

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>Nielsen-Kellerman Company,</b>	:	
	:	
<b>Plaintiff,</b>	:	
	:	<b>Civil Action No.: 03-</b>
<b>v.</b>	:	
	:	
<b>Extech Instruments Corporation,</b>	:	
	:	
<b>Defendant.</b>	:	<b><u>JURY TRIAL DEMANDED</u></b>

**COMPLAINT**

Plaintiff, Nielsen-Kellerman Company (hereinafter “Nielsen-Kellerman” or “plaintiff”), by and through its undersigned attorneys for its complaint against defendant, “Extech Instruments Corporation” (hereinafter “Extech” or “defendant”) alleges as follows:

**Parties**

1. Plaintiff is a Pennsylvania corporation having a place of business within this judicial district at 104 West 15<sup>th</sup> Street, Chester, Pennsylvania 19013.
2. Upon information and belief, defendant is a Massachusetts corporation having a principal place of business at 335 Bear Hill Road, Waltham, Massachusetts 02451.

**Jurisdiction and Venue**

3. This action arises under the Acts of Congress relating to patents, Title 35 U.S.C. §§ 271 *et seq.*, under the copyright laws of the United States, Title 17 U.S.C. §§ 101 *et seq.*, under the Lanham Act, Title 15 U.S.C. § 1051, *et seq.*, and common law. As such, this court has subject matter jurisdiction under the provisions of Title 28 U.S.C. §§ 1331 and 1338 because this action involves federal questions of law.

4. This Court may exercise personal jurisdiction over the defendant. A substantial part of the events giving rise to this action have occurred and continue to occur in this judicial district. As such, defendant should reasonably expect that its activities might have consequences herein. Moreover, Pennsylvania's long arm statute, 42 Pa. C.S.A. § 5322(a), confers personal jurisdiction over the defendant because defendant's business activities within the Commonwealth of Pennsylvania and in this judicial district are directly and/or indirectly infringing patent rights and copyrights of Nielsen-Kellerman.

5. This court has supplemental jurisdiction over the claims brought under the common law pursuant to 28 U.S.C. § 1338(b) and § 1367(a).

6. Venue is proper in this judicial district pursuant to Title 28 U.S.C. §§ 1391 and 1400.

**Plaintiff's Kestrel® Hand-Held Anemometers**

7. Plaintiff, at all times mentioned herein and for many years, has been, and is now, in the business of marketing, manufacturing, selling and distributing hand-held anemometers throughout the world and the United States, including within the Commonwealth of Pennsylvania and the Eastern District of Pennsylvania. These hand-held anemometers are marketed, distributed and sold under the trademark KESTREL. The Kestrel® 1000 measures wind speeds, the Kestrel® 2000 measures temperature as well as wind speed. The Kestrel® 3000 measures temperature, wind speed, and humidity.

8. Plaintiff's hand-held anemometers are sold in interstate commerce in the United States.

9. Together, the Kestrel® series of weather instruments have become associated in the minds of the public with plaintiff. The Kestrel® instruments have benefited from and also contributed to plaintiff's high reputation for quality.

10. The Kestrel® 1000, Kestrel®2000 and the Kestrel®3000 share the same distinctive design of the casing.

11. The casing design for the Kestrel® weather instruments is an original work of authorship.

12. Since at least as early as 1998, plaintiff has substantially marketed and distributed its Kestrel® weather instruments resulting in substantial sales of these products.

#### **The Patents-In-Suit**

13. On July 21, 1998, United States Letters Patent Number 5,783,753 (‘the ‘753 patent’) entitled “Vane Anemometer Having A Modular Impeller Assembly” was duly and legally issued, and assigned to Nielsen-Kellerman. The ‘753 patent is valid and enforceable. A true and correct copy of the ‘753 patent is attached hereto and marked as “Exhibit 1.”

14. On August 17, 1999, United States Letters Patent Number 5,939,645 (‘the ‘645 patent’) entitled “Vane Anemometer Having A Modular Impeller Assembly” was duly and legally issued, and assigned to Nielsen-Kellerman. The ‘645 patent is valid and enforceable. A true and correct copy of the ‘645 patent is attached hereto and marked as “Exhibit 2.”

15. On July 10, 2001, United States Letters Patent Number 6,257,074 B1 (‘the ‘074 patent’) entitled “Vane Anemometer With Thermally Isolated Sensors” was duly and legally issued, and assigned to Nielsen-Kellerman. The ‘074 patent is valid and enforceable. A true and correct copy of the ‘074 patent is attached hereto and marked as “Exhibit 3.”

16. The '753 patent, the '645 patent, and the '074 patent (collectively the patents-in-suit), all relate to vane anemometers.

17. Richard Kellerman, currently president of Nielsen-Kellerman, invented and developed the integral electronic circuitry permitting the real time measurement and display of wind speed, temperature, wind chill, and humidity. Richard Kellerman assigned the patent rights in his inventions to Nielsen-Kellerman.

#### **The Copyright-In-Suit**

18. On June 15, 2002, United States Copyright Registration No. VA 1-053-870 entitled "Anemometer Designs 1000" was duly and legally issued to Nielsen-Kellerman. The copyright registration is valid and enforceable. A true and correct copy of the copyright registration is attached hereto and marked as "Exhibit 4."

#### **Background as to Defendant's Infringing Conduct**

19. By way of background, defendant sells, offers to sell, distributes and imports for sale into the United States hand-held anemometers.

20. Defendant has not received authorization, nor obtained a license, from Nielsen-Kellerman to any anemometer patents.

21. Defendant was notified in writing of the patents-in-suit and requested to cease and desist from directly and/or indirectly infringing said patents or otherwise causing said patents to be infringed and offered to discuss a license under the patents-in-suit. A true and correct copy of this cease and desist letter is attached hereto and marked as "Exhibit 6."

22. Despite receiving notice of its infringing activities, defendant has continuously sold, offered for sale, and/or imported for sale into the United States hand-held anemometers that measure humidity.

23. Defendant has not pursued licensing discussions with plaintiff.

24. Defendant is a competitor of plaintiff.

25. Defendant has copied significant portions of plaintiff's Kestrel® weather instrument casing design.

26. Defendant is manufacturing, distributing, and/or selling anemometers with substantially similar designs as plaintiff's Kestrel® weather instrument casing design.

27. Upon information and belief, defendant has sold or distributed its infringing products directly to plaintiff's customers and potential customers.

**COUNT I**  
**PATENT INFRINGEMENT**

28. Plaintiff repeats and re-alleges, and incorporates by reference, the foregoing paragraphs as though the same were fully set forth at length herein.

29. Defendant sold, offered to sell, manufactured, and/or caused to be sold, offered for sale, and/or manufactured, hand-held anemometers that infringe the patents-in-suit. As a result, defendant has infringed, contributed to the infringement and/or induced the infringement of the patents-in-suit in violation of 35 U.S.C. §§ 271(b) and (c) in this judicial district and elsewhere in the United States and will continue to do so unless enjoined by this Court.

30. With full knowledge of the patents-in-suit, the conduct by defendant in contributing to or inducing the infringement of the patents-in-suit has been willful and deliberate, and in total disregard of plaintiff's lawful rights in the patents-in-suit, thus rendering this case "exceptional" under 35 U. S. C. § 285.

31. Plaintiff has suffered monetary damages as a result of the actions by defendant in contributing to third parties' infringement and/or inducing third parties to infringe the patents-in-suit. These damages include but are not limited to potential royalty streams in terms of a

reasonable licensing fee for the use of the technology covered by the patents-in-suit as well as loss of profits of plaintiff's Kestrel® products.

32. The infringement contributed by, or induced by, defendant has irreparably harmed plaintiff, and will continue to do so unless enjoined by this Court.

**COUNT II**  
**COPYRIGHT INFRINGEMENT**

33. Plaintiff repeats and re-alleges, and incorporates by reference, the foregoing paragraphs as though the same were fully set forth at length herein.

34. This cause of action for copyright infringement arises under the copyright laws of the United States, Title 17, U.S.C. § 101 *et. seq.*

35. Plaintiff's hand-held anemometer casing is an original work of authorship.

36. Plaintiff owns the copyright in the hand-held anemometer casing.

37. Plaintiff owns United States Copyright Registration VA 1-053-870.

38. Plaintiff's Kestrel® weather instruments that include this design casing are available on plaintiff's website and has been available on such website since at least as early as 1998.

39. Defendant had access to plaintiff's design casing.

40. Upon information and belief, defendant has copied significant portions of plaintiff's design casing. Defendant's casing design is substantially similar to plaintiff's design casing as covered by U.S. Copyright Registration Number VA 1-053-870.

41. By the actions alleged above, defendant has infringed and will continue to infringe plaintiff's copyright in its design casing.

42. On information and belief, defendant's manufacture, distribution, sale and offer to sell of its infringing products as complained of herein has been willful and deliberate.

43. On information and belief, defendant will continue to infringe plaintiff's copyrights unless restrained by this Court.

44. Plaintiff believes that it has suffered or is likely to suffer damages, and will continue to suffer serious and substantial damages resulting from defendant's acts of copyright infringement, including irreparable injury for which there is no adequate remedy at law.

45. Plaintiff's damages from the aforesaid unlawful actions of defendant, to the extent ascertainable, have not yet been determined.

**COUNT III**  
**VIOLATION OF §43(a) OF THE LANHAM ACT**

46. Plaintiff repeats and re-alleges, and incorporates by reference, the foregoing paragraphs as though the same were fully set forth at length herein.

47. Plaintiff's design casing is distinctive.

48. Plaintiff's design casing has acquired secondary meaning with the relevant consuming public as being affiliated, connected or associated with Plaintiff.

49. On information and belief, after plaintiff's creation and publication of the design casing and with constructive notice thereof, defendant adopted, copied and used significant portions of the design casing in defendant's hand-held anemometers.

50. Defendant's adoption, copying and use of significant amounts of the design casing constitutes a false designation of origin, a false or misleading description of fact, or a false or misleading representation of fact, that is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of defendant with plaintiff, and as to the origin, sponsorship, or approval of defendant's goods or commercial activities by plaintiff, and plaintiff is likely to be damaged by such actions.

51. On information and belief, defendant had knowledge of the falsity of the designation of origin or the falsity of the description or representation of fact in that it knew, among other things, of plaintiff's reputation and good will developed through the design casing.

52. These actions of defendant are likely to confuse, mislead, and deceive members of the public as to the origin or sponsorship of defendant and/or plaintiff's products in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

53. On information and belief, defendant's activities, including, but not limited to the unauthorized duplication and use of the design casing constitute unfair competition and unfair trade practices and defendant's adoption and use of a design casing substantially similar to plaintiff's design casing is likely to cause confusion, mistake, or deception or give defendant's products a marketability they would not otherwise possess, in violation of 15 U.S.C. § 1125(a).

54. Defendant's conduct described above has caused and, if not enjoined, will continue to cause irreparable damage to the rights of plaintiff in its Kestrel® products and its business, reputation and goodwill. Plaintiff's damages from the aforesaid unlawful actions of defendant, to the extent ascertainable, have not yet been determined.

**COUNT IV**  
**COMMON LAW UNFAIR COMPETITION**

55. Plaintiff repeats and re-alleges, and incorporates by reference, the foregoing paragraphs as though the same were fully set forth at length herein.

56. This cause of action arises under the common law.

57. Plaintiff and defendant are competitors in the hand-held anemometer market.

58. Plaintiff has extended a great deal of time, money and effort into the creation of its original casing design.



59. Plaintiff has used its original casing design prior to the actions of defendant complained of herein.

60. On information and belief, defendant has intentionally and willfully set out to appropriate the labors and expenditures of plaintiff by copying plaintiff's original casing design and using same in defendant's products.

61. On information and belief, defendant's activities, including, but not limited to the unauthorized duplication and use of the design casing constitute unfair competition and unfair trade practices and defendant's adoption and use of a design casing substantially similar to plaintiff's design casing is likely to cause confusion, mistake, or deception or give defendant's products a marketability they would not otherwise possess, thereby constituting common law unfair competition.

62. Defendant's conduct described above has caused and, if not enjoined, will result in the loss of the exclusive rights and benefits that plaintiff is entitled to enjoy under the common law and will continue to cause irreparable damage to the rights of plaintiff in the original design casing, and its business, reputation, and good will.

63. On information and belief, defendant will continue to infringe plaintiff's valuable rights in the original design casing unless restrained by this court.

64. Plaintiff has suffered and is continuing to suffer irreparable injury for which there is no adequate remedy at law.

65. Plaintiff's damages from the aforesaid unlawful actions of defendants, to the extent ascertainable, have not yet been determined.

**COUNT V**  
**UNJUST ENRICHMENT**

66. Plaintiff repeats and re-alleges, and incorporates by reference, the foregoing paragraphs as though the same were fully set forth at length herein.

67. This cause of action arises under the common law.

68. By the acts and activities of defendant complained of herein, defendant has been unjustly enriched.

69. Defendant's conduct described above has caused and, if not enjoined, will continue to cause irreparable damage to the rights of plaintiff in its Kestrel® weather instruments, and its business, reputation, and good will.

70. On information and belief, defendant will continue to infringe plaintiff's valuable rights in its Kestrel® weather instruments to the detriment of plaintiff unless restrained by this court.

71. Plaintiff has suffered and is continuing to suffer irreparable injury for which there is no adequate remedy at law.

72. Plaintiff's damages from the aforesaid unlawful actions of defendant, to the extent ascertainable, have not yet been determined.

#### **PRAYERS FOR RELIEF**

**WHEREFORE**, plaintiff prays for relief against defendant as follows:

(1) For a preliminary and permanent injunction restraining defendant, its officers, directors, agents, employees and all persons in active concert or participation with them who receive actual notice of the injunction, by personal service or otherwise, from doing, abiding, causing or abetting any of the following:

(a) infringing, contributing to the infringement and/or have actively inducing the infringement of U.S. Letters Patent 5,783,753;

(b) infringing, contributing to the infringement and/or have actively inducing the infringement of U.S. Letters Patent 5,939,645;

(c) infringing, contributing to the infringement and/or have actively inducing the infringement of U.S. Letters Patent 6,257,074 B1.

(2) Preliminarily and permanently enjoin defendant, and its respective agents, servants, representatives, officers, directors, employees, affiliates and all persons acting in concert with it, directly or indirectly, from infringing, inducing others to infringe and/or contributing to the infringement of U.S. Letters Patents 5,783,753; 5,939,645; 6,257,074 B1 pursuant to 35 U.S.C. § 283; and

(a) engaging in any acts or activities directly or indirectly calculated to infringe plaintiff's copyright;

(b) reproducing, preparing derivative works based upon, plaintiff's casing design;

(c) filling any orders for defendant's products that bear a substantially similar appearance to plaintiff's copyrighted casing design;

(d) using in selling, offering for sale, promoting, advertising, marketing and distributing of defendant's products, advertisements or promotional materials that include pictures or representations of products bearing the copyrighted casing design, or mention of or reference to plaintiff's copyrights in such a manner as to falsely designate origin, sponsorship or approval with plaintiff; and

(e) otherwise competing unfairly with plaintiff in any manner whatsoever.

(3) That defendant be required to deliver up to plaintiff for destruction, at defendant's expense, all catalogs, web site materials, literature, brochures, quotes, packaging, signs,

promotional materials, advertisements or other communications to the public in the possession or under the control of defendant, and any other material or any representations that are or may include photographs, drawings and/or mention of products that are substantially similar to plaintiff's copyrighted casing design as complained of herein.

(4) Order defendant to account for and pay to plaintiff the damages to which plaintiff is entitled as a consequence of the infringement of U.S. Letters Patents 5,783,753; 5,939,645; 6,257,074 B1, together with interest and costs of suit pursuant to 35 U.S.C. § 284.

(5) Award plaintiff enhanced damages up to treble the amount found or assessed pursuant to 35 U.S.C. § 284 in light of defendant's deliberate and willful infringement of U.S. Letters Patents 5,783,753; 5,939,645; 6,257,074 B1.

(6) Declare this case "exceptional" and award plaintiff its reasonable attorneys' fees pursuant to 35 U.S.C. § 285.

(7) That defendant be required to account for and pay over to plaintiff all profits received by defendant from its unlawful acts complained of herein.

(8) That defendant be required to pay to plaintiff damages to compensate plaintiff for defendant's unjust enrichment.

(9) That defendant be directed to account for and to pay over to plaintiff all damages suffered by plaintiff as a result of defendant's violation of the Lanham Act and that such damages be trebled because of defendant's willful actions.

(10) That the Court enter an order placing reasonable but effective restrictions on the future transactions and activities of defendant so as to prevent fraud on the Court and so as to ensure the capacity of defendant to pay, and the prompt payment of, any judgment entered against defendant in this action.

- (11) That plaintiff be awarded compensatory damages.
- (12) That plaintiff be awarded punitive damages.
- (13) That plaintiff be awarded its attorney's fees and the costs of this action.
- (14) Grant plaintiff such other relief as is just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on all triable issues of fact.

Dated: February \_\_\_\_\_, 2003

Respectfully submitted by:

COZEN O'CONNOR  
Attorneys for Plaintiff, Nielsen-Kellerman

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