

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.)	
_____)	

OBJECTION TO DEFENDANTS’ MOTION *IN LIMINE*
TO BIFURCATE LIABILITY AND DAMAGES PHASES OF TRIAL

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 object to Defendants’ Motion *in Limine* to Bifurcate Liability and Damages Phases of Trial. In support of this objection, Plaintiffs state as follows:

1. Defendants move *in limine* to bifurcate the liability and damages phases of the trial. Defendants argue bifurcation is necessary because (i) Plaintiffs’ remedy is limited to statutory damages as a result of the Court’s Order of November 19, 2004, and (ii) an award of statutory damages under the Copyright Act is for the Court, not a jury, to decide. Defendants are wrong on both counts.

2. Plaintiffs voluntarily gave up recovery of their lost profits in this action. By Order of November 19, 2004, the Magistrate interpreted Plaintiff’s decision as an election under § 504(c) of the Copyright Act to recover statutory damages.

3. Plaintiffs timely objected to the Magistrate's decision because the Copyright Act still entitled Plaintiffs to an election between Defendants' profits attributable to the alleged infringement or statutory damages. This Court agreed and it modified the Magistrate's decision so to permit Plaintiffs this election. Order of 10/11/2007 at 6 (Document 138). Therefore, Plaintiffs are still entitled to elect between Defendants' profits or statutory damages. Id. This election may be made any time before final judgment is rendered. Id. at 3. Defendants' contention that this Court has limited them to statutory damages reflects a careless review of the Orders this Court has issued at best.

4. Even if Plaintiffs elected statutory damages, the amount of statutory damages to be awarded would be determined by a jury. The Seventh Amendment to the United States Constitution provides a right to a jury trial in copyright infringement actions. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 347-355 (1998). This right extends to all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself. Id.; Ortiz-Gonzales v. Fonovisa, 277 F.3d 59, 63 n. 6 (1st Cir. 2002) (a party may demand a jury determination of the amount of statutory damages); M. Nimmer and D. Nimmer, Nimmer on Copyright §14.04[C][2] (2000).

5. Plaintiffs demanded a jury trial on all issues so triable. Documents 1 & 39. If Plaintiffs elect statutory damages, they will request that the jury determine the amount of those damages. As such, trial cannot be bifurcated as Defendants request because the jury will be required to determine both liability and damages for copyright infringement.¹ Defendants' motion *in limine* to bifurcate trial should be denied.

¹ Alternatively, if Plaintiffs elect to recover Defendants' profits, the amount of those profits too will be a question for the jury. See John G. Danielson, Inc. v. Winchester-Conant Properties, Inc., 322 F.3d 26, 47 (1st Cir. 2003) (jury determination of defendant's profits attributable to infringing activity).

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Deny Defendants Motion *in Limine* to Bifurcate Liability and Damage Phases of Trial; 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 28, 2009

By: /s/ Jonathan M. Shirley
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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 28, 2009

/s/ Jonathan M. Shirley
Jonathan M. Shirley