EXPANDING THE BRAND: THE CASE FOR GREATER ENFORCEMENT OF MANDATORY MEDIATION IN TRADEMARK DISPUTES

*Max Vilenchik**

INTRODUCTION

Currently, far too many trademark disputes that could have been settled outside of court end up in litigation. While alternative dispute resolution (ADR) has become more prevalent in other areas of the law, many trademark attorneys and their clients do not regularly consider ADR processes, such as mediation, as one of their options because these processes are still relatively new to the trademark law area.[1] This Note will propose that mandatory trademark mediation programs be expanded to ensure that trademark cases that are well suited for mediation end up in mediation rather than in mounting court dockets.

In Section I, this Note will first discuss the background and current problems associated with trademark litigation. Then in Section II, this Note will provide an explanation of the mediation process and highlight its particular benefits for resolving trademark disputes. Finally, in Section III, the Note will propose that the current problems with litigation and the substantial benefits of mediating trademark disputes warrant greater enforcement of mandatory mediation.

* Max Vilenchik is a 2011 J.D. Candidate at Benjamin N. Cardozo School of Law. Currently, Max is a member of Cardozo's Intellectual Property Society and the Dispute Resolution Society as well as the NYSBA Entertainment, Arts and Sports Law Section. He received his B.A. in Economics and Politics from Washington and Lee University. Max may be reached at vilenchikm@gmail.com.

[1] Scott H. Blackman & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1734 (1998).

I. Litigation of Trademark Disputes

A. Background of Trademark Litigation

A trademark is any word, symbol, or device used to identify and distinguish goods, and to indicate the source or manufacturer of the goods.[2] The categories of devices that can be trademarked have broadened over time to include sounds, scents, and colors in some cases.[3] Unlike copyright and patent law, trademark law is not derived from the Constitution, for the Constitution only grants Congress the power "[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[4] Trademark law became an economic necessity and was conceived as new technologies developed, and consumers began to purchase goods from expanding companies and brands rather than local merchants.[5] Trademarks became devices used to identify the source of consumer products.[6] For example, consumers around the world are now able to easily distinguish a Coca-Cola can from a Pepsi can just by seeing their respective (trademarked) color schemes.

As a result, protection of company and brand reputation became very important business interests.[7] Companies strived to build a positive reputation for their products, and used trademarks to symbolically represent the reputations they established.[8] Examples of famous logos in today's fashion industry include Nike's swoosh, Louis Vuitton's LV, and Ralph Laurens's polo player. These logos now carry a value of their own, independent of the

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2 Tiffany Walden, *Problems with the Piracy Paradox: Rebutting the Claim That Fashion Designs Do Not Need Intellectual Property Protection*, 20 N.Y. St. B.A. Ent. Arts & Sports L.J. 16, 16 (2009).

3 *See In re* Gen. Elec. Broad. Co., 199 U.S.P.Q. 560 (T.T.A.B. 1978) (determining that sound of Ship's Bell Clock could be registered as a trademark for radio broadcasting services upon a showing of acquired secondary meaning, a burden the registrant failed to meet in this case); *In re* Clarke, 17 U.S.P.Q.2d 1238 (T.T.A.B. 1990) (determining that a high impact, fresh, floral fragrance reminiscent of plumeria blossoms, applied to sewing thread was registrable trademark); Qualitex Co. v. Jacobson Prod. Co., 514 U.S. 159 (1995) (holding that a green and gold color scheme for packaging of dry cleaning pads could be trademarked).

4 U.S. Const., art. I, § 8, cl. 8.

5 David A. Bernstein, *A Case for Mediating Trademark Disputes in the Age of Expanding Brands*, 7 Cardozo J. Conflict Resol. 139, 142 (2005).

6 *Id.* at 143.

7 *Id.*

8 *Id.*

products they are attached to, because many consumers are willing to pay more for clothing bearing such logos than for similar goods without the logos. Moreover, some companies not only trademarked their brand names (i.e., "Nike") and their logos (i.e., the Nike swoosh) but trademarked designs.[9] For example, Burberry's check design is a federally registered trademark in any color combination. Also, in a recent Second Circuit decision, the court found that the color-design combination constituting a Louis Vuitton mark on its handbags qualifies for trademark protection, because it is both "inherently distinctive" and has "acquired secondary meaning," which means that consumers see the color scheme as more than just a mix of colors but also as an identifier of the source—Louis Vuitton.[10]

Companies with established reputations based on their trademarks began to rely on the law to prevent others from diluting, profiting from, or otherwise harming their trademarks.[11] As commerce expanded and became increasingly global, the use of trademark protection grew.[12] Companies turned to the concept of branding to secure their financial interests and their reputations, assigning trademarks to each and every product or service available for sale by a particular producer.[13] In time, as more and more companies that had previously offered limited products or services began to break into new categories with brand or line extensions, disputes over trademark rights increased, which in turn led to an increase in trademark litigation.[14]

B. Problems with Trademark Litigation

The increase in trademark litigation has underscored that trademark disputes are not ideal subjects for full-blown litigation. Many characteristics of trademark disputes make them unsuitable for litigation, and the use of litigation in trademark disputes is often inefficient and results in undesirable outcomes.

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9 Biana Borukhovich, *Fashion Design: The Work of Art That Is Still Unrecognized in the United States*, 20 N.Y. ST. B.A. ENT. ARTS & SPORTS L.J. 27, 28 (2009).

10 *Id.* (quoting Louis Vuitton Malletier v. Dooney & Bourke, Inc., 454 F.3d 108, 116 (2d Cir. 2006)).

11 Bernstein, *supra* note 5, at 143.

12 *Id.*

13 *Id.*

14 *Id.*

One of the major problems with trademark litigation is its high cost. The fact that federal courts have exclusive jurisdiction over most of these disputes makes trademark infringement litigation significantly more costly because litigating in federal courts is generally more expensive than litigating in state courts.[15] Also, the backlog in federal courts and the fact that federal courts are obligated to resolve criminal matters before civil matters often results in a longer waiting period for civil trials on the merits in federal court than in state court.[16]

Trademark litigation often turns into an endeavor that takes several years and reaps attorney fees and damage awards in the hundreds of thousands of dollars.[17] These costs are "so high because litigation is a highly competitive and adversarial process that encourages parties to exaggerate their claims."[18] One of the major reasons for the high costs is the need for extensive and often costly discovery.[19] There are also many hidden costs in trademark litigation which "include the cost of answering interrogatories, attending depositions, and attending a trial."[20] Also, as Kevin M. Lemley explains, "the court system establishes a great quantum of merit upon evidentiary procedure, witness credibility, and burdens of proof."[21] This results in more "opportunities for delay."[22] One commentator estimates that trademark lawsuits usually cost at least $500,000 by the time a trial starts.[23] Furthermore, a 2001 survey conducted by the American Intellectual Property Law Association (AIPLA) found that the average cost of a trademark dispute through trial is $502,000.[24] Additionally, the lost time and mental stress suffered by disputing trademark owners may lead to losses in productivity, which may, in turn, lead to subpar service, causing further losses of

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15 Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution.* 110 W. VA. L. REV. 999, 1001 (2008) (discussing problems with copyright litigation). It follows that similar arguments should apply to trademark litigation.

16 *Id.* at 1001–02.

17 Danny Ciraco, *Forget the Mechanics and Bring in the Gardeners*, 9 U. BALT. INTELL. PROP. L.J. 47, 68 (2000).

18 *Id.*

19 Bernstein, *supra* note 5, at 160. *See also* Ciraco, *supra* note 17 ("[R]esolving intellectual property disputes can be very expensive when we consider the burdensome discovery process . . . IP cases are incredibly sensitive to time.").

20 Ciraco, *supra* note 17, at 69.

21 Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes,* 37 AKRON L. REV. 287, 311 (2004).

22 *Id.*

23 Bernstein, *supra* note 5, at 156.

24 Lemley, *supra* note 21.

customers and sales.[25] When the litigation process finally comes to an end and a judgment is entered, "the losing party often appeals, which further adds to the costs and duration of the dispute."[26]

While the majority of cases do not proceed to trial, parties still often spend a great amount of money between the time of filing a trademark claim through discovery.[27] As a result, these high costs diminish the value of 11th hour settlements.[28] Parties gain more value from settlements that occur early in the litigation process than from last minute settlements when the parties have already incurred substantial litigation expenses.[29] Even a very high settlement agreement occurring the day before trial may be less financial rewarding than a significantly smaller settlement occurring early in the litigation process.[30] Given these factors, it should not be surprising that litigation may not feel like a victory for even successful litigants.[31]

A related problem is that not all parties are equally impacted by the potential of incurring greater costs associated with their trademark claims.[32] These higher expenses and long delays often force lower income, smaller, and noncommercial parties into unfavorable settlement agreements or discourage them from initiating a lawsuit in the first place, especially against a wealthy party.[33] On the other hand, wealthy parties may have greater incentive to litigate or at least threaten to litigate a dispute when they know that financially weaker parties lack the resources to pursue their claims or defenses. This may lead to unjust outcomes that are at odds with the goals of trademark law.[34]

In addition to financial concerns, the fact that trademark lawsuits often take a long time to litigate may have adverse effects on a company's business.[35] As discussed in the previous section, trademarks are utilized primarily in advertising, and if lengthy liti-

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25 Ciraco, *supra* note 17, at 69.

26 Lemley, *supra* note 21.

27 *Id.* at 312.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 Ciolli, *supra* note 15, at 1002.

33 *See id.*

34 *See id. See also* STEPHEN ELIAS, TRADEMARK: LEGAL CARE FOR YOUR BUSINESS AND PRODUCT NAME, 10/6 (5th ed. 2000) (explaining that many trademark disputes are resolved by the economically weaker party agreeing to back down, regardless of who has a stronger legal claim to the mark).

35 Bernstein, *supra* note 5, at 157.

gation prevents the timely marketing of certain products, significant financial setbacks may result for one or more of the parties involved.[36] For example, a fashion design company may be involved in a trademark dispute that prevents it from marketing products under the disputed mark. Even if the company has a better legal claim than the opposing party, a drawn-out trial could be very damaging to the company because fashion seasons and trends change quickly, and the brand-name or design might be out-of-style by the time litigation concludes. Consequently, in trademark disputes, one party may impose economic losses on its adversary through the use of tactical stalling techniques.[37] As Steven J. Elleman asserts, "[t]he possibility for parties to benefit from intentional delay is both unfair and inefficient. This is especially problematic because many products and methods possess only a limited window of opportunity to gain entry into the marketplace."[38]

The road to litigation is long and competitive, emphasizing a positional bargaining style that encourages "threat, bluff, and exaggeration."[39] As a result, parties take rash positions, making it difficult to change positions without compromising integrity or at least pride.[40] This process often heightens the animosity between the parties and leads to feelings of victimization or vengeance.[41] With exaggerated positions, the costs involved in "finding the truth" become inflated compared to what they would have been, had the parties adopted more reasonable positions.[42] And with strong feelings on both sides, the parties spend more time and money trying to "win" and "beat" the other party rather than trying to solve the dispute.[43] Moreover, because litigation is rarely sensitive to the human dimension of trademark disputes, it "diminishes or destroys

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36 *Id.*

37 Steven J. Elleman, *Problems in Patent Litigation: Mandatory Mediation May Provide Settlements and Solutions*, 12 OHIO ST. J. ON DISP. RESOL. 759, 759 (1997).

38 *Id.* This argument is presented in the context of patent disputes but is also analogous to trademark disputes, which often stall a party's ability to market its product. *See also* Ciraco, *supra* note 17 ("For most litigants, delay means added expense and for many 'justice delayed is justice denied.' This is particularly true for IP disputes, which are very time sensitive. Moreover, the cost of lost opportunities can be especially high.").

39 Ciraco, *supra* note 17, at 58.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.*; *see also* Lemley, *supra* note 21 (arguing that the exaggerated positions often taken by litigating parties ignite the costs of seeking the "truth" when both parties have expanded the bounds of the dispute).

what might have once been a functioning business relationship; thus, in turn creating a climate of mistrust."[44]

II. Mediation of Trademark Disputes

A. Background of the Mediation Process

In order to fully understand the process of mediation, it is first necessary to distinguish it from negotiation. Negotiation constitutes any form of communication, direct or indirect, where parties discuss their opposing interests, as well as the form of any joint action which they might take to manage and ultimately resolve their dispute.[45] On the other hand, mediation is a slightly more organized process because it includes the aid of a neutral third party to coordinate the dispute resolution process.[46]

Despite being more structured than typical negotiation, mediation is a dispute resolution process that is highly flexible and informal.[47] The disputing parties meet jointly and/or separately with a neutral third party, the mediator, and discuss their legal positions and interests in the dispute.[48] The mediator listens to both sides and provides his comments and suggestions, while striving to "bring the parties to a better understanding of where their points of agreement and difference lie."[49] The mediator may then use this information to help guide the parties to a common ground and ultimately a non-binding resolution.[50]

Although mediation has its fundamental characteristics, the form it takes varies a lot depending on the nature of the dispute, the objectives of the parties, and the style of the mediator.[51] Mediation is not impacted by the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Therefore, it is a process that can

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44 Ciraco, *supra* note 17, at 70 ("[I]f the opposing parties ever resume a business relationship after litigating with each other, the litigation cost must include reestablishing the lost goodwill between the parties—probably the most expensive cost.").

45 *Id.*

46 *Id.*

47 Marion M. Lim, *ADR of Patent Disputes: A Customized Prescription, Not an Over-the-Counter Remedy*, 6 Cardozo J. Conflict Resol. 155, 165 (2004).

48 *Id.*

49 Elleman, *supra* note 37, at 770.

50 *Id.*

51 *See* John P. McCrory, *Mandated Mediation of Civil Cases in State Courts: A Litigants Perspective on Program Model Choices,* 14 Ohio St. J. on Disp. Resol. 813, 830–31 (1999).

be modified by the parties and adapted to their needs.[52] Unless the parties stipulate otherwise, the mediation process is also a private and confidential proceeding where no transcript is drafted.[53] The parties and the mediator may withdraw from the mediation at any time before a written settlement agreement is made.[54] If all goes well, a successful mediation "results in a party-created compromise to end the dispute or an agreement as to a further action needed to resolve the dispute."[55]

B. Why Mediation is Well-Suited for Resolving Trademark Disputes

There are several reasons why trademark disputes are well-suited for resolution through the mediation process. As discussed above, the financial and temporal costs of trademark litigation can be extremely high. Mediation awards parties the opportunity to start negotiating immediately, rather than waiting months or years to appear on a court docket, thereby reducing economic costs and enabling a much speedier resolution.[56] Moreover, mediation is significantly less expensive than litigation because the parties or the mediator can appropriately limit the scope of discovery, which often consists of prohibitively expensive survey evidence.[57] The only significant expenses for mediating parties include the mediator employed by the parties and the time spent preparing for mediation sessions by the parties and their professional advisers.[58] Unlike litigation, mediation does not require parties to prepare pleadings or statements of cause.[59] Due to mediation's less formal procedures, its costs are significantly lower than those expended preparing for trial.[60] According to some attorneys, "clients who use mediation save about eighty percent of the cost of litigation."[61]

The lower cost of mediation is also important because it allows greater access to justice. Unlike litigation "which gives power to

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52 Lim, *supra* note 47.
53 *Id.*
54 *Id.*
55 *Id.*
56 Ciolli, *supra* note 15, at 1014.
57 Bernstein, *supra* note 5, at 156.
58 Ciraco, *supra* note 17, at 70.
59 *Id.*
60 *Id.*
61 *Id.*

those who can afford the financial burdens, mediation gives many who may not have had an opportunity to submerge themselves in legal waters a chance to be heard."[62] As one commentator explains, the cost-effectiveness of the mediation process allows an "open system" that takes into account that not everyone can afford to litigate.[63]

Another relevant aspect of mediation is that mediating parties can select a mediator that is knowledgeable and experienced in trademark law and particular trademark issues.[64] Trademark disputes are often more complicated and difficult to comprehend than other types of litigation.[65] Thus, having informed neutrals allows for additional cost savings and faster resolution[66] because "[t]he learning curve for an IP mediator is simply much flatter than for jurors and district court judges."[67] It also results in a fairer resolution for both parties because the neutral can focus on the particular issues in the case and will not have to be educated by the parties.[68]

Parties would also benefit from an experienced neutral because trademark disputes typically involve the tricky question of "likelihood of confusion" in which plaintiffs allege that the defendant's mark is confusingly similar to that of the plaintiff's.[69] An experienced neutral can be very useful in examining and interpreting the use and reliability of consumer surveys often used by parties to evidence confusion.[70] According to David A. Bernstein:

> [T]rademark experts are better qualified to interpret the surveys which are frequently submitted as evidence and understand the crucial questions of 'use' and 'reliability' in trademark infringement cases. As a result, a neutral that is particularly familiar with trademark law and the data involved is a more desirable option than the average judge or jury.[71]

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62 *Id.*

63 *Id.*

64 Bernstein, *supra* note 5, at 155.

65 *See id.*; *see also* Ciolli, *supra* note 15, at 1013–14 ("Intellectual property disputes—whether rooted in copyright, trademark, or patent law—are often more complex and difficult to comprehend than other types of litigation.").

66 *See* Bernstein, *supra* note 5, at 155.

67 Sarah Tran, *Experienced Intellectual Property Mediators: Increasingly Attractive in Times of "Patent" Unpredictability*, 13 HARV. NEGOT. L. REV. 313, 321 (2008).

68 Bernstein, *supra* note 5, at 155; *see also* Ciolli, *supra* note 15, at 1014 (explaining that mediating parties in intellectual property disputes "can select neutrals that possess the expertise necessary to 'concentrate on the details and specifics of the case, as opposed to trying to learn or better understand the technical process,'" which leads to fairer resolutions).

69 Blackman & McNeill, *supra* note 1, at 1727.

70 *Id.*

71 Bernstein, *supra* note 5, at 155.

Furthermore, an informed mediator is aware that reputations and relationships are important in the relatively small trademark community and that there is often the possibility that even disputing parties may someday desire a business relationship with each other.[72] Although trademark disputes, unlike patent disputes, do not usually present complicated scientific or technical issues, they do require an understanding of complicated legal rules, consumer perception and surveys, market data, and business relationships.[73] Therefore, mediation's capacity to provide expert neutrals to address these issues makes mediation a much more advantageous dispute resolution process for trademark adversaries than litigation.

Mediation can also be very beneficial to parties in trademark disputes because it provides much-needed privacy and confidentiality. In litigation, confidentiality is usually lost because judges generally do not close the courtroom to the public in jury trials.[74] On the other hand, "a mediated resolution shields the participants from the prying eyes of the public."[75] This aspect of mediation is particularly useful for trademark parties who worry about a negative public reaction to their brand name.[76] For example, a company involved in a trademark dispute may be concerned that exposure of the dispute could lead the public to perceive that the company is overly protective or aggressive in dealing with legal issues, thereby hurting the company's commercial reputation. Additionally, the privacy of mediation helps parties to prevent disclosure of its products and projects, and protects trade secrets and other proprietary information.[77] The problem with litigation is that it "may [call a party] to divulge very sensitive information regarding disputants' products or manufacturing processes," which is "is often an IP client's most valuable asset, and its exposure can spell financial ruin."[78] In mediation there are no written transcripts or opinions; settlement terms will be kept secret among parties, and mediators are bound by confidentiality agreements.[79]

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72 Tran, *supra* note 67, at 322.

73 Blackman & McNeill, *supra* note 1, at 1727.

74 Ciraco, *supra* note 17, at 76.

75 Wendy L. Dean, *Let's Make a Deal: Negotiating Resolution of Intellectual Property Disputes Through Mandatory Mediation at the Federal Circuit*, 6 J. MARSHALL REV. INTELL. PROP. L. 365, 369 (2007).

76 *See* Ciraco, *supra* note 17, at 69–70 ("The negative publicity associated with litigation may also lead to a loss of future customers along with the loss of unknown business opportunities. Corrective image advertising may also have to be factored into the cost of formal litigation.").

77 Dean, *supra* note 75, at 365.

78 Ciraco, *supra* note 17, at 76.

79 *See* Lim, *supra* note 47, at 165; Dean, *supra* note 75, at 365.

Finally, the mediation process produces creative resolutions for parties in trademark disputes. Most trademark disputes do not "require an 'either/or' result in which one party walks away with all the rights at issue . . . [P]arties [will] often consider some form of shared rights to be an acceptable, or even preferred, result."[80] It is also important to note that although trademark disputes are often between large companies, they regularly involve parties who are innovators and/or artists who are not well served by the one-dimensional compensation rewards offered by the courts. They often seek more tailored solutions that, for example, allow them to protect the reputation of their products or preserve an existing business relationship with the opposing party.[81] Other possible creative solutions that can be achieved through mediation include: public or private apology by one or more parties; an agreement for cooperation in future ventures; amendment to on-going contracts; payment of funds over time or linked to the stock market; or agreement to refrain from, or do a specific act (similar to the injunction and specific performance remedies provided by courts).[82] In the end, the mediating parties can both claim ownership of the resolution.[83]

The flexibility of mediation makes it a resolution process that the parties can use to effectively achieve creative and tailored solutions.[84] Mediating "parties are in total control of the process in mediation and are limited only by the participants' needs and creativity."[85] That is why it is often said that mediation is designed to address *interests* rather than rights.[86] In mediation, interests are uncovered, which ultimately helps the parties to understand each other's concerns.[87] As a result, the parties are able to produce more just results, which lead to greater client satisfaction.[88] Formulating a solution that best meets the needs of the parties and the situation helps prevent the parties from escalating the dispute,

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80 Blackman & McNeill, *supra* note 1, at 1716.

81 Ciraco, *supra* note 17, at 81. *See also id.* at 63 ("[I]n court, a financial award will often be the only remedy available to the parties."); *see also* Ciolli, *supra* note 15, at 1017 ("Lanham Act disputes, by their very nature, often involve businesses as parties, many of whom have pre-existing relationships that they wish to preserve.").

82 Ciraco, *supra* note 17, at 63.

83 Blackman & McNeill, *supra* note 1, at 1714.

84 Ciraco, *supra* note 17, at 65.

85 *Id.* at 63.

86 *Id.* at 86.

87 *Id.* at 60.

88 *Id.* at 63.

which could destroy any potential for future collaboration.[89] Moreover, these creative solutions usually provide greater closure, because "[p]arties who enjoy the freedom of creating a settlement which meets their interests are more likely to honor those agreements, thereby avoiding future judicial enforcement action."[90] Whereas the failure to address "these underlying [non-legal interests] has the tendency to fuel the 'spiral of unmanaged conflict.'"[91]

C. Why Parties Choose to Litigate Despite the Benefits of Mediation

Despite all the benefits of mediating trademark disputes, parties often choose not to mediate. There are circumstances in which parties may decide against mediation because strategically it is not the best option for them.[92] One party in a trademark dispute may determine that the most effective way to present its case is through litigation, and thus rejects the idea of mediation.[93] One party may choose not to mediate because mediation does not provide the remedy it seeks, such as an injunction or the establishment of a legal precedent.[94] These are some examples of the legitimate concerns that parties might have about mediating their cases and are probably good reasons not to mediate. However, parties often make the decision not to mediate on less reasonable grounds.

Parties in trademark disputes often forego mediation simply because they or their lawyers are unfamiliar or inexperienced with the mediation process.[95] Even though mediation is now widely available, many attorneys are not fully aware of ADR procedures, and as a result, ADR methods are not adequately used.[96] Furthermore, the relative lack of legal education in ADR fosters the perception that ADR provides less worthwhile outcomes than litigation.[97] A study of practicing trademark lawyers found a sig-

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89 Blackman & McNeill, *supra* note 1, at 1726.

90 Dean, *supra* note 75, at 369 (quoting Nancy Neal Yeend & Cathy Rincon, *ADR and Intellectual Property: A Prudent Option*, 36 IDEA 601, 603 (1996)).

91 Ciraco, *supra* note 17, at 67.

92 Jennifer Shack & Susan M. Yates, *Mediating Lanham Act Cases: The Role of Empirical Evaluation,* 22 N. ILL. U. L. REV. 287, 306 (2002).

93 *Id.*

94 *Id.*

95 Elleman, *supra* note 37, at 775–76.

96 *Id.*

97 *Id.*

nificant disconnect between the perception lawyers had about the effectiveness of a mediation program in their jurisdiction, and the reality.[98] The study concluded that further education was needed for lawyers to "develop their mediation advocacy skills and their ability to serve their clients' interests through mediation" and suggested that "the Court support such efforts."[99]

Another reason parties might litigate rather than mediate is that their lawyers often suffer from over-confidence biases. In the midst of a dispute, lawyers often become over-confident, which leads them to inadvertently overestimate their chances of winning the lawsuit while underestimating the risks of litigation.[100] Even when a lawyer is aware of the weaknesses of his case, he often fails to clearly convey them to the client.[101] If lawyers are over-confident about the prospects of litigation and pass these unrealistic expectations on to their clients, the mediation option becomes a lot less compelling.

A further explanation for the preference for litigation in trademark disputes may be that parties become emotionally attached to their mark. Parties in trademark disputes are sometimes personally responsible for the creation of their company's trademark, or the mark may symbolize a product or service that they created. This creative attachment to the trademark in dispute may make the creator intolerant of mediation even when it is the best option for resolving the dispute.[102] The creator may find it too difficult to sit in same room as the alleged infringer, and the creator may be too attached to consider any compromise or out-of-court settlement.[103]

Many disputes end up being litigated due to escalation of tension between the parties. When a legal dispute arises, litigation is often seen as the normal way to handle the matter; and lawyers and clients tend to resort to what John Lande calls the "litigation-as-usual" approach.[104] If the parties are unable to negotiate a settlement on their own before consulting lawyers, they are likely to feel "distrustful, angry, [and] skeptical" about reaching an agreement with the other side.[105] According to Professor Lande:

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98 *See* Shack & Yates, *supra* note 92, at 318.

99 *Id.*

100 Tran, *supra* note 67, at 318; *see also* Ciraco, *supra* note 17, at 69.

101 Tran, *supra* note 67, at 318.

102 *See* ELIAS, *supra* note 34, at 11/4.

103 *Id.*

104 John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 82 (2008).

105 *Id.*

> Being in a dispute in an adversarial disputing culture is enough to bring out the brute in many people. Even though many parties and lawyers are not generally nasty, they may act that way in response to their perception of nastiness by the other side. This can lead to a cycle of escalating conflict, which prolongs the agony. The last thing that some people want to do in this situation is to work cooperatively with (what they perceive as) the brute on the other side.[106]

Therefore, "it is often hard for clients and lawyers to escape the combination of seemingly-gravitational forces pulling them toward adversarial litigation."[107] Tensions often escalate quickly between parties, making litigation more appealing to bitter parties than mediation, especially in this overly litigious country. And, as a result, the parties often unwittingly forego the resolution process that better suits their interests.

III. Mandatory Mediation of Trademark Disputes

A. Existing Trademark Mediation Programs

Over the past twenty years, the number of ADR programs has increased in both state and federal courts.[108] Statutes such as the Civil Justice Reform Act of 1990 and the Alternative Dispute Resolution Act of 1998, which require every federal district court to implement at least one court-sponsored ADR program, have increased the use of these programs.[109] Of these various programs, there are some trademark mediation programs that are currently utilized by the courts.

In 1996, the U.S. District Court for the Northern District of Illinois created a mediation program specifically for trademark disputes, known as the Lanham Act Mediation Program.[110] This program resulted from collaboration between the intellectual property bar and the judicial leadership in the District Court.[111] This mediation program sought to provide "speedier and more cost-effective resolutions to trademark disputes . . . ."[112] The mediators in the

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106 *Id.*

107 *Id.* at 83.

108 *See* Shack & Yates, *supra* note 92, at 287; *see also* Ciolli, *supra* note 15, at 1013.

109 *See* Shack & Yates, *supra* note 92, at 287.

110 *Id.* at 288.

111 *Id.*

112 Ciolli, *supra* note 15, at 1015.

Program are selected from a referral list of qualified neutrals.[113] Generally, five or more years of trademark law practice, or three or more years as a neutral, is required in order to be a mediator in the Program.[114]

The rules of the Program provide that all trademark cases in the Northern District of Illinois are automatically assigned to mediation as provided by the Program.[115] However, if the parties do not wish to participate in the Program, they can submit a joint written statement to the court stating the reasons for declining the Program, without having to reveal which of the parties declined the mediation option.[116] On the other hand, if the parties do wish to mediate through the program, they are required to file a joint notice expressing their willingness to participate.[117] Therefore, the program is completely voluntary, as the parties can reject mediation after being assigned to the program.

Then in 2006, the United States Court of Appeals for the Federal Circuit (Federal Circuit) adopted a mandatory mediation program.[118] Under this program, all Federal Circuit cases are eligible for participation.[119] The docketing statement drafted by the principal attorney is used as a screening tool by the Mediation Office staff (the Chief Circuit Mediator and Circuit Mediation Officer) in considering which appeals would be good candidates for the mediation program.[120] The counsels for both sides are directed to explain why the case may not be well-suited for mediation and to provide "any other information relevant to the inclusion of this case in the court's mediation program."[121] Because this is a mandatory mediation program, the answers to these inquiries are not dispositive; rather, they are just factors considered in determining whether a case should be selected for mediation.[122] The court staff will also review notice(s) of appeal, judgments and other rulings, as well as the relevant pleadings from the lower tribunal.[123] To better assess the potential barriers to settlement, the court staff

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113 Shack & Yates, *supra* note 92, at 290.

114 *Id.*

115 Ciolli, *supra* note 15, at 1015.

116 *Id.*

117 *Id.*

118 Dean, *supra* note 75.

119 *Id.*

120 *Id.*

121 *Id.* at 370 (quoting Docketing Statement at Osage Nation of Indians v. United States, 97 F. Supp. 381 (1951), *appeal docketed*, No. 4 (U.S. Cl. Ct. May 1, 1951)).

122 *Id.*

123 Dean, *supra* note 75.

may also call counsel with follow-up questions, including a call to any party that has expressed reluctance to participate in the mediation program.[124] After all these steps are completed, the Mediation Office notifies the parties about whether the appeal will be included in the mediation program.[125]

This mandatory mediation program was initiated in the Federal Circuit to provide parties with intellectual property disputes "a risk-free, non-binding opportunity to settle their disputes in a confidential, timely and creative way, by utilizing the services of an experienced mediator with intellectual property subject matter expertise."[126] However, this program applies only to Federal Circuit. Thus, it is only an *appellate* mandatory mediation program without an equivalent at the district court level to reach trademark cases at the outset of litigation.

B. Proposal to Expand Mandatory Mediation in the District Courts

The substantial and widespread benefits of mediating trademark disputes[127] support the enforcement of mandatory mediation programs. Although a mandatory mediation program has finally been established for the Federal Circuit, there is a great need for such programs at the trial level. This section will propose incorporating the ideas behind the trademark mediation program in the Northern District of Illinois and the compelled mediation program established at the appellate level for Federal Circuit to expand mandatory trademark mediation programs to the federal district courts. Expanded enforcement of mandatory mediations will allow greater realization of benefits of mediation for trademark disputes.

Implementing a mandatory mediation program for trademark disputes would significantly expand the use of mediation in an area where it is much needed. As asserted above,[128] mediation is underutilized by trademark parties because the parties or their attorneys are either misinformed or uneducated about the process. Not

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124 *Id.*

125 *Id.*

126 *Id.* at 366.

127 *See supra* Part II.A. *See* TERRY L. TRANTINA, AN ATTORNEY'S GUIDE TO ALTERNATIVE DISPUTE RESOLUTION (ADR): "ADR 1.01" 42 (Practising Law Institute 1999) ("Most believe there are no real detriments and only significant benefits of mediating disputes. Studies show that mediation has a very high success rate, in the 60% plus range.").

128 *See supra* Part II.C.

surprisingly, a study of the Lanham Act Mediation Program found that almost a quarter of all trademark lawyers surveyed about the Program stated they did not know about the Program prior to receiving the survey.[129] By requiring rival trademark parties to first attempt mediation, a mandatory mediation program would bring the often unrealized benefits of mediation to parties in trademark disputes.[130]

Mandatory mediation would also help deal with the problems of overconfidence and pride among lawyers, which lead to unnecessary litigation. Some scholars argue that litigation "has turned into a battle forum for lawyers who sometimes lose sight of the real objective and of the economic restraints of the client; the goal has become to win at all costs."[131] Scholars suggest that mandatory mediation keeps communications open, allowing the parties to choose their own destinies, instead of being at the mercy of a stranger.[132] One of the most valuable characteristics of mediation is the mediator's role as an "agent of reality" by helping the parties to realistically assess the costs, benefits, and risks of continuing their dispute.[133] In mediation, expert mediators can provide a reality check to the parties on the strength of their cases and whether it is really worth the time and money to pursue.[134]

There are also reasons to support mandatory mediation beyond the need to compensate for the underutilization of mediation. There are many public and social benefits that would be gained from requiring trademark disputes to be mediated. More mediation of trademark disputes will lead to increased settlements, as parties would be forced to discuss their cases with professional mediators and seriously consider settlement.[135] This will ultimately lead to quicker resolutions and lower costs.[136] The program would help "cope with 'ever expanding court dockets and limited judicial resources,' allowing courts 'to devote those limited resources to fairly adjudicating those cases that do result in protracted litiga-

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129 *See* Shack & Yates, *supra* note 92, at 296.

130 Elleman, *supra* note 37, at 778.

131 Campbell C. Hutchinson, *The Case for Mandatory Mediation,* 42 LOY. L. REV. 85 (1996) (arguing that mandatory arbitration allows parties to be in control of their destinies).

132 *Id.*

133 Ciraco, *supra* note 17, at 69.

134 *See* Tran, *supra* note 67, at 320.

135 *See* McCrory, *supra* note 51, at 825; *see also* Dean, *supra* note 75.

136 McCrory, *supra* note 51, at 825; *see also* Dean, *supra* note 75.

tion.'"[137] Therefore, litigants will benefit either directly from more efficient settlements of their disputes or indirectly from the enhancement of judicial and other resources that are made available for litigated cases.[138] The costs to society that arise from courtroom delays will be reduced, and fewer resources will be wasted on incorrectly decided or inefficient, prolonged trials.[139] Additionally, quicker resolutions will benefit society because the parties will be able to go back to doing what they do best: creating and expanding products and services.[140] Furthermore, because the settlements are party-created, the dispute is likely to stay settled.

Several empirical results support the theoretical framework discussed in this section and suggest the potential benefits of the expanded use of mandatory mediation. Studies of existing mediation programs have found them to be successful in reaching more settlements in trademark disputes, and that they are supported by the majority of trademark attorneys practicing in that jurisdiction.[141]

A study of court records from the Lanham Act Mediation Program jurisdiction provides data on trademark mediation at the trial court level. This study, conducted by the Center for Analysis of Dispute Resolution Systems (CAADRS), surveyed 202 lawyers and thirty mediators who had been impacted by the Lanham Act Mediation Program, and reviewed court dockets for all Lanham Act cases filed between January 6, 1997 and December 31, 1999.[142] The study found that the cases tended to close quickly and that the majority of disputes were settled by unassisted negotiation between the parties.[143] The study also determined that very few cases went to litigation and that injunctive relief was sought only in a

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137 McCrory *supra* note 51, at 824; *see also* Dean, *supra* note 75 ("Appellate mediation clearly benefits the court by easing its workload and, on that ground alone, benefits the bar by allowing the court to maintain the timely issuance of quality decisions in those cases that do not settle." The same argument could be made about mandatory mediation programs at the trial level); Elleman, *supra* note 37, at 778 (quoting a federal judge who believes that trademark mediation programs provide "a means of relieving the mounting pressures on the bench and enhancing the options available to the bar for dispute resolution").

138 McCrory, *supra* note 51, at 824; *see also* Shack & Yates, *supra* note 92 ("This push to create new ADR programs has occurred for a number of reasons, including improving the quality of justice, decreasing the time and cost burden on the courts of a skyrocketing caseload, and improving the lives of the litigants.").

139 Elleman, *supra* note 37, at 777; *see also* Tran, *supra* note 67, at 319.

140 Tran, *supra* note 67, at 319.

141 *See* Shack & Yates, *supra* note 92.

142 Ciolli, *supra* note 15, at 1016.

143 Shack & Yates, *supra* note 92, at 297–98.

significant minority of cases.[144] According to the study, "almost 30% of all Lanham Act cases during that time period were closed before mediation would likely have taken place."[145] Furthermore, "[f]or those cases in which the parties did not reach settlement themselves, parties sought assistance with settlement more often than they turned to" litigation.[146] Taking all the data into consideration, the authors of the study conclude that the resolution rate for mediated cases is between 65% and 72%.[147]

CAADRS' study further reported that the lawyers' most frequently cited reasons for mediation were, in order: the "expense of litigation" (74.78%), the need for a "quick resolution" (50.34%), and the parties' need to preserve an ongoing business relationship (49.57%).[148] The feedback from the lawyers indicated that when these were their clients' interests, mediation would address them.[149] The most frequently cited reasons for not choosing the program dealt with the "willingness of parties to participate" (33%) and "lack of opportunity" (33%).[150] Only 20% of the respondents "indicated they did not mediate the case because of the need for something that they thought they could not obtain through mediation, such as satisfactory results, finality, injunctive relief or summary judgment."[151] Of lawyers who responded to the survey, 70% were overwhelmingly positive about the mediation experience, and no lawyer rated the experience as a waste of time.[152] In response to the open-ended question, "What recommendations do you have to improve the program?," the most common responses focused on encouraging greater use of the program and the possibility of making the program mandatory.[153]

The findings from the Lanham Act Mediation Program underscore mediation's strength in fostering mutual agreements in trademark disputes.[154] "Most participating lawyers rated the Program exceptionally high and stated they would use the Program again."[155] As Kevin M. Lemley explains, "If mediation can provide

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144 *Id.*
145 *Id.* at 298.
146 *Id.*
147 *Id.* at 300.
148 *Id.* at 305.
149 Shack & Yates, *supra* note 92, at 305.
150 *Id.* at 312.
151 *Id.* at 313.
152 *Id.* at 314.
153 *Id.* at 312
154 Lemley, *supra* note 21, at 309.
155 *Id.*

agreements in roughly two-thirds of all submitted disputes, parties should consider submitting the dispute to mediation rather than litigation."[156]

In another study, California tested the efficacy of early general mediation (not specifically for trademark disputes) through pilot programs in five courts and found that they achieved positive results. Under the statute authorizing the pilot programs, the "initial case management conferences" were to be held within ninety days after the case was filed; mediations should be scheduled within sixty days of these conferences.[157] In the San Diego and Los Angeles courts, the trial rates were reduced by 24% to 30%. San Diego had an estimated potential savings of 521 trial days per year, saving about $1.6 million. In Los Angeles, the estimate was 670 trial days saved per year, resulting in $2 million of savings.[158] The study also found that the use of mediation reduced disposition time, and that the attorneys who participated in mediations expressed satisfaction with the mediation experience.[159] The litigants were estimated to have saved almost $50 million over two years as a result of the five programs.[160] And the workloads were significantly reduced in four courts, resulting in 18% to 48% fewer motions and 11% to 32% fewer "other" pretrial hearings.[161]

A study of the District Court for the Western District of Missouri also suggests that court enforced mediation can be effective. Under the Western District of Missouri program, parties must attend a conference with the program administrator within thirty days after responsive pleadings are filed.[162] Originally this was a "demonstration" program and the subject of an experimental evaluation, featuring a random assignment of cases to a "mandatory mediation group," an "optional mediation group," or a "control group with no mediation."[163] The evaluation found that mandatory mediation cases were terminated after an average of 7.0 months, compared with 9.7 months for the control group. Of cases that went through an early assessment session, "38% settled at the session, 19% settled within a month of the session, and an additional 18% settled within three months, for a total of 75% settle-

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156 *Id.*
157 Lande, *supra* note 104, at 102.
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.* at 103.
163 Lande, *supra* note 104, at 103.

ments within three months of the session."[164] These findings illustrate that "mandatory mediation reduced the average time to disposition for cases in this group compared to cases in the control group."[165] Moreover, according to the study, the judges and lawyers were mostly very satisfied with the program.[166] A "great majority" of lawyers in the program believed that it "reduced litigation cost," creating a median estimated cost saving of "$15,000 per party."[167] The success of all the mediation programs discussed in this section indicates that mandatory mediation of trademark disputes can be effective at the trial level.

C. Potential Concerns and Criticisms

Although expanding the use of mandatory mediation in trademark disputes would be a worthwhile endeavor, there are some potential concerns and criticisms that should be addressed. Some commentators have a philosophical problem with the notion of mandatory mediation and believe that it should be entirely voluntary.[168] Others cite practical concerns with a program that mandates participation. They argue that coercing unwilling parties into mediation would undermine its benefits, making the process more adversarial and more like litigation.[169] Moreover, they believe that even though mandatory mediation will increases the number of disputes that are mediated, mandatory mediation would preclude "the deeper processes that lead to commitment, thus preventing the emergence of self-generated change."[170] The critics of mandatory mediation believe that all parties need to have a "mindset for resolution" and that "if someone at the table does not share that mindset, the case will not settle."[171] Ultimately, they argue that instead

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164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.* at 104.

168 *See* TRANTINA, *supra* note 127, at 43.

169 *See* Ciraco, *supra* note 17, at 85 ("Scholars have specifically used court-ordered or mandatory ADR as an example of the incongruity between interest-based methods through a rights-based design. If we were to adopt mandatory mediation, it will be forced to be institutionalized, more formal, and connected to rules, taking on qualities of the system it was meant to displace."); *see also* McCrory, *supra* note 51, at 830 ("There is concern in some quarters that the institutionalization of mediation in the courts will diminish party self-determination, result in mediation that is evaluative, and cause coerced settlements.").

170 Ciraco, *supra* note 17, at 82.

171 Shack & Yates, *supra* note 92, at 318.

of mandating mediation, in certain cases, it should just be encouraged, but remain voluntary.[172]

This argument is overstated. The statistics from existing programs show that mandatory mediation is as effective, or only marginally less effective, as voluntary mediation.[173] Even if one (or more) of the parties is initially reluctant to engage in mediation, there is still a good chance that the process could change their minds, especially if the mediator is skilled in reconciliation and specializes in trademark disputes. The mediator can bring parties together who were initially at polar ends by uncovering that the parties' positions are not as divergent as initially thought, or by crafting a previously unconsidered, creative solution to bring the parties to an agreement.[174] As discussed above,[175] trademark owners are often intimately attached to their marks, and the attachment can produce poor decisions to litigate their legal disputes. Forcing the parties to attempt mediation can help cool them off by giving them a reality check as to the strength of their legal claim and the cost of pursuing it, in addition to educating them about the concerns of the other party.

Also, if mandatory mediation programs use mediators with expertise in trademark law, as the Lanham Act Mediation Program requires, these mediators can help reassure the parties and instill more confidence in the dispute resolution process. In any case, the alternative approach suggested by critics of mandatory mediation is unsatisfactory. The problem with simply *encouraging* mediation in cases where mediation would be the best option is that it would not take us away from the current situation in which mediation in trademark disputes is being underutilized. If mediation remains voluntary, parties will continue to litigate cases that are better suited for mediation. As discussed above,[176] parties often choose not to mediate for the wrong reasons; only mandatory mediation can help rectify this underutilization.

Another often cited criticism of mandatory mediation is that there is usually no direct appellate review after the mediation is completed. If a party is left dissatisfied after mediation, it may have to bring the case to federal court to be heard *de novo*, and thus much of the litigation costs which were supposed to be

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172 Ciraco, *supra* note 17, at 89–90.

173 TRANTINA, *supra* note 127, at 43.

174 Elleman, *supra* note 37, at 777.

175 *See supra* Part II.C.

176 *Id.*

avoided are reintroduced.[177] Critics argue that mandatory mediation may then simply become "another hurdle to be cleared on the way to litigation, and which may become a formality that wastes both time and resources."[178] They also argue that mediation may be even more wasteful if one party has no intention to settle and is just going through the motions and buying time until the case goes to trial.[179] These concerns also exist in voluntary mediation, and it is a fair assertion that mandatory mediation programs would provide greater opportunity for parties to abuse the procedure and be wasteful. However, there is little evidence that this creates a serious enough problem to outweigh the significant benefits of expanding mediation through mandatory court-enforced programs. Furthermore, costs associated with the "another hurdle" problem are exaggerated. As Steven J. Elleman asserts, "[o]nce the mediation commences, if there is absolutely no possibility of settlement, the mediator will be able to quickly recognize this fact. The parties will then be free to leave mediation quickly after investing only a minimum of resources."[180]

Critics of mandatory mediation further cite that during the mediation process, third parties cannot be compelled to participate; and thus, it may be difficult to get some witnesses or experts to testify.[181] However, as discussed above, the purpose of mediation is not to discover "truth" or to see who is "right." The purpose is to resolve the dispute in a way that is in the best interests of both parties.[182] Determining who is in the "right" is not usually in the best interests of the parties because of the costs and time that would be involved.[183] Parties in trademark disputes are usually better off not trying to determine who the clear "winner" is through litigation but should instead mediate toward a win-win settlement.[184] In the process of working toward such a settlement the ability to offer witnesses and experts is not as important or beneficial as it is in truth-seeking litigation. Although mediation can be conducted in a more or less formal manner, it is true that the very nature of mediation makes it a more informal process than a court

177 Bernstein, *supra* note 5, at 161.

178 Ciraco, *supra* note 17, at 87.

179 *Id.*

180 Elleman, *supra* note 37, at 777.

181 Bernstein, *supra* note 5, at 161.

182 *See supra* Part II.B.

183 *Id.*

184 *Id.*

hearing.[185] Nevertheless, if the need for formality arises because of strategic needs such as third party testimonies or discovery issues, those can be handled with the judge prior to mediation.[186] Finally, if one of the parties or lawyers "simply has a need for the familiarity of a more formal process, that could be addressed by educational efforts."[187]

Some commentators argue that it is unfair to force mediation on parties who are interested in successfully litigating in order to send a deterrent message to potentially infringing third parties.[188] They further argue that published decisions within a court system also help draw attention to inadequacies in the law and can also offer public vindication to parties accused of infringing—benefits that are lost in mediation.[189] To be sure, mediation may not have such effects because of its confidentiality and lack of precedential value. It also follows that mediation does not offer a permanent injunction (a court-created remedy), which is an award often sought in trademark infringement cases.[190]

However, in terms of precedent, there is currently so much trademark litigation (as discussed above) that the lack of precedent-creation is not likely to be a major concern for trademark parties. Moreover, even though precedent-creation and certain remedies (i.e. injunctions and public vindication) are not built into the mediation process, mediation is flexible enough that such remedies can always be bargained for as part of the settlement. As noted earlier,[191] confidentiality is agreed to by the parties. Thus, the parties can always agree to make their settlement public if doing so is important to one or more of the parties. Similarly, the parties could always negotiate a settlement where one party must do or refrain from doing a certain activity, which would have an effect similar to an injunction. Even if a party insists on a court ordered remedy, it should be possible for the parties to still use mediation to negotiate and agree on the terms of such orders.

Of course, there will be situations where mediation is not appropriate in a trademark dispute, such as when one party infringes on the other's trademark in bad faith by counterfeiting or pirat-

185 *See* Shack & Yates, *supra* note 92, at 317.

186 *Id.*

187 *Id.*

188 Lim, *supra* note 47, at 183.

189 *Id.*

190 Bernstein, *supra* note 5, at 161.

191 *See supra* Part II.B.

ing.[192] These situations often arise in the fashion industry when a seller offers counterfeit or "knock-off" merchandise that displays well-known trademarks (i.e. a symbol or design pattern) of a designer brand in an effort to gain profits from the reputation established by the original designer brand. In such a scenario, mandating mediation would create inefficiency as the innocent party is unlikely to be interested in negotiating any kind of settlement with a party that is clearly in the wrong and infringing in bad faith.[193]

However, such disputes are not likely to be affected by the implementation of a mandatory mediation program. When one party is caught red-handed (knowingly and in bad faith) infringing on the other party's trademarks, it will probably be willing to settle the matter outside the judicial system—by monetary payment to the innocent party and an agreement to not infringe in the future. Therefore, courts will rarely have the opportunity to review such disputes and decide whether to send them to mandatory mediation. Even if such disputes fail to settle on their own and do enter the court system, these are the type of disputes that courts will not send to mandatory mediation. In such disputes, it will be clear that if an innocent party, which has more leverage in settlement negotiations, brings the action to court anyway, then the party is not interested in any sort of settlement that could be achieved through mediation. A court system employing a mandatory mediation program for mediation disputes will utilize judicial discretion over which disputes are sent to the program; the disputes that are not amenable to mediation are not likely to end up in mediation.

Finally, it is important to note that enforcing a mandatory mediation program does not mean that the parties must resolve their dispute. A great fear often expressed by critics of mandatory mediation is that "the institutionalization of mediation in the courts will diminish party self-determination, result in mediation that is evaluative, and cause coerced settlements."[194] While a court could encourage good faith and open-minded participation in its mandatory mediation program, it cannot compel settlement.[195] Making mediation mandatory does change the fact that the resolution must be mutually agreed upon, a fundamental characteristic of

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192 Ciraco, *supra* note 17, at 88.

193 *See* Lim, *supra* note 47, at 181 (discussing the "incongruent" relationship between an owner and an infringer in the context of patent disputes).

194 McCrory, *supra* note 51, at 830.

195 Dean, *supra* note 75, at 372.

mediation. And if one or more parties are truly unsatisfied with the resolution reached, they may always appeal because the mediation result is not binding.[196]

Moreover, the freedom to appeal mediation outcomes mitigates several of the concerns associated with mandatory mediation discussed in this section. As demonstrated above, mediation can offer a custom-tailored approach to resolving trademark disputes and produce results that satisfy broad interests.[197] Therefore, a great percentage of the trademark disputes which are traditionally litigated could be successfully resolved through mediation. If one or more of the parties truly needs a remedy that mediation cannot offer, mandatory mediation would never force a settlement upon the parties. The parties are always free to pursue litigation or any other action if they really cannot resolve their dispute through mediation.

CONCLUSION

As the marketplace continues to develop with new technologies, businesses respond by expanding their brands and seeking legal protection for their marks.[198] Currently, much of the trademark enforcement and dispute resolution efforts turn to litigation, an often overly lengthy and expensive process.[199] Even though mediation is a dispute resolution process that is naturally well-suited for trademark disputes[200] and has proven effective in studies of existing trademark mediation programs,[201] it continues to be underutilized in such disputes. Therefore, mediation is a brand of dispute resolution that is in need of expansion in the judicial marketplace. Greater enforcement of mandatory mediation in trademark disputes will help mitigate the problem of underutilization and will allow trademark parties to realize its benefits, which often work in the best interest of the parties and society as a whole.

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196 *Id.* at 370.
197 *See supra* Part II.B.
198 *See supra* Part I.A.
199 *See supra* Part I.B.
200 *See supra* Part II.B.
201 *See supra* Part III.B.