

105

MAY 09 2005

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

_____	)	
T-Peg, Inc. and Timberpeg East, Inc.	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. C-03-462-M
	)	
Vermont Timber Works, Inc. and Douglas Friant,	)	
	)	
Defendants.	)	
_____	)	

**PLAINTIFFS' OBJECTION TO DEFENDANTS'**  
**MOTION TO AWARD ATTORNEYS' FEES**

The plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. ("Timberpeg"), by and through their attorneys, Devine, Millimet & Branch, Professional Association, respectfully submit this Objection to Defendants' Motion to Award Attorneys' Fees.

**INTRODUCTION**

Counsel for the defendants acknowledges "[t]his was a complex case" that required, in his judgment, the taking of numerous depositions, the filing of numerous motions, and the consultation with numerous experts. See Affidavit of W.E. Whittington, Esq., Defendants' Motion Appendix ("Appendix") at Tab 17. Incongruously, the defendants contend that Timberpeg's claims were frivolous. See Defendants' Motion at 5. As set forth below, an award of attorneys' fees is not warranted in this case because Timberpeg's claims, far from being frivolous, were objectively reasonable in their legal and factual components. Accordingly, Timberpeg respectfully requests that this Court deny the defendants' request for attorneys' fees.

## ARGUMENT

### I. **EQUITABLE CONSIDERATIONS DO NOT WARRANT A FEE AWARD TO THE DEFENDANTS**

In deciding whether to award attorneys' fees and costs, a court may consider such factors as "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." See Fogarty v. Fantasy, Inc., 510 U.S. 517, 534 n. 19 (1994). These factors, however, must be employed consistent with the purposes of the Copyright Act, to encourage "the production of original literary, artistic, and musical expression for the good of the public." Id. at 524. Consideration of these factors compels the denial of the defendants' motion.

#### A. **Timberpeg's Copyright Claim Was Objectively Reasonable**

In the First Circuit, "objective unreasonableness" is the lynchpin of the attorneys' fees inquiry and a claim for fees may be denied solely because the claims asserted, though not prevailing, were "neither frivolous nor objectively unreasonable." Lotus Dev. Corp. v. Borland Indus., Inc., 140 F.3d 70, 73 (1st Cir. 1998). Objective reasonableness focuses on what the plaintiff knew when he or she made the claim and not in hindsight on the unfavorable outcome. See Invesys, Inc. v. McGraw-Hill Cos., 369 F.3d 16, 21 (1st 2004). The fact, therefore, that a plaintiff did not prevail on a copyright claim does not prove the claim objectively unreasonable. See id. This is because "[a] party who propounds a reasonable claim should not be penalized, whether or not the judge buys the claim . . ." Harris Custom Builders, Inc. v. Hoffmeyer, 140 F.3d 728, 730 (7th Cir. 1998). Stated alternatively, the purpose of the Copyright Act "to provide protection to creators of original works" should not be undermined by a chilling effect on the pursuit of such protection that would ensue if reasonableness hinged on whether a party prevailed. See Lotus Dev. Corp., 140 F.3d at 75; Mitek Holdings, Inc. v. Arce Eng. Co., Inc.,

198 F.3d 840, 843 (11th Cir. 1999)(vacating fee award to defendant because the district court failed to consider whether such an award would further the goals of the Copyright Act).

The objective reasonableness factor comprises two component inquiries: (1) factual reasonableness, and (2) legal reasonableness. See Fogarty, 510 U.S. at 534 n. 19. As set forth below, Timberpeg's claims were both factually and legally reasonable.

1. Timberpeg's Claim Was Objectively Reasonable In Fact

As mentioned, the state of the plaintiff's knowledge at the time it made the claim provides the focus of the reasonableness inquiry. See Invesys, 369 F.3d at 21. At the outset, Timberpeg and its independent representative, Old Hampshire Designs, spent countless hours with Mr. Isbitski in an attempt to create a home design that satisfied him. Affidavit of Lynn Cole ("Cole Aff."), Plaintiffs' Summary Judgment Appendix, Tab D. That effort included scrapping one design and preparing a second from scratch when it became clear that Mr. Isbitski was not satisfied with the initial design. See id. Mr. Isbitski, however, later stated he would not be building the Timberpeg-designed home.

A short while later, Timberpeg learned from Old Hampshire Designs that a home was being constructed on Mr. Isbitski's property in Salisbury, New Hampshire. See Deposition of Lynn Cole ("Cole Dep.") at 62-65, attached hereto as Exhibit A. Several Timberpeg representatives visited the building site on several occasions and found a timber frame enclosed by a roof and paneling on three sides.<sup>1</sup> Nearly simultaneously, Timberpeg discovered the plans Timberpeg had provided to Mr. Isbitski were on file with the Salisbury Building Department and were the basis on which a building permit had issued. See Cole Aff. at ¶ 6.

Visits to the building site confirmed that the structure bore a striking similarity to Timberpeg's design and that the placement of posts, the locations of window and door openings,

---

<sup>1</sup> Mr. Cole visited the site at least twice, as did Messrs. Vincent and Driesch, from Timberpeg's design group.

and the interior layout were virtually identical to those denoted on Timberpeg's plans. See Vincent Report, Plaintiffs' Summary Judgment Appendix, Tab C. In short, the timber frame was constructed in such a way as to match precisely the Timberpeg floor plan design, including its exterior dimensions, height, roof pitch, cantilevered kitchen bump-out, window and door locations, and interior accommodation for Timberpeg's floor plan, including the placement of rooms and location of the interior stairway and loft. See id; see also Order dated April 16, 2005 at 5. Based on all of this, Timberpeg concluded that the timber frame must have been prepared on the basis of Timberpeg's architectural plans.

Timberpeg did not immediately fly into court. Instead, upon learning that VTW provided the timber frame for Mr. Isbitski's house, Timberpeg wrote to VTW inquiring as to the use of Timberpeg's plans. See Defendants' Appendix at Tab 3. VTW's response only strengthened Timberpeg's conviction that VTW had made unauthorized use of the Timberpeg plans. In a letter dated September 22, 2003, VTW's counsel, Attorney Welch, stated that "Mr. Isbitski asked my client to design a frame to fit a portion of the floor plans of his house. He represented to my client hat (sic) he paid for and owned a set of plans, which he provided to my client that were drawn by Timberpeg." Id. at Tab 7. Later in that same letter, Attorney Welch stated:

"My client designed a frame to Isbitski's requirements and parameters, limited to the central section of his house . . . Mr. Isbitski did all other work, including the foundation, the building envelope, doors, windows, siding and finishing and all other sections of the house. Mr. Isbitski apparently followed the rest of the Timberpeg drawings, and, if Mr. Isbitski did not own the drawings as he told my client, Timberpeg may perhaps have a reasonable case against him."

Id. (emphasis added). Other VTW counsel said that VTW designed a timber frame "to accommodate floor plans of his house." Letter from Sinclair to Woods of 7/14/03, Plaintiffs' Summary Judgment Appendix at Tab G.

Timberpeg believed Attorney Welch's letter not only revealed Mr. Isbitski's unauthorized use of Timberpeg's plans, but expressly admitted VTW's own use of the plans as well. See id. ("My client designed a frame to fit a portion of the floor plans of his house").<sup>2</sup> VTW's reference to the "central section of [Isbitski's] house," moreover, indicated VTW was aware the house had another section beyond the "central section." Such information could only be learned by a party with access to the Timberpeg plans.

Discovery in the litigation revealed (a) VTW and Timberpeg were working with Mr. Isbitski during the same period of time and (b) VTW had received at least one set of earlier Timberpeg plans. In addition, the defendants produced notes of Kim Hentschel, a then VTW employee, memorializing a conversation with Mr. Isbitski in December 2001. That note states "us or Timberpeg." See Deposition of Kim Hentschel at 95-98 and Friant Deposition Exhibit 13, attached hereto as Exhibit B. It was simply implausible to believe that VTW did not use Timberpeg's plans to design the timber frame given the similarities between the timber frame and the Timberpeg design, the ongoing dialog between Mr. Isbitski and VTW about Timberpeg, and Mr. Isbitski's lack of compunction giving Timberpeg's plans to the panel supplier.

To be sure, Timberpeg pursued its claims even though Timberpeg was unable to uncover proof – direct evidence – of copying, beyond VTW's counsels' admissions.<sup>3</sup> Direct evidence, however, is often unavailable in copyright cases. See Lotus Dev. Corp. v. Borland Int'l, 49 F.3d 807, 813 (1st Cir. 1995). For that reason, copyright law allows plaintiffs to establish copying indirectly, by proof that the infringer had access and that the two works are substantially similar.

---

<sup>2</sup> Copying of floor plans alone can constitute infringement. See Richmond Homes Management, Inc. v. Raintree, Inc., 862 F.Supp. 1517, 1527 (W.D. VA 1994).

<sup>3</sup> Defendants' Motion To Dismiss prepared by VTW's third attorney asserts that Timberpeg authorized VTW's copying of Timberpeg's plans.

See id. This Court acknowledged that VTW and Timberpeg both dealt with Mr. Isbitski at the same time, which satisfied the access element. See Order dated February 9, 2005 at 16.

Based on the facts Timberpeg discerned at the time Timberpeg asserted its claims and throughout the discovery process, the factual predicate to the claims cannot be characterized as anything other than objectively reasonable. The frame erected copied virtually every major feature of Timberpeg's design, and communications from VTW's representatives confirmed that VTW used Timberpeg's plans to design the timber frame.

2. Timberpeg's Claim Was Objectively Reasonable In Law

The legal principals under which Timberpeg pursued its claims were also objectively reasonable. It bears noting that the defendants tested the sufficiency of Timberpeg's claims at the inception of the litigation through an omnibus motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. This Court disposed of the motion in a two word order, "Motion denied," with neither memorandum nor discussion.

Timberpeg based its claims on the strength of the Architectural Works Copyright Protection Act ("AWCPA"), which created a new category called "architectural works" entitled to copyright protection. See 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 2.20 (2003) [hereinafter Nimmer on Copyright]; 17 U.S.C. § 101 (2004). Architectural works are defined broadly under the Copyright Act as:

"the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of the spaces and elements in the design, but does not include individual standard features."

17 U.S.C. § 101 (emphasis added); see also § 102(8) (confirming copyright protection to architectural works). As this Court noted, the defendants agree with Timberpeg that a building

can be a copy of a building design protected as an architectural work under the Copyright Act. See Order dated April 6, 2005 at 3. Infringement in the architectural realm, therefore, is no longer limited to duplication – photocopying - of architectural plans, but also to the copying of designs of buildings, embodied in any tangible medium of expression. See 17 U.S.C. § 1; 17 U.S.C. §102 (a)(8). See Yankee Candle Co. v. New England Candle Co., 14 F. Supp.2d 154, 158 (D. Mass. 1998); J.R. Lazaro Builders, Inc. v. R.E. Ripberger Builders, Inc., 883 F. Supp. 336, 339 (S.D. Ind. 1995); Richmond Homes Management, Inc. v. Raintree, Inc., 862 F.Supp. 1517, 1524-25 (W.D.Va. 1994)(explaining differences in copyright law effected by AWCPA).

Admittedly, this Court ultimately held that the architectural plans reflecting a building design must first be copied in order for a subsequent building to constitute an infringement. See Order dated April 6, 2005 at 4-5. Timberpeg, nonetheless, reasonably believed that the mere using of the plans to design a structure, as opposed to first duplicating the plans then using the duplicated plans to design/create a structure, constituted infringement, and language in the Hunt decision supported that belief. See Hunt v. Pasternack, 192 F.3d 877, 880 (9th Cir. 1999). The statutory language of the AWCPA also led Timberpeg to that conclusion, in that the statute now protects the design of a building “as embodied in any tangible medium of expression,” 17 U.S.C. §101, including a structure less than a completed building. The legislative history, though read differently by this Court, also could be read to support Timberpeg’s theory. See Order dated April 6, 2005 at 4. That this Court disagreed with Timberpeg’s legal theory does not by itself make Timberpeg’s claims objectively unreasonable or frivolous. See Invessys, 369 F.3d at 21 (unfavorable outcome does not render claim unreasonable); Hoffmeyer, 140 F.3d at 730.

Ultimately, this dispute centered on the substantial similarity inquiry, which is fact and perception intensive. Timberpeg contended that the VTW frame expressed the overall form as

well as the arrangement and composition of spaces and elements in Timberpeg's copyrighted design, focusing on dimensions, roof pitch, stair and loft placement, window and door locations, and floor plan among others. This Court determined the frame did not necessarily dictate particular window and door placements or interior partitions, but otherwise did not disagree the frame was capable of supporting a building matching Timberpeg's architectural work. Order dated April 6, 2005 at 5.

Timberpeg's own examination, moreover, revealed numerous additional similarities between the timber frame and Timberpeg's plans, such as the awkward design of the loft overlooking the kitchen, the cantilevered kitchen bump-out that extended precisely one foot beyond the foundation, and the placement of posts in the dining room, which served purely aesthetic purposes and no structural requirement. While this Court noted the timber frame did not dictate window placement, VTW's timber frame also avoided placing a post, beam, or crossbrace in front of any of the 35 windows, 6 skylights, and 2 doors that appeared in Timberpeg's plans. Even VTW's roof frame included design features that were structurally unnecessary, but nonetheless just so happened to mimic Timberpeg's exact design. It was also exceedingly unusual to have Timberpeg's plans on file with the Salisbury Building Department, since the ostensible purpose of filing the plans was to inform the building inspector as to the design and layout of the Isbitski house.<sup>4</sup> Finally, the three perspective sketches created by VTW that illustrated the interior views of the Isbitski home precisely matched those of Timberpeg's plans. Timberpeg representatives who viewed the timber frame and VTW's sketches would have testified to these factual observations.<sup>5</sup>

---

<sup>4</sup> In fact, VTW subject itself to the building permit when it went on-site to erect the timber frame.

<sup>5</sup> Many of these similarities are not readily apparent to the layman. Timberpeg's case, therefore, hinged on the presentation of expert testimony to educate the Jury as to the similarities between VTW's timber frame and Timberpeg's plans. Even if Timberpeg's experts could not have opined on the ultimate question of substantial

Differences pointed out by VTW, however, were slight and not of a nature sufficient to defeat substantial similarity. VTW seized on the issue of post placements, see VTW motion at 4, but these differences in most instances were a matter of orientation (a 6” by 8” post versus an 8” by 6” post) or were measured in inches not affecting the underlying design. See Deposition of Jonathan Vincent at 59-60 & 68-69, attached hereto as Exhibit C. VTW contended that Timberpeg did not design a frame, but Timberpeg’s claim was that VTW’s frame embodied Timberpeg’s architectural work, which included reference to framing elements. At bottom, this Court’s Order did not rest on any argument asserted by VTW,<sup>6</sup> but rather on this Court’s independent view of the law and facts. This Court differed with Timberpeg on one part of Timberpeg’s theory – substantial similarity.

Further establishing Timberpeg’s reasonableness is Timberpeg’s successful resolution of a number of other copyright infringement disputes by relying on the protections afforded architectural works under the Copyright Act. See Defendants’ Appendix at Tab 5. The First Circuit has found it objectively reasonable for a plaintiff to bring a claim which, while unsuccessful in the present case, had previously been successful in others. See Lotus Dev. Corp., 140 F.3d at 74.

**B. Timberpeg’s Copyright Claims Were Not Motivated By Bad Faith**

The defendants seek to characterize Timberpeg’s claims as motivated by bad faith. Beyond the fact that nearly every defendant believes the plaintiff to have asserted claims in bad faith, a more complete examination of the “facts” cited by the defendants proves Timberpeg was

---

similarity, Timberpeg needed experts to explain to the Jury aspects of timberframing beyond the Jury’s ken, which would have armed the Jury to make the substantial similarity inquiry.

<sup>6</sup> Also worthy of mention is the fact that Timberpeg proved that VTW had access. See Order dated February 9, 2005 at 16.

forthright and sincere in attempting to redress a wrong that it believed, and continues to believe, it suffered.

1. Timberpeg Sought To Avoid Litigation

Timberpeg sought to get to the bottom of its dispute with the defendants without resorting to the courts. To that end, Timberpeg sent correspondence to VTW and its counsel. Contrary to the defendants' characterization, a review of that correspondence does not reveal it to be "designed to terrorize" nor to reflect "dubious legal principles." See Defendants' Motion Appendix at Tab 3. Rather, the correspondence explained the legal underpinnings of Timberpeg's position and recommended that VTW consult with an attorney.

Timberpeg also proposed in the summer of 2003 that the parties meet at the Isbitski house. Timberpeg hoped that this meeting would facilitate a resolution of the dispute by allowing both sides to review Timberpeg's plans and compare them to the timber frame VTW erected at the site. The defendants initially accepted the proposal to meet, but then later declined the offer. See Deposition of Steve Woods at 41-42, attached hereto as Exhibit D; see also Invoice of 10/15/03 by Dakin & Banelli, P.C., Entry for 9/2/03 (indicating offer of settlement by Timberpeg and possible site visit), Defendants' Appendix at Tab 11. The defendants also rejected Timberpeg's overtures to mediate the case. See Letter from Woods to Whittington of 1/15/04, attached hereto as Exhibit E.

2. Timberpeg's Plans Were Made Available To The Defendants

The defendants also allege that they were prevented from viewing Timberpeg's copyrighted plans. It was Timberpeg, however, who suggested the parties swap plans during the proposed meeting at the Isbitski house, i.e., Timberpeg would provide its plans in exchange for the plans drafted by VTW. Because the defendants declined to meet at the Isbitski house, the

swap never took place.<sup>7</sup> Nevertheless, Timberpeg promptly provided a copy of the plans to the defendants as part of its initial disclosures pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure. Moreover, the plans were already a matter of public record since they were on file with the Salisbury Building Department and registered with the U.S. Copyright Office. Thus, access to Timberpeg's plans was available to the defendants at all relevant times before and during this litigation. To now claim that Timberpeg somehow obstructed the defendants' ability to see Timberpeg's plans simply rings hollow.

3. Timberpeg Did Not Abuse The Discovery Process

Furthermore, Timberpeg made concerted efforts to comply with the defendants' discovery requests while, at the same time, propose reasonable limits on discovery so as not to bury the parties in litigation costs. Timberpeg produced well over 1,000 documents pursuant to the defendants' discovery requests, compared to the 200 documents produced by VTW. Timberpeg also proposed fewer depositions than allowed under the standard scheduling order, but the defendants refused to reduce the number of depositions. While the parties had discovery disputes, common in any strongly contested litigation, that does not somehow demonstrate that Timberpeg pursued its claims in bad faith and without a desire to enforce its copyright.

4. Timberpeg's Claims Were Not Motivated To Gain A Competitive Advantage

Finally, Timberpeg neither sought nor derived any competitive advantage in pursuing its claims against the defendants. As VTW principle Douglas Friant acknowledged, VTW's and Timberpeg's standard sales procedures do differ. See Deposition of Douglas Friant at 49, attached hereto as Exhibit F. Mr. Friant was at best unclear whether he considers Timberpeg and

---

<sup>7</sup> Defense counsel also approached Timberpeg for a copy of its plans and, again, Timberpeg proposed a swap. Timberpeg's offer was left unanswered. See Letter from Woods to Whittington of 11/25/03, attached hereto as Exhibit G.

VTW to be competitors. See id. at 49-50. Mr. Friant did testify that he did not believe that the two companies “compete head-to-head.” Id. at 49.

Timberpeg is aware of fifteen timber frame companies based in New Hampshire and Vermont alone – three of which were started by former Timberpeg employees. See Affidavit of Richard Neroni ¶ 2, attached hereto as Exhibit H. Moreover, timber frame companies from other parts of the country employ sales representatives to cover the New Hampshire and Vermont region. Id. ¶ 3. In short, there is significant competition within the timber frame industry from a variety of companies. Id. ¶ 4. Putting VTW out of business would have gained Timberpeg virtually nothing in establishing a greater competitive advantage in the industry. Id. ¶ 5. Moreover, Timberpeg’s repeated attempts to resolve this case belie any suggestion that Timberpeg’s objective in pursuing its claims was to put VTW out of business.

The defendants make much of prior copyright claims Timberpeg has pressed with respect to other architectural works’ copyrights and ask this Court to infer, with no evidence, that Timberpeg makes baseless threats to extort settlements, of which this action was one example. In fact, as defendants acknowledge, Timberpeg is a national family of companies that designs homes and manufactures complete timber frame home packages. Timberpeg enforces its intellectual property rights only as often as it has to, no differently than any other large home construction corporation, as reflected, for example by the series of reported decisions in which Arthur Rutenberg Homes is a plaintiff. See, e.g., Rutenberg Homes, Inc. v. Maloney, 891 F. Supp. 1560 (M.D. Fla. 1995); Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc., 829 F. Supp. 1314 (M.D. Fla. 1993); Arthur Rutenberg Corp. v. Parrino, 664 F. Supp 479 (M.D.Fla. 1987).

In nearly all of Timberpeg's prior cases, the defendant was represented by experienced intellectual property counsel. The settlements Timberpeg has entered into reflect the merits of Timberpeg's claims, and the defendants offer nothing to support their contrary spin.<sup>8</sup>

Finally, to the extent the defendants suggest that Timberpeg did not pursue this litigation vigorously with an eye toward trial, Timberpeg's hiring of trial counsel and submission of extensive proposed jury instructions and pretrial pleadings flatly confirm the contrary. In short, the defendants are unable to turn up any evidence of a bad faith motivation on the part of Timberpeg in pursuing its claims.

C. **An Award Of Fees Does Not Advance Considerations Of Compensation And Deterrence**

The defendants suggest that an award of attorneys fees is merited in this case because Timberpeg is the larger company. VTW itself, though smaller, has been in operation for over fifteen years. Thus, while VTW and Timberpeg may have differently sized revenues, this is not a situation where a dominant competitor has used its economic might to squeeze a new entrant to the industry. Cf. Yankee Candle Co., 140 F. Supp. 2d at 118 (plaintiffs economic dominance over the more recently established defendant warranted an award of attorneys' fees to defendant). Rather, Timberpeg and VTW coexisted without incident for a significant period of time before this litigation arose.

Furthermore, where the parties are litigating a matter of some importance to the copyright laws, deterrence has no role. See Lotus Dev. Corp., 140 F.3d at 74. This is because "[w]hen close infringement cases are litigated, copyright law benefits from the resulting clarification of the doctrine's boundaries." Id. at 75. This Court never found that VTW did not use Timberpeg's

---

<sup>8</sup> The defendants suggest that Timberpeg did not produce all documents relating to prior claims. See Defendants' Motion at 7. The defendants omit to inform this Court that defendants agreed Timberpeg would produce only post-1999 documents in Timberpeg's possession in Hanover, New Hampshire. See Correspondence from Whittington to Will of 6/13/04, attached hereto as Exhibit I.

plans in designing VTW's timber frame. Much of the evidence suggests strongly to the contrary. Timberpeg's theory of copyright infringement, while unsuccessful, sought to further define the boundaries that protect architectural works. When the dust settled, it was the fact that the alleged infringement occurred through a timber frame and not a completed building, a close question under governing law, that made this Court view the situation differently than Timberpeg. VTW's counsel admits this was "a complex case," Whittington Aff., which contradicts any assertion that the claims were frivolous. An award of attorneys fees in this case would not only penalize Timberpeg, but would chill other plaintiffs from bringing reasonable, albeit unsuccessful, claims.

## **II. THE AMOUNT OF THE DEFENDANTS' ATTORNEYS' FEES AND EXPENSES IS UNREASONABLE**

Should this Court determine that some award of attorneys' fees is appropriate, the amount of the attorneys' fees requested by the defendants – over \$118,000 – is excessive. The "lodestar" approach controls the calculation of fee awards: a determination of the hours reasonably spent on the case, multiplied by a reasonable rate. See Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331, 337 (1st Cir. 1997). To determine the hours reasonably expended, courts typically look at the actual hours spent by counsel as established by adequate contemporaneous billing records, then "subtract from that figure hours which were duplicative, unproductive, excessive or otherwise unnecessary." Grendel's Den v. Larkin, 749 F.2d 945, 950 (1st Cir. 1984)(emphasis added). A reasonable rate is that prevailing in the community for similar work. Maceira v. Pagan, 698 F.2d 38, 40 (1st Cir. 1983).

The defendants in this case seek reimbursement of attorneys' fees in the amount of \$118,911.93. These fees are based predominantly on an hourly rate of \$200 for attorney work

and \$85 for paralegal work.<sup>9</sup> This amount is excessive because, if awarded, it will represent a windfall to the defendants over and above their actual expenditures under their fee agreement with defense counsel. Furthermore, the fees are not supported by sufficiently detailed billing records and many of the hours charged are unreasonable.

**A. The Defendants Should Not Recover More Than They Were Required To Spend On Attorneys' Fees**

The fee agreement entered into between the defendants and defense counsel required the defendants to pay significantly lower attorneys' fees than the defendants now seek as an award. An award of attorneys' fees is made to the client, not to the attorney. See 4 Nimmer on Copyright § 14.10[C], 14-146 n. 15. Under the Copyright Act a "reasonable" attorney fee has been held to be an amount less than the prevailing market-based fee. See, e.g., Harris v. Emus Records Corp., 734 F.2d 1329 (9th Cir. 1984)(awarding 50% of actual attorneys fees). In addition, with respect to fee arrangements similar to that between the defendants and counsel in this action, courts have rejected fee requests in excess of the actual fees charged by the attorney. See Jewish Employment & Vocational Serv., Inc. v. Pleasant Educ. Supply Corp., 601 F. Supp. 224 (E.D. Pa. 1983).

Virtually identical to fee issue here, in Jewish Employment, the attorney agreed to bill the client only one-half of his usual rate and then attempt to recover in court his full rate. 601 F. Supp. at 225. If awarded, the client would have received the excess over the actual rate charged by the attorney. Id. The court rejected this scheme, holding that the prevailing party may not

---

<sup>9</sup> The defendants have offered no evidence that \$200 per hour is a reasonable rate prevailing in the Upper Valley community, and, therefore, do not meet their burden. Notably, it now appears that the magistrates order requiring payment of attorneys' fees of \$3,700 in connection with a discovery motion was based on the false premise that the defendants actually paid those fees. Timberpeg raised that issue in briefing at that time, and now, in light of the fee arrangement the defendants have finally disclosed, it appears that the defendants have not paid defense counsel's full fees since June 2004, though they claimed to be entitled to reimbursement for his full fees in connection with the discovery dispute.

make a profit in payment of an attorney's fee over and above the amount that the client actually paid to the attorney. Id. As a result, the court reduced the fee award requested by 50%. Id.

The defendants' fee arrangement with defense counsel in this case is similar to that of the one in Jewish Employment. In June 2004, the defendants converted their fee agreement with defense counsel such that they would only be charged half of the first \$25,000 in fees (i.e., \$12,500) and thereafter only half defense counsel's hourly rate. See Defendants' Motion at 13. The billing records after June 1, 2004 reflect billable fees totaling \$82,675. The defendants, however, were only obligated to pay half that amount, i.e., \$41,337. Therefore, of the \$118,911.93 billed by defense counsel, the defendants were only required to pay \$65,074, an amount which reflects the initial \$12,500 deduction of the first \$25,000 in fees and half defense counsel's rate after June 1, 2004. The defendants are not entitled to a windfall. See Jewish Employment, 601 F.2d at 225. Even if the Court determines to award fees, the starting point for assessing fees should be \$65,074.

**B. The Billing Records Lack Sufficient Detail For Timberpeg To Fairly Evaluate The Reasonableness Of Defendants' Request For Attorneys' Fees**

The billing records submitted by defendants in support of their motion for attorneys' fees do not sufficiently break down the fees according to the tasks performed by defense counsel. See Grendel's Den, 749 F.2d at 950. Rather, the records reflect large blocks of billed time under which various tasks were performed. For example, a five hour block of billed time can represent tasks ranging from legal research and drafting to e-mail correspondence and telephone conferences. See, e.g., Entry for 6/14/04. That practice makes it impossible for this Court to accurately gauge the time expended by defense counsel on specific tasks and whether the fees charged for those tasks were reasonable or excessive. Timberpeg respectfully requests that the Court further reduce the defendants' overall fee award by ten percent to account for

inefficiencies in defense counsel's representation that would be identifiable were the records more detailed. See Yankee Candle Co., 140 F. Supp. at 125 (adjusting fee award by 10% to account for inefficiencies in counsel's representation where billing entries recorded multiple tasks and calculating exact time spent on each activity was impractical).

**C. The Number Of Hours Charged By Defense Is Unreasonable**

While it is generally difficult to discern the precise amount of time defense counsel spent on particular tasks, there are several billing entries that clearly relate to fruitless and unproductive work or that are excessive or that simply do not relate to representation of the defendants:

1. Defendants' Motion To Dismiss Was Unproductive Work For Which No Fees Should Be Awarded

The defendants submitted a motion to dismiss in this case which was so bereft of merit that the Court answered it with a two word order – “Motion Denied”. See Order dated January 13, 2004. At best the motion was ill advised; at worst it should not have been filed. Counsel nonetheless spent an inordinate amount of time researching and drafting the motion. Indeed, there are ten entries in defense counsel's billing records between November 18, 2003 and January 12, 2004 reflecting work performed on the motion and subsequent response. These entries total 23.2 hours of work, resulting in \$4,640 in fees.<sup>10</sup> Because the defendants' motion lacked any merit, the fees related to its drafting and submission should be disqualified as unproductive work. Accordingly, the \$4,640 in fees related to the defendants' Motion to Dismiss should be deducted from defendants' fee request.

---

<sup>10</sup> See entries for 11/18, 11/20, 11/21, 11/25, 11/26, 12/1, 12/3, 12/12, 1/9, and 1/12.

2. Defense Counsel's Fees Related To Defendants' Motion For Summary Judgment Are Excessive

Defense counsel's billing records reflect 25 entries between June 7, 2004 and August 16, 2004 relating predominantly to the research and drafting of defendants' motion for summary judgment. These entries total roughly 90 hours of work, resulting in fees in excess of \$18,000.<sup>11</sup> To a significant extent, defense counsel billed for his education in copyright law for which Timberpeg should not be forced to pay.<sup>12</sup> See Orgel v. Clark Boardman Co., 128 U.S.P.Q. 531, 532 (S.D.N.Y. 1960)(stating that the full time expended by counsel should not be considered in determining a reasonable fee because "counsel were dealing with an unfamiliar subject and cannot fairly charge defendants for their education"). As defense counsel's fees related to the motion for summary judgment are facially excessive, they should be reduced by 50%, resulting in an additional \$9,000 reduction in any fee award.

3. Fees Related To Defense Counsel's Representation of Kimberly Hentschel Should Be Excluded

Kimberly Hentschel is a former employee of VTW who dealt closely with Mr. Istbitski during the periods relevant to this litigation. Exhibit B at 38-41 & 62-65. On or around October 25, 2004, Ms. Hentschel retained the representation of Attorney Whittington in anticipation of a deposition Timberpeg subpoenaed on November 5, 2004. Id. at 29-31. At the time she retained Attorney Whittington, Ms. Hentschel was no longer an employee of VTW. Id. at 35. Furthermore, Ms. Hentschel testified at her deposition that VTW had not offered to pay her attorneys fees. Id. at 31.

Nevertheless, there are six entries which appear in defense counsel's billing records between October 26, 2004 and November 5, 2004 that relate to the representation of Ms.

---

<sup>11</sup> See entries for 6/7-6/11, 6/13-6/18, 7/6, 7/7, 7/9, 7/13, 8/5, 8/6, 8/9-8/13, and 8/15-8/16.

<sup>12</sup> This is particularly the case because defense counsel held himself out to the defendants as knowledgeable in copyright and trademark. See Engagement Letter, included in Tab 12 of Defendants' Appendix.

Hentschel. These entries total 24 hours of work, resulting in fees of \$4,840.<sup>13</sup> In addition, Ms. Hentschel's counsel arranged for her deposition to be videotaped, which resulted in additional expenses of \$565. See Invoice of 2/11/2005, Defendants' Appendix at Tab 12. As Ms. Hentschel was neither an employee of VTW at the time of her deposition nor a party in this case, fees and expenses related to her representation by Attorney Whittington should be excluded. Timberpeg should not be billed for the defendants' choice to hire counsel for third party witnesses. Therefore, the \$5,405 in fees and expenses related to the representation of Ms. Hentschel should be deducted from defendants' fee award.

#### 4. Miscellaneous Fees And Expenses

There are several miscellaneous fees and expenses that should also be excluded from the defendants' fee award. First, defense counsel inadvertently disclosed information to Timberpeg during discovery. A billing entry on May 7, 2004 for \$229.50 relates specifically to legal research and a memorandum on the issue of inadvertent disclosure during discovery. As this fee was incurred to remedy defense counsel's own mistake, it should not be billed to Timberpeg.

Second, defense counsel's invoice for December 29, 2004 provides no description whatsoever for billable fees totaling \$2,250. As these fees are entirely without explanation or justification, they should be excluded.

Finally, defense counsel's invoice for April 12, 2005 includes an expert witness fee of \$1,350, which should not be recoverable. See West Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83, 86-102 (1991)(holding fees for services rendered by expert witnesses could not be shifted to losing party as part of "reasonable attorney's fee" under 42 U.S.C. § 1988).

Timberpeg respectfully requests that these miscellaneous fees and expenses totaling \$3,829.50 be deducted from the defendants' fee award.

---

<sup>13</sup> See entries for 10/26, 10/29, and 11/2-11/5.

**D. Summary Of Requested Fee Deductions**

As the defendants were not obligated to pay defense counsel's full hourly rate, this Court's starting point for assessing fees should be \$65,074. Furthermore, based on a review of the billing records, Timberpeg also requests that the defendants' fee request be reduced by an additional \$29,381.60. This represents an overall reduction of ten percent of the \$65,074 for hidden inefficiencies as well as the reduction of \$22,874.40 for fees that were either excessive, related to unproductive work, or were simply not recoverable against Timberpeg. Thus, while Timberpeg respectfully objects to any award of attorneys' fees in this case, such an award should not exceed \$35,692.04.

**CONCLUSION**

For the above-stated reasons, Timberpeg respectfully requests that this Court deny defendants' motion for attorneys' fees. Alternatively, should defendants' motion be granted, Timberpeg respectfully requests an award of attorneys' fees no greater than \$35,692.04.

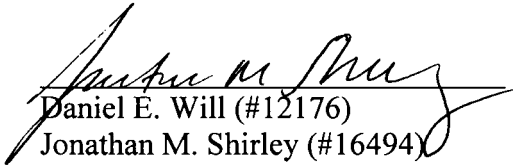
Respectfully submitted,

T-PEG, INC. AND TIMBERPEG EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Dated: May 6, 2005

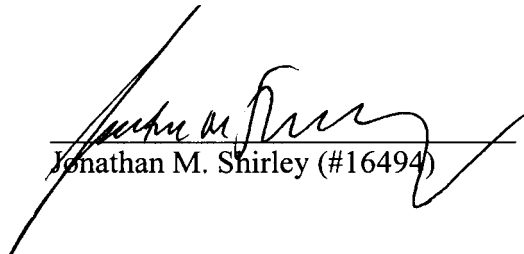
  
Daniel E. Will (#12176)  
Jonathan M. Shirley (#16494)  
111 Amherst Street  
P.O. Box 719  
Manchester, NH 03105-0719  
(603) 669-1000

Of Counsel:

Stephen S. Woods, Esquire (#8240)  
General Counsel for Plaintiffs  
Timberpeg East, Inc.  
c/o 68 Lyme Road  
Hanover, NH 03755  
(603) 643-6200

**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of May 2005, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.

  
Jonathan M. Shirley (#16494)