

The online future of civil justice  
Fordham IP Conference 2021  
Fordham Law School, New York

Abstract

*The future of civil justice is online. Cases, including intellectual property matters of all kinds, will be started online, managed online and, for the most part, resolved online. Alternative dispute resolution will be an integral element. It will make full use of the data: with machine learning and natural language processing. Proper judicial governance of these new structures and approaches is paramount. The prize, in terms of access to justice, is worth fighting for.*

There are conversations happening all over the world in which we are asking the same question: what lessons have we learned for the future? I want to focus on one aspect. This is about the conversations which are happening inside governments, amongst the judiciary and with legal professionals, which relate to the future of the civil justice system.

Why mention this at an IP conference? Well obviously intellectual property is an integral part of the civil justice system. And so as people interested in IP, we cannot insulate ourselves from wider changes in civil justice. But there is more to it than that. I think the practice of intellectual property law provides some unique perspectives which can be put to good use in this wider conversation. An obvious one is experience with science and technology, but another one is the fact that IP disputes happen at both ends of the scale – from a multi-billion dollar patent case to a one hundred pound photographic copyright case by an individual professional photographer. IP lawyers have an informed interest in a justice system which works for both kinds of case and everything in between.

*Where were we one year ago?*

Before Covid, courts were moving online. I am talking about England and Wales but from conversation with friends from elsewhere the picture is pretty similar. Many civil suits could be filed online and there was a digital court file as well. (In my country that applied to pretty much all IP cases but not all civil cases). Decisions were made either without a hearing at all or at a trial in the physical presence of lawyers and litigants. Those occasions involved lots of paper. The trend was towards digitisation, but it was slow. Alternative dispute resolution – such as mediation - was something which happened on discrete occasions.

*Where are we right now?*

Since March last year in our system the courts with a digital file system fared better than those in which paper was king. And in that period the large majority of hearings have been by telephone or by remote video conference and electronic documents. We have all learned how to do that. But I don't want to dwell on the pandemic.

*What is going to happen?*

Let me tell you where we will be in five years time:

- (i) *Every civil case will be started online.* Maybe that is true in your country. As I said it is not true for all cases in the UK at the moment. But it will come. The “digitally disadvantaged” will be helped to file online rather than, as now, permitted to file material at court on paper.
- (ii) *Every civil case will be managed online.* Again maybe that is true in your country already. But judges will access court files and work on them online. Just as an example, we are rolling out an online judge’s order making system for some small claims across EW this year. In that system the case papers are all online and the judge gives their case management directions – for a normal case - by clicking on a few radio buttons. The judge can make free text orders too but mostly does not need to. The order is available to the parties via their online account instantaneously.
- (iii) *There will be a funnel.* The Master of the Rolls talks about a funnel. What he means is that there will be a single online point of entry for people to bring any kind of court action. That will sit in front of an integrated court IT system. The system will include all civil, family and administrative tribunal cases. The system will guide the user forwards. In other words, it will funnel say – a small money claim to the right part of the system and, say, a large patent case to another part. We are working on the beginnings of this right now, on a project called case builder.
- (iv) The main beneficiaries of the funnel will be unrepresented parties but this system will affect professionals too. The court’s integrated system will allow professionals’ own inhouse IT system to interact directly with it. Let me explain how that will work. There will be APIs (in other words interfaces) which allow the law firms’ own internal case management systems to interact directly with the court system. By that method a case can be issued or defended in the appropriate way, generating the appropriate – electronic – court documents automatically. Again APIs of this kind already exist. Bulk issuers of debt claims in EW already use them.
- (v) Let me develop this API idea a bit further. One thing we have done in our online small money claims system is build a timeline – a chronology – into the computer screen dialogue which each party goes through to bring or defend a claim. This simple step has greatly improved the clarity of the cases brought by unrepresented litigants. But professionals don’t want to laboriously type in all that stuff. However we do want professionals to use the system and we don’t want to lose the timeline. So the answer is the API. It will allow the chronology to be built seamlessly by their IT own system and then uploaded automatically into ours.
- (vi) In future service of legal documents between professionally represented parties will be entirely electronic. There will be a provision in the terms by which professionals sign up to the court’s IT system that they accept service that way on behalf of all of their clients. We are working on that now.

- (vii) Today the process of a civil case is governed by procedural rules which parties routinely do not comply with either by accident or not. In future many of these things will be simply impossible not to comply with. I give you an example which exists today. In our paper system both parties are supposed to provide the court with the information necessary to give case management directions within 14 days of the case being defended. They routinely fail to do that and there is a cottage industry of judges and staff chasing them and making peremptory orders. In our new online small money claims system the parties can't fail to do this because the questions are posed as part of the computer screen dialogue. The defendant can't defend without answering those questions. The non-compliance problem has vanished.
- (viii) Let me tell you how alternative dispute resolution will work. It will be integrated into this system. It will not be something which happens at a particular "stage" nor will it be something which will only be triggered by the parties themselves. Indeed it may well happen before the claim is even issued. In EW we are in the process of introducing a pre-action IT system for certain kinds of claim (whiplash RTAs) which is designed to facilitate the resolution of that claim without going to court. Built into it is the possibility of getting the court to decide a single issue – say liability – but come back out again into the ADR system to settle another issue – say quantum. It is not yet fully integrated into the court's IT system but that is only a matter of time. It will be.
- (ix) But ADR will also be integrated into the process of a court action too. Using machine learning and NLP, the IT system itself will constantly monitor the file and be able to choose an appropriate moment to make a suggestion to a litigant. E.g. – it might say to the claimant: the defendant has admitted they owe you a debt but denied the full amount – have you considered making an offer that you would settle for a lower sum? Or perhaps: can I put you both in touch with an online mediator? These kinds of dialogue will be possible at any stage in the process. It may happen near the beginning or later, after evidence has been uploaded. In other words ADR will be integrated into the process as a whole.
- (x) But let's say the case has not been resolved. In future every pre-trial step involving the court which today required a hearing, will take place remotely using video conferencing and with electronic papers. There will no doubt be rare exceptions but they will be just that. This is not a denial of justice. We have learned that this is not only possible, but far more efficient not just for the court but for the parties.
- (xi) And what about trials? (I am not talking about jury trials.) In this future most trials will be conducted at least partly by video conference if not entirely that way. The trend for more or less paperless hearings will gather pace. Even if the advocates and the judge are in the same physical space, other lawyers, clients and witnesses may very well not be. The ability to access the trial remotely has significant benefits for open justice. Esp internationally

- (xii) And what about appeals? Well they do not need witnesses at all. In the future there will be even more use of video conferencing.

*What are the risks and what must we do about it?*

Two things I will say. One is this. Personally I think the future I have described is a good thing and will be to the benefit of everyone. Better access to justice, a more efficient and therefore less costly justice system for users and society as a whole. But I know not everyone agrees with all of what I have described and there is no doubt that conversations need to be had.

Secondly, a crucial question is – who is making the decisions about our future? To give an example – in the current world we have publicly available procedural rules – laws if you like - which say how the process of a patent case should operate. These rules are transparent. They maybe could be better expressed when written in legalese - but they can be scrutinised and changed by appropriate constitutional mechanisms. In the future world I am describing - it is the computer programmers who make the rules of civil procedure. They cannot and must not do that alone.

We all need to engage. Otherwise we risk a dystopian cyberpunk-esque court future. And that takes me to my last point. I want to refer you to a famous quote from the sci fi author William Gibson who invented cyberpunk itself.

The future is already here—it's just not very evenly distributed.

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