

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

_____)	
T-Peg, Inc. and Timberpeg East, Inc.)	
Plaintiffs,)	
v.)	No. C-03-462-M
Stanley J. Isbitski and Vermont Timber Works, Inc.)	
Defendants.)	
_____)	

**PLAINTIFFS' REPLY TO DEFENDANT'S
OBJECTION TO PLAINTIFFS' 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 submit this reply to the defendant's, Vermont Timber Works, Inc. ("VTW"), objection to Timberpeg's motion for partial summary judgment, and state as follows:

1. Timberpeg moved for partial summary judgment on two alternative elements of its copyright claim against VTW: direct copying and access, the latter comprising one of two elements necessary to prove copying circumstantially. VTW has objected to Timberpeg's motion for partial summary judgment. Timberpeg believes its principal brief suffices on the issue of direct copying. This reply focuses on the second component of Timberpeg's motion for partial summary judgment, namely access.

2. In the typical copyright infringement action, direct evidence of copying is often unavailable. Accordingly, a copyright plaintiff may prove copying circumstantially by proving that the defendant had access to the copyrighted work, in this case

architectural plans, and the defendant's work is substantially similar to the plaintiff's protected work. See Memorandum Of Law In Support Of Plaintiffs' Cross Motion For Partial Summary Judgment at p. 15. A copyright plaintiff may prove access as a matter of law by establishing that the defendant had the opportunity to have reviewed the copyrighted material. See id. at 16-17. Even at summary judgment, the opportunity to review the copyrighted material can be inferred by proof that the plaintiff and defendant were simultaneously dealing with a common, third party that itself had possession of the copyrighted work. See id. at 17

3. Timberpeg contends that the undisputed facts in the record confirm that VTW had access to Timberpeg's copyrighted architectural plans, as the law defines access. In that regard, Timberpeg has established, and VTW does not contest, that Timberpeg and VTW were simultaneously dealing with Stanley J. Isbitski who had Timberpeg's copyrighted architectural plans between the spring of 2001 and late 2002. See Timberpeg's Memorandum of Law at 18-19.

4. In its objection to Timberpeg's motion for partial summary judgment, VTW disputes neither the factual predicate upon which Timberpeg bases its access argument nor the decisional law Timberpeg cites in support of its claim for summary judgment in Timberpeg's favor that VTW had access to Timberpeg's copyrighted plans. VTW's sole reference to the access issue appears in VTW's Preliminary Objection To Plaintiffs' Motion For Partial Summary Judgment in which VTW contends, without further elaboration, (1) that a question of material fact exists as to whether VTW had access to the copyrighted plans, see paragraph 1, and (2) that Timberpeg did not create a

timberframe at all, and, therefore, by implication, VTW could not have had access to Timberpeg's timberframe plan, see paragraph 2.

5. VTW's first point is no more than a conclusory allegation, unsupported by any citation to the record demonstrating a genuine issue of material fact. Timberpeg does not contend that VTW's access to the 1999 plans constitutes access to the copyrighted plans. To the contrary, Timberpeg contends that the simultaneous dealings of VTW and Timberpeg with Mr. Isbitski gave VTW an opportunity to have reviewed Timberpeg's copyrighted plans, and establishes access without more. See Timberpeg's Memorandum Of Law at 17-18. While Mr. Friant contends that he never saw Timberpeg's plans, he admits that Mr. Isbitski provided him with specific information – to one eighth of an inch – concerning post location and frame details. See plaintiffs' Summary Judgment Appendix at Tab B, p. 107. This evidence alone establishes the opportunity to review that entitles Timberpeg to Summary Judgment as to access.

6 VTW's second point misconstrues the basis of Timberpeg's copyright claim. Timberpeg does not contend that VTW copied a timberframe drawing; Timberpeg claims that VTW's timberframe drawings and erected timberframe unlawfully infringe Timberpeg's protected architectural design, which is reflected in Timberpeg's copyrighted architectural plans. With respect to access, therefore, Timberpeg does not contend that VTW had access to copyrighted timberframe drawings. Instead, Timberpeg contends that VTW had access to copyrighted architectural plans.

7. For the reasons stated in its principal memorandum of law, Timberpeg requests Summary Judgment with respect to direct evidence of copying. Additionally, in the absence of any dispute of fact with respect to circumstantial proof of access,

Timberpeg is entitled to judgment as a matter of law in its favor that VTW had access to Timberpeg's copyrighted architectural plans.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: November 16, 2004

By:


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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.


Daniel E. Will (#12176)

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