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GUIDE

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How to Secure Effective Evidence at Trade Fairs

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1. Introduction

For companies considering moving into international markets, trade fairs are a key channel to introduce your product to the new market, expand your visibility and customer base and seek partners for manufacturing, distribution and retail. For many European SMEs, exhibiting at a major trade fair in China may be the first step towards internationalisation. However, as well as providing business opportunities, trade fairs also pose risks for exhibitors by exposing new products, technology, designs and brands to those who would copy the efforts of others for their own financial gain. In many ways a trade fair can be viewed as a supermarket for local counterfeiters looking for the next great product to copy or brand to appropriate, often to be sold at the same fair that the original product developer would like to exhibit.

This reality of counterfeit products being exhibited at trade fairs in China can be surprising to European visitors. Indeed, many European SMEs first discover their product is being copied when they see it exhibited at a fair. While such experiences can be disappointing for a company who has invested time and resources into developing the product or brand, they also serve as the ideal chance to collect essential evidence needed to stop the infringement. Examples of typical infringements found at trade fairs include:

- Displaying and selling counterfeit products bearing the trade mark(s) identical or similar to others' registered trade mark(s);
- Displaying and selling the products counterfeiting other's patent rights;
- Utilising others' copyrighted image(s), text(s) in the advertisement and/or company brochure and/or product catalogue;
- Copying others' products' design;
- Copying the design of another's exhibition booth.

This guide aims to explain why evidence of IPR infringement is important, what can be used and how to effectively secure the evidence needed.

Please note that to successfully halt counterfeiting in China it is essential to have registered intellectual property rights (IPR) in China in advance. IPRs which are valid only for your home country or jurisdictions other than the People's Republic of China will not provide any legal protection. Visiting a trade fair in China without registered IPR poses major risks for European SMEs including counterfeiting, trade mark squatting and patent trolling and should be avoided. For further information please see the Helpdesk's guide: '[IP Strategy for European SMEs at Trade Fairs in China](#)'.

2. Why do we need to collect evidence?

2.1 The burden of evidence is on the right holder

As mentioned in the introduction, the primary requirement to stop someone else using your IPR in China is to ensure it has been registered and that you legally own the right. The second step is to enforce your legal right through either the administrative route or civil action.

No matter which enforcement action is best suited your purpose, you will need to prove your IPR have been infringed by producing a significant volume of evidence.

In China's People's Court the burden of proof lies with the plaintiff (claimant) and documentary evidence is far stronger than witness testimony. As well as proving your ownership via IPR certificates you must prove the infringement via physical evidence including contracts, photographs of infringing products and proof of sale which have been validated by a notary public (A public officer or other person who is authorised to authenticate documents, evidence etc). If you wish to seek assistance from an administrative body (e.g. the State Administration for Market Regulation (SAMR) for trade marks) you must provide a similar body of evidence for your case to be accepted.

For a comprehensive introduction to enforcement options in China please see the Helpdesk's Enforcement guide. http://www.china-iprhelpdesk.eu/sites/all/docs/publications/EN_Enforcement_Aug-2013.pdf



2.2 What information/materials could be accepted by Chinese Courts for the claim of IPR infringement?

Any evidence provided to the People's Court must have three basic features:

1. authenticity, meaning that the evidence must be genuine both in terms of the actual content and the way the evidence was collected;
2. relevance, meaning that the evidence must be related to the facts of the case; and
3. legality, meaning that the evidence and the source of the evidence must conform to legal standards and forms. In general this means that contracts must be correctly formatted and photographs and proof of sales must be witnessed by a notary public.

If your intended evidence does not fulfil these three requirements it will not be accepted by the Court and could lead to an unsuccessful petition.

Relevant evidence showing the infringement includes:

- Photos showing the products are being displayed and/or sold at a trade fair;
- Photos of the exhibition booth – i.e. the infringer, and copy of the business card and/or copy or photo of business registration certificate;
- Photos of the trade fair where the infringement is found;
- Photos of the infringing products, and/or an actual product;
- Photos showing how the trade mark(s) at issue is being used on the product;
- Photos showing where the advertisement that contains your copyrighted images and/or texts are posted and the coverage of such infringing advertisement;
- Copy of the company brochure or product catalogue where the infringing product is mentioned or your copyrighted images and/or texts are posted.

Any evidence that can prove the infringer's bad faith (i.e. where the infringement is committed with awareness of the existence of other person's IP rights) is also required. For example, during your conversation with the exhibitor, it is found that the exhibitor is already aware of your brand or your product. If recorded by lawful means, such a conversation could be a

piece of evidence among other evidences to prove the bad faith of the infringer. Please consult a lawyer beforehand to make sure that you meet the lawful means requirement.

Should you have any previous cooperation with the infringer in question, any copies of the previous contracts, corporation agreements or order sheets could also be taken as evidence to show the infringer's bad faith.

In the cases where you wish to claim damages from the infringer, it is also important to show the negative impacts arising from the infringement on the reputation of your brand, company and products and the economic losses you have suffered or would have suffered. As such, any evidence showing the scale of the infringement which can indirectly testify the volume impacts on potential consumers and profit is material (e.g. sales performance and/or distribution network of the infringing product; size of the exhibition booth, location of the booth at a trade fair).

2.3 Types of notarisation at trade fairs

As explained above, the notarised evidence has stronger probative force likely to be accepted by Court or any other Chinese enforcement authority.

In practice, the most common ways to secure the relevant evidence of infringement at trade fairs by means of notarisation are (1) notarised purchases (i.e. purchasing a sample infringing product at a trade fair whilst accompanied by a notary public); (2) notarised photography of the presence of the infringer and/or infringing product(s) at a trade fair (i.e. taking photos at trade fairs of the infringer's exhibition booth, infringing products/exhibits, infringing advertisement with a notary public).

The aim of this type of notarisation is to preserve the relevant evidence that proves that the infringer has been committing or has committed IPR infringement at trade fairs.

3. Where to Find a Notary Public?

According to Article 25 of The P.R.C. Notarisation Law, any natural person, legal entity or other organisation can file an application for a notarisation at a notary public office where your domicile or habitual residence or your main administrative/business office in China is located or where the IPR infringement is found.

If you do not have a registered company or a branch or an

office in China, you should hire a notary public in the place where the trade fair is held.

You can search for notary publics on the website of the Ministry of Justice of the People's Republic of China : <http://12348.moj.gov.cn/#/publicities/notarization/notarization>

Just filter by provinces or municipalities in which you are looking to find a notary public. The website offers brief contact information including the name of the notary public, telephone number and the address.

Set out below are some guidelines of how and where to find a notary public in some cities where trade fairs are commonly held.¹



City	Number of Notary Public Offices	Website
Beijing	26	http://12348.moj.gov.cn/#/publicities/notarization/notarization
Shanghai	21	http://sh.12348.gov.cn/sites/12348/team.jsp?typeId=f2c12d3fe56845c-79154dea5a90c8bb1&zoneId=All&sort=All&servant=All&normal=true&award=&member=All&businessArea=All&jbusinessArea=All&partWord=#
Guangzhou	10	http://api.gzsfj.gov.cn/falvfuwu/gongzheng/gzxinxichaxun/
Shenzhen	7	https://gd.12348.gov.cn/jsp/web/legalserviceres/legalserviceorg.jsp?fwOrgType=100&flag=org&gdbTokenId=
Zhengzhou	7	http://ha.12348.gov.cn/#/publicities/notary/notaryList
Wuhan	13	http://12348.sjf.wh.gov.cn/whsf/list-9948f696a5fd448497da3cdcffa94d8.html
Chengdu	25	http://sc.12348.gov.cn/gz/gz.shtml?kplb=1

3.1 Notarisation official fees

The official notarisation fees vary from one notary public office to another. Usually, the official fees for the notarisation of evidence preservation range from CNY 1,000 (approximately EUR 126) to CNY 3,000 (approximately EUR 380) per item of evidence. Depending on the type of notarisation, the size of workload and the urgency of the notarisation, the official fees are negotiable with the notary public.

In addition to the notary public, SMEs are often also assisted by a lawyer who will help with on-site evidence gathering. This means that in addition to the Notary's official fees, legal fees covering the work of the lawyer will also apply.

4. What is Needed to Prepare for Lodging a Notarisation Request in China?

Before going to a notary public office, basic materials must be prepared. Below is a list of necessary documents to bring to the notary public office. As the working schedule varies depending

on different notary public offices, it is suggested to make a reservation with the office over the phone before you go.

1) Power of Attorney (POA)

If you, the owner of the relevant IP rights being infringed at trade fairs, entrust an IPR agency or a law firm to carry out the notarisation for evidence preservation on your behalf, an executed Power of Attorney is required.

If the Power of Attorney is executed by a foreign enterprise/ individual or from outside Mainland China, it shall be notarised (in the country where the POA is signed) and legalised (by the Chinese Embassy or Consulate in that country). Some notary public offices may also require any foreign language to be translated into Chinese.

2) Business Registration Certificate

If the IPR holder who applies for the notarisation or entrusts an IPR agency or law firm to apply for the notarisation is an enterprise, a copy of its business registration certificate is also required, to prove the IPR holder exists in law.

¹ Please use Internet Explorer to open the links. They might not open in other internet browsers.

If the IPR holder is however a natural person (i.e. an individual), a copy of his or her identity certificate shall be provided to the notary public office.

Since equivalent certificates from European countries vary in format and content, you are strongly advised to have such documents translated to Chinese for the presentation to the notary public office in China. Where such documents are obtained outside mainland China, it may also be required for them to be notarised and legalised.

3) Intellectual Property Certificates

These include trade mark registration certificates, copyright recordation certifications and patent certificates.

The Trade mark Registration Certificate shall be a full copy which includes the first approved registration, all the renewal certificates (if a trade mark has been registered more than 10 years ago) and all relevant amendment certificates (if a trade mark owner's address has ever been amended).

Regarding patents, the patent certificate together with the text of the patent announcement, patent owner's ID (personal ID for individual applicant or company business license for company applicant), certification on the patent's legal status and receipt of the latest annual payment shall be provided.

The notary can accept both Chinese and non-Chinese IPR certificates; however, if you want to sue the infringer in China, only Chinese IPR certificates are acceptable. In China, only Chinese IPR certificates are acceptable by the Chinese court. The IPR certificates obtained outside mainland China could be considered as reference, which could demonstrate that the relevant brand/product/IP rights at issue is famous amongst relevant consumers, in particular for those products with high visibility within a certain industry (In some special cases, some unregistered trade marks have been granted protection by the courts where the brand and its' products are particularly well known amongst Chinese consumers, thus allowing the trade mark owner to apply for invalidation of infringing marks registered in China. Such judgements are exceptional however and it is unwise to rely upon such a ruling).

4) Other Materials

If you entrust an IP agency or a law firm to do the notarisation for you, the business registration certificate of the said agency or law firm shall be provided to the notary public office. The copy of the identity certificate of the legal representative of the agency shall also be presented.

Except the copy of the legal representative's identity

certificate, all other documents and materials as illustrated above for the notarisation shall be stamped.

If you do not have a company seal, these documents could be signed on each page by the relevant person(s) who is conferred with the relevant authority by the company.

5) Exceptional requisite documents

In addition to the previously mentioned documents, some notary public offices may require other materials depending on each case. For example, a notary public may request a letter of condition, in which you explain the purpose of the notarisation (e.g. for the use of litigation).

5. Who Can Conduct Notarisation and How it is Conducted

5.1 Who may be eligible for notarisation at a trade fair?

If you are not going to entrust any IPR agency or law firm to apply for notarisation, in theory, anyone with the authorisation by you or your company can carry out the application.

It is often advisable to have an employee or an IPR lawyer who is familiar with your products being infringed to conduct the notarisation, as they will be able to spot the relevant infringements instantly and record them as notarised evidence.

If the IPR infringement found at a trade fair concerns patent infringement, it is recommended to have an employee who has patent expertise or a qualified patent attorney to conduct the notarisation.

5.2 What equipment shall be prepared for pre-notarisation?

Noting that more and more trade fairs prohibit any photography, a regular camera may increase potential risks of getting more attention, in most cases mobile phones are used to take photos at trade fairs. Mobile phones can also be used to record video or conversation audio at trade fairs.

You should make sure the photos are taken in front of the notary public and the quality of the images is in high resolution, clear but not blurred. After the photo evidence is collected, you will go with the notary public to his/her notary office to finish the relevant paper work. The photos can be either printed out and affixed in the notary deed or saved in CD as an attachment to the notary deed (the CD will be separately sealed).

5.3 How notarisation is conducted



5.4 Do's and Don'ts when conducting a notarisation at trade fairs

5.4.1 Do's

- 6) Pre-notarisation investigation against the targeted infringer is strongly advised in order to understand which evidence to notarise. You may spend a bit of time on the first day of the exhibition walking around the fair to make initial checks.
- 7) Before conducting the notarisation, you are advised to discuss with your notary public in detail what and how to notarise evidence. The notary public may be able to offer you appropriate suggestions in this respect, as they are more experienced in carrying out such activities at trade fairs.
- 8) You will need to make sure all relevant evidence showing the IPR infringement is collected.
- 9) If a sample infringing product is purchased at trade fairs, do not forget to ask for official receipt (i.e. fapiao) with the infringer's company seal or relevant person's signature. Such evidence proves where the infringing product

has been obtained from and the price of the infringing product, which help you and the court demonstrate how much illegal profits the infringer has earned or what losses you have suffered. In case the infringer does not offer the item for sale at the trade fair, you should at least take photos.

5.4.2 Don'ts

- 6) If the infringing exhibitor has ceased offering the infringing product that you have previously found on the other day of the trade fair for sale, in the course of the notarisation, you should not try to induce the exhibitor to sell you the infringing product as such behaviour will be regarded by court as an unlawful way of collecting evidence, or inducement to IPR infringement.
- 7) If the infringing exhibitor stops you from taking photos of their exhibition booth and the infringing product, do not argue directly with the exhibitor. You may however seek help from the exhibition holder who could also issue you a letter confirming the presence of the infringing exhibitor at the trade fair. This piece of evidence also helps to prove the existence of the infringer at the trade fair in addition to photo evidence of their booth.



6. What Should be Done After Notarisation?

6.1 Obtain notary deed and sealed evidence box

As soon as the notarisation is completed, it is advisable that you make an appointment with the notary public as to when to fetch the notary deed and the relevant evidence box.

Usually the notary public issues two originals for you. If you need any additional copies, you need to notify the notary public in advance. In practice, three original notary deeds are necessary, one copy for each side – your company, your law firm and the court where you file the case and more copies are required if you want to sue the infringer with other court(s). Photocopied notary deeds are usually accepted by IP administrative authorities if you file an administrative complaint, and you may be required to show them the original copy for authenticity check.

Generally, the notary public will ask how many notary deeds are required and you can request an unlimited number (subject to extra payment). Notary deeds and the evidence box are considered to be strong evidence when you sue the infringer, so you should take special care of both the deeds and the box. Do not lose either, because the process of obtaining another is very complex and can result in having to repeat the notarisation.

6.2 Keep the sealed evidence box in good condition

Usually evidence such as purchased item(s), company brochure, and business cards will be kept in a box with the notary public's seal. You are not advised to open the sealed evidence box until they are presented to the Court. If the seal is broken or the sealed box has ever been opened, such evidence will be questionable and may not be accepted by the Court.

6.3 Continuous monitoring of Suspected Infringers

It is important to continue the surveillance of the infringing exhibitor after the notarisation in order to verify if the IPR infringement is repeated at any other trade fairs. It is at your discretion to decide if any more notarisation of evidence preservation is needed.

It is also recommended to proceed with the relevant search

and investigation as to the scale of the infringing exhibitor's business, its distribution network, and its business locations before taking any further enforcement or legal action.

Should you take enforcement actions, no matter whether with the administrative authority or courts, the notarised evidence of infringement can be used to set up the case (using copies of the notary deed is acceptable) and the courts will use the original copy to prove the existence of infringement, together with any other evidence for instance with respect to the scale of infringement, volume of sales of infringing products, economic losses sustained by the right holder and illegal gains of the infringer and so on. Once this evidence is collated and considered by the court, justified compensation will be issued.

7. Additional information and useful links

China IPR SME Helpdesk guides IP Strategy for European SMEs at Trade Fairs in China:
http://www.china-iprhelpdesk.eu/docs/publications/tf_handbook.pdf

Guide to Trade Mark Protection in China:
https://www.china-iprhelpdesk.eu/sites/all/docs/publications/EN_TM_2016.pdf

Guide to Copyrights in China:
http://www.china-iprhelpdesk.eu/docs/publications/EN_Copyright_guide_Aug_2010.pdf

Guide to Patent Protection in China:
http://www.china-iprhelpdesk.eu/docs/publications/China_IPR_Guide-Guide_to_Patent_Protection_in_China_EN-2013.pdf

Enforcement of Intellectual Property Rights in China:
http://www.china-iprhelpdesk.eu/sites/all/docs/publications/EN_Enforcement_Aug-2013.pdf

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