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THE HORRORS OF COPYRIGHT LAW: AN ANALYSIS OF
 CHARACTER COPYRIGHT ISSUES & ICONIC HORROR
 VILLAINS

ALEXA BROWNING

Character copyrightability is a complex and nuanced legal issue that the courts have wrestled with for decades. Due to this, the outcomes of copyright protection cases can be unpredictable. This unpredictability can lead the creators of original content to feel insecure in the preservation of their work, which is crucial for the future of impactful and creative original works. While the issue of character copyrightability has been explored, this paper will examine character copyright protection for infamous horror movie villains whose likenesses were appropriated following their rise to popularity. This article will utilize cases involving the villains Michael Myers, Jason Voorhees, Freddy Krueger, and Ghostface to delve into the issue of horror movie character copyrightability. Characters' images and likenesses drive the popularity of horror movies and franchises. This is why the protection of horror movie characters specifically is imperative. Character copyright protection allows creators to freely produce original concepts and be rewarded for creativity. Character copyrightability should be a reliable legal approach to ensure the preservation of iconic horror characters.

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INTRODUCTION

The 1968 horror film *Night of the Living Dead*,¹ co-written and directed by George Romero, has been cited as one of the most influential zombie movies ever made.² Prior to the film's release, the popular interpretation of zombies was heavily inspired by voodoo zombies.³ Romero's *Night of the Living Dead* completely changed the popular perception of zombies and has continued to influence the depiction of zombies in modern film & TV up to this day.⁴ However, this groundbreaking film lives in the public domain and Romero hardly saw any profit from the movie, despite it being a box-office success and grossing thirty million dollars.⁵

Before the film was called *Night of the Living Dead*, the working title was "Night of the Flesh Eaters."⁶ The title was not changed to "Night of the Living Dead" until shortly before its release.⁷ Unfortunately, after this change the dis-

¹ NIGHT OF THE LIVING DEAD (Image Ten 1968).

² See Richard Newby, *The Lingering Horror of 'Night of the Living Dead'*, HOLLYWOOD REP. (Sept. 28, 2018, 9:00 AM), <https://www.hollywoodreporter.com/movies/movie-news/why-night-living-dead-is-more-relevant-ever-1145708/> [<https://perma.cc/T8DR-JKAJ>]; see also Alissa Wilkinson, *George Romero Didn't Mean to Tackle Race in Night of the Living Dead, but he did Anyway*, VOX (July 22, 2017, 10:00 AM), <https://www.vox.com/culture/2017/7/22/15985492/night-of-living-dead-movie-week-george-romero-zombies-get-out-jordan-peepe> [<https://perma.cc/2D6D-CPP6>]; see also *Zombies & America's Nightmares*, DEAD MEAT PODCAST (Aug. 7, 2018), https://www.youtube.com/watch?v=9P1zAWQbOoI&list=PLbV5-cW2vcuNb2X8vEW_N-JYCdxpTaCHq&index=5 [<https://perma.cc/97DJ-S9TR>].

³ See WHITE ZOMBIE (Halperin Productions 1932); see also *Zombies & America's Nightmares*, *supra* note 2.

⁴ See Wilkinson, *supra* note 2; see also Daga Nyang, *The Surprising And Enduring Importance Of Night Of The Living Dead*, FLA. INT'L UNIV.: FILM STUDIES CERTIFICATE PROGRAM (Apr. 17, 2019), <https://film.fiu.edu/the-surprising-and-enduring-importance-of-night-of-the-living-dead/> [<https://perma.cc/U4PS-WH2R>].

⁵ See *The First Horror Movie & The History of the Horror Genre*, N.Y. FILM ACAD. (July 21, 2022), <https://www.nyfa.edu/student-resources/how-horror-movies-have-changed-since-their-beginning/> [<https://perma.cc/C2KZ-GAGF>]; see also Michael Kennedy, *How Night of the Living Dead Accidentally Became Public Domain*, SCREENRANT (Nov. 16, 2019), <https://screenrant.com/night-living-dead-movie-public-domain-copyright-accident/> [<https://perma.cc/G7CG-ALLZ>].

⁶ See Kennedy, *supra* note 5.

⁷ *Id.*

tributor forgot to put the copyright notice in the final print and the film was unable to be protected under copyright.⁸ Therefore, the film lives in the public domain.

The horror genre specifically has experienced its fair share of copyright disputes. Horror has historically been overlooked as a genre and has not been considered a serious art.⁹ Due to this, horror filmmakers have often created films without a clear idea of how successful they would be. However, the unexpected widespread popularity of certain horror films has led to many attempts at appropriating infamous antagonists.¹⁰ This article examines character copyright protection and how it applies to infamous horror movie villains. Copyright protection for horror movie characters allows the original creators of the characters to portray them in the most authentic way possible. Characters are known to evolve over the decades for many reasons,¹¹ but only their original creators can incorporate such changes while maintaining the heart of their characters and staying true to the original concept.

Section I will discuss the history of horror films and identify the horror movie villains discussed throughout the remainder of the article. Section II will examine copyright law and character copyright. Section III will review copyright cases that involve the horror movie villains identified in Section I. Section IV will conclude the article and argue why horror movie characters should be protected by copyright.

I

THE HISTORY OF HORROR

Since the beginning of film there have always been “horror” movies, however, they did not gain widespread popularity until around the 1920s.¹² Films such

⁸ *See id.*; 17 U.S.C. § 406.

⁹ *See* Josh Rosenberg, *When Will the Oscars Finally Give Horror Its Due?*, ESQUIRE (Mar. 10, 2023), <https://www.esquire.com/entertainment/movies/a42748643/oscars-horror-academy-award-s-essay/> [<https://perma.cc/DE9U-6YUK>].

¹⁰ *See generally* *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293 (S.D.N.Y. 2001); *Don Post Studios, Inc. v. Cinema Secrets, Inc.*, 124 F. Supp. 2d 311 (E.D. Pa. 2000); *Easter Unlimited, Inc. v. Rozier*, No. 18-CV-06637, 2021 WL 4409729, at *1 (E.D.N.Y. Sept. 27, 2021).

¹¹ *See generally* *SCREAM 4* (Outerbanks Entertainment 2011).

¹² *See The First Horror Movie & The History of the Horror Genre*, *supra* note 5.; *see also* Open Culture, *The First Horror Film, George Méliès' The Haunted Castle (1896)*, YOUTUBE (Nov. 26, 2016), <https://www.youtube.com/watch?v=exNsVliQFMA> [<https://perma.cc/AX6Q-A3BG>].

as *The Cabinet of Dr. Caligari*¹³ and *Nosferatu*¹⁴ were catalysts for the genre's popularity.¹⁵ Both are German films influenced by the country's perspective on authority and fear after World War I.¹⁶ Since the release of these films, there have been an array of notable films that similarly reflect the social issues and fears of the time they were released.¹⁷

*Frankenstein*¹⁸ and *Freaks*,¹⁹ for example, both examine the theme of otherness that was prevalent in the 1930s. During this period, eugenics was a pervasive concern that caused high value to be put into a "healthy" or "superior" appearance.²⁰ Due to this, "visible disability or difference was interpreted as a sign of this inner deviance, which was also interpreted in terms of immorality and criminality."²¹ While *Freaks*²² features actors with disabilities, *Frankenstein*²³ features a deformed monster. Although Mary Shelley, the author of the gothic novel *Frankenstein*,²⁴ wrote her novel before the ideology of eugenics was popularized, the film incorporates more timely themes into the story.²⁵ The two films present

¹³ THE CABINET OF DR. CALIGARI (Decla-Film 1920).

¹⁴ NOSFERATU (Prana Film 1922).

¹⁵ See *The First Horror Movie & The History of the Horror Genre*, *supra* note 5.

¹⁶ See SIEGFRIED KRACAUER, *FROM CALIGARI TO HITLER: A PSYCHOLOGICAL HISTORY OF THE GERMAN FILM 72* (2019).

¹⁷ See *Nightmare on Our Street: Social Commentary in Modern Horror*, WRITERS GUILD OF AM. W. (Nov. 12, 2021), <https://www.wga.org/news-events/news/connect/11-12-21/nightmare-on-our-street-social-commentary-in-modern-horror> [<https://perma.cc/UWG8-U4UE>]; see also *How Social Fears Play an Important Role in Horror Films*, UKESSAYS (Aug. 24, 2021), <https://www.ukessays.com/essays/film-studies/horror-film-how-social-fears-play-an-important-role.php> [<https://perma.cc/Q3ZE-FJ4T>].

¹⁸ FRANKENSTEIN (Universal Pictures 1931).

¹⁹ FREAKS (Metro-Goldwyn-Mayer 1932).

²⁰ See Karen Norrgard, *Human Testing, the Eugenics Movement, and IRBs*, NATURE EDUC. (2008), <https://www.nature.com/scitable/topicpage/human-testing-the-eugenics-movement-and-irbs-724/> [<https://perma.cc/5VNA-T4UC>]; see also *Eugenics*, HISTORY (Oct. 28, 2019), <https://www.history.com/topics/germany/eugenics> [<https://perma.cc/7AYU-SAND>].

²¹ See Kristen Lopez, *'Freaks' Is the Granddaddy of Disabled Horror, for Better and Worse*, INDIEWIRE (Oct. 6, 2020), <https://www.indiewire.com/2020/10/freaks-disabled-horror-movie-1234590637/> [<https://perma.cc/M57Y-7WHD>].

²² FREAKS, *supra* note 19.

²³ FRANKENSTEIN, *supra* note 18.

²⁴ MARY SHELLEY, *FRANKENSTEIN* (1818).

²⁵ FRANKENSTEIN, *supra* note 18.

the audience with a prevalent social fear of “visible disability or difference.”²⁶ This societal fear was so strong, in fact, that the director of *Freaks*, Tod Browning, saw his career ultimately end as a result of the film’s negative reception.²⁷

The 1960s were another notable decade for the horror genre and the United States. Because of the rise of the civil rights movement and the civil unrest in many cities due to racial discrimination and police brutality, 1968 was a violent year in American history.²⁸ The Vietnam War, which began in 1964, contributed to the ongoing presence of violence in the United States. As the first televised war, Americans at home were exposed to the horrors of combat in real time.²⁹ *Night of the Living Dead*,³⁰ released in 1968, sheds light on the fears widely held by society at the time. Just a year before the 1968 release of *Night of the Living Dead*, the March on the Pentagon took place with thousands of attendees protesting the Vietnam War.³¹ Additionally, civil rights leader Martin Luther King Jr. and presidential candidate Robert F. Kennedy were assassinated that same year.³² As a whole, 1968 was polluted with violence and anger, which led many Americans to think “their country was having a nervous breakdown.”³³ Although the director of *Night of the Living Dead*, Romero, did not intend for the film to be about race and

²⁶ See Lopez, *supra* note 21.

²⁷ See *id.*

²⁸ See Farrell Evans, *The 1967 Riots: When Outrage Over Racial Injustice Boiled Over*, HISTORY (June 17, 2021), <https://www.history.com/news/1967-summer-riots-detroit-newark-kerne-r-commission> [<https://perma.cc/8KQ4-EXM8>].

²⁹ See Jessie Kratz, *Vietnam: The First Television War*, PIECES OF HIST. (Jan. 25, 2018), <https://prologue.blogs.archives.gov/2018/01/25/vietnam-the-first-television-war/> [<https://perma.cc/9RHN-YMGX>].

³⁰ NIGHT OF THE LIVING DEAD, *supra* note 1.

³¹ See *U.S. Marshals and the Pentagon Riot of October 21, 1967*, U.S. MARSHALS SERV., <https://www.usmarshals.gov/who-we-are/about-us/history/historical-reading-room/us-marshals-and-pentagon-riot-of-october-21-1967> [<https://perma.cc/KG36-82QZ>].

³² See *The Day That Martin Luther King Jr. Died*, NAT’L. CONST. CTR. (Apr. 4, 2022), <https://constitutioncenter.org/blog/the-day-that-dr-martin-luther-king-jr-died#:~:text=At%206%3A05%20P.M.%20on,and%20died%20an%20hour%20later> [<https://perma.cc/3JXC-AUPV>]; *Robert F. Kennedy is fatally shot*, HISTORY (June 2, 2022), <https://www.history.com/this-day-in-history/bobby-kennedy-is-assassinated> [<https://perma.cc/TDL8-5V5D>].

³³ See Kenneth T. Walsh, *1968: The Year That Changed America Forever*, U.S. NEWS & WORLD REP. (Dec. 31, 2017), <https://www.usnews.com/news/national-news/articles/2017-12-31/1968-the-year-that-changed-america-forever> [archival link omitted].

unrest,³⁴ he has since said that it captures the “anger” and “disappointment” of the time it was released.³⁵

The societal changes and fears of the 60s carried on into the 1970s, with the effects of the Vietnam War prevalent in 1970s culture.³⁶ The 70s saw a breakdown of traditional Christian values, a rise in individuality, and a surge of various liberation movements.³⁷ Amidst these cultural changes, the 1970s were also when some of the most iconic horror villains came to life on the big screen for the first time.

In 1978, John Carpenter’s *Halloween*³⁸ was released and popularized the slasher genre.³⁹ Merriam Webster defines a “slasher” as a person who “mutilates or kills with an edged blade.”⁴⁰ Slasher films typically feature an antagonist who stalks then harms or kills a group of people.⁴¹ Although *Halloween*⁴² was not the first slasher movie,⁴³ its influence on the horror genre was massive and its

³⁴ See Nyang, *supra* note 4; see also Joe Kane, *How Casting a Black Actor Changed ‘Night of the Living Dead’*, THE WRAP (Aug. 31, 2010, 5:20 PM), <https://www.thewrap.com/night-living-dead-casting-cult-classic-20545/> [<https://perma.cc/TTP9-Y78X>].

³⁵ NIGHTMARES IN RED, WHITE, AND BLUE (Lux Digital Pictures 2009).

³⁶ See Ryan Bergeron, *‘The Seventies’: Time Magazine’s Take on the End of the Vietnam War*, CNN (Aug. 17, 2015), <https://www.cnn.com/2015/06/23/living/the-seventies-time-magazine-vietnam-war/index.html> [<https://perma.cc/2D39-K54W>].

³⁷ See *1970s America*, NAT’L ARCHIVES (July 6, 2021), <https://www.nixonlibrary.gov/news/1970s-america> [<https://perma.cc/Z7JZ-PA2X>].

³⁸ HALLOWEEN (Compass International Pictures 1978).

³⁹ See Samuel R. Murrian, *John Carpenter’s 1978 ‘Halloween’ Is One of the Best, Scariest Horror Movies of All Time—Here’s Why*, PARADE (Oct. 12, 2022), <https://parade.com/606101/samuelmurrian/7-reasons-why-john-carpenters-halloween-is-one-of-the-most-beloved-horror-films-of-all-time/> [<https://perma.cc/B27P-36LG>].

⁴⁰ *Slasher*, MERRIAM-WEBSTER.COM DICTIONARY (2022), <https://www.merriam-webster.com/dictionary/slasher/> [<https://perma.cc/3XJP-LGEE>].

⁴¹ See generally STACEY ABBOTT ET AL., *STYLE AND FORM IN THE HOLLYWOOD SLASHER FILM* (Wickham Clayton ed., 2015).

⁴² HALLOWEEN, *supra* note 38.

⁴³ See Murrian, *supra* note 39; see also *PSYCHO* (Shamley Productions 1960); *PEEPING TOM* (Michael Powell Theatre 1960).

impact is still apparent.⁴⁴ It could be argued that without *Halloween*, the other films discussed in this article would not have been created.⁴⁵

In 2006, *Halloween* was selected for preservation in the United States National Film Registry⁴⁶ by the Library of Congress as being “uniquely artistic, frightening and a horror film keystone,”⁴⁷ and the main villain, Michael Myers, has been ranked the greatest slasher villain of all time.⁴⁸ Michael Myers’ defining characteristics are his slow and steady pace, blue utility jumpsuit, and white mask.⁴⁹ In the first *Halloween* film, Michael wields a large butcher knife and is often associated with knives, but his weapon of choice changes depending on his surroundings.⁵⁰ *Halloween* shaped the horror movies which came after it and aided in the rise of the slasher film.⁵¹

Shortly after, *Friday the 13th*⁵² was released in 1980. The film’s producers were inspired by the success of *Halloween* and wanted to create a similarly

⁴⁴ See Murrian, *supra* note 39.

⁴⁵ See *What Tropes and Themes Did “Halloween” Help Introduce to the Horror Genre?*, THE TAKE, <https://the-take.com/watch/what-tropes-and-themes-did-halloween-help-introduce-to-the-horror-genre#:~:text=It%20was%20largely%20responsible%20for,staples%20within%20the%20horror%20genre> [<https://perma.cc/Z35Z-33UE>].

⁴⁶ *Complete National Film Registry Listing*, LIBR. OF CONG., <https://www.loc.gov/programs/national-film-preservation-board/film-registry/complete-national-film-registry-listing/> [<https://perma.cc/7DN2-8RC3>].

⁴⁷ *Brief Descriptions and Expanded Essays of National Film Registry Titles*, LIBR. OF CONG., <https://www.loc.gov/static/programs/national-film-preservation-board/documents/halloween.pdf> [<https://perma.cc/KS22-DPM2>].

⁴⁸ Chad Byrnes, *A Killer List: The Greatest Slasher Movies of All Time*, LA WEEKLY (Oct. 22, 2018), <https://www.laweekly.com/a-killer-list-the-greatest-movie-slashers-of-all-time/> [<https://perma.cc/7C3T-B6T6>].

⁴⁹ See HALLOWEEN, *supra* note 38.

⁵⁰ *Id.*; see also Jake Dee, *Halloween: Michael Myers’ 10 Best Murder Weapons, Ranked*, SCREENRANT (Mar. 28, 2021), <https://screenrant.com/halloween-michael-myers-10-best-murder-weapons-ranked/#:~:text=Just%20as%20Freddy%20Krueger%20is,majority%20of%20his%20Halloween%20victims> [<https://perma.cc/MVV4-DS8D>].

⁵¹ See Amanda Bell, *The Evolution of Slasher Films Explained*, LOOPER (July 14, 2021, 3:01 PM), <https://www.looper.com/461144/the-evolution-of-slasher-films-explained/> [<https://perma.cc/SE7K-4NEK>].

⁵² FRIDAY THE 13TH (Georgetown Productions, Inc. 1980).

fashioned movie.⁵³ The movie was a box office success⁵⁴ and *Friday the 13th* is considered one of the most successful media franchises in the United States.⁵⁵ Jason Voorhees is the antagonist in *Friday the 13th*⁵⁶ and is widely recognized for his hockey mask.⁵⁷ He often wears dark, drab, and tattered clothing.⁵⁸ Although he is mistakenly known to carry a chainsaw,⁵⁹ Jason most often carries a machete.⁶⁰ Additionally, Jason is not the killer in the first installment of *Friday the 13th*;⁶¹ however, he is the killer in all the *Friday the 13th* sequels and represents

⁵³ See Kelly Konda, *Celebrating Friday the 13th By Looking at The Origins of the Film It Ripped Off: John Carpenter's Halloween*, WE MINORED IN FILM (June 13, 2014), <https://weminoredinfilm.com/2014/06/13/celebrating-friday-the-13th-by-looking-at-the-origins-of-the-film-it-ripped-off-john-carpenters-halloween/> [<https://perma.cc/9KZP-YPBR>]; see also Samuel Lowery, *The Brutal Horror Movie Friday the 13th Copied (Not Halloween)*, SCREENRANT (Sept. 10, 2022), <https://screenrant.com/italian-horror-a-bay-of-blood-inspired-friday-the-13th/#:~:text=It%27s%20no%20secret%20that%20Friday,in%20a%20new%20location%20while> [<https://perma.cc/SKG6-HT2S>].

⁵⁴ See Matt Slovic, 'Friday the 13th' Film History, WASH. POST (1996), <https://www.washingtonpost.com/wp-srv/style/longterm/movies/features/friday13/friday13.htm> [<https://perma.cc/2B2V-353R>].

⁵⁵ See *Top 25 Movie Franchises of All Time: #7*, IGN (May 14, 2012, 3:44 PM), <https://www.ign.com/articles/2006/12/18/top-25-movie-franchises-of-all-time-7> [<https://perma.cc/R3YG-BB7R>].

⁵⁶ FRIDAY THE 13TH, *supra* note 52.

⁵⁷ See Adrienne Tyler, *Friday the 13th: How Jason Got His Hockey Mask (In Both Versions)*, SCREENRANT (Sept. 12, 2019), <https://screenrant.com/friday-13th-movie-jason-hockey-mask-origin-explained/> [<https://perma.cc/8VJL-9QQM>].

⁵⁸ See FRIDAY THE 13TH, *supra* note 52.

⁵⁹ See Joséphine Michèle, *How The Simpsons Convinced People Jason Voorhees Carries a Chainsaw*, SCREENRANT (Dec. 18, 2021), <https://screenrant.com/simpsons-cape-feare-homer-jason-voorhees-chainsaw/> [<https://perma.cc/9HJ7-HTJZ>].

⁶⁰ See Melody MacReady, *Friday The 13th: Jason Voorhees' 13 Best Weapons*, SCREENRANT (Oct. 11, 2022), <https://screenrant.com/friday-the-13th-jason-voorhees-best-weapons/> [<https://perma.cc/6CLF-UFV9>].

⁶¹ See FRIDAY THE 13TH, *supra* note 52.

the franchise.⁶² Jason's mother, Pamela Voorhees, is the killer in the first *Friday the 13th* movie, where she dies at the end and Jason is resurrected.⁶³

1984 ushered in the next big slasher film in the genre, *A Nightmare on Elm Street*.⁶⁴ Directed by Wes Craven, *A Nightmare on Elm Street*,⁶⁵ marked a shift in the slasher genre, as it subtly departed from its predecessors.⁶⁶ Unlike *Halloween*⁶⁷ and *Friday the 13th*⁶⁸, the main villain in *A Nightmare on Elm Street*⁶⁹ is not a masked and silent killer. Instead, Freddy Krueger is cocky, loud, and expressive.⁷⁰ Freddy has severe burn marks on his face, and he wears a brimmed brown hat with a green and red striped sweater.⁷¹ His most iconic feature, however, is his razor-fingered glove.⁷² *A Nightmare on Elm Street*⁷³ was one of the first films produced by New Line Cinema, which would later be referred to as "The House That Freddy Built."⁷⁴ The film was nominated for Best Horror Film by the

⁶² FRIDAY THE 13TH PART 2 (Georgetown Productions, Inc. 1981); FRIDAY THE 13TH PART III (Paramount Pictures, Jason Productions, Inc. 1982); FRIDAY THE 13TH: THE FINAL CHAPTER (Paramount Pictures 1984); FRIDAY THE 13TH: A NEW BEGINNING (Paramount Pictures, Georgetown Productions, Inc., Terror, Inc. 1985); FRIDAY THE 13TH PART VI: JASON LIVES (Paramount Pictures, Terror, Inc. 1986); FRIDAY THE 13TH PART VII: THE NEW BLOOD (Paramount Pictures, Friday Four, Inc. 1988); FRIDAY THE 13TH PART VIII: JASON TAKES MANHATTAN (Paramount Pictures, Horror, Inc. 1989); JASON GOES TO HELL: THE FINAL FRIDAY (New Line Cinema 1993); JASON X (Crystal Lake Entertainment, Friday X Productions 2001).

⁶³ See FRIDAY THE 13TH, *supra* note 52; FRIDAY THE 13TH PART 2, *supra* note 62.

⁶⁴ A NIGHTMARE ON ELM STREET (New Line Cinema 1984).

⁶⁵ *Id.*

⁶⁶ See Cathal Gunning, *Most Modern Slasher Movies Steal Nightmare On Elm Street's Best Trick*, SCREENRANT (June 24, 2022), <https://screenrant.com/nightmare-elm-street-fantasy-elements-defined-modern-slasher-movies-how/> [<https://perma.cc/2CMP-9748>].

⁶⁷ HALLOWEEN, *supra* note 38.

⁶⁸ FRIDAY THE 13TH, *supra* note 52.

⁶⁹ A NIGHTMARE ON ELM STREET, *supra* note 64.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293, 293 (S.D.N.Y. 2001).

⁷³ *A Nightmare on Elm Street*, *supra* note 64.

⁷⁴ See *THE HOUSE THAT FREDDY BUILT* (Automat Pictures, New Line Home Entertainment 2006).

Academy of Science Fiction, Fantasy, & Horror Films in 1985⁷⁵ and was selected for preservation in the United States National Film Registry by the Library of Congress in 2021.⁷⁶

The 1990s turned away from traditional slasher films. Movies like *The Silence of the Lambs* and *The Blair Witch Project* were released and veered closer to psychological or supernatural thrillers, and yet were still widely celebrated.⁷⁷ Then in 1996 the self-aware and sometimes humorous *Scream* was released.⁷⁸ The film was monumental and pioneered the modernization of the slasher film.⁷⁹ *Halloween* and *Scream* have been cited by horror enthusiasts as the two most influential films for the horror genre,⁸⁰ and the characters in *Scream*⁸¹ are even shown watching *Halloween* in a scene during the movie. To further solidify the two films' significance, *Scream* was the highest-grossing slasher film in the world until the 2018 release of *Halloween*.⁸²

Scream features its infamous antagonist Ghostface.⁸³ Although the culprit underneath the mask changes in each installment of the franchise, Ghostface al-

⁷⁵ *Academy of Science Fiction, Fantasy, & Horror Films, USA 1985 Awards*, IMDb, <https://www.imdb.com/event/ev0000004/1985/1/> [<https://perma.cc/G5EG-YWQ7>].

⁷⁶ *Complete National Film Registry Listing*, *supra* note 46.

⁷⁷ See Aja Romano, *Understanding Silence of the Lambs' Complicated Cultural Legacy*, VOX (Feb. 16, 2021, 4:30 PM), <https://www.vox.com/culture/22281548/silence-of-the-lambs-cultural-impact-legacy-feminist-transphobia> [<https://perma.cc/9LFU-GKYQ>]; see also Josh Billinson, *'90s Kids Were Terrified By The Blair Witch, But Here's The Story Behind The Movie*, BUZZFEED (Oct. 21, 2019, 10:56 AM), <https://www.buzzfeednews.com/article/joshibillinson/blair-witch-project-halloween-horror-movie> [<https://perma.cc/W2GH-PLH>].

⁷⁸ SCREAM (Woods Entertainment 1996).

⁷⁹ See Paolo Carlos, *Scream at 25: How Scream Revived and Changed the Slasher Genre*, NYLON MANILA (Oct. 28, 2021), <https://nylonmanila.com/scream-at-25-how-scream-revived-and-changed-the-slasher-genre/> [<https://perma.cc/2HU7-L6W9>] (showing the film broke a box office record for the genre).

⁸⁰ Dead Meat, *Movies That Changed Horror*, YOUTUBE (May 22, 2018), https://www.youtube.com/watch?v=xTJbax_s1vU&list=PLbV5-cW2vcuNb2X8vEW_N-JYCdxpTaCHq&index=3 [<https://perma.cc/WRK3-YHFA>].

⁸¹ SCREAM, *supra* note 78.

⁸² *Genre Keyword: Slasher*, BOX OFFICE MOJO, <https://www.boxofficemojo.com/genre/sg1977610497/> [<https://perma.cc/325R-WAL2>]; see Carlos, *supra* note 79.

⁸³ SCREAM, *supra* note 78.

ways looks the same.⁸⁴ The killer always dons the distinctive white mask that features a long and distorted face.⁸⁵ He (or she) also wears a black cloak, often wields a discrete knife, and uses a voice changing device that distorts their speech into the famous “Ghostface voice.”⁸⁶

Michael Myers,⁸⁷ Jason Voorhees,⁸⁸ Freddy Krueger,⁸⁹ and Ghostface,⁹⁰ are four of the most prolific horror movie villains, and have been leaving audiences terrified for half a century. The slashers from *Halloween*,⁹¹ *Friday the 13th*,⁹² *A Nightmare on Elm Street*,⁹³ and *Scream*⁹⁴ all gained enough popularity to produce numerous sequels and have notable franchises within the horror movie industry.⁹⁵ The *Friday the 13th*⁹⁶ franchise, for example, has a whopping 12 movies, including a 2009 reboot.⁹⁷ *A Nightmare on Elm Street*⁹⁸ follows closely behind with 9 movies, which also includes a 2010 reboot.⁹⁹ *Scream 6*,¹⁰⁰ which was released in 2023 and became the highest grossing film in the franchise¹⁰¹ brought in a new generation of fans. Similarly, *Halloween Ends*, the final film in the rebooted

⁸⁴ SCREAM, *supra* note 78; SCREAM 2 (Craven-Maddalena Films, Miramax Films, Konrad Pictures, Dimension Films, Maven Entertainment Inc. 1997); SCREAM 3 (E1 Entertainment, Dimension Films, Craven-Maddalena Films, Konrad Pictures 2000); SCREAM 4 (The Weinstein Company, Corvus Corax, Outerbanks Entertainment 2011); SCREAM 5 (Paramount Pictures 2022); SCREAM 6 (Paramount Pictures 2023).

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ HALLOWEEN, *supra* note 38.

⁸⁸ FRIDAY THE 13TH, *supra* note 52.

⁸⁹ A NIGHTMARE ON ELM STREET, *supra* note 64.

⁹⁰ SCREAM, *supra* note 78.

⁹¹ HALLOWEEN, *supra* note 38.

⁹² FRIDAY THE 13TH, *supra* note 52.

⁹³ A NIGHTMARE ON ELM STREET, *supra* note 64.

⁹⁴ SCREAM, *supra* note 78.

⁹⁵ *See The First Horror Movie & The History of the Horror Genre*, *supra* note 5.

⁹⁶ FRIDAY THE 13TH, *supra* note 52.

⁹⁷ FRIDAY THE 13TH (New Line Cinema, Paramount Pictures 2009).

⁹⁸ A NIGHTMARE ON ELM STREET, *supra* note 64.

⁹⁹ A NIGHTMARE ON ELM STREET (New Line Cinema, Paramount Pictures 2010).

¹⁰⁰ SCREAM 6, *supra* note 84.

¹⁰¹ Rebecca Rubin, ‘*Scream VI*’ Crosses \$100 Million, First in Franchise to Hit Box Office Milestone in 26 Years, VARIETY (Apr. 6, 2023, 11:09 AM), <https://variety.com/2023/film/box-office/scream-6-box-office-100-million-milestone-1235575749/> [archival link omitted].

Halloween trilogy, was released on October 14th, 2022, marking the franchise's thirteenth film.¹⁰²

II

DISTINCTLY DELINEATED: PRECEDENT FOR COPYRIGHT PROTECTION

Copyright protection for original characters has been argued for decades. Through certain cases, the courts have produced reliable character copyrightability tests that have been continually upheld, and pave the way for original works to receive protection.¹⁰³ Its intended purpose is to give authors the right to protect their creative works from infringement.¹⁰⁴ However, copyright protection is not inherent to all creative works. The Copyright Act states that if a work is original, creative, fixated, and falls within one of the eight categories outlined, such as dramatic works or motion pictures, then the work is eligible for copyright protection,¹⁰⁵ and the author can apply to register a work through the U.S Copyright Office.¹⁰⁶

Regarding character copyright protection, a key foundational case is *Nichols v. Universal Pictures Corp.*¹⁰⁷ Anne Nichols, author of the play *Abie's Irish Rose*, sued Universal Pictures Corporation for copyright infringement.¹⁰⁸ Universal Pictures Corporation produced a play titled *The Cohens and the Kellys*, which Nichols believed infringed on the copyright of *Abie's Irish Rose*.¹⁰⁹ Both stories feature Jewish and Irish Catholic families who deal with the scandal of interfaith marriages.¹¹⁰ The court found that the similarities of the plays mostly involved

¹⁰² HALLOWEEN ENDS (Universal Pictures, Miramax, Blumhouse Productions, Trancas International Films, Rough House Pictures 2022).

¹⁰³ See *What is copyright?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/what-is-copyright/> [<https://perma.cc/4P6E-H4VS>]; see also KURT SAUNDERS, SAUNDERS' INTELLECTUAL PROPERTY LAW: LEGAL ASPECTS OF INNOVATION AND COMPETITION 259 (West Academic Publishing 2016).

¹⁰⁴ See SAUNDERS, *supra* note 103.

¹⁰⁵ See *id.* at 262.

¹⁰⁶ See *Registering a Work*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-register.html> [<https://perma.cc/X8YZ-JHYL>].

¹⁰⁷ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

¹⁰⁸ *Id.* at 120.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

the young lovers and fathers in each story.¹¹¹ However, both plays have unique attributes and plot points.¹¹²

The court held that the characters in *Abie's Irish Rose* were not distinctly delineated and therefore, were not able to be protected by copyright.¹¹³ The Second Circuit Court of Appeals reasoned that characters who are well delineated may be protected by copyright.¹¹⁴ *Nichols* established a three-step test to decipher how a character can be distinctly delineated.¹¹⁵ First, the character must have a personality and identifiable physical expression.¹¹⁶ Second, the character must be delineated enough to be recognized outside of the work that features the character.¹¹⁷ Third, the character must have unique attributes.¹¹⁸ Based on these three elements, the court found the characters in *Abie's Irish Rose* to not be copyrightable.¹¹⁹

The “distinctly delineated”¹²⁰ character test was later applied to a new set of facts in *Warner Bros. Pictures v. Columbia Broadcasting System*.¹²¹ Dashiell Hammett (Hammett) was the author of a mystery story titled *The Maltese Falcon*. Each installment of the story was copyrighted by the publisher.¹²² The publishing company, Alfred A. Knopf, Inc. (Knopf), entered a contract with Hammett to publish *The Maltese Falcon* as a book, and subsequently copyrighted the book.¹²³ After the book was published, Warner Bros. Pictures, Inc. (Warner Bros.) was defined as a purchaser of the work.¹²⁴

¹¹¹ *Id.* at 121–22.

¹¹² *Id.*

¹¹³ *Id.* (holding that the themes and characters of the plaintiff’s play relied on abstract and generalized stereotypes that lacked the novelty that is essential to copyright).

¹¹⁴ *See id.* (“A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*.”).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945 (9th Cir. 1954).

¹²² *Id.* at 946.

¹²³ *Id.*

¹²⁴ *Id.*

Within the contract between Hammett, Knopf, and Warner Bros., along with the assignment of copyright executed by Knopf, the motion picture company was granted defined rights to use *The Maltese Falcon* stories in motion pictures, radio, and television.¹²⁵ Following this contract, Hammett continued to use the characters from his stories and so did Warner Bros.¹²⁶ Warner Bros., however, claimed copyright infringement because Hammett was contracting with and allowing third parties to use the character Sam Spade from *The Maltese Falcon* in motion pictures, television, and radio.¹²⁷

Applying the “distinct delineation” test established in *Nichols*,¹²⁸ as well as other precedents, the court found the character Sam Spade unable to be protected by copyright.¹²⁹ The Ninth Circuit court held that a character can be protected by copyright if the character “constitutes the story being told.”¹³⁰ The court ruled the character Sam Spade was a “vehicle” for the story.¹³¹ This created the Sam Spade test, which would be utilized in later character copyright cases.

Building upon the holdings in *Nichols*¹³² and *Warner Bros.*¹³³ came the decision in *Universal City Studios, Inc. v. Kamar Industries*.¹³⁴ Universal City Studios, Inc. (Universal) produced the major motion picture entitled *E.T. The Extra-Terrestrial*, which premiered in May of 1982.¹³⁵ The movie focuses on E.T., an alien puppet character. Universal owned the copyright to the movie, which became a box-office success.¹³⁶ In collaboration with the licensing agent Merchandising Corporation of America, Universal was able to profit from licensed E.T.

¹²⁵ *Id.* at 948.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Nichols*, 45 F.2d at 119.

¹²⁹ *Warner Bros. Picture v. Columbia Broad. Sys.*, 216 F.2d at 951; *see generally* *Warner Bros. Pictures v. Majestic Pictures Corp.*, 70 F.2d 310, 311 (2d Cir. 1934) (indicating the line between infringement and non-infringement must be drawn).

¹³⁰ *Warner Bros. Picture v. Columbia Broad. Sys.*, 216 F.2d at 950.

¹³¹ *Id.*

¹³² *Nichols*, 45 F.2d at 122.

¹³³ *Warner Bros. Picture v. Columbia Broad. Sys.*, 216 F.2d at 950.

¹³⁴ *Universal City Studios v. Kamar Industries*, No. H-82-2377, 1982 WL 1278, at *3 (S.D. Tex. Sept. 20, 1982).

¹³⁵ *Id.* at *1.

¹³⁶ *Id.*

merchandise ranging from toys, mugs, and clothing.¹³⁷ However, Kamar Industries (Kamar) began to promote merchandise with the phrases “I E.T.” and “E.T. Phone Home!” without Universal’s consent.¹³⁸

Texas’s Southern District court ruled that characters who are an essential part of a story are protected by copyright, including *Nichols*¹³⁹ and *Warner Bros.*,¹⁴⁰ along with the “common law of trademark infringement and unfair competition.”¹⁴¹ Addressing the copyright claim, the distinctly delineated¹⁴² test was applied to the character E.T. and the court found E.T. to be a developed and well-delineated character,¹⁴³ as the movie *E.T. The Extra-Terrestrial*¹⁴⁴ would not be the same without the character E.T., and the story of the movie revolved around him.¹⁴⁵ Based on this reasoning, E.T. was granted copyright protection.¹⁴⁶

Similarly to *Universal City Studios*,¹⁴⁷ *Anderson v. Stallone* deals with the issue of iconic characters and their copyright protections.¹⁴⁸ Sylvester Stallone wrote and starred in the successful motion pictures *Rocky I, II, and III*.¹⁴⁹ In the movies, Stallone plays the titular character Rocky Balboa, who is the main character in each of the film installations.¹⁵⁰

After seeing *Rocky III*, writer Timothy Anderson wrote a thirty-one-page script summary entitled “Rocky IV.”¹⁵¹ Anderson hoped his summary would be used by Stallone and the production company MGM/UA Communications Co.

¹³⁷ *Id.*

¹³⁸ *Id.* at *2.

¹³⁹ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 119 (2d Cir. 1930).

¹⁴⁰ *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 945 (9th Cir. 1954).

¹⁴¹ *Universal City Studios*, 1982 WL 1278, at *4.

¹⁴² *Id.* at *3.

¹⁴³ *Id.* at *4.

¹⁴⁴ *E.T. THE EXTRA-TERRESTRIAL* (Amblin Entertainment 1982).

¹⁴⁵ *Universal City Studios*, 1982 WL 1278, at *3.

¹⁴⁶ *Id.* at *4.

¹⁴⁷ *Id.* at *1.

¹⁴⁸ *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *1 (C.D. Cal. Apr. 25, 1989).

¹⁴⁹ *Id.*; *ROCKY* (Chartoff-Winkler Productions 1976); *ROCKY II* (Chartoff-Winkler Productions 1979); *ROCKY III* (Chartoff-Winkler Productions 1982).

¹⁵⁰ *Anderson*, 1989 WL 206431, at *1.

¹⁵¹ *Id.*

(MGM) as a sequel to *Rocky III*.¹⁵² The script summary written by Anderson used characters created by Stallone in the Rocky franchise and listed Stallone as a co-author.¹⁵³ Without consulting Anderson or formally acknowledging his script summary, MGM released a fourth Rocky movie that had similar components to the summary written by Anderson.¹⁵⁴

The court ruled that Rocky was a well-delineated character.¹⁵⁵ The court stated that the original author of a copyrightable work cannot infringe on a derivative work by another author.¹⁵⁶ Additionally, they asked whether the *Rocky* characters were entitled to copyright protection.¹⁵⁷ Based on the application of law, the court found that Rocky was identifiable by his physicality and mannerisms.¹⁵⁸ Similar to E.T., Rocky was also ruled to be necessary for the story of *Rocky* and therefore, the character was protected by copyright.¹⁵⁹

Several years later, the same district court in California applied the rule established in *Anderson v. Stallone*¹⁶⁰ to *Metro-Goldwyn-Mayer v. American Honda*.¹⁶¹ The motion picture studio, Metro-Goldwyn-Mayer (Metro), brought action against the automobile manufacturer, American Honda Motor Co. (Honda), and its advertising agency.¹⁶² Metro argued that Honda was airing television advertisements that infringed on the studio's character James Bond.¹⁶³ Metro had copyright of the character James Bond, who appeared in sixteen Metro produced films.¹⁶⁴ The court affirmed the holdings in *Nichols*,¹⁶⁵ *Warner Bros.*,¹⁶⁶ and

¹⁵² *Id.*; *ROCKY III*, *supra* note 149.

¹⁵³ *Anderson*, 1989 WL 206431, at *1.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at *6-7 (citing *Walt Disney Prods. v. Air. Pirates*, 581 F.2d 751, 755 (9th Cir. 1978); *Olson v. Nat'l Broad. Corp.*, 855 F.2d 1446, 1451-52 n.6 (9th Cir.1988)).

¹⁵⁶ *Anderson*, 1989 WL 206431, at *8; 17 U.S.C. § 106(2).

¹⁵⁷ *Anderson*, 1989 WL 206431, at *7.

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* at *8.

¹⁶⁰ *Id.* at *1.

¹⁶¹ *Metro-Goldwyn-Mayer v. American Honda*, 900 F. Supp. 1287, 1293 (C.D. Cal. 1995).

¹⁶² *Id.* at 1291.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 119 (2d Cir. 1930).

¹⁶⁶ *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 945 (9th Cir. 1954).

*Anderson*¹⁶⁷ and serves as a recent interpretation of copyright protection for characters.

III A VILLAIN'S DAY IN COURT

The courts have established a rule of law to determine the copyrightability of certain characters. The distinctly delineated test, along with the Sam Spade test, can be applied to all fictional characters, including horror movie villains. Therefore, an application of the distinctly delineated test and the Sam Spade test to the characters from *Halloween*, *Friday the 13th*, *A Nightmare on Elm Street*, and *Scream* provide the most accurate analysis in regard to the copyrightability of these characters.

*Don Post Studios, Inc. v. Cinema Secrets, Inc.*¹⁶⁸ questions the copyrightability of a horror villain's mask. Don Post Studios (Don Post) created a prototype mask for the 1978 movie *Halloween*, which is donned by Michael Myers for the entire length of the movie.¹⁶⁹ Although the mask was created by Don Post, the company did not reserve any rights to the mask worn by Michael.¹⁷⁰

After the release of *Halloween*, Don Post created their version of the Michael Myers mask for sale after they were denied a license from the filmmakers to sell the mask.¹⁷¹ Don Post attempted to secure a copyright registration for their mask; however, their first application was rejected.¹⁷² Don Post reapplied without any mention of the character Michael Myers or *Halloween* and the copyright application was approved.¹⁷³

Two years later, in collaboration with the holder of the *Halloween* copyright, Cinema Secrets Inc. (Cinema Secrets) began to produce and market a Michael Myers mask based on the movie character.¹⁷⁴ Don Post subsequently filed a

¹⁶⁷ *Anderson v. Stallone*, No. 87-0592 WDKGX, 1989 WL 206431, at *1 (C.D. Cal. Apr. 25, 1989).

¹⁶⁸ *Don Post Studios, Inc. v. Cinema Secrets, Inc.*, 124 F. Supp. 2d 311, 315–16.

¹⁶⁹ *Id.* at 312.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 314.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 314-15.

lawsuit against Cinema Secrets, alleging that Cinema Secrets' mask copied their mask.¹⁷⁵ The court ruled that Don Post's copyright in their mask was invalid for "lack of originality" because Don Post copied the Michael Myers mask from *Halloween*.¹⁷⁶ Conclusively, the court held that Cinema Secrets' sale of the masks did not constitute copyright infringement.¹⁷⁷

Michael Myers is a well-delineated character when analyzed through the scope of the distinctly delineated test.¹⁷⁸ Michael has a quiet yet threatening personality and an identifiable physical expression.¹⁷⁹ His slow and stealthy walk, accompanied by his large, tall frame can be unmistakably recognized as Michael Myers.¹⁸⁰ Although other slashers, such as Jason Voorhees, have a similar slow walk and large frame, Michael Myers is individually recognizable outside of *Halloween*.¹⁸¹ His physical expression combined with his unique attributes are what make him so iconic, even outside of the *Halloween* franchise.¹⁸² Michael's most unique attribute, aside from his navy-blue utility jumpsuit, is the white mask he dons.¹⁸³ The white mask is so unique to Michael's character that it was the crux of the debate in *Don Post Studios*.¹⁸⁴

Michael Myers also passes the Sam Spade test.¹⁸⁵ The story of *Halloween*¹⁸⁶ would not be the same without Michael. Like E.T., the character disputed in *Universal City Studios, Inc.*,¹⁸⁷ Michael begins the story being told in *Halloween*.¹⁸⁸ Michael's point of view is also a recurring shot throughout the movie that builds

¹⁷⁵ *Id.* at 315.

¹⁷⁶ *Id.* at 316.

¹⁷⁷ *Id.* at 320.

¹⁷⁸ See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121–22 (2d Cir. 1930).

¹⁷⁹ HALLOWEEN, *supra* note 38.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Don Post Studios, Inc. v. Cinema Secrets, Inc.*, 124 F. Supp. 2d 311, 311.

¹⁸⁵ See *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954).

¹⁸⁶ HALLOWEEN, *supra* note 38.

¹⁸⁷ See *Universal City Studios v. Kamar Industries*, No. H-82-2377, 1982 WL 1278, at *3 (S.D. Tex. Sept. 20, 1982).

¹⁸⁸ HALLOWEEN, *supra* note 38.

suspense and puts the audience in Michael's shoes.¹⁸⁹ Furthermore, the plot of *Halloween* and most of its sequels rely on Michael to push the story forward.¹⁹⁰ Many of the characters in *Halloween* are focused on Michael, whether it is the sheriff or Michael's psychiatrist, the characters in *Halloween* are centered around Michael.¹⁹¹ While Michael Myers is the main villain, Laurie Strode is the heroine, or final girl,¹⁹² in *Halloween*¹⁹³ and both characters rely on each other for a purpose within the movie.¹⁹⁴

Following the *Don Post Studios* case, the motion picture company, New Line Cinema Corporation (New Line) and their production company sued toy company Russ Berrie & Company, Inc. (Russ Berrie).¹⁹⁵ New Line claimed Russ Berrie infringed on its copyright and trademark for the character Freddy Krueger.¹⁹⁶

New Line was the sole owner of a valid trademark for *A Nightmare on Elm Street* and the Freddy character.¹⁹⁷ Utilizing their trademark, New Line began selling a "Freddy Glove" in 1987.¹⁹⁸ The glove was a model of Freddy Krueger's glove from the movie, which features protruding razor blades.¹⁹⁹ However, in 1993, Russ Berrie began selling a similar glove with protruding razor blades and called it the "Ghostly Gasher."²⁰⁰

Furthermore, the court held that the copyright protections of *A Nightmare on Elm Street* and Freddy Krueger extended to the glove worn by Freddy because "[c]opyright protection is extended to the component part of the character which significantly aids in identifying the character."²⁰¹ Due to these rulings, and the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See CAROL CLOVER, MEN, WOMEN, AND CHAINSAWS (1992) (originating the term "final girl" as the sole woman survivor in a horror movie).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293, 293 (S.D.N.Y. 2001).

¹⁹⁶ *Id.* at 294.

¹⁹⁷ *Id.* at 295.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*; A NIGHTMARE ON ELM STREET, *supra* note 64.

²⁰⁰ *New Line Cinema Corp.*, 161 F. Supp. 2d at 295.

²⁰¹ *Id.* at 302 (citing *New Line Cinema Corp. v. Easter Unlimited, Inc.*, 17 U.S.P.Q.2d 1631, 1633 (E.D.N.Y. 1989)).

evidence that Russ Berrie had access to New Line's copyrighted material, the court held that Russ Berrie did infringe on New Line's copyright of *A Nightmare on Elm Street* and Freddy Krueger.²⁰²

The distinctly delineated test²⁰³ also shows that Freddy Krueger is a well delineated character. Freddy has a loud and boisterous personality and a distinct physical expression.²⁰⁴ Whereas Michael and Jason are tall and solid, Freddy is smaller and makes fluid movements.²⁰⁵ The limbo between dreams and reality that continues throughout *A Nightmare on Elm Street* is also represented by Freddy's physicality.²⁰⁶ He is a surreal character with surreal physicality; he is shown ripping his face off, filled with maggots, and cutting his fingers off.²⁰⁷ Along with that, Freddy is recognizable outside of *A Nightmare on Elm Street*.²⁰⁸ He does not rely on the story or setting to be a distinct and independent character.²⁰⁹ Unique attributes associated with Freddy are not only his outfit and burned skin,²¹⁰ but most notably his razor blade glove which was the topic of dispute in *New Line Cinema Corp. v. Russ Berrie & Co., Inc.*²¹¹

Freddy also passes the Sam Spade test.²¹² His character constitutes the story being told because *A Nightmare on Elm Street* is about Freddy.²¹³ Throughout the movie, Freddy terrorizes the character Nancy in her dreams.²¹⁴ Later, Nancy's mother reveals that Freddy used to be a real person who was a child murderer.²¹⁵ Due to his crimes, and no conviction, her mother and other teens at the time trapped Freddy in an old warehouse and burned it down with him inside.²¹⁶

²⁰² *Id.* at 305.

²⁰³ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121–22 (2d Cir. 1930).

²⁰⁴ *A NIGHTMARE ON ELM STREET*, *supra* note 64.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293, 293 (S.D.N.Y. 2001).

²¹² *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 948 (9th Cir. 1954).

²¹³ *A NIGHTMARE ON ELM STREET*, *supra* note 64.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

Freddy's dark and twisted backstory is what fuels his malevolence and makes his character a central aspect of the *A Nightmare on Elm Street* story.²¹⁷ He is the thread between all the movies in the franchise and makes the story.²¹⁸

Years later, the *Friday the 13th* franchise found itself in a legal battle in *Horror Inc. v. Miller*.²¹⁹ The film production company, Horror Inc., along with its successor, Manny Company (Manny), sought a legal declaration that *Friday the 13th's* screenwriter, Victor Miller, was a work for hire.²²⁰ Miller wrote the screenplay for the film in 1979; however, in 2016 Miller gave notice to Manny that he planned to terminate Manny's copyright.²²¹

Manny argued Miller was an employee of the company, and therefore Manny owned the screenplay because it was a "work made for hire."²²² However, Miller argued that he was an independent contractor for Manny when he wrote the screenplay, giving him the authority to reclaim the screenplay as his own.²²³ After considering the factors used to distinguish independent contractors and employees, as well as the factors used to analyze whether a work is prepared as a work made for hire in the context of copyright law, the court held that Miller was an independent contractor when he wrote the screenplay for *Friday the 13th*.²²⁴ This ruling meant Miller was entitled to authorship rights for the screenplay.²²⁵ Additionally, the court held that Manny and Horror Inc. did not recant Miller's authorship in a way that would generate a limitations period for an authorship claim.²²⁶

When examined under the lens of the distinctly delineated test, Jason Voorhees passes.²²⁷ Jason has a dull disposition and an identifiable physical expression.²²⁸

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Horror Inc. v. Miller*, 15 F.4th 232 (2d Cir. 2021).

²²⁰ *Id.* at 240.

²²¹ *Id.* at 236.

²²² *Id.* at 240.

²²³ *Id.* at 236.

²²⁴ *Id.* at 249–50; *see Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989); *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 116 (2d Cir. 2000).

²²⁵ *Horror Inc.*, 15 F.4th at 259.

²²⁶ *Id.*

²²⁷ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

²²⁸ *FRIDAY THE 13TH*, *supra* note 52.

He is slow in his pursuit of his victims, but unlike Michael Myers, is not graceful.²²⁹ Jason is also recognizable outside of *Friday the 13th* and does not rely on his settings to be familiar.²³⁰ Jason's unique attributes aid in making him recognizable outside of the *Friday the 13th* franchise.²³¹ Jason's hockey mask is undoubtedly his most unparalleled attribute.²³² In *Horror Inc. v. Miller*,²³³ the discussion of having a masked killer is included in the facts of the case. The creators of Jason's character were inspired by Michael Myers, so the inclusion of a masked killer was necessary for the story.²³⁴ Although there are similarities between Jason and Michael, their personalities, physical expression, and unique attributes make them both distinctly identifiable.²³⁵

Jason also constitutes the story being told. The *Friday the 13th* franchise is about Jason and the audience learns more about his childhood and character overall as the franchise continues.²³⁶ In the first film, the audience learns that Jason drowned as a child at camp while the counselors were neglecting their duties.²³⁷ Motivated by Jason's death, his mother, Pamela, seeks revenge by killing camp counselors.²³⁸ At the end of the film, Jason is inexplicably resurrected, and from then, he continues his mother's legacy of killing.²³⁹ Although Jason is not the killer in the first movie, Pamela is motivated by Jason's death and Jason pushes the story forward.²⁴⁰ While the characters Jason targets change in each movie, Jason remains the common denominator in all the *Friday the 13th* movies.²⁴¹

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² See Tyler, *supra* note 57.

²³³ *Horror Inc.*, 15 F.4th at 238.

²³⁴ See Konda, *supra* note 53.

²³⁵ See FRIDAY THE 13TH, *supra* note 52; HALLOWEEN, *supra* note 38.

²³⁶ FRIDAY THE 13TH, *supra* note 52; FRIDAY THE 13TH PART 2, *supra* note 62.

²³⁷ FRIDAY THE 13TH, *supra* note 52.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

The *Scream* franchise dealt with its own copyright issues in *Easter Unlimited, Inc. v. Rozier*.²⁴² Easter Unlimited Inc. (Easter Unlimited) designs, manufactures, and sells costume supplies and novelty gifts,²⁴³ and the Ghost Face Mask is one of the many products sold by the company. Additionally, they've held the copyright for it since 1993.²⁴⁴ Along with the mask, Easter Unlimited also holds a trademark registration for a stylized Ghost Face logo.²⁴⁵ In 1996, Easter Unlimited gave Dimension Films a license to use their Ghost Face Mask in the movie *Scream*.²⁴⁶ The movie's villain, Ghostface, wears the mask throughout the film.²⁴⁷

In 2018, Terry Rozier, a successful basketball player in the NBA, earned the nickname "Scary Terry" from sports media outlets and fans.²⁴⁸ The popularity of this nickname encouraged Rozier to start his own line of merchandise featuring a cartoon version of himself wearing the Ghost Face Mask used in *Scream*.²⁴⁹ Scary Terry merchandise never claimed to be affiliated with Easter Unlimited, and Easter Unlimited never authorized use of the Ghost Face Mask for any merchandise created by Rozier.²⁵⁰ Subsequently, Easter Unlimited claimed that Rozier committed copyright infringement.²⁵¹

For the purpose of subsequent analysis, the court assumed that Easter Unlimited did own a valid copyright,²⁵² and found that, despite the imagery being used across different mediums, Rozier did copy elements of the Ghost Face Mask.²⁵³ The court stated that substantial similarity "is a factual question and the appropriate test for determining whether substantial similarity is present is whether an average lay observer would recognize the alleged copy as having been appropri-

²⁴² See generally *Easter Unlimited, Inc. v. Rozier*, 18-CV-06637 (KAM), 2021 WL 440972, at *1 (E.D.N.Y. Sept. 27, 2021).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at *2.

²⁴⁶ *Id.*; *SCREAM*, *supra* note 78.

²⁴⁷ *SCREAM*, *supra* note 78.

²⁴⁸ *Easter Unlimited, Inc.*, 2021 WL 440972, at *2.

²⁴⁹ *Id.* at *3; *SCREAM*, *supra* note 78.

²⁵⁰ *Easter Unlimited, Inc.*, 2021 WL 440972, at *3.

²⁵¹ *Id.* at *6.

²⁵² *Id.* at *9.

²⁵³ *Id.* at *10.

ated from the copyrighted work.”²⁵⁴ Using the facts of the case, the court held that “the two works are substantially similar.”²⁵⁵

Although the court found Rozier to have committed unauthorized copying, the court also held that fair-use doctrine protected²⁵⁶ Rozier’s use of the Ghost Face Mask.²⁵⁷ Out of the four factors that make up the fair-use doctrine,²⁵⁸ the court reasoned that factors one and four supported Rozier’s fair-use claim.²⁵⁹ Factor one pertains to the purpose of the use and factor four questions the effect on the market value of the copyrighted work. The court also found factors two and three, which relate to the nature of the work and the importance of the portion of the work being used, respectively, to be unable to overcome the strength of factors one and four in the overall decision.²⁶⁰ The court subsequently held that Rozier’s “use of the *Scream* mask constitute[d] fair use.”²⁶¹

Ghostface is also a distinctly delineated character.²⁶² Although the culprit behind the mask changes throughout the films, Ghostface always has the same voice and demeanor.²⁶³ The person wearing the mask always reveals their use of a voice changing device that makes their voice sound the same as the voice in the first *Scream* movie.²⁶⁴ Additionally, Ghostface consistently acts with swift and furtive movements.²⁶⁵ Ghostface is recognizable outside of *Scream*.²⁶⁶ The

²⁵⁴ *Id.* (quoting *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966)); *see generally* *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1001 (2d Cir. 1995); *Malden Mills, Inc. v. Regency Mills, Inc.*, 626 F.2d 1112, 1113 (2d Cir. 1980).

²⁵⁵ *Easter Unlimited, Inc.*, 2021 WL 440972, at *10.

²⁵⁶ *See generally* *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, No. 19-2420-CV, 2021 WL 3742835, at *4 (2d Cir. Aug. 24, 2021) (quoting *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006)) (“The fair use doctrine seeks to strike a balance between an artist’s intellectual property rights to the fruits of her own creative labor . . . ‘and the rest of us to express them—or ourselves by reference to the works of others.’”).

²⁵⁷ *Easter Unlimited, Inc.*, 2021 WL 440972, at *17.

²⁵⁸ 17 U.S.C. § 107.

²⁵⁹ *Easter Unlimited, Inc.*, 2021 WL 440972, at *17.

²⁶⁰ *Id.* at *15–16.

²⁶¹ *Id.* at *11.

²⁶² *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 119 (2d Cir. 1930).

²⁶³ *SCREAM*, *supra* note 78.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

villain's most unique attribute is the stark white mask, which was the object of contention in *Easter Unlimited, Inc. v. Rozier*.²⁶⁷ Ghostface is especially unique because the mask existed before *Scream*;²⁶⁸ however, the mask is now widely associated with the movie.²⁶⁹

Like other slashers, Ghostface is in all the *Scream* installments and plays an essential role in the story.²⁷⁰ The movie starts with Ghostface terrorizing a teen alone inside her home in Woodsboro, where *Scream* is set.²⁷¹ Panic then ensues in the small California town and the characters discuss the masked killer, and their true identity, at length throughout the movie.²⁷² Like *Halloween*, the main heroine in *Scream*, Sidney Prescott, relies on Ghostface to tell her character's story and vice versa.²⁷³ *Scream* and its sequels rely on Ghostface to incite terror and continue the story.²⁷⁴

The characters Michael Myers, Jason Voorhees, Freddy Krueger, and Ghostface have similarities, though, that are applicable to other horror villains. Michael, Jason, and Ghostface all wear masks which is a recurring theme in the horror genre. While their masks are unique, being a masked killer is not unique in horror.²⁷⁵ Additionally, the antagonist in horror movies usually wears plain and tattered clothes, like Jason, Michael, and Ghostface. While Freddy's clothes are not plain, they are noticeably tattered.²⁷⁶ The villains in horror movies are also typ-

²⁶⁷ *Easter Unlimited, Inc. v. Rozier*, 18-CV-06637 (KAM), 2021 WL 440972, at *1 (E.D.N.Y. Sept. 27, 2021).

²⁶⁸ *SCREAM*, *supra* note 78.

²⁶⁹ See Rodrigo Kurtz, *The Ghost Face Mask*, HELLO SIDNEY, <https://hellosidney.com/ghostface/> [<https://perma.cc/75EW-83F8>].

²⁷⁰ *See id.*

²⁷¹ *SCREAM*, *supra* note 78.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Kurtz, *supra* note 269.

²⁷⁵ See Colin McCormick, *10 Best Masked Killers in Movies, According to Ranker*, SCREENRANT (June 26, 2022), <https://screenrant.com/best-horror-movie-masked-killers-ranker/> [<https://perma.cc/PP7U-EDV3>].

²⁷⁶ *See A NIGHTMARE ON ELM STREET*, *supra* note 64.

ically tall and large to make their character even more intimidating.²⁷⁷ Michael and Jason fit this description, whereas Freddy's build is less evident.²⁷⁸ The killer under the Ghostface disguise changes in every movie so his build changes but is generally depicted as tall and large.²⁷⁹ Horror villains usually always wield a bladed weapon that varies in size, hence their victims being "slashed" to death.²⁸⁰ Michael Myers, Jason Voorhees, Freddy Krueger, and Ghostface are no exception to this generalization.²⁸¹

CONCLUSION

George Romero passed away in 2017, leaving behind a legendary legacy of horror films.²⁸² Regrettably, he did not see any monetary credit for his first and extremely notable work *Night of the Living Dead* because it was not protected by copyright.²⁸³ Copyright laws allow for authors to protect their work and preserve it for up to seventy years after their death.²⁸⁴ This protection is crucial because creators of horror movies and characters know their creations best; they are able to produce the most authentic versions of their stories and characters. Although remakes in horror franchises can be passed along to different directors, producers, etc., the original creator of the film and its characters are the core of these franchises and thus deserve reliable protection.

Movies, characters, and franchises can evolve over time and still be great. However, without the original movie, remakes and sequels would not exist. With-

²⁷⁷ See Kayleena Pierce-Bohen & Shawn S. Lealos, *The 10 Tallest Horror Movie Villains (& 10 Shortest)*, SCREENRANT (Oct. 2, 2023), <https://screenrant.com/horror-movie-villains-tallest-shortest/> [<https://perma.cc/5BGT-DSDN>].

²⁷⁸ See HALLOWEEN, *supra* note 38; FRIDAY THE 13TH, *supra* note 52; A NIGHTMARE ON ELM STREET, *supra* note 64.

²⁷⁹ SCREAM, *supra* note 78.

²⁸⁰ See Ben Hathaway, *10 Most Iconic Horror Movie Weapons*, SCREENRANT (May 15, 2022), <https://screenrant.com/iconic-horror-movie-weapons/> [<https://perma.cc/V5NH-EX3P>].

²⁸¹ See HALLOWEEN, *supra* note 38; FRIDAY THE 13TH, *supra* note 52; A NIGHTMARE ON ELM STREET, *supra* note 64; SCREAM, *supra* note 78.

²⁸² See Tre'vell Anderson, *George A. Romero, 'Night of the Living Dead' Creator, Dies at 77*, LA TIMES (July 16, 2017, 7:25 PM), <https://www.latimes.com/entertainment/movies/la-me-george-romero-20170716-story.html> [<https://perma.cc/CJ7T-RJLP>].

²⁸³ See Kennedy, *supra* note 5.

²⁸⁴ 17 U.S.C. § 302; *see also* SAUNDERS, *supra* note 103, at 261.

out John Carpenter's creation of *Halloween*,²⁸⁵ there would be no *Halloween Ends*.²⁸⁶ Without Wes Craven, there would be no *Scream 6*²⁸⁷ or even *Scary Movie* franchise. Without Sean Cunningham, Victor Miller, and Craven, there would be no *Freddy vs. Jason*.²⁸⁸ Remakes and sequels are controversial,²⁸⁹ however, film is constantly building upon itself and the source material for remakes and sequels is valuable intellectual property.

Many horror films are based on existing novels,²⁹⁰ like *Frankenstein*.²⁹¹ This furthers the point that the original authors of stories and characters can do them the most justice. Similar to remakes and sequels, films based on novels can be valuable and enjoyable. Yet, those films would not be what they are without the original source material. For example, Stephen King is one of the most notable horror authors who has numerous movies based on his novels.²⁹² King's novels and the movies based on his books are cherished by horror fans; so much so that there is a podcast dedicated to King's works.²⁹³ For some projects based on his work, King was able to collaborate with the filmmakers to produce an authen-

²⁸⁵ HALLOWEEN, *supra* note 38.

²⁸⁶ HALLOWEEN ENDS, *supra* note 102.

²⁸⁷ SCREAM 6 (Spyglass Media Group 2023).

²⁸⁸ FREDDY VS. JASON (New Line Cinema, Crystal Lake Entertainment 2003).

²⁸⁹ See Emily Kubincanek, *Retracing Hollywood's Fascination with the Remake*, FILM SCHOOL REJECTS (Mar. 20, 2020), <https://filmschoolrejects.com/hollywood-remake-history/> [<https://perma.cc/6WB8-7NHR>]; Kayleigh Donaldson, *A Nightmare on Elm Street and the Disappointing Mediocrity of Horror Remakes*, SYFY WIRE (Apr. 27, 2020, 7:05 AM), <https://www.syfy.com/syfy-wire/a-nightmare-on-elm-street-mediocrity-of-horror-remakes> [<https://perma.cc/ESF6-UC8N>]; Keith Phipps, *Will Anyone Remember Any of the 21st Century Horror Remakes?*, THE RINGER (Oct. 2, 2018, 6:00 AM), <https://www.theringer.com/movies/2018/10/2/17915924/horror-movie-remakes-2000s-psycho-texas-chainsaw-massacre-halloween> [<https://perma.cc/V3BD-2UCC>].

²⁹⁰ See Mike R., *Top 10 Horror Novels Made Into Great Horror Movies*, HUDSON BOOKSELLERS (Oct. 9, 2015 3:30 AM), <https://www.hudsonbooksellers.com/top-10-horror-adaptions> [<https://perma.cc/R63P-W4KU>]; Alanna McAuliffe, *From Page to Scream: 35 Spine-Chilling Lists that Inspired Horror Movies*, AUDIBLE BLOG (Oct. 22, 2022), <https://www.audible.com/blog/article-horror-movies-based-on-books> [<https://perma.cc/66W4-UHQH>].

²⁹¹ FRANKENSTEIN, *supra* note 18.

²⁹² *Movies - A to Z*, STEPHEN KING (2022), <https://stephenking.com/works/movie/index.html> [<https://perma.cc/W4UT-ACYF>].

²⁹³ The Kingcast, *A Conversation With Stephen King* (Mar. 2, 2022, 4:00 AM), <https://podcasts.apple.com/us/podcast/the-kingcast/id1512844649?i=1000552672902> [<https://perma.cc/S9J3-43K6>].

tic adaptation of his stories.²⁹⁴ The movies that King was able to have input on uniquely captured his characters and stories.²⁹⁵

Michael Myers, Jason Voorhees, Freddy Krueger, and Ghostface, however, are all original characters; they were not based off any book. The four characters are pillars of the horror genre and have inspired other horror filmmakers to invent villains of their own.²⁹⁶ After decades of films, it is difficult to create a truly unique and distinctly delineated horror villain. It would be remiss not to reward creativity and original concepts. The originality of unique horror villains, like the ones covered in this article, should be preserved by copyright, even when it comes to sales of merchandise, video games, and toys.

For many horror fans, 2022 was considered a notable year for the genre.²⁹⁷ After such an outstanding year for horror, there are a growing number of aspiring horror artists that should be able to rely on copyright protection for new and unique horror characters. Unlike other genres, the antagonists in horror drive the plot of the film and are a critical component to the story. Copyright protection for horror villains in particular is so vital because without them, these iconic films, franchises, and legacies would not exist. As the horror genre continues to expand and grow in popularity, it is imperative to analyze the application of copyright protection to horror villains. Character copyright protection is a reliable legal approach to preserve horror villains that are the crux of their stories and should be applied to these villains to secure the future of the horror genre.

²⁹⁴ See, e.g., CREEPSHOW (Laurel Entertainment 1982); CREEPSHOW 2 (Laurel Entertainment 1987); CAT'S EYE (Dino De Laurentiis Company, Famous Films 1985); SILVER BULLET (Dino De Laurentiis Company 1985); PET SEMETARY (Laurel Productions 1989); A GOOD MARRIAGE (Screen Media Films 2014); CELL (Benaroya Pictures 2016).

²⁹⁵ See generally *Movies - A to Z*, *supra* note 292.

²⁹⁶ *Movies That Changed Horror*, *supra* note 80.

²⁹⁷ See Michael Cavanaugh, *How 2022 became a huge year for horror movies*, HOUSTON CHRON. (Nov. 8, 2022), <https://preview.houstonchronicle.com/movies-tv/how-2022-became-a-huge-year-for-horror-movies-17562219> [<https://perma.cc/AAC9-AKEP>].