

Study Question – 2025 – Explanatory Note

Preliminary Injunctions: Requirements for compensating damage suffered by the defendant

Preliminary injunctions are, as the name suggests, preliminary – provisional – by nature: the continuance of an injunction is conditional on the outcome of the main matter. If it is later found that no infringement has taken place, the defendant may have incurred damage that would not have occurred but for the preliminary injunction.

Courts across the world have adopted widely varying approaches when granting preliminary injunctions to protect the defendant from financial perspective of the permanence of such damage. Current approaches include among others: (a) granting a security, such as requiring the applicant to post a bond; (b) requiring the applicant to provide a cross-undertaking in damages; and (c) not requiring any financial security.

AIPPI has studied the criteria for the grant of preliminary injunctions in cases of infringement of intellectual property rights (Q219 - ExCo Hyderabad 2011). It was resolved that the Courts should be empowered to impose, as a condition of granting a preliminary injunction, that the claimant provide a bond, security, or undertaking to compensate a defendant who has suffered loss by a grant of preliminary injunction which is not upheld on the merits. However, the current resolution by AIPPI does not address the detailed requirements for providing such guarantees nor for compensating such damage.

A number of recent decisions in the UPC have also recently been issued, which illustrate the UPC's developing approach in relation to compensating for the negative effects of preliminary injunctions.

Accordingly, this Study Question will focus on exploring the detailed requirements for providing such guarantees and in particular the requirements for the actual compensation of the damage. In particular this Study Question will study the different needs of the applicants and the defendants and the appropriate balancing between them. One aspect to be studied is also the compensation of the legal costs incurred by the parties in the context of a preliminary injunction when the final judgment declares non-infringement.