American e-Discovery: Reason Enough to Arbitrate International IP Disputes

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Abstract

Discovery obligations in American courts create unnecessary cost and time burdens for disputants, resulting in cases settled upon costs rather than merits. With no apparent solution in sight for soaring costs related to overly-broad e-discovery requests, arbitration shows itself a suitable alternative. For international cases, where parties to disputes are required to comply with law in multiple jurisdictions, arbitration again offers disputants a means to binding awards without excessive conflicts of law interfering with data privacy or ethical obligations. Rules and laws related to arbitration ensure privacy throughout the process and international recognition thereafter. Analysis and review of cases, law, and rules of arbitration lead to wholesale endorsement of arbitration.

Keywords: Alternative dispute resolution; Intellectual property; international law; arbitration; E-discovery

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Introduction

American discovery presents significant challenges to international litigation. Although Federal Rule of Civil Procedure (FRCP) 1[1] and Federal Rule of Evidence (FRE) 102[2] state purpose of avoiding unnecessary cost and delay, it is often opined that Courts have failed in this regard[3]. Foreign parties may feel at a disadvantage in U.S. Courts where discovery can be expansive and disruptive to a company's internal policies[4]. The result of discovery-related problems is that trial may be "by attrition rather than by jury"[5] or that settlements are "driven by legal expense rather than the merits"[6].

This article reviews roots and fruits of faults and problems inherent to e-discovery. Cost is the biggest concern, which follows volume and extent of discoverable ESI. In patent cases, those costs are found to be astronomical. Unclear FRE and FRCP preservation provisions alongside hefty sanctions for spoliation leave few options for companies to efficiently manage legal affairs. International cases show conflicts of laws overseas[7] manifest unreasonable dilemmas for litigants in the U.S.[8] In contrast to rules of litigation which are written by public officials and

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[1] Rules of Civil Procedure for the United States District Courts, Rule 1. Scope and Purpose: "These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

[2] Federal Rules of Evidence, Rule 102. Purpose and Construction: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

[3] See for example U.S. House of Representatives Committee on the Judiciary Hearing on the Costs and Burdens of Civil Discovery (12/13/2011), http://judiciary.house.gov/ hearings/hear_12132011 _2.html (last visited Mar. 20, 2013). Thomas Hill testified that "current discovery rules appear to fall short of [Rule 1 FRCP]... the current system is inefficient and costs far too much money to ensure justice".

[4] Data protection and privacy concerns have been central to international opposition to U.S. Court procedure. See Erica Davila, International E-Discovery: Navigating the Maze (2008), http://tlp.law. pitt.edu/ojs/index.php/tlp/article/view/37 (last visited Mar. 20, 2013).

[5] *Supra* note 3. Justice Rebecca Love Kourlis in closing remarks.

[6] Michael Rader (2012), *Recent Patent Litigation Trends Affecting Non-Practicing Entities*, 18.2 IP Litigator 24.

[7] The United States has not yet been considered a nation which applies adequate protection of personal data under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 57. Giancarlo Frosio, *Urban Guerrilla & Piracy Surveillance: Accidental Casualties in Fighting Piracy in P2P Networks in Europe*, 37 Rutgers Computer & Technology L J 1 at 46. The Netherlands court remarked in the BREIN case in that the United States "cannot be regarded as a country with an appropriate level of protection for personal data."

[8] *In re Advocate "Christopher X"*, Chambre Criminelle [Cass. Crim.] Paris, Dec. 12, 2007, Juris-

applied broadly over all cases, arbitration allows parties the right to directly control their own unique process of taking evidence. The article concludes that arbitration is virtually always a more appropriate dispute resolution method (DRM) than litigation. Recommendations are made with the view of furthering the cause of arbitration of international disputes.

Costs and Burdens of Electronic Discovery

Discovery of electronically stored information (ESI) is an inescapable aspect of legal disputes in contemporary business. In some cases, terabytes of information need to be sifted through for production of millions of files. In *Zubulake IV*[9], American Federal Rules were construed such that a duty to preserve documents begins at the point where a party should know that the evidence may be relevant to future litigation. As a result, American courts may have closed the window of opportunity for cost-efficient ESI handling at large organizations. The effect of this obligation can be extremely wasteful, where companies need warehouse space to store information that may never be used[10].

Courts have occasionally recognized costs and burdens of e-discovery and adopted guidelines intended to constrain the process within the meaning of FRCP 1[11]. Despite relatively reasonable median litigation and discovery costs, statistics show imbalance in the numbers leading to extremely high costs in about 5% of all cases which account for about 60% of total litigation costs across all cases[12]. Discovery of ESI in international cases or those involving data that is spread out

Data [No. 2007-332254].

9 *Supra* note 7.

10 *Supra* note 3. Hill mentioned a case from General Electric where storage costs were $100,000 per month.

11 "Preservation efforts can become unduly burdensome and unreasonably costly unless those efforts are targeted to those documents reasonably likely to be relevant or lead to the discovery of relevant evidence." *In re Genetically Modified Rice Litigation*, 2007 WL 1655757 (June 5, 2007 E.D.Mo.). U.S. District Court for the Northern District of California adopted e-discovery guidelines in 2012. See http://www.cand.uscourts.gov/news/101 (last visited Mar. 20, 2013). The U.S. Federal Circuit Advisory Council adopted a Model Order governing e-discovery. See http://www.cafc.uscourts. g ov/the-court/advisory-council.html (last visited Mar. 20, 2013).

12 *Supra* note 3. Professor William H. J. Hubbard from the University of Chicago Law School discussed skewed data, where median cases were not representative of the data as a whole. Median cases involved about $35,000 in litigation costs, of which about $10,000 related to discovery. 5% of cases rose above the $100,000 mark in costs, but those cases accounted for 60% of all litigation costs. Justice Rebecca Love Kourlis explained that If a case costs 2-3millionUSD in legal fees, e-discovery can easily cost another 2-3million. William P. Butterfield testified that objective evidence shows most cases do not have high costs, but rather the outliers are what proponents of change focus on. These outliers include a lot of patent cases.

around the world[13] can be "prohibitively expensive"[14]. As a result, e-discovery threatens good faith litigation of claims.

FRCP 34(b) requires litigants to make specific discovery requests[15]. Parties may defend against overly general or ambiguous, excessively voluminous or burdensome requests under Rule 34(b)(2)[16]. Rule 26 theoretically protects parties from "undue burden or expense" in complying with discovery requests[17]. Apportionment and cost shifting are available under Rule 37(a)(5) when motions are heard. Technically speaking, the discovery process should follow Rule 1 and thus should not be abused to drive up costs[18]. However, litigants[19] and judges[20] criticize the process as falling short of Rule 1 purposes[21].

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[13] *United States ex rel. Julie McBride v. Halliburton Co., et al.* Civ. Action No. 05-CV-828 (2011). Halliburton "spent a king's ransom on discovery" producing documents contained remotely around the globe. "Since the defendants employ persons overseas, this data collection may have to be shipped to the United States, or sent by network connections with finite capacity, which may require several days just to copy and transmit the data from a single custodian. Ryba estimates that each custodian averages 15-20 gigabytes of data, and collection can take two to ten days per custodian."

[14] John Yip (2012), *Addressing the Costs and Comity Concerns of International E-Discovery*, 87 Washington L Rev 595.

[15] See also Manual for Complex Litigation, Fourth, §11.443 at 75. "In overseeing document production, the court should... prevent indiscriminate, overly broad, or unduly burdensome demands—in general, forbid sweeping requests, such as those for "all documents relating or referring to" an issue, party, or claim, and direct counsel to frame requests for production of the fewest documents possible..."

[16] *New Hampshire Ball Bearings, Inc. v. Jackson*, 969 A. 2d 351 – NH: Supreme Court (2009). "The parties engaged in a lengthy and bitterly fought discovery process...After seven months of discovery, NHBB filed a motion to compel Sargent to grant NHBB access to its servers, server backup tapes and employee computers in all three of Sargent's engineering divisions at its facility in Tucson, Arizona. The court denied the request, stating that the potential imaging of up to 250 hard drives was 'too broad and burdensome,' but allowed NHBB to make a narrower request."

[17] See *Herbert v. Lando*, 441 U.S. 153 (1979) at 177 (quoting Rule 26); *Crawford-El v. Britton*, 523 U.S. 574 (1998) at 599. "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery."

[18] *Stiller v. Arnold*, 167 F.R.D. 68, 71 (N.D. Ind. 1996). Rule 26(c) further provides protection for parties against "annoyance, embarrassment, oppression, or undue burden or expense". The Supreme Court contemplated Rule 26(c) in *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978), but has yet to address the issue again since.

[19] Mary Mack (2012), *eDiscovery & Preservation Obligations: Getting Ahead of the Game!*, Findlaw (2012-05-10), http://technology.findlaw.com/electronic-discovery/ediscovery-amp-preservation-obliga
tions-getting-ahead-of-the.html (last visited Mar. 21, 2013). "Unfortunately, the "trigger" of [the] duty [to preserve] is often unclear and may apply at any of several stages."

[20] *CBT Flint Partners v. Return Path*, 676 F.Supp.2d 1376 (2009). "The enormous burden and expense of electronic discovery are well known."

[21] Nicholas Pace and Laura Zakaras (2012), *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, RAND Institute for Civil Justice,

E-discovery costs are often asymmetrical since the "presumption is that parties must satisfy their own costs in replying to discovery requests,"[22] and so we find persuasive argument made on behalf of large corporations whose discovery costs are "in many cases astronomical"[23]. Theoretically the "overall goal of discovery [is] to focus on matters reasonably calculated to produce evidence admissible at trial"[24]. However, in practice information which does not aid in ascertainment of truth[25] is sought only to be considered irrelevant and inadmissible[26]. Overly broad ESI requests, which occur even since Rules amendments took effect, can yield millions electronic documents[27] plus source code[28] and other information[29].

In some cases, sanctions may not adequately offset excessive discovery costs[30]. Complying with an e-discovery request cost $249,000 in one case[31] and $274,000 in another[32]. A study found average discovery costs from 2006 to 2008 ranged between $621,880 and $2,993,567. High-end cases in that period were found to have had discovery costs of $2,354,868 to $9,759,900 per case[33]. Indeed, one case featured an

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http://www.ran d.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf (last visited Mar. 21, 2013). "There are complaints about the absence of clear legal authority. A key concern voiced by the interviewees was their uncertainty about what strategies are defensible ones for preservation duties."

22 *Dahl v. Bain Capital Partners*, 655 F.Supp.2d 146 (2009).

23 *Swanson v. Citibank*, 614 F.3d 400 (2010) at 411. "In most suits against corporations or other institutions... the plaintiff wants or needs more discovery of the defendant than the defendant wants or needs of the plaintiff...the electronic archives of large corporations or other large organizations holding millions of emails and other electronic communications...the cost is not only monetary; it can include, as well, the disruption of the defendant's operations...If no similar costs are borne by the plaintiff in complying with the defendant's discovery demands, the costs to the defendant may induce it to agree early in the litigation to a settlement favorable to the plaintiff."

24 *Supra* note 26 at 149.

25 FRE 102

26 FRE 402

27 *Heraeus Kulzer GmbH v. Biomet, Inc.*, 633 F. 3d 591 (2011) at 595. "A discovery demand in our courts might yield a haul of 30 million emails, few of which would be admissible in evidence."

28 *Supra* note 24 at 1380. "...overly broad discovery requests that required the production of 1.4 million electronic documents and 6 versions of source code...Ultimately, the Court ordered CBT and its counsel to pay Cisco IronPort $86,786.95 in attorney fees."

29 See *In the Matter of John Irwin v. Onondaga County Resource Recovery Agency*, 72 A.D.3d 314 – NY: Appellate Division (2010). The Court concluded that metadata is subject to disclosure.

30 See *In re Fannie Mae Securities Litigation*, 552 F. 3d 814 (2009) at 817. "...the individual defendants submitted over 400 search terms, which covered approximately 660,000 documents...OFHEO undertook extensive efforts to comply with the stipulated order, hiring 50 contract attorneys solely for that purpose. The total amount OFHEO spent on the individual defendants' discovery requests eventually reached over $6 million, more than 9 percent of the agency's entire annual budget."

31 *Wiginton v. CB Richard Ellis*, 229 F.R.D. 568, 572 (2004).

32 *Zubulake v. UBS Warburg (Zubulake III),* 216 F.R.D. 280 (2003) at 283.

33 Lawyers for Civil Justice, *Litigation Cost Survey of Major Companies* (2010), http://www.uscour

e-discovery estimate of nearly $10 million[34]. Review is the most costly part of ESI production, which has been found to rise above $200,000 per gigabyte[35]. One study found midsize cases generate 500 gigabytes of ESI, costing up to $3.5 million for processing and review[36].

Justice Kourliss testified to Congress that "the civil justice system in the United States is too expensive and too complex...a lawsuit takes too long and costs too much,"[37] leaving the system inaccessible to many individuals and entities. Such concern is not considered irrelevant, but rather dissent suggesting that arbitration may be favorable to litigation. Arbitration is well-known as a lower-cost, speedier and less cumbersome procedure compared to litigation[38]. Advantages of arbitration are multiplied in the context of international disputes[39] and when high-value sensitive information is involved[40]. In a new age of reduced economic certainty and demands to reduce legal costs, e-discovery is the proverbial "straw that broke the camel's back".

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ts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf (last visited Mar. 22, 2013).

34 See *Rowe Entertainment v. William Morris Agency*, 205 F.R.D. 421 (2002) at 425. "If the e-mails on all of the back-up tapes were produced instead of a sample of eight sessions, the total cost would mushroom to almost $9,750,000."

35 *Supra* note 25 at 28. Review accounts for the highest percentage of total e-discovery costs and the highest monetary cost when compared to collection and production. Of 36 cases surveyed, review costs ranged from around $1,800 to $210,000 per gigabyte.

36 Institute for the Advancement of the American Legal System, *Electronic Discovery: A View from the Front Lines* (2008), http://iaals.du.edu/images/wygwam/documents/publications/EDiscovery_View_Front_Lines2007.pdf (last visited Mar. 22, 2013).

37 *Supra* note 3.

38 David Allgeyer (2007), *In Search of Lower Cost Resolution: Using Arbitration to Resolve Patent Disputes*, 12 Conflict Management 9.

39 "Europeans generally do not share the American enthusiasm for litigation. They often view the American advocacy system as a hostile, aggressive environment. In particular, the size of American jury verdicts, sometimes inflated by treble and punitive damages, and contingency fee attorney contracts, offend European sensibilities. Many European attorneys view the American discovery process—often referred to as a 'fishing expedition'--as the root cause of all they find distasteful about American litigation." John Hinchey and Elizabeth Baer, *Discovery in International Arbitration*, Center for International Legal Studies Salzburg Conference (Jun 15-18, 2000).

40 Arbitration has multiple advantages in IP dispute resolution. Unlike litigation, the entire arbitral procedure is private and generally no information about the dispute is disclosed to the public. Rules can be written to include special provisions on handling of confidential information, knowhow and trade secrets. Douglas Fox and Roy Weinstein, *Arbitration and Intellectual Property Disputes*, American Bar Association 14th Annual Spring Conference (Apr. 19, 2012).

Patent Cases

Intellectual property cases in general were found to cost 62% for than other cases in U.S. courts. Less than one in ten thousand documents produced in discovery are admitted into trials[41]. One study found average discovery costs in patent infringement cases of $1.6 million[42]. In cases involving stakes of $25 million or more, discovery costs rose to $3 million on average[43]. Some commentators think these abnormally high litigation costs create artificial barriers to entry and stunt innovation[44]. The enormity of discovery costs may also help explain why about some 75% of patent cases are terminated before pre-trial[45]. Such costs make litigation extremely unappealing and make arbitration a superior dispute resolution method[46].

Different Traditions, Different Approaches

Common law jurisdictions, especially the United States, tend to place fewer boundaries on litigation than civil law jurisdictions. The American concept of discovery is a product of a litigious society, which people from civil law traditions may consider excessive or bordering on absurd. Overindulgence in the American system is perhaps best elucidated by the 1:10,000 ratio of documents used in trial compared to those produced in discovery[47]. Parties to disputes in civil law systems produce only what documents they intend to use[48]. In Germany, there is no discovery as a general rule, with only limited exception upon court approval[49].

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41 Hon. Randall Rader, *The State of Patent Litigation*, E.D. Texas Judicial Conference (2011), http://memberconnections.com/olc/filelib/LVFC/cpages/9008/Library/The%20State%20of%20Patent%20Litigation%20w%20Ediscovery%20Model%20Order.pdf (last visited Mar. 22, 2013).

42 *Supra* note 14.

43 John Allison, Emerson Tiller, Samantha Zyontz, and Tristan Bligh (2012), *Patent Litigation and the Internet*, 3 Stan. Tech. L. Rev., http://stlr.stanford.edu/pdf/allison-patent-litigation.pdf (last visited Mar. 22, 2013).

44 Judge T.S. Ellis III (1999), *Distortion of Patent Economics by Litigation Costs*, 5 CASRIP Publication Series: Streamlining Int'l Intellectual Property 22, http://www.law.washington.edu/casrip/symposium/Number5/pub5atcl3.pdf (last visited Mar. 22, 2013).

45 Gene Quinn, *Patent Litigation Statistics: 1980 – 2010*, IP Watchdog (Aug 2, 2011), http://www.ipwatchdog.com/2011/08/02/patent-litigation-statistics-1980-2010/id=17995/(last visited Mar. 27, 2013).

46 Anne St. Martin and J. Derek Mason (2011), *Arbitration: A Quick and Effective Means for Patent Dispute Resolution*, December les Nouvelles 269, http://lesnouvelles.lesi.org/lesnouvelles2011/lesNouvellesPDF12-2011/2-Mason%20R(p.269-278).pdf (last visited Mar. 27, 2013).

47 *Supra* note 41, Hon. Randall Rader (2011).

48 John McDougall and Fraser Milder Casgrain (2006), *Thoughts on Discovery in International Arbitration*, COMBAR North America Meeting.

49 Margaret Daley (2010), *Issues in International Discovery*, American Bar Association International Law Section, Duff & Phelps.

Privacy Ethics

Digital networks make possible the near-instantaneous transmission of enormous amounts of data across any physical distance, which consequently arouses divergent opinions about privacy. Information ethics involve controversial arguments which emerge from specific epistemological and deontological views[50]. Proponents of enhanced privacy regulations reference Orwell's "Big Brother" metaphor, or "the culture of surveillance", or Kafka's "The Trial"[51]. Personal and social implications of these comparisons range from mere inconvenience to absolute horror.

Depending on the legal jurisdiction, privacy rights vary broadly. In the United States, privacy rights took a backseat to "national security" under the Patriot Act[52] while European Union trended in the other direction. Google's recent experience with Europe's "right to be forgotten" policies is a prime example of variance of opinions across the Atlantic[53]. Data privacy is one reason discovery is limited or non-existent in civil law systems. The European Union, home of civil law traditions, considers personal data privacy a human right[54] and regulates transfer of such data[55], which includes email sent or received on company accounts[56]. No such expansive statutory protection exists in the United States, where tort jurisprudence provides incremental deployment. On the matter of individual privacy protections, the common law remedy has been considered "a prescription for sloth"[57], not yet proven to be scalable for the masses.

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50 Luciano Floridi (1999), *Information ethics: On the philosophical foundation of computer ethics*, 1 Ethics and Information Technology, pp.37-56.

51 Daniel Solove (2001), *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, Stanford Law Review, Vol.53, pp.1393-1462.

52 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107 –56. 115 Stat. 272 (2001).

53 *Google v. Agencia Española de Protección de Datos (AEPD)*, C-132/12 (EU Court of Justice, 2013).

54 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, Rome, 4.XI.1950, art. 8; *Copland v. U.K.*, 62617/00 [2007] ECHR 253, 42 (3 April 2007).

55 Council Directive 95/46/EC of the European Parliament and Council of 24 Oct. 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L281) (Nov. 23, 1995) at Art. 7.

56 Article 29 Data Protection Working Party, *Opinion 8/2001 on the Processing of Personal Data in the Employment Context*, at 24, 5062/01/EN/Final WP 48 (Sept. 13, 2001).

57 Jessica Litman (2000), Information Privacy/Information Property, Stanford Law Review, Vol.52 pp.1283-1313.

Blocking Statutes

Foreign privacy laws do not automatically preclude discovery in American courts[58]. The Supreme Court held "[i]t is well settled that [foreign] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute"[59]. While the European Union recommended using procedures of the Hague Convention[60], American courts held Federal Rules of Civil Procedure are the "normal method" for federal litigation and the Convention is only optional or supplemental[61]. Notwithstanding judicial rancor in the US with regard to foreign law, some so-called "legitimate interests" of foreign parties have been considered to reduce or refuse discovery[62]. Courts have deferred to the Hague Convention when it had not been "proven futile"[63]. Still, domestic interests generally outweigh competing foreign interests, giving U.S. law the upper-hand in U.S. courts, as should be expected[64].

Latent American hostility toward foreign law relates to its common law tradition, whereas judges in civil law systems are generally more responsive to application of foreign law. The *iura novit curia* (the judge knows the law) principle utilized in civil law reflects the more active nature of judges as compared to those in common law. Broad American discovery is undoubtedly justified due to the strictly adversarial nature of common law, where parties bear the burden of proof, in contrast to inquisitorial civil law, where judges play many of the same roles as common law attorneys in taking evidence. Fortunately for international disputants, common and civil law traditions share the same positive attitude toward arbitration[65], which

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58 Gareth Evans and Farrah Pepper, Court Holds U.S. Discovery Rules Trump French Law and Hague Convention, 9 Digital Discovery & E-Evidence (2009).

59 *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544, at n. 29 (1987).

60 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970); Nicole B. Boehler and Marla R. Weston, The European Union is Not "Getting Over" Data Privacy: the Data Protection Gulf Between the European Union and the United States, DRI (Mar. 20, 2013). http://www.imakenews.com/admirlaw/e_article001456833.cfm?x=0,b11,w.

61 *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 536, 107 S.Ct. 2542, 96 L.Ed.2d 461, at 533 and 542 (1987).

62 *In re Vitamins Antitrust Litig*., 2001 U.S. Dist. LEXIS 8904, at *72-73 (D.D.C. June 20, 2001).

63 *Tiffany and Co. v. Qi Andrew et al*, No. 10 Civ. 9471 (RA)(HBP) (S.D.N.Y. Nov. 7, 2012).

64 Erica Davila (2008), International E-Discovery: Navigating the Maze.

65 Dominik Lengeling, Common law and civil law – differences, reciprocal influences and points of intersection (2008).

virtually every country has embraced under the New York Convention [66] or UNCITRAL Model Law[67].

Online Copyright

Presently, we find a generally acceptable level of legislative commitments toward granting rights, but inconsistent and ineffectual executive and judicial means for enforcing such rights in the online context. In practice, broadband internet technologies have led to near-nullification of copyright. Online infringement occurs virtually everywhere on earth despite general prohibition under treaty and domestic implementing statutes. Somewhat ironically, torrent services and cyberlockers that provide infringing content or links usually have at least one IP registration in a Western European or North American country [68]. The very same nations that championed internet treaties[69] have failed to implement those provisions such that internet infringement in those nations is kept at a manageable level. With such leadership on the issue of international copyright protection, little can be expected from the current system.

Widespread ratifications of treaties supportive of international commercial arbitration are of special significance when contemplating potential avenues to resolve online copyright disputes. Whereas there is no international judicial forum for handling of private copyright claims, alternative dispute resolution offers a potential means through which injured parties can seek and find remedy. However, absent changes to the international system, bad-faith copyright infringement is not arbitrable due to lack of arbitration agreements, meaning de facto abolition of digital copyright remains the norm. Domestic statutes like DMCA[70] are intended to make resolution of copyright claims possible through public courts, but in practice these systems prove too inefficient. One feasible options is that an international ADR system similar to UDRP could be used to handle copyright claims on the web much in the same fashion as domain name (trademark) cases are currently handled[71], but such has yet to become any sort of reality. So, while online copyright remains a special issue of rights without remedy, we recognize that arbitration has emerged as a competitive DRM, especially in cross-border commercial cases.

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66 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

67 UNCITRAL Model Law on International Commercial Arbitration (1985).

68 Adam Tanielian, East-West IP Enforcement Partnerships (2014): Dream and Reality, 9 National Taiwan University Law Review.

69 WIPO Copyright Treaty (1996); WIPO Performances and Phonograms Treaty (1996).

70 Pub.L. 105-304, Digital Millennium Copyright Act (1998).

71 Mark Lemley and Anthony Reese (2004), *Reducing Digital Copyright Infringement without Restricting Innovation*, 56 Stanford Law Review 1345.

Advantages of Arbitration

Business and legal experts have embraced arbitration since inception. More recently, nations have formally come to consensus that arbitration is a valid, enforceable international DRM[72]. Sixty-four countries and eight American States adopted UNCITRAL's Model Law in efforts to standardize the international arbitral process[73]. Although the USA is not a contracting party of the Model Law, its Federal Arbitration Act[74] functions as a *de facto* implementing statute.

The US Supreme Court has more than once endorsed arbitration. In 1967, the Court surmised that "the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."[75] Later, in 1984, the American high Court reaffirmed its position, stating "in enacting §2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[76] By the 1990s, Courts had come to acknowledge and oppose the "longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts"[77]. Judges turned on their heels from the course of history and recognized that "arbitration is simply a matter of contract between parties; it is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration."[78]

Time and Cost Savings

Arbitration is widely considered to be cheaper and faster DRM than public courts[79]. One reason is the limited discovery process. FRCP[80] require discovery requests to "describe with reasonable particularity each item or category of items to be inspected". American rules mandate specific requests, but they fail to provide boundaries on the scope of requests. By comparison, both the International Bar

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72 150 nations have ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

73 UNCITRAL Model Law on International Commercial Arbitration (1985).

74 Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925).

75 *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., No. 343, 388 U.S. 395 (US Supreme Court 1967).

76 *Southland Corp. v. Keating,* No. 82-500, 465 U.S. 1 (US Supreme Court 1984).

77 *Gilmer v. Interstate/Johnson Lane Corp*., No. 500 US 20, 24 (1991).

78 *First Options of Chicago, Inc. v. Manuel Kaplan, et ux. and MK Investments, Inc*., No. 94-560, 514 US 938 (US Supreme Court 1995).

79 *See supra* note 38 (Allgeyer, 2007); *supra* note 40 (Fox and Weinstein, 2012).

80 FRCP 34(b)(1)(A).

Association[81] and the Chartered Institute of Arbitrators[82] require production requests to be "narrow and specific". By adding the word "narrow", these rules of evidence in arbitration reduce potential abuse of the process.

United States District Courts' Model Order on E-Discovery[83] can reduce the risk of overproduction by limiting email requests to a number of custodians and search terms, but the Model Order is not universally accepted and it does not preempt Federal or Local rules. No evidence was found suggesting average costs of discovery were dramatically reduced following implementation of the Model Order. In arbitration proceedings, judicial rules of evidence generally do not apply[84]. Rather, parties in arbitration agree upon certain issues prior to rise of disputes, and in the event of conflict during proceedings, the arbitrator or tribunal exercises discretion with the intent of achieving overarching goals of fairness and efficiency. While limited access to documents potentially increases difficulty in proving a case, avoidance of fishing expeditions seriously reduces dispute costs and time.

Specialized Tribunal

One of the main reasons overly broad discovery orders are allowed in American courts is that judges most often have no special training in sciences involved in patent cases. Obviously, the same is true of civilian juries, which would rarely be able to discern an odd pearl of relevant information from the massive cultch of documents available. Such lack of expertise in fact and law as found on American benches and in jury boxes frequently results in high costs and runaway damages verdicts, which some parties clearly enjoy although this immoderation fundamentally depreciates the cogency of public courts.

Arbitration offers parties full control over who hears and decides the case. Extensive provisions on nomination, appointment, challenge, and replacement of tribunal members are written into rules[85]. Parties can also structure the tribunal into an arbitration agreement. With a touch of foresight and optimal selection of an arbitral forum, disputants can entirely avoid costly and time-consuming errors that public courts have failed to eradicate.

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81 International Bar Association Rules on the Taking of Evidence in International Arbitration, art. 3(3)(a)(ii) (2010).

82 Chartered Institute of Arbitrators Protocol for E-Disclosure in Arbitration, art. 4(i) (2008).

83 Model Order Regarding E-Discovery in Patent Cases (2012).

84 Alan Kowalchyk, Resolving Intellectual Property Disputes Outside of Court: Using ADR to Take Control of Your Case, American Bar Association (n.d.).

85 UNCITRAL Arbitration Rules, §II (2010); WIPO Arbitration Rules, §III (2014); AAA Arbitration Rules, §12-20 (2013); ICC Arbitration Rules, §11-15 (2012).

Final and Binding Awards

American patent disputes are games of appeals, where over 70% of cases decided in District Courts are reconsidered in Circuit Courts which have a 76% modification rate[86]. One reason that trial court decisions are so seldom upheld is the *Markman*[87] hearing, which is unique to the USA. Just north of the border in Canada, patent trials are decided by a single judge who does not reconstruct claims at appeals. Canadian courts have decided against *Markman* style hearings[88], citing the British House of Lords[89], saying "preliminary points of law are too often treacherous short cuts. Their price can be delay and expense." One study found a 33% error rate in District Court patent language interpretation, as demonstrated by Circuit Court amendments of claim constructions in *Markman* hearings[90].

While many Americans may prefer to take their chances in public courts in hopes of bringing home large awards, arbitration is almost certainly a more attractive DRM for international participants who lack expertise and experience in the vacillating world of American common law. Court decisions which could be reversed twice – in Circuit and Supreme Courts – and modified or vacated in part a few times, whereas arbitral awards are final and binding. Except for rare cases involving corruption or malfeasance on the part of the tribunal, parties are obligated to carryout awards without delay, and public courts are bound to recognize and enforce awards[91]. Some may consider this lack of any appeals process as the prime disadvantage of arbitration, but for parties seeking swift and reliable determinations on the merits of a dispute, a final and binding decision is favorable.

International Validity

Just as patent claims are interpreted differently between American District and Circuit Courts, so do various nations and their courts construe claim language differently. Parties to disputes may find inconsistency in rulings where patent infringement is alleged in more than one jurisdiction. Opinions among courts, judges, and juries vary. Few disputes can illustrate such variance as well as the Epilady cases

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86 PWC, Patent Litigation Study (2014), http://www.pwc.com/en_US/us/forensic-services/publications/assets/2014-patent-litigation-study.pdf?bcsi_scan_13a1f34941b4233d=0&bcsi_scan_filename=2014-patent-litIgation-study.pdf

87 *Markman et al. v. Westview Instruments, Inc., et al.* (95-26), 517 U.S. 370 (1996).

88 *Realsearch Inc. et al. v. Valone Kone Brunette Ltd. et al.* , No. 27 C.P.R. (4th) 274 (F.C.T.D.) rev'd (2004), 31 C.P.R. (4th) 101 (F.C.A.) (Canada Federal Court Trial Division, Federal Court of Appeal 2003).

89 *Tilling v. Whiteman*, No. 1 A.C. 1 at 25 (UK House of Lords 1980).

90 Moore, K. (2001). Are District Court Judges Equipped to Resolve Patent Cases? Harvard Journal of Law & Technology, Vol.15(1), pp.1-39.

91 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

in Europe[92], where courts in Germany, Netherlands, and Italy ruled there was patent infringement while British and Austrian courts ruled there was not[93]. If these cases were arbitrated, a single award would have had binding effect in all 150 countries which are party to the New York Convention. This universality of arbitral awards undoubtedly deters some usage of arbitration, but for good-faith participants, the single international determination is generally perceived to be a source of incredible savings.

Information Privacy

Arbitration is an entirely private process, arising only out of prior written mutual agreements. UNCITRAL Rules[94], which serve as a general guide for rules on international commercial arbitration worldwide, make clear that from the notification process to the award, the entire proceedings are kept out of the public domain unless parties mutually agree otherwise. WIPO offers intellectual property disputants additional rules designed to protect proprietary information[95]. Whereas experts have lamented that disclosure and production in public court proceedings contribute to the threat of industrial espionage, arbitration has been hailed as a realistic solution[96]. Arbitration offers confidentiality throughout the entire process, the scope and impact of which can be tailored to suit the unique needs of disputants.

In arbitration, European parties to international disputes can more easily comply with domestic privacy standards. Excessive email production requests, which can be considered personal data in certain jurisdictions, can be nearly eradicated with appropriate tribunal discretion. Parties which may have to produce a terabyte of DSI in a public court process can reduce invasive digital searches to within a few hundred megabytes in arbitral proceedings. Parties can expect that such enhanced protection of sensitive and private information could reduce their chances of winning large awards, but these restrictions also help minimize frivolous claims.

Preservation of Relationships

Arbitration is fully binding, and it does serve as a substitute for judge or jury trials, but the arbitral process is less formal and much less adversarial than public DRMs. Whereas courts may compel unwilling parties to appear or take part in a lawsuit, arbitration is an entirely voluntary process. Arbitral tribunals may not hold

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92 *Improver Corp. v. Remington Consumer Prods. Ltd.*, [1990] F.S.R. 181 (Eng. Ch. 1989).

93 Victor Lerenius, Patent Application Strategy in Europe for the Pharmaceutical Industry, Lunds Universitet (2011). http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=2299989&fileOId=2301444.

94 UNCITRAL Arbitration Rules, art. 28(2), art. 34(5) (2010).

95 WIPO Arbitration Rules, art. 54, §VII (2014).

96 Richard Salyer (2005), *The Case for Arbitrating Intellectual Property Licensing Disputes*, Dispute Resolution Journal.

jurisdiction unless a "valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement."[97] A cooperative spirit is intrinsic to the pre-existing agreement to arbitrate. Upon rise of a dispute, parties may control the process together. Parties decide on rules of arbitration, applicable law, seat and language of arbitration, composition of the arbitral tribunal, method of taking evidence, duration and procedure of hearings, and confidentiality of the process through the award stage. Command over the process reduces unknown variables and allows parties to focus on the merits rather than loopholes.

The one-size-fits-all model of public courts is the only available avenue for cases of bad-faith infringement, but for disputes arising out of otherwise decent business relationships, arbitration offers a realistic way to resolve problems in a manner that does not destroy the relationship. Because of its less-adversarial nature, arbitration is an ideal means to resolve licensing disputes. When the existence of a dispute remains private, are not drawn into the public realm of media and political sensationalism. Even in cases where some details of arbitration are published, parties have opportunity through mutual consent obligations to redact publicly-available information in a manner that protects their reputations and spares them difficult marketing decisions. Moreover, parties which anticipate disputes and adequately prepare for them by entering into arbitration agreements may be more inclined to avoid disputes, knowing that "a court must compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made."[98] Foresight of the arbitration agreement undoubtedly enhances preventative measures, strengthening those relationships which are threatened less by arbitration than by litigation.

Conclusions

Public courts are too often like square pegs for circle holes – if you cut corners and push hard enough, you might make it fit, but the process creates unnecessary waste and stress when there is a more suitable option on the board. In the age of the 486 personal computer and floppy disk drive, when "gigabyte" was a word known to only a few nerds in the computer lab – none of whom had ever actually seen one – pretrial discovery was manageable, even easy by today's standards. Today, companies need to outsource IT professionals to retrieve data not even custodians knew still existed. ESI discovery can extend to metadata, backup tapes, source code, and deleted files.

Theoretically, American Rules set out to reduce excess, but in practice judges concede the fact that "a discovery demand in [US] courts might yield a haul of 30

97 Javitch v. First Union Securities, Inc., No. 315 F.3d 619 (US 6th Circuit Court of Appeals 2003).

98 *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985) at 219.

million emails, few of which would be admissible in evidence."[99] The result of such inefficiency is that the system of civil justice is dominated by large corporations, while individuals lack sufficient financial resources to utilize the system. E-discovery is the single largest draw of cash in any patent trial process, leaving most parties to settle based on costs rather than merits. The problem is neither a secret nor remarkably divisive. During our review of academic articles, industry studies, and judicial opinion on the issue of enormous ESI discovery burdens, we found zero arguments favoring the current process. Because the negative aspects of e-discovery are so frequently discussed, and given the apparent lack of support for the present situation, we were left to infer that a much broader, systemic problem was at play. There is a deficiency in the American courts which may not be possible to correct.

"Needless to say," said Hon. Rader, "if we cannot control the cost, complexity, and complications of patent litigation, the litigants that we serve will simply find a better way, or a better place, to resolve their disputes."[100] Arbitration is this "better way". If parties wish to use a binding DRM, and they do not want to risk overspending in courts, then arbitration is the only substitute service. Judges, attorneys, businesspeople, and academics alike have endorsed arbitration, particularly due to its time and cost efficiencies. Considering overwhelming opinion in favor of arbitration, and consensus opposed to discovery burdens in American courts, we conclude that arbitration should be utilized whenever possible. Parties to licensing agreements should include arbitration clauses in contracts. To the extent possible, we wholly recommend arbitration.

99 *Heraeus Kulzer GmbH v. Biomet, Inc*., 633 F. 3d 591 (2011).

100 Hon. Randall Rader (2011), *The State of Patent Litigation*, E.D. Texas Judicial Conference.

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