

How to Secure Effective Evidence at Trade Fairs

For companies considering moving into international markets, trade fairs are a key channel to introduce their product to the new market, expand 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.

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 images, texts in the advertisement and/or company brochure and/or product catalogue;
- Copying others' products' design;
- Copying the design of another's exhibition booth.

Why is collecting evidence important?

Evidence is needed for IPR enforcement. No matter which enforcement action is best suited for the company, the European SME will need to prove that its 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 ownership via IPR certificates SMEs 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 SMEs wish to seek assistance from an administrative body (e.g. the State Administration for Industry and Commerce (SAIC) for trade marks) they must provide a similar body of evidence for the case to be accepted.

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.

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 IP owner's conversation with the exhibitor, it is found that the exhibitor is already aware of IP owner's brand or 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. SMEs are however recommended to consult a lawyer beforehand to make sure they meet the lawful means requirement.

Similarly, should SMEs 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 the IP owner wishes to claim damages from the infringer, it is also important to show the negative impacts arising from the infringement on the reputation of IP owner's brand, company and products and the economic losses the IP owner has 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).

Types of Notarisation at Trade Fairs

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 products 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.

According to Chinese law, any natural person, legal entity or other organization can file an application for a notarisation at a notary public office where their domicile or habitual residence or main administrative/business office in China is located or where the IPR infringement is found. If a European SME does not have a registered company or an office in China, it should hire a notary public in the place where the trade fair is **held**.

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

Before going to a notary public office, basic materials must be prepared. These include:

1. Power of Attorney (POA)

If an SME, the owner of the relevant IP rights being infringed at trade fairs, entrusts an IPR agency or a law firm to carry out the notarisation for evidence preservation on their behalf, an executed Power of Attorney is required. If the POA 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. 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, SMEs are strongly advised to have such documents translated to Chinese. 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 notary can accept both Chinese and non-Chinese IPR certificates; however, if an SME wants to sue the infringer in China, only Chinese IPR certificates are acceptable. In China, only Chinese IPR certificates are acceptable by the Chinese court.

Different notary public offices could also require additional documents.

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

Do's

1. Pre-notarisation investigation against the targeted infringer is strongly advised in order to understand which evidence to notarise. IP owners should spend a bit of time on the first day of the exhibition walking around the fair to make initial checks.
2. Before conducting the notarisation, IP owners are advised to discuss with notary public in detail what and how to notarise evidence. The notary public may be able to offer appropriate suggestions in this respect, as they are more experienced in carrying out such activities at trade fairs.
3. IP owners will need to make sure all relevant evidence showing the IPR infringement is collected.
4. If a sample infringing product is purchased at trade fairs, IP owner should not forget to ask for official receipt 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 IP owner and the court demonstrate how much illegal profits the infringer has earned or what losses IP owner have suffered. In case the infringer does not offer the item for sale at the trade fair, IP owner should at least take photos.

Don'ts

1. If the infringing exhibitor has ceased offering the infringing product that IP owner have previously found on the trade fair for sale then in the course of the notarisation, IP owner should not try to induce the exhibitor to sell the infringing product as such behaviour will be regarded by court as an unlawful way of collecting evidence, or inducement to IPR infringement.
2. If the infringing exhibitor stops IP owner from taking photos of their exhibition booth and the infringing product, it is not advisable to argue directly with the exhibitor. IP owner may however seek help from the exhibition holder who could also issue 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.

What Should be Done After Notarisation?

As soon as the notarisation is completed, it is advisable to 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 IP owner. In practice, three original notary deeds are necessary, one copy for each side – IP owner's company, IP owner's law firm and the court where IP owner files the case and more copies are required if IP owner wants to sue the infringer with other court. Photocopied notary deeds are usually accepted by IP administrative authorities if IP owner files an administrative complaint.

Generally, the notary public will ask how many notary deeds are required and IP owners can request an unlimited number (subject to extra payment). Notary deeds and the evidence box are considered to be strong evidence when IP owners sue the infringer, so IP owners should take special care of both the deeds and the box.

Usually evidence such as purchased items, company brochure, and business cards will be kept in a box with the notary public's seal. IP owners 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.

Continue Monitoring 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 IP owner's 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 IP owner 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.

China IPR SME Helpdesk Team

Please include the attached by-line after the article:

The **China IPR SME Helpdesk** supports small and medium sized enterprises (SMEs) from European Union (EU) member states to protect and enforce their Intellectual Property Rights (IPR) in or relating to China, Hong Kong, Macao and Taiwan, through the provision of **free information and services**. The Helpdesk provides jargon-free, first-line, confidential advice on intellectual property and related issues, along with training events, materials and online resources. Individual SMEs and SME intermediaries can submit their IPR queries via email (question@china-iprhelpdesk.eu) and gain access to a panel of experts, in order to receive **free and confidential first-line advice within 3 working days**.

CHINA IPR SME HELPDESK



The China IPR SME Helpdesk is an initiative by the European Union

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