

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

SEP 18 2004

_____	)
T-Peg, Inc. and Timberpeg East, Inc.	)
Plaintiff,	)
v.	)
Stanley J. Isbitski and Vermont Timber Works, Inc.	)
Defendants.	)
_____	)

No. C-03-462-M

**OBJECTION TO DEFENDANT VERMONT TIMBER WORKS' MOTION FOR  
SUMMARY JUDGMENT AND CROSS MOTION  
FOR PARTIAL SUMMARY JUDGMENT**

NOW COME the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. ("Timberpeg"), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully object to the defendant Vermont Timber Works' Motion For Summary Judgment, and Cross Move for Partial Summary Judgment, and state as follows:

1. Vermont Timber Works ("VTW") moves for summary judgment in its favor on all counts of the complaint. Timberpeg objects to Vermont Timber Works' motion.
2. In addition, Timberpeg cross moves for summary judgment with respect to one element of Count II of the Complaint, for copyright infringement. Copyright infringement requires proof that the defendant copied the protected work. A plaintiff may prove copying through direct evidence of copying, or circumstantially by proving that the defendant had access to the protected work and that the two works are substantially similar.
3. The undisputed facts in the record establish that VTW directly copied Timberpeg's protected work, or, at a minimum, had access to that work. Timberpeg moves for partial summary judgment in its favor that VTW directly copied Timberpeg's protected work, or, alternatively, that VTW had access to that work.

4. Timberpeg incorporates herein and respectfully refers this Court to the memorandum of law in support of its objection and cross partial motion, as well as record support, filed herewith.

5. Pursuant to Local Rule 7.1(d), Timberpeg believes that oral argument may assist this Court in evaluating the instant motions, particularly through the benefit of the parties' explanations of the architectural plans and shop drawings at issue, and the opportunity to answer any questions the Court may have about that material. Accordingly, Timberpeg requests oral argument.

WHEREFORE, Timberpeg respectfully requests that this Court:


- A. Deny defendant Vermont Timberworks' Motion for Summary Judgment;
- B. Grant Summary Judgment in Timberpeg's favor on its claim that VTW directly copied Timberpeg's protected work; or
- C. Grant Summary Judgment in Timberpeg's favor on its claim that VTW had access to Timberpeg's protected work; and
- D. Grant such other and further relief as this Court deems just, equitable and proper.

Respectfully submitted,

T-PEG, INC. AND TIMBERPEG EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION



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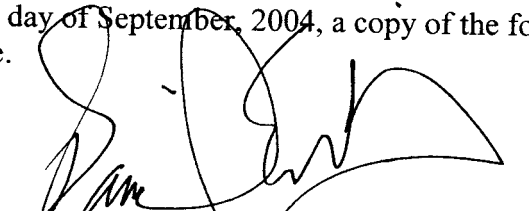
Dated: September 17, 2004

Of Counsel:

Stephen S. Woods, Esquire (#8240)  
General Counsel for Plaintiffs  
Timberpeg East, Inc.  
c/o 68 Lyme Road  
Hanover, NH 03755  
(603) 643-6200

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of September, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.



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Daniel E. Will (#12176)

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

SEP 18 2004

T-Peg, Inc. and Timberpeg East, Inc. )

Plaintiff, )

v. )

Stanley J. Isbitski and Vermont Timber Works, Inc. )

Defendants. )

No. C-03-462-M

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' OBJECTION  
TO MOTION FOR SUMMARY JUDGMENT AND  
CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT**

The plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (collectively "Timberpeg"), respectfully submit this memorandum of law in support of their objection to the defendant's, Vermont Timber Works, Inc. ("VTW") motion for summary judgment, and their cross motion for partial summary judgment.

**Statement Of Undisputed Facts**

**A. Parties**

TIMBERPEG® is a federally registered trademark used by a family of companies to promote, design, manufacture, and sell TIMBERPEG® brand post and beam home packages. See Affidavit of Brian Pattison ("Pattison Aff.") at ¶ 2, Plaintiffs' Summary Judgment Appendix ("PAPP.") at tab A. T-Peg, Inc. ("T-Peg") owns the TIMBERPEG® trademark and licenses the mark to a group of related companies, all owned by T-Peg, which includes Timberpeg East, Inc. ("Timberpeg East"). See *id.* at ¶¶ 2-3. The related

companies use the trade name, Timberpeg, to promote their common business. See id. at ¶ 3.

Timberpeg East, a wholly-owned subsidiary of T-Peg, is responsible for sales of TIMBERPEG® product in the Northeast. See id. at ¶ 4. Timberpeg Services, also a wholly-owned subsidiary of T-Peg, provides drafting and manufacturing services to Timberpeg East, as well as other related Timberpeg companies operating in other regions. Timberpeg Services operates solely for the benefit of the Timberpeg companies and does not independently provide services to the public or any unrelated companies. See id.

The common goal of T-Peg and Timberpeg East (and Timberpeg Services) is to promote and sell TIMBERPEG® brand product. See id. at ¶ 5. Consequently, T-Peg, Timberpeg East, and Timberpeg Services have contractual agreements whereby copyright interests are transferred and drafting services are provided by Timberpeg Services and paid for by Timberpeg East. See id. and Exhibits 1 and 2. T-Peg registers copyright interests, but Timberpeg East maintains co-ownership in the copyright arising from Timberpeg East projects. See id.

VTW is a company located in Vermont, which specializes in timber framing. See Deposition of Douglas Friant (“Friant Dep.”) at 18, PAPP. at tab B. VTW has no architects on staff, and does not design buildings. See id. at 27, 32. Instead, VTW utilizes architectural plans or sketches to fit frames to the houses those plans or sketches reflect. See id. at 37. VTW needs some significant information – footprint dimensions, wall height and roof pitch at a minimum – in order to design a frame. See id. at 31-2. If a customer comes to VTW without that information, VTW will generally refer that

customer to an architect, because architectural elements will drive the location of the timberframe components. See id. at 40.

VTW was founded by Douglas Friant and Dan Kelleher. See Friant Dep. at 17. Mr. Friant is the only person at VTW who does any drafting of timber frame drawings. See id. at 22.

**B. What Is A Timberframe**

Timberframing is a method of framing a building utilizing posts and beams, which, generally, remain visible inside of the building. See Friant Dep. at 27-8. The timberframe provides, in essence, the skeleton of a house, to which are affixed external siding and roofing and interior walls, again, typically with the frame itself visible on the interior. Timberframed buildings are unusual in that the timber frame itself – the structural component of the building – also defines the spaces within the building. See Plaintiff's Expert Disclosure (“Vincent Report”), PAPP. at tab C. A timber frame, therefore, can define the size, shape and intended layout of the building. See id.; see Friant Dep. at 33.

**C. Architectural Plans And Shop Drawings**

Architectural works – the design of a building – are reflected in so-called architectural plans. See, e.g., Defendant's MSJ Appendix, Tab 1. Architectural plans typically consist of foundation drawings, first and second floor drawings, elevations, sections, roof plans, and, sometimes, perspectives, which show the overall scope of a building. See Friant Dep. at 41. Architectural plans reflect a building's size, shape, layout or floor plan and dimension. See Vincent Report.

In the context of a timberframed building, the design of any particular timberframe is reflected in so-called shop drawings. See, e.g., Defendant's MSJ Appendix at Tab 2. Shop drawings reflect the components of the timberframe, meaning their location and their connections. See Friant Dep. at 41. It is typical to utilize architectural plans in the design process of a timberframe, see id. at 37, and architectural plans will often include designations for the locations of the frame components, see id. at 54. The Timberpeg plans at issue in this litigation include such designations. See Defendant's MSJ appendix at tab 1, sheet 2.

**D. Isbitski Residence Chronology**

On November 1, 1999, an individual named Stanley J. Isbitski entered into an agreement with Timberpeg called "Deposit Agreement For Timberpeg Preliminary Plans And Drawings," ("Design Agreement"). Defendant's MSJ Appendix at Tab 7. The Design Agreement provided that Timberpeg would prepare so-called preliminary plans, which would include the basement plan, floorplans, four elevations, and a cross section. See Deposit Agreement, ¶3.<sup>1</sup> The Design Agreement also provided that Timberpeg East, Inc. and/or its assigns, would own the copyright in the plans created and that whatever Mr. Isbitski provided by way of sketches or other materials would become the property of Timberpeg East, Inc. See id. at ¶4.

On or about December 29, 1999, Timberpeg completed the first set of preliminary plans, and supplied those plans to Mr. Isbitski. See Affidavit of Lynn Cole ("Cole Aff.") at ¶ 2, PAPP. at tab D. The plans reflected the design of a house, the main portion of which was to be timberframed, and a master bedroom wing of which was to be "stick

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<sup>1</sup> Although VTW suggested in its Motion to Dismiss that the preliminary nature of the plans is such to render them uncopyrightable, VTW does not pursue that theory in the present motion.

built,” meaning more standard framing with two inch lumber, and not posts and beams. See id.

In early December 2000, Mr. Isbitski first met with representatives of VTW. See Sworn Statement of Kim Hentschel ("Hentschel Statement") at ¶ 3, Defendant's MSJ Appendix at Tab 16. Among other documents, Mr. Isbitski brought a set of Timberpeg architectural plans with him, and showed them to VTW representatives. See id. at ¶ 5. According to VTW, Mr. Isbitski showed the plans to VTW by way of demonstrating what he did not want in a timberframe design. According to VTW, Mr. Isbitski wanted a different frame style, known as a “bent” frame and different frame component joinery. See Letter dated September 22, 2003 from John J. Welch, Esquire to Steven Woods, Esquire (“Welch Letter”) PAPP. at tab H.

In early 2001, Mr. Isbitski met with Lynn Cole of Timberpeg East, and Lynn Cole prepared a new floorplan for Mr. Isbitski. See Cole Aff. at ¶ 3. On or about April 20, 2001, Timberpeg completed a second set of architectural plans for Mr. Isbitski, which reflected the earlier meeting between Mr. Isbitski and Mr. Cole. See id. Timberpeg registered those plans with the Copyright Office, and that set of plans, and the architectural design they reflect, form the basis of this action. See Defendant's MSJ Appendix at Tab 1. The copyright became effective on May 18, 2001. See Certificate of Registration, VAu 510-781, attached as Exhibit E. Timberpeg delivered the plans to Mr. Isbitski for his further review and comment. See Cole Aff. at ¶ 3. On the strength of these plans, Mr. Isbitski obtained a building permit from the Town of Salisbury. See Cole Aff. at ¶ 6.

Mr. Isbitski made no further substantive revisions to the overall design of the house. See Cole Aff. at ¶ 4. He did, however, ask Timberpeg to frame his house design in a bent style. See id. In September 2001, at Mr. Isbitski's request, Timberpeg prepared construction drawings for Mr. Isbitski's residence, which included a so-called bent timberframe system. See id. at Exhibit 1. Except for providing for a bent frame, the construction plans duplicate the design embodied in the copyrighted plans. Compare April 20 plans with September 5 plans. Timberpeg sent the construction plans to Mr. Isbitski on or about September 19, 2001. See Cole Aff. at ¶ 4.

On or about February 20, 2002, VTW revised shop drawings of a timberframe for the portion of Mr. Isbitski's residence which the Timberpeg plans show to be timberframed. See Friant Dep. at 117-118; Defendant's MSJ Appendix at Tab. 2. Mr. Friant, who drew the shop drawings, testified that he had prepared between 10 and 20 revisions prior to February 20, 2002, but that VTW did not apparently keep any of the prior revisions. See Friant Dep. at 119. The last revision to the shop drawings occurred in May 2002. See id. at 121. It is undisputed that VTW went on to cut and erect the timberframe for the Isbitski residence.

**E. Similarity Between VTW Frame Design And Timberpeg Architectural Design**

The frame VTW drew and manufactured reflects a variety of similarities to the timber framed portion of Timberpeg's architectural design, which VTW does not discuss (or dispute). The footprint of the timberframed portion of the Isbitski house is nearly identical in both sets of plans, with the sole difference of two feet of size of the kitchen "bump out." See Vincent Report; see also Friant Dep. at 135-39; Defendant's MSJ Appendix at tab 1, sheet 2 and tab 2, sheet 2. Both bumpouts, however, remain

cantilevered. In addition, the overall dimensions are the same, the stair is the same design (switchback stairs) and in the same exact location, and the area shown as the loft is the same size and in the same location. See Vincent Report. The height of the walls is the same (first floor, 9 feet; second floor 8 feet), and the isometric (three dimensional) renderings in the VTW shop drawings show rooms (living room, dining room, kitchen) in the same location as in the Timberpeg architectural plans. See Vincent Report; compare Defendant's MSJ Appendix at tab 1, sheet 2 with id. at tab 1, sheet 1.

In addition, the post locations for the VTW frame posts are in the same locations as shown on the Timberpeg plans with a few minor exceptions, and the VTW frame accommodates the exact locations for the windows and doors as shown on the Timberpeg plans. See Vincent Report.

An examination of the house as constructed revealed that the foundation (which did not involve VTW) is of a simple rectangle, rather than as drawn on the Timberpeg plans. See id. The VTW frame, nonetheless, precisely matches the outline of the Timberpeg design with the exception of the kitchen bump out (a one by eight foot versus a one by ten foot bumpout), rather than the outline of the foundation actually poured. See id.

#### **F. VTW's Explanation**

During his deposition, Mr. Friant, who prepared the shop drawings on behalf of VTW, admitted, on a wall by wall basis, the footprint reflected in his shop drawings matches timberframed portion of the footprint in the Timberpeg architectural drawings. See Friant Dep. at 135-139. Mr. Friant denied, however, that he had in his possession Timberpeg's copyrighted plans during the frame drawing process. See id. at 106-07. At

the same time, Mr. Friant never strayed from his contention that VTW does not create architectural plans or design buildings. See, e.g., id. at 27, 42.

After his first visit with Isbitski, and review of Timberpeg's plans, Mr. Friant contends that he relied on Mr. Isbitski's very specific and precise instructions with respect to the design of the timberframe for his residence. Mr. Friant contends that he received these instructions through a series of telephone calls and meetings. See Friant Dep. at 108. According to Mr. Friant, Mr. Isbitski would specify, for example, the location of a post to within an eighth of an inch. See Friant Dep. at 109. Mr. Friant never questioned Mr. Isbitski concerning the source of the specific and precise instructions Mr. Isbitski provided. See id. More generally, when customers provide architectural plans, Mr. Friant does not contact the architect to verify that VTW has permission to use the architect's plans. See id. at 46.

Notably, during the times Mr. Isbitski met with Mr. Friant in person, the record is unclear whether Mr. Isbitski had documents to which he referred or not. For example, Mr. Friant testified that, during one such meeting, Mr. Friant did not know if Mr. Isbitski had any documents, and testified that Mr. Isbitski may have had some hand sketches or other documents, but that he did not recall seeing them. See id. at 109. More generally, Mr. Friant could not recall with any specificity what documents Mr. Isbitski provided to him. See id. at 123-25.

#### **G. VTW's Lawyers Speak**

By letter dated June 23, 2003, Timberpeg, through its General Counsel, raised the potential copyright claim with VTW. See Letter from Steven Woods, Esquire to VTW and Isbitski dated June 23, 2003, PAPP. at tab F. Molly Sinclair, Esquire responded on

VTW's behalf. See Letter dated July 14, 2003 ("Sinclair Letter") PAPP. at tab G. Mr. Friant testified Ms. Sinclair represented VTW and Attorney Sinclair was authorized to respond to Attorney Woods' letter. See Friant Dep. at 160. Mr. Friant also testified he saw the letter after it was sent, and he may have reviewed it before it was sent. See id. at 159-60.

In her response, Attorney Sinclair confirmed VTW contracted with Mr. Isbitski to design a frame "to accommodate floor plans of his house." Sinclair Letter. Mr. Friant, through counsel, invoked the attorney-client privilege when asked for clarification as to what floor plans Ms. Sinclair referred. See Friant Dep. at 160-61. In any event, in discovery to date, no floor plans, other than those that were part of Timberpeg's architectural plans, have surfaced.

On September 22, 2003, John J. Welch, Esquire sent a second letter to Attorney Woods. See Welch Letter, PAPP. at tab H. As with Attorney Sinclair, VTW authorized Attorney Welch to prepare the letter, and Mr. Friant testified that he may have reviewed the letter before it went to Attorney Woods. See Friant Dep. at 163-64.

The Welch letter reiterated that Mr. Isbitski asked VTW to design a frame to fit a portion of the floorplans of his house. Attorney Welch also confirmed that Mr. Isbitski provided a set of Timberpeg plans to VTW, which, Mr. Isbitski represented, he owned and for which he had paid. Attorney Welch confirmed that VTW "provided to Mr. Isbitski with [sic] an acceptable timber frame cut to [Mr. Isbitski's] drawings...." See Welch Letter.

In later correspondence and pleadings from VTW's third and present attorney, VTW again confirmed that it had copied Timberpeg's architectural plans. See letter dated

November 17, 2003 ("Whittington Letter"), PAPP. at tab I. The Whittington Letter stated "If VTW copied anything, it was the generic, non-original portion, i.e., the layout essentially." *Id.* at p. 2 (emphasis in original). More tellingly, Attorney Whittington further defended VTW's conduct in VTW's Motion to Dismiss, filed on December 3, 2003, stating: "Timberpeg specifically authorized the copying." Motion to Dismiss, p.6.

### **Summary Judgment Standard**

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The record evidence is taken in the light most favorable to the nonmoving party, indulging all reasonable inferences in his favor. *See Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 577 (1st Cir. 1999). However, the court must consider the record as a whole, and may not make credibility determinations or weigh the evidence. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000). The party seeking summary judgment must first demonstrate the absence of a genuine issue of material fact in the record. *See DeNovellis v. Shalala*, 124 F.3d 298, 306 (1st Cir. 1997) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). An issue of fact is genuine if there is sufficient evidence to permit a rational fact-finder, considering the evidence in the light most favorable to the nonmoving party, to find for either party. *See Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

## ARGUMENT

The parties are in general agreement as to the elements of a copyright claim. In that regard, a plaintiff must prove copying, and that the infringing work is substantially similar to the protected work.<sup>2</sup> A plaintiff may prove copying through direct evidence, or circumstantially by proving that the defendant had access to the protected work and the two works are substantially similar. If a plaintiff cannot prove access, it can still prove copying by proof that the two works are strikingly similar. As set forth below, in Section II, the record, beyond that portion presented in VTW's motion, contains strong direct evidence of copying, and nearly overwhelming evidence of access and substantial similarity. The only unique question in this case is whether shop drawings and a timberframe can infringe an architectural work. That question is discussed in Section I below.

### **I. A Timberframe Can Constitute A Copy Of An Architectural Work**

The core issue in this action and VTW's motion raise, concerns whether a timberframe, and shop drawings reflecting the frame, can constitute copying of an architectural work - the design of a building - for copyright infringement purposes. In its motion, VTW contends that the copyright statute protects only buildings, and not timberframes, which are something less than full buildings. See VTW Memorandum of Law at 15-16. VTW's contention misstates the inquiry. Timberpeg neither bases its claim upon a particular timberframe it designed, nor does Timberpeg allege that VTW's timberframe is a building subject to protection under the copyright act. Timberpeg

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<sup>2</sup> The plaintiffs use the term "copying" throughout this memorandum consistent with copyright caselaw that equates copying with any infringing use.

simply alleges that VTW's frame constitutes an unlawful copy of Timberpeg's architectural work reflected in Timberpeg's copyrighted architectural plans.

As VTW points out, section 101 of the copyright statute defines an architectural work as "the design of a building. . . ." 17 U.S.C. § 101. VTW omits the remainder of the definition. In full, the copyright act defines an architectural work as:

design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work 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.

The question is not, therefore, whether the VTW timberframe is itself a building, as VTW suggests, but whether the VTW timberframe, and the shop drawings that reflect its design, constitute a tangible medium of expression of the design of the Isbitski residence, and therefore, a copy of Timberpeg's protected architectural work.

When viewed in terms of the overall statutory definition, the VTW frame easily constitutes a tangible medium of expression of Timberpeg's architectural work, through VTW's timberframe's reflection of the "overall form as well as the arrangement and composition of spaces and elements in the design" of Timberpeg's architectural work.

With respect to the "overall form" element, the frame VTW drew and erected is the skeleton of the house it was designed to fit. Compare defendant's MSJ Appendix at tab 2, sheet 1 (VTW frame) with id at tab 6, sheets 4-5 (Timberpeg house). The VTW drawings and frame reflect nearly the identical footprint, the same plate height (exterior wall height – first floor 9 feet, second floor 8 feet in both works), and the same roof pitch and dimensions as the architectural work in Timberpeg's copyrighted plans. See Vincent Report. The timberframe, in other words, reflects the overall form – the shape, size,

proportions and lines – of the timberframed portion of Timberpeg’s copyrighted architectural work.

With respect to the “composition of spaces” element, VTW’s timberframe and drawings reflect the same interior room dimensions and floorplan/layout as the Timberpeg copyrighted plans. VTW places the stairs in the same location, and the frame itself (as opposed to the shop drawings) precisely accommodates the windows and doors in the same locations as the Timberpeg copyrighted plans. See Vincent Report. VTW locates posts in nearly the identical position as in the Timberpeg copyrighted plans. See Id. The VTW drawings and frame reflect nearly identical exterior envelopes and interior layout as Timberpeg’s architectural plans. In short, it is hard to imagine an expression of an architectural work more closely aligned with the statutory requirements.<sup>3</sup>

That VTW’s frame is less than a completed building in no way precludes it from being a tangible means of expression of Timberpeg’s copyrighted architectural work. The legislative history to the statutory amendment adding copyright protection for architectural works “makes clear that an unconstructed work, embodied only in plans or drawings, can be infringed by a structure that embodies the copied design.” Hunt v. Pasternak, 179 F.3d 683, 685-86 (9<sup>th</sup> Cir. 1999) (quotation and citation omitted) (emphasis added). This is simply an architecture-specific iteration of the principle that an allegedly infringing copy which is only an inchoate representation of some final product to be marketed commercially may still infringe. See Walker v. Univ. Books, 602 F.2d 859, 864 (9<sup>th</sup> Cir. 1979) (finding that blueprints copied from finished cards constitute an

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<sup>3</sup> VTW’s reliance on Yankee Candle Co., Inc. v. New England Candle Co., 14 F.Supp. 2d 154 (D. Mass. 1998) is unavailing, in that Yankee Candle stands for the proposition that copyright protection extends only to building designs, not the design of a store front within a mall. In this case, Timberpeg seeks to enforce protection of its building design, and not a timberframe design.

infringement of the latter even though not in final form); see also 2 Nimmer on Copyright (“Nimmer”) §8.01[B] at 8-16 (stating that the fact that one work has been copied from a work in another medium does not render it any less a copy). In like fashion, that the VTW timberframe is an inchoate representation of Timberpeg’s final house design does not preclude the VTW timberframe from infringing. VTW’s shop drawings are entitled “Isbitski Residence.” Similarly, that VTW copied the timberframed portion of Timberpeg’s plans, which also contain non-timberframe elements, in no way precludes VTW’s work from being a tangible medium of expression, and, therefore an infringement, of Timberpeg’s plans. See Richmond Homes Management, Inc. v. Raintree, Inc., 862 F.Supp. 1517, 1527 (W.D.Va. 1994) (“It is not necessary to prove that every element of the ... plans was copied; it is sufficient to show that a substantial part was copied.”).

In Walker v. Univ. Books, 602 F.2d 859, 864 (7<sup>th</sup> Cir. 1979) the plaintiff claimed that the defendant’s use of its finished product (cards) to make blueprints for new cards constituted infringement. The defendant, similar to VTW, contended that the blueprints did not constitute a final product, and, therefore, could not infringe. Rejecting that argument, the court emphasized that “the question is not whether the [defendant] utilized the blueprints as merely a step in manufacture of their cards, but whether they unauthorizedly utilized the [plaintiff’s] work in the manufacture of their blueprints.” Id. See also Walco Products, Inc. v. Kittay & Blitz, Inc., 354 F. Supp. 121, 125 (S.D.N.Y.) (finding likelihood of success on merits in preliminary injunction context of infringement through copying in three dimensional form the plaintiff’s two dimensional, copyrighted illustrations). In short, a timberframe, itself a structure, may nonetheless copy an

architectural work as the statute defines that term. See Hunt, 179 F.3d at 685-86. As set forth below, the record demonstrates VTW did copy Timberpeg's plans in VTW's shop drawings and timberframe VTW drew and manufactured.

## **II. VTW Copied Timberpeg's Copyrighted Architectural Plans**

Having established that a timberframe can copy an architectural work, the inquiry shifts to whether VTW's frame copied Timberpeg's architectural work. A plaintiff claiming copyright infringement must prove that it had a valid copyright, and that the defendant copied the plaintiff's copyrighted work.<sup>4</sup> A copyright plaintiff may prove copying in any of three different ways. First, the plaintiff may adduce direct evidence of copying. Because direct evidence of copying is frequently impossible to obtain, a plaintiff may also prove copying through proof that the defendant (1) had access to the copyrighted work, and (2) that the defendant's work is substantially similar to the plaintiff's copyrighted work. Alternatively, a plaintiff lacking direct evidence may prove copying by demonstrating that the two works are "strikingly similar." See 4 Nimmer on copyright §13.02[B]. In this action, the record contains evidence proving copying through all three methods.

### **A. Direct Evidence Of Copying**

VTW, through all three of its attorneys, has consistently admitted to copying Timberpeg's plans in preparing its shop drawings and designing and erecting its timberframe. The Sinclair Letter confirmed that Mr. Isbitski contracted with VTW to design a house frame "to accommodate floor plans of his house." Sinclair Letter, PAPP. at tab G. The Welch Letter confirmed that Mr. Isbitski asked VTW to design a frame to fit a portion of the floorplans of his house, that Mr. Isbitski provided a set of plans to

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<sup>4</sup> VTW does not challenge the validity of the copyright.

VTW drawn by Timberpeg, and VTW provided Mr. Isbitski with a frame cut to those drawings. See Welch Letter, PAPP. at tab H. The Whittington Letter implied that VTW copied Timberpeg's layout, see Whittington Letter, and VTW's Motion to Dismiss argued only that VTW's copying was authorized. VTW no longer argues Timberpeg authorized the admitted copying.

It is well established that an attorney speaks on behalf of and can bind his or her client through his or her statements and representations. See Bower v. Davis, 119 N.H. 605, 608 (1979) (representations in written correspondence by attorney with client's knowledge of attorney's role is binding on client). It is also well established that infringement of architectural plans can occur through copying of floor plans, the exterior, or both. See Richmond Homes, 862 F. Supp. at 1572. VTW's counsels' letters and VTW's prior pleadings confirm, by direct evidence, that VTW copied, at a minimum, Timberpeg's floorplans in the design of the timberframe.

**B. Ample Evidence In The Record Establishes Access**

Even if this Court views the record as lacking direct evidence of copying, the record overwhelmingly compels a finding of access and substantial similarity of the two works.

Access is defined broadly and means merely the opportunity to have reviewed the protected material. See Jones v. Nino Homes, 858 F.2d 274, 277 (6<sup>th</sup> Cir. 1988); Mayotte and Assoc. v. MGC Bldg. Co., 885 F. Supp. 148, 152 (E.D. Mich. 1994); Arthur Rutenberg Corp. v. Parrino, 664 F. Supp. 479, 481 (M.D. Fla. 1987). The Sinclair, Welch and Whittington letters alone establish that VTW had access to Timberpeg's copyrighted architectural plans. The Welch letter, for example, confirms

that Mr. Isbitski provided VTW with a set of Timberpeg plans, to which VTW cut a frame to fit. The Whittington and Sinclair Letters confirm that VTW had and used the floorplans, and the Motion to Dismiss confirms that copying occurred. These letters confirm that VTW had actual access to the plans.

Putting those letters aside, an opportunity to review the plans may be inferred, even on summary judgment when the plaintiff and defendant were both dealing with a mutual third party over the same period of time. See 4 Nimmer on Copyright § 13.02[A] at 13-17; Parrino, 664 F. Supp. at 481; Rottlund Co. v. Pinnacle, 2004 WL 1879983 at \*21 (D. Minn. 2004); Arthur Rutenberg v. Maloney, 891 F. Supp. 1560, 1567 (M.D. Fla. 1995). Proof of actual viewing or utilization of knowledge gained from viewing is not necessary. See Rottlund, 2004 WL 1879983 at \*21.

In Arthur Rutenberg Corporation v. Parrino, 664 F. Supp. 479, 481 (M.D. Fla. 1987), for example, evidence that the homeowner obtained the plaintiff's copyrighted plans, and then met with a drafting firm on at least eight occasions thereafter established access on the part of the drafting firm because "evidence that a third party with whom both the plaintiff and defendant were dealing had possession of plaintiff's work is sufficient to establish access by the defendant," meaning the drafting firm. In Arthur Rutenberg v. Maloney, 591 F. Supp. 1560, 1567 (M.D. Fla. 1995), plausible evidence that the drafter of the infringing plans had never seen the copyrighted plans did not overcome the finding of access based on the homeowner's possession of the plaintiff's plans before the drafter prepared her plans at the homeowner's behest. See also Rottlund, 2004 WL 1879983 at \*21 (attributing direct access of one defendant to others involved with that defendant).

The chronology in this action proves that VTW had an opportunity to review Timberpeg's plans regardless of VTW's insistence to the contrary. Mr. Isbitski went to Timberpeg in 1999, after which he received the first set of architectural plans. He shared those plans with VTW in late 2000. Mr. Isbitski returned to Timberpeg, where he obtained revised plans in April 2001 which Timberpeg copyrighted, and construction plans in September 2001 that reflected the so-called bent style timberframe. Mr. Isbitski then returned to VTW, who, between February and mid-May 2002, prepared shop drawings and, thereafter, erected a timberframe for Mr. Isbitski. Not only were Timberpeg and VTW both dealing with Mr. Isbitski, but VTW prepared its plans after Timberpeg provided Isbitski with the copyrighted plans. This was the same point in time during which Isbitski was allegedly instructing Mr. Friant on the location of posts, to within an eighth of an inch. On those undisputed facts, VTW, as a matter of law, had an opportunity to review Timberpeg's plans. See Parrino, 664 F. Supp. at 481; Maloney, 891 F. Supp. at 1567. Notably, by establishing a reasonable opportunity to view, Timberpeg establishes access, and not just an inference of access. See Rottlund, 2004 WL 1879983 at \*21 (explaining same in context of Summary Judgment).

In disputing access based on never having possessed or reviewed Timberpeg's plans, VTW appears to invoke "innocence" (i.e. Isbitski may have been doing something wrong, but not us) as a defense. See Welch Letter (stating that Timberpeg may have claim against Isbitski). VTW's argument is flawed: if Timberpeg has a claim against Isbitski, it also has a claim against VTW. This is because copyright law does not factor intent into liability. To the contrary,

[o]nce a plaintiff has proven that he or she owns the copyright on a particular work, and that the defendant has infringed on those

‘exclusive rights,’ the defendant is liable for the infringement and this liability is absolute. The defendant’s intent is simply not relevant: the defendant is liable for ‘innocent’ or ‘accidental’ infringements.

Pinkham v. Sara Lee Corp., 983 F.2d 824, 829 (8<sup>th</sup> Cir. 1992) (finding infringement even though defendant claimed that it was unaware of plaintiff’s existence at the time of the infringement). Even in situations in which the defendant believes in good faith that it is not infringing, the defendant may be found liable. See Pye v. Mitchell, 574 F.2d 476, 481 (9<sup>th</sup> Cir. 1978). See also 2 Nimmer on Copyright § 8.01[C] at 8-18. (stating that if a copyright defendant copied from a third party, that is no defense if the third work was an unauthorized copy of the plaintiff’s work.); 4 Nimmer § 13.08 at 13-284 (stating that where a defendant’s work is based on work furnished by a third party, the defendant’s ignorance that the third party has copied from the plaintiff will not immunize the defendant from liability). As the United States Court of Appeals for the Eighth Circuit points out,

liability for copyright infringement proceeds on the principle that ‘as between two innocent parties (i.e., the copyright owner and the innocent infringer) it is the latter who should suffer since he, unlike the copyright owner, either has an opportunity to guard against the infringement by diligent inquiry, or at least the ability to guard against liability for infringement by an indemnity agreement from his supplier or by an ‘errors and omissions’ insurance policy.

Pinkham, 983 F.2d at 829 (quoting 4 Nimmer on Copyright § 13.08 at 13-286).

At best, drawing all inferences in VTW’s favor, VTW could at most establish an inference of "accidental infringement," based on its claim that it did not see the copyrighted plans, and that Mr. Isbitski instructed, within 1/8 of an inch, where to locate

posts. Accidental infringement, however, does not shield VTW from liability,<sup>5</sup> or Summary Judgment in Timberpeg's favor on access.

**C. VTW's Shop Drawings And Timberframe Are Strikingly, Much Less Substantially Similar, To Timberpeg's Architectural Work**

In addition to proving access, a copyright plaintiff must also prove that the infringing work is substantially similar to the protected work. See Richmond Homes, 862 F.Supp. at 1527. When a plaintiff proves access, the substantial similarity burden decreases. See Kerr v. New Yorker Magazine, 63 F.Supp.2d 320, 325 (S.D.N.Y.). Alternatively, the copyright plaintiff may prove copying in the absence of direct evidence and without evidence of access, by proving that the two works are "strikingly similar" See 4 Nimmer, §13.02 [B]. A comparison of the two sets of plans in the context of governing law confirms that the two works are strikingly similar, much less substantially similar.

Substantial similarity does not require "mindless" or "slavish" copying. See Maloney, 891 F. Supp. at 1567; see also Richmond Homes, 862 F. Supp. at 1527 (stating that substantial similarity does not require proof that every element was copied). Instead, "the ordinary observer comparing two works, unless he or she set out to detect the disparities, would be disposed to overlook them and regard the two works' aesthetic appeal as the same, the two works are substantially similar." Richmond Homes, 862 F. Supp. at 1527 (quotation and citation omitted). The inquiry must focus on the ordinary

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<sup>5</sup> As the Pinkham decision points out, the "innocent" infringer is in the better position to guard against liability through, among other ways, diligent inquiry. See 983 F. 2d at 829. Mr. Friant testified that, not only did he conduct no inquiry of Isbitski, see Friant Dep. at 110-11, he has never conferred with architects that he has permission to use their copyrighted plans, see id. at 46. One telephone call to Timberpeg could have prevented the infringement and this litigation.

and reasonable layperson's overall impression of the two works, and not on a detailed comparison focusing on the individual differences. See id.

Factors that have been found to establish substantial similarity among architectural works include likeness of layout or floorplan; see Maloney, 891 F. Supp. at 1567; placement or number of rooms and similarity of room dimensions; see Parrino, 664 F. Supp. at 481; MGC, 885 F. Supp. at 153; placement of other features such as stairwells and windows; see MGC, 885 F. Supp. at 153. In short, the test concentrates on the gross features of the two architectural works rather than specific differences. See Value Group v. Mendham Lake Assoc., 800 F. Supp. 1228, 1233 (D.N.J. 1992).

In view of the test, both in the abstract and as applied, the VTW frame is easily substantially similar, if not strikingly similar, to Timberpeg's architectural plans. The two works contain nearly identical gross features, including floor plan, room dimension, stairwell location, post location, accommodation for identical window and door locations, exterior wall height and roof lines. See Vincent Report; compare Defendant's MSJ Appendix at tabs 1 and 2 (Timberpeg's plans and VTW's shop drawings). Nearly every, gross feature of Timberpeg's architectural work can be found in near duplication in VTW's shop drawings and frame. The two works in this action reflect similarity in nearly every category that has supported substantial similarity and lack the types of differences that have defeated substantial similarity in other cases.<sup>6</sup>

VTW implicitly concedes the similarities of the gross features of the two works in its motion, which neither disputes them, nor even discusses applicable law concerning

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<sup>6</sup> Striking similarity occurs when the overlap between the two works is such to preclude the possibility that the defendant independently arrived at the same result. 4 Nimmer § 13.02[B] at 13-26. In this action, VTW's assertion that it does not design homes precludes a claim of independent creation, and a defense to striking similarity. Nor could VTW make a valid claim of independent creation when VTW has admitted that Mr. Isbitski; instructed VTW where to place posts, to within an eighth of inch.

architectural works. Instead, VTW raises two arguments which, when scrutinized, do not bear on the substantial similarity inquiry at all. VTW first argues that Timberpeg's work is of a house, including a garage, stick built section, breezeway and post and beam section, whereas VTW's work is simply a timberframe. See Motion at 15. This argument essentially recasts the argument that a timberframe cannot constitute a copy, and that a copy of a portion of a protected work cannot be an infringement, both of which are refuted in prior sections.

VTW also argues that the Timberpeg plans are so "primitive" as to not even reflect a timberframe. Again, VTW's argument is analytically off kilter. Timberpeg has never asserted that it designed a frame that VTW copied; to the contrary, Timberpeg has always asserted that it designed a house, that VTW's drawings and frame are expressions, and, therefore, copies of that house. Indeed, VTW's own shop drawings are entitled "Isbitski Residence." See Defendant's MSJ Appendix at Tab 2. VTW does not contend that Timberpeg's drawings are too "primitive" to be copyrightable. In any event, Timberpeg's plans were sufficiently detailed for Isbitski to obtain a building permit.

A review of the report of Jonathan Vincent and relevant portions of the Timberpeg plans and VTW shop drawings reveal that the two works are nearly identical in their gross features, and depict only slight and insignificant differences. As a matter of law, the two works are substantially similar.

### **III. Timberpeg East Is A Proper Plaintiff**

VTW seeks summary judgment as to Timberpeg East on the grounds that it does not have any ownership of the copyright at issue. As described above, Timberpeg East is wholly owned by T-Peg, Inc., the record owner of the copyright in this action. See

Pattison Aff. at ¶ 5. Timberpeg East is responsible for TIMBERPEG® package sales and marketing in the northeast, and was the entity with whom Mr. Isbitski dealt. See id. T-Peg, Inc. and Timberpeg East share a mutual business goal and objective, reflected in agreements between them concerning copyright transfer and drafting, among other aspects. See id. One such contract expressly provides that the two entities have co-ownership of all copyrights or copyrightable material produced or acquired by Timberpeg East. See id. Timberpeg East is listed on the Isbitski plans, alongside of T-Peg, Inc., the record owner of the copyright.

The copyright statute expressly states that legal owners and beneficial owners of copyrights may sue for infringement. See 17 U.S.C. § 501(b). A beneficial owner may, for example, be an entity who parts with its legal title to a copyright as part of a business relationship with another entity. See, e.g., 3 Nimmer § 12.02[C] at 12-61. Thus, the mere fact that an entity is not a record owner at the time of registration alone does not preclude that entity from beneficial or equitable owner status with respect to enforcing the statutory rights. See Pye, 574 F.2d at 480. It is the cooperation and interrelationship of the two entities that gives rise to their ownership status. See id. (in context of two co-authors but only one listed as record owner).

Given the relationship between T-Peg, Inc. and Timberpeg East, including an express agreement that each shall own all copyrights acquired by Timberpeg East, the latter is easily viewed as an equitable or beneficial owner with standing to sue. Not only do the two entities have a joint relationship with respect to the marketing, sale and design of TIMBERPEG® packages, but Timberpeg East did the legwork with Mr. Isbitski, including overseeing the design of the Isbitski residence, for T-Peg, Inc. At a minimum,

a question of fact remains sufficient to defeat VTW's motion for summary judgment with respect to the status of Timberpeg East. The undisputed facts, however, confirm that Timberpeg East is a proper plaintiff along with T-Peg, Inc.

**IV. Questions Of Fact Preclude Summary Judgment  
In VTW's Favor On The State Law Claims**

Timberpeg concedes that, to the extent its state law claims create only rights equivalent to those provided by the copyright statute, those claims are preempted. At this juncture, however, summary judgment in VTW's favor on those claims is premature. In cases in which the defendant attacks the validity of the core copyright claim, judgment in its favor on any pendent state law claims is premature until the status of the copyright claim is determined. See, e.g., Intown Enterprises, Inc. v. Barnes, 721 F. Supp. 1263, 1267 (N.D. Ga. 1989) (dismissing state law claims as preempted only after finding valid copyright claim). In this action, for example, VTW argues strenuously that it never reviewed or possessed Timberpeg's copyrighted plans. Alternatively, VTW argues that its timberframe does not come within copyright statute protections. Should those arguments succeed in defeating Timberpeg's copyright claims, its unjust enrichment, unfair competition and Consumer Protection Act claims would provide alternate avenues of relief for Timberpeg.

Concerning Count VII, for violation of the New Hampshire Consumer Protection Act, this Court and the First Circuit have made it clear that the act applies to conduct between commercial entities. See Eastern Mountain Platform Tennis, Inc. v. Sherwin Williams Company, Inc., 40 F.3d 492, 500 (1<sup>st</sup> Cir. 1994); Pacamor Bearings, Inc. v. Minebea Co., Ltd, 918 F.Supp. 491, 499 (D.N.H. 996). Drawing all inferences in Timberpeg's favor, the record supports this claim separate from the copyright claim. In

that regard, Mr. Friant admitted that VTW and Timberpeg are competitors. See Friant Dep. at 50. Both design and erect timberframes, the difference being that Timberpeg also provides exterior covering and architectural services. See id. at 49. From the chronology of Isbitski events, a jury could infer that VTW met with Isbitski, became aware he was also dealing with Timberpeg, an admitted competitor, discussed design changes with him, sent him back to Timberpeg to have design changes incorporated into his architectural plans, then used those architectural plans to draw a frame, knowing Timberpeg's business included design and erection of timberframes. Such conduct, if assumed true for purposes of VTW's motion, would certainly "attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." Barrows v. Boles, 141 N.H. 382, 390 (1996).

With respect to Count VI, unfair competition, the same is true. From the facts in the record, a jury could infer that VTW knew that it was drawing a frame from Timberpeg's architectural plans (or was willfully blind to that fact), and allowed Isbitski to place those plans on file at the Salisbury Building Department for purposes of obtaining a building permit, without ever correcting the record or taking any other steps to insure that the general public, to whom the files of the Salisbury Building Inspector are open and available, did not think that VTW's work was really that of Timberpeg. Those facts preclude summary judgment on Count VI, even on the basis of VTW's characterization of the legal elements of that claim.

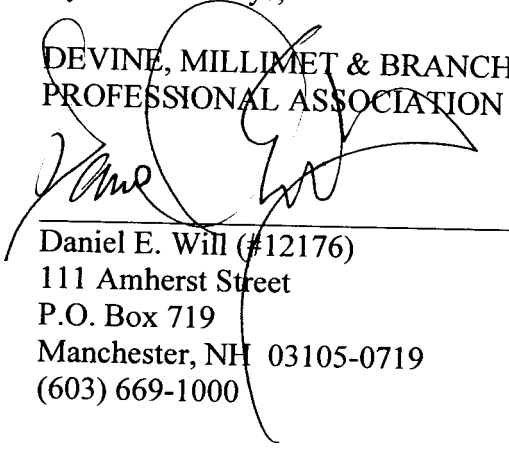
Respectfully submitted,

T-PEG, INC. AND  
TIMBERPEG EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Dated: September 17, 2004



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 17 day of September, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.



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Daniel E. Will (#12176)

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