Part I

Introduction

1 Franchise dynamics, creativity and the law

*Kathy Bowrey and Michael Handler**

1 The importance of studying franchises

The invention of an entertainment concept rich enough to sustain a franchise has become an accepted indicator of original creative genius in the twenty-first century. However, the relationship between creativity, economic opportunity and intellectual property law in the context of entertainment franchises is not well understood. One of the reasons for this relates to the complexity of factors involved, as well as the role of serendipity. A short consideration of the origins of a world-famous franchise, now entering its fiftieth year, provides a case in point.

1.1 'Hold tight and pretend it's a plan!':[1] The Doctor Who *franchise*

Given its origins, it is a wonder that *Doctor Who* even lasted beyond its first four episodes in 1963. The show had been conceived of by the BBC's Head of Drama, Sydney Newman, in early 1963, as little more than an educational, science fiction drama that would appeal to children, in order to plug a gap in Saturday evening programming.[2] The idea of a science fiction programme was frowned upon by some within the BBC, who disliked the genre's associations with comic books and American pulp fiction, something that helps explain the initial lack of institutional support for the development of the show.[3]

Copyright doctrine places the author of the script – a literary and a dramatic work – at the pinnacle of relevant legal and creative relationships. The production of the script is presumed to provide the necessary

* Our thanks go to José Bellido and Catherine Bond for their comments on this chapter.

[1] Doctor Who, in 'The Doctor, the Widow and the Wardrobe', *Doctor Who* (BBC television, 2011).

[2] See further B. J. Robb, *Timeless Adventures: How Doctor Who Conquered TV*, rev. edn (Harpenden: Kamera Books, 2013), pp. 18–22.

[3] J. Leach, *Doctor Who* (Detroit, MI: Wayne State University Press, 2009), p. 5.

impetus that makes possible the initiation of the making of a film and the eventual television broadcast. However, in commercial film and television production this is not necessarily the real sequence of events, as can be seen in the development of *Doctor Who*. In the first half of 1963, Newman worked on the concept of the show with the Head of Serials, Donald Wilson, and BBC screenwriter, C. E. Webber. Webber started developing the idea of an episodic 'loyalty programme' consisting of science fiction stories revolving around a number of constant, or 'loyalty', characters.[4] The interest here was not the creation of a stand-alone copyright work, but the production of a successful television series, recognizable in terms of its genre, key characters, appealing cast members and recurring dramatic elements that would draw audiences to return to see more. Newman is credited with coming up with the idea of a time-travelling doctor and, in some accounts, the name of the show,[5] while Wilson is said to have come up with the idea of a time machine able to dematerialize and rematerialize.[6] Scripts for various episode arcs (known as serials) were developed, but by June 1963 it was decided that Webber's script, which had been intended for the first four episodes, was not up to scratch. Instead, it was replaced with a caveman-themed script, based on a draft by Webber, with the writing credit going to Anthony Coburn,[7] who is thought to have come up with the idea of the outside of the Doctor's time-travelling machine, called the TARDIS, to be a blue police box.[8] Shortly afterwards, the BBC allocated an untested producer, Verity Lambert, and an untested director, Waris Hussein, to the show.[9] They were unimpressed by the quality of Coburn's script and asked for rewrites.[10] The creative contribution of the authors of the scripts was therefore structured by the briefs provided by the relevant 'non-authors'

[4] This is the language used in a memorandum from C. E. Webber to D. Wilson, 'Science Fiction', 29 March 1963, at http://bbc.co.uk/archive/doctorwho/6402.shtml.

[5] D. Howe, M. Stammers and S. Walker, *Doctor Who – The Handbook: The First Doctor – The William Hartnell Years, 1963–1966* (London: Virgin Publishing, 1994), p. 173; cf. Robb, *Timeless Adventures*, pp. 24–7 (outlining the collaboration between Webber and Newman in developing the Doctor's character, and suggesting that either Newman or caretaker producer Rex Tucker came up with the title).

[6] Robb, *Timeless Adventures*, p. 22; 'Who Created Who?', *BBC Two* (online), at http://bbc.co.uk/programmes/p01kqt9x/features/who-created-who.

[7] Robb, *Timeless Adventures*, p. 34.

[8] A. Cartmel, *Through Time: An Unauthorised and Unofficial History of Doctor Who* (New York: Continuum, 2005), p. 4. See also J. Legge, 'Who Owns the Tardis?', *Independent on Sunday*, 10 November 2013, p. 4.

[9] Lambert was primarily responsible for the casting of William Hartnell as the First Doctor.

[10] Robb, *Timeless Adventures*, p. 35. A pilot episode was filmed in September 1963, but featured so many production errors that Newman and Lambert decided that it needed to be reshot (see *ibid.*, pp. 39–40).

(i.e., department heads, directors and producers), in full knowledge that different writers might have been needed to be contracted to keep producing scripts on schedule if the series took off.

The first episode, 'An Unearthly Child', was broadcast the day after the assassination of President John F. Kennedy to modest ratings and a BBC-commissioned report indicating ambivalence amongst the audience.[11] The second episode received lukewarm reviews.[12] In light of this muted response and high production costs, the BBC came close to cancelling the programme within its first four episodes.[13] Factoring in the capriciousness of the audience is an ongoing challenge in popular television production. Whereas copyright law constructs the audience as largely passive recipients of cultural products and without significant power, a failure to engage key demographics as indicated by audience surveys and ratings data is often decisive in relation to the future of the programme. In the case of *Doctor Who*, it was only after the broadcast of the next serial, written on commission for the BBC by Terry Nation and entitled *The Daleks*, which introduced the eponymous cyborgs, that the show started to achieve genuine ratings success and, more importantly, enter the British public consciousness.

From these uncertain beginnings, featuring numerous creative contributions from a mix of BBC employees and independent contractors pulling in different directions, *Doctor Who* has become one of the longest-lasting and most productive franchises in history. The first three years after the show's debut saw the production of *Doctor Who* board games, craft sets, projector slides, comic strips, three novelizations of various serials and the first *Doctor Who Annual*, alongside three new seasons of the show. It was also a period of 'Dalekmania', giving rise to Dalek costumes, Dalek toy models made by at least four different companies,[14] two licensed Dalek films[15] and a Dalek stage play.[16] The BBC and Terry Nation exercised varying degrees of control over this spin-off activity,[17]

[11] Leach, *Doctor Who*, p. 11.
[12] M. Crozier, 'Television', *Guardian*, 2 December 1963, p. 7 (describing it as 'a depressing sequel' and that the 'Wigs and furry pelts and clubs and laborious dialogue were all ludicrous').
[13] M. Bould, 'Science Fiction Television in the United Kingdom', in J. P. Telotte, *The Essential Science Fiction Television Reader* (Lexington, KY: The University Press of Kentucky, 2008), p. 215.
[14] See 'Doctor Who Toy History', at http://doctorwhotoys.net/doctorwhotoyhistory.htm.
[15] *Dr. Who and the Daleks* (Amicus Productions, 1965) and *Daleks – Invasion Earth: 2150 AD* (Amicus Productions, 1966), both featuring Peter Cushing as the Doctor.
[16] *Curse of the Daleks* (1965).
[17] N. Perryman, '*Doctor Who* and the Convergence of Media: A Case Study in Transmedia Storytelling' (2008) 14 *Convergence: The International Journal of Research into New Media Technologies* 21, 23.

but it was still embraced by fans.[18] At the end of this period, the producers of the programme came up with the idea of allowing the character of the Doctor to 'regenerate', meaning that he could take a new physical form; a narrative device allowing them to replace the actor playing the Doctor with another. This allowed for continuity and renewal within the series (with seven different actors taking on the role up to the show's cancellation in 1989 after twenty-six seasons), without overly compromising the identity of and viewer loyalty towards the character or the extended universe. In the 1970s, the BBC registered a number of 'Doctor Who' logo trade marks for goods ranging from games, toys, clothing, to cosmetics and toothpaste.[19]

In an apparent paradox, the cancellation of the show in 1989 only helped expand the *Doctor Who* universe. Between 1991 and 1997, Virgin Publishing, a BBC licensee, produced around 100 books containing new stories about the First to Seventh Doctors, aimed at the adult audience that had grown up with the show, with fans being able to submit new story proposals.[20] The *Doctor Who Magazine*, which had started publishing in 1979, continued through this period, with fans and former *Doctor Who* scriptwriters taking a leading role in editing and shaping the content of the publication.[21] Following a 1996 made-for-television movie entitled *Doctor Who*, featuring the only screen appearance of the Eighth Doctor, the BBC started producing its own book ranges, including *The Eighth Doctor Adventures* and another series based on earlier Doctors, relying on many of the authors who had written for Virgin Publishing. Audioplays aimed squarely at fans were released in the late 1990s by Big Finish, another BBC licensee, featuring actors from *Doctor Who* reprising their roles.[22] Unlicensed activity also flourished during this time, including the production of audiobooks and a television series by the company BBV, featuring actors from *Doctor Who* drawing on their celebrity by taking on roles that alluded to their *Doctor Who* characters.[23]

[18] A. McKee, 'How to Tell the Difference between Production and Consumption: A Case Study in Doctor Who Fandom', in S. Gwenllian-Jones and R. E. Pearson (eds), *Cult Television* (Minneapolis, MN: University of Minnesota Press, 2004), pp. 175–81 (criticizing arguments that such activity can be dismissed as being 'non-canonical').

[19] See trade mark registrations UK1068701, UK1068702 and UK1068703, all dating from 1976.

[20] Perryman, '*Doctor Who* and the Convergence of Media', pp. 23–4.

[21] McKee, 'How to Tell the Difference between Production and Consumption', p. 172.

[22] A. O'Day, 'Event TV: Fan Consumption of Televised *Doctor Who* in Britain (1963–Present)', in G. Leitch (ed.), *Doctor Who in Time and Space: Essays on Themes, Characters, History and Fandom, 1963–2012* (Jefferson, NC: McFarland and Co., 2013), pp. 15–16.

[23] McKee, 'How to Tell the Difference between Production and Consumption', pp. 174–5.

Such was the level of goodwill that the *Doctor Who* franchise had maintained over this time that the television series was able to be relaunched by the BBC in 2005. This came with an even stronger focus on franchise-related activity, accompanied by more extensive 'Doctor Who' trade mark registrations.[24] Most notably, the new series has given rise to two spin-off television series, aimed at different audiences: *Torchwood* (based on Jack Harkness, a character in the new series and designed to explore more adult themes than *Doctor Who*) and *The Sarah Jane Adventures* (based on a popular companion of the Doctor from the 1970s and designed for teenagers). Both of these spin-offs have themselves been spun-off into novels, audiobooks and online content.[25] In addition, since 2005, the BBC has produced behind-the-scenes documentaries,[26] a children's television series[27] (itself featuring an animated serial based on *Doctor Who*)[28] and other television content, including a lavish docudrama about the show's early 1960s origins.[29] The BBC has also produced over fifty *New Series Adventures* books, featuring stories and audiobooks about the Ninth to Eleventh Doctors; launched its own magazine, *Doctor Who Adventures*, aimed at six to thirteen year olds; produced a huge range of licensed merchandise; and built a significant online presence for fans, featuring video clips, episode commentaries, interactive games, mobisodes and 'metasites' featuring enhanced details of fictional elements contained in the television show.[30] Separate from the BBC's activity, fan clubs around the world have continued to thrive, with major festivals and conventions attracting stars of the show and generating continued buzz.[31] Most recently, a permanent exhibition called 'The Doctor Who Experience' has opened in Cardiff, near the BBC's Roath Lock 'centre for excellence'

[24] New 'Doctor Who' logo marks were registered (EU4406229; UK2376000) in numerous classes covering goods and services including electronic and video games, books and magazines, clothing and footwear, games and toys, broadcasting, concerts and shows. A number of updated logo marks, for similar goods and services, were registered in 2009 (UK2527703; UK2527895; UK2527896; UK2527901).

[25] Supported by trade mark registrations for the word marks TORCHWOOD (UK2394209) and THE SARAH JANE ADVENTURES (EU6301808), covering similar goods and services to the 'Doctor Who' registrations. *The Sarah Jane Adventures* also featured the character K-9, a robotic dog that had been part of *Doctor Who* since 1977. A further spin-off television series called *K-9*, consisting of live action and animation, premiered in 2010. *K-9* is not a BBC production, but uses the original model of K-9, and contains allusions to the *Doctor Who* universe.

[26] *Doctor Who Confidential* (2005–11).

[27] *Totally Doctor Who* (2006–7).

[28] *The Infinite Quest* (2006–7).

[29] *An Adventure in Space and Time* (2013).

[30] Perryman, '*Doctor Who* and the Convergence of Media', pp. 26, 28–33.

[31] For an American perspective on the franchise, see L. Porter, *The Doctor Who Franchise: American Influence, Fan Culture and the Spinoffs* (Jefferson, NC: McFarland and Co., 2012).

for drama where *Doctor Who* is filmed, as part of attempts by Cardiff Council and the Welsh government to revitalize a downtrodden part of Cardiff Bay by turning it into a creative industries hub.[32]

Intellectual property rights clearly underpin ongoing investment in the *Doctor Who* franchise. It is axiomatic that these laws have a significant role to play in supporting this form of creative enterprise. However, as this brief history suggests, intellectual property law is more of a background presence than the central driver of this creative activity. In this regard, the voluminous literature on the centrality of copyright in providing an incentive to produce[33] warrants unpacking in relation to the creative industries and, in particular, in relation to the success of entertainment franchises.

1.2 The aim of this collection

By starting with *Doctor Who*, we do not mean to suggest that it is the world's oldest entertainment franchise. Such activity can be traced back at least as far as the beginning of the twentieth century. For example, Beatrix Potter's book *The Tale of Peter Rabbit*, first published commercially in 1902, soon branched into dolls, board games, wallpaper and porcelain.[34] Pat Sullivan's 'Felix the Cat' began as a New York newspaper strip in 1917, was turned into globally distributed animations in 1921, and soon came to support a myriad of character merchandising.[35] Also following suit from the early days of the film era is a certain mouse from Walt Disney's animated short *Steamboat Willie*, first screened in 1928. Mickey Mouse soon supported a huge range of merchandise marketed across the globe that remains of interest to fans, consumers and to copyright law today.[36] But it is in the last fifty years, since *Doctor Who* first screened, that the entertainment franchise has become typical of a mode of production that has shaped the global cultural landscape. Inescapable franchises from our time, such as *Star Trek*, James Bond, *Star Wars*, *Batman*,

[32] 'Work Starts on BBC Wales Drama Village in Cardiff Bay', *BBC News Wales* (online), 24 June 2010, at http://bbc.co.uk/news/10402789.

[33] For discussion in a law reform context, see I. Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (May 2011), at http://ipo.gov.uk/ipreview.htm; Australian Law Reform Commission, *Copyright and the Digital Economy*, Report 122 (November 2013), at http://alrc.gov.au/publications/copyright-report-122.

[34] L. Lear, *Beatrix Potter: The Extraordinary Life of a Victorian Genius* (London: Penguin, 2008).

[35] J. Canemaker, *Felix: The Twisted Tale of the World's Most Famous Cat* (New York: Pantheon, 1991).

[36] T. Susanin, *Walt Before Mickey: Disney's Early Years, 1919–1928* (Jackson, MS: University Press of Mississippi, 2011); L. Lessig, 'Free Mickey Mouse', *The Economist* (New York), 12 October 2002, p. 67.

Superman, *X-Men* and *Harry Potter*, might immediately spring to mind, although, as we will see, the cultural phenomenon in which audiences participate in extended relationships with fictional universes and cultural content extends well beyond such entertainment blockbusters.

Franchises involving films and television series have been well documented and interrogated in cultural studies scholarship, in particular in the work of Henry Jenkins on 'transmedia storytelling'[37] and Derek Johnson on media franchises and industrial institutions.[38] Cultural studies writers have also begun tracing the changes in content necessary for franchises to circulate globally and still connect with local audiences.[39] There is also considerable business law scholarship on franchising, which mainly focuses on 'how-to' aspects, such as the licensing of trade marks, 'know-how' and reputation to create income streams across time and space.[40] However, there is scant consideration of how value or custom is generated and sustained in the reputation associated with the franchise. In both disciplines, there has been very little scholarly work addressed to how the law, and intellectual property law in particular, has changed or is being stretched in practice to accommodate this type of cultural activity, creativity and form of enterprise.

Staying with *Doctor Who* as an example, it is clear that there are likely to be interesting, formal legal issues in trying to identify who owns and has the ability to exploit various individual aspects of the franchise, such as the characters played by actors, the Daleks or the TARDIS, the associated books, recordings, toys and other merchandise, and events and exhibitions. These are likely to give rise to complex, multi-jurisdictional licensing issues. However, there seems to be a much more fundamental issue at stake. Looking at the franchise *as a whole*, the question might be asked as to what sustains the economic and cultural value of this sort

[37] See especially H. Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York University Press, 2006), ch. 3; H. Jenkins, S. Ford and J. Green, *Spreadable Media: Creating Value and Meaning in a Networked Culture* (New York University Press, 2013).

[38] See especially D. Johnson, *Media Franchising: Creative License and Collaboration in the Culture Industries* (New York University Press, 2013). See also D. Johnson, 'Franchise Histories: Marvel, *X-Men* and the Negotiated Process of Expansion', in J. Staiger and S. Hake (eds), *Convergence Media History* (New York: Routledge, 2009); D. Johnson, 'Participation is Magic: Collaboration, Authorial Legitimacy, and the Author Function', in J. Gray and D. Johnson (eds), *A Companion to Media Authorship* (Chichester: Wiley-Blackwell, 2013).

[39] See, e.g., A. Moran (ed.), *TV Formats Worldwide: Localizing Global Programs* (University of Chicago Press, 2009). See also the collection of articles in (2013) 8(2) *Critical Studies in Television: The International Journal of Television Studies*.

[40] See, e.g., M. Hero (ed.), *International Franchising: A Practitioner's Guide* (London: Global Law and Business, 2010); S. Giles, M. Redfern and A. Terry, *Franchising Law and Practice* (Sydney: LexisNexis, looseleaf).

of phenomenon? Along with cultural studies scholars, we are doubtful that this can simply be located in the traditional, disaggregated objects of legal protection – the 'films', 'television broadcasts', 'sound recordings' and other 'works' that are generated. So is the real value tied up with something more nebulous and unfamiliar to the formal law – things that can be described at a higher level of abstraction, such as concepts, creative identities, personalities and other distinctive cultural identifiers, all of which are designed to generate continued consumer engagement and create an ongoing presence in the marketplace? If so, then how exactly are artists, owners and entrepreneurs (many of whom are not necessarily going to be connected to the original broadcaster) commercializing these more diffuse forms of 'creativity'? And how are they using the law and existing legal categories and concepts to do so?

This collection of essays aims to address these broader questions in exploring the relationship between law and creativity in the context of entertainment franchises. In the remainder of the first part of this chapter, we set the scene for the collection by engaging with the breadth of the concept of the 'entertainment franchise'. We show that it is a more complex, fluid concept than is sometimes appreciated, and that similar cultural and economic dynamics extend well beyond film- and television-related production to encompass a much wider range of creative output. We then show that the assumptions that what is of value to the entertainment industry, reflected in legal categories of protection that underpin legal scholarship, are problematic, meaning that the role that law plays in supporting creativity in this sector tends to be mischaracterized. Instead, we aim to show that while formal legal categories and legal narratives can and do limit our view of the relationships that are in play, it is a mistake to assume that law is merely a 'passive' follower of culture and economy in this context (that is, that law only steps in to manage transgression of established expectation). We explain that attention needs to be focused on how existing legal concepts, such as 'authorship' and 'property', are being actively extended to create new cultural meaning and value, and how more attention needs to be paid to existing managerial and professional practices that allow for authorship to function more effectively in the context of entertainment franchises.

In the second part of this chapter, we provide an overview of each essay in the collection, both in terms of how each constructs and engages with the extended notion of the entertainment franchise, and how each addresses one or more of the key themes of the collection. Collectively, the aim of the chapters is to help recharacterize law as far more active and foundational in constructing the very idea of culture and of economy.