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Taylor J. Pollier

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Rule 4(k)(2) and the Online Marketplace: An Efficient and Constitutional Route to Personal Jurisdiction over Foreign Merchants of Counterfeits

*Taylor J. Pollier**

ABSTRACT

The online marketplace has exploded as an efficient way for U.S. consumers to get the goods they need and want delivered directly to their doors. At the same time, the prevalence of counterfeit goods offered for sale on those marketplaces has grown. Companies in the United States that own the intellectual property rights to products being counterfeited online often use various methods to stop the infringement before court intervention is necessary. Ultimately, however, those companies may need to sue the infringing party to enforce their rights. Without the 1993 addition of Federal Rule of Civil Procedure 4(k)(2), that would not be possible in many situations.

Rule 4(k)(2) serves as the federal long-arm statute, and it is often the best way for aggrieved intellectual property holders in the United States to argue for personal jurisdiction over foreign merchants violating their IP rights. Rule 4(k)(2) bridges the gap where a foreign defendant has sufficient contacts with the United States as a whole, but not sufficient contacts with any particular state to justify personal jurisdiction under any state's long-arm statute. The Rule requires that the defendant is not subject to jurisdiction in any state's courts of general jurisdiction, but that can be a tall order for a plaintiff who does not know the internal operations of the foreign company. To remedy this, courts employ a burden-shifting analysis that requires that the plaintiff make only a prima facie showing that the defendant is not subject to jurisdiction in any state's courts of general jurisdiction.

This Article calls for a more plaintiff-favorable approach wherein the courts presume that the defendant is not subject to jurisdiction in any state's courts of general jurisdiction. This interpretation of Rule 4(k)(2) favors economy and efficiency and accords with the purpose of the Rule. This Article further shows that Rule 4(k)(2) ought to be interpreted as liberally as possible, with constitutional due process providing a limit for its use.

* J.D. Candidate, Thomas R. Kline School of Law of Duquesne University, 2023.

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I. INTRODUCTION

Federal Rule of Civil Procedure 4(k)(2) bridges a personal jurisdiction gap first found in the 1993 Supreme Court Case *Omni Capital International, Ltd. v. Rudolph Wolff & Co., Ltd.*¹ Omni Capital, a New York firm and defendant in the lawsuit, sought to join two English defendants in the case who both had contacts with the United States, but insufficient contacts with the forum state, Louisiana, to justify personal jurisdiction under the state's long-arm statute.² Because the exclusion of the London co-defendants created an unfair result, the Supreme Court stated that "those who propose the Federal Rules of Civil Procedure and . . . Congress" should work to modify the rules³ governing personal jurisdiction.⁴ The rule makers and Congress followed suit in a 1993 amendment

1. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments); *Omni Cap. Int'l, Ltd. v. Rudolph Wolff & Co.*, 484 U.S. 97, 108 (1987).

2. *Omni Cap. Int'l, Ltd.*, 484 U.S. at 108.

3. The Supreme Court proposes amendments to the Federal Rules of Civil Procedure to Congress by May 1 each year for consideration, pursuant to the Rules Enabling Act. See 28 U.S.C. § 2074. Unless Congress acts to modify or block amendments, they take effect on December 1 of that same year. See *id.* Generally, amendments the Supreme Court submits to Congress are at the recommendation of the Judicial Conference of the United States, comprised of federal judges from every circuit, and presided over by the Chief Justice of the Supreme Court. See 28 U.S.C. § 331. In turn, the Judicial Conference is empowered to create advisory committees who consider various sets of federal rules and recommend amendments to the Conference. See 28 U.S.C. § 2073.

4. *Omni Cap. Int'l*, 484 U.S. at 111.

to the Federal Rules of Civil Procedure.⁵ Rule 4(k)(2) now serves as a federal long-arm statute for claims arising under a federal question.⁶

Much has changed since 1993, and the world has seen the rise of the internet age.⁷ Commerce has shifted to take advantage of the conveniences of life in this modern time, and with that, a new era of international commerce has emerged.⁸ With a few clicks of a mouse, consumers can order a product from the other side of the world and have it shipped directly to their doorstep faster than ever before.⁹ While this increase in internet commerce has afforded us the comfort and ease we have now come to expect, unfortunately U.S. merchants have seen a dramatic increase in infringement of the intellectual property rights of their products.¹⁰ Many merchants on Amazon, Alibaba, eBay, and Wish offer products for purchase in the United States that violate domestic trademark and other intellectual property rights of U.S. companies.¹¹ Rule 4(k)(2) may offer a sound route for aggrieved trademark holders seeking to litigate the infringement in federal court when the infringing merchant is a foreign party. However, the reach of 4(k)(2) is narrow: the plaintiff's claim must arise under federal law.¹² Additionally, the defendant must have sufficient contacts with the United States to pass constitutional due process muster, but not enough contacts with any one state that subjects the defendant to that state's long-arm statute.¹³

Due process requires that a defendant have some "minimum contacts"¹⁴ with the forum and that they "purposefully directed"¹⁵ those actions. When U.S. companies bring an infringement action in

5. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

6. *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1294 (Fed. Cir. 2012).

7. Max Roser et al., *Internet*, OUR WORLD IN DATA, <https://ourworldindata.org/internet> (last visited Feb. 12, 2022).

8. Erica D. Klein & Anna K. Robinson, *Combating Online Infringement: Real-World Solutions for an Evolving Digital World*, A.B.A.: LANDSLIDE (Apr. 1, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2019-20/march-april/combating-online-infringement-real-world-solutions-evolving-digital-world/.

9. See generally AMAZON, <https://www.amazon.com/> (last visited Feb. 12, 2022); ALIBABA, <https://www.alibaba.com> (last visited Feb. 12, 2022); EBAY, <https://www.ebay.com/> (last visited Feb. 12, 2022).

10. *Trademark Infringement Rising Year-on-Year, Says CompuMark Report*, CLARIVATE (Jan. 14, 2020), <https://clarivate.com/compumark/news/trademark-infringement-rising-year-on-year-says-compumark-report/>.

11. See Klein & Robinson, *supra* note 8.

12. Mark B. Kravitz, *National Contacts and the Internet: The Application of FRCP 4(k)(2) to Cyberspace*, 7 U. BALT. INTELL. PROP. L.J. 55, 56 (1998).

13. *Id.* at 56–57.

14. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

15. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

federal court against merchants, the defendants often move to dismiss for lack of personal jurisdiction, arguing that they did not target any particular state, but instead just hired the third-party platform, which sells the product wherever it happens to sell the product.¹⁶ Rule 4(k)(2) may be the best method for U.S. plaintiffs to advocate for personal jurisdiction over these defendants in federal court.¹⁷ However, courts are not unified in their approach to analyzing a Rule 4(k)(2) argument.¹⁸

This Article argues that Rule 4(k)(2) should be construed liberally to allow for the burden of proof in personal jurisdiction disputes to shift to the defendant when the plaintiff makes a prima facie showing that the Rule applies. This burden-shifting approach advances economy, efficiency, and the purpose of Rule 4(k)(2). Moreover, 4(k)(2) is not overly broad because it is confined by due process under the Constitution. Section II.A of this Article discusses the factual background surrounding the growing problem of foreign infringement and the devastating results it can have on intellectual property rights holders.¹⁹ Section II.B provides the legal background to Rule 4(k)(2), particularly the requirement that the defendant be subject to personal jurisdiction in no state's court of general jurisdiction ("negation requirement") and the due process concerns under the Rule.²⁰ Section III.A suggests a framework for courts to properly shift the burden of production when personal jurisdiction is disputed under Rule 4(k)(2).²¹ Section III.B addresses concerns that Rule 4(k)(2) is overly broad and that the Rule "guarantees" jurisdiction,²² and finally, Part IV contains concluding remarks.²³

II. BACKGROUND

A. The Growing Problem of Online Infringement

In 2019, a study found that 85% of the brands represented in the study had suffered from trademark infringement, a rise of 15% over

16. See, e.g., *Ouyeinc Ltd. v. Alucy*, No. 20-C-3490, 2021 WL 2633317, at *4 (N.D. Ill. June 25, 2021); *Carson Optical, Inc. v. RQ Innovasion Inc.*, No. 16-CV-1157, 2020 WL 1516394, at *2 (E.D.N.Y. Mar. 30, 2020).

17. FED. R. CIV. P. 4(k)(2).

18. Compare *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 41 (1st Cir. 1999), with *ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir., *as amended*, July 2, 2001).

19. See *infra* Section II.A.

20. See *infra* Section II.B.

21. See *infra* Section III.A.

22. See *infra* Section III.B.

23. See *infra* Part IV.

a two-year period.²⁴ This growth comes as little surprise in the internet age; the speed at which an infringement can occur and become known to the public is greater than ever before.²⁵ An infringing trademark can cause consumer confusion, loss of brand reputation, and direct loss of revenue, potentially having a devastating effect on the party owning the brand.²⁶

A party wary of trademark infringement has a few options.²⁷ First, the party may register the trademark with the United States Patent and Trademark Office.²⁸ Second, the party may employ site-specific protection measures such as Amazon Brand Registry, Amazon Project Zero, eBay Verified Rights Owner Program, and Alibaba Intellectual Property Protection Platform.²⁹ But, while using these measures is free for the party, they are “not foolproof,” allowing parties only to remove “readily identifiable, low-hanging infringement fruit” from the online marketplace.³⁰ More detailed monitoring for infringing products on those websites can be an ongoing, costly process, involving training in-house teams to detect infringement and consider fair use before issuing takedown notices.³¹ Third, and in response to that problem, a market has emerged of “brand protection” firms that offer a suite of intellectual property protection services.³² These services are more sophisticated than those that the online marketplaces offer, and they often include machine learning and artificial intelligence-empowered

24. CLARIVATE, *supra* note 10.

25. See Klein & Robinson, *supra* note 8.

26. CLARIVATE, *supra* note 10.

27. See Klein & Robinson, *supra* note 8.

28. See *Online Brand Protection: Challenges and Solutions*, CORSEARCH (Apr. 11, 2021), <https://corsearch.com/online-brand-protection-challenges-and-solutions/>.

29. See Klein & Robinson, *supra* note 8. Amazon Brand Registry allows sellers to “use information about [their] brand to proactively remove suspected infringing or inaccurate content.” AMAZON BRAND REGISTRY, <https://brandservices.amazon.com> (last visited Feb. 12, 2022). Amazon Project Zero uses “machine learning [and] automated protections [that] continuously scan [Amazon] stores and proactively remove suspected counterfeits.” AMAZON PROJECT ZERO, <https://brandservices.amazon.com/projectzero> (last visited Feb. 12, 2022). The eBay Verified Rights Owner Program “allows owners of intellectual property (IP) rights and their authorized representatives to report eBay listings that may infringe on those rights.” *Verified Rights Owner Program*, EBAY, <https://pages.ebay.com/seller-center/listing-and-marketing/verified-rights-owner-program.html> (last visited Feb. 12, 2022). Alibaba’s Intellectual Property Protection Platform allows sellers who have submitted proof of identity and documentation of intellectual property rights to “submit takedown notices against suspected infringing product listings” for removal. *IPP Platform Instructions*, ALIBABA GROUP IP PROTECTION PLATFORM, <https://ipp.alibabagroup.com/instruction/en.htm#part2> (last visited Feb. 12, 2022).

30. Klein & Robinson, *supra* note 8.

31. *Id.*

32. See, e.g., *Anti-counterfeiting*, BRANDSHIELD, <https://www.brandshield.com/products/anti-counterfeiting/> (last visited Jan. 2, 2022).

software capable of scanning sites like Amazon, eBay, Alibaba, and Wish in pursuit of potential offenders.³³

Those are great options for the proactive trademark holder, but what of the party that has already suffered harm at the hands of an infringer? Moreover, although these services might discourage counterfeiters from posting products, they do not prevent it.³⁴ What of the trademark holder whose claim has been denied by the proprietors of the sites allowing the violation of the trademark right? The best way for such a party to stop the counterfeit sales is to obtain a judgment from a court.³⁵ Three quarters of polled brand owners reported trademark disputes that led to litigation.³⁶ However, litigation presents a new problem for U.S. trademark holders; when the alleged infringing party is located outside the United States, as is often the case,³⁷ the trademark holder may have difficulty bringing the alleged infringing party into court in the United States. This article contemplates the situation wherein a U.S. plaintiff and intellectual property holder seeks to hold an alleged foreign infringer (who, for example, operated through an online marketplace like Amazon) liable for damages in a U.S. federal court even when the foreign party has no “minimum contacts” with any particular state. Prior to the 1993 amendment to the Federal Rules of Civil Procedure adding Rule 4(k)(2), holding a foreign infringer liable would have been impossible.³⁸ However, Rule 4(k)(2) now allows for this type of personal jurisdiction,³⁹ and ought to be used to allow for the redress of infringement of intellectual property rights in this situation.

B. Personal Jurisdiction over Foreign Defendants & Rule 4(k)(2)

A court hearing a case must have personal jurisdiction over the defendant to enter a valid, enforceable judgment.⁴⁰ To satisfy the requirements of personal jurisdiction, a court must comply with the statute controlling the court’s jurisdictional reach and with the United States Constitution.⁴¹ The Due Process Clause of the

33. *See id.*

34. *See id.*

35. *See generally* Spin Master, Ltd. v. Zobmondo Ent., LLC, 944 F. Supp. 2d 830 (C.D. Cal. 2012).

36. CLARIVATE, *supra* note 10.

37. *See, e.g.*, Viahart LLC v. P’ships and Unincorporated Ass’ns Identified on Sched. “A”, No. 19-CV-8181, 2021 WL 5113935, at *1 (N.D. Ill. Nov. 3, 2021).

38. FED. R. CIV. P. 4(k)(2) (advisory committee’s note to 1993 amendments).

39. FED. R. CIV. P. 4(k)(2).

40. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011).

41. *See* Rogers v. Indiana, 996 F.3d 812, 818 (7th Cir. 2021).

Constitution protects the individual's right not to be subject to a judgment in a jurisdiction where a defendant has insufficient "contacts, ties, or relations."⁴² The principal consideration for courts determining whether an exercise of personal jurisdiction over a defendant would be constitutional is whether the defendant's contacts or ties with the forum are sufficient to make maintenance of the suit "reasonable and just under our traditional notions of fair play and substantial justice."⁴³ A court exercising personal jurisdiction over a business that "purposefully avails itself of the privilege of conducting activities within the forum State" is generally proper.⁴⁴ In determining whether a defendant has "purposefully availed" itself of the benefits and protections of the laws of a forum, courts consider "whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."⁴⁵ Because the states are sovereignties separate from the United States as a whole, this can lead to situations in which a "defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."⁴⁶ The Supreme Court, in *J. McIntyre Machinery, Ltd. v. Nicastro*, found that this would be an exceptional situation because "foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums."⁴⁷ However, the Supreme Court has yet to enter an internet-related personal jurisdiction decision.⁴⁸

Federal Rule of Civil Procedure 4(k)(2) provides a bridge to personal jurisdiction where defendants avail themselves of the laws of the United States overall, but not of any particular state.⁴⁹ Rule 4(k)(2) was added to the Federal Rules of Civil Procedure in 1993 in response to a recommendation the Supreme Court made in *Omni Capital International, v. Rudolf Wolff & Co., Ltd.*⁵⁰ Rule 4(k)(2) "corrects a gap in the enforcement of federal law."⁵¹ The advisory committee noted that a gap existed in a situation where a potential defendant was a non-resident of the United States having sufficient

42. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

43. *Id.* at 320.

44. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

45. *J. McIntyre Mach., Ltd.*, 564 U.S. at 884.

46. *Id.*

47. *Id.* at 884–85.

48. *See Walden v. Fiore*, 571 U.S. 277, 290 n.9 (2014) ("We leave questions about virtual contacts for another day.")

49. FED. R. CIV. P. 4(k)(2).

50. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

51. *Id.*

contacts with the nation to justify bringing that defendant into court, but where the defendant did not have sufficient contacts with any state sufficient to support personal jurisdiction there.⁵² The Rule, titled “Federal Claim Outside State-Court Jurisdiction,” provides:

For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if the defendant is not subject to jurisdiction in any state’s courts of general jurisdiction, and exercising jurisdiction is consistent with the United States Constitution and laws.⁵³

This Rule constitutes part of the federal long-arm statute and allows a district court to exercise personal jurisdiction even when a defendant does not have sufficient contacts with the forum when: “(1) the plaintiff’s claim arises under federal law, (2) the defendant is not subject to personal jurisdiction in the courts of any state, and (3) the exercise of jurisdiction satisfies due process requirements.”⁵⁴

While this reach may be narrow, in the contemporary internet age, a class of defendants has emerged who may be the perfect candidates for the application of Rule 4(k)(2).⁵⁵ Foreign merchants who use an online marketplace to offer products for purchase in the U.S. market that violate U.S. intellectual property rights of U.S. companies may fall into the purview of the Rule.⁵⁶ When those U.S. companies bring an infringement action in federal court against the merchants, the defendants often move to dismiss for lack of personal jurisdiction, arguing that they did not target any particular state, but that they just hired the third-party platform that sells the product to a purchaser, wherever she may be.⁵⁷

While the first requirement for personal jurisdiction pursuant to Rule 4(k)(2) (that the plaintiff’s claim arises under federal law) is established in cases alleging infringement of federal intellectual property laws, the other two requirements require closer analysis before a court can properly exercise personal jurisdiction. This

52. *Id.*

53. FED. R. CIV. P. 4(k)(2).

54. *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1294 (Fed. Cir. 2012).

55. *See, e.g.*, *ABG EPE IP, LLC v. 3C Smart Store*, No. 1:21-CV-1510, 2021 WL 2452636, at *3 (N.D. Ga. Apr. 17, 2021); *but see Carson Optical, Inc. v. RQ Innovation Inc.*, No. 16-CV-1157, 2020 WL 1516394, at *7 (E.D.N.Y. Mar. 30, 2020).

56. *See Klein & Robinson, supra* note 8.

57. *See, e.g., Ouyeinc Ltd. v. Alucy*, No. 20-C-3490, 2021 WL 2633317, at *4 (N.D. Ill. June 25, 2021).

Article considers those two requirements and how courts analyze them.

1. The Negation Requirement

When a defendant challenges personal jurisdiction in a suit, proving whether the defendant is not subject to personal jurisdiction in any state's courts of general jurisdiction (sometimes called the "negation requirement") poses practical difficulties for plaintiffs.⁵⁸ When a defendant challenges personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), the plaintiff ordinarily bears the burden of establishing that the court has personal jurisdiction over the defendant.⁵⁹ In the case where the plaintiff believes that the defendant is not subject to personal jurisdiction in any one state, but in the United States as a whole, that plaintiff may assert jurisdiction under Rule 4(k)(2).⁶⁰ Under the second Rule 4(k)(2) requirement, a plaintiff must prove that the defendant is not subject to personal jurisdiction in any of the states.⁶¹ This is quite a heavy burden, particularly because the defendant, and not the plaintiff, possesses the necessary information.⁶² But, shifting the burden to the defendant threatens to force the defendant to "choose between conceding its potential amenability to suit in federal court (by denying that any state court has jurisdiction over it) or conceding its potential amenability to suit in some identified state court."⁶³

The First Circuit, in response to this problem, devised a burden-shifting analysis wherein a plaintiff seeking to prove personal jurisdiction under Rule 4(k)(2) must make a prima facie showing: "(1) that the claim asserted arises under federal law, (2) that personal jurisdiction is not available under any situation-specific federal statute, and (3) that the putative defendant's contacts with the nation as a whole suffice to satisfy the applicable constitutional requirements."⁶⁴ As part of this showing, a plaintiff "must certify that, based on the information that is readily available to the plaintiff and his counsel, the defendant is not subject to suit in the courts

58. See *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico*, 563 F.3d 1285, 1294 (Fed. Cir. 2009).

59. *Id.*

60. FED. R. CIV. P. 4(k)(2).

61. *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 40 (1st Cir. 1999).

62. *Synthes*, 563 F.3d at 1294.

63. *Swiss Am. Bank*, 191 F.3d at 41. However, a defendant could also maintain that it does not have sufficient contacts with the United States as a whole to support personal jurisdiction constitutionally.

64. *Id.*

of general jurisdiction of any state.”⁶⁵ When a plaintiff makes this prima facie showing, the burden of production shifts to the defendant to offer evidence that either there is at least one state where it is subject to personal jurisdiction or that it has insufficient contacts with the United States as a whole to support a constitutional exercise of personal jurisdiction.⁶⁶ The Fourth Circuit has adopted the same burden-shifting scheme.⁶⁷

The Seventh Circuit adopted a similar burden-shifting scheme, but with a standard more favorable to plaintiffs.⁶⁸ Under that court’s jurisprudence, although a defendant “[n]aming a more appropriate state would amount to a consent to personal jurisdiction there,” when the “defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2).”⁶⁹ The Fifth,⁷⁰ Sixth,⁷¹ Ninth,⁷² Eleventh,⁷³ and D.C.⁷⁴ Circuits have adopted this approach as well. Provided the defendant has sufficient contacts with the United States as a whole, the Seventh Circuit’s burden-shifting framework allows for greater efficiency than the First Circuit’s because a personal jurisdiction determination can be made immediately when a defendant either admits to a proper forum or refuses to do so.⁷⁵ Perhaps most efficiently of all, the U.S. District Court for the Northern District of Georgia, Atlanta Division has issued a string of ex parte temporary restraining orders over the past few years, finding that foreign merchants are subject to personal jurisdiction under Rule 4(k)(2) based solely on the plaintiffs’ affidavits.⁷⁶

65. *Id.*

66. *Id.* at 42.

67. *See* Base Metal Trading v. Ojsc Novokuznetsky Aluminum Factory, 283 F.3d 208, 215 (4th Cir. 2002).

68. *ISI Int’l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir., *as amended*, July 2, 2001).

69. *Id.*

70. *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 651 (5th Cir. 2004).

71. *Lyngaas v. Ag*, 992 F.3d 412, 422 (6th Cir. 2021).

72. *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 461 (9th Cir. 2007).

73. *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1218 n.22 (11th Cir. 2009).

74. *Mwani v. bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005).

75. *See* *Viahart LLC v. P’ships and Unincorporated Ass’ns Identified on Sched. “A”*, No. 19-CV-8181, 2021 WL 5113935, at *3 (N.D. Ill. Nov. 3, 2021) (finding 4(k)(2) jurisdiction improper where plaintiff attempted to invoke 4(k)(2), but defendant admitted to having sold a product via Amazon in Maryland); *NOCO Co. v. Shenzhen Valuelink E-Com. Co., Ltd.*, No. 1:20-CV-49, 2021 WL 4699088, at *3 (N.D. Ohio July 22, 2021) (finding 4(k)(2) jurisdiction where the defendant used Amazon to sell products, but refused to name a state in which jurisdiction would be proper).

76. This court uses the same language in justifying ruling on ex parte temporary restraining orders without notice to the defendant and finding “a significant amount of evidence pertaining to the counterfeiting activity is in electronic form, and therefore subject to

In sum, after the plaintiff has made a prima facie showing of the applicability of Rule 4(k)(2), the Seventh Circuit's burden-shifting scheme puts the burden on the party with better access to the evidence: the defendant.⁷⁷ This makes the process of determining whether the court has personal jurisdiction over the defendant more efficient and less costly because it requires no jurisdictional discovery.⁷⁸ Furthermore, this application of 4(k)(2) aligns with the purpose of the Rule itself: to broaden the jurisdiction of federal courts in federal question cases when foreign defendants are not subject to the jurisdiction of any state, and the exercise of personal jurisdiction would not offend due process.⁷⁹

2. Due Process Requirements

Some courts analyze the due process requirement before they analyze the negation requirement.⁸⁰ Courts employing this approach find that if the defendant's contacts do not satisfy due process, it is not necessary to determine whether the requirements for application of Rule 4(k)(2) are met.⁸¹ The Due Process Clause of the Fifth Amendment restricts a federal court's exercise of personal jurisdiction over a defendant,⁸² requiring "that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party."⁸³ Federal courts, however, are largely limited to the reach of their host state's long-arm statute.⁸⁴ Thus, the Supreme Court has treated cases brought in federal court as if they had been brought in state court.⁸⁵ The Supreme Court has not yet ruled on what restrictions circumscribe the federal courts' exercise of personal jurisdiction with respect to the Fifth

quick, easy, and untraceable destruction by the Defendants." *Est. of Marilyn Monroe, LLC v. 123oilpainting*, No. 1:21-CV-3824, 2021 WL 5033827, at *2 (N.D. Ga. Sept. 22, 2021); *Sportswear Co. - S.p.A v. Act as Purchasing Agency*, No. 1:21-CV-00465, 2021 WL 2666885, at *2 (N.D. Ga. Feb. 2, 2021); *Moncler S.p.A v. A15720789095*, No. 1:20-CV-2498, 2020 WL 6481537, at *2 (N.D. Ga. June 15, 2020).

77. *See ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir., *as amended*, July 2, 2001).

78. *Id.* (finding that "[t]his procedure makes it unnecessary to traipse through the 50 states, asking whether each could entertain the suit").

79. FED. R. CIV. P. 4(k)(2).

80. *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico*, 563 F.3d 1285, 1295 (Fed. Cir. 2009).

81. *Id.*

82. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619–20 (1992); *Antonini v. Ford Motor Co.*, No. 3:16-CV-2021, 2017 WL 3633287, at *2 (M.D. Pa. Aug. 23, 2017) (citing *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783–84 (2017)).

83. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

84. *See* FED. R. CIV. P. 4(k)(1)(A).

85. *See, e.g., Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 463–64 (1985).

Amendment.⁸⁶ Circuits that have considered this question have found that the analysis is materially the same as the analysis under the Fourteenth Amendment's Due Process Clause:⁸⁷ a minimum contacts test and a "reasonableness" inquiry.⁸⁸ The only difference is that while the Fourteenth Amendment limits jurisdiction over a defendant with insufficient contacts in a state, the Fifth Amendment limits jurisdiction over a defendant with insufficient contacts with the "United States as a whole."⁸⁹ Rule 4(k)(2), therefore, functions as a federal long-arm statute and ensures that federal claims will have a U.S. forum if sufficient national contacts exist.⁹⁰

Under this federal long-arm approach, courts employ a two-part inquiry to determine if due process is satisfied.⁹¹ First, courts consider whether the defendant had sufficient "minimum contacts" with the United States to support the exercise of personal jurisdiction.⁹² For the first requirement, courts distinguish between "general" and "specific" jurisdiction.⁹³ Under *International Shoe* and its progeny, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."⁹⁴ Individuals are at home in their state of domicile; corporations are generally at home in their place of incorporation and where their principal place of business is located.⁹⁵ Thus, if a defendant is at home in any state, Rule 4(k)(2) will not be available because the Rule only applies when the defendant is not subject to personal jurisdiction in any state.⁹⁶ Rather, a court exercising personal jurisdiction under Rule 4(k)(2) must find that it has specific jurisdiction over the defendant.⁹⁷ Specific jurisdiction is the

86. See *Bristol-Myers*, 137 S. Ct. at 1783–84 (considering due process limits on a state but leaving the Fifth Amendment's restrictions on federal courts an open question).

87. See, e.g., *Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 238 (5th Cir. 2022); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 55 (D.C. Cir. 2017); *Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd.*, 956 F. Supp. 427, 438–39 (S.D.N.Y. 1996).

88. See, e.g., *Livnat*, 851 F.3d 45 at 55; *Aerogroup Int'l, Inc.*, 956 F. Supp. at 438–39.

89. See *Livnat*, 851 F.3d 45 at 55.

90. *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico*, 563 F.3d 1285, 1295–96 (Fed. Cir. 2009) (quoting FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments)).

91. *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996).

92. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

93. *Metro. Life Ins. Co.*, 84 F.3d at 567.

94. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

95. *Goodyear*, 564 U.S. at 924 (citing *Lea Brilmayer et al., A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 781 (1988)).

96. FED. R. CIV. P. 4(k)(2).

97. *Id.*

exercise of jurisdiction over an out-of-state defendant,⁹⁸ and a court must satisfy itself that “the defendant has ‘purposefully directed’ his activities at residents of the forum, and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities.”⁹⁹ Stated another way, the court must find that the defendant “purposefully avail[ed] itself of the privilege of conducting activities within the [United States].”¹⁰⁰

In the second inquiry courts undertake to determine satisfactory due process, they determine whether the exercise of specific personal jurisdiction would comport with “traditional notions of fair play and substantial justice.”¹⁰¹ The Supreme Court has found that weighing on this determination of fairness are the following factors: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) “the plaintiff’s interest in obtaining convenient and effective relief;” (4) “the interstate judicial system’s interest in obtaining the most efficient resolution of the controversy;” and (5) “the shared interest of the . . . states in furthering . . . substantive social policies.”¹⁰² The Court has further elaborated that the exercise of personal jurisdiction is preferred when the plaintiff has made a showing of the defendant’s minimum contacts, but that preference may be overcome by the defendant’s showing of “a compelling case that the presence of some other considerations would render jurisdiction unreasonable.”¹⁰³

Many district courts approaching the issue of alleged infringement by defendants residing outside the United States have found that the merchant-defendant’s sale, and sometimes merely offering for sale, a counterfeit product in a forum state is sufficient to satisfy due process in the forum state, making a 4(k)(2) argument inapposite.¹⁰⁴ Other district courts have found that a sale into the forum is not sufficient to satisfy the forum’s long-arm statute, particularly when the seller uses a third party platform like Amazon, and have

98. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

99. *Id.* (first quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); and then quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

100. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 620 (1992) (alteration in original) (quoting *Burger King Corp.*, 471 U.S. at 475).

101. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

102. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

103. *Burger King Corp.*, 471 U.S. at 477.

104. *See, e.g., WowWee Grp. Ltd. v. Meirly*, No. 18-CV-706, 2019 WL 1375470, at *4 (S.D.N.Y. Mar. 27, 2019) (finding a “substantial relationship between those offers for sale and the trademark infringement harms alleged to have been inflicted in New York”); *Furminator, Inc. v. Wahba*, No. 410-CV-01941, 2011 WL 3847390, at *5 (E.D. Mo. Aug. 29, 2011) (finding defendant’s use of Amazon and eBay to sell products to the plaintiff in Missouri sufficient to support personal jurisdiction in that state).

found Rule 4(k)(2) appropriate in that situation.¹⁰⁵ Still other courts have found that a defendant who “is willing to sell and ship, [c]ounterfeit [p]roducts to customers in the United States, including in this judicial district” is subject to personal jurisdiction under Rule 4(k)(2).¹⁰⁶ Within this determination is the finding that although these merchant-defendants offered, and perhaps sold, the infringing product into the forum state, these defendants are not subject to personal jurisdiction under the state’s long-arm statute.¹⁰⁷

III. ANALYSIS

The purpose of Rule 4(k)(2) is to expand the jurisdictional reach of federal courts to include personal jurisdiction over foreign defendants in cases arising under a federal question.¹⁰⁸ As such, when a plaintiff makes a prima facie showing that Rule 4(k)(2) applies, courts should apply the Rule to defendants who refuse to name another forum in which personal jurisdiction is proper.¹⁰⁹ Rule 4(k)(2) was adopted to ensure that federal claims will have a U.S. forum if sufficient national contacts exist.¹¹⁰ As the advisory committee’s note to Rule 4(k)(2) explains, in situations where a defendant has sufficient contacts with the United States in total, but insufficient contacts with any one state to confer personal jurisdiction, “the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule.”¹¹¹ The Supreme Court promulgated Rule 4(k)(2) to bridge this gap in personal jurisdiction.¹¹²

When a foreign person or entity infringes a U.S. patent or trademark right, that person may evade the U.S. court system on a successful motion to dismiss for lack of personal jurisdiction.¹¹³ However, if that infringer sells a violating product in the U.S. market,

105. See, e.g., *Talavera Hair Prods., Inc. v. Taizhou Yunsung Elec. Appliance Co., Ltd.*, No. 18-CV-823, 2021 WL 3493094, at *7–8 (S.D. Cal. Aug. 6, 2021).

106. *Est. of Marilyn Monroe, LLC v. 123oilpainting*, No. 1:21-CV-3824, 2021 WL 5033827, at *2 (N.D. Ga. Sept. 22, 2021); *ABG EPE IP, LLC v. 3C Smart Store*, No. 1:21-CV-1510, 2021 WL 2452636, at *2 (N.D. Ga. Apr. 17, 2021).

107. *Id.*

108. FED. R. CIV. P. 4(k)(2) (advisory committee’s note to 1993 amendments).

109. See, e.g., *ISI Int’l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir., as amended, July 2, 2001); but see *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 41 (1st Cir. 1999).

110. *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico*, 563 F.3d 1285, 1295 (Fed. Cir. 2009).

111. FED. R. CIV. P. 4(k)(2) (advisory committee’s note to 1993 amendments).

112. *Id.*

113. See *Fraserside IP L.L.C. v. Netvertising Ltd.*, 902 F. Supp. 2d 1165, 1169, 1181 (N.D. Iowa 2012).

it is availing itself of the laws and protections of the United States and ought to be able to be haled into court without offending due process's guarantee of "traditional notions of fair play and substantial justice."¹¹⁴

To further the interests of a plaintiff pursuing litigation against foreign counterfeiters of its products, Rule 4(k)(2) remains as an attractive option for arguing in the alternative against a challenge to personal jurisdiction: should the court find that there are insufficient contacts with any one state, personal jurisdiction may still attach. The use of an online platform for the sale of infringing goods should not create a "virtual moat" for defendants violating U.S. intellectual property rights.¹¹⁵ Moreover, the intellectual property right holders' interest is vested in the United States; a remedy should be available for the infringement on that interest in the United States¹¹⁶

A. Burden Shifting: Concerns of Economy, Efficiency, and Purpose

The Supreme Court promulgated Rule 4(k)(2) to expand the reach of federal courts' exercise of personal jurisdiction,¹¹⁷ and, as such, the Rule should be allowed to have that effect. Placing a heavy burden on a plaintiff to make more than a prima facie showing that the defendant is not amenable to suit in any state is no short order, and can chill meritorious claims, controverting congressional intent.¹¹⁸ Moreover, a burden-shifting scheme is better equipped to lower costs and free up court resources.¹¹⁹

As detailed above,¹²⁰ the circuit courts employ a burden-shifting scheme wherein a plaintiff seeking to prove personal jurisdiction under Rule 4(k)(2) must make a prima facie showing that the Rule applies and must certify that, based on the information that is readily available to the plaintiff and his counsel, the defendant is not subject to suit in the courts of general jurisdiction of any state.¹²¹

114. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *cf.* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980) (introducing and applying the stream-of-commerce analysis for personal jurisdiction to states before the adoption of Rule 4(k)(2)).

115. *Dohler S.A. v. Guru*, 16-23137-CIV, 2017 WL 4621098, at *6 (S.D. Fla. Oct. 16, 2017).

116. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) (finding in a Lanham Act suit, that "[w]here, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction.").

117. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

118. *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 41 (1st Cir. 1999).

119. Julius Ness Richardson, *Shifting the Burden of Production Under Rule 4(k)(2): A Cost-Minimizing Approach*, 69 U. CHI. L. REV. 1427, 1436–41 (2002).

120. *See supra* Section II.B.1.

121. *Swiss Am. Bank, Ltd.*, 191 F.3d at 40–41.

However, several of the circuits employ a burden-shifting scheme that is more broad in its application: when the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2).¹²²

One commentator suggests a “simplified version of the *Swiss Bank* approach” (articulated in the First Circuit) based on an economic cost analysis.¹²³ Under this commentator’s approach, the plaintiff must make a prima facie showing of a federal question (not at issue in this article) and satisfaction of constitutional due process.¹²⁴ Once a plaintiff has met that initial step, the defendant could challenge either of these prima facie elements, or the negation requirement of 4(k)(2).¹²⁵ Of course, a defendant’s contention that it would be amenable to suit in another state might defeat the negation requirement.¹²⁶ This will put the defendant in a difficult position: argue that personal jurisdiction in another state is proper while simultaneously arguing that the defendant does not have sufficient minimum contacts nationwide.¹²⁷ However, this is in accordance with the intent behind Rule 4(k)(2).¹²⁸ The Supreme Court promulgated the Rule to expand the jurisdiction of the federal courts, which fundamentally puts the defendant in a “more difficult situation.”¹²⁹

Furthermore, if a defendant refuses to proffer evidence refuting personal jurisdiction, it ought to be within the power of the court to exercise personal jurisdiction over the defendant when it has sufficient minimum contacts with the United States such that due process would not be offended, in accordance with the Seventh Circuit’s burden-shifting scheme. Allowing the court to make an inference of amenability to suit given a defendant who will not offer evidence further advances efficiency because it does not require plaintiffs, removed from the inner workings of the defendant’s business, to make any inquiry into the defendant’s amenability to suit in the forum. This makes sense as a defendant is uniquely situated to provide evidence regarding its contacts with the several states. The considerations of cost and congressional intent weigh heavily in

122. *ISI Int’l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir., *as amended*, July 2, 2001).

123. Richardson, *supra* note 119 at 1441.

124. *Id.* at 1441–42.

125. *Id.* at 1442.

126. *Id.*

127. *Id.* at 1442 n.111.

128. *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 41 (1st Cir. 1999).

129. Richardson, *supra* note 119, at 1442 n.111.

favor of a regime that allows for burden shifting even when it disadvantages defendants.¹³⁰

B. Guaranteed Jurisdiction and Right Without Remedy?

A wealth of caselaw interpreting the appropriate “minimum contacts” and “reasonableness” required for personal jurisdiction protects the defendant in litigation from being improperly subject to a court’s jurisdiction.¹³¹ However, one critic has questioned the propriety of Rule 4(k)(2) for being overly broad, and unduly guaranteeing personal jurisdiction. In his article on Rule 4(k)(2) and internet intellectual property disputes, Jeffrey R. Armstrong argues that “a foreign defendant will be forced to defend itself on foreign soil for the limited purpose of engaging in pretrial jurisdictional discovery (and quite possibly for the entire lawsuit) based upon the most subtle of contacts with the United States.”¹³²

However, the Supreme Court promulgated Rule 4(k)(2) in response to the personal jurisdiction gap found in *Omni Capital International*—the gap that a foreigner entity is judgment-proof in the United States if its contacts are spread across the states, and not focused in at least one.¹³³ This context suggests that the advisory committee sought to expand the reach of the federal courts’ personal jurisdiction, and Congress allowed it.¹³⁴ It also suggests that the Supreme Court believed this expansion would be constitutional.¹³⁵ Provided that the exercise of personal jurisdiction comports with the constitution and the will of the legislature, it is properly exercised.¹³⁶

Armstrong further contends that “by virtue of Rule 4(k)(2), and the extravagant construction placed upon it by federal courts, jurisdiction over foreign defendants for [i]nternet intellectual property disputes has become nearly guaranteed.”¹³⁷ But, as mentioned above,¹³⁸ courts interpret Rule 4(k)(2) in a way that is consistent with the purpose of the Rule, and a way that is workable in light of

130. *See id.* at 1442.

131. *See, e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011).

132. Jeffrey R. Armstrong, *Guaranteed Jurisdiction: The Emerging Role of Fed. R. Civ. P. 4(k)(2) in the Acquisition of Personal Jurisdiction of Foreign Nationals in Internet Intellectual Property Disputes*, 5 MINN. INTELL. PROP. REV. 63, 80 (2003).

133. FED. R. CIV. P. 4(k)(2) (advisory committee’s note to 1993 amendments).

134. Richardson, *supra* note 119, at 1431.

135. *See Omni Cap. Int’l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987).

136. *See Rogers v. Indiana*, 996 F.3d 812, 818 (7th Cir. 2021).

137. Armstrong, *supra* note 132.

138. *See supra* text accompanying notes 78–80.

the fact that defendants possess the evidence necessary to determine whether personal jurisdiction is proper.¹³⁹

Next, Armstrong argues for the establishment of an international treaty that would dictate a choice of laws to determine jurisdiction in international intellectual property disputes.¹⁴⁰ The argument goes as follows. Rule 4(k)(2) has “dramatically escalated” the availability of litigation to U.S. plaintiffs who allege intellectual property infringement by a foreign entity.¹⁴¹ An Australian court unfairly held Dow Jones liable for defamation in Victoria, Australia when it published an article online that caused damages to an Australian national. That court acted unfairly in that it exercised a “grossly inappropriate exercise of local jurisdiction.”¹⁴² The Australian court’s jurisdictional reach is analogous to the “aggressive reach of Rule 4(k)(2) for Internet-based intellectual property disputes.”¹⁴³ That courts are asserting power in this way may result in a jurisdictional arms race, and we could find ourselves in situations where “the rest of the world might haul U.S. citizens into their courts and make those U.S. citizens adhere to the intellectual property regulations of those countries.”¹⁴⁴ Therefore, Armstrong argues, now is the time for the “adoption of an international treaty for the uniform treatment of jurisdictional questions involving disputes over intellectual property matters.”¹⁴⁵

Armstrong’s analogy to the Australian Dow Jones case is dubious. While that court may have overreached with its jurisdictional exercise, why would it be an overreach of U.S. courts to protect intellectual property rights protected by U.S. laws in the United States? Moreover, why should U.S. courts not offer a remedy for the infringement of intellectual property rights in the United States when the alleged infringer then avails himself of the U.S. market? While Rule 4(k)(2) would extend personal jurisdiction to a foreign counterfeiter of rights held in the United States, damages to the reputation of one U.S. citizen likely would not pass muster because there is a lack of personal availment of the laws of the United States.

139. See *ISI Int’l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir., as amended, July 2, 2001).

140. Armstrong, *supra* note 132, at 81–85.

141. *Id.* at 81.

142. *Id.*

143. *Id.*

144. *Id.* at 82.

145. Armstrong, *supra* note 132, at 82.

Nineteen years have passed since the publication of Armstrong's article,¹⁴⁶ yet today there is still no international treaty in force for the resolution of personal jurisdiction in the realm of international intellectual property disputes.¹⁴⁷ Meanwhile, we see the growth of patent and trademark infringement cases accompanying the growth of online sales.¹⁴⁸ How then should those holding infringed intellectual property interests seek recourse? While an international treaty would balance the interests of nations and advance comity among them, certainly, it is not adequate to wait for an international treaty when damages have already been done, and plaintiffs often find themselves without recourse. Rather, the property interests are vested here in the United States, are protected by the U.S. federal government, and as such, the U.S. federal court system is the appropriate vehicle for the resolution of infringement claims.

IV. CONCLUSION

The advisory committee drafted Federal Rule of Civil Procedure 4(k)(2) in response to the Supreme Court's suggestion to correct "a gap in the enforcement of federal law" where a foreign defendant could avoid judgment in the United States for lack of a proper forum state with which the defendant had sufficient minimum contacts.¹⁴⁹ The Rule should be interpreted to that full effect. In the interest of broadening the reach of federal courts' personal jurisdiction, efficiency, and reducing costs, courts should employ a burden shifting regime that requires a plaintiff asserting personal jurisdiction under Rule 4(k)(2) to make a prima facie showing that the claim arises under federal law and that the exercise of personal jurisdiction over the defendant would not offend due process.¹⁵⁰ The burden should then shift to the defendant to either contest federal question, due process, or the negation requirement. If the defendant contests the negation requirement, but the defendant does not establish another state in which personal jurisdiction would be proper, the court

146. *Id.* at 63.

147. The U.S. and thirty other nations have signed the proposed Anti-Counterfeiting Trade Agreement, a multilateral treaty for combating intellectual property rights infringement. However, ratification of this treaty remains in a state of uncertainty over a decade later. See SHAYERAH ILIAS, CONG. RSCH. SERV., THE PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT: BACKGROUND AND KEY ISSUES (2012).

148. Matthew Bultman, *Patent Lawsuits on Rise, Buying Spree Hints More to Come*, BL (June 12, 2020, 6:30 AM), https://www.bloomberglaw.com/bloomberglawnews/ip-law/X8PL7EK4000000?bna_news_filter=ip-law#jcite.

149. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

150. See *supra* Section III.A.

should presume that the negation requirement is satisfied, as is the law in the Seventh Circuit and others.¹⁵¹ The contacts that the defendant has with the states are best known to the defendant, and the presumption makes the process more streamlined, eliminating the need for jurisdictional discovery with respect to the negation requirement.

Furthermore, the purpose of Rule 4(k)(2) is to protect rights granted under federal law.¹⁵² To that end, the Rule should be given full effect up to the constitutional due process limits. The Rule was recommended by the Supreme Court,¹⁵³ suggesting its constitutionality in situations where foreign defendants have violated federal law in the United States but were able to avoid the federal court system on a loophole. Now that the loophole is closed, rights created by U.S. laws ought to be protected in U.S. courts so long as doing so comports with the Constitution.

151. *See supra* Section II.B.1.

152. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

153. *Id.*