GIBSON DUNN

Second Circuit Issues Important Ruling Concerning Authors' Termination Rights Under The Copyright Act

Client Alert | October 5, 2021

In *Horror Inc. v. Miller*, the Second Circuit affirmed that Victor Miller had successfully reclaimed his rights in the screenplay for *Friday the 13th* by invoking the Copyright Act's termination provisions, notwithstanding his assignment of those rights to a film production company in 1980. The Court reached that conclusion after finding that Miller's assignment was made as an independent contractor, rather than as an employee.[1]

In certain situations, an author of a copyrighted work that has been transferred to another can terminate the transfer and reclaim the copyright. A transfer of a copyrighted work created as a work-for-hire, however, cannot be terminated. For purposes of determining if a work is a work-for-hire under the Copyright Act, *Horror Inc.* held that copyright law—not labor law—determines whether the creator and a hiring party are in an employer-employee relationship. The court further held that, because Miller wrote the screenplay as an independent contractor under copyright law, the screenplay was not a work-for-hire and Miller was entitled to terminate his decades-earlier transfer of the screenplay's copyright.

Statutory Background

The Copyright Act of 1976[2] provides that copyright ownership "vests initially in the author or authors of the work."[3] Under well-established case law, the person who "actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection," is generally considered to be the work's "author."[4] But the Copyright Act creates an exception for "a work made for hire," which is defined as one "prepared by an employee within the scope of his or employment," or, in certain instances, "a work specially ordered or commissioned for use as contribution to a collective work."[5] In the case of a work-for-hire, "the employer or other person for whom the work was prepared is considered the author."[6]

Authors can transfer ownership of any or all of the exclusive rights comprised in a copyright,[7] but Section 203 of the Copyright Act permits an author (or his or her successors) in certain circumstances to terminate prior transfers of copyrights during a specified window of time.[8] Congress added this termination right to the Copyright Act to address "the unequal bargaining position of authors" in negotiations over conveyance of their ownership rights "resulting . . . from the impossibility of determining the work's value until the value has been exploited."[9] A creator of a work-for-hire cannot take advantage of this provision, however, because the termination right expressly does not apply to works-for-hire.[10]

Factual Background

Victor Miller, a professional screenplay writer, has long been a member of the Writers Guild of America ("WGA"), a labor union representing writers in the film and television industries. In 1979, Miller agreed to write the screenplay for a horror film, which would eventually be titled *Friday the 13th* and introduce the iconic character of Jason

Related People

Brian C. Ascher

Ilissa Samplin

Michael L. Nadler

Doran J. Satanove

Voorhees.[11] *Friday the 13th* opened on May 9, 1980 and enjoyed "unprecedented box office success for a horror film," leading to eleven sequels to-date and a host of other derivative products.[12] But before that took place, in exchange for only $9,000, Miller assigned his rights in the screenplay to a film production and distribution company.

In 2016, Miller sought to reclaim copyright ownership of the screenplay by serving notices of termination pursuant to Section 203(a) of the Copyright Act. The companies to whom the copyrights had been transferred then sued Miller in the United States District Court for the District of Connecticut, seeking a declaration that Miller wrote the screenplay as an employee and that the screenplay therefore was a work-for-hire, which would prevent Miller from terminating the companies' rights. On cross-motions for summary judgment asserting largely undisputed facts, the District Court concluded that Miller did *not* create the screenplay as a work-for-hire. Because he was the "author" of the screenplay, his termination notices were valid and served to restore his ownership of the copyright for the *Friday the 13th* screenplay. After the companies appealed, the Second Circuit affirmed the District Court's ruling in Miller's favor.

The Second Circuit's Decision

Because the Copyright Act's termination provision is not applicable to works-for-hire, the courts had to resolve whether Miller was an employee or independent contractor of the film production company to which he assigned his rights at the time that he wrote the screenplay for *Friday the 13th*. This required the Second Circuit to decide as a matter of first impression what body of federal law governed Miller's employment status under the Copyright Act.

The production companies first argued that "Miller's WGA membership 'inherently' created an employer-employee relationship" pursuant to the National Labor Relations Act (the "NLRA"), under which screenwriters are permitted to unionize because they are classified as production companies' employees.[13] The Second Circuit rejected that argument because "the definition of 'employee' under copyright law is grounded in the common law of agency" and "serves different purposes than do the labor law concepts regarding employment relationships," such that there was "no sound basis for using labor law to override copyright law goals."[14]

In reaching this conclusion, the Court provided a thorough overview of the Supreme Court's decision in *Community for Creative Non-Violence v. Reid*, which set forth a thirteen-factor test for determining in the copyright context whether the creator of a work did so as an employee or as an independent contractor.[15] As explained in *Reid*, the Copyright Act provides a "restrictive definition of employment, one aimed at limiting the contours of the work-for-hire determination and protecting authors."[16] In the labor and employment law context, on the other hand, "the concept of employment is broader, adopting a more sweeping approach suitable to serve workers and their collective bargaining interests and establishing rights" related to their compensation and safety, among other issues.[17] Stated otherwise, "[t]hat labor law was determined to offer labor protections to independent writers does not have to reduce the protections provided to authors under the Copyright Act."[18] The Court of Appeals thus found that in analyzing whether the *Friday the 13th* screenplay was a work-for-hire, "[t]he District Court correctly set aside NLRA-based doctrine in favor of common law principles and the *Reid* factors" "regardless of Miller's employment status under the NLRA and his membership in the WGA."[19]

Having failed to persuade the Second Circuit to follow principles of labor law to find that Miller was an employee when he wrote the script, the production companies next argued that Miller's WGA membership should have been considered as an additional factor in applying the *Reid* multi-factor work-for-hire test. The Second Circuit deemed this argument "simply another attempt to shift *Reid's* analytic focus from agency law to labor law and convince us the labor law framework governs here."[20] Because *Reid* "instructs [courts] to look at the overall context of the parties' relationship based on . . . specific factors," Miller's WGA membership did "not alter or control [the Second Circuit's] analysis of

the *Reid* factors for copyright purposes."[21] Rather, it was "relevant only insofar as it informs [the] analysis of other factors, namely whether Miller received benefits commonly associated with an employment relationship."[22]

Applying the *Reid* factors, the Second Circuit proceeded to analyze whether Miller created the screenplay as an employee or as an independent contractor. In doing so, it found that only three of *Reid*'s thirteen factors—that the hiring party exercised some control over Miller's writing, that the hiring party was a business entity, and that soliciting the screenplay was part of its regular business—supported the production companies' arguments for classifying the screenplay as a work-for-hire under the Copyright Act. On balance, however, the Second Circuit found that the factors "weigh[ed] decisively in Miller's favor," leading the Court of Appeals to affirm the District Court's finding that Miller had created the screenplay as an independent contractor.[23] Accordingly, under the Copyright Act, Miller had the right to terminate his decades-earlier transfer of the copyright to the screenplay for *Friday the 13th*.

Conclusion

For purposes of applying the Copyright Act's termination provisions, *Horror Inc.* held that whether a work was "made for hire"—which in this case turned on the creator's status as an employee or independent contractor—is strictly governed by copyright law principles, rather than labor and employment law. Accordingly, it further held that to the extent the creator of a work is a union member, that fact has no independent weight in determining whether the creator was in an employment relationship with the entity for whom the work was created. These determinations may have significant implications for a broad array of copyrighted works, the ownership of which may be similarly subject to the Copyright Act's termination provisions.

---

[1] *Horror Inc. v. Miller*, No. 18-3123-cv, 2021 WL 4468980 (2d Cir. Sept. 30, 2021).

[2] 17 U.S.C. §§ 101 et seq.

[3] 17 U.S.C. § 201(a).

[4] *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

[5] 17 U.S.C. § 101.

[6] 17 U.S.C. § 201(b).

[7] 17 U.S.C. § 201(d).

[8] 17 U.S.C. § 203.

[9] H.R. Rep. No. 94-1476, 24th Cong. 2d Sess. at 124 (1976)

[10] 17 U.S.C. § 203(a) (termination right applies "[i]n the case of any work other than a work made for hire").

[11] *Horror Inc.*, 2021 WL 4468980, at *1-2.

[12] *Id.* at *3.

[13] *Id.* at *6.

[14] *Id.*

[15] 490 U.S. at 737.

[16] *Horror Inc.*, 2021 WL 4468980, at *8.

[17] *Id.* at *8.

[18] *Id.* at *10.

[19] *Id.*

[20] *Id.* at *11.

[21] *Id.* at *12.

[22] *Id.*

[23] *Id.* at *19.

The following Gibson Dunn lawyers assisted in the preparation of this client update: Brian Ascher, Ilissa Samplin, Michael Nadler, and Doran Satanove.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or the following leaders and members of the firm's Media, Entertainment & Technology Practice Group:

Media, Entertainment and Technology Group:
Scott A. Edelman – Co-Chair, Los Angeles (+1 310-557-8061, sedelman@gibsondunn.com)
Kevin Masuda – Co-Chair, Los Angeles (+1 213-229-7872, kmasuda@gibsondunn.com)
Benyamin S. Ross – Co-Chair, Los Angeles (+1 213-229-7048, bross@gibsondunn.com)
Orin Snyder – New York (+1 212-351-2400, osnyder@gibsondunn.com)
Brian C. Ascher – New York (+1 212-351-3989, bascher@gibsondunn.com)
Anne M. Champion – New York (+1 212-351-5361, achampion@gibsondunn.com)
Michael H. Dore – Los Angeles (+1 213-229-7652, mdore@gibsondunn.com)
Howard S. Hogan – Washington, D.C. (+1 202-887-3640, hhogan@gibsondunn.com)
Ilissa Samplin – Los Angeles (+1 213-229-7354, isamplin@gibsondunn.com)
Nathaniel L. Bach – Los Angeles (+1 213-229-7241,nbach@gibsondunn.com)

Please also feel free to contact the following practice leaders:

Intellectual Property Group:
Kate Dominguez – New York (+1 212-351-2338, kdominguez@gibsondunn.com)
Y. Ernest Hsin – San Francisco (+1 415-393-8224, ehsin@gibsondunn.com)
Josh Krevitt – New York (+1 212-351-4000, jkrevitt@gibsondunn.com)
Jane M. Love, Ph.D. – New York (+1 212-351-3922, jlove@gibsondunn.com)

Related Capabilities

Media, Entertainment, and Technology

Intellectual Property