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Building The Wireless Future™

CTIA

Cellular Telecommunications Industry Association
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May 9, 1995

RECEIVED
MAY - 9 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: *Ex Parte* Presentation
CC Docket No. 92-115

Dear Mr. Caton:

On Monday, May 8, 1995, the Cellular Telecommunications Industry Association ("CTIA") represented by Mr. Michael Altschul, Vice President and General Counsel; Ms. Andrea Williams, Staff Counsel; and Ms. Catherine Massey, Regulatory Counsel, McCaw Cellular Communications, met with Ms. Ruth Milkman, Senior Legal Advisor to Chairman Reed E. Hunt to discuss ESN security and the cloning of cellular telephones.

At the meeting, CTIA presented the attached documents. Pursuant to Section 1.1206 of the Commission's Rules, an original and one copy of this letter and the attachments are being filed with your office. If you have any questions concerning this submission, please contact the undersigned.

Sincerely,

Andrea D. Williams

Andrea D. Williams
Staff Counsel

Attachments

No. of Copies rec'd 0+1
List A B C D E

CTIA **Building The Wireless Future**

Combating Wireless Fraud: Maintaining the Integrity of Factory-Set Electronic Serial Numbers

Ex Parte Presentation
CC Docket No. 92-115
May 8, 1995

THE "EMULATION" OF ELECTRONIC SERIAL NUMBERS = CLONING

- The Electronic Serial Number (ESN) is a unique number assigned to a cellular phone by the manufacturer. Section 22.919 of the FCC's rules requires the ESN to be fixed and unchangeable, thus establishing a unique fingerprint for each phone. The cellular industry relies on ESN/MIN (Mobile Identification Number) pairs to validate its legitimate customers.

- Cloning refers to a method by which the original, factory-set ESN of a cellular phone has been altered, transferred, removed, or modified then reprogrammed into another cellular phone.

- Cloning fraud, the most prevalent type of cellular fraud, requires the ability to obtain valid ESN/MIN pairs, erasing the existing ESN from a cellular telephone and replacing it with a copied or cloned ESN. Once stolen ESN/MIN pairs are entered into cellular phones, the cloned telephone is able to gain unlawful access to cellular service.

- Cloned telephones are used not only to obtain free cellular service, but also to conduct criminal activity such as narcotic and drug trafficking.

- The type of ESN alteration/modification used and advocated by C Two Plus Technology and its affiliates cannot be distinguished from any other cloning of cellular telephones.

THE FCC'S POLICY AND RULES GOVERNING THE ALTERATION OF THE ESN

Since 1991, the Commission has clearly stated its policy and rules governing the alteration or modification of the original, factory-set ESNs in cellular telephones.

> **"Phones with altered ESNs do not comply with the Commission's rules and any individual or company operating such phones or performing such alterations is in violation of...the Commission's rules."** *FCC Public Notice, Report No. CL-92-3, October 2, 1991.*

> **"It is a violation of ...the Commission's Rules for an individual or company to alter or copy the ESN of a cellular telephone so that the telephone emulates the ESN of any other cellular telephone. Moreover, it is a violation of the Commission's Rules to operate a cellular telephone that contains an altered or copied ESN."** ***Letter of Clarification from Mr. John Cimko, Chief, FCC's Mobile Services Division, to Mr. Michael Altschul, dated January 15, 1993, concerning modification of ESNs by the NAM Emulation Programming Device manufactured and distributed by C Two Plus Technology.***

> **"Alteration of an ESN can interfere with a cellular carrier's effort to bill and collect for the use of its facilities. There is evidence suggesting that mobile phones with modified or cloned ESNs are used in a majority of cases involving cellular fraud....phones with altered ESNs do not comply with the Commission's rules...."** ***Letter of Clarification from Mr. John Cimko, Chief, FCC's Mobile Services Division, to the Honorable Jim Sasser, U. S. Senator, dated June 21, 1994, concerning a constituent's desire to have the same telephone number for each of his cellular telephones.***

"Any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of...[the Commission's] rules. Thus, we advise all cellular licensees and subscribers that the use of the C2+ altered cellular telephones constitutes a violation of the Act and our rules." *Part 22 Report and Order, 9 FCC Rcd 6513 (1994).*

A FEDERAL COURT HAS ENFORCED THE FCC'S NEW ESN SECURITY RULE

In Houston, Texas, the U.S. District Court has issued a permanent injunction against a C Two Plus affiliate. In its decision, the Court determined that emulation of the electronic serial numbers of cellular telephones by the defendant, an affiliate of C Two Plus Technology, violates the *Part 22 Report and Order*. *See Houston Cellular Telephone Company v. John C. Nelson, et. al*, Civil Action H-95-617, (S.D. Tex March 17, 1995).

While the FCC and the Court have clearly stated that emulation of ESNs violates the FCC's rules, a recent press release of a C Two Plus affiliate continues to ignore the ESN security rule by stating that the FCC's *Part 22 Report and Order* is an advisory opinion and "is not legally binding." *See Business Wire*, Dow Jones and Company, Charlotte, North Carolina (April 6, 1995).

THE CELLULAR LICENSEE'S RESPONSIBILITY FOR ADDITIONAL MOBILE UNITS

- Part 68 of the Commission's rules sets forth the customer-carrier relationship for the connection of additional phones to wired service. Under Part 68, it is the customer, not the wireline carrier, that assumes responsibility for the connection of additional phones on the customer's premises.

- The FCC, however, has prescribed a very different customer-carrier relationship for cellular service. The FCC holds the cellular licensee, not the customer, responsible for effective operational control over all mobile stations, *i.e.*, cellular mobile units, that communicate with the cellular licensee's base station. *See* 47 CFR Section 22.912.

- With cloned phones, it is impossible for the cellular licensee to comply with this Rule.

    - The licensee does not control the alteration or manipulation of the ESN.
    - The licensee cannot track or bill the cloned phone.
    - Cloned phones which are not controlled or authorized by the carriers do not fall within the carrier's blanket license. Therefore, such phones are unauthorized transmitters and violates Section 301 of the Communications Act.
    - Because the licensee does not control the cloned phone, the licensee also cannot ensure that the operation of a cloned phone does not interfere with legitimate customers' access to cellular service.

- Carriers are increasingly deploying anti-fraud features such as radio fingerprinting and velocity checking to combat cellular fraud. With the deployment of such features, a cloned phone can be detected and removed from the system before the user accesses the system. Thus, cloned phones customers will be denied access or removed from the system, regardless of their intended use of the phone.

RESPONDING TO CUSTOMER DEMAND WHILE PROTECTING AGAINST CELLULAR FRAUD

- **In response to consumers' desire to have two phones with the same phone number, cellular carriers have begun deploying switch-based technology which will "look for" or page several phones with the same MIN.**

- **Unlike cloned phones, each phone has a distinct, factory-set ESN.**

- **Unlike cloned phones, the switch-based technology allows cellular systems to authenticate or validate legitimate mobile units.**

PETITIONERS SEEK RECONSIDERATION OF SECTION 22.919

- **In the *Part 22 Report and Order*, the FCC stated that Section 22.915, which governs cellular specification compatibility, has been retained and renumbered Section 22.933. *See Part 22 Report and Order*, 9 FCC Rcd at 6526, n. 108 (1994).**

- **While C Two Plus Technology refers to Section 22.915 in its reply to *TIA/CTIA Joint Reply to Petitions for Reconsideration*, it does so in the context of cellular specification compatibility, not ESN security.**

- **Section 22.919 which governs ESN security, not the cellular specification compatibility under the former Section 22.915, is at issue on reconsideration of the *Part 22 Report and Order*.**

CONCLUSION

- **The FCC and a Federal Court have clearly stated that the "emulation" of ESNs violates the FCC's Rule governing ESN security.**

- **The type of alteration or modification of ESNs advocated and used by C Two Plus Technology to provide "extension" service is pure and simple cloning.**

- **To allow such cloning would not only violate the FCC's rules but also undermine the FCC's policy and recent enforcement efforts to combat cellular fraud.**

APPENDIX A

1. *Business Wire*, Dow Jones and Company, Charlotte, North Carolina (April 6, 1995).

2. *Houston Cellular Telephone Company v. John C. Nelson, et al.*, Civil Action H-95-617, (S.D. Tex. March 17, 1995).

3. *Plaintiff's Original Complaint and Request for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction, Houston Cellular Telephone Company v. John C. Nelson, et al.*, Civil Action H-95-617, (S.D. Tex. filed March 1, 1995).

4. *In the Matter of Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services,* CC Docket No. 92-115, *Report and Order*, 9 FCC Rcd 6513, 6525-6526 (1994).

5. *Letter of Clarification from Mr. John Cimko, Chief, FCC's Mobile Services Division, to the Honorable Jim Sasser, U. S. Senator*, dated June 21, 1994, concerning a constituent's desire to have the same telephone number for each of his cellular telephones.

6. *Letter of Clarification from Mr. John Cimko, Chief, FCC's Mobile Services Division, to Mr. Michael Altschul,* dated January 15, 1993, concerning modification of ESNs by the NAM Emulation Programming Device manufactured and distributed by C Two Plus Technology.

7. *Letter from Mr. Michael Altschul, Vice President and General Counsel for CTIA, to Ms. Renee Licht, FCC's Acting General Counsel,* dated November 4, 1992, requesting FCC's written concurrence that cellular phones containing ESNs modified by the NEPD do not conform to Part 22 Rules.

8. *FCC Public Notice, Report No. CL-92-3, October 2, 1991.*

CHARLOTTE, N.C.--(BUSINESS WIRE)--April 6, 1995--The latest innovation in the telecommunications industry has come to the Carolinas, bringing convenience for those who use it and controversy for the government.

The innovation is a ocellularo extension. It enables you to have two or more ocellularo phones on one line. Offered by Affordable oCellularo Extensions of Charlotte, an extension costs a one-time fee of $199. In comparison, phone companies charge $20 to $35 per month for a separate phone line.

The extension duplicates a telephone's electronic serial number. The results: you can hook more than one phone to a single telephone number. Only one phone may be used at a time, however.

The service appeals to salespeople, doctors, lawyers, and other professionals. They buy it to stay in touch with the office while in or out of the car and remain accessible to clients and staff. Extensions give family members a way to contact each other easily and provide a sense of security at night -- owners always have access to a phone.

What's the controversy? Phone companies, of course, wish this service would disappear. The government has some questions, too, claiming the service might encourage fraud.

In September, the Federal Communications Commission issued an advisory opinion saying the use of altered ocellularo telephones violates the Communications Act of 1994. Though the FCC's opinion is not legally binding, the commission is considering new regulations that might change how ocellularo phones are produced.

The ocellularo phone market is growing 40% annually in the U.S., according to industry research. Some analysts estimate as many as one-third of ocellularo owners are interested in extension capabilities.

For more information on ocellularo extensions, call Gary Raflo, owner of Affordable oCellularo Extensions, at 704/358-1926.

CONTACT: Andrea Cooper Communications, Charlotte
Andrea Cooper, 704/343-2543

11:36 ET APR 06, 1995
News Source: Business Wire
Industry: I/CTS I/TLS
Subject: N/BW N/PDT
Market Sector: M/UTI
Geographic Region: R/NC R/NME R/US R/USS
Message 0469 from PR

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United States District Court
Southern District of Texas
Houston Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

MAR 1 7 1995

Michael N. Milby, Clerk

HOUSTON CELLULAR TELEPHONE COMPANY,	§	
Plaintiff,	§	
versus	§	CIVIL ACTION H-95-617
JOHN C. NELSON, Doing Business as Both Cell Time Cellular and Action Cellular and DANNY HART, Doing Business as Action Cellular and ACTION CELLULAR EXTENSION, Inc.,	§	
Defendants.	§	

PERMANENT INJUNCTION

A. *Findings.*

Based on the stipulations and evidence, the court makes these findings:

1. John C. Nelson, Jr., who has done business as Cell Time Cellular and who is a representative of Action Cellular Extensions, Inc., has engaged in the emulation of the electronic serial numbers of cellular telephones since August 9, 1994.

2. Daniel K. Hart, as a representative of Action Cellular Extensions, Inc., has engaged in the emulation of the electronic serial numbers of cellular telephones since December 15, 1994.

3. Action Cellular Extensions, Inc., has engaged in the emulation of the electronic serial numbers of cellular telephones since December 15, 1994.

4. On May 4, 1981, after notice in the Federal Register, the Federal Communications Commission issued the Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment to Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems. (86 F.C.C. 2d 469 (1981). It adopted the technical specifications for cellular telephones that each telephone have a unique electronic serial number. This order was published in the

Federal Register on May 21, 1981 (46 Fed. Reg. 27655) with corrections on June 16, 1981 (46 Fed. Reg. 31417)

5 On September 9, 1994, after notice in the Federal Register, the FCC issued the Revision of Part 22 of the Commission Rules Governing the Public Mobile Services (9 FCC Rcd 6513 (1994) This FCC order was published in the Federal Register on November 17, 1994 (59 Fed. Reg. 59502)

6. Houston Cellular has suffered irreparable damage as a consequence of defendants' emulation of the electronic serial numbers of cellular telephones for which it is the carrier. The defendants' actions have deprived Houston Cellular of monthly access charges and other per unit charges its customers would owe for additional connections.

7 Although the damage is describable, Houston Cellular cannot reliably quantify it, making the legal remedy inadequate.

8 The acts of the defendants are analogous to their having installed unauthorized access to a cable television network. This piracy injures the utility and its legitimate customers.

9. No unrepresented third-party nor any diffuse public interest is adversely affected by the restrictions this injunction imposes on Nelson and Hart.

B. *Conclusions*

1. The FCC orders were regularly made, published in the Federal Register, and served on defendants by publication. 5 U.S.C. § 552(a)(1). *See also, Fed. Crop Ins. v. Merrill*, 332 U.S. 380, 384-85 (1947).

2. These orders adopted by the FCC constitute orders within the meaning of § 401(b) (47 U.S.C. § 401(b)) of the Communication Act of 1934.

3. Emulation of the electronic serial numbers of cellular telephones by Nelson , Hart, and Action Cellular Extensions, Inc., violates the two FCC orders.

4. Section 401(b) of the Communication Act of 1934 expressly authorizes injunctive relief for a party injured by disobedience of an FCC order. The prerequisite of irreparable injury need not be established where such injunctive relief is expressly authorized by statute. *United States v. Hayes Int'l Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969); *Gresham v. Windrush Partners*, 730 F.2d 1417, 1423 (11th Cir. 1984). Although Houston Cellular need only demonstrate that it has been injured to satisfy this standard, having found that it was in fact irreparably injured by defendants' acts and in an amount not susceptible to calculation, the court concludes that injunctive relief is available at common law.

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C. *Injunction.*

Based on these findings and conclusions, John C. Nelson, Jr., Daniel K. Hart, and Action Cellular Extensions, Inc., are enjoined permanently from emulating electronic serial numbers of cellular telephones for which Houston Cellular is the carrier.

This restriction binds them and all those who may knowingly act in concert with them, including employees, agents, and consumers.

1. Specifically, the defendants are enjoined from altering, transferring, emulating or manipulating electronic serial numbers of cellular telephones for which Houston Cellular is the carrier except in strict compliance with the FFC orders.

2. The defendants shall produce immediately to Houston Cellular these documents, including those seized by the United States Marshal and others in their possession or within their access:

   A. All lists, files, records, or other information containing names, addresses, or telephone numbers of entities for whom they altered, transferred, emulated, or manipulated the electronic serial numbers of cellular telephones from January 1, 1990, to March 15, 1995.

   B. All advertisements, brochures, or other documents that advertised services to the public for altering, transferring, emulating, or manipulating the electronic serial numbers of cellular telephones.

   C. Documents in their possession that identify other entities which offer services to alter, transfer, emulate or manipulate the electronic serial numbers of cellular telephones.

   D. Documents evincing a business relation or transaction with Technology, Inc.

   E. A complete copy of all data on any storage medium, including paper-based, fixed-disk, and removable-disk data (hard, removable, floppy, optical, and tape drives and RAM). Houston Cellular will reimburse the defendants for copying costs incurred in producing a hard copy.

3. With the exception of Houston Cellular subscribers' service orders or contracts, the defendants are entitled to retain the originals of those documents, providing Houston Cellular with photocopies. The defendants may retain photocopies of the Houston Cellular subscribers' service orders or contracts only for the purpose of assisting in re-emulation. The defendants will surrender to Houston Cellular all photocopies at the completion of the re-emulation or upon written request of Houston Cellular.

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4. This order does not require that the defendants produce C2+ Technology, Inc., proprietary information, equipment, or accessories in any form.

5. This is a final judgment. The court retains jurisdiction to enforce the injunction and the settlement from which it arose.

Signed March 15, 1995, at Houston, Texas.

Lynn N. Hughes
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON CELLULAR TELEPHONE COMPANY	§	C.A. NO. _____
V.	§	
JOHN C. NELSON, individually and d/b/a both CELL TIME CELLULAR and ACTION CELLULAR and DANNY HART, individually and d/b/a both ACTION CELLULAR and ACTION CELLULAR EXTENSION	§	**DEMAND FOR TRIAL BY JURY**

PLAINTIFF'S ORIGINAL COMPLAINT AND REQUEST FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW HOUSTON CELLULAR TELEPHONE COMPANY ("Houston Cellular"), plaintiff herein, seeking a temporary restraining order, preliminary injunction and permanent injunction. In support thereof, Houston Cellular would respectively show unto the court as follows:

I.
JURISDICTION AND PARTIES

1. This case arises under the constitution, laws or treaties of the United States. 28 U.S.C. § 1331. Pursuant to 47 U.S.C. § 401(b), Houston Cellular seeks to prohibit defendants from violating orders (collectively the "ESN Orders") of the Federal Communication Commission ("FCC") now codified in part at 47 C.F.R. 22.919(a).

2. Houston Cellular is a Texas general partnership with its principal place of business at One West Loop South, Suite 300, Houston, Texas 77027.

3. Defendant John C. Nelson is an individual residing in Harris County and doing business as both Cell Time Cellular, 5202 Sycamore Villas, Kingwood, Texas, 77345 and Action Cellular at 9100 Southwest Freeway, Suite 150, Houston, Texas. Defendant John C. Nelson, individually and doing business as Cell Time Cellular, may be served with process by serving

John C. Nelson at 5202 Sycamore Villas, Kingwood, Texas, 77345. Defendant John C. Nelson, individually and doing business as Action Cellular may be served at 9100 Southwest Freeway Suite 150, Houston, Texas.

4. Defendant Danny Hart, individually and doing business as both Action Cellular and Action Cellular Extension, is an individual who resides at 10210 Forum West Drive, Houston, Texas 77036. On information and belief, Danny Hart, doing business as Action Cellular, has an office at 9100 Southwest Freeway, Suite 150, Houston, Texas, and may be served at this address. On information and belief, Danny Hart, individually and doing business as Action Cellular Extension, may be served at 10210 Forum West Drive, Houston, Texas 77036.

II.
VENUE

5. Venue is proper in this district for two reasons. First, a substantial part of the events giving rise to Houston Cellular's claim occurred in this district. 28 U.S.C. § 1391(a)(2). Second, defendants are individuals or entities with contacts sufficient to deem them residents of this judicial district. 28 U.S.C. § 1391(c).

III.
SUMMARY OF ALLEGATIONS

6. Pursuant to 47 U.S.C. § 401(b) and Rule 65(b) of the Federal Rules of Civil Procedure, Houston Cellular seeks a temporary restraining order, preliminary injunction and, ultimately, a permanent injunction barring defendants from violating the FCC's ESN Orders. Furthermore, pursuant to 28 U.S.C. 2201(a), Houston Cellular seeks an order from the court declaring the rights and obligations of the parties, specifically stating defendants cannot alter, transfer, emulate or manipulate the ESN of cellular telephones in violation of the FCC's ESN Orders. Pursuant to 28 U.S.C. 2202, Houston Cellular seeks recovery of its reasonable and necessary attorneys' fees incurred by prosecution of this action.

IV.
FACTUAL BACKGROUND

7. Houston Cellular is licensed by the FCC as the exclusive provider of cellular communications services on its authorized frequencies in the Houston Metropolitan Statistical Area, which includes Harris, Liberty, Montgomery, Waller, Fort Bend and Brazoria Counties.

8. Defendants are engaged in the process of altering, manipulating, or emulating the Electronic Serial Numbers on cellular telephones in violation of the FCC's ESN Orders.

9. The Electronic Serial Number ("ESN") is a 32 bit binary number that uniquely identifies a cellular mobile transmitter to a cellular system. It is separate and distinct from the phone's 10-digit telephone number. One purpose of the ESN in a cellular telephone is similar to the Vehicle Identification Number in an automobile. Specifically, it uniquely identifies the equipment to assist in recovery, if it is stolen. More importantly, the ESN is designed to identify an authorized subscriber and enable cellular licensees, like Houston Cellular, to authorize system usage and to properly bill for calls made to and from a cellular telephone.

10. The alteration of a cellular telephone's ESN allows a person to simulate the signal of a different cellular telephone. This process, called emulation, allows one cellular phone to emulate, or imitate, another cellular phone. This allows a person to make a call on one cellular telephone while actually charging the call to another. Alteration of an ESN facilitates fraudulent and unauthorized cellular calls. An unauthorized user of a cellular phone that has an altered ESN can make numerous local and long distance calls and have the charges billed to a totally unsuspecting cellular customer. Alternatively, ESN alteration enables one cellular phone to emulate another cellular phone beyond the detection abilities of cellular licensees. This enables a customer to use more than one telephone for the same telephone number, thereby avoiding monthly access charges charged by Houston Cellular and other cellular licensees. By altering an ESN, a customer can fraudulently avoid paying the monthly access charge for multiple cellular phones, resulting in a significant loss of revenues to Houston Cellular.

11. Furthermore, Houston Cellular has recently offered a special long distance program whereby, for a monthly fee, Houston Cellular will allow free air time on all long distance calls in the State of Texas. Use of this long distance program will allow a customer to call long distance from his cellular telephone and pay only the rate charged by the customer's pre-selected long distance carrier. Houston Cellular will not charge for air time on such calls. Alteration of an ESN allows a customer to have multiple cellular phones covered by a single monthly fee payment for the long distance program, resulting in a substantial loss of revenue to Houston Cellular

12. As more fully described in the affidavit of Robert Edwards, attached and incorporated as Exhibit "A," defendants John C. Nelson, individually and doing business as Cell Time Cellular and as Action Cellular, have been engaged in the unauthorized practice of altering, transferring, emulating or manipulating the ESN of cellular telephones to emulate other phones subscribed to Houston Cellular. Specifically, on or about September 29, 1994, for a $225.00 fee, John Nelson altered an ESN on a cellular phone provided to him to emulate a Houston Cellular subscribed phone. In December of 1994, Robert Edwards returned to John Nelson and received a quote of $250.00 for the alteration of an additional cellular telephone.

13. Furthermore, as more fully described in the affidavit of Robert Edwards, attached and incorporated herein as Exhibit "A," defendants Danny Hart, individually and doing business as Action Cellular and Action Cellular Extension are also engaged in the unauthorized practice of altering, transferring, emulating or manipulating the ESN of cellular telephones. Specifically, on or about February 8, 1995, Houston Cellular received an ad on Adverfax. The ad specifically advertises "two cellular phones, one cellular number." Entities not licensed by the FCC to provide cellular service cannot provide this service set forth in the advertisement. Houston Cellular has not authorized any person or entity to alter or emulate ESNs for cellular phones subscribed to its service. See Affidavit of Mike Hanafin. The Affidavit of Robert Edwards describes a conversation with Danny Hart wherein he admitted that for $250.00 he would alter the ESN of a cellular phone to emulate a Houston Cellular subscriber's phone.

V.
FCC REGULATIONS

14. On May 4, 1981, the FCC released an Order entitled "An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems," 86 F.C.C.2d 469 (1981) in which it, among other things, adopted technical specifications for the use of cellular telephones, including a requirement that each phone have a unique ESN. See 86 F.C.C.2d at 508 & n.78, 573, and 593. This FCC Order (the "First ESN Order") was published in the Federal Register on May 21, 1981 (46 Fed. Reg. 27655) with corrections on June 16, 1981 (46 Fed. Reg. 31417.) A copy of this First ESN Order is attached as Exhibit "B." On September 9, 1994, the FCC released an Order entitled "Revision of Part 22 of the Commission Rules Governing the Public Mobile Services." This FCC Order (the "Second ESN Order") was published in the Federal Register on November 17, 1994 (59 Fed. Reg. 59502). (The First ESN Order and Second ESN Order are collectively referred to herein as the ESN Orders.) A copy of the Second ESN Order is attached as Exhibit "C."

15. In response to an FCC Notice of Proposed Rule Making, released June 12, 1992, 7 F.C.C. Rcd. 3658, and published in the Federal Register July 1, 1992 (57 Fed. Reg. 29260), C2+ Technology, a company that altered ESNs, requested the FCC to amend the Commission's rules and allow companies to market ancillary cellular equipment that emulates ESNs for the purpose of allowing more than one cellular telephone to have the same telephone number. See paragraph 67 of Exhibit "C."

16. The FCC specifically rejected the proposed amendment of the emulator. The Commission wrote:

> Further, we conclude that the practice of altering cellular phones to "emulate" ESNs without receiving the permission of the relevant cellular licensee should not be allowed because (1) simultaneous use of cellular telephones fraudulently emitting the same ESN without the licensee's permission could cause problems in some cellular systems such as erroneous tracking or billing; (2) fraudulent use of such phones without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled; and (3) such altered phones not authorized by the carrier, would therefore not fall within the licensee's

blanket license, and thus would be unlicensed transmitters in violation of Section 301 of the Act.

See paragraph 60 of Exhibit "C."

17. The Commission further concluded:

> Nevertheless, with regard to existing equipment, we conclude that cellular telephones with altered ESNs do not comply with the cellular system compatibility specification[1] and thus may not be considered authorized equipment under the original type acceptance. Accordingly, a consumer's knowing use of such altered equipment would violate our rules. We further believe that any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of our rules. Thus, we advise all cellular licensees and subscribers that the use of the C2+ altered cellular telephones constitutes a violation of the Act and our rules.

See paragraph 62.[2] (emphasis added).

In conclusion, in its Second ESN Order, the FCC clearly stated (1) use of altered cellular telephones constitutes a violation of both the Communications Act of 1934, as amended, and the First ESN Order as codified in Commission rules, and (2) any company that knowingly alters cellular telephones is "aiding in the violation of our [FCC] rules."

VI.
REQUEST FOR TEMPORARY RESTRAINING ORDER

18. Pursuant to 47 U.S.C. § 401(b) and Rule 65(b) of the Federal Rules of Civil Procedure, Houston Cellular seeks a temporary restraining order from the court asking the court (1) to enjoin defendants from altering, transferring, emulating or manipulating the ESNs of cellular telephones and (2) that all records, computer disks, and other information concerning altered telephones be preserved in their current state. As shown by the affidavits and evidence attached

---

[1] See previous 47 CFR § 22.915, which became new 47 CFR § 22.933, adopted in the Second ESN Order.

[2] The Second ESN Order also revised § 22.919(c), effective January 1, 1995, to require all manufacturers of cellular telephones to design their telephones such that any attempt to remove, tamper with, or change the ESN chip, will render the mobile transmitter inoperative. Thus, in new telephones, Houston Cellular and other cellular licensees should not be plagued with companies that alter ESNs in violation of the law. Any attempt to alter the ESN will render the cellular telephone inoperable.

hereto and incorporated herein, Houston Cellular would show immediate and irreparable injury will occur to Houston Cellular if an order enjoining defendants from altering, transferring, emulating or manipulating the ESNs is not granted. Specifically, as shown by the affidavit of Mike Hanafin, Vice President of Engineering and Operations, attached as Exhibit "D," Houston Cellular would show that it has no way of monitoring altered telephones and will continue to suffer fraudulent and unauthorized use of air time and theft of air time unless this order is granted. Furthermore, without records from defendants indicating the names of customers who have received altered telephones, Houston Cellular does not have a way to monitor the unauthorized use of cellular telephones or notify specific customers that they are using cellular telephones in an unauthorized manner.

19. In addition, 28 U.S.C. § 401(b) states:

> (b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.

20. In *South Central Bell Telephone Company v. Louisiana Public Service Commission*, 744 § 2d 1107 (5th Cir. 1984) vacated on other grounds 106 S. Ct. 2884. The Fifth Circuit, interpreting § 401(b), stated:

> Under § 401(b), a party seeking enforcement of an FCC declaration may obtain an injunction upon a finding that (1) the declaration is an FCC "order" within the meaning of the Act, (2) the order was regularly made and duly served upon the defendant, (3) the defendant is in disobedience of the order, and (4) the party seeking the injunction has been injured by the defendant's disobedience.

Id. at 1114-1115.

21. An FCC declaration is an "order," if the "agency acts in accordance with its legislatively delegating rule making authority" and intends it to be binding on all applicable

persons. *Id.* at 1115. On their face, the ESN Orders are "orders" prohibiting individuals, *inter alia*, from using cellular phones with altered ESNs or from altering ESNs in cellular phones.

22. In order to show that an order was duly served, the Fifth Circuit has stated:

> Thus, the requirement of "due service" is met if the defendant in a § 401(b) proceeding received notice legally sufficient to make the order enforceable. Under the APA [Administrative Procedures Act], a rule is enforceable once it is published in the *Federal Register*. 5 U.S.C. § 552(a)(1). The Supreme Court has held that appearance of a rule in that publication constitutes legal notice to the general public.

Id. at 1119 (cites omitted). The FCC adopted the ESN Orders pursuant to lawful notice and rule making proceedings under the APA, and the referenced ESN Orders were published in the Federal Register.

23. Houston Cellular, through the affidavits and Exhibits attached hereto and incorporated herein, has shown that the defendants have violated "orders" of the FCC which have been "duly served" upon the defendants. Because Houston Cellular has been injured by defendants' disobedience, it is entitled to a temporary restraining order prohibiting the altering, transferring, emulating or manipulating of ESNs of cellular telephones and enjoining defendants from altering or destroying any records relating to the altering, emulating, transferring or manipulating of ESNs.

VII.
REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTION

24. By way of this Complaint, Houston Cellular asks the court to set a date, within ten (10) days of the signing of the temporary restraining order, for hearing on the preliminary injunction. At the same time, Houston Cellular asks the court to order defendants to produce certain records relating to the altering, transferring, emulating or manipulating of cellular telephones, the servicing of clients, and/or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones to the court for in camera inspection and safekeeping.

25. Furthermore, after the preliminary injunction hearing, Houston Cellular asks for a trial at the earliest possible setting in order to permanently enjoin defendants from (1) altering, transferring, emulating or manipulating the ESN on cellular telephones, or (2) altering or

destroying any record that relates to the altering, transferring, emulating or manipulating of cellular telephones, or the servicing of clients or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones.

VIII.
REQUEST FOR DECLARATORY RELIEF PURSUANT TO 28 U.S.C. 2201 ET SEQ.

26. Pursuant to 28 U.S.C. 2201(a), Houston Cellular seeks a judgment from this court declaring the rights and obligations of Houston Cellular and the defendants. Specifically Houston Cellular asks the court to declare:

(1) Defendants' altering, transferring, emulating or manipulating ESNs is a violation of the FCC's ESN Orders and regulations and aids and assists others in violating the FCC's ESN Orders and regulations.

(2) The use of emulated or altered telephones is a violation of the FCC's ESN Orders and regulations.

(3) Houston Cellular has the right and the obligation to determine the names of all customers who have had their cellular telephones altered, transferred, emulated or manipulated so as to advise and notify the customer that the use of altered, transferred, emulated or manipulated telephones is a violation of the FCC's ESN Orders and regulations.

(4) Defendants have no right to alter, transfer, emulate or manipulate cellular telephones of Houston Cellular customers.

27. Pursuant to 28 U.S.C. 2202, Houston Cellular seeks reimbursement of the reasonable and necessary attorneys' fees incurred by Houston Cellular for bringing this declaratory judgment action.

IX.
PRAYER

28. Houston Cellular requests this court enter a temporary restraining order, after a hearing, preliminary injunction, and after a trial on the merits, a permanent injunction; that it be