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**National Intellectual Property
Rights: the Importance of Mediation
in an Increasingly Global and
Technological Society**

By

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National Intellectual Property Rights: the Importance of Mediation in an Increasingly Global and Technological Society

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1. INTRODUCTION

Our global society is increasingly dependent on new technologies. One of the consequences of this is the growing recognition of the importance of intangible assets relating to these technologies, known as Intellectual Property Rights (IPRs). The increasing importance of these IPRs is being recognised at all levels—political, societal and economic. IPRs move and travel freely across borders, whether via the internet or accompanying individuals in their travels. Yet, these same IPRs are governed by national laws, which vary in scope and effect as soon as they pass through one country's border to the next, or depending on the country in which the IPR has been created or is to be applied.

Despite attempts to harmonise the relevant laws at an international level (e.g. in the fields of copyrights, trade marks, design rights and patents), IPRs are territorial and only enforceable by national courts. These laws have difficulty keeping up with evolutions in technology, and the courts themselves may not be equipped to handle such specialised cases. This often leads to inconsistent results when IPRs are litigated simultaneously in several countries (e.g. most recently the erythropoietin patent cases opposing Amgen to TKT). Data recently compiled by Michael Elmer of the US law firm, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP exemplifies the typical costs, time and success rates of patent litigation in the 10 countries where these sorts of disputes are most often litigated.

Although complex and international disputes may be better handled by specialist arbitral tribunals, in certain jurisdictions IPR disputes are deemed to involve issues of public policy or *ordre public* (e.g. where determinations of validity are involved). This may make them non-arbitrable or render the enforcement of a multi-jurisdictional technology or IPR-based arbitral award difficult to subsequently enforce under the New York Convention. The confusion that often results from these disparate national IPRs, legal regimes and dispute resolution mechanisms affects all levels of society, and can lead to huge wastes of human and financial resources.

These drawbacks in effective IPR dispute resolution create great business uncertainty in the private sector, affecting multinationals and small and medium-sized enterprises (SMEs) equally. Regardless of their size, the livelihoods of all companies may depend on the enforceability of their or their competitors' IPRs. An excellent example of this can be found in the recent rounds of patent litigation involving BLACKBERRY PDA devices that are used worldwide, where the future use of these popular devices was jeopardised by patent proceedings in the United States.

Furthermore, due to new accounting requirements relating to goodwill allocations on corporate balance sheets, there is a growing need to better understand the impact of IPRs in financial statements. In 2003 Alan Greenspan, the recently-retired head of the US Federal Reserve, raised the question whether current company valuation methodologies, which are based on assessing tangible assets and cash flows, are relevant in a society that is increasingly dependant on intangible assets. This question is particularly worrisome when considered together with a recent PriceWaterhouseCoopers report that estimates that over 70 per cent of the value of the S&P 500[®] companies index consists of their intellectual property assets. This is likely to be a controversial field that may lead to increased conflicts at all levels of the private sector—from value creation through to value reporting and litigation risk assessments.

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Table 1 *Top 10 Global Patent Litigation Jurisdictions by Number of Patent Infringement Cases for 1997–2001¹ as Applied to a Sample Information Technology Patent Dispute (Source: Michael C. Elmer, 2005)*

No	Country	No of Law-suits Filed	Historical % of Decisions in favour of Patent Owner ¹	Typical Costs per Case (US\$) ²	Typical Time to 1st Judgment (months)
1	USA	11,652	59% ³	3.5 M	30
2	China ⁴	4,894	46%	450 K	24
3	Germany ⁵	3,850	41%	1.7 M	20
4	France ⁶	1,862	55%	750 K	37
5	S. Korea	1,651	–	–	–
6	Taiwan	1,478	–	–	–
7	Japan	1,186	20% ⁷	1.5 M	26
8	Brazil	620	–	–	–
9	UK ⁸	601	25%	1 M	14
10	Canada	382	–	–	–

¹ Patent held to be valid (where assessed) and infringed.

² Note that in some jurisdictions, e.g. Germany, France and the UK, the losing party also has to pay the other side's fees. (M = millions, K = thousands).

³ US national data are based on averages from bench trials (i.e. trials by judges only) where both validity and infringement were found. For jury trials (i.e. where lay jurors determine issues of fact) the average national statistics are 68% of cases in favour of patentee, where both validity and infringement were found. This explains the growing trend towards jury trial in the US, especially in the Northern District of California, which has the highest pro-patentee statistics in the US.

⁴ Data for China includes administrative and trial court infringement actions. The total number of patent cases filed in China exceeded the US in 2003.

⁵ Based on Düsseldorf court statistics.

⁶ Based on Paris court statistics, provided by Me Pierre Véron of Véron et Associés.

⁷ This is a mean taken from statistics for Tokyo (which has an estimated 15% patentee win rate) and Osaka (which has an estimated 25% patentee win rate).

⁸ Based on High Court of England and Wales statistics.

It also raises new potential issues regarding the fiduciary obligations of company directors, as mishandling of IPR assets may have serious consequences to a company's balance sheet.

The influence of IPRs, however, is not limited to the private sector. In both developed and developing countries there is a growing debate as to whether public or nationally-funded research and resources should be published or protected by patents or other IPRs. Governments are beginning to assert rights in their national heritages (e.g. bio-diversity), and to motivate universities to create technology transfer offices to create and manage IPRs. The recent emphasis on the societal and the economic impacts of IPRs (e.g. job and wealth creation, as well as improved products or services) is also causing these issues to be newly debated (and disputed) in several international diplomatic forums, such as the WHO, WTO and WIPO.

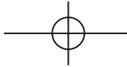
Additionally, whereas all disputes are greatly influenced by ethnic and national cultural diversity, IPR-based disputes often highlight new inter-cultural paradigms. Not only can the parties involved come from different countries, but the wide range of stakeholders involved in an IPR dispute are typically motivated by different interests and have different value metrics (e.g. scientists, civil servants, investors, industrialists, and entrepreneurs). This variety of

professional cultures can lead to potential clashes, even in situations where everyone has the same nationality and speaks the same language.

Mediation provides an excellent environment in which parties involved in complex IPR disputes or negotiations (e.g. pre-emptive mediations to prevent future disputes from arising) can safely discuss and assess their alternatives within this complex and ever confusing international arena. National courts and arbitral tribunals can only focus on past events and apply narrowly construed national laws to the facts of a case (which often leads to inconsistent results, as demonstrated by the much-discussed *EPILADY/Improver* cases in the 1990s, where the same patent was litigated in several countries with inconsistent results). Problems also often arise following court or arbitral tribunal judgments that find that two or more parties jointly own an IPR. Co-ownership can have different consequences under different national IPR regimes (e.g. granting joint rights in some countries—where the co-owners must agree on everything, severable rights in others—where each co-owner may deal separately with licensees, and creating an inability overall for either co-owner to grant exclusive licences without the mutual consent of the other in all cases). This can lead to unbearable consequences for all parties concerned, and other stakeholders affected by co-ownership situations.

Mediation, on the other hand, allows all national laws and perspectives to be taken into account as well as community interests (including even indigenous rights). The parties can discuss and agree to a solution based on future needs, and not just past facts, which respond to their true business interests and not simply their legally posited rights. The mediation process also allows parties complete flexibility over procedural and substantive issues (subject only to anti-trust constraints). This process can still lead to litigation or arbitration, but where the parties can agree beforehand on certain rules of procedure aimed at controlling the costs and accelerating the time to judgment (e.g. by limiting discovery, what questions will be asked of which experts and witnesses, and narrowing down the number of legal points remaining for adjudication). The parties can also agree to different outcome-based scenarios depending on the court or arbitral panel's decisions, whereby the parties can agree to limit the consequences of the decision in the future, or agree on the calculation of damages, so that they are able to get rid of worst-case scenarios and obtain business certainty earlier on.

This shift towards and increasing recognition of mediation in several countries and institutions is becoming apparent in many ways. In the United States, the US Court of Appeals for the Federal Circuit (the appellate court in most US federal IPR cases) instituted a pilot mediation scheme in October 2005. In the United Kingdom, the UK Patent Office is implementing a new Dispute Resolution Scheme this year. In France, a group of 45 of France's leading companies signed a new charter in November 2005, pledging to attempt to resolve future disputes through mediation with the Centre de Médiation et d'Arbitrage de Paris (CMAP). In Switzerland (where I am based), a new national law on civil procedure is being drafted, which will include mediation as well as arbitration at a federal level, and regional chambers of commerce are beginning to offer mediation rules. In Europe, a new EU Directive on mediation is being discussed at parliamentary level. At a more global level, a new Mediation Alliance (MEDAL) was created in September 2005 between five leading national mediation organisations (ACB in Holland, ADR in Italy, CEDR in the United Kingdom, CMAP in France, and JAMS in the United States) and the International Chamber of Commerce (ICC) is breathing new life into mediation, by having just held its first international mediation moot competition in January 2006. The International Trademark Association (INTA) is actively promoting the use of mediation to resolve international trade mark disputes and contains detailed information as well as a video on its website. Finally, the World Intellectual Property Organization (WIPO), through its Arbitration and Mediation Center, which was specifically set up to respond to these issues, is seeing a notable rise in requests for mediation within the last few years. These trends also indicate the growing importance not only of mediation, but especially its potential to resolve international IPR disputes.



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In summary, although mediation may not provide a complete solution in all cases, I believe that it is likely to lead to better, faster and cheaper dispute resolution in a growingly complex IPR and technology-based world, regardless of whether the mediation itself ends up providing a complete settlement agreement. It can also be combined with arbitration and litigation to provide similar benefits. The trend towards increased use of mediation to resolve conflicts can be seen in the growing number of companies and institutions that are beginning to use this form of dispute resolution.