

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.,	)	
and DOUGLAS FRIANT,	)	
Defendants.	)	

DEFENDANTS' FINAL PRETRIAL STATEMENT

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant"), submit the following Final Pretrial Statement in accordance with LR 16.2 and this Court's scheduling order:

1. Brief Statement of the Case. Plaintiffs are T-Peg, Inc. and Timberpeg East, Inc. (jointly "Timberpeg")<sup>1</sup>. Defendants are Vermont Timber Works, Inc. ("VTW") and its principal, Douglas Friant ("Friant").

Timberpeg and VTW are both in the timber frame business. Both parties design timber frames, cut the timbers for them, and sell those materials. VTW additionally erects the frames, whereas Timberpeg does not erect its frames and requires customers to erect the frames through separate builders.

The parties here had a common customer, Stanley Isbitski, a named defendant whom plaintiffs never served with process and whom they dismissed from the case on June 1, 2004.

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<sup>1</sup> For some purposes the distinction between the two plaintiffs is significant, and defendants' shorthand term including is purely for convenience and is not a waiver of its position that either or both plaintiffs must separately establish all elements of their claims to prevail.

Isbitski, a general building contractor, approached Timberpeg in April 1998, and, after becoming dissatisfied with Timberpeg's design and product, he approached VTW in December 2000.

Each company independently developed plans for him. Timberpeg developed "preliminary floor plans" for an entire house, much of which was to be traditionally framed ("stick built"). These plans were only "preliminary plans," and the timber frame component allegedly copied here did not even have a frame drawing or any framing detail. In fact, Timberpeg's Chief of Design admits that the Timberpeg drawings did not even include a frame drawing.

VTW created an original design, including complete shop drawings, for a timber frame for a discreet component of Isbitski's house, [Ex. 2], which covered only about half the timber frame area included in the Timberpeg floor plan.

Isbitski, himself a contractor, did not like the Timberpeg design, and decided to be his own contractor for his project while purchasing the VTW timberframe for a portion of it. In March 2002 he purchased the VTW timber frame design and materials. In approximately May 2002, Isbitski received permission from Timberpeg to put in and use the foundation contained in the Timberpeg plans.

In June 2002, after Isbitski laid the foundation for the entire house, breezeway and garage building, VTW cut, shipped and erected the timber frame portion of the structure, based on VTW's own, independent design.

Thereafter Isbitski contracted separately with The Murus Company (from Pennsylvania) to add outer panels to the frame, but became insolvent and abandoned the project without fully enclosing the VTW frame or completing the house.

The claims against Defendants are Counts II, V, VI and VII. Timberpeg claims in Count II that VTW infringed Timberpeg's copyright on its 4/21/01 Registered Plans. Counts V, VI and VII are based on the same factual allegations and contain no allegations independent of the copyright infringement count.

In November 2004, plaintiffs amended the complaint to add Friant as a defendant. Count VIII, for alleged copyright infringement, is the count against him.

The specific counts are as follows:

<u>Count</u>	<u>Legal Theory</u>	<u>Defendant</u>
II	Copyright Infringement	VTW
V	Unjust Enrichment	VTW
VI	Unfair Competition	VTW
VII	N.H. Consumer Protection Act	VTW
VIII	Copyright Infringement	Friant

Defendants filed two motions for summary judgment, on August 16, 2004 and November 1, 2004, on all counts, which remain pending.

In addition, the Court on November 19, 2004 sanctioned plaintiffs and ordered them to amend their complaint to delete their claims for their damages and defendants' profits. To date they have not done so.

2. Statement of Uncontested and Contested Facts.<sup>2</sup> The customer, Isbitski, approached Timberpeg in April 1998, [Interrog. No. 2, Ex. 9], and on November 1, 1999 entered a contract [Ex. 7] with Timberpeg East, Inc. for Timberpeg East to provide "Preliminary Plans" for him. As emphasized by Timberpeg in that document, the "Preliminary Plans" did "[not] include the frame design" and were to be used for planning purposes but not construction. [Ex. 7]

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<sup>2</sup> Bracketed references are to attachments to defendants' Motions for Summary Judgment, but are not attached to this pleading.

Isbitski's Contacts With VTW

Separately from his dealings with Timberpeg, Isbitski contacted VTW, speaking to its Customer Representative, Kim Hentschel, in approximately December 1999, to obtain a design of the timber frame portion of his proposed home. He stated that since he was a contractor, he would provide all the other components of the home.

Timberpeg's 4/20/01 Registered Design: (a) Preliminary Design; (b) Of Entire House; (c) With No Frame Design; and (d) Not For Construction

Timberpeg's "Registered Design" – the one registered with the U.S. Copyright Office and which is the subject of this suit – consists of five pages, which were drawn on 4/20/01 and 4/26/01 [Ex. 1]. As clearly demonstrated by those pages, the design is for an entire house and garage, much of it "stick-built." [Ex. 1]

Timberpeg admits that these five pages constitute the only Isbitski design Timberpeg ever registered with the Copyright Office. [Req. to Admit Nos. 1 & 2, Ex. 10]

Timberpeg, through Jonathan Vincent, its "Director of Design" and the person executing the copyright registration document, admits that the Registered Design did not contain timber frame drawings, and that Timberpeg never did create frame drawings for the Isbitski project.<sup>3</sup> [Vincent Dep. 98-99, Ex. 12]

Timberpeg's contract with Isbitski [Ex. 7] indicated that the frame design would not be included until after Isbitski contracted to purchase the Timberpeg package, which he never did.

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<sup>3</sup> Apparently at the same time as the Registered Design, Timberpeg created an "isometric" view of a timber frame, shown as Ex. 4, which according to Director of Design Vincent did not rise to the level of a timber frame "design." This cannot be the basis of any copyright infringement claim since Timberpeg did not register it with the U.S. Copyright Office. Nonetheless, Timberpeg will discuss it in this memorandum (below) to demonstrate that (1) Timberpeg never saw or had access to it, and (2) Timberpeg admits that it is not "substantially similar" to the VTW design.

In addition, Timberpeg's contract with Isbitski indicated that the Registered Plans were only "Preliminary Plans" and not for construction. [Ex. 7]

Timberpeg Frame Not Substantially Similar

Timberpeg's claims in this case are based on its plans dated 4/20/01 which it registered with the USPTO on May 18, 2001. [Cplt., ¶¶ 16 ff.]

The Registered Plans are the only plans relating to Isbitski which Timberpeg ever registered with the U.S. Copyright Office. [Req. to Admit Nos. 1 & 2, Ex. 10]

Timberpeg has no evidence of any act (other than VTW's erection of the VTW frame) by which VTW ever "copied, traced, digitalized or utilized" Timberpeg's Registered Plans (or Isometric). [Interrogs. 22 & 24, Ex.9]

Timberpeg's Director of Design, Architect Vincent (plaintiffs' disclosed expert witness), admits that the framing and structure of the two designs are different, and that these are "important elements" of the two designs. [Vincent Dep., Ex. 12 at 84-85]

Timberpeg admits that when Timberpeg subsequently modified the Registered Plans to create a "Bent" design Isbitski wanted, this was "a major change in the framing." [Vincent Dep., Ex. 12 at 91, line 14]

VTW Erection Of Timber Frame Based On VTW Plans

In June 2002 VTW erected a timber frame for Isbitski.

Timberpeg's own agents admit that the Timberpeg frame is a "purlin-rafter" design whereas the VTW design is a "bent" design, [Driesch Dep., Ex. 15 at p. 19; Cole Dep., Ex. 14 at pp. 39 40; Vincent Dep., Ex. 12 at pp. 103-04].

Timberpeg's own agent admits that the VTW timber frame and the Timberpeg frame are not "substantially similar" [Cole Dep., Ex. 14 at pp. 39-40].

### Authorization To Use Timberpeg Foundation Plan

Against payment of \$1,500, plaintiffs provided Isbitski a “Foundation Plan” (Ex. 27), which they did not copyright, and which they authorized him to use to construct the foundation on his project. Ex. 26 & 27; Cole Dep., Ex. 14 at pp. 54-56.

### Non-Copyrightability Of Design Elements

Through their Chief of Design, plaintiffs concede that placing posts over the foundation, girders or other posts is a “standard feature” and “functional requirement.” Vincent Dep. II at pp. 30-31, 33. [Ex. 29]

Through their Chief of Design, plaintiffs concede that designing in two-foot increments or intervals is “standard,” and that “it’s not anything you can copyright or trademark.” Vincent Dep. II at pp. 32-33. [Ex. 29]

Through their Chief of Design, plaintiffs concede that 8 feet and 9 feet story heights (also called “plate height”) are “standard,” that plaintiffs did not originate them, and that they claim no copyright in it. Vincent Dep. II at pp. 34-35. [Ex. 29]

On a post-by-post basis, plaintiffs concede that 25 of the 27 posts in the VTW frame design are different in location, size, orientation or other feature from the posts in their own drawing. Vincent Dep. II at pp. 57-69 [Ex. 29]. This is summarized, with deposition page references, in a chart [Ex. 30].

Through their Chief of Design, plaintiffs concede that the salt box and shed dormer forms have existed in New England since the 1600s, that plaintiffs did not originate these, and that they do not claim copyright in them. Vincent Dep. I at 35-37, Ex. 14.

Through their Chief of Design, plaintiffs concede that a 12/12 pitched roof is standard, not originated by them, and they do not claim copyright in it. Vincent Dep. I at 41-42 [Ex. 14]

Through their Chief of Design, plaintiffs concede that they do not assert copy-right in the dimensions alone of 40 feet by 44 feet (the dimensions in their plan) because those dimensions alone do not have “creative content. Vincent Dep. I at p. 42. [Ex. 14]

No VTW Profits

VTW spent 71.5 hours designing its frame, the same approximate amount as with all designs. (Ex. 31)

VTW charged \$1,500 for design work. [Ex. 32]

VTW’s designer compensation costs for the 71.5 design hours were \$2,539.29, and it had a loss of \$935.29 on the design services. [Ex. 33]

The remaining facts are contested:

3. Statement of Applicable Law. Counts II & VIII are governed by the Copyright Act of 1976, as amended, 17 U.S.C. §§1 ff. The remaining counts are governed by the law of the State of New Hampshire.

4. Witnesses.

Please see defendants Witness List, attached.

5. Waiver of claims or defenses. None by defendants.

6. Depositions which may be read into evidence.

Kim Hentschel  
Doug Friant  
Jonathan Vincent  
James Driesch  
Lynn Cole  
Stephen Woods  
Brian Pattisal  
Jim Potvin  
Phil Phillips  
Any depositions yet to be taken

7. Exhibits. Because the Exhibit List will be determined by rulings on several pending motions, defendants are filing a motion to extend the date to file their exhibit list, after consultation with the Court's Minute Clerk.

8. Statement of Special Damages. On plaintiffs' claims, unknown.

By Order of November 19, 2004, the Court has already disallowed plaintiffs' claims to their own lost damages and disgorgement of defendants' profits.

Accordingly, plaintiffs are limited to, at most, statutory damages under Section 504(c) of the Copyright Act, as limited by Sections 411 and 412 of the Copyright Act.

9. Latest Demand and Offer; ADR. Plaintiffs demanded \$27,000 on November 20, 2003. There has been no offer. There has been no ADR.

10. Claim for Attorneys Fees. Plaintiffs claim attorneys fees, but they appear to be barred, as to plaintiffs, are barred by Sections 411 and 412 of the Copyright Act.

Defendants claim attorneys fees under Section 505 of the Copyright Act; Fogarty v. Fantasy, 510 U.S. 517 (1994); Lotus Development Corp. v. Borland International, Inc., 140 F. 3d 70, 73 (1<sup>st</sup> Cir. 1998); Matthews v. Freedman, 157 F. 3d 25, 29 (1<sup>st</sup> Cir. 1998); Edwards v. Red Farm Studio Co., 109 F. 3d 80, 81-82 (1<sup>st</sup> Cir. 1997); and Ferraris Medical, Inc. v. Azimuth Corp., No. 2002 DNH 140 (2002).

11. Requests for View. Defendants request a view.

12. Estimate of length of Trial. If all the counts of the complaint are tried, defendants estimate 4-5 days.

Date: January 29, 2005

VERMONT TIMBER WORKS, INC.  
and DOUGLAS FRIANT,  
Defendants,

By: W. E. Whittington  
Their Attorney

W. E. Whittington (Bar No. 6916)  
Whittington Law Associates, PLLC  
35 South Main Street  
Hanover, NH 03755  
(603) 643-2755

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2005, I served the foregoing pleading on the following counsel of record, by first class mail:

Daniel E. Will, Esq.  
Devine, Millimet & Branch, P.A.  
111 Amherst Street  
Manchester, NH 03105

Stephen S. Woods, Esq.  
Traditional Management Company  
68 Lyme Road  
Hanover, NH 03755

W. E. Whittington  
W.E. Whittington