

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

T-Peg, Inc. and Timberpeg East, Inc.

Plaintiffs,

v.

Stanley J. Isbitski, Vermont Timber Works, Inc.  
and Douglas Friant,

Defendants.

No. C-03-462-M

**OBJECTION TO DEFENDANT’S MOTION FOR  
CLARIFICATION OF NOVEMBER 19 ORDER**

NOW COME, the Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (“Timberpeg”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and object to the defendant’s, Vermont Timber Works, Inc. motion for clarification of this Court’s November 19 order (“Order”), and state as follows:

1. The defendant purports to seek clarification of the Order as follows: (1) that this Court should order production of the “broadened discovery,” and (2) that portions of other pending motions should be decided in the defendant’s favor in light of the Order. For the following reasons, the defendant’s motion lacks merit.

**I. Broadened Discovery**

2. In seeking clarification, the defendant essentially asks this Court to reconsider that portion of the Order denying the defendant’s motion to compel the “broadened discovery” concerning Timberpeg’s profits. See Order at 3. The defendant contends that such discovery is relevant to statutory damages and that, in the absence of

an instruction to the jury that Timberpeg suffered no damages, it is entitled to that discovery, to try to prove that Timberpeg suffered no damages.

3. Timberpeg, however, need not prove actual damages to support an award of defendant's profits or statutory damages. Under governing copyright law, a plaintiff is entitled to statutory damages even if "[the plaintiff] has intentionally declined to offer evidence of actual damages." 4 Nimmer on Copyright §14.04[A] at 14-46.6 (emphasis added). Statutory damages, moreover, may be based on, among other things, the defendant's profits. See Polygram Intern. Pub., Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1335 (D. Mass. 1994) (stating that statutory damages can be based on the defendant's profits among other things). Accordingly, the absence of any discovery and evidence concerning Timberpeg's actual damages has no bearing on Timberpeg's entitlement to, and calculation of, statutory damages if Timberpeg elects statutory damages.

4. The defendant states that it would not "need" the broadened discovery if this Court instructed the jury that Timberpeg suffered no damages. Assuming Timberpeg elects statutory damages, such an instruction would be untrue, contrary to law, and prejudicial to Timberpeg. Timberpeg, as any copyright plaintiff, may elect from the damages available under the Copyright Act. The defendant apparently seeks discovery or an instruction so that it may argue Timberpeg suffered no actual harm, and, therefore, the jury should award only minimal statutory damages. This instruction would be untrue: Timberpeg has never stated that it suffered no damages; Timberpeg has elected to forego actual damages. Such an instruction, even if true, would seriously prejudice every copyright plaintiff who elects to forego recovery of its own actual damages and frustrate

the damages scheme the Copyright Act creates. No copyright plaintiff should be prejudiced for electing a remedy the copyright Act freely provides. Though not necessary, Timberpeg would not object to an instruction that Timberpeg does not seek actual damages, coupled with (1) an explanation to the jury that such an election is within Timberpeg's rights under the Copyright Act; and (2) and that counsel is not to argue, and the jury is not to infer, the absence of any actual damages as a result of Timberpeg's election to forego actual damages, i.e., Timberpeg's own lost profits.

## **II. Pending Motions**

5. The defendant also contends that, in light of the Order, various pending motions or portions of pending motions must now be granted, because VTW views Timberpeg's state law claims as moot if Timberpeg may not prove VTW's profits. Timberpeg does not understand the Order to preclude Timberpeg from seeking remedies available under Timberpeg's state law claims. Timberpeg has moved for reconsideration of the Order and Timberpeg's motion is currently pending. Moreover, disposition of Count VII, for violation of the New Hampshire Consumer Protection Act, is unaffected by the Order under any interpretation because that claim provides for statutory damages and attorney's fees.

WHEREFORE, Timberpeg respectfully requests that this Court:

- A. Deny the defendant's motion for clarification of November 19 order; and
- B. Grant such further and other relief as this Court deems just, equitable and proper.

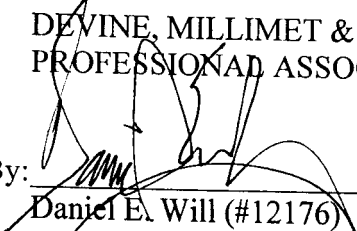
Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Dated: December 13, 2004

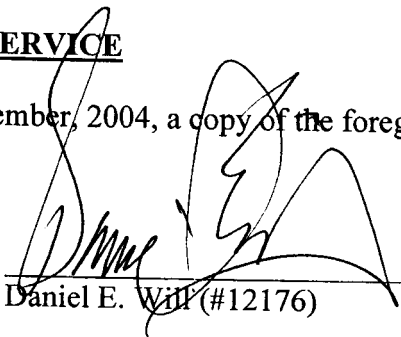
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of December, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.

  
Daniel E. Will (#12176)