

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

)	
MAPLEBEAR INC., DBA)	
INSTACART, a Delaware)	
corporation,)	
)	Civil Action No: 1:21-cv-474
Plaintiff,)	(AJT/IDD)
)	
v.)	
)	
JOHN DOES 1-2, CONTROLLING)	
AND OPERATING A MALICIOUS)	
APPLICATION KNOWN AS)	
SHOPPER HELPER,)	
)	
Defendants.)	

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF ITS PARTIAL OBJECTION TO
MAGISTRATE JUDGE’S REPORT & RECOMMENDATION TO ADDRESS LANHAM
ACT CLAIMS**

Pursuant to Fed. R. Civ. P. 72, Plaintiff Maplebear Inc.’s d/b/a Instacart (“Instacart” or “Plaintiff”) submits the following partial objection to the Magistrate Judge’s April 6, 2022 Report & Recommendation (Dkt. No. 41) which granted the requested relief – permanent injunction – but did so based on only violation of the Computer Fraud and Abuse Act (“CFAA”) without considering trademark violations under the Lanham Act. Dkt. No. 41 at 1, 7 (“For purposes of fashioning appropriate relief, it is therefore only necessary for the Court to analyze Plaintiff’s claim under the CFAA”). Because it is necessary to stop Defendants’ ongoing trademark violations separate and apart from unauthorized access in violation of the CFAA, Instacart requests the Court enter a modified Report & Recommendation, a proposed redlined version which is attached herein as Ex. 1, adding the Lanham Act as further grounds for granting permanent injunctive relief.

STANDARD OF REVIEW

De novo review is appropriate where, as here, an order “fails to apply” relevant statutes – in this case, the Lanham Act. *MeadWestvaco Corp. v. Rexam, PLC*, No. 1:10cv511 (GBL/TRJ), 2011 WL 2938456, at *2 (E.D. Va. July 18, 2011); Fed. R. Civ. P. 72(b)(3) (for dispositive issues, “the district judge must determine *de novo* any part of the magistrate judge’s disposition ...”); Fed. R. Civ. P. 72(a) (for non-dispositive issues, permitting court to modify or set aside any part of the order that is contrary to law); *Bruce v. Hartford*, 21 F. Supp. 3d 590, 594 (E.D. Va. 2014) (For questions of law “there is no practical difference between review under Rule 72(a)’s contrary to law standard and [a] *de novo* standard.”). Upon engaging in a *de novo* review, the Court “may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1); *Harrison v. Shanahan*, No. 118CV641LMBIDD, 2019 WL 2216474, at *1 (E.D. Va. May 22, 2019) (modifying in part magistrate judge’s order).

OBJECTIONS

Plaintiff filed a complaint alleging trademark violations under the Lanham Act among other claims. Dkt. No. 1 ¶¶ 65-81 (listing claims for trademark infringement under 15 U.S.C. § 1114, false designation of origin under 15 U.S.C. § 1125(a), and trademark dilution under 15 U.S.C. § 1125(c)). Defendants failed to respond. Plaintiff conducted extensive discovery. Over a six month period, Plaintiff issued ten subpoenas to ten infrastructure providers, waited for responses and analyzed the responses, negotiated and met and conferred with third party information providers in a very significant effort to obtain additional information regarding Defendants’ identities. Dkt. No. 35 at 3. Plaintiff’s discovery efforts yielded various names, addresses and payment means, which were all fake. *Id.* Plaintiff further sent notice to dozens of

different email addresses associated with Defendants. Defendants still failed to respond.

Plaintiff then filed a Motion for Default Judgment and Permanent Injunction seeking permanent injunctive relief based on trademark violations. Dkt. No. 37. Defendants failed to respond.

Where, as here, Defendants default, they thereby “concede[] the factual allegations of the Complaint.” Dkt. No. 41 at 6 (citing case law). Where Plaintiff has stated plausible claims upon which relief may be granted under Rule 12(b)(6), this Court may grant the requested relief. *Id.* at 6-7 (listing Plaintiff’s claims as including trademark violations under the Lanham Act).

I. Plaintiff Pled Independent Trademark Violations Under The Lanham Act Not Related to Computer Intrusions Which Further Support Permanent Injunctive Relief.

Plaintiff repeatedly pled and established facts supporting independent trademark violations under the Lanham Act not related to computer intrusions under the CFAA, which alone warrants expanding the current bases for awarding permanent injunctive relief. *See e.g.* Dkt. No. 1 ¶ 70 (alleging “wrongful and unauthorized use of Instacart’s trademarks to promote, market, or sell products and services” independent of any act of unauthorized access by Defendants). Defendants’ bad conduct extends to marketing and advertising, including using the “Instacart” trademark “#instacart #instacartshopper #instacartshoppers #instacartbot #instacartbatch #instacarttips #instacartpromocode #instacartlife” on social media. Gayde Decl., Dkt. No. 11 at 9, Fig. 1. Defendants’ social media strategy trades on continued violations of Plaintiff’s intellectual property rights in the “Instacart” trademark and confuses consumers into thinking the Shopper Helper application is legitimately associated with Instacart. Defendants’ further trademark violations under the Lanham Act are detailed both in Plaintiff’s pleadings and referenced in the Report & Recommendation itself:

- Defendants John Does 1-2 operate Shopper Helper, an unauthorized third-party mobile application, that runs on top of Instacart’s Shopper App. Dkt. No. 1 ¶¶ 42, 47, 56-58, 65-81 (citing trademark violations and outlining Lanham Act claims); Dkt. No. 41 at 5.

- Shopper Helper “uses Instacart’s **trademarks**, content and protected user interfaces.” Dkt. No. 1 ¶ 41; Dkt. No. 41 at 5 (Shopper Helper replicates the Shopper App’s “functionalities, user interface, **trademarks**, and content”) (emphasis added).
- “Once intercepted, Plaintiff’s Shopper App ceases to operate normally and **because Shopper Helper bears Plaintiff’s trademarks**, it misleads Plaintiff’s Shoppers and the public into believing that Instacart condones or facilitates the use of Shopper Helper.” *Id.* (emphasis added).
- “Shopper Helper inflicts substantial damage on Instacart **whose products and trademarks Defendants systematically abuse as part of Shopper Helper’s operations.**” Gayde Decl., Dkt. No. 11 at 9 (emphasis added).
- “Shopper Helper appears to the public to be identical to Instacart’s Shopper App because **it uses Instacart’s trademarks, content and protected user interfaces, but it is instead a fraudulent, counterfeit and adulterated version of Instacart’s Shopper App.** Defendants are **trading on Instacart’s trademarks** to deceive users of Instacart’s Shopper App and to trade on the legitimacy of Instacart’s brand,” Levin Decl., Dkt. No. 12 at 7-8 (emphasis added).

These additional trademark violations go beyond trademark infringement that has occurred as part of a knowing access of a protected computer which “furthers the intended fraud,” as set forth in the Computer Fraud & Abuse Act (18 U.S.C. § 1030(a)(4)) and found in the Report & Recommendation. Dkt. No. 41 at 7. Specifically, independent violations of the Lanham Act separate and apart from acts of unauthorized access under the CFAA in the record include:

- The user interface of the infringing Shopper Helper application reproduces the Instacart trademark and is nearly identical to the legitimate application, independent of any act of unauthorized access by Defendants. Dkt. No. 1 ¶ 42, Fig. 7-8.
- Defendants make “wrongful and unauthorized of Instacart’s trademarks to promote, market, or sell products and services,” independent of any act of unauthorized access by Defendants. Dkt. No. 1 ¶ 70.
- Defendants’ use of social media to “market Shopper Helper” includes using the “Instacart” trademark through reproduction including “#instacart #instacartshopper #instacartshoppers #instacartbot #instacartbatch #instacarttips #instacartpromocode #instacartlife.” Gayde Decl., Dkt. No. 11 at 9, Fig. 1.

Defendants failed to respond and thereby concede these factual allegations.

II. Plaintiff Stated Plausible Trademark Claims Under Fed. R. Civ. P. 12(b)(6).

Plaintiff establishes Defendants' liability for trademark counterfeiting where: (1) the defendant intentionally used a counterfeit mark in commerce; (2) the defendant knew that the mark was counterfeit; (3) the use occurred in connection with the sale, offer for sale, or distribution of goods; and (4) the use of the counterfeit mark was likely to confuse consumers. 15 U.S.C. § 1114(1); *Match.Com, LLC v. Fiesta Catering Int'l, Inc.*, No. 1:12-cv-363, 2013 WL 428056, at *6 (E.D. Va. Jan. 31, 2013). Defendants created a mobile application that once installed on a mobile device compromises underlying code of Plaintiff's Shopper App through the creation and operation of a counterfeit, adulterated version of the Shopper App bearing Instacart's trademarks. Dkt. No. 38 at 17. Because the compromised Shopper App uses Instacart's trademarks and does not appear any different to a party viewing that application on the mobile device than the legitimate application, there is likelihood of confusion by anyone viewing the Shopper Helper application, in that they would think that the adulterated Shopper Helper application is developed, distributed, affiliated and/or endorsed by Plaintiff. *Id.* at 16. Where a party produces counterfeit goods, it is presumed to create a likelihood of confusion. 15 U.S.C. § 1117(b)-(c) (2012); *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987).

Plaintiff has also established false designation of origin under section 1125(a), which prohibits use of any "word, term, name, symbol, or device, or any combination thereof" that: is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person. 15 U.S.C. § 1125(a)(1)(A); *see also Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 930 (4th Cir. 1995). Defendants' use of Plaintiff's trademarks and its symbols and brand extends

beyond just the Shopper Helper application and includes social media advertising and marketing to promote their Shopper Helper application that uses “#instacart #instacartshopper #instacartshoppers #instacartbot #instacartbatch #instacarttips #instacartpromocode #instacartlife.” Gayde Decl., Dkt. No. 11 at 9, Fig. 1. Defendants trade on Plaintiff’s “Instacart” trademark which causes confusion and mistakes by consumers who think the Shopper Helper application is official and legitimately associated with Plaintiff, which independently violates section 1125(a). Dkt. No. 38 at 18.

Plaintiff is entitled to permanent injunctive relief for trademark violations under the Lanham Act, both as part of unauthorized access that “furthers the intended fraud,” as set forth the Computer Fraud & Abuse Act (18 U.S.C. § 1030(a)(4)), but also as constituting standalone violations of 15 U.S.C. § 1114 and § 1125(a), independent of acts of unauthorized access.

III. Awarding Permanent Injunctive Relief Based On Lanham Act Violations Is Necessary To Prevent Defendants’ Ongoing And Future Bad Acts.

Defendants’ bad acts go beyond computer intrusions covered under the CFAA, which is the current basis for awarding permanent injunctive relief. Dkt. No. 41 at 1, 7 (“For purposes of fashioning appropriate relief, it is therefore only necessary for the Court to analyze Plaintiff’s claim under the CFAA”). Defendants have also committed standalone trademark violations, and there is a substantial risk and likelihood that they may do so again in the future, through new versions of Shopper Helper which make unauthorized use of Plaintiff’s trademarks and through other infringing content and operations, including infringing promotions and marketing on internet websites, on social media, and in other contexts. *See supra* at 4 (noting that Shopper Helper “systematically abuses” Instacart’s products and trademarks and highlighting Defendants’ use of Instacart’s “trademarks, content, and protected user interfaces”). Absent application of the relevant law – the Lanham Act – to Defendants’ standalone acts of trademark infringement,

Plaintiff will be left without full relief. Thus, modification of the Report & Recommendation is appropriate. *MeadWestvaco Corp.*, 2011 WL 2938456, at *2.

In practical terms, judgment and a permanent injunction encompassing both violations of the Computer Fraud & Abuse Act and violations of the Lanham Act are necessary to ensure that the scope of the injunction covers the scope of Defendants' unlawful activities, and to provide a basis for Plaintiff to enforce the injunction should Defendants continue to operate Shopper Helper or analogous unlawful applications in the future (or promote, market, and sell such an application). Therefore, Instacart respectfully requests this Court enter the narrowly tailored proposed redlined modifications to the Report & Recommendation attached as Ex. 1.

CONCLUSION

Therefore, Instacart requests the Court enter the modified Report & Recommendation, at Ex. 1, to add the Lanham Act as further grounds for granting permanent injunctive relief.

Dated: April 20, 2022

Respectfully submitted,

/s/ Julia R. Milewski

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2022, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system. Copies will also be served on the defendants listed below by electronic mail:

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