

SUBSIDIARY RIGHTS

Defining Subsidiary Rights

The basic meaning of Subsidiary Rights is all non-first class stage performance rights, including:

- Second class stage performances
- Stock amateur and repertory stage performances
- Condensed, tabloid dinner theatre performances
- Cabaret versions
- Concert, stage or tour versions
- Opera versions

However, in the US, the following are also part of Subsidiary Rights:

1. Motion picture, television, audio visual
2. Electronic multi-media, internet, mobile streaming, interactive, computer-assisted media.
3. Merchandising and commercial tie-ins.
4. Soundtrack albums.

In the UK these are sometimes included in Subsidiary Rights but merchandising and soundtrack albums are sometimes called Ancillary Rights.

In the UK, it is fairly common for all of the above rights to be granted to the producer of the first first-class production, although sometimes only merchandising, cast album rights may be granted to the Producer.

In the USA, following the Approved Production Contract of The Dramatists' Guild, subsidiary rights (ie., all the above categories) are retained by the Writers.

In the UK, where the subsidiary rights are granted to the Producer, the Writers together with the owners of underlying rights will typically receive between 50% and 60% of the net proceeds (although this is often lower in the case of cast albums and merchandising).

In the USA, the originating producer will receive percentages of the net proceeds emanating from these rights, in accordance with one of three formulae laid down in the APC (which basically span from 25% to 50% participation for the Producer for varying time periods).

To assign or not to assign Subsidiary Rights to a producer of your work

When a new musical is created, copyright law grants its writers ownership of a package of newly-created rights. In effect, these are the various ways in which the new musical can be exploited (the “restricted acts”: public performance, recordings, films, broadcasts and so on). Writers, naturally, wish their work to be performed and will seek to sell or license their rights in return for fair remuneration. It would be logical to grant a theatrical producer who plans to stage the work only the right to perform it publicly – the stage performing right – and to record a cast album.

However, producers commissioning a new show – and paying the writers a commission fee – or producing the show’s first first-class production, may request that additional (subsidiary) rights in the show be granted to them. The principle underlying such a request is that the producer’s initial investment, which can be a substantial sum of money, represents either a personal financial risk or a risk/investment by his or her investors.

Musicals are funded in a number of ways. A publically-funded company may use its subsidy to commission new work. A request for a share in subsidiary rights is likely to be intended to fund the company’s future work. It is certainly arguable whether, in principle, a commissioned writer should be asked to subsidise a commissioning company thus, but in a climate of reducing and disappearing subsidies, where companies are being pushed by the government to find private sources of funding, it is not surprising that the issue should come up.

A commercial producer, on the other hand, may invest personally in a production, or raise the production budget and some of the weekly running costs from private investors. In the latter case, the producer’s primary motivation is to realise a profit for his investors as quickly as possible. Should the production itself fail to make money, a share in subsidiary rights may give the producer the chance to recover some of his/her or investors’ initial outlay. Encouraging private investors is, of course, critical to an ongoing commercial theatre business.

So.... How should writers react to a request from a producing company to include Subsidiary Rights in their contract? First and foremost, seek advice, either from an agent or legal advisor if possible. The opportunity that the producer is offering you may in some cases justify the concession. You will need to assess your bargaining position, which will vary from one case to the next. For this reason, it is difficult to prescribe a response for every occasion. If you are asked to grant a share in subsidiary income, that is relatively simple. If you are asked to assign subsidiary rights to the producer, you need to consider what the producer will do with those rights – you may wish to include an obligation to exploit them.

In principle, writers should guard their rights carefully and try to ensure that any sale or assignment of those rights is for an appropriate consideration. At the same time, one must realise that it is impossible to place a completely objective value on rights, as on any piece of property. Such values must be subject to the laws of supply and demand. One must also realise that rights have value only if the writer

sells or licenses them and it is therefore in the writer's interest to sell or license in the right circumstances.