

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 EXCLUDE  
EVIDENCE, TESTIMONY, AND ARGUMENT  
CONCERNING PRIOR COPYRIGHT CLAIMS AND LAWSUITS**

NOW COME the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (“Timberpeg”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and move in limine to exclude evidence, testimony, and argument concerning prior copyright claims and lawsuits Timberpeg has asserted or commenced. In support of this motion, Timberpeg states as follows:

**Background**

1. This action involves, principally, a claim of copyright infringement by Timberpeg that the defendants unlawfully used Timberpeg's copyrighted architectural plans in the manufacture and erection of a timber frame for Stanley J. Isbitski. In discovery, the defendants requested documents concerning prior claims Timberpeg has asserted and prior lawsuits Timberpeg commenced for copyright infringement. Timberpeg objected on the grounds that VTW's request could not be reasonably

calculated to lead to the discovery of admissible evidence, and VTW moved to compel the information.

2. While this Court granted VTW's motion to compel, this Court inadvertently characterized Timberpeg as claiming trademark infringement and not copyright infringement, and stated that documents concerning such claims and suits could be relevant to a trademark action. See Order dated April 29, 2004 at 2. Timberpeg nonetheless produced documents concerning prior claims and suits going back to 1995.

3. Throughout this action, VTW has contended that Timberpeg's copyright claims are frivolous. As part of that contention, VTW has accused Timberpeg of pursuing copyright infringement claims in order to shake down parties for monetary settlements. VTW pursued this accusation, for example, during the deposition of Timberpeg's General Counsel. See Deposition of Stephen Woods, Esq. ("Woods Dep.") at 58-67, excerpts attached hereto as Exhibit A.

4. Given the defendants' approach during discovery, Timberpeg assumes that the defendants plan to introduce evidence during trial concerning Timberpeg's prior copyright claims in order to support an argument to the jury that this action is just another in a string of meritless claims Timberpeg has made, not to vindicate any copyright, but to lever money out of the defendants. Timberpeg now moves in limine to exclude any evidence, testimony, or argument as to prior copyright claims and suits.

### **Argument**

5. 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.” Evidence of Timberpeg’s prior copyright claims and suits fails to meet Rule 401’s standard for several reasons. First, this action is the only one Timberpeg has commenced with respect to the specific copyrighted architectural work at issue here - the Isbitski house plans. Unlike a trademark action, in which several suits can arise out of the same, global trademark, this action involves a copyright on a specific architectural work that is distinct from all of the copyrights and specific architectural works at issue in Timberpeg’s other claims or suits. Whatever may or may not have occurred with respect to other unrelated copyrights, therefore, cannot be characterized as having any tendency to make any fact of consequence in this action more or less probable with respect to this particular copyrighted architectural work.

6. In addition, claims or suits Timberpeg has pressed prior to this action have nothing to do with the central issue here, namely, whether the VTW timberframe infringes on Timberpeg’s copyright in the design reflected in the architectural plans for the Isbitski house. That inquiry centers on whether the defendants had access to Timberpeg’s copyrighted architectural plans, and whether the defendants’ timberframe is substantially similar to Timberpeg’s copyrighted house design. Timberpeg’s prior suits or claims, involving different copyrights, neither make infringement, or any of its elements, more or less probable.

7. Rule 402 of the Federal Rules of Evidence provides that evidence which is not relevant is not admissible. As evidence of Timberpeg’s prior claims and suits is not relevant, it should not be admitted.

8. Rule 403 of the Federal Rules of Evidence allows otherwise relevant evidence to be excluded if its probative value is substantially outweighed by the danger

of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Even assuming evidence of Timberpeg's prior claims and suits is relevant, admission of such evidence would create a serious risk of unfair prejudice, jury confusion, and would add unnecessary time to this trial. See, e.g. Fed.R.Evid. 406. Presumably, VTW would offer this evidence to argue that Timberpeg has a "routine practice" of leveraging monetary settlements out of others. Not only have the defendants failed to establish the predicates of Rule 406 admissibility, but such evidence would confuse the issues and mislead the jury. Rule 406 requires the routine practice to be closely parallel to the conduct at issue. As a result, courts are far less likely to admit routine practice evidence when it relates to parties other than those before the court than when the evidence deals with transactions between the parties. See Moore's Federal Rules Pamphlet 2004, part 2 §406.6. The defendants offer no proof that any of the prior claims and suits are parallel or similar to this action, nor did any of those actions involve the defendants. More fundamentally, a group of prior lawsuits involving different copyrights cannot be said to establish a routine practice for Rule 406 purposes.

9. Admission of such evidence and allowing the defendants to argue that Timberpeg regularly pursues meritless claims would prejudice Timberpeg, who has never received an adverse judicial decision on the merits of any of its prior claims. Such evidence would mislead the jury into thinking that this action is linked to prior claims, or that those claims lacked merit, a characterization Timberpeg disputes. Therefore, that this claim lacks merit.

10. Allowing such evidence about other copyright actions would add significant time to this trial for no more than a tangential sideshow. If the defendants pursue their line of argument and try to paint Timberpeg as asserting frivolous claims so as to shake money out of defendants, Timberpeg will have no choice but to explain each of the prior suits in detail so as to demonstrate to the jury the merit of each claim. Consequently, the prejudice to Timberpeg far outweighs any probative value.

11. For all of these reasons, Timberpeg requests that this Court exclude evidence of Timberpeg's prior claims and lawsuits, as well as any argument based on those prior claims and lawsuits.

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

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

WHEREFORE, Timberpeg respectfully requests that this Court:

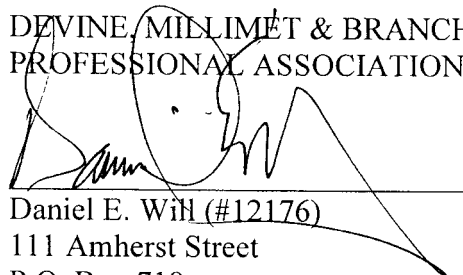
- A. Exclude evidence and argument concerning Timberpeg's prior claims and suits; and
- B. Grant such further and other relief as this Court deems just, proper, and equitable.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION



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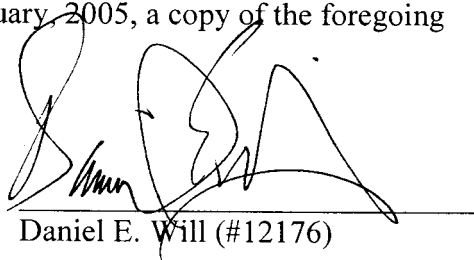
Dated: January 31, 2005

Of Counsel:

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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)