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Beyond Courts: ADR's Influence in Navigating Intellectual Property Rights

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ABSTRACT

In this essay, we set out to understand the potentiality of increasing reliance on Alternative Dispute Resolution techniques for Intellectual Property Disputes in India and internationally. Through a doctrinal study of judicial precedents and legislative provisions, the essay attempts to analyze how the jurisprudence has developed over the years and recognizes the legal lacuna present in the current practice. Further, the essay sheds light on how the positives of alternative dispute resolution methods can be used in the arena of Intellectual Property matters.

Keywords: *Intellectual Property Disputes, Arbitration, Mediations, ADR, World Intellectual Property Organization, Dispute resolution.*

I. INTRODUCTION

With the scale of advancements being made in technology in today's day and age, Intellectual Property Rights have come to the forefront like never before. Given the economic value associated with the exclusive right to utilise an innovation, the stakes are all the more. As is the case with any evolving field, an increase in exclusivity is always accompanied by an increase in disputes. This has led to a massive surge in the number of Intellectual Property disputes pending in Indian Courts. Considering the time volatility and hypersensitive nature of such disputes and the associated commercial value in intellectual property litigation, the traditional process of court is not an effective solution. The need for such disputes to be tried in an effective time-based manner is imminent. Further, given the fragile nature of reputations of the players in the commercial market, contesting an intellectual property dispute in an open court is not preferred by a lot of stakeholders.

As a result, Alternative Dispute Resolution techniques offer a unique solution to this specific set of issues. Utilising ADR techniques to resolve intellectual property matters ensures not only that the settlements are reached in faster timelines, but the private nature of the sittings also ensures that the trade secrets are not made public. The obvious advantages of dispute settlement

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through the Alternative Dispute Resolution techniques, combined with the broad range of methods it encompasses, poses as a sophisticated yet effective solution to a multitude of matters relating to Intellectual Property concerns.

II. INTELLECTUAL PROPERTY RIGHTS

Intellectual Properties are the emergence of the mind and Intellectual property rights are the rights that are granted to people who create such artistic works; designs; inventions; symbols etc. These rights bring along exclusive ownership and the right to obtain financial gains from the said work. They are classified as intangible assets, which generally give an organization an edge over its competitors in the market. A myriad of intellectual properties are recognised worldwide which include Trade Secrets, Patents, Geographical Indications, Trademarks, Industrial Designs, and Copyrights.

Given the lack of awareness in a majority of the Indian population, Intellectual Property Rights are by and large perceived as a concept that is of little or no significance. This is in sharp contrast to subjects such as personal rights, human rights, etc. which attract a lot of attention and acknowledgement. Intellectual Property Rights is still a developing field and yet to gain that kind of recognition, at least in India, if not globally. Interestingly, the importance of Intellectual Property Rights can be traced in the Constitution of India itself; the "Right to Property" was once a fundamental right, however, it is now a constitutional right. Further, it is now a human right as well. This nature of the "Right to Property" is envisioned in Article 300A[3]. The Supreme Court of India, in the case of *K.T Plantation Pvt. Ltd. Vs State of Karnataka*[4] observed that 'the expression 'Property' in Article 300A[5] confined not to land alone, it includes intangibles like copyrights and other intellectual property and embraces every possible interest recognized by law.'

A significant issue surrounding Intellectual Property Rights is the efficacy of granting exclusive ownership. Wherein on the one hand, Intellectual Property Rights give exclusive rights to a person over their creation, which in turn promotes and motivates them to innovate and create new things. On the other hand, these rights restrict open use by society, which can be perceived as obstructing the growth of humanity. The case of *Syndicate of Press of the University of Cambridge v. B. D. Bhandari*[6] highlighted the ambivalent nature of intellectual property rights from a legal perspective. On one hand, these rights are crucial in incentivizing the creation of

[3] INDIA CONST. art. 300A.
[4] K.T. Plantation Pvt. Ltd. V. State of Karnataka (2011) M.A.N.U. S.C 0914 (India).
[5] supra
[6] Syndicate of Press of the University of Cambridge v. B.D. Bhandari (2005) 31 PTC 58 (Del) (India)

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intellectual works, but on the other hand, granting too much protection can hinder the advancement of humanity. This very debate gives rise to a lot of conflicts and disputes in the world of IPR, which are often needed to be resolved through courts.

III. ALTERNATIVE DISPUTE RESOLUTION

India is the home of one of the most elaborate legal systems of the world. The Indian legal framework endeavors to acknowledge the wealth of cultural traditions and diversity of the nation through its unique blend of legal systems, incorporating aspects of common and civil law, as well as religious and customary laws. As a result, the legal process in India is very intricate and prolonged. By the sheer volume of cases that reach the doors of Indian Judiciary, adjudication of a case from start to end often takes a number of years. With over 4.7 crore cases[7] pending in courts in the country, it is only natural for the Judicial system to be overwhelmed and the common citizen to lose hope in the process of court. As a result, in recent years the Alternative Dispute Resolution techniques have come as a silver lining.

The history of ADR in India is however, not recent. The first arbitration act enacted in India dates way back to 1899, whose jurisdiction was limited to the presidency towns of Madras, Bombay and Calcutta. Arbitration, also found space in Schedule II of the Civil Procedure Code of 1908. Given its technicality and inexpediency, it paved the way for the creation of the Arbitration Act of 1940. Learning the shortcomings of these acts and using practical experience as a basis, a new Arbitration and Conciliation Act was adopted in 1996, which is the current code in use.

As an attempt to establish a proxy mechanism of resolving disputes than the traditional process of court, Alternative Dispute Resolution are techniques to resolve disagreements between parties through negotiations and discussions, allowing them to reach mutually agreeable settlements without a trial. ADR techniques are often also understood as a win-win strategy since the sole focus is on achieving an acceptable settlement instead of declaring winners or losers. A host of issues can be resolved through ADR techniques including civil, commercial and family disputes. As a general principle, all ADR techniques require the assistance of an unbiased third party, who in turn helps the two conflicting parties in tabling their concerns and working their way through them. Resolving disputes through ADR methods involves minimal judicial intervention, as was also reaffirmed in the case of *Uttarakhand Purv Sainik Kalyan*

[7] Sumeda May 10, Explained | The clogged state of the Indian judiciary, The Hindu (May 10, 2022), https://www.thehindu.com/news/national/indian-judiciary-pendency-data-courts-statistics-explain-judges-ramana-chief-justiceundertrials/article65378182.ece.

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Nigam Ltd. V. Northern Coal Field Ltd[8].

Section 89 of the Civil Procedure Code[9] which talks about settlement of disputes outside of court lists several Alternative Dispute Resolution techniques including Arbitration, Mediation, Negotiation, Conciliation, Judicial Settlement and Lok Adalats.

Arbitration involves the appointment of an unprejudiced arbitrator who examines the facts of the case and then renders a legally enforceable decision. In the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co.*[10], the Apex Court established that the resorting to arbitration can also be through a court mandate. The arbitral awards have limited scope for appeal and review. **Conciliation**, while following the same principle is more versatile. Herein a conciliator is hired by the disputing parties to help resolve their disputes individually. The conciliation proceedings are interest based with emphasis on privacy wherein other secondary factors like the socio-economic interests of the parties are also taken into account besides their legal interests to reach an amicable settlement. **Mediation** is a form of dispute resolution wherein the parties themselves are in control of the proceedings. In this technique, the mediator cannot pronounce a legally enforceable decision, and is only a facilitator to having structured discussion. Mediation is widely preferred as a method that helps in swift and inexpensive settlement while maintaining anonymity and the association between the parties.

While Arbitration and Conciliation are more formal ways of dispute settlement and are governed by the Arbitration and Conciliation Act, 1996. Whereas, Mediation is a more informal way of reaching a settlement and is nothing more than a friendly way of using specific communication and negotiation techniques to reach a cordial settlement.

Judicial settlement is also enlisted as a form of alternative dispute resolution in Section 89 of the Civil Procedure Code[11]. There are no specific rules for judicial settlement in India till date. However, the provisions of the Legal Services Authority Act, 1987 would be applicable to judicial settlements in India. The resolution of disputes through **Lok Adalats** or the Courts of People is also gaining increasing popularity. Lok Adalats have been established by the government as a means of settling disputes through compromise, and according to Section 21 of the Legal Services Authority Act, 1987[12], Lok Adalat award in a dispute, is deemed equal to a civil court decree and is final and the parties are bound by it. Such an award cannot be

[8] Uttarakhand Purv Sainik Kalyan Nigam Ltd. V. Northern Coal Field Ltd (2018) Special Leave Petition (C) No. 11476 (India)
[9] Civil Procedure Code, 1908, S.89.
[10] Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (2010) Civil Appeal No.6000 (India)
[11] Supra 7.
[12] Legal Services Authority Act, 1987, No. 39, Acts of Parliament, 1987 (India). Sec.21.

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appealed.

The importance of ADR methods and the need to encourage them has been discussed time and again in the judicial circles, be it through the remarks of the sitting judges of the Supreme Court of India or through the actions of the judiciary in referring matters to be resolved via settlements out of court. The Law Commission in its Report no. 222[13] also submitted the need to utilize ADR techniques for disbursement of justice as the court remained inaccessible due to various factors like poverty, illiteracy, ignorance, social and political backwardness to a wide section of the population of India.

IV. ARE INTELLECTUAL PROPERTY RIGHTS DISPUTES ARBITRABLE?

Before having a discussion on whether ADR is a better way to resolve IPR conflicts and disputes than traditional litigation, it is essential to determine whether IPR matters in India are arbitrable or not.

(A) Legislative provisions promoting Arbitration in Intellectual Property Rights

Arbitration and Conciliation Act, 1996 defines 'international commercial arbitration' under section 2(1)(f)[14] as an arbitration that relates to disputes arising out of a legal relationship that is considered to be commercial under the law. Commercial Courts Act, 2015 explicitly includes intellectual property rights relating to registered and unregistered trademarks, copyrights, geographical indications, designs, domain names, patents, and semiconductor integrated circuits under the definition of 'commercial dispute' in section 2(1)(xvii)[15].

Courts also derive power through section 89 of the Code of Civil Procedure, 1908[16], to refer parties involved in the IPR dispute to arbitration. Meaning, that if the court deems it fit, it can allow mediation, arbitration or conciliation for settling the disputes outside the doors of traditional judiciary.

Moreover, IPR legislations such as Copyright Act,1957; Trade Marks Act, 1999; Indian Patents Act, 1970, do not talk about any objection or oust the possibility of use of ADR techniques in Intellectual property matters per se.

(B) Judicial Interpretation

Indian Judiciary had an ambiguous stand on this question; however, clarity to some extent was

[13] Law Commission of India, REPORT NO. 222- NEED FOR JUSTICE DISPENSATION THROUGH ADR(2009),https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081082-2.pdf
[14] Arbitration and Conciliation Act, 1996, S. 2(1)(f).
[15] Commercial Courts Act, 2015, S.2(1)(xvii).
[16] Supra 7.

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afforded in the case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*[17] The Supreme Court laid down three aspects of arbitrability. Essentially setting up a test to determine the arbitrability of a dispute. – 1) The dispute must be capable of adjudication and settlement by arbitration. This primarily determines the nature of the dispute. If the suit can be decided by a private forum, an arbitral tribunal, or if it falls within a public forum and can only be decided by the courts. 2) The disputes must be covered by the arbitration agreement. That means whether the agreement establishes that particular dispute as an arbitrable matter or whether that dispute is excluded from the arbitration agreement. 3) The dispute must have been referred to arbitration by the parties themselves.

The court noted that, in general, any civil or commercial dispute that can be decided by the court can be resolved through arbitration, unless explicitly or implicitly excluded. However, there are certain matters which are described as matters of public policy that can only be adjudicated by the courts, such as criminal offenses, IBC matters, etc.

The mainstream conclusion that was drawn from the above observation was that rights in personam can be adjudicated and settled through arbitration, and all disputes which relate to rights in rem are required to be adjudicated by conventional courts and quasi-judicial tribunals, and are hence not suitable for private arbitration. However, this rule of rights in rem and rights in personam is not a rigid or inflexible rule. Disputes concerning rights in personam that stem from rights in rem have always been viewed as capable of being resolved through arbitration. The court provided an illustration from the aforementioned case, where the rights under a patent license can be arbitrated, but the validity of the patent itself cannot.

V. IPR – RIGHT IN REM OR RIGHT IN PERSONAM?

A right in rem is a right yielded against the world at large, while a right in personam is an legal interest secured only against specific individuals. IPR rights are generally rights in rem, which means that it affords against the world, protection to the creator/ innovator. However, as laid out in *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd*[18] 'Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.'

There have been several judicial pronouncements wherein sub–ordinate rights in personam in matters of Intellectual Property Rights arising from rights in rem were protected. In the year 2011, the Hon'ble Bombay High Court in the case of *Eros International Media Limited v.*

[17] Booz Allen and Hamilton Inc. V. SBI Home Finance Ltd., (2011) 5 S.C.C 532 (India).
[18] Supra 15

Telemax Links India Pvt. Ltd.[19] observed that Trademarks Act and Copyright Act does not negate the jurisdiction of an arbitral panel. Further, section 62(1)[20] of the Copyright Act should not be read down to mean the expelling of the jurisdiction of an arbitral panel. The Delhi High Court also, in the case of *Hero Electric Vehicles Private Limited v. Lectro E- Mobility Private Limited*[21] held that the trademark dispute could be resolved through arbitration since the plaintiffs were defending their mark against a specific individual or collection of individuals, and not the entire world.

Although the abovementioned cases may indicate that IPR matters can be resolved through arbitration, courts have often also taken a contrary stance. Judicial stand on whether IPR matters can be arbitrated on or not is still unsettled. However, there is no explicit bar on the arbitrability of IPR disputes, and most of them can be resolved through arbitration.

VI. NEED OF ADR IN IPR

Intellectual Property Matters are essentially very technical in nature, especially matters involving patents. The current court system can sometimes be ill-suited for dealing with such intricate matters and accordingly delivering an appropriate judgment. Taking the route of litigation to resolve disputes between parties can be an intensively costly and lengthy process. IPR matters are often time-sensitive where even a slight delay in resolution may lead to significant financial loss to the aggrieved party.

As a consequence, there is an imminent need to settle IPR matters without going to court and by resorting to Alternative Dispute Resolution mechanisms. ADR enables one to seek assistance from qualified professionals equipped with the technical knowledge who understand the nuances of Intellectual Property matters. It also offers a chance for both parties to come to a common ground which may be beneficial for all those concerned.

Indian courts have often recognized the need for ADR as a quick and efficient way to resolve Intellectual Property disputes. In the case of *Shree Vardhman Rice & Gen Mills v. Amar Singh Chawalwala*[22], the court observed that matters which relate to copyrights, trademarks and patents should be resolved expeditiously instead of just granting or refusing injunctions. The suit goes on for years without any finality to it. 'In our opinion, in matters relating to trademarks, copyright and patents the proviso to Order XVII Rule 1(2) C.P.C. should be strictly complied with by all the Courts, and the hearing of the suit in such matters should proceed on day-to-day

[19] Eros International Media Limited v. Telemax Links India Pvt. Ltd, (2016) M.A.N.U. M.H 0536 (India).
[20] Copyright Act, 1957, S.62(1).
[21] Electric Vehicles Private Limited v. Lectro E- Mobility Private Limited (2021) M.A.N.U D. E 0379 (India).
[22] Shree Vardhman Rice & Gen Mills v. Amar Singh Chawalwala, (2009) M.A.N.U. S.C. 1680 (India)

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basis and the final judgment should be given normally within four months from the date of the filing of the suit.'

This position was again taken by the courts in the case of *Bajaj Auto Limited v. TVS Motor Company Limited*[23] where the court voiced its worries once again, stating that experience has revealed that in India, disputes concerning patents, trademarks, and copyrights often linger for many years and the bulk of the litigation revolves around temporary injunctions. This is an unsatisfactory situation.

In both the aforementioned cases, Supreme Court of India recognised the delay that often takes place in Intellectual Property matters when traditional litigation is adopted as it is a cumbersome procedure.

Alternative Dispute Resolution for resolving IPR matters possesses a lot of advantages**.** One of the biggest concerns with IPR matters is **multi-jurisdictional litigation**. There is always a possibility that the intellectual property is registered in multiple countries and a dispute related to that intellectual property may attract litigation in several countries, i.e. multi-jurisdictional litigation. Resolving disputes through ADR helps the parties to simplify the procedure by resolving the dispute concerning intellectual property in multiple countries through a unified procedure.

ADR also provides an increased room for **Confidentiality**. ADR envisages a private, out of public eye settlement, which means that the proceedings are exclusive. This protects both parties from public scrutiny and protects their commercial reputations and other business secrets. The process is **economical and efficient**. Traditional litigation involves a lot of costs which are borne by both parties. ADR helps in minimizing such costs by providing quick and efficient redressal. ADR promotes the **participation of parties** in conflict. The parties can themselves select appropriate decision makers for their disputes and other procedural requirements such as the language and location of the proceedings.

Arbitral awards can generally not be appealed, unlike court decisions. This warrants them a **finality**. Under traditional litigation, if a person is not satisfied by the judgment of one court, they can appeal to a higher court; this normally cannot be done with arbitral awards.

VII. INTERNATIONAL PERSPECTIVE

It is not uncommon for rights on Intellectual Property to be in dispute between multinational commercial companies and even international jurisdictions. Intellectual property disputes,

[23] Bajaj Auto Limited v. TVS Motor Company Limited, (2009) 9 S.C.C. 797(India).

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especially patent related concerns are internationally encouraged and resolved through the method of arbitration. The flexibility involved in the ADR techniques not only caters to the time sensitivity of such issues, but also ensures that the award is neutral, which is of utmost importance in cross border disputes to rule out the possibility of home court advantage. Both the New York Convention, 1958[24] and the Model Law on International Commercial Arbitration, 1985[25] provide for arbitral settlement of disputes of a cosmopolitan nature. As a way of facilitating and achieving the said means, not only the United Nations Commission on International Trade Law (UNICTRAL) came up with a set of rules that would govern arbitration globally but also the World Intellectual Property Organization, a specialized agency of the United Nations, also came up with an Arbitration and Mediation Centre catering unilaterally to resolution of intellectual property disputes internationally in an efficient manner.

(A) UNICTRAL Arbitration Rules

As a result of several rounds of deliberations and discussions with leading international arbitration experts and international stakeholders, the General Assembly of the United Nations adopted the UNICTRAL Arbitration Rules in 1976[26]. Ever since their initial adoption, the rules have been essential in the settlement of several private commercial, investor state, interstate and commercial disputes.

The UNICTRAL Arbitration Rules are a comprehensive set of rules that lay down the procedures which govern the conduct of arbitral proceedings both in ad- hoc and administered arbitrations. These rules cover all facets of the arbitral process from the provision of a sample arbitration clause to the appointment of unbiased arbitrators and conduct of the proceedings. The rules also enlist the methodology in which any arbitral award given in a proceeding conducted in accordance to the rules, must be interpreted. Generally, covering only commercial relationships, the parties in disputes are required to mutually agree on the proceedings.

(B) World Intellectual Property Organization

Recognising the surge in Intellectual Property matters, the United Nations came up with a specialized agency called World Intellectual Property Organisation (WIPO) in 1967. With a mission to create an attainable intellectual property system, WIPO works to promote the protection of intellectual property rights throughout the world, besides ensuring coordination

[24] Convention on Recognition and Enforcement of Foreign Arbitral Awards, (United Nations Commission on International Trade Law) (1958)
[25] Model Law on International Commercial Arbitration, (United Nations Commission on International Trade Law) (1985)
[26] United Nations Commission on International Trade Law, Arbitration Rules, General Assembly Resolution 31/98 (1967)

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among the member states that have signed the WIPO treaties.

To achieve these objectives and to encourage the use of ADR techniques for a speedy resolution of IPR techniques, WIPO has set up an Arbitration and Mediation Centre in Singapore in 1994. Having gained recognition as a neutral international forum, most appropriate for cross border and cross-cultural intellectual property disputes, the centre has so far, resolved nearly 900 WIPO cases[27] through alternative dispute resolution means. The WIPO Arbitration and Mediation centre conducts its procedures according to the WIPO Arbitration, Mediation, Expert Determination Rules and Expedited Arbitration. In mediation, one or more unprejudiced mediators are appointed to assist the parties in identifying their interests and facilitating dialogue, but the mediator(s) do not render a decision. However, in case of Arbitration, the arbitrator(s) make a binding decision which is enforceable globally through the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards. Expedited Arbitration is reserved for urgent matters and is simply a arbitration process with shortened timelines. Expert Determination is a dispute resolution technique wherein a specific question relevant to the matter in dispute is posed to one or more independent experts. The decision of the experts is indissoluble, unless both the parties mutually agree to forgo the expert determination.

India is an active part of WIPO initiatives. Over the years, India has increased its involvement with the WIPO Arbitration and Mediation Centre. The WIPO centre collaborates with Federation of Indian Chambers of Commerce and Industry (FICCI) [28], Indian Council of Arbitrators (ICA)[29] and International Centre for Alternative Dispute Resolution (ICADR)[30] for encouragement of the use of ADR techniques for resolving Intellectual Property disputes in India.

VIII. SUGGESTIONS AND TAKEAWAYS

With Alternative Dispute Resolution methods gaining increasing popularity in Intellectual Property matters, it is important to note that ADR can be effective and better than traditional litigation only when it is time- barred, confidential and carried out by professionals who understand the nuances and technicalities of Intellectual Property Rights. At the same time, alternative dispute resolution methods should be given preference over litigation, and the courts

[27] WIPO, *Caseload Summary*, WIPO - WORLD INTELLECTUAL PROPERTY ORGANISATION, https://www.wipo.int/amc/en/center/caseload.html
[28] WIPO, *Alternative Dispute Resolution (ADR) Collaboration*, WIPO - WORLD INTELLECTUAL PROPERTY ORGANIZATION, https://www.wipo.int/amc/en/center/specific-sectors/adrcollaborations/
[29] Id.
[30] Id.

should progressively refer matters to arbitration, conciliation and mediation. This would save the time of the judiciary and would allow for the settlement to be a more efficient process. Even if the possibility of the resolution of the entire matter in question through ADR techniques appears bleak, there always remains an option to the parties of segregating and narrowing down the issues in dispute and disposing at least some of them in a speedy and inexpensive manner.

Arbitration can be extremely helpful when it comes to adjudication of disputes between two parties such as when it is a case of infringement in Intellectual Property Rights. An infringement dispute is only between those two parties, and has no impact on the rest of the world. It is as such a right in personam which is a sub-ordinate arising from right in rem and is hence arbitrable.

A major grey area which we encountered during the course of writing this essay is that the jurisprudence on the kind of cases of Intellectual Property rights that are arbitrable is not very clear. There exists a legal lacuna in terms of proper interpretation by the judiciary. This brings forth an urgent necessity for judicial precedents and guidelines that would shed clarity on the nature of IPR disputes open to arbitration and would be helpful in navigating the way ahead for utilizing alternative dispute resolution techniques.

Further, if India adopts ADR methods as its favored mechanism for resolving at least a majority of IPR disputes if not more, the country could see an exponential increase in foreign investments and collaborations. Alternative Dispute Resolution, being the more efficient manner of dispute resolution would prove to be a major attracting factor for foreign businesses. This could facilitate the establishment of India as a solid commercial player on the global map.

IX. CONCLUSION

Over the course of our research, we came across several compelling arguments for both the sides of the discussion but one thing that remained constant throughout the process was that the benefits of increasing involvement of Alternative Dispute Resolution methods in Intellectual Property Disputes overshadowed the negatives. Hence, it can be safely assumed that incorporating alternative dispute resolution methods would have a positive impact on the growth of intellectual property.

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