

Beware the Slender Man: Intellectual Property and Internet Folklore

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BEWARE THE SLENDER MAN: INTELLECTUAL PROPERTY AND INTERNET FOLKLORE

*Cathay Y. N. Smith**

Abstract

Internet folklore is created collaboratively within Internet communities—through memes, blogs, video games, fake news, found footage, creepypastas, art, podcasts, and other digital mediums. The Slender Man mythos is one of the most striking examples of Internet folklore. Slender Man, the tall and faceless monster who preys on children and teenagers, originated on an Internet forum in mid-2009 and quickly went viral, spreading to other forums and platforms online. His creation and development resulted from the collaborative efforts and cultural open-sourcing of many users and online communities; users reused, modified, and shared each other’s Slender Man creations, contributing to his development as a crowdsourced monster.

This Article uses Slender Man as a case study to examine the online creation and production of Internet folklore and cultural products and to explore how intellectual property law treats these types of collective creations. Specifically, it traces Slender Man’s creation, development, and propertization to explore collaborative creation and ownership rights in Internet folklore. Collaborative creation of cultural products is a familiar story. But who owns those works? What happens when those works are propertized? This Article analyzes claims to own Slender Man’s character under copyright law and Slender Man’s name and image under trademark law, and ultimately argues that even though parties claim to own Slender Man, Slender Man’s character, name, and image are in the commons, free for anyone to use in her own expressive works. Claims to own cultural products under intellectual property law, and the subsequent assertions of those claims, cause uncertainty and chill creativity, which ultimately harms the public by depriving it of more creative works.

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INTRODUCTION

I’m loving the Slenderman. . . . You posted an image and a tiny backstory. Planting a small seed of an idea into the internet, without even knowing (or planning) for others to run with it, and make it grow. Then, people saw your idea, and started expanding on it. The Slenderman went from an isolated incident to a full mythos, with woodcuttings, incident reports, coverups [sic] and multiple killings to it’s [sic] name in just a few pages of collaborative effort . . . I am continually [sic] amazed with how a single idea on the

internet can sprout and grow into something more incredible than you ever expected, simply through a small amount of creative effort on the part of many individuals.

—Moto42, *Something Awful*, June 16, 2009¹

Internet folklore is created collaboratively online within Internet communities—through memes,² blogs, video games, fake news, found footage,³ creepypastas,⁴ art, podcasts, and other digital mediums. According to Slender Man folklore, Slender Man has a roughly humanoid form; he is faceless, very thin, and unusually tall. He wears a white dress shirt and black suit, he has tentacles extending outward from his back,⁵ and he lives in dark forests but can appear anywhere.⁶ An encounter with Slender Man can result in uncontrollable coughing, nose-bleeds, memory loss, time gaps, insanity, desire to commit murder, death, and technology failure. He typically targets children and teenagers, and has been described by the media as “[t]he first great myth of the web,”⁷ a “crowdsourced monster,”⁸ a “Net Demon,”⁹ and an “Internet-born horror villain.”¹⁰

1. Moto42, *Create Paranormal Images*, SOMETHING AWFUL (June 16, 2009, 6:38 AM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=9>.

2. Memes are social ideas or images that are copied and shared virally online. The most prevalent memes are captioned images that give the image meaning. *See generally* James Gleick, *What Defines a Meme?*, SMITHSONIAN MAG.: ASKSMITHSONIAN (May 2011), <https://www.smithsonianmag.com/arts-culture/what-defines-a-meme-1904778/>.

3. Found footage is a film genre that presents a fictional story as if it were lost and then discovered film. *See generally* Rory Walsh, *Visual Trends: A History of the Found Footage Genre*, VIDEOMAKER.COM (June 26, 2012, 7:39 AM), <https://www.videomaker.com/videonews/2012/06/visual-trends-a-history-of-the-found-footage-genre>.

4. Creepypastas are bite-sized copy and pasted horror legends or images that are user-generated and shared online. Austin Considine, *Bored at Work? Try Creepypasta, or Web Scares*, N.Y. TIMES (Nov. 12, 2010), http://www.nytimes.com/2010/11/14/fashion/14noticed.html?_r=0.

5. *See generally* Caitlin Dewey, *The Complete History of ‘Slender Man,’ the Meme That Compelled Two Girls to Stab a Friend*, WASH. POST (July 27, 2016), <https://www.washingtonpost.com/news/the-intersect/wp/2014/06/03/the-complete-terrifying-history-of-slender-man-the-internet-meme-that-compelled-two-12-year-olds-to-stab-their-friend/> (detailing the story behind Slender Man).

6. *Id.*

7. *Tales, The Digital Human*, BBC RADIO (Oct. 29, 2012), <http://www.bbc.co.uk/programmes/b01nl671>.

8. Andrew Peck, *Tall Dark, and Loathsome: The Emergence of a Legend Cycle in the Digital Age*, 128 J. AM. FOLKLORE 333, 334 (2015).

9. Phillip Sherwell, *Net Demon Drove Girls (12) to Stab Pal*, IRISH INDEP. (June 4, 2014), <http://independent.ie/world-news/americas/net-demon-drove-girls-12-to-stab-pal-30327203.html>.

10. Shira Chess, *Open-Sourcing Horror: The Slender Man, Marble Hornets, and Genre Negotiations*, 15 INFO. COMM’N & SOC’Y, 374, 376 (2012).

Most people had not heard of Slender Man until he made nationwide headlines in May of 2014, when the media reported that two 12-year-old girls in Wisconsin stabbed their friend in the woods.¹¹ When the police asked the girls why they stabbed their friend, they answered that they tried to kill her to prove themselves worthy of Slender Man.¹² News headlines blamed the crime on Slender Man, calling him “[t]he Internet meme that compelled two 12-year-olds to stab friend” and “[t]he fictional online creature that drove 2 young girls to stab their friend.”¹³ Shortly after news of the stabbing, the media began to report other violent crimes linked to Slender Man.¹⁴ This resulted in moral panic and hysteria, with the media dubbing the online community that created Slender Man “an Internet horror-cult that almost caused a killing” and “a[n Internet] school for murder—spawning a deadly cult that’s molding vulnerable teens into potential killers.”¹⁵ HBO’s recent documentary on the Wisconsin crime, *Beware The Slenderman*, gave Slender Man even more notoriety,¹⁶ and Sony Pictures Entertainment’s *Slender Man* movie, scheduled for nationwide release in August of 2018, will solidify Slender Man as a household name.¹⁷

Most of the media and legal attention given Slender Man has focused on the moral and legal liability of Slender Man’s creators with regard to violent crimes, the decision to criminally prosecute the two twelve-year-old Wisconsin girls as adults, and the Internet’s powerful influence over

11. Abigail Jones, *The Girls Who Tried to Kill for Slender Man*, NEWSWEEK (Aug. 13, 2014), <http://www.newsweek.com/2014/08/22/girls-who-tried-kill-slender-man-264218.html>.

12. Ellen Gabler, *Charges Detail Waukesha Pre-teens’ Attempt to Kill Classmate*, MILWAUKEE J. SENTINEL (June 2, 2014), <http://archive.jsonline.com/news/crime/waukesha-police-2-12-year-old-girls-plotted-for-months-to-kill-friend-b99282655z1-261534171.html>.

13. SHIRA CHESSE & ERIC NEWSOM, FOLKLORE, HORROR STORIES AND THE SLENDER MAN 3 (2015).

14. *Id.*

15. *Id.* The attempted murder in Wisconsin was followed by similar stories in Ohio, where a mother claimed her daughter stabbed her for Slender Man; in Las Vegas, where a mass murderer purportedly liked to dress as Slender Man; and in Florida, where a teenage fan of Slender Man attempted to burn down her house with her family inside. Shira Chess, *The Two Slender Mans*, CULTURE DIGITALLY (Sept. 10, 2014), <http://culturedigitally.org/2014/09/the-two-slender-mans/>.

16. See, e.g., Bryn Lovitt, *HBO’s ‘Beware the Slenderman’ Doc: 6 Things We Learned*, ROLLING STONE (Jan. 24, 2017), <http://www.rollingstone.com/culture/lists/hbos-beware-the-slenderman-doc-6-things-we-learned-w462396>; *Beware the Slenderman* (HBO documentary broadcast Jan. 23, 2017), <http://www.hbo.com/documentaries/beware-the-slenderman> [hereinafter HBO, *Beware the Slenderman*].

17. Charles Bramesco, *Sony Developing ‘Slender Man’ Movie, Pretty Much Asking for It*, VANITY FAIR (May 7, 2016), <http://www.vanityfair.com/hollywood/2016/05/sony-slender-man-movie>; Katie Rogers, *‘Slender Man,’ a Horror Meme, Gets Ready to Step Out of the Shadows*, N.Y. TIMES (May 6, 2016), https://www.nytimes.com/2016/05/07/movies/slender-man-a-horror-meme-gets-ready-to-step-out-of-the-shadows.html?_r=0.

children and teenagers.¹⁸ Much less attention has focused on the creative process that gave birth to Slender Man and the creation of online communities, and the collaborative efforts within those communities, that created Slender Man and his lore. Those who have examined Slender Man's creation have compared it to traditional folklore, noting that at various times, multiple people within the community collaborated and collectively contributed to Slender Man's mythos.¹⁹ Others have compared Slender Man's creation to open-source software, describing it as involving the "reuse, modification, sharing of source code, an openness (and transparency) of infrastructure, and the negotiation and collaboration of many individuals."²⁰ Indeed, Slender Man's popularity and appeal derive from his being a hybrid of both traditional folklore and modern open-source peer-production; he represents a bridge between traditional forms of creation through collective storytelling, and innovative modern forms of creation through collaborative online peer-production.

This Article uses Slender Man as a case study to examine the creation and production of Internet folklore and explores how intellectual property treats that folklore. It traces Slender Man's creation, development, propertization, and commercialization in order to explore collaborative creation and ownership rights in Internet folklore, and, more broadly, intellectual property ownership in collaboratively created cultural products. At the same time, this Article revisits current issues in intellectual property law, including community production of cultural products, collaborative creation and the role of norms in digital communities, protection of folklore under intellectual property law, copyright protection of characters, and trademark protection of character names and images in expressive works.

Collaborative creation of cultural products is a familiar story. From traditional folklore (e.g., indigenous creation stories, the *Iliad*, the

18. See, e.g., Frances E. Chapman & Lauren Tarasuk, *Slender Man on Trial: Has Media Taken the Minds of the Young?*, 52 CRIM. L. BULL. (2016); Candace Plattor, *12-Year-Olds Are Stabbing 12-Year-Olds: Are We Paying Attention Yet?*, HUFFINGTON POST CAN. (June 4, 2014), http://www.huffingtonpost.ca/candace-plattor/slender-man-killing_b_5447611.html.

19. See, e.g., CHESSE & NEWSOM, *supra* note 13, at 77; Tina Boyer, *The Anatomy of a Monster: The Case of Slender Man*, 2 PRETERNATURE 240 (2013); Peck, *supra* note 8, at 344; Jeffrey Tolbert, *The Sort of Story That Has You Covering Your Mirrors: The Case of Slender Man*, SEMIOTIC REV., no. 2, Nov. 2013; Jesse Singal, *Why Kids Love Slender Man*, N.Y. MAG.: THE CUT (June 6, 2014, 8:53 AM), <http://nymag.com/scienceofus/2014/06/why-kids-love-slender-man.html?wpsrc=nymag> (interviewing folklorist Trevor Blank).

20. Chess, *supra* note 10, at 383.

Odyssey,²¹ *Cinderella*,²² and *Dick Whittington*²³), to new forms of digital creation (e.g., open-source software²⁴ and Wikipedia²⁵), communities collaborate, reuse, and modify creative works to generate intangible cultural products.²⁶ But who owns those works? And what happens when those works are propertized or commercialized? This Article explores those questions by looking at the case study of Slender Man, and ultimately concludes that as a community creation, Slender Man's character, name, and image are in the commons, free for anyone to use in her own expressive works. However, certain parties are attempting to claim copyright ownership of Slender Man's character and trademark ownership of Slender Man's name and image. These parties assert that they have the exclusive right to use Slender Man in all expressive works, sometimes even against members of the original creative community. These claims and overassertions of rights harm the public and create uncertainty within the original creative community. This not only chills creativity, but also harms the creative community that helped to popularize Slender Man in the first place

This Article proceeds as follows: Part I defines Internet folklore and compares it to traditional folklore and other collaboratively created cultural products. Part II traces Slender Man's creation and evolution, including the community norms and ethos that encouraged his creation, and the propertization and commercialization of Slender Man and its chilling effect on creativity. Part III reviews the literature on intellectual property protection of traditional folklore and examines how the characteristics that make traditional folklore generally unprotectable under intellectual property law may differ from those characteristics of Internet folklore. Part IV analyzes Slender Man as a copyrightable

21. Giancarlo F. Frosio, *Rediscovering Cumulative Creativity from the Oral Formulaic Tradition to Digital Remix: Can I Get a Witness*, 13 J. MARSHALL REV. INTELL. PROP. L. 341, 376 (2014) (tracing the creation of the *Illiad* and the *Odyssey* to support the opinion that “[t]he largest part of culture has been produced under a paradigm where . . . social and collaborative authorship were constitutional elements of the creative moment”).

22. See generally Michael Jon Andersen, *Claiming the Glass Slipper: The Protection of Folklore as Traditional Knowledge*, 1 CASE W. RES. J.L. TECH. & INTERNET 148, 149 (2010) (noting the folklore origins of Cinderella).

23. See generally Susanna Frederick Fischer, *Dick Whittington and Creativity: From Trade to Folklore, from Folklore to Trade*, 12 TEX. WESLEYAN L. REV. 5, 6 (2005) (explaining the folklore of a medieval English merchant who made a fortune trading luxury clothes).

24. See generally CHRISTOPHER M. KELTY, *TWO BITS: THE CULTURAL SIGNIFICANCE OF FREE SOFTWARE* (2008); Michael J. Madison et al., *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657, 661 (2010).

25. See Yochai Benkler & Helen Nissenbaum, *Commons-Based Production and Virtue*, 14 J. POL. PHIL. 394, 397–98 (2006); Madison et al., *supra* note 24, at 662.

26. For more examples of what they have termed “constructed cultural commons,” both in the cultural as well as scientific arenas, see Madison et al., *supra* note 24, at 660–63.

character and Slender Man's name and image as trademarks, and ultimately concludes that under current intellectual property regimes, Slender Man's character, name, and image are not subject to protection from use by third parties. Finally, Part V explains the harm the propertization of Slender Man and similar collectively created cultural products causes to the original creative community and the public.

I. INTERNET FOLKLORE

Internet folklore is folklore created online. Scholars studying digital collaboration often credit the Internet with the emergence of peer-production and collaborative creation of cultural products.²⁷ They claim that the Internet has enabled creative collaboration between individuals without reliance on central management, market incentives, or other external financial rewards.²⁸ This is certainly true in modern forms of digital creative communities, such as open-source software and Wikipedia. These digital communities rely on the Internet to collaborate across geographical and cultural boundaries and produce socially valuable cultural products. However, it would be incorrect to attribute collaborative creation solely to the Internet. For centuries, communities have collaborated to create cultural products in the form of folklore, which is embodied in those communities' stories, songs, arts, crafts, and legends.²⁹

Folklore represents "traditional art, literature, knowledge, and practice that is disseminated largely through oral communication and behavioral example."³⁰ The term *folk* in folklore refers to "any group of people whatsoever who share at least one common factor. It does not matter what the linking factor is . . . but what is important is that a group formed for whatever reason will have some traditions which it calls its own."³¹ Traditionally, the common factor that communities shared in traditional folklore was a common ethnicity, geographic location, religion, occupation, language, society, or culture. Members of the community did not necessarily know each other personally, but they were aware of the "common core of traditions belonging to the group, traditions which help[ed] the group have a sense of group identity."³² This folklore included songs, art, and crafts, as well as stories and legends, such as the

27. Benkler & Nissenbaum, *supra* note 25, at 394–95.

28. *Id.*

29. See, e.g., Frosio, *supra* note 21, at 376 ("At any step of our cultural history, we are presented with overwhelming evidences that creativity has strived through cumulative evolution, borrowing, appropriation, and imitation.").

30. *What Is Folklore?*, AM. FOLKLORE SOC'Y, <http://www.afsnet.org/?page=WhatIsFolklore> (last visited Feb. 10, 2017).

31. ALAN DUNDES, *THE STUDY OF FOLKLORE* 2 (1965).

32. *Id.*

Pied Piper, Wahungwe Creation Myth, Igorot, Rainbow Serpent, Loch Ness Monster, El Cucuy, La Llorona, the Krampus, and Dybbuk, to name a few.

The Internet's ability to connect people has provided a new platform for community formation and a new means for those communities to collaborate and create online. The Internet has changed the established notions of identity: Instead of communities forming only around a common religion, ethnicity, geographic location, or language, communities can form online regardless of social and geographic restrictions.³³ These online communities, or "geek enclaves and hubs," form around commonalities such as interests and accessibility to digital technology and the Internet, and the folklore they create is called *Internet* or *digital* folklore.³⁴ Unlike traditional folklore, which is disseminated through behavior and oral communication, Internet folklore is created digitally—manifested through various online mediums, such as memes, blogs, video games, fake news, found footage, creepypastas, art, and podcasts—and disseminated over the Internet. Like creators of traditional folklore, members of these online communities may not know each other personally, but they are aware of the common core of traditions, norms, and ethos of the online community, which allows the community to share a sense of group identity and belonging.

Folklorists have identified three attributes shared by all folklore: collectivity, variability, and performance.³⁵ Folklore is *collective* because multiple people in a community or communities, at various times, contribute to the folklore's creation. It is *variable* because a storyteller may revise, embellish, and personalize the lore depending on the context and who is telling the story. Finally, folklore is *performed* when storytellers change their stories or adjust iterations depending on audience participation and responses the storytellers receive.³⁶ The creative process of online legends, such as that of Slender Man, share folklore's same three attributes and have therefore been labeled *Internet* folklore.³⁷ In Internet folklore, users regularly embellish other user-created stories, images, memes, or video games, thereby collectively contributing to the folklore's creation. Internet folklore is variable in that

33. Trevor J. Blank, *Introduction: Toward a Conceptual Framework for the Study of Folklore and the Internet*, in *FOLKLORE AND THE INTERNET: VERNACULAR EXPRESSION IN A DIGITAL WORLD* 1, 7 (Trevor J. Blank ed., 2009).

34. Emma Louise Backe, *Contemporary Folklore in the Digital Age*, *GEEK ANTHROPOLOGIST* (Oct. 3, 2014), <https://thegeekanthropologist.com/2014/10/03/contemporary-folklore-in-the-digital-age/>.

35. Richard Bauman, *Folklore*, in *FOLKLORE, CULTURAL PERFORMANCES, AND POPULAR ENTERTAINMENTS: A COMMUNICATIONS-CENTERED HANDBOOK* 29, 37 (Richard Bauman ed., 1992).

36. CHESSE & NEWSOM, *supra* note 13, at 79.

37. *Id.* at 79–92.

it allows myths and characters to evolve online, their powers gained and lost, their traits added or morphed, depending on which user is telling the story. Finally, Internet folklore is performed, where users change their stories or tweak their contributions, based on feedback from other users or commenters, and alter their creations to fit within the community's ideals.

II. THE SLENDER MAN

Slender Man and his lore are among the more striking examples of collaborative creation and production of Internet folklore. The process of this creation has been compared to open-source software as well as to traditional folklore. Indeed, Slender Man is a crossover between the old and the new, representing both traditional and modern forms of collaborative creation. As one commentator describes Internet folklore,

“we have really returned here, in spite of the centralization of technology, to the old-fashioned definition of what folk culture used to be . . . [sic] We have these jokes and stories that will never see the printed page that exist only as glowing dots of phosphorous. It's not word-of-mouth folk culture but word-of-modem culture.”³⁸

To begin analyzing intellectual property rights in Internet folklore, it is helpful to understand the collaborative and peer-production process that creates online cultural products like Slender Man. The following is Slender Man's story.

A. *A Monster Is Born*

Slender Man originated on *Something Awful*, a website that hosts user-initiated forums, on June 10, 2009.³⁹ Typically, a user creates a topic for a forum, explains the guidelines for posting on the forum, then seeks contributions and posts from other users. The forums on *Something Awful* can be comedic, random, artistic, political, or relate to current events.

On June 8, 2009, *Something Awful* forum user Gerogerigegege created a new forum challenging users to “create paranormal images.”⁴⁰ Specifically, Gerogerigegege explained that

[c]reating paranormal images has been a hobby of mine

38. Blank, *supra* note 33, at 7 (quoting William Grimes, *Computer as a Cultural Tool: Chatter Mounts on Every Topic*, N.Y. TIMES, Dec. 1, 1992, at C13).

39. *Slender Man*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/slender-man> (last visited Feb. 17, 2017).

40. Gerogerigegege, *Create Paranormal Images*, SOMETHING AWFUL (June 8, 2009, 11:55 AM), <http://forums.somethingawful.com/showthread.php?threadid=3150591>.

for quite some time. Occasionally, I stumble upon odd web sites showcasing strange photos, and I always wondered if it were possible to get one of my own chops in a book, documentary, or web site just by casually leaking it out into the web – whether they’d be supplements to bogus stories or not.⁴¹

Gerogerigege called for forum users to “make a shitload” of paranormal images, provided a few “pro-tips” on creating convincing paranormal images using Photoshop, and explained that users did not have to post their original source images unless they wanted to.⁴² In response, users started to create and post Photoshopped paranormal images on the newly created forum.⁴³ That afternoon, instead of posting an image, user Lord Dangleberry wrote a “back story” to accompany a Photoshopped image of a ghost at a campground that was created by another user. The story involved a camping trip and a crying ghost child.⁴⁴

Two days later, at 1:07 PM on June 10, 2009, user Victor Surge (real name Eric Knudsen) posted two black and white images on the forum. One was a black-and-white photo featuring a group of teenagers walking briskly toward the camera with looks of fear or anger in their eyes. Lurking in the background of the photo, Victor Surge inserted a black-and-white image of an unusually tall, very thin, faceless man.⁴⁵

41. *Id.*

42. *Id.*

43. *See generally Create Paranormal Images*, SOMETHING AWFUL, <http://forums.somethingawful.com/showthread.php?threadid=3150591> (last visited Feb. 17, 2017).

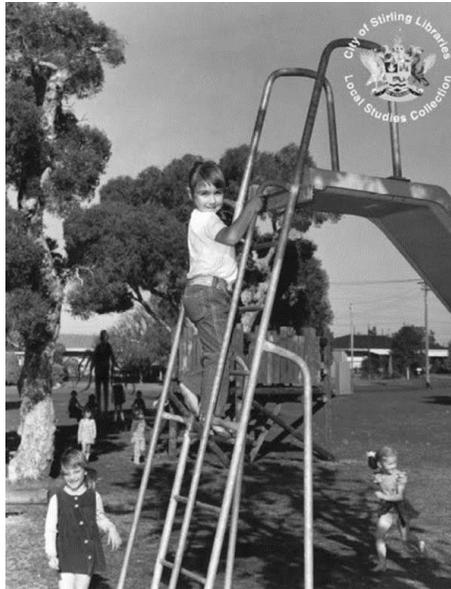
44. Dangleberry, *Create Paranormal Images*, SOMETHING AWFUL (June 8, 2009, 2:33 PM), <http://forums.somethingawful.com/showthread.php?threadid=3150591>.

45. Victor Surge, *Create Paranormal Images*, SOMETHING AWFUL (June 10, 2009, 1:07 PM), <http://forums.somethingawful.com/showthread.php?threadid=3150591>; KNOW YOUR MEME, *supra* note 39 (source containing the image).



The following caption accompanied the photo: “[W]e didn’t want to go, we didn’t want to kill them, but its persistent silence and outstretched arms horrified and comforted us at the same time...’ 1983, photographer unknown, presumed dead.”⁴⁶

The second photo Surge posted depicted children on a playground.⁴⁷ In the background of that photo, Surge inserted the shadow of an unusually tall and thin man with tentacles extending from his body.⁴⁸



Surge included the following caption with the photo:

One of two recovered photographs from the Stirling City

46. Victor Surge, *supra* note 45.

47. *Id.*

48. *Id.*; KNOW YOUR MEME, *supra* note 39.

Library Blaze. Notable for being taken the day which fourteen children vanished and for what is referred to as “The Slender Man”. Deformities cited as film defects by officials. Fire at library occurred one week later. Actual photograph confiscated as evidence.

1986, photographer: Mary Thomas, missing since June 13th, 1986.⁴⁹

With those two posts, Slender Man was born. *Something Awful* forum users praised Surge’s memes on the forum: User Leyendecker exclaimed, “when I finally saw the guy in the background [I] lost it this is going to give me nightmares”; Beerdeer added, “[a]s an amateur paranormal investigator, you’d be surprised how much the Slender Man appeared in pictures in times of disaster during that historical period. (AKA I’d like to see more of those).”⁵⁰ In response to these posts, Surge replied, “[m]aybe I’ll do some more research. I’ve heard there may be a couple more legit ‘Slender Man’ photographs out there. I’ll post them if I find them.”⁵¹

The next morning, Surge added another photo and a fictionalized account by a doctor at the fictional Woodview Mental Hospital and Psychological Rehabilitation Clinic from the 1990s.⁵² The entries were purportedly written by the doctor and described horrific occurrences at the mental institute, referring to the disappearance of thirty-three patients and staff, a “mass of blood and human tissue,” and photos of an “anomalous tall and slender subject. Facial blur caused by possible contamination . . . may have no eyes . . . [a]nomalies . . . thought to be appendages.”⁵³ Surge’s posts received more praise: ZombieScholar posted, “You are an amazing and terrible bastard, sir. Well played. Now to look over my shoulder every couple seconds for the rest of my day”; Dissappointed Owl asked Surge to “[p]lease do more. These are haunting.”⁵⁴

49. Victor Surge, *supra* note 45.

50. Comments by users Leyendecker & Beerdeer, *Create Paranormal Images*, SOMETHING AWFUL (June 10, 2009, 8:49–8:52 PM), <http://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=3>.

51. Victor Surge, *Create Paranormal Images*, SOMETHING AWFUL (June 10, 2009, 11:51 PM), <http://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=3>.

52. Victor Surge, *Create Paranormal Images*, SOMETHING AWFUL (June 11, 2009, 10:24 AM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=4>.

53. *Id.*

54. Comments by users ZombieScholar & Dissappointed Owl, *Create Paranormal Images*, SOMETHING AWFUL (June 11, 2009, 5:19–5:42 PM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=4>.

B. *Slender Man Is Reused, Modified, and Shared*

Less than twenty-four hours after Slender Man first appeared on *Something Awful*, other users on the forum began to create and contribute their own Slender Man images, stories, and fake sightings. For instance, on June 12, 2009, LeechCode5 posted: “I’ve been seriously debating sharing these, but after *Victor Surge*’s posts I feel I have to.”⁵⁵ LeechCode5 posted two photos on the forum: The first was accompanied by a story about an investigation involving the disappearance of nine teenagers from a campsite, and the second⁵⁶ showed a burning school house, with Slender Man (represented as an unusually tall and thin shadow) standing in the heavy smoke on the roof. LeechCode5 added the following text to explain the second photo:

[A]n elementary school fire in 1978. No official cause was ever found. Seven students and a teacher became trapped and died before firefighters could respond. Many of the students and teachers from the time have a history of anxiety disorders and panic attacks, even those who weren’t at the school on that day. At least one has since committed suicide, and several others legally changed their names once they reached adulthood and have disappeared.⁵⁷

LeechCode5’s contribution added new dimensions to the Slender Man character and his mythos, portraying Slender Man as more “actively malicious . . . associated with arson and long-term mental health issues.”⁵⁸ Other forum users contributed their own creations, further adding dimension to Slender Man and expanding his personality and character traits. For instance, users created and posted fake news articles about Slender Man at the scene of horrific events; Photoshopped images of Slender Man in the background of historic photos, including a photo of infamous cult leader Jim Jones; created faux German woodcuts from the 16th century with the image of a slender man;⁵⁹ rewrote popular children’s fairytales to include Slender Man; and recreated excerpts from

55. LeechCode5, *Create Paranormal Images*, SOMETHING AWFUL (June 12, 2009, 6:53 AM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=4>.

56. *Id.*

57. *Id.*

58. Peck, *supra* note 8, at 340–41.

59. GyverMac, *Create Paranormal Images*, SOMETHING AWFUL (June 15, 2009, 9:38 PM), <http://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=8> (“A german woodcut from the 1540s. . . . The character to the right bears little semblance to a human being, with skeletal physique and long limbs at odd angles.”).

historic archaeological books by inserting Slender Man.⁶⁰ As one scholar observed: “Even in these early days, Slender Man was freely developed as a communal property. . . . Those who followed . . . never bothered to ask permission to stretch the boundaries of the character or the stories [Victor Surge] had created.”⁶¹ These users’ contributions were not merely stories *about* Slender Man: many of them added new personality traits and characteristics, helping to shape Slender Man’s character more concretely.⁶²

Slender Man quickly spilled over from the *Something Awful* forum to other online forums and websites, and users began contributing to the Slender Man mythos through new mediums, including short films, video games, and original art. For instance, by June 16, 2009, less than a week after his birth, Slender Man had spread to */x/ (paranormal) 4chan* board,⁶³ and quickly spread to other boards such as *Tumblr*, *Unfiction Forums*, *Fangoria*, *Bungie*, *Facepunch*, *Wikibin*, */x/enopedia*, *TVTropes*, *Kongregate*, *DeviantArt*, *SlenderNation*, and *Mythical Creatures Guide*.⁶⁴ Internet users on *DeviantART*, an online artist community, began creating original Slender Man art.⁶⁵ Short films featuring Slender Man began showing up in all languages on YouTube, often in found-footage format.⁶⁶ One of the more popular Slender Man film series was YouTube’s *Marble Hornets* video blogs (vlogs). On June 20, 2009, Joseph DeLage and Troy Wagner created the *Marble Hornets* channel on YouTube and began creating and posting Slender Man videos. These videos, in found-footage format, were posted by “Jay.”⁶⁷ The first episode, “Introduction,” explains that Jay received the video footage from his college friend, Alex Kralie, who mysteriously disappeared.⁶⁸ Each “raw footage excerpt,” filmed by the missing Alex, is between two and fifteen minutes long, and narrated by Jay using title cards.⁶⁹

60. Bimston, *Create Paranormal Images*, SOMETHING AWFUL (June 15, 2009, 8:04 PM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=8> (“Mississippian mound near Crab Orchard Lake in Illinois. . . . Plates 17-19 illustrate artifacts typically displayed on photographs of earthworks The detail insets show the artifacts to be slender figures much taller than a human with multiple long curving limbs It is these artifacts that may have lead [sic] to the recurring ‘Slender Man’ scares in the midwest in the mid-20th century.”); see Peck, *supra* note 8, at 341.

61. CHES & NEWSOM, *supra* note 13, at 28.

62. Peck, *supra* note 8, at 340.

63. Moto42, *supra* note 1.

64. KNOW YOUR MEME, *supra* note 39.

65. *Id.*

66. HBO, *Beware the Slenderman*, *supra* note 16.

67. Marble Hornets, YOUTUBE, <https://www.youtube.com/user/MarbleHornets> (last visited Nov. 5, 2017).

68. *Id.*

69. *Id.*

“Introduction” has over 4.4 million views, and as of July 7, 2017, the *Marble Hornets* YouTube channel had almost 455,000 subscribers.⁷⁰ The *Marble Hornets* series introduced the “Slender Sickness”—the uncontrollable coughing and nose bleeds suffered by persons who encounter Slender Man—which became a defining ability of Slender Man.⁷¹ The *Marble Hornets* vlog generated its own fan base, prompting users to create supplemental videos, a detailed *Marble Hornets* Wikipage, and even fake Twitter accounts for the characters.⁷²

Marble Hornets was not the only vlog series based on Slender Man. Internet users created additional vlogs starring Slender Man, including *Everyman HYBRID* and *TribeTwelve*.⁷³ Slender Man starred in full length movies, including *The Slender Man* (a.k.a. *He’s Always Watching*), *Proxy*, and *The Slender Man*.⁷⁴ Users even created computer games and apps, like *Slender: The Eight Pages*,⁷⁵ *Slender: The Arrival*,⁷⁶ *Slender Man Must Die*,⁷⁷ *Slender Rising Free*,⁷⁸ and *Slender Man Blocks*.⁷⁹ There are also full-length novels on Slender Man, such as Willow Rose’s *Emma Frost Mystery Slenderman*,⁸⁰ Bruan Alaspa’s *Strange Fruit and the Slender Man: A Terrifying Novella*,⁸¹ and even Slender Man erotica, such

70. *Id.*

71. CHESSE & NEWSOM, *supra* note 13, at 66.

72. *Id.*

73. Bryn Lovitt, *Slender Man: From Horror Meme to Inspiration for Murder*, ROLLING STONE (Aug. 3, 2016), <https://www.rollingstone.com/culture/slender-man-from-horror-meme-to-inspiration-for-murder-w432163>.

74. *See, e.g., Slender Man Films/Movies*, FANDOM, http://theslenderman.wikia.com/wiki/Category:Slender_Man_Films/Movies (last visited Nov. 5, 2017).

75. *Slender: The Eight Pages*, Game Wiki, GIANT BOMB, <http://www.giantbomb.com/slender-the-eight-pages/3030-39028/> (last visited Nov. 5, 2017).

76. *Slender: The Arrival*, <http://www.slenderarrival.com/> (last visited Nov. 5, 2017).

77. *Slenderman Must Die: Chapter 1*, AMAZON, https://www.amazon.com/Slenderman-Must-Die-Chapter-1/dp/B00IZBF8BW/ref=sr_1_2?ie=UTF8&qid=1483556734&sr=8-2&keywords=slenderman+must+die (last visited Nov. 7, 2017).

78. *Slender Rising Free*, AMAZON, https://www.amazon.com/Teotl-Studios-Slender-Rising-Free/dp/B00OQP7Y8Q/ref=sr_1_1?ie=UTF8&qid=1483556770&sr=8-1&keywords=slender+rising+free (last visited Nov. 5, 2017).

79. *Slender Blocks*, AMAZON, https://www.amazon.com/App-Heaven-Slender-Blocks/dp/B00FM5333O/ref=sr_1_1?ie=UTF8&qid=1483556797&sr=8-1&keywords=slender+man+blocks (last visited Nov. 7, 2017).

80. *Slenderman (Emma Frost Book 9)*, AMAZON, https://www.amazon.com/Slenderman-Emma-Frost-Book-9-ebook/dp/B00Q6ZBAVQ/ref=sr_1_1?s=books&ie=UTF8&qid=1483556285&sr=1-1&keywords=slenderman (last visited Nov. 7, 2017).

81. *Strange Fruit and the Slender Man*, AMAZON, https://www.amazon.com/Strange-Fruit-Slender-Bryan-Alaspa-ebook/dp/B00G8P64TC/ref=redir_mobile_desktop?ie=UTF8&*Version*=1&*entries*=0 (last visited Nov. 7, 2017).

as Emma Steele's *I Slept with Slender Man*⁸² and Wren Winter's *Entangled (Paranormal Slenderman Erotica)*.⁸³ Slender Man continues to inspire creative works in different mediums both online and off.

C. Community Sharing Ethos and Cultural Open-Sourcing

From the beginning of Slender Man's creation, collaboration and sharing was explicitly encouraged.⁸⁴ It was common for one user to create a Photoshopped image and share it with other users, sometimes explicitly asking them to write stories about the image. In one instance, a user created a Photoshopped image of Slender Man in the background of a farmhouse and invited forum users to write a story about the image: "Story tellers, you're more than welcome to write a backstory for this one."⁸⁵ A few hours later, another user created and posted an interview transcript between the imaginary farmer from the farmhouse in the photo and the farmer's psychiatrist at a mental hospital.⁸⁶ Later that day, a third user created a podcast of the psychiatrist and the farmer voicing the interview transcript and posted it on the forum.⁸⁷ This type of collaborative process is apparent throughout the creation of Slender Man and his lore, and was explicitly encouraged by creators and Victor Surge himself.

Indeed, it was not uncommon for forum users to expressly seek assistance with an aspect of their contribution.⁸⁸ For example, user Deep Thoreau confessed to being "no good with photoshop, so I'd [sic] thought I'd add some text. If anyone is good making some images and wants to collaborate, send me a [private message]!" Mr. 47 admitted to being "useless with Photoshop," and instead put together a backstory for photos and invited others to "put some subtle touches on a couple of" photos.⁸⁹ Nurse Fanny encouraged another user to write her own backstory "and

82. *I Slept with Slender Man*, GOODREADS, <http://www.goodreads.com/book/show/18143726-i-slept-with-slender-man> (last visited Nov. 7, 2017).

83. *Entangled 2 (Paranormal Slenderman Erotica)*, FREE E-BOOKS, <http://andreabocellidallas.com/entangled-2-paranormal-slenderman.pdf> (last visited Nov. 7, 2017).

84. Peck, *supra* note 8, at 341.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Comments by users Deep Thoreau & Mr. 47, *Create Paranormal Images*, SOMETHING AWFUL (June 15, 2009, 7:13 PM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=7>.

try to get somebody to do a picture based off of the story.”⁹⁰ In response to the multiple creations by the community, Victor Surge encouraged the community to continue creating: “All of this stuff is amazing, keep it up.”⁹¹

Similarly, users began to police each other’s creations and helped mold Slender Man’s development by commenting on, discussing, praising, reviewing, and sometimes even ignoring certain users whose Slender Man creations did not live up to the community’s ideals.⁹² These comments, criticisms, and rejections formed part of the collaborative process in Slender Man’s creation.⁹³ For instance, it was common for users to criticize Slender Man stories or images that seemed fake, and to comment on what elements made them more or less effective.⁹⁴ User 21st Century posted a comment on another user’s Photoshopped image, “I don’t like it, it seems way too obvious . . . the Slender man [sic] just doesn’t blend well enough in the background, he’s too obvious. He doesn’t like being seen, you shouldn’t see him like that.”⁹⁵ Other comments attempted to shape the way Slender Man’s tentacles should be portrayed. For instance, user Thoreau-Up commented on a photoshopped image that “Slender Man’s tentacles need to be a little less obvious. It seems a lot less freakier [sic] if you can see them so clearly.”⁹⁶ Another user Woodrow Skillson agreed, “it’s better when you don’t notice them at first, and only later you realize just how alien the Slender Man is.”⁹⁷ A similar exchange occurred when user Archwhore posted the following comment: “Not meant to be criticism, . . . [b]ut I don’t like that Slender Man has turned into a regular-sized man that walks with the aid of giant tentacles It’s scarier when he’s normal looking enough to blend in

90. Nurse Fanny, *Create Paranormal Images*, SOMETHING AWFUL (June 14, 2009, 11:12 PM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=6>.

91. Victor Surge, *Create Paranormal Images*, SOMETHING AWFUL (June 15, 2009, 11:00 PM), <http://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=8>.

92. Chess, *supra* note 10, at 386.

93. *Id.*

94. Peck, *supra* note 8, at 334.

95. 21st Century, *Create Paranormal Images*, SOMETHING AWFUL (June 16, 2009, 12:39 AM), <http://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=8>.

96. Thoreau-Up, *Create Paranormal Images*, SOMETHING AWFUL (June 13, 2009, 7:35 PM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=5>.

97. Woodrow Skillson, *Create Paranormal Images*, SOMETHING AWFUL (June 13, 2009, 9:49 PM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=5>.

with everyday people if he wanted to”⁹⁸ User Mr. Fowl responded, “[y]es, but the Walker look gives it a much greater alien feel.”⁹⁹ Another user, Food Court Bailiff, agreed that “it’s great that we have given him multiple forms.”¹⁰⁰ User An Observer came up with the proposal that, “[h]ow about, the more people there are around, the more likely he is to be just with branchy hands instead of the ones out of his back?”¹⁰¹ Some users’ comments focused on the background of the Slender Man photos: “Slender Man should appear in seemingly innocent pictures (bright colors, happy people, etc somewhere in the background for realism.”¹⁰² Other users focused their criticisms on the format of the creations, demanding “[l]ess words, more Photoshop.”¹⁰³ Through this type of cultural open-sourcing and community debugging, users collaborated in constructing the “details, motifs, and shared expectations of the Slender Man legend cycle,” making his development an “entirely collaborative, iterative, and involved community debugging.”¹⁰⁴

D. *Propertization of Slender Man and Its Chilling Effect*

As Slender Man became popular, sophisticated parties capitalized on his virality and began to assert ownership over Slender Man and his lore. These efforts included parties filing for federal trademark and copyright registrations, issuing take-down notices under the Digital Millennium Copyright Act (DMCA), and sending cease-and-desist letters to creators of online Slender Man works.

A search on the U.S. Copyright Office’s website reveals multiple copyright registrations involving Slender Man. Victor Surge (under his real name, Eric Knudsen) registered his original memes and the Slender Man character in 2010.¹⁰⁵ There are copyright registrations for dramatic

98. Archwhore, *Create Paranormal Images*, SOMETHING AWFUL (June 17, 2009, 3:12 AM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=11>.

99. Mr. Fowl, *Create Paranormal Images*, SOMETHING AWFUL (June 17, 2009, 3:28 AM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=11>.

100. Food Court Bailiff, *Create Paranormal Images*, SOMETHING AWFUL (June 17, 2009, 3:29 AM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=11>.

101. An Observer, *Create Paranormal Images*, SOMETHING AWFUL (June 17, 2009, 3:31 AM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=11>.

102. Chess, *supra* note 10, at 387.

103. *Id.*

104. Peck, *supra* note 8, at 334; Chess, *supra* note 10, at 386.

105. U.S. Copyright Office Reg. No. TXu001664954 (Jan. 11, 2010).

works, screenplays, scripts,¹⁰⁶ songs, and lullabies about Slender Man.¹⁰⁷ There are also copyright registrations for Slender Man videos, including Fox Broadcasting Company's music video *Sympathy for Slender Man*,¹⁰⁸ Fine Brothers Properties' *Teens React to Slender Man*,¹⁰⁹ and HBO's *Beware the Slender Man*.¹¹⁰

In addition to copyright registrations, there are a number of word and design mark applications, both live and dead, in the Trademark Office for "Slender Man" and variations of Slender Man. These include design marks featuring "a thin, abnormally tall human-like figure with no facial features, elongated limbs and hands, in a dark suit with a white shirt and a thin, dark tie, and dark shoes . . . [with tentacles e]manating from the back of the upper body of the figure."¹¹¹ These trademark applications cover a variety of goods and services, including: clothing and costumes;¹¹² videos, DVDs, and software games;¹¹³ action figures, toys, cards, and board games;¹¹⁴ and entertainment services, including television programs, motion pictures, online computer games, websites game software,¹¹⁵ comic books, graphic novels, action figures, toys, t-shirts, software, and costumes.¹¹⁶ Four entities filed most of these trademark applications: It Is No Dream Entertainment, LLC; Mythology Entertainment, LLC; DC Visionaries, LLC; and AFG Media, Ltd.

Most significantly, creators of Slender Man works began to receive cease-and-desist letters and take-down notices due to purported intellectual property violations involving Slender Man. For instance, after

106. U.S. Copyright Office Reg. No. Pau003711201 (Jan. 13, 2014); U.S. Copyright Office Reg. No. Pau003589216 (Nov. 30, 2011).

107. U.S. Copyright Office Reg. No. SR0000760658 (Feb. 27, 2015); U.S. Copyright Office Reg. No. PA0001803086 (Apr. 20, 2012).

108. U.S. Copyright Office Reg. No. PA0001839145 (Apr. 2, 2013).

109. U.S. Copyright Office Reg. No. PA0001978381 (Nov. 18, 2015).

110. U.S. Copyright Office Reg. No. PA0001993570 (May 20, 2016).

111. *See, e.g.*, U.S. Trademark Application Serial No. 86264688 (filed Apr. 25, 2014).

112. U.S. Trademark Application Serial No. 87042367 (filed May 18, 2016); U.S. Trademark Application Serial No. 87042360 (filed May 18, 2016).

113. U.S. Trademark Application Serial No. 87042354 (filed May 18, 2016); U.S. Trademark Application Serial No. 87042345 (filed May 18, 2016); U.S. Trademark Application Serial No. 86262292 (filed Apr. 25, 2014); U.S. Trademark Application Serial No. 86250411 (filed Apr. 11, 2014).

114. U.S. Trademark Application Serial No. 86264688 (filed Apr. 29, 2014); U.S. Trademark Application Serial No. 86250510 (filed Apr. 12, 2014).

115. U.S. Trademark Application Serial No. 87042354 (filed May 18, 2016); U.S. Trademark Application Serial No. 87042345 (filed May 18, 2016); U.S. Trademark Application Serial No. 86262302 (filed Apr. 25, 2014); U.S. Trademark Application Serial No. 86250506 (filed Apr. 12, 2014).

116. U.S. Trademark Application Serial No. 86015025 (filed July 19, 2013); U.S. Trademark Application Serial No. 85715555 (filed Aug. 29, 2012).

raising \$10,000 on Kickstarter.com, an online funding platform for creative projects, filmmaker A.J. Meadows produced *The Slender Man*, a 2013 film about a “tall, thin, human-like creature (appearing to wear a suit) who snatches up children and in some cases adults as well.”¹¹⁷ Mythology Entertainment issued a DMCA take-down notice to Kickstarter, where Mythology Entertainment claimed to:

[Own] the copyright in and to the “Slender Man” character, which was originally created by Eric Knudsen in 2009. The character usually appears as a man with dramatically elongated limbs and no face, wearing a black suit and tie. . . . The film advertised herein, including the trailer . . . , incorporates and exploit’s [sic] Mythology’s copyrighted “Slender Man” character without authorization.¹¹⁸

In response to the DMCA take-down notice, Kickstarter removed the movie from its website. All copies of the movie, including every YouTube upload, were subsequently removed from the Internet.¹¹⁹ A similar fate befell Braeden Orr’s short film, *The Slender Man*, which featured “[f]ive college students [who] go out into the nearby woods to have one last fling before graduation. Plans change when they start to find strange notes and are stalked by a mysterious faceless man.”¹²⁰ Orr’s twelve-minute film quickly became “unavailable” everywhere.¹²¹ Due to “copyright concerns,” Justin Ross’s popular online video game, *Faceless*, was also blocked on Steam Greenlight, Valve Corp.’s experimental crowdsourcing service for games.¹²² *Faceless* featured Slender Man, who stalked children and teenagers in the game.¹²³ According to Internet rumors, even though Victor Surge gave Ross permission to use Slender Man in his video game, “a third party owns the option rights to Slender

117. Miles Klee, *How the Internet’s Creepiest Meme Mutated from Thought Experiment to Hollywood Blockbuster*, DAILY DOT (Aug. 21, 2013, 6:00 AM), <http://www.dailydot.com/upstream/slender-man-meme-marble-hornets-movie-origins/>.

118. *DMCA Claim by Mythology Entertainment for “Slender” The Movie (Canceled)*, LUMEN, <https://lumendatabase.org/notices/11107269#> (last visited Feb. 15, 2017).

119. See Klee, *supra* note 117.

120. *Id.*

121. *Id.*

122. Samit Sarkar, *Copyright Concerns Prevent Slender Man Game Faceless from Launching Through Steam Greenlight*, POLYGON (Nov. 14, 2012, 2:00 PM), <http://www.polygon.com/2012/11/14/3645438/slender-man-game-faceless-steam-greenlight-copyright-concerns>.

123. Jessica Condit, *Faceless: Slender Man Stalks, Blocks Greenlight’s Top Game from Steam*, ENGADGET (Nov. 14, 2012), <https://www.engadget.com/2012/11/14/faceless-slender-man-stalks-blocks-greenlights-top-game-from/>.

Man”¹²⁴ and has the right to determine Slender Man’s “appearance in film, TV, video games, and other for-profit entertainment.”¹²⁵

News of these take-downs began to spread in online forums and chat rooms, and rumors spread that a mysterious third party was enforcing its exclusive right to use the Slender Man name and character, and to create any works related to Slender Man.¹²⁶ The Internet is abuzz with questions, rumors, and opinions about who, if anyone, owns Slender Man, and whether users may use the Slender Man name or character in their expressive works. Many online users seem to believe that Surge, as Slender Man’s “creator,” owns the Slender Man character. Others fan the rumor that an unspecified third party owns the exclusive “option rights” to Slender Man. Finally, there are those who firmly believe that no one owns Slender Man because Slender Man is merely an idea or because he is a creation of the commons.

This uncertainty results in a cloud over Slender Man and creates a chilling effect on Slender Man creations.¹²⁷ A quick search on Google.com for “Is Slenderman copyrighted?” produces numerous forums where creators, wanting to use Slender Man in future works (such as films or novels) have to question whether they can use Slender Man in those creative endeavors. For instance, user MAUIquiorra started a thread on Wikia.com: “Is Slenderman copyrighted?”¹²⁸ MAUIquiorra wanted to write a novel involving Slender Man and wanted to “contact the people who own the copyright before continuing with this venture.”¹²⁹ MAUIquiorra’s question generated several responses. Some users responded that “Slender IS owned. Slender Man’s copyright is in fact owned under a standard copyright license. That’s [why] games that call their antagonist Slender Man and attempt to have commercial releases are killed. This is why movies using Slender Man keep getting brought down on Copyright charges.”¹³⁰ Another user asked on Quora.com, “Is Slender Man copyrighted? I recently read about him and I want to use him for my story.”¹³¹ That question received a number of contradictory responses, including that the “idea” of Slender Man is not protected, that there are

124. Sarkar, *supra* note 122.

125. Klee, *supra* note 117.

126. *Id.*

127. See Betsy Rosenblatt, *The Adventure of the Shrinking Public Domain*, 86 COLO. L. REV. 561, 608–13 (2015) (discussing risk aversion’s effect on the public domain).

128. MAUIquiorra, *Is Slender Man Copyrighted?*, WIKIA (July 3, 2014, 7:57 AM), <http://theslenderman.wikia.com/wiki/Thread:70556>.

129. *Id.*

130. *Id.*

131. *Is Slender Man Copyrighted? I Recently Read About Him and I Want to Use Him for My Story*, QUORA, <https://www.quora.com/Is-Slender-Man-copyrighted-I-recently-read-about-him-and-I-want-to-use-him-for-my-story> (last visited Feb. 17, 2017).

“so many representations now the original creator would probably find it impossible [to enforce] . . . [p]robably no one exists with a claim to authorship anyway,” or that “Slender Man is copyrighted by the original creator. A quick Internet search will tell you that it has also been enforced.”¹³²

Similarly, Wikiagirl posted the question, “is Slenderman . . . logo copyright protected? . . . Can I draw my own Slenderman image and sell it on stuff? [O]r am I violating anything? Who owns the rights to this stuff?”¹³³ A user confusingly responded to Wikiagirl: “You can’t. . . . [F]inancial gain with him is illegal since someone DOES own the copyright. . . . Basically you can do whatever you want with Slenderman as long as you don’t . . . [c]all him Slenderman”¹³⁴ Another user started a thread on Reddit.com titled, “Who, if anyone, owns the rights to ‘The Slender Man,’” and queried: “If I wanted to make a movie involving elements of The Slender Man mythos—would I be liable to be sued?”¹³⁵ Another user asked on Yahoo! Answers, “Is Slender Man a copyrighted character?” because the user was writing a fantasy novel and wanted to add a new monster to the novel.¹³⁶ Many such inquiries end up with answers that are confusing, contradictory, or incorrect. Some responses even advise the user to abandon proposed uses of Slender Man, even if those uses would be legal under copyright and trademark law. The flurry of questions shows that there is significant uncertainty surrounding ownership, exclusivity, and use of Slender Man as a character or as a name, which is suppressing lawful uses of the Slender Man character and name and discouraging creativity.

In May 2016, the *New York Times* reported that Sony Pictures Entertainment’s horror division, Screen Gems Studios, will produce a Slender Man movie for the big screen.¹³⁷ Screen Gems Studios is a producer of popular blockbuster horror movies including *The Mothman Prophecies*, *Boogeyman*, *The Exorcism of Emily Rose*, *Hostel*, *Resident*

132. *Id.*

133. Wikiagirl, *Is Slenderman or the Operator Logo Copyright Protected?*, FANDOM (Nov. 11, 2013, 4:54 PM), <http://theslenderman.wikia.com/wiki/Thread:51470>.

134. Fobarimperius, Posts to *Is Slenderman or the Operator Logo Copyright Protected?*, FANDOM (Nov. 12, 2013, 2:51, 10:22 PM), <http://theslenderman.wikia.com/wiki/Thread:51470>.

135. *Who, If Anyone, Owns the Rights to “the Slender Man”?*, REDDIT (Sept. 3, 2014), https://www.reddit.com/r/NoStupidQuestions/comments/2fdw8v/who_if_anyone_owns_the_rights_to_the_slender_man/ (user profile deleted).

136. *Is Slender Man a Copyrighted Character?*, YAHOO! ANSWERS, <https://answers.yahoo.com/question/index?qid=20120912114408AALODEN> (last visited Feb. 17, 2017).

137. Rogers, *supra* note 17; Comicbook Staff, *Exclusive: Screen Gems Developing Slender Man Film*, COMICBOOK (May 3, 2016), <http://comicbook.com/2016/05/03/exclusive-screen-gems-developing-slender-man-film/>.

Evil, and *Underworld*.¹³⁸ The studio hired experienced screenwriter David Birke and director Sylvain White to take on the Slender Man movie, which it plans to release on August 24, 2018.¹³⁹ According to online news articles, Screen Gems Studios is partnering with Mythology Entertainment, Madhouse Entertainment, and No Dream Entertainment to produce the Slender Man movie.¹⁴⁰ Mythology Entertainment—the same entity that filed the DMCA notice to take-down A.J. Meadows’s *The Slender Man* movie from Kickstarter.com—purportedly secured an assignment of the Slender Man character copyright from Victor Surge, and is further exploring television shows and video game possibilities with other studios.¹⁴¹ Mythology Entertainment and No Dream Entertainment have applied for a number of trademark registrations in the Trademark Office seeking exclusive rights to use word and design marks incorporating “Slender Man” for goods and services, covering entertainment services, movies, computer games, costumes, toys, and much more. In anticipation of the movie and further capitalizing on the Slender Man lore, these entities are attempting to clear the way to exclusively own and use Slender Man.

III. INTELLECTUAL PROPERTY AND FOLKLORE

Scholars have long debated the use of intellectual property laws to protect community cultural products, such as traditional folklore, from appropriation and exploitation. Most scholars recognize the limits of intellectual property law and understand that traditional folklore simply does not fit within the ambit of protected works.¹⁴²

Most scholarship in this area involves copyright law. Copyright law protects original works of authorship, including literary and artistic works, from being copied and distributed without the author’s consent.¹⁴³ It also grants the copyright holder the exclusive right to make derivatives

138. Comicbook Staff, *supra* note 137.

139. *Id.*; Amanda N’Duka, *Joey King, Julia Goldani-Telles & More Join ‘Slender Man’ from Director Sylvain White*, DEADLINE (May 22, 2017, 3:42 PM), <http://deadline.com/2017/05/joey-king-julia-goldani-telles-slender-man-director-sylvain-white-1202100183/>; *Slender Man (2018)*, IMDB, <https://www.imdb.com/title/tt5690360/> (last visited Apr. 19, 2018).

140. N’Duka, *supra* note 139.

141. Rogers, *supra* note 17.

142. *See, e.g.*, Christine Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 18–20 (1997); Shubha Ghosh, *Traditional Knowledge, Patents, and the New Mercantilism (Part II)*, 85 J. PAT. & TRADEMARK OFF. SOC’Y 855, 886 (2003); Angela Riley & Kristen Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 865–66 (2016); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 816–17 (2001).

143. *See* 17 U.S.C. § 106 (2012).

of her literary or artistic work.¹⁴⁴ Because folklore involves traditional art, literature, knowledge, and practice, copyright law seems to be the most appropriate legal regime for the protection of folklore. To be eligible for copyright protection, however, a work must meet certain requirements. First, the work must be original, which means it must be independently created and exhibit at least a modicum of creativity.¹⁴⁵ Folklore would likely not meet copyright law's "independently created" requirement under its originality standard because folklore often derives from early preexisting works, which evolve over time, and is also collaboratively and collectively created.¹⁴⁶ Copyright law also requires a work to be "fixed in a tangible medium" to be eligible for protection.¹⁴⁷ This fixation requirement can be a barrier for copyright protection of folklore because, by definition, traditional folklore is disseminated through "oral communication and behavioral example."¹⁴⁸ Folklore may never be written down or fixed for more than a transitory period. Finally, copyright law is premised on rewarding "a single highly centralized creative entity (usually a person or corporation)."¹⁴⁹ Folklore, on the other hand, is typically collectively created by a community, and often lacks an identifiable author or set of authors.¹⁵⁰ In limited circumstances, copyright law may recognize collaborative authorship through the joint authorship doctrine or individual rights in their independent contributions to collective works, but it does not generally recognize community authorship by a group of dispersed creators and community rights to a work. To be eligible for joint authorship, each joint author must contribute independently copyrightable content, and each must have intended to be a joint author.¹⁵¹ The collective creation of folklore would not typically satisfy either of those requirements.¹⁵² Therefore, copyright law is insufficient to protect folklore.

Some scholars have called for the protection of folklore under trademark law. Trademark law protects any word, name, symbol, device,

144. *Id.*

145. *Id.* § 102.

146. Farley, *supra* note 142, at 18–20; Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 *CARDOZO ARTS & ENT. L.J.* 175, 187–88 (2000).

147. 17 U.S.C. § 102.

148. *AM. FOLKLORE SOC'Y*, *supra* note 30.

149. Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 *HOFSTRA L. REV.* 1179, 1180–81 (2007) ("IP law is too attached to an outdated model of creativity, whose centerpiece is the lone creative individual."); Farley, *supra* note 142, at 29.

150. *See* Riley, *supra* note 146, at 191.

151. *See, e.g.,* *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991).

152. *See* Riley, *supra* note 146, at 193.

or combination thereof used as a source identifier.¹⁵³ To be a valid trademark, the mark must be used in commerce, must be distinctive, and must be nonfunctional.¹⁵⁴ Trademark law grants a valid trademark owner the right to prevent other parties from using the mark, or a similar mark, for similar goods or services.¹⁵⁵ Some scholars imagine a system where communities could own collective marks in order to authenticate traditional folklore created by members of the community and to ensure that those cultural products reflect a community's values.¹⁵⁶ Similarly, perhaps the title of the folklore, or the name of a character, could serve as a trademark identifying the community, thereby allowing the community to have exclusive rights to use that title or name. Traditional folklore titles, or characters within folklore, however, do not typically serve as source identifiers.¹⁵⁷ Furthermore, because these folklore titles or characters have been around for so long, so many within and outside of the community have used these characters and names that they would not be able to identify a single source.¹⁵⁸ Finally, communities do not typically use traditional folklore "in commerce."¹⁵⁹ For these reasons, and many more, trademark law is also not an appropriate fit for the protection of folklore.

Many scholars argue that intellectual property law should not protect traditional folklore. Some argue that protecting folklore through intellectual property laws could stifle creativity, further limit the already diminishing public domain, and limit the free exchange of information.¹⁶⁰ Others argue that traditional folklore is a community's cultural heritage that no one should exclusively own, or that intellectual property laws—which promote exclusivity and commodification—are an inappropriate fit for the protection of heritage.¹⁶¹ On the other hand, proponents for using intellectual property law to protect folklore argue that it is unjust

153. 15 U.S.C. § 1127 (2012).

154. *Id.*

155. *See id.* §§ 1114(1), 1125(a).

156. Doris E. Long, *Is Fame All There Is? Beating Global Monopolists at Their Own Marketing Game*, 40 GEO. WASH. INT'L L. REV. 123, 155–57 (2008).

157. *Id.*

158. *Id.*

159. *Id.*

160. Michael Brown, *Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 194 (1998); Fischer, *supra* note 23, at 8.

161. WIPO INTERGOVERNMENTAL COMM. ON INTELLECTUAL PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, FINAL REPORT ON NATIONAL EXPERIENCES WITH THE LEGAL PROTECTION OF EXPRESSIONS OF FOLKLORE 10 (Mar. 25, 2002), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_10.pdf; Danielle Conway-Jones, *Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Co-modification of Culture*, 48 HOW. L.J. 737, 741 (2005).

for traditional communities to derive no economic benefit from their folklore, especially where outsiders mine and exploit those communities' folklore to earn huge profits.¹⁶² Proponents also argue that outsiders who exploit and commercialize folklore have a greater tendency to misrepresent communal values, which harms the community's integrity.¹⁶³ Regardless of the merit of both sides' arguments, because traditional folklore cannot be traced to its originating author, relies on preexisting work, may not be fixed in a tangible medium, does not signify a single source, and is collectively created by a community, intellectual property law generally does not protect traditional folklore.

Unlike traditional folklore, however, Internet folklore is created digitally online. Internet folklore originated within the past decade; its creation is original and does not necessarily rely on preexisting works with untraceable authorships. This makes Internet folklore more likely to meet the originality requirement of copyright law. Additionally, Internet folklore's origins and creation can be traced through its digital footprints—thereby singling out the lore's originator. This makes it feasible to attribute Internet folklore to an individual author. Furthermore, like computer programs and software, Internet folklore meets copyright law's fixation requirement.¹⁶⁴ Finally, unlike traditional folklore, where a title or character may not be used in commerce, Internet folklore titles and character names are technically used "in commerce" for entertainment services, including online computer games, television programs, and series of motion pictures for distribution via the Internet and streaming services.

Nevertheless, like traditional folklore, and as exemplified by the creation of Slender Man, Internet folklore is created collectively and collaboratively by a community. Even though the origin of the online lore may be traced to one source, the development and production of the folklore is attributable to a community of creators. With this background, the Part that follows explores intellectual property rights in the Slender Man character, his name, and his image, and attempts to answer the questions: Who owns Slender Man? And who owns Internet folklore?

162. Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 772 (1999).

163. *See id.* at 773; Riley, *supra* note 146, at 197, 203 ("Beyond appropriation lies the distortion and misrepresentation of tribal creations as they are freely picked up by non-Natives and openly exploited for capital gain . . . without recognition or compensation going to the Native communities.").

164. *See* Midway Mfg. Co. v. Artic Int'l., 547 F. Supp. 999, 1008 (N.D. Ill. 1982); *see also* M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 440–41 (4th Cir. 1986).

IV. WHO OWNS SLENDER MAN?

Intellectual property is inherently exclusionary. The owner of an intellectual property right, such as a copyright or trademark, has the exclusive right to use the protected work or trademark. For instance, a copyright owner is entitled to exclude others from reproducing her work, preparing derivatives of her work, publicly distributing copies of her work, and displaying her work publicly.¹⁶⁵ Similarly, a trademark owner is entitled to enjoin others from using his trademark or a similar trademark in commerce for similar goods and services.¹⁶⁶

Parties that claim copyright ownership of Slender Man's character or trademark ownership of Slender Man's name and image are essentially asserting that they have the exclusive right to use Slender Man in all works. Indeed, if a party can claim to have a copyright over Slender Man's character, no one else can then use the Slender Man character in any future expressive works, create any derivatives of Slender Man, or share copies of her own Slender Man works on the Internet. Similarly, if a party can claim to own a trademark to Slender Man's name or image for broad entertainment services, no one else can call her character "Slender Man" in future expressive works, nor can she use Slender Man's image in her creations. This would effectively quash all creativity involving Slender Man. This type of ownership and exclusivity is antithetical to the collaborative culture that spurred Slender Man's creation and development in the first place. Yet, individuals and parties are attempting to claim exclusive rights over the Slender Man character, name, and image through copyright and trademark law. This is a familiar theme: Sophisticated third parties mine the Internet for cultural products, profit from those cultural products, and then use intellectual property laws to "assert and retain control over the resources generated by creative productivity."¹⁶⁷

As the following analyses will demonstrate, despite the claims made over Slender Man's character, name, and image, Slender Man—like traditional folklore and many collaborative digital peer-productions—is in the commons for anyone to freely use, reuse, and modify in future expressive works.

165. 17 U.S.C. § 106 (2012).

166. *Id.*

167. Jenna Wortham, *The Internet Is Where We Share—and Steal—the Best Ideas*, N.Y. TIMES MAG. (June 6, 2017), <https://nyti.ms/2rOjEob> (quoting Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. U. J. GENDER SOC. POL'Y & L. 551, 551 (2006)).

A. *Who Owns Slender Man's Character Under Copyright Law?*

Copyright law may protect a character by allowing the owner of the character's copyright to prevent others from using that character in any other works, including new original works or derivative works featuring different plots or narratives. For copyright law to protect a character, the character cannot be a "stock character," a prototypical character that has been recycled in stories and films for generations. Rather, the character must either: (1) be sufficiently delineated and developed, with enough specificity to constitute protectable expression, or (2) consist of "the story being told"—i.e., not a mere vehicle through which the story was conveyed.

Slender Man's character is a registered copyright in the U.S. Copyright Office.¹⁶⁸ Nevertheless, this registration is invalid. Because the Slender Man character—a tall, thin, faceless man in a suit—is a stock character in the horror genre, he is not protectable by copyright law. Even if Slender Man were not a stock character, he would not qualify as a copyrightable character under either the "sufficiently delineated test" or the "story being told test." Most importantly, even if Slender Man could qualify as a protectable character, his creation was attributable to a community of dispersed creators and his character is in the commons, free for all to use.

1. Slender Man Is a Stock Character

Copyright law does not protect stock characters because they lack distinctiveness and are not novel. Specifically, copyright law does not protect ideas, and if there are only a few ways to express the idea of a character, copyright law will not protect that character.¹⁶⁹ For instance, courts have found the following characters to be stock characters and not subject to copyright protection: the Reagan-Republican type; the liberal democrat; the devious campaign strategist;¹⁷⁰ the FBI agent working undercover; the black character disguising himself as white; the man disguising himself as a woman;¹⁷¹ the insincere, lying, and unethical talent agent;¹⁷² the drunken old bum; a talking cat; a gesticulating

168. U.S. Copyright Office Reg. No. TXu001664954 (Jan. 11, 2010); *see also* Klee, *supra* note 117.

169. Zahr K. Said, *Fixing Copyright in Characters: Literary Perspectives on a Legal Problem*, 35 CARDOZO L. REV. 769, 781–82 (2013) (discussing how the idea/expression dichotomy, the merger doctrine, and scènes à faire affect the copyrightability of characters).

170. *Blakeman v. Walt Disney Co.*, 613 F. Supp. 2d 288, 309 (E.D.N.Y. 2009).

171. *A Slice of Pie Prods., LLC v. Wayans Bros. Ent.*, 487 F. Supp. 2d 41, 48 (D. Conn. 2007).

172. *Willis v. HBO*, No. 00 CIV. 2500 (JSM), 2001 WL 1352916, at *2 (S.D.N.Y. Nov. 5, 2001).

Frenchman; a drunken suburban housewife; and a masked magician.¹⁷³ These familiar stock characters are not protectable by copyright law.

Tall, thin, faceless men in suits have been haunting us for years. The Japanese mythological creature the Noppera-bō is a faceless humanoid.¹⁷⁴ The Nazgûl in J.R.R. Tolkien's *Lord of the Rings* series are tall, faceless men who were once mortal men.¹⁷⁵ The Pale Man in Guillermo Del Toro's *Pan's Labyrinth* is a tall, skinny, faceless monster.¹⁷⁶ The Tall Man in *Phantasm* is a tall villain wearing a black suit who rarely speaks.¹⁷⁷ The Dementors in J.K. Rowling's *Harry Potter* series are tall, skinny, faceless ghosts who suck souls.¹⁷⁸ The Silence in *Doctor Who* are faceless men in black suits who cause memory loss.¹⁷⁹ The Gentlemen in *Buffy the Vampire Slayer* are bald, pale humanoids who wear black suits and never speak.¹⁸⁰ The Hollowgast in the movie *Miss Peregrine's Home for Peculiar Children* are large, faceless monsters with tentacles extending from their mouths who hunt children.¹⁸¹ The Demogorgon (a.k.a. The Monster) in *Stranger Things* is a tall, faceless monster who hunts children.¹⁸² These are just a small number of the many horror myths, stories, or films that feature tall, faceless men, some even wearing black suits, who affect malice upon the people they encounter, in many instances children. Like the evil forest-dwelling witch with a wart on her nose, the boogeyman hiding in your closet, and the fire-breathing dragon, the tall, thin, faceless villain is a stock character in the horror genre. Thus the tall, thin, faceless villain, who wears a suit and haunts children, joins the list of unprotectable concepts and stock characters.

173. See *Shame on You Prods., Inc. v. Banks*, 120 F. Supp. 3d 1123, 1165 (S.D. Cal. 2015) (listing a number of stock characters that are in the public domain, including the “thirty-year old pretty blonde”).

174. *Noppera-bō*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Noppera-b%C5%8D> (last visited Feb. 17, 2017).

175. *Nazgûl*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Nazg%C3%BB1> (last visited Feb. 17, 2017).

176. *Pale Man*, FANDOM, http://villains.wikia.com/wiki/Pale_Man (last visited Feb. 17, 2017).

177. *Tall Man (Phantasm)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Tall_Man_\(Phantasm\)](https://en.wikipedia.org/wiki/Tall_Man_(Phantasm)) (last visited Feb. 17, 2017).

178. *Dementor*, FANDOM, <http://harrypotter.wikia.com/wiki/Dementor> (last visited Feb. 17, 2017).

179. *Silence (Doctor Who)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Silence_\(Doctor_Who\)](https://en.wikipedia.org/wiki/Silence_(Doctor_Who)) (last visited Feb. 17, 2017).

180. *The Gentleman*, FANDOM, http://buffy.wikia.com/wiki/The_Gentlemen (last visited Feb. 17, 2017).

181. *MISS PEREGRINE'S HOME FOR PECULIAR CHILDREN* (20th Century Fox 2016).

182. *The Monster*, FANDOM, http://strangerthings.wikia.com/wiki/The_Monster (last visited Feb. 17, 2017).

2. Slender Man Is Not a Protectable Character Under Copyright Law

Even if Slender Man is not a stock character, copyright law only protects a character if he is (1) distinctively delineated, or (2) the story being told. Courts have found that characters who are literary as well as visual are more likely to meet the standard for copyright protection because they display “physical as well as conceptual qualities” in addition to “some unique elements of expressions.”¹⁸³ Regardless, Slender Man—as a literary and visual character—is not a protectable character under copyright law, whether the distinctively delineated test or the story being told test is applied.

The distinctively delineated test was first applied in *Nichols v. Universal Pictures Corp.*¹⁸⁴ In that case, the court held that characters may be entitled to some level of protection under copyright law only if an author imbues the character with sufficient originality.¹⁸⁵ In *Detective Comics, Inc. v. Bruns Publications, Inc.*,¹⁸⁶ the court applied the distinctively delineated test and found the Superman character protectable because Superman embodied sufficient originality, chiefly through his performance of specific feats—stopping bullets, flying, and jumping over buildings—in combination with his consistent depiction in a red-cape costume with an “S” on the chest.¹⁸⁷ To determine whether a character is distinctively delineated, courts often look at whether the character exhibits a consistent core of character traits and whether those traits distinguish the character from other characters within the same genre.¹⁸⁸ These traits may include the character’s physical depiction, linguistic quirks, relationships with others, and emotional characteristics.¹⁸⁹ For instance, a witch whose character traits include a long warty nose, black pointy hat, and broom flight likely do not distinguish that particular witch from other characters in the Wicca genre. On the other hand, a witch who wears tie-dyed bellbottoms, speaks with a southern accent, causes people to dance or laugh spontaneously, is best friends with a purple parrot, and always begins each sentence with “y’all” could, if consistently featured in multiple expressive works, potentially be distinguishable from other witches. Once a character is protected

183. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (8th Cir. 1978); *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1295 (C.D. Cal. 1995).

184. 45 F.2d 119, 122 (2d Cir. 1930).

185. *Id.*

186. 111 F.2d 432 (2d Cir. 1940).

187. *Id.* at 433.

188. See, e.g., *Shame on You Prods., Inc. v. Banks*, 120 F. Supp. 3d 1123, 1164 (C.D. Cal. 2015); *Metro-Goldwyn-Mayer, Inc.*, 900 F. Supp. at 1295 (C.D. Cal. 1995).

189. Said, *supra* note 169, at 779.

under copyright law, the copyright owner has the exclusive right to create further works with that character in any medium.

Slender Man does not qualify as a protectable character under the distinctively delineated test. As a preliminary matter, Slender Man's character traits are not consistent. For instance, in some iterations of Slender Man, he is depicted with tentacles extending from his sides.¹⁹⁰ In other iterations, there are no tentacles.¹⁹¹ In some portrayals of Slender Man, he is a protector of morally lost children. In other portrayals, he actively causes harm to children. Indeed, *Something Awful* forum users recognized and even embraced this un-delineated nature of Slender Man's character. For instance, on June 16, 2009, user Phy stated that, "I actually like that a consistent form for the Slender Man hasn't been settled on yet."¹⁹² User TrenchMaul encouraged the users to "just keep churning out pictures and stories and let the Slender Man evolve on his own,"¹⁹³ and user Mr. Gibbycrumbles acknowledged that

[w]hat comes naturally from this thread, is actually one of the greatest things about Slender Man; that is the fact that there is no true, definitive interpretation of what he looks like. Slender Man is vague, unclear, and this probably is the most important thing about him that needs to be preserved.¹⁹⁴

The only consistent description of Slender Man's character is that he is a "tall man, bald, and wearing a suit and tie."¹⁹⁵ Those physical traits, like the warty-nosed witch, do not distinguish him from other villainous characters in the same horror genre. Furthermore, as discussed more fully below, any consistent description of Slender Man was developed by a community of creators, and not by any individual author.

If Slender Man is not a protectable character under the distinctively delineated test, he is certainly not protectable under the story being told test. The story being told test was first articulated in *Warner Brothers*

190. *Abilities of the Slender Man*, FANDOM, http://theslenderman.wikia.com/wiki/Abilities_of_the_Slender_Man (last visited Nov. 5, 2017).

191. See, e.g., CHESS & NEWSOM, *supra* note 13, at 65.

192. Phy, *Create Paranormal Images*, SOMETHING AWFUL (June 16, 2009, 1:12 PM), <http://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=9>.

193. TrenchMaul, *Create Paranormal Images*, SOMETHING AWFUL (June 17, 2009, 4:23 AM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=12>.

194. Mr. Gibbycrumbles, *Create Paranormal Images*, SOMETHING AWFUL (June 17, 2009, 7:33 PM), <https://forums.somethingawful.com/showthread.php?threadid=3150591&userid=0&perpage=40&pagenumber=12>.

195. CHESS & NEWSOM, *supra* note 13, at 66.

Pictures v. Columbia Broadcasting System,¹⁹⁶ but has been limited by subsequent court decisions.¹⁹⁷ In *Warner Brothers Pictures*, the court explained that a character is only protectable under copyright law when it “constitute[s] the story being told,” and not merely a “chessman in the game of telling the story.”¹⁹⁸ The U.S. Court of Appeals for the Ninth Circuit articulated the test to ensure that copyright law’s goal of promoting the production of the arts was not thwarted by allowing one author to claim a monopoly over a character.¹⁹⁹ As a result, this test is much narrower than the sufficiently delineated test. Some scholars have described the story being told test as excluding “virtually any character from copyright protection, because it ‘seems to envisage a story devoid of plot wherein character study constitutes all, or substantially all, of the work.’”²⁰⁰ Other courts have refused to apply the test, or have broadened the test to combine it with the sufficiently delineated test to allow more protectable characters under copyright law.²⁰¹

In most depictions of Slender Man, Slender Man is not the “story being told.” Storylines in Slender Man lore are quite consistent: They typically involve a mysterious tragedy or horrific event, either reported through fake news, fictional interview sessions, re-read fairy tales, or found footage. Each of those works tells the story of a tragedy or tragedies that may be attributable to Slender Man, who was either sighted in the vicinity of the tragedy or captured on film. Like Sam Spade’s character in *The Maltese Falcon*, which the Ninth Circuit found did not constitute the story being told, the Slender Man character is also a mere chessman in the narrative of mysterious tragedies that form the Slender Man lore.²⁰²

3. Slender Man Is a Community Creation and Cannot Be Owned

Most importantly, Slender Man cannot be owned under copyright law because his character was collectively created by a community. Even if Slender Man is now distinctively delineated due to consistent portrayal in expressive works, those consistent character traits were created and developed by a community of creators, not by any one individual.

196. 216 F.2d 945, 950 (9th Cir. 1954).

197. See, e.g., *Gaiman v. McFarlane*, 360 F.3d 644, 660 (7th Cir. 2004); *Olson v. Nat’l Broad. Co.*, 855 F.2d 1446, 1452 & n.7 (9th Cir. 1988); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (8th Cir. 1978).

198. 216 F.2d at 950 (finding the character Sam Spade not protectable under copyright law).

199. *Id.*

200. Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 455 (1986) (quoting MELVILLE B. NIMMER ET AL., NIMMER ON COPYRIGHT § 2.12 (Matthew Bender & Co. 2004)).

201. See *Gaiman*, 360 F.3d at 660; *Olson*, 855 F.2d at 1452; *Walt Disney Prods.*, 581 F.2d at 755.

202. See, e.g., *Warner Bros. Pictures*, 216 F.2d at 950.

Therefore, no one can claim ownership of Slender Man's character under copyright law; Slender Man is in the commons, free for anyone to use.

Some online users seem to believe that Victor Surge owns the copyright to the Slender Man character. It is undisputed that Victor Surge first introduced Slender Man to the world on the *Something Awful* forum in the form of two memes. As described above, those two memes included Photoshopped images of a tall, thin, shadowy figure lurking in the background of two preexisting photos; one of those images seemed to show the figure with tentacles extending from his body. Accompanying each meme was a caption that implied that the shadowy figure caused the disappearance of children. Victor Surge's follow-up contribution on the *Something Awful* forum was a fictionalized transcript of a conversation between a mental patient and his doctor, which implied that an eyeless figure with appendages extending from his body caused tragedy. However, Victor Surge's individual contributions to the Slender Man character did not create a copyrightable character. Surge's unusually thin, tall, and faceless man, who possibly causes tragedy and preys on children, is not imbued with sufficient originality to be a copyrightable character. Even as a visual character, Surge's image of a tall, thin, shadowy figure with appendages is not sufficiently original to create a character protectable under copyright law.

Instead, Slender Man owes his existence to a community of creators. It was not Surge's creations that made Slender Man's character distinctively delineated or the "story being told" in the Slender Man lore. If Slender Man is a copyrightable character now, it is due to the contribution of a community of creators that imbued Slender Man with his distinctive and consistent appearance, abilities, personality, and character traits. Today, Slender Man is portrayed as a thin, unnaturally tall, faceless man who wears a black suit and tie over a white shirt, with tentacles that occasionally extend from his body. He appears and lives in the forest; he hunts and targets children; he controls minds; he causes uncontrollable coughing, nosebleeds, and memory loss; and he can distort electronics. Most of these character traits were community contributions—additions to Surge's original introduction. For instance, less than forty-eight hours after Victor Surge posted his first Slender Man meme on the *Something Awful* forum, user LeechCode5's story contributed to Slender Man's explicitly sinister character, portraying him as an arsonist who could cause long-term mental health issues.²⁰³ Slender Man's outfit, his black suit and tie with a white shirt, which contributes to Slender Man's character like Superman's tight blue suit with a red letter-S and cape, was a later addition not in Surge's original introduction

203. Peck, *supra* note 8, at 340–41.

of Slender Man.²⁰⁴ Creators on *Marble Hornets* added certain personality traits to the Slender Man character, including his ability to distort technology, to cause coughing fits, and his use of proxies.²⁰⁵ Users on *TribeTwelve* and *EverymanHYBRID* introduced the nosebleeds and headaches Slender Man would cause.²⁰⁶ Throughout the process, users in the community commented on and shaped Slender Man's growth— weeding out those personality traits or physical attributes that did not fit within the community's ideas of Slender Man and adding to those traits that became part Slender Man's consistent personality and appearance. In fact, by claiming to own the copyright to Slender Man's character, Surge is freeriding off of the community of creators who imbued Slender Man with the characteristics and personality he has today.

Even though copyright law allows collective ownership of an expressive work under the joint authorship doctrine, the Slender Man character could not qualify as a joint work under copyright law.²⁰⁷ Slender Man's character—like his lore—is the creation of many users and creators in a community. A “joint work” under copyright law is “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.”²⁰⁸ Once parties are deemed to be joint authors, each joint author has the right to use, license, or assign the jointly created work.²⁰⁹ In order to be joint authors under copyright law, all authors must have intended, at the time of the creation, that each author's contribution “be absorbed or combined into an integrated unit.”²¹⁰ Specifically, the U.S. Court of Appeals for the Second Circuit articulated the test for joint authorship as requiring each author to (1) contribute independently copyrightable parts to the work; and (2) mutually intend to be joint authors.²¹¹ As a preliminary matter, to identify the appropriate set of authors who could qualify as joint authors, the exact moment Slender Man became a copyrightable character must be identified. Technically, all users who contributed to creating Slender Man's character prior to that identified point in time could claim to be an author. Because, however, Slender Man's character continued to evolve rapidly, and because his creation and development spread virally through so many creators, mediums, and platforms, it is impossible to pinpoint a specific point in time when Slender Man's character became eligible for copyright.

204. Victor Surge, *supra* note 45.

205. CHESSE & NEWSOM, *supra* note 13, at 66.

206. *Id.*

207. 17 U.S.C. § 201(a) (2012).

208. *Id.* § 101.

209. *Id.* § 201(a).

210. *See* H.R. REP. NO. 94-1476, at 120–21 (1976).

211. *See* Childress v. Taylor, 945 F.2d 500, 507–08 (2d Cir. 1991).

Therefore, it would be impractical to identify a specific set of authors who could claim to be joint authors. Even if the exact time and place that Slender Man became a protectable character could be identified, the iterations or increments that each user contributed prior to that point are so slight that they are not likely to be independently copyrightable. For instance, neither adding a suit to Slender Man's image nor adding the effect of uncontrollable coughing to Slender Man's abilities is likely to be independently copyrightable. Each author must contribute independently copyrightable parts to the work to claim joint authorship, and these contributions to Slender Man's character were so slight that they would not meet this standard. Therefore, Slender Man's character, even if eligible for copyright now, belongs in the commons, freely available for anyone to use.

B. *Who Owns Slender Man's Name and Image Under Trademark Law*

Trademark law may protect a character's name and distinctive physical image. Like word marks and logos, a character's name or physical appearance may serve as a protectable trademark if it is used in commerce and is distinctive. To be distinctive, the character name or physical image must either be inherently distinctive or must have acquired distinctiveness.

Trademark law exists to prevent consumer confusion and encourage investment in quality products and services. Trademark law may seem like an appropriate framework to protect "spokescharacters," characters designed to serve as promotional and marketing tools for goods and services, such as McDonald's Ronald McDonald, or GEICO's Gecko.²¹² However, trademark law is not an appropriate tool to protect a character in expressive works when that character's purpose is not to serve as a source identifier for a commercial product or service, but rather to contribute to a narrative.²¹³ Using trademark law to exclude others from using or incorporating a character into their expressive work stretches the boundaries and purpose of trademark law to cover an area that should be within the exclusive purview of copyright law. Indeed, if a character does not qualify for copyright protection, or once the copyright to a character expires, that character should be free for all to use; no one should be able to monopolize a public domain character under trademark law. Nevertheless, under current case law, if a character or its name is inherently distinctive or has acquired distinctiveness, it could be protected from third-party use under trademark law.

212. See Rosenblatt, *supra* note 127, at 595.

213. *Id.*

In the case of *Slender Man*, as discussed more fully below, because neither his name nor his image is distinctive, and because neither indicates a single source, the *Slender Man* name and image should not serve as valid trademarks.

1. *Slender Man*'s Name Cannot Be a Trademark for Entertainment Services

A character name may be a protectable trademark if it is used in commerce and is distinctive. As a word mark, the character name must either be inherently distinctive or have acquired distinctiveness. Inherently distinctive marks are those that are either fanciful, arbitrary, or suggestive terms. Acquired distinctiveness means that consumers recognize and identify the mark with the trademark owner or its goods or services. For instance, the court in *Warner Brothers Entertainment v. Global Asylum, Inc.*²¹⁴ found the character name *Hobbit* to be fanciful and therefore inherently distinctive, because “[t]he word ‘Hobbit’ is a wholly made-up word with no discernible meaning. Tolkien invented the term to describe fictional creatures that inhabit the fantasy world he created in his novels.”²¹⁵ Even if the character name is not inherently distinctive, it may also acquire distinctiveness. In *Danjaq LLC v. Sony Corp.*,²¹⁶ the court held that the character name *James Bond* had acquired distinctiveness because “[f]or thirty-six years, Danjaq has promoted eighteen of the twenty James Bond films on a world-wide scale,” and the mark *James Bond* serves to identify a single source of origin—Danjaq.²¹⁷ Once a trademark right in a character name is established, use of that character’s name with commercial merchandise or even in subsequent expressive works could be infringement.²¹⁸

The character name *Slender Man* is not inherently distinctive. Unlike *Hobbit*, an entirely made-up word that describes the fictional race of miniature creatures who inhabit Middle-Earth in Tolkien’s books, *Slender Man* consists of two common words. Dictionaries define *Slender* as “spare in frame or flesh,” and *Man* as “an individual human; especially: an adult male human.”²¹⁹ Naming a tall and thin male character *Slender Man* is descriptive and is therefore not an inherently distinctive mark. Even though descriptive character names—such as

214. No. CV 12–9547 PSG (CWx), 2012 WL 6951315 (C.D. Cal. Dec. 10, 2012).

215. *Id.* at *5.

216. No. CV97-8414-ER (Mcx), 1998 WL 957053 (C.D. Cal. July 29, 1998), *aff’d*, 165 F.3d 915 (9th Cir. 1998).

217. *Id.* at *4.

218. 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 10:42 (4th ed. 2017).

219. *Slender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/slender> (last visited Mar. 1, 2017); *Man*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/man> (last visited Mar. 1, 2017).

Superman—could eventually acquire distinctiveness and come to signify one source of origin after long-term use, fame, and success, *Slender Man* has not achieved that type of recognition. In fact, in response to one of the trademark applications in the Trademark Office to register *Slender Man* for goods and services, including general entertainment services, the Trademark Office issued an office action refusing to register the mark because the words *Slender Man*, “when used . . . with the applicant’s goods and services . . . indicates to consumers that the goods/services feature a thin male, or a slender man,” and, therefore, are merely descriptive.²²⁰

Finally, to be protectable as a trademark, a character’s name must designate a single source.²²¹ Regardless of whether the mark is inherently distinctive or descriptive, if too many parties have used the same name or character, it cannot serve to identify the single literary, publishing, or production source. For instance, the court in *Universal City Studios v. Nintendo*²²² found that because so many different parties have used *King Kong*, it no longer signifies a single source of origin to consumers and, therefore, cannot be a valid trademark.²²³ Even if consumers now associate the name *Slender Man* with *the Slender Man* created on the *Something Awful* forum, so many parties within and outside of the community have used the name for films, songs, stories, and videos that the name has become diluted and fails to signify a single source. Therefore, *Slender Man* is a descriptive mark, it has not yet acquired distinctiveness, and cannot serve to identify a single source. *Slender Man* cannot be a valid trademark for entertainment services.

2. Slender Man’s Image Cannot Be a Trademark for Entertainment Services

In addition to the name of a character, courts have found that a character’s image may also be a protectable trademark if it is inherently distinctive or has acquired distinctiveness. For instance, in *Brown v. It’s Entertainment, Inc.*,²²⁴ the court found the character Arthur the Aardvark, a “stylized aardvark dressed like a schoolboy,” to be a protectable trademark because the character was arbitrary or fanciful and therefore inherently distinctive.²²⁵ Not all images of characters, however, are inherently distinctive. The court in *Fleischer Studios, Inc. v. A.V.E.L.A.*²²⁶

220. Office Action, Ser. No. 87042345, U.S. Patent & Trademark Office (Sept. 8, 2016).

221. Rosenblatt, *supra* note 127, at 597.

222. 578 F. Supp. 911, 913–14 (S.D.N.Y. 1983).

223. *Id.*

224. 34 F. Supp. 2d 854 (E.D.N.Y. 1999).

225. *Id.* at 859.

226. 654 F.3d 958 (9th Cir. 2011).

required the trademark owner to prove that the cartoon character Betty Boop had acquired distinctiveness.²²⁷ Similarly, here, a tall, thin, faceless man with tentacles and a suit is not inherently distinctive because, among other things, tall, thin, faceless shadows in suits, with and without appendages, have become common characters in horror entertainment genres. Furthermore, trademark law only considers a character's distinctive image, and not the character's physical abilities or personality traits.²²⁸ For instance, even though the Superman character—a man wearing a tight blue and red outfit, a red cape, and a red letter-S on his chest—may be protected by trademark law, trademark law does not consider Superman's abilities, such as x-ray vision, immeasurable strength, and invincibility.²²⁹ Even if Slender Man's abilities and personalities may help distinguish him from other tall, thin, faceless shadowy monsters in suits, trademark law does not consider those traits when determining whether a character's "image" is distinctive.

Finally, the same limitations that disqualify the Slender Man name from being a trademark also disqualify the Slender Man image. Specifically, the character has not acquired distinctiveness, and so many third parties have used the Slender Man character that he cannot signify a single source.

3. Trademark Defenses to "Infringing" Uses of Slender Man's Name and Image Allow All to Use Slender Man

Regardless of the trademark analyses above, future authors of expressive works have valid defenses against any claims that their use of Slender Man is trademark infringement.²³⁰ Under a First Amendment-based exemption, an author or creator of an expressive work featuring or involving Slender Man should be able to use "Slender Man" in or as the

227. *See id.* at 967 (explaining cartoon character Betty Boop required secondary meaning).

228. *See, e.g.,* D.C. Comics, Inc. v. Filmation Assocs., 486 F. Supp. 1273, 1277 (S.D.N.Y. 1980).

229. *Cf.* Warner Bros. v. Am. Broad. Co., 720 F.2d 231, 235–36 (2d Cir. 1983) (explaining trademark law cannot prevent another party from creating a character with similar super-human abilities).

230. Of course, under the classic fair use doctrine, a party can always use the words "slender man" to describe a slender male character. Fair use allows a party to use a term's original meaning to describe its goods or services, even if that term is another party's valid trademark. 15 U.S.C. § 1115(b)(4) (2012). Even though there may be alternative ways to describe a slender man—such as thin man, skinny man, emaciated man—the availability of alternatives terms does not negate a valid fair use defense under trademark law. Trademark ownership of the name Slender Man cannot prohibit future authors from creating characters who are thin and male by excluding them from using the original meaning of "slender man" to describe their characters. Therefore, future creators of works who want to include a thin man in their works should be free to use "slender man."

title of her work if it relates to her underlying expressive work, and if it does not explicitly mislead as to her source.²³¹ She could also include the Slender Man name or image within her expressive work without limitation in lyrics, photographs, artwork, films, and video games.²³² The Lanham Act does not apply to titles of expressive works as long as the title has some artistic relevance to the underlying expressive works and does not explicitly mislead consumers as to the source or content of the work.²³³ “[T]he public interest in free and artistic expression greatly outweighs its interest in potential consumer confusion.”²³⁴ Courts have defined “expressive works” to include any artistic, musical, or literary expressions, including photographs, artwork, movies, films, pornography, and video games. For instance, in *Roxbury Entertainment v. Penthouse*,²³⁵ the owner of the trademark ROUTE 66 for entertainment services, including films and DVDs, sued Penthouse Studios, the maker of the pornographic film *Penthouse: Route 66*.²³⁶ Even though Penthouse used Roxbury’s trademark ROUTE 66 in the title of Penthouse’s film, because ROUTE 66 was relevant to the underlying adult film, and Penthouse’s use of ROUTE 66 in the title of its adult film did not explicitly mislead consumers into believing that Roxbury produced *Penthouse: Route 66*, Penthouse’s use was exempt under the First Amendment.²³⁷

This First Amendment-based exemption applies even to uses of another party’s mark within the expressive work itself, not just in titles, and applies to the use of a trade dress or design mark in addition to a word mark. For instance, in *Mattel, Inc. v. Walking Mountain Productions*,²³⁸ a photographer used Barbie dolls posed in various “absurd and often sexualized positions” in his photographs.²³⁹ The court surmised that to find the photographer’s use of Mattel’s Barbie’s image an infringement of Mattel’s trade dress rights “would present First Amendment concerns.”²⁴⁰ Expanding on that concern further, in *E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc.*,²⁴¹ the owner of the Play Pen Gentlemen’s Club trademark brought suit against Rock Star Videos,

231. *Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989).

232. *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008).

233. *Rogers*, 875 F.2d at 1000; *Roxbury Entm’t v. Penthouse Media Grp., Inc.*, 669 F. Supp. 2d 1170, 1175 (C.D. Cal. 2009).

234. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 807 (9th Cir. 2003).

235. 669 F. Supp. 2d 1170.

236. *Id.* at 1172.

237. *Id.* at 1175–76.

238. 353 F.3d 792.

239. *Id.* at 796.

240. *Id.* at 808.

241. 547 F.3d 1095 (9th Cir. 2008).

creator of the popular and violent Grand Theft Auto video game series.²⁴² Play Pen claimed that the Grand Theft Auto video game infringed on its trademark and trade dress rights when the video game included a virtual, cartoon-style strip club, “Pig Pen,” in the game.²⁴³ The court found that because Grand Theft Auto’s use of “Pig Pen” and Play Pen’s trade dress had some artistic relevance to the video game and did not explicitly misrepresent the source or content of the video game, the use of Play Pen’s trademark and trade dress was protected under the First Amendment.²⁴⁴ Therefore, even if the Slender Man name and image are valid trademarks registered with the U.S. Patent and Trademark Office, subsequent creators can use Slender Man’s image in future works.²⁴⁵

An author may also be able to rely on a “nominative fair use” defense to use the name *Slender Man* or the Slender Man image to indicate *the* Slender Man. The nominative fair use defense allows a party to use another party’s trademark to identify the trademark owner or its goods or services. A common example of nominative fair use is comparative advertising, where a party may use a competitor’s trademark to refer to that competitor. The court in *New Kids on the Block v. News America Publishing, Inc.*²⁴⁶ set forth a three-part test for determining whether a third party’s use of a trademark satisfies a nominative fair use defense.²⁴⁷ *Mattel, Inc.* extended the test articulated in *New Kids on the Block* to include the use of a trade dress in expressive works.²⁴⁸ Specifically, the court in *Mattel, Inc.* recognized that the photographer’s use of Barbie’s image in his photographs was grounded in his desire to refer to Barbie as a point of reference for his photographs, and found his use of Mattel’s trade dress in Barbie to be nominative.²⁴⁹

As in *News Kids on the Block* and *Mattel, Inc.*, a creator’s use of the Slender Man name or image in an expressive work could also qualify as nominative fair use. The first prong of the nominative fair use test determines whether the party or its product (here, the Slender Man character) is one not readily identifiable without the use of the

242. *Id.* at 1098.

243. *Id.* at 1097–98.

244. *Id.* at 1100–01.

245. *But see* Rosenblatt, *supra* note 127, at 606–07 (noting that even though First Amendment-based exemption would technically “provide a sort of qualified immunity for adapters of characters . . . regardless of whether those characters or their names could be protected by trademark law[,]” not all Circuits have adopted this defense, and the defense still requires a balancing test weighing “likelihood of confusion against the First Amendment interest in free expression”) (emphasis omitted).

246. 971 F.2d 302 (9th Cir. 1992).

247. *Id.* at 308.

248. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 811 (9th Cir. 2003).

249. *Id.* at 810.

trademark.²⁵⁰ In the case of Slender Man, using the name *Slender Man* is necessary to identify *the* Slender Man. Similarly, use of the Slender Man image is reasonably necessary to conjure up Slender Man in a visual medium.²⁵¹ Even if an author or filmmaker could use other words to describe Slender Man, such as “the unusually tall, thin, faceless Caucasian man who wears a black suit, lives in the forest, and hunts children,” that does not negate a nominative fair use defense. In *Playboy Enterprises, Inc. v. Welles*,²⁵² the court acknowledged that instead of using Playboy’s trademarks to describe herself as “Playboy Playmate of 1981,” Terri Welles could have described herself as the “nude model selected by Mr. Hefner’s magazine as its number one prototypical woman for the year 1981.”²⁵³ Using such “absurd turns of phrase,” however, would be “impractical as well as ineffectual.”²⁵⁴ The second prong of the nominative fair use test determines whether “only so much of the mark or marks [is] used as is reasonably necessary to identify the product or services.”²⁵⁵ Courts caution that “[w]hat is ‘reasonably necessary to identify the . . . product’ differs from case to case.”²⁵⁶ In the case of an expressive work about Slender Man, it would be necessary to use Slender Man’s name or image each time the story, photograph, or films plot identifies Slender Man. Therefore, even though the use of his name or image may be extensive, those uses are reasonably necessary to identify the product—in this case, Slender Man. Finally, the third prong of a nominative fair use test requires that “the user do nothing that would, in conjunction with . . . the mark . . . , suggest sponsorship or endorsement by the trademark . . . holder.”²⁵⁷ Expressive works that use the Slender Man’s name or image would not suggest sponsorship or endorsement by the trademark holder. Because works involving Slender Man have been so prolific and created by so many users within and outside of the original creative community, it is unlikely that consumers would connect a new Slender Man story, film, or expressive work to any single author, entity, or source. Therefore, if a creator wishes to use the character name *Slender*

250. *Id.*

251. *Id.* at 810 (“[The photographer’s] use of the Barbie figure and head are reasonably necessary in order to conjure up the Barbie product in a photographic medium.”).

252. 279 F.3d 796 (9th Cir. 2002).

253. *Id.* at 802–04 (quoting *Playboy Enters., Inc. v. Terri Welles, Inc.*, 78 F. Supp. 2d 1066, 1079 (S.D. Cal. 1999)).

254. *Id.*

255. *Id.*

256. *Mattel, Inc.*, 353 F.3d at 811 (citing *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1154 (9th Cir. 2002)).

257. *Id.*

Man or Slender Man's image in her expressive work, that use could be a nominative fair use and exempt from infringement.²⁵⁸

The availability of these trademark defenses to the use of a trademark character in expressive works shows the limitations and incongruity of owning a trademark in the name of an expressive character. Regardless, even though creators may have the legal right to use the Slender Man name and image in subsequent expressive works under trademark law, trademark registrations and assertions of trademark rights still have a chilling effect on creativity. It has been explained that "fair use . . . simply means the right to hire a lawyer."²⁵⁹ Even the U.S. Supreme Court has acknowledged that competition is deterred, not merely by a successful suit, but also by the mere plausible threat of a suit.²⁶⁰ This type of deterrence is part of the Slender Man story. As recounted in the online discussions of intellectual property rights to Slender Man above, many commenters do not understand, or they disagree on, whether the name *Slender Man* is off-limits. This uncertainty chills creativity and harms the public by depriving it of more creative works.

V. THE HARM OF PROPERTIZATION

Sony Pictures Entertainment (Sony) is planning to make the Slender Man folklore into a blockbuster movie. That movie, *Slender Man*, is scheduled for nationwide release on August 24, 2018. This theme, involving an outside entity exploiting and propertizing a community's cultural products, is a familiar one both in the traditional folklore discourse as well as in the digital creative economy.²⁶¹ As discussed above, Slender Man's character, name, and image are in the commons, and copyright and trademark law are not available frameworks to protect collaboratively and collectively created folklore. On the other hand, copyright and trademark law can be legal tools used by sophisticated

258. *But cf.* Toho Co. v. William Morrow & Co., 33 F. Supp. 2d 1206, 1211 (1998); Rosenblatt, *supra* note 127, at 605 (noting that, technically, uses of a character's name to indicate the character would constitute nominative fair use: "in practice, the nominative fair use doctrine may do little to mollify adapters' risk or uncertainty . . . [because of] ambiguity in the law").

259. LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2004).

260. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 214 (2000).

261. For examples in traditional folklore, see, e.g., Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1098 (2009); J. Janewa OseiTutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147, 150–51 (2011); Riley & Carpenter, *supra* note 142, at 865. For an example in digital creative economy, see, e.g., Wortham, *supra* note 167 (describing the trend in which sophisticated entities take cultural products created by others online and profit from those creations).

entities (like Hollywood-based entertainment and movie studios) to secure certain private rights in such folklore. More importantly, copyright and trademark law serve as effective tools for those sophisticated entities to claim exclusivity to collaboratively created folklore and quash further creativity on the subject.

Even though copyright law does not protect the Slender Man character, any expressive works created with the Slender Man character may be protected as derivative under copyright law. Derivative works are works that recast, transform, or adapt one or more preexisting works.²⁶² Even if the preexisting work is not protectable by copyright law, the new nontrivial expressions in the derivatives are protected.²⁶³ In the case of Slender Man, no one owns the Slender Man character, but any new nontrivial personality traits or storylines that Sony adds to Slender Man, and certainly Sony's movie as a whole, could qualify for copyright protection as a derivative. Therefore, the original creative community, in this case the geek-hub or enclave that created Slender Man, cannot prevent Sony from using Slender Man in its movie because he is community creation not protected under copyright law. On the other hand, Sony, which freely appropriates Slender Man in its commercial movie, has exclusive rights to its new, independently created derivative, and can prevent the original creative community from using, reusing, or modifying that new derivative. In other words, a creator would not be permitted to write or produce a sequel to Sony's Slender Man movie without Sony's authorization, even though Sony's movie is essentially an unauthorized sequel to the original community's cultural product.

This is a familiar dilemma. Traditional communities are not rewarded for their creations with exclusivity or other pecuniary rewards under intellectual property law because their works are in the commons. However, sophisticated entities that freely appropriate these communities' folklore not only make millions of dollars off of the folklore, they are also awarded with exclusivity to the new expressions in the derivatives they have created, and can exclude even the original creative community from the new work.²⁶⁴ This type of appropriation also occurs in the modern digital economy, where users may create and post new ideas or expressive works to get noticed or land jobs, but end up having their works appropriated by sophisticated parties looking for

262. See 17 U.S.C. § 101 (2012).

263. See *id.* § 103(b).

264. See, e.g., Natalie Roterman, *Oaxaca's Congress Gives Its Indigenous Community Cultural Heritage Status*, LATIN TIMES (Mar. 15, 2016, 12:49 PM), <http://www.latintimes.com/oaxacas-congress-gives-its-indigenous-community-cultural-heritage-status-374570> (discussing French designers and brands that attempted to copyright and assert copyright infringement over textile design of traditional Oaxaca huipil shirts).

news ideas for a film or song, “creating a lopsided dynamic that tends to benefit people in power.”²⁶⁵

Some scholars may argue that this type of exploitation and propertization produces social benefits, since the cultural products are not left to languish in the commons.²⁶⁶ Indeed, commercialization of folklore makes it more accessible to a larger audience, increasing the dissemination of folklore and enhancing public knowledge. Similarly, big budget productions such as Sony’s could also advance progressive and socially positive views that may not have been embodied in the original community’s folklore. An example would be Disney’s latest retelling of the Snow Queen story from a feminist perspective in *Frozen* where the “act of true love” was not a kiss from the masculine hero but a self-sacrificing act between sisters. In the case of Internet folklore, however, the harm from exploitation and propertization could outweigh its benefits. Propertization and exclusivity threaten the creative commons. Sony’s monopoly claim over the Slender Man character,²⁶⁷ the expression in its movie, and Slender Man’s name and image²⁶⁸ suggest that Sony will undoubtedly continue to enforce, assert, and overly assert its claimed intellectual property rights against creators of other expressive Slender Man works. As already seen in the DMCA take-down of AJ Meadow’s *The Slender Man* movie on Kickstarter.com, this over assertion of rights not only deprives the public of already created works, it also deters future creativity; it establishes a cloud over other potential creators who desire to use Slender Man’s character, name, or image in their creative works. These creators often do not know their rights or, even if they do, are rightly concerned about Sony’s over-assertion of its claimed rights. This chills creativity, discourages creative efforts, and harms the public.

In the traditional folklore discourse, some commentators and agencies have suggested granting a traditional community intellectual property rights (or similar sui generis rights) so that the community may control and prevent others from propertizing its folklore.²⁶⁹ However, at least in

265. Wortham, *supra* note 167.

266. See Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 L. & CONTEMP. PROBS. 147, 147 (2003).

267. Because of Sony’s partnership with Mythology Entertainment, and Mythology Entertainment’s purported “assignment” of the Slender Man character copyright from Victor Surge, Sony claims the exclusive right to use the Slender Man character.

268. See *supra* Section II.D (discussing that Sony’s partner—Mythology Entertainment—has applied to the USPTO for multiple trademarks and design marks for Slender Man and his image).

269. See, e.g., *Mandate of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, WIPO, http://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2018-2019.pdf (last visited Mar. 3, 2017).

the Internet folklore context, introducing ownership and exclusivity into the creative community may actually discourage creativity because it is contrary to the community's sharing ethos, which fosters the creative production in the first place. "[T]he open sourcing of storytelling thrives on reuse, modification, sharing of source code, an openness (and transparency) of infrastructure, and the negotiation and collaboration of many individuals."²⁷⁰ Indeed, at the center of Internet folklore is "a driving utopian and ideological impulse for openness."²⁷¹ Once ownership and exclusivity is introduced into a community whose traditions and norms encourage sharing, critiquing, and building upon existing creations, the original incentive for collaboration may become lost. Rather than encouraging creativity, ownership rights and exclusivity regimes could, in fact, suppress creativity in these types of communities.²⁷²

Attempting to grant a community intellectual property rights also raises other issues, including, as a preliminary matter, properly defining the boundaries of the community and improperly imagining the community as a unified entity. As discussed in Part I, members of a community may simply share the same ethnicity, geographic location, religion, occupation, language, society, or culture and not know each other personally. This is particularly evident in Internet folklore where creators and contributors are geographically dispersed. Another issue is finding individuals within communities to represent these diverse groups of creators.²⁷³ Who has the right to speak for the community? Perhaps individuals may be identified in advance, or a committee of individuals within the community might form a representative entity that has the right to protect against exploitation of the community-created content or allow the community to earn attribution from or pecuniary interest in its creation.²⁷⁴ This option, however, would require advanced planning by community members, which does not necessarily reflect the spontaneous and viral nature of Internet folklore's creation. Some commentators propose relying on the joint authorship doctrine to give all contributors copyrights to the collectively created work.²⁷⁵ Under the joint authorship

270. CHESSE & NEWSOM, *supra* note 13, at 64.

271. Shira Chess, *Open-Sourcing Horror: The Slender Man, Marble Hornets, and Genre Negotiations*, 15 INFO. COMM. & SOC'Y 374, 385 (2012); *see also* Dale Bradley, *Open Source, Anarchy, and the Utopian Impulse*, M/C JOURNAL (July 2004), http://journal.media-culture.org.au/0406/03_Bradley.php (discussing Internet folklore and the openness of open-source software and the ideological utopian impulse).

272. *See* Mark Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1334 (2016).

273. *See* Merges, *supra* note 149, at 1189.

274. *Id.* at 1189–90.

275. Andres Sawicki & Anthony Casey, *Copyright in Teams*, 80 U. CHI. L. REV. 1683, 1716–

doctrine, “[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” is a joint work, allowing each author of the joint work to own an equal share in the copyright.²⁷⁶ However, as discussed above, under current application of the joint authorship doctrine, it would be difficult if not impossible to identify “authors” of Internet folklore. Specifically, not every contributor may have contributed independently copyrightable content, which is a requirement to finding joint authorship.²⁷⁷ Furthermore, none of the contributors exercised “control over the work,” which the Ninth Circuit found necessary to find joint authorship.²⁷⁸ In the creation of Internet folklore, none of the contributors had or even could have control over the work as a whole.²⁷⁹

On the other extreme, designating Internet folklore “free cultural work” may prevent the propertization of Internet folklore by allowing anyone to use, remix, transform, and build upon the cultural products as long as she freely distributes her contributions under the same standards.²⁸⁰ In Slender Man’s case, this would prevent future creators who rely on the community’s work—like Sony—from seeking exclusivity of their adapted Slender Man creations. This solution would not prevent Sony’s appropriation and exploitation of the community-created Slender Man, but it would prevent Sony from later claiming exclusivity to its derivatives; it would allow creators to build on Sony’s derivatives for future expressive works. But under this solution, who has the right to designate Slender Man as a “free cultural work” and who has the right to enforce this designation? Under the analyses in this Article, no one owns Internet folklore as intellectual property. Therefore, no one would have the right to designate Internet folklore as a free cultural work, nor would anyone have the right to enforce and require down-the-line creators to share and redistribute their creative works. In this case, because Slender Man, his character, name, and image are in the commons and cannot be owned by anyone, the community has no rights to enforce a free cultural work designation.

17 (2013).

276. 17 U.S.C. § 101 (2012).

277. To be eligible as a joint author, each author must contribute independently copyrightable content, and each must have intended to be a joint author. *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991).

278. In order to find joint authorship, “the putative author [must] exercise control over the work.” *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000).

279. See Sawicki & Casey, *supra* note 275, at 1720.

280. See, e.g., *Understanding Free Cultural Works*, CREATIVE COMMONS, <https://creativecommons.org/share-your-work/public-domain/freeworks/> (last visited Mar. 2, 2017).

CONCLUSION

Like traditional folklore, open-source software, and other community-created cultural products, Internet folklore's creation and development is the result of the collaborative efforts and cultural open-sourcing of many individuals and communities. Users in these online communities reused, modified, and shared each other's Slender Man creations, contributing to his development as a crowdsourced monster. Because of its collective and collaborative origins, Internet folklore is generally in the commons and not protected under intellectual property regimes. In the case of Slender Man, the analyses in this Article show that his character, name, and image are all in the commons. Nevertheless, this legal status has not prevented sophisticated parties and entities from claiming ownership of him under copyright and trademark law. This assertion of intellectual property rights and exclusivity are not only antithetical to the sharing and collaborative culture that spurred Slender Man's creation, development, and virality in the first place, it has also been shown to chill creativity. What is the solution to prevent this type of exploitation? Is it to grant broader intellectual property rights? To create a sui generis system or community-based rights? Or is it to designate these community cultural products as "free cultural works"? As explored in this Article, none of these solutions seem to be the perfect fit for the problem.

