Curbing Abusive Intellectual Property Litigation Through Mandatory Arbitration

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This paper considers whether abusive intellectual property litigation might be curbed by mandatory arbitration. Under this approach, applicants for patents or for federal copyright or trademark registrations would, as a condition of their grant, be required to agree to an arbitration provision. The terms of that provision would allow an accused infringer to choose between litigation and binding arbitration. The paper considers whether it is in the public interest to make this option available to defendants in all disputes, or whether it should be limited to certain categories of disputes in which abusive litigation is most problematic, such as patent infringement claims by nonpracticing entities, and copyright infringement claims in which the commercial value of the alleged infringement is nominal. Alternatively, the option could be limited to accused infringers of limited means. The goal is to discourage abusive litigation designed to extort unreasonable settlements, and to reduce the cost of defending against an infringement claim. Potential concerns include the Seventh Amendment right to jury trial, international treaty obligations, requests for injunctive relief, and the role of the federal courts in issuing binding interpretations of the law and determining the validity of federal patents and copyright and trademark registrations.