

1. It is important that intellectual property rights are respected and that this is supported by national courts where necessary
2. It is recognised that issues such as validity and infringement of rights may be disputed and, in some cases, national courts may ultimately determine that a right is not valid and/or not infringed
3. It is also recognised that the assertion of rights which are ultimately found not to be valid and/or infringement may damage third parties including:
  - a. Where threats are made against distributors or retailers, if those parties decide to stop distribution or retailing of their own volition until final resolution of the case; or
  - b. Where preliminary or interim injunctions are granted by the courts until final resolution of the case.
4. National courts currently adopt a broad range of measures to remedy such damage in certain cases, both legal measures (such as unfair competition law, competition law or specific tortious/delictual liability such as wrongful disparagement of competitors or “unjustified threats”) and practical measures (such as requiring bonds, security or cross-undertakings to the court)
5. Such measures are often not limited to intellectual property rights but affect other litigation in national courts and so would be difficult to harmonise.
6. Therefore the LIDC proposes that
  - a. As part of a balanced and well-functioning intellectual property system, national courts should have the discretion to require the asserted right holder to pay damages to the third parties in such cases.
  - b. Factors which could be considered as part of that discretion include the need to allow enforcement of intellectual property rights, bad faith, abusive behaviour, national thresholds for the grant of preliminary or interim injunctions and the actual level of damage caused.
  - c. Education and training: Ensure that relevant regulators and judges have received training in IP law, or have been selected from practitioners who are already expert in this subject