

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’ FINAL PRETRIAL STATEMENT

Defendants, Vermont Timber Works, Inc. (“VTW”) and Douglas Friant (“Friant”), submit the following Final Pretrial Statement in accordance with LR 16.2 and this Court’s scheduling order:

1. Brief Statement of the Case. Plaintiffs are T-Peg, Inc. and Timberpeg East, Inc. (collectively “Timberpeg”)¹. Defendants are Vermont Timber Works, Inc. (“VTW”) and its principal, Douglas Friant (“Friant”).

Timberpeg and VTW are both in the timber frame business. Both parties design timber frames, cut the timbers for them, and sell those materials. VTW additionally erects the frames, whereas Timberpeg does not erect its frames and requires customers to erect the frames through separate builders.

The parties here had a common customer, Stanley Isbitski, a named defendant whom plaintiffs never served with process and whom they dismissed from the case on June 1, 2004.

¹ For many purposes, including standing, copyright registration and ownership and damages, the distinction between the two plaintiffs is significant, and defendants’ use of the collective term “Timberpeg” simply repeats plaintiffs’ own ambiguous usage, and is not a waiver of defendants’ position that either or both plaintiffs must separately establish all elements of their claims to prevail. Defendants do not know which of plaintiffs is intended by plaintiffs’ term “Timberpeg.”

Isbitski, a general building contractor, approached Timberpeg in April 1998, and, after becoming dissatisfied with Timberpeg's design and product, he approached VTW in December 2000.

Each company independently developed plans for him.

Timberpeg

In December 1999 Timberpeg developed "preliminary floor plans" for an entire house, consisting of seven drawings [TIM 396-403], much of which was to be traditionally framed ("stick built"). These plans were not registered with the Copyright Office and are not at issue here.

In August 2001 Timberpeg "created" a timber frame design, which according to its own agents it "emulated" (i.e., copied) from a photo in a much earlier *Hearthstone Homes* catalog. It did not register this design.

In September 2001 Timberpeg developed a second set of plans, consisting of 10 drawings [TIM 421-430]. These plans were also not registered with the Copyright Office and are not at issue here.

At that time Isbitski told Timberpeg he was leaving Timberpeg and was going forward on his own. He requested the (unregistered) "Foundation Plan" which Timberpeg had created for him [TIM 428]. Against payment of \$1,003.05, Timberpeg provided Isbitski the single page "Foundation Plan" [TIM 428] – which provided a complete footprint, post locations, and

stairway location – and expressly authorized him to use it.²

In April 2002 Timberpeg developed a third set of plans, consisting of five drawings [TIM 454-458], not including a timber frame drawing. These are the only registered plans and the ones at issue in the case.

Vermont Timber Works

In December 2000, Isbitski brought the Timberpeg (unregistered) 1999 plans to VTW to show VTW what he did not like about the Timberpeg plans. VTW asserts that it did not even look at these plans, but Timberpeg attempts to use the encounter to show “access” to Timberpeg’s work.

VTW created an original design for a frame only, which plans were updated continually, until March 2002. VTW does not print its plans unless there is a need, and overwrites them as the customer updates. The date of the VTW plans as printed, and from which the frame was constructed, is March 25, 2002.

In June 2002, after Isbitski laid the foundation for the entire house, breezeway and garage building, VTW cut, shipped and erected the timber frame portion of the structure, based on VTW’s own, independent design.

² Timberpeg’s representative handling Isbitski testified:

- Q. And as of this date [September 25, 2002], you understand that Stan is leaving you . . . ?
A. Right. . . .
Q. [Y]ou indicated to Jay Tucker that Stan was going to . . . do the foundation himself?
A. [Yes]
Q. And at that point, he was not obligated to go forward with the full Timberpeg package, right?
A. No, at that point he was not.
* * *
Q. And you authorized him based on the plans, to go ahead and put in the foundation, right?
A. [Non-responsive answer]
Q. And you agreed for him to put in a foundation?
A. Right.

Thereafter Isbitski contracted separately with The Murus Company (from Pennsylvania) to add outer panels to the frame, but became insolvent and abandoned the project without fully enclosing the VTW frame or completing the house.

All the state claims have been dismissed, and the sole remaining claims are Counts II and VIII, identical counts against VTW and Friant for alleged copyright infringement of the April 2002 registered plans.

2. Statement of Uncontested and Contested Facts.³ The customer, Isbitski, approached Timberpeg in April 1998, [Interrog. No. 2, Ex. 9], and on November 1, 1999 entered a contract [Ex. 7] with Timberpeg East, Inc. for Timberpeg East to provide “Preliminary Plans” for him. As emphasized by Timberpeg in that document, the “Preliminary Plans” did “[not] include the frame design” and were to be used for planning purposes but not construction. [Ex. 7]

Isbitski’s Contacts With VTW

Separately from his dealings with Timberpeg, Isbitski contacted VTW, speaking to its Customer Representative, Kim Hentschel, in approximately December 1999, to obtain a design of the timber frame portion of his proposed home. He stated that since he was a contractor, he would provide all the other components of the home.

Timberpeg’s 4/20/01 Registered Design: (a) Preliminary Design; (b) Of Entire House; (c) With No Frame Design; and (d) Not For Construction

Timberpeg’s “Registered Design” – the one registered with the U.S. Copyright Office and which is the subject of this suit – consists of five pages, which were drawn on 4/20/01 and 4/26/01 [Ex. 1]. As clearly demonstrated by those pages, the design is for an entire house and garage, much of it “stick-built.” [Ex. 1]

³ Bracketed references are to attachments to defendants’ Motions for Summary Judgment, but are not attached to this pleading.

Timberpeg admits that these five pages constitute the only Isbitski design Timberpeg ever registered with the Copyright Office. [Req. to Admit Nos. 1 & 2, Ex. 10]

Timberpeg, through Jonathan Vincent, its “Director of Design” and the person executing the copyright registration document, admits that the Registered Design did not contain timber frame drawings, and that Timberpeg never did create frame drawings for the Isbitski project.⁴ [Vincent Dep. 98-99, Ex. 12]

Timberpeg’s contract with Isbitski [Ex. 7] indicated that the frame design would not be included until after Isbitski contracted to purchase the Timberpeg package, which he never did.

In addition, Timberpeg’s contract with Isbitski indicated that the Registered Plans were only “Preliminary Plans” and not for construction. [Ex. 7]

Timberpeg Frame Not Substantially Similar

Timberpeg’s claims in this case are based on its plans dated 4/20/01 which it registered with the USPTO on May 18, 2001. [Cplt., ¶¶ 16 ff.]

The Registered Plans are the only plans relating to Isbitski which Timberpeg ever registered with the U.S. Copyright Office. [Req. to Admit Nos. 1 & 2, Ex. 10]

Timberpeg has no evidence of any act (other than VTW’s erection of the VTW frame) by which VTW ever “copied, traced, digitalized or utilized” Timberpeg’s Registered Plans (or Isometric). [Interrogs. 22 & 24, Ex. 9]

⁴ Apparently at the same time as the Registered Design, Timberpeg created an “isometric” view of a timber frame, shown as Ex. 4, which according to Director of Design Vincent did not rise to the level of a timber frame “design.” This cannot be the basis of any copyright infringement claim since Timberpeg did not register it with the U.S. Copyright Office. Nonetheless, Timberpeg will discuss it in this memorandum (below) to demonstrate that (1) Timberpeg never saw or had access to it, and (2) Timberpeg admits that it is not “substantially similar” to the VTW design.

Timberpeg's Director of Design, Architect Vincent (plaintiffs' disclosed expert witness), admits that the framing and structure of the two designs are different, and that these are "important elements" of the two designs. [Vincent Dep., Ex. 12 at 84-85]

Timberpeg admits that when Timberpeg subsequently modified the Registered Plans to create a "Bent" design Isbitski wanted, this was "a major change in the framing." [Vincent Dep., Ex. 12 at 91, line 14]

VTW Erection Of Timber Frame Based On VTW Plans

In June 2002 VTW erected a timber frame for Isbitski.

Timberpeg's own agents admit that the Timberpeg frame is a "purlin-rafter" design whereas the VTW design is a "bent" design, [Driesch Dep., Ex. 15 at p. 19; Cole Dep., Ex. 14 at pp. 39-40; Vincent Dep., Ex. 12 at pp. 103-04].

Timberpeg's own agent admits that the VTW timber frame and the Timberpeg frame are not "substantially similar" [Cole Dep., Ex. 14 at pp. 39-40].

Authorization To Use Timberpeg Foundation Plan

Against payment of \$1,500, plaintiffs provided Isbitski a "Foundation Plan" (Ex. 27), which they did not copyright, and which they authorized him to use to construct the foundation on his project. Ex. 26 & 27; Cole Dep., Ex. 14 at pp. 54-56.

Non-Copyrightability Of Design Elements

Through their Chief of Design, plaintiffs concede that placing posts over the foundation, girders or other posts is a "standard feature" and "functional requirement." Vincent Dep. II at pp. 30-31, 33. [Ex. 29]

Through their Chief of Design, plaintiffs concede that designing in two-foot increments or intervals is “standard,” and that “it’s not anything you can copyright or trademark.” Vincent Dep. II at pp. 32-33. [Ex. 29]

Through their Chief of Design, plaintiffs concede that 8 feet and 9 feet story heights (also called “plate height”) are “standard,” that plaintiffs did not originate them, and that they claim no copyright in it. Vincent Dep. II at pp. 34-35. [Ex. 29]

On a post-by-post basis, plaintiffs concede that 25 of the 27 posts in the VTW frame design are different in location, size, orientation or other feature from the posts in their own drawing. Vincent Dep. II at pp. 57-69 [Ex. 29]. This is summarized, with deposition page references, in a chart [Ex. 30].

Through their Chief of Design, plaintiffs concede that the salt box and shed dormer forms have existed in New England since the 1600s, that plaintiffs did not originate these, and that they do not claim copyright in them. Vincent Dep. I at 35-37, Ex. 14.

Through their Chief of Design, plaintiffs concede that a 12/12 pitched roof is standard, not originated by them, and they do not claim copyright in it. Vincent Dep. I at 41-42 [Ex. 14]

Through their Chief of Design, plaintiffs concede that they do not assert copy-right in the dimensions alone of 40 feet by 44 feet (the dimensions in their plan) because those dimensions alone do not have “creative content.” Vincent Dep. I at p. 42. [Ex. 14]

No VTW Profits

VTW spent 71.5 hours designing its frame, the same approximate amount as with all designs. (Ex. 31)

VTW charged \$1,500 for design work. [Ex. 32]

VTW's designer compensation costs for the 71.5 design hours were \$2,539.29, and it had a loss of \$935.29 on the design services. [Ex. 33]

The remaining facts are contested:

3. Statement of Applicable Law. Counts II & VIII are governed by the Copyright Act of 1976, as amended, 17 U.S.C. §§1 ff. The remaining counts are governed by the law of the State of New Hampshire.

4. Witnesses.

Please see defendants' Witness List, filed online as a separate document.

5. Waiver of claims or defenses. None by defendants.

6. Depositions which may be read into evidence.

Kim Hentschel
 Doug Friant
 Jonathan Vincent
 James Driesch
 Lynn Cole
 Stephen Woods
 Brian Pattisal
 Jim Potvin
 Phil Phillips
 Any depositions yet to be taken

7. Exhibits. To avoid duplicate, defendants will not re-list exhibits listed on plaintiffs'

01/31/05 Pre-Trial Statement. In addition to those, they list the following:

A	Sheets SX & 8 from 04/20/01 plans	TIM 438-439	04/20/01
B	VTW frame design	F-1 to F-7	03/25/02
C	Hearthstone TimberFrame	113	
D	Fax, Cole to Kantor	TIM 083 & 087	08/09/01
E	Memo, Rivet to Cole	TIM 084 & 085	08/31/01
F	Fax, Cole to Downey	TIM 197 -198	05/02/01
G	Registration Statement	TIM 001-002	05/18/01
H	Ltr, TEI to Isbitski	TIM 150	07/23/02
I	Ltr, Woods to Pitkin, + enc	TIM472-474	10/28/03
J	TEI Plan Request "send Foundation Plans to	TIM 114	09/19/01

	customer”		
K	Fax, Cole to Tucker, + enc	TIM 180-182 & 183	08/06/01
L	Foundation Plan	TIM428	2001
M	Ltr, TEI to Isbitski	TIM 126	09/20/01
N	Summary of Vincent Test.,	Ex. 30 in MSJ II Appx	
O	VTW bill to Isbitski	041	03/07/02
P	Potvin ltr, and all documents referenced therein		10/28/04
Q	Phillips ltr		10/29/04
R	Job Cost Master		06/25/02
S	Plaintiffs documents re 6 jobs, produced per 11/19/04 ruling		misc

In addition, defendants reserve the right to offer all drawings created by plaintiffs and produced in the case, any document listed in plaintiffs’ 01/31/05 Pre-Trial Statement, any document they list in the current Pre-Trial Statement, any of plaintiffs’ responses to requests to admit, their responses to interrogatories, and their pleadings.

8. Statement of Special Damages. On plaintiffs’ claims, this Court’s sanction for plaintiffs’ failure to produce discovery resulted in plaintiffs’ forced election of statutory damages under 17 U.S.C. Section 504. See November 19, 2004 order (Doc. 52).

Under that Order, the Court has disallowed plaintiffs’ claims to their own lost damages and disgorgement of defendants’ profits. By Order of December 23, 2004, plaintiffs are also precluded “from offering such under statutory damages as well” (although defendants are not precluded from demonstrating no losses by plaintiffs and no profits by defendants).

Accordingly, plaintiffs are limited to, at most, statutory damages under Section 504(c) of the Copyright Act, as further limited by Sections 411 and 412⁵.

⁵ Since Section 504(c) provides that statutory damages are in a sum from \$750 to \$30,000 as the Court considers just, and based on the forced election, damages are an issue for the Court not jury, and defendants therefore request that the Court bifurcate the liability and damages portions of trial.

9. Latest Demand and Offer; ADR. Plaintiffs' latest proposal was to settle for mutual releases; defendants' latest demand was for plaintiffs to pay defendants \$100,000. There have been two unsuccessful mediations after the remand from the First Circuit.

10. Claim for Attorneys Fees. Plaintiffs claim attorneys fees, but they appear to be barred, as to plaintiffs, by Sections 411 and 412 of the Copyright Act.

Defendants claim attorneys fees under Section 505 of the Copyright Act; Fogarty v. Fantasy, 510 U.S. 517 (1994); Lotus Development Corp. v. Borland International, Inc., 140 F. 3d 70, 73 (1st Cir. 1998); Matthews v. Freedman, 157 F. 3d 25, 29 (1st Cir. 1998); Edwards v. Red Farm Studio Co., 109 F. 3d 80, 81-82 (1st Cir. 1997); and Ferraris Medical, Inc. v. Azimuth Corp., No. 2002 DNH 140 (2002).

11. Requests for View. Defendants request a view.

12. Estimate of length of Trial. Defendants estimate 4-5 days.

Date: August 14, 2009

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

/s/ W. E. Whittington
W. E. Whittington

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 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.

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