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Citations:

Bluebook 21st ed.
Joseph P. Fishman, Derivable Works, 67 UCLA L. REV. 122 (2020).

ALWD 6th ed.
Fishman, J. P., Derivable works, 67(1) UCLA L. Rev. 122 (2020).

APA 7th ed.
Fishman, J. P. (2020). Derivable works. UCLA Law Review, 67(1), 122-179.

Chicago 17th ed.
Joseph P. Fishman, "Derivable Works," UCLA Law Review 67, no. 1 (April 2020): 122-179

McGill Guide 9th ed.
Joseph P Fishman, "Derivable Works" (2020) 67:1 UCLA L Rev 122.

AGLC 4th ed.
Joseph P Fishman, 'Derivable Works' (2020) 67(1) UCLA Law Review 122.

MLA 8th ed.
Fishman, Joseph P. "Derivable Works." UCLA Law Review, vol. 67, no. 1, April 2020, p. 122-179. HeinOnline.

OSCOLA 4th ed.
Joseph P Fishman, 'Derivable Works' (2020) 67 UCLA L Rev 122

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U.C.L.A. Law Review

Derivable Works

Joseph P. Fishman

ABSTRACT

From sequels and spinoffs to physical merchandise, copyright and trademark law together give a creative work's owner exclusivity over a range of derivative products. It is often said that this enhanced appropriability encourages firms to spend money producing the underlying works. Less discussed, however, is what kinds of works it is encouraging them to spend money on. How, in other words, does providing control over a work's derivatives affect the direction of creative firms' investment?

This Article offers a theory. Granting originators exclusivity over derivative works and their related merchandise can enable marginal investment to tilt toward what I call *derivable works*: works that, from the owner's ex ante perspective, are most likely to generate marketable derivatives. Derivable works should be at the center of derivative-rights analyses because those rights selectively raise expected values for the subset of works from which derivatives predictably flow. By making ownership of rights in a derivable work often the most feasible entryway to derivative markets, IP law raises the opportunity cost of producing a standalone project. The more valuable the derivative markets become, the less attractive standalone projects look in comparison.

I examine this phenomenon through a case study of the U.S. film industry. Changing economics have increased the private value of protectable content that is best positioned to generate more protectable content. Filmmakers today are spending more to produce derivative films than before, and consumers are likewise spending more to see them. Studios are racing to launch new franchises and extending existing ones, while standalone films face new challenges to profitability. Though IP law is not solely causing these shifts, it is contributing to them by raising the private value of derivable content. They may not realize it, but IP policymakers face a choice on which direction to encourage investment to go. What they decide can affect which films are likely to be made, who is likely to make them, and how consumers will likely be able to access them.

AUTHOR

Associate Professor of Law, Vanderbilt Law School. For helpful conversations and comments along the way, thanks to Michael Abramowicz, Jonathan Barnett, Ken Basin, Peter DiCola, Dave Fagundes, Kristelia Garcia, Paul Goldstein, Jennifer Rothman, Zahr Said, Andres Sawicki, Dan Sharfstein, Jessica Silbey, and Kevin Stack, along with participants at the Vanderbilt Intellectual Property Scholars Colloquium, the Seventeenth Annual Intellectual Property Scholars Conference, the Fourth Copyright Scholarship Roundtable, and the Thirty-Eighth Annual Congress of the Association for the Advancement of Teaching and Research in Intellectual Property. Thanks also to the several film-industry executives who spoke with me on background over the course of my research. Finally, I am grateful to John Davidson and Blake Woodward for excellent research assistance. Any errors derive solely from my work.

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INTRODUCTION

Owners of IP rights in a creative work generally enjoy exclusivity over not only the work itself but also other goods that are based on it. If you want to make a sequel, translation, dramatization, or other adaptation—a "derivative work," in statutory parlance—you'll need the copyright owner's permission.[1] And if you want to sell merchandise that employs some aspect of the work that serves as a trademark (say, a Mickey Mouse mug or a Black Panther backpack), you'll need the trademark owner's permission, too.[2] As a result, those that own both the relevant copyrights and trademarks end up with a double layer of control over how their works are exploited in ancillary markets.

Allotting these rights to owners increases the share of a creative work's social value that they can privately appropriate. It is often said that this enhanced appropriability can offer firms additional incentives to spend money producing the underlying works.[3] Less discussed is the question of what *kinds* of works it incentivizes them to spend money on.[4]

Commentators did not used to ask qualitative questions like this often. Classically, IP scholarship thought of the law's goal in strictly quantitative terms. More authorial works. More technological inventions. The doctrine would remain agnostic about what gets made, so long as there's *more* of it. It needed only to induce creation of some critical mass of stuff, and then the market would pick winners and losers.[5]

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1. *See* 17 U.S.C. § 106(2) (2018).
2. *See, e.g.*, Warner Bros., Inc. v. Gay Toys, Inc., 658 F. 2d 76 (2d Cir. 1981).
3. *See, e.g.*, Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C. L. REV. 603, 636 (1984) (observing that "[t]he producer of a movie or television show may expect to receive a significant proportion of its total return in the form of royalties from [trademark] merchandising rights," though copyright protection and the right of publicity "will generally suffice to capture the bulk of the merchandising value inherent in such works."); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1910–11 (1990) ("Potential derivative works exploitations are often taken into account in the decision whether to make the initial investment in a work's creation. . . . A broad scope of protection, thus, may favor the broader production of works . . . .").
4. I speak of incentives here descriptively, not prescriptively. I do not take any normative position on whether particular IP laws *should* be providing such encouragement. Trademark theorists in particular might bristle at the notion that protection should be treated as an incentive to produce the underlying goods, rather than purely an incentive to provide better information about the source or sponsorship of those goods. *See, e.g.*, Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or* Fait Accompli?, 54 EMORY L.J. 461, 480 n.80, 481 (2005). As a factual matter, however, the incentive exists.
5. *See, e.g.*, Emerson v. Davies, 8 F. Cas. 615, 620–21 (C.C.D. Mass. 1845) (No. 4436) ("[W]hether to be better or worse is not a material inquiry in this case. If worse, his work will not be used by

But if we want to understand what type of creativity our IP laws actually promote, it is important to know how they influence not just the magnitude but also the direction of investment.[6] Lawmakers could, after all, structure additional incentives in any number of ways—granting more exclusive rights, increasing infringement remedies, weakening defenses, and so on, to say nothing of non–IP benefits like tax credits. Structuring our incentives in part by granting both copyright- and trademark-based control over exploiting derivatives is a policy choice. That choice may affect not only how much money IP owners spend but also, at least at the margin, what's worth spending on.

This Article offers a theory of what one of those effects may be. To understand the impact of protection for derivative works and their related merchandise, we need to pay more attention to what I call *derivable works*. A derivable work is one that, from its owner's ex ante perspective, will likely generate marketable derivatives. Derivability falls along a spectrum. A rightsholder might forecast that a given potential work could be exploited successfully in several ancillary markets, another in only one, and another in none at all. The more derivative value the rights holder expects a work to bear in the future, the more derivable it is.

Derivable works should be at the center of derivative-rights analyses because those rights do not raise the expected value of all works equally. Instead, they favor the subset of works from which derivatives predictably flow. Under the right conditions, I argue, our IP system plays a role in tilting production at the margin toward more derivable works and fewer standalone ones. And because a work's derivability may correlate with particular content-based characteristics like genre, our IP laws can attract firms to shift a greater share of investment into that kind of content.

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the community at large; if better, it is very likely to be so used. But either way, he is entitled to his copy-right, 'valere quantum valere potest' [let it be worth as much as it is worth]."); Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107, 1135 (1977) ("The copyright in a literary, visual or musical work may have great value, or no value at all. In leaving the determination of value to private marketplace decisions, the copyright system also leaves to private decision the quite separate question of how much should be invested in the development, production and marketing of a work.").

6. *See* Mark P. McKenna, & Christopher Jon Sprigman, *What's In, and What's Out: How IP's Boundary Rules Shape Innovation*, 30 HARV. J.L. & TECH. 491, 541 (2017) (discussing how uneven coverage in IP protection could drive marginal investments toward "different types of innovation" and highlighting the normative takeaway for IP policymakers that "optimal institutional design depends on what sort of innovation we prefer, and why"); *cf.* Peter Lee, *Reconceptualizing the Role of Intellectual Property Rights in Shaping Industry Structure*, 72 VAND. L. REV. 1197, 1201 (2019) (arguing that "[m]uch hangs in the balance" for IP policymakers because the structure of "IP-intensive industries can determine the amount, variety, and quality of drugs, food, software, movies, music, and books available to society").

This thumb on the scale does not necessarily exist in every market. If all works seem equally amenable to derivative exploitation, or if the expected value of derivative exploitation is generally small, not much should happen to investment's trajectory. The primary market would determine whether the work gets made, and any extra profit from a downstream adaptation would amount to a nice bonus.

But things change once certain works predictably lend themselves to large enough derivative revenue streams. When expected values in a derivative market eclipse those in a (nominally) primary one—say, the action figures bring in a higher return on investment than the theatrical box office—then the foreseeable spinoffs should play a larger role motivating which underlying works gets made. At the margin, investment should flow more toward those works that, whatever their standalone merits, are best positioned to serve as a platform for future derivatives. A work with high derivability could make a rational bet not because it carries a high expected value as a discrete asset, but instead because it functions as a real option for future investment with higher returns.[7] Even if IP law is not functioning as a true proximate cause of such investment decisions, it is at least contributing to them by making derivable content a more valuable asset.[8]

Commentators have not devoted much attention to derivable works as a category.[9] That may be because the discussion around this area of law tends to view the relevant rights as merely a supplementary revenue stream for a potential creative project. Some say the revenue is a lot; others say it is a little.[10] But both sides of that discussion usually proceed from the premise that a firm comes to the table with a particular work in mind, needing to decide whether to invest in

7. *See generally* James Jianxin Gong et al., *Real Options in the Motion Picture Industry: Evidence from Film Marketing and Sequels*, 28 CONTEMP. ACCT. RES. 1438 (2011).
8. *Cf.* Lee, *supra* note 6, at 1272–73 (arguing that IP protection can contribute to industry structure in "subtle, indirect ways" beyond serving as that structure's proximate cause, such as promoting concentration by providing assets that firms can accumulate through M&A and helping incumbents mitigate risk in ways that potential new entrants cannot).
9. For exceptions that briefly nod in the same general direction, see Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. CHI. L. REV. 1683, 1727 (2013) ("One problem with th[e] explanation of the derivative-works right as an additional incentive is that it means we are encouraging authors to create more of the kinds of works that lead to derivatives, but not more of the kinds of works that don't lead to derivatives . . . ."); Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 506 ("If the creators of fictional characters are given exclusive merchandising rights, this may encourage investment in entertainment properties containing character elements capable of supporting a merchandising effort."); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 128 (2001) ("I worry that merchandising may . . . distort the content of movies due to the extra profit derived from the practice . . . . Producers and writers develop characters and plots with an eye on toys and other merchandise that can be derived from the movie.").
10. *See* Derek E. Bambauer, *Faulty Math: The Economics of Legalizing* The Grey Album, 59 ALA. L. REV. 345, 357–91 (2008) (reviewing and critiquing standard arguments in favor of the derivative work right's incentive effects).

creating it or not. The literature frames the question as whether the existence of exclusive rights in a derivative work partly enables production of an underlying original. I argue here that in some markets, at least, precisely the opposite could be happening. Firms may be producing an underlying original partly in order to enable production of the derivatives.

If all of this sounds a bit too abstract, consider a derivable-works skew that is already observable on the ground in at least one major industry: the U.S. film business. Often held out as the entertainment world's poster child for strong IP protection,[11] studios have increasingly been favoring such works over the last decade. This rapid growth of franchise films has been dubbed "the most meaningful revolution in the movie business" since the 1950s.[12] Mid- and high-budget standalone productions, meanwhile, have faced steep hurdles securing financing.[13] As director and producer Shawn Levy told *The New Yorker* in 2016, "[E]very single first meeting I have on a movie, in the past two years, is not about the movie itself but about the franchise it would be starting."[14] These franchises are typically designed to extend across not just multiple films but also various other products and experiences, from apparel to live touring shows. According to one business journalist, "movie studios now exist primarily for the purpose of building and supporting branded franchises that continue in sequels, toys, and theme-park attractions."[15]

This Article focuses on film as a case study of how copyright and trademark protection may help direct investment toward works with high derivability. After first laying out the relevant law in Part I, I describe in Part II just how dependent on derivatives the industry has grown. Of course, there's already a common

11. *See, e.g.*, Richard Posner, *Do Patent and Copyright Law Restrict Competition and Creativity Excessively?*, BECKER-POSNER BLOG (Sept. 30, 2012), http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html [https://perma.cc/W9TR-UD9C] (arguing that while "copyright protection seems on the whole too extensive," protection for the film industry is easiest to defend because "modern action movies often cost[] hundreds of millions of dollars to make, yet [are] copiable almost instantaneously and able to be both copied and distributed almost costlessly").
12. *See* BEN FRITZ, THE BIG PICTURE: THE FIGHT FOR THE FUTURE OF MOVIES, at xv (2018).
13. *See, e.g.*, *id.* at 114–15; Jason Bailey, *How the Death of Mid-Budget Cinema Left a Generation of Iconic Filmmakers MIA*, FLAVORWIRE (Dec. 9, 2014), http://flavorwire.com/492985/how-the-death-of-mid-budget-cinema-left-a-generation-of-iconic-filmmakers-mia [https://perma.cc/8ZLN-A43B]; Janet Nguyen, *The Economics of a Blockbuster*, MARKETPLACE (Feb. 15, 2016), http://www.marketplace.org/2016/01/22/world/blockbusters-superhero-movies [https://perma.cc/F78J-7X93].
14. Tad Friend, *The Mogul of the Middle*, NEW YORKER (Jan. 3, 2016), https://www.newyorker.com/magazine/2016/01/11/the-mogul-of-the-middle [https://perma.cc/A8CG-DBHE].
15. FRITZ, *supra* note 12, at xix.

perception that studios are producing more franchises than they used to. But IP theorists and policymakers may still not appreciate the magnitude of the change. Examining all domestic theatrical releases produced between 2000 and 2017, Part II analyzes several trends underlying both studios' growing spending on making derivative films and consumers' growing spending on seeing them.[16]

Popular narratives about this franchise fetish tend to chock it up to growing risk aversion among studio executives.[17] But that account fails to fully explain why studios, which have always been in the business of maximizing return on investment, would be getting more unwilling to take on risk as time goes on. I contend that, beyond risk tolerance, our legal appropriability mechanisms are selecting for precisely this kind of content. Copyright and trademark law are helping make derivable works more attractive by increasing the size of those works' expected rewards relative to that of standalone ones. While the legal protections themselves have not changed much—the relevant doctrines have stayed roughly the same for decades—their perceived economic value has. As I argue in Part III, these rights tend to be worth more now to their owners than they used to. The exclusive rights to perform publicly or to reproduce and distribute copies of a film—once the most lucrative sticks in cinema's IP bundle—are not the profit powerhouses that they once were. As the marketplace becomes more saturated, with seemingly unlimited options of what to watch and how to watch it, IP owners are facing more competition than ever before. That is great news for consumers of existing content. But it also presents a challenge for licensors. Fewer people are paying to see a movie in the theater. And the streaming marketplace has not offered anywhere near the same home-entertainment margins as disc sales and rentals once did.

These leaner times have forced studios to seek out other revenue streams. What they've found is a cocktail of factors that have placed a premium on protectable content that can generate further protectable content. First, the major studios have increasingly relied on lavish, special effects–laden productions to lure people away from their streaming queues and into the theater. Soaring production budgets have necessitated equally soaring marketing budgets, trying to stimulate enough buzz to make the theatrical release a must-see event. As the total cost of each production rises, the studios are releasing fewer films. The net effect is fewer but bigger bets. In principle, each of those bets could be a standalone production.

16. *See infra* Subpart II.B.
17. *See, e.g.*, Mark Harris, *The Day the Movies Died*, GQ (Feb. 10, 2011), http://www.gq.com/story/the-day-the-movies-died-mark-harris [https://perma.cc/5LNE-U3GF] (lamenting the "bland assembly-line ethos" underlying "Hollywood's collective inattention/indifference to the basic virtues of story development" and the "decades-long marginalization of the very notion of creative ambition by the studios").

But studios can economize on marketing costs by bundling films together into franchises, effectively letting one film's popularity generate immediate brand awareness for its successor.

Second, studios have come to rely more on exploitation in foreign markets. But not every film plays as well in other cultures as it might in the United States. The more familiar the brand, the more receptive the market tends to be. That principle may be as true of filmed entertainment as it is of handbags or shoes.[18]

Third, consumers have revealed a strong demand for film-branded merchandise. Once upon a time, physical merchandise was a tertiary consideration for film executives. George Lucas, for example, famously convinced 20th Century Fox to grant him merchandise rights for the *Star Wars* franchise in exchange for taking a $500,000 cut on his director's fee for *The Empire Strikes Back*.[19] Tens of billions of dollars in retail sales later, it is the merchandise—not box office or home-entertainment products—that generates the most revenue.[20] One estimate pegged the take-home royalty payout for Lucas and Disney (which eventually bought him out) as of 2015 at $4 billion—surely higher now after the most recent crop of sequels and spinoffs.[21] While mocked today as one of the most lopsided deals in film history, it was not irrational for Fox at the time. Studios did not know then what they know now: there can be even bigger money in licensed merchandise than in the underlying audiovisual content.[22] But if you want to capture that money, you need a film that can spawn merchandise for people to buy. A standalone film with t-shirt-worthy characters or phrases is a good start. Even better, though, is a multi-installment series, where each new film serves as a brand extension capable of stimulating demand for a fresh batch of gear.

Fourth and finally, herd behavior amplifies whatever skew already exists. Executives do not know in advance whether a given film will underperform. What they do know is that if a film ends up underperforming, it is better for them reputationally if they are at least following a successful blueprint.

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18. *See* FRITZ, *supra* note 12, at 23.
19. *See* Mike Fleming Jr., *'Star Wars' Legacy II: An Architect of Hollywood's Greatest Deal Recalls How George Lucas Won Sequel Rights*, DEADLINE (Dec. 18, 2015, 1:40 PM), https://deadline.com/2015/12/star-wars-franchise-george-lucas-historic-rights-deal-tom-pollock-1201669419 [https://perma.cc/7K2J-HDEY].
20. *See* Alex Ben Block, *The Real Force Behind 'Star Wars': How George Lucas Built an Empire*, HOLLYWOOD REP. (Feb. 9, 2012, 2:12 PM), https://www.hollywoodreporter.com/news/george-lucas-star-wars-288513 [https://perma.cc/7C5G-SJNX] (reporting sales of "$20 billion and counting of licensed goods," compared to "$4.4 billion in tickets and $3.8 billion in home entertainment products").
21. *See* THORSTEN HENNIG-THURAU & MARK B. HOUSTON, ENTERTAINMENT SCIENCE 439–40 (2018) (assuming a 12 percent average royalty rate).
22. *See id.* at 439.

IP policymakers here face a normative choice. That choice is the subject of Part IV. Before any legal exclusivity enters the picture, studios would already have financial reason to produce derivatives. After all, their cheaper marketing costs and wider geographic viability are features of the content itself, not of the legal regime into which it is distributed. If lawmakers so desired, they could try to remain agnostic, treating derivative works the same as any other work (say, by granting copyright ownership to the derivative's author, rather than to the author of the underlying work).[23] That move would lower individual firms' incentives to concentrate their investment in derivables, though at the same time it would also lower the cost of entry for producing derivatives. Alternatively, lawmakers could affirmatively try to structure incentives to make investment in standalone productions start to look more attractive (say, by ramping up the originality threshold for securing copyright protection or by scaling back trademark's merchandising right).[24]

But IP law does neither of those things. Instead, it actually increases the incentive to invest in derivable works. Not only does its legal exclusivity enhance the revenue streams from derivatives, but the only ticket to that revenue is to produce (or acquire ownership of) a work from which subsequent derivatives can emanate. A dollar spent on a derivable work can thus go further than one spent on others. Even if unintentionally, IP law is subsidizing owners' investment in franchises.

Contrary to popular accounts of studio behavior, this Article's theory of derivable works does not assume any special level of risk aversion. Decisionmakers in the film industry could be entirely indifferent to risk and still rationally pursue their current, franchise-dominated course based on expected values alone. The growing share of derivative works and merchandise within the overall IP-appropriability pie likely makes this result privately optimal.

My agenda here is descriptive and diagnostic. I do not take a position on what range of expressive goods generally, or film content specifically, would make society best off. But it is key for those in charge of IP policy to understand that they are choosing a side, deliberately or not. It is not just the market that is picking winners and losers. It is also the lawmakers who influence what rewards the market will bear.

23. There's an article for that. *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989 (1997).
24. For that, too. *See* Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451 (2009); Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505 (2009); Dogan & Lemley, *supra* note 4.

That is a major challenge for IP theory. Copyright does not have an internal rationale for what kinds of works it ought to promote the most.[25] And trademark commentary typically does not even envision promoting particular kinds of goods at all (except perhaps to the extent that it induces investment in the quality of features that consumers cannot readily observe on a product's face).[26] But before policymakers can encourage the range of creative investments they would actually prefer, they need to understand that our existing IP laws may already have a preference embedded within them. The exclusive rights most relevant to the film industry certainly do.

Depending on your particular theory of the good, maybe it is the right preference, or maybe it is the wrong one. But either way, it is there.

I. CONTROLLING ADAPTATIONS THROUGH COPYRIGHT AND TRADEMARK LAW

When it comes to commercial exploitation of adaptations, copyright and trademark law are powerful things. Start with copyright. Section 106(2) of the Copyright Act grants a work's owner the exclusive right to prepare derivative works based upon it.[27] That grant is defined in seemingly sweeping language, covering "any . . . form in which a work may be recast, transformed, or adapted."[28] This statutory language, which the Ninth Circuit once dubbed "hopelessly overbroad,"[29] gives copyright owners substantial licensing opportunities.

On top of that, once one adds in the judge-made doctrine that even nonverbatim copying can infringe the separate-though-overlapping reproduction right so long as it is "substantially similar" to the original, copyright scope stretches across a wide and diverse set of potential follow-on works.[30] It uncontroversially extends to sequels, prequels, and other narrative extensions of underlying fictional

25. *See* Barton Beebe, Bleistein, *the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 334 (2017).
26. *See, e.g.*, Dogan & Lemley, *supra* note 4, at 468 (observing that unlike copyright, trademark theory and doctrine "reject the notion that trademark rights should serve as either an inducement or a reward for the creation of product features that have inherent—as opposed to source identifying—value"). On the relationship between trademark protection and unobservable product characteristics, see Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 117 n.150 (2012) (noting that the argument that trademarks reduce consumer search costs "presumes there are many situations in which a product's quality is not observable, and that is why consumers rely on the trademark to indicate quality").
27. 17 U.S.C. § 106(2) (2018).
28. 17 U.S.C. § 101.
29. Micro Star v. FormGen Inc., 154 F.3d 1107, 1110 (9th Cir. 1998).
30. *See* Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1346 (2015) (discussing substantial overlap between these two forms of infringement under § 106).

works.[31] Characters are particularly important assets in this context, as sufficiently developed ones can receive their own copyright protection independent of the work in which they originally appeared.[32] Owners can control the commercial exploitation of new storylines involving their characters, even if those characters have changed over the many decades of the copyright term.[33] An owner of a copyright in an audiovisual work could also reasonably expect to control sufficiently detailed plot summaries,[34] film clips or trailers,[35] and toys or other character-based merchandise.[36] Even nominally public-domain literary characters can take on a new copyright life once they are visually depicted, giving owners exclusivity over the most famous (and sometimes canonical) portrayals.[37]

More controversially, at least to commentators if not to many courts, copyright protection also spills out into more remote markets, where an entrepreneur might find a new way to capitalize on the work. Downstream

31. *See, e.g.*, *Micro Star*, 154 F.3d at 1112 ("A copyright owner holds the right to create sequels . . . ."); Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505, 1523–24 (observing that although sequels and prequels are not expressly mentioned in the definition of a derivative work, they are still natural fits because they "typically exist in the same medium as the underlying work, typically aim to operate in the same market segment as the original work, and, in fact, typically attract the same consumers as the original work did").

32. *See generally* Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769 (2013).

33. *See, e.g.*, Toho Co. v. William Morrow & Co., 33 F. Supp. 2d 1206 (C.D. Cal. 1998) (Godzilla); Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co., 900 F. Supp. 1287 (C.D. Cal. 1995) (James Bond).

34. *See* Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1370 (2d Cir. 1993).

35. *See* Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 275 F. Supp. 2d 543 (D.N.J. 2003); Lamb v. Starks, 949 F. Supp. 753 (N.D. Cal. 1996).

36. *See, e.g.*, King Features Syndicate v. Fleischer, 299 F. 533, 538 (2d Cir. 1924); Conan Props., Inc. v. Mattel, Inc., 712 F. Supp. 353 (S.D.N.Y. 1989); *see also* Hoepker v. Kruger, 200 F. Supp. 2d 340, 347 (S.D.N.Y. 2002) (observing in dicta that "museum gift merchandise" could constitute a derivative work of a photographic image). To take one recent example, all parties to a dispute over an unauthorized *Star Trek* film agreed that the owners' copyrights governed not only the familiar movies and television series but also derivative books, games, and documentaries. *See* Paramount Pictures Corp. v. Axanar Prods., Inc., No. 15-CV-09938-RGK-E, 2017 WL 83506, at *1 (C.D. Cal. Jan. 3, 2017).

37. *See* Ted Johnson, *Adapting a Classic? Get a Lawyer*, VARIETY (Sept. 15, 2012, 5:00 AM), https://variety.com/2012/biz/news/adapting-a-classic-get-a-lawyer-1118059260 [https://perma.cc/R4FN-74HL]. For an example of this principle at play in a litigated case, see Warner Bros. Entm't v. X One X Prods., 644 F. 3d 584, 597 (8th Cir. 2011) (observing that when literary characters are adapted to film, copyright protects "the increments of character expression in the films that go beyond the character expression in the books on which they were based" and that such increments are often substantial since "a book's description of a character generally anticipates very little of the expression of the character in film"). The court went so far as to suggest that reproducing a public-domain image of Judy Garland as Dorothy could infringe the film copyright for *The Wizard of Oz* if that reproduction were applied to the surface a ruby slipper. *Id.* at 602 n.10.

adaptations that judges have found to lie within the copyright owner's exclusive control include a trivia book about a popular television show;[38] a speed-up chip for a video game;[39] audio cassettes for talking teddy bears;[40] a guitar in the shape of the musician Prince's erstwhile pictographic name,[41] and, at least in dicta, a copy of a television broadcast that skips the commercials.[42] In Pamela Samuelson's recent encapsulation, these decisions have interpreted copyright to give owners "an entitlement to control all markets into which any emanation of their works might travel."[43]

Then comes trademark law. The Lanham Act, the federal trademark statute, protects symbols used in commerce that distinguish the source of a particular good or service from another's.[44] These symbols can come in many forms—a word, a slogan, an image, a sound, even a product's physical packaging or configuration. Once a trademark right accrues, its owner can prevent other parties from using a mark that is similar enough to confuse consumers about who is actually responsible for the good or service at issue.[45] Actionable confusion may concern not only whether the trademark holder is the source of the product, but also as to whether it has sponsored or approved it.[46]

Lucasfilm, for example, owns the wordmark LIGHTSABER for, among other things, toy weapons.[47] Another company that wanted to market a luminescent sword of pulsating energy would either need a license or else need to use a mark different enough to avoid the misleading impression that Lucasfilm stands behind it. And as one California company recently learned, the same would likely be true of an unlicensed party that held itself out as a training academy for wielding a lightsaber.[48] Authorized Jedis only.

38. Castle Rock Entm't, Inc. v. Carol Publ'g Grp., 150 F.3d 132 (2d Cir. 1998).
39. Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009 (7th Cir. 1983).
40. Worlds of Wonder, Inc. v. Vector Intercontinental, Inc., 653 F. Supp. 135, 140 (N.D. Ohio 1986); Worlds of Wonder, Inc. v. Veritel Learning Sys., Inc., 658 F Supp. 351, 356 (N.D. Tex. 1986).
41. Pickett v. Prince, 207 F.3d 402 (7th Cir. 2000).
42. *In re* Aimster Copyright Litig., 334 F.3d 643, 647 (7th Cir. 2003). Broadcasters recently lodged a similar claim against Dish's "Autohop" feature, *see* Brief for Amicus Curiae Nat'l Ass'n of Broadcasters in Support of Appellants at 25, Fox Broad. Co. v. Dish Network, L.L.C., 747 F.3d 1060 (9th Cir. 2014) (No. 12–57048), 2012 WL 6803505, though the case ultimately settled.
43. *See* Samuelson, *supra* note 31, at 1509.
44. *See* 15 U.S.C. § 1052 (2018).
45. 15 U.S.C. §§ 1114(1), 1125(a)(1)(A).
46. 15 U.S.C. § 1125(a)(1)(A).
47. LIGHTSABER, Registration No. 1,126,220.
48. Eriq Gardner, *Disney's Lucasfilm Sues Academy That Teaches People How to Use Lightsabers*, HOLLYWOOD REP. (Oct. 17, 2016 8:44 AM), https://www.hollywoodreporter.com/thr-esq/disneys-lucasfilm-sues-academy-teaches-938781 [https://perma.cc/MPT6-G6UG].

In a garden-variety trademark case, the mark's value to consumers lies in what it tells them about the product. In the entertainment world, however, the most valuable trademarks are often doing something else. They are not communicating information about the product; they *are* the product. Consumers typically do not seek out a Princess Elsa jacket[49] or a Groot luggage tag[50] because they think that the Disney Corporation is a particularly reliable producer of either jackets or luggage tags. They do so, rather, because they want the mark itself.[51]

Courts first began adopting such merchandising theories of infringement in cases over sports team logos in the 1970s.[52] Subsequent case law has established a right to prevent the sale of any branded merchandise that consumers would believe to be officially licensed—even if that belief would not affect any actual purchasing decisions.[53] The Fifth Circuit, for example, upheld a merchandising claim despite evidence that "some consumers might not care whether [the defendant's products] are officially licensed . . . ."[54] In its view, the dispositive question is not "[w]hether or not a consumer *cares* about official sponsorship" but rather "whether that consumer would likely *believe* the product is officially sponsored."[55] Increasingly, though, that condition is satisfied as a matter of course. As more merchandising claims have succeeded, and as more manufacturers have decided to seek out licenses, more consumers come to assume that a license must cover any branded merchandise sold through reputable channels.[56] This feedback loop has yielded what by now seems like a commercially ironclad exclusivity over

49. *See Elsa Fuzzy Hooded Jacket for Girls*, SHOP DISNEY, https://www.shopdisney.com/elsa-fuzzy-hooded-jacket-for-girls-7507057372737M.html [https://perma.cc/7JGC-6CZM].
50. *See Marvel Studios More Than a Guardian Bag Tag*, MARVEL SHOP, https://shop.marvel.com/groot-more-than-a-guardian-luggage-tag-customizable/mp/24880/0 [https://perma.cc/2QF9-AUEU].
51. *See* Dogan & Lemley, *supra* note 4, at 472.
52. *See, e.g.*, Bos. Prof. Hockey Ass'n v. Dall. Cap & Emblem Mfg., Inc., 510 F.2d 1004, 1012 (5th Cir. 1975) (holding, in a dispute over merchandise bearing sports teams' logos, that "[t]he confusion or deceit requirement is met by the fact that the defendant duplicated the protected trademarks and sold them to the public knowing that the public would identify them as being the teams' trademarks. The certain knowledge of the buyer that the source and origin of the trademark symbols were in plaintiffs satisfies the requirement of the act.").
53. *See* Dogan & Lemley, *supra* note 4, at 476–77 (summarizing cases).
54. Bd. of Supervisors for La. State v. Smack Apparel Co., 550 F. 3d 465, 485 (5th Cir. 2008).
55. *Id.* (italics in original).
56. *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 922–23 (2007) (identifying a feedback effect in which "as consumers develop expectations more favorable to expansive merchandising rights, mark users have even more reason to seek licenses, which in turn fuels more expansion, and so on"); Mark A. Lemley & Mark McKenna, *Irrelevant Confusion*, 62 STAN. L. REV. 413, 440 (2010) (arguing that "[a] use that originally confused no one came, over time, to confuse consumers as a few courts held that such uses were illegal," which provoked "widespread licensing, which made consumers assume that such T-shirts came only from licensed vendors," and that if any confusion exists today then "[i]t is the law itself that will have created that confusion").

exploiting marks festooned on physical merchandise.[57] If scripted content generates a market for consumer products that bear symbols recognizably associated with that content, the mark holder gets to control it.

A good example of this control is the Second Circuit's decision enjoining a manufacturer of unlicensed toy cars resembling the "General Lee" of *Dukes of Hazard* fame.[58] The court based its ruling on the fact that consumers assumed that the toys had been sponsored by Warner Bros., the studio behind the show. Warner, the court explained, "has licensed other toy manufacturers to produce authorized replicas of the 'General Lee' . . . . The undisputed facts demonstrate that this was not only the custom and practice of the industry, but also that product licensing arrangements were ultimately more profitable than the T.V. series itself."[59]

When the defendant tried at a later stage in the case to argue that the mark holder had not shown that "consumers of 'General Lee' models care whether the goods are manufactured or sponsored by any single source," the court doubled down on its prior pronouncement:

> [T]he public did associate the 'General Lee' with the 'Dukes of Hazzard' television series. Its distinctive markings and color made it a 'Dukes of Hazzard' car, or a toy depicting that car. It is because of that association, the identification of the toy car with its source, Warner's television series, that the toy car is bought by the public. That is enough.[60]

Together, modern copyright and trademark doctrine teach that control over an underlying film confers further control over its derivatives, both intangible and tangible. The industry has fully internalized this lesson. It is essentially unheard of today for a professional filmmaker to try an adaptation of copyrighted content without having first cleared the rights. All project planning occurs in the shadow of the rare exceptions that have served as cautionary tales.[61] A merchandise manufacturer, meanwhile, can pay hundreds of millions of dollars in royalties

57. *See* Irene Calboli, *The Case for a Limited Protection of Trademark Merchandising*, 2011 U. ILL. L. REV. 865, 892–96 (describing the "institutionalization" of merchandise rights in commercial practice); Gibson, *supra* note 56, at 922–23 ("[M]erchandising exclusivity is so widely accepted today that police routinely raid unlicensed merchandisers, and trademark owners, retail businesses, and even government officials simply assume the existence of such a right." (internal quotation marks omitted)).
58. Warner Bros., Inc. v. Gay Toys, Inc., 658 F. 2d 76 (2d Cir. 1981).
59. *Id.* at 79.
60. Warner Bros., Inc. v. Gay Toys, Inc., 724 F.2d 327, 334 (2d Cir. 1983).
61. *See, e.g.*, Anderson v. Stallone, No. 87–0592 WDKGX, 1989 WL 206431, at *5 (C.D. Cal. Apr. 25, 1989) (holding that the defendant's unauthorized plot outline for a new sequel in the *Rocky* film franchise infringed the copyrights covering the original films and was therefore itself ineligible for copyright protection).

annually for rights to make consumer products from film properties.[62] A single film can generate thousands of licensed products across hundreds of different licensees.[63]

These expansive doctrines, which have not always been a part of our law, are theoretically controversial among scholars.[64] But they've become quite stable among industry players. And while the law has not changed much over the last decade or so, its impact on the film business certainly has. The next Part explains how.

II. THE MODERN MOVIE LANDSCAPE

The film world today is undeniably derivative. Out of the twenty-five top-grossing movies at the 2017 domestic box office, nineteen were either sequels, spinoffs, or reboots of previous films.[65] Of the remaining six, two were the opening entry in a new franchise (*IT* and *Boss Baby*); and one is being spun off into a television series (*Hidden Figures*).[66] The previous year was much the same. In 2016, the top twenty-five featured fourteen sequels, spinoffs, and reboots.[67] Of the remaining eleven, three were the opening entry in a new franchise (*The Secret Life of Pets*, *Sing*, and *Bad Moms*); two were connected to the larger cinematic universe populated with Marvel comic-book characters, not to mention the opening entry of new franchises in their own right (*Doctor Strange* and *Deadpool*); and one was adapted from a popular toy (*Trolls*). And yes, that toy movie has gotten a sequel, too.[68]

Perhaps you do not need this Article to know all of this. Today, headlines like "Hollywood's Addiction to Franchises Is Reaching New Extremes" regularly

62. *See, e.g.*, HASBRO CORP., 2017 ANNUAL REPORT 36 (2018) (reporting entertainment-related royalty payments of $405.5 million in 2017, accounting for 7.8 percent of the company's net revenues).
63. *See, e.g.*, Tim Carvell, *How Sony Created a Monster*, FORTUNE, June 8, 1998, at 162, 168–69.
64. *See, e.g.*, Calboli, *supra* note 57, at 888–92 (surveying scholarly skepticism of the merchandising right's doctrinal validity in trademark law); Samuelson, *supra* note 31, at 1510 (observing that "[m]ost commentators have decried the overbreadth of the derivative work right" and that "[m]ysteries abound about [its] proper scope").
65. *See* MOTION PICTURE ASS'N OF AM., THEME REPORT 2017, at 24 (2018) (listing the twenty-five top-grossing films).
66. *See* Bryn Elise Sandberg, *"Hidden Figures" TV Series in the Works at Nat Geo*, HOLLYWOOD REP. (Apr. 5, 2018, 2:43 PM), https://www.hollywoodreporter.com/live-feed/hidden-figures-tv-series-works-at-nat-geo-1100235 [https://perma.cc/A23Y-WJWN].
67. *See* MOTION PICTURE ASS'N OF AM., THEATRICAL MARKET STATISTICS REPORT 2016, at 22 (2017) (listing the twenty-five top-grossing films).
68. Justin Kroll, *Universal DreamWorks Animation Announces "Trolls 2"; Sets for April 10, 2020*, VARIETY (Feb. 28, 2017, 10:57 AM), https://variety.com/2017/film/news/trolls-2-announced-april-2020-dreamworks-animation-1201998983 [https://perma.cc/M32U-D4ZR].

appear in major newspapers and magazines.[69] Anyone who's simply seen the coming attractions in the last few years might already have a similar intuition.

If there's truly change going on, though, it is worth delving into what exactly it is. After all, media outlets have been pronouncing their astonishment at studios' love of serialization for quite a while now. In 1983, a reviewer complained of a "Sequelmania" where "unadventurous corporate thinking . . . has turned the studios into glorified recycling centers."[70] A few years earlier, a week before *Jaws* would launch the franchise that started the now familiar summer-blockbuster trend, the New York Times published a piece declaring that the major studios had become "more conservative than they've ever been," producing "more sequels, more follow-up movies and more remakes than at any other time in Hollywood history."[71] Even as early as 1935's *Bride of Frankenstein*, a critic in the same paper wrote of a "form of ancestor-worship, tinged with honest reverence for the dollar, which deifies past cinema successes and urges producers to bullwhip their writing staffs into the creation of a sequel, companion-piece or postscript . . . ."[72] Just like any potential audience for a sequel, one might fairly ask here: What's different this time?

The answer is, in fact, a lot. To begin with, even if derivative content is nothing new, the overall share of spending on it is. Standalone films that in recent decades might have been theatrically distributed are today getting crowded out. Not since the 1930s and 1940s, which saw the release of over 500 derivative films, has Hollywood concentrated so heavily on serialized feature-length films.[73] And

69. *See* Cecilia Kang, *Hollywood's Addiction to Franchises is Reaching New Extremes*, WASH. POST (Jan. 16, 2015), https://www.washingtonpost.com/business/economy/hollywoods-addiction-to-franchises-is-reaching-new-extremes/2015/01/16/4b8bc934-96a9-11e4-aabd-d0b93ff613d5_story.html [https://perma.cc/L5VN-NUCN]; *accord, e.g.*, Michelle Kung & Lauren A.E. Schuker, *Sequels Come Fast, Furious as Studios Aim to Cut Risk*, WALL STREET J., Feb. 24, 2011, at B1; Derek Thompson, *The Reason Why Hollywood Makes So Many Boring Superhero Movies*, ATLANTIC (May 13, 2014), https://www.theatlantic.com/entertainment/archive/2014/05/hollywoods-real-superhero-problem/370785 [https://perma.cc/4VUM-79FM].

70. Peter Rainer, *"Sequelmania": Is It Throttling Hollywood?*, L.A. HERALD-EXAMINER, July 8, 1983, at D7.

71. Vincent Canby, *Sequels are a Sign of Fear*, N.Y. TIMES (May 25, 1975), https://www.nytimes.com/1975/05/25/archives/film-view-sequels-are-a-sign-of-fear.html [https://perma.cc/9SML-6CQA].

72. Frank S. Nugent, *Consider the Sequel*, N.Y. TIMES (May 31, 1936), https://www.nytimes.com/1936/05/31/archives/consider-the-sequel-inspired-by-ancestorworship-they-yet-may-lead.html?searchResultPosition=2 [https://perma.cc/9A8E-K8EJ].

73. *See* STUART HENDERSON, THE HOLLYWOOD SEQUEL: HISTORY AND FORM, 1911–2010, at 55 (2014). *The Durango Kid* series alone spanned a whopping sixty-four films between 1945 and 1952. *See* Stephen Follows, *Hollywood Sequels by the Numbers*, FILM DATA & EDUC. BLOG (June 15, 2015), https://stephenfollows.com/hollywood-sequels-by-the-numbers [https://perma.cc/B8KC-SGYV].

even then, the industrial backdrop to that production strategy looked little like today's. In the pretelevision era, the large number of weekly filmgoers and the prevalence of double features at the cinema generated immense demand for a steady stream of new product. Meanwhile, before antitrust enforcement broke apart the studio system, acting talent was typically beholden to studios under longterm contracts. Serial films during this period allowed studios to churn out supply at minimal development cost by repeatedly gathering the same stars to play the same characters.[74] Today's franchises, by contrast, are being assembled in spite of actors' free agency. And they're being made to soak up investment within a small number of very expensive films, not to spread it across many cheap ones. Unlike in the studio-system days, the most visible derivatives are not functioning as studios' means of rushing product to market.

Another major difference between now and then is the level of advance planning for derivability. As Catherine Fisk has documented, studios in the 1930s and 1940s generally did not demand sequel rights and character rights.[75] Their business model required copyright control over only the single film itself. It did not, by contrast, "entail possible sequels or tied-in marketing campaigns of novelizations and merchandising, so the main aspect of controlling a screenplay was complete at the time the picture was filmed."[76] Even when the blockbuster sequel phenomenon began to take off in the late 1970s, those follow-ups were typically produced in reaction to an underlying film that happened to perform well.[77] Modern franchises, however, are increasingly engineered early on to bear a brand that can be extended in multiple directions, whether through further films, physical merchandise, or experiences like theme park rides.

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74. *See* HENDERSON, *supra* note 73, at 49.
75. *See* Catherine L. Fisk, *The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938–2000*, 32 BERKELEY J. EMP. & LAB. L. 215, 259–60 (2011).
76. *Id.*
77. *See* Kathleen Loock, *The Sequel Paradox: Repetition, Innovation, and Hollywood's Hit Film Formula*, 17 FILM STUD. 92, 93 (2017) (arguing that even as studios invested more in sequels during the 1970s and 1980s, "the sequel was merely an afterthought at the time, conceived, created and released after a self-contained movie, which usually delivered narrative closure without built-in sequel options, had proven popular with audiences"); *Id.* at 102 ("Hollywood sequelisation during the 1970s and 1980s was unlike the pre-planned sequel production that picked up steam in the 1990s. . . . Conceptualised as serial installments that eventually add up to a self-contained whole, these [franchise] movies are hence fundamentally different from the earlier kind of unplanned sequel that followed on the heels of a box office hit."). *See also* HENDERSON, *supra* note 73, at 60–61 (observing that, for someone used to today's franchise-heavy offerings, "it is hard to conceive of the extent to which the equivalent releases from the early 1950s through to the late 1960s were, with a handful of noteworthy exceptions, standalone events," and that "it was rare that they spawned direct follow-ups, and it was rarer still . . . that the first film was evidently intended to represent the beginning of a series").

The core of this Part's descriptive case follows in Subpart II.B. Because much of the discussion revolves around the theatrical market, however, Subpart II.A begins with a brief overview of that market's relevance to feature-length films' commercial viability. Subpart II.C concludes by examining how streaming video-on-demand services are trying to change that relevance and how durable any such changes are likely to be.

A. The Box Office's Shifting Commercial Role

Movies can make money through several channels. The first and perhaps most familiar to many readers is theatrical exhibition. Once upon a time, box office sales represented the primary revenue stream for the film industry. Indeed, before the spread of television and home-video technology, it was the only revenue stream.[78] But by 1980 it had fallen to only about half of worldwide studio receipts, and by 1990 it had dropped to less than a third.[79] A 2012 estimate pegged the box office at 27.5 percent of studios' overall revenue pie.[80] One needs to treat these aggregate numbers carefully. They obscure variations in the extent to which different genres and budgets may rely on theatrical exploitation.[81] Nevertheless, they underscore a point that will drive much of the analysis to come: the box office is no longer the profit center of the industry. Indeed, it may even function as something of a loss leader.[82] To recoup their costs, most movies depend on the revenue they will earn after they leave the cinema.

By the beginning of the new millennium, the major revenue source for most films had shifted to home viewing, in particular through DVD/Blu-Ray sales and rentals.[83] That model, however, peaked in 2004, and revenue has been shrinking

78. *See* HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS 109–10 (9th ed. 2015) (showing that, in 1948, theatrical exhibition accounted for the entirety of worldwide studio receipts).
79. *Id.* In Vogel's encapsulation, "since the mid-1980s, the total fees from the licensing of films for use in ancillary markets . . . have collectively far overshadowed revenues derived from theatrical release." *Id.* at 107.
80. *See* JEFFREY C. ULIN, THE BUSINESS OF MEDIA DISTRIBUTION 12 (2d ed. 2014).
81. *See* Stephen Follows, *How Films Make Money Pt2: $30m–$100m Movies*, FILM DATA & EDUC. BLOG (July 18, 2016), https://stephenfollows.com/films-make-money-pt2-30m-100m-movies [https://perma.cc/5BCR-EEYA] (finding that among mid-budget films, "Horror and Family films rely on the theatrical window . . . to a greater degree than Action films and Thrillers do," and that "Sci-fi, Animation and Action films proportionally earn the most from Home Entertainment, while Thrillers and Romantic movies earn the most from the television window").
82. *See* EDWARD JAY EPSTEIN, THE BIG PICTURE: THE NEW LOGIC OF MONEY AND POWER IN HOLLYWOOD 22 (2005) ("Even though they lost more than $11 billion in 2003 on movies shown in theaters, they more than made up that deficit from licensing products from those movies to the global home-entertainment market.").
83. *See* VOGEL, *supra* note 78, at 109–10.

rapidly since.[84] Consumers are now spending more of those home entertainment dollars on subscription fees for streaming platforms like Netflix and Amazon Prime Video or transactional video-on-demand like rentals from Apple's iTunes store.[85] As of 2018, there are more online streaming subscriptions worldwide than there are cable subscriptions.[86]

Indeed, with subscription streaming services increasingly producing or distributing their own original films, some may wonder how often theatrical exhibition is even necessary. On the one hand, even a streaming giant like Amazon has continued to launch its releases with the traditional window of theatrical exclusivity.[87] On the other hand is Netflix. Netflix has charted a course in which typical theatrical runs range from insignificant to altogether nonexistent. It is reportedly aiming to release fifty-five original films a year (ninety if you include documentaries and children's animation), with budgets falling everywhere between a few million to $200 million.[88] That is more movies than any major Hollywood studio is making these days.[89] Netflix's 2019 release slate bested every

84. *See* Ryan Faughnder, *Big Flops. Waning Studio Profits. What Hollywood's Record Box Office Doesn't Tell You*, L.A. TIMES (Dec. 19, 2016, 3:00 AM), http://www.latimes.com/business/hollywood/la-fi-ct-cinema-pain-20161213-story.html? [https://perma.cc/2QR6-9JZY]; *Split Screens*, ECONOMIST (Feb. 23, 2013), https://www.economist.com/business/2013/02/23/split-screens [https://perma.cc/N3ZH-S8CS].

85. *See* Thomas K. Arnold, *Home Entertainment Spending in U.S. Hit Record $23.3 Billion in 2018*, VARIETY (Jan. 8, 2019, 11:29 AM), https://variety.com/2019/digital/news/home-entertainment-spending-2018-record-1203102664 [https://perma.cc/G5EX-7YZS] (announcing preliminary figures showing that the market for subscription video-on-demand totaled $12.9 billion in 2018, a 30 percent increase from 2017).

86. MOTION PICTURE ASS'N OF AM., 2018 THEME REPORT 31 (2019); *see also* Kevin Westcott et al., *Digital Media Trends Survey, 13th Edition*, DELOITTE INSIGHTS (Mar. 19, 2019), https://www2.deloitte.com/us/en/insights/industry/technology/digital-media-trends-consumption-habits-survey/summary.html [httsp://perma.cc/7SCY-6JUA] (reporting survey evidence showing that 69 percent of U.S. respondents subscribed to at least one streaming-video service versus 65 percent that subscribed to a "traditional pay TV" service such as cable or satellite).

87. *See, e.g.*, Ashley Rodriguez, *US Cinema Chains Want Nothing to Do With Netflix, But They Love Amazon*, QUARTZ (Apr. 3, 2017), https://qz.com/947237/unlike-netflix-cinema-chains-really-want-to-work-with-amazon [https://perma.cc/YJ7J-LU2H]. As the head of Amazon's motion picture group characterized the company's strategy, "We're a theatrical company that supports a theatrical window. We have home entertainment sales. In many ways we're operating like a traditional studio." Brent Lang, *Amazon Studios Looks to Shake Up the Movie Business as it Moves Into Self-Distribution*, VARIETY (Sept. 27, 2017, 9:45 AM), https://variety.com/2017/biz/features/amazon-studios-distribution-1202573790 [https://perma.cc/DZ8L-PU9S].

88. *See* Brooks Barnes, *Netflix's Movie Blitz Takes Aim at Hollywood's Heart*, N.Y. TIMES (Dec. 16, 2018), https://www.nytimes.com/2018/12/16/business/media/netflix-movies-hollywood.html [https://perma.cc/923Z-GTMJ].

89. *See Studio Market Share Yearly Breakdown 2018*, BOX OFF. MOJO, https://www.boxofficemojo.com/studio/?view=company&view2=yearly&yr=2018&p=.htm

traditional studio in Oscar nominations,[90] and it is now a card-carrying member of the Motion Picture Association of America (MPAA), alongside the major studios.[91] But unlike those studios, its content creation is vertically integrated with its distribution system.[92] Most of its original productions never see the inside of a cinema. They debut immediately on the streaming platform.[93] And while a few prestige films get a short theatrical run in order to qualify for awards, even those are almost always available online the same day.[94]

Nevertheless, despite Netflix's disruption, box office figures still matter for the vast majority of films. There is a widespread perception among film executives that the theater is where cultural currency is established.[95] As Amazon's head of media development explained in 2017:

> [T]heaters play an important role in the movie ecosystem now, so why not participate in that? . . . Once the movie comes on the service having been in theaters, I think there is a perception that it's a legit movie: It was reviewed, and it was in a theater—it's like, a movie. It helps with customer perception, it helps with filmmakers . . . .[96]

[https://perma.cc/9AKG-MJRU] (last accessed Jan. 23, 2019) (showing that that the largest number of films released by a major studio in 2018 was Warner Bros.'s thirty-eight).

90. Sarah Whitten, *Netflix Leads Oscar Nominations With 24 Nods—A First for a Streaming Service*, CNBC (Jan. 13, 2020, 3:34 PM), https://www.cnbc.com/2020/01/13/oscars-2020-netflix-leads-oscar-nominations-with-24-nods.html [https://perma.cc/9PH8-66SW].
91. In January 2019, the MPAA announced that Netflix would become the group's first member that was not a Hollywood studio. Pamela McClintock, *Netflix Becomes First Streamer to Join the Motion Picture Association of America*, HOLLYWOOD REP. (Jan. 22, 2019, 8:38 AM), https://www.hollywoodreporter.com/news/netflix-advanced-talks-join-mpaa-1177926 [https://perma.cc/5HWL-BAH8].
92. *See Where Netflix Sees Potential—And Risks*, WALL STREET J. (Oct. 30, 2016), https://www.wsj.com/articles/where-netflix-sees-potentialand-risks-1477880280 [https://perma.cc/5WPM-BCXR] (quoting Netflix CEO Reed Hastings's comments that "producing a lot of content ourselves . . . is a form of vertical integration that's been very successful for us").
93. *See* Barnes, *supra* note 88.
94. *See id.* For discussion of the exceedingly rare exceptions that have received even a week or two of theatrical exclusivity, see Pamela McClintock & Borys Kit, *As Netflix Blinks on Theatrical Runs, Which Directors Will Get A-List Treatment?*, HOLLYWOOD REP. (Nov. 7, 2018, 6:30 AM), https://www.hollywoodreporter.com/news/as-netflix-blinks-theatrical-runs-directors-will-get-a-list-treatment-1158771 [https://perma.cc/G2XL-DZWJ].
95. *See, e.g.*, Eric Kohn, *'Netflix is My Biggest Competitor': NEON Founder Tom Quinn on Making 'I, Tonya' Into a Hit and the Company's Future*, INDIEWIRE (Mar. 26, 2018, 1:39 PM), https://www.indiewire.com/2018/03/tom-quinn-neon-i-tonya-netflix-1201943238/ [https://perma.cc/5W9Z-ELXZ] (quoting an independent studio executive's opinion that theatrical releases help "buil[d] momentum" behind a film and make it "a part of . . . the cultural fabric," unlike Netflix's direct-to-streaming approach).
96. Christian Gallichio, *Amazon Explains How Theatrical Releases Help Their Films*, PLAYLIST (Apr. 5, 2017, 1:28 PM), https://theplaylist.net/amazon-explains-theatrical-releases-help-films-20170405 [https://perma.cc/H3VW-PXTX].

Historically, there's something to this claim. Performance at the theater has tended to be a strong indicator of performance in aftermarkets.[97] According to one industry guide, "[t]heatrical exhibition is the major factor in persuading the public what they want to see, even if that public never sets foot inside a motion picture theater."[98] Whether this relationship is actually causal or merely correlative is unclear.[99] Either way, the industry repeatedly emphasizes box office revenue numbers rather than net profit because of the perceived signaling function of a strong theater turnout.[100]

Thus, notwithstanding the declining importance of theatrical sales as an independent source of profitability (or even revenue, in Netflix's case), box office performance remains a helpful window into understanding why certain kinds of films are being made and are likely to be made in the future. To that end, the next Subpart explores some trends in the direction of investment for theatrically distributed films. To what extent Netflix, or any other subscription streaming platform, might change that trend is a subject that I take up afterward in Subpart II.C.

B. The Direction of Investment in the Film Industry

Through the mid-1990s, the major Hollywood studios that comprise the MPAA accounted for all but a small fraction of films. Since then, their supply has

97. *See* Jehoshua Eliashberg et al., *The Motion Picture Industry: Critical Issues in Practice, Current Research, and New Research Directions*, 25 MARKETING SCI. 638, 647 (2006) (reviewing empirical studies).

98. BILL DANIELS ET AL., MOVIE MONEY: UNDERSTANDING HOLLYWOOD'S (CREATIVE) ACCOUNTING PRACTICES 34 (2d ed. 2006).

99. Eliashberg et al., *supra* note 97, at 648 (noting the possibility that studios spend more to advertise the films that they expect to perform best, and that therefore "it remains largely unclear to what extent and how advertising impacts sales"); *see also* Stephen Follows, *How Movies Make Money: $100m+ Hollywood Blockbusters*, FILM DATA & EDUC. BLOG (July 10, 2016), https://stephenfollows.com/how-movies-make-money-hollywood-blockbusters [https://perma.cc/6UHR-FEZH] (finding that "movies with the biggest marketing budgets do seem to gross the highest amounts at the box office" but that "[s]tudios don't have to lock in their marketing commitments until they get close to the movie's release date and so it could be that they choose to double down on the marketing when they know they have a film which is likely to perform well").

100. *See, e.g.*, Eliashberg et al., *supra* note 97, at 647; Julia Greenberg, *Netflix and Amazon Offer Indie Filmmakers Hope (And Lots of Money)*, WIRED (Jan. 28, 2016, 7:00 AM), https://www.wired.com/2016/01/netflix-and-amazon-offer-indie-filmmakers-hope-and-lots-of-money [https://perma.cc/6WDF-PY8L] (recounting the view that "filmmakers can reap a lot of information from the box office numbers that come with a theatrical release," which both "inform future filmmaking choices" and "influence how much a filmmaker is able to sell her work for in the future"); *Split Screens*, *supra* note 84.

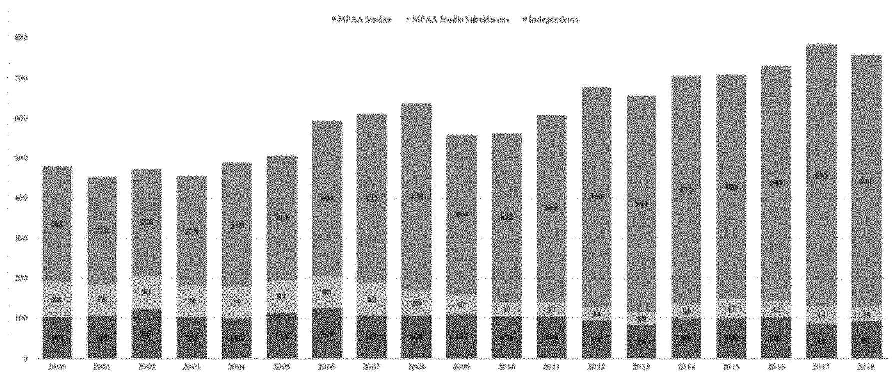
been tapering off while others' has exploded.[101] As Figure 1 below shows, the annual total has been rising over the last several years—despite a dip following the economic downturn and Hollywood writers' strike of 2007–2008[102]—as the increase in independent releases has outstripped the decrease in major-studio releases. While in 2000, independent studios accounted for 60 percent of total annual output, since 2012 their share has hovered around 80 percent. The tightest squeeze, represented below in the shrinking middle band, has occurred within MPAA member subsidiaries, a category that includes arthouse divisions specializing in smaller-budget productions (such as Fox's Fox Searchlight, Universal's Focus Features, and Sony's Sony Pictures Classics).[103] Their combined output has shrunk from over 80 films a year to under 50, only accounting for somewhere between 5 percent and 7 percent of total annual releases each year since 2010.

101. *See* Joel Waldfogel, *Cinematic Explosion: New Products, Unpredictability and Realized Quality in the Digital Era*, 64 J. INDUS. ECON. 755, 761 (2016) (charting the number of theatrical releases from the major studios on the one hand and from independents on the other between 1980 and 2012).

102. *Cf.* VIOLAINE ROUSSEL, REPRESENTING TALENT: HOLLYWOOD AGENTS AND THE MAKING OF MOVIES 40 (2017) (noting that the writers' strike "paralyzed" studios' activity but "also forced them to define another modus operandi"); Andrew Gumbel, *The New Abnormal: Tentpoles, Pre-Awareness, and the Crisis in Hollywood*, L.A. REV. BOOKS (July 26, 2013), https://lareviewofbooks.org/article/78166 [https://perma.cc/Q8YD-THGY] (quoting producer Lynda Obst's comments that the writers' strike and overall recession provided an "existential moment" when "everything came to a standstill" and "executives had nothing to do" except "examine their books and their business model").

103. *Cf. A World of Hits*, ECONOMIST (Nov. 26, 2009), https://www.economist.com/briefing/2009/11/26/a-world-of-hits [https://perma.cc/G2CA-5QMQ] (reporting on major studios' choice to "shut down or neglect[] their divisions that specialise in distributing low- and middle-budget films").

Figure 1: Domestic Theatrical Releases[104]

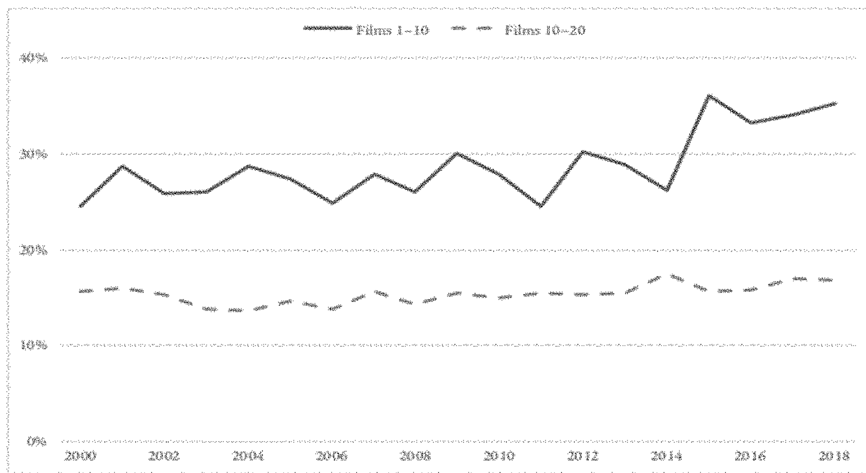


While the rise of independent cinema means that we're getting more films than ever before, those films are forced to fight over a shrinking slice of the box office pie. The theatrical market remains heavily concentrated in terms of both distributors and products. Between 1995 and 2018, the major studios along with Lionsgate Films, the largest global independent studio, combined for more than 80 percent of the total domestic box office.[105] Worldwide performance is even more top-heavy.[106] The most popular films, meanwhile, generate an increasingly concentrated share of the wealth. Using data published by Box Office Mojo, a box office reporting service, I tracked the top twenty releases' contribution to the aggregate domestic gross of all films released each year. As shown in Figure 2, films ten through twenty have consistently remained at around 15 percent of the total box office haul. The top ten, meanwhile, spent 2000 to 2014 darting between 25 percent and 30 percent. But since then, it has shot up to about 35 percent.[107] Given

104. Data is drawn from the MPAA's annual Theatrical Market Statistics reports, recently rechristened "THEME" Reports to reflect their addition of home-entertainment data, which are publicly available online. It includes all feature-length films that opened and earned any U.S. or Canadian box office revenue in a given year. *See, e.g.*, MOTION PICTURE ASS'N OF AM., THEATRICAL MARKET STATISTICS 2016, at 21 (2017). MPAA studios include Disney, Universal, Paramount, Sony, Twentieth Century Fox, and Warner Bros. The data does not include films originally distributed by Netflix, which only joined the MPAA in 2019. *See* McClintock, *supra* note 91.
105. *Distributors Market Share*, NUMBERS, https://www.the-numbers.com/market/distributors [https://perma.cc/G7SY-Z8QJ] (showing combined market share of 81.29 percent since 1995).
106. *See* S&P GLOBAL RATINGS, U.S. FILM INDUSTRY: ARE BIG-BUDGET FILMS MORE SUCCESSFUL? 3 (2018) (finding that between 2000 and 2017, the six majors and Lionsgate accounted for 95 percent of worldwide box office receipts).
107. *See* Michael Cieply, *Back to the Box-Office Future, as the Top Ten Films Eat Market Share*, DEADLINE (July 14, 2018, 1:00 PM), https://deadline.com/2018/07/box-office-future-top-ten-films-2018-black-panther-star-wars-market-share-1202426684 [https://perma.cc/XR2N-44HJ]; *see also* Ben Fritz, *Dominant Box Office Run of 'Blank Panther' Underscores a Growing*

that ticket sales have topped $11 billion each of the last several years, that 10 percent difference today translates roughly to an extra billion dollars of gross revenue for the owners of those ten films—the first percentile of the hundreds of films released each year. Not all of that billion, to be sure, is actually making its way back to the studios; the exhibitors will keep somewhere around half of it.[108] But even with that caveat, it is still a significant shift of wealth from outside the top twenty to the absolute top of the motion picture pyramid.

Figure 2: Top Films' Share of Domestic Box Office Receipts[109]



As the major studios release fewer films that capture more of the returns, production budgets have risen. Among the largest studios, the average film released between 2010 and 2017 cost 30 percent more to produce than did those released during the previous decade.[110] Disney's and Lionsgate's average budgets

Hollywood Problem, WALL STREET J. (Apr. 1, 2018, 12:39 PM), https://www.wsj.com/articles/torrid-box-office-run-of-black-panther-under-scores-a-growing-hollywood-problem-1522600746 [https://perma.cc/LF7U-EPNA] (stating that between 2015 and 2017, the top ten accounted for between 32 percent and 35 percent of annual box office receipts).

108. VOGEL, *supra* note 78, at 142–43 (discussing variations in distributor-exhibitor deals but noting that "[t]he upshot is that, on average, exhibitors have typically retained almost 50% of the box-office receipts in the United States").

109. Revenue data can be found through Box Office Mojo. *See Domestic Yearly Box Office*, BOX OFF. MOJO, https://www.boxofficemojo.com/yearly [https://perma.cc/6WW9-6X69]. The link shows overall grosses for the year; clicking through to each of the years shows the top grossing films by year. I summed the top twenty grosses and then looked at that sum as a fraction of the overall revenue for the year.

110. S&P GLOBAL RATINGS, *supra* note 106, at 7.

each more than doubled.[111] Moreover, as discussed further below, these estimates do not even include marketing expenses—a large and growing chunk of a distributor's total cost to release a film.[112]

The upshot of all this is that studios are placing fewer, bigger bets.[113] To better understand what kinds of films are meriting those bigger bets, I examined every release with a production year between 2000 and 2017 and with at least $1 of domestic box office revenue, a total of 10,456 films.[114] And I found that these bets have something in common: they're derivatives.[115] Whether measured by number of films, costs, or revenue, derivatives occupy a far larger part of the market now than they used to.[116]

Start with the simplest measure—how many movies get made. Among the six major studios, derivatives have risen from around 16 percent of annual productions to 40 percent, as shown below in Figure 3. Independent distributors,

111. *Id.*

112. *See infra* Subpart II.B.

113. *See* James Rainey, *'Increasingly Dire' Film Industry Has Fewer Winning Films, Studios (Analyst)*, VARIETY (Mar. 4, 2016, 9:07 AM), https://variety.com/2016/film/news/hollywood-dire-outlook-tentpoles-1201722775 [https://perma.cc/WAH9-Y2T9] (reporting on phenomenon of studio output becoming concentrated among "fewer, but bigger hits").

114. I used data provided by film industry analytics firm OpusData. For almost every movie released or rereleased in the United States over the last three decades, the dataset includes inflation-adjusted domestic box office grosses, estimated production budgets, the distributor's identity, the source material on which the screenplay was based (such as a book, a musical, real life events, a comic book, a television series, or an original screenplay), and a dummy variable indicating if a film is a sequel. To adjust for ticket price inflation, a film's domestic box office revenue in a given year is divided by that year's average ticket price and then multiplied by the current average ticket price of $8.97. For more information, see *Database Extracts*, OPUSDATA, https://www.opusdata.com/documentation/index.php/Database_Extracts [https://perma.cc/FFF5-2JME].

115. I define the "derivative" category to include sequels, remakes, spinoffs, and adaptations from television programs, toys, games, and theme park rides. This definition is a commercial one, not a legal one. Technically, every film is an audiovisual derivative work based on an underlying literary work (namely, the screenplay). Among the various subcategories that I have aggregated together under the "derivative" heading, the common denominator is a high likelihood of preexisting brand awareness. While it is certainly possible for a cinematization of a book or short story to meet the same criterion (especially if a book is a bestseller), the universe of these adaptations was large (1126 films) and heterogeneous, ranging from the familiar to the obscure. By contrast, the universes of adaptations of television (128 films), toys (thirteen films), games (thirty-five films), and theme park rides (seven films, five of which were Disney's Pirates of the Caribbean franchise) were each relatively small and consisted almost uniformly of brand name properties. Consistent with this approach, there is some empirical evidence that TV adaptations correlate with movie success while book adaptations do not (unless the universe of adaptations is restricted to bestsellers). *See* HENNING-THURAU & HOUSTON, *supra* note 21, at 406–08 (discussing studies).

116. As discussed above, derivative output was arguably comparable in the studio-system days of the 1930s and 1940s, but under starkly different economic conditions. *See supra* text accompanying note 73.

meanwhile, release many more original films, in most years devoting only around 5 percent of their combined productions to derivatives. Nevertheless, in absolute terms, independents are still very much getting in on the game. Figure 4 shows the number of derivative films produced each year, divided according to distributor type. While fifteen years ago the majors dominated derivative output, the last several years have seen a greater parity. Indeed, in several years independents actually accounted for more derivative films than the majors did.

Figure 3: Derivatives' Share of Total Releases

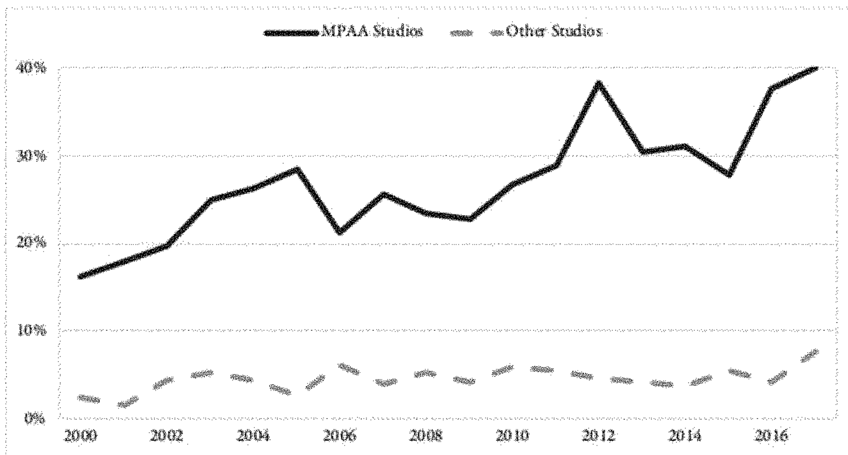
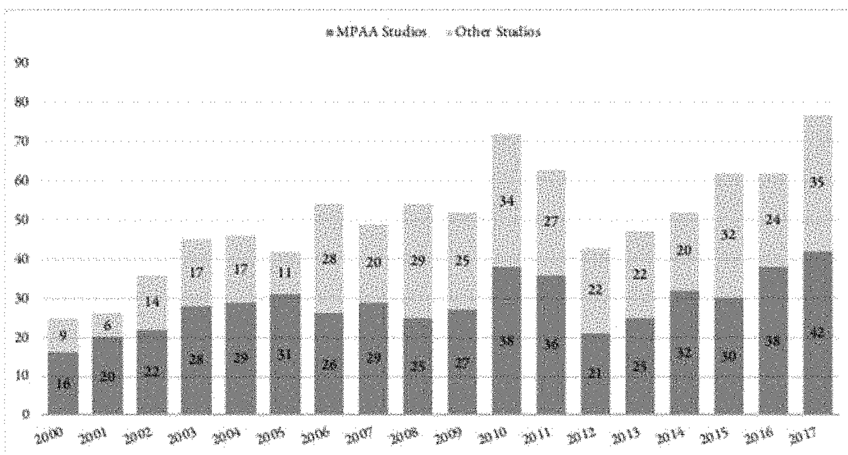


Figure 4: Total Number of Derivative Films



Not only are more derivative films being made, but the ones being made also tend to extend a franchise over a longer period than they once did. According to

the film-marketing firm FranchiseRe, the average installment number of franchise films released in 2000 was 1.7.[117] That figure consistently bounced around two for years. In 2017, however, it crossed three for the first time.[118] As of this writing in 2019 it sits at 3.6.[119] Franchises, in other words, are getting older and lengthier.

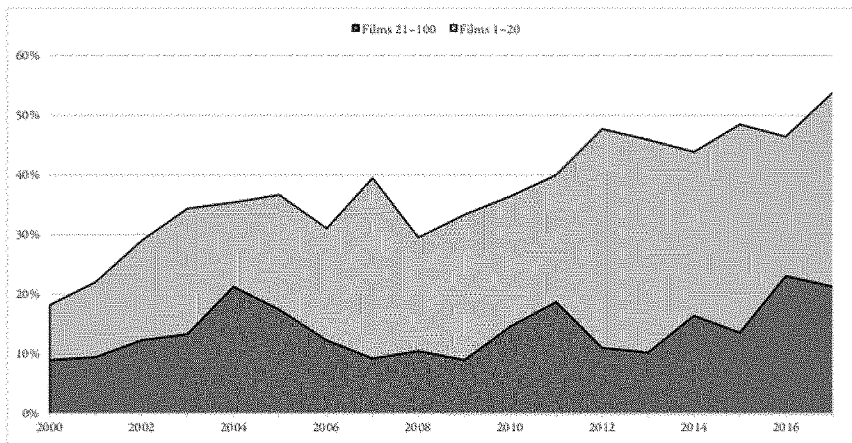
Of course, the number of films being produced does not provide a complete picture of studio priorities. In theory, original movies could cost an average of hundreds of millions of dollars, while sequels and spinoffs are churned out for a dime a dozen. But that is not what's happening. In 2011, then-Disney CFO Jay Rasulo told investors that company management "ha[d] spent a great deal of time focused on the value that franchises create for us.... [W]e think about these franchises as a key driver of how we allocate capital to creative pursuits...."[120] As a result, he explained, the company had increased the share of its film-production spending devoted to franchises from 40 percent to a whopping 80 percent.[121] Even its Pixar animation studio, which barely touched derivatives in its first ten films, has been devoting more resources to productions like *Toy Story 4* and *Cars 3*.[122]

The industry as a whole is following the same trend. Looking at the estimated budgets for the hundred most expensive films—a population that captures both high-budget and mid-budget fare—reveals that derivatives are capturing an increasing bulk of studios' production costs.[123] Figure 5 shows that, for the top hundred most expensive films produced in 2000, less than twenty cents out of every dollar was spent making a derivative. In 2007, it was forty cents. By 2017, it was more than fifty cents. As reflected in the figure's shaded bands, derivatives within the top twenty most expensive films are fueling a disproportionate amount of this increase.[124] The combined production-cost pot is growing more

117. *Current Movie Industry Charts*, FRANCHISERE, https://www.franchisere.biz/movie-industry-charts-and-trends [https://perma.cc/2U33-L38B] (see chart 4).
118. *Id.*
119. *Id.*
120. Jay Rasulo, Presentation at Disney's 2011 Investor Conference (Feb. 17, 2011), (transcript available at http://cdn.media.ir.thewaltdisneycompany.com/2011/events/ic/2011_Investor_Conference_Transcript_FINAL.pdf [https://perma.cc/9NWE-A5N6]).
121. *Id.*
122. *See* Victor Luckerson, *How Pixar Became a Sequel Factory*, RINGER (June 15, 2018, 6:30 AM), https://www.theringer.com/movies/2018/6/15/17466820/pixar-sequels-incredibles-2-disney-toy-story-finding-nemo-dory [https://perma.cc/6NRN-MQTF].
123. Without adjusting for inflation, the hundredth most expensive film between 2000 and 2017 had a median cost of $20 million and an average cost of just under $22 million. I limited my analysis to the top hundred films, rather than attempting to canvas the entire universe of domestic releases, because estimated production costs are frequently unavailable for films with the lowest budgets.
124. These budget estimates are admittedly an imprecise instrument to measure the true costs that producers and studios incur to bring these films to market. Neither those expenses nor a film's ultimate profitability are public information, leaving industry analysts to triangulate a film's tab from a motley range of available documents, executives with firsthand knowledge though

concentrated among a relatively small number of extremely expensive derivative films.

Figure 5: Derivatives' Share of Top 100 Films' Combined Production Budgets

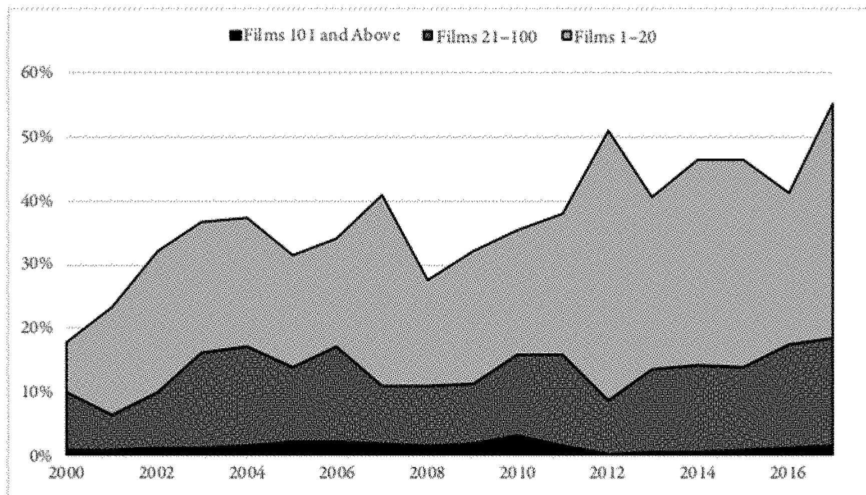


Just as studios are spending more on supplying derivative films, audiences are spending more on consuming them. Figure 6 displays derivatives' share of all films' combined domestic box office grosses. Despite some downward bounces in individual years, the derivative portion of the market has leapt upward overall. What in 2000 stood at under 17 percent has by 2017 surged to over 55 percent. In other words, even adding the combined revenue of *all* films that earned at least a dollar domestically—the complete long tail of theatrical distribution—derivatives still command a majority of the market. Once again, the bulk of that increase comes from derivatives within the top twenty films. Outside the top hundred, revenue from derivatives is essentially negligible, while the middle tier of derivatives falling between twenty-first and hundredth place has mostly hovered

questionable candor, and gossip. *See* Patrick Goldstein, *Why Everyone Lies About Their Movie's Budget*, L.A. TIMES (Jan. 5, 2009, 12:49 PM), https://latimesblogs.latimes.com/the_big_picture/2009/01/why-everyone-li.html [https://perma.cc/FR83-NULW]; *see also* John Sedgwick & Michael Pokorny, *Movie Stars and the Distribution of Financially Successful Films in the Motion Picture Industry*, 23 J. CULTURAL ECON. 319, 320 (1999) (noting "the extreme reluctance of film producers to reveal production budgets" and conceding that the lack of confirmed data is "a deficiency from which most studies in this area suffer"). These estimates are, however, the best evidence we have to work with, and many film-economics studies rely on them. *See* Tirtha Dhar et al., *The Long-Term Box Office Performance of Sequel Movies*, 23 MARKETING LETTERS 13 (2012); Amit M. Joshi & Dominique M. Hanssens, *Movie Advertising and the Stock Market Valuation of Studios: A Case of "Great Expectations?"*, 28 MARKETING SCI. 239 (2009); Sang Ho Kim et al., *Exploring the Effects of Online Word of Mouth and Expert Reviews on Theatrical Movies' Box Office Success*, 26 J. MEDIA ECON. 98 (2013).

around 15 percent. Derivatives in the top twenty, by contrast, have contributed around a third of the entire theatrical market over the last several years. Driving this top-heavy distribution is the fact that the top twenty is almost bereft of original productions. To see a top-twenty film that was made in 2017, domestic consumers spent $6.3 billion. They spent just under $4.7 billion—about three quarters of that total—on a derivative.

Figure 6: Derivatives' Share of Combined Box Office Revenues



In sum, even with a recent infusion of independent productions, both the money that filmmakers are spending to produce movies and the money that theatergoers are spending to see them have become tightly clustered among a handful of outsized bets. And those bets increasingly tend to be adaptations of preexisting source material.

C. The Industry's Possible Futures

Film's industrial organization is in flux. The box office is concentrating its supply and demand among big franchises with recognizable brands. Major studios are shrinking or eliminating their arthouse specialty divisions. The rewards are increasingly flowing out of the long tail and pooling around the most popular products. These shifts would seem to pose an existential threat to the continued supply of smaller films that cannot offer anything less than mass appeal.

Yet on-demand streaming services are trying to offer a new path to profitability. Netflix and Amazon have emerged as two of the highest bidders for independent films. They spend lavishly at prestigious festivals like Sundance and

Cannes, infusing the independent-film market with cash and offering built-in, widespread exposure.[125] Joining them recently is Apple, which as of this writing has partnered with indie studio A24 to produce new feature-length films for its new Apple TV+ service and hired strategists to position its content for Academy Awards.[126]

Unlike traditional studios, these streaming services do not need their film portfolios to make money. They just need them to convince consumers not to cancel their monthly subscriptions.[127] Filmmakers who are willing to sacrifice the upside of backend profits in return for a guaranteed buyout upfront are finding financing that studios are incapable of providing.[128] Sometimes they even toss around the words "lifesaving" and "savior" to describe the new benefactors.[129]

What's going to happen next is the subject of considerable prognostication within the industry—and any prediction I could offer here would probably age poorly. But here at least are a couple of possibilities. First, streaming might cannibalize independent filmmakers' theatrical-distribution market, leaving big-budget franchises as the only feature-length films fit for the traditional studio model.[130] That indie exodus would generate a new equilibrium split between two

125. *See, e.g.*, Sean Fennessey, *The End of Independent Film as We Know It*, RINGER (Apr. 10, 2017, 11:49 AM); Greenberg, *supra* note 100; Scott Roxborough & Rebecca Ford, *Cannes: Dealmakers Starting to Embrace Netflix Despite Disruption*, HOLLYWOOD REP. (May 19, 2017, 10:00 PM), https://www.hollywoodreporter.com/news/cannes-dealmakers-starting-embrace-netflix-disruption-1005461 [https://perma.cc/96ZV-PVC2].

126. *See* Brent Lang, *Apple Taps A24 to Produce Slate of Films*, VARIETY (Nov. 15, 2018, 12:30 PM), https://variety.com/2018/film/news/apple-a24-films-1203029800 [https://perma.cc/8526-EX4D]; Anousha Sakoui & Mark Gurman, *Apple Hires Oscar Chasers to Help It Catch Netflix*, BLOOMBERG (Mar. 15, 2019, 3:00 AM), https://www.bloomberg.com/news/articles/2019-03-15/apple-is-said-to-pursue-prestigious-awards-for-new-video-service [https://perma.cc/R78X-SQQU].

127. *See* FRITZ, *supra* note 12, at 236 (describing Amazon's and Netflix's model of releasing films in order to sell "video subscriptions, shoes, and garden hoses," and predicting—correctly, as it turned out—that Apple could soon join them in order to sell "more Apple TVs and iPads").

128. *See* Pamela McClintock, *Netflix Movies: Producers Weigh Hidden Downsides*, HOLLYWOOD REP. (Mar. 19, 2015, 5:00 AM), https://www.hollywoodreporter.com/news/netflix-movies-producers-weigh-hidden-782403 [https://perma.cc/7TQU-7BY5].

129. *See* Greenberg, *supra* note 100 (quoting one film executive's observation that "[t]he idea that the streaming services can be our new arthouse circuit is just nothing short of lifesaving for these artistic storytellers"); *see also* Tom Brueggemann, *Defending Netflix: Why the Streaming Giant May Be the Savior of Indie Film*, INDIEWIRE (May 1, 2017, 11:58 AM), https://www.indiewire.com/2017/05/defending-netflix-streaming-giant-savior-indie-film-1201808694 [https://perma.cc/4DTB-DNS7].

130. *See* Steven Zeitchik, *Is a 'Netflix Effect' Killing Prestige Films?*, WASH. POST (Nov. 29, 2018, 5:00 AM), https://www.washingtonpost.com/business/2018/11/29/is-netflix-effect-killing-prestige-films [https://perma.cc/MY7L-KAGA].

worlds: a streaming ecosystem full of niche films, and a big-studio one—likely even further consolidated than it is already—full of brand-driven spectacles.[131]

But if that split happens, the smaller films may not be available to everyone. Instead they'll likely be walled within proprietary ecosystems, the better to encourage consumers to subscribe to them. And unless those consumers are either affluent enough to subscribe to every platform or willing enough to pirate the content, the upshot would be a vastly more fractured entertainment landscape.[132]

Fractured or not, in this scenario at least nonfranchise content is still being funded. A second, more pessimistic possibility is that the current flood of streaming financing is a temporary phase rather than a longterm solution. Many doubt that Netflix's highly leveraged level of investment is sustainable.[133] It is also fair to wonder whether platforms might eventually decide that their content libraries are rich enough that they can dial down their investment without losing many subscribers.[134] Chris Moore, the producer of Amazon Studios' own Oscar-winning *Manchester by the Sea*, captured this anxiety well: "There's a window right now where they're all trying to fill up, but at some point, Amazon will have enough titles and all they'll care about are the big ones that are coming up . . . . And if you are a subscriber of Prime, which is what they care about, do you care if they have 50,000 titles or 6 million?"[135] Indeed, there's already some indication that Amazon is moving in the same direction as the major studios.[136]

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131. *See* FRITZ, *supra* note 12, at 239 (predicting that "old-school studios" will "further narrow down" their offerings to "the big, loud, and financially safe superheroes, sequels, and spinoffs" while "[o]riginal, mid-, or low-budget motion pictures for adults will increasingly play for just a few weeks, in a few dozen theaters, in major cities" and will otherwise be streamed "at home and on the go").
132. *Cf.* Karl Bode, *The Rise of Netflix Competitors Has Pushed Consumers Back Toward Piracy*, VICE: MOTHERBOARD (Oct. 2, 2018, 1:21 PM), https://motherboard.vice.com/en_us/article/d3q45v/bittorrent-usage-increases-netflix-streaming-sites [https://perma.cc/24FL-XBSW] (describing an observed rise in piracy, after years of decline, and attributing it to "the growing laundry-list of services users now need to subscribe to if they want to watch all of their favorite movies and shows," which can become "prohibitively expensive"); Westcott et al., *supra* note 86 (reporting that 47 percent of survey respondents "are frustrated by the growing number of subscriptions and services they need to piece together to watch what they want").
133. *See, e.g.*, Mark Sweney, *Netflix Puts Content Above Costs But Is the Policy Sustainable?*, GUARDIAN (May 25, 2018, 10:07 AM), https://www.theguardian.com/media/2018/may/25/netflix-puts-content-above-costs-but-is-policy-sustainable [https://perma.cc/WKS8-SPBM].
134. *Cf.* Alex Shephard, *Netflix Won't Save Prestige Cinema*, NEW REPUBLIC (Dec. 5, 2018), https://newrepublic.com/article/152530/netflix-wont-save-prestige-cinema [https://perma.cc/2PUD-XP6P] (arguing that economic pressures make streaming services "unlikely to commit for the long term to arty, mid-budget films . . . . They may temporarily slow the increasing homogenization of filmmaking in America, but they cannot reverse it.").
135. Fennessey, *supra* note 125.
136. *See* Jeffrey Dastin & Jessica Toonkel, *Exclusive: Amazon Studios to Cut Back on Indie Films in Programming Shift: Sources*, REUTERS (Jan. 18, 2018, 12:18 AM),

I take no position here on which outcome is most likely. I do take the position, however, that our existing copyright and trademark laws are playing an underexamined role in making any of these outcomes remotely possible. That claim follows in Part III.

III. CREATING FILM IN THE SHADOW OF DERIVATIVE RIGHTS

Why are we now seeing so much studio emphasis on franchises? Why does the industry now stand at an inflection point where mid- or high-budget standalone projects seem destined to become streaming-service exclusives or else nothing at all?

It may be tempting to lay these shifts at the feet of risk-averse or uncreative executives who, rather than auteurs, are in charge of greenlighting projects. That, at least, is how several recent think pieces have diagnosed the industry.[137] One prominent film journalist, for example, surmised in a widely read jeremiad:

> If you asked a bunch of executives without a creative bone in their bodies to craft a movie lineup for which the primary goal is to prevent failure, this is exactly what the defensive result would look like. It's a bulwark that has been constructed using only those tools with which they feel comfortable—spreadsheets, P&L statements, demographic studies, risk-avoidance principles, and a calendar. There is no evident

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https://www.reuters.com/article/us-amazon-com-films-exclusive/exclusive-amazon-studios-to-cut-back-on-indie-films-in-programming-shift-sources-idUSKBN1F70IG [https://perma.cc/4PSD-G2ZY] (reporting on "plans to shift resources from independent films to more commercial projects" after those initial films had served their purpose of "put[ting] it on the map in Hollywood").

137. *See* Jason Dietz, *Are Original Movies Really Better Than Derivative Works?*, METACRITIC (Apr. 21, 2011), http://www.metacritic.com/feature/movie-sequels-remakes-and-adaptations [https://perma.cc/DH4B-GBVG] (complaining that "Hollywood studios . . . will seemingly devote every resource they have to avoid developing an original idea"); *see also* Stephen Follows, *How Original Are Hollywood Movies?*, FILM DATA & EDUC. BLOG (June 8, 2015), https://stephenfollows.com/how-original-are-hollywood-movies [https://perma.cc/2M82-CXZL] (theorizing that "the environment for Hollywood movies is getting riskier and so studio execs are even more risk averse than ever before. . . . In the past few years there have been an increasing number of huge-budget failures, making Hollywood execs even more jumpy."); Amanda Ann Klein & R. Barton Palmer, *Spinoff City: Why Hollywood Is Built on Unoriginal Ideas*, ATLANTIC (Mar. 20, 2016), http://www.theatlantic.com/entertainment/archive/2016/03/cycles-sequels-spinoffs-remakes-and-reboots/474411 [https://perma.cc/3DRA-B4WA] (describing the "generalized sense that commercial cinema is losing its ability to come up with new ideas and, in its drive for profits, is finally scraping the bottom of the story-property barrel"). For an earlier version of the same argument, see Leslie Wayne, *Hollywood Sequels Are Just the Ticket*, N.Y. TIMES, July 18, 1982, at F1 (commenting that "the sky-high cost of movie making has increased the penalty of a flop, breeding caution in an industry still reeling from . . . expensive failures," and quoting a studio head's observation that "[t]here is less risk in making a sequel than in almost anything else").

> love of movies in this lineup, or even just joy in creative risk. Only a dread of losing.[138]

Acclaimed director Francis Ford Coppola sounded a similar note of alarm a few years ago at the Marrakech Film Festival. If you try to find a producer to make a film "that hasn't been made before," he explained, then "they will throw you out because they want the same film that works, that makes money. . . . [T]hey don't want you to risk anymore. They don't want you to take chances."[139]

Indeed, reducing project-specific risk is probably the most common explanation for derivatives' dominance.[140] Sequels have been called "a deliberate Hollywood strategy to control the risk inherent in making an expensive product for tens of millions of people whom studios do not know and will never meet."[141] Insiders often concede as much. In a 2014 earnings call, Disney CEO Bob Iger observed that "[w]hile there is no sure thing in a creative business, we believe the proven appeal of our brands and franchises reduces risk and maximizes our unique ability to create significant long-term value by leveraging successful content across our diverse array of businesses."[142] Years earlier, a former Sony head noted that studios prefer derivatives because "[t]here's more and more preoccupation with the downside . . . concern about risk-aversion."[143]

Perhaps executives are indeed more averse to risk than they used to be. But I doubt it. The film industry's commercial need to satisfy the market is old. Its colonization by derivatives is new. Yes, the major studios are now more subsumed

138. Mark Harris, *The Birdcage*, GRANTLAND (Dec. 16, 2014), http://grantland.com/features/2014-hollywood-blockbusters-franchises-box-office [https://perma.cc/34ZR-XA9Y].
139. Ariston Anderson, *Francis Ford Coppola: On Risk, Money, Craft & Collaboration*, 99U (Jan. 5, 2011), https://99u.adobe.com/articles/6973/Francis-Ford-Coppola-On-Risk-Money-Craft-Collaboration [https://perma.cc/9JQR-AYXZ].
140. *See* Casey & Sawicki, *supra* note 9, at 1733 (noting this trend); *see also* BENJAMIN HUNT, THE TIMID CORPORATION: WHY BUSINESS IS TERRIFIED OF TAKING RISK 132 (2003) (describing studios' attraction to franchises as "largely about avoiding risk," where "[t]he aim of the franchise, like brand building, is to build up a loyal customer base in order to minimize the risks of new releases"); Eliashberg et al., *supra* note 97, at 642 ("[S]tudios are coping with risk [by] pursuing franchises based on properties with demonstrated appeal in the marketplace."); Benjamin A. Goldberger, *How the "Summer of the Spinoff" Came to Be: The Branding of Characters in American Mass Media*, 23 LOY. L.A. ENT. L. REV. 301, 329 (2003) ("Like adaptations, sequels are of tremendous importance in the movie industry because they offer more predictable revenues. . . . [S]equels are a far surer bet for a studio than a brand new film.").
141. Derek Thompson, *Hollywood Has a Huge Millennial Problem*, ATLANTIC (June 8, 2016), https://www.theatlantic.com/business/archive/2016/06/hollywood-has-a-huge-millennial-problem/486209 [https://perma.cc/TW7L-N5DW].
142. Kang, *supra* note 69.
143. Claudia Eller & James Bates, *In Hollywood, More Business Than Show?*, L.A. TIMES (Aug. 13, 1999, 12:00 AM), http://articles.latimes.com/1999/aug/13/news/mn-65227 [https://perma.cc/5VNE-6EVV] (second alteration in original).

within global entertainment conglomerates. But even when standing on their own they still had to manage risk. There's likely more to this story than simply a generational fear of the unknown.

In this Part, I make a descriptive case for what the rest of that story is—and the undertheorized role that our copyright and trademark laws play in it. There are other contributing factors, to be sure, before IP ever arrives on the scene. They are the subject of Subpart III.A below, which documents why derivative films would likely attract disproportionate investment even without market exclusivity being granted to the owner of the underlying work. For starters, as the number of major-studio releases shrinks to a few big bets every year, derivatives do tend to carry less risk, just as the dominant account says.[144] Independent of risk, though, their expected value on average should also be higher. At a time when cutting through the media clutter is harder than it used to be, they tend to be easier to market;[145] at a time when the North American theatrical market has essentially plateaued, they're more popular in foreign territories;[146] and at a time when the studio herd has already converged around a franchise-based strategy, they're better for individual managers' reputational capital.[147]

But as Subpart III.B argues, all of those market factors are intensified by the exclusivities that copyright and trademark law inject into them. These exclusivities are a policy choice. They represent IP law's hidden hand in guiding which movies get made and which ones do not.

A. Derivatives' Changing Market Value

The domestic theatrical market is flat. After adjusting for inflation, box office revenue today is roughly where it was in the late 1990s.[148] In fact, the number of tickets sold has actually fallen.[149] Fewer people regularly go out to see movies anymore, leaving a small group of especially devoted theatergoers to sustain the entire revenue stream.[150] Rising ticket prices, not rising viewership, is the only reason box office revenues have even managed to hover at their current plateau.

144. *See infra* Subpart III.A.1.
145. *See infra* Subpart III.A.2.
146. *See infra* Subpart III.A.3.
147. *See infra* Subpart III.A.4.
148. *See Domestic Movie Theatrical Market Summary 1995 to 2019*, NUMBERS, https://www.the-numbers.com/market [https://perma.cc/D98M-252K].
149. *See id.*; *see also* Faughnder, *supra* note 84.
150. In 2018, only 12 percent of American and Canadian moviegoers (defined as over two years old) went to a movie theater at least once a month, yet that group accounted for almost half the tickets sold. MOTION PICTURE ASS'N OF AM., *supra* note 86, at 24. In 2000, by comparison, that figure was 30 percent. See *Split Screens*, *supra* note 84.

Studios have thus needed to look to other revenue streams for growth. As discussed earlier, for a while that meant DVDs and Blu-Ray, but those markets have been in rapid decline.[151] The inability of little plastic discs to bring in significant revenue effectively halved studios' profit margins.[152] Of course, the demise of disc might not pose much of a threat if streaming could make up the difference. Subscription streaming revenue, which has been surging for years, surpassed disc sales in 2016—probably permanently.[153] In 2018, while disc sales dropped to an estimated $4 billion, subscription fees to streaming platforms combined for an estimated $12.9 billion.[154]

But so far that comeback remains incomplete. Studios realize lower profit margins on licensing online transmission than they do on selling physical media.[155] This difference is unsurprising given the distribution bottleneck in the market thus far dominated by Netflix and Amazon; studios naturally have more leverage when distributing physical product through multiple brick-and-mortar retailers than when forced to work through a particular platform with an already locked-in audience. Perhaps, as some have argued, an increasingly credible threat of piracy also depresses the royalty rates that licensors are willing to accept.[156] In

151. *See supra* text accompanying note 84.
152. *See* LYNDA OBST, SLEEPLESS IN HOLLYWOOD: TALES FROM THE NEW ABNORMAL IN THE MOVIE BUSINESS 37 (2013).
153. *See* Andrew Wallenstein, *Home Entertainment 2016 Figures: Streaming Eclipses Disc Sales for the First Time*, VARIETY (Jan. 6, 2017, 10:31 AM), http://variety.com/2017/digital/news/home-entertainment-2016-figures-streaming-eclipses-disc-sales-for-the-first-time-1201954154 [https://perma.cc/6U28-Y8FX].
154. Arnold, *supra* note 85.
155. *See* Mark Sweney, *Falling DVD Sales Put Boot Into Profits at Sony Pictures*, GUARDIAN (Feb. 3, 2017, 11:16 AM), https://www.theguardian.com/film/2017/feb/03/sony-pictures-dvd-sales-profits-streaming [https://perma.cc/AKU3-WPF6] (quoting an industry analyst's observation that "[t]here is more value per unit for a studio in the sale of a DVD than in providing a film or TV show" to a streaming platform, and that as a result "[g]rowth in the digital retail and rental market is not compensating for declines in the physical market, which have been falling for a decade"); *see also* Ulin, *supra* note 80, at 53–54 (quoting a studio executive's take that "the incremental additional revenue generated through new media distribution . . . has not provided increases in revenue at the same volume and velocity as revenue has decreased from shrinking DVD sales. In other words, the flattening of the growth in old media distribution is not being completely replaced by the incremental revenue generated by new media digital distribution.").
156. *See* ANITA ELBERSE, BLOCKBUSTERS: HIT-MAKING, RISK-TAKING, AND THE BIG BUSINESS OF ENTERTAINMENT 236–37 (2013) (arguing that "[t]he threat of piracy" and "the lower perceptions among consumers of what price is reasonable," which is itself affected by the availability of pirated content, has made it harder for entertainment products other than blockbusters to attain profitability); *cf.* Peter Kafka, *Here's Why the Music Labels Are Furious at YouTube. Again.*, VOX: RECODE (Apr. 11, 2016, 4:00 AM), https://www.recode.net/2016/4/11/11586030/youtube-google-dmca-riaa-cary-sherman [https://perma.cc/FDW2-6LC4] (quoting a music industry executive's argument that licensors have less bargaining power to hold out for higher royalty rates from YouTube because it can always threaten, "[I]f

any event, the shift to streaming has effectively shrunk studios' revenue pie. The exclusive right to publicly perform a feature-length film or reproduce it in copies is essentially worth less on average than it used to be.

It is getting harder not only to monetize a film through traditional channels, but also to get consumers to pay attention to it at all. There's a glut of audiovisual content out there, thanks to the effectively neverending shelf space of streaming inventories. The increasingly saturated supply of entertainment options means more competition for consumers' dollars, hours, and attention spans.[157] The major studios have discovered that in order to entice viewers away from their homes and out to the theater, it helps to have a film that feels like a cultural event.[158] So they've concentrated their spending among a few annual blockbusters, rather than spreading investment across a larger and more diverse range of films. These tentpole productions, so named because once upon a time they were supposed to prop up the frame that housed other kinds of films, have become a misnomer. There's no more tent. Only poles.[159]

Why, though, do those blockbusters need to be strung together into franchises? Why not just make standalone—but still spectacle worthy—productions? The answer spans several factors. To begin with, contemporary audiences may simply tend to have stronger demand for derivative films. As Subpart II.B confirmed, they are at least spending more money to see them.[160] Without more, that fact does not yet confirm anything about preference strength. Derivative films' higher demand could simply be driven by studios predicting that they will perform more successfully and therefore lavishing more production and

you don't want to give us a license, okay. You know that your music is still going to be up on the service anyway."); Warner Music Group, Comment Letter on U.S. Copyright Office Section 512 Study: Notice and Request for Public Comment, at 10 (Mar. 31, 2016), https://www.regulations.gov/document?D=COLC-2015-0013-86022 [https://perma.cc/MBA9-M85R] (arguing that the Digital Millennium Copyright Act's safe harbors for online service providers put licensors in "an unfair negotiating situation" in which an online service that relies on those safe harbors will "expect that royalty rates must be discounted because of the possibility of that service's relying on [a safe harbor] for its content acquisition as an alternative to a license").

157. *See* FRITZ, *supra* note 12, at 114–15 ("In the past, if a major studio put its resources behind a movie, it was virtually certain to gross at least $15 million. But now, with big franchise films sucking up the oxygen in multiplexes and with most of the cultural buzz about interesting dramas centered on television, a new dramatic movie could come and go unnoticed, as if it never existed.").

158. *See* Faughnder, *supra* note 84.

159. *See* FRITZ, *supra* note 12, at xix ("'[E]vent' movies have been around for more than forty years, since Jaws . . . But they used to just be one element of a studio's strategy. Tentpoles got that name because they were supposed to hold up a structure that also contained dramas, romantic comedies, adult thrillers, and even totally original ideas.").

160. *See supra* Subpart II.B. Indeed, several earlier studies of sequel value have found a 20–30 percent revenue increase. HENNING-THURAU & HOUSTON, *supra* note 21, at 389.

marketing resources on them.[161] If that were the case, then these films' success would say more about studios' beliefs than consumers' true interests.

To get around that problem, marketing scholars Thorsten Hennig-Thurau, Mark Houston, and Torsten Heitjans attempted to compare derivative films with original films that were otherwise similar.[162] They examined domestic theatrical releases from 1998 to 2006 and matched each of that period's 101 initial sequels (that is, excluding any franchise installments beyond the second) with the three original films that matched it most closely across several characteristics.[163] Using the inflation-adjusted sum of theatrical and home-video revenue as their dependent variable, they found that on average the sequels outperformed the originals $175 million to $138 million, an increase of roughly 27 percent—all for the same cost of production.[164] Such statistical matching is necessarily a rough proxy. But to the extent that the study's similarity measures are valid, it suggests that domestic audiences do indeed tend to reveal a greater willingness to pay for sequels than for originals.

Even if it turns out that the current box office boom is not a fair reflection of average consumer taste, studios have plenty of other commercially compelling reasons to invest in derivative films rather than standalone ones. The following Subparts walk through them.

1. Risk Reduction

There's a lot to lose in the movie business. All the production budget figures cited throughout this Article underrepresent the actual bill for bringing a film to market, which also includes various other costs like marketing, financing, and overhead.[165] As of 2007, the last year that the MPAA reported the relevant data, the average budget for a feature film was nearly $107 million.[166] For any given project, there's a good chance that these expenditures will never be recouped. Not only might a greenlighted project fail to reach completion, but even those that do face

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161. *See id.* at 391–92 (describing this "treatment bias" difficulty with interpreting sequels' systematically higher box office returns).
162. Thorsten Hennig-Thurau, Mark B. Houston & Torsten Heitjans, *Conceptualizing and Measuring the Monetary Value of Brand Extensions: The Case of Motion Pictures*, 73 J. MARKETING 167 (2009).
163. *Id.* at 169–70. The variables were production budget, distribution intensity, rating, star power, cultural familiarity from an existing brand in a different product category, and genre. *Id.* at 169–71.
164. *Id.* at 173.
165. One recent analysis found that a film with a $150 million production budget would typically cost over $400 million to bring to market. Follows, *supra* note 99.
166. Jonathan M. Barnett, *Copyright Without Creators*, 9 REV. L. & ECON. 389, 396–97 (2013).

famously low odds of reaching profitability.[167] According to an analysis by the accounting firm Deloitte, for example, fewer than one in five major movies released in 2017 earned back its production and marketing costs.[168]

Much of the difficulty is forecasting the right projects to bet on. The industry's most famous tagline is "nobody knows anything."[169] Studios routinely pass on movies that go on to succeed wildly.[170] They also regularly make major investments in projects that go on to fail.[171] Against that highly uncertain backdrop, a bit of predictability goes a long way. Remakes, sequels, and spinoffs provide it. The same marketing study that found that sequels offered higher average returns also found that they carried lower average risk.[172] Another study that examined 143 franchises released in theaters before 2014 determined that the further into a franchise sequence a particular installment is, the easier it is to predict that installment's revenue (though, as a tradeoff, the less revenue the film tends to earn).[173]

The relationship between derivatives and risk management is intuitive. Making a derivative of a successful work may not guarantee success, but it at least helps the odds. The market, after all, has already endorsed the underlying product.[174] One film journalist recounts an apparently typical instance in which Paramount rejected a project, despite "attached stars, an approved script, and a bankable director," by explaining: "It's a terrific idea, too bad it has not been made into a movie already or we could have done the remake."[175]

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167. *See* Eliashberg et al., *supra* note 97, at 642 (listing the various risks that studios take on and explaining why most films never recoup their production and advertising costs).
168. Jeff Loucks, *Look Beyond Superheroes to Save Movie Theaters*, WALL STREET J.: CMO TODAY (Dec. 5, 2018, 9:01 PM), https://deloitte.wsj.com/cmo/2018/12/05/look-beyond-superheroes-to-save-movie-theaters [https://perma.cc/DBN2-6YJF].
169. The oft-invoked phrase was first popularized by screenwriter William Goldman as "the single most important fact, perhaps, of the entire movie industry." WILLIAM GOLDMAN, ADVENTURES IN THE SCREEN TRADE: A PERSONAL VIEW OF HOLLYWOOD AND SCREENWRITING 39 (1989).
170. Raiders of the Lost Ark, for example, was turned down by every studio except one. *Id.* at 40–41. Goldman's perceptive take: "Why did Paramount say yes? Because nobody knows anything. And why did all the other studios say no? Because nobody knows anything." *Id.* at 41.
171. I trust that you can probably supply your own example here. But if not, there's always The Adventures of Pluto Nash.
172. Hennig-Thurau, Houston, & Heitjans, *supra* note 162, at 173. The study measured risk as the average percentage errors that result from comparing actual revenue with the revenue that a regression analysis would have predicted.
173. Darren Filson & James H. Havlicek, *The Performance of Global Film Franchises: Installment Effects and Extension Decisions*, 42 J. CULTURAL ECON. 447, 458–61 (2018).
174. *See* Casey & Sawicki, *supra* note 9, at 1733; *see also* Michael Abramowicz & John F. Duffy, *Intellectual Property for Market Experimentation*, 83 N.Y.U. L. REV. 337, 394 (2008).
175. EDWARD JAY EPSTEIN, THE HOLLYWOOD ECONOMIST 185 (2010); *see also* HENDERSON, *supra* note 73, at 73–74 (noting that because studios' various ancillary markets "tend to be driven by theatrical success, the perceived (as opposed to actual) predictability of sequel revenues at the

So there's indeed truth to the argument that studios make derivative films because the returns are more predictable. But as the next Subparts show, even managers who are risk-neutral have plenty of reason to favor investing in derivative rather than original productions.

2. Marketing Expenses

> "Marketing is the single most discussed and debated issue in Hollywood. But cutting through the clutter and building awareness takes money."
>
> –Terry Press, President of CBS Films[176]

Gaudy production budgets may get the headlines, but the cost of filling the seats also ratchets up a film's price tag. Generating buzz about a film before its release is important not only for increasing box office revenue in the short term, but also for potentially stimulating a cascade of downstream revenue streams in the long term.[177] Robust marketing campaigns also help secure interest from both theatrical exhibitors and potential licensees for merchandising tie-ins.[178]

The timeframe for a major motion picture to succeed runs its course in a few weeks (and failures are often apparent after just a single weekend).[179] That is a short—and thus critically important—runway for ensuring a successful product launch. The marketing saturation necessary to draw moviegoers to a particular film does not come cheap—an estimated $3.2 billion was spent on ads across the film industry as of 2012.[180] As digital technologies bring down production and distribution costs, yielding a more crowded entertainment environment, that

box office brings with it the perceived predictability of success in these ancillary markets, thus further reinforcing the perception of the form's earning potential").

176. Quoted in Pamela McClintock, *$200 Million and Rising: Hollywood Struggles with Soaring Marketing Costs*, HOLLYWOOD REP. (July 31, 2014, 5:00 AM), https://www.hollywoodreporter.com/news/200-million-rising-hollywood-struggles-721818 [https://perma.cc/4SWN-9KTM].
177. *See, e.g.*, EPSTEIN, *supra* note 175, at 177–78 ("For the vast majority of its films . . . a studio has to look to recoup its losses in later markets on the theory that expending huge sums on its American opening will help the movie wrangle more advantageous play in foreign markets, sell more DVDs in video stores, and increase the licensing fees paid by pay-TV.").
178. *Id.* at 185–86.
179. *See* Larry Gerbrandt, *Does Movie Marketing Matter?*, HOLLYWOOD REP. (June 10, 2010, 5:42 PM), http://www.hollywoodreporter.com/news/does-movie-marketing-matter-24514 [https://perma.cc/FG4V-K5SD]. ("[T]here might not be a more daunting challenge than opening a major motion picture: Create an internationally recognized brand name that lasts a lifetime, and do it in a couple of weeks with no second chances to course-correct.").
180. Gabriel Beltrone, *A By-the-Numbers Look at Hollywood's Marketing Machine*, ADWEEK (Feb. 24, 2014), http://www.adweek.com/brand-marketing/numbers-look-hollywood-s-marketing-machine-155895 [https://perma.cc/B6AA-6UN7].

marketing cost should only go up.[181] Unsurprisingly, then, advertising expenditures are rising, far outstripping inflation.[182]

Because there's no such thing as brand loyalty to studios (except, notably, Disney), distributors need to build an audience from scratch for every picture they release.[183] That kind of effort does not scale easily. Indeed, the average cost of getting a customer into the theater is greater than the studios' average share of box office revenue.[184] Put differently, that means that studios are losing money just trying to sell their product. This strategy works so long as the expenses can be recouped in ancillary markets. But generating enough excitement to get people into the theater can cost tens of millions of dollars, up to—and sometimes beyond—half the cost of producing the film itself.[185] When each film requires an expensive and individualized marketing blitz, it makes sense to focus spending on fewer projects, just as the major studios have done.

At the same time, with fewer opportunities for profit, any failure looms larger. Studios are thus under even more pressure to market new products effectively. When a new film extends a brand already built by preexisting content, be it a prior film, a comic book, or even a theme park ride, that task becomes much easier. The name recognition among consumers comes prepackaged.[186] As one

181. *See* OBST, *supra* note 152, at 243 (describing a "worrisome" trend in which "the cost of marketing these [big-budget] movies has increased to the point that it keeps the heads of studios up at night"); Barnett, *supra* note 166, at 416, 419 (describing the inverse relationship between marketing and production costs, where "lower entry costs for artists imply higher search and evaluation costs for users," *id.* at 419).

182. *See* VOGEL, *supra* note 78, at 108–09 ("Between 1980 and 2013 . . . average marketing costs [for a major-studio picture] soared from $4.3 million to an estimated $40.0 million."); Stephen Follows, *The Cost of Movie Prints and Advertising*, FILM DATA & EDUC. BLOG (Feb. 27, 2017), https://stephenfollows.com/prints-and-advertising [https://perma.cc/66RN-A3BT] (finding that major studios' average, inflation-adjusted advertising costs rose from around $15 million in 1989 to around $40 million in 2007, the most recent year that the MPAA collected this data).

183. Indeed, the brands that successful movies help the most are usually not the studios' but those of third parties. *See* Adam Davidson, *When You Wish Upon 'Ishtar' . . . : How Does the Film Industry Actually Make Money?*, N.Y. TIMES MAG., July 1, 2012, at 16 ("[M]ost people don't even notice which studio made which movie. . . . In fact, movie studios are much better at helping brands they don't own [such as] certain stars, directors, producers and source material . . . .").

184. EPSTEIN, *supra* note 175, at 176–78.

185. *See* VOGEL, *supra* note 78, at 154 ("[S]tudios will often readily add 50 percent to a picture's production budget, just for advertising and publicity."); Bailey, *supra* note 13; Follows, *supra* note 99 (finding that, among movies with a production budget of $100 million or more, the average marketing cost was 81 percent of the production budget and 29 percent of total cost); Follows, *supra* note 81 (finding that, among movies with a production budget of between $30 million and $100 million, the average marketing cost was between 100 percent and 120 percent of the production budget across all genres).

186. *See* Kung & Schuker, *supra* note 69; Jacob Bogage, *Why Film Studios Really Like Movie Remakes*, WASH. POST (Aug. 23, 2016, 10:26 AM), https://www.washingtonpost.com/news/wonk/wp/2016/08/23/why-film-studios-really-like-movie-remakes [https://perma.cc/U3ZP-

industry analyst put it, a derivative film is "like producing [three] film[s] for the price of [one], if you factor in all the advertising the first movie does for the rest of the series."[187]

That brand recognition does not necessarily mean that studios can get away with spending less to market a derivative film. Were it so, one would expect that each new installment in a franchise would cost less to market than its predecessor. But a recent study examining inflation-adjusted advertising expenditures for franchise films found that they essentially stayed the same across all installments.[188] So it is not as if advertising derivative films is allowing studios to keep a few more dollars in their pockets. Perhaps, though, the dollars being spent go further.[189]

Theatrical exhibitors recognize this marketing advantage. As a result, they may more readily sign on to screening a brand-name film, lowering the studio's cost of wide theatrical distribution.[190] For similar reasons, studios may be better positioned to clear presales of downstream rights, a potentially major source of financing.[191]

Derivative films, in other words, do not just exhibit less volatility in outcomes. They are actually more cost-effective to sell. That raises their expected value, entirely independent of their risk profile. Once marketing costs are taken into account, a thoroughly risk neutral firm (or, depending on the numbers, even a modestly risk-seeking one) could still rationally prefer to invest in a derivative work over an original one with the same production budget.

3. Succeeding in Foreign Markets

Perhaps Hollywood's biggest revenue gain offsetting the decline in DVD sales is the foreign theatrical market. In 2018, it accounted for 71 percent of

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WEXC]. Mark Harris has argued that sequels have recently been shifting away from serial narrative and more toward pure brand extensions meant to keep an existing franchise commercially relevant. Mark Harris, *The Sequels of 2016 Aren't About Storytelling; They're Just Brand Extensions*, VULTURE (June 22, 2016), http://www.vulture.com/2016/06/definition-of-sequel-has-changed.html [https://perma.cc/Q796-6WBK].

187. Bogage, *supra* note 186. The original quote is written as "one film for the price of three," but context makes reasonably clear that the comparison was inadvertently flipped.

188. *See* Filson & Havlicek, *supra* note 173, at 453, 455.

189. *See* Wayne, *supra* note 137, at F17 ("Advertising and marketing costs do not drop, but movie executives say advertising dollars spent on a sequel are more effective because the public is already familiar with the film.").

190. Eliashberg et al., *supra* note 97, at 642 (arguing that "sequels might be more cost-efficient to develop and market" because "[e]xhibitors and other players will display more enthusiasm for a well-established movie property").

191. *See* Thomas Schatz, *The New Hollywood*, *in* 15 MOVIE BLOCKBUSTERS 35 (Julian Stringer ed., 2003).

worldwide box office grosses.[192] The consensus is that the domestic market has matured; any new audiences to be found will be located in developing economies' ascendant middle classes. The top prize among these new territories is China, the second largest film market in the world, behind the United States.[193] China is gaining an astonishing number of new multiplexes and has relaxed certain regulations on foreign-film exhibition, turning it into a booming market for Hollywood productions.[194]

To be fair, when it comes to ultimate profitability, comparing domestic and foreign theatrical receipts is not truly apples to apples. Studios typically retain a larger share of the box office gross in the United States and Canada then they do in other territories.[195] Nevertheless, the take-home pay is still large enough that the industry has reshaped itself around a global consumer base. As the CEO of the IMAX Corporation has observed, studio decisionmakers who used to ask "What are the DVD sales going to be?" now ask "How's the movie going to do in China?" when considering whether to greenlight a film.[196]

The films that play best in these foreign markets are franchises. Advertising a film in every territory is more difficult than doing it at home, so studios prefer to rely on existing brand recognition.[197] And if a particular franchise features less culturally-specific dialogue or humor and more action sequences—a universal

192. MOTION PICTURE ASS'N OF AM., *supra* note 86, at 8. For historical splits between domestic and foreign box office grosses, see VOGEL, *supra* note 78, at 98–101.

193. *See* MOTION PICTURE ASS'N OF AM., *supra* note 86, at 10; Fei Peng et al., *Star Power and Box Office Revenues: Evidence from China*, 43 J. CULTURAL ECON. 247, 251 (2019).

194. *See* Hannah Beech, *How China Is Remaking the Global Film Industry*, TIME (Jan. 26, 2017), http://time.com/4649913/china-remaking-global-film-industry [https://perma.cc/M6G2-5R7A]; Stephen Follows, *How Important is International Box Office to Hollywood?*, FILM DATA & EDUC. BLOG (May 15, 2017), https://stephenfollows.com/important-international-box-office-hollywood [https://perma.cc/9B8D-4UYC].

195. *See* Stephen Follows, *The Rise and Rise of the Film Business in China*, FILM DATA & EDUC. BLOG (Jan. 26, 2015), https://stephenfollows.com/film-business-in-china [https://perma.cc/7PGB-QXQW] (describing Hollywood studios' lower revenue shares and higher marketing costs when distributing films in China); *Split Screens*, *supra* note 84 ("[E]ven though studios are selling more tickets in emerging markets like Russia and China, they are taking home less money for their hits. In America the big studios keep around half of box-office receipts. In China Hollywood studios keep only a quarter.").

196. FRITZ, *supra* note 12, at 204–05.

197. *See* Matthew Garrahan, *The Rise and Rise of the Hollywood Film Franchise*, FIN. TIMES (Dec. 12, 2014), https://www.ft.com/content/192f583e-7fa7-11e4-adff-00144feabdc0 [https://perma.cc/7F8H-BHWW]; see also OBST, *supra* note 152, at 243 ("While the business has survived its DVD crisis by opening all these new markets abroad, the cost of doing so is astronomical and rising.").

cinematic language—so much the better.[198] There's also some evidence that Chinese consumers prefer sequels to standalone films.[199] Even blockbuster productions that underperform in the United States can succeed wildly there.[200] Seeking to explain this trend, one analyst has conjectured that audiences in developing countries tend to prefer famous Hollywood film brands the same way they might prefer prestige brands of apparel or perfume.[201] Another thinks that these audiences flock to blockbuster franchises because they're the film type that Hollywood (for now) still reliably makes better than do their respective domestic markets.[202] Whatever the cause, the major studios have internalized the lessons of the effect. An increasingly global viewership means an increasingly branded film supply.

4. The Private Cost of Unconventional Failure

> "Worldly wisdom teaches that it is better for reputation to fail conventionally than to succeed unconventionally."
>
> –John Maynard Keynes[203]

Apart from a firm's bottom line, individual executives may have professional incentives to herd within the confines of a successful model. Even if taking a given risk carries a higher expected value in terms of studio profit, it might carry a lower expected value in terms of managerial reputation.

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198. *See Split Screens*, *supra* note 84 ("Independent filmmakers can still make money on surprise hits but these have limited markets abroad: American dramas and comedies tend not to perform as well overseas as cartoon and action flicks.").
199. *See* Fiona Sussan & Ravi Chinta, *Converging and Diverging Forces on Customer Satisfaction: Comparative Empirical Analysis of Hollywood Movies in the U.S. and China*, SAM ADVANCED MGMT. J., Spring 2016, at 31, 41.
200. *See, e.g.*, Bogage, *supra* note 186; Rebecca Keegan, *Why Hollywood Needs Chinese Movie-goers More Than Ever This Summer*, VANITY FAIR (June 26, 2017), https://www.vanityfair.com/hollywood/2017/06/hollywood-blockbusters-china-box-office [https://perma.cc/YPE2-MHFN] (quoting a Paramount marketing executive's comment that "China loves the spectacle . . . . More mature markets like the U.S. and Europe are atrophying. But in newer markets like Latin America and Asia, they like it when their favorite movies come back bigger and better.").
201. FRITZ, *supra* note 12, at 23; *cf.* Sanjay Sood & Xavier Drèze, *Brand Extensions of Experiential Goods: Movie Sequel Evaluations*, 33 J. CONSUMER RES. 352, 352 (2006) (characterizing studios as "branding movies in a way similar to that in which consumer-packaged-goods manufacturers brand their products").
202. *See* Keegan, *supra* note 200 (noting that China's domestically produced romances and dramas still play perfectly well there and theorizing that "China's affection for Hollywood movies is mainly restricted to one genre: the kind of movies China can't make itself").
203. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT INTEREST AND MONEY 158 (1936).

In an idealized world, one could avoid committing errors altogether. Firm profit and individual reputation would then be perfectly aligned. But errors are, of course, inevitable. And when a decisionmaker commits one, it is usually safer to be able to point to peers who made the same mistake. The blame can be shared among a larger group of people, all of whom could be perceived to have reasonably followed the same market signals.[204] When a nonconformist commits a mistake, by contrast, he could be perceived to have unreasonably followed meaningless noise. If one wants to minimize the professional cost of error, it makes sense ex ante to favor mimicry rather than divergence. For that reason, as economists David Scharfstein and Jeremy Stein famously theorized, a manager sufficiently concerned about her personal reputation could rationally imitate others' investment decisions even if her private information suggests that the decision's expected value to the firm will be negative.[205]

So it is with film investments. The notion of herd behavior is familiar within Hollywood.[206] James Schamus, the head of Focus Features, captured the current zeitgeist this way:

> Fear has descended . . . and nobody in Hollywood wants to be the person who green-lit a movie that not only crashes but about which you can't protect yourself by saying, "But at least it was based on a comic book!"[207]

Herding in the movie business occurs on two levels. On the micro level, each derivative of a successful work ties itself to that work. On the macro level, every decision to produce a derivative ties itself to the universe of other decisions to produce derivatives. And on both levels, managers may plausibly predict higher reputational returns from sticking with the crowd. The combined effect is a further pressure on studios to choose derivatives rather than standalone productions. Even if a sequel fails to earn either profits or plaudits, in an industry

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204. *See* David S. Scharfstein & Jeremy C. Stein, *Herd Behavior and Investment*, 80 AM. ECON. REV. 465, 466 (1990).

205. *Id.*; *see also* Eric Bonabeau, *The Perils of the Imitation Age*, HARV. BUS. REV., June 2004, at 45, 47 (quoting a McKinsey director's observation that "[f]or most CEOs, only one thing is worse than making a huge strategic mistake: being the only person in the industry to make it").

206. *See, e.g.*, FRITZ, *supra* note 12, at 145 ("Hollywood is a herd industry. . . . For those peering at Disney, that means slashing the number of movies made per year by two-thirds. It also means largely abandoning any type of film that costs less than $100 million, is based on an original idea, or appeals to any group smaller than all the moviegoers around the globe."); *Fading Stars*, ECONOMIST (Feb. 27, 2016), http://www.economist.com/news/business/21693591-hollywood-studios-can-no-longer-bank-pulling-power-famous-actors-fading-stars [https://perma.cc/8VGS-NXNV] ("[I]f [Hollywood executives] make a flop with a big name in it, they are less likely to have to defend their decision to green-light the film.").

207. Harris, *supra* note 17 (quoting James Schamus).

in which others are pursuing a similar strategy, it is at least as good a way as any to keep your job.[208]

B. Legal Interventions

At this point, before IP law has yet entered the analysis, the market is already encouraging studios to favor franchises. They sell better, both here and especially abroad; they are less risky, more cost-effective to market, and they preserve individual executives' reputational standing even in times of failure. All of this even without any special carrots from the legal system.

And then copyright and trademark law arrive. These laws end up amplifying whatever franchising incentives already exist. Because of them, often the only feasible way to gain entry to high-value derivative markets is to own rights in a derivable. This extra option value means that studios deciding whether to invest in either a standalone production or in an installment within a serialized narrative are not merely choosing between two individual films. Instead, they are choosing between an individual film on the one hand and an entire suite of products on the other. IP exclusivity thus raises the opportunity cost of producing a standalone project.

The higher opportunity cost has likely contributed to an ongoing arms race for new potential franchises.[209] Studios that lack significant film-brand portfolios to exploit are rushing to catch up.[210] In a 2017 interview, one Hollywood producer tellingly warned that "[i]f you're going to work in the studio system, you better

208. *See* Ted Hope, *It's NOT About Art: The Film Industry is About People Keeping Their Jobs*, INDIEWIRE (July 20, 2011, 4:00 AM), https://www.indiewire.com/2011/07/its-not-about-art-the-film-industry-is-about-people-keeping-their-jobs-177899 [https://perma.cc/CF4X-3B74] (offering a film producer's view that studio executives greenlight so many derivatives not "to make money for their company" but instead "so that they do not lose their jobs").

209. *See, e.g.*, OBST, *supra* note 152, at 12 (observing studios' refusal to invest in films unless its title came packaged with audience "preawareness," it would sell overseas, and it would "generate a Franchise and/or Sequel"); ROUSSEL, *supra* note 102, at 41 (describing how "the accent placed on owning IP" has moved the role of talent agents away from "the model of the creative entrepreneur recognized for his or her eye for promising original projects and his or her close relationships with star talent" and instead toward "the figure of the top corporate executive" who can "secur[e] the rights to film franchises and 'sequelizable' productions, and whose practice resembles that of certain professionals in the world of finance").

210. *See, e.g.*, Borys Kit, *Sony's Uphill Climb to Build Bankable Film Franchises*, HOLLYWOOD REP. (Jan. 25, 2019, 1:01 PM), https://www.hollywoodreporter.com/heat-vision/sonys-uphill-climb-build-bankable-film-franchises-1178507 [https://perma.cc/6986-P8W4] (contrasting Sony's earlier losses from focusing too heavily on "star vehicles, prestige plays or pricey comedies" with its attempted pivot to a more lucrative commitment to "manufactur[ing] its own franchises").

have a really big I.P. behind you."[211] The current market for feature-length films, he explained, had "forced [him] to look at everything as though it could be I.P."[212] What he meant by "I.P." was not necessarily an already-exclusive property—he included within the category not only protected material like recent films and comic books but also public-domain literature like the works of Jules Verne and the Brothers Grimm.[213] Instead, he seemed to mean a recognizable brand that, if it did not already happen to be proprietary, could at least be made so through the addition of new narrative or visual details that could become entrenched in the public imagination.[214]

In many cases, incorporating such a brand has proven more important than incorporating a familiar story or characters.[215] Witness the proliferation of films based on plotless video games or toys, from 2014's *The Lego Movie* to 2016's *The Angry Birds Movie* to 2017's *The Emoji Movie.*[216] In 2019, Sony launched Playstation Productions, a division devoted to transforming its eponymous

211. Alex French, *How to Make a Movie Out of Anything—Even a Mindless Phone Game*, N.Y. TIMES MAG. (July 27, 2017), https://www.nytimes.com/2017/07/27/magazine/why-hollywood-is-trying-to-turn-everything-into-movies-even-mindless-games-like-fruit-ninja.html [https://perma.cc/2QXT-F2BG].
212. *Id.*
213. *Id.*
214. *See id.* For instance, compare the dwarves from the public-domain *Snow White* fairy tale with those in Disney's animated *Snow White*, which gave them their now-famous adjectival names; and then with the recent *Snow White and the Hunstman* franchise, which gave them backstories as goldminers with nightvision. *See* Johnson, *supra* note 37; Jill Pantozzi, *Disney Said "No" To* Snow White & The Huntsman, MARY SUE (Mar. 23, 2012, 4:15 PM), https://www.themarysue.com/disney-said-no-to-huntsman [https://perma.cc/5299-Y87U]; *see also* Larissa Faw, *Doll Fight: Is Disney's Snow White the Fairest of Them All?*, FORBES (Dec. 10, 2013, 8:49 AM), https://www.forbes.com/sites/larissafaw/2013/12/10/doll-fight-is-disneys-snow-white-the-fairest-of-them-all/#d965312e3e1c [https://perma.cc/J4PS-NTDW] (quoting a lawyer's argument that while the general outline of Snow White may be in the public domain, Disney injected IP protection into some of the main character's most visible details by putting that character "in a cartoon with music, and ma[king] her look a certain way").
215. *See* French, *supra* note 211 (describing the sharp rise of films based on recognizable yet nonnarrative entertainment products like toys and mobile games).
216. *See* Brian Crecente & Ricardo Lopez, *Can Studios Crack the Code for a Video Game Movie Breakout in the U.S.?*, VARIETY (June 6, 2018, 10:15 AM), https://variety.com/2018/film/news/video-game-movie-franchises-1202831491 [https://perma.cc/S34E-R8SH] (describing production companies now buying up rights to video- and board-game properties because "when success hits it will be," in one media analyst's estimation, "on the order of a magnitude of a superhero universe . . . that can be worth billions").

videogame company's catalog into film and television titles.[217] Even toymakers like Hasbro and Mattel are turning themselves into studios.[218]

According to producer Lynda Obst, suitability for future brand extension has taken on such outsized importance that serialized source material sometimes has to be concocted simply to offer a pretext for making a film about it:

> Titles and game libraries were being bought willy-nilly merely because someone somewhere in the building had heard of them.... In the absence of a catalog (and, of course, any pitches), producers set up brand-new comic books and graphic novels at studios as though they were IPs. They'd find young artists to turn some made-up superhero story into a comic book or graphic novel.... Then they would sell this new character to a studio as though it had already been sold in your neighborhood comic-book store as an established brand, though the exec was fully in on the gimmick. Buying the story without the fake comic book would have required confidence in the story itself on the part of the buyer.[219]

What is more, it is not just new franchises that IP protections are encouraging. It is also further extensions of the existing ones. Of course, IP does this in the familiar way by providing exclusivity for each new film itself. A sequel carrying an already-proven brand will naturally tend to offer a higher expected value if it is guaranteed to be the only entrant in that product space than it would if it needed to compete with competitors' versions.

But there's also another mechanism at work. By raising the value of derivables, copyright and trademark exclusivity indirectly incentivize the production of derivatives, too. Often a single film is both derivative and derivable at the same time. *The Empire Strikes Back*, for example, began as a derivative of its preceding film, *A New Hope*. Because it was also derivable, it eventually spun off other films, toys, books, and the animated series *The Yoda Chronicles*. Such is the genealogy of modern franchises. One sequel begets another, then both beget

217. Patrick Shanley, *Sony Interactive Launches Unit to Adapt Games for Film, TV*, HOLLYWOOD REP. (May 20, 2019 6:00 AM), https://www.hollywoodreporter.com//news/sony-interactive-launches-unit-adapt-games-film-tv-1211850 [https://perma.cc/XX8X-VQ5J].

218. *See, e.g.*, Greg Evans, *Paramount and Hasbro Seal New Deal For Production & Distribution*, DEADLINE (Nov. 3, 2017, 6:24 AM), https://deadline.com/2017/11/paramount-hasbro-production-distribution-deal-1202201005 [https://perma.cc/VCX9-PUR5]; Matthew Townsend, *Mattel's New CEO Starts Movie Unit to Jump-Start Film Franchises*, BLOOMBERG (Sept. 6, 2018, 1:05 PM), https://www.bloomberg.com/news/articles/2018-09-06/mattel-s-new-ceo-starts-movie-unit-to-jump-start-film-franchises [https://perma.cc/K2GW-C5A2].

219. OBST, *supra* note 152, at 247. Obst, writing in 2013, was optimistic that studios were evolving away from films bearing brands for brands' sake and would henceforward base greenlighting decisions more on underlying stories. *Id.* at 247–48. Six years later, brands for brands' sake still looks like a winning strategy.

ancillary products and experiences. Their commercial logic abhors a terminus. This is not necessarily to say that derivative rights represent a single, proximate cause of this direction of investment. But at the very least they are helping to facilitate to it.[220] Insofar as derivatives tend toward high derivability, IP exclusivity promotes them by raising their option value.

Derivability can be especially lucrative when it comes to physical goods and services. Much of that lucrativeness is driven by trademark's merchandising right. Unlike copyright's right to prepare derivative works, which effectively takes the exclusivity that would otherwise belong to the derivative author and shifts it over to the original author, the merchandising right generates exclusivity out of thin air. Recall that prior to courts' widespread adoption of the doctrine, there was little reason to expect that consumers who encountered these symbols in the wild perceived them to be indicators of commercial source.[221] Courts came to protect merchandising only because consumers associate a mark in some way with its owner, not because consumers necessarily care whether the merchandise's seller is affiliated with that owner.[222] If courts ceased to recognize a merchandising right, as several scholars have proposed they should,[223] then anyone—not just the derivable owner—could exploit these brands at the marginal cost of producing the physical products that bear them.[224] The entire royalty stream would disappear. Merchandising revenues are entirely a creature of law.

It is hard to overstate how large this legal creature has grown. The 2006 animated film *Cars*, which was critically panned and drew mediocre box office numbers, churned out an estimated $2 billion in retail merchandise sales in its first year.[225] In its first five years that number had risen to $10 billion—all but demanding a sequel despite the original film's lackluster theatrical performance.[226]

220. *Cf.* Lee, *supra* note 6, at 1273 (observing that by "generat[ing] income . . . and creat[ing] barriers to entry for traditional and streaming distributors," major studios' exclusive rights in their film portfolios "play a supporting role" in industry concentration even if those rights aren't necessarily "the 'cause' of concentration in a direct sense").

221. *See supra* Part I.

222. *See* Dogan & Lemley, *supra* note 4, at 481–82.

223. *See, e.g.*, Calboli, *supra* note 57, at 889–91 (surveying these arguments to return trademark doctrine toward protecting marks only insofar as they serve as source identifiers).

224. Here I am gliding over the additional clearance that would be required if the relevant mark is also protected by copyright (such as an image of a fictional character). Many marks used in merchandising, such as film titles, character names, or catch phrases, would not be. *See, e.g.*, Universal City Studios, Inc. v. Kamar Indus., Inc., No. 82-2377, 1982 WL 1278 (S.D. Tex. Sept. 20, 1982) (enjoining the unauthorized sale of consumer products inscribed with famous lines from the film *E.T. The Extra-Terrestrial*, such as "I E.T." and "E.T. Phone Home!!").

225. *See* VOGEL, *supra* note 78, at 184 n.77.

226. *See* Brooks Barnes, *It Wasn't a Wreck, Not Really*, N.Y. TIMES (Oct. 17, 2011), http://www.nytimes.com/2011/10/18/movies/john-lasseter-of-pixar-defends-cars-2.html [https://perma.cc/PTX3-4X49] (discussing a "central current" of *Cars 2*'s bad reviews that the

The *Cars* example is far from alone. In 2016, a reported seventeen out of the top twenty domestically grossing films had major licensing programs, compared with an average of eight films annually between 2001 and 2015.[227] Merchandise bearing entertainment- or character-based brands racked up estimated retail sales of over $121 billion worldwide ($43 billion in the United States) in 2017.[228] Those sales earned licensors an estimated $7 billion in royalties worldwide ($2.6 billion in the United States), accounting for almost half of combined merchandise royalties across all sectors.[229] For comparison, that is over four times as much as the royalties generated by licensing sports brands.[230] The prevailing royalty rates average between 6 percent and 12 percent depending on the product category, venturing as high as 16 percent for several key ones such as apparel, toys, and video games.[231] *Star Wars*, an exceptionally valuable property, has even commanded a reported 20 percent royalty.[232]

Merchandising potential affects which film projects get funded and what the ones that do will look like. At major studios, a brand-management division will often weigh in on whether backend licensing revenue can sufficiently offset production costs to justify an investment.[233] Marvel Studios decided to make its first in-house production be *Iron Man*—hardly a household name at the time—only after focus groups of children selected it as the character whose toy they would

sequel "had been forced . . . by Pixar's corporate parent, the Walt Disney Company, as a greedy grab for sales of related merchandise"); Dawn C. Chmielewski & Rebecca Keegan, *Merchandise Sales Drive Pixar's 'Cars' Franchise*, L.A. TIMES (June 21, 2011, 12:00 AM), http://articles.latimes.com/2011/jun/21/business/la-fi-ct-cars2-20110621 [https://perma.cc/BPH2-KN2L].

227. *How Will the Marketplace Deal with Big Movie Property Gridlock Going Forward?*, LICENSING INT'L (Sept. 19, 2017), https://www.licensing.org/inside-licensing/how-will-the-marketplace-deal-with-big-movie-property-gridlock-going-forward [https://perma.cc/SCN7-2VZC].
228. INT'L LICENSING INDUSTRY MERCHANDISERS' ASS'N, LIMA ANNUAL GLOBAL LICENSING INDUSTRY SURVEY 2018 REPORT 16 (2018). This category includes "properties springing primarily from feature films, television shows, videogames, online entertainment and social media." *Id.* at 13. It excludes music and celebrity licensing, which is tracked separately.
229. *Id.* at 18.
230. *Id.* (reporting an estimated $1.6 billion in royalties for sports-based properties, accounting for 11.4 percent of the aggregate licensing total).
231. INT'L LICENSING INDUSTRY MERCHANDISERS' ASS'N, LIMA ANNUAL GLOBAL LICENSING INDUSTRY SURVEY 2017 REPORT 11 (2017).
232. *See* GREGORY J. BATTERSBY & CHARLES W. GRIMES, LAW OF MERCHANDISE AND CHARACTER LICENSING § 2:8 (2018).
233. *Id.*; Madhavi Sunder, *Intellectual Property in Experience*, 117 MICH. L. REV. 197, 208–09 (2018) (describing how expected merchandising royalties can finance film production and giving the example of Warner Bros. $125 million investment in the first installment of the *Harry Potter* franchise, underwritten "with more than $100 million in advances from about 90 domestic licensees and 200 international licensees related to the film's characters and creations, from Quidditch brooms to wands to candy to costumes").

most want to play with.[234] When a film is based on a preexisting toy or other consumer product, the film also provides a reciprocal spillover benefit to the product's manufacturer by driving up its sales. Just as the studios are incentivized to base their films on such products, so are those manufacturers thus incentivized to turn the products into films.[235]

We're left with a marketplace in which, as a leading marketing consultant put it, "the studios are in the branded carnival business. Their job is to make amusement park rides."[236] For a mixture of both legal and nonlegal reasons, the smart bets are now in brands. But for legal reasons alone, the only way to place those bets is to have first acquired a derivable property that will grow films, films that will one day spring forth shoots of their own.

That is not to say that money is not being spent elsewhere. As Subpart II.C discussed, streaming services are currently bankrolling a wide range of standalone productions that would have difficulty securing distribution elsewhere. Still, the longterm viability of that dependency is uncertain. If it does not succeed, as some worry,[237] then the supply of standalone but capital-intensive productions will probably plummet. And if it does succeed, the path may very well be through platform exclusivity that walls off particular works to nonsubscribers. Outside those walls, the films that will thrive best are going to be derivables. That the division between these two worlds would even arise is likely due at least in part to the fact that copyright and trademark law say it should.

IV. Implications

That IP law is playing some role inducing more investment into certain classes of creative goods is not inherently a bad thing. Cultural production is always contingent on the world around it, law included.[238] If uneven IP

234. Fritz, *supra* note 12, at 63.

235. *See, e.g.*, Sarah Whitten, *Mattel Takes a Page from Hasbro's Playbook, Launches Film Division*, CNBC (Sept. 6, 2018, 4:38 PM), https://www.cnbc.com/2018/09/06/mattel-takes-a-page-from-hasbros-playbook-launches-film-division.html [https://perma.cc/5NGC-L8R8] (noting that "[v]enturing into film production could be a catalyst for sales for Mattel" after a period of slump).

236. *See* Obst, *supra* note 152, at 19 (quoting Kevin Goetz); *see also* Epstein, *supra* note 82, at 22 (arguing that films' largest commercial value today "lies not in the tickets they sell at the box office but in the licensable products they create for generations of consumers").

237. *See supra* Subpart II.C.

238. As I've argued elsewhere, "[c]reativity is always contingent on the external environment, whether it is technology, funding, a physical ailment, or even the weather. Law is simply part of the mix." Joseph P. Fishman, *Music as a Matter of Law*, 131 Harv. L. Rev. 1861, 1915 (2018). *See also* Michael Madison, *Blurred Copyright Lines*, Madisonian (Mar. 16, 2015), http://madisonian.net/2015/03/16/blurred-copyright-lines [https://perma.cc/U23U-VUYA]

appropriability ends up redirecting resources toward some kinds of authorial works and away from others, it is doing no more than a host of other nonlegal factors are already doing every day.

Still, policymakers are deciding on the trajectory, however indirectly. My goal here is not to stake a normative position on the proper direction of investment so much as to highlight that our existing IP incentives have inescapably normative consequences for where that direction will go. IP law is not a neutral platform letting the market pick its winners and losers. It is instead setting the terms of how best to win.

Policymakers, whether they realize it or not, face a choice. The design of derivative incentives affects which films are likely to be made, who is likely to make them, and how consumers will likely be able to access them. It is a value judgment about what range of cinematic projects should have opportunities to come to market.

That is a deeply uncomfortable question for the state to be asking. The jurisprudence surrounding authorial investment has tried to build itself on the foundation of Justice Holmes' canonical admonition that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [creative works], outside of the narrowest and most obvious limits."[239] Judges and policymakers, along with many theorists, are not used to talking about the trajectory of creativity as something that can be optimized. The usual account is that IP simply runs in the background, helping to enable the work that creative firms and individuals already want to do.[240] What makes them want to do that work in the first place might be profit, prestige, expressive fulfillment, fun, or any of the other myriad factors that drive people to spend money on artistic production. Whatever the reasons are, IP is classically supposed to take them as it finds them and facilitate a market that could make the investment commercially realistic.[241]

(noting the difficulty of establishing an artistic baseline from which IP-induced shifts could be said to diverge).

239. Bleistein v. Donaldson Lithographing Co., 188 US 239, 251 (1903).

240. The view traces back at least to Justice Story. *See* Emerson v. Davies, 8 F. Cas. 615, 620–21 (C.C.D. Mass. 1845) (Story, J.) ("[W]hether to be better or worse is not a material inquiry in this case. If worse, his work will not be used by the community at large; if better, it is very likely to be so used. But either way, he is entitled to his copy-right, 'valere quantum valere potest' [let it be worth as much as it is worth]."); *see also, e.g.*, Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 855 (5th Cir. 1979) (attributing to Congress the view that copyright's constitutional purpose "is best served by allowing all creative works . . . to be accorded copyright protection regardless of . . . content, trusting to the public taste to reward creators of useful works and to deny creators of useless works any reward").

241. *See* Goldstein, *supra* note 5, at 1135 (theorizing that copyright leaves determinations of value to "private marketplace decisions").

The dissonance between that account and the reality of derivable works is loudest within trademark theory. The idea that trademark doctrine would mold the trajectory of investment in goods, rather than in the marks that adorn them, is anathema. Trademark protection is supposed to encourage clearer communications from producers to consumers, after all, not any particular kind of product.[242] In the Seventh Circuit's recent explanation: "The aim of copyright is to foster creative works of authorship . . . . Trademark, by contrast, is aimed not at promoting creativity and invention but rather at fostering fair competition."[243] At least in the film industry, though, the merchandising right defies that principle. The stronger the right, the greater the rewards to—and thus the greater investment in—movies that can be translated into tangible goods and experiences.

Copyright theory, for its part, at least recognizes the possibility that legal changes could shift creative firms' investment priorities. But traditionally, that recognition has preceded calls for broader protection to ensure a diverse range of investments. Allowing authors to appropriate more of a work's social value, the argument goes, raises the upside on any particular work and thereby pushes particularly edgy or niche projects over the expected-profitability margin. In a 1982 public lecture, for example, former Register of Copyrights David Ladd decried limitations on copyright's appropriation mechanisms because they would cause "the entrepreneurial calculus which precedes risk-taking in authorship and publishing [to] shift[] in the direction of not taking a chance . . . ."[244] Other commentators more recently have posited a similar relationship between copyright protection's scope and the authorial-work supply's heterogeneity.[245] In these discussions, the derivative work right emerges

242. *See, e.g.*, Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 993 (9th Cir. 2006) ("[W]hile the basic policies underlying copyright and patent protection are to encourage creative authorship and invention, the purposes of trademark protection are to protect the public's expectation regarding the source and quality of goods."). IP scholarship is full of similar efforts to contrast copyright and trademark on this score. *See, e.g.*, Christopher Buccafusco & Jeanne C. Fromer, *Fashion's Function in Intellectual Property Law*, 93 NOTRE DAME L. REV. 51, 93 (2017) ("Unlike copyright law, trademark law is not concerned with encouraging the creation of new aesthetic works. Instead, to promote fair competition and protect consumers, trademark law guards consumers from marketplace confusion by ensuring that certain symbols accurately reflect the source of goods."); Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. 55, 65 (2007) ("Unlike copyright and patent law, trademark law is not designed to offer the trademark holder incentives to create . . . ."). *But see* McKenna & Sprigman, *supra* note 6, at 495 (recognizing that trade-dress protection for pill colors that produce placebo effects "would incentivize investment in the placebo color via trademark law if an exclusive right to use that color would tilt the competitive field in the direction of the trade dress owner").

243. Phx. Entm't Partners v. Rumsey, 829 F.3d 817, 825 (7th Cir. 2016).

244. David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 421, 431 (1983).

245. *See, e.g.*, Barnett, *supra* note 166, at 410 n.35 (arguing that weakening copyright would lead producers to "favor the lowest-risk projects that appeal to the broadest population; conversely,

as a particularly key guarantor of that heterogeneity, helping firms to cross-subsidize and build risk-diversified portfolios.[246]

The film industry's recent experience with derivable works shows why that theory is incomplete. Of course, raising a work's upside is a good way to encourage investment in that work, especially if it is both an expensive and risky bet to make (as so many movies are). The problem is that accomplishing that objective through derivative rights is selecting for particular works. The upside of derivable works grows, while that of standalone works is left untouched. Once derivative rights become valuable enough relative to other revenue streams, as they have for film, they are no longer spreading value across a range of potential projects. Quite the opposite. They are instead concentrating value within a specific class. Copyright and trademark protections are helping to build a market where derivable films have a better chance at succeeding than others do.

The output that we may take for granted as an inevitable marketplace reality is in fact highly contingent on these largely unintentional legal-design choices. Consider what kinds of films would be promoted by an alternative regime that offered weaker derivative rights. This thought experiment would work with any policy intervention that would meaningfully reduce derivability's expected value. It might be, say, that the right to produce sequels and spinoffs were granted a much shorter period of exclusivity. Or it might be the institution of compulsory licensing that capped the going rate for adapting name-brand properties. At the extreme, it might even be eliminating derivative rights altogether. Under any of these conditions, the film market would probably look considerably different. For one thing, studios' hunt for derivable content would almost certainly fade. Because being the first to exploit a preexisting work would carry less legal advantage, studios would have less reason to stockpile franchises. At the margins, there could be some standalone film projects that under current law would have lost out to a derivable but would now emerge as bets worth making.

Film types would probably also be apportioned differently between traditional studios and streaming platforms. As discussed above, mid- and high-budget standalone movies' current reliance on those platforms is beginning to

expanding expected returns (by increasing copyright) provides producers with additional profits that can be invested in high-risk 'artistic' projects that appeal to niche audiences"); Paul Goldstein, *Copyright*, 55 LAW & CONTEMP. PROBS. 79, 83 (1992) ("In a world where fewer rights secure fewer paying markets, publishers would be even more inclined than they are at present to seek the common denominator that will ensure them some economic return."); Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High-Piracy Environment?*, 27 HARV. J.L. & TECH. 467, 535–36 (2014) (links studios' shrinking returns on investment with a rise in "formulaic blockbusters at the expense of experimentation and diversity," *id.* at 536).

246. *See, e.g.*, Barnett, *supra* note 166, at 410; Ginsburg, *supra* note 3, at 1911.

bifurcate film distribution into publicly available franchises versus subscriber-only standalones.[247] With fewer or no legal subsidies for derivable content, however, that bifurcation would likely recede. If anyone could make a derivative of any underlying source, then neither distribution model would offer an obvious advantage for one type of film or another.

A more ambiguous issue is how the overall number of derivatives would change. On the one hand, decreasing derivative rights' value would effectively lessen the IP system's ongoing subsidy to owners of derivable content. The expected value of any film would need to be measured more on its own, self-contained terms. Studios might be less enthusiastic to invest substantially in a story or character that others were equally free to produce repeatedly.[248] Moreover, as merchandising's commercial value would nosedive, we should expect to see fewer derivative films that are engineered to function as brand-extensions.[249]

On the other hand, reducing an erstwhile owner's incentives would simultaneously lower everyone else's costs of entry to producing derivatives in the first place.[250] Competitors who under current law are locked out of using proprietary characters and cinematic universes would be given greater access. For all the nonlegal reasons discussed earlier, even this permissive regime would preserve ample commercial incentives to produce derivative films.[251] The success of a derivable film could thus trigger a land grab, as competitors race to the market to capitalize on a new brand's popularity.[252] There could conceivably be dozens of overlapping *Avengers* sequels instead of just Disney's. The legal regime would both invite more derivatives by making it less costly for second comers to imitate originators, while also inviting fewer by making it less beneficial for originators to

247. *See supra* Subpart II.C.

248. *See* Dennis S. Karjala, Essay, *Congestion Externalities and Extended Copyright Protection*, 94 GEO. L.J. 1065, 1083 (2006) ("It is plausible that, without some lead time advantage, few would be willing to invest in the production efforts knowing that many other versions of the same story were coming out at the same time. But there are not many works whose entrance into the public domain inspire an immediate rush of expensive-to-create derivative works, like movies.").

249. *See* Harris, *supra* note 186.

250. *See* Bambauer, *supra* note 10, at 378 ("While [exclusivity over derivative works] can spur production of initial works, it also depresses creation of derivatives by increasing their cost since secondary authors must pay for a license.").

251. *See supra* Subpart III.A.

252. The implications of such increased entry are explored in Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317 (2005).

imitate themselves.[253] Where the eventual equilibrium would settle depends on which of these two effects would predominate.

More ambitious reforms could deliver more predictable changes. One sure way to reduce investment not just in derivables but also in derivatives would be to couple a decrease in derivative rights with an increase in the amount of originality that would be deemed sufficient for obtaining copyright protection to begin with. Raising that threshold would align with some scholars' proposals.[254] It is not clear, however, whether the creative output necessary to clear a higher threshold is something most consumers would really want. According to psychological studies of creativity, audiences tend to dislike artistic works that break too sharply from existing conventions.[255] If there's such a thing as too much originality, a more demanding copyrightability threshold could select for content that few desire to see.

In any event, even if one ultimately decided to change course, it is not obvious as a practical matter how one should actually go about doing it. For starters, scaling back derivative rights is not costless. Without existing exclusivities, many socially valuable works likely do not get made, or at least do not get made with the same production quality.[256] Any proposed reform would need to account for what's lost. On top of that, tinkering with these rights across all subject-matter categories would probably be overinclusive. Not every market is going to select for derivables the way that the current film market does. Translations and sound recordings, for example, are paradigmatic derivative works under the Copyright Act.[257] Yet

253. Forecasting a net total would be easier if we knew which source of value is currently pushing a greater number of marginal, derivative film projects into expected profitability: their value as derivables (which depends on exclusive rights) or their value as derivatives (which to a large degree does not). That this information remains private probably puts these counterfactual predictions out of reach.

254. *See* Miller, *supra* note 24, at 463–64 (proposing that copyright law "draw on patent law's nonobviousness requirement," *id.* at 463, and raise the originality threshold in order to "encourag[e] those who experiment with expression to push against, and even break past, the norms and conventions of routine expression that dominate a given genre at a given time," *id.* at 463–64); Parchomovsky & Stein, *supra* note 24, at 1507 (arguing for a copyright system that would "calibrate authors' protection and liability to the originality level of their works," wherein "authors of highly original works will not only receive greater protection, but will also be sheltered from liability if sued for infringement by owners of predicting works").

255. *See generally* Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1479–83 (2010) (discussing psychological studies demonstrating an aversion to excessive newness in artistic works).

256. Derivative rights are sometimes justified not only as extra incentives for investments in originals, but also as tools to let authors take their time in planning serialized creations. Without derivative protection, the threat of competitive entry might force a popular original's author to rush to market with a slapdash follow-up, rather than spending the time to develop a higher-quality work. *See* Samuelson, *supra* note 31, at 1527–33 (reviewing justifications).

257. *See* 17 U.S.C. § 101 (2018) (defining derivative works).

essentially all literature is translatable, and all music is recordable. It is hard to conceive what a skew toward derivable works in those contexts would even mean.

Those practical challenges, however, do not change the fact that, to a significant degree, we get the films that our copyright and trademark laws pay for. A question that naturally follows is what kinds of films those ought to be. I do not have an answer. But our IP system is implicitly saying that it does. By shifting remuneration toward derivative exploitation, it is embedding that answer within the legal protections' structure. It is almost certainly not the product of intentional deliberation. If anything, the current bias for derivable films exists despite jurisprudential intentions, not because of them.

However elusive a full cost-benefit tally remains, lawmakers should recognize that they are taking a side, whichever course they choose. Leaving the existing regime of protection in place is delivering a certain mix of investments that require certain business models; changing it would deliver something different. Given the billions of dollars we're effectively allocating to one set of players rather than another, we should be able to articulate which is preferable and why. But we cannot begin to do that until we can decide what we're really trying to maximize.[258]

CONCLUSION

My argument has centered on the film industry. Yet the IP doctrines underlying that argument are not specific to a subject-matter category. In principle, they could shift investment decisions toward derivable works in any creative field. Film happens to be especially fertile ground for such shifts both because its decisionmakers can predict reasonably well which works are most derivable and because its derivative markets have largely supplanted its primary ones as profit generators.

Further research could reveal whether comparable dynamics exist in other entertainment industries. Given how many other major cultural markets are now dominated by franchises, it is certainly plausible that they would.[259] Even if they do not currently, though, copyright's and trademark's exclusivity structures lay a foundation on which a derivable-works skew could appear in the future, given the

258. *See* McKenna & Sprigman, *supra* note 6, at 542–43 (arguing in the related context of IP subject-matter boundaries that "[h]ow we construct each of the IP systems, and how we conceive of the interaction among those systems, necessarily embeds a choice about the type of competition, and therefore the type of innovation, we want to produce").

259. *See* HENNIG-THURAU & HOUSTON, *supra* note 21, at 381–82 (showing how brand extensions dominate the universe of commercial hits not only for movies but also for novels and video games).

right business conditions. The film market did not used to display those conditions, after all, until it did.

The upshot of all this might simply be to give consequentialist theories of IP yet another epistemic burden to bear at a time when it seems they are already being asked to shoulder too much weight.[260] But if we are to take seriously the U.S. Supreme Court's copyright maxim that "[t]he profit motive is the engine that ensures the progress of science,"[261] we ought to look carefully at what types of works IP law enables to profit most. Progress could lead in any number of directions. Derivative rights help guide which way we'll go.

260. *See* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 2 (2011) (observing that while "[i]t is easy to picture the toting up of costs and benefits, and to think of a good policy as one that equilibrates the scale at just the right point," projecting all the necessary counterfactuals turns out to be "[i]mpossibly complex").

261. Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (quoting Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 27 (S.D.N.Y. 1992)).

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