producers try to fit their theatrical offerings into the federal Regulation D, Rule 506 "safe harbor" exemptions from registration for private offerings, which were promulgated in 1982 under Section 4(2) of the Securities Act of 1933. Prior to 1996, all of the states also had broad authority—through their respective "blue sky" law—to regulate securities offerings with the stated goal of reducing fraud. New York was unique, in that its Arts and Cultural Affairs Law set forth specific rules relating to the syndication of theatrical investments that provided for a full-fledged review of the theatrical documents by New York's Department of Law (similar to the way public offerings are reviewed by the Securities and Exchange Commision (SEC)). This substantive review was a time-consuming and costly burden on commercial producers, a burden that was alleviated in 1996 by the passage of the National Securities Markets Improvements Act (NSMIA). In an effort to lessen the regulatory burden of federal and state securities laws and promote greater uniformity in the patchwork of regulations, NSMIA created a new category of securities known as the "covered security," which would be exempt from state substantive regulation. Offerings made in compliance with Rule 506 (still the most widely used type of offering for commercial theater production entities) were included in that category. The result of NSMIA was that the substantive authority of the states to review and approve a theatrical offering was preempted, although the states may still require notice filings (and the payment of corresponding fees), which apprise them of the existence of offerings in such states. A copy of Form D (required by the SEC) must also be provided once a sale of securities is made in the applicable state.[1] The enactment of NSMIA in 1996 and the preemption of substantive state review was a monumental improvement from the perspective of stage producers, allowing them to offer securities more quickly and efficiently to potential investors.

The theater industry finds itself once again in the midst of an equally groundbreaking moment with the dawn of Title III of the Jumpstart Our Business Startups Act of 2012, also known as the JOBS Act. (Note: see p. 87 for a more in-depth discussion of the JOBS Act.) Due to numerous regulatory hurdles, it has not been feasible to engage in "crowd-funding" (i.e., raising small amounts of money from a large number of people, principally via the Internet) on any widespread basis. The JOBS Act will open the door to this type of funding in the near future. It directs the SEC to create regulations allowing issuers of securities to sell up to $1 million in securities over a 12-month period to any number of investors without registering their offerings with the SEC. These securities will be "covered securities" exempt from state blue-sky regulations. Producers will have to meet a number of reporting and disclosure requirements in order to take advantage of the crowd-funding exemption, such as: the need to raise capital through an intermediary broker registered with the SEC or a so-called "funding portal"; capital raised in such a manner will be capped at $1 million; no individual may contribute more than 5% to 10% of his

or her annual income or net worth; and each investor's contribution will be capped at $1 million. In addition, given the current costs of producing a Broadway play or musical, or even an Off-Broadway musical, the $1 million cap does not make crowd-funding practical for raising all of the required capital for most major commercial productions. However, for certain Off-Broadway plays, developmental productions, cast or concept albums and other less costly stage ventures, the JOBS Act will no doubt be seen as a boon to producers and a leap forward in the liberalization of fundraising techniques.

Perhaps more important, the JOBS Act directs the SEC to change its rules to end the long-standing "general solicitation and general advertising" ban under Rule 506 by which (i) only "accredited" (i.e., relatively wealthy) investors may purchase the securities being sold and (ii) the issuer must take "reasonable steps to verify" that all purchasers are in fact accredited according to the methods specified by the SEC. Currently, the SEC rules only permit a producer to solicit investors with whom he or she (or a co-producer or finder) has a "substantive pre-existing relationship," which makes it challenging to connect with a large swath of individuals and inhibits the flow of capital into theater projects. After the rules are changed, however, it is anticipated that theatrical producers will be able to advertise their investment opportunities on generally accessible websites, through e-mail blasts and via other technologies in an effort to reach previously unreachable investors around the world.[2] The JOBS Act set an initial July 4, 2012 deadline for the SEC to end the advertising ban and promulgate other related rules but, as of December 31, 2012, no changes were made. As with all regulatory matters, the devil will be in the details of the new rules, but the lifting of the general solicitation ban is highly anticipated and has the potential to be very useful to theatrical producers in the near future.[3]

Unions

The relationship between the stage producers and the various unions that represent everyone from the directors and choreographers (Stage Directors and Choreographers Society or SDC) to the actors (Actor's Equity Association or AEA) to the musicians (American Federation of Musicians, Local 802 or AF of M) to the designers (United Scenic Artists or USA) and others (such as the International Alliance of Theatrical Stage Employees or IATSE) has been a rocky one over the past 25 years. Although the dramatists are not unionized (they are considered independent contractors rather than employees), almost everyone else is, from stagehands and hairstylists to the press agents and stage managers. There is a constant pressure on the part of producers to keep costs under control, counterbalanced by the steady insistence by the unions to maintain benefits or improve the conditions of their members. The result has been a number of high-profile strikes over the last 25 years, including the most recent 2003 AF of M strike and the 2007 IATSE (stagehands) strike.

Through prior negotiations, each Broadway theater had a pre-determined allocation of "seats" or places for musicians in the orchestra depending on the size of the venue. Producers had to either engage the minimum required number of musicians or pay the union the difference between the pre-determined sum and the actual amount hired if the producers elected to populate their productions with fewer musicians. In 2003, the producers sought to eliminate this requirement. They claimed that it created unnecessary expenses and interfered with creative freedom of the producers and dramatists (particularly for certain shows, like "rock and roll" musicals and chamber—or so-called "vest-pocket" musicals—which had lower budgets and/or did not require a full orchestra). The AF of M authorized a strike by its members, which lasted four days, after which the parties reached an agreement to reduce the number of musicians required at the largest Broadway theaters from 24 to 25 to 18 to 19. Although this provided a temporary resolution, we predict this issue will resurface as producers continue to relentlessly pursue cost-cutting measures, and as new technologies further evolve, such as "virtual orchestras," which attempt to replicate the fullness of an orchestra with far fewer players and more sophisticated musical reproduction equipment.

Similarly, in 2007, IATSE authorized a strike after three months of failing negotiations with The League of American Theaters and Producers (the League), which acts as the trade association and bargaining agent with all the unions representing the interests of Broadway producers and theater owners. As the League demanded more flexibility in hiring stagehands based on actual production needs as determined by the creative nature of the specific presentation, IATSE insisted on strict adherence to the pre-negotiated number of stagehands required to be employed for each production at a specific theater (e.g., the number of carpenters, electricians and property personnel) and the pre-set limitations on the activities that could be performed by each union member. Ultimately a settlement was reached, although the terms were not disclosed to the public. By the time an agreement was reached, the strike had dragged on for 19 days and had cost the city nearly $40 million in lost revenue.

AEA, the union that represents actors, has over the years shown willingness to compromise in recognition of the economic realities of commercial theater producing. For example, when producers started complaining that the cost of engaging Equity performers for certain touring productions was becoming prohibitively expensive, AEA understood the real consequences in the prospect of producers electing to shift to non-Equity tours and avoiding the hiring of its Union members altogether. In the late 1990s, AEA officials began creating special contracts with non-League producers, which allowed shows to go

on the road with union actors performing at rates lower than established union rates. In 2004, Equity worked with the League on an experimental initiative to adapt a new tier system for touring productions that allowed League producers to compensate union actors based on various factors, such as production scales and projected revenues. In 2009, Equity also adopted its Showcase Codes in order to provide an increase in the budgets of Equity showcase productions and more flexibility in their rehearsal time. The new experimental workshop "lab" contract, of which producers are now starting to avail themselves, is the latest example of how the AEA has strived to accommodate the needs of the producers with greater flexibility while protecting the interests of its members.

Obviously, the give-and-take between producers and unions will continue over the next 25 years as producers struggle to rein in ever rising costs, and the unions continue to press to retain the hardfought past benefits they have obtained for their members, as well as to improve working and economic conditions going forward.

Royalties

At the same time that producers continue to seek concessions from the theater unions to deal with the economic realities of producing live commercial theater, they have worked also with the creators of the stage productions to devise new ways to pay royalties with sophisticated economically based formulas. In a commercial production generally, there are percentage royalty participants, which include the dramatists, underlying rights owners (if the stage production is based on an underlying property), director and, often, choreographers, designers and others, including the producers themselves and regional or developmental theaters.[4]

Dramatists used to be paid on the basis of gross weekly box office receipts (GWBOR) (i.e., the ticket sales receipts less certain pre-established deductions such as taxes and credit card commissions). In the 1980s the industry saw a shift away from paying royalty participants on the basis of GWBOR and towards so-called "royalty pools," by which a fixed portion (typically about 35% to 40%) of the weekly net operating profits of the production (i.e., gross receipts less weekly running costs) are set aside for the royalty participants. In this shift from GWBOR to WNOP, for example, dramatists who might have once received 4.5% of GWBOR increasing to 6% of GWBOR post-recoupment (e.g., $31,500 pre-recoupment on a show with a GWBOR of $700,000, irrespective of running costs) would instead receive 15.6% of WNOP increasing to 17.8% of WNOP post-recoupment (e.g., $23,400 pre-recoupment on a show with a GWBOR of $700,000 and running expenses of $550,000), with some minimum weekly guaranteed payment to the dramatists (e.g., $6,000) regardless of the total amount of WNOP generated that week and WNOP aggregated and averaged in royalty "cycles" of four to five weeks. The underpinning of royalty pools is that royalties paid to royalty participants should be tied to the economic health of a show, and the economic health of a show cannot be measured accurately by examining only the box office receipts; rather one needs to look at the weekly profits, if any, after all operating costs are taken into account. For instance, *Spiderman: Turn Off the Dark* on Broadway could gross $1,000,000 in a given week, a source of pride for most producers, but not necessarily for the producers of *Spiderman*, which is reported to have weekly expenses in excess of $1,000,000; so a gross of $1,000,000 in this instance would result in no or negative weekly profit. Paying on the basis of WNOP allows stage productions to remain open longer under most circumstances which, producers argue, ultimately inures to the benefit of the royalty participants even though in a given week they might receive less than they would have were they to be paid on GWBOR.

A more recent innovation to the royalty structure is the implementation of "amortization" factors, which allows producers to deduct "off the top," and repay to their investors, a negotiated portion of the WNOP *before* the royalty participants' shares of the pool are calculated. A typical amortization amount would be 2% of the production costs each week (e.g., $160,000 each week if the production costs of a musical are $8,000,000). This expedites recoupment of the investors. It also reduces the available pool of WNOP allocated to the pool participants on a weekly basis. Note however that the amount that would have been paid to the royalty participants but for the amortization mechanism is *deferred* and not *waived*, meaning the royalty participants are entitled to be repaid these amounts (plus some premium over and above the deferred amounts) from various sources including net profits of the production company (if the production recoups) and, in the case of the dramatists, from the subsidiary rights income that otherwise would have been paid to the production entity.[5]

Most sophisticated investors (or indeed anyone who bothers to read articles about investing in Broadway shows) are aware that the vast majority of shows on Broadway do not recoup and this fact, producers argue, makes it increasingly difficult to raise money and, in turn, increasingly more appropriate to negotiate adjustments in the royalty structure. As the last 25 years saw the advent of royalty pools and the introduction of amortization, should economic realities make fundraising a challenge in the next 25 years, we predict further innovations and adjustments to the methods by which royalties are calculated and paid. This includes further attempts on the part of producers to make the royalty participants more like "partners" who sacrifice some of their income up front in the hopes of a greater payday should the production recoup its costs.[6]

Marketing and Sales

Theater productions are somewhat unique in that they need to brand themselves very quickly—and usually from a position of zero public recognition—before the funds raised run dry. Historically, producers relied on a campaign based on print advertising (such as an advertisement in the *New York Times*), radio spots and billboards—blunt instruments in today's age of technology driven and targeting marketing.

One of the most radical trends in theatrical advertising and marketing over the past 25 years has been the dramatically escalating use of the Internet to generate advance buzz and (producers hope) increased ticket sales. Most significantly, nearly half (48.1%) of all theatergoers currently report "Personal Recommendation or Friend's Facebook/ Twitter/ MySpace post" as the number one motivating factor in selecting a Broadway show.[7] Traditional word-of-mouth has been increasingly replaced with virtual word of mouth.

While print advertising, including expensive *New York Times* advertisements, would have represented an enormous portion of any Broadway show advertising budget 25 years ago, more shows are now relying heavily on electronic and new media marketing. Productions will likely expend advertising dollars on Google and Facebook ads in addition to employing innovative social media marketing strategies with the hope of creating a virtual community and active online presence, generating buzz and the invaluable word of mouth that is essential for a Broadway show to succeed. Word of mouth must translate into ticket sales rapidly in order for a show to survive during the initial weeks or months following its opening, but producers are attempting also to create significant anticipation for a show well in advance of its landing on the Great White Way via online activity. The producers hope that by increasing word of mouth and excitement in the potential fan base through contests, videos, and other interactive features, the fans will feel part of the show community and purchase tickets when they become available. As it remains a relatively new phenomenon, however, the jury is still out as to whether more gimmicky social media marketing efforts will actually translate into ticket sales.[8] The producers of *Next to Normal* generated press through their "live tweet" performance. The number of the production's Twitter followers increased from 145,000 to 550,000 throughout the serialized performance.[9] The show's advertising budget was relatively modest and use of "free" word of mouth techniques like generating Twitter buzz may have translated into ticket sales. The show eventually recouped its initial capitalization. Other recent social media efforts such as *End of the Rainbow*'s Instagram meet-up event at the Belasco Theater, Ken Davenport's *Godspell* blog (along with an associated website encouraging fans to upload "My Godspell Memory" videos), (note: see p. 88 of this issue of the *EASL Journal*) and a Facebook contest for tickets to a secret *Jesus Christ Superstar* concert performance may have been less successful in translating directly into sales, as those shows did not turn a profit during their Broadway runs.

One issue may be the ongoing challenge of convincing young people, the most active participants in these online activities, to purchase tickets. These online efforts often include ticket giveaways and discounts, but current older theatergoers still remain less likely to use these interactive sites and, for now, they remain the primary Broadway ticket purchasing audience. Almost two-thirds of the Broadway audience during the most recent Broadway season was older than 35; the largest age group of attendees is from 50 to 64. As young theatergoers age into more regular purchasers, these web-based activities may be valuable investments in cultivating the next generation of Broadway theatergoers.

Some other electronic forms of marketing include e-blasts to marketing lists, and free-to-join online discount "clubs," such as the Playbill Club and TheaterMania.com, often implementing carefully designed discounted pricing strategies for shows. More theatergoers now report that receiving an email about the show as a stronger motivating selection factor than receiving a flyer or postcard in the mail, and approximately 9% cite receiving or finding a discount as the primary motivator. Currently, critics' reviews in a newspaper, magazine, or on television collectively account for motivating show selection in 34% of theatergoers, although as Internet sources continue to become more relevant, such reviews may become less essential.

Not all marketing initiatives of recent years are electronic or Internet-related. More Broadway producers have been turning to market research firms and focus groups, including post-show surveys, to develop the best advertising plan for their shows. Some producers continue to attempt to attract younger, less affluent, and minority audiences to Broadway. Many commercial producers, continuing a trend that made a splash with *Rent*, offer same-day box office rush ticket discount policies to make Broadway more affordable to students and others who cannot afford the full ticket price, with the goal of spreading word-of-mouth among younger people.

The exact reverse strategy to sophisticated discounting programs is so-called "premium" priced seating for the more popular shows (it started with Mel Brooks' musical, *The Producers*), allowing producers to sell the best-located seats at a price substantially higher (sometimes as much as 300%) as the regularly priced top-price tickets. The implementation of so-called "dynamic pricing" has allowed producers to be much more nimble at capitalizing on the peak moments and surviving the leaner times of the season.

Broadway shows are also more reliant than ever before on recognizable "brands" for marketing purposes. Other than the continued embrace of revivals—revisiting old shows that have proven popular in the past—the most obvious manifestation of this is the increasing reliance onstage adaptations of well-known film properties or music catalogues. A glance at the ABC directory ads in The *New York Times* quickly reveals the sheer quantity of Broadway musicals based on film properties. The reasons are no mystery: about a quarter of all theatergoers report that their primary motivating factor for seeing such musicals is that they saw the movie.

Equally worthy of note, however, is the widespread and proliferating use of celebrity stars and, more recently, star producers. The use of film stars has been prevalent in Broadway productions for years. Of the roughly 900 productions that opened on Broadway between January 1, 1987 and December 31, 2012, approximately 160 (or 18%) featured at least one actor who had a prominent role in a film at some point in his or her career. From 1987 to 2000, about 50 productions featured at least one film star, but during the next 12 years, from 2000 to 2012, the number of productions featuring a film star almost tripled.[10] Recently, celebrities such as Oprah Winfrey, Bette Midler and Elton John have lent their names as "producers" in order to increase the publicity of Broadway musicals.

Other ways that producers have created broader awareness of their properties, and thus increasing the recognition of their brand, include incorporation of Broadway shows in other media, such as television and DVDs. Broadway shows have recently found members of their casts through auditions produced and taped as part of reality television series, including *Grease* and *Legally Blonde* (this trend has been more frequently used, to greater success, in London theater). Producers have also partnered with media companies, including Broadway Worldwide and NCM Fathom, to create television broadcasts, DVDs, and movie theater screenings (cinecasts) of filmed Broadway performances (*Jekyll & Hyde*, *Memphis*, *Legally Blonde*, and *Rent*). Film versions of certain long-running Broadway shows, such as *Chicago* and *Rock of Ages*, have contributed additional box office income to already successful New York productions (notwithstanding the fact that the *Rock of Ages* film was a failure at the box office). In addition to generating new revenue streams for the production, these techniques may also contribute to generating interest in a show outside of New York, which may translate into Broadway ticket sales to tourists—if the show is still running—or ticket sales for touring productions and increased licensing interest.

In sum, over the past 25 years Broadway producers have used new technology, as well as marketing strategies from other disciplines, to support the advertising and marketing efforts of their shows, attempting to broaden the traditional theatergoing audience and develop a new generation of theatergoers. As online technology rapidly changes, developments will certainly lead to new and exciting innovations in methods of nurturing Broadway audiences and selling tickets.

Conclusion

Producers are constantly seeking to tap new sources of fundraising. The enactment of NSMIA substantially liberalized the requirements for raising money for commercial productions, and the JOBS Act will provide a further step in that direction, increasing the pool of available investors and cutting through much of the red tape inherent in the process. Producers and unions will continue to strive for that happy medium that makes engaging all of the necessary staff economically feasible while protecting the rights of those employees. Producers will continue to fine-tune methods for paying royalties to the royalty participants, some of which may include positioning their royalty participants more like investing partners, reducing their weekly royalties in favor of a bigger pay-off should the show become successful. Producers will also tap into new technologies for marketing and promoting their projects and continue to experiment with dynamic pricing. In addition, they will continue to mitigate risk by relying are pre-branded properties such as well-known films, music catalogues, and celebrity actors and producers. Many people have predicted the demise of Broadway theater specifically, and indeed, the relevance of live theater in general, for decades, now more so than ever with the ever-increasing array of alternative entertainments such as video games, on-demand streaming and downloading of content and social media websites. Thus far, the naysayers have been proven wrong. In fact, Broadway annual grosses continue to increase to record-breaking levels. As long as producers and the creative talent and labor unions can continue to adapt, innovate and remain flexible in the face of an always-shifting landscape, we predict a bright future for the live commercial stage in the 25 years to come.

Endnotes

1. Another recent innovation is the introduction of electronic filing of Form D, mandatory since March 16, 2009, theoretically making it easier for issuers to file and amend, and also creating an interactive and searchable database on the SEC's website of recent filings. Prior to 2008, all Form D filings were submitted on paper and essentially buried in a morass of filing paperwork that could not be readily accessed.
2. The perils of relying on investors with whom the producer has no pre-existing relationship at all were recently manifest in the collapse of a planned Broadway production of *Rebecca* in 2012, when it turned out that an investor living abroad who had committed to contributing millions of dollars toward the production's capitalization did not, in fact, exist.
3. The SEC proposed rules on August 29, 2012. A link to the press release and proposed rules may be found at http://www.sec.gov/news/press/2012/2012-170.htm. See also p. 91 of this *EASL Journal* for a more detailed discussion of the proposed rules.

4. Another trend over the past 25 years is the increasing reliance by commercial producers on not-for-profit theaters to try out material with a commercially "enhanced" developmental production and to reduce/share costs of development. One tradeoff for this reliance is that the regional theaters for their time, effort and risk are entitled to an ongoing royalty from the commercial producers (and, often, a direct participation in the income derived by the dramatists).

5. If a production fails to recoup, then most royalty participants will not be able to recover sums deferred through amortization. Only the dramatists in such circumstances will have the opportunity to "claw-back" some of the remaining deferred amounts out of the subsidiary rights income that the dramatists otherwise would be required to pay the commercial production entity from future exploitations of the property, such as stock and amateur licensing income.

6. We also see further and continuing efforts on the part of directors, who are not copyright owners of the stage production and who typically receive remuneration only in connection with productions actually incorporating their direction, to seek participation in the income of the dramatists to ensure that they, too, are rewarded for the life of the show should their contributions help make the show a financial and durable success.

7. For all statistics regarding audience demographics, please see THE BROADWAY LEAGUE, THE DEMOGRAPHICS OF THE BROADWAY AUDIENCE 2011-2012 (2012). During the 2011-2012 Broadway season, 47% of all tickets were reported to have been purchased online, the largest proportion to date.

8. The flip side to the proliferation of social media and viral marketing is the premature critical drubbing a show can take before it is ready to be reviewed, which negative word of mouth can often kill a show that, in earlier days, could have quietly workshopped out of town outside the bright light of public scrutiny in preparation for its official opening.

9. Andrew Adam Newman, *It's Broadway Gone Viral, With* Next to Normal *via Twitter*, N.Y. TIMES, Aug. 17, 2009.

10. Analysis by Merlyne Jean-Louis using the Internet Broadway Database (www.ibdb.com).

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