

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION**

<p>Beyond Question Learning Technologies, Inc.,  Plaintiff,  v.  eInstruction Corporation,  Defendant.</p>	<p>Case No: _____</p> <p style="text-align: center;"><b>COMPLAINT (JURY TRIAL)</b></p>
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Plaintiff, Beyond Question learning Technologies, Inc., complaining of Defendant, eInstruction Corporation, hereby alleges the following:

**THE PARTIES**

1. Plaintiff, Beyond Question Learning Technologies, Inc. (hereinafter “Beyond Question”), is a corporation existing and organized under the laws of the State of South Carolina, having a principal place of business at 1446 Pineview Drive, Columbia, South Carolina, 29209.

2. Upon information and belief, Defendant, eInstruction Corporation (hereinafter “eInstruction”), is a corporation organized and existing under the laws of the State of Texas, having a principal place of business at 308 North Carroll Boulevard, Denton, Texas 76205.

3. Plaintiff is in the business of designing, developing, manufacturing and distributing educational software and systems for use in a classroom environment to facilitate the learning process of students.

4. Plaintiff is the designer, manufacturer and owner of an educational system entitled “Beyond Question,” which allows a teacher to administer a self-paced assessment to a plurality of students, each student having and using an individual remote to interact with a common

display that contains information regarding the individual student's progress during the self-paced assessment.

5. Plaintiff's system was originally designed and developed in 1996.

6. Upon information and belief, Defendant is also in the business of distributing educational materials including educational software or systems to be used in a classroom setting.

7. Upon information and belief, Defendant is the owner of record of U.S. Patent No. 6,895,213 entitled *System and Method for Communicating with Students in an Education Environment*.

8. Defendant's '213 patent was filed on December 3, 2001, more than on (1) year after Plaintiff's Beyond Question system was publicly used in the United States.

9. Smartroom Learning Solutions, Inc. (hereinafter "Smartroom") is a distributor of Plaintiff's Beyond Question system.

10. By way of a letter dated September 1, 2006, Defendant contacted Smartroom alleging that the Beyond Question system infringes U.S. Patent No. 6,895,213 and demanding that Smartroom immediately and permanently discontinue making, using, selling or offering for sale the Beyond Question system.

11. A true and correct copy of the letter is attached as Exhibit A.

12. The September 1, 2006 letter alleged that if Smartroom did not comply with Defendant's demands that Defendant would sue Smartroom for patent infringement. Exhibit A.

13. By way of a letter dated October 5, 2006, Defendant once again contacted Smartroom, threatening it with litigation if it did not provide written assurances that it would cease and desist the making, using, selling, offering for sale the Beyond Question system.

14. A true and correct copy of the letter is attached as Exhibit B.

15. By way of a letter dated November 30, 2006, Defendant contacted Smartroom for a third time, again threatening Smartroom with litigation if it did not immediately provide written assurances that it would comply with Defendant's demands.

16. A true and correct copy of the letter is attached as Exhibit C.

17. By way of a letter dated November 30, 2006, Defendant contacted Plaintiff alleging that its Beyond Question system infringes U.S. Patent No. 6,895,213 and threatening to commence litigation unless Plaintiff immediately and permanently cease and desist from the making, using, selling, offering for sale the Beyond Question system.

18. A true and correct copy of the letter is attached as Exhibit D.

19. By way of a phone call and an email dated January 5, 2007, Defendant contacted Shawnee Mission School District (Kansas), a potential customer of Plaintiff's and informed it that Plaintiff's Beyond Question system infringes on U.S. Patent No. 6,895,213 and threatened to sue the School District if it uses Plaintiff's Beyond Question system.

20. A true and correct copy of the email is attached as Exhibit E.

#### **JURISDICTION AND VENUE**

21. This Declaratory Judgment action arises under the Declaratory Judgment Act pursuant to and 28 U.S.C. §§ 2201 *et seq.* and the Patent Act pursuant to 35 U.S.C. §§ 1 *et seq.* This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338 and 2201.

22. The state and common law causes of action are properly before this court pursuant to 28 U.S.C. §§ 1338(b) and 1367.

23. Defendant has sold its products "in all 50 states" including the District of South Carolina as stated in Defendant's marketing materials included in its website.

24. Upon information and belief, Defendant has done business in the District of South Carolina and has offered its goods and services and distributed its goods and services to Bookman Road Elementary School, Forest Lake Elementary School, Windsor Elementary School, Crossroads Middle School, Dent Middle School, E.L. Wright Middle School, JET Middle School, Summit Parkway Middle School, A.C. Flora High School, Richland Northeast High School, Ridge View High School, University of South Carolina, South Carolina Bar, South Carolina Bar CLE, Richland School District Number Two, Zeta Tau Alpha, South Carolina Department of Education, St. John Neumann School all in Columbia, South Carolina.

25. Defendant has continuously and systematically done business in the District of South Carolina, has customers in South Carolina, has directed its goods and services to the citizen's of South Carolina, and has transmitted demand communications to citizen's of South Carolina.

26. Defendant is subject to personal jurisdiction in South Carolina.

27. Pursuant to 28 U.S.C. § 1391, venue is proper in this District and Division.

#### **FACTS COMMON TO ALL COUNTS**

28. Plaintiff has brought this Declaratory Judgment Action to prevent Defendant from continuing to represent to Plaintiff's customers and potential customers that Plaintiff is infringing patent rights Defendant does not have.

29. In 1996, approximately five years prior to the filing date of Defendant's '213 patent, Plaintiff's President, Christopher Allen, designed and developed the system that is prior art to Defendant's patent.

30. Mr. Allen's system anticipates Defendant's patent under 35 U.S.C. § 102 rendering Defendant's patent invalid.

31. Mr. Allen was publicly using the system, which he developed and designed in 1996, by at least 1998 - three years prior to the filing date of the Defendant's patent.

32. The United States Patent Office was not made aware of Plaintiff's system and therefore was not made aware of this prior art.

33. On or about September 5, 1995, Mr. Allen began as a college student at Erskine College in South Carolina.

34. Throughout the month of November 1996, Mr. Allen designed and developed the first version of the system entitled "Beyond Question,"

35. Mr. Allen created the Beyond Question system on his own time and on his own equipment.

36. In December 1996, Mr. Allen allowed his system to be used in the classrooms of Erskine College.

37. In December of 1996, the Beyond Question system was publicly used in the classrooms of Erskine College.

38. Mr. Allen continued to update, modify and add to the functionality of the Beyond Question system, creating several new versions of the system.

39. By September 1, 1998, Mr. Allen had added a multi-user functionality to the Beyond Question system.

40. In doing so, Mr. Allen added a graphical user interface to the Beyond Question system that shows multiple sections on a single display, with each section corresponding to one of the students using the system.

41. The graphical user interface includes a first portion for displaying the user identification and a second portion for displaying a question identification.

42. On May 15, 1999, Mr. Allen graduated from Erskine College.

43. On July 16, 2001, Mr. Allen formed Digital c, Incorporated.

44. On March 4<sup>th</sup>, 2002, Digital c, Inc. began offering the Beyond Question system commercially to the general public.

45. In December, 2005, Digital c, Inc., legally changed its name to Beyond Question Learning Technologies, Inc.

46. Upon information and belief, Defendant filed U.S. Patent Application Serial No. 10/004,949 on December 3, 2001, which was entitled *System and Method for Communicating with Students in an Education Environment*.

47. Upon information and belief, U.S. Patent Application Serial No. 10/004,949 matured into U.S. Patent No. 6,895,213 on May 17, 2005.

48. A true and correct copy of U.S. Patent No. 6,895,213 is attached as Exhibit F.

49. The 1998 version of the Beyond Question software fully anticipates U.S. Patent No. 6,895,213.

50. On January 3, 2006, Plaintiff commenced negotiations with Shawnee Mission School District for the sale of approximately \$500,000 worth of the Beyond Question system.

51. On January 5, 2006, Defendant sent an e-mail and letter to the Director of Purchasing Services for Shawnee Mission School District stating that eInstruction understood that the school district was evaluating student response systems that allows users of infrared (“IR”) transmitters to respond in a self-paced mode using printed test and questionnaire materials.

52. The January 5, 2007 email also stated that eInstruction believed that the student response system that Shawnee Mission School District was evaluating infringed U.S. Patent No. 6,895,213. Exhibit E.

53. In the January 5, 2007 email, Defendant informed Shawnee Mission School District that eInstruction had already pursued a lawsuit against Qwizdom Corporation for infringement of U.S. Patent No. 6,895,213, which resulted in a cash payment to eInstruction by Qwizdom Corporation and the removal of Qwizdom Corporation's allegedly infringing product. Exhibit E.

54. In the email, Defendant also stated that it intends to vigorously defend its rights to the U.S. Patent No. 6,895,213 and that it is "continuing our enforcement efforts against other third parties, including both manufacturers *and users* of infringing products, and intend to take all necessary steps to enforce eInstruction's intellectual property rights, including but not limited to filing a lawsuit against any infringing parties..." Exhibit E (emphasis added).

**FIRST CAUSE OF ACTION**  
**Declaratory Judgment – Invalidity of U.S. Patent No. 6,895,213**

55. Plaintiff realleges and incorporates Paragraphs 1-54.

56. The Beyond Question system fully anticipates the subject matter of U.S. Patent No. 6,895,213.

57. The Beyond Question system was publicly used more than one year prior to the filing date of U.S. Patent Application Serial No. 10/004,949, which matured into U.S. Patent No. 6,895,213.

58. Defendant did not submit the Beyond Question system to the U.S. Patent Office when prosecuting the '213 patent.

59. Pursuant to 35 U.S.C. §§ 101,102,103 and 112, U.S. Patent No. 6,895,213 is invalid.

60. Pursuant to 35 U.S.C. §§ 101,102,103 and 112, U.S. Patent No. 6,895,213 is unenforceable.

61. Defendant has no rights to enforce U.S. Patent 6,895,213 against third parties, including Plaintiff.

**SECOND CAUSE OF ACTION**  
**Declaratory Judgment – Non-Infringement of U.S. Patent No. 6,895,213**

62. Plaintiff realleges and incorporates Paragraphs 1-61.

63. U.S. Patent No. 6,895,213 is invalid and thus Plaintiff is free to make the subject matter of U.S. Patent No. 6,895,213 without incurring liability for patent infringement.

64. U.S. Patent No. 6,895,213 is invalid and thus Plaintiff is free to make the Beyond Question system without incurring liability for patent infringement.

65. U.S. Patent No. 6,895,213 is unenforceable and thus Plaintiff is free to make the subject matter of U.S. Patent No. 6,895,213 without incurring liability for patent infringement.

66. U.S. Patent No. 6,895,213 is unenforceable and thus Plaintiff is free to make the Beyond Question system without incurring liability for patent infringement.

67. Plaintiff has not infringed the claims of U.S. Patent No. 6,895,213.

68. With respect to U.S. Patent No. 6,895,213, Plaintiff is not liable for patent infringement.

**THIRD CAUSE OF ACTION**  
**Intentional Interference with Actual and Potential Contractual Relations**

69. Plaintiff realleges and incorporates Paragraphs 1-68.

70. Defendant has contacted at least one potential customer of Plaintiff to inform it that Plaintiff's Beyond Question system infringes U.S. Patent No. 6,895,213.

71. Defendant has threatened at least one of Plaintiff's potential customers with litigation should it purchase and use the Beyond Question system from Plaintiff.

72. Defendant is interfering with Plaintiff's prospective economic relations by using an improper method of competition, namely asserting rights in an invalid patent to coerce Plaintiff's prospective customers away from doing business with Plaintiff.

73. Defendant had knowledge that Plaintiff was in negotiations with the potential customer for the sale of the Beyond Question system.

74. Defendant sought to prevent such negotiations by threatening both Plaintiff and its potential customer with litigation based on patent infringement.

75. Defendant lacks any justification for its activities and its actions are motivated by an improper purpose.

76. As a result of Defendant's improper interference with at least one of Plaintiff's prospective customers, the prospective customer has delayed entering into the prospective contract with Plaintiff.

77. Defendant's actions are causing Plaintiff irreparable harm as well as actual damages, which include lost profits and lost sales.

**FOURTH CAUSE OF ACTION**  
**Injunction**

78. Plaintiff realleges and incorporates Paragraphs 1-77.

79. Defendant is making improper and false assertions to Plaintiff's customers and potential customers in order to divert business away from Plaintiff and to Defendant.

80. Plaintiff has been harmed by these actions and will continue to incur irreparable harm unless Defendant is restrained from its improper acts.

81. Plaintiff has no adequate remedy at law other than injunctive relief to prevent the Plaintiff from further irreparably harming the Plaintiff.

82. Plaintiff seeks an injunction preventing Defendant from asserting an invalid and unenforceable patent against third parties and from further interfering with Plaintiff's contractual and prospective contractual relations.

WHEREFORE, Plaintiff hereby requests a jury determination of the issues raised and prays that this Court and/or the trier of fact award the following relief:

- A. A determination that U.S. Patent No. 6,895,213 is invalid;
- B. A determination that U.S. Patent No. 6,895,213 is unenforceable;
- C. A determination that Plaintiff has not infringed U.S. Patent No. 6,895,213;
- D. A determination that Defendant's actions constitute Intentional Interference with Actual and Prospective Contractual Relations;
- E. An injunction preventing Plaintiff from asserting rights in the '213 patent that it does not have;
- F. An award of actual damages caused by Defendant's improper acts;
- G. An award of punitive damages based on Defendant's intentional interference with prospective economic relations.
- H. For such other relief as this Court deems just and proper.

Respectfully submitted,

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