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COMMENTS

ONLINE DISPUTE RESOLUTION SYSTEMS: THE FUTURE OF CYBERSPACE LAW

Lan Q. Hang*

I. INTRODUCTION

Every day millions of people enter cyberspace to conduct business, send messages, and gather information.¹ Electronic commerce (“e-commerce”) is one of many things that draws people to cyberspace, as evidenced by the frequent traffic to commercial web sites.² The convenience and low cost of conducting transactions online attract e-commerce customers and businesses.³ Internet users bought billions of dollars worth of goods online in 1999 and 2000, and that number is increasing every year.⁴

In light of all the transactions that occur over the

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1. According to estimates for the week ending January 14, 2001, the number of households with Internet access in the United States is over 162 million. See *Nielsen // Netratings* (visited Jan. 21, 2001) <<http://209.249.142.27/nnpm/owa/NRpublicreports.usageweekly>>.

2. See *Media Metrix Top 500* (visited Jan. 21, 2001) <<http://www.rkinc.com/data/top500.jsp>> (providing an “alphabetized list of the top 500 digital media sites”).

3. See *How the Internet Compares to Other Shopping Channels* (last modified Jan. 13, 2000) <http://cyberatlas.internet.com/markets/retailing/article/0,1323,6061_278991,00.html#table2>.

4. See *Projected Total Web Revenues For Consumer Products* (last modified Jan. 4, 2000) <http://cyberatlas.internet.com/markets/retailing/article/0,1323,6061_273531,00.html#table>. In December 2000 alone, online sales totaled \$7.2 billion. See also *Consumers Continue Online Purchases* (last modified Jan. 16, 2001) <http://cyberatlas.internet.com/markets/retailing/article/0,,6061_560781,00.html>.

Internet, disputes among parties will often arise.⁵ Whether the dispute is between individuals or individuals and merchants, resolving disputes that arise from online transactions may be difficult because unlike physical space, cyberspace has no established legal framework to address "virtual" disputes.⁶ Although most people who have conflicts that arise in cyberspace resolve their disputes informally,⁷ some people turn to the traditional legal system.⁸

A variety of behaviors and attitudes not present in the "real world" exist online.⁹ These differences have led to the development of alternative forms of dispute resolution solely for cyberspace.¹⁰ There are differences between the traditional court system and an online dispute resolution system that could help address the uniqueness of online conflict.¹¹

Many forms of Online Dispute Resolution Systems ("ODRS") already operate on the Internet.¹² Part II of this comment discusses the historical and legal framework of developing ODRS.¹³ Part II also contains a description of current web sites offering dispute resolution services.¹⁴ Part III identifies the legal questions regarding ODRS.¹⁵ Part IV focuses on the necessity of ODRS,¹⁶ why prior projects have failed,¹⁷ and whether the current systems will succeed.¹⁸ Finally, Part V proposes a model for successful ODRS.¹⁹

5. See *Virtual Magistrate Project Provides Dispute Resolution in Cyberspace*, 7 WORLD ARB. & MEDIATION REP. 76 (1996).

6. See Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential Problems and a Proposal*, 3 HARV. NEGOTIATION L. REV. 175, 176 (1998).

7. See M. Ethan Katsch, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953, 957 (1996).

8. See *id.* at 958. A search of the LEXIS and Westlaw databases shows numerous cases that involve "cyberspace" and "e-commerce."

9. See *id.* at 955.

10. See *id.*

11. See Alejandro E. Almaguer & Roland W. Baggot III, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711, 718 (1998). For a discussion of the differences, see *infra* Part II.A.

12. See *infra* Part II.D-E.

13. See *infra* Part II.A-C.

14. See *infra* Part II.D-E.

15. See *infra* Part III.

16. See *infra* Part IV.A.

17. See *infra* Part IV.B.

18. See *infra* Part IV.B.

19. See *infra* Part V.

II. BACKGROUND

One way to resolve the legal issues concerning the Internet is to implement a system that will recognize the distinctive legal aspects of cyberspace.²⁰ This system could be based upon the customs of the Internet, an idea based on the concept practiced centuries ago called the Law Merchant of Medieval Europe ("The Law Merchant").²¹ The Law Merchant presided over disputes arising from medieval trade fairs, using the standards developed by customary trade practices.²² The advantages of the Law Merchant were as follows: "(1) it was international, (2) its principle source was mercantile customs, (3) it was administered by merchants themselves, (4) its procedure was quick and informal, and (5) it stressed equity as an overriding principle."²³ Similarly, a Law Merchant for cyberspace may draw upon customary practices developed in cyberspace to resolve disputes.²⁴ Currently, there are customary practices, commonly known as "netiquette,"²⁵ that control how Internet users behave over the Internet.²⁶

A. *Electronic Commerce*

In the context of this comment, e-commerce refers to commercial transactions that occur online. This includes purchases made by individual consumers from online commercial retailers, transactions for the sale of goods by a business from another business, and the purchase of goods by a private individual from another private individual. This comment focuses on e-commerce disputes because online disputes are likely to arise in an e-commerce context.²⁷

20. See Bordone, *supra* note 6, at 178.

21. See Almaguer & Baggot, *supra* note 11, at 711, 718.

22. See *id.*

23. Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 976 (1997).

24. See Almaguer & Baggot, *supra* note 11, at 719.

25. Netiquette combines the words "Internet" and "etiquette." A basic search of the Internet using the term "netiquette" brings up a number of references. See, e.g., *Netiquette Home Page* (visited Jan. 21, 2001) <<http://www.albion.com/netiquette/>>.

26. See E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 195 (1996).

27. See George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 HASTINGS COMM. & ENT. L.J. 695, 709 (1997).

An example of an individual versus individual online dispute is when Buyer bids the highest price for an item auctioned by Seller through an online auction venue such as eBay.²⁸ Seller refuses to accept Buyer's winning bid and does not go through with the transaction. Buyer has little recourse through eBay because although eBay will investigate complaints, it has no power to compel Seller to complete the transaction or to force Seller to pay damages.²⁹ The auction site might exclude Seller from using eBay's site in the future or it may give Seller a bad rating, depending on the egregiousness of the act.³⁰ Seller may not have wanted to complete the transaction for a number of reasons. For instance, Buyer may have violated auction customs by submitting his winning bid just before the auction closed, or Seller may have received a better offer after the auction closed. eBay currently offers dispute resolution through SquareTrade,³¹ an online dispute resolution provider.³²

A similar problem may arise when an individual conducts business with an online merchant. Buyer purchases a license to use software from Merchant through Merchant's web site. Buyer downloads the software and uses it in violation of the license. Merchant wants to stop Buyer's illegal use of its software.³³

28. *eBay* (visited Jan. 21, 2001) <<http://www.ebay.com>>. eBay is an online auction house where Internet users may sell and purchase items ranging from concert tickets to antique jewelry. *See id.*

29. eBay's User Agreement provides in its release from liability clause that since it is only a venue for trading, it is not involved in the actual transaction between the consumer and a third party, and therefore, it is not a party to disputes involving the consumer and a third party. *See eBay User Agreement* § 3.3 (visited Jan. 21, 2001) <<http://pages.ebay.com/help/community/png-user.html>>.

30. *See eBay Rules and Safety Overview (SafeHarbor)* (visited Jan. 21, 2001) <<http://pages.ebay.com/services/safeharbor/index.html>>. The ratings system relies on feedback from people who have dealt with Seller to let other potential buyers know about the reliability or honesty of this particular Seller. This does not prevent a dishonest seller (or buyer) from making a new account with eBay under another identity. *See The Feedback Forum: One of Your Most Valuable Tools* (visited Jan. 21, 2001) <<http://pages.ebay.com/services/forum/feedback.html>>.

31. *SquareTrade* (visited Jan. 21, 2001) <<http://www.squaretrade.com>>. For further discussion of current online dispute resolution providers, see *infra* Part II.D.

32. *See infra* Part II.D.

33. *See, e.g., ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (holding that shrink-wrap licenses are enforceable against a buyer). Although this case did not involve an online transaction, it could easily have arisen online

An online business may also find itself in a dispute with another online business. In one case, eBay sued another online auction site for trespass because the rival web site sent an automated query program, or “robot,” to search eBay’s web site for bidding prices.³⁴ This burdened eBay’s computer network since the excess traffic to its web site by the robots took up valuable capacity.³⁵

These different types of disputes illustrate the range of problems that could arise over the Internet. Because the problems are diverse and relate specifically to the Internet, a resolution system created solely for the purpose of resolving such disputes could better address such problems.

B. *Alternative Dispute Resolution (“ADR”)*

An alternative to resolving disputes in court is ADR. ADR has been around since 1920.³⁶ Its purpose is “to avoid the costs, delays, and risks of a litigation system unresponsive to the needs of the busy industrial age.”³⁷ In 1925 Congress enacted the United States Arbitration Act, also known as the Federal Arbitration Act.³⁸ The following

since many software manufacturers offer to sell their software through their web sites and other online retail outlets. See, e.g., *Shop Microsoft* (visited Jan. 25, 2001) <<http://shop.microsoft.com/Default.asp>>; *Buy.com* (visited Jan. 25, 2001) <<http://www.us.buy.com/retail/software/department.asp?loc=105>>.

34. See *eBay, Inc. v. Bidder’s Edge*, 100 F. Supp. 2d 1058 (N.D. Cal. 2000) (enjoining Bidder’s Edge from using automated robotic programs to invade eBay’s web site).

35. See *id.* at 1071.

36. See *Past, Present & Future: Building on 70 Years of Innovation—The AAA Looks to the 21st Century*, 51 DISP. RESOL. J. 109, 110 (1996) [hereinafter *Past, Present & Future*].

37. *Id.* at 109.

38. The Act covers:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2000). The Act further provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such

year, the American Arbitration Association ("AAA") formed "to promote knowledge of arbitration and its application to the settlement of disputes."³⁹ Today, the AAA tries to prepare for a "more digital" age of conflict management.⁴⁰

Parties to a dispute who use ADR must agree through contract provision or through industry wide treaties and regulations to resolve future disputes by arbitration or mediation.⁴¹ The courts become involved only if a party wishes to enforce an arbitrator's decision against a non-compliant party.⁴² The rationales behind using ADR are to reduce caseloads of overburdened courts,⁴³ to reduce expense and delay from traditional litigation,⁴⁴ and to provide an alternative means of dispute resolution to those disenchanted with the adversarial model of litigation.⁴⁵

1. *Mediation*

In a mediation proceeding, an impartial third party to the dispute helps the disputing parties reach a settlement.⁴⁶ Although the mediator may suggest possible solutions, a mediator may not make any binding decisions.⁴⁷ The advantages of mediation are that it is informal and inexpensive.⁴⁸

arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. Congress has also passed the Alternative Dispute Resolution Act of 1998, which requires every federal district court to implement an ADR program. See 28 U.S.C. §§ 651-658 (Supp. IV 1998).

39. *Past, Present & Future*, *supra* note 36, at 110.

40. *See id.* at 109.

41. See Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 247 (1996).

42. The Federal Arbitration Act states:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 3.

43. See Weinstein, *supra* note 41, at 264.

44. *See id.* at 275.

45. *See id.* at 277.

46. See Friedman, *supra* note 27, at 695.

47. *See id.* at 698.

48. *See id.*

2. Arbitration

Unlike mediation, parties involved in an arbitration proceeding legally bind themselves to the arbitrator's decision.⁴⁹ Arbitration is "the submission of disputes to one or more impartial persons for final and binding determination."⁵⁰ Arbitration has the advantage of resolving disputes more quickly, costing less than trials, keeping proceedings informal, and having impartial and knowledgeable arbitrators.⁵¹ Arbitration has three essential characteristics: it is consensual between parties, it involves non-government decision makers, and it results in definitive and binding decisions.⁵²

3. Hybrids

Another form of ADR consists of both mediation and arbitration.⁵³ The parties may begin with mediation and if that does not work, then the parties move on to arbitration.⁵⁴ The reverse process of starting with arbitration and moving to mediation may occur as well.⁵⁵ The mediator can also serve as the arbitrator and vice versa.⁵⁶

C. Arbitration Clauses in Commercial Contracts

ADR helps to resolve disputes between parties involved in commercial transactions.⁵⁷ The most common way for disputes arising from commercial transactions to end up in ADR is through arbitration clauses in commercial contracts.⁵⁸ These clauses generally provide that if any dispute arises from the commercial transaction, it will go to arbitration.⁵⁹

49. *See id.*

50. *Id.*

51. *See id.*

52. *See* Llewellyn Joseph Gibbons, *Rusticum Judicium? Private "Courts" Enforcing Private Law and Public Rights: Regulating Virtual Arbitration in Cyberspace*, 24 OHIO N.U. L. REV. 769, 772 (1998).

53. *See* Friedman, *supra* note 27, at 698-99.

54. *See id.*

55. *See id.*

56. *See id.*

57. *See* Cona, *supra* note 23, at 977.

58. *See* Almaguer & Baggot, *supra* note 11, at 738.

59. The American Arbitration Association's standard arbitration clause provides:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial

The contract may be generic or it may specifically provide for a particular arbitrator or city where the arbitration would take place.⁶⁰ The U.S. Supreme Court has held that arbitration is a creature of contract, and therefore, enforceable in the courts of law.⁶¹ Additionally, the Court has upheld the validity of arbitration clauses in commercial contracts.⁶²

D. *Traditional Online Dispute Resolution Systems ("ODRS")*

Many ODRS web sites are currently operating. A number of earlier projects have failed to work or are no longer in service. Some of these web sites employ traditional methods of ADR. The only difference is that instead of meeting face to face, the parties interact online. Other web sites offer different forms of dispute resolutions. Currently, most of these sites are experimental projects still in development, which also means that they do not charge for their services. Each ODRS has its own procedure for resolving disputes.

[or other] Arbitration Rules [including the Emergency Interim Relief Procedures], and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Drafting Dispute Resolution Clauses (visited Jan. 25, 2001) <<http://www.adr.org/rules/guides/clausebook.html#Arbitration>>.

60. For example, eBay's arbitration clause provides:

The arbitration shall be conducted in San Jose, California, and judgment on the arbitration award may be entered into any court having jurisdiction thereof. Either you or eBay may seek any interim or preliminary relief from a court of competent jurisdiction in San Jose, California necessary to protect the rights or property of you or eBay pending the completion of arbitration.

eBay User Agreement, *supra* note 29.

61. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

62. See *Gibbons*, *supra* note 52, at 781.

1. *Virtual Magistrate Project ("VMP")*⁶³

One of the earliest and most talked about ADR online sites was the VMP.⁶⁴ The National Center for Automated Information Research ("NCAIR"), Cyberspace Law Institute ("CLI"), AAA, and the Villanova Center for Information Law and Policy sponsored VMP.⁶⁵ The VMP heard cases arising solely from Internet-related activity such as complaints about electronic messages and postings, copyright and trademark infringement, misappropriation of trade secrets, defamation, fraud, deceptive trade practices, inappropriate materials, and invasion of privacy.⁶⁶

An individual wishing to make a complaint e-mailed the VMP describing the alleged wrongful conduct and the names of the parties involved.⁶⁷ The Villanova Center for Information Law and Policy received the complaint and the AAA reviewed it before formally accepting it for resolution.⁶⁸ The actual proceedings occurred via e-mail.⁶⁹ In making a decision, the VMP Magistrate considered netiquette, the contracts involved, applicable laws, and the willingness of system operators to enforce the decisions.⁷⁰

The VMP's first and only case involved an America

63. The VMP web site closed after its trial run. Attempts to reach its web site have failed. The goals of VMP were to:

- (1) Establish feasibility of using online dispute resolutions for disputes that originate online;
- (2) Provide system operators with informed and neutral judgments on appropriate responses to complaints about allegedly wrongful postings;
- (3) Provide users and others with a rapid, low-cost, and readily accessible remedy for complaints about online postings;
- (4) Lay the groundwork for a self-sustaining, online dispute resolution system as a feature of contracts between system operators and users and content suppliers (and others concerned about wrongful postings);
- (5) Help to define the reasonable duties of a system operator confronted with a complaint;
- (6) Explore the possibility of using the VMP to resolve disputes related to computer networks; and
- (7) Develop a formal governing structure for an on-going Virtual Magistrate operation.

Almaguer & Baggot, *supra* note 11, at 720-21. These goals help shape the goals for a successful ODRS. See *infra* Part IV.B.

64. See Cona, *supra* note 23, at 987.

65. See Friedman, *supra* note 27, at 701.

66. See *id.* at 702.

67. See *id.* at 703.

68. See *id.*

69. See *id.* at 704.

70. See Almaguer & Baggot, *supra* note 11, at 726.

Online (“AOL”) user, James Tierney, who complained about an advertisement posted by EMail America on AOL’s web site.⁷¹ The ad offered for sale mass e-mail addresses.⁷² Tierney protested against the site mainly because it promoted spamming.⁷³ The parties involved in the resolution of the case were Tierney and AOL while EMail America did not participate.⁷⁴ Citing a violation to the user agreement it had with EMail America, AOL responded to the complaint by removing the ad from its system.⁷⁵

2. *Online Ombuds Office (“OOO”)*⁷⁶

Established in 1996, the OOO is the beta version of VMP.⁷⁷ Sponsored by the same organizations that sponsored VMP, the OOO only resolves disputes through an ombudsperson, whose function is very similar to that of a mediator.⁷⁸ The ombudsperson does not make decisions on disputes.⁷⁹ The complainant fills out an electronic form describing the dispute that arose from an online activity.⁸⁰ The ombudsperson replies to the e-mail message and attempts to contact the other party involved.⁸¹ The service provided by the OOO, like the VMP, is free of cost to the parties.⁸² The OOO claims that it has resolved disputes involving online businesses including eBay and Up4Sale, and

71. *See id.* at 727.

72. *See id.*

73. *See id.*

74. *See id.* at 730.

75. *See id.* at 728-29.

76. *Online Ombuds Office* (visited Jan. 21, 2001) <<http://aaron.sbs.umass.edu/center/ombuds/default.htm>>. There are web sites that provide similar services. *See, e.g., Online Mediators* (visited Jan. 21, 2001) <<http://www.onlinemediators.com>>. Another web site, Resolution Forum, offers online dispute resolution using special software that allows the parties and the mediator to send instant messages to each other. *See On-Line ADR* (visited Jan. 21, 2001) <http://www.resolutionforum.org/real_time.html>. A different take to ODRS is iCourthouse, where online users decide the case. *See iCourthouse* (Jan. 21, 2001) <<http://www.i-courthouse.com>>.

77. *See Online Ombuds Office, supra* note 76.

78. *See Frequently Asked Questions* (visited Jan. 21, 2001) <<http://aaron.sbs.umass.edu/center/ombuds/description.html#ombudsperson>>.

79. *See id.*

80. *See Frequently Asked Questions* (visited Jan. 21, 2001) <<http://aaron.sbs.umass.edu/center/ombuds/description.html#How>>.

81. *See id.*

82. *See Frequently Asked Questions* (visited Jan. 21, 2001) <<http://aaron.sbs.umass.edu/center/ombuds/description.html#cost>>.

trademark disputes involving domain names.⁸³ The OOO does not have a transcript of those disputes, but OOO's web site offers a transcript of one case that it helped resolve.⁸⁴

The case involved an individual, Robert Gray, who provided a news and information service through his web site.⁸⁵ Gray contacted OOO via e-mail to complain about the Hampshire County News, the local newspaper, which was threatening him with prosecution for copyright infringement.⁸⁶ On the other side, Hampshire County News believed that Gray was taking its news articles and posting them onto his web site verbatim in violation of its copyrights.⁸⁷ The OOO responded to Gray's complaint via e-mail and tried to obtain more information about the situation.⁸⁸ Next, the ombudsperson, Ethan Katsh, e-mailed the editor of the local newspaper about the complaint.⁸⁹ Communications via e-mail went back and forth between the parties for approximately one month.⁹⁰ The dispute ended when the Hampshire County News explained that it had not attempted to prosecute Gray for copyright infringement, but rather, it was concerned about the source of his news.⁹¹ Once it learned that Gray wrote his articles using various sources, however, the Hampshire County News was satisfied.⁹² The process took less than one month and at virtually no cost to either of the parties.⁹³

In addition to e-mail, the OOO plans to expand its online mediation service using software and video conferencing.⁹⁴ The OOO is developing its own online conferencing software and other types of online mediation tools.⁹⁵ The OOO is

83. See *Online Ombuds Office*, *supra* note 76.

84. See *id.*

85. See *Transcript of a Dispute: The Web Site Developer and the Newspaper* (visited Jan. 21, 2001) <<http://aaron.sbs.umass.edu/center/ombuds/narrative1.html>>.

86. See *id.*

87. See *id.*

88. See *id.*

89. See *id.*

90. See *id.*

91. See *Transcript of a Dispute: The Web Site Developer and the Newspaper*, *supra* note 85.

92. See *id.*

93. See *id.*

94. See *Current Projects* (visited Jan. 21, 2001) <<http://aaron.sbs.umass.edu/center/projects.html>>.

95. See *id.*

currently functional and hears disputes arising from any online activity.⁹⁶

3. *iLevel*⁹⁷ and the Better Business Bureau⁹⁸

The iLevel site is a place where individuals or businesses may file a complaint against a vendor, who can exist in either the real or virtual world.⁹⁹ The site then contacts the vendor about the dispute.¹⁰⁰ All communications between the parties are posted on the site.¹⁰¹ Visitors to the site can cast their opinion as to whether they side with the complainant or the vendor.¹⁰² Transactions through iLevel are not binding.¹⁰³ Thus far, iLevel has posted disputes involving prominent companies including Best Buy and BMW of North America.¹⁰⁴ In both cases involving the aforementioned companies, the companies did not settle with the complainant.¹⁰⁵ The site does not charge for posting complaints and contacting the vendor.¹⁰⁶

The Better Business Bureau ("BBB") offers another type of online dispute resolution dealing with vendors and customers. It has brought its consumer protection service online and offers two methods of dispute resolution,¹⁰⁷ one of which is more dispute prevention than resolution. One method of online dispute resolution requires that a consumer file a complaint via an electronic form available at its web site.¹⁰⁸ The complaint goes to a local BBB office, which employs traditional BBB methods except that most of the communication between the parties occurs through e-mail.¹⁰⁹

96. See *Online Ombuds Office*, *supra* note 76.

97. *iLevel* (visited Jan. 21, 2001) <<http://www.ilevel.com>>.

98. *Better Business Bureau* (visited Jan. 21, 2001) <<http://www.bbb.org>>.

99. See *iLevel* (visited Jan. 21, 2001) <<http://www.ilevel.com/visitor/about2.htm>>.

100. See *iLevel* (visited Jan. 21, 2001) <<http://www.ilevel.com/visitor/benefit2.htm>>.

101. See *id.*

102. See *id.*

103. See *iLevel* (visited Jan. 21, 2001) <<http://www.ilevel.com/visitor/benefit1.htm>>.

104. See *Case Studies* (visited Jan. 21, 2001) <http://www.ilevel.com/lab/vndreport_category.asp>.

105. See *id.*

106. See *id.*

107. See *id.*

108. See *Better Business Bureau Online Complaint System* (visited Jan. 21, 2001) <<http://www.bbb.org/bbbcomplaints/Welcome.asp>>.

109. See *Better Business Bureau Online Complaint System* (visited Jan. 21,

The second method is through BBBOnline,¹¹⁰ a program akin to putting a seal of approval on an e-commerce web site. An e-commerce merchant may apply for the BBBOnline seal by going through a rigorous examination by the BBB.¹¹¹ The BBBOnline seal's purpose is to assure customers that the BBB has approved of this particular merchant's web site.¹¹²

4. *World Intellectual Property Organization ("WIPO")*¹¹³

One ODRS that differs from the others is the expedited procedures for arbitration of domain name disputes and other intellectual property disputes. These sites encourage arbitration through digital communication, including online chatting as well as audio and televideo conferencing.¹¹⁴ A third party who believes that a domain name infringes on his intellectual property rights can apply to the WIPO Center to begin online mediation.¹¹⁵ The purpose of the expedited procedures was to avoid lengthy delay through traditional litigation.¹¹⁶ WIPO is limited, however, to online intellectual property disputes only.¹¹⁷

Like WIPO, Disputes.org¹¹⁸ and eResolution¹¹⁹ deal exclusively with domain name disputes. These sites are dispute resolution providers approved by the Internet Corporation for Assigned Names and Numbers.¹²⁰ The Disputes.org site is actually a link to the eResolution web site where complainants fill out an online complaint form.¹²¹ Either one or three panelists via e-mail will resolve the

2001) <<http://www.bbb.org/bbbcomplaintsexp/EnterZipNoJScript.asp>>.

110. *BBBOnline* (visited Jan. 21, 2001) <<http://www.bbbonline.org>>.

111. *See Reliability Program* (visited Jan. 21, 2001) <<http://www.bbbonline.org/reliability/index.asp>>.

112. *See id.*

113. *World Intellectual Property Organization* (visited Jan. 21, 2001) <http://www.io.io/wipo_press1.html>. Many celebrities, most notably Madonna, have utilized WIPO's domain name dispute function. She was successful in her attempt to block a New Jersey man from using the domain name "madonna.com." *See Madonna.com embroiled in domain ownership spat* (visited Jan. 21, 2001) <<http://news.cnet.com/news/0-1005-200-2577995.html>>.

114. *See World Intellectual Property Organization, supra* note 113.

115. *See id.*

116. *See id.*

117. *See id.*

118. *Disputes.org* (visited Jan. 21, 2001) <<http://www.disputes.org>>.

119. *eResolution* (visited Jan. 21, 2001) <<http://www.eresolution.org>>.

120. *See Disputes.org, supra* note 118.

121. *See id.*

dispute.¹²² The panelists can only make decisions regarding ownership of the domain name; they cannot make monetary judgments.¹²³ The fees vary according to the number of panelists and the number of domain names in dispute.¹²⁴

E. *Settlement Mechanisms*¹²⁵

As an alternative to traditional ADR, settlement web sites offer dispute resolution without a live neutral third party. These sites function like an auction and only resolve matters that require monetary redress. Both parties must first agree to the terms of the web site. One party begins by making a demand or an offer for settlement. The second party responds by making a counteroffer. The computer program acts as the arbitrator. If the matching offer is within a certain percentage of the demand or offer, the case will settle for that amount. If the case does not settle, then the parties engage in another round of demand and offer. These sites charge fees for their services.

III. IDENTIFICATION OF THE PROBLEM

Given the population boom on the Internet today¹²⁶ and the proposition that individuals communicate with others whom they likely would not have encountered in their normal lives, it is reasonable to expect increases in online disputes.¹²⁷ Normally, the courts resolve legal disputes. ADR is one

122. See *eResolution: File a Complaint* (visited Jan. 21, 2001) <<http://www.eresolution.ca/services/dnd/complaint.htm>>.

123. See *id.*

124. See *eResolution: Schedule of Fees* (visited Jan. 21, 2001) <<http://www.eresolution.ca/services/dnd/schedule.htm>>.

125. See, e.g., *CyberSettle* (visited Jan. 21, 2001) <<http://www.cybersettle.com>>. Cybersettle allows three rounds of settlement offers. If the matching offer is within 30% or \$5,000 of the first offer, then the case settles. All bids are closed, which means that the parties cannot see each other's bids. If after three rounds the case does not settle, then the process ends. The web site operators offer technical assistance 24 hours a day, 7 days a week. See *CyberSettle* (visited Jan. 21, 2001) <<http://www.cybersettle.com/about/index.asp>>. ClickNSettle, a subsidiary of National Arbitration and Mediation ("NAM"), is a similar web site and works almost the same way. See *ClickNSettle* (visited Jan. 21, 2001) <<http://www.clicknsettle.com>>; see also, *SettleOnline* (visited Jan. 21, 2001) <<http://www.settleonline.com>>; *Internet Neutral* (visited Jan. 21, 2001) <<http://www.internetneutral.com>>. Many insurance companies use settlement mechanisms to resolve "cookie-cutter" disputes. See Kate Marquess, *Point, Click—Settle Quick!*, A.B.A. J., Apr. 2000, at 82.

126. See *supra* note 1 and accompanying text.

127. See *Almguer & Baggot, supra* note 11, at 711.

option of avoiding the traditional court system. With other types of businesses going online,¹²⁸ it was not too long before legal services became available online.¹²⁹

The main question is whether ODRS are viable alternatives to the traditional court system. If so, what types of ODRS need to evolve to better address the legal needs of the virtual community?

Early ODRS projects have come and gone.¹³⁰ This does not necessarily mean that ODRS are unnecessary. The number of ODRS has dramatically increased since 1996 when the VMP began.¹³¹ This is a critical period for ODRS as the success of the current sites could hale a new medium of dispensing justice. The question remains as to what Internet users need in an online dispute resolution system that will solve their unique problems.

IV. ANALYSIS

The Internet is in the proverbial Dark Ages when a legal dispute arises online. A number of problems have emerged including issues regarding jurisdiction.¹³² For instance, may a California court haul an individual into its court when he has never set foot in California but his web site is accessible by residents of California?¹³³ This example presents just one of the legal issues involving the Internet; the rules emerging

128. Insurance companies offer quotes online. See, e.g., *Progressive Insurance* (visited Jan. 21, 2001) <<http://www1.progressive.com>>. Car manufacturers sell cars online. See, e.g., *Saturn* (visited Jan. 21, 2001) <<http://www.saturnbp.com>>. These are just two of the thousands of services that are now offered online.

129. Legal services are now available online. See, e.g., *Legalopinion.com* (visited Jan. 21, 2001) <<http://www.legalopinion.com>>; *FreeAdvice.com* <<http://www.freeadvice.com>>.

130. See *supra* Parts II.D.1, II.D.3.

131. The sites that were launched in 1999 include Online Mediators, Resolution Forum, Inc., iCourthouse, iLevel, eResolution, CyberSettle, ClickNSettle, and SettleOnline. See *supra* Parts II.D.4-8, II.E.1-3.

132. See Dale M. Cendali, *Personal Jurisdiction and the Internet* 79, 81 (PLI Patents, Copyrights, Trademarks & Literary Property Course Handbook Series No. 564, 1999).

133. See generally Kevin R. Lyn, *Personal Jurisdiction and the Internet: Is a Home Page Enough to Satisfy Minimum Contacts?* 22 CAMPBELL L. REV. 341 (2000). The answer to this question is that it depends on whether the defendant's conduct falls within the forum state's long-arm statute and whether the exercise of personal jurisdiction would be reasonable. See *id.* at 361; see also *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1122-23 (W.D. Pa. 1997).

from these cases are unsystematic and confusing.¹³⁴ The inconsistencies serve as evidence that traditional courts and laws are ill-equipped to handle the unique issues that arise in cyberspace.¹³⁵

Using the Law Merchant concept, potential ODRs may effectively serve the legal needs of the online community.¹³⁶ ODRs are web sites where Internet users can bring their disputes arising from online transactions.¹³⁷ There, users can choose from a number of mechanisms that will help them resolve their disputes.¹³⁸ The Law Merchant concept could help ODRs create a uniform body of law that applies to Internet transactions.¹³⁹ “[T]he systemic use of ADR would allow a custom to develop, rather than stifle it as a top-down regulatory framework or judicial pronouncement might.”¹⁴⁰ These customs could then turn around and serve as a guide to help ODRs resolve further disputes.¹⁴¹

ODRs use traditional and non-traditional ADR methods on the Internet.¹⁴² ODRs differ from traditional courts in that very little law directly applicable to the Internet exists at the moment.¹⁴³ Courts have had to reinterpret many laws to apply them to cyberspace, making the laws for the Internet “unpredictable.”¹⁴⁴

Although ODRs have similarities to traditional ADR such as legal enforcement of arbitral awards, major differences remain.¹⁴⁵ For example, imagine that an online broker, such as E*Trade,¹⁴⁶ suffers technical problems and Customer could not log on to sell his stocks while they were at a very high price. Later that day, Customer’s stocks plummet. Because he could not sell his stocks when they were at a high price, he lost a large amount of money. Customer wants to sue E*Trade. E*Trade does not have an

134. See Michael A. Geist, *The Reality Bytes: Regulating Economic Activity in the Age of the Internet*, 73 WASH. L. REV. 521, 532 (1998).

135. See *id.* at 533.

136. See Almaguer & Baggot, *supra* note 11, at 719.

137. See *infra* Part II.D.1.

138. See *infra* Part II.D.1.

139. See Almaguer & Baggot, *supra* note 11, at 719.

140. Lide, *supra* note 26, at 218.

141. See Almaguer & Baggot, *supra* note 11, at 719.

142. See *infra* Part II.D.

143. See Bordone, *supra* note 6, at 176.

144. See Lide, *supra* note 26, at 200.

145. See Katsh, *supra* note 7, at 969-76.

146. E*Trade (visited Jan. 21, 2001) <<http://www.etrade.com>>.

arbitration agreement, although it has an indemnification clause dealing with this type of situation.¹⁴⁷ Is Customer out of luck? Perhaps if there was a fast, cheap, and easy ODRS in place, Customer could convince E*Trade to go through an online dispute resolution process with him. This way, both parties could win. Customer may be able to recover a small settlement, a discount off future trades, or a promise from E*Trade to improve its technology support. He might not have received any remedy in the courts because of the indemnification clause. As for E*Trade, it retains a customer at a relatively low cost.

Another advantage of using ODRS is that the parties need not travel to the same locale to resolve their disputes.¹⁴⁸ If Customer resided in Alaska, he would not need to travel to California or any other state to resolve his dispute with E*Trade. He could sit in front of his connected computer and access an ODRS from his home.

A. *The Need for Effective ODRS*

Although the Internet offers an effective means of

147. See *E*Trade User Agreement* (visited Jan. 21, 2001) <http://www.etrade.com/cgi-bin/gx.cgi/AppLogic+Home?gxml=hpa_useragreement.html>. Its indemnification clause states, in part:

Information obtained by the independent providers (the 'Information') is believed to be reliable. However, E*TRADE does not guarantee the timeliness, sequence, accuracy, adequacy, or completeness of such Information. E*TRADE GIVES NO EXPRESS OR IMPLIED WARRANTIES (INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR USE) WITH RESPECT TO THE INFORMATION.

Neither E*TRADE nor any independent provider/transmitter of Information shall be liable in any way, and you agree to indemnify and hold harmless E*TRADE and the independent providers/transmitters for (1) any inaccuracy, error, or delay in, or omission of (a) any Information, or (b) the transmission or delivery of Information; (2) any loss or damage arising from or occasioned by (a) any such inaccuracy, error, delay, or omission, (b) non-performance, (c) interruption of Information due either to any negligent act or omission by E*TRADE or providers/transmitters of Information or to any 'force majeure' (i.e. flood, extraordinary weather conditions, earthquake, or other act of God, fire, war, insurrection, riot, labor dispute, accident, action of government, communications, power failure, or equipment or software malfunction) or any other cause beyond the reasonable control of E*TRADE or the Information providers/transmitters.

Id.

148. See Bordone, *supra* note 6, at 192.

communication, it will also lead to new causes of dispute.¹⁴⁹ The population of Internet users is growing every day, and the increase in traffic will inevitably result in more disputes.¹⁵⁰ People will increasingly enter into electronic contracts and perform their duties without ever exchanging a sheet of paper.¹⁵¹ Additionally, the Internet market is expanding through globalization as access becomes more readily available.¹⁵² Online dispute resolution mechanisms can be a practical and effective alternative to traditional court systems.

1. *Advantages of ODRS*

ODRS confers a number of advantages to online users. Many of the advantages relate to the advantages commonly associated with traditional ADR, but ODRS's value is twofold because of online communication. "The process will allow for greater flexibility, more creative solutions and quicker decisions."¹⁵³ The combination of ADR and online communication will enhance a user's online experience.

a. *Convenience*

The main advantage of ODRS is that parties will not have to commute over long distances to resolve their dispute.¹⁵⁴ Many online transactions occur between parties located in different areas. In some cases, the parties may reside in different countries. If the parties are far apart, at least one party will have to travel far to litigate. This may be time consuming and expensive. Online communication solves the problem because the parties could sit at their home computers and settle the matter.

Another convenience factor for the parties is that some ODRS, such as the settlement mechanisms, are available twenty-four hours a day and seven days a week.¹⁵⁵ When a

149. See Catherine Kessedjian & Sandra Cahn, *Dispute Resolution On-Line*, 32 INT'L LAW. 977, 978 (1998).

150. See *id.* ("A new breed of contracts has emerged whereby parties enter into agreements and perform them without ever meeting and without ever exchanging a single piece of paper.").

151. See *id.*

152. See Katsch, *supra* note 7, at 960.

153. Lide, *supra* note 26, at 219.

154. See Bordone, *supra* note 6, at 192.

155. See Friedman, *supra* note 27, at 711. Most of the settlement mechanism ODRS operate around the clock. See *supra* Part II.E.

dispute arises, the parties can settle their differences right away instead of having to wait weeks or months before their case goes to trial. The other types of ODRS may not be available upon demand, but the turnaround time is still faster than if the parties took their case to court.¹⁵⁶ A beneficial aspect to this is that parties will have their differences addressed immediately.

Related to availability is the convenience of scheduling.¹⁵⁷ If parties chose to mediate their disputes through e-mail or a user group, then any of the parties may post messages and read posted messages at any time, avoiding the hassles of trying to find a time to meet and phone tagging.¹⁵⁸

Parties also do not have to worry about an inexperienced person overseeing the dispute because sites like the Online Ombuds Office have mediators and arbitrators trained in ADR and computer usage.¹⁵⁹ Using ADR also means flexibility in procedural rules because the mediator can adapt the process to suit the needs of the parties.¹⁶⁰

b. *Low-Cost*

Litigating a dispute can be costly.¹⁶¹ A major portion of the expense is the cost of hiring an attorney. In many instances, parties engaging in online dispute resolution through ODRS will not have to consult an attorney at all. For instance, if each party knows the range within which he will settle the case, then the parties may use a settlement mechanism type of ODRS to resolve their dispute. Additionally, ODRS can save the parties the cost of long-distance calls and teleconferencing.¹⁶²

c. *Legitimate to Online Users*

Related to the Law Merchant concept,¹⁶³ online users are more likely to adhere to the judgments of their own virtual communities than the laws of physical space far away from

156. See Kessedjian & Cahn, *supra* note 149, at 977-78.

157. See Friedman, *supra* note 27, at 712.

158. See *id.*

159. See *Online Ombuds Office*, *supra* note 76.

160. See Lide, *supra* note 26, at 208.

161. See Friedman, *supra* note 27, at 712.

162. See *id.*

163. See *supra* Part II.

where they live.¹⁶⁴ People are more likely to accept a system of law that evolves from the community it governs.¹⁶⁵ This could be true of virtual communities as well:

If parties perceive that online dispute resolution models address their disputes more effectively, more efficiently, more equitably, and more legitimately, the advantage of taking the dispute to the non-virtual world will disappear. Indeed, in an ideal world, the dispute resolution model of Cyberspace may become so attractive that real world disputants might be moved to take their disputes online for resolution.¹⁶⁶

d. *Avoids Jurisdiction Issues*

The advantage that ODRS has over land-based legal systems is that it avoids the problem of whether the court has jurisdiction over an issue. Take, for example, a case where Californian invites Floridian via e-mail to enter into an extended business relationship. Californian may be amenable to service in Florida even though Californian has never set foot in Florida or conducted any other business in Florida.¹⁶⁷ Generally, courts will treat e-mail and other electronic communication like phone calls or surface mail when it comes to jurisdiction,¹⁶⁸ and online distribution of software, information, and other electronic goods from the forum state receive the same kind of treatment as physical goods distributed from that state.¹⁶⁹ If Californian sought and obtained an online distribution agreement with Floridian in the forum state, then Californian's activity would satisfy the purposeful availment requirement of the minimum contacts test.¹⁷⁰ Finally, an electronic point-and-click contract sent to the forum state via the Internet is analogous to a paper contract sent to that state.¹⁷¹

Despite these general rules the courts have not established a clear line of rules for finding personal jurisdiction in online transaction cases.¹⁷² On the other hand,

164. See Bordone, *supra* note 6, at 179.

165. See *id.* at 192.

166. *Id.*

167. See Cendali, *supra* note 132, at 84.

168. See *id.* at 83.

169. See *id.* at 84.

170. See *id.*

171. See *id.* at 85-86.

172. See *id.* at 88-98.

ODRS avoids jurisdiction issues altogether because parties can bind themselves to dispute resolution through the arbitration agreement.¹⁷³

The jurisdiction issue is especially relevant in light of the global nature of the Internet. Conducting business over the Internet will leave some parties facing foreign jurisdiction and foreign law.¹⁷⁴ The international character of a site like the Cyber Tribunal had one solution to the problems arising out of international Internet transactions.¹⁷⁵ Cyber Tribunal offered its services in French, English, and Spanish, thus resolving most of the language problem.¹⁷⁶ Perhaps in the future, as the demand grows there will be an increase in multi-national and multi-lingual ODRS. Not only could ODRS resolve international disputes, it will also reduce the burdens of both national and foreign court systems as well.¹⁷⁷ For instance, a French judge, on average, did not hear a case filed in 1998 until 2000.¹⁷⁸

2. *Disadvantages of ODRS*

Critics of ODRS point to a number of disadvantages, and they discount the benefits of the advantages. The most salient attacks argue that mediation or arbitration through the Internet is not really mediation or arbitration, and therefore, it does not offer the same advantages of traditional ADR.¹⁷⁹ This argument and the following present just some of the problems ODRS need to address.

a. *Loss of the Human Factor*

One critique of ODRS is that online mediation and arbitration offers no face-to-face contact, a relevant factor in resolving disputes through mediation and arbitration.¹⁸⁰ The mechanics of mediation and arbitration through e-mail loses the dynamics of the traditional ADR process, where the

173. See Lide, *supra* note 26, at 200.

174. See Kessedjian & Cahn, *supra* note 149, at 978.

175. See *CyberTribunal* (visited Nov. 22, 1999) <<http://www.cybertribunal.org/English/html/serviceseng.asp>>. Although the Cyber Tribunal project ended in December 1999, other sites could offer their services in different languages.

176. See *id.*

177. See Almaguer & Baggot, *supra* note 11, at 714.

178. See Kessedjian & Cahn, *supra* note 149, at 977.

179. See Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 *BYU L. REV.* 1305, 1312-13 (1998).

180. See *id.*

parties meet in the same room and face each other.¹⁸¹ For instance, mediation is thought to help bring about solutions because it forces the parties to confront their emotions and vent their feelings.¹⁸² E-mails may not carry the same emotionally-charged tones, thereby hindering the mediation process.¹⁸³ Furthermore, because the parties cannot see each other, they will not be able to read those same emotional messages through body language as they could if they were in the same room together.¹⁸⁴ Another problem is the fact that mediators/arbitrators may not be proficient in online communications, and this weakness is detrimental to the dispute resolution process where the mediator must be a highly skilled communicator.¹⁸⁵

The problem with face-to-face contact is that it does not take into account the fact that anonymity is highly valued over the Internet. If there must be face-to-face contact for each dispute resolution, ODRS is more likely to fail because anonymity is part of the Internet culture. The advantage of systems like the Online Ombuds Office and others is that they may preserve anonymity and resolve the dispute at the same time.¹⁸⁶

A solution to the loss of the face-to-face contact important in ADR is the use of video communication through the Internet. Although online voice and visual communication is not yet a reality, technology should remedy that situation soon. That is another advantage of ODRS, which, like other Internet technologies, has the flexibility to improve and adapt as technology advances.

b. *Lack of Accessibility*

Another argument against ODRS is that it requires parties to own a computer, sufficient software and hardware,

181. See *id.* at 1323. "The substitution of E-mail for dialogue, for example, makes it difficult to give any weight to emotion in mediation." *Id.*

182. See *id.*

183. See *id.*

184. See *id.* at 1311. "One's ability to express emotion online is different. . . . Oral expressions of feelings in a face-to-face setting have a richer and more meaningful context than written expressions of feelings in an E-mail exchange." *Id.*

185. See Eisen, *supra* note 179, at 1331.

186. See *Frequently Asked Questions* (visited Jan. 21, 2001) <<http://aaron.sbs.umass.edu/center/ombuds/description.html>>.

and some sort of account for online communication.¹⁸⁷ Although people may have access to the Internet, they may not actually own a connected computer or access one conveniently. For example, an individual uses the local library's computer to make a purchase online and is unsatisfied with the item's condition. The problems this individual may face in using ODRS are that he may not have access to the computer all the time, and it may be inconvenient for him to get to the library. Additionally, he may know how to access the Internet, but he may not know how to communicate effectively online, and thus, he may be at a disadvantage with online mediation or arbitration.

Considering that most people who engage in online activities have their own computer or have easy access to a connected computer, this argument is not very strong.¹⁸⁸ Furthermore, those sophisticated enough to engage in online commerce are presumably sophisticated enough to communicate effectively online, especially since making an online purchase usually requires an e-mail account and some Internet skills.

c. *Lack of Confidentiality and Security*

One major obstacle facing ODRS is the protection of sensitive material.¹⁸⁹ The standard practice in traditional ADR leaves no physical record.¹⁹⁰ If someone wanted to record the proceedings, then the others would know about it unless someone brings in a hidden recorder. No such guarantee exists with ODRS. Someone could easily print out e-mails used in the process and disseminate that information without anyone else's knowledge.¹⁹¹ Messages on user groups are also vulnerable.¹⁹² The feeling of confidentiality in ADR proceedings promotes a feeling of trust among the parties.¹⁹³ Protecting trust and the discussion process in ADR is very important because parties are more likely to speak freely when they can be sure that their words will not come back to

187. See Eisen, *supra* note 179, at 1336.

188. See Friedman, *supra* note 27, at 708.

189. See Kessedjian & Cahn, *supra* note 149, at 985.

190. See Katsch, *supra* note 7, at 971.

191. See *id.* at 971-72.

192. See *id.* at 972.

193. See *id.*

be held against them.¹⁹⁴ Furthermore, assuming that the parties are not the security breach, hackers may try to break into the system to cause mischief. Encryption is the best defense against hackers, but it is no protection against a dishonest party to the dispute.¹⁹⁵ If one party does not fully trust the other party, the ADR process is in jeopardy.

d. *Difficulty of Enforcing Arbitral Agreements*

To ensure the legitimacy of the ODRS process, parties engaged in arbitration must believe that the decisions rendered are enforceable. The U.S. Supreme Court has supported ADR by enforcing arbitration decisions.¹⁹⁶ Not only does ODRS have to ensure enforceability of arbitral awards to gain legitimacy, ODRS needs to reassure Internet users that they will have the equivalent of their "day in court."¹⁹⁷ One tool to help enforce decisions is through "cooperative exile."¹⁹⁸ Taking the idea that cyberspace law should be based upon customs, the cooperation exile model requires the cooperation of system operators and network administrators.¹⁹⁹ A party that does not live up to his arbitration agreement may be exiled²⁰⁰ from the Internet.²⁰¹ For example, if party A does not pay the amount the arbitrator has decided he owes party B, then the arbitrator, through contractual agreements with the system operator, such as AOL, can order termination of party B's account. This may be an effective enforcement tool against businesses that do not follow through on their arbitral obligations. A business that does not live up to its contractual agreements may no longer be allowed to have its web site, and thus, it could lose a great deal of money.

Although enforcement may be an issue, there are some

194. *See id.* at 971.

195. *See id.* at 973.

196. *See* Frederick L. Miller, *Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection*, 78 MICH. B.J. 302, 302 (1999).

197. *See* Christine Lepera & Jeannie Costello, *Alternative Dispute Resolution: What the Business Lawyer Needs to Know* 593, 605 (PLI Litig. & Admin. Practice Course Handbook Series No. H-605, 1999).

198. *See* Lide, *supra* note 26, at 221.

199. *See id.* at 221-22.

200. The online provider could refuse service to the offending party. However, this does not preclude the party from re-registering with the online provider or with other online providers. Absent a massive cooperative of online providers, it is highly unlikely that someone could be completely blocked from Internet access.

201. *See* Lide, *supra* note 26, at 222.

advantages to online arbitration from an international perspective. The United States has existing treaties with other nations to enforce arbitral agreements through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²⁰² Perhaps once ODRS becomes established practice in virtual communities, new treaties or modified existing treaties will emerge to protect it.

e. *Shifting Power Away from the Online Consumer*

ODRS raises concerns that arbitration clauses in contractual relationships will shift power away from consumers.²⁰³ The fear is that businesses will draft arbitration clauses to suit their needs such as choice of arbitrator and location of arbitration.²⁰⁴ Businesses may write off many of the advantages offered to consumers by ODRS, especially if the contractual agreement between the parties expressly prohibits the use of ODRS.²⁰⁵ Additionally, courts have the obligation of ensuring that the parties have equal standing before the law.²⁰⁶ Arbitrators, especially those drawn from the industries in which they are experts, are not bound by the same duty, although they do have a duty of fairness.²⁰⁷

B. *Evaluating Existing ODRS*

In addition to overcoming the problems described above, all the current projects, including the now-defunct VMP, share the same weakness—lack of publicity. Not many web users are resolving their disputes through ODRS, as evidenced by the closing of VMP and Cyber Tribunal. For ODRS to be effective, it must be put to use. If no one uses it, the role of ODRS in formalizing Internet rules and customs no longer exists. For instance, VMP only resolved one case and even that was problematic.²⁰⁸ In *Tierney v. EMail America*,²⁰⁹ Tierney was one of the project's advisors as well as

202. See Gibbons, *supra* note 52, at 782.

203. See Weinstein, *supra* note 41, at 259.

204. See Miller, *supra* note 196, at 303; *eBay User Agreement*, *supra* note 29.

205. See Miller, *supra* note 196, at 303.

206. See Weinstein, *supra* note 41, at 260.

207. See *id.*

208. See Almaguer & Baggot, *supra* note 11, at 730.

209. See *supra* note 71 and accompanying text.

the complainant.²¹⁰ This detracted from VMP's credibility and hurt its ability to attract every day web users.²¹¹ Another problem with the decision was that the principal wrongdoer, EMail America, did not participate as one of the parties.²¹² EMail America stated that VMP never contacted it.²¹³ Instead, AOL resolved the so-called dispute by acting on its own.²¹⁴ AOL had the power to remove the advertisement without a decree from VMP because EMail America had violated AOL's user agreement policy against spamming.²¹⁵ The case did nothing to increase VMP's legitimacy to online users because it was easy to discount the case as a publicity stunt. Attracting more cases was a problem for VMP,²¹⁶ and it poses a problem for current ODRS.

In order for any ODRS to become successful it must meet goals similar to the original goals of the VMP.²¹⁷ First, it must address the needs of online users. The ODRS should be specifically designed to handle online disputes and have personnel trained in the area of the Internet as well as dispute resolution. Second, it should establish trust among users. The site must ensure confidentiality and security, provide information about mediators and arbitrators, and thoroughly explain the process of online ADR. Third, it must cost less than going to court. Although some sites are offering their services for free, the cost of providing mediators and arbitrators will not sustain the sites as businesses if they continue to operate without a fee. Charging a small amount to cover the operational costs but still being less expensive than litigating in a court of law will be necessary. Fourth, it should be easy to use. The ODRS should adapt to the least technologically adept party to ensure that the parties are equally represented. Fifth, it must be convenient. The parties should have flexibility in choosing an ODRS process that is most helpful to them. Sixth, the ODRS should be less time consuming than going to traditional courts. Finally, it should establish presence in cyberspace communities. Part of

210. *See id.* at 732.

211. *See id.* at 730.

212. *See id.* at 729.

213. *See id.*

214. *See id.* at 731.

215. *See Almaguer & Baggot, supra* note 11, at 731.

216. *See id.* at 734.

217. *See supra* note 63.

attracting users is making one's presence known. ODRS could advertise through search engines, legal web sites, and through deals with big name businesses. Some e-businesses already have arbitration clauses in their user agreements. ODRS sites could contract with those e-businesses to direct any disputes to the ODRS sites.

V. PROPOSAL

A. *Self-Regulation*

The first proposed ODRS framework, the self-regulatory model,²¹⁸ provides that the current ODRS be given time to develop on its own. In other words, it would leave the current ODRS to the "invisible hand" of cyberspace. Over time, a system will develop to reflect the uniqueness of the Internet and disputes arising from it. The self-regulatory system would "promote dispute resolution; or rather, dispute resolution principles will drive the effort to self-regulate, obviating the need for governments to intervene and legislate along geopolitical lines."²¹⁹ According to this model, the existing systems may or may not be the same systems that will operate in the future.²²⁰

The problem with this model is that it does not promote the legitimacy of ODRS. As e-commerce grows and becomes more complex as more users of differing capabilities come online, the need for ODRS will be greater than ever, and disorganized ODRS will not adequately serve online communities. Arguably, a system on pace with the mores and customs of the Internet is better suited to meet its needs.

B. *Centralized ODRS*

In 1976, Frank E.A. Sander proposed a "multi-door courthouse" system.²²¹ He advocated a dispute resolution system tailored to the dispute at hand.²²² Sander's "Dispute Resolution Center"²²³ begins with the complainant bringing

218. See Almaguer & Baggot, *supra* note 11, at 714-16.

219. *Id.* at 714.

220. *See id.*

221. See Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 112, 130-33 (1976).

222. *See id.*

223. Sander envisions the DRC directory consisting of: a screening clerk in room 1, mediation in room 2, arbitration in room 3, fact finding in room 4,

her claim to a screening clerk, who would then direct her to the process best suited to her case.²²⁴ Sander believes that this system would open the judicial process so that courts would decide on their own to refer cases to another process and legislatures would provide for alternative means of dispute resolution.²²⁵

Robert Bordone envisions an ODRS web site he calls the Dispute Resolution Referral Center ("DRRC") that is very similar to Sander's idea of a multi-door courthouse.²²⁶ It would take online disputes that arise between Internet users.²²⁷ The process would offer a variety of services to better fit the nature of the dispute.²²⁸ The disputant files a complaint with the DRRC.²²⁹ The DRRC examines the claim and refers it to the appropriate online dispute resolution system.²³⁰ In effect, the DRRC would function as a gateway to ODRS sites operated by the DRRC. The DRRC would rely on system operators to enforce its decisions.²³¹ It would require system operators to condition Internet access on signing an agreement to resolve potential disputes through the DRRC.²³² The DRRC would charge nominal operational fees through the system operators and find public subsidies through other means.²³³

The framework holds a lot of promise. However, one problem with the system is that the DRRC operates the ODRS sites. A better alternative would be to have the ODRS sites independently operated by competing interests. This will ensure that the sites will continually improve to meet demand. Sites that do not keep up with demand will fail to attract users through word of mouth. If the site really does not live up to standards, the DRRC could pull it from its database.

malpractice screening panel in room 5, superior court in room 6, and an ombudsman in room 7. *See id.*

224. *See id.*

225. *See id.*

226. *See Bordone, supra* note 6, at 201.

227. *See id.*

228. *See id.* at 202.

229. *See id.*

230. *See id.*

231. *See id.* at 205-06.

232. *See Bordone, supra* note 6, at 206.

233. *See id.* at 208. The author leaves unclear what these other means will be. *See id.*

Another problem with the DRRC framework is that it may result in an overflow of cases, which may flood ODRS. Given the large Internet population and that Internet Service Providers are powerful relative to their subscribers,²³⁴ the DRRC may become overwhelmed. A better solution is to offer the Internet community choices. It is unlikely that a single, centralized system like the DRRC will develop because competition would not allow it. Internet users opposed to losing their right to have "their day in court" will use a system operator or patronize an e-business that does not have ODRS clauses in the user agreements. As long as people have a choice in ODRS, however, the Internet community will benefit.

Despite its problems, the DRRC does have advantages. DRRC would function as a referral service, but it would point the claimants to a number of sites that will best resolve their problem. For instance, if the parties just want to settle for money, the DRRC could refer the parties to a settlement ODRS.²³⁵ If mediation is what the parties seek, the DRRC would make referrals to sites like the Online *Frequently Asked Questions* Office.²³⁶ The DRRC would also sort the types of cases to the ODRS site specializing in that area. A dispute that arises from an online auction could go to an ODRS site that only handles online auction and similar disputes. If the dispute involves a consumer and an e-business, then it would go to an online ODRS that deals strictly with commercial transactions. Finally, intellectual property related disputes could go to WIPO or another intellectual property oriented site.²³⁷ As the demand for ODRS grows proportionate to the growth in the number of Internet users and the number of disputes, so will the number of ODRS sites. The increased demand will burden the few existing systems. Sites that do not charge for their services now may begin charging later. However, the sites have to be careful in order to ensure that costs are not so exorbitant as to turn away users. A centralized ODRS would also develop a stable and uniform body of law over time. Records of cases could be made public to educate online users

234. See Bordone, *supra* note 6, at 206.

235. See *supra* Part II.E.

236. See *Online Ombuds Office*, *supra* note 76.

237. See *supra* Part II.D.4.

as to how their disputes will potentially be handled. Additionally, this uniform body of law may, over time, reduce the numbers of disputes that arise because more people will behave according to these "laws." Like the Law Merchant of long ago, online dispute resolution systems will address the needs and concerns of a unique community using the customs and practices of that population.

VI. CONCLUSION

Online dispute resolution presents a realistic and practical solution to the growing needs of the Internet community. ODRS is an alternative to taking one's dispute from the place where it started to a legal system ill-equipped to handle such cases. It offers fast, convenient, and cheap service, the hallmark of doing business online. As the number of online users grows, so will the potential for dispute. The existing sites are trying to meet that demand, but there are a number of problems they must first overcome. The ultimate factor of whether ODRS will succeed will be their acceptance by the virtual community.