

## **Copyrights/Infringement**

### **Issues of Fact Remain on Similarity of Frame, Plans, to Plaintiff's 'Architectural Work'**

Whether a defendant's shop drawings and constructed frame were substantially similar to a plaintiff's architectural work presented genuine issues of material fact and should not have been decided on summary judgment, the U.S. Court of Appeals for the First Circuit held Aug. 18 (*T-Peg Inc. v. Vermont Timber Works Inc.*, 1st Cir. No. 05-2866, 8/18/06).

Reversing summary judgment in favor of an accused infringer of architectural plans, the court found that a number of elements relating to copying and substantial similarity remained in dispute, and therefore, should be decided by a jury at trial.

#### **Timberframe Homes**

T-Peg Inc. and Timberpeg East Inc. sell architectural designs and packages for construction of "timberframe" homes. A timberframe is a framing style which utilizes visible wooden posts and beams as a main feature to a home. By contrast, the more common "stick-built" style consists of frames using two-inch lumber rather than thicker posts and beams. Each Timberpeg package consists of preliminary plans and drawings, construction and foundation plans, and final plans, which include the complete frame drawings.

In 1999, Timberpeg was first hired by Stanley Isbitski to create a design a package for a house on his property. While the goal of the transaction was the eventual purchase of a Timberpeg package, Isbitski only purchased the preliminary, construction, and foundation plans and drawings.

Dissatisfied with the first set of plans, Isbitski requested a new set, in comport with his overall envisioned design. This second set of plans was registered by Timberpeg with the Copyright Office in May 2001, and was also recorded by Isbitski in the public records office of the Town of Salisbury, when he sought a building permit.

In 2000, Isbitski asked Vermont Timber Works Inc. to create a "shop drawing" and also to construct the timberframe-portion of his home, based on the first, unregistered set of drawings provided from Timberpeg. The drawings that were ultimately created differed somewhat from the first set of drawings, incorporating elements that Isbitski had specified to VTW.

After the VTW timberframe-portion had been completed, Isbitski ran into financial difficulties and the project was abandoned. After becoming aware of the constructed frame, Timberpeg filed suit in the U.S. District Court for the District of New Hampshire in 2003, against VTW and Isbitski for copyright infringement under the Architectural Works Copyright Protection Act, Pub. L. No. 101-650 §§701-706, 104 Stat.

5089, 5133-34 (1990). Unable to locate Isbitski, Timberpeg proceeded only against VTW.

In February 2005, Judge Steven J. McAuliffe granted summary judgment in VTW's favor on all counts. Relying on pre-AWCPA law, the court held that the VTW's constructed frame could not be a copy of an "architectural plan" under copyright law, and that the drawings were neither copied, nor substantially similar to Timberpeg's plans. After a move for reconsideration by Timberpeg, the court returned a holding that no reasonable jury could conclude that the timberframe, as constructed by VTW, was substantially similar to the architectural work of Timberpeg's registered plans.

### **Original Architectural Work**

Judge Sandra Lea Lynch began her analysis by discussing the governing framework of the AWCPA. The statute, enacted in 1990, extends copyright protection to "architectural works," which are defined as:

the design of the building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements ... but does not include individual standard features.

The AWCPA added architectural works as a new category of copyrightable works under 17 U.S.C. § 102(a)(8), Lynch noted. However, "[p]rotection for architectural plans, drawings, and models as pictorial, graphic, or sculptural works under section 102(a)(5) ... is unaffected by' the AWCPA," he said. Acknowledging that the legislative history created "two forms of protection" under the Copyright Act, Timberpeg said that it only sought protection under 17 U.S.C. § 102(a)(8), protection for architectural works.

### **Evidence of Actual Copying In Dispute**

To prevail on an action under the AWCPA, the court continued, Timberpeg must show in addition to ownership of a valid copyright (which was not contested here), that VTW actually copied its architectural work and that the copying was "so extensive that it rendered the infringing and copyrighted works 'substantially similar.'" Furthermore, that similarity must flow from more than a design's standard individual elements, such as common windows and doors, which would not be protectable, and those elements' "arrangement and composition" which would be.

Lynch turned to the main questions of copying and substantial similarity between Timberpeg's recorded design and the shop drawings and completed frame made by VTW.

Evidence of copying may be offered through both direct and circumstantial evidence, the court said. Arguing that direct evidence supported VTW's reliance on the registered plans, Timberpeg introduced a letter from VTW's counsel, stating that Isbitski had "represented to

[VTW] that he paid for and owned a set of plans, which he provided to [VTW] that were [in fact] drawn by Timberpeg." However, because the letter failed to state whether counsel was referring to the first, unregistered set of plans, or the second, registered plans, a factual dispute existed that could not be resolved on summary judgment, Lynch said.

"In the absence of direct evidence," Lynch continued, copying may be proved indirectly through "probative similarity," by offering evidence that the defendant "enjoyed access to the copyrighted work," and that "a sufficient degree of similarity" exists between the two works to give rise to an inference of actual copying.

At trial, Timberpeg argued that VTW had access to the second set of plans both through Isbitski personally, and through the public records office of the Town of Salisbury.

"A trier of fact may impute access," Lynch said, where there is evidence that both a plaintiff and defendant interacted with a mutual third party that had access to the plaintiff's work, and the "plaintiff's and defendant's dealings [with that third party] took place concurrently."

"As to whether there is a genuine issue of material fact as to 'probative similarity,' the court continued, "this analysis merges somewhat with the question of 'substantial similarity.'"

### **Application of the Ordinary Observer Test**

To determine substantial similarity, a court applies the "ordinary observer test." That test assesses the similarity between protectable elements of a plaintiff's work overall, and the infringing copy, the court said. While differences do factor into the equation, the mere existence of differences will not necessarily end the matter in favor of a defendant, however, if the points of dissimilarity exceed the points of similarity, and the remaining similar elements are of "minimal importance," then no infringement can result, Lynch said.

Comparing Timberpeg's copyrighted work as a whole against VTW's shop drawings and the completed frame, the court identified seven items of similarity between the two works: (1) both VTW's shop drawings and the frame itself had a backwards-L-shaped footprint with the same dimensions and shape as Timberpeg's design; (2) the shop drawings and frame had a kitchen "bump-out" that mirrored Timberpeg's plans; (3) VTW's shop drawings showed a central switchback staircase in the same general area as the staircase in Timberpeg plans; (4) the VTW frame had a lofted second floor with similar dimensions and locations; (5) the VTW frame had a similar roof pitch and dimensions; (6) the wall height was similar in both parties' plans; and (7) VTW's shop drawings appeared to contemplate a further attached wing that matched a "stick-built" portion created in Timberpeg's registered plans.

The court also faulted the district court for discounting the similarities that went to the "overall form" as well as the "arrangement and composition

of spaces and elements," of the Timberpeg design. In fact, Lynch stated, the similarities went well beyond those recognized by the lower court.

Further, the court rejected the claim made by VTW, and adopted by the district court, that there could be no infringement because Timberpeg had never actually designed a "complete[d] frame" in its plans.

"The question here," the court said, "is whether a reasonable jury could conclude that VTW's frame as drawn and built is substantially similar to Timberpeg's *architectural work*," and therefore did not turn on whether Timberpeg made a completed frame or not. The court also discounted the district court's reliance on VTW's contention that a frame did not meet the definition of an architectural work, as defined in the statute. In a footnote, the court dismissed this "shaky" logic, adding that "the statute does not require that the *infringing* work meet the definition of an architectural work."

While the appellate court acknowledged that differences were definitely present, the district court's failure to consider "the overall form as well as the arrangement and composition of spaces and elements in the design," led the court to conclude that the "magnitude and significance" of both the differences and similarities created genuine issues of material fact that could not be resolved on summary judgment.

The judgment was reversed, and the case was remanded.

The opinion was joined by Judges Juan R. Torruella and Jeffrey R. Howard.

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