

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

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

**OBJECTION TO DEFENDANTS’ MOTION FOR RECONSIDERATION
OF PORTION OF MARCH 28, 2008 ORDER**

NOW COME Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (collectively, “Timberpeg”), and respectfully object to Defendants’ Motion for Reconsideration of Portion of March 28, 2008 Order and state as follows:

INTRODUCTION

Defendants Vermont Timber Works, Inc. and Douglas Friant (collectively, “VTW”) argue that individual features of Timberpeg’s copyrighted architectural work are unoriginal and not protected by copyright. When these features are “separated” or “filtered out” from the work, VTW reasons, nothing remains of Timberpeg’s copyright to be infringed. VTW moved for summary judgment on this theory in November 2004 and it renewed the motion after the decision from the Circuit Court of Appeals for the First Circuit issued. By Order dated March 28, 2008, this Court denied VTW’s motion and held that it was foreclosed by the First Circuit’s decision. VTW now moves for reconsideration of the Court’s March 28 Order. VTW contends that its “separation/filtration” argument is different than the First Circuit’s substantial similarity

analysis and, therefore, the motion raises an independent and viable basis upon which to dismiss Timberpeg's infringement claim.

Timberpeg objects. The Court correctly denied VTW's motion for summary judgment (Document 44) because VTW's "separation/filtration" argument is contrary to the definition of architectural works under the Copyright Act and decisional law interpreting the Architectural Works Protection Act ("AWCPA"). It also fails to overcome the factual question of substantial similarity identified by the First Circuit. VTW's motion for reconsideration should be denied.

ARGUMENT

A. VTW's "Separation/Filtration" Argument Is Foreclosed By The First Circuit's Decision

The Court correctly ruled that the First Circuit's decision forecloses VTW's "separation/filtration" argument. The Copyright Act defines an architectural work as "the design of a building" and includes "the overall form as well as the arrangement and composition of spaces and elements in the design . . ." 17 U.S.C. § 102(a)(8). This means the combination of standard or unoriginal design elements are protected by copyright *even when those elements, standing alone, are not*. See T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 110 (1st Cir. 2006) (quoting legislative history of AWCPA: "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"). This also means the separability test applicable to pictorial, graphic, and sculptural works, i.e., the separation of a work's utilitarian and non-original features from copyright protection, does not apply to architectural works. Id.

In applying the AWCPA to this case, the First Circuit evaluated the overall form of Timberpeg's work and found that the following similarities in VTW's shop drawings and frame raised a question of substantial similarity:

1. VTW's shop drawings and the frame as constructed had a backwards-L-shaped footprint with exactly the same dimensions as the timberframed portion of the main house in Timberpeg's plans.
2. VTW's shop drawings and the constructed frame had a kitchen "bump-out" along the western wall, although the VTW bump-out was about two feet wider than the one in Timberpeg's plans.
3. VTW's shop drawings showed a central switchback staircase in precisely the same location as the staircase in Timberpeg's plans, and the constructed frame included the posts used to define the stair bay.
4. VTW's frame showed a lofted second floor in the same location and with the same dimensions as in Timberpeg's plans.
5. VTW's frame had the same roof pitch and dimensions as in Timberpeg's plans.
6. The plate (wall) height was the same in both Timberpeg's plans and VTW's shop drawings.
7. VTW's shop drawings appeared to contemplate a further wing attached to the eastern wall of the timberframe; the shop drawings showed the location of exterior wall panels (which VTW would not erect but were nonetheless reflected in the drawings), and there were no such panels along the eastern side. The Timberpeg plans showed a separate stick-built wing attached to the eastern side of the timberframed portion of the home.

T-Peg, Inc., 459 F.3d at 113. The First Circuit raised the question of substantial similarity not because these individual design elements are necessarily original to Timberpeg, but rather because Timberpeg's arrangement and composition of the elements in combination comprises an architectural work that is protected by copyright. Id. at 114.

By its motion, VTW again sets forth its "separation/filtration" argument and proposes that the very elements the First Circuit found gave rise to a question of substantial similarity in combination (e.g., footprint dimensions, wall height, stair and post locations) are not subject to

copyright protection standing alone and cannot form the basis for Timberpeg's copyright claim. While VTW contends its argument is different than the separation test applied to pictorial, graphic, and sculptural works, the end result is the same. Both the separation test and VTW's "separation/filtration" argument propose the removal of non-protectible elements from a work before copyright protection is evaluated and the alleged infringing work is examined for substantial similarity. The two approaches are functionally equivalent and both run counter to the protection of overall form and arrangement and composition of spaces and elements – even standard elements – afforded to architectural works. 17 U.S.C. § 102(a)(8). VTW's argument is also wholly against decisional law interpreting the AWCOPA – decisional law VTW refuses to address or even acknowledge as governing the inquiry. See Sturdza v. United Arab Emirates, 281 F.3d 1287 (D.C. Cir. 2002); Arthur Rutenberg Homes v. Maloney, 891 F.Supp. 1560 (M.D. Fla. 1995).

By rejecting the separation test, the First Circuit necessarily rejected VTW's "separation/filtration" argument. T-Peg, Inc., 459 F.3d at 110 ("There is no separation test for an architectural work"). The Court should deny VTW's motion for reconsideration because it correctly ruled that the "separation/filtration" argument set forth in VTW's motion for summary judgment (Document 41) is foreclosed by the First Circuit's decision.

B. VTW's Argument Fails On The Facts

The factual predicate of VTW's "separation/filtration" argument is also flawed. VTW trumpets as "undisputed fact" its conclusion that Timberpeg waived copyright protection for the dimensions of its architectural work and for the placement of the stairway and frame posts because it furnished Stanley Isbitski with a foundation plan. VTW overlooks significant facts in making this assertion. First, the deposit agreement signed by Isbitski governed his use of any

Timberpeg plans, including foundation plans. Deposit Agreement, attached as Exhibit 7 to VTW's Summary Judgment Appendix filed with Document 23. The deposit agreement also expressly reserved all of Timberpeg's copyrights in the work it produced to Isbitski:

[Timberpeg] owns and will continue to own the copyright in the Plans. The Plans may be used by Customer solely in connection with the evaluation and construction of one (1) Package purchased from [Timberpeg]. Any other use of the Plans, including, but not limited to, the following, is an unauthorized appropriation of copyright by Customer and a breach of this agreement: a) the copying of all or any part of the Plans; b) the utilization or partial utilization of the Plans for the construction of a similar building or structure; or c) any transfer or devliery of the Plans to another person without written authorization from [Timberpeg].

Id. Second, Timberpeg furnished the foundation plans at a time when Timberpeg believed Isbitski intended on purchasing a Timberpeg package. Deposition of Lynn Cole at 55, attached as Exhibit 14 to VTW's Summary Judgment Appendix filed with Document 23.¹ Nothing about the deposit agreement or Timberpeg's decision to furnish the foundation plans to Isbitski suggests any waiver of Timberpeg's copyrights. While Isbitski may well have poured a foundation using Timberpeg's foundation plans, that was the most he was permitted to do. Timberpeg never authorized Isbitski to build a structure on the foundation that copied any aspect of its architectural work nor can such authority be implied from the foundation plans. To find otherwise would be inconsistent with the evidence in the record, not to mention the heightened showing necessary to establish waiver as a matter of law. See K.J. Quinn & Co., Inc. v. Continental Casualty, 806 F. Supp. 1037, 1045 (D.N.H. 1992) (to establish defense of waiver under New Hampshire law, the record must demonstrate an intentional relinquishment of a known right).

¹ Q: So it was all right with you based on this fax that [Isbitski] could have the foundation and the footprint, right?

A: At this point, Stan was telling me he was building a Timberpeg home, that was my assumption, he was building a Timberpeg home. We were going to supply the plans and supply a Timberpeg package and he was, wanted to put a foundation in for that home at that point . . .

VTW overreaches in its characterizations of the foundation plans as evidencing a waiver of Timberpeg's copyrights, particularly when viewed in a light most favorable to Timberpeg. Accordingly, not only is VTW's "separation/filtration" argument foreclosed by the First Circuit's decision, but the purported "facts" underlying the argument cannot reasonably be adopted as undisputed.

CONCLUSION

For the foregoing reasons, Timberpeg respectfully requests that this Honorable Court deny VTW's Motion for Reconsideration of Portion of March 28, 2008 Order.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
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Dated: April 21, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this day, April 21, 2008, 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