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# Jason's Long Night at Camp Blood: Surveying the Independent Copyrightability of Jason Voorhees in the Wake of *Horror Inc. v. Miller*

Tim Kelly

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**JASON’S LONG NIGHT AT CAMP BLOOD:  
SURVEYING THE INDEPENDENT COPYRIGHTABILITY OF JASON VOORHEES  
IN THE WAKE OF  
HORROR INC. V. MILLER**

BY TIM KELLY<sup>1</sup>

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## I. INTRODUCTION – A DARK CLOUD OVER CAMP CRYSTAL LAKE

The character of Jason Voorhees has endured a great many hardships in his four decades on the big screen. He's been drowned, shot at, stabbed, blown up, and suffered countless wounds while inflicting many of his own; all for the entertainment of theatergoers.

While conventional weapons have proven no match for him, it would seem Jason has a different kind of Achille's heel: federal copyright law. The once indestructible Jason met his match on September 28, 2018, when the rights to one of the longest-running film franchises in the entertainment industry were completely upended. That is when Judge Stefan R. Underhill, in the United States District Court for the District of Connecticut, delivered his ruling on cross-motion for summary judgement in the matter of *Horror Inc. v. Miller*.

The decision hinged on a screenplay. In 2016, screenwriter Victor Miller filed copyright termination notices against Horror Inc. for the copyright of the original screenplay to the 1980 horror film *Friday the 13th*.<sup>2</sup> Horror Inc. sued Miller, seeking the declaration that Miller wrote the script as a "work made for hire."<sup>3</sup> Ultimately, Judge Underhill would find for Miller in a decision that sent shockwaves through the entertainment industry.<sup>4</sup> While whispers have indicated that basketball superstar and aspiring film producer LeBron James might soon be developing his own

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<sup>2</sup> *Horror Inc. v. Miller*, 335 F. Supp. 3d 273, 291 (D. Conn. 2018).

<sup>3</sup> *Id.* at 292.

<sup>4</sup> Eriq Gardner, 'Friday the 13th' Screenwriter Wins Rights Battle Against Producer, HOLLYWOOD REP. (September 28, 2018), <https://www.hollywoodreporter.com/thr-esq/friday-13th-screenwriter-wins-rights-battle-producer-1147991>.

*Friday the 13<sup>th</sup>* film,<sup>5</sup> current signs point to the franchise being put on hold pending this ongoing litigation.<sup>6</sup>

While Judge Underhill ruled in favor of Miller, there was still one significant matter he declined to analyze. Judge Underhill left open the issue that Horror Inc. could potentially “claim copyright in the monstrous ‘Jason’ figure present in sequels to the original film.”<sup>7</sup>

Separating Miller’s original screenplay from the larger *Friday the 13<sup>th</sup>* franchise (should Horror Inc. decide to try and do so) promises to be a complicated, litigious process. What seems like a simple issue at first glance becomes more complex upon reviewing the many differences that exist between Miller’s original screenplay and the Jason Voorhees character that would be developed in later sequels, apart from both Miller and his screenplay.

The broader issues of this case reach beyond the entertainment industry and strike at the many tangled facets of copyright law. Still, the circumstances that led us here—i.e., the differences between the two “Jason” depictions across multiple films—seem wholly unique to this franchise. It is in these unique circumstances that an argument begins to formulate that, while Miller’s copyright entitles him to everything contained under the umbrella of his screenplay, his ownership rights do not extend to the hockey mask-wearing, machete-wielding character developed by Horror Inc. in later *Friday the 13<sup>th</sup>* films. As this character is the widely-identifiable face of a multi-million-dollar franchise, it is likely that we have not heard the last about this matter.

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<sup>5</sup> Justin Kroll, *Lebron James to Produce ‘Friday the 13<sup>th</sup>’ Reboot*, VARIETY (October 22, 2018), <https://variety.com/2018/film/news/friday-the-13th-vertigo-entertainment-and-lebron-james-springhill-entertainment-1202988428/>.

<sup>6</sup> Brad Miska, *No, Blumhouse Isn’t Remaking ‘Friday the 13<sup>th</sup>’*, BLOODY DISGUSTING (Jan. 15, 2018), <https://bloody-disgusting.com/movie/3478359/no-blumhouse-isnt-remaking-friday-13th/>.

<sup>7</sup> Horror Inc. v. Miller, 335 F. Supp. 3d 273, 320 (D. Conn. 2018).

This article examines the independent copyrightability of fictional characters through these following assertions: (1) that the ‘Jason’ character as depicted from *Friday the 13<sup>th</sup> Part III* and later films is a derivative work from Victor Miller’s original screenplay; (2) that this later Jason Voorhees character is so delineated from the character in Victor Miller’s original screenplay as to be independently copyrightable; (3) that, in removing the similarities the two characters share, Horror Inc.’s continued use of the character should not constitute an infringement of Miller’s copyright; (4) that Jason’s hockey mask represents a crucial component part to the character and is subject to copyrightability of its own; and, finally, (5) that the ambiguities surrounding the independent copyrightability of characters like Jason Voorhees suggest a relatively underdeveloped area of federal copyright law.

To arrive at these conclusions, we will first review the substantive law pertinent to the independent copyrightability of individual characters. We will then analyze the events of *Horror Inc. v. Miller* before laying out the distinctions that have been applied to the Jason Voorhees character post-1981. In doing this, we will have laid the groundwork for an outcome that sees both parties retain significant legal and financial stake in the future development of this franchise.

## II. PERTINENT COPYRIGHT LAW

What defines an independently copyrightable character? Courts have largely looked past superficial components, denying characters that are a “rough idea[ ] of general nature ... instead of [a] specific expression and realization of those ideas.”<sup>8</sup> To rise to copyright protection under

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<sup>8</sup> *Allen v. Scholastic Inc.*, 739 F. Supp. 2d 642, 661 (S.D.N.Y. 2011) (quoting *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d at 69).

the federal law, a character must be fully developed and uniquely detailed.<sup>9</sup> As we'll soon find out, that is a rather abstract bar to clear.

#### A. COPYRIGHT AT A GLANCE

Copyright protection applies to works of authorship that have been fixed in a tangible medium and are original.<sup>10</sup> Works can be “fixed” when they are embodied in a tangible medium that is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated, for a period of more than a transitory duration.”<sup>11</sup> For example, a poem is fixed when it is written down on paper; and a painting is fixed when applied to a canvas.<sup>12</sup> The protections afforded to the author do not attach copyright to facts or ideas.<sup>13</sup> That is to say, the painter’s idea for the painting is not copyrightable. Instead, it is the painter’s expression of that idea, the fixed work, that becomes copyrightable.<sup>14</sup>

Under the guidelines set forth in the Copyright Act of 1976, “copyright ownership ‘vests initially in the author or authors of the work,’ which is generally the creator of the copyrighted work.”<sup>15</sup> In order to establish liability for copyright infringement, an author must show two things: (1) that they owned a valid copyright at the time the defendant copied the work; and (2) that the

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<sup>9</sup> *See, e.g., Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). *See also Warner Bros. Entm't v. X One X Prods.*, 644 F.3d 584 (8th Cir. 2011).

<sup>10</sup> 17 U.S.C. § 102(a) (2016).

<sup>11</sup> 17 U.S.C. § 101 (2016) (defining “fixation” and “copies”).

<sup>12</sup> 17 U.S.C. § 101 (2016).

<sup>13</sup> 17 U.S.C. § 102(b) (2016).

<sup>14</sup> *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (“Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has selected and arranged the facts. Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection.”).

<sup>15</sup> *See* 17 U.S.C. § 201(a) (2016) (quoted by *U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1015 (9th Cir. 2012)).

copying was wrongful because a substantial similarity existed between the original work and the protectable elements in the author's work.<sup>16</sup>

Federal law applies the phrase "copying" as shorthand for the exploitation of any exclusive rights described under Section 106 of the Copyright Act.<sup>17</sup> Authors hold the rights to: (1) reproduce, (2) perform publicly, (3) display publicly, (4) prepare derivative works of, and (5) distribute copies of their copyrighted works.<sup>18</sup>

While the Copyright Act doesn't explicitly define a "work of authorship,"<sup>19</sup> it does provide a non-exclusive list illustrating a variety of works that are subject to copyright protection; including literary and pictorial, graphic, and sculptural works.<sup>20</sup> The Second Circuit, where *Horror Inc. v. Miller* is being adjudicated, previously held that categories not acknowledged in the Act but otherwise analogous to those included, are also copyrightable.<sup>21</sup>

## B. DERIVATIVE WORKS

As mentioned above, authors hold the exclusive right "to prepare derivative works" based on their original work of authorship.<sup>22</sup> A derivative work is classified as a "work based upon one or more preexisting works that recasts, transforms, or adapts the preexisting work."<sup>23</sup> Modern

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<sup>16</sup> See Feist, 499 U.S. at 361. See also Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 63 (2d Cir. 2010) (clarifying that copying is divided into two parts in the second circuit: actual copying and illegal copying).

<sup>17</sup> 17 U.S.C. § 106 (2016).

<sup>18</sup> *Id.*

<sup>19</sup> See 17 U.S.C. § 101-102 (2016).

<sup>20</sup> See, e.g., 17 U.S.C. § 101, 102(a) (2016).

<sup>21</sup> Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 846-47 (2d Cir. 1997) (holding that a basketball game is not a "work of authorship" because it is not analogous to any of the works laid out under section 102(a)).

<sup>22</sup> 17 U.S.C. § 106 (2016).

<sup>23</sup> DC Comics v. Towle, 802 F.3d 1012, 1023 (9th Cir. 2015) (quoting 17 U.S.C. § 101 (2016)).



examples of derivative works include films based on novels and new arrangements of preexisting piano music.<sup>24</sup>

In the event a third party is authorized to copy from a preexisting work, the third party may still be able to obtain copyright protection in their derivative work, limited to the original elements they contributed to the work.<sup>25</sup> The courts have set a relatively low bar for such creativity, holding that a derivative work with “even a slight amount” of creativity—at least more than mere trivial elements of expression—will suffice for copyright protection.<sup>26</sup>

### C. COPYRIGHTING INDIVIDUAL CHARACTERS – THE “SUFFICIENTLY DELINEATED” TEST & “SUBSTANTIAL SIMILARITY”

If the bar for protecting third-party derivative works is low, the next hurdle is considerably more challenging. That is because the copyrighting of individual characters has been perplexing federal courtrooms since 1930, when Judge Learned Hand first discussed the possibility in *Nichols v. Universal Pictures Corp.*<sup>27</sup>

While the Second Circuit is somewhat conflicted on the matter, courts have historically found that—key to this article’s arguments—characters indeed constitute subject matter that can be copyrighted, independent of the works in which they are portrayed.<sup>28</sup> In the Second Circuit,

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<sup>24</sup> U.S. COPYRIGHT OFF., CIRCULAR 14: COPYRIGHT IN DERIVATIVE WORKS AND COMPILATIONS (2013), <https://www.copyright.gov/circs/circ14.pdf>.

<sup>25</sup> *DC Comics v. Towle*, 802 F.3d 1012, 1023 (9th Cir. 2015).

<sup>26</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

<sup>27</sup> *See Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

<sup>28</sup> *Id.* at 121. *See also Warner Bros. Inc. v. Am. Broad. Cos., Inc.*, 720 F.2d 231, 240-41 (2d Cir. 1983) (“However, there has been no doubt that copyright protection is available for characters portrayed in cartoons.”).

copyright protection for characters is a result of their “embodiment in original works of authorship.”<sup>29</sup>

Still, history shows courts have had difficulty articulating this distinction between a character and its underlying work. The challenge arises out of a notion that characters are abstractions of literal elements of expression that, when tied together in a narrative, form the larger, underlying work.<sup>30</sup> This is all to say that it is extremely difficult to prove copyright for an abstract concept like a character. To circumvent this challenge, courts must consider the textual and visual depictions of characters; i.e., their literary and pictorial, graphic, and sculptural depictions.<sup>31</sup> These considerations constitute a non-exclusive list by which a work can be interpreted.<sup>32</sup>

#### i. THE “SUFFICIENTLY DELINEATED” TEST

A derivative work is not eligible for copyright protection unless it can be “sufficiently delineated.”<sup>33</sup> This test follows the principle that derivative works secure copyright protection

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<sup>29</sup> Warner Bros. Inc. v. Am. Broad. Companies, Inc., 720 F.2d 231, 235 (2d Cir. 1983) (“Plaintiffs own the copyrights in various works embodying the character Superman and have thereby acquired copyright protection for the character itself.”).

<sup>30</sup> *Id.* at 243.

<sup>31</sup> 17 U.S.C. § 101, 102(a) (2016).

<sup>32</sup> See Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 846-47 (2d Cir. 1997) (“The list does not include athletic events, and, although the list is concededly non-exclusive, such events are neither similar nor analogous to any of the listed categories.”). See also Conan Properties Int'l LLC v. Sanchez, No. 17-CV-162 (FB), 2018 WL 4522099, at \*9 (E.D.N.Y. June 8, 2018), report and recommendation adopted as modified, No. 1:17-CV-00162-FB-RLM, 2018 WL 3869894 (E.D.N.Y. Aug. 15, 2018) (“These literal elements of expression do not, however, constitute the character, but, like dialogue is to a play’s plot, act as indicators of the abstract concept that is a character. Whether these literal elements of expression sufficiently come together to warrant a copyright over the character portrayed is the inquiry at hand.”).

<sup>33</sup> Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003). See also Silverman v. CBS Inc., 870 F.2d 40, 50 (2d Cir. 1989) (holding there was no infringement because the new works provided “further delineation of characters already sufficiently delineated to warrant copyright protection.”).

only for the incremental additions of originality contributed by the authors of those works.<sup>34</sup> The foundation for this test was first laid in 1930, in the Second Circuit with *Nichols*.<sup>35</sup> The facts involved a screenplay (*The Cohens and Kellys*) that allegedly bore substantial similarities to a stage play entitled *Abie's Irish Rose*. The issue at heart was whether the screenplay was an unauthorized derivative work of the stage play. Judge Hand scrutinized the similarity of the works, applying what he referred to as a “series of abstractions:”

But when the plagiarist does not take out a block in suit, but an abstract of the whole, decision is more troublesome. Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.<sup>36</sup>

Here, Judge Hand ruled that the two works shared common themes but that those themes were too general to constitute an infringement. He ultimately rejected the infringement claim, holding in part that the theme of the original play was “too generalized an abstraction” to be infringeable under the circumstances.<sup>37</sup>

As to the copyrightability of individual characters, Judge Hand reasoned they could be copyrighted “independently of the ‘plot’ proper...”<sup>38</sup> He concluded his analysis on the matter by

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<sup>34</sup> *Id.* at 49 (holding that the post-1948 “Amos ‘n’ Andy” radio scripts at issue were copyrightable only for the increments of expression beyond what was already included in the pre-1948 scripts (which were regarded as public domain)).

<sup>35</sup> See generally *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

<sup>36</sup> *Id.* at 21.

<sup>37</sup> *Id.* at 122 (“Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction from what she wrote. It was only a part of her ‘ideas.’”).

<sup>38</sup> *Nichols*, 45 F.2d at 121.

reasoning, “the less developed the character, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.”<sup>39</sup> The court denied protection for the characters at the heart of *Nichols*, but the opinion opened the door for the copyrightability of fictional characters in the future.<sup>40</sup> While *Nichols* proved to be prophetic text, its analytical approach is, to borrow a word from Judge Hand, highly “abstract.”

For a more modern analysis of this topic, we look to the United States Court of Appeals in the Ninth Circuit.<sup>41</sup> In 2015, the *DC Comics v. Towle* court held, “[n]ot every comic book, television, or motion picture character is entitled to copyright protection,”<sup>42</sup> reserving such protections only for characters that are especially distinctive.<sup>43</sup> To clear such a bar, the court reasoned that a character had to be sufficiently delineated, and possess consistent and widely identifiable traits.<sup>44</sup> The *Towle* decision advanced a three-part test: that a character (1) have “physical as well as conceptual qualities,”<sup>45</sup> (2) be “‘sufficiently delineated’ enough to be recognizable as the same character whenever it appears,”<sup>46</sup> and (3) be “especially distinctive” and

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<sup>39</sup> *Id.*

<sup>40</sup> Katherine Alphonso, *DC Comics v. Towle: To the Batmobile!: Which Fictional Characters Deserve Protection Under Copyright Law*, 47 GOLDEN GATE U. L. REV. 5, 10 (2017). See also Dean D. Niro, *Protecting Characters Through Copyright Law: Paving a New Road Upon Which Literary, Graphic, and Motion Picture Characters Can All Travel*, 41 DEPAUL L. REV. 359, 363-365 (1992).

<sup>41</sup> See *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015).

<sup>42</sup> *Id.* at 1019.

<sup>43</sup> *Id.* See also *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* See also *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978).

<sup>46</sup> *Towle*, 802 F.3d at 1019 (“To meet this standard, a character must be ‘sufficiently delineated’ and display ‘consistent, widely identifiable traits.’”). See also *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170 (9th Cir. 2003).

“contain some unique elements of expression.”<sup>47</sup> Interestingly, should a character be mute, that character can still be protectable if it meets the above test.<sup>48</sup>

## ii. SUBSTANTIAL SIMILARITY

It has been postulated that questions regarding the scope of character delineation and protection belong “not to [a] discussion of copyright’s subject matter but, instead, to the inquiry of substantial similarity.”<sup>49</sup> As is briefly touched upon in *Nichols*, the Second Circuit has also placed emphasis on substantial similarity of works.<sup>50</sup> The “substantial similarity” test asks whether the alleged “copying is illegal because a substantial similarity exists between the defendant’s work and the protectible elements of plaintiff[s’].”<sup>51</sup> Whether two works are substantially similar is a question of fact.<sup>52</sup> The bar that a plaintiff has to meet in proving substantial similarity is quite high; and courts do not always find substantial similarity in characters sharing similar, specific traits. <sup>53</sup>

In *Allen v. Scholastic Inc.*, it was held that the character at issue could not be infringed upon because the original work provided only a few details about the character, “such as where he

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<sup>47</sup> *Id.* at 1019.

<sup>48</sup> *Id.*

<sup>49</sup> MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12[A][1] (Rev. ed. 2018).

<sup>50</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (“Then the question is whether the part so taken is ‘substantial,’ and therefore not a ‘fair use’ of the copyrighted work; it is the same question as [sic] arises in the case of any other copyrighted work.”).

<sup>51</sup> *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 99 (2d Cir. 1999).

<sup>52</sup> *Allen v. Scholastic Inc.*, 739 F. Supp. 2d 642, 665 (S.D.N.Y. 2011) (holding that “the question of substantial similarity often presents a close issue of fact that must be resolved by a jury, district courts may determine non-infringement as a matter of law “either because the similarity between two works concerns only non-copyrightable elements of the plaintiff’s work, or because no reasonable jury, properly instructed, could find that the two works are substantially similar.”).

<sup>53</sup> *Id.* at 660 (holding that, because “[t]he bar for substantial similarity in a character is set quite high,” courts have found no substantial similarity between characters sharing far more specific and developed traits).

lives and what he does,” but that the work did not imbue the character with discernible personality or distinguishable appearance.”<sup>54</sup>

#### D. COMPONENT PARTS

Copyright protection also extends to “the component part of the character which significantly aids in identifying the character.”<sup>55</sup> This was the holding of *New Line Cinema Corp. v. Russ Berrie & Co.*, where it was found that a toy distributor’s sale of a glove similar to the one worn by the Freddy Krueger character in the *Nightmare on Elm Street* films violated New Line’s copyright.

#### E. JOINT AUTHORSHIP

The Copyright Act of 1976 defines "joint work" as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”<sup>56</sup> Parts of such a whole are considered "inseparable" when they have little or no independent meaning apart from each other.<sup>57</sup> For the work to be classified as "joint," the authors must have collaborated with each other or, in the absence of such a collaboration, prepared their respective contributions with the knowledge and intention that they would be merged with the contributions of other authors as part of the whole.<sup>58</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293, 302 (S.D.N.Y. 2001) (quoting *New Line Cinema Corp. v. Easter Unlimited, Inc.*, 17 U.S.P.Q.2d 1631, 1633 (E.D.N.Y.1989) (citing *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204 (2d Cir.1979)).

<sup>56</sup> 17 U.S.C. §101 (2016). *See also* *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991).

<sup>57</sup> *Childress v. Taylor*, 945 F.2d 505 (2d Cir. 1991).

<sup>58</sup> *Id.*

### III. PROCEDURAL HISTORY

#### A. “WORK-FOR-HIRE” & COPYRIGHT TERMINATION, BRIEFLY

The following two doctrines are deeply rooted within the Copyright Act of 1976 and especially relevant to the facts of *Horror Inc. v. Miller*. We will discuss them briefly and then move on.

##### i. WORK FOR HIRE

Work-for-hire defined in Section 101 of the Copyright Act of 1976. It states in part that such an agreement ensures “the employer or other person for whom the work was prepared is considered the author for purposes of this title...”<sup>59</sup> Section 101 states that a work meets “made for hire” status if one of two prongs are met: (1) the work is prepared by an employee acting within the scope of their employ; or (2) if the work has been specially commissioned as a contribution to a collective and the parties have expressly agreed and signed in writing that work has been conferred as a work made for hire.<sup>60</sup>

##### ii. COPYRIGHT TERMINATION

The purpose and reasoning for copyright termination is explained by the Supreme Court in *Mills Music, Inc. v. Snyder*:

The principal purpose... was to provide added benefits to authors. The extension of the duration of existing copyrights to 75 years, the provisions of a longer term (the author’s life, plus 50 years) for new copyrights, and the concept of a termination right itself, were all obviously intended to make the rewards for the creativity of authors more substantial. More particularly, the termination right was expressly intended to relieve authors of the

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<sup>59</sup> 17 U.S.C. § 101 (2016). *See also* 17 U.S.C. § 201(b) (2016) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

<sup>60</sup> *Horror Inc. v. Miller*, 335 F. Supp. 3d 273, 294 (D. Conn. 2018) (citing 17 U.S.C. § 101 (2016)).

consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product.<sup>61</sup>

The Copyright Act of 1976 made it so that authors of copyright grants executed on or after January 1, 1978, retained the right to terminate the original plan at any time during a five-year window, which opened at the end of thirty-five years from the date of publication.<sup>62</sup> Victor Miller first began executing his copyright termination notices in 2016, roughly one year into his federally allotted window to reclaim his copyright.

#### B. THE FACTS LEADING INTO *HORROR INC. V. MILLER*

Prior to writing the screenplay at issue, Victor Miller (“Miller”) had already established himself as a writer of novels and scripts in both film and television.<sup>63</sup> Since 1970, Sean S. Cunningham (“Cunningham”) had found work as a producer, director and writer of motion pictures.<sup>64</sup> Beginning in 1976, Miller and Cunningham worked on a series of projects beginning with the “non-union” film (written by Miller, directed by Cunningham) *Here Come the Tigers*.<sup>65</sup> Throughout their collaboration, Miller and Cunningham developed a consistent working relationship: Miller would handle the writing duties and then meet with Cunningham to exchange ideas.<sup>66</sup>

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<sup>61</sup> Mills Music, Inc. v. Snyder, 469 U.S. 153, 105 S. Ct. 638 (1985). See also U.S.C. §§ 203, 304(c), and 304(d).

<sup>62</sup> Aaron J. Moss & Kenneth Basin, *Copyright Termination and Loan-Out Corporations: Reconciling Practice and Policy*, 3 HARV. J. OF SPORTS & ENT. LAW 60.

<sup>63</sup> Horror Inc., 335 F. Supp. 3d at 285 (D. Conn. 2018).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*



After *Here Come the Tigers*, the duo again collaborated in 1978 on a film entitled *Manny's Orphans*.<sup>67</sup> In order to facilitate the production of that film, Cunningham (along with his company Sean S. Cunningham Films) entered into a limited partnership in the state of Connecticut under the name The Manny Company (“Manny”).<sup>68</sup> Manny hired Miller under the provisions of the operative collective bargaining agreement of the time, a 1977 Writer’s Guild of America (WGA) Theatrical and Television Basic Agreement.<sup>69</sup>

Later, in 1979, Cunningham saw the independently-made horror film *Halloween* and, hoping to capitalize on that film’s success, resolved to make a similarly-structured horror genre film.<sup>70</sup> Cunningham recalls first discussing the concept for the film at his kitchen table with Miller.<sup>71</sup> He tasked Miller to come up with “about 50 different venues” for their film’s setting.<sup>72</sup> At this point, Cunningham had again secured the writing talents of his friend.<sup>73</sup> Miller agreed to work on the proposed film and signed a “Writer’s Flat Deal Contract” with Manny.<sup>74</sup>

In their motion brief for summary judgement, Horror Inc. would offer up that Cunningham used “the standard WGA short form complete screenplay agreement issued by the WGA at the

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<sup>67</sup> *Id.*

<sup>68</sup> Horror Inc., 335 F. Supp. 3d at 285 (D. Conn. 2018).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> PETER M. BRACKE, CRYSTAL LAKE MEMORIES: THE COMPLETE HISTORY OF FRIDAY THE 13<sup>TH</sup> loc. 535-38 (2012) (ebook) (“Steve Cunningham: ‘Victor and I sat down at the kitchen table and started kicking around the concept—we’ll take a remote location and put a lot of young people in jeopardy.’”).

<sup>72</sup> *id.* at loc. 535-38. (2012) (ebook).

<sup>73</sup> Horror Inc., 335 F. Supp. 3d at 286.

<sup>74</sup> *Id.*

time.”<sup>75</sup> One fact that would be of immense import in this case: the contract Miller signed did not contain any provisions regarding either work-for-hire status or copyright arrangements.<sup>76</sup>

Interestingly, the WGA 1977 Theatrical and Television Basic Agreement contains no express agreements as to work-for-hire status.<sup>77</sup> It would appear on the facts that the template for the contract Miller signed was last updated in 1977.<sup>78</sup> In all likelihood, this contract would have been similar to the one Miller signed for *Manny's Orphans*. However, one crucial development had occurred between the time Miller signed his contract in '77 for *Manny's Orphans* to '79 when he signed on for this new horror venture: The Copyright Act of 1976 had gone into effect.<sup>79</sup>

Today, the boilerplate short-form contract used by WGA does indeed contain an express provision designating any writing covered under the provisions of the contract to be a “work made for hire,” and therefore owned by the company commissioning the work.<sup>80</sup> Had Manny provided their employee with a short-form contract pursuant to the Copyright Act of 1976, they would have been protected under section 101(2), likely avoiding their current legal troubles.<sup>81</sup>

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<sup>75</sup> *Id.* at 295. See also 2017 WL 3112970 Trial Motion, Memorandum and Affidavit, United States District Court, (D.Conn.) (“At the time he was hired to write for the Film, Miller was (and still is) a member of the Writer's Guild of America, East, Inc. (the “WGA”), a federally-recognized labor union representing screenwriters in the film and television industry.”).

<sup>76</sup> *Horror Inc.*, 335 F. Supp. 3d at 295.

<sup>77</sup> *Id.* (explaining that the collective bargaining agreement between the WGA and signatory companies pre-1978 contains no express arrangement regarding copyright).

<sup>78</sup> *Id.* at 296.

<sup>79</sup> *Id.* at 294 (“The Copyright Act of 1976, which became effective in 1978, one year before Miller and Manny began working on the screenplay, provides two routes according to which a writer's contributions could be considered ‘for hire.’”).

<sup>80</sup> *The Writers Guild Standard Writing Services Contract*, § 24 WRITERS GUILD OF AMERICA WEST, <https://www.wga.org/contracts/contracts/other-contracts/standard-theatrical>.

<sup>81</sup> *Horror Inc.*, 335 F. Supp. 3d at 296.

Upon signing the contract, Miller watched *Halloween* and continued further discussing ideas for the film's setting.<sup>82</sup> Miller decided that it would take place at a remote summer camp.<sup>83</sup> Before long, Miller had two completed drafts of the screenplay and a proposed title: "The Long Night at Camp Blood."<sup>84</sup> Throughout the course of the two months Miller spent working on various versions of the script, Cunningham contributed various suggestions that influenced the script.<sup>85</sup> As the script was being developed, Cunningham began seeking out investors for the film.<sup>86</sup>

Concurrently, the filmmaker decided to approach the film's title from a different angle. Cunningham thought back to his time on *Manny's Orphans*, when he'd made long lists of potential titles for that film.<sup>87</sup> One of the titles that most intrigued Cunningham was "Friday the 13<sup>th</sup>."<sup>88</sup> Cunningham believed that, with such a dynamic title, he'd have a concept that would garner interest from financial backers.<sup>89</sup> On Fourth of July weekend in 1979, Cunningham took out a full-page ad in *Variety* that featured the film's title—in bold lettering—crashing through a mirror; the tagline underneath reading "The Most Terrifying Film Ever Made! Available December 1979."<sup>90</sup>

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<sup>82</sup> *Id.* at 287.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 288.

<sup>86</sup> *Horror Inc. v. Miller*, 335 F. Supp. 3d 273, 289 (D. Conn. 2018).

<sup>87</sup> BRACKE, *supra* loc. 548-550 (2012) (ebook).

<sup>88</sup> *id.* at loc. 551-554 (2012) (ebook).

<sup>89</sup> *id.* at loc. 548-555 (2012) (ebook).

<sup>90</sup> *id.*

The ad would prove fruitful. Cunningham met with a potential investor in the form of Phil Scuderi, owner of Georgetown Productions, Inc. (“Georgetown”).<sup>91</sup> At that point, Georgetown and Manny entered into a deal: Georgetown would finance the entirety of the film’s \$500,000 budget in exchange for gaining complete control over the screenplay and eventual film.<sup>92</sup>

For his efforts, and in accordance with his contract, Miller was paid \$9,282 in 1979.<sup>93</sup> At no point did Manny provide Miller with traditional employee benefits, nor did Manny make contributions to any health care or pension plans in regard to Miller’s work on the film.<sup>94</sup> Furthermore, Manny paid Miller the lump sum due to him without deductions withholding for taxes, Social Security or Medicare.<sup>95</sup> Two days before its scheduled release date, Manny sold all of its “right, title and interest” in and to the screenplay to Georgetown, including “the right to copy the screenplay.”<sup>96</sup> In the agreement, Victor Miller is credited as the screenplay’s sole author.<sup>97</sup>

*Friday the 13<sup>th</sup>* was released on May 9, 1980.<sup>98</sup> Miller received an exclusive “written by” credit on the film.<sup>99</sup> On September 26, 1980, Georgetown obtained a copyright registration for the film, claiming copyright over the entire work including the screenplay, musical compositions, and

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<sup>91</sup> *Horror Inc. v. Miller*, 335 F. Supp. 3d 273, 289 (D. Conn. 2018).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 290.

<sup>95</sup> *Id.*

<sup>96</sup> *Horror Inc. v. Miller*, 335 F. Supp. 3d 273, 290 (D. Conn. 2018).

<sup>97</sup> *Id.*

<sup>98</sup> *Friday the 13<sup>th</sup> (1980)*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/movies/?id=friday13th.htm>.

<sup>99</sup> *Horror Inc. v. Miller*, 335 F. Supp. 3d 273, 290 (D. Conn. 2018).

any other literary or cinematographic materials.<sup>100</sup> Georgetown listed themselves as the author of the screenplay as a work-for-hire deal.<sup>101</sup>

Legal disputes regarding residual payments Miller alleged were owed to him began as early as the year the film was released.<sup>102</sup> In 1989, Miller received a settlement for \$27,396.<sup>103</sup> Since that time, and leading up to the current litigation, Miller has received additional sequel and residual payments of approximately \$200,000.<sup>104</sup> Over the years, the rights and interests in the franchise would eventually be acquired by successor-in-interest Horror, Inc.<sup>105</sup>

### C. THE BIRTH OF A FRANCHISE

*Friday the 13<sup>th</sup>* debuted on May 9, 1980, in front of 1,127 movie screens.<sup>106</sup> It earned the top spot and the weekend box office and went on to become the summer's second-highest earner.<sup>107</sup> Since the release of the original film, and across the span of almost forty years, the *Friday the 13<sup>th</sup>* franchise has gone on to achieve immense financial success. Cunningham and Miller's small independent slasher film, budgeted at a paltry \$550,000, has gone on to launch its own cottage industry in the form of a sprawling film franchise. While the films have never been critical

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 291.

<sup>102</sup> *Id.* at 289.

<sup>103</sup> *Id.*

<sup>104</sup> Horror Inc. v. Miller, 335 F. Supp. 3d 273, 289-90 (D. Conn. 2018).

<sup>105</sup> *Id.* at 291.

<sup>106</sup> BRACKE, *supra* loc. 1587 (2012) (ebook).

<sup>107</sup> *id.* at loc. 1587-1590 (2012) (ebook).

darlings,<sup>108</sup> they have, accumulatively, grossed a mammoth \$846,356,900 when adjusted for inflation.<sup>109</sup>

Spanning ten direct sequels and one reboot, the series has spawned a lucrative pipeline of ancillary products by way of action figures, books, videogames, and a plethora of movie merchandise including but not limited to those licensed hockey masks you see every year around the Halloween season. The success of these films has served to make homicidal maniac Jason Voorhees a household name in the decades since the original film was released.<sup>110</sup>

#### D. THE PAST COMES BACK TO HAUNT HORROR INC.

Between January 26, 2016, and July 14, 2016, Miller would serve three rounds of termination notices pursuant to Section 203 the Copyright Act of 1976.<sup>111</sup> Miller sent the notices seeking to recapture his copyright to the “The Long Night at Camp Blood” screenplay.<sup>112</sup> Horror and Manny (Cunningham’s company) were among the parties served.<sup>113</sup> On August 24, 2016, Horror Inc. and Manny (now “Horror,” collectively) filed in United States District Court for the District of Connecticut against Miller seeking a declaration that Miller’s screenplay was written as a “work made for hire.”<sup>114</sup> Under such a declaration, by Horror’s argument, Miller’s termination

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<sup>108</sup> Ty Burr, *Jason Goes to Hell: The Final Friday*, ENTERTAINMENT WEEKLY (August 27, 1993), <https://ew.com/article/1993/08/27/jason-goes-hell-final-friday/> (“While the Nightmare on Elm Street movies possess a sick yet clever surrealism, and the first Halloween was at least well crafted, the Friday the 13th series has always been the cut-rate horror franchise, offering barely functional sex-and-slash pitched straight at the moron brigade.”).

<sup>109</sup> *Franchises - Friday the 13th*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/franchises/chart/?id=fridaythe13th.htm>.

<sup>110</sup> Eriq Gardner, ‘Friday the 13th’ Rights at Stake in Lawsuit over Horror Classic, HOLLYWOOD REP. (Aug. 8, 2016), <https://www.hollywoodreporter.com/thr-esq/friday-13th-rights-at-stake-922911>.

<sup>111</sup> Horror Inc., 335 F. Supp. 3d at 291. *See also* U.S.C. §§ 203, 304(c), and 304(d).

<sup>112</sup> Horror Inc. v. Miller, 335 F. Supp. 3d 273, 291 (D. Conn. 2018).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 294.

notices would be invalid and Horror would be able to continue exploiting the original screenplay.<sup>115</sup> Horror further proclaimed that the notices constituted a material breach of Miller's employment agreement with Manny.<sup>116</sup>

Of particular import to the argument advanced in this article: Horror sought an alternative declaration that, should the District Court find Miller's termination notices valid, Miller would be entitled only to the elements in the original screenplay proven to be created solely by Miller.<sup>117</sup> Clearly, Horror wanted a declaration that the character of "Jason Voorhees" (a character that would evolve well beyond his depiction in the original movie) was untouchable for the purposes of Miller's termination notices.

Miller promptly filed a counterclaim on November 17, 2016, seeking an alternative declaration that the screenplay was not a work-for-hire.<sup>118</sup> Horror and Miller each filed cross motions for summary judgement on the matters of work-for-hire and the legitimacy of the termination notices.<sup>119</sup> With the termination notices served, Miller had shaken the very foundations of one of the film industry's most enduring franchises; but the nightmare was only beginning for Horror.

As Judge Underhill's nuanced opinion would soon substantiate, Miller's efforts would prove well-founded.

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Horror Inc. v. Miller, 335 F. Supp. 3d 273, 294 (D. Conn. 2018).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

### E. EFFECTS ON THE BUSINESS OF JASON

Miller's termination notices sent ripple effects across the franchise's larger footprint in the entertainment industry. Andrew Form—producer of the 2009 remake bearing the franchise name—stated that work on a follow-up to the remake was suspended due to “the rights [being] a little messed up.”<sup>120</sup> Assessing the risk posed by the ongoing court battle, video game developer Gun Media suspended all current and future work on their 2017 release *Friday the 13th: The Game*, including but not limited to future downloadable content and bug patches. Jason Blum, producer of *Get Out* and the 2018 *Halloween* remake, expressed an unwillingness to even discuss potential *Friday*-related projects until the dispute was resolved.<sup>121</sup>

### F. THE *HORROR INC. V. MILLER* RULING

Judge Underhill's opinion was signed on September 28, 2018.<sup>122</sup> Conscious of the subject matter at heart, he began his opinion with some colorful, horror-themed verbiage:

“Nearly 40 years ago, a screenplay was written about Camp Crystal Lake. The film created from the screenplay went on to significant commercial success. Lurking below that peaceful surface, however, was the Copyright Act's termination right, waiting for just the right moment, when it would emerge and wreak havoc on the rights to the screenplay.”<sup>123</sup>

Judge Underhill proceeded to go after Horror's arguments as if they were camp counselors spending a long weekend at Camp Crystal Lake.<sup>124</sup>

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<sup>120</sup> John Squires, *Platinum Dunes Producers Still Hope to Eventually Make Another 'Friday the 13th' Movie*, BLOODY DISGUSTING (July 2, 2018), <https://bloody-disgusting.com/movie/3507673/platinum-dunes-producers-still-hope-eventually-make-another-friday-13th-movie/>.

<sup>121</sup> Brad Miska, *No, Blumhouse Isn't Remaking 'Friday the 13th'*, BLOODY DISGUSTING (Jan. 15, 2018), <https://bloody-disgusting.com/movie/3478359/no-blumhouse-isnt-remaking-friday-13th/>.

<sup>122</sup> *Id.* at 273.

<sup>123</sup> *Id.* at 283.

<sup>124</sup> Patrick Anderson, *Copyright Termination Right Slashes Friday the 13th Franchise In Two*, IP WIRE (October 2, 2018), <http://ipwire.com/stories/copyright-termination-right-slashes-friday-the-13th-franchise-in-two/>.



He began his discussion by holding that Miller’s employment was not a work-for-hire agreement as argued by Horror.<sup>125</sup> As we know from the facts, Miller’s signed agreement did not expressly contain a work-for-hire provision; therefore, Horror was unable to make that argument in court.<sup>126</sup> Instead, Horror went a different route, arguing that Miller was “necessarily an employee of Manny, and not an independent contractor, because Miller, a WGA member, was hired by Manny, a WGA collective bargaining agreement signatory company...”<sup>127</sup> Essentially, Horror argued that, because the Copyright Act of 1976’s definition of “employee” was identical to the definition used in the National Labor Relations act, the Court would have to consider Miller an employee of Manny for the purposes set forth in the Copyright Act, thus rendering Miller not an independent contractor but a work-for-hire employee.<sup>128</sup> Judge Underhill countered that “the *CCNV* test”—as laid out by the United States Supreme Court in 1989—was the law of the land, and that nothing in that decision suggested the Supreme Court intended to have their analysis superseded by labor law considerations.<sup>129</sup>

In determining whether a sculpture was commissioned as a work-for-hire, the *CCNV* Court held that an employee’s status should be determined pursuant to an agency law analysis:

“To determine whether a work is a “work made for hire” within the § 101 definition, a court should first apply general common law of agency principles to ascertain whether the work was prepared by an employee or an independent contractor, and, depending upon the outcome, should then apply either § 101(1) or § 101(2).”<sup>130</sup>

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<sup>125</sup> Horror Inc., 335 F. Supp. 3d at 294.

<sup>126</sup> *Id.* at 295.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Horror Inc. v. Miller, 335 F. Supp. 3d 273, 296 (D. Conn. 2018). *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989).

<sup>130</sup> Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 731, 109 S. Ct. 2166, 2167–68, 104 L. Ed. 2d 811 (1989)

Furthermore, the *CCNV* Court called to a distinction between such an analysis and the broader definition of “employee” under labor law, concluding that Congress intended to describe the conventional master-servant relationship through agency law.<sup>131</sup>

In applying this test to the instant case, Judge Underhill effectively rendered Horror’s labor law argument dead-on-arrival. After laying out his reasoning for why work-for-hire did not apply to Miller’s screenplay, Underhill proceeded to hold, among other determinations, that Miller was an independent contractor for the purposes of his employment with Manny,<sup>132</sup> that Miller was the sole author of that screenplay,<sup>133</sup> and that Manny and Georgetown were not entitled to claim authorship of the screenplay.<sup>134</sup> Effectively, and with Judge Underhill’s opinion paving the way legally, Miller’s termination notices had reclaimed sole ownership of the copyright in the *Friday the 13th* screenplay.<sup>135</sup> In regard to what exactly Miller would reclaim, Underhill wrote that the reacquired copyright would extend to, “all copyrightable content in the screenplay...”<sup>136</sup>

Obviously, this was not the outcome Horror had hoped for; but what about their second declaration? What did Judge Underhill have to say on the matter of all the copyrightable *Friday the 13th* material that had been created and evolved independent of Miller’s original screenplay? On the matter of the adult Jason Voorhees character; the franchise’s main antagonist and cash cow since the second film, Underhill wrote:

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<sup>131</sup> *Id.* at 740.

<sup>132</sup> Horror Inc., 335 F. Supp. 3d at 311.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 312.

<sup>135</sup> *Id.* at 320.

<sup>136</sup> *Id.*

“I also decline to analyze the extent to which Miller can claim copyright in the monstrous ‘Jason’ figure present in sequels to the original film. Horror may very well be able to argue that the Jason character present in later films is distinct from the Jason character briefly present in the first film, and Horror or other participants may be able to stake a claim to have added sufficient independently copyrightable material to Jason in the sequels to hold independent copyright in the adult Jason character. That question is not properly before the court in this case, however. Miller’s termination notices apply only to the copyright in the screenplay for the first film, and did not purport to terminate a separate copyright in the adult Jason character present in later films. Adjudication of the status of any copyright in the adult Jason character will have to await a ripe dispute with respect to that issue.”<sup>137</sup>

With this decision, Miller had recaptured the rights to his original screenplay, and would be entitled to the bundle of sticks that came with it; however, what that bundle encompasses is at current time a matter to be determined, as evidenced by Judge Underhill’s punt on the matter of the “Jason Voorhees” character.

#### G. THE BLOODY AFTERMATH

On the first day of October in 2018, some two days after Judge Underhill rendered his decision, Horror released a statement:

“We are disappointed in the court’s ruling and disagree with its conclusion. We are considering our options including an appeal. In the meantime, the court was very clear that its ruling in favor of Mr. Miller is limited to the original screenplay in which Jason’s mother is the killer and that Mr. Miller’s termination notice did not purport to terminate the separate copyright in the iconic supernatural killer who wears a hockey mask. It also does not grant any rights to Mr. Miller that would enable him to use any element of the original screenplay outside of the United States.

“Following the guidelines set down by the Court’s ruling, we intend to aggressively explore many opportunities for new projects featuring settings and characters (including the hockey mask-wearing killer) not included in Mr. Miller’s screenplay, and in fact are currently in development on new projects that are consistent with the ruling which will be announced soon.”<sup>138</sup>

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<sup>137</sup> *Horror Inc.*, 335 F. Supp. 3d at 320.

<sup>138</sup> Brad Miska, *Statement Regarding “Friday the 13<sup>th</sup>” Court Ruling from Franchise Producer Horror, Inc. [Exclusive]*, BLOODY DISGUSTING (October 1, 2018), <https://bloody-disgusting.com/movie/3524534/statement-regarding-friday-the-13th-court-ruling-franchise-producer-horror-inc/>.

Horror's use of the phrase "hockey mask-wearing killer" was particularly interesting, suggesting they might apply a new strategy in their legal wrangling. In referring to Jason Voorhees simply as the "hockey mask-wearing killer," they began the process of removing what little connective tissue exists between the Jason character in the Miller screenplay and the modern Jason character depicted in later films.

For his part, Miller has alluded to a mutual interest in settling the matter, stating in a fan interview that, "[a]ll is forgiven;" he then concluded by saying, "I want what you want."<sup>139</sup> Cunningham filed an appeal of Judge Underhill's decision.<sup>140</sup> In his appeal, Cunningham argued that the decision could have damaging effects on the broader entertainment business,<sup>141</sup> and that the decision threatens to disrupt "long-settled relationships in the film industry and undermin[e] the very benefits the WGA has so successfully negotiated for its members."<sup>142</sup>

In the Second Circuit Court of Appeals, matters of copyright protection and fair use have historically been reviewed as mixed questions of law and fact.<sup>143</sup> The jurisdiction has typically

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<sup>139</sup> John Squires, "I Want What You Want": In New Interview, Victor Miller Addresses the 'Friday the 13th' Legal Issues, BLOODY DISGUSTING (February 25, 2019), <https://bloody-disgusting.com/movie/3548345/want-want-new-interview-victor-miller-addresses-friday-13th-legal-issues/> ("Everybody's trying to settle all the little things and dot the I's, get the semicolons where they belong and that kind of stuff. Who gets what... Who has to give what to whom... So, to me, it's a nightmare...").

<sup>140</sup> Jason Parker, *Horror Inc. Files Appeal In Lawsuit Loss To Victor Miller For Friday The 13th Rights*, FRIDAY THE 13TH FRANCHISE (October 18, 2018), <http://www.fridaythe13thfranchise.com/2018/10/horror-inc-files-appeal-in-lawsuit-loss.html>.

<sup>141</sup> Evan Lewis, *Friday The 13th Legal Battle Continues As Horror Inc. Files New Appeal*, WE GOT THIS COVERED (June 4, 2019), <https://wegotthiscovered.com/movies/friday-the-13th-legal-battle-continues-as-horror-inc-files-appeal/>.

<sup>142</sup> Bill Donahue, *'Friday the 13th' Ruling Will 'Upend' Movies, Produce Says*, LAW 360 (June 4, 2019), <https://www.law360.com/articles/1165694?copied=1>.

<sup>143</sup> For copyright protection examples, see *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140 (2d Cir. 2010)). For examples of fair use, see *Swatch Group Mgmt. Svcs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 81 (2d Cir. 2014); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999)).

reviewed such questions under a de novo standard.<sup>144</sup> Under such a standard, the Court of Appeals will be able to review the issues of *Horror Inc. v. Miller* as if the district court had not decided the matter.<sup>145</sup> This means that the Second Circuit, in addition to examining the “work-for-hire” issue, will again have the opportunity to review and make a determination on the independent copyrightability of the “hockey mask-wearing killer.”

In order to better understand Horror’s posture, we have to look at the history of the “Jason Voorhees” character. As you will soon see, the circumstances of subsequent films—extending far beyond Miller’s original screenplay—significantly muddy the issue of who owns what.

#### IV. JASON VOORHEES: ESTABLISHING A BASIS FOR LEGAL SEPARATION

##### A. THE TWO JASONS

This section’s title is something of a misnomer. There are, in fact, several different iterations of the Jason character depicted across a wide variety of mediums. The *Friday the 13th* video game depicts no less than ten different iterations (inspired by Jason’s various appearances in films and earlier games) of the character for gamers to play as; including but not limited to Uber Jason, the space-faring version of the character as he appeared in the motion picture *Jason X*.<sup>146</sup>

This article intends to draw a distinction between two specific iterations of the character: the child-like Jason depicted in Miller’s screenplay (“Child Jason”), and the hulking, zombified, machete-wielding Jason of later films (“Adult Jason”) produced by Horror Inc.

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<sup>144</sup> *Man Ferrostaal, Inc. v. M/V Akili*, 704 F.3d 77, 82 (2d Cir. 2012).

<sup>145</sup> *Summa v. Hofstra Univ.*, 708 F.3d 115, 123 (2d Cir. 2013).

<sup>146</sup> *See generally, Friday the 13th: The Game*.

A word of warning: making the case for these two distinct, independently copyrightable characters will involve delving slightly into the minutiae of a decades-old horror movie franchise. Proceed with caution.

### B. PART I – JASON AS A CHILD

If you've never seen these films, you'd be forgiven for thinking that Jason Voorhees is the main antagonist in the original *Friday the 13th*; however, this is not the case. As far as characters go, they do not get more abstract than the "Jason Voorhees" that is depicted in the original *Friday the 13th*. This is because, for all intents and purposes, the Jason Voorhees character is dead for the entirety of the film. Miller's screenplay actually calls for Jason's mother, Pamela Voorhees (played by Betsy Palmer), driven insane upon the drowning death of her son at the hands of unassuming camp counselors, to be the killer. The appearance of the young Jason was a late inclusion to the production,<sup>147</sup> and his depiction in the film would prove antithetical to the Jason Voorhees character as depicted in later films.

Film is a visual medium, and this franchise was a product of a different time. Unlike the computer-generated imagery we see in modern films, the *Friday the 13th* franchise is regarded not only for the narrative exploits of the Voorhees family, but also for the series' (at the time) cutting-edge practical effects.<sup>148</sup> While Miller and Cunningham fleshed out the first film's story, they would look to special effects guru Tom Savini ("Savini") to develop the film's more visceral, visual elements.<sup>149</sup> After six weeks of production, the *Friday the 13th* crew needed an exciting

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<sup>147</sup> BRACKE, *supra* loc. 1342-43 (2012) (ebook).

<sup>148</sup> Christopher Bickel, *Special Effects Horror Makeup God Tom Savini Profiled in New Documentary*, DANGEROUS MINDS (December 7, 2017) [https://dangerousminds.net/comments/special\\_fx\\_horror\\_makeup\\_god\\_tom\\_savini\\_profiled\\_in\\_new\\_documentary](https://dangerousminds.net/comments/special_fx_horror_makeup_god_tom_savini_profiled_in_new_documentary).

<sup>149</sup> BRACKE, *supra* loc. 1587-1590 (2012) (ebook).

ending to the film.<sup>150</sup> The original screenplay called for Alice, the film's main protagonist, to kill Mrs. Voorhees, but Cunningham pushed Miller to add one final scare into the film.<sup>151</sup>

On Cunningham's direction, Miller wrote a dream sequence where Alice sat in a canoe in a serene Crystal Lake, only to be snatched into the water by Jason Voorhees.<sup>152</sup> To avoid confusion, it's important to note again here that the Jason Voorhees of Alice's nightmare is, ostensibly, a figment of Alice's own imagination; which is to say that the character of Jason Voorhees is still as dead at the end of the film as he was at the beginning. By Miller's own words: "the only time Jason actually appears in the movie, when you actually see his face, it is a fantasy, so he could be anything you wanted him to be."<sup>153</sup>

The task of designing the look of the character in Alice's dream fell to Savini.<sup>154</sup> Jason's physical appearance in the film is that of a deformed child; substantially different from and lacking many of the defining traits of the eventual Adult Jason character.

Savini patterned the facial features of Jason after a neighbor from his youth.<sup>155</sup> This version of Jason was childlike in stature, bald, with a misshapen head and one eye.<sup>156</sup> The character would be depicted on screen by Ari Lehman, a thirteen-year-old boy at the time the film was produced.<sup>157</sup> Lehman recalls Cunningham telling him that his scrawny, teenaged stature was just "the right size"

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<sup>150</sup> *id.* at loc. 1342-43 (2012) (ebook).

<sup>151</sup> *id.* at loc. 1380-82 (2012) (ebook).

<sup>152</sup> *id.* at loc. 1345-1347 (2012) (ebook).

<sup>153</sup> *id.* at loc. 1371 (2012) (ebook).

<sup>154</sup> BRACKE, *supra* loc. 1355 (2012) (ebook).

<sup>155</sup> *id.* at loc. 1356 (2012) (ebook).

<sup>156</sup> *id.* at loc. 1358 (2012) (ebook).

<sup>157</sup> *id.* at loc. 1385 (2012) (ebook).

for the role.<sup>158</sup> Jason’s on-screen debut was filmed at the tail-end of production.<sup>159</sup> His appearance would go on to become one of the most memorable scenes in the film, and prove a fortuitous inclusion for the emerging franchise.

If Georgetown’s (and Horror Inc., by extension) copyright registration is any indication, the company began including “work-for-hire” language in their documents as early as September of 1980. With Miller exiting the franchise not long after, it is significant to note here that any and all additions, adjustments, modifications and tweaks to the character beyond this point were made by employees of Horror Inc. under, in all likelihood, contractual “work for hire” agreements. At the time that Miller left the franchise, the Jason Voorhees the character was still a deceased child who, contextually speaking, had not yet appeared on-screen.

### C. PART 2 – THE NEW JASON

The idea to make Jason Voorhees the sequel’s main antagonist is credited to Producer Phil Scuderi.<sup>160</sup> For the sequel, Cunningham would serve only as producer, abdicating directing duties to protégé Steve Miner, who concurred with Scuderi’s opinion that Jason needed to be a significant factor in the production.<sup>161</sup>

This new movie would retcon Jason’s death in the previous film, proffering instead that the character had in fact survived his initial drowning and somehow matured into a menacing, fully-grown adult male, ready to unleash terror on a new round of camp counselors.<sup>162</sup> While the

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<sup>158</sup> BRACKE, *supra* loc. 1388 (2012) (ebook).

<sup>159</sup> *id.* at loc. 1332-34 (2012) (ebook).

<sup>160</sup> *id.* at loc. 1827 (2012) (ebook).

<sup>161</sup> BRACKE, *supra* loc. 1848-53 (2012) (ebook).

<sup>162</sup> *id.* at loc. 1998-2002 (2012) (ebook).



idea lacked plausibility, the filmmakers saw it as means to recapture the appeal of the first film; in effect, capitalizing on the original film's impactful dream sequence.<sup>163</sup>

Ron Kurz, who'd assisted with scripting duties on the original film, was hired to script the follow-up.<sup>164</sup> The role of Jason required its actor to endure countless hours in a makeup chair and be outfitted with a burlap sack over his head for most of Jason's screen time.<sup>165</sup> With his long, scraggly hair, crooked teeth, distorted face, and exaggerated forehead, the Jason of *Friday the 13th Part 2* sports a look not dissimilar to the make-up design of the main character in David Lynch's *The Elephant Man*.<sup>166</sup>

While this film is notable for its use of an older, adult Jason as its antagonist, *Part 2*'s visual depiction of Jason would come to represent a historic departure in the series; wholly different from the look that would ultimately define Jason in later films. *Part 2* is also notable for introducing certain conceptual qualities that would be fleshed out in later films—namely, Jason surviving his initial drowning. Still, Jason's visual depiction in the film is of relatively minor importance for the purposes of this article. Aside from his adult stature, the elements that would come to define the Jason character, and ingratiate him into popular consciousness, would first reveal themselves in the next film.

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<sup>163</sup> *id.* at loc. 1987-1990 (2012) (ebook) (“TOM SAVINI: ‘Jason doesn't exist, OK? Jason died in the first movie. For Jason to be around today means what? He survived by living off of crawfish on the side of the lake? For 35 years? Nobody saw this kid walking around and growing up? It asks you to accept a lot. That was part of my concern about Part 2 when they offered it to me.’”).

<sup>164</sup> *id.* at loc. 1998 (2012) (ebook).

<sup>165</sup> *id.* at loc. 2049-51 (2012) (ebook).

<sup>166</sup> BRACKE, *supra* loc. 2043 (2012) (ebook).

#### D. PART 3 – WHAT’S IN A HOCKEY MASK?

The creative brain trust behind *Friday the 13th Part 2* was dissatisfied with Jason’s look in that film.<sup>167</sup> The third film in the series would see a new make-up crew come on board, meaning more radical shifts in Jason’s appearance.<sup>168</sup> Effects specialist Doug White would eventually inherit the project from effects wizard Stan Winston.<sup>169</sup> Winston had been employed to sculpt Jason’s makeup for the third film.<sup>170</sup> He had been experimenting with a new make-up technique that would be compatible with the third film’s 3D gimmick.<sup>171</sup>

When the filmmakers saw that Winston’s effects weren’t coming across effectively onscreen, White and his team were called in to redesign Jason’s make-up.<sup>172</sup> For the unmasked depiction of Adult Jason, White was instructed to disregard Carl Fullerton’s work from *Part 2*, and to sculpt a face inspired by the depiction in *Part 1*.<sup>173</sup> The filmmakers had already shot footage using parts of the Winston sculpt, so White needed to synthesize a range of different looks.<sup>174</sup> He crafted the back of the head to match the Winston sculpt and blended the sculpts from the first two

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<sup>167</sup> *id.* at loc. 3074-75 (2012) (ebook).

<sup>168</sup> *id.* at loc. 3078-79 (2012) (ebook).

<sup>169</sup> BRACKE, *supra* loc. 3116-3123 (2012) (ebook).

<sup>170</sup> *id.*

<sup>171</sup> *id.*

<sup>172</sup> *id.*

<sup>173</sup> BRACKE, *supra* loc. 3119-20 (2012) (ebook).

<sup>174</sup> *id.* at loc. 3120-21 (2012) (ebook).

films for the facial features.<sup>175</sup> Notably, the character was bald again like the Child Jason that appeared in the first film.<sup>176</sup>

Jason's costuming for the motion picture would be designed by Sandi Love,<sup>177</sup> who described the process of crafting Jason's new look to be a collaborative effort.<sup>178</sup> Love interpreted Jason as an ignored everyman and clad the character in drably-colored work clothes.<sup>179</sup> Performing under that costume was actor Richard Brooker, by then the third actor to portray Jason. The hunched, muscular, ex-acrobat, Brooker would add his own modifications to the character, portraying Jason as a quieter, more brutish and methodical killer than the iteration seen in the previous film.<sup>180</sup>

The script held an innocuous line in it: "Jason wears a mask."<sup>181</sup> One day, during a make-up test, the decision was made to finally test Jason's look under a new mask.<sup>182</sup> An old Detroit Red Wings goalie mask was then repurposed as Jason's mask.<sup>183</sup> When director Steve Miner first saw a depiction of the character wearing the hockey mask, he decided that it would be Jason's new look.<sup>184</sup> At that point, Doug White reentered the fray to provide new silicone masks of Jason's

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<sup>175</sup> *id.*

<sup>176</sup> *id.* at loc. 3123-24 (2012) (ebook).

<sup>177</sup> *id.* at loc. 3124-30 (2012) (ebook).

<sup>178</sup> BRACKE, *supra* loc. at loc. 3124-30 (2012) (ebook).

<sup>179</sup> *id.*

<sup>180</sup> *id.* at loc. 3372-3373 (2012) (ebook).

<sup>181</sup> *id.* at loc. 3165 (2012) (ebook).

<sup>182</sup> *id.* at loc. 3153-55 (2012) (ebook).

<sup>183</sup> BRACKE, *supra* loc. at loc. 3148-50 (2012) (ebook).

<sup>184</sup> *id.* at loc. 3153 (2012) (ebook).

human face, so as to fit with and incorporate the addition of a hockey mask.<sup>185</sup> Like Freddy with his menacing glove, Jason would now have an equally iconic component part.

The third *Friday the 13th* film is notable for its contributions to the character as well as the fact that it is the only film in the series to never refer to character as “Jason.”<sup>186</sup>

#### E. CONSISTENT DEPICTION ACROSS LATER FILMS

*Part III* establishes the iconic look of Jason, one that would see further evolution in later films. A further complication gets added in *Part IV*, when Adult Jason dies onscreen.<sup>187</sup> In that film’s conclusion, Jason is felled by his own machete when the main protagonist embeds it deeply into Jason’s head.<sup>188</sup> While Jason is resurrected by a lightning bolt in *Friday the 13th Part VI: Jason Lives*, his withering epidermis never completely recovers, and Jason’s flesh would thereon be depicted in varying states of morbid decay.<sup>189</sup>

#### V. LEGAL ANALYSIS

It is important to view these two characters for what they are: relatively separate concepts, bound together through name and origin. If we remove name and origin from the mix; these two characters are substantially different. Child Jason, as he appears in the first film, is merely a figment of another character’s imagination. In the context of the later films, Adult Jason is a living, breathing (well, at first), madman that survived the drowning detailed in the original film. It can

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<sup>185</sup> *id.* at loc. 3157-59 (2012) (ebook).

<sup>186</sup> *id.* at loc. 3603-04 (2012) (ebook).

<sup>187</sup> BRACKE, *supra* loc. 4536-39 (2012) (ebook).

<sup>188</sup> *id.*

<sup>189</sup> BRACKE, *supra* loc. 5814-17 (2012) (ebook)

be inferred from the facts then, that the Adult Jason character does not appear in the original film at all. For that matter, Adult Jason did not even exist until he was fixed in a tangible medium in later film productions. This would have first occurred in 1980 when Kurz wrote his first screenplay for *Friday the 13th Part 2*.<sup>190</sup>

The simple fact is that Miller's elemental contributions to the Jason character (i.e., his name and origin) are not the physical and conceptual elements that have defined the Adult Jason character since 1981. Relating it back to our review of Jason's development in later films, some physical and conceptual elements contributed by Horror Inc. include (but are by no means limited to): (1) the character's revised origin (wherein he survives his drowning) as written by screenwriter Ron Kurz (*Part 2*); (2) the drab work clothes as assembled by costume designer Sandi Love (*Part 3*); (3) Jason's face sculpt as designed by effects specialist Doug White (*Part 3*); (4) the hockey mask as selected by director Steve Miner (*Part 3*); (5) the character's muted and brutish demeanor as first portrayed by actor Richard Brooker (*Part 3*); and, (6) the character's "decaying flesh" appearance, first seen in *Part VI* and retained in all later films. These elements were developed by employees of Horror Inc. in the years after Miller left the franchise.

#### 1. ADULT JASON CONSTITUTES A DERIVATIVE WORK AND RETAINS CERTAIN ASPECTS

##### DERIVATIVE FROM MILLER'S SCREENPLAY

Derivative works have been categorized as newer works that transform or adapt preexisting works.<sup>191</sup> By this reasoning, the sequels developed by Horror Inc. would be classified as derivative works of Miller's original screenplay.

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<sup>190</sup> *id.* at loc. 1998 (2012) (ebook) ("RON KURZ: 'I couldn't just keep Jason as a child. You must understand, back then we had no idea Jason would become part of pop culture.'").

<sup>191</sup> DC Comics v. Towle, 802 F.3d 1012, 1023 (9th Cir. 2015) (quoting 17 U.S.C. § 101 (2016)).

As mentioned above, the two Jason depictions are bound by name and origin. The Adult Jason character (that survived his childhood drowning) is only referred to in *Part I*, but he still shares the same general origin as the version of Jason referred to throughout Miller's screenplay. In addition to those narrative similarities, the name "Jason Voorhees" is solely Miller's creation.<sup>192</sup> These two elements (name, origin), in conjunction with the actual name of the franchise (*Friday the 13th*, also the title of Miller's screenplay) would understandably be retained by Miller, should Horror seek to claim copyrightability over their own significant contributions.

2. ADULT JASON AS A DERIVATIVE WORK IS SO DELINEATED FROM MILLER'S ORIGINAL  
SCREENPLAY AS TO BE INDEPENDENTLY COPYRIGHTABLE

The principle of delineating independently copyrightable characters, as first addressed in *Nichols*, holds that copyright protection exists for characters that are substantially developed from their original works.<sup>193</sup> *Silverman vs. CBS Inc.*, further clarified that authors of derivative works secure copyright protection only for their additions of originality that they contributed to the original work.<sup>194</sup>

In order to be independently copyrightable, Horror would need to separate Adult Jason from the similarities in Miller's original screenplay. Doing so would require proof that Adult Jason bears significant, copyrightable distinctions from the original work. Here, we recall that third parties that copy from preexisting works are afforded copyright protection in their derivative

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<sup>192</sup> BRACKE, *supra* loc. 1337-39 (2012) (ebook) ("VICTOR MILLER: 'I went to school with a girl named Van Voorhees. I was always struck by the sound of the name because it was just creepy-sounding. My son Ian was born in 1968 and my other son Josh was born in 1972. I mixed the two together and that's how I came up with Jason Voorhees.'").

<sup>193</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>194</sup> *Silverman v. CBS Inc.*, 870 F.2d 40, 49 (2d Cir. 1989).

works, limited to the new elements they contributed to the old work.<sup>195</sup> If Miller’s reclaiming of his copyright retroactively rendered Horror a third party to the original screenplay, then Horror would be entitled to protections in relation to the the physical and conceptual elements the company contributed, both to the character and larger franchise. Here, Horror can claim that they are joint authors of the Adult Jason character; arguing that they prepared their respective contributions with the knowledge and intention that those additions of originality would be merged to the contributions of Miller’s screenplay.

Quantifying the additions of originality that have been added to Adult Jason would be a difficult endeavor in the Second Circuit, where there exists little legal precedent scrutinizing substantial delineation. To obtain a common law test defining delineation of derivative characters, we must look to the Ninth Circuit and apply the *Towle* test.<sup>196</sup> In *Towle*, the court held that the Batmobile had “appeared graphically in comic books, and as a three dimensional car in a television series and motion pictures, it has ‘physical as well as conceptual qualities,’” and was therefore subject to copyright protection, independent of the Batman property.<sup>197</sup>

For a character to be especially distinctive under the *Towle* test, it has to (1) display “physical as well as conceptual qualities,”<sup>198</sup> (2) be “‘sufficiently delineated’ enough to be recognizable as the same character whenever it appears,”<sup>199</sup> and (3) be “especially distinctive” and

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<sup>195</sup> *Id.* at 1023 (citing 17 U.S.C. § 501(b) (2016)).

<sup>196</sup> *DC Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015).

<sup>197</sup> *Towle*, 802 F.3d at 1021 (quoting *Air Pirates*, 581 F.2d at 755).

<sup>198</sup> *Id.* at 1021 (quoting *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978)).

<sup>199</sup> *Id.* See also *Rice v. Fox Broadcasting Co.*, 330 F.3d 1175 (9th Cir. 2003).

“contain some unique elements of expression.”<sup>200</sup> We will now parse out these elements out and apply them to Adult Jason.

#### i. PHYSICAL & CONCEPTUAL QUALITIES

While it is difficult to delineate a character,<sup>201</sup> common law has in past instances found that adding visual elements can make it easier. This first part of the *Towle* test came from *Walt Disney Prods. v. Air Pirates*, where “Disney” cartoon characters were parodied in adult-themed, “counter-culture” comic books. The *Air Pirates* decision held that a comic book character that displayed distinctive physical qualities, in addition to the conceptual ones, was more likely to contain some “unique elements of expression” and was therefore distinctively delineated.<sup>202</sup>

Due in part to his very brief inclusion in *Friday the 13<sup>th</sup>*, Child Jason has relatively few physical and conceptual elements. Conceptually, the character is deceased for the duration of the film and appears only in a dream sequence. As designed by Tom Savini, the character is bald with deformed facial features.<sup>203</sup> Child Jason is of relatively small stature, as he was depicted by thirteen-year-old Ari Lehman.<sup>204</sup>

Alternatively, the Adult Jason character has accumulated a wealth of both physical and conceptual qualities. Like the Batmobile, this depiction of Jason has appeared in a swath of literary, pictorial, graphic, and sculptural mediums. While Adult Jason was first visually conceptualized by Carl Fullerton in *Part II*, it was not until the third film that Jason fully becomes

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<sup>200</sup> *Id.* See also *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008).

<sup>201</sup> *Air Pirates*, 581 F.2d at 755.

<sup>202</sup> *Id.*

<sup>203</sup> BRACKE, *supra* loc. 1043-49 (2012) (ebook).

<sup>204</sup> *id.* at loc. 1386 (2012) (ebook).



the hockey mask-wearing, machete-wielding madman of later appearances. The design of Jason in the third film appears to have been a collaboration influenced by director Steve Miner, screenwriters Martin Kitrosser and Carol Watson, effects specialists Doug White, Stan Winston, actor Richard Brooker, and costume designer Sandi Love; all of whom were under the employ of Horror Inc. when they made their respective contributions.

With this creative brain trust at the helm, the Adult Jason character began exuding physical traits and conceptual elements that have been retained to this day. He wore tattered, drab workman's clothing.<sup>205</sup> His facial features—crafted primarily by Doug White—became a fusion of the Savini and Fullerton make-up designs from the previous films, in addition to incorporating elements of Stan Winston's original *Part III* design.<sup>206</sup> Finally, when Steve Miner first saw a test image depicting the character wearing his iconic hockey mask, he sensed they were tapping into what would become the character's most-visceral, iconic element.<sup>207</sup>

## ii. SUFFICIENTLY DELINEATED

It's not enough for a character to merely possess these new qualities; the character must also maintain them. The *Towle* decision affirmed the district court's ruling that the Batmobile was independently copyrightable, holding that the fictional vehicle "maintained distinct physical and conceptual qualities since its first appearance in the comic books in 1941."<sup>208</sup> The court first determined that the Batmobile always maintained certain conceptual elements: it was a highly interactive vehicle, it was equipped with high-tech gadgets and weapons that assisted Batman in

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<sup>205</sup> BRACKE, *supra* loc. 3119, 3126 (2012) (ebook).

<sup>206</sup> BRACKE, *supra* loc. 3117, 3120 (2012) (ebook).

<sup>207</sup> *id.* at loc. 3153, 3156 (2012) (ebook).

<sup>208</sup> DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015).

his crimefighting.<sup>209</sup> Next, they considered the Batmobile's physical elements across various depictions, finding that the car was usually bat-like in structure and displayed other bat-themed, exaggerated features. In finding the Batmobile "sufficiently delineated," the court reasoned that, "[t]his bat-like appearance has been a consistent theme throughout the comic books, television series, and motion picture, even though the precise nature of the bat-like characteristics have changed from time to time." The court cited the Batmobile's appearances in the comic books, the 1966 television series starring Adam West, and the 1989 Tim Burton film, in deciding that the Batmobile displayed "consistent, identifiable traits and attributes," thus meeting the second prong of their test.<sup>210</sup>

Much like the Batmobile in *Towle*, Adult Jason is "sufficiently delineated" so as to be recognizable as the same character whenever he appears. Across four decades, and spanning several different projects, the Adult Jason character has consistently maintained the above-mentioned physical and conceptual elements. Moreover, these elements have been represented in various other literary, graphic, and sculptural mediums. Apart from the films, the Adult Jason character moves a wide variety of merchandise in the form of licensed hockey masks, paintable model kits, posters, toys, coffee table books, young adult novelizations, and videogames. Of Gun Media's eleven iterations of Jason depicted in *Friday the 13th: The Game*, ten of those iterations retain some or all of the physical and conceptual elements as laid out above; those elements being Jason's clothing, his facial features, hockey mask, lack of speech, rotting flesh, and large, unrelenting demeanor.

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

## iii. ESPECIALLY DISTINCTIVE / UNIQUE ELEMENTS OF EXPRESSION

Copyright protection is available for characters that are “especially distinctive” and “contain some unique elements of expression.”<sup>211</sup> Under *Towle*, the court found that, to be especially distinctive, the character need be, “not merely a stock character.”<sup>212</sup> The *Towle* court cited the Batmobile’s status as a bat-themed sidekick outfitted with unique traits, physical characteristics, and a well-established name in determining that the car cleared the “especially distinctive” bar. In addition, the court noted that a character is copyrightable even when they “lack[] sentient attributes and do[] not speak.”<sup>213</sup>

It has been advanced in some critical circles that the *Friday the 13th* films follow a somewhat formulaic pattern, that the films themselves border on generic.<sup>214</sup> While an argument can certainly be advanced that the many poor, dearly-departed camp counselors of Crystal Lake are so generic as to be uncopyrightable, no such argument can be made for Adult Jason. Adult Jason’s most definable elements come not from Miller’s original screenplay, but from the many creative artists who have worked on the character with *Part III*. Their additions and modifications to the character’s physical and conceptual elements have evolved far beyond slight variations to the original work. Jason is the sole franchise character depicted across all films and has been featured predominantly across the vast majority of poster advertisements for the films for many years. Like the Batmobile, the character’s unique traits, physical characteristics, and well-known name, are elements that have been well-represented in popular culture for several decades. The

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<sup>211</sup> *Id.* at 1021 (quoting *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1224 (9th Cir. 2008)).

<sup>212</sup> *Id.* at 1022.

<sup>213</sup> *Halicki*, at 547 F.3d at 1224.

<sup>214</sup> Chris Eggertson, *Siskel and Ebert vs. ‘Friday the 13th’: A brief, scathing history*, UPROXX: HITFIX (November 13, 2015), <https://uproxx.com/hitfix/siskel-and-ebert-vs-friday-the-13th-a-brief-scathing-history/>.

character's visual depictions have been overseen by some of the most notable talents in the special effects and make-up industries.

In meeting the three prongs of *Towle* in the Ninth Circuit, there seemingly exists an argument for Horror to retain most if not all of the crucial elements defining the Adult Jason character.

3. UPON REMOVAL OF THE NAME AND ORIGIN ELEMENTS, ADULT JASON IS NOT SUBSTANTIALLY SIMILAR TO CHILD JASON BECAUSE THEY SHARE NO PROTECTABLE ELEMENTS

When considering infringement claims, the Second Circuit places significance on substantial similarity.<sup>215</sup> To determine substantial similarity, the *Allen* court applied a test of whether an ordinary observer would be disposed to overlook the differences and view the characters as the same.<sup>216</sup> In that case, the court found that the character at issue could not be infringed upon because the original work did not provide the character with discernible personality or distinguishable appearance.

Similarly, the characters of Child Jason and Adult Jason have so little in common as to not meet the standards set for substantial similarity. Upon removal of the "Jason Voorhees" name and the Camp Crystal Lake backstory, the "hockey mask-wearing killer" (as referred to in Horror's press release) lacks any "specific and developed traits" so similar to Child Jason as to meet the high bar of infringement.<sup>217</sup> In taking steps to insulate themselves from future litigation, Horror's

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<sup>215</sup> *Allen v. Scholastic Inc.*, 739 F. Supp. 2d 642, 665 (S.D.N.Y. 2011).

<sup>216</sup> *Id.* at 654 (holding that "[t]he standard test for substantial similarity between two items is whether an 'ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal as the same.'").

<sup>217</sup> *Id.* at 660.

use of the “hockey mask-wearing killer” IP could possibly proceed unimpeded. In the event Miller challenges such usage, Horror can still claim a stake in the character as a joint author.

#### 4. ADULT JASON’S HOCKEY MASK IS COPYRIGHTABLE AS A COMPONENT PART TO THE CHARACTER

If, as we have asserted, Adult Jason is a copyrightable character independent of Miller’s original screenplay, then his iconic hockey mask is equally copyrightable as a component part. In *New Line Cinema Corp. v. Russ Berrie & Co.*, the district court determined that Freddy Kruger’s glove was copyrightable as a “component part of the character which significantly aids in identifying the character.”<sup>218</sup> Comparatively, both Freddy’s glove and Jason’s mask were featured prominently in the marketing for the dueling characters’ mash-up film: *Freddy vs. Jason*.<sup>219</sup>

#### 5. THERE IS NEED FOR A MORE MODERN LEGAL STANDARD

*Towle* moves beyond the abstract nature of the *Nichols* ruling, but its test has yet to be applied in the Second Circuit, where *Horror Inc.* is currently being adjudicated. It is far from a certainty that the Second Circuit will apply the *Towle* test when *Horror Inc.* is reviewed on appeal. Still, this need for a more defined standard speaks to the surprisingly little progress courts have made on this matter in the near-century since *Nichols*.

The rise of streaming in the entertainment industry has created a demand for content like never before.<sup>220</sup> Likewise, more and more companies are acquiring recognizable intellectual

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<sup>218</sup> *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293, 302 (S.D.N.Y. 2001) (quoting *New Line Cinema Corp. v. Easter Unlimited, Inc.*, 17 U.S.P.Q.2d 1631, 1633 (E.D.N.Y.1989) (citing *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204 (2d Cir.1979)).

<sup>219</sup> *Freddy vs. Jason – Ads*, NIGHTMAREONELMSTREETFILM.COM, <http://nightmareonelmstreetfilms.com/site/films/freddy-vs-jason/freddy-vs-jason-ads/>.

<sup>220</sup> Vahe Arabian, *The Growth of Content Streaming: What Does This Mean For You?*, STATE OF DIGITAL PUBLISHING (October 27, 2016), <https://www.stateofdigitalpublishing.com/content-strategy/the-growth-of-streaming-content-the-numbers/>.

properties in order to exploit them for new content.<sup>221</sup> It stands to reason that further litigation around copyrightability of individual characters is on the horizon, as various mergers and acquisitions are bound to instigate new legal entanglements. Whether it's Miller's ongoing litigation or a different case altogether, the broader legal issues around characters and copyright are not going away until the courts and legislature adopt modern, universal standards not unlike what is laid out in the *Towle* decision.

## VI. CONCLUSION

The monstrous Jason Voorhees depicted in later films in the *Friday the 13th* franchise is a derivative work of Victor Miller's original screenplay. As a derivative work, the character is independently copyrightable for the many distinctions it lays upon the original work. This article has laid out several physical and conceptual elements of the modern Jason character that are wholly delineated from the character as featured in Miller's original screenplay. In removing the few similarities that exist, Horror Inc. should be able to continue exploiting the "hockey mask-wearing killer" without infringing on Miller's original screenplay.

Nothing in this article suggests that Victor Miller erred in reclaiming his stake in the copyright to his original screenplay. On the contrary, Underhill's ruling lays out in stark detail the apparent validity of Miller's termination notices. Under the arrangement proposed in this article, both parties effectively keep the elements they brought to the table: Miller with his original screenplay (and its entire bundle of sticks, including the *Friday the 13th* title and "Jason Voorhees" name), and Horror with their hockey-mask iteration of the character. Furthermore, should both

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<sup>221</sup> See generally, the Marvel franchise (owned by Disney), the Star Wars franchise (owned by Disney), Pixar (owned by Disney), 20th Century Fox (owned by Disney).

sides decide that these separate elements are essential to the larger brand, the parties can still recognize each other as joint authors and move the business forward together. The fact exists that significant caveats to this recognizable IP would have to be made in the event either party moved forward independently of the other.

Judge Underhill's *Horror Inc.* ruling is notable on variety of fronts. Not only did it completely upend the rights to one of Hollywood's longest running film franchises, it opened up a wider discussion about the independent copyrightability of characters in the face of termination notices. In doing so, the ruling leaves to a later date some much-needed legal guidance as it relates to the greater ambiguities of federal copyright law.

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