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A Practical Guide to Mediation in Intellectual Property, Technology & Related Disputes

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A PRACTICAL GUIDE TO MEDIATION IN INTELLECTUAL PROPERTY, TECHNOLOGY AND RELATED DISPUTES

By Jon Lang

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FOREWORD

There are few books published on the subject of mediation. And so far as I am aware there are none dedicated specifically to mediation and intellectual property disputes. Jon Lang is to be congratulated in taking up the challenge in writing a study on this burgeoning and commercially important area.

The fact that WIPO, INTA, and the UK Patent Office have embraced the cause of mediation, and that mediation has become the established first call procedure of large corporations with intellectual property disputes is sufficient indication that the role of mediation in the intellectual property field is here to stay.

When mediation was first promoted as a means of settling disputes it was viewed as being beneficial, because it was thought that contentious lawyers would be kept away from this informal means of resolving disputes. This approach is reminiscent of the optimistic beliefs of the pioneers, who sought informal resolutions in the industrial relations field. Ironically, industrial relations law has become an extensive legalistic field of its own. It is not unreasonable to envisage that the latent legal complexities associated with mediation may develop in the same way—consider the issues behind the meaning of "confidentiality".

Mediation can arrive at solutions, which courts cannot generally achieve. Courts must decide between right and wrong but in the intellectual property field, as Jon Lang shows, mediation may encourage

more flexible solutions—for example by assisting in the agreement of a partitioning arrangement, and/or acceptable licence terms between the parties. Mediation is therefore yet another legal avenue, with which intellectual property lawyers must be familiar.

This is very readable book and Jon Lang's flowing style takes the reader through the issues with little effort—as one might expect from some one who is responsible for the International Bar Association's Mediation journal. I strongly recommend this book.

Hugh Brett
Oxford
October 2006

PREFACE

I first began mediating intellectual property disputes and those arising in the technology sector whilst a solicitor in private practice. These were the types of disputes in which I was acting for clients, acting as party representative in litigation, arbitration and mediation. Whilst my mediation practice is far broader these days, having given up private practice back in April 2005 to concentrate on mediation, I still maintain a keen focus on the intellectual property and technology fields. Indeed, it has always struck me just how suited the process of mediation is to disputes in these fields. Maybe it is because parties find the range of outcomes at trial too limited, or perhaps because the high costs of litigating or arbitrating in these specialist fields is matched by the often high stakes parties play for.

It has also struck me just how much better the process works for the parties when they are well prepared. If one party is much better prepared than the other, it can have a profound effect. It shows not just in the confidence with which the parties go about the process of effective persuasion and negotiation but, I believe, in the deals that are struck. In short, the process is as skewed against the under-prepared as any other process, adjudicative or otherwise. Parties and their lawyers do not go into a trial or interlocutory hearing unprepared, with a buccaneering spirit, hopeful that it will be alright on the day. And they shouldn't go into a mediation in that way. They may well settle, but it will cost them

dear! Mediators are retained to break deadlock. The only way to break that deadlock is for one or both parties to move their position. However, without proper preparation, a party is going to have a far tougher job of persuading the other side that it is in their interests to move. A party rarely moves their position in any significant way unless they think it is in their interests so to do. But if they are not persuaded, the deadlock will remain, unless of course there is movement from the other party!

Given that mediation is an extremely important process for the resolution of IP and technology disputes, when I was invited to write a small practical guide for the EIPR series I thought, why not? What I didn't want to do was stray anywhere near the theory. Not because the theory doesn't matter, but because I think it is more interesting for the practitioner to get a feel for what works and what doesn't on the day or days of the mediation as seen through the eyes of a mediator, and how to get it "right" in the run up to the mediation. Whether readers find this more interesting than BATNA's, WATNA's or ZOPA's, or anyone of the several other acronyms one might come across in the more formal teachings, I leave it to them to tell me.

Jon Lang

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This book is about the effective use and practice of mediation. It examines some of the key issues in the context of the resolution of intellectual property and technology disputes. In traditional terminology this is a book about alternative dispute resolution, or "ADR". But there is nothing much "alternative" about the process of mediation at all. Increasingly mediation is on the agenda when it comes to the resolution of disputes. **1–01**

A recent Grant Thornton report entitled "The future of dispute resolution" published in February 2006,[1] contains some interesting but perhaps not wholly surprising findings. For instance:

- "8 out of 10 external lawyers and 9 out of 10 corporates think that more cases will be resolved by... ADR over the next three years."
- "...the volume of High Court litigation has declined significantly in recent years"...but in-house lawyers report a small rise in disputes over the last 3 years.
- "...more businesses are settling disputes without resorting to litigation."

[1] *www.grant-thornton.co.uk*