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**INTELLECTUAL PROPERTY RIGHTS: MEDIATION A BOON FOR DISPUTE  
RESOLUTION**

**Dr Vidhi Shah**

Assistant professor, Faculty of Law, GLS University

**Dr Suja Nayar**

Assistant professor, Faculty of Law, GLS University

**Ms. Urvashi Sharma**

Assistant professor, Faculty of Law, GLS University

**Dr Mayuri Pandya**

Dean, Faculty of Law, GLS University

**ABSTRACT**

*Intellectual property is an intangible property which gives protection to the original owner for the original work. It covers in its purview various types of property and includes Trade mark, Patent, Copyright, Design, and Geographical Indication. The law safeguards the original owner of the IP for its creation and also protects from any third person infringing it. There is civil as well as criminal remedies available for any sort of breach of contract or Infringement. The procedure becomes very lengthy due to justice delivery system is comparative slow in our country. The judicial system in our country is multiple layered which takes its own time in deciding the ceases. Due to delayed justice delivery system, number of fruitful alternatives has emerged. The best methods are Alternative Dispute Resolution which includes Arbitration, mediation, Negotiation and Conciliation.*

*This Article focuses chiefly on the Mediation as a most preferred Alternative dispute resolution in settlement of disputes of Intellectual Property. Mediation is one of the very proficient modes of resolving any dispute if we compared it with all other modes and ways of dispute resolution. The mediator acts as a mediator and is a neutral party to the dispute. The paper deals with all the advantages and the disadvantages of the Alternative dispute resolution techniques. The World Intellectual Property Organisation as specified and encouraged the countries for resolving the disputes through the Mediation rather than going for the conventional method. The disputes can be resolved in a very speedy manner and utmost confidentiality can be maintained as it is in camera between the parties and the mediator. The paper lay down the study of mediation and comes to the conclusion that the processes relating to ADR has comes a long way and it comes to solving cases of Intellectual Property and hence the future generation of innovators and originators might get an easier relief in case their work gets stolen.*

Both were happy with the result, and both rose in public estimation. I  
Realized that the true function of a lawyer was to unite parties riven asunder.  
The lesson was so indelibly burnt into me that a large part of my time during the  
Twenty years of my practice as a lawyer was occupied in bringing out private  
Compromises of hundreds of cases. I lost nothing thereby--not even money;  
Certainly not my soul<sup>1</sup>

## Introduction

The term 'Intellectual Property' is an outcome of the 'thoughts' impending in person's mind. The individuals' ability to generate new ideas, with the assist of their intellect, has been the most precious gift given to mankind by the Supreme spirit. These ideas have helped human race from transforming themselves from an ancient age to the Digital era. The term "Intellectual Property Rights" (here in referred to IPR) has emerged in to Global hub, the Law pertaining to Intellectual property is enacted in mostly all the countries of the world. The laws related to tangible assets and the intangible assets and all the privileges has always played a very important responsibility in promoting the shared fiscal and political progress in various societies. In today's era intellectual property rights have become more economically and politically important The concept of property consists of a person's legal right of whatever description. There are different types of Intellectual property. It includes in its preview Trademark, Patent, Copyright, Geographical Indication, Trade secret. The statue gives protection to the original owner of the Intellectual property. The whole concept behind the Intellectual property Law is to give protection to the original owner of the Intellectual Protect. In the case of GurukrupaMech Tech Pvt. Ltd. vs. State of Gujarat and Ors.<sup>2</sup>, the Hon'ble Gujarat High Court has defined the Intellectual Property as an off-putting right. The relevant extract is as under: *The Intellectual Property Law is a negative right which means it is a right to exclude others from using the property generated by the registered owner. It is thus obvious that this law anticipates pre-emptive measures to prevent the misuse, as the property is intangible per se*<sup>3</sup>.

The statue has provided various remedies for the infringement of the said Intellectual Property. It has civil as well as criminal liability. In the civil Disputes the suit is filled in the district court and is decided after considering all the evidences laid down by both the parties. The decree passed by the court can be challenged in a form of Appeal in the higher forum. In the criminal disputes the FIR or the complaints are filled and further Investigation, Inquiry and Trials are conducted.

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<sup>1</sup> MAHATMA GANDHI, AN AUTOBIOGRAPHY: THE STORY OF MY EXPERIMENTS WITH TRUTH, 134 (6th ed. 1965).

<sup>2</sup> (2018)4GLR3324

<sup>3</sup> ibid

The Indian Judicial system has many times failed in providing the fast justice to the people of India, which is assured under the Constitution of India. The Constitution of India enshrine the fair and speedy trial to the people of our country. The said aspect in reality has become a dream as the litigation process, and the Indian Courts has become very frivolous and lengthy. Compared to the population of the country to the ratio of judges in the different courts, there is a far more difference. The three tyre judicial system has become very lengthy Courts have become bias and it has been observed that many time the innocent person has to suffer and the person with malafide intensions go scot free.

From generation to generation the people of our country have faced ample of problems due to delays that are found in the court while dealing with the cases. The cases in the courts go on for years and years due to various reasons like Adjournments in the ongoing matters by the either side advocate, Judges not available or transfer of Judges. The resultant effect of all this is that so much money of the litigants is wasted and yet the litigants are not satisfied with the judicial process.

The time has now come to make the judicial system burden free. The civil and the criminal cases are affected tremendously and the intellectual property disputes are also affected in a very similar manner in the courts. There is need of a radical and innovative association to get rid of the years old Judicial System. We must go forward and make stronger the alternate dispute resolution mechanisms. The Budwiser case is the best example which every country should look into while dealing with the IP dispute. The parties involved in the dispute since 1970 for the mark BUDWISER<sup>4</sup>. The decision of the European Union final came in 2011. Such along and journey of IP litigation has changes the face of dispute resolution in the IP.

### **Alternative Dispute Resolution and Intellectual property**

Alternative Dispute Resolution (ADR) proceedings are a very new and the alternative techniques for the dispute resolution. It includes in its preview Arbitration, Conciliation, Negotiation and Mediation. Something that is now widely labelled as “ADR” or Alternative Dispute Resolution and defined by the World Intellectual Property Organization (WIPO) as a “neutral mechanism” that allows “parties to solve their disputes outside of court in a private forum, with the assistance of a qualified neutral intermediary of their choice”.<sup>5</sup> The time has come now to focus of ADR techniques for the speedy disposal of cases and reducing the burden of the court. It helps in saving the valuable times of the parties and money and reduces the hassle and burden of the tedious court proceedings for the parties. In addition, the parties involved in the ADR process get a win-win position, and it doesn’t harm to give it a try<sup>6</sup>. It has number of advantages for the problems and the

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<sup>4</sup> Anheuser-Busch v Budejovický Budvar saga.

<sup>5</sup> Prarthana patnaik, The New Age of IP Mediation in India, <https://spicyip.com/2018/07/the-new-age-of-ip-mediation-in-india.html> Access on October 21,2021at 10:00 pm

<sup>6</sup> Ibid

disputes which has raised from the intellectual property Rights. If we consider Mediation, it is the finest dispute resolution technique that has emerged very fast in the last half a decade. It is an attractive option for parties that place a premium on the preservation or enhancement of their relationship, seek to maintain control over the dispute settlement process, value confidentiality, or want to reach a speedy settlement without damage to their reputations.<sup>7</sup> For a time in history, IPR disputes were non-arbitral as the IP rights were bestowed by a sovereign entity and it must be adjudicated only by sovereign sanctioned bodies like courts.<sup>8</sup> With the shifting trends in IP laws for example like the development of transferability of patent rights, etc. dispute resolution in IPR has also been made more broad-minded. While most issues in IPR are matters of individual concern they can be suitably resolved through private arbitration. However, those that are a matter of public concern (*right in rem*) cannot enter into arbitral or any other ADR proceedings. In the case of *Booz-Allen & Hamilton Inc. v. SBI Home Finance Ltd*<sup>9</sup> the Supreme Court held that “*subject matter of arbitration that involves only rights in sonpersonem are arbitrable in nature, but no matter involving right in rem*,” The said opinion was further carried forward in case of *Eros International Media Limited v. Telemax Links India Pvt. Ltd. and Ors*<sup>10</sup> the court stated that the disputes relating to any breach of contracts of any Intellectual Property Rights are born out of the personal contracts and can be settled out of the court.

### **Justifiability of Mediation in Intellectual Property Rights**

Two parties enter into the contract for Licensing, Assignment and many other different types of contracts in reference to the Intellectual property. These contracts are entered with the mutual consent between the parties and with fixed terms and the conditions which are pre decided at the time of entering the contract. The remedy for the breach of contract is also specified by the parties. When the dispute arise there are few number of people who think or opt for the mediation, but In the Modern day contracts the parties do prefer Mediation as the best techniques for the dispute settlement rather than going to the courts. The disputing parties often set and share the Mediation as the only goals when a dispute arises. The very frequent examples of such IP contracts are Agreement for the joint ventures, patent, knowhow and trademark licenses, franchises, computer contracts, multimedia contracts, distribution contracts, joint ventures, different types of photography contracts, film contracts, licencing, Assignment etc., The dispute when resolved through the mediation, than a mediator will be appointed who hears the grievances from both the party and accordingly act neutrally and will settle the dispute.

The disputes relating to IPR is very complex and the stake of the parties are also very high so it is favourable for the parties to opt for the Mediation rather than conventions litigation process. This

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<sup>7</sup> <https://www.wipo.int/amc/en/mediation/why-meditation.html>, access on October 4, 2021

<sup>8</sup> <https://metacept.com/challenges-in-intellectual-property-rights-disputes-ii/>

<sup>9</sup> AIR 2011 SC 2507

<sup>10</sup> 2016 ARBLR 121 (BOM)

disputes are such that it required detail technical knowledge of the law and the process. Mediation, provides an ideal machinery of resolving IPR disputes since it merely focusses on parties' interests and on reaching a settlement, rather than delving into the rights of the parties and declaring a "winner".

### IPR & Mediation in India

Mediation can be particularly valuable for intellectual property disputes because of the complexity of the applicable law<sup>11</sup>. In the case of *Vikram Bakshi v. Ms. Sonia Khosla*<sup>12</sup> the court pointed out the advantages of mediation and also the court stated that Mediation can offer a favourable situation for all the parties and the settlement will be a win-win situation for the parties and the parties will not end up with either winning or losing. Mediation is the practice which is and can be initiated by the parties or by the order of the concerned court or prescribe by the law of a Member State. Mediation do not included any attempts made by the court or the judge grabbed to settle a dispute in the course of judicial proceedings concerning the dispute in question (conciliation). Mediation of IPR claims and disputes is gradually getting a grip in India. Due to the increasing backlog of the cases in the Indian Courts the IPR disputes are referred to the Mediation and the conciliation. Mediation is a non-binding process that are controlled by the parties that means a mediator unlike a judge or arbitrator is not a decision maker, his mediations will not contracted.<sup>13</sup>

Number of statues and various provisions of the said statues are dealing with the provision of IPR and the mediation. Section 12A in the Commercial Courts Act of 2015<sup>14</sup> ("The Ordinance") puts the mandate pre-institution mediation and settlement in cases where no urgent relief has been sought. It has been defined that "commercial disputes" include disputes arising out of intellectual property rights.<sup>15</sup> The Legal service Authority are in charge of conducting the mediation. The said mediation has to be completed within three months of its starting and in certain special cases it can be extended by two more months. The signed award between the parties are binding all the parties. Various steps has been taken under the act is of great help to the parties and also encourages the parties to bring to a halt to the other agencies like court for the dispute settlement and to resolve all the Intellectual property related matters by their own.

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<sup>11</sup> By Cheryl H. Agris, Stephen P. Gilbert, Charles E. Miller and Sherman Kahn, The Benefits of Mediation and Arbitration for Dispute Resolution in Intellectual Property Law, NYSBA New York Dispute Resolution Lawyer | Summer 2011 | Vol. 4 | No. 2, Access on November 5, 021

<sup>12</sup> Special Leave Petition (criminal) no. 6873 of 2010

<sup>13</sup> Maitreyee Bhardwaj, Mediation In Cases Of Intellectual Property Rights, <https://imwpost.com/mediation-in-cases-of-intellectual-property-rights/>

<sup>14</sup> Chapter IIIA of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Ordinance, 2018

<sup>15</sup> (Under Section 2(c) of the Commercial Court Act

There are number of instances in India where IPR disputes have been settled by the process of Mediation. The most successful and fastest mediation which took place was between the famous designers.<sup>16</sup> The Mediator who is appointed to resolve the IP dispute has to be very impartial and non-evaluative. They are not supposed to give their view on either side of there bonafides, their role is to see the future aspects and the outcomes and based on that negotiate with all the parties concerned. They bring both the parties on the table and negotiate with the parties. As suitable to be addressed in IP mediation include disputes which have arisen during negotiations between the parties, in which the issues are not excessively complicated or have been identified through negotiations, and the parties wish to solve them through mutual consultation.<sup>17</sup>

There was a time where parties to the dispute consider litigation as the only remedy available in the Intellectual property Rights Disputes. With the passage of time the Arbitration Techniques in IPR has risen, but still people do not consider it as a very first option. It is still considered as the alternative option. The Advocates who exclusively deals in the IP disputes and has an IP practice have started considering number of other options for the dispute resolution, in which mediation has become the most common technique. In the case of Bajaj Auto Ltd.v. TVS Motor Company<sup>18</sup> Supreme Court stated that in most of the suits filled in the Intellectual Property Matters, it ends up with interim temporary injunctions and then the matter goes on for years and years, the said delay do not serve the purpose of justice and hence the original owner of IP opt of Alternative dispute resolution. Non-adjudicative processes facilitate the IP advocates as it is less time consuming and there is more chances of settlement between the parties and safeguard big business affairs and overall offer higher fulfilment. In the case of Bawa Masala Co vs. Bawa Masala Co. Pvt. Ltd<sup>19</sup> the court state that the inclusion of mediation is an operational non-adjudicative processes in accord with adjudicative processes is probable going to show the way to considerably more rapidly, cheaper and superior outcomes, with advanced conformity and contentment ratings in over 80 per cent of IP disputes, both in National and the worldwide matters. There are ample of examples where WIPO has resolved so many disputes through the Mediation technique under WIPO Rules<sup>20</sup> and has been very successful in patent Mediation, Trade Mark Mediation and Copy Right.

### **Advantages and Dis-advantages of Mediation in IPR**

The Dispute resolution technique by the way of Mediation is very effective and has benefitted the parties who have opted for it, but there are cases where people are not that keen and are unwilling for adopting Alternative dispute techniques in resolving their disputes. Because of this there is a

<sup>16</sup> Raw Mango Pvt. Ltd. v. Vaishali Shadangule

<sup>17</sup> <https://www.managingip.com/article/b1npjmqflk9w2p/japan-implements-new-ip-mediation-proceedings>  
Access on November 5, 2021

<sup>18</sup> (2009) 9 SCC 797

<sup>19</sup> AIR 2007 Delhi 284

<sup>20</sup> [https://www.wipo.int/amc/en/mediation/case-example.html#accordion\\_\\_collapse\\_\\_14](https://www.wipo.int/amc/en/mediation/case-example.html#accordion__collapse__14)

great amount of inconsistency. Still people wants to give first and fore most priority to the Conventional pattern of Litigation. Since last twenty five years it has been observed that the IP attorney, IP Courts and tribunal and IP Organisations<sup>21</sup> are promoting the other techniques. The growing amount of evidence clearly shows improved settlements rates (e.g., above 70 per cent when mediation is used on its own and above 80 per cent when it is combined with arbitration), reduced time to outcomes (measured in weeks instead of months or years) and significant cost savings, not to mention higher satisfaction ratings.<sup>22</sup>

There are few remarkable disadvantages of Mediation and that is both the parties has to agree mutually for the mediation, if they do not agree mutually than the convention court proceedings has to be carried off, which will again start the conventional methods, Also in mediation there is not concept of ex-parte orders, so both the parties has to be present in all hearings.

### Conclusion and suggestions

By this Article a serious endeavour is done to find a balance approach between the adjudicative and the non-adjudicative process for the resolving the dispute. It also attempt to straighten out and expose some of the issues and challenges close to IP dispute and how to focus on the method of Mediation for a fruitful and the meaningful solution. The time has come to change the mind-set of all the interested party to divert there IP issues to the Mediation for speedy settlements.

Any judicial decision in reference to the IP conflicts whether it may be by the process of Litigation or by Alternative dispute resolution techniques be likely to be disjointed, not only by applications of various national statutes and provision but it also leads to international IP disputes. The biggest disadvantage of IP mediation is that if suppose the Mediation is unsuccessful, the parties can knock the doors of the court, which will not suffice with the balanced system. Finally the researcher hereby conclude that the Draft Mediation Bill, 2021 which is in public domain should be passed in the parliament at an earliest so that the appropriate statue for the mediation will be very much helpful to the parties opting for the Mediation. The Statue should allow the provision for the direct mediation tool for the dispute resolution rather than going to the courts and also allow the International Mediation for the global outcome of the mediation and to bring common standard at an International level. The Mediation process should be online so contractual parties residing in different corners of the world can take the utmost benefit of Mediation. This will in a way will be the best and the most successful technique to the dispute resolution when it comes to Intellectual property Rights and will be a boon for IP dispute resolution.

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<sup>21</sup> World Intellectual Property Organisation

<sup>22</sup> Jeremy Lack, Addressing the IP Dispute Resolution Paradox: Combining Mediation with Arbitration and Litigation, Global Arbitration review, <https://globalarbitrationreview.com/guide/the-guide-ip-arbitration/first-edition/article/addressing-the-ip-dispute-resolution-paradox-combining-mediation-arbitration-and-litigation>. Access on November 3, 2021