

9-21-09

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' MOTION FOR JUDGMENT AS A MATTER OF LAW
(DIRECTED VERDICT) under FRCP 50(a)

Defendants respectfully move the Court for judgment as a matter of law under FRCP 50(a), as follows:

1. Against TEI Because There Is No Registration In TEI's Name

There is one and only one registration in this case, and it is PX 17 (also DX "G"), attached here as Ex. 5. It lists T-Peg, Inc. alone, not TEI, as the author.

Sections 411 and 412 of the Copyright Act provide that there is no standing to sue for copyright infringement unless the plaintiff has registered its copyright ownership claim. Moreover, under Section 507 of the Copyright Act there is a three-year statute of limitations from the accrual of the cause of action, so it is too late for TEI to register now and re-commence suit.

Defendants are entitled to judgment against TEI.

2. Against T-Peg Because It Was Not The Author

The registration form claims that T-Peg is the author, but the evidence is undisputed that no one at T-Peg was not the author of the work.

Plaintiffs' own witnesses, Vincent, Driesch and Cole, all testified that all the drafting was done by Timberpeg Services, Inc., a separate entity from T-Peg, Inc.¹

This is also borne out by the listing of services on PX 31 and 33 (81.5 and 72 hours of design time), which the plaintiff witnesses testified were all performed by Timberpeg Services employees not T-Peg employees.

This is also borne out by plaintiffs' supplementary interrogatory response to Interrogatory 10, DX ___.

Defendants are entitled to judgment against T-Peg.

3. TEI Did Not Create The Architectural Work At Issue Through Lynn Cole

Plaintiffs' current claim is that Lynn Cole "authored" the work through his rough "sketches" dated 02/05/01 (PX 20) and 03/26/01 (PX 21), and that he did so as a work-for-hire for TEI. This claim fails as a matter of law for three reasons at least.

(a) Idea or concept, not definite expression thereof.

First, the sketches constitute only an "idea" or "concept," not a definite work "fixed in any tangible medium of expression" as required by Sections 101 and 102 (Exhibit 2, attached and highlighted for the Court's convenience) The relevant language is the following:

¹ Vincent actually testified that he was not sure when the Timberpeg Design Services Division of T-Peg became separately incorporated, and that he thought it was around 2005, thus raising an inference that T-Peg might have been an author *through its Design Services Division*. However, this was clarified by General Counsel Woods, who drafted and notarized the incorporation documents. He was shown the Articles of Incorporation (Ex. 1) and confirmed that the incorporation was dated May 24, 2000. Of course the Court could also judicially notice this fact from the Secretary of State's web site, www.sos.nh.gov/corporate.

Since all of the designers – and principally the person whose name appears on all the registered plans, Downey – were employees of Timberpeg Services, Inc., the work was created by the entity Timberpeg Services, Inc., not T-Peg.

101. Definitions.

An “architectural work” is the design of a building as embodied in any *tangible medium of expression, including a building, architectural plans, or drawings*. . . .

* * *

A work is “*fixed*” in a *tangible medium of expression* when its *embodiment* in a copy or phonorecord, by or under the authority of the author, is *sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated* for a period of more than transitory duration.

Emphasis added.

The Lynn Cole “sketches” in PX 20, 21 and 22 are simply not detailed and precise enough to be “perceived, reproduced or otherwise communicated.” That is, they do not communicate sufficient information so that a *particular, unique* architectural work could actually be constructed and defined. True, some information about *some* building is communicated, but there is too little detail to constitute a *unique* building.

That is why the “architectural work” definition in Section 101 indicates, as acceptable media of expression, “a building, architectural plans, or drawings.” Lynn Cole’s sketches constituted none of those.

The corollary of the Section 101 “sufficiently permanent or stable” requirement is the idea/expression dichotomy in Section 102, which provides:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship *fixed in any tangible medium of expression*, now known or later developed, from which they can be *perceived, reproduced, or otherwise communicated*

Works of authorship include the following categories:

(8) architectural works.

(b) *In no case does copyright protection* for an original work of authorship *extend to any idea, procedure, process, system,*

method of operation, *concept*, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Emphasis added.

Obviously Section 102 mirrors Section 101 in the “fixed-in-a-tangible-medium-of-expression” requirement, but it clarifies that in showing that this necessarily *excludes mere ideas and concepts*. That is what Lynn Cole sketched: ideas and concepts, not an architectural work.

(b) If Cole Sketches Were “Architectural Work,” They Weren’t Registered

Second, assuming arguendo that Cole’s sketches did constitute an architectural work, they were not registered.

The Copyright Act does not provide for a rolling or evolving “work,” but instead defines each version as a separate work which can be registered separately. As set forth in Section 101:

A work is “created” when it is fixed in a copy or phonorecord for the first time; *where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.*

Emphasis added.

Under this clear language, the three Cole sketches from March 2001 – if they constituted a fixed “work,” each constituted a “separate work” which could have been registered. There is no registration for the Cole sketches. Therefore neither Cole nor anyone else has standing to sue based on the Cole sketches.

(c) If Cole Sketches Were “Architectural Work,” The 4/22/01 Registered Work Was A “Derivative Work,” And Only The “New Material” Was Protected

Third, even if the Cole sketches (1) constituted a “work” and (2) were properly registered, this does not constitute “authorship” of the April 2001 *registered* plans, because the *registered* plans would then be just a *derivative* work, with copyright protection limited to the “new material” added. Again, per Section 101:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.

However, in a derivative work, only the “new material” is given protected status. As set forth in the registration form (Ex. 3, attached), Spaces 5 and 6 of the form (Ex. 17) deal with “derivative works” and require the claimant to check “Yes” and Box c in Space 5, and to disclose both the “preexisting material” and the “material added to this work” “in which copyright is claimed” in Space 6. See also the instructions for Form VA (Ex. 3, attached).

Since the registered plans constitute “new material” added by draftsman Joe Downey, a Timberpeg Services, Inc. employee, and other Timberpeg Services employees, TEI was not the author and plaintiff’s theory that TEI authored and then conveyed co-ownership to T-Peg fails to give standing as to anything in the *registered plans*. That could convey ownership only as to the pre-existing sketches, which were never registered.

4. No Effective Transfer To T-Peg

Even if plaintiffs overcame the above obstacles, they still do not have a valid transfer of ownership from TEI to T-Peg. Under Section 204(a) of the Copyright Act, a transfer of copyright ownership is not valid unless in writing and signed by the transferor:

204. Execution of Transfers of Copyright Ownership.

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner'

Plaintiffs have no sufficient transfer document.

Exhibit 62 is not signed and not authenticated.² Exhibit 64 – purportedly signed in 2008 – is also defective because the signatures were added more than four years after this action was commenced, and after the statute of limitations ran.

In addition, the registration form shows that plaintiffs never understood Exhibit 62/64 to be a transfer. If it were a transfer document, that would have been reflected on Space 4 of the registration application (Ex. 17). The line was left blank.

Lastly, the language of Exhibit 62/64, Para. 1, is insufficient to reflect a transfer for three reasons:

(1) The first sentence purports to convey co-ownership in all copyrighted material, but this is contradicted by the second sentence, which then “also” conveys authority to use it, that is, a license. A *license* grant is inconsistent with co-ownership. Therefore, the first sentence’s reference to “copyrightable/copyrighted *material*” more likely refers to “materials,” that is, the

² Authentication is not merely a tactic here, and defendants gave notice to plaintiffs before trial, the moment when these exhibits were added to plaintiffs’ list, that authentication was contested. (Exhibit 4, attached). No witness was able to identify that these documents existed at any defined time. The witness Woods simply stated that these documents reflect how the companies do business with each other. In addition they are hearsay. The Court admitted these provisionally, *subject to possibly being stricken later*. They should be stricken, and defendants so move.

promotional materials which T-Peg has created for all its subsidiaries to use. T-Peg truly did create those promotional materials; it did not create the design here. If the sentence intended to transfer *copyrights* presumably it would have used the word “copyrights” not “materials.”

(2) The third sentence conveys to T-Peg the authority to register the copyright “in the name of T-Peg, Inc. and Timberpeg East, Inc.” Clearly, T-Peg did not register the copyright that way, in both names. So the parties did not understand the provision to refer to architectural works.

5. No Evidentiary Basis For Finding Of “Substantial Similarity”

Finally, plaintiffs’ case must fail because their only proof of “copying” is the permissive inference arising if there is “substantial similarity,” but the jury would not have a legally sufficient evidentiary basis to find for plaintiffs on this issue. Indeed, based on plaintiffs’ own witnesses, experts and demonstrative exhibits (Ex. 61, Sheets 1-13) it is clear that

- 25 of 27 posts do not match
- Out of 11 window and door openings on the first floor, 9 don’t match
- Out of 6 window and door openings on the second floor, 6 don’t match
- Out of 6 window and door openings on the upper gable, 6 don’t match
- The sky lights don’t match
- The bump out doesn’t match
- The French doors don’t match and wouldn’t open
- The window on the second floor would interfere with a brace

Plaintiffs own expert testified repeatedly that for the VTW frame to work with plaintiffs’ plans, the features would have to be “adjusted” and the elevations would have to be re-drawn. A

design which could not even work functionally with the work it supposed copied is not "substantially similar."

Date: September 21, 2009

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

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

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Attachments:

- Ex. 1 – Art. Of Incorporation for Timberpeg Services, Inc. 05/242/00
- Ex. 2 – Sections 101 & 102 of Copyright Act, highlighted current
- Ex. 3 – Directions to Copyright Office Form VA current
- Ex. 4 – Defendants notice that authenticity of Ex. 62 is contested 09/15/09
- Ex 5 - Cert. of Registration* 05/18/09

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2009, I served the foregoing pleading on the following counsel of record, by hand:

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