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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Brunswick Corporation, a Delaware corporation,

Plaintiff,

v.

Simon Performance Technology, Inc.,
a California general stock corporation,
and

Eric T. Simon, an individual,

Defendants.

Case No. 3:20-cv-00889-BEN-AHG

**ORDER GRANTING JOINT
MOTION ENTERING CONSENT
JUDGMENT AND PERMANENT
INJUNCTION**

(DOC. NO. 13)

On May 12, 2020, Plaintiff Brunswick Corporation (“Brunswick”) filed a Complaint seeking a permanent injunction, damages and other relief against Defendants Simon Performance Technology, Inc. and Eric T. Simon, and their officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with Defendant for infringement of Brunswick’s

1 copyrights to its Mercury L6 Verado software and Mercury Great White software
2 under 17 U.S.C. § 501 and for violations of the Digital Millennium Copyright Act
3 under 17 U.S.C. §§ 1201(a)(1), 1201(a)(2), and 1201(b)(1).

4 Plaintiff and Defendants have now agreed to entry of this Stipulated Consent
5 Judgment and Permanent Injunction to resolve all matters in dispute between them
6 in this action. Plaintiff and Defendants have consented to entry of this Judgment
7 without trial or adjudication of any issue of law or fact herein.

8 **NOW, THEREFORE**, Plaintiffs and Defendant having requested the Court
9 to enter this Judgment, it is hereby ordered, adjudged, and decreed:

10 **STIPULATED FINDINGS OF FACT**

11 1. This Court has jurisdiction of the subject matter of this case and over
12 all parties hereto.

13 2. The Complaint states claim upon which relief may be granted against
14 the Defendants under 17 U.S.C. §§ 501, 1201(a)(1), 1201(a)(2), and 1201(b)(1).

15 3. Venue in the United States District Court for the Southern District of
16 California, San Diego Division is proper pursuant to 28 U.S.C. § 1391(b) and (c)
17 and 28 U.S.C. § 1400(a).

18 4. The balance of hardships and public policy favor the issuance of a
19 permanent injunction in favor of Brunswick.

20 5. The parties agree that no bond should be required.

21 6. An injunction will not adversely affect and is in the public interest.

22 7. Brunswick, through its unincorporated division Mercury Marine
23 (“Mercury”) manufactures marine engines and propulsion systems.

24 8. Mercury engines are controlled using software embedded on a control
25 module typically referred to as an engine control unit (ECU), engine control module
26 (ECM), or powertrain control module (PCM).

1 9. Brunswick owns all rights, title, and interest in and to the Mercury L6
2 Verado software are registered as TX8-837-639 (Verado Engine Control
3 MY2007p4) TX8-858-294 (Verado Engine Control LEG14) and to the Mercury
4 Great White software are registered as TX8-837-854 (Great White Engine Control
5 2018) and TX8-837-635 (Great White Engine Control 2019).

6 10. Brunswick employs at least one technological measure for controlling
7 access to Mercury's L6 Verado software and protecting a copyright in Mercury's
8 L6 Verado software. Brunswick also employs at least one technological measure
9 for controlling access to Mercury's Great White software and protecting a copyright
10 in Mercury's Great White software.

11 11. The Mercury L6 Verado software and Mercury Great White software
12 are valuable assets of Brunswick and represent a significant investment of research
13 and development costs.

14 12. Defendants promoted their products and services on their websites
15 simonmotorsports.com and simonperftech.com.

16 13. Defendants promoted, offered for sale and sold products and services
17 for upgrading Mercury engines, including upgrade tools and "tunes" for Mercury
18 engines.

19 14. Defendant Eric T. Simon personally engaged in offering and selling
20 upgrade tools and "tunes" for Mercury engines for and on behalf of Defendant
21 Simon Performance Technology and/or directed and controlled the acts of
22 Defendant Simon Performance Technology related to offer and sale of upgrade
23 tools and "tunes" for Mercury engines and benefitted financially from such acts.

24 15. Defendants, in the course of offering and selling upgrade tools and
25 "tunes" for Mercury engines, and without authorization, have reproduced and
26 copied Mercury's L6 Verado software and Great White software; have created
27 derivative works based upon Mercury's L6 Verado software and Great White
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1 software; and/or have distributed copies of Mercury’s L6 Verado software and
2 Great White software to the public by sale or other transfer.

3 16. Defendants, in the course of offering and selling upgrade tools and
4 “tunes” for Mercury engines, and without authorization, have circumvented
5 technological measures that control access to Mercury’s L6 Verado software and/or
6 Great White software.

7 17. Defendants, in the course of offering and selling upgrade tools and
8 “tunes” for Mercury engines, and without authorization, have offered to the public
9 and provided, technology, products, services, devices, components, or parts thereof,
10 that are primarily designed or produced for the purpose of circumventing a
11 technological measure controlling access to Mercury’s L6 Verado software and/or
12 Great White software, that have only limited commercially significant purpose or
13 use other than to circumvent such technological measures, and that are marketed by
14 Defendants or those acting in concert with Defendants, with Defendants’
15 knowledge for use in circumventing a technological measure controlling access to
16 Mercury’s L6 Verado software and/or Great White software.

17 18. Defendants, in the course of offering and selling upgrade tools and
18 “tunes” for Mercury engines, and without authorization, have offered to the public
19 and provided technology, products, services, devices, components, or parts thereof,
20 that are primarily designed or produced for the purpose of circumventing protection
21 afforded by a technological measure protecting a copyright in Mercury’s L6 Verado
22 software and/or Great White software, that have only limited commercially
23 significant purpose or use other than to circumvent such protection, and that are
24 marketed by Defendants or those acting in concert with Defendants, with
25 Defendants’ knowledge for use in circumventing such protection.

26 19. Defendants, Simon Performance Technology, Inc. and Eric T. Simon,
27 agree to entry of this Stipulated Consent Judgment and Permanent Injunction to
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1 resolve all matters of dispute between Defendants and Plaintiff arising out of the
2 allegations in Plaintiff’s Complaint, and Defendants agree to be bound by this
3 Stipulated Consent Judgment and Permanent Injunction.

4 20. Defendants have waived all rights to seek judicial review or otherwise
5 challenge or contest the validity of this Judgment, and further waive and release any
6 claim Defendants may have against Plaintiff and its employees and agents,
7 including any rights that may arise for attorney fees or other costs.

8 21. The parties shall each bear their own costs and attorneys’ fees incurred
9 in this action.

10 **STIPULATED CONCLUSIONS OF LAW**

11 1. Defendants, in the course of offering and selling upgrade tools and
12 “tunes” for Mercury engines, and without authorization, have infringed
13 Brunswick’s copyrights in the Mercury L6 Verado software in violation of 17
14 U.S.C. § 501 by reproducing copies of the Mercury L6 Verado software, preparing
15 derivative works based on the Mercury L6 Verado software, and/or distributing
16 copies of the Mercury L6 Verado software or the derivative works.

17 2. Defendants, in the course of offering and selling upgrade tools and
18 “tunes” for Mercury engines, and without authorization, have infringed
19 Brunswick’s copyrights in the Mercury Great White software in violation of 17
20 U.S.C. § 501 by reproducing copies of the Mercury Great White software, preparing
21 derivative works based on the Mercury Great White software, and/or distributing
22 copies of the Mercury Great White software or the derivative works.

23 3. Defendants, in the course of offering and selling upgrade tools and
24 “tunes” for Mercury engines, and without authorization, have contributorily
25 infringed Brunswick’s copyrights in the Mercury L6 Verado software and the
26 Mercury Great White software by knowingly inducing, causing, or materially
27 contributing to copyright infringement by another having knowledge, or reason to
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1 know, of the infringement, through marketing, use, and distribution of upgrade tools
2 and “tunes” for Mercury L6 Verado engines, Mercury V6 engines, and Mercury
3 V8 engines.

4 4. Defendants circumvented technological measures that control access
5 to Mercury’s L6 Verado software and Great White software in violation of 17
6 U.S.C. § 1201(a)(1).

7 5. Defendants offered to the public and provided technology, products,
8 services, devices, components, or parts thereof, that are primarily designed or
9 produced for the purpose of circumventing a technological measure controlling
10 access to Mercury’s L6 Verado software and Great White software, that have only
11 limited commercially significant purpose or use other than to circumvent such
12 technological measures, and that are marketed by Defendants or those acting in
13 concert with Defendants, with Defendants’ knowledge for use in circumventing a
14 technological measure controlling access to Mercury’s L6 Verado software and
15 Great White software in violation of 17 U.S.C. § 1201(a)(2).

16 6. Defendants offered to the public and provided technology, products,
17 services, devices, components, or parts thereof, that are primarily designed or
18 produced for the purpose of circumventing protection afforded by a technological
19 measure protecting copyrights in Mercury’s L6 Verado software and Great White
20 software, that have only limited commercially significant purpose or use other than
21 to circumvent such protections, and that are marketed by Defendants or those acting
22 in concert with Defendants, with Defendants’ knowledge for use in circumventing
23 such protection in violation of 17 U.S.C. § 1201(b)(1).

24 7. As a direct and proximate result of Defendants’ actions, Brunswick has
25 been irreparably harmed, including damage to its business and reputation, and
26 Brunswick will continue to be irreparably harmed unless and until Defendant ceases
27 offering and selling upgrade tools and “tunes” for Mercury engines.
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1 Control LEG14), TX8-837-854 (Great White Engine Control 2018) or TX8-837-
2 635 (Great White Engine Control 2019); and

3 G. otherwise engaging in any other acts or conduct that would infringe
4 Brunswick's copyrights or violate the anti-circumvention provisions of Digital
5 Millennium Copyright Act applicable to Brunswick's products.

6 **IT IS FURTHER ORDERED** that Simon Performance Technology, Inc.
7 and Eric T. Simon, their officers, agents, servants, employees, and attorneys, and
8 other persons who are in active concert or participation with:

9 H. turn over to Plaintiff or destroy all products that violate Brunswick's
10 copyrights or violate the anti-circumvention provisions of Digital Millennium
11 Copyright Act applicable to Brunswick's products, including all upgrade tools and
12 "tunes" for Mercury engines;

13 I. turn over to Plaintiff or destroy all advertising paraphernalia, kits,
14 labels, signs, prints, packages, containers, stationery, promotion materials, clothing,
15 advertising and other items, whether in physical, electronic, or other form, that
16 advertise or promote services for violating Brunswick's copyrights or the anti-
17 circumvention provisions of Digital Millennium Copyright Act applicable to
18 Brunswick's products;


19 J. abide by the terms and conditions of the separately executed
20 Confidential Settlement Agreement between the parties;

21 This Court will retain jurisdiction over any disputes between the parties, their
22 heirs, successors, and assigns with respect to enforcement of this Stipulated Consent
23 Judgment and Permanent Injunction and any settlement agreement entered into
24 between Plaintiff and Defendants regarding this litigation.

25 **IT IS SO ORDERED.**

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1 Dated: July 7, 2020

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3 Hon. Anthony J. Battaglia
4 United States District Judge
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