

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

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

OBJECTION PURSUANT TO FED. R. CIV. P. 72 AND LOCAL RULE 7.2(e)

NOW COME the Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (“Timberpeg”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and pursuant to Fed. R. Civ. P. 72 and Local Rule 7.2(e) respectfully object to the Court’s Order dated November 19, 2004. In support of this objection, Timberpeg states as follows:

PRELIMINARY STATEMENT

This action involves a claim of copyright infringement by Timberpeg against defendants Vermont Timber Works, Inc. and Douglas Friant (collectively “VTW”) concerning Timberpeg’s copyrighted architectural plans. The Copyright Act provides that a plaintiff may elect to pursue actual damages, in the form of the plaintiff’s lost profits and the disgorgement of defendant’s profits, or statutory damages. 17 U.S.C. § 504. In this case, Timberpeg notified VTW in the summer of 2004 that it did not intend to seek Timberpeg’s lost profits, but that it would still seek either disgorgement of VTW’s profits or statutory damages.

In resolving a discovery dispute that subsequently arose between the parties, the Court (Muirhead, J.) held that Timberpeg’s decision to forego its lost profits constituted an election of

statutory damages under 17 U.S.C. § 504(c) and that Timberpeg was foreclosed from seeking the disgorgement of VTW's profits. Timberpeg now objects to the Court's Order and pursuant to Fed. R. Civ. P. 72 and Local Rule 7.2(e) respectfully submits that Timberpeg made no such election and Timberpeg should not be foreclosed from seeking damages for VTW's profits.

FACTUAL AND PROCEDURAL BACKGROUND

In discovery, VTW propounded document production requests that sought a broad and burdensome scope of information concerning Timberpeg's calculation of gross profits – information that VTW contended was necessary to prepare its defense on the issue of damages. In response, and by letter dated September 29, 2004, Timberpeg notified VTW that Timberpeg would not seek damages for its lost profits and, as such, VTW's request for Timberpeg's gross profit information was irrelevant and not likely to lead to the discovery of admissible evidence. By that same letter, Timberpeg expressly reserved its right to seek damages for VTW's profits and/or statutory damages should Timberpeg prevail at trial. See Letter of 9/29/04, attached as Exhibit A.

VTW subsequently moved to compel Timberpeg to produce the requested gross profit documentation and Timberpeg objected. The motion was referred to the Magistrate for disposition. By Order dated November 19, 2004, the Court held, among other things, that “[i]n order to make the broadened discovery [of VTW] irrelevant plaintiff has committed itself to statutory damages and has made an election under [17 U.S.C. § 504(c)].” See Order of 11/19/04 at 3 (Muirhead, J.), attached as Exhibit B. The Court further ordered that Timberpeg amend its complaint to conform with “this election.” Id.

Timberpeg moved for reconsideration of the Court's order, in part, on the grounds that, consistent with the Copyright Act, its September 29, 2004 letter expressly reserved Timberpeg's

right to pursue damages in the form of the disgorgement of VTW's profits, as Timberpeg was entitled to do under 17 U.S.C. § 504(b). The Court denied Timberpeg's Motion for Reconsideration by Order dated March 29, 2005. Seven federal days later, and before the expiration of the 10 day period for Timberpeg to object pursuant to Fed. R. Civ. P. 72 and Local Rule 7.2(e), the Court entered judgment for VTW on its Motion for Summary Judgment, which disposed of the action and made irrelevant an objection to the ruling on damages. Timberpeg appealed the Summary Judgment Order and the First Circuit reversed and remanded. Accordingly, this action is once again on the trial docket.

On March 9, 2007, this Court conducted a telephonic Pretrial Status Conference. Among other items, counsel for Timberpeg informed this Court that Timberpeg intended to submit a partial objection to the Magistrate's report. This Court granted Timberpeg 30 days in which to make its objection, but asked that Timberpeg remind this Court of that 30 day permission in the partial objection. Accordingly, Timberpeg now brings this objection to the Court's Order of March 29, 2005 denying its Motion for Reconsideration.

ARGUMENT

A. Timberpeg's Objection Is Timely

Counsel for the defendants has suggested that the defendants may argue that this objection is untimely. To dispense with that issue as a threshold matter, Timberpeg reiterates the relevant chronology in the context of the applicable federal civil and local rules.

On November 19, 2004, the Magistrate issued the order to which Timberpeg now objects. Pursuant to Local Rule 7.2(e), Timberpeg moved for reconsideration. The Magistrate denied Timberpeg's Motion for Reconsideration on March 29, 2005. On April 7, 2005, seven federal days later, this Court entered judgment for VTW, which disposed of this action in its entirety.

Local Rule 7.2(e) provides that a party has 10 days from a Magistrate's denial of a motion for reconsideration in which to object to the district court. The Pretrial Status Conference on March 9, 2007, restarted this case, and this Court allowed Timberpeg 30 days in which to file this objection.

In short, this objection is timely because Timberpeg's ten day period had not run prior to entry of judgment, and the Pretrial Status Conference restarted the litigation and allowed Timberpeg an additional 30 days from March 9 to file this objection.

B. Timberpeg Is Entitled To Pursue Actual Damages To Disgorge VTW's Profits Or Statutory Damages

Timberpeg respectfully submits that the Court misapprehended Timberpeg's position concerning copyright damages. Timberpeg based its damages position in good faith reliance upon two established principals of copyright law. The Copyright Act on its face provides that Timberpeg may elect to forego its own lost profits, and seek either to disgorge the defendants' profits or statutory damages. Timberpeg, moreover, may make the election between statutory damages or the defendant's profits up to the end of trial. Contrary to the Magistrate's order, Timberpeg has never committed itself solely to statutory damages under the Copyright Act, but rather has chosen to forego its actual damages and instead seek either VTW's profits attributable to infringement or statutory damages. Exhibit A.

As an overview, with respect to claims for actual damages, the damages provisions of the Copyright Act are to be construed broadly in favor of infringement victims, and courts confronted with imprecision in calculating damages should err on the side of guaranteeing plaintiffs' full recovery. See Davis v. The Gap, Inc., 246 F.3d 152, 164 (2d Cir. 2001). Broad construction in turn is driven by the language of the statute itself. In that regard, the Copyright Act provides that "an infringer of copyright is liable for either (1) the copyright owner's actual

damages and any additional profits of the infringer . . . or (2) statutory damages . . .” 17 U.S.C. § 504(a) (emphasis added). The statutory language makes clear that plaintiffs may seek any profits connected with the infringement, either that plaintiff would have obtained and that defendant did obtain, or statutory damages. The statute does not tie the two profits provisions together such that plaintiffs must seek their own lost profits and the defendant’s profits. The express statutory language entitles Timberpeg to seek its own lost profits, the defendants’ profits, or statutory damages.

Decisional law construing the damages provision of the Copyright Act underscores Timberpeg’s argument in that courts have allowed copyright plaintiffs to recover the defendants’ profits even when plaintiffs have not met their burden of proof of their own actual damages. See Business Trends, Analysts v. Fredonia Group, Inc., 700 F.Supp. 1213, 1237 (S.D.N.Y. 1988) (allowing an award of damages based on the defendant’s profits where plaintiff failed to prove any actual damages); Johnson v. Jones, 921 F.Supp. 1573, 1586 (E.D. Mich. 1996) (same in context of architectural works copyright claim). This proposition is also consistent with the differing purposes of actual damages and disgorgement of profits under the Copyright Act. Actual damages serve to make the infringement plaintiff whole – to compensate the plaintiff. See Nimmer on Copyright, §14.02. Disgorgement of the infringer’s profits serves to prevent the infringer from unfairly benefiting from a wrongful act. See id. at §14.01[A]. In light of those differing purposes, allowing a copyright plaintiff to disgorge the defendant’s profits has no link to whether that plaintiff adduces evidence in support of, or deliberately foregoes, its own lost profits.

With respect to the timing of the election between the defendant’s profits and statutory damages, the Copyright Act states that plaintiffs may make elections between actual damages

and profits or statutory damages at any time up until the entry of judgment. See 17 U.S.C. § 504(c). Under the statute, therefore, Timberpeg may forego its actual damages at any time, but need not elect between the defendants' profits and statutory damages up until the entry of judgment,¹ which is what Timberpeg did in this action. By limiting Timberpeg exclusively to statutory damages, the Court overlooked or misapprehended governing law that allows Timberpeg to forego its own lost profits, but still seek the defendants' profits or statutory damages.

In short, Timberpeg has emphasized in correspondence with VTW and in pleadings to this Court that it will only forego Timberpeg's own lost profits but continue to seek VTW's profits, unless or until Timberpeg elects statutory damages under the Copyright Act. Timberpeg's position is grounded in governing law. For this reasons, Timberpeg requests that the Court restore Timberpeg's election right under 17 U.S.C. § 504 and permit it to seek damages to disgorge VTW's profits or statutory damages.

WHEREFORE, Timberpeg respectfully requests that this Honorable Court:

- A. Restore Timberpeg's election right under 17 U.S.C. § 504 and permit it to seek damages to disgorge VTW's profits or statutory damages; and
- B. Grant to Timberpeg such other and further relief as it deems just and equitable.

¹ Or at least up until the jury's deliberations. See Nimmer on Copyright, §14.04[A].

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: April 5, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this day, April 5, 2007, a copy of the foregoing was forwarded electronically to W.E. Whittington, Esquire, in accordance with the Court's Administrative Procedures for Electronic Case Filing.

/s/ Daniel E. Will
Daniel E. Will (#12176)