

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' REQUESTED JURY INSTRUCTIONS

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant"), request that the Court instruct the jury as follows:

Defendants reserve the right to submit additional and revised requests based on the Court's rulings on several key motions which remain pending.

Date: January 28, 2005

VERMONT TIMBER WORKS, INC.
Defendant,

By: W. E. Whittington
Its Attorney

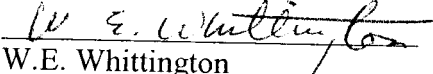
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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2005, I served the foregoing pleading on the following counsel of record, by first class mail:

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W.E. Whittington

Defendant's No. 1

Claims of the Parties

Plaintiffs make four claims against Vermont Timber Works, Inc. as follows:

- II. Copyright Infringement
- V. Unjust Enrichment
- VI. Unfair Competition
- VII. Violation of the New Hampshire Consumer Protection Act

Plaintiffs make an additional claim against Friant, as follows:

- VIII. Copyright Infringement

Defendants deny these claims, and in addition claim that, even if the claims were valid, they would be barred because:

- A. The design elements copied by defendants, if any, did not contain sufficient originality.
- B. The design elements copied by defendants, if any, were too preliminary to be an architectural work.

Complaint and Answer
- C. The timber frame erected by defendants was not a "house."
- D. Plaintiffs consented to the use of their foundation drawing, which was not copyrighted.
- E. The copyright notice prohibited only the copying of drawings themselves, not the "architectural work."
- F. As to Plaintiff Timberpeg East, Inc., plaintiff did not own the copyright.

- G. As to Plaintiff Timberpeg East, Inc., plaintiff did not assert any copyright.
- H. As to plaintiff T-Peg, plaintiff did not own the copyrighted drawings.
- I. Plaintiffs licensed, authorized or waived the use of their plans through the copyright notice, which prohibited only the reproduction of drawings.

Defendant's No. 2¹

Copyrightability
(Judge Determines Copyrightability As Matter Of Law)

The threshold issue of the copyright infringement claim is whether the elements of the plaintiffs' April 2001 Plan, which they contend were copied by the defendants are, in fact, copyrightable. Copyrightability is for the judge as an issue of law. Therefore, prior to submitting the question of whether the defendants infringed on the plaintiffs' copyrights to the jury, the court must determine, as a matter of law, which elements of the plaintiffs April 2001 Plan are not copyrightable because they are:

1. Non-original elements
2. Standard features
3. Elements which are functionally required
4. Features used by permission
5. Elements constituting mere "ideas" as opposed to the "expression of ideas."

If, after reviewing the April 2001 Plan, the court determines that there are no copyrightable elements to the Plan, then the plaintiffs' copyright infringement claim fails.

Sources: Nimmer On Copyright §12.11[B][1]; Lotus Dev. Corp. v. Borland Int'l, Inc., 788 F. Supp. 78, 85 (D. Mass. 1992) (all questions of law and fact bearing on copyrightability to be determined by court, not jury), *rev'd on other grounds but accepting proposition cited*, 49 F. 3d

¹ Defendants do not request No. 2 as instruction per se, but place it here to keep trace of the issue, which is for the Court. As briefed at p.4 of Defendants' Motion For Summary Judgment dated November 1, 2004, which was still pending at the time of submitting these instructions, the issue of copyrightability is for the Court, not the jury. It is nonetheless covered as a jury instruction in Federal Jury Practice. Should the Court deny the motion, the principles and issues should be revisited by the Court at the close of evidence, only now under the preponderance" standard rather than the summary judgment standard.

807 (1st Cir. 1995); 17 U.S.C. §101. Note: The factors set forth in Federal Jury Practice and Instructions §160.23 are relevant to this Court decision. See Defendants Instruction No. 6.

Defendant's No. 3

Copyright Generally

“Copyright” is the name for the protection that the law extends to an author (or creator) of an original work against the unauthorized appropriation of that work by others. Copyright protection extends only to the expression of the ideas in the author’s work, but never to the ideas themselves.

There are at least two competing considerations involved in a copyright. On the one hand, the creator of a work has the right to reap the benefit of the owner’s creativity and effort. On the other hand, progress in art (including architecture) as well as science requires that everyone have the right to develop and create new works using the same ideas and subjects.

The copyright law attempts to strike a balance between these two values, protecting so much of the creator’s original work as embodies the creator’s own particular form of expression, but not so much as would prevent others from using the same ideas, themes, and subjects in their own forms of expression.

Sources: See Federal Jury Practice and Instructions §160.10

Defendant's No. 4

Copyright Infringement; Essential Elements

In order to prevail on their copyright infringement claims, each plaintiff must prove two things:

First: That the plaintiff is the owner of a work protected by the Copyright Act.

Second: That one or both defendants infringed one or more of the rights granted by that Act.

Each of these aspects has several elements that I will explain to you.

Sources: See Federal Jury Practice and Instructions §160.21

Defendant's No. 5

Ownership of Valid Copyright

Each plaintiff must prove each of the following elements by preponderance of evidence:

First: That the April 2001 Plan at issue in this case has a timber frame component which is original.

Second: That the plaintiff created the plan.

Third: That the plaintiff complied with the formalities of the copyright law by registering the design elements of the April 2001 Plan with the Copyright Office.

Defendants dispute that the elements of the defendant's April 2001 Plan are original and contend that Timberpeg Services, Inc., not either plaintiff, is the creator of the April 2001 Plan.

As to plaintiff T-Peg, the burden of proof on this issue is on defendants because T-Peg registered the Plan in its name. However, you are not required to credit the claim in the registration and you must find lack of ownership if defendants demonstrate by a preponderance of evidence that T-Peg was not the creator.

As to the plaintiff Timberpeg East, the burden of proof lies with the plaintiff because there is no registration by Timberpeg East. You may find that plaintiff Timberpeg East created the Plan only if Timberpeg East proves that by preponderance of the evidence.

What is meant by "originality" will be explained in the next instruction.

Sources: See Federal Jury Practice and Instructions §160.22 & Pleadings

Defendant's No. 6

Originality of Copyright

If you find that the April 2001 Plan contains a timber frame design, you next must determine whether that design was original to one or both of the plaintiffs. Under the copyright law, "originality" means that the timber frame design component of the April 2001 Plan was independently created by one or both of the plaintiffs, or their employee, and not copied from other works. The April 2001 Plan might resemble other works, but if plaintiff independently conceived the Plan, or at least significant parts of it, then plaintiff's work is original.

The work need not be completely, entirely original. It may include or incorporate elements taken from prior works, from works used with their owner's permission or from works in the public domain. If you find that the April 2001 Plan involves variation on pre-existing works, then it is only to the elements of the plan that originated from the plaintiffs themselves that copyright protection extends.

Where plaintiff's work was taken from previous work, there is no precise rule as to how much must have originated from the plaintiffs in order for the plaintiffs copyright protection. However, trivial originality is not enough.

Each plaintiff, to prevail, must show that it made a substantial contribution or a substantial original variation distinguishable from prior works. Moreover, the originality must not be merely of a technical or mechanical nature.

Sources: See Federal Jury Practice and Instructions §160.23 & Pleadings

Defendant's No. 7

Copying

In addition to proving that they are owners of a copyright on the April 2001 Plan, and that elements of the Plan are original, as described by the Copyright Act, each plaintiff must also prove that defendants infringed its' copyright.

In order to establish infringement, a plaintiff must prove that defendants' work (the VTW design of the timber frame at issue) was copied or taken from the April 2001 Plan. No matter how similar the two works are, the plaintiffs may not recover against defendants unless that similarity is the result of the copying or taking of the plaintiff's April 2001 Plan, directly or indirectly, intentionally or unintentionally.

Furthermore, there is no liability unless it is the original aspects of the plaintiff's work that were copied or taken. If defendants copied or took only those elements of plaintiff's April 2001 Plan which were

- (1) not original with plaintiff, that is, portions which the plaintiff had in turn copied or taken from somebody else;
- (2) as to which plaintiff authorized Isbitski to use, that is, the foundation plan and features reasonably related to it;
- (3) which constituted standard features, such as standard building intervals, heights or practices, or doors or windows;
- (4) functionally required; and/or
- (5) more ideas, not expressions of ideas; and

Then the defendants are not liable for copyright infringement.

The defendants are liable only if they copied or took aspects of plaintiff's April 2001

Plan that were

- (1) original with the plaintiffs;
- (2) used without permission;
- (3) which were not standard features;
- (4) which were not functionally required; and
- (5) which were expressions of ideas, not merely the ideas themselves.

Sources: See Federal Jury Practice and Instructions §160.26 & Pleadings

Copying – Access and Substantial Similarity

The Plaintiffs cannot prevail unless they prove that the April 2001 Plan was infringed by the defendants. Infringement can be proved by direct or circumstantial evidence.

An example of direct evidence would be an admission by an employee of defendant that protected elements (as that is explained in the prior instruction) of the April 2001 Plan were copied, or the testimony of someone who saw them being copied. But most frequently proof of that nature is not available in copyright cases.

Circumstantial evidence is often resorted to in copyright cases, in an effort to show that infringement has occurred. Circumstantial evidence means the proof of facts that would support a logical inference that copying must have taken place. Among the significant circumstances for you to consider are these issues:

First: Did defendants have access to the plaintiff's April 2001 Plan?

Second: Are there similarities between the design elements of defendants' timber frame and the protected elements of the plaintiff's April 2001 Plan?

Third: If there are similarities, are they of such a nature that they probably could not have occurred without improper copying, or are there other apparent explanations for the similarities, such as, for example, that (a) Isbitski provided the same information to both plaintiffs and defendants, or (b) both plaintiffs and defendants obtained information from a common source, such as Hearthstone.

These are not the only questions that might arise on this issue. You may consider any relevant circumstance, that is, any circumstances from which you may draw an inference either that improper copying has taken place or that copying has not taken place.

If, after considering all the proof in the case, you find yourselves unable to draw a logical inference one way or the other, then the plaintiff will have failed in its burden of proof on this issue.

If you find, however, considering all the circumstances, that more likely than not that copying has taken place, then the plaintiff has sustained its burden on this issue.

On the subject of access, access means proof sufficient to show that defendants had a reasonable opportunity to view the plaintiff's April 2001 Plan. Plaintiffs are not required to show that whoever produced the design for the house in question actually saw the plaintiff's April 2001 Plan. In addition, the plaintiffs are not required to show that some particular channel of communication existed through which the work was seen.

It is sufficient for plaintiffs to show that defendants had reasonable opportunity to copy the plaintiff's April 2001 Plan. That would be a showing that defendants had access to the April 2001 Plan.

On the subject of similarity, if you find similarities between the April 2001 Plan and the design of the house in question, you must ask yourselves whether the similarities are or are not of the kind that would be likely to occur without improper copying. Similarity can result from improper copying but there are other possible explanations for similarity, such as required functionality, standard practice in the industry, the customer providing the same information to both parties, and copying from the same pre-existing plan of a third party such as Hearthstone, among other things.

On the other hand, certain similarities may be very convincing proof of copying. The more original, the more unusual or imaginative or arbitrary is the material that you find to be similar in both works, the less likely that similarity is a coincidence. The more extensive the

similarity and the more it extends to small arbitrary details, the more likely as a matter of common sense that is due to copying, rather than to coincidence, or the suggestiveness of the subject matter.

Sources: See Federal Jury Practice and Instructions §160.27 & Pleadings

Damages

If you find that one or both plaintiffs had a valid copyright and you find that protectible copyright elements were infringed by defendants, then you should find for plaintiff(s). You must then decide on the amount of damages to award to plaintiff(s).

Successful plaintiffs in a copyright case may elect between receiving (1) their actual damages caused by the infringement, plus the profits the defendant obtained through the infringement, or (2) "statutory damages," which I will explain to in a moment. The plaintiffs in this case have elected "statutory damages." Therefore you will not award plaintiffs their actual damages or defendants' profits, in any event.

"Statutory damages" are a figure within the of range of \$750 to \$30,000, to be decided by you the jury, based on any factors you may find relevant, including the ones I will mention below if you find them appropriate. The range was set by Congress for all copyright cases, big and small, and the existence of the range does not imply what figure you should award within the range. That is entirely up to you.

In determining a figure within the range, you should consider whatever factors you think appropriate, including

- The expenses saved by defendant by infringing, or lack of any savings;
- The profits reaped by defendant by infringing, or lack of any profits;
- The profits lost by plaintiffs as a result of the infringement, or lack of any profits.
- The size of defendant.
- Whether the infringement was willful, merely knowing but not willful, or innocent.

However, in considering these factors, you are not to simply award those amounts as damages, as plaintiffs have elected statutory damages instead. Rather, you are to consider them as factors in determining an amount within the range of \$750 to \$30,000.

Sources: See Federal Jury Practice and Instructions §160.90; 11 U.S.C. §504(c); Nimmer On Copyright §14.04[B][1][a] (as to factors to consider). See also this Court's Order of 11/19/04 determining that plaintiffs have elected statutory damages and are precluded from seeking actual damages.