

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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

**PLAINTIFFS’ MOTION IN LIMINE NO. 1,**  
**TO EXCLUDE EVIDENCE, TESTIMONY, AND ARGUMENT IN SUPPORT OF**  
**DEFENDANTS’ FAILED COPYRIGHT THEORIES**

NOW COME Plaintiffs, T-Peg, Inc. (“T-Peg”) and Timberpeg East, Inc. (“TEP”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and move in limine to exclude evidence, testimony, and argument Defendants will seek to introduce in support of their failed legal theories concerning copyright law. In support of this motion, Plaintiffs state the following:

**Background**

1. Plaintiffs claim Defendants’ timberframe, as reflected in shop drawings and as erected, infringes Plaintiffs’ copyrighted architectural work.
2. Plaintiffs completed a set of architectural plans on or about April 20, 2001 and registered them with the U.S. Copyright Office as an architectural work. The copyright became effective on May 18, 2001. These plans were conceived and drafted by Plaintiffs at the request of Mr. Isbitski, and no evidence in the record supports even an inference that Plaintiffs did not independently create the architectural work embodied in the plans.

3. Despite the presumed validity of Plaintiffs' copyright, Defendants have pursued a string of legal theories over the course of the action that either incorrectly frame the copyright issue at hand or misstate the relevant inquiry under copyright law. Those failed theories include: (i) "non-copyrightability" or "non-protectability" of design elements in Plaintiffs' architectural work (i.e., the separation/filtration test); (ii) the absence of a timberframe to timberframe comparison between the parties' works; (iii) the absence of an infringing architectural work, and (iv) Plaintiffs' alleged permission for Defendants to use elements of Plaintiffs' copyrighted work.

4. Plaintiffs expect that Defendants will continue to press these theories at trial through the introduction of irrelevant evidence, expert testimony, and argument. Defendants, for example, have disclosed an expert, Philip Phillips, who offers several opinions as to the originality of numerous features of Plaintiffs' copyrighted design. See Philip Phillips' Expert Report, attached hereto as Exhibit A. Plaintiffs assume that Defendants intend to elicit testimony from Mr. Phillips that these features are not original, and, on that basis, argue to the jury that Plaintiffs' design is not copyrightable or, at a minimum, that the unoriginal components must be "filtered" from the substantial similarity analysis. Defendants have also marked as an exhibit a foundation plan prepared by Plaintiffs that they claim gives them the right to use certain of Plaintiffs' design elements.

5. This Court has already rejected application of the "separation/filtration test" to Plaintiffs' architectural work and the United States Circuit Court of Appeals for the First Circuit has unequivocally ruled that a substantial similarity analysis focused on a timberframe to timberframe comparison (or lack thereof) between the parties' works is wrong. The First Circuit also held that Plaintiffs' infringement claims may prevail even if Defendants' timberframe does

not amount to an architectural work. Moreover, the notion that Plaintiffs' gave permission for Defendants to use certain elements of their copyrighted work is wrong on the facts and the law. Accordingly, Plaintiffs now move in limine to exclude evidence, testimony, and argument of Defendants' failed legal theories.

### **Argument**

#### **A. Non-Copyrightability / Non-Protectability**

6. Defendants have argued that certain aspects of Plaintiffs' architectural work are not subject to copyright protection because they represent "standard" design features or are "functionally required" by the home. These purportedly non-protectable features include: (i) wall heights of 8 feet and 9 feet, (ii) building increments of 4 feet and 6 feet, (iii) post locations, and (iv) roof pitch. Defendants first suggested that these unoriginal components defeated Plaintiffs' right to any copyright protection for its work. See Document 44 at 6-9 (Defendants' Motion for Summary Judgment on (1) Non-Copyrightability and (2) VTW's Lack of Profits). Defendants later shifted tack and argued instead that these unoriginal components needed to be separated out, or "filtered," from the Plaintiffs' copyrighted work before the jury compared it to Defendants' timberframe and examined for substantial similarity. Document 145-2 at 7-13. Both arguments are wrong.

7. To begin, the standard for originality is low under copyright law, with the focus resting on whether the designer copied from another design, or whether the designer independently arranged and composed the standard features into a particular design. See Richmond Homes Management, Inc. v. Raintree, Inc., 862 F. Supp. 1517, 1523 (W.D. Va. 1994). There is no credible dispute that Plaintiffs' architectural work in this case is original. Even Defendants' expert admits originality:

Q: Is there anything about the Timberpeg drawings or design that you view as creative or original?

A: Well, if you're asking me if somebody has drawn this exact picture before, I'd say probably not. And that answers the originality thing. Is it an original drawing? I assume it is. Is it creative? I personally would not call it creative .

Deposition of Philip G. Phillips on 1/6/05 at 54.

8. Moreover, as this Court observed, applicable law is clear that the inquiry is not whether the individual features of an architectural work are original, but rather whether those features have been selected and arranged in an original way. Court's Order of 3/27/2009 (Document 163) at 3; T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 110 (1st Cir. 2006). Thus, whether a particular window, door, roof, stair, or other feature itself is original has no bearing on whether an architectural work is subject to copyright, nor does it influence the substantial similarity inquiry. Instead, what matters is whether those standard features are composed, selected, and arranged in an original way. See T-Peg, 459 F.3d at 110. Contrary to Defendants' theory, these standard features are not separated or "filtered out" during the substantial similarity inquiry. Rather, the composition and arrangement of spaces created by standard features must be compared against the accused infringing work. Order of 3/27/09 at 3.<sup>1</sup>

9. Given the broad copyright protection given architectural works and their composition and arrangement of spaces, Defendants should not be allowed to confuse the jury by introducing evidence or argument that standard or so-called "functionally required" features either defeat Plaintiffs' copyright or should be ignored in analyzing substantial similarity.

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<sup>1</sup> Despite the First Circuit Order and this Court's Order of March 27, 2009, Defendants have raised the separation/filtration theory as recently as the mediation in July 2009.

**B. Lack of Timberframe to Timberframe Comparison**

10. Defendants have also sought to defeat Plaintiffs' infringement claims by arguing that Defendants designed a timberframe, while Plaintiffs did not, and that Defendants' timberframe posts have different joinery, size, location, and orientation.

11. None of this evidence is relevant because the critical inquiry is whether the composition and arrangement of spaces embodied in Defendants' shop drawings and timberframe is substantially similar to Plaintiffs' architectural work. The mere fact that Plaintiffs did not design a complete timberframe does not defeat substantial similarity, nor do elements of post joinery and orientation. Indeed, this was the central holding by the First Circuit:

The district court and VTW emphasized that VTW designed only a frame, while Timberpeg's plans did not contain a complete frame design. This emphasis wrongly assumes that the only question here is whether a reasonable jury could conclude that VTW's frame is substantially similar to Timberpeg's frame design, and that since Timberpeg never designed a complete frame, there can be no infringement. That is wrong. The question here is whether a reasonable jury could conclude that VTW's frame as drawn and built is substantially similar to Timberpeg's architectural work (which includes "the overall form as well as the arrangement and composition of spaces and elements in the design") as embodied in the second preliminary plans for the Isbitski house.

T-Peg, 459 F.3d at 114.

12. Thus, the First Circuit has already concluded that a timberframe to timberframe comparison is the incorrect inquiry in this case for evaluating substantial similarity. Defendants' emphasis on joinery, location, size and orientation of the timberframe posts are all sub-components of that same, wrong argument. For this reason, Defendants should be precluded from introducing evidence, testimony or argument that seeks to press a timberframe to timberframe comparison between the parties' works.

**C. Defendants' Timberframe Is Not An Architectural Work**

13. Defendants have suggested that Plaintiffs' infringement claims fail because Defendants' timberframe is not an architectural work. In other words, Defendants argue that a precondition to infringement is that the infringing work itself must constitute an architectural work.

14. The First Circuit rejected this theory as well:

The predicates of this argument are shaky, but the more fundamental problem is that the statute does not require that the infringing work meet the definition of an architectural work. For instances, the AWCPA excludes from the scope of exclusive rights in architectural works "the right to prevent the making, distributing or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place." Such a specific carve-out for works that are not architectural works weighs strongly against any argument that only architectural works can be infringing.

T-Peg, 459 F.3d at 115 n. 9 (citations omitted).

15. Accordingly, the First Circuit has rejected the absence of an infringing architectural work as a defense to copyright infringement and Defendants should be precluded from introducing evidence, testimony or argument at trial that seeks to revive this irrelevant and failed theory.

**D. Defendants Used Certain Design Elements "With Permission"**

16. Finally, Defendants have argued that Plaintiffs gave Isbitski permission to use Plaintiffs' foundation plan, which established the footprint of the structure and the location of footings. Defendants extrapolate from this that they were given "permission" to prepare shop drawings and erect a timberframe that used the home's footprint dimensions and that placed posts and a stairway over the footing locations.

17. Defendants were never given "permission" to infringe on any element of Plaintiffs' copyrighted architectural work. The deposit agreement signed by Isbitski governed

his use of any materials in which Plaintiffs owned a copyright. Deposit Agreement, attached as Exhibit 7 to VTW's Summary Judgment Appendix filed with Document 23. The deposit agreement expressly reserved all of Timberpeg's copyrights in the architectural 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 delivery of the Plans to another person without written authorization from [Timberpeg].

Id. Thus, Plaintiffs fully preserved the full scope of copyright protection in the design of the home they created for Isbitski.

18. While Isbitski may well have poured a foundation using Plaintiffs' foundation plan, that was the most he was permitted to do. As reflected in the deposit agreement, Plaintiffs never authorized Isbitski to build a structure on top of the foundation that copied any aspect of its copyrighted architectural work. Thus, Defendants' argument is founded on an apples to oranges comparison: pouring a foundation of a particular shape and size is simply not the same as having permission to build a copyrighted structure on top of that foundation. In any event, the only reason Isbitski was given Plaintiffs' foundation plan was because Plaintiffs believed at the time that 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.<sup>2</sup>

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<sup>2</sup> 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 . . .

19. Plaintiffs never waived any of its copyrights in its architectural work. 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).

20. Finally, the Defendants' "permission" argument is nonsensical. The footprint of the timberframe portion of Plaintiffs' copyrighted architectural work and the footprint of Defendants' timberframe are not the same as that of the concrete foundation because of design elements such as the cantilevered "bump out" in the kitchen and the attached porch. In other words, the walls of the respective timberframes do not precisely follow the perimeter of the concrete foundation. Regardless, Defendants' argument is only useful if they can employ their separation / filtering test, because they will have to argue that these "permitted" design features should be excluded from the substantial similarity analysis. As noted already, that test has been rejected by this Court.

**E. Federal Rules Of Evidence Preclude Defendants' Failed Copyright Theories**

21. Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 of the Federal Rules of Evidence states that evidence which is not relevant is inadmissible. Evidence as to "non-copyrightability" or "non-protectability" of various standard features or components of Plaintiffs' architectural design is irrelevant because copyrightability does not hinge on the originality of standard features, but rather on the composition and arrangement of those features into a design. Likewise, evidence and argument concerning a timberframe to

timberframe comparison, the absence of an infringing architectural work, or “permission” to use the design footprint or footing placement for posts or a stairway are all irrelevant because they have either already been rejected by the First Circuit or they lack any support in the record.

22. Even if not entirely irrelevant, evidence concerning any of these failed theories will confuse and mislead the jury as to the relevant inquiry concerning the validity of Plaintiffs’ copyright. Rule 403 of the Federal Rules of Evidence states that otherwise relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Evidence on an issue that pursues an incorrect legal path will almost certainly lead to confusion of the issues and will mislead the jury, to the prejudice of Plaintiffs. As such, all of the above evidence should be excluded under Rule 403.

23. For all of these reasons, Plaintiffs request that this Court exclude evidence, testimony, or argument, including the expert testimony of Defendants’ expert Mr. Phillips, concerning: (i) non-originality / non-protectability of standard or “functionally required” design elements, (ii) timberframe to timberframe comparison between the parties’ works, (iii) absence of an infringing architectural work, and (iv) “permission” to use the footprint dimensions and post and stairway footing locations.

24. Given the dispositive nature of this motion, no concurrence is necessary. See LR 7.1.

25. Given the authorities and argument cited herein, no memorandum of law is necessary. See LR 7.1.

WHEREFORE, Plaintiffs respectfully requests that this Court:

A. Exclude evidence, testimony (including expert witness testimony), and argument concerning the non-copyrightability or non-protectability of standard or “functionally required” design features that comprise Plaintiffs’ architectural work;

B. Exclude evidence, testimony (including expert witness testimony), and argument concerning a timberframe to timberframe comparison between the parties’ works;

C. Exclude evidence, testimony (including expert witness testimony), and argument concerning the absence of an infringing architectural work; and

D. Exclude evidence, testimony (including expert witness testimony), and argument concerning “permission” for Defendants to use footprint dimensions or footing locations for timberframe posts and a stairway.

E. Grant such further and other relief as this Court deems just, proper, and equitable.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Dated: August 14, 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was this day forwarded to W.E. Whittington, Esquire, by electronic transmission through the Court's Electronic Case Filing system.

Dated: August 14, 2009

/s/ Jonathan M. Shirley  
Jonathan M. Shirley

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