

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

5. On September 9, 1984, 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 Rad 6513 (1984)). The FCC order was published in the Federal Register on November 17, 1984 (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 privacy 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. 389, 394-85 (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 Defendants, 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 prerequisites 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); *Crawshaw v. Whitcomb 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 as common law.

C. Injunction.

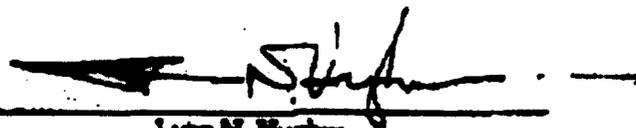
Based on these findings and conclusions, John C. Nelson, Jr., David K. Hart, and Acton Cellular Extension, Inc., are enjoined permanently from emitting electronic serial numbers of cellular telephones for which Houston Cellular is the carrier.

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, emitting or manipulating electronic serial numbers of cellular telephones for which Houston Cellular is the carrier except in strict compliance with the FCC orders.
2. The defendants shall produce immediately to Houston Cellular those documents, including those seized by the United States Marshal and others in their possession or within their control:
 - A. All lists, files, records, or other information containing names, addresses, or telephone numbers of entities for whom they altered, transferred, emitted, 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, emitting, or manipulating the electronic serial numbers of cellular telephones.
 - C. Documents in their possession that identify other entities which offer services to alter, transfer, emit or manipulate the electronic serial numbers of cellular telephones.
 - D. Documents arising a business relation or transaction with Technology, Inc.
 - E. A complete copy of all data on any storage medium, including paper-based, hard-disk, and removable-disk data (hard, removable, floppy, optical, and tape drives and RAM). Houston Cellular will reimburse the plaintiffs for copying costs incurred in producing a hard copy.
3. With the exception of Houston Cellular subscribers' service orders or contracts, the databases are entitled to retain the originals of these 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.

4. This order does not require that the defendants produce C3+ 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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2. As the accompanying affidavit of John P. Hart, Jr., Cellular One®'s Vice President, Engineering, explains, Cellular One® is suffering, and will continue to suffer, irreparable harm as a result of defendants' conduct.² As long as defendants continue to "emulate" cellular telephones, Cellular One®'s anti-fraud efforts will be compromised, the performance of its cellular network will be impaired, and the Company will lose significant revenue in an amount that cannot be determined.

3. Defendants Cellular Two, Inc. and Tony Yankovsky have already consented to the entry of a permanent injunction barring them from emulating cellular telephones. By this motion, Cellular One® seeks the entry of preliminary injunctive relief barring the remaining defendants, CES and Gedachian, from continuing their unlawful emulation activities.

Background

4. As explained in full in Mr. Hart's affidavit, every cellular telephone is manufactured with a unique ESN. When a call is placed or received, the cellular phone transmits its ESN, allowing the cellular service provider to

revised to take account of (a) plaintiff's settlement with defendants Cellular Two, Inc. and Tony Yankovsky; and (b) the May 10, 1995 amendment to the complaint.

² A copy of the Hart affidavit is annexed hereto as Exhibit A. The original was submitted to the Court with the order to show cause.

identify the subscriber and to track the call for billing purposes.

5. It is possible, however, to alter a cellular telephone's ESN to cause it to "emulate" the ESN of a different phone. Some persons tamper with cellular phones so that they emulate the ESNs of telephones belonging to unsuspecting cellular subscribers. When calls are placed on the altered phones, the account of the subscriber is charged.

6. Other persons, such as the defendants in this case, create unauthorized and unlawful "extension" phones for existing cellular subscribers by altering one or more phones to emulate the ESN of the customer's one authorized telephone. When calls are placed on the altered phones, the correct customer is charged, but the customer does not pay the monthly access fee for the "extension" phones.

The FCC Regulations

7. On November 17, 1994, the FCC promulgated 47 C.F.R. § 22.919(a), which mandates that every cellular telephone must have a unique ESN. See 59 Fed. Reg. 59,564 (1994) (attached as Exhibit B). The regulation became effective on January 1, 1995.

8. At the same time, the FCC recodified the old 47 C.F.R. § 22.915 at 47 C.F.R. § 22.933. See 59 Fed. Reg. 59,565 (1994) (attached as Exhibit C). The new § 22.933, identical in all material respects to its predecessor,

specifically incorporates the Cellular System Mobile Station-Land Station Compatibility Specification ("Compatibility Specification") published in the Federal Register on May 21, 1981. See 46 Fed. Reg. 27,655 (1981). Section 2.3.2 of the Compatibility Specification (attached as Exhibit D) also requires that each phone have a unique ESN by providing that the ESN "uniquely identifies a mobile station to any cellular system." Id.

9. In a Report and Order released on September 9, 1994, the FCC explained that both § 22.919(a) and the recodified § 22.933 prohibit individuals such as the defendants in this case from emulating ESNs. See Report and Order, Revision of Part 22 of Commission's Rules Governing Public Mobile Services, CC Docket No. 92-115 (attached, in relevant part, as Exhibit E). The FCC Report states 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." Id. ¶ 62 at 28.

Defendants

10. As fully explained in the accompanying affidavit of Salvador Vega,³ a private investigator retained by Cellular One®, defendants CES and Gedachian are actively

³ A copy of the Vega affidavit is annexed hereto as Exhibit E. The original was submitted to the Court with the order to show cause.

engaged in the business of emulating cellular telephones, for profit, despite the clear prohibition of ESN emulation included in 47 C.F.R. §§ 22.919(a) and 22.933. CES openly advertises its ESN emulation services.

The Harm to Cellular One®

11. As explained in full in the Hart affidavit, defendants' emulation of cellular telephone ESNs significantly harms Cellular One®. Emulation interferes with the Company's efforts to combat a severe and extremely costly fraud problem; it interferes with the proper operation of the Company's network -- to the inconvenience and detriment of all Cellular One® subscribers; and it causes a significant but indeterminable loss of revenue from subscribers who obtain unauthorized "extension" phones for which they do not pay the monthly access fee authorized by Cellular One®'s tariff.

The Amended Complaint

12. Cellular One®'s amended complaint (attached as Exhibit G) asserts a claim under § 401(b) of the Communications Act of 1934, 47 U.S.C. § 401(b). Section 401(b) expressly authorizes private actions for injunctive relief to prevent the violation of FCC orders. As explained fully in the accompanying memorandum of law, such relief is available to private litigants as long as the FCC regulation being enforced requires or prohibits specific activities on the part of a specific party. As evidenced by the language

of 47 C.F.R. §§ 22.919(a) and 22.933 and the accompanying FCC Report, both of the cited regulations clearly prohibit individuals such as the defendants in this case from engaging in a specific activity -- namely, the emulation of cellular telephone ESNs.

Cellular One®'s Entitlement to a Preliminary Injunction

13. As explained in Cellular One®'s memorandum, under 47 U.S.C. § 401(b), a plaintiff need not show irreparable harm in order to obtain preliminary relief. Rather, plaintiff need only show that the order being enforced was (1) regularly made, (2) duly served, (3) disobeyed, and that (4) disobedience to the order harmed the plaintiff. The first two requirements are merely procedural, and are satisfied by the notice and comment procedure used to adopt the regulations and the regulations' publication in the Federal Register. Defendants' violation of §§ 22.919(a) and 22.933 is established by their blatant disregard for the clear language and intent of the regulations prohibiting the emulation of ESNs. Finally, as described fully in the Hart affidavit, Cellular One® has been harmed, and continues to be harmed, by defendants' violation of the regulation.

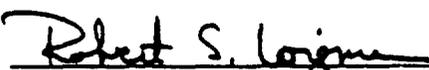
14. Moreover, as the memorandum explains, Cellular One® would be entitled to a preliminary injunction even if the court were to apply the traditional equitable criteria for issuance of such relief, i.e., irreparable harm and likelihood of success on the merits. Interference with

Cellular One®'s anti-fraud measures, the hampering of Cellular One®'s system operations, and the immeasurable loss of revenues, constitute irreparable harm. Furthermore, given defendants' clear violation of 47 C.F.R. §§ 22.919(a) and 22.933, there is little question about Cellular One®'s likelihood of success on the merits.

15. Accordingly, Cellular One® seeks a preliminary injunction barring defendants CES and Gedachian from emulating cellular telephone ESNs during the pendency of this action. Because Cellular One® cannot determine which, or how many, of its customers have had their phones emulated by defendants without obtaining access to defendants' books and records, Cellular One® also seeks an order barring defendants from destroying any documents relating to their emulation activities.


Robert B. Kaplan

Sworn to before me this
23rd day of May, 1995.


Notary Public

ROBERT S. LOIGMAN
NOTARY PUBLIC, State of New York
No. 02LO5040754
Qualified in New York County
Commission Expires March 20, 1997

10-digit telephone number, which is assigned by the cellular carrier.

3. When a customer of Cellular One[®] or any other cellular carrier initiates or receives a call, his or her phone is identified to the cellular system by its ESN. By identifying the particular phone being used to the cellular system, the ESN enables the cellular carrier to authorize system usage and to bill the appropriate account for the call.

4. "Emulation" is the process whereby the ESN of a particular cellular telephone is altered to simulate the ESN installed in a different phone. The cellular system cannot distinguish between a phone emitting a particular ESN because that was the number factory-installed into the phone and a phone emitting the same ESN because it has been emulated. As a result, emulation enables a person to make a call on one cellular telephone (the emulated phone) while charging the call to another phone (the phone originally assigned that ESN).

"Cloning" and "Extension" Phones

5. One species of emulation is known colloquially as "cloning." In this variety of emulation, thieves using sophisticated scanning equipment monitor a cellular call and determine the ESN of the transmitting phone. That ESN is then programmed into a different phone. Anyone using the altered phone will then be able to make calls that will be

interpreted by the system as originating from the phone that was "cloned." The bill for such calls will be sent to the customer whose ESN was misappropriated. When the fraud is discovered, the victim's bill is adjusted to remove the fraudulent charges and Cellular One[®] loses all revenue in connection with the unauthorized calls.

6. Each year, the cellular industry suffers massive losses as a result of this type of fraud. According to the Cellular Telephone Industry Association, losses from fraud totalled approximately \$500 million in the year 1994, or more than \$1.5 million each day. In the New York area alone, 1994 losses totalled approximately \$75 million.

7. In another species of emulation -- the one this case concerns -- a phone purchased by an existing Cellular One[®] customer is altered so that it emulates the ESN of the customer's original, authorized phone, for which he has an account. Emulators are able to achieve this result by (1) disassembling the original phone, (2) disengaging and removing the computer chip upon which the ESN is encoded, (3) placing the chip in an electronic device that manipulates the ESN by reprogramming the chip, (4) replacing the chip in the telephone, and (5) reassembling the phone. The result of the emulation is that the customer then has a second phone that is indistinguishable to the cellular system from the customer's pre-existing phone, enabling the customer to make calls from either phone on the

existing account. The customer obtains an "extension" phone for which he pays no access charge to Cellular One®.

The Harm to Cellular One® from Emulated "Extension" Phones

8. The injury inflicted by "cloning" is obvious. Cellular service is simply being stolen by thieves who make calls that will be billed erroneously to someone else's account. The injury caused by the creation of unauthorized "extension" phones with emulated ESNs is subtler but no less real.

Interference with Anti-Fraud Efforts

9. Cellular One® has a system in place that attempts to combat cloning. This system is able to detect when a "single" phone is being used at two or more locations at one time. Because it is obviously impossible to use one phone from two locations, the system is actually recognizing that multiple phones are emitting a single ESN.

10. Because emulated "extensions" used by legitimate Cellular One® customers, like phones cloned by thieves, emit the same ESN as another phone, it is impossible to distinguish between a phone that has been emulated at a customer's request and a phone that has been cloned without the customer's knowledge. Accordingly, the use of emulated "extension" phones significantly interferes with Cellular One®'s ability to take affirmative action against users of phones tracked by the anti-fraud system. In essence, the many unauthorized "extensions" in use act as

a smoke screen behind which the thieves can escape detection.

Interference with System Operation

11. The use of emulated "extensions" also interferes with the proper operation of Cellular One®'s system. Because there is no way for Cellular One® to determine how many of its customers have had their phones emulated, it is not possible for Cellular One® to properly assess the level of expected system usage. Customers with emulated phones are likely to use the system more frequently than other customers, either because they will more often have a phone available to them or because the emulated phone is given to a second individual.

12. By preventing Cellular One® from accurately predicting system usage, ESN emulation interferes with Cellular One®'s ability to accurately predict the need to expand system capacity. Capacity is limited, and the drain on system resources leads a deterioration in service for all customers -- increased static, the inability to complete a call ("blocked" calls) and involuntary disconnections ("dropped" calls).

Revenue Loss

13. By enabling customers of Cellular One® to obtain a second cellular phone which is invisible to Cellular One®'s system, emulation allows customers to avoid paying the monthly access fee to which Cellular One® is

entitled under its tariff. Because it is impossible to determine how many emulated "extension" phones are in use on the Cellular One® system, it is impossible to determine just how much revenue the Company is losing.

John P. Hart Jr.

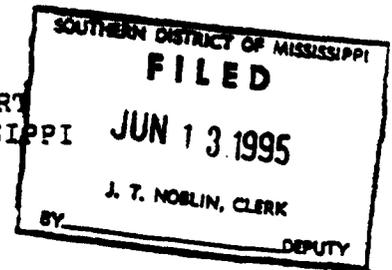
John P. Hart, Jr.

Sworn to before me this
25th day of April, 1995.

Dorothy A. Piazza
Notary Public

DOROTHY A. PIAZZA
A Notary Public of New Jersey
My Commission Expires April 28, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION



MISSISSIPPI CELLULAR TELEPHONE COMPANY
and CENTURY CELLUNET OF BILOXI, INC.

PLAINTIFFS

VERSUS

NO. 1:95cv311BR

CELLULAR EXTENSION SERVICE, INC. and
L. DEAN MCKAY, Individually

DEFENDANTS

**COMPLAINT AND
REQUEST FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION**

COME NOW MISSISSIPPI CELLULAR TELEPHONE COMPANY (which provides Cellular South Cellular Service and which is hereinafter referred to as "Cellular South" or "Plaintiff"), and CENTURY CELLUNET OF BILOXI, INC. ("Century Cellunet" or "Plaintiff") Plaintiffs herein, seeking a temporary restraining order, preliminary injunction and permanent injunction. In support thereof, Plaintiffs 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), Plaintiffs seek 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. Cellular South, which provides Cellular South Cellular Service in the counties of Harrison, Hancock and Stone, is a

Mississippi corporation with a sales office in Gulfport and Gautier, Mississippi, and with its registered office in Meadville, Franklin County, Mississippi. Century Cellunet of Biloxi, Inc. is a Mississippi corporation with a sales office in Biloxi, Mississippi, serving the South Mississippi area

3. Defendant, Cellular Extension Services, Inc. is a Mississippi corporation doing business and having its principal place of business at 1823 Second Street, Gulfport, Mississippi 39501, and which may be served with process by service upon L. Dean McKay at 1823 Second Street, Gulfport, Mississippi 39501. Defendant, L. Dean McKay is an individual and resident of the First Judicial District of Harrison County, and may be served with process at 1823 Second Street, Gulfport, Mississippi 39501.

II. VENUE

4. Venue is proper in this district for the reasons that the events giving rise to Plaintiffs' claims occurred in this district 28 U.S.C. § 1291(a)(2), and defendants are residents of this district. 28 U.S.C. § 1391(c).

III. SUMMARY OF ALLEGATIONS

5. Pursuant to 47 U.S.C. § 401(b) and Rule 65(b) of the Federal Rules of Civil Procedure, Plaintiffs seek 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), Plaintiffs seek an order from the court declaring the rights and obligations

of the parties, specifically stating that defendants cannot alter, transfer, emulate or manipulate the Electronic Serial Numbers (ESN) of cellular telephones in violation of the FCC's ESN Orders. Pursuant to 28 U.S.C. 2202, Plaintiffs seek recovery of their reasonable and necessary attorneys' fees incurred by prosecution of this action.

IV.
FACTUAL BACKGROUND

6. Cellular South and Century Cellnet are licensed by the FCC as the exclusive providers of cellular communication services on its authorized frequencies in the South Mississippi area, which includes all or portions of Harrison, Hancock, Jackson and Stone counties.

7. 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.

8. The 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 Cellular South and Century Cellnet, to authorize system usage and to properly bill for calls made to and from a cellular telephone.

9. The alteration of a cellular telephone's ESN, know as emulation, allows a person to simulate the signal of a different cellular telephone. 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 Plaintiffs 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 Plaintiffs.

10. On or about May 11, 1995 Nate Doshier contacted Defendant, Cellular Extension Services, by telephone call to Defendant, Dean McKay, and inquired of McKay whether he could program one of his two cellular phones so that he would have only one service contract or access fee to pay. Mr. McKay advised that he could perform this service. Both phones being used by Mr. Doshier were under service agreement to Cellular South.

On the morning of May 12, 1995 Mr. Doshier traveled to the business office of Cellular Extension Service at 1823 Second Street in Gulfport, Mississippi, where he was met by Dean McKay. Mr.

McKay proceeded to perform a service on the Motorola cellular phone of Mr. Doshier after which the Motorola phone had the same ESN as Mr. Doshier's other cellular phone, a Uniden phone. Mr. McKay then dialed his own voice mail using the Motorola phone to demonstrate to Mr. Doshier that the phone was working.

Mr. Doshier then paid to Mr. McKay the amount of \$175.00 for the service performed.

Mr. Doshier then traveled to the business office of Cellular South, where it was confirmed that the two phones of Mr. Doshier now had the same ESN.

All of the aforementioned activities of Nate Doshier performed on behalf of Cellular South are supported by the affidavit of Nate Doshier attached hereto as Exhibit "A".

11. On or about May 30, 1995 Stephen Barnes, using two cellular phones provided by and under service agreement to Century Cellunet, contacted Dean McKay of Cellular Extension Services, inquiring about the possibility of changing one of the ESN's of the phones so that both phones would have the same ESN. Mr. McKay informed Mr. Barnes that he could perform the service.

Later on May 30, 1995 Mr. Barnes traveled to 1823 Second Street in Gulfport, Mississippi and was met at the door by Mr. McKay. Mr. Barnes surrendered both phones to Mr. McKay, who then proceeded to change the ESN of one of the phones, so that thereafter both phones had the same ESN and the same number (760-0044). For this service Mr. Barnes paid to Mr. McKay the amount of \$175.00.

The aforementioned activities of Stephen Barnes performed on behalf of Century Cellunet using phones under service agreement to Century Cellunet are supported by affidavit of Stephen Barnes attached hereto as Exhibit "B".

V.
FCC REGULATIONS

11. 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 "C". 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 it's entirety in Pike and Fischer Radio Regulations (76 RR 2d Page 1), attached hereto as Exhibit "D". Summary of the same 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.)