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THE INJUNCTION BOND IN HIGH TECHNOLOGY LITIGATION: THE NEED FOR REFORM

Paul David Marotta*

I. INTRODUCTION

Due to advances in technology, temporary restraining orders and preliminary injunctions have gained the status of a judgment after trial. Rapidly advancing technology frequently results in relatively short periods available for commercial exploitation. It is true that systems comparable with the original IBM personal computer introduced six years ago remain available today.\(^1\) However, it is more frequently true that many high technology products and companies come and go in short order.\(^2\)

Small delays in marketing or selling a product are potentially devastating to the high technology company, and the issuance of an injunction can be fatal. Similarly, when a company is unable to obtain an injunction, aggressive marketing by a competitor can destroy the market for the product in question, even when the competitor's product is infringing.\(^3\) As the available period for commercial exploitation of a product decreases, the value of each unit of time required for exploitation of a product increases.\(^4\)

The cost of improperly granting or wrongfully denying an in-

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\(^1\) The IBM personal computer was first introduced in 1980. It contained 16,000 bytes of random access memory and used an Intel 8088 microprocessor.

\(^2\) Such as the meteoric rise and fall of Osborn Computer Company and Morrow Designs, and the rise, fall, and rebirth of Atari.

\(^3\) One limitation in writing a paper with a subject of temporary restraining orders and preliminary injunctions is that usually the former, and often the latter, are not subject to appeal or the subject of an appeal or writ and therefore are not the subject of an appellate opinion.

\(^4\) Obviously, if a product can command a market of $100,000 due to a unique technology of limited duration, the market should be exploited within the relevant time limitation. As exploitation is delayed, the value of that exploitation disappears altogether due to specific technology rather than merely suffering decrease due to the time value of money. Therefore, during five months, the market may be worth $20,000 per month, while over 10 months, the market would only be worth $50,000 due to sales of $10,000 per month for five months and no sales in the last five months because of the introduction of superior technology.
junction increases due to the high stakes frequently involved in high technology injunctions. The injunction bond in particular deserves scrutiny as it is frequently the sole remedy for a wrongfully enjoined party.

Injunction bonds were historically seen as useful and necessary in order to protect an enjoined defendant. Nonetheless, the procedure and basis for the setting of an injunction bond becomes of primary importance when that bond does not merely maintain the status quo of litigation, but hinders or allows advancement of a new technology.

There is an argument that if a new technology is merely an infringement of a patent, copyright, or misappropriation of trade secrets of another company, commercial exploitation of the infringing technology should be stopped. This is clearly the case when a trial has been held and a permanent injunction has been granted. Absent appeal, a bond is not required for a permanent injunction. However, current law frequently provides a haphazard stan-

5. As mentioned previously, when time is of the essence, an injunction possibly takes on greater significance than the discount rate alone. The reason for this increased significance in cases involving advancing technology is the increased potential for obsolescence over time.


7. FED. R. Civ. P. 65(c) provides in part that a bond is to be "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."


9. Unfortunately, the "status quo" in a case involving high technology is that of constant technological change, not stagnation. The test itself of whether an injunction maintains the status quo should be subjected to scrutiny. In a rapidly changing industry, a product could be under development one week and marketed commercially the next. The date on which an injunction is sought could therefore be either fortuitous or devastating to the subject of the injunction. If sales are ongoing, that would be the status quo, but if sales had not yet begun, that would be the status quo.

10. Plumbers Local No. 519 v. Construction Industries Stab. Comm., 350 F. Supp. 6, 9 (S.D. Fla. 1972) (where the purpose of an injunction is not to maintain the status quo it must appear that injury is imminent).

11. Likelihood of success on the merits is one element considered by a court in weighing the propriety of a preliminary injunction. See Beer Mart, Inc. v. Stroh Brewery Co., 633 F. Supp. 1089, 1104 (N.D. Ind. 1986). When a permanent injunction is granted, of course, success on the merits is assured, absent appeal. Permanent injunctions are typically only granted after full trial on the merits. See Shanks v. City of Dallas, 752 F.2d 1092, 1096-97 (5th Cir. 1985).

12. Both preliminary and permanent injunctions are appealable. 28 U.S.C. § 1292(a)(1); Overton v. City of Austin, 748 F.2d 941 (5th Cir. 1984).

dard for the setting of an injunction bond.\textsuperscript{14}

Even when there is a strong case for an injunction,\textsuperscript{15} a company winning an injunction is frequently unable to obtain sufficient collateral to post the bond. Due to the practical requirement of full collateralization of an injunction bond,\textsuperscript{16} a company winning an injunction is frequently unable to find a surety or post sufficient collateral.\textsuperscript{17} Thus, the infringing technology is allowed to continue. However, the argument exists that if the bond requirement is high, it is due to a judicial finding that the potential damage to the enjoined party is great. Sometimes, the plaintiff involved does not choose to proceed to trial because the window of opportunity for the market concerned has closed, and the infringing product has done sufficient damage to the market so as to make an injunction an inadequate remedy.\textsuperscript{18}

This article will first explore the standards and practical application of several state and federal laws regarding the necessity and amount of injunction bonds. Following this examination of current law, the article will make suggestions for improvement on the standards with particular emphasis on high technology and intellectual property litigation. The purpose of this article is to open the debate.

II. INJUNCTIONS AND TEMPORARY RESTRAINING ORDERS

The Federal Rules of Civil Procedure (F.R.C.P.) provide for...
both temporary restraining orders\textsuperscript{19} and preliminary injunctions.\textsuperscript{20} Temporary restraining orders may be granted without notice to the enjoined party, if it appears that immediate and irreparable injury will result before the adverse party can be heard, and the applicant's attorney certifies to the court what steps were made to give notice.\textsuperscript{21} Temporary restraining orders cannot exceed ten days, and the enjoined party may move for dissolution or modification of the injunction on two days notice.\textsuperscript{22}

In contrast, preliminary injunctions cannot be issued without notice, and may be consolidated with a trial on the merits.\textsuperscript{23} Both preliminary injunctions and temporary restraining orders cannot be issued unless the applicant relinquishes security to the court.\textsuperscript{24} The security can be a sum which the court deems proper. This may include the payment of costs and damages incurred or suffered by a wrongfully enjoined party.\textsuperscript{25}

Although F.R.C.P. 65(a) and F.R.C.P. 65(b) make sharp distinctions between restraining orders and injunctions, the substance of the proceeding and the amount of notice given are more important than the proceeding's characterization.\textsuperscript{26}

III. INJUNCTION BOND LAW

Injunction applicants have shown atypical creativity in avoiding the bond requirement. One plaintiff stated in a draft injunction that the bond was excused for "good cause shown," although no cause was specified,\textsuperscript{27} while another plaintiff attempted to act as its own surety.\textsuperscript{28}

Injunctions are designed as provisional remedies,\textsuperscript{29} and are primarily used to preserve the status quo of litigation pending trial.\textsuperscript{30} They do not involve an adjudication of the ultimate rights of the parties.\textsuperscript{31} Rather, injunctions are designed to prevent future

\begin{thebibliography}{99}
\bibitem{19} F.R. Civ. P. 65(b).
\bibitem{20} F.R. Civ. P. 65(a).
\bibitem{21} F.R. Civ. P. 65(b).
\bibitem{22} Id.
\bibitem{23} F.R. Civ. P. 65(a).
\bibitem{24} F.R. Civ. P. 65(c).
\bibitem{25} Id.
\bibitem{26} Thomason v. Cooper, 254 F.2d 808, 810 (8th Cir. 1958).
\bibitem{28} Jensvold v. Peterson, 108 N.W.2d 363, 365 (Iowa 1961).
\bibitem{29} 1 Knapp, Commercial Damages, §§ 14.01-14.02 (1986).
\bibitem{30} Collum v. Edwards, 578 F.2d 110, 113 (5th Cir. 1978); American Hosp. Assoc. v. Harris, 625 F.2d 1328 (7th Cir. 1980).
\end{thebibliography}
wrongs, not punish past acts.\textsuperscript{32}

Injunctions are typically statutory animals,\textsuperscript{33} although judicial interpretation of injunction statutes has not been consistently strict in following the relevant statutes.\textsuperscript{34} Consequently, statutes are the place to start when examining injunction provisions, and are likely to be the focal point when suggesting reforms.\textsuperscript{35}

\textbf{A. The Federal Statutory Regime}

Federal Rules of Civil Procedure Rule 65(c) provides that an injunction shall not issue, "except upon the giving of security by the applicant, in such sum as the court deems proper."\textsuperscript{36} Rule 65(c) is substantially the same as former 28 U.S.C. § 302.\textsuperscript{37} F.R.C.P. 65.1 provides that a surety on an injunction bond submits himself or herself to the jurisdiction of the court for any issue affecting the surety's liability on the bond.\textsuperscript{38}

Some federal statutes specifically allow injunction without bond,\textsuperscript{39} and others are silent as to whether or not a bond or undertaking is required.\textsuperscript{40} Of course, a great portion of high technology litigation involves questions of patent and copyright infringement, federal unfair competition, or trademark infringement. The provi-

\begin{footnotesize}
\begin{enumerate}
\item 33. The author was unable to find any jurisdiction of the United States which did not have a statute dealing with injunctions generally. Many jurisdictions have injunction provisions dealing with special situations such as family law or trade secrets as well. The most consistent special application injunction provisions concerned agricultural products, and such provisions typically waive the bond requirement.
\item 34. See, e.g., Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780 (10th Cir. 1964) (holding that bond not required in absence of proof of likelihood of injury); cf. Pioebe Mines Counsel. Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), cert. denied, 380 U.S. 956 (1965).
\item 35. See supra note 33.
\item 36. FED. R. Civ. P. 65(c) provides in full that \"[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. The provisions of FED. R. Civ. P. 65.1 apply to a surety upon a bond or undertaking under this rule.\" 37. 28 U.S.C. § 381 (1940) was repealed by the JUDICIAL CODE REVISION ACT of 1948. H.R. No. 308; H.R. 3214, 80th Cong., 1st Sess. (1947).
\item 38. FED. R. Civ. P. 65.1 provides in relevant part that \"[w]henever these rules require or permit the giving of security by a party . . . each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served.\" 39. See, e.g., 15 U.S.C. § 77(b), which expressly allows injunction without bond for violation of federal securities laws.
\item 40. See, e.g., 15 U.S.C. § 1116(a) which provides in part that \"[t]he several courts . . . shall have power to grant injunctions according to the principles of equity and upon such terms as the court may deem reasonable.\"
\end{enumerate}
\end{footnotesize}
sions for injunctive relief under the Copyright Act contain similar language to the provision for injunctive relief contained in the Lanham Act.

Generally, the provisions of § 502 of the Copyright Act and § 1116(a) of the Lanham Act state that an injunction may be granted, "on such terms as [the court] may deem reasonable." The "may deem reasonable" standard has not provided great direction to the federal courts and has been interpreted to both require, and to not require, an injunction bond.

The court is given similar discretion in patent infringement cases. One difference in patent infringement cases is that bonds will sometimes be required from defendants as an alternative to an injunction. Nonetheless, where there is a question as to a plaintiff's claims, a bond will be required to make a wrongfully enjoined defendant whole. In any case, great discretion is allowed.

In general, federal statutes provide little direction in assessing the need for, or amount of, an injunction bond. The direction that is provided frequently amounts to nothing more than carte blanche judicial discretion. Interpretation of these provisions frequently results in the lack of a usable standard for the practitioner.

Even F.R.C.P. Rule 65(c), the general federal injunction bond provision, is unclear. F.R.C.P. Rule 65(c) appears to set the standard that the injunction bond shall equal "such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."
been wrongfully enjoined or restrained.” However, in the same breath, F.R.C.P. Rule 65(c) provides that the amount of the injunction is in the court’s discretion.49 When read together, the provisions seem to do away with an objective standard, and gives the court sole discretion to set the bond at whatever amount the court deems proper.

Despite the apparent mandatory nature of the provision, courts have held that it may properly be in the discretion of the court not to require bond.50 The comma after the word “proper” could conceivably be removed from F.R.C.P. Rule 65(c) without practical change, since the limiting phrase, following the comma, has been all but ignored by some federal courts when discussing the propriety or size of injunction bonds.

B. State Statutory Regimes

State statutes frequently mirror federal law,51 although many state courts seem to read their respective injunction bond guidelines much more strictly than federal courts.

1. California

California provides a bit more guidance to courts faced with injunction bond issues. In California, the undertaking must be ordered
to the effect that the applicant will pay to the party enjoined, such damages, not exceeding an amount to be specified, as the party may sustain by reason of the injunction, if the court finally decides the applicant was not entitled to the injunction.”

Therefore, California does not allow the court open discretion in setting the amount of an injunction undertaking. Contrary to other states’ statutes, the California statute does not provide that the undertaking should be of an amount which “the court deems proper.”52

In fact, in 1982, California passed a general bond and undertaking law.53 Although the statutory scheme does not give significant

49. FED. R. CIV. P. 65(c) provides that the bond shall be, “in such sum as the court deems proper.”
51. In fact, several states such as Massachusetts and Texas seem to have adopted the federal provisions.
52. CAL. CODE CIV. PROC. § 529(a).
53. Id.; cf. FED. R. CIV. P. 65(c).
54. CAL. CODE CIV. PROC. §§ 995.010 - 996.510.
direction to a court in originally placing a bond, the law does pro-
vide a procedure with which to deal with insufficient and excessive
bonds. The beneficiary of a given bond may object to the bond on
the grounds that the sureties are insufficient, the amount of the
bond is insufficient, or the bond, "from any other cause," is
insufficient.

The court generally requires an objection to be made by no-
noticed motion specifying the precise grounds for the objection. The
objection must be made within ten days after service of copy of the
bond on the beneficiary. If the grounds for the objection include a
claim that the bond is insufficient, the motion must state the reason
for the insufficiency. If the motion is not brought within the re-
quired time, any objections are deemed waived unless good cause or
changed circumstances may be shown.

If, after a hearing, a court determines that a bond is insuffi-
cient, the court must specify in what respect the bond is insufficient
and order that a bond with sufficient sureties and in a sufficient
amount be given within five days. A bond in effect at a hearing at
which the bond is determined insufficient remains in effect until
either sufficient sureties are provided or the time in which to give
sufficient sureties expires.

A motion claiming that a bond is insufficient must be sup-
ported by affidavit, and is heard in the same manner as an objec-
tion to the bond. California also provides for a motion for
determination that the amount of the bond is excessive and an order
that the amount be reduced to "an amount that in the discretion of
the court or officer appears proper under the circumstances." After
a motion is made that the bond is excessive, the amount of the
bond is left to the discretion of the court.

This is obviously a change from the standard to be used in origi-
ally setting the bond. The procedure for reducing the amount of
a bond is specifically made subject to limitations in the statute

55. CAL. CODE CIV. PROC. §§ 995.920 - 996.010.
56. CAL. CODE CIV. PROC. § 995.920.
58. Id. § 995.930(a).
59. Id. § 995.930(c).
60. CAL. CODE CIV. PROC. § 995.960(b) (Deering Supp. 1987).
61. Id. § 995.960(b)(2).
63. Id. § 996.010(b).
64. CAL. CODE CIV. PROC. § 996.030(a) (Deering Supp. 1987).
65. Id.
under which a bond is ordered. 66 This is in recognition that the standards for setting the amount of the bond vary as to the Civil Procedure Code section under which the bond is originally required. 67

Supporting affidavits are required 68 and the procedure is the same as that for determination that a bond is insufficient. 69 If the bond is found to be excessive, the principal may give a new bond for the reduced amount. The same sureties may be involved as with the original bond, and no time limit is given for reduction of the bond. 70 Presumably, the party applying for reduction of an excessive bond should obtain reduction in the amount of the bond as soon as possible.

The California provisions regarding the amount of sureties are unclear as to whether motions may be made for reducing the amount of an excessive bond prior to establishment of the liability of a surety on the amount originally ordered by the court. The provisions seem to indicate that a bond must be in effect prior to a motion for reduction in the amount of an excessive bond. Thus, the provision provides little help to the injunction applicant who is unable to meet the amount of a bond required by the court. The applicant may then be limited to a motion for rehearing, and must attempt to present new evidence showing why the amount of the injunction bond originally ordered was excessive.

Although the California procedure for modification of injunction bonds provides some cursory relief to a plaintiff claiming a bond is excessive, or a defendant claiming a bond is insufficient, the standard for originally setting a bond gives no more instruction to the bench than F.R.C.P. 65(c).

2. Georgia

The Georgia statute provides that security is, “a prerequisite to the issuance of a restraining order or an interlocutory injunction,” but only if the court so requires and only in such sum as the court deems proper. 71 Despite the “prerequisite,” a bond is not required

66. See supra note 63.
67. CAL. CODE CIV. PROC. § 995.020(a). Since § 995.020(a) states that the Bond or Undertaking Law applies to any undertaking posted pursuant to any California statute, and since the statutes requiring or allowing bonds are legion and diverse, the Bond and Undertaking Law could not regulate the original basis for the bond.
68. CAL. CODE CIV. PROC. § 996.030(b) (Deering Supp. 1987).
69. Id.
70. CAL. CODE CIV. PROC. § 996.030(c) (Deering Supp. 1987).
71. GEORGIA CIVIL PROCEDURE ACT § 81A-165(c) provides that, “as a prerequisite to
by this statute prior to issuance of an injunction. Nonetheless, the Georgia Civil Practice Act does expressly allow advancement and consolidation of a trial on the merits with the injunction hearing.\textsuperscript{72}

Georgia provides separately for enjoining a trademark infringement.\textsuperscript{73} Possibly due to a heightened sense of potential damage by such infringement, the legislature omitted the “prerequisite” language, using a lesser standard “as may be [considered] by the court just and reasonable.”\textsuperscript{74} Additionally, the state seems to have dispensed with the injunction bond rule, at least in cases for wrongful seizure of allegedly counterfeit goods.\textsuperscript{75}

3. Illinois

Illinois employs the broad judicial discretion standard,\textsuperscript{76} thus, issuance of an injunction without a bond is discretionary.\textsuperscript{77} One Illinois case put it succinctly when it stated that injunctions were extraordinary remedies, and were even more extra-ordinary when granted without bond.\textsuperscript{78}

Nonetheless, Illinois allows a motion to dissolve injunctions at any time\textsuperscript{79} and does add something to the debate, requiring that when an injunction is dissolved, the court must, after application by the enjoined party, enter judgment in favor of the enjoined party if that party suffered damages.\textsuperscript{80} However, Illinois case law has softened this remedy by requiring a prior adjudication of “wrongful” entry of the injunction before recovery.\textsuperscript{81} The fact that the earlier enjoined party has now prevailed does not seem to be satisfactory.

\begin{itemize}
\item the issuance of a restraining order and an interlocutory injunction, the court may require the giving of security by the applicant, in such sums as the court deems proper for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been enjoined or restrained wrongfully."
\item GEORGIA CIVIL PRACTICE ACT, § 81A-165(a).
\item GA. CODE ANN., § 106-112(e) allows injunctions to restrain the manufacture, use, display, or sale of any counterfeits or imitations of a trademark or service mark.
\item \textit{Id.}
\item GA. CODE ANN. § 106-112(e).
\item ILL. REV. STAT., § 11-103. “The court in its discretion, may... require the applicant to give bond in such sum, upon such condition and with such security as may be deemed proper by the court.”
\item ILL. REV. STAT., § 11-108.
\item ILL. REV. STAT., § 11-110. The statute further provides that a failure to assess damages as required will not act to bar an action on the bond.
\end{itemize}
4. Louisiana

The Code Law of the state of Louisiana has one of the strongest bond requirements. It provides that an injunction "shall not issue unless the applicant furnishes security in the amount fixed by the court, except where security is dispensed with by the law." The bond requirement is mandatory, though the amount of the required bond is discretionary.

5. Massachusetts

In Massachusetts, a state with a substantial high technology industry, a restraining order or injunction cannot issue except upon the giving of an undertaking, "in such sum as the court deems proper." This is essentially the standard of the Federal Rules.

6. New York

New York is as strict as Louisiana, requiring that "prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court." Security is always required for a preliminary injunction, although it is discretionary in the case of a temporary restraining order. Of course, as the length of pendency of an improper injunction decreases, so too does the potential for harm and therefore the necessity for certainty of result. New York then contributes the idea that the bonding requirement should be more strictly enforced for preliminary injunctions than for temporary restraining orders.

7. Ohio

Ohio has a novel approach to the bond requirement, providing that, even if an injunction is granted, "[n]o temporary restraining order or preliminary injunction is operative until the party ob-

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82. Louisiana arguably bases its law on "Roman Law" or the Justinian Codes, rather than on case law.
83. LA. CODE CIV. PROC., article 3610 (West 1981, 1987).
taining it gives a bond . . . in an amount fixed by the court."

Though some cases have been true to the language of the statute, which states that a person cannot be held in contempt for violation of either a temporary restraining order or a preliminary injunction unless such restraining order or injunction has been made operative by the posting of a bond, others have not.

8. Oregon

Oregon provides that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such amount as the court deems proper." Oregon approaches the strict requirement of New York or Louisiana in making the bond requirement mandatory, while allowing discretion in the amount. In fact, Oregon appears to be a more conservative jurisdiction than New York since the bond requirement is mandatory for temporary restraining orders as well as preliminary injunctions.

9. Texas

In Texas, an injunction without the requirement of a bond, or posting of a bond is void ab initio. Cases suggest that if a bond is not required, a plaintiff may be able to save an injunction by voluntarily posting a bond. It seems that, regardless of the amount of the bond, if some bond is required the injunction will survive.

The Texas injunction bond statute provides that the court shall fix the amount of the security to be given by the injunction applicant. The rule further provides that the applicant will abide by the decision in the case, and will "pay all sums of money and costs that may be adjudged against him if the restraining order or temporary

89. OHIO RULES OF CIVIL PROCEDURE 65(c).
92. OREGON RULES OF CIVIL PROCEDURE, 82A(1)(a).
94. Jernigan and Boren, supra note 93, both suggest that failure by the court to require a bond, or failure by an applicant to post a bond results in the injunction being void. Nonetheless, the courts most likely meant that a bond had to be posted once required by the court, and did not mean to imply that a plaintiff could voluntarily post a bond, though none had been required. This could, of course, place the applicant in the unusual position of suggesting that a bond be required when a defendant makes such a request.
95. See generally Speedman Oil Co. v. Duval County Ranch Co., Inc., 504 S.W.2d 923 (1973).
injunction shall be dissolved in whole or in part.”

Although the standard provided by statute seems to imply full discretion, the applicant need be ready to pay only the amount which would be proper if the restraining order were improperly granted. Although this implies a similar two part standard as that contained in the Federal Rules, the standard under which the court labors grants significant discretion, thus amounting to little or no standard at all.

If the function of a bond “is to protect a defendant if it is subsequently determined that a t.r.o. was improvidently issued to the defendant’s detriment,” then the standard used to set a bond undertaking should consider the possible detriment suffered by the defendant.

III. Judicial Treatment of the Injunction Bond Issue

A. Injunction Without Bond

One proper reason to grant an injunction without the requirement of a bond is that the court granting the injunction is not limited to the general equitable powers of a federal court. For example, a bankruptcy court may exercise power expressly confided in it by the Bankruptcy Act. A federal court may examine the purposes behind the bond requirement, and therefore need not follow a strict interpretation of the statute or defer to the wisdom of Congress.

In fact, despite the apparently mandatory language of most injunction bond requirements, a court may dispense with such security where there has been no proof of a likelihood of harm to the party enjoined. Injunction bonds will also not be required when

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98. Tex. R. Civ. P. 684 (Vernon Supp. 1987) provides only that “the court shall fix the amount.” This seems to be even less instruction to a court than the Federal standard (“as the court deems proper”) or the California standard (an amount equal to “such damage . . . as the party may sustain by reason of the injunction”). The Federal standard invokes “propriety” and the California standard actually sets an “objective” basis for the amount of the undertaking; both of which are more instructive to the court than the Texas standard.
a preliminary injunction is issued to preserve a trial court's jurisdiction over the subject matter of an action, or where a preliminary injunction is issued to protect and enforce the orders of a court.

Other circumstances in which a bond is not required are legion. Where the bond requirement stifles and strips a plaintiff's right to judicial review, plaintiff need not post security. Where the defendant does not request a bond, no bond will be required. Even after requesting a bond, the defendant still needs to prove a likelihood of harm or a bond will not be required. A bond will not be necessary when a court is issuing an injunction to protect and enforce its orders or preserve subject matter jurisdiction. Finally, injunctions may be issued without bond when plaintiff is unable financially to post a bond.

One common circumstance in which injunctions have been granted without bond is where the applicant for the injunction is indigent. In some indigency cases, a court will find no bond requirement exists by rationalizing that there will be no harm to the enjoined party.

Some courts still strictly interpret the bond requirement in spite of the apparent penchant for liberality toward statutory provisions. The Seventh Circuit, for example, has expressed a strong desire for the requirement of a bond. This could be due to the presence of the "law and economics" school in the Seventh Circuit. Still, the haphazard application of rules regarding the grant of an injunction without a bond is some argument, by itself, for reform.

B. Guidelines for Setting the Amount of Bond

The amount required for a given bond can be more troubling than whether or not a bond will be required. If there is little or insufficient evidence concerning the proper amount of security, it is

103. See infra note 101.
104. Id.
106. U.S. v. Onan, 190 F.2d 1, 7 (8th Cir. 1951), cert. denied, 342 U.S. 869 (1951).
improper for a court to arbitrarily set some figure. This is true even though a court must still discharge its duty under injunction bond statute requirements.\(^{113}\)

Some courts will require a bond even when a defendant has shown that only negligible harm may result.\(^{114}\) Others will waive the requirement as not providing meaningful relief.\(^{115}\)

C. *Modifying Injunctive Relief*

While California has provided a statutory means for modifying a bond, other courts accomplish the same ends judicially. Federal District Courts always retain the power, after granting an injunction, to modify injunctive relief in light of changed circumstances.\(^{116}\)

Similarly, a bond already posted may be either increased or decreased due to changed circumstances. When it does not appear that a defendant will be subjected to large costs, a bond may still be increased due to attorneys fees and costs of appeal.\(^{117}\) A defendant looking to increase a bond will need to meet the burden of proof and act prior to dissolution of the injunction.\(^{118}\) This later rule could obviously damage the wrongfully enjoined defendant who delays in requesting a higher amount of bond.

D. *Strict Construction*

In spite of the judicial inclination to sometimes treat lightly the mandate of F.R.C.P. Rule 65(c), some courts read the statutes strictly. Courts have opined that where no bond has been required, as called for by F.R.C.P. Rule 65(c), an injunction must be reversed,\(^{119}\) dissolved,\(^{120}\) and vacated.\(^{121}\)

One court found that a lower court had violated F.R.C.P. 65(c) by not requiring a bond when granting a preliminary injunction, and therefore a wrongfully enjoined defendant could still recover

\(^{114}\) Austin v. Altman, 332 F.2d 273, 274 (2nd Cir. 1964).
\(^{115}\) See supra note 87.
\(^{119}\) Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), cert. den. 380 U.S. 956 (1965).
\(^{120}\) Telex Corp. v. International Business Machines Corp., 464 F.2d 1025 (8th Cir. 1972).
\(^{121}\) Holohan v. Holohan, 8 F.R.D. 221 (N.D. N.Y. 1948).
damages. Some courts have found that although the amount of a bond is within judicial discretion, that discretion is constrained by the statutory language. Still, the great weight of precedent is in favor of broad judicial discretion.

E. Who Can Demand Security

Generally, a bond is required for payment of damages to any party found to have been wrongfully enjoined. This obviously could cause problems in a class action involving a defendant class. It follows that any party subject to the injunction should be able to recover against the bond unless the injunction is wrongfully granted. However, this may not always be the case. Someone not a party to the case, and only arguably restrained by the injunction, may not have standing to demand security.

By the express language of many statutes, including F.R.C.P. 65(c), only a “party” who is found to have been wrongfully enjoined or restrained may recover against the bond. Nonetheless this probably does not preclude any recovery by a non-party restrained as a result of a wrongfully granted injunction. Additionally, harm to the public in general is one issue which should be considered in making the initial determination as to the propriety of the requested injunction.

In one case, a New York court held that where a circus was an indispensable party and might suffer substantial damage by an injunction, the circus was entitled to be protected by a bond.

F. Who Must Post Bond

The applicant for injunctive relief is generally required to post

126. Determination of the individuals and entities subject to the terms of an injunction can be complex. By the express language of Fed. R. Civ. P. 65(d) an injunction restrains the parties, their agents, and “those persons in active concert or participation with them who receive actual notice of the order.”
This rule, however, is not universal. The difficulties with policing the rule are obvious. If a patent holder is not in a position to protect his or her patent and a prospective licensee funds litigation, who must post the bond? The answer is that the patent holder must post the bond, but a court is not going to inquire into the source of funds.131

One court has noted that F.R.C.P. Rule 65(c) envisions that the security is to be provided by the party who will be unjustly enriched if the court errs in issuing the injunction.132 And, of course, the restrained party cannot be required to post the bond.133

G. Judicial Discretion

An examination of the judicial treatment of the injunction bonds requirements points out the inconsistent exercise of discretion and arbitrary results that are legitimate concerns of the party to an injunction hearing. Many courts have held that a bond is not required in cases where a temporary injunction issues.134 Other courts have held that even though the statutes generally provide that no restraining order or preliminary injunction may issue except upon the giving of a security, the requirement of security in each case actually rests in the discretion of the judge.135 Despite the seemingly mandatory language of the rule, courts have generally decided that the security requirement is actually within the discretion of the court.136

It is also possible that a substitution for a bond could be provided. For example, a court may waive the requirement of payment of back salary as substitution for an injunction bond, even when the retroactive reinstatement of certain employees is part of the action sought by the injunction.137

131. In any case, there is a very good argument to be made that the patent holder is "posting" the bond regardless of whether the collateral comes from earned surplus, debt, an interested prospective licensee, or even a new issue of securities. The focus of the bond requirement is protecting the defendant rather than ensuring singular payment by the plaintiff if the injunction is improper.
Nonetheless, a court faced with an injunction bond issue should entertain and expressly rule on the bond request. Absent extraordinary circumstances, the court should grant the requirement for a bond.\(^\text{138}\)

Defendants in cases involving intellectual property are frequently successful in a request for a bond,\(^\text{139}\) as are defendants involved in commercial disputes.\(^\text{140}\) The amount of an injunction bond is within the sound discretion of a court; as is the issue of whether or not a bond will be required.\(^\text{141}\) However, the exercise of such discretion is constrained by the statutory language which authorizes the injunction and provides for the bond.\(^\text{142}\)

When it is apparent that the injunction will cause more damage than originally thought, a court is authorized to order an increase in the security.\(^\text{143}\) However, offsetting factors must be considered because the estimated amount of damages must be in terms of a net figure.\(^\text{144}\) Courts should take care in setting bond amounts, since the specific issue of setting the amount of a bond is typically not appealable.\(^\text{145}\)

At least one standard utilized in determining whether or not an injunction bond should be increased requires a showing of either a “material change in conditions,” or the development of “unusual and unforeseen circumstances.”\(^\text{146}\) Some cases have differentiated between temporary restraining orders and preliminary injunctions, holding that undertakings are unnecessary for the former, but required on the granting of the latter.\(^\text{147}\)

Of course, as with most anything, an injunction bond can be waived by the enjoined party.\(^\text{148}\) A defendant is generally protected from damage in the event that the plaintiff does not prevail to the

\(^{138}\) Reinders Brothers, Inc. v. Rain Bird Easter Sales Corp., 627 F.2d 44 (7th Cir. 1980).

\(^{139}\) See generally, 2 CALLMAN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES, § 14.43, page 159 (4th ed. 1982).

\(^{140}\) See generally, International Manufacturing Company v. Landon, Inc. 327 F.2d 824 (9th Cir. 1964).

\(^{141}\) Chicago Stadium Corp. v. Scallen, 530 F.2d 204 (8th Cir. 1976).


\(^{148}\) Clarkson Co., Ltd. v. Shaheen, 544 F.2d 624 (2d Cir. 1976).
extent of the amount of bond as required by the court.\textsuperscript{149}

Some courts do not allow either a temporary restraining order or injunction absent the posting of a bond. Preliminary injunctions granted under circumstances where a bond or security is statutorily required are void where no bond is provided for.\textsuperscript{150} Further, courts have opined that language stating, "no restraining order ... shall issue except upon the giving of security," make the requirement mandatory, not precatory.\textsuperscript{151} As late as 1914 the federal courts were allowed to grant injunctions "with or without security, in the discretion of the court or judge."\textsuperscript{152}

The language of the undertaking or security was formerly more important than it is currently. For example, when a bond recited that it had been given in consideration for an injunction, but the injunction was issued and was served before the bond was given, the sureties on the bond have been held not to be liable, though the bond was given prior to any attempt to collect on the bond.\textsuperscript{153} Where an undertaking issues in order to protect defendants enjoined by a city, those defendants had a cause of action against the officers of the city because the officers' names appeared on the bond.\textsuperscript{154}

Nonetheless, the idea that an injunction bond should secure all of the rights and legal consequences resulting from an unsuccessful prosecution of an injunction for the enjoined party has been recognized for some time.\textsuperscript{155} Some courts have held that the language of an injunction bond should be interpreted strictly. Others have found that where a bond is made payable improperly to a sheriff instead of the enjoined party, it is nevertheless sufficient to protect the defendant in the event that the injunction is improperly issued.\textsuperscript{156}

If an injunction bond is broader than that required by statute, the entire bond is not vitiated.\textsuperscript{157} Rather, recovery cannot be had on the bond for a breach which is not according to statute.\textsuperscript{158}

\textsuperscript{149} American Television & Communications Corp. v. Manning, 651 P.2d 440, 446 (Colo. App. 1982).

\textsuperscript{150} In re Tamblyn, 298 Or. 620, 695 P.2d 902 (1985).

\textsuperscript{151} Id.

\textsuperscript{152} Carter v. Mulrein, 82 Cal. 167, 22 P. 1086 (1889).

\textsuperscript{153} Hawthorne v. McArthur, 8 Ky. L. Rptr. 526 (1886).

\textsuperscript{154} Mahan v. Tydings, 49 Ky. 351 (1850).


\textsuperscript{156} Menken v. Frank, 57 Miss. 732 (1880).

\textsuperscript{157} Id.

\textsuperscript{158} See CLAYTON ACT, ch. 323, §§ 17-18, 38 Stat. 730, 737-38 (1917); cf. FED. R. CIV. P. 65(c).
In appellate review of the amount of a bond posted, appeals courts will use the "abuse of discretion" standard.\textsuperscript{159} Thus, if the trial court has not clearly abused the discretion granted by the statute in the setting of a bond, the appellate court will not overturn the lower court. This is apparently due to the great discretion given the trial court under F.R.C.P. Rule 65(c).\textsuperscript{160}

H. Damages

There is an argument that the bond requirement should be waived where the plaintiff can show financial responsibility. The plaintiff will always be liable for a wrongful injunction, whether or not a bond is posted, or is sufficient.\textsuperscript{161} This suggestion seems to stem from the same school of thought as the idea of doing away with the injunction bond rule altogether. A bond would not be a limitation on a plaintiff's potential liability, but merely an assurance of solvency.

Recoverable damages under an injunction bond are those which arise from operation of the injunction itself.\textsuperscript{162} These damages generally do not include damages which are occasioned by other aspects of the case independent of the injunction.\textsuperscript{163}

When an injunction is overbroad, damages may be recovered on the bond as well as from the plaintiff, and return of the security would be improper without allowing the defendant to proceed.\textsuperscript{164}

IV. Peripheral Issues

In addition to the direct effect of the initial determination of the amount of an injunction bond, there are several peripheral issues tied to the bond amount which need to be considered in drafting a regime for injunction bonds. These peripheral issues follow.

A. The Injunction Bond Rule

Even though a judgment by an enjoined party on a bond shall be in an amount determined by the court,\textsuperscript{165} the aggregate liability

\begin{itemize}
  \item \textsuperscript{159} Monroe Div., Litton Business Sys. v. De Bari, 562 F.2d 30, 32 (10th Cir. 1977); Continental Oil Co. v. Frontier Ref. Co., 338 F.2d 789 (10th Cir. 1964).
  \item \textsuperscript{160} Stockslager v. Carroll Elec. Coop. Corp., 528 F.2d 949, 951 (8th Cir. 1976).
  \item \textsuperscript{161} Fed. R. Civ. P. 65(c).
  \item \textsuperscript{162} Lever Bros. Co. v. Int'l Chem. Workers Union, Local 217, 554 F.2d 115, 120 (4th Cir. 1976).
  \item \textsuperscript{163} Id. at 120.
  \item \textsuperscript{164} Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc., 413 F.2d 335, 338 (1st Cir. 1969).
  \item \textsuperscript{165} Cal. Code Civ. Proc. § 996.460(b).
\end{itemize}
of a surety for all breaches of the condition of a bond is limited to the amount of the bond.166 This does not mean, however, that in California there is any limitation of liability on the part of the principal.167

The injunction bond rule generally states that recovery for any damages which might result from the improper issuance of an injunction is limited to the amount of a bond.168 In the absence of an injunction bond, there may be no recovery even where a temporary restraining order is granted without just cause.169

The injunction bond rule raises the question of whether the plaintiff should be granted any limitation on liability for a wrongfully issued injunction. At least one commentator feels that a bond should always be required, and that the amount of the bond should be an absolute limit on the plaintiff’s liability.170 Nonetheless, there is no reason why a plaintiff’s liability for seeking and obtaining an illegal injunction should be limited.

The hesitancy to do away with the injunction bond rule is probably grounded in the feeling that the court has at least a small part to play in granting the injunction. Although recovery for damages caused by a wrongfully issued injunction could be seen as similar to those recoverable for abuse of process, one must resolve the conflict of abuse of process damages being granted when judicial process took part in the purported abuse. Because courts cannot be made liable, the plaintiff will be partially absolved. However, elimination of the injunction bond, and therefore, a plaintiff’s limited liability, would surely impose some restraint on overly zealous plaintiffs applying for sweeping injunctions.

The bond requirement could still address the practical requirement of a liquid plaintiff/applicant, but need not form either a limitation on the damages recoverable by the defendant, or a limitation on the liability of the plaintiff. Appeal bonds do not present a limit on recovery for a lost appeal, even though there is a liquidated claim on which the bond is based.171 Rather, the underlying judg-

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166. CAL. CODE CIV. PROC. § 996.470(a).
167. Id.
171. See, e.g., Palm Beach Heights Dev. & Sales Corp. v. Decillis, 385 So. 2d 1170 (Fla. App. 1980).
ment on which the appeal bond is based presents the limit on the appellant's potential liability.

Similarly, an injunction applicant should be liable for all damages proximately caused by a wrongful injunction, and the bond requirement should be used to ensure liquidity in the event of judgment. Certainly in California, bonds must contain a statement that the sureties are jointly and severally liable on the obligations.\textsuperscript{172} Additionally, a beneficiary may generally enforce the liability on a bond against both the principal and the sureties.\textsuperscript{173}

The kinds of damages which may be recovered from the surety are quite broad.\textsuperscript{174} Nonetheless, damages which have been occasioned by the underlying litigation, independent of the injunction alone, are not recoverable from a surety.\textsuperscript{175} In general, the damages recoverable under an injunction bond are for all losses proximately resulting from the injunction.\textsuperscript{176} The factors to be considered in determining the loss to the enjoined party depend on the circumstances of the particular case. Generally, equitable principles should be applied, and just and reasonable compensation should be granted to the enjoined party for the losses sustained.\textsuperscript{177}

Recoverable damages include such things as discovery expenses incurred in enforcing the injunction bond,\textsuperscript{178} actual and consequential damages,\textsuperscript{179} depreciation of plant and equipment,\textsuperscript{180} interest,\textsuperscript{181} taxes,\textsuperscript{182} and costs.\textsuperscript{183} Items not recoverable on an injunction bond include attorney's fees\textsuperscript{184} and nominal damages if no damages can be proved.\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{172} CAL. CODE CIV. PROC. § 995.320(a)(1) (Deering 1980 & Supp. 1987).
\item \textsuperscript{173} CAL. CODE CIV. PROC. § 996.410(a).
\item \textsuperscript{174} Lever Bros. Co. v. Int'l Chem. Workers Union, Local 217, 554 F.2d 115 (4th Cir. 1976).
\item \textsuperscript{175} Id. at 120.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Heiser v. Woodruff, 128 F.2d 178 (10th Cir. 1942).
\item \textsuperscript{179} Silvers v. TTC Indus., Inc., 484 F.2d 194 (6th Cir. 1973), on remand, 395 F. Supp. 1318 (E.D. Tenn. 1974).
\item \textsuperscript{180} Monolith Portland Midwest Co. v. Reconstruction F. Corp., 128 F. Supp. 824, 879 (S.D. Cal. 1955).
\item \textsuperscript{181} Id. at 880.
\item \textsuperscript{182} Fidelity & Deposit Co. of Maryland v. Helvering, 112 F.2d 205 (D.C. Cir. 1940).
\item \textsuperscript{183} Handy v. Samaha, 117 Cal. App. 286, 3 P.2d 602 (1931).
\item \textsuperscript{184} Firemans Fund Ins. Co., Inc. v. S.E.F. Constr. Co., 436 F.2d 1345 (10th Cir. 1971).
\item \textsuperscript{185} Bustamante v. Stewart, 55 Cal. 115 (1880).
\end{itemize}
B. Stay on Appeal

A preliminary injunction is appealable as an interlocutory order. As such, it may be stayed pending appeal. Appeals must generally be taken to the appellate courts and the Supreme Court will only stay injunction pending appeal in unusual circumstances. The grant of a preliminary injunction must be affirmed unless there was an abuse of discretion.

C. Liability of Surety

Even after release of the security there may still be damages under the bond. The liability of the surety will attach upon the event of a decree dismissing the injunction, voluntary dismissal of the injunction by the plaintiff without the consent of the defendant, or where the injunction was issued as a result of incomplete knowledge by the court.

The liability of a surety may be reduced by settlement of the parties and some cases have denied surety liability where there was not a final judgment in favor of the party enjoined.

V. INJUNCTION BONDS AND HIGH TECHNOLOGY

Injunctions will always cause some damage to the enjoined party. By definition, injunctions are a prohibition on otherwise lawful activity. The peculiar result of enjoining companies engaged in high technology enterprises is due to the relatively quick degree of

186. Maine v. Fri, 483 F.2d 439, 440 (1st Cir. 1973).
187. This could produce the rather odd situation of the applicant posting an injunction bond and the enjoined party posting an appeal bond. Courts have typically handled this by balancing anew the likelihood of success and weighing the outcome. See, Railway Labor Executives Ass'n v. Gibbons, 448 U.S. 1301 (1980) (stay denied and injunction entered), reh'g denied. 448 U.S. 909 (1980); Chicago Stadium Corp. v. Scallen, 530 F.2d 204 (8th Cir. 1976).
189. Apple Computer Inc. v. Formula International Inc., 725 F.2d 521, 523 (9th Cir. 1984). The author was unable to find any case involving appeal of the bond issue above. This is likely due to the availability of continuous review of the bond amount at the trial level.
191. Id.
change those industries experience. While it is true that other markets could involve the same problems of high technology industries, the high level of research and development expenditures make high-tech particularly valuable. "Fad" consumer products, for example, experience very short windows of opportunity and then are frequently never heard from again. Pet rocks are one example and trivia games are potentially another.

The need for quick market access in high technology is due to the rapidity of advancements rather than a need to capture fleeting consumer attention. Due to the short periods available for commercial exploitation, delaying introduction of a product through injunction could be attractive to competitors.

VI. SUGGESTIONS FOR REFORM

The lack of uniformity among the state statutes points out the range of policies available for implementation in drafting injunction bond requirements. An example of the reforms which are possible include ordering expedited discovery or consolidation with trial on the merits in an effort to increase the certainty of the propriety of injunctive relief; allowing oral argument or juries at injunction hearings; and giving enjoined parties some preference in trial calendar to decrease the length of effect of an improper injunction. Of course, the necessity and importance of the bond increases with the lack of certainty of the propriety of the injunction.

One reform could include an evidentiary hearing prior to the Courts granting of an injunction or posting of a bond. This possibility generally takes the form of moving injunction hearings toward trials on the merits. If a permanent injunction is proper after a trial on the merits, and if an injunction bond is unnecessary in the event of a permanent injunction, one must assume that justice has been served, and that truth prevailed after a trial on the merits. The possible limitations on this suggestion are inherent in our civil justice system and not the result of the problems with injunction bonds or injunctions.

196. Most courts include requests for injunction on a law and motion calendar regardless of the scope of the injunction, the amount at controversy, the likely amount of a bond, or other factors affecting the seriousness or nature of the requested injunction. In jurisdictions involving requests for oral testimony at law and motion, sometimes a separate hearing will be set.

197. Without discovery, a hearing on injunction cannot have the same evidentiary value as a trial, but obviously as one moves along the spectrum from no evidence to substantial evidence, the potential for error should decrease. See generally, 7 J. Moore Federal Practice, paragraph 65.09, at 65-95, (1986).
The premise then is that there is less possibility for error. Subsequently, the amount of an injunction bond is less important the more an injunction hearing resembles a trial on the merits. Some courts will allow oral testimony at an injunction hearing198 while others will not.199

An assumption can be made that oral testimony increases evidentiary reliability due to factors such as the opportunity to cross-examination,200 and the ascertainment of truth or veracity by the trier of fact.201 Therefore, the greater the amount of oral testimony allowed at injunction hearings, the more reliable the decision of whether or not to issue an injunction. This places less importance on the injunction bond.

Of course, injunction hearings are typically held on affidavits or declarations.202 Greater amounts of declaratory evidence submitted to, and considered by the court, would be another step toward more complete evidentiary hearings at the setting of injunctions. Oral testimony could assist in the actual determination of the amount of an injunction bond203 in addition to the determination of whether or not an injunction is proper. As the certainty of the propriety of an injunction increases, the importance of the amount of bond decreases for the adjoined party. Nevertheless, if an injunction is proper and the bond is too low, the plaintiff will be ill-served. Therefore, absent complete certainty, a separate hearing should be conducted concerning the amount of the bond.

Whether stated by statute or not, it is common knowledge that injunction bonds are set based upon the possible damages suffered by an enjoined party if wrongfully enjoined.204 In practice, courts sometimes view potential injury to an enjoined party as being either nominal, substantial, or extremely substantial. If damage to the en-

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198. Santa Clara County Superior Court, for example, requires filing of a request for oral testimony at a law and motion proceeding, which then may be granted or denied.

199. Federal courts in particular have rules that are peculiar to the judge drawn upon filing. Generally oral testimony is requested at the time of the hearing. Some judges routinely grant such requests, others routinely deny them.

200. Cross examination would not be available if the hearing is conducted on affidavit or verified complaint. See Fed. R. Civ. P. 65.

201. Veracity is easier to weigh due to the possibility of determination of truth from conflicting affidavits.


203. Injunction bond hearings, whether held separately from, or concurrently with, the application for injunction, often involve questions of past product sales, prospective product sales, market share, and other issues sufficiently complex to possibly warrant expert testimony.

joined party is seen as nominal, a bond will be set in a range of two to ten thousand dollars. If damage to the enjoined party appears to be substantial, a bond will be ordered in the fifty to two hundred thousand dollar range. If potential injury to the enjoined party is viewed as extremely substantial, a bond of $500,000 or more is required.\textsuperscript{205}

In business litigation where a party is enjoined from selling a product, evidence, except that of the most cursory kind, is typically not taken with regards to past sales of the product, dealer or distributor orders, inventory, potential future sales, market share, or anticipation of market growth.\textsuperscript{206} This could obviously be deadly to the company which had incurred millions of dollars in research and development expenses in preparation to reach a multi-billion dollar market, a not uncommon scenario for biotechnology firms. A company with a history of losses and no market share would have a difficult time arguing that an extraordinarily high bond was required.

Therefore, many possible avenues for reform could be procedural ones.\textsuperscript{207} Obviously, the potential damage done by a preliminary injunction is much more significant than the potential damage from a temporary restraining order.\textsuperscript{208} A temporary restraining order is typically only in effect from ten to fifteen days. Regardless of the speed at which technology is moving, ten to fifteen days should not present the possibility of collapse of a given product.

This is not to imply, however, that damage cannot be done by a ten day injunction of, for example, a game software company from any shipments or sales which are ordered in the middle of a Christ-

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\textsuperscript{205} As litigation surrounding high technology areas increases, courts are becoming more comfortable with it. A few years ago, however, courts would not pay particular attention to the bond amount. Thus, a plaintiff would suggest a minimal amount, a defendant would suggest the entire value of the company or product, and the court would order a bond equal to the average of the two.

\textsuperscript{206} The catch 22 here is that many of these factors are held to be too speculative under local jurisdiction remedies law to be recoverable. Thus, ignoring the injunction bond rule problems for the moment, a company could be wiped out by an injunction and then the owners faced with a proof problem of the prospective value of their company. Hence, no recovery is awarded.

\textsuperscript{207} The "extended hearing" suggestion would not affect the substantive local injunction bond statutes, the standards set forth in case law, or the guidelines for courts in setting bond amounts.

\textsuperscript{208} Temporary Restraining Orders are in place from 10 to 15 days at the most, in most jurisdictions. While a temporary restraining order can thus damage a company's sales of a given product, the potential for damage is far less than an injunction pending resolution of the dispute, possibly 3, 4, or more years.
mas rush. Nonetheless, except in a one product company, the effect of a temporary restraining order is blunted somewhat by the fact that it will usually only apply to one product or a fairly specific technology. The comparative harm by a preliminary injunction is much more substantial.

In an era where it typically takes three to five years to bring a case to trial, a three to five year preliminary injunction will likely result in the death of a high technology product. Therefore, at least at the preliminary injunction stage, jurisdiction of preliminary injunction hearings should be moved from a law and motion calendar, to a master or trial calendar. A threshold test as to the effect of grant or denial of an injunction to plaintiff or defendant could be adopted to avoid undue burden on the judicial system.

Of course, the importance of the grant or denial of a preliminary injunction, however, cannot be greater than a motion for summary judgment. In fact, summary judgments may hold more import for a party litigant than an injunction, unless the only relief prayed for is injunctive relief. This begs the question of whether summary judgment hearings should be moved from the law and motion calendar to a “short-cause” calendar as well. This suggestion is sure to elicit wrath from the bench due to already overcrowded court conditions. It is, however, a workable means of ensuring justice and equity in the granting of injunctions and the setting of injunction bonds.

Another suggestion for reform would be to require a separate injunction bond hearing after an injunction has been granted.

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209. One significant problem, even with vacated temporary restraining orders, is the market effect that adverse publicity may have. Products can be hurt by a short injunction if the market becomes uncertain of the products future.

210. This is true, though many high technology companies are driven by a single product.


212. In Los Angeles County, for example, the five year statute set forth in CAL. CODE CIV. PRO. § 583.310 (West 1976 & Supp. 1987) is frequently encountered.

213. Technologies are not made obsolete overnight, and many currently available products were first introduced in related form years ago, but continuous small improvements are necessary. It would be unwise for a company to keep devoting resources to improving a product which had already been enjoined, especially if the litigation was protracted. The end result could very possibly include a permanent injunction. Of course, in some infringement cases, the offending technology or element may possibly be purged from the product or company.

214. In fact, some courts do advise extended hearings for complex injunction requests. Additionally, FED. R. CIV. P. 65(a)(2) provides for the consolidation of a trial on the merits with a preliminary injunction request.

215. Many courts follow this path already, some requesting special briefing on the bond issue.
This eliminates the need for judicial attention to the injunction bond issue unless the injunction is granted. It will also ensure proper briefing by the parties and the preparation of evidentiary material related to the amount of a particular bond. The author has found that many attorneys do not include significant briefing on the issue of a bond at the injunction hearing. Rather, applicants merely request the posting of a bond, and suggest an amount.

A separate hearing on injunction bond will provide the enjoined party a chance to educate a court as to potential damage their company may suffer, allow for additional evidence, and focus the courts attention as to the bond amount. This may ensure companies an adequate remedy under the injunction bond rule if they are wrongfully enjoined.

A final suggestion for reform is to provide a mechanism either by statute or by common law, whereby a potentially enjoined party can point out the significantly increased possibility of harm due to the product being enjoined. Thereby, the high technology company which does not anticipate a significant window of opportunity for commercial exploitation could point out the effect of the injunction on that company, thereby invoking an increased evidentiary hearing or separate hearing on the undertaking issue.

This issue appears to be addressed from a different perspective at the stage of determining whether or not the injunction should issue. One factor typically considered by a court faced with a request for an injunction, is a balancing of the equities, whether harm to the applicant by denial is greater than harm to the defendant.

VII. CONCLUSION

Justice delayed is justice denied, and in the case of high technology, where the only certainty is change, this has never been more true. When the high technology company finds a major product has been enjoined, a major product which will be technologically

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216. This proposal could even include expedited discovery; first on the issue of the injunction itself; and second on the issue of the bond. If oral testimony will not be allowed, deposition testimony on the relevant issues could be admitted. Kelly v. Gilbert, 437 F. Supp. 201 (E.D.Mont. 1977).

217. There could be a threshold issue which would have to be met prior to directing significant court attention to this issue. There could also be inclusion in the factors considered by courts in setting bond amounts, an additional element regarding the period of commercial availability of the enjoined product.

superseded or matched in a short period of time, it is often true that the company itself will go down with the product.

Since an entire company can potentially be destroyed by an injunction, a rule which limits the recovery for a wrongfully enjoined party to the amount of a bond, is archaic. Hence the need for reform and the suggestions that grant or denial of injunctions be conducted at hearings with greater certainty, and that bond requirements be determined at evidentiary hearings or that the bond issue be a matter of a timely separate hearing and briefing.