



THEME ONE

New Windows on Intellectual Property Law



Adapting Novel into Film

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ABSTRACT (EN): This chapter explores, from an interdisciplinary perspective, the right of copyright holders to adapt literary works into film media. From debates in other fields of study, certain theories emerge which help to better understand the possibility of cinematic adaptation from literary sources. The author begins with the counterintuitive idea that there is no essence to any given work that is available to be adapted to another medium (constructivism). A second school of thought argues that the differences between literature and cinema—the written word and the visual image—are too great for there to be anything approaching equivalency between the two media (adaptation skepticism). Next the author considers the argument that what is adapted from book into film is a narrative structure that in only some respects is amenable to transfer to the film medium (structuralism). The author concludes with a brief look at the argument that reading and visualizing are inverse cognitive processes that suggest the differences between the two media are overstated (cognitive equivalency). After a brief exploration of the adaptation right in law, each of these perspectives is addressed. The author ultimately sides with the structuralist position and concludes that the legal test for infringement has much to gain from this analytical framework.

RÉSUMÉ (FR): Ce chapitre explore, dans une perspective interdisciplinaire, le droit des titulaires de droit d'auteur d'adapter leur œuvre littéraire au cinéma. Certaines théories, issues de débats provenant d'autres domaines d'étude, aident à mieux comprendre les avenues d'adaptation cinématographique des œuvres littéraires. L'auteur débute en explorant l'idée, qui va à l'encontre de l'intuition, qu'il n'y a pas, dans une œuvre donnée, une essence prête à être adaptée à un autre medium (constructivisme). Une

deuxième école de pensée soutient que la différence entre la littérature et le cinéma — le mot écrit et l'image visuelle — est bien trop grande pour qu'il y ait une quelconque équivalence entre les deux médias (scepticisme vis-à-vis de l'adaptation). Ensuite, l'auteur considère l'argument selon lequel ce qui est adapté du livre au film est la structure narrative, qui est susceptible à certains égards seulement d'être transférée au médium du film (structuralisme). L'auteur conclut en abordant brièvement l'argument selon lequel lire et voir sont deux processus cognitifs inverses, ce qui peut suggérer que les différences entre les deux médias sont exagérées (équivalence cognitive). Après un bref survol du droit concernant l'adaptation, chacune de ces quatre perspectives est envisagée. L'auteur finalement se rallie à la thèse structuraliste et conclut que le test juridique servant à déterminer la contrefaçon gagnerait à emprunter de ce cadre analytique.

A. INTRODUCTION

The history of cinema is replete with adaptations of novels into film. Indeed, it seems that almost every movie made these days is based on a book. Beyond mere commercial opportunism,¹ there is at least something about the film medium that lends itself to borrowing from literary sources. The significance of this topic for copyright scholars is that the cinematographic or movie right vests with the author of a book (what I will call the *adaptation right*). Where that right has been at issue, courts have struggled with developing a methodology for determining infringement. The enormously complex topic of assessing whether there has been a substantial taking from a textual medium for adaptation into a visual medium has been oversimplified both by legal tests for infringement and the manner in which they are applied.

The purpose of this short chapter is to explore the topic from extra-legal disciplinary perspectives in an effort to highlight some of the shortcomings of the law in this area, but also to embark on new ways of thinking about the adaptation right. This chapter draws on a field known as adaptation studies, which itself borrows liberally from literary criticism, film studies, art

1 Douglas Y'Barbo, "Aesthetic Ambition Versus Commercial Appeal: Adapting Novels to Film and the Copyright Law" (1998) 10 St Thomas L Rev 299 at 310 argues that best-selling or even popular novels can have a trademark value that can easily translate into commercial success for a movie version; Hollywood underwriters of big budget movies can be assured of a certain amount of commercial success for the movie version of the latest novel from John Grisham or Tom Clancy.

philosophy, and media studies. From debates within and across these fields, certain theories emerge which help to better understand the possibility of cinematic adaptation from literary sources (if indeed it is possible at all).² We will begin with the counterintuitive idea that there is no essence to any given work that is available to be adapted to another medium (constructivism). A second school of thought argues that the differences between literature and cinema — the written word and the visual image — are too great for there to be anything approaching equivalency between the two media (adaptation skepticism). Next we consider the argument that what is adapted from book into film is a narrative structure that, in some respects but not others, is amenable to transfer to the film medium (structuralism). We will conclude with a brief look at the argument that reading and visualizing are inverse cognitive processes that might suggest the differences between the two media are overstated (cognitive equivalency). After a brief exploration of the law of the adaptation right, each of these four perspectives will be addressed. I ultimately side with the structuralist position and conclude that the legal test for infringement has much to gain from this analytical framework.

B. LEGAL PERSPECTIVES

Copyright offers exclusive rights to an author who creates an original artistic, literary, musical, or dramatic work.³ The term *original* has been interpreted by the Supreme Court of Canada to mean that the work must demonstrate the author's "skill and judgment."⁴ A work created in one medium can be afforded copyright protection when adapted into another medium. Thus, section 3 of the *Copyright Act*⁵ gives the owner of a copyright "the sole right

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- 2 Constructivism and structuralism are well known schools of thought, whereas adaptation skepticism and cognitive equivalency are names I have created. Moreover, these theories are presented in stark terms and do not reflect the many variants thereof. Finally, the authors I cite in this paper sometimes belong to more than one school of thought. Bluestone and McFarlane, for example, are both adaptation skeptics and structuralists; however, because the latter elaborated a structuralist methodology while the former emphasized the problems of adaptation, they were categorized accordingly.
 - 3 *Copyright Act*, RSC 1985, c C-42, s 2 (the scope of covered works is broad) [definitions]; see *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 8 [CCH]. Furthermore, for copyright to subsist, the work must be fixated in a tangible form.
 - 4 *CCH*, *ibid* at para 16; see Cameron Hutchison "Insights from Psychology for Copyright's Originality Doctrine" (2012) 52 *IDEA* 101 for a discussion of the skill and judgment standard from a psychological perspective.
 - 5 *Copyright Act*, above note 3, s 3.

to produce or reproduce the work or any substantial part thereof in any material form whatever” For our purposes this includes paragraph 3(1)(d), the sole right “in the case of a literary, dramatic or musical work, to make any . . . cinematograph film”⁶ Thus, the author of a novel has the exclusive right to “make” the book, or a substantial part thereof, into a film.

Copyright does not subsist in respect of the ideas or facts that underlie a work, as opposed to its expression. American courts have struggled with whether the borrowed parts of a work at issue are mere ideas (as opposed to their expression) and thus not copyrightable. In this regard, courts often reference *Nichols v Universal Pictures Corp*⁷ in which the copyright holder of one play sued the producers of a second play for infringement. In that case, Judge Hand determined on the facts that “[t]he only matter in common to the two [works] is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation.”⁸ As such, the borrowing here was in the realm of idea and not expression. The case is famous for the pronouncement of an abstraction test:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.⁹

Separating the idea from the expression is a notoriously difficult exercise. For example, how much more borrowed incident was needed in *Nichols* for the defendant to have been found to have copied expression? As well, courts have historically wrestled with the distinctions, if any, between an “idea,” a “plot,” and a “theme.”¹⁰

6 *Ibid*, s 3(1)(d); the film adaptation right has not been judicially considered in Canada, which stands in contrast to a robust US caselaw on the subject.

7 *Nichols v Universal Pictures Corp*, 45 F 2d 119 (2d Cir 1930) [*Nichols*].

8 *Ibid* at 122.

9 *Ibid* at 121.

10 Melville B Nimmer, “Inroads on Copyright Protection” (1951) 64 Harv L Rev 1125. “At least one court has said that all these terms are synonymous, and another court has maintained that ‘plot’ and ‘theme’ are identical [S]ome courts have indicated that a theme may be protected, and others have held that a plot may be protected” at 1130–31; Robert Fuller Fleming, “Substantial Similarity: Where Plots Really Thicken” (1971) 19

Once into the realm of expression, copyright infringement is found where a defendant appropriates a qualitatively substantial portion of a work without permission of the copyright owner. Copyright infringement analysis compares the two works in question; in our scenario the movie (and not the script) will be reviewed and compared with the book.¹¹ Infringement analysis has two prongs. The first inquiry is whether there was access to the work (i.e., the second work *derived* from the first and was not the result of independent creation), and may be aided by expert evidence.¹² If access is proven, the question then becomes whether the second work infringed the first as viewed by an “ordinary observer” (and notably *without* the assistance of expert evidence).¹³ On this second prong, courts considering the adaptation right generally begin their analysis by discounting elements which are not protected by copyright such as ideas,¹⁴ stock themes,¹⁵ and *scenes a faire*.¹⁶ Then, distilling the two works to their essential elements, a comparative analysis is considered through the following prisms: total concept and feel, theme and plot, mood, characters, pace, setting, sequence of events, and structure.¹⁷ Surprisingly, these terms are not defined in the caselaw.

There is a long legal history, both in caselaw and legal commentary, on the subject of adaptation. Much of the early commentary on the subject takes issue with the “ordinary observer” test or “audience test” for determining substantial appropriation. Nimmer, for example, argued that “[t]here are numerous instances when the ordinary observer is simply not capable of detecting substantial appropriation.”¹⁸ He advocated that the dif-

Copyright L Symp 252. Moreover, some courts have defined plot as “bare plot” while others refer to it as “the entire sequence of events which lead the story situation from cause to effect” at 261.

- 11 *Beal v Paramount Pictures Corp*, 20 F 3d 454 at 456 (11th Cir 1994) [*Beal*].
- 12 *Y’Barbo*, above note 1 at 307.
- 13 *Ibid*; see for example *Arden v Columbia Pictures Industries*, 908 F Supp 1248 (SDNY 1995) [*Arden*]. “Courts are asked ‘whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work’” at 1248.
- 14 *Ibid*. Thus in *Arden*, the idea found in the novel *One Fine Day* of a man who is “trapped in a day that repeats itself over and over” was a permissible taking for the producers of the film *Groundhog Day* since the idea was expressed in “very different ways” as between novel and film, at 1249.
- 15 *Ibid*. “[T]he ‘familiar figure of the Irish cop’ is a stock theme of police fiction” at 1259.
- 16 *Ibid* at 1259, meaning those elements that are indispensable, or at least standard, in the expression of a topic.
- 17 *Y’Barbo*, above note 1 at 356 ff; *Beal*, above note 11 at 462–64.
- 18 Nimmer, above note 10 at 1137; Fleming, above note 10; Robert C Sorenson & Theodore C Sorenson, “Re-Examining the Traditional Legal Test of Literal Similarity: A Proposal for

ferences between novel and film, for example, can hide a substantial similarity between two works.¹⁹ He thus called for a measure of literary analysis as a criterion in determining substantial similarity, and a shift away from an “ordinary observer” approach.²⁰

In a more recent treatment, Douglas Y’Barbo argues that copyright fails to protect those elements of a novel that are most commonly used for a film adaptation, specifically the story line or plot structure of the book.²¹ Copyright infringement is improbable in other ways as well:

First, the majority of the elements comprising a work of fiction are not protectable. They are either too general, or they are unoriginal to that author Second, even if a film maker borrows some protectable elements from the novel, those elements may be so trivial, either in quantity or quality, that the film does not resemble the novel. Third, the film maker may take some elements from the novel that comprise its aesthetic appeal—the work’s essence. Hence, the film and novel may be very similar, even though what was taken was not quantitatively significant. Fourth, the film maker may take the same elements from the novel, yet, once transplanted into the film, they are no longer recognizable as having originated with the novel.²²

A corollary of his argument is that many literary aspects are inassimilable into film media.²³

Y’Barbo demonstrates his thesis by critically examining the criteria used by courts to assess infringement. Thus, the “total concept and feel” of a book may lie in its prose and literary devices such as internal monologue whereas filmmakers rely on visual stimuli, actors, linear juxtaposition of

Content Analysis” (1951–52) 37 Cornell LQ 638. The authors offer critiques of the ordinary observer test; Robert H Rotstein, “Beyond Metaphor: Copyright Infringement and the Fiction of the Work” (1993) 68 Chicago-Kent L Rev 725 at 785, advocating that a better way to judge infringement would be an “audience competent in the particular genre” test.

19 Nimmer, above note 10 at 1138. “A novel will often be composed of largely introspective thoughts and emotions which of necessity will be expressed in a quite different manner when dramatized” at 1138.

20 *Ibid* at 1140.

21 Y’Barbo, above note 1 at 316–17. Moreover, the “overwhelming majority of any novel is unprotectable, because it consists of ideas, scenes a faire, merged expression, historical fact, and other material in the public domain” at 315; he supports this position by concluding that “[e]very contemporary film-adaptation dispute has been decided on summary judgment for the defendant” at 320.

22 *Ibid* at 321 [emphasis in original][footnotes omitted].

23 *Ibid* at 354.

images, and editing to achieve a pleasing effect.²⁴ Moreover, the time constraints (and thus editing) of film means that the “pace” of a movie will usually differ from the literary text.²⁵ While a movie adaptation may follow the story line or “plot” of a book, this is generally not protectable *per se*; often, as well, a “theme” or meaning will change as the filmmaker alters the novel to a happy ending.²⁶ Filmmakers often simplify the story line and present a linear “sequence of events” (and perhaps even present material in a familiar genre quite different from the book) in an effort not to confuse audiences and to meet the two-hour or less time frame.²⁷ The portrayal and development of “character” are often simplified due to time limits and the general inability to rely on devices such as internal monologue, and depend heavily on actor portrayal.²⁸ As we will see shortly, Y’Barbo’s analysis echoes many of the arguments advanced by the adaptation skeptics.

C. OTHER DISCIPLINARY PERSPECTIVES

At the most general level, extra legal disciplinary perspectives on book-to-film adaptation separate into four general streams of theory, which I have termed: (1) constructivism, (2) adaptation skepticism, (3) structuralism, and (4) cognitive equivalency. Not surprisingly, the first two theories are highly skeptical of the possibility of adapting book to film (but for very different reasons), while structuralists are guardedly optimistic about the ability to adapt certain aspects of narrative structure. The fourth perspective is still too speculative to be of any analytical assistance.

The notion that a copyrighted work has protectable elements that may survive the transfer into another medium implies that a work possesses certain static and unchanging properties in the first instance. A central question in art philosophy is “what is a work of art?” Are there properties to a work or art — a static essence in other words — that can be objectively identified?²⁹ Similarly in copyright law, we might ask “are there identifiable, static properties to a work which are capable of being adapted to another medium?” The answer seems to be “yes” in that copyright treats a work as

24 *Ibid* at 356–59.

25 *Ibid* at 360.

26 *Ibid* at 362.

27 *Ibid* at 362–63.

28 *Ibid* at 364.

29 Robert Stecker, *Aesthetics and the Philosophy of Art: An Introduction* (Lanham: Rowman & Littlefield Publishers, 2005) at 9.

“an object with fixed characteristics existing independently of context and audience.”³⁰ When we compare two works for infringement analysis, we are distilling two works to their essential properties before comparing them.³¹

A constructivist perspective seriously challenges copyright’s essentialist thesis. Constructivists maintain that every time we interpret a work of art, “we are imputing properties to something which either alters that very thing or creates something new. [Thus these] objects of interpretation have a degree of dependence on the interpretation people give [them] . . . are identified in terms of the properties they are conceived as having . . . [and] lack an essence or fixed nature.”³² From this perspective, Rotstein contends that works are not fixed but have changing identities, which depend on audience response to the work in the context in which it appears.³³ These changing identities, or interpretations, may apply to even the most foundational doctrines of copyright’s essentialism. For example, the distinction between an idea and its expression is itself an act of interpretation.³⁴ Noting Nimmer’s famous description of a shared fourteen-point plot line between *Romeo and Juliet*³⁵ on the one hand, and *West Side Story*³⁶ on the other, Rotstein provides alternative interpretations of these plots lines which show that, even at this most basic level, there is not similarity but rather substantial divergence.³⁷ For example, the first point, that “[t]he boy and girl are members of a hostile group” seems hardly worthy when the alternative

30 Rotstein, above note 18 at 741.

31 *Ibid.* In this regard, Rotstein quite rightly notes “[i]ronically, for copyright the essence of the work lies, not at some deep core, but at the surface of the work, i.e., the words on the page. Abstract characterizations of the work, though some may still qualify for protection as ‘expression,’ move further and further away from the surface” at 760, n 154.

32 Stecker, above note 29 at 112.

33 Rotstein, above note 18 at 726–27. “The reader in effect creates the text by virtue of the broader context in which he or she exists. For this reason, the text does not . . . have a fixed identity” at 736–37. “The text is a speech event involving interaction among a producer (the ‘author’), a textual artifact (book, movie, song, computer program), and a recipient (reader, viewer, listener). Texts occur only upon the dynamic interaction of all three” at 739–40.

34 *Ibid.* at 760.

35 William Shakespeare, *Romeo and Juliet. A Tragedy* (Edinburgh: Marin & Wotherspoon, 1768).

36 *West Side Story*, DVD, directed by Robert Wise & Jerome Robbins (1961; Los Angeles, CA: United Artists, 1998).

37 Rotstein, above note 18. “[E]ven an interpretation that seems straightforward and merely descriptive of a plot line is subject to challenge” at 764, citing Melville B Nimmer & David Nimmer, *Nimmer on Copyright* (New York: Matthew Bender & Co, 1985) at 13.42–13.42.1.

interpretation is presented: “Maria in *West Side Story* is not a member of a hostile group (the gang) and is indeed unaware of the hostility. The boy in *West Side Story* has withdrawn from the hostile group (the gang). Romeo and Juliet at first both carry the ancient grudge between their families.”³⁸ Constructivists, therefore, are skeptical of the possibility of adaptation since they believe that there is no objective essence of a work, which exists independently of interpretation and context.

The *adaptation skeptics* uphold the unity of form and content, believing that the semiotic systems of text and film are incommensurable. A main proponent here would be the founding father of adaptation studies, George Bluestone, who viewed film and literature as radically different primarily due to the fact that one medium is linguistic while the other is visual.³⁹ As Bluestone claimed, “changes are *inevitable* the moment one abandons the linguistic for the visual medium.”⁴⁰ For example, the internal content of thought including “memory, dreams, imagination” — so much a part of literature — cannot adequately be translated into the film form.⁴¹ At most, film can infer thoughts but it cannot directly show them to us.⁴² Moreover, whereas literature focuses on internal thought, character, and the psychological, film is about external action, plot, and the social.⁴³ Even the transfer of characters from novel to film is lacking since the visual medium is not commensurate with the power of language.⁴⁴ What is transferable between these two media, according to Bluestone, is the narrative form. Yet even here film directs our visual perception of that narrative.⁴⁵ Moreover, the production, business model, and audience demands of each medium are very different which “condition and shape artistic content”; the film is produced collaboratively and needs mass appeal to offset high production costs whereas the writings of the single author need not be geared toward such large-scale commercial success.⁴⁶ In sum, Bluestone concludes:

38 Rotstein, above note 18 at 762 [emphasis in original].

39 George Bluestone, *Novels into Film* (Berkeley: University of California Press, 1968) at viii.

40 *Ibid* at 5 [emphasis in original].

41 *Ibid* at viii–ix, 23 and 47.

42 *Ibid* at 48.

43 *Ibid*.

44 *Ibid* at 23.

45 *Ibid* at 31 and 58.

46 *Ibid* at ix, 31 and 34.

What happens, therefore, when the filmist undertakes the adaptation of a novel, given the inevitable mutation, is that he does not convert the novel at all. What he adapts is a kind of paraphrase of the novel—the novel viewed as raw material. He looks not to the organic novel, whose language is inseparable from its theme, but to characters and incidents which have somehow detached themselves from language and, like the heroes of folk legends, have achieved a mythic life of their own.⁴⁷

One of the adaptations Bluestone examines is *The Grapes of Wrath*,⁴⁸ in which both film and novel follow a similar plot line but with major differences in theme and social commentary. The movie, for example, omits the centrality of natural and zoological motifs of the book which act as metaphors for, among other things, the tribulations of the Joad family, i.e., the harsh natural order of things.⁴⁹ Moreover, a dominant theme—the political implications of the book—is muted and deradicalized.⁵⁰ Some changes, such as the interchapters which present the author’s point of view are deleted while others, such as the dialogue are either abridged or sanitized.⁵¹ These reflect both the time constraints of the film medium but also the packaging of movies for mass appeal. Perhaps most important of all is the changed ending which Bluestone claims as “one of the most remarkable narrative switches in film history”:

Instead of ending with the strike-breaking episodes in which Tom is clubbed, Casy killed, and the strikers routed, the film ends with the Govern-

47 *Ibid.* Thus, “the filmist becomes not a translator for an established author, but a new author in his own right.” He continues, quoting Balazs, “while ‘the subject, or story, of both works is identical, their content is nevertheless different. It is this different *content* that is adequately expressed in the changed form resulting from the adaptation.’ It follows that the raw material of reality can be fashioned in many different forms, but a *content* which determines the form is no longer such raw material” at 62 [emphasis in original].

48 John Steinbeck, *The Grapes of Wrath* (New York: The Viking Press, 1939); *The Grapes of Wrath*, DVD, directed by John Ford (1940; Los Angeles, CA: 20th Century Fox Home Entertainment, 2004).

49 Bluestone, above note 39. “The persistence of this imagery reveals at least part of its service. In the first place, even in our random selections, biology supports and comments upon sociology. Sexual activity, the primacy of the family clan, the threat and utility of industrial machinery, the alienation and hostility of the law, the growing anger at economic oppression, the arguments for human dignity, are all accompanied by, or expressed in terms of, zoological images. In the second place, the presence of literal and figurative animals is more frequent when the oppression of the Joads is most severe” at 150–51.

50 *Ibid* at 158–59.

51 *Ibid* at 162–64.

ment Camp interlude. This reversal . . . accomplishes, in its metamorphic power, an entirely new structure which has far-reaching consequences. Combined with the deletion of the last dismal episode, and the pruning, alterations, and selections we have already traced, the new order changes the parabolic structure to a straight line that continually ascends.⁵²

What is perhaps interesting about this comparison is that it reveals profound underlying differences between the two works, which superficially may not have been obvious to an ordinary observer. In other words, while the characterizations and many of the incidents were followed in the movie, important elements from the book were absent either because they were not adaptable to the new media or were consciously altered to change the meaning and presentation of the work.

The third perspective, firmly rooted in the *structuralist* school of thought, argues that elements of the narrative structure of a book can be successfully transferred to the screen. In adaptation studies, the most prominent advocate of this view is Brian McFarlane who rails against the subjectivity of impressionistic responses in favour of a more objective and systematic means of evaluating the similarities and differences between book and film.⁵³ To be sure, McFarlane is a disciple of Bluestone in the way he conceives of the profound differences between book and film as media in terms of portrayal,⁵⁴ form,⁵⁵ and semiotics.⁵⁶

However, unlike Bluestone, he is systematic in identifying those elements of narrative structure capable of being adapted. He defines narrative as “a series of events, causally linked, involving a continuing set of char-

52 *Ibid.* “Thus, the book, which is an exhortation to action, becomes a film which offers reassurance that no action is required to insure the desired resolution of the issue” at 166–67.

53 Brian McFarlane, *Novel Into Film: An Introduction to the Theory of Adaptation* (Oxford: Clarendon Press, 1996) at 195.

54 *Ibid.* The narrating voice of a book and its “privileged position of knowledge about characters, periods, places . . .” is replaced by a visual presentation of action unfolding at 18; film is agile in presenting visual perspectives but seems largely incapable of portraying a psychological viewpoint of a character. And while film can adequately portray the appearance of a character and setting, we must evaluate character motivations, and thoughts though *mise-en-scène* as, for example, the way an actor looks and gestures at 16–17.

55 *Ibid.* at 27. The linear, prodding accretion of knowledge of events and characters of the book is replaced by the immediacy and visual richness of the screen.

56 *Ibid.* at 28. Language as a semiotic system is much richer, and more pervasively known, than the codes of cinema.

acters which influence and are influenced by the course of events”⁵⁷ McFarlane argues that certain elements of a novel’s narrative structure are *transferable* or “amenable to display in film” while others are *adaptable* in the sense that an element “must find quite different equivalences in the film medium, when such equivalences are sought or are available at all.”⁵⁸ Whether an element of a narrative structure is transferable or adaptable depends, in a general sense, on the function that element serves.

Here he borrows directly from Roland Barthes who argued that narrative is comprised solely of functions. The main function — *functions proper* — consists of the actions and events, which are presented horizontally throughout the story.⁵⁹ These functions are further divided into *cardinal functions* or *hinge points* of narrative where “the actions they refer to open up alternatives of consequence to the development of the story.”⁶⁰ The “linking together of cardinal functions provides the irreducible bare bones of the narrative” and, furthermore, they are usually transferable from book to novel.⁶¹ An example of altering a cardinal function would be to change a sad ending to a happy ending. Another category is the *catalyzer function*, which are small actions that are complementary to a cardinal function, e.g., the setting of a table for a meal gives occasion for an action of cardinal importance to the story.⁶² To the extent that functions proper are actions and events which do not depend on language for their expression, they are transferable from one medium to another.⁶³ The *integrational functions*, vertical in nature, are *indices proper* and *informants*. The latter consist of pure data and “‘ready-made knowledge’ such as the names, ages, and professions of characters,” and are amenable to transfer.⁶⁴ However, *indices proper*

57 *Ibid* at 12.

58 *Ibid* at 13.

59 *Ibid*.

60 *Ibid*; Roland Barthes “Introduction to the Structural Analysis of Narratives” in Susana Onega & Jose Angel Garcia Landa, eds, *Narratology: An Introduction* (London: Longman, 1996). To use Barthes’s own expression, “[f]or a function to be cardinal, it is enough that the action to which it refers open (or continue, or close) an alternative that is of direct consequence for the subsequent development of the story, in short that it inaugurate or conclude an uncertainty” at 51.

61 McFarlane, above note 53 at 14.

62 *Ibid*; Barthes, above note 60. As Barthes puts it, these are the “trivial incidents or descriptions” at 51.

63 McFarlane, above note 53 at 14.

64 *Ibid*.

relate to diffuse aspects such as “character and atmosphere” and at best can be adapted to the screen.⁶⁵

McFarlane applies Barthes structural analysis to the movie *Cape Fear*⁶⁶ as sourced from the novel *The Executioners*.⁶⁷ He lists twenty-two cardinal functions found in the book. All but one of these functions is preserved in the movie though almost half of them are elaborated or expressed somewhat differently than in the book.⁶⁸ Still, McFarlane maintains:

Overall, then, there is a close parallel between the cardinal functions which carry the action in the novel and those in the film. Sometimes, as indicated, these appear in different orders in the two texts, and sometimes the motivations for the actions vary from one text to the other. However, in terms of the pattern of narrative development which shapes the film as a whole, as distinct from the cardinal functions of varying degrees of importance within individual segments, there is considerable correspondence. The social and affective discrepancies between the two texts will generally be located at other levels of the texts, sometimes at the level of the catalysers which surround the cardinal functions . . . but more significantly at the level of enunciation, through the exercise of those strategies peculiar to the medium in question.⁶⁹

McFarlane thus adopts Bluestone’s criticisms of adaptation yet, relying on Barthes, is systematic in identifying elements of a book that are more and less capable of being expressed in film.

Kamilla Elliott seems perhaps the most sanguine about the adaptation process.⁷⁰ Her thesis is that both film and novel possess complete signs that are both approximate and analogous to each other, thus obviating the need to split form from content or morph words into images.⁷¹ Two kinds of analogy help accomplish this task. The more intuitive structural analogy “upholds categorizations of novels as words and films as images and the inviolable bond of signifier and signified” and locates “visual equivalents for

65 *Ibid.*

66 *Cape Fear*, DVD, directed by J Lee Thompson (1962; Universal City, CA: Universal Pictures, 2001).

67 John D MacDonald, *The Executioners* (New York: Simon and Shuster, 1957).

68 McFarlane, above note 53 at 175–76.

69 *Ibid* at 178.

70 Kamilla Elliott, *Rethinking the Film/Novel Debate* (Cambridge: Cambridge University Press, 2003).

71 *Ibid* at 4.

verbal expression without admitting any inherence between words and images or any separation of form and content.”⁷² Secondly, and less intuitively, her looking glass model of analogy takes the possibility of transfer even further. Here, she argues an inverse cognitive process between the visualizing of verbal images and the verbalization of perceptual images:

Verbalizing and visualizing thus prove to be connected rather than opposed cognitive processes. But they are not simply “connected”: rather, they inhere looking glass fashion. The cognition of mental images and of perceptual images has been shown to be a directly inverse process: “the [mental] image is first represented as *sensationless qualities* and later represented as *sensory qualities*, whereas the percept is first represented as *sensory qualities* and later represented as *sensationless qualities*.”⁷³

The cognitive distinctions between the imagery of the written word and visual perceptions are thus minimized. While this may or may not be so, we know too little about how such processes work to derive much analytical clarity from exploring this approach further.

D. DISCUSSION

In this final section I would like to revisit the key elements of the legal test for infringement of the adaptation right (i.e., plot, theme, and characters) as these are illuminated by the above perspectives.⁷⁴ In so doing, I reject the constructivist thesis, i.e., that there is no essence or fixed nature to a work. I do not disagree that interpretations of a work can differ at an abstract level. However, this does not mean that it is impossible to find consensus as to what is basically happening in a plot line or how we may understand a character. Inaccurate descriptions of a plot line, such as between *Romeo and Ju-*

72 *Ibid* at 195. “However, given the cliched and monosyllabic nature of most visual symbols, this model of adaptation feeds perceptions that film and television are crude and reductive modes of representation far inferior to verbal representation” at 195.

73 *Ibid* at 222 [emphasis in original][footnote omitted].

74 The other elements of the test must be relatively insignificant to copyright infringement analysis as they are too basic to have much analytical weight: the feel, mood, or pace of a work is too non-specific, while setting must be viewed as incidental to the plot and characters. Sequence of events and structure will be subsumed in the discussion on plot and characterization; see also Y’Barbo, above note 1 at 356–59, in particular see his discussion of “total concept and feel,” and “pace”; one might also add that the *concept* of work likely resides in the realm of idea rather than expression and should not be subject to copyright protection.

liet and *West Side Story*, should not be mistaken for interpretative ambiguity. Constructivism assists more in helping us understand that instability may lie in more abstract levels of the work. There may be contested interpretations as to a meaning or message of a work or that cultural or temporal contexts may radically alter an appreciation of a work. For example, the stereotyped portrayal of Jewish characters in *Nichols* may be viewed by a contemporary audience as “highly offensive” rather than “humorous and benign” as they would be to a 1920s audience.⁷⁵ At the level of meaning, theme, and aesthetic appeal, works are much less stable than at the more basic level of description.

Having cleared the constructivist hurdle, we now confront the possibility of an essence that may lend itself to adaptation. Bluestone’s thesis on adaptation seems as strong today as it was when he wrote his book in the late 1950s. The semiotic systems of literature and film are profoundly different. It is an overly broad claim to argue that while these fundamental differences exist, they can be accommodated through analogical devices. What analogical device exists in film to adapt a long, nuanced internal monologue of a character? Is it possible to communicate this in any way other than by literary text? In addition to the inherent problems of representing or communicating the verbal into the visual, film versions are often intentional mutations of the book whether as an abridged or changed plot line, through omitted and simplified characterizations, or otherwise. The combined impact of intentional modifications and untransferable expression means that the film cannot remain truly faithful to the book. However, we all know from experience that something familiar carries forward from book to film. That something must be the element of the narrative.

McFarlane’s approach brings greater analytical clarity to this process by which a book’s narrative finds expression in film. We are able to identify that which may be more or less successfully transferred (i.e., for which there are visual equivalents) from that which cannot. Characterization is identified, quite rightly, as less amenable to transfer. To be sure, the raw data of a character, e.g., her age or occupation, are easily transferable to film as is the dialogue of the book. Appearances, and audience reception, of the character are less transferable as actor portrayal and costumes may convey quite a different image and impression than that conjured up in a book. But it is difficult if not impossible, for example, to convey the depth of a character,

75 Rotstein, above note 18 at 793.

or that character's development, in a novel when it relies heavily on internal monologues and other devices as conveyed from the privileged position of the author. Voice-overs, visual stimuli, and/or dialogue can attempt to convey these aspects of character but it will always fall far short of the detailed and nuanced development of the literary portrayal. Apart from dialogue, then, we might have reason to suspect that it would be very difficult to copy a character from book to film.

McFarlane's analytical framework is particularly helpful in dissecting plot. Rather than gauging infringement from impressionistically assessing similarities in plot as a whole, a bifurcated analysis is offered. The main points in the progression of a plot, or *cardinal functions*, are distinguished from the incidents of expression, or *catalyzer functions*. As such, it is possible that cardinal functions may be substantially replicated in film yet adorned with wholly original incidents. The American adaptations of Akira Kurosawa's works are examples of this. Thus, *The Magnificent Seven*⁷⁶ shared many (though certainly not all) of the cardinal functions of the *Seven Samurai*.⁷⁷ However, this structural similarity may not be apparent to an ordinary observer who might see these as distinct genres of film with little in common. More typically, we can imagine that many of the incidents of a novel may stay the same but in service to crucial changes in cardinal functions. Such portrayals may give the audience a superficial experience of seeing a faithful adaptation though the underlying narrative hinge points have been substantially altered. The changes to *The Grapes of Wrath*, discussed earlier, are an example of this. Of course, not all changes to a plot line are equally important: the changed ending to Steinbeck's classic is much more serious a change than the omission of the novel's natural imagery. Nor should it necessarily matter, as McFarlane's example of *Cape Fear* illustrates, whether the film version alters the sequence of events.

Sometimes the deliberate changing of a plot line — e.g., a different ending or deletion of scenes — can substantially alter a theme notwithstanding a surface fidelity to much of the plot line. A theme or message of the book must, at least for authors and audiences of high literature, be considered of great importance to the integrity and appreciation of a work. Changes in cardinal functions, like the changing of an ending can be a fatal attack on a

76 *The Magnificent Seven*, DVD, directed by John Sturges (1960; Los Angeles, CA: United Artists Corp, 2001).

77 *Seven Samurai*, DVD, directed by Akira Kurosawa (1956; Los Angeles, CA: Columbia Pictures USA, 2002).

main theme not to mention a story's main character. The cold war version of *The Quiet American*⁷⁸ is a vivid example of this.

Graham Greene's classic story portrays a 1950s English correspondent Thomas Fowler stationed in Saigon who, amid the burgeoning civil war, is too cynical to choose sides. His friendship with an American, Pyle, who earlier in the book saves his life, becomes strained when Pyle wins the affections of Fowler's mistress, to whom Fowler is very strongly attached. Pyle is in fact a CIA agent who is in Vietnam to assist General Thé's third force in their bloody effort to seize power. When Fowler discovers Pyle's true identity and his orchestration in a bombing by the third force, which kills and maims many people, he realizes he must choose sides and intervene to save innocent lives. Fowler's decision to help set up Pyle's assassination is a morally complex one as his motives are at least partly selfish — i.e., the winning back of his mistress. Joseph L Mankiewicz's 1956 adaptation of this book⁷⁹ makes the following changes:

- The motive for Fowler's conspiracy with the Communists to kill Pyle is made explicitly personal, i.e., to win back his mistress;⁸⁰
- A changed ending which makes clear that Pyle was not a CIA agent but an innocent and that Fowler was duped by the Communists;⁸¹
- A favourable portrayal of General Thé and the third force;⁸² and
- The omission of the human consequences of war.⁸³

With just these few changes, we have a substantial deviation from novel to film in the most important aspects. An anti-war, anti-imperialist theme is replaced with an optimistic view of the third force in Vietnam. The moral complexity of Fowler's decision (i.e., whether to be complicit in the assassination of a man who has saved his own life but threatens the lives of many others and who competes for his mistress) and the development of his character from a man who does not take sides to one who does for a noble reason, is eviscerated by a simplistic portrayal of a man who is both selfish in

78 Graham Greene, *The Quiet American* (London: William Heinemann, 1955).

79 *The Quiet American*, DVD, directed by Joseph L Mankiewicz (1958; Los Angeles, CA: United Artists Corp, 2005).

80 Brian Neve, "Adaptation and the Cold War: Mankiewicz's *The Quiet American*" in James M Welsh & Peter Lev, eds, *The Literature/Film Reader: Issues of Adaptation* (Lanham: Scarecrow Press, 2007) 235 at 238 and 241 [Welsh & Lev, *Adaptation*].

81 *Ibid* at 240–41.

82 *Ibid* at 239.

83 *Ibid* at 240.

his motives, and gullible at the hands of the bad Communists. So jarring are changes in this characterization that one scholar comments: “If one is going to throw away Greene’s justly achieved moral ambivalence, then one would do better to choose another source to transform or write one’s own script from scratch.”⁸⁴ Thus, the changing of an important cardinal function or two can have an enormous impact on the themes of, and characterization within, a book.

E. CONCLUSION

The ordinary observer test for copyright infringement sacrifices analytical clarity for the ease of impressionistic comparisons. The tools for a more sophisticated analysis are available when we look outward from law to other disciplines of study. Drawing on these other disciplines, the purpose of this paper has been to (1) highlight the difficulties, and in some aspects impossibilities, of adapting book to film; and (2) provide insights that might contribute to an improved analytical framework for copyright infringement in this context. Importantly, it remains to be seen the manner in which the particular analytical framework advanced in this paper fits with the idea/expression dichotomy. In a recent copyright infringement case, the Quebec Court of Appeal admitted an expert opinion which assessed a work in terms of “its structure and composition and the way its elements are arranged . . . things that are not perceived directly . . .”⁸⁵ The court believed that the expert opinion assisted in making comparisons that were not perceived directly, i.e., the deeper structure or “‘intelligible’ form.”⁸⁶ We can only hope that this represents the beginning of a trend where courts look to extra-legal disciplinary perspectives to assist in their analysis of copyright infringement.

84 Kenneth C Pellow, “All the Quiet Americans” in Welsh & Lev, *Adaptation*, above note 80 at 247.

85 *France Animation sa c Robinson*, 2011 QCCA 1361 at 80, leave to appeal to SCC granted, *Cinar Corporation et al v Claude Robinson et al*, 2012 SCC 25; my thanks to Professor Pierre-Emmanuel Moysse for drawing this case to my attention.

86 *Ibid* at 80.