

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, Vermont Timber Works, Inc. and Douglas Friant,)	
)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF
OBJECTION TO DEFENDANT’S MOTION FOR SUMMARY JUDGMENT
ON (1) NONCOPYRIGHTABILITY AND (2) VTW’S LACK OF PROFITS**

The plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (“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 on (1) noncopyrightability and (2) VTW’s lack of profits.

Statement of Undisputed Facts

Timberpeg respectfully refers this Court to the prior summary judgment pleadings for the context and background relevant to this dispute generally. VTW has moved for summary judgment on two grounds. First, VTW contends that Timberpeg’s architectural design, reflected in its copyrighted architectural plans, lacks sufficient originality to merit copyright protection. Second, VTW contends that VTW did not profit from the preparation of shop drawings of the timberframe that VTW erected, and, therefore, that it VTW is entitled to Summary Judgment on Timberpeg’s claim for disgorgement of profits.

With respect to VTW's first argument, the record reflects the following.

Timberpeg contends that VTW's timberframe is substantially similar to the architectural work embodied in Timberpeg's architectural plans because the VTW timberframe embodies the size, shape, architectural spaces, floor plan and overall design of the architectural work embodied in Timberpeg's plans. See Complaint, ¶¶23, 41. Jonathan Vincent, Timberpeg's chief of design and an architect by education, reviewed the Timberpeg plans and the VTW shop drawings and visited the Isbitski house. Mr. Vincent concluded that the outline and design of the Isbitski residence in the VTW drawings matches almost exactly the architectural design represented in Timberpeg's plans. See Report of Jonathan Vincent ("Vincent Report"), Plaintiffs' Summary Judgment Appendix ("App.") at tab C. Mr. Vincent concluded that the overall dimensions are the same, the stair is the same design and in the same location, the area shown as the loft is the same size and location, the plate heights and overall mass of the building is the same, and, most telling, the interior views in the VTW isometric drawings show the room locations to be the same as in the Timberpeg plans. See id.

Mr. Vincent's examination of the Isbitski residence confirmed that the outline and shape of the building is largely the same as in the Timberpeg plans, the windows and doors are in the same locations, the interior loft is in the same location and of the same dimensions, among other things. See id. Mr. Vincent concluded that the overall design embodied in VTW's frame is virtually identical to the architectural design shown in Timberpeg's copyrighted architectural plans. See id.

With respect to VTW's profits, in discovery VTW produced copies of invoices issued to and paid by Mr. Isbitski, in the aggregate amount of \$66,350. In depositions,

Douglas Friant, a VTW principal, testified that the addition of each of the invoices would yield the gross revenues VTW received from Mr. Isbitski for the design and erection of the timberframe. See Deposition of Douglas Friant (“Friant Dep.”) at 153-54, excerpts attached along with the invoices at Exhibit A. A former VTW director of marketing, who was VTW’s primary contact with Mr. Isbitski, confirmed Mr. Friant’s testimony. See Deposition of Kim Hentschel (“Hentschel Dep.”) at 122-23, excerpts attached hereto as Exhibit B.

Argument

I. Timberpeg’s Architectural Design Is Sufficiently Original To Be Copyrightable

VTW argues that Timberpeg’s architectural design is not sufficiently original to be entitled to copyright protection. VTW bases this argument upon an element by element deconstruction of Timberpeg’s architectural design into a series of features which, VTW contends, themselves are not copyrightable. In essence, VTW contends that any individual features of an architectural design that are not original preclude an architectural design that utilizes those features from being original. VTW’s argument is at odds with the Copyright Act and has been rejected by courts to whom it has been presented.

The Copyright Act protects original architectural works and defines an architectural work as:

the 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.

17 U.S.C. § 101. Decisional law on point makes clear that “[t]he level of originality required for copyright protection is not especially elevated,” and that “[t]he underlying component parts of a creation are not subject to protection, but a creator’s independent selection and arrangement of component parts into an original design is copyrightable.” Arthur Rutenberg Homes, Inc. v. Maloney, 891 F. Supp. 1560, 1566 (M.D. Fla. 1995).

Courts, therefore, have consistently rejected VTW’s approach, which seeks to “filter out” standard features in an architectural design for purposes of determining whether the design is sufficiently original to be entitled to protection. In Arthur Rutenberg Homes, Inc. v. Maloney, 891 F. Supp. 1560 (M.D. Fla.), for example, the defendant challenged the copyrightability of the plaintiff’s architectural works in much the same manner as VTW does in this action, by trying to reduce the design to a series of standard features, not individually copyrightable. The court rejected that approach, noting that while the architectural works at issue comprised many standard features, the works were nonetheless protected because of the originality of the overall arrangement of the features, which all provided a look and feel that distinguished the design from other homes. See id. at 1566.

The decision of the United States Court of Appeals in Sturdza v. United Arab Emirates, 281 F.3d 1287 (D.C. Cir. 2002), similarly rejected the approach VTW takes in this motion. Sturdza involved the copyrightability of the design for an embassy, which contained what the Court identified as several standard features, such as domes, parapets, wind towers, arches, and Islamic patterns, each of which, on their own, were not protectible. See 281 F.3d at 1297. The court emphasized that the architect’s use of these standard elements in the overall architectural design created a copyrightable work, even if

the individual features themselves could not be protected. The court concluded that “to hold otherwise would render basic architectural elements unavailable to architects generally, thus running afoul of the very purpose of the idea/expression distinction: promoting incentives for authors to produce original work while protecting society’s interest in the free flow of ideas.” Id.

By asking this Court to “filter out” what it contends are standard features of Timberpeg’s architectural design, VTW seeks to apply the very analyses squarely rejected in Maloney and Sturdza, which, if adopted, would render virtually every architectural work unprotectible. Even if one assumes that each of the “standard features” VTW identifies in Timberpeg’s design is, in fact, a standard, non-copyrightable feature, it is the arrangement and composition of those features that make the Timberpeg design copyrightable. As the leading copyright treatise summarizes, “the originality necessary to support a copyright merely calls for independent creation, not novelty.” Nimmer on Copyright, §2.01 [A]. Thus, Timberpeg does not claim copyright in its windows, doors, staircases, or even in a saltbox design.¹ Timberpeg claims copyright in the arrangement of all of those features that create an original home design with its own look and feel.

In this action, Timberpeg claims that the design embodied in VTW’s timberframe copies Timberpeg’s architectural design, and, therefore, infringes upon Timberpeg’s copyright. Ample evidence in the record confirms that many of the features, even if themselves standard, are similarly, if not identically, arranged between the two. See

¹ VTW presents no evidence that Timberpeg possessed, or even knew of, the 300 year old saltbox design to which VTW refers in Defendant’s Reply Memo Supporting Its Motion for Summary Judgment (at p. 7), nor any evidence that the room layout and size of the historical saltbox is at all similar to Timberpeg’s architectural design.

Report of Jonathan Vincent, Timberpeg's MSJ Appendix at Tab C. VTW's effort to "filter out" the nonprotectible elements strays from the originality analysis that determines whether an architectural work is protectible. Accordingly, VTW's motion should be denied.

II. VTW Received Gross Revenues Of \$66,350 From The Isbitski Project

VTW contends that it had no profits attributable to the design of its timberframe, and, therefore, VTW is entitled to summary judgment on Timberpeg's claim for disgorgement of VTW's profits. This argument overlooks the remedies scheme set forth in the Copyright Act.

The Copyright Act provides that a copyright owner is entitled to recover actual damages suffered as well as any profits of the infringer that are attributable to the infringement. See 17 U.S.C. § 504(b). A copyright plaintiff may seek disgorgement of the infringer's profits whether or not it adduces any evidence of its own actual damages. See Business Trends Analysts Inc. v. Freedonia Group, Inc., 700 F.Supp. 1213, 1237 (S.D.N.Y. 1988), aff'd, 887 F.2d 399 (2d Cir. 1989) (allowing disgorgement of defendant's profits despite lack of proof of actual damages). The Copyright Act further provides that in establishing the infringer's profits, the copyright owner must present proof only of the infringer's gross revenue; the infringer bears the burden of proving his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work. See id.

From the beginning of this action, Timberpeg has sought disgorgement of all of VTW's profits that are attributable to VTW's infringement of Timberpeg's copyrighted work. See Complaint, Prayer for Relief, Subsection A. VTW drew, manufactured, and

erected a timberframe for Mr. Isbitski, for a total price of \$66,350. Mr. Isbitski paid VTW that amount. See Friant Dep. at 153-54; Hentschel Dep. at 122-23. At no time has Timberpeg limited its disgorgement claim to profits VTW made from the drafting of the timberframe, nor does the Copyright Act require such limitation.

The record, therefore, reflects undisputed proof that VTW received \$66,350 in gross revenues from its drawing, manufacture, and erection of Mr. Isbitski's timberframe, which, Timberpeg contends, infringed upon Timberpeg's copyrighted architectural plans. To the extent VTW contends that drafting time/cost constitutes an allowable deduction from that gross revenue figure, VTW fails to offer this Court any support for that proposition.

In short, Timberpeg seeks what the Copyright Act allows: disgorgement of all profits attributable to the infringement, in this case, all profits VTW received from the Isbitski project. Timberpeg has met its burden of demonstrating VTW's gross revenues. VTW has not demonstrated allowable deductions from those gross revenues that confirm, beyond a dispute of fact, that it made no profits from the Isbitski project. Accordingly, VTW's motion for summary judgment, as to VTW's profits should be denied.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: November 30, 2004

By 

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.


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