Why Spider-Man Can't Go to Disney World: Private Ordering, Copyright, and the Modern Entertainment Franchise

Michael Burstein

Copyright is built on discrete things—"works of authorship" that may take literary, musical, dramatic, graphic, and other forms. But the modern entertainment landscape is not so discrete. Instead, it is made up of elements that cross the boundaries of the prototypical work of authorship—characters, plot devices, worlds, and environments that appear and are remixed throughout movies, television, books, physical objects and merchandise, and even theme parks—to make up modern franchises. Examples of such franchises abound—Star Wars, Harry Potter, James Bond, or Pokemon, to name a few. Copyright law generally does not recognize the wholesale existence of such franchises. Characters, for example, have long been eligible for copyright protection, but determining the boundaries and enforceability of copyright in the characters of a literary work, as distinct from the work of authorship itself, is an exercise fraught with uncertainty and confusion. The modern franchise often circumvents this mess, relying less on the baseline boundaries of protection defined in copyright law and more on bespoke, private arrangements. Franchises are built on interlocking series of contracts that set forth the boundaries of creative works and transact in them. In this article, I use a series of examples of such agreements to explain how copyright's imprecision generates contractual innovation and positive spillovers. I argue that as copyright law evolves in the shadow of deal-making to better effectuate transactions, it ironically risks losing the social benefits of that imprecision.

To take one example: In March 1994, Marvel Entertainment—the creators of Spider-Man, the Avengers, the X-Men, and other comic book characters—entered into an agreement with MCA, then the owner of Universal Studios, to develop a theme park "land" in Orlando, Florida based on Marvel characters. The resulting "Marvel Super Hero Island" opened at Universal's Islands of Adventure Theme Park 1999, and it was a hit. Fifteen years later, the Walt Disney Company acquired Marvel for over $4 billion and sought to incorporate Marvel characters into its own theme parks in Orlando and Anaheim, California. But the old agreement with Universal contained a clause granting to Universal the exclusive right to use Marvel characters in a theme park east of the Mississippi that are part of the same "family" as any characters that Universal was currently using in its theme park at the time. Disney has therefore had to engage in a multi-year effort to test the boundaries of what it can do with Marvel characters in its flagship theme parks at Walt Disney World in Orlando.

A "family" of characters is not a recognized concept in copyright law. Indeed, that concept appears at first glance to protect more than the discrete characters with which copyright struggles and therefore provide a base on which the parties can extend a franchise. At the same time, however, "family" has proven to be a highly malleable concept. Disney, for example, clearly cannot use Spider-Man at Disney World because there is already a Spider-Man attraction at Universal Studios. Separately, the Guardians of the Galaxy are not used at Universal, and Disney has announced plans for a Guardians of the Galaxy roller coaster at Epcot. But what happens if, in a movie, Spider-Man and the Guardians of the Galaxy meet? This is exactly what occurred in the 2018 film "Avengers Infinity War." Does that mean that the Guardians of the Galaxy, which Disney previously viewed as a distinct property, are now part of the Avengers "family"? If so, can Universal claim exclusive rights to this character? What if, contrariwise, Disney argues that Spider Man is now part of the Guardians of the Galaxy family? This and other examples show two things about the relationship between entertainment franchise and copyright law.

First, the subjects of copyright protection often do not line up neatly with the objects of commercial trade. When there is a disconnect between the two, private ordering is likely to fill the gap. Second, the private ordering solution itself is likely to be imperfect given the difficulties that inhere in drawing boundaries around creative works.

Private ordering therefore has both promise and peril for contracting parties bargaining in the face of indeterminate copyright rules. But from a social perspective, copyright's indeterminacy may offer a benefit—it allows parties flexibility and the ability to experiment and innovate in the ways that they structure the information flow around their intellectual assets. I conclude by observing that copyright itself appears sometimes to evolve in the shadow of deal-making. Character copyright has become more expansive, for example, in light of merchandising practices. I argue that while such adaptation may offer additional certainty for contracting parties, it may be socially suboptimal. Because entertainment franchises operate in dynamic environments in which the content of, producers of, and media for creative work are constantly changing and reshuffling, the ability to craft customized arrangements is paramount. Copyright should not develop rules that tend to limit those arrangements.