

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  
AS TO THE ORIGINALITY  
OF ANY OF THE INDIVIDUAL FEATURES OF  
TIMBERPEG’S COPYRIGHTED ARCHITECTURAL DESIGN**

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 as to the originality of any of the individual features of Timberpeg’s copyrighted architectural design. In support of this motion, Timberpeg states the following:

**Background**

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 erect a timberframe for Stanley J. Isbitski.

2. Timberpeg completed the set of architectural plans at issue in this action on or about April 20, 2001 and registered them with the U.S. Copyright Office. The copyright became effective on May 18, 2001. These plans were conceived and drafted by Timberpeg at the request

of Mr. Isbitski, and no evidence in the record supports even an inference that Timberpeg did not independently create the architectural design.

3. Despite the presumed validity of Timberpeg's copyright, the defendants have repeatedly challenged the copyrightability of Timberpeg's architectural plans. The defendants have pressed this challenge by claiming that Timberpeg's architectural plans lack that modicum of creativity required for copyright protection. See Defendants' Motion for Summary Judgment on (1) Non-Copyrightability and (2) VTW's Lack of Profits at 6-9. The essence of the defendants' argument is that because Timberpeg's architectural plans consist of unoriginal component parts (e.g., stairs, walls, and windows) that appear in all architectural plans, Timberpeg's plans are not entitled to copyright protection.

4. If past is prologue, Timberpeg expects that the defendants will continue this line of attack at trial by seeking to introduce irrelevant evidence, expert testimony, and argument concerning the "non-copyrightability" of Timberpeg's architectural plans. The defendants, for example, have disclosed an expert, Philip Phillips, who offers several opinions as to the originality of numerous features of Timberpeg's copyrighted design. See Philip Phillips' Expert Report, attached hereto as Exhibit A. Timberpeg assumes that the defendants intend to elicit testimony from Mr. Phillips that these features are not original, and, on that basis, argue to the jury that Timberpeg's design is not copyrightable.

5. Whether a work is copyrightable, however, is a question for the court, not the jury, and turns on how the individual features, even standard features, are selected, arranged, and composed into an original design, not whether any or all of those individual features are themselves original. Accordingly, Timberpeg now moves in limine to exclude such evidence, testimony, and argument.

## Argument

6. The defendants' challenge to copyrightability consists in reducing Timberpeg's architectural design into a series of individual, and allegedly standard features. Applicable law, however, is clear that the inquiry is not whether the individual features of an architectural work are original, but rather whether those features have been selected and arranged in an original way. See Richmond Homes Management, Inc. v. Raintree, Inc., 862 F. Supp. 1517, 1523 (W.D. Va. 1994). Thus, whether a particular window, door, roof, stair, or other feature itself is original has no bearing on copyrightability. Instead, what matters is whether those standard features are composed, selected, and arranged in an original way. See Id. The standard for originality, moreover, is low and focuses on whether the designer copied from another design, or whether the designer independently arranged and composed the standard features into a particular design. See Id.

7. Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having a 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 as to the lack of originality of various of the standard features or components of Timberpeg's architectural design is irrelevant, both because this Court must make the determination as to copyrightability and, more importantly, because copyrightability does not hinge on the originality of standard features, but rather on the composition of those features into a design. Evidence, therefore, that a particular feature of the Timberpeg design, such as the heights of the first and second floors, is not original, cannot be said to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence.

8. Rule 402 of the Federal Rules of Evidence states that evidence which is not relevant is inadmissible. Since the originality of any of the standard features that comprise Timberpeg's original design is not relevant, such evidence should be excluded.

9. Even if not entirely irrelevant, evidence concerning the originality of any of the standard features of Timberpeg's design will confuse and mislead the jury as to the relevant inquiry concerning the validity of Timberpeg's copyright. Rule 403 of the Federal Rules of Evidence states that otherwise relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Evidence on an issue that pursues an incorrect legal path will almost certainly lead to confusion of the issues and will mislead the jury, to the prejudice of Timberpeg. As such, this evidence should be excluded under Rule 403.

10. For all of these reasons, Timberpeg requests that this Court exclude evidence, testimony, or argument concerning the originality of the standard features of Timberpeg's architectural design, including through the defendants' expert Mr. Phillips.

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

12. 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, testimony, and argument concerning the originality of any of the standard features that comprise Timberpeg's architectural design; and

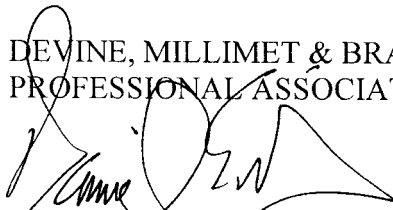
B. Grant such further and other relief as this Court deems just, proper, and equitable.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION



---

Daniel E. Will (#12176)  
111 Amherst Street  
P.O. Box 719  
Manchester, NH 03105-0719  
(603) 669-1000

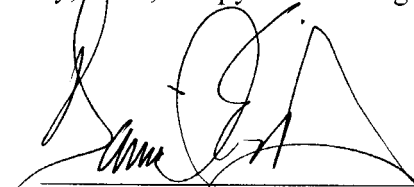
Dated: January 31, 2005

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)