



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

A report on the results
of the WIPO-MCST survey

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.

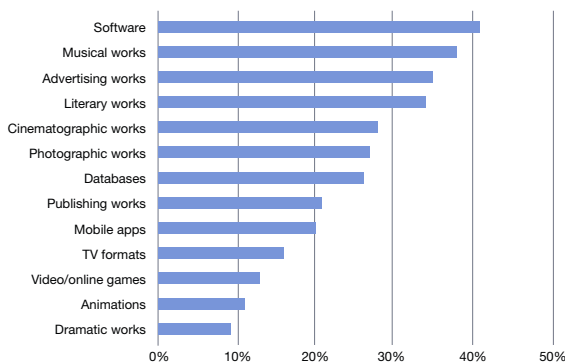
Disputes

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.

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.

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



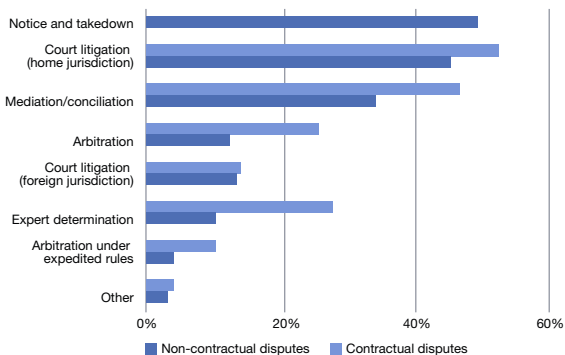
When looking at the outcome of disputes, the survey results show that the most common remedies pursued both by claimants and defendants were damages,

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.

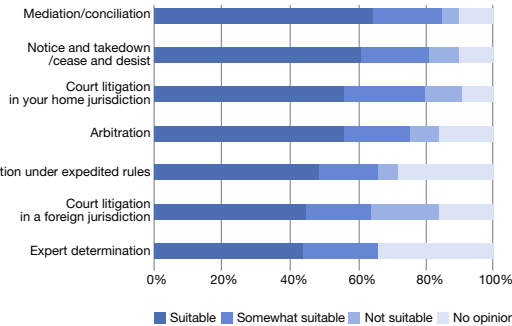
Figure 0.2 Dispute resolution mechanisms used



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

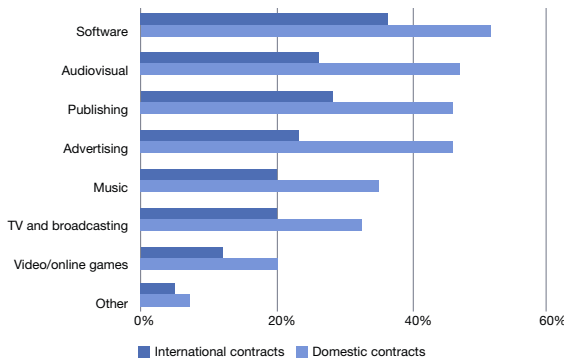


The survey respondents and interviewees seemed to have overlapping priorities in resolving these disputes regardless of whether the dispute was domestic or international. The top priorities were the cost and speed of resolving the dispute, followed by the quality of the outcome and its enforceability.

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.

Figure 0.4 Areas of contracts concluded



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.

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 OCSSPs: 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.

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