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## To Kill a Mockingbird award paves way for movie remake

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*Promotional still from the film To Kill a Mockingbird (1962) with Gregory Peck and Brock Peters.*

A dispute over rights to Harper Lee's *To Kill a Mockingbird* has settled after an arbitrator ruled following the author's death that successors and heirs to the makers of the Academy award-winning film retain the movie remake and sequel rights.

The dispute came to light this month, after an application was made to the US District Court for the Southern District of Alabama – the US state where Lee lived and where the novel is set – to confirm the final arbitral award, issued by arbitrator **Richard Silberberg** on 20 January.

The award incorporates a settlement agreement reached by the parties in December last year, after Silberberg issued a partial final award in June 2018 in favour of the companies that inherited the

original filmmakers' rights. This followed a three-year proceeding under American Arbitration Association rules.

In the words of *The New York Times*, the drawn-out dispute "pitted a bestselling American literary icon against the descendants of filmmakers who had produced an acclaimed movie that was nominated for an Oscar for best picture and that Lee herself professed to love". The final award and settlement pave the way for a remake of the film and the making of sequels or derivative productions.

The dispute also involved consideration of allegations that Lee's representative, Alabama-based lawyer **Tonja Carter** (who had power of attorney over the author's affairs in her final years and has administered her estate since her death), had engaged in "a multi-year pattern of conduct" that was "demonstrably contrary" to Lee's wishes, including preventing access to her will.

Silberberg swerved any factual findings on these contentious issues, instead deciding the dispute based on the agreements the parties had entered, principles of New York contract law and the 1976 US Copyright Act.

### **An American classic**

*To Kill a Mockingbird* was first published in 1960 and the story of racism and rape in the American deep south, seen through the eyes of a young girl, Scout, became a Pulitzer prize-winning classic that has sold over 40 million copies worldwide and been studied by generations of schoolchildren.

Among its most famous passages is the advice of Scout's father, lawyer Atticus Finch, that: "You never really understand a person until you consider things from his point of view... until you climb into his skin and walk around in it".

The critically-acclaimed film version came out just two years after the book, in 1962, starring Gregory Peck as Atticus. It was a box office hit, grossing more than US\$20 million from a US\$2 million budget, and won Oscars for best actor (Peck), best art-direction and best screenplay. It also received nominations for five other Oscars, losing out to *Lawrence of Arabia* for "best picture".

Lee described the black-and-white film as "a work of art" and said there wasn't anyone other than Peck who could have played Atticus. She went on to enjoy a lifelong friendship with the actor and his family, including his daughter, movie producer Cecelia Peck, who regularly visited her in Monroeville, Alabama. Cecelia Peck is the owner of one of the film companies in the dispute, named Atticus Corporation after her late father's character.

Fifty-five years after publishing *To Kill a Mockingbird*, Lee stunned the literary world by publishing a second novel in early 2015, when she was 88.

*Go Set a Watchman* was promoted as a sequel to *To Kill a Mockingbird*, depicting the same characters in later life, though it was written before, in the mid-1950s. By the time it came out, Lee was represented in all her business affairs by Carter, to whom she had granted a lasting power of attorney after suffering a stroke. It was Carter who reportedly discovered the long-lost *Go Set a Watchman* manuscript in a safe deposit box in 2014.

The episode led to concern that Lee, who had always maintained she would not publish another novel, may have been subject to coercion and elder abuse. However, following an investigation that included an interview with Lee in her care home, Alabama officials confirmed that she had been sufficiently mentally competent to agree to the book's release.

### **The rights dispute**

The arbitration concerned a motion picture option agreement that Lee signed with Robert Mulligan, Alan Pakula and Peck – director, producer and star of the 1962 film – the year before it was made. In the 1961 agreement, which was governed by New York law, Lee granted them rights to both the novel and any sequel she might write or publish in return for payments and a percentage of profits.

This agreement was not reconsidered for four decades, until Lee argued in 2000 that the rights conferred had reverted to her and persuaded the film companies to enter a new agreement granting her a greater share of profits.

Eight years later, Lee served the film companies with a notice terminating the 1961 rights, as permitted by section 304(c) of the 1976 Copyright Act. A new agreement gave the companies the film rights and certain other rights but reserved the literary, stage, television and radio rights to her.

In 2015, after the publication of *Go Set a Watchmen* and following approaches by several film studios which wanted to buy the rights to that novel, Carter issued a further termination notice on Lee's behalf, seeking to revoke all the rights conferred in the previous agreements.

Carter went on to initiate the arbitration in August 2015, seeking declarations that the rights had been lost.

Among other arguments, Carter said in the arbitration that the grant of an option to any sequel in the 1961 agreement was void *ab initio* under New York law because it was "perpetual", exercisable whenever such a sequel was published to the end of time.

The film companies filed a counterclaim arguing that the 1961 deal still applied and no other companies could produce films derived from Lee's novels. They alleged Carter had breached the deal by failing to honour the sequel option with respect to *Go Set A Watchman* and giving them a

right of first refusal to produce a stage version of *To Kill a Mockingbird* on Broadway. They said the revocation of rights by the author in 2008 and 2015 were invalid.

In February 2016, Lee died and her interests in both novels and the arbitration proceedings passed to her estate, administered by Carter.

### **Were Lee's wishes misrepresented?**

An initial row in the arbitration concerned whether the film companies should be entitled to testimony from Lee herself, rather than Carter, who they accused of misrepresenting the authors' wishes. After Lee died, this became a row over whether they were entitled to view the author's will, which had been sealed by the Alabama Probate Court at Carter's behest to protect the author's privacy and avoid "potential harassment" of beneficiaries.

In support of their application to view the will, the film companies pointed to a news report in which Lee had answered a journalist's inquiry as to whether she would agree to a film remake of *To Kill a Mockingbird*. Lee responded: "No, no, no! It's even in my will... And you can put that in your story!"

This was consistent with a letter she had written to Peck's widow in 2008, stating: "[H]e was the only Atticus and I hope there is some way to prevent a remake of any kind."

Having initially ruled that it would be "unnecessary" for the film companies to view the will, Silberberg – who is head of arbitration and litigation at Dorsey & Whitney in New York – reconsidered. He accepted that Carter wanted to shield the will from those without a compelling reason to see it, "given Ms Lee's notoriety, the abiding public interest in her life and work, and her well-documented desire to maintain her privacy". However, he suggested that it would not be violating her privacy for it to be produced "for a limited purpose and under appropriately controlled circumstances".

He noted that Carter had been granted a discretion by the Alabama court to show the sealed will to interested parties and said she was not insulated "from an obligation to provide relevant discovery" as a litigant in the arbitration.

Accordingly, Silberberg directed that she show the will to the film companies' counsel on an "attorney eyes only" basis, with "wholly private family matters", which were not relevant to the dispute, redacted.

It is not known whether this viewing took place. In 2018, *The New York Times* was allowed to view the will (which had been signed by Lee just eight days before her death) after filing a lawsuit in Alabama arguing that it was public record. The newspaper's coverage of its contents makes no

mention of a clause relating to a movie sequel, explaining that the author's literary interests were assigned to a trust administered by Carter, the terms of which were unknown.

Addressing the film companies' "passionate" assertion that Carter had acted without Lee's authority in terminating their rights and commencing the arbitration, Silberberg said this was "understandable" given these actions were "antithetical" to their personal experience of Lee "in the waning years of her life".

He observed, however, that, without an evidentiary hearing, he was not in a position to resolve "factual disputes regarding what Ms Lee knew or didn't know, what she understood or didn't understand, what she said or didn't say, and what she did or didn't do at various points in time". He added that such a hearing would be fruitless given that the two "primary sources of proof", Lee and her lawyer sister Alice, were both dead.

As a result, Silberberg accepted that Carter had legitimately exercised her power of attorney and "did not exceed her authority" in acting as she did. Carter herself vigorously denied acting contrary to Lee's wishes, asserting that she had always made sure the author approved her actions and issued the 2015 termination notice in line with her express instructions. She also said Lee had personally met with counsel and urged them to start the arbitration.

### **Were the film companies the true heirs?**

A further issue in the case was whether the companies fighting the claim were "true and exclusive" heirs to the rights conferred on Mulligan, Pakula and Peck in 1961, with Carter arguing that they must produce documents to prove the "chain of title". She suggested that Universal Studios (which had offered a seven-figure sum to make a film of *Go Set a Watchman*) possessed some rights, thanks to an assignment in the context of a 1962 financing agreement.

The film companies resisted the call for them to prove their successorship, suggesting it would require the production of 750 to 1,000 documents, which would have to be reviewed by counsel at huge expense. They argued that Carter was estopped from challenging their status as successors to the agreement given Lee had acknowledged it in the 2000 and 2008 agreements. They also argued that Universal would not have offered so much money to make *Go Set A Watchman* if it already possessed the rights.

Silberberg noted that, under the AAA rules, he only had to order the production of documents if it was "reasonable" and would help resolve the dispute efficiently and economically. He said Carter's requests were "overbroad," given that they were based on a mere suspicion that the chain of title might be defective.

He permitted limited discovery only on the issue of whether rights had been assigned to Universal as security for financial advances and for how long, which he said could be determined from a copy of the 1962 financing agreement. After reviewing that document, he said Carter could apply for "additional, narrowly-tailored discovery on the successorship issue" but she did not do so.

### **Silberberg's rulings in the partial award**

Silberberg said the legal issues in the arbitration were "complex", with no definitive answers in case law. He highlighted the difficulty of harmoniously interpreting multiple "interconnected instruments" issued over more than 50 years, between 1961 and 2015.

Addressing the 1976 Copyright Act, Silberberg explained that the US Congress had given authors power to terminate rights granted many years before in recognition of the fact that they may have lacked leverage to negotiate the value of those rights when their work was first published. Section 304(c) gave them the "opportunity to recapture some of their works' value once they had already been exploited for a period of time and their true worth had become more apparent", but it only applied to rights granted before 1 January 1978, when the act took effect.

Silberberg noted that nothing in the act prevented the parties from agreeing on new rights and said that this had happened in 2000. By that time, Lee had been able to assess the value of *To Kill a Mockingbird* and the potential value of any sequel over almost four decades and the new agreement entered that year secured her a greater profit share (although he conceded that it may not have been "the best deal" she could have got).

While the 2000 agreement did not supersede the grant of rights in 1961 – rather acting as a *coda* to them – he said "it set the stage" for this to occur eight years later. The 2008 agreement was "a new conveyance of rights" that replaced the rights awarded previously and henceforward became the source of the film companies' interests in *To Kill a Mockingbird*.

As regards the termination notices issued in 2008 and 2015, Silberberg held that neither was effective for technical reasons. He said the 2008 notice was not served in the required time to terminate the 1961 rights but that the parties had struck a new deal anyway. The 2015 notice could not terminate that new deal because it was entered after 1 January 1978.

The option to any sequel did not violate New York's rule against perpetuities because its wording made it clear that the sequel would have to be written or published by Lee during her lifetime, not by unidentified third parties at any time in the future, said Silberberg. Though written before *To Kill a Mockingbird*, *Go Set a Watchman* became subject to the option when it was published in 2015.



In making these rulings, Silberberg referred to a host of other US cases from the past two decades in which rights have been revoked in line with section 304(c) of the Copyright Act. These included cases over *Lassie Come Home* by Eric Knight, the Superman comic character created by Joseph Schuster, the works of AA Milne and John Steinbeck and the song "Santa Claus is Comin' to Town".

### **The settlement**

The parties' settlement, which is appended to the final award, was in line with the 2008 agreement, granting the film companies the rights to remake the original film and make sequels or derivative films, including films that "age" the characters backwards or forwards, with the caveat that the estate must sign off on them.

The Lee estate also agreed to pay an undisclosed sum to the companies. Silberberg had already ruled they should share the costs of the arbitration – US\$11,500 for the AAA and US\$80,800 for him – as well as paying their own lawyers.

In a statement, Carter said that the Lee estate is "disappointed" with the outcome of the arbitration. She said the arbitrator's ruling was "based entirely upon a one-sided 2008 agreement that the heirs of Gregory Peck convinced Ms Lee to sign, at a time when she was advised solely by her 93-year old sister, even though it was entirely against her interests to do so. The 2008 agreement transferred extraordinarily valuable intellectual property rights owned by Ms Lee in exchange for one dollar."

The lawyer who represented the film companies, **Mark Lee** of Rimon Law in Los Angeles, told *The New York Times* that his clients fought to retain the film rights partly to prevent anyone else from making a movie that would not be true to the spirit of the novel or original film.

"They want to be proper guardians of those rights," he said. "They want nothing to happen with those rights that they do not approve of, or that would not honour Ms Lee's legacy."

He added that there were no immediate plans to press ahead with a film featuring the *To Kill a Mockingbird* characters.

"My clients have no present intention to create a produce a remake or sequel," he said. "I would never say never, but at present they have no such plans."

### **Other disputes**

The arbitration is not the only legal battle that has been fought by Lee's estate. There was also a court case in Alabama over the Broadway adaptation of *To Kill a Mockingbird* by Aaron Sorkin, which Lee's estate said made too many changes to the characters, especially Atticus.

The dispute settled amicably in 2018, after the producer offered to stage the play in the courthouse so the judge could decide for himself if it deviated from the spirit of the novel.

After that, there was an arbitration over the estate's attempt to prevent a theatrical publishing company, Dramatic Publishing, from licensing a different stage adaptation of *To Kill a Mockingbird* by Christopher Sergel, which has been performed for decades at schools and community theatres in the US. Dramatic claimed that the estate acted in concert with the Broadway producers to prevent local productions of the play from going ahead.

In January, an arbitrator ruled that the estate had "tortiously interfered with contracts" that permitted the performance of the play and ordered it to pay Dramatic more than US\$2.5 million in damages and costs. It also stated that the company retained the rights to license stage productions in "non first-class theatre".

Sergel's grandson, who is president of Dramatic, said that the company had been fully "vindicated" after "a long and difficult struggle... exacerbated by the ravages of covid on the theatre industry and the education system". His lawyer, **Kevin Tottis** of Tottis Law in Chicago, said Dramatic had been "dragged through the mud for licensing the play in the very market they had licensed it in for years."

Lee's estate, which is represented in the dispute by **Matthew Lembke** of Bradley Arant Boult Cummings in Birmingham, Alabama, has reportedly filed a motion to overturn the award in Chicago. In a 1987 letter, Lee said that Sergel's adaptation "admirably fulfils the purpose for which it was written, for amateurs, high school students and small theatre groups" but she turned down Dramatic's request to stage a Broadway adaptation of the play, eventually awarding those rights to the producers of Sorkin's version the year before she died.

Meanwhile, the posthumous exploitation and commercialisation of Lee's legacy remains controversial, with the estate having recently approved projects including a graphic novel of *To Kill a Mockingbird* and a Harper Lee Trail in Monroeville. This plan was unlikely to have appealed to Lee, who resented her home and town being turned into tourist attractions and sued a local museum for trademark infringement for selling *To Kill a Mockingbird* T-shirts and souvenirs.

Sixty-two years after it was published, a novel that idealises the practice of law and has inspired many young people to pursue careers in the field is now firmly in the clutches of lawyers – with the stakes only set to rise if, as Carter hinted may happen in a 2015 article in *The Wall Street Journal*, a further lost Lee manuscript emerges.



***In the American Arbitration Association proceeding***

*Tonya B Carter as personal representative of the Last Will of Decedent Nelle Harper Lee v Atticus Corporation, Hannah C Pakula and Broadwalk Productions*

Sole arbitrator

- **Richard Silberberg**

Counsel to Tonya Carter

- Cooper & Kirk

Partner **Michael W Kirk** in Washington, DC

Counsel to Atticus Corporation, Hannah Pakula and Broadwalk Productions

- Manatt Phelps & Phillips

Partner **Mark S Lee** in Los Angeles (now at Rimon Law in Los Angeles, which he joined in 2018)

***In the confirmation proceeding in the US District Court for the Southern District of Alabama Southern Division***

*Atticus Corporation, Hannah C Pakula and Broadwalk Productions v Tonja B Carter as personal representative of the estate of Nelle Harper Lee and Harper Lee LLC, a limited liability company*

Counsel to Atticus Corporation, Hannah Pakula and Broadwalk Productions

- Burr & Forman

Partner **H William Wasden** in Mobile, Alabama

Counsel to Tonja Carter and Harper Lee LLC

- Rimon Law

Partner **Mark Lee** in Los Angeles (previously of Manatt Phelps & Phillips)