

5. This Court has subject matter jurisdiction over the trade dress infringement claim pursuant to 28 U.S.C. §§ 1331 and 1338(a) as a case arising under the Lanham Act, 15 U.S.C. §§ 1051 et seq.

6. Viewpoint does business in interstate commerce throughout the United States, including within this judicial district, and is subject to the personal jurisdiction of this Court.

7. On information and belief, Viewpoint has offered products for sale in this judicial district which are the subject of this action, has purposely directed activities at residents of this district, and has caused events to occur in this district that are the subject of this litigation.

8. Venue in this judicial district is proper under 28 U.S.C. §§ 1391 and 1400 inasmuch as Viewpoint is doing business in this district and has committed acts of infringement here.

Facts

9. Xikar is a well known developer and distributor of precision cutting products and tools, including cigar cutters.

10. In 1998 Xikar introduced a tear-drop shaped cigar cutter (the "Xikar Cutter") to the marketplace and thereafter began selling the cigar cutter throughout the United States and foreign countries. Since that time, the overall configuration and appearance of the Xikar Cutter has remained essentially the same and, except for infringing activities of competitors, Xikar has been the exclusive source of cigar cutters having the unique tear-drop configuration and appearance.

11. Xikar's unique tear-drop shaped cigar cutter has acquired distinctiveness by virtue of Xikar's exclusive use over the years. This unique design serves to identify Xikar's cigar cutter, distinguishes it from those of others, and constitutes protectable trade dress.

12. Xikar originated and holds exclusive rights in the tear-drop shaped cigar cutter. The unique tear-drop shape of the Xikar Cutter creates a commercial impression separate and apart from any identifying words contained on it.

13. The Xikar Cutter has been sold extensively throughout the United States and has developed a reputation among consumers as a premium cigar cutter. The Xikar Cutter has had tremendous success within the marketplace.

14. Xikar has developed significant consumer and trade recognition and goodwill in its tear-drop shaped design, such that the Xikar Cutter design has acquired distinctiveness or secondary meaning within the marketplace. The tear-drop shape of the Xikar Cutter is non-functional, unique and distinguishable over other cigar cutter shapes, and serves as an indicator of source.

15. Xikar also has developed significant consumer and trade recognition and goodwill in its tear-drop shaped cigar cutter. The tear-drop shape has become associated in the minds of purchasers with Xikar as the manufacturer of the tear-drop shaped Xikar Cutter.

16. On July 27, 1998, a design patent application entitled "Cigar Cutter" was filed in the United States Patent and Trademark Office directed to the Xikar Cutter. The patent application was assigned Serial No. 29/091,270.

17. On May 18, 1999, the United States Patent and Trademark Office issued U.S. Patent No. Des. 410,109 ("the '109 Patent"). A copy of the '109 Patent is appended hereto as Exhibit 1.

18. At all times since the issuance of the '109 Patent, Xikar Cutters have been marked with the Des. 410,109 patent number.

19. On April 30, 1998, a utility patent application entitled, "Cigar Cutter" was filed in the United States Patent and Trademark Office directed to the mechanical aspects of the Xikar cutter. The patent application was assigned serial no. 09/070,085.

20. On August 17, 1999, the United States Patent and Trademark Office issued United States Patent No. 5,937,523 ("the '523 Patent"), a copy of the '523 Patent is appended hereto as Exhibit 2.

21. At all times since the issuance of the '523 Patent, Xikar cutters have been marked with the Patent No. 5,937,523.

22. Xikar is the owner of all right, title and interest in and to the '109 and '523 patents.

23. Viewpoint is the owner of the Tommy Bahama brand and sells Tommy Bahama products at retail locations across the United States.

24. Viewpoint has been offering a tear-drop shaped cigar cutter which is a substantial copy of the Xikar Cutter for sale in Tommy Bahama retail stores. The infringing cigar cutter is marked with the Tommy Bahama brand name. Attached hereto as Exhibit 3 is a photograph accurately depicting the Tommy Bahama cigar cutter.

25. Upon information and belief, Viewpoint has sold and has offered for sale the infringing cigar cutter in commerce throughout the United States. Such sales are without the authorization or consent of Xikar.

26. Substantial consumer confusion between the Xikar tear-drop shaped cigar cutter and the Tommy Bahama cigar cutter, as well as confusion among those in the trade, is likely to occur due to the acts of Viewpoint in infringing and/or copying the Xikar trade dress.

27. The acts of Viewpoint have injured and will continue to cause further irreparable injury to Xikar if Viewpoint is not restrained by the court from further violation of Xikar's rights in its patents and trade dress.

COUNT I

Patent Infringement

28. The allegations set forth in paragraphs 1 through 27 are incorporated by reference as if fully set forth herein.

29. Upon information and belief, Viewpoint has sold, and is continuing to sell cigar cutters which infringe upon the claim of the '109 Patent and at least claim 1 of the '523 patent in violation of 35 U.S.C. § 271.

30. Xikar has been, and continues to be, damaged by Viewpoint's infringing activities.

31. Upon information and belief, Viewpoint will continue to infringe the '109 Patent and the '523 Patent and damage Xikar unless enjoined by this Court.

COUNT II

False Designation of Origin and Unfair Competition Under 15 U.S.C. § 1125(a)

32. Xikar adopts and incorporates by reference paragraphs 1 through 31 as if fully set forth herein.

33. The past and continued use by Viewpoint of the infringing cigar cutter constitutes a use in commerce of a symbol and/or device under 15 U.S.C. § 1125(a)(1). Viewpoint's infringing cigar cutter is likely to cause consumer confusion or mistake as to as to the affiliation,

connection or association of Xikar with Viewpoint and/or confusion as to the origin, sponsorship or approval of Viewpoint's cigar cutter products by Xikar, in violation of 15 U.S.C. § 1125(a)(1).

34. Viewpoint's cigar cutter constitutes a false designation of origin or misleading description of fact and/or false or misleading representation of fact under 15 U.S.C. § 1125(a)(1). It wrongfully and falsely suggests Viewpoint's products originate from or are connected with Xikar.

35. Viewpoint, through the actions described herein, has acted willfully.

36. Viewpoint's conduct has damaged Xikar and will, unless restrained by this Court, further impair, if not destroy, the value of Xikar's trade dress and goodwill associated therewith.

WHEREFORE, Xikar prays for judgment as follows:

a. That the Court find that Viewpoint has violated 35 U.S.C. § 271 by infringing the claims of the '109 and '523 Patents, which patents are valid and enforceable;

b. That the Court find that Xikar has protectable trade dress in its tear-drop shaped cigar cutter and that Viewpoint has infringed Xikar's trade dress;

c. That Viewpoint, its partners, agents, servants, employees, officers, directors, successors, assigns, attorneys and those persons in active concert or participation with Viewpoint or with any of the foregoing be permanently enjoined and restrained from infringing Xikar's trade dress or the claim of the '109 Patent in any manner, from inducing others to infringe such patent or from contributing to such infringement, pursuant to 35 U.S.C. § 283;

d. That Viewpoint remove from its United States inventory and deliver to Xikar any cigar cutters that infringe the '109 or '523 Patents or Xikar's trade dress.

e. That Viewpoint be required to deliver to Xikar for destruction all product, displays, advertisements, packaging, brochures, catalogs, order forms, price lists or any other materials, whether in tangible or electronic form (including the Internet), in its possession or control or in the possession or control of its agents which infringe or induce infringement of the '109 or '523 Patents or which infringe Xikar's trade dress;

f. That Viewpoint be required to recall and turn over to Xikar for destruction all current catalogs that have been distributed to its sales agents and customers offering the infringing cigar cutters;

g. That Viewpoint be required to account for and pay over to Xikar all of the profits which Viewpoint has derived from its sales of the infringing cigar cutter and to pay such damages to Xikar as this Court shall determine is just and proper to adequately compensate Xikar for the aforesaid patent and trade dress infringement including prejudgment and post judgment interest on the same pursuant to 35 U.S.C. § 284;

h. That Viewpoint be required to pay over to Xikar an increased damages award of three (3) times the amount found or assessed pursuant to 35 U.S.C. § 284;

i. That this case be deemed exceptional under the Patent Laws and that Viewpoint be required to pay to Xikar the cost incurred herein including all of Xikar's attorneys' fees pursuant to 35 U.S.C. §§ 284 and 285;

j. That Xikar have such other and further relief as is warranted by the pleadings and/or the evidence.

DATED this 23rd day of February, 2005.

Respectfully submitted,

/s/ J. David Wharton
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