

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MASSIMILIANO MARTONE, an individual;
and MARTONE RADIO TECHNOLOGY, INC., a
Nevada Corporation,

Plaintiffs,

v.

DAVID BURGESS, an individual; KESTREL
SIGNAL PROCESSING, INC., a California
Corporation; and RANGE NETWORKS,
INC.,

Defendant.

No. C 08-2379 CW

ORDER DENYING
PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING
ORDER, DENYING IN PART
WITHOUT PREJUDICE
PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION,
AND GRANTING PLAINTIFFS'
MOTION FOR LEAVE TO FILE
UNDER SEAL; ORDER TO
SHOW CAUSE

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Plaintiffs Massimiliano Martone and Martone Radio Technology, Inc. have moved ex parte for a temporary restraining order that would: 1) enjoin Defendants David Burgess, Kestrel Signal Processing, Inc. and Range Networks, Inc. from disseminating certain information that allegedly constitutes Plaintiffs' intellectual property; 2) compel Defendants to remove certain information that allegedly constitutes Plaintiffs' intellectual property from a publicly accessible internet site; and 3) require Defendants to preserve information that can be used to identify individuals who have accessed Plaintiffs' alleged intellectual

1 property.

2 A temporary restraining order may be issued without providing
3 the opposing party an opportunity to be heard only if "specific
4 facts in an affidavit or a verified complaint clearly show that
5 immediate and irreparable injury, loss, or damage will result to
6 the movant before the adverse party can be heard in opposition."
7 Fed. R. Civ. P. 65(b)(1)(A). If the moving party has made the
8 threshold showing that the circumstances would justify ex parte
9 relief, "[t]he standard for issuing a temporary restraining order
10 is identical to the standard for issuing a preliminary injunction."
11 Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F.
12 Supp. 1320, 1323 (N.D. Cal. 1995). Thus, the moving party must
13 demonstrate either: 1) a combination of probable success on the
14 merits and the possibility of irreparable harm; or 2) that serious
15 questions regarding the merits exist and the balance of hardships
16 tips sharply in the moving party's favor. Wenger v. Monroe, 282
17 F.3d 1068, 1077 (9th Cir. 2002).

18 Plaintiffs have not made a sufficient showing of immediate and
19 irreparable harm to justify granting ex parte relief. Nor does the
20 current record raise serious questions regarding Plaintiffs' claims
21 to warrant a preliminary injunction. It is possible that
22 Defendants have taken, and will continue to continue to take, steps
23 to disseminate information that is Plaintiffs' intellectual
24 property. To the extent Plaintiffs can demonstrate that this is
25 likely, a preliminary injunction is available to stop further
26 irreparable harm. However, the Court cannot evaluate on the
27 present record the strength of Plaintiffs' claim that the
28 information at issue is actually their intellectual property.

1 Plaintiffs have submitted a declaration from Mr. Martone, supported
2 by numerous exhibits, explaining his theory that Defendants made
3 source code developed by Plaintiffs publicly available on the
4 internet. However, the declaration consists largely of Mr.
5 Martone's opinions on the matter. Although Mr. Martone is well
6 versed in the field of software engineering, as a Plaintiff, it is
7 in his interest to provide an opinion that is favorable to his
8 claim. Because the testimony in the declaration is highly
9 technical, the Court is not in a position to evaluate its
10 persuasiveness. Plaintiffs must make a greater showing to obtain a
11 preliminary injunction. They may accomplish this by submitting
12 opinion testimony from a disinterested expert concerning the
13 significance of any similarities between the material Defendants
14 have posted on their internet site and Plaintiffs' intellectual
15 property.

16 In addition, Plaintiffs have not proposed a preliminary
17 injunction that is narrowly drawn to prevent Defendants from
18 disseminating only the specific alleged intellectual property that
19 is the subject of this lawsuit. Their proposal would prohibit
20 Defendants from disseminating "any algorithm, computer code, source
21 code, software, technical information or any other intellectual
22 property or technical data relating to any actual, planned or
23 potential development by Defendants of any base station
24 transceiver." The Court cannot issue an injunction with such a
25 broad reach.

26 With respect to Plaintiffs' request that the Court require
27 Defendants to preserve information that can be used to identify
28 individuals who have accessed their internet site, Plaintiffs have

1 not demonstrated that immediate and irreparable harm will result if
2 the Court affords Defendants an opportunity to oppose the request.

3 For these reasons, Plaintiffs' ex parte motion for a temporary
4 restraining order is DENIED. Their motion for a preliminary
5 injunction is DENIED WITHOUT PREJUDICE to the extent it seeks the
6 first and second forms of relief described in the first paragraph
7 of this order. Plaintiffs may re-file their motion to demonstrate
8 through the use of disinterested expert opinion that the
9 information they seek to enjoin Defendants from disseminating
10 constitutes their intellectual property. Plaintiffs must also
11 submit with their renewed motion a revised proposed preliminary
12 injunction that is narrowly drawn to cover only the specific
13 alleged intellectual property that is the subject of this
14 litigation. The proposed injunction may refer to appended
15 material, if reference to such material is necessary in order to
16 define with precision the scope of the injunction. If Plaintiffs
17 wish to have their renewed motion considered on an expedited basis,
18 they should file a motion to shorten time, in accordance with the
19 Local Civil Rules, at the time they file their renewed motion.

20 To the extent the present motion for a preliminary injunction
21 seeks the third form of relief described in the first paragraph of
22 this order, the Court will take the motion under submission on the
23 papers. Defendants are hereby ordered to show cause, within two
24 days of the date of this order, why they and their agents,
25 officers, directors, employees and anyone acting on their behalf
26 should not be required to preserve and protect the names, internet
27 addresses and other identifiers of all persons or entities who have
28 uploaded, downloaded or otherwise accessed any internet website

1 established by Defendants and containing any algorithms, computer
2 code, software, technical information or any other intellectual
3 property or technical data relating to any base station
4 transceiver. Defendants shall further show cause why Plaintiffs
5 should not be excused from posting a bond if a preliminary
6 injunction to this effect is issued. Plaintiffs shall file a reply
7 to Defendants' submission one day thereafter.

8 Plaintiffs have also filed a motion to lodge the Declaration
9 of Massimiliano Martone and attached exhibits under seal. It is
10 not clear whether, by filing this motion, Plaintiffs seek merely to
11 file the declaration outside of the public record, or instead seek
12 to submit the documents for in camera review without making them
13 available to Defendants. The Court deems the motion as seeking the
14 former category of relief. Because the relevant documents contain
15 confidential information that could be used to harm Plaintiffs if
16 it were filed in the public record, the motion is GRANTED. The
17 documents, however, must be served on Defendants. If the parties
18 are unable to stipulate to a protective order, Plaintiffs may move
19 for one.

20 IT IS SO ORDERED.

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22 Dated: 11/20/08



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CLAUDIA WILKEN
United States District Judge