

WHO KILLED THE MOCKINGBIRD?—AN
ANALYSIS OF COMMUNITY THEATRES’
LEGAL STANDING AMID COPYRIGHT
DISPUTES OVER TO KILL A MOCKINGBIRD
AND HOW TO PROTECT COMMUNITY
THEATRES

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I. INTRODUCTION

Community theatres are the heart and soul of the theatrical world. Community theatre is often the first exposure people have to a live theatre experience,¹ bringing art to communities as well as keeping communities involved in the creation of the art. As a result, community theatres have always been an irreplaceable component of America's theatrical landscape.²

Recently, at least eight community theatres across the country have been forced to shut down their productions of *To Kill a Mockingbird* after they received cease-and-desist letters claiming that they "didn't have the right to perform the play."³ The letters came from the 2018 Broadway production of the Harper Lee novel.⁴ Relying on their contract with Harper Lee, Atticus Limited Liability Company (Atticus LLC), the production company for the Broadway play, and its lead producer, Scott Rudin, claimed the exclusive right to stage *To Kill a Mockingbird* within a 25-mile radius of major cities with a population of 150,000 or more in 1960,⁵ blocking these theatres from staging any play adapted from the Harper Lee novel—even though these targeted community theatres actually obtained rights to perform Christopher Sergel's adaptation of *To Kill a Mockingbird*, which was another dramatized adaptation created long before the Broadway version.⁶ Behind all the chaos and confusion was the rights dispute between Rudin (and Atticus LLC) and Dramatic Publishing Company (DPC), the publishing house that represents and licenses the performance rights to Sergel's dramatized adaptation of *To Kill a Mockingbird*. Caught in the middle of this legal dispute, almost all of the affected theatres have

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¹ Michael H. Arve, *Why Community Theatre is Important to the Whole Theatre Community*, *Lyric Arts*, <http://www.lyricarts.org/about-us/articles-we-love/why-community-theatre-is-important-to-the-whole-theatre-communit> [perma.cc/LHZ5-8BR9] (last visited Sept. 5, 2014).

² *Id.*

³ Zachary Stewart, *Theaters Are Canceling To Kill a Mockingbird: How the Broadway Production is Involved*, *THEATERMANIA* (Mar. 1, 2019), https://www.theatermania.com/broadway/news/theaters-canceling-to-kill-a-mockingbird-broadway_87974.html.

⁴ *Id.*

⁵ *Id.*

⁶ Michael Paulson & Alexandra Alter, *Legal Threats From Broadway's 'Mockingbird' Sink Productions Around the Country*, *NY TIMES* (Feb. 28, 2019), <https://www.nytimes.com/2019/02/28/theater/scott-rudin-mockingbird-broadway.html>.

sustained losses, from postponement of the performances, change of venues, or cancellation of the performances.⁷ And as will be explained in this Note, even though Rudin later purported to offer the affected theatres a chance to stage the 2018 Broadway playscript,⁸ it is still unlikely that these community theatres would ever be made whole.

This Note will look into the inequality and unfairness faced by community theatres in this legal dispute, as well as in the broader performance rights licensing practice. Part II of this Note will briefly introduce the common licensing practice for the community theatres in the United States, and the enforcement thereof. Part III will then analyze the importance of community theatres, both culturally and financially, to the development of the theatre industry in the United States. Part IV will then focus on the legal disputes faced by the community theatres over the exclusive licensing of *To Kill a Mockingbird*. Part V will propose some best practices that could be imperative to addressing the challenges faced by community theatres; this part will also advocate for the allocation of more legal resources to community theatres in an effort to bring greater exposure to theatrical art to a wider community.

II. BACKGROUND

A. Obtaining Performance Rights as A Community Theatre

To analyze the plight faced by the community theatres caught in the crossfire of rights disputes, we shall first take a look at the licensing scheme implemented in the U.S. theatre industry. As a common practice, apart from works in the public domain (such as the works of William Shakespeare), the performance rights for most copyrighted theatrical works available for community theatre productions are administered by publishing houses (i.e., licensing agencies) on behalf of the authors.⁹ Assuming its performance license is available¹⁰ to community theatres, community theatre producers usually pay royalties to the relevant publishing house, then they will be granted the rights to produce the copyrighted theatrical

⁷ *Id.*

⁸ Greg Evans, *Scott Rudin Offers Community Theaters 'To Kill A Mockingbird' After Controversy*, DEADLINE (Mar. 1, 2019, 12:39 PM), <https://deadline.com/2019/03/to-kill-a-mockingbird-scott-rudin-broadway-aaron-sorkin-lawsuit-1202567854/>; See also Michael Paulson & Alexandra Alter, *'Mockingbird' Producer Reconsiders, Letting Local Plays Go Forward*, NY TIMES (Mar. 1, 2019), <https://www.nytimes.com/2019/03/01/theater/scott-rudin-mockingbird-broadway.html>.

⁹ *Obtaining Rights*, AM. ASS'N OF CMTY. THEATRE, <https://aact.org/obtaining-rights> (last visited Oct. 9, 2020).

¹⁰ If a certain work is "restricted," its performance rights may not be obtained by another producer. See *Rights & Royalty Terms: A Glossary*, AM. ASS'N OF CMTY. THEATRE, 3 (2015), https://aact.org/sites/default/files/resource_library/rights-royalty-glossary.pdf.

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work.¹¹ During this process, the producer will first look up the theatrical work in each publishing house's catalog and online listing.¹² After contacting the relevant publishing house, the producer will be given a royalty quote, which usually depends on the specific title, place of performance (including city, state and the specific theatre), seating capacity of the theatre, ticket prices, number of performances, performance dates, producing organization and whether it is a nonprofit or for-profit group, and Equity status of the production.¹³ In addition, publishing houses will also charge materials rental fees for scripts and scores, as requested by the producer.¹⁴ Subsequently, if the producer finds the quote and other special conditions¹⁵ acceptable, the producer will sign the publishing house's production contract and the producer will be granted a performance license for the specific production.

In the vast majority of the time, none of the terms in these community theatre production licenses is negotiable. Under this licensing scheme, the royalties are calculated by each publishing house's own formula, the community theatres are usually not allowed to make any changes to the existing script, and the entire contract is usually a take-it-or-leave-it adhesion contract. As aforementioned, some performance licenses may also be subject to certain "special conditions." Sometimes, these special conditions are tailored for plans of an upcoming Broadway (or West End) revival or tour, a motion picture remake, a regional theatre's¹⁶ exclusive run, and other exclusive production in a certain area or on a certain

¹¹ AM. ASS'N OF CMTY. THEATRE, *supra* note 9. The commonly-seen licensing houses include Dramatists Play Service (<https://www.dramatists.com/>), Samuel French (<https://www.samuel french.com/>), Tams-Witmark (<https://tamswitmark.com/>), Rodgers & Hammerstein Theatricals (<https://www.rnh.com/>), The Musical Company (<https://themusicalcompany.com/>), Music Theatre International (<https://www.mtishows.com/>). As of 2020, Samuel French, Tams-Witmark, and R&H have already merged into Concord Theatricals (<https://concord.com/theatricals/>).

¹² For example, *see* *Plays*, CONCORD THEATRICALS, <https://www.concordtheatricals.com/perform/plays> (last visited Oct. 9, 2020); *See also Full Length Plays*, DRAMATIC PUBLISHING, <https://www.dramaticpublishing.com/browse/full-length-plays?m-layered=1> (last visited Oct. 9, 2020).

¹³ Actors' Equity Association is the union for Principal, Chorus and Stage Manager in the theatre industry. "Equity negotiates and administers multi-employer national and regional collective bargaining agreements, as well as single-employer agreements with theatrical employers. These agreements provide minimum salaries, benefits, job security and numerous other provisions to ensure safe working conditions and a work environment where actors and stage managers are protected." *See Contracts & Codes*, ACTORS' EQUITY ASSOCIATION, <https://www.actorsequity.org/resources/contracts/> (last visited Oct. 9, 2020).

¹⁴ *MTI Enters. v. Theaterpalooza Cmty. Theatre. Prods.*, No. 1:18-cv-650 (TSE/IDD), 2018 U.S. Dist. LEXIS 218423, *4 (E.D. Va. Dec. 7, 2018); *see also* AM. ASS'N OF CMTY. THEATRE, *supra* note 9.

¹⁵ Apart from the royalties, the quote may also include certain requirements on advertising, credits, etc.

¹⁶ Most of the professional regional theatres are members of the League of Resident Theatres (LORT). *See* LEAGUE OF RESIDENT THEATRES, <http://lort.org/> (last visited Oct. 9, 2020).

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platform. These special conditions may be restrictions and limitations on the production, for instance, that the production not be within a certain-mile radius of any major cities,¹⁷ or limitations on press releases in a certain geographic area. Depending on the community theatre's production plan, some of these special conditions would make it virtually infeasible for the producer to stage that theatrical work: suppose the community theatre was to obtain the rights to a play, and the special conditions restricted that the play can only be performed in a venue outside a 25-mile radius of any major city; the producer will be left with no choice but either forgoing this production or trying to find a venue in an area with a smaller population, which usually has much less theatre venues.

Furthermore, as aforementioned, some theatrical works may be restricted¹⁸ and thus not available for community theatre productions.¹⁹ A professional production can negotiate for exclusivity and noncompetition within one or more stipulated areas, with undoubtedly much higher royalties,²⁰ thus restricting community theaters' production of the same theatrical work. However, whether or not a theatrical work has been restricted sometimes is not publicized in the publishing house's catalogs or online listing.²¹ There could be several reasons for this secret restricted status—an ongoing negotiation for an exclusive performance license could render the theatrical work's restricted status uncertain;²² or the professional production could require this information to be kept undisclosed until the official announcement; or in some cases, copyright holders could only want professional companies to stage the work.

In guidelines provided by American Association of Community Theatre (AACT), producers are encouraged to always check with the publishing house before beginning any work on the production.²³ The secret restricted status sometimes adds another wrinkle to this seemingly comprehensive licensing scheme. During the unknown period of time when the licensing availability of a theatrical work is rendered unclear because of an ongoing negotiation between the copyright holder(s) (as well as the publishing house) and a professional production company, community theatre applicants would almost never have access to such information

¹⁷ As will be explained later, this limitation is similar to the limitation alleged by Atticus LLC and Scott Rudin. Paulson & Alter, *supra* note 6.

¹⁸ If a certain work is "restricted," its performance rights may not be obtained by another producer. See *Rights & Royalty Terms: A Glossary*, *supra* note 10.

¹⁹ AM. ASS'N OF CMTY. THEATRE, *supra* note 9.

²⁰ *Rights & Royalty Terms: A Glossary*, *supra* note 10.

²¹ *Id.*

²² *Id.* ("The availability of a play can change from day to day").

²³ AM. ASS'N OF CMTY. THEATRE, *supra* note 9 ("Never assume that a play is available, you should always check with the play publishing house before you advertise or begin work on the production.").

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regarding the actual availability of that theatrical work. Meanwhile, the publishing house would continue to engage in the licensing process with potential licensees before any final agreement. Therefore, if a community theatre applicant happens to be caught in the middle of this uncertainty while gradually moving forward with the production plans as its license application is being processed, the costs incurred most likely have to be borne by the community theatre—since it assumed its own risks (by moving forward with the production before *actually* obtaining the rights). These collateral damages could easily become unbearable for most community theatres with shoestring budgets, that operate on public donations and governmental and organizational grants.

*B. Copyright Enforcement & Copyright Awareness Among
Community Theatres*

With respect to copyright enforcement, production companies big and small have also been made aware of the consequences of copyright infringement, many of which occur when a theatrical work is produced without a performance license,²⁴ through the cease-and-desist letters²⁵ and the occasional lawsuits that made the headlines. Only very recently has United States District Court for the Eastern District of Virginia decided a copyright infringement case where the defendant community theatre was hit with a hefty “fine” for producing several theatrical works without obtaining performance licenses.²⁶

In *MTI Enters. v. Theaterpalooza Community Theater Productions, Inc.*, licensing house Music Theatre International filed a complaint against Theaterpalooza Community Theater Productions, Inc. over at least sixteen “illegal and unlicensed productions.”²⁷ The court decided that plaintiffs, including Music Theatre International, were entitled to a maximum

²⁴ Some other infringements usually include using excerpts from other copyrighted works or famous person’s name or likeness without their authorization. See Sophie Haigney, *James Franco’s Lawyers Shut Down Play That Uses His Name*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/theater/james-francos-play-cancelled.html>; see also Nicole Serratore, *That’s What They Wrote and ‘That’swhatshe said’*, AM. THEATRE (Feb. 12, 2016file://localhost/), <https://www.americantheatre.org/2016/02/12/thats-what-they-wrote-and-thatswhatshe-said/>.

²⁵ Apart from Atticus LLC’s cease-and-desist notice, there was another reported cease-and-desist letter from the publishing house Rodgers & Hammerstein. See Kenneth Jones, *R&H Org Nixes Walnut Street’s Singalong Sound of Music*, PLAYBILL (Dec. 6, 2002), <https://www.playbill.com/article/r-h-org-nixes-walnut-streets-singalong-sound-of-music-com-109932>.

²⁶ *Theaterpalooza*, 2018 U.S. Dist. LEXIS 218423, at *13–18.

²⁷ Adam Hetrick, *Music Theatre International Files Legal Action Against Virginia Community Theatre*, PLAYBILL (July 16, 2018), <http://www.playbill.com/article/music-theatre-international-files-legal-action-against-virginia-community-theatre>.

statutory award for *Annie*, *Mama Mia!*, and *Hairspray*²⁸ in the amount of \$450,000.²⁹ Furthermore, the court agreed that the plaintiffs should be entitled to a permanent injunction enjoining the defendant Theaterpalooza from any further infringement.³⁰ However, the court also recommended that the plaintiffs should either not be entitled to attorney's fees or only be entitled to a reduction in the fees they requested. In addition, the costs of litigation in the amount of \$1,532.72 will be borne by the defendant.³¹

In the digital age where online advertising and marketing has long become a popular trend,³² detection of copyright infringement has also become much easier for the publishing houses and copyright holders. On the other hand, hefty penalties such as the ones in *Theaterpalooza* could make community theatres highly cautious about *any* potential lawsuits or legal disputes, especially copyright infringement. If community theatres are to face any legal disputes, they are neither in any position to mount legal defenses nor can they afford to risk the cost of losing a lawsuit.³³ Therefore, when it comes to performance rights, community theatres usually are wary of infringement penalties and seek to obtain the performance licenses for their productions.

III. COMMUNITY THEATRES AND CULTURAL DEVELOPMENT

From its roots in Sophocles's and Shakespeare's productions where audiences cut across class, the theatre has always needed diverse communal viewing experience.³⁴ Community theatres are important to our culture, as they make unique and irreplaceable contributions to the art. In artist director Karena Johnson's words, context can inform the drama on the stage.³⁵ As compared to about 75 regional professional theatres³⁶ as well as 41 Broadway theatres³⁷ and 70-ish off-Broadway theatres,³⁸ the significant

²⁸ In *Theaterpalooza*, the court and the plaintiffs seem to have only focused on these three musicals. *Theaterpalooza*, 2018 U.S. Dist. LEXIS 218423, at *4.

²⁹ *Id.* at *18.

³⁰ *Id.*

³¹ *Id.*

³² Trefis Team & Great Speculations, *How Has The U.S. Online Advertising Market Grown, And What's The Forecast Over The Next 5 Years?*, FORBES (June 11, 2019, 10:45 AM), <https://www.forbes.com/sites/greatspeculations/2019/06/11/how-has-the-u-s-online-advertising-market-grown-and-whats-the-forecast-over-the-next-5-years/> - 3cf2b3a06607.

³³ Paulson & Alter, *supra* note 6.

³⁴ Karena Johnson, *Theatres are not catering for the working class majority*, GUARDIAN (Sept. 15, 2014, 6:00 AM), <https://www.theguardian.com/culture-professionals-network/culture-professionals-blog/2014/sep/15/working-class-people-subsidised-theatre>.

³⁵ *Id.*

³⁶ LEAGUE OF RESIDENT THEATRES, *supra* note 16.

³⁷ *Current Broadway Houses*, INTERNET BROADWAY DATABASE, <https://www.ibdb.com/theatres> (last visited Feb. 13, 2021).

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number of over 7,000 community theatres³⁹ in the United States means that many more theatrical works can be brought to life on the stages of the community theatres. And these communal theatrical experiences would in turn contribute to the creation of the art. On the other hand, as the ticket prices for commercial theatres keep going up,⁴⁰ community theatres, with an average ticket price of \$20 or less, would undoubtedly be more attractive to people who are interested in the theatrical art.

Meanwhile, disproportionate to their want of bargaining power as well as protection in the face of any legal disputes, community theatres in fact generate considerable revenues for copyright holders as well as the publishing houses. Community theatre productions are usually granted stock or amateur rights, hence their productions are sometimes referred to as stock and amateur productions. Even though the licensing of stock and amateur productions would not generate “the instant big bucks”⁴¹ of Broadway and national tours, the royalties from these productions are “pure profits” paid to the copyright holders as well as their publishing houses.⁴² Through the facilitation of publishing houses (such as aforementioned DPC), copyright holders will continue to profit from their theatrical works at the local level from stock and amateur productions even after their Broadway and other First Class Production⁴³ run have ended;⁴⁴ some of which have even made up for the losses in their First Class Productions.

³⁸ *Theatres*, THE OFF-BROADWAY LEAGUE, <http://offbroadway.com/theatres.php> (last visited Feb. 13, 2021).

³⁹ *Community Theatres: Join 7,000 Other Theatres in Joining AACT*, TICKET PEAK, <https://ticketpeak.site/community-theatres-join-7000-other-theatres-in-joining-aact/> (last visited Feb. 15, 2021).

⁴⁰ David Ng, *Average cost of a Broadway ticket passes \$100 for the first time*, L.A. TIMES (June 10, 2014), <https://www.latimes.com/entertainment/arts/la-et-cm-broadway-ticket-prices-20140610-story.html>; see also James B. Stewart, *Broadway Tickets, for the Price of an Economics Lesson*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/08/business/broadway-theater-ticket-prices.html>.

⁴¹ Robert Hofler, *Life After Death on Broadway: Even Flops Make Money in Amateur, Stock Productions*, VARIETY (Nov. 20, 2009 10:52 AM), <https://variety.com/2009/legit/news/life-after-death-on-broadway-1118011669/>.

⁴² *Id.* (In most cases, authors enjoy a 60–40 split between them and producers and investors in stock and amateur royalties for the first ten years; that divide further favors the creatives in the following eight years. After those eighteen years have ended, the authors get it all.).

⁴³ A “First-Class Class Production” means a production with a First-Class Cast, a First-Class Director in a First-Class Theatre. A First-Class Cast means a professional cast, which means Actors’ Equity actors. A First-Class Director means a professional director, which means a member of the Society of Stage Directors and Choreographers (“SSD&C”). A First-Class Theatre means Broadway theatres and a bunch of other classy theatres in certain specific cities scattered throughout the United States. See DONALD C. FARBER, *PRODUCING THEATRE: A COMPREHENSIVE AND LEGAL BUSINESS GUIDE* loc. 499 (3rd ed. 2006).

⁴⁴ Shane D. Valenzi, *A Rollicking Band of Pirates: Licensing the Exclusive Right of Public Performance in the Theatre Industry*, 14 VAND. J. ENT. & TECH. L. 759, 761 (2012).

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Seussical, among all “Broadway losers,” is one of the best examples of the revenue-generating ability of the stock and amateur licenses. During the twenty-nine-week run of *Seussical* on Broadway, it only managed to score an average of just over 70 percent capacity,⁴⁵ and left with a ten-and-a-half-million-dollar loss.⁴⁶ However, in the first ten years following its Broadway run, the show has been clocking in more than 700 productions annually in the United States, topping even *Annie*; and in some years, *Seussical* is “the most performed show in America.”⁴⁷ Consequently, the songwriters of *Seussical*, Lynn Ahrens and Stephen Flaherty, rightfully call themselves “the king and queen of stock and amateur.”⁴⁸

Another example is *All Shook Up*, the Elvis Presley jukebox musical on Broadway in 2005.⁴⁹ According to Joe DiPietro,⁵⁰ the book writer of *All Shook Up*, he only made “a few thousand dollars” in royalties from the musical’s six-month-run on Broadway,⁵¹ from which he could barely make a living.⁵² However, the stock and amateur rights have generated “tens of thousands of dollars” for his first quarterly royalties check alone.⁵³ *All Shook Up* was projected for \$1 million royalty range for its first year of stock and amateur licensing, according to Theatrical Rights Worldwide.⁵⁴ And the similar profitable stock and amateur licensing was expected for the Johnny Cash jukebox musical *Ring of Fire*,⁵⁵ which only had ninety-five performances (including thirty-eight previews) on Broadway with a box-office gross of \$2,775,120.⁵⁶

⁴⁵ “*Seussical*” *Broadway Grosses*, BROADWAY WORLD, <https://www.broadwayworld.com/grosses/SEUSSICAL> (last visited Feb. 13, 2021).

⁴⁶ Elizabeth Weiss, *To Flip a Flop*, NEW YORKER (Jan. 7, 2014), <https://www.newyorker.com/business/currency/to-flip-a-flop>; see also Robin Pogrebin, *The Places It Didn’t Go: How a Small Success Was Puffed into a Big Flop*, N.Y. TIMES (July 18, 2001), <https://www.nytimes.com/2001/07/18/theater/the-places-it-didn-t-go-how-a-small-success-was-puffed-into-a-big-flop.html>.

⁴⁷ Hofler, *supra* note 41.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Joe DiPietro’s Tony Award-winning Broadway musical *Memphis*, is also a community theatres favorite. See *Our Shows*, THEATRICAL RTS. WORLDWIDE, <https://www.theatricalrights.com/shows/> (last visited Oct. 9, 2020) (Theatrical Rights Worldwide is a publishing house. *Memphis* is listed on its front page.); see also *Production Rights*, BROADWAY MUSICAL HOME, <http://broadwaymusicalhome.com/production-rights.htm> (last visited Oct. 9, 2020) (*Memphis* is as “Bestselling Contemporary Musicals.”).

⁵¹ Hofler, *supra* note 41. “*All Shook Up*” *Broadway Grosses*, BROADWAY WORLD, <https://www.broadwayworld.com/grosses/ALL-SHOOK-UP> (last visited Jan. 7, 2020).

⁵² Hofler, *supra* note 41.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Hofler, *supra* note 41.

⁵⁶ “*Ring of Fire*” *Broadway Grosses*, BROADWAY WORLD, <https://www.broadwayworld.com/grosses/RING-OF-FIRE> (last visited Jan. 7, 2020).

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Admittedly, when compared to Broadway productions, the royalties for a single stock or amateur production⁵⁷ might not even be a fraction of the daily gross of any Broadway production,⁵⁸ where creators are always entitled to a fixed amount of royalties or a certain share of the proceeds. Nonetheless, as aforementioned, the licensing of stock and amateur rights has served as the primary source of income for many theatrical authors, even for those whose works “flopped” at the level of First Class Production.⁵⁹

Nowadays, as Broadway and high-end regional productions are becoming prohibitively expensive,⁶⁰ it is equally getting more and more difficult for these productions to recoup. For example, according to its filing with the Securities and Exchange Commission, *To Kill a Mockingbird* was capitalized for \$7.5 million, which is comparatively high for a straight play⁶¹ (as opposed to a musical) on Broadway.⁶² In the same season, *King Kong*, the musical which put a colossal marionette on the Broadway stage, announced its capitalization of \$30 million, and until the closing of its thirty-three-week Broadway run, there has been no announcement of recoupment.⁶³ Even though Broadway is witnessing a rapid growth in the budgets of theatrical productions, with the equally greater burden of recoupment, it is still difficult for copyright holders, especially creators, to enjoy a substantive profit from their works’ First Class Productions. On the contrary, the licensing income from stock and amateur productions is providing a steady income for more and more copyright holders. With this safety net weaved by stock and amateur licensing, creators⁶⁴ should be more incentivized to create original theatrical works, upon which the prosperity of the theatre industry depends. Therefore, community theatres which have

⁵⁷ Paulson & Alter, *supra* note 6 (For example, the Grand Theatre maintained that it paid DPC nearly \$6,000 for the performance rights to Sergel’s *To Kill a Mockingbird*, for its two-week run of the play in a one-thousand-seat theatre.).

⁵⁸ For instance, the second preview week of *To Kill a Mockingbird* generated a gross of \$1,130,163 (according to Broadwayworld data), with an average of about \$141,270 daily gross. See “*To Kill a Mockingbird*” *Broadway Grosses*, BROADWAY WORLD, <https://www.broadwayworld.com/grosses/TO-KILL-A-MOCKINGBIRD> (last visited Feb. 14, 2021).

⁵⁹ Valenzi, *supra* note 44, at 760-61; see also Hofler, *supra* note 41.

⁶⁰ Valenzi, *supra* note 44, at 761.

⁶¹ The term “play” can be either a general term, or more specifically refer to a non-musical play. Sometimes the term “straight play” is used in contrast to “musical.” which refers to a play based on music, dance, and songs sung by the play’s characters. See, e.g., Logan Culwell-Block, *13 Straight Plays Everyone Should Know*, PLAYBILL (Nov. 16, 2018), <https://www.playbill.com/article/13-straight-plays-everyone-should-know>.

⁶² Paulson & Alter, *supra* note 6.

⁶³ Nancy Coleman & Scott Heller, “*King Kong*” and “*Cher Show*” *Musicals Announce Closings*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/theater/king-kong-broadway-closing.html>.

⁶⁴ Under a work-for-hire arrangement, the creator would not be the copyright holder.

been generating these revenues should also be accorded the bargaining power as well as the legal protection that matches their contribution.

IV. A CASE STUDY

A. Broadway Shockers: To Kill a Mockingbird and Its Courtroom Drama Offstage

In 2018, a new stage version of *To Kill a Mockingbird*, with a script by Aaron Sorkin, burst onto Broadway.⁶⁵ With an average weekly attendance of over 100 percent (including “Standing Room Only” (“SRO”) ticket sales),⁶⁶ this Broadway production of *To Kill a Mockingbird* has undoubtedly become one of the most successful Broadway hits,⁶⁷ also creating a box-office miracle for an American play.⁶⁸ Different from the book’s focus on Atticus Finch’s daughter Scout, the Broadway production follows the story of Atticus Finch, a lawyer in a small town in 1930’s Alabama, as he defends Tom Robinson, a Black man falsely accused of rape.⁶⁹ Also, the Broadway production has been restructured to introduce the trial immediately, setting out to create dramatic quotient right from the top.⁷⁰

The Broadway production’s departures have caused huge controversy. After Harper Lee passed away in February 2016, her estate sued Scott Rudin (the lead producer for the 2018 Broadway production), complaining the Sorkin adaptation deviated too much from the novel.⁷¹ Lee’s estate maintained that the contract signed between Lee and Rudin’s company, Rudinplay, in 2015 required that the play “not derogate or depart in any manner from the spirit of the Novel nor alter its characters,” and that the estate has the final authority to determine whether such departures have

⁶⁵ Stuart Miller, *The Long, Strange Flight of ‘Mockingbird’*, AMERICAN THEATRE (Mar. 4, 2019), <https://www.americantheatre.org/2019/03/04/the-long-strange-flight-of-mockingbird/>.

⁶⁶ *QUICK STATS of “To Kill a Mockingbird”*, PLAYBILL, <https://www.playbill.com/production/to-kill-a-mockingbird-2018-2019> (last visited Jan. 7, 2020).

⁶⁷ David Rooney, “*To Kill a Mockingbird*” Becomes Top-Grossing American Play in Broadway History, HOLLYWOOD REPORTER (May 10, 2019, 7:00 AM), <https://www.hollywoodreporter.com/news/kill-a-mockingbird-becomes-top-grossing-us-play-broadway-history-1208931>.

⁶⁸ Miller, *supra* note 65; see also Zachary Stewart, *Broadway Shockers 2018: Harper Lee’s Estate Sues Producers of “To Kill a Mockingbird”*, THEATERMANIA (Dec. 26, 2018), https://www.theatermania.com/broadway/news/broadway-shockers-2018-harper-lee-estate-sues_87334.html (calling *To Kill a Mockingbird* “a giant haul for a nonmusical”).

⁶⁹ Andrew Limbong, *Aaron Sorkin Brings ‘To Kill A Mockingbird’ To The Broadway Stage*, NPR (Dec. 26, 2018), <https://www.npr.org/2018/12/22/679448620/aaron-sorkin-brings-to-kill-a-mockingbird-to-the-broadway-stage>.

⁷⁰ Miller, *supra* note 65.

⁷¹ *Carter v. Rudinplay, Inc.*, No. 18-0117-WS-B, 2018 U.S. Dist. LEXIS 76561(2018).

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occurred.⁷² The matter was eventually settled without going to trial, and Sorkin made some changes to his script to keep the show on track.⁷³

As a matter of fact, the Broadway production is not the first stage adaptation of this famous courtroom drama.⁷⁴ In 1965, only five years after the play's publication, Christopher Sergel, a playwright whose family ran the play publisher Dramatic Publishing Company (DPC), asked for permission to create a low-profile adaptation for schools, who were eagerly requesting a stage dramatization.⁷⁵ In 1969, Harper Lee signed on for Sergel's adaptation.⁷⁶ According to Christopher Sergel III, the playwright's grandson, and the current president of DPC, "Lee read and approved it, writing that it had her support for *stock and amateur* productions."⁷⁷

The book *To Kill a Mockingbird* has been a staple of middle and high school syllabi since its 1960 publication.⁷⁸ With the extensive popularity of the book among American readers, Sergel's adaptation has always been one of the go-to choices for community theatres looking for an American classic to fit into the season.⁷⁹ As a result, this courtroom in a 1930s Alabama small town has been recreated over and over again in schools, community theatres,⁸⁰ and even some regional theatres,⁸¹ based on performance licenses granted by the publishing house DPC.

While these two dramatized adaptations of Harper Lee's *To Kill a Mockingbird*—one by Christopher Sergel⁸² and one by Aaron Sorkin—both "closely track" Harper Lee's original novel, they have followed dramatically different narrative structures, and adopted varying casting choices.⁸³ However, it is the coexistence of these two adaptations that led

⁷² Laurel Wamsley, *Harper Lee Estate Sues Over 'To Kill A Mockingbird' Broadway Script By Aaron Sorkin*, NPR (Mar. 15, 2018, 4:17 PM), <https://www.npr.org/sections/thetwo-way/2018/03/15/593988778/harper-lee-estate-sues-over-to-kill-a-mockingbird-broadway-script-by-aaron-sorki>.

⁷³ Stewart, *supra* note 68.

⁷⁴ Miller, *supra* note 65.

⁷⁵ *Id.* (Before the Sergel adaptation for stage play, the book had already been adapted into an Oscar-winning film written by Horton Foote, starring Gregory Peck.).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Stewart, *supra* note 3.

⁷⁹ Paulson & Alter, *supra* note 6 ("According to lists on Dramatic Publishing Company's website, before March, there had already been more than 25 community theatre productions of *Mockingbird* scheduled to be staged in the year of 2019.").

⁸⁰ Miller, *supra* note 65.

⁸¹ *Id.* (It was unclear whether those regional theatre productions were within the scope of stock and amateur productions, since the concept of large professional regional theatres didn't even exist in 1960s.).

⁸² *To Kill a Mockingbird (Revised Version)*, DRAMATIC PUB., <https://www.dramaticpublishing.com/to-kill-a-mockingbird-t34> (last visited Jan. 7, 2020).

⁸³ Paulson & Alter, *supra* note 8.

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to the legal drama that shocks many: When the new stage version was coming to Broadway in November, 2018, community theatres all across the United States, who had obtained rights to Sergel's adaptation, received cease-and-desist letters from Atticus LLC and lead producer Rudin,⁸⁴ claiming that these community theatres did not have the right to perform the play,⁸⁵ and threatening excessive damages in the case of noncompliance.⁸⁶

Hence, apart from being an eventful legal drama on the stage, offstage, this new stage adaptation has also spawned its own courtroom drama in the real world.⁸⁷ In response to the legal threats, most community theatres chose to abandon their productions, or at least temporarily halt their mounting of the play, since they were neither equipped with enough copyright knowledge to fight Rudin's claims nor can they afford the cost of losing a lawsuit.⁸⁸ What is more, this pressure from Atticus LLC and Rudin even can be felt overseas—among all the productions that had been called off, a planned tour in the United Kingdom was also canceled in January, 2019, following the Atticus LLC and Rudin's assertion of worldwide exclusivity in the professional stage rights to *To Kill a Mockingbird*.⁸⁹

B. Analysis of the Legal Disputes Underneath

All of these called off productions used Sergel's script and had acquired performance licenses from DPC.⁹⁰ According to DPC, Sergel's adaptation has been the "only game in town"⁹¹ for nearly fifty years, until

⁸⁴ Atticus Limited Liability Company is the producing entity formed by lead producer Scott Rudin to produce Sorkin's adaptation of *To Kill a Mockingbird* on Broadway. See Miller, *supra* note 65. A limited liability company or a limited partnership is usually used as the producing entity for most theatrical productions. See FARBER, *supra* note 43, at loc. 829-30.

⁸⁵ Stewart, *supra* note 3.

⁸⁶ Mark Kennedy, *Why small US theaters have canceled 'To Kill a Mockingbird'*, AP (Feb. 28, 2019), <https://apnews.com/article/637225beebba450b912015cb64bb760b> (The all-volunteer Curtain Call Theatre in Braintree, Massachusetts, said it received a letter threatening damages of up to \$150,000, a staggering amount for a venue where tickets for plays are \$20 and \$25 for musicals.).

⁸⁷ Stewart, *supra* note 68; see also Alexandra Alter & Michael Paulson, "Mockingbird" Play Publisher Demands \$500,000 From Harper Lee Estate, N.Y. TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/theater/mockingbird-broadway-harper-lee-dispute.html>.

⁸⁸ Stewart, *supra* note 3.

⁸⁹ Stewart, *supra* note 3. See also Alex Marshall, *Broadway 'Mockingbird' Precludes British 'Mockingbird'*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/theater/mockingbird-tour-scott-rudin-london-transfer.html>; See also *To Kill a Mockingbird UK Tour*, OPEN AIR THEATRE, <https://openairtheatre.com/production/to-kill-a-mockingbird-uk-tour> [<https://web.archive.org/web/20191108165435/https://openairtheatre.com/production/to-kill-a-mockingbird-uk-tour>].

⁹⁰ Kennedy, *supra* note 86.

⁹¹ Stewart, *supra* note 3.

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Sorkin's version opened on Broadway in 2018.⁹² On the surface, this case might seem straightforward—since Sergel's adaptation and Sorkin's Broadway adaptation are two separate versions, the Broadway adaptation should not be able to block off the productions using Sergel's script.⁹³ However, the legal dispute beneath is much more complicated.

All these legal disputes over production rights stem from “a contract that dates back half a century,” according to Atticus LLC and Rudin.⁹⁴ Rudin asserted that in the 2015 contract between Harper Lee and Rudin's production company, Rudinplay,⁹⁵ he agreed to pay Harper Lee the sum of \$100,000 in exchange for the right to adapt her novel *To Kill a Mockingbird* into a stage play.⁹⁶ And he further asserted that the 1969 contract between Harper Lee and DPC blocked *Mockingbird* productions within 25 miles of cities that had a population of 150,000 or more in 1960 (which is the last census year before the agreement was signed) while a “first-class dramatic play” based on the novel is playing on Broadway⁹⁷ or on tour.⁹⁸ Therefore, according to Rudin, since Sorkin's adaptation is a “first-class dramatic play” playing on Broadway, DPC cannot give out any performance licenses within 25 miles of any major cities. However, based on the limited public information,⁹⁹ it is unclear whether the 1969 contract was meant to limit the “first-class dramatic play” to a Broadway production of Sergel's adaptation or it was meant to include any “first-class dramatic play” based on Harper Lee's *Mockingbird*. Yet apparently, the Lee estate believed that it meant the latter—since lawyers of the Lee estate had put DPC on notice “a dozen times” about their violation of the original licensing rights.¹⁰⁰

Nonetheless, the other reading is not without merits. Apart from Sergel's adaptation for stock and amateur productions,¹⁰¹ Harper Lee had repeatedly rejected the idea of a new version for the professional market.¹⁰² What is more, although she had not approved the publication of a

⁹² Christopher Sergel III, *Statement Regarding To Kill a Mockingbird*, DRAMATIC PUBLISHING (Mar. 8, 2019), <https://www.dramaticpublishing.com/statement-regarding-to-kill-a-mockingbird>.

⁹³ Each owner of copyright can exploit their exclusive rights. See 17 U.S.C. § 106 (2002).

⁹⁴ Paulson & Alter, *supra* note 6.

⁹⁵ Wamsley, *supra* note 72.

⁹⁶ *Carter*, 2018 U.S. Dist. LEXIS 76561, at *2.

⁹⁷ Paulson & Alter, *supra* note 8.

⁹⁸ Paulson & Alter, *supra* note 6.

⁹⁹ *Carter*, 2018 U.S. Dist. LEXIS 76561, at *2.

¹⁰⁰ Miller, *supra* note 65.

¹⁰¹ *Id.*

¹⁰² *Id.* (Towers said he was approached by Lee's agent in the late 1990s about creating a new version for the professional market, but Lee scotched the idea. He says the agent told him that Lee “wanted all the productions to go away. There was a sense that if she endorsed a new one, even if it was better, it would lead to more productions.” Added Shields, “She eventually resented anything that drew attention to her.”).

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professional adaptation, Harper Lee did not seem to be against the professional productions evolving from Sergel's adaptation.¹⁰³ Unfortunately, it is impossible for us to know anything about the actual content of the 1969 DPC agreement with Harper Lee, or even DPC's interpretation of that agreement, since neither the representatives for the Lee estate nor DPC President Christopher Sergel III has ever commented on the issue (apart from the short statement on DPC's website).¹⁰⁴

Meanwhile, according to Rudin, as DPC did not respond to the request of Rudin and the Lee estate to stop granting licenses to community theatres within 25-mile radius of major cities, the cease-and-desist letters started to be sent directly to the community theatres. These letters informed the community theatres that their productions as licensed by DPC infringed on rights directly licensed to Atticus LLC by Harper Lee, and also warned these theatres not to put on their shows¹⁰⁵ or they could be subject to huge copyright infringement penalties,¹⁰⁶ regardless that these community theatres were producing a completely different, decades-old script by Christopher Sergel.¹⁰⁷ By putting pressure on DPC's licensees, Rudin and Atticus LLC was aiming to discourage community theatres with 25 miles of major cities from obtaining licenses to Sergel's adaptation. Then, Rudin and Atticus LLC virtually could achieve the same effect of stopping DPC from giving out licenses to those community theatres, thus clearing the road for their tour production. These legal threats would undoubtedly deter community theatres from putting on Sergel's adaptation, even though Rudin claimed that they were never trying to "put a stop to 'the Sergel play.'"¹⁰⁸

C. Community Theatres Caught in the Crossfire

1. Impossible for Community Theatres to be Informed

This fight over the performance rights of *Mockingbird* was ignited by the unclear¹⁰⁹ copyright proprietorship situation between the Lee estate and

¹⁰³ Miller, *supra* note 65. (There has been many professional production adapted from the Sergel adaptation. Some are very high profile, such as the Paper Mill Playhouse production, Hartford Stage's 2009 production starring Foote's daughter.)

¹⁰⁴ Paulson & Alter, *supra* note 6. Sergel III, *supra* note 92.

¹⁰⁵ Paulson & Alter, *supra* note 8.

¹⁰⁶ Kennedy, *supra* note 86 (The all-volunteer Curtain Call Theatre in Braintree, Massachusetts, said it received a letter threatening damages of up to \$150,000, a staggering amount for a venue where tickets for plays are \$20 and \$25 for musicals.)

¹⁰⁷ Paulson & Alter, *supra* note 8.

¹⁰⁸ Paulson & Alter, *supra* note 6 (In a statement by Scott Rudin, he said the Broadway production was never trying to put a stop to "the Sergel play," and they had "no issue with the [Sergel] play having a long life" as long as DPC adhere to the guidelines set in DPC's own agreement with Harper Lee).

¹⁰⁹ Paulson & Alter, *supra* note 8 (DPC and Lee Estate didn't comment on this issue).

Atticus LLC (Rudin) and DPC. Nevertheless, it is both impossible and impractical for any community theatre to be responsible in ensuring that the chain of title is intact, given their limited resources and little access to any information on the nonpublic disputes over production rights.

As explained before, community theatres obtain stock or amateur rights through a standardized process, and they usually have very little access to, let alone any bargaining power over, the secret restricted status of a certain theatrical work. Similarly, it seems unlikely for community theatres to avoid the legal threats from Rudin and Atticus LLC. Here, especially before the emergence of the disputes between the Lee estate and Atticus LLC (Rudin) and DPC, when a community theatre producer decided to stage Sergel's adaptation of *To Kill a Mockingbird*, they probably would just apply for a performance license through DPC without any doubt that DPC is the rightful agent of Harper Lee's work.¹¹⁰ What is more, the community theatre also would not acquire such information from DPC, since DPC has been insisting that they are the rightful representative of Sergel's adaptation of Harper Lee's *To Kill a Mockingbird* and they could never have expected a Broadway production.¹¹¹

2. Improper for Community Theatres to Bear the Cost

With this omnipresent threat of legal actions, affected community theatres are left hanging in the wind. After receiving the unavoidable cease-and-desist letters from Rudin and Atticus LLC, those community theatres had few options but to relocate to a country venue outside the 25-mile radius of major cities or to cancel their productions entirely.¹¹² According to a non-exhaustive list provided by *The New York Times*, at least eight community productions have been affected by threatened legal actions, including productions in Buffalo, New York; Dayton, Ohio; Marblehead and Braintree in Massachusetts; Oklahoma City, Oklahoma; Buda, Texas; Azusa, California; and Salt Lake City, Utah.¹¹³ Nevertheless, some productions outside urban areas, such as the production at Pennsylvania State University¹¹⁴ and the production by The Ritz Players in

¹¹⁰ *To Kill a Mockingbird (Revised Version)*, *supra* note 82. Sometimes, pursuant to its own representation agreements, the licensing house could have the exclusive right to license performances of certain copyrighted materials, which is not unusual in the industry.

¹¹¹ Sergel III, *supra* note 92.

¹¹² Paulson & Alter, *supra* note 6 ("According to lists on Dramatic Publishing Company's website, before March, there had already been more than 25 community theatre productions of *Mockingbird* scheduled to be staged in the year of 2019.")

¹¹³ *Id.*

¹¹⁴ *To Kill a Mockingbird*, PENN. ST. SCH. OF THEATRE, <http://theatre.psu.edu/mockingbird> [<https://web.archive.org/web/20191205060759/https://theatre.psu.edu/mockingbird>].

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Tiffin, Ohio,¹¹⁵ appeared to be safe since they are both outside the 25-mile radius of any major cities.¹¹⁶

This combative move by Rudin and Atticus LLC has prompted calls for a boycott of Rudin's work.¹¹⁷ Later, as a response to the overwhelming negative coverage, Rudin and the Broadway producing team behind Sorkin's *To Kill a Mockingbird* announced that they would offer Sorkin's adaptation to the community theaters forced to cancel their productions of Sergel's adaptation.¹¹⁸ Amongst the eight community theatres affected, at least five of them (including Dayton Playhouse, the Kavinoky Theatre, The Grand Theatre Company, Oklahoma City University School of Theatre, Azusa Pacific University) accepted Rudin's offer to stage the Sorkin's adaptation instead.¹¹⁹ The rest of the affected theatres have either canceled their productions entirely,¹²⁰ or have moved to a venue far from the affected

¹¹⁵ *To Kill a Mockingbird*, THE RITZ THEATRE, <https://ritztheatre.org/events/to-kill-a-mockingbird/> (last visited Jan. 7, 2020).

¹¹⁶ Paulson & Alter, *supra* note 6.

¹¹⁷ Kennedy, *supra* note 86.

¹¹⁸ Stewart, *supra* note 3; *see also* Evans, *supra* note 8.

¹¹⁹ Dayton Playhouse (Dayton, Ohio) moved their production of *To Kill a Mockingbird* to 19/20 season (November 1–17, 2019), using Rudin's script; *see 2019-2020 Season*, DAYTON PLAYHOUSE, <https://wordpress.thedaytonplayhouse.com/seasons/2019-2020-season/> (last visited Feb. 14, 2021). Dayton Playhouse also canceled the performances for 18/19 season (March 8–17); *see 2018-19 Season Review*, DAYTON PLAYHOUSE, <https://wordpress.thedaytonplayhouse.com/seasons/2018-19-season-overview/> (last visited Feb. 14, 2021). The Kavinoky Theatre (Buffalo, New York) moved their production from March 8–31, 2019 to November 11–December 11, 2019. *See Harper Lee's To Kill a Mockingbird*, THE KAVINOKY THEATRE, <http://www.kavinokytheatre.com/events/harper-lee-s-to-kill-a-mockingbird/> (last visited Feb. 14, 2021). *See also*

BWW News Desk, *Kavinoky Theatre Replaces MOCKINGBIRD With 1984*, BROADWAY WORLD (Mar. 16, 2019), <https://www.broadwayworld.com/buffalo/article/Kavinoky-Theatre-Replaces-MOCKINGBIRD-With-1984-20190316> [<https://perma.cc/3F8Y-AKMM>]. The Grand Theatre Company (Salt Lake City, Utah) canceled their production in 18/19 season (March 21–April 6, 2019). *See To Kill a Mockingbird*, GRAND THEATRE, <http://grandtheatrecompany.com/to-kill-a-mockingbird/> [perma.cc/9ML5-X4FX] (last visited Oct. 9, 2020). The Grand Theatre Company later announced that they would mount another version for 19/20 season (March 26 – April 11, 2020). *See Harper Lee's To Kill a Mockingbird*, GRAND THEATRE, <http://grandtheatrecompany.com/to-kill-a-mockingbird/> (last visited Feb. 14, 2021). Oklahoma City University School of Theatre (co-production with Oklahoma Children's Theatre) staged the production from October 23–27, 2019. *See 'To Kill a Mockingbird' Takes Rare Flight*, OKLAHOMA CITY UNIVERSITY (Sept. 3, 2019), <https://www.okcu.edu/news/to-kill-a-mockingbird-takes-rare-flight/>. In South California, Azusa Pacific University's new production with Rudin's script is set for February 13–29, 2020. *See Current Season*, AZUSA PACIFIC UNIVERSITY, <https://www.apu.edu/vpa/theater/season/> [<https://perma.cc/B5AN-D7FN>] (last visited Oct. 9, 2020). *See also In the News: Aaron Sorkin's To Kill a Mockingbird Adaptation Set for APU Theater*, AZUSA PACIFIC UNIVERSITY (Mar. 4, 2019), <https://www.apu.edu/media/news/inthenews/26782/>.

¹²⁰ Curtain Call Theatre (Braintree, Massachusetts) seemed to have canceled the production for their 2018–2019 season. *See Past Seasons*, CURTAIN CALL THEATRE, https://curtaincallbraintree.org/cart/past_seasons.html [<https://perma.cc/NP73-ZNEX>] (last visited Feb. 14, 2021). And they did not announce any Mockingbird production in their 2019–2020 season either. *See 2019-2020 Shows & Events*, CURTAIN CALL THEATRE, https://curtaincallbraintree.org/cart/shows_events.html [<https://perma.cc/2MKF-RPGC>] (last visited Feb.

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cities at their own cost. For instance, Mugford Street Players has moved their venue to the Gloucester Stage Company, which is safely outside the 25-mile radius of Boston.¹²¹

However, neither the offer of Sorkin's adaptation nor the relocation could make up for the community theatres' incurred losses. The affected community theatres already paid DPC for what they believed were the legal rights to produce *To Kill a Mockingbird*.¹²² Moreover, several of the community theatres had already been deep into the rehearsal processes when they received the cease-and-desist letters from Rudin and Atticus LLC. By that point, the community theaters had most likely already spent thousands of dollars and devoted hundreds of hours to the show.¹²³ As these community theatres usually operate on very limited budget (sometimes less than \$10,000 for a show¹²⁴), these nonrefundable and unrecoverable costs could drain a huge part of their funds.

For example, although the Kavinoky Theatre accepted the offer to produce Sorkin's adaptation and move scheduled performance to its next season,¹²⁵ it was still left with all of its out-of-pocket costs incurred from the cancellation of its earlier Sergel production, which would be burdensome to any community theatres with small scale budgets. In fact, when the community theatre heard from Rudin and Atticus LLC, the Kavinoky Theatre's *To Kill a Mockingbird* had already been shaping up to a success, with some three thousand advance tickets sold.¹²⁶ In addition, the cast of nineteen actors, which included six children, had been rehearsing for weeks, and the set had already been built.¹²⁷ However, in the face of legal threats, the theatre had to offer refunds to ticket purchasers, and planned to stage an adaptation of George Orwell's *1984* instead.¹²⁸ Another example is the Grand Theatre in Salt Lake City, which also canceled its planned production of *To Kill a Mockingbird* for the 2018/2019 season and accepted

14, 2021). Also, UK and Ireland tour of *Mockingbird* is still canceled. See *To Kill a Mockingbird UK Tour*, *supra* note 89.

¹²¹ Stewart, *supra* note 3.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See, e.g., Typical Annual Budget, NEW ARTISTS PRODUCTIONS (Nov. 2018), <https://newartistsproductions.org/how-to-start-a-youth-theater/typical-annual-budget/> ("A typical show budget for our organization is: \$8,950. This is for a Disney Junior production giving six performances in the same venue before a limited size audience.").

¹²⁵ See *Past Seasons*, *supra* note 120. The Kavinoky Theatre (Buffalo, New York) moved their production from March 8 – 31, 2019 to November 11–December 11, 2019. BWW News Desk, *supra* note 119.

¹²⁶ Paulson & Alter, *supra* note 6.

¹²⁷ *Id.*

¹²⁸ Kavinoky Theatre (@kavinokytheatre), FACEBOOK (Feb. 25, 2019 11:57 AM), <https://www.facebook.com/kavinokytheatre/posts/3018258884866781>.

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the offer to mount Sorkin's adaptation instead.¹²⁹ However, Seth Miller, the executive artistic director of the Grand Theatre, expressed his concern for Rudin's offer. He told *The New York Times* that it was "too late" for his theatre to mount a different version of the play in the scheduled time slot, and they would have to produce the Sorkin's adaptation next season; yet he was also "not sure how long Mr. Rudin's offer was good for."¹³⁰

Seth Miller's concern might also resonate with many similarly situated community theatre producers who have canceled the production entirely because of concerns that they might not have enough time to mount a "dramatically different" version of the play; or worse, they just could not afford to do so. The mere cancellation of the show could already be costly. Apart from leaving actors, directors, and designers in the lurch,¹³¹ community theatre companies sometimes have to pay partial, or even whole, remuneration to the parties involved in the case of cancellation or abandonment of the production. On the other hand, if the community theatre could and would relocate to another suitable venue, it would still be costly and time-consuming, considering all the logistical challenges involved. For example, the theatre probably would still have to refund the ticket purchasers who find the new venue too faraway, have all their designers adjust their designs and work products to make sure that all of the set, projection, costumes, lighting and sound are compatible with the new venue, and plan for the additional load-in and load-out costs, and so on.¹³²

3. Some Possible Defenses for Community Theatres

The producers of these community theatres are puzzled, because they did not think that it was possible for their humble community productions to affect the financial viability of the Broadway production on any conceivable level,¹³³ especially when the community productions are using a completely different script. Conventionally, the First Class Production, especially the tour company, would secure the production's exclusivity and noncompetition within the performance areas, in the hope that it would maximize the box office revenue. However, as analyzed before, the revenue-generating ability of stock and amateur productions¹³⁴ should serve as a strong counterargument against this rationale. Unfortunately, this

¹²⁹ See *Past Seasons*, *supra* note 120. The Grand Theatre Company (Salt Lake City, Utah) canceled their production in 18/19 season (March 21–April 6, 2019). The Grand Theatre Company later announced that they would mount another version for 19/20 season (March 26 – April 11, 2020).

¹³⁰ Paulson & Alter, *supra* note 8.

¹³¹ Stewart, *supra* note 3.

¹³² Paulson & Alter, *supra* note 6.

¹³³ *Id.*

¹³⁴ Hofler, *supra* note 41.

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somewhat attenuated reasoning would not save the affected community theatres from the urgent legal threats faced by them. Ultimately, even though these community theatres do not believe that they could ever be a problem for the Broadway production, yet they all chose to make adjustments accordingly—as “the nonprofit could not afford to risk the cost of losing a lawsuit,” and usually is “not in any position to mount a legal defense.”¹³⁵

On the other hand, the community theatres might be able to argue that they were the third-party beneficiaries of the licensing agreement between Lee and DPC, acting with good faith belief that the stock and amateur rights licensed to them were binding on the parties. Whereas publishing houses, whether or not they have made it clear to the licensees about the copyright clearance status with the copyright holders, are usually in a more advantageous position to understand and thus avert the legal risks of potential copyright infringement. And if the publishing houses cannot prevent infringement from happening, they should be the ones to absorb the damages. Legally sound or not, this argument probably would not come into play until the parties are negotiating with each other (or arguing in front of a judge); however, as aforementioned, community theatres scarcely set aside any budget for legal disputes. Therefore, in practice, not many community theatres would raise this argument.

4. Further Defenses Based on the Copyright Doctrine—Copyrightability of Theatrical Production as a Form of Nontextual Creative Works

With theatre being a collaborative medium, especially in the wave of devised theatre¹³⁶ and improvisational theatre, theatre artists have come a long way fighting for protection and recognition of their hard work in the creation process. However, under the current structure of copyright law, it is usually the playwrights, or the musical’s songwriters, lyricists and scriptwriters who would be considered the “authors.” Apart from the creators of the literal content, directors and dramaturges have gradually “earned” their shares in the collaborative work—it has become rather

¹³⁵ Paulson & Alter, *supra* note 6 (“Seth Miller, the executive artistic director of the Grand Theater in Salt Lake City told The New York Times, ‘I’m angry and frustrated, because we’re not impacting his show, not even a little bit. They know we’re not in any position to mount a legal defense.’”) (In response to Atticus LLC’s cease-and-desist letters, Lyn Adams, the executive director of the Oklahoma Children’s Theater, said, “It was a very strong-arm kind of letter, shaking their finger at us and telling us we were doing a bad thing and would be sued if we went ahead with a production.”).

¹³⁶ Martine Kei Green-Rogers, *What Is Devised Theatre?*, THEATRE TIMES (Sept. 28, 2016), <https://thetheatretimes.com/what-is-devised-theatre/> [<https://perma.cc/7NY4-54YB>]. (Devised theatre is theatre that begins without a script. The script gets “written” as the rehearsal process takes place through a series of improvisations and collaborations.”).

conventional for directors to copyright their stage directions.¹³⁷ Yet beyond that, designers, and (sometimes) actors comprising the creative team behind a production are widely regarded as employees of the production and are, by default, subject to the work-for-hire doctrine.¹³⁸ The difference between ownership and working as an employee, first of all, would create an income gap between these “two groups of collaborators”; since as aforementioned, it is not unusual for large amount of revenue to be generated from the licensing of the production.¹³⁹

Apart from the economic factor, the incoherence and confusion resulted from the literal mode of copyright law has also added to our doubt about the copyright protection afforded the “text” in the theatre.¹⁴⁰ Professor Rebecca Tushnet points out that copyright is literal; that it starts with the written word as its model, then tries to fit everything else into the literary mode.¹⁴¹ However, in the rise of transmedia entertainment, in which characters and content migrate from one form of media to another, such migration creates further challenges for the definition of a work protected by copyright under its literal model.¹⁴² Therefore, it would be misleading to seek protection of the exclusivity of a play-adaptation of a book. However, similar to the last several potential arguments for the community theatres, this argument calling for the deconstruction of exclusivity in transmedia works is even more attenuated to saving community theatres from the current legal threats.

V. PROPOSALS FOR COMMUNITY THEATRES IN THIS CASE AND BEYOND

A. Doctrinal Proposals—Best Practices

The intertwined copyright and licensing rights here all stem from the inconsistencies between the 1969 agreement (between Lee and Sergel) and the 2015 agreement (between Lee and Rudinplay); and some might argue

¹³⁷ Symposium: *How the Show Goes On: Law and Theater in the Twenty-First Century*, Panel Discussion: *What Permission? A Practitioner’s Guide to Copyright Licensing in Theater*, 29 COLUM. J.L. & ARTS 445, 453 (2006).

¹³⁸ Ryan J. Richardson, Comment, *The Art of Making Art: A Narrative of Collaboration in American Theatre and a Response to Calls for Change to the Copyright Act of 1976*, 42 CUMB. L. REV. 489, 510; see also *Julien v. Soc’y of Stage Dirs. & Choreographers, Inc.*, No. 68 Civ. 5120, 1975 U.S. Dist. LEXIS 15839, at *6-8 (S.D.N.Y. Oct. 7, 1975).

¹³⁹ Hofler, *supra* note 41.

¹⁴⁰ Rebecca Tushnet, *Worth A Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 684–85 (2012).

¹⁴¹ *Id.*, at 684.

¹⁴² *Id.*, at 751; see also Henry Jenkins, *Transmedia Storytelling 101*, CONFESSIONS OF AN ACA-FAN: THE OFFICIAL WEBLOG OF HENRY JENKINS (Mar. 22, 2007, 12:00 AM), http://www.henryjenkins.org/2007/03/transmedia_storytelling_101.html.

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that the following legal conflagration was inevitable given each parties' revenues at stake. However, it is improper for the community theatres to bear the costs simply because they unfortunately picked *To Kill a Mockingbird* for their upcoming production season.

Rules of best practices for the current licensing scheme could be imperative to addressing the underlying challenges faced by community theatres. The best practices should first require that, under the circumstances similar to the *Mockingbird* situation, where more than one adaptation based on the same original work exists, each adaptation shall not have exclusivity over the other adaptation(s). Although the author of the book should be able to freely grant adaptation rights to as many contracting parties as she wants, it would be counterintuitive for her to grant exclusivity to one of these adaptations. This practice should be able to substantially invalidate any claims the producer of one of the adaptations might have against any productions (including any stock or amateur productions) of the other adaptations. Applied to the *Mockingbird* case at hand, this practice probably could block out Rudin and Atticus LLC's claims against the community theatres. Secondly, authors (and their estate, if deceased) should be discouraged from licensing exclusive First Class Production rights again, if they have already been licensing stock and amateur rights to their works. Under this proposal, it should become more cumbersome for the Lee estate to license an exclusive First Class Production adaptation of *Mockingbird*. Meanwhile, it would also serve as an effective method to keep author's original objectives and wishes intact (say, if the author only wants the work to be produced in schools and communities, rather than on any professional stage).

Thirdly, if exclusive First Class Production rights are to be licensed again, after stock and amateur licenses become available to community theatres, copyright holders should be encouraged to later give the similar amount of creative space to community theatres¹⁴³ as accorded to these First Class Productions. Beyond the *Mockingbird* case at hand, this proposed practice is intended to cover a wide range of theatrical works, the majority of which are all kinds of Broadway (as well as Westend) revivals. This proposal calls for a similar or equal treatment to the artistic choices of a community theatre as accorded to any First Class Productions. There have been myriad reasons to reviving classics with First Class Productions—using a familiar classic to echo the current struggles, having different generations picking up on different aspects of a timeless story, making the

¹⁴³ As aforementioned, standard performance license usually does not allow any re-imagination.

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show more accessible than its older productions,¹⁴⁴ sometimes also giving an old classic a modern interpretation.¹⁴⁵ And none of these can be achieved without some level of changes to the original work. However, contrary to the creative licenses given to these First Class Productions, standard boilerplate performance licenses for community theatres usually does not allow any re-imagination of the theatrical work. This differentiated treatment on creative license could only entrench the classism ideas in the theatres, where community theatres with smaller budget and lower prices are not trusted with artistic choices.¹⁴⁶

In another article on the unfairness of exclusive licenses, there has been a proposal calling the Dramatists' Guild—a quasi-labor union of playwrights—to mandate its members (i.e., playwrights and other content creators) to limit the publishing houses' ability to grant performance licenses to nonexclusive licenses only.¹⁴⁷ This proposal surely would disincentivize some producers from seeking an exclusive license, however, a producer could still seek an exclusive license directly from the copyright holder, while the uncertainty created by secret restricted status lurking in the background.

Fourthly, if a community theatre has relied on the publishing house approving the performance license (or any substance promise on giving out a performance license to the community theatre¹⁴⁸), the community theatre should be compensated for any out-of-pocket costs for their reliance on the publishing house's representation. This proposal is more like a reiteration of the contract law principles. However, by incorporating this principle into the best practices, the theatre licensing scheme could extend more solid protection to the legally vulnerable community theatres.

B. Legal Aid

Caught in the crossfire of the legal disputes over *To Kill a Mockingbird*, ironically, the small theatres across America did not have Atticus Finch to their rescue. Although in practice many law firms have

¹⁴⁴ E.g., Deaf West's *Spring Awakening* on Broadway. See Neda Ulaby, 'Spring Awakening' Returns To Broadway — In Sign Language, NPR (Oct. 13, 2015), <https://www.npr.org/2015/10/13/448379000/spring-awakening-returns-to-broadway-in-sign-language>.

¹⁴⁵ E.g., 2018 version of *Oklahoma!* on Broadway. See Sarah Larson, *Daniel Fish's Dark Take on "Oklahoma!"*, NEW YORKER (Oct. 15, 2018), <https://www.newyorker.com/magazine/2018/10/22/daniel-fishs-dark-take-on-oklahoma>.

¹⁴⁶ Even though for a really long time, Harper Lee has insisted on not having a professional stage adaptation of her work, she has never objected to giving creative license to many community and regional theatres. And this is quite the opposite of the common practice, where stock and amateur productions are contractually barred from changing the script. See Miller, *supra* note 65.

¹⁴⁷ Valenzi, *supra* note 44, at 759.

¹⁴⁸ i.e., if both parties are already in the process of signing the boilerplate licensing contract.

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already been “pairing up” with nonprofit theatre companies to provide pro bono legal service,¹⁴⁹ there is a wide disparity between super-nonprofits (such as Manhattan Theatre Group, The Public Theatre) and small nonprofit community theatres that may have never heard of these legal services. Therefore, law firms and smaller-scale community theatre should be encouraged to seek more “collaboration” through pro bono legal services.

If community theatres could also have access to legal assistance more often, the producers for the stock and amateur productions of *Mockingbird* probably would be less helpless after receiving cease-and-desist letters from the Broadway producer. With the help from legal professionals, these community theatre producers would at least have a better understanding of their contractual rights before signing the license agreements. Also, legal professionals could help them assess the legal risk of different response measures. For instance, the community theatres could question the basis for Rudin and Atticus LLC’s claim of copyright infringement; or they could argue that since Lee has never raised any opposition to the actual geographic scope of the stock and amateur licenses granted through DPC in the past several decades,¹⁵⁰ these facts should be taken into consideration when interpreting the alleged 1969 agreement between Harper Lee and Sergel.¹⁵¹ Moreover, if the community theatre chooses to suspend its production of Sergel’s *Mockingbird* mid-mounting, it would at least have some assurance that it might be able to allege *promissory estoppel* against DPC. As the first exposure to a live theatre experience for a vast majority of Americans,¹⁵² community theatres have been the starting point of theatrical art. Therefore, community theatres would be a more than suitable area for pro bono legal services to offer their help.

VI. CONCLUSION

Community theatres have been bringing theatrical art to the communities, as well as keeping the communities involved in the creation of the art. What is more, theatre works such as *To Kill a Mockingbird* also bear the mission of educating the community. The significant number of community theatres in the United States has always been one of the reasons for the vibrant theatre industry in the United States. However, community theatres usually do not have any bargaining power in applying for or securing the stock and amateur performance licenses—their reliance on

¹⁴⁹ Jason P. Baruch, *The Arranged Marriage Between Not-For-Profit Theater Companies and Commercial Producers*, SENDROFF & BARUCH, <http://sendroffbaruch.com/the-arranged-marriage-between-not-for-profit-theater-companies-and-commercial-producers/> (last visited Sept. 27, 2019).

¹⁵⁰ Miller, *supra* note 65.

¹⁵¹ Paulson & Alter, *supra* note 8.

¹⁵² Arve, *supra* note 1.

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their existing executed performance licenses may even be challenged. Because of the accessibility and importance of community theaters, efforts should be made to provide for fairer and less cumbersome access to performance rights for the community theatres.