



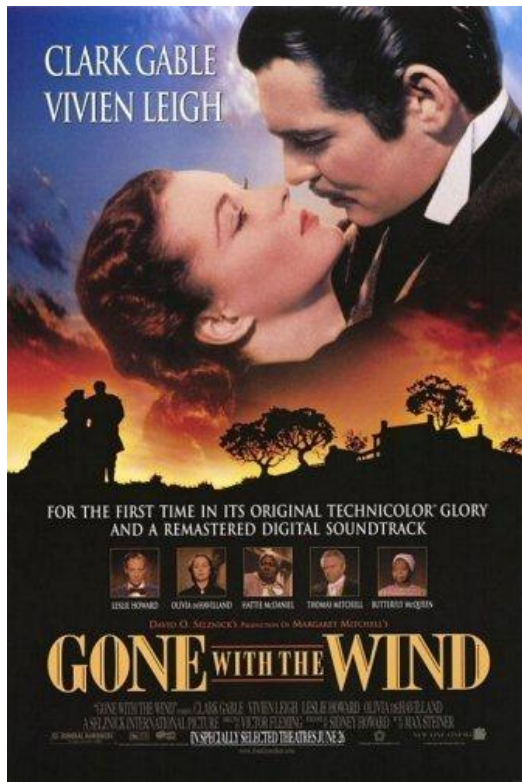
FROM BOOK TO SCREEN

Mining Literary Works in the Movie Business

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From the earliest days of the film industry books have been used as the basis for the narrative structure of films. *THE BIG PARADE* (1925) by King Vidor was based on a story by author Laurence Stallings. Mary Shelley's Gothic 1818 novel, *FRANKENSTEIN* was made for the screen by James Whale in 1931. James Hilton's best-selling novel *LOST HORIZON* was faithfully adapted for the screen by screenwriter Robert Riskin and made into a film in 1937 by Frank Capra. The two great works of American cinema made in 1939 were adapted from books: *THE WIZARD OF OZ* (directed by Victor Fleming; screenplay by Noel Langley, based on L. Frank Baum's novel) and *GONE WITH THE WIND* (Sidney Howard's script, adapted from Margaret Mitchell's novel and produced by David O. Selznick).



The making, marketing and distribution of a motion picture involve enormous expense and risk. The producers, financiers and distributors of motion pictures try to minimize their exposure to the fullest extent possible. A novel can be viewed as a way of testing the story in the market thereby indicating the potential for a motion picture. Moreover, the marketing of the novel creates awareness of the book and the book's fan base may become the audience for the film.

There are also aesthetic reasons for using a book as the basis for a film. Although books and films are very different mediums, they share many common features such as plot structure, characters, and tone. The characteristics of compelling literary characters may translate well to the screen. The book author has presumably solved problems of story structure, character motivation and character arc. The benefits of those solutions can be carried over to the screen version of the book. Essentially, book serves as research and development for the film.

RECENT MOTION PICTURES NOMINATED FOR ACADEMY AWARD FOR BEST PICTURE BASED ON BOOKS, PLAYS OR SHORT STORIES		
2010	THE BLIND SIDE DISTRIC 9 AN EDUCATION PRECIOUS: BASED ON THE NOVEL 'PUSH' BY SAPPHIRE UP IN THE AIR	5 out of 10 nominees
2009	CURIOUS CASE OF BEJAMIN BUTTON FROST/NIXON	5 out of 5 nominees

	MILK THE READER SLUMDOG MILLIONAIRE (Winner)	
2008	ATONEMENT NO COUNTRY FOR OLD MEN (Winner) THERE WILL BE BLOOD	3 out of 5 nominees
2007	ATONEMENT NO COUNTRY FOR OLDER MEN (Winner) THERE WILL BE BLOOD	3 out of 5 nominees
2006	THE DEPARTED (Winner)	1 out of 5 nominees
2005	BROKEBACK MOUNTAIN CAPOTE and MUNICH	3 out of 5 nominees
2004	MILLION DOLLAR BABY (Winner) SIDEWAYS and FINDING NEVERLAND	3 out of 5
2003	LORD OF THE RINGS: RETURN OF THE KING (Winner) MASTER AND COMMANDER: FAR SIDE OF THE WORLD MYSTIC RIVER and SEABISCUIT	4 out of 5
2002	CHICAGO (winner) THE HOURS LORD OF THE RINGS: THE TWO TOWERS and THE PIANIST	4 out of 5

An independent producer who controls the rights in a book, especially a noted book, gains additional benefits. A book is a unique property. Many films can be made about a southern belle's struggles during the transition from an antebellum plantation through the Civil War to a war ravaged post-war South, but there is only one **GONE WITH THE WIND**. A producer with a project that is based on a desirable book may be more likely to get distributors and financiers interested in supporting that project. Studios, for example, are more likely to take interest in a project that is adapted from a best-selling novel than an equally good original screenplay.

But adaptations can be tricky and do not always result in artistic and/or commercial successes. Readers often have fixed expectations of beloved books and the film adaptation may fall short of those expectations.

This article focuses on the two principal agreements that impact the book to screen scenario. First, the book publishing agreement in which the book author transfers certain rights to the book publisher. Second, the option and purchase agreement in which the book author transfers certain rights to the producer to allow the development of a motion picture or television production.

It is worth noting that another party is involved in these transactions: the author's agent. Successful authors are almost always represented by literary agents. The agent's agreement with the author usually gives the agent the exclusive right to represent the author in all matters involving the book. Those representation rights not only include representing the author for the purpose of the book publishing agreement, but also the disposition of the motion picture and television rights in the author's book.

Book Publishing

The book publishing contract influences the process of taking a book to the screen in a number of ways. Let's start with who controls the motion picture and television rights: the publisher or the author?

Who Controls the film rights? Modern publishing agreements typically reserve film and TV rights to the author. But there is a trend, especially among the major publishing houses who are affiliated with motion picture studios, for publishers to acquire the film and TV rights. It may be beneficial to authors to grant such rights especially where the publisher has a good track record of exploiting such rights and where the financial and reversionary terms involving the rights are appropriate. Of course granting the film and TV rights to the publisher will allow the publisher to take a share of the revenue from the exploitation of those rights. Also to be considered is that in most cases, publishers do not actively market film and TV rights, rather producers take the initiative and seek out books.

In evaluating whether to grant film and TV rights to any publisher large or small, the author will want to consider several factors. First, the author will want to know whether the publisher has the capacity to cause the rights to be exploited. For example, is the publisher affiliated with an established production and distribution company and has the publisher had success in getting its books made into films? Next, the author will want to consider the royalty paid to the author from film and/or TV revenues. Author's royalties are in the 8 to 15% range for the sale of books. Authors are paid a higher share of the publisher's revenues from "subsidiary" rights such as film and TV rights. This is because the publisher is not incurring production, manufacturing and marketing costs in connection with revenues from subsidiary rights. Rather, the publisher receives those revenues from the third party such as the film production companies. And those companies, not the publisher, incur production, manufacturing and marketing costs. Authors generally receive between 50 to 75% of the publisher's revenues from film and TV rights. Finally, the author may wish to negotiate a reasonable reversion of film and TV rights after an appropriate period (3 to 10 years from the publication of the book) if the rights are not exploited. If the rights have not been exploited within that period of time, the publisher is probably not going to get someone to pick up the rights. One of the justifications for the publisher participating in the revenues from a film or TV program based on the book is the incidental connection between the publisher's efforts in marketing the book and generating interests from production companies that leads to film and TV revenues. That incidental connection grows more tenuous the longer there are no agreements being offered from film and TV producers; and hence, a good reason for reversion.

If the author has retained the film and TV rights, producers must contact the author directly, or more commonly the author's agent, to inquire about the availability of the rights. Authors and producers often develop strong relationships that carry forward

through the development of the project. For independent producers a close relationship may be necessary if the independent producer expects to option the film and TV rights for an amount that is consistent with most independent producer's development budgets, i.e. not much.

Agents are 'ten-percenters'. That is, they get 10% of the author's revenues for their services. It is not worth the agent's time to negotiate the agreement if the option fee is \$1,000 and the agent's fee is 10% of that. If the producer can communicate his or her passion for the book and vision for the film adaptation, the author may, despite the agent's influence, agree to option the book for a nominal fee. In fairness, many agents are quite amenable to such arrangements when they see the potential therein for the development of their author's career.

Marketing Issues. For those same reasons whereby a book helps to market a film, the reverse is also true. Millions and even tens of millions of dollars may be spent on the marketing and distribution of the motion picture or television program based on the book. Those marketing dollars can result in significant increases in book sales – and not only the adapted book but the author's other books, existing and future.

Authors and publishers have a great interest in the making and marketing of film versions of their books. Even if a publisher does not participate financially in the film and TV rights in the book, the publisher will be interested in coordinating the marketing of book with the marketing of the film. The publisher may re-release or publish special editions to tie-in with the release of the film. The publishers will want to use the artwork and actors' photographs from the film's marketing campaign – in the marketing materials and the cover art of the book.

Agents of successful established authors and hot new authors often send out prepublication manuscripts to acquisition people at studios and producers with the hope of stimulating a bidding war for the book's rights. A manuscript for a book by successful author whose prior books were made into successful films may command in excess of a million dollars for the purchase of the motion picture rights.

Literary Property Option and Purchase Agreement

The agreement used by producers to acquire motion picture and TV rights from the book author is the option and purchase agreement. It is actually two agreements wrapped into one. The option part of the agreement grants the producer the exclusive right for a period of time to purchase the motion picture and TV rights in the book under the conditions specified in the purchase part of the agreement. In the purchase part of the agreement, the producer purchases the rights.

The producer should make sure the agreement not only specifies the terms of the option but also the terms for purchase of the film rights. It could be financially disastrous to develop the project to the point where the financing is ready and the other elements are in place but the terms for the purchase of the book have not been settled. This situation would have the effect of dramatically increasing the author's bargaining power and consequently increasing the cost of acquiring the rights.

Why option? Why not buy the film rights in the book outright and be done with it? The development of a film or TV production involves significant financial risk. To minimize the risk, independent producers prefer to option rights rather than buy them.

Hundreds of projects are developed by independent production companies and major motion picture studios for every single production that actually reaches the screen. A producer may not be able to afford to purchase the rights in all of the properties (books and scripts) that he/she is developing. The option agreement allows the production company to exclusively control the book for a period of time for a relatively small sum. Think of it as renting with the option to buy.

During this "renting" period the producer develops the film project. Development consists of putting a 'package' together consisting of a budget, commitments from actors and technical personnel, and a synopsis or screenplay. During the development phase the producer approaches financiers, banks, and distributors to arrange for financing and distribution. This is an expensive and time consuming process.

Description of Property. The book and its origin should be described with specificity in the agreement. For example, a book might be described as follows: "*a literary work entitled "_____", written by Author and [to be] published by {name of publisher}.*" If the copyright in the book has been registered, the copyright registration number and the country in which the book is registered should be specified.

The producer acquiring rights in a book protected by copyright should conduct a copyright search. If the copyright in the book is registered, the copyright search will determine the current copyright owner or assignee and whether there are any claims filed against the copyright. This search should be done no later than preproduction and preferably prior to the execution of the option and purchase agreement. The option and purchase agreement should include a short-form option agreement and a short-form assignment agreement attached as exhibits. It is advisable for the producer to file the short-form option agreement against the copyright registration in the book following the signing of the option and purchase agreement. The short-form assignment agreement should be filed against the copyright registration in the book following the payment of the purchase price.

Rights Granted. As described above the option and purchase agreement is actually two agreements and correspondingly rights are granted from the author to the producer in two parts: first, certain rights are granted temporarily but exclusively during the option period so that the producer can develop the film or TV project. Second, when the option is exercised, certain rights are granted exclusively and perpetually.

Rights granted to the producer during the option period include the right to do preparatory work during option period in anticipation of making the motion picture or television program. For example, the producer may hire a writer to write a screenplay, the producer may create budgets, cast actors, and publicize the underlying work.

Rights granted to the producer when the option is exercised include at a minimum the following exclusive, worldwide, and perpetual rights: (i) the right to make one or more the motion pictures or television programs (the "Picture"); (ii) the right to distribute, copy, sell, promote, publicize, market, and exploit the Picture in any and all media, now known or

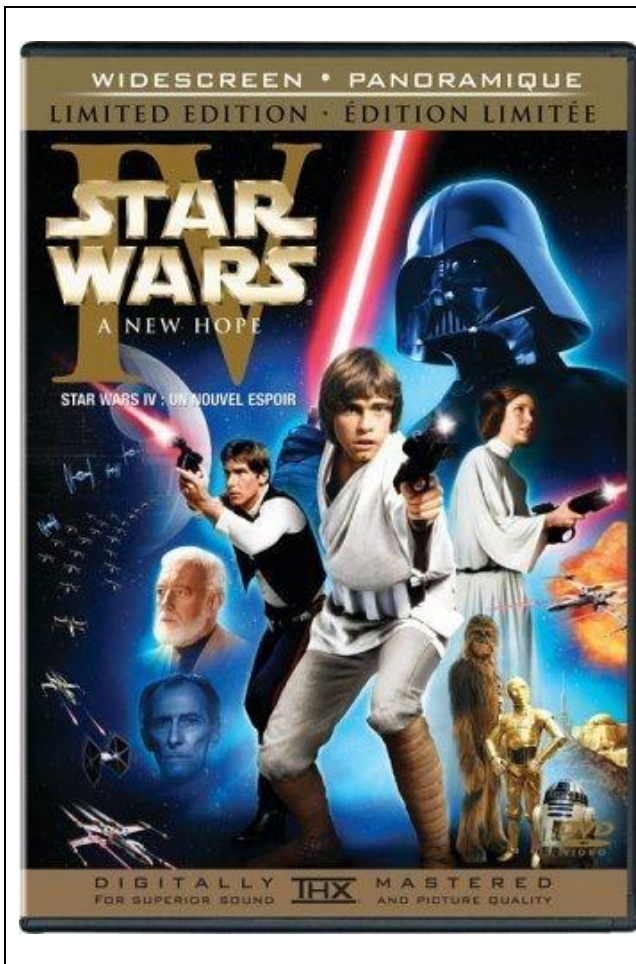
hereafter known; (iii) the right to change, modify and rearrange the book in the process of creating the Picture; and (iv) the right to use name and likeness of author in the promotion and marketing of the Picture. During the option period the producer does not want anyone else to develop a film or TV project based on the book or to approach distributors and financiers with the project and therefore the must insist on exclusivity.

The rights granted in purchase portion of the agreement are also customarily exclusive, worldwide and perpetual. Exclusivity here is also crucial to the producer. The producer, financiers, and distributors want exclusivity so that no other films or TV productions are made based on the rights. One can imagine situations in which exclusivity is not critical; such as a documentary filmmaker who does not intend to make a fictionalized film or TV productions based on the rights is produced. But generally, exclusivity is necessary and is required by the producer.

Likewise, producers insist on the grant of rights being worldwide and perpetual in most situations, especially in the case of theatrical films. Film and TV productions are often distributed worldwide and for many years. Limiting the exploitation of the production by time or geographic area is not financially desirable for the producer, financiers and the distributor.

The rights granted in the purchase agreement are typically broader than just making and distributing a film or TV program based on the book. Why is the grant broader? The simple answer is that all the 'down-stream' participants will require the producer to acquire a broad range of rights. The down-stream participants are the distributor, the broadcaster, the financier, the banks, and others who invest in or take rights from the pool of rights owned or controlled by the producer. They want their risky investment to pay off in all possible ways. They do not want other parties to unfairly profit off of their investment. Since these participants finance the production, they wield considerable bargaining power. Without the broad grant of rights, the producer will not be able to attract these parties to participate in the financing and distribution of the film or TV program.

What other rights are typically granted in the purchase agreement? The right to make sequels and mini-series, and remakes; the rights in the plot, theme, title, story and characters in the Picture; the right to manufacture merchandise based on the film, the right to make a novelization of the motion picture or television program.



The producer may seek the right to create a novel based on the film (“novelization”). There are markets for such books. STAR WARS is a good example. There have been many books sold based on that film series. In option and purchase agreements not involving books, novelization rights are generally not a significant issue between the parties. But to a book author and book publisher it may be a significant issue. Authors generally abhor novelizations and consequently the right is not often granted in an option and purchase agreement for a book. The issue may come up, particularly if the original work is a short story, play or an unpublished manuscript.

Reserved Rights. The agreement generally includes a clause reserving to the author all rights not specifically granted to the producer. And the agreement often goes further in expressly reserving certain rights to the author.

Print publication rights are commonly reserved in option and purchase agreements for book and are often broadly described. These include rights to publish and distribute the text of the book in print and to record and distribute audio recordings such as “audio books”. The producer may wish to limit the audio book recordings to single voice non-dramatic readings. Print rights typically encompass any publication medium that essentially reproduces in whole or in part the text and/or original illustrations of the book and serves as a substitute for or supplement to the book form of the book (e.g. computer software and projectable transparencies of text and original illustrations) and CD, CD-ROM, CD-I, download, or other similar audio and/or visual systems. Print rights are usually reserved exclusively to the author in all languages, in perpetuity, and throughout the world.

The situation may be different if the book is not subject to a publishing agreement as may be the case in short stories, unpublished manuscripts or out-of-print books. In such cases production companies, especially those with print publishing businesses or affiliates, may seek to acquire the book publishing rights from the author.

Other rights that might be reserved by the author include live television and radio broadcast rights, dramatic and musical stage productions based with living actors in the immediate presence of an audience.

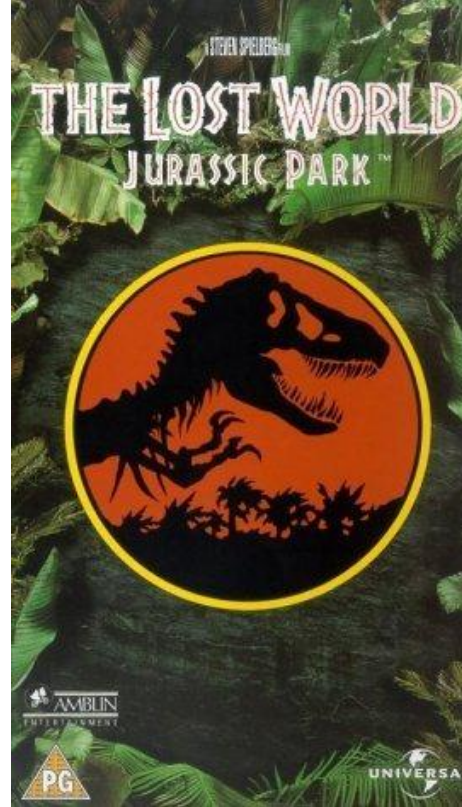
Language reserving rights to authors to create author-written sequels and character rights requires special attention. Authors may wish to write (or have already written/) sequels, prequels and other works using the same characters, plots and situations/themes/topics. Producers may have several concerns in this regard. First, the producer does not want another film or TV programs based on those other books to be distributed. A second motion picture or TV program (a sequel or one featuring the same character(s)) in the marketplace at the same time or in close succession may compete with and cut into the revenues of the producer's film. Furthermore, the producer will argue, the audience's interest in the sequels may have been created by producer's film. The producer's financiers and distributor will be very unhappy about the prospects of a competing film and the potential of reduction of revenues or missed opportunities. For that reason, the producer may seek to acquire rights in author-written sequels for itself or restrict the author's exploitation of such rights and character rights as discussed further below.

Sidebar:

Sorting out rights when there are author-written sequels and character rights can be a challenge. For example, there have been 3 films in the "Jurassic Park" series. The fourth in the series, "Jurassic Park IV," is currently scheduled for release in 2010. Michael Crichton wrote two novels: "Jurassic Park" and "The Lost World" that were the basis for the first two films, both directed by Steven Spielberg. He also co-wrote the screenplay for the first "Jurassic Park" (1993) with David Koepp. Koepp wrote the screenplay for "The Lost World" (1997). Peter Buchman wrote the screenplay for "Jurassic Park III" (2001) with Alexander Payne and John Taylor. William Monahan wrote the screenplay for "Jurassic Park IV". In screenplays new characters and events are added. Certainly "The Lost World" and "Jurassic Park IV" include new events and new characters that are not in the original novels. The option and purchase agreement should address the ownership of such the rights and the use that can be made of those rights.



Authors are also concerned about credits. In addition to his screenplay credit in “Jurassic Park”, Crichton is credited with “based on the novel by” in “Jurassic Park” and “The Lost World”, and in “Jurassic Park III” his credit is ‘based on characters created by’ (and he will likely receive the same credit in “Jurassic Park IV”.)



For similar reasons, autobiographies require special consideration. Autobiographies raise the issue of the scope of the rights granted to the author’s life story. The events depicted in the film may be limited to only one portion of the life story or maybe only a portion of the published autobiography. The author may wish to retain motion picture rights in the events or time periods not covered by the events and time period to be portrayed in the film, especially events of author's life subsequent to the date of the agreement. In the case of autobiographies, the producer will want to make sure the agreement includes a provision in which the author waives claims of rights of privacy, publicity, defamation, and the like.

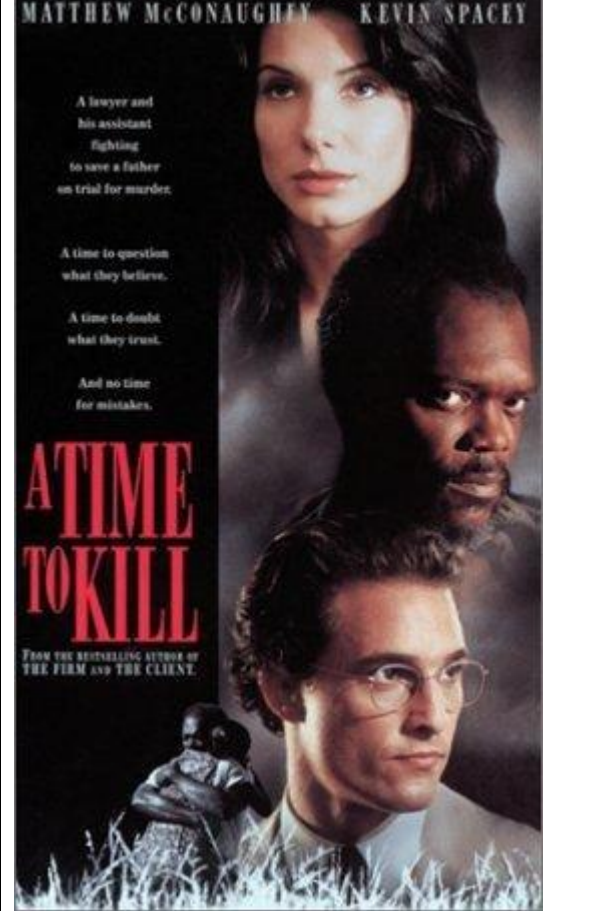
Restriction on Author Reserved Rights. As mentioned above, the marketing and distribution of a motion picture or television program can contribute significantly to the sales of the adapted book as well as the author’s other books. If the author has reserved rights, such as the right to produce a live stage version of the book, the marketing of the film or TV program can add value to such works. The producer may wish to restrict the author's ability to exploit one or more of the retained rights. Those restrictions may take several forms.

Hold Back. The producer may require a "hold back" period (e.g. 3 - 7 years) during which the author may not exploit the reserved rights. This prevents productions based on the reserved rights from competing with, or trading off the good will created by the producer's film or TV program. Hold backs are used with respect to dramatic and musical stage productions, film and TV rights based on sequel books, and live television and radio broadcast rights.

Revenue Sharing. A film can create commercial opportunity and contribute significantly to the commercial value of works created based on the writer's reserved rights. For example, there may be no interest on a play based on the author's book until a commercially successful film is released. In those circumstances, the producer may be justified in taking a share of the revenues from the author's exploitation of play. This would be particularly true if the play was exploited soon after the release of the film.

Matching Rights, First/Last Refusal. Another alternative is to grant the producer the right to enter into an agreement with the author later, should the author wish to exploit the reserved rights. Several mechanisms can be used to protect the producer's interests in this regard including requiring the author to come to the producer first before negotiating with others (right of first negotiation); or giving the producer the right to match any third party offer (right of first/last refusal).

Creative Control. It is customary for the producer to have creative control over and complete discretion in alteration of the book's story in adapting the story for the screen. The author wants to film to be true to the spirit of the book or at a minimum not reflect poorly on the book. Financiers and distributors do not want their investment subject to such things as an author's approval, and in most cases it is unwise to grant the author creative approval over the film. A possible compromise is to give the author consultation rights. Authors may be very protective of their characters, particularly if the characters are part of an on-going series of novels or stories, or where characters are based on real people. Authors may require assurance that the character will not be depicted in a negative light or inappropriate manner for the character or killed in the film in not killed in the book.

<p>Sidebar:</p> <p>Superstar authors may be able to negotiate some control over the film. John Grisham wanted control over the film version of his first and favorite novel, “A Time to Kill”. At the time when that film was being developed, several of his books had been made into successful films: “The Firm” (1993), “The Pelican Brief” (1993), “The Client” (1994), and “The Chamber” (1996). This track record gave Grisham bargaining power. Moreover, he had a working relationship with director Joel Schumacher who directed “The Client”. This enabled Grisham to take an active role in the making of the film as a producer</p>	

Droit Moral. Droit Moral refers to the body of law (well developed in France) that grants moral rights to creators of creative works, such as books, plays, and screenplays. For example, these laws may give the authors of a book or screenplay the right to approve material variations, changes and adaptations to their work. The United States Copyright Law recognizes very few of the principles of Droit Moral. However, because films and TV programs find their way to jurisdictions that recognize Droit Moral, and because the life of a film or TV program can be long during which time laws may be changed to include Droit Moral principals, it is advisable to address this issue in the agreement. The customary approach is to require the Author to waive Droit Moral similar laws.

Duration of Option. The initial option period usually lasts for 6 to 18 months but can be longer in some cases. Agreements commonly include second and sometimes even third options to extend the duration of the option period. Extensions are customarily exercised by the producer giving the author written notice and an additional (often larger) payment. An author entering into an option and purchase agreement with an inexperienced independent producer may wish to make producer's right to extend the option contingent upon the producer providing author with tangible proof that the producer is making steps toward producing the film. For example, as a condition of extending the option period, the author may require the producer to provide a letter of intent from financiers or distributors that sufficient funds are committed or a letter of intent has been secured from major actors indicating their commitment to play a part in the

film. If the producer fails to extend the option period or exercise the option and purchase the rights, the agreement terminates and all rights revert to the author.

Consideration. The contract provisions specifying when, how, and how much, the author is paid for the rights are greatly varied, and are limited only by the imagination and the bargaining power of the parties. The author's bargaining power comes from the parties' perception of the value of the book in the financing, making of and marketing of the film or TV production. Also to be taken into consideration is the interrelationship of the provisions of the agreement. For example, the author's lack of creative control, discussed above, may be salvaged by a generous purchase price. Similarly, restrictions on an author's use of retained rights may be considered reasonable and appropriate if there are corresponding financial compensations.

Option Payments. The amount of the option payment depends on a number of factors - the same factors that affect the purchase price as discussed below. The size of the option payment can also be affected the length of the option period: longer option may require larger payments. But principal factors are (1) is there competition and (2) is the agent involved? If there is competition among production companies for a book, it does not matter whether the producer is an independent or not, they must pay a competitive amount. If an agent is involved, it is the agent's job to make sure there is competition. As mentioned above, agents get paid 10% of the amounts paid to their author clients and if 10% of the option fee is not very much, the agent is generally not very interested in the offer.

There are exceptions. Some authors are interested in working with independent filmmakers. What the independent filmmaker lacks in dollars can be made up in passion and enthusiasm. Sometimes other perks must be thrown in, like an associate producer credits for authors of successful books.

A filmmaker optioning a book in the absence of competition may pay a nominal amount such as \$1,000 or less for the option period fee. But the factors affecting purchase price discussed below can also influence the amount of the option fees. In most cases a personal relationship between the filmmaker and the author will increase the filmmaker's chances of getting an option agreement, may reduce the size of the option payment, and perhaps the purchase price too. For that reason filmmakers are well advised to make the initial contacts to the author and/or the agent. An initial call from the filmmaker's attorney may inflate the option payment.

The initial option payment is paid at the time the agreement is signed. Option payments are either applicable against (that is, they reduce) the purchase price, or they are inapplicable (they do not reduce the purchase price). By custom, the first option payment is applicable and the second (often larger) option payment is inapplicable.

Purchase Price. Purchase prices range from nominal amounts to millions of dollars for a best seller. The following is a discussion of some of the factors affecting the perceived value of the book and therefore the amount of the purchase price.

Competition: Probably the greatest factor affecting the size of the purchase price is the amount of competition for the book and the skills of the persons handling the bidding.

The Film's Budget: The next most important factor is the budget of the film. As a rule of thumb, producers want the underlying rights for the film (i.e. the book, the screenplay, life story rights, etc.) to be 5% or less collectively (in extraordinary cases, up to 10%) of the budget. Financiers generally scrutinize the budget carefully and these numbers must be in line. If one of the components, for example the book or screenplay, contributes mightily to the marketing of the film, that component should get the lion's share of the 5 to 10%.

The Writer's Reputation: A skeptic might say the author's reputation boils down to what the author got the last time one of the author's books were optioned. This is referred to as "precedence" or the author's "quote". Agents always want to get at least as much as the author got for the last book. Sometimes it's merited. Sometimes not. Have the author's other books been made into successful films? Is the author living? Living authors can help promote a film and may write more books which can also help the film.

The Book's Track Record: Is the book about to be published, was it orphaned by the publishing industry, was it published a long time ago, is it out of print? Was it on the best seller list? If so, for how long and how recently? The public's awareness of the book is an important factor in marketing the film. Has this book been optioned before? If so, how many times, by whom, for how much, and what happened? This information is difficult for the producer to get. But if the book has been optioned before then it has probably made the rounds of the studios, distributors, and large production companies. This is not helpful to the producer because once an acquisitions person has said no to a project (even if the producer is different) it is more likely the response will be no the second time.

The Producer's Reputation: Successful authors may have seen their books optioned repeatedly and not made. There is not much money in options. The money for the author is in the purchase price and the successful release of the film. So the author's pay day is tied to whether the producer is successful in setting up the film. A producer with a track record is in a better position to get the project successfully through development, into production and up on the screen. Therefore, a moderate amount of success (especially if it is recent) can improve a producer's bargaining position substantially. Everyone loves a winner and a rising star. If the producer is unknown, their bargaining power is greatly reduced.

Formulation of Purchase Price. The purchase price, generally paid prior to or upon commencement of principal photography, can be formulated in many ways.

Flat Fee: The simplest formulation is to set a fixed price.

Percentage of Budget: It is common to determine the purchase price as a percentage of the film's production budget. Thus if the producer is successful in attracting talent and money to the production of the film and the budget is larger than expected, the author receives some of the benefit of that success. On the other hand if the budget is small, the producer cannot afford to make the film if a disproportionate amount of the budget is paid for the purchase of the book rights.

The producer will want to carefully define the budget for the purpose of the purchase price formula. Most low budget films are made with in-

kind contribution of services and equipment. The producer will want to set the purchase price as a percentage of the “cash” budget and may want to exclude certain items such as financing costs from that cash budget formulation. The producer will want to set a maximum on the purchase price to make sure that he/she is not over-paying and the author may wish to set a minimum to make sure he/she is not under-paid. The minimum and maximum may related to the author’s quote or precedent.

Contingent and deferred compensation. The following additional types of consideration are paid based on the occurrence of subsequent events:

Bonus for the Book’s Success: The agreement may provide for the escalation of the purchase price if book becomes a best seller or otherwise performs well in the marketplace.

Set Up Bonus: When the project is set up with a financier or studio, the author may be paid a one-time, bonus payment in an amount that varies depending on whether the film is set up at a major studio, mini-major, or cable or television network.

Box Office Bonuses: This payment is a fixed amount paid at increments of box office receipts for the Picture.

Deferrals: Deferrals are usually fixed dollar payments to be paid to actors or production personnel in the future if the producer receives income from the sale or other exploitation of the production. Sometimes production costs are paid before deferrals but deferrals are commonly paid prior to profit participants. When deferrals are used to pay authors, it is usually in circumstances where the limited size of the budget prevents the producer from paying the author the author’s full quote.

Net Receipts: The parties may agree that the author will be paid a portion of net receipts or profits from the Picture. The general rule of thumb is that the rights holders (the author in this case) and the screenplay writer share approximately 5% of net receipts. The definition of net profits or net receipts can be lengthy, complicated, and time consuming to negotiate. It is customary to piggy-back off the definition in other agreements such as in the agreement between the distributor and the producer, or the definition of some other net receipts recipient. Even for successful films, the possibility of getting paid from net receipts is very small.

Other Versions of the Film: Additional payments to the author may occur upon the making of a sequel (usually one-half (1/2) of the original purchase price), a remake (one-third (1/3) of the original purchase price) and the production of a television version, such as a mini-series or series.

Book Author as Screenplay Writer. Book authors sometimes try their hand at screenwriting. This often happens after the book author’s other books are made into films and the author decides the results were disastrous or, regardless of the results, how hard can it be to write 110 pages of dialog? Writing novels and writing screenplays are very different skills. Many great novel writers fail as screenplay writers. But there are successes too. If the author will also be the writer of the screenplay the agreement must specify the

terms under which such writing is undertaken. The author will be interested in determining who owns rights in the screenplay if the book falls out of option.

Consultation. Option and purchase agreements may include provisions whereby the producer hires the author as a consultant to the production. This may give the author the ability to influence the project and the portrayal of the characters and narrative. It might also result in some additional payment to the author.

Credits – Book Author. The author may wish to specify the size and placement of the author's credit (e.g. opening credits or ending credits), whether the credit appears by itself on the frame or with other credits; the wording of the credit (e.g. "story by ...", "based on the novel by ..."); and whether the credit appears in advertising and promotion for the film. If the title of the book is not the title of the Picture, the book may be credit as: 'based on the Book ["title"] by [author's name]', or equivalent. The Writer's Guild of America establishes standards for on screen credits to be given to WGA writers and WGA signatories. Producer will want to limit its responsibility to give the author credits to situations within producer's control and exclude inadvertent omissions as a cause of a breach of the agreement.

Identifiable Persons. If the book is based on or identifies actual (not fictional) persons the agreement must address the issue of the rights of these persons. The producer should review any agreements that the author has with such subjects. If those agreements grant the author extensive rights (sufficient for the producer's purposes) and release the subjects' claims of rights of privacy, publicity, defamation, and the like, and if such agreements are assignable, then the producer should seek an assignment from the author. If not, then the producer must consider how these rights can be cleared and at what cost. The producer may be wise to include a provision in the agreement requiring the author to secure such releases for the producer's benefit or cooperate with the producer in the effort to secure the releases.

Similarly, if the book contains materials owned by third parties, such as copyrighted materials, or raises other rights clearance problems, the producer may want the author to assign to producer the benefit of any rights the author may have in these materials. The producer may also require author to secure those rights for the producer or cooperate with the producer in the effort to secure these rights.

Reversion. Upon payment of the purchase price, the producer owns the rights. But what if the film or TV program is not produced or not distributed? The author may wish to specify that the rights revert to the author under certain conditions; for example, if no film or TV program is produced or distributed within 10 years from the date the rights are purchased. The producer may demand that in the event of reversion the author must repay to producer the purchase price paid or an amount equal to producer's investment in the project. The author may require that no fee is payable unless or until the book is set up with a third party financier.

Representations. The usual representations and warranties in the agreement include for example that the book is original with the author and not in the public domain, that the author is the owner of all rights in the book; that the book does not infringe the rights of others, for example: copyright, trademark, publicity, privacy, and does not defame other parties.

Negotiable limitations on author's representations and warranties may include that warranties are given with the qualifier: "to the best of author's knowledge." This might be applicable where owner is the heir of a deceased author, or has otherwise acquired the copyright in the book from the author. If the author has acquired rights from a third party with limitations on those rights, the author will wish to pass those limitations on to the producer. If author was unable to acquire certain releases the author will want the producer to specifically acknowledge that fact and the parties may negotiate the responsibility. The author also may wish to exclude those problems which would have been discovered by producer's due diligent investigation of the facts. Producer will attempt to limit such excluded problems in some way such as limited only to those problems unknown to the author.

The producer may wish to require the author to prepare an annotated version of the book or play detailing sources of materials owned by other parties, identifying real persons depicted in the book, and identifying any other rights contained therein. These annotations should indicate which elements can be documented as public domain information and which materials are made up or invented by the writer.

Publisher's Consent. The publisher's consent is an agreement signed by the book publishing company that has the publishing rights to the book. The publisher's consent is attached to the option and purchase agreement as an exhibit. It acknowledges that the producer approves of the grant of the following rights to the producer: film and TV rights and ancillary and subsidiary rights (merchandising, commercial tie-in, music, music publishing, soundtrack, interactive media, theme park, sequel and remake rights, etc.) and the publication of a limited portion of the book for advertising and publicity purposes. In many cases the author has retained all such rights and the Publisher's Release is merely a quit-claim. The publisher's consent is required by the errors and omissions insurance carrier. It is important for the producer to get the publisher's consent signed at the time the option and purchase agreement is signed or it could be expensive later.

For films and TV programs based on books the option and purchase agreement is the root agreement from which all rights flow. It is one of the most common agreements in the industry and yet it varies greatly from deal to deal. Getting it right - getting an agreement that serves all parties and the resulting production - requires knowledge of the industry, careful analysis of the many factors affecting the deal and an artful balance of the parties' bargaining power.

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