

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

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’ STANDING BRIEF

NOW COME Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (collectively, “Timberpeg” or “Plaintiffs”) and respectfully submit the following Reply to Defendants’ Standing Brief.

PRELIMINARY STATEMENT

By its Order of March 28, 2008, the Court directed the parties to brief Plaintiffs’ standing to sue Defendants (collectively, “VTW”) for copyright infringement and to answer specific questions concerning Plaintiffs’ conveyance of copyright ownership by contract. Plaintiffs submitted a factual record and legal analysis demonstrating that T-Peg, Inc. (“T-Peg”) and Timberpeg East, Inc. (“Timberpeg East”) jointly own the copyright at issue by virtue of a valid and unambiguous contract, thereby vesting both with standing to sue VTW for infringement. Plaintiffs also presented decisional law establishing that technical errors in a copyright registration are not fatal to a copyright’s validity or to an action for infringement of that copyright.

For its part, VTW submitted a memorandum that largely ignored the issues to be briefed and instead called for reconsideration of the Court’s March 28 Order and dismissal of this

infringement action because Plaintiffs allegedly “admitted” facts in discovery and withheld documents from disclosure. VTW’s arguments lack merit and Plaintiffs submit the following reply to correct a record VTW knowingly distorts.

ARGUMENT

A. The Discovery Record

VTW argues that Plaintiffs are foreclosed from claiming copyright ownership because they “admitted” in discovery that Joe Downey authored the April 2001 architectural work and because they failed to produce the contract documents conveying copyright ownership to T-Peg and Timberpeg East until after discovery closed. Both assertions are false.

The parties do not dispute that Lynn Cole, an employee of Timberpeg East, drafted hand sketches of Isbitski’s home, which Isbitski approved and which Downey then converted into scaled, computer-generated plans. See Affidavit of Lynn Cole attached as Exhibit C to Docket Entry 135. It is Cole’s original design that is reflected in the plans Downey prepared and it is therefore Cole who “authored” the April 2001 architectural work.¹ As Cole was employed by Timberpeg East when he drafted the design for Isbitski, the architectural work was “made for hire” and owned by Timberpeg East. Id. The copyright was then conveyed jointly to T-Peg and Timberpeg East by contract. See Exhibit 1 to Affidavit of Richard Neroni, attached as Exhibit B to Docket Entry 135.

Plaintiffs admitted nothing in discovery to contradict these facts. VTW’s interrogatory 10 sought information about “design time” spent on the Isbitski project, which Plaintiffs answered with the information available. The answer did not include design time for Lynn Cole

¹ As an aside, VTW’s insistence that Cole’s sketches should not be considered by the Court because they are not the copyrighted work at issue is a non-sequiter. See VTW Brief at 6-8. Plaintiffs submitted Cole’s sketches to the Court to demonstrate that it was Cole’s original design that is reflected in the scaled, computer-generated plans Downey prepared. VTW fails to explain why Cole’s sketches are not relevant for this purpose.

because Timberpeg East employees did not track such information, which Plaintiffs' answer explained. More importantly, VTW's interrogatory 10 did not ask Plaintiffs about authorship of the architectural work – a far different question and one that would have prompted a different answer. Likewise, Jonathan Vincent's deposition testimony that "Downey drafted the plans here" acknowledges Downey's role in preparing the scaled, computer-generated plans. Vincent did not address authorship at his deposition because VTW did not ask him about authorship. In its arguments based on interrogatory 10 and Vincent's testimony, VTW seeks to defeat Plaintiffs' claim on the basis of discovery VTW never conducted. Had VTW actually asked the questions relevant to standing, this supplemental briefing would have been unnecessary.

Moreover, the contract documents between T-Peg, Timberpeg East and Timberpeg Services, Inc., that conveyed copyright ownership to Plaintiffs were all timely disclosed to VTW. This is evidenced by the Bates stamps appearing in the lower right hand corner of each contract, which Plaintiffs included on all documents produced to VTW. See e.g., Exhibits A and B to Docket Entry 135. VTW's suggestion that Plaintiffs produced the contracts only after the close of discovery is simply wrong.

Cole's authorship of the architectural work is undisputed and Plaintiffs did not contradict this fact in discovery. VTW's claims to the contrary are untrue and its protests of "gross" unfairness and due process violation in allowing Plaintiffs to demonstrate authorship ring hollow.

B. Downey's Authorship Would Change Nothing

Neither Plaintiffs' ownership of the copyright nor standing to sue VTW would change even had Downey "authored" the April 2001 architectural work. Downey was employed by Timberpeg Services, Inc. ("Timberpeg Services") and all copyrighted work he created belonged

to the company as a work made for hire. Timberpeg Services was party to a contract whereby it conveyed all copyright ownership to Timberpeg East. Exhibit B to Docket Entry 135. In turn, Timberpeg East conveyed joint ownership in its copyright to T-Peg by virtue of Plaintiffs' contract. Exhibit A to Docket Entry 135. Thus, even if Downey authored the April 2001 architectural work, the copyright was still conveyed to Plaintiffs by operation of the chain of contracts between Timberpeg Design, Timberpeg East, and T-Peg.

VTW asserts two challenges to this alternative theory of copyright ownership. VTW first argues that the writing requirement to convey copyright ownership is not satisfied as between Timberpeg Services and Timberpeg East because the contract upon which Plaintiffs rely is actually between Timberpeg Design Services Division and Timberpeg East. VTW Brief at 9. As Plaintiffs have already explained (and as the Court understood in its March 28 Order), Timberpeg Design Services Division incorporated in 2000 to become Timberpeg Services. Exhibit B to Docket Entry 135. Timberpeg Services assumed all rights, duties and obligations of Timberpeg Design Services Division upon its incorporation. *Id.* The mere fact that Timberpeg Design Services Division incorporated to become Timberpeg Services does not defeat the validity of the contract it entered with Timberpeg East. VTW fails to produce any legal authority to the contrary. More importantly, VTW does not have standing to challenge the validity of the contract in the first instance. *Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 592 (7th Cir. 2003) (where no dispute as to ownership exists between copyright owner and transferee, "it would be unusual and unwarranted to permit a third-party infringer to invoke Section 204(a) to avoid suit for copyright infringement").

VTW next asserts that the contract between Timberpeg Services and Timberpeg East was ineffective to convey copyright ownership because it did not concern the work Downey

performed on the Isbitski project. VTW Brief at 10. The plain language of the contract belies VTW's tortured interpretation. Timberpeg Services agreed to provide "product design services" for "work being done or planned by [Timberpeg East] in the field of designing." Exhibit B to Docket Entry 135. Downey's role on the Isbitski project was to prepare a set of preliminary plans based on sketches created by Cole, a Timberpeg East employee. It was this set of preliminary plans that Plaintiffs registered with the Copyright Office. The contract between Timberpeg Services and Timberpeg East governed the work performed by Downey and the copyright that arose as a result.

C. VTW Does Not Address The Central Issues

VTW's standing brief is most remarkable for what it does not say. VTW provides no analysis for the language appearing in paragraph 1 of the contract between T-Peg and Timberpeg East, as the Court instructed. Order of 3/28/2008 at 3, 12. While VTW continues to describe T-Peg as a "non-exclusive" licensee, it provides no explanation for this position in the face of the stark language in paragraph 1 to the contrary.² VTW does not dispute that a copyright may be jointly owned and that the owners share equal rights to use and register the copyright. It does not deny that an exclusive licensee has standing to register a copyright and to sue for copyright infringement. Finally, it provides no analysis or decisional law to contradict the settled principle that technical errors in a copyright registration are not fatal to an infringement action and may be cured through a supplemental registration. VTW, in other words, is silent when it comes to the fundamental principles of copyright law that support Plaintiffs' ownership of the April 2001 architectural work and standing to bring this infringement action.

² VTW's "non-exclusive" licensee argument appears based on language in paragraph 2 of the contract between T-Peg and Timberpeg East. Court's Order of 3/28/08 at 3. Paragraph 2 concerns a separate transfer of non-exclusive rights from T-Peg to Timberpeg East. Paragraph 2 was not the subject of the Court's March 28 Order and it is not germane to the issues at hand.

CONCLUSION

For the foregoing reasons, and for all the reasons set forth in their standing brief, Plaintiffs respectfully request the Court enter an order finding Plaintiffs own the copyright to the April 2001 architectural work at issue and have standing to prosecute this infringement action.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: June 16, 2008

/s/ Jonathan M. Shirley
Daniel E. Will (Bar No. 12176)
Jonathan M. Shirley (Bar No. 16494)
111 Amherst Street
Manchester, NH 03105-0719
(603) 669-1000

Of Counsel:

Stephen S. Woods, Esquire (#8240)
General Counsel for Plaintiffs
Timberpeg East, Inc.
c/o 68 Lyme Road
Hanover, NH 03755
(603) 643-6200

CERTIFICATE OF SERVICE

I hereby certify that on this day, June 16, 2008, a copy of the foregoing Reply to Defendants' Standing Brief 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