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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 CLARIFICATION  
OF NOVEMBER 19, 2004 ORDER

Defendant, Vermont Timber Works, Inc. ("VTW"), requests that the Court clarify (and revise as appropriate) its November 19, 2004 Order concerning the relevancy of plaintiffs' documents on damages. As shown below, (1) despite plaintiffs' election to seek statutory damages rather than lost profits, plaintiffs' (lack of) damages is still relevant to the issue of statutory damages; and (2) other motions currently pending should now be granted based on the November 19 Order.

The Order, while sanctioning plaintiffs for failure to comply with the rules and for "six months of stonewalling," nonetheless inadvertently harms defendants to the extent it cuts off discovery on plaintiffs' lack of damages.

Damage Information Is Still Relevant To "Statutory Damages"

This is a case alleging copyright infringement. Under Section 504 of the Copyright Act, 17 U.S.C. §504, a plaintiff may elect either "actual damages and profits" or "statutory damages," not both, as the November 19 Order correctly notes.

In electing statutory damages, it is true that plaintiffs have mooted the issue of their damages per se, that is, under Section 504(b). But those damages still have relevance in any determination of statutory damages, under Section 504(c).

Statutory damages, under Section 504(c), are not a specific figure, but a discretionary range, from \$750 to \$30,000.<sup>1</sup> According to Nimmer, “the determination of statutory damages within the applicable limits may turn upon such factors as . . . the revenues lost by the plaintiffs as a result of the defendant’s infringements.” Nimmer On Copyright §14.04[B][1][a] at page 14-48.

Here, defendant is confident that the actual damages discovery will demonstrate that plaintiffs had no lost revenues based on the alleged infringement. Thus defendant still needs the damages discovery in support of its argument that any statutory damages should be de minimus.<sup>2</sup>

If the court were to instruct the jury that plaintiffs suffered no damages by virtue of defendants’ actions, defendants would no longer have a need for this discovery.

Since the Court has not so ruled, defendants respectfully request that the discovery relating not just to the six jobs, but to the plaintiffs’ broader range of 20 jobs – to which plaintiffs even agreed<sup>3</sup> – and other agreed or requested information, be ordered produced, as follows:

- (1) The job cost and accounting information for plaintiffs’ June and June 2002 jobs, plus enough sequential August 2002 jobs to make 20 jobs in total.  
Ex. 1.

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<sup>1</sup> In addition, if a finding of “willfulness” is made, the range can be increased to \$150,000, and if a finding of “unawareness” is made, the range can be reduced to as little as \$200.

<sup>2</sup> In addition, plaintiffs alleged in their Objection to the Motion To Dismiss in this case (Document 8, at 20) that on the state law claims they were “prepared to prove damages in excess of \$75,000.” The factual basis of this statement has been cast severely in doubt by the damages discovery produced to date, and since plaintiffs themselves raised the matter in their pleadings, causing defendant expense in defending it, defendant should be permitted to test it.

<sup>3</sup> The parties agreed that plaintiffs would produce the information as to the “projects [in] June and July of 2002 with enough sequential additional ones in August to hit the bogey of 20,” Ex. 1, attached, so that defendant could affirmatively demonstrate that plaintiffs suffered no loss of revenues or profits.

- (2) On the Isbitski job, a break out of time, expense and costs as between the timber frame component and the non-timber frame components, and any documents relating thereto. Ex. 1.
- (3) Plaintiffs' computation of gross profit margin based on the sale of the timber frame alone. Ex. 1.
- (4) The calculations of [aggregate] profit of each separate plaintiff [Timberpeg East, Inc. and T-Peg, Inc.], during calendar year 2002. If plaintiffs are on a fiscal year other than 12/31, the same information for the entire fiscal year(s) which include the period Feb-June 2002. Ex. 2.
- (5) Plaintiffs' documents showing overhead for 2002 (or the fiscal years including Feb - June 2002), and, if there is a year-end reconciliation by job or analogous document (which defendant assumes already exists), the reconciliations relating to the 20 designated jobs.<sup>4</sup> Ex. 2.
- (6) The break out of claimed damages as between between the timber frame component and other components, and all documents showing or relating to the components.

Portions Of Other Pending Motions Should Be Decided  
In Defendants' Favor Based On The November 19 Order

In light of the November 19 Order that plaintiffs "will not be permitted to seek actual damages and any additional profits" (at 3), defendant's Motion For Judgment On The Pleadings (Document 33) and Prayer 2 of its second Motion For Summary Judgment (Document 44) should now be granted.

The Motion For Judgment On The Pleadings (Document 33) demonstrates that the state law claims, Counts V, VI and VII, all require a showing of damages and seeks judgment based on plaintiffs' inability to show damages. Now that the Court has ruled that plaintiffs may not seek damages, judgment on those counts should be granted.

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<sup>4</sup> Under costs accounting principles, a reconciliation is typically made at the end of a fiscal year in which the overall overhead is prorated and charged back to each individual job.

In addition, the Motion For Judgment On The Pleadings also requests judgment on the damages portion of the copyright infringement claim. In light of the Order, this motion should be granted as moot.

Prayer 2 of Defendant's second Motion For Summary Judgment (Document 44) seeks summary judgment on the ground that defendant had no profits attributable to the alleged infringement. Based on the November 19 Order, this aspect of the Motion should now be granted.

Certification

Defendant has consulted with plaintiffs' counsel and plaintiffs do not assent to the requested relief.

Date: November 23, 2004

VERMONT TIMBER WORKS, INC.  
Defendant,

By: W. E. Whittington  
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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2004, I served the foregoing pleading on the following counsel of record, by first class mail:

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