

MADE IN CHINA, SUED IN THE U.S.: THE EXPLOITATION OF CIVIL PROCEDURE IN CROSS-BORDER E- COMMERCE TRADEMARK INFRINGEMENT CASES

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During the period of economic resurgence after the subprime mortgage crisis, China became a manufacturing powerhouse, with Amazon playing a pivotal role. Amazon's attractive policies lured Chinese e-commerce sellers to its platform, subsequently drawing many more customers with their competitive pricing. This surge, however, also invited Chinese counterfeiters onto Amazon's platform. Major brands responded by suing those counterfeit sellers for trademark infringement. As most Chinese sellers failed to attend trials, these cases almost always resulted in uncontested wins for the brands, thereby granting them access to the sellers' financial accounts as a means to satisfy the damage claimed. Many U.S. businesses saw this as a lucrative opportunity. They replicated the strategies by bringing suits against numerous Chinese sellers for guaranteed profits. Yet, these cases against Chinese defendants likely possess four procedural flaws: the arguable invalidity of service pursuant to the Hague Convention on the Service Abroad, the questionable jurisdiction of U.S. courts over Chinese sellers, the potential impropriety in joining numerous sellers in one suit, and the inadequate notice for many Chinese sellers.

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I. INTRODUCTION

With the rapid expansion of e-commerce in the past few decades,¹ many have become familiar with the business model specializing in products “made in China, sold on Amazon.”² The phrase “made in China, sold on Amazon” denotes the large number of Chinese sellers who are engaged in cross-border e-commerce transactions utilizing the U.S. e-commerce giant, Amazon.³ It is estimated that the Chinese cross-border e-commerce industry reached a market size of more than \$3.5 trillion in 2020.⁴ However, many do not know that these Chinese sellers are being targeted by a wave of trademark infringement lawsuits in U.S. federal courts (hereinafter “this line of cases”) that began in the early 2010’s, with the Northern District of Illinois being the most-favored forum to file such suits.

In this line of cases, each suit often consolidates several hundred Chinese e-commerce sellers as defendants, with remedies granted to U.S. companies that reach millions of dollars.⁵ Law firms such as Greer, Burns & Crain LLP and Keith Law PLLC that specialize in bringing trademark infringement lawsuits against Chinese e-commerce sellers have allegedly gained over a billion dollars.⁶

1. See Bas van Heel et al., *Cross-Border E-Commerce Makes the World Flatter*, BCG PERSP.’S (2014), http://boston-consulting-group-brightspot.s3.amazonaws.com/img-src/Cross-Border_E-Commerce_Makes_The_World_Flatter_Sep_2014_tcm9-82788.pdf (noting that cross-border e-commerce had grown tremendously to a \$80 billion business in 2014, and the revenue will predictably reach \$250 billion to \$350 billion by 2025).

2. Iris Deng, *‘Made in China, Sold on Amazon’ Community Grew in 2021 Despite Crackdown on Fake Review, US E-commerce Giant Says*, S. CHINA MORNING POST (Jan. 13, 2022, 11:30 PM), <https://mcdn.i-scmp.com/tech/big-tech/article/3163280/made-china-sold-amazon-community-grew-2021-despite-crackdown-fake>.

3. *Id.*

4. See QIN BINWU (覃斌武), MEIGUO FAYUAN GUANXIA ZHONGGUO KUAJING DIANSHANG QIYE DE FALI, GUIZE HE YINGDUI (美国法院管辖中国跨境电商企业的法理、规则和应对) [The Jurisprudence, Rules and Response to U.S. Courts’ Jurisdiction over Chinese Cross-border E-Commerce Companies] 1–2 (Hunansheng Jiaoyuting ed., 2022) (noting that among China’s cross-border e-commerce industry, the business-to-consumer sales model reached a size of ¥25 trillion in 2021).

5. See *id.* at 7 (noting that even though each defendant’s retrievable funds are limited, numerous defendants are often lumped in a single case, making the profits from litigating such cases sizable).

6. Zuo Qinnian (左钦念), Yingshou Zhuigan Anke, GBC Lüsuo Pingjie Qinquan Susong

Although some of these lawsuits have merit, many Chinese corporations have been summarily dismantled by U.S. trademark holders who are exploiting four procedural weaknesses in the U.S. legal system to capitalize off of these corporations. First, the U.S. plaintiffs' email service to the Chinese defendants likely violates due process protected by the Federal Rules of Civil Procedure ("FRCP"). Second, the courts that rendered the most recent rulings likely lacked jurisdiction over the Chinese sellers. Third, the common occurrence of U.S. plaintiffs filing joint lawsuits against a massive number of Chinese sellers likely fails to conform to the FRCP's joinder rules. Fourth, the preliminary injunctions against the Chinese sellers are often hastily granted by U.S. courts despite key procedural requirements not being satisfied. These four procedural issues often go unlitigated because Chinese sellers rarely appear in U.S. courts, which is arguably the reason why the plaintiffs initiate such suits. U.S. federal courts and the U.S. legal system thus has become a part of U.S. corporate strategy to gain windfall remedies.

This Note attempts to analyze the four common procedural issues that exist in this line of cases to show how U.S. trademark holders are exploiting Chinese producers.⁷ The first part of the Note briefly introduces the "made in China, sold on Amazon" business model and its expansion. Next, the Note explains how this expansion has led to the increase in cross-border sales of counterfeits, and how such increase prompted the emergence of U.S. trademark infringement lawsuits against e-commerce sellers based in China. The third part of the Note analyzes the four common procedural issues within these line of cases in detail. It further discusses why U.S. federal courts' common rulings in favor of the plaintiffs are likely erroneous. In conclusion, the Note then identifies several related legal inquiries that should inform future research.

II. "MADE IN CHINA, SOLD ON AMAZON"

Amazon, founded in 1994, is currently the global leading e-retailer, with more than \$469 billion USD in net sales in 2021.⁸ The company generates the majority of its revenue through its online retailing service.⁹ Its

Nianshouru 10yi Meijin (营收追赶安克，GBC律所凭借侵权诉讼年收入10亿美金) [Catching Up with Anker's Revenue, Law Firm GBC Received \$1 Billion from Infringement Lawsuits], YIEN WANG (亿恩网) (Apr. 28, 2021, 10:30 AM), <https://www.ennews.com/article-21540-1.html>.

7. Note that this note focuses solely on procedural matters; it does not delve into the merits of any plaintiffs' trademark infringement claims.

8. *Annual Net Sales Revenue of Amazon from 2004 to 2022*, STATISTA, <https://www.statista.com/statistics/266282/annual-net-revenue-of-amazoncom/> (last visited Dec. 22, 2022).

9. *Id.*

stunning online retail sales are partially driven by the extensive participation of small and midsize businesses (“SMBs”); nearly 2 million sell regularly on the platform.¹⁰ Many SMBs are independent sellers leveraging Amazon’s expansive global reach to market and sell their own merchandise.¹¹ One blog finds that 82% of the SMBs on Amazon are third-party sellers, meaning that those SMBs sell their products directly to consumers through the platform.¹² The third-party SMB business model is growing rapidly: in 2020, more than 200,000 new third-party sellers from around the world began selling on Amazon, representing a 45% increase during 2019.¹³ In the fourth quarter of 2021, Amazon’s net sales generated through its third-party seller services peaked at over 30 billion USD.¹⁴ It is believed that third-party SMBs contribute roughly 22% of Amazon’s annual online retail revenue from 2022 to 2023.¹⁵

Businesses based in China account for a disproportionately large percentage of the SMBs selling on Amazon. In January 2021, China-based sellers represented 75% of new sellers on Amazon, dwarfing other foreign sellers.¹⁶ This is hardly a new phenomenon. The number of Amazon sellers based in China has been increasing steadily and drastically since 2015, which marked the beginning of Amazon’s campaign to attract more Chinese sellers.¹⁷ The campaign is arguably prompted by Amazon’s goal to increase

10. Daisy Quaker, *Amazon Stats: Growth, Sales, and More*, AMAZON (Mar. 31, 2022), <https://sell.amazon.com/blog/grow-your-business/amazon-stats-growth-and-sales#:~:text=Small%2D%20and%20medium%2D%20sized%20businesses%20in%20Amazon%20stores&text=More%20than%201.7%20million%20SMBs,businesses%20employ%20over%20800%2C000%20people>.

11. *2022 Small Business Empowerment Report*, AMAZON 3–5 (May 2023), <https://cdn-sellingpartners.aboutamazon.com/84/6e/5105fb3847e89135abcd755439b9/2022-small-business-empowerment-reportv-may2023.pdf>.

12. Melissa Boice, *15 Amazon Statistics You Should Know in 2022*, JUNGLE SCOUT (Mar. 29, 2022), <https://www.junglescout.com/blog/amazon-statistics/>.

13. *2021 Amazon Small Business Empowerment Report*, AMAZON 3 (Oct. 2021), <https://assets.aboutamazon.com/9b/84/05cb2fc14da18e4574a5132f675a/amazon-smb-report-2021.pdf>.

14. *Value of Third-party Seller Services of Amazon Worldwide from 4th Quarter 2017 to 3rd Quarter 2022*, STATISTA, <https://www.statista.com/statistics/1240236/amazon-third-party-seller-services-value/#:~:text=Amazon%20net%20sales%20generated%20through,year%20over%20year%20basis> (last visited Dec. 22, 2022).

15. Boice, *supra* note 12.

16. Juozas Kaziukenas, *75% of New Sellers on Amazon Are from China*, MARKETPLACE PULSE (Jan. 19, 2021), <https://www.marketplacepulse.com/articles/75-of-new-sellers-on-amazon-are-from-china#:~:text=While%20this%20hasn%20yet,Japan%20%2D%20are%20based%20in%20China>.

17. See Wade Shepard, *How Amazon’s Wooing of Chinese Sellers is Killing Small American Business*, FORBES (Feb. 14, 2017, 11:36 AM), <https://www.forbes.com/sites/wadeshepard/2017/02/14/how-amazons-woeing-of-chinese-sellers-is-hurting-american-innovation/?sh=7fc1708b1df2> (noting that Amazon smoothed the way for Chinese manufacturers to sell directly to consumers in the West).

traffic to its site, as it was not yet the behemoth we see today, and was still competing with other e-commerce platforms for market dominance.¹⁸ To do so, Amazon needed sellers who could offer products at more competitive prices than those offered by other platforms.¹⁹ Unsurprisingly, sellers based in China are uniquely positioned to win the price game. Known as the “world’s factory,”²⁰ China has, over the past several decades, built a solid domestic production line that could make goods rapidly at a relatively low price.²¹ These Chinese sellers also get heavily subsidized international postage rates through a system called ePacket, further outcompeting other foreign sellers as shipping fees are often borne by the customers.²² These factors working in tandem give Chinese e-commerce sellers unique advantages over sellers from other nations.

As a result, Amazon began aggressively courting Chinese sellers in 2015 by implementing several new policies.²³ First, it set up a Selling Portal—a website specifically made for Amazon sellers to manage their online stores—completely in Chinese language to accommodate Chinese merchants who lack proficiency in English.²⁴ It hired Chinese-speaking support staff to help Chinese sellers navigate Amazon’s platform.²⁵ It also actively educated Chinese manufacturers on the benefits of using the Amazon Fulfillment Method and trained them on how to sell on Amazon.²⁶ Furthermore, it streamlined the process of shipping goods from China to the U.S. by registering with the Federal Maritime Commission to provide ocean freight that allowed for Chinese sellers to ship entire containers directly to Amazon’s fulfillment warehouse.²⁷ As a former Amazon Seller consultant

18. *Id.*

19. *Id.*

20. *Id.*

21. See ALEXANDRA HARNEY, *THE CHINA PRICE: THE TRUE COST OF CHINESE COMPETITIVE ADVANTAGE* 1–2 (Penguin Press ed., 2008) (noting that goods produced in China cost for half or even a fifth of what it would cost in America; by one estimate, products made in China have saved the average American family \$500 a year).

22. Wade Shepard, *As U.S. Postage Rates Continue to Rise, the USPS Gives the Chinese a ‘Free Ride,’* FORBES (Nov. 5, 2017, 1:33 AM), <https://www.forbes.com/sites/wadeshepard/2017/11/05/how-the-usps-epacket-gives-postal-subsidies-to-chinese-e-commerce-merchants-to-ship-to-the-usa-cheap/?sh=6286e69240ca>.

23. Gary Huang, *How Amazon Caters to Chinese Sellers (and How to Compete)*, 80/20 SOURCING (2018), <https://www.8020sourcing.com/how-amazon-caters-to-chinese-sellers-and-how-to-compete/>.

24. See AMAZON GLOBAL SELLING, <https://gs.amazon.cn/> (last visited Dec. 22, 2022) (showing that the website first appears in Chinese language and users must toggle to read the website in English).

25. Huang, *supra* note 23.

26. See Dave Bryant, *I Attended the Largest Chinese Amazon Conference in the World*, ECOMCREW (Dec. 17, 2019), <https://www.ecomcrew.com/amazon-china-conference/> (“[T]he absolute focus of the trade show from Amazon was their Amazon Global Logistics (AGL) Program.”).

27. Huang, *supra* note 23.

has commented, “Amazon wanted all those Chinese sellers in the U.S. They actively invited them to sell.”²⁸

Drawn in by these tactics, along with the immense financial benefits of direct access to consumers without third-party middlemen, Chinese sellers began pouring onto the site. Their numbers on Amazon doubled in 2015 alone, “making [the site] the cross-border ecommerce choice for Chinese sellers.”²⁹ In the same year, Amazon’s profits increased by 20 percent, surpassing Walmart as the most valuable retailer in the U.S.³⁰ Today, among the millions of cross-border merchants selling on Amazon, 25% of them are based in China.³¹

III. THE RISE OF TRADEMARK LAWSUITS AGAINST CHINESE SELLERS

Along with the immense commercial success achieved by Amazon due to its active recruitment of China-based sellers, the world’s counterfeiters gained unprecedented access to the U.S. market. As early as 2000, China was described as having “the most serious counterfeiting problem in the history of the world.”³² Many attribute China’s inability to effectively regulate counterfeiting to the increasing access to advanced technology brought into the country by multinational corporations and the lack of effective deterrence mechanisms in China’s developing legal system.³³ As of today, the country remains the largest source of counterfeit goods in the world.³⁴ It is estimated that 80% of the world’s counterfeits originated from China, and that counterfeiting is now a global industry worth \$1.7 trillion per year.³⁵ In 2021, 75% of the value of counterfeit and pirated goods seized by

28. Shepard, *How Chinese Counterfeiters Continue Beating Amazon*, FORBES (Jan. 12, 2017, 9:10 PM), <https://www.forbes.com/sites/wadeshepard/2017/01/12/why-amazon-is-losing-its-battle-against-chinese-counterfeiters/?sh=1c8ca180585c> (quoting Chris McCade, an Amazon Seller consultant, who formerly worked in Amazon’s merchant account investigation division).

29. *Id.*

30. *Id.*

31. *Why more marketplaces are shifting their focus to US sellers*, PAYONEER (June 15, 2023), <https://www.payoneer.com/resources/risk-compliance/marketplaces-shifting-focus-to-us-sellers/>.

32. Daniel C.K. Chow, *Counterfeiting in the People’s Republic of China*, 78 WASH. U.L.Q. 1, 3 (2000).

33. Daniel C.K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, 40 NW. J. INT’L. L. & BUS. 157, 167 (2020).

34. Kanishka Singh, *China Leads the World in Counterfeit, Pirated Products - U.S. Report*, REUTERS (Jan. 31, 2023, 4:56 PM), <https://www.reuters.com/business/china-leads-world-counterfeit-pirated-products-us-report-2023-01-31/#:~:text=%22Counterfeit%20and%20pirated%20goods%20from,on%20%22notorious%20markets%22%20added>.

35. Wade Shepard, *Meet the Man Fighting America’s Trade War Against Chinese Counterfeits (It’s Not Trump)*, FORBES (Mar. 29, 2018, 3:52 AM),

U.S. Customs and Border Protection originated from China and Hong Kong.³⁶ The European Union (“EU”) similarly claimed that China is the largest source of counterfeit goods sold into the EU.³⁷

The counterfeiting problem only grew thanks to the development of e-commerce. Prior to the rise of the Internet, Chinese counterfeiters attempting to sell their products in the U.S. would load goods into large shipping containers with false documentation for ocean transport.³⁸ Upon receiving credible information about a particular illicit shipment, U.S. customs authorities would inspect the containers upon arrival.³⁹ Even if the counterfeit goods made it across the Pacific Ocean, sellers in the U.S. had limited channels to reach their desired customers.⁴⁰ However, the surge in online sales has transformed this landscape. Counterfeit products are now easily accessible to global customers through the Internet.⁴¹ Presently, millions of small individual packages are sent to the U.S. via mail, creating a significant challenge in detecting and intercepting these illicit shipments.⁴²

E-commerce platforms not only provide counterfeiters with unparalleled access to consumers but also enable them to exploit the Internet’s anonymity. They often utilize fabricated identities, business names, and locations to avoid detection.⁴³ In short, the Internet has become

<https://www.forbes.com/sites/wadeshepard/2018/03/29/meet-the-man-fighting-americas-trade-war-against-chinese-counterfeits/#321a1941c0d6>.

36. Singh, *supra* note 34. See also U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-216, INTELLECTUAL PROPERTY: AGENCIES CAN IMPROVE EFFORTS TO ADDRESS RISKS POSED BY CHANGING COUNTERFEITS MARKET 13 (2018), <https://www.gao.gov/assets/690/689713.pdf> (noting that in 2016, 88% of all seized counterfeit goods by the U.S. originated from China and Hong Kong and discussing how the use of the Internet allows counterfeiters to transcend limits of brick and mortar counterfeiting).

37. EUROPEAN COMM’N, EU SEIZURES AT THE BORDER OF GOODS INFRINGING ON INTELLECTUAL PROPERTY RIGHTS (2018), https://taxation-customs.ec.europa.eu/system/files/2018-09/factsheet_ipr_report_2018_en.pdf.

38. See Daniel C.K. Chow, *Organized Crime, Local Protectionism and the Trade in Counterfeit Goods in China*, 14 CHINA ECON. REV. 473, 475 (2003) (“[I]t was reported that every day containers of counterfeit cigarettes produced in China are unloaded from ships in Los Angeles port and enter the United States under false import documents . . .”).

39. Chow, *supra* note 33, at 171.

40. See *id.* at 170 (stating that counterfeit goods were sold in side streets or back alleys and would almost never be sold in high-end retail stores).

41. See *id.* at 171 (“With Internet sales, thousands or hundreds of thousands of small, individual packages are now shipped to the United States by mail, making it nearly impossible to detect and stop these shipments.”).

42. See David Pierson, *Extra Inventory. More Sales. Lower Prices. How Counterfeits Benefit Amazon*, L.A. TIMES (Sept. 28, 2018, 3:00 AM), <https://www.latimes.com/business/technology/la-fi-tr-amazon-counterfeits-20180928-story.html> (“Customs agents had a fighting chance when pirated goods predominantly arrived in cargo containers. But with the rise of e-commerce, counterfeiters and their middlemen can ship goods in parcels too innumerable to catch.”).

43. See *id.* (“[B]rands say the same fraudsters keep showing up under different names . . .”); see also Alana Semuels, *Amazon May Have a Counterfeit Problem*, THE ATLANTIC (Apr. 20, 2018),

“an irresistible new opportunity” for counterfeiters to generate profit.⁴⁴ Amazon, the largest e-commerce platform in the U.S.,⁴⁵ naturally has become a counterfeiter’s safe haven.⁴⁶

In response to the proliferation of counterfeit goods on the platform, Amazon initiated an anti-counterfeiting campaign. To identify and remove counterfeits, Amazon employed advanced machine-learning algorithms that scrutinize product listings, pricing irregularities, seller behavior, and customer feedback.⁴⁷ Moreover, it also introduced a self-service counterfeit removal tool that allows registered brands to proactively monitor their products and report potential infringements.⁴⁸ However, this process required brands to submit a request, which would then be evaluated by the company before any removal took place.⁴⁹

Despite the establishment of such process and Amazon’s “zero tolerance for the sale of counterfeit items,”⁵⁰ the regular distribution of counterfeit items through the platform has noticeably escalated to an epidemic scale in recent years.⁵¹ For instance, Apple discovered that 90% of the chargers purportedly linked to their brand on Amazon were, in fact, counterfeit.⁵² Similarly, it is not uncommon to come across new pairs of Adidas Yeezy Boost 350 Oxford sneakers, typically priced at \$1,200,

<https://www.theatlantic.com/technology/archive/2018/04/amazon-may-have-a-counterfeit-problem/558482/> (“Today, though, the process of finding people and businesses selling counterfeit versions of your product is much, much more difficult. The rise of e-commerce sites like Amazon and eBay have essentially helped create millions of such stores online . . .”).

44. Chow, *supra* note 33, at 171.

45. See *Most Popular E-commerce and Shopping Websites in the United States Based on Share of Visits*, STATISTA, <https://www.statista.com/statistics/266203/us-market-share-of-leading-shopping-classifieds-websites/> (last visited Oct. 6, 2023) (documenting that in April 2023, Amazon was the leading online shopping platform as it accounted for over 44% of desktop traffic in the e-commerce subcategory, besting eBay, the second place, by more than 30%).

46. See Ari Levy, *Amazon’s Chinese Counterfeit Problem is Getting Worse*, CNBC: THE PULSE @ 1 MARKET (July 8, 2016, 9:34 AM), <https://www.cnbc.com/2016/07/08/amazons-chinese-counterfeit-problem-is-getting-worse.html> (stating that the counterfeiting issue has “exploded” after Amazon actively brought more Chinese manufacturers onto the platform to achieve its quest to be “the low-cost provider of everything on the planet”).

47. Elizabeth Segrán, *‘The Volume of the Problem is Astonishing’: Amazon’s Battle Against Fakes may be too Little, too Late*, FAST CO. (May 17, 2021), <https://www.fastcompany.com/90636859/the-volume-of-the-problem-is-astonishing-amazons-battle-against-fakes-may-be-too-little-too-late>.

48. *Id.*

49. *Id.*; see *Counterfeit Crimes Unit FAQ*, AMAZON, <https://brandservices.amazon.com/counterfeitcrimesunit/faq> (last visited Sept. 12, 2023) (demonstrating Amazon’s counterfeit violation tool that requires brands to submit a report).

50. Shepard, *supra* note 35.

51. Shepard, *supra* note 28. See also Levy, *supra* note 46.

52. Shepard, *supra* note 28.

available on the platform for a mere \$40.⁵³ Major brands have thus consistently voiced concerns that Amazon was inadequate in purging its environment of counterfeit products.⁵⁴

Consequently, U.S. brands took it upon themselves to solve the counterfeiting problem by filing lawsuits against e-commerce sellers that allegedly sold counterfeits. Beginning in mid 2010's, big fashion brands took the lead, dragging sellers based in China into U.S. federal courts, claiming trademark infringement under the Lanham Act.⁵⁵ The results of their lawsuits were promising, resulting in unopposed motions and windfall remedies. Seldom did any Chinese sellers appear in U.S. courtrooms when summoned.⁵⁶ These early cases proceeded through a series of *ex parte* motions that has now evolved into a systemized litigation strategy.

First, the plaintiffs often request a Temporary Restraining Order (“TRO”) against several hundred Chinese e-commerce sellers that were joined within a single suit.⁵⁷ A TRO is a pre-trial temporary injunction that requires an individual to begin or cease a specific action for a short period of time.⁵⁸ The TROs sought by the U.S. brands enable the temporary freezing of the defendants’ PayPal accounts, Amazon wallets, and other financial

53. *Id.*

54. *See id.* (noting that some big brands like Apple filed lawsuits against Amazon because of the counterfeit products on its site, while other brands like Birkenstock stopped selling their products on Amazon altogether).

55. *See Chanel, Inc. v. P’ships and Unincorporated Ass’ns Identified in Schedule “A,”* No. CIV.A H-12-02085, 2013 WL 5425252 (S.D. Tex. Sept. 26, 2013) (holding that defendants violated the Lanham Act); *see also Bulgari, S.p.A. v. P’ships and Unincorporated Ass’ns Identified on Schedule “A,”* No. 14-CV-4819, 2014 WL 3749132 (N.D. Ill. July 18, 2014) (stating that plaintiffs will likely be able to establish a *prima facie* case under the Lanham Act).

56. *See Chanel*, 2013 WL 5425252 at *1 (“[N]o defendant has answered or otherwise responded to Chanel’s complaint and motion for default judgment and permanent injunction.”). *See also* Chen Ting (陈婷), Wang Ziwei (王紫薇), Kuajing Dianshang Maijia, Kunzai Zhishi Chanquan “Weilie” Zhong (跨境电商卖家·困在知识产权“围猎”中) [Cross-Border E-Commerce Sellers Stuck in the “Hunt” of IP Litigations], Huxiu (虎嗅) (Sep. 2, 2021, 10:30 AM), <https://m.huxiu.com/article/453071.html> (stating that in most scenarios, the Chinese defendants would not litigate in the hope of quickly unfreezing their accounts); Li Lan (李澜), Zhongguo Kuajing Dianshang Zaimai Bei Shangbiao Qinquan De Zuixian Jinzhan–Yi Yilinuoyi Beiqu Lianbang Diqu Fayuan Weili (中国跨境电商在美被诉商标侵权的最新进展—以伊利诺伊州北区联邦地区法院为例) [The Newest Development of IP Litigations concerning Chinese Cross-Border E-Commerce Sellers—Using the Northern District of Illinois as an Example], GEN Law Firm (己任律所) (Sep. 19, 2023) <https://www.genlaw.com/publications/article/507.html> (noting that only very few Chinese defendants decided to respond to the complaints).

57. *See, e.g., Bulgari, S.p.A. v. P’ships and Unincorporated Ass’ns Identified on Schedule “A,”* No. 14-CV-4819, 2014 WL 3749132, at *2 (N.D. Ill. July 18, 2014) (noting that the court entered an order granting Plaintiff’s TRO); *Luxtotta Group S.p.A and Oakley, Inc. v. Light in the Box Limited*, No. 16-cv-05314, 2016 WL 6092636, at *2 (N.D. Ill. Oct. 19, 2016) (stating that the court granted a motion for a sealed TRO).

58. 42 AM. JUR. 2D *Injunctions* § 8 (1962).

accounts.⁵⁹ A TRO can be issued without notice to defendants in an *ex parte* manner.⁶⁰ And a TRO is granted often with little delay, per the directions in the FRCP.⁶¹ A TRO is valid for 14 days and lasts until a court holds a hearing on whether to grant a subsequent preliminary injunction.⁶² It can be extended should plaintiffs request an extension and the judge sees fit to grant it.⁶³

Next, before the TRO lapses, the brands often move to obtain a preliminary injunction against the Chinese defendants. A preliminary injunction is an order granted before the hearing on the merits of the case with the goal of preserving the relative positions of the parties.⁶⁴ It cannot be granted in an *ex parte* manner; courts may issue a preliminary injunction only upon notice to the adverse party.⁶⁵ The brands often seek preliminary injunctions to extend the effect of the TROs, freezing the defendants' financial accounts for the entirety of the case.⁶⁶ Since the Chinese defendants often fail to appear at the hearings in most trials, as discussed at length below,

59. For examples of courts granting *ex parte* application for temporary restraining orders freezing of Defendants' financial accounts, see *Tory Burch LLC v. P'ships and Unincorporated Ass'ns Identified on Schedule "A" and Does 1-100*, No. 13-c-2059, 2013 WL 1283824 *16 (N.D.Ill. Mar. 27, 2013) (citing *Oakley, Inc. v. P'ships and Unincorporated Ass'ns Identified on Schedule "A" and Does 1-100*, No. 12-cv-9864 (N.D. Ill. Dec. 14, 2012); *True Religion Apparel, Inc. et al. v. Does 1-100*, No. 12-cv-9894 (N.D. Ill. Dec. 12, 2012); *Tory Burch LLC v. Does 1-100*, No. 12-cv-9066 (N.D. Ill. Nov. 12, 2012); *Coach, Inc., et al v. Does 1-100*, No. 12-cv-8963 (N.D. Ill. Nov. 8, 2012); *Tory Burch LLC v. Does 1-100*, No. 12-cv-07163 (N.D. Ill. Sep. 7, 2012).

60. See FED. R. CIV. P. 65(b)(1) ("The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney . . .").

61. See *id.* (The granting of TRO without notice requires the plaintiff to show that "immediate and irreparable injury, loss, or damage will result" before the defendant can be heard, and thus the sufficient showing of immediate and irreparable harm often results in seamless granting).

62. Temporary restraining order, LEGAL INFO. INST., https://www.law.cornell.edu/wex/temporary_restraining_order#:~:text=A%20TRO%20will%20only%20expire,See%20Civil%20Procedure (last visited Sept.15, 2023).

63. *Id.* See also 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. The reasons for an extension must be entered in the record.").

64. 42 AM. JUR. 2D *Temporary or Preliminary Injunctions* § 9 (1962).

65. FED. R. CIV. P. 65(a).

66. For examples of courts granting preliminary injunctions restraining Defendants' from transferring or disposing of any money or assets from any financial accounts until further order by the court, see *Bulgari, S.p.A. v. P'ships and Unincorporated Ass'ns Identified on Schedule "A,"* No. 14-CV-4819, 2014 WL 3749132, at *2–3 (N.D. Ill. July 18, 2014); *Chanel, Inc. v. 7perfectbags.com*, No. 12-22057-CIV, 2013 WL 12065883, at *5–7 (S.D. Fla. Aug. 19, 2013); *Tiffany (NJ), LLC v. 925sterlingstore.com*, No. 12-21160-CIV, 2012 WL 12873549, at *4–6 (S.D. Fla. Apr. 10, 2012); *Abercrombie & Fitch Trading Co. v. A4bag.com, et al.*, No. 12-23725-CIV, 2012 WL 12673785, at *6–9 (S.D. Fla. Nov. 5, 2012); *Gucci America, Inc. v. 2012coachoutletonline.net et al.*, No. 12-23197-CIV, 2012 WL 12873227, at *7–9 (S.D. Fla. Oct. 17, 2012); *Adidas AG, et al. v. Adidasrazylight2.com, et al.*, No. 13-21230-CIV, 2013 WL 1651731, at *8–11 (S.D. Fla. Apr. 16, 2013).

courts have hardly been reluctant to grant such preliminary injunctions.⁶⁷

Lastly, the plaintiffs will close the case by filing a motion for default judgment. A default judgment is a judgment entered upon the failure of a defendant to appear before a court or to answer a complaint.⁶⁸ Brands have been able to receive many default judgments against the Chinese sellers with relative ease because, as mentioned above, the defendants often do not attend trials. As a result of the default judgement, all the sellers' financial accounts previously frozen are then transferred to the plaintiffs to satisfy the remedies due.⁶⁹

Although there is no accurate data on how much money different brands have recovered from Chinese sellers' financial accounts, the author estimates that the value per lawsuit averages at millions of dollars.⁷⁰ The large payments in this line of cases are partially due to the unique payout structure Amazon maintains. Amazon has a payout schedule of 14 days, meaning that a seller does not receive the revenue resulting from its sales for a two-week interim until the set payout date.⁷¹ Depending on the number of sales generated, a seller's Amazon Wallet could contain tens of thousands of dollars during a given two week period.⁷² Because the U.S. brands may sue hundreds of sellers in a single lawsuit,⁷³ the amount that they could recover from the sellers' Amazon accounts alone is conceivably not a small number. In addition, law firms hired by the brands often put minimal effort into the

67. *See supra* note 59.

68. FED. R. CIV. P. 55.

69. For examples of courts entering default judgements granting the transfer of defendants' financial accounts in satisfaction of the damages caused by the alleged trademark infringement, see *Under Armour, Inc. v. 51Infljersey.com, et al.*, No. 13-62809-CIV, 2014 WL 1652044 (S.D. Fla. Apr. 23, 2014); *Mon Cheri Bridals, LLC v. P'ships and Unincorporated Ass'ns Identified on Schedule "A" and John Does 1-1,000*, No. 3:15-cv-00021-FDW-DCK, 2015 WL 3509259 (W.D.N.C. June 4, 2015).

70. Courts have recognized that because the counterfeiting took place on the Internet, it is difficult to calculate the actual losses incurred by the plaintiffs. *Luxottica USA LLC v. P'ships and Unincorporated Ass'ns Identified on Schedule "A,"* No. 14-c-9061, 2015 WL 3818622, at *3 (N.D. Ill. June 18, 2015). But courts have tried to quantify the damages by awarding damages to each infringed trademark held by plaintiffs, and the damages per mark could reach \$750,000. *Deckers Outdoor Co. v. Does 1-55 d/b/a the aliases identified on Schedule A and Does 56-500*, No. 11-c-10, 2011 WL 4929036, at *5 (N.D. Ill. Oct. 14, 2011) (totaling the award received by the plaintiff to over \$36 million). This level of substantial damages is in fact quite common in this line of cases. *See, e.g., Luxottica*, 2015 WL 3818622, at *3 (noting that the plaintiff was awarded \$2 million against each of the defaulting defendants); *S&J Wholesale, LLC, et al. v. Alkitchmall et al.*, No. 1:22-cv-68, 2022 WL 2232148, at *3 (E.D. Tenn. June 21, 2022) (plaintiffs alleging that the damage they suffered was at least \$1 million).

71. *See QIN, supra* note 4, at 7.

72. *Id.*

73. *See, e.g., Estee Lauder Cosmetics Ltd. v. P'ships and Unincorporated Ass'ns Identified on Schedule A*, 334 F.R.D. 182, 189-90 (N.D. Ill. 2020) (declining plaintiff's request to join dozens or hundreds of online retailers in a single case); *S&J Wholesale, LLC, et al.*, 2022 WL 2232148, at *1 (noting that there are 125 named defendants).

suit because the Chinese defendants seldom show up in court. The trial strategy consists solely of the filing of several motions. There are often no counterclaims, no discovery process, and no trial. Thus, relatively little legal fees are billed to the U.S. brands. This tactic undoubtedly makes economic sense.

As more and more brands have successfully implemented the same strategy and recovered a lucrative amount from Chinese counterfeit sellers, other trademark holders have seen a business opportunity. Beginning in the late 2010s, U.S. federal courts encountered a wave of trademark infringement lawsuits against e-commerce sellers based in China.⁷⁴ The trademark holders suing Chinese sellers claim trademark infringement and employ the previously discussed trial strategy. First, they apply for TROs against hundreds of sellers to freeze the sellers' financial accounts. They then move for preliminary injunctions before the TROs lapse, and eventually move for default judgments as the Chinese sellers fail to respond. The result of successful implementation of the legal strategy is a windfall profit from the sellers' frozen financial accounts.

The number of cases using an identical strategy against sellers based in China has increased drastically in recent years.⁷⁵ Regardless of whether U.S. trademark holders have valid trademark infringement claims, this line of cases undoubtedly has exploited several procedural weaknesses in the U.S. legal system, raising concerns about the constitutional due process protection provided to foreign defendants in trademark infringement disputes. The next section analyzes the four common procedural issues encountered in many trademark cases against Chinese e-commerce sellers.

74. For examples of these trademark infringement lawsuits against e-commerce sellers based in China, see *Luxottica Group S.p.A and Oakley, Inc. v. P'ships and Unincorporated Ass'ns Identified on Schedule "A,"* 391 F.Supp.3d 816 (N.D. Ill. 2019); *Pow! Ent., LLC v. Individuals, Corps., Ltd. Ltd. Liab. Cos. P'ships and Unincorporated Ass'ns Identified on Schedule "A,"* No. 20-cv-1324, 2020 WL 8455479 (N.D. Ill. Dec. 7, 2020); *Hangzhou Chic Intelligent Tech. Co. v. P'ships and Unincorporated Ass'ns Identified on Schedule "A,"* No. 20-c-4806, 2021 WL 1222783 (N.D. Ill. Apr. 1, 2021); *NBA Props., Inc. v. P'ships and Unincorporated Ass'ns Identified in Schedule "A,"* 549 F.Supp.3d 790 (N.D. Ill. 2021); *BVE Brands, LLC v. Individuals, P'ships and Unincorporated Ass'ns Identified on Schedule "A,"* No. 1:22-cv-00278-RP, 2022 WL 5571495 (W.D. Tex. Apr. 21, 2022); *Zuru (Singapore) Pte., Ltd., et al. v. Individuals, Corps., Ltd. Liab. Cos., P'ships, and Unincorporated Ass'ns Identified on Schedule A Hereto,* No-22-CIV-2483, 2022 WL 14872617 (S.D.N.Y. Oct. 26, 2022).

75. The law firm Greer Burns & Crain, for example, has filed more 243 e-commerce trademark infringement cases in 2020 alone, generating more than \$1 billion in revenue. The firm also filed more than 270 cases in 2021. See Press Release, GBC Recognized as Most Active Trademark Litigation Firm in 2021, GREER BURNS & CRAIN (Jan. 19, 2022), <https://gbc.law/news/gbc-recognized-as-most-active-trademark-litigation-firm-in-2021#:~:text=Greer%2C%20Burns%20%26%20Crain%20was%20again,stores%20trafficking%20in%20infringing%20products>. Zuo, *supra* note 6.

IV. FOUR COMMON PROCEDURAL ISSUES

Although many U.S. trademark holders have legitimate trademark infringement claims against Chinese e-commerce sellers, their lawsuits have gradually developed into a systematic exploitation of U.S. legal procedure against disadvantaged foreign defendants, allowing the plaintiffs to capture windfall profits.

Because this line of cases is typically filed in U.S. district courts, the FRCP controls the procedural protections provided to the parties, aided by constitutional constraints functioning in the background. Although prohibited by this applicable procedural due process framework, these courts regularly overlook the plaintiffs' refusal to comply with the service requirement set forth in the Convention on the Service Abroad of Judicial and Extrajudicial Documents ("Hague Convention") and the FRCP. Next, federal courts often neglect to recognize the constitutional limits on their personal jurisdiction and blindly exercise their jurisdictional power over Chinese defendants. Further, the plaintiffs have routinely joined a massive number of defendants in a single lawsuit without regard to the joinder requirements set forth in the FRCP. Lastly, a preliminary injunction is often granted absent notice to Chinese defendants or fair opportunity for these defendants to prepare for trial. This Section will analyze these four procedural issues separately, endeavoring to illuminate the way in which this practice has stripped away the procedural protection due to the defendants.

A. Invalid Service by Email

The first procedural issue existing in this line of cases is the violation of the process requirements in the Hague Convention and thus the FRCP. Whether a defendant is properly served with notice is a preliminary question a court must consider.⁷⁶ Absent valid and adequate service of process, a defendant's mere knowledge of the existence of a lawsuit is insufficient to confer federal jurisdiction over that defendant.⁷⁷ In other words, "[b]efore a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."⁷⁸

In U.S. federal courts, Rule 4(f) of the FRCP governs service on foreign defendants. Rule 4(f) authorizes three methods of service to foreign

76. See, e.g., *Bomze et al. v. Nardis Sportswear, Inc.*, 165 F.2d 33, 35 (2d Cir. 1948) (stressing that the first question the court will consider is whether service was valid under the applicable law).

77. See *Mid-Continent Wood Prods., Inc. v. Harris*, 936 F.2d 297, 301 (7th Cir. 1991) (citing *Bennett v. Circus U.S.A.*, 108 F.R.D. 142, 148 (1985), which held that knowledge of a lawsuit does not make up for deficiencies in service).

78. *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

defendants outside of the U.S.⁷⁹ First, a U.S. plaintiff can serve a foreign defendant “by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the [Hague Convention].”⁸⁰ Second, if no international agreement exists, a plaintiff is authorized to use “a method that is reasonably calculated to give notice” as provided by the foreign national’s law, by a foreign authority in response to a letter of request or letter rogatory, or by personal service or service through the clerk of court.⁸¹ Third, service can also be completed “by other means” as the court orders, so long as that method is “not prohibited by international agreement.”⁸² Since the U.S. and China are both member states of the Hague Convention,⁸³ which is an international agreement, only the first and third methods of service laid out in Rule 4(f) are relevant for this line of cases.

At first blush, the first method set forth by Rule 4(f)(1) should be the default approach to serving process because the Hague Convention is an “internationally agreed means of service.”⁸⁴ The Hague Convention intends to establish “simple and certain means by which to serve process on a foreign national.”⁸⁵ Article 1 of the Hague Convention provides that “[t]he present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.”⁸⁶ But where “the address of the person to be served with the document is not known,”⁸⁷ the Hague Convention does not apply.

Article 2 of the Hague Convention requires each signatory nation to designate a central authority (“Central Authority”) to effectuate service of judicial documents from other signatory nations.⁸⁸ Although each member state might have some nuance to its own service process, the process through

79. FED. R. CIV. P. 4(f).

80. FED. R. CIV. P. 4(f)(1).

81. FED. R. CIV. P. 4(f)(2).

82. FED. R. CIV. P. 4(f)(3).

83. *Status Table: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17> (last updated June 23, 2023).

84. FED. R. CIV. P. 4(f)(1).

85. *Kreimerman, et al. v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 643 (5th Cir. 1994) (citing *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 706 (1988)). See also *Water Splash, Inc. v. Menon*, 581 U.S. 271, 273 (2017) (stating that the purpose of the Hague Convention is to simplify and standardize serving process abroad by specifying certain approved methods of service and preempts inconsistent methods of service wherever it applies).

86. *Convention on The Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* art. 1, Nov. 15, 1965, 20.1 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter *Hague Service Convention*].

87. *Id.*

88. *Schlunk*, 486 U.S. at 698.

the Central Authority may be summarized as follows: a plaintiff's attorney or an officer of the court will first send a request form, with the documents to be served, to the foreign country's Central Authority.⁸⁹ Upon receipt of proper documents, the foreign country's Central Authority conducts service pursuant to the foreign country's laws.⁹⁰ After service has been completed, the Central Authority will complete the return of service form and forward the form to the person who initiated the request.⁹¹ If service was unsuccessful, the return of service documents will provide an explanation.⁹²

In addition to service through a country's Central Authority, Article 8 of the Hague Convention also allows service "directly through diplomatic or consular agents,"⁹³ and Article 10 endorses service by postal channels.⁹⁴ However, China expressed reservations regarding both Articles 8 and 10 as part of its accession to the Hague Convention.⁹⁵ The official PRC declarations and reservations to the Hague Convention make it clear that, with the exception of voluntary service on a foreign national living in China by the country's own embassy or consulate, the only acceptable method of foreign service on individuals in China is through China's Central Authority.⁹⁶ Therefore, pursuant to Rule 4(f)(1), if a U.S. plaintiff wants to serve a defendant in China, he or she can do so only through China's Central Authority.

Nevertheless, the U.S. plaintiffs in this line of cases simply use email to serve their summons upon the Chinese e-commerce sellers.⁹⁷ The legal

89. Hague Service Convention art. 3. For an example of a model form annexed to the Hague Convention, see *Request for Service Abroad of Judicial or Extrajudicial Documents*, available at <https://assets.hcch.net/docs/18774c6c-2c85-41a7-8fe6-55c23acd498b.pdf>.

90. Hague Service Convention art. 5. The Hague Convention does not specify a deadline for return of service by the Central Authority but does allow a plaintiff to take a default judgment where the Central Authority has failed to respond within six months *and* the plaintiff has made "every reasonable effort" to obtain a certificate of service or deliver "through the competent authorities of the [foreign country] addressed." Hague Service Convention art. 15 (emphasis added).

91. Hague Service Convention art. 6.

92. *Id.*

93. Hague Convention art. 8.

94. Hague Convention art. 10(a) ("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.").

95. *Declaration/Reservation/Notification: People's Republic of China*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=393&disp=resdn> (last visited Dec. 22, 2022) [hereinafter *Declaration: PRC*].

96. *See id.*; Hague Convention arts. 3, 9 (China's reservation from Articles 8 and 10 leaves only the methods described in Articles 3 and 9 as acceptable methods of foreign service).

97. For examples of Chinese defendants moving to dismiss for failure to comply with the Hague Convention arising from plaintiffs' service via mail, see *Luxottica Group S.p.A. and Oakley, Inc. v.*

propriety of such electronic service is based on two core inquiries: whether the Hague Convention applies to these cases, and if so, whether U.S. courts have the authority under FRCP 4(f)(3) to authorize service by email rather than through China's Central Authority.

Over the years, many plaintiffs have been faced with the argument that service by email is inappropriate and have contested that the Hague Convention does not apply to their suit. For instance, the plaintiffs in *Luxottica* argued that the Hague Convention does not apply to the present case because Article 1 of the Convention exempts the application of its service requirements when "the address of the person to be served with the document is not known."⁹⁸ The *Luxottica* plaintiffs asserted that because the Chinese defendants engaged in counterfeit business, their published addresses were likely false. To support this argument, the plaintiffs cited the 2017 statistics released by the U.S. Customs and Border Protection to show that goods exported by China "represent the lion's share of counterfeit imported goods seized."⁹⁹

But some courts disagree with this argument. The long-standing precedent on the application of the Hague Convention provides that a plaintiff cannot "close its eyes to the obvious to avoid the Hague [] Convention."¹⁰⁰ To satisfy an Article 1 exemption, a plaintiff must make reasonably diligent efforts to learn the defendant's accurate mailing address.¹⁰¹ As the *Luxottica* court stressed: "A generalized suspicion about an address's validity does not make it 'unknown' under the Hague Service Convention."¹⁰² The fact that the defendants allegedly sold counterfeit goods cannot sufficiently prove that their listed address is patently invalid.¹⁰³ More specific proof of falsehood is needed to qualify for an exemption under Article 1.¹⁰⁴

P'ships and Unincorporated Ass'ns Identified on Schedule "A," 391 F.Supp.3d 816, 819 (N.D. Ill. 2019); *Oakley, INC. v. P'ships and Unincorporated Ass'ns Identified on Schedule "A,"* No. 20-cv-05049, 2021 WL 2894166, at *1 (N.D. Ill. July 9, 2021).

98. *Luxottica*, 391 F.Supp.3d 816 at 822.

99. *Id.* at 823.

100. *Id.* at 822. *See also* *Advanced Access Content Sys. Licensing Adm'r'in., LLC v. Shen*, 2018 WL 4757939, at *4-5 (S.D.N.Y. Sept. 30, 2018) (echoing that precedents require plaintiff to exercise reasonable diligence in attempting to find foreign defendant's mailing address before plaintiff could argue the Hague Convention as inapplicable); *Compass Bank v. Katz*, 287 F.R.D. 392, 394-95 (S.D. Tex. 2012) (noting that the Hague Convention requires, at the minimum, that "a plaintiff put forth reasonable diligence in attempting to discover defendant's address, before finding the party can circumvent the methods for service of process authorized.").

101. *Luxottica*, 391 F.Supp.3d at 822.

102. *Id.* at 823.

103. *Id.*

104. *See id.* at 822-23 (stating that plaintiffs did not offer evidence that they investigated the validity

Plaintiffs could satisfy the requisite standard of proof by conducting a “reasonable investigation” into the validity of the defendants’ purported mailing address once they learn of the address.¹⁰⁵ For instance, in *Chanel, Inc.*, the court held that the Hague Convention does not apply because the plaintiff hired an investigator in China to investigate the addresses provided by the defendant and found that the address was invalid.¹⁰⁶ Accordingly, if the plaintiffs in this line of cases want to use email service, they are required to conduct a similar, extensive investigation to actively confirm the invalidity of the address. But seldom did these plaintiffs in this line of cases conduct such an investigation. Thus, their argument that the Hague Convention does not apply because defendants’ addresses are unknown fails.

The plaintiffs in *Luxottica* also argued that the Hague Convention did not apply because of the excessive length of time it took for China’s Central Authority to complete the service process.¹⁰⁷ Specifically, the plaintiffs argued that their case is akin to the exception granted in *In re Potash Antitrust Litigation*.¹⁰⁸ In *Potash*, the court ruled that the Hague Convention did not apply to Russian defendants and authorized the service of a Russian defendant by fax and email because it was “an exceptional case.”¹⁰⁹ Specifically, Russia had “unilaterally suspended all judicial cooperation with the United States in civil proceedings and all service requests [were] returned unexecuted” since 2003.¹¹⁰ Based on the 1993 FRCP Advisory Committee’s note to Rule 4(f)(1), the *Potash* court reasoned that the Hague Convention does not apply where a signatory state to the Hague Convention has “refused to cooperate for substantive reasons.”¹¹¹

But according to the court in *Luxottica*, the exception carved out by *Potash* categorically fails in cases against Chinese e-commerce sellers because China has not refused to cooperate with the Hague Convention for substantive reasons.¹¹² Although there is evidence that suggests that China’s Central Authority takes one to two years to serve process, there is currently

of the return address).

105. *Id.* at 823 (citing *Advanced Access*, No. 14-CV-1112 (VSB), 2018 WL 4757939, at *5); *Shenzhen Ruobilin Network Tech., Ltd. v. SJG-Lesn*, No. 16-CV-386-WMC, 2016 WL 6988868, at *1 (W.D. Wis. Nov. 29, 2016); *Blumedia Inc. v. Sordid Ones BV*, No. 10-CV-01158-MSK-KLM, 2011 WL 42296, at *2 (D. Colo. Jan. 6, 2011); *Progressive Se. Ins. Co.*, 2011 WL 2672565, at *2–3.

106. *Chanel, Inc. v. Song Xu*, No. 1:11-CV-137, 2010 WL 396357, at *1, *3 (W.D. Tenn. Jan. 27, 2010). *See also* *BP Prods. N. Am., Inc. v. Dagra*, 232 F.R.D. 263, 264 (E.D. Va. 2005).

107. *Luxottica*, 391 F.Supp.3d at 824.

108. *Id.*

109. *In re Potash Antitrust Litigation*, 667 F.Supp.2d 907, 930 (N.D. Ill. 2009).

110. *Id.* at 929.

111. *Id.* at 930.

112. *Luxottica*, 391 F.Supp.3d at 824.

no substantive explanation for these delays.¹¹³ Accordingly, there is no finding that China refused to cooperate, unlike Russia.¹¹⁴ Furthermore, Article 15 of the Hague Convention offers solutions if a state's Central Authority takes more than six months to complete the service.¹¹⁵ Absent specific grounds that make the Hague Convention inadequate and thus inapplicable, U.S. courts lack the authority to bypass the Convention when ordering service upon foreign persons.¹¹⁶ Therefore, the Hague Convention arguably applies in this line of cases, and plaintiffs who seek to sue Chinese defendants in U.S. court should follow the process set forth in the agreement.

Next, because the Hague Convention applies, it must be asked whether U.S. courts are allowed to authorize service by email under Rule 4(f)(3) of the FRCP in an absence of direction from the Hague Convention. As mentioned above, Rule 4(f)(3) allows U.S. courts to permit alternative means of service if the means is "not prohibited by international agreement."¹¹⁷ Accordingly, service by email is permissible only if the Hague Convention does not prohibit this means. However, as a textual matter, the Hague Convention is silent on email service.¹¹⁸ It is equally silent on service by fax or other means of delivery unknown in the 1960's, when it was written.¹¹⁹ Therefore, the core inquiry is whether the textual silence leaves courts "free" to authorize service by email.

Because of the absence of relevant Supreme Court precedent, federal courts are divided on this specific question.¹²⁰ Some courts have held that

113. *Id.*

114. *Id.*

115. *Id.*

116. See *Luxottica*, 391 F.Supp.3d at 824 (finding that the Hague Convention applies, and the plaintiffs' email service was inappropriate because they failed to demonstrate the inadequacy if the Convention's remedies).

117. FED. R. CIV. P. 4(f)(3).

118. Hague Service Convention arts. 8, 10.

119. While email has arguably been around since the late 1960s, email did not exist in its modern form until 1972, when an engineer named Ray Tomlinson wrote software to send the first network email. Barry M. Leiner et. al., *A Brief History of the Internet*, 39 ACM SIGCOMM COMPUT. COMM'N REV. 22, 24 (1999), available at <https://groups.csail.mit.edu/ana/A/%20brief%20history%20of%20the%20internet%20-%20p22-leiner.pdf>.

120. See generally Michael A. Rosenhouse, *Permissibility of Effectuating Service of Process by Email Between Parties to Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 14 A.L.R. Fed. 3d Art. 8 (2016) (noting that courts are divided about the permissibility of conducting service process by email). See also *MacLean-Fogg Co. v. Ningbo Fastlink Equip. Co.*, No. 08 CV 2593, 2008 WL 5100414, at *2 (N.D. Ill. Dec. 1, 2008) ("The Hague Convention does not prohibit service by e-mail or facsimile."); *Ouyeinc Ltd. v. Alucy*, No. 20 C 3490, 2021 WL 2633317, at *3 (N.D. Ill. June 25, 2021) ("The Hague Convention does not prohibit service by e-mail or facsimile."); *Cf. Commodity Futures Trading Comm'n v. Caniff*, No. 19-CV-2935, 2020 WL 956302, at *6 (N.D. Ill. Feb. 27, 2020) ("The Convention does not affirmatively authorize, nor does it prohibit,

electronic service, although not included in the Hague Convention, is consistent with the Convention because China does not object to email service.¹²¹ The majority of courts¹²² that have ruled in this way relied on a rule promulgated by the Supreme Court in *Water Splash Inc. v. Menon*.¹²³ In *Water Splash*, the Court held that service by mail, though not affirmatively authorized by the Hague Convention, was “permissible” if two conditions are met: “first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law.”¹²⁴ Applying this reasoning, some courts have found that because China has only objected to service through “postal channels” but not email service within Article 10 of the Hague Convention, and Chinese law allows email service under certain circumstances,¹²⁵ email service on defendants in China is thus appropriate under the Convention and FRCP.¹²⁶ As such, under Rule 4(f)(3), courts have held that service by email is a proper means of service on foreign defendants.

But this interpretation is likely erroneous because China’s objection to Article 10(a)’s service through postal channels should be understood as an implied objection to service by email. As discussed above, Article 10(a) of the Hague Convention explicitly permits service by “postal channel[s].” China “oppose[s] the service of documents in the territory of the People’s Republic of China by the methods provided by Article 10 of the Convention.”¹²⁷ Many courts and scholars believe that service by email is a method endorsed by Article 10 because email is within the scope of the term “postal channel.”¹²⁸ Similarly, Article 14 of the 2008 Universal

service by email.”).

121. See e.g., *Hangzhou Chic Intelligent Tech. Co. and Unicorn Global Inc. v. P’ships and Unincorporated Ass’ns Identified on Schedule “A,”* No. 20 C 4806, 2021 WL 1222783, at *4 (N.D. Ill. Apr. 1, 2021) (stating that some courts have found that email service is sufficient because China does not object).

122. See *Chanel, Inc. v. HandbagStore*, No. 20-CV-62121, 2021 WL 3060329, at *9 (S.D. Fla. June 30, 2021) (stating that the majority of courts find that electronic service by email is not prohibited if the state has not objected to it).

123. 137 S. Ct. 1504 (2017).

124. *Id.* at 1513.

125. See MINSHI SUSONG FA (民事诉讼法) [CIVIL CODE] art. 87 (China) (“Subject to the consent of the person on which a procedural document is to be served, the document may be served by way of . . . electronic mail.”).

126. *Hangzhou Chic*, No. 20 C 4806, 2021 WL 1222783, at *3–4 (stating that the objection to postal service does not extend to email service).

127. *Declaration: PRC*, *supra* note 95.

128. Ronald J. Hedges, Kenneth N. Rashbaum & Adam C. Losey, *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4 FED. CTS. L. REV. 55, 65 (2010); Richard J. Hawkins, Comment, *Dysfunctional Equivalence: The New Approach to Defining “Postal Channels” Under the Hague Service Convention*, 55 UCLA L. REV. 205, 224 (2007)

Postal Convention defined “electronic mail” as “a postal service involving the electronic transmission of messages.”¹²⁹ Furthermore, if the term “postal channel” as denoted in Article 10 is interpreted to exclude email, service by email “would bypass [all other] [] methods of service the Hague Convention authorizes,” contradicting the goals of the Convention to establish internationally recognized and certain means to serve foreign nationals.¹³⁰ Because of this concern, certain U.S. courts have ruled that reservations made by other countries under Article 10 against service through postal channels should also include their objections to email service.¹³¹ Accordingly, it is reasonable to interpret Article 10 as encompassing email service under the term “postal channel,” while also duly respecting China’s objection to email service. The fact that this alignment is absent represents a departure from an established international legal standard. Therefore, service by email on defendants in China is likely proscribed by the Hague Convention, rendering Rule 4(f)(3) authorization impermissible.

In sum, valid and adequate service is a prerequisite for a court to exercise its judicial power over a defendant. In disputes between domestic plaintiffs and foreign persons, Rule 4(f) of the FRCP dictates that service on foreign persons shall be made in accordance with an applicable international agreement.¹³² In the line of cases against several hundred e-commerce

(demonstrating that many scholars view email as included in the definition of “postal channel”). For U.S. cases interpreting “postal channels” to include courier services or email, see, for example, *TracFone Wireless, Inc. v. Hernandez*, 126 F. Supp. 3d 1357 (S.D. Fla. 2015) (finding that service on a defendant by FedEx delivery is done through a postal channel); *Lexmark Int’l, Inc. v. Ink Techs. Printer Supplies, LLC*, No. 1:10-cv-564, 2013 U.S. Dist. LEXIS 200012 (S.D. Ohio Aug. 21, 2013) (finding both courier service and email service are appropriate under article 10(a), thus implying that they are both postal channels); *NOCO Co. v. Khaustov*, No. 1:19 CV 196, 2019 U.S. Dist. LEXIS 151413 (N.D. Ohio Sep. 5, 2019) (allowing service by email to a defendant in a signatory country).

129. Universal Postal Union [UPU], *Universal Postal Convention*, art. 14, ¶1.1 (2008), available at <https://www.upu.int/UPU/media/upu/files/aboutUpu/acts/08-actsAndOtherDecisionsPreviousCongresses/act2008DecisionsGeneveEn.pdf>. But the current version of the Universal Postal Convention, which was revised in 2016 by the Istanbul Committee, deleted the article defining electronic mail. Universal Postal Union [UPU], *Convention Manual*, at III (2018), available at <https://www.upu.int/UPU/media/upu/files/UPU/aboutUpu/acts/manualsInThreeVolumes/actInThreeVolumesManualOfConventionEn.pdf>.

130. *Luxottica Group S.p.A and Oakley, Inc. v. P’ships and Unincorporated Ass’ns Identified on Schedule “A,”* 391 F.Supp.3d 816, 827 (N.D. Ill. 2019).

131. See, e.g., *Elobied v. Baylock*, 299 F.R.D. 105, 108 (E.D. Pa. 2014) (finding that Switzerland’s reservation to Article 10 of the Hague Convention bars service by email on individuals located in Switzerland); *Agha v. Jacobs*, No. C 07-1800 RS, 2008 WL 2051061, at *1–2 (N.D. Cal. May 13, 2008) (finding that email cannot be distinguished from “postal channel,” thus Germany’s reservation to Article 10 of the Hague Convention bars email service); *Compass Bank v. Katz*, 287 F.R.D. 392, 396–97 (S.D. Tex. 2012) (finding Mexico’s reservation to Article 10 of the Hague Convention constitutes its objection for service by email). See also *Jian Zhang v. Baidu.com Inc.*, 293 F.R.D. 508, 515 n.2 (S.D.N.Y. 2013) (suggesting as dictum that email service is not permissible in China).

132. FED. R. CIV. P. 4(f)(1) (“Unless federal law provides otherwise, an individual—other than a

sellers based in China, it is common practice to serve the Chinese defendants through email and petition the courts to authorize their email service under Rule 4(f)(3), *ex post facto*. However, since the Hague Convention applies in this line of cases, and China and the U.S. are both member states to the Hague Convention, service by email is only permissible if it is not prohibited by the Convention under the FRCP. While some federal courts are split on this issue because the Hague Convention is silent on email service, email service is likely inappropriate in this line of cases because China's objections to service through postal channels arguably encompasses its resistance to email service. Therefore, the hundreds of cases in which the Chinese sellers have been served by emails stand in violation of the Hague Convention and thus, the FRCP.

B. Lack of Personal Jurisdiction

Another prominent procedural issue in this line of cases is the courts' problematic exercise of personal jurisdiction over defendants who are not U.S. companies and have not intentionally directed their conduct to any specific U.S. states. A court hearing a claim is required to dismiss the claim if the court lacks personal jurisdiction over the defendant.¹³³ Rule 4(k)(1)(A) of the FRCP provides that a federal district court's jurisdiction reaches as far as that of the courts of its host states.¹³⁴ Most states, including Illinois—the most-favored forum in this line of cases—have enacted long-arm statutes that allow their federal courts to have personal jurisdiction over out-of-state defendants as long as the exercise of such jurisdiction does not violate due process limits set out in the U.S. Constitution.¹³⁵ These limits are delineated by the Supreme Court's expansive precedent on personal jurisdiction.¹³⁶

minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States: (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.”).

133. *Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 116 (1987).

134. FED. R. CIV. P. 4(k)(1)(A) (“*In General*. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”).

135. See *Long-Arm Statutes: A Fifty-State Survey*, VEDDER PRICE (2003), <http://euro.ecom.cmu.edu/program/law/08-732/Jurisdiction/LongArmSurvey.pdf> (showing, for example, that Illinois' statute on jurisdiction states that: “A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States”). See also 4 Fed. Prac. & Proc. Civ. § 1068 Growth and Use of Long-Arm Statutes (4th ed.) (describing the spate of state legislatures confirming their statute to the broad standard permitted by the *International Shoe* decision).

136. See generally *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. 255, 261 (2017) (noting that the Fourteenth Amendment's due process clause limits the personal jurisdiction of state courts); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (“A state

There are two types of personal jurisdiction that a court may have over a defendant: general jurisdiction and specific jurisdiction.¹³⁷ A court with general jurisdiction over a defendant can hear any case brought against the defendant regardless of where the actions underlying the claim occurred.¹³⁸ Specific jurisdiction, on the other hand, requires a relationship between the non-resident defendant's in-state contacts and the claim.¹³⁹ A court without general jurisdiction can only exercise its specific jurisdiction over the claims that arise out of the defendant's contact with the state.¹⁴⁰ Many U.S. courts have exercised jurisdiction over e-commerce sellers in China,¹⁴¹ even though these Chinese defendants do not have sufficient contacts to satisfy specific jurisdiction requirements and are not subject to the courts' general jurisdiction. It should be noted that in this line of cases, jurisdictional challenges are seldom raised because most of the Chinese defendants have not responded to the pleadings.¹⁴² But in the few cases in which the Chinese defendants have raised jurisdictional challenges, courts have hastily dismissed the challenges by misapplying precedent,¹⁴³ thus arguably expanding its jurisdictional power in violation of constitutional due process limits. The following subsections analyze general jurisdiction and specific jurisdiction separately.

1. General Jurisdiction

For a court to obtain general jurisdiction over a defendant, the defendant needs to have substantial contacts with the forum so that the defendant is

court's assertion of jurisdiction exposes defendants to the State's coercive power, and is therefore subject to review for compatibility with the Fourteenth Amendment's Due Process Clause."); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) ("The Due Process clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant.").

137. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414–15 (distinguishing between specific and general jurisdiction).

138. 4 FED. PRAC. & PROC. CIV. § 1067.5 General Jurisdiction (4th ed.).

139. *Id.* at § 1067.2 Minimum Contacts, Fair Play, and Substantial Justice.

140. *Id.*

141. *See, e.g., NBA Props, Inc. v. P'ships and Unincorporated Ass'ns Identified in Schedule "A"*, 549 F. Supp. 3d 790, 793–95 (N.D. Ill. 2021) (finding specific jurisdiction over Chinese-based online retailers); *Kay v. Individual Defendants, P'ships, and Unincorporated Ass'ns*, No. 22-cv-3033-RJD, 2023 WL 4350645, at *1 (S.D. Ill. Apr. 14, 2023) (concluding that the court has personal jurisdiction over the defendants without further analysis).

142. Some jurisdictions have the rule that if the defendant does not raise a jurisdictional challenge, its defense of lack of personal jurisdiction is waived. *See, e.g., David R. DeMuro*, *Civil Trial Practice* § 1.24 (3d ed. 2023).

143. *See, e.g., NBA Props, Inc.*, 549 F. Supp. 3d at 794 (dismissing defendant's lack of personal jurisdiction argument); *Kay*, 2023 WL 4350645 at *1 (concluding that the court has personal jurisdiction over the defendants without further analysis).

basically “at home.”¹⁴⁴ This concept as it applies to foreign defendants was discussed in *Goodyear Dunlop Tires Operations v. Brown*.¹⁴⁵ In *Goodyear*, several children were killed in a bus accident in North Carolina.¹⁴⁶ The estates of these children sued the foreign subsidiaries of Goodyear USA, alleging that the accident was caused by defective tires manufactured by the foreign subsidiaries, who sold their tires in the United States.¹⁴⁷ Justice Ginsburg, writing a unanimous opinion of the Court, held that the North Carolina courts lacked general jurisdiction over these foreign entities.¹⁴⁸ Justice Ginsburg reasoned that general jurisdiction requires the defendant’s affiliations with the State be so “continuous and systematic” as to render the defendant “essentially at home in the forum State.”¹⁴⁹ In practice, the defendant’s place of incorporation and principal place of business have been held to demonstrate that they are “at home.”¹⁵⁰

After *Goodyear*, the Supreme Court further clarified in *Daimler AG v. Bauman* that the “at home” requirement is exceedingly difficult to satisfy.¹⁵¹ *Daimler* involved an Argentine citizen suing the German Daimler company in California state courts, alleging that Daimler’s Argentine subsidiary assisted the Argentine government with torturing the plaintiff’s family.¹⁵² Although Daimler maintained a distribution agency in California, the Supreme Court ruled that California courts do not automatically possess general jurisdiction over a foreign corporation even if “[the] corporation engages in a substantial, continuous, and systematic course of business [in that state].”¹⁵³ Rather, a corporation’s affiliations with a state must be “so continuous and systematic” that the state could be seen as the corporation’s “home.”¹⁵⁴

In a footnote, the Court acknowledged that in an exceptional case, a corporation’s operations in a state other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render it “essentially at home” in that state.¹⁵⁵ However, Daimler’s

144. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

145. 564 U.S. 915, 919 (2011).

146. *Id.* at 918.

147. *Id.*

148. *Id.* at 930–31.

149. *Id.* at 919.

150. *Id.* at 924.

151. 571 U.S. 117, 134–36 (2014) (noting that the Ninth Circuit’s agency theory was too lax for the purpose of establishing general jurisdiction over foreign corporate defendants).

152. *Id.* at 117.

153. *Id.* at 138 (internal quotation marks omitted).

154. *Id.* at 127 (internal quotation marks omitted).

155. *See id.* at n.19 (“We do not foreclose the possibility that in an exceptional case . . . a

activities in California did not approach that level because “California sales [only] account for 2.4% of Daimler’s worldwide sales.”¹⁵⁶ Therefore, according to Supreme Court precedent, courts generally do not possess general jurisdiction over a company unless it sits in a state where the corporation is incorporated or maintains its principal business, or whose affiliation with the company is “so continuous and systematic” as to provide them with a home.

Accordingly, U.S. federal courts likely do not possess general jurisdiction over the Chinese e-commerce sellers under the “at home” test. As *Daimler* has shown, a company that does not incorporate or maintain a principal place of business in a state needs to have more than a “continuous and systematic” affiliation with the state to render itself “essentially at home” in the state. In this line of cases, nearly all defendants are incorporated and maintain their principal place of business in China, rather than in the U.S.¹⁵⁷ Their business is accessible everywhere and does not target a specific state.¹⁵⁸ Many Chinese sellers likely sell less than 2.4% of their total goods in any one state,¹⁵⁹ a threshold that the Supreme Court found insufficient to render a company “at home” in *Daimler*. Therefore, the few courts faced with jurisdictional challenges raised by the Chinese sellers never bother to analyze whether they have general jurisdiction because it is not a good basis for asserting personal jurisdiction over Chinese defendants.¹⁶⁰

2. Specific Jurisdiction

The Supreme Court, in its landmark case *International Shoe Co. v. Washington*, stated that specific jurisdiction is premised on a defendant’s “certain minimum contacts with [the state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”¹⁶¹ This rule instructs a court to first analyze the defendant’s

corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler’s activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State . . . quite another to expose it to suit on claims having no connection whatever to the forum State.”)

156. *Id.* at 123.

157. *See* QIN, *supra* note 4, at 2 (stating that over 95% of all the cross-border ecommerce retailers sued in the U.S. are based in China).

158. *See id.* at 144–45 (noting that the targeted customers of Chinese e-commerce merchants are not limited to particular states).

159. *Id.* at 55–56, 59.

160. *See, e.g.,* NBA Props, Inc. v. P’ships and Unincorporated Ass’ns Identified in Schedule “A,” 549 F. Supp. 3d 790, 793–95 (N.D. Ill. 2021) (resting the discussion entirely on specific jurisdiction).

161. 326 U.S. 310, 316 (1945).

prelitigation connections with the state.¹⁶² Without the finding of sufficient connection to establish “minimum contacts,” a court lacks specific jurisdiction over the defendant.¹⁶³

The concept of “minimum contacts” has been further developed in later Supreme Court cases. In *World-Wide Volkswagen v. Woodson*, the majority held that the “minimum contacts” test requires a company to “purposefully avail[] itself of the privilege of conducting activities within the forum state.”¹⁶⁴ Acts such as establishing a distribution agency, renting an office, advertising, tailoring the products to the forum, and hiring workers in the forum state are examples of purposeful availment.¹⁶⁵ If, instead, the contacts result from chance or the acts of others, the minimum contacts requirement of specific jurisdiction will not be satisfied.¹⁶⁶

Similarly, in *Asahi Metal Industry Co. v. Superior Court*, Justice O’Connor, writing for a four-vote plurality, endorsed the view that a company does not purposefully avail itself to a forum in which its product appears without satisfying the previously discussed minimum conduct requirement.¹⁶⁷ The defendant in this case, Asahi, a Japanese component-maker, maintained no direct business nor advertisement in California.¹⁶⁸ Although Asahi was aware that the final product containing its parts could arrive in California, it took no action to direct its parts there beyond selling the parts to a Taiwanese final-product manufacturer.¹⁶⁹ Justice O’Connor reasoned, and the majority agreed, that the mere placement of a product into the “stream of commerce” should not subject a defendant to a state’s specific jurisdiction without additional conduct “purposefully directed” at the state.¹⁷⁰

162. 4 FED. PRAC. & PROC. CIV. §1067.2 Minimum Contacts, Fair Play, and Substantial Justice (initiating an inquiry into the minimum contacts of a nonresident civil defendant’s connections with the forum state that may be sufficient for the forum state to assert personal jurisdiction over that defendant).

163. *Id.*

164. 444 U.S. 286, 297 (1980) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

165. *See id.* at 295, 297 (reasoning that the subjection of specific jurisdiction upon a foreign corporate defendant is reasonable if the sales made in the state resulted from the defendant’s series of effort to serve the market of the state).

166. *See id.* at 297–98 (noting that sales in a state should not be the basis for specific jurisdiction if the sale is an isolated occurrence).

167. 480 U.S. 102, 115–16 (1987).

168. *Id.* at 103.

169. *Id.*

170. *Id.* at 103–04. The same principle is reiterated in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011). McIntyre is a British company that manufactured and sold scrap recycling machines used to cut metals. It was an exhibitor for several annual conventions based in the U.S. and maintained a U.S. distributor for sales in the U.S. One of McIntyre’s machines ended up in a factory in New Jersey. The plaintiff, an employee of this factory, accidentally injured himself while using McIntyre’s machine. The Supreme Court, in overruling the New Jersey Supreme Court, found that New Jersey lacks specific

Therefore, for a court to exercise specific jurisdiction over a foreign company, there must be “minimum contacts” between the company and the forum state before the litigation arises. The cornerstone requirement establishing “minimum contacts” is that the defendant company must have conducted actions in the state that show “purposeful availment” to the state. Without purposeful availment, there are no minimum contacts, and thus no specific jurisdiction.

Taking the “minimum contacts” test at face value, it is likely that the federal courts lack specific jurisdiction over the several hundred Chinese sellers because these sellers did not purposefully avail themselves to any states. Many of these sellers do not own any property in the U.S., do not maintain a distribution center in the U.S., and did not purchase any goods or service from any states in the U.S. to contribute to its business.¹⁷¹ Their sale on Amazon would not constitute purposeful availment because the products were offered to the U.S. population at large, not to a specific state or the residents in such state. Similar to the defendant in *Asahi*, the Chinese sellers do not know and could not have known to which specific state the product would be sold after it was placed in the stream of commerce, and they have taken no additional action to direct their sales to a specific region beyond maintaining their page on Amazon’s website.¹⁷²

In the rare circumstances in which Chinese defendants have challenged the courts’ jurisdiction, some courts have found the presence of purposeful availment based on the Chinese defendants’ tenuous link with the state. For instance, in *NBA Properties, Inc. v. Partnerships and Unincorporated Associations Identified in Schedule “A”*, the District Court for the Northern District of Illinois ruled that the defendant purposefully availed itself in Illinois by simply shipping one product to Illinois, even though the sole shipment to Illinois was a “sham transaction.”¹⁷³ The *NBA* court based its controversial ruling on the Seventh Circuit’s reasoning in *Illinois v. Hemi Group, LLC*.¹⁷⁴

In *Hemi*, the state of Illinois sued Hemi, a New Mexico company that maintained an online cigarette shop, through which the company sold cigarettes to Illinois residents in violation of Illinois laws.¹⁷⁵ Hemi challenged the district court’s jurisdiction because it was not incorporated in Illinois, hired no officers or employees in Illinois, did not bank in Illinois,

jurisdiction because McIntyre did not engage in any conduct purposefully directed at New Jersey.

171. See QIN, *supra* note 4, at 16–18.

172. See *id.* at 18.

173. 549 F. Supp. 3d 790, 793–95 (N.D. Ill. 2021).

174. *Id.* at 794.

175. 622 F.3d 754, 755 (7th Cir. 2010).

and had no advertisements in Illinois.¹⁷⁶ Nevertheless, the Seventh Circuit found that Hemi's contacts with Illinois were sufficient because "Hemi stood ready and willing to do business with Illinois residents."¹⁷⁷ Of particular significance to the court was the fact that Hemi's websites specifically stated that it would ship to any state in the country except New York.¹⁷⁸ The court noted that this statement was crucial for two reasons: first, the statement demonstrated Hemi's affirmative election to do business with Illinois residents; and second, it demonstrated Hemi's knowledge that it could protect itself from being dragged into courts in a particular state by excluding that state from its shipping.¹⁷⁹

Relying on *Hemi*'s reasoning, the *NBA* court found that the Chinese defendant was "ready and willing to do business with [Illinois] residents" because the defendant's website offered Illinois as a "ship-to" forum and the defendant had shipped one product to Illinois.¹⁸⁰ The *NBA* court thus held that that even though the Chinese defendant's connection with Illinois was tenuous, it nevertheless purposefully availed itself to Illinois because of the indications on its website and its product shipment, and thus minimum contacts were satisfied.¹⁸¹

The *NBA* court's finding, however, is likely flawed because its reliance on *Hemi* was gravely misplaced. In *Hemi*, the Seventh Circuit explicitly cautioned that its ruling does not stand for the position that a defendant will be hauled into court simply because the defendant owns and operates a website that is available to Illinois residents.¹⁸² The court explained that what separates Hemi from other ordinary online retailers is that Hemi specifically targeted the Illinois market and "reach[ed] out to the residents of Illinois, not the residents reaching back."¹⁸³ Although the *Hemi* court did not provide any examples to illustrate what constitutes active targeting, its ruling suggests that a defendant does not purposefully avail itself to a state by merely listing her products online absent voluntary contacts with the state.¹⁸⁴

176. *Id.* at 756.

177. *Id.* at 758.

178. *Id.*

179. *Id.*

180. *NBA Props, Inc. v. P'ships and Unincorporated Ass'ns Identified in Schedule "A,"* 549 F. Supp. 3d 790, 794 (N.D. Ill. 2021).

181. *Id.* at 793.

182. *Illinois v. Hemi Group LLC*, 622 F.3d 754, 760 (7th Cir. 2010).

183. *Id.* at 758.

184. *See id.* (stressing that Illinois' jurisdiction over Hemi rests primarily on the fact that Hemi excluded New York from the states to which it ships its products, evincing Hemi's knowledge that conducting business with residents of a particular state could potentially subject itself to that state's jurisdiction.).

American Bridal & Prom Industry Association, Inc. v. The Partnerships and Unincorporated Associations Identified on Schedule A affirms *Hemi*'s limited scope.¹⁸⁵ In *American Bridal*, the court dismissed a trademark infringement case against over 3,000 foreign defendants, most of whom were based in China, on the ground that it lacked specific jurisdiction.¹⁸⁶ In reaching this decision, the court distinguished the present case with *Hemi*, stressing that merely maintaining interactive websites is not enough for purposeful availment:

Plaintiffs have not shown that the [Defendants'] websites were any more accessible in Illinois than anywhere else in the world; they have not shown that any Illinois residents actually accessed the websites; they have not shown any injury occurring in Illinois; they have not shown that any Defendant took any action with respect to Illinois in particular. They have not alleged or shown that any of the Defendants specifically agreed to ship to Illinois or that they otherwise reached out to, or expressly aimed their activities at, this state or its residents. Quite simply, Plaintiffs failed to show that *any* Defendant had any voluntary contacts with the State of Illinois, yet they seek to drag all 3000-plus Defendants into this district here solely because of their websites—precisely what *Hemi* admonished courts to avoid.¹⁸⁷

Accordingly, the *NBA* court's finding of specific jurisdiction via *Hemi*¹⁸⁸ is an erroneous departure from precedent because in *NBA*, there was no evidence that the Chinese defendants actively targeted Illinois residents outside of maintaining a website generally targeting the U.S. The *NBA* court's failure to faithfully follow *Hemi* and *American Bridal* thus creates a dangerous precedent regarding a court's unfounded and expansive jurisdiction over foreign defendants.

In sum, a court adjudicating a case against thousands of e-commerce sellers based in China must have personal jurisdiction over all the defendants.¹⁸⁹ Under Rule 4(k)(1)(A), a federal court's territorial jurisdiction reaches as far as that of the courts of its host states. Thus, federal courts in long-arm jurisdictions may not expand their jurisdiction over

185. *Am. Bridal & Prom Indus. Ass'n, Inc. v. P'ships and Unincorporated Ass'ns Identified on Schedule A*, 192 F. Supp. 3d 924, 935 (N.D. Ill. 2016).

186. *Id.*

187. *Id.* at 934.

188. *NBA Props, Inc. v. P'ships and Unincorporated Ass'ns Identified in Schedule "A,"* 549 F. Supp. 3d 790, 795 (N.D. Ill. 2021).

189. *See Asahi Metal Indus. Co. v. Super. Ct. of Cal.*, 480 U.S. 102, 116 (1987) (holding that because of the international context and heavy burden on the alien defendant, the exercise of personal jurisdiction by a California court in this instance would be unreasonable and unfair).

constitutional due process limits. As shown from the analysis above, U.S. courts lack general jurisdiction over Chinese e-commerce sellers, and their bases for having specific jurisdiction over such Chinese defendants are, at best, precarious. The expansion of domestic courts' jurisdiction over foreign defendants, in and of itself, poses a serious challenge to the legitimacy of the U.S. legal system in cross-border litigation.

C. Misjoinder

The third procedural issue in this line of cases is that the several hundred Chinese defendants have often been improperly joined in a single suit. Such joinder of distinct entities likely fails the “same transactions or occurrences” test. Joinder rules in federal courts are governed by the FRCP. Under Rule 20(a)(2), multiple defendants may be joined in a single action only if two requirements are satisfied: (1) the claims against them must be asserted “with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences,” and (2) there must be a “question of law or fact common to all defendants.”¹⁹⁰ The party seeking joinder bears the burden to prove both requirements.¹⁹¹ Furthermore, U.S. courts have “considerable discretion” to deny joinder “when it would not facilitate judicial economy and when different witnesses and documentary proof would be required.”¹⁹²

But joinder rules in intellectual property case are applied in a more nuanced way. The court in *Estee Lauder* explained that joinder of unconnected defendants in intellectual property cases is only appropriate where the alleged counterfeit products are the same, or the defendants use the same counterfeiting processes with respect to the intellectual property in question.¹⁹³ But the alleged sameness of the products or manufacturing processes is not sufficient to automatically constitute the “same series of transactions or occurrences” requirement under Rule 20 of the FRCP.¹⁹⁴ The “same series of transactions or occurrences” requires “shared, overlapping facts that give rise to each cause of action, and not just distinct, albeit

190. FED. R. CIV. P. 20(a)(2)(A)–(B).

191. *Estee Lauder Cosmetics Ltd. v. P’ships and Unincorporated Ass’ns Identified on Schedule A*, 334 F.R.D. 182, 185 (N.D. Ill. 2020).

192. *Acevedo v. Allsup’s Convenience Stores*, 600 F.3d 516, 522 (5th Cir. 2010).

193. *Estee Lauder*, 334 F.R.D. at 187.

194. *See, e.g., ThermaPure, Inc. v. Temp-Air, Inc.*, No. 10-CV-4724, 2010 WL 5419090, at *4 (N.D. Ill. Dec. 22, 2010) (stating that “Rule 20(a)’s requirement for a common transaction or occurrence is not satisfied where multiple defendants are merely alleged to have infringed the same patent or trademark”); *Slep-Tone Entm’t Corp. v. Roberto*, No. 12-cv-5750, 2013 WL 5748896, at *2–3 (N.D. Ill. Oct. 22, 2013); *Spread Spectrum Screening, LLC v. Eastman Kodak Co.*, No. 10 C 1101, 2010 WL 3516106, at *2 (N.D. Ill. Sept. 1, 2010); *SB Designs v. Reebok Int’l, Ltd.*, 305 F. Supp. 2d 888, 892 (N.D. Ill. 2004); *Magnavox Co. v. APF Elecs.*, 496 F. Supp. 29, 34 (N.D. Ill. 1980).

coincidentally identical, facts.”¹⁹⁵ Unless there is an actual link between the facts underlying each claim of infringement, independently developed products using differently sourced parts cannot be considered part of the same series of transaction, even if they are otherwise coincidentally identical.¹⁹⁶

But the precise boundaries of what conditions constitute the “same series of transactions or occurrences” in intellectual property case is still a topic of heated debate.¹⁹⁷ Some courts, when faced this line of cases, upheld the massive joinder of several hundred Chinese defendants by adopting a broad application of the “same series of transactions or occurrences” test.¹⁹⁸ For instance, the court in *Bicycle Peddler, LLC v. Does 1-12* upheld the plaintiff’s joinder motion by reasoning that the use of the word “series” in Rule 20 implies that the transactional link between parties may be more attenuated but still satisfies joinder requirements.¹⁹⁹ Similarly, the court in *Bose Corporation* also upheld the practice of massive joinders across industries, reasoning that Rule 20’s inclusion of the term “occurrence” allows plaintiffs to join all defendants who participate in the occurrence of

195. *Estee Lauder*, 334 F.R.D. at 185 (quoting *In re EMC Corp.*, 677 F.3d 1351, 1359 (Fed. Cir. 2012)).

196. In addition to finding that the same product or process is involved, to determine whether the joinder test is satisfied in an intellectual property case, courts could also consider whether the alleged acts of infringement occurred during the same time period, the existence of some relationship among the defendants, the use of identically sourced components, licensing or technology agreements between the defendants, overlap of the products’ or processes’ development and manufacture, and whether the case involves a claim for lost profits. The district court enjoys considerable discretion in weighing the relevant factors. See *In re EMC Corp.*, 677 F.3d at 1359–60.

197. The Supreme Court has issued opinions on a few cases which illustrate what constitute “the same transaction [or] occurrence,” but these opinions give only general guidance not suitable for the massive joinder in this line of cases. For example, in *United States v. Mississippi*, 380 U.S. 128 (1965), the United States by the Attorney General brought a voting-rights case against the State of Mississippi, the three members of the Mississippi State Board of Election Commissioners, and six county Registrars of Voters. The counties moved for severance and separate trials on the grounds that the United States improperly attempted to hold them jointly liable. But the Supreme Court denied this argument, holding that the joinders in this case were permissible under Rule 20 of the FRCP. The Court reasoned that because the counties allegedly had acted “as part of a state-wide system” that deprived colored people of their voting rights, the claims against the counties arose from “the same series of transactions or occurrences.” *Mississippi*, 380 U.S. 128 at 815–16. In other words, because the counties and state actors were working in tandem to implement a single state-wide system, the joinder in the case is reasonable.

198. See, e.g., *PTG Nevada, LLC v. Does 1-25*, No. 16 C 1614, 2016 WL 3521941, at *3 (N.D. Ill. June 28, 2016) (recognizing that the word “transaction” has flexible meaning and can involve a series of many occurrences, so all logically related events entitling a person to institute legal action against another are generally regarded as comprising a transaction or occurrence); *Glacier Films (USA), Inc. v. Does 1-29*, No. 15-cv-4016, 2015 WL 8989217, at *3 (N.D. Ill. Dec. 15, 2015); *reFX Audio Software v. Does 1-111*, No. 13 C 1795, 2013 WL 3867656, at *3 (N.D. Ill. July 23, 2013); *Zambezia Film Pty v. Does 1-65*, No. 13 C 1321, 2013 WL 4600385, at *4–5 (N.D. Ill. Aug. 29, 2013); *Bicycle Peddler, LLC v. Does 1-12*, 295 F.R.D. 274, 277–78 (N.D. Ill. 2013).

199. 295 F.R.D. at 278 (N.D. Ill. 2013).

unlawful “cooperative” mass harm, “despite the lack of a ‘transactional link.’”²⁰⁰ According to the *Bose* court, defendants who participate in mass counterfeiting abroad are subject to Rule 20 joinder, even if this circumstance was “inconceivable when Rule 20 was drafted.”²⁰¹

Other courts have pushed back against this expansive understanding of Rule 20 joinder. For instance, in *Estee Lauder Cosmetics Ltd. v. Partnerships and Unincorporated Associations Identified on Schedule A*, the court reversed the plaintiff’s motion for a TRO because it found the plaintiff’s joinder inappropriate based on the facts of the case.²⁰² Despite the plaintiff’s assertion that the defendants all belonged to “an interrelated group of counterfeiters working in active concert to knowingly and willfully manufacture, import, distribute, offer for sale, and sell [counterfeit] products,” the court found this claim unsubstantiated.²⁰³ The court first pointed out that the defendants do not “use the same product images and product descriptions” to advertise their products.²⁰⁴ Regarding the defendants who used similar images and descriptions for advertising purposes, the court held that these images and descriptions are “so generic that no inference of a connection between those defendants can be drawn.”²⁰⁵ The court reasoned that because the defendants were allegedly counterfeiting the same products, it was not surprising for them to use similar descriptions and images without working in concert.²⁰⁶ Although some defendants shared “unique images, unique word and sentence construction, or the same misspellings or grammar mistakes” that could lead to the inference that they were connected to one another, the defendants should not be automatically joined because they shared similar advertising strategies.²⁰⁷ The *Estee Lauder* court’s differentiation among the alleged counterfeit sellers should be followed in other cases that heedlessly join several hundred Chinese e-commerce sellers without factual basis.

Additionally, there is a strong policy argument in favor of a narrow interpretation of Rule 20. For instance, the *Estee Lauder* court voiced its

200. 334 F.R.D. 511, 516 (N.D. Ill. 2020).

201. *Id.*

202. 334 F.R.D. 182, 190 (N.D. Ill. 2020).

203. *Id.* at 184, 188.

204. *Id.*

205. *Id.* See also *In re EMC Corp.*, 677 F.3d 1351, 1359 (Fed. Cir. 2012) (“The sameness of the accused products is not enough to establish that claims of infringement arise from the ‘same transaction.’”); *Rudd v. Lux Products Corp.*, No. 09-cv-6957, 2011 WL 148052, at *3 (N.D. Ill. Jan. 12, 2011) (“Simply alleging that Defendants manufacture or sell similar products does not support joinder under Rule 20.”).

206. *Estee Lauder*, 334 F.R.D. at 188.

207. *Id.*

concerns that presenting several hundred defendants in one single lawsuit potentially undermines judicial economy.²⁰⁸ A court bears the burden to evaluate all the evidence submitted in a case and determine the appropriate damages, if any, owed by each defendant.²⁰⁹ When several hundred defendants are named in a single case, the ensuing facts and evidence presented and the variety of possible defenses could become unwieldy for a court to manage.²¹⁰ This burden is especially pronounced in cases involving motions for TRO and default judgment because these motions are often *ex parte* in practice, meaning that the defendants are often not involved in the discussion. As such, to ensure justice and protect the defendant's interest, courts must be more judicious in approaching TRO and default judgment motions, thereby requiring more time in consideration and adding more pressure on courts to weigh the parties' competing interests.²¹¹ Thus, contrary to some courts' reasoning,²¹² joining a massive number of defendants in a single case may in fact be injurious to judicial economy, even if it is technically legal.

In sum, in this line of cases, the several hundred e-commerce sellers based in China should not be jointly sued in a single case, because the plaintiffs likely cannot satisfy the joinder requirements set forth by Rule 20 of the FRCP. One of the requirements in Rule 20 is that the defendants' action must arise out of "the same transaction, occurrence, or series of transactions or occurrences." However, this is impossible to ensure in these cases, given the sheer number of defendants involved and the independence of each defendant's action. Furthermore, there is a possibility of undermining judicial economy by joining hundreds of defendants that are only tangentially connected. Therefore, the majority of the Chinese defendants in this line of cases has been improperly joined, in violation of their due process rights.

208. *Id.* at 189–90.

209. *Id.* at 189.

210. *See id.* (rejecting the plaintiff's argument that joinder in the case would lead to speedy and inexpensive resolution because joining hundreds of defendants in a single case in fact undermines judicial economy). *See also* Purzel Video GMBH v. Does 1-91, No. 4:12CV02292, 2013 WL 4775919, at *2 (E.D. Mo. Sept. 6, 2013) ("Rule 20(a)'s purpose of promoting judicial economy and trial convenience would not be served by allowing the number of defendants in this case because the ensuing discovery and variety of defenses could prove unwieldy for a single case.").

211. *See Estee Lauder*, 334 F.R.D. at 189–90 (noting that it is more burdensome for a court to uphold its duty to ensure equal justice under law when there are hundreds of defendants named).

212. *See Bose Corp. v. P'Ships & Unincorporated Ass'ns*, 334 F.R.D. 511, 517 (N.D. Ill. 2020) (arguing that joining the defendants promotes judicial economy because the defendants would not likely show up, and the court will likely enter default judgment for the plaintiff).

D. Inappropriate Granting of Preliminary Injunctions

The fourth and last major procedural issue that exists in this line of cases is the inappropriate granting of preliminary injunctions without granting of notice to Chinese defendants. A preliminary injunction is a provisional equitable remedy by which a court orders a litigant to perform, or refrain from performing, a particular act before the court's entry of final judgment.²¹³ Rule 65(a) of the FRCP permits a court to enter a preliminary injunction "only on notice to the adverse party." The Supreme Court has interpreted Rule 65(a)'s notice requirement to mean that the defendant must be given a "fair opportunity to oppose the application and to prepare for such opposition" in a hearing.²¹⁴ Rule 65(b)(3) also reads that if a TRO is issued without notice to the party against whom the order is sought, the subsequent motion for the preliminary injunction "must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character."

The plaintiffs in this line of cases often abused the structure set forth in Rule 65 by either failing to provide defendants with proper notice of the preliminary injunction hearing, or strategically limiting the preparation time given to the defendants before the hearing. In this line of cases, the plaintiffs almost always start with a motion for a TRO without serving notice to the Chinese defendants.²¹⁵ Thus, before the foreign defendants know of the action against them, their financial accounts are frozen pursuant to the TRO.²¹⁶ Then, before the TRO expires, the plaintiffs often move to dissolve the TRO and replace it with a preliminary injunction, the granting of which freezes the sellers' financial accounts for the entirety of the case.²¹⁷ Per Rule 65(b)(4), the hearing for the transfer from a TRO to a preliminary injunction is often set on a day shortly after the motion is filed to the court.²¹⁸ The plaintiffs usually do send notice of the hearing to the defendants as required by Rule 65(a).²¹⁹ However, these notices are often sent out late or only a few days before the hearing commences.

213. 42 AM JUR. 2D *Injunctions* § 9 (1962).

214. *Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers No. 70 of Alameda Cnty.*, 94 S.Ct. 1113, 1121 (1974). *See also Illinois ex rel. Hartigan v. Peters*, 871 F.2d 1336, 1340 (7th Cir. 1989) (noting that one court has stated, "notice should apprise a defendant of a hearing and provide adequate time to prepare a defense") (citing *SEC v. Capital Growth Co.*, 391 F. Supp. 593, 600 (S.D.N.Y. 1974)).

215. *See QIN BINWU (覃斌武)*, *supra* note 4, at 128.

216. *Id.*

217. *Id.* at 116, 128.

218. *See* FED. R. CIV. P. 65(b)(4) (requiring the courts to hear and decide the motion to dissolve the TRO "as promptly as justice requires"). *See also QIN BINWU (覃斌武)*, *supra* note 4, at 116 (noting that courts in this line of cases are required to decide such motions as soon as possible).

219. *QIN BINWU (覃斌武)*, *supra* note 4, at 128.

For instance, in *ABC Corporation v. Gyroor*, the plaintiffs filed a motion for a preliminary injunction on November 20, 2020.²²⁰ Four days later, on November 24, 2020, the court promptly entered a preliminary injunction for the plaintiffs, freezing the assets of all the defendants then identified.²²¹ However, one of the defendants was not served with the complaint until December 29, 2020, which was a month after the preliminary injunction hearing.²²²

Similarly, in *Zuru (Singapore) Pte. v. Individuals, Corporations, Limited Liability Companies, Partnerships, and Unincorporated Associations Identified on Schedule A*,²²³ the plaintiff filed for a preliminary injunction on May 27, 2021, after a court granted its motion for a TRO.²²⁴ The hearing for the preliminary injunction was scheduled on June 2, 2021.²²⁵ But the notice of the hearing and the summons to the 138 defendants were not sent out until May 30, which was only three days before the hearing.²²⁶ And, ironically, the notice and summons were both sent to the defendants via email, which is likely invalid under the Hague Convention as discussed.²²⁷

As these two cases show, it is doubtful that defendants were afforded proper notice and summons before such hearings, given that most of the defendants were in China. Even if the Chinese defendants received adequate notice before the hearing, there is still a concern that they were deprived of a “fair opportunity” to prepare their opposition.

Worse yet, most courts issue preliminary injunctions automatically, without considering if the notice requirement has been properly met, because Chinese defendants rarely have the proper notice or service to cause them to attend the hearing.²²⁸ It is highly likely that most plaintiffs know that the Chinese defendants often do not come to the hearing and thus take advantage of the defendants. To the author’s knowledge, out of the several hundred cases filed and the millions of the Chinese defendants who have lost their assets due to injunctions, only a handful of the defendants have decided to file for a subsequent motion to dissolve the preliminary injunction entered against them. But when the defendants have done so, their motions to dissolve have been granted precisely because of plaintiffs’ procedural

220. 51 F.4th 1365, 1370 (Fed. Cir. 2022).

221. *Id.* at 1370, 1376.

222. *Id.* at 1370.

223. Plaintiff’s Mem. in Supp. of Plaintiff’s Mot. for Entry of Default and Default J., No. 1:21-cv-02180, (N.D. Ill. June 21, 2021) (hereinafter *Zuru Plaintiff Memo*).

224. *See* QIN, *supra* note 4, at 7.

225. *See Zuru Plaintiff Memo* at *3.

226. *Id.* at *4.

227. *Id.*

228. *See* QIN, *supra* note 4, at 128.

violations, supporting the conclusion that this trial strategy is per se invalid.²²⁹

In sum, Rule 65(a) instructs that a court shall not grant a preliminary injunction if the defendant does not have notice of the injunction motion. However, in this line of cases, the plaintiffs are able to expedite a hearing for preliminary injunction. This is accomplished by first filing for a TRO without notice to the defendants, thereby limiting the period of notice given to the defendants before the hearing. Another tactic is to delay the receipt of notice until after the preliminary injunction is granted. This action is not only a violation of Rule 65(a)'s notice requirement in practice, but also an intentional exploitation of foreign defendants' vulnerability in the U.S. legal system.

V. CONCLUSION

This study on the recent wave of U.S. trademark infringement lawsuits involving several hundred e-commerce sellers based in China delves into the procedural issues that exist in these cases. It focuses solely on how the domestic trademark holder plaintiffs have been able to take advantage of foreign defendants and capture a windfall by exploiting certain procedural weakness in the U.S. legal system. The strategy implemented by the plaintiffs involves three steps: first, they would file a TRO to freeze these sellers' financial accounts; second, they would move to transfer the TRO into a preliminary injunction, prolonging the freezing of the sellers' financial accounts for the entirety of the case; lastly, the plaintiffs would move for default judgement, transferring defendants' assets in the financial accounts to the plaintiffs. This strategy has worked exceptionally well because, as the plaintiffs had expected, the vast majority of the Chinese sellers never appear before the courts to argue their cases.

Without delving into the plaintiffs' substantive arguments on the merits in such cases, the rulings are problematic because there exist four procedural issues that have gone largely unaddressed. First, the email service on the Chinese defendants is often invalid because China's objections to the Hague Convention prevents service by email on Chinese entities, and the FRCP, which governs service on foreign defendants, explicitly prohibits service methods that violate the Convention. Second, the courts issuing such rulings likely lack personal jurisdiction over Chinese defendants because the sellers are incorporated and principally conduct business in China, and they often

229. *See ABC Corp. v. P'ship and Unincorporated Ass'n Identified on Schedule "A,"* 51 F.4th 1365, 1369 (Fed. Cir. 2022) (explaining that because the required notice under Federal Rule of Civil Procedure 65(a) was not given, the court vacated the issuance of the Preliminary Injunction after the defendants appealed from the order entered by the court).

do not purposefully avail themselves into any U.S. states. Third, most of the defendants are likely improperly joined in mass because the defendants' actions often do not arise out of the "[same] transactions or occurrences" under the most persuasive reading of the governing law. Fourth, most of the preliminary injunctions are likely erroneously granted because the plaintiffs often do not deliver effective notice to the Chinese defendants. This is accomplished by waiting to serve the defendants by email until only a few days before the hearing of the motion, depriving the defendants of either the requisite notice or a fair opportunity to prepare their cases.

Despite these four procedural issues, cases using the exact same strategy continue to fill federal courts' dockets. Chinese sellers continue to fail to appear because of improper notice granted. Rulings continue to be entered in favor of the plaintiffs. Thus, a large amount of money continues to be siphoned out of Chinese sellers' financial accounts into the pockets of U.S. plaintiffs and their law firms. In short, this phenomenon impacts the procedural legitimacy of the U.S. legal system and affects cross-border e-commerce generally.

This line of cases warrants continued study. For instance, future research could focus on why most of the cases were filed in the Northern District of Illinois. Potential directions could be unearthing the specific precedents in this venue that give American defendants an edge, and comparing the different rulings rendered by the judges in this specific district. Future research could also analyze the law and economics aspect of this story, such as examining how the theory of collective action explains the prevalence of this line of cases and discussing potential solutions for the predicament to help the U.S. legal system reduce dubious lawsuits and save judicial resources. Furthermore, future discussions should also focus on what kind of constitutional due process protection foreign defendants enjoy in U.S. courts, and if the decisions in this line of cases pose threats to those constitutional rights.