

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.)	
_____)	

MOTION FOR RECONSIDERATION

NOW COME, the Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (“Timberpeg”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully move for reconsideration pursuant to LR 7.2(e), of this Court’s order dated November 19, 2004. In support of this motion, Timberpeg states as follows:

1. This Court’s November 19 order (“Order”) responded to VTW’s motion to compel and for sanctions and Timberpeg’s objection. In the Order, this Court determined that Timberpeg had elected statutory damages under the Copyright Act and ordered that Timberpeg would not be permitted to seek actual damages and “any additional other profits.” This Court also granted in part VTW’s motion to compel documents relating to Timberpeg’s calculation of Timberpeg’s gross profit margin. Finally, this Court ordered Timberpeg to show cause why it should not have to pay for VTW’s costs in obtaining the discovery. Timberpeg respectfully moves for reconsideration of this Court’s Order with respect to this Court’s determinations concerning Timberpeg’s damages election and this Court’s order concerning the production of documents. Timberpeg will respond to this

Court's show cause order in the 20 days ordered, but submits this motion for reconsideration within ten days, as required by Local Rule 7.2(e).

I. Reconsideration Of This Court's Finding That Timberpeg Elected Statutory Damages

2. In the Order, this Court found that Timberpeg has committed itself to statutory damages and, therefore, would not be permitted "to seek actual damages and any additional profits." Order at 3. Timberpeg seeks clarification from this Court as to whether additional profits means Timberpeg's profits as opposed to the defendants' profits. If this Court means Timberpeg will not be allowed to seek disgorgement of the defendants' profits, Timberpeg respectfully submits that this Court misapprehended Timberpeg's position concerning damages, as governed by applicable law, and requests that this Court reconsider that portion of its order.

3. Timberpeg has not at any time in this action committed itself solely to statutory damages under the Copyright Act. To the contrary, Timberpeg has chosen to forego its actual damages and has stated that Timberpeg will seek either the defendants' profits attributable to the infringement or statutory damages. See letters attached as Exhibits 17 and 19 to VTW's Second Motion To Compel; see also Timberpeg's Objection to same at 9-10 (describing Timberpeg's decision to forego its own lost profits but to seek defendants' profits or statutory damages).

4. Timberpeg based its damages position in good faith reliance upon two established principles of copyright law. With respect to claims for actual damages, the damages provisions of the Copyright Act are to be construed broadly in favor of infringement victims, and courts confronted with imprecision in calculating damages should err on the side of guaranteeing plaintiffs a full recovery. See Davis v. The Gap,

Inc., 246 F.3d 152, 164 (2d Cir 2001). Accordingly, courts have allowed copyright plaintiffs to recover the defendant's profits even when they have not met their burden of proof on their own actual damages. See Business Trends, Analysts v. Fredonia Group, Inc., 700 F.Supp. 1213, 1237 (S.D.N.Y. 1988)(allowing an award of damages based on the defendant's profits where plaintiff failed to prove any actual damages); Johnson v. Jones, 921 F.Supp. 1573, 1586 (E.D. Mich. 1996) (same in context of architectural works copyright claim). This proposition flows directly from the differing purposes of actual damages and disgorgement of profits under the Copyright Act. Actual damages serve to make the infringement plaintiff whole – to compensate the plaintiff. See Nimmer on Copyright, §14.02. Disgorgement of the infringer's profits serves to prevent the infringer from unfairly benefiting from a wrongful act. See id. at §14.01[A]. In light of those differing purposes, allowing a copyright plaintiff to disgorge the defendant's profits has no link to whether that plaintiff adduces evidence, or deliberately foregoes, its own lost profits.

5. With respect to the timing of the election between the defendant's profits and statutory damages, the Copyright Act states that plaintiffs may make elections between actual damages and profits or statutory damages at any time up until the entry of judgment. See 17 U.S.C. § 504(c). These two propositions allow Timberpeg to forego its actual damages but to elect between the defendants' profits and statutory damages up until the entry of judgment,¹ which is what Timberpeg did in this action. If this Court intended that Timberpeg may not seek the defendants' profits, Timberpeg respectfully submits that this Court overlooked or misapprehended governing law that allows

¹ Or at least up until the jury's deliberations. See Nimmer on Copyright, §14.04[A].

Timberpeg to forego its own lost profits, but still seek the defendants' profits or statutory damages.

6. This Court's holding would also inadvertently deprive Timberpeg of a remedy for its non-copyright claims, some of which provide for the disgorgement of the defendants' profits. Beyond copyright infringement, Timberpeg asserts claims for unjust enrichment, unfair competition, and the New Hampshire Consumer Protection Act, the remedy for at least two of which includes disgorgement of the defendant's profits. See Martin v. Phillips, 122 N.H. 34, 37 (1982)(defining unjust enrichment); Curtis Mfg. Co. v. Plasti-Clip Corp; 933 F.Supp. 94, 104 (D.N.H. 1995)(describing unjust enrichment remedy as payment of the value of what the defendant wrongfully received, one measure of which is the defendant's profits). If this Court intended that Timberpeg may not seek VTW's profits, this Court will have effectively deprived Timberpeg of remedies for claims other than its copyright claims.

7. Finally, even if Timberpeg elected statutory damages, evidence of the defendants' profits would be relevant to that inquiry. See Polygram Intern. Pub., Inc. v. Nevada/TIG, Inc., 855 F.Supp. 1314, 1335 (D.Mass. 1994). This Court's holding would deprive Timberpeg of the opportunity to present evidence to the jury that would allow for the jury's determination of a fair statutory damages award.

8. In short, Timberpeg has emphasized in correspondence with the defendants and in pleadings to this Court that it will only forego Timberpeg's own lost profits but continue to seek the defendants' profits, unless or until Timberpeg elects statutory damages under the Copyright Act. Timberpeg's position is grounded in governing law. For these reasons, Timberpeg requests that this Court either clarify that

the Order does not preclude Timberpeg from seeking the defendants' profits and discovery of same, or reconsider that portion of the Order precluding Timberpeg from seeking the defendants' profits.

II. Reconsideration Of Order Compelling Production Of Documentation With Respect To Six Timberpeg Projects

9. Timberpeg also moves for reconsideration of this Court's Order that Timberpeg produce the documents concerning six Timberpeg projects. In the Order, this Court held that Timberpeg's election to forego its own actual damages rendered VTW's "broadened discovery" documents concerning all of Timberpeg's projects – irrelevant. This Court, however, ordered production of documents with respect to six jobs upon which Timberpeg relied in calculating its gross profit margin (prior to electing to forego actual damages) because Timberpeg asserted no relevance objection. See Order at 3.

10. This Court's holding that Timberpeg's decision to forego actual damages renders the broadened discovery irrelevant applies with equal force to the six specific jobs. Discovery concerning those specific jobs relates to no issue in the litigation in the absence of a claim by Timberpeg for its lost profits.²

11. To order the production of that information will bring Timberpeg's profits, which it no longer seeks back onto center stage, at the risk of eclipsing the central issue and purpose of the litigation, namely, protection of Timberpeg's intellectual property rights. It was that concern that drove, in large part, Timberpeg's decision to forego actual

² The discovery – either broadened or limited to the six specific profits – does not necessarily pertain to the statutory damages analysis, either, despite the defendants' assertion to the contrary. See Defendant's Motion for Clarification Of November 19 Order. Timberpeg will respond to VTW's motion in greater detail in a separate pleading, but even in the absence of a claim for actual damages, statutory damages can be based on, among other things, the defendant's profits. See Polygram, 855 F.Supp. at 1335. Moreover, a copyright plaintiff may seek statutory damages "regardless of the evidence offered as to his actual damages . . . and even if he has intentionally declined to offer such evidence although it was available." Nimmer on Copyright, §14.04(A) at 14-46.6.

damages. In the absence of any relevance to the remaining damages claims in this action, VTW cannot state a proper purpose for seeking the production of such documents. For these reasons, Timberpeg requests that this Court reconsider that portion of the Order requiring Timberpeg to produce any documents concerning Timberpeg's gross profits. Should this Court nonetheless order production, Timberpeg requests that production occur under a standard protective order, providing that the documents will be used solely for purposes of this litigation and not disseminated beyond parties as necessary for purposes of the litigation and their counsel.

12. Due to the extensive argument and authorities cited herein, no accompanying memorandum of law is necessary. See LR 7.2.

13. Counsel for the defendants has been contacted and does not assent to the relief requested herein.

14. Timberpeg requests a hearing on this motion if it would be helpful to this Court's disposition of the issues raised herein.

WHEREFORE, Timberpeg respectfully requests that this Court:

A. Clarify that Timberpeg may seek the defendants' profits or reconsider its order that Timberpeg may not seek the defendants' profits;

B. Reconsider its order that Timberpeg must produce documents concerning the six specific jobs; and

C. Grant such further and other 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

Dated: December 3, 2004

By:


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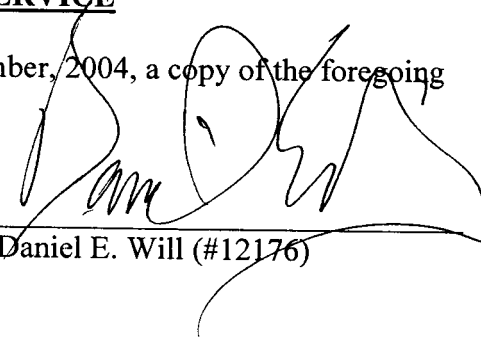
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2004, a copy of the foregoing
was forwarded to W.E. Whittington, Esquire.


Daniel E. Will (#12176)