Consensus or compulsion?

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When a person receives the same message often enough, from intelligent people whose opinions are not only valued but are handsomely paid for, he is apt to believe it. Yet, acceptance within the canon of generally accepted wisdom does not of itself qualify a widely held belief as being true.

In the field of IP as elsewhere, opinions are often accepted uncritically on the trusting assumption that opinions that have been carefully formed and eloquently articulated are almost sure to be respectfully disseminated. Having been acted upon, they are strengthened since their advocates can say, ‘don’t just take our word for it—you can see for yourself that this is what so-and-so does’.

And yet, taken over a long period of time, the accepted wisdom in so many sectors appears to oscillate between opposing poles. IP portfolios are beefed up, their owners having been urged to secure a strong market presence and to acquire negotiating power when entering new fields of activity; those same portfolios are then slimmed down again as owners are encouraged to divest all but the most essential of rights, to focus on their areas of core expertise, to reduce waste, and to simplify non-productive administrative activity.

If we hang around for long enough we see similar bipolar tendencies among firms providing professional legal and paralegal services for IP clients. Boutiques that are first encouraged to concentrate on their special skills are then taken to task for their limited vision in failing to provide a one-stop-shop for a wide variety of legal services that have little or nothing to do with their original focus. Practices with a merely national perspective are chided for their failure to match their clients’ international demands for IP registration, exploitation, and enforcement in an increasingly global market; they are then pressed to build up a solely national presence and avoid the undesirable consequences of spreading their resources too thinly and turning away work because their foreign-based tributary offices have conflicted them out.

Nowhere is the oscillatory effect of contradictory advice more clearly demonstrated than in the field of dispute resolution. Litigation, arbitration, mediation, early neutral evaluation, and the rest—each in turn glows in the reflected limelight of fashionable wisdom, and then fades in the wake of the next wave of transmitted wisdom. Some tout compulsion as the best way of enforcing rights, others vaunt the benefits of more consensual modes of settling disagreements.

The truth is that no one means of resolving disputes is inherently superior to any other: it is the nature of the dispute and the characteristics of the disputants that should determine which one to use. A knife is not better than a fork, spoon, or chopsticks, since each item possesses functional advantages over the others when the conditions are right. In the same way, litigation will score well in disputes in which an alleged infringer is uncooperative and must be compelled to participate while consensual forms of dispute resolution score highly where there is an existing or potential long-term relationship between the parties and a will to avoid friction in the future.

Against this, it is apparent that some IP practitioners appear to believe that it is only through going to court that one can establish one’s credentials as a doughty defender of a client’s interests: litigation is public, a visible sign of achievement, while mediation and arbitration may be invisible to all but the protagonists even if they have not been shrouded in requirements of confidentiality. Best of all, IP litigation is a form of advertising by the lawyer that is paid for by his client.

So some tough questions must be asked. Why do some lawyers seem incapable of keeping their clients out of court? What attracts clients to lawyers that represent them so publicly? Why is mediation seen as the wimp’s option even in disputes that are close calls, when it enables the IP owner to keep more control over the outcome than suing in court can ever do? These questions must be kept in mind.

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