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PATENTS

**Patent Enforcement at Trade Shows in the United States—
The Best Tools for the Job**



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Many companies are rightfully concerned about the potential for patent or other intellectual-property infringers to promote and sell infringing products at industry trade shows in the United States. In any given industry, there may be one major annual trade show that serves as a key opportunity to promote new products and make new business connections. The presence of a competitor promoting similar, infringing products for a lower cost can undercut this opportunity and draw business away from the patent owner.

In this article, we discuss three primary avenues for addressing the threat posed by patent infringers at trade shows:

- Internal enforcement mechanisms provided by the trade show organizers themselves;

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- U.S. district court actions, including seeking a temporary restraining order (TRO); and
 - Section 337 actions at the U.S. International Trade Commission
- We then conclude by providing some general guidance on which option would be most suitable based on your company's goals.

Internal Trade Show Enforcement Mechanisms

Some trade show organizers take a proactive approach to their exhibitors' intellectual property rights and actually have an enforcement mechanism built-in to their contract with exhibitors.

A good example of this approach is the IP complaint mechanism available at the Automotive Aftermarket Products Expo (AAPEX), an enormous annual trade show that showcases products and services from over 2,200 automotive aftermarket manufacturers and suppliers. The AAPEX website states that:

We remind all of our exhibitors that AAPEX will have attorneys on site. Event Management's attorneys will be prepared to investigate an exhibitor's properly documented complaint of an intellectual property rights violation that is brought to the attention of Event Management. Products or product catalogs on display that are determined to violate the intellectual property rights (patent, trademark, trade dress or copyright) of the exhibitor may result in sanctions in accordance with the event rules.

The AAPEX website includes a complaint form that an exhibitor can use to bring infringing activity to the attention of the AAPEX organizers. The form requires information about the complainant and the accused infringer, the steps taken to resolve the dispute prior to the submission of the complaint, a description of all "essential facts" relating to the infringement, and an identification of any related litigation or other proceedings.

Upon receiving a complaint, AAPEX management will conduct an initial review to determine whether the

complaint is adequately documented and may also conduct its own preliminary investigation into the allegations in the complaint. AAPEX management may then order the accused infringer to remove the accused products from display during the pendency of the investigation. The accused infringer will be given an opportunity to respond to the allegations before any final decision is made.

If AAPEX management determines that the complaint has merit and that the accused products are indeed infringing, it will impose sanctions against the infringing exhibitor. These sanctions can include a warning, reprimand, imposition of a fine, removal of items displayed in the exhibitor's booth, expulsion of the exhibitor from the current AAPEX show and a ban from future AAPEX shows.

In our experience, this sort of enforcement mechanism works reasonably well if a company's only goal is to prevent the display and promotion of infringing products at the trade show itself. Unfortunately, however, not all trade shows include a mechanism of this sort. For example, unlike AAPEX, the intellectual property policy of the Consumer Electronics Show (CES) does not appear to contemplate that the trade show managers themselves might take forceful action against accused infringers.

In view of these varied approaches, it is important to carefully examine your particular trade show's policy before deciding on whether to pursue an internal enforcement procedure. That said, since these internal mechanisms are all based on contracts between show management and their exhibitors, it may be possible to lobby show management to include a stronger enforcement mechanism in their contract in future years if your company thinks that such a procedure would be useful and your trade show does not currently provide a strong mechanism.

District Court Actions and Temporary Restraining Orders

District courts—and in particular the U.S. District Court for the District of Nevada—have developed a body of case law relating to requests for temporary restraining orders (TROs) to prevent infringers from displaying infringing products and offering them for sale at trade shows. This is a more powerful option for enforcing patents at trade shows, but it generally would also be significantly more expensive to pursue than an internal enforcement mechanism.

In *Neptune Techs. & Bioresources, Inc. v. Luhua Biomarine (Shandong) Co.*, No. 2:15-cv-01911 (D. Nev.), the plaintiff filed an emergency ex parte motion for a TRO, seizure order and preliminary injunction on the same day that it filed its infringement complaint against the defendant. The district court reviewed the complaint and emergency motion and issued a TRO and seizure order the next day. As part of its order, the court ordered the U.S. Marshals to go to the SupplySide West Trade Show in Las Vegas, serve the infringement complaint on the accused infringer's representatives at the trade show and seize relevant evidence so that it could not be hidden or destroyed. The order also expedited the hearing on the motion for preliminary injunction so that the hearing would occur before the expiration of the TRO.

Importantly, the emergency motion for a TRO, seizure order and preliminary injunction in the *Neptune* case was clearly not prepared in a single day, e.g., after noticing infringement at the SupplySide West Trade Show. Rather, the emergency motion was a very detailed document accompanied by three declarations and numerous exhibits, including a detailed expert declaration on infringement and a detailed factual declaration from one of the plaintiff's executives demonstrating the irreparable harm that the plaintiff would suffer due to the infringement.

In contrast to the *Neptune* case, in *SATA GmbH & Co. KG v. Zhejiang Refine Wufu Air Tools Co.*, No. 2:15-cv-02111 (D. Nev.), the court denied the plaintiff's emergency motion for a TRO. In *SATA*, the court found that the motion was not sufficiently supported by factual evidence as to irreparable harm and thus denied the motion. Indeed, the *SATA* motion did not contain nearly as much evidentiary support as the successful motion in the *Neptune* case. Thus, in order to be successful in pursuing a TRO, it appears that a plaintiff must perform a significant amount of work in preparing its infringement case and demonstrating irreparable harm before filing.

If your company does not need or want a TRO—perhaps because there is a sufficient internal enforcement mechanism at the trade show—but still wants to initiate district court litigation against an accused infringer, the trade show can provide an excellent opportunity to serve the infringer with a standard district court complaint. If the accused infringer is operating a booth at a U.S. trade show, it will necessarily have representatives physically present in the U.S. who would be subject to service. Also, the district court for the district where the trade show is located would very likely have personal jurisdiction over the infringer due to the infringer's promotion of infringing products at the trade show. Thus, the trade show can serve as an excellent opportunity to initiate litigation against a foreign company that may have no permanent presence in the U.S. and would otherwise be difficult to serve with a complaint. For example, in 2010, Robert Bosch LLC served district court complaints on numerous foreign accused infringers at their respective booths at the AAPEX trade show, and obtained multiple settlements and default judgements that might otherwise have been impossible to get.

Section 337 Actions

A Section 337 action at the U.S. International Trade Commission is another option worth considering if your company is facing widespread infringement by foreign manufacturers at U.S. trade shows. The ITC has the power to issue exclusion orders against products that infringe valid U.S. intellectual property rights, meaning that those products can be entirely banned from entering the U.S. See 19 U.S.C. § 1337. And unlike district court, the ITC does not need to obtain personal jurisdiction over an accused infringer in order to issue an exclusion order against that infringer's products. (See *Sealed Air Corp. v. U.S. Int'l Trade Comm'n*, 645 F.2d 976, 985, 209 U.S.P.Q. 469 (C.C.P.A. 1981).) While the ITC does have a jurisdictional "importation" requirement—requiring a showing that products are actually being imported into the U.S.—this can be satisfied by demonstrating a single instance of importation.

(*Certain Purple Protective Gloves*, Inv. No. 337-TA-500, Order No. 17 (Sept. 23, 2004).) In fact, demonstrating that a sample product was imported for display at a U.S. trade show can be enough to satisfy the ITC's importation requirement. (See *Certain Acesulfame Potassium and Blends and Products Containing Same*, Inv. No. 337-TA-403, Initial Determination at 157-60 (Nov. 20, 1998).)

Thus, if your company is aware of an infringer that is importing infringing products into the U.S. and is likely to promote and offer for sale these products at a future trade show, it may be possible to file a Section 337 complaint preemptively and get an exclusion order barring that infringer not only from selling its products at the trade show, but also from importing those products into the U.S. at all. While a complete Section 337 proceeding typically takes on the order of 16 months—and thus may not provide a quick enough solution to infringement at a trade show in the immediate future—Section 337 can provide lasting, comprehensive relief in situations where the infringement is ongoing and likely to continue at future trade shows.

Moreover, while the ITC's standard remedy after finding a violation of Section 337 is the so-called Limited Exclusion Order (LEO)—which bars importation of products from the named respondents in the investigation—the ITC also has the power to issue a broader remedy that covers *all* infringing products being imported into the U.S., regardless of source. This more powerful remedy is the General Exclusion Order (GEO). In order to obtain a GEO rather than an LEO, a complainant must demonstrate that either “a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons” or “there is a pattern of violation of [Section 337] and it is difficult to identify the source of infringing products.” (19 U.S.C. § 1337(d)(2).) Where there are multiple foreign infringers and the facts support issuance of a GEO, your company could potentially obtain a broad remedy in a single case that would bar all infringing imports from all sources. While this one case seeking a GEO would likely be more expensive than a standard ITC case seeking only an LEO, it also has the potential to be far less expensive overall and more efficient than pursuing each infringer separately.

Choosing the Best Option(s)

Given the above options, how do you choose which is best for you? While every case is different and should be carefully evaluated on an individual basis, we can provide the following general comments.

As a threshold matter, it must always be remembered that a patent owner should only file an infringement complaint after conducting a thorough pre-filing investigation. Under Rule 11 of the Federal Rules of Civil Procedure, severe sanctions can be imposed against a plaintiff who fails to conduct an adequate investigation before filing a district court complaint. Similar rules apply at the ITC. And even with respect to internal trade show enforcement procedures, it would be dangerous to file a complaint without conducting an adequate pre-filing investigation. For example, the accused infringer could potentially sue you in district court for damages

arising from lost sales at the trade show if it is found that the infringement complaint was improper.

Assuming that there is in fact a strong and well-reasoned argument that the accused products are infringing, you would need to weigh several considerations before deciding whether to pursue an internal trade show procedure (if it exists), a district court complaint and TRO, a Section 337 action or a combination of these.

First, the internal complaint procedure would likely be simpler, faster and less expensive to pursue than a well-supported emergency motion for TRO in district court or an ITC action. Thus, if infringement is first discovered at the trade show itself and your goal is to immediately have the infringing products removed from the trade show, the internal procedure would be a viable option (if it exists at your trade show). As discussed above, the detailed supporting evidence required for a successful TRO motion in district court would appear to make the district court option extremely difficult to pursue if infringement is only first discovered at the trade show and relief is needed immediately.

On the other hand, the district court option is much more powerful than the internal procedure and should be seriously considered if there is sufficient lead time, e.g., if you are aware weeks or months in advance that the infringing products will be displayed at the trade show. If the TRO motion is successful, agents of the U.S. government (the U.S. Marshals), will typically serve the complaint on the accused infringer at the trade show and may even seize evidence of infringement. This could be very important because if, for example, the accused infringer is based in China and has no permanent U.S. presence, it could be difficult or impossible to serve a district court complaint on it under normal circumstances. Thus, the trade show can be viewed as a great opportunity to initiate U.S. litigation against an entity that would otherwise be difficult to pursue.

For the most comprehensive and long-term solution to the problem of foreign manufacturers promoting infringing products at U.S. trade shows, you can consider filing a Section 337 complaint at the ITC. If successful, this could result in the ITC's banning the infringer's products from entering the country entirely. And in some situations, you may even be able to obtain a GEO banning all infringing products from all sources. While Section 337 would likely not be a fast enough mechanism to immediately address infringement that is newly-discovered at a particular trade show, it could serve as a powerful follow-on mechanism to prevent infringement in the future and thus might be a good tool to use in conjunction with one of the other available mechanisms.

Because trade shows can be so important to your business, it is important to consider whether you can leverage your intellectual property assets to disrupt and deter infringing activity at these shows. As discussed above, internal enforcement mechanisms, district court complaints and Section 337 complaints are some of the best available tools to accomplish this. Depending on your situation and goals, one or more of these tools may be worth pursuing at your next trade show.