

### Video Games & E-Sports: How WIPO's ADR Can Help Resolve IP Disputes

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**OASB** [COLD OPEN] So efficiency: We try to provide a quick way of solving disputes in a way that will allow the parties to gain value of their IP assets and unblock these disputes, and in a way that they can exploit this. Also the fee structure—because we're not for profit, we want to make it accessible to the parties. And also because in these cases, the need of solving the dispute sometimes is a very short notice and we have this fast track that will allow parties to solve these disputes in 24 hours in a way that would not be possible in other situations.

**MAU** Welcome to this episode of the Knobbe IP+ Podcast. I'm your host of today's episode, Mauricio A. Uribe, a partner at the law firm of Knobbe Martens. Today I have the great pleasure of speaking with Oscar Suarez Bohorquez, WIPO's Legal Officer in the Business Development and Digital Content Disputes. Oscar, welcome.

**OASB** Hello Mauricio, how are you? Thank you for the invitation today.

**MAU** It's my pleasure to have this opportunity to chat with you today. We're going to be discussing WIPO's recently announced program on the alternative dispute resolution for video games and e-sports disputes. So Oscar, let's start with a little bit of the background. Tell us a little bit about yourself and how you ended up in Geneva.

**OASB** Yes, thank you. That's actually, I have many people say the same thing, but it was by pure chance, let's say. As you may know, as background, I'm a lawyer from Colombia actually. Most of my practice was private practice. I worked for companies, particularly I was more into the corporate structures but always with this kind of focus into the international environment. During university years I did a lot of public international law too. So it was always in my mind. And then after some years practicing in Colombia, all my clients were international. All my practice was going that way, so I ended up going to Leiden University. And from there this passion for arbitration, international ADR was something that really attracted me. And then I also had this IP background that was mixed with all the corporate things I was doing and there was this opportunity to come to Geneva and practice a bit of this mix, that is very niche, which is ADR and IP. So that's why I said it was by mere coincidence because it wasn't in the plan. But

then when I was here, I truly enjoyed it at the beginning and then life just kept coming and it's been almost six years now that I'm here at the organization. And of course, we're looking at all sorts of subjects, including this area that we're talking about that's video games and e-sports.

**MAU** That's a great segue because one of the first questions I had was why would WIPO focus on something so specific for video games and e-sports disputes? What's the purpose behind the program?

**OASB** So I think we, as an organization, have been focusing on, let's say, less traditional areas than we were looking before. You know, we have this big system, like the PCT, like the Madrid System, which are, let's say, our traditional core services of registry and whatnot. For the past years we've been exploring new areas that are quite trending and that are quite interesting and big, like the video game industries we know. It has surpassed even the film and music sectors. It's so big that people - maybe we didn't realize it so clearly. Of course the pandemic helped people going online, enjoying more video games. And from all this came this realization, I think, that it was something that we wanted to look into because there is so much IP contained into the video games area. And of course the e-sports disputes that are coming from not only the IP environment, but also in the areas of e-sports, we can talk about a bit more later. Some other issues that are more related to the ethics of e-sports players or e-sports athletes, as some people say.

So at WIPO we started looking into the area just to help the environment. We have many programs that are focused specially into helping SMEs and new companies that are trying to develop and to realize the value of their IP. So when we go to video games, we have of course copyright, but we also have patents that are related to the hardware, even internally. Then we have all the trademarks that go with it. So it's a huge IP environment that is quite interesting to realize how integrated—we call them "IP intensive industries," and video games is for sure one of those. And then when we started seeing in our caseload, we started noticing, and I can narrate a bit more later, about disputes that were coming into this environment. So we would see disputes coming from parties that wanted to publish video games and they had maybe an allegation of IP infringement or even in the digital environment streaming of these sports competitions. So it was like, "Hey listen, let's just maybe create a program out of it." And we've been seeing a lot of interest in this environment currently.

Long explanation just to say why we're looking into this!

**MAU** That's great. And so following up on your question, is this program set up for all sorts of IP? Are we talking from patent to copyright, trademark to trade secret? Or is there a specific focus?

**OASB** We have been seeing cases coming from everywhere. So, of course, copyright we go from game storylines to game plays - but we also see designs all in the area of copyright. So I come back like even the characters. Even we've seen this case about dances that are included there, and this Fortnite case that came up to be about this dance. It's all these areas. But we also have, as I was saying, like hardware patents,

we have these consoles and accessories. We have know-how, like trade secrets of the companies. We include within – we have all this niche-developed musical works. We have IP infringements. We of course have an area that is quite interesting for us that we're starting to look into is the part of the contract negotiation.

And we see this in a way that, kind of drifts apart from the question, but I think is quite interesting to talk about it, because we're looking into ADR, particularly mediation and this concept of deal mediation. Meaning that we want to see and help the parties in these industries. And when we're reaching the closing of the agreement, there may be these last parts that are not going to be able to be fixed by themselves. And then mediation can help as a tool to close these IP licensing agreements, for example. And we have this and this is part of what we're doing in the video game environment. We see it in other areas like, not related to this, but, for example, for the life sciences we also have this program. Because we see that IP licensing and, based on our caseload, we see that those little details of how much money we're going to pay here or there and whatnot, mediation can be very useful. So we see in the context of the IP licensing environment some interesting disputes.

So we have all the three areas of main areas of IP, plus all these other additional things that I've been mentioning—software agreements, and more in the context of technology transfer, even the M&A concept of buying these big companies, acquiring smaller studios that are producing the video games and whatnot. So this is just a broad scope of what we've been seeing.

**MAU** That's great, and so let me follow up with that. One of the questions I have is how do you get WIPO involved in the first place? And from what you just described, it's not just about disputes. It could be in the deal making. It could be in the merger and acquisitions. So maybe you can touch on all those. Like, where would you think parties reach out to WIPO and say we're at this stage of this interaction with another party, how can WIPO help?

**OASB** Yeah so, that's a very relevant point, particularly because most of the listeners here may know that when we're talking about ADR we're talking about a voluntary basis. And so the idea is we're trying to find collaborative spaces in a way. Either to discuss before we have a potential dispute, how we're going to solve the dispute. But also, and this is very important, we make this differentiation, for example, with piracy. It's very difficult that anybody in a piracy case is going to end up in mediation or arbitration because there's no goodwill there. But when we're looking into solving disputes, pre-dispute or whether the dispute already arises, we find this collaborative environment which is part of what we're trying to focus on. We're trying to solve disputes, not in a way that is a zero sum game, but we're trying to find solving disputes in a way that both parties are taking something positive out of it. And particularly continuing, and also unlocking disputes that are in this very highly dynamic environment that is video games. You know, the product market and the product cycles are very short, so we need to solve them quickly. So, when we unlock with this kind of possibilities of quick

mediation that will allow to unlock this dispute, it will allow the parties to commercialize easier and to make a profit out of the IP assets.

So in that sense, going into the aspect of how to access it: you will go signing in a contract where you have clear clauses. And this is something that comes to be quite often. Actually, quite recently, there was a firm that was signing an M&A deal, as I was saying, and they were calling to ask would you have some model clauses, for example, to include here so we can consider WIPO mediation in case there's a dispute. So we have his contract clauses, of course, which will be mediation followed by court or arbitration, depending on what they need. But we also have cases, and we've had cases in this environment, where parties have been in a dispute for a long time. And even before, when they're in courts, particularly when we have multi-jurisdictional cases, they decide to do kind of a stop of all procedures and come to WIPO as a one-stop shop to solve the dispute here. So we have these two sides of the coin. We have pre- and post-dispute.

But in the end the spirit of all is to help unlock the discussions in a collaborative way because even in our arbitration, and just to give an example there, even in our arbitrations, most of what the arbitrators are trying to do is try to help the parties find an agreement, even within the arbitration. So it's not uncommon that, in an arbitration, parties end the proceeding and then they have an award, a consent award. And then the arbitration just finishes there.

**MAU** One of the things to follow-up on what you just said is when I think about license negotiations or a dispute resolution, I always like to have milestones that you keep along the way. Are we making progress? That metric that measures, like "Is this working for us?" How would you describe the context of this program? What are the milestones that we should look for?

**OASB** So there are three things I think we're mainly doing in this program. The first one which, because the area is so new, we're talking about e-sports and we've been talking about video games, now we focus on e-sports. But e-sports has, let's say it bluntly, e-sports players they're not thinking about IP disputes. They're not thinking about mediation and arbitration. They just want to play. They just want to compete. But then there's some moments where, during the competitions, there are issues that appear. Like, for example, we had a case where an e-sports competition couldn't happen because they were using a brand of a sponsor that was actually not a sponsor. So there was a trademark infringement there and they just stopped the competition. And there was an opportunity of developing, of going ahead with the competition. So in this area, the awareness part of it is very important. It is making people aware that we have this system, that we are trying to create some procedures that will allow the ecosystem to work better, to allow parties to have a better system in place to continue doing their e-sports, to continue doing the competitions, to help the system do better.

Then the second part is of course helping solve the disputes, but I would say in nontraditional manners. So they're quite –we have some quite innovative ideas coming up. So, for example, we do tailored procedures, of course. We have currently signed

an agreement with the Esports Integrity Commission that happened quite recently this year, where we're trying to merge the dispute resolution of what they call "ethics disputes" - which may be e-doping, cheating, whatnot - with the IP and create maybe a centralized place where we can resolve the disputes kind of as an appeal to the decisions that are taken during the competition. But also even, and these are some discussions we've been having - we'll have a conference relating to this—about maybe using even block chain applications to deploy this system in a very easy manner around the different competitions. And then the third one is to make it accessible for parties. Because of course in an e-sport competition, maybe all parties won't have access to very expensive mechanisms. So we're trying to make it approachable to the parties in a way that is less costly and speedy, apart from, of course, the more traditional big disputes when they arise - if we're talking about big publishers, it would not. So these are the approaches: awareness, creative solutions and creative mechanisms, and attainable and like lowering the bar for accessing these systems.

**MAU** So would you say this is something that has a very European-centric focus that includes at least one European country, or do you anticipate this being really a worldwide solution for companies all over?

**OASB** I think our view is that this is going to be global. Of course we're based in Geneva and it gives kind of the feeling that we're very Europe-based. But actually we've been, in the past years, we've been expanding in a way that we've been working a lot more with the other regions. And, for example, when we talk about this collaboration with ESIC, this is a global institution that is helping in different e-sport competitions and our approach to this will be global, in that sense. Of course, there are some specific connotations talking about the European Union and all the regulations coming up is quite interesting because they have these new regulations.

For example, you were talking in one of your podcasts about the AI Act - which I listened to, it was very informative, I really liked it by the way - but also we have the Digital Services Act that came into place at the beginning of the year. And there the questions are a bit different because it kind of, it sets an umbrella that captures all kinds of disputes, including maybe this dispute relating to video games, e-sports, digital environment is quite relevant. So we were talking about streaming competitions - if there's an infringement there, it could fall within the DSA because you don't have to be established in the EU. It just has to be targeted to the EU for it to be relevant and for it to fall within the DSA. So in that sense it is something that I consider it will be global approach. At the EU level, for example, it will have its own implications which we are working in a specific system also for that, that will maybe capture these kinds of disputes in a different way. But that's another, a different story.

**MAU** Oh that's great. And that was going to be my next question, you kind of preempted it. It seems like WIPO is going to have to integrate and that's a tall task. But I think that would be fantastic.

**OASB** Yes, I think what is interesting about the IP environment is, of course, it's so global and it's ever-growing. I think we really don't, even though of course there's the IP protection

at a national level, we more and more talk about the implications of everything that we do in IP in a global view, where there's specific regulations. We talk about the importance of the U.S. and they come up every time the caseload comes out that it's actually quite relevant around the world. We also have the EU now coming up with this, and we see other players coming even with different positions that are quite interesting. So in that sense we believe that, at the EU level, the USA for example will impact in a way that may be global too, but it will be limited to whatever is relevant for the EU in that sense.

However, it may replicate in other models that maybe may follow example, as it happened for example with the GDPR for data protection that ended up being the inspirational law or model for other countries around the world. So in the area of what we're doing, of course we take quite a lot of inspiration from different systems, trying to create in some ways, without trying to be pretentious of course, but some best practices that we can see from where we're sitting, that we could implement for the differences including of course what we're doing in the video games and e-sport disputes environment.

**MAU** As a reminder listeners, I'm Mauricio Uribe with Knobbe Martens and we're here today talking with Oscar Suarez Bohorquez with the WIPO about ADR for Video Games and E-Sports Disputes.

Oscar, I'd like to turn our conversation because the WIPO website had a wonderful set of examples that I think provide some of the context in terms of what this program can really do. I thought maybe you and I could do kind of a fast review of some of the ones that you think are the most interesting scenarios in terms of where this program will be very efficient or has been very efficient in resolving some of these disputes.

**OASB** Yes, absolutely, absolutely.

**MAU** So let's start with Scenario 1: A dispute between a European software company and a European retail chain whether there's a trademark license involved between the use of a trademark within a video game. What would that look like?

**OASB** So what happened in this case is we are – so we're talking about a different situation but in this case, we have these contracts that may be happening between different parties, and that this case particularly, we see that sometimes they extend the interpretation of what the contract allows them to do. So in this case – and we see that with this and others – but in this case, what happens is that they are using a trademark, but they don't know if that trademark can extend, based on the contract provision, to other parts of the product that maybe need a different license or may not be thought about. And this is what happened. We've seen this case in other areas. I think this particularly is in the area of a video game, and yeah that's what it looked like. For me, this case is a classic case of interpreting the contract where maybe the parties were not too careful in viewing where the market was going with the product they were developing. And, in the end, this is a case that may have gone into mediation, for example, and then they may have solved it quite easily in saying "Yes, of course we can extend that" or maybe they say "No, you can't," and then it stops there. And

sometimes they terminate the agreement or not. So this is the kind of disputes that relate to this specific example here.

**MAU** Okay, let's go to another one that I think is this kind of global solution. And the way this scenario is played out was an Asian video game company and a European developer and they have ongoing issues related to copyright infringement, payment of royalties, and the blocking of unauthorized streaming of e-sports competitions. How does that get resolved?

**OASB** So here what happened is – again, there was a misuse and there were no licensing, so the streaming competition basically ended up asking for the blocking of the streaming. And this is a perfect example of how you can create an infringement case into a cooperative case, meaning that yes, there may be an infringement at the basis, but then what they may end up being/doing is authorizing and licensing the possibility of this company to stream the competition or not. So this is more or less what happened in this case. The Asian video game company and the European developer, they argued that there was an infringement of how they were using the competition in general for the video game. And then ends up being solved in a way that parties will agree to a license and be able to allow for this. Because, in the end, if you are monetizing let's say, for example, if we put it on YouTube, this kind of competition, both parties are actually benefitting from it because there will be monetization that will - if registered accordingly and we have all the content ID and all the procedures are inside the mechanism that YouTube has – this is actually beneficial. The important thing is that it will have to be authorized under the terms of the copyright holder in this case. So this is a typical case of how you can solve this and make it a constructive license where infringement was happening before.

**MAU** That's fantastic. For our listeners, I encourage you to go to the WIPO website. Unfortunately, I don't think we have enough time to go through all these scenarios, but I found it really interesting that WIPO set out quite a few examples in terms of the different range and types of disputes or types or interactions that really might leverage the benefit of this new program. So thank you, Oscar, for sharing at least those two examples.

I want to use the closing part of our program to talk a little bit about the key features of this program, and really the dispute resolution board. Could you give us a little bit of the makeup and what is the dispute resolution board for this program, and some of the efficiencies associated?

**OASB** Yes, of course. So this resolution board is not something that we came up with. It's quite used, for example, in long-standing collaborations. So we see that, for example, in construction cases, where all this is going to go forever and then you don't want to stop everything when there's a dispute about something specific, particularly because many of these disputes may arise about very technical things that don't actually block the whole process but needs to be resolved in order to keep going. So in this case the dispute resolution board—let's think about it in a way that is a group of experts that will help solve these technical things along the way, without blocking the development of

the whole product, in general. So we were inspired in this dispute resolution as used in the construction cases. We believe that it was quite suitable for the video games industry for example, or even in the competitions, as this mechanism that will be quick, easy to help solve these kinds of disputes. So also we have used this in trade fairs already, where somebody sees an infringement happening. This standing dispute resolution board right there and they solved the dispute in a faster way that would take 24 hours.

And then what happens is, either the experts decide there was an infringement or, usually what happens is that the party that is the potential infringer, let's say, actually says "okay you know what I'll just remove the product," and that's it. It's quite efficient to solve disputes. So efficiency is one of the key features, particularly because these competitions may happen very quickly and the idea is to solve the disputes right there. This is where this blockchain mechanism that I was mentioning could work, because it could be standing people all over the world don't need to be physically there. It can be as independent as possible because it will be people that are completely anonymous and also completely – not anonymous let's say – but completely independent from any interest that, for example, teams. So you need that independence and neutrality, for sure.

And then the idea is that in case, it could be binding or nonbinding. This is important because sometimes in these disputes, it may not be the best idea if it's binding because you may want to go to court sometimes. So we see that a nonbinding procedure also allows parties to say "okay, maybe I'm happy with it, but if I'm *really* not happy with it and I want to assume the cost, I will go and litigate this." But it really helps.

We see this in spite of many different procedures that we have that are nonbinding also helps the parties to consider getting into these procedures easier because they feel like maybe they can solve but they can also have the court recourse in case they are not completely satisfied with the result.

**MAU** And just to close out the loop to this, what would be the fee structure? Because you mentioned obligation – what is the fee structure for this?

**OASB** Yes, of course. You're absolutely right. So the idea is to make it accessible, so the fee structure goes in a way that is controlled and is contained depending on, let's say depending on the dispute. We will – for example in an e-sports competition, we will setup the fees accordingly to what the parties or what the organizers would decide. So in that sense it's quite negotiable and more case-to-case based. Our fees in general are quite competitive. I can – of course I don't want to start talking numbers and calculating, but we have a fee calculator and whatnot. That's why I was more like structuring, and what the "three things" here is—we want to make it competitive. We want to make it accessible for the parties. Because as the WIPO we are not for profit. Our whole mandate is to make the IP environment better and easier and more useful, and these are the kind of procedures we want to see, and we believe that in this environment, making a very accessible fee structure will go in line with this belief.



**MAU** I'm going to close out our podcast. Unfortunately we've run out of time, but you had mentioned very early in our conversation about the morality aspect so I kind of want to go back and let you kind of close out on that topic. Just explain that a little bit to our listeners in terms of how that comes up in the context of this e-sports and video gaming dispute resolution.

**OASB** Yes, absolutely. So when we think – this is going more into the details of how the e-sports disputes happen. So let's think about it in two areas: We see all the commercial things that could come up in an e-sports competition from developing them, from setting them up, from maybe in the execution – I was mentioning that they were using a trademark and then the competition was cancelled. We have a big part that could be commercially based, including IP when I talk about commercial.

And then we have the aspect of "doping," which they call "e-doping", of cheating – and we see a lot of cases coming up. So when we signed this collaboration with ESIC, we found that there could be a very positive synergy if we could help out resolving disputes that are relating to the commercial part of it but providing our expertise on handling cases in general in administering those ADR cases for what they're doing in the ethics things. So the ethics things will be all these allegations of cheating in many ways which, to be very honest I'm not a gamer at that level. I played FIFA, and I barely know how to make a pass in FIFA, so I wouldn't know how they cheat. But because there's so much money at stake, particularly gambling and whatnot, so that part of the ethics is very important to protect and validate the integrity of the system. But like when you think of about a similar system, you would think about the Tribunal Arbitral du Sport or the Court of Arbitration, that is the one that deals with all the Olympic Games issues, that one is the one that's solving these kinds of disputes.

So we're thinking about a similar system that will go into the sports environment and we will help, mostly with the commercial and IP disputes, but provide the facilities for administering cases that will basically permeate for all what is the IP – for the e-sports disputes.

**MAU** Okay. Oscar, I think we're out of time, so first of all thank you so much for your time sharing this amazing content, and I'm sure we will continue to hear about what a great role WIPO has for e-sports and gaming, and in general just the ADR program. So this was a fascinating conversation. Thank you for your time.

**OASB** Thank you, Mauricio. It's a pleasure and we're just starting on this, so we'll have more news coming up and we'll see how this develops. But thank you. Thank you very much. It was a pleasure to talk to you.

**MAU** This wraps up today's episode. Be sure to visit [knobbe.com](http://knobbe.com) to listen to or view a written transcript of this or other episodes of Knobbe IP+. Until next time, I'm Mauricio Uribe, thanks so much for listening.