

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. 2
(TO EXCLUDE EVIDENCE THAT PLAINTIFFS SUFFERED NO DAMAGES)

Defendants object to plaintiffs' motion (Doc. 184) to exclude evidence that plaintiffs' suffered no damages (they actually made a profit). .

The context of this issue is that, under 17 U.S.C. Section 504, a successful infringement plaintiff is entitled to the following remedies:

- its own damages from the infringement
- the infringer's profit
- in lieu of the above, statutory damages (the election can be made at any time until submission of the case to the jury)

Here, as a result of plaintiffs' discovery abuse in hiding its damages information, the Court deemed plaintiffs to have waived any claim for their own damages.¹

Plaintiffs now seek to turn their own sanction into an advantage by precluding defendants from introducing evidence that they suffered no damages. They claim that this is based on "relevance" since they no longer seek damages.

¹ As provided in the November 19, 2004 Order (Doc. 52) the ruling was based on "plaintiffs' failure to comply with Rule 26(a)(1), [their] failure to comply with Rule 33 and the six months of "stone-walling."

However, under the statutory damages election, which ranges from \$750 to \$30,000 – and which plaintiffs can make at the end of evidence – their damages or lack thereof is one of the factors which a jury can consider in determining what level of statutory damages to award.

Nimmer On Copyright Section 14.04[B][1][a] at p. 14-47.

Therefore the plaintiffs' lack of damages, and the fact that they made a profit on their damages, is probative to an issue in the case.

WHEREFORE, plaintiffs' Motion In Limine No. 2 should be denied.

Date: August 28, 2009

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

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

W. E. Whittington (Bar No. 6916)
Whittington Law Associates, PLLC
35 South Main Street
Hanover, NH 03755
(603) 643-2755
ned@whittington-law.com

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.

Daniel E. Will, Esq.
Jonathan Shirley, Esq.
Devine, Millimet & Branch, P.A.
111 Amherst Street
Manchester, NH 03105
dwill@devinemillimet.com
jshirley@devinemillimet.com

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