

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' OBJECTION
TO PLAINTIFFS' MOTION IN LIMINE No. 1
(TO EXCLUDE EVIDENCE RE FOUR COPYRIGHT DEFENSES)

Defendants object to plaintiffs' motion (Doc. 183) to exclude evidence relating to the following partial or complete defenses:

- (1) non-protectibility of certain design elements
- (2) absence of timberframe to timberframe comparison
- (3) absence of infringing architectural work
- (4) plaintiffs' permission/license for Isbitski to use the foundation plan

As noted below, plaintiffs have not received summary judgment on any of these issues, or on any issue, and they greatly misunderstand the significance of this Court's refusal to grant defendants' summary judgment motions as well as the First Circuit's vacating of this Court's summary judgment grant in defendants' favor. Those rulings determined only that there are factual issues for the jury, and did not foreclose any defenses.

A. Non-Protectibility Of Certain Design Elements: Copy Protection
Extends Only To “Constituent Elements That Are Original”

The defense addressed in Heading A is best identified through in the language of the Supreme Court:

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.

Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 361 (1991)

(emphasis added).

This defense, or restriction of plaintiff’s claim, is also recognized in the pattern instruction 160.23 “Originality” of Federal Jury Practice And Instructions (Ex. 1, attached) which instructs the jury as follows:

If you find that plaintiff’s work involves variations on pre-existing works, then it is only to the elements of the plaintiff’s work that originated from plaintiff that copyright protection extends.

Ex. 1, attached (emphasis added) (this instruction is also included in defendants’ proposed instructions, Doc. 190-2 at 14 of 14).

Plaintiffs have admitted, for example, that they did not originate (i) wall heights of 8 feet and 9 feet, (ii) building increments of 4 feet and 6 feet, and (iii) the roof pitch, and in any event these would be non-copyrightable under the architectural work definition as “individual standard features.” 17 U.S.C. Section 101 (definition of “architectural work”). In addition, they have admitted that they did not originate the salt-box with dormer form.

Therefore, it is entirely proper for defendants to introduce evidence that plaintiffs did not originate certain elements of the work, and for the Court to submit the issue to the

jury per the pattern federal copyright instructions.¹

B. “Lack Of Timberframe To Timberframe Comparison”

Plaintiffs’ heading is a misnomer, and misstates the apparent issue.

Defendants agree that the case cannot be decided solely on whether there is a direct frame-to-frame to comparison.

But the fact that defendants designed a timberframe, while plaintiffs did not, is one piece of evidence which the jury may properly consider in determining overall “substantial similarity.” Separate from the “substantial similarity” inquiry, the evidence also has direct bearing on whether defendants copied plaintiffs’ work.²

In addition, the fact that “defendants’ timberframe posts have different joinery, size, location, and orientation,” admitted by plaintiffs, is a fact for the jury to consider in determining both “substantial similarity” and actual copying or lack thereof, based on all the evidence.

C. “Defendants’ Timberframe Is Not An Architectural Work”

In Heading C, plaintiffs seek to bar not evidence but a legal theory, and one which defendants have not even asserted. This argument is premature, and should be addressed, if at all, prior to closing arguments, once the evidence is in.

¹ In addition, if the Court permits plaintiff to introduce its frame drawing (which was never registered), there will be substantial evidence that plaintiffs did not design the frame but copied it directly (plaintiff’s own word in passing the photo to its draftsman was to “emulate” it) from a frame shown in a *Hearthstone Homes* catalogue. More particularly, the frame ultimately “drawn” by plaintiffs in September 2001 directed “emulated” the frame created by *Hearthstone* as noted by plaintiffs’ designers expressly copying the catalogue page. See Defendants Trial Exhibits F, D, and E (attached here as Exhibits 2, 3 and 4).

² Plaintiffs misapply the law in attempting to reduce the entire case to a “substantial similarity” inquiry. Certainly, if the jury finds “access” plus “substantial similarity” it may infer copying. But this is only a permissive inference, and the jury may certainly consider other evidence, including testimony of the defendant of non-copying, dissimilarity of designs, differences in details of the plans, lack of economic incentive to copy, etc.

D. Permission/License To Use Foundation Plan

It is long established in copyright law that there is no infringement where copying is done with permission or license. As noted by Nimmer,

Grants of Nonexclusive Licenses. It will be recalled that the requirement of a written instrument applies solely to a “transfer of copyright ownership,” which by definition does not include nonexclusive licenses. By negative implication, nonexclusive licenses may therefore be granted orally, or may even be implied from conduct. When the totality of the parties’ conduct indicates an intent to grant such permission, the result is a nonexclusive license.

Nimmer On Copyright Section 10.03[A][7] at 10-49 (emphasis added).³

Here, there is clear evidence that plaintiff licensed Isbitski to use the “Foundation Plan,” and that evidence is not merely oral permission or a course of conduct but an express written letter of authority. The evidence includes the following:

- Defendants Trial Exhibit K, plaintiffs’ note that it would send Isbitski the Foundation Plan in exchange for \$1,500. (Ex. 6 to this pleading)
- Defendants Trial Exhibit J, plaintiffs’ order to “send 2 extra Foundation plans to customer (Isbitski)” (Ex. 7 to this pleading)
- The testimony of plaintiffs’ sales representative dealing with Isbitski, Lynn Cole, who testified at deposition:

Q. And as of this date [September 25, 2002], you understand that Stan [Isbitski] 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.

³ See also Pattern Instruction 160.01 “ Nature Of The Action,” from Federal Jury Practice And Instructions, Civil, Ex. 5 attached, which states:

The owner of a copyright generally has the right to exclude any other person from [copying, etc.], . . . unless licensed by the copyright owner.

Emphasis added.

* * *

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.

(Cole Dep. at 54-56, Ex. 8, attached)

- The Foundation Plan itself, Defendants Trial Exhibit L, exactly matches the foundation installed on the Isbitski property. That Foundation Plan not only sets out the footprint of the house but also gives the information concerning post location and location of the central staircase. (Ex. 9 to this pleading)

Since permissive or licensed use is not copyright infringement, defendants have every right to show the permission given to use the Foundation Plan, and it is not only relevant but central to the issue of whether there was unlicensed use.

WHEREFORE, plaintiffs' Motion In Limine No. 1 should be denied.

Date: August 28, 2009

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

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

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Attachments

- Ex. 1 – Federal Jury Practice, Copyright Instruction 160.23 “Originality”
- Ex. 2 – Timberpeg fax “I’ve included a photo (from Stan) 05/02/01
that shows what he wants,” and photo, DX “F”
- Ex. 3 – Timberpeg fax, “This is picture of bent style timberframe that Stan 08/09/01
Isbitski wants us to emulate,” and photo, DX “D”
- Ex. 4 – Timberpeg memo, Lynn this is what I had in mind,” 08/31/01
and sketch, DX “E”

Ex. 5 – Federal Jury Practice, Copyright Instruction 160.01 “Nature Of The Action”	
Ex. 6 – Timberpeg fax, “He wants a foundation plan right away”	08/06/01
Timberpeg East Contact Note “I told him we could do	08/01/01
Foundation plan but that he would need to send \$1,500”	
DX “K”	
Ex. 7 – Timberpeg Construction Plan Request “*send 2 extra Foundation	09/19/01
Plans to customer (Isbitski),” DX “J”	
Ex. 8 – Lynn Cole Deposition, pp. 54-56	03/31/04
Ex. 9 – Foundation Plan, DX “L”	2001

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 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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