

# Comparative Study on Civil Mediation and Apple v. Samsung: Mediation in Intellectual Property Disputes

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## Abstract

*In 2011, Apple's accusation of Samsung for infringing Apple's major copyrights sparked the ongoing legal confrontation between the two major IT figures. The lawsuit in California involved mediation which is now widely accepted as an effective means to resolve disputes, especially IP cases. This article accounts for civil mediation in general and focuses on the differences between the US Mandatory Mediation Program for the Court of Appeals of the Federal Circuit and the Ninth Circuit Mediation Program, Hong Kong Court-Annexed Mediation and Korea's Civil Mediation. The article also introduces mediation in IP along with the requirements in Mandatory (IP) Mediation at the US Courts of Appeal for the Federal Circuit and the Lanham Act Mediation Program, IP mediation In Hong Kong and many Korean ADR Commissions specializing in IP related matters.*

KEY WORDS: Mediation, IP Mediation, ADR, Apple v. Samsung, US Mandatory Mediation Program for the Court of Appeals of the Federal Circuit, Ninth Circuit Mediation Program, Hong Kong Court-Annexed Mediation, Korea's Civil Mediation, Mandatory (IP) Mediation at the US Courts of Appeal for the Federal Circuit, the Lanham Act Mediation Program, IP mediation In Hong Kong, Korean ADR Commissions

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## I. Introduction

On April 15, 2011, Apple, Inc. ("Apple") filed a lawsuit in federal court for the Northern District of California against Defendants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung

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Telecommunications America, LLC (collectively “Samsung”), alleging that Samsung’s Galaxy cell phones and computer tablets have infringed Apple’s trade dress, trademarks, and utility and design patents.<sup>1)</sup> Apple’s California lawsuit was another battle of claims and counterclaims between the two parties, in a continuing global legal war taking place in numerous countries including the United States, South Korea, Germany, Japan, and other jurisdictions. The first verdict delivered in 2012 by the jury in California was largely a victory for Apple. It found that Samsung had infringed most of the patents and partially diluted Apple’s trade dresses, ordering Samsung to pay approximately 1.049 billion dollars for the damage. Courts in other countries, such as South Korea, Japan and the United Kingdom, mainly ruled in favor of Samsung.<sup>2)</sup> Since then, court decisions from different jurisdictions have shown colliding views and the skirmishes in court continued as both parties refused to settle the matter by other means.

Recently, however, the legal salvo encountered a new phase as Apple and Samsung had agreed to arrange a mediation session by February, 2014 after Judge Lucy Koh encouraged both parties to try mediation. Consistent with previous settlement attempts, the mediation session between the CEOs of Apple and Samsung without outside lawyers had also failed to settle the legal war between the two titans.

## II. Mediation in general

### 1. *Definition and Characteristics of Mediation*

Mediation is defined as a process in which an impartial third party – the ‘mediator’ – facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement of their dispute.<sup>3)</sup>

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1) Order Granting Limited Expedition Discovery at 1, Apple Inc. v. Samsung Elecs. Co. Ltd., No. 11-CV-01846-LHK, Doc. 52 (2011).

2) The second suit in South Korea filed by Samsung claiming that iPhone and iPad violated three of its patents was rejected on December 12, 2013.

3) United States Uniform Mediation Act 2001 Section 3(2), Hong Kong Mediation Ordinance Cap. 620 Section 4(1).

Instead of being “the judge of the dispute,” mediators would not give any personal judgment or professional opinions to determine the “rights and wrongs” of the involved parties. To the contrary, the role of the mediators is to assist the disputing parties to reach a mutually acceptable agreement based on the parties’ self-interest. If a settlement is reached, it would be reduced to a written contract which is legal binding and enforceable under the law of contract.<sup>4)</sup>

In contrast to litigation, mediation is a party-controlled, confidential, and time-and-money-saving process. Mediation conducted by professional mediators can often help parties facilitate settlement, particularly if such mediation takes place early in the dispute. Mediation can be completed within a short timeframe with less exchange of information, or discovery of information, which another Alternative Dispute Resolution (“ADR”) process, such as Arbitration, is incapable of doing so.<sup>5)</sup>

Despite these advantages, mediation also has its potential setbacks. In fact, parties may end up spending even more time and money if they agree to settle during mediation but cannot agree on the terms of the settlement agreement after the mediation session. Therefore it is strongly advised for parties to examine their case with an experienced legal counsel to determine whether the parties would be better off engaging in mediation. In addition to consideration of the strengths and weaknesses of their legal case, the parties should also take into account commercial factors in deciding if mediation should be pursued. Litigation is extremely taxing on management resources as executives must divert their attention from operational matters and devote time and effort in working with lawyers throughout the litigation process. In jurisdictions such as the United States with extensive and broad discovery rules and intensive motion practices, litigation can be extremely demanding on both financial and non-financial resources for the litigants. Thus, mediation can be an appealing mechanism for dispute settlement if the parties are serious about using it as a procedure to resolve disputes.

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4) *About Mediation*, HONG KONG MEDIATION AND ARBITRATION CENTRE, [http://www.hkmaac.org/Mediation/mediation/mediation\\_services.html](http://www.hkmaac.org/Mediation/mediation/mediation_services.html).

5) Luis M. Martinez & Thomas Ventrone, *Contemporary Issues in International Arbitration and Mediation*, in THE ICDR MEDIATION PRACTICE 486 (2010).

Mediation is categorized in two different types: by substance of the dispute such as marital disputes and nature of the mediation process used by the mediator, for instance, mediation rules of the World Intellectual Property Organization.<sup>6)</sup>

In the U.S., Hong Kong and South Korea, mediation can also be grouped by Court-Annexed Mediation and the Non-Court-Annexed Mediation. The latter is further divided into Administrative Commission Mediation and Private Mediation.<sup>7)</sup> Statutes and rules made by legislative bodies for mediation are applied to Court-Annexed Mediation whereas Non-Court-Annexed Mediation usually has its own set of rules prepared by a provider other than the court.<sup>8)</sup>

As for Court-Annexed Mediation, there is a significant difference among the three legal systems. Court-Annexed Mediation in US and HK means mediation based in court, or involving referral by the court to outside ADR programs of the bar association, nonprofit groups, other local courts, or private ADR providers. The mediators are always 'neutrals' or independent third parties with no interest or involvements in the dispute between the parties and never the judge conducting the litigation. In Korea, however, Court-Annexed Mediation is defined as mediation conducted by a mediation judge or a mediation commissioner within the court system. In some exceptional cases, the judge who adjudicates the case could also be the mediator and when the mediation process fails to resolve the disputes, the same judge continues to judge the lawsuit.

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6) See WIPO Mediation Rules at <http://www.wipo.int/amc/en/mediation/rules/> (last visited Sept. 8, 2014, 10:45 AM).

7) Court-annexed Mediation is generally defined as mediation in court or mediation referred by a judge. Administrative Commission Mediation is the mediation held under a commission or council within the administrative government with mostly mediators appointed by the commission. Private Mediation is mediation that involves neither court nor the administration, simply done by private mediation providers.

8) For example, the American Arbitration Association (AAA), International Centre for Dispute Resolution (ICDR), KCAB (Korean Commercial Arbitration Board), Hong Kong International Arbitration Centre (HKIAC), and Hong Kong Mediation and Arbitration Centre (HKMAAC) each have their own guidance for conducting mediation. Although Section 5(1) of Cap 620 Mediation Ordinance only states that the ordinance applies to mediation conducted in Hong Kong, the Mediation Ordinance and Practice Direction 31(Mediation) would seldom have chance to be applied in a mediation proceeding solely conducted by private mediation providers with no intervention of the court.

Non-Court-Annexed Mediation in Hong Kong is separate into four broad areas, Building Management, Financial Dispute, Family Dispute, and General Mediation, with the last divided into Commercial, Neighbor, Land/Tenancy, Employment, Consumer and others.<sup>9)</sup>

## 2. Requirements

### 1) US: Mandatory Mediation Program for the Court of Appeals of the Federal Circuit

All thirteen federal courts of appeals in the United States have implemented appellate mediation or settlement programs.<sup>10)</sup>

On October 3, 2005, the United States Court of Appeals for the Federal Circuit (Federal Circuit) initiated an Appellate Mediation Program by an administrative order now covered by Federal Circuit Rule 33.1, effective December 6, 2013.<sup>11)</sup> The program is administered by the Circuit Executive through the court's Office of General Counsel and operates under guidelines for mediation that are binding on the parties.<sup>12)</sup> The mediation program is confidential and provides an opportunity for the parties to settle their dispute. Mediators are experienced volunteer neutral, third-party mediator, or a magistrate judge. All cases in which the parties are represented by counsel are eligible for the program. The parties may voluntarily submit their disputes for mediation or the Office of General Counsel may select cases for the program. The Office of General Counsel may review the notice of appeal, the trial tribunal's docket sheet, the decision of the trial tribunal, the court's docketing statement, and briefs to

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9) *Types of Mediation*, HONG KONG MEDIATION AND ARBITRATION CENTRE, <http://www.hkmaac.org/Mediation/mediation/types.html>.

10) Regarding the Court-Annexed Mediation in US, there are mediations both at the appellate level and the District Court level of the Federal Courts. They do not differ much from each other, except that on appeal, a judge, jury or administrative agency has already rendered an appealable decision.

11) Federal Rule of Appellate Procedure 33.1 provides: "The court may adopt mediation guidelines with respect to mediation of the cases pending before the court. These guidelines shall be binding on the parties.

12) The current guidelines became effective December 6, 2013 and are found at [www.cafc.uscourts.gov/images/stories/mediation/Dec-2013-revision/mediation%20guidelines\\_effective\\_12-6-2013.pdf](http://www.cafc.uscourts.gov/images/stories/mediation/Dec-2013-revision/mediation%20guidelines_effective_12-6-2013.pdf) (last visited Sept. 8, 2014, 10:51 AM).

aid in selecting cases for mediation. Once the case is selected, participation for mediation is mandatory.

### 2) *The Ninth Circuit Mediation Program*

Headquartered in San Francisco, the United States Court of Appeals for the Ninth Circuit offers a court mediation program.<sup>13)</sup> The program is established pursuant to Federal Rule of Appellate Procedure 33 and Circuit Rule 33-1 to facilitate settlement of cases on appeal.<sup>14)</sup> Almost all civil cases where parties are represented by counsel are eligible for the program. Unlike the Federal Circuit program, mediations in the Ninth Circuit Mediation Program are all full time employees of the court who are shielded from other operations of the court. The mediators are experienced lawyers from different practices and are trained and experienced in negotiation, appellate mediation and Ninth Circuit practice and procedure. Cases are primarily referred to the program through a Settlement Assessment Conference initiated by the court. Appellants are required to file the Mediation Questionnaire in the Ninth Circuit within 7 days of the docketing of an appeal or a petition for review. Mediators will then review the questionnaire and the court will order counsel to participate in a telephonic Settlement Assessment Conference with a circuit mediator to exchange information about the case, discuss options the mediation program offers, and look at whether the case might benefit from inclusion in the mediation program. Where the parties agree to participate in the Mediation Program, the mediator will ask questions, reframe problems, facilitate communication, assist the parties to understand each other and help identify creative solutions. The mediator does not take sides, render decisions, offer legal advice or reveal confidences.

### 3) *Hong Kong Court-Annexed Mediation*

Hong Kong implemented its Civil Justice Reform in April 2009. Part of its objectives is to encourage and facilitate the settlement of disputes by a means other than litigation in court. A new Practice Direction on mediation,

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13) <http://www.ca9.uscourts.gov/mediation/> (last visited Sept. 8, 2014, 11:00 AM).

14) Federal Rules of Appellate Procedure Rule 33 and the Ninth Circuit Rule 33-1 enable the Ninth Circuit Mediation Program.

Practice Direction 31 (“PD 31”), was introduced and came into effect on 1 January 2010. It applies to almost all civil proceedings in the Court of First Instance and the District Court which have been begun by writ.<sup>15)</sup>

PD 31 states that the underlying objective of Civil Law Reform is to facilitate the settlement of disputes. The Court has a duty as part of active case management to further that objective by encouraging disputing parties to use alternative dispute resolution (“ADR”) if the Court considers that it is appropriate and that the court should facilitate its use. The Court also has a duty to help the parties to settle their case. The parties and their legal representatives have the duty of assisting the Court to discharge the duty in question.<sup>16)</sup> PD 31 directs all parties to file a mediation certificate signed by the solicitors and the parties they represent. The mediation certificate indicates the party’s willingness to attempt mediation to try to settle their disputes. If they are not willing to attempt mediation, the party must provide the reason(s) in a statement filed with the mediation certificate.<sup>17)</sup>

If a party has not engaged in mediation to the minimum level of participation, or has no reasonable explanation for not engaging in mediation, this party may face an adverse costs order.<sup>18)</sup> The solicitor must confirm in the mediation certificate that he has explained to the client the availability of mediation with a view to settling the dispute or part(s) of the dispute, and the respective costs positions of mediation as compared with the costs of the litigation. In addition, the solicitor must confirm that he has explained to his client the Mediation Practice Direction.<sup>19)</sup>

The party (“the Applicant”) willing to try mediation should serve a Mediation Notice on the other party (“the Respondent”) soon after filing the Mediation Certificate. The Mediation Notice must be in the form and

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15) In the Court of First Instance: Proceedings in the Construction and Arbitration List (PD 6.), and Proceedings in the Personal Injuries List (PD 18.1). In the District Court: Proceedings in the Personal Injuries, Proceedings in the Equal Opportunities List under the Sex Discrimination Ordinance (Cap. 480), Disability Discrimination Ordinance (Cap. 487) and Family Status Discrimination Ordinance (Cap. 527), Proceedings to recover tax under the Inland Revenue Ordinance (Cap. 112).

16) Practice Direction 31 Mediation, Part A, (1).

17) *Id.* Appendix B, Part I, (2).

18) *Id.* Part A, (1).

19) *Id.* Appendix B, Part II.

containing the information required by PD 31 and signed by the Applicant or his Solicitor. Upon receiving the Mediation Notice, the Respondent should respond to the Applicant by way of a Mediation Response within 14 days signed by the Respondent or his solicitor.<sup>20)</sup>

#### 4) Korea: Civil Mediation<sup>21)</sup>

Under the policy of reducing social cost and promote efficiency in court, Korea enacted the Civil Mediation Act in 1990, establishing an integrated system of court-annexed mediation. The Court-Annexed Civil Mediation Program covers all civil cases except family cases.

Civil Mediation Act Article 2 and 6 state that mediation can be initiated by a party's application or by the trial court's order to refer to mediation, starting any time before or during litigation until the end of the oral proceedings of the appellate trial.<sup>22)</sup> When a case has been referred to mediation by the court's order, parties' consent is unnecessary; indicating that mediation referred by a judge is in fact mandatory.<sup>23)</sup> Even if a party explicitly refuses to engage in mediation, mediation sessions are held as long as the court has issued reference to mediation.

Civil Mediation Act Article 7 directs that the Mediation Judge, a judge that only serves as a mediator in a specific case, is the primary mediator. Cases involving complicated issues may be referred to a Standing Mediation Commissioner or the Court Mediation Commission by the order of the Mediation Judge or upon the request of a party. The judge who referred the case has the discretion to appoint himself to be the mediator when he finds it necessary. This usually happens when the issues are simple and both parties are eager to resolve the matter in short time with an amicable resolution.

Application for mediation may be done by writing or orally in front of the Court Deputy Director who files it on form with a seal.<sup>24)</sup> After the

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20) *Id.* Part B, (3).

21) Court-Annexed Mediation in Korea follows the rules within Minsajojeongbeop [Civil Mediation Act], Act No.11157, Jan. 17, 2012 (S. Kor.), and Minsajojeonggyuchik [Civil Mediation Regulation], Supreme Court Decree No. 2488. Oct. 11, 2013 (S. Kor.).

22) Civil Mediation Regulation, art. 4. (S. Kor.).

23) SABEOBYEONSUWON [JUDICIAL RESEARCH & TRAINING INSTITUTE], ADR 128 (2012) (S. Kor.).

24) Minsajojeongbeop [Civil Mediation Act], Act No.11157, Jan. 17, 2012 (S. Kor.), art.5,



delivery of the Notice of mediation to the corresponding party,<sup>25)</sup> the court must inform the date of the mediation session to all the parties.<sup>26)</sup> Parties must appear in person at the mediation session, unless their counsel or representative authorized by the court participates instead. When the party who applied for mediation (“the applicant”) is absent from the mediation session, the court must decide on a new session date and inform the parties. If the applicant does not appear at the new session, the court shall deem that application for mediation is withdrawn.<sup>27)</sup> If the responding party does not appear in a court-referred mediation session or the parties fail to reach an agreement, the mediation judge may make a decision for a possible settlement. When no party objects to the decision within two weeks the decision becomes binding and enforceable.<sup>28)</sup> Whereas a party makes an objection, the procedure automatically resorts to litigation proceedings. In this stage, article 23 forbids quoting statements and evidence exclusively produced in the mediation session.

### III. Mediation in IP

#### 1. Distinctive characteristics, advantage of mediation usage in IP

In addition to the advantages of mediation in general, mediation offers distinctive benefits in IP-related disputes. Intellectual property (IP) is defined as “exclusive rights to novel ideas as contained in tangible products of cognitive effort,”<sup>29)</sup> including “literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition, and all other rights

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para. 1,2,3.

25) *Id.* art. 14.

26) *Id.* art. 15.

27) *Id.* art. 31; Minsajojeonggyuchik [Civil Mediation Regulation] art. 6 (S. Kor.).

28) Minsajojeongbeop [Civil Mediation Act] arts. 30, 32, 34 (S. Kor.).

29) Dale A. Nance, *Forward: Owning Ideas*, 13 HARV. J.L. & PUB. POL'Y 757, 757 (1990).

resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”<sup>30)</sup>

- Notable saving in Finance and Time

As a fundamental trait, intellectual property exists only for a limited time and is freely available to the public after expiration. Therefore procedural formalities in litigation, such as discovery requirements and exchange of documents would seriously burden the owner in exploiting his own intellectual property. Mediation could end the dispute in a single proceeding, saving a substantial amount of time and costs.<sup>31)</sup>

- Flexibility of the Result

Mediation could produce innovative solutions by focusing on the parties’ interests, rather than declaring “a winner”, as occurred in arbitration. Such disputes are common in the field of intellectual property where there can be several intellectual property rights in a single entity and each might be owned by a different party as well as separately licensed to other parties. The outcome of mediation could vary from cross-licence, geographic restrictions on the scope of use, and even to an agreement to exchange a patent right for a trade secret.<sup>32)</sup>

## 2. Requirements

### 1) Mandatory (IP) Mediation at the U.S. Courts of Appeal for the Federal Circuit

The Federal Circuit established the mandatory mediation program for all the Federal Circuit cases, including cases concerned with intellectual property issues in 2006. Although the primary purpose of this program is to facilitate civil cases docketed in court, it also offers the opportunity to resolve intellectual property disputes with “a risk-free, non-binding settlement in a confidential, timely and creative way, by utilizing the

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30) Bryan Niblett, *Arbitrating the Creative*, 50 DISP. RESOL. J. 64, 64 (1995).

31) Susan Corbeit, *Mediation of Intellectual Property Disputes: A Critical Analysis*, 17 NEW ZEALAND BUSINESS LAW QUARTERLY 61 (Mar. 2011)

32) *Id.* at 62.

services of an experienced mediator of intellectual property expertise.”<sup>33)</sup>

A decade before, in 1996, the U.S. District Court for the Northern District of Illinois created a mediation program targeted on trademark disputes, known as the Lanham Act Mediation Program.<sup>34)</sup> Under the Federal Trademark Act of 1946 (the “Lanham Act”) and Local Rule 16.3, all trademark cases in the Northern District of Illinois are automatically forwarded to mediation. After each party has been notified that the dispute has been referred to mediation, the parties must file a joint written notice stating either: (1) they want to participate, (2) they do not want to participate, or (3) they already are participating in another mediation program. If the parties decline to participate, they must also submit a brief statement explaining the reason for declining, without revealing the actual party which refused to mediate.<sup>35)</sup>

## 2) Hong Kong

The Hong Kong judicial system does not differentiate IP litigation from other litigation. Parties in IP litigation must follow the mediation procedure under PD 31 as described above.

## 3) Korea

Various ADR commissions, provided by the administrative government, offer mediation sessions focusing on IP issues. The Korea Copyright Commission, Industrial Property Right Dispute Resolution Committee, Layout- Design Review and Mediation Committee, Internet Address Dispute Resolution Committee, E-Commerce Mediation Committee, Design Dispute Resolution Committee, the Content Dispute Resolution Committee and the Korean Arbitration Board were each established under specifically-targeted laws.<sup>36)</sup> In general, the mediation

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33) Wendy L. Dean, *Let's Make a Deal: Negotiating Resolution of Intellectual Property Disputes Through Mandatory Mediation at the Federal Circuit*, 6 J. MARSHALL REV. INTELL. PROP. L 366 (2007).

34) Max Vilenchik, *Expanding the Brand: the Case for Greater Enforcement of Mandatory Mediation in Trademark Disputes*, 12 CARDOZO J. OF CONFLICT RESOLUTION 294 (2010).

35) SUSAN M. YATES & JENNIFER E. SHACK, AN EVALUATION OF THE LANHAM ACT MEDIATION PROGRAM IN THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS 5 (2000).

36) Following the set up of Jeojakgwon Simuijojeongwiwonhoe [Copyright Commission

process is initiated by the request of a party and engaging in mediation is not required for litigation afterward.<sup>37)</sup>

#### IV. Mediation in Apple v. Samsung Case

The legal battles between Apple and Samsung continue. The just concluded mediation talks were not the first attempt to settle matters out of court. After Apple filed the second lawsuit, US District Court Judge Koh had referred the case to mediation back in April, 2012. Unfortunately the parties had failed to find sufficient common ground to settle their disputes then as now. The jury of the second trial recently awarded Apple 119.6 million dollars, but also found Apple's violations of Samsung's patents, ordering Apple to pay 158,000 dollars. Many expect Judge Koh will be asked to order a new trial and the Federal Appeals Court is already reviewing the case, indicating that both parties will continue the fight in court which could also provide more chances of finding common grounds. The fact that the damages owed by Samsung drastically dropped from 1

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for Deliberation and Conciliation] in 1987, Jeojakgwon Simuiwionhoe [the Korea Copyright Commission] was established under Jeojakgwonbeop[Copyright Act] in 2007. Balmyeong Jinheungbeop [Invention Promotion Act] ordered the establishment of Saneop Jaesangwon Bunjaengjojeongwiwonhoe [Industrial Property Right Dispute Resolution Committee] in 1995. Baechiseolgye Simuijojeongwiwonhoe [Layout- Design Review and Mediation Committee] was organized after Bandoche Jipjeokhoeroui Baechiseolgyee gwanhan beomnyul [Act on the Layout-Designs of Semiconductor Integrated Circuits] in 1992. Inteonetjuso Bunjaengjojeongwiwonhoe [Internet Address Dispute Resolution Committee] was set up by Inteonetjuso Jawone gwanhan beomnyul [Internet Address Resource Act] in 2004. Jeonjamunseo mit Jeonjageorae gibonbeop [Framework Act on Electronic Commerce] enabled the establishment of the Jeonjamunseo Jeonjageorae Bunjaengjojeongwiwonhoe [E-Commerce Mediation Committee] in 2000. Dijain Bunjaengjojeongwiwonhoe [Design Dispute Resolution Committee] was established under Saneop Dijain Jinheungbeop [Industrial Design Promotion Act] in 2012 and Kontencheu Bunjaengjojeongwiwonhoe [Content Dispute Resolution Committee] was organized by Kontenteusaneop Jinheungbeop [Content Industry Promotion Act] in 2010. Korean Arbitration Board (KCAB) started as an ADR provider named International Commercial Arbitration Committee within the Korea Chamber of Commerce and Industry under Jungjaebeop [Arbitration Act] in 1966. It became an independent private organization in 1970. KCAB designed its own International Arbitration Rules in 2007.

37) SABEOPYEONSUWON , *supra* note 23, at 95.

billion dollars in the first trial to 119.6 million dollars in this second trial also imply that resorting to mediation may benefit both. So far, the dispute has demanded considerable financial and human resources at a relatively predictable basis whereas the amount of damages depending on the jury's verdict has become smaller than Apple initially claimed. Mediation can reduce future opportunity cost in prolonged court proceeding and deliver an outcome that both parties may seek mutual benefit. Nonetheless, these efforts have not borne fruit.

Despite the advantages mediation can deliver, Apple and Samsung failed to reach an agreement through mediation. In August, 2014, the parties announced in a joint statement that they have dropped all non-US litigation between them but will continue to litigate their US cases.<sup>38)</sup> The agreement did not involve any licensing arrangements between the two titans. The parties have litigation in 9 separate countries and the agreement ends the lawsuits in all countries except for the United States.

Although the statement did not explain the reasons for the agreement, the termination of multi-jurisdictional lawsuits should not be interpreted as a settlement of their dispute. Instead, it seems the parties have agreed to entrust the outcome of their disputes to the US appellate courts.

The case reflects the challenges facing mediation in the IP sector. The lawsuits filed by Apple included claims for injunctive relief to shut out Samsung of the smart phone market. Injunctive relief is granted by a court of law with the authority to make such an enforceable order. The mediation process, on the other hand, is designed to facilitate a settlement between the litigating parties. Compromise will be necessary to achieve a voluntary settlement of the dispute through mediation. Where a litigant's primary objective is to force its adversary out of the marketplace completely and monetary damages a secondary objective, it is difficult to see how the mediation process will be able to facilitate such a resolution.

In IP disputes involving issues of contractual disputes, such as breaches of licensing agreements, where monetary damages may resolve the dispute, mediation is conducive to facilitating settlement. However, the Samsung /

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38) Tim Bradshaw, *Apple and Samsung settle non-US patent disputes*, FINANCIAL TIMES, Aug. 6, 2014, available at <http://www.ft.com/cms/s/0/ad934228-1d06-11e4-b4c7-00144feabdc0.html#axzz3A4bHfHye>.

Apple battle does not fit into this mode and despite the efforts of Judge Koh to nudge the parties into settlement through mediation, mediation was unsuccessful.

## V. Conclusion

Mediation is a non-binding process designed to settle disputes by means of flexible and informal sessions. In the U.S., all Federal Circuit cases, upon court referrals or parties' request, are incorporated into the Ninth Circuit Mediation Program shortly after the mediation questionnaire is screened by the court. Once the case is decided to be engaged in the program, participation in mediation becomes mandatory. In Hong Kong, all civil proceedings are required to participate in mediation. The court may impose adverse costs sanction unless a reasonable explanation is provided. As for Korea, mediation is initiated upon the court's referral or parties' request. However, the court may refer a case to mediation, disregarding a party's refusal to engage in mediation.

The Lanham Act Mediation Program, a special mediation procedure for IP matters, covers all trademark cases in the Northern District of Illinois. After the automatic assignment to mediation, the parties can reject participation, meaning the program is completely voluntary.

Mediation in the IP sector is highly capable of delivering solutions that is impossible within the walls of litigation. Parties can reach an agreement sufficing each other's needs via reduced timeframe and budget. Despite the pain-staking process the parties have gone through, the chances of settlement by mediation cannot be easily denied.

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