

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

T-Peq, Inc. and  
Timberpeg East, Inc.,  
Plaintiffs

v.

Civil No. 03-cv-462-SM

Vermont Timber Works, Inc.  
and Douglas Friant,  
Defendants

**JURY INSTRUCTIONS**

**INTRODUCTION**

At this stage of the trial it is my duty to instruct you on the principles of law that you must apply in deciding this case. It is your duty to follow these instructions during your deliberations. You should not single out any one instruction but instead apply these instructions as a whole to the evidence in this case.

**JURY SOLE JUDGES OF FACT**

You are the exclusive judges of the facts. You must weigh the evidence that has been presented impartially, without bias, without prejudice, and without sympathy. You must determine what the facts are, what the truth is, based upon the evidence presented in the case. You will decide the case by applying the law as I give it to you in these instructions to the facts as you find them to be from the evidence.

**CREDIBILITY OF WITNESSES**

In determining what the facts are and what the truth is, you must necessarily assess the credibility of each witness and determine what weight you will give to each witness's testimony. By credibility I mean the believability or the truthfulness of a witness.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief or not worthy of belief. You should also consider the extent, if any, to which the testimony of each witness is either supported or contradicted by other evidence in the case.

After assessing the credibility of each witness, you will assign to the testimony of each witness, both under direct and cross-examination, such weight as you deem proper. You are not required to believe the testimony of a witness simply because that witness was under oath. You may believe or disbelieve all or part of the testimony of any witness. It is within your province to determine what testimony is worthy of belief and what testimony may not be worthy of belief.

**TESTIMONY OF EXPERT WITNESSES**

You have heard testimony from witnesses who were permitted to testify as experts. An expert is allowed to express an opinion on those matters about which he or she has special knowledge and training. Expert testimony is presented to you based on the belief that someone who is experienced in a particular field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing an expert's testimony, you may consider the expert's qualifications, experience, training, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness's testimony. You may give the expert testimony such weight, if any, as you find it deserves in light of all of the evidence in this case. You should not, however, accept the testimony of an expert witness merely because that witness is an expert. Nor should you substitute the opinions of an expert for your own reason, judgment, and common sense. In the end, the determination of the facts in this case rests solely with you.

**WEIGHT OF THE EVIDENCE**

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You will consider all the facts and circumstances in evidence to determine

which of the witnesses are worthy of belief. You may find that the testimony of a small number of witnesses on a particular issue is more credible than the testimony of a greater number of witnesses on the other side of the same issue. It is not the number of witnesses or the quantity of testimony that is important, but the quality of the evidence that has been produced that is important.

#### **DIRECT AND CIRCUMSTANTIAL EVIDENCE**

There are two types of evidence that you may properly use in deciding this case.

Direct evidence is the testimony given by a witness about what that witness has seen, heard, or observed, or what that witness knows based on personal knowledge. Direct evidence also includes any exhibits that have been admitted and any stipulations that have been agreed to by the lawyers. [== During the course of the trial, you were told that the parties agreed, or "stipulated," to certain facts. This simply means that both sides accept those facts to be true. Because there is no disagreement regarding those facts, there was no need for either side to introduce evidence relating to them. You must accept as true the facts to which the parties have stipulated. ==]

Evidence may also be used to prove a fact by implication, and this is referred to as circumstantial evidence. In other

words, from examining direct evidence you may be able to draw certain inferences that are reasonable and justified in light of your daily experience and common sense. Such reasonable inferences constitute circumstantial evidence.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is up to you to decide how to weigh the evidence in this case.

#### **WHAT IS EVIDENCE**

The evidence in this case consists of: (1) the sworn testimony of the witnesses, both on direct and cross-examination, regardless of who may have called those witnesses; (2) the exhibits that have been admitted into evidence, regardless of who may have produced them; and (3) any facts to which the lawyers have agreed or stipulated.

#### **WHAT IS NOT EVIDENCE**

Certain things are not evidence and you cannot consider them as evidence:

1. Arguments, statements, and questions by the lawyers are not evidence. Questions asked by the lawyers and what the lawyers have said in their opening statements, closing arguments, and at other times during the trial are intended to help you interpret the evidence, but they are not evidence. If the facts

as you remember them differ from the way the lawyers have stated them, your memory controls.

2. Objections by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper under the rules of evidence. I must rule on objections and I have not intended to indicate in any way by my rulings or by what I have said what the verdict should be in this case. You should not be influenced by the lawyers' objections or by my rulings on those objections.

3. Testimony that has been excluded or stricken, or that I have instructed you to disregard, is not evidence and must not be considered in any way in your deliberations.

4. Anything you may have seen or heard or read when the court was not in session is not evidence. You must decide the case solely on the evidence received at trial.

#### **PLAINTIFF'S BURDEN OF PROOF**

As the plaintiffs in this case, T-Peg, Inc. and Timberpeg East, Inc. bear the burden of proving, by a preponderance of the evidence, each of the essential elements of their claims. A preponderance of the evidence simply means that quantity and quality of evidence necessary to persuade you that a party's claim is more likely true than not true. Think of a set of scales. At the beginning of the trial they are perfectly

balanced and even. At the end of the trial, if they have been tilted by the evidence ever so slightly toward the plaintiffs, then they have met their burden. On the other hand, if the scales remain even, or if they tip ever so slightly in the defendants' favor, then the plaintiffs have not met their burden.

In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits admitted into evidence, regardless of who may have produced them.

#### **LIABILITY**

##### **A. GENERAL STATEMENT OF THE CASE**

For purposes of convenience and simplicity, I will occasionally refer to the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc., collectively as "Timberpeg," and Vermont Timberworks, Inc., and Mr. Friant as "VTW." As you know, Timberpeg East sells architectural designs and the associated packages of materials for the construction of timberframed homes. Timberpeg East created an initial and, subsequently, a second set of "preliminary plans" for a house for Stanley Isbitski in Salisbury, New Hampshire. The second set of preliminary plans (April 20, 2001) are the copyrighted plans at issue here. Those

plans show a timberframed main house, but the plans do not provide a drawing of the actual timberframe. T-Peg, Inc., registered the preliminary plans as an "architectural work" with the Copyright Office, and maintained ownership over the copyright in the work embodied in those plans (the "preliminary plans"). Timberpeg East is a co-owner, along with T-Peg, Inc., of the copyrighted architectural work embodied in the registered preliminary plans.

Isbitski did not, however, purchase a Timberpeg package. Isbitski hired defendant Vermont Timber Works, Inc., to design and erect a bent style timberframe for him to use in building a house. VTW designed and erected the frame for the house, but Isbitski never completed construction. Subsequently, another party purchased the property and completed construction of the house. Neither Isbitski nor the subsequent property owner is a party to this suit.

Timberpeg claims that the timberframe VTW designed (and eventually erected) infringes its copyright in the architectural work embodied in its registered preliminary plans. Specifically, it says that the timberframe, as depicted in VTW's shop drawings, and as erected by VTW, is an infringing copy of the architectural work reflected in Timberpeg's copyrighted preliminary plans.

VTW says that when it met with him, Isbitski had only Timberpeg's initial (unregistered) preliminary plans, not the

second set of preliminary plans that Timberpeg produced and eventually registered with the Copyright Office as an architectural work. And, VTW says that neither those initial, unregistered plans, nor the second registered plans, factored into its creation of the timberframe it designed.

**B. COPYRIGHT LAW**

Generally A "copyright" is the exclusive right to copy. Copyrighted works can include literary works, musical compositions, dramatic works, motion pictures, pictorial or graphic works, and architectural works. As you know, this case involves Timberpeg's claim that defendants violated its copyright in an "architectural work" and I will define that term for you in just a moment.

The owner of a copyright generally has the right to exclude any other person from reproducing, preparing derivative works, distributing, displaying, or using the work covered by the copyright for a specific period of time. One who reproduces a copyrighted work during the term of the copyright, infringes the copyright, unless licensed by the copyright owner.

Obtaining a Copyright A copyright automatically exists in an original work the moment the work is created. The owner of the copyright may register the copyright by delivering to the

Copyright Office of the Library of Congress a copy of the work. After examination and a determination that the material deposited constitutes copyrightable subject matter and that the legal and formal requirements are satisfied, the Register of Copyrights registers the work and issues a certificate of registration to the copyright owner.

"Architectural Work" An architectural work is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. It includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features. Individual standard features include such things as standard windows, doors, stairways, ceiling heights, and other staple building components. Although individual standard features cannot be copyrighted, the overall combination and/or arrangement of such individual standard features can be protected by copyright law if the overall combination or arrangement represents an original arrangement or composition of those standard features and elements.

**C. ESSENTIAL ELEMENTS OF TIMBERPEG'S CLAIMS**

In order to prevail on its claim for infringement Timberpeg must prove, by a preponderance of the evidence, each of the following three essential elements:

First, that Timberpeg owns a valid copyright in the architectural work it accuses defendants of having copied; and

Second, that VTW actually copied that architectural work; and

Third, that the defendants' copying of the architectural work was so extensive that it rendered VTW's work and the copyrighted work substantially similar.

T-Peg, Inc. and Timberpeg East, Inc. do co-own a valid copyright in the preliminary plans registered with the Copyright Office.

"Actual Copying" Actual copying may be proved by Timberpeg by introducing direct evidence that defendant copied the protected work.

Another way Timberpeg might prove that one or both of the defendants actually copied its architectural work, as embodied in the registered preliminary plans, would be to demonstrate that: (1) a defendant enjoyed access to the copyrighted work and had the opportunity to copy it; and (2) a sufficient degree of similarity exists between the copyrighted work and the allegedly

infringing work to give rise to an inference of actual copying. You may impute access when there is evidence that a third party with whom both the plaintiff and defendant were dealing had possession of plaintiff's work and the plaintiff and defendant's dealings took place concurrently. And you may consider whether a work was accessible by the public including defendants.

You should remember, however, that no matter how similar the two works are, Timberpeg may not recover from VTW unless those similarities are the result of actual copying, directly or indirectly, intentionally or unintentionally.

Furthermore, VTW is not liable to Timberpeg unless you conclude that it copied original aspects of Timberpeg's work. The focus of your inquiry must be on those aspects of Timberpeg's architectural work that are protectable under copyright laws, and, whether whatever copying took place appropriated those protected elements.

"Substantial Similarity" To carry its burden as to the third essential element of its copyright violation claims, Timberpeg must demonstrate that the copying was so extensive that it rendered the copyrighted work and the allegedly infringing work so similar that VTW's work represented a wrongful appropriation of the "protected aspects" of Timberpeg's

copyrighted work. Here, the copyrighted work at issue is the architectural work embodied in the preliminary plans Timberpeg registered with the Copyright Office (April 20, 2001). The allegedly infringing works consist of both VTW's shop drawings and the frame VTW actually erected for Isbitski.

As I mentioned earlier, the "protected aspects" of Timberpeg's architectural work (as embodied in the preliminary plans) are the overall form as well as the arrangement and composition of spaces and elements in the design. Those aspects of the plans that are not protected are individual standard features, such as common windows, doors, and other staple building components. Nevertheless, non-standard individual features that reflect some amount of originality may be subject to copyright protection. In other words, the copyright laws recognize that creativity in architecture frequently takes the form of a selection, coordination, or arrangement of otherwise unprotectable design elements into an original, protectable whole. It also recognizes that an architect may incorporate new, protectable design elements into otherwise standard, unprotectable building features.

Two works are "substantially similar" if, upon examination, an ordinary observer would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression. The two works need not be exact copies to be substantially similar. On

one hand, slight or trivial variations between the works will not preclude a finding of substantial similarity. But, on the other hand, if the points of dissimilarity not only exceed the points of similarity, but also indicate that the remaining points of similarity are, within the context of Timberpeg's work, of minimal importance, then the works are not "substantially similar."

In other words, you must determine whether Timberpeg has proved, by a preponderance of the evidence, that VTW's frame (as drawn and/or as built) is substantially similar to Timberpeg's protected architectural work, as embodied in the registered preliminary plans, which includes the overall form as well as the arrangement and composition of spaces and elements in the design. To do so, you must compare Timberpeg's two-dimensional plans, which embody what it claims are original design arrangements and compositions of spaces, with both VTW's two-dimensional shop drawings and the three-dimensional timberframe it constructed.

Simply because a timberframe is not a complete house does not mean that it cannot be substantially similar to the design of a house. In determining whether Timberpeg has proved that its architectural work, as embodied in its preliminary plans, and VTW's timberframe, as designed and built, are "substantially similar," you may compare VTW's work and Timberpeg's work, considering the similarities and differences between them. For

example, and only by way of illustration and not limitation, you may consider:

1. the overall footprint of the house and its dimensions and proportions;
2. the number of floors, their layout, and their dimensions;
3. the layout and location of various rooms, their dimensions, and their relationship to each other;
4. the location and height of various interior walls;
5. the design of the roof, its slope, and its dimensions;
6. the locations and relative sizes of the windows, doorways, and stairways;
7. the style of framing used or depicted (e.g., "bent style," "common rafters, with principal purlins," etc.);
8. the number, size, orientation, notching, and location of support posts.

Slight or trivial variations between works will not prevent a finding of infringement, but if the points of dissimilarity not only exceed the points of similarity, but indicate that the remaining points of similarity are of minimal importance, either qualitatively or quantitatively, then no infringement results.

While all house plans obviously share common features, some designs give particular homes a certain look and feel. That distinguishing look and feel is subject of copyright protection.

Individual Liability for Copyright Infringement As you know, Timberpeg claims that both Vermont Timber Works and Douglas Friant violated its copyright. You must first determine whether Timberpeg has proved, by a preponderance of the evidence, that Vermont Timber Works violated its copyright. If you find that Timberpeg has proved its copyright claim against Vermont Timber Works, you must next determine whether Timberpeg has proved its claim against Mr. Friant. To prevail on its copyright infringement claim against Mr. Friant, Timberpeg must prove, by a preponderance of the evidence, each of the following four elements:

First, that Timberpeg is the owner of a valid copyright, and

Second, that Vermont Timber Works copied original elements of the copyrighted work, and

Third, Mr. Friant personally participated in the designing and drafting of the VTW Timberframe, or

Fourth, that Mr. Friant had a financial interest in the infringing activity of Vermont Timber Works, and had the right and the ability to supervise the infringing activity of Vermont Timber Works.

"Willful Infringement" Timberpeg claims that defendants' infringement of its copyrighted work was "willful." In the context of this case, "willful" means that a defendant knew that its actions constituted copyright infringement. To prove willful copyright infringement, Timberpeg must show that: (1) the

defendant was actually aware that its activity constituted copyright infringement; or (2) the defendant's actions were the result of a reckless disregard for, or willful blindness to, Timberpeg's rights in the copyrighted plans.

**ORDER OF DELIBERATIONS**

You should consider all of the evidence that has been presented to you and determine whether or not the plaintiffs have proved, by a preponderance of the evidence, their claims that Vermont Timber Works and Douglas Friant infringed their copyright.

**CONCLUSION**

When you retire to the jury room to deliberate, you may take with you this charge and the exhibits that the court has admitted into evidence. The principles of law set forth in these instructions are intended to guide you in reaching a fair and just result in this case, which is important to all the parties. You are to exercise your judgment and common sense without prejudice and without sympathy, but with honesty and understanding. You should be conscientious in your deliberations and seek to reach a just result in this case because that is your highest duty as judges of the facts and as officers of this court.

**A. SELECTION OF A FOREPERSON**

When you retire, you should elect one member of the jury as your foreperson. That individual will act very much like the chairperson of a committee, seeing to it that the deliberations are conducted in an orderly fashion and that each juror has a full and fair opportunity to express his or her views, positions, and arguments on the evidence and on the law.

**B. UNANIMOUS VERDICT**

The verdict must represent the considered judgment of each juror. In order to return a verdict, each juror must agree to it. That is to say, your verdict, regardless of whether it is in favor of the plaintiffs or the defendants, must be unanimous.

**C. DELIBERATIONS**

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with the other jurors. In the course of your deliberations, do not hesitate to reexamine your own views and to change your opinion if you become convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of the evidence solely based on the

opinion of the other jurors or merely for the purpose of returning a verdict. Remember at all times that you are not partisans, you are judges - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

If during your deliberations it becomes necessary to communicate with me, please give a written message to the Court Security Officer, who will bring it to me. I will then respond as promptly as possible, either in writing or by meeting with you in the courtroom. I will always first show the attorneys your question and my response before I answer your question.

Now, this is very important, you must never disclose to anyone, including the court, how the jury stands, numerically or otherwise, on the matters you are deciding, until after you have reached a unanimous verdict or have been discharged. In other words, if the jury is split, say 5 to 3, on some issue, the existence of that split or the number on one side or the other must not be disclosed to anyone, including me.

If we recess during your deliberations, follow all of the instructions that I have given you concerning your conduct during the trial. In particular, do not discuss the case with anyone other than your fellow jurors in the jury room, when everyone is present.

After you have reached your unanimous verdict, your foreperson must complete, sign, and date the verdict form you

will be given. Return this charge together with any written answers to your questions. After you have reached a verdict, you are not required to talk to anyone about the case unless I direct you to do so.

At the risk of being repetitive, let me once again tell you that nothing said in these instructions is intended to suggest in any way what your verdict should be. The verdict is the exclusive responsibility of the jury, not the judge.

When you have arrived at a verdict, notify the Court Security Officer and you will be returned to the courtroom.