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' SUPPLEMENTAL MEMO SUPPORTING THEIR
MOTION FOR SUMMARY JUDGMENT II (Document 44)
BASED ON NON-PROTECTIBLE DESIGN ELEMENTS

Defendants, Vermont Timber Works, Inc. ("VTW") and Doug Friant ("Friant"), respectfully submit this supplemental memo supporting their Second Motion For Summary Judgment (Document 44) ("MSJ II").

Background

By way of review, Heading I of defendants' 2004 MSJ II (Document 44, pp. 4-9) demonstrates that, as required by Feist Publications , Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1990), the following "constituent elements" of plaintiffs' alleged design are "unprotectible" as (1) lacking originality, (2) constituting "standard features," (3) functionally required, (4) used with permission, and/or (5) constituting mere "ideas" not "expression":

(1) Footprint/foundation – used with permission.

(2) Post locations in foundation – functionally required.

(3) Location of stairs – used with permission.

(4) Wall heights of 8 feet, 9 feet – standard features.

(5) Location of rooms – not determined by defendants.

(6) Post locations – functionally required.

(7) Increments of 4 feet, 6 feet – standard features.

The Architectural Works Protection Act still being relatively new, at the time of the 2005 original briefing there was very little law applying the Feist element-sorting process in architecture cases. With over three more years having passed, the law has become settled, and defendants wish to update their explication of the law here.

I. STATUTORY PROVISIONS GOVERNING "SUBJECT MATTER OF COPYRIGHT"[1]

Of course, the starting point for determining what is copyrightable is the Copyright Act itself, because without triggering language in the statute there is no copyright protection at all. The following language from Section 103 and 104, with inserted bracketed numbers indicating points addressed in this memorandum, is relevant:

> **§102. Subject Matter of Copyright: In General**
>
> (a) Copyright protection subsists, in accordance with this title, in [1] original works of authorship [2] fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
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> * * *
>
> (8) architectural works
>
> (b) [3] In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

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[1] Copyrightability is always for the judge as an issue of law. Nimmer, id. §12.10[b]. See also, T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F. 3d 97, 114 at n. 7 (1st Cir. 2006) ("the extent to which the copyrighted work contains protected expression is a matter of law, determined by the court"); Lexmark International, Inc. v. Static Control Components, Inc., 387 F. 3d 522, 534 (6th Cir. 2004) ("whether the portions of the work copied were entitled to copyright protection [is] a legal matter).

§103. Subject Matter of Copyright: Compilations and Derivative Works

> (a) The subject matter of copyright as specified by section 102 [4] includes compilations and derivative works, but [5] protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.
>
> (b) The [6] copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

Emphasis added.

II. SUPREME COURT: *FEIST* AND THE DETERMINATION OF "THE EXTENT OF COPYRIGHT PROTECTION: COPYING OF *CONSTITUENT ELEMENTS OF THE WORK THAT ARE ORIGINAL*"

The Supreme Court has explained Sections 102 and 103, and set out the appropriate standard for "the extent of copyright protection," in Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).

Feist concerned the "extent of copyright protection available to telephone directory white pages." 499 U.S. at 342. The plaintiff, Rural Telephone, was the state-approved, monopoly telephone service provider in the area, and published a traditional white pages telephone directory, with names arranged alphabetically and the associated telephone numbers. The defendant approached Rural and eleven other regional providers to obtain licenses to use the phone numbers so as to create a regional directory. The other eleven agreed, but Rural refused. Feist then used them without Rural's consent, claiming it was entitled to copyright protection

because it had expended funds and employee time in compiling the information, the so-called "sweat of the brow" doctrine.

The issue was whether the information copied – the names and associated numbers – was beyond the scope of copyright protection. 499 U.S. at 344.

The Supreme Court articulated the issue thus:

> At a minimum, Feist copied the names, towns, and telephone numbers of 1,309 of the Rural's subscribers. Not all copying, however, is copyright infringement. To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." . . .
>
> The question is whether Rural has proved the second element. In other words, did Feist, by taking 1,309 names, towns, and telephone numbers from Rural's white pages, copy anything that was "original" to Rural?

499 U.S. at 361 (emphasis added).

It is particularly noteworthy under the Feist test that two separate issues must be addressed:

(1) whether the work has *some* original material sufficiently creative to be copyrighted, and

(2) whether *the elements allegedly copied* were original and sufficiently creative to be copyrighted.

The Supreme Court disposed of the case on the first of these issues alone. Rural argued that its work was sufficiently creative because it had "selected and arranged" the facts contained in its directory. The Supreme Court rejected mere "selection" and "arrangement" as constitutionally[2] insufficient:

> The question that remains is whether Rural selected, coordinated, or arranged these uncopyrightable facts in an original way. . . . [T]he

[2] Congress' copyright authority derives from Article I, Section 8, Clause 8 of the Constitution, which authorizes Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

> selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. . . .
>
> The selection, coordination, and arrangement of Rural's white pages do not satisfy the minimum constitutional standards for copyright protection. . . . Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory.
>
> Rural's selection of listings could not be more obvious: it publishes the most basic information – name, town, and telephone number – about each person who applies to it for telephone service. This is "selection" of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original.
>
> Nor can Rural claim originality in its coordination and arrangement of facts. . . . [T]here is nothing remotely creative about arranging names alphabetically in a white pages directory.
>
> * * *
>
> Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort.

499 U.S. at 362-64 (emphasis added).

III. VARIOUS GROUNDS OF NON-PROTECTIBIILTY

There are numerous well-established grounds on which individual components are not protectible.

Based on the 1976 Copyright Act[3] and Feist, (a) the lack of creativity/originality is one ground.

[3] Consistent with Article I, Section 8, Clause 8 of the Constitution, Section 102(a) of the Copyright Act accords copyright protection to "original works of authorship fixed in any tangible medium of expression . . . ."

In addition, individual components are not protectible to the extent they constitute (b) merely an "idea not expression thereof," "procedure," "concept," etc.;[4] (c) statements of facts;[5] (d) in "architectural works" cases, individual standard features;[6] (e) elements which are "functionally required;"[7] (f) elements used with permission;[8] (g) elements dictated by efficiency, necessity, or external factors,[9] or (i) "*scenes a faire*."[10]

In addition, in this case (g) certain elements are not protectible because plaintiffs have waived protection through their legal admissions in the case.[11]

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[4] Section 102(b) provides that "in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described . . . ." See also, Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 349-50 (1991) (copyright protection not available for an "idea"). The D. C. Circuit has held that "domes, wind-towers, parapets, and arches represent ideas, not expression." Sturdza v. United Arab Emirates, 281 F. 3d 1287, 1289 (D.C. Cir. 2002).

[5] See generally, Nimmer §13.03[B][2][b] ("because no copyright may exist in facts *per se*, the copyright in a book dealing with factual matters cannot be infringed by a work that copies such facts but in a manner in which the particular verbal description of such facts is not copied").

[6] The definition of "architectural works" in Section 101 states that the work "does not include individual standard features."

[7] Nimmer points out, Section 2.20[A] at p. 2-217, that "according to the legislative history, [the architectural works category] still adverts to functionality by according protection only when 'the design elements are not functionally required.'"

[8] See generally, Nimmer §13.03[B][2][c] ("even if similarity be conceded, there can be no liability to the extent that such elements are immunized by an appropriate license agreement").

[9] Kohus v. Mariol, 328 F. 3d 848, 856 (6th Cir. 2003); Matthew Bender & Co. v. West Publishing Co., 158 F. 3d 674, 682 (2d Cir. 1998).

[10] *Scenes a faire* are "thematic concepts or schemes that are not original to the author," Reyher v. Children's Television Workshop, 533 F. 2d 87, 91 (2d Cir. 1976), or elements "which are as a practical matter indispensable, or at least standard, in the treatment of a given topic." Sturdza v. United Arab Emirates, 281 F. 3d 1287, 1289 (D.C. Cir. 2002).

[11] As listed in the MSJ II (Document 44), pp. 7 ff, plaintiffs have conceded that it sent Isbitski the foundation plan and "authorized him . . . to put in the foundation" (at 7); that placement of the posts over the foundation or girders is "functionally required" (at 8); that the wall heights of 8 feet and 9 feet are "standard" features (at 8); that defendants' frame did not have any walls or partitions (at 9); and that the use of standard four feet and six feet increments is "standard" (at 9).

IV. THE PROCESS OF DISCERNING THE "PROTECTIBLE ELEMENTS"

The formulation under which the work's components are sorted, and the non-protectible components discarded, is expressed slightly differently in the Second, Ninth and Tenth Circuits from the First and other circuits, but in all circuits a process is required which removes from consideration the non-protectible elements and then considers only the protectible ones in the "substantially similar" analysis.

A. The "Abstraction-Filtration-Comparison" Test (2d, 9th, and 10th Circuits)

The test articulated most often, although initially used to address the unique issues in computer software programs, is the "abstraction-filtration-comparison" test. It was used most prominently by the Second Circuit in Computer Associates International, Inc. v. Altai, Inc., 982 F. 2d 693 (2d Cir. 1992). As summarized by Professor Nimmer:

> In [Altai] the Second Circuit adopted essentially the successive filtration approach proposed herein [in Nimmer]. More specifically, Altai divides the process into three steps: abstraction of the plaintiff's program, filtration out of nonprotectible elements found therein, and comparison between the remaining "golden nugget" and defendant's work. Other courts have subsequently followed Altai's lead, so that this filtration test may now be regarded as the dominant, albeit not universal, standard.
>
> * * *
>
> Although the discussion in this subsection illustrates application of the filtration test solely in the context of computer software, there is no reason to limit it to that realm.

Nimmer §13.03[F] at 13-119 (emphasis added).

The Abstraction-Filtration-Comparison test has been adopted in the Ninth and Tenth and D.C. Circuits. See, e.g., Sturdza v. United Arab Emirates, 281 F. 3d 1287, 1297 (2002) ("filtering out [elements] viewed as unprotectible ideas"); Country Kids 'N City Slicks, Inc., 77 F. 3d 1280, 1285-87 (10th Cir. 1996) ("abstraction-filtration-comparison"); Autoskill, Inc. v. Nat'l

Educ. Support Sys., Inc., 994 F. 2d 1476, 1490-98 (10th Cir.), cert. denied, 114 S. Ct. 307 (1993); Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F. 3d 823, 834-42 (10th Cir. 1993; Computer Associates International, Inc. v. Altai, Inc., 982 F. 2d 693, 707 (2d Cir. 1992) ("Professor Nimmer suggests, and we endorse, a 'successive filtering method' for separating protectible expression from non-protectible material").

B. First Circuit: "Dissection" Or "Separation" Test

The First Circuit has recently embraced the abstraction-filtration concept, Johnson v. Gordon, 409 F. 3d 12, 17 (1st Cir. 2005) but with a slightly different formulation, using the terms "dissection" and "separation" rather than "filtration." Thus, it states that a lower court "must engage in dissection of the copyrighted work by separating its original, protected, expressive elements from those aspects that are not copyrightable." 409 F. 3d at 17.[12] That is the applicable formulation here.

C. Nimmer

The leading copyright treatise – while addressing the slightly varying formulations in the circuits – gives the following summary of the process of segregating the "protectible elements":

> [E]ven if the two works in suit are similar, the court may still determine as a matter of law whether the similarity relates to copyrightable matter. Summary judgment for defendant is proper if the similarity relates to noncopyrightable material. Nimmer.

[12] In a memorandum (Document 124 at 11) supporting their own summary judgment motion, plaintiffs claim that "courts have consistently rejected [the filtering out approach]," citing, remarkably, Sturdza, which could not be more contrary to the proposition attributed to it:

> The district court next "filtered out" those elements of Sturdza'a design it viewed as unprotectible ideas: "domes, wind-towers, parapets, arches, and Islamic patterns." According to the district court, Sturdza's expression of these elements, but not her use of them, is protectible. We agree with this aspect of the district court's decision. In and of themselves, domes, wind-towers, parapets, and arches represent ideas, not expression. Indeed, to hold otherwise would render basic architectural elements unavailable to architects generally, thus running afoul of the very purpose of the idea/expression distinction.

281 F. 3d at 1297, citing Feist and citations omitted.

* * *

> When similar works resemble each other only in those unprotected aspects, then defendant prevails.

Nimmer On Copyright §12.10[b][3] at 12-186 and §13.03[B][2][a] at 13-59.

VI. SEPARATION OF "PROTECTIBLE ELEMENTS" IN RECENT ARCHITECTURAL WORKS CASES

Two recent decisions illustrate the application of the dissection process in cases involving architectural works.

A. Trek Leasing

Trek Leasing, Inc. v. The United States, 66 Fed. Cl. 8 (Fed. Court of Claims 2005), had a fact pattern with many parallels to the instant case. The plaintiff registered an "architectural work" copyright for a U.S. Post Office building in Fort Defiance Arizona, and claimed that the U.S. Postal Service infringed that copyright in building a second Post Office building in Kayenta, Arizona. The buildings necessarily had many similarities because the first post office was "designed to reflect the BIA [Bureau of Indian Affairs] Pueblo Revival style of architecture and on the fact that Plaintiff's work was constrained by external factors, such as cost restrictions, and dimensions, placement of windows and doors, etc. that were specified by the USPS standard drawings." 66 Fed. Cl. at 10.

The court noted its task in separating the protectible from the non-protectible, stating that "[o]nce the protectible aspects of the plaintiff's work are identified, they may be compared with the allegedly infringing work to determine copyright liability." 66 Fed. Cl. at 12.

The court then embarked on the "Separation of the Unprotectible Aspects" process, 66 Fed. Cl. at 12-17, whereby it eliminated elements based on elements mandated by the BIA Pueblo Revival style, the idea/expression dichotomy, and *scenes a faire*. It found the following elements unprotectible:

- Certain use of stone because it was "dictated by the architectural style." At 20

- Use of canales as they were "hallmarks of the BIA Pueblo Revival style." At 21

- Use of muntins, and placement of doors and windows as "required by the USPS plans." At 21.

- Parapets, capstones, and stepped back roof because these were "elements of the BIA Pueblo Revival style." At. 21.

- CMU (concrete masonry unit) walls as those were "required due to economic considerations." At 21.

The Court then found lack of substantial similarity as to the remaining, protectible elements, and granted summary judgment, summarizing as follows:

> Almost all of the similarities between the two buildings can be attributed to two sources: (1) the USPS drawings, and (2) the BIA Pueblo Revival Style. Since precedent prevents the Court from consideration of uncopyrightable portions of the copyrighted work, and there are few similarities after those portions are filtered, there is little original work that Defendant could have copied.

66 Fed. Cl. at 23.

Here, as in Trek Leasing, the court must "separate out" out the non-protectible elements. In Trek Leasing the process began with the (non-protectible) USPS design parameters and BIA Pueblo Revival style. In this case it begins with the footprint, which was sold to the owner as contained in the foundation plan plaintiffs "authorized" him to use. All other "similar" features between plaintiffs' design and defendants' frame are the required result of the footprint, standard features, or functionally required, or ideas not expression.

B. Tiseo Architects

Tiseo Architects, Inc. v. B & B Pools Service, 495 F. 3d 344 (6th Cir. 2007), involved a commercial business where the customer first came to the plaintiff architect with a "rough, crude sketch illustrating what [it] wanted the new offices to look like" along with "various

requirements . . . based upon zoning requirements and the [customer's] preferences." The plaintiff architect drew its plans based on these parameters. The customer next took its sketches to the defendant architect, which predictably created a work with many similarities to the plaintiff's. The court found that "both drawings were based on [the customer's] original sketches, that both incorporated [his] suggestions for various features of the floor plan, and that the options for how to design the addition were extremely limited by zoning requirements and the presence of a load-bearing wall that the plans had to accommodate.

Since "access" was not contested, the issue was "substantial similarity." In affirming the ruling for the defendant, the Sixth Circuit emphasized the filtering process necessary to arrive at the "protectible elements":

> Because the district court properly analyzed the similarity of the works <u>after filtering out the unprotectible elements</u> of Tiseo Architects' drawings, the judgment of the district court is affirmed.
>
> * * *
>
> [T]he substantial similarity analysis of a copyright infringement claim is divided into two steps: the <u>first step requires identifying which aspects of the artist's work, if any, are protectible</u> by copyright; the second involves determining whether the allegedly infringing work is "substantially similar" to protectible elements of the artist's work. <u>The essence of the first step is to filter out the unoriginal, unprotectible elements – elements that were not independently created by the inventor, and that possess no minimal degree of creativity – through a variety of analyses</u>.

495 F. 3d 344 at 346, 348 (emphasis added and citations omitted).

The trial court had properly "filtered out many elements of [plaintiff's work]" because they were based on the customer's sketch, possessed no degree of creativity because they were dictated by zoning regulations or the realities of the existing physical structure. What similarities remained were too minor to constitute "substantial similarity."

Here, as in Tiseo Architects, the plaintiffs and defendants' footprints were similar because they were both dictated by the same customer, himself a builder, who determined all his own dimensions precisely, started with his own sketches, and independently gave his dimensions to both parties. Everything else was dictated by the non-protectible floor plan or the New England saltbox style, or were standard features.

CONCLUSION

As in Trek Leasing and Tiseo Architects, and as mandated by the First Circuit in Johnson, the Court here must "dissect" or "separate" (not "filter," although defendants submit there is no practical difference in the context of this case) the design elements to eliminate the non-protectible and arrive at the protectible. Once it does, the remaining similarities will be zero, or insubstantial, and will not rise anywhere near the level of "substantial similarity."

Summary judgment should be issued for defendants.

Date: March 7, 2008

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

/s/ W. E. Whittington
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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2008, 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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