

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

T-PEG, INC and)
TIMBERPEG EAST, INC.,)
Plaintiffs,)
)
vs.) No. 03-CV-462-M
)
VERMONT TIMBER WORKS, INC.,)
And DOUGLAS FRIANT,)
Defendants.)

DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTION
TO MAGISTRATE'S DECISION
WITH MEMORANDUM INCORPORATED THEREIN

Defendants, Vermont Timber Works, Inc. ("VTW") and Doug Friant, respectfully submit this memo supporting the Magistrate Judge's November 19, 2004 Order (Document 52), which the Magistrate Judge reaffirmed on March 29, 2005.

Standard

Under FRCP 72(a) this Court lets the Magistrate Judge's ruling stand unless T-Peg demonstrates that it is "clearly erroneous or contrary to law." Magistrate Judges have broad discretion on non-dispositive matters, and "reversal is warranted only if that discretion has been abused." Franco v. Yale University, 80 Fed. Appx. 707, 710 (2d Cir. 2003). As shown below, the Magistrate Judge's decision was in perfect conformity with T-Peg's statement that it had exercised its "election" under Section 504.

Plaintiffs' Current Request

Plaintiffs' current request is for a single change, to "restore Timberpeg's election right under 17 U.S.C. §504." This is a request which was not raised in plaintiffs' motion to reconsider addressed to the Magistrate.

Argument

As shown below, plaintiffs' request mischaracterizes the remedies positions it took previously, as well as the fact its purported "election" was the final act in a six-month period of "stonewalling" and changing position to avoid providing discovery on remedies while attempting to preserve all its options.

The remedies section of the Copyright Act, 17 U.S.C. §504, contains the following remedies provision:

504(a) **In General.** [A]n 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, as provided by subsection (c).

504(b) **Actual Damages and Profits.** [Described]

504(c) **Statutory Damages.**

- (1) [T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages **and** profits, an award of statutory damages for all infringements involved in the action

Emphasis added.

The Section (c)(1) election is clearly between "actual damages and profits," on one side, and "statutory damages," on the other. It is emphatically not an option for the plaintiffs to elect

all of one side (statutory damages) while retaining part of the other side (profits), as plaintiffs now claim they were attempting to do.

What plaintiffs did was to make a purported “election” – earlier than they had to under Section 504 but still unambiguously made for strategic reasons – while attempting to not really give up what the election required. This was a continuing ruse to avoid providing required discovery. Thus the last paragraph of plaintiffs’ September 29, 2004 letter, attached to plaintiffs’ current pleading, clearly indicated that counsel had exercised “my client’s election.” This was highlighted in the ensuing correspondence, Exhibits 18 and 19 to the Second Motion To Compel (Document 32):

Ex. 18, from defendants’ counsel to plaintiffs’ counsel:

“Fourth, I assume you know there is a relationship between damages and profits, and that either one precludes statutory damages. In other words, it’s either-or, not both. Unless you advise me that plaintiffs are additionally waiving claims to defendant’s profits and will amend accordingly, our inclination is to go forward with our motion to compel.” (Emphasis added)

Ex. 19, plaintiffs’ counsel’s response:

“If you continue to seek that discover, and any efforts on your part require us to produce that discovery, then, of course, we reserve our right to seek our lost profits as damages. We need not elect between statutory damages or disgorgement of profits under the copyright statute at this time, as the statute makes clear.” (Emphasis added)

In other words, after first making the election, in Ex. 17, in order to avoid producing discovery, by the next letter, Ex. 19, plaintiffs had now reneged on that election and were “reserving [their] right” to seek both (1) their own damages and (2) defendants’ profits, as well as (3) statutory damages. And all the while they were using their supposed “election” in Ex. 17 to continue to argue that damages discovery was irrelevant.

Defendants' good-faith but thwarted attempts to get this discovery cover Exhibits 1-19 in the Second Motion to Compel, and the Magistrate Judge's Order articulates chapter and verse on what he found to be plaintiffs' "failure to comply with Rules [26(a)(1) and 33] and "six months of 'stonewalling.'"

In the final analysis, plaintiffs said in plain English in Exhibit 17 that they had made the Section 504 "election," and the Magistrate judge found that "in order to make the broadened discovery irrelevant plaintiff has committed itself to statutory damages and has made an election under 28 U.S.C. §504."

Plaintiffs have not demonstrated that this ruling was "clearly erroneous" or "contrary to law."

Date: April 13, 2007

VERMONT TIMBER WORKS, INC.
and DOUGLAS FRIANT, Defendants,

/s/ W. E. Whittington
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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2007, I served the foregoing pleading on the following counsel of record, by causing it to be filed electronically via the CM/ECF filing system or mailed by first-class United States Mail, postage pre-paid, or in such other manner as may be indicated:

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