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Marketa Trimble

University of Nevada, Las Vegas – William S. Boyd School of Law

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Enforcement of Intellectual Property Rights at Trade Shows: A Review and Recommendations

MARKETA TRIMBLE*

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* Samuel S. Lionel Professor of Intellectual Property Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The author thanks Chief Judge Gloria M. Navarro of the U.S. District Court for the District of Nevada and Lex Machina for enabling her to access case dockets and case documents for the underlying research. The author expresses gratitude to the many who have commented on the article and contributed with thoughts and suggestions, including Daniel H. Bliss (Howard & Howard); Yves Bugmann (Federation of the Swiss Watch Industry FH); Gregor Bühler (Homburger); Mark Cohen (USPTO); Thomas F. Cotter (University of Minnesota); Judge Anne-Kristin Fricke (Landgericht München I); John M. Golden (University of Texas); Angela Herberholz (UFI, the Global Association of the Exhibition Industry); John L. Krieger (Dickinson Wright); Christoph Lanz (MCH Group AG, Baselworld); Thomas Legler (Pestalozzi Attorneys at Law Ltd.); Stefan Luginbuehl (European Patent Office); Thomas Main (UNLV); Kara Maser (Consumer Technology Association); Michael McCue (Lewis Roca); Judge Jochen Meyer (Landgericht Braunschweig); Commercial Courts of Barcelona, Patent Section, and its members (Yolanda Rios López, Alfonso Merino Rebollo, and Florencio Molina López); Silke Müller (Messe Frankfurt Exhibitions GmbH); Lydia Nussbaum (UNLV); Judge Philip M. Pro (ret., JAMS); Judith Schallnau (WIPO Arbitration and Mediation Center); Jeffrey Stempel (UNLV); Jean Sternlight (UNLV); Barbara Weizsaecker (European Exhibition Industry Alliance); and Danielle Zheng (USPTO). The author thanks Andrew Martineau and Elizabeth Manriquez of the Wiener-Rogers Law Library at the William S. Boyd School of Law for research support, and William S. Boyd School of Law students Nathaniel T. Collins and Cory M. Ford for contributing their efforts to the underlying research on temporary restraining orders. The author is indebted to Gary A. Trimble for his valuable editing suggestions.

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ABSTRACT

Trade shows (also referred to as trade fairs or exhibitions) are venues for the exchange of information about the newest intellectual property (“IP”) and can also be venues where disputes over IP rights arise or escalate. When trade shows become arenas for such disputes, IP right owners seek means to stop infringements of their IP rights on site—at the trade show and with immediate effect. This article reviews from a comparative perspective the options that IP right owners have for immediate relief at trade shows. After considering the limitations that current law imposes on temporary restraining orders in the United States, the article explores alternative dispute resolution (“ADR”) mechanisms that some trade show organizers around the world have created to deal with IP rights disputes. The article assesses ADR mechanisms not as alternatives to, but as complements to, court proceedings and points out the positive and negative aspects of ADR mechanisms when the mechanisms are used to address IP rights disputes at trade shows. Drawing on the experiences from other countries, the article recommends that courts support IP rights enforcement at trade shows through the adoption of certain accommodation practices, which can complement ADR mechanisms.

I. INTRODUCTION

Trade shows¹ are a traditional means for exchanging information about the latest developments in business and technology and learning about the newest intellectual property (“IP”) in an industry. They can also be places where IP right holders discover that their IP rights are being infringed.² Additionally, trade shows are sometimes places where IP right holders escalate standing disputes over IP rights, because trade shows are where IP right owners have an opportunity to confront alleged IP infringers.³ Naturally, IP right owners want to act swiftly against infringers at trade shows because trade shows lend infringing products or processes increased exposure and legitimacy that exacerbates the effects of an initial infringement at a trade show. For infringers, enforcement actions at trade shows can have lasting and damaging effects because the actions may send a powerful message to their business partners and customers (whether the enforcement actions are legitimate or not). Given the significant impact that IP rights enforcement actions (or lack of enforcement actions) at trade shows can have on all parties in IP rights disputes, a balanced approach to enforcement is extremely important. This article reviews the existing enforcement mechanisms in search of dispute resolution designs that can balance the rights of all parties.

A focus on traditional brick-and-mortar trade shows might seem outdated in the digital age; traditional trade shows with experts who interact with each other in person in large exhibition halls where exhibitors exhibit physical objects may appear obsolete. However, traditional trade shows have

¹ A trade show is “[a]n event at which commercial products are exhibited; *esp.* one devoted to a specific industry or business, and often open only to people working in that industry.” *Trade Show*, *Oxford English Dictionary* (3d ed. 2015). Throughout this article, the term “trade show” is used in a generic sense; it encompasses events referred to elsewhere as “trade fairs” and “exhibitions.”

² “Exhibitions provide excellent opportunities to obtain information on competitors and to discover the existence of new products and services, hence pinpointing potential IPR infringements at the initial stage prior to large scale manufacturing and commercialisation.” UFI Recommendations for the Protection of Intellectual Property Rights at Exhibitions, UFI, at 4, available at http://www.ufi.org/wp-content/uploads/2016/01/ipr_recommendations.pdf (last visited July 11, 2018).

³ For simplification and readability, throughout the article the word “infringer” is used even in instances when it would be more accurate to speak of an “alleged infringer” because an infringement has not yet been adjudicated.

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played and continue to play important roles; the value of face-to-face exchanges of information and the importance of inspecting physical objects in person have not diminished, despite the advances in technologies that enable high-quality remote interaction.⁴ Statistics confirm the popularity of trade shows: UFI, the Global Association of the Exhibition Industry,⁵ estimates that about 31,000 exhibitions, each with a minimum of 500 square meters of exhibition space, took place in 2012, which represented approximately 4.4 million companies exhibiting their goods and services to about 260 million visitors over about 124 million square meters of total net exhibition space.⁶

Trade shows have always been natural catalysts of IP rights disputes, and in the past, large international exhibitions—events similar in some respects to trade shows—have made important contributions to the history of IP law. The world exhibitions that took place in London in 1851 and 1862, in Paris in 1855 and 1867, and in Vienna in 1873 precipitated the adoption of laws that provided for temporary protection for IP rights during the exhibitions.⁷ Temporary protection was of particular importance to foreign

⁴ The character of trade shows has evolved—from market-type events at which exhibitors exhibited their entire product lines to showcasing events at which exhibitors feature only samples of their product lines. See Christoph Graf von Groeben, *Genießen Aussteller auf Inlandsmessen Immunität?*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [(GRUR)] 795, 796 (2011) (Ger.). Trade show activities may be extended through use of the Internet.

⁵ UFI, the Global Association of the Exhibition Industry, which was created in 1925 under the name “Union des Foires Internationales,” is “a non-political international association” whose “main goal is to represent, promote and support the business interests of its members and the exhibition industry worldwide.” *UFI History*, UFI, <http://www.ufi.org/about/ufi-history/> (last visited July 11, 2018). As of July 13, 2017, UFI had 722 member organizations in 85 countries. *Id.*; UFI History, UFI, <http://www.ufi.org/about/ufi-history/> (last visited July 11, 2018).

⁶ UFI, *Global Exhibition Industry Statistics, March 2014*, 15 (2014), http://www.ufi.org/wp-content/uploads/2016/01/2014_exhibitor_industry_statistics_b.pdf (last visited July 11, 2018).

⁷ “Act of the British Parliament, ‘to extend the Provisions of the Designs Act, 1850, and to give Protection from Piracy to Persons exhibiting new Inventions in the Exhibition of the Works of Industry of all Nations (in London), in 1851,’” *reprinted in* HERTSLET’S COMMERCIAL TREATIES 310–12 (1856); An Act for the Protection of Inventions and Designs exhibited at the International Exhibition of Industry and Art for the Year 1862, *reprinted in* NEWTON’S LONDON J. OF ARTS AND SCI. 305 (1862); Law of the 27th of March, 1867, Protecting until the 1st of April, 1868, Industrial Inventions and Manufacturing Designs admitted to the Universal Exhibition of 1867, *reprinted in* 15 J.

exhibitors, who were concerned about a lack of adequate protection for their IP at a time when the countries in which the exhibitions took place did not provide national treatment to foreign nationals who were potential right holders.⁸ These exhibitions and the related temporary protection laws stood at the beginnings of international IP law; the Paris and Vienna exhibitions propelled the negotiations of the Paris Convention for the Protection of Industrial Property, which began in 1873 and continued until the Convention was signed in 1883.⁹ The Convention facilitated the protection of foreigners' inventions, and from its inception included a provision on temporary IP protection at exhibitions.¹⁰

To offer effective protection for IP rights, once such rights come into existence, there must be mechanisms to enforce the rights. The need for such mechanisms also exists at trade shows, where IP right owners sometimes seek to enforce their rights against infringers through the emergency relief that is provided by an order for an infringer to stop exhibiting infringing products and engaging in other infringing conduct at a trade show—conduct such as

SOC. ARTS 333 (1867); Gesetz vom 13. November 1872 über den zeitweiligen Schutz der auf der Weltausstellung des Jahres 1873 in Wien zur Ausstellung gelangenden Gegenstände, R. G. Bl. LVIII. St., Nr. 159, reprinted in AUSTRIA: ARCHIV FÜR GESETZGEBUNG UND STATISTIK AUF DEN GEBIETEN DER GEWERBE, DES HANDELS UND DER SCHIFFFAHRT 1197 (Verlag der Kaiserl.-Königl. Hof- und Staatsdr., 1872).

⁸ On the barriers that foreign inventors faced when they wanted to apply for patent protection in foreign countries in the 1800s, see MARKETA TRIMBLE, GLOBAL PATENTS: LIMITS OF TRANSNATIONAL ENFORCEMENT 19–22 (2012). Based on the laws, exhibitors could apply for certificates to protect temporarily their inventions, trademarks, and designs. *Id.* On actual numbers of certificates issued, see, e.g., David J. Jeremy, *The Great Exhibition, Exhibitions, and Technology Transfer*, in THE GREAT EXHIBITION AND ITS LEGACY 127–40, 131–32 (Franz Bosbach & John R. Davis eds., 2002).

⁹ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1629, 828 U.N.T.S. 305 [hereinafter Paris Convention].

¹⁰ Paris Convention, art. 11. See also SAM RICKETSON, THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY 416–21 (2015); Michael Blakeney, *The International Protection of Industrial Property: From the Paris Convention to the Agreement on Trade-Related Aspects of Intellectual Property Rights (The TRIPS Agreement)*, WIPO, WIPO/IP/UNI/DUB/04/1 5 (2004). An important component of the previous national laws on temporary protection was a provision that preserved priority for the purposes of a later filing for a patent or trademark. Exhibiting at an international exhibition is a feature of grace periods in many countries today. See, e.g., the Convention on the Grant of European Patents, art. 5, ¶ 1b, Oct. 5, 1973, 1065 U.N.T.S. 199 [hereinafter European Patent Convention].

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demonstrating, distributing, offering to sell, and selling infringing products. IP right owners might also attempt to seize evidence of infringements that they can use in future proceedings against an infringer. Emergency relief may be obtained either from a court in the location of the trade show or from an alternative dispute resolution (“ADR”)¹¹ body that some trade show organizers have established.¹²

This article analyzes the two types of mechanisms—one administered by a court, the other administered by an out-of-court ADR body (“ADR mechanism”)¹³—and explores and compares the functioning of the mechanisms. Part I reviews the legal means and the challenges of the emergency relief that is available under U.S. law to IP right owners at trade shows in the United States; the court-issued means include temporary restraining orders (“TROs”) issued *ex parte*.¹⁴ Part II explores various means of support for IP rights enforcement that trade show organizers provide, including ADR mechanisms that exist at some trade shows around the world, and discusses the accommodation practices that some courts in the world have

¹¹ The term “ADR” is used in this article to describe a resolution that is “an ‘alternative’ to the formal procedures adopted by the courts of law, as part of a system of justice established and administered by the state. . . .” NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN, & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 40 (6th ed. 2015).

¹² This article does not address other forms of relief that might be available to stop infringements at trade shows, such as exclusion orders issued by the International Trade Commission (including temporary exclusion orders) and criminal enforcement measures.

¹³ The term “ADR mechanisms,” as used in this article, refers to the ADR mechanisms that are established and administered by trade show operators; the article does not address court-created ADR mechanisms that exist in some courts. Although trade show-related mechanisms usually consist of arbitration, the article uses the more general term “ADR mechanisms” because forms of ADR other than arbitration might be possible in a trade show context. The suitability of the term “ADR” has been debated in cases of mandatory arbitration, but not all trade-show related arbitration is mandatory or is mandatory for all parties. The debate about the term’s suitability is beyond the scope of this article. For a debate about whether mandatory arbitration fits within ADR, see, e.g., Jean R. Sternlight, *Is Binding Arbitration A Form of ADR?: An Argument that the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97 (2000).

¹⁴ A companion article includes an analysis of the current law on TROs and an empirical study of the TRO practice at the U.S. District Court for the District of Nevada. See Marketa Trimble, *Temporary Restraining Orders to Enforce Intellectual Property Rights at Trade Shows: An Empirical Study*, 83(4) BROOK. L. REV. 1345 (2018).

adopted to react promptly to trade show-related IP rights disputes.¹⁵ Based on the analysis of trade show-related TRO practices in the United States, trade show ADR mechanisms, and courts' accommodation practices, Part III identifies the possibilities for and the challenges faced by the various means of IP rights enforcement at trade shows.

As commentators have observed in other contexts, it is difficult to make a recommendation in the abstract for an ideal dispute resolution design.¹⁶ There are many variables involved in different dispute resolution contexts,¹⁷ and the components of dispute resolution mechanisms need to take into account these variables.¹⁸ Therefore, this article offers no universal design to be followed by all trade shows, but it does offer considerations that can guide the design process for creating a dispute resolution mechanism that will ultimately be tailored to each individual trade show.¹⁹

In addition to offering considerations for designing dispute resolution mechanisms, the article pursues two additional goals: First, the article introduces to a wider audience the remarkable and highly specialized emergency relief practice that has developed in connection with trade shows; even many IP law experts are not aware of the existence of this niche expertise. Second, the article contributes to the literature on injunctive relief in IP cases; although the literature on injunctive relief in IP cases has flourished in the United States since the U.S. Supreme Court's 2006 decision in *eBay*,²⁰ little

¹⁵ Part II *infra* also discusses administrative proceedings that were created in China to support IP rights enforcement at trade shows.

¹⁶ See, e.g., Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1490 (2004).

¹⁷ For an example of a list of "a number of distinct structural variables and/or choices that make up a [dispute system design]" see Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 12–14 (2008). For a revised Analytic Framework for Dispute System Design see Lisa Blomgren Amsler, *The Dispute Resolver's Role within A Dispute System Design: Justice, Accountability, and Impact*, 13 U. ST. THOMAS L.J. 168, 172–73 (2017).

¹⁸ See *infra* Part III.

¹⁹ It is conceivable that similar or identical dispute resolution designs could be adopted for similar trade shows in similar venues. See, for example, the WIPO Arbitration and Mediation Center's trade show-related initiatives *infra* in note 133.

²⁰ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). For examples of post-*eBay* literature on injunctive relief in IP cases, see, e.g., Thomas F. Cotter, *Patent Holdup, Patent Remedies, and Antitrust Responses*, 34 J. CORP. L. 1151 (2009); Kirti Gupta & Jay

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has been written about emergency relief at trade shows.²¹

This article is one part of a project on the enforcement of IP rights at trade shows, which explores the doctrinal, empirical, and comparative aspects of the various forms of emergency relief that are available for IP rights infringements at trade shows and the dispute resolution mechanisms that provide such relief. This article discusses comparative findings and qualitative research observations, while an earlier companion article reported the doctrinal and quantitative research findings from the project.²² Because of the links within the project, this article also refers to the doctrinal and empirical analysis of the companion article. While the two articles demonstrate the broad scope of research undertaken in the project, they do not aspire to be an exhaustive treatment of the topic.

Finally, it should be noted that dispute resolution mechanisms at places of commercial exchange are certainly not novel phenomena or a novel subject for research. Mechanisms to resolve disputes at various markets have existed for centuries and have covered disputes over quantity, quality, prices,

P. Kesan, *Studying the Impact of eBay on Injunctive Relief in Patent Cases*, Univ. of Ill. Coll. Of Law, Working Paper No. 17-03, 2015; Ryan T. Holte & Christopher B. Seaman, *Patent Injunctions on Appeal: An Empirical Study of the Federal Circuit's Application of eBay*, 92 WASH. L. REV. 145 (2017); Mark A. Lemley, *Did eBay Irreparably Injure Trademark Law?*, 92 NOTRE DAME L. REV. 1795 (2017); Jiarui Liu, *Copyright Injunctions after eBay: An Empirical Study*, 16(1) LEWIS & CLARK L. REV. 215 (2012); Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949 (2016).

²¹ E.g., Tammy Dunn & Jeffery Langer, *Ready for Your Next Trade Show? The TRO Trend Continues*, LAW360 (Nov. 22, 2016, 5:44 PM), available at <https://www.law360.com/articles/863327/ready-for-your-next-trade-show-the-tro-trend-continues>; Merritt Blakeslee & R. Austin Blakeslee, *CES Seizure Order Against Alleged Patent Infringers Issued by the Las Vegas Federal District Court*, IP WATCHDOG (Jan. 13, 2016), available at <http://www.ipwatchdog.com/2016/01/13/ces-seizure-order-patent-las-vegas/id=64873/> (last visited July 11, 2018). For literature on emergency relief in IP cases in general, see, e.g., Gabrielle Levin, *Desperate Times, Desperate Measures? Reconceptualizing Ex Parte Seizure Orders to More Effectively Fight the War on Trademark Counterfeiting*, 14 BALTIMORE INTELL. PROP. L. J. 171 (2006); Lucas G. Paglia & Mark A. Rush, *The Ex Parte Seizure Process and the Battle Against Bootleggers*, 4 VAND. J. ENT. L. & PRAC. 4 (2002); Bryan A. Schwartz, *Remedy and Bonding Law under Section 337: A Primer for the Patent Litigator*, 8 FED. CIR. BAR J. 121 (1999); Robert C. Dorr & William P. Eagles, *Resolving Claims to Ownership of Software and Computer-Stored Data—The Importance of Temporary Restraining Orders and Preliminary Injunctions*, 5 COMPUTER/L.J. 1 (1984).

²² Trimble, *supra* note 14.

and other aspects of an exchange.²³ A wealth of literature analyzes some of these mechanisms from the legal history, law and society, and ADR perspectives.²⁴ The dispute resolution mechanisms described in Part II are additional examples of such mechanisms and await thorough exploration from these perspectives.

II. EMERGENCY RELIEF AT TRADE SHOWS IN THE UNITED STATES

Exhibitors can infringe IP rights at trade shows in a number of ways. Typical trade show activities—exhibiting, demonstrating, offering for sale, selling, and providing information about products and processes²⁵—can infringe trademarks, for example, by using in commerce counterfeit trademarks or marks that are likely to cause confusion as to the origin of products;²⁶ can infringe copyright by displaying publicly and distributing unlicensed copies;²⁷ and can infringe patents by using, offering for sale, and selling patent-infringing products.²⁸ These activities may also lead to secondary liability, for example in the form of inducement of infringements of IP rights.²⁹

Not all of the activities that infringe IP rights at trade shows in one country will necessarily infringe the rights if committed at trade shows in other countries. Notwithstanding the high degree of international IP law harmonization that countries have achieved by concluding and implementing

²³ See, e.g., W. SILBERSCHMIDT, DIE DEUTSCHE SONDERGERICHTSBARKEIT IN HANDELS- UND GEWERBESACHEN: INSBESONDERE SEIT DER FRANZÖSISCHEN REVOLUTION 125 (1904) (discussing market courts that were established in Braunschweig and other German cities in the 1600s).

²⁴ E.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Eric A. Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 CAL. L. REV. 313 (2006).

²⁵ For simplification, the rest of the article refers only to “products” when both products and processes are meant.

²⁶ 15 U.S.C. § 1125 (2012).

²⁷ 17 U.S.C. § 106 (2002).

²⁸ 35 U.S.C. § 271(a) (2012).

²⁹ 35 U.S.C. § 271(b) (2012); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936–37 (2005).

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international IP treaties,³⁰ countries vary in what subject matter they protect by IP laws, how they assess the legality of different activities, and what exceptions they make to and limitations they place on IP rights. Some subject matters might be protected by IP laws in some countries but not in other countries, either because IP right owners have secured IP rights only in the former countries, or because IP right owners are not able to secure the same IP rights in the latter countries (for example, because the latter countries exclude the given subject matter from IP protection). Minor territorial spillover can expand IP rights protection from one country to other countries; for example, under U.S. law, an offer made for the sale of a product covered by a U.S. patent at a trade show outside the United States will infringe the U.S. patent if the offer is to sell the product in the United States without the authorization of, or a prior sale by, the patent owner.³¹ However, in general, IP rights protection is limited to countries for which an IP right owner has obtained the IP rights and/or where IP laws protect the rights.³²

Countries' IP laws might not view similar or identical activities as infringing IP rights, even when those IP rights exist in multiple countries. For example, an offer made at a trade show in Germany to sell a patent-infringing product will infringe patent rights in Germany, sometimes even when the eventual sale was intended to occur outside Germany;³³ however, an offer

³⁰ *E.g.*, Paris Convention, *supra* note 9; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1896, S. TREATY DOC. NO. 99-17 (1986) (as revised at Paris July 4, 1971 and amended Sept. 28, 1979); Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1869 U.N.T.S. 299 (the TRIPS Agreement).

³¹ *Impression Products, Inc. v. Lexmark Products, Inc.*, 137 S. Ct. 1523, 1535 (2017); *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc.*, 617 F.3d 1296, 1309 (Fed. Cir. 2010).

³² On the principle of territoriality in IP law, see, e.g., Marketa Trimble, *Advancing National Intellectual Property Policies in A Transnational Context*, 74 MD. L. REV. 203, 231-32 (2015).

³³ *E.g.*, Patentverletzung, Mobiltelefone, Verkaufsmesse, Zustellungsmangel, Verbotungsrechte, Landgericht Düsseldorf, 4a O 113/06, June 21, 2007; Patentverletzung bei Ausstellung auf einer Fachmesse, Landgericht Düsseldorf, 4a O 90/15, April 28, 2016, GRUR-RS 2016, 09545, par. II, 1, a) ("The prerequisite in such a case is only that from the perspective of the recipient, the offer could concern [Germany]. However, this is what a trade show visitor typically expects unless something else is expressly communicated to him." Translation by author.). The German courts have recognized that in some cases, particularly when a trade show is significant in its field of industry and for international

made at a trade show in the United States to sell a patent-infringing product will infringe patent rights in the United States only if the eventual sale was intended to, or did, occur in the United States.³⁴ For a patent to be infringed through an offer to sell made at a trade show in the United States, the offer must fulfill the definition of an offer under contract law;³⁵ however, a lesser act is required for finding a patent-infringing offer to sell under German law when the offer is made at a trade show in Germany.³⁶ Of course, additional acts at a trade show in the United States may suffice to lead to a finding of infringement of the patent in the United States.

When an exhibitor infringes IP rights at a trade show, the IP right owner might seek emergency relief—a tool used for stopping the infringing activity immediately. Sometimes an infringement at a trade show is preceded by other activities by the infringer that suggest that an infringement at the trade show might occur; even so, the trade show might be the first and/or the best opportunity for the IP right owner to oppose the infringement, for example if the activities that predated the trade show did not infringe the IP right owner's rights because the infringer acted in a country where the IP was not protected or where the IP right owner did not own the rights. Another reason that an IP right owner might not act against an infringer before a trade show is if the

trade, it is possible that an exhibitor is not directing its offer to recipients in the country in which the trade show takes place. However, in such cases, the burden is on the defendant to prove that its offer is not directed at recipients in Germany. *See, e.g.,* Landgericht Düsseldorf, 4a O 333/06, November 27, 2007; *Ausstellen auf internationaler Inlandsmesse*, Landgericht Düsseldorf, 2a O 250/14, January 28, 2015. *See also infra* notes 276–280 and accompanying text.

³⁴ *Transocean Offshore Deepwater Drilling*, 617 F.3d at 1309 (Fed. Cir. 2010) (“[T]he location of the contemplated sale controls whether there is an offer to sell within the United States.”); *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, 831 F.3d 1369, 1380 (Fed. Cir. 2016).

³⁵ *Rotec Industries, Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, 1254–55 (Fed. Cir. 2000).

³⁶ *E.g.,* *Einstweilige Verfügung, Auskunftsanspruch, Patentverletzung, Stand der Technik*, Landgericht Braunschweig, 9 O 842/11, June 1, 2011; *Patentverletzung bereits durch Aufstellen auf einer Fachmesse (Sterilcontainer)*, Oberlandesgericht Düsseldorf, I-15 U 19/14, March 27, 2014, GRUR-RS 2014, 16067, par. B, I, 1; *Patentverletzung bei Ausstellung auf einer Fachmesse*, Landgericht Düsseldorf, 4a O 90/15, April 28, 2016, GRUR-RS 2016, 09545, par. II, 1, a). Different rules apply to a so-called performance show (*Leistungsschau*), as opposed to a trade show (*Verkaufsmesse*). *Id. Cf. Pralinenform II*, Bundesgerichtshof, GRUR 2010, 1103, GRUR-Prax 2010, 506 (a trademark case); *Keksstangen (“Mikado”)*, Bundesgerichtshof, I ZR 133/13, October 23, 2014 (an unfair competition case in which the products were accessible only to expert visitors).

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infringer is a foreign person or entity and it would be difficult for the IP right owner to enforce its IP rights abroad—or in the United States—against the foreign infringer.³⁷

Some IP right owners might delay enforcement until a trade show for strategic reasons—to benefit from emergency relief. Decisions on emergency relief are made expeditiously and may favor IP right owners, particularly if the relief is issued *ex parte*—without a hearing of all parties. Enforcement of such relief can cause significant damage to the alleged infringer because the enforcement has both an immediate impact on the infringer's trade show activities and long-lasting effects on the infringer's reputation. Given how powerful the effects of emergency relief can be, it is important that the relief and the institutions that issue the relief be designed in a manner that takes into account the rights of all parties to an IP rights dispute.

The court-issued relief that IP right owners have available to stop infringing activity at trade shows in the United States is a TRO, which a court may issue *ex parte*—without a hearing of the alleged infringer.³⁸ IP right owners may request other or additional measures to target infringements at trade shows, such as seizure orders, but TROs are the primary means of stopping these infringements.³⁹ TROs may be requested from and issued by U.S. federal district courts under the Federal Rules of Civil Procedure; similar means are available in state courts under state law⁴⁰ in cases that may be brought in state courts.⁴¹ Border measures can also be useful in enforcing IP

³⁷ This article focuses on situations in which jurisdiction is claimed over an alleged infringer based on the infringer's infringing activities at a trade show. The article leaves aside situations in which an IP right owner attempts to use an infringer's participation at a trade show to claim transient jurisdiction over the infringer in a court in the location of the trade show. In the United States, the existence of this type of jurisdiction in patent matters has been questionable since the U.S. Supreme Court decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017). For an example of a recent application of the decision in a trade-show related case see, e.g., *Percept Technologies v. Fove, Inc.*, DNEV, 2:15-cv-02387-RFB-CWH, order (D. Nev. Aug. 8, 2017).

³⁸ FED. R. CIV. P. 65(b)(1). For an overview of measures available in various other countries, see, e.g., Giovanni Casucci, *How to Protect Your Intellectual Property at Trade Fairs*, in *EXPERIENCE AND PRACTICE IN EUROPE* 4, 14–35 (2d ed. 2009).

³⁹ For seizure orders see, e.g., 15 U.S.C. § 1116(d). For examples of seizure orders issued for trade shows see Trimble, *supra* note 14, at 1353, n.37.

⁴⁰ *E.g.*, N.Y. C.P.L.R. 6301; NEV. R. CIV. P. 65(b) (2019).

⁴¹ For the exclusive jurisdiction of federal courts, see 28 U.S.C. § 1338(a).

rights at trade shows if the measures can stop the importation of infringing products that will be brought to a trade show.⁴²

An empirical study, reported in detail in a companion article,⁴³ discusses a significant limitation on the availability of TROs for trade shows under current U.S. law. The study reviewed TRO cases that were filed in the U.S. District Court for the District of Nevada in 2014–2016 and concerned IP infringements at trade shows in Las Vegas, Nevada—a major trade show center.⁴⁴ The study showed that in 2014–2016, IP right owners filed motions for TROs for trade show-related infringements in sixteen cases.⁴⁵ One characteristic of the sixteen trade show-related TRO cases was that most of the cases involved foreign defendants; in fifteen of the sixteen cases, foreign entities were sued—either alone or together with a U.S. entity.⁴⁶ The prevailing involvement of foreign defendants might simply suggest that the entities that the IP right owners accused of infringements happened to be foreign entities; however, the companion article argues that the more likely reason is that current TRO law makes it easier for IP right owners to request and obtain TROs against foreign entities at trade shows.⁴⁷

TRO law has been affected by the 2006 U.S. Supreme Court *eBay* decision,⁴⁸ in which the Court held that courts must diligently apply the four-factor test for injunctions and may no longer presume the existence of irreparable harm in IP infringement cases.⁴⁹ After *eBay*, lower courts have extended the rigorous application of the four-factor equitable test, without the

⁴² 19 U.S.C. § 1337; see e.g., U.S. Customs and Border Protection, *How Businesses Can Partner with CBP to Protect Their Rights*, INTELLECTUAL PROPERTY RIGHTS ENFORCEMENT (2017), available at https://www.cbp.gov/sites/default/files/assets/documents/2017-Jan/ipr_guide.pdf (last visited July 11, 2018). See also *Intellectual Property Rights e-Recordation*, U.S. CUSTOMS AND BORDER PROTECTION, <https://iprr.cbp.gov/> (last visited July 11, 2018). Criminal measures may also be available to enforce some IP rights in some circumstances. See, e.g., 17 U.S.C. § 506; 18 U.S.C. § 2318, 2319, 2319A, 2320.

⁴³ Trimble, *supra* note 14, at 1379–91.

⁴⁴ *Id.* at 1348. Trade shows take place not only in the City of Las Vegas but also in the larger Las Vegas area, which is located in Clark County, Nevada. *Id.*

⁴⁵ *Id.* at 1360. The period studied was January 1, 2014–December 31, 2016. *Id.*

⁴⁶ *Id.* at 1376–77.

⁴⁷ Trimble, *supra* note 14, at 1387.

⁴⁸ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

⁴⁹ *Id.* at 393–94.

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presumption, to preliminary injunctions and to cases of infringements of other types of IP rights,⁵⁰ requiring IP right owners seeking TROs to present evidence that there is a likelihood of irreparable harm if a motion for a TRO is denied.⁵¹ A showing that an IP right is valid and likely to be infringed is no longer sufficient to support the granting of a motion for a TRO; courts now require that the “likelihood of irreparable harm . . . be based on evidence in the record, not ‘unsupported and conclusory statements regarding harm [the plaintiff] *might* suffer.’”⁵²

The result of *eBay* and the post-*eBay* developments is that TRO motions require a showing of evidence of a likelihood of irreparable harm—evidence that is unlikely to be amenable to collection in the short timeframe of a trade show, since a longer time for an IP right owner to assemble sufficient evidence will likely be required.⁵³ It seems, therefore, that IP right owners will

⁵⁰ *Id.*, at 394 (“[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and . . . such discretion must be exercised consistent with traditional principles of equity . . .”). For the extension in the Ninth Circuit see *Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995, 998 (9th Cir. 2011) (a copyright case); *Herb Reed Enters., LLC v. Florida Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1249, 1250 (9th Cir. 2013) (a trademark case) (“Gone are the days when ‘[o]nce the plaintiff in an infringement action has established a likelihood of confusion, it is ordinarily presumed that the plaintiff will suffer irreparable harm if injunctive relief does not issue.’” (citation omitted)).

⁵¹ The likelihood of irreparable harm if the measure does not issue is one of the four factors a court must consider for both preliminary injunctions and TROs. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The four factors are the following: (1) the likelihood of success on the merits, (2) the likelihood of irreparable harm in the absence of the requested relief, (3) the balance of equities, and (4) public interest. *Id.*

⁵² *OTR Wheel Eng’g, Inc. v. W. Worldwide Servs., Inc.*, 602 F. App’x 669, 672 (9th Cir. 2015) (quoting *Herb Reed Enters., LLC v. Fla. Entm’t Mgmt, Inc.*, 736 F.3d 1239, 1250–51 (9th Cir. 2013)). See also *Automated Merch. Sys., Inc. v. Crane Co.*, 357 F. App’x 297, 301 (Fed. Cir. 2009) (finding that the plaintiff did not demonstrate a likelihood of irreparable harm when “the district court cited no evidence (and neither party point[ed] to any evidence here) that [the price erosion] would be likely to occur; the only support for this theory of harm is the district court’s conclusory statement that price erosion is possible.”). For an *ex parte* TRO, a court must also determine whether “immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.” Fed. R. Civ. P. 65(b)(1)(A).

⁵³ See, e.g., *adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747 (9th Cir. 2018). The plaintiff in *adidas* presented the results of customer surveys that the court considered would “demonstrate that [adidas’s] intangible benefits will be harmed if the [allegedly infringing product] stays on the market because consumers will be confused about the source . . .” *Id.* at 757. By adopting this approach, the court arguably returned to the pre-

be successful in requesting trade show-related TROs only in cases in which they know of infringing activity before, and possibly long before, a trade show and have an opportunity to collect evidence that will be required for the requesting and granting of a TRO motion.

However, courts should not issue TROs for ongoing infringements if an IP right owner had a reasonable opportunity to enforce its IP rights before a trade show. If an IP right owner knows of infringements before a trade show but does not attempt to enforce its rights before the show, its behavior may indicate that the owner is attempting to use a TRO strategically to exert pressure on an alleged infringer, possibly to extract higher licensing fees in licensing negotiations. Nevertheless, there will be situations in which an IP right owner, even with prior knowledge of earlier infringements, cannot reasonably enforce its IP right before a trade show. These will often be cases involving foreign infringers—infringers that an IP right owner may have difficulty bringing before a U.S. court, and against whom the IP right owner might have difficulty in enforcing the rights in a foreign court.

Current law therefore creates a situation in which trade show-related TROs are available primarily, if not exclusively, for IP right owners who seek to enforce their IP rights against foreign infringers when an infringer has infringed IP rights before a trade show but an IP right owner had no reasonable opportunity to enforce its rights before the trade show. This restriction is a significant limitation on the availability of TROs in the context of trade shows; the limitation means that TROs could be unavailable, as a practical matter, in many cases when IP right owners discover new infringements at a trade show.

While changes to TRO law may be contemplated as a route to improve the availability of trade show-related TROs in appropriate circumstances,⁵⁴ it is also possible to consider other forms of IP rights enforcement as alternatives or complements to court proceedings and court-issued emergency relief. The following section reviews IP rights enforcement support that some trade show organizers and some courts have developed to assist with IP rights

Herb Reed era when irreparable injury was still a consideration rather than a requirement. See Lemley, *supra* note 20, at 1802.

⁵⁴ For possible changes in the law to address the problem of the limited availability of TROs for IP infringements at trade shows, see Trimble, *supra* note 14. See also Lemley, *supra* note 20, at 1811–13.

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enforcement at trade shows.

III. DISPUTE RESOLUTION MECHANISMS AND OTHER SUPPORT FOR IP RIGHTS ENFORCEMENT AT TRADE SHOWS

Many trade show organizers provide various means of support for IP rights enforcement at trade shows, and in some trade show centers local courts also offer some special forms of support for trade show-related IP enforcement.⁵⁵ This Part reviews and compares the support by trade show organizers and courts.

Trade show organizers have multiple interests in assisting IP rights enforcement: Trade show organizers want to minimize disputes on the trade show floor, including disputes arising over IP rights.⁵⁶ Organizers want to create and maintain a welcoming and productive environment that is conducive to learning and positive business and personal interactions;⁵⁷ confrontations during a trade show, and especially on the trade show floor; and interventions by law enforcement can be disruptive, not reflect well on exhibitors, and dissuade exhibitors—both IP right holders and IP infringers—from participating in a trade show and visitors from visiting the show in the future.⁵⁸ Trade show organizers that represent a particular industry might have a strong interest in promoting IP rights protection and effective IP rights enforcement within their industry. Also, some support for IP rights

⁵⁵ On other government support for IP rights protection and enforcement at trade shows, see *infra* note 257.

⁵⁶ See, e.g., *2017 General Regulations, Supplementary Regulations for Exhibitors*, BASELWORLD 1, 9 (2017) (on file with author) (“The Show Management is most anxious to ensure the consistent observation and respect by exhibitors of intellectual property rights.”); *Intellectual Property Rights Policy*, SEMA SHOW 1, 2 (2018) <https://www.semashow.com/sites/default/files/pdfs/property-rights.pdf>.

⁵⁷ According to Kara Maser, Deputy General Counsel of the Consumer Technology Association, the Consumer Technology Association “wants to ensure interactions about IP are supported and do not disrupt the main purpose of [CES].” E-mail from Kara Maser, Deputy General Counsel for the Consumer Technology Association (Aug. 22, 2017) (on file with author).

⁵⁸ “The Show Management will . . . endeavour to ensure that the atmosphere of the Show is not unreasonably disturbed by coercive legal measures.” *2017 General Regulations, supra* note 56, at 9. See also *Intellectual Property Rights Policy, supra* note 56, at 2.

enforcement by trade show organizers might be necessary for the organizers to avoid accusations of collusion in, contribution to, or inducement of IP rights infringing activities.

Courts may have their own motivations for accommodating IP rights enforcement at trade shows: Courts, particularly courts that are at least partially specialized in IP matters, may recognize the specific nature of IP rights disputes that arise at trade shows and the emergency relief that IP rights holders seek. Courts may prefer to minimize the issuance of ex parte measures in these disputes and therefore seek ways to facilitate expeditious procedures that allow for a hearing of all parties before deciding on a measure, such as a preliminary injunction. Courts may respond to industry and trade show organizer appeals for accommodation of trade show-related IP rights disputes; the launching of a special user-friendly expedited trade show-related procedure can be an excellent opportunity to showcase judicial entrepreneurship that is responsive to the societal and economic needs of the court's locale.

A. *Information and Legal Assistance*

Assistance by trade show organizers to IP right holders regarding IP matters falls into three categories: (1) providing information, (2) facilitating legal advice and other assistance in legal matters, and (3) establishing and maintaining ADR mechanisms. UFI, in its *Recommendations for the Protection of IP Rights at Exhibitions*,⁵⁹ urges trade show organizers to provide information to exhibitors about IP protection before trade shows and make available before and during trade shows the contact details of IP experts, customs authorities, and attorneys willing to represent exhibitors.⁶⁰ The *Recommendations* also state that “[o]rganizers should be able to provide a neutral arbitration, arbitrator, or judge to help determine if there is a violation

⁵⁹ The *Recommendations* were drafted in 2008. Thomas Legler, *WIPO Fast-Track Intellectual Property Dispute Resolution Procedure for Palexpo Trade Fairs*, WIPO 1, 2 (2015), http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_10/wipo_ace_10_6.pdf.

⁶⁰ *UFI Recommendations for the Protection of IP Rights at Exhibitions*, THE GLOBAL ASSOCIATION OF THE EXHIBITION INDUSTRY 1, 8, http://www.ufi.org/wp-content/uploads/2016/01/ipr_recommendations.pdf (last visited July 11, 2018).

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or to resolve IPR disputes during the trade fair.”⁶¹

A number of trade show organizers provide information before and during their trade shows on IP rights protection.⁶² For example, the “Messe Frankfurt Against Copying” initiative, launched in 2006, provides information to exhibitors and visitors, both on paper (flyers) and online, and runs an information booth at selected Messe Frankfurt events.⁶³ Similarly, *Motortec Automechanika Madrid*’s “Against Copy” initiative, launched at the International Fair for the Spanish Automotive Industry in 2015,⁶⁴ is devised “to advise and inform participants at the event on the issue of intellectual property.”⁶⁵

Some trade show organizers facilitate legal advice for IP right holders on-site at trade shows. Messe Frankfurt organizes an on-site “legal emergency service providing initial consultation”⁶⁶ at trade shows and cooperates with a number of partners in the area of IP rights protection, including the German Patent and Trade Mark Office and German Customs Authority.⁶⁷ The *Première Vision Paris* show established a Copyright Unit to provide

⁶¹ *Id.*

⁶² For an overview of “good practices” and examples of provisions of IP right information by trade show organizers see *Fact Sheet IP Considerations for Trade Fair Organizers*, EUROPEAN IPR HELPDESK, 1, 3–4, <https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-IP-considerations-for-trade-fair-organisers.pdf> (last visited July 11, 2018). For information provided through government-supported initiatives see *infra* note 257.

⁶³ *Messe Frankfurt Against Copying—Our Initiative for Protecting Your Rights*, MESSE FRANKFURT, <https://www.messefrankfurt.com/frankfurt/en/company/corporate-social-responsibility/against-copying.html> (last visited July 11, 2018).

⁶⁴ Press Release, Motortec Automechanika Madrid, Motortec A.M. and Pons Patentes y Mar-Cas Launch the “Against Copy” Service Combat Industrial Piracy (Feb. 15, 2015).

⁶⁵ *Id.*

⁶⁶ *Our Initiative for Your Right*, MESSE FRANKFURT AGAINST COPYING, <https://automechanika.messefrankfurt.com/content/dam/messefrankfurt-redaktion/automechanika/general/download/service-documents/en/Messe-Frankfurt-against-copying-EN.pdf> (last visited July 11, 2018). See also E-mail from Silke Müller, Messe Frankfurt Exhibitions GmbH (July 2, 2017) (on file with author).

⁶⁷ According to the 2016 Annual Report of the German Patent and Trademark Office, in 2016 the Office participated in “23 trade fairs and IP conferences,” including *bauma* in Munich, *drupa* in Düsseldorf, and *CeBIT* in Hannover. *Annual Report 2016*, GERMAN PATENT AND TRADE MARK OFFICE 1, 50 (2016), https://www.dpma.de/docs/dpma/veroeffentlichungen/jahresberichte/dpma-jahresbericht2016_nichtbarrierefrei.pdf.

information and advice on copyright protection for fashion and protection against counterfeiting.⁶⁸ During the show the Copyright Unit, which consists of lawyers and other experts, provides free legal consultation and offers paid legal advice in cases that require legal action.⁶⁹

A component of the legal support that may be provided at trade shows is assistance with the collection of evidence and service of process of legal documents. For example, for at least ten years⁷⁰ the Consumer Technology Association (“CTA”), which runs *CES* in Las Vegas,⁷¹ has had “Procedures for Requests by IP Owners to Visit CES® 2018 Exhibit Booths”⁷² that IP right owners are to follow if they wish to visit an alleged infringer’s exhibition booth, so that the visit is conducted in the presence of an authorized CTA representative. Similarly, the rules of MCH Swiss Exhibition (Basel) Ltd.⁷³ and the “Intellectual Property Service Regulation” adopted by Fiera Milano SPA⁷⁴ include formal procedures for the collection of evidence at the *Baselworld* trade show in Basel, Switzerland,⁷⁵ and at the *International Hospitality Exhibition* in Milan, Italy,⁷⁶ respectively. *Motortec Automechanika Madrid*’s “Against Copy” initiative facilitates “access to a notary who will draw up a record of any possible violations, specialists who will provide [exhibitors] with legal advice[,] and a technical service which will analyse those devices that could be vulnerable to the committing of an offence.”⁷⁷ The

⁶⁸ *Protection of Creation*, PREMIÈRE VISION PARIS, <https://www.premierevision.com/en/%20presentation/supporting-creation/protection-of-creation/> (last visited July 11, 2018).

⁶⁹ *Id.*

⁷⁰ E-mail from Kara Maser, *supra* note 57. According to Kara Maser, for *CES*, the Consumer Technology Association has “offered a similar process for over 30 years.” *Id.*

⁷¹ *See About CES*, CONSUMER TECHNOLOGY ASSOCIATION, <http://www.ces.tech/about-us> (last visited July 11, 2018).

⁷² *Procedures for Requests by IP Owners to Visit CES® 2018 Exhibit Booths*, CONSUMER TECHNOLOGY ASSOCIATION, <https://ces.tech/Exhibitor/Show-Planning/Procedures-for-requests-by-IP-owners> (last visited July 9, 2017).

⁷³ *Supplementary Regulations Concerning Imitations and Forgeries; Moderation in Exercise of Legal Right (Panel Regulations)*, in *2017 General Regulations, Supplementary Regulations for Exhibitors*, BASELWORLD, 2017, par. 4 (2017) (on file with author).

⁷⁴ *See infra* note 155 and accompanying text.

⁷⁵ *See infra* note 93 and accompanying text; *see also infra* notes 122–126.

⁷⁶ *See infra* notes 154–156.

⁷⁷ *Motortec Automechanika Madrid*, *supra* note 64.

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*SEMA Show*⁷⁸ has rules requiring that a court order issued against an exhibitor “be directed to the Show Management Office and not directly to the violating exhibitor,” and that the management of the trade show assist with the service of the order to the alleged infringer.⁷⁹

B. *General IP Clauses in Trade Shows’ Terms and Conditions*

Trade show organizers can encourage exhibitors to respect IP laws by including in exhibitor contracts an obligation for exhibitors to follow IP laws and not infringe the IP rights of others. An example of the inclusion of such an obligation is the following provision in the “General Terms and Conditions” of Messe Frankfurt, to which exhibitors must consent if they wish to exhibit at a Messe Frankfurt trade show:

The exhibitor makes a binding and irrevocable declaration that the products exhibited by it are its own creation or that they are admissible copies or imitations of other suppliers or other third parties. The exhibitor also undertakes to respect the privileged property rights of third parties. If such a property right infringement is brought to the exhibitor’s attention in an orderly manner while attending the event, the exhibitor undertakes in advance to remove the affected products from the stand.⁸⁰

In addition to calling an exhibitor’s attention to IP matters, this type of provision enables the trade show organizer to act against an exhibitor who infringes IP rights and consequently hold the exhibitor liable for a violation

⁷⁸ *About the 2018 SEMA Show*, SEMA SHOW, <https://www.semashow.com/the-sema-show> (last visited July 11, 2018).

⁷⁹ *Intellectual Property Rights Policy*, *supra* note 56, at 4. SEMA’s approach to court orders is consistent with SEMA’s attempts to minimize any public display of controversies over IP rights. *See id.* at 2.

⁸⁰ E-mail from Silke Müller, *supra* note 66.

of the contract.

When drafting such a provision, trade show organizers need to balance the need to maintain their reputation and the trade show's reputation with the danger of being held secondarily liable for IP rights infringement.⁸¹ While it is against a trade show organizer's interest to generate or encourage IP rights disputes, the organizer must be concerned about allegations of its own secondary liability for IP rights infringements. Organizers might therefore include indemnification clauses in their exhibitor contracts.⁸²

Some trade show organizers establish rules according to which trade show management will proceed in cases of allegations of IP rights violations. Reed Exhibitions'⁸³ "IP Issues and Procedures," applicable for *BookExpo*,⁸⁴ outlines the procedure that an exhibitor must follow to report to the trade show organizer that another exhibitor has infringed its IP rights. The organizer limits its role to one of "a neutral party"⁸⁵ that may be present during the service of court documents, "assist in communicating [the] asserted rights,"⁸⁶ "take steps which, in its sole discretion, are believed reasonable and appropriate to achieve an accommodation and/or resolution of IP rights issues between exhibitors," and "when it is deemed reasonable and appropriate in its sole discretion, ask (and possibly insist) that an exhibitor remove items or materials from that exhibitor's booth" but "only where the asserted Federal rights . . . clearly cover the items or materials of the alleged infringing exhibitor in the reasonable judgment of Management."⁸⁷

⁸¹ See, e.g., *Fonovisa Inc. v. Cherry Auction Inc.*, 76 F.3d 259 (9th Cir. 1996) (finding that organizers of "swap meets" can be held liable for vicarious copyright infringement, contributory copyright infringement, and contributory trademark infringement of third-party vendors). On the motivations of trade show organizers, see *infra* Part III.

⁸² An indemnification clause is included, for example, in the CES Exhibit Space Contract, section 37. E-mail from Kara Maser, *supra* note 57. See also *Intellectual Property Rights Policy*, *supra* note 56, at 4.

⁸³ REED EXHIBITIONS, <http://www.reedexpo.com/> (last visited July 11, 2018).

⁸⁴ *IP Issues and Procedures*, 1, 1-3, https://www.bookexpoamerica.com/RNA/RNA_BookExpo_V2/2017/_docs/exhibitor-manual/BOOKEXPO17-Ops-ExMan-RX-Show%20Info-IPIssuesProcedures.pdf?v=636228476254331257 (last visited July 11, 2018).

⁸⁵ *Id.* at 2.

⁸⁶ *Id.*

⁸⁷ *Id.*

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The *SEMA Show*'s Intellectual Property Rights Policy⁸⁸ provides for the broad discretion of trade show management, which may act against companies that engage in acts that SEMA “deems to be infringing upon another company’s intellectual property rights.”⁸⁹ Management’s decisions may concern “any conduct that SEMA in its sole discretion determines to be a use of intellectual property detrimental to a SEMA member, exhibitor or SEMA-sponsored show.”⁹⁰ This flexible wording leaves room for decisions even on actions that are not defined as IP rights infringements under U.S. law.

These types of clauses might give trade show organizers the power to enforce IP rights as they see fit and when they see fit—at any time, with no procedure, no evidentiary requirements, and possibly with no accountability. Unfortunately, the resulting system safeguards neither the rights of IP right owners nor the rights of alleged infringers, and the system may in fact backfire against the trade show organizer, who could face complaints from either side for its action or inaction regarding IP enforcement.

C. *Alternative Dispute Resolution Mechanisms*

The most sophisticated form of trade show organizer involvement in IP enforcement consists of the establishment and maintenance of ADR mechanisms⁹¹ that address IP rights violations alleged to have occurred at trade shows.⁹² Existing ADR mechanisms vary based on how detailed their procedures are, how formal or informal they are, whether or not they are mandatory for trade show exhibitors, which IP rights may be asserted through the mechanisms, what remedies IP right holders may obtain through the mechanisms, and whether or not an appeal or other review procedure is available (in addition to a court proceeding).

Baselworld—an annual watch and jewelry trade show that takes place

⁸⁸ *Intellectual Property Rights Policy*, *supra* note 56.

⁸⁹ *Id.* at 2.

⁹⁰ *Id.* at 3.

⁹¹ For the definition of “ADR” for the purposes of this article see BLACKABY, *supra* note 11, at 40.

⁹² According to a 2015 report by Thomas Legler, “[o]nly a few organizers of trade exhibition have set up a real alternative dispute resolution mechanism in order to solve intellectual property disputes during the fair.” Legler, *supra* note 59, at 2.

in Basel, Switzerland⁹³—has had an IP dispute resolution panel (“Panel”) since 1985, and its IP Panel has become a model for other trade shows.⁹⁴ The Panel was created in direct response to an incident at the *BASEL 84* trade show (which took place in 1984) when, based on complaints by some manufacturers about IP infringements, the president of the Cantonal Civil Court and his clerk seized watch models from thirteen manufacturers.⁹⁵ With minor changes to the composition and rules, the Panel has handled IP rights claims at *Baselworld* every year since 1985.⁹⁶

The Panel is the arbitration body for IP rights disputes that arise during *Baselworld*; in 2017, for example, the Panel consisted of six voting members: a chairman, three members who are “lawyers of Swiss nationality,”⁹⁷ and two members who are “experts of non-Swiss nationality with special knowledge of the watch and clock sector.”⁹⁸ The Panel is assisted by “one to three technical experts” and is advised by the Secretary, who is the Head of the Legal Department of the trade show organizer.⁹⁹

Exhibitors and non-exhibitors may file a complaint with the Panel during *Baselworld*; the procedure is mandatory for trade show exhibitors.¹⁰⁰ IP right holders may assert their rights under Swiss law as to their design, trademark or other indication of source, and copyright;¹⁰¹ unfair competition claims may also be raised.¹⁰² Until and including 2015, the Panel accepted

⁹³ See Preamble, in *2017 General Regulations, Supplementary Regulations for Exhibitors*, BASELWORLD (2017) (on file with author). *Baselworld* is operated by MCH Group. In 2016, *Baselworld* attracted 1,500 exhibitors and 145,000 visitors. *Annual Report 2016*, MCH GROUP 1, 22 (2016), <https://www.mch-group.com/-/media/mch-group/Documents/Reports/2016/mch-group-annual-report-2016-en.pdf>.

⁹⁴ Legler, *supra* note 59, at 2.

⁹⁵ Isabel Koellreuter & Franziska Schürch, *Showcase to the World: Watches and Jewellery the Swiss Industries Fair in Basel*, in *IN STEP WITH TIME: FROM SWISS INDUSTRIES FAIR TO MCH GROUP* 219, 229 (Patrick Kury & Esther Baur eds., 2016).

⁹⁶ Thomas Legler, *WIPO Fast-Track Intellectual Property Dispute Resolution Procedure for Palexpo Trade Fairs*, WIPO 2 (Aug. 5, 2015), http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_10/wipo_ace_10_6.pdf.

⁹⁷ *Supplementary Regulations Concerning Imitations and Forgeries*, *supra* note 73, at par. 2.2.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at par. 2.1.

¹⁰¹ A registration of the IP right must be provided to the Panel. *Id.* at par. 3.2.

¹⁰² *What Are the Grounds for Filing a Complaint?*, BASELWORLD (May 2018),

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complaints concerning patents; however, because of the increasing complexity of the patented technologies at issue, the Panel disallowed complaints regarding patent matters after 2015.¹⁰³ Additionally, the Panel has discretion to decline hearing “case[s] of highly complex matters.”¹⁰⁴

A complaint may be filed with the Panel at any time during the trade show, and a complaint does not have to be filed in writing.¹⁰⁵ The procedure does not require that the complainant be represented by a lawyer.¹⁰⁶ Once a complaint is filed, an inspection of the exhibition booth in question follows; the inspection is conducted by the Panel, a representative of the complainant, and a representative of the infringer.¹⁰⁷ After the inspection, during which the representative of the infringer may raise objections, the Panel meets in plenary to arrive at a decision on the complaint.¹⁰⁸ The decision is issued to the parties in writing within twenty-four hours¹⁰⁹ and is legally binding for the duration of the trade show;¹¹⁰ a next-day decision is timely because *Baselworld* lasts six days.¹¹¹ The primary remedy that the Panel may grant consists of an order to remove immediately the infringing product from the trade show and a prohibition of further sales of the product at the trade show; more severe

<https://www.baselworld.com/en-US/Exhibitors/Panel.aspx>.

¹⁰³ *Supplementary Regulations Concerning Imitations and Forgerie*, *supra* note 73, at par. 2.1; E-mail from Christoph Lanz, MCH Group Ltd. and the Secretary of the Panel Baselworld (July 18, 2017) (on file with author).

¹⁰⁴ *Supplementary Regulations Concerning Imitations and Forgeries*, *supra* note 73, at par. 3.1.

¹⁰⁵ *How Must Complaints Be Filed?*, BASELWORLD, <https://www.baselworld.com/en-US/Exhibitors/Panel.aspx> (last visited July 11, 2018). The filing of a complaint is subject to a fee; in 2017 the fee to be paid by the complainant-exhibitor was CHF 2,200, and CHF 10,000 for a complainant – non-exhibitor. *Supplementary Regulations Concerning Imitations and Forgeries*, *supra* note 73, at par. 7.1. The defendant’s fee was CHF 4,000, and the Panel could reduce or increase the fee by CHF 500, depending on the nature of the case. *Id.* at par. 7.2.

¹⁰⁶ *How Must Complaints Be Filed?*, *supra* note 105.

¹⁰⁷ *Panel Procedure*, BASELWORLD, <https://www.baselworld.com/en-US/Exhibitors/Panel.aspx> (last visited July 11, 2018).

¹⁰⁸ *Id.*

¹⁰⁹ *Supplementary Regulations Concerning Imitations and Forgeries*, *supra* note 73, at par. 3.3.

¹¹⁰ *What Is the Impact of the Panel’s Decisions?*, BASELWORLD, <https://www.baselworld.com/en-US/Exhibitors/Panel.aspx> (last visited July 11, 2018).

¹¹¹ In 2018, Baselworld took place on March 22–27, 2018. *Photos and Videos*, BASELWORLD (Sept. 24, 2018), <https://www.baselworld.com/en-US.aspx>.

remedies are an immediate closure of the infringer's entire exhibition booth and exclusion of the infringer from future *Baselworld* trade shows.¹¹²

A reconsideration of and an appeal against the *Baselworld* Panel's decisions are available: An application for reconsideration in light of new facts or evidence may be submitted during the trade show, and an appeal may also be filed either during the show or within thirty days after the trade show if a party alleges that the Panel did not follow its rules.¹¹³ The filing of an application for reconsideration or an appeal will not result in a stay of the remedies granted by the Panel.¹¹⁴ It may seem inconsequential to seek a reversal of the Panel's decision after the trade show but, as one commentator noted, the Panel decisions have possible further uses as "expert opinions by the ordinary courts in Switzerland and abroad."¹¹⁵

The statistics of the *Baselworld* Panel show an impressive number of cases brought before and decided by the ADR body. In 1985–2016, the Panel handled a total of 873 complaints.¹¹⁶ The number of cases ranged from nine to fifty per year during that period,¹¹⁷ with the numbers remaining under seventeen each year starting in 2010;¹¹⁸ in 2016, the Panel handled nine cases.¹¹⁹ In most of the cases in 1985–2016 the complaints concerned

¹¹² *Supplementary Regulations Concerning Imitations and Forgeries*, *supra* note 73, at par. 3.5, 3.6. See also *What Sanctions Can the Panel Impose?*, BASELWORLD, <https://www.baselworld.com/en-US/Exhibitors/Panel.aspx> (last visited July 11, 2018).

¹¹³ *Supplementary Regulations Concerning Imitations and Forgeries*, *supra* note 73, at par. 3.7. See also *What Appeals Are There Against the Decisions by the Panel?*, BASELWORLD, <https://www.baselworld.com/en-US/Exhibitors/Panel.aspx> (last visited July 11, 2018).

¹¹⁴ *Supplementary Regulations Concerning Imitations and Forgeries*, *supra* note 73, at par. 3.7.

¹¹⁵ Christoph Lanz, *The Fight Against Counterfeiting and Imitations at Trade Fairs: The Panel of Baselworld*, WIPO, Advisory Committee on Enforcement, WIPO/ACE/8/11 2 (Oct. 15, 2012).

¹¹⁶ Statistics from Christoph Lanz, MCH Group Ltd. and the Secretary of the Panel Baselworld (July 2017) (on file with author).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* Yves Bugmann, Head of the Legal Division of the Federation of the Swiss Watch Industry, sees two reasons for the declining numbers of disputes: (1) "Baselworld's IP Panel is well known in the watch industry. The exhibitors know that the respect for IP rights is important for the management of the Fair," and (2) "The number of exhibitors decreased during the last few years." E-mail from Yves Bugmann, Head of the Legal Division of the Federation of the Swiss Watch Industry (Aug. 2017) (on file with author).

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infringements of design rights, followed by unfair competition and trademark infringements.¹²⁰ Patent infringement complaints, which are no longer accepted by the Panel as of 2016, were raised in fifty-six cases in 1985–2015.¹²¹

In addition to complaints filed under the procedure described above, the *Baselworld* Panel accepts requests by parties to secure evidence (requests for a “constat”).¹²² These requests fall under a separate procedure through which the Panel makes no decision on the merits of the request but orders a temporary surrender of the allegedly infringing products so that photographs may be taken for later use as evidence.¹²³ The Panel provides a statement with the photographic evidence to both parties.¹²⁴ To minimize abuses of the procedure, the Panel requires that the requesting party make a written application accompanied by proof of a Swiss IP right and justification for the use of the procedure.¹²⁵ In 1985–2016 the Panel handled a total of 191 such requests; the highest number of these requests that were decided by the Panel in one year in the period 1985–2016 was sixteen, but the numbers have remained under ten beginning in 2006, and the Panel handled only two such requests in 2016.¹²⁶

Another trade show with an ADR mechanism for IP disputes is *Spielwarenmesse*, which takes place in Nurnberg, Germany. The decisionmaking body for the show is a three-member IPR Council; in 2018, for example, the Council consisted of a professor who was also a retired presiding judge of a regional court, the general manager of the German Union

¹²⁰ E-mail from Christoph Lanz, *supra* note 103.

¹²¹ Statistics from Christoph Lanz, *supra* note 116. The fifty-six cases also included requests for securing evidence (for an explanation of such requests see the next paragraph in the main text). E-mail from Christoph Lanz, *supra* note 103. The patent cases all concerned utility patents; designs in these cases are protected by a separate design right, not by a patent. For the reasons that patent disputes are no longer decided at *Baselworld*, see *infra* Part III, Section C.

¹²² *Supplementary Regulations Concerning Imitations and Forgeries*, *supra* note 73, at par. 4.4. See also E-mail from Christoph Lanz, *supra* note 103.

¹²³ *Supplementary Regulations Concerning Imitations and Forgeries*, *supra* note 73, at par. 4.4.

¹²⁴ *Id.*

¹²⁵ *Id.* In 2017 the requests to secure evidence were subject to a fee of CHF 2,600. *Id.* at par. 7.5.

¹²⁶ Statistics from Christoph Lanz, *supra* note 116.

of the Toy Industry,¹²⁷ and a patent attorney.¹²⁸ Exhibitors may opt in to have their disputes decided by the IPR Council but are not required to do so.¹²⁹ Complaints must be submitted to the IPR Council in writing; only if the infringer accepts the procedure's terms and conditions will the IPR Council accept comments from the infringer and possibly inspect the infringer's booth. If the IPR Council considers the complaint justified, it will ask the infringer "to remove the exhibit concerned for the duration of the fair and to promise the complainant not to exhibit and/or offer the exhibit in any way for the remaining duration of the fair."¹³⁰ Additionally, the trade show organizer may decide to exclude the infringer "from all further fairs and events" of the organizer.¹³¹

An example of a recently created ADR mechanism that has drawn on lessons learned from earlier ADR mechanisms is the WIPO Fast-Track Intellectual Property Dispute Resolution Procedure for Palexpo Trade Fairs ("WIPO Fast-Track Procedure"), developed by Palexpo Trade Fairs SA¹³² and the World Intellectual Property Organization's Arbitration and Mediation Center ("WIPO Center").¹³³ The WIPO Fast-Track Procedure was first

¹²⁷ Deutscher Verband der Spielwarenindustrie e.V. (DVSI), <http://www.dvsi.de/> (last visited July 11, 2018).

¹²⁸ SPIELWARENMESSE, IPR COUNCIL—FOR THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS (2018), https://www.spielwarenmesse.de/fileadmin/data_archive/Relaunch_Spielwarenmesse/pdf/2018_IPR_Infosheet_EN.pdf.

¹²⁹ *Id.* at 2.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Other trade shows with ADR mechanisms for IP disputes arising at trade shows include *MACEF*, *EXPOCOMFORT*, *MARMOMACC*, and *SAMOTER*. Legler, *supra* note 59, at 2. See also Casucci, *supra* note 38, at 10–12, 25–26.

¹³³ *WIPO Fast-Track Intellectual Property Dispute Resolution Procedure for Palexpo Trade Fairs*, WIPO, <http://www.wipo.int/amc/en/center/specific-sectors/tradefairs/palexpo/> (last visited July 11, 2018). According to Judith Schallnau of the WIPO Center,

[t]he WIPO Arbitration and Mediation Center is a neutral, international and non-profit dispute resolution provider that offers time- and cost-efficient alternative dispute resolution (ADR) options. WIPO mediation, arbitration, expedited

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launched at the *International Motor Show* in Geneva, Switzerland in 2015.¹³⁴ As the trade show organizer did in the case of *Baselworld*, Palexpo became interested in having an ADR mechanism after it encountered IP disputes at its trade shows.¹³⁵

The WIPO Fast-Track Procedure provides for a binding “decision of an expert panel within 24 hours with immediate effect,”¹³⁶ and although the Procedure includes elements of the *Baselworld* Panel procedure, there are notable differences between the two ADR mechanisms that originate from the broader approach taken by the WIPO Fast-Track Procedure, which was founded on “the 1996 proposed WIPO Emergency Relief Rules, the WIPO Expedited Arbitration Rules (article 43), the Uniform Domain Name Dispute Resolution Policy (UDRP), close collaboration with Palexpo and experts, and exchanges with providers of dispute resolution mechanisms, in particular with *Baselworld*.”¹³⁷ Although the number of cases to date that have been filed under the WIPO Fast-Track Procedure is low, the WIPO Center and Palexpo have noted their positive experience with the Procedure’s functioning and preventive effects.¹³⁸ The design of the WIPO Fast-Track Procedure is

arbitration, and expert determination[s] enable private parties to efficiently settle their domestic or cross-border IP and technology disputes out of court. As part of the WIPO ADR Services for Specific Sectors, the WIPO Center provides dispute resolution advice and case administration services to help parties resolve disputes arising at trade fairs. Where appropriate, the WIPO Center provides guidance in the establishment of adapted ADR frameworks, such as the WIPO Fast-Track procedure.

Telephone Interview with Judith Schallnau, WIPO Arbitration and Mediation Center (July 26, 2014) (on file with author). See also *WIPO Alternative Dispute Resolution (ADR) for Trade Fairs*, WIPO <http://www.wipo.int/amc/en/center/specific-sectors/tradefairs/> (last visited July 11, 2018).

¹³⁴ Legler, *supra* note 59, at 2, 3.

¹³⁵ E-mail from Thomas Legler (Aug. 4, 2017) (on file with author).

¹³⁶ Gregor Bühler, *Interim Protection of Intellectual Property Rights at Swiss Trade Fairs* 1 (2016).

¹³⁷ Telephone Interview with Judith Schallnau, *supra* note 133.

¹³⁸ Thomas Legler notes that “[o]ne should . . . not underestimate the preventive effect of the system put in place” and points out that a threat of filing under the Procedure sufficed

instructive, particularly given the extensive expertise of its designers;¹³⁹ The WIPO Center anticipates that the “design can, ... in principle, be adapted to future dispute resolution needs.”¹⁴⁰

The WIPO Fast-Track Procedure may be requested for alleged violations of copyright, trademarks, design rights, or unfair competition under Swiss law.¹⁴¹ Because of the complexity of patent disputes, the Procedure is not, as the procedure of the *Baselworld* Panel is not, available for patent infringements.¹⁴² In contrast to the *Baselworld* procedure, the WIPO Fast-Track Procedure relies in its implementation on Palexpo’s collaboration with the WIPO Center; it utilizes the Center’s IP dispute resolution experience and resources,¹⁴³ requires a request filed in writing,¹⁴⁴ sets a period of three business hours for a respondent to file an answer,¹⁴⁵ allows for a provisional measure (removal of the disputed products until a final decision),¹⁴⁶ and enables a settlement of the dispute through a cease-and-desist declaration.¹⁴⁷ A decision should be rendered within twenty-four hours of the receipt of a request, and the decision is binding and immediately enforceable at the trade fair.

As opposed to the six members of the *Baselworld* Panel, who are appointed by the *Baselworld* trade show management for all disputes arising

to dissuade the alleged infringers from continuing their infringing activities. E-mail from Thomas Legler, *supra* note 135. See also Telephone Interview with Judith Schallnau, *supra* note 133.

¹³⁹ Telephone Interview with Judith Schallnau, *supra* note 133.

¹⁴⁰ *Id.*

¹⁴¹ *Palexpo Trade Fairs—Fast-Track Intellectual Property Dispute Resolution Procedure*, WIPO, art. 2(b), <http://www.wipo.int/amc/en/center/specific-sectors/tradefairs/rules/index.html> (last visited July 11, 2018).

¹⁴² *Id.* at art. 2(c). According to Thomas Legler, the decision not to include patent disputes “was taken from the outset, i.e. independently from *Baselworld* decision.” E-mail from Thomas Legler, *supra* note 135.

¹⁴³ Bühler, *supra* note 136, at 2.

¹⁴⁴ *Palexpo Trade Fairs—Fast-Track Intellectual Property Dispute Resolution Procedure*, WIPO, art. 4, <http://www.wipo.int/amc/en/center/specific-sectors/tradefairs/rules/index.html> (last visited July 11, 2018). In 2017 the fee for the request was CHF 3,500. *Id.* at art. 25(a).

¹⁴⁵ *Id.* at art. 6(e). See also Legler, *supra* note 59, at 3.

¹⁴⁶ *Palexpo Trade Fairs – Fast-Track Intellectual Property Dispute Resolution Procedure*, *supra* note 144, at art. 8.

¹⁴⁷ Legler, *supra* note 59, at 3.

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at the show,¹⁴⁸ Palexpo's Expert Panel is appointed individually for each dispute; each Expert Panel consists of one "lawyer qualified under Swiss law with experience in intellectual property matters,"¹⁴⁹ who is appointed "in accordance with a rotational system" from a list of candidates, maintained by the WIPO Center, together with information about their qualifications and experience.¹⁵⁰ Confirmation of a candidate's impartiality and independence is required when the WIPO Center appoints the candidate to act as Expert Panel.¹⁵¹ The Expert Panel may consult a chairperson, who is appointed by the Center.¹⁵² Within thirty days of the Expert Panel's decision, the parties may submit the decision to WIPO Expedited Arbitration.¹⁵³

In Italy, INDICAM—Centromarca Institute for the Fight against Counterfeiting¹⁵⁴—created a model "Intellectual Property Service Regulation" that is available for trade show organizers to adopt; one adopter is Fiera Milano SPA, the organizer of the *International Hospitality Exhibition* in Milan.¹⁵⁵ The Service has three purposes: (1) to inform exhibitors about IP rights and the means available to protect the rights, (2) to provide a procedure for collecting evidence of possible infringements, and (3) to create a mechanism to resolve disputes and provide emergency relief at trade shows.¹⁵⁶ The ADR mechanism is available to decide IP rights disputes; unfair competition cases are excluded from its scope.¹⁵⁷ The ADR Panel consists of "at least three experts in

¹⁴⁸ *Supplementary Regulations Concerning Imitations and Forgeries*, *supra* note 73, at par. 2.1.b.

¹⁴⁹ *Palexpo Trade Fairs – Fast-Track Intellectual Property Dispute Resolution Procedure*, *supra* note 144, at art. 10(a).

¹⁵⁰ *Id.* at ar. 11. The rules also include a provision on impartiality and independence of the Expert Panel. *Id.* at art. 12.

¹⁵¹ Telephone Interview with Judith Schallnau, *supra* note 133.

¹⁵² *Palexpo Trade Fairs – Fast-Track Intellectual Property Dispute Resolution Procedure*, *supra* note 144 at art. 18.

¹⁵³ *Id.* at art. 26(a). See also *WIPO Alternative Dispute Resolution (ADR) for Trade Fairs*, WIPO, <http://www.wipo.int/amc/en/center/specific-sectors/tradefairs/> (last visited July 11, 2018).

¹⁵⁴ INDICAM—ISTITUTO DI CENTROMARCA PER LA LOTTA ALLA CONTRAFFAZIONE, <http://www.indicam.it/index.php> (last visited July 11, 2018).

¹⁵⁵ Intellectual Property Service Regulation, available at http://host.fieramilano.it/sites/default/files/Servizio_Propriet%C3%A0_Industriale_e_Intellettuale_0.pdf (last visited July 11, 2018).

¹⁵⁶ *Id.* at Preamble, § 2.

¹⁵⁷ *Id.* at § 1.3.

Intellectual Property,”¹⁵⁸ who make a preliminary finding on an infringement upon a request by a complainant.¹⁵⁹ The panel orders a hearing of the alleged infringer “at least 12 hours *after* the notification of the hearing . . . in order to enable the alleged infringer to collect the necessary documentation and prepare his/her own defence.”¹⁶⁰ The panel should promote “an amicable settlement”¹⁶¹ between the parties, but if no settlement is reached, the panel must issue its decision and communicate it to the parties within four hours of the hearing.¹⁶² If the panel determines that an IP right has been infringed, the infringer must remove the infringing product from the trade show.¹⁶³

Other dispute resolution mechanisms can be designed with greater trade show organizer involvement in decisionmaking. For example, the organizer of the *AAPEX* trade show in Las Vegas, Nevada¹⁶⁴ offers an IP Review Process that is mandatory for all exhibitors, who must agree to be bound by the Process as a condition of their exhibiting at *AAPEX*.¹⁶⁵ A complaint must be submitted in writing and supported by additional documents.¹⁶⁶ There is no independent panel established to resolve the complaint; rather, it is the *AAPEX* Management who “[u]pon completion of its investigation . . . determine[s], upon a preponderance of the evidence, whether a violation of the IP Addendum has occurred.”¹⁶⁷ In addition to the removal of infringing items, expulsion from the ongoing *AAPEX* show, and a ban from future *AAPEX* shows, *AAPEX* Management may impose a fine on the

¹⁵⁸ *Id.*, at § 8.1.

¹⁵⁹ The request is subject to a fee; as of August 2017 the amount listed in the Regulation was EUR 500 for an exhibitor and EUR 1,500 for a visitor. *Id.* at § 9.2.

¹⁶⁰ *Id.* at § 9.3 (emphasis added).

¹⁶¹ *Id.* at § 9.4.

¹⁶² *Id.* at § 9.7.

¹⁶³ *Id.* at §§ 8.4, 9.7.

¹⁶⁴ “*AAPEX*” stands for *Automotive Aftermarket Products Expo*. “*AAPEX* is a trade show sponsored and organized by the Motor & Equipment Manufacturers Association/Automotive Aftermarket Suppliers Association and Auto Care Association.” *AAPEX Intellectual Property Statement*, *AAPEX* 1, 2 (2017) <http://www.aapexshow.com/2017/custom/images/docs/Exhibitor%20Guide/2017/Intellectual%20Property%20Rights%20-%20English.pdf>.

¹⁶⁵ *AAPEX Intellectual Property Statement*, *AAPEX* 6, 10 (2017) <http://www.aapexshow.com/2017/custom/images/docs/Exhibitor%20Guide/2017/Intellectual%20Property%20Rights%20-%20English.pdf> (last visited July 11, 2018).

¹⁶⁶ *Id.* at 6.

¹⁶⁷ *Id.* at 7.

infringer.¹⁶⁸

D. *Judicial Support*

The existence of ADR mechanisms at trade shows does not eliminate the need for access to the courts, even apart from the fact that the mechanisms require court proceedings to be available in support of the mechanisms' existence.¹⁶⁹ Some IP disputes arising at trade shows will appear in the courts even when an ADR mechanism is in place, because not all parties are obligated to utilize the mechanism. Some trade show organizers do not require all exhibitors to consent in the trade show exhibitor contract to the use of an ADR mechanism,¹⁷⁰ which leaves exhibitors who are IP right owners free to choose between the mechanism and a court procedure. Even trade show organizers that mandate the use of a mechanism in their contracts with exhibitors cannot compel IP right owners who are not exhibitors to use the mechanism; non-exhibitor IP right owners may opt in to use the mechanism, but if they do not, they may turn to a court to enforce their IP rights.¹⁷¹ Similarly, infringers who have no contractual obligation to use a mechanism may refuse to consent to its use and thus force IP right owners to resort to the courts.

If a party is not contractually mandated to use an ADR mechanism, whether it opts in to a mechanism or not depends on a number of factors. A party's perception of the legitimacy of a mechanism will play an important

¹⁶⁸ *Id.* at 8.

¹⁶⁹ When necessary, courts enforce arbitration clauses in contracts and enforce arbitral awards.

¹⁷⁰ For example, exhibitors may opt in to use the IPR Council at the *Spielwarenmesse* but are not *ex ante* bound to use it through their contract with the organizer. SPIELWARENMESSE, *supra* note 128.

¹⁷¹ *See, e.g.,* the General Conditions of Participation of Messe München. The General Conditions for participation at Messe München events state that “[a]s long as an Intellectual Property Panel is active in accordance with an understanding with Messe München GmbH, members of the Panel are entitled to enter the booth of the exhibits and inspect the exhibits exhibited in the booth to determine whether [. . .] the exhibits infringe the industrial property, author’s rights, or competition law of the person who requested the Intellectual Property Panel.” Allgemeine Teilnahmebedingungen, Messe München GmbH, A 13, available at <https://automatica-munich.com/media/website/files/pdf/application/general-terms-of-participation-a.pdf> (last visited Oct. 15, 2018).

role,¹⁷² particularly initially when the mechanism has just been launched. Also influencing a party's choice will be its ties to the trade show and the particular industry; a party who is a repeat exhibitor and/or cares about its reputation in the industry is more likely to select the ADR mechanism, provided that the mechanism is perceived to be the legitimate and preferred route of dispute resolution in the community.¹⁷³ A party with no ties to the community might have little incentive to subject itself to the mechanism.

Another reason that courts remain relevant, even when an ADR mechanism exists and even when it is the preferred route, is that, as mentioned above,¹⁷⁴ the mechanism might not be available for disputes concerning all types of IP rights; some ADR mechanisms exclude patent rights from their scope,¹⁷⁵ and ADR mechanisms are typically available only for IP rights under the laws of the country in which the trade show takes place, thus excluding claims based on foreign IP rights.¹⁷⁶ Furthermore, an IP right owner might prefer court proceedings if the proceedings would facilitate an effective preservation of evidence and/or secure other procedural advantages that an ADR mechanism would not. Court proceedings also give an IP right owner the possibility of seeking an ultimate resolution of the merits of the dispute.¹⁷⁷

Courts may assist parties involved in IP rights disputes at trade shows by implementing certain accommodation practices. Courts in some major trade show centers have adopted such practices; examples of the practices range from extending the accessibility of a court beyond its regular business hours to holding court hearings on trade show premises. Courts introduced

¹⁷² See *infra* Part III, Section A.

¹⁷³ Feldman, *supra* note 24, at 313 (“To minimize the negative consequences of . . . conflict, members of close-knit groups who anticipate future interactions create ways to resolve their disputes using internal group norms rather than state-enforced legal rules.”).

¹⁷⁴ See *supra* Part II, Section C.

¹⁷⁵ See *supra* notes 103 and 142 and accompanying text.

¹⁷⁶ On the possibility that foreign IP rights may be infringed at a trade show see *supra* note 31 and accompanying text. Courts handle cases involving foreign IP rights only to the extent that the cases concern transitory causes of action. On transitory causes of action see, e.g., Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 339, 357 (2015).

¹⁷⁷ In some industries the desire of parties to an IP dispute to obtain a decision on the merits might prevail over the need to obtain provisional relief; an ADR mechanism providing such relief is therefore less useful in these industries. E-mail from Barbara Weizsaecker, European Exhibition Industry Alliance (Oct. 9, 2017) (on file with author).

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these practices in response to appeals by industry groups and/or trade show organizers, and the courts have adjusted their practices as they and repeat parties gain expertise in IP disputes and react to technological progress.

The District Court in Braunschweig, Germany (Landgericht Braunschweig) is a court with decades of experience in accommodation practices for trade shows. The Court has had exclusive jurisdiction in selected IP matters in the German state of Lower Saxony since 1950,¹⁷⁸ and its territorial jurisdiction includes Hannover—a major trade show center. Since 1967, the Court's Division of Patent Disputes (Patentstreitkammer), which has had jurisdiction, inter alia, over disputes concerning infringements of patents, utility models, designs, and trademarks, has offered a standby service (Bereitschaftsdienst) for selected trade shows to process claims by IP right holders that arise at the shows.¹⁷⁹

As a part of its standby service, the Braunschweig Division makes itself accessible outside of its regular business hours¹⁸⁰ and offers expeditious processing of requests for trade show-related preliminary injunctions.¹⁸¹ In preparation for selected trade shows, the presiding judge makes himself available on the trade show dates and keeps the Division's calendar open as much as possible.¹⁸² The Division accepts filings for preliminary injunctions by fax (typically also accompanied by an email) and decides on the filings within a few hours.¹⁸³ The expeditious processing of filings remains the most important component of the Division's standby service; the availability of the Division outside regular business hours has become less important in recent years as the durations of trade shows have apparently been shortened and trade

¹⁷⁸ Landgericht Braunschweig, *Patent- und Markengericht Niedersachsen*, https://www.landgericht-braunschweig.niedersachsen.de/wir_ueber_uns/patent_und_markengericht_niedersachsen/patent--und-markengericht-niedersachsen-68913.html (last visited July 11, 2018). See also Günter Lidle, *Das einstweilige Verfügungsverfahren in Patentsachen und die Industriemessen in Hannover*, GRUR 54, 54 (1964).

¹⁷⁹ Günter Lidle, *Der Bereitschaftsdienst der Patentstreitkammer Braunschweig während der Hannover-Messen*, GRUR 93, 93 (1978).

¹⁸⁰ *Id.*

¹⁸¹ See Lidle, *supra* note 179, at 93–96.

¹⁸² E-mail from Judge Jochen Meyer, Landgericht Braunschweig, 9. Zivilkammer, (July 24, 2017) (on file with author).

¹⁸³ *Id.*

shows in Hannover now rarely run into the weekends.¹⁸⁴

The third component of the standby service—the practice of holding hearings in appropriate cases on the premises of the selected trade shows—has been phased out since the late 1990s.¹⁸⁵ The Division previously held hearings at trade shows but was doing so less frequently toward the late 1990s because modern communication technologies made it easier for parties and their attorneys to communicate remotely with the Division.¹⁸⁶ One of the reasons for the phasing out of on-premises hearings was the need for the Division to economize because of staffing limitations.¹⁸⁷ According to the current presiding judge of the Division, the on-premises presence of judges added little if any value to the hearings (at which judges inspect evidence, typically from photographs and other documents, and parties are usually represented by specialized attorneys). At the hearings the judges may not provide legal advice to parties who are not represented, and other non-judicial organizations are available to assist non-represented parties with legal advice.¹⁸⁸

The impetus for the Braunschweig Division’s standby service for selected trade shows in Hannover came from industries and industry groups, and similarly an impetus for action by the Munich District Court was based on Messe München’s suggestion that “Munich’s District Court reserve [. . .] court sessions for events particularly prone to product and brand piracy.”¹⁸⁹ Accordingly, Messe München informs IP right holders that they should “clearly mark on [their] form that [the case] is related to the trade fair”¹⁹⁰ in order “to accelerate the legal proceedings.”¹⁹¹ The Court’s judges are aware of trade show dates in advance and decide on requests for trade show-related

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Company Profile, MESSE MÜNCHEN*, http://www.messemunchen.de/en/company/profil/profil_2.php (last visited July 11, 2018). See also *Initiative gegen Marken- und Produktpiraterie*, BAU 2019, <https://bau-muenchen.com/aussteller/informieren/patentschutz/patentschutz.pdf> (last visited July 11, 2018).

¹⁹⁰ *Company Profile*, *supra* note 189. See also *Initiative gegen Marken- und Produktpiraterie*, *supra* note 189.

¹⁹¹ *Initiative gegen Marken- und Produktpiraterie*, *supra* note 189.

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provisional measures within hours.¹⁹²

A recent example of a court's constructive approach to IP rights enforcement at a trade show is the adoption by the Commercial Courts of Barcelona of a special protocol, the Fast Track Protocol ("Protocolo de Actuación Rápida") ("Protocol"), which was originally drafted for the 2015 *Mobile World Congress*. Upon a request by the organizer of the 2016 trade show *Alimentaria*, the Courts again activated the Protocol in 2016; later that year the Courts followed the Protocol repeatedly during other trade shows held in Barcelona in 2016¹⁹³ and in 2017.¹⁹⁴

In the Fast Track Protocol the Barcelona Commercial Courts have committed themselves to handle expeditiously the requests for provisional measures in IP matters during trade shows¹⁹⁵ while avoiding, to the extent possible, the issuance of provisional measures *ex parte*.¹⁹⁶ Under the Protocol, the Courts pledge to give priority to requests for provisional measures concerning IP rights at trade shows,¹⁹⁷ to resolve requests for *ex parte* measures within two days of a filing,¹⁹⁸ and to resolve requests for measures

¹⁹² E-mail from Judge Anne Fricke, Landgericht München I (July 28, 2017) (on file with author).

¹⁹³ ACTIVACIÓN DEL PROTOCOLO DE ACTUACIÓN RÁPIDA DE LOS JUZGADOS MERCANTILES DE BARCELONA PARA EL SALÓN ALIMENTARIA 2016 I (2016), <http://www.poderjudicial.es/stfls/TRIBUNALES%20SUPERIORES%20DE%20JUSTICIA/TSJ%20Catalunya/DOCUMENTOS%20DE%20INTER%3%89S/Protocolo%20actuaci%C3%B3n%20Sal%C3%B3n%20Alimentaria%202016.pdf>; LOS JUZGADOS MERCANTILES DE BARCELONA ACTIVAN EL PROTOCOLO PARA EL SALÓN ALIMENTARIA (2016), <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunales-Superiores-de-Justicia/TSJ-Cataluna/En-Portada/Los-juzgados-mercantiles-de-Barcelona-activan-el-protocolo-para-el-Salon-Alimentaria>.

¹⁹⁴ PROTOCOLO DE SERVICIO DE GUARDIA Y DE ACTUACIÓN RÁPIDA DE LOS JUZGADOS MERCANTILES DE BARCELONA PARA EL *MOBILE WORLD CONGRESS 2017* (2017), <http://www.icab.es/files/242-497743-DOCUMENTO/PROTOCOLO-MWC-2017.pd>.

¹⁹⁵ ACTIVACIÓN DEL PROTOCOLO DE ACTUACIÓN RÁPIDA DE LOS JUZGADOS MERCANTILES DE BARCELONA PARA EL SALÓN ALIMENTARIA 2016, *supra* note 193; Héctor Sbert, *IP Protection Throughout "Alimentaria 2016": Rapid Intervention Protocol from Barcelona Courts*, LINKEDIN (Apr. 30, 2016), <https://www.linkedin.com/pulse/ip-protection-throughout-alimentaria-2016-rapid-from-sbert-p%C3%A9rez>.

¹⁹⁶ ACTIVACIÓN DEL PROTOCOLO DE ACTUACIÓN RÁPIDA DE LOS JUZGADOS MERCANTILES DE BARCELONA PARA EL SALÓN ALIMENTARIA 2016, *supra* note 193, at 2.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

that require hearings within ten days of filing.¹⁹⁹ The Courts have declared their willingness to respect protective letters (“escritos preventivos”—discussed below) that can protect parties that are willing to appear against the issuance of measures *ex parte*.²⁰⁰ Additionally, the Courts have pledged that they will take into consideration the conduct of an IP right holder, particularly whether the IP right holder has delayed a filing for a measure to create an emergency to justify the issuance of a measure *ex parte*.²⁰¹

The Courts’ initial experience with the Fast Track Protocol has been a success. According to one of the judges of the Courts, under the Protocol, the Court “reduces to 24 hours the judicial response to conflicts that, in normal situations, would extend for weeks or months according to legal deadlines.”²⁰² During the 2017 *Mobile World Congress*, twenty-one complaints were filed with and decided by the Courts under the Protocol,²⁰³ and the judges managed to cut the Protocol’s two-day deadline for *ex parte* provisional measures in half.²⁰⁴ It is worth noting that in all cases filed under the Fast Track Protocol, the IP right owners knew or had “serious suspicions” of infringements of their IP rights prior to the trade shows.²⁰⁵

The protective letters mentioned in the Barcelona Commercial Courts’ Fast Track Protocol correspond to the protective letters that are also registered by courts in some other countries, for example in Switzerland, Germany

¹⁹⁹ *Id.*

²⁰⁰ *Id.* On protective letters registered by the Commercial Courts of Barcelona see, e.g., Xavier Fàbrega Sabaté, *Barcelona Commercial Court No. 4: Admission of Protective Briefs in Patent Infringement Proceedings* (2013), <http://www.lexology.com/library/detail.aspx?g=d27eb72d-be4f-4342-9cdd-ba585a6def7>.

²⁰¹ On the delay tactics used by IP right owners see Trimble, *supra* note 14.

²⁰² E-mail from Judge Florencio Molina López of the Commercial Court No. 5 of Barcelona (July 2017) (on file with author).

²⁰³ *Los Juzgados Admiten y Resuelven 21 Asuntos de Propiedad Intelectual en el MWC*, EUROPAPRESS (Mar. 7, 2017), <http://www.europapress.es/catalunya/noticia-juzgados-admiten-resuelven-21-asuntos-propiedad-intelectual-mwc-20170307111857.html>.

²⁰⁴ *Id.*

²⁰⁵ E-mail from Judge Florencio Molina López, *supra* note 202.

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(“Schutzschriften”),²⁰⁶ and the Netherlands,²⁰⁷ the letters should also be available under the proposed Rules of Procedure of the Unified Patent Court.²⁰⁸ In a trade show context, an exhibitor who is seeking protection from ex parte preliminary measures may file a protective letter once the exhibitor has reason to believe that an ex parte preliminary measure might be requested.²⁰⁹ In Germany, protective letters are recorded in a central register (“Zentrales Schutz-schriftenregister”), which allows for an exchange of information among courts about protective letters that were filed in any jurisdiction in Germany, thus eliminating the need for applicants to file protective letters in multiple courts.²¹⁰

Protective letters are useful and are being used.²¹¹ According to a judge in the Braunschweig Division, these letters are helpful—for example when the letters are available in a case that is pending in another court between

²⁰⁶ Zivilprozessordnung, art. 270 (Switzerland); Zivilprozessordnung, §. 945a (Germany). For detailed discussions of Germany’s Schutzschrift, see also HELMUT LIEBER & AXEL ZIMMERMANN, *DIE EINSTWEILIGE VERFÜGUNG IM EWERBLICHEN RECHTSSCHUTZ* 23 (2009); ANDREAS WEHLAU & BJÖRN KALBFUS, *DIE SCHUTZSCHRIFT* (2015).

²⁰⁷ See Andreas Wehlau & Bjorn Kalbfus, *The Conflict Between Ex Parte Injunctions and the Right to Be Heard: Protective Letters at European Level as A Possible Solution*, 34(6) EIPR 410, 413–14 (2012). On the first recorded use of a document similar to a protective letter in a French court, see Dominique Menard & Stanislas Roux-Vaillard, *France Trials “Protective Letter” in Patent Litigation Process*, BNA, World Intellectual Property Report, 26 WIPR 13 (2012).

²⁰⁸ UNIFIED PATENT COURT, Rules of Proc. 207 (as amended 2017), available at <https://www.unified-patent-court.org/sites/default/files/UPC-Rules-of-Procedure.pdf>. On the Unified Patent Court, see *About the UPC*, UNIFIED PATENT COURT, <https://www.unified-patent-court.org/> (last visited July 11, 2018).

²⁰⁹ Zivilprozessordnung, *supra* note 206; § 945a (Germany) *supra* note 206; LIEBER & ZIMMERMANN, *supra* note 206, at 23; Wehlau & Kalbfus, *supra* note 207, at 412. See also Lidle, *supra* note 179, at 93. In Germany, the Schutzschrift developed within the courts (the first Schutzschrift was apparently issued in 1965 but its roots are even older); it was not until recently that a statute was passed on the Schutzschrift in Germany (with effect as of January 1, 2016). Wehlau & Kalbfus, *supra* note 207, at 1. In one publication, protective letters are explained as “a sort of pre-defence on the merit that must be taken into due account before the grant of the preliminary measure.” Casucci, *supra* note 38, at 19.

²¹⁰ Über das Register, Zentrales Schutzschriftenregister, <https://schutzschriftenregister.hessen.de/%C3%BCber-uns/%C3%BCber-das-register> (last visited July 11, 2018).

²¹¹ Palexpo and the WIPO Center recognize the potential value of protective letters in ADR mechanisms. E-mail from Thomas Legler, *supra* note 135; Telephone Interview with Judith Schallnau, *supra* note 133.

the same parties, the pending case concerns the same IP right, and the Braunschweig Division would not know about the pending parallel proceeding unless the infringer brought the parallel proceeding to the attention of the Division.²¹² Protective letters were also filed for the 2017 *Mobile World Congress*; the Barcelona Commercial Courts registered twelve protective letters by exhibitors, including by major exhibitors such as Samsung, Nokia, and Ericsson,²¹³ and all of the letters concerned patents.²¹⁴

E. *A Hybrid Model*

A complete comparative picture of IP rights enforcement at trade shows must include mention of a hybrid model that was created in China in 2006; the model uses features of the ADR mechanisms described above but applies them in the framework of an administrative determination of IP infringement. The 2006 “Protection Measures for Intellectual Property Rights during Exhibitions”²¹⁵ (the “Measures”) call on trade show organizers to intensify IP rights protection at trade shows,²¹⁶ mandate that the organizers establish an “office in charge of IPRs complaints” at any trade show that “lasts for 3 days or more and if the administrative department of exhibitions believes it is required,”²¹⁷ and outline the process for a resolution of complaints.²¹⁸

The Measures set rules for the composition of the offices²¹⁹ and their

²¹² Lidle, *supra* note 179, at 93–94.

²¹³ E-mail from Judge Florencio Molina López, *supra* note 202. See also *Los Juzgados Admiten y Resuelven 21 Asuntos de Propiedad Intelectual en el MWC*, *supra* note 203. According to Lieber and Zimmermann, as of 2009 the total (including trade-show specific) number of Schutzschriften issued in Germany was about 20,000 per year. LIEBER & ZIMMERMANN, *supra* note 206, at 25.

²¹⁴ E-mail from Judge Florencio Molina López, *supra* note 202.

²¹⁵ PROTECTION MEASURES FOR INTELLECTUAL PROPERTY RIGHTS DURING EXHIBITIONS (2006), available at <http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn092en.pdf>.

²¹⁶ *Id.* at art. 3–5.

²¹⁷ *Id.* at art. 6.

²¹⁸ See Demian Stauber & Zhongqi Zhou, *Protection of Intellectual Property Rights at Trade Fairs in China—Analysis of the Current Legal Framework and Comparison with Other Approaches*, 10 UC DAVIS BUS. L. 207, 218–23 (2010).

²¹⁹ PROTECTION MEASURES FOR INTELLECTUAL PROPERTY RIGHTS DURING EXHIBITIONS, *supra* note 215, at art. 7.

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procedures²²⁰ in matters of infringements of patents, trademarks, and copyrights.²²¹ Once an IP right owner files a complaint, the office transfers the complaint within twenty-four hours to the IPRs administrative department,²²² which informs the trade show organizer and the respondent of the complaint²²³ and may set a deadline for a response by the respondent.²²⁴ According to the Measures, the IPRs administrative department “shall make a decision and deliver it to the two parties timely, unless any further investigation is required.”²²⁵ If the IPRs administrative department concludes that the IP right at issue was infringed, “it may punish the exhibitor in collaboration with the administrative department of exhibitions according to law.”²²⁶ The remedies include an order to cease the infringing activity, withdraw the infringing products from the trade show, and destroy “publicity materials.”²²⁷ Repeated infringements will result in suspension from exhibition at future trade shows of the organizer.²²⁸

The adoption of the Measures was followed by a one-year “Operation Blue Sky” campaign that the government launched in 2007; the campaign was designed “to increase IPR protections at exhibitions and trade fairs”²²⁹ and consisted of information and training initiatives.²³⁰ Other measures followed: In 2009 the municipal government of Guangzhou approved measures to protect IP rights at the Guangzhou trade show.²³¹ In 2012 the provincial government of the Guangdong province adopted provincial measures to strengthen patent protections at trade shows, maintain order at trade shows, and promote economic and social development.²³²

²²⁰ *Id.* at art. 8 *et seq.*

²²¹ *Id.* at art. 2.

²²² *Id.* at art. 11.

²²³ *Id.* at art. 12.

²²⁴ *Id.* at art. 13.

²²⁵ *Id.* at art. 14.

²²⁶ *Id.* at art. 24.

²²⁷ *Id.* at art. 25, 28.

²²⁸ *Id.* at art. 31.

²²⁹ Stauber & Zhou, *supra* note 218, at 217.

²³⁰ *Id.*

²³¹ Measures for the Protection of Intellectual Property Rights at the Guangzhou Exhibition (promulgated on October 1, 2009, amended by Guangzhou Municipal People’s Government Order No. 72, June 16, 2012).

²³² Guangdong Provincial Exhibition Patent Protection Measures, art. 1 (Sept. 10,

Experiences with the functioning of the Measures and the Blue Sky campaign appear to have been mixed.²³³ Mark Cohen, who served as the IP attaché at the U.S. Embassy in Beijing, recalls that the U.S. company ABRO reported in 2010 that it saw its IP rights enforced effectively against companies selling counterfeit ABRO products.²³⁴ Cohen, however, witnessed in other instances that while enforcement “actions were undertaken, first and second time infringers were let off with just a warning.”²³⁵

IV. THE POSSIBILITIES AND CHALLENGES OF IP ENFORCEMENT AT TRADE SHOWS

Interest in IP rights enforcement at trade shows might be on the rise, concomitantly with the growing general awareness and appreciation of the value of IP rights protection. This awareness translates into more activity with regard to IP rights protection and more vigilant enforcement of IP rights. However, enforcement actions at trade shows can be disruptive and are particularly troublesome when the actions are illegitimate. Concerns about the effects of enforcement ordered by the courts motivated the *BASEL 84* trade show organizer to create the *Baselworld* Panel when it faced negative press about acts of IP rights enforcements that, in the words of the current Secretary of the Panel, created a situation in which “an atmosphere of uncertainty and unease prevailed in the exhibition halls.”²³⁶ Similarly, Palexpo Trade Fairs SA (in collaboration with the WIPO Center) created a WIPO Fast-Track Procedure for Palexpo in reaction to an increasing number of disputes over IP rights at trade shows and to concerns about the potential negative effects of court-ordered enforcement actions.

The emergence of ADR mechanisms to deal with IP rights disputes at trade shows does not appear to be limited to a particular industry, although

2012).

²³³ For a discussion of anticipated problems see Stauber & Zhou, *supra* note 218, at 222–23.

²³⁴ Mark Allen Cohen, *Future Motion vs Changzhou First Int’l Trade Co: Defendant Fails in Its Effort to Recover Security and Attorneys [sic] Fees at CES*, CHINA IPR (Oct. 30, 2016), <https://chinaipr.com/tag/canton-trade-fair/>.

²³⁵ *Id.*

²³⁶ Lanz, *supra* note 115, at 2.

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logically any concerns about IP rights enforcement are more manifest at trade shows that cover IP-intensive and IP rights infringement-prone industries, such as the consumer electronics and automobile industries.²³⁷ With IP rights protection playing an increasingly important role in all industries, the focus on IP rights protection and enforcement is likely to extend to other large trade shows, and particularly to trade shows with international participation.

Many trade show organizers and industry groups might contemplate the most suitable mechanisms to address IP rights enforcement concerns while maintaining a positive and dynamic atmosphere at their trade shows. Because the trade show industry in major trade show centers constitutes an important sector of the local economy, courts in these centers might seek ways to respond to the needs of the industry and accommodate IP disputes arising at trade shows. The following sections discuss the options that trade show organizer mechanisms, including ADR mechanisms, and court accommodation practices offer.²³⁸ The options are analyzed from institutional, procedural, and substantive perspectives; the order of the discussion does not suggest any hierarchy among the three perspectives because the features interact and affect each other, so they must be considered concurrently.

A. *Institutional Perspective*

The institutions involved in IP rights enforcement at trade shows—courts, including specialized courts and semi-specialized judges,²³⁹ ADR bodies with various degrees of independence,²⁴⁰ and trade show organizers²⁴¹—may all be well-suited to decide IP rights disputes at trade

²³⁷ Trimble, *supra* note 14, at 1372. See Figure 9 for the trade shows for which TRO motions were filed in the U.S. District Court for the District of Nevada in from 2014 through 2016. *Id.* See also *supra* Part II, Section C for the discussion of ADR mechanisms.

²³⁸ The analysis does not strictly follow the analytical frameworks discussed by Blomgren, but incorporates the variables and choices suggested by Blomgren. Blomgren, *supra* note 17.

²³⁹ On the involvement by courts see *supra* Part II, Section 4. For an example of a specialized court see *supra* notes 178 and 179 and accompanying text. On semi-specialized judges, such as judges in the Patent Pilot Program at the U.S. District Court for the District of Nevada, see Trimble, *supra* note 14.

²⁴⁰ See *supra* Part II, Section C.

²⁴¹ See *supra* Part II, Section B.

shows. Although it seems likely that parties to disputes will prefer an independent decisionmaking body, meaning a court or an independent panel (the UFI's *Recommendations* specify "a neutral . . . arbitrator, or judge"²⁴²), it is possible that under some circumstances even a trade show organizer might enjoy sufficient respect and prestige in an industry to assume legitimacy as a decisionmaker.²⁴³

A perception of legitimacy might depend on pre-existing notions in an industry or at a trade show, on the design of a decisionmaking body, or on exhibitors' evolving experiences with the functioning of an institution.²⁴⁴ The conditions of a particular industry and a trade show organizer's entity structure (including its ownership structure) can influence whether a trade show organizer is an acceptable decisionmaker for the parties in a dispute. Different circumstances might warrant an independent panel as the preferred decisionmaker. Acceptance of the decisionmaking body by the parties is crucial for the functioning of an ADR mechanism that requires the parties to opt in—i.e., when the parties are not contractually bound to utilize the mechanism.²⁴⁵

The level of expertise of the decisionmaking body will be important for the functioning of the dispute resolution mechanism; a mechanism will be beneficial if it draws on experts knowledgeable about the particular industry, the objects of the IP rights (which are the products covered by the IP rights), and IP law. Knowledge of an industry and the objects of IP rights is more likely to fall within the expertise of an ADR body created for a trade show than a court, although judges or panels of judges who specialize in IP matters, and particularly such judges in courts located in major trade show centers, may

²⁴² UFI *Recommendations for the Protection of IP Rights at Exhibitions*, *supra* note 60.

²⁴³ Note that, for example, WIPO Fast-Track Procedure decisions "are rendered by external impartial and independent experts" with "no personal or professional link with either party involved in the dispute." Telephone Interview with Judith Schallnau, *supra* note 133.

²⁴⁴ According to Yves Bugmann, Head of the Legal Division of the Federation of the Swiss Watch Industry, "Baselworld's IP Panel has a proven reputation within the industry." E-mail from Yves Bugmann, *supra* note 119.

²⁴⁵ Even the mechanisms that are mandatory for exhibitors are opt-in for non-exhibitors who have no contractual relation with the trade show organizer. *See also supra* notes 170 and 171 and accompanying text.

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be well-informed about the types of IP rights typically at issue and the issues that are important in the industries of the main trade shows. The advantage of greater subject matter expertise in ADR bodies, as compared to the courts, could be outweighed by concerns about potentially excessive influence on ADR bodies by an industry and/or major industry players.

Consistency of decisionmaking is another important aspect to consider in choosing an avenue for dispute resolution; consistent decisionmaking increases the legitimacy of a decisionmaking body, enhances predictability and legal certainty, and should ultimately contribute to a decrease in the numbers of disputes. It is easier to build a consistent body of decisions if case opinions are publicly available, and more so if decisions are, at least in significant cases, accompanied by the reasoned opinion of the decisionmaker.

An ADR panel's decisions might be kept confidential, and if the decisions are voluntarily complied with or any enforcement is executed discreetly, the outcome might not ever become public. While the confidentiality afforded in some ADR mechanisms is a part of the appeal of the mechanisms,²⁴⁶ the lack of availability of case law that is produced under such mechanisms is problematic; a body of available case law can shape the expectations of parties and guide their behavior.²⁴⁷ If case law is not available and the composition of an ADR panel changes frequently, panelists cannot benefit from an institutional memory and ensure consistency of decisionmaking. A central repository of knowledge is helpful; in the WIPO Fast-Track Procedure, the chairperson of the Procedure could serve in this role, and institutional memory in the Procedure is also safeguarded by the extensive involvement and expertise of the WIPO Center.²⁴⁸ Court decisions

²⁴⁶ See, e.g., MARK V.B. PARTRIDGE, *ALTERNATIVE DISPUTE RESOLUTION: AN ESSENTIAL COMPETENCY FOR LAWYERS* 14–15 (2009); see also BLACKABY, *supra* note 11, at 124–30.

²⁴⁷ On “the current trend [which] is to diminish—or at least to question—the confidentiality of arbitral proceedings as a whole,” see BLACKABY, *supra* note 11, at 127–28.

²⁴⁸ See *supra* note 152 and accompanying text. According to Judith Schallnau of the WIPO Center, “[u]ltimately, institutional memory is ensured by the WIPO Center as it keeps track of the cases filed, collaborates with all partners involved, and appoints the Expert Panel and the Chairperson.” Telephone Interview with Judith Schallnau, *supra* note 133.

might also be confidential—courts might issue *ex parte* measures under seal to prevent an infringer from concealing evidence, but the outcome and the court’s opinion will typically become available.

The numbers of cases decided will also affect the consistency of decisionmaking; the greater the number of cases, the better will be the opportunity for a decisionmaker to develop a robust body of case law to guide future decisions. Courts may handle more cases in a centralized fashion (for the trade shows in their jurisdiction) and standardize their case law across all trade shows and industries; however, the standardization might be conditioned upon a court allowing specialized panels (such as in Braunschweig and Barcelona),²⁴⁹ or at least semi-specialized judges (such as the Patent Pilot Program judges in Nevada),²⁵⁰ to decide the cases. In contrast, ADR panels may develop case law that is trade show specific—case law that reflects the ethics and practices of an individual trade show and industry.²⁵¹

B. *Procedural Perspective*

The procedure for obtaining relief to enforce IP rights at a trade show should reflect the need for effective and rapid relief in legitimate cases and safeguard against misuses of the procedure. And it should certainly ensure due process and fairness to all parties; for example, while it might seem appealing to trade show organizers to mandate the use of ADR in their contracts with exhibitors, an obligation for exhibitors to submit IP right disputes to an ADR panel places exhibitors at a disadvantage with respect to non-exhibitors, who have no contractual relationship with a trade show organizer and therefore remain free to choose between an ADR mechanism (by opting in) and court proceedings.²⁵²

Courts might have limited or no leeway to adjust their general

²⁴⁹ See *supra* notes 178–203 and accompanying text.

²⁵⁰ See Trimble, *supra* note 14.

²⁵¹ On the “jurisgenerative” function of arbitration, see, e.g., Michael A. Helfand, *Arbitration’s Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 2997 (2015).

²⁵² Other pressures may force a party to submit to an ADR mechanism. See, e.g., Helfand, *supra* note 251, at 3042 (discussing a community’s pressure to submit to arbitration in the context of religious arbitration).

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procedural rules to the needs of trade shows. However, courts in trade show centers might accommodate IP disputes arising at trade shows by adopting measures that are within any procedural limitations. Examples of such measures include extended business hours, aspirational deadlines for handing down court decisions, and even holding court hearings on trade show premises²⁵³ (although it appears that hearings on trade show premises can be costly and unnecessary given the availability of modern technologies that enable remote connections to courtrooms).

The design of ADR mechanisms can be flexible as to procedure; a certain degree of formality is advisable to ensure fairness and legitimacy in proceedings, but the appropriateness of a minimum formality must be balanced with the need to protect parties who are not repeat players and who can be disadvantaged by the requirements of higher formality. An option to file complaints and responses orally could be helpful to parties who are not repeat players; the use of forms for filings, such as those used in the WIPO Fast-Track Procedure, can also assist such parties.²⁵⁴

One way that ADR mechanisms strive for accessibility is by allowing parties to appear without being represented by an attorney. However, representation by an attorney who is knowledgeable about law and procedure will clearly be to a party's advantage.²⁵⁵ Trade show organizers can be of assistance by providing information about attorneys available and qualified to advise and/or represent parties in ADR proceedings, although organizers should clearly define their role in this regard to avoid challenges based on unfair competition.²⁵⁶ To the extent that foreign countries are concerned that

²⁵³ See *supra* Part III, Section D.

²⁵⁴ See the forms used by SEMA in its Intellectual Property Rights Policy. *Intellectual Property Rights Policy*, *supra* note 56.

²⁵⁵ Repeat players will be more likely to have an attorney available to assist them in case of a dispute. See, e.g., Gregor Bühler, *Interim Protection of Intellectual Property Rights at Swiss Trade Fairs*, HOMBURGER 3 (Feb. 26, 2016) (“Due to the limited time available to file and/or respond to claims under the Fast-Track Procedure, there is typically not enough time to retain a suitable attorney accustomed with the procedural particularities. It is therefore advisable to have experienced counsel on board from early on, particularly where potential disputes are foreseeable, for instance where warning letters from competitors are received in advance of the show . . .”).

²⁵⁶ For example, “[f]or reasons of competition regulations, Messe Frankfurt is not authorized to recommend lawyers in the field of IPR.” E-mail from Silke Müller, *supra* note 66.

businesses from their countries could suffer from IP rights enforcement at third-country trade shows, countries' consulates and/or other governmental agencies can set up services to advise businesses from their countries at these trade shows.²⁵⁷

One feature that is apparent in both court accommodation practices and ADR procedures is the preference for a hearing of the parties before issuing emergency relief, and not to issue relief *ex parte* unless necessary. An ADR mechanism can be designed to prevent *ex parte* decisions altogether; courts may facilitate hearings of infringers by increased accessibility, open calendars, and rapid scheduling. Setting up a system that allows a hearing of the parties within a short time may promote amicable solutions through agreement of the parties, to the extent possible.²⁵⁸ However, short deadlines should take the rights of an infringer into account; the deadline for a hearing should be set not only by a maximum time but also a minimum time, to give the infringer an opportunity to prepare for the hearing.²⁵⁹

The protective letters that are available in some jurisdictions enable exhibitors to take preventive steps to protect themselves against measures issued *ex parte*;²⁶⁰ protective letters are not a guarantee against *ex parte* measures, but they are a declaration by the exhibitor that the exhibitor is ready to appear at a hearing if necessary. The numbers of protective letters filed show

²⁵⁷ Government-supported initiatives concerning IP rights enforcement at trade shows include, for example, the following materials: Casucci, *supra* note 38 (a manual developed with the support of the EU-China IPR2 Project); *Intellectual Property Management at Trade Fairs*, EUROPEAN IPR HELPDESK, available at https://iprhelpdesk.eu/sites/default/files/documents/IPR_leaflet_trade-fairs.pdf (last visited July 11, 2018); *Intellectual Property Management at Trade Fairs*, EUROPEAN IPR HELPDESK (May 2017), available at <https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-IP-management-trade-fairs.pdf>; *IP Considerations for Trade Fair Organisers*, EUROPEAN IPR HELPDESK (May 2017), available at <https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-IP-considerations-for-trade-fair-organisers.pdf>. (The last three documents were prepared in collaboration with the European Major Exhibition Centres Association and the European Exhibition Industry Alliance). See also IPR SME HELPDESK, <http://www.ipr-hub.eu/> (last visited July 11, 2018).

²⁵⁸ For examples of the promotion of settlements in ADR mechanisms, see *supra* notes 151 and 161–62 and accompanying text.

²⁵⁹ See *supra* note 160 and accompanying text.

²⁶⁰ See *supra* notes 206–14 and accompanying text.

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their popularity among parties,²⁶¹ their popularity is confirmed by their inclusion in the proposed Rules of Procedure for the Unified Patent Court²⁶² and their consideration for inclusion in the rules for the WIPO Fast-Track Procedure.²⁶³ Protective letters may have positive effects on IP enforcement at trade shows: not only do letters inform a court about a party's willingness to appear and about any parallel proceedings, they also help identify "bad actors" (e.g., counterfeiters), who are unlikely to file protective letters. Of course, not all actors who are not "bad actors" will file for protective letters, and the filing of a protective letter by a party does not mean that the party is not a "bad actor." But in some cases, the non-filing of a protective letter could be one indicator of the actual situation.

C. *Substantive Perspective*

The types of IP rights that may be enforced depend on the jurisdictional delineation and the choice-of-law rules that courts and ADR panels apply. Several ADR panels have excluded patent matters from the scope of disputes; the complexity of patent technology involved in recent disputes was mentioned as the reason that the *Baselworld* Panel no longer accepts patent infringement complaints.²⁶⁴ Palexpo and WIPO chose from the outset not to include patents in the WIPO Fast-Track Procedure, given that "patent disputes may be very complex, evidence based on patented technology may be difficult to obtain within the limited time available to the parties, and it would be difficult for the Expert Panel to render a decision on a complex patent dispute within 24 hours."²⁶⁵ In general, ADR panels tend to prefer complaints concerning registered IP rights—as opposed to complaints concerning unregistered IP rights—because registered rights allow for evidence of registration that is easily available and presentable with a complaint.

It is questionable whether courts that have jurisdiction in IP matters,

²⁶¹ See *supra* note 213 and accompanying text.

²⁶² See *supra* note 208.

²⁶³ See *supra* note 211.

²⁶⁴ See *supra* note 102.

²⁶⁵ Telephone Interview with Judith Schallnau, *supra* note 133. See also *supra* note 142.

including patent and unregistered IP matters, are better equipped than ADR panels to handle complex patent or unregistered IP matters in the short time frame of a trade show.²⁶⁶ Courts might be better equipped to handle patent cases, for example, if the courts have specialized panels or judges who handle patent cases and the ADR panels have no patent law experts.

When ADR panels have patent law experts and courts are not specialized for patents, ADR panels might be a better option for emergency relief in patent disputes. However, it might be challenging to have patent law experts on an ADR panel who can address all relevant fields of technology, even when the ADR panel is specially designed to decide patent disputes arising at a particular trade show. For instance, the scope of technology at issue at *Baselworld* may at one time have been relatively narrow and straightforward, but the current complexity of technology at *Baselworld* makes it difficult to have available patent law experts on the panels in all the various areas of technology potentially subject to dispute.²⁶⁷

Another question is whether the complexity involved in patent and unregistered IP rights infringement cases should lead courts and ADR panels to resign on providing emergency relief in these cases. Because courts require security from plaintiffs, the emergency relief that courts issue might be more appropriate for patent and unregistered IP rights infringement cases—where the possibility of an incorrect decision might be higher than in cases of infringements of other IP rights.²⁶⁸ Also, in court proceedings corrections can be made in a later decision on the merits, while some ADR mechanisms offer

²⁶⁶ For example, according to Yves Bugmann, the cases that the *Baselworld* Panel decides have become increasingly complex in recent years: “The cases are much more difficult to decide as the number of slavish copies went down. The Panel judges have to decide if the similarities are more important than the (minor) differences” E-mail from Yves Bugmann, *supra* note 119.

²⁶⁷ For example, according to Thomas Legler, “the International Motor Show would have faced multiple patent aspects as cars are nowadays complex ‘machines’ relating not only to mechanics but also chemicals/combustion (electricity, gas, petrol, diesel; hybrid technics), electronics/computer technology, etc.” E-mail from Thomas Legler, *supra* note 135.

²⁶⁸ Although in general arbitrators could also require security, providing security would not be effective in a trade show context, where an ADR mechanism is designed to decide trade show-related relief but not deliver a decision on the merits. A requirement of security would compel an ADR panel to revisit its decision much later—something that seems impractical.

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no opportunity for appeal.

Choice-of-law rules determine the territorial scope of claims—under the laws of which country(ies) complainants may bring claims. While courts are bound by the rules of their national law for IP cases in general,²⁶⁹ ADR mechanisms may limit or expand the law applicable to claims raised within their mechanisms. Existing ADR mechanism rules, if the rules refer to any substantive law, point to the IP rights of the country in which the trade show takes place,²⁷⁰ foreseeing, presumably, that the law of the same country will apply to the IP rights under the generally-accepted choice-of-law rule of *lex loci protectionis* for IP rights infringements—the law of the country for which protection is sought is the law that applies to the infringements. An ADR panel at a trade show in Switzerland will therefore accept complaints concerning Swiss IP rights and decide on infringement under Swiss law;²⁷¹ the Swiss panel would not, under the existing *Baselworld* rules, for example, decide an infringement of a U.S. patent that was committed at a trade show, in Switzerland in the form of an infringing offer to sell—an offer made at a Swiss trade show to sell a patent-infringing product in the United States.²⁷²

Limiting decisions to the law of the jurisdiction in which a trade show takes place is understandable; given the speed of trade show infringement proceedings, it is easier and faster if an ADR panel limits itself to laws with which its panelists are familiar—there is no time to search for experts in foreign law and determine outcomes based on foreign law. Additionally, in matters of registered IP rights, in many countries even the courts will not adjudicate infringements under foreign law because of concerns about the possible need to address the validity of the registered right.²⁷³ ADR panels may follow the same rule, although in some countries arbitral tribunals are permitted to decide on the validity of foreign-registered IP rights.²⁷⁴

²⁶⁹ In the United States, choice-of-law rules are a matter of state law. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §10 (Am. Law Inst. 1971). *See also supra* notes 31 and 32 and accompanying text.

²⁷⁰ *See, e.g., supra* notes 101 and 141 and accompanying text.

²⁷¹ *Id.*

²⁷² *See supra* note 34 and accompanying text.

²⁷³ *E.g., Voda v. Cordis*, 476 F.3d 887 (Fed. Cir. 2007).

²⁷⁴ On the arbitrability of the validity of U.S. patents in the United States, see 35 U.S.C. § 294(a). On the arbitrability of copyright validity in the United States, see 1 Alt. Disp. Resol. § 20:7 (4th ed.). On the arbitrability of various issues in IP disputes, see, e.g., Steven

It seems logical that a decisionmaker would want to abstain from deciding foreign IP rights in the context of a trade show,²⁷⁵ but it might seem counter-intuitive that a decisionmaker would limit its enforcement of a local IP right—an IP right protected under the law of its own jurisdiction. Yet this limitation is precisely what Jochen Pagenberg suggested for cases of allegations of IP rights infringements at trade shows that have substantial international participation (“international trade shows”).²⁷⁶

Pagenberg argued that in the context of international trade shows, enforcement of IP rights that exist in the country where a trade show is held, but not in the country where an exhibitor is from and/or where an exhibitor intends to continue using the IP right, amount to an inappropriate expansion of national IP rights. Pagenberg noted that the enforcement of IP rights under German law at international trade shows held in Germany leads to a situation in which “a German industrial property right could be used to prevent the marketing of goods far beyond the German borders,” which, Pagenberg opined, is “a result that is certainly not covered by the scope of the exclusive right.”²⁷⁷

Pagenberg’s argument resembles an argument made in another context that says that seizures by customs authorities of IP-infringing goods in transit constitute an impermissible expansion of the IP rights of the country of transit, unless the goods leak onto the market of the country of transit.²⁷⁸

A. Certilman & Joel E. Lutzker, *Arbitrability of Intellectual Property Disputes*, in *ARBITRATION OF INTERNATIONAL INTELLECTUAL PROPERTY DISPUTES* 55–96 (Thomas D. Halket ed., 2012).

²⁷⁵ Courts might have no choice but to decide the cases if the courts have jurisdiction to decide the matters, the matters are transitory causes of action, and the courts may not use the doctrine of forum non-conveniens to dismiss the complaint.

²⁷⁶ M. W. Jochen Pagenberg, Commentary on Federal Supreme Court (Bundesgerichtshof) 19.01.1989 Case No. I ZR 217/86 “Kronenthaler,” IIC 728, 731 (1990) (Ger.).

²⁷⁷ *Id.*

²⁷⁸ Whether or not seizure of goods in transit is a reasonable IP enforcement policy has been debated. The TRIPS Agreement makes it mandatory for countries to implement border measures to suspend the release into circulation of imported counterfeit trademark and pirated goods but allows countries to forego the application of the procedures to goods in transit. *TRIPS Agreement*, *supra* note 10, at art. 51 n.13. Countries are free to introduce border measures for exportation and/or for goods protected by patent rights. When national customs authorities in the European Union seized generic drugs in transit, India and Brazil argued that the seizures violated the law and requested consultations regarding the seizures

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Pagenberg would permit the presence of infringing goods at international trade shows—their exhibition, demonstration, and even offers to sell—as long as the activities would exclude any distribution to the country in which the trade show takes place. Pagenberg envisioned that “the ‘infringer’ in question should make clear to the public, by means of obvious notices at his sales or exhibition stand . . . and/or by means of a distinction between the product version sold in [the country of the trade show] and that sold in unprotected countries, that he respects the existing trademark and/or patent rights.”²⁷⁹ The trade show floor itself would therefore be treated as a quasi “transit zone” where remedies based on national IP rights would be constrained to the proposed minimum, provided that the products would not leak onto the market in the country of the trade show.²⁸⁰

It may seem that post-*eBay* law in the United States would allow the U.S. courts to achieve the result proposed by Pagenberg, but it does not. Post-*eBay* law on injunctive relief provides the possibility of limiting injunctions and TROs for IP infringements at trade shows if the infringing activity can be shown not to cause, or likely cause, irreparable harm if a TRO does not issue.²⁸¹ If in the scenario that Pagenberg portrayed, evidence of irreparable harm in a similar case in the United States were missing, a TRO would not issue. However, one significant difference between Pagenberg’s proposal (for Germany) and the outcome of a similar case under U.S. law is that Pagenberg’s

at the World Trade Organization. *European Union and a Member State—Seizure of Generic Drugs in Transit*, WTO, WT/DS408/1 (May 19, 2010); *European Union and a Member State—Seizure of Generic Drugs in Transit*, WTO, WT/DS409/1, (May 19, 2010). In 2011 the Court of Justice of the European Union ruled that goods in transit may be seized by customs authorities only if “it is proven that they are intended to be put on sale in the European Union.” *Koninklijke Philips Electronics NV v. Lucheng Meijing Industrial Company Ltd.*, CJEU, C-446/09 and C-495/09 (Dec. 1, 2011). However, the new EU Trademark Regulation, effective as of October 1, 2017, operates on the premise that “it should be permissible for EU trade mark proprietors to prevent the entry of infringing goods and their placement in all customs situations, including transit, . . . also when such goods are not intended to be placed on the market of the Union.” Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification), O.J. (L 154), Recital 16.

²⁷⁹ Pagenberg, *supra* note 276.

²⁸⁰ It may be subject to debate at what point a leakage onto the local market is likely; some German courts have discussed this question in their opinions. *See, e.g., supra* note 33.

²⁸¹ *See supra* notes 51–52 and accompanying text.

proposal counts on some remedy—such as an obligation for the infringer to provide clear notice. Under U.S. law, and absent an IP owner’s ability to show a likelihood of irreparable harm, no TRO may issue in the United States, even a TRO that would only order an infringer to label the goods or provide some other notification.

An ADR mechanism can be more flexible with remedies and need not impose the same conditions on the issuance of remedies that courts must follow. For example, in the United States, ADR panels would not need to be bound by the four-part test for injunctive relief that courts must apply and that, since *eBay*, requires evidence of a likelihood of irreparable harm.²⁸² The possibility of obtaining emergency relief without having to present evidence of a likelihood of irreparable harm could solve the post-*eBay* situation in which only IP right owners with pre-existing knowledge of infringements are able to obtain TROs for trade shows, because only advance knowledge enables IP right holders to accumulate the evidence that courts require for the issuance of TROs.²⁸³ Of course, an easier accessibility of TROs should be balanced with other safeguards for the rights of infringers, particularly the opportunity to be heard before injunctive relief is issued.

V. CONCLUSIONS

IP rights enforcement at trade shows is an important component of IP rights protection and enforcement; given the degree of exposure that infringing products receive at trade shows, particularly large trade shows with international participation, it is not surprising that IP right owners place great importance on stopping infringing activities immediately through emergency relief. Yet not all IP infringement allegations lend themselves to rapid decisionmaking for emergency relief; while it may be easy in some cases to determine the likelihood of success on the merits, such as in many piracy and counterfeiting cases, in other cases it will be difficult to decide expeditiously whether IP rights are being infringed or even likely being infringed. Erroneous decisions carry consequences, particularly when the short time frame in which trade shows take place and the exposure that enforcement actions receive on

²⁸² *Id.*

²⁸³ *See supra* Part I.

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trade show floors turn temporary relief into de facto final remedies.

The two primary mechanisms of dispute resolution that exist in the world today for the resolution of IP disputes at trade shows—court proceedings and ADR mechanisms—both have roles to play in the resolution of disputes, and in the context of IP rights enforcement at trade shows the two may coexist and complement each other. Lessons about the strengths and weaknesses of the two mechanisms can assist trade show organizers and courts in designing new or adjusting existing mechanisms to better serve the needs of IP right owners as they enforce their IP rights at trade shows.²⁸⁴

A number of factors affect the choice of mechanism and choice of features that might be best for IP rights enforcement at a given trade show, including the culture of the particular industry, the culture of the particular trade show, the substantive and procedural rules of the jurisdiction in which the trade show takes place, and the institutional situation—the trade show organizer’s management and the local court. It might ultimately be the entrepreneurial spirit of the trade show organizer, the local bar, and the local court that will determine what mechanisms will prevail in cases where the mechanisms are alternatives, and whether the mechanisms will be successful in addressing IP rights enforcement at trade shows.

In the United States, ADR mechanisms for trade show-related IP rights disputes can address the limitation that *eBay* and post-*eBay* developments have created for trade show-related TROs. The fact that courts may not presume a likelihood of irreparable harm in IP rights infringement cases has a significant effect on trade show-related TRO cases, in which typically only an IP right owner who knew of infringements before a trade show will be able to provide evidence of irreparable harm. The requirement that an IP right owner provide evidence of a likelihood of irreparable harm places a TRO out of the reach of an owner who first discovers at a trade show that his IP rights are being infringed. ADR mechanisms can make emergency relief accessible for newly-discovered infringements because ADR mechanisms may depart from the courts’ use of the obligatory four-part test and the test’s requirement of evidence of a likelihood of irreparable harm. At

²⁸⁴ On the possibility of a symbiotic relationship between ADR and civil litigation in general, see, e.g., Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681 (2005).

the same time, the subject-matter expertise possessed by ADR panels, their in-depth knowledge of a trade show's environment, and their need to maintain their reputation within an industry and a particular trade show should positively direct the attention of ADR panels toward a balancing of the rights of all parties.

Effective dispute resolution mechanisms can deter future infringements, including infringements at trade shows. ADR mechanisms and court proceedings that accommodate trade show specificities can contribute to expeditious, consistent, and respected IP dispute resolutions at trade shows that further support the positive environment at trade shows and a productive exchange of information about the latest developments in technology and IP.