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# Mediation as an alternative to litigation in patent infringement disputes

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# ADR bulletin

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## National and international applications of ADR

# Mediation as an alternative to litigation in patent infringement disputes

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## Introduction

As the use of mediation becomes increasingly popularised as a potentially efficient and cost-effective alternative to traditional litigation, parties involved in several areas of dispute resolution have begun to further explore its usefulness. One such area is that of intellectual property (IP).

Traditionally mediation has not played a significant role in IP disputes, which have consumed extensive court time throughout the world and have cost correspondingly large amounts of money in litigation expenses. Studies indicate that litigating a patent case through the trial stage costs each side approximately \$2 million in legal fees and related expenses, and that average litigation costs continue to increase by up to 15% each year.<sup>1</sup>

This not only suggests that cheaper options to litigation may be beneficial, but that many parties may not have the funds necessary to litigate. Furthermore, intellectual property disputes often involve complex technical and legal issues resulting in extremely lengthy proceedings. As one author notes, cases involving computer software disputes, for example, can result in a litigation process that takes longer than the life-cycle of the relevant product itself, invariably resulting in damages being awarded too late.<sup>2</sup> It is for these reasons that mediation has been deemed to be the 'sleeping giant' of IP disputes.<sup>3</sup>

As with all methods of ADR it is important to note that the suitability of mediation for resolving IP disputes will vary on a case-by-case basis. First, intellectual property can be broadly categorised in terms of copyright, trademarks and patents, and the nature of disputes varies among each category.<sup>4</sup> Further variability exists within each specific area of IP and as discussed below several factors are important to consider when determining whether mediation is a viable option.

Due to the broad scope of the topic, this article focuses on the use of mediation exclusively in patent disputes. This is a particularly interesting topic as many complexities of fact and law often surround patent disputes, large amounts of money are commonly involved, a strong history of patent litigation exists, and disputing parties have not traditionally considered maintaining a continued relationship. Here the advantages of patent mediation and its potential effectiveness as an alternative to both arbitration and litigation are explored. It is argued that there is currently room for further use of mediation in settling these disputes. Finally, the use of mediation in international patent disputes is considered in the context of the World Trade Organisation (WTO) and World Intellectual Property Organisation (WIPO).

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**The current approach:  
patent litigation**

A patent can be generally defined as a proprietary right over the invention of a product or process that provides an inventor with a monopoly right for a certain period of time, typically 20 years during which the product or process cannot be exploited by others.<sup>5</sup> Patent disputes typically arise where a third party allegedly infringes the monopoly right of a patent holder, although other disputes such as those involving licensing agreements can also eventuate.

In most federal states intellectual property is a matter of national jurisdiction and so proceedings are initiated in the federal level court. Most patent disputes involve courts having to decide on technical questions of fact and law with respect to claims of alleged patent infringement. This requires consideration of an appropriate means to interpret the claims of a patent,<sup>6</sup> which can be defined as the precise technical descriptions of the invention on which is based an evaluation of the protection sought.<sup>7</sup> Its interpretation is a question of law and on appeal the court may discard the claim's interpretation, forcing the parties in dispute to re-argue their case on correct interpretations.<sup>8</sup> This is a complex procedure that ultimately contributes to the often lengthy and expensive litigation process.

Cases become further complicated when a party alleged to have infringed a patent responds with a counterclaim of patent invalidity. This is the most typical defence to infringement. Cross-claiming requires the court to reconsider the validity of the original patent and whether it meets the statutory requirements of novelty, inventiveness and non-obviousness.<sup>9</sup> During re-examination the court must consider newly uncovered references or evidence potentially material to the patentability of the invention that had not been considered by the relevant patent office.<sup>10</sup> If a defendant successfully pleads the defence of a patent the patent owner will lose not only the case but also the patent itself. Conversely, a patent owner who successfully wins an infringement claim may be awarded damages, and

an injunction against further infringement will typically be ordered. Evidently, patent litigation involves many complexities.

**Potential advantages of  
patent mediation**

Historically, there has been an aversion to using ADR to resolve patent disputes. A good example can be seen in the United States. The traditional view of the courts, as set out in the Supreme Court case of *Lear, Inc. v Adkins*,<sup>11</sup> was that a patent dispute can be challenged in court despite express provision in any contract or agreement made privately, which includes settlements made through an ADR process. This, the court stated, was because the public interest in patent validity overrode the private right to contract.<sup>12</sup> Indeed, one may adopt the view that ADR processes have no role in resolving patent disputes, as any process that allows a potentially invalid patent to remain valid restrains the competition in the use of ideas that should be available in the public domain.

Nonetheless, jurisdictions have come to consider the balance between the potential negative aspects of ADR with its arguably outweighing advantages. With the explosion of patent litigation in the US, for example, Congress subsequently legislated for the use of ADR in patent disputes. Originally, 35 USC § 294 provided for only the arbitration of patent infringement disputes. However, in 2006 the US Court of Appeals for the Federal Circuit, which deals with the majority of IP appellate disputes, went further and enacted a mandatory non-fee mediation program for parties seeking to appeal court decisions of IP disputes.<sup>13</sup> As the US remains a world leader in intellectual property, it is suggested by some that this may be representative of an early movement towards not only the use of ADR, but a shift from arbitration to mediation in IP disputes.<sup>14</sup>

Given the disadvantages of litigation the question begs, what role can mediation play in resolving patent infringement disputes? Scholars identify several advantages:<sup>15</sup>

- time and money;
- avoiding claim re-interpretation;
- less risk of patent invalidation;



- avoiding the discovery process;
- confidentiality; and
- creative solutions.

### **Time and money**

Perhaps the most well-recognised potential advantages of mediation as an alternative to litigation are its time and cost benefits.

With regard to costs, scholars point to mediation's efficiencies, referring to anything from general theory to rather complex economic models incorporating economic and behavioural settlement patterns.<sup>16</sup> Empirical evidence of such benefits continues to accumulate. A recent example can be seen in Singapore where in June of 2009 the Minister of Law announced that since mediations began at the Singapore Mediation Centre in 1997, over 75% of the disputes mediated were settled, 90% within one day.<sup>17</sup> More impressive however is the 90% settlement rate of the 188,000 cases mediated by the subordinate courts in that jurisdiction since 1997.

### **Avoiding claim re-interpretation**

As discussed above, on appeal from a court's decisions on a patent infringement case the parties involved are often required to re-argue how a patent claim is to be interpreted, resulting in judicial inefficiency. Mediation, although not binding, is not subject to an appeal process involving the re-interpretation of a claim. Furthermore, as discussed below, although the claims of a patent may be a central issue of a mediation, it may be possible to avoid settling strict points of law through alternative processes of settlement discussed below. It is also possible for the disputing parties to agree contractually to a particular interpretation of a patent claim. In this way mediation can be used as a pre-trial strategem to avoiding otherwise complex, expensive and time-consuming issues being brought before the court.<sup>18</sup>

### **Less risk of patent invalidation**

Mediators in patent disputes do not make a determinative decision regarding the actual validity of a patent. The result is that the party claiming that

their patent has been wrongfully exploited does not run the risk of having the patent invalidated, provided the dispute does not go to court. Patent mediation thus avoids a winner-loser, zero-sum result.<sup>19</sup>

Where the validity of a patent is challenged in mediation, the parties may consider the alternative option of litigation as an incentive to determine a settlement amount in mediation.

### **Avoiding the discovery process**

The advantage of using mediation in avoiding the discovery process of trial relates back to the avoidance of time delays and the heavy expenses of litigation. Prior to patent mediation parties are able to agree to procedures, including the regulation of expert opinion and discovery.<sup>20</sup> While some form of discovery may be required, mediation allows for flexibility, where parties can consider the funds and resources they are willing to spend on this aspect of the mediation.

### **Confidentiality**

Due to the commercial nature of many patent disputes and the widespread use of patents in many industries, patent infringement conflicts often involve large corporations. Perhaps the best example can be seen in

Mediation can be a particularly useful means of dispute resolution in providing for confidentiality, an obvious advantage for a company's reputation.

### **Creative solutions**

One of the greatest advantages to using mediation is the ability to resolve disputes through creative solutions. As Vitoria notes, a mediator may be able to assist the parties in dispute to identify their needs rather than focus on their legal rights and wrongs with respect to a patent.<sup>23</sup> Given the monopoly rights patent owners are entitled to and the diversity of the patent as a tool in business, several possible creative solutions exist in resolving patent disputes; these include licensing agreements, agreements to share emerging technologies, agreements to collaborate in research and development, and agreements to divide up patent rights based on jurisdictions.<sup>24</sup>

Of these possibilities, licensing agreements may have particular utility in settling disputes. In a situation where a competitor agrees not to challenge the validity of a patent in court and no action is brought for infringement, a patentee can, for example, allow its competitor to manufacture the patented invention.<sup>25</sup> Such an agreement would commonly contain a provision that

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the pharmaceutical industry. In 2008 global pharmaceutical sales reached nearly US \$750 billion,<sup>21</sup> and pharmaceutical corporations continue to rely heavily in raising capital on the monopoly right provided through patents. However, with litigation comes the problem of public scrutiny, to which pharmaceutical companies have been increasingly subject in recent years.<sup>22</sup>

requires the licensee to pay the patent owner for the manufacture of the patented good or process and to sell it subject to specified terms.<sup>26</sup>

As with licensing agreements, agreements to share emerging technologies, agreements to collaborate in research and developments, and to divide up patent rights in different jurisdictions are all potentially beneficial



to the parties in dispute, each option providing the possibility of expanding the market in which a patented good or process is sold. Each of these agreements therefore provides for the preservation of the relationship between the disputing parties that would not be possible through litigation.<sup>27</sup>

Indeed, it is due to the value of allowing for the potential preservation of relationships that mediation is arguably a preferable means of resolving patent disputes as compared to not only litigation but also arbitration.<sup>28</sup> Admittedly, arbitration itself has several commonalities with mediation that make it potentially advantageous in relation to litigation. As with mediation, experts in the area of patent law can be used as arbitrators so there is less need for expert testimony. This ultimately saves on related time and costs, as discussed above. It has been stated that it is a near surety that arbitration will cost less than 50% of the litigation cost of a patent infringement suit, and that this figure may be as low as 10%.<sup>29</sup> However, in comparing arbitration to mediation one can refer to the fact that parties in arbitration have less control than those in mediation, which displays less adversarial characteristics.<sup>30</sup> As such, parties in mediation may be more likely to cooperate and leave the settlement with a better relationship.<sup>31</sup> Parties to mediation also generally remain more informed as to the issues and more amenable to settlement,<sup>32</sup> which further provides the possibility of a continued relationship.

### The balance of law

Perhaps the most contentious issue of using mediation in patent disputes relates to the settling of points of law. As previously mentioned, some are of the view that mediation provides an inappropriate forum for settling patent disputes due to public policy reasons, where a 'bad' patent will not be invalidated resulting in an unfair and improper monopoly right.

However, it is important to note that many patent infringement claims are automatically cross-claimed for invalidity simply as a defence and so the

validity of a patent should arguably not be a matter of dispute in court. Furthermore, the fact remains that patent offices originally evaluate innovators' claims and grant patents accordingly after thorough analysis, and so one may question whether a potentially extensive re-evaluation of a

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patent should be required at all. Indeed, the possibility that a patent will be invalidated has led some to describe the patent application as a 'lottery ticket'.<sup>33</sup> This supports the case for mediation as an 'alternative conceptualisation'<sup>34</sup> of justice that can avoid focusing on the narrow issue of the patent claim itself and allow for the consideration of alternative means of settlement.

While there are policy arguments for not using mediation in patent disputes, in practice mediation may not be used because patent holders require adjudication to completely bar another party from exploiting its patent. This may particularly be the case where a patent provides for a monopoly right over a good or service of high market value.

Admittedly, mediation may not be suitable for all patent disputes. What will commonly be required is a balancing of the costs of litigation and the potential benefits of barring another party from infringing a patent.<sup>35</sup> Also required is consideration of the potential risks of losing a case and the possibility that the gains from winning may in fact be no greater than the gains from the settlement alternatives of mediation.<sup>36</sup>

Nonetheless, intellectual property litigation has a strong history dating back to the late 1800s,<sup>37</sup> and the further use of mediation to resolve a legal dispute is a relatively new idea requiring

an overcoming of the litigation mindset barrier that currently exists.

It is important to note that mediation operates in the shadow of the law and so is not incapable of assisting with the settling of points of law regarding patent validity.<sup>38</sup> While some consider this to be insufficient in settling disputes

involving legal issues, others such as Elleman suggest that mediation is in fact a more effective means of settling patent disputes, as judges in court are more likely to make 'uneducated verdicts' and may be unreasonably expected to comprehend, for example, the science behind a technical explanation.<sup>39</sup> This view does, however, presume that during mediation a patent expert will mediate or be present and able to help settle issues of law in dispute.

### A suitable mediation approach?

Many of those who advocate the use of mediation in patent disputes are indeed of the view that an expert in patent law should be used as a mediator.<sup>40</sup> It is true that some patent disputes will involve parties seeking a court ruling on a point of law, and in such cases a mediator with expertise may be required. Alternatively, the parties may agree to call on experts, which the WIPO provides for as an option in its Mediation Rules.<sup>41</sup> In either instance, an evaluative approach to the mediation process may be most suitable. This approach is advantageous because the patent expert is able to apply his or her knowledge to provide information, advise the parties and predict likely outcomes in patent litigation in a much timelier manner than litigation.<sup>42</sup>



Tran identifies several advantages to using a patent expert as a mediator. First, they are able to give the disputing parties what she refers to as a 'gift of a reality dose'.<sup>43</sup> Because mediators are able to provide an opinion on the likelihood of an argument relating to a patent succeeding in trial, parties can be informed that their arguments may in fact not be as strong as they believe. This may assist the parties to converge their estimates of the value of a case.<sup>44</sup>

Related to the array of potential settlement options available as discussed above, Tran also notes that using an IP expert as a mediator has the benefit of allowing the mediator to expose the parties to every possible means of resolution suitable to IP disputes.<sup>45</sup> She states that an IP mediator understands that the IP community is small and that disputing parties may share an interest in developing a business relationship with each other.<sup>46</sup>

While it may be desirable to adopt what may be referred to as an 'expert advisory' model of mediation,<sup>47</sup> it is perhaps too narrow an approach to assume that the process of patent mediation necessarily requires an expert in patent law to mediate. As with other areas of mediated disputes the appropriate model to apply should depend upon the circumstances of each case.<sup>48</sup>

Alexander points to several potential disadvantages in using expert advisory mediation. She notes that it may result in the disputing parties focusing on rights and positions rather than their interests, and that the parties will not be encouraged to acknowledge the perspective of the other side.<sup>49</sup> Where legal rights and positions become the basis of a mediation, it is possible that many potential settlement options will be lost.

Furthermore, as Alexander also points out, the settlement proposals by the expert mediator may not support the parties' long-term interests or the improvement of their relationship. Expert advisory mediators often focus on a limited number of solutions that have worked in the past, and the multi-dimensional and unique facts of each case may not be addressed.<sup>50</sup> This may particularly be the case where the

validity of a patent has resulted in positional bargaining. When mediators do provide options based on legal positions the perception of impartiality may be lost, for example where a mediator provides an opinion of the likely outcome of litigation.

Given the potential downfalls of using an expert advisory mediator it may be suitable at times to adopt aspects of the facilitative model using a mediator trained to apply this approach. Indeed, there is no distinct line separating optimal models and their application is flexible.<sup>51</sup> A mediator of a patent dispute may initiate the mediation process as a facilitator, attempting to extract the parties' interests and possible creative solutions that benefit both sides before shifting to more of an evaluative approach. While it is generally for the parties to decide how they would like the mediation to proceed, it is important to recognise that there are limitations in using the evaluative approach with a patent expert mediator. Further research in this area could shed light on the possible effectiveness of alternative approaches.

### Patent mediation at the international level

Several issues arise in cross-border intellectual property disputes with regard to jurisdiction.<sup>52</sup> Intellectual property rights are dependent on the laws that create them and so are confined to the geographical reach of the relevant jurisdiction's legislation.<sup>53</sup> It is for this reason that a corporation having a patent in several jurisdictions is required to bring separate actions in each jurisdiction where alleged patent infringements have occurred.

The time and cost disadvantages in bringing separate actions are obvious, as are the apparent inefficiencies. Furthermore, as was seen in the 1990s multi-jurisdictional *EPILADY/Improver* cases,<sup>54</sup> litigation of the same patent in several jurisdictions can result in inconsistent court rulings. Although there have been attempts to establish a set of patent law norms to harmonise the patent laws of different jurisdictions through WIPO, there is still much work to be done.<sup>55</sup> As an alternative to litigation, mediation allows multi-jurisdictional disputes to be

resolved more efficiently as it avoids the need for issues to be resolved independently in each jurisdiction. The EU, for example, has recognised this benefit and has recently empowered judges to refer international disputes to mediation, even where there has been no prior agreement.<sup>56</sup>

At the international level the TRIPS agreement of the WTO is the most comprehensive international agreement on intellectual property to date.<sup>57</sup> Member states must implement minimum standards such as the non-discriminatory granting of IP rights, but Part III of the agreement relies primarily on the legal and administrative mechanisms of member states' domestic laws.<sup>58</sup>

Article 5 of the WTO's Dispute Settlement Understanding does provide for the possible use of mediation on a voluntary basis, and a consultation obligation exists before a WTO Panel can be requested.<sup>59</sup> However, the consultation does not occur in the presence of a facilitator and it can be considered more of a formal exchange rather than a dispute resolution meeting.<sup>60</sup> WTO dispute settlement thus occurs largely in the mode of litigation.<sup>61</sup> By 2004 on only one occasion had WTO members resorted to mediation pursuant to Art 5 of General Agreement on Tariffs and Trade (GATT) 1994 in settling a dispute.<sup>62</sup> Evidently, the matter was not one involving intellectual property rights.

The question then remains, how can mediation be further utilised at the international level? As McRae notes, with respect to cross-border legal processes the international community is largely characterised by the absence of binding forms of dispute settlement.<sup>63</sup> It is evident that the current regime of the WTO, while providing for the optional use of mediation, has not adopted it as a common method of dispute settlement.

It is possible that as mediation continues to expand at the domestic level the trend will follow at the international level. The other possibility is the adoption of a mandatory mediation scheme, for example one that replaces the current consultation requirement of the Dispute Settlement Understanding.



It is important to note that disputes within the WTO involve only member countries as the parties, for example where there is a complaint of non-compliance with the TRIPs through enacted domestic legislation. This differs from international disputes on intellectual property issues involving two corporations from different countries, but the principles of mediation as a means of settlement equally apply in both instances.

The other major international forum in which IP mediation can occur is that of WIPO. In 1994 WIPO established its Arbitration and Mediation Centre which serves to resolve international commercial IP disputes.<sup>64</sup>

To date WIPO has received approximately 80 requests for mediation relating to disputes in several areas of IP, most of these which have been based on contract clauses. While the 80 requests for mediation may seem reasonably high, this number is minute relative to the number of international IP disputes that arise each year. Furthermore, the fact that most WIPO mediations have been based on contract clauses may suggest that mediation is not being used for patent infringement disputes.

Given the many potential advantages of using mediation in instances of infringement, as discussed above, there appears to be much room for further use of mediation within the WIPO forum.

## Conclusion

Intellectual property provides an interesting area of disputes for which the use of mediation can be considered. Patent disputes in particular often involve lengthy proceedings, are tremendously costly and resource-demanding, and provide one-sided outcomes.

As an alternative to litigation patent mediation can save time and money, avoid the need to interpret and re-interpret patent claims, remove risks of patent invalidation, maintain confidentiality and promote creative solutions. It is for these reasons that some commentators suggest that a mandatory patent mediation scheme is preferable, but further research needs to be carried out in several jurisdictions where patent mediation is still an emerging idea.

As seen in the recently implemented mandatory IP mediation legislation enacted in the US, patent mediation continues to expand at the global scale and its potential usefulness in resolving international disputes in overcoming jurisdictional hurdles provides much incentive for corporations to consider this alternative to litigation.

Beyond the benefits of resolving disputes, some commentators have gone so far as to suggest that alternatives to patent litigation will in fact be more effective in generating innovation, as high litigation costs limit the ability of inventors to progress in their respective fields of work.<sup>65</sup>

While mediation may not be suitable in resolving all patent disputes, it is argued that there is currently room for expansion, particularly in disputes where parties have traditionally opted for litigation where points of law are to be resolved. In such cases mediation can involve mediators with expert knowledge in a given area of patent law or, alternatively, the use of non-expert mediators who are able to focus on creative means of settlement.

It has been stated that,

If matters do proceed to litigation, the uncertain results can vex comity and augment resentment and frictions that will undermine [the enjoyment] of intellectual property rights at a future time.<sup>66</sup>

The case for patent mediation is an arguably strong one. ●

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