

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

_____)	
T-Peg, Inc. and Timberpeg East, Inc.)	
)	
Plaintiffs,)	
)	
v.)	No. C-03-462-M
)	
Vermont Timber Works, Inc.)	
and Douglas Friant,)	
)	
Defendants.)	
_____)	

**MOTION IN LIMINE TO PRECLUDE EVIDENCE, TESTIMONY,
OR REFERENCE TO THE PLAINTIFFS'
ELECTION TO FOREGO THEIR OWN LOST PROFITS**

NOW COME the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. ("Timberpeg"), by and through its attorneys, Devine, Millimet & Branch, Professional Association, and respectfully submit this Motion in Limine to Preclude Evidence, Testimony, or any Reference to Timberpeg's election to forego recovery of its own lost profits as part of the damages in this action. In support of its motion, Timberpeg states the following:

1. In this action, Timberpeg claims copyright infringement, unjust enrichment, and unfair competitive practices arising out of the defendants' use of Timberpeg's copyrighted architectural plans to manufacture and build a timberframe for Stanley Isbitski. Among available remedies, the Copyright Act allows a plaintiff to seek either its lost profits and disgorgement of the defendant's profits or statutory damages.

2. During the course of discovery, Timberpeg determined that it would not seek its own lost profits, and would seek either disgorgement of the defendants' profits or statutory

damages. Timberpeg's election resulted in motion practice before this Court, in which, among other things, the defendants have alleged that Timberpeg suffered no actual damages and have requested an instruction to the jury that Timberpeg suffered no damages as a result of the infringement. Timberpeg assumes that the defendants will press this argument to the jury during trial. As such evidence and argument would be improper and unfairly prejudicial, Timberpeg now moves in limine to preclude evidence, testimony, or argument concerning Timberpeg's decision not to seek Timberpeg's own lost profits.

Argument

3. The Copyright Act provides Timberpeg with various damages options. 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 adduced evidence of 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). A plaintiff's decisions about which damages to seek, whether its own lost profits, disgorgement of the defendant's profits, or statutory damages, is within the plaintiff's province under copyright law, and, therefore, should not serve as a basis for a negative or adverse inference by the defendant to support an argument that the plaintiff suffered no damages.

4. Rule 401 of the Federal Rules of Evidence defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” In light of the legitimacy of Timberpeg’s decision as to damages, an inference that Timberpeg suffered no damages falls short of Rule 401’s standard, in that such an inference cannot have the tendency to make the existence of any fact in question more or less probable. If Timberpeg does not seek its own lost profits, those lost profits cannot be at issue.

5. Rule 402 of the Federal Rules of Evidence provides that evidence which is not relevant is not admissible. As evidence concerning Timberpeg’s lost profits is irrelevant, it should be excluded.

6. Rule 403 of the Federal Rules of Evidence allows relevant evidence to be excluded if its probative value is substantially outweighed by the danger of confusing the issues or misleading the jury. Even assuming evidence concerning Timberpeg’s decision not to seek its own lost profits can be characterized as relevant for Rule 401 purposes, such evidence’s probative value would be far outweighed by the prejudicial effect such evidence and inference would cause by misleading the jury. Such evidence, and corresponding argument to the jury, would tend to make the jury think that no damages were warranted, regardless of the defendants’ profits and Timberpeg’s right to disgorge them. Timberpeg should not suffer prejudice by having done what copyright law allows, and the defendants should not be allowed to try to protect their own ill gotten gains by trying to suggest to the jury that their illegal conduct caused Timberpeg no harm.

7. At most, the jury should be instructed that Timberpeg has elected not to seek its own lost profits, and that the jury is not to infer anything about that decision, which is

appropriate under governing law. Under no circumstances should the jury be instructed that Timberpeg suffered no damage, nor should the defendants be allowed to introduce that argument at trial.

8. For all of these reasons, Timberpeg respectfully requests that this Court preclude any evidence, testimony, or reference to Timberpeg's decision to forego seeking its own lost profits.

9. Given the dispositive nature of this motion, no concurrence is necessary. See LR 7.1.

10. Given the authorities and argument cited herein, no memorandum of law is necessary. See LR 7.1.

WHEREFORE, Timberpeg respectfully requests that this Court:

- A. Exclude evidence and argument concerning the Timberpeg's own lost profits; and
- B. Grant such further and other relief as this Court deems just, proper, and equitable.

Respectfully submitted,

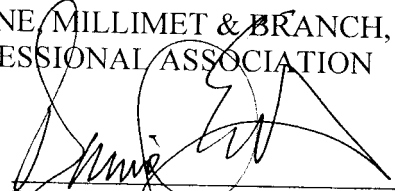
T-PEG, INC. AND TIMBERPEG
EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: January 31, 2005

By:



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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)