SEMINAR PAPER

TRENDS AND DEVELOPMENTS IN IP MEDIATION

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By

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TRENDS AND DEVELOPMENTS IN IP MEDIATION

Introduction

1. Litigation can be a blunt tool for IP dispute resolution. The American humourist Ambrose Bierce described a lawsuit as:

   [slide] *"A machine which you go into as a pig and come out of as a sausage*."[1]

2. Mediation can be a highly effective alternative to litigation for IP dispute resolution. Mediation is being used evermore around the world to resolve IP disputes.

3. This seminar examines the latest trends and developments in IP mediation. I will start with a brief description of what mediation is, cover some evidence for its efficacy, and then look at why it is so apt for IP disputes (with reference to some recent figures, cases and commentary). I will then comment on the use of mediation to settle recent major overseas IP disputes – cases where highly complex issues and massive sums are effectively dealt with by mediation. Next, some commentary on the new WIPO Mediation Rules, and WIPO's international partnership schemes – the world body taking a leading role in the development of IP mediation. I will wrap up with some thoughts on the possibilities for the increased use of mediation in New Zealand IP cases.

[slide] What is mediation?

4. **[slide]** These are the words to *Kumbaya*. This is not mediation. **[slide]** These are mung beans. Not mediation. **[slide]** These are some people holding hands. Not mediation either.

5. **[slide]** Mediation can be simply defined as: "*the attempt to settle a dispute through a neutral party*"[2]. It is a facilitated negotiation process. Mediation: "..*puts the power for a solution back into the hands of those most affected – the parties – and enables them to construct a solution that works for them*"[3].

6. Mediation has been around for a long time. Legislation at the time of Henry I (1100-1135) encouraged mediation, or "settlement by love" as it was referred to then[4]. The days on which mediation was to occur were known as lovedays[5]. A dispute between Henry II and Thomas Beckett was the subject of a mediation. But apparently the loveday proved unsuccessful because the King refused to kiss Beckett[6]. Beckett was later murdered by supporters of the King in Canterbury Cathedral. I wonder whether Beckett had really done his risk assessment carefully here, when he insisted on the kiss. I also wonder whether the mediator, in a moment of quiet self-reflection after the mediation, ever thought to himself: "*maybe I should have mentioned death as a risk factor when we were in private sessions.....*".

7. Despite its long history, mediation still has an undeserved reputation amongst some as unsophisticated, and uncommercial. It is seen as best suited to *"touchy-feely*"

areas like family or employment disputes, or cases where "*splitting it down the middle"* is the way to go.

8. In fact, mediation can be highly sophisticated, commercial, and efficacious. With well thought out pre-mediation information exchange, and comprehensive risk and costs assessments, parties can and should come to mediation with a good idea of where they stand, and what will happen if they do not settle. The mediation itself can and should involve a robust discussion of the key issues, and further exposure of the parties' respective strengths and weaknesses. Mediation is a process which can achieve well-informed settlements, utilising a full range of commercial options.

[slide] Evidence of efficacy

9. There is substantial evidence, worldwide, for the efficacy of mediation in all civil fields. For example:

   (a) US Department of Justice records for Department litigation in 2012 across the US showed that:

      (i) The success rate for voluntary ADR in Department litigation ranged from 69%-79%; and

      (ii) 1,516 months of litigation time were saved (ie, over 100 years) [7];

   (b) In a 2011 study of civil cases in Michigan, mediation produced far more settlements and consent judgments (i.e., 84% of cases) than other approaches, including case evaluation (62%), mediation plus case evaluation (62%), and the regular litigation stream (45%). Additionally, the mediated cases resolved more quickly (regardless of whether they settled or not)[8];

   (c) **[slide]** In a 2010 survey of mediations in UK construction disputes, "*[t]he cost savings attributed to successful mediations were significant….. . Only 15% of responses reported savings of less than £25,000; 76% saved more than £25,000; and the top 9% of cases saved over £300,000..."*[9]*;*

   (d) In a Scottish mediation pilot that ran from 2006 through 2008, 90% of parties that settled at mediation reported that the terms of their agreement had been carried out, while only 67% of litigants who otherwise settled during the course of litigation reported compliance with the agreement[10]; and

   (e) A 2001 study of mediated EU commercial cases found that even those that did not settle at mediation were shorter and less costly to the courts and the disputants[11].

[slide] Why is mediation so apt for IP disputes?

10. Mediation is particularly apt for IP disputes for a number of reasons. The starting point is that IP disputes can be particularly time-consuming and expensive to litigate. In this regard:

(a) The following are statistics cited by WIPO on the duration and cost of patent litigation in UK and US Courts in 2006[12]:

	Average length	**Average costs**
UK	First instance: 12 Months Court of Appeal: 12 Months Supreme Court: 24 Months	Euro: 550k-1.5M Euro:150k-1.5M Euro: 150k-1.5M
US	First instance: 24 Months Appeal: 12+months	USD 650k-5M USD 150k-250k

Delay can of course be a particular concern in patent litigation, given that patents are of course of only finite duration. This point is well illustrated by the case of the cockroach trap **[slide]**. In 1998, an article appeared in The Times headed: "*Unveiled: cockroach trap to beat the world*". The article was about a trap invented by a professor at Southampton University. In that same year, a PCT application was made for the invention by the University. Ownership of the patent was contested though, by another party which claimed to be the inventor. In 2006, the case was the subject of a decision by the English Court of Appeal in *IDA Ltd v The University of Southampton*[13]. In delivering the Court's decision, Lord Justice Jacob raised significant concerns about the litigation of entitlement cases, stating:

> *"Parties to these disputes should realise, that if fully fought, they can be protracted, very very expensive, and emotionally draining. On top of that, very often development or exploitation of the invention under dispute will be stultified by the dead hand of unresolved litigation. That may be the case here: there has not yet been any exploitation by either side, some 8 years after the original PCT application…This sort of dispute is particularly apt for early mediation.."*[14]

The stakes can be very high. Each month of exclusivity for a pharmaceutical drug can be worth millions. And the life cycles for technical innovations are becoming shorter and shorter[15].

(b) And these are the statistics cited by WIPO on the duration and cost of trade mark litigation in UK and US Courts in 2006[16]**[slide]**:

	Average length	**Average costs**
UK	First instance: 10-12 Months Court of Appeal: 12 Months Supreme Court: 24 Months	GBP 100k-500k GBP 50k-250k
US	First instance: 2-5 years Appeal: 1-2 years	USD 350k-1.5M

11. I think we can assume that New Zealand IP cases take at least as long to dispose of (*Lucas v Peterson* was filed in the High Court in February 1999, and the Supreme Court decision was issued over seven years later, in March 2006[17]), and are also very costly.

12. **[slide]** Another issue with the economics of IP litigation is that damages can be extremely difficult to quantify. As Victoria University Associate Professor Susan Corbett has stated[18]**:**

> "*Arguably, an intellectual property right can be precisely valued in only two situations: when it expires, and when a Court rules that it never existed in the first place. In both instances, the value of the intellectual property right is zero*."

13. The Courts can also be very conservative in their approach to damages in IP cases. An example of this can be seen in the New Zealand decisions on additional damages for breach of copyright. In the *G-Star* case, the Court of Appeal set out a schedule of additional damages awards cases in New Zealand[19]. It referred to only one award that was over $20,000.

14. Even more than in other fields, in IP litigation costs can very quickly escalate well past likely returns.

15. IP litigation is also an incredibly uncertain beast. In New Zealand we do not of course have a specialist IP bench. With all due respect to the Courts, this has to have some effect on the quality and consistency of IP decision-making. And winning a case at first instance is no guarantee of ultimate success. In the US, appeals are successful in over 30% of IP cases[20]. I suspect that a similar statistic applies here.

16. So, settling IP disputes early to avoid the costs, delays, marginal returns, and uncertainties of litigation makes sense. But there is more **[slide]**. Mediation also gives parties a far broader range of options. The following is a non-exhaustive list of what a settlement agreement can achieve in an IP dispute that a Court cannot order:

    (a) Cross-licences;

    (b) Agreements as to territories for sale;

    (c) Trade-offs between competing IP rights;

    (d) Negotiated royalty rates;

    (e) Resolution of multi-jurisdiction disputes. Obviously a great deal of IP litigation, particularly in the pharmaceutical, technology and entertainment fields, has a multi-jurisdictional flavour;

    (f) Agreements not to sue, and agreements not to oppose;

    (g) Agreements to changes in the IP rights to be claimed: eg: classes for a trade mark, narrowing of claims for a patent;

    (h) Agreed redesigns, rewordings, reworkings;

    (i) Apologies; and

    (j) Agreements to work together in the future.

    In my view, the opportunities for "value-add" in settlement are richer in IP than in any other field of commercial litigation.

17. At this point, you might say though: "*can't we achieve all of that through negotiation? Why do we need to mediate?*" The answer is that "*yes*", all of that can of course conceivably be achieved by negotiation. And not all cases need to mediate. But, in my view, mediation can greatly increase the chances of achieving settlement, and of such settlements being lasting and effective. I have cited some of the statistics in support of this thesis earlier. The following are some further observations on why mediation can work best **[slide]**:

    (a) Mediation can be the best way to repair relationships. A lot of hard-nosed lawyers scoff at the importance of relationships in commercial disputes. They are wrong to do so. In a speech on mediation earlier this month, Lord Neuberger, President of the UK Supreme Court, cited a 2007 UK survey,

        "*which reported that 47% of respondents involved in commercial litigation admitted that a personal dislike of the other side had been responsible for driving them into costly and lengthy litigation*"[21].

        Typically, when parties negotiate towards settlement of IP disputes, they do so through lawyers, by correspondence or on the phone. A face to face mediation, on the other hand, gets parties together and encourages them to address all of the issues between them – including their relationship;

    (b) It provides the opportunity for catharsis – so often the precursor to reconciliation. Having your lawyer write a really well-worded letter may be mildly cathartic. Telling the other side in person how wrong you think they are, and how much damage they have caused, will inevitably be much more so. Many parties want to have their say before they settle. For many parties, a mediation will be the only chance they get to have their say, short of trial;

    (c) Mediation gives parties to IP disputes a particularly good opportunity to look at matters in a practical, problem-solving way. Leading UK IP mediator Jon Lang recommends that samples be brought along to mediations, and says that:

        "*Many cases have been settled with parties looking over products bearing an allegedly infringing trade mark, or which are said to infringe another's design right, with parties suggesting changes that could be made to resolve the dispute*"[22]

    (d) The parties also get the benefit of the help of a third party neutral, who may well have subject matter expertise, and whose sole aim is to help them overcome their differences. They also get the benefit of a tried and effective process. Often, cases are settled at mediation after a long and unsuccessful attempt at reaching settlement through inter-party negotiations. It is the mediator, and/or the process, that ends up making the difference.

Use of mediation to settle major overseas IP disputes

18. I will turn at this point to comment on the use of mediation to settle some recent major overseas IP disputes.

[slide] *Universal, Sony BMG, and Warner v Baidu*

19. Baidu is a search engine behemoth in China. It is a direct competitor to Google. In 2011 its China market share was 80% vs 20% for Google[23]. It was also considered in the West to be a dominant player in the illegal downloading of music in China.

From 2005-2010, music companies tried and failed to hold Baidu to account in litigation in the Chinese courts[24].

20. The macro background to this litigation involved international politics at the highest level, and massive sums of money. Since joining the WTO in 2001, China has faced constant criticism from the US and other Western countries for not doing enough to protect IP rights. In 2008 alone, it was estimated that the pirated music market in China caused the US trade losses of more the $560M. IP was a subject of the summit between Presidents Obama and Hu in January 2011.[25]

21. In August 2010, three music companies, Universal, Sony BMG, and Warner appealed a loss against Baidu in a lower Court to the Beijing Higher People's Court. The Court heard the appeal, but decided not to give a verdict. Instead, it referred the case to mediation with the Mediation Centre of the Internet Society of China.

22. **[slide]** After six months of mediation efforts, a settlement was reached in July 2011. The settlement included the following provisions[26]:

    (a) Baidu was granted a license to over 500,000 songs, which could be offered to Chinese internet users for free;

    (b) Baidu would pay the music companies on a per-play and per-download basis;

    (c) The licensed music would be supported by advertising on Baidu and, if the advertising revenue exceeded a certain amount, the music companies would get an extra split; and

    (d) Baidu agreed to donate an undisclosed amount to an anti-piracy fund.

23. In December 2011, Baidu was removed from the so-called "*301 list of notorious markets*" by the Office of the US Trade Representative.[27]

24. Plainly enough, the settlement, and its consequences, could not have been achieved by a Court ruling.

25. The settlement has been heralded as:

    (a) A step forward for copyright protection in China. A similar deal has since been reached in 2013, between four music companies and two other Chinese internet companies, Sohu and Sogou – again after a Court-directed mediation, this one lasting for 19 months[28]; and

    (b) A step forward for mediation of IP disputes in China. Apparently mediation of such disputes is not the norm, but there is a sense that attitudes in this regard are changing[29].

26. The case was also lauded by the Supreme Court of China, which included it in its "*Top 10 IP Cases of 2011*"[30].

[slide] *AMD v Intel*

27. The tale of the AMD-Intel mediation is an all-American one, which might yet spawn a mini-series or a movie. Massive companies, huge sums, an all-star mediator, and a beachside mediation. It even has its own "play-by-play" on Bloomberg[31].

28. AMD and Intel are the world's largest makers of computer chips. From 2004, there were multiple issues, and extensive litigation, between them. AMD accused Intel of anti-competitive behaviour, in particular by making incentive payments to PC makers to coerce them into using Intel chips. In turn, Intel contended that AMD was in breach of patent cross-licensing arrangements between the two parties, by looking to spin the technology into a subsidiary[32].

29. In 2009, Intel and AMD entered into protracted negotiations to try to resolve matters between them. Impasse was reached. AMD wanted payment for dropping the anti-competitive behaviour claims, whilst Intel said that it should be compensated over the patent issue.

30. Enter top US mediator Antonio Piazza, described as having: "*a photographic memory and a knack for bringing parties together in deals where the situation seems intractable*"[33]. Piazza mediates in San Francisco and Hawaii. He mediated this case for two days at a hotel in Maui. But apparently there was no fun on the beach. After a marathon session, the parties hammered out a deal.

31. **[slide]** The settlement included:

    (a) A payment of $1.25 billion from Intel to AMD;

    (b) Agreement on future business practices (including ruling out incentive payments);

    (c) New patent cross-licenses;

    (d) Dispute resolution provisions, including regular meetings between the parties' general counsel; and

    (e) The withdrawal of the litigation[34].

32. Interestingly, rebooting the relationship between the two companies was an important aspect of settlement. AMD Vice-President for Legal Affairs Thomas McCoy stated: "*we needed to find a way to conduct ourselves in a manner consistent with industry leaders, not tribal warriors*"[35].

33. So, mediation got these parties across the line, the deal was not something that could have been achieved through the Courts, and relationships were enhanced.

[slide] *The Winklevoss Twins v Zuckerberg*

34. Antonio Piazza was also the mediator in another very high profile US mediation – being that which settled the dispute between Mark Zuckerberg and Tyler and Cameron Winklevoss.

35. As many of you will know, the Winklevoss twins, or "Winklevi" as Zuckerberg is portrayed as calling them in the film *The Social Network*, alleged that Zuckerberg stole the idea for Facebook from them when they were all at Harvard together. Litigation flew both ways.

36. The parties and Piazza undertook a mediation on 22 February 2008. A deal was reached in the early hours that involved the payment of some $65M to the Winklevoss twins in cash and stock[36].

37. This is a mediation story that does not have quite such a happy ending. With Facebook soaring to a value of $50 Billion, the Winklevoss twins got buyers regret, and sued to unpick the mediated settlement agreement. They were unsuccessful[37].

[slide] *RadioShack*

38. RadioShack, once a major force in US electronics retail, filed for bankruptcy protection in February 2015. A major and very modern issue in that bankruptcy has been the disposal of its customer data. RadioShack wanted to sell 8.5 million customer email addresses and some 67 million complete customer name and address files. Various states attorneys objected to this on privacy grounds[38].

39. Radioshack agreed to go to mediation with the states attorneys, and the prospective purchaser of the data, this month to address the issue[39]. The results of that mediation were filed in Court in the US last Wednesday, 20 May 2015. A deal was reached which put tight limits on the data purchase, and allowed customers to opt out of having their data transferred[40]. New York's Attorney General, Eric T. Schniederman, described the settlement as a victory for consumers' privacy nationwide, which would serve as a model for future bankruptcies[41]

40. This seems to me to represent a really interesting development, with mediation being used to manage issues between the government and private entities over civil rights associated with IP.

[slide] The New WIPO Mediation Rules

41. I will move now from individual mediations to WIPO, and aspects of its contribution to IP mediation.

42. WIPO has been a longtime promoter of mediation. The WIPO Arbitration and Mediation Centre was established in 1994. From the Centre, WIPO offers support for IP mediation, via: model clauses, rules and the provision of neutrals.

43. In 2014, WIPO released its new Mediation Rules[42]. They are used for cases mediated via the WIPO Arbitration and Mediation Centre. I note that:

    (a) Apparently mediations made up some 51% of the Centre's caseload in 2010[43]; and

    (b) WIPO mediation is said to enjoy a 70% success rate[44].

44. The WIPO Mediation Rules can be incorporated by reference in dispute resolution clauses in any IP contract.

45. The new WIPO Mediation Rules contain provisions that we would all expect from a mediation agreement. In particular:

    (a) There is an express requirement that the mediator be neutral (Article 7);

(b) The parties are to co-operate in good faith (Article 10);

(c) The mediator can meet privately with each party, but cannot disclose what they say in private session to the other party without consent (Article 11);

(d) The mediator has no power to impose a settlement (Article 13(a)); and

(e) There are tight provisions as to confidentiality (Articles 14-17).

46. **[slide]** But the new WIPO Mediation Rules also contain provisions which look a little more unusual through a New Zealand mediation lens. In particular:

(a) If the parties cannot agree on how to conduct the mediation, the mediator gets to determine how it shall be conducted (Article 9). That is a step away from the entirely facilitative model that we typically see here, where the mediator has no decision-making powers;

(b) If the mediator believes that any issue between the parties is not susceptible to resolution through mediation, the mediator can (under Article 13) propose:

(i) Expert determination;

(ii) Arbitration; or

(iii) The submission of the last offers made, for an arbitration on the sole issue of which of the last offers should prevail (I suspect that this suggestion would work as a great reality testing tool if one party is being manifestly unreasonable).

Prior to their amendment in 2014, the WIPO Mediation Rules also included a provision that the mediator could propose turning the matter into an arbitration, at which the mediator will be the sole arbitrator, and could take into account information received during the mediation. This option has real efficiency appeal, but there is a risk that parties' approach to the mediator, and the mediation, will be much less candid if they think that the mediator could ultimately end up deciding the case. I expect that may be why it was dropped in the new Rules;

(c) Most interesting is Article 27, which provides:

> *The parties agree that, to the extent permitted by the applicable law, the running of the limitation period under any applicable statute of limitations or an equivalent rule shall be suspended in relation to the dispute that is the subject of the mediation from the date of the commencement of the mediation until the date of the termination of the mediation*

I have not seen a clause like that in any other mediation agreement. It seems likely to be enforceable in New Zealand – indeed s41 of the Limitation Act 2010 expressly provides for contracting out of limitation periods. Under the Rules, a mediation is commenced as soon as a Request for Mediation is received by the WIPO Arbitration and Mediation Centre (Article 4). So, this clause might be a very useful tool, as a quick and cheap fix for a claimant

who is brushing up close to a limitation period, and/or who has limitation concerns in multiple jurisdictions.

47. In September 2014, WIPO also introduced new Mediation Rules for Film and Media[45]. The key differences between these and WIPO Mediation Rules relate to mediator appointment, with specific provisions on subject matter expertise, mediator nationality, and mediator conflicts.

[slide] WIPO's international partnership schemes

48. WIPO also works in partnership with intellectual property offices in individual countries on IP mediation.

49. In particular[46]:

(a) In Brazil, WIPO has participated in the development of a mediation option for trade mark proceedings pending before the Brazilian National Institute of Industrial Property. WIPO is also the designated provider of mediation services to the Institute where one or more parties is domiciled outside of Brazil;

(b) In Colombia, the National Copyright Directorate of Colombia has designated the WIPO Centre as the administrator of ADR cases where one or both parties are primarily domiciled outside of Colombia;

(c) In Indonesia, WIPO is participating in the development of a mediation option for trade mark proceedings pending before the Directorate General of Intellectual Property Rights of Indonesia;

(d) In the Philippines, an announcement was made on 16 April 2015 of a co-operation agreement concluded between the Philippines IPO and WIPO, which gives parties in dispute over IP rights in the Philippines the option to refer their dispute to WIPO mediation[47];

(e) The Korean Copyright Commission offers a WIPO mediation option to potential parties;

(f) In Singapore, WIPO has participated in the development of a mediation option for trademark proceedings pending before the IPO of Singapore. IPOS has designated the WIPO Center, through its Office in Singapore, as the administrator of such mediations; and

(g) The UK's IPO lists WIPO as one of the mediation providers for its mediation service.

50. Most of these arrangements are relatively recent as I understand it, and I suspect that WIPO will be working with more and more countries on IP mediation in years to come.

[slide] Possibilities for the increased use of mediation in New Zealand IP cases

51. As you will no doubt have gathered, I am a card-carrying convert to the IP mediation cause. So, naturally, I think that there should be increased use of mediation in New Zealand IP cases. Hopefully, some of what I have said here supports that.

52. In large part, the impetus for the increased use of mediation will come from the IP litigators who manage and advise on IP disputes. I know that many IP litigators are very keen on mediation, but I wonder if all use it as often as they might. I think part of the problem here lies with how we mediate in New Zealand. We are somewhat wedded here to the one day "all in" mediation model. These can, and often do, work well. But they are not the only way, and can be too clumsy for really sophisticated disputes. For those disputes, tailored and staged mediations can work extremely well (note the two China music cases above, where mediations went for six and 19 months respectively), and I would suggest should be used more often here.

53. The possibilities for such tailoring and staging are endless, but options can include: targeted pre-mediation information exchange, agreement on obtaining pre-mediation non-binding opinions on discrete legal issues, agreement on processes for narrowing or resolving issues between experts, and/or staggered mediations for multiparty disputes. However the tailoring is done, the purpose is to help parties to mediate on a well-informed, and well-considered basis, which should give them the best prospect of settling, and settling well.

54. I can also see no reason why IPONZ should not develop a mediation scheme for IP disputes before it. We would be following the UK's lead in this regard. As I have noted, there are also mediation schemes in intellectual property offices in a variety of other countries.

55. I would also suggest that a Court-based mediation scheme could work particularly well for intellectual property matters in New Zealand. There is widespread precedent for this internationally. In 2006, the United States Court of Appeals for the Federal Circuit adopted a mandatory mediation program, which included IP cases[48]. The UK Court of Appeal also has a mediation scheme. The Federal Court in Australia can also refer cases to mediation before trained registrars. Apparently, in 2009-2010, IP matters were the second most common type of dispute referred to mediation by the Federal Court (after trade practices cases)[49].

56. Finally, there may be possibilities for mediation to be promoted in the New Zealand IP statutory framework. There is no mention of mediation in any of the New Zealand IP statutes as far as I am aware. But at least 50 other New Zealand statutes do mention it[50]. I note that, in Australia, under a 2006 amendment to the Copyright Act 1968, the Copyright Tribunal can direct parties to mediation[51].

[slide] Concluding remarks

57. I am conscious that this has been something of a gallop. The trends and developments in IP mediation around the world are many and varied. If there is a common thread, it is that IP mediation is becoming increasingly well recognised as apt for the resolution of IP disputes. That recognition is flowing through into cases, mediation schemes and laws in many jurisdictions. I expect that mediation will be used more and more in IP, including in New Zealand, and that it will come to be used in a more sophisticated and structured way.

Mark Kelly,
27 May 2015

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