



VOLUNTEER LAWYERS FOR THE ARTS

Exploring Legal Issues in Theater Through the Career of Stephen Sondheim

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May 22, 2023 1:00-2:30

TIMED AGENDA

1. Introduction 1:00-1:05
 - a. Attorneys and Agents

2. Dramatists Guild 1:05-1:10
 - a. Dramatists' Bill of Rights
 - b. Approved Production Contracts

3. Copyright 1:10-1:20
 - a. Rights in authorship
 - b. Joint works
 - c. Collaboration
 - d. Stage direction
 - e. Merger
 - f. Ideas
 - g. Underlying rights
 - h. Derivative Works
 - i. Fair Use

4. Contracts 1:20-1:30
 - a. Option Agreements
 - b. Commission Agreements
 - c. Production Contracts

- d. Scott Rudin lawsuit

- 5. Raising Money 1:30-1:40
 - a. Forming LLCs or limited partnerships
 - b. Private offerings
 - c. Capitalizations

- 6. Not for Profit theaters 1:40-1:45

- 7. Miscellaneous 1:45-1:55
 - a. Billing
 - b. Compensation
 - c. Royalties
 - d. Subsidiary Rights
 - e. Licensing
 - i. Approvals
 - ii. Publishing company
 - iii. Public Performance
 - iv. Mechanical License
 - f. Publishing lyrics
 - g. Cast album
 - h. Synch rights
 - i. Right of publicity
 - j. Covid

- 8. Questions 1:55-2:00

OUTLINE

EXPLORING LEGAL ISSUES IN THEATER THROUGH THE CAREER OF STEPHEN SONDHEIM

1. Initial encounter with entertainment attorney
 - a. Meeting with Robert H. Montgomery, Jr.
 - b. Sondheim told he didn't need a publisher yet when asked by Frank Loesser to join his publishing company
2. Agent
 - a. Flora Roberts
 - b. Principal and agent relationship
 - c. Money paid directly to agent
 - d. Contingency fee, ongoing commissions for deals negotiated by agent
 - e. *Sweeney Todd* negotiations with Christopher Bond over adapting the play, Sondheim dedicated musical to her
 - f. Died at age 77 in 1998
3. Dramatists Guild of America (DGA)
 - a. Served as president from 1973 to 1981
 - b. Dramatist's Bill of Rights
 - c. Approved Production Contract (APC), Guild requires its members to use the APC
 - d. Not a union, not exempt from antitrust laws, does not have legal power to organize authors as a collective bargaining unit or force producers to use their contract
 - e. Playwrights are independent contractors, unlike film and TV writers, who are employees of the producers, WGA is a collective bargaining agent.
 - f. Sued by Broadway League for violation of Sherman Antitrust Act, Guild counterclaimed, parties settled, replaced Minimum Basic Production Contract with APC
 - g. Senators Ted Kennedy and Orrin Hatch co-sponsored bill to exempt the Guild from antitrust laws so it could bargain collectively with producers on

contracts, Arthur Miller, Sondheim, and Wendy Wassertsein testified at Senate hearing, producers testified against it, bill died

4. Copyright

- a. “Congress shall have Power...to Promote the Progress of Science and Useful Arts by securing for limited Times to Authors, and Inventors the exclusive Right to their respective Writings and Discoveries”
- b. Original works of authorship containing a minimal amount of creativity, fixed in a tangible medium of expression
- c. Categories of creative works eligible for copyright protection, including literary works, musical works (including accompanying lyrics), dramatic works (including accompanying music), and sound recordings
- d. Bundle of rights include production of copies, distribution, display, and performance, preparation of derivative works
- e. Rights vest in author, can be assigned or licensed to others
- f. Playwright maintains copyright, licenses it to producer (as opposed to screenwriter)
- g. Infringement, story about his mother, seeing *A Chorus Line*, told Dorothy Hammerstein that Sondheim had been plagiarized by the writers and she was going to tell him to sue
- h. Registration creates presumption your copyright ownership is valid, remedies for infringement, allow for statutory damages

5. Joint work

- a. A musical may be registered as a joint work comprising individual copyrights in the book, music, and lyrics, and material taken from underlying work
- b. Work prepared by two or more authors with the intention that their contributions be merged into inseparable and interdependent parts of a unitary whole
- c. Required elements for a joint authorship: intent to create a joint work, each makes separately copyrightable contributions
- d. Each joint author owns 100% of the work absent an agreement
- e. Separate copyright in orchestrations

6. Duration of protection

- a. Works created and published before 1/1/78-protected for 95 years from the date the work was published
- b. Works created and published after 1/1/78-protected for 70 years after author's death, rights pass on to estate
- c. Joint works, last until 70 years after the last surviving author's death
- d. Works made for hire: 95 years from the year of first publication or 120 years from creation, whichever is first
- e. Public domain

7. Collaboration

- a. Authors of a musical: composer, lyricist, and book-writer
- b. Enter into collaboration agreement to set forth rights, obligations, and duties
- c. Sondheim owns all rights to his songs
- d. Book-writer agrees not to claim rights to the songs, agree to the integrity of each author's ownership rights
- e. Sondheim's tendency to take dialogue written by librettist and turn into lyrics, calls it "cannibalizing" the books of his musicals
- f. Sondheim: "Any bookwriter I work with knows I'm going to steal from him and I try to help him out whenever I can, too...The piece can't have a texture unless it's all blended"
- g. Sondheim took Laurents' dialogue and turned it into "Something's Coming." "I've never seen anyone so encouraging, let alone generous, urging us, 'Yes, take it, take it, make it a song'"
- h. Laurents: "The first thing a librettist must be prepared to do is to sacrifice ego. You have to know that the music is the most important thing and everything has to be built toward it."

8. Question of copyright in stage direction

- a. Increasingly, directors and dramaturgs seek co-authorship credit.
- b. John Weidman, Harvard Law School, librettist, "Protecting the American Playwright" lecture, Brooklyn Law Review, 2007
- c. To date there is no case law that clearly addresses this issue

9. Merger

- a. If merger does not occur, then Sondheim can use the songs for a different musical
- b. Upon merger, authors agree that none will license the songs or book apart from the other elements of musical without approval of other authors
- c. Exception for songwriter is right to exploit songs
- d. Merger of songs and book is different from merger of songs and book with underlying material

10. Ideas

- a. Ideas are as free as the air (Brandeis)
- b. It is only the expression of an idea, concept, or principal that is eligible for copyright protection
- c. *Assassins*, 1979 script by Charles Gilbert Jr., about a Vietnam veteran who becomes a presidential assassin, opens at carnival shooting gallery, negotiated Gilbert's permission to use idea, Gilbert got credit and royalty

11. Underlying rights

- a. Hammerstein assignments
 - i. George S. Kaufman's *Beggar on Horseback*, got permission
 - ii. Maxwell Anderson's *High Tor*, could not get the rights
 - iii. *Mary Poppins*, P.L. Travers later asked Sondheim to adapt it for stage
- b. *Road Show*, David Merrick and Irving Berlin had acquired rights to *The Legendary Mizners*, Alva Johnston's biography of Addison and Wilson Mizner
- c. *Gypsy*, based on *Gypsy: A Memoir* published in 1957 by Gypsy Rose Lee, David Merrick got rights, she only insisted that the title be *Gypsy*, most of book was made up, emphasis shifted to her mother
- d. *Ring Around the Moon*, Jean Anouilh rejected proposal, then said rights are available by telegram after *Night Music* opened
- e. *A Little Night Music*, Ingmar Bergman's 1955 film *Smiles of a Summer Night*
- f. *Sweeney Todd*, Christopher Bond's play had been optioned to producers already, but they passed their rights along to Sondheim

12. Authorized v. unauthorized changes

- a. No unauthorized changes to script permitted
- b. Changes can be requested
- c. Jerome Robbins cut “Little Lamb.” Jule Styne threatened to withdraw entire score of *Gypsy* if the song was not put back into the show, Ethel Merman refused to sing new verse of “Some People”
- d. *Company* in Australia v. Broadway revival of *Company*
- e. *Assassins*
- f. Barbra Streisand, *The Broadway Album*, tailored songs to her including “Send in the Clowns” with revised lyrics
- g. Zero Mostel, improvising during *Forum*, announce boxing fight results
- h. Revisions to *Merrily We Roll Along*
- i. *Into the Woods Jr.*
- j. *Sweeney Todd School Edition*

13. Derivative works

- a. Film adaptations
- b. Film rights to *West Side Story* sold for \$375,000 plus share of gross, later sued for proper accounting
- c. Money from film rights to *Gypsy* used for townhouse
- d. PBS telecasts
- e. Proposed *West Side Story* prequel, *Maria*, Long Wharf Theatre later backtracked after legal questions arose

14. Fair Use

- a. Four factor test
 - i. Purpose and character of the use (educational/nonprofit vs. commercial)
 - ii. Nature of the copyrighted work (fiction or nonfiction, original or not, published or not)
 - iii. Amount and substantiality of the portion used in relation to the work as a whole

- iv. Effect of the use on the potential market for or value of the copyrighted work (whether it diminishes the commercial value)
- b. Parody, transformative value
 - i. *Forbidden Broadway*, use same music, permission
 - ii. *Musical of Musicals the Musical*
 - iii. “Another Hundred Lyrics”
 - iv. “Co-Op,” Documentary Now!
- c. Criticism, commentary, news reporting, teaching, scholarship, research

15. Contracts between writer and producer

- a. Option agreement
- b. Commission agreement
- c. Production contract, exclusive right to present first-class productions within specified time period

16. Scott Rudin lawsuit

- a. Rudin alleged that his investment in 1999 workshop production of *Wise Guys* gave him rights to the show if it were to be produced commercially
- b. Rudin sent cease-and-desist order as plans were being made for regional production
- c. Sondheim and Weidman brought lawsuit against Rudin on 11/20/01
- d. Temporary restraining order in December 2001 that prevented Rudin from interfering with regional production
- e. Rudin countersued for fraud and breach of contract
- f. Settled out of court, Rudin would be reimbursed for his investment if the show was ever produced commercially

17. Raising money

- a. Limited liability company or limited partnership
- b. Private offering under Regulation D, Rule 506 “safe harbor” exemption from registration

- c. Backers auditions (33 held for *Anyone Can Whistle*)
- d. Accredited investors
- e. Following recoupment, producer and investors split profits
- f. Hal Prince
- g. Capitalizations
 - i. *Saturday Night*-\$300,000
 - ii. *West Side Story*-\$500,000
 - iii. *Forum*-\$500,000
 - iv. *Anyone Can Whistle*-\$350,000
 - v. *Company*-\$550,000
 - vi. *Follies*-\$800,000, weekly running cost of \$85,000
 - vii. *A Little Night Music*-\$750,000, weekly running cost of \$61,000, paid back its investment
 - viii. *Pacific Overtures*-\$650,000
 - ix. *Sweeney Todd*-\$1.3 million
 - x. *Merrily We Roll Along*-\$1.5 million
 - xi. *Sunday in the Park with George*-\$2.4 million
 - xii. *Assassins*-over \$1 million, negotiations broke down

18. Not-for-profit theaters

- a. Section 501(c)(3) organization
- b. Producers provide enhancement money
- c. Not-for-profit receives credit and financial participation in royalties and subsidiary income.
- d. Playwrights Horizons (*Sunday in the Park with George*, *Assassins*)
- e. Old Globe (*Into the Woods*)
- f. *Road Show* (Goodman Theatre, Kennedy Center, Public Theater)

19. Rehearsals

- a. Right to attend rehearsals
- b. Sondheim usually not present, busy writing new songs

20. Billing

- a. Size, where, and when
- b. 50% of title, on separate line, immediately below title.
- c. *West Side Story*
- d. *Sweeney Todd*, dispute between producers and Christopher Bond over his billing

21. Compensation

- a. Option payments
- b. Advances
- c. Royalties
- d. Subsidiary rights income

22. Royalties

- a. Royalty participants (writers, underlying rights owner, director/choreographer, producers, designers, star, not-for-profit theater, workshop participants, orchestrator), probably not theater
- b. Traditionally based on weekly net gross (gross v. net gross), total of 4.5% (each writer at 1.5%) rising to 6% after recoupment, 15-20% going to royalty holders
- c. *West Side Story*-1% vs. 3% for Bernstein.
- d. *Gypsy*-2.25%, going to 2.5% once show made profit
- e. *A Little Night Music*-4%, earned \$16,000 to \$17,000 monthly
- f. Today paid out of royalty pool from weekly operating profits (weekly net gross minus operating costs and, if applicable, amortization payment to investors)
- g. Royalty pool split 35% to royalty participants and 65% to investors

- h. Minimum weekly fixed payments to royalty participants
- i. Royalty pool used for *Into the Woods*
- j. Waiving royalties to keep show from closing (*Anyone Can Whistle*)

23. Subsidiary Rights

- a. Authors own subsidiary rights including film rights and non-first class productions
- b. Producer and director participate in subsidiary rights income after “vesting,” production must run certain number of performances

24. Licensing

- a. Music Theatre International, theatrical licensing agency
- b. Producers must apply to MTI for rights to perform non-first class productions
- c. First-class productions handled by agent
- d. Payments per performance
- e. Collects royalty fees from producers on behalf of show’s writers
- f. Royalties may be a flat sum, percentage of ticket sales, or a combination.
- g. MTI provides authorized scripts
- h. Does not include right to videotape production or post recording on social media.

25. Approvals

- a. Authors have right to approve cast, director, choreographer, designers, replacements
- b. Songwriter can approve music personnel
- c. Arthur Laurents and Patti LuPone and *Gypsy*
- d. Paper Mill Playhouse production of *Follies*, Broadway transfer scuttled by Bobby Goldman, wife of late James Goldman

26. Publishing Company

- a. Music publisher administers, promotes, and exploits the songs

- b. Assign the copyright, writer and publisher split income
- c. Retain creative and financial control over songs
- d. Originally represented by Williamson, the publishing company founded by R&
- e. Subsequently founded his own publishing companies (Burthen Music, Beautiful Music, Rilting)

27. Public performance license

- a. “Small rights”
- b. Writer receives royalties when song is performed publicly in non-dramatic performance
- c. BMI (Broadcast Music, Inc.) and ASCAP (American Society of Composers, Authors, and Publishers) issue blanket public performance licenses and collect royalties
- d. Sondheim revues (*Side by Side by Sondheim*, *Marry Me a Little*, *Putting It Together*, *Sondheim on Sondheim*)

28. Mechanical license

- a. Once song receives its first commercial recording, anyone can subsequently record it as a matter of law via compulsory mechanical license
- b. Obtain mechanical license from publisher.
- c. Mechanical royalties paid to publisher and songwriter
- d. Harry Fox collects mechanical royalties
- e. Cannot change essential nature of the song
- f. Judy Collins, Streisand, Sinatra

29. Publishing the lyrics

- a. Not covered by mechanical license
- b. Request permission
- c. *Finishing the Hat*, *Look I Made a Hat*

30. Cast album

- a. Producer acquires right to produce original cast album
- b. Costs of \$250,000 to \$500,000
- c. Recording company would advance recording costs, recouped against royalties to production. Royalties are split between authors and producer.
- d. *Company* cast album documentary, session went from 10 am Sunday to 4:30 am Monday
- e. Unions restrict recording time from 10 am to 6 pm, require actors be paid week's salary for each day's session, made with orchestra and singers together, maximum of 8 out of 9 hours
- f. *Anyone Can Whistle*, Columbia recorded the cast album even though it was not contractually obligated due to short run
- g. Copyright in sound recording distinguishable from copyright in composition
- h. Master rights, rights to the sound recording, grant master license for physical albums, streaming, downloading, sampling

31. Right of synchronization

- a. Use song in connection with visual images (film, TV show, commercial)
- b. Need synchronization license
- c. *Marriage Story*, *The Birdcage*
- d. Commercials, "Putting It Together" for Xerox commercial

32. Right of Publicity

- a. Appropriation of a person's name, likeness, image for commercial purposes
- b. NY post-mortem right of publicity, enacted in 2020, 40 years after death, protects person's right of publicity that has commercial value, if decedent was domiciled in NY at time of death on or after 5/29/21
- c. *Sondheim on Sondheim*
- d. Sondheim merchandise-mugs, t-shirts, website
- e. South Park
- f. HBO series
- g. *Assassins*

33. COVID

- a. *West Side Story*, *Company*
- b. Insurance and governmental payments
- c. Drive-in production of *Assassins*
- d. 90th birthday YouTube special
- e. Right to perform show onstage is distinguishable from right to perform it online.

FURTHER RESOURCES

Stephen Sondheim:

1. *Finishing the Hat* and *Look, I Made a Hat*, by Stephen Sondheim (Sondheim's collected lyrics with extensive commentary from Sondheim)
2. *Stephen Sondheim: A Life*, by Meryl Secrest (authorized biography, goes only up to 1990s)
3. *Putting It Together: How Stephen Sondheim and I Created Sunday in the Park with George*, by James Lapine (oral history of the development of *Sunday*)
4. *Sondheim & Co.*, by Craig Zadan (oral history of Sondheim's musicals up through *Into the Woods*)
5. *The Stephen Sondheim Encyclopedia*, by Rick Pender (entries on Sondheim's musicals, collaborators, and influences)
6. *On Sondheim: An Opinionated Guide*, by Ethan Mordden

Theater Law:

1. *I Wanna Be A Producer: How to Make a Killing on Broadway...Or Get Killed*, by John Breglio (guide to producing on Broadway by prominent entertainment attorney)
2. *The Stage Producer's Business and Legal Guide*, by Charles Grippo
3. *The Commercial Theater Institute Guide to Producing Plays and Musicals*, by Ben Hodges and Frederic B. Vogel
4. *The Business of Broadway: An Insider's Guide to Working, Producing, and Investing in the World's Greatest Theatre Community*, by Mitch Weiss and Perri Gaffney

Entertainment Law:

1. *Law and Authors: A Legal Handbook for Writers*, by Jacqueline D. Lipton
2. *Entertainment Law for the General Practitioner*, by X.M. Franscogna Jr., Shawnassey B. Howell, and H. Lee Hetherington
3. *Entertainment Law in a Nutshell*, by Sherri Burr
4. *All That You Need to Know About the Music Business*, by Donald S. Passman