

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’ REQUESTED JURY INSTRUCTIONS

Defendants request that the Court instruct the jury in accordance with 3B Federal Jury Practice And Instructions, Civil (5th Ed. 2001), Chapter 160 “Copyright Infringement,” as follows and per the attached mark-up:

- 160.01 Nature of the Action
- 160.03 Obtaining a Copyright
- 160.04 Subject Matter
- 160.10 Generally
- 160.21 Elements of Plaintiff’s Copyright Infringement Claim
- 160.22 Ownership of Valid Copyright
- 160.23 Originality
- 160.24 Authorship and Work Made-for-Hire *not claimed by plaintiffs* and therefore not appropriate. Defendants will propose instructions addressing each plaintiff’s claim of ownership after plaintiffs’ case is concluded.
- 160.25 Notice of Copyright
- 160.26 Copying
- 160.27 Accessibility
- 160.81 Abandonment *not relevant but defendants propose an instruction on License instead.*

Defendants reserve the right to submit additional and revised requests based on the Court’s rulings on several key motions which remain pending.

Defendants 1 (to follow 160.04)

Architectural Work

An “architectural work” is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

Source: 17 U.S.C. §101.

Defendants 2 (in lieu of 160.81)

License

Defendants claim that plaintiffs granted Isbitski and, through him, persons working on his behalf such as defendants, a license to use the Foundation Plan and the information contained on it.

A copyright owner may license, that is, give permission, to any other person to use a copyright or one or more elements thereof. No particular form is required to grant such a license. If you find that plaintiffs granted Isbitski license, or permission, to use the Foundation Plan then defendants are not liable for using any elements contained in that Foundation or derived from it.

Source: Pleadings. See also Paragraph 3 of 160.01.

Defendants 3

Separate Plaintiffs

There are two separate plaintiffs in this case. These are T-Peg, Inc., a New Hampshire corporation with principal place of business in Hanover, New Hampshire, and Timberpeg East, Inc., a New Hampshire corporation with principal place of business in Claremont, New Hampshire.

Each plaintiff has brought a separate copyright infringement claim against defendants, and each plaintiff must prove all of the elements of copyright infringement, as I have explained them to you, by a preponderance of evidence in order to prevail.

Source: Pleadings

Defendants 4

No Damages Calculation

You are only to consider whether each plaintiff has proven copyright infringement.

Regardless of your findings on copyright infringement, you are not to consider any damages or other remedies. These issues will be addressed, if appropriate, in another phase of the proceeding.

Note: Based on the Court's Order of November 19, 2004 (Doc. 52), plaintiffs were deemed as having elected statutory damages under 17 U.S.C. Section 504 in lieu of their actual damages or defendants supposed profits.

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 the jury.

Therefore defendants have moved the Court to bifurcate the liability and damages portions of trial. (Doc. 178)

Defendants 5

Substantial Similarity

“Two works will be said to be “substantial similar” if a reasonable, ordinary observer, upon examination of the two works, would conclude that the defendant unlawfully appropriated the plaintiff’s protectible expression.”¹

“The inquiry focuses not on every aspect of the copyrighted work, but on those aspects of the plaintiff’s work that are protectible under copyright laws and whether whatever copying took place appropriated those elements.”²

“The extent of copying from the plaintiff’s work is, of course, relevant to the analysis of substantial similarity. If such a small amount of the plaintiff’s work is copied that the two works cannot be said to be substantially similar, then no infringement results.”³

Source:

¹ T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F. 3d 97, 112 (1st Cir. 2006)

² Id. (two paragraphs earlier than prior quotation)

³ Situation Management Systems v. ASP.Consulting LLC, 560 F. 3d 53, 58-59 (1st Cir. 2009).

Defendants 6

Special Interrogatory Form

Defendants propose the use of a special jury interrogatory form to assist the jury in assessing the significant elements, and as to each separate plaintiff.

Defendants will propose a specific form after the conclusion of plaintiffs' case.

Please see attached pages from 3B Federal Jury Practice And Instructions, Civil (5th Ed. 2001), Chapter 160 "Copyright Infringement."]

Date: August 14, 2009

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

By: _____
Their Attorney

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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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