

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 OBJECTION TO PLAINTIFFS’ EXPERT TESTIMONY

Defendant, Vermont Timber Works, Inc. (“VTW”), objects to plaintiffs’ proposed expert testimony from Jonathan Vincent and James Driesch.

The Issue: “Substantial Similarity”

This is a case for alleged copyright infringement of an architectural design. As briefed by both parties in connection with the summary judgment motions, a required element of a plaintiff’s infringement case (absent direct evidence of copying) is that the “copied” design is “substantially similar” to the design registered with the Copyright Office.<sup>1</sup>

The Disclosed “Experts”

Plaintiffs have made an expert disclosure (Ex. 1, attached) as to two persons – each of whom is an employee of plaintiffs or their affiliated company:

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<sup>1</sup> E.g., Grubb v. KMS Patriots, L.P., 88 F. 2d 1, 6 (1<sup>st</sup> 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”).

(1) Jonathan Vincent, employed by Timberpeg Design Services, whose sole applicable opinion is that “the overall design is virtually the same.” Ex. 1. At deposition, Vincent at first denied any opinion as to “substantial similarity” (Ex. 2, at 21-22), but then appeared to broaden his opinion to claim that “what’s built is substantially similar to our plans,” the term used by the cases.<sup>2</sup>

(2) James Driesch, also employed by Timberpeg Design Services, who submitted no expert report (Ex. 3 at 12-13), signed no opinions (Ex. 3 at 13), has “no opinions separate from [Vincent’s]” (Ex. 3 at 4), did not assist Vincent in preparing the opinion (Ex. 3 at 5) and simply “read [Vincent’s] opinion and agreed with [it].” Ex. 3 at 15. Other than that, Driesch’s sole involvement in the expert opinion was in taking measurements (which in no way is an expert function).

#### Vincent Is Unqualified And His Expert Testimony Should Be Excluded

A witness may testify as an expert only if he has scientific, technical, or other specialized knowledge based on his knowledge, skill, experience, training, or education, which will assist the trier of fact to understand the evidence or to determine a fact in issue. FRE 702

Vincent has no specialized knowledge, skill, experience training or education on the subject of “substantial similarity.” His testimony is as follows:

- He has never rendered expert opinions before in any legal case. Ex. 2 at 90.

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<sup>2</sup> To the extent Vincent has opinions other than as to “substantial similarity,” they should be excluded as irrelevant.

- He did not take any courses in architecture school that address the subject of "substantial similarity" of designs under the Copyright Act or otherwise. Ex. 2 at 90.
- He has never seen the term "substantial similarity" addressed in books or publications (except in copyright notices, which he does not rely on here). Ex. 2 at 90-91.
- He is not an expert in copyright. Ex. 2 at 91.
- He has never done timber frame drafting by computer (as was done here). Ex. 2 at 91.

In short, there is nothing Vincent knows or does which gives him a superior vantage point to a jury to address the subject of "substantial similarity."

**Driesch Is Unqualified, Has No Opinions, And Has Not Submitted The Required Report; His Expert Testimony Should Be Excluded**

Driesch also has no knowledge, skill, experience, training, or education, which will assist the trier of fact to understand the evidence or to determine a fact in issue.

Moreover, it is not even clear he holds an opinion at all, since he merely "read Vincent's report" and "agreed with it."

In addition, plaintiffs should be barred from using Driesch since they submitted no expert report for him as required by FRCP 26(a)(2)(B).

**Conclusion**

The Court should exclude expert testimony from Jonathan Vincent and James Driesch.

Date: November 20, 2004

VERMONT TIMBER WORKS, INC.  
Defendant,

By: W E Whittington  
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Attachments:

Ex. 1 – Plaintiffs’ Expert Disclosure	07/27/04
Ex. 2 – Deposition of Jonathan Vincent	10/22/04
Ex. 3 – Deposition of James Driesch	10/22/04

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2004, I served the foregoing pleading on the following counsel of record, by first class mail:

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