

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 SUFFICIENCY OF THE PLAINTIFFS'
COPYRIGHT NOTICE**

NOW COME the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. ("Timberpeg"), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully submit this Motion in Limine to Preclude Evidence, Testimony, or any Reference to the Sufficiency of the Plaintiffs' Copyright Notice. In support of its 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 build a timberframe for Stanley J. Isbitski.

2. On or about April 20, 2001, Timberpeg completed a set of architectural plans for Mr. Isbitski. Timberpeg registered these architectural plans with the U.S. Copyright Office and the copyright became effective on May 18, 2001. See Certificate of Registration, Vau

510-781, attached as Exhibit A. It is this set of plans, and the architectural design they reflect, that form the basis of this action.

3. To ensure the full protection of the copyright laws, Timberpeg placed a copyright notice on the bottom of each page of the architectural plans before they were given to Mr. Isbitski. This notice stated:

This drawing may not be reproduced or copied, in whole or in part,
without the expressed written permission of T-Peg, Inc.
Copyright © 2001 T-Peg, Inc.

A true and accurate copy of this notice is attached hereto as Exhibit B. Significantly, Timberpeg East, Inc.'s name is also listed next to this notice.

4. The defendants have argued that Timberpeg's copyright notice is deficient. Their argument appears to be that the language Timberpeg utilized to accompany the "©" warns only that the plans may not be copied, i.e., duplicated, as opposed to the architectural design the plans reflect. Throughout this litigation, the defendants have contended that never photocopied Timberpeg's plans.

5. This is the first time anyone has questioned the sufficiency of Timberpeg's copyright notice. Timberpeg subsequently altered the language it employs.

6. The defendants have also sought discovery on those alterations to the copyright notice, and Timberpeg has produced non-privileged documents reflecting the change. Timberpeg now seeks to exclude evidence of the changes and argument that the copyright notice on the architectural plans at issue is insufficient.

Argument

7. A copyright notice is legally sufficient if it satisfies two criteria. First, the notice must consist of the word "Copyright" or the copyright symbol "©", the date of the work's first

publication, and the name of the copyright owner. 17 U.S.C. § 401(b). Second, the notice must be affixed to the work in such a manner and location as to give reasonable notice of the claim of copyright. Id. § 401(c).

8. The Register of Copyrights has prescribed specific methods of affixation and positioning of the notice on various types of works that will satisfy the requirement of “reasonable notice.” See 37 C.F.R. § 201.20. Compliance with these specifications conclusively establishes that reasonable notice has been given. Id. § 201.20(a); Nimmer on Copyrights § 7.10[A][1], at 7-69.

9. The Register of Copyrights has prescribed that a notice reproduced on the front or back of a copy of a “pictorial, graphic, or sculptural work” is acceptable. 37 C.F.R. § 201.20(i). Architectural plans are a form of “pictorial, graphic, or sculptural work,” as defined by the copyright laws. 17 U.S.C. § 101.

10. Accordingly, Timberpeg’s copyright notice on the architectural plans at issue in this case is correct both in form and location. Not only does Timberpeg’s copyright notice consist of the appropriate elements (i.e., the word “Copyright,” the first date of publication, and Timberpeg’s name), but the notice is also affixed to the front of every page of the plans, a location that conclusively establishes reasonable notice. Whatever other language accompanying those fundamental elements of Timberpeg’s copyright notice is irrelevant to the inquiry. Provided Timberpeg included those elements, the defendants were on notice that Timberpeg asserted copyright protection over Timberpeg’s architectural plans.

11. Because the copyright notice is sufficient as a matter of law, any questions raised by the defendants as to its sufficiency, or as to subsequent alterations of the notice on

Timberpeg's other architectural plans, is irrelevant and will only serve to confuse the jury. Therefore, such evidence, testimony, or argument should be excluded at trial.

12. 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 concerning the sufficiency of Timberpeg's copyright notice cannot be viewed as relevant under Rule 401. The legal sufficiency of Timberpeg's copyright notice, which is conclusively established, has no tendency to make any fact of consequence more or less probable with respect to the determination of whether the defendants infringed Timberpeg's copyright. The defendants, in other words, may not contend that the copyright notice misled them into thinking they could use the plans provided they did not photocopy them. 13. Rule 402 of the Federal Rules of Evidence provides that evidence which is not relevant is not admissible. As evidence concerning the sufficiency of or alterations to Timberpeg's copyright notice is not relevant, such evidence should be excluded. Of course, the irony of the defendants' argument with respect to this evidence cannot be ignored: they seek to attack the sufficiency of a copyright notice that they claim to have never seen.

14. Moreover, 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 confusing the issues or misleading the jury. Even assuming evidence concerning the sufficiency of Timberpeg's copyright notice is relevant, introduction of such evidence will likely confuse and mislead the jury. Such evidence will likely lead the jury to assume that the insufficiency of a copyright notice is a defense to infringement, when that is not the case. Evidence that Timberpeg revised its language after the defendants challenged its validity will

tend to make the jury believe that the original notice was insufficient, akin to a subsequent remedial measure under Rule 407 of the Federal Rules of Evidence. See, e.g., Hickman v. Gen. Ins. Co., 299 F.3d 1208, 1214 (10th Cir. 2002) (excluding evidence of change in corporate operating procedures after filing of sort alleging same to constitute breach of fiduciary duty). The issue in this case is whether the defendants infringed Timberpeg's copyright. Evidence concerning the sufficiency of the copyright notice, which cannot be disputed as a matter of law, would simply distract the jury from the actual issue in this case.

15. For all of these reasons, Timberpeg respectfully requests that this Court preclude any evidence, testimony, or reference to the sufficiency of or alterations to Timberpeg's copyright notice.

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

17. 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 sufficiency of Timberpeg's copyright;
- B. Exclude evidence and argument concerning any changes Timberpeg has made to its copyright notice on other architectural plans; and
- C. Grant such further and other relief as this Court deems just, proper, and equitable.

Respectfully submitted,

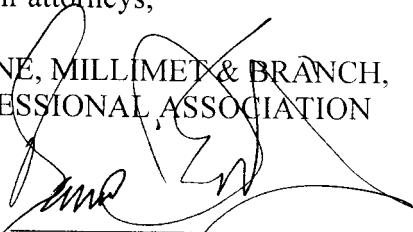
T-PEG, INC. AND TIMBERPEG
EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: January 31, 2005

By:



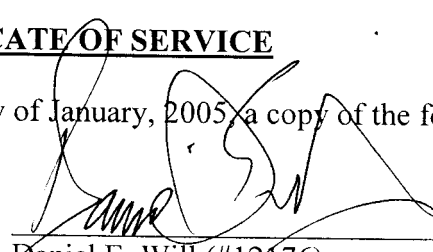
Daniel E. Will (#12176)
111 Amherst Street
Manchester, NH 03101
(603) 669-1000

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)