

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' MOTION FOR CERTIFICATION
OF INTERLOCUTORY APPEAL
UNDER 28 U.S.C. SECTION 1292(b)

Defendants respectfully move that the Court enter an order certifying under 28 U.S.C. Section 1292(b) that the Court's Order in Document 163 (that the abstraction/filtration test does not apply in cases under the AWCPA) "involves a controlling question of law as to which there is substantial ground for difference of opinion" and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

In support of this motion, defendants state as follows:

This Court clearly accepts the separation or filtration principle as a general proposition (Document 163 at 4):

Under traditional copyright principles, a court separates a copyrighted work's original, protected expressive elements from those aspects that are not copyrightable because they represent unprotected ideas or unoriginal expressions. . . . The rationale behind this procedure is that "[w]hile a finding of substantial similarity vel non derives from an examination of the juxtaposed works as a whole, that examination must focus on 'what aspects of the plaintiff's work are protectible under copyright laws and whether whatever copying took place appropriated those [protected] elements.'"

Citing Johnson v. Gordon, 409 F. 3d 12, 19 (1st Cir. 2005) and Matthews v. Freedman, 157 F. 3d 25, 27 (1st Cir. 1998).

The principle derives from the oft-quoted Supreme Court mandate in Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 361 (1990), where it held:

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*.

Emphasis added.

This Court declines to apply the traditional analysis in this case, however, because it treats “architectural work” cases as different. Document 163 at 7. Defendants understand that the Court bases this distinction on two sentences in the First Circuit’s holding in the prior appeal of this case, T-Peg, Inc. v. Vt. Timber Works, Inc., 459 F. 3d 97 (1st Cir. 2006):

- First, that “while individual standard features may not be individually copyrightable . . . the combination of such features may be copyrightable.” Document 163 at 3, quoting T-Peg, Inc.
- Second, that the AWCPA “established, for architectural works, ‘a standard of copyrightability more generous than that accorded pictorial, graphic or sculptural works.’” Document 163 at 5, quoting T-Peg, Inc.

Defendants respectfully disagree with the Court’s interpretation, believing that the first quoted situation refers to a situation where a work incorporates standard features *arranged in an expressive way* but not just the *use* of standard features (e.g., the use of four vertical standard 4 x 6 windows arranged abutting each other so as to draw a picture of an extended horizontal viewing section, but not just the use of a 4 x 6 window.)

Significantly in this case, *none* of the elements defendants sought to have filtered out as “unprotectible” was even based on the “combination of features” or “more generous than other categories” reasons which the Court finds to be architectural-work-specific reasons.¹ To illustrate, defendants believe that, at least, an element “used with permission” ought to be filtered out as unprotectible, regardless of whether the work at issue is a pictorial/graphic/sculptural work or an architectural work.

Moreover, litigation of architectural work infringement is a very recent phenomenon, and there is very little precedent addressing the Feist formulation. Thus there is “substantial ground for difference of opinion,” as the Feist language is strong, and neither the AWCPA nor the First Circuit’s opinion in T-Peg, Inc. addresses at all how Feist’s “protectible element” concept is to be applied in cases under the AWCPA. At least two cases – albeit rejected or distinguished by this Court – suggest that filtering may still be appropriate under the AWCPA. Thus certification of the issue as having “substantial ground for difference of opinion” is appropriate, defendants believe.

¹ As set forth in their prior memo (Document 148 at 1-2), defendants sought a ruling that the following “constituent elements” of plaintiffs’ alleged design are unprotectible under Feist as (1) non-original, (2) standard features, (3) functionally required, (4) used with permission, and/or (5) 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.

In addition, there can hardly be doubt that an immediate appeal of this issue would “materially advance the ultimate termination of the litigation.” Without clarification it is impossible to craft appropriate jury instructions, or for the parties to evaluate how to try the case, as to the seven categories of “elements” which defendants seek to have removed from the case as “unprotectible.”² By way of example:

- Where plaintiffs’ customer Isbitsky paid for the foundation plan and received written permission from plaintiffs to use it, will the Court instruct the jury that defendants are liable if they followed the footprint in that plan?
- Will the jury be instructed that defendants are liable for using standard wall heights of 8 feet and 9 feet?

It seems that, without clarification of whether and to what extent the filtering or protectible-elements concepts apply in an AWCPA case, the case is destined for a second appeal and retrial no matter what instructions are given.

For the above reasons, defendants respectfully request that the Court enter an order certifying under 28 U.S.C. Section 1292(b) that the Court’s Order in Document 163 (relating to whether the traditional abstraction/filtration/separation/dissection test applies in cases involving architectural works) involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

LR 7.1 Certifications

Per Local Rule 7.1 counsel certifies that he sought assent from opposing counsel (by e-mail on April 26, 2009) and that he has not obtained such assent.

² These are listed at fn 1 above.

Per Local Rule 7.1 counsel states that no separate memorandum in support is being submitted as the motion is straightforward and does not require complex briefing.

Date: April 27, 2009

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

/s/ W. E. Whittington
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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2009, 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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