

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’ REQUEST FOR JURY INSTRUCTIONS

NOW COME Plaintiffs, T-Peg, Inc. (“T-Peg”) and Timberpeg East, Inc. (“TEP”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully object to Defendants’ Request for Jury Instructions and state as follows:

I. Preliminary Statement

Defendants’ proposed jury instructions raise issues that: (i) are not relevant to the action, (ii) have already been resolved by the Court, or (iii) do not adequately frame the jury’s inquiry under the Architectural Works Copyright Protection Act (“AWCPA”). For these reasons, as explained in more detail below, Plaintiffs object to the following jury instructions requested by Defendants.

II. Defendants 1

Plaintiffs object to Defendants Instruction 1, inasmuch as it suffers from the same flaws as many of Defendants’ proposed instructions, namely that it reflects an effort to inject the improper “separation” or “filtration” test into this litigation. This test is improper under the

AWCPA and it has already been rejected by this Court and the First Circuit. Plaintiffs refer to their objection to Defendants' Instructions 5 and § 160.26, below, for further explanation.

III. Defendants 2 (In Lieu of § 160.81): License

Plaintiffs provided Isbitski a foundation plan. Based on this fact, Defendants propose an instruction that would direct the jury to find Defendants not liable for using any design elements contained in the foundation plan or "derived from it" if the jury concludes that Plaintiffs "licensed" the foundation plan to Isbitski.

Plaintiffs object to this instruction because they have moved *in limine* to exclude evidence or argument in support of Defendants' failed theory that Isbitski's receipt of Plaintiffs' foundation plan somehow gave Isbitski (or Defendants) "license" to build a structure atop the foundation that infringed Plaintiffs' architectural work. See Plaintiff's Motion in Limine No. 1, Document 183 at 6-7. As set forth in Plaintiffs' motion, Defendants' foundation plan argument is illogical and contrary to Plaintiffs' agreement with Isbitski, as reflected in the Deposit Agreement, that Plaintiffs reserved all of their rights in the copyrighted architectural work. See id. The fact that Defendants provide no citation to any decisional law to support their "license" instruction only further demonstrates that the theory is baseless. For these reasons, the instruction should be stricken.

IV. Defendants 3

Plaintiffs object to Defendants' Instruction 3 because it raises the issue of standing, which has been determined as a matter of law by this Court prior to trial. Order of 3/27/09 at 4. The jury should not be instructed on standing.

V. Defendants 4: No Damage Calculation

Defendants propose an instruction that requires the jury only consider whether Plaintiffs have proved copyright infringement, and not the question of damages. This instruction is related to Defendants' Motion *in Limine* to Bifurcate Liability and Damages Phases of Trial. Document 178. Plaintiffs object to this instruction for the same reason they object to Defendants' Motion *in Limine*: copyright infringement damages is a question for the jury to decide. The Seventh Amendment to the United States Constitution guarantees a trial by jury for copyright infringement actions. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 347-355 (1998). The jury is to decide all issues of copyright infringement, including the amount of damages to be awarded. Id. Defendants' instruction is incorrect as a matter of law and it should be stricken.

VI. Defendants 5: Substantial Similarity; § 160.26 Copying

Defendants propose two related instructions on substantial similarity and copying, Defendants 5 and § 160.26 (Defendants' Exhibit B at 36). Plaintiffs object to these instructions because neither adequately frames the unique substantial similarity analysis that is required by the AWCPA. Substantial similarity under the AWCPA requires a comparison of the overall form as well as the arrangement and composition of spaces and elements between Plaintiffs' copyrighted architectural work and Defendants shop drawings and timberframe. T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 113-14 (1st Cir. 2006). Although standard features

within an architectural work are not individually protected by copyright, the original arrangement of those standard features may be protected. Id. This Court and the First Circuit have already rejected the separation test under the AWCPA, yet Defendants continue to pursue that theory through Instruction 5. T-Peg, 459 F.3d at 110; Order of 3/27/09 (Document 163). In short, the jury is not to separate unoriginal or standard design features from Plaintiffs' architectural work. Rather, the jury must evaluate the overall form and composition spaces in the architectural work, including elements that are otherwise unoriginal or standard, to determine substantial similarity.

Defendants' instructions on substantial similarity (Defendants 5 and §160.26) incorrectly direct the jury to separate out from the analysis design elements that are not "original" to the work. As such, the instructions do not properly take account of overall form and composition and arrangement of spaces, including unoriginal or standard elements, that is required by the AWCPA. Defendants' 5 and §160.26 should be stricken.

VII. §160.01: Nature of the Action

Plaintiffs' object to Defendants' three handwritten annotations to instruction § 160.01. First, Defendants propose "individual standard features" be added to the second paragraph of the instruction, which is a passage that enumerates aspects of a work that cannot be copyrighted. Defendants' annotation is misleading because while individual standard features cannot be independently copyrighted, an original arrangement of standard features is subject to copyright under the AWCPA. Without this further explanation as to how individual standard features are protected under the AWCPA, Defendants' annotation is misleading because a jury could conclude that individual standard features are not subject to copyright protection and that such elements should be excluded from their analysis of substantial similarity.

Second, Defendants propose the jury be instructed that “Plaintiffs claim to be the owner of a copyright.” This Court has already determined that Plaintiffs own the copyright in the architectural work at issue in this action. Order of 3/27/2009 at 4. There is no need to include language in the instruction that shades Plaintiffs’ ownership as subject to question.

Third, Defendants propose that the Court articulate Defendants’ flawed theory that Isbitski’s possession of Plaintiffs’ foundation plan amounted to a “license” to infringe Plaintiffs’ architectural work. As discussed above, Defendants’ foundation plan theory is without any support and it should be excluded from trial and eliminated from the jury instructions.

VIII. §160.22: Ownership of Valid Copyright

Defendants propose an instruction on ownership of valid copyright in which the jury is told that Defendants challenge whether Plaintiffs are the authors of the work and also challenge the adequacy of Plaintiffs’ copyright notice. Neither issue should be addressed to the jury.

The Court has already resolved the question of authorship and ownership of the architectural work in Plaintiffs’ favor. Order of 3/27/2009. It is inappropriate to suggest to the jury that it will need to decide either of these issues. As for the allegedly deficient copyright notice, Plaintiffs have moved *in limine* to preclude Defendants from challenging the copyright notice. Document 188 (Plaintiffs’ Motion *in Limine* No. 6). Should Plaintiffs’ motion be granted, reference to any alleged inadequacy of Plaintiffs’ copyright notice should also be removed from the instruction.

IX. §160.23: Originality

Plaintiffs object to Defendants’ proposed instruction on originality. First, there is no dispute that the copyrighted architectural work at issue is original. Originality is a low threshold, see Richmond Homes Management, Inc. v. Raintree, Inc., 862 F. Supp. 1517, 1523 (W.D. Va.

1994), and Defendants make no allegation that the Plaintiffs' architectural work was itself improperly copied and even their expert, Phil Phillips, admits originality. See Document 183 at 4. Indeed, had originality been in doubt, the First Circuit would have stopped there rather than analyze access and substantial similarity: the First Circuit would have had no need to discuss copying if it had not been satisfied as to the originality of the Plaintiffs' work.

In addition, Defendants' proposed instruction fails to address the unique originality standard that applies to works protected by the AWCPA. Defendants' originality instruction amounts to yet another attempt to inject the separation test that this Court and the First Circuit have roundly rejected. Under the AWCPA, architectural works reflecting an original form or composition and arrangement of spaces is subject to copyright protection. This protection extends to an original arrangement of standard design features. T-Peg, 459 F.3d at 110.

While Defendants' proposed instruction at §160.23 may accurately describe the originality inquiry in other types of copyright infringement actions, it contradicts the originality inquiry germane to the AWCPA. The instruction incorrectly instructs the jury to eliminate, or separate out, unoriginal components of Plaintiffs' architectural work to determine what elements of the work are copyright protected. The AWCPA does not subject architectural works to a separation test. Instead, the AWCPA protects the overall form and arrangement of spaces, including the arrangement of standard features. Defendants' instruction will leave the jury with a misunderstanding as to the proper inquiry of originality under the AWCPA and it should be stricken.

X. §160.24: Authorship and Work Made for Hire

Defendants apparently do not propose the instruction set forth in §160.24, but instead propose to submit an instruction on authorship and assignment after hearing Plaintiffs' case.

The Court has already resolved the question of authorship and ownership in Plaintiffs' favor. Order of 3/27/09. Defendants also do not have standing to challenge Plaintiffs' assignment of the copyright. Billy-Bob Teeth, Inc. v. Novelty, Inc., 329 F.3d 586, 591 (7th Cir. 2003). The issue of authorship and assignment, therefore, are irrelevant and they should not be raised in the jury instructions. Defendants' instruction on authorship and assignment, whatever it may turn out to be, should not be permitted.

XI. §160.25: Notice of Copyright

As noted above, Plaintiffs have moved *in limine* to exclude any evidence, testimony or reference by Defendants to the adequacy of Plaintiffs' copyright notice. See Document 188. Plaintiffs' object to this instruction because their copyright notice is sufficient as a matter of law. Defendants' instruction on notice of copyright, therefore, should be stricken.

XII. §160.27: Accessibility

Plaintiffs contend that their proposed instructions concerning direct evidence of copying, and access and substantial similarity as indirect or circumstantial evidence of copying are preferable to Defendants' proposed § 160.27. Plaintiffs, moreover, object to Defendants' handwritten annotation included in § 160.27 that "[t]here is no direct evidence of copying in this case." The First Circuit determined that the letters sent to Plaintiffs by Defendants' attorneys could be introduced at trial and that a jury could determine that the letters admitted copying by Defendants. T-Peg, 459 F.3d at 111. Plaintiffs expect additional evidence adduced at trial will also support a finding of direct evidence of copying. Defendants' instruction that no direct evidence exists is simply wrong and it should be stricken.

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Deny Defendants' Request for Jury Instructions as discussed above; 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

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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

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