

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,

No. C 08-2379 CW

Plaintiffs,

PRELIMINARY
INJUNCTION

v.

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

Defendant.

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Plaintiffs Massimiliano Martone and Martone Radio Technology, Inc. previously moved for a preliminary injunction 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 they maintain; and 3) require Defendants to preserve information that can be used to identify individuals who have accessed Plaintiffs' alleged intellectual property,

1 through Defendants' website. The Court held that, because the
2 primary evidence in support of Plaintiffs' position was Mr.
3 Martone's own testimony on highly technical matters of software
4 engineering, the motion did not raise serious questions regarding
5 Plaintiffs' claims to warrant a preliminary injunction granting the
6 first two forms of relief, particularly considering the breadth of
7 such relief. The Court therefore denied the motion in relevant
8 part, without prejudice to re-filing with supporting opinion
9 testimony from a disinterested expert concerning the significance
10 of the similarities between Plaintiffs' intellectual property and
11 the material Defendants have posted on their internet site.

12 With respect to the third form of relief, the Court ordered
13 Defendants to show cause:

14 why they and their agents, officers, directors, employees
15 and anyone acting on their behalf should not be required
16 to preserve and protect the names, internet addresses and
17 other identifiers of all persons or entities who have
18 uploaded, downloaded or otherwise accessed any internet
website established by Defendants and containing any
algorithms, computer code, software, technical
information or any other intellectual property or
technical data relating to any base station transceiver.

19 Docket No. 27 at 4-5. The Court further ordered Defendants to show
20 cause "why Plaintiffs should not be excused from posting a bond if
21 a preliminary injunction to this effect is issued." Id. at 5.

22 In response to the order to show cause, Defendants submitted a
23 twenty-eight page brief, exceeding the twenty-five page limit
24 specified in Local Civil Rule 7-4(b). Less than one page of the
25 brief addresses the relief specified in the order to show cause;
26 the remainder argues generally that Defendants have not
27 misappropriated Plaintiffs' intellectual property. The brief does
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1 not address the bond issue. Regarding the preservation of
2 identifying information, Defendants assert simply that, because the
3 host of their website "uses an anonymous read access mechanism,
4 defendants have no information about the operation of [the host's]
5 servers beyond what is available to the general public." Defs.'
6 Opp. at 27.

7 "Injunctive relief is warranted when the party requesting such
8 relief demonstrates some combination of probable success on the
9 merits and the possibility of irreparable harm. These two factors
10 are not independent tests, but rather 'opposite ends of a single
11 continuum in which the required showing of harm varies inversely
12 with the required showing of meritoriousness.'" Indep. Living Ctr.
13 of S. Cal., Inc. v. Shewry, 543 F.3d 1047, 1049 (9th Cir. 2008)
14 (quoting Rodeo Collection, Ltd. v. W. Seventh, 812 F.2d 1215, 1217
15 (9th Cir. 1987)). "When the balance of harm 'tips decidedly toward
16 the plaintiff,' injunctive relief may be granted if the plaintiff
17 raises questions 'serious enough to require litigation.'" Id.
18 (quoting Benda v. Grand Lodge of the Int'l Ass'n of Machinists &
19 Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978)).

20 Defendants have not demonstrated that they stand to suffer any
21 harm if they are required to preserve information that can be used
22 to identify individuals who have accessed Plaintiffs' alleged
23 intellectual property. They assert simply that they do not have
24 access to such information under their current arrangement with the
25 host of their website. They have not shown, however, that an
26 alternative arrangement is not possible. For instance, they could
27 condition access to their website on the provision of identifying
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1 information. In addition, Plaintiffs have submitted documents
2 obtained from the website's host demonstrating that the host has
3 compiled a large amount of statistical data on access to the
4 website. This suggests that the host possesses at least some
5 identifying information, such as the IP addresses, of those
6 accessing the website. Defendants have not shown that this
7 information is not available to them.

8 Nor have Defendants demonstrated the absence of "questions
9 serious enough to require litigation" to warrant denying
10 Plaintiffs' motion. Their opposition argues primarily that the
11 information they have made publicly available is not Plaintiffs'
12 intellectual property. But this argument is largely conclusory and
13 rests almost entirely on Mr. Burgess' own testimony. While
14 Plaintiffs' position suffers from the same weakness of relying on
15 self-serving testimony, Plaintiffs have nonetheless pointed to
16 specific similarities between their alleged intellectual property
17 and the material on Defendants' website. Although, as the Court
18 previously found, Plaintiffs have not yet made an adequate showing
19 of serious questions to justify imposing the harm on Defendants
20 that may result from granting either of the first two forms of
21 relief sought, the balance of harm associated with the third form
22 of relief is different. Requiring Defendants to preserve
23 identifying information poses no harm to them, while posing a risk
24 to Plaintiffs that they will be unable to take further steps to
25 ensure that their intellectual property is secure in the future.
26 Accordingly, the legal questions Plaintiffs have raised are
27 sufficiently serious to warrant granting this form of relief.

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1 For these reasons, IT IS HEREBY ORDERED that Defendants and
2 their agents, officers, directors, employees and anyone acting on
3 their behalf are enjoined from making available on any internet
4 website any algorithm, computer code, software, technical
5 information or any other intellectual property or technical data
6 relating to any base station transceiver, unless they gather and
7 preserve the names, internet addresses and other identifiers of all
8 persons or entities who upload, download or otherwise access any
9 such information.

10 This preliminary injunction will take effect upon Plaintiffs'
11 posting a bond in the amount of \$1,000. The Court finds that this
12 amount is appropriate, given that Defendants have not shown any
13 realistic likelihood of their suffering harm as a result of this
14 injunction. See Jorgensen v. Cassidy, 320 F.3d 906, 919 (9th Cir.
15 2003).

16 As stated previously, if Plaintiffs wish to obtain additional
17 injunctive relief, they must re-file their motion for a preliminary
18 injunction, demonstrating through the use of disinterested expert
19 opinion that the information they seek to enjoin Defendants from
20 disseminating constitutes their intellectual property. Plaintiffs
21 must also submit with their renewed motion a revised proposed
22 preliminary injunction that is narrowly drawn to cover only the
23 specific alleged intellectual property that is the subject of this
24 litigation. The proposed injunction may refer to appended
25 material, if reference to such material is necessary in order to
26 define with precision the scope of the injunction. If Plaintiffs
27 wish to have their renewed motion considered on an expedited basis,

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1 they should file a motion to shorten time, in accordance with the
2 Local Civil Rules, at the time they file their renewed motion.

3 IT IS SO ORDERED.

Claudia Wilken

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5 Dated: 12/3/08

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CLAUDIA WILKEN
United States District Judge

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