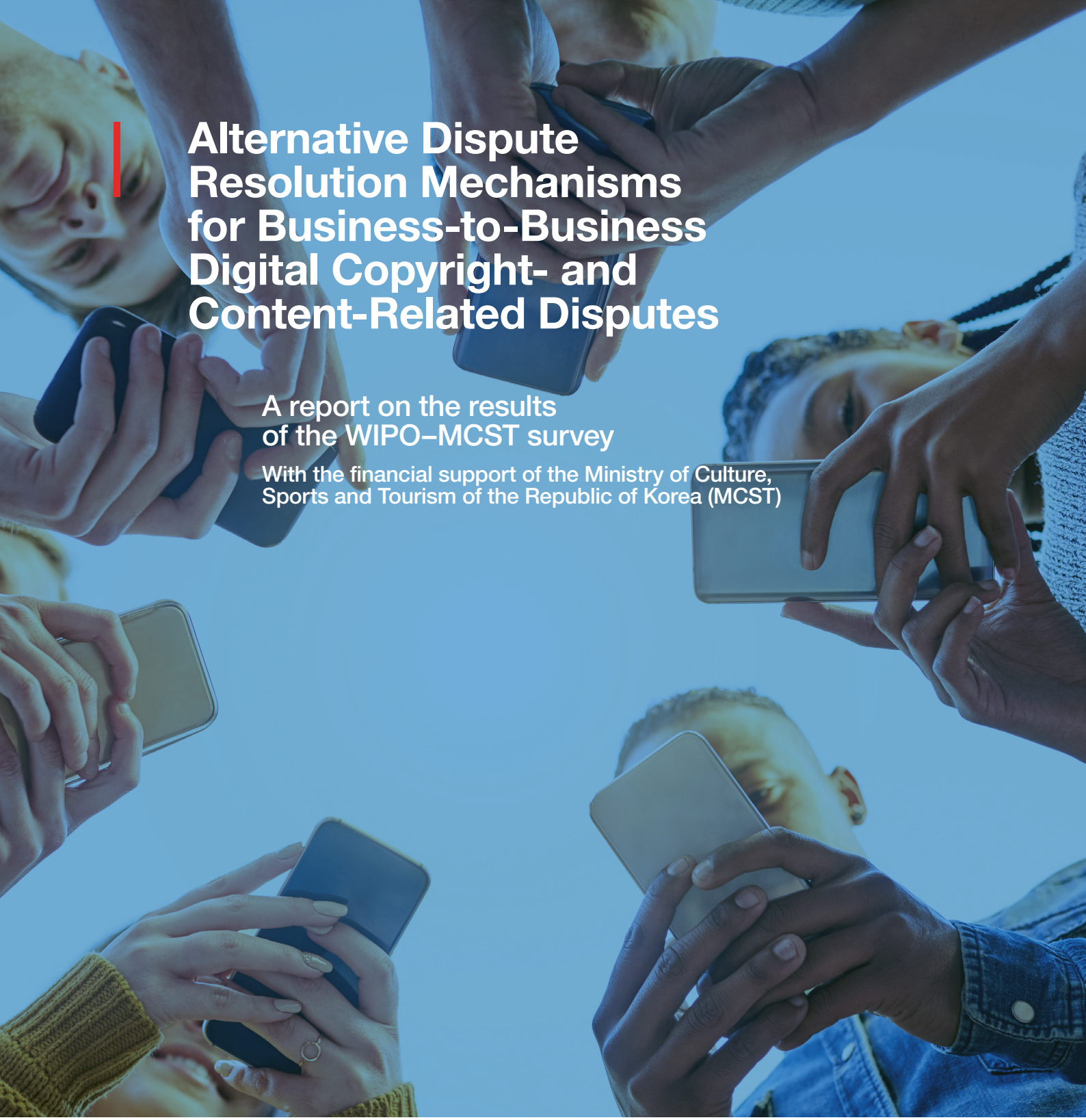

Alternative Dispute Resolution Mechanisms for Business-to-Business Digital Copyright- and Content-Related Disputes

A report on the results of the WIPO–MCST survey

With the financial support of the Ministry of Culture, Sports and Tourism of the Republic of Korea (MCST)

WIPO
WORLD INTELLECTUAL PROPERTY ORGANIZATION

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Forewords

From music to video-sharing social networking services, the digital content market is global. The shift in the way digital content is handled also underlines the need to protect creators' rights.

In supporting social and economic development, creators and other actors of the creative industries rely on the copyright system to safeguard their rights. Since the creative industries is a very dynamic sector, where members of the ecosystem have different interest, it is not surprising that disputes arise. Therefore, individuals and businesses need access to effective dispute resolution to ensure they are justly rewarded for their works. In this evolving space, court litigation is not always suited to copyright- and content-related disputes, shifting attention to the role of alternative dispute resolution (ADR) mechanisms.

The WIPO-MCST Survey and Report on the Use of ADR Mechanisms for Business-to-Business (B2B) Digital Copyright- and Content-Related Disputes seeks to add to a fact-based understanding of this topic across industries. In addition to assessing the current use of ADR to resolve such disputes, the report may inform the development of tailored ADR mechanisms, in line with recent national and regional legislative developments.

The report highlights WIPO's commitment to contributing to an environment in which individuals and businesses can continue to produce creative content in the digital market. Addressing a wide range of stakeholders – including copyright- and content-intensive companies of all sizes, online intermediaries and platforms, creators, entrepreneurs, collective management organizations, in-house and external counsel, and government bodies – the report identifies the potential of ADR mechanisms at an important moment in international policymaking in the area of digital copyright.

We are most grateful for the invaluable support of the Ministry of Culture, Sports and Tourism of the Republic of Korea (MCST) in enabling the production of this report through the Funds-in-Trust for the promotion of ADR (FIT-ROK/ADR). We are pleased with this opportunity for WIPO to contribute to the broader conversation on the role which ADR mechanisms can play in a more effective environment for the fair recognition, protection and compensation of creators' rights.

Marco M. Alemán,
Assistant Director General
IP and Innovation Ecosystems Sector
World Intellectual Property Organization

Technological development has resulted in increased creation and consumption of content while the value of such content, delivering information and enjoyment to people everywhere, is continuously growing. The estimated size of the global content market has grown to USD 2.4 trillion (PwC, 2019). If related industries that are driven by content, such as manufacturing and tourism, are taken into account, the value rises to unimaginable heights.

At the same time, there are threats that hinder quantitative and qualitative growth of content. Disputes regarding content are rising across borders while the speed of copyright infringement surpasses that of enforcement. The distribution cycle of digital content, such as games, movies and music, is short, and their circulation and reproduction easy, making it difficult to depend solely on resolution through existing trial procedures.

ADR mechanisms can be a viable alternative in a rapidly changing content environment. Compared to court litigation, ADR is more affordable, faster and easier when trying to settle cross-border, international disputes. The Ministry of Culture, Sports and Tourism of the Republic of Korea (MCST) has gradually increased its WIPO Funds-in-Trust, initiated in 2006, and has been implementing various cooperative projects and research with the objective of further promoting the ADR mechanism since 2018.

I offer my sincere congratulations on the publication of the *WIPO-MCST Survey and Report on the Use of ADR Mechanisms for Business-to-Business (B2B) Digital Copyright- and Content-Related Disputes*. I am very happy that cooperation between WIPO and the MCST has led to this meaningful research.

I believe this survey and report will serve well as base material that investigates how approximately 130 countries are using ADR, and thus will be useful in facilitating these mechanisms in the future. I sincerely hope that this report will lead to more interest in and constructive discussion on the topic of ADR and that these mechanisms will be more widely used in content-related disputes.

Oh Yeong-Woo,
Vice Minister
Ministry of Culture, Sports and Tourism
Republic of Korea

About the authors

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Dev Gangjee is Professor of Intellectual Property Law at the University of Oxford. His primary research interests relate to trademarks, copyright and geographical indications. Dev is a member of the European Communities Trade Marks Association (ECTA) and has acted as an expert or consultant for international organizations, national governments and law firms. He has collaborated closely with leading UK intellectual property law firms, as the former director of the Oxford Diploma in Intellectual Property Law and Practice. Dev was principal investigator for a comparative report on voluntary copyright registration systems for the European Union Intellectual Property Office in 2018.

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Mimi Zou is cofounder of and principal investigator at the Deep Tech Dispute Resolution Lab and the director of Studies in Law at Regent's Park College, University of Oxford. She is also Associate Professor in Law at the University of Reading. Mimi Zou is a member of the World Economic Forum Experts Network, specializing in the areas of China, justice and blockchain, the World Bank's Access to Justice and Technology Taskforce, and the UNIDROIT Working Group on Digital Assets and Private Law. Her research has won international awards and been covered by international media outlets. Mimi Zou is a qualified lawyer in Australia and England and Wales, with over 17 years of experience working for and advising international organizations, government departments and firms in tech and professional services sectors in China, Europe, the United States of America and Asia-Pacific. She holds DPhil in Law and Bachelor of Civil Law (Distinction) degrees from the University of Oxford, as well as first-class honors degrees in Law and Economic and Social Science from the University of Sydney.

Adriana Bora

Adriana Bora is an artificial intelligence (AI) policy researcher and project manager at The Future Society, a member of the Massachusetts Institute of Technology (MIT) Computational Law Report Task Force on Modern Slavery and a contributor to The Good AI. Adriana has a keen interest in the use of data science and AI applications to progress the Sustainable Development Goals (SDGs) – particularly SDG 8, Target 8.7, focusing on eradicating modern slavery. Through her research, Adriana studies how augmented intelligence can accelerate the eradication of modern slavery. She is applying machine learning in analyzing and benchmarking businesses' reports published since the passing of the Modern Slavery Acts in the United Kingdom and Australia. Adriana holds a Master's Degree in International Public Management from Sciences Po Paris School of International Affairs. She also studied for a year at the University of Hong Kong and holds a diploma in International Relations and Advanced Quantitative Methods from the University of Essex.

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The report was prepared under the direction of Ignacio de Castro (Director, WIPO Center, IP Disputes and External Relations Division) and led by Leandro Toscano (Head, WIPO Center, Business Development Unit) and Oscar Suárez (Fellow, WIPO Center, Business Development Unit). The authors of the report are Dev Gangjee (University of Oxford), Mimi Zou (University of Oxford) and Adriana Bora (The Future Society). The WIPO Center contributed its case administration and ADR procedural development experience to Chapter 4 of the report.

Youngyoul Lee (Director General, Copyright Bureau), Young Jin Choi (Director, Cultural Trade and Cooperation Division), Sunkee Kim (Deputy Director) and Ji-In Lee (Policy Specialist), all from the MCST, provided invaluable input in all stages of the survey and report.

A number of copyright offices provided insights on their experience at a national level, including information on legislation and on their dispute resolution mechanisms. Special credit is also due to the 997 survey respondents and 74 interviewees from 129 countries whose valuable contributions have informed the report.

Additional input and comments on the report, and assistance in the distribution of the survey, were kindly provided by WIPO colleagues Michele Woods and Paolo Lanteri of the Copyright Law Division, and Benoît Müller, Anita Huss-Ekerhult and Miyuki Monroig from the Copyright Management Division. Julio Raffo from the WIPO Innovation Economy Section contributed to the design and methodology of the survey. The survey and report also benefited from input and review by WIPO Center colleagues.

Executive summary

Background

The World Intellectual Property Organization's Arbitration and Mediation Center (WIPO Center), in collaboration with the Ministry of Culture, Sports and Tourism of the Republic of Korea (MCST) has conducted a survey on the use of alternative dispute resolution (ADR) mechanisms for business-to-business (B2B) digital copyright- and content-related disputes. Based on this wide-ranging survey, in-depth interviews, legislative research and further analysis, this report identifies the potential for ADR solutions for B2B disputes relating to digital copyright or content.

As the report documents, digital copyright disputes do arise in the B2B context. The relevant sectors identified by respondents include advertising, animation, broadcasting, films, database protection, books and publishing more generally (including e-books), mobile phone applications, musical works and sound recording, photographs, software, television formats and video games. The subject matter of these disputes frequently relates to: (1) whether valid rights exist, who owns them and whether they have been infringed; (2) transactions relating to rights (e.g., the transfer of an intellectual property (IP) asset); and (3) the appropriate remuneration for the use of protected content (e.g., setting license fees).

For parties involved in these disputes, conventional litigation is often unsuitable, as it may disrupt their ongoing commercial relationships, the disputes may straddle several jurisdictions, and the courts may be unable to offer the requisite speed, confidentiality, sectoral expertise and economical solutions. In such situations, ADR options, including mediation, arbitration or expert determination, are more suitable alternatives. The increasing adoption of online dispute resolution (ODR) tools – such as online dockets and videoconferencing tools – in the ADR context has added to ADR's appeal.

IP practitioner associations have therefore expressed an interest in ADR solutions, while national or regional IP offices increasingly facilitate ADR as an alternative to litigation. Both the Korea Copyright Commission (KCC), which offers ADR services, and the WIPO Center have seen an increase in their copyright caseload. Yet, to date, there is very limited empirical research on the application of ADR to such digital copyright disputes in the B2B context, including through online content-sharing service providers (OCSSPs).

Objectives

Against the above background, this report seeks to address the identified knowledge gap by developing an empirically informed understanding of a number of thematic issues. The report:

- describes the *increasing prevalence of ADR mechanisms* in relation to copyright- and content-related B2B disputes, as reflected in legislation, as well as in practice;
- identifies the *copyright-intensive sectors and types of work* that generate B2B disputes (e.g., software, musical and other creative works);
- characterizes the *nature of these disputes (*e.g., contractual or non-contractual) and identifies their *principal features*;
- establishes the *monetary value* range of the claims (i.e., what is at stake for commercial parties) and the *preferred remedies* (e.g., damages, royalties, declarations of infringement or non-infringement, takedowns, etc.);
- assesses the *propensity for parties to settle* in both contractual and non-contractual dispute scenarios;

- identifies *parties' needs and preferences* (e.g., cost, speed, quality of the outcome, confidentiality) in relation to the available mechanisms and procedures for resolving these disputes (e.g., litigation in court, mediation, arbitration, expert determination, etc.); and
- analyzes the *opportunities, challenges, advantages and drawbacks of specialized ADR mechanisms* in relation to these disputes.

Results from the survey and interviews

Respondents and results

The survey and interviews targeted a global audience, with responses from 129 countries across all regions. The results presented in this study are based on 997 responses to the survey and 74 responses to interviews conducted with key stakeholders.

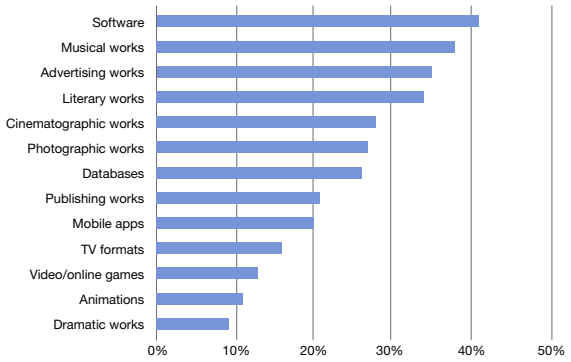
Most of the respondents were legal practitioners working in small and medium-sized law firms. The survey also had a good representation of mediators and arbitrators. The majority of the respondents had over five years' experience in relation to B2B digital copyright and content matters.

Disputes

The responses indicated that more than 60 percent of the respondents had been involved in B2B digital copyright- and content-related disputes in the last five years. The majority (65 percent) were claimants or represented the claimant, but 45 percent had been defendants or represented the defendant.

Most of the disputes in which the survey respondents were involved were non-contractual and domestic in nature. The most frequent subject matters mentioned included software, musical works, advertising and literary works. Furthermore, the interviews also revealed that the most recurrent types of dispute in which the interviewees were involved related to infringement and licensing. In their experience, non-contractual disputes usually related to various types of infringement by unauthorized third parties. Additionally, a majority of interviewees had observed an increase in digital copyright- and content-related disputes in recent years. Some mentioned the rising diversification of the usage of digital copyrighted works and new types of dispute arising as a result.

Figure 0.1 Subject matter of the B2B digital copyright- and content-related disputes



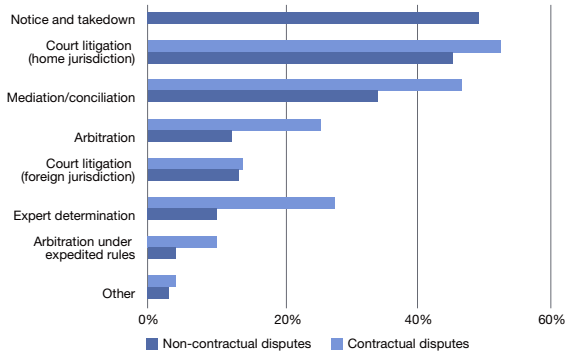
The value of the disputes in which the survey respondents were involved varied, with the majority (59 percent) falling into the bracket of USD 10,000–100,000. Notably, there was a sizable proportion of respondents (36 percent) who had been involved in disputes that did not concern a monetary amount.

When looking at the outcome of disputes, the survey results show that the most common remedies pursued both by claimants and defendants were damages, followed by royalties. Declarations of infringement and contractual renegotiations were also sought-after outcomes. Both contractual and non-contractual B2B digital copyright- and content-related disputes frequently ended in settlements.

In terms of dispute resolution mechanisms, court litigation in the respondent's home jurisdiction was the most commonly used approach to resolve contractual and non-contractual disputes. Given the nature of digital content, respondents (unsurprisingly) indicated that the most frequent mechanism used for resolving non-contractual B2B digital copyright- and content-related disputes was notice and takedown. The interviews additionally revealed that there were relatively few specialized mechanisms available for resolving B2B digital copyright- and content-related disputes or that stakeholders were unaware of such mechanisms. The exception to this were some collective management organizations (CMOs), which have internal dispute resolution mechanisms, as well as use ADR options.

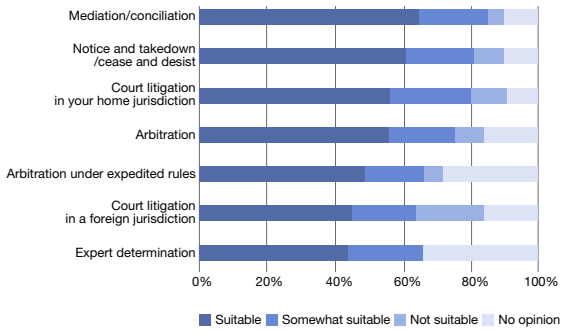
Among those surveyed, the most commonly used tools were documents-only procedures (64 percent), followed by hearing via video conference (32 percent), and electronic case filing and management tools (29 percent). Online dispute resolution platforms were used by 25 percent of the respondents. In the interviews, some stakeholders pointed to a gap in the existence of best practices contained in guidelines or protocols for resolving disputes.

Figure 0.2 Dispute resolution mechanisms used



Overall, the survey respondents' perceptions of various mechanisms used to resolve B2B digital copyright- and content-related disputes seemed positive: all were predominantly perceived as suitable. Based on survey respondents' experience with each of these mechanisms, mediation, notice and takedown, arbitration and court litigation in a home jurisdiction were often perceived as suitable mechanisms.

Figure 0.3 Perception of dispute resolution mechanisms

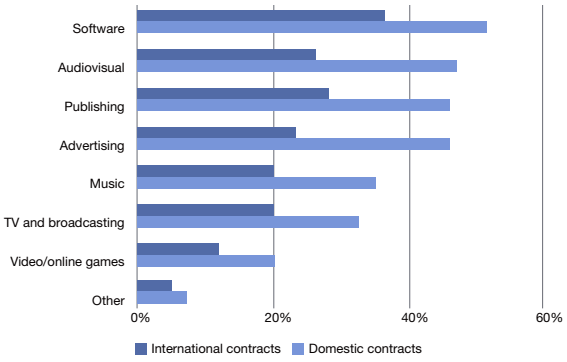


The survey respondents and interviewees seemed to have overlapping priorities in resolving these disputes regardless of whether the dispute was domestic or international. The top priorities were the cost and speed of resolving the dispute, followed by the quality of the outcome and its enforceability.

Contracts

The WIPO-MCST survey further looked at respondents' experiences with B2B digital copyright- and content-related contracts. Of those surveyed, 64 percent concluded such contracts. In terms of the subject matter, software licensing emerged as the largest category, in both domestic and international contexts, followed by audiovisual, publishing and advertising contracts. Respondents were also asked if they had policies or guidelines for drafting dispute-resolution clauses for B2B digital copyright- and content-related contracts; the majority declared that they did. Of those that had such policies, the majority included ADR mechanisms in their policies or guidelines.

Figure 0.4 Areas of contracts concluded



Reported trends and areas for improvement

The WIPO Center asked respondents and interviewees whether they had observed any trends in the use of dispute resolution mechanisms in B2B digital copyright- and content-related disputes. Some respondents indicated that they had noticed an increase in the use of ADR, as more stakeholders become familiar with these mechanisms and come to trust them. Specifically, respondents highlighted the increased use of expedited arbitration and expert determination, as well as the use of adapted ADR procedures for copyright disputes. In line with the experience of the WIPO Center, respondents confirmed that the use of facilitative technology to resolve disputes more quickly has become more common.

When asked which improvements might assist with resolving B2B digital copyright- and content-related disputes, respondents identified the development of standardized, tailor-made and specialized rules and procedures and related

dispute resolution guidelines. Of central importance were international and neutral dispute resolution providers. Respondents also mentioned the use of online dispute resolution (ODR) processes and tools, and they referred to the need to include mediation in legislation.

ADR practical applications: current and potential

Recent developments on notice mechanisms for copyright infringements in the digital environment

Recent regulatory developments point to the need for effective mechanisms that provide an alternative to the courts for resolving B2B digital copyright- and content-related disputes. Notably, the US Digital Millennium Copyright Act of 1998 (DMCA) and the European Digital Single Market Directive (DSM Directive) include several provisions referring to ADR. For example, in the DSM Directive, the use of ADR – in particular, mediation – is encouraged to negotiate and reach agreements on licensing rights for audiovisual works on video-on-demand services. Parties to disputes involving transparency obligations and contractual adjustments related to fair and proportionate remuneration for authors and performers are also encouraged to use voluntary ADR procedures. The DSM Directive also requires OCSSPs to put in place effective and expeditious complaint and redress mechanisms for users in the event of disputes over the disabling of access to, or the removal of, uploaded content involving copyright-protected works or other protected subject matter. The Directive sets out the need for available out-of-court redress mechanisms to settle these disputes, without depriving the user of legal protection and access to judicial remedies. This essentially involves a multi-tiered process for resolving disputes involving the use of protected content by OCCSP: upload-filtering by OCSSPs, human review, ADR and court proceedings.

Effective notice mechanisms adopted by OCSSPs, internet service providers (ISPs) and online platforms can help to efficiently resolve copyright infringement disputes at their onset, especially in relatively straightforward cases. Many globally accessible OCSSPs have implemented or are considering internal redress mechanisms that offer a human review phase for complaints. This allows for context-specific assessments and overcomes the drawbacks of automatic filters in determining whether an exception or limitation applies. For more complex complaints, it seems unavoidable that even the OCSSP's internal (human) review mechanisms may not be able to provide redress.

Development of adapted and customized ADR procedures

Against the above background, a range of out-of-court and judicial options may be needed to resolve copyright disputes impartially, such as that suggested in Article 17(9) of the DSM Directive. This means that we need to look at how customized ADR mechanisms can help stakeholders (users, right-holders, OCSSPs) to efficiently and effectively resolve such disputes.

The WIPO Center, in collaboration with relevant stakeholders, is adapting the WIPO Expert Determination Rules as a global procedure to reflect best international practices for the resolution of user-uploaded content disputes by OCSSPs. Parties can also benefit from WIPO model ADR submission agreements tailored to their digital copyright-and content-related disputes.

Overall, the above developments in ADR solutions and adapted procedures could significantly enhance the resolution of digital copyright- and content-related disputes by promoting accessibility, affordability, transparency, neutrality and fairness.

Chapter 1

Introduction

Background and context

The creative industries have considerable economic importance, while enabling creators to earn livelihoods in personally fulfilling ways.[1] Over the past decades, the internet has transformed the way in which creative content is produced, distributed and consumed. Today, creative works circulate widely and reach new audiences, while digital infrastructure facilitates new forms of collaboration. Intellectual property (IP) in general and copyright in particular regulate the circulation of such works. Copyright, also known as an author's rights, is a "legal term used to describe the rights that creators have over their literary and artistic works ranging from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings,"[2] plus new forms of creative original expressions even when they do not fall in traditional listed categories. Digital copyright refers to the situation where digital technology, including the networked environment of the internet, has irrevocably changed "patterns of production, modification, dissemination and consumption of creative works packaged in digital formats."[3] Copyright law has been applied, or adapted where necessary, to regulate the copying, modification and circulation of content in this altered environment.

When copyright-related disputes arise, as they inevitably do, the parties can vary considerably in terms of their size, commercial sophistication and resources. At one end of the scale, disputes involve major international corporations contesting copyright claims.[4] At the other end, copyright disputes can involve individual professional photographers or artists, who object to unauthorized use of their works on the internet and seek a license fee.[5] This report maps the potential for alternative dispute resolution (ADR) across this broad range of business-to-business (B2B) disputes in copyright-intensive sectors, with a focus on digital copyright- and content-related disputes.

For national statistical classification purposes, copyright-intensive industries are those that produce content for consumption, those that distribute that content or those that do both in conjunction (e.g., newspapers or filmmaking, and distribution).

The core of these industries includes:

- press and literature;
- music, theatrical productions, operas;
- motion picture and video;
- radio and television;
- photography;
- software, databases and computer games;
- visual and graphic arts;
- advertising services; and
- collective (copyright) management organizations for right-holders.[6]

Within these sectors, the results of the survey on the use of ADR mechanisms for B2B digital copyright- and content-related disputes indicate that B2B disputes relating to digital copyright have occurred in the following areas (see Characteristics of disputes in Chapter 3):

- advertising;
- animation;
- films and cinematographic works;
- database protection;
- books (including e-books) and other literary works, as well as publishing more generally;
- mobile applications;
- musical works and sound recordings;
- photographs;
- software;
- television formats; and
- video games.

The limited data available further suggests that businesses within these sectors do make use of ADR where it is available. For example, Korea Copyright Commission (KCC) statistics indicate that, within the corpus of more than 2,200 disputes resolved through ADR between 1988 and June 2020, the types of work most frequently involved were literary works, software, photographs, artistic works and musical works.[7] The Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO Center) reports that its services are used by parties from the arts, broadcasting, collective management of rights, entertainment, film and media, and television formats, while also covering licensing disputes or infringement claims across these sectors.[8]

As regards the legal nature of these disputes, they usually relate to:

- the enforceability, infringement, subsistence, validity, ownership, scope, duration or any other aspect of an IP right;
- a dispute over a transaction in respect of an IP right; and
- a dispute over any compensation payable for an IP right.[9]

ADR solutions to such disputes deserve serious consideration in the B2B context, because commercial parties are often involved in an ongoing business relationship (e.g., related to the licensing of protected content). Litigation is seen as antagonistic, especially where the need to preserve commercial relationships is an important priority. In other situations, the parties may be based in different jurisdictions, while the contested use can straddle borders. ADR is therefore particularly relevant for cross-border disputes, especially those across multiple jurisdictions. In many cases, traditional litigation mechanisms and national procedures may not necessarily provide the fast, flexible, economical and comprehensive solutions that content producers and users in the digital world are looking for. Contractually incorporating a dispute resolution strategy at the start of the parties' relationship is therefore attractive in a B2B setting, giving parties a greater degree of control over the process and outcomes.

These factors have led to a greater awareness of the potential for ADR mechanisms such as mediation, arbitration and expert determination to provide timely, cost-efficient and effective resolutions for B2B IP disputes. This potential has led to growing interest among IP practitioners and in-house lawyers in ADR solutions. In response, many national intellectual property offices (IPOs) have started to actively promote the use of ADR. For instance, in the Republic of Korea, under the Ministry of Culture, Sports and Tourism (MCST), the KCC administers mediation proceedings concerning copyright and related rights,[10] and the Korea Creative Content Agency (KOCCA) administers mediation proceedings concerning content-related rights.[11] To further encourage the use of mediation during the COVID-19 pandemic, WIPO and the MCST introduced a funding scheme to help cover the cost of WIPO mediation procedures for parties involved in international copyright- and content-related disputes.[12] In Singapore, the Intellectual Property Office of Singapore (IPOS) introduced an Enhanced Mediation Promotion Scheme, which offers parties subsidies for mediation as an alternative to litigation in disputes arising from IP claims.[13] Some IPOs, such as the United Kingdom (UK) IPO (which has its own mediation services), have even advised IP rights owners that "legal action should always be the last resort in trying to resolve any dispute."[14] A survey conducted by WIPO in 2013, in relation to technology transactions, found that litigation in court (32 percent) was closely followed by arbitration and expedited arbitration (30 percent), and mediation (12 percent), as a contractually incorporated dispute resolution clause.[15] For technology, media and telecommunications (TMT), a well-established ADR survey noted that 92 percent of respondents considered arbitration well suited to TMT disputes, while 82 percent foresaw an increase in the use of arbitration. Arbitration (43 percent) and mediation (40 percent) compared favorably as preferences, when compared to litigation (50 percent). Respondents indicated that issues relating to IP ownership and technology licensing continued to generate disputes, while the coordination of collaborative projects was a potential growth area.[16]

Practitioners have noted that "arbitration, as a private and confidential procedure, is increasingly being used to resolve disputes involving IP rights, especially when involving parties from different jurisdictions."[17] This trend is particularly visible in patent law. For example, arbitration is regularly used to resolve a dispute over whether the patent claims cover a particular product such that royalties under an existing license are payable. Expert determination is also relied on in patent pools for standard essential patents, to determine whether a patent is indeed "essential" to the standard and whether royalties need to be apportioned to its owner.[18]

Responding to this trend, international IP practitioner associations have established ADR committees to explore its potential advantages. By way of an example, the International Association for the Protection of Intellectual Property, also known as AIPPI (*Association Internationale pour la Protection de la Propriété Intellectuelle*), has established an ADR committee in response to growing interest among its members.[19] The International Trademark Association (INTA) has also set up an ADR committee to promote ADR as a cost-effective means of resolving brand-related disputes around the globe.[20] The Mediation Committee of the International Bar Association has noted that "mediation is a highly effective mechanism to resolve [IP] disputes and avoid high litigation fees and significant damage to reputation which affects the image of a business in the market place."[21] This interest in ADR is reflected in the WIPO-MCST survey responses of legal practitioners, as well as in-house legal professionals (Chapter 3).

The potential for ADR has been emphasized for digital B2B copyright- and content-related disputes. In contrast to patents, copyright infringement disputes are commonly viewed as less "technical", even in cases of non-literal copying (e.g., where the author of a book alleges that its plot has been infringed by a film). These cases usually do not require extensive discovery proceedings or access to documentation.[22] An exceptional category is software infringement claims, where neutral experts may be required to help resolve disputes. In the context of improving enforcement for visual works on the internet, the American Intellectual Property Law Association (AIPLA) "supports additional inquiry into an alternative dispute resolution processes for internet-based copyright infringement disputes."[23] The rapid rise of copyright disputes on internet platforms has been a major factor behind this growing interest. In the B2B context, such disputes can relate to:

i. a professional creator being accused of infringement (e.g., reusing a fragment of another song or an image in their own work) and resisting a right-holder's "takedown" request to the online platform hosting the impugned content; and
ii. commercial licensing arrangements between the platform and right-holders or their representatives, usually in relation to audiovisual media that is available on the platform.[24]

The growing interest in ADR solutions for copyright disputes is reflected in WIPO Center statistics. The WIPO Center has seen an increase in copyright- and content-related mediation and arbitration cases and good offices requests in the last five years. For the period between 1998 and 2015, 4 percent of the cases related to copyright disputes. Between January 2016 and June 2021, this rose to 28 percent. Overall, these disputes account for 21 percent of WIPO mediation and arbitration cases.[25] WIPO ADR cases are predominately based on contract clauses, where the parties identify the ADR option(s) in advance. However, some WIPO ADR cases arise from a submission agreement concluded after the dispute has arisen and litigation may even have commenced before a national court. There is an increasing WIPO caseload relating to copyright- and content-related disputes, especially in the digital environment.

While these are clear indicators of a growing interest in IP ADR more generally, this report focuses specifically on the potential for ADR in the context of B2B digital copyright- and content-related disputes, for three principal reasons.

i. Many B2B digital copyright transactions cover *multiple territories* and involve cross-border arrangements between several parties. Licenses and other contractual agreements relating to film, music and visual works (artistic works, photographs) are good illustrations of this.[26] ADR has the potential to consolidate and streamline these disputes. It is also relevant for many popular online and social media platforms that help a range of commercial users to create and distribute protected content.[27]
ii. As indicated previously, *the characteristics of parties vary considerably*. Individual creative professionals or small and medium-sized enterprises (SMEs) are unlikely to have the resources or appetite for conventional litigation. A fast, economical and effective ADR solution is therefore appealing for these parties.
iii. As part of a broader trend, ADR in many legal fields increasingly relies upon *ODR tools*.[28] Some experts view the development of ODR as making ADR "even more attractive"[29] and allowing "ADR to expand and deliver on its fullest potential."[30] The use of a wide range of ODR tools in IP disputes has grown in recent years. To take an institutional example, the WIPO Center offers parties and neutrals an online docket (WIPO eADR)

and videoconferencing tools for ADR and makes available a WIPO Checklist for the Online Conduct of Mediation and Arbitration Proceedings, reflecting its experience in this area.[31]

To date, there is limited empirical research on the use of ADR solutions in B2B digital copyright- and content-related disputes. This report seeks to address this knowledge gap, by developing an empirically informed understanding of:

i. existing B2B digital copyright- and content-related disputes across copyright-intensive industries (e.g., subject matter, type, value of disputes and sectors);
ii. the manner in which such disputes are being resolved; and
iii. the potential for specialized ADR mechanisms to resolve such disputes.

A key component of this report is its analysis of the results of the survey, including 997 valid responses and 74 stakeholder interviews. The respondents to the survey and the stakeholders interviewed have shared information providing important insights into the demand, needs and preferences of individual parties, as well as sectoral preferences in such disputes.

It is anticipated that the findings of this report will help to inform the development of appropriate ADR mechanisms and procedures for B2B digital copyright- and content-related disputes. The findings suggest that the demand for specialized ADR services, including the use of ODR, will continue to grow in the near future. This trend has been reinforced by the COVID-19 pandemic, which has disrupted the day-to-day functioning of courts in many States and encouraged parties to turn to ADR procedures with ODR tools to resolve civil and commercial disputes remotely.

Objectives

The main objectives of this report are to:

- describe the increasing use of ADR mechanisms and processes to IP disputes in general and copyright- and content-related disputes, as reflected in legislation as well as in practice;
- identify the copyright-intensive sectors and types of work that generate B2B disputes (e.g., software, musical and other creative works);
- characterize the nature of the disputes (e.g., contractual or non-contractual) and identify the features of disputes that have been more frequently reported;
- consider the value of the amounts in dispute (i.e., what is at stake for commercial parties) and the remedies that are preferred (e.g., damages, royalties, declarations of infringement or non-infringement, takedowns, etc.);
- assess the propensity for parties to settle in both contractual and non-contractual dispute scenarios;
- identify parties' needs and preferences (e.g., cost, speed, quality of the outcome, confidentiality) in relation to the mechanisms and procedures for resolving these disputes (e.g., litigation in court, mediation, arbitration, expert determination, etc.); and
- analyze the opportunities, challenges, advantages and drawbacks of specialized ADR mechanisms in relation to these disputes.

Methodology

This report combines qualitative and quantitative research conducted between August 2019 and December 2020. The analysis was developed through a combination of: (i) desk research on the existing legal position regarding the appropriateness of ADR for B2B digital copyright- and content-related disputes; (ii) data analysis, drawing on 74 interviews with key stakeholders; and (iii) descriptive statistical analysis of the results of a survey that was completed by 997 respondents from 129 States across all continents. The survey respondents and interview participants included copyright- and content-intensive companies, online intermediaries and platforms, in-house and external counsel, creators, entrepreneurs, collective management organizations (CMOs), mediators, arbitrators, industry associations, government bodies and other entities involved in B2B digital copyright- and content-related disputes.[32]

Although the survey and interview findings do not intend to reflect global trends exhaustively, the empirical research presented in this report is nevertheless valuable. The responses from the survey and interviews provide useful insights into various stakeholders' perceptions of the needs, challenges and opportunities in the use of ADR in B2B digital copyright- and content-related disputes.

The report also assembles a range of relevant qualitative and quantitative data from several jurisdictions. Information was requested and obtained from copyright stakeholders (e.g., copyright offices, CMOs) in Argentina, Australia, Brazil, China, Colombia, Denmark, Ecuador, Germany, India, Japan, Kenya, Mexico, Nigeria, Paraguay, Philippines, Republic of Korea, Romania, Singapore, Spain, Switzerland, Trinidad and Tobago, United Kingdom, United Republic of Tanzania and United States of America.[33] The WIPO Center has included in the report several anonymized mediation and arbitration case examples involving B2B digital copyright- and content-related disputes.[34].

Scope and limitations

Although some findings have broader relevance, such as the growing recognition of the arbitrability of IP disputes in national or regional legislation, the focus of this report is on B2B disputes relating to copyright issues. More specifically, it concerns the dispute resolution mechanisms and procedures adopted by the parties to these disputes, including their needs and preferences for specialized ADR options. As such, the scope of this report does not include business-to-consumer (B2C) disputes or disputes between online service providers (i.e., internet platforms, including social media platforms) and their non-commercial users.

A related set of limitations are applicable to surveys in general. Where possible, our report has controlled for these limitations through its design and by pursuing a well-defined data-cleaning process. The survey analyzed in this report is designed to capture, in three sections with carefully considered questions, the profile of the respondents, the respondents' experience in relation to B2B digital copyright- and content-related disputes, and salient issues arising from the parties' contracts in which the disputes arise. Yet, in accordance with usual practice, the survey questions were standardized and not all of them would have been relevant to some respondents. To address this limitation, certain screening questions were included at the beginning of each section of the survey. If the screening question was irrelevant to the respondent, the respondent would be automatically directed to answer the questions in the next section.[35] Another common limitation of online surveys is the receipt of responses that do not meet the survey target criteria. To overcome this, the survey included a qualifier question (in this case, Question 3),[36] which ensured that only respondents with relevant experience were considered in the final analysis.
Once the survey data collection was finalized, a data-cleaning process was constructed and conducted based on best practices. This ensured that only high-quality responses were included in the final analysis.[37] Decisions on whether to exclude certain survey responses from the final data set are not always clear-cut. In this analysis, these decisions were made according to the volume of data and overall goals for the survey. During this data-cleaning process, duplicate responses were eliminated. In addition, responses from respondents who rushed through the survey, respondents who provided inconsistent answers (e.g., declaring that they have relevant experience in Question 3 but selecting no experience for Questions 7 or 21) and respondents who offered incomprehensible feedback in the open-ended questions were filtered out. Other examples of steps taken during the data-cleaning process include analysis of outliers and responses that were unrealistic, as well as responses from those respondents who "straight-lined" through the survey (e.g., selecting the first response to every question, regardless of its substance). After these carefully considered decisions and steps, from among more than 1,300 responses received, the final data set includes 997 responses from 129 States.

Finally, despite the wide reach of this survey, the representativeness of the sample is always a challenge for online surveys. This affects the extent to which inferences can be drawn in relation to the broader population of parties who have been and are likely to be involved in B2B copyright disputes. To overcome this, 74 in-depth interviews were conducted by the WIPO Center to obtain more granular qualitative evidence.

Structure

Chapter 2 of the report provides an overview of the growing use of ADR in IP disputes, commencing with an introduction to mediation, arbitration and expert determination as the most common ADR mechanisms. It further examines some of the key considerations driving the use of ADR – such as cost, flexibility and enforceability – that are relevant to B2B digital copyright- and content-related disputes. The analysis turns to national copyright frameworks, which facilitate ADR. These include specific provisions of national copyright laws that

identify ADR, as well as initiatives established by national IP or copyright offices to facilitate dispute resolution.

Chapter 3 presents the main findings from the survey and interviews with stakeholders. These findings shed light on the common characteristics of these disputes, the outcomes of such disputes, the types of dispute resolution mechanism used by parties and stakeholders' experiences and perceptions of the different mechanisms. They also elucidate the use of specific contracts and policies addressing dispute resolution in this area of IP.

Chapter 4 concludes, identifying best practices and emerging trends in relation to B2B digital copyright- and content-related disputes. The increasing use of automated content recognition mechanisms or filters has resulted in an increased number of blocking or takedown requests for user content. When users of platforms contest these infringement allegations by right-holders, existing procedures can be usefully complemented with bespoke ADR solutions. Some recommendations for facilitating the use of ADR to resolve B2B digital copyright- and content-related disputes are also put forward.

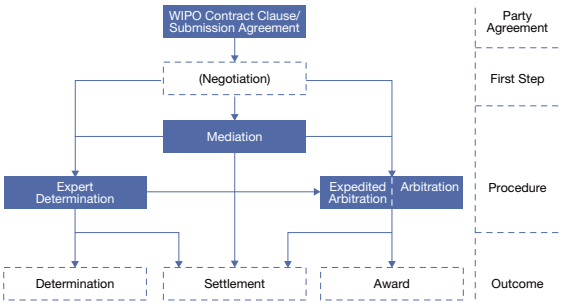
Chapter 2

Overview of trends and practices

ADR mechanisms for resolving IP disputes

There are numerous ADR mechanisms currently used to resolve IP disputes, which include unassisted negotiation, conciliation, mediation, expert opinion, expert determination, early neutral evaluations, dispute boards, arbitration or expedited arbitration and a hybrid of different mechanisms.[38] ADR mechanisms generally involve a voluntary and consensual process through which parties agree to engage in the relevant procedure for resolving a dispute. Figure 2.1 shows the ADR mechanisms and proceedings offered by the WIPO Center, which include mediation, arbitration, expedited arbitration and expert determination.[39] Parties may negotiate a model "WIPO Contract Clause" in their principal contract. The inclusion of such a clause would subject a dispute arising out of or in connection with the principal contract to WIPO Mediation, Arbitration, Expedited Arbitration or Expert Determination Rules.[40] In the absence of an existing contract clause, parties may still submit their dispute to the WIPO Center (after the dispute in question arises) through a submission agreement.

Figure 2.1 ADR mechanisms and proceedings offered by the WIPO Center



Mediation

The WIPO Center defines mediation as:

> "...an informal consensual process in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of their dispute, based on the parties' respective interests. The mediator cannot impose a decision. The settlement agreement has force of contract. Mediation leaves open court or agreed arbitration options."[41]

Mediation as a procedure is less formal than arbitration and expert determination. As an assisted form of negotiation, mediators do not have the power to impose a final and binding decision on the parties. If the parties reach a resolution, a settlement agreement can be enforced as a contract between the parties. If the dispute remains unresolved, parties can still resort to arbitration or other forms of ADR and litigation.[42]

The process is entirely voluntary and based on an underlying agreement between the parties to submit the dispute to mediation. A mediation agreement can be in place to submit future disputes under a contract to mediation. In the absence of a mediation agreement, a party wishing to propose the submission of a dispute to WIPO mediation may submit a unilateral request to the WIPO Center and the other party. The WIPO Center or an external neutral appointed by the WIPO Center may assist the parties to consider the request. The other party must agree to submit the dispute to WIPO mediation.[43] In WIPO's ADR procedures, where there is a formal agreement to mediate, almost 70 percent of cases administered by the WIPO Center have settled during mediation.[44]

Compared to arbitration and litigation, mediation offers the distinct advantage of allowing parties

to maintain control over the process and outcome of dispute resolution. Mediation can be used at any time during a multi-tiered dispute resolution process and can bring benefits for parties in terms of avoiding lengthy and costly litigation, with its associated uncertainties.[45]

As a less adversarial form of ADR, mediation can be extremely well suited to achieving beneficial outcomes for both parties in disputes involving different interests or cross-cultural elements and where parties are keen to preserve or develop an underlying business relationship. With a focus on parties' interests, mediation is well suited to a range of IP disputes.[46] The confidential and non-binding nature of mediation can help promote openness in the parties' negotiations, since any admissions, proposals or offers for settlement cannot be used beyond the mediation process.

While mediation and other forms of assisted negotiation provide certain advantages over arbitration and litigation, its effectiveness can often depend on the type of dispute, parties' bargaining positions and the ability to enforce the settlement agreement (e.g., enforcing the agreement where a party's assets are located). A positive development that seeks to facilitate the enforcement of cross-border settlement agreements has been the adoption of the Singapore Mediation Convention.[47] This international convention provides for a cross-border settlement agreement to be enforced directly by the courts of signatory States. Given the cross-border nature of many IP disputes, the Singapore Mediation Convention is likely to further encourage the use of mediation by parties in such disputes.[48]

Arbitration

The form of ADR perceived to be closest to litigation is arbitration, which is an adjudicatory method of dispute resolution.[49] Arbitration can be defined as:

> "...a consensual procedure in which the parties submit their dispute to one or more chosen arbitrators, for a binding and final decision (award) based on the parties' respective rights and obligations and internationally enforceable under arbitral law. As a private alternative, arbitration normally forecloses court options."[50]

There must be an agreement between the parties to the contract to refer disputes to arbitration. The arbitration provision or clause in the parties' contract usually sets out the key aspects of the arbitral process. This includes the seat (place) of arbitration, the number of arbitrators to be appointed, and the procedural rules of the arbitration. The choice of the seat of arbitration can be an important consideration for parties, since the arbitration will take place within a legislative framework that determines the level of support the courts in the selected seat will provide, the enforceability of any award and the scope for parties to challenge the award.

It has been observed that:

> "Like court proceedings, arbitration requires localization and identification of the local laws applicable to the dispute, including the issues of infringement and validity. However, in arbitration, these laws are generally chosen by the parties themselves. Thus, any impediment presented by the territorial nature of IP can be negotiated and overcome relatively easily."[51]

However, the procedural rules vary according to the arbitral institution where the dispute is heard. The institution's procedural rules would typically cover the entire process, including commencement of the arbitration, constitution and establishment of the arbitral tribunal, conduct of the proceedings, rendering of awards and other decisions, determination of fees and costs, and confidentiality.[52] Arbitral institutions regularly revise their rules in line with users' needs and preferences, as well as related domestic and international regulatory developments.

Under most arbitral institutions' procedures, parties put forward their case via written submissions, together with any documentary, factual and expert evidence, before the tribunal. There may be interim hearings to agree timetables and other interlocutory hearings. The arbitration usually concludes in a hearing in the selected seat (or at a different venue if agreed by the parties) and a final award is issued by the tribunal. Many institutions also provide a fast-track mechanism. WIPO has an expedited arbitration procedure, which carries out the arbitration in a shortened time frame and at a reduced cost. Expedited proceedings can result in the issuance of a final award within a shorter time frame.[53]

One important difference between judicial determination by a court and an arbitral award is that the former will have *erga omnes* effects, binding third parties, whereas the latter will have *inter partes* effects. It has been observed that:

> "...arbitral awards only touch upon the parties to the relevant arbitral proceedings. They produce inter partes effect only. (…) if a party desires to obtain a decision that can be made public, for example for deterrence of potential IP infringers, international arbitration might not be a suitable option in all cases."[54]

Since the parties' mutual agreement forms the basis for arbitration, it is especially relevant in the context of B2B digital copyright- and content-related disputes where the parties to a contract may wish to preserve an ongoing commercial relationship as well as confidentiality.

Expert determination

Expert determination involves the appointment of one or more impartial experts to provide an opinion or determination on a specific matter referred to them by the parties. These matters tend to require certain technical expertise, such as valuation of IP assets or royalty fees, or the extent of license rights covered or existence of copyright exceptions and limitations.[55] Depending on the parties' agreement, the outcome of expert determination may be binding or non-binding. Based on the WIPO Center's definition:

> "Expert determination is a procedure in which a dispute or a difference between the parties is submitted, by agreement of the parties, to one [or more] experts who make a determination on the matter referred to it [them]. The determination is binding, unless the parties agreed otherwise."[56]

National patent offices, such as the UK Intellectual Property Office[57] and the Japan Patent Office (JPO),[58] offer non-binding expert advisory opinions, which are produced by senior patent examiners, on various aspects of patent validity or scope. These opinions can help parties to negotiate a settlement or, alternatively, to decide whether to proceed with litigation. A variant of expert determination is early neutral evaluation, where an expert (often an experienced litigator or retired judge) is appointed to assess the strengths and weaknesses of each parties' claims.[59]

Like other ADR procedures, expert determination can take place only if the parties have agreed to it. The parties may include an expert determination clause in their principal contract as a mechanism to deal with future issues or disputes arising under the contract. If a dispute has already occurred but there is no such clause in the relevant contract, it may be referred to expert determination upon a submission agreement between the parties under the WIPO Rules.[60]

Expert determination can be used on its own as a stand-alone process or as a part of or in connection with mediation, arbitration or litigation. For example, an independent expert in the relevant field may provide an early neutral evaluation, which usually involves a non-binding assessment of the issues. A neutral expert view on the matter can help facilitate parties' negotiations to settle the dispute.

There are important differences between expert determination and arbitration. As described earlier, arbitration entails a more structured adjudicative process in which parties put their case forward to the arbitral tribunal. This process normally results in a hearing, with a final arbitral award issued by the tribunal at the end of the proceedings and internationally enforceable under the New York Convention.[61] Compared to arbitration, an expert determination tends to be a less formal and often speedier process.[62] Whereas arbitration usually covers a broader scope of disputes, it can be more efficient for parties to refer a particular set of issues for expert determination.

An expert's role in this process is also different from that of an arbitrator. In arbitration, the arbitrator must act on the evidence and submissions of the parties, not the arbitrator's own opinion (even though the arbitrator is likely to have the relevant expertise in the matter). In expert determinations, unless the parties agree on certain procedural rules, the expert can make decisions based on their opinion without regard to the parties' submissions (if any). To put it another way, procedural requirements as legal safeguards assume greater importance in arbitration than expert determination.[63] Unlike arbitral awards, enforcing a decision from an expert determination is based on a contractual claim between the parties. Nevertheless, the grounds for challenging an expert determination in court tend to be quite limited.[64]

Key considerations relating to the use of ADR

The growing popularity of ADR to resolve a wide range of IP disputes has been driven by a number of factors. These factors range from the cost-effectiveness and efficiency benefits of using ADR

to the need for a neutral third party with specialist technical knowledge. In this section, we review the main factors that have been considered in existing literature on the use of ADR in IP disputes.

It should be noted that ADR should not be seen merely as an "alternative" to litigation, since it is common for ADR procedures (especially mediation) to be part of a multi-tiered dispute resolution framework, or the so-called multi-door courthouse.[65] Courts in a growing number of jurisdictions may expect or even require parties to a dispute to have considered the use of or actually to have undertaken forms of ADR such as mediation before starting legal proceedings.[66] In recent decades, court-sponsored or court-annexed ADR processes have become widespread in many jurisdictions, including mediation schemes within the courts[67] and (to a lesser extent) judicial early neutral evaluations,[68] for the purpose of helping parties settle their disputes.

Time and cost

The digital world moves quickly and is constantly evolving. Content producers, users and internet intermediaries operate in an ecosystem characterized by rapid and dynamic technological innovation and change. Parties involved in B2B digital copyright- and content-related disputes tend to look for expeditious and economical dispute resolution mechanisms and procedures, especially when they are less well-resourced SMEs and individuals. For copyright owners, infringement of their works often requires immediate redress. Digital content on the internet can be uploaded and downloaded in seconds and reach a global audience. Moreover, in a commercial relationship, the dispute needs to be resolved speedily so that the parties can continue doing business with each other.

For more complex B2B digital copyright- and content-related disputes, ADR mechanisms such as mediation, expert determination or arbitration are likely to deliver substantial time and cost savings compared to litigation. Cost savings are attributed to curtailed procedure as well as the relative infrequency of an appeal.[69] For example, arbitration procedures usually entail fewer formalities than litigation, along with a compressed schedule for discovery and trial (especially with expedited arbitration) and the possibility of conducting virtual hearings.

Flexibility and choice

A commonly espoused benefit of ADR is offering parties the autonomy to decide how, where and by whom their dispute is resolved.[70] The nature of B2B digital copyright- and content-related disputes may be more favorable to customized ADR processes and methods that enable parties to formulate outcomes that meet their specific interests and to come up with more creative solutions to resolve their dispute. This flexibility is available due to the limited presence of procedural constraints that characterize the more formal proceedings found in litigation. Mediation, in particular, is associated with comparatively fewer formalities and parties have considerable freedom in deciding how the process evolves.

The need for flexibility in reaching inventive solutions is especially important in light of the complexity of certain B2B digital copyright- and content-related disputes, where perceptions regarding the legal use of copyrighted materials and content may differ vastly within the online community and the implications of copyright law are not necessarily known and/or accepted by the average user.[71] Moreover, if the parties have a mutual interest in preserving an existing relationship or preventing damage to their future relationship, ADR mechanisms may serve this purpose better than litigation. Mediation, in particular, tends to focus more on the parties' motivations and interests instead of legal positions, which can help to facilitate a more efficient and effective settlement that meets the parties' needs.

From a flexibility perspective, there is a potential downside to the consensual nature of ADR mechanisms for some cases. Additional parties are unable to be automatically added to ADR procedures or consolidated into related ADR proceedings, unlike litigation. While some arbitral institutions, including the WIPO Center,[72] have in place rules to address this, it is still difficult to include a third party or to consolidate multiple disputes in arbitration when compared to litigation. The confidential nature of ADR mechanisms also reinforces this difficulty. In some digital copyright- and content-related disputes where there may be many parties involved, ADR mechanisms may not offer the advantage of litigation, where third-party defendants can be joined to the case if they fall within the jurisdiction of the court.

Enforceability

Arbitration

Litigation is certainly the most "superior" mechanism of dispute resolution when it comes to domestic enforcement. Nevertheless, the ease of enforcement of arbitral awards is commonly viewed as a key advantage of arbitration. Notably, the New York Convention[73] provides for the reciprocal enforcement of arbitral awards in more than 160 States. A Contracting State is obliged to recognize arbitral awards made in other Contracting States as binding and to enforce them in accordance with its procedural rules. As such, an arbitral award issued in relation to a cross-border B2B digital copyright- and content-related dispute can be enforced in any Contracting State under the New York Convention. Depending on the arbitral laws of the particular State, enforcing an arbitral award can be a more straightforward process than trying to enforce a foreign judgment.

Most arbitral laws would only allow an award to be challenged in limited circumstances. Under the New York Convention, a Contracting State may only refuse to enforce an award if:

- the parties to the arbitration agreement were under some incapacity;
- the arbitration agreement was not valid under the law to which the parties have subjected it;
- a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
- the award goes beyond the scope of the submission to arbitration;
- the composition of the tribunal or the procedure was not in accordance with the parties' agreement;
- the award is not final and binding or has been set aside;
- the subject matter of the award is not capable of settlement by arbitration under the law of the Contracting State; or
- it would be contrary to public policy to enforce the award.[74]

Expert determination

Compared to an arbitral award, expert determinations have the force of a contractually binding determination. For example, English courts have generally been willing to enforce expert determination clauses and experts' decisions without reconsidering the merits of the underlying dispute, except where there is evidence of manifest error.[75]

Mediation

Mediation traditionally does not have the enforcement strength of litigation or arbitration. Like expert determinations, settlement agreements have the binding force of a contractual arrangement between the parties. As noted earlier, the Singapore Mediation Convention of 2018 has bolstered the enforceability of cross-border settlement agreements in the courts of party States that have ratified the Convention without needing to commence new proceedings. Nevertheless, the Singapore Mediation Convention sets out certain grounds upon which a competent authority (such as a court) may refuse enforcement – namely, that:

- a party to the settlement agreement was under some incapacity;
- the settlement agreement is null and void, inoperative or incapable of being performed under the law, is not binding or not final, or has been subsequently modified;
- the obligations in the settlement agreement have already been fulfilled or are not clear or comprehensible;
- granting relief would be contrary to the terms of the settlement agreement;
- there was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which breach that party would not have entered into the settlement agreement;
- there was a failure by the mediator to disclose the circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure had a material impact or undue influence on a party, which would not otherwise have entered into the settlement agreement;
- it would be contrary to the public policy of the State where enforcement is sought;[76]
- the subject matter of the dispute is not capable of settlement by mediation under the law of the State where enforcement is sought.

How the Convention will operate in practice ultimately depends on how it is implemented locally by the signatory States. The Convention leaves considerable room to signatory States for determining the conduct of mediation and the enforcement of settlements reached in accordance with their own rules of procedure.

Neutrality in jurisdiction

Many B2B digital copyright- and content-related disputes are likely to be cross-border. The exploitation of copyright on the internet is inherently extra-territorial. Given the territorial nature of IP issues, States generally have different sets of laws governing various aspects of IP rights protection. This is notwithstanding efforts to harmonize IP laws, as well as the settlement of cross-border IP disputes, at regional and transnational levels.[77]

While each party may perceive a "home-court advantage"[78] in pursuing the dispute in their respective local courts, the reality of commencing proceedings in multiple jurisdictions (as well as multiple courts within a State) can impose significant burdens on parties' resources and time. It is not uncommon to find disputes regarding IP rights that entail parallel proceedings relating to validity and infringement in one forum and contractual disagreement in another forum.[79] Parallel proceedings in different jurisdictions can potentially create conflicting results, which brings uncertainty with regards to protracted litigation over complex conflict of laws consideration regarding jurisdiction, forum selection and recognition of foreign judgments.[80]

Parties to cross-border commercial transactions may refer their disputes to a neutral forum for ADR to overcome such challenges. By selecting and agreeing to a single forum and process in advance, parties can often alleviate the abovementioned risks and uncertainties associated with litigation. Beyond a neutral forum to handle the dispute, parties can also choose a mediator, arbitrator or expert from a different jurisdiction from those of the parties, a neutral governing law, a neutral location and a neutral language for conducting the ADR process.

Technical specialization

The technical expertise of the adjudicator can be an important consideration for parties to a B2B digital copyright- and content-related dispute. Some of these disputes can pose complex, technical issues that require the adjudicator to have a solid understanding of the underlying technology of the software or the nuances of the creative work. Parties to these disputes may prefer an adjudicator (or mediator) who has the relevant expertise and experience.

Specialized IP courts and tribunals have emerged in different jurisdictions in recent years, and there is evidence that having "a sufficient level of experience and expertise among the courts and judges can significantly improve the quality of justice in IP disputes."[81] The expertise of the court is particularly important for IP disputes given the time-sensitive nature of applications for temporary relief and other provisional measures. Having specialized courts with expertise can also avoid the risk of delegating decision-making to experts instead of judges in non-specialized courts, promote consistency and uniformity in the law, avoid or reduce the risk of forum shopping and facilitate the adoption of special procedural rules tailored to IP disputes.[82] Nevertheless, not all States have the resources, expertise or the need to create and maintain specialized IP courts and tribunals. Specialized courts are also at risk of being subject to "capture" by special interest groups or developing a "tunnel vision" that neglects the broader legal and policy frameworks in which IP disputes are situated.[83]

It has been observed that the "availability and efficiency of IP ADR mechanisms as an alternative to traditional IP court litigation may have an impact on the advantages of and need for specialized IP courts."[84] Given the diversity of IP disputes, ADR may offer parties a wider pool of mediators, arbitrators and experts with specialized expertise. This is especially beneficial in the context of a dispute that requires particular expertise. If the actual substance of the dispute concerns a technical disagreement, it is perhaps more expeditious and efficient for parties to turn to an expert and use a suitable ADR procedure such as expert determination.[85] For a broader range of digital copyright- and content-related disputes, having an arbitrator or mediator with pertinent technical experience and knowledge can offer distinct advantages. Besides having greater confidence that the arbitrator or mediator will draw on their expertise to formulate an appropriate resolution of the case, parties may also save considerable time, effort and resources, since there is no need to submit copious amounts of technical explanatory materials to the arbitrator or mediator.[86]

Confidentiality

ADR mechanisms can be advantageous for commercial parties due to the privacy and confidentiality that arbitration and mediation can offer in comparison to the public nature of court litigation. If the dispute touches on trade secrets

and other proprietary or sensitive business information such as source code in software and where continued confidentiality is involved, the parties are likely to prefer a more private resolution of their dispute. Parties may also wish to protect reputational interests in seeking confidentiality in the dispute resolution process. The need to preserve confidentiality, in practice, is a critical factor in IP disputes, as it "allows parties to focus on the merits of the dispute without concern over its public impact."[87]

In ADR, parties have significant choice at the onset in deciding what information they wish to make public (if any). Parties can agree that any or all of the ADR procedure, such as the hearing, evidence and any disclosures, be kept confidential. Some ADR institutions have detailed provisions in their procedural rules to help safeguard and maintain confidentiality with respect to the ADR proceedings and outcomes.[88] Nevertheless, it is important not to assume that all mediation and arbitration proceedings are inherently confidential. This is because confidentiality provisions in the relevant ADR rules can "vary in the level of detail and comprehensiveness."[89] In particular, the WIPO Rules include detailed provisions concerning the confidentiality of the existence, content and outcome of WIPO ADR proceedings.

Precedential value

In certain situations, parties will prefer the litigation route, which results in a publicly available court decision. The resulting publicity and precedential or persuasive value of a judgment sends a signal that litigants find helpful. This is especially desirable where a new type of dispute occurs or where businesses are involved in litigation against several other parties involving similar issues or subject matter. The confidential nature of mediation or arbitration may be considered undesirable in these situations.

Copyright legislative frameworks and ADR adoption

Copyright disputes as appropriate subject matter for ADR

In recent years, there has been a perceptible shift toward increasingly recognizing IP rights as suitable subject matter for ADR procedures. The starting point for analysis is to distinguish between rights that require mandatory registration formalities in order to be effective (e.g., patents, trademarks or certain design protection regimes) and those that do not (e.g., copyright, trade secrets). Historically, since registration-based rights were granted by sovereign State authorities, such as a patent office, the authority to adjudicate on validity was reserved for that national legal system, since this could involve matters of public policy.[90] It was thought that since a determination of the validity of the right would have *erga omnes* effects, impacting on parties not directly involved with the dispute, only a State authority could decide this. By contrast, it has been recognized for some time that contractual or commercial disputes with an IP element – such as the interpretation of a licensing agreement – can be resolved through mediation or arbitration.

Since copyright protection does not require mandatory registration, although it can be supported by voluntary registration,[91] a wide range of copyright disputes are suitable subject matter for ADR. Only a limited set of issues may not be suitable, depending on the jurisdiction. Certain aspects of copyright, such as moral rights or resale rights *(droit de suite*) for visual artists,[92] have previously been considered unsuitable for ADR since they are linked to the personality interests of creators and therefore inalienable in many jurisdictions. They cannot be transferred along with the economic rights (e.g., relating to reproduction and distribution). "As a consequence, both in legal systems that exclude arbitrability of disputes concerning non-disposable rights, such as the French one […] and in those that adopt, in this regard, the criterion of the economic nature of the claims or interests at stake, such as the German, the Swiss, and the Portuguese ones, submission to arbitration of disputes concerning moral rights of authors is restricted."[93] However, according to a more permissive approach adopted in other States, so long as the effects of the mediation or arbitration are confined to being *inter partes*, disputes relating to moral rights may also qualify for arbitration or mediation.[94]

Even in the case of registration-based IP rights, a more liberal position has gradually evolved.[95] Many types of contractual dispute have always been amenable to ADR solutions in most jurisdictions, such as those arising from licensing or the assignment of IP rights. A growing number of jurisdictions recognize that even the validity of

registration-based rights are arbitrable, provided that the effects of these awards are restricted to the parties *inter se*.

> "Arbitral awards concerning the validity of such titles and registrations may, therefore, only address such issues as incidental questions, when raised by the defendant as a means of defense, and they will only have effects inter parties […] In sum, according to this point of view, an arbitral tribunal is not allowed to declare the invalidity of an IP title, which is not an arbitrable issue, but solely its non-enforceability (inopposabilité) between the parties in dispute."[96]

Jurisdictions that have adopted this approach include France, Singapore and Hong Kong, China.[97] A few States go even further and recognize the *erga omnes* effects of arbitration awards on parties who are unrelated to the dispute. For instance, an arbitral award declaring a patent invalid will be recognized and enforced by the Swiss Institute for Intellectual Property in the same manner as a judgment or order to the same effect.[98]

ADR in national and regional copyright frameworks

In order to facilitate more effective dispute resolution, courts in many States direct litigants toward ADR solutions in civil proceedings, including copyright proceedings, initiated in a traditional litigation setting.[99] Several respondents have indicated that the general ADR frameworks of their jurisdictions will therefore encompass copyright disputes.

However, in some jurisdictions, copyright legislation *expressly encourages* or *mandatorily requires* certain types of dispute to be resolved using ADR approaches. Some interview respondents highlighted the important signaling function of such legislation, which can helpfully remind parties of the potential for ADR specifically in relation to copyright disputes. Another trend worth emphasizing is that certain national IP or copyright offices actively facilitate ADR in the copyright context. The following examples illustrate the range of situations and types of copyright dispute in which ADR solutions are either identified in legislation or supported by other institutional arrangements provided by national IPOs.

Australia

The Copyright Act 1968[100] provides for a quasi-judicial scheme administered by the Copyright Tribunal of Australia, an independent body under the Federal Court of Australia, to consider disputes for appropriate licensing remuneration for uses of copyright material allowed under the Copyright Act. This includes for statutory licenses (for education and government uses), voluntary licenses (generally with collecting management organizations for "blanket" repertoire licenses) and other specific circumstances. The Tribunal has powers to refer dispute applications, or parts of applications, to ADR and it does not hear matters of copyright infringement. The dispute resolution processes include conferencing, mediation, neutral evaluation, case appraisal and conciliation.

Australia has a "safe harbor" scheme that limits the liability of some online service providers for copyright infringement by their users in certain circumstances when they undertake the required conditions, such as responding to an infringement notice by removing the infringing content. When introduced, this was restricted to carriage service providers (CSPs), which included ISPs and excluded content-hosting platforms. The scheme has been recently extended to service providers in the disability, education, library, archive and cultural sectors.[101] The scheme does not apply to other online service providers such as e-commerce marketplaces, social media and user group forums. Significantly, the "safe harbors" provide immunity from monetary damages or penalties, but not injunctive relief. There are no legislative provisions that regulate appeals against content being taken down and this appears to be an area where ADR has potential to fill a gap. Australia is also implementing, through novel legislation, a mandatory code of conduct to help support the sustainability of the Australian news media sector by addressing bargaining power imbalances between digital platforms and Australian news businesses.[102] The presumption seems to be that news article headlines and snippets circulated via online platforms are protected by copyright. The code introduces compulsory arbitration, where parties cannot arrive at a negotiated agreement about remuneration for news content being made available on designated digital platforms. In so-called baseball arbitration, an arbitral panel will select between two final offers made by the bargaining parties.

Brazil

The Law on Copyright and Neighboring Rights, No. 9610 of 1998, as amended in 2013, envisages that disputes can arise between collecting societies and copyright owners or their agents in relation to royalty payments owed, the criteria for calculating amounts, etc. Besides litigation, Article 100-B expressly recognizes that such disputes may be resolved through mediation or arbitration. Subordinate legislation authorizes the Ministry of Culture to foster mediation, conciliation or arbitration between copyright owners or their representative associations and users.[103] The legislation requires the establishment of a panel of dispute resolution experts, with relevant experience and knowledge, to resolve such disputes.

China

The Copyright Law of China (as amended[104]) recognizes ADR. Article 55 states that copyright disputes may be settled by mediation or addressed by arbitration, based on a written arbitration submission agreement between the parties to the dispute or through an arbitration clause under a copyright-related contract. In the absence of these agreements or clauses, disputants can directly commence court litigation.

There has been significant policy direction at the highest level in recent years to adopt ADR (referred to as "diversified dispute resolution" in China). The Supreme People's Court of China (SPC) issued an important Opinion in 2016 to promote a diversified dispute resolution framework aimed at reducing the number of cases filed, heard and tried by the courts.[105] It is intended to direct commercial disputes to institutions that can resolve cases in a more competent, efficient and timely manner.[106] These institutions include industry associations, arbitration commissions, specialized mediation associations and neutral evaluation mechanisms.

The SPC Opinion also calls for better mediation of cases within the courts by involving court-annexed mediators before or after the party files a lawsuit. The Opinion emphasizes that the courts can leverage forces outside the judiciary to resolve disputes. It requires better linkages between other dispute resolution institutions and the courts, stressing the role of mediation and easing procedures for enforcing mediation agreements by courts.[107] In 2019, the SPC issued a follow-up Opinion on establishing "one-stop" diversified dispute resolution and "one-stop" litigation centers, which include the better use of litigation service platforms and video links to deal with cases.[108]

Several other organizations exist to facilitate (non-judicial) ADR in IP disputes, including copyright mediation services.[109] A pro-arbitration culture in China's commercial dispute resolution landscape has developed rapidly; this is relevant to B2B digital copyright- and content-related disputes.

Besides the existing options for ADR provision, China is investing in ODR in the context of a "Smart Courts" framework, notably through the establishment of internet courts in Hangzhou, Beijing and Guangzhou.[110] These courts have more streamlined procedures, designed to achieve greater speed, lower litigation costs and convenience. They have introduced technological innovations in relation to the submission of electronic evidence (e.g., by establishing platforms for secure blockchain evidence generation), as well as a range of online mediation and trial mechanisms.[111] Like other Chinese courts, these internet courts place an increasing emphasis on judicially administered mediation.

Colombia

Collaboration between the National Directorate of Copyright of Colombia and the WIPO Center

In Colombia, the National Directorate of Copyright of Colombia (DNDA) has offered conciliation services for disputes involving copyright and related rights since 2012.[112] Conciliations at the DNDA are administered according to its Internal Conciliation and Arbitration Rules, which are based on Colombia's laws on conciliation.

Requests for conciliation can be filed by one or both parties. The parties can choose to appoint their own conciliator for the hearing from the list of conciliators provided by the DNDA. Otherwise, the DNDA can either appoint one of its internal officers as the conciliator[113] or choose an external conciliator that satisfies its requirements and has been previously registered in that list. All conciliators need to be certified by the Ministry of Justice and Law.[114]

If a party fails to attend the conciliation hearing without justification, the conciliator will issue a certificate that can be submitted in subsequent court proceedings as proof of fulfilling the pre-trial conciliation obligation,[115] required in IP cases,

except when requesting a preliminary injunction.[116] It may also imply a sanction to the party that did not participate in the conciliation hearing.[117]

If the parties are able to reach a settlement, the terms of the settlement will be recorded by the conciliator in a certificate that is enforceable as a court judgment.[118] In the event that no settlement is reached, the conciliator will issue a certificate stating the outcome of the conciliation.

As an example,[119] the Conciliation and Arbitration Center of the DNDA had 403 cases in 2018. Mainly, these involved some 85 percent domestic interests, with 15 percent of cases involving international issues. The case law involved instances of copyright and content infringement, including software infringement, and the service was used by large companies, SMEs, individuals (e.g., authors, interpreters), CMOs and universities. Finally, out of these cases, 35 percent of cases did not settle (i.e., *acta de conciliación*) and 15 percent reached a settlement.

Pursuant to a collaboration agreement with the DNDA, the WIPO Center administers mediation proceedings concerning copyright and related rights in Colombia. The DNDA and the WIPO Center make available forms to facilitate the submission of disputes to WIPO mediation and offer discounted fees for such referrals.[120]

Dominican Republic

Collaboration between the National Copyright Office of the Dominican Republic and the WIPO Center

The National Copyright Office of the Dominican Republic (ONDA) Center for Mediation, Conciliation and Arbitration is an entity created to help resolve copyright and related rights disputes in the Dominican Republic through ADR methods. The purpose of the Center is to assist parties in the expeditious resolution of their disputes without the need for court litigation.[121] The WIPO Center and the ONDA have developed a co-administration scheme for copyright disputes in the Dominican Republic.

Ecuador

The Organic Code on the Social Economy of Knowledge, Creativity and Innovation[122] refers to mediation in article 262. This article indicates that a formally constituted association, union or representative group of users may request mediation from the competent authority in matters of IP rights when it considers that the rates established and authorized to a CMO do not comply with the Code.

Article 565 of the Code provides that interim measures may be ordered, including the suspension of public communication of protected content in digital media and the suspension of the services of a web portal due to an alleged violation of IP rights.

Additionally, the Arbitration and Mediation Law[123] provides in articles 1 and 43 that any disputes that can be settled by the parties may be referred to arbitration or mediation, including IP rights.

Collaboration between the National Service of Intellectual Rights of Ecuador and the WIPO Center

The WIPO Center collaborates with the National Service of Intellectual Rights of Ecuador (SENADI) in the promotion of the use of ADR options for IP disputes in Ecuador.

European Union

As one of the earliest pan-European harmonization interventions, the Satellite and Cable Directive[124] established a copyright clearing mechanism, designed around collective management of rights, to overcome copyright barriers and encourage the cross-border distribution of radio and television content across the European Union (EU). As part of the regime to facilitate the licensing of content, EU Member States are required to "ensure that either party may call upon the assistance of one or more mediators […] who shall provide assistance with negotiation. They may also submit proposals to the parties."[125] It was envisaged that mediation would assist with contractual negotiations and help to resolve disputes, including situations where permission to retransmit cable programs had been unreasonably refused or offered on unreasonable terms.[126] However, Member States have either relied on existing mediation mechanisms or light-touch approaches, such as drawing up a list of potential mediators, to satisfy this obligation. In practice, the mediation process does not seem to have been widely used.[127]

The Information Society Directive[128] (InfoSoc Directive) was enacted to strengthen copyright protection in response to technological developments

and the emerging digitally networked environment of the late 1990s. It was also legislated to implement obligations under the WIPO Copyright Treaty of 1996. The Directive sought to harmonize core rights, as well as copyright exceptions. One enhancement that proved controversial was the legal protection of technological protection measures (TPMs) against any means of circumvention. It was controversial since:

> "...technological measures and, in particular, digital rights management, have been criticized as an unwelcome privatization of law threatening traditional copyright landmarks, affecting users' rights to privacy and controlling information and materials in the public domain. Moreover, users and consumers developed a fear of a 'digital lock-up' which would prevent them from enjoying and consuming works at their leisure in the same way as they used to in an analogue scenario."[129]

Therefore, the Directive sought to ensure that if voluntary measures to accommodate the equivalent of analogue exceptions were not forthcoming from right-holders, Member States would be obliged to ensure that TPMs could not override these exceptions.[130] The preface to the Directive notes: "Recourse to mediation could help users and right-holders to settle disputes."[131] As a result of this obligation, several EU Members created observatory bodies – usually administrative agencies of the State – to monitor the use of TPMs and intervene, in the form of mediation in some States, where necessary.[132]

The Collective Management Directive[133] was enacted inter alia among other things, to ensure that right-holders who assign those rights to CMOs have a say in the management of their rights. CMOs grant licenses on behalf of multiple right-holders, usually as a single blanket license and for a single periodic payment.[134] Within a jurisdiction, each sector (e.g., books and other publications, musical works) usually has a separate CMO. The Directive seeks to improve the functioning and accountability of CMOs. In this regard, it envisages potential disputes in two spheres: first, disputes between right-holders or members and the CMO, in relation to whether the CMO has (for example) appropriate authorization to manage the rights, terms of membership or the collection and distribution of royalties; and second, disputes between CMOs and users or licensees, relating to licensing conditions, the amount charged for a license or refusal to license. The preface to the Directive notes:

> "Member States should be able to provide that disputes between CMOs, their members, right-holders or users as to the application of this Directive can be submitted to a rapid, independent and impartial alternative dispute resolution procedure. In particular, the effectiveness of the rules on multi-territorial licensing of online rights in musical works could be undermined if disputes between CMOs and other parties were not resolved quickly and efficiently. As a result, it is appropriate to provide, without prejudice to the right of access to a tribunal, for the possibility of easily accessible, efficient and impartial out-of-court procedures, such as mediation or arbitration, for resolving conflicts between, on the one hand, CMOs granting multi-territorial licenses and, on the other, online service providers, right-holders or other CMOs. This Directive neither prescribes a specific manner in which such alternative dispute resolution should be organized, nor determines which body should carry it out, provided that its independence, impartiality and efficiency are guaranteed."[135]

Article 34 specifies that Member States may provide for "rapid, independent, and impartial" ADR mechanisms between CMOs, or between a CMO and its members, right-holders or users. Along similar lines, Article 35 of the Directive addresses the resolution of disputes between CMOs and users, "concerning in particular, existing and proposed licensing conditions or a breach of contract." Significantly, parties involved in a dispute should have the option of easily accessible, efficient and impartial out-of-court procedures, such as mediation or arbitration, for resolving conflicts. However, since these provisions identify an optional dispute resolution mechanism, they leave the door open for litigation in court in the alternative.

Most recently, the Digital Single Market Directive[136] (DSM Directive) was enacted to further modernize EU copyright law, to keep pace with technological developments after the InfoSoc Directive. Among its goals are establishing relevant exceptions for a digital age, such as text and data mining (required for the development of artificial intelligence) and educational, as well as research, exceptions. The DSM Directive seeks to improve cross-border access to copyright-protected content. It also claims to improve the functioning of the digital copyright

marketplace by recalibrating the rights and responsibilities of publishers, authors and online platforms. Three sets of provisions are relevant in the context of ADR.

i. Where parties face difficulties in negotiating contractual licenses for accessing audiovisual works, for the purposes of video-on-demand services, Article 13 specifies that:

   "Member States shall ensure that parties facing [such] difficulties […] may rely on the assistance of an impartial body or of mediators. The impartial body established or designated by a Member State for the purpose of this Article and mediators shall provide assistance to the parties with their negotiations and help the parties reach agreements, including, where appropriate, by submitting proposals to them."

ii. Certain provisions are designed to allow authors and performers to receive both better quality information and proportionate remuneration, especially in the case of so-called best-selling works. Article 19 imposes a transparency obligation requiring EU Member States to ensure that authors and performers receive "up to date, relevant and comprehensive information on the exploitation of their works and performances." Article 20 requires that, in the absence of a collective bargaining agreement that achieves the same result, authors and performers (or their representatives) can claim:

   "[A]dditional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances."

   This introduces a contract-adjustment provision where the work proves to be lucrative, in a manner that allows creative professionals to be proportionately remunerated. Article 19 therefore provides authors and performers with information and Article 20 allows them to adjust contracts based on that information. Finally, for disputes in relation to both Articles 19 and 20, Article 21 imposes an obligation on Member States to provide authors and performers with the option of a "voluntary, ADR procedure."

iii. Article 17 is a complex provision,[137] which imposes duties on OCSSPs operating at sufficiently large scale, such as social media or audiovisual content-sharing platforms. The nature of the duty is to seek out licenses from right-holders or to provide content-moderating mechanisms.[138]

iv. Content moderation can be carried out by algorithmic enforcement, via automated filters that scan online platforms, which could lead to false positives and over-blocking. As an example, a video could be removed from a hosting platform, but the reproduction of the allegedly infringing content may be permitted under a recognized exception to copyright, such as quotation or parody.[139] In the B2B context, creative professionals who rely on social media could be affected by this. To protect these uses, OCSSPs will need to administer complaint and redress mechanisms that must: (i) process submitted complaints "without undue delay"; and (ii) subject decisions to disable or remove content to human review. There is clearly potential for ADR solutions to operate in the context of Article 17(9), which requires that:

   "[M]ember States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies."

Collaboration between European Member States, copyright authorities and the WIPO Center

The WIPO Center collaborates with the Hungarian Intellectual Property Office (HIPO),[140] the Ministry of Culture of the Republic of Lithuania, the Romanian Copyright Office (ORDA)[141], and the Ministry of Culture and Sports of Spain to promote the use of ADR options for copyright disputes in their respective jurisdictions.

Japan

The Japanese Copyright Act, 1970 (as amended) expressly provides for copyright mediation in articles 105–111. This process requires an application to the Cultural Affairs Bureau of the Ministry of Education, Sports and Science, which will appoint suitable mediators. Specialized IP arbitration, mediation, and neutral expert advisory opinions are also available

via the Japan Intellectual Property Arbitration Centre (JIPAC).[142] The JIPAC was originally founded in 1988 with a patent law emphasis but has broadened its remit over time, notably covering domain name disputes. Statistical data until 2014 indicates that 8 percent of the ADR applications related to copyright disputes.[143] JPO also lists other specialist ADR service providers.[144]

Kenya

Collaboration between the Kenya Copyright Board and the WIPO Center

In Kenya, the Kenya Copyright Board (KECOBO) offers mediation services to the right-holders and users where they opt not to go to court and are seeking a fast and expeditious process to determine cases. Most of the mediation cases involve different right-holders in the music and book publishing sectors. KECOBO has also handled cases involving infringement of copyright in audiovisual works.[145]

Mexico

The new Federal Law on the Protection of Industrial Property (LFPPI) of Mexico came into force in November 2020. The LFPPI includes a conciliation procedure conducted by the Mexican Institute of Industrial Property (IMPI Mexico) within administrative procedures regarding infringement declarations (including copyright). Articles 372–385 of the LFPPI establish the procedural rules and describe the different steps of the conciliation procedure.

Conciliation may be requested by any of the parties at any stage of the administrative procedure, as long as a decision on the merits of the dispute has not been issued. This conciliation option is an agile procedure and it does not suspend the conduct of the administrative procedure before IMPI Mexico. If the parties reach an agreement in the course of the conciliation, the administrative procedure will be closed. Such agreement has *res judicata* effect and is enforceable as a final decision.

Collaboration between the Mexican authorities and the WIPO Center

Mexican Institute of Industrial Property

The WIPO Center collaborates with IMPI Mexico in the promotion of the use of ADR options for industrial property disputes in Mexico.[146]

National Institute of Copyright of Mexico

Since 1996, National Institute of Copyright of Mexico (INDAUTOR) has conducted a conciliation procedure called *Procedimiento de Avenencia*, established in the Mexican Federal Copyright Law.[147] In this out-of-court procedure, INDAUTOR will help parties to reach a settlement in copyright disputes. If a settlement is reached, the agreement will have the force of a court judgment.

The procedure starts when any party submits a request that considers their copyright and/or related rights to have been affected by another party. The hearing takes place 20 days after the filing of the request.[148] If a party does not appear at the hearing, INDAUTOR can fine them.[149]

Since 2009, INDAUTOR has received more than 13,000 conciliation requests.[150] For example, in 2019, the main filers were CMOs (76 percent), followed by Individuals (23 percent) and software right-holders (1 percent), with an average settlement rate of 16 percent.

The WIPO Center collaborates with INDAUTOR have in the promotion of ADR options for copyright disputes in Mexico. Noting the unprecedented circumstances of the COVID-19 pandemic, the WIPO Center and INDAUTOR jointly made available online conciliation meetings to resolve copyright disputes in Mexico.

Nigeria

The Copyright Act of 2004[151] provides the framework for regulating copyright within Nigeria. Part III of that Act deals with the administration of Copyright and establishes the Nigerian Copyright Commission (section 34). The Copyright (Collective Management Organizations) Regulations 2007, which is secondary legislation made pursuant to the Copyright Act, provides for a Dispute Settlement Panel, to be appointed by the Nigerian Copyright Commission, to consider issues arising from the negotiation of licenses and tariffs between a CMO and a user of copyright works seeking a license from that CMO. The 2007 Regulations cross-reference certain applicable provisions of the Nigerian Arbitration Act, in relation to the equal treatment of parties, the power to order attendance of witnesses, and the recognition and enforcement of awards.

Collaboration between the Nigerian Copyright Commission and the WIPO Center

Since 2020, the Nigerian Copyright Commission (NCC) and WIPO have collaborated in promoting the use of ADR options for copyright disputes in Nigeria.[152]

Paraguay

The Law on Copyright and Related Rights, No. 1328 of 1998 establishes the National Directorate of Copyright (DINAPI) in its Title XII. Article 147(5) stipulates that DINAPI will have the power to arbitrate between parties to a copyright dispute or to convene a conciliation hearing. Decree No. 460/2013 Regulating the Law Creating DINAPI, establishes in article 6 the Directorate of Mediation and Conciliation within the organizational structure of DINAPI.

Collaboration between National Directorate of Copyright and the WIPO Center

DINAPI and WIPO collaborate in the promotion of the use of ADR options for IP disputes in Paraguay.

Philippines

Collaboration between the Intellectual Property Office of the Philippines and the WIPO Center

The Intellectual Property Office of the Philippines (IPOPHL) has offered mediation services for IP disputes since 2010. Mediation is mandatory for the following types of intellectual property dispute administered by IPOPHL, including administrative complaints for violation of IP rights and/or unfair competition, and disputes relating to the terms of a license involving the author's rights to public performance or other communication of his work.[153]

Mediation services for disputes pending before IPOPHL can be provided by different ADR institutions, depending on the nature of the dispute.[154] Generally, disputes can be referred to the IPOPHL Alternative Dispute Resolution Services (ADRS) for mediation, to be administered according to the IPOPHL Mediation Rules.[155] Since 2011, IPOPHL has administered 40 mediations related to copyright and related rights, with a 35 percent settlement rate.

Since April 2015, where one or both parties are domiciled outside of the Philippines, the dispute can also be submitted to the WIPO Center to be administered in accordance with the WIPO Mediation Rules. Parties can submit an application for mediation to the WIPO Center after their case has been referred to IPOPHL for mandatory briefing on the mediation options.[156] For parties that opt for WIPO mediation, the WIPO Center will administer the proceedings and also assist in the appointment of an appropriate mediator.[157] IPOPHL and the WIPO Center make forms available to facilitate the submission of disputes to WIPO mediation and offer discounted fees for such referrals.[158]

If the party initiating the claim fails to attend the mediation, the case may be dismissed. If the opposing party fails to attend the mediation, they may be declared to be in default. The absent party may be required to reimburse the other party up to three times the costs incurred, including any lawyers' fees.[159]

Republic of Korea

The Republic of Korea has over three decades of experience with ADR in the copyright context, having introduced the Copyright Deliberation and Conciliation Committee into the Korea Copyright Act in 1987. That role is currently performed by the KCC, whose function, among other things, is "to deliberate on matters concerning copyright and other rights […] protected pursuant to this Act, and to mediate and conciliate disputes concerning copyright."[160] Articles 114–117 of the Copyright Act establishes a mediation panel and indicates its composition, certain non-disclosure requirements to keep proceedings confidential and the process for objecting to or appealing a mediation decision. The KCC also has conciliation panels, while there are separate provisions for specialized areas (e.g., software). The Korea Commercial Arbitration Board also considers IP disputes, while the Electronic Commerce Mediation Committee considers software disputes, including B2B software transactions.

Collaboration between the Ministry of Culture, Sports and Tourism of the Republic of Korea and the WIPO Center

A framework for collaboration between the Ministry of Culture, Sports and Tourism of the Republic of Korea (MCST) and WIPO was established in 2018. The MCST and the WIPO Center established a joint dispute resolution procedure to facilitate the mediation of international copyright- and content-related disputes in the Republic of Korea. The KCC

and KOCCA are governmental organizations affiliated with the MCST. Effective May 1, 2019, parties to such disputes can benefit from a Mediation Promotion Scheme, which will help fund their mediation costs.

Korea Copyright Commission

In the Republic of Korea, the KCC has offered mediation services for copyright disputes since 1988 and has provided court-annexed mediation services at the Seoul District Court since 2013. As of August 2020, the KCC has administered a total of 2,230 mediation requests and the settlement rate has reached 34 percent. Mediations at the KCC are administered according to the KCC Mediation Rules and the Copyright Act. In the period January 2016 to June 2020, the KCC administered 436 mediations related to protected works such as literary works, software, photographic works, artistic works, musical works, cinematographic works, compilation works and databases.

Requests for mediation can be filed by one party to the dispute and KCC procedures will be generally completed within three months. The Copyright Act provides that information disclosed during the mediation is confidential and cannot be used by the parties in a lawsuit or arbitration proceedings.

If a party fails to attend the mediation, the mediators can issue a certificate that can be submitted in subsequent court proceedings. If the parties are able to reach a settlement, the terms of the settlement will be recorded by the mediation division in a certificate that is binding and enforceable by the parties with the same effect as a court settlement.

The KCC can also refer disputes to the WIPO Center for mediation. The KCC and the WIPO Center make available forms to facilitate the submission of disputes to WIPO mediation and offer discounted fees for such referrals.

Korea Creative Content Agency

KOCCA's mandate is to foster Korean cultural content industries. According to the Content Industry Promotion Act of Korea, the Content Dispute Resolution Committee (CDRC) of KOCCA provides mediation for the resolution of the disputes arising out of the use of content. CDRC Mediation Rules allow one party to file a mediation request unilaterally without the consent of the other party, but the mediation will only be commenced with the consent of both parties. The settlement agreement resulting from CDRC mediation is enforceable with the same effect as a consent judgment. Since the establishment of the CDRC in 2011, it has received an increasing number of mediation requests. In this regard, in the period January 2016 to June 2020, the CDRC received 26,171 requests for mediation (including 941 B2B mediations) related to areas such as video games, cinematographic works, data and other content-related matters.

To promote ADR of content disputes in the Republic of Korea, KOCCA and the WIPO Center concluded a Memorandum of Understanding (MOU) in September 2012. Pursuant to this collaboration agreement, parties have the option of submitting international disputes to WIPO mediation. KOCCA and the WIPO Center make available forms to facilitate such submission and offer discounted fees for such referrals.

Singapore

In the wake of the Intellectual Property (Dispute Resolution) Act 2019,[161] it is now clear that a much broader range of IP disputes, including copyright- and content-related disputes, can be resolved by arbitration in Singapore. New provisions have been added to the Arbitration Act and the International Arbitration Act to expressly acknowledge this. As regards copyright legislation more specifically, the Singapore Copyright Act of 1987[162] has, since 2009, expanded the jurisdiction of the Copyright Tribunal to cover all types of copyright work. The Tribunal is empowered to resolve disputes relating to copyright licensing, including licensing schemes administered by CMOs and ascertaining the royalties payable to copyright owners.[163] The composition and membership of the Copyright Tribunal panel was also enhanced, in order to cope with the possible increase in caseload.

Collaboration between the Intellectual Property Office of Singapore and the WIPO Center

The WIPO Center collaborates with the Intellectual Property Office of Singapore (IPOS) to resolve copyright disputes through ADR. WIPO mediation services may be used for any copyright disputes in Singapore, including any:

- proceedings before the Copyright Tribunal,

such as licensing disputes between CMOs and persons who may require copyright licenses;
- disputes relating to collective management even if they do not fall within the Copyright Tribunal's jurisdiction, such as disputes between CMOs and their members;
- disputes relating to orphan works, such as any remuneration payable to copyright owners who are found after their works have been used; and
- copyright disputes before the Singapore courts.

Trinidad and Tobago

Collaboration between the Intellectual Property Office of Trinidad and Tobago and the WIPO Center

A framework for collaboration between the Intellectual Property Office of Trinidad and Tobago (TTIPO) and the WIPO has been established upon the signing of an MOU in 2018.[164] Through the signing of the MOU, TTIPO makes available ADR options – in particular, mediation – for IP and technology disputes, including copyright-related disputes, through the WIPO Center.[165]

United Kingdom

The principal legislation for the United Kingdom is the Copyright, Designs, and Patents Act (CDPA) 1988. While it does not directly refer to ADR, it does establish the UK Copyright Tribunal.[166] This Tribunal "aims to resolve UK commercial licensing disputes between copyright owners or their agents (CMOs) and people who use copyright material in their business."[167] In resolving such disputes, the Tribunal can "encourage and facilitate the use of an ADR procedure if it considers it appropriate."[168]

Additionally, certain procedural mechanisms related to the conduct of litigation encourage parties to actively consider ADR options. The Intellectual Property Enterprise Court (IPEC) is a specialist IP court that is part of the Business and Property Courts division of the High Court of Justice.[169] It is favored by individual litigants and SMEs, since it aims to provide cost-effective and speedier dispute resolution. In the initial stages of litigation, the IPEC judge will hold a case management conference with the parties to manage the conduct of the case. Before this conference, the parties are required to give consideration to ADR options.[170] More generally, an unreasonable refusal to consider mediation prior to commencing legal proceedings (in any area of law) can also mean that the party at fault does not recover all its legal costs.[171]

Collaboration between the Intellectual Property Office of the United Kingdom and the WIPO Center

The Intellectual Property Office (IPO) of the United Kingdom offers a mediation service to parties involved in an IP-related dispute covering trademarks, copyright, designs and patents.[172] The WIPO Center collaborates with the IPO in the promotion of the use of ADR options for IP disputes in the United Kingdom and is one of the listed mediation providers.[173]

United Republic of Tanzania

Collaboration between the Copyright Society of Tanzania and the WIPO Center

In the United Republic of Tanzania, under section 47(b) and (c) of the Copyright Act, the Copyright Society of Tanzania (COSOTA) maintains registers of works, productions, and associations of authors, performers, translators, producers of sound recordings, broadcasters and publishers. COSOTA is mandated to search for, identify and publicize the rights of owners and give evidence of the ownership of copyright and neighboring rights where there is a dispute or an infringement. In doing so, COSOTA offers ADR services for the resolution of copyright and neighboring rights disputes.[174] During the period July 2019 to June 2020, COSOTA administered 43 disputes.

United States of America

The US Copyright Act of 1976 (as amended), codified in Title 17 of the United States Code (USC), is largely silent on arbitration or other forms of ADR.[175] However, US courts have, over time, increasingly supported parties that have contractually opted for ADR. Courts have dismissed infringement claims where copyright disputes were within the scope of mandatory arbitration clauses, thereby redirecting parties toward an arbitration process that had been previously agreed upon.[176]

Since the 1980s, courts have also confirmed that copyright disputes are appropriate subject matter for arbitration, even where the dispute concerns the validity of copyright, since the arbitration award would not have any precedential value (i.e., would have only *inter partes* effects).[177] Court-facilitated ADR is also prevalent. US federal courts are subject to the Alternative Dispute Resolution Act of 1998, which requires these courts to provide litigants in all civil cases with at least one ADR process, including

mediation. If the parties agree to ADR, which remains a confidential process, the litigated dispute remains pending before the original judge until the dispute is settled. Additionally, there are private ADR service providers, which have IP expertise.[178] Specific ADR providers for discrete creative sectors also exist, such as the Independent Film and Television Alliance (IFTA) arbitration services for disputes involving entertainment-related production, finance and distribution agreements.[179]

One recent development, which responds to some of the driving factors behind ADR – a demand for greater efficiency, expertise and speed, with lower costs – is the recent legislation to establish a Copyright Claims Board within the US Copyright Office. This deals with "small claims," which are capped up to the value of USD 30,000 in damages. The new dispute resolution model, as an alternative to federal copyright litigation, is contained in the Copyright Alternative in Small-Claims Enforcement Act of 2019 (the CASE Act), which became law on December 27, 2020.[180] This new "small claims" model is directed at professionals, such as photographers, who seek to claim compensation for the unauthorized use of their work. CASE prioritizes ODR, except where physical or other non-testimonial evidence requires in-person hearings. However, participation is voluntary. Disputants can opt out of adjudication before this tribunal and choose to have disputes heard before other forums, such as a court.

Recent developments concerning online service providers

Contemporary debates concerning the duties and obligations of online services providers (OSPs) highlight that they could do more to protect copyright content. Regulation had developed around the so-called safe harbors model, and variations thereof, established in the closing years of the 20th century. In the early days of the commercial internet, ISPs were held liable in certain jurisdictions for the infringing activities of their users. Successful claims were based on (causation-centric) theories of strict liability – merely providing access to the internet caused infringement – or on the basis that ISPs had constructive knowledge of the actions of their users. Such forms of liability would have proved crippling for ISPs and inhibited the development of the internet. To balance the interests of the ISPs, their users and right-holders, the "safe harbors" model was created.[181] The model established under the US Digital Millennium Copyright Act of 1998 (DMCA) proved influential in this regard. The objectives of this model are clear:

> "One is providing important legal certainty for OSPs, so that the internet ecosystem can flourish without the threat of the potentially devastating economic impact of liability for copyright infringement as a result of their users' activity. The other is protecting the legitimate interests of authors and other right-holders against the threat of rampant, low-barrier online infringement. [Legislators] balanced these interests through a system where OSPs can enjoy limitations on copyright liability—known as "safe harbors"—in exchange for meeting certain conditions, while giving right-holders an expeditious and extra-judicial method for addressing infringement of their works. Thus, for some types of OSPs, their safe harbors are conditioned on taking down infringing content expeditiously upon notification by a right-holder [i.e., the notice-and-takedown model]."[182]

With significant changes in the internet ecosystem over the past two decades, States around the world are reassessing that balance, with a view to imposing further duties and obligations on internet intermediaries. The rise of "web 2.0, user-generated content (UGC) websites, the wide spread of online streaming websites, and free hosting of large files are just some of the many examples of the constantly evolving online environment."[183] Download speeds have also increased considerably, enabling a world of cloud computing and media streaming. Meanwhile OSPs more actively curate the content they host, albeit via automated algorithms. In some cases, they may no longer resemble the neutral or hands-off providers originally envisaged under the "safe harbors" model.

Consequently, one emerging option is to impose a new set of obligations on certain types of OSP, to proactively do more to filter content on their websites. The DSM Directive, seen above,[184] represents this approach. Article 17 targets OCSSPs, whose main purpose "is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes."[185] Additional criteria apply before Article 17 obligations take effect, such as the annual turnover being above EUR 10 million, the

average number of monthly unique visitors from the EU exceeding 5 million and the services having been available for over three years.[186] Under Article 17, the unauthorized uploading of content by *users* of OCSSPs is deemed to be infringement *on the part of the service provider itself*, by violating the communication to the public right. To avoid infringement, the OCSSP must obtain authorization – usually by obtaining licenses for content that it hosts on behalf of users – or else demonstrate:

> "...that it has made best efforts to obtain authorization; made best efforts to ensure the unavailability of specific works in accordance with high industry standards; and has acted expeditiously, upon receiving a sufficiently substantiated notice from the right-holder, to disable access to or to remove from its website the notified works, and made best efforts to prevent future uploads of these works."[187]

The requirement to make "best efforts" is widely understood to require filters or automated content recognition systems that comprehensively scan user uploads and either block (at the time of uploading) or subsequently remove content that contains protected works that have been flagged by their right-holders. However, the difficulty with existing automated filtration technology is that it leads to "removals caused by incorrect rights information, removals caused by the inability to recognize legitimate uses [including those covered by copyright limitations and exceptions], and removals caused by the inability to accurately identify works."[188] The concern is that over-blocking could unlawfully inhibit freedom of expression and freedom of information.[189]
In recognition of the possibility that legitimate content can be blocked, Article 17(9) requires "that online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them." It also specifies that "Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes." This seems to clearly recognize the potential for accessible, speedy and effective ADR mechanisms to resolve such disputes.
As regards the current "safe harbors" regime, here too there is potential for bespoke ADR solutions. In the United States, a notice-and-takedown request can be met by a counter-notice, on the basis that the user is making permitted or exempted use of content. However, the restoration of content could take 10–14 days, according to current statutory requirements. As the US Copyright Office recognizes:

> "[There are] concerns regarding the ten to 14 day timeframe for restoration of content following a counter-notice, as provided by the current section 512(g)(2)(C). Stakeholders on all sides take issue with this timeframe, arguing that it is either too short or too long. To address these concerns, both sides would need a method for seeking an adjudication of their claims: allowing users to challenge a takedown notice upon receipt and allowing right-holders to bring a claim in response to a counter-notice. While it is currently possible to do both in federal court, as the Office has noted on multiple occasions, federal litigation is both expensive, complex, and often slow. To address these shortcomings, Congress could consider adoption of an alternative method for adjudicating online infringement disputes within the overall notice-and-takedown framework. To be an improvement over the current system's reliance on federal court, any such alternative method should be less expensive, simple enough for both sides to participate in without an attorney, and efficient."[190]

This clearly indicates the potential for bespoke ADR mechanisms operating to assist in resolving such online disputes.

Chapter 3

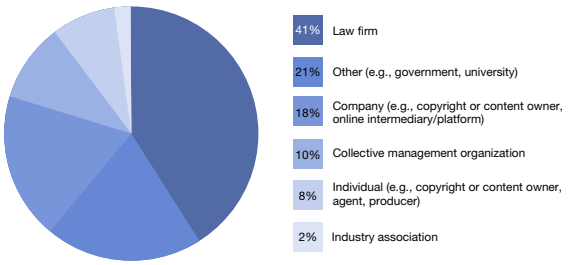
Findings from the survey and interviews

This chapter presents the main component of our report, which integrates the findings from the WIPO–MCST survey and interviews with a range of stakeholders involved in B2B copyright- and content-related disputes around the world.

Respondents' profiles

The survey obtained 997 valid responses and 74 interviews were conducted with key stakeholders. Of the survey respondents, 41 percent worked in law firms, approximately 18 percent worked at a company that was a copyright or content owner, online intermediary or platform and around 10 percent were from CMOs (Figure 3.1).

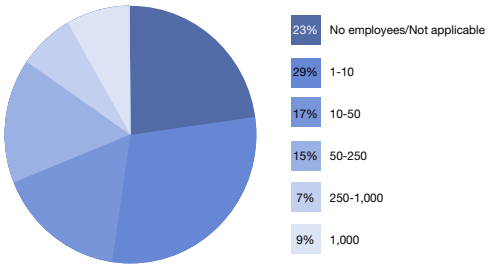
Figure 3.1 Respondent's employment



The results are shown as the constituent percentages of the total number of respondents (997).

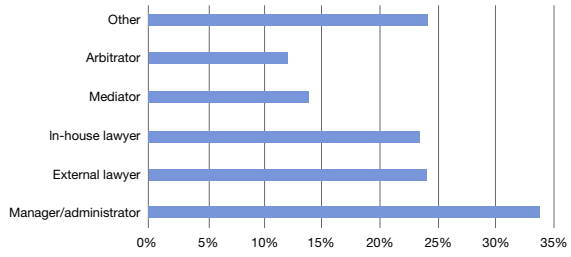
Of the survey respondents' firms and organizations, 61 percent were SMEs (with 46 percent having 1–50 employees and 15 percent having 51–250 employees). Sixteen percent of respondents represented larger institutions with more than 250 employees (with 7 percent having between 250–1,000 employees and 9 percent having more than 1,000 employees) and 26 percent were working in structures with no employees (23 percent) (Figure 3.2).

Figure 3.2 Number of employees



Forty-nine percent of the respondents were legal practitioners (both external and in-house counsels). Over one-third (34 percent) of the respondents held managerial and administration positions. Mediators and arbitrators were also well represented (26 percent of respondents) (Figure 3.3).

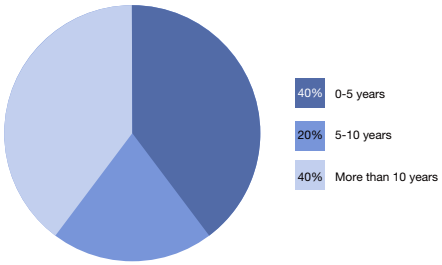
Figure 3.3 Respondent's position/role



The results are shown as the constituent percentages of the total number of respondents (997). Respondents could select multiple options.

Experience level varied, with 60 percent of respondents having at least five years of experience and 40 percent less than five years of experience (Figure 3.4).

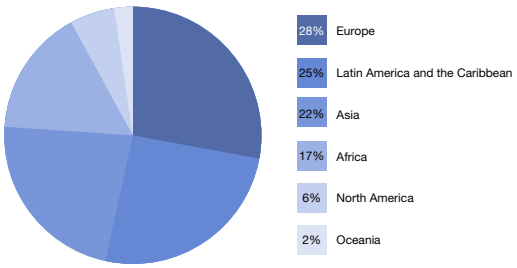
Figure 3.4 Respondent's experience in B2B digital copyright and content



The results are shown as the constituent percentages of the total number of respondents (997).

The survey targeted a global audience, with responses from 129 countries from all regions. Figure 3.5 shows the region and countries that were the primary location of the respondents. The survey also includes interviews with respondents located in Argentina, Brazil, China, Denmark, Germany, Greece, Japan, Mexico, Poland, the Republic of Korea, Singapore, Spain, the United Kingdom, the United States and Zimbabwe.

Figure 3.5 Respondent's primary location



Europe 28%

Albania, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, North Macedonia, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Spain, Sweden, Switzerland, Ukraine, United Kingdom

Latin America and the Caribbean 25%

Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, Venezuela (Bolivarian Republic of)

Asia 22%

Afghanistan, Armenia, Azerbaijan, Bahrain, Bangladesh, Bhutan, Cambodia, China, Georgia, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Japan, Jordan, Kuwait, Lebanon, Malaysia, Myanmar, Nepal, Oman, Pakistan, Philippines, Republic of Korea, Saudi Arabia, Singapore, Sri Lanka, Thailand, Turkey, United Arab Emirates, Uzbekistan, Viet Nam, Yemen

Africa 17%

Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Cote d'Ivoire, Democratic Republic of the Congo, Egypt, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Rwanda, Senegal, South Africa, South Sudan, Togo, Tunisia, Uganda, United Republic of Tanzania, Zambia, Zimbabwe

North America 6%

Canada, United States of America

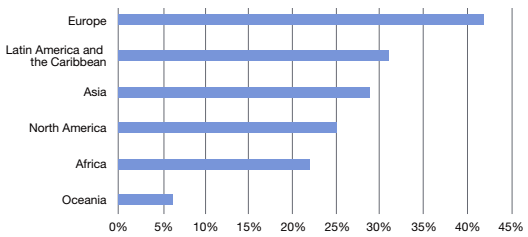
Oceania 2%

Australia, New Zealand, Samoa, Vanuatu

The regions' results are shown as the constituent percentages of the total number of answers (984). The States are shown as the constituent percentages of their representative region.

The regions where the respondents primarily operate are presented in Figure 3.6.

Figure 3.6 Regions where respondent primarily operates

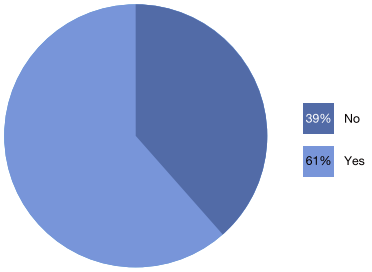


The results are shown as the constituent percentages of the total number of respondents (997). Respondents could select multiple options.

Characteristics of disputes

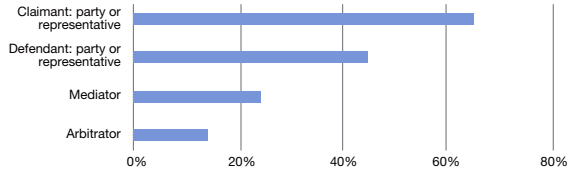
Around 61 percent of respondents had been involved in B2B digital copyright- and content-related disputes in the last five years (Figure 3.7). Among these respondents, over 65 percent had been the claimant or represented the claimant and 45 percent had been the defendant or represented the defendant. Other respondents had been involved either as a mediator (25 percent) or arbitrator (15 percent) in these disputes (Figure 3.8).

Figure 3.7 Respondent's involvement in B2B digital copyright- and content-related disputes



The results are shown as the constituent percentages of the total number of respondents (997).

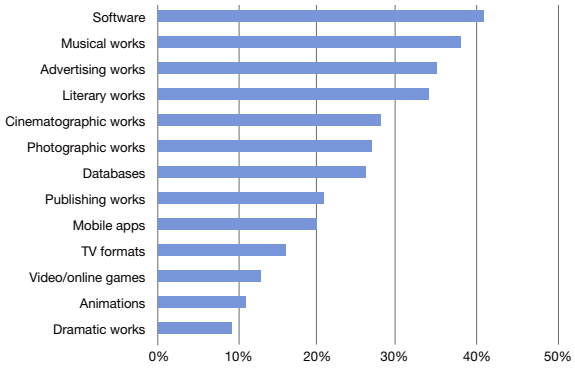
Figure 3.8 Respondent's role in B2B digital copyright- and content-related disputes



The results are shown as the constituent percentages of the total number of respondents (381). Respondents could select multiple options.

The subject matter of disputes in which the respondents had been involved in the last five years varied (Figure 3.9). The most common types of dispute were in relation to software (41 percent), musical works (38 percent), advertising (35 percent), literary works (34 percent), cinematographic works (28 percent), photographic works (27 percent) and databases (26 percent). Fifty-seven percent of these disputes were non-contractual and 67 percent domestic (Figures 3.10 and 3.11). The interview findings reflected similar trends concerning the subject matter of these disputes (Table 3.1), but the interviews also revealed that the most recurrent types of dispute related to infringement and licensing.

Figure 3.9 Subject matter of the B2B digital copyright- and content-related disputes

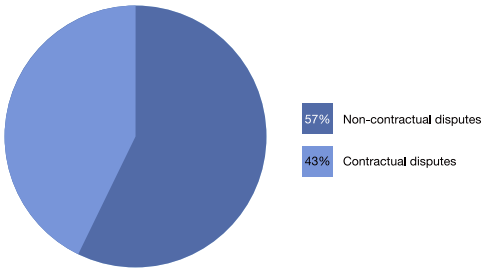


The results are shown as the constituent percentages of the total number of respondents (382). Respondents could select multiple options.

Table 3.1 Top three subject matters of disputes (by respondent's primary location)

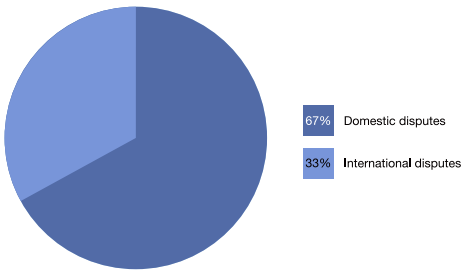
	Africa	Asia	Europe	Latin America and the Caribbean	North America	Oceania
1	Musical works	Software	Software	Software	Literary works	Musical works
2	Literary works	Musical works	Musical works	Advertising	Software	Advertising
3	Advertising	Literary works	Photographic works	Literary works	Advertising/ photographic works	Cinematographic/ dramatic works

Figure 3.10 Approximate percentage of non-contractual and contractual disputes



The results are shown as the average percentages.

Figure 3.11 Approximate percentage of domestic and international disputes



The results are shown as the average percentages.

Analysis by type of respondent of approximate percentages of non-contractual and contractual disputes, and domestic and international disputes (in the last five years)

Table 3.2 reflects the responses included in Figures 3.10 and 3.11 by type of respondent. The table shows that CMOs and large companies are particularly involved in non-contractual and domestic disputes compared to other types of respondent.

Table 3.2 Analysis by type of respondent

	Non-contractual	Contractual	Domestic	International
CMOs	76%	24%	77%	23%
Large companies	70%	30%	60%	40%
SMEs	54%	46%	58%	42%
Individuals	51%	49%	55%	45%

Analysis of interviews on the subject matter of disputes

For contractual disputes, where there is an existing commercial relationship between the parties, the following types of dispute were identified.

- Several respondents mentioned *software disputes*.[191] These related to: the question of who owned software code written by commissioned programmers when the commercial relationship broke down; ownership issues when existing code was significantly improved or updated; navigating between conflicting open source and proprietary licenses relating to the same software package; and contractual disputes when the software created was found to be unsatisfactory. Video game development, as a specific aspect of software development, was identified as a recurrent type of dispute by some interviewees.[192]
- Disputes between *publishers and authors*, relating to adequate remuneration for e-books and other new digital formats, were mentioned. These are related to new models of digital distribution, which circulate publications more widely to new audiences, or the digitalization of a back catalogue of print media, where authors seek a share of the new revenue streams.[193]
- Another issue related to the *accuracy of data* in usage reports (e.g., how many times has a protected work been viewed, listened to or downloaded).[194] Online service providers and platforms had different approaches when attempting to calculate the number of times content had been consumed (e.g., whether the initiation of a video counts as a view or the amount of time spent watching it) in order to generate accurate reports.[195]
- *Disputes relating to the ownership of content* that is consumed digitally are especially acute since copyright lacks any formal ownership registration requirement. When entire catalogues of music are transferred, the licensees are not always informed of the change in ownership and may be approached for payment by both former and current owners.[196] Online platforms also face competing demands for payment from right-holders, sometimes based in different jurisdictions. Online platforms are then unsure whom they should pay.[197]
- *Disputes relating to CMOs* include grievances regarding licensing revenues – including revenues from cross-border and online uses – which have been collected by the CMO but not adequately shared with content creators, such as musicians.[198] As one would expect, disputes also relate to license payments owed by users of protected works.[199] Negotiations between CMOs, which represent music or sound recording right-holders, and social media platforms for permission to play content were also mentioned. There were references to disputes over whether a given use of content is within the scope of an existing license.[200] Finally, there were disputes between CMOs in relation to revenue sharing, such as where the proceeds from a levy on media is to be shared across different categories of right-holders: producers, composers, film directors, writers, musical performers and actors.[201]
- A wide range of *licensing disputes* were identified. Examples include clients who produce content for one streaming entertainment service and then wish to distribute the content on another service,[202] documentary filmmakers who wish to license short clips of footage (e.g., from sports matches) but do not get permission or are presented with unreasonable terms[203] and developers who find it challenging to negotiate the use of copyright-protected media in video games.[204] Disputes often relate to old contracts being adapted for new uses.[205] These include disagreements about the existence and scope of royalty-sharing obligations for digital uses of the content that was assigned/licensed in a pre-digital era. There are additional complexities for longer contract chains involving sub-licensees.[206]

Non-contractual disputes were usually related to various types of infringement by unauthorized third parties. Rights such as reproduction (making copies of the work), distribution or communication to the public and making the work available online were most often implicated. The following examples were mentioned:

- Some respondents cited *third parties copying the layout and content* of web pages.[207]
- Respondents mentioned encountering so-called *copyright trolls* or *copyright opportunists*. These are parties who enforce copyright online to generate revenue in an opportunistic and unreasonable manner without creating the underlying works or seeking to commercially develop them.[208] These entities rely on increasingly sophisticated image or multimedia search technologies. When a match is found (e.g., for a photograph via an image search in a blog post), they send out numerous letters demanding a fee to settle infringement claims. It is sometimes unclear whether these entities are actually authorized to represent the right-holders of the relevant content.[209]
- In relation to *online platforms that host content*, respondents did make use of "notice and takedown" facilities offered by these platforms.[210] Given the scale of infringements, anonymity of the parties infringing and relatively low value of infringement, the platforms, own response mechanisms were considered more appropriate even for commercial infringers, as opposed to (say) arbitration. However, there is an awareness of recent changes to the current "safe harbors" model for platforms, which insulate them from the infringing actions of their users.[211] The new regime established under Article 17 of the DSM Directive and policy debates in the United States increasingly advocate new obligations for OCSSPs to monitor available content, through the adoption of automated filtering systems.[212] At present, some of the larger OCSSPs have voluntarily adopted such systems – automatically scanning uploads for infringing audiovisual content – but the legislative direction of travel seems to be toward requiring at least larger OSPs to adopt filtering and human review as a mandatory obligation. Users of the OCSSP's services who believe a claim against their uploaded file is invalid or believe their video was misidentified by automated filtering technology can dispute the infringement claim via human review and/or ADR. There is potential for neutral expert determination to resolve such disputes relatively cheaply and expeditiously, as recognized by Article 17(9) of the DSM Directive.
- Where *infringement* is alleged, copyright limitations and exceptions are argued in response. Interview respondents referred to the significance of limitations relating to making works accessible online for those with disabilities, how certain cultural uses may be technically infringing but were difficult to pursue (e.g., children reading out their favorite books on audiovisual platforms) and the exponential growth in the online use of materials for educational purposes during the COVID-19 pandemic.[213]

A majority of interviewees had observed an increase in digital copyright- and content-related disputes in recent years. Some mentioned the rising diversification of the usage of digital copyrighted works and new types of dispute arising as a result.[214] Several respondents noted growth in disputes associated with new digital formats being exploited and digital content being created in new markets,[215] such as e-books,[216] self-published or self-distributed music,[217] internet radio[218] and webtoons.[219]

In some States, such as China and the Republic of Korea, the comprehensive digitalization of music, film, television and other content has led to an upsurge of digital copyright disputes in recent years.[220] With the ever-growing volume of new content for digital media generated by businesses and consumed by users, and the relative ease of disseminating copyright-protected materials on the internet, the occurrence of these disputes has also increased.[221] Some respondents also pointed to the fact that copyright holders (including companies and artists) are increasingly aware of the value of copyright and related rights and the need for more effective protection.[222] This increased awareness has contributed to the growing number of claims involving digital copyright and content being brought to court or ADR.[223]

According to a law firm representative in China:

> "China's digital copyright disputes have grown rapidly in the past few years. There are currently three internet courts in China, namely Beijing, Hangzhou and Guangzhou. Taking the Beijing Internet Court as an example, more than half of its cases are online infringement cases, with over 10,000 cases per year."[224]

Another Interviewee, a representative of a company in the Republic of Korea, further commented:

> "[Digital copyright-related disputes have] definitely increased [...] With the development of various technologies such as "over the top" (OTT) [live streaming of media content], online access to content has become easier and faster. In particular, infringement claims by foreign companies have increased due to the ease of accessing content all over the world."[225]

Examples of copyright- and content-related disputes referred to the WIPO Center

Audiovisual works

- Two European companies specialized in digital effects and a Latin American producer concerning agreement for co-production of animated film
- TV distribution company and international sports federation concerning agreement for exclusive broadcasting of sports competitions in Asia-Pacific region
- Two Asian producers and a European producer concerning agreement for development of pilot for TV reality show
- Author of an audiovisual production and a number of Asian streaming companies regarding amount of royalties to be paid for his work
- Association of film producers and website operator regarding copyright infringement by making films and TV shows available on website
- Creator and event organizer regarding alleged copyright infringement of digital effects to be used in live broadcasting of sports competitions
- Two Latin American producers and two European companies in entertainment industry regarding alleged copy of TV show developed by Latin American producers in their home jurisdiction

Mobile apps

- Startup companies based in the Middle East and in the United States regarding licensing agreement for mobile apps
- Unauthorized use and distribution of copyright-protected icons for mobile apps

Musical works

- Group of music publishing associations and CMO regarding distribution of royalties for public communication on TV of musical works
- Unpaid royalties to author of musical work included in TV series produced by multinational entertainment company and broadcast through OTT platform
- Author and online platform regarding removal of his musical work due to copyright infringement

Photographic works

- European photographer and Asian media company regarding publication of photographs on internet without authorization or payment
- Company that provides copyright enforcement services (on behalf of European media group) and European company regarding payment of royalties for unauthorized use of photographs on website

Social media platform disputes

- Copyright infringement for unauthorized use of website content on social media platform
- Copyright infringement for copying cartoon character from social media account

Software disputes

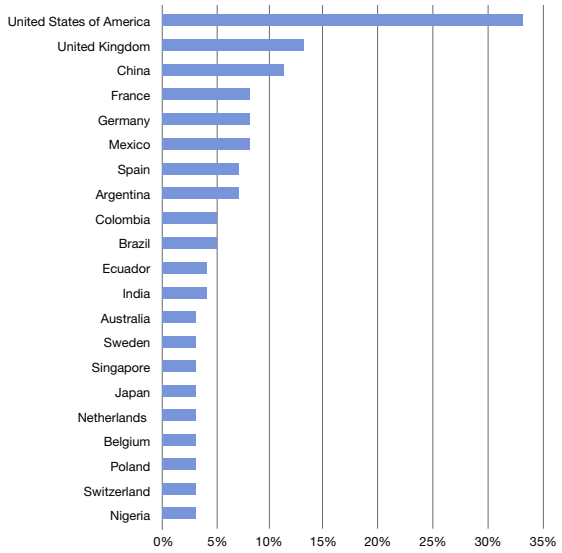
- Asian company and European software developer regarding scope of software licensing agreement to provide mobile payment services in Asian countries
- Software developer based in the United States and European company related to online license agreement of security software

Video/online games

- Video game company and developer regarding copyright infringement, payment of royalties and blocking of streaming of e-sports competitions on online platform
- Alleged violation of copyrights regarding scenario for computer game
- Creator of character for online game and another party, regarding unauthorized use of character in online audiovisual works

The States where most of the survey respondents' disputes occurred were the United States, the United Kingdom, China, Mexico, Germany, France, Argentina and Spain (Figure 3.12).

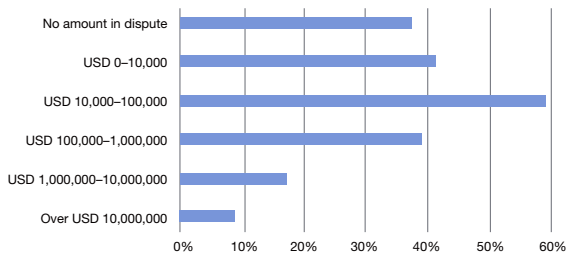
Figure 3.12 States where respondent's disputes occurred (top 20)



The results are shown as the constituent percentages of the total number of respondents (369). Respondents could select multiple options.

Looking at the *value of the claims or dispute*, 59 percent of respondents involved in B2B digital copyright- and content-related disputes in the last five years indicated that their disputes fell into the bracket of USD 10,000–100,000. Disputes of USD 0–10,000 were also common (41 percent), along with higher-value disputes from USD 100,000 to USD 1 million (39 percent). There were fewer respondents involved in disputes over USD 1 million or more (17 percent for USD 1–10 million; 8 percent for over USD 10 million). Notably, a sizable proportion of respondents were involved in disputes that did not concern a monetary amount (36 percent) (Figure 3.13).

Figure 3.13 Amounts involved in respondent's disputes

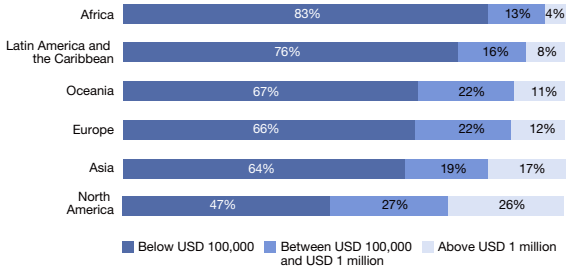


The results are shown as the constituent percentages of the total number of respondents (303). Respondents could select multiple options.

Amounts in dispute of the B2B digital copyright- and content-related disputes (by respondent's primary location and by type of respondent)

Figure 3.14 reflects the responses included in Figure 3.13 by respondent's primary location. The chart shows that larger amounts in dispute are most common in North America, Asia and Europe.

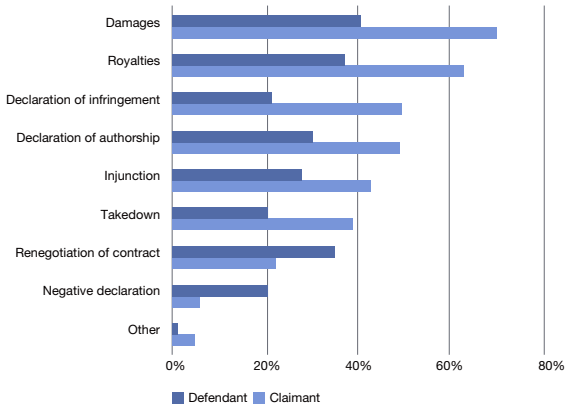
Figure 3.14



The WIPO–MCST survey results also indicate that 41 percent of the disputes of large companies and 40 percent of the disputes of SMEs are below USD 10,000. Only 15 percent of the disputes of large companies and 10 percent of the disputes of SMEs are over USD 1 million.

Damages was the most common remedy pursued by claimants (70 percent) and defendants (41 percent) involved in B2B digital copyright- and content-related disputes in the last five years. Claims for royalties were also frequently pursued by both claimants (63 percent) and defendants (37 percent). Around 49 percent of claimants sought a declaration of infringement; 35 percent of defendants sought to renegotiate the contract (Figure 3.15).

Figure 3.15 Common remedies pursued in disputes

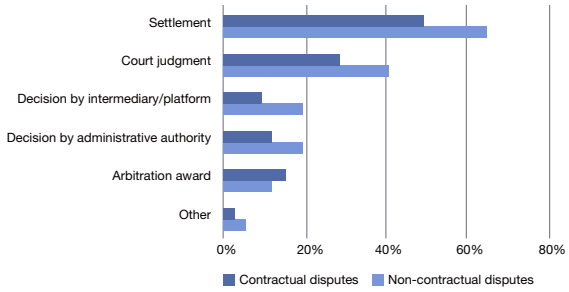


The results are shown as the constituent percentages of the total number of respondent claimants (361) and defendants (194). Respondents could select multiple options.

Outcomes of disputes

The survey results show that settlement was the most common outcome of B2B digital copyright- and content-related disputes in both contractual (48 percent) and non-contractual (65 percent) disputes (Figure 3.16). The second most common outcome for parties was a court judgment, which had a higher frequency among non-contractual disputes (41 percent) than contractual disputes (27 percent). The proportion of arbitration awards as an outcome was similar in contractual disputes (15 percent) and non-contractual disputes (12 percent).

Figure 3.16 Common outcomes in disputes



The results are shown as the constituent percentages of the total number of respondents (372). Respondents could select multiple options.

Examples of settlement in WIPO mediation and arbitration copyright- and content-related cases

WIPO mediation of a TV copyright royalty dispute

A group of European CMOs and a number of digital cable operators were involved in a dispute concerning the remuneration for national and foreign TV stations offered by cable operators based on an established common tariff. The parties agreed to refer the dispute to WIPO mediation by subscribing a submission agreement. In the agreement, the parties named a WIPO mediator and a copyright expert they wanted to assist them with the technical discussions on tariffs and national and international copyright law. The parties reached a settlement agreement within four months.

WIPO mediation of a TV format dispute

A dispute concerning the copy of a TV format for a quiz show arose between production companies based in the United Kingdom and Germany. The UK-based company, which created and developed the TV format, claimed that there were substantial similarities between its show and another game show produced by the German company. Following exchanges between the parties, they agreed to submit the dispute to mediation in accordance with the WIPO Mediation Rules for Film and Media. The parties managed to settle their dispute after a one-day meeting with the mediator, opening the possibility for collaboration between the companies.

WIPO arbitration of a software dispute

An Asian company and a European software developer entered into a license agreement to provide mobile payment services in a number of Asian States. The agreement included a WIPO arbitration clause. When a dispute related to the licensing agreements arose between the parties, the Asian company initiated WIPO arbitration proceedings. Both parties requested interim measures in the course of the arbitration. At the suggestion of the arbitrator and with the consent of the parties, having reviewed the further pleadings in the case, the arbitrator convened a conciliation conference. After further discussions, the parties settled their dispute. The European developer agreed to pay a certain amount to the Asian company, which in turn agreed to transfer relevant IP rights to the developer.

Types of dispute resolution mechanism used

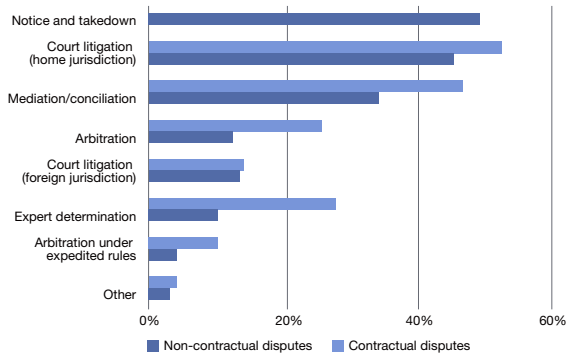
The survey respondents' experiences showed that the most frequent mechanism[226] used for resolving non-contractual B2B digital copyright- and content-related disputes was notice and takedown (48 percent).

An interviewee also noted that it was a "good thing" that internet providers had "very specific" guidelines for users of their services, installed systems to detect offending content and took action to remove such content.[227] However, another interviewee noted that platforms' notice-and-takedown measures were not very well regulated and "you end up relying on the good sense of the platform."[228]

According to the WIPO–MCST survey findings, court litigation in the respondent's home jurisdiction was the most commonly used mechanism to resolve contractual (51 percent) and non-contractual disputes (44 percent). Yet, for the non-contractual disputes, notice and takedown was the mechanism mostly used (48 percent). Mediation and conciliation was also frequently utilized in contractual

(45 percent) and non-contractual (33 percent) disputes. Arbitration was used more in contractual disputes (25 percent) than in non-contractual disputes (12 percent) (Figure 3.17).

Figure 3.17 Dispute resolution mechanisms used to resolve disputes



The results are shown as the constituent percentages of the total number of respondents (318). Respondents could select multiple options.

The interviews revealed that there were relatively few specialized mechanisms available for resolving B2B digital copyright- and content-related disputes or that stakeholders were unaware of such mechanisms.[229]

From the interviews, it appears that the use of arbitration and mediation varies across organizations and States. CMOs tend to have their own complaints and disputes procedures, as indicated by one interviewee:

> "Our CMO has an internal mechanism to resolve these disputes. We do not use mediation so often, but we do use arbitration. However, we do more direct negotiation with other CMOs. When we have problems with right-holders, they have to go to court. As such, we do not use mediation or arbitration too often for these matters."[230]

Some jurisdictions have particular experience in the use of arbitration as an alternative to litigation in B2B copyright cases:

> "When disputes do arise in a commercial context, they will be handled manually and they will be evidence-based. The defendant will ask for proof of ownership and then pay. This will resolve the vast majority of cases. When this does not solve the issue, they will try to use arbitration and expect that both parties will honor the findings of the arbitration. The United Kingdom has a lot of experience in this regard."[231]

Moreover, litigation may be preferred where there is a more adversarial culture in which litigation is seen as the best strategy to enforce a party's rights:

> "In California, people do not use mediation and prefer a more adversarial procedure. This may be because usually one of the parties does not have a strong position but expects the other party to settle because of the potential costs."[232]

Top three dispute resolution mechanisms used to resolve disputes (by type of respondent)

Tables 3.3 and 3.4 indicate that mediation/conciliation is the most common mechanism used by CMOs and individuals both for non-contractual and contractual disputes, and is overall the most common mechanism for nearly all types of respondent.

Notice and takedown mechanisms are particularly favored by large companies and SMEs for non-contractual disputes.

Large companies and SMEs primarily use court litigation in their home jurisdiction to resolve contractual disputes.

Table 3.3 Non-contractual disputes

CMOs	Large companies	SMEs	Individuals
Mediation/ conciliation	Notice and takedown	Notice and takedown	Mediation/ conciliation
Court litigation in home jurisdiction	Court litigation in foreign jurisdiction	Mediation/ conciliation	Notice and takedown
Notice and takedown	Court litigation in home jurisdiction	Court litigation in home jurisdiction	Expert determination

Table 3.4 Contractual disputes

CMOs	Large companies	SMEs	Individuals
Mediation/ conciliation	Court litigation in home jurisdiction	Court litigation in home jurisdiction	Mediation/ conciliation
Court litigation in home jurisdiction	Mediation/ conciliation	Mediation/ conciliation	Court litigation in home jurisdiction
Expert determination	Arbitration	Expert determination	Arbitration / arbitration under expedited rules

WIPO mediation followed by arbitration

Some 30 percent of the mediation, arbitration and expedited arbitration cases filed with the WIPO Center included an escalation clause providing for WIPO mediation followed, in the absence of a settlement, by WIPO arbitration or expedited arbitration.

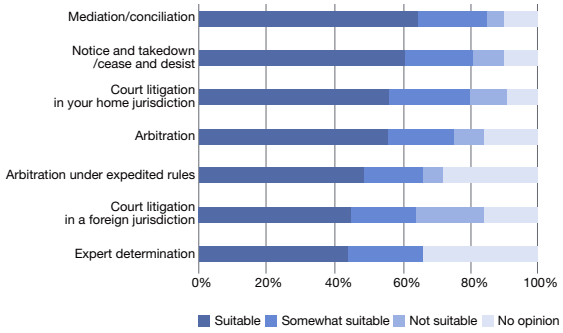
Example of a WIPO mediation followed by expedited arbitration

A publishing house entered into a contract with a software company for the development of a new web presence. The project had to be completed within one year and included a clause submitting disputes to WIPO mediation and, if settlement could not be reached within 60 days, to WIPO expedited arbitration. After some time, the publishing house was not satisfied with the services delivered by the developer, refused to pay, threatened rescission of the contract and asked for damages. The publishing house filed a request for mediation. While the parties failed to reach a settlement, the mediation enabled them to focus the issues that were addressed in the ensuing expedited arbitration proceeding. Following the termination of the mediation, the publishing house initiated expedited arbitration proceedings. As agreed by the parties, the WIPO Center appointed a practicing judge as sole arbitrator. In the course of the one-day hearing, the parties expressed their desire to settle their case, asking the arbitrator to prepare a settlement proposal. The parties accepted the arbitrator's proposal and requested the arbitrator to issue a consent award.

Respondents' perceptions and priorities

The respondents' perceptions of various mechanisms used to resolve B2B digital copyright- and content-related disputes seemed generally positive, all being predominantly perceived as suitable. Based on respondents' experience with each of these mechanisms, mediation as well as notice and takedown, arbitration and court litigation in home jurisdiction were often perceived as suitable mechanisms (56–64 percent). While predominantly seen as a suitable mechanism, court litigation in a foreign jurisdiction, compared with the other mechanisms, had the largest proportion of responses describing it as not suitable (20 percent). Expert determination is the mechanism that had the highest proportion of its responses with no opinion (35 percent) (Figure 3.18). This finding corresponds to the general observation (mentioned above in Key considerations relating to the use of ADR, in Chapter 2) regarding the "home-court advantage" that parties often perceive when seeking legal action in their own local jurisdictions. From this perspective, a dispute litigated in a foreign jurisdiction is less desirable than other mechanisms of dispute resolution.

Figure 3.18 Respondent's perception of dispute resolution mechanisms



The results are shown as the constituent percentages of the total number of responses per category (310–328). Respondents could select multiple options.

Respondent's perception of dispute resolution mechanisms used to resolve B2B digital copyright- and content-related disputes

Most respondents (80 percent of law firms, 79 percent of individuals, 77 percent of CMOs and 57 percent of companies) indicated that *mediation/conciliation* is perceived as at least suitable to resolve B2B digital copyright- and content-related disputes.

A considerable percentage of law firms (58 percent), CMOs (53 percent), companies (41 percent) and individuals (21 percent) have no opinion on the suitability of *expedited arbitration* to resolve B2B digital copyright- and content-related disputes. This could be related to their lack of knowledge of expedited arbitration mechanisms.

A significant percentage of respondents (64 percent of individuals, 57 percent of CMOs, 55 percent of companies and 53 percent of law firms) consider *expert determination* at least somewhat suitable to resolve B2B digital copyright- and content-related disputes. Many respondents (47 percent of law firms, 45 percent of companies, 43 percent of CMOs and 36 percent of individuals) had no opinion on the suitability of expert determination. This could also be related to their lack of awareness of this ADR mechanism.

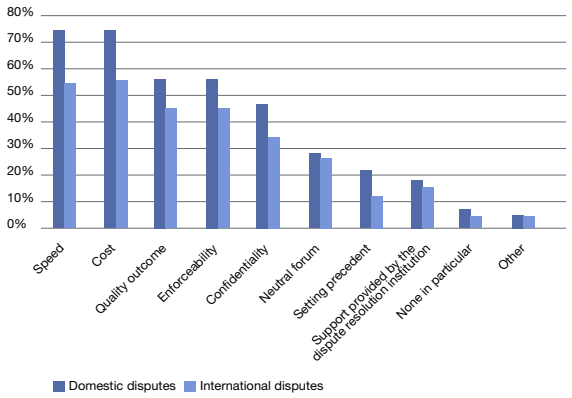
The respondents seemed to have overlapping priorities in resolving these disputes regardless of whether the dispute was domestic or international (Figure 3.19). The top priorities, with almost identical percentages, were the cost and speed of resolving the dispute, found in 55–56 percent of the responses relating to international disputes and 74 percent relating to domestic disputes. The importance of cost and speed considerations was also highlighted in the interviews.[233]

Following cost and speed, the *quality of the outcome and enforceability* were the next priorities when resolving B2B digital copyright- and content-related disputes, as indicated by 45 percent of respondents involved in international disputes and 57 percent in domestic disputes. *Confidentiality* was also high on the list, particularly in domestic disputes, in which 47 percent of the respondents identified it as a priority (compared with 34 percent in international disputes). A possible reason for this difference between domestic and international disputes may be concerns over local reputational risks for a business involved in such disputes. Similarly, setting precedent was considered as a priority more often in domestic disputes (22 percent) than in international disputes (12 percent). A neutral forum was identified as a priority in 26 percent (domestic disputes) and 28 percent (international disputes) of the responses.

Another priority identified in the interviews was the importance of technical expertise required to resolve digital copyright disputes. It was pointed out that judges may not have the knowledge to handle these that which end up at their courts as they consider other commercial cases. Even specialized IP courts did not have the particular expertise or up-to-date knowledge of the fast-evolving digital environment in which these cases are situated. As one interviewee put it:

> "The advantage of ADR in the resolution of digital copyright disputes over court litigation lies in its professional neutrals. Although judges in specialized IP courts have the professional knowledge, skills and experience in the field of IP, they are not always familiar with new developments in the digital environment […] This means that the parties must ask expert witnesses to support their claims. In arbitration or mediation, arbitrators and mediators with particular expertise in the digital field are a huge attraction."[234]

Figure 3.19 Respondent's resolution priorities



The results are shown as the constituent percentages of the total number of respondents (321). Respondents could select multiple options.

Example of a WIPO mediation of a dispute related to the production of a documentary film

Two European companies were involved in the joint production of a documentary film. Following completion of the film, a dispute arose between them concerning contractual budget responsibility and resulting shares of payment. The film production contract between the parties did not include a dispute resolution clause, so parties eventually agreed to submit their dispute to WIPO mediation by way of submission agreement. Parties were keen on an expeditious conduct of the mediation. The parties agreed on the appointment of a mediator with expertise in film production collaboration. The one-day mediation meeting was held four weeks after the commencement of the mediation and, with the help of the mediator, the parties settled their dispute in that meeting.

Tools used in dispute resolution

The tools most commonly used[235] by the respondents in B2B digital copyright- and content-related disputes were documents-only procedures (64 percent), followed by hearing via video conference (32 percent), and electronic case filing and management tools (29 percent). Online dispute resolution platforms were used by 25 percent of the respondents in disputes.

In the interviews, some stakeholders pointed to a gap in the existence of best practices in guidelines or documents on resolving disputes. There were some common suggestions for developing tailored dispute resolution mechanisms. These included

the creation of best practices similar to those developed by the International Confederation of Societies of Authors and Composers (CISAC) for commercial disputes,[236] and the establishment of specialized mediation services and courts at a national level and the use of WIPO ADR for international disputes.[237] In the light of the disruptions brought by the COVID-19 pandemic, some stakeholders supported the establishment of independent courts that can be accessed virtually.[238] Some emphasized the need to avoid fragmentation and to push for coherence and consolidation of the different dispute resolution mechanisms that exist in the online ecosystem.[239] At the same time, some recommendations encouraged the creation of an ADR framework that is flexible enough to allow for appropriate substantive and procedural innovation in each case.[240]

Some interviewees declared that they would like to see the existence of a specialized stage prior to litigation before the courts,[241] and they noticed that resolving digital copyright disputes through arbitration and mediation is a growing trend. However, they highlighted possible areas of improvement for current ADR procedures. For example:

> "I think arbitration could be very useful, but the threshold may be too high for a small company. This forces the parties to look for other ways."[242]

> "We feel that the effectiveness/usefulness of dispute resolution mechanisms for actually conclusively resolving disputes is one of the deciding factors for potential users and we hope to see the development of mechanisms that can effectively resolve disputes in this regard. [...] Also, the low levels of predictability of ADR procedures may also deter potential users from choosing these options. Enhanced visibility and volume of relevant information related to the pool of neutrals, anonymized case examples, etc., may help address this issue."[243]

> "When participating in ADR procedure, I sensed most experts have not much knowledge of new technology, more specifically web-casting. It seems necessary to expand the pool of experts from various fields to participate in the ADR service."[244]

There was a general consensus that ADR mechanisms should be developed with accessibility, efficiency, cost, speed and enforceability in mind.[245]

Finally, the interviewees highlighted the need for increasing awareness of ADR mechanisms among commercial parties involved in these disputes. Outreach activities should be promoted to encourage commercial parties to use ADR. There is also a need to expand the pool of multidisciplinary experts that could participate in ADR services. These measures should go some way in ensuring that copyright and content creators are educated about their rights, while the ADR experts are up to date with technological developments.[246]

Example of a WIPO mediation of a mobile apps dispute

Startup companies based in the Middle East and in the United States entered into a license agreement for the use of mobile phone applications. This contained a dispute resolution clause referring to WIPO mediation followed, in the absence of a settlement, by WIPO arbitration. A dispute arose between the parties regarding the authorized use of the application under the license and, in particular, whether such use was to be made against payment or free of charge. The mediation sessions took place entirely via remote communication tools and, within two months after the appointment of the mediator, a settlement agreement was reached with the mediator's assistance. The parties expressed interest in continuing to collaborate.

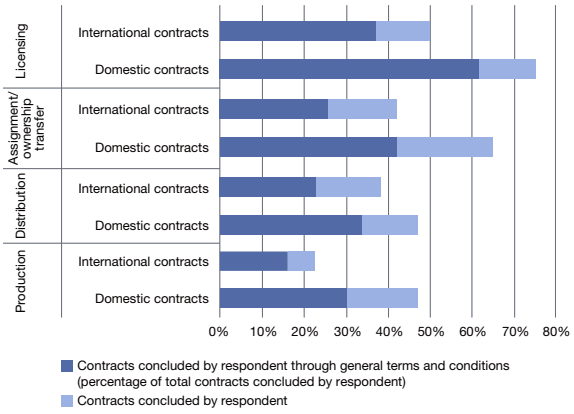
Example of a WIPO expedited arbitration of a software dispute

A software developer based in the United States and a European company concluded an online license agreement permitting use of the European company's security software for internet distribution of the developer's software. The license agreement contained a WIPO expedited arbitration clause. Several years after the conclusion of the agreement, the software developer submitted a request for expedited arbitration to the WIPO Center alleging that the European company's security application had not prevented third parties from unauthorized access to his software and claiming substantial damages for breach of contract. The parties chose one of the candidates proposed by the WIPO Center as sole arbitrator and agreed to hold the hearing through a videoconference, including witness examinations. Following post-hearing submissions, the arbitrator rendered a final award.

B2B digital copyright- and content-related contracts

The survey further looked at respondents' experience with the B2B digital copyright- and content-related contracts. A total of 64 percent of survey respondents concluded such contracts. These contracts were predominantly related to licensing, in both domestic (75 percent) and international (50 percent) cases. The second most common type concerned assignment or ownership transfer. In other areas, domestic contracts tended to be equally split between production and distribution (47 percent each). In international contracts, distribution contracts were more frequent (37 percent) than production contracts (22 percent). The same patterns are found also in contracts concluded through general terms and conditions in the last five years (Figure 3.20).

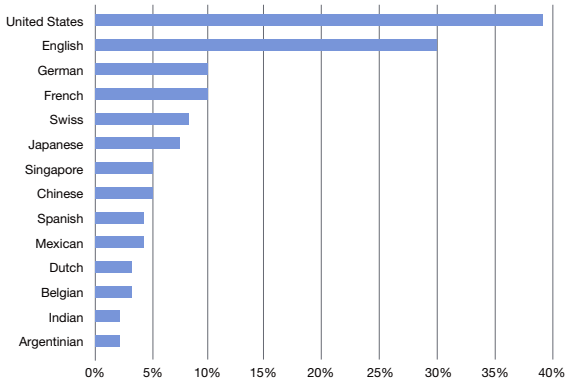
Figure 3.20 Type and proportion of contracts concluded through general terms and conditions



The results are shown as the constituent percentages of the total number of respondents (316). Respondents could select multiple options.

The findings showed that the most common applicable laws cited in the B2B digital copyright- and content-related contracts were US, English, French, German, Swiss and Japanese laws (Figure 3.21). Within the United States, the state laws of California (38 percent), New York (36 percent) and Delaware (10 percent) were the most common.

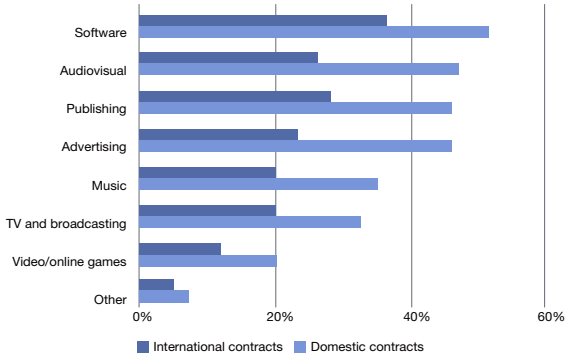
Figure 3.21 Most common applicable laws in B2B digital copyright- and content-related contracts



The results are shown as the constituent percentages of the total number of respondents (314). Respondents could select multiple options.

The respondents were able to choose multiple areas covered by the contracts. Software-related contracts were the most common, both for domestic contracts (51 percent) and international contracts (36 percent). The other common areas covered by contracts were audiovisual, publishing and advertising (Figure 3.22).

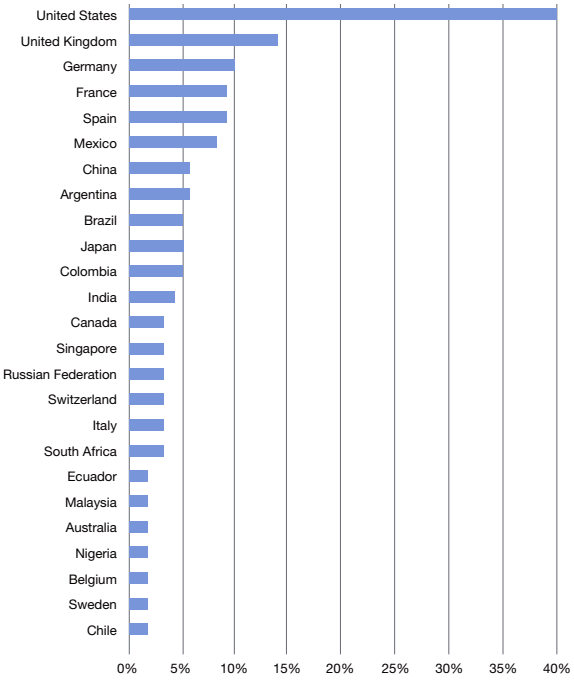
Figure 3.22 Areas of contracts concluded



The results are shown as the constituent percentages of the total number of respondents (316). Respondents could select multiple options.

The top 25 locations of the other parties involved in the B2B digital copyright- and content-related contracts are illustrated in Figure 3.23. Most survey respondents concluded contracts with another party or parties that were situated in the United States, United Kingdom, Germany, Spain, France, Mexico, Argentina and China.

Figure 3.23 Most common locations of the other party(ies) in respondent's B2B digital copyright- and content-related contracts (top 25)



The results are shown as the constituent percentages of the total number of respondents (315). Respondents could select multiple options.

The respondents were also asked whether they had policies or guidelines for drafting dispute resolution clauses for the B2B digital copyright- and content-related contracts. Sixty-one percent declared that they did, while 39 percent did not have any such policies. Of those that had such policies, 69 percent included ADR mechanisms in their policies or guidelines.

One of the interviewees provided an interesting example of how certain ADR mechanisms may be imposed by the other party, which sometimes results from limited awareness of other available options:

> "Spain has become a hub of film production and thus this has brought major studios, and platforms, especially the ones based in the United States of America. The contracts with these partners (e.g., Production Service Contracts) usually contain arbitration clauses which cannot be altered."[247]

Policies or guidelines for drafting dispute resolution clauses in B2B digital copyright- and content-related contracts

Companies

Forty-eight percent of SMEs and 45 percent of large companies have policies or guidelines for drafting dispute resolution clauses in their B2B digital copyright- and content-related contracts Twenty-three percent of SMEs and 33 percent of large companies include ADR in their policies or guidelines.

CMOs

Fifty-two percent of CMOs have policies or guidelines for drafting dispute resolution clauses in their B2B digital copyright- and content-related contracts. Twenty-eight percent of CMOs include ADR in their policies or guidelines.

Law firms

Sixty-one percent of law firms have policies or guidelines for drafting dispute resolution clauses for their clients' B2B digital copyright- and content-related contracts. Fifty percent of law firms include ADR in their clients' policies or guidelines.

Example of inclusion of ADR options in general terms and conditions of B2B software agreements

The following case study illustrates the use of WIPO ADR options by a number of companies of the same corporate group in the software industry. While the parent company of the group is based in the United States, the group operates globally.

The companies in the group filed 25 requests for mediation before the WIPO Center concerning disputes related to software agreements. The main types of agreement were software license and maintenance agreements, and reseller/ distribution agreements.

The companies' dispute resolution policies included an escalation clause providing for WIPO mediation followed by WIPO expedited arbitration, in their terms and conditions in B2B agreements. The clause usually indicated a 60-day period for the mediation phase.

Fifty-seven percent of the disputes were settled following the submission of the request for WIPO

mediation. Of these, 38 percent of settlements happened after the commencement of the mediation but before the appointment of the mediator, resulting in considerable time and cost savings.

The average duration of WIPO mediation proceedings was three months.

Reported trends and improvements

The WIPO Center asked respondents and interviewees whether they observed any trends in the use of dispute resolution mechanisms in B2B digital copyright- and content-related disputes. Some respondents and interviewees indicated that they had noticed an *increase in the use of ADR* (in particular, conciliation/mediation[248]) as more stakeholders became familiar with and trusted these mechanisms.[249] Additionally, respondents highlighted the *increased use of expedited arbitration and expert determination*,[250] as well as the use of *specialized ADR for copyright disputes*.[251] Some respondents indicated that specialized ADR had become more common than litigation for this type of dispute (mostly related to non-contractual disputes[252]); disputes arising in this sector may involve many jurisdictions.[253] In this context, suitable ADR mechanisms made available by platforms are a positive trend within this sector, as mentioned by the respondents.[254]

In line with the experience of the WIPO Center, respondents expressed that the use of technology had become more common as a way of resolving disputes faster (e.g., online submissions, videoconferencing).[255]

Respondents referred to the *inclusion of mediation in legislation*[256] (e.g., in the music sector for disputes between producers and digital platforms).[257] In addition, court-annexed ADR is available in certain legislations and parties are encouraged to attempt ADR before going to court.[258] Respondents observed trends in the promotion of the use of ADR by government agencies[259] (e.g., copyright offices) and the increasing inclusion of ADR clauses in contracts.[260]

When asked about which improvements they would suggest for resolving B2B digital copyright- and content-related disputes, respondents and interviewees identified the use of ODR platforms,[261] the development of tailor-made and specialized rules and procedures,[262] and dispute resolution guidelines.[263] They also emphasized the importance of having international and neutral dispute resolution providers.[264] Furthermore, in order to reduce the cost and the duration of dispute resolution processes,[265] respondents highlighted the need for affordable, fast and enforceable adjudication mechanisms.[266] They also expressed interest in the development of common forums to resolve multijurisdictional disputes.[267] Respondents considered it necessary to raise awareness of ADR among stakeholders in the sector.[268] Moreover, they indicated the need to improve the availability of specialized neutrals[269] and to train judges on ADR.[270] Further improvements mentioned by respondents included the harmonization of model ADR clauses and the promotion of inclusion of such clauses in contracts,[271] as well as the need for cultural changes to consider the use of ADR.[272]

Chapter 4

ADR practical applications: current and potential

This concluding chapter discusses some practical applications to resolve B2B digital copyright- and content-related disputes based on the key findings of the survey and analysis in this report.

Chapter 2 of the report provided an analysis of national and regional copyright legislations that include ADR provisions and related initiatives. It also gave examples of frameworks established by national IP or copyright offices to facilitate dispute resolution. As presented in Chapter 3, most of the survey respondents favor the use of ADR to resolve such disputes.

Overall, recent regulatory developments point to the need for effective mechanisms that provide an alternative to the courts for resolving B2B digital copyright- and content-related disputes. Notably, the US DMCA (including the ongoing legislative update project in the US Congress) and the EU DSM Directive include several provisions referring to ADR. For example, in the DSM Directive, the use of ADR – in particular, mediation – is encouraged for negotiating and reaching agreements on licensing rights for audiovisual works on video-on-demand services.[273] Parties to disputes involving transparency obligations and contractual adjustments related to fair and proportionate remuneration for authors and performers are also encouraged to use voluntary ADR procedures to resolve such disputes.[274] The DSM Directive requires OCSSPs to put in place effective and expeditious complaint and redress mechanisms for users in the event of disputes over the disabling of access to, or the removal of, uploaded content involving copyright-protected works or other protected subject matter.[275] The Directive sets out the need for available *out-of-court* redress mechanisms to settle these disputes, without depriving the user of legal protection and access to judicial remedies. This essentially involves a multi-tiered process for resolving disputes involving the use of protected content by OCCSPs: upload-filtering by OCSSPs, human review, ADR and court proceedings.
In light of the findings presented here and current regulatory and policy developments, we examine three practical applications in the resolution of B2B digital copyright- and content-related disputes: the effective use of online dispute resolution (ODR) processes and tools; notice mechanisms for copyright infringements in the digital environment; and the development of adapted and customized ADR procedures.

Effective use of ODR processes and tools

ODR platforms have seen a renaissance in recent years. They have operated in parallel and in conjunction with the "traditional" court systems. As a working definition, we adopt the United Nations Commission on International Trade Law (UNCITRAL) ODR Working Group's definition of ODR as "a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology."[276] The approaches to ODR systems design can therefore range from fully computerized systems to hybrid solutions. The disruptions brought by COVID-19 have also highlighted possibilities of rapidly switching from "brick-and-mortar" courtrooms to adopting a range of ODR processes and tools in many jurisdictions.

Innovations in the use of technology to resolve B2B digital copyright- and content-related disputes through ODR methods can generate significant benefits for right-holders and users by promoting expediency and convenience, cutting

legal costs and avoiding adversarial processes that damage the parties' relationship. For over two decades, e-commerce companies such as eBay, PayPal and Alibaba have established and deployed their own ADR-ODR systems that handle millions of disputes every year. Within the EU, there has been a significant policy impetus in recent years to promote ODR in the arena of consumer-to-business disputes. The European Commission has developed a European ODR platform and introduced a regulation requiring all online retailers and traders in the EU, Iceland, Liechtenstein and Norway to provide a link to the platform and a contact email address.[277]

Within courts and tribunals, the adoption of new technologies and online processes has occurred at a much slower pace than private initiatives. However, in recent years, courts around the world have embarked on a range of digitalization reforms toward developing "online courts."[278] As mentioned in Chapter 2, China's Internet Courts have primary jurisdiction over online copyright infringements and conduct almost the entire process (case filing, case management, pre-trial mediation, hearing and delivery of judgment) online.

At the heart of ODR lies the possibility of making dispute resolution more accessible through the use of technology and increasing economic and time efficiencies through the use of streamlined dispute resolution processes. In addition to efficiency outcomes, some advocates argue that ODR mechanisms have significant potential to improve the quality of dispute resolution outcomes. These advantages are particularly important for less-resourced parties, which include a range of right-holders in the creative industry, as well as users of copyright works and content.

In the current COVID-19 climate, parties, mediators, arbitrators and experts involved in IP disputes are increasingly using online tools in their ADR proceedings.[279] For example, to assist with timely and cost-efficient administration of procedures under its Rules, the WIPO Center has made available videoconferencing solutions for stakeholders, as well as a Checklist for the Online Conduct of Mediation and Arbitration Proceedings.[280] In addition to videoconferencing facilities, some 30 percent of parties in WIPO arbitrations have opted to use WIPO eADR,[281] a time- and cost-effective online case management tool developed and managed by the WIPO Center.

WIPO eADR

Parties to a procedure under the WIPO Mediation, Arbitration, Expedited Arbitration or Expert Determination Rules may opt to use WIPO eADR. WIPO eADR allows parties, mediators, arbitrators and experts in a WIPO case to securely submit communications electronically into an online docket.

In 2020, as a result of the growing use of WIPO's online case administration tools, the WIPO Center observed that the settlement rate in mediation cases increased to 78 percent. Based on its experience with online case administration tools, the WIPO Center is adapting these tools to specific types of digital copyright- and content-related dispute. The WIPO Center also makes its online case administration tools available to Member States' copyright authorities.

Given the online nature of digital copyright- and content-related disputes, ODR processes and tools offer an efficient and streamlined approach to support the settlement of such disputes. More advanced ODR tools that employ new technologies in AI and blockchain can also be effectively deployed to increase the efficiency and quality of the process. To date, a range of AI tools such as chatbots, document review and real-time language translation have been used in various dispute resolution procedures (from mediation to litigation). Blockchain technology has been used to verify the authenticity of evidence relating to online copyrighted work and alleged infringements.[282] There is also potential to use blockchain technology to enhance the registration process for IP rights and rights management information. This can be particularly important in the context of unregistered IP rights such as copyright.[283]

Recent developments on notice mechanisms for copyright infringements in the digital environment

Effective notice mechanisms adopted by OCSSPs, ISPs and online platforms can help to efficiently resolve copyright infringement disputes at the onset, especially in relatively straightforward cases. An efficient, fair and fast process of resolving these disputes at this stage can help to develop and maintain right-holders'

and users' trust and confidence in the platform. Many OCSSPs, ISPs and online platforms have adopted notice-and-take down processes in accordance with the DMCA, which enables "safe harbor" protections. Several OCSSPs include in their platform a process of notification of alleged copyright infringement for the right-holder to report an alleged copyright infringement through either written notice or by completing an online form. In general, the more popular and well-known OCSSPs offer a relatively streamlined and user-friendly framework for such notifications that includes a simple online form that can be easily filled out. To meet the requirement of a legally effective infringement notice under the DMCA, these online forms typically include the following information: topic, personal information of the right-holder, complaint, subject of inquiry (including the URL of the alleged infringement), details of inquiry, and attachments evidencing ownership and infringement.

Furthermore, a number of large OCSSPs provide relevant copyright law information on their platform, as well as links to more resources from a local copyright office or WIPO. Some OCSSPs further set out a list of "Frequently Asked Questions (FAQs)" on the first page of the notification section of their website. Moreover, OCSSPs' copyright clauses often refer to the originality of the uploaded content, as well as the duty of good faith of the party reporting a complaint to the platform. Good practices in conveying such information include the clear communication of the relevant information in plain language, with shorter and less complex sentences, and limited use of legal jargon. In this way, important information is presented to laypersons in a user-centered way that makes it easier for readers to find and understand the information.

Under the DMCA, only the right-holder or their authorized representative may file a report of copyright infringement. It is noted that this important piece of information is not always explicitly mentioned in lesser-known platforms. Instead of a dedicated web page with relevant information on copyright infringement and notification information, such information is often hidden in the terms of services of smaller or lesser-known platforms, for example, with a clause stipulating the information that the right-holder needs to include and send to a designated contact agent.

Pursuant to the DMCA, the right-holder is ultimately accountable for the authenticity of the notice-and-takedown submission and will be held legally responsible for the relevant claim of copyright infringement. To help alleviate some of the procedural burden on the right-holder, some platforms have adopted AI-enabled filtering systems that facilitate the identification and verification of copyright infringements.[284]
The use of automatic filtering tools is encouraged by the DSM Directive. Under Article 17(4), OCSSPs are liable for unauthorized content uploaded/shared by its users that allegedly infringes another's copyright and/or related rights *unless* they can demonstrate that they have:

> "(a) made best efforts to obtain an authorization and made in accordance with high industry standards of professional diligence,
> (b) made best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event;
> (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter and made best efforts to prevent their future uploads in accordance with point (b)."

It can be seen that the DSM Directive imposes proactive monitoring and filtering obligations on OCSSPs, which are not limited only to reacting to takedown notices that they receive. Nevertheless, under Article 17(9), decisions to disable access to or remove uploaded content shall be subject to human review. Recital 70 of the DSM Directive further sets out that the complaint and redress mechanisms shall allow "users to complain about the steps with regard to their uploads, in particular where they could benefit from an exception or limitation to copyright relating to an upload to which access has been disabled or that has been removed." Such complaints must be processed without undue delay. Right-holders must also duly justify their requests for disabling access or removing the content, which shall be subject to human review.

Many globally accessible OCSSPs have implemented or are considering internal redress mechanisms that offer a human review phase for complaints. This allows for context-specific assessments and overcomes the drawbacks of automatic filters in determining whether an exception or limitation applies (e.g., AI may not yet be able to recognize parody). For more complex complaints, it seems unavoidable that even the OCSSP's internal (human) review mechanisms may not be able to provide redress. This is where a range of out-of-court, as well as, judicial options may be needed to resolve copyright disputes impartially, as stated in Article 17(9) of the DSM Directive. This suggests that we need to look at how customized ADR mechanisms can help stakeholders (users, right-holders, OCSSPs) to efficiently and effectively resolve such disputes.

Development of adapted and customized ADR procedures

The survey and report have helped to identify and visualize trends across multiple jurisdictions and inform the development of best ADR practices appropriate for digital copyright- and content-related disputes, taking into account relevant legislation and existing contractual practices.

WIPO expert determination rules for user-uploaded content

The WIPO Center, in collaboration with relevant stakeholders, is adapting the WIPO Expert Determination Rules as a global procedure to reflect best international practices for the resolution of user-uploaded content disputes by OCSSPs. The WIPO Center intends to make this procedure available in 2021, when European Member States are required to implement the DSM Directive.

Under the procedure, a clause referring to the WIPO Rules for Expert Determination for User Uploaded Content (WIPO EDUUC) can be included in the general terms and conditions of the OCSSPs. In the absence of such contractual clause, users and right-holders could conclude a WIPO EDUUC model submission agreement to resolve an existing dispute[285]. In any event, using the WIPO EDUUC procedure is always optional for right-holders and does not exclude recourse to the competent courts.

Non-infringing content means that the user is able to rely on one of the following applicable exceptions or limitations when uploading and making available the content in issue:

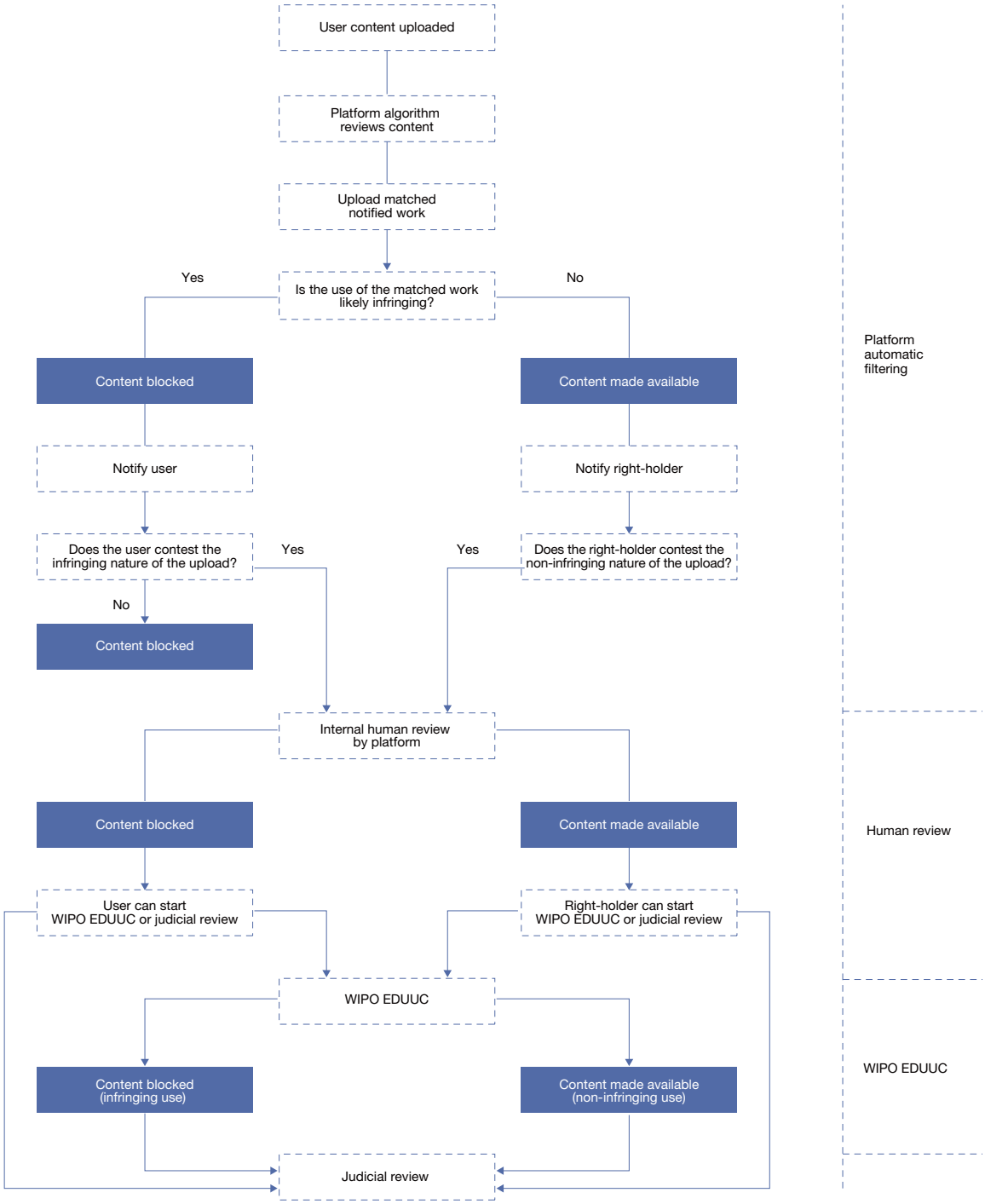
(a) quotation, criticism, review;
(b) use for the purpose of caricature, parody or pastiche.

The remedies available as a result of the EDUUC procedure are limited to blocking/disabling and/or removal of the content or reinstatement of the content that had been blocked/disabled and/or removed.

WIPO mediation and arbitration for digital copyright- and content-related disputes

The WIPO-MCST survey results and this report have shown that a broad spectrum of disputes exist in the B2B digital copyright and content environment. This diversity of disputes is reflected in some of the national and regional legal frameworks presented in this report[286] and in the types of dispute mentioned by respondents regarding digital platforms.[287] Some national and regional legal frameworks and initiatives may encourage parties to negotiate access to content and to distribution channels with the help of a third party (i.e., a mediator) when they are having difficulties reaching an agreement. Once licenses are in place, parties are encouraged to use ADR to resolve disputes concerning transparency obligations and contract adjustment.

Figure 4.1 Expert Determination for User Uploaded Content Disputes (EDUUC)



Types of dispute

Parties can benefit from the use of specialized ADR mechanisms, such as WIPO mediation and arbitration, to resolve the following types of dispute:

i. negotiation of licensing agreements for distribution of content in video-on-demand platforms;[288]
ii. breach of scope of licensing terms;[289]
iii. existing licensing terms that do not include new distribution channels;[290]
iv. existing licensing terms that include a transparency obligation by online platforms to right-holders regarding the exploitation of works and revenues generated;[291]
v. adjustment of existing licensing terms concerning remuneration from online platforms to right-holders;[292]
vii. criteria to determine tariffs between CMOs and right-holders;[294]
viii. determination of reasonable remuneration terms between online platforms and right-holders;[295]
ix. determination of ownership of unpaid/unclaimed royalties by CMOs or online platform;[296]
x. ownership over software improvements or updates in software development agreements;[297]
xi. delivery and quality of works and/or content in film co-production or advertising agreements; and
xii. determination of disputes related to the blocking/removal or reinstatement of works or content from a platform due to copyright infringement/non-infringing use.[298]

In some of these disputes, parties have used a submission agreement to initiate WIPO mediation or arbitration proceedings. As an additional tool, under Article 4 of the WIPO Mediation Rules, a party to a dispute that does not have a mediation clause in a contract can invite the other party to mediate via a unilateral request for mediation.[299] Such a request is sent to the other party to consider submitting the dispute to WIPO mediation. If the other party agrees, WIPO mediation will commence and the case will be administered by the WIPO Center. Also, upon request by a party, the WIPO Center may appoint an external neutral to help parties considering submission of the dispute to WIPO mediation (Article 4(b)). Provided that the parties agree, the neutral may subsequently be appointed as mediator.

Model submission agreements (including sample descriptions of scope)

The following model WIPO mediation and arbitration submission agreements for digital copyright- and content-related disputes contain the principal elements needed to assist parties in submitting existing disputes (including the types of dispute listed above) to WIPO mediation and arbitration. Where deemed useful, parties can adapt these model submission agreements to their needs.

WIPO model mediation submission agreement for digital copyright- and content-related disputes

1. We, the undersigned parties, hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following dispute.
The dispute concerns:

[The following sample descriptions of the dispute could be used by parties when defining the scope of the dispute.]

1.1 The negotiation/determination of the terms of a license relating to [specify works and/or content] (including, determining whether [name of party] already holds a license for its use of the repertoire works in certain territories).
1.2 Whether the use of [specify work and/or content] [or] [content] falls within the scope of the license.
1.3.1 Whether the scope of the license covers licensing through [specify digital distribution channels].
1.3.2 The amount and level of royalties to [name of party] due to exploitation of [specify works and/or content] in [specify distribution channels].
1.4 The accuracy of data in usage reports (including reproductions and time reproduced, downloads, digital sales, geographical scope) for the purposes of remuneration.
1.5 The appropriate level of remuneration for the exploitation of the [specify works and/or content] licensed by [name party] to [name party] following the remuneration previously agreed by the parties.
1.6.1 The amount of the licensing revenues collected by [name, e.g., CMO] and the distribution to [name, e.g., right-holder].

1.6.2 The share of revenues corresponding to [name, e.g., CMO] and [name, e.g., CMO, producers, composers, film directors, writers, musical performers and actors] from [specify works and/or content].
1.7 The level of tariffs to be applied by [name, e.g., CMO] to [name, e.g., right-holder] corresponding to [specify works and/or content].
1.8 The level of reasonable remuneration terms to be paid by [name, e.g., platform] to [name, e.g., right-holder] [including past and future periods].
1.9 Who is entitled to payment of unpaid/unclaimed royalties from [specify works and/or content] by [name, e.g., CMO, online platform].
1.10 Ownership over improvements or updates of software deriving from [specify software development agreement].
1.11 The level of adequate performance of [specify works and/or content] delivered by [name party] to [name party] under the [specify film co-production or advertisement agreement].
1.12 Whether [specify works and/or content] should be blocked/removed or reinstated from [name platform] due to copyright infringement/non-infringing use [and payment of damages].

2. The appointment of the mediator shall take place in accordance with the procedure set out in Article 7(a) of the WIPO Mediation Rules.

3. The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

WIPO model (expedited) arbitration submission agreement for digital copyright- and content-related disputes

We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with the WIPO Arbitration Rules.

[The following sample descriptions of the dispute could be used by parties.]

1. The arbitral tribunal shall have jurisdiction to finally settle the terms of a license relating to [specify works and/or content] (including determining whether [name of party] already holds a license for its use of the repertoire works in certain territories) (including settling the disputed terms and any issues that are necessary to settle the disputed terms resulting in a full and binding license to be entered into by the parties).

[Additional optional specifications: The parties agree that copyright infringement will not be raised as an issue in the arbitration and the arbitral tribunal shall not have jurisdiction to consider or decide issues as to the subsistence or infringement of copyright.

Party B agrees that, for the purposes of this arbitration, it shall not advance any case that involves arguments to the effect that certain instances of use of [define works] do not require a license.

The parties undertake to enter into and be bound by the license in the form settled by the arbitral tribunal.]

2. The arbitral tribunal shall have jurisdiction to finally settle whether the use of [specify work
and/or content] [or] [content] falls within the scope of the license.

3.1. The arbitral tribunal shall have jurisdiction to finally settle whether the scope of the license covers licensing through [specify digital distribution channels].
3.2. The arbitral tribunal shall have jurisdiction to finally settle the amount and level of royalties to [name of party] due to exploitation of [specify works and/or content] in [specify distribution channels].

4. The arbitral tribunal shall have jurisdiction to finally settle whether the data in usage reports (including reproductions and time reproduced, downloads, digital sales, geographical scope) is accurate for the purposes of remuneration.

5. The arbitral tribunal shall have jurisdiction to finally settle the level of appropriate remuneration for the exploitation of the [specify works and/or content] licensed by [name party] to [name party] following the remuneration previously agreed by the parties.

6.1. The arbitral tribunal shall have jurisdiction to finally settle the amount of the licensing

revenues collected by [name, e.g., CMO] and the distribution to [name, e.g., right-holder].
6.2. The arbitral tribunal shall have jurisdiction to finally settle the share of revenues between [name, e.g., CMO] and [name, e.g., CMO, producers, composers, film directors, writers, musical performers, and actors] from [specify works and/or content].

7. The arbitral tribunal shall have jurisdiction to finally settle the level of tariffs to be applied by [name, e.g., CMO] to [name, e.g., right-holder] corresponding to [specify works and/or content].

8. The arbitral tribunal shall have jurisdiction to finally settle the level of reasonable remuneration terms to be paid by [name, e.g., platform] to [name, e.g., right-holder] [including past and future periods].

9. The arbitral tribunal shall have jurisdiction to finally settle who is entitled to payment of unpaid/unclaimed royalties from [specify works and/or content] by [name, e.g., CMO, online platform].

10. The arbitral tribunal shall have jurisdiction to finally settle who owns improvements or updates of software deriving from [specify software development agreement].

11. The arbitral tribunal shall have jurisdiction to finally settle the level of adequate performance of [specify works and/or content] delivered by [name party] to [name party] under the [specify film co-production or advertisement agreement].

12. The arbitral tribunal shall have jurisdiction to finally settle whether [specify works
and/or content] should be blocked/removed or reinstated from [name platform] due to copyright infringement/non-infringing use [and payment of damages].

The arbitral tribunal shall consist of [a sole arbitrator/three arbitrators]. The place of arbitration shall be [specify place]. The language to be used in the arbitral proceedings shall be [specify language]. The dispute shall be decided in accordance with the law of [specify jurisdiction].

Concluding observation

Overall, the above developments in ADR solutions and adapted procedures have the potential to significantly enhance the resolution of digital copyright- and content-related disputes by promoting accessibility, affordability, transparency, neutrality and fairness. Future research and data collection and analysis to measure and evaluate such mechanisms will further contribute to the efficient and fair resolution of copyright- and content-related disputes.

Notes

1. See, e.g., UNCTAD and UNDP (2008). *Creative Economy Report 2008. The Challenges of Assessing the Creative Economy: Towards Informed Policy Making.* UNCTAD/ DITC/2008/2. Geneva: UNCTAD/UNDP; UNCTAD (2018). *Creative Economy Outlook: Trends in International Trade in Creative Industries*. UNCTAD/ DITC/ TED/2018/3. Geneva: UNCTAD; Ruth Towse (ed.) (2013). *Handbook on the Digital Creative Economy*. Cheltenham: Edward Elgar.
2. For an overview, see WIPO (n.d.a). Copyright. Geneva: WIPO. Available at: www.wipo.int/copyright/, accessed March 29, 2021.
3. Giuseppe Mazziotti (2008). *EU Digital Copyright Law and the End-User*. Berlin: Springer, 3. See also Jessica D. Litman (2006). *Digital Copyright* (2nd edn). Amherst, NY: Prometheus Books.
4. As an illustration, see *Oracle Am., Inc. v. Google Inc.*, 886 F.3d 1179 (2018), on appeal before the U.S. Supreme Court at time of writing.
5. Elena Cooper and Sheona Burrow (2019). Photographic copyright and the Intellectual Property Enterprise Court in historical perspective. *Legal Studies*, 39(1), 143. See also Matthew Sag (2019). Empirical studies of copyright litigation. In Menell, P. and D. Schwartz (eds.), *Research Handbook on the Economics of Intellectual Property Law, Vol. II: Analytical Methods*. Cheltenham: Edward Elgar, pp. 511–532, at 511, 515 (describing US studies which find that copyright litigation is "mainly the province of small firms" and not "the sport of kings").
6. WIPO (2015). *Guide on Surveying the Economic Contribution of the Copyright-Based Industries*. Geneva: WIPO, 49-50.
7. Korea Copyright Commission (2018). *Annual Report*. Seoul: Korea Copyright Commission. Available at: www.copyright.or.kr/eng/activities/annual-report/index.do, accessed March 29, 2021.
8. WIPO (2020b). WIPO Caseload Summary. Geneva: WIPO. Available at: www.wipo.int/amc/en/center/caseload.html, accessed March 29, 2021.
9. As defined in the Intellectual Property (Dispute Resolution) Act 2019, (Singapore), s 2, which inserts a new definition provision into the Arbitration Act (rev'd edn) 2002 (Singapore), s 52A.
10. Korea Copyright Commission (n.d.). ADR Mediation. Seoul: Korea Copyright Commission. Available at: www.copyright.or.kr/eng/service/adr/conciliation.do, accessed March 29, 2021.
11. See KCDRC (n.d.). 콘텐츠분야 국제분쟁해결을 위.한콘텐츠분. Seoul: KCDRC. Available at: www.kcdrc.kr/guid04.do, accessed March 29, 2021.
12. See WIPO (2020a). MCST–WIPO Collaboration: Mediation for International Copyright and Content-Related Disputes. Available at: www.wipo.int/amc/en/center/specific-sectors/ipoffices/korea/mcst/, accessed March 29, 2021.
13. IPOS (n.d.a). Growing Your Business with IP: Funding. Singapore: IPOS. Available at: www.ipos.gov.sg/manage-ip/funding, accessed March 29, 2021.
14. UK IPO (2020b). *Resolving IP Disputes*. IP Health Check 5. London: UK IPO. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/355845/Resolving_IP_Disputes.pdf, accessed March 29, 2021. Details on the mediation service are available at UK IPO (2020a). Intellectual Property Mediation. London: UK IPO. Available at: www.gov.uk/guidance/intellectual-property-mediation, accessed March 29, 2021.
15. WIPO (2013). *International Survey on Dispute Resolution in Technology Transactions*. Geneva: WIPO. Available at: www.wipo.int/amc/en/center/survey/, accessed March 29, 2021. (In terms of coverage, 393 respondents from 62 States completed the survey. They included law firms, companies, research organizations, universities, government bodies and self-employed professionals. However, the agreements most frequently concluded – including non-disclosure agreements, assignments, licenses and research-and-development agreements – related mainly to patentable technology and know-how.)
16. Queen Mary, University of London (2016). Pre-empting and Resolving Technology, Media and Telecoms Disputes: International Dispute Resolution Survey. London: Queen Mary, University of London. Available at: www.arbitration.qmul.ac.uk/media/arbitration/ docs/Fixing_Tech_report_online_singles.pdf, accessed March 29, 2021.
17. Kenneth R. Adamo (2011). Overview of international arbitration in the intellectual property context. *Global Business Law Review*, 2(1), 7, at 8.
18. Trevor Cook (2014). *ADR as a Tool for Intellectual Property (IP) Enforcement*. WIPO/ACE/9/3. Geneva: WIPO Advisory Committee on Enforcement.
19. See AIPPI (n.d.). Alternative Dispute Resolution. Zurich: AIPPI. Available at: https://aippi.org/about-aippi/committees/adr/, accessed March 29, 2021.
20. See INTA (2021). Alternative Dispute Resolution Committee. New York: INTA. Available at: www.inta.org/committees/alternative-dispute-resolution-committee/, accessed March 29, 2021.
21. IBA Mediation Committee (2015). Mediation as an alternative method to resolve intellectual property disputes. *IBA Newsletter*, July 29. Available at: www.ibanet.org/Article/Detail.aspx?ArticleUid=09317ae5-7898-4c9a-b8e4-b7122ca59364, accessed March 29, 2021.
22. Scott H Blackman and Rebecca M McNeill (1997). Alternative dispute resolution in commercial intellectual property disputes. *American University Law Review*, 47, 1709, at 1718–1720; Anita Stork (1988). The use of arbitration in copyright disputes: *IBM v. Fujitsu. High Technology Law Journal*, 3, 241.
23. American Intellectual Property Law Association (2015). Comments Submitted pursuant to Notice of Inquiry regarding "Copyright Protection for Certain Visual Works" Apr. 24, 2015. Federal Register, 80(23054), July 23. Available at: www.aipla.org/docs/default-source/advocacy/documents/
24. US Copyright Office (2020). *Section 512 of Title 17: A Report of the Register of Copyrights*. Washington, D.C.: US Copyright Office. (Section 512 contains the "safe harbor" provisions in US copyright law, whereby OSPs are immunized from liability if they follow certain conditions requiring the "notice and takedown" of infringing content. Changes in technology and business models sed to create and disseminate copyrighted materials have led to calls to review the safe harbor provisions originally conceived in the late 1990s. For similar debates in the EU, see European Commission (2015). *Towards a Modern, More European Copyright Framework*. COM/2015/0626 final. Brussels: European Commission. This communication ultimately led to the enactment of the 2019 Digital Single Market Directive, which is outlined in Copyright legislative frameworks and ADR adoption, Chapter 2.
25. See WIPO (2020b). WIPO Caseload Summary. Geneva: WIPO. Available at: www.wipo.int/amc/en/center/caseload.html, accessed March 29, 2021.
26. See generally, Jacques de Werra (2013b). *Research Handbook on Intellectual Property Licensing*. Cheltenham: Edward Elgar.
27. Michael L. Rustad, Richard Buckingham, Diane D'Angelo and Katherine Durlacher (2011). An empirical report of predispute mandatory arbitration clauses in social media terms of service agreements. *UALR Law Review*, 34, 643.

28. A basic definition of ODR is the "use of information and communication technologies to help parties resolve their disputes." See Colin Rule (2016). Is ODR ADR? A response to Carrie Menkel-Meadow. *International Journal on Online Dispute Resolution*, 3(1), 11.
29. Rupert Jackson (2018). Was it all worth it? Lecture to the Cambridge Law Faculty, March 5. Available at: www.judiciary.uk/wp-content/uploads/2018/03/speech-jackson-was-it-all-worth-it-mar2018.pdf, accessed March 29, 2021.
30. Rule (n 28) 11.
31. WIPO (n.d.b). Online Case Administration Tools. Geneva: WIPO. Available at: www.wipo.int/amc/en/eadr/, accessed March 29, 2021.
32. See Figure 3.1.
33. See Copyright legislative frameworks and ADR adoption, Chapter 2.
34. See Chapter 3.
35. See, e.g., Q7, "Have you been involved in B2B digital copyright- and content-related disputes in the last five years? (single selection)," and Q21, "Have you concluded B2B digital copyright- and content-related contracts? (single selection)."
36. See Q3, "Respondent's experience in B2B digital copyright- and content-related field (single selection)."
37. Jason W. Osborne (2013). *Best Practices in Data Cleaning: A Complete Guide to Everything You Need to Do Before and After Collecting your Data*. Thousand Oaks, CA: Sage.
38. See WIPO (2018a). *Guide on Alternative Dispute Resolution Options for Intellectual Property Offices and Courts*. Geneva: WIPO. Available at: www.wipo.int/publications/en/details.jsp?id=4342&plang=EN, accessed March 29, 2021.
39. WIPO (n.d.c). WIPO ADR Procedures. Geneva: WIPO. Available at: www.wipo.int/amc/en/center/wipo-adr.html, accessed March 29, 2021.
40. WIPO (2020c). *WIPO Mediation, Arbitration, Expedited Arbitration and Expert Determination Rules and Clauses*. Geneva: WIPO.
41. WIPO (n.d.c). WIPO ADR Procedures. Geneva: WIPO. Available at: www.wipo.int/amc/en/center/wipo-adr.html, accessed March 29, 2021.
42. See Matthew H. Ormsbee (2011). Music to everyone's ears: Binding mediation in music rights disputes. *Cardozo Journal of Conflict Resolution*, 13, 225. Ormsbee emphasizes both the empathy and expertise required to adequately mediate music infringement disputes and proposes a two-stage process of (i) mediation in good faith, followed by (ii) binding arbitration if the first stage is unsuccessful.
43. WIPO (2020d). WIPO Mediation Rules. Geneva: WIPO. Available at: www.wipo.int/amc/en/mediation/rules/, accessed March 29, 2021, Rule 4.
44. WIPO (2018b). *Guide to Mediation*. Geneva: WIPO, at 19.
45. Mary Vitoria (2006). Mediation of intellectual property disputes. *Journal of Intellectual Property Law & Practice*, 1, 398.
46. Asako Wechs Hatanaka (2018). Optimising mediation for intellectual property law: Perspectives from EU, French and UK law. *IIC International Review of Intellectual Property and Competition Law*, 49, 384.
47. United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Mediation Convention"), signed August 7, 2019.
48. WIPO has updated its Mediation Rules (effective January 1, 2020) to reflect the developments arising from the Singapore Convention – namely, relating to the submission of a settlement agreement to a court in the jurisdiction in which enforcement is sought.
49. Trevor Cook and Alejandro Garcia (2010). *International Intellectual Property Arbitration*. Alphen aan den Rijn: Wolters Kluwer.
50. WIPO (n.d.c). WIPO ADR Procedures. Geneva: WIPO. Available at: www.wipo.int/amc/en/center/wipo-adr.html, accessed March 29, 2021.
51. Eun-Joo Min and Johannes Christian Wichard (2018). Cross-border intellectual property enforcement. In Dreyfuss, R. and J. Pila (eds.), *The Oxford Handbook of Intellectual Property Law*. Oxford: Oxford University Press, pp. 687–719, at 719; see also Kap-You Kim and Umaer Khalil (2016). The procedural benefits of arbitrating patent disputes. *Journal of Arbitration Studies*, 26, 50.
See, e.g., WIPO (2020e). WIPO Arbitration Rules. Geneva: WIPO. Available at: www.wipo.int/amc/en/arbitration/rules/index.html, accessed March 29, 2021.
52. See, e.g., WIPO (2020e). WIPO Arbitration Rules. Geneva: WIPO. Available at: www.wipo.int/amc/en/arbitration/rules/index.html, accessed March 29, 2021.
53. See further WIPO (n.d.d). What Is WIPO Expedited Arbitration? Geneva: WIPO. Available at: www.wipo.int/amc/en/arbitration/what-is-exp-arb.html, accessed March 29, 2021.
54. Cook and Garcia (n 49), at 35.
55. WIPO (n.d.e). Why Expert Determination in Intellectual Property? Geneva: WIPO. Available at: www.wipo.int/amc/en/expert-determination/why-is-exp.html, accessed March 29, 2021.
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57. See UK IPO (2014a). Opinions: Resolving Patent Disputes. London: UK IPO. Available at: www.gov.uk/guidance/opinions-resolving-patent-disputes, accessed March 29, 2021.
58. See JPO (1998). *HANTEI* (Advisory Opinion on the technical scope of a patented invention). Tokyo: JPO. Available at: www.jpo.go.jp/e/system/trial_appeal/shubetu-hantei/, accessed March 29, 2021.
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61. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"). Available at: uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards, accessed March 29, 2021.
62. Adham Kotb (2017). Alternative dispute resolution: Arbitration remains a better final and binding alternative than expert determination. *Queen Mary Law Journal*, 8, 125.
63. Filip De Ly and Paul-A Gélinas (eds.) (2017). *Dispute Prevention and Settlement through Expert Determination and Dispute Boards*. Paris: International Chamber of Commerce.
64. *Ibid.*
65. Frank E. A. Sander (1976). Varieties of dispute resolution. Address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. *Federal Rules Decisions*, 79, 70.
66. In some jurisdictions, such as Argentina, Canada, China, Greece, India, Italy, Romania, Singapore, Turkey and the United States, mandatory or quasi-mandatory mediation is in place for certain types of civil dispute (often family or employment cases but also some commercial cases). In other jurisdictions, such as the United Kingdom, the unreasonable refusal of a party at fault to undertake ADR may incur sanctions such as liability for the legal costs of the other party.
67. For example, courts in Australia, Canada, China, Singapore and the United States have developed court-connected or judicial ADR programs.

68. In the United Kingdom, for example, the prospect of the increasing use of judicial early neutral evaluations has arisen from the cases of *Seals & Anor v Williams* [2015] EWHC 1829 (Ch) and *Lomax v Lomax* [2019] EWCA Civ 1467. Both decisions were inheritance disputes, facilitated by the court's general powers of case management.
69. Peter Jabaly (2010). IP litigation or ADR: Costing out the decision. *Journal of Intellectual Property Law & Practice*, 5(10), 730; Jesse Bennett (2010). Saving time and money by using alternative dispute resolution for intellectual property disputes: WIPO to the rescue. *Revista Jurídica* UPR, 79, 389.
70. Blackman and McNeil (n 22).
71. See, e.g., the community of remix artists or 'vidders': Katharina Freund (2014). Fair use is legal use: Copyright negotiations and strategies in the fan-vidding community. *New Media & Society*, 1347, 18.
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73. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention"). Available at: uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards, accessed March 29, 2021.
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82. *Ibid*., at 24–26.
83. *Ibid*., at 26–31.
84. *Ibid*., at 23.
85. Cook and Garcia (n 49), at 3.
86. Blackman and McNeil (n 22), at 1716–1717.
87. Ignacio de Castro and Andrzej Gadkowski (2020). Confidentiality and protection of trade secrets in intellectual property mediation and arbitration. In Zeiler, G. and A. Zojer (eds.), *Trade Secrets: Procedural and Substantive Issues.* Vienna: NWV Verlag, pp. 79–90, at 80.
88. See WIPO (2020d). WIPO Mediation Rules. Geneva: WIPO. Available at: www.wipo.int/amc/en/mediation/rules/, accessed March 29, 2021, Rules 12, 13, 15, 16–18; WIPO (2020e). WIPO Arbitration Rules. Geneva: WIPO. Available at: www.wipo.int/amc/en/arbitration/rules/index.html, accessed March 29, 2021, Rules 54, 57, 75–78; WIPO (2020f). WIPO Expedited Arbitration Rules. Geneva: WIPO. Available at: www.wipo.int/amc/en/arbitration/expedited-rules/, accessed March 29, 2021, Rules 48, 51, 68–71.
89. de Castro and Gadkowski (n 87).
90. For the historic, restrictive position, see International Chamber of Commerce (1998). Final report on intellectual property disputes and arbitration. *ICC International Court of Arbitration Bulletin*, 9(1), 37; William Grantham (1996). The arbitrability of international intellectual property disputes. *Berkeley Journal of International Law*, 14, 173; Anna P Mantakou (2009). Arbitrability and intellectual property disputes. In Mistelis, L. and S. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives*. Alphen aan den Rijn, Netherlands: Kluwer Law International, at 263.
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94. Hatanaka (n 46), at 405.
95. Jacques De Werra (2013a). Arbitrating international intellectual property disputes: Time to think beyond the issue of (non-) arbitrability. *International Business Law Journal*, 3, 299; Patrick Rohn and Philipp Groz (2012). Drafting arbitration clauses for IP agreements. *Journal of Intellectual Property Law and Practice*, 7(9652), 652, at 653.
96. Vicente (n 93), at 155–156. See also Cook and Garcia (n 49), ch. 4.
97. See, respectively: Intellectual Property Code (France), art. L331-1 ("Les dispositions qui précèdent ne font pas obstacle au recours à l'arbitrage, dans les conditions prévues aux articles 2059 et 2060 du code civil" [The foregoing provisions do not preclude recourse to arbitration, under the conditions provided for in articles 2059 and 2060 of the Civil Code]); Arbitration Ordinance 2011 (Hong Kong), Pt 11A; Intellectual Property (Dispute Resolution) Act 2019 (Singapore), s 2, clarifying that this has been the settled position.
98. Communication of the Federal Office of Intellectual Property, 15 December 1975 (1976) Swiss Review of Industrial Property and Copyright 36.

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101. The original scheme is contained in the Copyright Act 1968 (Australia), Pt V, s 2AA. It was extended via the Copyright Amendment (Service Providers) Act 2017 (Australia).
102. Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2021 (Australia).
103. Collective Copyright Management Decree No. 8469 of June 22, 2015 (Brazil), art. 25.
104. First enacted in 1990, the Copyright Law of China was updated in 2001 and 2010. At the time of writing, further amendments to the Copyright Law are in progress before the national legislature (National People's Congress).
105. Opinion of the People's Courts on more deeply reforming the diversified dispute resolution mechanism (Diversified Dispute Resolution Opinion, No. 14, SPC, 2016). Available at: www.court.gov.cn/fabu-xiangqing-22742.html, accessed March 29, 2021.
106. *Ibid*., arts. 9–10.
107. *Ibid*., Pts II and IV.
108. Opinion on the Construction of One-Stop Diversified Dispute Resolution Mechanism and One-Stop Litigation Service Centers (PKU Law, August 1, 2019). Available at: www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=334602, accessed March 29, 2021.
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113. At the DNDA, internal officers are appointed as conciliators through a rotation system. A list of conciliators at the National Directorate Copyright of Colombia can be viewed online at www.sicaac.gov.co/Reportes/Directorios/Centros, accessed March 29, 2021.
114. Law 640 of 2001 (Colombia), art. 7.
115. Law 640 of 2001 (Colombia), art. 35.
116. General Procedural Code (Colombia), arts. 589 and 590 (esp. 590(1)).
117. Law 640 of 2001 (Colombia), art. 35(1).
118. Law 446 of 1998 (Colombia), art. 66.
119. Information given by DNDA on September 13, 2019, based on the caseload from January 1, 2018 to December 31, 2018.
120. WIPO (2014). Mediación OMPI para Controversias en Materia de Derechos de Autor Presentadas ante la Dirección Nacional de Derecho de Autor (DNDA) de Colombia. Geneva: WIPO. Available at: www.wipo.int/amc/es/center/specific-sectors/dnda/, accessed March 29, 2021.
121. See ONDA (n.d.).Mediación de Conflictos (Conciliación, Mediación y Arbitraje). Available at: http://onda.gob.do/index.php/servicios/mediacion-de-conflictos, accessed March 29, 2021.
122. WIPO (2020g). WIPO Lex: Ecuador. Geneva: WIPO. Available at: https://wipolex.wipo.int/en/text/439750, accessed March 29, 2021.
123. Ley de Arbitraje y Mediación de 2006 (Ecuador). Available at: https://ccq.ec/wp-content/uploads/2019/01/Ley-de-Arbitraje-y-Mediacio%CC%81n.pdf, accessed March 29, 2021.
124. Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15 ("Satellite and Cable Directive").
125. Article 11 of the Satellite and Cable Directive.
126. Recitals 30 and 31 of the Satellite and Cable Directive.
127. See Annex 2 to European Commission (2016). *Evaluation of the Council Directive 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission*. SWD (2016) 308 final. Brussels: European Commission.
128. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 ("InfoSoc Directive").
129. Brigitte Lindner (2008). Alternative dispute resolution: A remedy for soothing tensions between technological measures and exceptions? In Torremans, P. (ed.), *Copyright Law: A Handbook of Contemporary Research*. Cheltenham: Edward Elgar, 426–428, at 427.
130. Article 6(4) of the InfoSoc Directive.
131. Recital 46 of the InfoSoc Directive.
132. Lucie Guibault, Guido Westkamp and Thomas Rieber-Mohn (2012). Study on the implementation and effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. Institute for Information Law Research Paper, 23, 124.
133. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L 84/72 ("CM Directive").
134. See Daniel Gervais (ed.) (2015). *Collective Management of Copyright and Related Rights* (3rd edn). Alphen aan den Rijn: Wolters Kluwer, at Pt II.
135. Recital 49 of the CM Directive.
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137. Axel Metzger et al. (2020). Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law: Comment of the European Copyright Society. Rochester, NY: SSRN. Available at https://ssrn.com/abstract=3589323, accessed March 29, 2021.
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Senate Committee on the Judiciary, Subcommittee on Intellectual Property Hearing on the Digital Millennium Copyright Act at 22: How other countries are handling online piracy. Rochester, NY: SSRN. Available at: https://ssrn.com/abstract=3578026 or http://dx.doi.org/10.2139/ssrn.3578026, accessed March 29, 2021, at 2–3.

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140. HIPO (2020). IP Alternative Dispute Resolution. Budapest: HIPO. Available at: www.sztnh.gov.hu/en/ip-alternative-dispute-resolution, accessed March 29, 2021; WIPO (n.d.g).

141. Mediation and Arbitration for Copyright Disputes in Romania. Geneva: WIPO. Available at: www.wipo.int/amc/en/center/specific-sectors/ipoffices/romania/orda.html, accessed March 29, 2021.

142. See Japan Intellectual Property Arbitration Center (n.d.). Case Statistics. Tokyo: Japan Intellectual Property Arbitration Center. Available at: www.ip-adr.gr.jp/eng/ case-statistics/, accessed March 29, 2021.

143. See *ibid*.

144. See JPO (n.d.). Intellectual Property Arbitration Portal Site. Tokyo: JPO. Available at: www.jpo.go.jp/e/support/general/chizai_chusai_portal/index.html, accessed March 29, 2021.

145. See KECOBO (n.d.). Corporate Social Responsibility. Nairobi: KECOBO. Available at: www.copyright.go.ke/about-us/csr/12-copyright/23-mediation.html, accessed March 29, 2021.

146. See IMPI Mexico (n.d.). Mediación OMPI para Controversias de Propiedad Intelectual y TICs en México. Geneva: WIPO. Available at: www.gob.mx/cms/uploads/attachment/file/137298/Colaboracion_IMPI_Mexico-OMPI_final.pdf, accessed March 29, 2021.

147. Ley Federal del Derecho de Autor de 1996 (Mexico), art. 217.

148. *Ibid*., art. 218.

149. *Ibid*.

150. See INDAUTOR (2021) Solicitudes de Procedimientos de Avenencia por año. Mexico City: INDAUTOR. Available at: www.indautor.gob.mx/documentos/informacion-oficial/Graficasavenencias.pdf, accessed March 29, 2021.

151. Laws of the Federation Nigeria 2004 (Nigeria), Ch. C28.

152. WIPO (2020h) Mediation and Arbitration for Copyright Disputes in Nigeria. Available at: www.wipo.int/amc/en/center/specific-sectors/ipoffices/nigeria/index.html, accessed March 29, 2021.

153. IPOPHIL Office Order No. 154. Available at: www.ipophil.gov.ph/ip-mediation/, accessed March 29, 2021.

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155. IPOPHIL (n.d.). Alternative Dispute Resolution. Available at: www.ipophil.gov.ph/ip-mediation/, accessed March 29, 2021.

156. See WIPO (n.d.h). Agreement and Request for WIPO Mediation in IPOPHL Proceedings. Geneva: WIPO. Available at: www.wipo.int/export/sites/www/amc/en/docs/ipo- phl_agreementrequest.doc, accessed March 29, 2021.

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158. *Ibid*.

159. IPOPHIL (n.d.). Alternative Dispute Resolution. Available at: www.ipophil.gov.ph/ip-mediation/, accessed March 29, 2021.

160. Copyright Act of 1957 (Republic of Korea), art. 112.

161. See the Intellectual Property (Dispute Resolution) Act 2019 (Singapore). Available at: https://sso.agc.gov.sg/Acts-Supp/23-2019/

162. See Copyright Act 1987 (Singapore). Available at: https://sso.agc.gov.sg/Act/CA1987, accessed March 29, 2021.

163. See IPOS (n.d.b). Copyright. Singapore: IPOS. Available at: www.ipos.gov.sg/understanding-innovation-ip/copyright, accessed March 29, 2021.

164. See WIPO (n.d.j). Alternative Dispute Resolution Services for Intellectual Property Disputes in Trinidad and Tobago. Geneva: WIPO. Available at: www.wipo.int/amc/en/center/specific-sectors/ipoffices/trinidadtobago/, accessed March 29, 2021.

165. See TTIPO (n.d.). Alternative Dispute Resolution. Port of Spain: TTIPO. Available at: http://ipo.gov.tt/ipo-news/alternative-dispute-resolution/, accessed March 29, 2021.

166. Copyright, Designs and Patents Act 1988 (United Kingdom), ss 145–152.

167. UK IPO (2019). Copyright Tribunal. London: UK IPO. Available at: www.gov.uk/government/organisations/copyright-tribunal, accessed March 29, 2021.

168. Copyright Tribunal Rules 2010, SI 791/2010 (United Kingdom), rule 19(2).

169. See UK IPO (n.d.a). Intellectual Property Enterprise Court. London: UK IPO. Available at: www.gov.uk/courts-tribunals/intellectual-property-enterprise-court, accessed March 29, 2021.

170. HM Courts & Tribunals Service (2019). *Intellectual Property Enterprise Court Guide*. London: HMSO. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/system/uploads/attachment_data/file/823201/intellectual-property-enterprise-guide.pdf, accessed March 29, 2021, at sections 4.6(f) and 4.11. More generally, for the encouragement of ADR solutions in litigation before any court, see paras 3(d), 8-11 of the Civil Procedure Practice Direction on Pre-Action Conduct and Protocols. Available at: www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct, accessed March 29, 2021.

171. *Halsey v Milton Keynes* General *NHS Trust* [2004] EWCA Civ 573; PGF II SA v OMFS Co. [2013] EWCA Civ 1288.

172. See UK IPO (2014b). Guidance: Intellectual Property Mediation. London: UK IPO. Available at: www.gov.uk/guidance/intellectual-property-mediation, accessed March 29, 2021.

173. See UK IPO (n.d.b). Mediation Providers. London: UK IPO. Available at: https://assets.publishing.service.gov.uk/ government/uploads/system/uploads/attachment_ data/file/987216/mediation-providers.pdf, accessed March 29, 2021.

174. See COSOTA (2016). Legal and Dispute Resolution. Dar es Salaam: COSOTA. Available at: www.cosota.go.tz/index.php/2016/05/27/legal-and-dispute-resolution-2/, accessed March 29, 2021.

175. A form of mandatory arbitration is mentioned in the context of the Copyright Royalty Board (CRB), previously known as the Copyright Royalty Arbitration Panel (CARP). The CRB oversees statutory licenses and determines royalty rates, while also setting the terms applicable to statutory licenses.

176. William F Patry (2020). *Patry on Copyright*. Eagan, MN: Thomson West, at § 17:194.

177. One of the leading cases is *Saturday Evening Post Co. v. Rumbleseat Press*, Inc. 816 F.2d 1191 (7th Cir., 1987). See also Howard B. Abrams and Tyler T. Ochoa (2019). *Law of Copyright*. Eagan, MN: Thomson West, at § 13:49.

178. See JAMS (n.d.). Intellectual Property (IP) Dispute Resolution: JAMS Intellectual Property Mediation, Arbitration and ADR Services. Washington, D.C.: JAMS. Available at: www.jamsadr.com/intellectual-property, accessed March 29, 2021; American Arbitration Association (2021). Practice Areas: The Expertise to Address a World of Disputes. Washington, D.C.: American Arbitration Association. Available at: www.adr.org/commercial, accessed March 29, 2021.
179. IFTA (2021). IFTA Arbitration. Los Angeles, CA: IFTA. Available at: https://ifta-online.org/ifta-arbitration/, accessed March 29, 2021.
180. The text of the legislation is found within the Consolidated Appropriations Act of 2021 (United States). Available at: https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-116HR133SA-RCP-116-68.pdf, accessed March 29, 2021. For background context, see US Copyright Office (2013). *Copyright Small Claims: US Copyright Office Report*. Washington, D.C.: US Copyright Office.
181. For background, see Lilian Edwards (2010). *Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*. Geneva: WIPO. For an overview of national approaches, see Graeme Dinwoodie (ed.) (2010). *Secondary Liability of Internet Service Providers*. New York: Springer.
182. US Copyright Office (n 24), at 1.
183. See WIPO (n.d.k). Internet Intermediaries and Creative Content. Geneva: WIPO. Available at: www.wipo.int/copyright/en/internet_intermediaries/index.html, accessed March 29, 2021.
184. See the section on the European Union in Chapter 2, 28.
185. Article 2(6) of the DSM Directive.
186. Recitals 62 and 66 and Art. 17(6) of the DSM Directive.
187. US Copyright Office (n 24), at 62–63.
188. Paul Keller (2020). How Filters Fail (to Meet the Requirements of the DSM Directive). Washington, D.C.: InfoJustice. Available at: http://infojustice.org/archives/42401, accessed March 29, 2021. For examples of these incorrect identifications occurring at scale, see Jennifer M. Urban, Joe Karaganis, Brianna Schofield (2017). Notice and takedown in everyday practice. Ver. 2. UC Berkeley Public Law Research Paper No. 2755628. Berkeley, CA: University of California.
189. Christina Angelopoulos et al. (2015). *Study of Fundamental Rights Limitations for Online Enforcement through Self-regulation*. Amsterdam: Institute for Information Law (IViR).
190. US Copyright Office (n 24), at 181–182 (internal citations omitted).
191. Law firm, Brazil; law firm, Colombia; law firm, Singapore; law firm, Spain.
192. Law firm, China; law firm, Spain.
193. CMO, Argentina.
194. Consultancy, Brazil.
195. Video hosting website, China.
196. Law firm, United Kingdom.
197. Company, United States.
198. Consultancy, Romania.
199. CMO, Spain; law firm, Mexico.
200. CMO, Japan; law firm, Republic of Korea.
201. CMO, Greece.
202. Law firm, Argentina.
203. Law firm, Argentina; video hosting website, China.
204. Law firm, Singapore.
205. Law firm, United Kingdom.
206. Other respondent, Switzerland.
207. Technology company, China.
208. Shyamkrishna Balganesh (2013). The uneasy case against copyright trolls. *Southern California Law Review*, 86, 723; Jeanne C Fromer (2020). The new copyright opportunist. *Journal of the Copyright Society of the USA*, 67, 1.
209. Other respondent, Japan; law firm, Paraguay; other respondent, Republic of Korea; law firm, United States.
210. Law firm, Brazil; law firm, Mexico; law firm, Paraguay.
211. Law firm, Denmark; CMO, Japan; law firm, Spain; other respondent, Switzerland; law firm, United Kingdom.
212. For the DSM Directive, see page 28 of Copyright legislative frameworks and ADR adoption in Chapter 2. For US debates, see US Copyright Office (n 24); US Senate Hearings, Subcommittee on Intellectual Property (2020). The Digital Millennium Copyright Act at 22: What Is It, Why Was It Enacted, and Where Are We Now? US Senate Hearings, February 11. Available at: www.judiciary.senate.gov/meetings/the-digital-millennium-copyright-act-at-22-what-is-it-why-it-was-enacted-and-where-are-we-now, accessed March 29, 2021.
213. Law firm, Brazil; law firm, Republic of Korea; individual, Togo.
214. Law firm, Republic of Korea; video hosting website, China.
215. CMO, Greece.
216. CMO, Argentina.
217. Law firm, United Kingdom.
218. Professor/legal consultant, Bosnia and Herzegovina.
219. Company, Republic of Korea.
220. University researcher, China; law firm, Republic of Korea.
221. Law firm, Spain; law firm, Singapore.
222. Law firm, Denmark.
223. Law firm, Denmark; law firm, China.
224. Law firm, China.
225. Company, Republic of Korea.
226. For this question, the respondents had multiple choices.
227. Composers association, Philippines.
228. Law firm, Brazil.
229. CMO, Greece; law firm, Honduras; consultancy, Romania; law firm, Colombia.
230. CMO, Germany.
231. Law firm, United Kingdom.
232. Consultancy, United States.
233. Law firm, China.
234. University researcher, China.
235. For this question, the respondents had multiple choices.
236. Law firm, United Kingdom.
237. Law firm, Argentina.
238. Law firm, Colombia.
239. Interview, Switzerland.
240. Law firm, United States.
241. CMO, Argentina.
242. CMO, Germany.
243. CMO, Japan.
244. Company, Republic of Korea.
245. Video hosting company, China; CMO, Republic of Korea; law firm, Republic of Korea; consultancy, Romania; law firm, Singapore; CMO, Zimbabwe.
246. Company, Germany; law firm, Honduras; company, Republic of Korea; law firm, Spain.
247. Law firm, Spain.
248. CMO, Argentina. large company, China; law firm, Belgium; law firm, Croatia; law firm, Singapore; law firm, Switzerland.
249. Individual, Argentina; individual, Colombia; individual, Mexico; individual, Nicaragua; law firm, Argentina; law firm, Colombia; law firm, Ecuador; law firm, India; law firm, Italy; law firm, Mexico; law firm, Nigeria; law firm, Poland; law firm, Peru; law firm, Singapore; law firm, South Africa; law firm, Spain; law firm, Turkey; law firm, Uganda.
250. Law firm, Italy; law firm, Paraguay.
251. Law firm, Ecuador; law firm, Colombia.
252. CMO, Zambia.
253. Individual, Cambodia.
254. CMO, Argentina; CMO, Bulgaria; law firm, Argentina.
255. Law firm, Argentina; law firm, Brazil; law firm, China; law firm, Mexico; law firm, Peru; law firm, Spain.
256. CMO, Spain; industry association, Indonesia.

257. CMO, France.
258. Law firm, Belgium; law firm, Kenya; law firm, Rwanda.
259. Other respondent, Philippines.
260. Other respondent, Germany; other respondent, Malaysia; other respondent, Trinidad and Tobago; SME, Spain.
261. CMO, Zimbabwe; law firm, Argentina; law firm, Belgium; law firm, Brazil; law firm, Ecuador; law firm, India; law firm, Italy; law firm, Mexico; law firm, Peru; other respondent, Brazil; other respondent, Chile; other respondent, El Salvador; other respondent, Peru.
262. CMO, Argentina; large company, China; law firm, Belgium; law firm, Canada; law firm, Colombia; law firm, China; law firm, Ecuador; law firm, Malaysia, law firm, Mexico; other respondent, Bhutan; other respondent, India; other respondent, Japan; other respondent, Kuwait; other respondent, Mexico; other respondent, Nigeria; other respondent, Poland; other respondent, Sri Lanka.
263. Academic, Chile; individual, India.
264. Large company, China; large company, India; law firm, Argentina.
265. CMO, Ghana; CMO, Paraguay; CMO, Peru; CMO, Spain; CMO, Sweden; SME, Botswana; SME, Brazil; SME, Cuba; SME, France; SME, Germany; SME, Japan.
266. Law firm, Brazil; law firm, Cuba; law firm, Mexico; law firm, Pakistan; law firm, Peru; law firm, South Africa; law firm, Spain; law firm, Viet Nam.
267. Law firm, Australia.
268. CMO, Kenya; CMO, Zimbabwe; individual, Colombia; individual, Mexico; individual, Nicaragua; individual, Spain; individual, Togo; individual, Zimbabwe; SME, Brazil; SME, Cameroon; other respondent, Bangladesh; other respondent, Benin; other respondent, Botswana; other respondent, Brazil; other respondent, Burkina Faso; other respondent, Burundi; other respondent, Cameroon; other respondent, Gabon; other respondent, Mexico; other respondent, Peru; other respondent, Rwanda; other respondent, Samoa; other respondent, Spain; other respondent, Tunisia; other respondent, Turkey; other respondent, Uzbekistan; other respondent, Vanuatu.
269. CMO, Zambia; law firm, Argentina; law firm, Burkina Faso; law firm, Colombia; law firm, Croatia; law firm, Cuba; law firm, Ecuador; law firm, Nigeria; law firm, Paraguay; law firm, Peru; law firm, Spain; law firm, Trinidad and Tobago; law firm, Uganda; SME, Cuba; SME, Germany.
270. Law firm, Croatia; law firm, Honduras; law firm, Italy; law firm, Rwanda; law firm, South Africa.
271. Law firm, Mexico; law firm, Poland.
272. Law firm, Switzerland.
273. Article 13 of the DSM Directive requires Member States to establish or designate an impartial body of mediators to assist parties in this regard, which may submit proposals to the parties where appropriate.
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286. See Copyright legislative frameworks and ADR adoption in Chapter 2.
287. See Characteristics of disputes and Outcomes of disputes, Chapter 3, pp. 38-44.
288. See Copyright legislative frameworks and ADR adoption in Chapter 2.
289. See Characteristics of disputes, Chapter 3.
290. See Characteristics of disputes, Chapter 3.
291. Article 19(1) of the DSM Directive provides that: "Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due."
292. Article 20(1) of the DSM Directive applies "when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances."
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294. See Outcomes of disputes, Chapter 3.
295. See Outcomes of disputes, Chapter 3.
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Annex: Survey questionnaire

1. Your employment

- ○ Company (e.g., copyright or content owner, online intermediary/platform)
- ○ Individual (e.g., copyright or content owner, agent, producer)
- ○ Law firm
- ○ Collective management organization
- ○ Industry association
- ○ Other (Please specify) _____

2. Your position/role (multiple selections allowed)

- ○ Manager/administrator
- ○ In-house lawyer
- ○ External lawyer
- ○ Mediator
- ○ Arbitrator
- ○ Other (Please specify) _____

3. Your experience in business-to-business (B2B) digital copyright and content

Note: For the purpose of this survey, "digital copyright and content" refers to products, services or information protected by copyright and related rights (e.g., audiovisual productions, data, e-books, music, software, video games) that may be distributed in the digital environment (e.g., digital marketplaces, mobile applications stores, over-the-top (OTT) services, social media, streaming).
"B2B transactions" refers to the exchange of products, services, or information between businesses rather than between businesses and consumers.

- ○ No experience
- ○ 0–5 years
- ○ 5–10 years
- ○ More than 10 years

4. Number of employees

- ○ No employees/Not applicable
- ○ 1–10
- ○ 10–50
- ○ 50–250
- ○ 250–1,000
- ○ +1,000

5. Your primary location

Please select country

6. Regions where you operate primarily (multiple selections allowed)

- ○ Africa
- ○ Asia
- ○ Europe
- ○ Latin America and the Caribbean
- ○ North America
- ○ Oceania

7. Have you been involved in B2B digital copyright- and content-related disputes? (last 5 years)

- ○ Yes
- ○ No

8. What was your role in these disputes? (multiple selections allowed)

- ○ Claimant (party or representative)
- ○ Defendant (party or representative)
- ○ Mediator
- ○ Arbitrator
- ○ Not applicable
- ○ Other (Please specify) _____

9. Subject matter of the B2B digital copyright- and content-related disputes in which you have been involved (last 5 years) (multiple selections allowed)

- ○ Advertising
- ○ Animation
- ○ Cinematographic work
- ○ Database
- ○ Dramatic work
- ○ Literary work
- ○ Mobile apps
- ○ Musical work
- ○ Photographic work
- ○ Publishing
- ○ Software
- ○ TV formats
- ○ Video/online games
- ○ Other (Please specify) _____

10. Approximate percentage of the non-contractual and contractual B2B digital copyright- and content-related disputes in which you have been involved (last 5 years) (sum of selections should equal 100)

Non-contractual _____%

Contractual _____%

11. Approximate percentage of the domestic and international B2B digital copyright- and content-related disputes in which you have been involved (last 5 years) (sum of selections should equal 100)

Domestic (both parties from the same jurisdiction) _____%

International _____%

12. Have you been involved in B2B digital copyright- and content-related disputes in any of the following amounts per dispute? (last 5 years) (multiple selections allowed; no cumulative total is sought)

- ○ No amount in dispute
- ○ USD 0–10,000
- ○ USD 10,000–100,000
- ○ USD 100,000–1,000,000
- ○ USD 1,000,000–10,000,000
- ○ Over USD 10,000,000

13. Top three countries where the B2B digital copyright- and content-related disputes in which you have been involved occurred (last 5 years) (single selection per dropdown list – not mandatory to complete all three dropdown lists)

14. Remedies pursued by claimant and defendant in the B2B digital copyright- and content-related disputes in which you have been involved (last 5 years) (multiple selections allowed)

	Claimant	Defendant
Royalties	○	○
Damages	○	○
Declaration of authorship	○	○
Declaration of infringement	○	○
Injunction	○	○
Negative declaration	○	○
Renegotiation of contract	○	○
Takedown	○	○
Other (Please specify)	○	○

_____

15. Outcome of the B2B digital copyright- and content-related disputes in which you have been involved (last 5 years) (multiple selections allowed)

Note: For the purpose of this question, 'settlement' includes any consensual solution of a dispute (whether directly between the parties or during mediation, court proceedings, arbitration or other dispute resolution mechanisms).

	Non-contractual	Contractual
Settlement	○	○
Court judgment	○	○
Arbitration award	○	○
Decision by administrative authority	○	○
Decision by intermediary /platform	○	○
Other (Please specify)	○	○

_____

16. Approximate settlement rates for the B2B digital copyright- and content-related disputes in which you have been involved (last 5 years) (only numbers up to 100 allowed)

Note: For the purpose of this question, "settlement" includes any consensual solution of a dispute (whether directly between the parties or during mediation, court proceedings, arbitration or other dispute resolution mechanisms).

Non-contractual _____%

Contractual _____%

17. Which dispute resolution mechanisms have been used to resolve the B2B digital copyright- and content-related disputes in which you have been involved? (last 5 years) (multiple selections allowed)

	Non-contractual	Contractual
Notice and takedown/ cease and desist	○	○
Court litigation in your home jurisdiction	○	○
Court litigation in a foreign jurisdiction	○	○
Mediation/conciliation	○	○
Arbitration	○	○
Arbitration under expedited rules	○	○
Expert determination	○	○
Other (Please specify)	○	○

_____

18. What are your five priorities in resolving your B2B digital copyright- and content-related disputes? (no ranking within your five selections)

	Domestic disputes	International disputes
Cost	○	○
Speed	○	○
Confidentiality	○	○
Quality outcome (including specialization of decision-maker)	○	○
Enforceability	○	○
Neutral forum	○	○
Setting precedent	○	○
Support provided by the dispute resolution institution	○	○
None in particular (standard internal practice)	○	○
Other (Please specify)	○	○

_____

19. What is your perception of the dispute resolution mechanisms used to resolve the B2B digital copyright- and content-related disputes in which you have been involved? (last 5 years) (single selection per row)

	Suitable	Somewhat suitable	Not suitable	No opinion
Notice and takedown /cease and desist	○	○	○	○
Court litigation in your home jurisdiction	○	○	○	○
Court litigation in a foreign jurisdiction	○	○	○	○
Mediation/conciliation	○	○	○	○
Arbitration	○	○	○	○
Arbitration under expedited rules	○	○	○	○
Expert determination	○	○	○	○
Other (Please specify)	○	○	○	○

_____

20. Have you used any of the following dispute resolution tools for B2B digital copyright- and content-related dispute resolution? (multiple selections allowed)

- ○ Electronic case filing and management tools (e.g., WIPO eADR)
- ○ Online dispute resolution platforms (e.g., offered by intermediaries)
- ○ Hearings via videoconference or similar
- ○ Documents-only procedure
- ○ Other (Please specify)

_____

21. Have you concluded B2B digital copyright- and content-related contracts? (last 5 years)

- ○ Yes
- ○ No
- ○ Not applicable

22. Do the contracts you have concluded concern any of the following B2B digital copyright- and content-related areas? (last 5 years) (multiple selections allowed)

	Domestic	International
Advertising	○	○
Audiovisual production	○	○
Publishing	○	○
Software	○	○
TV and broadcasting	○	○
Video/online games	○	○
Music	○	○
Other (please specify)	○	○

_____

23. What are the types of contract you have concluded? (last 5 years) (multiple selections allowed)

	Domestic	International
Assignment/ownership transfer	○	○
Distribution	○	○
Licensing	○	○
Production	○	○
Other (Please specify)	○	○

_____

24. Are any of the contracts indicated in the previous question concluded through general terms and conditions? (last 5 years) (multiple selections allowed)

	Domestic	International
Assignment/ownership transfer	○	○
Distribution	○	○
Licensing	○	○
Production	○	○
Other (Please specify)	○	○

_____

25. What are the most common locations of the other party/ies in your B2B digital copyright- and content-related contracts? (last 5 years) (single selection per dropdown list; not mandatory to complete all three dropdown lists)

Please select location

26. What are the most common applicable laws in your B2B digital copyright- and content-related contracts? (last 5 years) (single selection per dropdown list; not mandatory to complete all three dropdown lists)

Please select law

If you selected United States, please specify state.

Other applicable law (Please specify)

_____

27. Do you have policies or guidelines for drafting dispute resolution clauses in your B2B digital copyright- and content-related contracts?

- ○ Yes
- ○ No
- ○ Not applicable

28. Do these policies or guidelines include any ADR mechanisms?

- ○ Yes
- ○ No

If "yes", please provide details:

_____

29. Do you observe any trends in the use of dispute resolution mechanisms in B2B digital copyright- and content-related disputes?

Please provide details:

_____

30. Which improvements would you suggest for resolving B2B digital copyright- and content-related disputes?

Please provide details:

_____

31. Availability for a brief follow-up interview?

- ○ Yes
- ○ No

32. If you are willing to be interviewed, or if you would like to receive occasional emails about WIPO ADR services and events, please indicate your email address:

_____

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