Shaping New Legal Frontiers: Dispute Resolution for the Internet

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I. INTRODUCTION

The world of the Internet, still in its nascent stages, is becoming more complex as software and networks become increasingly sophisticated and pervasive.[1] The Internet is developing rapidly and the number of people interacting on the Internet is growing, as is the number of Internet hosts and the number of domain names for organizations.[2] The Internet has made it easy for individuals to communicate with groups that "are unlikely to have interacted . . . before";[3] to disseminate information across institutional, economic, political and social boundaries;[4] and to have economically significant relationships wholly independent of physical proximity.

The Internet promises to be a fertile ground for novel disputes. There are, however, some fundamental obstacles to a coherent system for resolving them. Underlying issues such as the exercise of personal jurisdiction and conflict of laws (especially between international parties) make it very difficult for traditional land-based courts to apply nation-based laws. Traditional courts simply do not have the ability or the authority to effectively resolve disputes that arise from online activity. Thus, legal analysts are looking toward Alternative Dispute Resolution (ADR) mechanisms, such as arbitration, in the hope of finding effective ways to resolve disputes of Internet users.

This Note will first examine the features of the Internet which undermine reliance on traditional litigation. It will then argue that ADR, as an accurate reflection of rapidly developing Internet custom, is a natural and effective solution. This Note will then turn to a critical case study of the Virtual Magistrate Project, a recent effort to implement online ADR for Internet disputes, and will discuss possible reasons for its apparent failure. The Note will conclude with the proposition that ADR for the Internet can

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[1] *See* M. Ethan Katsch, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953, 954 (1996).

[2] *See id.* at 959.

[3] *Id.*

[4] *See id.*

be effectively implemented through a comprehensive, "top-down," contract-based plan.

II. THE INTERNET COMPELS THE USE OF ADR

A. *The Internet Undermines Traditional Notions of Territoriality*

The necessity for an alternative system of dispute resolution arises from the fundamental nature of the Internet itself. The Internet is a global computer network, spanning lines of demarcation, bypassing national borders, integrating cultures and surpassing language barriers. The Internet's global nature undermines the traditional notion that legally significant actions take place in a physical location.[5] Actions of Internet users can be global in nature, simultaneously affecting citizens of many different countries, forcing the recognition that Internet behavior is not traditionally locus-based. The Internet destroys the association of geographic location and: "The *power* of local governments to assert control over online behavior (1); The *effects* of online behavior on individuals or things (2); The *legitimacy* of a local sovereign's efforts to regulate global phenomena (3); and The ability of physical location to give *notice* of which sets of rules apply (4)."[6] Thus, because the Internet does not map neatly into the jurisdiction of any existing sovereign entity, territorially defined laws and rules are difficult to apply to the Internet and activities of Internet users.[7] Often, traditional courts are "too slow, too expensive, and too inaccessible to address all problems that arise on the [Internet]."[8]

B. *ADR Alleviates System Intermediary Problems*

The way that the Internet is accessed by most users creates an additional need for a formalized ADR mechanism. Almost all Internet users, in order to gain access to the Internet, subscribe to an online service provider such as America Online (AOL), a university network or an Internet service provider (ISP). For every online service provider there are

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[5] *See* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370 (1996).

[6] *Id.*

[7] *See id.* at 1372-1373.

[8] *Id.*

system operators (sysops) who can control the information that flows through their network.[9] When a sysop is notified by a subscriber or by a third party of a potentially tortious communication on the system over which the sysop exerts control, the sysop is faced with a difficult choice: (1) take no action at all (i.e., make an affirmative decision to perpetuate the status quo), or (2) remove the communication (i.e., delete the offending message).[10] In light of the possibility of vicarious, contributory and accomplice liability when the system is used for illegal or harmful activity, not taking any action at all may seem unreasonable to a sysop.[11] On the other hand, removing the challenged message may "unfairly and unnecessarily [impact] the communication of third parties who have engaged in no wrongdoing."[12] Because a sysop's liability is likely to be significantly less if she simply deletes the offending message immediately, there is an inherent bias for the sysop to act in the complainant's favor.[13] Cases highlighting the dilemma faced by sysops include *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*,[14]

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[9] System operators generally are defined as anyone who has the ability to control messages that flow through a computer network. This definition includes operators of large online systems such as America Online, as well as moderators of Usenet groups and proprietors of small bulletin board systems (BBS). *See* David G. Post, *Dispute Resolution in Cyberspace: Engineering a Virtual Magistrate System*, ¶ 9 (visited Jan. 22, 1997) <http://www.law.vill.edu/ncair/disres/DGP2.HTM>.

[10] *See* Robert Gellman, *A Brief History of the Virtual Magistrate Project: The Early Months*, ¶ 3 (last modified May 22, 1996) <http://www.law.vill.edu/ncair/disres/GELLMAN.HTM>; *see also* Post, *supra* note 9, ¶¶ 7–13.

[11] *See* Gellman, *supra* note 10, ¶ 3.

[12] *Id.*

[13] *See* Post, *supra* note 9, ¶ 19. If the sysop does not take any action, she may be held liable because she knew or should have known that she was contributing to the offense. In a case of copyright infringement, liability could be great. However, if the sysop simply deletes the message, she is not likely to have any liability because "neither the Actor, nor the larger online community, is likely to have a legally enforceable right against Sysop that is violated by deletion of the challenged posting." *Id.* ¶ 24.

[14] 907 F. Supp. 1361 (N.D. Cal. 1995). At summary judgment, the court held:

> (1) access provider was not directly liable for copies that were made and stored on its computer; (2) fact issue as to whether access provider had knowledge of infringing activity precluded summary judgment on contributory infringement claim; (3) access provider did not receive direct financial benefit from infringing activity necessary to hold it vicariously liable; (4) fact issues precluded summary judgment on access provider's fair use defense; (5) bulletin board operator could not be held liable on theories of direct infringement or vicarious liability; (6)

Cubby, Inc. v. Compuserve, Inc.[15] and *Stratton Oakmont, Inc. v. Prodigy Services Co.*[16] A neutral adjudicating third party would be able to remove the sysop dilemma by making informed unbiased decisions that take into account both the rights and the liabilities of affected parties, maximizing the benefit to all Internet users.[17]

C. *Self-Regulatory Mechanisms Promote a "Cyber-Usage of Trade"*

A self-regulatory scheme for dealing with Internet transactions goes hand in hand with the ideal goals of decreased government intervention and decreased litigation. In order to become a truly free-flowing information medium, the Internet must devise ways to hone its ability to regulate itself. As such, any self-regulatory mechanism that is accepted by the Internet community will 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. The Internet

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holders' allegations were sufficient to raise issue of contributory infringement on part of operator; and (7) holders were not entitled to preliminary injunction.

Id. at 1361–1362.

[15] 776 F. Supp. 135 (S.D.N.Y. 1991). Granting the summary judgment motion, the court held:

> (1) computer service company that provided its subscribers with access to electronic library of news publications put together by independent third party and loaded onto company's computer banks was mere "distributor" of information, which could not be held liable for defamatory statements made in news publications absent showing that it knew or had reason to know of defamation; (2) company could not be held liable on unfair competition claim based on such defamatory statements; and (3) company which agreed to manage, review, edit and otherwise control contents of computer service company's journalism data base was not "agent" of computer service company, for whose torts company could be held vicariously liable.

Id. at 135.

[16] No. 30163/04, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995). In granting partial summary judgment to plaintiffs, the court held (1) that Prodigy was a "publisher" for the purposes of Plaintiffs' libel claims; and (2) that Charles Epstein, a sysop for Prodigy was agent for the purposes of the acts and omissions alleged in the complaint.

[17] *See* Post, *supra* note 9, ¶ 2.

always has been a self-regulating body on some level, and some commentators suggest that self-regulation is the key to success for online commerce:

> Before commerce can flourish online some trusted intermediary must create the basic rules of the game: rules of property, security of exchange, and means of enforcement. If central governments are not well-positioned to make and enforce these rules, then business entities are likely to fill the vacuum. In the process, they will shift the delicate balance between business and government. They will also stand to reap tremendous profits.
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> The source of the profits lies squarely with the rules, or standards, of electronic commerce. Accordingly, the generation of profit will occur largely in the cybercommunities that establish and support these rules.[18]

Setting standards for electronic commerce in the online arena is only the beginning. As digital signatures,[19] electronic data interchange (EDI)[20]

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[18] Debora Spar & Jeffrey Bussgang, *Ruling Commerce in the Networld*, JOURNAL OF COMPUTER-MEDIATED COMMUNICATION, Vol. 2, Issue 1 (last modified June 1, 1996) <http://www.usc.edu/dept/annenberg/vol2/issue1/commerce.html>.

[19] A digital signature is a way of attaching a computer generated code to an electronic transaction (such as an e-mail message) to authenticate the sender's identity. Pretty Good Privacy (PGP) is a form of digital signature, which also allows for authenticated encryption. A public key, an example of which follows, can be used by one person to send messages to another person online. The recipient of the message can verify the authenticity of the message (and decrypt it if necessary) using decryption programs.

-----BEGIN PGP PUBLIC KEY BLOCK-----
Version: 2.6.3
mQCPAzMGA1AAAAEEAL/l7HlQYPcOMJqjTPHdsxIL1CZFV5rs7sSrG21mZjanN0WE
ZBc8ZRrgo19P2rcsYHMS9sjK0GXexIf/4yy/UyhzbsfRRUHeHEVoQLWLWpO0ZbHZ
YhIsHR6jfh/Oms38JR5vl1vk8fERRZZVtiyS617joDZYowIJ3nNw2eCH5J4oCqnO
U7yRS18VkSlAvAVDWJQPRrr3alBCwzWQVahJgjHJU7J98KDTltdAo54xBaVT1CvS
X3Ew9Q==
=ko84
-----END PGP PUBLIC KEY BLOCK-----

Digital signatures can be used for virtually any online communication. For a sophisticated overview of digital signatures, see A. Michael Froomkin, *The Metaphor Is The Key: Cryptography, The Clipper Chip, And The Constitution*, 143 U. PA. L. REV. 709 (1995).

and other electronic commercial mechanisms mature, a usage of trade will evolve in electronic commerce.[21] With respect to usage of trade, the Internet is now in its formative years.

As we enter an age of standardized online transactions, a mature, ordered cyberspace will emerge. The next step will be preservation of that order. Online ADR mechanisms must address the problems and breaches that flow from this ordered system. The primary reason for using ADR to fill the gap is simple: electronic commerce demands speed and efficiency. Viable alternatives to litigation must be fostered and embraced to answer the problems of the present and of the future of mature online communications. The mechanisms must be fast and reliable—a call not answered by the courts. Further, in the global environment, artificial jurisdictional constructs will hinder the flow of information on a global basis. As jurisdictional issues vis-à-vis the Internet continue to develop, users struggle to predict court decisions.[22] Without predictability, electronic commerce will suffer, inhibiting the growth of the global economy. ADR can provide the necessary dispute resolution infrastructure for a prosperous Internet.

In the age of mature electronic commercial transactions, parties must be able to rely on custom and usage of trade for predictability. It is in this predictability that global economies will prosper.

III. AN ADR MECHANISM CAN BE GROUNDED IN, AND PROMOTES THE NATURAL DEVELOPMENT OF, INTERNET CUSTOM

Cyberspace is a place where a well-defined culture is developing; because the Internet largely has been unregulated by geopolitical, land-

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[20] EDI is the point-to-point exchange of business information in standard formats which occurs computer-to-computer over networks (e.g., the Internet).

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

[22] One only needs to consider the multitude of law review articles and notes discussing jurisdiction and the Internet, in the face of only a handful of decisions by the courts.

based sovereigns, cyberspace has grown in a vacuum without any traditional laws.[23]

Throughout history in almost all judicial systems, law has followed societal customs. For example, early American Indian tribal courts recognized that customary underlying beliefs and conduct provided a contemporary foundation for tribal governance and regulation.[24] Tribal courts find their justification in guiding principles that promote integrity.[25] The tribal courts did not derive credibility simply because they were the sole means of redress among their people; rather, their adherence to long-established customs and beliefs produced decisions that were good for the tribe. An important principle for cyberspace emerges here: any forum for resolving disputes on the Internet must be viewed as credible by the inhabitants of the Internet. This principle may seem obvious, but note that the credibility of the dispute resolution body often is the only barrier to subsequent litigation.

The Internet has its own customs and usage that must shape dispute resolution in cyberspace.[26] If cyberspace custom drives the decisions of cybercommunity-based dispute resolution, we will find dispute resolution decisions that the cyberspace community will be willing to recognize as "proper and right."[27] At common law, for a custom to become enforceable it had to be "(1) legal, (2) notorious, (3) ancient or immemorial and continuous, (4) reasonable, (5) certain, (6) universal and obligatory . . . a creature of its history."[28] Similarly, among tribal courts, thought and conduct had to be "known, accepted, and used by the people of the present

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[23] *See* Johnson & Post, *supra* note 5, at 1367 (arguing that cyberspace requires a system of rules quite distinct from the laws that regulate physical, geographically defined political borders and territories).

[24] *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 244 (1994).

[25] *See id.* at 245. While Indian peoples put weight on "ethnic identity of the people who operate the courts, the geographical location, or the physical arrangement of the forum," these factors alone are not enough to give a court system its credibility. *Id.* at 244.

[26] Tribal jurisprudence is appropriate for the indigenous people when custom and usage underlie the tribal codified and common law. *See id.* at 245.

[27] Likewise, Indian peoples viewed custom-based decisions as proper and right for the tribe. *See id.* (citing Brian Simpson, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND COMMON LAW 19 (William Twining ed., 1986)).

[28] Joseph H. Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U. L. REV. 1101, 1103 (1965).

day."[29] Likewise, customs and beliefs that drive transactions on the Internet[30] must be embraced as the core principles from which ADR must draw to establish itself as a viable alternative to litigation of online disputes.[31]

Precedent for recognition of custom as a basis of law, where "customs grew from the 'bottom up' and achieved the status of legal enforceability,"[32] abounds in the history of international law and the law of the United States. For example, the Law Merchant of Medieval Europe adjudicated disputes that arose from Medieval trade fairs.[33] When resolving a dispute, the Law Merchant drew his power from an enforceable set of customary practices that were "reasonably uniform across all the jurisdictions involved in the trade fairs."[34] Although the enforceable customs and practices existed apart from the "ordinary rules of law that applied to non-merchant transactions"[35] and no statute or other authoritative law gave rise to the existence of the Law Merchant,[36] the Law Merchant's decisions were final and enforceable, having power equal to that of a decision rendered in any commercial court.[37] The appealing attributes of the Law Merchant were its speedy resolution of disputes, its practicality and its adaptability to changes.[38]

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[29] James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265, 275 (1984). *See, e.g.*, Hood v. Bordy, 10 Indian L. Rep. 6061, 6063 (Navajo 1991); C.B. v. Little Flower Freedom Ctr., 18 Indian L. Rep. 6121, 6123 (Northern Plains Intertribal Ct. App. 1991).

[30] Principles of free speech and privacy are chief concerns that most Internet users hold sacred, notwithstanding the paucity of governmental support or positive judicial opinions to that effect. *See generally The Electronic Frontier Foundation* <http://www.eff.org>.

[31] *See generally* Lide, *supra* note 21.

[32] I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993, 1019–1020 (1994).

[33] Medieval trade fairs were the periodic gatherings of merchants from Europe and Asia at the commercial centers of Europe and England where "goods of all sort were bought and sold for shipment or transport back to the merchant's home territory." *Id.* at 1020.

[34] *Id.*

[35] *Id.*

[36] *See id.*

[37] *See id.* at 1020–1021.

[38] *See id.* at 1021.

Another example of customary law is set forth by *Swift v. Tyson*.[39] In *Swift* the Court held that Section 34 of the Judiciary Act of 1789, when it referred to "the laws of the several states," did not "extend to contracts or other instruments of a commercial nature; the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."[40] With this declaration, the Court recognized the existence of authority that was binding on local courts, but whose origin could not be traced to any particular sovereign.[41] Such authority could be, and was, developed as distinct—a form of common law that was enforceable in the federal courts.[42]

A formalized ADR mechanism, grounded in custom, is a logical and natural step for the resolution of disputes that arise on the Internet. As the Law Merchant and early Indian tribal law demonstrate, custom-based law has a strong historical basis. Even though Internet commerce presents novel legal issues, those issues do not need a new and innovative solution; rather, what is needed is the revitalization of an old and currently unused solution—custom-based law.

IV. CASE STUDY: THE VIRTUAL MAGISTRATE PROJECT

The Virtual Magistrate attempts to provide fast, global dispute resolution on the Internet,[43] taking into account Internet etiquette (netiquette) and user custom.[44] The Virtual Magistrate Project (Project), an experimental online arbitration tribunal specifically designed to resolve disputes on worldwide computer networks concerning online messages, postings and files,[45] was initiated October 25, 1995 by a working group at

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[39] 41 U.S. (16 Pet.) 1 (1842). For an earlier discussion of customary law, see *The Antelope*, 23 U.S. (10 Wheat.) 66, 66 (1825) (holding that "[t]he African slave trade is contrary to the law of nature, but is not prohibited by the positive [international customary] law of nations").

[40] *Swift*, 41 U.S. at 1–2.

[41] *See* Jack Goldsmith & Lawrence Lessig, *Grounding Virtual Magistrate*, ¶ 5 (visited Jan. 22, 1997) <http://www.law.vill.edu/ncair/disres/groundvm.html>.

[42] *See id.*

[43] *See The Virtual Magistrate Project: Frequently Asked Questions*, ¶ 1 (last modified July 24, 1996) <http://vmag.vclip.org/docs/vmagfaq.html>.

[44] *See id.* ¶ 23.

[45] *See The Virtual Magistrate Project: Concept Paper*, ¶ 1 (last modified July 24, 1996) <http://vmag.vclip.org/docs/vmpaper.html>.

a meeting sponsored by the National Center for Automated Information Research (NCAIR) and the cyberspace Law Institute (CLI).[46] The basic function of the Virtual Magistrate Project is to rapidly resolve disputes involving: "(1) users of online systems, (2) those who claim to be harmed by wrongful messages, postings or files, and (3) system operators (to the extent that complaints or demands for remedies are directed at system operators)."[47]

So long as the relevant parties agree to have the Virtual Magistrate arbitrate the dispute, the Magistrate's services are available to any computer network worldwide.[48] The Magistrate attempts to receive and resolve complaints within seventy-two hours (three business days) after acceptance.[49] As with all nonmandatory arbitration, every party must agree to have the Virtual Magistrate hear the case; however, the Virtual Magistrate decision does not have to be a substitute for traditional judicial remedies—parties can choose to make the arbitration decision nonbinding, leaving open the possibility of pursuit of traditional court litigation.[50]

A. *Project Goals*

The developers of the Virtual Magistrate Project set forth seven basic goals:

1. Establish the feasibility of using online dispute resolution 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.

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[46] The participants in the working group discussions were: Timothy C. Lexiner (NCAIR); Anne Sloane (NCAIR); Ellen Kirsh (America Online); William Marmon (MCI); David R. Johnson (CLI/Lexis Counsel Connect); David Post (CLI/Georgetown Law School); Robert Gellman (CLI Fellow); J. Beckwith Burr (CLI Fellow/Federal Trade Commission); and George H. Friedman (American Arbitration Association). *See id.* ¶ 3.

[47] *Id.* ¶ 4.

[48] *See id.*

[49] *See The Virtual Magistrate Project: Basic Rules*, ¶ 1 (last modified July 24, 1996) <http://vmag.vclip.org/docs/vmrules.html>.

[50] *See id.*

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 Virtual Magistrate Project to resolve disputes related to computer networks.
7. Develop a formal governing structure for an ongoing Virtual Magistrate operation.[51]

The developers also universally agreed that an additional important goal of the Project is for it to be "easy to understand and accessible to all."[52] Thus, the working group avoided creating overly complex or legalistic rules and proceedings, hoping to retain the Project's desired reflection of the developing customs and culture of the Internet—a difficult challenge.[53] Because the Virtual Magistrate Project is experimental, the goals of the Project are subject to change in order to best serve the Internet community;[54] so too is the Project itself.[55]

The Virtual Magistrate Project's focus on user custom and netiquette draws on the historical precedents of the Law Merchant and *Swift*-like customary law. Because the Virtual Magistrate adjudicates disputes that arise solely from Internet related activity, over time it could develop a common law of cyberspace. This cyberspace law would take into account customs of Internet users, and it would have the ability to adapt to new customs as the Internet grows and develops.[56] An authoritative law that derives its power from the custom of the Internet would be very helpful,

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[51] *The Virtual Magistrate Project: Pilot Project Goals*, ¶ 1 (last modified Feb. 26, 1996) <http://vmag.vclip.org/docs/vmaggoals.html>.

[52] Gellman, *supra* note 10, ¶ 23.

[53] *See id.*

[54] *See The Virtual Magistrate Project: Concept Paper*, *supra* note 45, ¶ 11.

[55] *See id.*

[56] This customary cyberlaw would have to be recognized as not conforming with positivist legal theory. Positivism requires that before a law is authoritative it must be able to be traced to the action of a sovereign—to an authoritative source that has the ability to enforce its decrees. We have not recognized that authoritative law can exist without being able to trace it to its source since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), where the Court said "law in the sense in which courts speak of it today does not exist without some definite authority behind it." *Id.* at 66.

For additional discussion of positivist theory and customary law, see Goldsmith & Lessig, *supra* note 41, ¶¶ 1–11.

for example, in adjudicating disputes where the custom of the Internet has developed in direct contradiction to the existing law.[57]

B. *Types of Cases Heard*

The Virtual Magistrate accepts cases that involve complaints about messages, postings, and files claiming copyright or trademark infringement, misappropriation of trade secrets, defamation, fraud, deceptive trade practices, inappropriate materials, invasion of privacy and other wrongful content.[58] Due to the great speed of replication and dissemination made possible by the Internet,[59] intellectual property, trademark and copyright infringements are of particular concern.[60] In most cases, the Virtual Magistrate decides "whether it would be reasonable for a system operator to delete, mask, or otherwise restrict access to a challenged message, file, or posting."[61] Other cases may call for decisions about the disclosure of the identity of an individual to a person other than the government.[62] In extreme cases, the Virtual Magistrate may rule on whether it is appropriate for a system operator to deny a person access to an online system.[63] The Virtual Magistrate will not decide questions about billing or financial obligations between users and system operators.[64]

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[57] Situations where such contradictory custom has already begun to develop are (1) where Internet users upload and download information from computers, and (2) when a user copies e-mail messages and forwards them to others—both of which have a strong possibility of violating existing copyright law, yet "everybody does it all the time." Lide, *supra* note 21, at 207.

[58] For example, the Virtual Magistrate would consider materials that are obscene, lewd or otherwise violative of system rules. *See The Virtual Magistrate Project: Concept Paper*, *supra* note 45, ¶ 9.

[59] For example, an e-mail communication can be sent around the world in less than 10 seconds.

[60] Two high profile cases concerning online copyright infringement are *Playboy Entertainments, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) and *Religious Tech. Ctr. v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). Playboy won at summary judgment. Netcom eventually settled. For further discussion of the *Netcom* case, see Mark Walsh, *Netcom Settlement Could Help Forge Internet IP Policy*, THE RECORDER, Aug. 6, 1996.

[61] *The Virtual Magistrate Project: Concept Paper*, *supra* note 45, ¶ 10.

[62] *See id.*

[63] *See id.*

[64] *See id.*

C. *Procedure of Virtual Magistrate Proceedings*

The Virtual Magistrate Project has set forth specific rules governing submission of complaints, acceptance of cases, the actual proceedings and the legal standard that the Magistrate is to apply. These rules are similar to, and work in reference to, rules promulgated by the American Arbitration Association.[65]

1. *Complaints*

Complaints heard by the Virtual Magistrate must be submitted via regular electronic mail in ASCII text[66] (when possible) to the Villanova Center for Information Law and Policy at vmag@mail.law.vill.edu.[67] Complaints are to include:

> 1. A description of the action, posting, or other conduct that is the subject of the complaint;
> 2. The objection to the activity in question and the reason for seeking relief;
> 3. The name, affiliation, address, and electronic mail address of any networks or system operators whose actions or facilities are relevant to the complaint;
> 4. The name, affiliation, address, and electronic mail address of any other persons whose activities or facilities are relevant to the complaint;
> 5. Any posted material (or a pointer to posted material) that is relevant to the complaint.[68]

Upon request and at the discretion of the Magistrate, any party to a case may "proceed without revealing name, address or affiliation."[69]

Complaints and related materials will not be made public until the Magistrate renders a final decision.[70] As with names, addresses and

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[65] *See The Virtual Magistrate Project: Basic Rules*, *supra* note 49, ¶ 22. "Any procedural matters that are not addressed by these rules or in other Virtual Magistrate Project documents will be resolved in accordance with the AAA's Commercial Arbitration Rules and general principles of fairness." *Id.*

[66] Thus, there can be no traditional footnotes.

[67] *See The Virtual Magistrate Project: Basic Rules*, *supra* note 49, ¶ 3. Complaints also may be submitted by using an optional form that is available at <http://vmag.vclip.org/forms/dispute.form.html>.

[68] *Id.* ¶ 4.

[69] *Id.*

affiliation, upon request by any party and at the discretion of the Magistrate, information pertaining to the complaint may be kept confidential and not made available to the public.[71] Often, a significant factor that determines whether parties assent to arbitration is whether a party will be able to gain the benefit of strict confidentiality.[72] Most successful arbitration programs are conducted in secret;[73] therefore, the Virtual Magistrate's option to grant parties strict confidentiality comports with accepted arbitral practice and procedure.

2. *Acceptance*

Before the Virtual Magistrate formally accepts a complaint, the American Arbitration Association carefully reviews it and requests additional information from the complainant when necessary.[74] A complaint is not accepted until all parties have agreed to participate[75] and have agreed to "hold harmless from . . . liability the Virtual Magistrate Project, [the] AAA, the Magistrate, and all other persons connected with the Virtual Magistrate Project for any act of commission or omission in connection with the . . . Virtual Magistrate Project."[76] Once a complaint is accepted, the AAA selects an available Magistrate[77] from the pool of qualified Magistrates.[78] If the complaint and all accompanying materials have not

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[70] *See id.* ¶ 6.

[71] *See id.* ¶ 5.

[72] *See* Post, *supra* note 9, ¶ 36.

[73] *See id.*

[74] *See The Virtual Magistrate Project: Basic Rules*, *supra* note 49, ¶ 10.

[75] *See id.* Formal agreement is necessary because arbitration derives its enforcement power from contract law.

[76] *Id.* at *4. However, if parties are negotiating without the aid of the Virtual Magistrate, the formal acceptance process may be suspended. *See id.* at ¶ 10.

[77] The AAA selection of the Magistrate is contrary to the rules and practices of many other arbitration tribunals, particularly international arbitration tribunals such as the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) and tribunals that follow the rules of United Nations Commission of International Trade Law (UNCITRAL), where the parties each select their own arbitrator, who, in turn, select the third arbitrator to act as the chairman. *See, e.g.*, Article 7(1) of the UNCITRAL Arbitration Rules; *see also* GUIGO WANG, WANG'S BUSINESS LAW OF CHINA VI 2213 (1996) (discussing CIETAC arbitrator selection).

[78] The pool of Magistrates is not limited to lawyers. In order to be a member of the pool, a Magistrate must be selected jointly by the AAA and a subcommittee of CLI

been forwarded to the Magistrate prior to formal acceptance,[79] such materials are required to be forwarded immediately, at which time the seventy-two hour turn-around time commences.[80]

3. *Actual Proceedings*

All proceedings of a case before the Virtual Magistrate are held online. Unlike most other arbitration proceedings, where the parties meet face to face in a single location, the parties before the Virtual Magistrate neither travel to meet personally nor even have to speak to each other on the telephone.[81] Established for each case is a listserv/newsgroup (grist),[82] where all participants are directed to post messages. Any message that is posted to the grist is first captured and saved by the Villanova Center for Information Law and Policy[83] and then sent to all participants

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Fellows and must be able to demonstrate familiarity with both the law and online systems. *See The Virtual Magistrate Project: Concept Paper*, *supra* note 45, ¶ 9. Magistrates are required to attend a training and orientation program and are required to be familiar with (1) the Virtual Magistrate Rules, (2) the Virtual Magistrate Handbook for Magistrates, (3) the AAA Commercial Arbitration Rules and (4) the AAA Code of Ethics for Arbitrators in Commercial Disputes. *See Virtual Magistrate Handbook for Magistrates*, ¶ 2 (last updated Feb. 26, 1996) <http://vmag.vclip.org/magis/vmhdbook.html>.

[79] Sending the materials to the Magistrate prior to formal acceptance may occur if participation by the Magistrate will help parties agree to participate in the process. *See The Virtual Magistrate Project: Basic Rules*, *supra* note 49, ¶ 12.

[80] *See id.* Magistrates are notified of cases by telephone to ensure availability. Due to the time restraints (72 hours), magistrates are asked to decline a case if they are not sure that they will be able to complete a case within the available time or be able to be online for a few days. *See Virtual Magistrate Handbook for Magistrates*, *supra* note 78, ¶ 4. Although the goal of the Virtual Magistrate Project is to decide cases within three business days of acceptance, this goal is not a formal requirement. In order to be fair, Magistrates may take more time to collect all points of view. Also, delays in the e-mail system may require the magistrate to take more time. Cases, however, are not to continue for weeks. Timing is important to the "utility and credibility of the entire project." *Id.* ¶ 10.

[81] Note, however, that there is one other online dispute resolution service where a significant portion of the mediation is performed online. *See The Online Ombuds Office*, (last visited Mar. 2, 1997) <http://www.ombuds.org>.

[82] *See The Virtual Magistrate Project: Basic Rules*, *supra* note 49, ¶ 15. A grist is "something employed to one's profit or advantage." RANDOM HOUSE UNABRIDGED DICTIONARY 623 (9th ed. 1983). However, with regard to online services, this usage of grist appears to give a new connotation to the word.

[83] *See Virtual Magistrate Handbook for Magistrates*, *supra* note 78, ¶ 6.

automatically.[84] Access to the grist is controlled by password; thus, only the participants will be able to read the posted messages during the ongoing arbitration.[85] Although the public will be able to access the Virtual Magistrate Project Home Page and see pending cases listed on the docket, the public will not be able to access case information until the time of a final determination.[86]

4. *Applicable Legal Standard*

The standard for decisions by the Virtual Magistrate is one of reasonableness in light of all available information.[87] When applying this standard, the Magistrate, in addition to the available information, must also consider "(1) network etiquette, (2) applicable contracts, (3) appropriate substantive laws, and (4) whether a system operator would be acting *reasonably* if it withheld messages, files, or postings from public access pending resolution of claims between the parties in interest in any applicable legal jurisdiction."[88] Furthermore, before applying the law of any specific legal jurisdiction, the Virtual Magistrate is to consider "the circumstances of each complaint, the views of the parties about applicable legal principles and remedies, and the likely outcome in any ultimate litigation or dispute resolution."[89] The decisions of the Magistrate will not be treated as binding precedent for future cases.[90] However, the nonprecedential value of the decisions will not detract from their persuasive value, allowing a "body of cyberlaw" to develop and form the basis for the resolution of future disputes.[91]

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[84] *See The Virtual Magistrate Project: Basic Rules*, *supra* note 49, ¶ 15.

[85] *See id.*

[86] *See The Virtual Magistrate Project: Concept Paper*, *supra* note 45, ¶ 26.

[87] *See id.* ¶ 16. This standard seems to ask Magistrates to apply a combination of a "reasonableness" standard and a "totality of the circumstances" standard.

[88] *Id.* (emphasis added).

[89] *Id.* ¶ 17.

[90] *See The Virtual Magistrate Project: Concept Paper*, *supra* note 45, ¶ 28.

[91] *See id.* For further discussion of the historical background supporting the development of a custom-based cyberlaw, see *supra* notes 23–42 and accompanying text.

D. Tierney and EMail America

The first and only case that the Virtual Magistrate has decided since its inception is the arbitration of *Tierney and EMail America*.[92] The complainant, James E. Tierney, requested the removal of an advertisement[93] posted by EMail America from the system of respondent America Online (AOL).[94] The advertisement about which Tierney complained offered for sale five million e-mail addresses in plain ASCII text format for $99, and up to twenty million e-mail addresses for $359.[95] The sales pitch of the advertisement promoted (1) the ease of importing the addresses into an address book for use in sending the buyer's own advertisements, (2) a high return rate of eighteen percent, and (3) the low cost of sending advertisements to the addresses ("100,000 ads for the price of ten first class letters by U.S. Mail").[96] Tierney did not investigate the merits of the EMail America advertisement, nor did he try to determine whether or not EMail America actually existed, claiming that the ad "on its face [was] inherently inappropriate for posting by America Online."[97]

Tierney complained that the advertisement should be removed on three grounds "(1) The advertisement promotes bulk e-mailing which is a practice that is against sound public policy and is not in the interest of Internet users. (2) The advertisement is a potential violation of [the subscriber's] privacy and could frustrate [the subscriber's] use of the

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[92] *See* Docket No. 96-0001 (May 8, 1996), *available at* <http://vmag.vclip.org/doksys/96-0001>. At the time of writing, *Tierney* was the only case that the Virtual Magistrate Project had decided.

Tierney and EMail America is a bit of a misnomer because EMail America did not participate in the arbitration. The AAA identifies cases by the names of the principal parties, using "and" rather than "vs." The Virtual Magistrate Project adopted the AAA practice. *See Virtual Magistrate Handbook for Magistrates*, *supra* note 78, ¶ 27. For further discussion of EMail America's absence, see *infra* notes 113-118 and accompanying text. For further discussion of the Virtual Magistrate Project's dearth of cases, see *infra* notes 132-144 and accompanying text.

[93] After the case was decided, America Online discovered that the "posted advertisement" was actually direct e-mail. Thus, it could not be removed. For further discussion, see *infra* note 130 and accompanying text.

[94] *See Tierney and EMail America*: *Final Decision*, ¶ 3 (last modified May 21, 1996) <http://vmag.vclip.org/doksys/96-0001/index.html?6>.

[95] *See Tierney and EMail America*: *Case Information*, ¶¶ 4-6 (last modified May 8, 1996) <http://vmag.vclip.org/doksys/96-0001>.

[96] *Id.* ¶ 4.

[97] *Id.* ¶ 9.

Internet. (3) The advertisement is deceptive."[98] Tierney based his first argument, the public policy argument, on the fact that bulk e-mailing (also known as "spamming"),[99] as performed and advertised by EMail America, violated AOL's long-standing rules against bulk e-mailings.[100] America Online responded that Internet custom, protocol and courses of dealing generally accepted within the Internet community all reject the practice of indiscriminate bulk e-mail marketing as unscrupulous due to frequent propagation of fraud, unfair trade practices and unfair competition.[101]

In his complaint, Tierney also claimed that mass commercial mailings generally violated his privacy and frustrated his use of the Internet, thereby diminishing the value of his Internet communication.[102] Additionally, Tierney claimed that he did not want to receive unsolicited advertisements and that he was unable to block the unsolicited e-mail.[103] America Online responded:

> 1. The unsolicited dissemination of commercial e-mail by EMail America is violative of the Terms of Service Agreement (TOS) entered into by subscribers of America Online, Inc.
> 2. The mass distribution of joint electronic mail, known as "spamming" has an adverse impact on the ability of the AOL network to process the legitimate mail of its subscribers.
> 3. The unsolicited dissemination of commercial e-mail to AOL subscribers constitutes an invasion of their privacy and has generated numerous complaints and has injured AOL's relationship with their members.[104]

America Online's response was appended by an affidavit that delineates the nature of the benefits of membership to AOL, described the e-mail transfer

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[98] *Id.* ¶¶ 10–12.

[99] Spamming is "a pejorative term for indiscriminate, bulk, direct mail marketing via email." *Tierney and EMail America: Final Decision, supra* note 94, at *2.

[100] *See Tierney and EMail America: Case Information, supra* note 95, ¶ 10. Spamming generally is prohibited because it adversely affects the Internet service provider's ability to process legitimate communications. Finite computing resources of Internet service providers are not designed to accommodate mass mailings of unsolicited bulk e-mail. *See Response & Affidavit of America Online*, ¶ 19 (last modified May 15, 1996) <http://vmag.vclip.org/doksys/96-0001/index.html>.

[101] *See Response & Affidavit of America Online, supra* note 100, ¶ 14.

[102] *See Tierney and EMail America: Case Information, supra* note 95, ¶ 11.

[103] *See id.*

[104] *Response & Affidavit of America Online, supra* note 100, ¶¶ 3–5.

process, explained portions of the TOS agreement and stated that accounts that were found in violation of the TOS agreement were terminated.[105]

The matter of *Tierney and EMail America* was resolved by the Virtual Magistrate without EMail America's participation. A spokesperson for EMail America claimed that EMail America was never contacted by the Virtual Magistrate.[106] Furthermore, the spokesperson stated that EMail America did not recognize the authority of the Virtual Magistrate Project.[107] The Magistrate's decision states: "Three attempts by the Virtual Magistrate to contact EMail America, over a seven day period, at the given number produced no response."[108] Thus, the likelihood that EMail America refused to recognize the Virtual Magistrate's authority, or simply did not want to participate in the arbitration, is a much greater possibility than the likelihood that the Virtual Magistrate did not contact or attempt to contact EMail America.

The Virtual Magistrate's final determination was that "AOL should remove from its system the item complained of by Mr. Tierney."[109] The Magistrate also concluded that removal or blocking[110] of EMail America's advertisement would be a permissible application of Paragraph 4(a)[111] of

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[105] *See id.* ¶¶ 11–27.

[106] *See A "Good" Case, Not An "Ideal" Case: Virtual Justice: The No-Show Case Showcases: Promise and Peril of the Virtual Magistrate Project*, VOORHEES REPORT, June 3, 1996, at *3, *available in* 1996 WL 8913605 [hereinafter VOORHEES REPORT].

[107] *See id.*

[108] *Tierney and EMail America: Final Decision*, *supra* note 94, ¶ 7.

[109] *Id.* ¶ 14. The decision was limited specifically to the actual item about which Tierney complained—the one attached to his complaint. It did not carry over to any similar messages by EMail America or similar messages found on AOL's system.

[110] Under their TOS, AOL does not "pre-screen" content of messages. However, because the message involved in Tierney's complaint would have been "post-screened," blocking would have been acceptable. *See id.* ¶ 17.

[111] Paragraph 4(a) of AOL's TOS states:

> Content. You acknowledge that (i) AOL contains information, communications, software, photos, video, graphics, music, sounds, and other material and services (collectively, "Content"), and (ii) such content is generally provided under license by independent content providers ("ICPs") and other AOL subscribers. Each Member and any user of Members Master Account must evaluate, and bear the risk associated with, the accuracy, completeness or usefulness of any Content. AOL Inc. does not pre-screen Content as a matter of policy, but AOL Inc. and ICPs shall have the right, but not the responsibility, to remove Content which is deemed in their discretion harmful, offensive, or otherwise in violation of the TOS.

AOL's TOS.[112] Thus, in theory, because the Virtual Magistrate granted the equitable relief Tierney requested, Tierney won the arbitration.

1. *Critique of* Tierney

The *Tierney* case is riddled with problems that reflect on the credibility and the efficacy of the Virtual Magistrate Project. First, EMail America did not participate. Second, AOL could have taken action without the Virtual Magistrate's direction. Third, Tierney had a conflict of interest. Lastly, the relief granted could not be executed. These problems and others, such as a dearth of cases, security problems with e-mail, the inability to physically face one's opponent, limitations of Internet access by foreign parties and failure by major service providers to accept fully the idea of online ADR, have haunted the Virtual Magistrate Project, causing its viability to be closely scrutinized.

a. *EMail America's Nonparticipation*

EMail America's nonparticipation in the *Tierney* decision detracts from the value of the decision, calling into question the credibility of the processes and procedures of the Virtual Magistrate Program. Tierney's complaint was "In Rem: with Respect for a Certain Posting,"[113] requesting removal from the system of EMail America's advertisement.[114] Thus, Tierney's action was against EMail America and its message, not America Online.[115] Nonetheless, America Online was the sole respondent and the arbitration proceedings came to a final decision without the participation of

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Response & Affidavit of America Online, *supra* note 101, ¶ 32.

[112] *See Tierney and EMail America: Final Decision*, *supra* note 94, ¶ 13. This determination will provide guidance to AOL when faced with similar complaints in the future.

[113] *Tierney and EMail America: Case Information*, *supra* note 95, ¶ 1.

[114] *See id.*

[115] The case name, *Tierney and EMail America*, is derived from Tierney's complaint. Had the Magistrate followed the AAA rule whereby the name of the case is taken from the main participants, the name of the case would have been *Tierney and America Online*.

the source of the problem, EMail America.[116] The actual fact-finding of the Magistrate necessarily was limited, casting the decision with the shadow of hurried "over-zealousness to make law in cyberspace"[117] and giving the decision default-like qualities. As stated by the Virtual Magistrate's Executive Director, "it clearly would have been better had EMail America participated."[118]

b. *AOL Did Not Need the Virtual Magistrate Decision*

The second problem with the *Tierney* decision is that America Online, under its TOS, could have taken action without the Virtual Magistrate's order. Paragraph 4(a) of AOL's TOS specifically reserves the right "to remove Content which is deemed in their discretion harmful, offensive, or otherwise in violation of the TOS."[119] Although the Virtual Magistrate noted that within AOL's 5.5 million account membership "[t]here may be AOL members who have no objection to bulk e-mail advertising or who may even desire to receive it,"[120] because of its TOS and regardless of possible ensuing complaints from members, AOL did not need the Virtual Magistrate's decision to remove the EMail America's posting. Thus, the Virtual Magistrate's decision is essentially advisory in nature.

If the Virtual Magistrate Project wants to gain credibility and garner respect within the legal community as a legitimate tribunal, it will have to screen the cases it accepts more carefully and refrain from rendering advisory opinions. The stated goals of the Virtual Magistrate Project might have been implemented best by not accepting *Tierney*, allowing AOL to take appropriate actions in removing the message. If complaints were to arise in response to AOL's action, then the Virtual Magistrate might be able to resolve a "real" controversy. Overall, the Virtual Magistrate's decision simply was not necessary to determine the appropriate outcome of Tierney's case.

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[116] In a civil court, Tierney's complaint, more than likely, would have been dismissed on a motion by AOL under Rule 12(b)(7) for failure to join a necessary party. *See* FED. R. CIV. P. 12(b)(7).

[117] VOORHEES REPORT, *supra* note 106, at *6.

[118] E-mail from Robert Gellman, Executive Director Virtual Magistrate Project (Jan. 12, 1997, 5:31 PM) (on file with the *Ohio State Journal on Dispute Resolution*).

[119] *Response & Affidavit of America Online*, *supra* note 101, ¶ 32.

[120] *Tierney and EMail America: Final Decision*, *supra* note 94, ¶ 10.

c. *Tierney's Conflict of Interest*

The third problem with the *Tierney* decision is that Tierney, the complainant, had a conflict of interest. Prior to the time he filed his complaint and continuing to present day, Tierney has served as an advisor to the Virtual Magistrate Project on consumer fraud issues.[121] Tierney is also a forum moderator on Counsel Connect,[122] whose co-director, David Johnson, helped develop the Virtual Magistrate Project.[123] Thus, the *Tierney* decision has the appearance of an inside job.

However, the Executive Director of the Virtual Magistrate Project, Robert Gellman, stated that the Magistrate, N.M. Norton, Jr.,[124] had no idea about Tierney's connection to the Virtual Magistrate Project and that "the conflict issue is a red herring."[125] Essentially, even though Tierney had a personal conflict of interest, Tierney's conflict did not influence the Magistrate's decision. Nevertheless, Tierney's actual conflict of interest and the appearance of impropriety that it created does not affirm the Virtual Magistrate's credibility.

d. *The Relief Granted Could Not Be Executed*

The last problem with the *Tierney* decision is that the relief granted could not be executed. The Virtual Magistrate thought that he was dealing with a posting in AOL's classified section,[126] but the message turned out to be direct e-mail.[127] The fact that the message was not a classified posting

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[121] *See* David J. Loundy, *Virtual Magistrate Becomes a Reality, Sort of*, CHI. DAILY L. BULL., June 16, 1996, at 5; *see also* Gellman, *A Brief History of the Virtual Magistrate Project: The Early Months*, *supra* note 10, ¶ 7.

[122] *See* David Post, *Virtual Magistrates, Virtual Law*, AM. LAW., July/Aug. 1996, at 104.

[123] For list of working group participants, see *supra* note 46; *see also* Dave Thom, *E-Mail Arbitration System Takes ADR to Cyberspace*, N.J. L.J., Apr. 15, 1996, at 22. However, it should be noted that Counsel Connect is not directly affiliated with the Virtual Magistrate Project. *See* E-mail from Robert Gellman, *supra* note 118.

[124] N.M. Norton, Jr., is a partner at the Little Rock, Arkansas law firm Wright, Lindsey & Jennings. *See* Loundy, *supra* note 121, at 1.

[125] E-mail from Robert Gellman, *supra* note 118.

[126] *See* VOORHEES REPORT, *supra* note 106, at *5.

[127] *See* E-mail from Robert Gellman, *supra* note 118.

became clear only after the decision had been rendered.[128] Thus, AOL was unable to enforce the *Tierney* decision because "there was nothing to enforce it against."[129] When ascertaining exactly the focus of Tierney's complaint, the Magistrate was not sufficiently thorough,[130] giving the impression of a rush to judgment.[131] Again, if the Virtual Magistrate Project wants to garner credibility as a legitimate arbitral tribunal and gain respect within the legal community, the Magistrates will have to avoid making careless errors that cause them to render unenforceable decisions.

E. *Other Challenges Facing the Project*

The Virtual Magistrate Project has a number of other challenges to overcome if it is to earn acclaim as an arbitral tribunal, including overcoming its lack of cases, the questionable security of e-mail, Internet access by foreign parties, the elimination of face-to-face meetings and acceptance by major online service providers.

1. *Attracting Cases*

The first obstacle for the Virtual Magistrate Project to overcome is the need to attract more cases. Since its inception, the Project has adjudicated only one case, *Tierney*,[132] and does not have any cases currently in progress.[133] The Virtual Magistrate has had a few disputes submitted, but those disputes were rejected either for substantive reasons or because the

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[128] *See id.*

[129] *Id.* Once e-mail is delivered into a private mailbox, it cannot be deleted by the Internet access provider. A classified ad posting, however, can be deleted.

[130] *See id.* If the Magistrate had investigated more thoroughly, he would have discovered that Tierney never actually received EMail America's ad in his e-mailbox. Rather, an investigator at a state attorney general's office gave him a print copy of the EMail America ad. Therefore, even Tierney did not know whether it was direct e-mail or a classified posting. He is reported as having assumed that it was a classified posting. *See* VOORHEES REPORT, *supra* note 106, at *5.

[131] *See* VOORHEES REPORT, *supra* note 106, at *5.

[132] *See The Virtual Magistrate Project: Decided Cases* (last updated May 21, 1996) <http://vmag.vclip.org/cases/decided.html>. As indicated in note 92, *Tierney and EMail America* was the only case adjudicated by the Virtual Magistrate Project at the time this Note was written.

[133] *See The Virtual Magistrate Project: Case Docket* (last updated Feb. 8, 1996) <http://vmag.vclip.org/cases>.

responding party refused to participate.[134] In a limited number of instances, discussions with the parties initiated by the Virtual Magistrate led to a "satisfactory resolution of the dispute without any direct action by the [Virtual Magistrate]."[135]

Although the Virtual Magistrate Project currently does not keep statistics on the cases that have either been rejected or abandoned, the total is estimated to be less than twenty.[136] Attracting cases has been difficult. During the first six weeks of operation, the Project received three disputes but accepted none of them.[137] The first of the three concerned a retail computer purchase. The case was not accepted because it did not involve computer network interaction. Therefore, it did not fall within the jurisdiction of the project because it did not meet the substantive requirements.[138]

The second and third complaints received during the opening weeks of the Virtual Magistrate Project were rejected not for substantive reasons but rather because "considerable effort would be required to contact all parties and convince them to submit to the jurisdiction of the Virtual Magistrate."[139] Both complaints exhibited the existence of personal animosity among the parties that would have required significant pre-acceptance and post-acceptance negotiation.[140] Because the Virtual Magistrate Project is not designed to conduct lengthy pre- and post-acceptance negotiations, and because considerable effort would have been

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[134] *See* E-mail from Robert Gellman, Executive Director Virtual Magistrate Project (Jan. 12, 1997, 12:38 AM) (on file with the *Ohio State Journal on Dispute Resolution*). Party refusal to participate in the arbitration process plagues many upstart arbitration tribunals and organizations.

[135] *Id.*

[136] *See id.*

[137] *See* Gellman, *supra* note 10, ¶ 30.

[138] *See id.* However, when the complaint was filed the stated rules and procedures did not define expressly the types of acceptable disputes. *See id.* For discussion of the types of cases the Virtual Magistrate Project accepts, see *supra* notes 74–80 and accompanying text.

[139] Gellman, *supra* note 10, ¶ 32.

[140] *See id.* Typically, AAA conducts pre-acceptance negotiations before turning the case over to the Virtual Magistrate. After closer examination of both complaints, however, the Project managers determined that the cases would be administered most effectively if the same person conducted all negotiations. *See id.* ¶¶ 32–33.

required to obtain consent from the parties to allow Virtual Magistrate arbitration, the cases were rejected.[141]

One possible explanation for the reason the Virtual Magistrate has not heard many cases is that "there aren't enough real disputes that people care about."[142] Although the Virtual Magistrate Project administrators doubt this theory,[143] it is a possibility. According to Assistant General Counsel for AOL, William Burrington, AOL "only gets a few on-line disputes each month."[144] Regardless of the reason for the Virtual Magistrate's dearth of cases, it is obvious that without a case load, the Virtual Magistrate will not survive.

2. *E-mail's Questionable Security*

The second challenge that the Virtual Magistrate Project must overcome is the questionable security of e-mail. The Internet does not readily facilitate the safe dissemination of confidential information. Therefore, parties who consider utilizing the Virtual Magistrate must consider carefully whether potential problems with confidentiality will deter them from selecting the Virtual Magistrate Project as an acceptable tribunal for the arbitration of their claims. Currently, the Virtual Magistrate Project puts parties on notice that information about their case, even the private memos sent directly to the Magistrate, will be available publicly.[145] As the Virtual Magistrate Project progresses and develops, and because the Project does not make documents public until a final determination has been made, confidentiality may not be a serious, inhibiting challenge.[146] By not revealing any of the communications until the case has reached a final determination, the Virtual Magistrate Project maintains confidentiality and shows parties that it is willing to take steps to ensure that communications

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[141] Because of the limitations that the current acceptance process creates, the Project managers are reviewing the acceptance process, considering referring the complaints to magistrates before they are formally accepted. *See id.* ¶ 34.

[142] E-mail from Robert Gellman, *supra* note 134.

[143] *See id.*

[144] Dave Thom, *ADR in Cyberspace*, AM. LAW., May 1996, at supp. 19. At the time the *Tierney* case was rendered, AOL had approximately 5.5 million members. *See Response & Affidavit of America Online*, *supra* note 100, ¶ 6.

[145] *See The Virtual Magistrate Project: Frequently Asked Questions*, *supra* note 43, ¶ 25; *see also* George H. Friedman, *The Virtual Magistrate*, MULTIMEDIA STRATEGIST, July 1996, at 6.

[146] *See The Virtual Magistrate Project: Concept Paper*, *supra* note 45, ¶ 26.

are kept confidential.[147] As the Project adjudicates more cases, if the participants do not encounter problems with e-mail security, this concern should wane.

Future technological advances, specifically advances in the ease of use of encryption software, may alleviate confidentiality concerns in the long term. If the Virtual Magistrate performs all of the proceedings online while retaining confidentiality through encryption, parties should not be wary of the process simply because of the possibility of interception of a confidential communication.

Another mechanism that the Virtual Magistrate Project could employ to alleviate parties' confidentiality concerns is the use of confidential, live chat websites that are accessible by password only. Live chat allows Internet users to communicate through text in real time, creating a conversational exchange rather than the letter-like exchange of e-mail. The confidential, live chat website would allow the disputing parties and the mediators to meet electronically to conduct the problem solving process (i.e., exchange documents, files, photographs and engage in important dialogue).[148] Although the Virtual Magistrate Project currently requires a password to access postings on the grist, a private chatroom may make the parties more comfortable because their communications would take place in the unfettered atmosphere of real time.

V. DEVELOPING ALTERNATIVE SOLUTIONS

The problems surrounding the Virtual Magistrate's first decision has led to difficulty in attracting cases and has hindered its acceptance as an accredited arbitral tribunal. Resolving the specific problems facing the Virtual Magistrate Project, more than likely, is not the best long term solution for its acceptance; rather, it may be more beneficial to develop a mechanism establishing the framework for ADR in general, such as a top-down contracting effort. Then, once online ADR gains credibility, a forum such as the Virtual Magistrate Project may be adopted wholesale.

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[147] Nevertheless, all e-mail communications are delivered through the parties' Internet service provider. While en route to the Virtual Magistrate Project, a party's communication could be intercepted by a sysop.

[148] At least one dispute resolution firm, The Janzen Group, already uses confidential live chat sites to mediate disputes online. *See Virtual Magistrate Project Provides Dispute Resolution in Cyberspace*, WORLD ARB. & MEDIATION REP., March 1996, at 77.

A. *Top-Down Contracting*

Almost all parties on the Internet have some existing contractual relationship between access providers and their cyber-domiciliaries.[149] Seizing upon this established contractual framework, the globally-networked industry can work to solve the ever-present disputes in the online community. The Internet happens to be structured in a manner that is conducive to a top-down contracting effort for the implementation of an ADR mechanism. Through such an effort, industry heavyweights can increase the usage of ADR for online conflicts.

The Internet is structured such that there are relatively few players who comprise the top tier of the network topology, which is comprised of the major backbone providers.[150] The second network tier is occupied by more players who reside in the hub cities.[151] The hub-level players then provide service to lower-end connection points which, in turn, service Internet service providers (ISPs). However, the uniqueness (and beauty) of the Internet is that this topographic model is actually a web of networks. An end user may connect through an ISP, which connects to the city's backbone provider, which in turn connects to a hub city. Alternatively, a user might use MCI for Internet service, in which case the user is directly connected to a major backbone for her provider.

For example, many ISPs in Ohio use OARnet[152] as their provider. OARnet is the major backbone provider for Ohio, but uses MCI or Sprint for physical connections. On a smaller scale, the Ohio State University (OSU)[153] also is a backbone site; all OSU students, staff and faculty use it for direct Internet access. Users of Columbus-based CompuServe, however, connect through OARnet.[154] Thus, while the topology and

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[149] *See generally* Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75 (1996). University students, AOL members and ISP subscribers all have contracts or agreements with their access providers.

[150] For example, some of the major backbone providers are: Ameritech, Sprint, MCI, MAE, CIX and FIX.

[151] Some of the major Internet hubs are: Chicago, Washington, D.C., Atlanta, Los Angeles, San Francisco and New York.

[152] OARnet Internet Service Provider <http://www.oar.net>.

[153] The Ohio State University <http://www.osu.edu>.

[154] *See* MCI, *BIPP '96 Network Diagram* (last visited Feb. 8, 1997) <httpwww.mci.com/bipp95.html>; Brian Powell, *Topology* (last modified Feb. 27, 1997) http://www.osc.edu/~almaguer/JDR/bpowell.html; *see also* OARnet,

contracting relationship on the Internet resembles a mix of web-interdependence and top-down hierarchy, the major backbone providers are best situated to initiate the ADR contracting effort by providing the framework where ADR agreements and clauses could be implemented on all levels throughout the Internet. Because most parties have pre-existing contractual agreements with their Internet access providers,[155] implementation of arbitration clauses into those contracts could be accomplished with relative ease.[156] With agreements to arbitrate stemming from Internet backbone providers and trickling down to both commercial and private users, Internet ADR will be efficient and maintainable across jurisdictional boundaries. By focusing on contract clauses, parties will be able to determine how to resolve their disputes through contract negotiations and according to custom and usage of trade fashioned by the online community.

We should note that not all Internet networking and access contracts look alike, in both the language of the terms and the nature of the parties' relationships to each other. In order to understand the backdrop against which arbitration clauses will be developed, an examination of the different relationships among parties to electronic network access contracts is necessary—particularly rulemaking models and contract enforcement mechanisms. The basic rulemaking models in electronic network access contracts are as follows: [157]

1. an authoritarian model, in which the supplier of services sets rules for access and use unilaterally;

Network Maps (last modified Nov. 13, 1996) <http:/www.oar.net/ABOUT/map.html> (providing a graphical illustration of backbone topology, and national topology for the Internet).

[155] *See* Burnstein, *supra* note 149 (using the same analysis in arguing for the implementation of forum and law selection clauses into Internet access agreements).

[156] For individual users, access agreements usually are on a month-to-month basis. An ISP could notify its users of the addition of an arbitration clause in its contract, allowing those who object to terminate their service.

[157] *See* Henry J. Perritt, Jr., *Dispute Resolution in Electronic Network Communities*, 38 VILL. L. REV. 349, 354 (1993). Historically, host-based electronic systems have followed an authoritarian model. *See id.* at 354 n.13 and accompanying text. Examples of host-based electronic systems are America Online, CompuServe and Microsoft Network.

2. a democratic model, in which voluntary associations of network users set rules through informal social norms or formal multi-party agreements;[158] and
3. a formal legal model, in which contract offers and acceptances define acceptable conduct.[159]

The enforcement mechanisms are "1. the social enforcement model;[160] 2. the disconnection enforcement model;[161] and, 3. the legal enforcement model."[162] These rulemaking models and enforcement mechanisms can be combined in many ways, producing the parties' desired contractual relationship.[163]

1. *Authoritarian Rulemaking-Disconnection Enforcement Model*

The authoritarian rulemaking-disconnection enforcement model is the most prevalent enforcement model on the Internet. Authoritarian rulemaking combined with the disconnection enforcement model exemplifies the contractual relationships among various service providers and Internet users, such as: AOL to subscriber, ISP to subscriber and, to a lesser degree, university to user.[164]

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[158] *See id.* The democratic model historically has been followed by wide area networks (wans) or inter-networks, like the Internet. *See id.* at n.14 and accompanying text.

[159] *See id.* at 354. The formal legal model is a mixture of the previous two models with established law. While America Online's TOS follows the authoritarian model, a court determines whether the resultant agreement is a contract.

[160] Social forces in a cohesive community often act to discipline the offender beginning with informal disapprobation, and extending ultimately to expulsion. *See id.* at 355.

[161] *Id.* There is a distinction between vertical disconnection (e.g., where AOL terminates a user for violation of its TOS) and horizontal disconnection (e.g., public libraries using censorware on the public computers, blocking access to "objectionable" sites). *See id.*

[162] *Id.* This model represents the regular workings of the court system.

[163] *See id.*

[164] Universities tend to use due process mechanisms such as student disciplinary councils and administrative reviews of users' actions. Nevertheless, universities impose rules for Internet access and have the power to deny Internet services to their faculty, staff and students.

For example, under America Online's Terms of Service Agreement,[165] subscribers agree to a multitude of compulsory terms, including choice of law and choice of forum clauses. First, AOL restricts the selection of a user's account name to a nonoffensive name, one's own name or one not in violation of a third party's property rights.[166] Second, under the "Charges and Billing Practices" section, AOL reserves the right to change its fees and billing methods after notice is posted in its billing area.[167] Third, besides the usual software warranty disclaimers, AOL's TOS also includes an indemnification provision whereby the user agrees to "defend, indemnify and hold harmless AOL, Inc., . . . from all liabilities, claims and expenses, . . . that arises [sic] from breach of the TOS by use of or in connection with, transmission of any Content on AOL or the Internet . . . ."[168]

The applicable clauses in AOL's TOS state that the laws of the Commonwealth of Virginia govern the TOS and the user's membership.[169] The TOS also states that the user "expressly agrees [that] exclusive jurisdiction for any claim or dispute resides in the courts of the Commonwealth of Virginia [and that the user] expressly consents to the exercise of personal jurisdiction in the Commonwealth of Virginia in connection with any dispute or claim involving AOL, Inc."[170]

From AOL's TOS we can discern plainly that the relationship between America Online and its users follows the authoritarian model of rulemaking. Likewise, the enforcement mechanism is fashioned after the disconnection enforcement model, subjecting violators of AOL's rules for online conduct to account termination.[171] Further, the TOS provides that

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[165] America Online, *America Online Terms of Service* (last modified Jan. 21, 1997), America Online Keyword: TOS [hereinafter AOL TOS].

[166] *See id.* AOL also thereby reserves the right to make users change their AOL user name as well.

[167] *See id.* at cl. 2.4. America Online presents this clause in full caps and states that notice of the changes would be posted in a designated area or, at its discretion, e-mailed to users directly. Users have the option of discontinuing service if they do not agree with the changes. As a practical matter, users agree to changes without notice. AOL is not required to directly e-mail its users, and users rarely check the designated area for updates. Thus, upon expiration of 30 days after the posting of a change, the user, by default, agrees to the change in the terms of service.

[168] *Id.* at cl. 7.

[169] *See id.* at cl. 9.3.

[170] *Id.*

[171] *See id.* at cl. 8.2.

the user's sole remedy for dissatisfaction with AOL is to terminate her membership.[172]

America Online's TOS has not prevented subscribers from taking disputes to traditional courts. For example, as a result of its December 1996 membership drive, AOL's membership reached over 8 million users worldwide, causing access problems and spawning numerous lawsuits.[173] Even though access problems are expressly disclaimed in the TOS, AOL users filed numerous lawsuits over the log-on problems. Eventually, rather than litigate each claim, a mass settlement was reached between AOL and the Attorneys General of 37 states.[174] This flood of litigation against AOL demonstrates the need for arbitration clauses.

2. *Other Relationships*

The other significant relationship dichotomy that governs the internet working relationships among backbone carriers and providers at the hub cities is the democraticor formal legal model paired with the legal enforcement model. The parties are sophisticated, determining to a great degree the terms of their networking contracts through the negotiation process. The parties usually exhibit relatively equal bargaining power. The remedy under this relationship scheme is most often legal enforcement of the contract, with parties seeking to have provisions of the contract carried out.[175]

In a contract-based paradigm for implementing arbitration clauses into Internet access agreements, the varied relationships of parties on the Internet must be taken into account. Disputes among sophisticated network access providers will be different than disputes among users or disputes between users and access providers. Thus, in drafting arbitration clauses, the normal course of conduct between the parties and how such parties normally resolve disputes must be taken into account.

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[172] *See id.*

[173] *See* Kevin Maney, *Gridlock on Info Highway*, USA TODAY, Jan. 20, 1997, at B1.

[174] *See AOL to Repay Customers: Settlement Reached with Attorneys General*, CHICAGO TRIBUNE, Jan. 29, 1997 at C1, *available in* LEXIS, News Library, Chtrib file.

[175] *See* Perritt, *supra* note 157, at 366.

B. *Relationship Paradigms: Privity Issues*

Agreements to arbitrate necessarily encompass service provider to user relationships. The service provider will also contract with *its* service provider, perhaps a backbone provider. There is vertical privity from the individual user on up to the backbone provider. What seems to be missing is the horizontal privity—the contractual relationship between, for example, a user of America Online and a user of Netcom, Inc.[176]

For the arbitration clauses to be effective, a major legal bridge must be crossed linking the end users to each other on the network contracting scheme. For example, user A, a member of AOL, harms user B, a subscriber of Netcom. Assuming each party has an arbitration clause in her contract with her respective service provider, how do we link the two users such that the arbitration clauses bind the parties? The answer lies in the third party beneficiary doctrine.[177] For example, the Internet's networking protocol and connection scheme is somewhat similar to that of a telephone call: one user on the east coast uses her MCI long distance service to call another user on the west coast, whose provider is Pacific Bell.[178] The users are not, by virtue of their long-distance service contracts, in a contractual relationship with each other. In the context of the Internet network structure, the parties are even further removed from each other. Because the Internet uses dynamic routing, the same pathway between users on opposites sides of the country will not necessarily be the same for all communications.[179]

Interplay between users on dynamic routing networks creates a "combinatorial explosion" of contract transactions where legal rights and duties are defined solely through contract.[180] Third party contract

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[176] Netcom ON-Line Communications Services, Inc., is a major Internet service provider. <http://www.netcom.com>.

[177] *See* Perritt, *supra* note 157, at 387–388.

[178] *See id.* at 385.

[179] The Internet uses dynamic routing to send information. Dynamic routing allows the network to determine the best possible route for the information, avoiding breaks in the network and ensuring proper delivery of the message to the destination. Note, however, that in the Internet context, both the east coast and west coast users might be using America Online, in which case their relationship is much "closer."

[180] *See* Perritt, *supra* note 157, at 386.

beneficiary theory provides one solution to the problem of dealing with dynamic routing and contractual relationships between remote parties.[181]

In our example involving Internet user A and Internet user B, the contract could be interpreted as conferring benefits on either of the two parties.[182] Accordingly, a promise in a contract to arbitrate online disputes arising out of an online transaction would "create a duty in the promisor to any intended beneficiary [(either user A or user B)] to perform the promise."[183]

Note that the third party beneficiary is not identified when contracting for Internet access. However, an intended beneficiary need not be identified expressly in the contract;[184] rather, it is enough to recognize that the beneficiary's right furthers the intentions of the parties and that "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."[185] Thus, when parties enter into contracts for Internet access, they may agree to arbitrate disputes resulting out of their use of the Internet with parties unidentified at the time of contracting.

Relying on third party beneficiary doctrine, agreements to arbitrate can bring users together under a scheme for arbitration of online disputes. Thus, user A and user B will be in horizontal privity and bound to the terms of their contracts requiring them to arbitrate their online disputes.

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[181] *See id.* at 387; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981) (recognizing creation of duties and rights to intended beneficiaries).

[182] *See* RESTATEMENT (SECOND) OF CONTRACTS § 304 cmt. e, illus. 9 (1981). The common carrier insurance illustration provides the best fit for the network contract scenario: where "such liability insurance is required as a condition of the common carrier's license, it is plausible that the contracted insurance was intended to benefit the persons injured by the common carrier, and therefore, such an injured person may maintain a direct action against the insurance company." Perritt, *supra* note 157, at 387.

[183] RESTATEMENT (SECOND) OF CONTRACTS § 304. The drafters explain that "the parties to a contract have the power, if they so intend, to create a right in a third person." *Id.* at cmt. b.

[184] *See id.* § 308 (indicating that identification of the beneficiaries is not necessary at the time of contracting).

[185] Perritt, *supra* note 157, at 387. "Restatement § 302 differentiates intended beneficiaries from incidental beneficiaries, providing the example where a union employee is the intended beneficiary of a collective bargaining agreement, even though the employee is not a party to the contract; rather, the actual contracting parties are the employee's union and the employer." *Id.*

C. *Model Arbitration Provisions: A Beginning for Practical Drafting*

When drafting online arbitration agreements or clauses, the drafters must examine the relationships between the parties. Agreements tailored to the specific needs of the parties will yield the best results. When applicable, we will use the Virtual Magistrate Project as the default party of reference in the clauses below.

1. *American Arbitration Association Standard Clause*

The standard arbitration clause suggested for use by the American Arbitration Association provides a helpful starting point:

> 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 [applicable] rules and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.[186]

The standard clause provides a good starting point, but modification should be made before implementation in an online arbitration agreement. For example, reference to rules established by the AAA also is advisable.[187]

2. *User Conduct*

A clause addressing user behavior which may give rise to a dispute could read as follows:

> User agrees to arbitration with the Virtual Magistrate [or other body] for any disputes arising out of or in connection with user's use, association with, conduct with respect to, or access to the Internet or any other computer network including, but not limited to, the user's network service provider, proprietary host-based systems and ISPs.

This clause can be modified further to reflect the expected conduct and relationship between backbone providers and ISPs. Accordingly, such a

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[186] The American Arbitration Association, *Drafting Dispute Resolution Clauses* (last modified 1994) <http://www.adr.org/clausebook.html>.

[187] The Virtual Magistrate has opted to adopt the AAA rules in its resolution of disputes. *See Virtual Magistrate Project: Basic Rules*, *supra* note 49, ¶ 22.

clause could be modified to reflect the differing relationships between parties, encompassing issues already in contracts between backbone providers and ISPs, such as stable network access and flow-through traffic provisions.[188]

3. *Arbitrator Experience*

The arbitrators must possess a high level of Internet experience from which to draw upon in making decisions. A thorough understanding of network protocols, Internet legal issues and network contracts are baseline prerequisites for a successful arbitrator. The Virtual Magistrate Project provides that arbitrators will have a certain level of experience and technical competence.[189]

4. *Discovery*

In electronic transactions discovery problems can be highly exacerbated: the parties may be using encryption, there may be loss of real time transactions and files may have been deleted through the natural course of conduct.[190] ISPs should agree to comply in good faith with the discovery process to the benefit of the arbitration process and the resolution of the dispute.

5. *Third Party Beneficiary Clause*

The issue of horizontal privity can be handled properly with language

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[188] Flow-through traffic is Internet traffic that the hub or backbone provider agrees to allow to flow through its networks. Such traffic often does not originate from parties having a contractual relationship with the hub. An example would be an e-mail message from a person connected to Hong Kong Telecom to a person on America Online.

[189] *See Virtual Magistrate Handbook for Magistrates*, *supra* note 78, ¶ 2.

[190] Note that America Online, Inc. keeps certain records of users' transactions and communications. *See* AOL TOS *supra* note 165, at cl. 4.1. There is the possibility of the malicious destruction of computer files as well.

manifesting the parties' intent to create rights and duties to third party beneficiaries.[191] For example:

> The parties hereby agree that disputes arising out of conduct on the Internet often involve parties out of the jurisdiction of the user. The parties also recognize that such parties may have Internet access through other Internet service providers, backbone providers, or proprietary host-based systems.
>
> It is the EXPRESS INTENT of the USER AND SERVICE PROVIDER TO ACCORD AND GRANT RIGHTS TO SUCH THIRD PARTIES who may become parties to disputes arising out of the user's use of the Internet, as defined above in the USAGE CLAUSE.

Through clear and effective contract drafting, enforcement of arbitration clauses against third party beneficiaries should no longer be an obstacle preventing online arbitration.

6. *Costs and Frivolity of Online Disputes*

Often, minor disputes in the real world do not get resolved; rather, they dissipate with the passing of time. However, in the online environment, access to information and speed of communication often make for hasty decisionmaking by the actors, potentially leading some to institute questionable proceedings. Thus, a provision discouraging the filing of frivolous disputes should be included:

> User agrees to pay for the costs of arbitration proceedings jointly with other parties involved in the dispute. Please note: the user's regular cost of service does not pay for Virtual Magistrate proceedings.
>
> When a user files a complaint with the Virtual Magistrate, an "initial dispute validation proceeding" will be initiated. User agrees to pay for the initial dispute validation proceedings in the event of a frivolous filing or if the Virtual Magistrate deems the dispute unfit for arbitration. Should the matter be deemed fit for arbitration, the fees for the initial dispute validation proceeding will be allocated to all parties equally in addition to other fees allocated as stated herein.
>
> Unfit for arbitration shall be defined as filings subject to sanctions within the purview of Federal Rule of Civil Procedure 11.

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[191] For further discussion of third party beneficiaries and their rights, see *supra* notes 177–187 and accompanying text.

Such a clause provides for the efficient operation of online dispute resolution by establishing mechanisms whereby costs are justly and efficiently allocated. Further, the clause also operates to discourage frivolous disputes.

7. *International Binding Effect*

Disputes on the Internet easily can involve international parties; therefore, reference to the AAA International Arbitration Rules[192] as well as the UNCITRAL Rules is advisable. Such a reference could be encompassed with the following language:

> Any controversy or claim arising out of or relating to this contract shall be determined by arbitration administered by the American Arbitration Association in accordance with its International Arbitration Rules.[193]
>
> User further agrees that the proceedings of the Virtual Magistrate will have binding effect upon any subsequent litigation in the Federal Courts of the United States, The State Courts of any of the United States, The Military Courts of the United States and of Other Nations, The Courts of any Sovereign Nation, The Courts of California, The Courts and Decisions of the United Nations, The Courts of American Indian Tribal Nations and the Courts of International Jurisdiction.

The scope of transactions on the Internet encompasses the global marketplace, affecting users all over the world. For arbitration agreements to be effective, international considerations must be taken into account when drafting clauses.

VI. CONCLUSION

The need for viable alternative dispute resolution mechanisms on the Internet is increasing. Online disputes are increasing as a natural consequence of the increase in users on the Internet. Today, there are no viable mechanisms for online alternative dispute resolution. Through

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[192] *See* American Arbitration Association, *International Arbitration Rules of the American Arbitration Association* (last modified Apr. 1, 1997) < http://www.adr.org/intarb.html>.

[193] American Arbitration Association, *Drafting Dispute Resolution Clauses—Section III*, Ex. INTL 1 (last modified Apr. 1, 1997) <http://www.adr.org/clausebook3.html#international>.

reliance on the existing framework of contractual relationships, Internet users and providers can cooperatively alleviate the problem, leading to the natural evolution of a cyberspace customary law through the comprehensive implementation of ADR.