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ADR Offers Quick and Creative Resolutions for Cutting-Edge Entertainment & Technology Disputes

By Hon. Terry B. Friedman (Ret.)

In less than one month, Apple's newest tech device, the iPad, has exploded across the consumer market. (For a full description of what is an iPad, including all its bells and whistles, see ["It's A Game Changer"] by Paul Kiesel, [*Daily Journal*], April 13, 2010.) At last count, more than 1.1 million have been sold in the U.S. alone. Projections forecast that as many as 7-10 million Americans will plunk down $499 - 829 for an iPad by year's end, with millions more expected to be sold internationally. Besides its highly successful sales launch, the iPad also is dominating the technology news sector, as consumers and commentators alike debate its uses and attributes. Perhaps the hottest topic concerns the thousands, perhaps millions, of applications that the iPad offers. Unlike the free Web model that allows Internet users to surf any content accessible through a Web site, iPad applications offer consumers a dizzying array of content, in many instances, at a price. Impressively, by retaining control of application approval, through a requirement that all application developers sign a 21,000 word agreement, Apple has achieved huge power over accessibility of information, news, entertainment and culture in the U.S. market and around the world.

Without a doubt, the iPad offers wonderful opportunities to the entertainment and technology industries to build new revenue sources. The opportunity for enormous profit for application developers and content providers understandably can lead to disagreements over division of dollars and other financial conflict. Even more challenging may be clashes regarding content.

Most of these types of disputes take place behind closed doors, although a few have emerged into the public domain. For example, Apple initially declined an app proposed by SFGate.com's animated political cartoonist Mark Fiore on the ground that that his app violated Apple's iTunes Store policy against content that "ridicules public figures." Eventually, Apple and Fiore reached an understanding that opened the iPad to Fiore's content. Apple clearly has the right to control the content it allows on its own products, such as the iPad, so it is possible that similar disputes may arise between Apple and other content providers.

Another potential broad scale conflict between Apple and software giant Adobe has received considerable media attention in recent days. Apple has not allowed Adobe's Flash animation software on the iPad, as well as the iPhone and iPod, because Apple has determined that Flash uses too many resources and could make devices such as the iPad unstable. This is a big deal because Flash is a multimedia platform that has become the de facto standard way to add animation and interactivity to Web pages. In other words, many content providers depend on Adobe's Flash to enable them to present video based or other compelling programs to the online public. Some speculate that Apple may want to enter the animation software market, challenging Adobe's dominance. If so, this dispute is very high stakes.

The potential for conflict is very real among the many players involved in putting an application on an iPad screen, in dividing up the 99 cents or $2.49 or whatever consumers may be charged to download the app. The scorecard of players includes the app developer, the content provider, perhaps advertisers, and Apple.

These disputes lend themselves particularly to alternative dispute resolution, utilizing either mediation or arbitration. Mediation is especially beneficial for disputants who have an ongoing relationship. Apple may have the power to dictate terms for app developers to gain access to the iPad, but the giant device maker shares vital interests with those developers; the more apps available on the iPad the more desirable the device to consumers. Plus, Apple retains 30 cents of every dollar iPad owners spend purchasing apps from the Apple Store. So, if conflicts arise between Apple and the app developers, each has much to gain from finding resolutions that preserve their business relationship. Unfortunately, the contentious path of litigation tends to drive adverse parties further apart and the end result at trial or by dispositive motion generally is all or nothing – one side wins, the other loses. By contrast, mediation – especially in a business context – provides each party an opportunity to achieve at least some of its objectives and minimize the risk of total or devastating defeat. An added benefit in mediation is the protection it offers to parties who wish to keep

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proprietary information confidential. Few conflicts involve as many trade secrets as those that arise where the digital technology and entertainment sectors intersect.

Though arbitration is an adversarial process, it, too, offers advantages over traditional litigation. First, the parties can select the decision-maker(s), based on experience, expertise, temperament and other qualifications, rather than the random process that appropriately governs case assignments in court. Second, scheduling is user-friendly in arbitration, allowing the sides to work with the neutral to set hearing dates that accommodate attorney, party and witness needs without being subject to the difficult challenge trial judges encounter balancing the demands of multiple cases on calendar. Third, due to a decision bythe California Supreme Court ([*Moncharsh v. Heily & Blase*] (1992) 10 C.4th 1), an arbitration provides as close as a party can come to finality because arbitrator awards generally are not subject to appellate review.

Mediation and arbitration give parties control over the process and provide much flexibility. Each allows the parties to limit costs and budget accurately. Often the most expensive and unpredictable aspect of litigation is discovery. Not so in mediation and arbitration. In arbitration, the parties and the arbitrator work out careful and usually constrained discovery plans. Sometimes very limited discovery helps sides prepare for mediation. Perhaps the most important advantage of alternative dispute resolution (ADR) in entertainment-digital technology disputes is the flexibility to craft creative solutions. Digital technology is developing at light speed. Think back to the beginning of this century, before the iPod, YouTube, Facebook and the iPad. When no one can anticipate the exact form of the disputes that will arise even in the near-future, it is highly advantageous for sophisticated, innovative, entrepreneurial deal makers to incorporate ADR in contracts involving new products and relationships, such as those that surround the iPad.

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