

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BLACK & DECKER INC. and BLACK &
DECKER (U.S.) INC.,

Plaintiffs,

v.

MUSIC PERFORMANCE
LABORATORY, INC., d/b/a MPL
CORPORATION and d/b/a TURBO
GARDEN, and WILLIAM M. MAYHEW,
individually and d/b/a MPL
CORPORATION and d/b/a TURBO
GARDEN,

Defendants.

Civil Action No. 1:09-cv-03491

Judge Guzman
Magistrate-Judge Mason

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

Plaintiffs, Black & Decker Inc. and Black & Decker (U.S.) Inc. (collectively "Black & Decker"), complain of Defendants, Music Performance Laboratory, Inc. d/b/a MPL Corporation and d/b/a Turbo Garden, and William M. Mayhew, individually and d/b/a MPL Corporation and d/b/a Turbo Garden, as follows:

Parties, Jurisdiction and Venue

1. This is a complaint for patent infringement (35 U.S.C. § 1 et seq.); breach of contract; and copyright infringement (17 U.S.C. § 101 et seq.).
2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).
3. Venue is proper in this District under 28 U.S.C. §§ 1391(b)-(c) and 1400(a)-(b).
4. Black & Decker Inc. is a Delaware corporation having its principal place of business at 1207 Drummond Plaza, Newark, Delaware.

5. Black & Decker (U.S.) Inc. is a Maryland corporation having its principal place of business at 701 East Joppa Road, Towson, Maryland.

6. Music Performance Laboratory, Inc., d/b/a MPL Corporation and d/b/a Turbo Garden ("MPL"), is a California corporation with its principal place of business at 17282 Blue Spruce Lane, Yorba Linda, CA 92886. MPL manufactures and sells lawn and garden products, including the lawn mower products accused of infringement in this action.

7. William M. Mayhew, d/b/a/ MPL Corporation and d/b/a/ Turbo Garden ("Mayhew"), is an individual residing and doing business at 17282 Blue Spruce Lane, Yorba Linda, CA 92886. Mayhew has been conducting business in this judicial district and throughout the country under the names MPL Corporation and Turbo Garden. Mayhew is personally responsible and liable for all of the infringing actions complained of herein.

8. The contract which gives rise to the Breach of Contract Count II in this action was executed in Chicago, Illinois.

9. The Court has personal jurisdiction over MPL and Mayhew because, among other things, they transact business in this judicial district, at least by offering to sell, selling and/or advertising the infringing lawn mower products in such a way as to reach customers in Illinois and this judicial district through the Internet via the website www.mplcar.com and Internet retailers such as Amazon.com. MPL and Mayhew have specifically committed acts of infringement in this judicial district.

**COUNT I
PATENT INFRINGEMENT**

10. Black & Decker incorporates the allegations set forth in the preceding paragraphs as though fully set forth herein.

11. Black & Decker Inc. owns United States Patent No. 5,526,633, entitled "Lawn Mower Having Improved Deck Height Adjustment Mechanism," issued on June 18, 1996 (the "'633" patent) (Exhibit 1) and United States Patent No. Des. 426,836, entitled "Mower Shroud," issued on June 20, 2000 (the "'836 patent") (Exhibit 2).

12. Black & Decker (U.S.) Inc. is the exclusive licensee under the '633 and '836 patents and has been directly injured by Defendants' infringing activities. Black & Decker (U.S.) Inc. manufactures and sells the Black & Decker Cordless Power Mower. From 1996 through 2007 the Cordless Power Mower was available as Model No. CMM1000, which evolved into the currently available Model CMM1200. Each Model of the Black & Decker Cordless Power Mower incorporates the design of the '836 patent and a height adjustment mechanism covered by the '633 patent.

13. Black & Decker Inc. and Black & Decker (U.S.) Inc. have standing to sue for infringement of the '633 and '836 patents because they collectively own all right, title and interest in and to the '633 and '836 patents and the Black & Decker products covered by those patents, including the right to collect for past damages. Black & Decker Inc. and Black & Decker (U.S.) Inc. have each suffered injury from the Defendants' acts of patent infringement.

14. MPL and Mayhew have infringed, and are now directly infringing the '633 and '836 patents through, among other activities, the manufacture, use, sale, importation and/or offer for sale of infringing lawn mower products, including but not limited to the Turbo Garden 36-volt Cordless Rechargeable Lawn Mower (Model No. TGP-CLM-8) and MPL 36-volt Rechargeable Cordless Lawn Mower (Model No. SPL-CLM-8 and/or Item No. MP-35v19) (the "Accused Products") throughout the United States, including within this judicial district. MPL and Mayhew have also infringed the '633 and '836 patents by knowingly and actively inducing

others to infringe and by contributing to the infringement of others by the manufacture, use, sale, importation and/or offer for sale of the Accused Products.

15. The '836 patented design is nonfunctional. MPL and Mayhew have copied the ornamental features and overall visual appearance of the '836 patent, such that the Accused Products have substantially the same design as the '836 patent in the eye of an ordinary observer.

16. Defendants' infringement, contributory infringement and/or inducement to infringe has injured Black & Decker, and Black & Decker is entitled to recover damages adequate to compensate it for such infringement, but in no event less than a reasonable royalty, and in the case of the '836 design patent, Defendants' total profits.

17. Defendants have been given actual notice of their infringement of the '633 and '836 patents, and Black & Decker has fully complied with the provisions of 35 U.S.C. § 287.

18. Defendants' infringement, contributory infringement and/or inducement to infringe has been willful, deliberate and objectively reckless.

19. Defendants' infringing activities have caused irreparable harm to Black & Decker, which has no adequate remedy at law, and will continue to injure Black & Decker, unless and until this Court enters an injunction prohibiting further infringement and enjoining Defendants from contributing to and/or inducing infringement; specifically, enjoining further manufacture, use, sale, importation and/or offer for sale of products that come within the scope of the claims of the '633 and/or '836 patents.

**COUNT I
PRAYER FOR RELIEF**

WHEREFORE, Black & Decker respectfully asks this Court to enter judgment jointly and severally against MPL and Mayhew, individually and d/b/a MPL Corporation and/or Turbo Garden, as well as their subsidiaries, successors, parents, affiliates, officers, directors, agents,

servants and employees, and all persons in active concert or participation with them, granting the following relief:

- a. The entry of judgment in favor of Black & Decker and against MPL and Mayhew on Count I of this Complaint;
- b. An award of damages adequate to compensate Black & Decker for the infringement that has occurred, but in no event less than a reasonable royalty as permitted by 35 U.S.C. § 284, together with prejudgment interest from the date the infringement began;
- c. A permanent injunction prohibiting further infringement, inducement and/or contributory infringement of the '633 and '836 patents;
- d. Increased damages as permitted under 35 U.S.C. § 284;
- e. Additional damages for design patent infringement as permitted under 35 U.S.C. § 289;
- f. A finding that this case is exceptional and an award to Black & Decker of its attorneys' fees and costs as provided by 35 U.S.C. § 285; and,
- g. Such other relief that Black & Decker may be entitled to under law, and any other and further relief that this Court or a jury may deem just and proper.

**COUNT II
BREACH OF CONTRACT**

20. Black & Decker incorporates the allegations set forth in the preceding paragraphs as though fully set forth herein.

21. Mayhew, individually and on behalf of Music Performance Laboratory, Inc., d/b/a MPL Corporation, entered into a valid and enforceable contract with Black & Decker by

executing on December 30, 2008 a letter agreement dated October 13, 2008 ("Agreement") (Exhibit 3).

22. As part of the Agreement, MPL and Mayhew "acknowledge[d] that they have imported, advertised, distributed, offered for sale and/or sold in the United States the MPL 36 Volt Re-chargeable Cordless Lawn Mower (e.g., Model #SPL-CLM-8 and Item #MP-36v19)" charged with infringement of the '633 and '836 patents.

23. In addition, MPL and Mayhew "warrant[ed] and represent[ed] that they purchased, imported, distributed, offered for sale and sold 602 total units of the MPL Cordless Mower" and that "[t]here are no further units in the possession of MPL or Mayhew, or any of their customers and/or distributors."

24. Among other things, the Agreement provides that "MPL and Mayhew, and any person or entity acting under their direction or control or in active concert or participation with them, shall permanently and immediately refrain from and cease, manufacturing, importing, advertising, distributing, offering for sale and/or selling in the United States the MPL Cordless Mower, and any other product that has insubstantial differences and/or which comes within the scope of any claim of the Black & Decker patents."

25. In March 2009, Black & Decker learned that MPL and Mayhew were (and are still) offering for sale a 36-volt Cordless Rechargeable Lawn Mower (Model No. TGP-CLM-8) under the brand name "Turbo Garden" through their website www.mplcar.com (Exhibit 4). This product is also available through online retailers such as Amazon.com, Bargainoutfitters.com and Sportsmansguide.com (see e.g. Exhibit 5).

26. The Turbo Garden and MPL websites confirm that Turbo Garden is "an MPL Corporation Company" (Exhibit 6; see also Exhibit 4).

27. MPL and Mayhew have materially breached the Agreement by, among other things, "manufacturing, importing, advertising, distributing, offering for sale and/or selling in the United States the MPL Cordless Mower, and any other product that has insubstantial differences and/or which comes within the scope of any claim of the Black & Decker" '633 and '836 patents.

28. MPL and Mayhew are in breach of the Agreement which provides that:

In the event that MPL and/or Mayhew breach this letter agreement, Black & Decker will be entitled to all normal relief which it may request from any court of competent jurisdiction, including without limitation seeking enforcement and collection of damages against MPL and Mayhew.

29. Black & Decker has been damaged by Defendants' breach of the Agreement and is entitled to damages adequate to compensate it for the breach that has occurred.

30. Defendants' breach has caused damage both repairable and irreparable to Black & Decker and will continue to do so unless and until Defendants are enjoined by this Court.

**COUNT II
PRAYER FOR RELIEF**

WHEREFORE, Black & Decker respectfully asks this Court to enter judgment jointly and severally against MPL and Mayhew, individually and d/b/a MPL Corporation and/or Turbo Garden, as well as their subsidiaries, successors, parents, affiliates, officers, directors, agents, servants and employees, and all persons in active concert or participation with them, granting the following relief:

a. The entry of judgment in favor of Black & Decker and against MPL and Mayhew on Count II of this Complaint;

b. Compensatory damages in an amount to be determined at trial for MPL and Mayhew's breach of contract;

c. An award to Black & Decker of its attorneys' fees and costs of suit incurred herein; and

d. Such other relief that Black & Decker may be entitled to under law, and any other and further relief that this Court or a jury may deem just and proper.

**COUNT III
COPYRIGHT INFRINGEMENT**

31. Black & Decker incorporates the allegations set forth in the preceding paragraphs as though fully set forth herein.

32. Beginning in 1996, Black & Decker manufactured and sold the Model CMM1000 Cordless Power Mower. As part of this business, Black & Decker created and used an Instruction Manual detailing the specifications and instructions for use of the CMM1000 Cordless Power Mower. The 2005 Instruction Manual is attached as Exhibit 7.

33. Black & Decker Inc. owns U.S. Copyright Certificate of Registration No. TX 6-933-417 for the work entitled "Black & Decker CMM1000 19" (483mm) Cordless Convertible Mulching Rear Bag Mower Instruction Manual" (the "Copyright") (Exhibit 8). The Certificate of Registration constitutes prima facie evidence of the validity of this copyright.

34. Black & Decker (U.S.) Inc. has been granted exclusive permission to use the Copyright and has been directly injured by Defendants' infringing activities.

35. Black & Decker Inc. and Black & Decker (U.S.) Inc. have standing to sue for infringement of the Copyright because they collectively own all right, title and interest in and to the Copyright, the Instruction Manual and/or the Black & Decker products which are the subject of the copyrighted Instruction Manual, including the right to collect for past damages. Black & Decker Inc. and Black & Decker (U.S.) Inc. have each suffered injury from the Defendants' acts of copyright infringement.

36. Black & Decker has complied with all statutory formalities required by the Copyright Act in order to maintain the validity of the copyright in its Instruction Manual, including marking the proper notice of copyright pursuant to 17 U.S.C. § 401.

37. The Black & Decker Instruction Manual is an original work of authorship and contains copyrightable subject matter under the Copyright Act.

38. MPL and Mayhew have infringed, and continue to infringe, at least Copyright Registration No. TX 6-933-417 in violation of 17 U.S.C. § 106 et seq. by producing, distributing and/or selling unauthorized copies of the Black & Decker 2005 Instructional Manual or unauthorized derivative works based on the Black & Decker 2005 Instruction Manual.

39. Specifically, MPL and Mayhew have produced, distributed and are distributing, themselves and/or through others, Instruction Manuals for the MPL Model SPL-CLM-8 and Turbo Garden Model TGP-CLM-8 Accused Products, which copy major portions of Black & Decker's copyrighted Instruction Manual, including word-for-word copying, copying of figures and copying of overall document organization (Exhibits 9 and 10, respectively).

40. Defendants' conduct constitutes continuing, direct and contributory infringement of Black & Decker's copyright. This infringement has been deliberate and willful.

41. As a result of this infringement, Black & Decker has sustained, and will continue to sustain, substantial injuries, loss, and damage to its Copyright or exclusive rights under the Copyright in its Instruction Manual, and Black & Decker has sustained and will sustain damages from the loss of value of its Copyright and irreparable harm by reason of the Defendants' conduct.

**COUNT III
PRAYER FOR RELIEF**

WHEREFORE, Black & Decker respectfully asks this Court to enter judgment jointly and severally against MPL and Mayhew, individually and d/b/a MPL Corporation and/or Turbo Garden, as well as their subsidiaries, successors, parents, affiliates, officers, directors, agents, servants and employees, and all persons in active concert or participation with them, granting the following relief:

a. The entry of judgment in favor of Black & Decker and against MPL and Mayhew on Count III of this Complaint;

b. A permanent injunction prohibiting further infringement of Black & Decker's Copyright as provided in 17 U.S.C. § 502 and specifically prohibiting and enjoining Defendants from:

- (1) producing, distributing, circulating, selling, offer for sale, promoting or displaying any copies of the Black & Decker Instruction Manual or of any reproductions or substantially similar imitations thereof or any unauthorized derivative works based on the Black & Decker Instruction Manual;
- (2) imitating, copying or making any unauthorized use of Black & Decker's registered Copyright identified herein;
- (3) in any manner infringing or contributing to or participating in the infringement by others of any of Black & Decker's copyrights, and from acting in concert with, aiding, or abetting others to infringe any of said copyrights in any way;

c. Ordering Defendants, pursuant to 17 U.S.C. § 502, to send notice to all of their customers to recall for destruction all copies of the Black & Decker Instruction Manual and all unauthorized works based on the Black & Decker Instruction Manual;

d. Ordering Defendants, pursuant to 17 U.S.C. § 503, to deliver for destruction all copies of any Black & Decker Instruction Manual, including any reproductions or substantially similar imitations thereof, and all unauthorized derivative works based on the Black & Decker Instruction Manual, and all other materials in its possession or control relating to such copies or unauthorized derivative works;

e. Damages for copyright infringement determined in accordance with 17 U.S.C. § 504, including an award of:

- (1) Damages in an amount to be determined at trial arising out of the foregoing acts of infringement and sustained by reason of said wrongful acts;
- (2) Defendants' profits as a consequence of the acts of infringement and an accounting of said profits.

f. Ordering Defendants to file with the Court within thirty (30) days after service of any judgment issued herein, or within such reasonable time as the Court may direct, a report in writing and under oath setting forth in detail the manner and form in which Defendants have complied with such judgment; and,

g. Such other relief that Black & Decker may be entitled to under law, and any other and further relief that this Court or a jury may deem just and proper.

JURY DEMAND

Black & Decker demands a trial by jury on all issues presented in this First Amended Complaint.

Respectfully submitted,

/s/ Raymond P. Niro, Jr.

Raymond P. Niro, Jr.

Dina M. Hayes

Robert A. Conley

NIRO, SCAVONE, HALLER & NIRO

181 West Madison, Suite 4600

Chicago, Illinois 60602

(312) 236-0733

Fax: (312) 236-3137

mirojr@nshn.com; hayes@nshn.com;

conley@nshn.com

Attorneys for Plaintiffs, Black & Decker Inc. and
Black & Decker (U.S.) Inc.