

NOVEL ADAPTATION TO STAGE AND SCREEN: RETHINKING THE CONTRACTUAL AND CREATIVE PROCESS

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I. INTRODUCTION

“We want to option your novel.” The words every author lives for. Or are they? Is the offer from a Hollywood studio executive to buy your novel a blessing or a curse? Depending on the vantage point of the author—whether the book is a self-published fan favorite or an international bestseller—the reaction could vary. But either way, the bottom line for both is the potential to increase their fan base and generate more money from their creative work, outcomes that are attractive to any artist.

It is no small task to take a creative work that can be anywhere from 200–500 pages, sometimes as large as 800 or more pages, and turn it into a stage or screenplay which often does not exceed 130 pages.¹ Not to mention the challenge of turning a literary medium into a visual one. Novels delve into what characters are thinking and feeling with rich, detailed descriptions. With screenplays, everything has to be shown through “visuals, behavior, actions and in dialogue.”² The same goes for the theater, “A great novel does not necessarily make a great play. The two are very different beasts. A book offers private pleasure . . . [t]he joys of theatre are communal, dynamic and transient.”³ “The different narrative demands of the genres can chafe, leaving stage adaptations looking flat and linear.”⁴ Looming over the practical adaptation process is the larger issue of creative interpretation. Writing is

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¹ Danny Manus, *Notes from the Margins: Adapting Books into Screenplays*, SCRIPT (Dec. 15, 2015), <https://www.scriptmag.com/features/craft-features/adapting-a-book-into-a-screenplay>.

² *Id.*

³ Sarah Hemming, *Adapting Novels for the Theatre*, FIN. TIMES (Nov. 22, 2013), <https://www.ft.com/content/30392f4c-5130-11e3-b499-00144feabdc0>.

⁴ *Id.*

a solitary, individual, intimate—and some would even say sacred—process. Efforts to translate the intent of an author’s mind into such exposed mediums as television, film, and stage can not only be wrought with challenges, but catastrophic. “The process of translating our favorite books into film is an inherently tricky conversion. Between casting central characters and fitting in (or cutting out) major plot points, so much can go wrong—or at least stray from the author’s initial intentions.”⁵

Many well-known, established authors have gone on the record expressing their disappointment in the film version of their novels. “The movie was not really based on my work. They used the names of the characters but they replaced original material with material they had written for them . . . [t]hey had the right as a studio to make that movie and there was nothing I could do,” lamented Anne Rice regarding the film based on her novel *The Queen of the Damned*.⁶ Some best-selling authors feel so strongly about the craft of writing that they believe books should remain solely in the hands of readers. “I was stupid enough, or it was vanity, that when *The Alchemist* was released . . . it was immediately sold to Hollywood. A book is not improved when it becomes a movie. A book is something that stimulates creativity in the reader. The movie—you have everything already,” stated Author Paulo Coelho.⁷ So much of the innate pleasure and sense of connection individuals find in reading is derived from the fact that a reader’s mind becomes an extension of the author’s creative imagination. With a novel, “you can still play it your own way, seeing the characters and their motivations exactly as you like.”⁸ In short, you create the image fantasy in your head, a film changes that experience. “We sit back and watch it play out, and we do so with a changed eye, having read the books. We’re not going in as innocents but as experts.”⁹ The goal of filmmakers is to make a movie that appeals to the masses and in order to do so the content of the book needs to fit into specific boxes, among them: the “film-

⁵ Jessica Gentile, *10 Authors Who Despised the Movie Versions of Their Books*, PASTE (Nov. 15, 2013, 11:50 AM), <https://www.pastemagazine.com/blogs/lists/2013/11/10-authors-who-despised-the-movie-versions-of-their-books.html>.

⁶ Anne Rice, *Opinion of the Movie The Queen of the Damned*, YOUTUBE (Dec. 23, 2009), <https://www.youtube.com/watch?v=PCX7aD2Pn1k>.

⁷ Lucas Wittmann, *Why Best-Seller Paulo Coelho Thinks Books Should Never Be Made Into Movies*, TIME (Oct. 4, 2018), <http://time.com/5415042/paulo-coelho-hippie/>.

⁸ Jen Doll, *The Trouble with Making Books We Love into Movies*, ATLANTIC (Mar. 23, 2012), <https://www.theatlantic.com/entertainment/archive/2012/03/trouble-making-books-we-love-movies/330196/>.

⁹ *Id.*

makers' assumptions of what will be successful; not offend anyone; get a certain rating . . . come in within a certain budget; not be too short or too long; be made within a finite period of time. . . ."¹⁰

In addition to how far the final creative product deviates from their work, authors can also be shocked by their financial outcomes. Such was the case of Author Winston Groom, whose novel *Forrest Gump* became "the fastest grossing Paramount film to pass \$100 million, \$200 million, and \$300 million in box office receipts (at the time of its release)."¹¹ In just over two months the film became one of the highest grossing movies of all time.¹² Groom was paid \$350,000 and a three percent share of the film's net profits by Paramount.¹³ After witnessing the success of the film, Groom reached out to Paramount to inquire into his share of the profits and was informed that his three percent share was based on "accounting profits" and that the studio was *losing* money based on *their* accounting.¹⁴ When Groom and his lawyer sat down with studio executives and were informed of their accounting process they learned about a provision in the contract that allowed the movie company to set aside a portion of the film's revenue (up to \$140 million) to make up for studio losses of future bad movies.¹⁵ When Groom challenged Paramount in court, the judge dismissed the case, as the contract Groom signed clearly stated that he was to receive a share of the film's "accounting profits."¹⁶

While the financial incentive is certainly tempting on both ends, it is often the film studios that have their bottom line top-of-mind. Filmmakers are lured by a "pre-sold title" with "the expectation that respectability or popularity achieved in one medium might infect the work created in another," as best-selling books come with "ready-made material" that delivers "pre-tested stories and characters."¹⁷ Book adaptations are said to bring in 53% more in global revenue than films developed from an original screen-

¹⁰ *Id.*

¹¹ *What Accounting Lesson Winston Groom Learned from the Movie Forrest Gump?*, KONVEXITY (Jan. 12, 2013), <https://konvexity.wordpress.com/2013/01/12/what-accounting-lesson-winston-groom-learned-from-the-movie-forrest-gump/>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ BRIAN MCFARLANE, *NOVEL TO FILM: AN INTRODUCTION TO THE THEORY OF ADAPTATION* 7–8 (Oxford Univ. Press 1996).

play.¹⁸ Similarly, TV adaptations are known for bringing in more than 50% more viewers than original programming and productions adapted for stage generate three times more in revenue than ticket sales for original plays.¹⁹ “Relying on adapted material can help alleviate part of the risk in the creative production process.”²⁰

On the flip side, the emergence of “streaming platforms such as Amazon Video and Netflix has opened up new and profitable revenue streams for writers.”²¹ As such, the hunt for good, pre-existing creative material has become more competitive, with “more and more [screen businesses] . . . hiring dedicated scouts . . . to make sure they’re at the front of the queue for exciting material.”²² Industry experts say the combination of the “[n]ew screening platforms, different formats and the resultant ever-expanding audience make this a really exciting time to be bringing books to the screen” and “[b]ooks that already have a proven audience are a logical place to turn to.”²³ Literary agent Holly Frederick notes that, “Books are very desirable for the television marketplace now . . . [t]here are so many buyers out there. There’s a new streaming platform that comes out everyday, a new cable channel that comes out everyday.”²⁴

However, the process of adaptation—from beginning to end—is often rife with legal conflict. Typically, disputes are resolved through time-consuming and expensive litigation, pitting two parties with a singular goal—but perhaps differing aims—against one another. Often the outcome of litigation results not in mutual resolution, but in a repudiation of the author’s original intent to share their vision with a greater audience. Even established authors, as in the case of Anne Rice, run the risk of losing all bargaining power once the contracts are signed.

How, where, and why do adaptation deals go sour? Do authors need tougher contractual protections from the risks involved in the ride to releasing a creative work into the hands of other crea-

¹⁸ Andrew Leicester, *Book Adaptations into Screen and Stage: A Powerful Two-Way Street*, BOOKSELLER (Nov. 29, 2018), <https://www.thebookseller.com/blogs/book-adaptations-screen-and-stage-powerful-two-way-street-901421>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Heloise Wood, *Passing the Screen Test: Four Speakers Reveal What Makes a Hit TV Adaptation*, BOOKSELLER (Sept. 11, 2018), <https://www.thebookseller.com/insight/passing-screen-test-four-speakers-reveal-what-makes-hit-tv-adaptation-858426>.

²² *Id.*

²³ *Id.*

²⁴ Janet Nguyen, *How Do Books Get Adapted into Movies?*, MARKETPLACE (Dec. 13, 2018), <https://www.marketplace.org/2018/12/13/business/how-do-books-get-adapted-movies>.

tives? Or do authors need to release some of that control and recognize that film and stage hold space for a different aesthetic, and are imaginative projects with their own life force? Agreeing to an appointed mediator—with experience and expertise in both the writing and production worlds—could avoid litigation and potentially bring a much richer and well-received product to market. By activating this type of mediator at various trigger points in the adaptation process—such as contract drafting, scriptwriting, pre-production, filming or rehearsals, and post-production—the interests of authors will be well-represented, the chances of conflict regarding the creative process will be minimized, and disputes over adaptation can avoid the courtroom and make a faster and more positive entry onto stage or screen.

Part II of this Note will discuss the process of how an author typically sells their novel rights to a movie studio or production company. Part III will highlight a recent high-profile lawsuit which illuminates the issues of vague contractual terms and construction and examines disparities in bargaining power. Finally, Part IV will propose how an industry knowledgeable negotiator and/or mediator can serve to lay the foundation for and settle disputes of adaptation transactions.

II. BACKGROUND

Under the Copyright Clause of the U.S. Constitution, [The Congress shall have the 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.”²⁵ An author has the exclusive right to, and can authorize others to: reproduce the work; prepare derivative works; distribute copies; publicly perform and/or display the work.²⁶ An author is free to transfer their work through assignment, exclusive license, or non-exclusive license.²⁷ Under the first two the transfer must be in writing, non-exclusive license may be implied. Therefore, the process of novel adaptation is almost exclusively governed by contract law.

²⁵ U.S. Const. art. I, § 8, cl. 8.

²⁶ 17 U.S.C. § 106.

²⁷ Christine Varad, *Copyright & IP Assignment Explained: What Copyright Transfer and Assignment of Rights Really Means*, KUNVAY (Sept. 9, 2018), <http://blog.kunvay.com/copyright-ip-assignment-explained-copyright-transfer-assignment-rights-really-means/>.

An “option,” gives a production company or studio the exclusive right, for a specified length of time, to make an author’s work into a film, TV show, or stage play, for a mutually agreed upon fee to the author.²⁸ After the novel has been optioned, producers and/or a studio work to secure funding to adapt the book and hire a scriptwriter, if the author has not been tapped to do the job herself, which is often the case.²⁹ During the option window and/or once the project is “greenlighted”—meaning the money has been secured to make the production—authors, often with the help of their literary agents or lawyers, begin contract negotiations regarding a purchase price to license the work and other contract particulars.³⁰ This transitions the project into the next phase of a purchase agreement, where the “rights in the creative work will then be transferred . . . usually, the purchase agreement will be negotiated in tandem with the option agreement.”³¹ Often, this negotiation does not involve giving many rights to the author.³²

Typically, adaptation contracts outline two major issues: pricing and creative control. Pricing involves not just the purchase price paid to the author but clauses concerning a share in the film or play’s profits.³³ As cited above in the case of Groom, these provisions can be tricky with phrases like “net profits,” “gross profits,” and “accounting profits,” leaving a novice author baffled as to what “share” they will actually be receiving. As screenwriter Mark Sanderson puts it, “The studios would like you to believe these top moneymaking films end up with no profits and they can show that no film actually makes money . . . making sure the ‘Net Profit’ participants [who] do not see a dime.”³⁴ In addition, more often than not, adaptation contracts require that the author give up all crea-

²⁸ *Selling Your Book’s Movie and TV Rights – What You Need to Know*, WRITERS DIGEST (Sept. 25, 2012), <http://www.writersdigest.com/whats-new/selling-your-books-movie-and-tv-rights-what-you-need-to-know>.

²⁹ *Id.* (“Hollywood prefers to use its own writers to adapt work.”).

³⁰ *Id.*

³¹ Matt Knight, *From Book to Screen – How Dramatic Rights Are Sold*, SIDEBAR SATURDAYS (Jan. 20, 2018), <https://www.sidebarsaturdays.com/2018/01/20/from-book-to-screen-how-dramatic-rights-are-sold-you-know-you-want-it/>.

³² *What You Need to Know About Selling Your Book’s Movie Rights*, SPARK PRESS (July 12, 2016), <https://gosparkpress.com/summer-blockbusters-need-know-selling-books-movie-rights/> (“unless you’re a Big Name, you’re probably not going to get much say in how the movie turns out. Some directors will let an author consult with casting or the adaptation process itself, but don’t count on it. Once the book has been signed over, it’s out of your hands.”).

³³ *Id.*

³⁴ Mark Sanderson, *The Truth Behind the Net Profit Lie*, MY BLANK PAGE BLOG (May 28, 2012), <https://scriptcat.wordpress.com/2012/05/28/the-truth-behind-the-net-profit-lie/>.

tive control.³⁵ Hollywood has an aversion to using novelists, other than “big fish authors,” and prefers to “stick with their own screenwriters.”³⁶ The tendency of studios to use their own screenwriters essentially cuts authors out of the picture as soon as the contract is signed.

Most recently, a high-profile adaptation case pitted the estate of one of the greatest American authors of the 20th century against one of modern Hollywood’s star writers. On March 13, 2018, the estate of writer Harper Lee, author of the American classic *To Kill a Mockingbird*, filed suit against Rudinplay, Inc., the producer of the forthcoming Broadway stage adaptation of the novel.³⁷ The complaint, *Carter v. Rudinplay, Inc.*, filed in U.S. District Court for the Southern District of Alabama, argued that the contract signed between Ms. Lee and Rudinplay required “that the play not derogate or depart in any manner from the spirit of the Novel nor alter its characters” and that the production company did not have the final say in determining whether any derogation had occurred.³⁸ The case centered around comments made by Aaron Sorkin, hired by Rudinplay to write the stage adaptation of the novel. In multiple interviews³⁹, Sorkin admitted that the screenplay would put his own mark on Harper’s novel: “As far as Atticus and his virtue goes, this is a different take on *Mockingbird* than Harper Lee’s . . . he has a kind of running argument with Calpurnia, the housekeeper which is a much bigger role in the play I just wrote.”⁴⁰ After reading the news reports and an initial draft of the play, Harper’s estate personal representative expressed concern from the family that the play’s portrayal of characters was not in line with the novel.⁴¹ She was assured by Rudinplay that the contractual agreement would be honored and the play was still a “working draft.”⁴² Despite assurances, and after being excluded from seeing

³⁵ Knight, *supra* note 31 (“Do not be surprised if the author is required to give up creative control once the work has been purchased.”).

³⁶ *Id.*

³⁷ Gordon Cox, *Broadway’s ‘To Kill a Mockingbird’ Hit with Lawsuit by Harper Lee Estate*, VARIETY (Mar. 14, 2018, 2:39 PM), <https://variety.com/2018/legit/news/to-kill-a-mockingbird-law-suit-broadway-1202726993/>.

³⁸ *Carter v. Rudinplay, Inc.*, No. 18-CV-117, 2018 WL 2107608 (S.D. Ala. May 7, 2018) [hereinafter *Carter Complaint*].

³⁹ *Id.* at 6-7.

⁴⁰ Kyle Buchanan, *How Aaron Sorkin’s To Kill A Mockingbird Will Surprise You*, VULTURE (Sept. 13, 2017), <https://www.vulture.com/2017/09/how-aaron-sorkins-to-kill-a-mockingbird-will-surprise-you.html>.

⁴¹ *Carter Complaint*, *supra* note 38, at 6.

⁴² *Id.*

an updated draft, the estate filed the suit cited above.⁴³ Scott Rudin, the owner of Rudinplay, then countersued in New York, seeking \$10 million in damages from Lee's estate for challenging the Sorkin adaptation.⁴⁴ Rudin argued that by approving Sorkin, Ms. Lee and her representatives understood Sorkin would "put a unique spin on the material."⁴⁵ The complaint stated, "The approval of Mr. Sorkin as playwright . . . reflected the parties understanding that the play, while remaining true to the spirit of the novel, would not be a mere recitation of the novel from the stage of the theater."⁴⁶ Rudin claimed the wrangling with the estate over who controlled the script had clouded the potential production and "damaged the process" by making it difficult to secure the necessary financing from investors for the play's production.⁴⁷ Rudin even suggested putting on a performance for a jury so the factfinder could determine whether the production was true to the spirit of the novel, stating, "A play and a book are two different things. A book is meant to be read; a play is meant to be performed."⁴⁸ The case eventually settled in May 2018.⁴⁹ The terms of the settlement were not made public.⁵⁰

III. DISCUSSION

A. *Vague Contractual Terms and Construction*

The *To Kill A Mockingbird* (hereinafter "*Mockingbird*") conflict ended up in court primarily due to alleged violations of contract which centered around disagreements over whether the

⁴³ *Id.*

⁴⁴ Michael Paulson & Alexandra Alter, *Courtroom Drama: Producer Offers to Stage Disputed 'Mockingbird' for Judge*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/theater/mockingbird-harper-lee-scott-rudin-lawsuit.html>.

⁴⁵ Michael Paulson & Alexandra Alter, *Broadway 'Mockingbird' Is Back on Track, as Court Dispute Ends*, N.Y. TIMES (May 10, 2018), <https://www.nytimes.com/2018/05/10/theater/to-kill-a-mockingbird-broadway-harper-lee.html>.

⁴⁶ *Id.*

⁴⁷ Paulson & Alter, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ Erik Pedersen, *'To Kill a Mockingbird' Broadway Dispute Settled; Show Will Go On*, DEADLINE (May 10, 2018, 2:05 PM), <https://deadline.com/2018/05/to-kill-a-mockingbird-broadway-lawsuit-settlement-scott-rudin-harper-lee-1202387754/>.

⁵⁰ Eriq Gardner, *Scott Rudin Settles with Harper Lee Estate Over 'To Kill a Mockingbird' Adaptation*, HOLLYWOOD REP. (May 10, 2018, 12:49 PM), <https://www.hollywoodreporter.com/thr-esq/scott-rudin-settles-harper-lee-estate-kill-a-mockingbird-adaptation-1110808>.

adaptation deviated too much from the novel.⁵¹ The case raised two key issues in the evolution of novel adaptation to stage or screen and common subsequent legal disputes—vague contractual terms and construction and disparity in bargaining power.

In June 2015, Author Harper Lee entered into a contract with Rudinplay to produce the live stage performance of *Mockingbird*.⁵² Under the contract, Rudinplay would pay Lee \$100,000 to secure the exclusive rights to create a “dramatic adaptation” of *Mockingbird* and acquire the “sole and exclusive option to acquire exclusive worldwide live stage rights (with a specified limitation).”⁵³ In exchange, Lee agreed that “during the period when Rudinplay held live stage rights, she would not authorize the development, marketing, and/or production of any live stage production or other live show or audiovisual production that is based on the Novel or any portion thereof.”⁵⁴ Under the agreement Lee would also get a billing credit, “certain royalties and certain net profits resulting from presentation of the Play” as well as “the absolute and unconditional right to approve the Playwright for the Play . . . the exercise of such right shall be within her sole and unfettered decision.”⁵⁵ To that end, the producers procured Aaron Sorkin as playwright and Lee approved him in November 2015.⁵⁶

The transactional provisions, cited above, caused no challenge from the estate. It was the provisions related to creative control and interpretation which were the genesis of the litigation. In the complaint, the personal representative of the Lee estate, Tonja B. Carter, alleged that Sorkin’s adaptation was “not faithful to the spirit of the book, as the producers of the upcoming Broadway show had promised it would be.”⁵⁷ The complaint states that “Atticus Finch, the central figure in *To Kill a Mockingbird*, is portrayed in the novel as a model of wisdom, integrity, and professionalism.”⁵⁸ According to the complaint, the contract provided that Lee “shall have the right to review the script of the Play

⁵¹ Alexandra Alter & Michael Paulson, *Harper Lee’s Estate Sues Over Broadway Version of ‘Mockingbird’*, N.Y. TIMES (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/theater/harper-lee-estate-lawsuit-broadway-mockingbird.html>.

⁵² *Carter Complaint*, *supra* note 38, at 4.

⁵³ *Id.*

⁵⁴ *Id.* at 4–5.

⁵⁵ *Id.* at 5.

⁵⁶ *Id.* at 6.

⁵⁷ Colin Moynihan, *Trial Date Set for Dispute Over Broadway ‘Mockingbird,’* N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/theater/mockingbird-broadway-trial-date.html>.

⁵⁸ *Carter Complaint*, *supra* note 38, at 3.

and make comments which shall be considered in good faith by the Playwright.”⁵⁹ More specifically, that “the Play shall not derogate or depart in any manner from the spirit of the Novel nor alter its characters.”⁶⁰ Lee’s estate argued the alteration of main characters, like Atticus Finch and Calpurnia, questioned the impact of two other characters added who were not in the original novel, stated that the setting was not consistent with the setting of 1930s small-town Alabama, and contended further alteration of the children characters Jem and Scout Finch.⁶¹ Rudinplay disputed the accusations, its countersuit stating, “the character of Atticus in the draft script remained noble and idealistic, and true to the character as he appeared in ‘To Kill a Mockingbird.’”⁶² However, in an interview with the *New York Times* in March 2018, Producer Scott Rudin admitted that “he was unwilling to make changes to the script to adhere to some [of] the novel’s racially outdated views,” saying: “I can’t and won’t present a play that feels like it was written in the year the book was written in terms of racial politics. The world has changed since then.”⁶³

When Lee died in early 2016, the estate succeeded her as the author under the contract terms.⁶⁴ The controversy began in September of 2017 when Sorkin was interviewed by the media outlet *Vulture* at the Toronto Film Festival.⁶⁵ When asked “how the younger characters Jem, Scout, and Dill are going to speak Sorkin,” Sorkin responded:

I didn’t write their language like they were children . . . as far as Atticus and his virtue goes, this is a different take on *Mockingbird* than Harper Lee’s . . . he becomes Atticus Finch by the end of the play . . . he is in denial about his neighbors, and his friends and the world around him, that is as racist as it is . . . he becomes an apologist for these people.⁶⁶

Sorkin continued: “That adjustment not only gives Atticus a character journey from naïveté to righteousness, it ties the 1930s-set *Mockingbird* to today’s social climate.”⁶⁷ In subsequent interviews with the publication *Playbill*, Sorkin stated that it “doesn’t work at

⁵⁹ *Id.* at 5.

⁶⁰ *Id.* at 6.

⁶¹ *Id.* at 8-10.

⁶² *Paulson & Alter, supra* note 44.

⁶³ *Alter & Paulson, supra* note 51.

⁶⁴ *Carter Complaint, supra* note 38, at 6.

⁶⁵ *Buchanan, supra* note 40.

⁶⁶ *Carter Complaint, supra* note 38, at 6-7.

⁶⁷ *Id.* at 7.

all” to take the scenes that Lee wrote in the novel and dramatize them.⁶⁸

In an email shortly thereafter, the estate’s literary agent raised concerns about the sentiments raised in Sorkin’s interviews.⁶⁹ The producer, Rudin, replied confirming that “[t]he Atticus of the book is the Atticus of the novel . . . I am never going to fall anywhere outside the agreement.”⁷⁰ Rudin also placed a call to Carter, who was given an advance draft copy of the script during the same time, to assure her that despite her concerns regarding the alteration of characters, Atticus and housekeeper Calpurnia, and the addition of two characters not in the novel at all, that “he wanted to do the Play right.”⁷¹ Carter further stressed that in her estimation “the script was not consistent with the setting of 1930s small-town Alabama.”⁷² Rudin’s only assurance was that “the estate would be satisfied with the final product.”⁷³

Following the Carter/Rudin conversation, the estate’s literary agent sent a clarification email to confirm the understanding between all parties, stating: “We are all agreed that the Atticus in the play must remain the Atticus in the book.”⁷⁴ Rudin responded with the evasive and generic answer of: “We’re not looking to make any wholesale changes from what [Ms. Lee] did but simply to dramatize the book, which is sometimes very passive and more ruminative than dramatic.”⁷⁵ However, when a new script was sent in September 2017, it only exacerbated Carter’s concerns.⁷⁶

Six months later, Carter and Rudin met face-to-face to iron out issues.⁷⁷ The exchange was described in the complaint as “heated,” with Rudin resisting Carter’s comments and adding only that the draft was a “working draft,” and that her concerns would “be considered at a number of upcoming ‘workshops’.”⁷⁸ In the month that followed, the estate received no updated versions of the

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 8.

⁷¹ *Carter Complaint, supra* note 38, at 8.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 9.

⁷⁵ *Id.* (Rudin went on to advise, “remember you are reading a first draft . . . the process of making a play happens in workshops and rehearsals and previews.”).

⁷⁶ *Id.* at 8.

⁷⁷ *Carter Complaint, supra* note 38, at 9.

⁷⁸ *Id.* at 10.

script or notification that there was “a willingness to make substantial revisions to the Play.”⁷⁹

In March 2018, Carter sent a letter to Rudin expressing “the Estate’s position that the Play derogates or departs from the spirit of the Novel and . . . alters five of the Novel’s characters.”⁸⁰ An attorney for Rudin responded, referring to Paragraph 12 of the contract which states that “the Play shall not derogate or depart in any manner from the spirit of the Novel nor alter its characters,” but asserted that “The Author is . . . not the final arbiter of what ‘derogates or departs from the spirit of the Novel, or alters its characters.’”⁸¹ In the letter, Rudin’s lawyer also denied that the play derogated or departed from the spirit of the novel, or that any characters had been altered.⁸² Eight days later, Carter filed suit.

The issues the above conflict raises are rooted not just in vague contract terms, such as “in the spirit of the novel,” but the wide canyon that exists between parties in regard to both creative interpretation of the story as well as contractual interpretation. Disputes even arise years after the finished product has been delivered. In June 2016, author Homer Hickam filed a complaint against Universal Studios stemming from an agreement entered into between the parties in 1996, under which Hickam granted Universal his life story rights as reflected in the novel *Rocket Boys*. The story was then made into a film by Universal titled *October Sky*.⁸³ In 2006, Hickam developed, produced, and began staging the musical *Rocket Boys*.⁸⁴ Afterward, Universal developed its own musical based on *October Sky*, but as Hickam alleged in the suit, by copying “scene choices and sequences” and “language exclusively written for the *Rocket Boys* musical.”⁸⁵ Hickam’s claims included breach of contract, fraud, misappropriation of name and identity, intentional interference with contractual relations, and unfair competition.⁸⁶ The complaint argued that “Hickam [and family] . . . never granted Universal the right to portray them in

⁷⁹ *Id.*

⁸⁰ *Id.* at 11.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Dominic Patten & Erik Pedersen, *Universal Faces \$20M Lawsuit by Homer Hickam over ‘October Sky’ Musical*, DEADLINE (June 2, 2016, 7:32 PM), <https://deadline.com/2016/06/october-sky-musical-lawsuit-homer-hickam-universal-pictures-1201766554/>.

⁸⁴ *Id.*

⁸⁵ *Hickam v. Universal Pictures*, No. BC622436, 2018 WL 3144251 (Super. Ct. Cal. June 2, 2016) [hereinafter *Hickam Complaint*].

⁸⁶ *Id.* at 1.

connection with any stage plays or musicals,”⁸⁷ and claimed that Universal did not “have any rights to his life story other than the right to make” *October Sky*.⁸⁸ Universal countered, arguing that Hickam optioned “all rights to Universal to make any and all motion pictures or live stage productions” and demanded that he “cease and desist in developing, producing and performing the *Rocket Boys* musical”.⁸⁹

The Hickam battle centered around conflicting interpretations of the April 1996 *Life Story Option/Purchase and Consulting Agreement* for *Rocket Boys*.⁹⁰ Under the agreement, Hickam granted Universal “all motion picture, television and ancillary rights in and to the Work,” the Work was defined as “[t]he life story of Owner and the book to be written.”⁹¹ Life story was later defined in the agreement as “[t]he rights granted to Universal hereunder include all rights in and to the life story of Owner (Hickam) from birth through and including 1960.”⁹² Hickam’s interpretation of the terms were that it only pertained to the period of 1943 (his birth) until 1960, and “then only as the Work encompassed those time periods.”⁹³ Hickam argued that “Universal’s interpretation of the Agreement at the time that it was executed was consistent with that of [himself],” and that Universal, later claimed that “said term granted it all rights to all of the characters in the story for all time, even before 1943 and after 1960 and to include stories separate and apart from the Story and the Work.”⁹⁴ Further, Hickam contended that under the “Release to Portray” provision in the agreement he “only granted Universal the right to portray him in theatrical or television motion pictures and not in any live stage plays which are never mentioned anywhere in the Agreement.”⁹⁵

Even still, when approached in 2006 by a well-known Broadway musical production team, Hickam contacted Universal to ensure he could move ahead with his plans to develop *Rocket Boys*

⁸⁷ *Id.* at 3.

⁸⁸ Ashley Cullins, *Author Sues Universal Over Musical Theater Adaptation of ‘October Sky’*, HOLLYWOOD REP. (June 3, 2016, 3:34 PM), <https://www.hollywoodreporter.com/thr-esq/author-sues-universal-musical-theater-899337>.

⁸⁹ *Id.*

⁹⁰ *Hickam Complaint*, *supra* note 85, at 10.

⁹¹ *Id.* (*Rocket Boys* was still unpublished at the time).

⁹² *Id.* at 11.

⁹³ *Id.* at 12.

⁹⁴ *Id.*

⁹⁵ *Id.* at 14.

into a musical.⁹⁶ In an amendment to the original agreement, Universal granted Hickam exclusive live stage rights for five years, in exchange for 50% of the revenue, after which the rights became non-exclusive.⁹⁷ In 2013, Universal informed Hickam of their intention to license non-exclusive stage rights to a musical based on *October Sky*.⁹⁸ At the time, according to Hickam, he was assured the two musicals could move forward simultaneously with no issues.⁹⁹ Two years later however, according to Hickam, Universal threatened to assert rights to Hickam's life story, outside of those as he understood them in the original agreement, if Hickam did not cease production on his *Rocket Boys* musical.¹⁰⁰ In his complaint, Hickam asked the court for reformation and rescission, stating:

To the extent that the Court determines that the language . . . grants Hickam's life story rights before 1943 and after 1960 and any other story outside the Story and the Work during any year, any agreement from Hickam regarding same was agreed to by either unilateral mistake of Hickam, with the knowledge of Universal, or by mutual mistake.¹⁰¹

Hickam also sought a declaration by the court that Universal "only had the right to portray Hickam in a theatrical or television motion picture, and not in a live stage performance, and that such right is not assignable."¹⁰² The case was voluntarily dismissed in September 2017, as the parties agreed to a settlement, the details of which were not made public.¹⁰³

In both the *Mockingbird* and *Rocket Boys* disputes, conflict stemmed from issues of vague contract terms and poor construction as well as misalignment regarding the subjective intent and interpretation of the parties. In the matter of *Mockingbird*, Cheryl Davis, General Counsel of the Authors Guild, recognizes how easy it is to see both sides:

[T]he play shall not derogate or depart in *any manner* from the spirit of the novel nor alter its' characters'—could be interpreted in a limiting manner in the Lee estate's favor, but the

⁹⁶ *Hickam Complaint*, *supra* note 85, at 16-17.

⁹⁷ *Id.* at 17.

⁹⁸ *Id.* at 18.

⁹⁹ *Id.* at 20.

¹⁰⁰ *Id.* at 24.

¹⁰¹ *Id.* at 37.

¹⁰² *Hickam Complaint*, *supra* note 85, at 38.

¹⁰³ *Hickam v. Universal Pictures*, No. B277326 (Cal. Ct. App. dismissed Sept. 22, 2017).

underlying concepts ‘spirit of the novel’ and what it means to ‘alter’ a character are themselves ambiguous.¹⁰⁴

Davis argues that any discrepancy in interpretation of the provision would make it “quite possible that the parties had different understandings.”¹⁰⁵

Therefore, despite contracts being executed, one could argue that there truly is no meeting of the minds in regard to expectations and vision of the parties involved in these types of adaptation rights transfers, which eventually leads to conflict. However, interpretation, at least initially, should be objective. By providing interpretation terms that make expectations and rights explicit in the contract, inclusive of negotiation and meditation for any remaining disputes, the parties would be better positioned from the start. Inserting an interpretation clause—that includes a glossary of definitions—into these contracts would allow the parties to understand and agree to what the broad terms actually mean before embarking on the creative project. For example, the parties could choose to define the generic term “spirit of the novel,” as anything related to the specific elements of the story, exactly as they are depicted—including the plot, setting, theme, point of view, and characters or it could have a much broader definition as being related solely to the conflict and resolution presented in the story. Another example would be defining what “altering a character” looks like. Does it mean changing surface elements like gender, ethnicity, age, accent, or hair color or something deeper like the ability to reshape the character’s back story, personality, presence, and role in driving the plot?

Including an interpretation section and making negotiation and meditation mandatory early on in the adaptation process—as early as initial contract conversations and drafting—would allow discrepancies and disputes to rise to the surface, would address concerns from both parties, and reveal multiple conflict scenarios. Thus, a more thorough, richly detailed contract could be the result.

¹⁰⁴ Michael Paulson & Alexandra Alter, *We Asked 7 Lawyers to Untangle the Broadway Fight Over ‘To Kill a Mockingbird’*, N.Y. TIMES (Mar. 23, 2018), <https://www.nytimes.com/2018/03/23/theater/harper-lee-aaron-sorkin-broadway.html>.

¹⁰⁵ *Id.*

B. *Disparity in Bargaining Power*

Inequality of bargaining power involves situations where one party to a contract stands in a better position, with more options or better alternatives, than the other party.¹⁰⁶ “This results in one party having greater ‘power’ than the other to choose not to take the deal,”¹⁰⁷ and makes it more likely that the party with less bargaining power will be forced to accept unfavorable terms if they want to salvage the contract.

In relation to adapting novels to film or stage, the power imbalance is no secret. “My contract didn’t award me any creative control over the script; most book authors don’t get much leverage unless you’re as successful as E.L. James or Stephen King,”¹⁰⁸ noted Author Caren Lissner regarding the deal she made to sell the film rights to her novel *Carrie Pilby*.¹⁰⁹ “The movie-making process is filled with U-turns, dead-ends, and uncertainty. It’s why authors are told never to get their hopes up or to presume they’ll have any control over the outcome.”¹¹⁰

A well-known author is expected to have more bargaining rights in Hollywood since studios and streaming services can make the film or TV series faster with established source material, take on lower risk by using already popular books, and appeal to a built-in fan base.¹¹¹ In response to a question from a reporter as to what a major author deserves from Hollywood when they turn their book into a movie, Stephen King responded:

They deserve a fair shake and, okay, I’ve always said to myself, I can’t understand why any filmmaker wants to spend \$1 million for a book and then do something that bears very little resem-

¹⁰⁶ *Inequality of Bargaining Power*, WIKIPEDIA (last visited Feb. 2, 2019), https://en.wikipedia.org/wiki/Inequality_of_bargaining_power.

¹⁰⁷ *Id.*

¹⁰⁸ *E.L. James*, WIKIPEDIA, (last visited July 20, 2019), https://en.wikipedia.org/wiki/E._L._James (E.L. James is a best-selling British Author who has sold over 125 million copies of her books worldwide.); *Stephen King*, WIKIPEDIA, (last visited July 20, 2019), https://en.wikipedia.org/wiki/Stephen_King (Stephen King is a best-selling American Author who has sold over 350 million copies of his books.).

¹⁰⁹ Caren Lissner, *How My First Novel Became a Movie*, ATLANTIC (Sept. 17, 2017), <https://www.theatlantic.com/entertainment/archive/2017/09/how-my-first-novel-became-a-movie/539430/>.

¹¹⁰ Jane Friedman, *How a Book Becomes a Movie*, JANE FRIEDMAN (July 27, 2015), <https://www.janefriedman.com/how-a-book-becomes-a-movie/>.

¹¹¹ Andrew Liptak, *Why Hollywood is Turning to Books for its Biggest Productions*, VERGE (Jan. 26, 2017, 2:53 PM), <https://www.theverge.com/2017/1/26/14326356/hollywood-movie-book-adaptations-2017-expanse-game-of-thrones>.

blance to the book . . . the book deserves a fair shake . . . what the writer deserves is a fair accounting if the movie's a success.¹¹²

But King also admits he is in a unique position as one of the most popular and prolific American authors of all time: "I want approvals over the screenwriter, the director and the principal cast. We try to make these people understand, the people that are doing the deal, that I want to be part of the solution, not part of the problem."¹¹³

As we've seen in the *Mockingbird* case, disparity in bargaining power and ensuing conflicts can also depend on whether the author is alive or deceased, and the extent of the estate's control over rights to the author's work. Is it fair to say that the representatives for the estate know the true depth and scope of what the author would have wanted?

We know that all the parties to these negotiations and agreements want a deal, but at what cost? When interviewed, Author Fay Weldon was frank about the process of adapting her novel *She-Devil* into a film: "The Hollywood experience for a novelist is that they don't want to know you're alive: they'd rather you were dead. I only watched filming of the movie once . . . [i] could see they'd rather missed the point of the novel so I didn't have much faith in it after that."¹¹⁴ Authors tend to see a lucrative funding stream to be able to give them more freedom to do what they love to do most—write. "[T]he film company had given me money and in return I had given my book to them. That was the deal," said Weldon.¹¹⁵

Writing is inherently about connection, and the appeal to connect and find an even greater audience for your work is incredibly attractive. Then there is simply the gorgeous dream of having a world you created in your mind projected into a symphony of visual images, in some ways a rebirth of the book. But the risk for authors is that they have little to no control of the finished product

¹¹² Mike Fleming, Jr., *Stephen King on What Hollywood Owes Authors When Their Books Become Films: Q&A*, DEADLINE (Feb. 2, 2016, 10:45 AM), <https://deadline.com/2016/02/stephen-king-what-hollywood-owes-authors-when-their-books-become-films-q-a-the-dark-tower-the-shining-1201694691/>.

¹¹³ *Id.*

¹¹⁴ Charlotte Philby, *Hollywood ate my Novel: Novelists Reveal What it's Like to Have their Book Turned Into a Movie*, INDEPENDENT (Feb. 18, 2012), <https://www.independent.co.uk/arts-entertainment/books/features/hollywood-ate-my-novel-novelists-reveal-what-it-s-like-to-have-their-book-turned-into-a-movie-6940772.html>.

¹¹⁵ *Id.*

and hide in horror at the misinterpretation or what they might consider a massacre of their creative work. “When I write a book, and someone decides to make it into a movie, I’m glad,” stated Italian novelist Elena Ferrante, whose work has been adapted to film and most recently an HBO mini-series.¹¹⁶ But, she added, “Then the work begins. My first impression is traumatic, as the literary cover is torn off my novel by the screenwriters. It’s a terrible moment: I worked on that text for years, and now everything seems to become impoverished.”¹¹⁷

Studios and production companies see dollar signs but have much more in their coffers than the typical author. Buying the rights to a novel is an everyday occurrence for studios, whereas for most authors it may be a once in a lifetime opportunity. “More than a few indie authors might be thinking, ‘So what? To have my work shared with a broad audience? Bring it!’” notes Mercy Pilkington, the CEO and Founder of Author Options, a hybrid publishing and consulting company.¹¹⁸ But she warns, “Barring a really great agent or contract attorney looking out for their author’s interests . . . the absolute pillaging of a book destined for the screen can be brutal.”¹¹⁹ Often, the studios are only willing to purchase the work on their terms and have nothing to lose by walking away from a novelist whose demands are too great. The novelist, seeing this as their only shot, usually takes the unfavorable deal.

IV. PROPOSAL

Given that contracts to license creative works can be ambiguous and amorphous with regard to creative control and interpretation, and often involve great disparities in bargaining power, the disputes surrounding them are better suited for mindful, proactive resolution in the form of negotiation and mediation, rather than reactive litigation. Involving a skilled negotiator and/or mediator from start to finish—from initial conversations regarding an option

¹¹⁶ Elena Ferrante, *Elena Ferrante on the Screen Adaptation of Her Book: ‘I want to say, let’s give up’*, *GUARDIAN* (Nov. 10, 2018), <https://www.theguardian.com/lifeandstyle/2018/nov/10/elena-ferrante-on-screen-adaptations-of-her-novels>; Elena Ferrante, *WIKIPEDIA* (last visited July 20, 2019), https://en.wikipedia.org/wiki/Elena_Ferrante.

¹¹⁷ Ferrante, *supra* note 116.

¹¹⁸ Mercy Pilkington, *Do Indies Need to Worry About Adaptations of Their Books?*, *GOODREADER* (Oct. 21, 2018), <https://goodereader.com/blog/indie-author-news/do-indies-need-to-worry-about-adaptations-of-their-books>.

¹¹⁹ *Id.*

contract all the way through to final cut or theater previews—would not only make for more solid adaptation contracts less prone to litigation, but level the playing field between authors and production companies.

Using the tools of negotiation and mediation as effective means of Alternative Dispute Resolution can greatly increase the chances that more books, both well-known and independent voices, meet an exciting new evolution of expression and a greater audience. Both negotiation and mediation are informal and productive alternatives to litigation.¹²⁰ While negotiation usually finds the parties working directly to resolve any disputes, mediation involves a mediator “trained in negotiations, who bring[s] opposing parties together and attempt[s] to work out a settlement or agreement that both parties accept or reject.”¹²¹

In 2016, the Authors Guild challenged the U.S. publishing industry “to take a fresh look at the standard book contract” which “insulate[s] the publishers from any potential loss, placing all the risk on the author,” with authors being asked to sign “standard agreements ‘no questions asked,’ and if they question author-unfriendly terms, they are often told the clauses are ‘not negotiable.’”¹²² The call to action of the Guild was to make “the publishing industry more fair and profitable for authors.”¹²³

Similarly, dedicated negotiators and mediators with experience in both writing and production could be the shot in the arm the entertainment world needs to ensure that novel adaptations to film, television, and stage become lucrative, fair, and positive experiences for all parties involved. Negotiation, known as the “pre-eminent mode of dispute resolution,” is when the parties meet in an effort to settle a dispute, with the parties themselves staying in control of the process and solution.¹²⁴ However, it is clear that due to a disparity in bargaining power and perhaps a novice author unfamiliar with just what kind of protection they’ll have under such vague contract terms, a skilled negotiator should be brought into the initial contract conversations. Given the unique nature of these creative conflicts, just having a neutral third-party present to settle disputes would likely not be enough. The negotiator and/or media-

¹²⁰ *Alternative Dispute Resolution*, LEGAL INFORMATION INSTITUTE (last visited July 20, 2019), https://www.law.cornell.edu/wex/alternative_dispute_resolution.

¹²¹ *Id.*

¹²² *Fair Contract Initiative*, AUTHORS GUILD (last visited July 20, 2019), <https://www.authorsguild.org/where-we-stand/fair-contracts>.

¹²³ *Id.*

¹²⁴ *Alternative Dispute Resolution*, *supra* note 120.

tor needs to be someone that has practical knowledge within the film industry and the experience of being a writer.

The Writers Guild of America is especially well-suited to identify and supply this type of individual. A negotiator, drawn from the pool of talented and experienced individuals at The Writers Guild of America, could serve as a neutral party that has both a thorough understanding and appreciation for the craft of writing, while having a keen awareness of the interests and needs of the entertainment industry. Writers Guild staff currently negotiate contracts for their members, so they are well-equipped and familiar with how to “negotiate and enforce fair contracts.”¹²⁵ Secondly, a Writers Guild negotiator and/or mediator would have the right skills, know-how, and perspective needed to manage the dynamics between the parties and is also likely to be a trusted counsel who has the broad ability to not only understand industry specific concepts but present reasonable resolutions. Guild staff or an attorney who has experience working extensively on both sides of these deals—with authors and with studios—could serve as a trusted mediator once the process has moved further into screenwriting, pre-production, and filming or rehearsals.

The contract for a film also gives one party or the other “final say privilege” over the finished product.¹²⁶ “Well-established directors have the ‘final cut privilege,’ meaning that they have the final say on which edit of the film is released. For other directors, the studio can order further edits without the director’s permission.”¹²⁷ In short, final say is rarely ever the privilege of the original author of the work. Building mediation into the contract would eliminate the power of the ‘final say’ concept and clause in theory and practice. The mediator would work with the parties toward a mutually agreed upon finished product. If the parties still stayed in conflict, and couldn’t arrive at agreement on the finished product, the contract would give the mediator the power to resolve the dispute based on industry expectations.

Known as “supercharged negotiation,” in a mediation session a mediator can “assist the parties in their negotiations by identifying obstacles to settlement and developing strategies to overcome

¹²⁵ *What is the Guild?*, WRITERS GUILD OF AM. EAST (last visited Nov. 29, 2019), <https://www.wgaeast.org/what-is-the-guild/#What>.

¹²⁶ *Final Cut Privilege*, WIKIPEDIA (last visited July 20, 2019), https://en.wikipedia.org/wiki/Final_cut_privilege.

¹²⁷ *Film Director*, WIKIPEDIA (last visited July 20, 2019), https://en.wikipedia.org/wiki/Film_director.

ing them.”¹²⁸ The mediator would serve the true interests and desires of the author, while also recognizing the needs and demands of production companies. Given that mediation sessions are private and confidential, and no public record is made of the proceedings,¹²⁹ it is an attractive option for studios and high-powered Broadway producers to utilize in order to avoid the potential negative publicity resulting from an adaptation deal that turns sour. Likewise, this type of privacy allows authors to be able to shield themselves from any unfavorable portrayal by the opposition and not have to deal with navigating the entertainment media world, which they may be unequipped to handle.

Further, a mediator would take into consideration an often-overlooked aspect of the process—what benefit the finished product has to a loyal and eager fan base hoping to see a book that they loved transformed in a way that makes their heart dance as much as their initial reading of the novel. For example, a mediator may suggest that the source material in question not be turned into a film at all, and is better suited for television. British author Deborah Harkness, whose novel *Discovery of Witches* premiered as a TV series in the U.S. in January 2019 and was originally optioned to be a film, feels TV was the right way to go in the end: “TV’s ability to linger on stories, to develop characters, to give you that sense that you’re on the journey with them, it’s just so much more feasible to tell a story . . . on a television series than it is on a 90-minute movie framework.”¹³⁰ Harkness adds that she was even “impressed with the way the writers of the show expanded the scope of the story,” since all the books in her series were written in the first person, but “the writers were able to brilliantly bring to life [the rest of the story]. If I could go back and do a do-over this is how I’d do the books, just so I could get all that juicy, fun intrigue into them.”¹³¹ The myriad of new streaming platforms requiring content gives the mediator another tool with which to potentially advise the author to choose something other than a big studio film deal being presented.

By inserting unique solutions and ideas, a mediator’s role could end up being even more creative than practical. Given the

¹²⁸ Michael Roberts, *Why Mediation Works*, MEDIATE.COM (Aug. 2000), <https://www.mediate.com/articles/roberts.cfm>.

¹²⁹ *Id.*

¹³⁰ Rich Sands, *NYCC: A Discovery of Witches Author Deborah Harkness Talks Adapting the Books for TV*, SYFY WIRE (Oct. 5, 2018), <https://www.syfy.com/syfywire/a-discovery-of-witches-author-deborah-harkness-talks-about-adapting-the-books-for-tv>.

¹³¹ *Id.*

“confidential and non-binding nature of the proceedings,”¹³² his/her presence would help to build trust among the parties and potentially foster a deeper collaborative relationship which could end up in a heretofore unrealized potential of the source material. “The mediation session normally provides each side with a more realistic view of the opposing position (not one filtered through lawyers) and often results in the consideration of settlement proposals that otherwise would have been rejected.”¹³³ Italian author Ferrante admits that even after the initial horror of seeing her novels morph into somewhat unrecognizable skeletons in screenplay form, in working with screenwriters: “I often seem to be collaborating on ‘remaking’ my novel, with writing that I would never have used. And when it all seems in order”—the story and the dialogues flow; we’ve honed, eliminated—the work seems finished.”¹³⁴

“There are a lot of writers who are very, very sensitive to the idea, or they have somehow gotten the idea that movie people are full of sh*t,” says Author Stephen King.¹³⁵ “That’s not the truth. I’ve worked with an awful lot of movie people over the years that I think are very, very smart, very persistent and find ways to get things done,” he adds.¹³⁶ “There was a time when I distrusted the process very much. But having been around the business with so many films, I have more of a tendency to trust good directors than I used to.”¹³⁷ “The process was sort of animated, [though] nobody slammed any doors,” admits critically acclaimed British Author Ian McEwan describing the adaptation of his novella *The Children Act*.¹³⁸ McEwan, who also served as the screenwriter for the adaptation, acknowledges that while producers may “come and raise questions and problems,” the process of creative collaboration can help develop something even better than what the producers are suggesting or what the writer had originally conceived.¹³⁹ *New York Times* Best Selling Young Adult Author Nicola Yoon also had a positive experience in the adaptation of her novel *Every-*

¹³² Roberts, *supra* note 128.

¹³³ *Id.*

¹³⁴ Ferrante, *supra* note 116.

¹³⁵ Fleming, *supra* note 112.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Katie Kilkenny, *Ian McEwan on Adapting His Own Novels and Script Notes That Drive Him “Mad,”* HOLLYWOOD REP (Sept. 14, 2018, 6:15 AM), <https://www.hollywoodreporter.com/news/ian-mcewan-adapting-his-novels-script-notes-drive-him-mad-1143252>.

¹³⁹ *Id.*

thing, *Everything*, saying about the process: “To give it to someone else, you have to trust that they match your vision . . . [and] bring the same sort of passion and commitment that you did.”¹⁴⁰ She worked with producers who included her and welcomed her notes on the script, when she was invited to MGM to view the final screening she said it was surreal and wonderful. “[i]t’s not the same as your book, right? It’s a different piece of art. And that’s nice. For me, it’s nice that there’s more art about these characters that I’ve loved for so long in the world.”¹⁴¹

A mediator, who’s able to speak both languages, could help bridge the gap and build these types of amicable, mutually beneficial relationships by “translating” the aims, desires, and creative interpretation of the work in progress, as well as forming a clearer, more aligned picture of the finished product. Through the dedicated and transparent work of a mediator, the author may see their work with fresh eyes. McEwan says that working with close friends in the business “in a kind of intimacy and extended negotiation,” brings the best results as they, “just talked our way into a script that we were all happy with.”¹⁴² This was in stark contrast to his prior experience in Hollywood, typical of most film adaptations, where the notes producers gave were all “formed out of a pattern, as if they’d all taken Screenwriting 101 years ago . . . [i] didn’t think there was any real thought behind it, these were just buttons that were being pressed.”¹⁴³ Having written multiple screenplays for the TV and film adaptations of his work, McEwan is now keenly aware of the unanticipated, yet welcome, creative nuances that arise from the process of adaptation:

[T]here’s always that opportunity to go back and do things differently. . . you [also] get impelled to a greater accuracy in the movie. When you’ve actually got to see everything, when it’s so literal as cinema is, you have to get things bang-on right . . . [t]hat’s a kind of discovery in itself. Writing a screenplay is a way of really laying out the whole corpse and bringing it back to life in a different way.¹⁴⁴

Likewise, a skilled mediator could serve as the necessary, neutral third party that can help to overcome the political posturing, power trips, and plain arrogance of bankable Hollywood

¹⁴⁰ *Nguyen, supra* note 24.

¹⁴¹ *Id.*

¹⁴² *Kilkenny, supra* note 138.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

screenwriters, directors, producers, and even actors who continue to run roughshod over authors and have little respect for the principal creative work. In an interview, just weeks before opening night of *Mockingbird*, leading man Jeff Daniels who plays Atticus Finch had strong words for any prospective viewer, “So all these people who love this book . . . delete, delete, delete, delete, delete, delete. I’m originating the role as far as I’m concerned . . . [y]ou think we’re supposed to go over here. Well we’re going over here.”¹⁴⁵ As for Sorkin, his final objective seemed to deny the notion that the source material he needed to create *Mockingbird*, even existed:

For those who haven’t read the book in 20 years . . . for those who read the book last week . . . my hope and belief is that 30 seconds after the curtain goes up you will have forgotten those expectations and you will be caught up in this new thing that you’re seeing.¹⁴⁶

A mediator in these situations is the right choice for a multitude of reasons, among them “a mediator’s job is to keep the parties focused on exploring productive avenues to settlement, posturing and hard bargaining are often reduced or eliminated.”¹⁴⁷ A skilled mediator drawn from the entertainment writing world would have the ability to present a dual-sided approach to common sticking points in regards to contractual terms, creative input and control, and issues surrounding disparity in bargaining power.

Second, mediation brings all parties to the table to resolve a problem.¹⁴⁸ High-level decision makers or little-known authors, who in the normal course of business may be discussing matters through lawyers or agents, are now forced to focus on the matters at hand directly. Perhaps most importantly, using a mediator presents an opportunity for “each party . . . to directly educate and influence their opponents. As a result, the mediation session normally provides each side with a more realistic view of the opposing position.”¹⁴⁹ In novel adaptation disputes it is easy for the parties to dig in their heels in regards to plot, character, or narrative, a mediator can help communicate areas of commonality when it

¹⁴⁵ *60 Minutes* (CBS television broadcast Nov. 25, 2018), https://www.cbs.com/shows/60_minutes/video/YgchIHexvobJCHtmlDzqQhZurZV7_LJV/chaos-on-the-border-robots-to-the-rescue-to-kill-a-mockingbird/.

¹⁴⁶ *Id.*

¹⁴⁷ *Roberts, supra* note 128.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

comes to the big picture of the story and from there zero in on how best to achieve that vision.

Further, a mediator is critical in allowing “each side to ‘test market’ a settlement proposal by privately conveying the proposal to the mediator.”¹⁵⁰ This is particularly favorable to authors unfamiliar with the adaptation process who can run their desires and willing concessions by the mediator without fear of having it used against them in negotiations. Finally, a mediator is critical in assisting “the parties to clarify their real objective and to consider alternatives that might be overlooked by attorneys engaged in battle.”¹⁵¹ A mediator’s sole intent is to reach a positive resolution and resolve potential, impending, or current disputes. In regard to novel adaptation, a mediator can get to the core of the relationship by ironing out vague contractual terms that seem to favor one party over another or honing in on areas of poor contract construction that cry out for clarification. Vague and opaque clauses in contracts—such as “spirit of the novel” in *Mockingbird*, “accounting profits” in *Groom*, and “life story” in *Hickam*—could be resolved at the outset were a skilled mediator involved in initial contract negotiations. A mediator could push the parties toward adopting clear and exacting language to contracts terms, for example clarifying whether “spirit of the novel,” includes theme, tone, setting, language. A mediator could also ensure that definitions and interpretations clauses are added to the contract, inoculating later disputes on the manner or fashion in which the agreement is to be read.

A mediator can clarify specifics regarding what type of control the author retains, whether he/she will serve as a consultant, screenwriter or hands-on day-to-day advisor. A mediator can help stipulate plot structure and identify if and when it has been breached. A mediator has a keen awareness of the investment of all parties, both financial and creative, and can ensure parity while balancing the integrity of the source material with the real-world demands of visual storytelling and commercial success.

A true meeting of the minds involves clear expectations and a unified vision. In his/her ability to control communications between an author and producers, a mediator will appreciate that the differences in medium—the written word versus the visual world—serve only as opportunities and not obstacles to the birthing of the ultimate artistic product. Well-established sticking point matters

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

like “final cut” of the project can be navigated by a mediator with greater fairness and insight than opposing counsel or in some cases even the parties themselves. “When you sell a book it is a gamble,” said Author Lionel Shriver, whose novel *We Need to Talk About Kevin* was released as a film in 2011.¹⁵² “[Y]ou take the risk that someone will take your work and turn it into something you are ashamed of. But something is generally more interesting than something not happening, so it’s a risk worth taking,” he adds. A mediator has the potential to ensure that the novel adaptation process is not only realistic and practical, and efficient and effective from start to finish, but delivers a richer product than the parties originally thought imaginable. “It’s nice to be surprised by someone bringing something new to your material,” said Shriver.¹⁵³

In conclusion, as witnessed in the *Mockingbird* case, using Alternative Dispute Resolution is a wiser and more efficient solution since these cases waste time, money, and critical public relations capital in litigation. While *Mockingbird* did eventually make it to Broadway in December 2018, the taint of the lawsuit continued to surround the production. “Have you screwed it up?” asked CBS reporter Steve Kroft in a 60 minutes interview with Sorkin just weeks before opening day.¹⁵⁴ “I don’t think I have, I – I think I did get out of it alive,” Sorkin responded, adding: “There is no event in the play that doesn’t occur in the book. I – I – I haven’t added new things. But those events are simply – we’re taking another look at them. It’s going to be a new look at familiar material.”¹⁵⁵ *Mockingbird* Director Bartlett Sher admitted, “the challenge is expectations. The challenge is swimming into the national memory between people who have a deep memory of the book . . . and people who are going to come into the theater and see it now.”¹⁵⁶ Since the terms of the settlement remain confidential, we’ll never know if the areas in which the play deviates from the book—including by replacing the child actors with adults, introducing the trial at the start of the story, and giving Calpurnia, the maid, a more prominent voice—were concessions of the estate made in fear of retaliatory litigation or amicable creatively conscious agreements.¹⁵⁷

¹⁵² *Philby*, *supra* note 114.

¹⁵³ *Id.*

¹⁵⁴ *60 Minutes*, *supra* note 145.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

On the heels of the *Mockingbird* case, in November 2018, Author Jon Krakauer brought suit over the musical adaptation of his 1996 book *Into the Wild*.¹⁵⁸ According to the complaint, Krakauer found the script objectionable and then sought to exercise his alleged right under the contract to have his name and the title removed from the play.¹⁵⁹ In essence, the dispute revolved around contract interpretation and questions over rights to the title.¹⁶⁰ While this recent high-profile case winds its way through the judicial process in Colorado, one can surmise that perhaps its fate will also be that of the many other adaptation lawsuits that have gone before it. The majority of adaptation dispute cases end up in settlement, proving that these lawsuits—while often well-intentioned and full of merit—are essentially pointless. Along the way, both parties—some more than others—are likely to be harmed by the negative publicity and be forced to make unwanted concessions. Given the high-risk potential to harm their brand, bottom line, or established audience, authors and studios alike are well advised to choose the Alternative Dispute Resolution process.

V. CONCLUSION

In conclusion, with a mediator involved in initial novel adaptation contract discussions and subsequent stages of production, both the author and the producers would be better served. When a popular novel with an established fan base is turned into a flop at the box office, no one wins. When a new author just finding her audience has the opportunity to reach thousands more potential fans, the introduction should be a positive one.

There is always the chance that serendipity could spring from the start. “We wanted to preserve what we thought was so cool about the book, and that was our pitch when we were trying to get the rights . . . it was already so beautiful and horrifying that the pressure was just not to mess up William’s very beautiful novel,” commented Screenwriter Macon Blair who wrote the adaptation

¹⁵⁸ Mitchell Byars, *Boulder Author Jon Krakauer Sues Over “Into the Wild” Musical*, *BOULDER DAILY CAMERA* (Dec. 7, 2018, 2:59 PM), <https://www.dailycamera.com/2018/12/07/boulder-author-jon-krakauer-sues-over-into-the-wild-musical/>.

¹⁵⁹ *Id.*

¹⁶⁰ Stephanie Wild, *Author of ‘Into the Wild’ Novel Files Lawsuit Over Musical Adaptation*, *BROADWAY WORLD* (Dec. 9, 2018), <https://www.broadwayworld.com/article/Author-of-Into-The-Wild-Novel-Files-Lawsuit-Over-Musical-Adaptation-20181209>.

for William Giraldi's 2014 novel, *Hold the Dark*.¹⁶¹ Jeremy Saulnier, the Director of the film felt a similar commitment when he read the novel, "I felt an intuitive connection to it, and I got it, so I could be the translator. To do that visually, Macon had done the heavy lifting along with William to create the story and the architecture. I just wanted to be true to the material."¹⁶² Many say the key is to keep lines of communication open from the very beginning. When writing the 2018 released film of Patrick deWitt's 2011 novel *The Sisters Brothers*, screenwriter Thomas Bidegain said he met with deWitt early in the process to discuss "beefing up two characters" and "changing one character from male to female," and that deWitt agreed to the changes amicably.¹⁶³

But if and when there is no chemistry between author and buyer from the start, a mediator could play the key role in honoring both the author's creation and the filmmakers' intent, while along the way potentially changing how all participating creatives think about the process. Instead of seeing the filmmaking process as something to protect themselves from, a mediator could help guide authors through this vulnerable time by stressing the importance of a truth writers know all too well—that the process of creation is never really over. As Ferrante put it, "the book, it will stay behind, imperturbable, while the film comes closer and closer to one of its possible incarnations."¹⁶⁴

Further, a mediator can help soften a studio's stance on keeping authors at a distance and ensure that authors are treated on fairer footing. Contract remains the core of the adaptation process, so involving skilled negotiators and/or mediators from the start sets up a route to resolving conflict later in the production process. When the parties come in with a strong and clear contract from the start, having negotiated with open minds and agree to work within that structure, the chances for later conflict is greatly diminished. Additionally, by encouraging studios to bring authors into the fold at various stages of production, a mediator can highlight the ways in which screenwriters and filmmakers can rely on authors for access "behind the veil," with authors sharing the es-

¹⁶¹ Jennifer Blair, *Novel Ideas: Moviemakers Jeremy Saulnier and Macon Blair on Adapting a Book for the Screen and Building Atmosphere*, MOVIE MAKER (Oct. 29, 2018), <https://www.moviemaker.com/archives/moviemaking/hold-the-dark-jeremy-saulnier-macon-blair/>.

¹⁶² *Id.*

¹⁶³ Raju Mudhar, *Creators of Three Films Discuss the Challenges of Putting a Book on Screen*, STAR (Sept. 12, 2018), <https://www.thestar.com/entertainment/tiff/2018/09/12/creators-of-three-films-discuss-the-challenges-of-putting-a-book-on-screen.html>.

¹⁶⁴ Ferrante, *supra* note 116.

sence or motive behind the words on the pages of the novel. This deeply intimate process could further stimulate new visual, aural, and dialogue ideas in the filmmakers' minds. Simultaneously, a mediator could help authors understand that film or television—being different mediums—offers authors an even more expansive way through which to express their work. As co-screenwriter and director of *The Sisters Brothers*, Jacques Audiard, put it: “Cinema is a collective effort, and we all look for gold in the same river.”¹⁶⁵ His advice in short: “What makes an adaptation work? Adapt your source material, then adapt your adaptation. Then keep writing.”¹⁶⁶

More than six decades ago, George Bluestone, author and Professor Emeritus of film at Boston University, captured the essence of film adaptation in a sentiment that still rings true today:

As long as the cinema remains as omnivorous as it is for story material, its dependence on literature will continue. The best one can hope for, then, is a minimal awareness of that metamorphic process which transforms pieces of fiction into new artistic entities. Once that process is understood, the alchemist's firing pit will surely yield less disappointing lead; it may even yield surprising deposits of gold.¹⁶⁷

There is no precedent to having this type of neutral third party involved in book to screen, stage or television adaptations, however it is well past time that it occurs. In order to ensure that authors' rights and creative works continue to be respected and honored at every stage of their evolution, and that audiences have an ever-flowing chance to fall in love with characters and stories they only thought they knew, a mediator's role in bringing these two creative powerhouses together could make for a newfound love of once read or undiscovered novels and an even richer and more rewarding experience of television and film.

¹⁶⁵ Jacques Audiard, *Kindling Kinship: To Write an Adaptation, Build Bonds Between Your Creative Partners and Your Source Material*, MOVIE MAKER (Oct. 15, 2018), <https://www.movie-maker.com/archives/moviemaking/screenwriting/the-sisters-brothers-jacques-audiard-screen-writing-adaptation/>.

¹⁶⁶ *Id.*

¹⁶⁷ GEORGE BLUESTONE, *NOVELS INTO FILM*, 219 (Johns Hopkins Univ. Press 1957).

