

## SCHEDULE “A” CASES. NOT SAD AT ALL.

ELIZABETH BANEGAS\*

### ABSTRACT

*Despite the recent hysterics from less than a handful of vocal critics, mass-defendant intellectual property infringement lawsuits—also known as “Schedule A” cases—are neither abusive nor a nefarious circumvention of procedural and substantive rules. They are simply a potent mechanism to curb online intellectual property infringement. Schedule A cases are procedurally proper, efficient, and effective weapons in a rights owner’s arsenal to counter the enormous rise in the sale of infringing products flowing into the United States. Moreover, given the anonymity afforded by the Internet to offshore scofflaws, Schedule A cases remain one of the few actions that provide meaningful deterrence to counterfeiting and intellectual property infringement. This paper seeks to rebut the recent string of criticism and explain why Schedule A cases are proper and necessary.*

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## INTRODUCTION

Well-known brands and other intellectual property (“IP”) rights owners (“Rights Owners”) have a major problem—an endless game of whack-a-mole against countless anonymous scofflaws who blatantly and shamelessly violate Rights Owners’ IP.<sup>1</sup> An online seller of infringing goods pops-up, and the moment a Rights Owner acts, the infringing seller disappears and oftentimes reappears again shortly thereafter. The solution: mass-defendant intellectual property infringement lawsuits

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<sup>1</sup> Victoria Arnold-Rees, “*One of the few effective mechanisms*”: academic paper was wrong to target multi-seller litigation actions, *WORLD TRADEMARK REV.* (Apr. 1, 2023), <https://www.worldtrademarkreview.com/article/one-of-the-few-effective-mechanisms-academic-paper-was-wrong-target-multi-seller-litigation-actions> [<https://perma.cc/XW5J-UAKV>].

colloquially referred to as Schedule A cases ("Sch. A Cases"). Sch. A Cases are routinely filed by Rights Owners such as "Converse, Lululemon, the NBA, Nike, Swarovski, Toyota and Volkswagen."<sup>2</sup> The suits are referred to as Sch. A Cases because the defendants are so numerous in each individual case that they are listed on a separate document, oftentimes titled "Schedule A," instead of in the case caption.<sup>3</sup> While Sch. A Cases started as a novel method of IP enforcement for a few famous brands brought by a small subset of practitioners, they have exploded in popularity due to their effectiveness and efficiency in reducing online IP infringement and providing Rights Owners with a viable means of recovering damages.<sup>4</sup> Unfortunately, Sch. A Cases have recently been subject to criticisms which rest on emotionally charged language, unsubstantiated conclusions, and examples of bad lawyering as justification to condemn the Schedule A regime.<sup>5</sup>

As Justice Holmes remarked, protecting IP is a "delicate matter that may be of great value but that easily is destroyed, and therefore should be protected with corresponding care."<sup>6</sup> But protecting IP is difficult and has traditionally been expensive for Rights Owners.<sup>7</sup> While the advent of the Internet provided Rights Owners new opportunities to promote their products and services and

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<sup>2</sup> *Id.*

<sup>3</sup> Riddhi Setty & Isaiah Poritz, *Brands Flock to Chicago Court in War on Internet Counterfeiters*, BLOOMBERG L. (Apr. 5, 2023, 5:05 AM), <https://news.bloomberglaw.com/ip-law/brands-flock-to-chicago-court-in-war-on-internet-counterfeiters> [<https://perma.cc/ZU87-LJ2V>].

<sup>4</sup> *Id.*

<sup>5</sup> Eric Goldman, *A SAD Scheme of Abusive Intellectual Property Litigation*, 123 COLUM. L. REV. 183, 183 (2023) (referring to Schedule A defendants as "SAD" as a play on words to characterize his opinion of Schedule A cases).

<sup>6</sup> *A. Bourjois & Co., Inc. v. Katzel*, 260 U.S. 689, 692 (1923).

<sup>7</sup> *Arnold-Rees*, *supra* note 1.

spread their messaging on a global scale, it also created an attractive and difficult-to-stop opportunity for IP theft.<sup>8</sup> Scofflaws leverage the mass reach and anonymity of the Internet to sell illicit products that infringe Rights Owners' IP ("Infringing Products").<sup>9</sup>

The sale of Infringing Products, primarily consisting of counterfeit products,<sup>10</sup> is big business. In 2023, U.S. Customs and Border Protection and the Department of Homeland Security seized almost twenty thousand shipments containing Infringing Products, or nearly twenty-three million Infringing Products.<sup>11</sup> Before the Internet, Infringing Products were shipped through a network of traffickers who used street dealers and other physical means to get the Infringing Products to market.<sup>12</sup> Today, most of these illicit transactions occur through websites and online marketplace platforms like Alibaba, AliExpress, Amazon, eBay, Etsy, and others.<sup>13</sup> In many

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<sup>8</sup> *Id.*

<sup>9</sup> See *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1018 (9th Cir. 2002).

<sup>10</sup> "Counterfeit" is a term of art in Trademark Law. See 15 U.S.C. §§ 1116(d)(1)(B), 1127. However, the majority of statistics on counterfeit products focus on products that are fraudulent imitations (fakes, knock offs, etc.) of a trusted brand and product, therefore conflating trademark infringement, copyright infringement, and design patent infringement. While technically improper terminology, this is largely an academic distinction that makes little to no practical difference in the marketplace. The conflation is appropriate because the resulting harms, sources of the goods, channels of distribution, and consumer perception would largely be the same. .

<sup>11</sup> *Intellectual Property Rights*, U.S. CUSTOMS AND BORDER PROTECTION (last visited Feb. 15, 2024), <https://www.cbp.gov/trade/priority-issues/ipr> [https://perma.cc/5QEP-S3TG].

<sup>12</sup> Daniel C.K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, 40 NW. J. INT'L L. & BUS. 157, 169 (2020).

<sup>13</sup> John Dunham & Assocs., *The Counterfeit Silk Road: Impact of Counterfeit Consumer Products Smuggled Into The United States*, BUY SAFE AMERICA COALITION (Oct. 6, 2021),

cases, traffickers will operate under the guise of legitimate online marketplaces while hiding behind false identities, business names, and locations.<sup>14</sup> With the appearance of legitimacy, the traffickers ship Infringing Products to purchasers by international mail or express courier services.<sup>15</sup> These shipments often arrive in the form of small, individualized packages which lower the traffickers' detection risk and loss if the packages are seized.<sup>16</sup> As a result of this scheme, Infringing Products have flooded the American market, with sales topping out at an estimated \$4.5 trillion a year.<sup>17</sup>

IP infringement is not a victimless crime. Infringing Products directly threaten national security and public safety when introduced into the U.S. markets, and indirectly threaten security because they fund transnational criminal organizations.<sup>18</sup> Infringing Products pose significant risks to consumers who may, intentionally or ignorantly, purchase harmful Infringing Products.<sup>19</sup> As significant as these risks are, Rights Owners also suffer significant harm. Beyond stealing revenue away from Rights Owners, Infringing Product sellers threaten IP innovation, erode economic competitiveness, and diminish

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<https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/campaigns/buy%20safe%20america/fact%20sheets/buy-safe-america-the-counterfeit-silk-road-report.pdf> [https://perma.cc/3HMB-SJ8C].

<sup>14</sup> U.S. DEP'T OF HOMELAND SEC., REP. ON COMBATTING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS 7 (2020).

<sup>15</sup> Dunham & Assocs., *supra* note 13.

<sup>16</sup> Chow, *supra* note 12, at 171.

<sup>17</sup> FED. RSCH. DIV., LIBR. OF CONG., NO. 2020-03, U.S. INTELLECTUAL PROPERTY AND COUNTERFEIT GOODS—LANDSCAPE REVIEW OF EXISTING/EMERGING RESEARCH i (2020).

<sup>18</sup> U.S. DEP'T OF HOMELAND SEC. OFF. OF STRATEGY, POL'Y & PLANS, REP. TO THE PRESIDENT OF THE UNITED STATES COMBATTING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS 7 (2020).

<sup>19</sup> *Id.*

the reputations and trustworthiness of the Rights Owners.<sup>20</sup> The success of Rights Owners depends on their ability to control their brand images in the U.S. and worldwide.<sup>21</sup> Rights Owners' reputations come from their ability to control the quality and origins of their products and services.<sup>22</sup> The exclusive right to control the quality and origin of their products is integral to Rights Owners' success.<sup>23</sup> Infringing Product sellers usurp Rights Owners' ability to control and protect their IP. Moreover, the law imposes a duty on Rights Owners to police the use of their marks.<sup>24</sup> Thus, Rights Owners need a viable, effective, and cost-effective solution. Enter Sch. A Cases.

This article argues that Sch. A Cases are procedurally proper, successful, and essential to Rights Owners facing significant online IP infringement. This article explains the propriety and effectiveness of Sch. A Cases and rebuts the oft-cited criticisms of them. To understand the workings of Sch. A Cases, some background knowledge is helpful. Part I explains the problem Sch. A Cases solve, followed by a discussion outlining the lifecycle of a prototypical Sch. A Case. Part II examines the procedural components of Sch. A Cases that seem to generate the most controversy. Finally, Part III examines the benefits, criticisms, and limitations of Sch. A Cases.

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<sup>20</sup> *Id.* at 3

<sup>21</sup> Brief of Stussy, Inc. as Amicus Curiae in Support of Respondent at \*1, *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, No. 21-1043, 2023 WL 1797874, at \*1 (2023).

<sup>22</sup> *Id.*

<sup>23</sup> Gary L. Deel, *What is Intellectual Property Law? And Why Does it Matter?*, AMERICAN PUBLIC UNIVERSITY (July 13, 2023), <https://www.apu.apus.edu/area-of-study/security-and-global-studies/resources/what-is-intellectual-property-law/> [<https://perma.cc/8JZF-JNVW>].

<sup>24</sup> See *Luna Distrib. L.L.C. v. Stoli Grp. (USA), L.L.C.*, No. 17-1552, 2018 WL 5099277, at \*7 (C.D. Cal. July 10, 2018).

## I. THE A, B, Cs OF SCHEDULE As

### A. *The Perils of Infringing Products*

The world is awash with fakes—from consumer goods like fake Louboutin heels to necessities like medicine and microprocessors; if a product exists, someone will fake it.<sup>25</sup> The production and trafficking of Infringing Products, which is often portrayed as harmless, garners little sympathy or consideration from the general public. Many otherwise law-abiding citizens do not fully consider the harms caused by purchasing cheap imitations of highly sought-after products; it feels like they are getting a good deal.<sup>26</sup> While many consumers can guess that purchasing Infringing Products affects Rights Owners' bottom line, this consequence seems remote compared to their good deal.<sup>27</sup> Nonetheless, Infringing Products harm numerous

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<sup>25</sup> See Alexandra Gibbs, *China's craziest counterfeits*, CNBC (updated Apr. 10, 2015), <https://www.cnbc.com/2015/04/09/chinas-craziest-counterfeits.html> [<https://perma.cc/MCP2-SN36>].

<sup>26</sup> See, e.g., Trevor Little, *Research provides insight into why consumers buy fakes, and what may prevent them from doing so*, WORLD TRADEMARK REVIEW (Sept. 2, 2020), <https://www.worldtrademarkreview.com/article/research-provides-insight-why-consumers-buy-fakes-and-what-may-prevent-them-doing-so> [<https://perma.cc/3CYS-WR8H>]; Oleksandra Zavetailo, *Top Reasons Why People Buy Fake Goods*, MEDIUM (Dec. 13, 2018), <https://medium.com/simplybrand/top-reasons-why-people-buy-fake-goods-c3ddfc36d1e3> [<https://perma.cc/QNJ6-QRJ4>]; *Stop Buying Fake Goods! These are 5 Reasons Why You Should Buy Original Products*, PERMATABANK (Jan. 12, 2022), <https://www.permatabank.com/en/article/stop-beli-barang-kw-5-alasan-sebaiknya-beli-barang-ori#:~:text=In%20general%2C%20price%20is%20the,considers%20a%20lot%20of%20aspects> [<https://perma.cc/YB5H-F46P>].

<sup>27</sup> United Nations Office on Drugs and Crime, *Counterfeit Products*, TOCTA REPORT (2010), <https://www.unodc.org/documents/data-and->

stakeholders.<sup>28</sup> As such, it is vital to examine the damage Infringing Products wreak on consumers, the economy, and national security in order to appreciate the measures that Rights Owners must take to protect their IP.

According to U.S. Customs and Border Protection, most Infringing Products now come through international mail and express courier services due to increased sales from offshore online scofflaws.<sup>29</sup> The bulk of Infringing Products that make their way to the U.S. “come from China and its dependent territories, accounting for over 90.6 percent of all cargo with” IP thefts.<sup>30</sup> As of 2018, the trafficking of Infringing Products is the largest criminal enterprise in the world, with domestic and international sales reaching higher than human or drug trafficking.<sup>31</sup> The rise of e-commerce has made it increasingly difficult to distinguish the real from the fake.<sup>32</sup> Infringing Products are no longer limited to luxury items but include virtually any product.<sup>33</sup> Whether a consumer knowingly or unknowingly purchases an Infringing Product, these products are often dangerous and pose many health and safety risks.<sup>34</sup> Counterfeit “toy producers need not worry about choking

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analysis/tocta/8.Counterfeit\_products.pdf [https://perma.cc/XC4F-P7PM].

<sup>28</sup> *Id.*

<sup>29</sup> Dunham & Assocs., *supra* note 13.

<sup>30</sup> *Id.*

<sup>31</sup> FED. RSCH. DIV., LIBR. OF CONG., NO. 2020-03, U.S. INTELLECTUAL PROPERTY AND COUNTERFEIT GOODS—LANDSCAPE REVIEW OF EXISTING/EMERGING RESEARCH i (2020).

<sup>32</sup> *Are Your Online Purchases Legit?*, U.S. GOV’T ACCOUNTABILITY OFF. (Mar. 9, 2018), <https://www.gao.gov/blog/2018/03/09/are-your-online-purchases-legit> [https://perma.cc/GW36-4EFV].

<sup>33</sup> *See* Gibbs, *supra* note 25.

<sup>34</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-216, INTELLECTUAL PROPERTY AGENCIES CAN IMPROVE EFFORTS TO ADDRESS RISKS POSED BY CHANGING COUNTERFEITS MARKET 8 (2018).



hazards or paint toxicity.”<sup>35</sup> Counterfeit clothing contains dangerous chemicals and heavy metals.<sup>36</sup> Counterfeit auto parts do not undergo the rigorous testing borne by their genuine counterparts.<sup>37</sup> “Due to cheaper materials and workmanship, counterfeit batteries and cigarette lighters are prone to explode.”<sup>38</sup> Counterfeit pharmaceuticals “need not contain any active ingredient at all.”<sup>39</sup> Worse, they may cause severe injury or death.<sup>40</sup> These dangerous, defective, and sham products are often illegally produced and sold at a profit to fund other criminal activities.<sup>41</sup> According to the United Nations on Drugs and Crime, counterfeits are becoming an increasingly attractive revenue stream for criminal organizations looking to diversify their offerings.<sup>42</sup>

In addition to the aforementioned, Infringing Product sales cause significant economic harm. Infringing Products do not enter normal retail distribution channels.<sup>43</sup> In 2020, it was estimated “that over 39,860 jobs in

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<sup>35</sup> United Nations Office on Drugs and Crime, *Counterfeit Products*, TOCTA REPORT (2010), [https://www.unodc.org/documents/data-and-analysis/tocta/8.Counterfeit\\_products.pdf](https://www.unodc.org/documents/data-and-analysis/tocta/8.Counterfeit_products.pdf) [<https://perma.cc/XC4F-P7PM>].

<sup>36</sup> *Fashion Industry Study Reveals Dangerous Chemicals, Heavy Metals in Counterfeit Products*, AMERICAN APPAREL & FOOTWEAR ASS’N (Mar. 23, 2022), [https://www.aafaglobal.org/AAFA/AAFA\\_News/2022\\_Press\\_Releases/Fashion\\_Industry\\_Study\\_Reveals\\_Dangerous\\_Chemicals\\_Heavy\\_Metals\\_Counterfeits.aspx](https://www.aafaglobal.org/AAFA/AAFA_News/2022_Press_Releases/Fashion_Industry_Study_Reveals_Dangerous_Chemicals_Heavy_Metals_Counterfeits.aspx) [<https://perma.cc/D629-JNW5>].

<sup>37</sup> United Nations Office on Drugs and Crime, *Counterfeit Products*, TOCTA REPORT (2010), [https://www.unodc.org/documents/data-and-analysis/tocta/8.Counterfeit\\_products.pdf](https://www.unodc.org/documents/data-and-analysis/tocta/8.Counterfeit_products.pdf) [<https://perma.cc/XC4F-P7PM>].

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-216, INTELLECTUAL PROPERTY AGENCIES CAN IMPROVE EFFORTS TO ADDRESS RISKS POSED BY CHANGING COUNTERFEITS MARKET 8 (2018).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Dunham & Assocs., *supra* note 13.

wholesaling and nearly 283,400 retail jobs” had been lost due to the Infringing Products sales through non-retail distribution channels.<sup>44</sup> Further, Infringing Product importation costs the U.S. government an estimated “\$7.2 billion in personal and business tax revenues alone.”<sup>45</sup> The damage is not only limited to the U.S.; Infringing Product manufacturers exploit unregulated sweatshops and utilize dirty production methods that harm the environment.<sup>46</sup> In sum, scofflaws undercut any pre-set industry standards.

One thing is clear: Infringing Product sales inflict damages that go well beyond Rights Owners’ bottom lines and affect a broad array of stakeholders, both domestically and globally.<sup>47</sup> Damage caused to Rights Owners by Infringing Product sales should not be understated.

Rights Owners’ goodwill and reputation are eroded by Infringing Product sales.<sup>48</sup> Rights Owners are also responsible for enforcing their IP rights and allocating resources to develop solutions to the problems described above.<sup>49</sup> Infringing Product trafficking has become a major source of unfair global competition.<sup>50</sup> Rights Owners have to compete with illegitimate players who ignore established

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Transnat’l All. to Combat Illicit Trade, *The Human Cost Of Illicit Trade: Exposing Demand For Forced Labor In The Dark Corners Of The Economy*, TRACIT.ORG, at 14, 17 (Nov. 2021).

<sup>47</sup> *Counterfeit goods: a bargain or a costly mistake?*, U.N. OFF. ON DRUGS & CRIME, <https://www.unodc.org/toc/en/crimes/counterfeit-goods.html#:~:text=More%20taxes%2C%20more%20expense%2C%20fewer,revenue%2C%20business%20income%20and%20jobs> [<https://perma.cc/G9CW-EKH6>] (last visited Sept. 13, 2024).

<sup>48</sup> See Keith Goldstein, *The Global Impact of Counterfeiting And Solutions To Stop It*, FORBES BUSINESS COUNCIL (Aug. 2, 2022), <https://www.forbes.com/sites/forbesbusinesscouncil/2022/08/02/the-global-impact-of-counterfeiting-and-solutions-to-stop-it/?sh=7fc142cd1ca2> [<https://perma.cc/V938-JLGE>].

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

rules of engagement, eat up market share, and diminish Rights Owners' reputations and goodwill.<sup>51</sup> The ramifications from Infringing Product sales are not benign—research has found that 52% of consumers lost trust in a brand after purchasing a fake good online.<sup>52</sup> Rights Owners' businesses depend on the quality of their products, the originality of their designs, where products are available, and their exclusivity.<sup>53</sup> Infringing Product sellers undercut those for Rights Owners.<sup>54</sup>

### **B. The New Middleman: Online Marketplaces**

It is important to understand the operation of online marketplaces to recognize how they facilitate the trafficking of Infringing Products. An "online marketplace" is a type of e-commerce site used by third-party entities to sell their goods and services to consumers.<sup>55</sup> The online marketplace showcases third parties' inventories and facilitates sales.<sup>56</sup> In a nutshell, an online marketplace acts as a middleman connecting buyers with sellers. Online marketplaces can be based in foreign countries (like AliExpress and Alibaba) or based in the U.S. (like Amazon and Etsy).<sup>57</sup> Online marketplaces

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<sup>51</sup> *Id.*

<sup>52</sup> See INCOPRO, *IS FAKE THE NEW REAL? LIVING IN A FAKE SOCIETY-US*, (2023) (ebook); see also Joseph M. Forgione, *Counterfeiting, Couture, and the Decline of Consumer Trust in Online Marketplace Platforms*, 61 N.Y.L. SCH. L. REV. 195, 205–07 (2017).

<sup>53</sup> Brief of Stussy, Inc. as Amicus Curiae in Support of Respondent, *supra* note 21, at \*1.

<sup>54</sup> *Id.* at \*28.

<sup>55</sup> Sara Matasci, *Marketplace 101: What is an Online Marketplace and How Does it Work?*, MIRAKL (Sept. 8, 2022), <https://www.mirakl.com/blog/marketplace-101-what-is-an-online-marketplace-and-how-does-it-work> [<https://perma.cc/7HKU-9XU4>].

<sup>56</sup> *Id.* Online marketplaces, like Walmart, sell their own goods while also allowing third-party entities to separately sell their own inventory.

<sup>57</sup> Dunham & Assocs., *supra* note 13.

accessible to U.S. consumers almost always accept common American payment methods such as U.S. dollars, credit cards, and payment processors like PayPal.<sup>58</sup> Most online marketplaces only recently began requiring identifying information, but much of the information other than a user's email is difficult to fully verify.<sup>59</sup> Thus, scofflaws can easily establish attractive "storefronts" to compete with legitimate businesses.<sup>60</sup>

The rise of e-commerce came with the exponential popularity of online marketplaces which have become a favorite for unloading Infringing Products.<sup>61</sup> Selling Infringing Products through online marketplaces presents a lucrative opportunity: there are endless customers available online to conveniently transact with, and listing on established online marketplace platforms creates an air of legitimacy.<sup>62</sup> An Infringing Product seller can set up multiple accounts on various online marketplaces that contain false identities, business names, and locations.<sup>63</sup> The ability to rapidly proliferate online marketplace accounts complicates enforcement efforts, especially for Rights Owners.<sup>64</sup> The rapid proliferation of fake profiles allows scofflaws to hop from one profile to another despite the removal of any one profile.<sup>65</sup> Further, the sellers often

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<sup>58</sup> Brief of Stussy, Inc. as Amicus Curiae in Support of Respondent, *supra* note 21, at \*23.

<sup>59</sup> U.S. DEP'T OF HOMELAND SEC., REP. ON COMBATTING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS 24 (2020).

<sup>60</sup> *Id.* at 12.

<sup>61</sup> Forgione, *supra* note 52, at 201.

<sup>62</sup> U.S. DEP'T OF HOMELAND SEC., REP. ON COMBATTING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS 10 (2020).

<sup>63</sup> *Id.* at 11.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

deceive consumers by using images of genuine goods but selling Infringing Products.<sup>66</sup>

Some online marketplace platforms have expended significant resources in attempts to eradicate Infringing Products from their online marketplaces.<sup>67</sup> For example, Amazon investigates counterfeit reports, created an internal brand registry to protect trademarks, and has filed lawsuits against Infringing Product sellers.<sup>68</sup> eBay has provided a way for users to report suspected Infringing Products, while Etsy will remove Infringing Product listings if they appear on Etsy's prohibited items list.<sup>69</sup> Conversely, some online marketplaces remain "fiercely opposed" to measures taken against infringers, claiming "that collecting and verifying basic seller information is too difficult, too complicated, [and] too burdensome . . . ."<sup>70</sup> Notably, many online marketplaces generate fees every time a product is sold on their platforms.<sup>71</sup> Thus, eradicating Infringing Products

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<sup>66</sup> See @artloss1, eBay (Apr. 3, 2022), <https://community.ebay.com/t5/Buying/Seller-sent-me-a-counterfeit/td-p/32828148> (showing an eBay consumer post where the customer complained that the product they received was counterfeit, even though the seller had advertised it as an authentic item).

<sup>67</sup> See *infra* notes 68–69.

<sup>68</sup> David Z. Morris, *Amazon Slammed for Being 'Complicit' in Sales of Counterfeit Products*, FORTUNE (Mar. 3, 2018), <https://fortune.com/2018/03/03/amazon-complicit-selling-counterfeit-products/> [<https://perma.cc/DFC6-G4LY>].

<sup>69</sup> *eBay Community Protection*, EBAY, <https://www.ebaymainstreet.com/issues/ebay-community-protection> [<https://perma.cc/VR7K-2R25>]; *Prohibited Items Policy*, ETSY, <https://www.etsy.com/legal/prohibited/#:~:text=Unauthorized%20replicas%20or%20copies%20of,without%20the%20brand%20owner's%20consent> (last visited Mar. 11, 2024).

<sup>70</sup> Buy Safe America, *The Inform Consumers Act of 2020*, BUY SAFE AMERICA COALITION, <https://www.buysafeamerica.org/informed-consumers-act> [<https://perma.cc/8WFT-P4VU>] (last visited Sept. 29, 2024).

<sup>71</sup> *Id.*; Forgione, *supra* note 52.

could reduce a non-negligible portion of their overall revenue.

Despite efforts from online marketplaces to curb Infringing Product sales, Infringing Products have continued to flood the marketplace.<sup>72</sup> As such, Rights Owners are faced with a difficult problem: how can they effectively remove thousands of sham products from online marketplaces when the marketplaces are unable to accomplish this themselves? Recently, Rights Owners have turned to federal intellectual property infringement litigation to combat the problem by filing Sch. A Cases.

### C. *A Typical Lifecycle of Sch. A Cases*

This Section outlines the prototypical Sch. A Case's procedural posture, recognizing there are differences in what Rights Owners may be aiming to achieve. The presumptive goal of the standard Sch. A Case is to stop online Infringing Product sales and deter the same.<sup>73</sup> The great majority of Sch. A Case complaints allege claims against a very specific type of defendant that comport with very specific parameters.<sup>74</sup> Ensuring each defendant aligns with the representations made in the complaint is necessary to comport with both pleading requirements and thorny

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<sup>72</sup> U.S. DEP'T OF HOMELAND SEC., REP. ON COMBATTING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS 25 (2020).

<sup>73</sup> Arnold-Rees, *supra* note 1.

<sup>74</sup> *E.g., infra* note 77; Compl., Toyota Motor Sales, U.S.A., Inc. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A," No. 23-cv-15256 (N.D. Ill. filed Oct. 24, 2023), ECF No. 1; Compl., Celine SA v. P'ships & Unincorporated Ass'ns Identified on Sched. "A," No. 22-cv-05668 (N.D. Ill. filed Oct. 17, 2022), ECF No. 1; Compl., Rivers Cuomo v. P'ships & Unincorporated Ass'ns Identified on Sched. "A," No. 23-cv-04125 (N.D. Ill. filed June 27, 2023), ECF No. 1; Compl., Viacom International Inc. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A," 23-cv-02733 (N.D. Ill. filed May 1, 2023), ECF No. 1.

issues related to the Federal Rules of Civil Procedure, including personal jurisdiction, joinder, and service of process.

First, each defendant is a third-party seller on an online marketplace platform, like Amazon, or owns and operates an independent website selling Infringing Products.<sup>75</sup> Second, each defendant is domiciled in a foreign country.<sup>76</sup> Third, each defendant sells or offers to sell Infringing Products into the forum state.<sup>77</sup>

While these mass-defendant cases do not have an official name, they are commonly referred to as “Schedule A cases”<sup>78</sup> because the defendants are identified on a “Schedule A” which is attached to the complaint, rather than being named in the case caption. The typical Schedule

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<sup>75</sup> See Decl. Martin F. Trainor at 2, ABC Corp. v. P’ships and Unincorporated Ass’ns Identified on Sched. “A,” No. 22-cv-07079 (N.D. Ill. filed Jan. 13, 2023), ECF No. 18-1.

<sup>76</sup> *Id.*

<sup>77</sup> Compl. ¶ 2, Creative Licensing Corp. v. P’ships & Unincorporated Ass’ns Identified on Sched. “A,” No. 23-cv-02325 (N.D. Ill. filed Apr. 13, 2023), ECF No. 1.

<sup>78</sup> The “Schedule A” variation of mass-counterfeiting litigation is predominantly used in the United States District Court for the Northern District of Illinois. Setty & Poritz, *supra* note 3. In other populous jurisdictions where mass-counterfeiting litigation occurs, this convention varies. See *Viahart, L.L.C. v. Does 1-54*, No. 18-cv-00604, 2022 WL 4137278 (E.D. Tex. Sept. 12, 2022) (calling defendants Does); *ABG-Shaq, L.L.C. v. 2301caozhiyao, et al.*, No. 21-cv-2476, 2021 WL 5033455 (N.D. Ga. June 24, 2021) (including defendants by their Seller Aliases in the complaint’s case caption, but the complaint is filed under seal). This article will mostly focus on mass counterfeiting litigation conventions in the Seventh Circuit because most mass-counterfeiting cases are filed in the Northern District of Illinois. While there is some speculation, and admittedly there is no definitive reason why these cases are predominantly filed in the Northern District of Illinois, this author believes the answer is born out of practicality—this is a niche practice, with the most experienced and successful practitioners of the niche practice residing in Illinois, and the Seventh Circuit has the clearest case law.

A lists dozens, or even hundreds, of defendants. The case caption temporarily identifies the defendants under a pseudonym, for example, as “The Partnerships and Unincorporated Associations Identified on Schedule A.”<sup>79</sup> The Schedule A identifies the defendants by their domain name or online marketplace store name (“Seller Alias”) and that the unknown individual or entity owns or operates to sell Infringing Products.<sup>80</sup> The defendants are named by their Seller Alias because their true identities are unknown when the complaint is filed.<sup>81</sup>

Sch. A Cases start with a plaintiff filing a complaint and the Schedule A listing the defendants.<sup>82</sup> The Schedule A is almost always filed under seal, along with a motion asking the court for permission to file it under seal. The purpose of this is to ensure that the defendants are not prematurely made aware of the litigation.<sup>83</sup> Without further context, this may violate internal notions of fairness based on the *ex parte* relief Rights Owners are seeking. However, as informed by common sense and decades of experience, Schedule A defendants (“Defendants”) are almost exclusively scofflaws; they capitalize on the anonymity and mass reach afforded by the Internet and attempt to evade detection by Rights Owners.<sup>84</sup> Schedule A plaintiffs argue that if Defendants were to catch wind of the lawsuit prematurely, they would likely destroy relevant evidence,

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<sup>79</sup> Compl. ¶ 1, *supra* note 77 (case caption).

<sup>80</sup> Marko Zoretic & Jack Hendershott, *Do ‘Schedule A’ cases threaten foreign firms in the US?*, WORLD INTELLECTUAL PROPERTY REVIEW (Aug. 9, 2023), <https://www.worldipreview.com/patent/do-schedule-a-cases-threaten-foreign-firms-in-the-us> [<https://perma.cc/ZTE6-PKEW>].

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See Mem. in Support of Pl.’s Mot. for Electronic Serv. of Process at 1, FCA US L.L.C. v. P’ships & Unincorporated Ass’ns Identified on Sched. “A,” No. 23-cv-14020 (N.D. Ill. filed Sept. 26, 2023), ECF No. 17.



“register new e-commerce stores under new seller aliases and move assets to offshore bank accounts outside the jurisdiction of” the U.S.<sup>85</sup> Judges across the country have been sympathetic to this argument, as evidenced by the routine nature by which they allow the Schedule A document to be filed under seal.<sup>86</sup>

After the complaint is filed, the plaintiff moves for *ex parte* entry of a sealed Temporary Restraining Order (“TRO”) and authorization to complete electronic service of process pursuant to Federal Rule of Civil Procedure 4(f)(3) (“E-Service”).<sup>87</sup> The motion for *ex parte* entry of a TRO seeks injunctive relief enjoining Defendants from selling Infringing Products and providing expedited discovery regarding the Defendants’ operation.<sup>88</sup> It further asks third-party online marketplaces and payment processors to remove the Defendants’ Infringing Product listings, freeze the Defendants’ financial assets, and

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<sup>85</sup> See *Chrome Cherry Ltd. v. P’ships & Unincorporated Ass’ns Identified on Sched. “A,”* No. 21-cv-05491, 2021 WL 6752296, at \*2 (N.D. Ill. Oct. 20, 2021) (granting plaintiff’s motion to file underseal).

<sup>86</sup> *E.g., id.*; Order Granting Pl.’s Mot. to File Under Seal at 1, *Adidas AG v. Individuals, P’ships, and Unincorporated Ass’ns Identified on Sched. “A,”* No. 20-cv-61146 (S.D. Fla. filed June 16, 2020), ECF No. 8; Order, *Natty Paint LLC v. Individuals, Bus. Entities, and Unincorporated Ass’ns Identified on Ex. 1,* No. 22-cv-01193 (W.D. Tex. filed Nov. 18, 2022), ECF No. 9; Order Case Sealed, *Off-White L.L.C. v. Ali JR,* No. 19-cv-01775 (S.D. N.Y. filed Feb. 26, 2019), ECF. No. 1.

<sup>87</sup> See R. Mark Halligan, *Preparing ex parte seizure orders to protect trade secrets*, REUTERS (Oct. 27, 2023), <https://www.reuters.com/legal/legalindustry/preparing-ex-parte-seizure-orders-protect-trade-secrets-2023-10-27/#:~:text=An%20ex%20parte%20seizure%20order%20is%20nothing%20new%20in%20intellectual,issued%20in%20trademark%20infringement%20cases> (“For more than 100 years, the *ex parte* seizure order has been utilized in copyright infringement cases, and for over 30 years *ex parte* seizure orders have been issued in trademark infringement cases.”).

<sup>88</sup> *Zoretic & Hendershott, supra* note 80.

provide the plaintiff with Defendants' contact information.<sup>89</sup> If Defendants' assets are not restrained (as explained further below), Rights Owners would not only be deprived of recovering any monetary remedies and an equitable remedy of accounting, but there would also be no meaningful deterrent due to the lack of financial consequences for foreign Defendants who lack assets within a U.S. court's jurisdiction.<sup>90</sup> The motion for E-Service seeks court authorization to serve the Defendants and provide all notices of the later stages of the proceedings by electronically publishing the complaint, summons, and all other relevant court documents on a website, and sending a link to that website via e-mail to the Defendants.<sup>91</sup> In the great majority of Sch. A Cases, these motions are granted without issue.<sup>92</sup>

Once the TRO is entered, the plaintiff serves it on the relevant third parties—i.e., the online marketplaces that the Defendants sell their Infringing Products on.<sup>93</sup> The

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<sup>89</sup> Sealed Temporary Restraining Order, *Toyota Motor Sales, U.S.A., Inc. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A,"* No. 23-cv-15256 (N.D. Ill. Filed Oct. 26, 2023), ECF No. 22.

<sup>90</sup> *Id.*

<sup>91</sup> Mem. in Support of Pl.'s Mot. for Electronic Serv. of Process, *supra* note 84, at 1.

<sup>92</sup> Order Granting Pl.'s Mot. for Final J. at 5, *Adidas AG v. Individuals, P'ships, and Unincorporated Ass'ns Identified on Sched. "A,"* No. 20-cv-61146 (S.D. Fla. filed Oct. 21, 2020), ECF No. 46; Prelim. Inj. at 2, *CCA and B, L.L.C. v. anhuaxiansizhichuangdianzishangwuyouxianzerengongs,* No. 22-cv-04594 (N.D. Ga. filed Jan. 3, 2023), ECF No. 24; Final J. Order at 16, *FCA US L.L.C. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A,"* No. 23-cv-14020 (N.D. Ill. filed Dec. 5, 2023), ECF No. 48; Order Adopting Magistrate Recommendation at 13, *Chanel Inc. v. Zhang Yang,* No. 12-4428, 2013 WL 5755217, at \*13 (N.D. Cal. Oct. 21, 2013).

<sup>93</sup> Sealed Temporary Restraining Order, *Toyota Motor Sales, U.S.A., Inc. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A,"* No. 23-cv-15256 (N.D. Ill. Filed Oct. 26, 2023), ECF No. 22.

third parties temporarily disable the relevant product listings and institute an asset freeze before Defendants become aware of the proceedings against them.<sup>94</sup> The third parties then provide plaintiff discovery regarding the Defendants' contact information, limited sales information, and information regarding the Defendants' financial accounts.<sup>95</sup> While not ordered to do so, the third parties also generally provide notice to Defendants after they have instituted the asset restraint and disabled the product listing, informing the Defendants that the Rights Owner has instituted a lawsuit against them, and providing the Defendants with plaintiff's counsel's contact information.<sup>96</sup>

After the third parties have confirmed the effectuation of the TRO, the plaintiff serves the Defendants electronically via publication and e-mail and moves in court for entry of a preliminary injunction.<sup>97</sup> The plaintiff will electronically publish the complaint, summons, and all relevant documents to a website, and then send the website's link to the Defendants via e-mail.<sup>98</sup> The relief sought in the motion for entry of a preliminary injunction ultimately mirrors the relief awarded in the TRO but remains in effect until the matter is resolved.<sup>99</sup> Like the motions for entry of a TRO and E-Service, most motions

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<sup>94</sup> Zoretic & Hendershott, *supra* note 80.

<sup>95</sup> Sealed Temporary Restraining Order, Toyota Motor Sales, U.S.A., Inc. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A," No. 23-cv-15256 (N.D. Ill. Filed Oct. 26, 2023), ECF No. 22.

<sup>96</sup> *Id.* This author believes third parties should not be required to provide defendants with notice that an action has been taken against them, considering plaintiffs are required to (and do) serve defendants in order to proceed with the case.

<sup>97</sup> *Id.*

<sup>98</sup> See Mem. in support of Pl.'s Mot. for Electronic Serv. of Process, *supra* note 84.

<sup>99</sup> Sealed Temporary Restraining Order, Toyota Motor Sales, U.S.A., Inc. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A," No. 23-cv-15256 (N.D. Ill. Filed Oct. 26, 2023), ECF No. 22.; *infra* note 100.

for entry of a preliminary injunction are granted without issue in Sch. A Cases.<sup>100</sup>

Once the Defendants' deadline to file a responsive pleading has passed, Sch. A Case plaintiffs will move for entry of default and default judgment against any Defendants that have failed to file a responsive pleading or settle.<sup>101</sup> Sch. A Case plaintiffs typically seek a permanent injunction prohibiting Defendants from further infringing the plaintiffs' IP and an order permanently restraining Defendants' financial accounts operated by the third parties.<sup>102</sup> Due to the lack of information regarding the Defendants' operations, Rights Owners asserting trademark infringement and counterfeiting and/or copyright infringement also seek statutory damages, as well as an order requiring the third parties operating the Defendants' financial accounts to transfer funds—up to the amount of the statutory damages award—to the plaintiff in partial satisfaction of the judgment.<sup>103</sup> Once the court enters a default judgment, this concludes the typical Sch. A Case. With the typical case lasting around three to four months,

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<sup>100</sup> See e.g., order Granting Mot. for Entry of Prelim. Inj. at 15, *Adidas AG v. Individuals, P'ships, and Unincorporated Ass'ns Identified on Sched. "A,"* No. 20-cv-61146 (S.D. Fla. filed July 14, 2020), ECF No. 31; Prelim. Inj. at 2, *CCA and B, L.L.C. v. anhuaxiansizhichuangdianzishangwuyouxianzerengongs*, No. 22-cv-4594 (N.D. Ga. filed Jan. 3, 2023), ECF No. 24; Prelim. Inj. at 8, *Natty Paint L.L.C. v. Individuals, Bus. Entities, and Unincorporated Ass'ns Identified on Ex. 1*, No. 22-cv-1193 (W.D. Tex. filed Feb. 8, 2023), ECF No. 23; Prelim. Inj. Order at 16, *OFF-WHITE L.L.C. v. ALI JR*, No. 19-cv-1775 (S.D. N.Y. Filed Mar. 15, 2019), ECF No. 17; Prelim. Inj. at 17, *Chanel Inc. v. Zhang Yang*, No. 12-cv-04428 (N.D. Cal. filed Sept. 19, 2012), ECF No. 21.

<sup>101</sup> Mem. In Support of Pl.'s Mot. Entry of Default and Default J. at 1, *Superhype Tapes, Ltd., v. Linyi Banner Exhibition Advertising Media Co., Ltd*, No. 23-cv-05834 (N.D. Ill. Filed Dec. 8, 2023), ECF No. 49.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*; 17 U.S.C. § 504(c); 15 U.S.C. § 1117(c).

Sch. A Cases are fast, efficient, and provide actual relief to Rights Owners and deter a Defendant's conduct.<sup>104</sup>

## II. LET'S TALK PROCEDURE

Generally, when Defendants appear in Sch. A Cases, it is not to challenge the merits of the underlying infringement claim (because they are almost always liable). Rather, they typically challenge personal jurisdiction, electronic service, or joinder.<sup>105</sup> The below subsections will discuss the arguments surrounding personal jurisdiction, electronic service of process, and joinder, in addition to establishing why they are proper in Sch. A Cases.

### A. *Personal Jurisdiction*

One procedural aspect that some Defendants challenge is that the court lacks personal jurisdiction over them.<sup>106</sup> Defendants assert that personal jurisdiction is improper because their only contact with the forum state, if any, is limited to a single sale of an Infringing Product.<sup>107</sup> However, this argument misses the point because, by their own affirmative actions, the Defendants create the relevant minimum contacts with the forum state such that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice. Defendants

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<sup>104</sup> *E.g.*, Compl., Toyota Motor Sales, U.S.A., Inc. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A," No. 23-cv-15256 (N.D. Ill. filed Oct. 24, 2023), ECF No. 1; Final J. Order, Toyota Motor Sales U.S.A., Inc. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A," No. 23-cv-15256 (N.D. Ill. filed Feb. 1, 2024), ECF No. 46.

<sup>105</sup> *See infra* Sections A, B, and C.

<sup>106</sup> *See* NBA Props., Inc. v. HANWJH, 46 F.4th 614, 618 (7th Cir. 2022).

<sup>107</sup> *Id.*

voluntarily target the relevant forum state by setting up online marketplace storefronts—which are created for the sole purpose of selling goods—and affirmatively agree to sell goods to specific states or regions.<sup>108</sup> Because Defendants take several affirmative steps to target the U.S. and the relevant forum state, they should not be surprised when they are haled to court for lawsuits arising out of those actions, no matter their claims to the contrary.

Determining whether a court can exercise personal jurisdiction over an out-of-state defendant involves two familiar inquiries. First, a court looks to the forum state’s long-arm statute.<sup>109</sup> For purposes of this article, the assumption is that the state’s long-arm statute extends to the Constitutional limit.<sup>110</sup> The second inquiry asks whether asserting personal jurisdiction over the defendant comports with due process.<sup>111</sup> The Due Process Clause authorizes personal jurisdiction over an out-of-state defendant who has “certain minimum contacts” with the relevant forum such that the exercise of personal jurisdiction “does not offend ‘traditional notions of fair play and substantial justice.’”<sup>112</sup> A defendant’s contacts with the forum state must be such that the defendant could “reasonably anticipate being haled into court there.”<sup>113</sup>

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<sup>108</sup> Dec. of Daven Brodess at 4–5, *Pit Viper, L.L.C. v. Yiwu Jinhua Accessories Co., Ltd., et al.*, No. 23-cv-11374 (N.D. Ill. filed Oct. 2, 2024), ECF No. 80.

<sup>109</sup> Order, *OFF-WHITE L.L.C. v. ALI JR.*, No. 19-cv-01775 (S.D.N.Y. filed Sept. 28, 2020), ECF No. 55; *see* VEDDER, PRICE, KAUFMAN & KAMM HOLZ, P.C., *LONG-ARM STATUTES: A FIFTY-STATE SURVEY*, VEDDERPRICE (2003) (ebook). This article will continue under the assumption that the long-arm state statutes involved in Schedule A cases allow for personal jurisdiction.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>113</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

The issue in these cases is usually specific personal jurisdiction as opposed to general personal jurisdiction.<sup>114</sup> When analyzing specific personal jurisdiction, courts consider: (1) whether the out-of-state defendant “purposefully availed” itself of the privilege of conducting activities within the forum state, thus invoking the benefit of the forum state’s laws; (2) whether the plaintiff’s claims “arise out of or relate to” at least one of the defendant’s contacts with the forum; and (3) whether the exercise of personal jurisdiction comports with “traditional notions of fair play and substantial justice.”<sup>115</sup> Notably, the relationship between the defendant and the forum must arise out of the contacts that the defendant voluntarily created with the forum so “that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts, or of the ‘unilateral activity of another party or a third person.’”<sup>116</sup>

An analysis regarding each of the due process factors is discussed in greater detail below.

### 1. Purposeful Availment

Contacts constituting purposeful availment must show that a defendant “avail[ed] itself of the privilege of conducting activities within the forum state.”<sup>117</sup> “[P]hysical presence is not necessary for a defendant to

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<sup>114</sup> See *infra* note 154. This article does not provide an argument based on personal jurisdiction over the defendants pursuant to Fed. R. Civ. P. 4(k)(2), but briefly mentions it is likely an additional or alternative way to establish that personal jurisdiction over a defendant. FED. R. CIV. P. 4(k)(2).

<sup>115</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413–14 (1984); *Int’l Shoe Co.*, 326 U.S. at 316; *Burger King Corp.*, 471 U.S. at 474–75.

<sup>116</sup> *Burger King Corp.*, 471 U.S. at 475 (internal citation omitted).

<sup>117</sup> *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359 (2021).

have sufficient minimum contacts with a forum state.”<sup>118</sup> Rather, what is required is that the “defendant reasonably could foresee that its product would be sold in the forum.”<sup>119</sup> The Defendants in Sch. A Cases all create online marketplace stores or websites for the sole purpose of selling goods to American consumers; the Defendants determine what regions and states they will sell to while setting up their store, and affirmatively agree to sell Infringing Products into the forum state.<sup>120</sup> So, it is reasonable to conclude that by offering for sale, or selling, into a forum, one may get sued for harm arising from that sale. Defendants are not passive operators of an interactive website, but rather intentionally set up their stores to target the U.S. market.<sup>121</sup>

The Seventh Circuit’s recent ruling in *NBA Properties, Inc. v. HANWJH* is particularly instructive and is currently the only appellate court decision that this Author found regarding personal jurisdiction that was made in the context of a Sch. A Case.<sup>122</sup> In *NBA Properties*, the issue before the Seventh Circuit was whether one sale of an Infringing Product to the NBA’s investigator in Illinois was enough to subject the defendant to personal jurisdiction in Illinois.<sup>123</sup> Deciding not to “break new ground,” the Seventh Circuit answered in the affirmative.<sup>124</sup>

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<sup>118</sup> *NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 624 (7th Cir. 2022).

<sup>119</sup> *Id.* at 623.

<sup>120</sup> Decl. of Lijia Chen, *Ouyeinc Ltd. v. 1 Baaaai*, No. 20-cv-03488 (N.D. Ill. filed May 25, 2021), ECF No. 125-1; Decl. of Lijia Chen, *Ouyeinc Ltd. v. Alucy*, No. 20-cv-03490 (N.D. Ill. filed May 25, 2021), ECF No. 141-3; Decl. of Lijia Chen, *Gen. Tools & Instruments, L.L.C. v. P’ships & Unincorporated Ass’ns Identified on Sched. “A,”* No. 20-cv-01036 (N.D. Ill. filed May 21, 2021), ECF No. 175-1.

<sup>121</sup> Dec. of Daven Brodess, *supra* note 108, at 4.

<sup>122</sup> *NBA Props., Inc.*, 46 F.4th at 618.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 624.



The outcome makes sense, despite there only being evidence of one Infringing Product sold into the forum state that was ordered by the plaintiff's own investigators.<sup>125</sup> The exact amount of products sold in the Schedule A context is irrelevant for purposes of establishing personal jurisdiction because the Supreme Court expressly rejected creating bright line rules, which is what requiring a certain amount of sales to confer personal jurisdiction amounts to.<sup>126</sup> The Supreme Court has also held that a defendant's single contact with a forum state is sufficient for personal jurisdiction in other contexts.<sup>127</sup>

Whether the plaintiff's investigators, rather than a random consumer, made the purchase does not (and should not) matter. When the order is placed, the Defendants do not know, or care, who the product is being sold to. But they are aware that they are conducting business with someone in that forum state.<sup>128</sup> An investigator's purchase is not manufacturing jurisdiction.<sup>129</sup> To hold otherwise ignores that the Defendant ships Infringing Products into the forum only after structuring its business in a way that invites orders from the forum state. Defendants should not be permitted to sell Infringing Products into a forum state, reap those benefits, and then point to purchasers and say "It was all their idea."<sup>130</sup> The Defendants "want[] to have [their] cake and eat it, too: [they] want[] the benefit of a nationwide business model with none of the exposure."<sup>131</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 485–86 (1985).

<sup>127</sup> *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 221, 223 (1957).

<sup>128</sup> *Dec. of Daven Brodess*, *supra* note 108, at 9.

<sup>129</sup> *Viahart, L.L.C. v. Does 1-54*, No. 18-cv-604, 2022 WL 4138590, at \*7–8 (E.D. Tex. July 18, 2022); *ISI Brands, Inc. v. KCC Int'l, Inc.*, 458 F. Supp. 2d 81, 88–89 (E.D. N.Y. Oct. 19, 2006).

<sup>130</sup> *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 428 (7th Cir. 2010).

<sup>131</sup> *Illinois v. Hemi Grp. L.L.C.*, 622 F.3d 754, 760 (7th Cir. 2010).

While caselaw suggests that a single sale of an Infringing Product is sufficient to establish personal jurisdiction over a Defendant, few circuit courts have addressed what happens when a foreign defendant offers an Infringing Product for sale, but never actually completes the sale or ships the Infringing Product into the forum. Recently, the Second Circuit held that personal jurisdiction “doesn’t require a completed sale. It only requires a transaction.”<sup>132</sup> Reversing the district court’s dismissal of the defendants for a lack of personal jurisdiction, the Second Circuit made clear that none of its precedent “should be read as indicating that shipment is required to demonstrate a business transaction” for purposes of personal jurisdiction.<sup>133</sup> The fact that the defendants “cancelled the orders and refunded the purchase price to the customer does not change this conclusion” because, as the Second Circuit correctly stated, the focus is on how the defendants structured their e-commerce business in a way to purposefully avail themselves in New York.<sup>134</sup> The waters can get murky when further stretching personal jurisdiction to situations where there was no transaction of Infringing Products or other evidence of targeting.<sup>135</sup>

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<sup>132</sup> *Am. Girl, L.L.C. v. Zembrka*, No. 21-cv-1381, 2024 WL 4206197, at \*4 (2d Cir. Sept. 17, 2024).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at \*3–4.

<sup>135</sup> This Author does not believe that the Supreme Court’s holding regarding the extraterritoriality of the Lanham Act in *Abitron Austria GmbH v. Hetronic Int’l, Inc.*, 600 U.S. 412 (2023) is relevant to Schedule A cases, because this conduct constitutes use in domestic commerce. *See, e.g.*, 5 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION, § 29:56 (5th ed. Supp. 2023) (“The use of an infringing mark as part of an internet site aimed at selling to buyers in the United States may constitute an infringement of the mark in the United States.”); *id.* at § 25:54.50 (“When an alleged infringing mark is used on the internet, the use is clearly a ‘use in commerce.’”); *id.* at § 3:7 (discussing “evidence of use as a trademark” where “a designation is prominently displayed in a way easily recognized by web users as an

While not discussed in further detail here, if no court has jurisdiction over the defendant because of a purported lack of sales, personal jurisdiction would still be proper under Rule 4(k)(2) due to the nature of online sellers and their targeting of the U.S.<sup>136</sup>

Defendants purposefully avail themselves of the privilege of conducting activities within the forum. Actions taken by them establish a deliberate targeting of the U.S., and more specifically, the relevant forum state. As previously noted, Defendants are foreign sellers who create online storefronts through third-party online marketplaces or independent websites.<sup>137</sup> To give more context, when Defendants create their storefronts, they affirmatively select the U.S. and the specific states thereof from a list of regions they want to conduct business with.<sup>138</sup> For instance, on Amazon, Defendants “use ‘Shipping settings’ to customize the regions that they will ship to and

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indicator of origin”); *accord*, *In re Sones*, 590 F.3d 1282, 1288 (Fed. Cir. 2009) (observing, with respect to the use-in-commerce requirement, that a “website [can be] an electronic retail store, and the web page [can be] a shelf-talker or banner which encourages the consumer to buy the product.”). Further, some courts have explained why even the offer for sale of Infringing Products into the forum state subjects the defendant to personal jurisdiction in the forum state. *BRABUS GmbH v. Individuals Identified on Schedule A Hereto*, No. 20-cv-03720, 2022 WL 7501046, at \*2–3 (N.D. Ill. Oct. 13, 2022); *Soclean, Inc. v. RespLabs Medical USA, Inc., et al.*, No. 21-cv-003422, 2022 WL 2818715, at \*2–3 (N.D. Ill. July 19, 2022); *Monster Energy Co. v. Wensheng*, 136 F. Supp. 3d 897, 904 (N.D. Ill. 2015); *Ouyeinc Ltd. v. Alucy*, No. 20-cv-3490, 2021 WL 2633317, at \*4 (N.D. Ill. June 25, 2021); *Christian Dior Couture, S.A. v. Liu*, No. 15-cv-06324, 2015 U.S. Dist. LEXIS 158225, \*5–15 (N.D. Ill. Nov. 17, 2015).

<sup>136</sup> FED. R. CIV. P. 4(k)(2); *see also* *ABG-Shaq, L.L.C. v. 2301caozhiyao*, No. 21-cv-2476, 2021 WL 5033455, at \*2 (N.D. Ga. June 24, 2021); *Animaccord Ltd. v. Individuals, Partnerships & Unincorporated Ass’ns Identified on Schedule “A”*, No. 23-cv-277, 2023 WL 4533407, at \*3 (W.D. Tex. June 8, 2023).

<sup>137</sup> *Compl.*, *supra* note 77.

<sup>138</sup> *Decls. of Lijia Chen*, *supra* note 120.

the service levels that they will support for each region.”<sup>139</sup> This appears to be consistent across all the platforms.<sup>140</sup> Even more revealing is if the Defendant is selling through Walmart.com; Walmart.com only ships to U.S. addresses, so a foreign individual or entity has no legitimate argument that they created that storefront to serve non-U.S. markets.<sup>141</sup>

Through Defendants’ storefronts, U.S. consumers purchase Infringing Products, and logistics are maintained to ship these products to forums throughout the U.S.<sup>142</sup> The Infringing Products are advertised, offered in wholesale quantities, and often include discounted prices.<sup>143</sup> The advertisements often include all fifty states of the U.S., so it is not persuasive to argue that the Defendants did not exploit the relevant forum market simply because advertisements were not expressly aimed at a specific state.<sup>144</sup> Moreover, there is no *per se* requirement that the

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<sup>139</sup> Justin Gaudio, et al., *How to Fight Chinese Intellectual Property Violations as an Amazon Seller*, GREEN BURNS & CRAIN, <https://gbc.law/fight-chinese-intellectual-property-violations-amazon-seller> [<https://perma.cc/5TLW-2EGH>] (last visited Oct. 2, 2024).

<sup>140</sup> Decls. of Lijia Chen, *supra* note 120.

<sup>141</sup> *WFS International Sellers*, WALMART SELLER HELP, [https://sellerhelp.walmart.com/s/guide?language=en\\_US&article=000011263](https://sellerhelp.walmart.com/s/guide?language=en_US&article=000011263) [<https://perma.cc/N9VJ-XBRK>] (last visited Mar. 9, 2024).

<sup>142</sup> Dec. of Daven Brodessa, *supra* note 108, at 5.

<sup>143</sup> *Contra Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 449–50, 454 (3d Cir. 2003) (where a website did not establish purposeful availment to support exercise of personal jurisdiction when it: did not advertise in the forum, was not designed or intended to reach consumers of the forum, was entirely in Spanish, and only offered merchandise in Spanish pesetas and euros). This case does not come close to the facts represented in Sched. A cases—Sched. A defendants’ websites are designed to accommodate U.S. addresses, are offered entirely in English, offer merchandise in U.S. dollars, and advertise shipment to all fifty states in the U.S.

<sup>144</sup> *LG Elecs., Inc. v. The P’ships & Unincorporated Ass’ns Identified in Schedule A*, No. 21-cv-2600, 2021 WL 5742389, at \*3 (N.D. Ill. Dec. 2, 2021) (explaining how using an established distribution

Defendant specifically or exclusively targeted the forum in its business activity; it is sufficient that the Defendant could reasonably foresee that the Infringing Product would be sold in the forum.<sup>145</sup> Thus, Defendants can certainly foresee their Infringing Products being sold in the forum when offering the product for sale to the forum. From there, Defendants contractually agree to accept orders from the forum's residents and fulfill orders as soon as the "pay now" button is clicked.<sup>146</sup> These actions demonstrate that Defendants are ready, willing, and able to ship products to the relevant forum.

The Defendants' listings also show they anticipate being haled into court due to their attempts to avoid detection. Below is a listing for a counterfeit Marc Jacobs "The Tote Bag" sold on DHgate.com (see *Figures 1 and 2*). Defendants understand their actions are illegal, so they attempt to blur or edit out the mark from the product listing.<sup>147</sup> They also avoid using the mark in the description substituting words like "designer" or "luxury."<sup>148</sup> However, as the images from the product listing demonstrate, the bags that consumers purchase do in fact bear counterfeit marks.<sup>149</sup> These are just some of the

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channel, like Amazon, to sell unauthorized goods, is sufficient to confer the court with personal jurisdiction over the defendant for patent infringement).

<sup>145</sup> See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984).

<sup>146</sup> Dec. of Daven Brodross, *supra* note 108, at 4–5.

<sup>147</sup> *Designer Bag Tote Bag*, DHGATE, [https://www.dhgate.com/product/designer-bag-tote-bag-women-handbag-shoulder/913901164.html?d1\\_page\\_num=1&dspm=pcen.sp.list.5.LGizB4mCfJh4sgBTqZgo&resource\\_id=913901164&scm\\_id=search.LIST..@.keywordSearchFlow|v2|tnsbrand|526\\_3,590\\_3,591\\_5,594\\_0,596\\_3,593\\_3,592\\_5,595\\_2|35739e9f38644b2d9757f9649fc3e57a|bestmatch.newC.&skuAttr=8888:6778,700516:986851#s1-1-1;sear|1547292062:2](https://www.dhgate.com/product/designer-bag-tote-bag-women-handbag-shoulder/913901164.html?d1_page_num=1&dspm=pcen.sp.list.5.LGizB4mCfJh4sgBTqZgo&resource_id=913901164&scm_id=search.LIST..@.keywordSearchFlow|v2|tnsbrand|526_3,590_3,591_5,594_0,596_3,593_3,592_5,595_2|35739e9f38644b2d9757f9649fc3e57a|bestmatch.newC.&skuAttr=8888:6778,700516:986851#s1-1-1;sear|1547292062:2) [https://perma.cc/9WW5-XZXD] (last visited Feb. 17, 2024).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

most common tactics employed by counterfeiters to avoid detection.

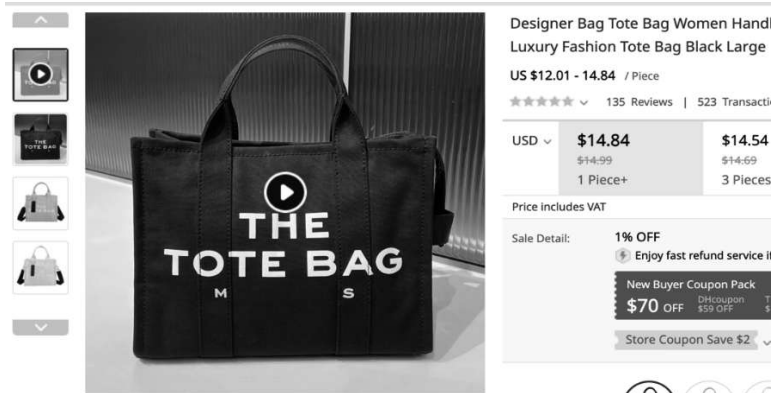


Figure 1. Defendant's poor attempt to evade detection.<sup>150</sup>

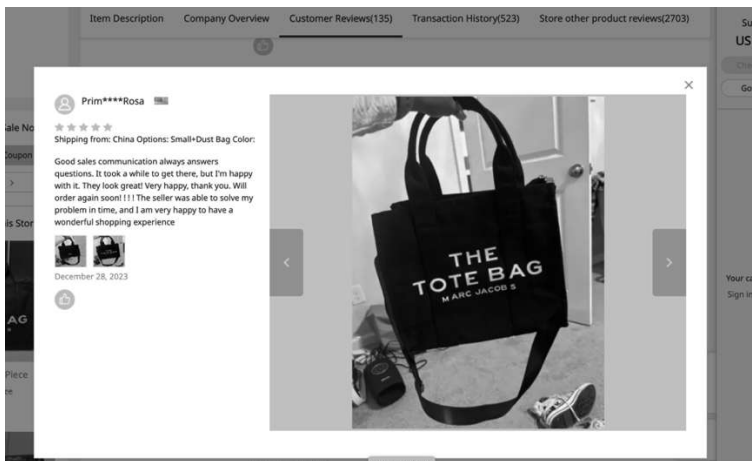


Figure 2. Purchased product image from customer review.<sup>151</sup>

Additionally, some Defendants will falsely state that they are selling genuine products or have a license to

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

sell Rights Owners' products.<sup>152</sup> Thus, the Defendants' actions are consistent with *Keeton*, in which the sale of Infringing Products is not the result of "'random,' 'fortuitous,' or 'attenuated' contacts" when the sales occurred through the Defendants' regular business.<sup>153</sup> Therefore, these contacts indicate Defendants' purposeful availment of the benefit of transacting business in the forum.

This conclusion is not unique to the Seventh Circuit. The Second, Fourth, Ninth, and Eleventh Circuits have all found personal jurisdiction proper based on similar facts to Sch. A Cases.<sup>154</sup> In contrast, the Eighth Circuit has taken a different view in *Bros. & Sisters in Christ, L.L.C. v. Zazzle, Inc.*, 42 F.4th 948 (8th Cir. 2022). In *Bros. &*

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<sup>152</sup> Jiong Sun, Xing Zhang & Quingyuan Zhu, *Counterfeiters in Online Marketplaces: Stealing Your Sales or Sharing Your Costs*, 96 SCIEDIRECT 189 (2020).

<sup>153</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984).

<sup>154</sup> *See, e.g., Chloé v. Queen Bee of Beverly Hills, L.L.C.*, 616 F.3d 158, 162, 171 (2d Cir. 2010) (holding jurisdiction was proper over an out-of-state defendant who offered handbags for sale and sold a single allegedly infringing bag to the forum); *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344, 353 (4th Cir. 2020) (holding an out-of-state website operator purposefully availed himself of the privilege of conducting business in Virginia by collecting personal information from visitors, visitors agreeing to contractual terms when using the website, advertisers directing advertisements toward the forum, and the defendant ultimately profiting off visitors by selling advertising space and data); *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1093–94 (9th Cir. 2023) (holding defendant's Amazon storefront—its means of conducting business—showed the defendant purposefully availed itself in the forum); *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1357 (11th Cir. 2013) (holding a defendant purposefully availed himself where his use of a fully interactive, commercial website, which received orders from multiple Florida residents to ship goods into Florida, caused at least one counterfeit product to be shipped to an investigator in Florida).

*Sisters in Christ*, the court held that a single sale of an Infringing Product in the jurisdiction was insufficient to confer personal jurisdiction over an out-of-state defendant.<sup>155</sup> This opinion expressed that the plaintiff pled no facts suggesting that defendant “uniquely or expressly” aimed its allegedly tortious act at Missouri.<sup>156</sup> However, the plaintiff’s counsel likely failed to properly develop a factual record regarding the defendant’s actions, such as details and requirements creating a webpage, listing products, and choosing shipping settings. Had the Eighth Circuit been provided this factual record, it may have come to a different result. A defendant’s actual sales numbers are not necessary to establish jurisdiction, as this focuses on their backward reaching actions, rather than their forward reaching actions when creating an e-commerce storefront. Plaintiffs cannot determine how many sales an e-commerce store has shipped into a district prior to filing a lawsuit and obtaining discovery.<sup>157</sup> Sales numbers or an actual sale is helpful to confirm that a defendant’s e-commerce stores are set up to receive orders from U.S. residents. However, any court opinion that focuses solely on the sales numbers improperly ignores a defendant’s actions leading up to the offer for sale.

In sum, Defendants purposefully avail themselves of the forum by shipping an Infringing Product to the forum only after structuring their sales activity in a manner that invites orders from the forum and develops the capacity to fill them.

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<sup>155</sup> *Bros. & Sisters in Christ, L.L.C. v. Zazzle, Inc.*, 42 F.4th 948, 953 (8th Cir. 2022).

<sup>156</sup> *Id.* at 954 (quoting *Johnson v. Arden*, 614 F.3d 785, 798 (8th Cir. 2010)).

<sup>157</sup> Decl. of Martin F. Trainor, *supra* note 75.



## 2. “Arising Out of” or Relatedness

The exercise of specific personal jurisdiction also requires that a defendant’s minimum contacts “‘arise out of or relate to the defendant’s contacts’ with the forum.”<sup>158</sup> This requirement is met when the basis of the lawsuit is an IP violation, and the contact is the sale of Infringing Products.<sup>159</sup> When all Defendants’ ties involve offering for sale or selling Infringing Products into the forum state, the relatedness inquiry is straightforward: Defendants sold Infringing Products into the forum state, and the lawsuit alleges IP violations arise out of those sales. Due process only requires that “the ‘relationship among the defendant, the forum[s], and the litigation’—is close enough to support specific jurisdiction.”<sup>160</sup> Many circuits ruling on facts similar to Sch. A Cases have found this requirement to be easily satisfied.<sup>161</sup> The Fifth Circuit, however,

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<sup>158</sup> *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 592 U.S. 351, 359 (2021) (quoting *Brystol-Myers Squibb Co. v. Super. Ct. of Cal.*, S.F. Cnty., 582 U.S. 255, 272 (2017) (Sotomayor, J., dissenting)).

<sup>159</sup> See *infra* note 161.

<sup>160</sup> *Ford Motor Co.*, 592 U.S. at 358, 371 (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)).

<sup>161</sup> See *Chloé v. Queen Bee of Beverly Hills, L.L.C.*, 616 F.3d 158, 172 (2d Cir. 2010) (jurisdiction is proper because “trademark infringement is a tort and its effects are felt in New York where Chloé is located and consumers may be deceived”); *UMG Recordings, Inc. v. Kurbanov*, 963 F.3d 344, 354–55 (4th Cir. 2020) (Plaintiffs’ copyright infringement claims arise out of Defendant’s activities directed at Virginia, including: Defendant’s website’s large audience for alleged music piracy and the Defendant’s sale of visitors’ data to advertising brokers); *NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 626 (7th Cir. 2022) (“[Defendant’s] listing of its product on Amazon.com and its sale of the product to counsel are certainly related sufficiently to the harm of likelihood of confusion”); *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1096 (9th Cir. 2023) (holding that Defendant’s sale and distribution of products in the forum relate to the Plaintiffs’ trademark claims); *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1356 (11th Cir. 2013) (“[Defendant’s] ties to Florida all involve the advertising, selling, and distributing of alleged counterfeit and

appears to have taken a different view.<sup>162</sup> In a non-precedential opinion, the Fifth Circuit held that the relatedness prong was not met where the Infringing Products were purchased by the plaintiff's agents in the forum state.<sup>163</sup> The court reasoned that, because trademark infringement requires a likelihood of confusion and only the plaintiff's agents purchased the Infringing Product in the forum state, there could be no confusion; thus, the lawsuit was unrelated to those contacts.<sup>164</sup> This approach represents a causal approach that was recently rejected by the Supreme Court.<sup>165</sup> Further, this is a misunderstanding of trademark law because it conflates actual confusion, which is merely one, non-dispositive factor to consider, with likelihood of confusion, which is the multifactor test for trademark infringement.<sup>166</sup> Thus, for the foregoing reasons, the Rights Owner's claim arises out of the Defendants' contacts with the forum state.

### 3. Traditional Notions of Fair Play and Substantial Justice

The exercise of personal jurisdiction over Defendants comports with fair play and substantial justice.<sup>167</sup> While circuits differ on exactly what factors they look to, the most relevant factors include: (1) the burden on the defendant, (2) the forum's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, and (4) the judicial system's interest in

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infringing Louis Vuitton goods into the state;" thus, there is a direct causal relationship).

<sup>162</sup> *Getagadget, L.L.C. v. Jet Creations Inc.*, No. 19-51019, 2022 WL 964204, at \*4 (5th Cir. Mar. 30, 2022) (per curiam).

<sup>163</sup> *Id.* at \*5.

<sup>164</sup> *Id.*

<sup>165</sup> *NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 626 (7th Cir. 2022); *Ford Motor Co.*, 592 U.S. at 361.

<sup>166</sup> *NBA Properties, Inc.*, 46 F.4th at 626.

<sup>167</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 324 (1945).

resolving the dispute.<sup>168</sup> Typically, there is little disagreement on this prong of specific personal jurisdiction, as courts will not delve into it if the first two prongs are not met.

Naturally, there will be some burden on out-of-state Defendants to travel to forum states for trial. However, this is not dispositive. Rather, the inconvenience of traveling to forum states may cut both ways, as plaintiffs may not be headquartered in the forum state but still seek to protect the consumers of that forum. "Even if forcing the defendant to litigate in a forum relatively distant from its home base were found to be a burden, the argument would provide defendant only weak support, if any, because 'the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago.'"<sup>169</sup> Additionally, most jurisdictions in the U.S. would not be convenient for Defendants, because they are often located outside the U.S. Inconvenience should not be a permitted excuse to escape accountability, especially in the Sch. A Case context where Defendants take affirmative actions to set up U.S.-facing storefronts.

Moreover, when a defendant chooses to conduct a "part of its general business" in a particular forum, it is fair to subject that defendant to personal jurisdiction in that forum.<sup>170</sup> Considering Defendants willingly choose to

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<sup>168</sup> *NBA Props.*, 46 F.4th at 627 (quoting *State of Ill. v. Hemi Grp. L.L.C.*, 622 F.3d 754, 759 (7th Cir. 2010)); *Chloé*, 616 F.3d at 173 (quoting *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 113 (1987)); *Herbal Brands, Inc. v. Photoplaza, Inc.*, 72 F.4th 1085, 1096 (9th Cir. 2023) (quoting *Freestream Aircraft (Bermuda) Ltd. v. Aero L. Grp.*, 905 F.3d 597, 607 (9th Cir. 2018)).

<sup>169</sup> *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129–30 (2d Cir. 2002) (quoting *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 574 (2d Cir. 1996)).

<sup>170</sup> *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) (holding that because the defendant was "carrying on a 'part of its general business'" in the state, it was fair to subject the defendant to

conduct business with the U.S., they should not expect to escape the reach of U.S. courts. Defendants offer for sale and/or sell Infringing Products to the U.S. market. They structure their marketing in a manner that easily serves the forum’s consumers.<sup>171</sup> Thus, the burden of requiring Defendants to defend themselves in a U.S. forum is comparatively minimal. Defendants should not be able to “have [their] cake and eat it, too” because this would be equivalent to “[wanting] the benefit of a nationwide business model with none of the exposure.”<sup>172</sup>

Furthermore, the forum has a “manifest interest in providing effective means of redress for its residents.”<sup>173</sup> Because the damage Infringing Product sellers cause to consumers, businesses, the economy, Rights Owners, and national security is severe, a state has an overwhelming interest in hearing the case and, most importantly, protecting its residents.<sup>174</sup> “When minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant.”<sup>175</sup> Ultimately, there is no unfairness in making Defendants defend lawsuits in the state where, through the very activity giving rise to the suit, they benefited from ill-gotten gains.<sup>176</sup>

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jurisdiction for a claim arising out of that activity) (quoting *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952)).

<sup>171</sup> See Dec. of Daven Brodess, *supra* note 108, at 4–13.

<sup>172</sup> *Illinois v. Hemi Grp. L.L.C.*, 622 F.3d 754, 760 (7th Cir. 2010).

<sup>173</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 (1985) (quoting *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

<sup>174</sup> See *supra* Part I, Section A.

<sup>175</sup> *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 114 (1987).

<sup>176</sup> *uBID, Inc. v. GoDaddy Grp., Inc.*, 623 F.3d 421, 427 (7th Cir. 2010); *Hemi*, 622 F.3d at 760 (finding that jurisdiction in Illinois was fair where defendant had established an “expansive, sophisticated commercial venture online,” and “held itself out to conduct business

In sum, there are no valid Due Process Clause concerns, and exercising personal jurisdiction over Defendants is proper.

**B. Electronic Service of Process**

Defendants also frequently challenge the propriety of electronic service of process authorized in most Sch. A Case, TROs, and preliminary injunctions. As explained above, Sch. A Case plaintiffs are routinely granted authorization to serve the Defendants by (1) electronically publishing the complaint, summons, and other court filings to a website and (2) sending an e-mail to the Defendants via the e-mail addresses listed on Defendants' online marketplaces and e-mail addresses provided by third parties in response to the TRO ("E-Service").<sup>177</sup> E-Service provides a reliable, convenient, traceable, and verifiable means of service.<sup>178</sup> As many courts have concluded, this method of service is also perhaps the most effective way of serving Defendants.<sup>179</sup> However, Defendants and critics of Sch. A Cases often argue that Rights Owners should be required to serve the Defendants through the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

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nationwide and [succeeded] in reaching customers across the country.").

<sup>177</sup> Mem. in Support of Pl.'s Mot. for Electronic Serv. of Process, *supra* note 84, at 1; Pl.'s Resp. in Opp'n to Def. Electrician Guy's Mot. Pursuant to Rule 55(C); 60(B) to Vacate Entry of Judgment and/or Default Judgment at 3–4, *Peanuts Worldwide L.L.C. v. The P'ships & Unincorporated Ass'ns Identified on Sched. A, No. 23-cv-02965* (N.D. Ill. filed Sept. 19, 2023), ECF No. 46.

<sup>178</sup> Order at 2, *Oakley, Inc. v. Yantai Lanlei Network Tech. Co., Ltd.*, No. 20-cv-00396 (N.D. Ill. filed May 12, 2021), ECF No. 54.

<sup>179</sup> Notification of Docket Entry at 1, *Birkenstock U.S. BidCo, Inc. v. The P'ships & Unincorporated Ass'ns Identified on Sched. A, No. 23-cv-16390* (N.D. Ill. filed Dec. 5, 2023), ECF No. 20.

(“Hague Convention”). These arguments are belied by well-established caselaw and generally fail to rebut the effectiveness of E-Service when done correctly.

There are valid reasons why Rights Owners routinely ask for permission to use alternative methods of service in lieu of serving Defendants through the methods authorized by the Hague Convention. Depending on a Defendant’s home nation, completing service of process through the Hague Convention’s methods can be slow, inefficient, costly, confusing, and difficult to monitor.<sup>180</sup> There is no justifiable reason to make service more difficult than necessary.<sup>181</sup> There is a need for speed in Sch. A Cases; requiring Rights Owners to serve Defendants through the Hague Convention frustrates the purpose of the litigation and undermines the plaintiff’s ability to obtain relief.<sup>182</sup> For example, the average time it takes to complete service of processes through the Hague Convention in China, if everything is done correctly, ranges from four to six months, but can take up to a year (if service is accomplished at all).<sup>183</sup> This is a problem because the *ex parte* TRO would expire months before a

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<sup>180</sup> See generally Eric Porterfield, *Too Much Process, Not Enough Service: International Service of Process Under the Hague Service Convention*, 86 TEMP. L. REV. 331 (2014); see also *China - Central Authority & practical information*, HCCH, <https://www.hcch.net/en/states/authorities/details3/?aid=243> [<https://perma.cc/QG4V-4T45>].

<sup>181</sup> FED. R. CIV. P. 1 (“[The Rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

<sup>182</sup> 4B ALAN WRIGHT & ARTHUR MILLER, *FEDERAL PRACTICE & PROCEDURE CIVIL* § 1134 (4th ed. 2024) (a need for speed justifies alternative service); *Hangzhou Chic Intel. Tech. Co. v. The P’ships & Unincorporated Ass’ns Identified on Sched. A*, No. 20-cv-04806, 2021 WL 1222783, at \*3 (N.D. Ill. Apr. 1, 2021).

<sup>183</sup> Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, T.I.A.S. No. 6638 [hereinafter Hague Convention].

plaintiff could provide actual notice to the Defendants for purposes of obtaining a preliminary injunction.<sup>184</sup> While Defendants would surely disagree, E-Service benefits them too. E-Service is instantaneous; providing the Defendants with several benefits like access to court documents without having to search through PACER (or have a PACER account), a direct and speedy way to contact plaintiff's counsel, and a quick opportunity to respond. It also eliminates issues like having court documents served on the wrong person. Given the issues with service through the Hague Convention, it is reasonable for parties to seek permission to use alternative viable means when available.

So how is service via electronic publication and e-mail, a straightforward and effective method of service, procedurally proper? Federal Rule of Civil Procedure 4(f) governs the service of parties in foreign countries. Defendants largely reside in foreign countries, usually China, or another country that is a signatory to the Hague Convention.<sup>185</sup> In this context, Rule 4(f) provides the two relevant avenues for completing service under these facts—Rule 4(f)(1) and Rule 4(f)(3).<sup>186</sup> Via the first avenue, under Rule 4(f)(1), a party can accomplish service of process by following an internationally agreed means of service, such as the Hague Convention.<sup>187</sup> The second avenue is through any court-directed means that is not prohibited by international agreement, pursuant to Rule 4(f)(3).<sup>188</sup> There is no hierarchy in Rule 4(f); the plain language of Rule 4(f) demonstrates that, “Rule 4(f)(3) is not subsumed within or in any way dominated by Rule 4(f)’s other subsections; it

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<sup>184</sup> FED. R. CIV. P. 65.

<sup>185</sup> See HCCH Members, HCCH, <https://www.hcch.net/en/states/hcch-members> [<https://perma.cc/9N44-S8XJ>].

<sup>186</sup> FED. R. CIV. P. 4(f).

<sup>187</sup> FED. R. CIV. P. 4(f)(1).

<sup>188</sup> FED. R. CIV. P. 4(f)(3).

stands independently, on equal footing.”<sup>189</sup> Nothing in Rule 4(f)(1) or Rule 4(f)(2) indicates their primacy, and Rule 4(f)(3) contains no qualifiers suggesting a party must attempt service through Rule 4(f)(1) first.<sup>190</sup> Notably, according to Article 1 of the Hague Convention, the “Convention shall not apply where the address of the person to be served with the document is not known.”<sup>191</sup> As a result, the Hague Convention does not apply to most Defendants, given the anonymous nature of the Defendants and the lack of verifiability of any physical address they provide on their online storefronts.<sup>192</sup> Thus, completing service through the Hague Convention is optional under Rule 4(f), and courts have broad discretion to permit and fashion alternative service pursuant to Rule 4(f)(3).<sup>193</sup>

But just because a party is not required to complete service pursuant to Rule 4(f)(1) before seeking alternative service under Rule 4(f)(3), this does not compel a court to permit alternative service in all situations. In addition to being justified and not violating any treaty, the service method must be reasonably calculated under the facts of the case to provide the Defendants with notice and to give them an opportunity to raise objections.<sup>194</sup> Most courts seem to

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<sup>189</sup> *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002); *see Nuance Commc’ns, Inc. v. Abby Software House*, 626 F.3d 1222, 1239 (Fed. Cir. 2010) (quoting *Rio*, 284 F.3d at 1015).

<sup>190</sup> *Brookshire Bros., Ltd. v. Chiquita Brands Int’l, Inc.*, No. 05-cv-21962, 2007 WL 1577771, at \*1 (S.D. Fla. May 31, 2007) (quoting *Rio*, 284 F.3d at 1015); *see also Nuance Commc’ns, Inc.*, 626 F.3d at 1239; *Nagravision SA v. Gotech Int’l Tech. Ltd.*, 882 F.3d 494, 498 (5th Cir. 2018).

<sup>191</sup> Hague Convention, *supra* note 183, at Article 1.

<sup>192</sup> *Id.*

<sup>193</sup> *Viahart, L.L.C. v. GangPeng*, No. 21-cv-40166, 2022 WL 445161, at \*3 (5th Cir. 2022); *see also Brockmeyer v. May*, 383 F.3d 798, 805 (9th Cir. 2004); *Hangzhou Chic Intel. Tech. Co. v. P’ships & Unincorporated Ass’ns Identified on Sched. A*, No. 20-cv-4806, 2021 WL 1222783, at \*1 (N.D. Ill. Apr. 1, 2021).

<sup>194</sup> *Id.*



find that when (1) the Defendants conduct their businesses over the Internet, (2) the Defendants regularly use their e-mail to operate their business, and (3) the requesting party shows e-mail is reasonably calculated to reach the Defendant, that E-Service is reasonably calculated under the circumstances to provide notice to the Defendants.<sup>195</sup> This outcome makes perfect sense and achieves the goals of the Federal Rules of Civil Procedure. As an added safeguard, the Defendants would also necessarily receive notice from the online marketplace platforms, payment processors, or domain registrars.<sup>196</sup>

In Sch. A Cases, the Defendants are all alleged to be foreign online merchants who use their e-mails on a regular basis to communicate with consumers, online marketplace platforms, payment processors, and other service providers.<sup>197</sup> Defendants necessarily employ e-mail for all manners of communication regarding their storefronts. This means the e-mail must be current and that Defendants check it regularly. Moreover, the online marketplaces validate the e-mail addresses used by Defendants to register their storefronts.<sup>198</sup> E-commerce platforms are also

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<sup>195</sup> Order Denying Motion to Dismiss for Insufficient Service at 7–8, *Chanel, Inc. v. The Individuals, Bus. Entities, and Unincorporated Ass'ns Identified on Sched. "A,"* No. 22-cv-61541 (S.D. Fla. filed Dec. 9, 2022) (quoting *Louis Vuitton Malletier v. aaalvshop.com*, No. 19-CIV-61986-RAR, 2019 WL 7911372, at \*2 (S.D. Fla. Aug. 13, 2019)); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (finding that service is constitutionally adequate if it provides “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”).

<sup>196</sup> *Grumpy Cat Ltd. v. Individuals, Corps., L.L.C.s, P'ships, & Unincorporated Ass'ns Identified on Sched. A Hereto*, No. 21-cv-5847, 2022 WL 18937691, at \*1 (N.D. Ill. Mar. 28, 2022).

<sup>197</sup> See Mem. in Support of Pl.'s Mot. for Electronic Serv. of Process, *supra* note 84.

<sup>198</sup> *Choose an email address for your business account*, AMAZON HELP & CUSTOMER SERVICE,

required to obtain a working email address from sellers under the INFORM Consumers Act.<sup>199</sup> As a result, courts can be sure that Defendants' e-mail addresses provided by third parties are active e-mail addresses that get regularly monitored by the Defendants. Thus, serving Defendants via E-Service is reasonably calculated to provide notice of the case.

It appears the most challenged issue is whether E-Service is prohibited by the Hague Convention. As most courts have found, it is not prohibited by the Hague Convention.<sup>200</sup> However, the issue is not completely free of doubt, and entire articles can be devoted to this specific issue alone (the answer would still likely be unclear). The lack of clarity stems from the fact that service by E-Service is not mentioned by the Hague Convention—it is neither authorized, nor prohibited.<sup>201</sup> The Supreme Court held that the Hague Convention prohibits some forms of service that are not explicitly mentioned by it, but the Court has also explained that alternative means of service unmentioned by the Hague Convention are not prohibited if the receiving

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<https://www.amazon.com/gp/help/customer/display.html?nodeId=202117400> (last visited Mar. 7, 2024); *Help Confirming your email address*, EBAY HELP, <https://pages.ebay.com/ebaymotors/help/reg/contextual/confirmemail.html#:~:text=Confirming%20your%20email%20address%20is,completed%20your%20registration%20on%20eBay> [<https://perma.cc/Z2PQ-LDX3>]; *How to Create an Etsy Account*, ETSY, <https://help.etsy.com/hc/en-us/articles/115015568007-How-to-Create-an-Etsy-Account> (last visited Mar. 7, 2024); *Frequently Asked Questions*, ALIBABA GROUP, <https://ipp.alibabagroup.com/infoContent.htm?skyWindowUrl=contact-us-sme-en> [<https://perma.cc/9Z36-5XKW>].

<sup>199</sup> See INFORM Consumers Act, 15 U.S.C. § 45f (2024).

<sup>200</sup> *Viahart, L.L.C. v. GangPeng*, No. 21-cv-40166, 2022 WL 445161, at \*3 (5th Cir. 2022).

<sup>201</sup> Hague Convention, *supra* note 183.

state has not objected to them.<sup>202</sup> Thus, for purposes of Rule 4(f)(3), if a member state has not objected to a method of service, and that method is not inconsistent with the methods provided for in the Hague Convention, it is proper for a district court to authorize that method of service. Because the relevant member state in most Sch. A Cases is China, the focus is on whether China can be said to have objected to e-mail service.

China has likely not objected to e-mail service. Defendants frequently argue that China has objected e-mail service because China has objected to Article 10(a) of the Hague Convention, which states, "Provided the State of destination does not object, the present Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad . . . ." <sup>203</sup> But postal channels are not the same thing as e-mail. The most logical interpretation of "postal channels" refers exclusively to items physically delivered by postal services, not email.<sup>204</sup> Considering that the Hague Convention was drafted before modern technologies like e-mail were widely used, the meaning of "postal channels" was naturally limited to what was possible and common at that time.<sup>205</sup> Postal channels, therefore, include letter post, certified mail, and registered mail.<sup>206</sup> Further, China's express objection to service by postal channels is based on

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<sup>202</sup> Hangzhou Chic Intelligent Tech. Co. v. P'ships & Unincorporated Ass'ns Identified on Sched. A, No. 20-cv-4806, 2021 WL 1222783, at \*3 (N.D. Ill. Apr. 1, 2021) (citing Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 703–04 (1988) and Water Splash, Inc. v. Menon, 581 U.S. 271, 284 (2017)).

<sup>203</sup> Hague Convention, *supra* note 183, at Article 10(a).

<sup>204</sup> See NBA Props., Inc. v. P'ships & Unincorporated Ass'ns Identified in Sched. "A," 549 F. Supp. 3d 790, 798 (N.D. Ill. 2021).

<sup>205</sup> Richard J. Hawkins, *Dysfunctional Equivalence: The New Approach to Defining "Postal Channels" Under the Hague Service Convention*, 55 UCLA L. REV. 206, 222 (2004).

<sup>206</sup> See *Hangzhou*, 2021 WL 1222783, at \*3.

the concern that it constitutes a physical intrusion onto Chinese territory.<sup>207</sup> Additionally, transmission by postal channels is generally done by a governmental entity (e.g., the United States Postal Service). Therefore, another reason why a sovereign may object to service by postal channels is that it may view this as another intrusion on its sovereignty or as coercion.<sup>208</sup> E-mail does not have these traits. Thus, China has not objected to E-Service by virtue of objecting to Article 10(a), as most courts have concluded in the context of adversarial presentment.

On the contrary, it appears that China has endorsed E-Service.<sup>209</sup> The clearest example of this is China's recent amendment to the PRC Civil Procedure Law.<sup>210</sup> Article 283 of the New Civil Procedure Law states ten methods of service that a court may authorize on a recipient without a domicile within the territory of the PRC.<sup>211</sup> Method number nine provides for "[s]ervice by electronic means . . . unless such electronic means are prohibited by the laws of the country where the recipient is located."<sup>212</sup> It is counterintuitive to conclude that China would expressly adopt a method of service it finds objectionable.<sup>213</sup> Given that China has expressly adopted service by electronic means, that alone should preclude conclusions to the contrary.

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<sup>207</sup> *Id.*

<sup>208</sup> Proposed Amicus Brief of Richard K. Wagner in Support of Reversing the Dist. Ct.'s Order at 11–12, *Smart Study Co., Ltd., v. Happy Party-001*, No. 22-1810, 2023 WL 3116020 (2d Cir. 2023).

<sup>209</sup> See Dr. Ulrike Glück & Stephen Wu, *Amendment of PRC Civil Procedure Law*, CMS (Nov. 9, 2023), <https://cms.law/en/chn/publication/amendment-of-prc-civil-procedure-law>.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Hangzhou*, 2021 WL 1222783, at \*4.

Some resist this straightforward reasoning, and conclude that where the Hague Convention applies, following its protocol is mandatory and alternative service is proper only if service through China's central authority fails.<sup>214</sup> This view ignores the arguments explained above, the need for speed, the nature of Defendants' conduct, and operations in Sch. A Cases. However, even if correct, there is an alternative, yet less factually clear justification for permitting E-Service as opposed to a Hague Convention prescribed method. Article 1 of the Hague Convention states that "[t]his Convention shall not apply where the address of the person to be served with the document is not known."<sup>215</sup> Defendants usually use false or difficult-to-verify addresses; the addresses are unknown. Thus, the Hague Convention would be inapplicable, and service under Rule 4(f)(3) is still proper.

Before concluding that the address is unknown, courts impose a reasonable diligence requirement and generally require the plaintiff to investigate and verify a Defendant's mailing address.<sup>216</sup> There is no set standard for what counts as reasonable diligence, but this Author believes that, in the context of Schedule A, requiring significant diligence would be a futile exercise.<sup>217</sup> Depending on the online marketplace or website, there may be an address listed.<sup>218</sup> However, the Defendants are scofflaws—they routinely provide false, incomplete,

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<sup>214</sup> See *NOCO Co. v. Liu Chang*, No. 18-cv-2561, 2019 WL 2135665, at \*3 (N.D. Ohio May 16, 2019).

<sup>215</sup> Hague Convention, *supra* note 183 at Article 1.

<sup>216</sup> *NBA Props., Inc. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A,"* 549 F. Supp. 3d 790, 796 (N.D. Ill. 2021).

<sup>217</sup> Proposed Amicus Brief of Richard K. Wagner in Support of Reversing the Dist. Ct.'s Order, *supra* note 208, at 14.

<sup>218</sup> Many platforms like Amazon have required an address for a few years now, but we should see more platforms displaying information for some sellers because of the INFORM Consumers Act. 15 U.S.C. § 45f.

misleading, and/or difficult-to-verify names and addresses.<sup>219</sup>

A case illustrative of this point is *Levi Strauss & Co. v. Zhejiang Weidu Garment Co., Ltd.*, which was a Sch. A Case brought by Levi Strauss & Co. in the Northern District of Illinois.<sup>220</sup> There, a Defendant moved to quash service because it disputed that its address was unknown, and the mere allegation that counterfeiters typically provide false addresses did not justify alternative service.<sup>221</sup> In response, Levi's investigator traveled to China and located the building the Defendant listed as its physical address.<sup>222</sup> After searching each of that building's eight floors, interviewing building staff, and reviewing Chinese business directories, the investigator concluded that the Defendant's listed physical address was fraudulent.<sup>223</sup> The court then denied the Defendant's motion.<sup>224</sup> The facts in that case were not unique or exceptional in the Schedule A context—they were representative. So, it is reasonable to recognize that requiring plaintiffs to prove the falsity of every purported address by traveling to each address, or by contacting the Defendant before the lawsuit before authorizing alternative service, would do nothing but waste time and resources (and may prematurely alert the Defendant of the pending lawsuit). Therefore, even if a court concludes that following the Hague Convention is

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<sup>219</sup> *E.g.*, *Chanel, Inc. v. Song Xu*, No. 9-cv-02610, 2010 WL 396357, at \*1–2 (W.D. Tenn. Jan. 27, 2010); *Chanel, Inc. v. Zhixian*, No. 10-cv-60585, 2010 WL 1740695, at \*1 (S.D. Fla. Apr. 29, 2010).

<sup>220</sup> Mem. Order at 1, *Levi Strauss & Co. v. Zhejiang Weidu Garment Co., Ltd., et al.*, No. 16-cv-07824 (N.D. Ill. filed Nov. 17, 2016), ECF No. 52.

<sup>221</sup> Def. Yogee Mall's Am. Mot. to Dismiss and Mot. to Quash Serv. at 5–6, *Levi Strauss & Co. v. Zhejiang Weidu Garment Co., Ltd., et al.*, No. 16-cv-07824 (N.D. Ill. filed Nov. 31, 2016), ECF No. 45.

<sup>222</sup> Mem. Order, *supra* note 220, at 5.

<sup>223</sup> *Id.* at 5–6.

<sup>224</sup> *Id.* at 2.

mandatory, authorizing alternative service is still appropriate because defendants in Sch. A Cases use false or misleading addresses, making the Hague Convention inapplicable.<sup>225</sup>

To summarize, the Defendants in Sch. A Cases are properly served pursuant to Rule 4(f)(3) via E-Service. There is no hierarchy in Rule 4(f), alternative service under 4(f)(3) is not extraordinary relief, and plaintiffs are not required to attempt service through the Hague Convention first. E-Service is reliable, not prohibited by an international treaty, and benefits all parties involved. Even if a court concludes that service through the Hague Convention is mandatory, alternative service is still appropriate because the defendants' addresses are likely false and, therefore, unknown. Therefore, the Hague Convention does not apply.

### ***C. Joinder***

Last of the oft-disputed procedural elements of Sch. A Cases is joinder. While there is some skepticism about joining dozens or even hundreds of Defendants into one case, this practice remains legally and practically sound. This Author believes the key to understanding why joinder is proper is understanding that it is discretionary.<sup>226</sup> The Supreme Court has noted that the Rules' impulse is towards encouraging courts to take the broadest possible scope of joinder rules so long as it is consistent with fairness to the parties.<sup>227</sup> Judges have wide discretion to manage the

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<sup>225</sup> Given the numerous exceptions and not yet scrutinized verification methods, this Author does not yet find that the INFORM Consumers Act changes any of these conclusions.

<sup>226</sup> *Malibu Media, L.L.C. v. John Does 1-6*, 291 F.R.D. 191, 199 (N.D. Ill. 2013).

<sup>227</sup> *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966); *see also* Order at 2, *Zou v. The Entities and Individuals*

structure of lawsuits and promote the resolution of disputes in a manner that promotes fairness to the parties and judicial efficiency.<sup>228</sup> Because joinder in Sch. A Cases accomplishes these goals, most courts have concluded that joinder is proper, particularly at the pleading stage of a case.

Federal Rule of Civil Procedure 20(a) governs permissive joinder of parties and provides that defendants may be joined in one action where: “(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action.”<sup>229</sup> Subsection B is met because all Defendants infringe the Rights Owners IP by selling and offering for sale Infringing Products into the U.S. through the Internet. The controversy focuses on the term “transaction or occurrence.” The Supreme Court and the Seventh Circuit have noted that there is no objective way to divide the world into “transactions or occurrences.”<sup>230</sup> However, this test is flexible.<sup>231</sup> Since there is no objective way to identify “transactions or occurrences,” the proper analysis involves an investigation of the fairest and most efficient way for a plaintiff to seek relief for the alleged harm.<sup>232</sup>

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Identified in Annex A, No. 23-cv-16600 (N.D. Ill filed Mar. 8, 2024), ECF No. 60.

<sup>228</sup> *Bose Corp. v. P’ships & Unincorporated Ass’ns Identified on Sched. “A,”* 334 F.R.D. 511, 513 (N.D. Ill. 2020).

<sup>229</sup> FED. R. CIV. P. 20(a)(2).

<sup>230</sup> *See Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926) (“‘Transaction’ is a word of flexible meaning.”); *Ross v. Bd. of Educ. of Twp. High Sch. Dist. 211, et al.*, 486 F.3d 279, 284 (7th Cir. 2007).

<sup>231</sup> *United Mine Workers of Am.*, 383 U.S. at 724.

<sup>232</sup> *Bose Corp.*, 334 F.R.D. at 513; *United Mine Workers of Am.*, 383 U.S. at 724 (courts liberally construe Rule 20 in the interest of convenience and judicial economy, “entertaining the broadest possible



First, it is necessary to look at the terms “occurrence” and “transaction.” It appears that no court has considered the meaning of “occurrence” apart from the meaning of “transaction,” even though the “[c]anons of construction ordinarily suggest that the terms connected by a disjunctive”—like “transactions or occurrences”—“be given separate meanings . . . .”<sup>233</sup> This however does not necessitate the finding that the two terms are separate; rather, the term “or” signifies that any one condition in the list is sufficient.<sup>234</sup> Whether the drafters of Rule 20 intended “or” to be either inclusive (e.g., A or B, or both) or exclusive (e.g., A or B, but not both), “occurrences” are able to stand alone.<sup>235</sup> Moreover, comparing the ordinary meanings of the two words, “occurrence” has a broader definition than “transaction.”<sup>236</sup> Unlike a “transaction,” which involves a coordinated exchange, an “occurrence” happens independently without any joint action.<sup>237</sup>

Here, the Internet hosts many occurrences that can be described as cooperative, but not necessarily

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scope of action consistent with fairness to the parties [such that] joinder of claims, parties and remedies is strongly encouraged.”)

<sup>233</sup> *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 229 (1993).

<sup>234</sup> VALERIE BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (2015).

<sup>235</sup> See Reed Dickerson, *The Difficult Choice Between “And” and “Or,”* 46 A.B.A. J. 310, 310 (1960).

<sup>236</sup> According to the Merriam-Webster dictionary, “transaction” generally involves a reciprocal affect or exchange, whereas an “occurrence” is defined as something that simply “happens” or “appears.” *Transaction*, MERRIAM-WEBSTER DICTIONARY (2024), <https://www.merriam-webster.com/dictionary/transaction>

[<https://perma.cc/Y63D-SJX6>]; *Occurrence*, MERRIAM-WEBSTER DICTIONARY (2024), <https://www.merriam-webster.com/dictionary/occurrence> [<https://perma.cc/A4TL-JHLQ>].

<sup>237</sup> *Bose Corp.*, 334 F.R.D. at 516 (“[T]he Rule’s inclusion of the term “occurrence” suggests that joinder is appropriate in cases alleging harm that is not strictly “transactional.”).

transactional or intentionally coordinated.<sup>238</sup> The sale of Infringing Products constitutes an “occurrence” of mass harm. Why? Because the Internet allows Defendants to exploit anonymity and access billions worldwide through a single click. While one Defendant’s actions may seem small, the Internet enables aggregation that substantially impacts the economy and society through the sale of Infringing Products.<sup>239</sup> Together, these actions amount to a “swarm” of scofflaws passing off their Infringing Products as genuine products. Defendants, as part of the same occurrence of mass harm, are a “swarm” attacking all at once.<sup>240</sup> Even if Defendants are not directly coordinating, they “take advantage of a set of circumstances—the anonymity and mass reach afforded by the internet and the cover afforded by international borders—to violate [the plaintiffs’ IP] with impunity.”<sup>241</sup> It is reasonable to conclude that Defendants understand that their chances of profiting through anonymous storefronts are enhanced as their numbers increase.<sup>242</sup> The more swarm members selling Infringing Products, the more difficult it is for Rights Owners to successfully defend their IP. As such, filing individual cases of action against a single scofflaw ignores the form of harm that Rights Owners face.<sup>243</sup> Seeking relief against each individual scofflaw goes against common sense, because it is the swarm—the fact that Defendants are attacking all at once—that is the defining aspect of the harm Rights Owners seek relief from.<sup>244</sup> Defendants who are a part of the swarm infringing on the

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<sup>238</sup> *See id.*

<sup>239</sup> *See* Part I, Section C.

<sup>240</sup> *Bose Corp.*, 334 F.R.D. at 517.

<sup>241</sup> *Id.* at 516.

<sup>242</sup> *Id.*

<sup>243</sup> Compl. ¶ 2, *Creative Licensing Corp. v. P’ships & Unincorporated Ass’ns Identified on Sched. “A,”* No. 23-cv-02325 (N.D. Ill. filed Apr. 13, 2023), ECF No. 1.

<sup>244</sup> *Bose Corp.*, 334 F.R.D. at 517.

IP of Rights Owners can therefore be easily joined under Rule 20 by conceptualizing the swarm as an “occurrence.”<sup>245</sup>

Courts also utilize the logical relationship test, finding that claims against different defendants arise out of the same transaction or occurrence if there is a “logical relationship between the separate causes of action.”<sup>246</sup> In other words, courts assess whether the parties and claims should be litigated together in the same case.<sup>247</sup> Again, the courts have “considerable discretion” and “flexibility” in determining whether plaintiffs have plausibly alleged such a relationship.<sup>248</sup> Defendants share a logical relationship supporting joinder. Meeting the same fact pattern, all Defendants are generally alleged to share the following characteristics: (1) concealment of their true identities by using anonymous business names; (2) lacking credible information regarding their physical addresses; and (3) coordinated strategies, e.g., using similar advertising and market strategies to target consumers whilst evading law enforcement.<sup>249</sup> Moreover, these Defendants communicate with each other through chat rooms, like sellerdefense.cn,

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<sup>245</sup> *Id.*; *Chrome Cherry Ltd. v. P’ships & Unincorporated Ass’ns Identified on Sched. “A,”* No. 21-cv-05491, 2021 WL 6752296, at \*1–2 (N.D. Ill. Oct. 20, 2021) (finding “Plaintiff has sufficiently demonstrated that [the claims] arise out of the same occurrence or series of occurrences” in a design patent case).

<sup>246</sup> *In re EMC Corp.*, 677 F.3d 1351, 1358 (Fed. Cir. 2012); *In re Price*, 42 F.3d 1068, 1073 (7th Cir. 1994) (discussing the “same transaction or occurrence” requirement in the context of Rule 13); *see also Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974) (looking to the “logical relationship” between separate occurrences and finding that “all reasonably related claims for relief by or against different parties [can] be tried in a single proceeding.”).

<sup>247</sup> *Bose Corp.*, 334 F.R.D. at 513.

<sup>248</sup> *UWM Student Ass’n v. Lovell*, 888 F.3d 854, 863 (7th Cir. 2018).

<sup>249</sup> *Mem. Establishing Joinder is Proper, Nike Inc. v. The P’ships & Unincorporated Ass’ns Identified on Sched. “A,”* No. 23-cv-16114 (N.D. Ill. filed Nov. 22, 2023), ECF No. 20.

that provide tactics for operating storefronts and evading lawsuits, while routinely monitoring Sch. A Cases.<sup>250</sup> These allegations provide adequate evidence that Defendants operate in a similar fashion, communicate with each other, and work at the same time to sell Infringing Products. Defendants are working together as a network of scofflaws, thereby establishing a logical relationship between them. Nonetheless, joinder in this case is appropriate at the preliminary stage. Creating direct links between all the Defendants is cumbersome and time-consuming, which Rule 20 does not require in order to join multiple Defendants. Joinder of the Defendants in Sch. A Cases is proper under Rule 20's inclusion of the term "occurrence" because Defendants have a logical relationship to one another.

In Sch. A Cases, joinder serves as an important interest of convenience and judicial economy. The Federal Rules of Civil Procedure govern civil proceedings in the U.S. and their purpose is "to secure the just, speedy, and inexpensive determination of every action and proceeding" for the plaintiff, defendants, and the courts.<sup>251</sup> While joinder does not create unnecessary delay or prejudice for any party, severance of each Defendant is likely to cause delays and harm plaintiffs and Defendants alike.<sup>252</sup> The Defendants could end up defending identical, concurrent lawsuits if severed prematurely into separate cases. To the extent any Defendant appears and raises defenses that distinguish it from the swarm or argues misjoinder, the court can sever the claims against that Defendant under

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<sup>250</sup> Compl. ¶ 11, *Creative Licensing Corp. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A,"* No. 23-cv-02325 (N.D. Ill. filed Apr. 13, 2023), ECF No. 1.

<sup>251</sup> FED. R. CIV. P. 1.

<sup>252</sup> Mem. Establishing Joinder is Proper, *supra* note 249, at 11; *Viahart, L.L.C. v. GangPeng, et al.*, No. 21-cv-40166, 2022 WL 445161, at \*4 (5th Cir. 2022) (finding that no defendants are prejudiced).

Rule 21, just as it can sever parties on its own at any point if joinder proves unfair or unmanageable.<sup>253</sup> Furthermore, the resources of the court and judges will be substantially taxed if joinder was improper in Sch. A Cases.

Requiring the filing of separate complaints could flood the courts with thousands of additional single defendant [Schedule A] cases, with no difference in resolution of nearly every case in a practical sense. The only thing that will inevitably occur is the slowdown of adjudications of other lawsuits, or the decrease of filings of cases which on their face have alleged plausible [IP] violations...<sup>254</sup>

Notably, such impediments would also reduce the ability of plaintiffs and other Rights Owners to effectively protect their IP rights and consumers in a cost-effective manner. This is considerably true in the context of IP theft.

Moreover, criticism that Rights Owners are depriving the government of money by not filing individual cases borders on nonsensical and is an attempt to appeal to a superficial sense of fairness.<sup>255</sup> These arguments operate on the assumption that if Rights Owners were required to pay a filing fee for every Defendant in a Sch. A Case, that Rights Owner would do so. Obviously, if this was required, Rights Owners would only selectively bring lawsuits against large-scale Infringing Product traffickers. This criticism also disregards the millions of dollars in filing fees that Sch. A Cases generate for the court system. If Sch. A Cases were not financially practical, the millions of dollars they currently generate for the government would halt. Even worse, this criticism fails to consider the practical implications of its prescriptions—if Rights

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<sup>253</sup> FED. R. CIV. P. 21.

<sup>254</sup> *Bose Corp. v. P'ships & Unincorporated Ass'ns Identified on Sched. "A,"* 334 F.R.D. 511, 517 n.6 (N.D. Ill. 2020).

<sup>255</sup> Goldman, *supra* note 5, at 185.

Owners were required to file a single lawsuit against each Schedule A Defendant, the court system would be flooded with tens of thousands of more cases per year.

As such, joinder of Defendants is proper. This approach is also consistent with the strongly encouraged policy of entertaining the broadest possible scope of action consistent with fairness to the parties. It keeps the cases manageable and generates, as opposed to deprives, the government of filing fees. Most importantly, it helps achieve the most just and desirable outcome: reduction of IP violations and relief for Rights Owners.

### **III. DISCUSSION: THE GOOD, THE BAD, AND THE NOT SO SAD**

As established, Sch. A Cases are procedurally proper, efficient, and effective weapons in a Right Owner's arsenal. While online infringement will likely never be completely eradicated, consistent and repeated Schedule A filings help significantly reduce, if not virtually eliminate, the problem.<sup>256</sup> That is because, logically, when Defendants are caught and fined heavily, they will think twice the next time they consider offering Infringing Products, as the financial incentive to sell such products will be eliminated. This section will proceed to outline some additional benefits and rebut additional criticisms that were not addressed in the preceding sections.

After more than a decade of success by certain practitioners, district court judges across the country have become familiar and comfortable with these types of cases, with some even developing procedures to streamline

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<sup>256</sup> Pl.'s Statement Regarding Min. Entry at 1–2, *Oakley Inc. v. Dior668*, No. 23-cv-13821 (N.D. Ill. filed Nov. 3, 2023), ECF No. 19; Arnold-Rees, *supra* note 1.

them.<sup>257</sup> As a result, the long-term success of these cases has not gone unnoticed. More brands have turned to Sch. A Cases to protect their IP rights against shameless and nameless online infringers. The increase in the number of Rights Owners filing Sch. A Cases, coupled with the fact that more Rights Owners are experiencing problems with online IP infringement, largely explains why so many Sch. A Cases are filed. This is a good thing because more Rights Owners are obtaining relief.

The frequency with which these cases are filed has invited misguided criticism. Critics are reminded that Rights Owners come to federal court to vindicate important rights; they are seeking to solve a legitimate problem as effectively and efficiently as they can. Sch. A Cases are not unfair, nor do they target innocent or vulnerable sellers. If the government, as opposed to a Rights Owner, brought similar claims against these Defendants and proved the same allegations at trial, many of these Defendants would be adjudged criminals.<sup>258</sup> That being said, this Author recognizes that the numerosity of Sch. A Cases has its drawbacks. These cases can take up busy court dockets and require the attention of busy judges alongside their staff. However, concerns about clogging busy court

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<sup>257</sup> See, e.g., Judge LaShonda A. Hunt, *Counterfeit Products/Schedule A Cases*, NORTHERN DISTRICT OF ILLINOIS, <https://www.ilnd.uscourts.gov/PrintContent.aspx?cmpid=1401> [<https://perma.cc/9V3B-LKS3>]; Judge Martha M. Pacold, *Schedule A Cases*, NORTHERN DISTRICT OF ILLINOIS, <https://www.ilnd.uscourts.gov/PrintContent.aspx?cmpid=1272> [<https://perma.cc/JEH8-UGU9>]; Judge Thomas M. Durkin, *Counterfeit Product Case Proposed Order Forms*, NORTHERN DISTRICT OF ILLINOIS, <https://www.ilnd.uscourts.gov/PrintContent.aspx?cmpid=1270> [<https://perma.cc/4XZ2-X372>]; Judge Jorge L. Alonso, *Counterfeit Product Cases*, NORTHERN DISTRICT OF ILLINOIS, <https://www.ilnd.uscourts.gov/PrintContent.aspx?cmpid=1361> [<https://perma.cc/5CUK-KNUT>].

<sup>258</sup> 18 U.S.C. §§ 1961(1), 1962.

dockets are generally overstated, given that the average lifecycle of a case is a few months and requires fewer judicial resources than a standard personal injury case. It is rare to see a Sch. A Case that has been sitting on a court's docket for over a year.

The success of Sch. A Cases has also bred imitation from firms with varying degrees of diligence. These less diligent firms appear to bring cases against improper defendants, fail to conduct the required pre-suit due diligence, neglect to fairly evaluate the likelihood of success on the merits, fail to consider any applicable defenses, and even copy—sometimes verbatim—the practices and pleadings of well-established Schedule A practitioners.<sup>259</sup> Consequently, some commentators hyper-focus on and misleadingly cherry-pick these examples—which are correctly categorized as bad lawyering or represent the minority view among judges—and attempt to weaponize them as if they are representative of all Sch. A Cases. These narratives ignore the countless cases that have been successfully brought and adjudicated on the

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<sup>259</sup> *E.g.*, *Min. Entry, Wang, et al. v. Individuals, P'ships, and Unincorporated Ass'ns on Sched. A, et al.*, No. 22-cv-02024 (N.D. Ill. filed Feb. 22, 2023), ECF No. 71; *Tr. at 6, Wang, et al. v. Individuals, P'ships, and Unincorporated Ass'ns on Sched. A, et al.*, No. 22-cv-02024 (N.D. Ill. filed Feb. 22, 2023), ECF No. 74; *Xped L.L.C. v. Entities Listed on Exhibit 1*, No. 21-cv-06237, 2023 WL 5748350 (N.D. Ill. Sept. 6, 2023); *Roblox Corp. v. Bigfinz*, No. 23-cv-5346, 2023 WL 8258653 (N.D. Ill. Nov. 29, 2023); *Emoji Co. v. Individuals, Corps., L.L.C.s, P'ships, & Unincorporated Ass'ns Identified on Sched. A Hereto*, No. 21-cv-1739 (N.D. Ill. filed Mar. 31, 2022), ECF No. 9. As an example of the copying, compare the complaints filed on behalf of Celine by two law firms in the same district. *Compare* *Compl., Celine SA v. The P'ships & Unincorporated Ass'ns Identified on Sched. "A,"* No. 22-cv-05668 (N.D. Ill. filed Oct. 17, 2022), ECF No. 1 (displaying a first firm's filing), *with* *Compl., Celine SA v. P'ships & Unincorporated Ass'ns Identified on Sched. "A,"* No. 23-cv-02652 (N.D. Ill. filed Apr. 27, 2023), ECF No. 1 (displaying a subsequent firm copying former firm's pleading).



merits. Moreover, it downplays the harms associated with Infringing Products and paints obviously willful infringers as innocent sympathetic victims. These narratives are incorrect. Lawyers bringing these cases should, however, be reminded that these are public proceedings. Just because a Defendant will likely not appear, does not mean ethical obligations and other requirements are loosened.

Another aspect to consider is that Sch. A Cases were originally conceived for trademark infringement. The cases are also proper in the copyright infringement and design patent infringement contexts. However, Sch. A Cases are not meant for just any species of IP infringement. A firm recently attempted to assert a Sch. A Case for a utility patent.<sup>260</sup> This is ill-advised because it amounts to putting a square peg into a round hole—it simply does not work. This is largely because, in the case of a utility patent, the test and analysis for infringement and evidentiary support are completely different. Determining infringement of a utility patent involves comparing the language of the written patent claims and determining whether each of the claims are infringed.<sup>261</sup> There are also more ways a patent can be infringed. Evaluating this would be overly burdensome for courts in a Schedule A context and would likely violate the Patent Act's joinder rules, which require that the defendant is selling "the same accused product or process."<sup>262</sup> However, in design patent cases where the patented design covers the entire product, and the Infringing Product is an exact match to the design

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<sup>260</sup> Op. & Order at 1, *Jiangsu Huari Webbing Leather Co., Ltd. v. Joes Identified in Sched. A*, No. 23-cv-02605 (S.D. N.Y. filed Jan. 2, 2024), ECF No. 76.

<sup>261</sup> *Managing a patent*, U. S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents/basics/manage> [<https://perma.cc/5Y2Y-VX9N>].

<sup>262</sup> 35 U.S.C. § 299.

patent, these issues are not present.<sup>263</sup> Thus, here is where we find a necessary boundary for Sch. A Cases—they must be limited to the trademark, copyright, and design patent contexts.

There is also a reality that Sch. A Cases only deter, but cannot indefinitely eliminate, the sale of Infringing Products. But to do away with Sch. A Cases now would be detrimental because they are powerful tools in brand protection. If a reduction to the amount of Sch. A Cases was desirable, the answer is not to impose additional hurdles for Rights Owners. The answer lies with the Defendants—simply stop selling Infringing Products. This obvious point is often overlooked, but if the defendants simply followed the law, they never would have been sued in the first place.<sup>264</sup> Recognizing that this may be asking

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<sup>263</sup> See, e.g., Min. Entry at 1, *Oakley, Inc. v. P’ships & Unincorporated Ass’ns Identified on Sched. “A,”* No. 21-cv-00818 (N.D. Ill. filed Mar. 11, 2021), ECF No. 25; Mem. Op. & Order at 2, *Oakley, Inc. v. P’ships & Unincorporated Ass’ns Identified on Sched. “A,”* No. 1:21-cv-00536 (N.D. Ill. filed Mar. 6, 2021), ECF No. 14 (finding evidence submitted “suffices to satisfy the ‘series of transactions or occurrences’ requirement of section 299(a)(1)” in design patent infringement case); *Chrome Cherry Ltd. v. P’ships & Unincorporated Ass’ns Identified on Sched. “A,”* No. 21-cv-05491, 2021 WL 6752296, at \*1 (N.D. Ill. Oct. 20, 2021) (finding “Plaintiff has sufficiently demonstrated that [the claims] arise out of the same occurrence or series of occurrences” in design patent case); Min. Entry, *NG Imports, et al. v. Does 1-254 as Identified in Ex. 2,* No. 21-cv-00514 (N.D. Ill. filed Mar. 8, 2021), ECF No. 24. Additionally, where the design patent covers the entire product, and the Infringing Product is identical to the claimed design, there are no concerns about a lack of prior art references presented to the court as pointed out by some commentators. See Sarah Burnstein, *Guest Post: We need to talk about the NDIL’s Schedule-A cases*, PATENTLYO (Oct. 30, 2022), <https://patentlyo.com/patent/2022/10/guest-post-about.html> [<https://perma.cc/WYD2-YK8Y>].

<sup>264</sup> Relatedly, critics argue that Sch. A Cases coerce defendants into unfair settlements. This Author disagrees. Settlement is hardly a novel concept in litigation. Defendants, and any other defendant in different contexts, selling Infringing Products have two options: litigate or settle.

for too much, the most realistic solution is to put the burden on online marketplaces and other similar service providers to actively police their platforms. Under current case law, online marketplaces avoid liability for the sale of Infringing Products on their platform, absent specific facts.<sup>265</sup> If Congress enacted laws that changed the requirements of direct liability of these platforms or imposed significant penalties for permitting Infringing Products to be sold by third parties on their platforms, it would lead to a reduction of Sch. A Cases while achieving their primary goal: stopping IP infringement.

## CONCLUSION

Sch. A Cases are one of the few available mechanisms to counter the enormous rise in the sale of Infringing Products flowing into the U.S. These lawsuits allow Rights Owners to shut down hundreds of Infringing Product listings and deter scofflaws through significant monetary damages. Without Sch. A Cases, Rights Owners are left with no efficient and cost-effective way to stop rampant online IP theft and protect American consumers who are at risk. As established above, Sch. A Cases are not only necessary but also proper and fair. See? Not so sad.<sup>266</sup>

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Though settlement may seem to be the simpler route, defendants are by no means obligated to acquiesce. They may opt to contest allegations or assert defenses. Ultimately, settlement remains an option, not a mandate.

<sup>265</sup> Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 109 (2d Cir. 2010).

<sup>266</sup> Goldman, *supra* note 5, at 184.