

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

X-CALIBER, LLC, a Michigan limited
liability company,

Case No.

Plaintiff

Hon.

v

ALL AMERICAN INDUSTRIES, INC., a
Michigan corporation; ACRA CAST, INC., a
Michigan corporation; and RICHARD SINGER
IV, an individual,

Defendants.

Christopher R. Royce (P49102)
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COMPLAINT

NOW COMES Plaintiff, X-CALIBER, LLC, by and through its attorneys, Royce Law Firm, PLC, and for its Complaint against Richard Singer, All American Industries, Inc., and Acra Cast, Inc. states as follows:

NATURE OF THE SUIT

1. This is an action for United States Patent Infringement under 35 U.S.C. § 271, Trademark Infringement under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); False Designation / Trademark Misappropriation under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a); Procurement of Registration by Falsity or Fraud, 15 U.S.C. § 1120, and Copyright Infringement, under the Copyright Act, 17 U.S.C. § 101 *et seq.*

PARTIES

2. Plaintiff X-Caliber, LLC, ("XCAL") is a Michigan limited liability company, with its principle place of business located within the State of Michigan and this Judicial District.
3. Defendant All American Industries, Inc., ("AAI") was, at relevant times, a Michigan corporation, with its principle place of business located within the State of Michigan and this Judicial District.
4. Defendant Acra Cast, Inc. ("ACI") is a Michigan corporation, with its principle place of business located within the State of Michigan and this Judicial District.
5. Defendant ACI is a successor corporation to Defendant AAI.
6. Defendant Richard Singer is an individual residing within the State of Michigan and this Judicial District.
7. Upon information and belief, Defendant Singer was a shareholder and the President of AAI.
8. Upon information and belief, Defendant Singer is a shareholder and the President of ACI.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over all federal causes of actions set forth herein based upon 15 U.S.C § 1121, 28 U.S.C. §§ 1331, 1338(a) and 1338(b), and pursuant to the supplemental jurisdiction of this Court under 28 U.S.C. § 1367.
10. This Court has personal jurisdiction over the Defendants by virtue of, *inter alia*, the Defendants' (a) location within the State of Michigan and within this Judicial District; (b) commission of tortious acts within the State of Michigan and within this Judicial District, and; (c) regular and continuous transaction of business, including the tortious acts complained of herein, within the State of Michigan and within this Judicial District.
11. Venue is proper in this Judicial District and Division pursuant to 28 U.S.C. § 1391(b) and (c).

BACKGROUND

12. In or about 1995, Delbert Austin began doing business as X-Caliber.

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13. Delbert Austin, d/b/a X-Caliber, adopted the following logo and common law trademark (“Logo”) in or about 1995 and began using the Logo in interstate commerce:



14. In August, 2003, Delbert Austin formally organized X-Caliber, LLC (“XCAL”) and assigned rights to the Logo to XCAL.
15. In or about 2004, Delbert Austin and Rodney Austin invented and applied for a patent on an anti-vibration rifle bipod.
16. On December 5, 2006, United States Patent No. 7,143,986, (entitled, "STABILIZING DEVICE") was duly and lawfully issued by the United States Patent and Trademark Office, to the inventors, Delbert Austin and Rodney Austin (“Bipod Patent” or, alternatively, the “’986 Patent.”) A true and accurate copy of the '986 Patent is attached to this Complaint at Exhibit 1, and is hereby incorporated by reference.
17. Delbert Austin and Rodney Austin licensed rights under the Bipod Patent to XCAL, which began efforts to manufacture and market the bipod (“Patented Bipod”) in interstate commerce.
18. Since the issuance of the ‘986 patent, Plaintiff has complied with the marking and notice requirements of 35 U.S.C. § 287.
19. In or about November, 2006, a company evaluating the Patented Bipod for military applications referred to the Patented Bipod as the “Anti-Vibration Sniper’s Bi-Pod.”
20. XCAL immediately adopted the name, ANTI-VIBRATION SNIPER’S BI-POD, and its abbreviation, “AVSB,” and began using them in interstate commerce for the marketing of its Patented Bipod.
21. In or about June, 2007, XCAL orally contracted with AAI to produce the castings and build bipod leg assemblies.

22. In 2007, XCAL adopted the name, X-Caliber Accuracy Systems, for use in the marketing of firearm bipods.

23. In or about 2008, XCAL modified its Logo to the following:



24. The relationship between XCAL and AAI deteriorated in late 2008 and early 2009 due to AAI's misrepresentations, breaches of trust and its inability to deliver merchantable goods.

25. XCAL terminated its relationship with Defendant AAI and, on March 30, 2009, counsel for XCAL sent a certified letter to Defendants AAI and Singer confirming the termination of the relationship.

26. Upon information and belief, prior to March 30, 2009, Defendant AAI hosted XCAL's website, www.xcaliberaccuracy.com, on its servers.

27. Following receipt of the letter from XCAL's counsel, Defendants, individually or in concert, seized control of XCAL's website, removed XCAL's contact information and continued to use the website to market the Patented Bipod on their own behalf.

28. On April 8, 2009, without XCAL's knowledge or authorization, Defendant Singer made application for the trademark, X-CALIBER ACCURACY SYSTEMS ("X-CALIBER Trademark"), by or on behalf of AAI.

29. The X-CALIBER Trademark application included XCAL's stylized logo and was filed under Section 1(b), indicating intent by AAI to use the X-CALIBER Trademark in interstate commerce.

30. Singer signed the X-CALIBER Trademark application, knowingly and falsely representing:

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or

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both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

31. On April 15, 2009, without Plaintiff's knowledge or authorization, Defendant Singer made application for the trademark, ANTI-VIBRATION SNIPER'S BI-POD AVSB ("AVSB Trademark"), by or on behalf of AAI.
32. The ASVB Trademark application included specimens purportedly documenting use of the trademark by the applicant that were comprised, in whole or substantial part, of text and images created and/or owned by Plaintiff.
33. Singer signed the ASVB Trademark application, knowingly and falsely representing:

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are

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true; and that all statements made on information and belief are believed to be true.

34. XCAL obtained a Federal Trademark for X-VIP (the "Mark") for use in conjunction with the marketing and sale of firearm bipods. U.S. Registration No. 3808012. A true and accurate copy of the Registration is attached to this Complaint at Exhibit 2, and is hereby incorporated by reference.
35. Defendants, individually or in concert, advertised XCAL's Patented Bipod for sale in the April 2010 issue of *Special Weapons for Military & Police* magazine, using an image taken by Delbert Austin and owned by XCAL.
36. Defendants have known of the Bipod Patent since 2007 but have, nevertheless, pursued their knowing and willful infringement thereof in flagrant disregard of Plaintiff's rights thereunder.
37. XCAL is the exclusive licensee of the '986 patent, and has the right to sue and recover damages for infringement thereof.
38. XCAL markets and sells firearm bipods, in interstate commerce, under the common law trademarks, X-CALIBER and X-CALIBER ACCURACY SYSTEMS.
39. XCAL markets and sells Patented Bipods, in interstate commerce, under the trademarks X-VIP, ANTI VIBRATION SNIPER'S BIPOD, and AVSB. [Collectively, X-VIP, ANTI VIBRATION SNIPER'S BIPOD, AVSB, X-CALIBER and X-CALIBER ACCURACY SYSTEMS are referred to herein as Plaintiff's Marks.]
40. Plaintiff's Marks enjoy significant common law rights and protection by virtue of their continuous use, in interstate commerce, on or in association with the respective products branded thereunder.
41. Plaintiff has respectively devoted substantial resources over the years to acquire and maintain its renowned Marks and rights appurtenant thereto.

COUNT I

PATENT INFRINGEMENT UNDER 35 U.S.C. 271

42. Paragraphs 1 through 41 are realleged and incorporated herein by reference.
43. The claim of the '986 patent is presumed valid pursuant to 35 U.S.C. § 282.
44. Defendants, individually or in concert, in violation of 35 U.S.C. § 271, infringed and/or are currently infringing, contributorily infringing or inducing others to infringe, the claim of the '986 patent, either literally or under the Doctrine of Equivalents, by

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- making, causing to be made, using, offering to sell, selling or importing into the United States, without license or authority, within this Judicial District and elsewhere, products covered by the '986 patent ("Infringing Products").
45. Defendants, individually or in concert, have offered for sale, through print catalogues and/or through electronic marketplaces (*e.g.*, Internet websites), devices covered by at least one claim of the '986 patent.
 46. Defendants, individually or in concert, have infringed, and upon information and belief, will continue to infringe, the '986 patent by the use, manufacture, offer for sale, sale, and/or importation of Infringing Products.
 47. As a result of each Defendant's actions, Plaintiff has suffered irreparable injury to its business, reputation and good will in addition to damages, including lost profits and loss of reasonable royalties.

COUNT II

UNFAIR COMPETITION – TRADEMARK INFRINGEMENT UNDER § 43(A) OF THE LANHAM ACT

48. Paragraphs 1 through 47 are realleged and incorporated herein by reference.
49. As a result of the continuous, widespread and extensive use of the Marks by Plaintiff, together with the substantial and ongoing investment of resources in the marketing, promotion and sales activities of the Marks, Plaintiff's Marks are exceedingly strong marks, and have thus engendered significant goodwill and favorable reputation and renown among the relevant public.
50. Plaintiff's Marks are the subject of significant common law trademark rights under Section 43(a)(I) of the Lanham Act, 15 U.S.C. § 1125(a)(1).
51. Defendants, individually or in concert, offer for sale and/or sell Infringing Products under a mark ("Infringing Mark") either identical or substantially similar to at least one of Plaintiff's Marks, creating a likelihood of confusion among consumers in the relevant marketplace.
52. Defendants' use of the Infringing Mark on the same or similar goods (a) is likely to cause confusion, mistake, or deception; (b) will lead others to believe that Defendants' product is connected, affiliated or associated with, or otherwise related to, Plaintiff; or (c) constitutes a reproduction, counterfeit, copy, or colorable imitation of at least one of Plaintiff's Marks and, as such, is likely to cause confusion, mistake, or deception.

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53. Defendants will, if not preliminary and permanently enjoined by the Court, continue their acts of trademark infringement as set forth above, thereby deceiving the public, trading on the goodwill established in Plaintiff's Marks, and causing Plaintiff immediate and irreparable harm, damage and injury.
54. As a result of each Defendant's actions, Plaintiff has suffered irreparable injury to Plaintiff's business, reputation and good will in addition to damages, including lost profits and loss of reasonable royalties.

COUNT III

FALSE DESIGNATION OF ORIGIN / TRADEMARK MISAPPROPRIATION

Section 43(a) of the Lanham Act

55. Paragraphs 1 through 54 are realleged and incorporated herein by reference.
56. Plaintiff made a substantial investment of time, effort and money in creating and establishing its Marks in interstate commerce.
57. Defendants, individually or in concert, misappropriated Plaintiff's Marks by one or more of the following acts:
 - a. Seizing control of Plaintiff's website, operating it as their own and offering Patented Bipods for sale under one or more of Plaintiff's Marks;
 - b. Diverting XCAL's customers and potential customers away from XCAL for commercial gain or with the intent to tarnish or disparage Plaintiff's rights in its Marks;
 - c. Applying for and obtaining the AVSB Trademark by false and/or fraudulent statements;
 - d. Making application for Plaintiff's trademark X-CALIBER ACCURACY SYSTEMS;
 - e. Selling or offering to sell Patented Bipods using Plaintiff's Marks;
 - f. Holding out AAI and/or ACI as a manufacturer, distributor and/or retailer of Patented Bipods;
 - g. Holding out Defendants as having rights in, or rights to the Bipod Patent;

- h. Holding out Singer as an employee, owner and/or officer of XCAL.
58. As a result of each of Defendants' actions, Plaintiff has suffered irreparable injury to Plaintiff's business, reputation and good will in addition to damages, including lost profits and loss of reasonable royalties.

COUNT IV

PROCUREMENT OF FEDERAL REGISTRATION BY FALSITY OR FRAUD

15 U.S.C. § 1120

59. Paragraphs 1 through 58 are realleged and incorporated herein by reference.
60. Defendants, individually or in concert, made false and/or fraudulent representations in its application for the X-CALIBER Trademark, in violation of Section §38 of the Lanham Act, 15 U.S.C. § 1120.
61. Such false and/or fraudulent representations include, but are not limited to:
- a. That the applicant was the owner of the trademark sought to be registered;
 - b. That the applicant is entitled to use the trademark in commerce;
 - c. That no other person, firm, corporation or association has the right to use the mark in commerce, and;
 - d. That no other person, firm, corporation or association has the right to use the trademark mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person and/or entity, to cause confusion or mistake, or to deceive the relevant market as to the source of the goods.
62. Defendants, individually or in concert, made false and/or fraudulent representations in its application for the AVSB Trademark, in violation of Section §38 of the Lanham Act, 15 U.S.C. § 1120.
63. Such false and/or fraudulent representations include, but are not limited to:
- a. That the applicant was the owner of the trademark sought to be registered;
 - b. That the applicant is entitled to use the trademark in commerce;

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- c. That no other person, firm, corporation or association has the right to use the mark in commerce, and;
 - d. That no other person, firm, corporation or association has the right to use the trademark mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods of such other person and/or entity, to cause confusion or mistake, or to deceive the relevant market as to the source of the goods.
64. As result of each of Defendants' actions, Plaintiff has suffered injury, including irreparable injury, and damages, including lost profits, reasonable royalties, and other damages as set forth herein.

COUNT V

COPYRIGHT INFRINGEMENT

65. Paragraphs 1 through 64 are realleged and incorporated herein by reference.
66. At all relevant times the Plaintiff has been the holder of the pertinent exclusive rights infringed by Defendants, as alleged hereunder, for certain copyrighted images, including but not limited to each of the images attached hereto at Exhibit 3 (collectively, including derivative works, the "Copyrighted Images").
67. Plaintiff is responsible for the creation, development, production, and distribution of the Copyrighted Images, which have significant value.
68. The Copyrighted Images are the subject of valid Certificates of Copyright Registration, Nos. VA0001742440, VA0001742579, VA0001742566, and VA0001742580. True and accurate copies of the Registrations are attached to this Complaint at Exhibit 4, and are hereby incorporated by reference.
69. Plaintiff has the distinct, severable, and exclusive right to, among other things, reproduce, publicly perform, and publicly display the Copyrighted Images pursuant to Section 106 of the Copyright Act of 1976 (the "Copyright Act"), 17 U.S.C. §§ 106(1), (4), (5).
70. Defendants, without the permission or consent of the Plaintiff, have, individually or in concert, used, and continue to use, reproduce and distribute to the public, including by making available for distribution to others, the Copyrighted Images.
71. Defendants' acts violate Plaintiff's exclusive rights of reproduction and distribution and each of Defendants' acts constitutes an infringement of the Plaintiff's exclusive rights protected under the Copyright Act.

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72. Defendants' acts are willful, intentional, and in disregard of and with indifference to the rights of the Plaintiff.
73. Plaintiff is entitled to relief pursuant to 17 U.S.C. § 504 as a result of Defendants' wrongful acts of infringement, in addition to attorneys' fees and costs pursuant to 17 U.S.C. § 505.
74. Defendants' acts are causing and, unless enjoined and restrained by this Court, will continue to cause the Plaintiff great and irreparable injury that cannot fully be compensated or measured in money. Plaintiff has no adequate remedy at law.
75. Pursuant to 17 U.S.C. §§ 502 and 503, the Plaintiff is entitled to injunctive relief prohibiting Defendants from further infringement of Plaintiff's copyrights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment as follows:

- A. A permanent injunction restraining each of the Defendants, their respective officers, agents, servants, employees, attorneys, and those in active concert or participation with them, or any of them who receive actual notice of the order by personal service or otherwise, from:
 1. making, using, selling, offering for sale, or importing into the United States, the Infringing Products;
 2. assisting or inducing others to make, use, sell, offer for sale, or import into the United States, the Infringing Products;
 3. using, reproducing, advertising, or promoting, in connection with any product or service, Plaintiff's Marks, any other name or mark confusingly similar therewith;
 4. reproducing, selling, distributing, publicly performing, or making derivative works of Plaintiff's Copyrighted Images.
- B. An award of damages for each Defendant's acts of liability under 35 U.S.C. § 271, in accordance 35 U.S.C. § 284, and in particular, an award of damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the Infringing Products by each Defendant, together with interest and costs as fixed by the Court;
- C. An award of increased damages under 35 U.S.C. § 284, including three times the amount found or assessed in paragraph (B) above;

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Defendant's unlawful activity, and any costs incurred with pursuing this Action, including Court costs, attorney's fees, and additional costs related thereto, pursuant to 15 U.S.C. § 1117(a);

- E. A determination by the Court that each Defendant's unlawful actions set forth herein are exceptional, warranting an award of damages to Plaintiff for all reasonable attorney fees incurred by Plaintiff, pursuant to 35 U.S.C. § 285 and 15 U.S.C. § 1117(a);
- F. An award of damages from each Defendant for liability for copyright infringement pursuant to 17 U.S.C. 504(b);
- G. An order requiring Defendants to account for and be disgorged of all gains, profits and advantages derived by its copyright infringement, pursuant to 17 U.S.C. 504(b);
- H. An award of prejudgment and post-judgment interest and costs of suit, and;
- I. An award of any such other and further relief as this Court deems just and equitable.

Respectfully submitted,

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Dated: December 7, 2010

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