

PROTECTION OF INTELLECTUAL PROPERTY RIGHTS AT TRADE FAIRS IN CHINA – ANALYSIS OF THE CURRENT LEGAL FRAMEWORK AND COMPARISON WITH OTHER APPROACHES

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INTRODUCTION

Trade fairs and commercial exhibitions are important places for doing business, offering companies the possibility to market their products or to look for potential partners. Exhibitions are often the place to display or introduce new products and technologies. However, exhibitions also present a perfect opportunity for those interested to exhibit new products and technologies that infringe upon the intellectual property rights (“IPRs”) of others. Because exhibitions allow an exhibitor to reach a wide audience in a very short period of time, they present a huge risk of irreparable harm to right holders. Remediating IPR infringements at exhibitions poses particular challenges, including the need for quick decisions, because of the large audience and the potential prejudice which infringements or false allegations of IPR infringement may have. Protection of right holders against IPR infringements at trade fairs has become a big concern for Chinese authorities. This is not surprising because there are a vast number of exhibitions in China¹, which are attended by numerous international firms wary of protecting their IPRs. This article discusses how China has attempted to solve these problems by implementing new regulations specifically addressing IPR protection and suggests improvements to the measures adopted by China. The first part of this article will address particular concerns of IPR protection at trade fairs. The second part will provide a general description of IPR protection in China and the special rules adopted for trade fairs. Thereafter, the third part will introduce the means of protection for IPRs at trade fairs available in European courts. Following that, the fourth part will explain a different approach,

¹ According to the exhibitions calendar of expoua.com, in March 2010 alone over 50 exhibitions took place in China. See ExpoUA, Exhibitions China, <http://www.expoua.com/Exhibition/lang/en/region/147/country/167> (last visited May 18, 2010). Many of these exhibitions feature 500 to 3,000 exhibitors. See e.g., Chinese Beauty Expo, <http://www.chinabeautyexpo.biz>.

particularly the arbitration solution adopted by the watch and jewelry fair “Baselworld” in Switzerland. The last part analyzes the Chinese legal framework in light of particularities of IPR protection at trade fairs identified in the first part and the solutions adopted by other countries or institutions outlined in the third part.

I. DISTINCT CHALLENGES OF IPR PROTECTION AT TRADE FAIRS

Trade fairs present their own set of distinct challenges with regard to IP protection. First, because those who attend a fair are particularly interested in the goods presented, an infringer reaches a large group of potential customers (including retailers and distributors). Consumers might also believe that products presented at fairs are subject to scrutiny and therefore legal.

A recent report of the European Union identifies a “risk of double prejudice.”² For the IP right holder, the risk is the lack of effective protection; on the other hand, the alleged infringer risks harm from an unwarranted intervention³. Any intervention by the authorities in trade fair booths may deter potential clients of a firm accused of violating an IP right from purchasing this firm’s products. Therefore, even small and unsound interventions may have a big impact. The ultimate harm to such parties is related to a lost business opportunity, something which is very difficult for a judge to appreciate in the course of a subsequent litigation on the merits.⁴ According to the Chairman of the Baselworld Panel, the arbitration board for the Baselworld watch and jewelry fair, many exhibitors make 80% to 90% of their annual sales at the Baselworld.⁵

Another important issue is timing: trade fairs are regularly held on consecutive days, which often include weekends.⁶ Hence, if enforcement is left to official authorities, there is the considerable risk of not being able to obtain quick relief.⁷ Quick relief is necessary because of the heightened risk of harm and the short duration of the fair.

Connected to the importance of the timing problem is the risk that either the right holder or the alleged infringer may not be able to find a

² GIOVANNI CASUCCI ET AL., EU-CHINA IPR2, HOW TO PROTECT YOUR INTELLECTUAL PROPERTY AT TRADE FAIRS: EXPERIENCE AND PRACTICE IN EUROPE 6 (2008), http://www.ipr2.org/images/stories/trade_fair_study_brief.pdf.

³ *Id.*

⁴ *Id.*

⁵ PAUL RUEST, THE BASELWORLD PANEL: AN INSTRUMENT FOR THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS 9-17 (2004) (on file with authors) (brochure on 20 year jubilee of Panel).

⁶ CASUCCI, *supra* note 2, at 6.

⁷ *Id.*

specialized lawyer or counsel, such as a patent attorney, on short notice.⁸ The intervening authorities face the same problem. Particularly in patent cases, the parties are very lucky if they get a judge or administrative officer who not only knows patent law, but also understands the technical basics of the patent and of the allegedly infringing items.

On the other hand, trade fairs also provide right holders certain benefits in the context of enforcing their rights. First of all, the place of the exhibition is, in most jurisdictions, a possible venue for initiating a claim (*locus delicti*), even if neither the right owner nor the alleged infringer reside there.⁹ A right holder may thus anticipate at which trade fairs a competitor it suspects of infringing its IPRs will exhibit the allegedly infringing goods, and then commence legal proceedings at the place of the exhibition if infringing goods are actually displayed. Hence, a right holder may have an opportunity to engage in some forum shopping, maybe even internationally, if he knows at which fairs the alleged infringer is going to be exhibiting.¹⁰ If the right holder is aware of these opportunities, he may even implement a strategy and prepare the claims he is going to bring at a specific place, which may give him a very valuable advantage over the unprepared defendant. The plaintiff may thereby also profit from particularly favorable national laws. Such an attack is even more likely to prove successful if the court or administrative authorities must make quick decisions, because then the first impression (the classical *prima facie* case) is very important and may tip the scales in favor of the claimant even if he would not have a great case on the merits in subsequent proceedings.

Another advantage for IP right holders is that it is typical practice for exhibitors to explain the function of their products at trade fairs.¹¹ Hence, potential plaintiffs may find that gathering evidence is much easier because the infringing products are actually on hand and that the infringer may oblige them with an explanation that can then be used as further proof that the product infringes upon his or her rights.

Two further points are worth mentioning. First, trade fairs offer a special kind of sanction, namely a ban from the present or future exhibitions. Such a penalty may have a significant deterrent effect because the ban and the negative publicity associated with it may affect his or her ability to advertise and market legal products. Second, there is a contractual relation between the infringer and a nonparty, the exhibition organizer, who is likely interested in

⁸ *Id.*

⁹ *See also id.*

¹⁰ This is relatively easy to find out, because most trade fairs publish lists of participants. *See, e.g.,* Baselword, Information, <http://baselcatalog.messe.ch/mch/exhlist.asp> (last visited May 31, 2010) (providing mask for searching exhibitors by company names).

¹¹ CASUCCI, *supra* note 2, at 6.

preventing infringement.¹² This is uncommon in IP infringement disputes (other than those arising from contractual differences) where the right owner and any third party usually lack any connection with the infringer. Hence, if the authorities wish to address some of the problems discussed above, a legal solution could take advantage of these special opportunities.

The Union of International Fairs (“UFI”), the Global Association of the Exhibition Industry,¹³ issued the “Recommendations for the Protection of Intellectual Property Rights at Exhibitions” in February 2008.¹⁴ These recommendations advise that organizers inform exhibitors about IPR protection before the exhibition starts.¹⁵ Particularly, exhibitors should be advised to protect and register IPRs before the fairs, which is especially important for patents (because exhibitions may destroy novelty).¹⁶ Exhibition organizers should further include contact details of the person responsible for IPR issues within the organizing company and details of local and national IPR organizations, customs authorities, and patent and trademark attorneys.¹⁷ The guidelines further recommend advising exhibitors to have certified evidence of their IPRs ready at the exhibition to facilitate proof of infringement.¹⁸ Additionally, organizers should supply addresses of local IP attorneys and denominate “on-site or on-call experts” (IP attorneys, customs authorities) or even provide for a specific point of contact for dealing with IPR complaints during the exhibition, e.g. by hiring an arbitrator which may be called upon at the event.¹⁹

II. OVERVIEW OVER THE CHINESE IPR PROTECTION SYSTEM

A. Substantive Rules

China has created legislation for the full spectrum of intellectual property rights,²⁰ including patents,²¹ industrial design,²² lay-out designs of

¹² Flea markets and similar venues for gray or black market goods excluded.

¹³ This organization was formerly known as the Union des Foires Internationales.

¹⁴ UFI, UFI Recommendations for the Protection of Intellectual Property Rights at Exhibitions (2008), http://www.ufi.org/media/thetradefairsector/ipr_recommendations.pdf.

¹⁵ *Id* at 7.

¹⁶ *Id*.

¹⁷ *Id*.

¹⁸ *Id*.

¹⁹ *Id*.

²⁰ See PETER GANEA & THOMAS PATTLÖCH, *INTELLECTUAL PROPERTY LAW IN CHINA* 363-369 (Christopher Heath ed., 2005) (for fairly broad overview over laws, regulations and judicial interpretations).

²¹ *E.g.*, Patent Law (1984), *amended on* Aug. 25, 2000; Implementing Regulations of the Patent Law (Promulgated by Decree No. 306 of the State Council, June 15, 2001).

²² These are also governed by the Patent Act. See Patent Law, art. 2 (1984).

integrated circuits,²³ copyrights,²⁴ trademarks,²⁵ and geographical indications.²⁶ Since the accession of China to the World Trade Organization (“WTO”) and the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”) in December 2001, China’s IP laws are very similar to the ones in Europe and the United States. For the purpose of this article, it is not necessary to dive deeper into the substantive provisions. However, the substantive provisions alone are not sufficient. Without enforcement, the best substantive laws end up in smoke.

B. Enforcement

1. Background

China’s enforcement system for IPRs is quite complicated.²⁷ In general, enforcement of IPRs at trade fairs is possible in courts²⁸ or via administrative authorities.²⁹ Thus, the Chinese enforcement system is usually described as one of “dual enforcement.”³⁰ The protection of IPRs by border measures (customs) and criminal enforcement are outside the scope of this article, as neither of these venues specifically relate to IPR protection at trade fairs.

While administrative enforcement was the favorite avenue for some

²³ Regulation on the Protection of Layout Design of Integrated Circuits, (Promulgated by Decree No. 300 of the State Council of the People’s Republic of China, March 28, 2001).

²⁴ *E.g.*, Copyright Law of the People’s Republic of China (1990), *as amended* by the Standing Committee of the National People’s Congress (October 27, 2001); Regulations for the Implementation of International Copyright Treaties (Promulgated by State Council, September 25, 1992).

²⁵ *E.g.*, Trademark Law (1982), *amended* October 27, 2001; Regulations for the Implementation of the Trademark Law (Promulgated by Decree No. 358 of the State Council, Aug. 3, 2002); Interpretation by the Supreme People’s Court of the Issues Relating to Application of Law to Pre-trial Suspension of Acts of Infringement of Exclusive Right to Use Trademarks and to Evidence Preservation (Adopted at 1203rd meeting of Judicial Committee of Supreme People’s Court, Dec. 25, 2001, effective Jan. 22, 2002).

²⁶ Provisions for the Protection of Products of Geographical Indication (Promulgated by the General Administration of Quality Supervision, Inspection and Quarantine, May 16, 2005).

²⁷ This article will not address the entire administrative system concerning application, examination and cancellation of IPRs.

²⁸ *See generally* Civil Procedure Code of the People’s Republic of April 9, 1991 and Criminal Code of July 1, 1979, amended on March 14, 1997, Chapter VII, Articles 217 and 218; Criminal Procedure Code of the People’s Republic of China, amended by the National People’s Congress on March 17, 1996.

²⁹ *See supra* notes 11-14.

³⁰ *Supra* note 20, at 289 (discussing other mechanisms within Chinese legal system for regulating and enforcing IP laws other than two mentioned here). Discussion of such other mechanisms falls beyond scope of this article).

time, this seems to be changing in recent years.³¹ Among the reasons for this change is the fact that pre-litigation remedies are generally only available in civil enforcement actions.³² However, administrative actions are still the usual way for dealing with trademark infringement because the handling of such cases can be pretty straightforward, especially when the infringement consists of simple counterfeiting or other blatant violations.³³ The same is not true for patent infringement, which regularly involves difficult questions before infringement may be found, whereas copyright matters can be complicated as to the question of whether there is a valid copyright and who the right owner is.³⁴

2. Civil Enforcement

a. Ordinary Litigation

Generally, first instance subject matter jurisdiction for IP infringement cases matters lies with the Intermediate People's Courts.³⁵ Only a few district courts in big cities were assigned by the relevant People's High Courts to also have jurisdiction for intellectual property disputes.³⁶ The intellectual property chambers (No. 3) in these courts are assigned professional judges to ensure good decisions.³⁷ For the purpose of this article, it is sufficient to know that territorial jurisdiction in all types of IP infringement matters is at least given where the infringing act occurs.³⁸ An ordinary process takes about six months in the first instance.³⁹

b. Preliminary Injunctions

All relevant Chinese IPR laws expressly permit courts to issue preliminary injunctions.⁴⁰ Furthermore, the Chinese Supreme Court has issued interpretations with regard to pre-trial measures in trademark and patent law

³¹ *Id.* at 289-90.

³² *Id.* at 290.

³³ *Id.*

³⁴ *Id.*

³⁵ *Supra* note 20, at 298-301; *see also id.* at 293 (identifying roughly 400 Intermediate People's Courts as mostly at prefecture level).

³⁶ Jiang Zhipei, China IPR Law, Judicial Remedy and Provisional Measures For IP Rights Protection in Civil Procedures in China (2) (2002), <http://www.chinaiprlaw.com/english/forum/forum28.htm>.

³⁷ *Id.*

³⁸ *See* Civil Procedure Act, Art. 29 (P.R.C.); *see also* Interpretation of the Sup. People's Ct. of Several Questions on the Application of Law in Trail of Trademark Civil Dispute Cases, Art. 6 (P.R.C.).

³⁹ *See supra* note 20, at 302.

⁴⁰ Trademark Act, Art. 57 (P.R.C.); Patent Act, Art. 61 (P.R.C.); Copyright Act, Art. 49 (P.R.C.).

which complement the IPR laws.⁴¹

Jurisdiction for preliminary injunctions is determined by the same principles as for permanent relief.⁴² The applicant must not only show documents proving the authenticity and validity of his rights, but also submit evidence for showing that the defendant is committing or about to commit an infringing act which would lead to irreparable damage to the applicant.⁴³ The court will require a guaranty⁴⁴ for in the event that the defendant may suffer damages by unwarranted measures.⁴⁵ The court must rule on an application for injunctive relief within 48 hours of the filing, and the order will be executed immediately.⁴⁶ Article 66 of the revised Patent Act stipulates this time limit.

The Supreme People's Court's provisions for "pre-trial cessation of patent infringement" contain another interesting rule: the people's court may summon and interrogate one or both parties before rendering the decision if the court deems this necessary for verifying the relevant facts within the aforementioned time limit.⁴⁷ The court must promptly notify the party against which a decision is rendered within five days.⁴⁸ These rules show that *ex parte* measures are available, if the court does not find it necessary to consult with the defendant prior to the decision. *Ex parte* measures are available in trademark and copyright cases as well.⁴⁹

In ordinary proceedings, especially in patent law, courts will usually call on experts.⁵⁰ This seems almost impossible in preliminary proceedings if the decision has to be rendered within 48 hours, since the appointment, work of the experts, and the parties' rights to cross-examine the expert⁵¹ require

⁴¹ Sup. People's Ct. Interpretation relating to the application of law to pre-trial suspension of acts of infringement of trademarks and to evidence preservation of December 25, 2001 (P.R.C.); Sup. People's Ct. for the Application of Law to Pre-trial Cessation of Infringement of Patent Rights of July 1, 2001 (P.R.C.).

⁴² GANEA & PATTLOCH, *supra* note 20, at 301.

⁴³ GANEA & PATTLOCH, *supra* note 20, at 318.

⁴⁴ GANEA & PATTLOCH, *supra* note 20, at 318-19.

⁴⁵ GANEA & PATTLOCH, *supra* note 20, at 320.

⁴⁶ Interpretation of the Supreme People's Court on the Application of Law for Stopping the Infringement upon the Right to the Exclusive Use of a Registered Trademark and Preserving Evidence before Filing a Lawsuit, Art. 9 (2001) Supreme People's Court's Interpretation relating to the Application of Law in Adjudication of Cases of Civil Copyright Cases, Art. 30(2) (Oct. 12, 2002); Several Provisions of the Supreme People's Court for the Application of Law to Pre-trial Cessation of Infringement of Patent Rights, Art. 9 (July 1, 2001).

⁴⁷ Several Provisions of the Supreme People's Court for the Application of Law to Stopping infringement of Patent Right Before Instituting Legal Proceedings, Art. 9 (2) (July 1, 2001).

⁴⁸ *Id.*

⁴⁹ GANEA & PATTLOCH, *supra* note 20, at 319.

⁵⁰ GANEA & PATTLOCH, *supra* note 20, at 308-9.

⁵¹ GANEA & PATTLOCH, *supra* note 20, at 309.

much more time.

With respect to relief ordered prior to the commencement of an action, if the plaintiff fails to file suit within 15 days from when relief is granted, the court must order the withdrawal of the injunctive measures.⁵² Thus, the plaintiff has to be prepared to pursue the claim quickly.

3. Administrative Enforcement

a. Copyright Law

Copyright enforcement is governed by a set of different rules.⁵³ According to the Implementing Measures for Copyright Administrative Adjudication (“CR Implementing Measures”),⁵⁴ the National Copyright Administration (“NCA”) and its local offices may impose administrative penalties.⁵⁵ Territorial jurisdiction is, available *inter alia* at the place where the infringing actions are carried out or have effect.⁵⁶ An important point to emphasize is that with regard to administrative measures in copyright law—the copyright administration will only handle infringement cases where public interests are at stake.⁵⁷ This gives the authorities a considerable amount of discretion.⁵⁸ The copyright administrative department decides whether to accept a case by officially putting the case on file and notifying the complainant within fifteen days from the date of receipt of all the materials associated.⁵⁹ In urgent cases, the authorities may order a party to cease and

⁵² Supreme People’s Court’s Interpretation relating to the application of law to pre-trial suspension of acts of infringement of trademarks and to evidence preservation, Art. 12 (Dec. 25, 2001).

⁵³ See, e.g., National Copyright Administration, Implementing Measures for Copyright Administrative Adjudication (Sept. 1, 2003); Measures for the Enforcement of Copyright Administrative Penalties (July 24, 2003); Supreme People’s Court’s Interpretation relating to the Application of Law in Adjudication of Cases of Civil Copyright Cases (Oct. 12, 2002; Interpretation of the Supreme People’s Court of Several Issues Relating to the Application of Law to the Trial of Civil Copyrights Disputes (Oct. 2, 2002;.

⁵⁴ National Copyright Administration, Implementing Measures for Copyright Administrative Adjudication (Sept. 1, 2003).

⁵⁵ Measures for the Enforcement of Copyright Administrative Penalty, Arts. 2 & 6 (July 24, 2003).

⁵⁶ Measures for the Enforcement of Copyright Administrative Penalty, Art. 5 (July 24, 2003).

⁵⁷ See Implementing Regulations of CR Law, Art. 37 (Sept. 15, 2002); Measures for Implementation of the Administrative Punishment of Copyright, Article 3(1) (July 24, 2003) (referring to tort acts listed in Article 47 of Copyright Law, concurrently with damages to public interests); GANEA & PATTLOCH, *supra* note 20, at 326.

⁵⁸ JIANQIANG NIE, THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 225 (Cameron 2006).

⁵⁹ Measures for Implementation of the Administrative Punishment of Copyright, art. 13 (July 24, 2003) (P.R.C.).

desist further infringement before officially taking the case on file.⁶⁰ The administrative authorities may order a stop to the infringing acts, confiscate the illegal gains, the means for making the infringing goods, and the illegal copies, and impose fines.⁶¹

b. Trademark Law

According to Article 53 of the Trademark Act, a registered trademark owner may seek redress for trademark infringement through the People's Court or through administrative adjudication. A trademark owner may also follow another route, which will not be addressed in more detail, and base their infringement claim on the product quality law.⁶²

The Trademark Division of each provincial and municipal Administration for Industry and Commerce ("local AIC") has the authority to investigate trademark infringement within its geographic jurisdiction, seize evidence, and adjudicate complaints.⁶³ The administrative remedies that may be imposed by a local AIC Trademark Division include (i) cease and desist orders; (ii) confiscation and destruction of trademark representations that may be separated from the goods, in which case the goods may be returned to the alleged infringer; (iii) confiscation and destruction of counterfeit goods where the trademark representation cannot be separated from the goods; and (iv) fines.⁶⁴ The local AIC can and usually does make an immediate oral decision if the complainant provides sufficient evidence and the case is "clear cut and urgent."⁶⁵

c. Patent Law

The patentee may request the administrative authority for patent affairs to handle the matter.⁶⁶ The requests for an administrative investigation of

⁶⁰ Measures for Implementation of the Administrative Punishment of Copyright, art. 15 (July 24, 2003) (P.R.C.)

⁶¹ Measures for Implementation of the Administrative Punishment of Copyright, art. 14 (July 24, 2003) (P.R.C.).

⁶² See Danny Friedmann, *How to work within China's IPR enforcement system for trademark and design rights*, http://www.nfprojects.nl/ipdragon/BMM_Bulletin_How_to_work_within_Chinas_IPR_enforcement_system.pdf

⁶³ Trademark Law of the People's Republic of China, art. 54 (promulgated by the Standing Comm. People's Cong., Aug 23, 1982, effective Mar. 1, 1983, last amended Oct. 27, 2001) (P.R.C.).

⁶⁴ Trademark Law of the People's Republic of China, art. 53 (promulgated by the Standing Comm. Nat'l People's Cong., Aug 23, 1982, effective Mar. 1, 1983, last amended Oct. 27, 2001) (P.R.C.).

⁶⁵ YANG XIAOGUANG, *THE CHINA IP FOCUS* 70 (2003); GANEA/PATTLOCH, *supra* note 20, at 325. A written decision will be issued subsequently.

⁶⁶ Patent Law of the People's Republic of China, art. 57 (promulgated by the Standing

alleged infringement start at the local intellectual property office or administrative authority for patent affairs where the infringing activity is believed to be taking place.⁶⁷ Upon receipt of a sufficient complaint, the administrative authority for patent affairs places it on file and forwards copies of the complaint to the respondent within seven days from the date of filing, asking for a written defense.⁶⁸ Thereafter, an oral hearing may be conducted.⁶⁹ When the administrative authority for patent affairs handling the matter finds that an infringement occurred, it may order the infringer to cease the infringing act immediately.⁷⁰ Notably, the laws and regulations relating to patent law do not contain any provision similar to Article 15 of the Measures for Implementation of the Administrative Punishment of Copyright of July 24, 2003, which provides for emergency orders before taking the case on file. The only interim measure is the raid for collection of evidence.⁷¹

III. IPR PROTECTION AT TRADE FAIRS

A. *The Chinese Solution: The Protection Measures for Intellectual Property Rights During Exhibitions*

1. Introduction

Apparently aware of the particular problems posed by trade fairs, China decided to take special measures for the protection of IPRs during exhibitions. In 2006, the Ministry of Commerce, the State Administration for Industry and Commerce, the State Bureau of Copyright, and the State Intellectual Property Office promulgated the “Protection Measures for Intellectual Property Rights during Exhibitions” (“PMEX”),⁷² which became effective on March 1, 2006. Shortly thereafter, China introduced a campaign called “Blue Skye” to increase IPR protections at exhibitions and trade fairs. The campaign included distributing information materials, urging exhibition organizers to provide field guidance on making complaints, and training

Comm. Nat’l People’s Cong., March 12, 1984) (P.R.C.).

⁶⁷ Measures for Administrative Enforcement of Patent, art. 22 (promulgated by the State Intellectual Property Office, Dec. 17, 2001) (P.R.C.).

⁶⁸ *Id.* at art. 9.

⁶⁹ *Id.* at art. 10.

⁷⁰ *Id.* at art. 33.

⁷¹ Compare Measures for Implementation of the Administrative Punishment of Copyright, art. 15 (July 24, 2003) (P.R.C.), with Measures for Administrative Enforcement of Patent, art. 27 (promulgated by the State Intellectual Property Office, Dec. 17, 2001) (P.R.C.).

⁷² Protection Measures for Intellectual Property Rights During Exhibitions (promulgated by the Ministry of Commerce, State Administration for Industry and Commerce, State Bureau of Copyright, State Intellectual Property Office, Jan. 10, 2006, effective Mar. 1, 2006) (P.R.C.), available at <http://www.chinaipr.gov.cn/laws/laws/others/232865.shtml> (last visited Apr. 5, 2010) [hereinafter PMEX].

people employed in the exhibition industry.⁷³ Furthermore, in 2008, China launched an IPR Protection Plan which included amendments to twenty-four laws, regulations, and administrative measures, as well as various campaigns promoting the enforcement of IPRs. One of the major goals of the plan was to strengthen the supervision over the implementation of the PMEX. This objective is the center of attention of this article.⁷⁴

2. The Measures in Detail

The PMEX apply to the protection of patents, trademarks, and copyrights in all kinds of exhibitions, trade fairs, expositions, commodity fairs, and shows concerning the economic and technical trade held within the People's Republic of China.⁷⁵ Given that the Patent Act covers industrial designs as well,⁷⁶ it seems safe to assume that industrial designs are also among the protected IPRs.

The exhibition sponsor is legally obliged to safeguard the legitimate rights and interests of IPRs holders and to actively cooperate with the administrative IPRs department.⁷⁷ The exhibition sponsor may intensify the IPRs protection during the exhibition by contractual stipulations with the participants of the exhibition.⁷⁸

According to Article 6 of the PMEX, the exhibition sponsor shall establish an office in charge of IPRs complaints during the exhibition, "if an exhibition lasts for three days or more and if the administrative department of exhibitions believes it is required".⁷⁹ It is, however, slightly unclear, whether the "and" is meant cumulatively or alternatively. The latter is more probable, because answer one of the guidelines of the Ministry of Commerce and Trade interprets the provision as meaning "or if the administrative authority of exhibition deems it necessary."⁸⁰

If a special office is established, the IPRs administrative department at the locality of the exhibition must dispatch officers and handle the

⁷³ See China IPR, http://www.gov.cn/english/special/2006-04/30/content_272128.htm (last visited April 11, 2010) (official website for Campaign Operation Blue Skye).

⁷⁴ See point II.II.1. of the Action Plan, http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=197210&col_no=925&dir=200804.

⁷⁵ PMEX art. 2.

⁷⁶ *Supra* note 22.

⁷⁷ PMEX art. 4.

⁷⁸ *Id.*

⁷⁹ PMEX art. 6(1).

⁸⁰ See The Guideline For Complaint Submission Against Infringement of Intellectual Property at Exhibition: Ten Questions on How to Protect Your Intellectual Property at Exhibitions, available at http://beijing.usembassy-china.org.cn/uploads/images/W73FkhlCQ-s8tRGeky3abMg/MOFCOM_Trade_Fair_IPR_Manual.pdf (guidelines for complaint submission against infringement of intellectual property at exhibitions) [hereinafter "Guideline For Complaint"].

infringement cases.⁸¹ As discussed above, different administrative authorities deal with various types of IPRs. Hence, the singular form is slightly misleading: each administrative department responsible for enforcing some sort of IPRs is required to dispatch representatives.⁸²

If no special office needs to be installed, the IPRs administrative department at the locality of exhibition must “intensify the guidance for and supervision over the IPRs protection during the exhibition as well as the handling of relevant cases therein,”⁸³ while the exhibition sponsor shall prominently announce contact information of the competent IPRs administrative department.⁸⁴

The office handling IPR complaints is staffed with representatives from the exhibition sponsor, the administrative department of exhibitions, and the respective IPRs administrative departments for patents, trademarks, and copyrights.⁸⁵ The office is responsible for accepting complaints of IPRs holders and removing suspected infringing items during the exhibition.⁸⁶ The office forwards complaints to the competent IPRs administrative department to “coordinate, supervise, and urge” the treatment of complaints.⁸⁷ Alternatively, right holders may still file a complaint with the administrative department itself instead of with the office.⁸⁸

To file a complaint with the office, the right holder must submit: “(1) a legitimate and effective certificate of IPRs ownership; (2) the basic information about the suspected infringers; (3) the explanations and evidence for any suspected infringement; and (4) where an agent is entrusted to file a complaint, the relevant Power of Attorney.”⁸⁹ If the complaint does not comply with these requirements, the office must inform the complainant to give him an opportunity to submit additional documents.⁹⁰ If he fails to provide the missing information the second time, the complaint will be dismissed.⁹¹ If the complaint satisfies the criteria of Article 8 of the PMEX, the office must forward it to the relevant IPRs administrative department within 24 hours.⁹²

Upon accepting the complaint, the administrative department timely

⁸¹ PMEX art. 6(1).

⁸² See also Guideline For Complaint, *supra* note 80, at 4.

⁸³ PMEX art. 6(2).

⁸⁴ *Id.*

⁸⁵ PMEX art. 7.

⁸⁶ PMEX art. 7(1).

⁸⁷ PMEX art. 7(2) and (3).

⁸⁸ PMEX art. 8.

⁸⁹ *Id.*

⁹⁰ PMEX art. 9.

⁹¹ *Id.*

⁹² PMEX art. 11.

notifies the exhibition sponsor and the respondent⁹³ and sets an answer deadline.⁹⁴ After the defendant has submitted his answer or fails to submit one within the designated time period, the administrative department renders the decision and delivers it to parties, “unless any further investigation is required”.⁹⁵

The PMEX further contain special provisions for patent, trademark, and copyright protection by the local administrative authorities. However, these provisions mainly repeat the rules foreseen by the respective IPR statutes.⁹⁶

If the local IPRs administrative department finds an infringement, “it may punish the exhibitor in collaboration with the administrative department of exhibitions according to law”.⁹⁷ If infringement of an invention patent or a utility model is found, the administrative department may order the infringer to stop his infringement immediately by removing exhibition items, destroying advertising publications, or replacing exhibition boards.⁹⁸ If a design patent is infringed, the infringer must be ordered to remove infringing items.⁹⁹ With regard to protection of trademarks, infringement is dealt with according to the general rules of the trademark laws.¹⁰⁰ For copyrights, the PMEX refer to Article 47 of the Copyright Act, which states that the remedies available consist of “ceasing the infringing act, confiscating unlawful income from the act, confiscating and destroying infringing reproductions and imposing a fine.”¹⁰¹ While the rules addressing patents and copyright state that the authorities may order the infringer to remove all infringing exhibited items, to destroy the advertising materials relating to the infringing items, and to change the exhibition board of introduction with regard to the infringing items,¹⁰² the PMEX do not expressly provide for such remedies in trademark matters.¹⁰³ These remedies are likely not applicable to trademark law because they are only stated in the measures and, at least as the publicity materials and the change of the introduction board are concerned, quite specific. On the other hand, these remedies might maybe be inferred by interpreting Article 53 of the Trademark Act more broadly, which is done in practice.

If the same exhibitor infringes more than twice consecutively, the

⁹³ PMEX art. 12.

⁹⁴ PMEX art. 13.

⁹⁵ PMEX art. 14.

⁹⁶ See PMEX art. 16-23.

⁹⁷ PMEX art. 24.

⁹⁸ PMEX art. 25.

⁹⁹ *Id.*

¹⁰⁰ PMEX art. 27.

¹⁰¹ PMEX art. 28.

¹⁰² PMEX art. 25 & 28.

¹⁰³ See PMEX art. 27.

exhibition sponsor shall prohibit the exhibitor from participating in the next exhibition.¹⁰⁴ Finally, if an exhibition organizer does not comply with its duties of protecting IPRs during an exhibition, it may be barred from holding any further exhibitions.¹⁰⁵

If a case has not been concluded by the end of an exhibition, the IPRs administrative department at the locality of the exhibition shall, within 15 workdays, transfer it to the IPRs administrative department for further treatment.¹⁰⁶

3. Analysis of the Improvement of IPR Protection by the PMEX

This section will examine how the PMEX differ from the ordinary way of enforcing IPRs via the administrative route in China and how right holders profit from these differences.

First of all, the apparent “invention” of the measures is the obligation, although contingent on the duration or importance of the fair, of the exhibition sponsor to set up an office in charge of IP violations.¹⁰⁷ What are the advantages of the office for right holders? This fairly simple measure certainly facilitates procedures for right holders. They can file the complaint with the office, which will check whether it fulfills the formal requirements and forward it to the relevant authorities. Thereby, the complainant is relieved from investigating the appropriate administrative authority responsible for his or her claims, which could be quite difficult if he or she is not familiar with the particular jurisdiction. Yet, the office has 24 hours to forward the complaint,¹⁰⁸ which is a long period considering the importance of timing. This time limit may offset the advantages to the complainant of not having to search for the correct office.

One can only speculate why the scope the PMEX is limited to patents, trademarks, and copyrights. Claims for violations of geographical indications, layout design of integrated circuit, business secrets, and anti-unfair competition laws do not profit from the additional benefit. With regard to business secrets and unfair competition, the exclusion may be understandable. The measures emphasize that the right holders have to submit evidence of their rights. Meeting this burden is easier with rights that must be registered, such as patents, trademarks and, even copyrights¹⁰⁹.

¹⁰⁴ PMEX art. 31.

¹⁰⁵ PMEX art. 32.

¹⁰⁶ PMEX art. 33.

¹⁰⁷ *Supra* note 14, at 7.

¹⁰⁸ PMEX art. 11.

¹⁰⁹ See Agreement on Trade Related Aspects of Intellectual Property Rights, art. 9, 33 I.L.M. 1125, (1994) [hereinafter TRIPS]; Berne Convention for the Protection of Literary and

Perhaps the most important provision is Article 7(1) of the PMEX, which entitles the office in charge to “suspend the items suspected of infringement during the exhibition.”¹¹⁰ However, the measures do not provide any further guidance on the details of this competence. First, it is unclear what “suspected” means. Is it sufficient that the office sees a *prima facie* case of infringement? Second, there are no procedural rules; there are, for example, no provisions addressing possible defenses of the alleged infringer.

The PMEX also do not address the required composition of the office. The PMEX simply require that the local agencies must dispatch personnel. There is no statement as to the number or the proportion between the dispatched personnel and exhibition sponsor’s appointed people. Additionally, the PMEX lack rules about who makes the decisions.

Article 10 of the PMEX is not entirely clear. It stipulates that “where a complainant brings any damage to the relevant respondent by submitting any false complaint material or by any other fabricated complaint, he shall be subject to the relevant legal liabilities.”¹¹¹ It seems that the provision just repeated the fact that bringing false claims may lead to damage compensation claims by the counterparty. However, the MOFCOM guidelines state that “[P]ursuant to Article 10 of ‘The Measures on the Protection of Intellectual Property at Exhibitions,’ complainants shall be legally liable for losses of the exhibitors resulting from their submission of false complaint materials or other false practices.” The statement could indicate that the provision has individual character and stipulates a special liability for false claims at exhibitions. Read this way, the provision would address the concern already discussed that right holders may well try to misuse the opportunity to submit claims as a mechanism of discrediting a competitor.¹¹²

Whether Articles 25 and 28 of the PMEX offer additional remedies is arguable. Although the authorities may order the infringer to withdraw all the exhibited items of infringement, to destroy the publicity materials, and to change the exhibition board’s of introduction to the exhibited items, these remedies should be available under the general infringement provisions of the relevant laws as well. Nevertheless, the express inclusion of these remedies in the PMEX is beneficial for the right holders: by expressly stating the remedies, the PMEX confirm to right holders, and deciding administrative authorities, that these remedies are available, thereby enhancing legal certainty and speed by removing the existence of certain remedies as a disputable issue.

Artistic Works, art. 5(2) (1971) [hereinafter Paris Act] (this *de facto*, although not *de jure*, obligation for registration might not be in compliance with international obligations).

¹¹⁰ PMEX art. 7(1).

¹¹¹ PMEX art. 10.

¹¹² See CASUCCI, *supra* note 2, at 6.

As explained, the NCA and its offices may refuse to pursue a case if they do not see public interests involved.¹¹³ There is no indication that the PMEX changed anything in this regard.

Articles 31 and 32 of the PMEX implement two of the suggestions we have made above. First, the exhibition sponsor may be punished for IPR infringements committed by exhibitors if he does not comply with his obligations under the PMEX to protect IPRs.¹¹⁴ Second, the PMEX establish the special remedy of excluding an exhibitor from future exhibitions.¹¹⁵ Both these provisions contain remedies that are specific for trade fairs and may not be obtained under the general IPR infringement provisions.

Summing up, the title of the measures sounds quite promising. Indeed, the valuable, but insufficiently regulated competence of the office to remove items suspected of infringement, the clear statements of Articles 25 and 28 of the PMEX with regard to particular remedies, and the additional remedies of Articles 31 and 32 of the PMEX certainly improve the IPR protection for right holders at trade fairs. Additionally, the measures fulfill another very important purpose. By implementing one set of measures with detailed provisions on how to formally protect right holder's legitimate interests and imposing duties on the exhibition sponsors, the measures considerably improve the awareness of most of the possibly affected people and institutions, such as right owners, possible infringers, exhibition sponsors, local authorities, and probably even exhibition visitors. From this broader point of view, the practical impact of the PMEX may be even higher and more valuable to the right owners than the actual legal benefits.

B. Other Solutions: No Special Protection for IPRs at Trade Fairs

1. European Countries Generally

In Europe, customs authorities are the only administrative bodies investigating IPR violations.¹¹⁶ Right holders can either file a civil suit or deposit a complaint with a criminal prosecutor. Typically, pre-trial preliminary injunctions provide the fastest means of obtaining relief.

The European Union has adopted the so-called Enforcement Directive, which contains rules for preliminary seizures and injunctive orders.¹¹⁷ The Member States are obliged to ensure that the judicial authorities may issue

¹¹³ See *supra* note 11, at 6.

¹¹⁴ PMEX art. 31.

¹¹⁵ PMEX art. 32.

¹¹⁶ CASUCCI, *supra* note 2, at 8 (noting role of administrative authorities is normally reduced to administration of rights, such as registration, examination and cancellation).

¹¹⁷ Council Directive 2004/48/EC, 2004 O.J. (L 195) 16 (EC).

preliminary injunctions against possible infringers or to provisionally prohibit the continuation of the alleged infringements, or request guarantees to ensure the compensation of the right holder in case infringement is found.¹¹⁸ Further, judicial authorities must be entitled to order the “seizure or delivery up of the goods suspected of infringing an intellectual property right to prevent their entry into or movement within the channels of commerce.”¹¹⁹ The Directive expressly stipulates that the provisional measures may be taken *ex parte*, particularly where any delay would cause irreparable harm to the right holder, but with subsequent information of the parties.¹²⁰

2. Switzerland

The Swiss regulations will be explained in some more detail. This article will later discuss the regulations adopted by Baselworld, “the world’s biggest and most important event for the watch and jewelry industry”.¹²¹ It is important to understand the judicial background of these regulations because in assessing whether similar measures would be advisable for trade fairs in China, a major consideration is an understanding of the remedies available under the Swiss model.

In Switzerland, for all sorts of IPR violations, the right owner may ask the competent court for a preliminary injunction.¹²² Only one court in each state handles IP matters. Generally, this is either a special chamber of the appellate court or a specialized commercial court.¹²³ The territorial jurisdiction in national cases is governed by the Act on Territorial Jurisdiction,¹²⁴ offering venues at the domicile of the infringer, the claimant, or where the infringing acts occur or have effects.¹²⁵ In euro-international disputes, the Lugano-Convention¹²⁶ regulates territorial jurisdiction, and in other international disputes, the Swiss Private International Law Act,¹²⁷ regulates territorial jurisdiction and determines conflict of law issues. Both

¹¹⁸ Council Directive 2004/48/EC, art. 9(1)(a), 2004 O.J. (L 195) 22 (EC).

¹¹⁹ Council Directive 2004/48/EC, art. 9(1)(b), 2004 O.J. (L 195) 22 (EC).

¹²⁰ Council Directive 2004/48/EC, art. 9(4), 2004 O.J. (L 195) 22 (EC).

¹²¹ BaselWorld, <http://www.baselworld.com/en-us/The-Show/Key-Facts-And-Figures.aspx> (last visited April 11, 2010).

¹²² See, e.g., Design Act, art. 38; Patent Act, art. 77; Copyright Act, art. 65; Anti-Unfair Competition Act art. 14; Civil Code, 28(c).

¹²³ Such commercial courts exist in the States of Zurich, Bern, St. Gallen and Aargau.

¹²⁴ Bundesgesetz vom 24. März 2000 über den Gerichtsstand in Zivilsachen (Gerichtsstandsgesetz, GestG), SR 272.

¹²⁵ GestG., Art. 25.

¹²⁶ Uebereinkommen vom 16. September 1988 über die gerichtliche Zuständigkeit und die Vollstreckung gerichtlicher Entscheidungen in Zivil- und Handelssachen, SR 0.275.11.

¹²⁷ Bundesgesetz vom 18. Dezember 1987 über das Internationale Privatrecht (IPRG), SR 291.

contain the same venues as the domestic law, apart from the domicile of the claimant.¹²⁸ Therefore, at least the specific IP court at the place where a trade fair is held has territorial jurisdiction over the dispute, which also applies for preliminary measures.¹²⁹ The applicable law is Swiss law, if protection is sought in Switzerland.¹³⁰

The requirements for successfully obtaining preliminary measures include: the likelihood of success on the merits, the likelihood of irreparable harm, and the need for a quick decision.¹³¹ If an injunction is sought, the likelihood standard is higher than in cases where the remedial order requires only the preservation of evidence. Additionally, injunctions may only be granted if the interests of the right holder outbalance the interests of the alleged infringer.¹³² *Ex parte* injunctions further require that the time needed for summoning to an oral hearing with an immediate subsequent decision would frustrate the effects of the preliminary injunction.¹³³ This last requirement is very difficult to satisfy. Nonetheless, IP infringements at trade fairs regularly satisfy it due to the very short timeline and the huge potential for harm. Depending on the speed of the courts, *ex parte* injunctions can be obtained within 24 hours of the filing, but there are no obligations of the courts to decide within a certain time period. Preliminary injunctions may take weeks or even months, although courts have it within their authority to set a very tight timetable and summon parties on short notice, if they deem it necessary. As it is usually in the interest of the alleged infringer to be heard, he normally prefers to be informed, even on short notice, than to be faced with an *ex parte* injunction.

C. The Arbitration Solution

Although the Swiss legal framework seems to offer quite effective protection against IPR infringements, the most important trade fair in Switzerland, the Baselworld watch and jewelry exhibition, has decided to go another route and institute an arbitration panel. This section will examine the arbitration panel.

In 1985, the Baselworld management installed an arbitration commission called the "Panel."¹³⁴ Before the Panel was instituted, claimants were required to seek remedies from the Basel cantonal courts as set forth in

¹²⁸ See Lugano-Convention, Arts. 5(3), 2; 109 IPRG, Art.

¹²⁹ GestG., Art. 33; Lugano-Convention, art. 24; IPRG, art. 24.

¹³⁰ See IPRG, Art. 110.

¹³¹ Civil Code, Art. 28(c).

¹³² BGE 104 Ia 408, 414; 100 Ia 18, 22.

¹³³ DANIEL ALDER, DER VORSORGLICHE RECHTSSCHUTZ IM IMMATERIALGÜTERRECHT, 156 (1993).

¹³⁴ PAUL RUEST, *supra* note 5, at 9.

Section III.B above. However, faced with around 30 complaints during the exhibition,¹³⁵ the court had difficulties delivering decisions in a timely manner.¹³⁶ Additionally, “substantial negative press coverage” went along with these suits.¹³⁷ The average number of cases has remained the same throughout the years: as of 2004, the Panel had dealt with 617 complaints, out of which 90 were settled or resolved without decisions.¹³⁸ Infringement was found in 87% of the 527 cases decided.¹³⁹ However, the figure of complaints has to be compared to the number of roughly 2,300 exhibitors, most of which display a wide variety of goods.¹⁴⁰

The functioning of the Panel may be illustrated by the incident involving a Chinese firm.¹⁴¹ At Baselworld 2008, a Swiss heavyweight watch firm questioned the “rotary artwork” device on a Sea-gull watch.¹⁴² On April 5, 2008, at 3 p.m., representatives from the Swiss watchmaker and a Baselworld arbitration committee arrived at the Sea-gull booth.¹⁴³ They intended to check the Sea-gull watch for infringement of the Swiss company’s IPRs.¹⁴⁴ After “carefully scrutinizing the designs of the two companies”, the 70-year-old design arbitration expert concluded that the Sea-gull model’s “planetary transmission” device was sufficiently different from the Swiss watchmaker’s design and stated with his thumb up: “Your watch is quite a great work.”¹⁴⁵ Therefore, the alleged infringement of IPRs proved wrong.

This story gives a first impression of how the Baselworld Panel works. Let us look at the method more closely. The exhibitors sign a contract with the exhibition organizer, according to which an exhibitor has to call first upon the panel before initiating an action in court.¹⁴⁶ The panel consists of a Chairman, who is Swiss lawyer, two additional Swiss lawyers, a patent attorney practicing in Switzerland, two experts with special knowledge of the watch and clock sector who are not Swiss nationals, and one expert who is not Swiss

¹³⁵ According to the Secretary of the Panel, Mr. Christoph Lanz, the figures have remained the same in the past few years.

¹³⁶ PAUL RUEST, *supra* note 5, at 9.

¹³⁷ *Id.*

¹³⁸ *Id.* at 16.

¹³⁹ *Id.* at 16.

¹⁴⁰ *Id.* at 17.

¹⁴¹ The following short story is taken from BI XIAONING, *Soaring High*, CHINA DAILY, May 5, 2008; available at http://www.chinadaily.com.cn/bw/2008-05/05/content_6660572.htm.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Supplementary Regulations 2009, Art. 2.1 (on file with the author). The Supplementary Regulations form part of the Exhibitor’s Contract. We would like to thank Mr. Christoph Lanz, Secretary of the Panel, for providing us with the Supplementary Regulations 2009.

with special knowledge of the jewelry sector.¹⁴⁷ Additionally, the panel consists of one or two technical experts and a secretary with advising, but not voting, rights.¹⁴⁸ The Panel accepts complaints from exhibitors against non-exhibitors as well as complaints by a non-exhibitor, if he accepts the Supplementary Regulations, or against a non-exhibitor who is illegally offering his goods for sale within the area of the Baselworld.¹⁴⁹

Complaints may be filed daily until 4 pm.¹⁵⁰ The complainant must submit a valid extract of the appropriate IP register,¹⁵¹ which, due to a lack of registers, is not available in Swiss unfair competition or copyright claims. Upon payment of the handling fee, the panel convenes as soon as possible to establish the facts.¹⁵² A delegation of two members of the panel carries out the inspection at the stand of the defendant and hears his arguments.¹⁵³ The claimant should also be present.¹⁵⁴ Within 24 hours of filing the complaint, the panel prepares a report or decision on the steps taken, factual findings, and on the positions taken by the parties.¹⁵⁵ In practice, the Panel meets at 5 p.m. and reaches its decisions, which are issued to the parties the following day from 9 a.m. onward in fifteen-minute sessions.¹⁵⁶ Panel decisions are made by simple majority of those present and able to vote.¹⁵⁷ The Panel may decline to take up a complaint or to render a decision in highly complex matters, such as patent infringement claims.¹⁵⁸ Panel decisions are final and not appealable within the arbitration framework created by Baselworld.¹⁵⁹ However, if the defendant has new documents or evidence, he may ask for reconsideration of a decision during the fair.¹⁶⁰ Furthermore, parties may appeal to the management of the Baselworld for not conforming to the Regulations at the latest within 30 days of the closing date.¹⁶¹

If the panel finds no infringement, it informs the parties and the

¹⁴⁷ Supplementary Regulations 2009, Art. 2.2.

¹⁴⁸ *Id.*

¹⁴⁹ Supplementary Regulations 2009, Art. 3.1.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at art. 3.2.

¹⁵² *Id.* at art. 7 (noting that handling fee is approximately USD 2'000 for exhibitors and USD 9'000 for non-exhibitors). If the claimant wins, he will be refunded half of the amount. If defendant loses, he has to pay approximately USD 3'500.

¹⁵³ PAUL RUEST, *supra* note 5, at 9.

¹⁵⁴ *Id.*

¹⁵⁵ Supplementary Regulations 2009, art. 3.4.

¹⁵⁶ PAUL RUEST, *supra* note 5, at 9-10.

¹⁵⁷ Supplementary Regulations 2009, art. 2.3.

¹⁵⁸ *Id.* at art. 3.1.

¹⁵⁹ *Id.* at art. 3.7.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

Baselworld management accordingly and tries to convince the parties to settle the dispute if it deems this appropriate.¹⁶² If the panel finds infringement, it directs the defendant to withdraw the contested objects immediately and encourages discussions between the parties.¹⁶³ The Panel makes the infringer sign a declaration which contains a cognizance of the Panel's ruling, the agreement to withdraw the infringing object and to discontinue sale at the Baselworld, cognizance of the ability of the Baselworld to take further measures, confirmation of renunciation of the right to compensation with the activities of the Panel, and assumption of the costs of the intervention of the Panel.¹⁶⁴ The Panel may recommend that the management of the Baselworld deny the exhibitor admission to the next fair, that it immediately closes the stand, or take other measures.¹⁶⁵ Additionally, the Panel may act as a mediator or secure evidence at the request of an exhibitor or non-exhibitor.¹⁶⁶ The Panel workings are executed as secretly as possible¹⁶⁷ Exhibitors are under the obligation to exercise their rights in a reasonable manner. In particular, they should not engage in any publicity concerning Panel's decisions or measures and should not disturb the atmosphere of the show.¹⁶⁸

IV. COMPARATIVE ANALYSIS OF THE CHINESE RULES

A. *Assessment of the Existing Rules*

1. Overview

This final section will analyze the suitability of the particular approaches discussed in the first chapters to solve the IPR enforcement issues posed by trade fairs. While preliminary injunctions of civil courts are the only judicial way to protect IPRs at trade fairs in Europe, China offers right holders additional protection by way of administrative enforcement. The next subsection will thus address the differences between civil and administrative enforcement of IPR protection at trade fairs. For the following discussion, it is assumed that a complaint office under Article 6 of the PMEX is set up.¹⁶⁹

2. The Issues in Detail

Thus far, this article has identified the following challenges for IPR

¹⁶² *Id.* at art. 3.2.

¹⁶³ *Id.* at art. 3.5(a).

¹⁶⁴ *Id.* at art. 3.5(b).

¹⁶⁵ *Id.* at art. 3.6.

¹⁶⁶ *Id.* at art. 4.

¹⁶⁷ PAUL RUEST, *supra* note 5, at 10.

¹⁶⁸ Supplementary Regulations 2009, art. 5.1.

¹⁶⁹ However, not all fairs are obliged to have one. See *supra* note 14 and accompanying text.

protection at exhibitions:¹⁷⁰ the enormous potential harm for both parties and the chances of abusing the situation for unfounded claims, which calls for well-founded decisions along with minimal publicity; timing for both parties, making quick decisions necessary which in turn requires the availability of deciding authorities, legal advisors, experts and translators; quick and temporary relief during the fair, especially the removal of the goods and finally, with the exhibitor sponsor there is a third party involved who is interested in protection of the IPRs.

As noted, the PMEX add the power of the office to remove items suspected of infringement, the clear statements of Articles 25 and 28 of the PMEX with regard to particular remedies, and the remedies of Articles 31 and 32 of the PMEX and thereby solve a couple of these special concerns.¹⁷¹

a. Venue

Both civil and administrative enforcement may take place at the locality where the infringing activity is carried out.¹⁷² However, only administrative enforcement offers the advantage of filing a complaint at the exhibition's location. Nevertheless, the office forwards the complaint to the respective authorities. These authorities must contact the defendant who in turn may submit written or oral statements. This may lead to a delay in the proceedings.

b. Issues Concerning the Decision-Making Authority

First, the composition of the deciding authorities may differ considerably. The IPR chambers of Chinese courts are presumably staffed with people trained in intellectual property law,¹⁷³ who will gain considerable experience if the tide of IP-related disputes continues to rise. Although the administrative offices are also specialized in IP matters, it is, not at least due to the vast number, unlikely that the quality and experience of the staff is comparable to that of the courts.¹⁷⁴ The staffing, size, knowledge, and attitude towards IPR protection may further vary from authority to authority. This is of course a general fact, which parties in any proceedings have to deal with. However, in light of the need for fast decisions and the potential harm, these

¹⁷⁰ See *supra* notes 4-7 and accompanying text.

¹⁷¹ See *supra* notes 19-21 and accompanying text.

¹⁷² See *supra* notes 11-12 and accompanying text (although there is not express provision for trademark law, it may be reasonable assumed that the jurisdiction is the same because both copyright and patent law contain such provisions).

¹⁷³ See *supra* note 9 and accompanying text

¹⁷⁴ See generally Shanghai Administration of Industry and Commerce, Contact List of Trademark Department of SHAIC, <http://www.sgs.gov.cn/sgs/en/news2.jsp?id=12> (last visited June 5, 2010) (noting that Shanghai Administration of Industry and Commerce alone has 20 branches).

differences may affect the parties severely. It is just fortuitousness whether the court or administrative authority in the locality where the exhibition takes place has experience and knowledge of that particular industry. The importance of having experienced decision-making authorities is higher at trade fairs because of the urgency of decisions, which leaves less time for the decision-maker to gain the relevant knowledge if it does not have it initially.

Another important aspect is the impartiality and independence of the authority. A particular concern exists as to the nationality of the parties. On one hand, the risk of local protectionism cannot be neglected, which may be particularly high where the local administrative offices and local exhibitors are involved. On the other hand, the huge emphasis on increased protection of IPRs by all sorts of very high-ranking officials and authorities¹⁷⁵ may also result in decisions “overprotecting” foreign right holders to demonstrate the willingness and effectiveness of the system.

As concerns the exhibition office’s authority to remove allegedly infringing items for the time of the fair,¹⁷⁶ the lack of any rules regarding composition of the office, procedure, parties’ rights, and decision-making is a major unsolved problem.

c. Legal Certainty and Timeliness of Decision

Courts in civil litigation must render decisions on preliminary measures within 48 hours.¹⁷⁷ Accordingly, a speedy treatment is guaranteed. The same is not necessarily true for administrative proceedings. As explained above, the NCA and its offices may refuse to take on a copyright case if they do not see public interests involved.¹⁷⁸ With regard to patent law, the administrative dispute may well take a few weeks.¹⁷⁹ A timely decision via the administrative route may therefore, only be expected if the exhibition office may act itself. It certainly is helpful for the right holder, if the office uses its power under Article 7(1) of the PMEX and suspends the items suspected of infringement during the exhibition. Nevertheless, although this may be the most salient remedy to the complainant, other remedies, such as the order to destroy the advertising materials concerning the infringing items,¹⁸⁰ may only be enforced by the administrative authorities, not by the exhibition office. Hence, the administrative route may not guarantee full relief for the right holder during the exhibition.

Although the 48 hour time limit on civil courts’ decisions is very quick

¹⁷⁵ See *supra* note 14 and accompanying text.

¹⁷⁶ PMEX art. 7(1).

¹⁷⁷ *Supra* notes 10-11 and accompanying text.

¹⁷⁸ *Supra* notes 11-12 and accompanying text.

¹⁷⁹ *Supra* note 13 and accompanying text.

¹⁸⁰ PMEX art. 25 and 28.

by international standards,¹⁸¹ even the civil court route is not a completely satisfactory course of action. Rendering quick decisions requires the availability of deciding authorities, legal advisors, experts, and translators. This is particularly problematic on weekends and holidays, when courts may be closed and experts unavailable. The courts may also receive more claims than they can reasonably handle within the 48 hours.¹⁸² Obtaining and instructing competent lawyers or experts, which are necessary to minimize the risk of liability for unfounded claims,¹⁸³ adds additional problems to the system. Parties also run the risk of losing a civil suit on formal grounds. For these reasons, even the 48-hour deadline for courts may not entirely ensure the availability of sufficient remedies against IPR infringement at trade fairs.

d. Role and Rights of the Parties

The main difference between civil and administrative enforcement is that the claimant is not completely the master over administrative actions. Once the activities of the defendants are brought to the attention of the relevant office, the administrative authorities may take actions *ex officio*, which may reduce that chance of settling the dispute between the parties.¹⁸⁴ Another difference is the higher risk for a claimant of losing on formalistic grounds, which is inherent in each civil lawsuit and far less prevalent in administrative procedures. For example, the copyright administrative authorities investigate the facts and collect evidence themselves.¹⁸⁵

For foreign right holders, language may also pose a serious obstacle in proceedings. If they do not have Chinese-speaking employees, they need translators or Chinese speaking representatives. Although they will regularly hire such people for working at the stands, that does not guarantee they are proficient enough to translate legal matters. Hence, a foreign right holder may find it difficult to enforce his rights should a court or administrative office become involved.

e. Scope of the Decision and Remedies

In general, disadvantages of the administrative process include: the lack of compensation for the right holder, fines too small to deter future infringement, or the potential to place the offender out of business.¹⁸⁶ However, for trade fairs, these general concerns are not as serious. The most

¹⁸¹ Cf. *supra* notes 22-24.

¹⁸² As explained, this was one of the main reasons for the establishment of the Baselworld Panel. See *supra* note 25 and accompanying text.

¹⁸³ See *supra* note 5.

¹⁸⁴ GANEA & PATTLOCH, *supra* note 20, at 323.

¹⁸⁵ See Measures for Implementation of the Administrative Punishment of Copyright Infringement, art. 16 et seq. (July 24, 2003).

¹⁸⁶ See also JIANQIANG NIE, *supra* note 58, at 225.

important remedy is immediate removal of the infringing goods and accompanying advertisement materials, the former of which is available through Article 7(1) of the PMEX. Civil preliminary injunctions, even if only interlocutory, may have a heavier impact on the defendant because courts will generally prohibit the sale or offer for sale without limiting the injunction to the time of the exhibition. Hence, a right owner may get more in court than a remedy that is narrowly tailored to the fair. The defendant may be affected in such a case, if courts tend to be willing to issue a preliminary or *ex parte* injunction because of the speed needed. Therefore, the defendant may wind up with an overreaching judgment against him.

On the other hand, the potential harm to the defendant stemming from the procedures seems to be less because the court will not investigate at the fair and draw attention to the booths,¹⁸⁷ whereas this may well happen in administrative procedures.

European countries and China offer preliminary injunctions of civil courts as a judicial way to protect IPRs at trade fairs. While the prerequisites for obtaining preliminary injunctions are very similar throughout these countries, China's procedural law contains a special obligation of courts to decide such claims within 48 hours, which is very valuable for right holders seeking quick relief. Still, such clear-cut rules may affect the quality of the decisions, especially if an inexperienced court has to follow them. China does not only offer protection in civil courts on a similar basis as European courts, but additionally provides for IPR protection via administrative authorities. This venue is of particular importance for trade fairs since the implementation of the PMEX, which are directly aimed at exhibitions. As China already offers the administrative route for IPR infringement claims, it makes sense to focus enforcement for trade fairs through this channel.

B. Possible Improvements and Alternatives

1. Overview

The next part of this article suggests potential improvements of the PMEX. We will then discuss possible alternatives outside the existing regulations.

2. Specific Amendments of the PMEX

The first improvement regarding the PMEX concerns the scope of their application.¹⁸⁸ The PMEX should at least apply to all IPRs which may be registered. Preferably, the PMEX should extend to unregistered IPRs (including unfair competition) as well. The concern about adjudicating such

¹⁸⁷ Another question is, of course, potential press coverage initiated by a malicious claimant.

¹⁸⁸ *Supra* note 14 and accompanying text.

claims can be addressed by asking for clear evidence of entitlement, rather than by excluding the subject matter as such.

Arguably, another flaw is lack of sufficient protection for design patents. According to Article 11(2) of the Patent Act, only the exploitation of a design patent, “that is, make, sell or import the product incorporating the patented design” constitutes infringement, whereas patents for inventions or utility models are infringed by exploitation, “that is, make, use, offer to sell, sell or import the patented product”.¹⁸⁹ In line with the Patent Act, any claims for infringement of a design patent require an actual sale (i.e., conclusion of a purchase agreement) of the infringing items at the exhibition.¹⁹⁰ Therefore, the right owner cannot stop the mere display of the infringing items unless he is able to collect evidence of actual sales, such as orders, agreements, or invoices. However, it is difficult to see the reasons for this different treatment of patents for inventions, utility models, and designs. The measures should thus remedy this inconsistency.¹⁹¹

The third point that might be improved is the loss of time resulting from the 24 hours the office has to forward a complaint.¹⁹² This issue could be solved by shortening that timeframe, which seems long for assessing just the formal requirements of the complaint. Another way of shortening this delay would be to grant the office broader decision-making authority, including the right to order other preliminary measures than the suspension of goods during the exhibition according to Article 7(1) of the PMEX. However, this broader authority should only extend to measures directly related to the trade fair. This way, the right holders’ interests in fast decisions can be balanced against the possible harm by overreaching general injunctions to the defendants. Having an on-site office with decision making authority would, apart from the speedier proceedings, further solve the problem of *ex parte* measures—the defendant’s arguments may be heard without losing time, which improves due process. Interestingly, some offices apparently already interpret their authority more broadly than currently authorized by the PMEX and order the destruction of advertising materials in clear-cut cases.¹⁹³

Regardless of whether the office is granted more decision making authority, the procedural rules governing its operations, such as composition, procedures, burden of proof, time frame for rendering a decision, should

¹⁸⁹ Patent Act, Art. 11(1).

¹⁹⁰ PMEX, art. 25(2).

¹⁹¹ See also Roy Liu, *Case Summary: The Intellectual Property Protection during Exhibitions in China*, http://www.liuandpartners.com/En_InformationShow.asp?id=126.

¹⁹² See *supra* note 17 and accompanying text.

¹⁹³ See Intellectual Property Protection in China, Sichuan: IP Office Stationed at Sugar and Alcohol Commodities Fair, March 26, 2008, available at <http://www.chinaipr.gov.cn/news/local/235775.shtml> (noting, “The infringing goods as well as promotion materials were destroyed on the ground”),

certainly be formally stated in a legally binding manner. Further, the rules should make clear that an office may decline to take a case only if the technical questions involved are too complicated for the office to handle in an equitable manner.

Even if the office has decision-making authority and its operations are governed by sufficient rules, there remain further concerns. To ensure sufficient technical and industry knowhow, a central pool of experts, preferably with additional legal knowledge, could be established from which the exhibition sponsor could pick appropriate members. This would, however, mean that the office consisted of “outsiders”, i.e. non-governmental officials.

To sum up, an exhibition office with such broader competences, additionally staffed with some national or at least provincial specialists and governed by clearer rules, would guarantee even better protection than the existing one for both parties. In the remaining paragraph, we will discuss whether an arbitration solution might still have further advantages.

3. Amendments outside of the Existing Framework: Should Chinese Exhibitions adopt Arbitration Solutions?

Although the proposed strengthened office would solve most of the issues addressed in this article, some problems remain as long as state rules govern and administrative authorities are involved. One concern is the independence and impartiality of the decision-making authority.¹⁹⁴ Administrative officials are state employees and therefore, at least theoretically, may be influenced by higher authorities. Additionally, they are Chinese nationals, and favoritism may play a role, either for or against the interests of foreign parties.¹⁹⁵ A truly independent on-site authority could be achieved by establishing an arbitration panel. Further advantages of a panel are the flexibility of composition, which could be tailored for each fair, and the language of the proceedings. It is, for example, quite possible that the dispute arises between two foreign right holders, in which case proceedings in English might be more appropriate for both parties. The freedom to choose experienced and recognized experts for a panel is potentially the biggest advantage. Such a panel can make decisions that serve as a basis for settlements between the parties and thus, potentially save each party a lot of money they would have to spend in subsequent procedures.

However, there are also downsides of arbitration panels. The main disadvantage of an arbitration panel is the actual costs. Additionally, contrary to state enforcement, typically no liability exists for unjustified claims brought before an arbitration panel. This may invite unfounded claims of right holders, which may damage the alleged infringer. However, this possible disadvantage

¹⁹⁴ See *supra* note 20 and accompanying text.

¹⁹⁵ *Id.*

is offset by the quality of the panel decision and appropriate safeguards in the rules, such as requiring clear evidence of ownership from the claimant. The first disadvantage, the costs, is more serious, because the arbitration solution requires exhibitors to initiate arbitration before going to court and thus deprives them of the cheaper civil or administrative litigation. However, as the example of the Baselworld shows, high quality panel decisions in a western industrialized country are available for roughly USD 2,000,¹⁹⁶ which could be considerably less in China and should thus not be deterring exhibitors, at least at larger exhibitions. The last point is that arbitration clauses may of course only bind exhibitors.

Summing up, an arbitration solution has additional benefits compared with the suggested stronger office. If no such stronger office was installed, the reasons¹⁹⁷ for the stronger office would call for an arbitration solution as well. The advantages over the modified strong office, however, seem not as compelling as to warrant a mandatory scheme. Nevertheless, huge and important fairs with international exhibitors could certainly profit from adopting such a solution.

Nevertheless, there are serious obstacles to this proposition. It is disputed whether IPR infringement disputes are arbitrable,¹⁹⁸ and current Chinese law does not allow ad hoc arbitration,¹⁹⁹ which is what such a panel solution would be.²⁰⁰ China would thus have to make an exception in its arbitration law for fairs. A first hint in this direction can be inferred from Article 4 of the PMEX, which expressly states that the exhibition sponsor may intensify the IPRs protection during the exhibition by contractual stipulations with the participants of the exhibition.

CONCLUSION

China's laws not only offer the same amount of protection for IPR violations at trade fairs through court enforcement as in European countries and the United States, but also provide for the additional advantage of administrative proceedings. Therefore, it makes sense to focus on the latter approach for trade fairs, which China has done by implementing the PMEX. These rules are an important step in the right direction, but could still be

¹⁹⁶ *Supra* note 157 and accompanying text.

¹⁹⁷ *Supra* note 35 and accompanying text.

¹⁹⁸ JINGZHOU TAO, *ARBITRATION LAW AND PRACTICE IN CHINA* 49 (2004); He Wei and Wang Yaxi, *Exploration and Development of Arbitration on IP Rights*, KING & WOOD IP BULLETIN (July 2009).

¹⁹⁹ See Arbitration Act, art. 18; TAO, *supra* note 198, at 56.

²⁰⁰ See ANNE-VERONIQUE SCHLAEPER & BLAISE STUCKI, *INTERNATIONAL ARBITRATION IN SWITZERLAND* 5 (Gabrielle Kaufmann-Kohler & Blaise Stucki (eds.), 2004) (defining ad hoc arbitration).

considerably improved. The major flaws include: the limited power of the office, the complete lack of rules for the decision-making of the office, and the limitations in staffing. Without these concerns, China's system for protection of IPRs at trade fairs would even obviate the need for additional arbitration solutions and could serve as a model for other jurisdictions.