

Daniele (Danny) Ciracò

Forget the Mechanics and Bring in the Gardeners: An Exploration of Mediation in Intellectual Property Disputes

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"We keep bringing in mechanics -- when what we need are gardeners" -- Peter Senge

INTRODUCTION

We often rely on old ways of doing things, not necessarily because they work but because we have become so accustomed to them. Inventors, creators and others involved in the intellectual property (IP) industries may be an exception to this trend, yet they too often follow the majority and rely on traditional resolution systems like the courts to settle their disputes, as opposed to exploring alternative dispute resolution (ADR) mechanisms. For many lawyers and business people especially, the courts still seem like the most appropriate forum for conflict resolution. They are more comfortable with litigation, "...the devil they know, rather than trying out ADR as the devil they do not know."² Some in the IP fields have begun to turn to alternative forms of conflict resolution namely arbitration however, few have seriously given mediation similar consideration.

Alan M. Webber, "Learning for a Change," (May 1999) *Fast Company* no. 24 178 at 184.

2 James R. Sobieraj & Michael G. Anderson, "Contracting For Alternative Dispute Resolution," (1994) 2 *Intellectual Property Law* no. 2 111 at 551. Alex Wellington, "Taking Codes of Ethics Seriously: Alternative Dispute Resolution and Reconstitutive Liberalism," (July 1999) vol. XII *Canadian Journal of Law and Jurisprudence* no.2 297 at 300.

There have been many debates between the promoters and the critics of ADR a sign of a maturing academic field of enquiry and endeavour.³ The goal of this paper is to theorize on the benefits of mediation in IP disputes. I begin in Part I, with some background information on IP and ADR. In Part II, I will analyze the court system as a machine, and mediation as an organism. By describing mediation as an organism we will be able to see its potential to effectively deal with IP disputes. In particular, we will look at mediation's flexibility, its cost-effectiveness, its sensitivity to time, its effectiveness in dealing with highly technical and complex issues, its respect for confidentiality, and its effectiveness to deal with internationally complicated disputes -- all of which will illustrate mediation's organic design. Peter Senge dealt with similar metaphors in his book on management thinking entitled, *The Fifth Discipline: The Art & Practice of the Learning Organization*. He argued that for years companies have been designed as machines when they should be designed as living organisms. He argued that organizations designed after machines do not allow change and growth like an organism design. Senge prophesied that, "[t]he most universal challenge that we face is the transition from seeing our human institutions as machines to seeing them as embodiments of nature... We need to realize that we're a part of nature, rather than separate from nature."⁴

While I champion mediation as a more effective tool to deal with IP disputes, in Part III, I am critical of mandatory mediation. At this juncture, I examine two dominant mediation philosophies, namely "the satisfaction story" and "the transformative story" and I illustrate that mandatory mediation aligns more closely with the satisfaction story, which may pervert some of mediation's organic qualities; some of the

same qualities that make it so appropriate for dealing with IP disputes. The point will be that, by adopting mandatory mediation, organic mediation will likely mutate into "machine mediation". So while mediation can be effective in dealing with IP disputes, we must recognize that there is a difference between machine mediation and organic mediation and the two will not necessarily be equally effective in settling IP conflicts.

Webber, *supra* note 1 at 180.

PART I:

UNDERSTANDING INTELLECTUAL PROPERTY and DISPUTE RESOLUTION

A. Intellectual Property

At the very outset, before we look at the effectiveness of mediation as a resolution mechanism, it is instructive to have a basic understanding of intellectual property rights. There are four distinct types of intellectual property: trademarks, copyright, patents, and industrial property. Our focus will be on copyright and patents.

"Intellectual property" seems to capture contemporary thoughts on this area of law. "Intellectual" acknowledges that the product is intangible, yet important, while "property" seems to reflect our capitalist beliefs on ownership and exclusivity. The focus however, was not always on "property" but rather "privilege," as grants of monopoly depended on the favour of the monarch and the royal entourage. This favouritism changed in the West during the eighteenth century as the forces of the Enlightenment and the Industrial Revolution consciously worked to switch discourse from privilege to property. Capitalists wanted to "own" whatever their enterprise produced and wanted to exclude everyone else from its enjoyment except on their terms.⁵ Essentially, the argument has always been that those who "sowed" had to be protected from those who wanted to reap without sowing. The idea was that creativity would be discouraged if creators were not protected. Of course not everyone agrees. Opponents of strict intellectual property protection argue that ideas and inventions, particularly those ideas and inventions concerning health, medicine, food production and education, belong to the whole world and are concerned that too much protection may hinder economic and social progress. The point however, is that intellectual property rights deal with exploitation rights of creators, artists and inventors. Let us now turn to a more detailed understanding of copyright and patents.

David Vaver, *Intellectual Property Law: Copyright, Patents, and Trade-marks*, (Concord: Irwin Law, 1997) at 3.

(i) Copyright

Since copyright is entirely a creature of statute, and because our focus is on Canada, we will concentrate on the Canadian Copyright Act.⁶ Canadian copyright legislation came into effect January 1, 1924. It was based on the U.K. Copyright Act of 1911.⁷ It is notable that copyright law falls under the umbrella "intellectual property law," and is consequently distinct from real property. Indeed, while real property protects tangible objects, copyright law protects intangible property as the expression of one's ideas. As such, its key objective is to grant exploitation rights to owners of original works.

To begin, copyright exists in every original literary, dramatic, musical, and artistic work.⁸ It is also worth noting that the *C Act* covers almost any produced expression, regardless of whether the work is good or bad. As Vaver confirms, "...the law does not require that work have any merit or, indeed, that it be such

of a work at all."⁹ The only thing that can be excluded from copyright protection might be mass-produced items.

So what exactly is copyright? According to the *CAct*, copyright means:

The sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform or in the case of lecture to deliver, the work or any substantial part thereof in public, or, if the work is unpublished, to publish the work or any substantial part thereof.¹⁰

6 *Copyright Act*, R.S.C. 1985, C.c-42, hereinafter, the *CAct*

Lesley Ellen Harris, "Canadian Copyright Law," (1994) v. 25 *The Law Librarian* at 137

C Act, *supra* note 6 at s. 5(1).

Vaver, *supra* note 5 at 88.

Other rights of copyright include, the right to translate the work, convert the work from one form into another, make a recording or film of the work, communicate the work by radio communication, exhibit the work in public, and the right to authorize any of the above." Besides these relatively clear protections, a copyright owner also has "moral rights". This means that "...the author of a work has, subject to section 28.2, the right to the integrity of the work and in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous."¹² In addition, while moral rights cannot be assigned, they can be waived in whole or in part and that assignment of copyright in a work does not necessarily constitute a waiver of any moral rights.¹³ In other words, a creator maintains their moral rights regardless of whether they have assigned their copyright unless they specifically waive their moral rights¹⁴.

The *C Act* explains that infringing applies when a work is "copied" from an original copyrighted work without consent of the owner. In order to substantiate infringement, the plaintiff needs to establish: (1) actual reproducing of the work or a significant likeness to the work (without authorization) and (2) a possibility of access to the said work.¹⁵

CAct, *supra* note 6 at s. 3(1).

Ibid.

Ibid. s. 14.1(1).

Ibid. s. 14.1(2).

An example of a creator's moral rights is illustrated in *Snow v. Eaton Centre Limited* (1982), 70 C.P.R. (2d) 105. In this case, a sculptor who created a group of flying geese in the Eaton Centre, in Toronto was entitled not to have his work decorated with red ribbons at Christmas time. The court found that decorating the geese interfered with the moral rights of the artist.

See also *Gondos v. Hardy et al.* (1982), 38 O.R. (2d) 555 64 C.P.R. (2d) 145 (H.C.) which followed *U & R Tax Services v. H&R Block Canada Inc.* (1995), 62 C.P.R. (3d) Doc T-891-89 (Fed. T.D.), *U & R Tax Services*) in determining access as a necessity for infringement. The court held that "credible evidence of access or causal connection between the works" constitutes a breach.

The original purpose to protect expressed works may have been to promote culture and the dissemination of works by providing incentives to authors and artists to produce worthy work and to entrepreneurs to invest in the financing, production, and distribution of such work.⁶ However, it is questionable whether the *C Act* is attaining these ends since more and more protection is extended to digital technologies often produced as terms of workers' employment.¹⁷ As John Gurnsey argued, copyright is no longer concerned primarily with the "lonely starving artists" but also with companies -- ranging from small and not-for-profit concerns to huge multi-million dollar contracts.¹⁸

(ii) *Patents*

Although patents fall within the IP gambit, patent law has a very different focus than copyright law. When someone introduces a product into the market, anybody can copy it and compete with the original producer without incurring the initial costs of invention and product development. The patent gives its holder an amount of time to develop and market the invention without competition. Therefore, at the most basic level, a patent is granted by the government and allows the patent holder the right to exclude others from making, using or selling an invention. Intimately related to patents are laws that involve trade secrets. A "trade secret" is information about a product or process kept secret from competitors. Trade secret law is said to have its origins in Roman law, which provided for punishment of those who induced an employee to reveal commercial secrets of their master, or employer.¹⁹ It is important to understand that in Canada, trade secrets are only a creation of common law action, without governing legislation.²⁰ Contract, equity and property law all combine in trade secret, or breach of confidence cases. Patents, meanwhile are governed by the *Patents Act*²¹ in Canada.

¹⁶ Vaver, *supra* note 5 at 22.

Ibid at 22

John Gurnsey, *Copyright Theft* (New York: Aslib Gover, 1995) at 17.

Alex Wellington, *Patents and Trade Secrets -- Cases and Materials* vol. 1 (North York: Osgoode Hall Law School, 1999) at 16.

Unlike copyright protection, which is granted without registration and is deemed protected upon creation of a copyrightable work, a patent must be registered in order to be protected. The application is referred to as a "petition", which dates back to the time when English patent applications were "humbly" made "To The Queen's Most Excellent Majesty."²² In other words, unlike copyright, the right to patent depends on the claim date of the application, which is usually its filing date. An earlier inventor will lose their right to patent protection if a second inventor sends her application to the Patent Office before the earlier inventor.²³

"art²⁴ process²⁵, machine²⁶, manufacture or composition of matter²⁷" or any new and useful "improvement of one of these qualifies as a patentable "invention" in Canada if it is "new and useful;" the implication is that the invention also be non-obvious.²⁸ Some things that are not patentable include, natural phenomena, scientific principles, abstract theorems, which include computer programs, schemes, plans, business methods, medical or surgical treatments.²⁹

²⁰ Trademarks are not mentioned in the Constitution Act, 1867, as are "Patents of invention and Discover" and "Copyrights" (deemed to include design rights). Nevertheless, trademark legislation is considered part of the "Regulation of trade and Commerce", which may also support Plant Breeders'

Rights legislation, and the integrated Circuit Topography Acts, as noted in Vaver, supra note 5 at 17-8.

21 Patents Act, R.S.C. 1985, c. P4

Vaver, supra note 5 at 115.

PAct, supra note 21 at s. 27(1.5).

24 An "art" has been defined as "an act or series of acts performed by some physical agent upon some physical object and producing in such object some change either of character or of condition." See *Lawson v. Canada (Commissioner of Patents)* (1970), 62 C.P.R. 101 at 109 (Ex. Ct.). This definition included processes and methods, however excludes things like methods of cross examination, advocacy, or tax avoidance, building designs and land subdivision schemes, and medical or surgical treatments, as noted in Vaver, supra note 5 at 122.

25 A process is considered a systematic series of interdependent actions or steps for some useful result but excludes a machine, things or result.

26 A machine includes apparatus of interrelated parts with separate functions and devices that modify force or motion and that on its own or in combination with other elements achieves a useful end.

27 By "manufacture" patent law in Canada refers to a product made manually or by an industrial process, by changing the character or condition of material objects and therefore is similar with "machine" and "composition of matter." "Composition of matter" simply refers to any composite article or substance produced from two or more substances.

28 P Act, supra note 21 at s. 2 def. "invention"

(iii) Characteristics of IF Conflicts

With a cursory understanding of IP -- particularly copyright and patents -- it is now appropriate to turn to the six characteristics of IP conflicts that may be addressed ideally through mediation. First, although IP disputes often involve large companies, they regularly involve artists and inventors who are not served well by the limited compensation rewards offered through the courts; many see more value in the fame and recognition attached to their creation. Second, resolving intellectual property disputes can be very expensive when we consider the burdensome discovery process, particularly in high-tech disputes. Third, IP cases are incredibly sensitive to time. Today we live in a rapidly changing technological environment, where IP can become obsolete very quickly. In other words, expedient settlement is of paramount importance because the patent and technology being disputed for example, may actually become obsolete before a matter reaches the litigation stage.³⁰ Fourth, IP disputes are often complex and can involve a high level of technical know-how; for instance, evidence of an appreciation for the technical complexities involved in patent disputes, is given in the *P Act* which explains, in the case of non-obviousness, that, "[.it] must be subject matter that would not have been obvious... to a *person skilled in the art or science* to which it pertains...[emphasis added]." In other words, many IP cases, particularly hi-tech cases, can be very complicated and require expert involvement.³¹ Fifth, IP cases are dependant on confidentiality. Litigation for example, may call to divulge very sensitive information regarding disputants' products or manufacturing processes. This information is often an IP client's most valuable asset, and its exposure can spell financial ruin.³² Finally, IP disputes often transcend national borders and parties face jurisdictional problems that can complicate the resolution process. In short, the characteristics of IP disputes illustrate that these conflicts have specific needs, which we will see, can be effectively addressed through a tailored

resolution process like mediation.

29 Vaver, *supra* note 5 at 127-131.

Jennifer Mills, "Alternative Dispute Resolution in Intellectual Property Disputes," (1996) 11 *Ohio State Journal on Dispute Resolution* no. 1 227 at 231.

B. Dispute Resolution Strategies

In order to appreciate the benefits of mediation we must first understand the different types of conflict resolution strategies. Anthropologists have developed a simple model to describe the dispute resolution process. Essentially the model outlines that the nature of the relationship between the disputants will dictate their choice of dispute resolution procedures. Each procedure will in turn provide a different form of resolution for the dispute.³³ There are four basic reference points along the spectrum of dispute resolution techniques -- negotiation, mediation, arbitration, and adjudication.³⁴ Negotiations is at the most collaborative end of the spectrum and constitutes any form of communication, direct or indirect, where parties who have at least some opposing interest discuss, without resort to arbitration or a trial, the form of any joint action which they might take to manage and ultimately resolve the differences between

PAct, supra note 21 at 28.3

32 James Gilliland Jr. "Alternative IP Resolution," <http://www.ipmag.com/agilled.html>.

L. Nader & H. Todd, *The Disputing Process -- Law in Ten Societies* 13-14 (1978) as noted in William F. Heinze, "Patent Mediation: the Forgotten Alternative in Dispute Resolution," (1991) 18 *Aipla Quarterly Journal* no. 4 333 at 339.

Ibid. at 339-41.

Mediation meanwhile, which is only lately receiving attention despite its rich history,³⁶ can be defined as the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate the parties' needs."³⁷ In an arbitration format, a third party listens to disputants and makes a decision as a judge would, except that in an arbitration process, the parties often decide the rules of procedure, rights of appeal, whether or not the arbitration decision will be binding and, most important, who the arbitrator(s) will be.³⁸ Finally at the most confrontational end of the spectrum is adjudication, which requires a neutral authority to pronounce a final judgment based on evidence received under formal rules of procedure.³⁹ And while these of course are not all of the resolution strategies⁴⁰, they cover the four main reference points.

Stephen D. York, *Practical ADR*, (London: FT Law & Tax, 1996) at 10.

36 Mediation has been used for thousands of years. In ancient China, mediation was the principal means of resolving disputes. The Confucian view was that moral persuasion and agreement, rather than sovereign coercion, achieved optimum resolution of a dispute. It was the duty of every citizen to avoid court proceedings, which are viewed as harmful to the natural social order. It is for this reason that the Chinese and other Asian cultures have considered litigation as the last resort, which involves a loss of face." J. Folber, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, (San Francisco: Jossey-Bass, 1984) at 7.

Ibid. at7;

Norman A. Ross, *You Be the Judge: The Complete Canadian Guide to Resolving Legal Disputes Out of Court*, (Toronto: John Wiley & Sons Canada, Ltd, 1997.) at 31;

Heinze, *supra* note 33 at 341. -

40 Aside from the four mentioned dispute resolution mechanism there are other ADR methods:

Mini-trial is a formalized settlement conference where representatives of disputants make short presentations to a panel of at least one member of each party and usually a neutral advisor. The process is similar to the court process, however the outcome is not binding unless and until a settlement agreement is executed.

Early neutral evaluation involves an evaluator, experienced, or has specialized training in the substantive area in issue, and conducts a brief, confidential, non-binding session early in the litigation to hear both sides of the case. The evaluator identifies the main issues in dispute, explores the possibility of settlement and assesses the merits of the claims; summary jury trial is a non-binding, informal settlement process in which real jurors hear abbreviated case presentation, typically lasting one or two days; A judge or other neutral officer presides over the hearing, but generally there are not witnesses and the rules of evidence are relaxed. Settlement-authorized client representatives are required to attend the trial. After the trial, the jurors retire to deliberate and then deliver an advisory verdict, which becomes a bench-point for settlement negotiations among the client and lawyers with assistance from the judicial officer if requested.

Mediation arbitration or "med/arb" commences as the mediation by a third party, and if the mediation does not successfully resolve the dispute, the third party assumes the role of the arbitrator and imposes a decision upon the parties.

See Hon. Mr. Justice George W. Adams and Naomi L. Bussin, "Alternative Dispute Resolution and Canadian Courts: A time For Change," (1995), 17 *Advocate's Quarterly*, no. 2, 135-141. Also see Robert A Baruch Bush, "Dispute Resolution -- The Domestic Arena: A Survey of methods, Applications, and Critical Issues," in *Beyond Confrontation: Learning Conflict Resolution in the Post-Cold War Era*, John A. Vasquez, James Turner Johnson, Sandford Jafife, and Linda Stamato, (Michigan: The University of Michigan Press, 1995) at 10-1. See York, *supra* note 9 at 10-9.

41 Heinze, *supra* note 33 at 341.

42 Vithelm Aubert, Law as a Way of Resolving Conflicts," in Laura Nader, Law in Culture and Society, (Chicago: Aldine Publishing Co., 1969) as cited in Jane Banefield, *Law and Society*, 18 1-2.

D. Gifford, "A Context-Based Theory of Strategy Selection in Legal Negotiation" (1985) 46 *Ohio State Law Journal* 41 at 108.

Anthropologists have argued that disputants who seek to maintain their relationship or resolve disputes with multiple issues will tend to rely on a collaborative procedure such as negotiation. These types of procedures naturally lead to compromise solutions. Disputants with single-issue disputes and no relationship to maintain will tend to rely on adjudicatory forms of dispute resolution, such as litigation. Consequently, the latter disputes are more likely to be resolved in the form of win-or-lose decisions.⁴¹

At the core of the problem is the distinction between conflicts of interest and conflicts of value and facts (or more commonly referred to as "rights"). Vilhelm Aubert, spoke of this distinction in the earlier part of the twentieth century and explained that understanding these distinctions will help to understand what resolution strategy will be more effective. In a conflict where interests are partly incompatible and partly overlapping, negotiation presents itself as a normal procedure to resolve the conflict, yet if the interests are contradictory to the extent that gains and losses must cancel each other -- a zero-sum game -- negotiation is less adequate.⁴²

With all of this said, it is important to appreciate that although negotiation is premised on the notion of collaboration there are various types of negotiation strategies. Competitive negotiation strategies dominated the early texts used in law schools to teach negotiations.⁴³

However in 1981, Professors Roger Fisher and William Ury published their groundbreaking book, *Getting to Yes: Negotiating Agreement Without Giving in*, where they criticized the competitive theory and championed the method of principled negotiation. Their strategy is intertwined with a problem-solving or integrative approach. And while principled negotiation, or an integrative strategy, relies on a cooperative negotiation strategy, many scholars see cooperative negotiation and principled negotiation as different styles.⁴⁴

To illustrate the differences between competitive, cooperative, and integrative negotiation strategies we can turn to a popular example that involves a dispute over an orange. Two parties arguing over the orange, and claiming that they have a right to it would best illustrate a competitive negotiation strategy. Bluffs and pressure tactics would dominate this negotiation. Meanwhile, if the parties decide to split the orange in half, we see a cooperative strategy develop. An integrative or principled negotiation strategy meanwhile, is a deeper form of negotiation where parties probe and ask questions relating to why each party needs the orange. Negotiators who employ the integrative strategy may discover that one of the parties did not need the entire orange but in fact only needed the peel of the orange for a cake he was baking, while the other party just needed the juice of the orange. The point is that the parties have gone beyond their positions (wanting the orange) and discovered that there were interests behind these positions that could lead to a greater level of individual and collective satisfaction.

Not surprisingly, we do not have full consensus on whether there are in fact three types of negotiation strategies. Some scholars argue that there are only two main extremes -competitive and cooperative -- and all negotiation strategies fall within the spectrum. In particular, these academics argue that the integrative approach is really just a branch of the cooperative negotiation strategy. Irrespective of how one may draw the boundaries of these strategies, it is important to note that these strategies, while different, do not operate exclusive of each other and may all be incorporated in a single negotiation session or in other dispute resolution contexts.

See D. Gifford, *ibid* who outlines these three main negotiation strategies.

It is useful to now explore the ADR system that has gained the most acceptance in IP disputes and which has taken most of the attention away from mediation: arbitration. Arbitration has already been embraced by many involved in IP disputes. Arbitration is seen as speedy and cost effective, and can, "...outperform the present system you choose can be an expert; the time-table can be set by the parties; the rules of evidence can be relaxed, and no time will be wasted by taking interlocutory rulings to the Court of Appeal."⁴⁵ In the U.S., parties have embraced arbitration for IP disputes by enacting the *Federal Arbitration Act*. And the message from the U.S. highest court is that if a contract contains an arbitration provision, a strong presumption exists that the arbitration clause is enforceable and subject to the Federal Arbitration Act.⁴⁶ Further support for arbitration can be seen with former President Reagan, who, upon

signing the patent arbitration bill, specifically recognized, "the inordinately high cost of patent litigation" as a major incentive for arbitrating patent disputes.⁴⁷

Although mediation is also being accepted, as we see through the implementation of mandatory mediation in Ontario,⁴⁸ and the more recent changes to the Federal Court Rules,⁴⁹ the preferred ADR mechanism among IP disputants seems to be arbitration. A smaller number of people have been courageous enough to venture deeper into the ADR fields in order to resolve IP conflicts using mediation. Mediation, it seems, has not gained as much recognition although in *fact* it can be distinguished from arbitration as being superior in many respects. The arbitration system, for example, is still strongly connected to the adversarial system and puts considerable weight on rights as opposed to interests. Mediation however, is designed to be more concerned with addressing interests rather than rights. This is not to say that arbitration is not appropriate for IP disputes. I do advance ADR in general for IP conflicts, yet I propose that mediation can be a more effective ADR process. Mediation can more effectively deal with the particular characteristics of IP disputes noted earlier. In order to better understand this argument, it is now instructive to advance the metaphorical analysis.

Honourable Fred Kaufman, C.M., Q.C. "The Pros and Cons of Arbitration," (1993) *10 Canadian Intellectual Property Review*, 597.

It is also worth noting that section 2 of the Federal Arbitration Act makes a written contract to arbitrate valid, irrevocable, and enforceable -- except when the contract as a whole may be rescinded. The courts have interpreted the grounds for rescinding an arbitration clause to include only general contract defenses such as fraud, undue influence, or overwhelming bargaining position. As noted in Sobieraj, & Anderson, *supra* note 2 at 114-15.

Statement on Signing the Patent and Trademark Office Appropriation Bill, 18 Weekly Comp. Press. Doc. 36 Aug. 28, 1982 as noted in *Heinze*, *supra* note 33 at 338.

See Rule 24.1, a new Rule of Civil Procedure (Ontario).

See Federal Court Rules 382 to 386, which allow a court to order that a proceeding, or any issue in a proceeding, be referred to a dispute resolution conference, to be conducted in accordance with rules 387 to 389.

PART II

MACHINES VS. ORGANISMS - METAPHORS FOR RESOLUTION

A. The Court System as a Machine

In order to understand the effectiveness of mediation in IP disputes, we need to look at the court system, and the adversarial process more generally, in relation to mediation. An effective way to do this is to illustrate how the court system is designed as a machine, which makes it less effective to deal with IP disputes, and look at mediation as an organism, to see how this system can more effectively deal with IP conflicts.

Before we begin to understand how it is that the court system is designed as a machine we need to engage in a preliminary understanding of the judicial system. The adversarial process is based on rights, or as Aubert explained, it involves a conflict of values or facts. He posited that conflicts over values and facts are more "public." A solution implies a stand on what has actually happened or on what norms ought to

be applied to conflicts of a particular kind. Actors other than those directly engaged in the dispute have a stake in the outcome because a certain definition of the truth of a factual matter, or a determination of a point of value can come to mean something for the general public as well.⁵⁰ Since the "public" is now affected, the adversarial system is influenced. In order to create a seemingly neutral, equitable, and consistent resolution process that upholds these "rights", a mechanical organizational structure develops.

The adversarial process assigns particular functions to the participants in the trial, especially the judge, the parties, and the lawyers. The parties are fairly disconnected from the resolution process communicating only through their lawyers, to each other, and to court officials. To distance disputants further, the complexities of the court procedure are generally incomprehensible to the average client.⁵¹ The adversarial process prescribes a noninterventionist role for the judge, while parties are seen as bipolar contestants in a forum in which only one party can succeed. Effectively, through the adversarial process the trial is regarded as a self-contained event. Once the judge makes a decision, the court's involvement ends.⁵² The result is a lack of control by the parties over the process, which often leads to frustration and disempowerment.

Aubert, *supra* note 42 at 181-2.

The roads to litigation are lengthy and often the trip emphasizes positional bargaining.⁵³ This bargaining style fuels threat, bluff, exaggeration, and the need for "11th-hour soul-searching."⁵⁴ Parties, with the help of their lawyers, take extravagant positions from which it is difficult to back down from without compromising integrity. This process will often heighten negative feelings between the parties and elicit sentiments of victimization or vengeance, eventually leading to exhaustion. The result is a severely damaged communication link between lawyers and clients.⁵⁵ In the result, we witness what has been coined the "spiral of unmanaged conflict," -- a process where groups are forced to escalate their activities to gain recognition for their concerns. Eventually everyone engages in an adversarial battle, throwing more time and money into "winning" than into solving the problems.⁵⁶

Adams & Bussin, *supra* note 40 at 143.

⁵² Stephen Bottomly, Neil Gunnigham, and Stephen Parker, *Law in Context*, (Annadale, N.S.W., 1994) at 87-8.

Fisher and W. Ury, *Getting to Yes: Negotiation Agreement Without Giving In* (New York: Penguin, 1981)

"When Negotiators bargain over positions they tend to lock themselves in those positions... As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties... Bargaining over positions creates incentives that stall settlements... Positional bargaining becomes a contest of will." at 4-5. the Honorable Mr. Justice George W. Adams, "Negotiation: Why Do We Do It Like We Do?", A Paper Published by the Industrial Relations Centre, Queens University (1992), as noted in Adams & Bussin, *supra* note 40 at 143.

Ibid. at 143.

Now, to appreciate the machine metaphor, we must understand that "machine" reflects what we more commonly refer to as "bureaucracy." The industrial revolution fueled bureaucratization and routinization. Factory owners and their engineers realized that the efficient operation of their new machines ultimately required major changes in the design and control of work. As manufacturers sought to increase efficiency, by reducing the discretion of workers in favour of control by their machines and their

supervisors, the division of labour became intensified and increasingly specialized.⁵⁷ Through this explanation of classical management theory, which is seen as the creation of bureaucratization, we will be able to more clearly understand how it is that the court system is a machine.

Classical management theorists like Henri Fayol, R.W. Mooney, and Col. Lyndall Urwick, believed that management is a process of planning, organization, command, coordination, and control.⁵⁸ Classical management theorists were interested in designing an organization that resembled a machine. The organization was to be created as a network of precisely defined jobs, linked together in a defined chain of command expressed in what Morgan referred to as, "...the classical dictum 'one man one boss'."⁵⁹ Here, we begin to see how the court system is designed as a machine. As explained earlier, the adversarial system clearly defines all roles for participants. The parties play a constrained role guided by the lawyers and judges who, like parts of a machine, are confined to very specific tasks, which include, following precedents and adhering strictly to legal arguments. Ultimately, the judges make the decisions and are the final link in the chain of command.

⁵⁶ Susan L. Carpenter and E. J. D. Kennedy, *Managing Public Disputes, a Practical Guide to Handling Conflict and Reaching Agreements*, (San Francisco: Jossey-Bass Publishers, 1988), at 11.

Garth Morgan, *Images of Organization*, (Beverly Hills: Sage, 1986) at 23.

⁵⁸ *Ibid.* at 25.

Ibid. at 27.

Aside from classical management theory, scientific management also helps to paint a clearer picture of the machine as a metaphor for the court system. Gareth Morgan referred to Frederick the Great's military organization strategies and Frederick Taylor who pioneered what is known as scientific management. Taylor was interested in the use of time-and-motion study as a means of analyzing and standardizing work activities. The same approach to work design is found in assembly-line manufacture. In this illustration, workers are not only servants to "bosses" but are also servants to machines that are in complete control of the organization and pace of work.⁶⁰ In this light, the court system seems to have been designed with the mechanical mentality of scientific management. All the procedures are clearly defined as forms and claims must be filed and these must all meet set time requirements. Similarly, as noted earlier, the parties in the dispute have no connection with the process. The court begins to resemble an assembly line whereby cases become widgets that roll by the judge, who then deals with them as quickly as possible in order not to delay productivity.

B. Mediation as an Organism

Meanwhile, the organism metaphor better illustrates mediation. Its flexibility and sensitivity to its surroundings -- namely how the mediation process is affected by the parties and the issues that surround the dispute -- strengthen mediation's connection to a system designed as an organism. The point is that unlike the adversarial system, which is rights-based and as Aubert said, "more public,"⁶⁰ and forces the system to be more structural, mediation is interest-based and tailored for the disputants; ergo the organism imagery.

⁶⁰ *Ibid.* at 28-9.

Looking towards nature to better understand organizations is not a new phenomenon. Over the last fifty years organizational theorists have looked away from mechanical science and have begun to explore

biology as a source of ideas for thinking about how organizations work. Theorists began to look at organizations as "open systems"; the process of adapting organizations to environments, organizational life cycles, the factors influencing organizational health and development, different species of organization, and the relations between species and their ecology.⁶² This philosophy developed from the understanding that employees and people are complex and have complex needs that must be satisfied in order to live full, healthy, and productive lives. The point of the organism metaphor is that individuals and groups, like biological organisms, operate most effectively only when their needs are satisfied.⁶³ Now let us turn to the characteristics of IP disputes and flush out the elements that align mediation with an organism.

(i) Mediation is flexible and adapts to parties and their interests

One of mediation's greatest assets, and its most evident connection to an organism, is its procedural flexibility and adaptability. Unlike litigation, which incites positional bargaining⁶⁴, mediation is based on principled negotiation. In principled negotiation, interests are uncovered, which helps the parties to understand their adversaries' concerns. As we learned earlier, Aubert talked about interests and rights in the first part of the century. When a case is dealt with in court, the conflict between the parties is formulated as a controversy over facts and/or norms applicable to the case. Aubert explained that:

Irrespective of the source of the conflict between the parties, it must be formulated in court as a disagreement over norms and/or over factual matters... The verdict of the court has an either/or character; the decision is based upon a single, definite conception of what has actually taken place and upon a single interpretation of the legal norms.⁶⁵

61 Aubert, *supra* note 42 at 283.

62 Morgan, *supra* note 57 at 39-40.

63 *Ibid.* at 41.

Fisher & Ury, *supra* note 53 at 4-5: "When negotiators bargain over positions, they tend to lock themselves into those positions... As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties... Bargaining over positions creates incentives that stall settlements... Positional bargaining becomes a contest of will" At 4-5.

65 Aubert, *supra* note 42 at 286

As Julie Macfarlane reiterated, an emphasis on litigation reflects, "...the dominance of a 'rights' culture, seen in both the justice system and public attitudes towards conflict and reconciliation."⁶⁶ The court therefore, focuses on rights, and winners and losers, while mediation is designed to focus on parties' interests' and mutual gain.

Julie Macfarlane, "The Mediation Alternative" in Julie Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto, ON: Emond Montgomery, 1997) at 5.

The courts' focus on rights affects the negotiation strategies that parties utilize. As I mentioned, most of the early texts used in law schools to teach negotiations, for example, focused on the "competitive strategy" and at least implicitly endorsed such a strategy.⁶⁷ The competitive negotiator tries to maximize the benefits for her client by persuading her opponent to settle for less than the opponent would have settled with at the beginning of the negotiation. The underlying premise of the competitive strategy is that

all gains for one's own client are obtained at the expense of the opposing party. In other words, competitive negotiators see the negotiation as a competition over a fixed pie. As such, these negotiators work to convince their opponents that their settlement alternative is not as advantageous as they previously thought, in turn lessening the opponent's confidence in their case and thereby inducing them to settle for less than they originally asked. The competitive negotiator therefore, moves "psychologically against the other person," with behaviour to unnerve the opponent,⁶⁸ and may employ very strategic tactics:

- arrange to negotiate on their own turf;
 - balance or slightly outnumber the other side;
 - designate one of their demands as a "precondition";
 - make the other side tender the first offer;
 - make the first demand very high;
 - make the other side make the first compromise;
 - invoke law or justice;
 - be tough -- especially against a "patsy;"
 - appear irrational where it seems helpful;
 - claim that they do not have the authority to compromise; and
- will themselves promptly reduce the agreement to writing.⁶⁹

Not surprisingly, competitive negotiators expect similar tactics from their opponents and therefore mistrust them.

It is interesting to note that law, through its legal principles and male's historical domination of the legal profession and the public sphere more generally, may have in fact facilitated these competitive negotiation strategies. These competitive negotiation strategies, lined with deception and mistrust, seem fuelled, or at least reinforced, by certain common law principles like "*caveat emptor*", which warns, "let the buyer beware."⁷⁰ Although there is no consensus when *caveat emptor*⁷¹ came into being most agree that it was the case of *Lopus*,⁷² which had been credited as the originator of the doctrine of *caveat emptor* under English common law. The decision was recognized for the proposition that English courts were not interested in enforcing the fairness of an exchange because they thought contracting parties should handle such matters themselves.⁷³ Couple legal principles like *caveat emptor* with how men have been socialized to be competitive and to play a prominent role in the public sphere and we begin to see how this competitive negotiation strategy came to flourish.⁷⁴ Put plainly, the courts and the legal system in general seem to facilitate competitive negotiation tactics.

⁶⁷ Gifford, *supra* note 43 at 41.

⁶⁸ *ibid.* at 48.

⁶⁹ Michael Meltsner and Philip G. Schrag, "Negotiating Tactics for Legal Services Lawyers," (1973) 7

⁷⁰ In full, the Latin maxim reads: "Caveat emptor, qui ignorare non debuit quod jus alienum emit," which means: "Let a purchaser, who ought not be ignorant of the amount and nature of the interest (to be acquired), exercise proper caution." Walter H. Hamilton, "The Ancient Maxim *Caveat Emptor*," (1931) 40 *Yale Law Journal* at 1133.

⁷¹ According to some scholars, the English courts first applied the doctrine of *caveat emptor* to the sale of real property; a sixteenth-century seller conveyed the premises "as is," unless an express contract

provision provided otherwise. See Jean C. Love, "Landlords' Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?," (1975) *Wis. L. Review* 19 at 20. Other scholars claim that *caveat emptor* is often traced to 16th Century decisions involving the sale of chattels (see Hamilton, *supra* note 70 at 1156-64. The phrase itself first appeared in a text containing advice on horse trading published in 1534. *Ibid.* at 1164; Kevin M. Teeven, A History of the Anglo- American Common Law of Contract 136 (1990) ("[i]f he be tame and have been ridden upon, then *caveat emptor*." Alan Weinberber believes that *caveat emptor's* "earliest appearance in the common law courts may have been in reaction to an upsurge in itinerant merchants. The doctrine alerted buyers of the likelihood that their sellers would not be available to respond to customer complaints." As noted in Alan M. Weinberger, "Let the Buyer Be Well informed? -- Doubting The Demise of *Caveat Emptor*," (1996) 55 *Maryland Law Review* 387 at 391.) Other academics purport that the doctrine of *caveat emptor* originated much earlier in primitive Roman Law. (see A. Rogerson, "implied Warranty Against Latent Defects in Roman and English Law," in David Daube ed. *Studies in the Roman Law of Sale* 112, 113 (1959); William L. Burdick, *Principles of Roman Law* 445 (1938).)

Arbitration shares some of the weaknesses of litigation. Arbitration has been criticized because disputants have been seen to frequently treat arbitration as a means for attaining individual goals, rather than as a forum for resolving disputes without confrontation. The result of this misuse of the arbitration process is that today's arbitration sessions take on all the trappings of litigation, including lawyers, transcripts, formal rules of evidence and procedure, and their associated costs.⁷⁵

72 79 Eng. Rep. 3, Cro Jac. 4 (Ex. Ch. 1603).

Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract* at 179 (1979).

Leonard Greenhalgh analyzed the "winning" as a masculine metaphor when describing negotiations. Greenhalgh explained that sports metaphors seem far more prevalent among males than among females. This can be traced to the fact that competitive games play a more prominent role in the early development and socialization of boys than they do in girls. More specifically, he argued that boys typically are taught to play games in which the objective is to defeat their opponents and then gloat about the victory, or ridicule the playmates who have lost. Meanwhile, girls have been taught to play games that are relationship-oriented ("Barbie and Ken" doll games or "house"). When they do participate in competitive games, girls are taught to end the game or change the rules if it becomes apparent that the game has stopped being fun for their playmates who are not doing so well, in other words, Greenhalgh argued that girls are taught to play games that preserve and enhance the relationship, while boys are taught to preserve and enhance their feelings of self-worth at the expense of the relationship. In the end, Greenhalgh argued that as a result of this socialization, men have a general tendency to think in terms of competing and therefore rely heavily on win-lose metaphors, while women, have a general tendency to think in terms of preserving and enhancing relationships, and win-lose metaphors are less salient to them. See Leonard Greenhalgh, (1987) 3 "The Case Against Winning in Negotiations," *Negotiation Journal* 167, at 170.

Mediation meanwhile can be more effective than arbitration. Mediation eliminates the stigma of compromise verdicts often associated with arbitration because any settlements reached are arrived at voluntarily.⁷⁶ This interest-based process leads to greater client satisfaction because the process tends to educate both sides and helps them to produce more just results.⁷⁷ Also, in court, a financial award will often be the only remedy available to the parties. Conversely, mediation can offer a range of processes and settlement options:

- one party can publicly or privately apologize to the other;

- . the parties can co-operate in future ventures; the profits of which will be shared;
- an exchange of technologies or license agreements;
- amendments to on-going contracts;
- payment of funds over time, perhaps linked to stock market or foreign currency movements;
- one party may refrain from, or do a specific act (equivalent to an injunction or specific performance remedy in court).⁷⁸

In mediation the parties are in total control of the process and are limited only by the participants' needs and creativity.

While many argue that mediation is designed to resolve disputes, others argue that to be truly successful and satisfy disputant's needs, mediation must change from a problem solving orientation -- also referred to as humanistic mediation -- to one that focuses on empowerment and recognition.⁷⁹ Empowerment is important in the process because it shows mediation understands that disputes are very diverse and involve unique people with very different needs, and which will inevitably require different resolution approaches. Empowerment is a prerequisite for the development of self-respect and self-esteem, without which dependency and, inevitably, counter-dependency will be dominant characteristics of behaviour.⁸⁰ Closely connected to empowerment is the notion of recognition whereby parties begin to be more attentive, sympathetic, and responsive to the situation of the other party, thereby expanding their perspective to include an appreciation for another's situation.⁸¹ In other words, unlike the adversarial system which forces parties to become dependent on the process -- and whereby both the parties and the process become parasites to each other -- mediation is more "open". Like an organism, it takes into account peoples' differences by "empowering" the parties during the process of the dispute and encouraging them to "recognize" their adversaries' interests and needs -- which in turn creates a symbiotic relationship between the parties and the process.

Heinze, *supra* note 33 at 339.

76 Steven Elleman, "Problems in Patent Litigation: Mandatory Mediation May Provide Settlements and Solutions," (1997), 12 *Ohio State Journal on Dispute Resolution* at 774.

York, *supra* note 35 at 117.

See *ibid.* at 20-2 1.

This process/party relationship and empowerment allow the participants to play different roles. As previously stated, in an adversarial system, everyone is part of a machine playing clearly defined parts. In mediation, since the parties become empowered, they define what roles need to be played. Parties who previously felt like victims obtain a powerful sense of their own abilities and strengths, as well as assuming responsibility for outcomes of their actions.⁸² The adversarial system can therefore be seen as a system involving "redundancy of parts," a design principle which describes the tendency towards organizational change through the application of a social-control mechanism utilizing a high degree of specialization, hierarchical command structures, and standardized practice.⁸³ Meanwhile, mediation's "openness" and adaptability, which allows parties to play different roles, can be seen as a second design principle: redundancy of functions. Redundancy of functions "emphasizes the commitment of the potential capacity available for change to the ability of the operating parts in an organization (in this

context, the people r parties involved in the dispute]) to perform a range of functions. The goal in this second design mode is the emphasis on the creation of shared values and mutual support, continued learning, variety in operating methods, and a self controlling management style. Such principles will tend to adopt an organism metaphor of the organization and to establish an open-systems perspective emphasizing interactive organization/environment relationships.⁸⁵ Many scholars would argue that this second style is better suited for unstable social environments like environments that surround conflict.

B. McKrney, "A Critical Analysis of Transformative Mediation," *Peace Research*, v. 29(1) February, 1997 at 42.

SO M. B. E. Clarkson, "Values: Moving from the Old Paradigm to the New," in S. Wright and D. Morley (eds), *Learning Works: Searching for Organizational Futures*, (Toronto: the ABL Group, 1989) at 18.

R. A. Baruch Bush and J. P. Folger, *The Promise of Mediation, Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass Publishers, 1994) at 89.

As I explained previously, disputants often get locked into positions very early in the dispute resolution process and insist on receiving everything they want and refuse to make any concessions in return. This approach runs counter to the traditional game theory assumption that each party acts rationally and bases calculations on the belief that the other parties will act rationally as well. In practice assuming party rationality is not necessarily a good assumption. Questioning this false "rationality" becomes justified when we consider that even with the same information about an uncertain situation, people in different positions tend to bias their probability assessments toward the outcomes that are favourable to themselves.⁸⁶ So, even if parties can agree on the facts, they may still violently disagree over the significance of those facts for resolving the dispute. Fortunately, in mediation, past events are much less important to resolving disputes compared to the question of what it will take for the parties to live with one another in the future. A mediator, unlike a judge or arbitrator, can encourage disputants to focus on this latter question by helping them to distinguish their true needs -- those things that must take place for settlement -- from their original desires.⁸⁷ Put plainly, mediation's flexibility adapts itself to the particular parties involved and allows the focus to be on their interests and not necessarily rights, which may or may not address the parties' underlying interests. Mediation's organism-like design allows room for these non-legal issues, which in fact may be more important than the legal ones. Not addressing these underlying concerns has the tendency to fuel the "spiral of unmanaged conflict."⁸⁸ To bring this fairly theoretical analysis into a more practical realm let us turn to some examples of IP disputes.

82 These were the responses of dispute resolution professionals who answered a questionnaire produced in the Network: Interaction for Conflict Resolution, *Dispute Resolution in Canada: A Survey of Activities and Services, Research Section*, Department of Justice Canada, at 4 1-2.

D. Morley, "Frameworks for Organizational Change: *Towards Action Learning in Global Environments*," in *Learning Works: Searching for Organizational Future*, (Toronto: The ABL Group, 1989) at 166.

Ibid. at 166.

85 *Ibid* at 167.

In *Lancashire Fires Limited v. SA Lyons & Co. Lim*,⁸⁹ a case involving trade secrets, an employer brought his employee to court claiming that the employee, alter leaving the plaintiffs employment, had acted in breach of a duty of confidence which he continued to owe to the plaintiff. The point I wish to make is that the court was looking at rights -- as it is designed to do

-- and it was concerned with drawing a line between what it felt was appropriate or inappropriate behaviour. Worth noting is the final comment that Sir Thomas Bingham M.R. made. He said:

Peyton Young, "Negotiation Analysis," in ed. Peyton Young, *Negotiation Analysis* (Ann Arbor: The University of Michigan Press) at 16-17.

87 Singer & Lewis, *Mediation Training Manual* 3 (Center for Dispute Settlement 1987) at 3-6, as noted in Heinze, *supra* note 33 at 343-4.

Susan L. Carpenter and E. J. D. Kennedy, *Managing Public Disputes, A Practical Guide to Handling Conflict and Reaching Agreements*, (San Francisco: Jossey-Bass Publishers, 1988) at 11.

89 [1996] F.S.R. 629 (C.A.) hereinafter [*Lancashire*] Arthur Wright

power to compel participation in consensual ADR. 164 Judges in particular appreciate the relief it gives to the congested courts. Delay associated with a trial is evident by the backlog of 10,000 civil cases in Toronto (General Court Division).¹⁶⁵ Cases on the civil non-jury list generally take at least one year to reach the pre-trial conference stage and may not be tried until six to eight months have passed.¹⁶⁶ According to a report conducted by the Centre for Dispute Resolution (CEDR) in London, Ontario, over 90 percent of the cases which it has administered since 1990 have been settled, which is reflective of other settlement rates from around the world.¹⁶⁷ Even Ontario has introduced mandatory mediation, established by Rule 24.1. The Rule mandates all parties to participate in a three-hour mediation except for family law cases.¹⁶⁸

By adopting this organism styled resolution system to disputes, and to the courts more generally, it will help to satisfy the resolution needs of the disputants. Courts that only offer trials are limited in their responses to a legal dispute. One party wins and the opposing party loses. Judges unfortunately are confined and cannot resort to intermediate solutions, compromise, and tailored outcomes that accommodate the parties' best interests. Litigation, therefore, creates winners and losers and often the winners feel like losers given the limited nature of many legal remedies, the attendant delay, and the partial indemnification of cost orders.¹⁶⁹ Mediation may help to customize the solutions to better satisfy the parties involved. The best aspect of mediation

in court *is* that it offers a different avenue to pursue justice. It is important that the justice system understands that people want their conflicts "resolved", but not necessarily "tried".¹⁷⁰ The legal profession should view mediation as a "new justice product" that allows lawyers to offer new services to their clients in addition to, and not instead of, litigation.¹⁷¹ Professor Frank E.A. Sander refers to this concept as the "multi-door court-house" where, instead of one "door" leading to a court-room, there are several doors available for individuals to obtain the most appropriate resolution process. The key feature of the multi-door court-house is the initial procedure: intake screening and referral. Here disputes are analyzed according to various criteria to determine which dispute resolution mechanism or sequence of mechanisms would be best suited for the problem.¹⁷² The point is that it is not sufficient to provide only one specialized formal dispute resolution procedure, like a trial, to a growing complex society.¹⁷³ A doctor would never dream of prescribing the same medication for every disease and expect to have remedied all the ailments, so it would not be prudent to prescribe litigation to resolve types of conflicts, which inevitably require different care.

See, e.g. *McKay v. Ashland Oil, inc.*, 120 F.R.D. 43,44 (E.D. Ky. 1988); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 (M.D. Fla. 1988); *Federal Reserve Bank v. Carey-Canada, inc.*, 123 F.R.D. *Joseph Oat Corp.*, 107 F.R.D. 275, 277 (W.D. Wis. 1985), rev'd, 871 F.2d 650 (7th Cir. 1989).

Ass noted in L. V. Katz, "Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?" (1993) *Journal of Dispute Resolution*, no. 1 at 2 1-22.

165 Emond, "Alternative Dispute Resolution: A Conceptual Overview," in Emond ed., *Commercial Dispute Resolution* (1998), at 9.

166 G. Sander and Rogers, *Dispute Resolution*, 2nd ed. (1992), at 137.

167 York, *supra* note 35 at 21.

168 Norman Macinnes, "Mandatory ADR in Ontario only Months Away," (May 29, 1998) *The Lawyers Weekly* at 11. Also see Charles Kent, "Court Changes Bring ADR into Intellectual Property Regime," (May 29, 1998) *The Lawyers Weekly* at 18.

169 York, *supra* note 35 at 144.

170 *Ibid.* at 145.

171 *Ibid.* at 150.

Frank E.A. Sander, "Dispute Resolution Within and Outside the Courts: An Overview of the US. Experience", in Cochrane ed., *Attorney General and New Methods of Dispute Resolution* (1990) at 19-21. See Katz, *supra* note 164 at 53.

The interrelationship between the courts, the rule of law and dispute resolution was underlined by the Supreme Court of Canada in the following passage from the decision of the Honorable Mr. Justice Cory in *Edmonton Journal v. Alberta (Attorney General)* (1989), 64 D.L.R. (4th) 577, at p. 1337,

There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. It is precisely this fundamental public function of the courts that makes ADR within the courts so crucial. As noted in Adams & Bussin, *supra* note 40 at 134.

B. The Creation Of "Machine Mediation" -- A Theoretical Analysis

Although I am in favour of a "multi-door court house" this is not to say that I favour mandatory mediation. Regardless of the evident advantages of incorporating mediation into the courts, it is important to note that the result would no longer be mediation designed as an organism. First, how the case for mediation is disseminated would in and of itself be more reflective of a mechanical process, which could affect mediation's effectiveness. Senge argued that commitment to change only comes about when people determine that you are asking them to do something that they really care about. For this reason, if you create compliance-oriented change -- i.e. mandatory mediation -- you will get change, but you will be precluding the deeper processes that lead to commitment, and you will prevent the emergence of self-generated change.¹⁷⁴ Senge also referred to "seed carriers" whom he explained were workers within an organization who know how to get people talking to one another and how to build informal communities; in effect they were creating communities of practice. So, as opposed to manufacturing change through the courts, we need to realize that we are able to cultivate change and like the employee "seed-carriers", parties that have voluntarily chosen mediation can similarly, speaking from a personal point of view, spread the word that mediation works.

Second, and more importantly, mediation within the courts may begin to mutate into a more mechanical process. Steven Elleman, who argued for mandatory mediation in IP disputes said that: "utilizing a professional mediator and forcing the parties to seriously consider settlement should increase settlement levels."⁷⁵ While settlement levels may increase, this overlooks the point that settlement is not necessarily the most important aspect of mediation.

174 Webber, *supra* note 1 at 186.

Yet it is exactly this mentality that would align mandatory mediation more closely with a machine-like system. Mediation in the courts, and in turn the legal profession, would influence mediation's development and just as some scholars argue that arbitration in certain industries has been "juridified" by the involvement of lawyers⁷⁶, so to will other forms of ADR, which will in turn affect the type of mediation processes adopted in the courts.⁷⁷ An explanation of two different types of mediation will help to illustrate this point.

The authors of, *The Promise of Mediation* have explained the different philosophies within mediation. One philosophy the authors referred to is "the Satisfaction Story." The premise of this thinking is that the most important goal of mediation is to maximize the satisfaction of individuals' needs or, conversely, minimize suffering, and create the greatest possible satisfaction for the individuals on all sides of the conflict. This story stresses mediation's capacity to reframe conflicts as mutual problems and to find optimal solutions to those problems, because this is how the ultimate goal is met -- all parties' needs get satisfied.⁷⁸ With this approach, cases are dealt with faster than going to trial, which eases the pressure of backlogged courts, saves parties time and money, and more accurately addresses participants' needs.

On the other hand, "The Transformation Story," emphasizes that the most important goal of mediation is to encourage moral growth and transforming human character, toward both greater strength and greater compassion. This story highlights mediation's capacity for fostering empowerment and recognition, because when these occur in conflict, it signifies that one or both parties have attained the ultimate goal of moral development to some degree.⁷⁹ This second mediation philosophy is somewhat more idealistic in that it not only attempts to satisfy and transform the character of individual disputants but also society as a whole. Mediation's informality and consensuality allows parties to define problems and goals in their own terms, which validates the importance of those problems and goals in the parties' lives. Participants gain a greater sense of self-respect, self-reliance, and self-confidence, which has been called the empowerment dimension of the mediation process.¹⁸⁰ In addition, the private, nonjudgmental character of mediation can provide disputants with a non-threatening opportunity to explain and humanize themselves to one another. The movement has used this dimension of the process to help individuals strengthen their inherent capacity for relating with concern to the problems of others. Mediation can thus incite acknowledgment and concern between conflicting parties, as fellow human beings. These outcomes have been called the recognition dimension of the mediation process. This sense of empowerment and recognition would contribute to the transformation of individuals from fearful, defensive, and self-centered beings into confident, empathetic, and considerate ones.¹⁸¹ These elements, and especially empowerment, constitute the seed of the mediation-as-organism metaphor. Without these qualities, we are closer to The Satisfaction Story, which is what the courts seem to be adopting -- ergo machine mediation.

175 Elleman, *supra* note 76 at 777

176 'Juridification' is used to describe the monopolization of the legal field by legal professionals. See, Flood, J. and Caiger, A. (1993) "Lawyers and Arbitration: The Juridification of Construction Disputes," *Modern Law Review* Vol. 56 no. 412-440, who cites Pierre Bourdieu (1987) "The Force of Law:

Towards a Sociology of the Juridical Field," 38 Hastings Law Journal, 805-53.

177 See Penny Brooker, "The 'Juridification' of Alternative Dispute Resolution," Anglo-American Law Review 1, who analyzes the development of ADR in the U.K. construction industry and how it is being dominated by legal profession, resulting in what she calls the 'juridification' of ADR.

178 RA. Baruch Bush and J. P. Folger, *The Promise of Mediation, Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass Publishers, 1994) at 26. Some of the people that the authors associate with The Satisfaction Story are: Fisher and Ury, 1981; Fisher and Brown, 1989; Suskind and Cruikshank, 1987; including judges and other justice system officials, Chief Justice Warren Burger (1982) and many other judicial leaders (see Galanter, 1985), at 17.

ibid. at 27. The authors argue that the Transformation Story of the mediation movement is not widely told in the published literature of the field. The few who present this view include practitioners such as Albie Davis, 1989 and academics such as Leonard Riskin and Carrie Menkel-Meadow (in some of their work, see Riskin, 1982, 1984; Menkel-Meadow, 1991; see also Dukes, 1993) as well as (Folger and Bush, 1994 and Bush, (1989) at 21.

180 *ibid.* at 20.

181 *ibid.* at 20-1.

In other words, the main difference is that "the Satisfaction Story" deals with improving the parties' situation while the "Transformation" philosophy strives to improve the parties themselves. This is not to say that all voluntary mediation will be transformative, or that mandatory mediation through the courts cannot be transformative, but rather that mandatory mediation through the courts has a better chance of adopting the machine like qualities of the court, elevating the importance of settlement and downplaying the role of empowerment and recognition. The reason to understand these two mediation approaches is to appreciate that there are in fact different types of mediation and that by mandating mediation we may indirectly enforce the satisfaction story thereby creating a more rigid mechanical mediation. While it is unlikely that a large multi-million dollar company is interested in "empowerment and recognition" and is probably more concerned with profits, mandatory mediation would reinforce the satisfaction model to the point that the transformative model would fade. If a company is not interested in empowerment and recognition, they can choose a mediation approach that is more in line with the satisfaction story. A zealous inventor or an impassioned artist meanwhile, may be more concerned with empowering themselves and having other parties recognize their concerns. In other words, mandating mediation would create a specific type of mediation process, which would not be appropriate for all situations. The parties need to decide whether they want mediation and what type of mediation would be most appropriate as opposed to having a mechanical mediation process pushed onto them. In addition, the parties' power to choose the mediation approach that they prefer is more reflective of the organic metaphor. Put plainly, from a theoretical point of view, mandating mediation amputates mediation's organic qualities.

C. The Negatives Of Mutating The Organism-- A Practical Analysis

(i) Underlying Conflicts And Long Term Relations

Although we have seen that, in theory, mandating mediation may weaken mediation's connection to an organism, there are some more practical consequences that we need to consider. Once we understand that there are different philosophies behind mediation we can more clearly see how mandatory mediation begins to lose its organism qualities and how losing these qualities negatively affects IP disputes.

One of the most celebrated elements of mediation -- which is its main connection to an organism -- is its informal, consensual elements. These elements, however, are likely to be affected if mediation is captured and mandated by the courts. With this concern in mind, many scholars have looked at interest based conflict management systems and recognized the inherent contradiction in creating an interest based system within a rights based one. They have said:

Confronted with the high costs of using the rights-based forums and dissatisfied with the resulting "win-lose" impact on ongoing relationships, organizational leaders have flocked to ADR courses to learn the newer and perhaps more enlightened methods of resolving disputes. The problem, however, is that these interest-based methods are often imposed or required through rights-based designs, with little or no input from institutional or individual stakeholders.¹⁸²

Scholars have specifically used court-ordered or mandatory ADR as an example of the incongruity between interest-based methods through a rights-based design. If we were to adopt mandatory mediation, it will be forced to be institutionalized, more formal, and connected to rules, taking on qualities of the system it was meant to displace. Even judges are beginning to recognize this point. Madam Justice Rosalie Abella of the Ontario Court of Appeal said, "mediation and 'alternative dispute mechanisms' hailed as speedy alternatives to protracted lawsuits, 'are themselves turning into procedural mimics of the court system' just as costly or complex."¹⁸³

182 Costantino, C. and C. S. Merchant. *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (San Francisco: Jossey-Bass, 1966) at 52.

Let us dig deeper to have a clear understanding of the negative consequences of mandating mediation. ADR can be grouped into decision-oriented processes and consensual processes. Decision-oriented methods, such as arbitration and fact-finding, rely on a decision by a neutral third party to resolve the dispute. Meanwhile, in a consensual process, a third party assists disputants in reaching their own agreement regarding how to resolve their dispute.¹⁸⁴ Once the courts adopt ADR, regardless of whether it was meant to be consensual ADR, there will often be strong traces of decision-oriented processes. With mandatory mediation there will be more pressure on the disputing parties to focus on settlement.¹⁸⁵ Justice and efficiency seem to encompass the two goals of court mandatory mediation, where efficiency seems to be assuming more importance. Although the judges cannot force mediation onto parties, the U.S. judges in some states have ordered litigants to mediate and to operate in good faith; courts have then pronounced guidelines to describe such a good faith effort.¹⁸⁶

The main concern I have tried to address is that mandatory mediation might revert back to a machine-like system, which focuses too much on outcomes and rights, and not on parties' interests, recognition and empowerment, which are mediation's main strengths. Recognizing this mediation mutation is important for IP disputes because one of the main reasons mediation has grown in popularity is because of the fact that it helps maintain long term relationships by focusing on interests and moving away from the courts.¹⁸⁷ This is not to say that the noted satisfaction story, or "machine mediation" cannot nourish productive post-dispute relations. The focus however, is often so settlement specific that underlying issues that may have been addressed through the transformative model may not have been addressed through machine mediation.

183 Tracey Tyler, "Judge blames lawyers' behaviour for low confidence in legal system," *The Toronto Star* Oct. 30, 1999 TS A2

184 Katz, *supra* note 164 at 6.

185 It is worth noting that a lot of my thoughts on "machine mediation" stem from my experiences as a mediator in the Small Claims Court in North York, Ontario. I found the judges to be very pro-settlement, constantly framing the conflicts in terms of "rights"; one judge in particular insisted that we read the files of the cases we were to mediate in order to spot the legal issues. While this may have been my experience with a select few judges, the experience as a whole reinforced my belief that working with a rights-based mentality, focusing on settlement, will likely lead to "machine mediation."

186 Courts will require a party to engage "actively... in the bargaining process with an open mind and a sincere desire to reach an agreement." (*Detroit Police Officers Association v. City of Detroit*, 214 NW2d 803, 808 (Mich 1974), and in another case the litigants were required to have "honesty of purpose, and] freedom from intention to defraud" (*Efron V. Kalmanovitz*, 57 Cal. Prp. 248,251 (Ct AppI 1967) as noted in York, *supra* note 35 at 21.

An example where machine mediation would not be as affective as organism mediation,

is the case involving Peter Taborsky. When he was a student at the University of South Florida, he took an \$8.50-an-hour-job where he was assigned to a \$20,000 project contracted by a subsidiary of Florida Progress, a local power company, to determine if bacteria could be used to extract ammonia from clinoptilolite, a clay used in filtering water. The terms of the Florida Progress contract stipulated that Taborsky's findings belonged to the company. Taborsky disagreed and eventually was jailed for "stealing" his own notebooks and ideas and then refusing a judges' orders not to exploit them. Noreen Segres, the school's general counsel epitomizes the notion of "rights" when she said: "It is irrelevant to us who invented [the process]. We own it" 188. The point is that the rights based system did not really take into account the inventor because it was too preoccupied with the concept of property rights; which is ironic when we consider that intellectual property protection in general is designed to protect inventors and creators. The point is that Taborsky was probably less concerned with "rights" - defined in the legal sense - and more concerned with not being exploited and bullied. We must keep in mind that this event led to the break up of his marriage,¹⁸⁹ he chose jail over assigning the patent he had filed on his findings, and he refused an offer of a pardon by Florida Governor, claiming that accepting this would mean admitting he is guilty.¹⁹⁰ The point is that there was definitely a high level of emotion and pride involved which was not dealt with through trial, and which could not have been dealt with through trial. Mandating that Taborsky participate in mediation, where the emphasis would most likely have been on settlement and clearing the court docket, may have led Taborsky to feel patronized, which could have caused more harm. Organism mediation, which of course would have been voluntary, would probably have more effectively dealt with this conflict by focusing on empowerment and recognition; probably the "justice" that Toborsky was seeking.

187 Singer, *supra* note 133 at 222.

188 Leon Jaroff, intellectual Chain Gang: Convicted of Stealing His Own Ideas and Notebooks, an Idealistic Young Scientist Sits in Jail", *Time*, October 28, 1996 at 70.

(ii) Time Can Be Wasted

A more practical problem with mandatory mediation is that it may actually cause delay as opposed to providing a speedy, cost-effective resolution process, which as we saw earlier is important to IP disputes. Litigants may tend to wait until the mediation process is either about to commence or is finished before parties begin serious settlement discussions.¹⁹¹ This strategic waiting may result in longer processing time for such cases than for others that settle without mediation. As a result, mandatory mediation, or arbitration for that matter, may simply become another hurdle to be cleared on the way to litigation, and which may become a formality that wastes both time and resources¹⁹². According to a Pennsylvania

study, defendants nearly always reject the mediation awards and request trial, thereby prolonging ultimate disposition rates¹⁹³ Arguably, mandatory mediation may substitute ordinary settlements rather than decrease the number of trials, and may discourage parties to settle on their own. It may also encourage parties to exaggerate their requests in order to look as though they have compromised when it comes to the mandatory mediation. Some parties may also go through the motions of mediation not to be perceived by the judge as unwilling to settle. And of course related to all of this, mandatory mediation may be even more wasteful if one of the parties enters negotiations with no intention to abide by the mediated settlement, and are therefore just buying time.

Taborsky was sentenced to 3 1/2 years and his wife, exhausted by the legal battles, left him. Taborsky admits: "I decided that the case was more important than our marriage." *ibid.* at 70.

¹⁹⁰ Jaroff, *supra* note 188 at 70.

Katz, *supra* note 164 at 47.

¹⁹² Elleman, *supra* note 76 at 776.

More specifically, there may be situations where mediation is not appropriate for IP disputes at all: where there is bad faith counterfeiting or piracy, where the objective of the parties or of one of them is to obtain a neutral opinion on a question of genuine difference, or to establish a precedent, or to be publicly vindicated on an issue in dispute, or where the goal of a party is to actually impede prompt resolution.¹⁹⁴ If the process is voluntary, there is at least some assurance that the parties will be negotiating in good faith.¹⁹⁵

(iii) Loss Of Personal Choice and Procedural Safeguards Important to IP Disputes

Putting aside the more obvious dangers that mandatory mediation may have on the historically disadvantaged,¹⁹⁶ there are drawbacks that relate more specifically to IP disputes. For some, for example, winning against their "adversaries" is highly valued: it proves they were "right." And therefore settling through mediation may be a sign of weakness¹⁹⁷ Additionally, disputants may not accept the procedural trade-offs that come with an alternative dispute resolution procedure. Discovery must be significantly reduced (or even eliminated) before any ADR's substantial time can be realized. Sacrificing discovery may be asking for too much in many IP disputes. For example, a patent owner usually needs documents and depositions to prove willful infringement, and the accused infringer generally needs testimony and documents from the inventor to show either the defense of "failure to disclose the best mode" or "inequitable conduct."⁹⁸ Also, after the dispute arises parties may be reluctant to enter into an ADR procedure where they cannot cross-examine the opponent's witnesses. The attachment to cross-examination is usually connected to the mistrust of the opponent that prevented resolution of the dispute in the first place. And finally IP disputants may also be reluctant to relinquish the right of an appeal, which is connected to litigation.¹⁹⁹ Therefore, while mediation can be effective in resolving IP disputes, mandating mediation can result in harmful consequences.

The authors of the study found that there was a high rate of plaintiffs' awards, and a very high (25 percent) appeal rate. The reason was that defendants tended to improve their position at trial *de novo*, even when the plaintiff continued to prevail. See D. L. Mettrick, "The Benefits of Research for Management; The Case of Civil Arbitration Programs," (19984), 9 Just. Sys. J. 111-14 as noted in Katz, *supra* note 164 at 47-8.

¹⁹⁴ Fernandez & Spolter, *supra* note 150 at 64.

Sobieraj & Anderson, *supra* note 2 at 552. A study by the Society of Professionals in Dispute Resolution recommends caution in adopting mandatory mediation and recommends that mandatory mediation programs pay greater attention to historically disadvantaged groups. See Society of Professionals in Dispute Resolution, *Mandated Participation and Dispute Resolution as it Relates to the Courts* 1(1991), as noted in Katz, *supra* note 164 at 52-3.

¹⁹⁷ L.E. Susskind, E. F. Babbitt, and P. N. Segal, "When ADR Becomes the Law: A Review of Federal Practice" (1993), 9 *Negotiation Journal* at 59.

¹⁹⁸ Sobieraj & Anderson, *supra* note 2 at 118.

¹⁹⁹ *Ibid.* at 118.

CONCLUSION

The benefit of using metaphors to describe dispute resolution mechanisms is that they help us to visualize and better understand how they operate. The court's adversarial system's clearly defined parts or roles, its inflexibility, its bureaucratization, its hierarchical structure, and its emphasis on rights and outcomes become clearer when we have something like a machine model as a point of reference. Likewise, the organism metaphor gives us a clearer understanding for how mediation can operate in IP disputes. Its adaptability, both internally and externally, plus its emphasis on individual needs become clearer when we compare it to an organism model. Holding up mediation's organizational process to an organism sheds light on what is a growing legal field. We looked at how mediation and its organism design work effectively to address some of the common features of IP disputes. The point of the organism metaphor is that individuals and groups, like biological organisms, operate most effectively only when their needs are satisfied. Mediation helps people to achieve these needs by acting as an open system, which relies on its internal (parties) and external (issues) components -like an organism. So as Senge argued, we need to bring in the gardeners and think like biologists, not as mechanics.

The benefits of implementing mediation into the court system include the prospect that it may help to legitimize mediation and make it a valued tool for resolving disputes and may help to restore the role of our courts as community centres for conflict resolution. However, if people feel coerced into mediation, it may have the opposite effect. Equipped with an understanding of the organizational structures of these two conflict resolution systems, we can more easily see that attempting to breed these two methods results in a mutated mediation system that becomes somewhat more mechanical than it ideally should be. The emphasis here would be on conflict

resolution efficiency as opposed to organism mediation, which would allow parties to dictate their own resolution process.

At the most basic level we must understand which resolution system would be most effective for dealing with different types of disputes. For example, one needs to decide whether to opt for an adjudicative process which would be most effective when a long post-contractual relationship is secondary to "winning" the dispute, or a non-adjudicative ADR process which would be best employed in a situation where maintaining a long-term contractual relationship is very important.²⁰⁰ Ultimately, however, disputants should have some choice and not be mandated to do something against their wishes or be misled into believing that they have chosen an alternative resolution process, which in fact is not what they had envisioned.

²⁰⁰ Sobieraj & Anderson, *supra* note 2 at 125.

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