

# UIC John Marshall Journal of Information Technology & Privacy Law

---

Volume 19  
Issue 3 *Journal of Computer & Information Law*  
- Spring 2001

Article 2

---

Spring 2001

## Do You Want to Step Outside? An Overview of Online Alternative Dispute Resolution, 19 J. Marshall J. Computer & Info. L. 457 (2001)

William Krause

Follow this and additional works at: <https://repository.law.uic.edu/jitpl>



Part of the [Computer Law Commons](#), [Dispute Resolution and Arbitration Commons](#), [Internet Law Commons](#), [Privacy Law Commons](#), and the [Science and Technology Law Commons](#)

---

### Recommended Citation

William Krause, Do You Want to Step Outside? An Overview of Online Alternative Dispute Resolution, 19 J. Marshall J. Computer & Info. L. 457 (2001)

<https://repository.law.uic.edu/jitpl/vol19/iss3/2>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC John Marshall Journal of Information Technology & Privacy Law by an authorized administrator of UIC Law Open Access Repository. For more information, please contact [repository@jmls.edu](mailto:repository@jmls.edu).

# DO YOU WANT TO STEP OUTSIDE? AN OVERVIEW OF ONLINE ALTERNATIVE DISPUTE RESOLUTION

by WILLIAM KRAUSE†

## I. INTRODUCTION

The mirror or screen world will contain and reflect many facets of the physical world, and will also contain and reflect much of the conflict of the physical world. It will be an environment that will confront us with a broad variety of disputing behaviors and attitudes, some of which are familiar from the physical world and some of which are not. In addition, it will lead to the development of online dispute resolution processes and institutions, thus mirroring much conflict resolving behavior of the physical world.<sup>1</sup>

This quote, printed only five years ago, reads strangely like ancient prophesy. The then newly-formed thought of dispute resolution conducted online is now transformed into a growing, though embryonic, world of online Alternative Means of Dispute Resolution (“ADR”).<sup>2</sup> The goal of this article is twofold: first, to take a snapshot of the resources currently available for private dispute resolution conducted through the medium of the Internet and, second, to examine the functionality and usefulness of online dispute resolution, discussing a series of policy positives and negatives and examining how these considerations are or could be dealt with.

---

† Associate, Lane, Powell, Spears, Lubersky, LLP, Seattle, Washington; J.D. Seattle University School of Law, *summa cum laude*; M.A. North Carolina State University. The author would like to thank his wife, Heather Lynne Seymour Krause for her love and support emotionally and financially, and Professor Gregory Silverman for his guidance and oversight.

1. M. Ethan Katsh, *Dispute Resolution in Cyberspace*, 28 Conn. L. Rev. 953, 955 (1996).

2. See generally Federal Trade Commission, Bureau of Consumer Protection, *Consumer Protection in the Global Electronic Marketplace* <<http://www.ftc.gov/bcp/icpw/looking-ahead/looking-ahead.htm>> (accessed Oct. 10, 2001).

## A BLURRY SNAPSHOT OF CURRENT ONLINE ADR

Due to the constant changing quality of the Internet, it would be impossible to catalogue all of the resources available for dispute resolution that are either available on or connected with the Internet. In the primordial soup of the Internet, private providers and academic or industry experiments regularly appear with flurries of press coverage and, just as regularly, silently expire.<sup>3</sup> Current dispute resolution resources generally disclaim their comprehensiveness.<sup>4</sup> Although quite useful for identifying types of providers and gaining insight into how “established” a given Web resource provider may be, these lists are only “jumping off” points—sites praised in even the most current lists are sometimes no longer operative, have changed hands, and/or have changed missions.<sup>5</sup> This section therefore aspires to a more general objective: to identify current notable providers of online ADR resources and the major paradigms among those providers.

## THE VIRTUAL MAGISTRATE

The Virtual Magistrate (“VMAG”) project was an early experiment in online arbitration developed at a 1995 meeting sponsored by the National Center for Automated Information Research (“NCAIR”) and the Cyberspace Law Institute (“CLI”).<sup>6</sup> VMAG was undertaken by a varied

---

3. See e.g. Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U. Cal. Davis L. Rev. 151, 220 (2000) (stating “[t]hese online services tend to come and go as their business plans succeed or fail, or their grants expire”).

4. James Boskey, *Useful ADR Sites on the WorldWideWeb* ¶ 1 <<http://www.mediate.com/articles/boskey.cfm>> (accessed Mar. 8, 2001) (noting that “[i]t is impossible to list all of the other sites dedicated to ADR that are available on the World Wide Web, nor would such a list be very useful. . . [i]nstead, what I have attempted to provide here is a list of major sites for the past year that will make good starting points for the [W]eb surfer with an interest in dispute resolution”); see generally Alan Weiner, *Opportunities and Initiatives in Online Dispute Resolution* <<http://www.mediate.com/articles/awiener1.cfm>> (accessed Mar. 28, 2001); Colin Rule, *Online Dispute Resolution Links* <<http://www.mediate.com/articles/odrlinks.cfm>> (accessed Mar. 28, 2001). ADRR.com, a site kept by Steven R. Marsh, provides links to “substantial on-line materials for alternative dispute resolution and mediation,” including a “Tutorial for Mediation Related Web Site Design.” Steven R. Marsh, *ADR Resources* ¶ 1 <<http://www.adrr.com>> (accessed Apr. 8, 2001).

5. See generally <<http://www.webdispute.com>> (accessed Mar. 28, 2001). On a recent visit to the site, however, the home page was blank except for the site’s title and a note, “Web site is being reconstructed. We apologize for any inconvenience.” See also e.g. Wiener, *supra* n. 4, at ¶ 19 (stating “[W]eb dispute.com currently offers Document/E-Mail Arbitration for disputes resulting from e-commerce transactions”); see also generally *The Virtual Magistrate Project: Frequently Asked Questions*, *infra* n. 6.

6. *The Virtual Magistrate Project: Frequently Asked Questions* ¶ 10 <<http://www.vmag.org/docs/FAQ.html>> (accessed Mar. 28, 2001) [hereinafter VMAG FAQ]; Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 Ohio St. J. on Dis. Res. 675, 684 (2000) [hereinafter Perritt, *Demand for New Forms*].

group of partners, including the American Arbitration Association ("AAA") and counsel for American Online and CompuServe.<sup>7</sup> The original motivation was to respond to a dilemma then facing Internet service providers: if and when the providers were accused of allowing access to copyrighted, private, fraudulent or defamatory material, they could either do nothing and face the wrath of the complainer, or the providers could take down the offensive material and face the wrath of the customer who had created the posting.<sup>8</sup> VMAG was conducted and operated entirely over the Web using e-mail communications.<sup>9</sup>

VMAG was a self-described attempt "to respond to the need for immediate, global dispute resolution on the Net."<sup>10</sup> Its decisions were not binding and users were free to "pursue other remedies."<sup>11</sup> In 1999, control of the site was transferred from the Villanova University School of Law to the Chicago-Kent College of Law and the site's rules were modified to expand the types of cases the site would arbitrate.<sup>12</sup> However, few potential claimants contacted the site, and although the site is still posted, the AAA's participation has dwindled and the site has apparently become dormant.<sup>13</sup> During its tenure, only one case was actually decided by a VMAG arbitrator.<sup>14</sup>

#### SETTLEMENT SITES

In the last couple of years a number of privately-run Web sites have appeared that perform a simple service: they allow both sides of a dispute to reduce their claim or acceptable liability to a monetary amount, enter their desired settlement levels into a computer, and if the numbers coincide, to reach an automated and binding settlement.<sup>15</sup> Examples include ClickNsettle, Claimsettle, 1-2-3 Settle, AllSettle, SettlementOnline, SettleOnline, SettleSmart and USSettle. As one set of commentators has noted, although these sites perform "an extraordinary

---

7. *Id.* at 684.

8. *Id.* The Online Copyright Infringement Liability Limitation Act now provides a safe harbor for Internet service providers in some circumstances. 17 U.S.C. § 512 (Supp. 1998).

9. Perritt, *Demand for New Forms*, *supra* n. 6, at 685-86.

10. VMAG FAQ, *supra* n. 6, at ¶ 3.

11. *Id.*

12. Perritt, *Demand for New Forms*, *supra* n. 6, at 686. "The VMAG arbitration program accepts complaints about online disputes over communications, property, tort and contract disputes." VMAG FAQ, *supra* n. 6, at ¶ 5.

13. *See* Perritt, *Demand for New Forms*, *supra* n. 6, at 686-87.

14. *Id.*

15. *See generally* ClickNSettle.com, *Speed and Justice for All* <<http://www.clicknsettle.com/index1.cfm?CFID=7694&CFTOKEN=94894873>> (accessed Oct. 22, 2001); *see also generally* Claimsettle.com, *Your Internet Solution to Simplify and Streamline the Settlement Process* <<http://www.claimsettle.com/FlashIntro.htm>> (accessed Oct. 22, 2001).

rily simple set of calculations,” they can be “extraordinarily useful, particularly in some disputing arenas, such as insurance company and claimant disputes, in which the disagreement is over money and where settlement out of court always has been expected.”<sup>16</sup>

Settlement site services are necessarily limited in that they do not purport to evaluate the legal viability or strength of claims, they simply allow parties, who hopefully have some grasp as to the market value of the claim to “meet in the middle.”<sup>17</sup> The primary use of settlement sites appears to be in the insurance claim area.<sup>18</sup> In this context the sites offer a number of advantages. First, settlement sites remove the possibly acrimonious face-to-face or over the phone haggling and allow each party to efficiently calculate its perception of the case’s value and potentially resolve the dispute without further negotiations.<sup>19</sup> Secondly, settlement sites speed the process with “cyber-settlements” typically occurring in ten days as opposed to three to four weeks for traditional negotiations.<sup>20</sup> Because the process is cheap and quick, it has been highly attractive to insurance companies, with at least one investing substantially in ClickNsettle.com.<sup>21</sup> Lastly, privacy is maintained in that if no settlement is reached, the numbers presented by each side are not revealed; the process therefore cannot be used as a stalking horse to discover the opposition’s breaking point, and future negotiations can proceed on an equal playing field.<sup>22</sup>

---

16. Ethan Katsh, Janet Rifkin & Alan Gaitenby, *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of “Ebay Law,”* 15 Ohio St. J. on Dis. Res. 705, 720-21 (2000) [hereinafter Katsh, *E-Commerce, E-Disputes*].

17. See *Online ADR: Its Utility and Policy Issues, Sophistication of Users* *infra* Part III, § D.

18. Randy Barrett, *Justice Is Just a Mouse Click Away*, Interactive Week from ZDWire ¶ 7 (Feb. 28, 2000) (available at 2000 WL 4064970).

19. Katsh, *E-Commerce, E-Disputes, supra* n. 16, at 722. “It cuts a lot of the B.S. off the table and we start looking more realistically at the case’s value. . . .”; ClickNSettle.com, *What They Are Saying about Us* ¶ 16 <<http://clicknsettle.com/saying.cfm>> (accessed Jan. 27, 2001) (quoting Michael Kambouris, Massachusetts plaintiffs’ attorney on ABC World News This Morning).

20. Catherine Arnold, *Online Settlement Choices Open Up*, Natl. Underwriter Prop. & Casualty-Risk & Ben. Mgmt. 29 ¶¶ 6, 7 (Aug. 21, 2000) (available in 2000 WL 10593792) (quoting Ray Lao, Associate Regional Vice President of Traveler’s Property Casualty).

21. Interview by Dennis B. Sullivan with Fred R. Marcon and Frank J. Coyne, chairman and president and chief executive officer, respectively, Insurance Services Office, Inc. (Oct. 1, 2000) (available at 2000 WL 28043508). Insurance Services Office, Inc. (“ISO”) is an independent information provider to the insurance industry, e.g., providing prospective loss costs. *Id.* at 6. Mr. Coyne noted, “We will be investors in some of these ecommerce solutions, not just because we are looking for investment return, but because it’s important to the industry that certain initiatives get underway.” *Id.* ISO invested \$4 million to acquire a sixteen percent ownership share of the parent company of ClickNSettle.com. *Id.*

22. See generally *id.*

Unlike VMAG, settlement sites are doing considerable business. Between its start in 1998 and February 2000, Cybersettle.com settled cases with an aggregate value exceeding thirty million dollars.<sup>23</sup> These settlement systems are, however, only useful in a very narrow band of negotiations; they will only work where claim values can be reduced to dollars and where the two sides can come within a certain percentage of the other's perceived claim value. The main drawback from a policy standpoint, which will be discussed more thoroughly below, is that a fair result will only appear if both parties have some sense of the claims actual value, i.e., if the claim was to proceed to litigation, what range of recovery amounts could the plaintiff expect? If the claimant is unsophisticated or inexperienced and is using the system without counsel, that claimant might get the short end of the proverbial stick.

ClickNSettle is the only publicly traded dispute-resolution company in the U.S.,<sup>24</sup> and because of this and its frequent mention in current articles, this article will examine it as an example of the industry. ClickNsettle settlements are binding, as both parties must agree to be contractually bound by any agreement before entering bids.<sup>25</sup> The company originally employed a "round" bidding model in which parties would enter three increasing or decreasing dollar amounts, and these would be compared.<sup>26</sup> Because this system provided settlements in, on the average, only two to nine percent of cases, the model was revamped to a "limited bid" model, which is producing settlements in about fifty percent of cases.<sup>27</sup> Although this does not equal the estimated eighty percent settlement rate of in-person mediation sessions, the inexpensive and quick nature of the process make it, at least in the eyes of the corporation's chief executive officer, a favorable choice.<sup>28</sup> The cost to use the system is typically around \$250 per case.<sup>29</sup> Realizing that the cyber-settlement process is a limited tool in the alternative dispute-resolution workshop, the company is also currently expanding its capacities by hiring arbitrators, including former judges and offering "Web-enabled" traditional arbitration and mediation services.<sup>30</sup>

---

23. See generally Barrett, *supra* n. 18.

24. See generally ClickNSettle.com *Corporate Information* <[http://www.clicknsettle.com/corp\\_info.cfm](http://www.clicknsettle.com/corp_info.cfm)> (accessed Jan. 27, 2001).

25. See generally ClickNSettle.com news release <<http://clicknsettle.com/content.cfm?memoid-36>> (accessed Jan. 1, 2001).

26. Arnold, *supra* n. 20, at ¶ 12.

27. *Id.* at ¶¶ 11, 13.

28. *Id.* at ¶ 14. (quoting Roy Israel, president and chief executive officer of ClickNSettle, who derived the percentage figures above from his clients).

29. See generally ClickNSettle.com news release, *supra* n. 25.

30. *Id.*; Ian S. Bruce, *Soon, We Will Take the Law into Our Own Hands* ¶ 10 (Feb. 7, 2000) (available in 2000 WL 7538423) (noting that "[f]or added credibility, the company has begun hiring flocks of retiring judges to sit on its case review panels").

## SQUARETRADE

A recent newcomer to the online dispute resolution, but a major player due to its partnership with eBay, SquareTrade provides a forum to mediate e-commerce consumer disputes.<sup>31</sup> SquareTrade also provides a “seal” program, through which sellers, including auction sellers, small businesses and large enterprises can, by agreeing to settle disputes at the site, place the SquareTrade “seal” on their Web pages, thereby, in theory, assuring potential buyers that they will have recourse if a transaction goes awry.<sup>32</sup>

The process, which is free to consumers, begins with the filing of a complaint.<sup>33</sup> SquareTrade then notifies the other party via e-mail and sends both parties a password so they may enter a secure “case page.”<sup>34</sup> The parties then participate in a “direct negotiation” whereby they attempt to reach an agreement via direct communication.<sup>35</sup>

SquareTrade estimates that approximately sixty percent of cases are resolved at this stage.<sup>36</sup> If this fails, the parties may request the participation of a trained mediator who facilitates positive, solution-oriented discussion by acting as a go-between for the parties.<sup>37</sup> Once the mediator intervenes the parties no longer communicate directly and do not see the discussion between the other party and the mediator.<sup>38</sup> The mediator will only suggest solutions if asked to do so and will base any recommendation on “the information provided by the parties” and principles of fairness.<sup>39</sup>

This mediation is non-binding, and the parties retain their option to pursue recourse through traditional legal methods offline.<sup>40</sup> If the transaction occurred on eBay, the parties may use that system’s “Feedback Forum” to leave comments about their experience. Or, if a purchased

31. See generally SquareTrade, *Homepage* <<http://www.squaretrade.com>> (accessed Oct. 22, 2001) [hereinafter SquareTrade].

32. *Id.*

33. SquareTrade, *A Simple, 4 Step Process to Resolve Disputes* ¶ 1 <<http://www.squaretrade.com>> (accessed Oct. 22, 2001) [hereinafter SquareTrade, *Simple 4 Step Process*].

34. *Id.* at ¶ 2.

35. *Id.* at ¶ 3.

36. See generally *id.*

37. *Id.* at ¶ 4.

38. See generally *id.*; SquareTrade Mediation, *Top Ten Frequently Asked Questions* ¶ 5 <[http://squ.../help\)odr\\_dn.jsp;jsessionid=p903fhv091?vhostid=tomcat1&stmp=squaretrade&cntid=p903fhv09](http://squ.../help)odr_dn.jsp;jsessionid=p903fhv091?vhostid=tomcat1&stmp=squaretrade&cntid=p903fhv09)> (accessed Apr. 8, 2001) [hereinafter SquareTrade FAQ]. SquareTrade’s mediators go through an extensive training program. *Special Supplement: ADR 2000, CPR’s Online Seminar; ADR & Technology*, 18 *Alternatives to High Cost Litig.* 129 (2000) [hereinafter *CPR’s Online Seminar*] (identifying a comment of Sandra A. Sellers, of Technology Mediation Services LLC, a SquareTrade mediator).

39. *Id.*

40. SquareTrade FAQ, *supra* n. 38, at ¶ 13.

item never arrived, a buyer may be eligible for partial reimbursement through eBay's Fraud Protection Program.<sup>41</sup>

### iLEVEL

iLevel is a privately run mediation site that appears to target consumers as potential site "members" and emphasizes the power of the "community" of potentially angry customers to convince vendors that mediation would be to their benefit.<sup>42</sup> On its Web site, after noting some statistics tending to show the business benefits of creating and retaining happy customers, the company states that "[h]onest and concerned vendors understand your true value and will do whatever they can, within reason, to keep you happy."<sup>43</sup> The site therefore gives the parties to a dispute thirty days and "at least two opportunities to reconcile" before employing any negative incentives.<sup>44</sup> However, if those discussions fail, the site will post all information regarding the case in its "community repository," where it will be available to inform the "community."<sup>45</sup> Unlike other services, many of which will have no effect if the vendor chooses not to respond and participate, iLevel notes its power comes from the "community" of consumers, and if a vendor does not participate, the record of the dispute will be posted for all to see.<sup>46</sup>

iLevel envisions a full range of potential remedies being available to the wronged member: encouraging consideration of "structured payments, letters of recommendation or apology, confidentiality agreements, and agreements for future business."<sup>47</sup> To further encourage the "member" to vent her wrath, in the "court of public opinion," on a page titled "It's legal," iLevel lays out the five elements that a plaintiff would need to prove to sustain a defamation claim.<sup>48</sup> The site then notes that "[o]pinions, properly worded and identified as such, are not defamatory."<sup>49</sup> However, the page then goes on to reference the Telecommunications Act of 1996, which could shield it from liability for a "member's"

---

41. *See generally id.*

42. iLevel, *iLevel Home Page* <<http://www.ilevel.com>> (accessed Mar. 28, 2001).

43. iLevel, *Benefits* ¶ 1 <<http://www.ilevel.com/visitor/benefit1/htm>> (accessed Sept. 29, 2001).

44. *Id.* at ¶ 2.

45. *Id.*

46. *Id.* at ¶ 3 (noting that "[v]endor participation is actively solicited and encouraged . . . However, absent a vendor's response, a member's dispute will be posted without vendor input. . . The [vendor] will be given multiple opportunities to communicate and to reconcile with you, the member. . . [n]on-membership and/or non-participation does not shield the [vendor] from a posting of the dispute.").

47. *Id.* at ¶ 11.

48. iLevel, *It's Legal* ¶ 3 <<http://www.ilevel.com/visitor/legal.htm>> (accessed Mar. 28, 2001).

49. *Id.*



defamatory statement.<sup>50</sup>

Information about membership fees is not available on any of the introductory pages, and an e-mail query to the site's Web master regarding fees drew no response. However, it appears that members are charged an annual fee for which they may use the site and its resources as much or as little as desired with no additional fees.<sup>51</sup>

### INTERNET NEUTRAL

As opposed to iLevel, which appears directed towards a target audience of consumers, the mediation site Internet Neutral markets itself as an inexpensive alternative dispute-resolution resource for vendors or other parties who have the opportunity to set contract terms.<sup>52</sup> Notably, the site includes on its home page a link to a sample contract term that would require non-binding mediation provided by Internet Neutral as a precursor to any other recourse.<sup>53</sup>

The process laid out in this clause would require the disputing party to first put its claim, including the "substance and scope of the dispute, . . . including legal and factual justifications, the remedy sought, and any other pertinent matters," in writing and deliver it to the other party.<sup>54</sup> The responding party would then have ten days to put its side in writing, after which the parties would follow up with a telephone conference "to negotiate in good faith."<sup>55</sup> If the telephone conference does not result in resolution, the parties would then submit the dispute to the mediators at Internet Neutral or, if Internet Neutral was unavailable or "conflicted out," to another, similar Web site, and split the fees.<sup>56</sup> The parties would then mediate in good faith for at least ten days before either would be free to pursue any other course of action.<sup>57</sup> The entire proceedings would be confidential, and any "conduct, statements, promises, offers, views, and opinions" would be deemed non-discoverable and inadmissible in later litigation unless they were discoverable or ad-

---

50. *Id.* at ¶ 7 (quoting "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider"). The terms are not defined on the site.

51. iLevel, *Cost* ¶ 2 <<http://www.ilevel.com/visitor/cost/htm>> (accessed Mar. 3, 2001) (stating somewhat contradictorily, "retail price of \$0.00").

52. *See generally* Internet Neutral-Online Mediation Specialists <<http://www.Internetneutral.com>> (accessed Mar. 28, 2001).

53. *See generally id.*; *see generally* Internet Neutral-Online Mediation Specialists <<http://www.Internetneutral.com/terms.htm>> (accessed Mar. 28, 2001) [hereinafter IN Contract Clause].

54. Internet Neutral-Online Mediation Specialists, *Dispute Resolution Provisions* ¶ 1 <<http://www.internetneutral.com/terms.htm>> (accessed Sept. 29, 2001).

55. *Id.* at ¶¶ 2, 3.

56. *Id.* at ¶ 4.

57. *Id.* at ¶ 6.

missible on an independent basis.<sup>58</sup>

The costs for this service consist of a minimum charge of \$250 for two hours of mediation (including breaks) and two hours of mediator preparation time.<sup>59</sup> After that, the parties are charged \$125 per hour.<sup>60</sup> If the parties agree to mediate via e-mail only, Internet Neutral will charge a per-minute fee, varying by the amount in dispute, starting at one dollar per minute for claims up to \$100 and rising to six dollars per minute for claims over \$1 million.<sup>61</sup> For the per-minute fees, each party must pay an up-front retainer based on their share of a minimal estimate.<sup>62</sup>

### ICANN's UDRP

Probably the most famous and certainly the most written-about Internet arbitration service is the Uniform Domain Name Resolution Process ("UDRP") of the Internet Corporation for Assigned Names and Numbers ("ICANN"). Historically, the management of the domain name system<sup>63</sup> was under the control of Network Solutions, a private company operating under a U.S. government-granted monopoly. In 1997, President Clinton directed the Secretary of Commerce to take steps to put control of the Internet to private hands, being careful to do so in a way that would increase both competition and international participation in the Internet's management.<sup>64</sup> Subsequently, ICANN was established as a non-profit corporation in California.<sup>65</sup> In November 1998, ICANN entered into a memorandum of understanding with the Department of Commerce to work jointly on a transition from government to private Internet management.<sup>66</sup> As a private organization, ICANN has no inherent legal authority. Its powers are based on contracts signed by par-

---

58. *Id.* at ¶ 8.

59. See generally Internet Neutral-Online Mediation Specialists, *The Fees* <<http://www.Internetneutral.com/fees.htm>> (accessed Mar. 28, 2001).

60. See generally *id.*

61. See *id.*

62. See *id.*

63. The four key functions of the Internet that Network Solutions formerly oversaw, and that ICANN now oversees, are: (1) the technical coordination of the domain name system (i.e., [www.x.com](http://www.x.com), which the system converts to numbers, thereby allowing Internet addresses to be assigned easily-remembered names), (2) the allocation of Internet addresses, (3) the assignment of protocol parameters, and (4) the management of the root server system (i.e., the pyramid-like hierarchy of computers). John F. Delaney & M. Lorlane Ford, *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, 631 PLI/Pat 31, n. 167 (2001) [hereinafter *The Law of the Internet*]; ICANN, *Background Page* ¶¶ 1, 5 <<http://www.icann.org/general/background.htm>> (accessed Mar. 28, 2001) [hereinafter ICANN Background].

64. *The Law of the Internet*, *supra* n. 63, at 166.

65. ICANN Background, *supra* n. 63, at ¶ 5.

66. *Id.*

ticipants, the policies for which are hopefully guided by the consensus of the worldwide Internet community.<sup>67</sup>

In May 1999, after receiving input from government, industry, private citizens and after the presentation of a study by the World Intellectual Property Organization ("WIPO"), ICANN's board of directors voted to institute a uniform dispute-resolution policy to resolve disputes between holders of trademarks and holders of domain names that allegedly infringed on those trademarks.<sup>68</sup> In October 1999, ICANN approved UDRP.<sup>69</sup>

As part of its system for assigning domain names, ICANN accredits registrars who must agree to abide by UDRP.<sup>70</sup> By applying to a registrar to obtain a domain name or by renewing a domain name, the domain name holder "represent[s] and warrant[s] that, to their knowledge, the domain name does not infringe on "the rights of any third party" and is not held for "an unlawful purpose."<sup>71</sup> The domain name registrant ("registrant") also agrees to submit to a mandatory administrative proceeding should a trademark holder ("complainant") file a proper complaint against them under UDRP.<sup>72</sup>

A complainant must assert three things: the registrant's domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; the registrant has no rights or legitimate interests in respect of the domain name; and the registrant's domain name has been registered and is being used in bad faith.<sup>73</sup>

The bad faith requirement will be considered met if the complainant shows that: (1) the domain name was acquired "primarily for the purpose of selling, renting, or otherwise transferring" the domain name to a trademark holder for consideration greater than out-of-pocket expenses in acquiring the domain name; (2) the domain name was registered to prevent the trademark holder from using its mark in a domain name *and* the registrant has "engaged in a pattern of such conduct"; (3) the domain name was registered primarily to disrupt a competitor's business; or (4) the domain name is used in a deliberate attempt to attract business cus-

67. *Id.* at ¶ 9.

68. See generally ICANN, *Frequently Asked Questions* <<http://www.icann.org/general/faq1.htm>> (accessed Mar. 28, 2001) [hereinafter ICANN FAQ].

69. See generally ICANN, *Uniform Domain Name Dispute Resolution Policy* <<http://www.icann.org/udrp/udrp-policy-24oct99.htm>> (accessed Mar. 28, 2001) [hereinafter ICANN UDRP].

70. To become accredited, registrars must also meet other criteria, including minimum capitalization and carrying liability insurance. *The Law of the Internet*, *supra* n. 63, at n. 167. There are currently over 70 accredited registrars. *Id.*

71. ICANN UDRP, *supra* n. 69, § 2.

72. *Id.* § 4(a).

73. *Id.*

tomers who confuse the name with a complainant's trademark.<sup>74</sup>

ICANN does not participate in these proceedings.<sup>75</sup> Instead, the complainant must choose an "approved provider" who will administer the proceeding.<sup>76</sup> There are currently four approved providers: the CPR Institute for Dispute Resolution, eResolution, the National Arbitration Forum, and the WIPO.<sup>77</sup> The only remedies available under UDRP are cancellation of the domain name or transfer of the domain name to the complainant.<sup>78</sup>

Once the arbitrator rules on a case, ICANN will, if called for by the decision, cancel or transfer a disputed domain name. However, UDRP is only an optional remedy; the disputant can instead bring suit in any competent court, and although the registrant is compelled to arbitrate, she may fight an unfavorable decision in court.<sup>79</sup>

Although UDRP process is widely heralded as e-mail based, the complainant is required to forward a copy of the complaint to the registrant by postal mail, facsimile *and* e-mail.<sup>80</sup> Thereafter written communication to and between the disputants "shall" be made by the means the disputant has specified—fax, e-mail or postal or courier service.<sup>81</sup>

The disputants have a choice between having their case heard by a single arbitrator or a panel of three, and the costs are borne by the complainant unless the registrant elects to use a three-arbitrator panel, in which case the fees are split.<sup>82</sup> Fees are set by the approved providers and vary. For a single arbitrator and a complaint dealing with only one or two domain names, eResolution charges \$1,250, while it charges \$4,600 for three panelists deciding a complaint covering between eleven

---

74. *Id.* § 4(b).

75. *Id.* § 4(h).

76. *See generally id.*

77. *See generally* ICANN, *Approved Providers for Uniform Domain Name Dispute Resolution Policy* <<http://www.icann.org/udrp/approved-providers.htm>> (accessed Mar. 28, 2001).

78. ICANN UDRP, *supra* n. 69, § 4(i).

79. *Id.* One commentator has suggested that because of the rapid results provided by ICANN's UDRP and the civil damages provided under the U.S. Anticybersquatting Consumer Protection Act, a wise trademark holder will pursue both remedies simultaneously. Jason M. Osborn, *Note, Effective and Contemporary Solutions to Domain Name Disputes: ICANN's Uniform Domain Name Dispute Resolution Policy and the Federal Anticybersquatting Consumer Protection Act of 1999*, 76 *Notre Dame L. Rev.* 209, 240-41 (2000) (citing *Broadbridge Media, LLC v. HyperCD.com*, 106 F. Supp. 2d 505 (S.D.N.Y. 2000)) (allowing suit under the Anticybersquatting Consumer Protection Act concurrently with proceedings under ICANN's UDRP).

80. ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy* § 2 <<http://www.icann.org/udrp/udrp-rules-24oct99.htm>> (accessed Mar. 28, 2001) [hereinafter ICANN UDRP Rules].

81. *Id.* § 2(b).

82. *Id.* § 6(c).

and fifteen domain names.<sup>83</sup> The CPR Institute for Dispute Resolution charges between \$2,000 (one panelist, one to two domain names) and \$6,000 (three panelists, three to five domain names), with fees for disputes of over six domain names decided in consultation.<sup>84</sup> The fees charged by the National Arbitration Forum range between \$950 (one domain name, one arbitrator) to \$4,000 (eleven to fifteen domain names, three panelists), with fees for larger suits determined in consultation.<sup>85</sup> The fourth approved provider, WIPO, charges fees between \$1,500 (up to five domain names, one arbitrator) and \$4,000 (up to ten domain names, three panelists).<sup>86</sup>

There are no in-person hearings (including tele-conference, video-conference or Web conference) unless the arbitrator decides, "as an exceptional matter," that it is necessary to decide the complaint.<sup>87</sup> Because the arbitrator or panel has only fourteen days to render a decision, it is unlikely that this would happen.<sup>88</sup> Again, absent extraordinary circumstances, the written decision of the arbitrator will be published on ICANN's Web site.<sup>89</sup>

As of March 27, 2001, ICANN reported that 2,474 cases had reached disposition under UDRP.<sup>90</sup> Of those, 1,972 were resolved in favor of the complainant, with a total of 3,506 domain names transferred and twenty-one cancelled, 483 were resolved in favor of the respondent, and eighteen cases reached a split decision.<sup>91</sup> Additionally, fifty-five cases were settled, 266 were dismissed, and in 321 cases there was no disposition.<sup>92</sup>

## II. ONLINE ADR: ITS UTILITY & POLICY ISSUES

Because the Internet and the concept of online dispute resolution are so new and are changing and developing rapidly, practical and policy issues

---

83. See generally eResolution, *Schedule of Fees* <[www.eresolution.ca/services/dnd/schedule.htm](http://www.eresolution.ca/services/dnd/schedule.htm)> (accessed Mar. 28, 2001).

84. CPR, *Supplemental Rules and Fees* § 13 <[http://www.cpr.adr.org/ICANN\\_RulesAndFees.htm](http://www.cpr.adr.org/ICANN_RulesAndFees.htm)> (accessed Mar. 28, 2001).

85. See generally National Arbitration Forum, *Schedule of Fees* <<http://www.arbforum.com/domains/domain-fees.asp>> (accessed Mar. 28, 2001).

86. See generally WIPO, *Schedule of Fees under the ICANN Policy* <<http://www.arbiter.wipo.int/domains/fees/index.html>> (accessed Mar. 28, 2001).

87. ICANN, UDRP Rules, *supra* n. 80, § 13.

88. *Id.* § 15.

89. *Id.* §16(b). The arbitrator or panel would decide if such extraordinary circumstances exist and would then redact as necessary. See *id.* The remainder of the decision would be published. See generally *id.*

90. See generally ICANN, *Summary of Status Proceedings* <<http://www.icann.org/udrp/proceedings-stat.htm>> (accessed Mar. 28, 2001).

91. See generally *id.*

92. See generally *id.*

swirl together like leaves caught up in a whirlwind. An initial and underlying question is this: Who will make and enforce the rules on the Internet? Should the law of the Internet be law determined by states, enacted by judges? Should governments stand back and allow a private legal framework to evolve? Would a hybrid form of legal ordering be best?

Academics skeptical of state-sponsored regulation note that the Internet is a borderless world; there are no lines drawn between the bits and bytes as they roar around the Cisco highway.<sup>93</sup> Because life and business in a cyber-world will entail phenomena heretofore unseen in the real world, new rules will emerge to govern it.<sup>94</sup> Those on the other side of the debate see a place for private ordering, but urge that some form of overarching regulation with enforcement power will have to be put in place to pursue paternalistic ends and to protect third parties.<sup>95</sup>

A full and deep discussion of the arguments raised in this debate would go well beyond the scope of this article, but it seems most likely that some form of hybrid legal framework will form. While it makes perfect sense to allow businesses to order the legal obligations, rights, and recourse in their dealings with each other, the Internet will not thrive if it becomes a jungle where those with high levels of sophistication, wealth, and/or bargaining power are able to set their own rules to the detriment of consumers or casual users.<sup>96</sup> It will be interesting to see whether some form of overarching or underlying "public" law will be developed by the various states by consensus (a logistical nightmare) or as a consensus of Internet users by some private entity like ICANN. After all, what is "government?", merely a territorial ruling body (and perhaps the Internet is a new territory) given its power by some combination of consensus and might.<sup>97</sup>

---

93. See David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 *Stan. L. Rev.* 1367 (1996). This paper is widely regarded as the seminal work of "regulation skeptics." See *id.*

94. See *id.*

95. See Jack L. Goldsmith, *Against Cyberanarchy*, 65 *U. Chi. L. Rev.* 1199 (1998); Jack L. Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 *Chi.-Kent L. Rev.* 1119 (1998).

96. See Henry H. Perritt, Jr., *Economic and Other Barriers to Electronic Commerce*, 21 *U. Pa. J. Intl. Econ. L.* 563 (2000) [hereinafter Perritt, *Economic and Other Barriers*]. Perritt, Dean of the Chicago-Kent College of Law, notes:

Public law can set minimum, and relatively general, standards of conduct and provide backup enforcement. Used in this way, public law defines the boundaries within which a multiplicity of private regulatory regimes can work out detailed rules, first-level dispute resolution, and rule enforcement machinery.

*Id.* at 575.

97. I think that consensus, rather than might, will be the key to ordering the online, barring some jump in technology better suited for a movie starring Arnold Schwarzenegger.

Alternative dispute resolution will likely be incorporated as a first-level option for dispute resolution, and, most likely, will be employed in the context of privately ordered transactions. There are three basic models for ADR: negotiation, arbitration, and mediation.<sup>98</sup> In negotiation, the parties resolve a dispute through private discussions aimed at reaching an agreement without outside intervention.<sup>99</sup> When a neutral third party is brought in to help facilitate and focus negotiations, this is called mediation.<sup>100</sup> And when a third party is given the power to resolve the matter, in a binding or non-binding decision, this is called arbitration.<sup>101</sup>

One of the main benefits of ADR is that by employing it parties to a transaction can avoid mutually disagreeable aspects of public law or at least many of them, by contracting around them.<sup>102</sup> The process can also be cheaper and swifter than typical litigation. Jurisdictional issues can be avoided by agreement of the parties.<sup>103</sup> By carrying out the process online, the parties can both avoid travel expenses and save time and can, depending on the system in place, work on their case at any time of day or night.<sup>104</sup> Although online ADR might be best suited for the resolution of disagreements that originate in cyberspace,<sup>105</sup> it could just as conceivably be put to use in an offline dispute as well.<sup>106</sup>

Potential problems arise, however, whenever people can in effect make their own law. With sophisticated parties of equal bargaining power there may be no problem, but if certain powerful, sophisticated and profit-motivated repeat players are left free to create rules that either overtly or more subtly tend to provide them with favorable outcomes, a critical eye must be turned on the process. This is also important if, as is currently the case, state governments are, for the most part (and perhaps for the best) eschewing public laws and regulations for the Internet.<sup>107</sup>

---

98. See generally *CPR's Online Seminar*, *supra* n. 38.

99. *Black's Law Dictionary* 1188 (Henry Campbell Black, M.A., 4th ed., West 1968).

100. *Black's Law Dictionary* at 1133.

101. *Black's Law Dictionary* at 134-35.

102. See Katsh, *E-Commerce, E-Disputes*, *supra* n. 16, at 707.

103. See *id.* at 708.

104. See Christopher Christensen, *Settling Disputes Online: Can Disputes Be Resolved in Cyberspace?* 223 N.Y.L.J. T3 (May 8, 2000) (available in WL 5/8/2000 N.Y.L.J. T3 ¶ 11). Speaking of settlement sites, Mr. Christensen notes, "The services are available 24 hours a day, seven days a week. They also free up lawyers to focus on complex claims that require a greater commitment and expense to resolve." *Id.*

105. See *e.g.* Barrett, *supra* n. 18, at ¶ 10 (quoting Ethan Katsh as saying that "[t]he offline legal system is of absolutely no use at all" for net-based disputes").

106. Admittedly, parties who dispute offline might not be as inclined to turn to new technology as someone who by their use leading up to the dispute has indicated both an inclination to use the technology and access to the technology.

107. Thornburg, *supra* n. 3, at 154 (stating that "the processes shift procedural advantage to certain powerful players. . .[r]ules can be designed to promote desired outcomes. . .

With the exception of ICANN's UDRP, most current online ADR is mediation- rather than arbitration-based.<sup>108</sup> Most current online ADR also seems to be focused towards resolving smaller, Internet-based disputes which seem to be the use it is well-suited for, i.e., low-cost transactions with discovery not necessary beyond rudimentary document and statement gathering.<sup>109</sup>

Problems, however, bubble to the surface in all of these contexts. The following sections will discuss particularly troublesome issues, noting theoretical and real repercussions, both positive and negative, and will discuss current and potential ways to emphasize the positive and, if not eliminate, at least de-emphasize the negative.

### THE NEED FOR CONSUMER CONFIDENCE

If the Internet is to be a successful and growing marketplace, it needs customers. E-people to browse; people to buy things. People use the World Wide Web for purposes other than sending e-mail and viewing pornography. Before the public at large will frequent Internet-based businesses, though, it will need two things: access to the Internet and an inclination to use it for commerce. This paper will not consider the first issue: getting people online and all that entails, economically and educationally. This section will instead focus on what makes people shop online.

In the physical world, people frequent certain stores for many purposes: the quality of the goods, price advantages, and customer service among them, but also because they know they will have recourse if the goods are not up to snuff. Nordstrom, LL Bean and Lands End make large portions of their reputations by being accessible and easy places to return goods.<sup>110</sup> Relationships of trust are built. Underlying trust is another core paradigm; if you get ripped off at a local store, you will have recourse in the law. You can, if you absolutely must, sue.

This is not necessarily so on the Internet. Because the Internet is new, relationships of trust have not been built.<sup>111</sup> And, more worrisome, if someone rips you off, what will you do? Sue? Where? How?

---

mechanisms do not protect certain traditional components of due process in dispute resolution. . . by eliminating the courts as arbiters of disputes, these processes decrease the power of government to shape and enforce substantive law").

108. *Id.* (stating that "[e]xisting online dispute resolution systems are not particularly geared toward arbitration (except ICANN arbitration) or toward compelled processes").

109. *See generally* SquareTrade, *supra* n. 31.

110. *See generally* Nordstrom, *Homepage* <<http://www.nordstrom.com>> (accessed Oct. 22, 2001); *see also generally* Lands End, *Homepage* <<http://www.landsend.com>> (accessed Oct. 22, 2001).

111. Unless, of course, the online entity has a positive history as a traditional brick and mortar operation.



One method of instilling confidence, at least in the U.S., is the phenomena of credit card chargebacks. Under the Fair Credit Billing Act,<sup>112</sup> if a consumer disputes a charge that appears on a credit card statement, i.e., claims a broadly defined "billing error,"<sup>113</sup> the card issuer is not permitted to insist on payment unless and until they investigate the claim. In most cases, there is an investigation, negotiation, and the charge is reinstated.<sup>114</sup> However, if one really *is* ripped off, there is a very real possibility that they will not be charged.<sup>115</sup> This also provides a frustrated consumer with a good, informal method to vent anger and frustration and even if the charge is later reinstated, the merchant had to answer for whatever it did to rouse the consumer's ire.<sup>116</sup>

The private dispute resolution available through one's credit card issuer, however, has limited applicability.<sup>117</sup> A few disgruntled, vocal consumers can convince many others that there is an unacceptable risk. Even small anecdotal evidence of online misfortune is potential poison in the water.<sup>118</sup> This is why initiatives like SquareTrade are starting to appear.<sup>119</sup> Merchants, especially large-scale merchants or those who aggregate online shopping options into virtual shopping centers, know they will benefit directly though increased consumer activity if they can assuage such fears. EBay knows that it will profit greatly if it can convince just a small percentage of visitors, who would otherwise have only window shopped, that they are safe to bid.

That is also why is it worthwhile for a small merchant posting items on eBay to pay a little money to put a SquareTrade seal on their auction

112. 15 U.S.C. § 1666 (1994).

113. This term includes "[a] reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction." *Id.* § 1666(b)(3).

114. Perritt, *Demand for New Forms*, *supra* n. 6, at 690.

115. As anecdotal evidence, I can offer a family member who purchased a fine glass lamp in Italy, asking to have it shipped. When the lamp had still not arrived after two months, she disputed the charge and it was removed. Even though the lamp did arrive a few weeks later, the credit card issuer declined to reinstate the bill because the merchant had refused to respond to their inquiry.

116. Perritt, *Demand for New Forms*, *supra* n. 6, at 691 (noting that under federal law "[a]lmost no reported cases in regular courts exist, suggesting that consumers rarely are motivated to go beyond the chargeback process to more formal forms of dispute resolution").

117. *See id.* at 693.

118. *Id.* (stating that "[i]f the online medium gains a reputation as a haven for swindlers, a great deal of time and effort will be required to restore its image to the point where consumers will consider it safe enough to spend their money online"); Perritt, *Electronic and Other Barriers to Electronic Commerce*, *supra* n. 96, at 563 (noting that "[t]his new marketplace presents low economic barriers to entry, but uncertainty about remedies when electronic deals go bad may impede full realization of the Internet's potential").

119. *See generally* SquareTrade, *supra* n. 31.

page.<sup>120</sup> For the price of the seal, they make dispute resolution resources available to a potential buyer and show that risk is reduced, thus beginning to build trust.<sup>121</sup> After all, it seems unlikely that if a merchant planned to rob someone, they would bind themselves to appear before a private, impartial party to mediate any potential disputes. In the end, any means that a merchant can employ to increase trust and consumer confidence, be it through consistent customer service or by offering recourse through third-party dispute-resolution services, will ultimately produce a favorable result.

### JURISDICTION AND ENFORCEMENT

One of the greatest legal uncertainties of the Internet is jurisdiction.<sup>122</sup> Because of the global, borderless nature of the medium coupled with the fact that users may remain anonymous or create identities, it is close to impossible to determine where another party to a transaction is geographically located.<sup>123</sup> Beyond that, the medium itself, with messages reduced to “packets” of electronic data transmitted through a network of servers located throughout the world, makes it difficult to fix a location (“localize”) where a given transaction or occurrence took place.<sup>124</sup> If a disgruntled computer user in Washington defamed South Dakota-based Gateway in a Yahoo! chat room maintained in California, where did the tort take place? Similar issues arise as to contract formation.<sup>125</sup>

Because geographic borders limit most formal sources of dispute resolution through concepts of legal sovereignty, an injured person might not be able to get legal recourse without traveling to the jurisdiction where the transaction or occurrence “took place” or where the wrongdoer resides.<sup>126</sup>

Even if the locations could be fixed, procedural and enforcement problems may still present themselves. Individual nations may have barriers in place to protect their citizens from lawsuits filed in other countries. For example, England’s Protection of Trading Interests Act of 1980 permits the UK Secretary of State to block, with legal force and potential sanctions, discovery requests from abroad, as well as the execu-

---

120. See generally SquareTrade Seal, *Building Trust in Transactions* <[http://www.squaretrade.com/overview\\_seal.jsp?vhostid™omcat2&stmp=squaretrade&cntid=gm5y1q52i1&memid=brs43150/22/01](http://www.squaretrade.com/overview_seal.jsp?vhostid™omcat2&stmp=squaretrade&cntid=gm5y1q52i1&memid=brs43150/22/01)> (accessed Oct. 22, 2001).

121. Katsh, *E-Commerce, E-Disputes*, *supra* n. 16, at 730.

122. See generally Johnson & Post, *supra* n. 93.

123. See generally *id.*

124. See generally *id.*

125. See Perritt, *Economic and Other Barriers*, *supra* n. 96, at 570-71 (stating that “[b]ecause of the difficulties of localizing conduct in Internet markets, allocating jurisdiction to a formal public institution is uncertain, even as a theoretical matter”).

126. *Id.* at 568.

tion of judgments for multiple damages. Even the U.S. Supreme Court has held that one international convention, the Hague Convention on Taking Evidence Abroad, is permissive, and thus provides no guarantees of legal process.<sup>127</sup>

One way to avoid the jurisdiction tangle is through "targeting."<sup>128</sup> This is done by directing one's sales or purchasing activity only towards those jurisdictions one wishes to "purposefully avail" oneself of.<sup>129</sup> On the Internet, this can be achieved by allowing only the residents of certain chosen jurisdictions to order goods or services, and this can be checked through shipping, billing and credit card addresses.<sup>130</sup> The other side of the coin is that if one wished to avoid only a few jurisdictions, one could "de-target" the residents of those places and exclude them from the site.<sup>131</sup> The downside of de-targeting is that it closes the residents of those jurisdictions out of global e-commerce.<sup>132</sup> The other negatives of targeting or de-targeting are that it limits the potential market for a seller, and although one is careful, it may not always be possible to ensure that a participant from a de-targeted jurisdiction could not slip through one's filters.<sup>133</sup>

It would be difficult to fit a full discussion of the issues related to jurisdiction on the Internet into a book, let alone this section.<sup>134</sup> Thankfully, the ability to avoid the entire jurisdiction discussion is one of the most attractive features of online ADR. Parties can contractually agree to resolve any future disputes growing out of a given transaction by submitting the dispute to an ADR provider.<sup>135</sup> The parties can bargain for a mutually convenient location, a location near one party, or in the case of a disparity in bargaining power, a location inconvenient for one party.<sup>136</sup>

Where the circumstances permit, Internet-based ADR providers of-

---

127. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. of Iowa*, 482 U.S. 522 (1987).

128. Perritt, *Economic and Other Barriers*, *supra* n. 96, at 573.

129. *Id.* at 573.

130. *See generally id.*

131. *Id.* at 573.

132. *Id.* at 574.

133. *See generally id.*

134. *See* Chicago-Kent College of Law, *Internet Jurisdiction Hyperlink Guide* <<http://www.kent.law.edu/cyberlaw/resources/guide.html>> (accessed Mar. 28, 2001) (providing an extensive list of resources concerning Internet jurisdiction with hyperlinks to documents).

135. *See* Henry H. Perritt, Jr., *Economic and Other Barriers*, *supra* n. 96, at 574 (noting that "jurisdictional uncertainties associated with transnational commerce on the Internet can be reduced when rules are made and enforced by private rather than public institutions").

136. Dean Perritt notes that "the traditional difficulty with private regulation is that it may not express the political consensus of democratic societies with respect to values to be enforced or the balance of power to be struck between stronger and weaker market participants." *Id.* at 574-75.

for a convenient alternative to geographically fixed ADR.<sup>137</sup> ICANN's UDRP may be the key example of this. As noted above, a domain name holder is obliged to participate in UDRP if a complaint is filed, but all aspects of the arbitration are conducted either online or through the mails. UDRP avoids issues of national jurisdiction unless a party later, or concurrently, opts to file suit in an appropriate court, and allows the arbitral panels to consider the applicable legal principles of the home nations of the participants.<sup>138</sup>

Of course, the consideration of a participant's national laws is not guaranteed. One of the weaknesses underlying private resolution of disputes, especially in an international context, is that the decision might not reflect the community consensus of one of the jurisdictions.<sup>139</sup> Where a given state has legislated certain guaranteed protections for its citizens, avoiding those protections may appear to be unjust to both the disputant and to his or her nation.<sup>140</sup> This end-run around lady justice may be efficient in transactions between sophisticated repeat players, but if one of the parties has used superior legal sophistication or over-reaching bargaining power to force an arbitration clause onto the other participant, the result may be unsettling. A seemingly unjust outcome may also undermine the ability of parties to make or enforce such agreements as well.

Even if one prevails in an arbitration setting, however, one still has concerns about enforcing the decision.<sup>141</sup> To do so, one may have to rally the coercive legal power of the jurisdiction in which the other party, or that party's property, resides.<sup>142</sup> Although locating the other party and its assets may be challenging, some legal frameworks are in place that could make it possible to enforce an arbitral award, even across jurisdictions.<sup>143</sup> Within the U.S., the Federal Arbitration Act provides for the enforcement of arbitral awards that have their roots in a mandatory, binding arbitration contractual clause.<sup>144</sup> In the international arena,

---

137. See Lesly Stones, *Online Arbitration Takes Off*, Bus. Day 20 (Mar. 23, 2000) (available at 2000 WL 7452664) (stating that "[s]ince international disputes increasingly involve some form of Internet activity. . . resolving them via the Internet has a certain poetic justice").

138. See Osborn, *supra* n. 79, at 241-42.

139. See *id.* at 241-43.

140. Perritt, *Economic and Other Barriers*, *supra* n. 96, at 574-75.

141. *Id.* at 571-72 (stating "[m]eaningful enforcement and application depend upon the practicality of asserting coercive control over property or persons located within the boundaries of the rule issuing or adjudication sovereign or the willingness of the other sovereigns to recognize and enforce foreign rules and decisions").

142. *Id.*

143. *Id.*

144. 9 U.S.C. §§ 1-16 (1994); see also Thornburg, *Going Private*, *supra* n. 3, at 571-72 (noting "[t]he federal courts have interpreted the act broadly").

one may (between signatory states) rely on the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>145</sup>

Of course, practical matters reduce the utility of even a guaranteed enforcement tool. Unless the remedy is meted out automatically at the end of the proceeding, like the remedies available through ICANN's UDRP, it may cost money to enforce the decision against an unwilling adversary.<sup>146</sup> It would not make economic sense for a disputant prevailing in arbitration concerning, say, an eBay auction item worth \$200, to travel to another state, let alone seek enforcement abroad.<sup>147</sup> So while contractually required arbitration may be binding and enforceable across jurisdictions, it may be of little use to many online disputants.

### BINDING CLAUSES: PROS AND CONS

While contractual clauses that require binding arbitration may not be helpful to those who are wronged in small consumer transactions, they are of enormous value to merchants and other repeat players. Merchants, who engage in daily transactions via the Internet could potentially be in a situation where they would have to comply with the laws of each and every state and political subdivision thereof.<sup>148</sup> By clearly defining the parameters of the transaction and the rights of the parties,

---

145. See generally Status of UNCITRAL Conventions and Model Laws (available at <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>).

146. Henry H. Peritt, Jr., *Will the Judgment-Proof Own Cyberspace?*, 32 Intl. Law. 1121, 1123 (1998) (noting "the real problem is turning a judgment supported by jurisdiction into meaningful economic relief").

147. Federal Trade Commission, *Consumer Protection in the Global Electronic Marketplace: Looking Ahead FTC Workshop* ¶ 7 <<http://www.ftc.gov/bpc/icpw/lookingahead/lookingahead.htm>> (accessed Nov. 18, 2001) (noting that "[e]ven if consumers could sue foreign businesses in the consumers' home courts applying local laws, they suggested, litigation over small-value Internet transactions generally makes no practical or economic sense. Even if a consumer obtained a judgment at home, it would be difficult, if not impossible, to have it enforced abroad."); see also *id.* *Access to Courts* ¶ 1 (noting that "a consumer who buys but does not receive \$500 worth of pottery from an Italian Web site is unlikely to buy a \$700 plane ticket to travel to Italy to pursue relief through a foreign judicial system); see also Global Business Dialogue's Working Group on Alternative Dispute Resolution, *Alternative Dispute Resolution & e-Confidence* ¶ 4 <<http://mediate.com/articles/econfidence.cfm>> (accessed Nov. 18, 2001) [hereinafter GBDe, *Alternative Dispute Resolution*] (discussing general barriers to consumer confidence in Internet transactions and noting "the cost and complexity of cross-border enforcement will stand in the way of proper redress in the vast majority of cases").

148. Thornburg, *supra* n. 3, at 180 (noting that "because of the global nature of the World Wide Web, goods sold online tend to be offered to potential customers in all states and all countries. It may be possible to determine the applicable law in some of these locations, but learning and complying with the law of all possible consumers is an overwhelming task").

some of this can be avoided.<sup>149</sup> Merchants could also be open to a potential logistical nightmare if some product defect opened them up to suits in each jurisdiction in which they transact business. Binding arbitration clauses could round up all complainants in one arena, and prevent the possibility of class action lawsuits.<sup>150</sup> Besides determining jurisdiction, the merchant and its lawyers would also have to navigate the uncertainties of choice of law and choice of forum within jurisdictions.<sup>151</sup>

The three principle ways to impose a binding arbitration clause are (1) to place the clause in the "terms and conditions" or "conditions of use" section which each customer or user must agree to be bound by to participate, (2) to include the term with the product so that the consumer is confronted with the term after receiving the paid-for item,<sup>152</sup> and (3) including the term in the "click wrap" box that pops up on a user's computer screen requiring the consumer to agree to certain terms before the transaction will proceed.<sup>153</sup>

Thus, the Internet marketer is both motivated to reduce its own uncertainty and expense by including a binding arbitration clause and is capable of doing so.<sup>154</sup> From the merchant's standpoint, and the standpoint of the lawyers advising them how to structure their transactions to limit costs and liability, there are few direct drawbacks.<sup>155</sup> However, in the bigger picture there are a number of fairly obvious drawbacks to any

---

149. Obviously consumers cannot contract out of certain laws, such as consumer protection statutes.

150. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000); Thornburg, *supra* n. 3, at 204. Professor Thornburg notes that "the potential for class actions is also exactly the reason some businesses require arbitration rather than litigation of consumer disputes." *Id.* She also points out that many courts have enforced such clauses to bar class actions or class arbitration actions. *Id.* (citing *inter alia*, *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275-77 (7th Cir. 1995), which denied class certification in arbitration proceeding because no provisions for such certification were included in the relevant contractual clause); cf. *Blue Cross of Ca. v. Superior Court*, 78 Cal. Rptr. 2d 779 (Ct. App. 1998) (allowing class action because arbitration agreement did not prohibit it).

151. Thornburg, *supra* n. 3, at 180.

152. Counter-intuitively, some courts have applied an expanded version of contract formation to allow such post-hoc terms to be included, finding that even though initial terms have been agreed upon, the consideration has been received, and the goods have been delivered, the contract still will not form until the consumer opens the box, (theoretically) reads the conditions, and then decides not to take the affirmative action of returning the goods. See *e.g.* *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

153. Thornburg, *supra* n. 3, at 183.

154. See *e.g.* Katsh, *E-Commerce, E-Diputes*, *supra* n. 16, at 731 (noting that "[t]his is a power that marketplace owners do have, since parties that refuse to participate and abide by decisions could be threatened with exclusion"); see also, Thornburg, *supra* n. 3, at 179 (stating that "the types of pressures that lead merchants to impose clauses resolving uncertainty in their favor are intensified on the Internet").

155. See generally *id.*

situation where one party can unilaterally dictate terms.<sup>156</sup> First, by sidestepping normal public law, the parties who can dictate terms may be able to undercut consumer protections put in place locally.<sup>157</sup> This creates the second problem: if local laws are sidestepped, then local governments will be hamstrung in their efforts to protect their own citizens.<sup>158</sup> The sovereign will be helpless to protect its minions.

A third problem is that by putting post-hoc terms into contracts or by burying a binding arbitration clause deep into a terms-and-conditions page, the merchant is making harder for the consumer to make an informed decision.<sup>159</sup> The consumer is generally not a repeat player, or legally savvy enough to understand the full import of the clause — what rights and recourse they are in fact giving up.<sup>160</sup> Consumers can be and are held to these contacts, but no one creating these clauses could credibly assert that more than a small percentage of consumers read all of the small print on each transaction. When one is buying a \$20 book, it simply is not worth the trouble to spend half an hour plodding through legalese. The counter argument is that if it is not worth taking the time to read for such a small transaction, a fully informed consumer would probably consent to the term anyway; they would take the small risk. This argument begs the question, in the proper meaning of the term.

A fourth problem is that merchants in some countries will be put at

156. The ideas in the following paragraphs were inspired in part by issues raised in the Bureau of Consumer Protection. See generally Federal Trade Commission, *supra* n. 147.

157. *Id. Ineffectiveness of Law Enforcement* ¶¶ 1-2 (noting “[g]overnments—both national and provincial—would be expected to refrain from protecting their own citizens from foreign wrongdoers, passing off this responsibility to foreign governments, even where local consumers were victimized by deceptive marketing or shipping of dangerous products from abroad.”).

Unscrupulous business operators could easily exploit such a system. They could establish themselves in (or select by contract) jurisdictions with a lax or non-existent consumer protection environment, evading law enforcement altogether. They could also operate in (or select by contract) jurisdictions enforcing consumer protection laws, but target only foreign consumers, knowing that local authorities would be hard-pressed to devote scarce resources to protecting foreign consumers at the expense of protecting domestic ones).

158. *Id.*

159. *Id. Uniformed Decision Making* ¶ 1 (stating “[m]arket economies work best when consumers can make informed purchasing decisions. Therefore, if consumer protections for cross-border Internet transactions were weakened in exchange for legal and/or practical benefits—the case under a country-of-origin/prescribed-by-seller framework—it would be imperative that consumers knowingly choose to give up certain protections. This is particularly true in an international context, where choice-of-law and choice-of-forum clauses could have profound effects on consumer rights”).

160. *Id. Uniformed Decision Making* ¶ 3 (stating that “[c]onsumers would need to understand how the substantive protection of the company’s chosen jurisdiction differed from those conferred at home and whether the procedural rights would enable them to invoke those core protections”).

a competitive disadvantage.<sup>161</sup> The reason for this is that some jurisdictions, like the U.S., will not allow parties to contract around certain consumer protections.<sup>162</sup> As a hypothetical, imagine that a Chechen company could sell a U.S. customer a telephone that gave an unplanned and dangerous shock. At the same time, a U.S. company sold the same telephone, imported from Chechnya, to another consumer. Both merchants include binding arbitration clauses in their terms and conditions of use. Both consumers are injured and seek to file suit. While the customer who bought from the U.S. company could most likely bring suit under her state's consumer protection laws, the court finding as a statutory or public policy matter that you cannot contract out of a tort, the consumer seeking redress in Russia's disputed province would likely be told to talk to the arbitrator.

A final problem is shown in the previous paragraph. The customer of the Chechen seller will likely be disappointed at having to arbitrate.<sup>163</sup> Although the arbitral forum may be of fine quality, discovery will most likely be limited, there will be no jury, there is no guarantee that U.S. standards for consumer goods quality and liability will be applied, and damages could be limited to actual out-of-pocket expense.<sup>164</sup> The cost, in time and money of achieving recourse for the consumer may also be prohibitive. If, for instance, the complainant was required to exhaust the merchant's internal dispute-resolution systems, then submit to non-binding arbitration, and only after that could they file a lawsuit.<sup>165</sup> In short, the consumer might well feel they have had no proper access to judicial recourse.<sup>166</sup>

What these potential problems boil down to is a crisis of consumer confidence. If merchants are driven by desire for simplicity and cost-savings to put onerous terms on consumer transactions, if some consumers feel they are given the short end of the stick, then anecdotal evidence and water cooler stories could erode consumer confidence in Web transactions.

---

161. *Id.* § Competition Concerns ¶ 1.

162. *Id.*

163. *Id.* § Access to Courts.

164. *See generally* Thornburg, *Going Private*, *supra* n. 3, at 197.

165. *See id.* at 197 n. 202. Professor Thornburg also points to another sign that the processes imposed are meant to be a hindrance, e.g., "one way" clauses, where the consumer, but not the merchant, is required to follow the proscribed procedures before seeking any recourse in court. *Id.* at 187 n. 161.

166. *Id.* at 184 (stating that "[t]he consumer. . . has potentially been deprived of her home state's consumer protection law, forced to litigate or arbitrate in an inconvenient forum, and been given procedural systems that may limit her ability to prove a meritorious case").



## USER SOPHISTICATION

Many consumer advocates voice one central, underlying concern. At what point does the imposition of a private dispute-resolution requirement place too big a burden on the average consumer.<sup>167</sup> That is, when is the sophistication and savvy of the average Internet user not enough to level the playing field.<sup>168</sup>

This arises in even the simplest of the online ADR paradigms, the settlement site. One plaintiff's attorney has described these sites as "ADR lite," noting that "it preys on what we're all short of these days—time and money—but it will not serve people's best interest."<sup>169</sup> There seems to be no argument on this point. As the president and chief executive officer of ClickNsettle has stated, "if you don't understand what the value of your case is, you should never go to ClickNsettle."<sup>170</sup>

To call a consumer unsophisticated in this context is far from insulting. It is simply a matter of experience and learning. If faced with an arbitration proceeding, a consumer drafts her own complaint, the writing may not be entirely clear or eloquent (this is a problem even among lawyers, admittedly).<sup>171</sup> The lay person may include facts they consider important but which are not legally relevant, or they may omit facts that *are* legally relevant.<sup>172</sup> Overall, the document may seem less clear or credible than the response prepared by the respondent, who will likely be a multi-time participant in arbitration and/or have the advice of counsel.<sup>173</sup> In any online dispute-resolution forum, especially one where a complainant participates without representation, communication with the arbitrators or mediators will be generally written and thus may present an unfair advantage to those who can organize and eloquently state their cases.<sup>174</sup>

There may be no ultimate resolution on this issue. It might be proper, especially in cases more complex than simple consumer disputes,

---

167. See generally Department of Commerce, Federal Trade Commission, *Alternative Dispute Resolution* <<http://www.ftc.gov/os/2000/02/altdisputeresolutionfrn.htm>> (accessed Oct. 22, 2001).

168. See generally *id.*

169. Denise Magnell, *Welcome to the World of Cyber Settlements*, 223 N.Y.L.J. 5 (Feb. 1, 2000) (quoting Eric J. Parker, a plaintiffs' attorney based in Boston).

170. *Id.*

171. Thornburg, *Going Private*, *supra* n. 3, at 206-07.

172. *Id.*

173. See Perritt, *Demand for New Forms*, *supra* n. 6, at 700. Dean Perritt argues that a one-sided lack of sophistication may create a lack of due process. *Id.* "This information deficit has been noted widely in connection with arbitration of individual employment disputes. The low transaction value makes it less likely that consumers will avail themselves of private counsel." *Id.*

174. See *id.* at 698-700.

to provide some kind of counsel or aid to participants.<sup>175</sup> For example, a person who registers his daughter Martha's name as a domain name so that he can make a Web site with pictures of her may be in no position to make a proper case in ICANN's UDRP if Martha Stewart's lawyers come calling, demanding the address be handed over. Trademark law is not common dinner conversation even among lawyers. In the meantime, that same person might be more than qualified to fill out a form to arbitrate over a defective toaster. "It shoots sparks" might be all he would have to say to prevail there.

The counterpoint to this sounds hollow but contains much truth: at least it's something. The average consumer is not going to pursue a lawsuit over faulty \$20 telephone.<sup>176</sup> Given the opportunity, however, the average consumer very well might file an arbitration complaint, especially if there is no fee involved and information about this option was readily available. This is precisely the purpose of SquareTrade's seal program.<sup>177</sup>

Ultimately, this may be a question with no answer. More likely, it is a factor to be considered, among many others, in shaping how the public and private laws of the Internet evolve.

#### INTERNET TOOLS IN ARBITRATION: THE LACK OF FACE-TO-FACE DISCOURSE.

It is obvious that when alternative dispute resolution is conducted online the parties are not in the same room, interacting in a physical sense. What is not obvious is whether or not this is a good thing. Missing from such encounters is the opportunity for the mediator or arbitrator to watch the disputants talk, to ask them direct questions, to read their physical and emotional signals—all of the intangible things that can be summed up within the realm of judging "credibility."<sup>178</sup> On a less concrete level, even the experienced arbitrator or mediator may find it challenging to evaluate data or guide conversations in an environment where they are completely removed from the parties' physical presence.<sup>179</sup>

---

175. *Id.* (noting that "in all but the simplest cases, counsel is invaluable in helping a naive disputant understand the procedure, the relevant rules for decision, and the most effective way to prevent a case. Online arbitration systems should allow for counsel, perhaps subject to control by the arbitrator, who may determine in simple cases that no counsel is permitted.")

176. See Bruce, *supra* n. 30, at ¶ 22 (quoting Richard Cohen, founder of the UK online legal service Desktop Lawyer, as saying "many members of the population are too intimidated by price and status to seek professional aid").

177. See generally SquareTrade, *supra* n. 31.

178. Katsh, *E-Commerce, E-Disputes Resolution*, *supra* n. 16.

179. Katsh, *Dispute Resolution in Cyberspace*, *supra* n. 1, at 974 (noting that "we are challenged with uncertainty because cyberspace does not provide us with familiar or fixed boundaries and limits").

Another thing removed from the mix online is the chemistry between disputants. Although the parties may have dealt at arms length and thus have no history, in any case where the disputants have encountered each other in the real world, the online mediator or arbitrator may not be able to account for factors like hurt feelings, anger or hatred that would become readily apparent in a physical gathering.<sup>180</sup>

Finally, the lack of both physical confrontation and the ability to make a heartfelt plea may make the process less than satisfying for complainants.<sup>181</sup> They are deprived both of the ability to communicate their beliefs or feelings of hurt, disappointment or outrage, and of the finality of a handshake or a pat on the back when a solution is reached.<sup>182</sup>

However, the lack of emotional outpouring may also serve as an advantage in heated disputes. Online mediation necessarily does not happen in the same time frame as a face-to-face meeting, thus a mediator may be able to diffuse the situation by relying on the "cool print medium," which does not require an instant response, and may let parties reflect on the proceeding and what is, in the long run, really important to them.<sup>183</sup>

The asynchrony inherent in ADR by e-mail may give the parties time to think through their responses and "form their thoughts slowly."<sup>184</sup> Participants, especially those uncomfortable with direct confrontation and argument, may feel more at ease because they do not have to compete for air time with the intermediary.<sup>185</sup> This may be very helpful in the context of an ongoing business relationship, where by not squaring off physically, but instead settling a dispute from afar, through an intermediary, it may be possible to avoid the kind of personal emotional involvement that might damage future relations.

The possibility does exist, however, that this can backfire. If the parties are so enraged that they cannot be civil and the tone of their e-mail communication is angry and accusatory, it may be difficult for a mediator to provide a soothing presence while removed from the situation.<sup>186</sup>

---

180. See generally Barrett, *supra* n. 18.

181. Katsh, *E-Commerce, E-Disputes*, *supra* n. 16, at 716 (stating that "when the parties shake hands, sign an agreement, and get congratulated personally by the mediator, there is both symbolic as well as substantive closure to a mediation. E-mail does not lend itself to these ceremonial moments").

182. *Id.*

183. *CPR's Online Seminar*, *supra* n. 38, cmt. of M. Scott Donahey; see also Brenda Park Sunoo, *Hot Disputes Cool Down in Online Mediation*, *Personnel J.* 48 (available at 2001 WL 11690279) (Jan. 1. 2001) (noting that single-day mediation sessions often result in a "battle mentality" and, "a crisis-like environment").

184. *Id.* at ¶ 20.

185. *Id.*

186. Katsh, *E-Commerce, E-Disputes*, *supra* n.16, at 715.

One thing that a mediator or arbitrator who is operating online can provide to create a sense of fairness is to have a procedural framework in place.<sup>187</sup> For example, at each step of mediation, SquareTrade mediators send both parties update notices.<sup>188</sup> In theory, this lets the parties, who are basically in limbo between messages, know that something is happening, that someone is reviewing their case, reading their materials, and that the process is ongoing.

One possible way to work around any shortfalls arising from lack of physical interaction is to employ video-conferencing or streaming video. This can be used to allow the mediator or arbitrator to see the parties, and in some situations, to allow the parties to see each other.<sup>189</sup> The settlement site ClickNSettle employs a number of different tele-conferencing services, and, as broadband capacity becomes more readily available, plans to start providing video-conference settlement hearings that will include both parties, a judge, counsel for the parties, and witnesses.<sup>190</sup> This is in direct contrast to the ICANN UDRP, which, as noted above, will only allow in-person hearings, including video-conferences, as an exceptional matter.<sup>191</sup>

Another source of improvement in the quality of online interaction lies in the growing medium itself: innovations being made in software may provide for richer communication. One commentator has pointed to online settlement sites, not as an example of innovation, but to show that mediation and arbitration require a broad array of interactions.<sup>192</sup> As the medium grows and develops, it will very likely produce new tools for other mediation and arbitration tasks.<sup>193</sup>

### FINDING PROPER NEUTRALS

Two separate problems arise in locating the proper person or persons to oversee a dispute resolution process: first, the neutral must be qualified and unbiased, and, second, there must be enough of these qualified, unbiased neutrals to meet the needs of the online populace.<sup>194</sup> The first

---

187. *CPR's Online Seminar*, *supra* n. 38, cmt. of Sandra A. Sellers.

188. *Id.*

189. See Katsh, *E-Commerce, E-Disputes*, *supra* n. 16, at 718.

190. Bruce, *supra* n. 30, at ¶ 11.

191. See generally ICANN UDRP, *supra* n. 69.

192. *CPR's Online Seminar*, *supra* n. 38, cmt. of Ethan Katsh.

193. See e.g. Ethan Katsh, *Online ADR Becoming a Global Priority*, 6 No. 2 *Disp. Resol. Mag.* 6, 7 (2000) (stating that "dispute resolution in an environment which is characterized by rapid change, such as the Net, will likely be characterized by ongoing experimentation and improvement"); see also Katsh, *supra* n. 16, at 723-24 (suggesting the use of "more visual displays of information . . . [that] allow selections to be made and feelings to be communicated as much as possible in ways other than typing in text, for example, by using a mouse to highlight, drag, or manipulate objects").

194. See Perritt, *Demand for New Forms*, *supra* n. 6, at 678.

problem seems readily solvable; all an ADR provider must do is put a conflict-screening program in place similar to those in law firms, which would identify any possible conflicts of interest.<sup>195</sup> If a conflict is identified, the neutral, or, if necessary, the provider, need only recuse herself.

A more subtle and pernicious threat of bias creeps up in the context of binding arbitration clauses. Where a repeat player in e-commerce is writing a clause requiring disputes to be arbitrated, it is very likely that they will specify a certain ADR provider. Arbitrators need to eat too, and although that provider most likely has no connection (other than, perhaps, a convenient geographic location) to the contract-writing party, it becomes immediately obvious that the contact writer is a large source of business. In this situation, an ADR provider who consistently finds against the contact writer may alienate that party, and all it takes is a minor revision in a document to send the business elsewhere. The provider may feel pressure, even if only subconsciously or even if only in the perception of the complainants, to defer to the party sending them the business.<sup>196</sup> One suggestion to reduce this risk is to establish review by integrated or independent supervisory bodies that are staffed either by people "whose independence is beyond any doubt" and/or with parties who represent consumer advocacy groups.<sup>197</sup>

The second problem is finding neutrals in the first place.<sup>198</sup> One must first ensure that a chosen arbitrator or mediator has the requisite experience and knowledge.<sup>199</sup> Established ADR providers can assure this by posting the names and qualifications of their neutrals on their Web sites, ensuring the right person is put on the right job.<sup>200</sup> Then a more involved problem arises: the economics of the equation are skewed. To quote one mediator, "The reality is, who really wants to mediate for a \$40 dispute?"<sup>201</sup> Providers can address this problem in many ways. The first is by putting part of the cost burden on merchants. This happens in

195. *Id.* (noting "widely accepted arbitration systems, such as those defined by the American Arbitration Association and by the International Chamber of Commerce maintain rosters of qualified arbitrators who have been screened to ensure the absence of bias").

196. Thornburg, *supra* n. 3, at 208-09 (stating "it is not the one-shot consumer that the arbitrator needs to satisfy for business development; it is the repeat player seller who is capable of bringing numerous cases to the arbitrator").

197. GBDe, *Alternative Dispute Resolution*, *supra* n. 147, at ¶ 10.

198. Stones, *supra* n. 137, at ¶ 20.

199. *Id.* (noting that "[i]n court it is easy to check that the adjudicators are erudite attorneys consulting weighty legal tomes. . . [i]n cyberspace how would you know whether a mere computer geek was running the show and plucking his judgment from a comic book?").

200. See Perritt, *Demand for New Forms*, *supra* n. 6, at 678 (noting that "online dispute resolution systems . . . should begin with rosters of qualified and unbiased decision makers, with appropriate background information available online, to facilitate review and selection of arbitrators by disputants.").

201. Barrett, *supra* n. 18, at ¶ 16 (quoting Jeffrey Krivis).

seal programs, where sellers will pay money up-front to provide them and their customers with access to a “free” dispute resolution process should a problem arise.<sup>202</sup> This up-front payment system works similarly to insurance.<sup>203</sup> It also allows a provider to establish a large, efficient, standardized service. Theoretically, by aggregating the resources and dealing with a volume of complaints, the provider can, through efficiency of scale, reduce the per-transaction costs to themselves. So, hypothetically, a \$40 dispute might cost \$100 to resolve in a one-shot deal, but the provider can both bring in more than \$100 in up-front payments per transaction, and reduce that \$100 through greater efficiency.

Tied to this is the problem of simply finding mediators.<sup>204</sup> One would think that online disputes will grow with the medium, and if there are suddenly millions of disputes, ADR providers will need thousands and thousands of mediators. The medium itself provides a solution. Just as the Internet allows business transactions to be conducted between parties regardless of geographic location, it can allow disputes to be resolved by arbitrators from anywhere.<sup>205</sup> ADR providers could recruit mediators from South Dakota or India and train and organize their efforts online. This would also provide the benefit of allowing people who want to arbitrate to live in rural settings, at a lower cost of living. It would also provide an additional source of income to others, like lawyers, who could arbitrate part-time to supplement their income.

#### FEES: A BARRIER TO ACCESS?

Wherever the arbitration process is not free to the users, the cost of such a process will be an issue, especially if the process is mandatory for a party seeking redress for a deal gone awry. Although costs vary between providers, a large filing fee may make it impracticable for a wronged party to gain meaningful access to justice.<sup>206</sup> For example, in the seminal *Hill v. Gateway 2000, Inc.*<sup>207</sup> decision, the appeals court dis-

---

202. See generally SquareTrade, *supra* n. 31.

203. Both in that a fee is paid up front, with the provider and payor allocating the risk of possible arbitration expense, and in that by putting a binding arbitration scheme in place, the merchant is limiting the risk of litigation, which can cost significantly more than litigation. See Sunoo, *supra* n. 183, at ¶ 10 (quoting Kristina Eisenacher as stating that litigation can cost as much as eighty percent more than mediation).

204. See generally Stones, *supra* n. 137 (stating that “there are obstacles to be overcome, including a lack of experienced arbitrators willing to preside online”).

205. See Katsh, *E-Commerce, E-Disputes*, *supra* n. 16, at 732 (noting that “[i]n cyberspace, expertise can be brought to anywhere from anywhere”).

206. Thornburg, *Going Private*, *supra* n. 3, at 197 (2000) (stating that “some of the processes charge a higher initial filing fee than would a corresponding court process. This is particularly true of mandatory arbitration clauses, although the cost will vary from provider . . .”).

207. 105 F.3d 1147 (7th Cir. 1997).

missed a suit, saying mandatory arbitration was the only option while glossing over the fact that the filing fee of the required provider, the International Chamber of Commerce, was \$4,000—much higher than the total value of the goods in dispute.<sup>208</sup> Other courts have refused to enforce arbitration clauses where the filing fees were excessive.<sup>209</sup>

The balance to be struck is between providing fees low enough to allow access to justice, while not leaving the door completely ajar to frivolous claims.<sup>210</sup> In some cases, an initial filing fee may be more cost effective than litigation, but this will vary from dispute to dispute. For more complex disputes, the delays, fees, and costs e.g., attorney's fees, could dwarf a "small" \$4,000 filing fee for an ADR process.<sup>211</sup> For example, the cost of litigation to retrieve a trademark-infringing domain name would almost certainly outstrip the fees charged by ICANN's approved providers. The quick and, in this context, inexpensive UDRP process is quite useful, especially in "cybersquatting" cases, where a domain name holder is offering the name for sale at a "nuisance value."<sup>212</sup>

Again, this problem does not have a clear resolution. In practice, market forces may create resources like SquareTrade, where consumers in small transactions will frequent sellers who offer free or inexpensive ADR resources, while participants in larger transactions will consider it a bargain to pay thousands of dollars to arbitrate rather than litigate.<sup>213</sup> In the end, simple resources like credit card chargebacks and a good return/refund policy may better serve the normal consumer than outside intervention.<sup>214</sup>

#### LIMITED HEARINGS AND LACK OF DISCOVERY

An additional access-to-justice issue grows out of the ADR process itself. While public litigation guarantees a disputant certain processes and rights, an arbitration proceeding may minimize or eliminate them. While normal commercial arbitration often includes a full-blown hearing with representation and the presentation of evidence and witnesses, an online discovery process will necessarily limit the scope of discovery.<sup>215</sup>

---

208. Thornburg, *Going Private*, *supra* n. 3, at 198.

209. *Id.* at 198-99 (citing *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir. 1999) (refusing to dismiss because defendant had not shown arbitration fees to be reasonable); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y.App. Div. 1998) (finding a \$4,000 filing fee excessive, but under the Federal Arbitration Act, ordering arbitration).

210. GBDe, *Alternative Dispute Resolution*, *supra* n. 147, at ¶ 11.

211. Sunoo, *supra* n. 183, at ¶¶ 27-28.

212. See Osborn, *Effective and Contemporary Solutions*, *supra* n. 79, at 239-40.

213. See generally SquareTrade, *supra* n. 31.

214. See Thornburg, *Going Private*, *supra* n. 3, at 198 n. 208.

215. *Id.* at 205-06 (noting that "consumer arbitration clauses are apt to prohibit or limit hearings").

So long as the facts are undisputed, this will provide no problem—the arbitrator can examine the record and use it as the basis of any decision. A very large obstacle appears, however, if key facts are disputed.<sup>216</sup>

This lack of discovery will be especially burdensome to complainants who carry the burden of proof.<sup>217</sup> A consumer will only have access to the online documentation of the deal and the allegedly defective or unsatisfactory product, and may be in a position of having to render their arguments and impressions written form, having only their own perceptions and opinions as a basis.<sup>218</sup> This could put the complainant at a decided disadvantage because lack of a discovery process will deny the complainant access to the merchant's relevant records concerning design and manufacture, the personnel who made relevant decisions, similar complaints the merchant may have received from other consumers which might show an awareness of the problem, and internal memoranda.<sup>219</sup> Additionally, where the parties rely on witnesses to inform the arbitrator, the lack of a face-to-face encounter may deprive the arbitrator of a chance to assess the witnesses' demeanor and credibility.<sup>220</sup> By limiting or eliminating discovery, basic concepts of due process may be compromised.

These inherent difficulties are clearly visible in the ICANN UDRP process. One commentator states that the purpose of the UDRP is to provide “a quick, cheap, just and generally lightweight process to resolve clear cases of abusive registrations.”<sup>221</sup> However, the nature of trademark disputes is generally not so simple. Because of the process's aversion to hearings, reliance on a complaint and response, with some documentation, and considering the fourteen-day time limit placed on decision makers, it is quite possible that disputants could be given short

---

216. *Id.* at 205 (noting that “when operative facts are essentially uncontested, a decision based on written statements should be sufficient. When facts are disputed, however, the lack of a hearing can distort the fact finding process”).

217. *Id.* at 206 (stating “procedures that make it harder to present a sufficient quantum of credible information will systematically hurt the party with the burden of proof”).

218. *Id.* at 201-02 (asserting that the consumer/complainant does not “have access to records concerning the product's design or manufacture, complaints from others that might show the existence of a defect or the seller's knowledge of the problem, or internal communications concerning the product. Neither does the consumer have access to the people who made the relevant decision”).

219. *Id.* (noting that “an arbitration system that allows a dispute to be decided when only the defendant has access to this relevant and potentially incriminating information will lead to inaccurate and one-sided results”).

220. See Perritt, *Demand for New Forms*, *supra* n. 6, at 680 (suggesting that possible solutions would be to take these cases offline or to employ video-conferencing).

221. A. Michael Froomkin, *Comments on ICANN Uniform Dispute Resolution Policy: A Catalog of Critical Process Failures; Progress on Substance; More Work Needed, Substantive Issues* ¶ 1 <<http://www.law.miami.edu/~amf/icann-udp.htm>> (accessed Mar. 28, 2001). [hereinafter Froomkin, *Substantive Issues*]



shrift. Where a respondent relies on a common law trademark right it may be nearly impossible to present the requisite facts to the arbitrators.<sup>222</sup> Any creep beyond the black and white issues readily addressable by the process's rules, e.g., a question of confusing similarity, malevolent intent, bad faith, fair use, or tarnishment, could create a situation where arbitrators make an uninformed decision.<sup>223</sup> All we know is "hard cases belong in court."<sup>224</sup>

One partial solution may be to build a procedural device into these online dispute-resolution processes by which a neutral would make an initial evaluation of the case. She could evaluate the complaint and response to determine whether disputed material facts existed. If so, a limited discovery process could be employed to address only those issues, to provide the decision maker with the information she would need to make a truly informed decision. This narrowing process would operate in a fashion similar to partial summary judgment motions or pretrial orders.<sup>225</sup>

The key will be to remember that in almost every transaction gone bad there will be two stories. If those stories dispute facts operative to the decision, there must be some meaningful way to conduct, at a minimum, some focused discovery. Otherwise the process would amount to little more than a he-said she-said shouting match, with the neutral listening to the noise and choosing a side, at best at random, and at worst based on inherent prejudice or something as simple as which pleading was more coherent. What meaningful discovery could consist of would necessarily vary from transaction to transaction, but it would be worthwhile to develop a broad array of tools available to the neutral. This could include video-conferencing, an opportunity to have physical evidence examined by the neutral or another neutral close to the party in possession, plus any other new invention or system that is developed for the medium. As the demand for online ADR increases, the profit motive for potential inventors does as well.

### THE NEED FOR A RECORD

The goal of due process is generally supported when a record is kept of proceedings.<sup>226</sup> A record not only assures the parties and outside observers that a process was followed, it also provides a resource for future

---

222. Thornburg, *Going Private*, *supra* n. 3, at 200-01.

223. *Id.* at 162.

224. Froomkin, *Substantive Issues*, *supra* n. 221, at ¶ 2.

225. Perritt, *Demand for New Forms*, *supra* n. 6, at 679.

226. *Id.* at 680 (discussing the due process requirement of a record as discussed in Judge Henry J. Friendly's seminal article, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1291-92 (1975)).

decision makers to evaluate when confronted with similar cases.<sup>227</sup> This can help ensure consistent decisions in similar cases—namely, equal treatment for similarly situated parties. A record is also necessary if the ADR process provides for an appellate review of the decision.<sup>228</sup>

A great benefit of online dispute resolution is the automatic generation of a record; that is, the neutral is necessarily presented with written pleadings and statements, and any other material transmitted online, e.g., video-conferencing, is necessarily “captured” in an electronic form.<sup>229</sup>

However, the law governing enforcement of arbitral decisions does not necessarily require that a record be kept. Neither the Uniform Arbitration Act nor the Federal Arbitration Act require that the arbitrators record findings of fact, conclusions of law, or the reasoning behind their decisions.<sup>230</sup>

Even if not required, it will remain important for online ADR providers to maintain and provide access to meaningful records of the cases they adjudicate.

### SECURITY CONCERNS

A final concern with online ADR is the security of the process. In general, security concerns can be addressed with technology. They can be addressed by current technology or by the development of new technology.

A focal concern for parties entering into alternative dispute resolution is confidentiality. This is of great concern if the current resolution will be non-binding and may thus end up in litigation.<sup>231</sup> It is also of great importance if the subject matter of the discussion is proprietary or contains non-public information, for example, in a securities-law compliance context. Where the parties can be assured that their communications will be kept in strict confidence, the mediator or arbitrator will

---

227. *Id.* at 681-82.

228. *Id.* at 680-81.

229. *Id.* (noting that “online dispute resolution automatically generates a record because textual submissions and oral submissions transmitted electronically are fixed (recorded) by the technology”); see also Sunoo, *supra* n. 183, at ¶ 3 (quoting attorney Geoff Sharp as saying “[y]ou also have a complete record of the mediation,” as compared to face-to-face meetings).

230. Thornburg, *Going Private*, *supra* n. 3, at 212 n. 270, citing Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 1083 (2000).

231. See Perritt, *Demand for New Forms*, *supra* n. 6, at 682 (stating “many disputants prefer commercial arbitration over judicial conflict resolution precisely because arbitration proceedings need not be open to the public”).

benefit from receiving more frank and open discussion of the case.<sup>232</sup>

Confidentiality is threatened by the medium itself. Any online communication necessarily involves the copying of transferred information in servers located over the entire world.<sup>233</sup> Copies will survive, at a minimum, on the hard drives of the sender and recipient, as well as on the Internet service provider's backup system and in a temporary storage file.<sup>234</sup> Two possible tools to lessen threats of information being accessed by inappropriate persons are the use of pseudonyms and re-mailer systems that would make it difficult for a party trying to intercept a transmission to identify the source, and encryption which would theoretically make it mathematically impracticable for anyone but the intended recipient, or someone who has gained access to their encryption "key," to decipher the text of a message.<sup>235</sup>

Another security concern lies in authentication; both in being sure who actually sent a message and to prevent later repudiation of statements.<sup>236</sup> This can also be provided with a reasonably high degree of certainty by current encryption tools that can both provide assurance absent outside access to the encryption "keys," of who sent a message, and permit only a certain party to open it.<sup>237</sup> This process also addresses concerns about message integrity as it shows that no outside party has intercepted and modified the transmission.<sup>238</sup>

Another form of security is the password system, currently used by SquareTrade and Online Resolution, in which the provider sends each party a password that allows them access to a secure page within the provider's system.<sup>239</sup> These systems are estimated to provide around ninety-five percent assurance that the party communicating is who she claims to be.<sup>240</sup> Not perfect, but something, and probably enough in most contexts.

---

232. See Katsh, *Dispute Resolution in Cyberspace*, *supra* n. 1, at 971 (noting a guarantee of confidentiality "is often not a legally binding guarantee that is supported by case law or statute. More commonly, it requires some trust in the word of the neutral that intrusions into the process will be resisted").

233. *Id.*

234. *Id.*

235. *Id.* at 973.

236. *CPR's Online Seminar*, *supra* n. 38, cmt. of Charles Merrill.

237. Gregory Silverman, Class Notes, Electronic Commerce course (Seattle, Wash., Spring 2000) (copy on file with author). See e.g. *PGP Integrated into McAfee and Sniffer Business Units* <<http://www.pgp.com>> (accessed Jan. 23, 2002).

238. *Id.*

239. See generally Sunoo, *supra* n. 183.

240. *Id.* at ¶ 25 (quoting Colin Rule, chief executive officer of Online Resolution).

### III. CONCLUSION

The policy issues swirling around online ADR can be reduced to two main headings: capabilities and scope. The medium clearly can provide tremendous advantages in certain areas, namely settlement sites for use between knowledgeable parties and ICANN's UDRP for use in cybersquatting cases. When cases exceed the core competencies of these processes, however, problems result.

Because the medium is growing and changing at such a rapid pace, it is likely that its competency will develop. The key will be for those creating and operating these systems to balance the competing interests—efficiency versus due process, cost versus access—and to refuse to apply their systems to cases or paradigms that are beyond their systems' competency.

