

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.,)	
Defendant.)	

DEFENDANT’S MOTION
FOR SUMMARY JUDGMENT

Defendant, Vermont Timber Works, Inc., (“VTW”) moves the Court under FRCP 56 for summary judgment on Counts II, V, VI and VII of the complaint (the only remaining claims) on the following grounds:

1. The copyright infringement claim fails as a matter of law because
 - (a) There is no evidence that VTW had “access” to Timberpeg’s copyrighted material (pp. 3-4 below);
 - (b) VTW’s timber frame is not “substantially similar” to anything created by Timberpeg (p. 15 below);
 - (c) The Copyright Act only extends to “buildings,” not “other structures” such as mere timber frames (pp. 15-17 below); and
 - (d) As to plaintiff Timberpeg East, Inc., the claim is defective because Timberpeg East, Inc. is not an owner of any copyright. (pp. 17-18 below)
2. The state law claims are pre-empted by Section 301 of the Copyright Act. (pp. 18-20 below)
3. There is no independent federal jurisdiction over the state law claims. (pp. 20-21 below)
4. There is no evidence of unfair competition (trademark confusion). (pp. 21-22 below)
5. As a matter of law, there was no act of VTW violating the Consumer Protection Act (p. 23 below).

There is no genuine dispute as to any material fact and VTW is entitled to judgment on all counts as a matter of law. The following memorandum, and Exhibits 1-22,¹ are submitted in support.

MEMORANDUM IN SUPPORT

PRELIMINARY STATEMENT

Plaintiffs are T-Peg, Inc. and Timberpeg East, Inc. (jointly “Timberpeg”). Timberpeg and defendant, Vermont Timber Works, Inc. (“VTW”), are both in the timber frame business. Both parties design timber frames, cut the timbers for them, and sell those materials. VTW additionally erects the frames, whereas Timberpeg does not erect its frames and requires customers to erect the frames through separate builders.

The common prospect here was Stanley Isbitski, a named defendant whom plaintiffs never served with process and whom they dismissed from the case on June 1, 2004. Isbitski, a general building contractor, approached both Timberpeg and VTW independently. According to Timberpeg, he contacted Timberpeg in April 1998. He contacted VTW in December 2000, after becoming dissatisfied with Timberpeg’s design and product.

Each company independently developed plans for him. Timberpeg developed rudimentary floor plans for an entire house, much of which was to be traditionally framed (“stick built”). These plans were only “preliminary plans” [Ex. 1], and the timber frame component allegedly copied here did not even have a frame drawing or any framing detail. In fact, Timberpeg’s Chief of Design admits that the Timberpeg drawings did not even include a frame

¹ The exhibits are contained in a separate MSJ Appendix.

drawing. [Ex. 12 at 98-99] It just showed, on traditional floor plans, which area was intended to be timber framed as opposed to stick-built.

VTW created an original design, including complete shop drawings, for a timber frame for a discreet component of Isbitski's house, [Ex. 2], which covered only about half the timber frame area included in the Timberpeg floor plan. The Timberpeg floor plan showed a timber frame area of 44' x 52' [Ex. 1, 2d sheet], whereas the VTW frame was 44'x 28' [Ex. 2]. The Timberpeg floor plans and VTW drawings are entirely different from each other, as will be discussed in more detail in the Statement of Facts, below.

Isbitski, himself a contractor, did not like the Timberpeg design, and decided to be his own contractor for his project while purchasing the VTW timberframe for a portion of it. In March 2002 he purchased the VTW timber frame design and materials. In June 2002, after Isbitski laid the foundation for the entire house, breezeway and garage building, VTW cut, shipped and erected the timber frame a portion of the structure, based on VTW's own, independent design. Thereafter Isbitski apparently added a few outer panels to the frame (not through VTW), but became insolvent and abandoned the project without enclosing the VTW frame or completing the house. The state of the project at that point is shown by the photos in Exhibit 3.

The claims against VTW are Counts II, V, VI and VII. Timberpeg claims in Count II that VTW infringed Timberpeg's copyright on its 4/21/01 Registered Plans. Counts V, VI and VII are based on the same factual allegations and contain no allegations independent of the copyright infringement count. The specific counts are as follows:

<u>Count</u>	<u>Legal Theory</u>	<u>Defendant</u>
I	Copyright Infringement	Isbitski (dismissed)*
II	Copyright Infringement	VTW
III	Breach of Contract	Isbitski (dismissed)*
IV	Unjust Enrichment	Isbitski (dismissed)*
V	Unjust Enrichment	VTW
VI	Unfair Competition	VTW
VII	N.H. Consumer Protection Act	VTW

* Timberpeg dismissed all counts against Isbitski on June 1, 2004.

STATEMENT OF UNDISPUTED FACTS

For purposes of summary judgment, there is no genuine dispute as to the following material facts:

Parties

1. Plaintiffs are T-Peg, Inc. and Timberpeg East, Inc., both New Hampshire corporations (jointly “Timberpeg”).²

² The Complaint imprecisely combines two distinct entities – T-Peg, Inc. and Timberpeg East, Inc. – under the term “Timberpeg,” Cplt., ¶ 2, and also treats the “combined” entity as including a third entity – Timberpeg Services, Inc. – which is not even before the court.

From plaintiffs’ discovery responses, [Req. to Admit 4, Ex. 11, & Interrogs. Nos. 1 & 3, Ex.10], the following is the relationship of the three:

- *T-Peg, Inc.* This is the parent company, which had no contact with the customer, Isbitski, and which performed no design services, but which registered the plans created by Timberpeg Services in its (T-Peg’s) name.
- *Timberpeg East, Inc.* This is a wholly-owned subsidiary of T-Peg. It was the operating company which had contact with the customer, Isbitski, and entered into a contract with him. It performed no design work, and the copyright is not registered to it.

(footnote 2 continued on next page)

2. Defendant, Vermont Timber Works, Inc. (“VTW”) is a Vermont corporation with place of business in Windsor, Vermont.

Isbitski’s Contacts With Timberpeg

3. On November 1, 1999, the prospect, Isbitski, entered a “Deposit Agreement For Preliminary Plans” [Ex. 7] with Timberpeg East, Inc. for Timberpeg East to provide “Preliminary Plans” for him. As emphasized by Timberpeg in that document, the “Preliminary Plans” “include[d] basement plan, floor plans, four elevations, and a typical building cross-section,” but did “[not] include the frame design” and were to be used for “planning the construction process.” [Ex. 7]

4. Timberpeg prepared and filed with the Copyright Office the five sheets included in Exhibit 1, consisting of

- Cover Sheet: New Residence for Stanley J. Isbitski
- First Floor Plan
- Second Floor Plan
- Elevations (North and East)
- Elevations (South and West)

These five pages were logged in by the Copyright Office on May 18, 2001. [Ex. 1, last page]

(footnote 2 continued)

- *Timberpeg Services, Inc.* This is a separate subsidiary of T-Peg which employs designers. This is the only “Timberpeg” company which performed design work on the Isbitski project, but it neither had a relationship with Isbitski nor registered the copyright design in its name. It is not a party in the case. Plaintiffs have not identified any contractual relationship between Timberpeg Services and either of the plaintiffs.

Except as to Section I(C) below, these distinctions are not relevant to this motion and VTW will use the term “Timberpeg” as referring to both plaintiffs.

Isbitski's Contacts With VTW

5. Independently of his dealings with Timberpeg, Isbitski contacted VTW, speaking to its Customer Representative, Kim Hentschel, in December 1999, to obtain a design of a timber frame for a portion of his proposed home. He told her that since he was a contractor, he would provide all the other components of the home. [Hentschel Aff., ¶¶3-4, Ex. 16]

6. Isbitski's initial meeting with VTW in December 2000 was the only time Isbitski or anyone else provided VTW any Timberpeg drawings (the Timberpeg "Pre-December 2000 Drawings").³ While Hentschel did not review them - he told her that he did not like them - it is clear these were not the plans at issue here, which were not even created until 17 months later.

The meeting is described by VTW's Customer Representative, Hentschel, as follows:

At this initial meeting he brought a Hearthstone photo⁴ and another page from the Hearthstone catalogue, which showed the way he wanted the timberframe, and had me copy the picture of the Hearthstone drawing. In that initial meeting he also showed me a set of Timberpeg drawings. He said he was very frustrated because Timberpeg wouldn't give him the frame design he wanted, and wasn't spending enough with him to understand what he wanted. He said he did not want to use this Timberpeg design. These plans were dated prior to the time of our meeting. I believe he took his Timberpeg drawings with him at the end of this meeting, although it is possible he may have left them with me for a couple of days. I did not use them as he indicated the Timberpeg concept was not what he wanted. He did not like the Timberpeg design, and he also liked the fact that VTW's beams were hand-crafted, using traditional joinery, with mortise, tenons, and hardwood

³ Not only did Hentschel not utilize those Pre-December 2000 Drawings, she does not even recall what they depicted, and they are not contained in the VTW file. They are not the basis of any claim in the case, nor could they be, since they were never registered with the U.S. Copyright Office. See 17 U.S.C. §411.

⁴ The "Hearthstone photo" [Ex. 6] was not a Timberpeg design but a photo from the unrelated Hearthstone company in North Carolina. Isbitski independently gave the Hearthstone photo to both Timberpeg [Ex. 8] and VTW [Ex. 6], and it appears in the document files of both. In September 2002 - after Isbitski rejected the Timberpeg design - Timberpeg recast its concept based on the Hearthstone photo, bluntly acknowledging that it [Timberpeg] was "emulating," that is, copying, the Hearthstone photo. [Ex. 8 & 9]

pegs, dovetailed joists, and finished, whereas Timberpeg's were machine cut. He also liked the fact that we had our in-house assembly and erection crew. The same crew responsible for the shop fabrication of his frame, would be the same crew sent to the site for the assembly and the erection of his frame. He stated that Timberpeg did not have an in-house crew, and that a crew of sub-contractors would be needed in order to raise his frame if he chose to use Timberpeg.

Also at the first meeting he told me the dimensions of his plan, so that we could make some initial rough sketches which are referred to in Document 125, and I would have used this to create the initial rough budget based on these parameters. I computed 4096 square feet, and based on that and other information we generated together produced the initial budget estimate dated 12/8/00 (125), which I mailed to him with my 12/8/00 letter (112).

[Hentschel Aff., ¶¶5-6, Ex. 16] (emphasis added).

7. In addition, Isbitski may have shown the Pre-December 2000 Plans to VTW's Designer, Doug Friant, who describes the contact thus:

At the time of Stan's initial meeting in December 8, 2000, I met with either Kim or Stan, or both, and was shown some plans marked Timberpeg, which Stan and Kim indicated he did not want to use. *He said he did not like the Timberpeg design, that it was not what he wanted*, and that he liked the VTW concept much better. *I did not look carefully at the Timberpeg plans, since they had no interest for me, and perused them only to be polite to Stan.*

[Friant Aff., Ex. 15, ¶ 4]

8. In addition, Friant made it crystal clear that so far as his recollection allows, he never saw the Registered Plans. [Friant Deposition, Ex. 4. pp. 97-98]

Timberpeg's 4/20/01 Registered Design: (a) "Preliminary" Design; (b) Of Entire House; (c) With No Frame Design; and (d) Not For Construction

9. Timberpeg's "Registered Design" – the one registered with the U.S. Copyright Office and which is the subject of this suit – consists of five pages, which were drawn on 4/20/01 and 4/26/01 [Ex. 1]. As clearly demonstrated by those pages, the design is for an entire house and garage, much of it "stick-built;" there is no drawing of a timber frame. [Ex. 1]

10. Timberpeg admits that these five pages constitute the only Isbitski design Timberpeg ever registered with the Copyright Office. [Req. to Admit Nos. 1 & 2, Ex. 10]

11. Timberpeg, through Jonathan Vincent, its “Director of Design” and the person executing the copyright registration document, admits that the Registered Design did not contain timber frame drawings, and that Timberpeg never did create frame drawings for the Isbitski project. [Vincent Dep. 98-99, Ex. 12]

12. In addition, Timberpeg’s Deposit Agreement For Preliminary Plans with Isbitski indicated that the frame design would not be included until after Isbitski contracted to purchase the Timberpeg package, which he never did. [Ex. 7]

13. In addition, Timberpeg’s contract with Isbitski indicated that the Registered Plans were only “Preliminary Plans” and not for construction. [Ex. 7]

VTW’s Design of Timber Frame

14. Based on Isbitski’s dimensions communicated directly to VTW’s Designer and the Hearthstone photo Isbitski provided, VTW generated original drawings for a timber frame (the “VTW Design”). The VTW Design and drawings comprising them [Ex. 2] were created between December 1999 and May 17, 2002. [Friant Aff. ¶¶8-16, Ex. 17]

15. The VTW Design was created by VTW’s designer, Doug Friant, who worked entirely from the dimensions provided by Isbitski and the Hearthstone photo provided by Isbitski. Neither Friant nor Hentschel used the Timberpeg Pre-2000 Drawings in any way in creating the VTW Design. [Hentschel Aff. ¶5, Ex.16; Friant Aff. ¶¶8-16, Ex. 17]

16. As testified by Friant, the concepts went directly from Isbitski’s head to Friant’s computer as the two sat before the computer:

Q. [Isbitsky] would often sit down with you or talk to you about ideas or thoughts that he had as to what he wanted for his frame?

A. Yes. . . .

Q. How specific would he be – how specific would the information he gave to you be?

A. Be quite specific.

Q. Would he tell you where to put a post?

A. To an eighth of an inch. . . . I would draw stuff and he would come up and say, no, I don't like that, move it two inches, and I would move it two inches. . . . I'm in business because I accommodate. . . .

Q. Did you ever ask him whether he was referring to anything as he was telling you, you know, move a post here by an eighth of an inch or something to that effect?

A. No. He told me that he and his wife, who died, planned this house and were planning this house for years and were working on the design for years. So I assumed he had – he knew what he wanted. He said – he represented himself as a contractor, and I had no real reason to question him.

* * *

Q. [H]ow did you know that, for example, in the top left, this was the view from the kitchen toward the living room? How did you know where the kitchen was with respect to the living room?

A. Because the day that I drew these, Isbitski was sitting there with me and he said, can we look at the frame from the inside? And I said, sure. So he said, look at it from wherever, here. I said, okay. What do you want me to call that? He said, View From Kitchen Toward Living Room. That's what I typed on the page. . . .

Q. So Mr. Isbitski was sitting with you?

- A. Yup.
- Q. And what was he looking at?
- A. I don't know if he was looking at anything.
- Q. Was he looking at your computer screen?
- A. He was looking at my screen.
- Q. Did he have any other documents with him?
- A. I don't remember any other documents.

Friant Deposition, pp. 108-11 and 124-25, Ex. 4 (emphasis added).

Timberpeg Registered Design Never Seen By VTW

17. Timberpeg's claims in this case are not based on the Timberpeg (as yet unidentified) Pre-2000 Plans which Isbitski fleetingly showed to VTW, but on its plans dated 4/20/01 which it registered with the Copyright Office on May 18, 2001. [Cplt., ¶¶ 16 ff.]
18. The Registered Plans are the only plans relating to Isbitski which Timberpeg ever registered with the Copyright Office. [Req. to Admit Nos. 1 & 2, Ex. 10]
19. The only VTW personnel working on the design of the Isbitski project, Hentschel and Friant, never saw the Registered Design (or the unregistered Isometric) during the design and erection process. [Hentschel Aff. ¶13, Ex. 16; Friant Aff. ¶13, Ex. 17]
20. Timberpeg has not put forward any evidence that any agent of VTW ever saw or had access to Timberpeg's Registered Design (or the unregistered Isometric) prior to commencement of this suit.
21. Timberpeg has no evidence of any act by which VTW ever "copied, traced, digitalized or utilized" Timberpeg's Registered Plans. [Interrogs. 22 & 24, Ex.9]

22. At no time until long after the Isbitski frame was constructed and this case commenced did either of the VTW employees who worked with Isbitski – Customer Representative Hentschel and Designer Friant – ever see the Timberpeg Registered Plans (or the un-registered Isometric). [Hentschel Aff. ¶13, Ex. 16; Friant Aff. ¶13, Ex. 17]

ARGUMENT

Standard

Summary judgment is appropriate when the record reveals “no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” FRCP 56(c).

The nonmoving party “may not rest upon mere allegation or denials of [the movant’s] pleading, but must set forth specific facts showing that there is a genuine issue” of material fact as to each issue upon which he or she would bear the ultimate burden of proof at trial. Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)). In this context, “a fact is ‘material’ if it potentially affects the outcome of the suit and a dispute over it is ‘genuine’ if the parties’ positions on the issue are supported by conflicting evidence.” Intern’l Ass’n of Machinists and Aerospace Workers v. Winship Green Nursing Center, 103 F.3d 196, 199-200 (1st Cir. 1996) (citations omitted).

As shown below, based on the undisputed material facts, VTW is entitled to judgment as a matter of law.

I. VTW IS ENTITLED TO JUDGMENT ON THE COPYRIGHT INFRINGEMENT CLAIM (COUNT II) BECAUSE THERE IS NO EVIDENCE THAT IT COPIED THE PROTECTED WORK

The essence of the copyright infringement count is that VTW infringed Timberpeg's copyrighted plans by "utiliz[ing] the Plans or caus[ing] them to be utilized in the manufacture of a timber frame" for the Isbitski house. Cplt. ¶40. Based on the undisputed material facts, VTW is entitled to judgment as a matter of law (1) against both plaintiffs because there is no evidence that VTW copied or utilized the plans, and (2) against plaintiff Timberpeg East, Inc. because that plaintiff does not hold a valid copyright.

The elements of a copyright infringement claim are well settled. "To establish copyright infringement, a plaintiff must prove (1) ownership of a valid copyright, and (2) copying of the constituent elements of the work that are original." CCM Cable Rep, Inc. v. Ocean Coast Properties, Inc., 97 F. 3d 1504, 1513 (1st Cir. 1996); Segrets, Inc. v. Gillman Knitwear Co., 207 F. 3d 56, 60 (1st Cir.), cert. denied, 121 S. Ct. 76 (2000); Ferraris Medical, Inc. v. Azimuth Corp., No. 2001 DNH 002 (at 11).

Concerning the "copying" element, a plaintiff

may either [1] present direct evidence of factual copying or, if that is unavailable, [2] evidence that the alleged infringer had access to the copyrighted work and the offending and copyrighted works are so similar that the court may infer that there was factual copying (i.e. probative similarity)."

CCM Cable, 97 F. 3d at 1513 (emphasis added); Grubb v. KMS Patriots, L.P., 88 F. 2d 1, 6 (1st Cir. 1996); Ferraris Medical, Inc. v. Azimuth Corp., No. 2001 DNH 002, at 11 ("access" plus "copying so extensive that it renders the allegedly infringing work "substantially similar").

A. No Direct Evidence Of Copying

Concerning “direct” evidence of copying, there is none whatsoever. The Complaint does not allege any (nor would a bare allegation suffice on summary judgment). And in response to VTW’s interrogatories, Timberpeg failed to identify any direct evidence of copying.⁵ There is no witness who saw VTW copy, and VTW did not copy. In addition, there are direct statements from the only VTW employees involved in the Isbitski project that they never saw the Timberpeg Registered Design until this case was well under way and the frame had long been constructed. [Hentschel Aff., Ex. 16 ¶13; Friant Aff., Ex. 17 ¶¶10-16]

⁵ Timberpeg vaguely alleges, “on information and belief,” that VTW “used” the Plans” (¶21), and states the bare conclusion that VTW “copied” the Plans or “caused them to be copied” (¶39). No factual basis is alleged, and Timberpeg’s responses to the interrogatories demonstrate that it has no factual basis:

Int. 21. Do you assert that VTW copied or duplicated the Registered Plans in any manner other than through the construction of a timber frame on the Isbitski property? If so, describe in detail each claimed instance of copying or duplication, state the method of copying or duplicating, and produce all documents concerning them.

Answer: Plaintiffs object to this request as requiring a legal conclusion. Without waiving said objection, Plaintiffs do not yet know the extent of VTW’s copying of Plaintiffs’ registered copyrighted plans.

Int. 23. Concerning Paragraph 54 of your Complaint, are you aware of any tracing, digitizing, copying and/or other utilization of the Registered Plans by VTW other than VTW’s manufacture and erection of the VTW timber frame on Isbitski’s property? If so, describe in detail each claimed act of tracing, digitizing, copying and/or other utilization, stating for each the date(s) as precisely or approximately as known, identifying each person who participated in the act(s), and producing all documents concerning them.

Answer: Plaintiffs object to this request as requiring a legal conclusion. Without waiving said objection, Plaintiffs do not yet know the extent of VTW’s utilization of Plaintiffs’ registered copyrighted plans.

Ex. 11 (emphasis added)

With no direct evidence of copying, Timberpeg must show “access” plus “substantial similarity.” Grubb v. KMS Patriots, L.P., 88 F. 3d 1, 6 (1st Cir. 1996) (plaintiff bears the burden of showing both access and substantial similarity). See also CCM Cable, Grubb and Ferraris Medical, discussed at 12 above.

B. No Evidence Of “Access”

To show access, a plaintiff must demonstrate at least

a reasonable opportunity to view [the copyrighted work]. . . . [R]easonable opportunity . . . does not encompass any bare possibility, in the sense that anything is possible. Access may not be inferred through mere speculation or conjecture. There must be a reasonable possibility of viewing plaintiff’s work – not a bare possibility.

Nimmer On Copyright §13.02[A] (emphasis added). See also, Three Boys Music Corp. v. Bolton, 212 F. 3d 477, 482 (9th Cir. 2000) (quoting Nimmer; “access” found only because of “widespread dissemination” of Isley Brothers song); Herzog v. Castle Rock Entertainment, 193 F. 3d 1241, 1250 (1999) (quoting Nimmer; mere presence at same film festival not enough); Ferguson v. National Broadcasting Co., 584 F. 2d 111, 113 (5th Cir. 1978) (“access” defined as “opportunity to view the copyrighted work; plaintiff’s statement of mere mailing to defendant insufficient).

Here, the Registered Timberpeg Plans were not available generally in commerce, as in the Ferraris case, nor is there any evidence the Timberpeg Registered Plans (the 4/21/01 plans) were ever sent or given to VTW, as in Grubb. Plaintiffs cannot point to any event where VTW supposedly had access to the Registered Plans, and VTW’s agents working with Isbitski have sworn that they did not have access.

The reality is that the Registered Plans were not even created until April 20, 2001. There is not one shred of evidence that anyone gave or sent them to VTW. They were not published in

architectural magazines or on the internet. VTW simply has no evidence of any kind that VTW had access to them.

VTW simply could not copy what was not there.

C. Not “Substantially Similar”
As A Matter of Law

Nor is there “substantial similarity” between the Timberpeg house floor plan and the VTW timber frame drawings. The Registered Design – the only one which was registered with the Copyright Office and which is the basis of this action – is a depiction of an entire house, including a garage, a stick-built section, a breezeway, and a post and beam section approximately 44 feet by 52 feet. VTW did not design or build anything but a timber frame, which was approximately 44 feet by 28 feet. The Timberpeg floor plan does not even contain a drawing of a frame. Timberpeg’s own Preliminary Agreement with Isbitski makes clear it was not yet designing the frame [Ex. 7], and Timberpeg’s Chief of Design admits that no frame design had yet been drawn. [Vincent Dep., Ex. 12 at 98-99]

Even if one were to consider a portion of the Timberpeg post-and-beam area equal in area to the VTW frame, the two are not “substantially similar.” The Timberpeg Registered Plans are so preliminary and primitive that they do not even define what the supposed frame would look like. Compare Ex. 1 with Ex. 2.

D. “Buildings,” Not “Other Structures,” Protected

The complaint alleges, as it must in order to obtain copyright protection, that Isbitski built a “house.” Then, through interesting grammar, it suggests that the “House” is “substantially similar” to VTW’s timber frame:

32. Isbitski improperly utilized the [Timberpeg] Plans or caused them to be used in the construction of a house at 289 New Road, Salisbury, New Hampshire, (the “Isbitski House”)

* * *

41. The Isbitski House, which incorporates [VTW's] timber frame, which timber frame . . . is substantially similar to the architectural work embodied in the [Timberpeg's] Plans.

Cplt, ¶¶ 32 & 41 (emphasis added).

Apparently Timberpeg makes this allegation in an attempt to shoehorn its case into Section 101 of the Copyright Act, which defines an “architectural work” as “the design of a building.” Nimmer notes that while the term “building” is not defined in the Act, the proposed protection for “other three-dimensional structures” was deleted from the bill as enacted. Nimmer On Copyright §2.20. Similarly, the Copyright Office regulations provide that “structures other than buildings” “cannot be registered.” 37 C.F.R. §202.11(d). Thus, there is no copyright protection at all for a design – such as a mere timber frame - which is not a “design of a building.”

See also, Ale House Management, Inc. v. Raleigh Ale House, Inc., 205 F. 3d 137, 143 (4th Cir. 2000) (island-or peninsula-shaped bar within larger structure not entitled to copyright protection); Yankee Candle Co., Inc. v. New England Candle Co., 14 F. Supp. 154, 159 (D. Mass 1998) (summary judgment against plaintiff, which sought to copyright a “structure-within-a-structure,” a candle store within a larger mall).

The Yankee Candle case is particularly instructive. There the defendant brashly copied the plaintiff's store design elements so that defendant's “colonial style candle store [looked] remarkably similar to its [copyrighted] Yankee competitor just north of the border.” Nonetheless, the Court granted summary judgment because protection does not extend to

individual units comprising a larger structure. Surely Congress did not intend for individual offices in an office building, though elaborately designed, to qualify as “buildings” themselves. . . . The

Court concludes that although Yankee may have intended its Holyoke store to offer a structure habitable by employees and shoppers alike, its proper characterization lies as a structure other than a building, or a structure in a building, not as a “building” in and of itself.

14 F. Supp. at 160 (emphasis added).⁶

Here, of course, Timberpeg’s allegation that Isbitski or VTW constructed a “house” is simply laughable. Exhibit 3 consists of photos taken by Timberpeg itself, and show a frame which is open to the weather, not enclosed, with no doors, windows, toilets, running water, or rooms. Indeed, the foundation, roof and side panels shown in those photos were not even constructed by VTW, as Timberpeg well knew before it ever filed this case.

The bottom line is that Timberpeg did not copyright a timber frame here at all and, even if it had, a timber frame would not be entitled to copyright protection under Section 101 of the Act, the Copyright Office regulations, and the Yankee Candle and Ale House Management cases.

E. Timberpeg East Not A Copyright Owner

In addition to proving “copying,” a plaintiff in a copyright infringement case must prove that it is the owner of the copyright. To establish ownership – and, therefore, standing – the plaintiff “produces a certificate of copyright, which constitutes prima facie evidence.” CCM Cable Rep, Inc. v. Ocean Coast Properties, Inc., 97 F. 3d 1504, 1513 (1st Cir. 1996). Here, there is a Certificate of Registration attached to the Complaint as Exhibit B [Ex. 19], but it is solely in the name of T-Peg, Inc. as author. It does not contain the name of Timberpeg East, Inc., nor is there any certificate of assignment filed in the USPTO. Nor does any document produced by

⁶ In addition, the Court analyzed several possible definitions of the term “building,” including one from Black’s Law Dictionary. 14 F. Supp at 160. A timber frame – which has no roof, no sides, and no enclosure at all, is not intended to be “humanly inhabitable” under any of the definitions analyzed there, and therefore is not a “building.”

plaintiffs reflect any assignment of copyright interest from T-Peg, Inc. to Timberpeg East, Inc., nor have plaintiffs produced any documents of assignment or license in response to Requests to Product. [Ex.11, RTP Nos. 1 & 7]

Since there is no evidence that Timberpeg East, Inc. owns a copyright interest in the Registered Design, VTW is entitled to summary judgment as against Timberpeg East.

II. THE STATE LAW CLAIMS (COUNTS V, VI, AND VII) ARE PRE-EMPTED BY SECTION 301 OF THE COPYRIGHT ACT

The State claims – Counts V (Unjust Enrichment), VI (Unfair Competition) and VII (N.H. Consumer Protection Act) – are based on the identical factual allegations as the copyright count, but plaintiffs simply re-state them as common law and statutory causes of action.

Indeed, none of these counts alleges any “wrongful act” other than supposed improper copying, which is the gravamen of the copyright claim. Nor have plaintiffs identified any other wrongful conduct in their discovery responses.⁷

⁷ Unfair Competition (Int. 22): “Concerning your claim of unfair competition against VTW, do you claim unfair competition based on any act other than VTW’s manufacture and erection of the VTW timber frame on Isbitski’s property? If so, describe in detail each claimed act of unfair competition, stating for each the date(s) as precisely or approximately as known, identifying each person who participated in the act(s), and producing all documents concerning them.”

Answer: “Plaintiffs object to this request as requiring a legal conclusion. Without waiving said objection, Plaintiffs do not yet know of the extent of VTW’s acts of unfair competition.”

Unjust Enrichment (Int. 23): “Concerning Paragraph 54 of your Complaint [the unjust enrichment claim] that VTW wrongfully traced, digitalized, copied or otherwise utilized the plans,] are you aware of any tracing, digitizing, copying and/or other utilization of the Registered Plans by VTW other than VTW’s manufacture and erection of the VTW timber frame on the Isbitski property? If so, describe in detail each claimed instance of tracing, digitizing, copying and/or other utilization, stating for each the date(s) as precisely or approximately as known, identifying each person who participated in the act(s), and producing all documents concerning them.”

These counts must be dismissed, because they are preempted by Section 301 of the Copyright Act, which states that “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title.”

The practical application of copyright pre-emption has been explained by the First Circuit thus:

Section 301(a) precludes enforcement of any state cause of action which is equivalent in substance to a federal copyright infringement claim. Courts have developed a functional test to assess the question of equivalence. If a state cause of action requires an extra element, beyond mere copying, preparation of derivative works, performance, distribution or display, then the state cause of action is qualitatively different from, and not subsumed within, a copyright infringement claim and federal law will not preempt the state action.

Data General Corp. v. Grumman Systems Support Corp., 36 F. 3d 1147, 1165 (1st Cir. 1994), citing Nimmer On Copyright (other citations deleted and emphasis added).

An action for unjust enrichment is regarded as an “equivalent right” to copyright and hence preempted. 1 Nimmer On Copyright 1.01[B][g]; Ehat v. Tanner, 780 F. 2d 876, 878 & n. 2 (10th Cir. 1985), cert. denied, 479 U.S. 820 (1986); Tingley Systems, Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 112 (D. Mass. 2001); Guedes v. Martinez, 2001 Copr. Dec. ¶28,230 (D.P.R. 2001); Wilson v. Mr. Tee’s, 855 F. Supp. 679, 684 (D.N.J. 1994); Kunycia v. Melville Realty Company, Inc., 755 F. Supp. 566, 577 (S.D.N.Y. 1990).

(footnote 7 continued on next page)

(footnote 7 continued)

Answer: “Plaintiffs object to this request as requiring a legal conclusion. Without waiving said objection, Plaintiffs do not yet know of the extent of VTW’s copying of Plaintiffs’ registered copyrighted plans.”

[Interrogs. 22 & 23, Ex. 11 (emphasis added)]

The same is true of unfair competition claims. Ehat v. Tanner, 780 F. 2d 876, 878 & n. 2 (10th Cir. 1985), cert. denied, 479 U.S. 820 (1986). The only case finding that “unfair competition” was not preempted is Data General Corp., supra, where the First Circuit held that the requirement in that case that plaintiff show a breach of its confidential relationship with plaintiff was an “additional element” not present in a normal copyright case. 36 F. 3d at 1165. Here, VTW and Timberpeg were not in a confidential relationship, so the Data General ruling mandates a finding of preemption.

Concerning the N.H. Consumer Protection Act, VTW has found no New Hampshire case even asserting copying as a violation of the Act, but the above analysis clearly indicates that preemption exists in these circumstances. Count VII (the Consumer Protection Act statute) contains the briefest of allegations, primarily incorporating the other counts by reference. The only wrongful “act” of VTW specifically mentioned in Count VII is the boilerplate reference in Paragraph 66 to “[VTW’s] willful, unlawful copying and use of Timberpeg’s Plans.” By no stretch of the imagination could this possibly be “qualitatively different” from copyright infringement.

Counts V, VI and VII are all preempted. VTW is entitled to judgment as a matter of law.

III. THERE IS NO INDEPENDENT FEDERAL JURISDICTION OVER COUNTS V, VI AND VII

If the Court dismisses the copyright claim (which is the basis for supplemental jurisdiction over the State causes of action), there is no independent subject matter jurisdiction over the remaining counts based on diversity.

While plaintiffs plead alternative federal jurisdiction based on diversity (Cplt., Para. 6), their allegation of a sum in controversy which “exceeds the sum of \$75,000” is fanciful and proven untrue by the allegations of the complaint, and should be disregarded.

The only amount of damages mentioned by Timberpeg is the \$1,003.75 which plaintiffs state is “owed . . . for unreimbursed services.” Cplt. ¶¶ 10-12. This figure is confirmed in Timberpeg’s accounting to Isbitski dated July 23, 2002. [Ex. 20]⁸

The Court should dismiss Counts V, VI and VII for lack of the \$75,000 threshold for diversity jurisdiction.

IV. VTW IS ENTITLED TO JUDGMENT ON
COUNT VI (THE UNFAIR COMPETITION CLAIM)

Count VI purports to state a claim for common law “unfair competition.”⁹

As noted by this Court, “the New Hampshire Supreme Court has not defined the exact contours of common-law unfair competition,” but does provide that “a person is liable for unfair competition if he engages in conduct which deceives the general buying public.” Optical Alignment Systems and Inspection Services, Inc. v. Alignment Services of North America, Inc., No. 95-94-JD slip op. (Nov. 1, 1995 D.N.H.). As noted by Judge DiClerico, no case decided under New Hampshire law has imposed common law liability without finding (1) secondary

⁸ Moreover, the Complaint concealed the fact that Timberpeg subsequently threatened the Bank foreclosing on the Isbitski property with suit and thereby obtained an additional \$4,000 from the Bank in exchange for licensing the Bank to use the Plans. After VTW subpoenaed the Bank’s records Timberpeg supplemented its document production with its communications to the Bank, thus demonstrating the additional \$4,000 payment.[Ex. 21] Thus, Timberpeg was paid \$7,500 between Isbitski (\$3,500) and the Bank (\$4,000) together, against its charges of \$4,503.75. It had a profit, not “losses.”

⁹ Presumably this count is not brought under any federal statute as the count is not asserted to be a basis for federal jurisdiction. See Paragraph 5 of the Complaint. It is not brought under the New Hampshire Consumer Protection Act because Count VII is brought under that statute.

meaning attached to a trademark, and (2) “the defendant’s use of the name or mark would probably confuse him with the plaintiff in the public’s mind.” Mueller Co. v. United States Pipe & Foundry Co., Opinion No. 2003 DNH 168 at 11.

Here, it is unclear what plaintiffs’ unfair competition theory is, other than their vague assertion that VT “is a competitor of Timberpeg’s.” Cplt., ¶61. There is no hint anywhere in the Complaint that VTW took some action to cause “confusion between it and Timberpeg in the public’s mind.” So far as alleged in the Complaint, no person other than Isbitski and VTW ever was aware of the plans Timberpeg created for him, and there could have been no doubt in Isbitski’s mind that he purchased his timber frame from VTW.

In addition, VTW gave Timberpeg the opportunity to explain its theory, and the acts it claims “caused confusion,” and Timberpeg has been unable to list a single one:

Interrog. 22: “Concerning your claim of unfair competition against VTW, do you claim unfair competition based on any act other than VTW’s manufacture and erection of the VTW timber frame on Isbitski’s property? If so, describe in detail each claimed act of unfair competition, stating for each the date(s) as precisely or approximately as known, identifying each person who participated in the act(s), and producing all documents concerning them.”

Answer: “Plaintiffs object to this request as requiring a legal conclusion. Without waiving said objection, Plaintiffs do not yet know of the extent of VTW’s acts of unfair competition.”

In response to VTW’s properly supported summary judgment motion, Timberpeg may not rest upon the “mere allegations of its pleading” but must “by affidavit . . . set forth specific facts showing that there is a genuine issue.” With Timberpeg unable to identify a single act of unfair competition, VTW is entitled to judgment as a matter of law.

V. VTW IS ENTITLED TO JUDGMENT ON COUNT VII
(THE NEW HAMPSHIRE CONSUMER PROTECTION ACT CLAIM)

Count VII purports to state a claim under the New Hampshire Consumer Protection Act, RSA 358-A. However, it must be dismissed as it does not allege any of the “prohibited acts” listed in RSA 358-A:2.

The operative allegation of Count VII is Paragraph 66, which states: “Through its willful, unlawful copying and use of Timberpeg’s Plans, VTW has engaged in unfair or deceptive conduct toward Timberpeg.”

However, Timberpeg has not a single shred of evidence that VTW ever copied or used Timberpeg’s Plans, and the only VTW personnel involved have given sworn statements that they did not copy the Timberpeg Plans or use them in any way. See details at pp. 14-16 above.

In response to VTW’s properly supported summary judgment motion, Timberpeg may not rest upon the “mere allegations of its pleading” but must “by affidavit . . . set forth specific facts showing that there is a genuine issue.” Timberpeg cannot do so. Therefore, VTW is entitled to judgment as a matter of law.

CONCLUSION

VTW is entitled to judgment on all counts.

Date: August 16, 2004

VERMONT TIMBER WORKS, INC.
Defendant,

By: W. E. Whittington
Its Attorney

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

Attachments:

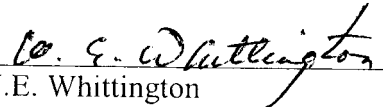
Ex. 1	- Timberpeg's "Registered Plans," dated 4/20/01 and registered with the Copyright Office 5/8/01	4/20/01
Ex. 2	- VTW plans for timber frame	3/25/02
Ex. 3	- Photos of timber frame as constructed by VTW, plus foundation, garage, and a few panels placed on frame by Isbitski	Spring 04
Ex. 4	- Friant Deposition excerpts, pp. 1, 97-98, 108-11 & 123-25	8/10/04
Ex. 5	- (Not Used)	
Ex. 6	- Hearthstone picture	pre-2000
Ex. 7	- Isbitski-Timberpeg contract for "Preliminary Plans"	11/05/99
Ex. 8	- Timberpeg internal note to "emulate" Hearthstone "bent style"	8/09/01
Ex. 9	- Timberpeg isometric based on Hearthstone	8/31/01
Ex. 9A	- Timberpeg internal note: "change our standard purlin frame to Bent Type frame" & includes "photo [Hearthstone] from Stan"	5/02/01
Ex. 10	- Timberpeg's Answers to Requests to Admit	5/12/04
Ex. 11	- Timberpeg's Answers to Interrogatories	5/12/04
Ex. 12	- Timberpeg [Jonathan Vincent] Deposition	3/31/04
Ex. 13	- Timberpeg [Chad Rivet] Deposition	3/31/04
Ex. 14	- Timberpeg [Lynn Cole] Deposition	3/31/04
Ex. 15	- Timberpeg [Robert Driesch] Deposition	3/31/04
Ex. 16	- VTW [Kim Hentschel] Affidavit	6/16/04
Ex. 17	- VTW [Doug Friant] Sworn Statement	6/18/04
Ex. 18	- (Not Used)	
Ex. 19	- Certificate of Registration from U.S. Copyright Office (also Ex. B to Complaint)	5/18/01
Ex. 20	- Timberpeg accounting to Isbitski	7/23/02
Ex. 21	- Timberpeg license agreement to Sugar River Savings Bank	10/28/03
Ex. 22	- Counsel's Authenticating Affidavit	8/16/04

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2004, I served the foregoing Defendant Vermont Timber Works' Motion For Summary Judgment on the following counsels of record, by first class mail:

Daniel E. Will, Esq.
Devine, Millimet & Branch, P.A.
111 Amherst Street
Manchester, NH 03105

Stephen S. Woods, Esq.
Traditional Management Company
68 Lyme Road
Hanover, NH 03755


W.E. Whittington