

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

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

**PLAINTIFFS’ REPLY TO DEFENDANTS’ OPPOSITION TO  
PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT**

NOW COME Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (collectively “Timberpeg”) and respectfully submit the following Reply to Defendants’ Opposition to Plaintiffs’ Motion for Partial Summary Judgment (Docket Entry 129).

**PRELIMINARY STATEMENT**

Timberpeg moves for partial summary judgment on its claims for copyright infringement that (i) Timberpeg’s April 2001 architectural plans constitute an original architectural work entitled to copyright protection and (ii) the Defendants, Vermont Timber Works, Inc. and Douglas Friant (collectively “VTW”), had access to Timberpeg’s plans. VTW objects and asserts that an assortment of alleged disputed facts prevent summary judgment on these issues. As discussed below, however, VTW’s opposition relies principally on arguments that have already been rejected by the First Circuit or that ignore basic principles of copyright law.

## ARGUMENT

### **A. VTW's Originality Analysis Is Wrong**

VTW objects to summary judgment as to the originality of Timberpeg's plans by raising a series of arguments that, when distilled to their essence, fall into two categories. VTW first raises arguments that challenge whether T-Peg, Inc. and Timberpeg East, Inc. own the copyright in the April 2001 architectural plans. Defendants' Opposition at 4-8. This issue forms the basis for VTW's motion for summary judgment based on plaintiffs' lack of standing (Docket Entry 126). Timberpeg will object to that motion separately and address the merits of VTW's copyright ownership and standing arguments at that time. The question of copyright ownership does not bear on whether the architectural work here is sufficiently original to be entitled to copyright protection. For the purposes of this motion, therefore, the Court need not resolve the issue of ownership to reach a decision on originality.

The second category of arguments VTW raises centers on the theory that Timberpeg's plans, when separated into their individual component parts, consist of unoriginal and/or standard design features that are not entitled to copyright protection. VTW argues, for example, that Timberpeg's plans incorporate standard eight and nine foot plate heights, two foot design increments, a 12/12 pitched roof, and perimeter dimensions of 40 by 44 feet. Defendants' Opposition at 10. VTW further argues that other elements of Timberpeg's plans are derivative of previous architectural works or flow from ideas expressed by Mr. Isbitski. Id. These unoriginal components, VTW reasons, defeat Timberpeg's claim of originality.

VTW's component by component analysis, however, flies in the face of the Architectural Works Copyright Protection Act of 1990 ("AWCPA"). Even worse, VTW made the very argument it now advances to the First Circuit, who unequivocally rejected it. As defined under

the Copyright Act, an architectural work “includes the overall form as well as the arrangement and composition of spaces and elements in the design.” 17 U.S.C § 101. The legislative history for the AWCPA explains this definition as follows:

[t]he phrase ‘arrangement and composition of spaces and elements’ recognizes that: (1) creativity in architecture frequently takes the form of a selection, coordination, or arrangement of unprotectible elements into an original, protectible whole; (2) an architect may incorporate new, protectible design elements into otherwise standard, unprotectible building features; and (3) interior architecture may be protected.

See T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 110 (1st Cir. 2006) (quoting H.R.

Rep. No. 101-735). Thus, as noted by the First Circuit, while individual standard features are not individually subject to copyright protection, the combination of such standard features is copyrightable. Id.

The heightened copyright protection granted architectural works stands in contrast to the protection afforded other works. For example, the Copyright Act does not protect mechanical or utilitarian features of a pictorial, graphic or sculptural work. For this reason, courts apply a “separability test” when evaluating such works to distinguish between those design elements that are original and those that are mechanical or utilitarian. Id. Significantly, however, the legislative history for the AWCPA expressly rejected application of the separability test to architectural works. Id.

Undaunted by the First Circuit, VTW asks this Court to apply the separability test. The First Circuit rejected the separability test on appeal as having no application to this case and, as such, VTW’s argument at this stage of the litigation is simply irrelevant. Id. The only issue is whether the overall form as well as the arrangement and composition of spaces and elements in

Timberpeg's plans reflect an original design.<sup>1</sup> The First Circuit determined that Timberpeg's plans reflected an original architectural work. See id. at 114. Such a conclusion is fully supported by the record evidence, which includes testimony from Lynn Cole, Timberpeg's Regional Manager, that he created the design reflected in Timberpeg's copyrighted plans. See Affidavit of Lynn Cole ¶ 3, attached as Exhibit G to Timberpeg's Motion for Partial Summary Judgment. Therefore, Timberpeg is entitled to summary judgment that its registered plans are protected by copyright.<sup>2</sup>

**B. It Is Undisputed That Timberpeg and VTW Dealt With Isbitski During The Same Period, Which Alone Establishes Access**

VTW attempts to avoid summary judgment on the issue of VTW's access to Timberpeg's registered plans by suggesting that material questions of fact remain on such issues as when Mr. Isbitski filed the plans with the Salisbury building department or the meaning of VTW's attorneys' letters. Defendants' Opposition at 15. Even assuming such factual questions still remain, VTW does not dispute that Timberpeg and VTW both dealt with Mr. Isbitski during the period of time in which Mr. Isbitski was in possession of Timberpeg's copyrighted plans. See T-Peg, Inc., 459 F.3d at 111. This fact alone establishes an inference that VTW had access to the plans and the opportunity to copy them. See, e.g., id. (citing authority for the principle that parties' simultaneous dealings with third party in possession of copyrighted work establishes access); Arthur Rutenberg Corp. v. Parrino, 664 F.Supp. 479, 481 (M.D.Fla. 1987). What is more, contrary to VTW's assertion, when a reasonable opportunity to view is established, it is

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<sup>1</sup> VTW is silent on this point, of course. In three years of litigation, VTW has failed to produce or identify any other designs that are identical to the overall form and arrangement of spaces reflected in the plans created by Timberpeg.

<sup>2</sup> VTW also suggests that Timberpeg cannot claim that its frame design is similar to that built by VTW. This argument smacks of VTW's argument on appeal that, because Timberpeg never designed a frame, VTW's frame is not an infringing work. The First Circuit flatly rejected VTW's argument, concluding "[t]hat is wrong." T-Peg, Inc., 459 F.3d at 114.

appropriate not just to find a mere inference of access, but to deem access established. Rottlund Co. v. Pinnacle, 2004 WL 1879983 at 21. As Nimmer explains:

It would seem clearer and more just in terms of the plaintiff's burden of proof to regard a reasonable opportunity to view as access in itself and not merely as creating an inference of access. This approach is consistent with what is perhaps the more prevailing definition of access, i.e., the opportunity to copy. The trier of fact may conclude that the person who created defendant's work had, but did not avail himself of, the opportunity to view, but this conclusion properly goes to the ultimate issue of copying, and not to the subordinate issue of access.

Nimmer on Copyright § 13.02[A], at 13-16.

Accordingly, VTW's access to Timberpeg's plans is not in dispute and, for the purposes of simplifying the issues at trial, the question should be resolved in Timberpeg's favor on summary judgment.

### **CONCLUSION**

For the reasons as set forth above and for all the reasons stated in its principal memorandum of law, Timberpeg respectfully requests that this Honorable Court grant Plaintiffs' Motion for Partial Summary Judgment.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Dated: July 18, 2007

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day, July 18, 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