

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

HECKLER & KOCH, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Cause No. 1:09-cv-0898-LJM-DML
	)	
LEAPERS, INC.	)	
	)	
Defendant.	)	

**FIRST AMENDED COMPLAINT**

For its First Amended Complaint against Defendant, Leapers, Inc. (“Leapers”) referred to hereafter as (“Defendant”), Plaintiff, Heckler & Koch, Inc. (“HK”) hereby alleges as follows:

**A.**  
**SUBSTANCE OF THE ACTION**

1. Plaintiff’s First Amended Complaint arises from the unauthorized advertisement, distribution and/or sale of airsoft guns and accessories by Defendant. Several models of airsoft guns sold and offered for sale by Defendant, and their advertisements, packaging, and other related materials make unauthorized use of the protected intellectual property of HK.
2. HK is the owner of various intellectual property developed and maintained by HK in relation to its sale of firearms and related products.
3. Within HK’s intellectual property portfolio are firearm model names and the distinctive and famous three dimensional trade dress design shapes of its popular firearms known and designated as the MP5®, G36®, G3®, USP®, MK23 and

- P7® models. Sample images of the MP5, G36, G3, USP, MK23 and P7 are attached hereto and made a part hereof within Ex. A, Leapers Infringements and HK Products and Ex. B, Evidence of Leapers Products (Exs. A-B hereinafter collectively referred to as the “Leapers Infringements”).
4. Defendant advertises, manufactures, distributes and/or sells several airsoft guns whose design shapes intentionally replicate the HK’s intellectual property, wholly without authorization from HK to do so.
  5. Defendant’s UTG Sport AccuShot Premium CQB Navy Seal UTG5, UTG Sport AccuShot Spring Model CQB Navy Seal UTG5, Mini Electric SOFT-602, UHC Precision Model 5 Spring Rifle, and UTG Sport Precision Model 5 Spring models make unauthorized use of HK’s distinctive and famous MP5 trade dress. Sample images of the MP5, are attached hereto and made a part hereof within Exs. A-B.
  6. Defendant’s NeonFire Model 36 Elite Commando Spring Rifle and NeonFire Model 36 Elite Sniper make unauthorized use of HK’s distinctive and famous G36 trade dress. Sample images of the G36, are attached hereto and made a part hereof within Exs. A-B.
  7. Defendant’s Mini Electric SOFT-605 makes unauthorized use of HK’s distinctive and famous G3 trade dress. Sample images of the G3, are attached hereto and made a part hereof within Exs. A-B.
  8. Defendant’s UHC Gas Special Tactical Style, UHC Gas Special Tactical Style 2-Tone, UHC Secret Agent Special-UP8, UHC Secret Agent Speicla-UP8 2-Tone, UHC Elite Long Barrel-The Raider-U Style Black, UHC Navy Commando, UHC Gas Special Raider Style Black, and UHC Gas Special Raider Style 2-Tone make

- unauthorized use of HK's distinctive and famous USP trade dress. Sample images of the USP, are attached hereto and made a part hereof within Exs. A-B.
9. Defendant's UTG Sport Model 23 Navy Seal Spring Pistol makes unauthorized use of HK's distinctive and famous MK23 trade dress. Sample images of the MK23, are attached hereto and made a part hereof within Exs. A-B.
  10. Defendant's Secret Agent Special-UP7M13 makes unauthorized use of HK's distinctive and famous P7 trade dress. Sample images of the P7, are attached hereto and made a part hereof within Exs. A-B.
  11. The product descriptions for Defendant's UTG Sport AccuShot Premium CQB Navy Seal UTG5 and UTG Sport AccuShot Spring Model CQB Navy Seal UTG5 make unauthorized use of HK's Federal Trademark Registration No. 1594109 for the MP5® wordmark. [Ex. C, MP5 Registration]
  12. The product descriptions for Defendant's NeonFire Model 36 Elite Commando Spring Rifle and NeonFire Model 36 Elite Sniper make unauthorized use of HK's Federal Trademark Registration Nos. 3635547 and 3028713 for the G36® wordmark and Federal Trademark Registration No. 1594108 for the G3® wordmark. [Ex. D, G36 and G3 Registrations]
  13. The product descriptions for Defendant's UHC Gas Special Tactical Style and UHC Gas Special Tactical Style 2-Tone make unauthorized use of HK's Federal Trademark Registration No. 3595107, 1832127 and 1833281 for the USP® and HK USP® wordmarks. [Ex. E, USP Registrations]
  14. Sample images of the infringing Defendant's models are attached hereto and made a part hereof as Exs. A-B.

15. Defendant's unauthorized use of the HK's intellectual property in the designs of the Defendant Infringements, advertisements, and packaging relating to the Defendant Infringements violates HK's rights as owner of the subject intellectual property. HK asserts claims for federal trademark infringement, federal trademark dilution, false designation of origin or sponsorship, false advertising and trade dress infringement pursuant to the Lanham Act, as well as common law trademark infringement, unfair competition, conversion, forgery, counterfeiting, and deception. HK seeks a permanent injunction preventing Defendant from using the HK's intellectual property, along with an award of damages, treble damages, corrective advertising damages, profits, attorney's fees and costs.

**B.**  
**THE PARTIES**

16. HK is a corporation organized and existing under the laws of Virginia.

17. Defendant, Leapers, Inc. is a corporation organized and existing under the laws of Michigan. Leapers, Inc. can be served via its registered agent, Dung-Ju Ding, 32700 Capitol Street, Livonia, MI 48150.

**C.**  
**JURISDICTION AND VENUE**

18. This Court has original jurisdiction over Counts I through III of this First Amended Complaint pursuant to 28 U.S.C. §§1331 and 1338(a).

19. This Court has original jurisdiction over Count V of this First Amended Complaint pursuant to 28 U.S.C. §1338(b).

20. This Court has supplemental jurisdiction over Count IV and Counts VI through IX of this First Amended Complaint pursuant to 28 U.S.C. §1367(a).

21. Defendant has submitted to this Court's jurisdiction by doing business in the state of Indiana.
22. Venue properly lies in this Court because a substantial part of the events giving rise to the claims alleged herein arose in the state of Indiana.

**D.**  
**GENERAL ALLEGATIONS**

**1. The HK IP**

23. HK is a leading firearms manufacturer and distributor in the United States. HK is especially prominent in providing weaponry to military and law enforcement throughout the country.
24. Related to this business, HK owns a wide variety of intellectual property rights. Included within HK's intellectual property are federally registered trademarks for HK's famous firearm model names, state registered trademarks and common law trade dress rights in the distinctive three dimensional design shapes of HK's well-known firearms, and common law rights for HK's firearm model names and the distinctive three dimensional design shapes of HK's well-known firearms. These rights are collectively referred to hereinafter as the "HK IP."
25. Relevant to this action, HK is the registrant for federal registration numbers 1594109 for the MP5 word mark, 3635547 and 3028713 for the G36 word mark, 3595107, 1832127, and 1833281 for the USP word mark, and 1594108 for the G3 word mark. [Ex. C-E] These registrations are active and unrevoked, and constitute *prima facie* evidence of HK's ownership of the marks.
26. Also relevant to this action, HK is the registrant for Indiana registration numbers 20081120-13168 and 20081120-13169 for the three dimensional design shape of

- the MP5 firearm, 20081120-13172 and 20081120-13172 for the three dimensional design shape of G36 firearm, and 20081120-13178 and 20081120-13179 for the three dimensional design shape of the USP firearm. Copies of these Indiana state trademark registration certificates are attached hereto and made a part hereof as Ex. F.
27. HK also owns valid and protectable common law trademark rights in the distinct three dimensional design shapes of its gun products, including but not limited to the MP5, G36, G3, USP, MK23 and P7 firearms, as well as the model names for these products. These common law rights are included in the HK IP.
28. The HK IP is inherently distinctive and/or has developed a strong secondary meaning that identifies the HK IP with HK to the consuming public.
29. HK maintains strict control over the quality and nature of their products and items bearing the HK IP.
30. HK has invested considerable time and money in establishing the HK IP throughout Indiana and the United States. As a result of these efforts, the HK IP is immediately recognizable.
31. HK has acquired substantial goodwill among consumers.
32. As a result of such goodwill and immediate recognition, items bearing the HK IP have become highly valuable.

## **2. Defendant's Infringement of HK's Rights**

33. Subsequent to HK's development, use and registration of the HK IP, Defendant began using the HK IP or confusingly similar variations of the marks.
34. Wholly without authorization from HK, Defendant manufactured, produced,

- advertised and/or sold items bearing the HK IP. As shown in the sample images of the Leapers Infringements attached hereto as Exs. A-B, Defendant manufactured, distributed, advertised and/or sold the Leapers Infringements which do and are intended to replicate the HK IP.
35. Defendant has not received permission from HK or anyone acting on HK's behalf, to manufacture, produce, advertise or sell any item bearing the HK IP.
36. By manufacturing, producing, advertising and/or selling items bearing the HK IP without permission, Defendant has attempted to profit from and capitalize on the intellectual property rights and substantial goodwill developed by HK.
37. Defendant has willfully and intentionally manufactured, produced, advertised and/or sold products bearing the HK IP with knowledge of HK's ownership of the HK IP.
38. Defendant manufactured, produced, advertised and/or sold items bearing the HK IP with knowledge that Defendant's use of the HK IP was unauthorized.
39. The manufacture, production, advertisement, and/or sale of items bearing the HK IP created a likelihood of consumer confusion.
40. Defendant used the HK IP with the intent to confuse and/or deceive consumers.

**COUNT I**  
**FEDERAL TRADEMARK INFRINGEMENT UNDER 15 U.S.C. § 1114**

41. HK incorporates herein by reference the allegations contained in all previous paragraphs of this First Amended Complaint.
42. Defendant has used in commerce, and in connection with the sale of goods, reproductions, counterfeits, copies or colorable imitations of the HK IP.
43. Defendant has reproduced, counterfeited, copied or imitated the HK IP and

- applied the HK IP to labels, signs, prints, packages, receptacles or advertisements intended to be used in commerce.
44. Defendant's use of the HK IP creates the likelihood of confusion, mistake and/or deception among consumers.
45. Defendant willfully infringed upon the HK IP. Defendant intended to confuse, mistake or deceive consumers.
46. Defendant used the reproductions of the HK IP with knowledge that the marks were copies and/or counterfeits.
47. Consumers were initially interested in and lured to the infringing items by Defendant's use of the HK IP.
48. As a result of Defendant's infringement, HK has suffered irreparable harm. Unless Defendant is permanently enjoined from further infringement, HK will continue to suffer irreparable harm.
49. A permanent injunction is necessary to prevent Defendant from further interference with the HK IP.
50. As a result of Defendant's infringement under 15 U.S.C. § 1114, HK has been injured and is entitled to damages, including but not limited to, Defendant's profits from the sale of all infringing goods, actual damages, corrective advertising damages, treble damages, statutory damages, costs of suit and attorney's fees.

**COUNT II**  
**TRADEMARK DILUTION UNDER 15 U.S.C. § 1125(c)**

51. HK incorporates by reference the allegations contained in all previous paragraphs of this Complaint.



52. The HK IP is the product of creativity and imagination.
53. The HK IP is famous and distinctive.
54. The HK IP is widely recognized by the general consuming public of the United States as a designation of HK as the source of the HK IP.
55. Defendant adopted the HK IP after the marks became famous.
56. Defendant's use of the HK IP impairs the distinctiveness of the HK IP.
57. Defendant's use of the HK IP harms the reputation of the HK IP as identifiers of superbly high quality products.
58. Defendant's use of the HK IP caused dilution of the HK IP.
59. Defendant's use of the HK IP is commercial and in commerce.
60. Defendant's use of the HK IP has weakened the unique association of the HK IP with HK.
61. As a result of Defendant's dilution under 15 U.S.C. § 1125(c), HK has suffered irreparable harm. Unless Defendant is permanently enjoined from further dilution, HK will continue to suffer irreparable harm.
62. A permanent injunction is necessary to prevent Defendant from further interference with the HK IP.
63. Defendant's dilution of the HK IP has caused HK damages, including, but not limited to, Defendant's profits from the sale of all infringing goods, actual damages, treble damages, statutory damages, costs of suit and attorney's fees.

**COUNT III**  
**FALSE DESIGNATION OF ORIGIN OR SPONSORSHIP,**  
**FALSE ADVERTISING AND**  
**TRADE DRESS INFRINGEMENT UNDER 15 U.S.C. § 1125(a)**

64. HK incorporates by reference the allegations contained in all previous paragraphs of this First Amended Complaint.
65. Defendant used the HK IP in commerce and in connection with the sale of goods or services.
66. Defendant's use of the HK IP is likely to cause confusion or mistake and/or is likely to deceive consumers as to the affiliation, connection or association of Defendant with HK; or as to the origin, sponsorship, or approval of Defendant's goods by HK, or anyone acting on behalf of HK.
67. Defendant's conduct constitutes false or misleading descriptions, false advertising, and false designations of the origin and/or sponsorship of Defendant's goods and constitutes trade dress infringement in violation of § 43(a) of the Lanham Act, as amended, 15 U.S.C. § 1125(a).
68. As a result of Defendant's conduct, HK has suffered irreparable harm. Unless Defendant is permanently enjoined from further false designations, false advertisement and trade dress infringement, HK will continue to suffer irreparable harm.
69. A permanent injunction is necessary to prevent Defendant from further interference with the HK IP.
70. Defendant's violation of 15 U.S.C. §1125(a) has caused HK to incur damages, including, but not limited to, Defendant's profits from the sale of all infringing goods, actual damages, corrective advertising damages, treble damages, statutory damages, costs of suit and attorney's fees.

**COUNT IV**  
**COMMON LAW TRADEMARK INFRINGEMENT**

71. HK incorporates by reference the allegations contained in all previous paragraphs of this First Amended Complaint.
72. HK is the owner of the HK IP.
73. Defendant has reproduced, counterfeited, copied or imitated the HK IP and applied the HK IP to labels, signs, prints, packages, receptacles, and/or advertisements intended to be used in commerce and has incorporated the HK IP into the design of the Leapers Infringements.
74. Defendant willfully infringed upon the HK IP. Defendant intended to confuse, mistake or deceive consumers.
75. Defendant used the reproductions of the HK IP with knowledge that the Leapers Infringements were confusingly similar copies.
76. Consumers were initially interested in and lured to the Leapers Infringements by Defendant's use of the HK IP.
77. The HK IP is immediately recognizable and famous throughout the world.
78. HK has acquired a reputation among consumers for quality and excellence, and the HK IP has come to symbolize that reputation.
79. Defendant, with knowledge of and with intentional disregard for the rights of HK, manufactured, produced, advertised and/or sold items using the HK IP or confusingly similar imitations thereof.
80. Defendant's use of the HK IP has created the likelihood of confusion among consumers.
81. Defendant's acts constitute trademark infringement and willful infringement under the common law.

82. As a result of Defendant's conduct, HK has suffered irreparable harm. Unless Defendant is permanently enjoined from further infringement, HK will continue to suffer irreparable harm.

83. A permanent injunction is necessary to prevent Defendant from further interference with the HK IP.

84. As a result of Defendant's infringement, HK has suffered damages, including, but not limited to, Defendant's profits from the sale of all infringing goods, actual damages, treble damages, statutory damages, costs of suit and attorney's fees.

**COUNT V**  
**UNFAIR COMPETITION**

85. HK incorporates by reference the allegations contained in all previous paragraphs of this First Amended Complaint.

86. Defendant's unlawful and unauthorized use of the HK IP constitutes unfair competition with HK.

87. Defendant's conduct creates consumer confusion as to the source and/or origin of the infringing items.

88. Defendant's use of the HK IP is an attempt to interfere with HK's business relationship with its consumers and to trade on HK's goodwill.

89. As a result of Defendant's conduct, HK has suffered irreparable harm. Unless Defendant is permanently enjoined from further unfair competition, HK will continue to suffer irreparable harm.

90. A permanent injunction is necessary to prevent Defendant from further interference with the HK IP.

91. Defendant's unfair competition has caused HK to incur damages, including but

not limited to, Defendant's profits from the sale of the infringing products, actual damages, costs of suit and attorney's fees.

**COUNT VI**  
**CONVERSION UNDER IND. CODE § 35-43-4-3**

92. HK incorporates by reference the allegations contained in all previous paragraphs of this First Amended Complaint.

93. Defendant knowingly or intentionally exerted unauthorized control over the property of HK, specifically the HK IP, owned by HK.

94. Defendant sold items bearing the HK IP without HK's consent and in a manner or to an extent other than that to which HK had consented.

95. Defendant knowingly or intentionally exerted unauthorized control over HK's intangibles, namely the HK IP and the goodwill developed by HK.

96. Defendant misappropriated the HK IP for its own use and benefit and interfered with HK's control over the HK IP.

97. As a result of Defendant's conversion, HK was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime Victim's Act, Ind. Code § 34-24-3-1.

**COUNT VII**  
**FORGERY UNDER IND. CODE § 35-43-5-2(b)**

98. HK incorporates by reference the allegations contained in the previous paragraphs of this First Amended Complaint.

99. Defendant, with the intent to defraud, made, uttered, and/or possessed a written instrument, namely the Defendant's airsoft guns and accessories, advertisements and packaging in such a manner that they purport to have been made by HK.

100. Defendant was not given the authority to make or possess the infringing items by HK or anyone acting on behalf of HK.

101. As a result of Defendant's forgery, HK was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime Victim's Act, Ind. Code § 34-24-3-1.

**COUNT VIII**  
**COUNTERFEITING UNDER IND. CODE § 35-43-5-2(a)**

102. HK incorporates herein by reference the allegations contained in all previous paragraphs of this First Amended Complaint.

103. Defendant knowingly or intentionally made and/or uttered a written instrument, namely the Defendant's airsoft guns and accessories advertisements and packaging in such a manner that they purport to have been made by HK.

104. Defendants were not given the authority to make or utter the infringing items by HK or anyone acting on behalf of HK.

105. As a result of Defendant's counterfeiting, HK was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime Victim's Act, Ind. Code § 34-24-3-1.

**COUNT IX**  
**DECEPTION UNDER IND. CODE § 35-43-5-3**

106. HK incorporates herein by reference the allegations contained in all previous paragraphs of this First Amended Complaint.

107. Defendant knowingly or intentionally made a false or misleading written statement, namely that the Defendant's airsoft guns are sponsored by or affiliated with HK, with the intent to obtain property.

108. Defendant, with the intent to defraud, misrepresented the identity or quality of property, namely the Defendant's airsoft guns.

109. As a result of Defendant's deception, HK was damaged and seeks an award of actual damages, treble damages, costs and attorney's fees pursuant to the Indiana Crime Victim's Act, Ind. Code § 34-24-3-1.

**PRAYER FOR RELIEF**

WHEREFORE, HK prays for relief against the Defendant as follows:

- a. That Defendant, its officers, partners, agents, servants, affiliates, employees, attorneys, and representatives, and all those in privity or acting in consent or participation with Defendant, and each and all of them, be permanently enjoined from:
  - (i) Imitating, copying, reproducing, or using, in any manner, the HK IP, or any other mark confusingly similar to the HK IP;
  - (ii) Committing any act that dilutes or is likely to dilute the distinctiveness of the HK IP;
  - (iii) Committing any act that is likely to create the impression that Defendant's business or products are in any way sponsored by, approved of or otherwise affiliated or connected with HK;
  - (iv) Importing, manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product or service using any simulation, reproduction, counterfeit, copy or imitation of any of the HK IP; and
  - (v) instructing, assisting, aiding, or abetting any other person or

business entity in engaging in or performing any of the activities referred to in subparagraphs (i) through (iv) above.

- b. That Defendant be required to:
- (i) Deliver to HK for destruction all goods and materials bearing the HK IP which Defendant has in its possession;
  - (ii) Recall and deliver to HK for destruction all goods and materials bearing the HK IP that have been previously distributed or sold;
  - (iii) Pay compensatory damages to HK in an amount to be determined at trial for the injuries HK has sustained as a consequence of the acts complained of;
  - (iv) Pay HK treble damages, or alternatively, Defendant's profits trebled, whichever is greater;
  - (v) Pay all of HK's litigation expenses, including reasonable attorneys' fees and costs of this action;
  - (vi) Pay interest to HK, including pre-judgment interest on the foregoing sums; and
  - (vii) File with this Court and serve on HK an affidavit setting forth in detail the manner and form of Defendant's compliance with the terms of this Court's orders.
- c. That HK be awarded such other and further relief as the Court may deem just and proper.



**DEMAND FOR TRIAL BY JURY**

Plaintiff hereby respectfully requests a trial by jury in this cause, and for all other relief just and proper in the premises.

Respectfully submitted,

/s/ Brian J. McGinnis  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was filed electronically on the 12<sup>th</sup> day of October, 2009. Notice of the filing will be sent to the following parties by operation of the Court's electronic filing system. The following parties may access this filing through the Court's system.

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