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Schedule A Cases Can Provide Quick, Cost-Effective Relief Against Widespread Intellectual Property Theft on Online Marketplaces

By Tommy Martin

Protecting a company's intellectual property (IP) on online marketplaces can be like a game of Whack-a-Mole.¹ While certain marketplaces provide mechanisms for quickly and inexpensively removing unlawful listings from their platforms,² it does not take long for bad actors to pop up again with new listings on the same platforms.³ Fortunately, there is a powerful mechanism for reaching an even larger number of bad actors even more quickly than going directly to the online marketplace.⁴ They have been coined "Schedule A Cases" by the district court that has become the most popular venue for this type of litigation – the U.S. District Court for the District of Illinois.⁵

INJUNCTIVE RELIEF

Schedule A Cases have been used to seek injunctive relief against virtually every type of intellectual property (IP) theft, including copyright, trademark, and patent infringement.⁶ They are so named

because the defendants are frequently listed in a "Schedule A" that is filed under seal and attached to the complaint, rather than defendants being identified in the complaint itself. The plaintiff also may hide its own identity,⁷ or file the entire complaint under seal,⁸ to prevent the defendants from learning of the proceedings prematurely and taking evasive actions, such as emptying their accounts and creating new listings under new names.⁹ The intended (and actual) result is that the first time a defendant usually learns it was named in a Schedule A Case is after a temporary restraining order (TRO) has already issued against it.

Plaintiffs often seek ex parte TROs within days of filing their complaints, and sometimes even contemporaneously with their complaints.¹⁰ Success rates are high due to the lack of participation by the defendant at this point in the litigation.¹¹ This also speeds up rulings, which can result in TROs issuing in a matter of days, or even hours, after a complaint is filed.¹²

Online marketplaces also tend to act quickly after being notified of a TRO against their resellers, freezing all of the accused infringer's activity, including withdrawals from the accused infringer's own accounts.¹³ And because the only

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information plaintiff may have to identify a defendant is the alias that defendant uses to sell products on an online marketplace, courts typically allow plaintiffs to serve the complaint and TRO on defendants via alternative means, such as email or directly through the online marketplace.¹⁴ This makes serving a large number of defendants – many of whom may be located abroad – much easier for plaintiffs.

OTHER RELIEF

Because a TRO only lasts 14 days,¹⁵ plaintiffs promptly seek default judgments against no-show defendants and preliminary restraining orders (PRO) against those that make appearances.¹⁶ But online marketplaces have been known to continue freezing defendants' accounts well past the expiration of TROs, even if a PRO is not issued or even sought.¹⁷ This can be devastating for smaller defendants, as they are denied access to the very funds needed to defend themselves from the claims being levied against them.¹⁸

Initiating a Schedule A Case in a district court may be preferable to going to online marketplaces directly because it allows plaintiffs to obtain faster, more far-reaching results. Compared to Amazon's Patent Evaluation Express (APEX) process, for example, Schedule A Cases can result in TRO's issuing as quickly as the same day a complaint is filed, and can include hundreds of listings in a single complaint.¹⁹ Amazon's APEX process, on the other hand, takes approximately 14 weeks and only allows a plaintiff to accuse 20 listings at once.²⁰ But there are tradeoffs, of course. For example, a Schedule A plaintiff exposes itself to the potential for counterclaims and expensive, prolonged litigation if their claims are contested, whereas there is no discovery in Amazon's APEX process and the available defenses are extremely limited.²¹

Schedule A Cases can provide quick, cost-effective relief against widespread IP theft on online marketplaces.

Furthermore, Schedule A Cases are open to abuse due to the lack of adversarial proceedings in obtaining a TRO and the relaxed service requirements.²² One must therefore ensure to

follow the requirements of the Federal Rules of Civil Procedure, including by only naming defendants involved in infringing activities “arising out of the same transaction, occurrence, or series of transactions or occurrences” in patent cases.²³ This requirement is likely the most difficult for courts to police *sua sponte* because the defendants that are the subject of a Schedule A Case often are of the type that intentionally hide their true identities and interrelationships.²⁴ But this potential issue is easily addressed by simply filing multiple complaints against different groups of respondents,²⁵ which can often be done in the same court if the defendants are located abroad.²⁶

CONCLUSION

In sum, Schedule A Cases can provide quick, cost-effective relief against widespread IP theft on online marketplaces. Rights holders can, in a single action, freeze the assets and remove the listings of a large number of infringers in a matter of days. But, as with all district court litigation, caution must be taken to ensure compliance with the Federal Rules of Civil Procedure.

Notes

1. Ina Steiner, *Small Sellers Are Getting Swept Up as Brands “Weaponize” the Legal System*, ECOMMERCE-BYTES.COM (Jul. 16, 2023) (available at <https://www.ecommercebytes.com/2023/07/16/small-sellers-are-getting-swept-up-as-brands-weaponize-the-legal-system/>) (referring to attempts to go directly to online marketplaces as a game of “Whack-a-Mole”); Samuel Baird and Noel Paterson, *How Some Brands are Successfully – and Cost-Effectively – Combating Online Counterfeiters*, IPWATCHDOG.COM (Oct. 13, 2022) (describing the protection of brands on online marketplaces as being “like herding cats”).
2. Katherine Corry and Tommy Martin, *Prompt, Inexpensive Relief From Patent Infringement Available to Small Startups Through Amazon’s APEX Process*, 35 INT’L PROP. & TECH. LAW 3 (Mar. 2023).
3. Ina Steiner, *Small Sellers Are Getting Swept Up as Brands “Weaponize” the Legal System*, ECOMMERCEBYTES.COM (Jul. 16, 2023) (available at <https://www.ecommercebytes.com/2023/07/16/small-sellers-are-getting-swept-up-as-brands-weaponize-the-legal-system/>) (“So, even though the millions of listings are regularly taken down, more replace them with little or no disruption to sales, resulting in little or no net change.”);

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- Fu v. The Partnerships and Unincorporated Associations Identified on Schedule A, Case No. 1-24-cv-00592 at ECF No. 1 at 5 (Jan. 23, 2024 N.D. Ill.) (alleging that “Defendants will often register new online marketplace accounts under new aliases once they receive notice of a lawsuit”).
4. Samuel Baird and Noel Paterson, How Some Brands are Successfully – and Cost-Effectively – Combating Online Counterfeiters, IPWATCHDOG.COM (Oct. 13, 2022) (“The strategy is more effective than the ‘Whack-a-Mole’ game where you’re sending takedown notices to the platforms.”)
 5. See <https://www.ilnd.uscourts.gov/judge-cmp-detail.aspx?cmpid=1272> (providing templates for filing “Schedule A Cases” in the U.S. District Court for the District of Illinois); see also Eric Goldman, A SAD Scheme of Abusive Intellectual Property Litigation, 123 COLUM. L. REV. 183 at 195 (Nov. 20, 2023) (estimating that over 88% of Schedule A Cases filed since 1991 were filed in the Northern District of Illinois); Riddhi Setty and Isaiah Poritz, Brands Flock to Chicago Court in War on Internet Counterfeiters, BLOOMBERGLAW.COM (Apr. 5, 2023) (available at <https://news.bloomberglaw.com/ip-law/brands-flock-to-chicago-court-in-war-on-internet-counterfeiters>); Charlotte Kilpatrick et al., Illinois District Trademark Cases Blow Up, MANAGINGIP.COM (Feb. 12, 2021) (available at <https://www.managingip.com/article/2a5cy9i4u1e0icanwke0w/this-week-in-ip-illinois-tm-cases-soar-ip-rights-bring-riches-skinny-label-case-revived>).
 6. See, e.g., Bala Bangles, Inc. v. The Partnerships and Unincorporated Associations Identified on Schedule A, Case No. 1-23-cv-16721 (N.D. Ill.) (copyright, trademark, and design patent infringement). The vast majority of Schedule A Cases filed are for trademark infringement. See Eric Goldman, A SAD Scheme of Abusive Intellectual Property Litigation, 123 COLUM. L. REV. 183 at 195 (Nov. 20, 2023). And the vast majority of patent infringement cases are for design patents. See, e.g., Marko R. Zoretic and Jack Hendershott, “Schedule A” Cases: A Powerful Tool for Enforcing Design Patents, N.Y.L.J. at 1 (May 15, 2023). But plaintiffs also routinely file Schedule A Cases for utility patent infringement. See, e.g., Broadway Pine Brands LLC v. Oatslikeme et al., Case No. 2-23-cv-01750 (W.D. Pa.); XYZ Corporation v. The Partnerships and Unincorporated Associations Identified on Schedule A, Case No. 1-23-cv-15841 (N.D. Ill.); DCStar Inc v. huirankenlai, Case No. 1-23-cv-05937 (Aug. 23, 2023 N.D. Ill.)
 7. See, e.g., XYZ Corporation v. The Individuals, Partnerships and Unincorporated Associations Identified on Schedule A, Case No. 1-23-cv-24366, ECF No. 1 (Nov. 15, 2023 S.D. Fla.); Doe v. The Partnership and Unincorporated Associations Identified On Schedule A, ECF No. 1 (Nov. 13, 2023 N.D. Ill.).
 8. See, e.g., Easlick et al v. CJ Emerald et al., Case No. 2-23-cv-02000, ECF No. 1 (Nov. 20, 2023 W.D. Pa.); DCStar Inc v. huirankenlai, Case No. 1-23-cv-05937, ECF No. 1 (Aug. 23, 2023 N.D. Ill.).
 9. See, e.g., Fu v. The Partnerships and Unincorporated Associations Identified on Schedule A, Case No. 1-24-cv-00592 at ECF No. 1 at 5 (Jan. 23, 2024 N.D. Ill.) (alleging that “Defendants will often register new online marketplace accounts under new aliases once they receive notice of a lawsuit” and that “analysis of PayPal transaction logs from previous similar cases indicates that offshore infringers regularly move funds from U.S.-based PayPal accounts to China-based bank accounts outside the jurisdiction of this Court”); XYZ Corporation v. The Individuals, Partnerships, and Unincorporated Associations identified on Schedule A, Case No. 1-23-cv-24601, ECF No. 1 at 3, 6 (Dec. 5, 2023 S.D. Fla.) (alleging that “Defendants will continue to register or acquire new seller identification aliases and domain names for the purpose of selling and offering for sale goods bearing infringing and counterfeit reproductions of Plaintiff’s Patent unless preliminarily and permanently enjoined” and that “Defendants are likely to transfer or conceal their assets to avoid payment of any monetary judgment awarded to Plaintiff in order to avoid being detected and shut down”); Broadway Pine Brands LLC v. Oatslikeme et al., Case No. 2-23-cv-01750, ECF No. 1 at 13, 19 (Oct. 10, 2023 W.D. Pa.) (alleging that “Defendants will continue to register or acquire new seller identification aliases for the purpose of selling and offering for sale goods infringing at least one claim of the Plaintiff’s Patent unless preliminarily and permanently enjoined” and that “Defendants are likely to transfer or secrete their assets to avoid payment of any monetary judgment awarded to Plaintiff”).
 10. See, e.g., Fu v. The Partnerships and Unincorporated Associations Identified on Schedule A, Case No. 1-24-cv-00592 at ECF No. 6 (Jan. 29, 2023 N.D. Ill.) (motion for TRO filed 6 days after complaint); Bala Bangles, Inc. v. The Partnerships and Unincorporated Associations Identified on Schedule A, Case No. 1-23-cv-16721, ECF No. 12 (Dec. 19, 2023 N.D. Ill.) (motion for TRO filed 6 days after complaint); Shenzhen Yihong Lighting Co., Ltd. v. The Partnerships and Unincorporated Associations Identified on Schedule A, Case No. 1-23-cv-16703, ECF No. (Dec. 15, 2023 N.D. Ill.) (motion for TRO filed 3 days after complaint); Wang v. The Partnerships and Unincorporated Organizations in Schedule A, Case No. 8-23-cv-02787, ECF No. 15

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- (Dec. 13, 2023 M.D. Fla.) (motion for TRO filed 7 days after complaint); *Easlick et al v. CJ Emerald et al.*, Case No. 2-23-cv-02000, ECF No. 4 (Nov. 20, 2023 W.D. Pa.) (motion for TRO filed same day as complaint); *Broadway Pine Brands LLC v. Oatslikeme et al.*, Case No. 2-23-cv-01750, ECF No. 4 (Oct. 10, 2023 W.D. Pa.) (motion for TRO filed same day as complaint).
11. Marko R. Zoretic and Jack Hendershott, “Schedule A” Cases: A Powerful Tool for Enforcing Design Patents, *N.Y.L.J.* at 2 (May 15, 2023) (determining that TROs were granted in 85 of 87 Section A Cases in the Northern District of Illinois and 5 of 5 Schedule A Cases in the Southern District of New since 2022).
 12. See, e.g., *Fu v. The Partnerships and Unincorporated Associations Identified on Schedule A*, Case No. 1-24-cv-00592 at ECF Nos. 1 & 8 (N.D. Ill.) (16 days to obtain TRO); *Bala Bangles, Inc. v. The Partnerships and Unincorporated Associations Identified on Schedule A*, Case No. 1-23-cv-16721, ECF Nos. 1 & 21 (N.D. Ill.) (9 days to obtain TRO); *Shenzhen Yihong Lighting Co., Ltd. v. The Partnerships and Unincorporated Associations Identified on Schedule A*, Case No. 1-23-cv-16703, ECF Nos. 1 & 9 (N.D. Ill.); *Wang v. The Partnerships and Unincorporated Organizations in Schedule A*, Case No. 8-23-cv-02787, ECF Nos. 1 & 21 (M.D. Fla.); *XYZ Corporation v. The Individuals, Partnerships, and Unincorporated Associations identified on Schedule A*, Case No. 1-23-cv-24601, ECF Nos. 1 & 25 (S.D. Fla.) (42 days to obtain TRO); *Easlick et al v. CJ Emerald et al.*, Case No. 2-23-cv-02000, ECF Nos. 1 & 22 (W.D. Pa.) (TRO issued same day as complaint); *Broadway Pine Brands LLC v. Oatslikeme et al.*, Case No. 2-23-cv-01750, ECF Nos. 1 & 18 (W.D. Pa.) (1 day to obtain TRO).
 13. See, e.g., Eric Goldman, A SAD Scheme of Abusive Intellectual Property Litigation, 123 *COLUM. L REV.* 183 at 190-191 (Nov. 20, 2023); Ina Steiner, Small Sellers Are Getting Swept Up as Brands “Weaponize” the Legal System, *E-COMMERCEBYTES.COM* (Jul. 16, 2023); Marko R. Zoretic and Jack Hendershott, “Schedule A” Cases: A Powerful Tool for Enforcing Design Patents, *N.Y.L.J.* at 3 (May 15, 2023).
 14. See, e.g., Eric Goldman, A SAD Scheme of Abusive Intellectual Property Litigation, 123 *COLUM. L REV.* 183 at 197 (Nov. 20, 2023); Ina Steiner, Small Sellers Are Getting Swept Up as Brands “Weaponize” the Legal System, *E-COMMERCEBYTES.COM* (Jul. 16, 2023); Marko R. Zoretic and Jack Hendershott, “Schedule A” Cases: A Powerful Tool for Enforcing Design Patents, *N.Y.L.J.* at 3 (May 15, 2023).
 15. See *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.”).
 16. See, e.g., Eric Goldman, A SAD Scheme of Abusive Intellectual Property Litigation, 123 *COLUM. L REV.* 183 at 192 (Nov. 20, 2023); Marko R. Zoretic and Jack Hendershott, “Schedule A” Cases: A Powerful Tool for Enforcing Design Patents, *N.Y.L.J.* at 3 (May 15, 2023).
 17. See, e.g., Eric Goldman, A SAD Scheme of Abusive Intellectual Property Litigation, 123 *COLUM. L REV.* 183 at 190-191 (Nov. 20, 2023); Marko R. Zoretic and Jack Hendershott, “Schedule A” Cases: A Powerful Tool for Enforcing Design Patents, *N.Y.L.J.* at 3 (May 15, 2023).
 18. See, e.g., Eric Goldman, A SAD Scheme of Abusive Intellectual Property Litigation, 123 *COLUM. L REV.* 183 at 190-191 (Nov. 20, 2023).
 19. See, e.g., *Easlick et al v. CJ Emerald et al.*, Case No. 2-23-cv-02000, ECF Nos. 1 & 22 (W.D. Pa.) (TRO issued against 67 defendants same day as complaint filed); *Emoji Co. v. Individuals, Corps., Ltd. Liab. Cos., P’ships, & Uninc. Ass’ns Identified on Schedule A Hereto*, Case No. 21-cv-01739, ECF Nos. 1 & 31 (N.D. Ill.) (TRO issued against 250 defendants 36 days after complaint filed).
 20. See Amazon Patent Evaluation Express Procedure (Version 230202) (on file with author).
 21. See Amazon Patent Evaluation Express Procedure at 3 (Version 230202) (on file with author). The closest thing to an invalidity defense available in Amazon’s APEX process is a seller’s ability to show that “the Accused Products (or physically identical products) were on sale one year or more before [an] asserted patent’s earliest effective filing date.”
 22. See, e.g., Eric Goldman, A SAD Scheme of Abusive Intellectual Property Litigation, 123 *COLUM. L REV.* 183 at 197-202 (Nov. 20, 2023); Ina Steiner, Small Sellers Are Getting Swept Up as Brands “Weaponize” the Legal System, *E-COMMERCEBYTES.COM* (Jul. 16, 2023); Marko R. Zoretic and Jack Hendershott, “Schedule A” Cases: A Powerful Tool for Enforcing Design Patents, *N.Y.L.J.* at 3 (May 15, 2023).
 23. *FED. R. CIV. P.* 20(a)(2)(A).
 24. See, e.g., Eric Goldman, A SAD Scheme of Abusive Intellectual Property Litigation, 123 *COLUM. L REV.* 183 at 185 (Nov. 20, 2023); Marko R. Zoretic and Jack Hendershott, “Schedule A” Cases: A Powerful Tool for Enforcing Design Patents, *N.Y.L.J.* at 2 (May 15, 2023).
 25. See, e.g., *Aquapaw LLC v. Allnice et al.*, Case No. 2-20-cv-01954 (W.D. Pa.); *Aquapaw Brands LLC v. Tiktoks et al.*, Case No. 2-21-cv-00696 (W.D. Pa.); *Aquapaw Brands LLC v. Flo Pet et al.*, Case No. 2-21-cv-00988
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(W.D. Pa.); AquaPaw Brands LLC v. Yan-Peng et al.,
Case No. 2-21-cv-01784 (W.D. Pa.); AquaPaw Brands
LLC v. Joyi Yan et al., Case No. 2-22-cv-01607 (W.D.

Pa.); AquaPaw Brands LLC v. Pusifica et al., 2-23-cv-
00538 (W.D. Pa.).
26. See 35 U.S.C. § 293; FED. R. CIV. P. 4(k)(2).

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