



Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Dated: January 31, 2005

By: 

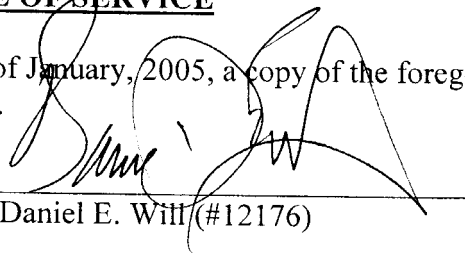
Daniel E. Will (#12176)  
111 Amherst Street  
Manchester, NH 03101  
(603) 669-1000

Of Counsel:

Stephen S. Woods, Esquire (#8240)  
General Counsel for Plaintiffs  
Timberpeg East, Inc.  
c/o 68 Lyme Road  
Hanover, NH 03755  
(603) 643-6200

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of January, 2005, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.

  
Daniel E. Will (#12176)

## **JURY INSTRUCTION NO. 1:**

### **Overview of the Nature of the Case and Issues**

This is a civil action in which T-Peg, Inc. and Timberpeg East, Inc. (collectively “Timberpeg”) have sued Vermont Timber Works, Inc. (“VTW”) and Douglas Friant (collectively “the defendants”) for copyright infringement, unjust enrichment, and unfair competitive practices.

Timberpeg is in the business of designing timberframe homes and manufacturing timberframe packages for customers. Timberframing is a method of framing a house utilizing large posts and beams that are generally visible inside of the house. Exterior insulation and sheathing or panels wrap around the outside of the timberframe and support the exterior siding and roofing. The timberframe package Timberpeg manufactures typically consists of the posts and beams for the timberframe, the exterior doors and windows, insulation, clapboard siding, and roofing materials.

Timberpeg’s home designs are reflected in architectural plans. Timberpeg’s architectural plans generally reflect the size, shape, dimension, and layout for all levels of a timberframe home, from the foundation to the roof. The plans reflect exterior wall height, roof pitch, interior room size and layout, window and door locations, and other design details. Timberpeg’s architectural plans also designate the location of the post and major beam components of the timberframe.

VTW is in the business of manufacturing and erecting timberframes. Mr. Friant is one of VTW’s owners, and is VTW’s sole draftsman. VTW does not design homes or draft architectural plans. Rather, VTW takes architectural plans drafted by others and designs and builds timberframes to fit the houses reflected in those plans.

In 1999, Stanley Isbitski entered into an agreement for Timberpeg to design him a home with post and beam sections, and traditionally framed sections. This agreement provided that Timberpeg would own the copyright in the plans created.

Later that year, Timberpeg completed a set of architectural plans, which it provided to Mr. Isbitski. In 2001, Timberpeg provided Mr. Isbitski a revised set of architectural plans containing additional details necessary for construction. The revised architectural plans, which Timberpeg registered with the U.S. Copyright Office, reflected the design of a house, the main portion of which was to be timberframed, and a master bedroom wing which was to be built using standard two inch lumber framing, not posts and beams. Mr. Isbitski later filed these Timberpeg plans with the Salisbury building department and he was issued a permit to build the home. I will hereafter refer to these revised architectural plans as the “Timberpeg plans.”

In early 2000, Mr. Isbitski began to work with the defendants, a competitor of Timberpeg, to purchase and erect the timberframe for the home Timberpeg was designing. Timberpeg claims that Mr. Isbitski gave the defendants access to the Timberpeg plans so that the defendants could draft sketches and build a timberframe to fit the home reflected in those plans. Timberpeg alleges that the timberframe built by the defendants infringes Timberpeg's copyright because the timberframe copies the design reflected in Timberpeg's copyrighted architectural plans. The defendants deny that they either saw or used the Timberpeg plans to design and build the timberframe for Mr. Isbitski's home.

Timberpeg has asserted claims for copyright infringement, as well as for unfair competition, unjust enrichment and violation of a New Hampshire statute called the Consumer Protection Act. The defendants deny any liability to Timberpeg. I will now instruct you as to each of Timberpeg's claims.

**JURY INSTRUCTION NO. 2:**

**Copyrights – Generally**

The term “copyright” refers to the protection that the law extends to an author or creator of an original work against the unauthorized appropriation of that work by others. The “author” of a copyright is the creator of any original work protected by the copyright laws. The owner of a copyright has the right to exclude any other person from reproducing, preparing derivative works from, distributing, performing, displaying, or using the work covered by the copyright for a specified period of time. In layman’s terms, that means that no one may use a copyrighted work, in whole or in part, without permission from the owner.

The term “work” refers to any material that is subject to protection under the copyright laws. The term work includes creations such as songs, pictures, sculptures, literature, among other things. The term works also includes architectural works.

**Sources:**

*See 17 U.S.C §§ 101, 102, 106 & 501 (2004).*

**JURY INSTRUCTION NO. 3:**

**Copyrights - Architectural Works**

Architectural works means the design of a building as embodied in any tangible medium of expression. As you know from the evidence you have heard, the design of a building can exist in architectural plans and drawings as well as in the completed building itself. Whatever the form in which the design is reflected, the copyright protection is the same. Copyright protection extends to the architectural work, regardless of the form, in which it is expressed. This means that, however expressed, copyright protection extends to the design, meaning overall form as well as the arrangement and composition of spaces and elements in the design, of a building.

**Sources:**

*See* 17 U.S.C §§ 101, 102, 106 & 501 (2004).

**JURY INSTRUCTION NO. 4:**

**Copyright Infringement – Generally**

In this case, Timberpeg claims that the defendants infringed its copyright in the Timberpeg plans. To find liability for copyright infringement, Timberpeg must prove, by a preponderance of the evidence, or, as I explained earlier, more likely than not, two elements:

1. that Timberpeg owns a valid copyright in the Timberpeg plans; and
2. that the defendants copied some or all original elements of those plans.

Although I will explain the word “copied” in greater detail in a few moments, I emphasize that its meaning in this context is much broader than just slavish or mindless copying. I also emphasize that preponderance of the evidence means that you must be persuaded by the evidence that it is more probably true than not true that Timberpeg has proved each element. I will now explain the elements of copyright infringement.

**Sources:**

*Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991); *Saenger Org. v. Nationwide Ins. Licensing Assocs., Inc.*, 119 F.3d 55, 59 (1st Cir. 1997); *CCM Cable Rep., Inc. v. Ocean Coast Properties.*, 97 F.3d 1504, 1513 (1st Cir. 1996).

**JURY INSTRUCTION NO. 5:**

**Copyright Infringement – Ownership of Valid Copyright**

To find liability against the defendants for copyright infringement, you must first find that Timberpeg is the owner of a valid copyright in the Timberpeg plans. To establish ownership of a valid copyright, you must find, by a preponderance of the evidence, the following:

1. that the Timberpeg plans as a whole are an original work; and
2. that the plaintiff owns the copyright to the Timberpeg plans.

There is no claim in this case that Timberpeg does not own the copyright in the Timberpeg plans, so I instruct you that Timberpeg owns the copyright in the plans. I will now explain what “original” means, so that you can determine whether Timberpeg’s copyright is valid.

**Sources:**

*Saenger Org., Inc. v. Nationwide Ins. Licensing Assocs., Inc.*, 119 F.3d 55, 59 (1st Cir. 1997); *Lotus Dev. Corp. v. Borland Int’l Inc.*, 49 F.3d 807, 813 (1st Cir. 1995).

**JURY INSTRUCTION NO. 6:**

**Copyright Infringement – Originality of Work**

To prove that Timberpeg’s copyright is not valid, the defendants must demonstrate, by a preponderance of the evidence, that the Timberpeg plans lack originality. Under copyright law, however, originality simply means that the work was independently created and not copied. Hence, the threshold for originality is low: as long as the work is the creative idea of the author, it is considered original. The plaintiff’s copyright is only invalid if you find that the Timberpeg plans are not Timberpeg’s creative idea. For the purpose of making this determination, you must attribute to Timberpeg any creative ideas contributed by Mr. Isbitski.

Your originality inquiry must focus on the overall Timberpeg design for the Isbitski house. I instruct you that originality in copyright law requires only that Timberpeg has arranged the various features and elements in an original way, meaning a way that is not a copy. Many of the features of a house, such as wall and roof dimensions, windows, doors, among others, are not original in that many houses contain some or all of the same elements. I instruct you that you are not to examine the Timberpeg design in terms of its standard features, but rather that you are to examine the overall design – how Timberpeg composed and arranged all of these features into a single design of a house – when determining originality. If Timberpeg independently selected and arranged the various elements and did not copy other designs, then you must find the Timberpeg design original and you must find Timberpeg’s copyright valid.

**Sources:**

*CCM Cable Rep., Inc. v. Ocean Coast Properties.*, 97 F.3d 1504, 1513 (1st Cir. 1996); *Richmond Homes Mgmt., Inc. v. Raintree, Inc.*, 862 F. Supp. 1517, 1523-24 (W.D. Va. 1994).

**JURY INSTRUCTION NO. 7:**

**Copyright Infringement – Elements**

If you find, by a preponderance of the evidence, that Timberpeg owns a valid copyright in the Timberpeg plans, you must next consider whether Timberpeg has proved, also by a preponderance of the evidence, that the defendants infringed their copyright. Infringement may be established in one of two ways. First, you may find that the Timberpeg plans and the defendants' timberframe are "strikingly similar." Alternatively, you may find that the defendants copied the original elements of the Timberpeg plans and that the copying was so extensive that the Timberpeg plans and the defendants' timberframe are "substantially similar." I will now explain to you these elements of copyright infringement.

**Sources:**

*Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 33 (1st Cir. 2001); *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 62 (1st Cir. 2000).

## **JURY INSTRUCTION NO. 8:**

### **Copyright Infringement – Striking Similarity**

You may find that the defendants' timberframe and the Timberpeg plans are "strikingly similar." To find striking similarity, it is required that the similarities between the two works be so striking as to preclude the possibility that the defendants independently arrived at the same result. In essence, "striking similarity" means that, through logic and experience, it is virtually impossible that the two works could have been independently created.

If you find striking similarity to exist in this case, then copyright infringement is established and you must then determine the appropriate damages to award Timberpeg. If you do not find striking similarity, then you may still consider whether the defendants copied the original elements of the Timberpeg plans and that the copying was so extensive that the Timberpeg plans and the defendants' timberframe are "substantially similar."

#### **Source:**

*Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 33 (1st Cir. 2001); *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 62 (1st Cir. 2000); *Arthur Rutenberg Corp. v. Parrino*, 664 F.Supp 479, 481 (M.D.Fla. 1987).

**JURY INSTRUCTION NO. 9:**

**Copyright Infringement – Unauthorized Copying**

Timberpeg may prove copying by direct or indirect evidence, meaning Timberpeg may prove either that the defendants actually used Timberpeg's copyrighted plans in the defendants' designing, manufacturing and erecting their timberframe, or simply that the defendants had access to Timberpeg's copyrighted architectural plans. In most copyright cases, proof of direct copying is not available. A lack of direct evidence does not require a finding for the defendants, nor should you infer that no copying occurred solely because you have seen no direct evidence of copying. Because direct evidence of copying is so often unavailable, the law allows a plaintiff to prove copying indirectly, by proving:

1. that the defendants had access to the Timberpeg plans; and
2. that there is a probative similarity between the Timberpeg plans and the defendants' timberframe.

In this case, therefore, if Timberpeg establishes direct evidence of copying, or, alternatively, proves access and probative similarity, you are instructed to find copying.

**Sources:**

*Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 33 (1st Cir. 2001); *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 62 (1st Cir. 2000).

**JURY INSTRUCTION NO. 10:**

**Copyright Infringement – Direct Evidence of Copying**

Direct evidence of copying is evidence tending to demonstrate that a defendant has copied a protected work. One form of direct evidence would be an admission by a defendant that he or she copied a protected work.

In New Hampshire, when an attorney acts on behalf of his or her client in a civil litigation matter and the client knows of the attorney's acts, then those acts are legally binding on the client. This means, for example, that an attorney's statement to an opposing party is legally binding on the client.

You have seen correspondence to Timberpeg from the defendants' attorneys, through which Timberpeg claims the defendants admitted copying the Timberpeg plans. If you find that these letters admit copying of the Timberpeg plans and that either, or both, of the defendants authorized their counsel to respond to Timberpeg, then you must find that Timberpeg has established direct evidence of copying against either or both of the defendants.

**Sources:**

*Bower v. Davis & Symonds Lumber Co.*, 119 N.H. 605, 608 (1979); *Manchester Housing Auth. v. Zyla*, 118 N.H. 268, 269 (1978).

**JURY INSTRUCTION NO. 11: [For use if access is at issue]**

**Copyright Infringement – Access to Plaintiff’s Work**

If you do not find direct evidence of copying, then you may still determine that there is indirect evidence of copying by the defendants through access to the Timberpeg plans.

To prove that the defendants had access to the Timberpeg plans, Timberpeg must demonstrate that the defendants had a reasonable opportunity to view the Timberpeg plans. Timberpeg need not prove that the defendants actually saw the Timberpeg plans.

Under copyright law, if a third party deals with the plaintiff and defendant at the same time while in possession of the protected work, then access by the defendant is established. Therefore, if you determine in this case that Mr. Isbitski dealt with Timberpeg and the defendants at the same time while Mr. Isbitski was in possession of the Timberpeg plans, then you must find that the defendants had access to the Timberpeg plans.

**Sources:**

*Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 62 (1st Cir. 2000); *Kamar Intern., Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062 (9th Cir. 1981); *Arthur Rutenberg v. Parrino*, 664 F.Supp. 479, 481 (M.D. Fla. 1987).

**JURY INSTRUCTION NO. 11: [For use if access established at trial]**

**Copyright Infringement – Access to Plaintiff’s Work**

If you do not find direct evidence of copying, then you may still determine that there is indirect evidence of copying by the defendants through access to the Timberpeg plans.

To prove that the defendants had access to the Timberpeg plans, Timberpeg must demonstrate that the defendants had a reasonable opportunity to view the Timberpeg plans. Timberpeg need not prove that the defendants actually saw the Timberpeg plans.

You have heard undisputed evidence that both Timberpeg and the defendants were dealing with Mr. Isbitski during the same period of time. I instruct you that this evidence establishes access as a matter of law.

I also instruct you that because access has been established in this case, the defendants cannot claim innocent infringement of Timberpeg’s copyright. As a matter of law, a defendant cannot claim innocent infringement if a copyright notice appears on the protected work and the defendant had access to that work. Therefore, you must disregard all evidence and argument presented by the defendants regarding innocent infringement.

**Sources:**

*Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 62 (1st Cir. 2000); *Kamar Intern., Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062 (9th Cir. 1981); *Arthur Rutenberg v. Parrino*, 664 F.Supp. 479, 481 (M.D. Fla. 1987); 2 M. Nimmer & D. Nimmer, *Nimmer on Copyrights* § 7.02[C][3], at 7-17 & 7-18 n.25 (2003).

**JURY INSTRUCTION NO. 11: [For use if access found on summary judgment]**

**Copyright Infringement – Access to Plaintiff’s Work**

I have already determined that, as a matter of law, the defendants had access to the Timberpeg plans. Therefore, you must only decide whether probative similarity exists between the two works.

## **JURY INSTRUCTION NO. 12:**

### **Copyright Infringement – Substantial Similarity**

In addition to proving that the defendants had access to the Timberpeg plans, Timberpeg must also prove that the defendants' timberframe is substantially similar to the architectural design reflected in Timberpeg's architectural plans.

I will explain the details of what make any two works substantially similar, but I first want to emphasize two points to you. First, I remind you that just because a timberframe is not a complete house does not mean that it cannot be substantially similar to the design of a house. If a timberframe reflects enough of the overall features of the design of a house, as I will explain to you, then that timberframe is substantially similar to the design of the house.

Second, you need not apply any special knowledge to make the substantial similarity determination. The test for substantially similar is the "ordinary observer test." Under this test, you must determine whether, in comparing the two works, an ordinary reasonable person would recognize the defendants' work as having been derived from Timberpeg's work. I will now explain how you are to go about determining substantial similarity.

#### **Sources:**

*Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 33 (1st Cir. 2001); *Walker v. University Books, Inc.*, 602 F.2d 859, 864 (9th Cir. 1979); *Arthur Rutenberg Homes, Inc. v. Maloney*, 891 F.Supp. 1560, 1567 (M.D. Fla. 1995); *Richmond Homes Mgmt., Inc. v. Raintree, Inc.*, 862 F.Supp. 1517, 1527 (W.D.Va. 1994); *Value Group, Inc. v. Mendham Lake Estates, L.P.*, 800 F. Supp. 1228, 1233 (D.N.J. 1992).

**JURY INSTRUCTION NO. 13:**

**Copyright Infringement – Substantial Similarity Between Timberframe and Timberpeg plans**

Your evaluation of the timberframe and the Timberpeg plans under the “ordinary observer test” should be based on an overall impression of the two works, not on a detailed comparison that focuses on individual differences. You cannot rely on particularized differences between a protected architectural design and an allegedly infringing work if the two are otherwise substantially similar. This means that exact reproduction or near identity is not necessary to establish substantial similarity. You should consider any differences between the two only if those so outweigh similarities that the similarities can only be deemed inconsequential within the total context of the copyrighted work. In other words, whatever differences, if any, you identify must be so substantial as to make whatever similarity, if any, inconsequential.

I want to remind you about comparing a timberframe to a house. Please remember that a copy which is only an incomplete representation of some final product may still be substantially similar to a copyrighted work. Thus a timberframe, which is not a completed house, may still be substantially similar to that house or house design. Substantial similarity may also exist even if the copy is produced in a medium different than that of the protected work. As such, it is possible under copyright law for substantial similarity to exist between a three-dimensional timberframe and two-dimensional architectural plans. In other words, infringement can be established based on substantial similarity between a structure and architectural plans. The fact that Timberpeg did or did not design a timberframe should not affect your analysis, nor should the fact that only part of the house was to be timberframed affect your analysis if the defendants’ timberframe is substantially similar to the portion of the house Timberpeg designed to be timberframed. The comparison is not between two timberframes, but between a timberframe and a house design.

Moreover, it is not necessary that the whole or even a large portion of the Timberpeg plans are copied. It is sufficient if a material and substantial part of the plans are copied, even though it be but a small part of the whole. A defendant, for example, may infringe on a copyright in an architectural work even if that defendant copies only the floor plan of that architectural work. Thus, while a timberframe may only represent one element of a house design, it is still possible for substantial similarity to exist between the defendants’ timberframe and certain design features of the Timberpeg plans.

I instruct you that if you find the defendants’ timberframe substantially similar to part of Timberpeg’s design, such as the floor plan or elevations, you must find for Timberpeg.

**Sources:**

*Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 33 (1st Cir. 2001); *Walker v. University Books, Inc.*, 602 F.2d 859, 864 (9th Cir. 1979); *Nucor Corp. v. Tennessee Forging Steel Service, Inc.*, 476 F.2d 386, 391 (8th

Cir. 1973); *Arthur Rutenberg Homes, Inc. v. Maloney*, 891 F.Supp. 1560, 1567-68 (M.D. Fla. 1995); *Richmond Homes Mgmt., Inc. v. Raintree, Inc.*, 862 F.Supp. 1517, 1527 (W.D.Va. 1994).

**JURY INSTRUCTION NO. 14:**

**Copyright Infringement - Comparing Features of Timberframe and Timberpeg plans**

In determining whether substantially similar exists, you should compare the following gross features of the timberframe and the Timberpeg plans, such as:

1. the overall layout and proportions, such as room dimensions and total living space;
2. the number of floors;
3. the location of the dining room, living room, and staircase;
4. the height of each level of living space;
5. the location of the windows and doorways; and
6. the exterior elevations of the home, including roof lines and pitch.

This list is not exclusive; you may consider other gross features that you find indicative of substantial similarity. Let me also remind you that your comparison should not focus on particularized differences between the two works. Therefore, differences that are not visible to the naked eye or do not affect the overall look and feel of the home should not be the focus of your comparison.

**Source:**

*Howard v. Sterchi*, 974 F.2d 1272, 1276 (8th Cir. 1992).

**JURY INSTRUCTION NO. 15:**

**Copyright Infringement – Individual Liability**

As I mentioned to you, Timberpeg has brought copyright infringement claims against VTW and Mr. Friant. If you find, based on my prior instructions, that Timberpeg has proved infringement, then you must find for Timberpeg with respect to its claim against VTW. I will now instruct you as to some additional elements Timberpeg must prove in order to hold Mr. Friant personally liable for copyright infringement. An individual, including a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, or who personally participates in that activity is liable for the infringement.

In this case, if you find that Mr. Friant supervised or had the ability to supervise the design of the VTW timberframe and had a financial interest in that activity, or that he personally participated in the designing and drafting of the VTW timberframe, then you must find that Mr. Friant is personally liable for copyright infringement.

**Sources:**

17 U.S.C. § 501(a); *Pinkham v. Sara Lee Corp.*, 983 F.2d 824, 834 (8th Cir. 1992); *Southern Bell Tel. & Tel. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 811 (11th Cir. 1985).

**JURY INSTRUCTION NO. 16:**

**Copyright Infringement – Willful Infringement**

Timberpeg claims that the defendants' infringement was willful. Willful infringement of a copyright occurs when a person acts in disregard of a copyright with no reasonable basis to believe that he or she had a right to copy the protected work. If you find that either or both of the defendants acted in disregard of Timberpeg's copyright in the Isbitski architectural plans, and that either or both had no reasonable basis to believe they had a right to copy the Timberpeg plans, then you must find that either or both of the defendants have engaged in willful infringement.

**Sources:**

17 U.S.C. § 504(c); *Cable/Home Comm. Corp. v. Network Prods., Inc.*, 902 F.2d 829, 851 (11th Cir. 1990); *Arthur Rutenberg Homes v. Maloney*, 891 F.Supp. 1560, 1568 (M.D.Fla. 1995).

**JURY INSTRUCTION NO. 17:**

**Copyright Infringement – Copyright Notice**

The defendants allege that Timberpeg’s copyright notice on the Timberpeg plans is defective. A copyright notice is effective if it consists of the word “Copyright” or the copyright symbol “©” accompanied by the date of the work’s first publication and the name of the copyright owner. In addition, the notice must be affixed to the work in a manner and location as to give reasonable notice of the claim of copyright.

I have determined that Timberpeg’s copyright notice on the Timberpeg plans is sufficient as a matter of law. Therefore, I instruct you to disregard any evidence or arguments made by the defendants regarding the sufficiency of Timberpeg’s copyright notice.

**Sources:**

17 U.S.C. § 401(c); 2 M. Nimmer & D. Nimmer, *Nimmer on Copyrights* §§ 7.05, at 7-29 & 7.10, at 7-69 (2003).

**JURY INSTRUCTION NO. 18: [For use if actual damages elected]**

**Copyright Infringement Damages – Actual Damages Plus Profits**

A copyright owner is entitled to recover damages for copyright infringement. Generally, the copyright owner may recover the actual damages suffered by it as a result of the infringement as well as any profits of the defendant that are attributable to the infringement.

The copyright act allows parties to select their remedies, and the absence of evidence concerning any one remedy has no bearing on whether a party can obtain any other remedy. In this case, Timberpeg does not seek its own actual damages, but rather seeks only the profits the defendants gained through the infringement. You are not to draw any conclusions from Timberpeg's election, such as, for example, that Timberpeg suffered no damages as a result of the infringement.

**Sources:**

17 U.S.C. § 504(b); *Danielson, Inc. v. Winchester-Conant Properties, Inc.*, 322 F.3d 26, 47 (1st Cir. 2003); 4 M. Nimmer & D. Nimmer, *Nimmer on Copyrights* §§ 14.01, at 14-37 & 14.03[B], at 14-42.

**JURY INSTRUCTION NO. 19: [For use if actual damages elected]**

**Copyright Infringement Damages - Defendants' Profits**

In establishing a defendant's profits, the copyright owner is only required to present proof of the defendant's gross revenues. Thereafter, the defendant carries the burden of proving any deductible expenses. Expenses that may be deducted are only those expenses that are proven by the defendant as specifically relating to the production and sale of the infringing work. The defendant may not deduct, however, any of its indirect or fixed overhead expenses. For example, costs for materials and labor related to the construction of the infringing work are deductible. In contrast, employee salaries and the general month to month costs of running a business, such as lighting, heating, and rent, are not.

In this case, Timberpeg seeks to recover the defendants' profits from the infringement. The parties agree that VTW earned \$66,350 in gross revenue from the Isbitski project. You must award Timberpeg that amount unless VTW proves that it incurred expenses specifically related to the manufacture and construction of the timberframe. If it proves such expenses, then the expenses should be deducted from the gross revenues of \$66,350. The resulting amount is Timberpeg's damages award.

**Sources:**

17 U.S.C. § 504(b); *Danielson, Inc. v. Winchester-Conant Properties, Inc.*, 322 F.3d 26, 47 (1st Cir. 2003); *Playboy Enterprises, Inc. v. Dumas*, 837 F. Supp. 295, 318 (S.D.N.Y. 1993); 4 M. Nimmer & D. Nimmer, *Nimmer on Copyrights* §§ 14.01, at 14-37 & 14.03[B], at 14-42.

**JURY INSTRUCTION NO. 20: [For use if statutory damages elected]**

**Copyright Infringement Damages – Statutory Damages**

A copyright owner is entitled to recover statutory damages for copyright infringement. While the award of statutory damages should be in an amount you consider just, there are certain guidelines that must be observed. If you find that the defendants infringed on Timberpeg's copyright, you must award at least \$750 and no more than \$30,000 for each act of infringement.

In determining an amount of statutory damages that is just, you should consider such factors as the expenses saved and profits reaped by the defendants, any revenues that may have been lost by Timberpeg, the deterrent value of the award, and whether the infringement was willful or innocent.

**Sources:**

17 U.S.C. § 504(c); *Polygram Int'l Pub., Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1335 (D. Mass. 1994); *Sailor Music v. Mai Kai of Concord, Inc.*, 640 F. Supp. 629 (D.N.H. 1986).

**JURY INSTRUCTION NO. 21: [For use if statutory damages elected]**

**Copyright Infringement Damages - Willful Infringement**

If you find that the defendants willfully infringed Timberpeg's copyright, then you may award statutory damages up to \$150,000 for each act of infringement. As I explained earlier, willful infringement of a copyright occurs when a person acts in disregard of a copyright with no reasonable basis to believe that he or she had a right to copy the protected work.

**Source:**

17 U.S.C. § 504(c).

**JURY INSTRUCTION NO. 22: [For use if statutory damages elected and access is at issue]**

**Copyright Infringement Damages - Innocent Infringement**

Alternatively, you may award statutory damages as little as \$200 if you find that the defendants innocently infringed Timberpeg's copyright. To make such an award, however, the defendants must have first carried the burden of proving that they were not aware and had no reason to believe that their acts constituted copyright infringement. I must emphasize that even if you find that the defendants acted innocently, that does not mean you may find in the defendants' favor on Timberpeg's copyright infringement claim. Innocence is merely one of many factors you may consider when you are determining what damages to award.

I also instruct you that you cannot find innocent infringement if you determine that the defendants had access to the Timberpeg plans. Access as I use it here means the same as I defined it before: it is when a defendant has reasonable opportunity to view the protected work. Under copyright law, the defense of innocent infringement is unavailable when a copyright owner uses a copyright notice on the protected work and the defendant has access to that work. In this case, Timberpeg used a legally effective copyright notice on the Timberpeg plans. Therefore, if you find that the defendants had access to the Timberpeg plans, then you cannot award the reduced statutory damages for innocent infringement.

**Sources:**

17 U.S.C. § 504(c); *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995); *Douglas v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1140 (7th Cir. 1985); 2 M. Nimmer & D. Nimmer, *Nimmer on Copyrights* § 7.02[C][3], at 7-17 & 7-18 n.25 (2003).

**JURY INSTRUCTION NO. 22: [For use if statutory damages elected and access not at issue]**

**Copyright Infringement Damages – Innocent Infringement**

I instruct you not to consider whether the defendants' infringement of Timberpeg's copyright was innocent. Innocent infringement refers to situations where a defendant is not aware and has no reason to believe that his or her acts constitute copyright infringement. As a matter of law, a defendant cannot innocently infringe a copyright if it is determined that a copyright notice appeared on the protected work and the defendant had access to that work.

Timberpeg has already established that it used a sufficient copyright notice on the Timberpeg plans and that the defendants had access to those plans. Therefore, the defendants cannot be found to have innocently infringed Timberpeg's copyright. Accordingly, you cannot weigh innocence as a factor when determining your statutory damages award.

**Sources:**

17 U.S.C. § 504(c); *Lipton v. Nature Co.*, 71 F.3d 464, 471 (2d Cir. 1995); *Douglas v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1140 (7th Cir. 1985); 2 M. Nimmer & D. Nimmer, *Nimmer on Copyrights* § 7.02[C][3], at 7-17 & 7-18 n.25 (2003).

**JURY INSTRUCTION NO. 23:**

**State Law Claim – Unfair Competition**

Timberpeg claims that Vermont Timber Works engaged in unfair competition by using the Timberpeg plans without its consent or approval. One who causes harm to the commercial relations of another by engaging in a business or trade is subject to liability for such harm if it results from acts or practices that are determined to be an unfair method of competition, taking into account the nature of the conduct and its likely effect on both the person seeking relief and the public.

If you find that Vermont Timber Works' conduct harmed Timberpeg and that such conduct was an unfair method of competition, then Vermont Timber Works is liable for the commercial tort of unfair competition. You shall award Timberpeg damages in an amount equal to Vermont Timber Works' profits resulting from the unfair competition, as established by the evidence.

**Source:**

Restatement (Third) of Unfair Competition § 1 (1995).

**JURY INSTRUCTION NO. 24:**

**State Law Claim – New Hampshire Consumer Protection Act (RSA 358-A)**

Timberpeg claims that Vermont Timber Works engaged in unfair and deceptive trade practices in violation of the New Hampshire Consumer Protection Act. The Consumer Protection Act states, in relevant part, that:

It shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce with this state. Such unfair competition or unfair or deceptive act or practice shall include . . . [c]ausing a likelihood of confusion or of misunderstanding as to the source . . . of goods or services . . .

In order to find for Timberpeg on its Consumer Protection Act claim, you must find not only that Vermont Timber Works engaged in acts that violate the Consumer Protection Act, but also that its conduct attained a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce. In other words, Vermont Timber Works' conduct must exceed what a business person would expect to see in the business world.

Timberpeg claims that Vermont Timber Works violated the Consumer Protection Act by designing and building a timberframe using the Timberpeg plans without Timberpeg's consent or approval. If you find, by a preponderance of the evidence, that Vermont Timber Works engaged in this conduct and that this conduct exceeded what a business person would expect to see in the business world, you will find that it has violated the Consumer Protection Act.

Timberpeg also claims that Vermont Timber Works violated the Consumer Protection Act by causing a likelihood of confusion as to the source of the timberframe by allowing the Timberpeg plans to be filed with the Salisbury Building Department for the purpose of obtaining a building permit and not correcting the record or taking other steps to insure that the general public did not think that the timberframe was the work of Timberpeg. If you find, by a preponderance of the evidence, that Vermont Timber Works caused a likelihood of confusion with respect to the Timberpeg plans and that its conduct exceeded what a business person would expect to see in the business world, you will find that Vermont Timber Works violated the Consumer Protection Act.

If you find that Vermont Timber Works violated the Consumer Protection Act, you must then decide whether the evidence shows that Timberpeg suffered damages or losses because of the violation. If you find that Timberpeg has shown, by a preponderance of the evidence, that it suffered damages or losses because of a violation of the Consumer Protection Act, you will award Timberpeg the amount of actual damages it sustained or \$1,000, whichever is greater.

The law does not require mathematical certainty in computing damages, However, your computation of the damage award must be supported by the evidence; it cannot be based on speculation.

**Sources:**

RSA 358-A:2; *Barrows v. Bowles*, 141 N.H. 382, 390 (1996).

**JURY INSTRUCTION NO. 25:**

**State Law Claim – Willful and Knowing Violation of the Consumer Protection Act**

Timberpeg claims that Vermont Timber Works' violation of the Consumer Protection Act was willful and knowing. A willful act is a voluntary act committed with an intent to cause its result. It is not, by contrast, an accident or an act committed on the basis of a mistake of fact. A person acts knowingly with respect to conduct or to a circumstance when he is aware that his conduct is of such nature or that such circumstance exists. If you find, by a preponderance of the evidence, that Vermont Timber Works' violation of the Consumer Protection Act was willful or knowing, you should multiply the amount awarded for such violation by no less than two (2) and no more than (3).

**Source:**

RSA 358-A:10; Rood v. Moore, 148 N.H. 378 (2002); RSA 626:2(II)(b).

**JURY INSTRUCTION NO. 26:**

**State Law Claim – Unjust Enrichment**

Timberpeg claims that Vermont Timber Works has been unjustly enriched as a result of using the Timberpeg plans to build its timberframe. A plaintiff is entitled to restitution for unjust enrichment if a defendant receives a benefit and it would be unconscionable for the defendant to retain that benefit.

If you find that Vermont Timber Works received a benefit as a result of using the Timberpeg plans and that it would be unconscionable for it to retain that benefit, then Timberpeg is entitled to receive payment in an amount equal to the benefit Vermont Timber Works received. In this case, that amount would be equal to the profits Vermont Timber Works realized as a result of building the timberframe.

**Source:**

*Nat'l Employment Staffing Serv. Corp. v. Olsten Staffing Service, Inc.*, 145 N.H. 158, 162 (2000); see *Curtis Mfg. Co. v. Plastic-Clip Corp.*, 933 F. Supp. 94, 104 (D.N.H. 1995).