SCREENWRITER "KILLS" JASON: VICTOR MILLER ALLOWED TO TERMINATE HIS GRANT OF RIGHTS IN FRIDAY THE 13TH SCREENPLAY

Horror Inc. v. Miller

Just as Jason terminated the counselors at Camp Crystal Lake in the summer of '79, screenwriter Victor Miller validly terminated production company Horror Inc.'s rights to the copyright in the screenplay for "Friday the 13th." In a recent decision[1], the U.S. District Court for District of Connecticut found that Victor Miller did not prepare the screenplay as a work made for hire. Thus, Miller held the authorship right of termination, which allowed him to terminate any rights to the screenplay he granted to Horror, Inc., more than 35 years ago.

The outcome of this case highlights the fact that termination of an author's copyright assignment is a real and significant threat to a successful franchise, be it a series of cult horror movies or a long-running television show. If the creator of the work is an employee who authored the work within the scope of her employment (and not an independent contractor), then the work is usually considered a work for hire, no matter the kind of creative work. However, it is often the case that studios work with freelance writers, not employees, to conceptualize ideas. To ensure that a studio or production company is considered the author of such a work, the relevant entity should, first, make sure that any "work for hire" agreement is both in writing and express and, second, that the work falls within one of the 9 limited categories of works that can culminate in a work for hire (as a contribution to a collective work, part of a motion picture or other audiovisual work, translation, supplementary work, compilation, instructional text, test, answer material for a test, or as an atlas).

The dispute in this case arose under the elusive termination right provided by the Copyright Act. The right to terminate went into effect in 1978 and gives a copyright owner the ability to terminate grants of her copyright interests 35 years after the right is first transferred. This puts 2019 within the hotbed of termination actions– 41 years after the right to termination was created and 6 years after the first instances of termination would have been allowed to commence.

Miller, the screenwriter of the famous—some would say infamous—horror movie "Friday the 13th," timely filed and served notices purporting to terminate any permissions he granted to the "Friday the 13th" production company to exploit his work. The Plaintiff, the production company and its successor in interest, Horror Inc., brought a declaratory judgment action seeking a determination that Defendant Miller's preparation of the screenplay constituted a work for hire. At the heart of this dispute was whether Miller currently has or had ever held authorship rights to the screenplay, which would allow Miller to terminate any permissions he previously granted 35 or more years ago.

There are two ways that a work becomes a work-for-hire: (1) through an express written agreement and inclusion in one of the nine categories, and (2) where the author is an employee and creates the work

[1] *Horror Inc. v. Miller*, 335 F. Supp. 3d 273 (D. Conn. 2018).

within the scope of his employment. Horror argued that Miller produced the screenplay as Horror's employee within the scope of his employment and, therefore, as a work for hire. If the work was created as a work made for hire, then the employer would be deemed the initial author of the work, and the associated authorship rights vest with the employer, including the right to terminate. In this case, Horror made no argument that the work was commissioned through an express written agreement, but rather, Horror argued, that Miller was an employee pursuant to labor law. The Court pointed out that this was an interesting argument to make because it did not follow the traditional test mandated by the Supreme Court in *CCNV*[2] for determining whether a hired party is an employee. The Court further concluded that the arguments presented by Horror—that labor law required finding that Miller was Horror's employee—were not convincing.

The Court then applied the *CCNV* factors and concluded that Miller wrote the screenplay as an independent contractor, not as an employee. The Court relied on the following facts in making its determination: Horror's lack of detailed control over Miller's expression; Horror's approval authority over the screenplay; writing the screenplay for a successful motion picture required skill; the absence of traditional employee benefits; Miller's engagement for the completion of a single screenplay project; Horror's lack of right to assign additional projects to Miller; Miller worked on the screenplay for a short duration (two months); Miller was paid a flat fee for completion of the screenplay project; Miller supplied his own tools; and Horror's status as a business in the regular pursuit of filmmaking.

Because the Court concluded that Miller was an independent contractor, and not an employee of Horror's, the authorship rights for the screenplay belong to Miller. Therefore, Miller had the ability to utilize his termination right and terminate the exploitation grant given to Horror in 1979.

Studios and production companies should take note—even franchises that make a killing can be cut off by shortsightedness.

[2] *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (hereinafter "*CCNV*").