

**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.	)	
_____	)	

**OPPOSITION TO DEFENDANTS’ MOTION FOR  
SUMMARY JUDGMENT BASED ON PLAINTIFFS’ LACK OF STANDING**

NOW COME Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (collectively, “Timberpeg”) and respectfully submit the following Opposition to Defendants’ Motion for Summary Judgment Based on Plaintiffs’ Lack of Standing (Docket Entry 126).

**PRELIMINARY STATEMENT**

Defendants Vermont Timber Works, Inc. and Douglas Friant (collectively, “VTW”) move for summary judgment on the grounds that the named plaintiffs allegedly do not own the copyright to the architectural plans at issue and, therefore, lack standing to prosecute this infringement action. Timberpeg objects to VTW’s motion. The question of copyright ownership is a non-issue that, after all is said and done, VTW itself does not have the standing to raise. The Timberpeg family of companies have long standing agreements in which T-Peg, Inc. (“T-Peg”) and Timberpeg East, Inc. (“Timberpeg East”) have equal, undivided ownership in the rights to all copyrighted and copyrightable material generated on behalf of Timberpeg East. As such, T-Peg and Timberpeg East own the copyright to the architectural plans at issue and they are the

proper parties to prosecute this infringement action. VTW's motion for summary judgment should be denied.

### **FACTUAL BACKGROUND**

#### **A. TIMBERPEG® and The Timberpeg Family of Companies**

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. Affidavit of Richard Neroni ¶ 2, attached hereto as Exhibit A [hereinafter "Neroni Aff."].<sup>1</sup> T-Peg owns the TIMBERPEG® trademark. Id.

T-Peg licenses the TIMBERPEG® trademark to a group of related companies, all owned by T-Peg. These related companies include Timberpeg East, Timberpeg Pacific, Inc., Timberpeg South, Inc., Timberpeg West, Inc. and Timberpeg Services, Inc. ("Timberpeg Services"). Id. ¶ 3. These companies use the TIMBERPEG® trademark for purposes of effectuating sales of TIMBERPEG® product. The related companies use the trade name "Timberpeg" to promote their common business. Id.

Timberpeg East is a wholly owned subsidiary of T-Peg and is responsible for sales of TIMBERPEG® product in the northeast United States. Id. ¶ 4. Timberpeg Services, also a wholly owned subsidiary of T-Peg, provides design, drafting, and manufacturing services to Timberpeg East as well as the other Timberpeg companies operating in regions other than the northeast. Id. Timberpeg Services operates solely for the benefit of the Timberpeg companies and does not independently provide services to the general public or any unrelated companies. Id.

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<sup>1</sup> This affidavit was originally submitted by Timberpeg in support of its Motion for Partial Summary Judgment filed June 3, 2007.

Timberpeg Services was incorporated in 2000. Affidavit of Richard Neroni In Support of Opposition to Defendants' Motion for Summary Judgment Based on Plaintiffs' Lack of Standing ¶ 2, attached hereto as Exhibit B [hereinafter "Second Neroni Aff."]. Prior to that, all design and drafting services were provided by Timberpeg Services' predecessor-in-interest, Timberpeg Design Services Division ("TDSD"), which operated as a division of Timberpeg East. Id. ¶ 3. TDSD was separated from Timberpeg East in 2000 and incorporated as Timberpeg Services. Id. This organizational change was undertaken for accounting purposes. Id. Timberpeg Services assumed all contractual rights and obligations of TDSD upon its incorporation in 2000. Id. ¶ 5.

### **B. Timberpeg Copyright Ownership**

The Timberpeg family of companies have entered into contractual agreements that convey equal, undivided ownership shares in all copyrighted material to T-Peg and the regional operating company, such as Timberpeg East. For example, Timberpeg East entered into an agreement with T-Peg whereby Timberpeg East conveyed "co-ownership and co-claimant rights to any and all copyrightable/copyrighted material produced or acquired by Timberpeg East." Neroni Aff., Ex. 1 ¶ 1. While Timberpeg is presently unable to locate an executed copy of the agreement, T-Peg and Timberpeg East have operated consistent with the terms of the agreement for the past twenty years. Neroni Aff. ¶ 5.

Similarly, on January 1, 1994, TDSD entered into a written agreement with Timberpeg East whereby TDSD agreed to convey all rights to its copyrighted material to Timberpeg East. Second Neroni Aff. ¶ 4 and Ex. 1. Timberpeg Services assumed the rights and obligations of TDSD under this contract upon TDSD's incorporation in 2000 and it has handled its copyrighted and copyrightable material consistent with the terms of the agreement since that time. Id. ¶ 5.

### **C. The Isbitski Architectural Plans**

Stanley J. Isbitski (“Isbitski”) approached Timberpeg East in 1999 about designing a home. Affidavit of Lynn Cole Filed In Support of Opposition to Defendants’ Motion for Summary Judgment Based on Lack of Standing ¶¶ 1-2, attached hereto as Exhibit C [hereinafter “Cole Aff.”]. Lynn Cole (“Cole”), a regional manager for Timberpeg East, served as the principal Timberpeg contact with Isbitski. Id. ¶ 1. Timberpeg produced an initial set of plans for Isbitski in 1999, which Isbitski did not like. Id. ¶¶ 2-3. In early 2001, Cole met with Isbitski to discuss some new ideas Isbitski wanted to incorporate into his future home. Id. ¶ 3. Based on this meeting, and in his capacity as regional manager for Timberpeg East, Cole designed a entirely new floorplan for Isbitski by hand. Id. ¶ 3 and Ex. 1. Cole sent his hand-drawn floorplan to Timberpeg Services to have it converted into scaled architectural plans using a computer aided design (“CAD”) program. Id. ¶ 4. Joe Downey (“Downey”), a draftsman employed by Timberpeg Services at the time, converted Cole’s floorplan using the CAD program. Id. The April 2001 architectural plans at issue in this action, which were registered with the United States Copyright Office, are the plans that Downey generated when he converted Cole’s floorplan using the CAD program. Id. ¶ 4 and Ex. 2.

### **ARGUMENT**

VTW contends that, because Downey’s name appears on the registered architectural plans, the copyright to the work is owned by Timberpeg Services under the work-for-hire doctrine. Thus, VTW reasons, T-Peg and Timberpeg East lack standing to bring this infringement action. VTW’s motion is wrong on the facts and wrong on the law and, in any event, VTW does not have standing to challenge Timberpeg’s copyright ownership in the first instance.

As discussed below, Cole authored the April 2001 plans, not Downey. Under the work-for-hire doctrine, copyright ownership automatically vested in Timberpeg East, not Timberpeg Services. In turn, Timberpeg East conveyed an equal, undivided ownership share in the copyright to T-Peg pursuant to a preexisting agreement, while reserving to itself ownership rights as well. T-Peg and Timberpeg East, therefore, each have standing to assert the infringement claims in this action because they each own an equal, undivided share in the copyright. What is more, even if Downey had authored the plans, T-Peg and Timberpeg East would still co-own the copyright by operation of the existing contractual agreements between the Timberpeg companies. In short, regardless of whether the copyright initially vested in Timberpeg East or Timberpeg Services, the corporate entities that rightfully own the copyright are the plaintiffs named in this action.

**A. Copyright Ownership Initially Vested In Timberpeg East Because Its Employee, Lynn Cole, Authored The Plans**

The April 2001 plans that form the basis for this copyright infringement action were authored by Cole, an employee of Timberpeg East, and not Downey. Copyright protection, as established under the United States Constitution, is only provided to the “author” of a work. Authorship, therefore, is the critical element for resolving questions of copyright ownership. The United States Supreme Court defined the term “author” in a constitutional sense to be “He to whom anything owes its origin; originator, maker.” Burrows-Giles Lithographic Co. v. Sarony, 11 U.S. 53, 58 (1884). As this definition makes plain, the one indispensable element of authorship is originality. 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 1.06[A], 1-102.2 (2003) [hereinafter “Nimmer”]. By contrast, “[o]ne who has slavishly or mechanically copied from others may not claim to be an author.” Id. Thus, even though copyright only inheres in works fixed in a tangible medium of expression, the author is still the originator and not the

“fixer.” Id. at 1-102.3. “Poets, essayists, novelists, and the like may have copyrights even if they do not run the printing presses or process the photographic plates necessary to fix the writings into book form.” Id. (quoting Andrien v. Southern Ocean Country Chamber of Commerce, 927 F.2d 132, 135 (3d Cir. 1991)). In short, copyright ownership flows to the one who creates the original work, not necessarily to the one who renders it in a fixed medium of expression.

In this case, it was Cole who authored the April 2001 plans because he was the person who met with Isbitski, envisioned the arrangement of the home that Isbitski desired, and then reduced that vision to a detailed, hand-drafted floorplan. Cole Aff. at Ex. 1. Downey’s role, by comparison, consisted of transcribing Cole’s floorplan into a CAD program, thereby converting the hand-drawn sketches into scaled, computer-generated architectural plans. See id. ¶ 4. In other words, it was Cole who contributed the essential element of originality for the floorplans while Downey’s efforts focused on the mechanics of transcribing them into a usable format. Cole, therefore, is the person who authored the April 2001 plans, not Downey.

Moreover, since Cole is the author of the plans, copyright ownership automatically vested in Timberpeg East by virtue of the work made for hire doctrine. Copyright ownership vests initially with the author of the work. 17 U.S.C. § 201(a). In the case of a work made for hire, however, the employer is considered the author of the work and is regarded as the initial owner of the copyright unless there has been an agreement otherwise. Id. § 201(b). Traditional agency principals governing scope of employment are used to determine whether an employee created a work under the work made for hire doctrine. Nimmer § 5.03[B][1][b], at 5-34. An employee conducts himself within the scope of his employment if his conduct (i) is of the kind of work he is employed to perform, (ii) occurs substantially within authorized work hours and space, or (iii)

is actuated, at least in part, by a purpose to serve the employer. Id. (citing, e.g., Quinn v. City of Detroit, 988 F. Supp. 1044, 1049 (E.D. Mich. 1997)).

Cole created his hand-drawn floorplan of the Isbitski home in his capacity as a regional manager for Timberpeg East -- a task he regularly performs on behalf Timberpeg East for customers. Cole Aff. ¶ 6. Indeed, Cole indicated this on the floorplan when he included at the corner of each page “© Timberpeg - L. Cole.” Id. at Ex. 1. Cole’s drafting of the floorplan took place within the scope of his employment for Timberpeg East. Id. Accordingly, the copyright to the April 2001 plans initially vested in Timberpeg East as a work made for hire.

**B. T-Peg Owns An Equal And Undivided Share In The Copyright Pursuant To A Preexisting Agreement With Timberpeg East**

T-Peg also owns the copyright in the plans because Timberpeg East conveyed an undivided share in the ownership rights pursuant to an agreement that existed before Cole designed the plans. Copyright ownership may be transferred, assigned, or conveyed, just like other forms of property. See 17 U.S.C. § 201(d)(2). Two or more persons may own undivided shares in a copyright, thus giving rise to what is known as a “joint work.” Nimmer § 6.01, at 6-3.<sup>2</sup> The owners of a joint work are treated as tenants-in-common and they each hold equal rights in the copyright, including the right to register the work or to bring infringement actions. Id. §§ 6.08 & 6.09, at 6-28.2 to 6-29. As for the mechanics of transferring a copyright interest, the conveyance must be memorialized in a writing. 17 U.S.C. § 204(a). This formality may be satisfied, however, by an oral assignment later ratified in writing. Beckwith Builders, Inc. v. Depietri, 2006 DNH 107, 25 (citing Billy-Bob Teeth, Inc. v. Novelty, Inc., 329 F.3d 586, 591

<sup>2</sup> The Copyright Act defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101. Nimmer observes that this definition is improperly designated and is, in fact, the definition for “joint authorship.” Rather, a “joint work” is a broader concept that is more properly defined as one in which the copyright is owned in undivided shares by two or more persons. One such example provided by Nimmer is where an author transfers an undivided interest in the copyright to one or more persons, reserving to himself an undivided interest. Nimmer § 6.01, at 6-3 (citing Oddo v. Ries, 743 F.2d 630 (9th Cir. 1984)).

(7th Cir. 2003)). Such oral assignments – later confirmed in writing – are deemed to be valid ab initio. Id.

The analysis in Billy-Bob Teeth sheds a revealing light on the nature of the arguments raised by VTW here. That case involved an owner’s transfer of his copyright in a work to a company he founded after the work had been created. Billy Bob Teeth, 329 F.3d at 589. The company registered the copyright as a work made for hire and, later, sued the defendant for infringement of the copyright. Id. at 589-90. The defendant challenged the company’s standing to bring the infringement action because a writing did not exist memorializing the copyright transfer.<sup>3</sup> Id. To rectify this oversight, the owner executed an agreement on the eve of trial that memorialized his prior transfer of the copyright to his company. Id. The United States Court of Appeals for the Seventh Circuit held that the writing, even though executed on the eve of trial, ratified the earlier “oral” transfer.<sup>4</sup> Id. Thus, the company was vested with standing to prosecute the infringement action, thereby mooting the defendant’s motion. See id.

Perhaps more importantly, the Court noted that the issue was irrelevant anyway since the defendant itself did not have standing under the Copyright Act to challenge the transfer in the first instance. Id. at 592. The Court observed that the writing requirement under the Copyright Act is in the nature of a statute of frauds and is designed to resolve disputes among copyright owners. Id. Thus, where there is no dispute between the copyright owner and the transferee about the status of the copyright ownership, “it would be unusual and unwarranted to permit a

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<sup>3</sup> The defendant also challenged the copyright registration on the grounds that the work was not a work made for hire, as indicated on the application, since the work was created *before* the company existed or had employees. The Court brushed aside the significance of this registration defect, noting “case law is overwhelming that inadvertent mistakes on registration certificates do not . . . bar infringement actions, unless the claimant intended to defraud the Copyright Office by making the misstatement.” Billy-Bob Teeth, 329 F.3d at 591 (internal quotations omitted).

<sup>4</sup> The Court construed the prior “oral” transfer requirement loosely, noting that corporations cannot literally discuss anything with anyone. Instead, it was sufficient for purposes of establishing a prior oral transfer that the owner acknowledged the intention to transfer the copyright to his company when he incorporated it. Billy-Bob Teeth, 329 F.3d at 592.

third-party infringer to invoke section 204(a) to avoid suit for copyright infringement.” Id. at 592-93 (quoting Imperial Residential Design, Inc. v. Palms Development Group, Inc., 70 F.3d 96, 99 (11th Cir. 1995) (internal quotations omitted)).

T-Peg and Timberpeg East are parties to a long-standing agreement whereby Timberpeg East conveys “co-ownership and co-claimant rights” to T-Peg in all of its copyrightable and copyrighted material. See Neroni Aff., Ex. 1 ¶ 1. Thus, when copyright ownership in Cole’s plans vested in Timberpeg East under the work made for hire doctrine, an equal, undivided ownership interest also vested immediately in T-Peg under the parties’ agreement.<sup>5</sup> In turn, as owner of an undivided share of the copyright, T-Peg was entitled to register the plans with the United States Copyright Office, which it did,<sup>6</sup> and it had standing to commence this infringement action along side Timberpeg East.

VTW takes pains to point out that Timberpeg has only been able to produce an unsigned copy of the agreement between T-Peg and Timberpeg East. The uncontradicted evidence, however, makes plain that T-Peg and Timberpeg East have operated consistent with the terms of their agreement for the past 20 years. See Neroni Aff. ¶ 5. This is why T-Peg’s name appears in the copyright notice included on the registered plans that Downey generated. See Cole Aff. at Ex. 2. It is also why the Deposit Agreement signed by Isbitski expressly notes that “[Timberpeg East] and/or *its assigns* owns” the copyright. See Ex. F to Timberpeg’s Motion for Partial

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<sup>5</sup> VTW mischaracterizes T-Peg’s interest in the copyright as a “non-exclusive license.” See VTW Memo at 10. This argument is based on language in the agreement irrelevant to the issue. Timberpeg East conveys an equal, undivided share of copyright ownership to T-Peg in paragraph 1 of the agreement. VTW relies, however, on language appearing in paragraph 2 that relates to a separate assignment of rights by T-Peg back to Timberpeg East. See Neroni Aff. at Ex. 1.

<sup>6</sup> T-Peg properly designated the plans as a work made for hire on the copyright application since it was Cole, a Timberpeg East employee, who created the work. See Ex. 1 to VTW Memo. of Law. Even if this designation were incorrect, it is certainly not fatal to the copyright registration since VTW has neither suggested nor proffered any evidence that the designation was intended to defraud the Copyright Office. See Billy-Bob Teeth, Inc., 329 F.3d at 591.

Summary Judgment (emphasis added). Hence, even assuming the agreement was never executed (which Timberpeg disputes), the companies have nevertheless operated under an oral assignment of the copyright that could be ratified ab initio by the execution of the agreement today. See Billy-Bob Teeth, 329 F.3d at 591. Of course, the whole question as to what entity owns the plans is irrelevant anyway because there is no dispute among the Timberpeg family of companies as to which companies own the copyright. Thus, when all is said and done, it is only VTW that lacks standing on this issue since, as the alleged infringer, VTW is not entitled to challenge copyright ownership when no dispute exists between the owner and the transferee. Id. at 592.

Accordingly, T-Peg and Timberpeg East are the proper party plaintiffs in this infringement action and VTW's motion for summary judgment should be denied.

**C. The End Result Is The Same Even If Downey Authored The Plans**

It bears noting that T-Peg and Timberpeg East would still be the proper plaintiffs in this action even if, as VTW argues, Downey authored the plans and not Cole. Under that scenario, copyright ownership in the plans would have vested automatically in Timberpeg Services under the work made for hire doctrine because Downey was working within the scope of his employment for Timberpeg Services when he converted Cole's floorplans using the CAD program. 17 U.S.C. § 201(b); see Cole Aff. ¶ 4. Pursuant to the agreement between TDSD and Timberpeg East (which Timberpeg Services assumed as the successor-in-interest to TDSD), copyright ownership then transferred in full to Timberpeg East. Second Neroni Aff at Ex. 1. In turn, Timberpeg East transferred an equal and undivided ownership share to T-Peg by operation of their preexisting agreement. See Neroni Aff. at Ex. 1. T-Peg and Timberpeg East, therefore, would ultimately own the copyright to the plans even if ownership initially vested in Timberpeg Services. In short, contrary to VTW's assertions, it simply does not matter whether Cole or Downey authored the plans because the end result is the same.

**CONCLUSION**

For the foregoing reasons, Timberpeg respectfully requests that this Honorable Court deny Defendants' Motion for Summary Judgment Based on the Plaintiffs' Lack of Standing.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
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Dated: July 30, 2007

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day, July 30, 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