

College of Visual Arts
Art and the Law
Trial Materials
Discovery Results

Depositions of the following parties to the action were held. The evidence disclosed during these depositions was as follows:

Plaintiff's side:

Chris Scribe, plaintiff

Chris is 25 years old, having graduated from the College of Visual Arts with a B.F.A. Chris works as a professional illustrator, doing freelance work for many advertising agencies, design firms, and corporations.

Chris confirmed the facts stated in the chronology. The *Grim Reaper* image was first conceived in art school and modified slightly after that until taking its final form in February 2009. Chris likes the image a lot and views it almost as a child, and thus is very protective of it.

Ashton Sublime, Ph.D. – art historian and art critic.

Scribe's attorneys have retained the expert services of Dr. Ashton Sublime to examine the original *Grim Reaper*, the pumpkin photograph, and the carving pattern and to give an opinion about the extent of transformation of the image from the original to the carving pattern. Sublime earned a Ph.D. in art history from the University of Minnesota. Sublime is a tenured professor of art history at Macalester College. Sublime has published many articles concerning art history and criticism. The most recent article, published in the journal *Copyright Law: Visual Arts in the Digital Age*, dealt with the concept of "derivative work" in the context of digital creation and manipulation of images.

Sublime will testify that although the images are somewhat different, these differences are not significant, and the carving pattern was clearly derived from the original image. Aspects of the image that support this conclusion are the proportions of the parts of the reaper image, the position of the scythe, hands, and feet, and the choice of depicting the grim reaper figure in this particular manner. Sublime produced an image by Jancy of another pumpkin carving of a grim reaper figure to illustrate the different ways in which this idea of the grim reaper can be produced in pumpkin carving form. In Sublime's opinion, Tracer took more than the idea of the grim reaper from Scribe's image: Tracer took the manner of expression of the idea, also, and created a derivative work.

Defendant's side:

Pat Tracer, defendant

Pat Tracer is 35 years old. Pat received a B.F.A. degree from the University of Minnesota and works as an illustrator. Pat started the carving pattern business about 5 years ago and has been very successful at it; now about half of the annual earned income comes from Cool Pumpkin Patterns on the Web and the fall festivals displaying the patterns.

Tracer confirmed the facts stated in the chronology. Tracer will testify that the manner of acquiring the Reaper carving pattern was typical of the practice of others in this industry. The idea of an image is acquired from other sources and, through creative skill and experience, transformed into a carving pattern that reflects the basic idea of the original image, but not the manner of expression.

Tracer was asked in the deposition where the Reaper pattern ranked in popularity among the 20 patterns sold for that particular season. The Reaper pattern was #1 in single pattern sales. Tracer was asked how big a factor the pattern was in sales of the collections with all 20 patterns included. He said it was a significant selling point for the collections, but customers who purchased the collections were especially drawn to the reaper and 2 other patterns, so it was probably not the main reason people bought the entire collection of patterns.

Tracer produced books of account concerning sales of the reaper carving pattern.

Internet sales:

Single copies of Reaper pattern: 572 @ \$4.95 each = \$2,831.40

Net profit (income less expenses): \$2,500.00

Pattern collections containing Reaper pattern: 2,752 @ \$15.95 each = \$43,894.40

Net profit: \$42,000.00

Fall festival sales:

Single copies of Reaper pattern: 1,540 @ \$4.95 each = \$7,623.00

Net profit: \$5,000.00

Pattern collections containing Reaper pattern: 3,107 @ 15.95 each = \$49,556.65

Net profit: \$40,000.00

Delaney Frankenheim, Ph.D. – art historian and art critic.

Delaney Frankenheim earned a Ph.D. in art history from Yale University and is a tenured art history professor at the University of Minnesota. Frankenheim has published many articles on art history and criticism and lectures frequently at the Minnesota Institute of Art.

Frankenheim has examined the images and concluded that the carving pattern image, although similar in some respects to the original *Grim Reaper*, was transformed in many critical respects to become a carving image. The carving pattern simplified the image so that it would be possible to use it for pumpkin carving, thus crucial detail in the manner of expressing the idea in the original is lost in the pattern. According to Frankenheim, the creative detail of the original produces the character of its manner of expressing the underlying idea. The carving pattern lacks these creative elements, and so does not reproduce the original in any meaningful way – thus it is not a “copy” of the original. Because it is so transformed from the original, and its manner and purpose are so different from the original, it cannot be considered a “derivative” work, either, in Frankenheim’s expert opinion.