

**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.)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT**

The plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (collectively “Timberpeg”), respectfully submit this memorandum of law in support of their motion for partial summary judgment.

PRELIMINARY STATEMENT

This is an action for copyright infringement arising out of a set of architectural plans created by Timberpeg for a prospective customer named Stanley J. Isbitski (“Isbitski”) and registered with the United States Copyright Office (the “Timberpeg plans”). Timberpeg alleges that VTW and its owner, Douglas Friant, (collectively “VTW”) infringed the Timberpeg plans when it created shop drawings and later built a timberframe for Isbitski.

Timberpeg’s copyright infringement claim was dismissed in February 2005 when this Court granted summary judgment in favor of VTW. Timberpeg appealed, and the United States Court of Appeals for the First Circuit reversed and remanded this action for a jury trial on whether VTW copied the Timberpeg plans and whether the VTW timberframe and shop drawings are substantially similar to Timberpeg’s architectural plans.

Timberpeg now moves for summary judgment on two issues the parties raised before this Court and on appeal that the First Circuit Court ultimately resolved in Timberpeg's favor. First, Timberpeg moves for summary judgment that its plans reflect an original architectural work that is entitled to protection under the Copyright Act. Second, Timberpeg moves for summary judgment that VTW had access to the Timberpeg plans, thereby establishing the first element of proof through indirect evidence that VTW copied the Timberpeg plans.

STATEMENT OF UNDISPUTED FACTS

A. Parties

TIMBERPEG[®] is a federally registered trademark used by a family of companies to promote, design, manufacture, and sell TIMBERPEG[®] brand post and beam home packages. See Affidavit of Richard Neroni ("Neroni Aff.") ¶ 2, attached as Exhibit A. T-Peg, Inc. ("T-Peg") owns the TIMBERPEG[®] trademark and licenses the mark to a group of related companies, all owned by T-Peg, which includes Timberpeg East, Inc. ("Timberpeg East"). See id. ¶¶ 2-3. The related companies use the trade name, Timberpeg, to promote their common business. See id. ¶ 3.

Timberpeg East, a wholly-owned subsidiary of T-Peg, is responsible for sales of TIMBERPEG[®] product in the Northeast. See id. ¶ 4. Timberpeg Services, also a wholly-owned subsidiary of T-Peg, provides drafting and manufacturing services to Timberpeg East, as well as other related Timberpeg companies operating in other regions. Timberpeg Services operates solely for the benefit of the Timberpeg companies and does not independently provide services to the public or any unrelated companies. See id.

The common goal of T-Peg and Timberpeg East (and Timberpeg Services) is to promote and sell TIMBERPEG[®] brand product. See id. ¶ 5. Consequently, T-Peg, Timberpeg East, and

Timberpeg Services have contractual agreements whereby copyright interests are transferred and drafting services are provided by Timberpeg Services and paid for by Timberpeg East. See id. and Tabs 1 and 2. T-Peg registers copyright interests, but Timberpeg East maintains co-ownership in the copyright arising from Timberpeg East projects. See id.

VTW is a company located in Vermont, which specializes in timber framing. See Deposition of Douglas Friant (“Friant Dep.”) at 18, attached as Exhibit B. VTW has no architects on staff and does not design buildings. See id. at 27, 32. Instead, VTW utilizes architectural plans or sketches to fit frames to the houses those plans or sketches reflect. See id. at 37. VTW needs some significant information – footprint dimensions, wall height and roof pitch at a minimum – in order to design a frame. See id. at 31-2. If a customer comes to VTW without that information, VTW will generally refer that customer to an architect, because architectural elements will drive the location of the timberframe components. See id. at 40.

VTW was founded by Douglas Friant and Dan Kelleher. See Friant Dep. at 17. Mr. Friant is the only person at VTW who does any drafting of timber frame drawings. See id. at 22.

B. What Is A Timberframe

Timberframing is a method of framing a building utilizing posts and beams, which generally remain visible inside of the building. See Friant Dep. at 27-8. The timberframe provides, in essence, the skeleton of a house to which are affixed external siding and roofing and interior walls, typically with the frame itself visible on the interior. Timberframed buildings are unusual in that the timber frame itself – the structural component of the building – also defines the spaces within the building. See Plaintiff’s Expert Disclosure (“Vincent Report”), attached as Exhibit C. A timberframe, therefore, can define the size, shape and intended layout of the building. See id.; see Friant Dep. at 33.

C. Architectural Plans And Shop Drawings

Architectural works – the design of a building – can be reflected in so-called architectural plans. See, e.g., Timberpeg Plans, attached as Exhibit D. Architectural plans typically consist of foundation drawings, first and second floor drawings, elevations, sections, roof plans, and, sometimes, perspectives, which show the overall scope of a building. See Friant Dep. at 41. Architectural plans reflect a building's size, shape, layout or floor plan and dimension. See Vincent Report at Exhibit C.

In the context of a timberframed building, the design of any particular timberframe is reflected in so-called shop drawings. See, e.g., VTW Shop Drawings, attached as Exhibit E. Shop drawings reflect the components of the timberframe, meaning their location and their connections. See Friant Dep. at 41. It is typical to utilize architectural plans in the design process of a timberframe, see id. at 37, and architectural plans will often include designations for the locations of the frame components, see id. at 54. The Timberpeg plans at issue in this litigation include such designations. See Exhibit D at sheet 2.

D. Isbitski Residence Chronology

On November 1, 1999, an individual named Stanley J. Isbitski entered into an agreement with Timberpeg called “Deposit Agreement For Timberpeg Preliminary Plans And Drawings” (“Design Agreement”). Design Agreement, attached as Exhibit F. The Design Agreement provided that Timberpeg would prepare so-called preliminary plans, which would include the basement plan, floorplans, four elevations, and a cross section. See Deposit Agreement ¶ 3. The Design Agreement also provided that Timberpeg East, Inc. and/or its assigns, would own the copyright in the plans created and that whatever Mr. Isbitski provided by way of sketches or other materials would become the property of Timberpeg East, Inc. See id. ¶ 4.

On or about December 29, 1999, Timberpeg completed the first set of preliminary plans, and supplied those plans to Mr. Isbitski. See Affidavit of Lynn Cole ("Cole Aff.") ¶ 2, attached as Exhibit G. The plans reflected the design of a house, the main portion of which was to be timberframed, and a master bedroom wing of which was to be "stick built," meaning more standard framing with two inch lumber, and not posts and beams. See id.

In early December 2000, Mr. Isbitski first met with representatives of VTW. See Sworn Statement of Kim Hentschel ("Hentschel Statement") ¶ 3, attached as Exhibit H. Among other documents, Mr. Isbitski brought a set of Timberpeg architectural plans with him, and showed them to VTW representatives. See id. ¶ 5. According to VTW, Mr. Isbitski showed the plans to VTW by way of demonstrating what he did not want in a timberframe design. According to VTW, Mr. Isbitski wanted a different frame style, known as a "bent" frame and different frame component joinery. See Letter dated September 22, 2003 from John J. Welch, Esquire to Stephen Woods, Esquire ("Welch Letter"), attached as Exhibit I.

In early 2001, Mr. Isbitski met with Lynn Cole of Timberpeg East, and Lynn Cole prepared a new floorplan for Mr. Isbitski. See Cole Aff. ¶ 3. On or about April 20, 2001, Timberpeg completed a second set of architectural plans for Mr. Isbitski, which reflected the earlier meeting between Mr. Isbitski and Mr. Cole. See id. Timberpeg registered those plans with the Copyright Office, and that set of plans, and the architectural design they reflect, form the basis of this action. See Exhibit D. The copyright became effective on May 18, 2001. See Certificate of Registration, VAu 510-781, attached as Exhibit J. Timberpeg delivered the plans to Mr. Isbitski for his further review and comment. See Cole Aff. ¶ 3. On the strength of these plans, Mr. Isbitski obtained a building permit from the Town of Salisbury. See Cole Aff. ¶ 6.

Mr. Isbitski made no further substantive revisions to the overall design of the house. See Cole Aff. ¶ 4. He did, however, ask Timberpeg to frame his house design in a bent style. See id. In September 2001, at Mr. Isbitski's request, Timberpeg prepared construction drawings for Mr. Isbitski's residence, which included a so-called bent timberframe system. See id. at Tab 1. Except for providing for a bent frame, the construction plans duplicate the design embodied in the copyrighted plans. Compare April 20 plans (Exhibit D) with September 5 plans (Exhibit G at Tab 1). Timberpeg sent the construction plans to Mr. Isbitski on or about September 19, 2001. See Cole Aff. ¶ 4.

On or about February 20, 2002, VTW revised shop drawings of a timberframe for the portion of Mr. Isbitski's residence which the Timberpeg plans show to be timberframed. See Friant Dep. at 117-118; VTW Shop Drawings at Exhibit E. Mr. Friant, who drew the shop drawings, testified that he had prepared between 10 and 20 revisions prior to February 20, 2002, but that VTW did not apparently keep any of the prior revisions. See Friant Dep. at 119. The last revision to the shop drawings occurred in May 2002. See id. at 121. It is undisputed that VTW went on to cut and erect the timberframe for the Isbitski residence.

E. The Procedural History

The parties moved for summary judgment in advance of the trial originally scheduled for March 2005. VTW offered two bases for summary judgment. First, VTW argued that the Timberpeg plans could not be infringed as a matter of law because the plans comprised component architectural elements that lacked sufficient originality to be protected under the Copyright Act. See VTW Motion for Summary Judgment dated 11/1/04. Second, VTW argued that no substantial similarity could exist between the VTW timberframe and the Timberpeg plans

because Timberpeg never designed a timberframe whereas VTW *only* designed a timberframe. See VTW Motion for Summary Judgment dated 8/16/04.

For its part, Timberpeg sought, among other things, judgment as a matter of law that VTW had access to the Timberpeg plans since they were in Isbitski's possession at the time VTW created its timberframe for Isbitski.¹ See Timberpeg Cross-Motion for Summary Judgment dated 9/17/04.

This Court granted summary judgment to VTW, and in so doing, held that the two works lacked any probative similarity to suggest VTW copied the Timberpeg plans, based principally on the fact that Timberpeg did not design a timberframe while VTW drew and erected only a timberframe. See Order dated 2/9/05 at 17. This Court also held that, even had VTW copied the Timberpeg plans, no reasonable jury could conclude that any substantial similarity existed between the works. Id. at 18.

The United States Court of Appeals for the First Circuit reversed the summary judgment order and remanded the case to have a jury determine whether VTW copied the Timberpeg plans and whether a substantial similarity exists between the two works such that VTW could be deemed to have infringed Timberpeg's copyright. See T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97 (1st Cir. 2006). In reaching its decision, the First Circuit ruled in Timberpeg's favor on a series of arguments raised by the parties before this Court and on appeal.

The First Circuit explicitly held, for example, that Timberpeg's plans reflected an original work entitled to copyright protection. The Court stated:

Keeping in mind the definition of an "architectural work" as "including the overall form as well as the arrangement and composition of spaced and elements in the design," we conclude that there are genuine issues of

¹ As described below, a copyright plaintiff may prove copyright infringement by showing either that (1) the defendant copied the work, or (2) that the defendant had access to the work and produced a substantially similar work. Access, therefore, may be an element of proof of infringement.

material fact as to substantial similarity. . . At issue here is a particular combination of elements in Timberpeg's architectural work: a portion of a home featuring a timberframe with a backwards-L-shaped footprint, with a particular arrangement of posts, with certain dimensions and a bump-out along the western wall, featuring a central switchback staircase, with a lofted second floor of a certain floor area and in a certain location, with a certain roof pitch with certain dimensions, and certain wall heights.

Id. at 113-14.

The First Circuit also rejected VTW's theory that it could not have infringed Timberpeg's plans because Timberpeg never designed a timberframe. In this regard, the Court opined:

This emphasis wrongly assumes that the only issue here is whether a reasonable jury could conclude that VTW's frame is substantially similar to Timberpeg's frame design, and that since Timberpeg never designed a complete frame, there can be no infringement. That is wrong. The question here is whether a reasonable jury could conclude that VTW's frame as drawn and built is substantially similar to Timberpeg's architectural work (which includes "the overall form as well as the arrangement and composition of spaces and elements in the design") as embodied in the second preliminary plans for the Isbitski house. This does not necessarily turn on whether Timber created a complete frame design or not.

Id. at 114.

Finally, the First Circuit addressed Timberpeg's proposition that VTW enjoyed access to the Timberpeg plans because Isbitski possessed the plans during the time he worked with VTW to design its timberframe.² The First Circuit concluded that the Timberpeg plans had been in Isbitski's possession for nearly one year by the time he agreed to purchase the timberframe from VTW on March 8, 2002. Id. at 106. Based on this finding, the First Circuit held that VTW had access to the Timberpeg plans because such access could be imputed where there is evidence that a "third party [Isbitski] with whom both the plaintiff [Timberpeg] and the defendant [VTW] were dealing had possession of the plaintiff's work" and "the plaintiff's and defendant' dealings took

² A fact this Court recognized as well in the first summary judgment order. See Order of 2/9/05 at 16.

place concurrently.” Id. at 111 (quoting 4 Nimmer & Nimmer, Nimmer on Copyright § 13.02[A]).

The parties have participated in further mediation since the First Circuit’s decision, but to no avail. A jury trial on Timberpeg’s copyright infringement claim is scheduled for October 2007.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The record evidence is taken in the light most favorable to the nonmoving party, indulging all reasonable inferences in his favor. See Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 577 (1st Cir. 1999). However, the Court must consider the record as a whole and may not make credibility determinations or weigh the evidence. See Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2110 (2000). The party seeking summary judgment must first demonstrate the absence of a genuine issue of material fact in the record. See DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). An issue of fact is genuine if there is sufficient evidence to permit a rational fact-finder, considering the evidence in the light most favorable to the nonmoving party, to find for either party. See Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

ARGUMENT

To prevail on its claim for copyright infringement, Timberpeg must prove that it owns an architectural work protected under the Copyright Act, that VTW copied the protected

architectural work, and that VTW's infringing work is substantially similar to Timberpeg's protected work. The First Circuit has held that the questions of whether the works share a probative and substantial similarity must be resolved by a jury. Nevertheless, by this motion, Timberpeg seeks partial summary judgment that its plans are original and that VTW had access to the plans – questions that, should Timberpeg prevail, will narrow the issues for the jury's consideration at trial.

I. TIMBERPEG'S PLANS EMBODY AN ORIGINAL ARCHITECTURAL WORK ENTITLED TO PROTECTION UNDER THE COPYRIGHT ACT

VTW argued before this Court and on appeal that Timberpeg's architectural design is not sufficiently original to be entitled to copyright protection. VTW based this argument upon an element by element deconstruction of Timberpeg's architectural design into a series of features which, VTW contended, themselves are not copyrightable. In essence, VTW contended that any individual features of an architectural design that are not original preclude an architectural design that utilizes those features from being original, and that those elements must be effectively stripped from any design prior to determining whether the design is original. VTW's argument is at odds with the Copyright Act and has now been flatly rejected by the First Circuit on appeal.

The Copyright Act protects original architectural works, and defines architectural work 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 spaces and elements in the design, but does not include individual standard features.

17 U.S.C. § 101. Decisional law on point makes clear that “[t]he level of originality required for copyright protection is not especially elevated,” and that “[t]he underlying component parts of a creation are not subject to protection, but a creator's independent selection and arrangement of component parts into an original design is copyrightable.” Arthur Rutenberg Homes, Inc. v.

Maloney, 891 F. Supp. 1560, 1566 (M.D. Fla. 1995). Courts, therefore, have consistently rejected VTW's approach, which seeks to "filter out" standard features in an architectural design for purposes of determining whether the design is sufficiently original to be entitled to protection. See, e.g., Arthur Rutenberg Homes, Inc. v. Maloney, 891 F. Supp. 1560 (M.D. Fla.) and Sturdza v. United Arab Emirates, 281 F.3d 1287 (D.C. Cir. 2002).

The First Circuit, recognizing this established precedent, explicitly rejected VTW's approach on appeal. It acknowledged that Timberpeg "bases its claim here on a combination of elements, which taken together, are protectible under the definition of an architectural work in 17 U.S.C. § 101." T-Peg, Inc., 459 F.3d at 115. The First Circuit further noted that the legislative history for the Architectural Works Copyright Protection Act ("AWCPA") states that "the phrase 'arrangement and composition of spaces and elements' recognizes that . . . creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotectible elements into an original, protectible whole." Id. at 116. It is for this reason the First Circuit concluded "there is no separability test for an architectural work." Id. at 110. In other words, the protectible elements of an architectural work are not to be separated from the utilitarian aspects when examining the work's copyright protection. See id.

By seeking to "filter out" what VTW contended were standard features of Timberpeg's architectural design, VTW applied the separability test that has been squarely rejected in the decisional law and the First Circuit in this action. Even if one assumes that each of the "standard features" VTW identified in Timberpeg's design is, in fact, a standard, non-copyrightable feature, it is the arrangement and composition of those features that make the Timberpeg design copyrightable. Such arrangement and composition was the product of a lengthy creative process undertaken by Timberpeg to design and then redesign the plans to express Isbitski's vision for

his home.³ Timberpeg claims copyright in the arrangement of all of those features which create an original home design with its own look and feel – an architectural work the First Circuit recognized is original and entitled to copyright protection. Accordingly, given the dictates of the AWCPA and the First Circuit’s decision on appeal, Timberpeg is entitled to summary judgment that the architectural work reflected in its registered plans is entitled to protection under the Copyright Act.

II. The Record Facts Establish VTW Had Access To Timberpeg’s Plans

To prevail on its infringement claim, Timberpeg must prove, among other things, that VTW copied its plans. Because direct evidence of copying is frequently impossible to obtain, a plaintiff may prove copying indirectly through proof that the defendant (1) had access to the copyrighted work, and (2) that the defendant’s work is substantially similar to the plaintiff’s copyrighted work. See 4 Nimmer on Copyright §13.02[B]. The element of access in this context is defined broadly and means merely the opportunity to have reviewed the protected material. See Jones v. Nino Homes, 858 F.2d 274, 277 (6th Cir. 1988); Mayotte and Assoc. v. MGC Bldg. Co., 885 F. Supp. 148, 152 (E.D. Mich. 1994); Arthur Rutenberg Corp. v. Parrino, 664 F. Supp. 479, 481 (M.D. Fla. 1987). An opportunity to review the plans may be inferred, even on summary judgment, when the plaintiff and defendant were both dealing with a mutual third party over the same period of time. See 4 Nimmer on Copyright § 13.02[A] at 13-17; Parrino, 664 F. Supp. at 481; Rottlund Co. v. Pinnacle, 2004 WL 1879983 at *21 (D. Minn. 2004); Arthur Rutenberg v. Maloney, 891 F. Supp. 1560, 1567 (M.D. Fla. 1995). A conclusive

³ If nothing else, that the work is the product of a creative process undertaken by Timberpeg alone establishes originality, thereby entitling the work to protection under the Copyright Act. See Cole Aff. ¶ 3; Richmond Homes Management, Inc. v. Raintree, Inc., 862 F.Supp. 1517, 1523 (W.D.Va. 1994) ("Architectural structures and plans are subject to copyright protection under 17 U.S.C. §§ 102(a)(5) and (8) where the author has independently created the works and the works reflect creativity, regardless of how simple the design.").

finding of access does not require proof of actual viewing or utilization of knowledge gained from viewing. See Rottlund, 2004 WL 1879983 at *21.

The chronology in this action proves as a matter of law that VTW had an opportunity to review Timberpeg's plans, even if VTW denies such a review, because the record reveals no dispute of fact that VTW and Timberpeg both dealt with Mr. Isbitski over the same period of time when Mr. Isbitski had Timberpeg's copyrighted plans. Mr. Isbitski went to Timberpeg in 1999, after which he received the first set of architectural plans. He shared those plans with VTW in late 2000. Mr. Isbitski returned to Timberpeg and obtained revised plans in April 2001, which Timberpeg copyrighted, and construction plans in September 2001 that reflected the so-called bent style timberframe. Mr. Isbitski then filed the copyrighted plans with the Salisbury building department and returned to VTW, who, between February and mid-May 2002, prepared shop drawings and, thereafter, erected a timberframe for Mr. Isbitski. Not only were Timberpeg and VTW both dealing with Mr. Isbitski simultaneously, but VTW prepared its plans after Timberpeg provided Isbitski with the copyrighted plans and after Isbitski made them publicly available by filing them with the Salisbury building department. This was the same point in time during which Isbitski was allegedly instructing Mr. Friant on the location of posts to within an eighth of an inch. See Friant Dep. at 109. On those undisputed facts, VTW, as a matter of law, had an opportunity to review Timberpeg's plans. See Parrino, 664 F. Supp. at 481; Maloney, 891 F. Supp. at 1567. Notably, by establishing a reasonable opportunity to view, Timberpeg establishes access, and not just an inference of access. See Rottlund, 2004 WL 1879983 at *21 (explaining same in context of summary judgment).

That VTW had access to the Timberpeg plans is precisely the determination made by the First Circuit when it reviewed the same facts on appeal. See T-Peg, Inc., 459 F.3d at 111.

Accordingly, Timberpeg is entitled to summary judgment that VTW had access to the Timberpeg plans, thereby establishing the first element for proving by indirect evidence that VTW copied the Timberpeg plans, leaving for trial only the issues of direct copying by VTW, whether VTW's frame is substantially similar to Timberpeg's protected work, and damages.

CONCLUSION

For the foregoing reasons, Timberpeg respectfully requests summary judgment in its favor on the issue of the originality of its architectural work and VTW's access to the work.

Respectfully submitted,

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

By their attorneys,
DEVINE, MILLIMET & BRANCH,
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Dated: June 3, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this day, June 3, 2007, a copy of the foregoing was transmitted to W.E. Whittington, Esquire in accordance with the Court's Administrative Procedures of Electronic Filing.

/s/ Jonathan M. Shirley
Jonathan M. Shirley

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