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### **RESOLVING INTELLECTUAL PROPERTY PROBLEMS THROUGH ALTERNATIVE DISPUTE RESOLUTION\***

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#### **I. INTRODUCTION**

1. The sections below offer thumbnail descriptions of some of the Alternative Dispute Resolution (ADR) methods available for use in resolving Intellectual Property (IP) disputes in both the domestic or international arenas. These include prevention, private discussion and negotiation, consultation with an advisor or neutral, early neutral evaluation, mediation, online settlement procedures, arbitration, expert determination, and court-centered settlement efforts.

2. These alternatives are not mutually exclusive, but instead can be used in succession until the problem is effectively resolved. A basic functional sequence for their employment would be as follows:

- First, attempt to prevent the problem from arising.
- But second, if a problem does occur, use self-help: try to find good advice and begin private two-party negotiations.
- Third, if those negotiations fail, add a third party to help facilitate the negotiations through offering evaluation or mediation.

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\*\* The views expressed in this document are those of the authors alone, and not those of the Secretariat or any of the Member States of WIPO.

- Fourth, if that fails, empower a third party to decide the matter through expert determination, arbitration, a specialty court, or traditional litigation.

## II. PREVENTION

3. Prevention is not technically an Alternative Dispute Resolution method, because effective prevention means that no dispute ever arises.<sup>1</sup> But preventive measures should be strongly considered, and planned for, in building a legal system that provides and protects IP rights. Preventive measures are often relatively inexpensive. Once problems or disputes arise, the procedures for addressing those problems become more costly and risky. Furthermore, effecting preventive measures requires identifying virtually every other aspect of the system, and working toward understanding and communicating how those elements work together. Those efforts in themselves will often reveal trouble-spots that can be eliminated, and that begin a network of communication that generates constant feedback and system improvement.

4. The best preventive measures involve decentralized self-corrective actions: they equip as many people as possible with the knowledge and means to adjust their behaviors quickly and cheaply to avoid infringing on the rights of others. But prevention often begins with a top-down expert evaluation of the sources of friction or disputes within a given system. Chronically troublesome aspects are revised to reduce the pathological potential. Then, finally, resources are supplied so that the users of the system can be empowered to make their own accommodations based on an understanding of the rules and values within the system.

5. The United States Patent and Trademark Office (USPTO) has made a major start toward preventive education, and thus plays an important role in preventing IP problems. Its efforts exemplify the principles for effective prevention:

- First, the USPTO provides searchable databases of existing patents and trademarks so that people can avoid infringement.
- Second, the USPTO website offers information about the nature of IP rights, application procedures, and enforcement. Good examples are the instructive and innovative “Trademark Information Network” videos on the USPTO website about trademark registration and application procedures. They are clever, accessible, and useful in providing people with information that will guide them in both avoiding trouble and expense, and securing their rights.
- Finally, the informal, very practically-oriented approach to presenting answers to “Frequently Asked Questions” is exactly the right sort of method for delivering legal information to the public in a format that works, and that people may even enjoy.

## III. PRIVATE DISCUSSION AND NEGOTIATION

6. Private discussion and negotiation is the initial step of “self-help” toward resolving a problem between disputing parties once it has arisen. Neither lawyers nor public bodies would necessarily be involved directly at this stage, but the power of private conversations between problem holders should not be neglected.

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<sup>1</sup> See generally Thomas D. Barton, PREVENTIVE LAW AND PROBLEM-SOLVING: LAWYERING FOR THE FUTURE (2009).

7. Public bodies can be helpful in the background for prompting these negotiations. Public IP rights-recognition bodies can be a readily accessible source to clarify the beginning entitlements of one party or the other that will facilitate private negotiations. If the erring party can be steered to an easy source of information that reveals legal rights, then inadvertent infringement or abuse may be cleared up quickly without any third party involvement. At the very least, declaration of a rights entitlement can sometimes clarify which party must provide a remedy to the other.

8. If simple two-party negotiations fail, then a third party - either an individual or an organization - can play any or all of the following roles in helping people to resolve their dispute:

- a) offering advice to parties about either the substance of their problem or about how procedurally they might resolve it;
- b) offering an evaluation of the outcome of the problem, if it were to be heard as a traditional law case decided by a judge or jury;
- c) facilitating better communication between the disputing parties, thus augmenting self-help so they can find their own resolution and perhaps also improve their future interactions; and
- d) deciding the matter, *i.e.* making an expert determination, declaring an arbitral award, or pronouncing a traditional legal judgment.

Each of those four functions (advice, evaluation, facilitation, and decision-making) plays a varying role in the remaining third-party ADR mechanisms.

#### **IV. SEEKING COUNSEL FROM AN ADVISOR OR STANDING NEUTRAL**

9. The advisor or Standing Neutral technique is well known in large construction-industry projects,<sup>2</sup> but can also be applied in various IP settings. It may be especially useful in complex multi-faceted licensing agreements or joint ventures in which the parties realize they will have a series of unknowable contingencies.

10. It works as follows: At the outset of a major project or venture, the parties agree on the appointment of a named expert who will be available to offer non-binding advice to the parties in the event of a problem. The advisor informs him/herself about the particulars of the project, and periodically keeps abreast of developments. The function of this proactive information-gathering is to ensure that the neutral will know the parties, and will be able to respond quickly in the event of advice being needed.

11. Experience has found that naming a Standing Neutral to give advice about disputes actually reduces the incidence and seriousness of disputes. Although this is contrary to intuition, once someone is officially named as advisor and is personally known to the parties, both parties seem to be reluctant to have to resort to that advisor. Instead, the tendency is for the party to contact its counterpart in the project with whom there may be some disagreement or early dispute. Informal negotiations then take place to resolve the matter so that no consultation with the Standing Neutral becomes necessary.

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<sup>2</sup> James P. Groton, *Preventive Practices: Lessons from the Construction Industry in Barton*, *supra* note 1, at 75-88.

12. Could an agency like the USPTO or Copyright Office offer such a service? For some projects it would seem a good possibility, one far more feasible in the executive branch than as an adjunct to courts. The U.S. administrative IP institutions and their counterparts in other countries are both expert and respected, with a public status that could be especially effective in advancing a preventive psychology. Further, these offices are repositories for the sort of detached, objective expertise that could readily generate a listing of individuals who would be well-qualified to act as Standing Neutrals. Providing the personnel for this role – either permanent employees of the agency or private consultants on an approved list – could be a win-win for government and the public:

- a) It could provide an additional service to the public, but one that would be consistent with the mission of the agencies;
- b) Offering the Standing Neutral service could provide an additional source of funding for the agencies (a possibility recently made more realistic under the America Invents Act); and
- c) It could also be a two-way learning experience, serving to educate private parties about IP rights but also keeping the Standing Neutral (and indirectly the public agency) up to date about technical developments in the field.

## V. EARLY NEUTRAL EVALUATION

13. The Early Neutral Evaluation (ENE) mechanism has been used successfully for various legal problems, and may be especially well suited to IP problems. An ENE is, as the phrase suggests: taking the dispute to a mutually agreed-upon expert for evaluation of the outcome (and likely cost) if the matter went to court.<sup>3</sup>

14. A classic ENE does not decide a dispute, nor does it directly facilitate talks between the disputing parties. But an ENE does often stimulate better private negotiations between the parties, wherever those private negotiations are being obstructed by one or both parties holding unrealistic visions of their prospects in court. Once people hear a realistic assessment from a disinterested, knowledgeable source, it may narrow the range of bargaining to create a band of overlap in which a mutually agreeable bargain may be struck.

15. The key to a successful ENE is finding individuals with credibility and expertise. Once again, however, a public IP agency like the United States Patent and Trademark Office and Copyright Office would seem well positioned to offer ENE as an initial ADR mechanism.<sup>4</sup> Staff at these agencies have the technical expertise, and may well have the legal background, to be

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<sup>3</sup> According to Kenneth B. Germaine, *Getting a Grip on a Trademark/Trade Dress Case Before It Gets a Grip on the Budget: Using Subject-Savvy Early Neutral Evaluators to Grapple with Difficult Dilemmas*, PLI ORDER No. 18666 JUNE-JULY, 2009 UNDERSTANDING TRADEMARK LAW 2009 389, 391:

ENE can be an effective *evaluative* technique in various intellectual property disputes. ENE allows an unbiased third party, a person deeply steeped in the legal subject matter and trained to listen to all sides, to help both sides -- or, in *ex parte* situations, the sole retaining party -- understand the strengths/weaknesses of their positions *before* large litigation expenses are incurred. Indeed, ENE can be commenced very early, based on existing allegations and information, thus possibly avoiding substantial "discovery" expenditures. As an unbiased neutral, the ENE professional can see the problem from perspectives different from those of the disputing parties and she/he can identify dimensions and possible solutions which may not be apparent to them.

<sup>4</sup> *Id.*, at 391-92.

effective and credible as evaluators. This would be an especially promising role, for example, for experienced IP lawyers who seek semi- or early-retirement opportunities.

16. The evaluative role of the classic ENE could even be combined with a stronger advisory role, akin to that of the Standing Neutral. This advisory role could concern the substance of the problem, if alternative courses of action are still available to the parties. Or this additional advisory role of the ENE could concern procedural alternatives. In other words, if properly informed about ADR possibilities, the ENE could act as an advisor about what procedures the parties might next attempt, in the event that their private settlement talks fail.

## VI. MEDIATION

17. Mediation functions primarily to facilitate better communication between the parties toward concluding a settlement. The mediator may possibly also act as an evaluator, but some mediators disapprove of combining this role with their facilitative role. The clear aim of mediation, in any event, is to settle the dispute and enable the parties to come to a formal written agreement, which then can be enforced as a private contract. The mediator is skilled in communication, helping to draw out the interests of the parties and find a range of mutual benefits. Mediation in general offers the possibility of creative solutions and better relationship protection for the parties.<sup>5</sup>

18. Mediation is generally recognized as offering the advantages of retaining party control; flexibility of remedy; speed of resolution; confidentiality; low cost; and the possibility of maintaining or improving the parties' relationship. Notwithstanding these advantages, IP disputants have been somewhat slow to accept mediation. Some cultures, for example, resist mediation because it lacks authoritative involvement of the state.<sup>6</sup> In other legal traditions, the reluctance may stem more from the highly complex fact patterns often involved and the technical nature of some IP laws. Parties may be skeptical that a mediator can understand the problem and be effective. But where mediators who are expert in IP have been made available to parties (as through the World Intellectual Property Organization (WIPO) or in some U.S. District Courts<sup>7</sup>), mediation appears to be more strongly accepted.<sup>8</sup>

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<sup>5</sup> Max Vilenchik, *Expanding the Brand: The Case for Greater Enforcement of Mandatory Mediation in Trademark Disputes*, 12 CARDOZO JOURNAL OF CONFLICT RESOLUTION 281, 291 (2010).

<sup>6</sup> Karin Klemp, Lawyer, personal communication, March 9, 2012, concerning Brazilian culture.

<sup>7</sup> Vilenchik, *supra* note 5, at 290.

<sup>8</sup> Here is how mediation is implemented in one District Court:

ADR seems to work in those courts that used it for patent issues. The United States District Court for the District of Delaware has gained a reputation among patent litigators as having expertise in handling patent cases. This district court relies heavily upon the ADR practice of mediation. Some of the judges require the parties to meet with Magistrate Trostle to discuss mediation as part of their conference order, while others merely recommend this practice.

During a one-day mediation session, Magistrate Trostle encourages the parties to explore creative solutions and, at the very least, provides a framework for the parties to continue discussions in a non-adversarial atmosphere. After this daylong session, the parties usually continue negotiations with Trostle via teleconference. While the procedure is not complicated, it is extremely successful. According to Magistrate Trostle, about sixty-five to seventy percent of patent cases are settled as a direct result of mediation.

Thomas Hitter, *What is So Special About the Federal Circuit? A Recommendation for ADR Use in the Federal Circuit*, 13 FEDERAL CIRCUIT BAR JOURNAL 441, 465-66 (2004).

## VII. ONLINE SETTLEMENT PROCEDURES

19. Because of its potential for dramatically reduced costs, legal professionals and online technologists have experimented for several years with possible online settlement methods to resolve legal problems. Those efforts have had mixed results.

20. One example of a successful IP-related online ADR program is the procedure under the Uniform Domain Name Resolution Policy (UDRP). UDRP was conceived largely by WIPO at the behest of the Internet Corporation for Assigned Names and Numbers (ICANN) for resolving problems of “cyber-squatting,” or internet domain name trademark disputes.

21. The UDRP is an effective and inexpensive match to the cyber-squatting problem it addresses. But its success is not easily duplicated. That is because of a combination of features of the problem itself, and the UDRP procedure. First, cyber-squatting as a problem is fairly simple, both legally and factually. This limits the scope of the inquiry and need for testimony; it also means that preparation is relatively easy. Virtually no vital information need be “discovered” by one party from the other. Second, the remedy is also easy. It is limited to a binary “valid/invalid” decision about the use of the domain name; no money damages need be calculated.

22. Finally, the UDRP benefits from assurances of participation and decisional enforcement. Rather than relying on the consent of the defendant to participate in the process once a problem has arisen, that participation is ensured in advance as a requirement of registering a domain name. Enforcement is virtually assured, through cooperation of the internet domain name registrars who agree to abide by the UDRP decision. Court appeals are rare.

## VIII. ARBITRATION

23. Arbitration, both U.S. based and international, has long-standing recognition as an ADR method. Arbitration is a flexible procedure in which a private third party is engaged to decide the merits of a controversy. The parties may shape much about the procedures that will be used in a particular arbitration, through either a pre-existing contractual clause calling for arbitration in the event of a dispute or an agreement submitting a dispute to arbitration at the time the dispute arises.

24. From the perspective of common law procedures, common variables available for the parties to decide in an agreement leading to an arbitration proceeding include: applying the rules of evidence; following legal precedent; the extent of fact discovery; making oral presentations; and whether the award will be accompanied by a written rationale of the arbitrator. Furthermore, through the contract setting up their arbitration, the parties may also be able to stipulate the substantive law that will apply to their arbitration. For example, rather than general law being applied the parties could agree that the traditions of the parties would govern the resolution; or the customs of a trade; or the law of a particular nation; or even to permit the arbitrator to invoke equitable principles as appropriate.

25. The advantages of private arbitration for resolving IP matters are therefore several. The arbitrator (or panel of arbitrators) can be selected for their subject matter expertise as well as their reputation for fairness; the proceeding can be kept confidential, even as to whether an arbitration occurred; the parties may select both the location of the proceeding and the law

upon which it will be based; the arbitral decision or “award” is authoritative, being reviewed in the courts only on very limited grounds;<sup>9</sup> and finally, an arbitral award is enforceable world-wide through the New York Convention<sup>10</sup> (which is ratified by most countries). As suggested above, this last advantage is highly significant. Enforcing court judgments across national legal systems is often legally and politically problematic, as well as time-consuming and financially costly.

26. One possible limitation of arbitration, however, is its questionable ability to affect IP recognition or validity.<sup>11</sup> Most IP matters are arbitrable in most countries, but not always.<sup>12</sup> The reluctance of some nations to permit arbitration of the validity or proper recognition of IP rights reflects a significant concern. IP rights are essentially monopolistic, with inherent potential for anti-competitive effects or protection of local enterprises. Private arbitration may limit the information that flows into public institutions, and thereby limit regulatory potential.<sup>13</sup>

27. Two additional features of arbitration exacerbate this shift from public to private power: confidentiality and court enforcement of arbitral awards without substantive review. Confidentiality in arbitration can be virtually total, and is often discussed as one of its significant attractions. Parties can privately agree to various levels of secrecy. They may forego entirely the arbitrator giving reasons for the award, or agree to its non-disclosure beyond the parties; or they may seal the terms of the award; or they may even prevent the public from learning that an arbitration occurred. Public policy development about IP is to that extent deprived of the information about effects or trends. Legal development, especially in common law jurisdictions, is similarly stunted by fewer judgments circulating that otherwise would be available to help interpret IP legislation or judicial doctrines.

28. The New York Convention or equivalent domestic statutes that require court enforcement of arbitral awards without significant merit review<sup>14</sup> also operate to limit public influence on IP problem-solving. But Professor Philip McConaughay has identified the dilemma posed by courts taking a “second look” at the merits of an arbitration award or imposing other quality

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<sup>9</sup> Scott H. Blackmand, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AMERICAN UNIVERSITY LAW REVIEW 1709, 1732--33 (1998). See also Julia A. Martin, *Arbitrating in the Alps Rather than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STANFORD LAW REVIEW 917, 953-54 (1997).

<sup>10</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention), 330 U.N.T.S. 3, 21 U.S.T. 2517, TIAS 6997 (June 10, 1958).

<sup>11</sup> See generally, M. A. Smith, *et. al.*, *Arbitration of Patent Infringement and Validity Issues Worldwide*, 19 HARVARD JOURNAL OF LAW AND TECHNOLOGY 299 (2006).

<sup>12</sup> *Id.* See also Martin, *supra* note 9, at 944-46.

<sup>13</sup> Despite the economic incentives that ADR offers for resolving patent and intellectual property disputes, there is still the concern that it may be against the public's interest. Patents are “an exception to the general rule against monopolies and to the right to access to a free and open market.” The patent is a right being assigned to particular people, thus excluding others. As a result, there is a strong desire that the exclusive rights associated with a patent be awarded only to those who undertake valid research. Unlike government contract and employee disputes, people other than just the parties to a dispute are concerned with the outcome of a patent's validity--most notably, the patent holder's competitors. Judicial scrutiny and full disclosure in discovery are used to protect the social and economic interest in awarding valid property rights. Hitter, *supra* note 8, at 463.

<sup>14</sup> Lucille M. Ponte & Erika M. Brown, *Resolving Information Technology Disputes After NAFTA: A Practical Comparison of Domestic and International Arbitration*, 7 TULANE JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 43, 63-65 (1999).

control measures before enforcing the award.<sup>15</sup> By taking second looks, particular economic and social policies can come under stronger control and the Western ideal of consistency and predictability in the law can be furthered.<sup>16</sup> On the other hand, a second look may undermine the flexibility of arbitration, which would in turn reduce its attractiveness as an alternative to the courts.<sup>17</sup>

29. Increasing the level of merit-based court review of arbitration awards would help to protect the public interest in competitive markets and the appropriate accessibility of IP rights, and it would maintain confidence that the rule of law underpins the awards. Yet confidentiality, clarity, and efficiency all could be compromised by court oversight that is too strong. One possible way to soften this dilemma would be to strengthen the role of courts or administrative agencies in supplying arbitrators, and crafting template rules for how arbitrations should proceed.

## IX. EXPERT DETERMINATION

30. Expert Determination is a device formalized in WIPO.<sup>18</sup> Its process is a simplified version of arbitration, relying on some online communications and an IP expert as third party decision-maker who can be chosen by the parties or supplied by WIPO.

31. Compared to arbitration, the WIPO Expert Determination is a less “legally-structured” process especially well-suited to narrower technical, scientific or business issues like the valuation of an IPR, or the breadth of a patent claim.<sup>19</sup>

## X. COURT-CENTERED SETTLEMENT EFFORTS

32. Court-Centered Settlement methods often have no special application to IP rights cases, but are certainly available for use in IP disputes. The most common of these is court-ordered settlement conferences, in which a judge to whom a formal case has been assigned will require the lawyers (and perhaps the parties) to appear informally before the judge to discuss possible

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<sup>15</sup> Philip J. McConaughay summarizes the various proposals of “leading commentators [who] have expressed their concern over [arbitration’s] potential for lawlessness by urging dramatic procedural reforms designed to increase the probability of international arbitrations achieving proper legal results:”

The proposed reforms extend to mandatory and non-mandatory law cases alike. Among the proposals are calls for greater transparency of the arbitral process, more uniform rules of procedure, standard rules of evidence, reasoned arbitral opinions, and the publication of opinions and awards. Some commentators even have proposed the creation of a single neutral international institution that would administer all international commercial arbitrations pursuant to a system of adjudication incorporating the foregoing reforms.

Philip J. McConaughay, *The Risks and Virtues of Lawlessness: A “Second Look” at International Commercial Arbitration*, 93 NORTHWESTERN UNIVERSITY LAW REVIEW 453, 457–58 (1999).

<sup>16</sup> *Id.* at 458–45.

<sup>17</sup> *Id.*, at 458: “[T]he success of commercial dispute resolution for participants from [Asia and much of the developing world] often turns on the availability of precisely those features of arbitral ‘lawlessness’ that proponents of arbitral reform seek to displace: carefully guarded secrecy, complete flexibility of procedure and evidence, and the absence of reasoned opinions and published awards attributing breach, blame and fault.”

<sup>18</sup> WIPO, Expert Determination, available at <http://www.wipo.int/amc/en/expert-determination/>, (last visited Nov. 21, 2013).

<sup>19</sup> WIPO Arbitration and Mediation Center, *Why Mediate/Arbitrate Intellectual Property Disputes?* 42 LES NOUVELLES 301, 303 (2007).



settlement. The judge may be strong in pressuring a resolution, or not. Even if a full settlement is not reached, some of the issues may be concluded.

33. Especially promising for IP cases, however, may be the use of a magistrate judge or appointment of a special master. Their role would resemble an ENE involvement,<sup>20</sup> but with stronger authority.

34. A more exotic device that could be connected directly to courts is the “mini-trial” in which lawyers for each side of a dispute make short adversarial arguments in front of all the assembled disputants. In a mini-trial, there is no judge or jury, but a neutral party may be present to control the proceedings.<sup>21</sup> The theory behind this ADR method is that one party may hear for the first time how the dispute is viewed legally by the other side. Having heard these arguments, the parties themselves may be more willing to negotiate a private solution. But on the other hand, the attorneys may be concerned about having revealed too much of the strategy they intend to employ at trial.<sup>22</sup>

35. Nonetheless, some consider the mini-trial to have significant potential.<sup>23</sup> The tone of a mini-trial differs from other ADR methods, offering some special possibilities for creative solutions as well as relationships.<sup>24</sup>

## XI. CONCLUSION

36. IP enforcement should protect rights that have been legitimately recognized by the law, and facilitate their future use. These three functions of intellectual property law - recognition, enforcement, and facilitation - must be properly balanced if the underlying goals of social invention and creativity are to be achieved. As globalization and digitization progress, creating effective, efficient, and productive enforcement procedures becomes more difficult but yet more crucial.

37. Adjudication must remain a central option. Its properties of transparency, clarity, power, precedent, and ability to bring a public regulatory voice to intellectual property disputes make adjudication an invaluable resource. But its accelerating costs, delays, uncertain expertise, and possible relational destructiveness have spawned a private market for alternative methods.

38. The market has generated admirable procedural innovations. The next evolutionary stage is toward stronger use of the ADR methods within public bodies and international organizations. This should not, and will not, displace the purely private use of these methods. But folding these alternative practices into public legal systems and recognition agencies may enhance the quality and consistency of the ADR methods themselves, as well as permit easier integration of public values into IP dispute resolution. It will prompt yet further innovations in designing ADR methods, and build experience among IP legal practitioners in fitting the procedures to particular problems and contexts.

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<sup>20</sup> Kevin R. Casey, *Alternative Dispute Resolution and Patent Law*, 3 FEDERAL CIRCUIT BAR JOURNAL 1, 11-13 (1993).

<sup>21</sup> See Blackmand, *supra* note 9, at 1715; Thomas J. Klitgaard & William E. Mussman, *High Technology Disputes: The Minitrial as the Emerging Solution*, 8 SANTA CLARA COMPUTER & HIGH TECH LAW JOURNAL 1, 2 (1992).

<sup>22</sup> Richard Naiberg, personal communication, March 9, 2012.

<sup>23</sup> Casey, *supra* note 20, at 1.

<sup>24</sup> Klitgaard & Mussman, *supra* note 21, at 3-4.

39. Finally, offering a broader, more flexible and cheaper enforcement system for IP rights may make intellectual property generally more accessible and feasible. By increasing efficiency and party participation in enforcement, more creators may be encouraged to seek legal recognition for their inventions and expression; and once those rights are secured, the ideas will be put to better use for their creators, the public, and the new innovators who will build on those rights.

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