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Temporary Restraining Orders to Enforce Intellectual Property Rights at Trade Shows: An Empirical Study

Marketa Trimble

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

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TEMPORARY RESTRAINING ORDERS TO ENFORCE INTELLECTUAL PROPERTY RIGHTS AT TRADE SHOWS: AN EMPIRICAL STUDY

Marketa Trimble[†]

ABSTRACT

Infringements of intellectual property (IP) rights by exhibitors at trade shows (also called trade fairs or exhibitions), such as infringements committed through exhibitions of or offers to sell infringing products, can be extremely damaging to IP right owners because of the wide exposure that trade shows provide for infringing IP; the promotion of the infringing IP and the contacts made by infringers at trade shows can facilitate further infringements after a trade show that can be very difficult for IP right owners to prevent. IP right owners therefore seek to obtain emergency injunctive relief to stop trade show infringements immediately—if possible, during the trade show itself. In the United States, the relief that courts issue in these situations is typically a temporary restraining order (TRO). This article reviews the law and practice of TROs requested and issued for trade shows and reports original empirical findings about the practice at the U.S. District Court for the District of Nevada—the court that issues TROs for trade shows that take place in Las Vegas, Nevada, a major international trade show center. Based on an analysis of the law and practice, the article argues that in the context of trade shows, current law on injunctive relief in IP cases relegates a TRO to a position as a tool that is available only against foreign infringers who have infringed IP rights before the trade show in question. While there may be multiple reasons why TROs issued for trade shows often target foreign infringers, current TRO law might

[†] 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, Inc., 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.); Thomas Main (UNLV); Kara Maser (Consumer Technology Association); 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 Mueller (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.

be a contributing factor to the high percentage of trade show-related TROs issued against foreign infringers. The limited availability of TROs for trade shows is problematic because it leaves IP right owners without access to emergency relief in situations other than those involving pre-existing infringements by foreign infringers. Absent a change in the current law, alternative dispute resolution mechanisms may offer a route to more accessible emergency relief at trade shows.

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INTRODUCTION

Injunctive relief in intellectual property (IP) cases has received much attention in the United States since the U.S. Supreme Court's 2006 decision in *eBay v. MercExchange*,¹ which made it more difficult for IP right owners to obtain injunctive relief against infringers of IP rights.² Although *eBay* concerned a permanent injunction in a patent infringement case, subsequent decisions extended the effects of the decision to preliminary injunctions and to other types of cases, including cases concerning other IP rights.³ After *eBay*, numerous analyses have been published, including several empirical studies, that trace post-*eBay* developments in injunctive relief.⁴ However, one particular use of injunctive relief in IP cases has escaped a thorough analysis: emergency injunctive relief requested and issued to stop IP rights infringements at trade shows.⁵ This article explores this use through the perspective of current law and practice relating to temporary restraining orders (TROs), and reports the results of an original empirical study of TROs that have been requested and issued for the purposes of stopping IP rights infringements at trade shows.

¹ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

² Gupta and Kesan's study confirmed that "the *eBay* decision has reduced, rather dramatically, both the level at which injunctive relief is sought in patent cases and the rate at which they are granted, particularly for preliminary injunctions." Kirti Gupta & Jay P. Kesan, *Studying the Impact of eBay on Injunctive Relief in Patent Cases*, University of Illinois College of Law Legal Studies Research Paper No. 17-03, p. 12, available at <http://dx.doi.org/10.2139/ssrn.2816701> (last visited July 31, 2017).

While *eBay* arose from a patent infringement case, follow-up decisions by lower courts extended the *eBay* holding to other types of IP rights. *See infra* note 47.

IP right holders other than IP right owners may seek to enforce IP rights; for simplification, this article uses the term "IP right owners" throughout.

³ Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUMBIA L. REV. 203, 205 and 222-226 (2012).

⁴ *See, e.g.*, Mark A. Lemley, *Did eBay Irreparably Injure Trademark Law?*, Stanford Public Law Working Paper No. 2808677, 2016; Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949 (2016); Kirti Gupta & Jay 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; Jiarui Liu, *Copyright Injunctions after eBay: An Empirical Study*, 16(1) LEWIS & CLARK L. REV. 215 (2012); Thomas F. Cotter, *Patent Holdup, Patent Remedies, and Antitrust Responses*, 34 J. CORP. L. 1151 (2009).

⁵ For articles on emergency relief in IP cases in general *see* 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/LAW JOURNAL 1 (1984).

Trade shows, also called trade fairs or exhibitions,⁶ are one traditional means of exchanging information about the latest developments in business and technology in an industry; they therefore are also venues for showcasing the newest IP and are places where IP right owners may initially discover that their IP rights are being infringed. This article refers to infringements in such trade show situations as “newly-discovered infringements.” In other situations, IP right owners know of infringements of their IP rights before trade shows, and at the trade shows IP owners are in a position to confront in person the infringers of their rights.⁷ The article calls infringements in these other situations “pre-existing infringements.”

In both situations IP right owners seek ways to stop infringing activity immediately—at the trade show. The stakes are high, and the need for relief is urgent: trade shows provide infringing products or processes⁸ an elevated degree of exposure that exacerbates the effects of an initial infringement. Even if no sales contracts are concluded for infringing products at a show, the successful promotion and contacts initiated at a show can lead to further infringements that may expand to multiple countries and make enforcement of IP rights more complicated and costly for a right holder.

Emergency relief issued for and executed at trade shows is a powerful tool: not only may an IP right owner prevent the exhibition, demonstration, offers to sell, sales of and other activities concerning the infringing product, the right owner’s action, if strategically timed and executed, will send a powerful message to the current and potential business partners and customers of the infringer.⁹ The consequences of an emergency relief enforcement action can be damaging and long lasting, which is why any relief must be carefully designed and calibrated to respect the rights of all parties concerned.

In the United States, the emergency relief that IP right owners typically request and that courts issue to stop IP rights infringements at trade shows is a TRO (hereafter called “trade show-related TRO”). Trade show-related TROs are certainly not the only TROs in IP cases; IP right owners file for TROs in other contexts—for example, in other cases of copyright piracy, trademark counterfeiting, and cybersquatting. However, trade show-related TROs are very specific and warrant an analysis separate from the analyses of other TROs in IP cases.

⁶ 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.” Oxford English Dictionary, Third Edition, December 2015. Throughout this article, the term “trade show” is used to encompass events referred to elsewhere as “trade fairs” and “exhibitions.”

⁷ 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.

⁸ For simplification, the rest of the article uses the term “products,” but processes may also be the object of the IP right.

⁹ See, e.g., Bloomberg, *Watch U.S. Marshals Raid Chinese Hoverboard Booth at CES*, YouTube (Jan. 7, 2016), <https://www.youtube.com/watch?v=zMsc-as6eYY>.

The most important characteristic of trade show-related TROs that distinguishes them from other TROs in IP cases is that—notwithstanding their name—trade show-related TROs are often *de facto* the ultimate relief in an IP dispute. Because of the short duration of trade shows, if a TRO is timely issued and executed it can exclude infringing products from an entire show or most of a show, thereby achieving the single goal that many IP right owners pursue at that moment—removing the infringing products from the show. Although excluding infringing IP from a trade show might not be the sole objective of an IP right owner (the owner will typically also want to stop any future infringements as well), the trade show-related TRO may, in fact, morph into full-scope relief, while TROs issued in other contexts—for example, to stop the distribution of pirated copies on the internet—will rarely suffice to fulfill an IP right owner’s goal because of the short duration for which TROs are issued.¹⁰

This article analyzes the law and practice of trade show-related TROs. Part I reviews TRO law in IP cases in general and notes the doctrinal aspects that make the issuance of trade show-related TROs difficult, in particular since *eBay*.¹¹ Part II offers a detailed look at the trade show-related TRO practice in one federal district court—the U.S. District Court for the District of Nevada. The practice is summarized in detailed statistical information about cases in which IP right owners filed motions for trade show-related TROs in the U.S. District Court for the District of Nevada, whose jurisdiction includes Las Vegas, Nevada—one of the largest trade show centers in the world.¹² Part III analyzes challenges in the issuance of trade show-related TROs, particularly the problems of showing a likelihood of irreparable harm post *eBay*, and argues that post-*eBay* law has created a situation in which trade show-related TROs are relegated to a relief that is available only against foreign infringers and only in cases of pre-existing infringements.

The article reaches two conclusions. The first conclusion concerns the limits on the availability of trade show-related TROs following *eBay*: For newly-discovered infringements it is difficult, if not impossible, in the short time frame of a trade show for an IP right owner to assemble sufficient evidence to show a likelihood of irreparable harm. Therefore, trade show-related TROs are largely unavailable for newly-discovered infringements—a significant gap in the availability of emergency relief for IP infringements at trade shows. This gap raises the question, addressed in Part III, whether the gap should be filled, and if so, how.

The second conclusion addresses the observations of those members of the practicing bar who have described as a “developing trend” the practice of the U.S. District Court for the District of

¹⁰ See *infra* note 32.

¹¹ See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

¹² Technically, most trade shows in Las Vegas, Nevada, do not take place in the City of Las Vegas but rather in Clark County, Nevada, in which the City of Las Vegas is located; most of the trade show venues are located outside the city limits of Las Vegas, but lie within Clark County. For data on Las Vegas as a major trade show center see *infra* notes 68–75 and the accompanying text.

Nevada to “[grant] temporary restraining orders against non-U.S. companies accused of patent infringement on the eve or at the beginning of trade shows where they planned to exhibit.”¹³ The results of the empirical study that is reported in this article show that the limited number of cases does not make it possible to discern any clear trends in the practice, nor any signs of bias based on the type of IP right, the country of domicile of the IP right owner, or the country of domicile of the infringer.

The article originates from a project on the enforcement of IP rights at trade shows that involves explorations from the doctrinal, empirical, and comparative perspectives of various forms of emergency relief and various dispute resolution mechanisms that produce such relief. The analyses of trade show-related TROs issued under U.S. law and TROs issued by the U.S. District Court for the District of Nevada are only two components of a broader project; the other components include the trade show-related practices of courts in other countries and alternative dispute resolution mechanisms that have been developed by trade show organizers around the world to resolve disputes at trade shows. These other components are mentioned in Part III because they offer inspiration and models for potential solutions to post-*eBay* limitations on trade show-related TROs; a companion article that also stems from the study discusses the other components thoroughly.¹⁴

I. TRADE SHOW-RELATED TEMPORARY RESTRAINING ORDERS

When IP right owners want to stop infringing activity at trade shows, their enforcement of their IP rights is a matter of emergency because of the exposure garnered by infringing products at trade shows and the short duration of the shows. IP rights, such as copyright, trademark and patent rights, may be infringed at trade shows in various ways. For example, an exhibition of an unauthorized copy of a copyright-protected work in an exhibition booth will infringe the right to display and/or perform the work publicly,¹⁵ even when the copy is not being offered for sale. An exhibition or demonstration of a product that was made without a license from the owner of the patent on the

¹³ Tammy Dunn & Jeffery Langer, *Ready for Your Next Trade Show? The TRO Trend Continues*, Law360, November 22, 2016, available at <https://www.law360.com/articles/863327/ready-for-your-next-trade-show-the-tro-trend-continues> (last visited July 14, 2017). See also Merritt Blakeslee & R. Austin Blakeslee, *CES Seizure Order Against Alleged Patent Infringers Issued by the Las Vegas Federal District Court*, IP Watchdog, January 13, 2016, available at <http://www.ipwatchdog.com/2016/01/13/ces-seizure-order-patent-las-vegas/id=64873/> (last visited July 14, 2017) (“[T]he Las Vegas bench of the U.S. District Court for Nevada has developed a muscular set of equitable remedies for U.S. patent holders...”).

¹⁴ Marketa Trimble, *Enforcement of Intellectual Property Rights at Trade Shows: A Review and Recommendations*, 34 OHIO ST. J. ON DISP. RESOL. (forthcoming 2018).

¹⁵ 17 U.S.C. 106(5).

product or on its component may suggest, at a minimum, a patent-infringing use and patent-infringing offer to sell.¹⁶

IP right owners who know in advance of the possibility that an infringing product might be exhibited at a trade show should strive to prevent IP rights enforcement emergencies from arising at trade shows. IP right owners who have advance knowledge of such infringements should target the future exhibitor/potential infringer with a cease-and-desist letter before the trade show, and if the infringing product is to be delivered to the trade show from another country, IP right owners may apply for a border measure¹⁷ to prevent the infringing product from entering the country in which the trade show is to take place.¹⁸ If it is possible, IP right owners may also file an infringement lawsuit sufficiently in advance of a trade show and seek preliminary and permanent injunctions to prevent any infringement at a trade show.¹⁹

In some instances, however, an emergency inevitably arises: an IP right owner's earlier attempts at enforcement have been unsuccessful or the IP right owner discovers the infringement only on the exhibition floor shortly before or during the trade show. It is then that the IP right owner seeks emergency relief to stop the infringer from exhibiting the infringing product at the trade show and from other acts that do infringe or would infringe the IP right. Unless the IP right

¹⁶ 35 U.S.C. 271(a).

¹⁷ In the United States, owners of trademarks and copyrights may register their rights with U.S. Customs and Border Protection and "submit allegations of infringing shipments or conduct to [the agency]." Intellectual Property Rights Enforcement, U.S. Customs and Border Protection, p. 5, available at https://www.cbp.gov/sites/default/files/documents/ipr_guide.pdf (last visited July 9, 2017). See also IPRR—Intellectual Property Rights e-Recordation, U.S. Customs and Border Protection, <https://iprr.cbp.gov/> (last visited July 9, 2017).

¹⁸ The International Trade Commission ("ITC") may issue a section 337 exclusion order to prevent importation into the United States, and in some instances such orders might cover importations for the purposes of exhibiting at trade shows in the United States. 19 U.S.C. 1337. In *Ink Jet Cartridges*, the ITC declined to extend an exclusion order to cover importation for purposes of display at trade shows; however, the ITC did not imply that exclusion orders for such purposes could never issue. *Ink Jet Print Cartridges and Components Thereof*, Inv. No. 337-TA-446, USITC Pub 3549, (Oct. 2002), Commission Opinion, May 8, 2002, at p. 8. The ITC noted that although it was authorized to exclude "all types of entry, not just entries for consumption," it would not in the case exclude entry for the purposes of trade shows. The ITC reasoned that the complainant in the case "has presented no evidence that it will be adversely affected if [the infringing] cartridges are displayed at trade fairs in the United States after entry of the limited exclusion order." *Id.* at 7. The ITC noted, that given that it would issue an exclusion order in the case to cover importation for purposes of sale, "it seems extremely unlikely that [the infringing] cartridges would be imported for display at trade fairs in the United States, if they cannot be imported into the United States for commercial sale." *Id.* at 8.

Either a temporary exclusion order or a temporary cease and desist order is also available under section 337. However, the proceedings for temporary ITC orders last significantly longer than TRO proceedings in a federal district court. As in a motion for a TRO, in a motion for a temporary ITC order the moving party must make a showing that irreparable harm is likely if the order does not issue. 19 CFR 210.52.

¹⁹ Criminal proceedings may also be instituted against an infringer. According to the U.S. Attorney's Office for the District of Nevada, the Office "did not prosecute any case from 2014 to 2016 involving trademark, patent, copyright, or trade secret enforcement at trade shows in Las Vegas." Email from Trisha Young, U.S. Attorney's Office for the District of Nevada, August 30, 2017, on file with the author.

owner is bound to or agrees to utilize an ADR mechanism to enforce its IP right (when such a mechanism is available),²⁰ the IP right owner must turn to a court with a request for a measure to address the emergency.²¹

The emergency relief that IP right owners typically request from judges for trade shows is an ex parte temporary restraining order (“ex parte TRO”). When issued as an ex parte measure,²² a TRO enables a quick decision by a judge who does not have to schedule a hearing of the parties before issuing the ex parte TRO, and it therefore allows for a swift enforcement action without necessitating advance notice to the infringer. TROs are generally available in IP cases, and some federal IP statutes specifically mention TROs as an available remedy in IP cases: The U.S. Copyright Act lists TROs among the remedies that are available for infringements of semiconductor chip products²³ and original vessel hull or deck designs.²⁴ The U.S. Copyright Act for copyrighted works, the U.S. Patent Act, and the Defend Trade Secrets Act do not list TROs as remedies that are available for copyright and patent infringements and trade secret violations, but the Acts refer to either temporary injunctions²⁵ or injunctions in general,²⁶ presumably subsuming TROs in these categories. Similarly, the Lanham Act refers to injunctions in general as an available remedy,²⁷ including in cases of dilution.²⁸ Additionally, outside of copyright, patent, and protected plant variety cases—in which federal courts have exclusive jurisdiction²⁹—TROs may be available in state courts under state rules in IP cases that fall outside the exclusive jurisdiction of federal courts, such as in trademark, unfair competition, and trade secrets cases.³⁰ This article focuses on the TROs that are available in U.S. federal courts.

²⁰ For a discussion of ADR mechanisms at trade shows and any potential secondary liability of trade show operators for intellectual property law violations by trade show exhibitors *see* Trimble, *supra* note 14.

²¹ The judicial authorities of all countries that are parties to the TRIPS Agreement “shall have the authority to order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring ... [and] (b) to preserve relevant evidence in regard to the alleged infringement” [and] “the authority to adopt provisional measures inaudita altera parte where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.” TRIPS Agreement, Art. 50(1) and (2).

²² Fed. R. Civ. P. 65(b)(1). Once a court orders a hearing of all parties (*audi alteram partem*) on a motion for a TRO, the resulting order is no longer an ex parte TRO; some courts continue to refer to such orders as TROs, while other courts refer to the remedy issued after the hearing as a preliminary injunction. Moore’s Federal Practice—Civil §65.31 (“[W]hen a temporary restraining order is sought on notice to the adverse party, it may be treated by the court as a motion for a preliminary injunction.” *Id.*).

²³ 17 U.S.C. 911(a).

²⁴ 17 U.S.C. 1322(a).

²⁵ 17 U.S.C. 502(a).

²⁶ 35 U.S.C. 283; 18 U.S.C. 1836.

²⁷ 15 U.S.C. 1116(a).

²⁸ 15 U.S.C. 1125(c)(5). *See also* 15 U.S.C. 1116(d) for a special seizure measure concerning counterfeit trademarks.

²⁹ 28 U.S.C. 1338(a).

³⁰ *E.g.*, NY CPLR 6301; NRCP 65(b).

Because urgency is so important for enforcement at trade shows, notifying the opposing party and waiting for a subsequent hearing will most likely take longer than the duration of the trade show.³¹ The limited period for which a TRO may be issued presents no problem in the context of trade shows; the maximum duration of a TRO is fourteen days,³² with a possibility of an extension.³³ While a tool with such a short duration is usually not effective for stopping most IP rights infringements until the infringement dispute is resolved, a TRO is all that an IP right owner typically needs to prevent an infringer from exhibiting an infringing product and committing IP infringements at a trade show, since trade shows typically last no longer than a week.³⁴

There are a number of problems with ex parte TROs issued to enforce IP rights at trade shows. First, an ex parte TRO issued in the context of a trade show is essentially incontestable; the issuance may not be appealed and the infringer may only object to the TRO at a hearing on a motion for preliminary injunction, which a court must set for “the earliest possible time” after a TRO is issued without notice.³⁵ However, even the earliest of the “earliest possible time[s]” is unlikely to enable the infringer to object in time to return its disputed product to the trade show floor. Further, a hearing on a motion for dissolution of the TRO, which the court must “hear and decide [...] as promptly as justice requires,”³⁶ is also unlikely to be scheduled early enough to enable the return of the product to the trade show floor. Additionally, even if either of these possible hearings were to occur early enough to enable the return of the product to the trade show floor, the damage to the infringer’s reputation caused by the enforcement of the TRO could be irreparable.

Any damage inflicted on an infringer by a TRO should be mitigated by the security that the issuing court must require from the IP right owner in an amount that “the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.”³⁷ But this security is another problem with ex parte TROs at trade shows: It clearly is a challenge to quantify damages caused by the wrongful enjoinder of activities at trade shows and difficult to quantify the lost opportunities an infringer will suffer to his reputation and business opportunities when a TRO is enforced on an exhibition floor in front of other exhibitors and visitors. The practice at the U.S. District Court for the District of Nevada, where the amount of security has been between \$10,000 and \$50,000 for trade show-related TROs in recent years,³⁸

³¹ For example, the trade shows that were at issue in the case study in *infra* Part II lasted between two and five days. *See infra* notes 113–115 and the accompanying text.

³² FED. R. CIV. P. 65(b)(2).

³³ *Id.*

³⁴ *See supra* note 31.

³⁵ FED. R. CIV. P. 65(b)(3).

³⁶ FED. R. CIV. P. 65(b)(4).

³⁷ FED. R. CIV. P. 65(c).

³⁸ Amounts of security that plaintiffs were ordered to tender in the cases reviewed in Part II were, for example,

suggests that courts might be requiring only nominal security.

The severity of the possible effects of an ex parte TRO should translate into strict requirements for its issuance; as Nimmer wrote, an IP right owner should “show that ‘the sky is falling’”³⁹ before the IP right owner may obtain an ex parte TRO. As they do for preliminary injunctions, courts must consider four factors before issuing an ex parte TRO: (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) the public interest.⁴⁰ What makes a decision on an ex parte TRO different from a decision on a preliminary injunction is that for a TRO a court must determine whether “immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.”⁴¹ For a TRO, the Federal Rules of Civil Procedure also require that an IP right owner’s attorney “certif[y] in writing any efforts made to give notice and the reasons why it should not be required.”⁴²

As will be apparent from the analysis in Part II,⁴³ an IP right owner, although unlikely to have difficulties showing a likelihood of success of an infringement action on the merits—particularly in cases of a registered IP right and in the absence of the infringer’s objections to the validity of the IP right at issue—will likely have difficulties in showing a likelihood of irreparable harm and the immediacy of the harm caused if a court does not issue a TRO.

Until the U.S. Supreme Court’s decision in *eBay*,⁴⁴ courts presumed the existence of irreparable harm in infringement cases when an IP right was valid and infringed.⁴⁵ In *eBay*, the Supreme Court rejected this presumption in reaction to a particular problem in the patent litigation landscape: the tendency of some non-practicing entities (also referred to as “patent assertion entities”) to take advantage of the courts’ practice of almost automatic issuance of injunctions in

\$10,000 (*Future Motion, Inc. v. Changzhou First International Trade Co., Ltd.*, DNEV, 2:16-cv-00013-MMD-CWH, docket document 11, January 6, 2016); \$25,000 (*Nike, Inc. v. Fujian Bestwinn (China) Industry Co., Ltd.*, DNEV, 2:16-cv-00311-APG-VCF, docket document 9, February 17, 2016); \$50,000 (*Neptune Technologies & Bioresources, Inc. v. Luhua Biomarine (Shandong) Co., Ltd.*, DNEV, 2:15-cv-01911-GMN-CWH, docket document 9, October 7, 2015).

³⁹ 6-35 Nimmer on Copyright § 35.01.

⁴⁰ *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

⁴¹ FED. R. CIV. P. 65(b)(1)(A).

⁴² A court may issue a TRO ex parte only if

“(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
(B) the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.”

FED. R. CIV. P. 65(b)(1).

⁴³ See *infra* Part II.2.

⁴⁴ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

⁴⁵ *Id.* at 393–94. See also Jiarui Liu, *Copyright Injunction after eBay: An Empirical Study*, 16(1) LEWIS & CLARK L. REV. 215, 226 (2012). For the pre-*eBay* history of the presumption of irreparable harm see Gergen, Golden & Smith, *supra* note 3, 222-226.

patent cases. The practice enabled the patent assertion entities to extort exorbitant licensing fees from practicing entities that were alleged to have infringed the patent assertion entities' patents.

The issuance of injunctions was never completely automatic; courts did issue injunctions based on the equitable four-part test, and they occasionally, although not often, denied injunctions or denied injunctions with immediate effect.⁴⁶ But courts issued injunctions frequently enough to provide patent assertion entities with a powerful threat in licensing negotiations. *eBay* concerned a permanent injunction in a patent infringement case, but the requirement of the strict application of the four-part test and the elimination of the presumption of irreparable harm was eventually extended to preliminary injunctions and to other types of IP rights,⁴⁷ and now affects trade show-related TROs.

The elimination of the presumption of irreparable harm in IP cases is particularly problematic. As the U.S. Supreme Court explained post-*eBay* in its decision in *Winter v. Natural Resources Defense Council*, the irreparable harm factor is a condition sine qua non,⁴⁸ the irreparable harm must be present even if the other factors weigh strongly in favor of the issuance of the injunction.⁴⁹ Even in the Ninth Circuit, where courts continue to use a version of the "sliding scale" approach,⁵⁰ a likelihood of irreparable harm must be shown.⁵¹

⁴⁶ *E.g.*, *City of Milwaukee v. Activated Sludge*, 69 F.2d 577 (7th Cir, 1934), cert. denied 293 U.S. 576 (1934); *Shiley, Inc. v. Bentley Laboratories, Inc.*, 601 F.Supp. 964 (C.D.Cal. 1985); *Schneider (Europe) AG v. SciMed Life Systems*, 852 F. Supp. 813 (D. Minn. 1994).

⁴⁷ *E.g.*, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008); *Salinger v. Cotling*, 607 F.3d 68 (2d Cir. 2010). In the Ninth Circuit *see Flexible Lifeline Systems, Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 995 and 998 (9th Cir. 2011) (a copyright case); *Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1249 and 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.'" *Id.* at 1250, internal quotation omitted). *See also* Gergen, Golden & Smith, *supra* note 3; Anne Gilson LaLonde & Jerome Gilson, *Adios! to the Irreparable Harm Presumption in Trademark Law*, 107 *The Trademark Rep.* 913 (2017).

⁴⁸ *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 21 (2008) ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. ... Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.").

⁴⁹ *eBay's* "test presents its factors as four separately assessed prongs, rather than as true 'factors'—i.e., elements of an overall decision making process that can be weighed with or against one another." Gergen, Golden & Smith, *supra* note 3, at 208.

⁵⁰ "This circuit has adopted and applied a version of the sliding scale approach under which a preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [plaintiff's] favor.'" *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (2011). "[S]erious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test [(i.e. the irreparable harm and the public interest)] are also met." *Id.* at 1132.

⁵¹ "[P]laintiffs must establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (2011).

As for the immediacy of irreparable harm, a plaintiff seeking a trade show-related TRO will allege that (1) harm will occur in such a short period that there is no time for a court to order a hearing and issue a preliminary injunction in time to prevent the harm, and/or (2) harm is likely to occur when the defendant is served, the notice being likely to cause the defendant to accelerate and/or intensify his infringing actions before the court can hear the parties and issue a preliminary injunction.⁵² The first scenario might involve a defendant who would cooperate with a court after receiving notice of a motion (and not accelerate its infringing activity upon receipt of the notice or destroy evidence); nevertheless, the process might still be too lengthy if notice were required to prevent irreparable harm at trade shows of short duration. The second scenario would involve a defendant who refuses to cooperate with a court and upon receipt of a notice of a motion would accelerate and/or intensify its infringing activity, and/or destroy evidence. In this second scenario, plaintiffs might also request that a court issue an order for seizure to secure evidence.⁵³

In the first scenario an IP right owner will argue that notice to an infringer should not be required because notice would mean that a court would have to order a hearing, which would delay the issuance of a TRO.⁵⁴ However, the need for a prompt remedy, by itself, should not justify an ex parte TRO if notice could actually be served on an infringer, as is typically the case with a trade show exhibitor/defendant attending a trade show that is in progress. Courts have held that if notice can be provided to an infringer, an ex parte TRO is appropriate only if there is a danger that upon receiving the notice, the infringer would boycott further proceedings, for example by destroying evidence before a hearing. An assertion that an infringer might behave in such manner must be supported by a “showing that the adverse party has a history of disposing of evidence or violating court orders or that persons similar to the adverse party have such a history.”⁵⁵ A declaration that such conduct is “a common occurrence when dealing with infringers” and is “well-recognized in the case law”⁵⁶ will not suffice.

Courts should be sensitive to the creation of artificial emergencies at trade shows by right owners who postpone legal action that they could have taken against infringers before a trade show.⁵⁷ For example, the weight should be against the issuance of a TRO if an infringement that a

⁵² *E.g.*, *NFC Ring Inc. v. Kerv Wearables LTD, DNEV*, case No. 2:16-cv-2441, Plaintiff’s Emergency Motion for an Ex Parte Temporary Restraining Order, Seizure Order and Preliminary Injunction, docket document 7, October 20, 2016, pp. 4-5.

⁵³ FED. R. CIV. P. 64.

⁵⁴ A TRO may also be issued when the alleged infringer’s identity is unknown. *See* *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993).

⁵⁵ *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir.1993).

⁵⁶ *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1132 (9th Cir. 2006) (the case concerned a sale of allegedly trademark-infringing goods at the Reno Air Races—an event that resembled a trade show).

⁵⁷ In a non-trade show-related context see *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 678 F.3d 1314, 1325 (Fed. Cir. 2012) (“The district court correctly noted that delay in bringing an infringement action and seeking a preliminary injunction are factors that could suggest that the patentee is not irreparably harmed by the infringement.”).

right owner alleges is occurring at a trade show is not newly discovered but is a pre-existing infringement of which the IP right owner had prior knowledge. An example from outside the United States illustrates this situation: a Commercial Court in Barcelona refused to issue an ex parte injunction for the Mobile World Congress trade show in 2016 when the court found, *inter alia*, that the infringement at the trade show was not a newly-discovered infringement but rather an ongoing infringement of which the plaintiff had knowledge long before the trade show.⁵⁸

Courts might not deny TROs in all cases involving pre-existing infringements; when assessing whether they should issue a TRO, courts should consider whether an IP right owner had a reasonable opportunity to assert the IP right and oppose the ongoing infringing activity at an earlier time. It is possible that pre-existing infringing activity did not concern the owner's IP right (if the IP right was owned by someone else at that time), or did not concern a protected IP right at all (because it occurred in a country where the IP right enjoys no protection). It is also possible that the earlier activity did infringe the owner's IP right but the IP right owner could only have opposed the infringement by resorting to a court outside its state or outside the United States; in such a case a court might view the feasibility of earlier legal action with reference to the type of IP owner (for example, a multinational corporation or a small business) and/or the foreign court in which the IP right owner would have had to enforce the right.

Finally, a court must evaluate the availability of remedies at law and consider the balance of hardships. Ongoing licensing negotiations between an IP right owner and an infringer might suggest that the IP right owner is using a TRO as leverage in ongoing licensing negotiations, and attempts to license the IP right might indicate that a monetary remedy could satisfy the IP right owner.⁵⁹ Of course, ongoing licensing negotiations should not always protect an infringer from the issuance of a TRO; superficial or insincere licensing inquiries by infringers should not be allowed to be used as shields against TROs.

The frequency with which parties request and courts grant TROs in IP cases in general (and not only in trade show-related situations) varies, depending on the type of IP right asserted. Nimmer stated that in copyright cases, "temporary restraining orders are commonly sought, often

⁵⁸ *Sisvel International, S.A. v. Archos S.A. y Archos Technology España, S.L.*, Juzgado de lo Mercantil, Barcelona, AJM B 22/2016 - ECLI: ES:JMB:2016:22A, Feb. 22, 2016. *See also infra* note 59. On the treatment of delayed enforcement actions by the "Fast Track Protocol" that the Commercial Courts of Barcelona developed *see* Trimble, *supra* note 14.

⁵⁹ In *Sisvel International*, the Commercial Courts of Barcelona denied a preliminary injunction i.a. because the plaintiff attempted to use the ex parte procedure to exert pressure on the alleged infringer in their ongoing licensing negotiations. *See supra* note 58. On the redundancy of the factors of irreparable harm and inadequacy of legal remedies in the four-factor test *see* Gergen, Golden & Smith, *supra* note 3, at 208; Lee, *supra* note 45, at 242–243; ePlus Inc. v. Lawson Software, Inc., 946 F. Supp. 2d 459, 467 (E.D. Va. 2013), *vacated by* 789 F.3d 1349 (Fed. Cir. 2015).

on an *ex parte* basis,”⁶⁰ “[i]n product counterfeiting cases in particular.”⁶¹ Chisum noted that in patent cases “a patent owner may be able to obtain ... a temporary restraining order”⁶² only “[i]n rare circumstances.”⁶³ According to Lex Machina⁶⁴—a database that includes all trademark, copyright, and patent cases that have been filed in the U.S. federal district courts—TROs (not necessarily only *ex parte* TROs)⁶⁵ were mentioned (i.e. it is likely that the plaintiffs filed for TROs in the cases) in 1,578 trademark cases, 377 copyright cases, and 226 patent cases filed in the federal district courts in 2014 – 2016.⁶⁶ These numbers represented 13.5%, 2.8%, and 1.5% of all trademark, copyright, and patent cases filed in all federal district courts during that period, respectively.⁶⁷ The next Part reviews detailed statistics on TROs that were filed for in, and issued by, the U.S. District Court for the District of Nevada.

II. EMPIRICAL EVIDENCE FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF NEVADA

The functioning of *ex parte* TROs for IP rights enforcement at trade shows may be illustrated by a case study of Las Vegas, Nevada—a major trade show center.⁶⁸ In 2011, the Las Vegas Convention Center, by itself, was the third largest trade show venue in North America, based on indoor exhibition space;⁶⁹ other venues in Las Vegas provide additional trade show and meeting

⁶⁰ 6-35 Nimmer on Copyright § 35.01.

⁶¹ *Id.*

⁶² 7-20 Chisum on Patents § 20.04.

⁶³ *Id.*

⁶⁴ Lex Machina includes dockets and docket documents of trademark, copyright, and patent cases filed in U.S. federal district courts. Lex Machina, <https://lexmachina.com/> (last visited July 2, 2017).

⁶⁵ On TROs issued after a hearing of all parties *see supra* note 20.

⁶⁶ Lex Machina, search for “temporary restraining order,” performed on July 5, 2017. The period is from January 1, 2014, until December 31, 2016.

⁶⁷ According to Lex Machina as of July 5, 2017, the total numbers of cases filed in U.S. federal district courts were as follows:

Trademark cases: 4,398 in 2014; 3,721 in 2015; and 3,571 in 2016.

Copyright cases: 4,336 in 2014, 5,208 in 2015, and 3,916 in 2016.

Patent cases: 5,093 in 2014; 5,823 in 2015; and 4,534 in 2016.

Lex Machina, Case Filings, as of July 1, 2017.

Cases that concern multiple types of IP rights appear in all individual categories of cases and therefore may appear in the above statistics two or three times.

Statistics for U.S. state courts are not available. *See infra* Part II for more detailed statistics of cases filed in 2014–2016 in the U.S. District Court for the District of Nevada.

⁶⁸ On the location of trade shows *see supra* note 12.

⁶⁹ The 2011 World Map of Exhibition Venues, UFI, the Global Association of the Exhibition Industry, December 2011, Table 3, p. 5, http://www.ufi.org/wp-content/uploads/2016/01/ufi_world_map_of_exhibition_venues_december_2011.pdf (last visited July 3, 2017). According to UFI, in 2011 the Las Vegas Convention Center was the 19th largest exhibition venue in the world based

spaces, expanding the total space available for trade shows and conferences to more than eleven million square feet (i.e. more than one million square meters) at the end of 2016.⁷⁰ A number of large international trade shows take place in Las Vegas, such as annual CES,⁷¹ the Global Gaming Expo (G2E), the vehicle aftermarket shows SEMA⁷² and AAPEX,⁷³ the concrete and masonry show World of Concrete,⁷⁴ and the beauty and cosmetics show CosmoProf North America.⁷⁵

This Part presents the results of an empirical study of TRO cases that involve claims of trademark, copyright, and/or patent infringement that were filed in the U.S. District Court for the District of Nevada (Nevada District Court), which is the federal court in which IP right owners file for TROs for trade shows held in the City of Las Vegas and the county in which the City is located—Clark County.⁷⁶ The study covered cases filed in the Nevada District Court in the calendar years 2014, 2015, and 2016, and proceeded in three steps. First, all trademark, copyright, and patent cases were identified that were filed in the Nevada District Court between January 1, 2014, and December 31, 2016 (IP cases). The identification of the cases was conducted based on searches in the Lex Machina database;⁷⁷ the resulting population of cases was then cross-referenced with court dockets in the PACER database.⁷⁸ Second, based on a review of the dockets of the identified IP cases, cases were selected in which a motion for a TRO was filed (TRO cases).

on the size of its indoor exhibition space. *Id.* Messe Hannover and Messe Frankfurt led the list in 2011. *Id.* In 2017 the Board of Directors of the Las Vegas Convention and Visitors Authority approved a significant expansion of the Las Vegas Convention Center, including its indoor exhibition space. Rachel Wimberly, *LVCVA Board Approves \$1.4 Billion Las Vegas CC Expansion/Renovation Project*, June 13, 2017, <http://www.tsnn.com/news-blogs/lvcva-board-approves-14-billion-las-vegas-cc-expansionrenovation-project> (last visited July 8, 2017).

⁷⁰ Clark County Meeting Space Report, Effective: December 31, 2016, Las Vegas Convention and Visitors Authority, p. 4 (11,235,066 square feet of total “Combined Exhibit and Meeting Space Square Footage” for the Las Vegas area, i.e. 1,043,772 square meters). According to UFI, in 2011, the venue with the largest indoor exhibition space in the world was Messe Hannover in Germany with 466,100 square meters of indoor exhibition space. *See supra* note 69.

⁷¹ “CES” stands for “Consumer Electronics Show.” *See* Where Innovators Gather, CES, <http://www.ces.tech/about-us> (last visited July 17, 2017).

⁷² “SEMA” stands for Specialty Equipment Market Association; it is an association of the automotive aftermarket.

⁷³ “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, 2017, p. 2, *available at* <http://www.aapexshow.com/2017/custom/images/docs/Exhibitor%20Guide/2017/Intellectual%20Property%20Rights%20-%20English.pdf> (last visited July 14, 2017).

⁷⁴ World of Concrete is “the largest annual international event dedicated to concrete and masonry professionals.” World of Concrete, <https://www.worldofconcrete.com/en/attendee.html> (last visited July 21, 2017).

⁷⁵ CosmoProf is a beauty and cosmetics show. CosmoProf North America, <http://cosmoprofnorthamerica.com/exhibition/> (last visited July 21, 2017).

⁷⁶ In some cases, IP right owners could request TROs in the Nevada state courts. *See also supra* notes 29–30 and accompanying text.

⁷⁷ Lex Machina, <https://lexmachina.com/> (last visited July 5, 2017).

⁷⁸ PACER—Public Access to Court Electronic Records, <https://www.pacer.gov/> (last visited July 5, 2017). In PACER the “Nature of suite” codes were “820 (Copyright),” “830 (Patent),” and “840 (Trademark).”

Third, the dockets and docket documents of the TRO cases were reviewed in detail and coded, with particular attention to trade show-related TRO cases. Then, the statistics that are reported in this Part were generated from the information.

A. General Overview of IP Cases Filed in the U.S. District Court for the District of Nevada in 2014–2016

With respect to the numbers of IP cases filed in all U.S. district courts in 2014–2016, the IP caseload in the Nevada District Court may be described as slightly above average and definitely above the median. In the three years covered by the study, 333 IP cases were filed in the court. As shown in Figure 1, of the total of 333 IP cases, 103 were filed in 2014, 88 in 2015, and 142 in 2016. As to the average numbers of trademark, copyright, and patent cases filed per year and per U.S. district court in the same period, the Nevada court’s caseload was above average in its numbers of trademark cases filed in each of the three years, and in the number of copyright cases filed in 2016.⁷⁹ The court’s caseload was also above average in the number of patent cases filed in 2016, but only when the average is calculated without data from the U.S. District Court for the Eastern District of Texas—a district court that may be justifiably treated as an outlier because of the extremely high numbers of patent cases that were and are filed in that court.⁸⁰ The numbers of IP cases filed also placed the Nevada District Court well above the median among all U.S. district

⁷⁹ According to the numbers available in Lex Machina, the following were the numbers of trademark cases:

2014: Nevada 62 cases, U.S. average 51.1 cases

2015: Nevada 55 cases, U.S. average 45.1 cases

2016: Nevada 62 cases, U.S. average 44.2 cases

According to the numbers available in Lex Machina, the following were the numbers of copyright cases:

2014: Nevada 22 cases, U.S. average 46.6 cases

2015: Nevada 19 cases, U.S. average 55.6 cases

2016: Nevada 54 cases, U.S. average 42.1 cases

Lex Machina, as of July 7, 2017.

Note that Lex Machina counts cases in more than one category if a case concerns multiple types of IP rights.

⁸⁰ According to the numbers available in Lex Machina, the following were the numbers of patent cases (U.S. average, excluding the Eastern District of Texas):

2014: Nevada 28 cases, U.S. average 39.8 cases

2015: Nevada 29 cases, U.S. average 35.7 cases

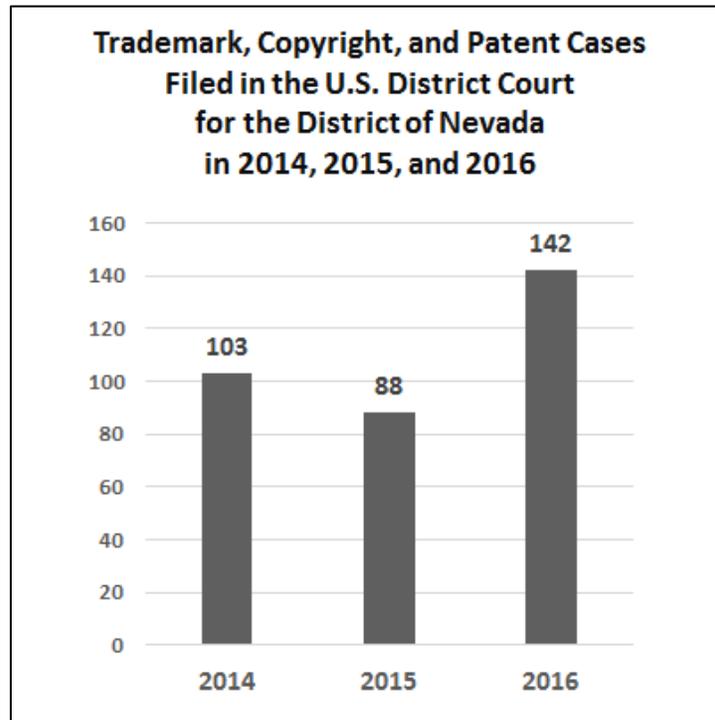
2016: Nevada 41 cases, U.S. average 31.2 cases

The numbers of patent cases filed in the U.S. District Court for the Eastern District of Texas were extremely high in 2014–2016; the numbers accounted for 28%, 43.7%, and 36.7% of all patent cases filed in the United States in the three years, respectively. Lex Machina, as of July 7, 2017.

For explanations of the popularity among plaintiffs of the U.S. District Court for the Eastern District of Texas see, e.g., Saurabh Vishnubhakat, *Reconceiving the Patent Rocket Docket: An Empirical Study of Infringement Litigation 1985-2010*, 11 J. MARSHALL REV. INTELL. PROP. L. 58, 64–67 (2011); Paul M. Janicke, *The Judicial Panel on Multidistrict Litigation: Now A Strengthened Traffic Cop for Patent Venue*, 32 REV. LITIG. 497, 501–02 (2013); Brian J. Love & James C. Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20(1) STANFORD TECH. L. REV. (2017).

courts; in the three years the Court ranked in either the first quartile or the top of the second quartile in the list of all U.S. federal district courts by numbers of IP cases filed for each type of IP case.⁸¹

Figure 1



The Nevada District Court has developed a considerable expertise in IP matters. Although the court did not handle the numbers of IP cases that the busiest of all U.S. district courts in IP cases handle,⁸² in 2016, for example, the number of trademark cases filed in the Nevada District Court was comparable to the numbers of cases filed in district courts such as the District of Minnesota and the District of Massachusetts.⁸³ The Nevada District Court’s role in the IP litigation landscape

⁸¹ According to the numbers available in Lex Machina, among the 94 U.S. federal district courts, Nevada ranked as follows with respect to the numbers of cases that included claims concerning the following IP rights:

Trademark cases: 22nd in 2014, 24th in 2015 (tied with the District of Minnesota), and 19th in 2016.

Copyright cases: 29th in 2014, 32nd in 2015, and 20th in 2016.

Patent cases: 28th in 2014, 28th in 2015, and 19th in 2016.

Lex Machina, as of July 7, 2017.

⁸² Among the courts with the largest dockets of IP cases are U.S. district courts for the Central District of California, the District of Delaware, the Northern District of Illinois, the Northern District of California, the Eastern District of Texas, and the Southern District of New York. Lex Machina, as of July 7, 2017.

⁸³ In 2016, 57 trademark cases were filed in the District of Nevada, 56 trademark cases were filed in the District

is enhanced by its participation in the Patent Pilot Program. Since 2011, the Court has been one of fourteen federal district courts that participate in the Program, which allows for a certain degree of specialization in patent matters by designated Program judges who choose to participate in the Program and who are randomly assigned patent cases that non-program judges may return to the Program case pool.⁸⁴

In the IP cases filed in the Nevada District Court, parties have occasionally filed for TROs and some of the TROs are trade show related. Of the 333 IP cases that were filed in the court in 2014–2016, 44 were TRO cases (13.2% of all IP cases), and in 16 of these 44 TRO cases plaintiffs filed a TRO motion for the purposes of a trade show (“trade show-related TRO cases”). In the 16 trade show-related TRO cases, IP right owners requested a TRO to stop infringement that was occurring at an ongoing trade show or was expected to occur at a forthcoming trade show in Las Vegas.⁸⁵ Figures 2, 3, and 4 show the statistics of the IP, TRO, and trade-show related TRO cases for 2014, 2015, and 2016, respectively. The numbers of TRO cases were 18, 13, and 13 in 2014, 2015, and 2016, respectively; of these, 5, 5, and 6 cases, respectively, were trade show-related TRO cases.

of Minnesota, and 54 trademark cases were filed in the District of Massachusetts. Lex Machina, as of July 7, 2017.

⁸⁴ Patent Pilot Program, U.S. District Court for the District of Nevada, First Amended General Order No. 2011-03, available at <http://www.nvd.uscourts.gov/Files/General%20Order%202011-03.pdf> (last visited July 7, 2017). For statistics associated with the District of Nevada’s Patent Pilot Program participation see *infra* notes 102–118 and accompanying text.

⁸⁵ For a note on trade show-related IP cases in which this type of TRO was not requested see *infra* notes 122–125 and accompanying text. Two of the 44 TRO cases were not included in the pool of 16 trade show-related TRO cases because the events for which the TROs were requested in the two cases did not match the definition of a trade show (see *supra* note 6): Hologram USA, Inc. et al v. Pulse Evolution Corporation et al, DNEV, 2:14-cv-00772-GMN-NJK (a TRO requested for the Billboard Music Awards); Bravado International Group Merchandising Services, Inc. v. Does 1-100 et al, DNEV, 2:16-cv-00668-RFB-VCF (a TRO requested for Guns N’ Roses concerts).

Figure 2

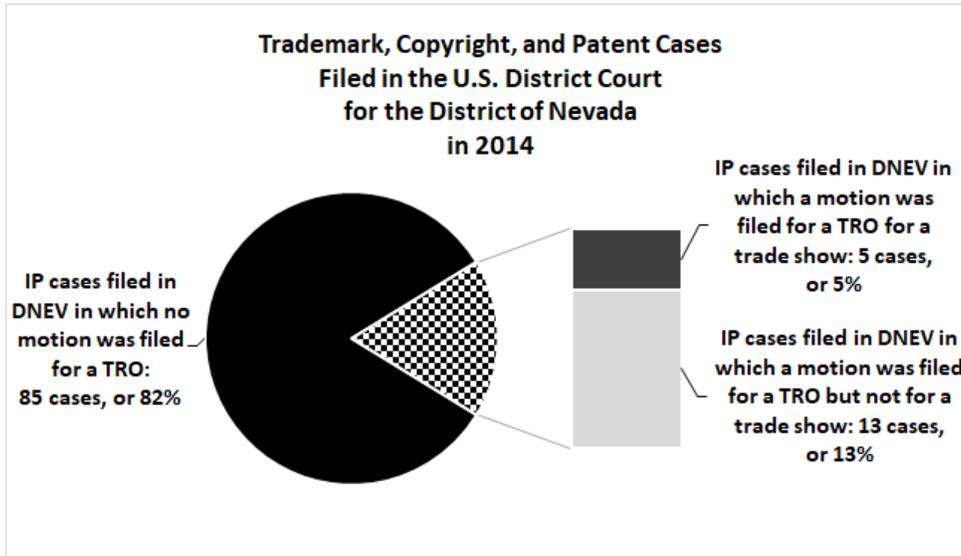


Figure 3

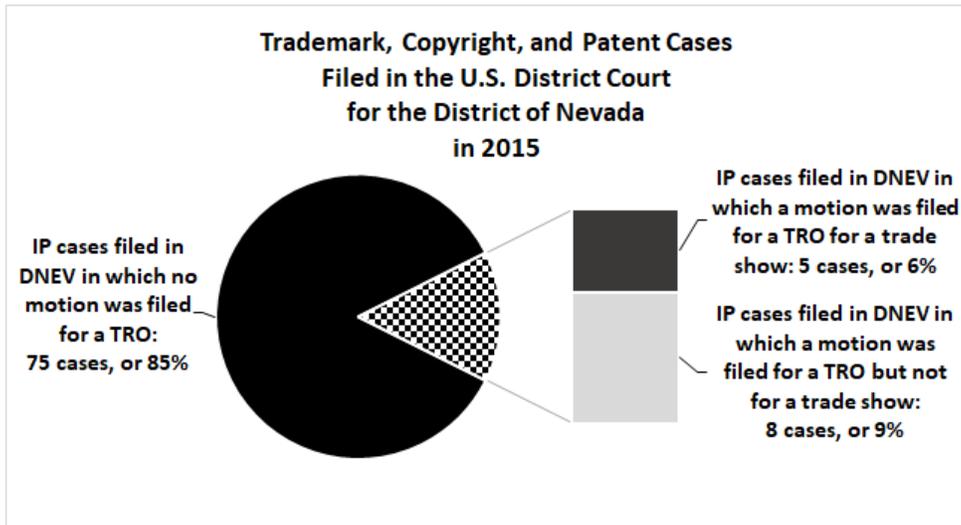
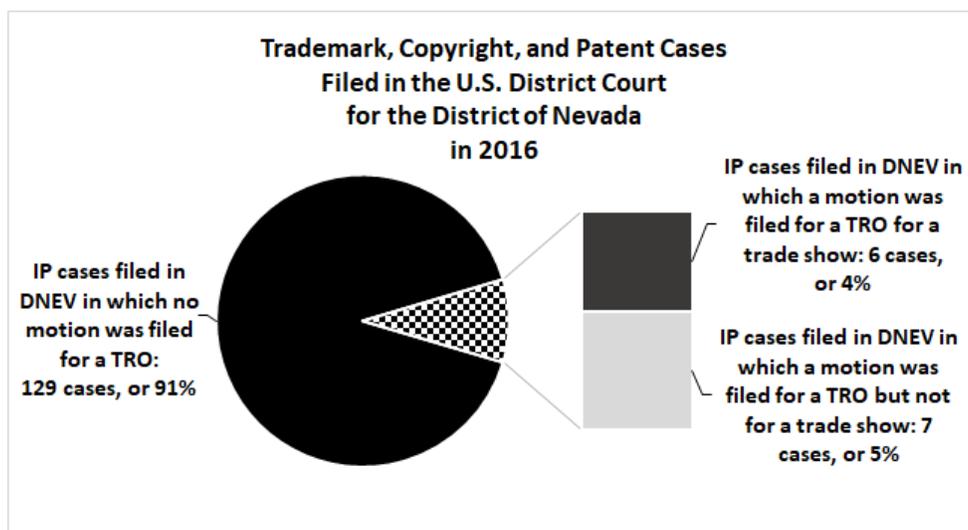


Figure 4



In 2014–2016 the percentages of trade show-related TRO cases increased in relation to all TRO cases; the percentages were 27.8%, 38.5%, and 46.2% in the three years, respectively. However, because the absolute numbers of IP cases filed in the District Court fluctuated in the three years and the number was much higher in 2016 than in 2014 and 2015, the percentages of trade show-related TRO cases remained relatively flat in relation to the numbers of all IP cases; as indicated in Figures 2, 3, and 4, the percentages were 5%, 6%, and 4% in the three years, respectively.

Figures 5 and 6 show statistics reflecting the outcomes of TRO motions in trade show-related TRO cases (Figure 5) and non-trade show-related TRO cases (Figure 6), including whether the TROs were issued ex parte or subsequent to a hearing of the parties. Once a TRO is issued after a hearing of the parties, the TRO is treated as a preliminary injunction; nevertheless, courts will occasionally refer to the order as a TRO even if the order was issued after a hearing of the parties.⁸⁶ In the TRO cases that were studied, there were two cases in which the court heard the parties before the court issued a TRO/preliminary injunction; in one of the two cases, and following the hearing, the court issued a TRO (in a trade show-related TRO case),⁸⁷ and in the other case, the court issued a preliminary injunction instead of a TRO (in a non-trade show-related TRO case).⁸⁸

Figure 5 summarizes the data for the 16 trade show-related TRO cases, and Figure 6 summarizes the data for the other 28 TRO cases—IP cases in which a TRO was requested, but the

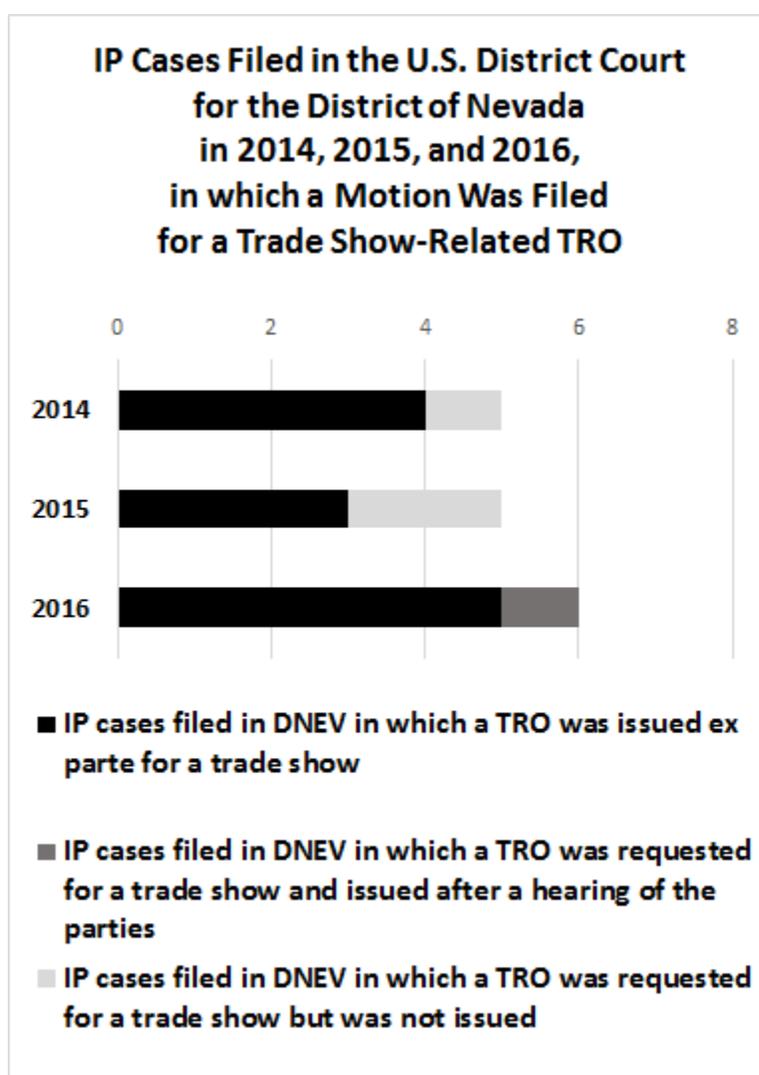
⁸⁶ See *supra* note 22.

⁸⁷ *Equalia, LLC, et al v. Kushgo LLC et al.*, DNEV, 2:16-cv-02851-RFB-CWH.

⁸⁸ *Las Vegas Sands Corp. v. First Cagayan Leisure & Resort Corp. et al.*, DNEV, 2:14-cv-00424-JCM-NJK.

TRO was not for a trade show. Trade show-related TROs were issued in 4, 3, and 6 IP cases in the three years, respectively; with one exception, the TROs were issued ex parte.⁸⁹ TROs that were not related to trade shows were issued ex parte in 4, 1, and 5 IP cases in the three years, respectively; in one additional case the court granted a preliminary injunction rather than a TRO after the court heard the parties.⁹⁰

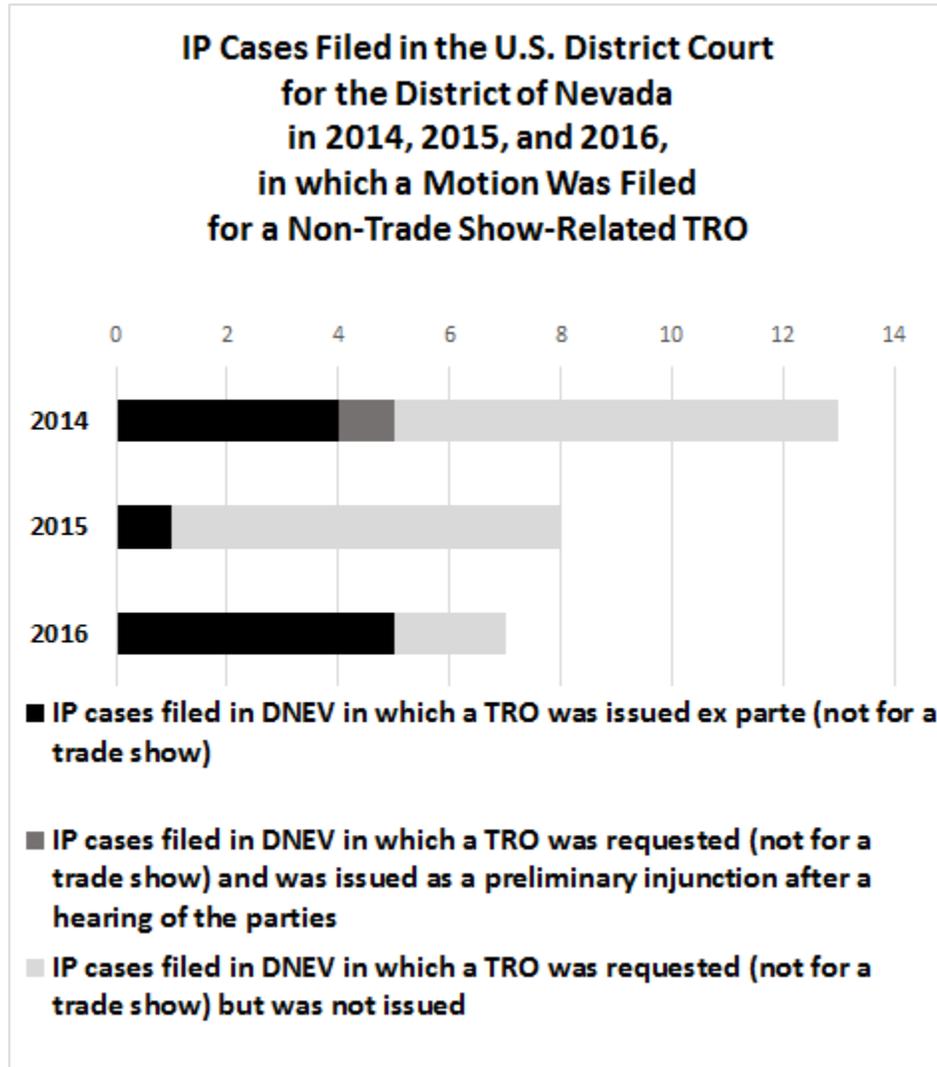
Figure 5



⁸⁹ See *supra* note 87.

⁹⁰ See *supra* note 88.

Figure 6



A comparison of Figures 5 and 6 reveals that a larger percentage of TROs were issued in trade show-related cases than in non-trade show-related cases; in 2014–2016 only 3 TROs that were requested were not issued in trade show-related TRO cases (18.8% of such cases), while 17 TROs that were requested were not issued in non-trade show-related TRO cases (60.7% of such cases). Of the 3 trade show-related TRO cases in which TROs were not issued, in two cases the court denied the motion for a TRO (12.5% of the 16 trade show-related cases), while in the third case the court never decided on the TRO motion because the case closed before the court decided on

the TRO motion.⁹¹ In all 17 non-trade show-related TRO cases in which TROs were not issued, the motions for TROs were denied.

B. Detailed Statistics of Cases Involving a Motion for a TRO for a Trade Show

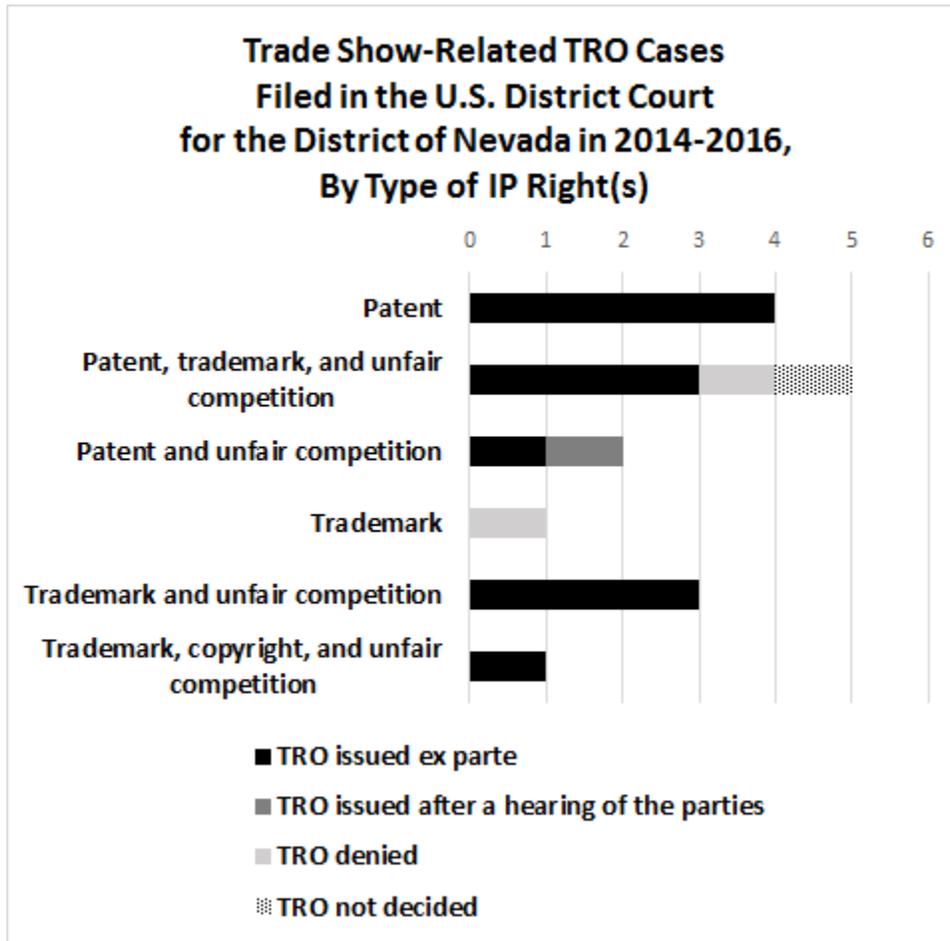
Figures 7–14 analyze in greater detail the 16 trade show-related TRO cases; each figure provides information about a characteristic of the cases and also includes information about the outcome of the TRO motions for the cases with that characteristic. Because in one instance a case was closed before a decision was made on the TRO motion,⁹² the numbers of cases in Figures 8 and 11 total 15 (and not 16) because the two figures concern only TRO motions that were decided and TROs that were issued, respectively.

Figure 7 shows the distribution of types of IP rights that were claimed in the 16 trade show-related TRO cases. The trade show-related TRO cases in 2014–2016 included in only one case a copyright claim; other claims were trademark and/or patent infringement claims. In 2016, all of the trade show-related TRO cases (6 cases) concerned patents—in 3 of the 2016 cases, only patent infringement claims were raised, and in the remaining 3 cases, combinations of patent infringement and other IP rights infringement claims were raised.

⁹¹ Conair Corporation et al v. INF Professional, DNEV, 2:14-cv-01150-RCJ-VCF.

⁹² *Id.*

Figure 7



Overall, the most frequent claims were patent infringement claims and unfair competition claims, which each appeared in 11 cases. Of the 11 cases that involved patent infringement claims, 4 were solely patent cases and 7 also included a trademark infringement and/or unfair competition claim. Of the 11 patent cases, 3 cases involved utility patents,⁹³ 3 involved design patents,⁹⁴ and 5 involved combinations of utility and design patents. Trademark infringement claims were raised in 10 of the 16 trade show-related TRO cases. Additional claims were included in some of the

⁹³ A utility patent protects “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” 35 U.S.C. 101.

⁹⁴ A design patent protects “any new, original and ornamental design for an article of manufacture.” 35 U.S.C. 171.

cases—for example, a claim of trade secrets misappropriation⁹⁵ and a cybersquatting claim.⁹⁶

Given the low number of cases, it is not possible to make any conclusions about the likelihood of obtaining a TRO in cases involving specific types of IP rights. In the two cases in which the court denied motions for a TRO, one concerned patent, trademark, and unfair competition claims⁹⁷ and the other involved trademark infringement.⁹⁸

Figure 8 shows decisions on TRO motions, by judge, in the 15 trade show-related TRO cases in which a decision on a TRO motion was made. The Nevada District Court currently has 12 judges, of which 8 have their chambers in Las Vegas and 4 in Reno.⁹⁹ Five judges with chambers in Las Vegas and two judges with chambers in Reno decided the TRO motions in the 15 trade show-related TRO cases.¹⁰⁰ Chief Judge Gloria M. Navarro¹⁰¹ decided five of the TRO motions, four judges decided two TRO motions each, and two judges decided one TRO motion each.

⁹⁵ *NFC Ring, Inc. v. KERV Wearables LTD*, DNEV, 2:16-cv-02441-GMN-GWF.

⁹⁶ *Toyo Tire and Rubber Co., Ltd. et al v. Kabusikiki Kaisha Tokyo Nihoon Rubber Corp. et al*, DNEV, 2:14-cv-01847-JAD-VCF.

⁹⁷ *SATA GmbH & Co. KG v. Zhejiang Refine Wufu Air Tools Co., Ltd. et al.*, DNEV, 2:15-cv-02111-GMN-CWH.

⁹⁸ *Evergreen Research and Marketing, LLC v. Mystical Distributing Co. Ltd*, DNEV, 2:15-cv-00318-JAD-PAL.

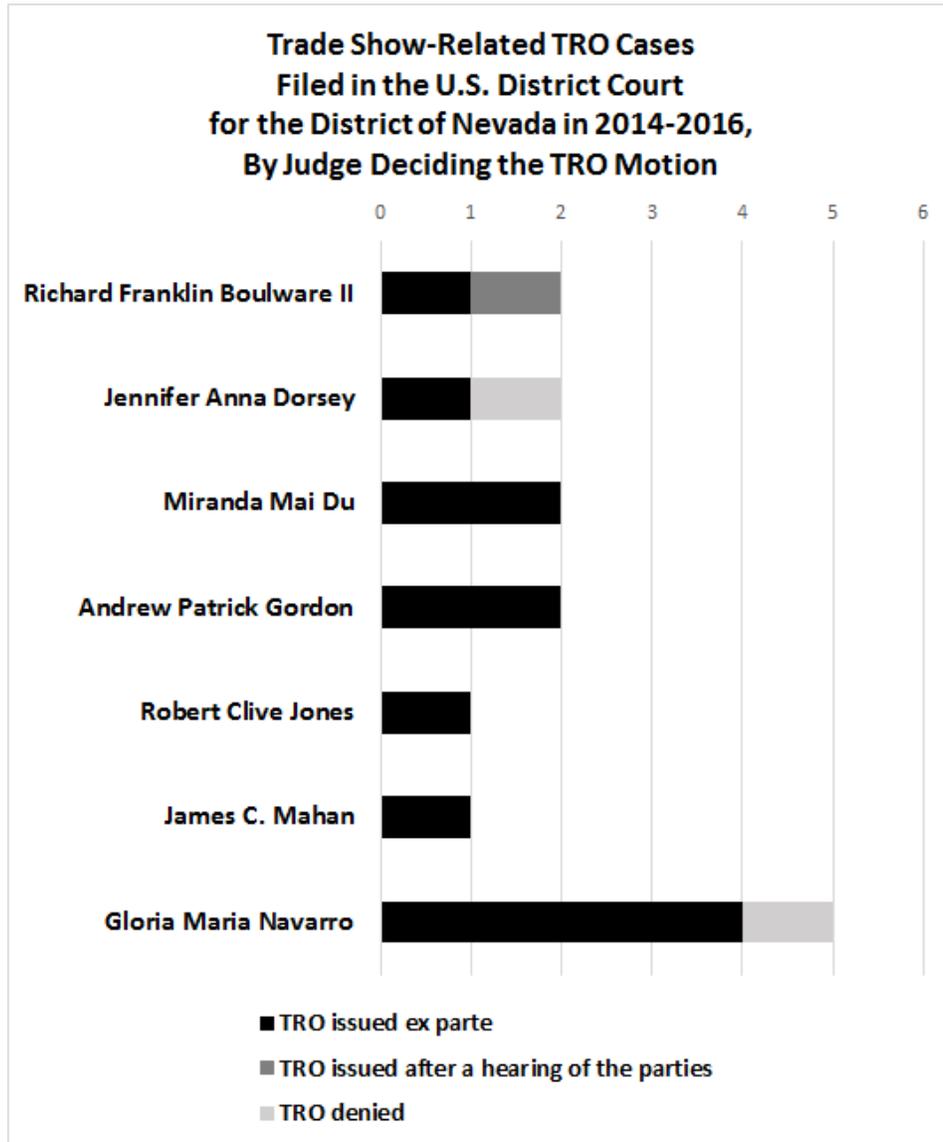
⁹⁹ Judges, U.S. District Court for the District of Nevada, <http://www.nvd.uscourts.gov/JudgeList.aspx> (last visited July 8, 2017).

The Court also has magistrate judges, but magistrate judges may not issue TROs or injunctions. 28 U.S.C. 636(b)(1)(A). According to the local rules of the District Court, a magistrate judge may conduct a review and “necessary evidentiary and other hearings and file findings and recommendations for disposition by the district judge.” Local Rules of Practice of the United States District Court for the District of Nevada, Effective June 1, 1995, with Amendments Effective May 1, 1998, and December 1, 2000, LR IB 1-4(a), available at <http://www.nvd.uscourts.gov/Files/localrules.pdf> (last visited July 8, 2017).

¹⁰⁰ Of the seven judges, six have been on the court for the period from January 1, 2014 to December 31, 2016; Judge Richard F. Boulware II joined the court in June 2014. U.S. District Court for the District of Nevada, <http://www.nvd.uscourts.gov/Bio/rfBoulware.aspx> (last visited July 8, 2017).

¹⁰¹ Gloria M. Navarro has been Chief Judge of the District Court since January 1, 2014. U.S. District Court for the District of Nevada, <http://www.nvd.uscourts.gov/bio/gloriamnavarro.aspx> (last visited July 8, 2017).

Figure 8



Because the District Court participates in the Patent Pilot Program,¹⁰² patent cases that are initially assigned to a judge who is not a Program judge may be reassigned to one of the Program judges if the case is declined by the judge to whom the case was initially assigned. In the 16 trade show-related TRO cases, reassignment occurred in 7 of the 11 cases that involved patents. Only one of the seven cases was reassigned after a decision on the TRO motion had been made by the

¹⁰² For information on the Patent Pilot Program *see supra* note 84 and accompanying text.

judge to whom the case was initially assigned,¹⁰³ in the remaining 6 cases, the reassignment occurred before a decision on the TRO motion was made.

Figure 9 lists the 10 different trade shows for which the 16 TROs were requested. In two cases, TROs were requested for the purposes of two related (and simultaneously held) trade shows—SEMA¹⁰⁴ and AAPEX¹⁰⁵—which explains why the total number of cases in Figure 9 totals 18 and not 16. The largest number of TROs per show were requested for CosmoProf (4 cases)¹⁰⁶ and SEMA (3 cases); two TROs each were requested for AAPEX, CES,¹⁰⁷ and SupplySide West.¹⁰⁸ CosmoProf had the largest number of TROs issued (3 TROs); SEMA and SupplySide West each had two TROs issued.

¹⁰³ *Neptune Technologies & Bioresources, Inc. v. Luhua Biomarine (Shandong) Co., Ltd.*, DNEV, 2:15-cv-01911-GMN-CWH. The case was originally assigned to Judge James C. Mahan, who also granted the TRO ex parte. The case was then reassigned to Judge Jennifer A. Dorsey.

¹⁰⁴ *See supra* note 72.

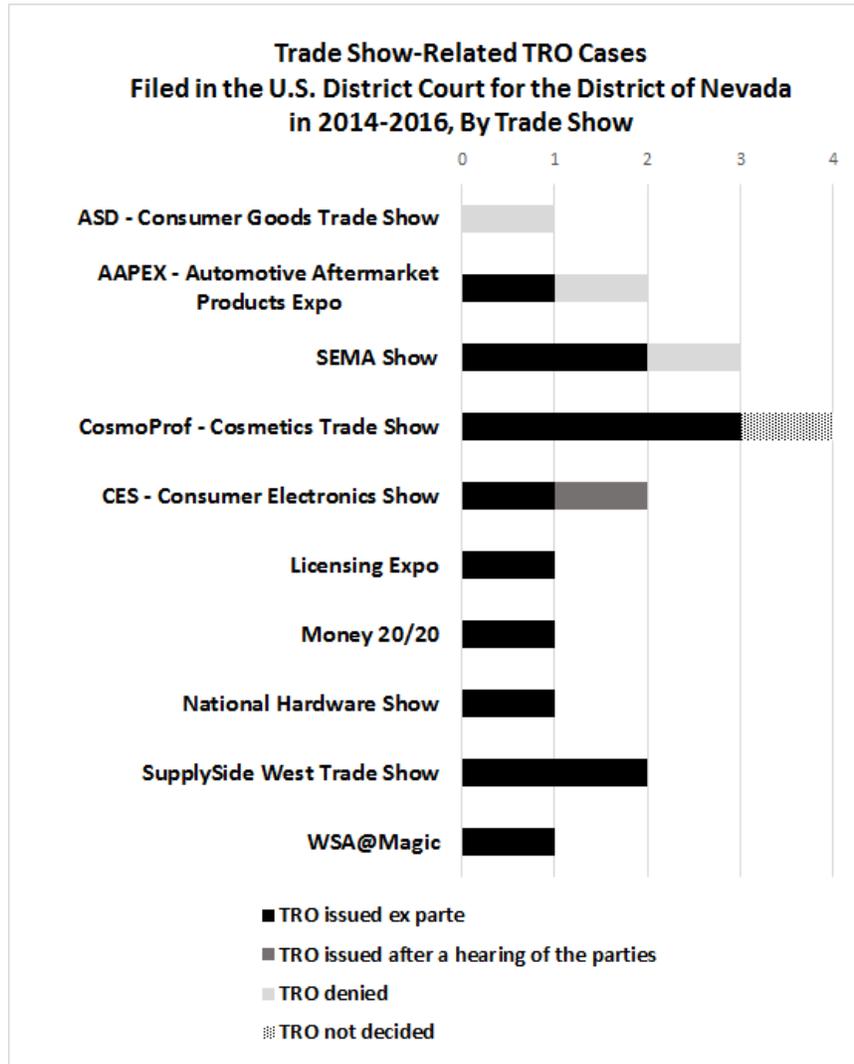
¹⁰⁵ *See supra* note 73.

¹⁰⁶ *See supra* note 75.

¹⁰⁷ *See supra* note 71.

¹⁰⁸ SupplySide West is a trade show for “ingredient buyers and suppliers from the dietary supplement, beverage, functional food, personal care and sports nutrition industries.” SupplySide West, <https://west.supplysideshow.com/en/home.html> (last visited July 8, 2017).

Figure 9



Figures 10 and 11 show the timing of the filings of the TRO motions in the 16 trade show-related TRO cases and the timing of the issuance of the TROs in the 13 trade show-related TRO cases in which TROs were issued. Figure 10 shows that in 6 cases the TRO motions were filed before the trade show began; in the remaining 10 cases the TRO motions were filed during the trade show.¹⁰⁹ It does not appear from Figure 10 that the success of a TRO motion depended on

¹⁰⁹ For the purposes of this study, a motion was considered to be filed during a trade show if the filing data fell on one of the days on which the trade show took place. This could include instances in which the motion was filed at the district court on the morning of the opening day, before the trade show opened.

whether the motion was filed before or during the trade show. Figure 11 indicates that more TROs were issued during trade shows (10 cases) than before trade shows (3 cases).

Figure 10

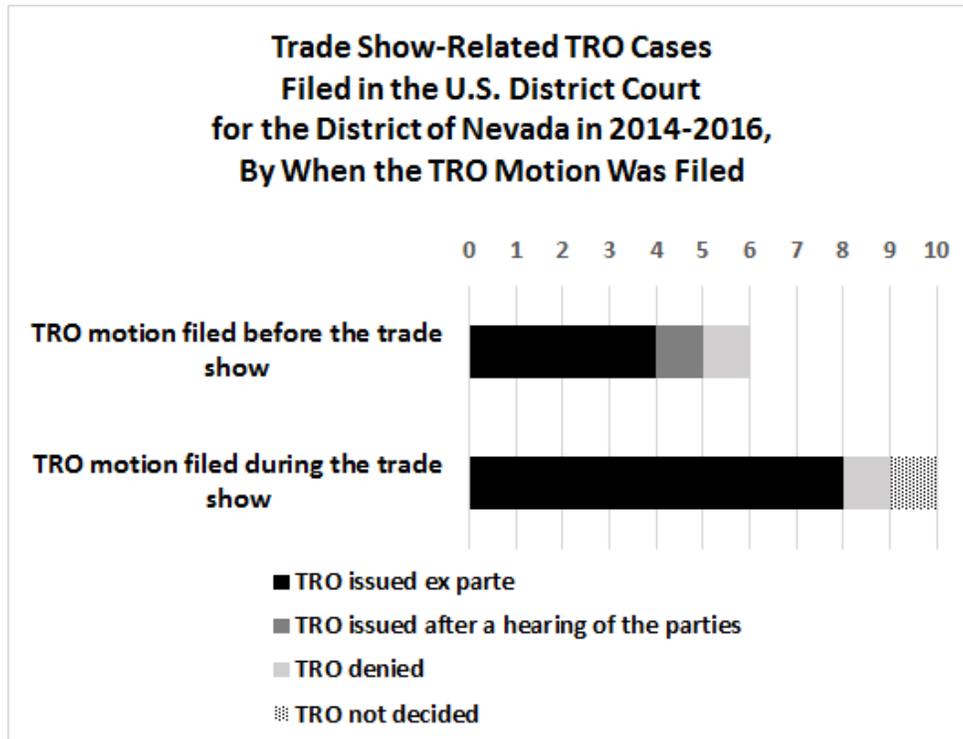
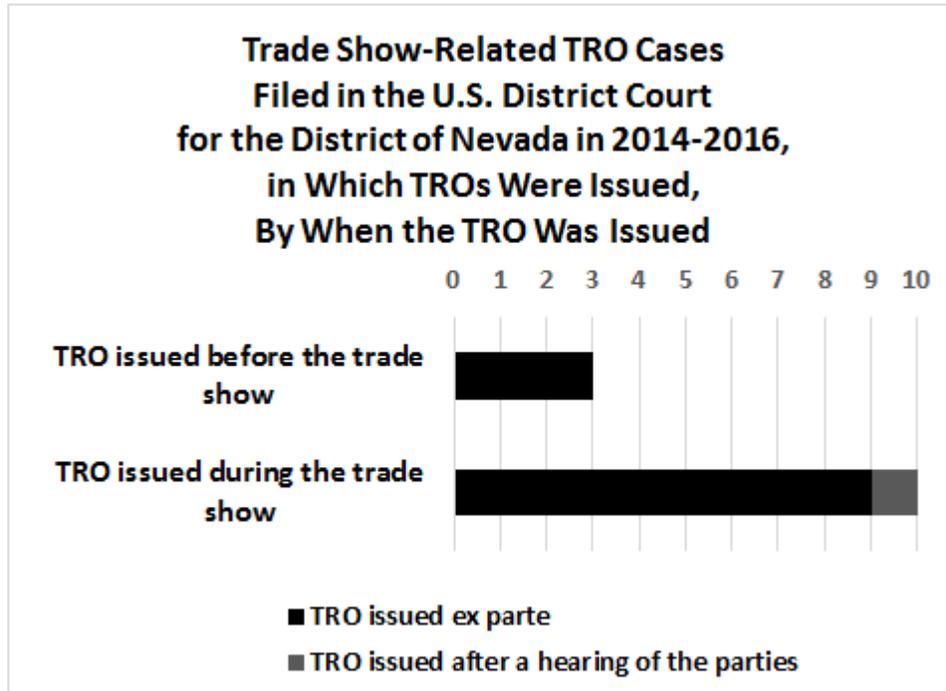


Figure 11



Most of the 13 TROs that were issued were issued during trade shows, but some were issued even before their trade shows started. The earliest a trade show-related TRO motion was filed was 19 days before the trade show began; in that case the TRO was issued two days before the trade show started.¹¹⁰ In all 10 cases in which TRO motions were filed during trade shows, the plaintiffs filed motions for TROs on the first or second day of the trade show. In one case when a motion for a TRO was filed for two trade shows held simultaneously, the motion was filed on the second day of one of the trade shows, which was the fourth day of the other show.¹¹¹ In some cases plaintiffs re-filed their TRO motions in the same cases if a TRO was not issued in response to their first motion.¹¹²

¹¹⁰ Hand & Nail Harmony, Inc. et al v. Guangzhou Cocome Cosmetics, Co. et al., DNEV, 2:15-cv-01191-GMN-PAL.

¹¹¹ SATA GmbH & Co. KG v. Zhejiang Refine Wufu Air Tools Co., Ltd. et al., DNEV, 2:15-cv-02111-GMN-CWH.

¹¹² Conair Corporation et al v. INF Professional, DNEV, 2:14-cv-01150-RCJ-VCF; Conair Corporation et al v. Le Angelique, Inc., DNEV, 2:14-cv-01149-RCJ-PAL; Evergreen Research and Marketing, LLC v. Mystical Distributing Co. Ltd, DNEV, 2:15-cv-00318-JAD-PAL; Hand & Nail Harmony, Inc. et al v. Guangzhou Cocome Cosmetics, Co. et al., DNEV, 2:15-cv-01191-GMN-PAL.

The TROs were typically issued timely enough to impact the alleged infringing activities at their trade shows. The trade shows for which TROs were requested lasted between 2 and 5 days, and the 10 TROs that were issued during the trade shows were issued in 3 cases on the first day of the show, in 1 case on the second day of the show, in 5 cases on the third day of the show, and in 1 case on the fourth day of the show. In 5 of the 13 cases in which a TRO was issued, the TRO was issued on the same day on which the motion was filed; in 1 of the 5 cases the motion was filed and the TRO was issued 3 days before the trade show, in 3 of the cases the motion was filed and the TRO was issued on the first day of the trade show, and in 1 case the motion was filed and the TRO was issued on the second day of the trade show.

The TROs were issued in one or in a number of days. The longest time for the issuance of a TRO was 17 days in the case of a TRO that was requested 19 days before a trade show, and the TRO was issued *ex parte* two days before the trade show; in this case the first TRO motion was denied and the plaintiffs had to file an additional affidavit to support their TRO motion before the TRO was finally issued.¹¹³

In some cases, even when a TRO application was filed in advance of a trade show, the resulting TRO was not issued until the show was in progress, or even after the trade show had finished. In two cases TRO motions were filed before trade shows but TROs were not issued before the trade shows; in one case the motion was filed 5 days before the trade show and the TRO was issued on the third day of the trade show,¹¹⁴ and in the other case the motion was filed 4 days before the trade show but the court ordered a hearing on the motion and issued a TRO on the fourth day of the trade show.¹¹⁵

Reassignments of cases to Patent Pilot Program judges did not seem to slow down the process of granting or denying TROs. Reassignments typically occurred on the same day or the day after a TRO motion was filed. Of the 7 cases that were reassigned, 4 cases were reassigned on the same day on which the TRO motion was filed, and 2 cases were reassigned on the day after the TRO motion was filed.¹¹⁶ In only one case did it take 3 days after the filing of the TRO motion to reassign the case, and that case was the case that was reassigned after a TRO motion had been granted by the judge to whom the case had initially been assigned.¹¹⁷

Given the low numbers of trade show-related TRO cases, it is difficult to conclude whether the

¹¹³ *Hand & Nail Harmony, Inc. et al v. Guangzhou Cocome Cosmetics, Co. et al.*, DNEV, 2:15-cv-01191-GMN-PAL.

¹¹⁴ *Id.*

¹¹⁵ *Equalia, LLC, et al v. Kushgo LLC et al.*, DNEV, 2:16-cv-02851-RFB-CWH.

¹¹⁶ In one of the two cases the plaintiff filed a TRO motion on both the day of the reassignment and the day after the reassignment. *Conair Corporation et al v. Le Angelique, Inc.*, DNEV, 2:14-cv-01149-RJ-PAL.

¹¹⁷ *See supra* note 103. The TRO motion was filed on October 6, 2015, Judge Mahan granted the motion on October 7, 2015, and the case was reassigned on October 9, 2015. *See infra* for a discussion of the effect of reassignments on the speed with which the Court decided TRO motions.

reassignments of some cases to Patent Pilot Program judges¹¹⁸ had any effect on the amount of time within which the decisions on TRO motions were made. If there was any effect, it appears that in the cases that were reassigned, TROs were issued more quickly than in the cases in which cases were not reassigned: Of the 6 reassigned cases in which TROs were issued after the cases had been reassigned, judges made decisions on TROs on either the same day the TRO motion was filed (3 cases) or two days later (2 cases). In the remaining case of the 6 cases the TRO was denied by the judge to whom the case was reassigned—one day after the TRO motion was filed and on the same day on which the case was reassigned. In the cases that were not reassigned and in which TROs were issued, courts issued TROs from the day of filing of the motion up to 17 days later, including two cases in which it took 7 days for issuance and one case in which it took 17 days for issuance. In one case that was not reassigned, a motion for a TRO was denied on the day after the motion was filed.

Figures 12 and 13 show the countries of domicile of the parties that were involved in the 16 trade show-related TRO cases. The information about the domiciles of the parties was collected from the complaints that were filed by the plaintiffs. As is apparent from Figure 12, in 12, or three-quarters of the 16 trade show-related TRO cases, the plaintiffs (or at least one of the plaintiffs) were from the United States. In the defendant data, which are summarized in Figure 13, the country of domicile that was most represented was China; in 7 cases all of the defendants were from China and in an additional 5 cases defendants from China were sued together with defendants from other countries; therefore, three-quarters of trade show-related TRO cases involved at least one defendant from China.¹¹⁹ The number of cases is insufficient to justify any conclusions about judicial bias, based on the countries of domicile of the parties, in any of the decisions on TROs in trade show-related TRO cases.

¹¹⁸ See *supra* notes 84, 102, and accompanying text.

¹¹⁹ In one of the 4 cases, the two domiciles of the defendants were China and Hong Kong.

Figure 12

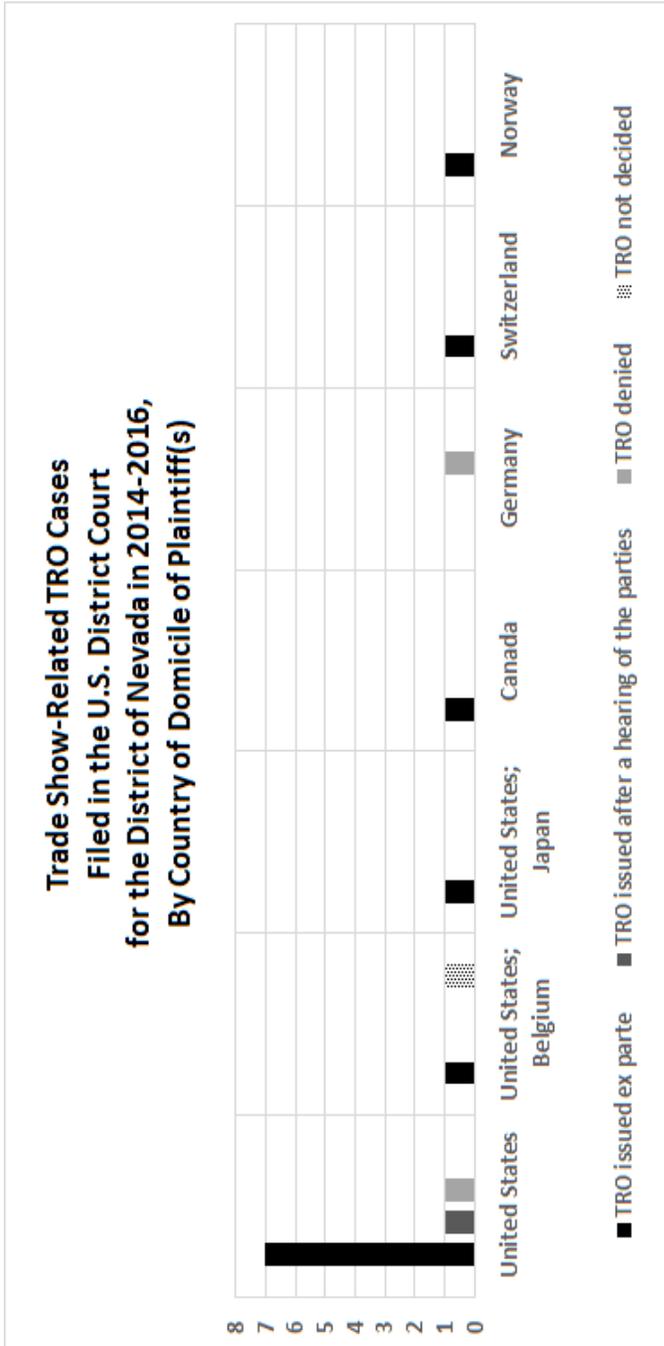


Figure 13

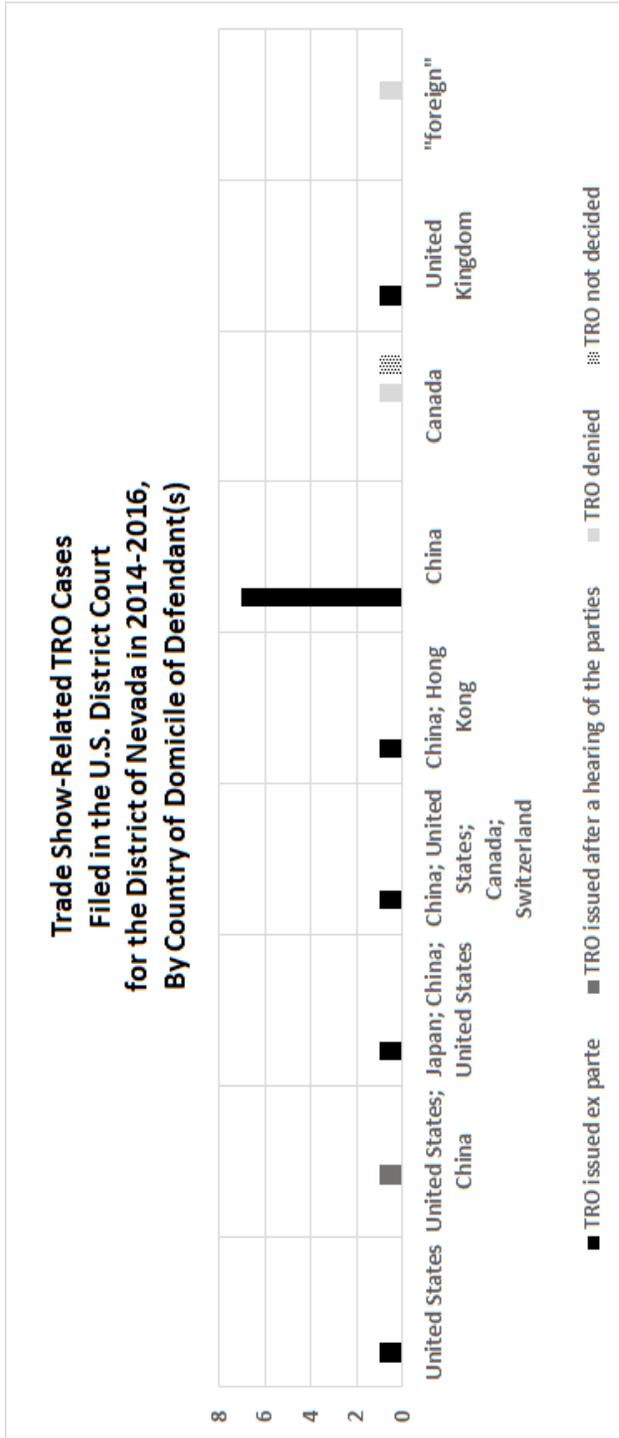
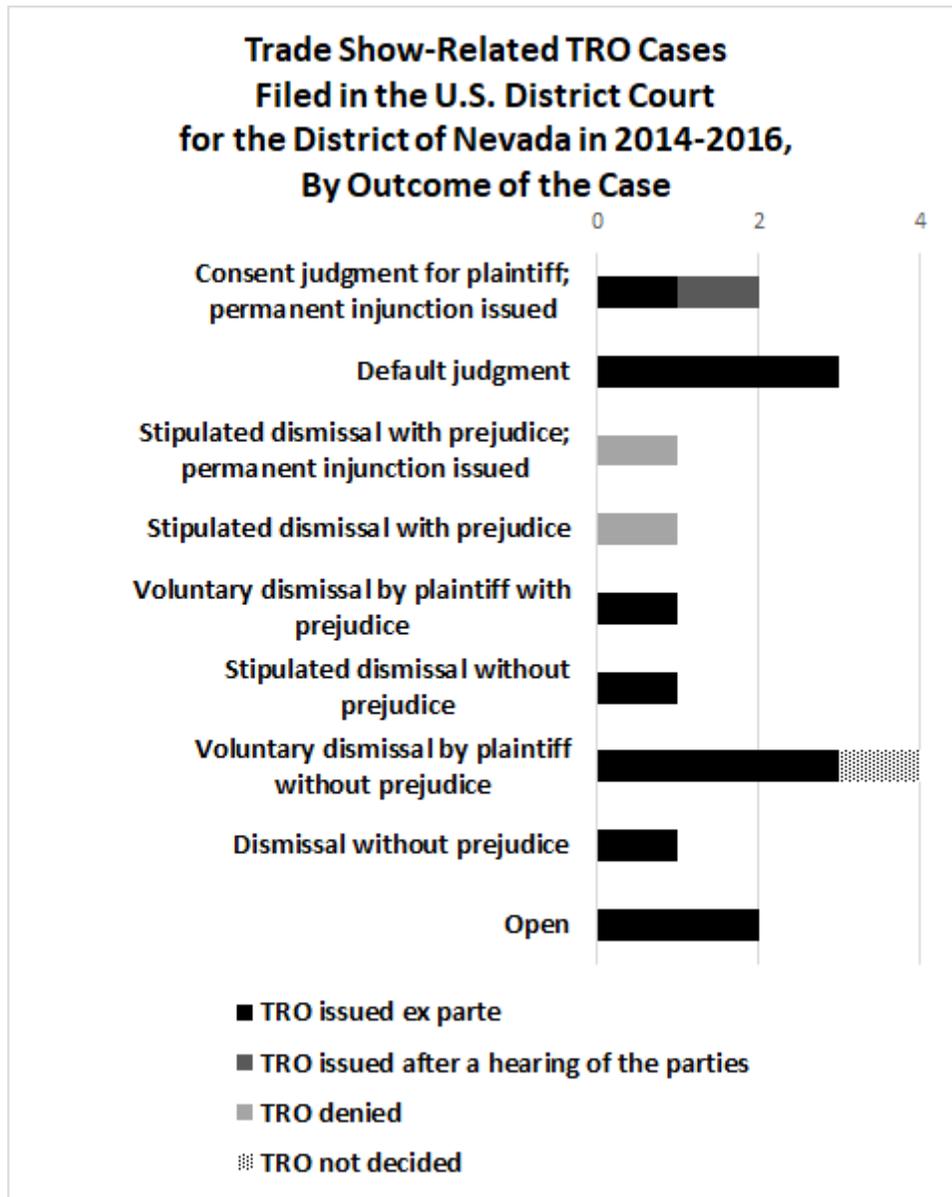


Figure 14 includes information on the outcomes of the 16 trade show-related TRO cases. Two cases—one filed in 2015 and one filed in 2016—were still open as of July 8, 2017; these two cases were the only cases of the 16 cases that were transferred from the Nevada District Court to other U.S. district courts.¹²⁰ The other 14 cases were all closed as of July 8, 2017; five cases ended with a default or consent judgment in favor of the plaintiff, and in another case (in which the parties stipulated to a dismissal) an injunction was issued against the defendant. In none of the 14 closed cases did the Nevada District Court decide on the merits following a trial. The absence of resolutions at trial might relate to the nature of the circumstances of the cases, but the absence of trials is also consistent with the generally low percentage of IP cases that proceed to trial in U.S. district courts.¹²¹

¹²⁰ Wenger S.A. v. Fuzhou Hunter Product Import and Export Co., Ltd. et al., DNEV, 2:15-cv-01098-GMN-NJK, transferred to WDNY, 1:15-cv-00637-WMS-HKS; NFC Ring, Inc. v. KERV Wearables LTD, DNEV, 2:16-cv-02441-GMN-GWF, transferred to NDCA, 5:16-cv-07159-BLF.

¹²¹ For example, according to some studies, only about 5% of patent cases in U.S. district courts proceed to trial. Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1512 (2003); Jay P. Kesan, *Taking Stock of the U.S. Patent System*, in 2 INTELL. PROP. & INFO. WEALTH: PATS. & TRADE SECRETS 227, 232–33 (Peter K. Yu ed., 2007). For the statistics of disputes that are decided at trial *see, e.g.*, MARK V.B. PARTRIDGE, *ALTERNATIVE DISPUTE RESOLUTION: AN ESSENTIAL COMPETENCY FOR LAWYERS* 6 (Oxford Univ. Press, 2009).

Figure 14



It is important to note that IP enforcement in the context of trade shows does not necessarily end, or even necessarily begin, with the filing of trade show-related TRO motions such as the motions in the cases for which the statistics are summarized in this Part. Some IP right owners file lawsuits during trade shows for IP infringements occurring during the trade shows but do not file

motions for TROs for the trade shows.¹²² Other IP right owners file lawsuits after trade shows to enforce their rights that were infringed at the trade shows and that might continue to be infringed after the trade shows. For example, in the Nevada District Court in 2014–2016, an IP right owner filed a lawsuit alleging infringement of its copyright in a trade show exhibition booth (i.e., claiming copyright in the booth itself) about two months after the 2015 trade show took place.¹²³ In another case a major gaming equipment manufacturer sued another major gaming equipment manufacturer for infringement of three design patents to a “cabinet with a curved monitor;”¹²⁴ the design patent holder alleged that the infringement had occurred at the 2016 G2E trade show about two weeks before the lawsuit was filed.¹²⁵

IP rights infringement cases brought in connection with trade shows that do not include filings for TRO motions for the trade shows can be helpful in understanding the magnitude and complexity of IP enforcement issues that arise in the context of trade shows. However, because this article focuses on emergency relief available to IP right owners during trade shows, and not relief after trade shows, these cases are not included in the statistics reported above and are not part of the detailed discussion of trade show-related TRO cases in the following Part.

III. IRREPARABLE HARM AND TRADE SHOW-RELATED TROS AFTER *EBAY*

The statistics reviewed in the previous Part show that trade show-related TROs, though infrequently, were requested in the Nevada District Court in 2014–2016, and the likelihood that these TROs would issue was much higher than the likelihood in the same period that non-trade show-related TROs would issue.¹²⁶ The statistics confirm the observation made by commentators that trade show-related TROs in the Nevada District Court involve primarily allegations of patent infringement¹²⁷ committed by non-U.S. actors.¹²⁸ However, there are no indications in the small population of cases of the presence of any bias in the court decisions based on types of IP rights

¹²² *E.g.*, *SATA GmbH & Co. KG v. NingBo Genin Industrial Co., Ltd.*, DNEV, 2:16-cv-02546-JAD-GWF; *SATA GmbH & Co. KG v. Taizhou Luxi Tools Co., Ltd.*, DNEV, 2:16-cv-02544-JCM-CWH.

¹²³ *Team One Display Services, Inc. v. Arlon Graphics, LLC*, DNEV, 2:15-cv-01185-JCM-GWF, Complaint, docket document 1, June 22, 2015. The International Sign Association trade show took place on April 9–11, 2015. *Id.*

¹²⁴ The complaint included additional causes of action. *Bally Gaming, Inc. v. Aristocrat Technologies, Inc. et al.*, DNEV, 2:16-cv-02359-JCM-CWH, Complaint, docket document 1, October 10, 2016. The G2E (Global Gaming Expo) trade show took place on September 27–29, 2016.

¹²⁵ *Id.*

¹²⁶ As the statistics in Part II *supra* show, 87.5% of requested trade show-related TROs issued, but only 39.3% of requested non-trade show related TROs issued. *See supra* note 91 and accompanying text.

¹²⁷ *See also supra* Figure 7.

¹²⁸ *See also supra* Figure 13.

asserted,¹²⁹ on judges deciding the TRO motions,¹³⁰ on particular trade shows,¹³¹ or on parties' countries of domicile.¹³²

The outcomes of at least some of the cases confirm that the issuance of the injunctive relief was justified: In 5 cases either a consent judgment or a default judgment was issued in favor of the plaintiffs, and in the additional cases the resulting settlements could indicate that relief might have been justified.¹³³ Finding that the TROs were issued in cases where hindsight indicates that the TROs were justified might suggest that the TRO practice of the court is sound. However, an analysis of the court's reasons for the granting of TROs in 13 cases and denials of TROs in 2 cases reveals a general problem that current law holds for IP right owners who seek TROs to stop infringements at trade shows.

A. Lessons from Trade Show-Related TROs in the U.S. District Court for the District of Nevada

The reasons for which some TRO motions succeed are of great interest and importance to practitioners, who have tried to create a recipe for successful motions. One commentator observed that what may have helped in obtaining a TRO in at least one of the cases included in the analysis in Part II—*Neptune Technologies & Bioresources, Inc. v. Luhua Biomarine (Shandong) Co., Ltd.*¹³⁴—was that “the emergency motion was a very detailed document accompanied by three declarations and numerous exhibits.”¹³⁵ The commentator added that “the emergency motion ... was clearly not prepared in a single day,”¹³⁶ and suggested that the failure of a motion filed in another case from Part II, *SATA GmbH & Co. KG v. Zhejiang Refine Wufu Air Tools Co., Ltd. et al.*,¹³⁷ might have stemmed from the fact that the motion “did not contain nearly as much evidentiary support as the successful motion in the Neptune case.”¹³⁸

¹²⁹ See *supra* Figure 7.

¹³⁰ See *supra* Figure 8.

¹³¹ See *supra* Figure 9.

¹³² See *supra* Figures 12 and 13.

¹³³ See *supra* Figure 14, and notes 120–121 and accompanying text.

¹³⁴ *Neptune Technologies & Bioresources, Inc. v. Luhua Biomarine (Shandong) Co., Ltd.*, DNEV, 2:15-cv-01911-GMN-CWH.

¹³⁵ Alexander B. Englehart, *Patent Enforcement at Trade Shows in the United States—The Best Tools for the Job*, Bloomberg BNA, April 21, 2017.

¹³⁶ *Id.*

¹³⁷ *SATA GmbH & Co. KG v. Zhejiang Refine Wufu Air Tools Co., Ltd. et al.*, DNEV, 2:15-cv-02111-GMN-CWH.

¹³⁸ *Id.*

While evidentiary support is key to the success of a TRO motion, and a well-argued motion accompanied by supporting documents has a better chance of succeeding, a court's placement of excessive weight on the length of a motion and/or the number of supporting documents would be problematic. The long period necessary for the preparation of such a motion may indicate that a plaintiff may have created a trade show-related emergency artificially after being aware of an infringement long before a trade show, which time enabled the plaintiff to accumulate evidence and prepare a lengthy motion.¹³⁹

Other commentators have suggested that the difference in the outcomes of trade show-related TRO motions might also have been connected to plaintiffs' efforts, if any, to serve notice on infringers.¹⁴⁰ The commentators¹⁴¹ noted that Neptune, whose TRO motion was granted, "provided evidence of its attempts to engage the accused infringer in licensing negotiations prior to the trade show,"¹⁴² while SATA, whose TRO motion was denied, "provided no evidence of previous efforts to contact the infringers."¹⁴³ In this case, it is also problematic to draw any generalizations: Although the federal rules for TROs require that the plaintiff's attorney certify "any efforts made to give notice and the reasons why it should not be required,"¹⁴⁴ and therefore some effort to contact the infringer is envisioned, more substantial and/or early prior contacts and attempts at licensing negotiations could weigh against the issuance of a TRO if they evidence knowledge of pre-existing infringements and suggest that a monetary remedy might be sufficient if the IP right owner has been looking to license its IP right.¹⁴⁵

TROs were denied in the two cases in Part II because there was no showing of a likelihood of irreparable harm—one of the four factors that courts must consider in granting a TRO.¹⁴⁶ In one of the two cases, *Evergreen Research and Marketing, LLC v. Mystical Distributing Co. Ltd.*,¹⁴⁷ the defendant (a Canadian company that had previously distributed plaintiff's product in Canada) had been infringing plaintiff's (a U.S. company's) IP rights from the time that it "started selling the same product in nearly identical packaging."¹⁴⁸ The acts of infringement in this case pre-dated the March 2015 ASD Market Week trade show, for which the plaintiff requested the TRO. The plaintiff filed a complaint, which included claims of trade dress infringement and dilution, on

¹³⁹ See *supra* note 58 and accompanying text.

¹⁴⁰ Tammy Terry & Jeffery P. Langer, *The Hottest Product At Your Next Trade Show—A TRO*, Law360, March 7, 2016, available at <https://www.law360.com/articles/766318/the-hottest-product-at-your-next-trade-show-a-tro> (last visited July 14, 2017).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See *supra* note 42 and accompanying text.

¹⁴⁵ See *supra* note 59 and accompanying text.

¹⁴⁶ See *supra* note 40 and accompanying text.

¹⁴⁷ *Evergreen Research and Marketing, LLC v. Mystical Distributing Co. Ltd.*, DNEV, 2:15-cv-00318-JAD-PAL.

¹⁴⁸ *Id.*, Complaint, docket document 1, February 23, 2015.

February 23, 2015,¹⁴⁹ and on February 25, 2015, the plaintiff filed an “Emergency/Ex Parte Application for A Temporary Restraining Order.”¹⁵⁰

On February 26, 2015, Judge Jennifer A. Dorsey denied Evergreen’s motion for a TRO.¹⁵¹ Judge Dorsey noted that “Evergreen has presented a persuasive case for the granting of a temporary restraining order,” but Evergreen did not offer to provide security, did not “provide any argument or authority that might help [the judge] determine what a reasonable security amount might be,” and was unclear about the amount of estimated harm.¹⁵² Following Judge Dorsey’s decision, Evergreen re-filed the TRO motion but again on February 27, 2015, Judge Dorsey denied the TRO motion¹⁵³ because the plaintiff failed to show a likelihood of irreparable harm. The judge considered the plaintiff’s arguments in the second motion to be insufficient because the plaintiff merely stated that it would lose a particular amount in gross revenue from the trade show but did not explain how it arrived at the amount. Additionally, the judge noted that Evergreen failed to state why its alleged potential monetary injury could not be compensated by damages.¹⁵⁴

A failure to show a likelihood of irreparable harm was also the reason for Chief Judge Gloria M. Navarro’s denial of a TRO motion in *SATA GmbH & Co. KG v. Zhejiang Refine Wufu Air Tools Co., Ltd. et al.*¹⁵⁵ The German company SATA discovered allegedly infringing acts when its representatives visited the AAPEX and SEMA trade shows on November 3, 2015. On November 4, 2015, SATA filed a complaint against the Canadian and Chinese defendants that included several causes of action, including trademark infringement, design patent infringement, and unfair competition,¹⁵⁶ and also filed an “Emergency Ex Parte Motion for Temporary Restraining and Seizure Order and for Preliminary Injunction.”¹⁵⁷

On November 5, 2015, Chief Judge Navarro denied SATA’s motion for a TRO and preliminary injunction because SATA failed to show a likelihood of irreparable harm.¹⁵⁸ SATA did discuss potential irreparable harm in the motion but the judge found no evidence of a likelihood of irreparable harm, based on the insufficiency of plaintiff’s arguments: The plaintiff argued only that

¹⁴⁹ *Id.*, Complaint, docket document 1, February 23, 2015.

¹⁵⁰ *Id.*, Emergency/Ex Parte Application for A Temporary Restraining Order, docket document 6, February 25, 2015.

¹⁵¹ *Id.*, Order Denying without Prejudice *Ex Parte* Application for Temporary Restraining Order, docket document 8, February 26, 2015.

¹⁵² *Id.*

¹⁵³ *Id.*, Order Denying Second *Ex Parte* Application for Temporary Restraining Order, docket document 13, February 27, 2015.

¹⁵⁴ *Id.*

¹⁵⁵ *SATA GmbH & Co. KG v. Zhejiang Refine Wufu Air Tools Co., Ltd. et al*, DNEV, 2:15-cv-02111-GMN-CWH.

¹⁵⁶ *Id.*, Complaint, docket document 1, November 4, 2015.

¹⁵⁷ *Id.*, Emergency Ex Parte Motion for Temporary Restraining and Seizure Order and for Preliminary Injunction, docket document 2, November 4, 2015.

¹⁵⁸ *Id.*, Order, docket document 11, November 5, 2015.

without a TRO or preliminary injunction it would lose an opportunity to collect evidence, suffer adverse effects to its goodwill and reputation if “Defendants’ goods are of poor quality,”¹⁵⁹ and potentially face problems with collecting on any monetary judgment in the future “because Defendants are foreign companies with no regular U.S. presence.”¹⁶⁰

The types of irreparable harm alleged in these two trade show-related TRO motions are common for such motions. Direct competition that will result in price erosion, lost revenue, lost market share, and harm to reputation and goodwill are among the typical harms that IP right owners allege,¹⁶¹ and courts have recognized these alleged harms as cognizable irreparable harms¹⁶² by issuing TROs in other trade show-related TRO cases.¹⁶³ However, courts do require that a “likelihood of irreparable harm ... be based on evidence in the record, not ‘unsupported and conclusory statements regarding harm [that the plaintiff] *might* suffer.’”¹⁶⁴

The differences among cases brought by the same plaintiff in similar cases are instructive. SATA was denied a TRO for AAPEX and SEMA in 2015¹⁶⁵ but was issued a TRO in a similar trade show-related case in 2013.¹⁶⁶ The 2013 and 2015 cases were both brought by the German plaintiff against primarily Chinese defendants and the TRO motions were almost identical in their

¹⁵⁹ *Id.*, Emergency Ex Parte Motion for Temporary Restraining and Seizure Order and for Preliminary Injunction, docket document 2, November 4, 2015, p. 17 (“If Defendants’ goods are of poor quality (and indeed, given SATA’s products are known for their high quality ..., it is near guaranteed that Defendants’ products are inferior) this will reflect adversely upon SATA’s business good will and reputation.” *Id.*).

¹⁶⁰ *Id.*, Order, docket document 11, November 5, 2015.

¹⁶¹ *E.g.*, Neptune Technologies & Bioresources, Inc. v. Luhua Biomarine (Shandong) Co., Ltd., DNEV, 2:15-cv-01911-GMN-CWH, docket document 5, October 6, 2015, p. 20.

¹⁶² *E.g.*, Canon, Inc. v. GCC Intern. Ltd., 263 Fed.Appx. 57, 62 (Fed. Cir. 2008); Automated Merchandising Systems, Inc. v. Crane Co., 357 Fed.Appx. 297, 301 (Fed. Cir. 2009); Merial Ltd. v. Cipla Ltd., 681 F.3d 1283, 1306 (Fed.Cir.2012); Trebro Mfg., Inc. v. Firefly Equipment, LLC, 748 F.3d 1159, 1170-1171 (Fed. Cir. 2014); OTR Wheel Engineering, Inc. v. West Worldwide Services, Inc., 602 Fed.Appx. 669, 672 (9th Cir. 2015); Life Alert Emergency Response, Inc. v. LifeWatch, Inc., 601 F.Appx 469, 474 (9th Cir. 2015). *See also* in the context of permanent injunctions in patent cases Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949, 1992 (2016).

¹⁶³ *E.g.*, Conair Corporation et al v. Le Angelique, Inc., DNEV, 2:14-cv-01149-RCJ-PAL, Memorandum of Law in Support of Conair’s Motion for Temporary Restraining Order, July 13, 2014, p. 12 (arguing that the irreparable harm consisted i.a. of “trespass on exclusive rights; competition leading to price erosion; tarnishing the market with poor quality product; and damage to Conair’s reputation as an innovator.”).

¹⁶⁴ OTR Wheel Engineering, inc. v. West Worldwide Services, Inc., 602 Fed.Appx. 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 Merchandising Systems, Inc. v. Crane Co., 357 Fed.Appx. 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.”).

¹⁶⁵ SATA GmbH & Co. KG v. Zhejiang Refine Wufu Air Tools Co., Ltd. et al, DNEV, 2:15-cv-02111-GMN-CWH.

¹⁶⁶ SATA GmbH & Co. KG v. Wenzhou T&E Industrial Co., Ltd. et al, DNEV, 2:13-cv-02042-APG-NJK.

allegations of irreparable harm.¹⁶⁷ Notwithstanding the near duplication, the motion for a TRO was granted in 2013 by Judge Andrew Gordon and denied in 2015 by Chief Judge Navarro; Chief Judge Navarro denied the motion for a TRO because of plaintiff's failure to show a likelihood of irreparable harm.

Chief Judge Navarro's 2015 *SATA* decision was influenced by *Herb Reed Enters., LLC v. Fla. Entm't Mgmt, Inc.*,¹⁶⁸ an opinion that a panel of the U.S. Court of Appeals for the Ninth Circuit issued only a month after Judge Gordon's 2013 *SATA* decision. In *Herb Reed* the Ninth Circuit held that *eBay*'s holding proscribing the presumption of irreparable harm in cases of patent infringements should extend to trademark infringement cases, including to the analysis for preliminary injunctions.¹⁶⁹

In *Herb Reed* the Ninth Circuit overruled a 2012 Nevada District Court decision¹⁷⁰ and criticized the district court's analysis of the likelihood of irreparable harm. The Ninth Circuit in *Herb Reed* noted that "[t]he district court's analysis of irreparable harm [was] cursory and conclusory, rather than being grounded in any evidence or showing offered" by the plaintiff,¹⁷¹ that "the [District C]ourt's pronouncements [were] grounded in platitudes rather than evidence,"¹⁷² and that "[t]he practical effect of the district court's conclusions, which included no factual findings, [was] to reinsert the now-rejected presumption of irreparable harm based solely on a strong case of trademark infringement."¹⁷³ Given the Ninth Circuit's conclusion in *Herb Reed*, it is not surprising that *SATA*'s 2013 and 2015 TRO motions were decided differently.¹⁷⁴

What has made TRO motions successful after *Herb Reed*¹⁷⁵ has been some evidence of a likelihood of irreparable harm, and although TRO motions since then have often remained brief in

¹⁶⁷ *Id.*, docket document 4, November 6, 2013, pp. 24–25; *SATA GmbH & Co. KG v. Zhejiang Refine Wufu Air Tools Co., Ltd. et al*, DNEV, 2:15-cv-02111-GMN-CWH, docket document 2, November 4, 2015, pp. 16-17. The only differences were references to the different declarations submitted in the two cases, a citation in the 2013 motion to a district court decision that was omitted from the 2015 motion, and a citation to the *eBay* decision that was added to the 2015 motion.

¹⁶⁸ *Herb Reed Enters., LLC v. Fla. Entm't Mgmt, Inc.*, 736 F.3d 1239 (9th Cir. 2013).

¹⁶⁹ *Id.* at 1249.

¹⁷⁰ *Herb Reed Enters., LLC v. Fla. Entm't Mgmt, Inc.*, D. Nev., Not reported in F.Supp.2d, 2012 WL 3020039, July 24, 2012.

¹⁷¹ *Herb Reed Enters., LLC v. Fla. Entm't Mgmt, Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013).

¹⁷² *Id.* at 1250.

¹⁷³ *Id.*

¹⁷⁴ In 2016 *SATA* filed two cases against companies infringing its rights at the AAPEX trade show in Las Vegas but in neither case filed for an ex parte TRO. *SATA GmbH & Co. KG v. NingBo Genin Industrial Co., Ltd.*, DNEV, 2:16-cv-02546-JAD-GWF; *SATA GmbH & Co. KG v. Taizhou Luxi Tools Co., Ltd*, DNEV, 2:16-cv-02544-JCM-CWH.

¹⁷⁵ *E.g.*, Chief Judge Navarro issued an injunction in the following three trade show-related cases post *Herb Reed*: *Hand & Nail Harmony, Inc. et al v. Guangzhou Cocome Cosmetics, Co. et al*, DNEV, 2:15-cv-01191-GMN-PAL; *NFC Ring, Inc. v. KERV Wearables LTD*, DNEV, 2:16-cv-02441-GMN-GWF; *Omix Ada, Inc. v. Changzhou Jiulong Auto Lamps Factory et al*, DNEV, 2:16-cv-02527-GMN-CWH.

their descriptions of a likelihood of irreparable harm, affidavits and/or declarations attached to the motions have provided some evidence of a likelihood. This evidence has included descriptions of complaints by confused distributors and third parties about the source of the infringing product,¹⁷⁶ information on prior infringing activities and enforcement at the same trade show in prior years,¹⁷⁷ communication from infringers to plaintiffs and other distributors,¹⁷⁸ a threat by a distributor not to renew a contract with plaintiffs because of IP right violations,¹⁷⁹ and/or references to prior behavior by other but similar defendants.¹⁸⁰

While documents in the successful TRO motions detailed some evidence of a likelihood of irreparable harm, the declarations attached to the 2015 *SATA* motion included no specific allegations that would show a likelihood of irreparable harm.¹⁸¹ Similarly, the declarations attached to the unsuccessful motion in *Evergreen Research and Marketing*¹⁸² fell short of a showing of likelihood; the unsupported statement by plaintiff's owner did not suffice when the owner said that the plaintiff "will lose approximately \$500,000 in gross revenue from the 2015 ASD trade show as a result of [the defendant's] attempting to sell products."¹⁸³

As the examples of evidence of a likelihood of irreparable harm suggest, such evidence will typically be unavailable for newly-discovered infringements, and it will usually be difficult if not impossible to collect and present such evidence for a TRO in the short time frame of a trade show. Nor will it be likely that a plaintiff will have time to collect evidence of irreparable harm to support a trade show-related TRO if the plaintiff discovers an infringement at a trade show; it will probably be only IP right owners who discover an infringement before a trade show who will have time to prepare a TRO motion for submission during the trade show.

However, a TRO should not typically be the proper measure to contest infringement at a trade show if a right owner was aware of an infringement before the show. The system should encourage

¹⁷⁶ *Hand & Nail Harmony, Inc. et al v. Guangzhou Cocome Cosmetics, Co. et al*, DNEV, 2:15-cv-01191-GMN-PAL, docket document 3, June 23, 2015, p. 23

¹⁷⁷ *Hand & Nail Harmony, Inc. et al v. Guangzhou Cocome Cosmetics, Co. et al*, DNEV, 2:15-cv-01191-GMN-PAL, docket document 3, June 23, 2015, p. 23

¹⁷⁸ *Hand & Nail Harmony, Inc. et al v. Guangzhou Cocome Cosmetics, Co. et al*, DNEV, 2:15-cv-01191-GMN-PAL, docket document 3, June 23, 2015, p. 23; *Aker BioMarine Antarctic, AS v. Luhua Biomarine (Shandong) Co., Ltd. et al*, DNEV, 2:16-cv-02314-MMD-PAL, docket document 4, Declaration by Erik S. Maurer, Exhibit S.

¹⁷⁹ *Hand & Nail Harmony, Inc. et al v. Guangzhou Cocome Cosmetics, Co. et al*, DNEV, 2:15-cv-01191-GMN-PAL, docket document 26, Affidavit of Steven R. Malynn, July 10, 2015.

¹⁸⁰ *Neptune Technologies & Bioresources, Inc. v. Luhua Biomarine (Shandong) Co., Ltd.*, DNEV, 2:15-cv-01911-GMN-CWH, docket document 5, Declaration by Jonathan W. Fountain. *See supra* note 55 and accompanying text.

¹⁸¹ The declarations were by a *SATA* attorney and a *SATA* patent engineer. *SATA GmbH & Co. KG v. Zhejiang Refine Wufu Air Tools Co., Ltd. et al*, DNEV, 2:15-cv-02111-GMN-CWH, attachments to docket document 2, November 4, 2015.

¹⁸² *Evergreen Research and Marketing, LLC v. Mystical Distributing Co. Ltd.*, DNEV, 2:15-cv-00318-JAD-PAL.

¹⁸³ *Id.*, docket document 6, Declaration of Robert Albert, February 25, 2015, p. 6.

right owners to avoid trade show emergencies and trade show-related TRO motions by taking steps to enforce their rights before trade shows begin; pre-existing infringements should be handled at the time the infringements occur.

Courts might view cases of pre-existing infringements more favorably when the cases involve foreign infringers; for a trade show in the United States, the show might be the only opportunity an IP right owner has to enforce its IP rights against foreign infringers, the show might be the only venue where an IP right owner's U.S. IP rights¹⁸⁴ are being infringed, and the show might be the only opportunity for the IP right owner to raise infringement claims in a U.S. court. In cases where U.S. IP rights have been infringed before a trade show and a foreign court could have adjudicated the pre-existing infringements, U.S. courts might not expect the IP right owner to pursue enforcement of the U.S. IP rights in foreign courts. The presence of the infringer at a trade show also makes it easier to serve the foreign infringer and collect evidence.¹⁸⁵ For these reasons, TROs for pre-existing infringements will more likely issue against foreign infringers than against U.S. infringers.

B. Expanding the Availability of Emergency Relief for Trade Shows

Given *eBay*'s emphasis on a showing of likelihood of irreparable harm, it appears that trade show-related TROs will be unavailable for many newly-discovered infringements at trade shows. Courts may be reluctant to issue trade show-related TROs for infringements that predate trade shows in cases where a plaintiff could have taken enforcement actions before a show, which should often be the case if a defendant has some presence in the United States. Therefore, trade show-related TROs will be available primarily in cases of pre-existing infringements by foreign defendants.

While the availability of trade show-related TROs against foreign defendants in cases of pre-existing infringements seems warranted when IP rights owners could not reasonably have proceeded against foreign infringers earlier, it seems unjustifiable not to offer trade show-related emergency relief for newly-discovered infringements.¹⁸⁶ Newly-discovered infringements can be equally damaging, and if they involve foreign infringers, they can result in the same kinds of

¹⁸⁴ "U.S. IP rights" refers here to IP rights that are protected under U.S. law, such as U.S.-granted patents, U.S.-registered trademarks, U.S. state-registered trademarks, and copyrights and trade secrets protected under the laws of the United States or the individual states.

¹⁸⁵ Dr. Gregor Bühler describes a similar experience in Switzerland, the Geneva Motor Show ("GMS"): "The GMS Geneva was also a good forum because taking action against ... infringer in other places was not feasible (defendants from China and Brazil)." Responses to questions posed by the author to Dr. Gregor Bühler of Homburger, July 2017, on file with the author.

¹⁸⁶ The assumption made here is that it is desirable to offer emergency relief in IP cases, which of course is an assumption that is open to a debate that is outside the scope of this article.

enforcement problems from which pre-existing infringements suffer before, and possibly also after, trade shows. Provided that an expansion of the availability of trade show-related TROs is indeed desirable, there are three ways to achieve an expansion.

First, courts could try to accommodate the need for trade show-related TROs for newly-discovered infringements by lowering the evidence bar for a showing of likelihood of irreparable harm. The Ninth Circuit in *Herb Reed* specifically warned against this approach, pointing out that relaxing the evidentiary requirement can de facto reintroduce a presumption of likelihood of irreparable harm.¹⁸⁷ But there might still be some room for courts to relax the evidentiary requirement in the trade show context and issue TROs for newly-discovered infringements; for example, instead of the eliminated presumption, courts could infer the likelihood of irreparable harm in certain circumstances. A case currently pending before the Ninth Circuit might help to clarify whether any such room exists, specifically in trademark cases.¹⁸⁸ If a special approach were adopted for trademark cases, it is possible that the special circumstances of infringements discovered at trade shows could also receive special consideration.

Another approach for facilitating TROs for newly-discovered infringements would be to reintroduce the presumption of irreparable harm specifically for TROs for trade shows.¹⁸⁹ A reintroduction would probably require legislative action given the U.S. Supreme Court's decisions in *eBay* and *Winter*,¹⁹⁰ in which the Court reiterated the standard for the likelihood of irreparable injury for preliminary injunctions.¹⁹¹ The new presumption could cover all trade show-related TROs: if an IP right is valid and was infringed at a trade show, a likelihood of irreparable harm would be presumed. Other requirements, including a tender of higher security, could be added to prevent abuses of trade show-related TROs.¹⁹² A proposal concerning the presumption would not be the first proposal for a legislative reintroduction of the presumption of irreparable harm; in May 2017, the Board of Directors of the International Trademark Association passed a resolution proposing that the Lanham Act should be amended to re-establish a rebuttable presumption of irreparable harm.¹⁹³

¹⁸⁷ *Herb Reed Enters., LLC v. Fla. Entm't Mgmt, Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013).

¹⁸⁸ *Adidas America Inc. et al. v. Skechers USA Inc.*, 149 F.Supp.3d 1222 (D.Or. 2016), appeal filed Mar. 17, 2016.

¹⁸⁹ For an example of a critique of post-*eBay* law as applied to permanent injunctions see Gergen, Golden & Smith, *supra* note 3; for an example of a critique of post-*eBay* law as applied to copyright cases see Liu, *supra* note 45, at 287.

¹⁹⁰ *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008).

¹⁹¹ *Id.* at 22.

¹⁹² A "protective letter," as it is known in some European jurisdictions, can also be introduced to mitigate the potential negative effects of trade show-related TROs. For a discussion of protective letters see Trimble, *supra* note 16.

¹⁹³ Amendment of the Lanham Act to Include a Rebuttable Presumption of Irreparable Harm, INTA Board

Finally, a solution—or rather a workaround—to the problem of the de facto limitation on trade show-related TROs would be to establish or utilize existing alternative dispute resolution (ADR) mechanisms to resolve IP disputes at trade shows and issue injunctive relief promptly at and for trade shows.¹⁹⁴ ADR mechanisms to handle IP disputes arising at trade shows already exist; these ADR mechanisms have been established by a number of trade show organizers in the world.¹⁹⁵ The Baselworld annual watch and jewelry trade show¹⁹⁶ in Basel, Switzerland, has the longest experience with its ADR mechanism, which it launched in 1985.¹⁹⁷ Other trade shows have created similar mechanisms; for example, the toy industry trade show Spielwarenmesse in Nürnberg, Germany, has also established an ADR mechanism for IP disputes.¹⁹⁸ In one of the most recent examples, the trade show organizer Palexpo Trade Fairs SA in Switzerland partnered with the World Intellectual Property Organization (WIPO) to create an ADR mechanism (the Fast Track Procedure)¹⁹⁹ for IP disputes at trade shows that draws on the expertise of the WIPO Arbitration and Mediation Center.²⁰⁰

The existing ADR mechanisms vary by the level of detail of their procedures, the level of formality of the mechanism, whether or not the mechanism is mandatory for trade show exhibitors, the types of IP rights that may be asserted through the mechanism, the remedies that IP right holders may obtain through the mechanism, and whether or not an appeal or another review

Resolution, May 20, 2017, available at <https://www.inta.org/Advocacy/Pages/Amendment%20of%20the%20Lanham%20Act%20to%20Include%20a%20Rebuttable%20Presumption%20of%20Irreparable%20Harm.aspx> (last visited Nov. 12, 2017). The proposal is not trade show-specific and does not refer to trade show-related TROs; it calls for a reintroduction of the presumption for all trademark cases based on the argument that “Lanham Act cases ... are unique in the harms that they seek to prevent and remedy.” *Id.*

¹⁹⁴ “ADR” is used here 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 (6th ed. Oxford Univ. Press, 2015), p. 40.

¹⁹⁵ For an analysis of ADR mechanisms that were created to resolve IP disputes at trade shows and for references to other related literature see Trimble, *supra* note 14.

¹⁹⁶ See 2017 General Regulations, Supplementary Regulations for Exhibitors, Baselworld, 2017, on file with the author, Preamble. Baselworld is operated by MCH Group. In 2016, Baselworld attracted 1,500 exhibitors and 145,000 visitors. Annual Report 2016, MCH Group, <https://www.mch-group.com/-/media/mch-group/Documents/Reports/2016/mch-group-annual-report-2016-en.pdf> (last visited July 2, 2017), p. 22.

¹⁹⁷ Thomas Legler, *WIPO Fast-Track Intellectual Property Dispute Resolution Procedure for Palexpo Trade Fairs*, WIPO, Advisory Committee on Enforcement, WIPO/ACE/10/6, August 5, 2015, p. 2.

¹⁹⁸ IPR Council – for the Protection of Intellectual Property Rights, Spielwarenmesse Nuremberg, 1–6 February 2017, available at https://www.spielwarenmesse.de/fileadmin/data_archive/Relaunch_Spielwarenmesse/pdf/2017_IPR_Infoblatt_GB.pdf (last visited July 9, 2017).

¹⁹⁹ Palexpo Trade Fairs—Fast-Track Intellectual Property Dispute Resolution Procedure, WIPO, <http://www.wipo.int/amc/en/center/specific-sectors/tradefairs/rules/index.html> (last visited July 19, 2017). The ADR mechanism was first launched at the International Motor Show in Geneva in 2015. Legler, *supra* note 197, pp. 2 and 3.

²⁰⁰ WIPO Arbitration and Mediation Center, WIPO, <http://www.wipo.int/amc/en/center/background.html> (last visited July 31, 2017).

procedure is available in the mechanism (in addition to court proceedings).²⁰¹ Some trade show organizers have similar but less sophisticated mechanisms to address IP infringements at trade shows; these other mechanisms often seem to be formalized means of preventing potential claims of secondary liability.²⁰²

Whether ADR mechanisms are the best solution for resolving IP disputes at trade shows deserves its own discussion; a companion article that is also based on the research for the present article discusses different ADR mechanisms and their positives and negatives in detail.²⁰³ Leaving aside the possible negative aspects of the mechanisms for purposes of the present discussion, the positive features of the mechanisms speak in favor of their use: being established by and for specific trade shows, ADR mechanisms can offer the advantage of subject matter expertise and in-depth knowledge of one particular sector of industry that enables the ADR panelists to make informed decisions. Another advantage of the existing ADR mechanisms is that they are designed to eliminate the need for the issuance of ex parte measures and to facilitate fair hearings of all parties to the extent possible—goals with which courts agree²⁰⁴ but are not always in a position to achieve. Importantly for the present discussion, the ADR mechanisms need not require that ADR panels follow the four-factor test when issuing injunctive relief.²⁰⁵ ADR mechanisms can therefore address the problems inherent in TROs by (1) bypassing the post-*eBay* difficulty of a showing of likelihood of irreparable harm,²⁰⁶ and (2) possibly eliminating the need for TROs in a number of cases in which the mechanisms can facilitate a hearing of all parties.

²⁰¹ For a detailed analysis of these ADR mechanisms see Trimble, *supra* note 14.

²⁰² AAPEX Intellectual Property Statement, AAPEX, 2017, available at <http://www.aapexshow.com/2017//custom/images/docs/Exhibitor%20Guide/2017/Intellectual%20Property%20Rights%20-%20English.pdf> (last visited July 14, 2017); IP Issues and Procedures, Reed Exhibitions, available at https://www.bookexpoamerica.com/RNA/RNA_BookExpo_V2/2017/_docs/exhibitor-manual/BOOKEXP017-Ops-ExMan-RX-Show%20Info-IPIssuesProcedures.pdf?v=636228476254331257 (last visited July 9, 2017).

²⁰³ See *supra* note 14 and accompanying text.

²⁰⁴ E.g., courts in Braunschweig and Munich, Germany, have adopted measures to accommodate IP disputes arising at trade shows. Responses from Judge Jochen Meyer, Landgericht Braunschweig, 9. Zivilkammer, July 24, 2017, to questions posed by the author; Responses from Judge Anne-Kristin Fricke, Landgericht München I, July, 2017, to questions posed by the author. See also the Fast Track Protocol that the Commercial Courts of Barcelona have adopted for trade shows taking place in Barcelona, Spain. Activación del Protocolo de Actuación Rápida de los Juzgados Mercantiles de Barcelona para el Salón Alimentaria 2016, available at <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunales-Superiores-de-Justicia/TSJ-Cataluna/Sala-de-prensa/Notas-de-prensa/Los-juzgados-mercantiles-de-Barcelona-activan-el-protocolo-para-el-Salon-Alimentaria> (last visited July 2, 2017); Protocolo de Servicio de Guardia y de Actuación Rápida de los Juzgados Mercantiles de Barcelona para el *Mobile World Congress 2017*, available at <http://www.icab.es/files/242-497743-DOCUMENTO/PROTOCOLO-MWC-2017.pdf> (last visited July 17, 2017).

²⁰⁵ Note that the International Trade Commission decides cases under Section 337 without using the four-factor test for injunctive relief. See *Spansion, Inc. v. International Trade Com'n*, 629 F.3d 1331 (Fed. Cir. 2010); 19 U.S.C. §1337(d)(1).

²⁰⁶ For a criticism of changes to substantive law through arbitration see J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 2994, 3076–83 (2015).

CONCLUSION

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 attempt to stop infringing activities immediately. Yet not all IP infringement allegations lend themselves to rapid decision making; in some cases determining infringement is straightforward, such as in piracy cases and many counterfeiting cases, but in other cases it is difficult to decide quickly whether an IP right is being, has been, or is likely to be infringed. Erroneous decisions are not without consequences, since exhibitors have but a short time at trade shows to present their products and services, and may receive extensive negative exposure from an enforcement action on the trade show floor.

The challenges of rapid decision making will ultimately shape—and appropriately so—the availability of temporary relief in IP cases at trade shows; however, recent developments, which have made TROs more difficult to obtain in trade show-related IP cases, might have tilted the scale unfairly to the detriment of IP right owners. The limitations of post-*eBay* law have effectively made it impossible for IP right owners to obtain trade show-related TROs for newly-discovered infringements—infringements that IP right owners learn of immediately before a trade show or during a show on the trade show floor. In some cases of newly-discovered infringements, however, there may be good reasons for IP right owners to be able to obtain emergency relief. The current law is ripe for a reevaluation that takes into account the specificities of IP rights enforcement at trade shows.