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EMERGING IP ENFORCEMENT IN ONLINE MARKETS AND DIGITAL SPACES

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A SAD SCHEME OF ABUSIVE INTELLECTUAL PROPERTY LITIGATION

*Eric Goldman**[1]

This Piece describes a sophisticated but underreported system of mass-defendant intellectual property litigation called the "Schedule A Defendants Scheme" (the "SAD Scheme"), which occurs most frequently in the Northern District of Illinois and principally targets online merchants based in China. The SAD Scheme capitalizes on weak spots in the Federal Rules of Civil Procedure, judicial deference to IP rightsowners, and online marketplaces' liability exposure. With substantial assistance from judges, rightsowners can use these dynamics to extract settlements from online merchants without satisfying basic procedural safeguards like serving the complaint and establishing personal jurisdiction over defendants. This paper explains the scheme, how it bypasses standard legal safeguards, how it has affected hundreds of thousands of merchants, and how it imposes substantial costs on online marketplaces, consumers, and the courts. The Piece concludes with some ideas about ways to curb the system.

INTRODUCTION

This Piece identifies an underreported system of abusive intellectual property (IP) litigation.[2] Indeed, the system is so obscure that it doesn't

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1. In 2021, the author filed a declaration in a SAD Scheme case in support of a defendant's motion for attorneys' fees. See Declaration of Dean Eric Goldman at 3, Emoji Co. v. Individuals, Corps., Ltd. Liab. Cos., P'ships, & Uninc. Ass'ns Identified on Schedule A Hereto, No. 21-cv-1739 (N.D. Ill. filed Aug. 16, 2021), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3534&context=historical [https://perma.cc/YS6W-JAUV] [hereinafter Emojico Declaration].

2. For prior work on mass-defendant intellectual property enforcement, see generally Shyamkrishna Balganesh & Jonah B. Gelbach, Debunking the Myth of the

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have an official name yet. This paper calls it the "Schedule A Defendants" scheme (the "SAD Scheme") because the rightsowner-plaintiffs often identify the defendants[3] in a separately filed and sealed "Schedule A"[4] attachment to the complaint.

Rightsowners use the SAD Scheme to combat the sale of allegedly infringing[5] items via online marketplaces (such as Amazon and Wish)[6] by

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Copyright Troll Apocalypse, 101 Iowa L. Rev. Online 43 (2016), https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-01/Balganesh_Gelbach.pdf [https://perma.cc/VK2H-UN4D] (suggesting that some legal literature defines the phenomenon of "copyright trolls," who acquire copyrights solely to litigate copyright infringement, too broadly and overstates the problem within the United States); Shyamkrishna Balganesh, The Uneasy Case Against Copyright Trolls, 86 S. Cal. L. Rev. 723 (2013) (discussing the connection between the policy goals of copyright enforcement and the problematic rise of copyright trolls); Colleen V. Chien, Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents, 87 N.C. L. Rev. 1571 (2009) (evaluating litigation data of high-tech patents to highlight the most common types of patent suits and who is most likely to bring the claim); Brad A. Greenberg, Copyright Trolls and Presumptively Fair Uses, 85 U. Colo. L. Rev. 53 (2014) ("[C]ourts should impose a presumptive bar on troll-related litigation. Such burden shifting is warranted under traditional fair use analysis . . . ."); Brad A. Greenberg, Copyright Trolls and the Common Law, 100 Iowa L. Rev. Bulletin 77 (2015) (concluding that trolling-related litigation is best addressed through ad hoc judicial determinations rather than per se legislative classifications), https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-01/Greenberg.pdf [https://perma.cc/SRV6-536V]; Michael S. Mireles, Trademark Trolls: A Problem in the United States?, 18 Chap. L. Rev. 815 (2015) ("[T]his Paper discusses patent trolls and separates 'trolling behavior' from other troubling trademark enforcement practices such as 'bullying.' This Paper then gives the reasons why trademark trolls are likely not a problem in the United States."); Matthew Sag, Copyright Trolling, An Empirical Study, 100 Iowa L. Rev. 1105 (2015) (discussing multi-defendant John Doe lawsuits); Matthew Sag & Jake Haskell, Defense Against the Dark Arts of Copyright Trolling, 103 Iowa L. Rev. 571 (2018) (proposing a legal framework for defending against copyright trolls).

3. There are many variations, but a typical SAD Scheme complaint caption might refer to the defendants as "the Individuals, Corporations, Limited Liability Companies, Partnerships, and Unincorporated Associations Identified on Schedule A Hereto." See infra note 15 and accompanying text.

4. In addition to "Schedule A," plaintiffs have also used the titles "Exhibit 1," "Exhibit A," "Annex A," and other synonyms. See infra Part III.

5. Rightsowners may overclaim infringement. For example, a SAD rightsowner-plaintiff may characterize the defendants' items as "counterfeits," even when those items are noninfringing knockoff goods, gray market goods, goods that have leaked out of the rightsowner's official distribution channels, used or refurbished goods, or otherwise noninfringing goods. See generally Sarah Burstein, Guest Post, Against the Design-Seizure Bill, Patently-O (Jan. 3, 2020), https://patentlyo.com/patent/2020/01/against-design-seizure.html [https://perma.cc/XC4K-2PYG] [hereinafter Burstein, Against the Design-Seizure Bill] (discussing how "counterfeit" allegations may be rhetorically deceptive).

6. Rightsowners also sometimes use the SAD Scheme against nonmarketplace service providers such as payment processors and other financial institutions. This Piece doesn't separately address the unique considerations these nonmarketplace players may encounter, but much of the Piece's analysis about marketplaces applies equally to the other service providers.

third-party merchants.[7] The rightsowners bring lawsuits on an ex parte basis and obtain injunctions that freeze the merchant's relationship with online marketplaces.[8] Most SAD Scheme cases are trademark lawsuits filed in the Northern District of Illinois.[9] The SAD Scheme has likely affected hundreds of thousands of online merchants and deprived the federal government of a quarter-billion dollars of court filing fees.[10]

The SAD Scheme addresses an ongoing problem for rightsowners:[11] how to cost-effectively redress high volumes of infringement in online marketplaces,[12] especially when the alleged infringers are located in China or other foreign countries and hide their identities and locations.[13] Unfortunately, the SAD Scheme advances this goal by subverting existing intellectual property and civil procedure rules. Each step in this process superficially appears to comply with the applicable rules, but the combination of ex parte proceedings and extrajudicial actions by the online marketplaces produces unjust outcomes, including unwarranted settlements.

Thus, the SAD Scheme goes far beyond just curbing online infringement and instead causes substantial harm to innocent

7. Samuel Baird & Noel Paterson, How Some Brands Are Successfully—and Cost-Effectively—Combating Online Counterfeiters, IPWatchdog (Oct. 13, 2022), https://ipwatchdog.com/2022/10/13/brands-successfully-cost-effectively-combating-online-counterfeiters/id=152088/ [https://perma.cc/U2MN-CUNK].

8. Id.

9. See infra Part II.

10. See infra Part II.

11. Rightsowners can always take advantage of the copyright notice-and-takedown provisions of 17 U.S.C. § 512 or the de facto notice-and-takedown scheme for trademarks suggested by Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 99–107 (2d Cir. 2010). Instead, at least some rightsowners apparently have adopted the SAD Scheme as their preferred alternative to the venerable notice-and-takedown approach.

12. "Brand owners and their attorneys view the lawsuits as one of the few available tactics to counter an enormous rise in counterfeit merchandise flowing into the US from elusive foreign sellers." Riddhi Setty & Isaiah Poritz, Brands Flock to Chicago Court in War on Internet Counterfeiters, Bloomberg L. (Apr. 5, 2023), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/ip-law/BNA%2000000187-3842-d882-abcf-f85a8b3d0001 (on file with the *Columbia Law Review*).

Rightsowners increasingly may be able to locate and sue online marketplace merchants due to laws like the Arkansas Online Marketplace Consumer Inform Act, which requires some merchants to publicly display a physical address, Act 555, ch. 119, 2021 Ark. Acts 2450 (codified at Ark. Code Ann. § 4-119-103(a)(2)(B) (2023)), and the similar INFORM Consumers Act passed by Congress in 2022, Collection, Verification, and Disclosure of Information by Online Marketplaces to Inform Consumers, Pub. L. No. 117-328, sec. 301, 136 Stat. 5555 (2022) (codified at 15 U.S.C.A. § 45f (2023)). China's recent Electronic Commerce Law might also facilitate locating and suing these merchants. See Daniel C.K. Chow, Strategies to Combat Internet Sales of Counterfeit Goods, 52 Seton Hall L. Rev. 1053, 1071–81 (2022).

13. Dave Bryant, How Chinese Sellers Are Manipulating Amazon in 2023, EcomCrew (Aug. 2, 2023), https://www.ecomcrew.com/chinese-sellers-manipulating-amazon/ [https://perma.cc/578U-CWXJ] (last updated Aug. 21, 2023) (estimating that nearly two-thirds of Amazon marketplace merchants are based in China).

merchants,[14] online marketplaces, and marketplace consumers. It also undermines public trust and confidence in the courts. Although eliminating the SAD Scheme will undoubtedly make it costlier for rightsowners to do their enforcement work, the rule of law requires it.

Part I of the Piece describes how the SAD Scheme works. Part II quantifies its prevalence. Part III describes how the SAD Scheme abuses the legal system. Part IV discusses some ways to curb the SAD Scheme.

I. How the SAD Scheme Works

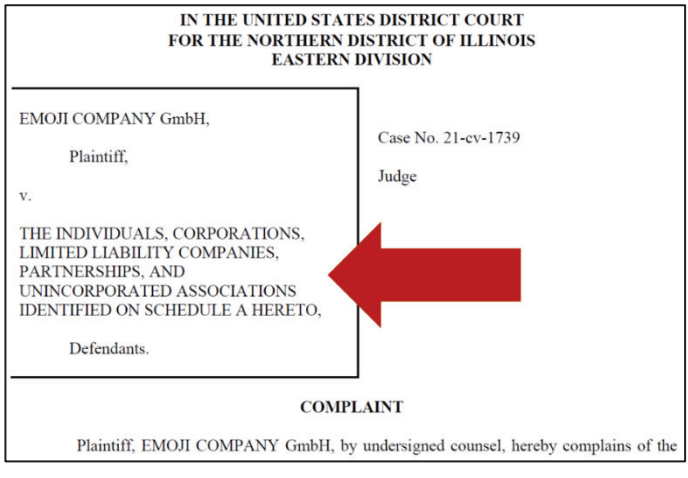
This Part describes how the SAD Scheme works and provides a case study of an abusive SAD Scheme lawsuit.

A. *The SAD Scheme in Eight Steps*

Rightsowners use the SAD Scheme to redress purported infringement taking place in online marketplaces. A rightsowner will identify a cohort of defendant-merchants whose marketplace listings suggest that the merchants are selling items that infringe the rightsowner's IP rights. After developing a cohort of potential defendants, the rightsowner proceeds using this eight-step protocol:

Step 1. A rightsowner files a complaint with a caption referencing defendants listed on a Schedule A, as indicated by the red arrow below:[15]

FIGURE 1. EXAMPLE GENERIC DEFENDANT NAME ON COMPLAINT


IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EMOJI COMPANY GmbH,

Plaintiff,

v.

THE INDIVIDUALS, CORPORATIONS, LIMITED LIABILITY COMPANIES, PARTNERSHIPS, AND UNINCORPORATED ASSOCIATIONS IDENTIFIED ON SCHEDULE A HERETO,

Defendants.

Case No. 21-cv-1739

Judge

COMPLAINT

Plaintiff, EMOJI COMPANY GmbH, by undersigned counsel, hereby complains of the

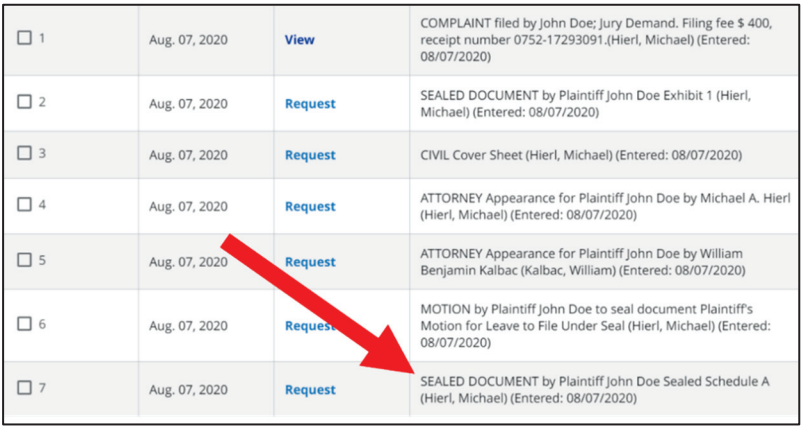
14. See Setty & Poritz, supra note 12 (citing William Stroever, an attorney at Cole Schotz PC, as "acknowledg[ing] that non-infringing sellers may get tied up in these suits, but . . . [saying] that's an inevitable risk with all kinds of litigation").

15. Complaint at 1, Emoji Co. v. Individuals, Corps., Ltd. Liab. Cos., P'ships, & Uninc. Ass'ns Identified on Schedule A Hereto, No. 21-cv-1739 (N.D. Ill. filed Mar. 31, 2021). This and other images in this Piece are on file with the *Columbia Law Review*.

The complaint will generically contain sparse factual assertions that are not particularized to any defendant, which makes it easy to clone-and-revise the complaint for subsequent cases.

Step 2. The rightsowner files the Schedule A defendant list separately from the complaint (with a different docket entry number) and asks the judge to seal it. An example docket:[16]

FIGURE 2. EXAMPLE DOCKET WITH SCHEDULE A DEFENDANT FILING



☐ 1	Aug. 07, 2020	View	COMPLAINT filed by John Doe; Jury Demand. Filing fee $ 400, receipt number 0752-17293091.(Hierl, Michael) (Entered: 08/07/2020)
☐ 2	Aug. 07, 2020	Request	SEALED DOCUMENT by Plaintiff John Doe Exhibit 1 (Hierl, Michael) (Entered: 08/07/2020)
☐ 3	Aug. 07, 2020	Request	CIVIL Cover Sheet (Hierl, Michael) (Entered: 08/07/2020)
☐ 4	Aug. 07, 2020	Request	ATTORNEY Appearance for Plaintiff John Doe by Michael A. Hierl (Hierl, Michael) (Entered: 08/07/2020)
☐ 5	Aug. 07, 2020	Request	ATTORNEY Appearance for Plaintiff John Doe by William Benjamin Kalbac (Kalbac, William) (Entered: 08/07/2020)
☐ 6	Aug. 07, 2020	Request	MOTION by Plaintiff John Doe to seal document Plaintiff's Motion for Leave to File Under Seal (Hierl, Michael) (Entered: 08/07/2020)
☐ 7	Aug. 07, 2020	Request	SEALED DOCUMENT by Plaintiff John Doe Sealed Schedule A (Hierl, Michael) (Entered: 08/07/2020)

16. Court Docket, Emoji Co. v. ARIELA_BRIGER, No. 1:20-cv-04645 (N.D. Ill. Aug. 4, 2021) (on file with the *Columbia Law Review*). This screenshot was taken on July 12, 2023. Observe that this rightsowner hid its identity. See supra note 18 and accompanying text.

The actual contents of a Schedule A may be a threadbare list of defendant names, such as this example:[17]

FIGURE 3. EXAMPLE LIST OF SCHEDULE A DEFENDANTS



Schedule A

No.	Defendant Name / Alias
1	dosaty
2	LinYiBiHuiChuangMaZhiPinChang
3	392991170
4	1 Million
5	A_qing70
6	ACOOP
7	aelitorex
8	AIHUTOO
9	AILIELIA US
10	AISSO
11	Alexander Hamilton
12	Allaaly
13	AllOverAgain
14	alonestion
15	Amaze Oversea
16	AnuMeg
17	Arrocidea
18	Arthox
19	Avantik INT
20	Azika
21	bagging&shao
22	BAOLIANLE
23	Bear Orange Club
24	Best Cool Gift
25	Best4Life Store
26	Biye
27	Bthome
28	CarbProm
29	cairfy
30	CAO THI MY shop
31	CATSDER
32	ChiangXHM
33	dongxiangpu longjiao linzongshi xiemaodian
34	dongxiangqulongjiaolinzongBaiHuoTingShuoHuo
35	Chinet
36	Chorus & Chill
37	Christine's house
38	Chuxintrehe
39	Cindy&Will
40	dianlihouse

Schedule A

41	gold master DIY lab
42	Commepart
43	Comperfect
44	CRAFTSGALAXY
45	Crown Madant
46	Crystal&
47	CS—DB
48	Customize Store
49	Dabangjiewai
50	daiyuzuo
51	daiyuzilan
52	dalhings
53	Danny Tina
54	dataxiaozhaoxingbaihuodian
55	DaTongShiLinYiKaiYouXianGongSi
56	Dawai Trading
57	Dayone(Trackable Epacket,7-15days arrive)
58	DeanMile
59	Deng Chao
60	Dengfugi
61	Design With Vinyl
62	DIYHOT
63	DO THI TRUC LY
64	Dododi
65	DongDongMaiZhou
66	dongdongzitudian
67	dongwanyanliujigelin
68	Double Gift
69	duofazhuangdian
70	Eden Edius
71	Emily Boyle666
72	FA OCEAN
73	fei pin dian zi
74	fancy land
75	FancyMug US
76	FeiXiaoChuYingBaoCaiChang
77	findmlove
78	forget1
79	Gilin Bellamy
80	Glittering Jewel
81	GNOCE

Schedule A

82	GRAPY
83	Great Fans
84	Grazif
85	gtbobi
86	GTN Tech
87	guangbanbangmao
88	GuangZhouDaNiuYuanShangMaoYouXianGongSi
89	guangzhoutaolingmaoyiyouxiangongsi
90	gugubaomao SHOP
91	HAMIQIB
92	hanki
93	hanfulinbanghuochaoshi
94	HAOYUBOTONG-US
95	Harmon Mug store
96	Hcnfs
97	HeBeiXuWuXinCaiLiaoYouXianGongSi
98	henanshifengzhuangzhigongzhengyouxiangongsi
99	henanxuanyangqinfuoyundaHyouxiangongsi
100	HLPbabyshmath
101	HoArts
102	Home L6
103	HouYiCanYinFuWuYouXianGongSi
104	HQOMO
105	HRUNC8
106	Hu Ji Leng
107	iaoyouth
108	IOSOWING
109	Igou Chou Store
110	INILO Blessings
111	IUIUYFYTFY
112	ivyn
113	J.Ann Fashion
114	Jason Paigel
115	JeanMuseum
116	JIAHUIA
117	JIAJU--DI
118	jiangwei19752021
119	jiedianzong
120	Jinanlh-US
121	Jinan Lixia District Meijin E-commerce
122	jindengtaizhangmao

Schedule A

123	JiShuiXianPanXianBaiHuoDian
124	JK Home Online
125	JOLUMO
126	Jolly Factory
127	Joyway cookware
128	Justin Daisy
129	KaiFangShuOuShangMaoYou
130	KAPOKU
131	KATERN
132	Kelly Moll
133	KEVIN MANIS
134	Klo-26K
135	Koba Mug
136	L&C HOME
137	LanKhou
138	LEE-JOHN fashion
139	LEHOSAN
140	Leihuo
141	Leihu mall
142	Lifetime-US
143	LIMEIJP
144	linuo US
145	lvyiteng
146	lvchanS
147	Luanroo
148	LUCKY MUO
149	luckyschool
150	Luiteram
151	LuJunZhangUS
152	luobeingzhua
153	LUONG TRUNG
154	LUZHOU
155	LvMeiYaManMaoYiYouXianGongSi
156	LvYuanQuAoZhaBaoDongYongPinJingXiaoChu
157	MALOK
158	manhl
159	Matching Stuff
160	May Gift Department Store
161	meigzhelig
162	Meowstar
163	midongxin

Schedule A

164	Ming-store
165	mingyangwanghao
166	minyiyifashi
167	miyuenfanrenjia
168	Moddit Fide
169	MSHIH
170	MTJZ
171	MType
172	Mucuoy Jat
173	MuyuTech
174	My Heart Choice

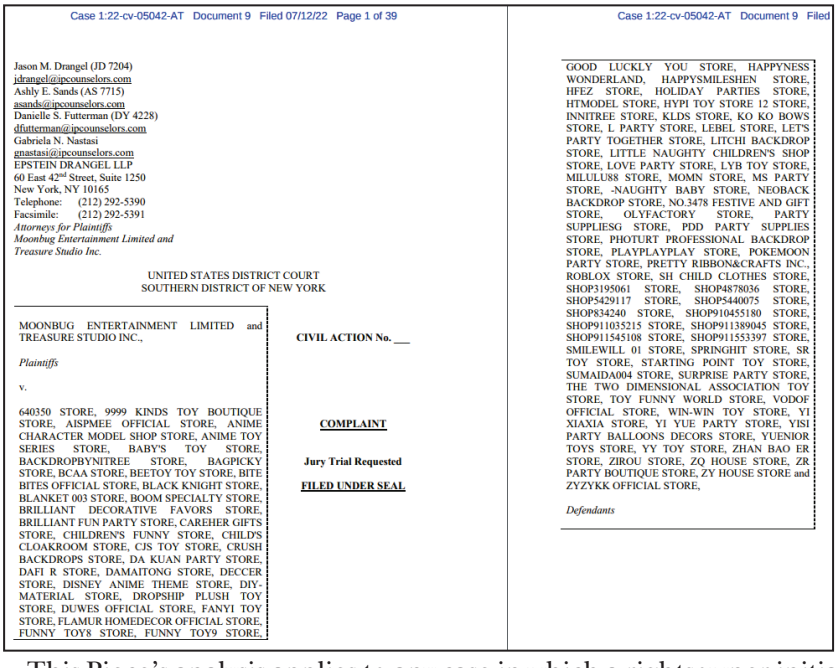
Schedule A

205	YuCiYangZiXunDian
206	yueheniyun
207	yuezhuangbangmao
208	Yuelan Trading
209	YuNan
210	yunlaijiabangmaoyouxiangongsi
211	YUXUNYAOdip
212	YXTXD
213	YYGL2
214	Z.C.L
215	zdl2020

17. Schedule A, *Emoji Co.*, No. 1:21-cv-01739 (N.D. Ill. filed Mar. 31, 2021), ECF No. 6.

Instead of using a sealed defendant list, rightsowners might file the entire complaint under seal.[18] This example lists nearly 100 defendants in the caption:[19]

FIGURE 4. EXAMPLE COMPLAINT NAMING NEARLY 100 DEFENDANTS



Case 1:22-cv-05042-AT Document 9 Filed 07/12/22 Page 1 of 39

Jason M. Drangel (JD 7204)
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Treasure Studio Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MOONBUG ENTERTAINMENT LIMITED and TREASURE STUDIO INC.,

Plaintiffs

v.

640350 STORE, 9999 KINDS TOY BOUTIQUE STORE, AISPMEE OFFICIAL STORE, ANIME CHARACTER MODEL SHOP STORE, ANIME TOY SERIES STORE, BABY'S TOY STORE, BACKDROPBYNITREE STORE, BAGPICKY STORE, BCAA STORE, BEETOY TOY STORE, BITE BITES OFFICIAL STORE, BLACK KNIGHT STORE, BLANKET 003 STORE, BOOM SPECIALTY STORE, BRILLIANT DECORATIVE FAVORS STORE, BRILLIANT FUN PARTY STORE, CAREHER GIFTS STORE, CHILDREN'S FUNNY STORE, CHILD'S CLOAKROOM STORE, CJS TOY STORE, CRUSH BACKDROPS STORE, DA KUAN PARTY STORE, DAFI R STORE, DAMAITONG STORE, DECCER STORE, DISNEY ANIME THEME STORE, DIY-MATERIAL STORE, DROPSHIP PLUSH TOY STORE, DUWES OFFICIAL STORE, FANYI TOY STORE, FLAMUR HOMEDECOR OFFICIAL STORE, FUNNY TOY8 STORE, FUNNY TOY9 STORE,

CIVIL ACTION No. ___

COMPLAINT

Jury Trial Requested

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Case 1:22-cv-05042-AT Document 9 Filed

GOOD LUCKLY YOU STORE, HAPPYNESS WONDERLAND, HAPPYSMILESHEN STORE, HFEZ STORE, HOLIDAY PARTIES STORE, HTMODEL STORE, HYPI TOY STORE 12 STORE, INNITREE STORE, KLDS STORE, KO KO BOWS STORE, L PARTY STORE, LEBEL STORE, LET'S PARTY TOGETHER STORE, LITCHI BACKDROP STORE, LITTLE NAUGHTY CHILDREN'S SHOP STORE, LOVE PARTY STORE, LYB TOY STORE, MILULU88 STORE, MOMN STORE, MS PARTY STORE, -NAUGHTY BABY STORE, NEOBACK BACKDROP STORE, NO.3478 FESTIVE AND GIFT STORE, OLYFACTORY STORE, PARTY SUPPLIESG STORE, PDD PARTY SUPPLIES STORE, PHOTURT PROFESSIONAL BACKDROP STORE, PLAYPLAYPLAY STORE, POKEMOON PARTY STORE, PRETTY RIBBON&CRAFTS INC., ROBLOX STORE, SH CHILD CLOTHES STORE, SHOP3195061 STORE, SHOP4878036 STORE, SHOP5429117 STORE, SHOP5440075 STORE, SHOP834240 STORE, SHOP910455180 STORE, SHOP911035215 STORE, SHOP911389045 STORE, SHOP911545108 STORE, SHOP911553397 STORE, SMILEWILL 01 STORE, SPRINGHIT STORE, SR TOY STORE, STARTING POINT TOY STORE, SUMAIDA004 STORE, SURPRISE PARTY STORE, THE TWO DIMENSIONAL ASSOCIATION TOY STORE, TOY FUNNY WORLD STORE, VODOF OFFICIAL STORE, WIN-WIN TOY STORE, YI XIAXIA STORE, YI YUE PARTY STORE, YISI PARTY BALLOONS DECORS STORE, YUENIOR TOYS STORE, YY TOY STORE, ZHAN BAO ER STORE, ZIROU STORE, ZQ HOUSE STORE, ZR PARTY BOUTIQUE STORE, ZY HOUSE STORE and ZYZYKK OFFICIAL STORE,

Defendants

This Piece's analysis applies to any case in which a rightsowner initially seals the defendants' identities.

It may be appropriate to temporarily seal defendant identities when there are bona fide concerns that defendants will dissipate assets or destroy evidence before the rightsowner can effectuate service. Judges have the discretion to accept or reject the rightsowner's sealing request.[20] Defendant identities should remain sealed only until the rightsowner has the

18. In another variation, a rightsowner sued as a "Doe" plaintiff and sealed the identity of the allegedly infringed IP. Complaint at 1, Doe v. P'ships Identified on Schedule "A", No. 22-cv-5512 (N.D. Ill. filed Oct. 7, 2022), ECF No. 1. The rightsowner explained:

> Plaintiff's name is being temporarily withheld to prevent Defendants from obtaining advance notice of this action and Plaintiff's accompanying *ex parte* Motion for Entry of Temporary Restraining Order and transferring funds out of the accounts that Plaintiff seeks to re[s]train. Plaintiff is identified on the U.S. Certificate of Trademark Registration for Plaintiff's trademark filed under seal as Exhibit 1.

Id. at 1 n.1. That lawsuit targeted over 475 defendants. Schedule A, *Doe v. P'ships*, No. 22-cv-5512 (N.D. Ill. filed Oct. 7, 2022), ECF No. 5.

19. Complaint at 1–2, Moonbug Ent. Ltd. v. 640350 Store, No. 1:22-cv-05042-AT (S.D.N.Y. filed July 12, 2022).

20. Fed. R. Civ. P. 5.2(d).

reasonable opportunity to serve defendants, but judges do not always revisit the sealing if no one subsequently complains about it.

Step 3. The rightsowner requests an ex parte temporary restraining order (TRO) against the defendants' allegedly infringing behavior.[21] The TROs also impose various obligations on online marketplaces. TROs are intended to be extraordinary remedies, and the rightsowners' pleading burdens to obtain TROs are high.[22] The proceeding takes place ex parte (i.e., without the defendants present). Accordingly, defendants are unable to highlight any problems with the rightsowner's request, though judges sometimes spot defects sua sponte.[23]

Step 4. After the judge grants an ex parte TRO, the rightsowner submits it to the online marketplaces where the defendants are selling.[24]

Step 5. The online marketplaces typically honor the TRO's obligations, even if they may have legitimate grounds to argue that the TRO does not bind them.[25] Defying the TRO would put the online marketplace at risk of being held in contempt, but the online marketplaces have another reason to honor it. The TRO might put the online marketplace on notice of infringing activity by identified merchants and thereby increase the marketplace's risk of contributory infringement in future cases if they don't curb further infringing activity by those merchants.[26] TROs are not

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21. Baird & Paterson, supra note 7 (noting that emergency TROs "increased 70% from 2019 to 2021," largely due to the SAD Scheme).

22. Parties seeking TROs must show "specific facts . . . that immediate and irreparable injury, loss, or damage will result" without the TRO. Fed. R. Civ. P. 65(b)(1)(A).

23. See, e.g., Zuru (Singapore) Pte, Ltd. v. Individuals, Corps., Ltd. Liab. Cos., P'ships, & Uninc. Ass'ns Identified on Schedule A, No. 20-00395 JMS-KJM, 2021 WL 310336, at *5 & n.6 (D. Haw. Jan. 29, 2021) (denying the rightsowner's ex parte TRO request because "the cookie-cutter statements contained in each declaration suggest that Plaintiffs did not expend much effort in this case to establish any *particularized* facts that would warrant ex parte relief").

24. See generally Fed. R. Civ. P. 65(b) (describing the general two-week expiration of ex parte TROs after issued by the court).

25. If the TRO expressly directs online marketplaces to take action, the marketplaces may not be obligated to act if the marketplaces are not defendants in the pending case and are not otherwise acting "in active concert or participation" with the named defendants. Fed. R. Civ. P. 65(d)(2); see also Eicher Motors Ltd. v. Individuals, Corps., Ltd. Liab. Cos., P'ships, & Uninc. Ass'ns Identified on Schedule A Hereto, No. 22-cv-2458, 2022 WL 3081869, at *3 (N.D. Ill. Aug. 3, 2022) (holding that the facts at issue did not establish Amazon as the merchants' agent). Judge Joan Gottschall in the Northern District of Illinois reminds plaintiffs that "third parties not named in the complaint (typically, [e.g.], Amazon and eBay) cannot be named as in active concert or participation with the defendants unless their active concert or participation is proven AND they receive advance notice and an opportunity to be heard before any such order is entered." Judge Joan B. Gottschall, U.S. Dist. Ct., N.D. Ill., https://www.ilnd.uscourts.gov/judge-info.aspx?AYKasbtMpJs= [https://perma.cc/U49D-DKDW] (last visited Aug. 16, 2023).

26. See, e.g., Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 107 (2d Cir. 2010) (discussing whether eBay's generalized knowledge of trademark infringement constituted contributory liability); see also Chow, supra note 12, at 1062–71 (discussing online marketplaces' contributory trademark liability based on takedown notices).

supposed to last longer than fourteen days,[27] but online marketplaces may maintain the account freeze indefinitely to reduce their legal risk.[28]

To implement the TRO, online marketplaces often will freeze all of the merchant's marketplace activity, not just the purported infringing activity. This freeze immediately harms defendants in two ways.

First, the freeze locks any cash being held by the online marketplace.[29] This freeze can cause severe or fatal cash-flow problems for the defendant, which may not be able to pay its vendors, employees, or lawyers.

Second, the freeze prevents the merchant from making future sales—including both allegedly infringing *and unchallenged noninfringing* items.[30] This consequence exposes a critical mismatch between the TRO's intended and actual remedies. The TRO should only reach items that infringe the rightsowner's IP, but the TRO-induced freeze can collaterally affect legitimate items. Reduced merchant activity hurts the marketplaces by decreasing their revenues and profits.[31]

Consumers are hurt when the SAD Scheme excludes legitimate items from marketplaces. Having fewer merchants and items reduces consumers' choices and boosts the prices they pay. By distorting competition among legitimate merchants and items, the SAD Scheme's ex parte TRO counterproductively harms the public interest rather than promoting it.

Step 6. Because its identity is still sealed by the court, the merchant may first learn about the lawsuit when its marketplace account is frozen.[32] With the merchant's business and cash flow in tatters, the SAD Scheme rightsowner can offer a convenient resolution—settle at a price reflecting the merchant's dire need for an immediate solution.[33] If the merchant

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27. Fed. R. Civ. P. 65(b)(2) ("The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension.").

28. Instead of implementing the TRO verbatim, rightsowners and online marketplaces always have the option to negotiate custom private arrangements that deviate from the TRO.

29. Judge Martha Pacold's SAD Scheme TRO template form instructs online marketplaces to "restrain and enjoin any such accounts or funds from transferring or disposing of any money or other of Defendants' assets until further order by this Court." U.S. Dist. Ct., N. Dist. of Ill., Sealed Temporary Restraining Order 6, https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Pacold/TRO%20Template%20Schedule%20A%20cases.pdf [https://perma.cc/5Z8S-5B47] (last visited Sept. 8, 2023).

30. See, e.g., Appellant NeoMagic Corporation's Opening Brief at 11, Gorge Design Grp. LLC v. Xuansheng, No. 21-1695 (Fed. Cir. Apr. 6, 2023), 2021 WL 5050187.

31. The TROs impose other costs on online marketplaces. According to Wish's general counsel, in 2022, Wish spent over $1.25 million on outside counsel and had five full-time employees handling TRO demands. Email from Joanna Forster, Interim Gen. Couns. & Chief Compliance Off., Wish, to author (Apr. 27, 2023) (on file with the *Columbia Law Review*).

32. See, e.g., ABC Corp. I v. P'ship & Uninc. Ass'ns Identified on Schedule "A", 51 F.4th 1365, 1376 (Fed. Cir. 2022) (holding that an Amazon account freeze didn't confer notice of the lawsuit sufficient to compel a defendant to engage with the suit).

33. As one defendant explained:

accepts the settlement, the rightsowner dismisses the merchant from the case.

Often, settlements of intellectual property disputes are viewed as socially beneficial because the parties voluntarily resolved the matter while preserving judicial resources.[34] SAD Scheme settlements are the opposite. In the SAD Scheme, TROs are based exclusively on the rightsowner's story. The TRO then prompts merchants to settle involuntarily—without the court hearing their story at all—because it's cheaper, quicker, or more predictable compared to fighting back. These unwarranted settlements signal a systemic process failure, not the prosocial outcomes normally associated with settlements.

Step 7. The rightsowner may voluntarily drop any merchant who doesn't settle. By strategically deciding which parties stay in the case, the rightsowner can control what information reaches the judge.[35] With a steady stream of dismissed merchants (who settled or are dismissed voluntarily), the case superficially appears to be progressing.

Step 8. After the settlements and voluntary dismissals, remaining merchants may not appear in court for a variety of reasons: The merchant can't afford to litigate; the amount of money at stake isn't worth the litigation costs; the merchant never got proper notice or service; the merchant is outside the United States and thinks it is not bound by any U.S. court proceeding; the merchant is bankrupt, perhaps due to the marketplace freeze; or the merchant infringed and knows it would lose in court.

The rightsowner then seeks default judgments against no-show merchants, which courts are inclined to grant, though they may trim the damages amount or injunction scope. To ease collection, courts may order online marketplaces to turn over any frozen cash to the rightsowner to satisfy the judgment.[36]

> Gorge [(the rightsowner)] . . . subjected NeoMagic [(the defendant)] to a short barrage of sealed litigation intended to secretly shut down NeoMagic's business, seize NeoMagic's marketplace (typically listing more than 100,000 products daily), and freeze NeoMagic's funds (in excess of $300,000) based upon the sale of a single unit of a $4.99 product . . . . Gorge still demanded payment of $9,500 for Gorge to release the over $300,000 of NeoMagic money that remained frozen (crippling NeoMagic's ability to do business).

Appellant NeoMagic Corporation's Opening Brief, supra note 30, at 11.

34. See, e.g., 1-800-Contacts, Inc. v. Fed. Trade Comm'n, 1 F.4th 102, 121 (2d Cir. 2021) (noting that courts should typically not second-guess trademark settlement agreements negotiated between competitors).

35. See Appellant NeoMagic Corporation's Opening Brief, supra note 30, at 12 ("Gorge dismissed NeoMagic under [FRCP] 41 immediately preceding the injunction hearing so that NeoMagic could not present [adverse] information verbally to the district court . . . .").

36. E.g., Ontel Prods. Corp. v. Uninc. Ass'ns Identified in Schedule A, No. 1:21cv1452 (MSN/JFA), 2022 WL 9874815, at *12 (E.D. Va. Aug. 12, 2022).

B. *A SAD Case Study*[37]

Emoji company GmbH (Emojico) is a German company with U.S. trademark registrations in the word "emoji" for numerous classes.[38] It licenses vendors to sell goods under its "emoji" brand. It's not unusual for dictionary words to turn into trademarks for nondictionary meanings (think "Apple" for computers), but the purported trademark owner cannot stop the word from being used for its dictionary meanings.[39]

In one of its Schedule A Defendants cases,[40] Emojico claimed this Amazon marketplace listing infringed on its trademark:[41]

FIGURE 5. EMOJICO'S AMAZON MARKETPLACE SCREENSHOT OF "INFRINGING" MATERIAL



Emojico apparently conducted a keyword search in Amazon's marketplace for the word "emoji" and flagged hundreds of listings where the word "emoji" appeared in the product title or description.[42] Emojico then claimed that those listings violated its trademark rights in the word

37. For another case study, see Sarah Burstein, Guest Post, We Need to Talk About the NDIL's Schedule-A Cases, Patently-O (Oct. 30, 2022), http://patentlyo.com/patent/2022/10/guest-post-about.html [https://perma.cc/VE5U-NESV] (discussing *ABC Corp. I*, 52 F.4th 934).

38. See, e.g., EMOJI, Registration No. 5,489,322 (covering goods such as motor buses, hubcaps, caps for vehicle petrol tanks, ships' hulls, and rowlocks); EMOJI, Registration No. 5,415,510 (covering goods such as penis enlargers, cuticle pushers, fruit knives, pesticides, and bowel evacuant preparations).

39. See infra note 47 and accompanying text.

40. Emoji Co. v. Individuals, Corps., Ltd. Liab. Cos., P'ships, & Uninc. Ass'ns Identified on Schedule A Hereto, No. 21-cv-1739 (N.D. Ill. docketed Mar. 3, 2022).

41. Emojico Declaration, supra note 1, at para. 31 (citing Declaration of Anna K. Reiter exh. 2, pt. 1, at 21, *Emoji Co.*, No. 21-cv-1739 (N.D. Ill. filed Mar. 31, 2021), ECF No. 10).

42. Id. at para. 32.

"emoji."[43] In the screenshot above, the green box indicates the alleged infringement.[44]

This is not a good-faith trademark claim. Trademark law typically restricts junior users from using a trademarked term as a source identifier.[45] The depicted mug isn't using "emoji" as a source identifier. It's not an "emoji"-branded mug, and the word "emoji" doesn't appear on the mug. The only reference to "emoji" is in the mug's item description.

Also, trademark law recognizes "descriptive fair use," which occurs when a junior user uses a dictionary word to describe a product's attributes.[46] That's exactly what the mug merchant is doing—telling consumers that the mug displays a poop emoji. The merchant has no other way to accurately describe the mug. Any synonym for "poop emoji" would hinder consumer decisionmaking, and trademark law does not require merchants to linguistically stretch to that extent.[47]

Given that it's an attempt to propertize the dictionary meaning of the term "emoji," this trademark claim never should have been brought. Yet, pursuant to the SAD Scheme, a judge may never hear any objection to Emojico's enforcement. By overclaiming its trademark registration in "emoji" and then controlling the narrative told to the judge, Emojico can obtain legally unsupportable settlements or default judgments for poop emoji mugs.

II. QUANTIFYING THE SAD SCHEME'S PREVALENCE

This Part provides empirical details about the SAD Scheme.

A. *Methodology*

On December 28, 2022, the author searched for "schedule a" and related terms[48] using Bloomberg Law Docket's "parties" field. This search produced a total dataset of 9,181 cases. Using Bloomberg Law's search

43. Declaration of Anna K. Reiter exh. 2, pt. 1, at 21, *Emoji Co.*, No. 21-cv-1739 (N.D. Ill. filed Mar. 31, 2021), ECF No. 10.

44. Emojico Declaration, supra note 1, at para. 31.

45. 15 U.S.C. §§ 1114(1), 1125(a)(1)(A) (2018).

46. Id. §§ 1115(b)(3), 1125(c)(3).

47. For example, the purported trademark owners of the name "Albert Einstein" sued a merchant selling a mousepad displaying the image of Albert Einstein because the Amazon listing's product description referenced "Albert Einstein." Hebrew Univ. of Jerusalem v. DealzEpic, No. 21-cv-5492, 2022 WL 3026934, at *1 (N.D. Ill. Aug. 1, 2022). The court rejected the trademark infringement on "fair use" grounds: "[D]ealzEpic's use of Albert Einstein within its Amazon listing accurately described its mousepad. . . . [D]ealzEpic communicated the most prominent characteristic of the mousepad: that it displays a portrait of Albert Einstein. The name informs consumers—if they do not already know—that the person on the mousepad is Einstein." Id. at *4. The court also rejected the claim that the vendor used the name as a trademark. Id. at *3.

48. The query: "schedule a" or "exhibit 1" or "exhibit a" or "annex a" or "annex 1" or "schedule 1."

filters, that preliminary batch of search results was further refined to exclude state and foreign cases,[49] to retain only cases in the federal "nature of suit" (NOS) fields of copyright, patent, or trademark[50] (which excluded non-IP claims such as asset forfeiture), and to retain only cases for which the search terms appeared in the "complaint." With those refinements, the dataset consisted of 3,217 cases dating back to 1991. The first dataset case styled with a "Schedule A" caption was filed in 2013.[51]

Of the 3,217 dataset cases, 2,846 cases (over 88%) were filed in the Northern District of Illinois. The Southern District of Florida had 242 cases (7.5%). The remaining jurisdictions had less than 2% each.

Why are SAD Scheme cases concentrated in the Northern District of Illinois? Though the scheme's historical linkage to the district isn't clear,[52] at this point, rightsowners will keep filing cases in the district so long as

49. Federal copyright and patent claims must be filed in federal court. 28 U.S.C. § 1338 (2018). Federal trademark claims can be filed in state court, id., but that's rarely done. 6 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 32:1 (4th ed. 2008). Excluding state court cases from the dataset may undercount any SAD Scheme cases involving exclusively state IP claims or federal trademark cases filed in state court, but that's likely a de minimis number of cases.

50. The NOS field is notoriously unreliable. E.g., Christina L. Boyd & David A. Hoffman, The Use and Reliability of Federal Nature of Suit Codes, 2017 Mich. St. L. Rev. 997, 1007. For example, a case must fit within a single type of claim, even if it raises multiple types. Id. at 1006. So, if a complaint included utility patent, trademark, and copyright claims, it would be categorized in only one of those fields. See id.

51. Complaint at 2, Deckers Outdoor Corp. v. P'ships Identified on Schedule "A", No. 13-cv-2167 (N.D. Ill. filed Mar. 21, 2013), 2013 WL 1292315 [hereinafter *Deckers* Complaint] (alleging that defendants infringed the "Ugg" brand trademark).

An earlier example is *Yahoo! Inc. v. Yahooahtos.com*, which involved "1865 other domain names listed on Exhibit A." No. 1:05-cv-01441, 2006 WL 2303166 (E.D. Va. Aug. 8, 2006). Other early cases may have targeted "Doe" defendants without using the "Schedule A" caption.

For another early example, see Am. Bridal & Prom Indus. Ass'n, Inc. v. P'ships Identified on Schedule "A", 192 F. Supp. 3d 924, 926 (N.D. Ill. June 29, 2016) (noting that suit was filed "against a group of individuals and unincorporated business associations, as well as 100 John Does, who, upon information and belief, reside in foreign jurisdictions"). See also Daniel Nazer, Abusive Site-Blocking Tactics by American Bridal and Prom Industry Association Collapse Under Scrutiny, Elec. Frontier Found. (Mar. 28, 2016), https://www.eff.org/deeplinks/2016/03/american-bridal-and-prom-industry-association-slinks-away-after-being-called-out [https://perma.cc/C3NQ-8WXG] (explaining how the judge granted a TRO against 3,343 defendants).

52. One hypothesis is that the local Chicago bar may have innovated the practice. Now, Illinois law firms practicing the SAD Scheme include Greer, Burns & Crain (GBC); Keith A. Vogt; David Gulbransen; Hughes Socol Piers Resnick & Dym, Ltd.; Keener and Associates, PC; and Dunlap Bennett & Ludwig, PLLC. See Cháng Jiàn Wèn Tí (常见问题) [Frequently Asked Questions], SellerDefense (May 28, 2020), https://sellerdefense.cn/qa/ (on file with the *Columbia Law Review*) (enumerating some Chicago-based law firms that regularly sue sellers).

they keep getting their desired outcomes.[53] Indeed, one district judge, Judge Martha Pacold, helps SAD Scheme cases succeed by providing filing templates to rightsowners.[54] There may be other rightsowner-favorable local doctrines,[55] though that remains speculative.

Of the 3,217 dataset cases, 2,837 cases (88%) list "trademarks" in the NOS field.[56] Copyright and patent cases each make up about 6%.

Of the 3,217 cases in the dataset, 935 were filed in 2022, 733 were filed in 2021, and 533 were filed in 2020. Collectively, the data indicate that the number of cases is growing substantially on a year-to-year basis, and over two-thirds of the all-time SAD Scheme lawsuits through December 28, 2022, were filed after January 1, 2020.

Bloomberg Law also allows for searches by case resolution.[57] Given the SAD Scheme's relatively recent emergence, cases may not have reached a resolution yet. Furthermore, it's unclear how Bloomberg Law categorizes the resolution of a "case" with hundreds of defendants who reached different outcomes. Despite those data problems, the data support the inference that many cases do not follow an adversarial model of litigation. Of the cases that listed a resolution (2,688 cases), 70% were categorized as "default judgments," 28% were categorized as "voluntary/joint dismissal," and less than 2% of the resolutions had some other conclusion (like an adjudication on the merits).

Based on a 2021 review of Emojico SAD Scheme cases, Emojico sued an estimated average of over 200 defendants in each case.[58] If that average applies to the entire dataset, then over 600,000 merchants have been sued in a SAD Scheme case.

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53. See Setty & Poritz, supra note 12 ("Plaintiffs often want to sue in a court that already has experience with those types of cases . . . . [P]laintiffs may not want to risk filing in other districts, where judges are less experienced and may rule differently.").

54. See Schedule A Cases, U.S. Cts., https://www.ilnd.uscourts.gov/judge-cmp-detail.aspx?cmpid=1272 [https://perma.cc/J4PP-KYYL] (last visited Aug. 16, 2023).

55. For example, the Seventh Circuit has held that a single test buy in Illinois supported personal jurisdiction against a Chinese merchant. See NBA Props., Inc. v. HANWJH, 46 F.4th 614, 627 (7th Cir. 2022); see also Baird & Paterson, supra note 7 (citing federal court receptivity "to cases using anonymous plaintiffs and case combining" in the Northern District of Illinois and noting increasing caseloads in other districts); Lauraann Wood, Northern Ill. A Surprise Magnet for Counterfeiting Suits, Law360 (Jan. 24, 2023), https://www.law360.com/ip/articles/1568802 (on file with the *Columbia Law Review*) (discussing how the popularity of counterfeit suits within certain jurisdictions may be a result of favorable personal jurisdiction case law).

56. For additional analyses of SAD Scheme case data by industry, see Baird & Paterson, supra note 7.

57. This option required unselecting the restriction to "complaints," which temporarily increased the size of the dataset slightly to 3,241 instead of 3,217.

58. Emojico Declaration, supra note 1, at para. 19.

III. How the Legal System Enables the SAD Scheme

The SAD Scheme capitalizes on several dynamics. First, intellectual property regimes routinely impose strict liability,[59] which makes it easier for rightsowners to succeed with minimal factual showings. Second, because of the "property" connotations of "intellectual property," judges are sometimes inclined to vindicate a rightsowner's property interests. Third, the SAD Scheme can take place largely or wholly ex parte, so judges act on the rightsowners' unrebutted assertions. Fourth, the online marketplaces' handling of the TRO plays a critical role by over-freezing defendant-merchants' product offerings.

Collectively, these dynamics create an environment in which rightsowners can nominally follow the rules and yet achieve abusive and extortive outcomes. This Part explains the factors that contribute to the SAD Scheme's success.

Generic Pleading. Rightsowners engaging in mass IP enforcement operations want to keep costs down. For example, SAD Scheme rightsowners reuse complaint templates by asserting generic facts, none particularized to any defendant.[60] Such nonspecific pleadings may not comport with the pleading standards and pre-filing investigatory work required by the Federal Rules of Civil Procedure (FRCP).[61] In ex parte proceedings, however, sometimes those filings are tolerated.

Bypassing Service. Rightsowners may have difficulty finding and serving merchants, especially those located internationally.[62] The SAD Scheme can largely sidestep any service issues.[63] Due to the marketplace freezes and the resulting settlements, rightsowners may substantially resolve their lawsuits without ever serving merchants.

Bypassing Personal Jurisdiction. A SAD Scheme complaint may generically allege that all defendants committed infringing acts in the desired

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59. See, e.g., 4 McCarthy, supra note 49, § 23:107; 6 William F. Patry, Patry on Copyright § 21:38 (2019).

60. See, e.g., *Deckers* Complaint, supra note 51, at paras. 10–17 (describing generic allegations against the SAD Scheme defendants).

61. See Fed. R. Civ. P. 11(b) (explaining that representations to the court must accord with the best of the person's knowledge after an inquiry reasonable under the circumstances).

62. See generally Fed. R. Civ. P. 4(f) (noting different acceptable methods of service for defendants in a foreign country). With respect to venue selection, another hypothesis is that Northern District of Illinois judges allow service of international defendants by alternative means, such as email, more freely than judges in other districts.

63. FRCP 65 allows a party to seek a TRO without notice if the "movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required" before an ex parte TRO is issued. Fed. R. Civ. P. 65(b)(1)(B). There is no actual requirement that notice must be given to the defendant, even if the attorney could easily do so. Id.

venue without providing any factual support.[64] That should not be enough to establish personal jurisdiction. For example, due process typically requires that each online defendant intentionally directed their actions into the forum jurisdiction,[65] and showing "intentional direction" requires defendant-specific facts. This should mean that rightsowners establish jurisdiction on a defendant-by-defendant basis, but that's rarely been required (most likely due to the ex parte nature of the proceedings).

Misjoinder. In general, courts interpret joinder rules liberally, and expansive joinder rules can offer significant efficiencies to rightsowners.[66] That said, misjoinder can severely disadvantage defendants and create chaos in the courts.

Typically, in a SAD Scheme case, the defendants have no relationship with each other. Instead, the rightsowner sweeps up an assemblage of alleged infringers in an online marketplace and enumerates them in a complaint. The rightsowner then generically asserts that the defendants are related to each other without providing any factual support.

The FRCP permits joinder of defendants only "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences."[67] Defendants who are independently (allegedly) infringing the rightsowner's IP rights in parallel with each other in the same marketplace do not satisfy this standard. One court explained:

> The allegations and evidence plaintiff has provided only supports a conclusion that many distinct counterfeiters are using similar strategies to sell counterfeit versions of plaintiff's HUGGLE products, and they may be acquiring these counterfeit products from the same or similar sources. Distinct individuals or entities independently selling counterfeit goods over the internet does not satisfy the transaction or occurrence requirement of FRCP 20.[68]

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64. See, e.g., *Deckers* Complaint, supra note 51, at para. 11 ("On information and belief, Defendants are an interrelated group of counterfeiters . . . . In the event that Defendants and/or third party service providers provide additional credible information regarding the identities of Defendants, Deckers will take appropriate steps to amend the Complaint.").

65. See, e.g., Herbal Brands, Inc. v. Photoplaza, Inc., 72 F.4th 1085, 1095 (9th Cir. 2023); ALS Scan, Inc. v. Digit. Serv. Consultants, Inc., 293 F.3d 707, 711–12 (4th Cir. 2002).

66. See, e.g., David O. Taylor, Patent Misjoinder, 88 N.Y.U. L. Rev. 652, 671–72 (2013).

67. Fed. R. Civ. P. 20(a)(2)(A). In patent cases, joinder requires that (1) the claims are asserted "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences relating to the making, using, importing into the United States, offering for sale, or selling of the same accused product or process," and that (2) "questions of fact common to all defendants or counterclaim defendants will arise in the action." 35 U.S.C. § 299 (2018).

68. Ontel Prods. Corp. v. Uninc. Ass'ns Identified in Schedule A, No. 1:21cv1452 (MSN/JFA), 2022 WL 9874815, at *5 (E.D. Va. Aug. 12, 2022). Yet, consistent with the puzzling judicial deference to the SAD Scheme, the judge disregarded the joinder defect. Id. at *6 ("[A]ny defects related to joinder in this action would not affect any of the remaining defendants' substantial rights . . . .").

Rightsowners may feel that it's not logistically or financially feasible to pursue merchants individually, which is why they prefer to mass-sue merchants using the SAD Scheme. Individual lawsuits are exactly what the joinder rules typically require, however, and courts shouldn't manufacture a workaround to those rules.

Misjoinder plays an important role in making SAD Scheme litigation profitable.[69] The complaint filing fee is $402, regardless of how many defendants are named.[70] By combining unrelated defendants into a single case, a rightsowner can dramatically reduce its per-defendant filing costs. For example, if the rightsowner names 200 defendants on a Schedule A instead of filing individual lawsuits against each defendant, the filing costs drop 99.5% to about $2 per defendant instead of $402 per defendant. That $400 difference per defendant makes more enforcement actions financially viable.

The rightsowners' windfall comes at the government's expense. If 200 defendants are improperly joined in a single complaint, the government loses $80,000 in potential filing fees. If that average holds true over the 3,200+ SAD Scheme cases, the SAD Scheme has cost the courts over $250 million so far. In practice, the number would likely be substantially lower if rightsowners had to pay the full filing fee per defendant because rightsowners would not sue so many merchants;[71] this dynamic highlights how filing fees serve an important function of screening cases that aren't worth the public costs to adjudicate them.[72]

Sealed Defendant Identities. Courts generally require litigants to publicly identify themselves to ensure transparency of the judicial system.[73]

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69. Emojico Declaration, supra note 1, at para. 21. IP trolling routinely involves expansive approaches to joinder. See Sag & Haskell, supra note 2, at 584–88 (describing courts' varying approaches to joinder when BitTorrent users independently download parts of a copyrighted work).

70. This includes the $350 filing fee for civil actions per 28 U.S.C. § 1926(a), plus a $52 administration fee. District Court Miscellaneous Fee Schedule, U.S. Cts., https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule [https://perma.cc/8PLC-7D5P] (last visited Sept. 8, 2023).

71. See Setty & Poritz, supra note 12 (quoting Justin Gaudio, an attorney at Greer Burns & Crain, as saying that "[b]rand owners cannot afford to pay a quarter-billion [dollars] in filing fees to enforce their trademark rights through the courts" (second alteration in original)).

72. See Carl Reynolds & Jeff Hall, Conf. of State Ct. Adm'rs, 2011–2012 Policy Paper: Courts Are Not Revenue Centers 7 (2011), https://cosca.ncsc.org/__data/assets/pdf_file/0019/23446/courtsarenotrevenuecenters-final.pdf [https://perma.cc/4SHU-P2NJ] ("Court users derive a private benefit from the courts and may be charged reasonable fees partially to offset the cost of the courts borne by the public-at-large.").

73. E.g., Eugene Volokh, The Law of Pseudonymous Litigation, 73 Hastings L.J. 1353, 1360–61 (2022); Tom Isler, White Paper: Anonymous Civil Litigants, Reps. Comm. for Freedom of the Press, https://www.rcfp.org/journals/news-media-and-law-fall-2015/white-paper-anonymous-civil-l [https://perma.cc/6RP7-PFQL] (last visited Aug. 16, 2023) ("Throughout the country, anonymous or pseudonymous litigation is generally disfavored . . . ." (footnote omitted)); cf. Lior Jacob Strahilevitz, Pseudonymous Litigation,

Although sealed defendant identities are occasionally appropriate, judges should scrutinize such requests carefully rather than accept the rightsowner's unrebutted assertions at face value.[74]

Dismissal of Merchants Who Fight Back. As discussed above, rightsowners can strategically use defendant dismissals to control the adversarial information made available to judges.[75] Judges should consider what information they are not receiving in any case with many voluntary dismissals.

Non-Individualized Adjudication. It usually is not cost-effective for rightsowners to engage in individualized litigation against each SAD Scheme defendant. Ex parte hearings are a low-cost alternative—they facilitate non-individualized adjudication for all defendants because defendants aren't around to make their individual cases.

Extrajudicial Resolutions. The ex parte TRO is the linchpin to the SAD Scheme. To get it, rightsowners must show "specific facts . . . that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition."[76] Judges should enforce the "specific facts" requirement vigorously,[77] but the SAD Scheme shows that rightsowners can succeed with generic filings.[78]

Ex parte TROs generally should preserve the status quo until the defendant can appear,[79] but SAD Scheme TROs *change* the status quo and can negate the need for further judicially supervised proceedings. That makes the SAD Scheme ex parte TRO an inappropriate judicial intervention.

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77 U. Chi. L. Rev. 1239, 1240 (2010) (outlining "a theory of pseudonymous litigation and identify[ing] what is at stake in a case caption"). See generally Bernard Chao, Not So Confidential: A Call for Restraint in Sealing Court Records, 2011 Patently-O Patent L.J. 6, https://cdn.patentlyo.com/media/docs/2011/07/chao.sealedrecords.pdf [https://perma.cc/W4TT-CF65] (describing the public interest furthered by transparent judicial records).

74. See Appellant NeoMagic Corporation's Opening Brief, supra note 30, at 42–44 (arguing that a case should not be sealed against a defendant without a finding of "good cause").

75. See supra note 35 and accompanying text.

76. Fed. R. Civ. P. 65(b)(1)(A).

77. E.g., Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006) ("[C]ourts have recognized very few circumstances justifying the issuance of an ex parte TRO.").

78. See Appellant NeoMagic Corporation's Opening Brief, supra note 30, at 44–47 ("[D]espite the lack of showing of any irreparable harm attributable to NeoMagic, Gorge was able to induce the district court to enter a far-overreaching restraining order that allowed Gorge the ability to seize all of NeoMagic's financial accounts . . . .").

79. Granny Goose Foods, Inc. v. Bhd. of Teamsters Loc. No. 70, 415 U.S. 423, 439 (1974) ("*Ex parte* temporary restraining orders . . . should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.").

Limited Error Correction. Intellectual property cases have heightened risks of judicial errors.

First, IP rights often have indeterminate boundaries.[80] Rightsowners routinely push their claims to those borders or beyond,[81] expecting that defendants will push back on any overclaims. When defendants don't appear in court and the property borders aren't clear, judges may accept the overclaims.[82]

Second, courts routinely need extrinsic evidence to determine the validity and scope of IP rights, and a non-adversarial process won't produce this evidence.[83] For example, design patent infringement may require a thorough prior art review to determine whether "an ordinary observer, taking into account the prior art, would believe the [allegedly infringing] design to be the same as the patented design."[84] The rightsowner can't be trusted to find and submit prior art; after all, they would immediately argue that any items should be disregarded. The judge may lack the technical expertise or research capacity to find the prior art themselves. Without the right prior art before the judge, "*ex parte* assessments of design patent infringement are likely to lead to significant over-enforcement."[85]

In SAD Scheme cases, any factual or legal errors are unlikely to be corrected or appealed because most defendants will settle, be voluntarily dismissed, or no-show.[86]

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80. The rights conferred by patent, copyright, and trademark doctrines often overlap. Laura A. Heymann, Overlapping Intellectual Property Doctrines: Elections of Rights Versus Selection of Remedies, 17 Stan. Tech. L. Rev. 239, 242–49 (2013).

81. E.g., James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 Yale L.J. 882, 884–86 (2007) (describing how ambiguities in copyright, trademark, and patent law create a feedback loop that benefits rightsowners).

82. Judges sometimes unilaterally push back on rights overclaims. See Notification of Docket Entry at 1, Grumpy Cat Ltd. v. Individuals, Corps., Ltd. Liab. Cos., P'ships, & Uninc. Ass'ns Identified on Schedule A Hereto, No. 1:22–cv–03216 (N.D. Ill. filed June 23, 2022), ECF No. 24 ("Some of the accused products likely infringe plaintiff's trademarks or copyrights, but the court is not persuaded that the accused products depicted in every submitted screenshot infringe. . . . Not every frowning cartoon cat infringes; or at least plaintiff has failed to persuade that its intellectual property reaches that far.").

83. See Sarah R. Wasserman Rajec, Patents Absent Adversaries, 81 Brook. L. Rev. 1073, 1082–83 (2016) (arguing that the adversarial system develops evidence better than a non-adversarial or inquisitorial system).

84. Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665, 678–79 (Fed. Cir. 2008).

85. See Burstein, Against the Design-Seizure Bill, supra note 5.

86. See supra text accompanying notes 57–58. SAD Scheme defendants are not likely to appeal in any circumstance, but they likely cannot appeal TROs at all. See 28 U.S.C. § 1292(a)(1) (2018); see also Pre-Term Cleveland v. Att'y Gen. of Ohio, No. 20-3365, 2020 WL 1673310, at *1 (6th Cir. Apr. 6, 2020) (noting that under 28 U.S.C. § 1292(a)(1), federal appellate courts "generally lack jurisdiction to hear an appeal of a district court's decision to grant or deny a TRO" absent exceptional circumstances).

For example, Emojico requested a default judgment against some defendants.[87] The court spotted Emojico's overclaim; it was improperly seeking to propertize a dictionary word.[88] Nevertheless, the judge ignored the descriptive fair use statutory defense in determining liability because the defendants did not raise the defense (they couldn't—they defaulted).[89] Instead, the judge said descriptive fair use only negated the claim of willful infringement, not the trademark infringement itself, and awarded statutory damages of "only" $25,000 against each defendant.[90] But if the defendants qualified for descriptive fair use, the court should not have awarded any damages at all because the infringement case failed. Yet, because the defendants defaulted, they won't appeal the ruling.

IV. WAYS TO ADDRESS THE SAD SCHEME

It's hard to know how often SAD Scheme lawsuits are legitimate and the optimal way for rightsowners to obtain redress. Are there ways to preserve the legitimate cases while curbing illegitimate ones? This Part offers some ideas.

A. *Judicial Education*

As described in Part III, the SAD Scheme depends heavily on judges credulously accepting rightsowners' unrebutted claims. Judges could reduce abusive SAD Scheme lawsuits simply by challenging rightsowners' filings more vigorously.

Yet, judges often disregard the rare defendant pushback.[91] Further, although Northern District of Illinois judges now have seen many SAD Scheme cases, they keep coming—and Judge Pacold is still helping rightsowners file factually threadbare filings.[92] Thus, greater judicial awareness alone may not cure SAD Scheme abuses.

B. *Changes in Online Marketplace Policies*

The SAD Scheme would wane if online marketplaces did not honor ex parte TROs so expansively. For example, any account freeze should only

87. Emoji Co. v. Individuals, Corps., Ltd. Liab. Cos., P'ships, & Uninc. Ass'ns Identified on Schedule A, Nos. 20-cv-04678, 21-cv-05319, 21-cv-05453, 2022 WL 4465593, at *1 (N.D. Ill. Sept. 26, 2022).

88. Id. at *4–5 ("Plaintiff suggests that any person who sells a product depicting a familiar emoji is forbidden from using the one word that most closely describes the image depicted. Plaintiff's right cannot be so expansive.").

89. Id. at *5; see also 15 U.S.C. § 1115(b)(4) (2018) (describing the descriptive fair use defense, which can be invoked in response to a trademark infringement claim).

90. *Emoji Co.*, 2022 WL 4465593, at *5–7.

91. See, e.g., supra note 68 (describing an instance in which a court acquiesced to a dubious legal theory in a SAD case).

92. See supra note 54 and accompanying text (describing how Judge Pacold provides plaintiffs in SAD cases with templates for filings).

relate to the items and money associated with the allegedly infringing activity, not the entire account and all funds in possession. Courts have nevertheless rejected this argument. Wish asked a judge for a more tailored asset freeze, but the judge responded that Wish wasn't the right party to raise the objection (because the money was the merchants', not Wish's) and Wish couldn't prove that the money in its possession wasn't from infringing sales.[93]

Furthermore, online marketplaces fear their own liability exposure, and that deters them from voluntarily adopting nuanced policies. It's simpler and lower risk for them to categorically shut down alleged infringers identified in the TRO.

C. *Greater Use of Existing Legal Doctrines*

In addition to more vigorous enforcement of the rules explored in Part III, some other existing FRCP provisions might help curb abusive SAD Scheme lawsuits:

Defendant classes. FRCP 23 contemplates that defendants can form classes, just like rightsowners do.[94] For example, a defendant class could bust the rightsowner's trademark or establish defenses like descriptive fair use. Few individual defendants, however, have enough motivation and resources to fight their case, let alone organize a class.

Attorneys' fees awards. Prevailing defendants may be awarded attorneys' fees in extraordinary patent[95] or trademark cases[96] or at a judge's discretion in copyright cases.[97] Judges could also impose FRCP 11 sanctions if rightsowner's counsel didn't properly do pre-filing investigations, misrepresented the situation to the judge, or made overly generic filings.[98]

Fee shifts can make mass IP enforcement less financially attractive[99] and compensate SAD Scheme defendants willing to fight back. Further,

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93. See Order at 1–2, MSM Design & Eng'g LLC v. P'ships & Uninc. Ass'ns Identified on Schedule "A", No. 20 C 121 (N.D. Ill. July 28, 2021), ECF No. 49; Order at 1–2, Oraldent Ltd. v. P'ships & Uninc. Ass'ns Identified on Schedule "A", No. 20 C 304 (N.D. Ill. Feb. 22, 2021), ECF No. 44.

94. See Fed. R. Civ. P. 23; see also Assaf Hamdani & Alon Klement, The Class Defense, 93 Calif. L. Rev. 685, 690–91 (2005) (proposing a mechanism in which a class of defendants can consolidate their defense claims); Francis X. Shen, The Overlooked Utility of the Defendant Class Action, 88 Denv. U. L. Rev. 73, 79–85 (2010) (summarizing courts' approaches to defendant class actions); Robert R. Simpson & Craig Lyle Perra, Defendant Class Actions, 32 Conn. L. Rev. 1319, 1323 (2000) (noting that defendant class actions have been used in "various types of cases, including, but not limited to, patent infringement cases, suits against local officials challenging the validity of state laws, securities litigation, and actions against employers").

95. 35 U.S.C. § 285 (2018).

96. 15 U.S.C. § 1117(a) (2018).

97. 17 U.S.C. § 505 (2018).

98. Fed. R. Civ. P. 11.

99. For example, fee shifts to defendants helped unravel Righthaven's mass copyright enforcements. See Ian Polonsky, You Can't Go Home Again: The *Righthaven* Cases and

SAD Scheme cases should qualify as "extraordinary" cases for fee shift purposes for the reasons outlined in Part III.[100]

Nevertheless, judges have rejected discretionary fee shifts in SAD Scheme cases. One court explained its fee shift denial:

> [T]his case has followed the same trajectory of many other cases in this District and in districts throughout the country in instances where a plaintiff discovers that its intellectual property has likely been pirated and identical or substantially similar knock-off products are being offered for sale from on-line platforms. To hold that this case is exceptional would topsy-turvy that term—elevating what is ordinary to extraordinary. It would erect an unwarranted barrier to plausible claims by legitimately injured Plaintiffs.[101]

The judge's pro-rightsowner sympathy is not unusual. It's a primary reason why judges might not use fee shifts more aggressively in SAD Scheme cases, even when it's deserved. Plus, rightsowners might avoid fee shifts by dismissing defendants voluntarily,[102] even though judges should award fee shifts in those circumstances to prevent strategic gaming.

Bonds. FRCP 65 says that a "court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."[103]

Copyright Trolling on the Internet, 36 Colum. J.L. & Arts 71, 90 (2012); see also Righthaven LLC v. DiBiase, No. 2:10-CV-01343-RLH, 2011 WL 5101938, at *1 (D. Nev. Oct. 26, 2011) (amounting to nearly $120,000 in fees and costs); Righthaven LLC v. Wolf, 813 F. Supp. 2d 1265, 1273 (D. Colo. 2011) (awarding attorney's fees to the defendant); Righthaven, LLC v. Leon, No. 2:10-CV-01672-GMN-LRL, 2011 WL 2633118, at *2 (D. Nev. July 5, 2011) (amounting to over $3,800 in fees); Judgment in a Civil Case at 1, Righthaven LLC v. Hoehn, 792 F. Supp. 2d 1138 (D. Nev. 2011) (No. 2:11-CV-00050-PMP-RJJ) (on file with the *Columbia Law Review*) (reaching over $34,000 in fees).

Some overaggressive rightsowners repeatedly bring ill-advised cases, even after fee shifts and sanctions. See, e.g., Richard Liebowitz, Wikipedia, https://en.wikipedia.org/wiki/Richard_Liebowitz [https://perma.cc/RC3T-X3A8] (last visited Sept. 28, 2023).

100. See Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 554 (2014) (holding that, in the patent context, the awarding of attorney's fees is warranted in cases "that stand[] out from others with respect to the substantive strength of a party's litigating position . . . or the unreasonable manner in which the case was litigated").

101. Gorge Design Grp. LLC v. Syarme, No. 2:20-cv-1384, 2020 WL 8672008, at *3 (W.D. Pa. Dec. 4, 2020).

102. See id. at *1 (discussing how the rightsowner's voluntary dismissal meant that NeoMagic technically didn't prevail).

The Emojico Declaration, supra note 1, was filed after the rightsowner voluntarily dismissed the defendant. The court summarily denied the defendant's fee shift request without explanation. Order, Emoji Co. v. Individuals, Corps., Ltd. Liab. Cos., P'ships, & Uninc. Ass'ns Identified on Schedule A Hereto, No. 21-cv-1739 (N.D. Ill. Mar. 23, 2022), ECF No. 116.

103. Fed. R. Civ. P. 65(c).

Courts set bond amounts at their discretion, but the amount should be high enough to accommodate the losses to all potentially affected parties, including the targeted merchants, the online marketplaces, and consumers.[104] Unfortunately, courts routinely undervalue bonds in SAD Scheme cases because they don't anticipate how much harm the ex parte TRO will cause.[105]

Bonds serve an important gatekeeping function. For example, after one court required a SAD Scheme rightsowner to tender a bond of $10,000 per defendant, the rightsowner dropped the number of defendants from 218 to 5 because the 2% premium to secure funds for a $2.18 million bond was too much.[106]

But bonds suffer some of the same limitations as attorneys' fee shifts: Dismissed or settled defendants aren't likely to seek payment from the bond, and judges won't make awards out of the bond if it seems punitive to the rightsowner to do so.[107] While higher bond amounts could force rightsowners to evaluate their cases more carefully upfront due to the

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104. See Rathmann Grp. v. Tanenbaum, 889 F.2d 787, 790 (8th Cir. 1989) ("The bond should be of an amount adequate to protect [the defendant's] business . . . .").

105. See Appellant NeoMagic Corporation's Opening Brief, supra note 30, at 36 ("Gorge's bond amounted to less than $130 per defendant, and for that it was able to seize over $300,000 of NeoMagic's funds and obtain an order allowing Gorge to take control of NeoMagic's online marketplace . . . .").

106. Plaintiff's Statement Relating to the December 19, 2022 Minute Order No. 19, Blue Sphere, Inc. v. Individuals, Corps., Ltd. Liab. Cos., P'ships, & Uninc. Ass'ns Identified on Schedule A Hereto (*Blue Sphere I*), No. 22-cv-5599 (N.D. Ill. filed Dec. 21, 2022), ECF No. 20.

The rightsowner filed a new complaint against the 213 dropped defendants. See Complaint, Blue Sphere, Inc. v. Individuals, Corps., Ltd. Liab. Cos., P'ships, & Uninc. Ass'ns Identified on Schedule A Hereto (*Blue Sphere II*), No. 22-cv-6502 (N.D. Ill. filed Nov. 21, 2022), ECF No. 1. The first judge did not appreciate the maneuver:

> Plaintiff's counsel engaged in that judicial rug-pulling sub silentio, without telling this Court or Judge Guzman what they were doing. . . . Plaintiff's counsel later explained that they do not like this Court's bond requirements. So they decided to refile the case and get another judge. . . . The Federal Rules and the U.S. Code allow a certain amount of forum shopping. But they do not allow judge shopping. . . . Parties can pick their lawyers, and parties can pick their cases. But parties cannot pick their judges. Plaintiff's counsel cannot drop defendants, and then refile on behalf of those defendants, in an attempt to get what they perceive to be a greener judicial pasture.

Minute Entry, *Blue Sphere I*, No. 22-cv-5599 (N.D. Ill. filed Jan. 18, 2023), ECF No. 28 (citation omitted). The same judge later added: "Clients have some latitude at picking a forum. Clients have no latitude picking a judge. Judge shopping ain't a thing here or anywhere else. . . . This is absolutely beyond the pale." Celeste Bott, 'Judge Shopping Ain't a Thing Here,' Ill. Judge Warns IP Atty, Law360 (May 2, 2023), https://www.law360.com/legalethics/articles/1603426/-judge-shopping-ain-t-a-thing-here-ill-judge-warns-ip-atty (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Transcript of Proceedings at 6–7, 9, *Blue Sphere I*, No. 22-cv-5599 (N.D. Ill. heard Jan. 18, 2023), ECF No. 35).

107. See supra notes 99–100 and accompanying text.

surety fee, more aggressive judicial imposition of bonds isn't likely to materially impact SAD Scheme cases.

D. *Possible Statutory Reforms*

It is unlikely that Congress would adopt any anti–SAD Scheme legislative reforms. Congress is constantly paralyzed by gridlock; it is difficult to pass any reforms that do not benefit rightsowners; and Congress might misconceptualize the SAD Scheme as a regional (i.e., Chicago) problem. If Congress ever considers ways to curb the SAD Scheme, it should evaluate these ideas for reforms:

Filing fees scaled to the number of defendants.[108] Enumerating lots of defendants in a single complaint is critical to the SAD Scheme's financial success. It would change the rightsowners' economic calculus if filing costs reflected this practice.[109] For example, the $402 filing fees might cover only the first X defendants, after which each additional defendant could cost another $402. If X were set high enough so that most legitimate cases would qualify for the fixed pricing, this pricing change could easily cut back on abusive cases.

Stronger presumptions against sealed defendant identities. To emphasize that sealed defendant identities should be exceptional, the FRCP could impose heightened judicial scrutiny of cases with sealed defendant identities. For example: Filing fees could be higher when the complaint has sealed defendant identities; rightsowners could be required to proactively disclose how often they have filed complaints with sealed defendant identities and how those cases resolved; judges could be required to take extra steps upfront to verify the legitimacy of sealing requests before a rightsowner can move forward; and the default rule could be that any sealed defendant identities automatically become unsealed within a statutorily specified number of days or weeks after filing unless the rightsowner shows an extraordinary need to keep the identities sealed.

CONCLUSION

Reading this paper often leaves readers feeling confused, frustrated, and angry. The SAD Scheme seemingly contravenes basic civil procedure and intellectual property rules, and readers cannot understand how rightsowners get away with it. Furthermore, it's hard to believe that judges tolerate or even encourage these practices rather than emphatically shutting them down.

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108. Alternatively, Congress could adopt more restrictive joinder rules for trademark and copyright cases analogous to the patent joinder rules in 35 U.S.C. § 299.

109. Cf. Jonathan S. Masur, Costly Screens and Patent Examination, 2 J. Legal Analysis 687, 688 (2010) (discussing how patent prosecution costs can screen out low-value applications).

Yet, SAD Scheme cases keep growing in number precisely because rightsowners are achieving outcomes they should not be able to obtain. Even if the SAD Scheme does help some rightsowners shut down some counterfeiters, in our jurisprudential system the ends do not justify the means. Instead, judges and regulators should do more to protect the interests of the many thousands of victimized merchants as well as the marketplaces and their consumers. Rightsowners have other ways to combat foreign counterfeiters without denigrating the rule of law.