

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

PREMIER SELLING TECHNOLOGIES,
et al.,

Defendants.

CASE NO. C15-463RAJ

TEMPORARY RESTRAINING
ORDER & ORDER TO SHOW
CAUSE

I. INTRODUCTION

This matter comes before the court on the ex parte motion of Plaintiff Microsoft Corporation for a temporary restraining order (“TRO”). Dkt. # 2. For the reasons stated herein, the court GRANTS the motion, although it does not award all of the relief Microsoft requests. Part III of this order includes a TRO that will take effect, as to each Defendant, as soon as Microsoft effects service of this order upon that Defendant. Unless the court orders otherwise, that TRO will convert to a preliminary injunction 14 days after Microsoft serves this order, and that conversion will be effective without the necessity of additional service upon any Defendant.

The court orders that each Defendant must, within 14 days of service of this order on that Defendant, show cause why the court should not convert the TRO into a preliminary injunction. Unless Defendant a timely shows cause *and* the court issues an order terminating the TRO, the TRO will convert to a preliminary injunction 14 days

ORDER – 1

1 after Microsoft serves this order, and that conversion will be effective without the
2 necessity of additional service upon any Defendant.

3 **II. BACKGROUND & ANALYSIS**

4 The “standard for issuing a temporary restraining order is essentially the same as
5 that for issuing a preliminary injunction.” *Beaty v. Brewer*, No. 11-9907, 2011 U.S. App.
6 LEXIS 11391, at *8 (9th Cir. May 25, 2011). The primary difference is that a court can
7 issue a TRO without notice to the adverse party in certain circumstances. Fed. R. Civ. P.
8 65(b)(1)(A). Putting aside concerns about notice to the non-moving party, the court may
9 issue a TRO where a party establishes (1) a likelihood of success on the merits, (2) that it
10 is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the
11 balance of hardships tips in its favor, and (4) that the public interest favors an injunction.
12 *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). A party can
13 also satisfy the first and third elements of the test by raising serious questions going to the
14 merits of its case and showing that the balance of hardships tips sharply in its favor.
15 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). In
16 cases where clear irreparable harm would result and there are serious questions going to
17 the merits, a court may issue provisional relief for the purpose of permitting it to consider
18 the merits of the dispute on a reasonable timetable. *Id.* at 1134. *Small v. Avanti Health*
19 *Sys., LLC*, 661 F.3d 1180, 1187 (9th Cir. 2011) (noting that it appears settled that *Winter*
20 did not “change the requisite showing for any individual factor [in the Ninth Circuit’s
21 preliminary injunction analysis] other than irreparable harm”).

22 **A. Likelihood of Success on the Merits**

23 The evidence that Microsoft has submitted in support of its motion convinces the
24 court that it is highly likely to prove that Defendants are engaging in a conspiracy to
25 resell Microsoft’s software in violation of the Copyright Act and the Lanham Act. The
26 Defendants are three Canadian residents (Mark Valentine, Cody Jerry Allan Altizer, and
27

1 Robert Romero), one Canadian Corporation (Premier Selling Technologies, Inc., or
2 “PST”), and a host of alter egos.¹ Their conspiracy, reduced to its essence, is as follows:

- 3 1) Since April 2014, PST has been registered as a Microsoft authorized education
4 reseller. That registration allows it to sell Microsoft software products to
5 educational users at reduced prices.
- 6 2) PST, acting through Defendants, has created fictitious sales to fictitious
7 educational users, thereby obtaining many “product keys” from Microsoft. A
8 product key is a lengthy code that allows a person using it to download
9 software from Microsoft over the internet.
- 10 3) Using a network of websites (including premiersellingtechnologies.org,
11 amazingtechdeals.net, softwaresupplysource.com, and advantageittech.com),
12 Defendants advertise Microsoft software at “wholesale discounts.” When a
13 customer purchases this “discounted” software, Defendants supply the
14 customer with a product key it obtained as described above. Defendants
15 pocket the profits.
- 16 4) Defendants have none of the indicia of a legitimate business enterprise. The
17 business address in Toronto that PST provided to Microsoft is a vacant
18 building. Microsoft has been unable to locate PST anywhere. The websites
19 that Defendants use to sell Microsoft’s products are registered to fictitious
20 entities or via services that obscure the identity of the person or entity
21 operating the website.

22 PST has created more than 260 fictitious educational sales agreements. The
23 product keys Defendants have obtained as a result of those fictitious sales have been used
24 on at least 20,000 devices in about 60 countries to download Microsoft software.
25 Microsoft estimates that it has lost almost \$8 million in sales revenue as a result.

27 ¹ Plaintiffs also named “Billing Systems Corp.” as a Defendant, but admits that it has no
28 evidence that the entity has been incorporated anywhere.

1 Microsoft has demonstrated that it has registered copyrights for the software
2 Defendants have illegally sold, and the Microsoft trademarks that Defendants have used
3 in their unlawful sales are federally registered.

4 Although Microsoft does not discuss the potential issues of extraterritoriality that
5 arise from enforcing the Lanham Act and Copyright Act against foreign Defendants, the
6 court is convinced that Microsoft is likely to succeed in that regard as well. A plaintiff
7 can apply the Lanham Act to foreign activity if it satisfies three requirements: (1) the
8 foreign activity must have some effect on American commerce, (2) that effect must inflict
9 a cognizable Lanham Act injury on the party, and (3) the interest of and links to
10 American commerce must be sufficiently strong in relation to those of other nations.
11 *Ocean Garden, Inc. v. Marktrade Co.*, 953 F.2d 500, 503 (9th Cir. 1991); *Reebok Int'l,*
12 *Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 554 (9th Cir. 1992). Microsoft is likely to
13 succeed in proving that Defendants' foreign sales of Microsoft goods, particularly to
14 customers in the United States, are within the scope of the Lanham Act. The Copyright
15 Act does not reach acts of infringement that take place entirely abroad. *Subafilms, Ltd. v.*
16 *MGM-Pathé Communications Co.*, 24 F.3d 1088, 1098 (9th Cir. 1994). In this case,
17 however, Microsoft is likely to succeed in proving that Defendants' foreign conduct has
18 induced infringement of Microsoft's copyrights by customers in the United States. *See,*
19 *e.g., MGM Studios Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1097 (C.D. Cal. 2003);
20 *see also Los Angeles News Serv. V. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 992 (9th
21 Cir. 1998) (approving Second Circuit rule that "a party becomes liable for extraterritorial
22 damages only when an act of infringement occurs within the United States, subjecting it
23 to liability as an infringer (or a contributory infringer) under the Copyright Act").

24 To summarize: Microsoft has demonstrated a strong likelihood of success on the
25 merits of its Copyright Act and Lanham Act claims.

1 **B. Irreparable Harm**

2 Defendants’ activities have caused and will cause Microsoft to lose customers.
3 Moreover, because Defendants will not provide support to the customers to whom they
4 unlawfully sell, Microsoft’s reputation is likely to be damaged *See Stuhlberg Int’l Sales*
5 *Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) (“Evidence of threatened
6 loss of prospective customers or goodwill certainly supports a finding of the possibility of
7 irreparable harm.”). Microsoft has demonstrated that it invests substantial resources into
8 protecting the brand that its registered trademarks represent, and has demonstrated that
9 Defendants’ conduct has irreparably harmed that brand and will continue to do so.

10 It is possible that monetary damages would serve as an adequate remedy for at
11 least some of the harm Microsoft has suffered and will continue to suffer. An injunction
12 should not issue where money damages are an adequate remedy. *Herb Reed Enters.,*
13 *LLC v. Fla. Entm’t Mgmt.*, 736 F.3d 1239, 1250 (9th Cir. 2013). Here, however,
14 Microsoft’s evidence establishes not only that Defendants are profiting at Microsoft’s
15 expense, but that Defendants have gone to great lengths to hide themselves and the assets
16 that are the fruits of their unlawful conspiracy. That Microsoft is unlikely to obtain
17 monetary relief is further evidence of irreparable harm. *Cal. Pharmacists Ass’n v.*
18 *Maxwell-Jolly*, 563 F.3d 847, 851-52 (9th Cir. 2009), *vacated for other reasons by*
19 *Douglas v. Independent Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012); *Hilao v.*
20 *Marcos*, 25 F.3d 1467, 1480 (“[A] district court has authority to issue a preliminary
21 injunction where the plaintiffs can establish that money damages will be an inadequate
22 remedy due to impending insolvency of the defendant or that defendant has engaged in a
23 pattern of secreting or dissipating assets to avoid judgment.”).

24 **C. Balance of Hardships**

25 The balance of hardships tips sharply in Microsoft’s favor. The only hardship
26 Defendants face from the injunction is the cessation of their unlawful business activities.
27

1 Microsoft, by contrast, faces the hardship of ongoing lost profits, ongoing lost customers,
2 and ongoing damage to its goodwill.

3 **D. Public Interest**

4 The public interest favors Microsoft’s right to enforce its trademarks and
5 copyrights. Allowing Defendants to continue their scheme serves no public interest.

6 **E. TRO Without Notice to Defendants**

7 Finally, the court concludes that it is proper to issue this order without notice to
8 Defendants. Federal Rule of Civil Procedure 65(b)(1) permits the court to do so where
9 “specific facts in an affidavit or a verified complaint clearly show that immediate and
10 irreparable injury, loss, or damage will result to the movant before the adverse party can
11 be heard in opposition,” and the “movant’s attorney certifies in writing any efforts made
12 to give notice and the reasons why it should not be required.” Here, Microsoft has not
13 only demonstrated that it will continue to suffer irreparable harm every day that it waits
14 for an injunction, but its evidence convinces the court that Defendants are likely to take
15 steps to hide themselves, their unlawful conduct, and the fruits of that unlawful conduct if
16 they are given notice before the court awards an injunction.

17 **F. Microsoft Is Not Entitled to an Order Impacting Third Parties.**

18 Microsoft has, for the reasons stated above, satisfied its burden to demonstrate that
19 the court should enjoin Defendants not only from continuing their unlawful conduct, but
20 also from transferring the fruits of that conduct. But Microsoft asks for much more. It
21 asks the court to enjoin every third party who is assisting Defendants, even innocently, in
22 carrying out their unlawful scheme. For example, it asks the court to enjoin any internet
23 service provider or financial institution who is assisting Defendants. Microsoft does so
24 even though, at least so far as the record reflects, it cannot identify any third party who is
25 assisting Defendants. Even assuming that there are third parties assisting Defendants,
26 Microsoft has not given the court any reason to believe that they are within the
27 jurisdictional reach of the United States. Microsoft asks, in essence, for a TRO indorsed

1 in blank that it can serve upon any third party, anywhere in the world, who might be
2 helping Defendants carry out their scheme. The court will not grant that request.

3 Without substantially better evidence from Microsoft, evidence that demonstrates
4 that an identified third party is assisting Defendants in carrying out their scheme, the
5 court will not enjoin any third party except for third parties who are knowingly acting in
6 concert with Defendants to carry out the scheme the court has already described.

7 **G. Discovery May Begin Immediately.**

8 Microsoft may commence discovery, including discovery to third parties,
9 immediately. Microsoft asks the court to order in advance that any third party receiving a
10 subpoena or other discovery request from Microsoft must respond to it within 5 days.
11 Again, Microsoft asks for too much. Again, the court cannot be certain that the third
12 parties from whom Microsoft will seek discovery are located in the United States or
13 otherwise subject to the court's jurisdiction. Putting that aside, the court will not compel
14 unknown third parties to produce an unknown number of documents in just five days.
15 The court encourages any third party receiving a legitimate subpoena or other request
16 from Microsoft to cooperate expeditiously. The court will take a dim view of any third
17 party who obstructs legitimate efforts at discovery. The court will not, however, override
18 ordinary legal protections for third parties in discovery. To the extent that Microsoft can
19 point to a specific third party and a specific reason for expedited discovery from that
20 party, it is welcome to seek relief from the court.

21 **III. TEMPORARY RESTRAINING ORDER**

22 1) Upon service of this order, and until further order of the court, Defendants
23 (Premier Selling Technologies, Inc.; Mark E. Valentine; Cody Jerry Allan
24 Altizer; Robert Romero; Billing Systems Corp.; and any alter egos or aliases
25 for these individuals or entities) are prohibited from the following:

- 26 a) Selling, offering for sale, distributing, or otherwise trafficking in any
27 Microsoft product without Microsoft's express written permission;

