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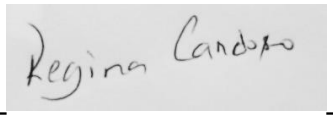
Signature:  **: 29/08/2019**

Notes:

“Mediation in Copyright Disputes in Ireland”

by

REGINA MACHADO ARAUJO CARDOSO

A dissertation presented to the

FACULTY OF LAW
INDEPENDENT COLLEGE DUBLIN

MA in Dispute Resolution

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Declaration

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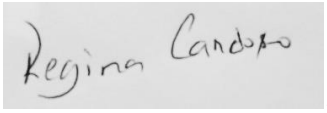
Signature……  ……

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Abstract

Conflicts arising from ownership related to authorship have always been historically numerous, but grow exponentially with the popularization of the internet and the penetration of digital devices, when access and ownership of other people's works have become so easy. On the other hand, alternative forms of out-of-court dispute settlement are found to be a constant in the world as a quick and peaceful guarantee of the integrity of citizens' rights and are increasingly present in Ireland, thus favouring judicial provision, which deals with causes that truly cannot be transacted. This research highlights Mediation as the most appropriate among conflict resolution alternatives because of its principles of Confidentiality, Impartiality, Neutrality, Independence and Autonomy and analyses the possibility of using Mediation as an alternative resolution in Copyright Disputes in Ireland. In this regard, the study presents the scenario in various conditions: when the dispute must be resolved through Mediation and why it is considered an effective method. It also examines the possible limitations that the method may present in certain areas or contexts related to Copyright. The study presents an expensive Interview with one of Ireland's leading experts in the area, and collects her statements with other studies, authors, legislations, articles, surveys and cases. The research is intended for intellectual property rights holders, mediators and copyright lawyers, and others interested in this field, who are invited to consider using Mediation as a winning alternative means of resolving Copyright Disputes.

Keywords: Mediation; Copyright; Copyright Disputes; Alternative Dispute Resolution (ADR).

Resumo

Os conflitos decorrentes da propriedade relacionada à autoria sempre foram historicamente numerosos, mas crescem exponencialmente com a popularização da internet e a penetração de dispositivos digitais, quando o acesso e a apropriação de obras alheias se tornaram tão fáceis. Por outro lado, constata-se que as formas alternativas de resolução de conflitos extrajudiciais são uma constante no mundo, como garantia rápida e pacifica de assegurar a integridade do direito dos cidadãos e, estão cada vez mais presentes na Irlanda, favorecendo assim a prestação jurisdicional, que passa a se ocupar de causas que verdadeiramente não podem ser transacionadas. A presente pesquisa destaca a Mediação como a mais adequada dentre as alternativas de resolução de conflitos por causa de seus princípios de confidencialidade, imparcialidade, neutralidade, independência e autonomia e faz uma análise sobre a possibilidade do uso da Mediação como alternativa de resolução em conflitos de Direito Autoral na Irlanda. A esse respeito, o estudo apresenta o cenário em variadas condições: quando a disputa deve ser resolvida por meio da Mediação e porque ela é considerada um método eficaz. Analisa também as possíveis limitações que o método pode apresentar em determinadas áreas ou contextos relativos a Direito Autoral. O estudo apresenta uma expressiva Entrevista com uma das principais especialistas da Irlanda na área, e faz um cotejo entre as declarações dela com outros estudos, autores, legislações, artigos, pesquisas e casos. A pesquisa é destinada aos titulares de direitos de propriedade intelectual, mediadores e advogados especialistas em Direito Autoral e demais interessados neste segmento, que são convidados a considerar o uso da Mediação como um meio alternativo vencedor de resolver conflitos de Direito Autoral.

Palavras-Chave: Mediação, Direito Autoral; Conflitos de Direito Autoral, Resoluções Alternativas de Conflitos

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Terms and abbreviations

ADR	Alternative Dispute Resolution
CAI	Copyright Association of Ireland
CJEU	Court of Justice of the European Union
CDR	Community Designs Regulation
DBEI	Department of Business, Enterprise and Innovation
DRM	Digital Rights Management
EUIPO	European Union Intellectual Property Office
ICMA	Irish Commercial Mediation Association
MADR	Master in Alternative Dispute Resolution
R&D	Research and Development
TPM	Technological Protection Measures
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Chapter 1

Introduction

This proposal presents the results of research done on books, websites, articles, theses and dissertation banks, online libraries, government websites and academic directories, collated with an interview with one of Ireland's leading experts in the field. The first chapter is the current introduction, which presents the justification of the proposal in which the research problem is inserted, as well as the general and specific objectives. The second describes the methodology defined for the research, the way the data will be presented, analysed and discussed in order to reach a conclusion, as well as the limitations are foreseen for the methodology and for the research in general. The third chapter reviews the literature, starting from the concepts for the reader to be contextualized and then, in synergy with the proposed objectives, organizes the main ideas collected in the literature analysed in comparison with the interview. In this chapter, for a didactic reason, we will analyse, discuss and conclude the study.

The research will present the theoretical studies on the subject and dialogue with the qualitative and quantitative results raised.

1.1 Context

The conflicts arising from ownership related to authorship are numerous, especially with the popularisation and penetration of digital devices-devices derived from mobile telephony, computing, electronics and internet access in recent decades, when access to works and eventually use them as "inspiration", "rereading" or even with their appropriation, copying them in their entirety (Leal & Souza, 2010). People are massively producing and delivering unidirectional content (Santaella, 2003).

The demand is for becoming *productive* but not necessarily *creative*, so the very means used for sharing content, such as social networks, already facilitate the appropriation of works. By connecting to a social network, the user can post something, such as photos, videos, texts, music, etc. In order to insert these files into your post, he will not need to identify the authorship, since at no point in loading the file will this issue arise as a requirement. Similarly, when interacting with other posts, the user can like, comment or share. By sharing it also need not identify the source or authorship.

This practice serves as an example to illustrate routine behaviour in networks. Copying and pasting have become common habits of those who allegedly produce, and this trivialization of appropriation eventually extends to corporate and educational environments. The practice of using without "asking" the author or even identifying the author is so commonplace that it seems correct. Many people really are completely unaware of copyright laws and have committed some slip-ups in their proven lives because of this ignorance. However, when acting as professionals, people are "vested" in the position and represent companies, in this context, if they repeat misappropriation behaviour, they compromise institutions, and "slips" can create many conflicts. As can be seen from the simple example, ignorance or bad faith generate numerous conflicts that were potentiated with the ease caused by technology. As are also common cases in the e-commerce sector, where internet giants are constantly being sued by fashion retailers by traditional companies, such as Hermès or Louis Vuitton, for selling counterfeit products, which damages them of up to one hundred million dollars. As report Ebel "[t] he Internet provides rapid and anonymous access to a worldwide market, making it an effective channel for the distribution of counterfeit goods." (Ebel, 2016). Those involved in these disputes can be dragged into court and spend many years arguing and negotiating until a decision is made. Processes can be long and expensive, and they can destroy relationships and the image of institutions.

In many cases, conflicts can be resolved peacefully if conducted by someone skilled enough to mediate dialogue between the parties. Sometimes copyright conflicts can involve large sums and are very

complex, sometimes they require very simple things to resolve, such as an apology and damages repair. Conflict mediation has become an increasingly debated and stimulated issue in the legal environment, as it facilitates the resolution of litigation, being more agile and less costly than going through an entire judicial conflict, with its various stages and deadlines.

1.2 Aims and Objectives

1.2.1 Research Problem

Due to this context, the desire to research the use of Mediation as a conflict resolution instrument related to authorship, understanding its potential to simplify the discussions within the scope of the conflicts arises. In line with one of the formative axes of this line of research, in an attempt to transcend the thematic field of authorship and its various languages, in a new contemporary locus, there arises, in this sense and direction, the desire to deepen this research channel, starting from the following question:

1) Can Mediation, as an instrument of consensus in a conflictive situation, be used in a discussion of a substance as complex as authorship?

This problem unfolds on more two questions:

1.1) Is there an approach to determine the circumstances in which Mediation would be best suited to resolve copyright-related disputes?

1.2) How can Mediation dialogue with the subjectivity present in certain conflicts related to authorship?

1.2.2 General Objective

The research intends to consider the specific problem raised in this context, with the general objective of analysing the implications of the use of Mediation as an instrument of Resolution of Conflicts in Copyright as an intellectual instrument of representation of thought and life. In order to achieve this general objective, the following specific objectives were established:

1.2.3 Specific Objectives

- To understand the dynamics of Mediation in the resolution of conflicts having a category of analysis, its capacity to produce agreements.
- Investigate what types of copyright conflicts and in what contexts these agreements occur most frequently.
- Analyse to what extent the use of Mediation can be considered more appropriate than the other methods of litigation having an analysis category, the time and cost involved until an agreement is reached.

Research innovation is seen in the choice of the research locus, since the theme will be contextualised and analysed having as focus the Irish legislation.

Chapter 2.

Research Methodology and Methods

CONCEPTUAL REFLECTIONS

2.1 Initial Conceptualization

Methodology comes from the Greek language argo "odos" = walks: "logos-discourse, study. This is a method to study and understand the various methods available for conducting academic research. The Methodology at an applied level examines, describes and evaluates research methods and techniques that enable the collection and processing of information to route and solve problems and / or research questions.

The Methodology is the application of procedures and techniques that must be observed for the construction of knowledge, with the purpose of proving its validity and utility in the various spheres of society. To understand the characteristics of scientific research and its methods, one must first understand what science is.

The term science, etymologically comes from the Latin verb Scire, which means to learn, to know. This etymological definition, however, is not enough to differentiate science from other activities involved in learning and knowledge. According to Trujillo Ferrari (1974), science is a set of rational attitudes and activities, dinged to systematic knowledge with a limited objective, capable of being subjected to verification. Lakatos and Marconi (2007) add that in addition to being a 'systematization of knowledge', science is' a set of logically correlated propositions about the behaviour of certain phenomena that one wishes to study.

2.2 Introduction

This section highlights the main components of the methodology used in this mediation study and a reflection about the possibility of using this conflict resolution alternative in copyrights disputes. The section is intended to illustrate how the research was planned and what its philosophy was and to describe the approach and strategy adopted.

The explanatory points considered in this study were:

1) The Literature Review;

2) A comparison of the points raised in the Interview with the literature, legislation, articles and other sources.

3) Analysis and Considerations

4) The conclusion of the study.

This strategy aims to identify the factors that influence the choice of Measurement as indicated for the resolution of copyrights disputes with an emphasis on the data collected, literature and the considerations pointed out in the interview.

Figure 01 *Case Study and Interview. By the researcher*

For a didactic reason, the methodology is presented first, to clarify and guide the reading of the Literature Review which, in turn, will integrate into a single chapter: A Presentation of Data, Data Analysis / Findings, Discussion and Conclusion. This is because the Interview will be the guiding thread, as illustrated in the figure above, bringing statements that will be analyzed individually through the collation where they will be discussed so that the conclusion can be reached. This way, it is believed that it will be easier for the reader to understand as it will be able to follow the logic and individual contribution of each topic to the final conclusion.

2.3 Research Onion

The phases for the development of the research strategy were defined based on Research Onion. Thus, we first defined the research philosophy that served as a starting point, then came the approaches, strategies, choices, time horizons and procedural techniques that were identified step by step.

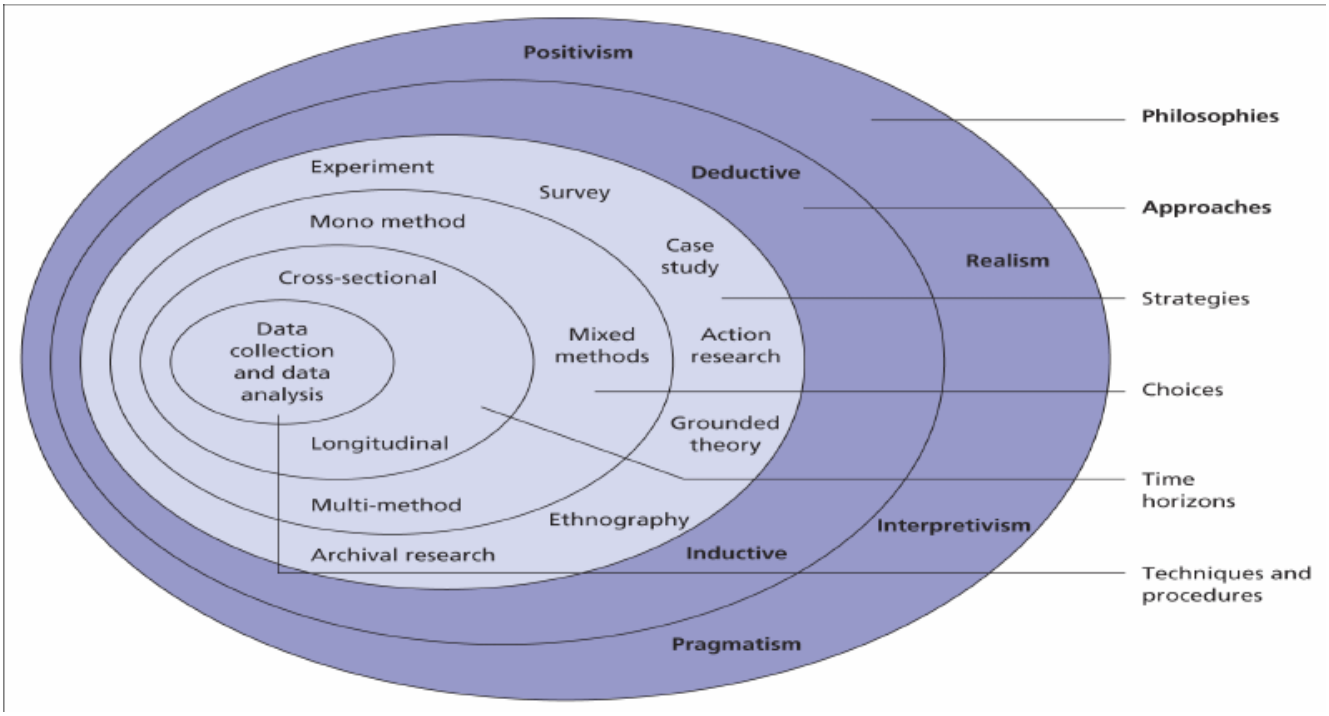


Figure 02 *Research Onion 1. By The Service Management Blogspot*

2.3.1 Research Philosophy

Philosophy considers the purpose of the study and the set of beliefs on which research is based. The onion research defines four main research philosophies. Positivism, in which only the factual information obtained through observation matters. Realism that considers the scientific method imperfect, and sees reality and the researcher as independent and not biased. Pragmatism, which as the name implies, understands that only the concept that supports action matters and that there are several

ways to interpret, so research questions are the most important thing. And finally The Interpretivism, which was the philosophy adopted in this study, as it integrates the human interest in the study and therefore sees researchers as social actors who should value the differences between people and interpret the elements of the study (Sales and Service Management, 2016). The philosophical worldview for research will be also constructivist because it will be based on systems of cultural thought and historically linked (Lamont, 2018).

The research philosophy chosen includes assumptions and Beliefs about the perception of the world of general knowledge and specialized writings. Saunders et al. (2012) explain the importance of this overview and believe that it is absolutely applicable in situations in which the understanding of the world occurs from the perspective of various people.

Thus, the *interpretative* philosophy is exemplified through all the quantitative data raised, as well as the considerations of the qualitative interview conducted. Other studies on the theme addressed were based on the philosophy of positivism, in which the researcher deduces and simplifies the data collected. The perception of subjectivity was also considered, following the interpretative approach in qualitative research that explores the subjective meanings and the background of the interviewee who contributed to the researcher's understanding. Subjectivity is inevitable in data analysis and interpretation, as well as in finding out results. That is because the conclusion may be subjective and reflect this unavoidable personal bias.

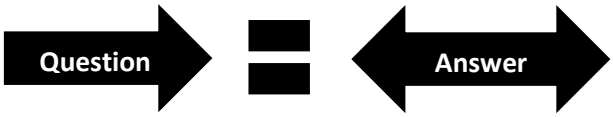
2.3.2 Research Approach

According to Saunders et al. (2012), there are two types of research approaches.

1) The first is Deductive, a rational study based on previously existing theories. The deductive method is related to research and comprises theory development through the use of data that test this theory (qualitative method).

2) The second is the Inductive method, in which the researcher will build the theory through qualitative data, focusing on details to find the result behind the phenomena. This method is observing first, then changes to the research process.

It is understood that this study can be classified as mixed, deductive and inductive. Deductive because it starts with a question and proposes to answer it:



Question: Is Mediation a conflict resolution alternative suitable for copyrights disputes?

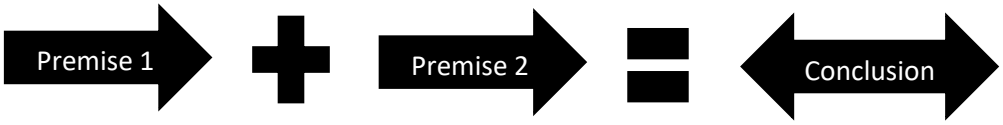
That is, the deductive approach is based on the fact that the constructed hypothesis is based on a pre-existing theory. This study is based on the literature review aiming to bring the views of various authors on the subject. These points of view allow us to understand the theme and its contradictions, so well analyzed by the interviewed judge.

However, the method used will also be the Inductive, since it will start from the specific use of the general and the experience to make inferences and analyzes. The research will start on the premises:

Premise 1 (**P1**): Mediation is confidential, usually preserves relationships and is a particularly quick and cost-effective alternative to litigation.

Premise 2 (**P2**) Confidentiality, speed and the preservation of relationships are fundamental in copyrights disputes.

The proof or denial of these premises, will support Conclusion (C) that is the answer to the problem of the present research. So:



Conclusion (**C**) = Mediation is or is not a suitable conflict resolution alternative as a consensus instrument in copyright disputes.

Qualitative research is related to the inductive approach. The Inductive method is based on the role of the premises that support the conclusion. However, the truth of the conclusion cannot be guaranteed, since it is a kind of reasoning that does not make use of universal laws, such as the laws of mathematics or logic. As Marques (2019) explains, the inductive reasoning is based on the premises to reach a conclusion greater than these premises, in which the facts are explained from the simple observations.

The overall conclusion will follow the Bell (2010) model and will be based on the observations made in the research development

> *Although following the sequential order of the Research Onion layers is a didactic matter, the presentation of Research Choices will be held before Research Strategy.*

2.3.3 Research Choices

This dissertation adopts the *mixed method*, using a qualitative methodology and a quantitative methodology. Will be Qualitative because the theme focuses on human beings and their subjectivity, but

is also Quantitative because will bring data numbers of the surveys presented beyond the interview conducted.

2.3.3.1 Methodological Choices

Once exposed, what is conceptually understood by methodology, science and method, it will be the moment to describe and justify the methodological choices adopted in the present research.

Quantitative research relies on the collection and interpretation of generally comprehensive data. Qualitative Research, on the contrary, is based on the collection of information. Considering the observation of Blaxter at all (2010), who reminds us that "data are not always facts". It was decided to carry out a mixed research, which will focus on the analysis of "secondary" documents that will be analyzed prioritizing depth and not quantity. An interview will be held, configuring a mixed character to the research that will be qualitatively qualitative with quantitative elements. Although, based on Blaxter at all (2010) the classification between qualitative and quantitative is considered rather simple, since data not collected directly in the field, can be interpreted giving priority to the character and the numerical amplitude. As well as, numerical extracts and surveys can be interpreted with subjectivity.

The qualitative research stands out among the various possibilities of studying the phenomena that involve human beings and their intricate social relations, established in diverse environments. For this reason, it is understood as natural to use it in a context of authorship conflict. Blaxter, et al (2010) determines that some basic characteristics identify the so-called qualitative studies. According to this view, it is considered that a phenomenon will be understood more deeply when analyzed in its context, that is, where it occurs and of which it is part, for this, it must be analyzed in an integrated perspective. Therefore, when the researcher performs its collection, it will seek to capture the phenomenon studied

from the perspective of the people involved and should consider all relevant points of view and data. The qualitative study can be carried out in different ways, in which the following stand out: case study, ethnography and documentary research.

2.3.4 Research Strategy

Second Sales and Service Management (2016) search strategies should involve a future plan outlining the steps to achieve the search goal. The strategies can be:

Experimental: when conducting an experiment and examining its results.

***Research*:** When selecting a population sample, considering its size, to apply a questionnaire for data collection and analysis of results. This will also be done in the present work, albeit indirectly, as results of two questionnaires conducted by World Intellectual Property Organization (WIPO) and Irish Commercial Mediation Association (ICMA) will be presented.

Case Study: When analyzing or object or event to get the study result. The case study is characterized (Blaxter, et al., 2010) as a type of research whose object is a unit that is deeply analyzed. It aims at the detailed examination of an environment, a simple subject or a particular situation to obtain a detailed picture of the events, experiences, relationships, situations or processes that are being analyzed. The case study is characterized as a type of research whose object is a unit that is analyzed deeply, its approach then, is exactly the opposite of a mass study, because, the objective is to illuminate the general looking at the particular. This will be the strategy adopted because the present study considers that the use of mediation in copyright conflicts should be restricted to particular themes or contexts and therefore cannot be applied broadly and generally. The strategy was illustrated and explained in more detail above.

Action Research: When diagnosing a problem to implement the appropriate actions to solve it.

Grounded Theory: a qualitative theory that departs from the inductive approach to defining study standards based on data.

Ethnography: It happens by observing a group of people to understand their culture. This study is generally associated with anthropology since the term literally means to describe peoples or cultures and its origin is associated with the study of tribes and primitive populations. Today, ethnography is also used in the study of social issues in several areas of knowledge, such as education, business administration and social psychology. However, the ethnographic study avoids the definition of hypotheses and premises and does not apply to the present research.

***Archival Research or Documentary Research*:** consists of the examination of materials that have not yet received an analytical treatment or that can be reexamined with a view to a new or complementary interpretation. It can provide a useful basis for other types of qualitative studies and enable the researcher's creativity to drive research through differentiated approaches. This type of research allows the study of people to whom we do not have physical access (distant or dead). Besides, documents are a non-reactive source and especially conducive to the study of long periods. The present work will adopt documentary research, from the perspective of Blaxter, et al. (2010), which believes that documentary research represents a form that can take on an innovative character, bringing important contributions in the study of some subjects. Also, documents are normally considered important sources of data for other types of qualitative studies, deserving special attention.

The main advantages of using documentary research highlighted by Denscombe (2010) are:

1) Access to data, since a vast amount of information, can be found in documents that can generally be accessed easily.

2) They are economically viable, since data can be obtained on a large scale.

3) The permanence of data. The data is generally permanent and can be verified by third parties.

According to Denscombe (2010), the analysis of qualitative data tends to take several forms, and these usually reflect the particularity of the data being used and the purpose of using them. For this reason, there is hardly a single approach to qualitative data. However, for him, some principles must permeate the conduct of qualitative research, they are:

Iterative: when the analysis is not limited to a single event that occurs at a specific time. In this case, the analysis takes place in a continuous process in which data collection and analysis occur simultaneously.

Inductive: when the analysis starts from the particular to the general. From the detailed study of the data found, we come to other abstract and generic statements.

Centered on the researcher: the researcher has total influence on the results and conclusions since their values and experiences will guide their interpretation.

The Research Strategy is intended to answer the research objectives. The strategy research is based on a primary qualitative individual interview and on the analysis of a secondary quantitative questionnaires, since they was applied by the WIPO and the ICMA, whose data belong to objectivism, positivism and longitudinal time period. The surveys was used because they are important structured data collection in which varied experiences fit into programmed reaction categories and ensured that the process was simplified by providing data from large numbers of members. The research strategy, as stated, is linked to deductive and inductive research. This creates results that are easy to summarize, associate and simplify, and also contains information on various demographic aspects (eg gender, age, educational attainment, and so on ...). The qualitative approach often offers more flexibility and openness to the research question. The qualitative method, on the other hand, plays a significant role in conducting the assessment, the intention of the interview was to have an overview of copyright conflicts from the

point of view of a highly skilled professional with extensive experience in the Irish and European court, whose account provided valuable insights to understand the processes behind the observed results.

The table below lists the research objectives according to the strategies:

RESEARCH AIMS	**RESEARCH STRATEGIES**
Provide a review of literature	Qualitative
Analyze survey results	Quantitative
Conduct interview with an Irish judge who served as a Judge of the Supreme Court, a Judge of the High Court and a Judge of the European Court of Justice	Qualitative
Analyze interview statements in light of other data and information.	Qualitative

Table 01: *Research aims and research strategies connection. Source: by researcher*

2.3.5 Time Horizons

According to Sales and Service Management (2016), Time Horizon is the time frame required for the project to be completed. The entire thesis process was limited to ten weeks, which allowed the dissertation to be realized from June 22, 2019 to August 2019. The full allocation time for each party is listed (in the table below).

The Transversal time horizon establishes the specific point of data collection. The longitudinal time horizon, in turn, determines the data collection performed repeatedly and continuously (Sales and Service Management, 2016).

The cross-sectional cut was used in this study with the interview that took place on a specific date. The longitudinal time horizon occurred with the collection of all other data and secondary information.

Task	**Start**	**Finish**
Searching for Secondary data	17/06/2019	25/08/2019
Writing Literature Review	09/07/2019	25/08/2019
Writing Methodology	09/07/2019	14/08/2019
Completing Interview Design	25/07/2019	27/07/2019
Conducting the Interview	29/07/2019	29/07/2019
Transcribing the Interview	08/08/2019	18/08/2019
Completing alterations from supervisor's feedback	22/08/2019	27/08/2019
Completing the Revision	28/08/2019	28/08/2019
Concluding and submitting the dissertation	29/08/2019	31/08/2019

Table 02: Time collection. Source: by researcher

2.3.6 Techniques and Procedures

The process used in data collection and analysis depends on the approach and strategy adopted and will influence the reliability and validity of the research.

The data collected are classified as primary and secondary (Sales and Service Management, 2016). The primaries are those achieved directly, firsthand; in this study, these are the data collected in the interview. Secondary data are obtained from other research and are present in this dissertation through the surveys used and also from the literature review with relevant bibliographies on the subject, such as scientific articles, books, monographs, theses, specialized magazines, newspapers, websites, periodicals and legislation in Ireland in the last five years that guided the study and the search for similarities and differences of the different researchers analyzed.

For the survey of the articles in the literature, a search was carried out in the following databases: MyAthens, Academia, Scielo, Scopus, Web of Science and Google Scholar. The following descriptors and combinations were used in the English language: "Copyright and Mediation", "Mediating disputes and copyright" and "Mediation and Entertainment Industry". The inclusion criteria defined for the selection of articles were: articles published in English, Portuguese and French; full articles that portray the theme published and indexed in the referred databases in the last fifteen years. The scope was largely due to the low result obtained in smaller cuts.

The analysis of the selected studies, concerning the research design, was based on Anway, Bardach, Blaxter, Bell and Denscombe. The analysis and the synthesis of data extracted from the articles were performed descriptively, to gather the knowledge produced on the theme explored in the review stage.

The 60-minute interview was conducted face-to-face because it allows the researcher to rapport with the interviewee and consequently gain their collaboration. Although the researcher previously defined a list of questions relevant to the study, which was sent and previously approved by the interviewee via email, at the time of the personal meeting the open questions that were originally eight ended up being answered in three topics that encompassed the entire study expected content. The raw data of the interview were transcribed to the computer. Then the content was structured around key themes so that they could be explored throughout the study, both in the interpretation of basic research data, such as the questionnaire, as well as in the foundation of conclusions presented by the researcher.

2.3.7 Ethical Concerns

Ethical issues are very critical in research and in this study were observed with the rigor required for research focused on humans. Gbadamosi (2012) asserts that being ethical is fundamental when studying other people. The researcher ensured the interviewee's consent to record her statement and also to reveal her name. As well as, the objective regarding their participation in the project was previously explained so that the interviewee could collaborate voluntarily.

The research will be conducted following best practices and submitted to the ethics committee and the regulatory bodies for: Maintain ethical standards of practice in research; Protect human subjects of research from harm; Ensure that the practice of fully informed consent is observed; Preserve the subjects' rights; Provide reassurance to the public and outside bodies that all the above are being done.

The interview was prepared in accordance with the following Ethical Codes and Research Standards (HHS.gov, 2016): Ethical Codes; Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research; Declaration of Helsinki; Nuremberg Code – PDF; Research

Standards; 45 Code of Federal Regulations 46; 21 CFR 50 (Protection of Human Subjects) and 21 CFR 56 (Institutional Review Boards).

2.3.8 Limitations of the Methodology

Some limitations must be considered since the author of the research is foreign and does not have easy access to the institutions. It may be seen as a weakness that only one interview was conducted. However, the interviewee was the person who had the most experience in copyright conflicts, faced both in court by ADR, so the researcher believes that her speech was too relevant to be discarded and leaves for future research to conduct a larger sample. The time to do the dissertation, it was also a problem. It is very difficult to develop a master's level thesis in such a shortly. Another limitation was the language barrier that is likely to be a challenge, especially in the interview.

2.3.9 Research Limitations

It was intended to do this in this paper, to apply the questionnaire in Ireland. The researcher contacted The Mediators' Institute of Ireland (MII) through Office Manager Alison Martin, but she said that during this period it would be impossible as MII members would be on holiday until the end of September. The same information was obtained from the Irish Commercial Association (ICMA) by Mr Aidan Kirrane.

This study will describe relations between theoretical constructs from a sample of literature, therefore, it is not possible to extend the results obtained beyond Ireland.

Chapter 3

Literature Review

As stated earlier in Methodology, for a didactic reason, the Literature Review, the Presentation of Data, Data Analysis / Findings, Discussion and Conclusion will be presented in a single chapter. The interview will be the guiding thread, through which will be presented the three primordial Statements that will then be compared with the literature, articles, legislation, resulting from questionnaires applied by renowned institutions in the area, etc. This discussion then, in turn, will lead to the Conclusion.

The desire to conduct the research arose when the first contacts with the Institutions were made. The initial idea was to apply the WIPO questionnaire in Ireland with the support of the Mediation Associations. Nevertheless, fate did not want it to be so. Members were on vacation due to return in October. Then came the possibility of interviewing The Hon. John D. Cooke SC, appointed by the manager of one of the Institutions, as a key person for the subject matter of the research. He was very kind, very receptive and with complete lack of vanity stated that despite his experience as a Mediator, he believed that the appropriate person to talk about the relevance of the research would be Honourable Judge Fidelma Macken a former judge of both the EU Court and the Irish Supreme Court. He brokered the contact, and that was how the dissertation was awarded the richest and most experienced testimonial that could be obtained.

The Hon. Fidelma Macken is not an ordinary woman. She is a retired judge of the Irish Supreme Court and also a former judge of the European Court of Justice. She was invited to the Irish Bar in 1973, and to the Bar of England and Wales in 1987. From 1973 to 1979, she served as a legal advisor to a trademark and patent law firm. She started practising at the Irish Bar in 1979 and took silk in 1995. She specializes in Public and Administrative Law, European Law, Irish Constitutional Law, Company Law

and Intellectual Property. She was then appointed a judge of the Irish Supreme Court in 1998. In 1999 she was the first woman to be appointed to the European Court of Justice. After, in 2004, she returned to the High Court of Ireland and, in 2005, was appointed to the Irish Supreme Court, where she retired in 2012 (Brick Court Chambers, n.d.).

She has participated or chaired many seminal cases involving multiple legal issues at European and national level, including the areas of free movement, environment (water, waste, special conservation areas), telecommunications, privacy and data protection, regulatory control, the European Arrest Warrant, intellectual property and a wide variety of constitutional and EU Treaty issues.

Below are three specific points of view of Judge Macken in separated cases that will be the guiding thread of the discussion.[1]

[1] The complete transcript of the interview can be found in the appendices of this research.

What is the role of Mediation as a conflict resolution alternative?

Can Mediation be considered more appropriate than others methods of Litigation having considered the natures of the dispute and cost involved until resolution?

Do you consider Mediation an alternative dispute resolution suitable for copyrights disputes?

Figure 03: *Statements. Source: by researcher*

3.1 Statement 1

Figure 04: *Statements 1. Source: by researcher*

3.1.1 Definition of Terms

The analysis of the question will begin with a definition of terms to facilitate the understanding and contextualization of the research focus.

3.1.1.1 Dispute Resolution

Alternative Dispute Resolution (ADR) it is considered as methods of conflict resolution, as any type of procedure leading to a final agreement. Negotiation is the most common of them, however, this study will address alternatives involving a neutral third party conducting the process until an agreement is reached. In this case, it can be said that there are three basic types of Dispute Resolution: Mediation, Arbitration, and Litigation.

3.1.1.2 Litigation

Is best known among conflict resolution methods, used in settling disputes that usually involve a defendant and an author who will meet in court before a judge and eventually also a jury. In this type,

the lawyers to support the decision that will be taken by the judge and the jury present the evidence; the information is usually public. In arbitration, a neutral third party will act as a judge and decide the dispute after hearing the different sides; your decision will be binding; there is some flexibility as the parties can negotiate some aspects such as the presence of lawyers; decisions cannot be appealed (Harvard Law School, 2018).

3.1.1.3 Arbitration

Arbitration is a private form of Dispute Adjudication, in which an independent and neutral third person chosen by the litigants to become a party to the proceedings makes a judicial determination of a dispute. In a legal definition, Arbitration is a procedure to determine the legal rights and obligations of the parties judicially, with binding effect, which is enforceable in law, thus reflecting in private proceedings the role of a civil court of law.['O'Callaghan v Coral Racing Ltd, unreported, Court of Appeal, November 26, 1998, apud (Dowling - Hussey & Dunne, 2014, p. 2)]. The Arbitration Act of 2010 governs arbitration in Ireland. Arbitration requires an agreement of the parties to be adopted.

3.1.1.4 Mediation

According Sampaio & Neto (2017) Mediation is a peaceful conflict resolution process in which a third person, impartial and independent, with the necessary training, facilitates dialogue between the parties to understand the conflict better and seek to achieve creative and possible solutions. The process is informal, and the parties can talk about their feelings on a confidential basis. The mediator will work with the parties together or individually to help them find a sustainable, non-binding voluntary solution (Harvard Law School, 2018). As this is a collaborative process, Mediation offers the parties the

possibility of settling disputes by agreement rather than facing a process of contradictory litigation that will culminate in a trial. If, with the help of a Neutral Mediator, the parties reach an agreement, they can be registered to become legally binding. But if, at worst, this agreement is not possible, the parties can always appear before the court, because the Mediation does not nullify this right.

Mediation Law in Ireland
Acts of the Oireachtas (EU Mediation Regulations)
Mediation Bill 2017
Statutory Instruments
SI 13 of 2018 Rules Of The Superior Court (Mediation) 2018
SI 12 of 2018 Circuit Court Rules (Family Law Mediation) 2018
SI 11 of 2018 Circuit Court Rules (Mediation) 2018
SI 09 of 2018 District Court (Mediation) Rules 2018
No. 209 of 2011 – European Communities Mediation Regulations 2011
Law Reform Reports
LRC/98/2010 – Alternative Dispute Resolution: Mediation and Conciliation
Proposed Legislation
First Stage – Mediation Bill 2017
Draft General Scheme of Mediation Bill 2012
Draft Mediation and Conciliation Bill – 2010

Table 03 *Mediation Law in Ireland (Anon., 2018, p. By Mediate Ireland)*.

The European Communities Mediation Regulations SI No. 209 of 2011 and The European Communities Mediation Regulation 2011, in law, were signed by the Minister of Justice and Equality Alan Shatter on 5 May 2011 and entered into force on 18 of the same month, giving full effect to Directive 2008/52 / EC (JOL136 of 24.5.2008, p.3) of the 2008 European Parliament and Council which deals with some aspects of Mediation as civil and commercial matters. These regulations follow the 2010 Supreme Courts (Mediation and Conciliation) Rule SI No. 502 of 2010 and highlight the Irish government's willingness to make Mediation an integral part of its legal system (Mediate Ireland, s.d.).

The Mediation Act 2017 was signed by Justice and Equality Minister Charles Flanagan and entered into force on January 1 th, 2018. The Act strengthened the above provisions recognizing Mediation in the Superior and Commercial Courts in Ireland. The law requires litigants to consider Mediation and imposes penalties for costs when its absence is unjustified. The purpose of the Act 2017 is to recognize the potential of this alternative to achieve better results for the parties and to make greater use of Mediation as a Dispute Resolution Method and thereby reduce the existing pressure on the court system.

According to Judge Macken (2019), as the former patron from the Irish Commercial Mediation Association (ICMA), the idea of the Association was to promote Mediation and Mediators, with the possibility of resolving disputes extended to as many areas as possible through mediation rather than automatically go to court. The main idea was to promote mediation in cases of medical malpractice, because it is very expensive for the parties to go to court in these cases, and they are usually very long cases. She states that most people involved in negligence cases are not interested in the judicial environment. What they really want is for the wrongdoer to apologize, to explain how a mistake was made. After that, they may even ask for some compensation, but this is the last of their thoughts. That is why she considers, it is an area that she finds particularly useful for Mediation.

Among the main determinations of the Mediation Act 2017 (Irish Statute Book, 2017), the following stand out:

- Solicitors are required to advise the parties to consider Mediation in conflict resolution, informing them of the advantages and benefits of Mediation. This advice should be formalized through a statutory statement to be provided to the Court. The litigation will be postponed by the Court until this statement is provided.
- The Ombudsman should assist the parties in a neutral manner, the parties must present the proposals for agreement. If it is not reached, the Mediator shall submit a report to the Court confirming the Mediation without agreement, but without reporting what happened during the Mediation.
- Whatever happens during the Mediation, communications, records, notes, will be protected by Confidentiality and will not be disclosed to the public or in any proceedings before the Court. Some exceptions are foreseen to impose certain Mediation remedies, to prevent physical or psychological harm to any vulnerable party or to prevent the commission or concealment of a crime.
- The Act also requires a formal agreement to be signed for Mediation to take place. It should contain information on when, how and where the Mediation will take place, including cost, confidentiality, etc. clauses. This agreement temporarily suspends the legal time limits for the Mediation to take place.

The existence of legislation as a Mediation Act 2017 that encourages the use of Mediation and sets criteria for its happening is important, especially as the judge emphasizes that for Mediation to be

effective, good Mediation is necessary rather than bad Mediation. Good Mediation can be a special opportunity for the parties and can work very well. Mediation is good when it facilitates the parties themselves to enter into a rich agreement.

The neutrality that she mentions, and which is set out in the Mediation Act 2017, is one of Mediation's main advantages: the ability of the parties themselves to decide what is the best solution for them and not simply to accept the decision of an arbitrator or judge. After all, this is the main reason Mediation is considered a great alternative method of conflict resolution and an option for the traditional justice system. The method is not new; on the contrary, it goes back to ancient times but has been updated to the current reality. It arises as to the result of a liberal tendency of countries frustrated with state judicial formalism in the face of conflicts in the areas of the effective, commercial or professional interrelationship between individuals or legal entities. This liberal tendency is associated with the distancing of the state from the subjects of private interests by the recognition of the fullness of this citizen and of his ability to manage his own conflicts (Sampaio & Neto, 2017).

LITIGATION	ARBITRATION	MEDIATION
Strict application of legal principles	Flexible application of legal principles	Less emphasis on legal principles
Technical expertise must be introduced through expert witnesses	Arbitration may be expert in field	Mediator may be expert in field
Outcome binding and enforceable	Outcome binding and enforceable	Settlement agreement enforceable as contract only
Limited range of outcomes	Limited range of outcomes	Creative Solutions Possible
Outcome transparent	Outcome not transparent unless reasons provided	Parties alone determine outcome
Outcome public	Outcome Public	Outcome private
Appeal	No appeal	No need for appeal
Polarising emphasis on differences	Polarising emphasis on differences	Brings parties together – emphasis on common goals

Table 04. Comparative Summary. By Law Society of Ireland (2018). Adapted by the researcher

3.2 Statement 2

Figure 05*. Statement 2. By the Researcher.*

3.2.1 Definition of Terms

To analyse this question, it is essential before to contextualize the reader about Intellectual Property and its specific branch Copyright, as well as what may be considered an infringement of this right.

3.2.1.1 Authorship

Reflecting on Mediation in copyright requires thinking of authorship in the Information Society, which is mediated by digital and telematics technologies and also requires thinking about the management of copyright processes in the context of a free culture that coexists with the exclusive right guaranteed by law. To begin these reflections, it is important to try to recover, in the light of philosophical discourse, the historical processes of expression and protection of this expression in the evolution of man, the perception of culture, the political, economic and cultural connotations that permeate and personify his expressions.

3.2.1.2 Intellectual Property

According to Barringer and Ireland (2016) "[i] intellectual property is any product of human intellect that is intangible but has value in the marketplace." An intangible good is something that comes from the human imagination; therefore, it is something incorporeal, not seen and not touched, as well as inventiveness, but which exists and has commercial value, such as inventions of products (patents); artistic and literary creations (copyright); designs (industrial); symbols, brand-names, or logos and trademarks. Often the intangible good of a company is worth more than its physical assets, such as the Coca Cola brand, which is worth much more than the company's physical assets.

Because of this "value", it was necessary to create a management system to recognise and reward the inventiveness of the creator, without however preventing society from benefiting from his creation. The inventor must be encouraged to create, and it is fair that he be monetarily rewarded for his works, and that his creative activity should be his source of sustenance. On the other hand, sometimes free access to the product is fundamental to cultural and scientific development, and often this access, as in the case of medicinal substance, can mean the survival of human beings.

The management of the intellectual property is one of the most significant challenges of contemporary society; after all, even the notion of ownership of intangible goods in the face of globalisation needs to be redefined. The protection of copyrights, trademarks, patents, and cultivars coexists with access to information, free open source software, free culture and, in general, new forms of organisation and production of knowledge (Leal & Souza, 2010).

Rights management is an arduous and complicated task because it involves diverse, often conflicting, intricate interests that permeate the most important and varied fields of life. The concept of intellectual property requires knowledge; tangible, intangible, genetic and cultural heritage; the culture itself; traditions; the rights; limitations on rights; individual interests and collective interests. The

"individual interest", is related to the incentive for new research that generates discoveries, innovations, new products, new solutions, new technologies, and new amenities. With the incentive, it is possible to recognise and compensate for the discovery of new cures, the production of new medicines and even of future commodities, in this way, this "individual" benefits many. However, this "individual interest" ensures privileges that, although temporary, are exclusive and conflict with the right to access to information, universal access to health, the digitised world, in which the creative and knowledge production process can be given collectively; world in which to share is to divide, but also is to add; in which converging and participating are the tonic of the creative culture.

Faced with such conflict, ideologies and interests oppose and impose themselves with the weapons that are at hand to legitimise or criminalise. Conflicts occur in personal, corporate, and creative spheres. The merit may involve large contracts, large sums of money or just the need for recognition of authorship. Understanding the subjectivity of the creation process and the impact that the technologies have on it is crucial to the resolution of its consequent conflicts.

A legal regime able to manage such complexity is as challenging as it is pressing since the dilemma affects everyone, even those who ignore, banalise or repudiate the theme intellectual property, because it is a subject permeates one's life, from waking to sleep, from born when it ceases to exist. It is present, as it reminds us Leal and Souza (2010) in simple attitudes, such as choosing a song, buying utensils, choosing a particular brand, sharing information, using an image, divulging a text, consuming a new technology. Finally, in each of these simple tasks and everyday choices, there will be those who will benefit and those who will be harmed (Leal & Souza, 2010).

The Copyright and Other Intellectual Property Law Provisions Act 2019 was signed into law by President Higgins on 26 June 2019.

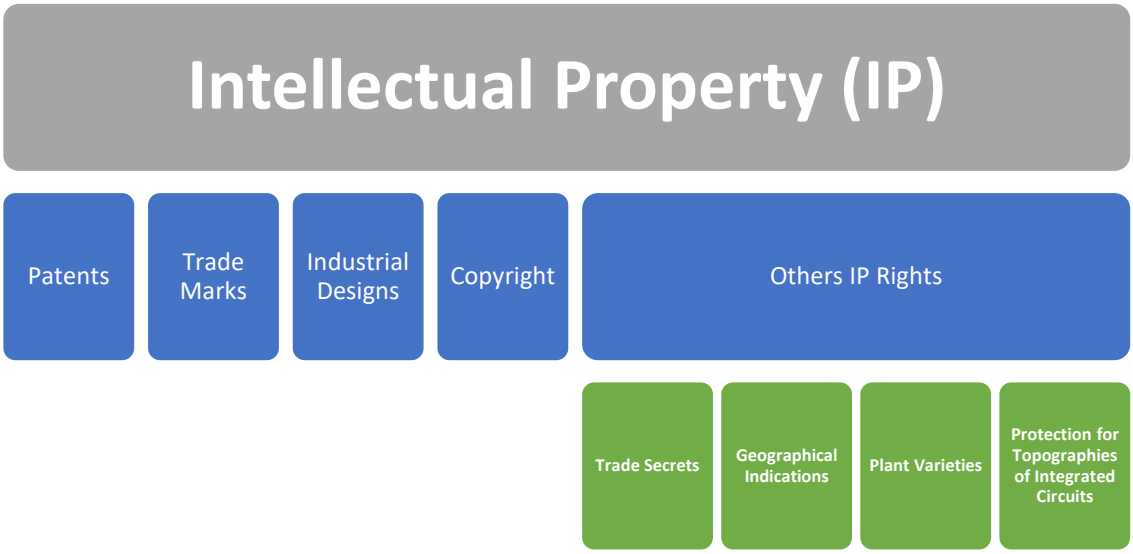


Figure 06.*Intellectual Property Rights. By DBEI 1*

In the flowchart above we can see the representation of the System of Intellectual Property in force in Ireland according to the Department of Business, Enterprise and Innovation (DBEI), in which are noted the formal rights: patents, trademarks and industrial designs, so named because they can be registered. The copyright, encompasses the productions of the mind expressed in creative works, such as movies, music, books and also software. Eventually, other creations such as computers, cars and medicines are also inserted in this category; however, this detailing is not relevant for the present study. Other informal rights are also protected: Geographical Indications of Origin, Vegetable Varieties, Topographies of Integrated Circuits and Trade Secrets.

3.2.1.3 Copyright

A period of enormous technological progress and great social transformations, the fifteenth century marked the emergence of the modern age, the new era, in which the creation of independent

universities of the church took place, fomenting the demand for books and, consequently, for the work of the scribes. Neil Postman (apud (Souza, 2013, p. 18) said that in 1480, before the explosion of post-Gutenberg information, there were 34 schools throughout England and by 1660, the number was 444. All this growth would have occurred, to be able to handle so much information. This is because, with the invention of the graphic printing by Gutemberg at the beginning of this century, it became possible to reproduce on a large scale what was done by hand. With this possibility, there was a cultural outbreak that originated the Renaissance and the cultural industry (Souza, 2013). In the face of this new context, a repressed demand of a religious character was initially met: many bibles and "indulgences" were printed, books and, with them, a potential market was discovered. However, to supply this market, it was necessary to invest, and this also consisted of a certain risk, since nothing guaranteed the acquisition of printed books. That is was how appeared the publisher and, the rights of the Editor (Gandelman, 2001, p. 38) In Barbosa's view (Barbosa, 2013, p. 3) however, the intention of the legislation was primarily to protect the authors from the excessive economic and technical power of graphic entrepreneurs.

It so happens that the writer had no idea how many of his books were made. Therefore, to protect the writer's rights, the state came on the scene and created an author protection law. Historically, copyright dates back to eighteenth-century England, specifically to the year 1710, with the statute of Queen Anne. The statute gave rise to the English view of copyright protection, which granted, for the first time to authors of literary works, the privilege reproduction of his works for a certain period of time. This vision was called copyright, that is, copy right, later also accepted in North America, ruling in those laws until today (Ascensão, 1997, p. 4).

In the United States, as Souza relates (2006, p. 145), the matter was first treated in state laws, such as that of "Massachusetts that regulated the matter in 1783, including protection in the Constitution of 1787 and later in federal law through the Copyright Act of 1790. Meanwhile, in the eighteenth century,

in France, in the context of the French Revolution, a system differed from the English system of copyright. This new system centered the protection also on creative activity, on the protection of the author in his individuality, and not only on material reproduction, which is only one of many ways of using a work. This led to the need for the creation of international legislation, which (Ascensão, 1997) gave rise to the Berne Convention in 1886, a standard instrument that currently governs copyright, which is administered by the WIPO-World Intellectual Protection Organization, and with full force in the great majority of the countries that are part of the WTO - World Trade Organization, including Ireland.

Material or economic rights

The copyright holder has the right to prevent the use and exploitation of his property. His permission is required for others: to copy his work; publicly expose the work (this includes posting it on the internet); distributing it the work; rent or lend; translate or adapt the work. For this to happen, the copyright holder must authorize and may charge a fee or royalties in the case of reproductions (Copyright Association of Ireland, n.d.).

Moral Rights

Moral rights are common, as stated above, in systems derived from French, but were unknown to Irish law until introduced by directives aimed at harmonizing copyright laws throughout the European Union. Moral rights are tied to the creator and may not be sold or transferred, they are: the paternity right of the work (the right to be recognized and identified as the author); the right to integrity (the right to prevent any change that you deem derogatory, such as a distortion or mutilation of your work) And finally, the false attribution right (which happens when a job is falsely attributed to someone). According to the Copyright Association of Ireland - CAI (n.d.), moral rights, in Ireland, may be waived, but this waiver must be formalized in writing. Chapter 7 of the Copyright and Related Rights Act, 2000 (No. 28 of 2000) deals in greater detail with moral rights applicable in Ireland.

Copyright law does not protect ideas as long as they are in one's mind, protection happens when these ideas are expressed, in which case what is protected is the form of expression of these ideas and not the ideas themselves (Gorry, 2013).

Copyright has some exceptions regarding the use. They are associated with the relationship between need versus exclusivity. In other words, use is legally permitted in some situations where such use is necessary and justifiable. Such as:

Insubstantial Copy: If the extension of the copy is insignificant, it is allowed. The problem is that the definition of "insubstantial" is very subjective and varies according to work, for example, copying a short excerpt from a short poem may be substantial, copying an excerpt from a multi-chapter book may not be. But it is not always the size of the copy that determines whether it is substantial, this may be related to how significant that copied piece may be in relation to the entire work, for music, for example, a short sequence of notes already can characterize an abuse.

Fair Negotiation: A work may be used without permission when necessary in research or study, in conducting a review or review, or in reporting events, provided that such use does not cause harm to the copyright holder and identifies the author and title of the work.

Educational use: For the same reason as above, the use of excerpts of the work for educational purposes will be allowed for exams and school anthologies.

Libraries and Archives: Because of their purpose, public libraries, archives, and some educational establishments may copy and lend works provided they meet certain conditions.

Attribution and Licensing Rights: Copyright owners may negotiate these rights through licensing or attribution. Licensing is permission for someone else to use the work, while attribution is the transfer of ownership of the rights. This may happen in whole or in part, for example, the author may authorize

his book to be translated, but not authorize its exploitation by the film industry. This is also related to "support", for example, the photographer may authorize the use of his photo to illustrate a book, but not to print a t-shirt. That is, the authorization is restrictive, and the utilization must always be backed by a specific authorization for that purpose.

In the Irish system, copyright generally extends up to seventy years after the creator's death. However, the duration of this protection is related to the job format.

Copyright protection expires 70 years:

- After the death of the author of literary, dramatic, musical and artistic works; of the death of the director, screenwriter and author of the film's soundtrack.
- After computer-generated jobs are publicly available for the first time

Protection expires after 50 years:

- Making a sound recording available to the public.
- From the broadcast of first broadcast of a broadcasts
- After the typographic arrangement of a published edition

Further details on copyright duration in Ireland can be found in Chapter 3 of the Copyright and Related Rights Act 2000 (No. 28 of 2000).

To set up authorship no registration is required, protection is automatic as long as it is the original result of a creator's effort and skill. It is recommended, however, that the author have evidence of his creation in case proof of his authorship is required. This can be proven by sending a copy of the work to yourself by registered mail or by archiving the work with an Agency that protects these rights. The agency will charge for the service but will provide proof of authorship if the author needs it.

Formally protected works are usually accompanied by the copyright notice "©" with the date of creation and the name of the author. This notice is not required, but it is recommended to alert you to the protection and identify the rights holder (Copyright Association of Ireland, n.d.).

e.g.: © *Copyright Regina Cardoso 2019*

It is noteworthy that not everything can be copyrighted. For this to happen, it is necessary to configure the realization and materialization of a work. So copyright does not protect ideas, information, styles, concepts or techniques. This is also a subjective matter because the character of originality will be judged by the extent to which it may have been "inspired," for example. This subjectivity is the source of many conflicts that sometimes involve large sums of money. There is also the issue of fan fictions, which create new characters for pre-existing stories, such as Harry Porter. The written stories and new fan-created characters were tolerated by the author until she sold the rights to the Film Industry. From then on the case became a legal clash (Cardoso, 2014).

Neither original or very small works, names, unique words, slogans and titles can be copyrighted. Eventually, these "works" may be protected in another way, such as trademarks (Copyright Association of Ireland, n.d.).

Copyright is a legal instrument and, regardless of the different views related to its origin, should encourage intellectual creation, for the benefit of the creator a (2013, p. p.3)s well as society. Copyright is part of the Intellectual Property System in which intellectual property is the genre, with industrial property and copyright being its species.

According to Bittar (2005, p. 8), copyright is "the branch of private law that regulates the legal relations arising from the creation and economical use of intellectual, aesthetic works and understood in literature, the arts, and science". Classical legal doctrine divided these rights according to their different

natures. As said below, Moral rights refer to the right of recognition and identification of authorship. Patrimonial rights refer to the right of remuneration and confer on the author the right to receive financial advantages with the use of his work.

The core of the copyright issue is the search for the balance between respects for authorship versus the need to grant public access. The commitment to authorship is not only legal, the recognition of authorship is also an important incentive to the creative process and remuneration, a stimulus so that the author can subsist of his creative process. Public access, in turn, is fundamental as a promotion of culture, as well as being a guaranteed fundamental right.

It is interesting to remember that copyright encompasses different types of creative expressions, such as movies, music, texts, fine arts, etc. Yet, it is not the interest of this study to analyse each type and its specificities, since, with the cultural convergence and convergence of technological devices, this segmentation does not make sense, nor would it impact or contribute to the objective of this research.

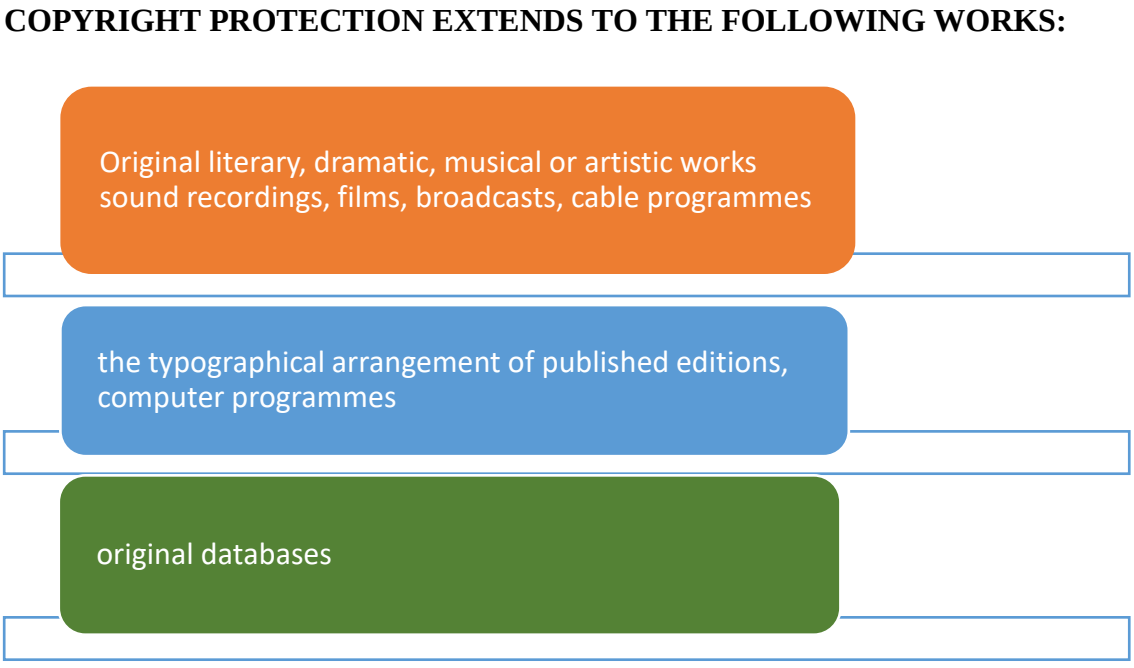


***Figure 07**. Copyright Protection. By the Researcher*

The owner of moral copyright is the author, but the Copyright and Related Rights Act of 2000 has a very specific definition for authorship.

In this Law, copyright ownership is the property of the creator of the work, but it also includes: the person making a broadcast in the case of broadcast; the person providing the cable program service in which the program is included, in the case of a cable program; the publisher, in the case of a typographical arrangement of a published edition; the person by whom the necessary arrangements for the creation of the work are undertaken in the case of a work which is computer-generated; the individual or group of individuals who made the database, in the case of an original database; and the photographer, in the case of a photograph, with the exception that in the case of a photographed person, the image rights will be owned by this person. A good example of rights extensions is recorded songs. In their case, the rights will be with the authors of the lyrics and music, but they reach the record label, which has certain rights to the sound recording, and also reach the performing artists will have rights related to their performances. The legislation will always allow authors, moral rights holders, to object if they consider that their work is being depreciated. Because it is a form of ownership, material copyright may be transferred to another person, for exemple, as is the case where the rights to a book are transferred to the publisher. However, credit for authorship (moral right) should always be given to the writer. In the Irish workplace, the employer is the copyright holder of what was created by the employee during the work, unless otherwise negotiated by contract. (Gorry, 2013).

Previously, the commissioner of some works could be the copyright holder. From the Copyright and Related Works Act, 220, this is no longer possible. A plaintiff who wishes to be copyright holder must formalize this via contract because now, under Irish law, assignment of copyright to a work will only be effective if it is in writing and signed by the person who assigns the rights Copyright as determined in section 120, Copyright and Related Rights Act, 2000.

In the past, each technology or media had own specific regulations, channels and distribution markets. However, with the emergence of digitisation, there was a radical change in this scenario organised by ethical and legislative codes. From digitisation, the same content can be manifested in different media, in different channels and in different forms. This possibility conquered by technology made possible and encouraged a convergence. However, this conquest also provoked disorder and eventually also became a source of conflict with unpredictable results, as reported by Pool (Jenkins, 2008, p. 36).

Technological changes affect different people in different ways; some will lose; some will win. Concerning the technology itself, some will die so that others are born. This is what Jenkins (2008) teaches us, the death of certain distribution systems, which are the tools used to access content such as cassette tapes and CDs, will happen with the birth of new delivery technologies. Meanwhile, the media will be kept alive, because they are cultural systems that can adapt and reinvent themselves in new contexts, such as radio in the advent of TV (Cardoso, 2014).

At this juncture, devices appear that incorporate numerous functions, such as smartphones and their thousand and one features. There is also the possibility of these functions being accessed on different devices or different devices being accessed at the same time. Music can be heard on the cd player, computer, radio, smartphone. While listening to music, one can use a computer and work on different programs. The entertainment industry diversifies into the market by offering content across multiple devices, affecting media ownership standards, and users simultaneously consume various content made available through these different media. Producing and consuming are actions equally affected by the Culture of Convergence (Jenkins, 2008).

Copyright infringement occurs when the user does what the media environment allows: to share files, manipulate content, take ownership of it, return it after modifying it. By doing so, even if they are

unaware that it is illegal, they may be committing a criminal act and may face civil penalties. Ignorance of an infraction cannot be used as a defence. However, ignorance about what is lawful or illicit is precisely the cause of many conflicts. The very ease of access induces this. One can cite as an example, the texts published on the internet. People think that because they are accessible, they are freely available. They are unaware of the fact that these texts are protected by copyright law and that, before reproducing or modifying them, they need to know whether the author of that text allows its reproduction, if it is allowed, if it may happen free or should be costly. Many are still unaware of the obligation to credit the authorship and reproduce the texts they like on their personal pages, appropriating (naively or not) the authorship.

On the other hand, Dreier (2008) recalls that digital technology has turned the end user into a producer of the copy he consumes. The copyright law prior to digitization affected not only the authors but also the producers, transmitters and executors of works, and after it included a larger number of stakeholders. However, the same technology that facilitates copying allows for protective technology measures (TPMs) that can restrict or block access to and use of protected materials and even materials that were not intended to be, which directly impacts the freedom of expression of modern users.

The primary legislation governing copyright in Ireland is the Copyright and Related Rights Act, 2000 (No. 28 of 2000). Irish law is based on "S.I. No. 337/2011 - European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011". Ireland's copyright law is subject to EU directive 2001/29 / EC which deals with some aspects of the subject when inserted in the information society, aspects that were absorbed by Ireland in its copyright law and in the Copyright and Related Rights Act 2000 that can be found online at the Irish Statute Book (2000). The law was extended in 2004 with the EU directive by the amendment act European

Communities (Copyright and Related Rights). The 2000 Act overturned much of Irish copyright, as expressed in its section 10.

Illegal use of a work may be challenged in court. The technical term for misuse is violation. When a violation is characterized, the copyright infringer may face civil liability and criminal convictions. Violations can be committed by an individual or large corporations, involving only issues of recognition of authorship or large sums of money. The copyright owner should always seek professional advice to find out about available resources and options for dealing with these violations. Notify infringer, negotiate, litigate. Fight offense directly in the courts or use one of the conflict resolution alternatives? Can all disputes be faced in the same way or are there appropriate strategies for different situations? These will be the reflections that will guide the following paragraphs.

Returning to the question of if Mediation can be considered more appropriate than other methods of Litigation, Judge Macken (2019) thinks it is tough to give a definitive answer. She believes this depends significantly on the type of situation the person is in, the type of dispute, the complexity of the dispute, and the time it may take to mediate or court. She states that it is interesting to note that Mediation will not automatically be shorter. It may be less expensive, but not always. This really depends on the context of the dispute and the complexity of it. To support her claims, she uses three examples, which in her view, show how difficult it is to give a general answer to this case. She says the cases report answers the above question

The first example was a case involving copyright and contracts. Copyright on bulletproof vests. Vests that are worn by the security guards or the army so that if they are hit they will not be killed. They are made of certain types of different layers of fabric and a small amount of metal coatings and certain types of carbon and tailings. They are made of layers that have a specific sequence, so they need a lot of technology and expertise to make them. They are used in dangerous confrontations where there is a risk

of being targeted. One UK company was asked to provide a large number of bulletproof vests to the army of another African company2. The manufacturing company developed a specific technology to meet the demand and made the first delivery. They were waiting for a second demand, as the total amount would be three lots of five million euros each. That meant a lot of money in the 1990s. She adds a curiosity to the report, the way the vests were tested in North Africa: they picked a few people to wear the vests and had them run and then shot them. Fortunately, as she says, the bulletproof vests were really good, so no one died. Going back to the negotiation, after the contract was signed, the first delivery was made, and the corresponding payment was made, everything seemed to be going well. However, they waited more than nine months for the second request, but it did not happen. Then a business friend from the company commented: I went to an exhibition in the Middle East and saw the demonstration of his bulletproof vest and was really impressed, just brilliant! Moreover, the company asked: where was that? Therefore, he replied: in Dubai. That was how a major investigation began in which they discovered that the intermediary who had introduced them to the African company and who had never shown any knowledge or experience in the area had established a small business in Cork, including with financial assistance from the Irish government and the International Association. Development (IDA). The intermediary also established two other companies in China and the Cayman Islands and two offices in England.

This discovery led to a coordinated international operation involving, in addition to Ireland, the mentioned countries and the United States. The judge was part of the team, although at the time she was only a junior. Besides her, there were two seniors. The operation was carried out simultaneously and was launched at the same time in London, China, Dublin. Everything happened at the same time, all courts, judges, inspectors, investigators, lawyers working together and issuing equivalent orders in all jurisdictions. Inspectors and investigators found a lot of evidence in the factory garbage and were able to

[2] The judge declined to mention the company and left the researcher free to decide whether or not to do. The researcher decided that revealing company names would not be relevant to the study.

prove that the bulletproof vests were being manufactured there and were able to gather documentation to incriminate the intermediary. It was a successful operation, yet extraordinarily technical and time-consuming. Therefore, it would not be possible in her opinion to refer this case to the Mediation. It was a copyright and security case in which much scientific evidence was needed. To prove that the intermediate's bulletproof vests had been copied from the company, many specialists had to be involved. She thinks it would be complicated to find a Mediator who could handle it. Hence, it does not consider that in this case, Mediation was preferable to litigation. The judges involved were brilliant, the operations concurrent, the information confidential. She believes this to be an excellent example of a case where Mediation is not appropriate, nor would it be suitable for Arbitration.

The second example the judge reported was a design case with copyright elements. It concerned an unregistered design very close to what is registered in English as Design Copyright. It was the front door design, which may seem very basic. However, the applicant argued that it had designed this particular port with unusual elements and that it was copied to other ports, thus constituting a violation. The defendants defended themselves by saying that the elements were common and unremarkable, nothing that could be protected, and either by design or by copyright. The case was evaluated by experts, but she says the team was not large and that on the second day when they met the case was resolved. For her, the settlement, in this case, was the result of a deal between the two lawyers representing the claims of their respective clients. Consequently, this was a case that could be cited as a good example of a conflict that can be resolved by Mediation.

The third example was a case between the Dunnes Store and Karen Millen Fashions Ltd. Karen Millen accused Dunnes of copying the design of their jacket, thus committing copyright infringement. The case went to the Court because it was an unregistered design, i.e. unregistered copyright. The European Court of Justice held that the case involved elements of brand reputation. She does not know

why they decided to take this line. In Ireland, the Court was happy with the trial, but there was criticism in another jurisdiction. She thinks this is also a case that could have been conducted by Mediation because both sides could explain how they came to their particular design. She points out that it is possible to be influenced by others without this set up a copy or a copyright infringement. So she thinks this case should have been taken to Mediation.

Judge Macken (2019) believes these three examples answer the question. Because for her, it is not possible to establish definitive rules saying, under these circumstances, Yes: mediation, in this case, or No, we have to go to litigation. The best option will depend on the nature of the dispute, in particular, but also the parties, and she makes a curious statement: some parties always want to go to court. He says this is the case in general for most movie companies, phone companies or telecommunication companies, who always want to go to court because judges will understand the copyright limitation. For the judge, these companies do not like to go to mediation because they will have to deal with parties with unreasonable expectations and also because the mediation is not binding, so these companies believe that they will not have a definitive result in mediation and will eventually have to go to court anyhow. Therefore, choosing the method for settling the dispute will depend a lot on the industry, the nature of the accused and their history of going to court.

She says this can be observed in many countries. In many jurisdictions, they have the same problem with Mediation. Although there is an option to go to Mediation, some countries conduct certain conflicts for Arbitration because it imposes a result. For this reason, according to her, some companies, such as construction, already incorporate arbitration clauses in their contracts, because they believe that this will have a definitive result and experts may conduct disputes in the area. She says that the constitutional right of access to court prevents the Mediation from being binding, but the fact that it is voluntary and not binding allows the parties to waive it at any time. Consequently, what can be done is

to encourage people to accept the outcome, or to impose, for example, some costs on the unwilling or unwilling party to the process. She says that is why in the European Court of Justice cases of standards-essential patents involving royalty payments are brought to Arbitration or the Court. She thinks that while the parties may make the outcome of the Mediation binding, few do so to ensure that they can later go to court.

In the judge's opinion, Mediation does not work so well in all areas. In some cases, Mediation is a good alternative; in others, arbitration may be more appropriate. The criterion of choice must be associated with the particular case, or when it can be used as a precedent for going to court. Mediation works very well in areas where people have been dealing with each other for a long time, and then the problem arises. They may be part of large or small businesses, but they have a bond and do not necessarily want to break the relationship and believe that if they go to court, it will be complicated to avoid this. In such cases, useful Mediation can solve the problem and allow the parties to preserve the relationship.

Before analysing the judge's statements, some data regarding the third case she used as an example will be added, since the case deals with unregistered drawings, which requires some clarification. In the European Union, the Community Designs Regulation gives rights to unregistered projects. Community Design Council Regulation (EC) No 6/2002 ("CDR") is a protective mechanism to protect products that have a short shelf life when it would make no sense for the designer to face the cost and burden of obtaining long-term registered protection. The mechanism prevents third parties from copying the protected drawing. These rights are valid for three years and arise automatically upon public disclosure. In the third example given, the judge mentions the decision of the Court of Justice of the European Union (CJEU) on the case in 2014. The CJEU states that the assessment of the uniqueness of a design should refer to previous projects. The Amsterdam court in a case of a Dutch designer against the IKEA store acquitted the store accused of copying a designer lamp because it held that if an accused

is unaware of a previous project, his project cannot be considered a slavish imitation, for servile imitation presupposes real knowledge of the previous project (Cleuver, 2017). After the Millen v. Dunne's case, unregistered design rights have come to have a very high presumption of validity, creating for designers, unlike in the Netherlands, a more rigorous duty of care in regarding what is called a slave copy of a design (Cassidy & Hing, 2016)3.

The judge's statements are the result of her considerable experience and knowledge. It exposes the fact that there is no universal method of conflict resolution that can be applied in any context. This is the reason why there are alternatives, so that the most suitable one can be applied according to its specificities. Therefore, in conflict situations, the parties, the values involved, the area of expertise, the subject matter discussed, the complexity, the time and the available resources should be considered in choosing the ADR to be applied.

The Judge's opinions reflects on the outcome of the WIPO's survey. The World Intellectual Property Organization (WIPO) Arbitration and Mediation Center provides alternatives for resolving international commercial disputes between individuals. Because of the expertise of its leading transnational dispute settlement team, WIPO's ADRs and experts have a high reputation in Intellectual Property (IP) disputes. As parties generally choose the dispute settlement mechanism in their negotiations without comparative information, WIPO conducted a research to provide elements for parties to make this choice. The research presents party dispute resolution strategies as well as best practices in technological conflict resolution. The WIPO Arbitration and Mediation Center has conducted the survey to investigate Conflict Resolution in Technology Transactions to evaluate the use of Dispute Resolution (ADR) Alternative methods in comparison with litigation4.

[3] Full details of the case can be found at https://intellectualpropertyblog.fieldfisher.com/2016/karen-millen-fashions-ltd-v-dunnes-stores-dunnes-stores-limerick-ltd-clarifying-the-assessment-of -individual-character-in-me-designs.
[4] The full WIPO survey can be found at the following address https://www.wipo.int/amc/en/center/survey/results.html.

The Survey was answered by 393 respondents from 62 countries in Europe, North America, Asia, South America, Oceania, the Caribbean, Central America, and Africa. Respondents are employees of companies, law firms, universities, research organizations, government agencies or self-employed. Respondents are in business areas including pharmaceuticals, IT, biotechnology, telecommunications, electronics, chemicals, life sciences, mechanics and consumer goods.

Chart 1: Location of Respondents' Headquarters

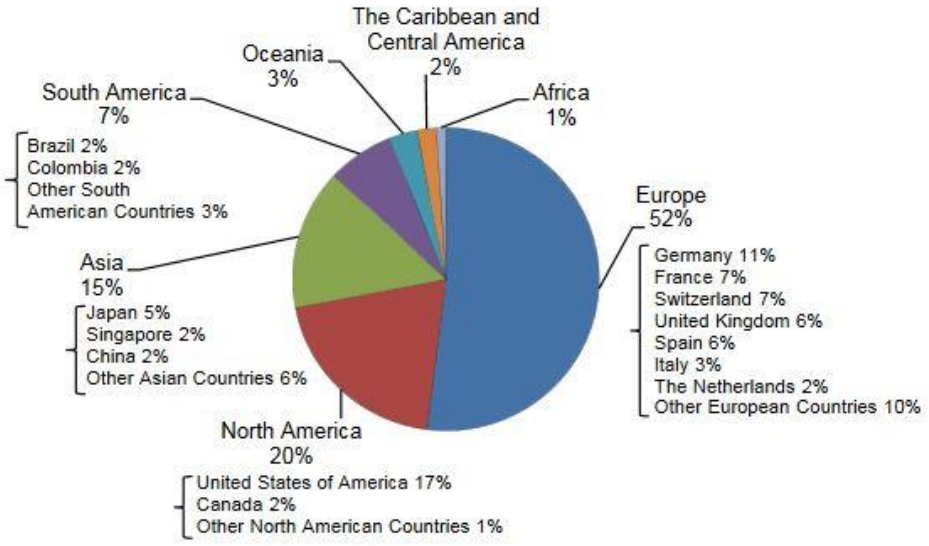


***Figure 08**. Location of Respondents. Source: WIPO Arbitration and Mediation Center, International Survey on Dispute Resolution in Technology Transactions*

Regarding the Dispute Resolution Clauses, 94% of respondents stated that these clauses are part of their contracts, the most common being stand-alone (32%), and then accelerated arbitration (30%) and Mediation (12%). However, Mediation was also included when using multi-layer clauses before other alternatives, including lawsuits (corresponding to 17% and all clauses). Respondents point to an out-of-court dispute resolution trend and consider cost and time as the main reason for both domestic and international settlements. The most important factor for choosing Mediation was finding a Business Solution.

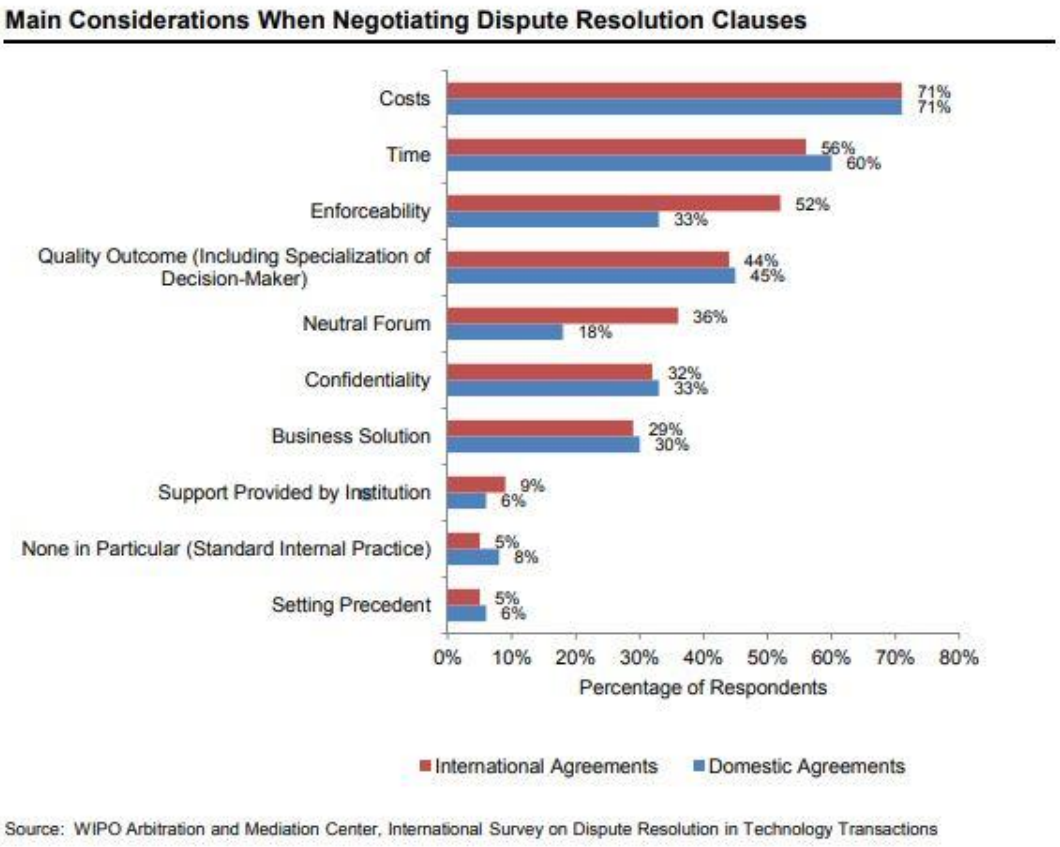


Figure 09 *Clauses. Source: WIPO Arbitration and Mediation Center, International Survey on Dispute Resolution in Technology Transactions*

Still, among the considerations made by the judge, the statement that mediation is not faster or less expensive than the other alternatives cannot be ratified in the research. The results of one survey by WIPO research and another by ICMA point to the opposite of this.

When asked about Time and Cost, respondents reported that they spent more time and had significantly higher costs on lawsuits than on Arbitration and Mediation. Legal disputes in the home jurisdiction took about 3 years, while in another jurisdiction the average was 3.5 years, while Mediation took an average of 8 months and Arbitration 1 year. The costs of litigation in the home jurisdiction averaged $ 475,000, while in another jurisdiction, on average $ 850,000, Mediation did not exceed $ 100,000 and Arbitration $ 400,000.

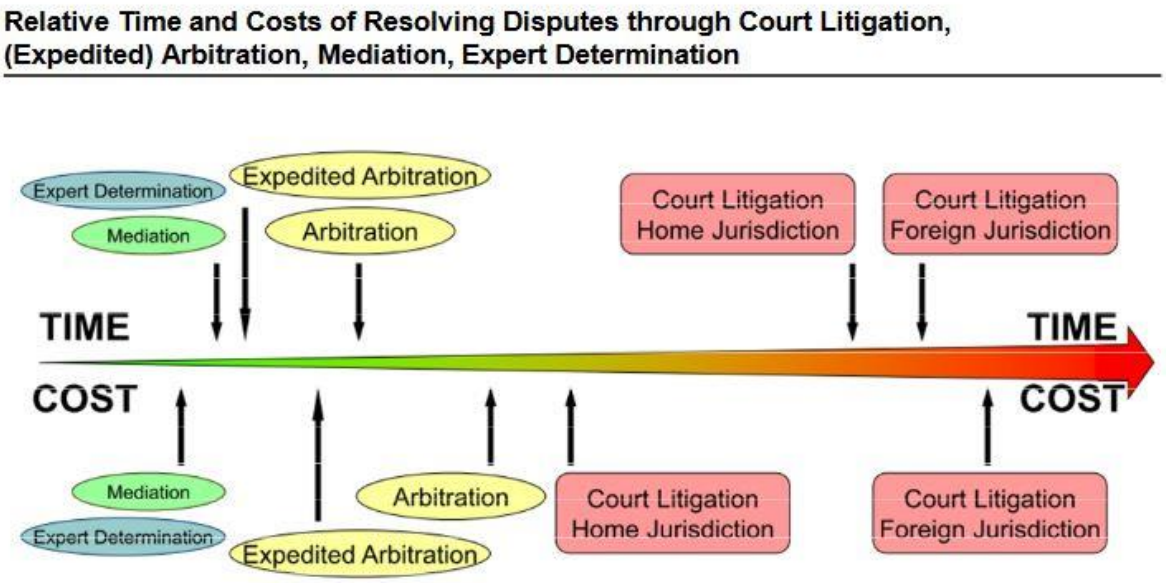


Figure 10 *Time and Costs. Source: WIPO Arbitration and Mediation Center, International Survey on Dispute Resolution in Technology Transactions.*

Complementing the research result, WIPO reported that in the experience of its Center and under its rules, the average time of Mediation is 5 months, Arbitration 7 months and cases 23 months. Average costs are $ 21,000 for Mediations, $ 48,000 for Expedited Arbitration, and $ 165,000 for Arbitrations (usually large cases involving patent protected in various jurisdictions).

In turn, the survey applied by ICMA and mentioned above inspired the Conference held in March 2009 by the Institution, with the following theme: "Mediation saves: time, money and business relations". The Conference exposed the experience of Mediation in Ireland and other jurisdictions. The survey mentioned was conducted with Managing Partners from more than 3,500 law firms, lawyers and other professionals. The conference brought together leading Irish jurists such as Mark Appel, senior vice president of the International Center for Dispute Resolution, Judge Peter Kelly of the Court of Commerce. The above discussed the results of the mediation research and chaired a panel discussion

with speakers including: Terence O'Keeffe, Dublin City Council of Law, Turlough O'Donnell SC, lawyer and mediator, Martin Lang, head of contracts and resolution of Construction litigation Industry Federation, John Madden, Madden Mediation & Arbitration Limited and Visiting Professor at Law TCD, and Brian Speers, CMG Solicitors and Mediator. The Conference focused on the time and cost that can be saved, among other benefits of mediation, such as preserving valuable business relationships when disputes arise. The result was as follows: respondents indicated cost savings of around 70% as a significant advantage, followed by speed, process control, relationship preservation and confidentiality (ICMA - Irish Commercial Mediation Association, 2018).

Another statement by the judge interpreted differently by the ICMA research was about the willingness of Mediation, which is viewed by the judge as a weakness is instead perceived as an advantage by the ICMA, whose survey respondents rate Mediation as their first preference in dispute resolution, placing it before Conciliation, Arbitration, and Litigation. The position of mediation as a legal alternative established by the Court of Commerce with the determination that the process can be suspended at any time for mediation to take place fostered the choice of Mediation, making it a preferred method in almost all cases of the Court of Commerce. Statistics from the Irish Court of Commerce indicated that 65% of cases referred to Mediation in 2009 were successfully resolved (HOMS Solicitors, 2009).

The Civil Liabilities and Tribunals Act 2004 S15 is in the same voluntary and discretionary time. One of the parties may request the use of Mediation by the judge who may grant it. If one of the parties is resistant, S15 will allow cost penalties. These sanctions do not happen under the rules of the Ord. 63a of the Rules of the Superior Courts, because in the Commercial Court, the judge cannot force Mediation (Jerome, 2010).

According to Goodbody (A&L Goodbody, 2017), Mediation is increasingly used as a broader possibility for dispute resolution, especially in some areas where speed and confidentiality are

paramount. That is why, the Financial Services and Pensions Ombudsman Act 2017 and the Irish Central Bank and Financial Services 2017 Amendment Act promote the use of Mediation as a quick and effective way to resolve disputes over financial services. The ICMA's survey also found that followers who use mediation most are family businesses, partnerships, termination of business relationships, employment, and professional negligence. The growth of the method used in Ireland is forecast to be 100% next year (ICMA - Irish Commercial Mediation Association 2018).

These features point to mediation as an alternative to conflict resolution in general, but Set Smiley (2015) points out that Mediation is not always appropriate, as it also states Chiru (2017), Michell (1987) and Stork (1988). For them, Mediation requires the participation of both parties, so if one side does not want to, the problem will be brought to court. Other factors, such as a court injunction, may also make mediation impossible.

The judge noted that some companies always prefer to go to court or, like construction companies, prefer Arbitration over Mediation because Arbitration guarantees a binding legal outcome. This is actually seen by many as a disadvantage of Mediation, because even if the parties can reach an agreement, the dispute may not have ended definitively. If one of the parties then decides that they are not satisfied with the outcome, they may file a lawsuit, so being legally binding gives companies, the assurance that the conflict has been resolved definitively (UpCounsel, n.d.). In the other hand, being legally binding is not always seen as positive, because this makes it impossible to appeal. If no formal appeal, process is available, even if one of the parties disagrees with the outcome and finds it biased or unfair, it will not be able to appeal (Allen, s.d.) and (UpConsel, s.d.). In Ireland, the outcome of Mediation is The Mediation Agreement that is governed by section 11 of the Mediation Act 2017 and can be legally binding if the parties agree if so, then it is a contract and legally enforceable (McLoughlin, 2018).

3.3 Statement 3

Figure 11. *Statement 3. Source by Researcher.*

The judge found this to be an interesting question because it allows her to clarify her position in the previous answers. She reaffirmed that the method chosen for a dispute should depend on two factors that must be combined: the nature of the dispute and the particularity of the intellectual property discussed. She says that when she gave the previous examples and said that in the case of bulletproof vests, she believed it was not a suitable case for Mediation because of the complexity of the dispute and the number of experts required to materialize the evidence, there was yet another element that corroborated his statement. On the contrary, when she stated in the door and jacket cases that both were suitable for Mediation she did because she considers that design infringement and unregistered design infringement are naturally resolvable disputes by Mediation. Also because these disputes depend on the engagement of the parties, in other words, the parties will be able to resolve these disputes and eventually the problem. The successful party may require the other party to destroy unauthorized copies or set an amount to be paid for the use of what has been copied, and the case will be over. Nevertheless, this does not apply to other forms of intellectual property rights. She gives as an example a case of trademark registration. If someone sues for having a European Union trademark outside the European Union

Intellectual Property Office (EUIPO)[5] office in Alicante, and protection extends to perhaps 14 of the 27 member states, the law will extend to all member states. Normal; if successful, they may prevent anyone from using this trademark. You may also destroy any goods bearing this mark or ship the goods to a country outside the European Union where this mark is not protected.

She warns that these types of cases occur most often in patents. However, in this case, it is referring to trademarks. If the infringers are relatively small and are in one of the countries where the trademark owner is not using his own trademark because he has no market! The trademark owner may grant a license to the infringing company, allowing the infringing company to use the trademark in this country for a fee. This arrangement may be convenient for both. For the brand owner, because he will make it known and open market in another country. For the offender, because he can continue in a market where he already operates. Therefore, in this case, an agreement between the parties is possible. In the case of copyright and industrial design, the example given for trademarks also applies because Design is also registered at the EUIPO office in Alicante and extends to the whole of the Union. Whether or not it is subject to attack for lack of use.

She explains that patent protections were granted in Munich under an international convention, so when a patent is granted protection extends across all countries of the European Union that the owner of the invention has designated in the application. She also explains why she believes patent infringements, particularly in some areas such as Pharmaceuticals and Telecommunications, are less suitable for mediation than Arbitration or Litigation. Firstly, the protection of the majority lasts 20 years in the case of patents, with a possible extension. In the case of Registered Design, it lasts a little less, ranging from 5, 10 to 15 years. It says that agreements between an infringer and the patent owner are

[5] **EUIPO** is the European Union Intellectual Property Office responsible for managing the EU trade mark and the registered Community design.

possible and usually last as long as the protection obtained by paying royalties that are monitored by the patent owner. Such monitoring requires access to the licensee's financial records so that the grantor can control through the licensee's results whether the licensee is paying the royalties correctly. If the grantor realizes that the payment is wrong, he may sue the other.

If all goes well, the parties may enter into other arrangements for other pharmaceutical products. Thus, there will be continuity and continuity is never well resolved by Mediation unless a binding formal agreement follows it! Pharmaceuticals do not lend themselves to a single conclusion, except when there is a proven infringement, and the other side no longer wants any ongoing relationship between them! She reports that the same kind of problem arises in the standard-essential patent area, which are currently predominantly in the field of telecommunications but will move across all areas of the internet of things, such as driverless cars, robotic operations, major technologies — automatic, not technology in general, but technology that needs to talk to some other technology. Moreover, the reason for this is that in all these areas there have to be standards set by someone, be it the US, the US standard-setting organization, or a big company from France, there will always be someone to set the standards, almost all the standards, in the field of telecommunications.

Therefore, according to her, there will be more and more of these standards, or core standards, that make Mediation very difficult, because what the parties are looking for are binding decisions that will be converted into binding agreements so that the parties will choose Arbitration or by the Litigation. Although it is possible to have a Mediation in which the parties agree to convert this into a binding agreement. However, according to her, the preference seems to her to be between Litigation and Arbitration. She says it is possible to find many winning litigation appeals in some jurisdictions, losing in others on the same issue. Finally, they decide to enter into a worldwide standard patent portfolio

agreement. It makes a significant distinction between patent and some registered designs because some of them may fall under these standard settings, such as medical devices and the like.

About Copyright, she points out that they cover a vast spectrum. From Copyright assigning the content of the news, or Netflix, or what people download to their devices. Is possible to have Copyright by assigning Mona Lisa reproductions, or architectural drawings, or theatrical productions, or classical, rock, instrumental music not written in a musical form but inserted into recorded music. The sector is so broad that it finds it impossible to determine for all Mediation, Litigation or Arbitration. She thinks there is an important area where Mediation is perfect and a smaller area where it does not apply. The classic kind of areas of artistic rights, musical works in the strict sense, noting that one is not recording works, but musical rights, literary works, artists dramatic works. These are her most prone to more formal litigation. However, if there is a single claimed copyright infringement on a piece by an author, Mediation is perfect! Then is required to look at the segment when it comes to Copyright.

She says that in Copyright unfortunately there are cases where lawyers take control of Mediation and decide why they feel that parties do not understand enough of copyright laws and limits and therefore may have extremely high expectations. She emphasizes that copyright is a very exotic and wide area. In addition, he mentions that often, the lawyers hired by the plaintiffs are not experts, but are involved because they advocate for that client on all sorts of subjects. Because of the customer's trust in them, they get involved in mediating something they do not understand: copyright. Therefore, in her experience, the most successful Mediations are those where preliminary exchanges take place between lawyers when they meet to decide the best way to manage Mediation. Moreover, especially when the attorneys involved are experts hired by the author for this particular case, or as with television, film or music companies, the attorneys involved are used to dealing with copyright issues all the time. She also comments that there are lawyers who are suitable and others are not, because not everyone has the same kind of

experience, so having a preliminary meeting with lawyers is a good opportunity to do both. This way, the less experienced lawyer will suddenly realize that there are limits to what can be claimed. For this reason, she states that managing a mediation is a very important aspect to get a good result. Therefore, if there is an enthusiastic lawyer on one side, generally the tendency is not to get a good result. There are certain special abilities to perform well-executed mediation. For example, imagine a situation where there is someone on one side who has a trusted lawyer to solve all kinds of problems, and now someone has stolen this person's song, or the idea of a script that the person wrote and was rejected. Suddenly, the person discovered that it is being used in a movie. On the other side, there is a big movie company that supposedly rejected the script and is now using it. The company has lawyers specializing in copyright. So mediating something like this requires preliminary stages, so that the plaintiff's attorneys can learn from the preliminary discussions and help the complainant understand their limits, avoiding major disappointments. She says the situation needs to be sufficiently well analyzed so that there is no imbalance. That is because she advocates preliminary meetings as an opportunity to give the parties a sense of what kind of agreement can be reached and maintain significant control, not simply transferring the decision to the lawyers. If this is possible, she thinks it is possible to have a very good Mediation.

She also points out that only parts of copyright are harmonized in the U.S., and one must keep this in mind when looking at the most appropriate method.

Another thing that she considers essential and that she thinks people forget is that when an agreement is reached in Mediation or even Arbitration, we must take into account the views of the Commission and the rules set out in the Treaties. So many prefer Arbitration or Litigation because some mediators are not lawyers and do not know the competition rules, so they prefer to hire a specialist Intellectual Property lawyer with experience in this type of arrangement. She says her claims are based

on the experience she has had judging, arbitrating and mediating. For her, all these elements come into play at the moment of a decision, because that the subject is so complex.

As can be seen from the judge's considerations, although Mediation has established itself as a means of resolving non-judgmental disputes and its growing popularity, it is still neglected as an alternative to Arbitration or Litigation in technological disputes. The WIPO survey illustrates this trend; however, it demonstrates that utilization is significant, mainly because Mediation has been used as the first alternative in some cases.

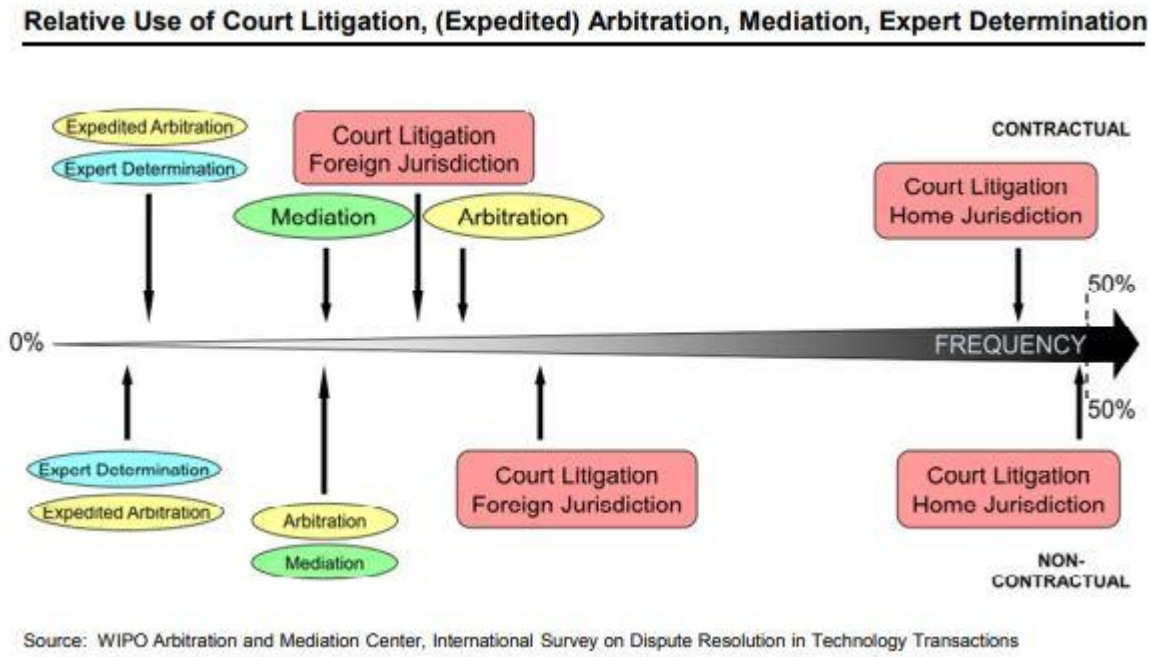


Figure 12. *Relative Local. Source: WIPO Arbitration and Mediation Center, International Survey on Dispute Resolution in Technology Transactions.*

Regarding Mechanisms Used to Resolve Conflicts: Type, Time and Costs. The most commonly used mechanism used to resolve technological disputes was judicial Litigation in the respondents' home jurisdiction, followed by Litigation in another jurisdiction, Arbitration, Mediation, expedited arbitration,

and expert determination. Nevertheless 29% of respondents reported having submitted a dispute to Mediation before or during the court dispute and that, these disputes involved patent, copyright and/or know-how issues.

Also were addressed by WIPO the Technology-Related Agreements concluded, the survey identified that Confidentiality, Designation, Licenses, Dispute Settlement, Merger and Acquisition Agreements, and Research and Development (R&D) were most frequently concluded. Although outnumbered by patents and Know-How, Copyright was present in the agreements.

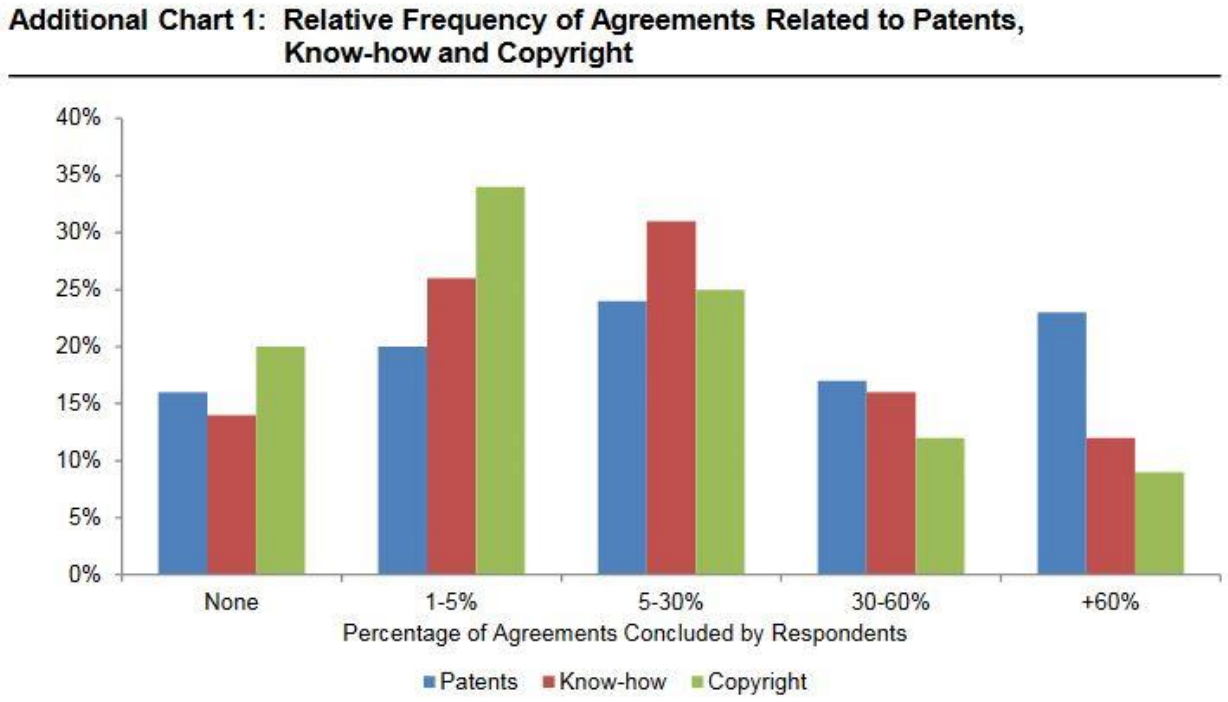


Figure 13. *Relative Frequency of Agreements. Source: WIPO Arbitration and Mediation Center, International Survey on Dispute Resolution in Technology Transactions*

The reasons why Mediation cannot be considered a good alternative in copyright disputes are, in Anway's (2002) view, based on three myths. Two of them were mentioned by the judge and will be taken

up in Anway's analysis, whose study was the winner in the 2002 Law category by the James Boskey ADR Writing Competition.

The first would be that the parties wish their day in court. This myth stems from lawyers' presumption that their clients will be dissatisfied with Mediation. This belief is confronted, according to the author, by the parties' manifest desire to resolve their conflicts as quickly and cheaply as possible. This is also the conclusion that was presented in the ICMA survey in the first statement analysed. According to Anway (2002), many disputants see a day at court as devastating and embarrassing, and this fear causes many to stop seeking their civil remedies. It can be added that Mediation is seen as a "cathartic equivalent" to court day because it allows parties the opportunity to exchange their views with the help of an impartial third party.

The second myth is that parties may disclose Confidential Information during Mediation. This fear may cause copyright litigants to be reluctant to mediate for fear that the opposing party will use Mediation to find out information and then solicit it legally. However, the voluntary and confidential nature of Mediation allows the refusal of the disclosure. One of the main advantages of Mediation is precisely the possibility of the parties to discuss confidential issues that would be publicly exposed in court.

The third myth is that customers benefit from adversarial representation. In this case, the low incidence of Mediation in copyright disputes would be due to the aversion that expert intellectual property lawyers have to the method by believing that this may give the impression that he has no capacity to face a court. This fear disadvantages clients because of the prejudice of the lawyer restricts their right to mediate.

There is also a popular perception that those who choose Mediation are afraid of the outcome of the litigation (Bardach, 1993). As the judge said, some lawyers think that there are situations where

Mediation is not appropriate, for example in cases involving a great deal of complexity or a great imbalance between the parties, however this can be solved by inserting clauses that allow forgetting that the process is informal and voluntary. Another criticism of Mediation is the fact that the party may be reactive to the method, or that he or she may conceal relevant facts or be untrue because is not under oath, yet the reactivity can be skillfully administered by the mediator and an honesty clause may be included in the mediation agreement (Bardach, 1993).

Another point to highlight in the judge's speech as disadvantageous to the Mediation would be the argument that there may be an imbalance in terms of both bargaining power and copyright knowledge among clients. Yet Anway (2002) points out that this imbalance will also occur in court with the aggravation that in court the also likely financial imbalance can be much more damaging to the weaker because court litigation is more expensive and slower.

The current litigation system structure for Copyright Disputes makes it difficult for some right holders to have access to defense, as does the ordinary citizen when faced with a claim that he has committed copyright infringement, especially when federal courts have exclusive jurisdiction over these disputes which makes proceedings more expensive and slower, inasmuch as federal courts are required to decide on criminal matters before civil matters, as states Ebel (2016) and Ciolli (2015). In a scenario where there is financial inequality between parties, waiting too long for a decision and bearing the high cost causes some to accept unfair agreements or results and may cause some small businesses or the general public to give up fighting for their copyrights. These unfair outcomes not only harm the most vulnerable parties but also damage the public interest, especially in cases of "fair use". Arbitration could be an alternative to the high costs and time required for litigation, but the costs of Arbitration have been growing exacerbated, as they include arbitrators and attorney’s fees, travel costs, food and lodging costs

of witnesses, fees, stenographic transcriptions, etc. In addition, arbitration requires the fulfilment of a series of formalities, which also makes it consume a lot of time (Bardach, 1993).

Mediation shifts the focus from disputes and changes the dynamics of winner versus loser seeking a solution focused on the interests and winnings of both parties. This paradigm break allows us to maintain confidence and minimize the mental anguish and monetary costs involved (Ciolli, 2015). In Mediation the parties may choose a neutral third party (the mediator) with whom they feel comfortable and insert a clause defining in advance what kind of method they will choose to resolve issues that have not been resolved in Mediation. The confidentiality of the Mediation, the flexibility and the informality of the method allow the parties to reach a friendlier consensus, more quickly and at a reasonable cost (Bardach, 1993).

According Ciolli (2015) it can be said that Mediation is the most appropriate process to deal with many intellectual property disputes because these conflicts are more complex and difficult to understand, which detracts from the decision to be made by judges and jury. In Mediation, the parties may require the participation of specialists who understand the technical and scientific nature of the issues discussed, which may lead to a fairer decision. Mediate is “inexpensive, quick and flexible enough to adapt to the eccentricities of the entertainment world. Therefore, it is the perfect vehicle for dealing with contract disputes” (Bardach, 1993).

Thus, it can be seen that several studies cited consider that copyright disputes are not only suitable for mediation, but more indicated and synergistic with Mediation. Being Mediation superior to Litigation in cases related to Intellectual Property (Anway, 2002)

Mediation dates back to ancient times has crossed many civilizations and continues to grow in the contemporary world. The significant impact of its application indicates its importance. This importance comes from the experience of the mediator and from his ability to act more dynamically and

sensitively (Alexia Georgakopoulos, 2017). Mediation can follow any line or format of work, depending on the circumstances or the perception of the mediator. The parties are free to adopt or modify procedures at any time during the process. Even if Mediation is not successful, the parties will be more mature to face other types of litigation (Bardach, 1993). Beyond the fact that this type of dispute involves creativity and innovation and the wear and tear consumed in traditional methods can bring harm to the whole society (Newman, 2013). Besides, the disadvantages of Mediation do not outweigh the benefits of its use in entertainment-related disputes (Newman, 2013).

3.4 Literature Conclusion

The present study focused on assessing whether Mediation can be considered as an appropriate instrument to resolve copyright conflicts, as they are sometimes complex, subjective and particular. To answer this question you need to consider two factors: the people involved and the subject discussed.

With regard to people, it is understood that the perception that ordinary people want judges dressed in black, well-dressed lawyers, and the glamour of a court as the ideal setting for settling their disputes is not real. People with problems, such as people in pain, whether physical or emotional, want relief and want it as quickly, cheaply and discreetly as possible.

Regarding the matter discussed, it is noted that Intellectual Property law includes three areas: Copyright, patents and trademarks. However, only the sense of ownership links these areas that have such unusual characteristics, considering that they have different legislations and different modes of protection. While the Patent Law protects the novelty of an invention, the Trademark Law protects the trademark and its commercial use, indicating the origin of related products; The Copyright Law protects

intangible means of the artistic and original expression. These striking differences between areas require different criteria for handling your disputes.

After the study, it is concluded that the branch of Copyright, in turn, is too vast and complex to choose a single method to resolve their conflicts. In some situations, without this being a demerit for Mediation, Arbitration or Litigation may be more appropriate. Mediation may be inappropriate, for example, when:

- A copyright dispute has already been adjudicated, and an appeal is pending.
- When there is a need to involve a large number of experts in different jurisdictions.

Mediation, however, is a method that is extremely adherent to copyright law and is capable of dealing with its complexity and subjectivity, presenting itself in countless cases as the most appropriate method.

- When the cost of litigation is too high
- When the outcome of the dispute cannot be especially predicted;
- When the confidentiality of the process is very important to the image of those involved;
- When licensing (rights sharing) is a possible solution;
- When there are adverse legal precedents for one of the parties;
- When it is not possible to reduce the long terms of the courts that bring unimaginable damage to certain segments.
- When it is possible to select Expert and experienced Copyright Mediators.
- When you want to preserve business relationships and avoid damage to the reputation of those involved.

Reflection on Learning

This section is a personal reflection on my experience and learning process during this dissertation. The process will be presented using Kolb's learning cycle methodology in McLeod's (2017) approach.

The Kolb Learning Cycle was created in 1984 by education theorist David A. Kolb, a master and doctor from Harvard University and founder of Learning-Based Systems. The theory is a model of representing how people learn, which places high value on the role of experience in learning.

Kolb describes the learning process based on a continuous four-stage cycle: Concrete Experience (act), Reflective Observation (reflect), Abstract Conceptualization (conceptualize), and Active Experimentation (apply). Going through each of them is a way to reflect on your learning.

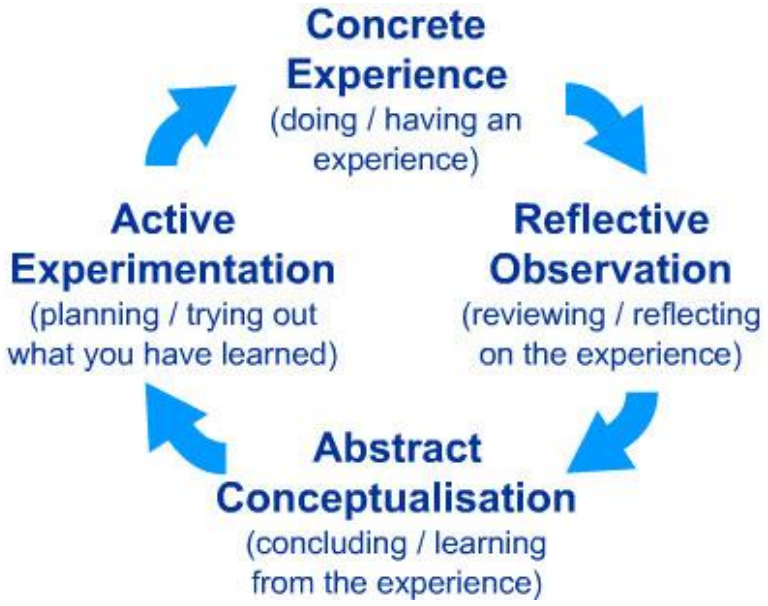


***Figure 14**: Kolb's Learning Cycle (1984, cited in McLeod, 2017).*

1. **Concrete Experience**. In developing an activity, the learner reinterprets his previous experience.
2. **Reflective Observation**. The learner reflects on the experience and interprets his emotions.
3. **Abstract Conceptualization**. Reflection generates a new idea or modifies an existing concept, and one learns from experience.
4. **Active Experimentation**. The student applies theory to see what happens in practice by actively learning

Learning can begin at any stage, but the student will need to follow the flow and complete the cycle. Effective learning occurs when the whole cycle is experienced by the person, with each stage feeding the next. In Kolb's theory (McLeod, 2017) people learn in four different styles, influenced by factors such as educational experiences, the social environment or their basic cognitive structure. According to the theory, the choice is the result of the combination of two variables or two choices made in different axes in which one relates to how we approach a task and the other to how we think and feel about it. For him, it is not possible to execute two variables of the same axis, such as think and act. Our learning style is a product of the combination of two chosen styles and results in classifications: diverging, assimilating, converging and accommodating, as shown in the table below.

TWO – BY – TWO MATRIX

	Active Experimentation (Doing)	**Reflective Observation (Watching)**
Concrete Experience (Feeling)	Accommodating (CE/AE)	Diverging (CE/RO)
Abstract Conceptualization (Thinking)	Converging (AC/AE)	Assimilating (AC/RO)

Table 05*: Kolb's two-by-two Matrix. (1984, cited in McLeod, 2017).*

Diverging: These are sensitive, observant, artistic-minded people who prefer to watch over and use their imagination to solve problems. They prefer to work in groups.

Assimilating: They are more logical people for whom ideas and concepts are more important than people. They prefer analytical models and reflect on things.

Converging: They use their learning to solve problems. They prefer technical and technological tasks and are not interested in interpersonal aspects. They appreciate new ideas and practical simulations.

Accommodating: It is the predominant style. They are intuitive, non-logical people who like challenges. Relying on the analysis of others, prefer practical and experimental approaches.

According to Kolb's theory (McLeod, 2017), we use and need to use all stimuli in learning, but the proper style would be the result of method preference, and this knowledge can be beneficial for learning to be guided by taking this into account preferably making it more effective.

Since learning is a natural process, along my path, I made intuitively the choices classified by Kolb. Knowing the theory, I was curious to know how I would qualify and then took a test (Reis, et al., 2012) that described me as follows according to Kolb's theoretical criteria:

Personal Result Kolb's Matrix

Kolb's Matrix Style	Pontuaction
Diverging	37
Assimilating	23
Converging	21
Accommodating	35

***Table 06**: Personal Result. Adapted from Kolb's two-by-two Matrix By the Researcher*

The result did not surprise me; I actually identified with him. I consider myself an intuitive person and my learning process is very emotional. I am not a very practical person, and I like challenges. Indeed, being in Ireland pursuing a master's degree in Dispute Resolution (MADR) is a challenge that has been embraced and has been revealing.

I have always enjoyed studying, but I like different things, I am attracted to different subjects, and this obviously has positive and negative consequences for my professional life. Among the positive ones, the most significant are: I have a diverse culture and high adaptability. Among the negatives stand out: the dispersion makes me a generalist who has no deep practical experience because I am always attracted to a new interest. I quote as an example: I have two degrees, I am an educator and lawyer. I

have two Specializations: One in Translation (Portuguese - French) and another in Technological Innovation. I am in my second master; the first was in Management with research in Copyright. My friends joke asking if I have decided on the subject of my two doctorates.

I will give a brief overview of what I was doing to contextualize my arrival at the Master. I am moved by my fears and fascination to learn. I worked for a large government company in the field of educational technologies when I earned a specialization in Technological Innovation and fell in love with Intellectual Property (IP). This passion, at first sight, made me change the academic course, and I decided to study law. It was a difficult decision and with a huge burden, but it was sensational to dive into this universe, and I became a lawyer. Then I did a master's degree in Management, but with emphasis on Intellectual Property, with copyright as a theme. The following plans were to follow the natural flow: to do the doctorate. However, my country has entered into an economic and political crisis. Cuts in funding came for educational projects. The area I worked in was deactivated, and I lost my job after 13 years working in a company I loved. It was a shock; I was lost, disappointed, unmotivated and scared. It is not easy to start over when you are no longer so young, especially in a country in crisis. I started to apply, but my lack of experience as a lawyer in litigation made it difficult for me to get a position in a formal law office. I had a few alternatives before me, only multinational companies had an IP area in my city, and they required English. Then I realized that I needed to work on my weaknesses to get a professional opportunity and decided that I would learn English. This was an important skill both as a lawyer in a large firm and in the academic field, in which I had a small but very pleasurable experience as a professor in Technology and Undergraduate degrees, as a lecturer in Ethics and Intellectual Property.

Learning English was an emergency as my financial breath to remain unemployed had a deadline, and I was afraid. Therefore, I made the decision to study English in an immersive process in another country. The plan was to learn English and return fluent to Brazil a year later. I had had previous experience many years ago when, shortly after graduation, I lived in France for a year and learned French.

Thus, the plan seemed simple and objective. I chose Ireland because it is a European country and because I will be able to work as a student, which would allow me to return to Brazil with some financial reserve. Outlined Plans, my daughter, who had just returned from an exchange in the United States at the time, was my biggest supporter. Ireland has become my destination.

A year later, living with Brazilians, the English had not evolved as expected, so I renewed, and when finishing the renovations, I realized that the situation in Brazil had worsened. There was no job market, and I was afraid to go back and get unemployed and out of prospects again. Then the old project to do a doctorate in Portugal at a University with a great reputation in the field of copyright was reactivated, but for that I needed to be very good in English, so it would be wise to invest some more time in contact with the language, and I realized that I was already in love with Ireland and was afraid to leave. So doing a new master's degree seemed like a good excuse to stay. After all, this would allow me to evolve a little further into English and facilitate the acceptance process at a Portuguese University, and this is how I entered the MADR Conflict Resolution Alternatives Master's Degree at Independent College.

The master's degree itself was already a big challenge due to lack of language competence, so I decided that I would continue my studies in Copyright and finally focus my energy and find a link between current and previous research. This is how I decided to study the possibility of using Mediation as an alternative dispute resolution in Copyright Disputes, and at this point I think I have entered stage 1 of the Kolb cycle, the concrete experience of developing a masters research and reinterpreting my previous experience in which Copyright was also studied, but would now be analysed in another scenario, reinterpreted in the light of a new culture, a new legal system and under a new approach, the possibility of using Mediation. But above all, there was a new element that seemed to be an insurmountable obstacle: studying in another language. Classes came together, and learning and exchanges with colleagues, new content, new teachers and I moved to Stage 2, more reflective and questioning about my experience,

where would it lead me, if the lack of language maturity could be outdated or not. At this stage, it was inevitable to make comparisons between previous and current experience. There was an abyssal difference, and I felt alone and helpless. Despite studying Methodology with John Lamont, who is now my supervisor, the discipline was short, and the introduction to the research questions was conducted in a group work that was an extremely frustrating and daunting experience because it was not real. We don't research together, we don't learn together, we don't share, and we don't complement each other. We presented ourselves as a quilt, and because of this frustration, I moved painfully to stage 3. But this allowed me to resignify my learning process, I empowered myself and decided that I would take the reins of my learning, without comparisons, with more delivery, with more empathy, with more commitment, and then pleasure came back. Nice to learn, to drink from the wonderful sources that were the teachers, to realize that I could face my weaknesses and make myself better. The practice of dissertation building was guided by John Lamont, and with him, I went through to cycle 4, and I confess I was surprised because the previous frustrating experience was replaced by something new so I found that we were not the same. I had changed and was determined to do my best. I had also resignified his role and could actually see him. Then I understood that I was the researcher and that he would be my facilitator. He gave me methodological suggestions, links, book directions, feedbacks recommending changes, but the most important thing he gave me was the ability to learn (actively) despite the fear.

I started the research with the certainty that it would lead me to a certain result. I interrupt my study with a different conclusion. I say interrupted because I learned that a study never ends; we just choose a certain point to report what we concluded so far at that moment. I came to the research result led by Lamont's supervision, my researches, the collaboration of colleagues and people I did not even know personally. I came to the research result driven by the generosity of Judge Fidelma Macken, who shared with me a hundredth of her knowledge. I came to her, driven by the detachment needed to experience Kolb Cycle 4. The conclusion of my research is a resounding *yes* and a resounding *no*.

Because there is no single answer for such diverse and complex area as Copyright, I surrender to this result humbly and learn from it that the most fascinating result that can be obtained is always to be open to learning.

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Appendix A.: Interview Transcription

1) As a former patron from the Irish Commercial Mediation Association. What is your opinion about the role of mediation as a conflict resolution alternative?

The idea of the Association was to promote Mediation and mediators. And the possibility of resolving disputes is extended to as many areas as possible through Mediation rather than automatically going to court. Our main idea was to promote Mediation in cases of medical malpractice, because it is very expensive for the parties to go to court in these cases, and they are usually very long cases. Most people who are involved in malpractice cases are not really interested in the judicial environment. What they truly want is for the harm-maker to apologize, to explain how was made a mistake. After that, they may even ask for some compensation, but this is the last of the thoughts. That is why I consider this to be a very suitable area for Mediation.

So it is an area that I find particularly useful for Mediation, but I refer to good Mediation and not poor Mediation. Good Mediation in this area can be a special opportunity for the parties and can work very well. However, it does not work so well in all areas. Sometimes there is a need to involve specialists to present evidence of negligence to the court, either from the doctor or from the hospital. Experts may be needed to prove that unfortunately, what happened was a fatality, an accident because medical conduct was perfect, but medicine is not exactly like mathematics. In some cases then, I think Mediation is a good possible alternative; in others, Arbitration might be more appropriate. Therefore, the criterion of choice should be associated with the particular case, or where it can be used as a precedent for going to court. Mediation works very well in areas where people have been dealing with each other for a long time, and then the problem arises. They may be part of large or small companies, but they have a bond and do not necessarily want to break the relationship and believe that if they go to court, it will be very difficult to avoid this. In such cases, good Mediation can solve the problem and allow the parties to preserve the relationship.

What is a good mediation and a poor mediation?

In my experience, there is a big distinction between good Mediation and bad Mediation. Mediation is good when it facilitates the parties themselves to enter into a rich agreement.

But unfortunately, there are cases in which lawyers are involved, and so involved and take control that they decide how Mediation will proceed. Often they do so because they feel that the parties do not understand enough of laws and so complain, for example, in copyright. Copyright is a very exotic and wide area. It is often noticed in Mediation that authors are unaware of the limits of copyright, so they may have extremely high expectations. Ignorance is what generates unacceptably high expectations. Often the lawyers hired by the authors are not specialists, but they are involved because they are their lawyers of all kinds, so because of the trust the client has in him, they get involved in mediating something they don't understand: copyright. So, in my experience, the most successful mediations are those in which preliminary exchanges with lawyers take place in order to decide the best way to manage Mediation. And especially when the attorneys involved are specialists hired by the author for that particular case, or as with television, film, or music companies, the attorneys involved are used to dealing with copyright issues all the time. I am also referring to lawyers who are good lawyers, don't get me wrong, but not everyone has the same kind of experience, so having a preliminary meeting with lawyers is often a good opportunity to state what the law he says, both ways. In this way, the less experienced lawyer will suddenly realize that there are limits to what can be claimed. And so, I think managing a mediation is a very important aspect to get a good result. Therefore, if there are an enthusiastic lawyer and one side, usually the tendency is not to get a good

result. There are certain special abilities to perform a well-executed Mediation. For example, imagine a situation where you have on one side someone who has a lawyer you trust to solve all kinds of problems, and now someone has stolen your song or the idea that the person wrote that was rejected as a script, but now is being used in a movie. On the other side, you have a big movie company that supposedly rejected the script and is now using it. The company has lawyers specializing in copyright. So mediating something like this requires preliminary stages, so that the plaintiff's attorneys can learn from the preliminary discussions and help the complainant understand their limits, avoiding major disappointments. So, this is what I mean, and the situation needs to be sufficiently well analysed so that there is no imbalance. That is why I defend the preliminary meetings as an opportunity to give the parties a sense of what kind of agreement can be reached and maintain significant control, not simply transferring the decision to the lawyers. If this is possible, I think it will achieve very good Mediation.

2) Do you think that Mediation can be considered more appropriate than others methods of Litigation having considered the natures of the dispute and cost involved until resolution?

Well, it is very difficult to give a definitive answer. As I mentioned in the previous answer, it depends a lot on the type of situation you are in, or the type of dispute, the complexity of the dispute, the time it may take in the Mediation or the Court. It is interesting to note that Mediation will not automatically be shorter. It may be less expensive, but not always. It really depends on the context of the dispute and the complexity of it. I will give examples just to show how difficult it is to give a general answer to this case. So, I will refer to the period I was still practising at the Bar before becoming a judge in 1998. I have an opinion on current cases, but I prefer to talk only about cases in which I was involved. I believe that just reporting the cases will give you the answer.

The first example was a case involving copyright and contracts. Copyright on bulletproof vests. Vests that are worn by security guards or the army, so that if they are hit, they will not be killed. So they are made of certain types of different fabric layers and a small amount of metal liners and certain types of carbon and tailings. They are made of layers that have a specific sequence. They only wear this when they are involved in something very dangerous and are at risk of being hit. Even then, they can still be hit in the arms, but they have their bodies protected except for the trauma of the bullets, and even that is protected by certain types of fabrics made by Dupont in the US, or at least in the 1990s).

A United Kingdom company has been asked to provide a large number of bulletproof vests to the army of another African company (I will not mention the company; you can find it on if you wish and then you can decide whether or not to mention it). They were successful in the first delivery and were waiting for the second demand, as the overall value would be three lots of five million euros each. This meant a lot of money in the 1990s. A curiosity, the way the vests were tested in North Africa: they picked some people who dressed and had them run and shot them. Fortunately, the bulletproof vests were really good, so no one died.

So after the contract was signed, the first delivery was made, everything went very well. The bulletproof vests sent, and payment was made, and they waited more than nine months for the second-order, but it did not happen. Then a business friend from the company commented to them: I went to an exhibition in the Middle East and saw the demonstration of your bulletproof vest and was really impressed, just brilliant! And the company asked: where was that? And he replied: in Dubai. And that was how a major investigation began in which they discovered that the intermediary who had introduced them to the African company and who had never shown any knowledge or expertise in the area had established a small business in Cork, including with financial assistance from the Irish

government and International Development Association (IDA), as well as two other companies in China and the Cayman Islands with offices (office only) in England.

This discovery generated an international coordinated operation involving, in addition to Ireland, the mentioned countries and the United States. I was part of the team at this time, although I was only a junior. Besides me, there were two Seniors. Then a simultaneous operation was triggered at 10 am on any given day in London, China, Dublin all at the same time, all in the same application, all courts, judges, inspectors, investigators, lawyers working together and issuing equivalent orders in all jurisdictions.

Inspectors and investigators found a lot of evidence in the factory garbage and were able to prove that the bulletproof vests were being manufactured there and were able to gather all that information to incriminate the intermediary. It was a successful but extraordinarily technical and time-consuming operation.

So it would not have been possible to send such a case to Mediation. It was a case of copyright and security. Much technical evidence was needed, and for the evidence that the bulletproof vests produced by the intermediary had been copied from the company, many specialists were involved. Because of this, it would not be possible to send the case to Mediation. It was a very complex and particular case and involved at least eight specialists. It would be very difficult to find a Mediator who could handle it. So this is the case where I do not consider Mediation to be preferable to litigation. The judges involved were brilliant, the operations concurrent, the information confidential. Anyway, I think this is an excellent example of a case where Mediation is not appropriate.

so, we can not generalize

Exactly, just feeling when you know something about the case, you suggest immediately that, a case like that can never go to Mediation. Will be difficult to go to Arbitration either, but certainly, I know that can not go to Mediation.

On the other hand, when I came back from Luxembourg, I was sitting in a case that was settled on a second day, to mean that it is a very good example to give you. It was a Copyright case, predominant a design case with a copyright element you know. But it concerned a un unregistered design. That means not registered but just claim to have a novelty of this particular design or copyright lear, design predominantly, because they had introduced an unregistered design that suppose that unregistered design and much closest to what this recorded in English as Design Copyright. In concerned the design of Front of doors, which seems very basic but this particularly claimant or plaintiff, they said that they had designed that particular door and this had unusual elements that we have been founded in others doors and these others people had infringed it. And they said no, it is a common thing; there is no novelty in it, nothing that could be protected, either by design or by copyright and it is run full days with some experts but not the complex experts that we find in the other case, and in the second day when we reunite they said that they had settled the case. So, the settlement, in that case, is, in reality, a formality Mediation between the two lawyers who were embattling their claims, but is lawyers refer rather than plaintiff and defendants. But, of course, the lawyers can not agree on anything unless that the two parties actually agreed. So, that was a case that probably could had done to Mediation, and might be quicker, because it might resolve it in the second day, rapid example.

There is another example also this I came back, but since I was retired, so I just mention. And the case concerning Jeans. I think was Jeans or Jacket. A case between Dunnes Store and Karen Mullen. Do you know The designer Karen Mullen? She suits Dunnes Stores for copyright design, unregistered design, copyright infringement and the case eventually went to the Bar. To the Court of Justice

because this new Law, the unregistered design or unregistered copyright or The European Court of Justice takes this very oath judgement and that introduced elements of reputation coming from the trademark side. I do not know why they decided to go than that line, but they did. In Ireland, the Court has come back is very happy with the judgement but there has been criticism in other jurisdiction. I think that is a Case that also could have done to Mediation because the defendant and the plaintiff could explain how they came to their particular design. I mean we can be influenced by other people without actually copy in the copyright sense. So, I think I could have done to a Mediation but was no sense, and anybody was prepared to go to Mediation. So far I know, I have made any inquiry.

So, I really mention those three almost by the way as a response because it is not possible to *lay down* definitive rules saying in this circumstances yes: Mediation, in this circumstances no, you have to go to Litigation. It very much depends on the nature of the dispute in particular but also on the parties, because you may find a party always want to go to Court, a particular party, not just any party but you may find for example that in general most movies Company always want to go to Court because they know the judges are going to understanding the limitation on Copyright. And what the other side is going to be in touch at the end of the day. So, you may get some Telephone Companys or Telecommunication Companys, will do the same, they prefer to go to Court, and a lot of then do not like to go to Mediation because they are dealing in their views with an overly enthusiastic time on the other side, so they think that if they go to Mediation is not going to resolve because Mediation is not binding. It is not going to result in a definitive fixed result. It can be ... they both parties until they are going to be in Court anyway. So, it very much depends on the industry, the nature of the defendants, what their history in terms of going to Court . As to the way they do that, because very often if they are prepared to settle or do something, they do that long before, you get (...) near a poor case or (...) Arbitration or Mediation. Do you know? They settled themselves. So, I hope that useful but is the reality that I think it happens.

(The Interviewer): I understanding that. You can not generalize: It is okay or it is good for Copyright or not. It depends on the case)

Exactly!

And for example, you will find that in a lot of countries. In a lot of jurisdictions, they have the same problem with Mediation. And you have an option to go to Mediation, but some countries obliged you to take certes disputes to Arbitration, and that is because the Arbitration is one that imposed result. Obligatory to go to and the answer is to impose on both parties. And there you have finality. So they can get certain (...) that move by legislation out of the Court system because it is considered they are more suitable to be done by way to Arbitration, for example, in this Country, all disputes, Construction disputes, that are governed by certes types of standard form contracts must go to Arbitration and that is because you can get your answer, you can get your result, you can get your expert in the areas very easily. So there is a long-established cases book on all of this and then most of the disputes so everybody has something very clear to wet to. ... to Mediation is voluntary, is non-binding, and it very much depends on the attitude of both parties. So, you can see the distinction that

(The Interviewer: but it can be legally binding if in the final the parties decided that)

The legally binding in most Mediations, most Mediations are not legally binding. They can be in certes very limited circumstances, but otherwise, they are voluntary, and they are not legally binding. You can simply walk away and go back into Court. And that very often depends on what you

Constitutional right of access to Court is. That can not be cut down permanently by saying a voluntary Mediation is now binding in both parties. You can encourage people to accept the result by imposing, for example, some costs in a reluctant party, on a party who really has not engaged in the process or has miss behaviour during the course the process or things like that. But are very... at least in this jurisdiction and indeed in most of the jurisdiction, where you can impose a Mediation as a finally binding result. And in fact, one of the things that are interesting is that in the European Court of Justice when they are talking about certes types of cases, for example, contracts for royalties payments in the cases of standards-essential pa payments in the cases of standards-essential patents. That is a very technical term. The Court Asset time and time again, particularly in opinions of the other () and the way and to deal with this is to for the party owner the patent to tell the intend license, what the standards terms are? And if this intend license does not like these terms, then they have to send back very quickly their suggested terms. And the parties to then resolve that by means of binding Arbitration or Court. But (carefully) finding Arbitration before they come to Court. Not by a voluntary Mediation that is not binding. There are several jurisdictions with the idea where is recognized that, in general, voluntary Mediation is not binding on the parties. Then the parties could agree to make it binding but very few wills. Because they always want to have their day in Court. Sometimes do they find that in the case of Family Law, for example, where both parties will agree to what they decide before the Mediator, and that is what they bring to Court to be approved by the Court. But, in general, Mediations are not binding. So, that is my answer to the second question.

3) During your time in judicial office, you presided over or was a member of the formation in many seminal cases involving a wide range of legal issue, at European and national level, related to intellectual property. Because of your experience, do you consider Mediation an alternative dispute resolution suitable for intellectual property disputes?

That is an interesting question, because it is determined, both by the nature of the intellectual property, but also by the nature of the dispute, and again they are not segregated, they are combined in the answer to this! And I'll tell you what I mean by that, when I gave you the earlier examples of the bulletproof vests, I said it wasn't suitable for mediation because of the absolute complexity of the nature of the dispute and it needed a large number of experts to come and give evidence! There was another element to it, which I will mention in a moment, it was in particular not suitable!

The other two cases, the doors and the dressers, were suitable for mediation by virtue of the nature of the dispute, that is copyright infringement or unregistered design infringement/copyright.

But there was another element to it, and the other element is that in those cases, the dispute is a type of a one off engagement between the parties, in other words they will resolve the dispute and that will be end of the problem under copyright law, the problem under design. Either they will succeed or they won't succeed, but if they succeed then they will be able to oblige the other side to destroy all the copies that they have, all the dressers or the doors or whatever, or they may pay to allow them to use them up, and that's the end of it!

But that doesn't apply in a lot of other forms of intellectual property rights. So if I can go through them at its simplest starting with trademark registration. And I am going to talk about registrations rather than passing off, but trademark registration.

Somebody sues for they have a European Union registered trademark out of the EU IPO office in Alicante, and it extends to maybe 14 of the 27, it extends in law to all the member states. But they may be using it say 18 of the 27 member states but not in others. Now normally speaking, if they succeed, so I'm talking about the norm, if they succeed, they will be able to stop whoever has been

using their trademark, and any goods that bear those trademarks have to be destroyed or sent abroad to any non EU country where's there no equivalent trademark protection.

But you could have a case which arises more often in patents and I just mention it in the case of trademarks. If the infringers are in one of the countries, and they're fairly small for example, one of the countries where the owner of the trademark is not actually using their own trademark because they don't have a market! They may be prepared, as part of the settlement, they may be prepared to give a licence to the company in this other country, for a fee, to use the trademark on the real goods, because that suits up the trademark owner because they are building up use in another country, and they are building up a market in another country. And it suits the infringer because he is already in that market and wants to be able to continue. So that's a possibility. It might or might not be a one off fee, but I want you to remember that that's a possibility because I'm going to speak more about it in the field of patents.

Then if I deal with patents next, and I'll come to copyright in a moment. I'll deal with copyright and industrial design together, but the same applies in the case of industrial design, registered industrial design, as it does in the case of trademarks, because a European wide registered design is registered, again, at the EU IPO office in Alicante and extends to the whole of the union. Whether or not it is subject to attack because it isn't used sufficiently, I'm parking at the moment! But you could say the same about a registered design, save for one element which is more like patents.

So, I'm now going to deal with patents and registered designs together, ok? The patent class normally, there aren't any such things as the equivalent European Union patents, because the patents have been granted in Munich under an international convention, which you don't have to be concerned about that in this talk about mediation, because the patent when it is granted, is granted in all of the nominated countries of the European Union that the owner of the invention has designated in their application. So it becomes a type of European Union wide protection in a technical way which we don't have to discuss.

Now, the reason why infringements of patents, in particular in some areas, but predominantly in the field of Pharmaceuticals and Telecommunications, are less suitable for mediation than arbitration or litigation is the following. Most of these, because they last for 20 years in the case of patents, with a possible extension, and a lesser number of years, 5,10,15 in the case of registered design. The arrangements between an infringer and the owner of the patent regularly, not always, regularly tend to lead to an agreement between the two of them, for all sorts of reasons that we don't have to go into! But those agreements will be long lasting, they last for the life of the patent and of any extension that's granted. And they are invariably subject to a royalty payment, so much per item, or so much percentage or whatever. And the patent owner always has to have terms in the licencing agreement under which he can check that they are actually paying what they should be paying. So the agreement that they have between then will include provision for outsiders to come in and check their records, go into their financial records, on a confidential basis. And the results of those can be reported back to the patentee and the patentee will then say no, no, no, we know they are not actually paying us the percentage, because we have done checks and we know they are actually selling 'x' amount, and in their books they are only recording 'x' minus 'y' amount and paying us, so we need now to sue them under the settlement agreement for these continuing things.

Or, for example, if it worked very well, the two parties will continue more agreement relating to other pharmaceutical products. So there will be a continuum, and a continuum is never well settled by mediation, unless that mediation is followed by an absolutely binding formal agreement! It doesn't lend itself to a one off conclusion, except where there is an infringement, the infringement is proved and the other side doesn't want any continuing relationship between them! So that's the pharmaceutical area!

Exactly the same type of issue arises in the area of standard essential patent, which are predominantly at the moment in the telecommunications field, but are going to move into all of the areas of the internet of things, which are driverless cars, robotic operations, big big automatic technology, not technology in general, but technology that needs to talk to some other technology. And the reason for that is, that in all of those areas there have to be standards fixed by somebody, either the E.U. or the USA standard fixing organisation, or there is a big company in France that fixes standards, almost all standards in the telecommunications field. An independent company, recognised by the E.U. as being the standard setting agency for telecommunications.

So there are going to be more and more of these standard setting, or standard essential, which make mere mediation very difficult, because what you are looking for are binding decisions that are going to be converted into binding agreements. So you are looking at either arbitration or litigation, rarely at just mediation! Although you could have a mediation where the parties agree we now convert this into an agreement. But the preference, seems to me, to be between litigation and arbitration and one very often follows the other. You may find a lot of litigation appeals winning in some jurisdictions, losing in others on the same issue. Finally they say, look we'll go to arbitration and we'll settle a worldwide agreement for our standard essential patent portfolio. That frequently happens! So, I make a big distinction between patent and some registered designs because some of them may come under these standard settings, you know medical devices and things like this. So they are going to fall into a very fixed category, in my view, of arbitration or litigation.

Then in copyright, copyright is a little funny because it covers such a broad spectrum. So you may have copyright consigning the content of the news, or Netflix, or what you download on your device. You may have copyrights consigning reproductions of the Mona Lisa, or architectural drawings, or theater productions, or musical/classical/rock/instant music that is not written down in a musical form, but is recorded in some. The sector is so wide that I think, you could not possibly say all mediation, or all litigation or arbitration. I think there is a huge area in which mediation is perfect and a smaller area, more the classical kind of areas of artistic rights, musical works in the strict sense, writing down you're not recording works but musical rights, literary works, artists, dramatic works. Those tend to lend themselves to the more formal litigation, arbitration end of things. Nevertheless, if you had a single copyright infringement claimed in respect of one play by an author, mediation is perfect! So you really have to look at the divide when you come to copyright.

And also, in copyright, only parts of copyright as opposed to trademarks and designs, only part of copyright is harmonised at E.U. level. So you have to bear all of these in mind when you are looking at what would be suitable ?? EU supply in this type of case will know if it is not harmonised but it might be convenient to follow it. And the other thing that is really important, that people forget about, is that if you go to mediation and you reach an agreement consequent on the mediation, or indeed in arbitration, when they are drafting the result of the mediation or arbitration, you always have to bear in mind the Commission's views, and they're very strong and their rules and the treaty rules relating to competition, but in the context of any settlement.

So a lot of people prefer to go to arbitration, or to go to litigation, where there's a greater degree of certainty as to what are we going to have to look at in terms of competition, as opposed to with mediators who may not all even be lawyers, what are we going to do about the competition element of this. They are now going to have to employ a competition lawyer, or a very good intellectual property lawyer with expertise in doing these kinds of agreement. So there are lots of elements that come into play before you can say this direction or that direction. So that's what I would draw from my experience of both litigation, judging, arbitrating and mediating, you know, so that's quite complex.