

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.	)	
_____	)	

**PLAINTIFFS’ MOTION IN LIMINE NO. 2, TO PRECLUDE EVIDENCE,  
TESTIMONY, OR REFERENCE TO THE PLAINTIFFS’  
ELECTION TO FOREGO THEIR OWN LOST PROFITS**

NOW COME Plaintiffs, T-Peg, Inc. (“T-Peg”) and Timberpeg East, Inc. (“TEI”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully submit this Motion in Limine to Preclude Evidence, Testimony, or any Reference to Plaintiffs’ election to forego recovery of their own lost profits as part of the damages in this action. In support of their motion, Plaintiffs state the following:

1. Plaintiffs claim Defendants’ timberframe, as reflected in shop drawings and as erected, infringes Plaintiffs’ copyrighted architectural work. Among available remedies, the Copyright Act allows a plaintiff to seek either its lost profits and disgorgement of the defendant’s profits or statutory damages.

2. During the course of discovery, Plaintiffs determined that they would not seek their own lost profits, and would seek either disgorgement of the defendants’ profits or statutory damages. Plaintiffs election resulted in motion practice before this Court in 2004, in which,

among other things, Defendants alleged that Plaintiffs suffered no actual damages and requested an instruction to the jury that Plaintiffs suffered no damages as a result of the infringement. Plaintiffs assume that Defendants will again seek to press this argument to the jury during trial. As such evidence and argument would be improper and unfairly prejudicial, Plaintiffs now move in limine to preclude evidence, testimony, or argument concerning Plaintiffs' decision not to seek their own lost profits.

### **Argument**

3. The Copyright Act provides Plaintiffs with various damages options. With respect to claims for actual damages, the damages provisions of the Copyright Act are to be construed broadly in favor of infringement victims, and courts confronted with imprecision in calculating damages should err on the side of guaranteeing plaintiffs a full recovery. See Davis v. The Gap, Inc., 246 F.3d 152, 164 (2d Cir 2001). Accordingly, courts have allowed copyright plaintiffs to recover the defendant's profits even when they have not adduced evidence of their own actual damages. See Business Trends Analysts v. Fredonia Group, Inc., 700 F.Supp. 1213, 1237 (S.D.N.Y. 1988)(allowing an award of damages based on the defendant's profits where plaintiff failed to prove any actual damages); Johnson v. Jones, 921 F.Supp. 1573, 1586 (E.D. Mich. 1996) (same in context of architectural works copyright claim). A plaintiff's decision about which damages to seek, whether its own lost profits, disgorgement of the defendant's profits, or statutory damages, is within the plaintiff's province under copyright law, and, therefore, should not serve as a basis for a negative or adverse inference by the defendant to support an argument that the plaintiff suffered no damages.

4. To that end, in an Order dated October 11, 2007 (Document 138), this Court explained the remedies scheme within the copyright statute, and approved of the Plaintiffs'

decision to give up their own actual damages, and to instead - permissibly - forestall a decision whether to seek statutory damages or to disgorge VTW's profits. This Court accepted the plaintiffs' decision, and nothing in the Order suggests that the Plaintiffs' decision was in any way driven by a lack of actual damages. This Court simply determined that Plaintiffs - for whatever reason - could forego their actual damages and elect between the disgorgement of defendants' profits on statutory damages at a later date.

5. Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having any 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." In light of the legitimacy of Plaintiffs' decision as to damages, an inference that Plaintiffs suffered no damages falls short of Rule 401's standard, in that such an inference cannot have the tendency to make the existence of any fact in question more or less probable. If Plaintiffs do not seek their own lost profits, those lost profits cannot be at issue.

6. Rule 402 of the Federal Rules of Evidence provides that evidence which is not relevant is not admissible. As evidence concerning Plaintiffs' lost profits is irrelevant, it should be excluded.

7. Rule 403 of the Federal Rules of Evidence allows relevant evidence to be excluded if its probative value is substantially outweighed by the danger of confusing the issues or misleading the jury. Even assuming evidence concerning Plaintiffs' decision not to seek its own lost profits can be characterized as relevant for Rule 401 purposes, such evidence's probative value would be far outweighed by the prejudicial effect such evidence and inference would cause by misleading the jury. Such evidence, and corresponding argument to the jury, would tend to make the jury think that no damages were warranted, regardless of the defendants'

profits and Plaintiffs' right to disgorge them. Plaintiffs should not suffer prejudice by having done what copyright law allows, and Defendants should not be allowed to try to protect their own ill gotten gains by trying to suggest to the jury that their illegal conduct caused Plaintiffs no harm. This is all the more the case in light of this Court's October 2007 Order (Document 138), which approved the propriety of the Plaintiffs' decision. To allow Defendants to infer that the Plaintiffs suffered no damages would be to penalize the Plaintiffs for selecting among the damages options the statute provides to them.

8. At most, the jury should be instructed that Plaintiffs have elected not to seek their own lost profits, and that the jury is not to infer anything about that decision, which is appropriate under governing law. Under no circumstances should the jury be instructed that Plaintiffs suffered no damage, nor should Defendants be allowed to introduce that argument at trial.

9. For all of these reasons, Plaintiffs respectfully requests that this Court preclude any evidence, testimony, or reference to Plaintiffs' decision to forego seeking its own lost profits.

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

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

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Exclude evidence and argument concerning Plaintiffs own lost profits; and
- B. 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