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## FOREWORD TO THE UNITED STATES PATENT AND TRADEMARK OFFICE SYMPOSIUM ON TRENDS IN ALTERNATIVE DISPUTE RESOLUTION CONCERNING INTELLECTUAL PROPERTY RIGHTS LITIGATION

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The Greek philosopher and scholar, Plato, was the first to note that necessity is the “mother of invention.” There is certainly much truth to that insightful observation by Plato. However—without wanting to contradict one of the most influential contributors to the evolution of modern philosophy and science—I must humbly point out that Plato perhaps committed an error of omission. He forgot to point out that invention actually requires two parents. Besides necessity, there must also be a spark of ingenuity.

This journal, and the study upon which it is based, represent both of these qualities. It will come as no surprise to any of the readers of this journal that intellectual property (IP) is an incredibly important, albeit highly technical, complex field of law. The stakes are high and

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the battles over who owns what and how much it is worth can be time-consuming and bitter. It was in this context, aware of the need for creative approaches to handling such battles, that California Western School of Law approached the United States Patent and Trademark Office in early 2011 and proposed that the two entities undertake a joint study on the use of alternative dispute resolution (ADR) in IP litigation. With the increasing costs of litigation and proliferation of domestic, multilateral, and online forms of ADR, the objective was to provide the most up-to-date picture possible of the application of ADR tools to IP disputes and to encourage their development in this field.

In furtherance of that goal, on March 8-9, 2012, California Western School of Law hosted a symposium on ADR trends in IP litigation. The symposium drew distinguished speakers from the public and private sector, as well as from the United States and abroad. The school itself provided two of those esteemed presenters. The first of these, Professor Thomas Barton, expertly framed the discussion, and pointed out that ADR in IP disputes tends to be viewed through the prism of enforcement. Traditional enforcement mechanisms are capable of disposing of disputes accurately and fairly, but they can also be expensive and unpredictable. ADR, meanwhile, can provide resolution while reducing the acrimony that often plays a prominent role in litigation.

There is no “one size fits all” approach, as Professor Barton explained and as is demonstrated by the results of the study and the excellent contributions to this journal. Culture, experience, the state of development of a country/region’s IP laws, and other factors can influence how popular a particular tool of dispute resolution is with people and businesses. Ultimately, the most effective dispute resolution systems provide multiple alternatives, alternatives that are not mutually exclusive.

The second invaluable contribution from California Western School of Law came from Professor James Cooper. Professor Cooper discussed the approach taken in an area of much interest and activity in recent years—free trade agreements (FTAs). In particular, Professor Cooper spoke about the historic development of the North American Free Trade Agreement and the inclusion and use of dispute resolution mechanisms in that trade agreement and in the bilateral and multilateral FTAs that followed.

The other presenters at the symposium—the same distinguished group of contributors to this journal—introduced the methods of ADR available in other countries and regions. Their contributions to this journal reflect those discussions. One presenter discussed the developing practice of ADR in IP disputes in Brazil, where ADR has a relatively recent but rich history. For instance, late in 2011, a new proceeding was implemented to resolve disputes over domain names. This provides Brazilians an opportunity to access dispute resolution in Portuguese. In addition, Brazil has a unique Advertising Self-Regulation Code, which allows for resolution of IP-related advertising disputes through a type of peer review/determination process. Nevertheless, the practice of mediation is viewed with suspicion in Brazil. There is a fear that mediation could expose weaknesses in a party's position before litigation.

In contrast, in Canada, mediation is used in nearly every IP case. Courts offer a full range of ADR options, but—aside from mediation—other forms of ADR are rarely used. Even mediation is occasionally avoided out of fear that it would create an appearance of “making deals” with competitors and putting companies in violation of anti-trust laws.

MERCOSUR, sometimes referred to as the “Common Market of the South,” was established in 1991 by Brazil, Argentina, Paraguay, and Uruguay under the Treaty of Asunción to create a free trade area among its members.<sup>1</sup> MERCOSUR members have available to them the ability to arbitrate commercial disputes; however, arbitration and mediation are rarely used for IP disputes. More frequently, rights holders turn to the courts, where they can obtain tougher and possibly more immediate remedies.

Islamic law provides its own unique perspective on IP, where IP is not included within the classical definition of “property” and was, historically, seen to be a public good. Despite this historic view, Islamic law has been interpreted to offer protection for IP; and many countries with Islamic legal systems have robust statutes in place for IP protection. One might expect a significant role for ADR in countries based on Islamic law. As you will read, the reality is quite

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1. It was hoped that MERCOSUR would serve as a stepping stone toward full economic integration among all of the South American states. Internal disputes, increasingly protectionist behavior by the trading bloc, and controversy over Venezuela's role within the bloc have made MERCOSUR's future uncertain.

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different. In the example of Jordan, new mediation laws were passed in 2006, but there continues to be a need for greater experience with this tool.

In parts of East Asia, as in the countries based on Islamic law, one would expect a widespread use of ADR tools, particularly given the community-based approach to resolving disputes in those regions. There are highly developed ADR systems in place in East Asia. Yet, those systems tend to be underutilized. In Asia generally, Singapore is an exception, boasting several arbitration and mediation centers (including the only World Intellectual Property Organization Arbitration and Mediation Center outside of Switzerland). However, in places like Japan and Korea, where there is significant trust in public institutions and ready access to funds to finance litigation, traditional avenues for resolving disputes are much more common. If anything, ADR tends to be viewed in these places not as an alternative, but as a complement to litigation.

As with many East Asian countries, the European Union (EU) members have a number of well-developed options for ADR available to them. In fact, the EU has taken recent steps to promote the use of ADR in IP cases. For example, the Office for Harmonization in the Internal Market, the branch of the EU regulating trademarks and designs, decided, in April 2011, to establish a cost-free mediation system to run parallel to appeal proceedings.

In every region of the world, ADR tools are increasingly available for use in handling IP disputes. The challenge is building awareness about them and their tremendous potential and overcoming persistent concerns and fears about their capacity to bring needed resolution. This journal will help in this endeavor.