

# Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?

Lucille M. Ponte\*

I.	INTRODUCTION .....	55
II.	EARLY ODR EFFORTS .....	60
III.	ODR IN THE CURRENT ONLINE ENVIRONMENT .....	65
	A. <i>Settlements Negotiated Through Automated Blind Bids</i> .....	66
	B. <i>Mediation Services in the Online Environment</i> .....	70
	1. Online Consumer Advocacy and Complaint Services .....	71
	2. Software-Based or Automated Mediation Services .....	73
	3. Facilitative Online Mediation Services .....	75
	C. <i>Adjudicatory Mechanisms in the Online Environment</i> .....	79
	1. Online Med-Arb Services for Consumer Disputes .....	79
	2. Online Arbitration Services .....	80
	3. Online Jury Proceedings .....	83
IV.	THROWING BAD MONEY AFTER BAD? .....	86
	A. <i>Specialized Training and Standards for ODR Practitioners</i> .....	87
	B. <i>Need for International Enforceability</i> .....	88
	C. <i>Importance of Low or No-Cost ODR Options</i> .....	89
	D. <i>Continued Technological Experimentation for ODR Services</i> .....	90
	E. <i>Greater Public Awareness and Understanding of ADR Concepts and Processes</i> .....	90
V.	CONCLUSION .....	91

## I. INTRODUCTION

“Shop ‘til You Drop.” It was once the exclusive mantra of hardcore shoppers who pounded the pavement of Main Streets and the tiles of malls. But that phrase has taken on a whole new meaning as

---

\* Associate Professor of Law, Bentley College, Waltham, Massachusetts. Professor Ponte wishes to acknowledge and thank Stephen D. Lichtenstein, J.D., Chair & Professor, Law Department, and H. Lee Schlorff, Ph.D., Vice President of Academic Affairs and Dean of Faculty, for funding support through the Summer Research Grant Program at Bentley College.

growing numbers of shoppers click and buy their way through the Internet's twenty-four-hour international marketplace of endless choices from the comfort of their own homes and offices.<sup>1</sup> As e-commerce presents a new wave of consumer options, disputes over online consumer purchases are growing with the lightning speed of the Internet.<sup>2</sup> With no uniform laws or court systems in cyberspace,

---

1. In 1998, the Department of Commerce estimated that Internet retail sales reached \$2.6 billion. *See* GERALD R. FERRERA ET AL., *CYBERLAW: TEXT AND CASES* 127 (2001). In addition, about \$970 million was spent on visits to adult-oriented Web sites. *See id.* at 221. It is estimated that e-commerce revenues will exceed \$1 trillion by 2003. *See id.* at 99. Online retail businesses are often called "e-tailers."

Recent figures indicate that about forty percent of all Internet users are located outside the United States. *See id.* at 11. Although most sites are in English, there are an increasing number of sites in other languages. *See id.* The European Union (EU) has initiated the eEurope project to help better develop its e-commerce market. *See* Public Comments by Paul Skehan, Eurochambres (European Chambers of Commerce) to Federal Trade Commission 1 (n.d.), available at <http://www.ftc.gov/bcp/altdisresolution/comments/skehan1.htm> (last visited July 18, 2000) [hereinafter Eurochambres Comments]. The eEurope project will try "to accelerate online buying and selling of goods and services in Europe. It is recognized that Europe lags far behind the United States in this area." *See id.* Language barriers and the reluctance of EU businesses to establish online sites have been partially blamed for the slow e-commerce development among EU member nations. *See id.* However, "a major reason for the lack of take-up appears to be a lack of trust or confidence on the part of the buyer." *Id.* The eEurope program will seek to promote EU consumer confidence in e-commerce through the establishment of effective alternative dispute systems. *See id.*

In Japan, the Ministry of International Trade and Industry (MITI) echoed concerns that consumers may be reluctant to become active in e-commerce because of a lack of knowledge and access to appropriate channels of dispute resolution. *See* Public Comments by Ministry of International Trade and Industry (MITI), Japan, to Federal Trade Commission 1-2 (June 29, 2000), available at <http://www.ftc.gov/bcp/altdisresol.../postworkshopcomments/yasunaga.htm> (last visited July 18, 2000) [hereinafter MITI Comments]. Although MITI has yet to take an official policy stand regarding online ADR, MITI did indicate that online ADR could be an effective and valuable tool for e-commerce disputes. *See id.* at 2-3.

2. In 1998, the Federal Trade Commission received 7955 Internet-related complaints, which shot up nearly 135% to 18,622 complaints in 1999. *See* Carolyn Said, *Net Services Referee Disputes Between Online Sellers, Buyers*, S.F. CHRON., June 12, 2000, at C3; Michael Liedtke, *Online Mediators Seek Opportunities*, YAHOO! NEWS, Apr. 30, 2000. The National Consumers League's Internet Fraud Watch division found a thirty-eight percent increase in consumer Internet complaints in 1999. *See* Said, *supra*. In the league's October 1999 survey, about twenty percent of online consumers surveyed indicated problems with an Internet transaction in the past twelve months. *See id.*; Liedtke, *supra*. An overwhelming majority of Internet-related complaints dealt with online auction transactions. *See* Said, *supra*; Liedtke, *supra*. *See generally* James M. Snyder, *Note: Online Auction Fraud: Are the Auction Houses Doing All They Should or Could to Stop Online Fraud?*, 52 FED. COMM. L.J. 453 (Mar. 2000) (discussing alarming increase in online auction fraud and self-regulatory efforts of auction houses. Author advocates that FTC must take stronger role to stem tide of auction fraud).

In addition, more consumers are also using the Internet to register their complaints against both online and offline businesses. The Better Business Bureau (BBB) announced that more than 67,000 consumers had filed online complaints with the BBB between January and May, 2000, which could present a 38.3% increase if the trend continues. *See Latest BBB Consumer Complaint Statistics Reflect Dramatic Shift to Internet* (June 6, 2000), available at

disappointed consumers are groping for ways to resolve online consumer disputes that reflect the speed, efficiency, and convenience of online technologies.<sup>3</sup>

In this fast-paced environment, government agencies, e-businesses, and consumer groups are scrambling to find answers that will bolster consumer confidence in this burgeoning online marketplace.<sup>4</sup> The Federal Trade Commission (FTC) recently held an

---

<http://www.bbb.org/alerts/bbbstats.asp> (last visited July 25, 2000). The BBB expects that about fifty percent of all BBB complaints will be filed online by the end of 2000. *See id.*

Those in urban areas with incomes over \$75,000 were twenty times more likely to have Internet access than lower income rural households. *See* DEP'T OF COM., NAT'L TELECOMM. & INFO. ADMIN., *FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE* (1999), available at <http://www.ntia.doc.gov/ntiahome/fftn99/contents.html> (last visited July 24, 2000). In addition, between 1997 and 1998, the digital divide widened to twenty-five percent between those with the highest and lowest education levels and to twenty-nine percent between those with the highest and lowest income levels. *See id.* At the end of 1999, President Clinton, along with business and civil rights leaders, announced a series of initiatives and partnerships aimed at narrowing the digital divide. *See* Jeri Clausing, *Clinton Addresses Gap in Computer Access*, N.Y. TIMES ON THE WEB, Dec. 9, 1999, at 1-5, at <http://www.nytimes.com/library/tech/99/12/cyber/articles/10divide.html> (last visited July 24, 2000).

3. The issues of choice of law, enforceability, and sovereignty found in offline dispute resolution are magnified by the cross-border nature of the Internet. *See* Robert C. Bordone, Note, *Electronic Online Dispute Resolution: A Systems Approach-Potential, Problems, and a Proposal*, 3 HARV. NEGOTIATION L. REV. 175, 181 (Spring 1998); Alejandro E. Almaguer & Roland W. Baggott III, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711, 711-12 (1998); Frank A. Cona, *Focus on Cyberlaw: Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 993-94 (Fall 1997); E. Casey Lide, Note & Comment: *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 220 (1996). Many Internet consumer disputes involve low dollar amounts in dispute, ranging from \$300-\$3,000. *See* Public Comments of National Consumers League, the Electronic Privacy Center and Consumer Federation of America to the Federal Trade Commission 1 (June 26, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/> (last visited July 18, 2000) [hereinafter Consumer Group Comments]. In some cases, the disputes have involved as little as a \$2 shipping charge between parties. *See* Carl S. Kaplan, *Mediators Help Settle Online Auction Disputes*, N.Y. TIMES ON THE WEB, May 7, 1999. In such instances, parties are in no position to undertake the time and expense of either domestic or international litigation. *See infra* note 4.

4. Recently, the OECD Council approved a set of e-commerce guidelines that included greater use of ADR. *See* Recommendations of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, Organization for Economic Cooperation and Development 7-8 (Dec. 9, 1999), at <http://www.oecd.org/dsti/sti/it/consumer/prod/guidelines.htm> (last visited July 21, 2000). The resolution stated that online "[c]onsumers should be provided meaningful access to fair and timely alternative dispute resolution and redress without undue cost or burden." *Id.*

In addition, the Electronic Commerce and Consumer Group, composed of America Online (AOL), American Telephone & Telegraph (AT&T), Dell Computer Corporation, International Business Machines (IBM), Microsoft, Network Solutions, Inc., Time Warner, Inc., and Visa U.S.A. Inc., has proposed guidelines for merchant-to-consumer transactions, aimed at boosting consumer confidence in global e-commerce, which includes a provision about dispute resolution mechanisms. *See* Electronic Commerce and Consumer Group, Guidelines for Merchant-to-Consumer Transactions and Commentary, at 1 (n.d.), at <http://www.ecommercegroup.org/guidelines.htm> (last visited Aug. 7, 2000). The introduction states:

international workshop focusing on tailoring alternative dispute resolution (ADR) to meet the conflict resolution demands of the Internet, breathing new life into the ADR movement.<sup>5</sup> Both the popular press<sup>6</sup> and ADR experts<sup>7</sup> are heralding online ADR as key to

---

In terms of dispute resolution, the goal is to resolve these issues in a manner that reflects that the monetary values of these disputes, while important to individual consumers, are often small in amount. Therefore, traditional court-based solutions, including small claims courts, particularly for people who live in different countries, are by and large impractical. The Guidelines focus on alternative dispute resolution, which will better empower consumers to seek the correction of wrongs . . . [we] plan to actively participate in the global discussion and encouragement of effective alternative dispute resolution mechanisms for the online environment.

*Id.* Under the relevant guideline provision, merchants are encouraged to provide “fair, timely, and affordable means to settle disputes and obtain redress” through internal and third party dispute resolution mechanisms. *See id.* § XIV. Internet consumer disputes tend to involve relatively small dollar amounts, which can deter consumer action against an e-tailer and points to the need for cost-effective ODR methods. *See id.*; Consumer Group Comments, *supra* note 3, at 4; Post Workshop Public Comments by Charles I. Underhill, Senior Vice President, Dispute Resolution Division, Better Business Bureau (BBB), to the Federal Trade Commission, at 4, 8-9 (June 21, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/> (last visited July 18, 2000) [hereinafter Underhill Post Workshop Comments].

5. In the wake of the guidelines, the Federal Trade Commission sent out an initial notice about a public workshop and a request for comments on eighteen sets of questions concerning online ADR. *See* Public Workshop: Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, 65 Fed. Reg. 7831 (Feb. 16, 2000), at <http://www.ftc.gov/os/2000/02/altdisresolutionfrm.htm> (last visited July 18, 2000). The two-day workshop, held in Washington, D.C. on June 6th and 7th, brought together international government authorities, consumer groups, ADR professionals and e-business leaders. *See FTC, Commerce to Host Online Dispute Resolution Workshop* (June 5, 2000), at <http://www.ftc.gov/opa/2000/06/adr.htm> (last visited June 20, 2000) (providing copy of agenda of two-day workshop). A number of public authorities and private e-commerce players at the FTC workshop emphasized the importance of effective dispute resolution as integral to boosting consumer confidence in and use of the electronic malls of the Internet. *See, e.g.*, Consumer Group Comments, *supra* note 3; Post Workshop Public Comments by the European Commission to the Department of Commerce & Federal Trade Commission 1-2 (May 30, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/> (last visited July 18, 2000) [hereinafter European Commission Comments]; MITI Comments, *supra* note 1, at 1-2; Eurochambres Comments *supra* note 1, at 1; *infra* note 7.

6. *See, e.g.*, Jon Rhine, *FTC Pushes e-Tailers to Placate Angry Customers*, S.F. BUS. TIMES, June 16-22, 2000, at 12; James H. Johnston, *A New Edge to an Old Tool—Online ADR*, LEGAL TIMES, May 1, 2000, at 26; David Jarman, *Online Mediation Services Help Resolve Disputes When Auction Deals Go Bad*, Apr. 14, 2000, at <http://www.auctionwatch.com/awdaily/features/neutral/index.html> (last visited July 18, 2000); *Online Mediator Service Hoping to Help Those in Disputes over Online Purchases* (National Public Radio, Morning Edition, Apr. 3, 2000); *Premier On-line Consumer Protection Site Warmly Embraces Disgruntled On-line Shoppers, Gratis!*, PR NEWSWIRE, Dec. 28, 1999 (Lexis-Nexis Academic Universe-Document); Said, *supra* note 2; Liedtke, *supra* note 2; Kaplan, *supra* note 3.

7. *See, e.g.*, Bordone, *supra* note 3; Almaguer & Baggott, *supra* note 3; Lide, *supra* note 3; Public Comments of Ethan Katsh, Director, Center for Information Technology and Dispute Resolution, to Federal Trade Commission (Apr. 12, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/katsh.htm> (last visited July 18, 2000) [hereinafter Katsh Comments]; Public Comments of Ryan Baker, WebMediate, Inc. to Federal Trade Commission (n.d.), at <http://www.ftc.gov/bcp/altdisresolution/comments/> (last visited July 18, 2000) [hereinafter Baker

dealing with Internet consumer problems.<sup>8</sup> Like a modern day gold rush, numerous profit and nonprofit ADR organizations are jockeying for preeminence in the online dispute resolution (ODR) arena.<sup>9</sup>

---

Comments]; Public Comments of Professor Karim Benyekhief, eResolution, to Federal Trade Commission (n.d.), at <http://www.ftc.gov/bcp/altdisresolution/comments/> (last visited July 18, 2000) [hereinafter Benyekhief Comments]; *supra* notes 1, 4. *But see infra* note 8 and accompanying text.

8. Typically, ODR is viewed as helping to bridge the geographic distance between Internet disputants and saving the time and costs associated with standard litigation, in-person meetings and travel. *See* Bordone, *supra* note 3, at 191-92; Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 B.Y.U. L. REV. 1305, 1307-08 (1998); Susan Patlyek, *Dispute Resolution in Cyberspace* (n.d.), at <http://www.chss.montclair.edu/leclair/LS/papers/cyberadr.html> (last visited July 21, 2000). However, some ADR experts suggest that ODR cannot always replace the need for face-to-face communication between disputants. *See* Eisen, *supra*, at 1321, 1324-25, 1329; Cona, *supra* note 3, at 992; Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law"*, 15 OHIO ST. J. ON DISP. RESOL. 705 (Summer 2000); Public Comments by Dr. Luis Miguel Díaz & Nancy A. Oretskin, U.S.-Mexico Conflict Resolution Center, to the Federal Trade Commission 1 (Mar. 17, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/diazattach.htm> (last visited July 18, 2000) [hereinafter Diaz Comments].

Mr. Cona, a former consultant to the Virtual Magistrate Project, indicated in the context of arbitration that,

[w]hile information technology can be used to reduce the time and cost involved in some traditional mechanisms of international arbitration, it cannot truly replace oral discussion and a face-to-face examination of witnesses. In many disputes, the necessary frequency of such in person events may make implementation of Internet enhanced dispute resolution impracticable.

*Id.*; *see infra* note 77 and accompanying text.

This view was reflected in comments by representatives of U.S.-Mexico Conflict Resolution Center, who stated that

there are human beings behind disputes. Internet has added a new mode of communication as far as the speed, although it uses written language, a very old mode of communication. The caveat is not to lose sense that even the very best written communication cannot substitute the personal communication in which the communicators face each other and express their thoughts and emotions in verbal and body language. Therefore, whatever system of rules for online disputes is adopted, it should include a rule which allows for personal contact between the disputants, whether by themselves or with the assistance of a facilitator-mediator, or an arbitrator.

Díaz Comments, *supra*, at 1.

Others have added that technology, such as e-mail, can be abused by parties who want to avoid face-to-face meetings or to ignore important case issues. *See* Wendy Liebowitz, *Online Dispute Settlements: A Winning Option*, N.Y.L.J., June 29, 1999, at 5.

In addition, the results are mixed as to whether ADR actually saves time and money for disputants and the judicial system. *See* James S. Kakalik et al., *Just, Speedy and Inexpensive? An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act*, Rand Inst. (1996), at <http://www.rand.org/publications/MR/MR800/index.html> (last visited July 28, 2000); Deborah R. Hensler, *Does ADR Really Save Money? The Jury's Still Out*, NAT'L L.J., Apr. 11, 1994, at C2; Craig Ewen, *State Justice Institute Conference on Court-Connected ADR*, DISP. RESOL. MAG., Spring 1994, at 7; Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution*, 53 U. CHI. L. REV. 366, 367 (1986).

9. For the purposes of this Article, the term "ODR" will be used primarily to refer to ADR methods that use online technologies (such as e-mail, chat rooms, and listservs) to resolve

Splashy Web sites are popping up all over the Internet touting ADR providers' fast and easy ODR options in this nascent market. But can ODR really deliver the goods for the average Internet consumer? Is it worth it for the unhappy online shopper to sink more time and money into ODR in order to resolve a low cost Internet dispute? Despite some inflated claims to the contrary, more serious thought and work needs to be done before online consumers can feel confident that ODR options will truly help resolve their online disagreements in a fast, fair, and cost-effective manner.<sup>10</sup>

Part I of this Article will consider the early development efforts for ODR. Part II will discuss the main forms of ODR being marketed on the Internet today, with a special focus on ODR services aimed at online consumer disputes.<sup>11</sup> Both profit and nonprofit ADR organizations dealing with disagreements in cyberspace will be explored. Part III will conclude with a discussion of areas that must be addressed before online shoppers can have solid confidence in the credibility and reliability of ODR providers.<sup>12</sup>

## II. EARLY ODR EFFORTS

Despite the recent hype about ODR and the flurry of new ODR Web sites, there have been several earlier attempts to develop ODR programs. The National Conference of Automated Information Research teamed with other organizations to develop and fund three different ODR programs: the Virtual Magistrate Project;<sup>13</sup> the Online Mediation Project (Mediate-net);<sup>14</sup> and, Online Ombuds Office

---

disputes that arise from online transactions. However, the term "ODR" can also be applied to online ADR providers who handle offline disputes using online technologies. *See, e.g.*, <http://www.icourthouse.com> (last visited July 18, 2000) (handling online and offline disputes using online juries); <http://www.allsettle.com> (last visited July 25, 2000) (using automated blind bid software to aid in settlement of insurance claims). Some proponents of ODR hope that in the future more disputants with offline disputes will turn to ODR for its projected lower costs, speed and convenience. *See* Bordone, *supra* note 3, at 192. The concept of ODR is a subcategory of ADR. The term "ADR" will be used to refer to dispute resolution efforts used in the offline world for offline disputes.

10. *See infra* notes 13-39 and accompanying text.

11. *See infra* notes 4-153 and accompanying text.

12. *See infra* notes 154-172 and accompanying text.

13. The Virtual Magistrate Program was launched in May 1996. This project was jointly administered and funded through NCAIR, the Cyberspace Law Institute, the Villanova Center for Information Law and Policy, and the American Arbitration Association. *See* Bordone, *supra* note 3, at 187-88; Cona, *supra* note 3, at 987-88; Patlyek, *supra* note 8, at 2. Another experimental online arbitration and mediation service was started in 1997 by Professor Karim Benyekhlef, University of Montreal, CyberTribunal, also ceased operations in December 1999, due to a lack of funding. *See* <http://www.cybertribunal.org/> (last visited July 26, 2000).

14. The third NCAIR-funded project was the Online Mediation Project based at the University of Maryland Law School and operated by the Law School's Program for Dispute

(OOO).<sup>15</sup> Each program targeted different types of disputes and used different ADR approaches. The Virtual Magistrate program used an online arbitration panel to handle claims that Internet users brought against system operators or against other users who had disseminated harmful or unlawful messages, postings, or files.<sup>16</sup> Mediate-net was designed as an online information resource and mediation service that used a mix of real time meetings and video conferencing for Maryland residents with family law disagreements governed by Maryland law.<sup>17</sup> The OOO is a mediation service aimed at disagreements that arise from a broad array of online activities.<sup>18</sup> Unfortunately, none of these pioneering projects gained widespread support, and only the OOO still maintains an active online presence.<sup>19</sup>

Of these earlier projects, the failure of the Virtual Magistrate project illustrates some of the obstacles facing the use of ODR for consumer disputes today. The Virtual Magistrate was an ambitious pilot program that sought not only to resolve disputes world-wide, but to determine the feasibility of, and provide the framework for, future ODR systems, and to help interpret the duties of system operators on such diverse issues as copyright infringement, invasion of privacy, trademark infringement, misappropriation of trade secrets, fraud, deceptive business practices, and defamation.<sup>20</sup> The Virtual Magistrate

---

Resolution and the Center for On-Line Mediation & Trade, Inc. See Bordone, *supra* note 3, at 187-88; Cona, *supra* note 3, at 989; Patlyek, *supra* note 8, at 3.

15. NCAIR teamed with the Cyberspace Law Institute and the Center for Information Technology and Dispute Resolution at the University of Massachusetts in Amherst to create the Online Ombuds Office in July, 1996. See Bordone, *supra* note 3, at 187-88; Cona, *supra* note 3, at 987-88; Patlyek, *supra* note 8, at 4; <http://www.aaron.sbs.umass.edu/center/ombuds/database.htm> (last visited July 25, 2000) (Online Ombuds Office's Table of Disputes page).

16. See Cona, *supra* note 3, at 987-88; Almaguer & Baggott, *supra* note 3, at 719-20; Patlyek, *supra* note 8, at 2-3.

17. See Patlyek, *supra* note 8, at 3-4; <http://www.mediate.net.org/index.htm> (last visited July 21, 2000) (Mediate-net's Web site).

18. See <http://aaron.sbs.umass.edu/center/ombuds/database.htm> (last visited July 25, 2000) (Online Ombuds Office's Table of Disputes page). Recently, the OOO completed a pilot mediation project with eBay concerning online auction disputes, and the findings of that project were recently published. See Katsh et al., *supra* note 8; Liebowitz, *supra* note 8, at 5; Carl S. Kaplan, Mediators Help Settle Online Auction Disputes, CYBERLAW J., May 7, 1999, at 2-3, at <http://www.nytimes.com/library/tech/99/05/cyber/cyberlaw/07law.html> (last visited July 18, 2000); See also *infra* notes 98-102 and accompanying text.

19. The Virtual Magistrate is now defunct. See Liebowitz, *supra* note 8, at 5. Mediate-net has an existing Web site which has not been updated since October 4, 1996. See <http://www.mediate-net.org/index.htm> (last visited July 21, 2000). An e-mail request to Mediate-net for clarification of its active status did not receive a response. Only the OOO has a current, active Web site. See <http://www.aaron.sbs.umass.edu/center/ombuds/default.htm> (last visited July 18, 2000).

20. See Cona, *supra* note 3, at 987-88; Almaguer & Baggott, *supra* note 3, at 720-22. The seven goals of the Virtual Magistrate were:

relied heavily on the support of system operators in order to enforce the program's decisions. The program did not specifically apply to online consumer disputes.<sup>21</sup>

The Virtual Magistrate program was the first effort aimed at online arbitration using a combination of e-mail and a listserv as the forms of online communication.<sup>22</sup> Complaints, filed electronically, indicated the basic facts of the objectionable conduct, the parties involved, the remedies sought, and any relevant posted materials.<sup>23</sup> The American Arbitration Association (AAA) would screen the complaint to determine if further information or clarifications were needed. The AAA would then contact the responding party to gain their agreement to arbitrate the matter before the Virtual Magistrate. If an agreement to arbitrate was reached, the AAA would select a magistrate with an appropriate background to hear the case.<sup>24</sup>

The arbitration proceeding occurred completely online, with the parties and the selected magistrate communicating with each other on a specific, password-protected listserv (referred to as the "grist"), which would distribute postings to all the participants.<sup>25</sup> In some

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

See Cona, *supra* note 3, at 987-88; Almaguer & Baggott, *supra* note 3, at 720-21.

21. One case involving a consumer purchase of a computer was rejected because the dispute did not arise online. See Almaguer & Baggott, *supra* note 3, at 734.

22. See Cona, *supra* note 3, at 987-88; Almaguer & Baggott, *supra* note 3, at 719-20; Patlyek, *supra* note 8, at 2-3. See generally Henry J. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675 (Summer 2000) (outlining main criteria for fairness in online arbitration proceedings).

23. See Almaguer & Baggott, *supra* note 3, at 723; Patlyek, *supra* note 8, at 3.

24. See Almaguer & Baggott, *supra* note 3, at 724; Patlyek, *supra* note 8, at 3.

25. See Almaguer & Baggott, *supra* note 3, at 725-26; Patlyek, *supra* note 8, at 3. The public could not view materials in the dispute until after a decision had been rendered. See Almaguer & Baggott, *supra*, at 726; Patlyek, *supra* note 8, at 3.



instances, the magistrate might use individual e-mail if private communications were required.<sup>26</sup>

The magistrate's final decision would be posted on the listserv, spelling out the appropriate relief, which might involve the removal of a posting by a system operator or the denial of access to the system by the wrongdoer.<sup>27</sup> The decision would have no precedential value, but might be viewed as persuasive authority in the developing area of Internet law.<sup>28</sup> In light of the rapid pace of the Internet, the magistrate sought to deliver decisions within seventy-two hours of the parties' agreement to arbitrate.<sup>29</sup>

Unfortunately, the project did not draw many interested parties.<sup>30</sup> The Virtual Magistrate only rendered one decision, Tierney and EMail America, a dispute concerning an unsolicited bulk e-mail (an online practice called "spamming"<sup>31</sup>), brought by one of the project's advisors.<sup>32</sup>

Mr. Tierney complained that Email America had posted an ad offering to sell five million Internet e-mail addresses in violation of public policy, privacy rights, and fair business practices. The action

---

26. See Patlyek, *supra* note 8, at 3.

27. See Almaguer & Baggott, *supra* note 3, at 725-26; Patlyek, *supra* note 8, at 3. The magistrate used the traditional arbitration standard of reasonableness, but did so in light of "network etiquette, applicable contracts, appropriate substantive laws, and whether a system operator would be acting reasonably if it withheld messages, files, or postings from public access pending resolution of claims between the parties in interest in any applicable legal jurisdiction." Almaguer & Baggott, *supra* note 3, at 726 (citation omitted).

28. See Almaguer & Baggott, *supra* note 3, at 726.

29. See *id.* at 725 n.80; Patlyek, *supra* note 8, at 3. The Virtual Magistrate's only decision took thirteen days from the date of the claimant's initial online complaint to resolve and did not involve the participation of the alleged wrongdoer in the dispute. See *infra* note 37 and accompanying text.

30. See Bordone, *supra* note 3, at 196, Almaguer & Baggott, *supra* note 3, at 733; see also *supra* notes 1, 5 and accompanying text. Formal statistics were not maintained for the project, but it is estimated that there were fewer than twenty cases considered for resolution. See Almaguer & Baggott, *supra* note 3, at 734. One case involving a consumer purchase of a computer was rejected because the dispute did not arise online. See *id.*

31. See Almaguer & Baggott, *supra* note 3, at 727-28; Cona, *supra* note 3, at 995-96. In Internet parlance, sending unsolicited bulk e-mails is referred to as "spamming" and is viewed as an annoying interference with a subscriber's privacy rights and an online service provider's property rights. See FERRERA ET AL., *supra* note 1, at 210-11, 214-15. Under recent precedent, online service providers have sought court injunctions to block spamming to their subscribers. See *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997) (issuing preliminary injunction against bulk e-mailer under theory of trespass to chattels and determined that CompuServe's efforts to block spamming did not violate First Amendment); *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996) (determining that AOL's efforts to block spamming did not violate First Amendment).

32. See Almaguer & Baggott, *supra* note 3, at 732. Mr. Tierney was a consumer fraud advisor to the Virtual Magistrate project and was professionally associated with one of the project founders. Therefore, the decision was tainted due to this apparent conflict of interest. See *id.*

was brought against respondents, Email America and America Online, Inc. (AOL), the online service provider (OSP). The decision was rendered with the participation of AOL, but without the participation of the alleged wrongdoer, Email America. The Virtual Magistrate ultimately determined that AOL should remove or block the Email America posting as allowed under AOL's terms of use.<sup>33</sup> Unfortunately, it was later determined that Email America had sent a direct e-mail to Tierney and other AOL subscribers, so AOL ultimately had nothing to remove or block.<sup>34</sup>

The Tierney decision has been highly criticized, but does offer insight into some of the potential obstacles facing the use of ODR to handle online business-to-consumer disputes.<sup>35</sup> The Virtual Magistrate project had difficulty attracting potential cases with the Tierney action having been brought by an advisor to the Virtual Magistrate, as opposed to a typical Internet user. This lack of interest points to the need for ODR providers to better educate the public about online ADR and the need for ODR providers to inspire public confidence in and awareness of their services.<sup>36</sup> Second, Email America did not participate in the proceedings and the case could only go forward because of AOL's willingness to participate. In standard business-to-consumer disputes, ODR must be able to secure the full participation of the e-tailer and the online consumer for the online proceedings to be effective.<sup>37</sup> Third, the magistrate lacked the ability to enforce the decision. With the global nature of the Internet, online consumers may receive little benefit from the time and money expended in using ODR services if the ODR provider lacks the ability to enforce its decisions.<sup>38</sup> Fourth, the relief ordered by the Virtual Magistrate could have been handled by AOL under its own terms of use without the intervention of the Virtual Magistrate. Therefore, ODR can only gain support if it can provide an added value to the dispute resolution process, above and beyond what OSPs and e-consumers can already do on their own. Lastly, the magistrate ordered relief that could not be executed because

---

33. See *id.* at 727-30; Cona, *supra* note 3, at 995-97.

34. See Almaguer & Baggott, *supra* note 3, at 732-33.

35. See *id.* at 730-33; Cona, *supra* note 3, at 998.

36. See Bordone, *supra* note 3, at 196; Almaguer & Baggott, *supra* note 3, at 733; see also *supra* notes 1, 4-5 and accompanying text.

37. See Cona, *supra* note 3, at 987-88; Almaguer & Baggott, *supra* note 3, at 719-20; Patlyek, *supra* note 8, at 2-3. The Cybertribunal site ran into similar difficulties when using voluntary arbitration proceedings. In more than half of the cases that came before the Cybertribunal, the alleged wrongdoer never responded to the e-mail from the ODR provider. See *infra* notes 125-128, 130 and accompanying text.

38. See *supra* note 3 and accompanying text; see also *infra* notes 126, 131-132 and accompanying text.

of a misunderstanding about the nature of the advertisement. Thus, ODR providers must be careful when engaging in online communications to properly ascertain the facts and issues in dispute and must establish methods to insure quality and accuracy in their decision-making.<sup>39</sup>

### III. ODR IN THE CURRENT ONLINE ENVIRONMENT

The early ODR projects were established by nonprofit and educational organizations gathering data on ODR processes, experimenting with technological methods, and seeking to develop a framework for sustaining effective ODR. Browsing the Internet today, one finds that ODR offerings are a patchwork of entities, a mix of public and private, nonprofit and profit ventures, using different ODR methods and varied business models. Some programs are free or low-cost options, while others use a sliding scale based on the value of the dispute. Still others charge initiation fees with supplemental hourly rates using participants' credit cards. Certain ODR offerings are completely automated online systems, while others use a blend of online and offline methods to handle disagreements through mediation, arbitration, and cyberspace juries.

There is general agreement that ODR processes should remain flexible, and that no one form of ODR will work best in all online dispute situations.<sup>40</sup> However, there is less agreement on how ODR methods and standards should be developed and implemented. Some ODR commentators view cyberspace as a separate domain that should develop its own laws and customs. These commentators want a unique, self-regulated model of ODR that is neither constrained nor governed by real world government authorities and the attendant issues of sovereignty, territoriality, choice of laws, and jurisdiction.<sup>41</sup> Naturally, government authorities oppose this notion of self-regulated

---

39. See Almaguer & Baggott, *supra* note 3, at 731-33; see also *infra* note 154 and accompanying text.

40. See, e.g., MITI Comments, *supra* note 1, at 3; European Commission Comments, *supra* note 5, at 5; Katsh Comments, *supra* note 7, at 2; Baker Comments, *supra* note 7, at 2. As Professor Katsh stated:

We need to design and implement appropriate systems, and what is appropriate may vary from marketplace to marketplace. In the existing and currently functioning arena of domain names, arbitration has been workable, in insurance claims disputes a totally automated negotiation process has been growing in use, and in the online auction context, mediation may be preferred.

Katsh Comments, *supra* note 7, at 2.

41. See Bordone, *supra* note 3, at 190-91, 193-94; Almaguer & Baggott, *supra* note 3, at 715-19; Benyekhief Comments, *supra* note 7, at 10.

ODR developed solely in cyberspace and operated outside of the scope of government oversight.<sup>42</sup> To aid in understanding this thicket of ODR options, Part II will categorize ODR programs by the ADR methods they employ to help deal with online disputes.

*A. Settlements Negotiated Through Automated Blind Bids*

Several ODR sites operate focusing solely on the negotiation of monetary settlements in disputes.<sup>43</sup> CyberSettle.com,<sup>44</sup> clickNsettle.com,<sup>45</sup> and SettleSmart.com<sup>46</sup> are representative of this form of ODR. These ODR programs offer complete online services using e-mail to notify parties of settlement activity and software programs that automatically compare double blind bids between the opposing parties. These ODR services provide parties with access twenty-four hours a day to a confidential system of blind bids. These companies assert that their

---

42. See MITI Comments, *supra* note 1, at 3; European Commission Comments, *supra* note 5, at 4. As the European Commission indicated:

Industry should be encouraged not just to develop ADRs in isolation. . . . Public authorities must act as honest brokers in this process allowing standards to be established by consensus through the exchange and development of these stakeholders' experience. Such a partnership will guarantee trust and boost confidence. Public authorities then have a role as the guarantors of these agreements overseeing the results.

European Commission Comments, *supra* note 5, at 7.

This perspective was echoed by representatives of the U.S.-Mexico Conflict Resolution Center, in Las Cruces, New Mexico, who stated that "because Electronic commerce is a new phenomenon, it is a liability of governments, for the protection of consumers, to make known which are the rules for dispute resolution online." Diaz Comments, *supra* note 8, at 1.

43. Focusing merely on the settlement of disputes, and not the quality of justice, has been hotly debated in ADR circles for years. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1, 6-12, 18-21 (1991); Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 15-27 (1987); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075-89 (1984).

44. See <http://www.cybersettle.com> (last visited Nov. 11, 1999) (providing automated blind bid services for insurance claims and other cyberspace disputes). CyberSettle estimates that its service has handled over 5000 cases valued at more than \$20 million dollars in dispute since August 1988. See Katsh et al., *supra* note 8, at 721; *CyberSettle.Com Opens Up a Portal for Online ADR*, CORP. LEGAL TIMES, Sept. 9, 1999, at 22.

45. See <http://www.clicknsettle.com> (last visited June 2, 2000) (providing automated blind bid services for wide range of disputes). It is important to note that clickNsettle is owned and operated by the National Arbitration and Mediation (NAM) Corporation, which also offers traditional ADR training and services such as mediation, arbitration, and mock jury trials. In addition, NAM Corporation offers videoconferencing services for handling ADR proceedings for disputants in different locations. See <http://www.clicknsettle.com/aboutus.cfm> (last visited June 2, 2000).

46. See <http://www.settlesmart.com> (last visited July 18, 2000) (offering automated blind bid services in insurance disputes as well as business, real estate and construction conflicts). This firm indicates that its services have resulted in \$36 million in settlements and verdicts. See <http://www.settlesmart.com.how.htm> (last visited July 18, 2000).

systems are fast, user-friendly, and cost-effective, offering parties the opportunity to settle cases without compromising future negotiations.<sup>47</sup>

In blind bid negotiations, parties submit online confidential settlement bids through e-mail to secure, password protected sites.<sup>48</sup> Sites, such as CyberSettle.com and SettleSmart.com, usually allow three rounds of bidding.<sup>49</sup> Alternatively, some ODR providers, like clickNsettle.com, offer numerous rounds of offers and demands between the parties within a defined time period.<sup>50</sup>

Typically, in an automated bid situation governed by a distinct number of rounds, the initiating party, who is interested in settling the dispute, enters three settlement offers as first, second and third-round offers.<sup>51</sup> The offers are usually bound by a predetermined expiration

---

47. See <http://www.settlesmart.com/benefits.htm> (last visited July 18, 2000); [http://clicknsettle.com/hiw\\_a.cfm](http://clicknsettle.com/hiw_a.cfm) (last visited June 2, 2000); <http://www.cybersettle.com/about/main.htm> (last visited Aug. 3, 2000). It is also important to note that settlement rates for double blind bidding systems have remained low, only about forty percent, an amount not likely to inspire confidence in disputants involved in online consumer disputes. See Baker Comments, *supra* note 7, at 5.

Popular with insurance companies, some of these ODR firms do not restrict their offerings to insurers, but are interested in attracting a wide range of online disputes. See *Injury Claims Go Online Via New Self-Help Website*, PR NEWSWIRE, May 2, 2000, at 1; Matthew Goldstein, *Mediator Morphs into Web Service, and Finally Gets Wall Street's Notice: New Feature Enable On-Line Settlements*, CRAIN'S NEW YORK BUSINESS, Aug. 9, 1999, at 2; Katsh Comments, *supra* note 7, at 3; <http://www.allsettle.com> (last visited July 25, 2000) (Web site for ODR service using blind bids to resolve insurance disputes); <http://www.myclaim.com> (last visited Aug. 3, 2000) (Web site for ODR service using blind bids to resolve insurance disputes); *supra* notes 40, 44-46 and accompanying text.

Concerns about objectivity and impartiality may arise when there are close business affiliations between ODR services and insurers. Recently, Insurance Services Office, Inc., which provided consulting and technical services to insurance brokers and companies, purchased a sixteen percent or \$4 million share of the NAM Corporation, which operates clickNsettle.com and provides mediation and arbitration services. Clearly, this purchase may raise concerns about the objectivity and impartiality of NAM Corporation in handling insurance disputes. See *ISO Acquires Stake in Dot-Com Service*, J. OF COM., May 16, 2000, at 10. Also, the Robert Plan Corporation, an auto insurance service underwriter, selected Cybersettle.com as its exclusive ODR provider and expects to submit at least 15,000 claims through Cybersettle.com in the next twelve months. See *The Robert Plan Selects Cybersettle as Exclusive Online Dispute Resolution System*, PR NEWSWIRE, Dec. 16, 1999, at 1. Obviously, there needs to be full disclosure of these ties to claimants, as well as the development and application of professional ODR codes of conduct. See *infra* note 155 and accompanying text.

48. See <http://www.settlesmart.com/how.htm> (last visited July 18, 2000); [http://www.clicknsettle.com/hiw\\_c.cfm](http://www.clicknsettle.com/hiw_c.cfm) (last visited June 2, 2000); [http://www.cybersettle.com/faq/step\\_01.htm](http://www.cybersettle.com/faq/step_01.htm) (last visited Aug. 3, 2000).

49. See <http://www.settlesmart.com/how.htm> (last visited July 18, 2000); [http://www.cybersettle.com/faq/step\\_01.htm](http://www.cybersettle.com/faq/step_01.htm) (last visited Aug. 3, 2000).

50. See [http://clicknsettle.com/hiw\\_c.cfm](http://clicknsettle.com/hiw_c.cfm) (last visited June 2, 2000).

51. See <http://www.settlesmart.com/how.htm> (last visited July 18, 2000); [http://www.cybersettle.com/faq/step\\_01.htm](http://www.cybersettle.com/faq/step_01.htm) (last visited Aug. 3, 2000).

date.<sup>52</sup> Using e-mail, the ODR service notifies the responding party, normally the claimant, that the initiating party is interested in settling and has submitted a settlement offer.<sup>53</sup> The respondent then provides settlement demands (or offers, if applicable) ranked by first, second, and third rounds.<sup>54</sup> Neither party is aware of the amounts offered by their opponent. The software technology then automatically compares the ranked bids of each party to determine if settlement has been achieved. If no settlement occurs, the parties have not disclosed their suggested settlement amounts, and therefore, have not compromised their future bargaining positions.<sup>55</sup>

In blind bid programs based upon a limited time period, a party may submit an initial offer followed by a series of demands and offers within a specific time period. To insure good faith bargaining, each new offer must increase or new demand must decrease by a specified percentage. Cases that do not settle within the stated time period automatically expire.<sup>56</sup>

Under either form of blind bidding, if the bids come within a certain agreed upon percentage or monetary figure, then the dispute is automatically settled for the median amount. Each party is sent an e-mail confirmation of the settlement figure. If an offer to settle is greater than the settlement demand, then the matter is resolved for the amount of the demand. If no settlement is reached, then the parties

---

52. SettleSmart generally provides parties with thirty days to respond to first round bids and fifteen days to respond to second and third round bids. Parties may modify these suggested time limits, particularly if the negotiation cycle must be limited due to the scheduled trial date for the dispute. See <http://www.settlesmart.com/how.htm> (last visited July 18, 2000). For CyberSettle, the initiating party can determine the expiration date of the demands or offers. See [http://www.cybersettle.com/faq/step\\_01.htm](http://www.cybersettle.com/faq/step_01.htm) (last visited Aug. 3, 2000).

53. CyberSettle informs the parties by e-mail that a matter is ready for online settlement bids. See [http://www.cybersettle.com/faq/step\\_02.htm](http://www.cybersettle.com/faq/step_02.htm) (last visited Aug. 3, 2000). SettleSmart suggests that parties initially inform the other side by letter about the planned use of SettleSmart with its Web address, and provides a sample letter for party use. A party may e-mail or call SettleSmart to learn more about its services. SettleSmart also recommends that parties send their view of the dispute to their opponent so as to provide a context for the settlement offers or demands communicated online. Once this suggested process is completed, the other party will not be surprised when contacted by SettleSmart about the initiation of the blind bidding process. See <http://www.settlesmart.com/FAQ.htm> (last visited July 18, 2000).

54. See <http://www.settlesmart.com/how.htm> (last visited July 18, 2000); [http://www.cybersettle.com/faq/step\\_03.htm](http://www.cybersettle.com/faq/step_03.htm) (last visited Aug. 3, 2000).

55. See <http://www.settlesmart.com/how.htm> (last visited July 18, 2000); <http://www.settlesmart.com/benefits.htm> (last visited July 18, 2000); [http://www.cybersettle.com/faq/step\\_03.htm](http://www.cybersettle.com/faq/step_03.htm) (last visited Aug. 3, 2000).

56. See [http://www.clicknsettle.com/hiw\\_c.cfm](http://www.clicknsettle.com/hiw_c.cfm) (last visited June 2, 2000). In the clickNsettle program, parties are generally working within a sixty-day time limit. To promote the negotiation process, each new offer must increase or each new demand must decrease by a minimum of five percent. See *id.*

are free to continue with the litigation process or other ADR methods.<sup>57</sup>

Cost is an important factor to consider in the use of ODR for online consumer disputes, which tend to involve low dollar amounts. Although SettleSmart and Cybersettle limit parties to three rounds of bidding per session, they offer flat fees based on the dollar amounts in issue.<sup>58</sup> In comparison, clickNsettle provides more opportunities to make demands or offers, but participants have to pay for each offer or demand along with a settlement fee if the matter is resolved.<sup>59</sup> If a consumer purchases a collectible for \$300, it is questionable that the consumer would be willing to pay a minimum of \$100 more (basically more than one-third of what they have already paid) to a third party, especially if that service could not guarantee a successful, enforceable result.<sup>60</sup> It is doubtful whether automated blind bids or any other forms of ODR could be very effective in resolving most

---

57. In the typical CyberSettle process, a dispute will settle at the median amount if parties are within thirty percent or \$5000 of each other's bids. See [http://www.cybersettle.com/faq/step\\_03.htm](http://www.cybersettle.com/faq/step_03.htm) (last visited Aug. 3, 2000). In the usual clickNsettle case, if bids are within thirty percent of each other the dispute is settled at the midpoint. See [http://www.clicknsettle.com/hiw\\_a.cfm](http://www.clicknsettle.com/hiw_a.cfm) (last visited June 2, 2000); [http://www.clicknsettle.com/hiw\\_d.cfm](http://www.clicknsettle.com/hiw_d.cfm) (last visited June 2, 2000). SettleSmart uses a sliding scale based on the damage amounts in dispute. If the claim is \$20,000 or less, the parties "split the difference" if they come within fifteen percent or \$2000 of each other's bids. If the claim is more than \$20,000, the case will settle if the offers and demands are within twenty percent or \$5000. See <http://www.settlesmart.com/how.htm> (last visited July 18, 2000); <http://www.settlesmart.com/benefits.htm> (last visited July 18, 2000).

58. SettleSmart charges the requesting party \$150 for small claims disputes (\$20,000 or less in dispute) made up of a \$20.00 initiation fee, \$50.00 if the responding party agrees to negotiate, and an added \$80.00 if the case settles. For claims in excess of \$20,000, SettleSmart charges the same initiation and response fees but tacks on an additional \$125.00 if the claim settles, for a total of \$225.00. See <http://www.settlesmart.com/costs.htm> (last visited July 18, 2000). CyberSettle does not charge any initiation fee, and only receives fees if the parties reached a settlement. For disputes up to \$5000, there is a \$100 fee; from \$5001-\$10,000, a \$150 fee; and claims over \$10,000, a \$200 fee. See <http://www.cybersettle.com/faq/faq012.htm> (last visited Aug. 3, 2000).

59. Under clickNsettle's fee schedule, the submitting party pays a \$15 initiation fee. Each offer or demand would then be charged at a certain rate depending on when the offer or demand was made within the sixty-day standard negotiating cycle. During the first twenty days of negotiations, each party pays \$10 per offer or demand, \$15 for the next twenty days, and \$20 for the last twenty days. In addition, each party pays a settlement fee of \$100 for disputes under \$10,000 and \$200 for cases for \$10,000 or more. See [http://www.clicknsettle.com/online\\_fees.cfm](http://www.clicknsettle.com/online_fees.cfm) (last visited Aug. 3, 2000).

60. Even though Cybersettle does not receive fees unless a case settles, parties may agree on a settlement figure, but could run into difficulties when trying to collect on the settlement amount. What happens if a party does not pay the agreed-upon amount within a reasonable time period? Cybersettle and any other ODR service cannot guarantee reasonable compliance or enforce party settlements without some form of judicial assistance.

online consumer disputes unless there is no fee, or, at most, a nominal charge to handle the complaint.<sup>61</sup>

In order to successfully adapt the automated blind bidding process to online consumer disputes, the parties must agree on the basic facts of the dispute, must already have determined responsibility for damages, and must be able to resolve the conflict solely through monetary remedies. Most online consumer disputes are based on the factual differences between the parties to an online transaction, usually as to the quality, authenticity, or terms of agreement of a product they ordered online.<sup>62</sup> If the facts are clear and the responsibility is determined in such disputes, then it would seem unlikely that consumers would be willing to pay more money to a third party for blind bids. Rather, the consumer could just work for free with a company's customer service department or directly with another consumer, using e-mail or other standard forms of communication, such as telephone, fax, or mail.<sup>63</sup>

#### B. Mediation Services in the Online Environment

Traditionally, mediation involves a neutral third party who conducts face-to-face meetings to help parties negotiate a mutually satisfactory resolution. Because of the distances between parties in online disputes, online mediation challenges the need for, and importance of, direct personal contact.<sup>64</sup> Under the broad concept of

---

61. See Consumers Groups Comments, *supra* note 3, at 4; Underhill Post Workshop Comments, *supra* note 4, at 9. Recently, Lisa Allen, on online legal expert for Forrester Research in Cambridge, stated that she doubted the profitability of the application of ODR to online consumer disputes.

Online mediation will probably fill a need, but I'm not so sure about the business model. Just because there is a demand for a certain service doesn't mean there is going to be a revenue stream behind it. Look at what has happened with online content: Everyone wants to read it, but no one wants to pay for it.

Liedtke, *supra* note 2.

62. "[M]ost complaints fall into these categories: 'I didn't get it,' 'I didn't get the same thing I was promised,' 'These terms weren't what I agreed to:' and 'It's defective.'" Consumer Group Comments, *supra* note 3, at 8. In commenting on Cybersettle, Dean of the Chicago-Kent Law School, Henry Perritt, indicated that there is a need to introduce the human element and to adapt these systems to deal with disagreements that involve more than money. See Justin Kelly, *Cybersettle to Expand Settlement Services*, ADRWORLD.COM, June 12, 2000 (courtesy of SquareTrade Press Kit, on file with author). Dean Perritt stated that blind bidding processes are not truly effective conflict resolution tools because most disputes involve complex issues that are better suited to mediation and arbitration. See *id.*

63. See *infra* notes 65-72 and accompanying text.

64. See Public Comments by Ernest M. Thiessen, President, One Accord Technologies, to Federal Trade Commission 1 (Apr. 19, 2000), at <http://www.oneaccordinc.com/OASite/FTCWorkshop.html> (last visited Aug. 4, 2000); Public Comments by Ronna D. Brown, President, The Better Business Bureau (Metropolitan New York) to the Federal Trade Commission 2-5



facilitating communication, online mediation takes a number of different forms in dealing with disagreements. The three main types of online mediation are: (1) online consumer advocacy and complaint services, (2) software-based or automated mediation services, and (3) facilitative mediation services. Unlike most automated blind bid programs, some online mediation services have specifically targeted and dealt with the resolution of online consumer disputes.

### 1. Online Consumer Advocacy and Complaint Services

Some online consumer complaint services primarily provide consumers with an opportunity to vent their concerns about either an online or “bricks-and-mortar” business. Typically, these sites have chat rooms where disgruntled consumers can voice their complaints and make others aware of poor business practices. Similar to an old fashioned letter writing campaign, these services also take an active role on behalf of the consumer by trying to contact the business by e-mail or mail. Normally, these services are free to consumers. Companies that do not respond, or that fail to respond in a timely manner, are added to a poor business practice list. Consumers may browse the site to determine if a business is listed as having poor business practices based on the number and seriousness of complaints received. These sites will often aggregate consumer complaints in an effort to get a company to respond to a product or customer service problem.<sup>65</sup> Some sites include not only a listing of the most offending companies, but also those receiving the most plaudits.<sup>66</sup> However,

---

(Mar. 21, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/> (last visited July 18, 2000); Katsh Comments, *supra* note 7, at 2. As Ms. Brown of the Better Business Bureau indicated in her comments:

The BBB has long been conducting its mediation services in a *non-traditional format*, settling disputes via telephone/mail. Indeed, without conducting traditional face-to-face mediation (for myriad reasons, from sheer volume to personnel and time limitations), the BBB has already demonstrated the attainable success of non-traditional mediation. Performed correctly telephone mediation has proven quite effective, extremely efficient, and appropriate for a broad range of cases. Analogously, on-line mediation—performed correctly—should be able to achieve such measured success *in a further expedited fashion*.

Brown, *supra*, at 2 (emphasis in original). *But see supra* notes 8 & 62 and accompanying text.

65. See, e.g., <http://www.ugetheard.com> (last visited June 20, 2000); <http://www.planetfeedback.com> (last visited June 20, 2000); <http://www.feedbackdirect.com> (last visited June 20, 2000); <http://www.fightback.com> (last visited June 20, 2000); <http://www.complain.com> (last visited June 20, 2000); <http://www.ecomplaints.com> (last visited June 20, 2000).

66. See <http://www.ugetheard.com> (last visited June 20, 2000); <http://www.planetfeedback.com> (last visited June 20, 2000); <http://www.feedbackdirect.com> (last visited June 20, 2000). An alternative site has been developed that allows angry customer service

besides the threat of bad publicity on the Internet, these services normally do not go beyond their e-mail or mail attempts to get a business's attention, and they do not actively handle online negotiations or other real time discussions between the consumer and the business entity.<sup>67</sup>

The primary benefits of these services are that they are free and that they offer a public service by proactively informing consumers about companies with poor ratings before consumers enter into commercial transactions. Unfortunately, as these sites have proliferated, information about companies with questionable records has become too diffuse, requiring consumers to check dozens of sites before determining the reliability of a given e-tailer.<sup>68</sup> In addition, once a dispute arises, it is unclear how effective an e-mail or letter will be in resolving a business-to-consumer dispute.

Unlike these more limited complaint services, the Better Business Bureau (BBB) OnLine provides opportunities to register complaints electronically, but then helps the consumer to handle the dispute using standard offline processes.<sup>69</sup> For example, the BBB OnLine Reliability program adopted a code for good online commercial standards and established a trustmark program for complying businesses. Receipt of the BBB OnLine Reliability trustmark commits a firm to participate in the BBB's dispute resolution services with disgruntled consumers.<sup>70</sup> After receiving an

---

representatives to vent their views about customers. See [www.customerssuck.com](http://www.customerssuck.com) (last visited June 20, 2000).

67. See *supra* note 65 and accompanying text.

68. Rather than dozens of new sites popping up on the Internet, it might be useful to have a central clearinghouse of complaints about e-commerce businesses. Through a central clearinghouse, it would be much easier for consumers to determine the overall reliability and responsiveness of an e-tailer.

69. See <http://www.bbbonline.org> (providing Web site for BBB OnLine's complaint, mediation and arbitration services) (June 17, 2000).

70. See Public Comments by Charles I. Underhill, Senior Vice President, Dispute Resolution Division, to the Federal Trade Commission 8 (Mar. 21, 2000), at <http://www.ftc.gov/bcp/altdisresolution/comments/> (last visited July 18, 2000) [hereinafter Underhill Workshop Comments]. The BBB also has the BBB OnLine Privacy program. This program offers a privacy seal to e-businesses that comply with the BBB's online privacy requirements and provides dispute resolution services to consumers for alleged online privacy violations. See *id.* Similar trustmark programs, some of which offer dispute resolution services to online consumers, exist on the Internet. See, e.g., <http://www.webassured.com> (last visited June 17, 2000); *infra* notes 104-111 and accompanying text.

Participants in the FTC workshop indicated that establishing codes of good business conduct, augmented by a self-regulatory or governmental trustmark program for complying e-businesses, was the first step in building consumer confidence and avoiding e-commerce conflicts. See, e.g., MITI Comments, *supra* note 1, at 1, 3; Consumers Group Comments, *supra* note 3, at 1-2; European Commission Comments, *supra* note 5, at 3; Underhill Post Workshop Comments, *supra* note 4, at 6, 8-9.

electronic complaint, the BBB OnLine typically contacts the parties by telephone or regular mail to discuss the dispute using conciliation, mediation, and possibly in-person arbitration hearings to handle the conflict.<sup>71</sup> Unfortunately, the BBB OnLine program does not yet provide online conciliation, mediation, or arbitration services to bridge the distance between online disputants.<sup>72</sup>

## 2. Software-Based or Automated Mediation Services

One highly experimental area of online mediation concerns the use of automated software programs to handle multiparty online disputes.<sup>73</sup> One Accord is an ODR provider that has developed a software program that brings together the concepts of interest-based negotiation with optimization and networking algorithms to assist parties in reaching win-win settlements.<sup>74</sup> A facilitator guides each party's use of the software program, which helps them to qualify their interests, quantify their levels of satisfaction, and attain efficient, fair resolutions. The parties do not have to be in the same location and primarily only need access to a computer and One Accord's powerful server site.<sup>75</sup>

In the One Accord process, a facilitator meets with each party to help them model their negotiation problem. The facilitator aids the disputants in defining their issues and determining their interests. Once the parties have done this, the disputants, with the assistance of the facilitator, complete a Single Negotiation Form in which they agree to the existing issues and interests. The facilitator then enters this information onto the One Accord server. The parties then exchange initial proposals or optimal targets on the password-protected Neutral Access Site, leaving room for future concessions. The facilitator then works with each party confidentially to help give initial weights or assign initial preferences to their interests. The

---

71. See <http://www.bbb.org/complaints/csa.asp> (last visited July 25, 2000); Underhill Workshop Comments, *supra* note 70, at 8.

72. See *supra* note 69 and accompanying text. The BBB has indicated that "there are simply no truly representative models of successful cross-border, online consumer dispute resolution programs." Underhill Post Workshop Comments, *supra* note 4, at 3.

73. See *infra* notes 74-77 and accompanying text. See generally Ernest M. Thiessen & Joseph McMahon, Jr., *Beyond Win-Win in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 643 (Summer 2000) (outlining One Accord process and provides hypothetical example of program's application to environmental dispute).

74. See <http://www.oneaccordinc.com/>; Patent Received for Computer-Based Mediation and Negotiation (May 22, 1996), at <http://www.oneaccordinc.com/OASite/pressRelease.html> (last visited Aug. 4, 2000).

75. See <http://www.oneaccordinc.com/introduction/html> (last visited Aug. 4, 2000); <http://www.oneaccordinc.com/process.html> (last visited July 18, 2000).

parties then input their confidential preferences at their own computer terminal assisted by a user friendly graphical interface. The parties may contact each other in person or by telephone to share further information and offer possible compromises. These party concessions and preferences are then entered onto the One Accord software system, which generates settlement packages for party consideration. The facilitator assists the parties in rating each new settlement package offered and in further refining their interests. If the parties reach a tentative settlement by selecting the same settlement package, then the One Accord software system optimizes the selected package by generating improvements to the selected package to maximize the benefits for both of the parties.<sup>76</sup> Although this type of automated mediation is still in its early stages of development, ODR experts believe that there needs to be greater experimentation with, and more research on, automated software programs that may enhance the online mediation process.<sup>77</sup>

---

76. See <http://www.oneaccordinc.com/process.html> (last visited July 18, 2000); <http://www.oneaccordinc.com/neutralsite.html> (last visited July 18, 2000).

77. As Mr. Thiessen, One Accord's president, stated:

The obvious advantage of face-to-face meetings is the potential ability of human beings to communicate clearly and effectively with one another using not only mere words, but all the nuances of speech tones, body language and environmental factors that great communicators depend upon. Where feelings are important, this type of communication is essential to enhance relationships and avoid or clear up misunderstandings. A warm handshake confirming the deal still requires a physical presence. On the other hand, the requirement for decision-makers to gather at the same place at the same time and make decisions in a relatively short period of time, usually with restricted access to other resources imposes costly constraints, especially when great distances are involved.

A rapidly maturing Internet, with ever broadening bandwidth, video conferencing and other technological advances are enabling the creation of increasingly more sophisticated "black boxes" to better handle the complexity of real world decision-making problems. Research results are optimistic that very complex problems can be defined well enough that an "automated black box" can often produce better answers and/or shorter solution times. The real world "proof in the pudding" is not quite here yet but I am confident that we will soon see that online decision-making not only offers huge advantages in terms of freeing decision-makers from time and space constraints, but will give them centralized computer power for number crunching and optimization that will greatly increase efficiency and provide opportunities for more equitable solutions to many problems that are presently poorly solved or simply go unsolved.

Thiessen Comments, *supra* note 64, at 1. Mr. Thiessen's view has been echoed by Professor Katsh, who indicated:

Online mediation should not be considered to be simply the exchange of e-mails managed by a mediator. E-mail will have it (sic) place but E-mail alone might be considered to be version 1 of mediation software. We are fortunate to have a widely used and available application like E-mail, but we should understand that if success is achieved using an E-mail-focused system, even greater success is likely with Web-

### 3. Facilitative Online Mediation Services

Numerous mediation firms have established an electronic presence on the Internet.<sup>78</sup> Most ODR providers primarily use online technologies to mediate disputes that occasionally are augmented by offline forms of communication. In the online world, the mediator and interested parties may communicate in asynchronous formats using e-mail, listservs, chat rooms and other conferencing software.<sup>79</sup> Depending on the selected online technology, the mediator can send private, individual, or group messages for party response. Parties may respond by e-mail, be directed to a listserv that will automatically distribute the message to all participating parties, or post views on a confidential chat board for party review. The mediation participants may also use simultaneous software programs such as Internet Relay Chat (IRC), sometimes referred to as instant messaging, which allows parties to converse online through e-mail in real time. Some experimental efforts have been undertaken to use videoconferencing to help replicate a face-to-face mediation.<sup>80</sup> Three representative online mediation services are the OOO,<sup>81</sup> SquareTrade,<sup>82</sup> and InternetNeutral.<sup>83</sup>

The OOO has been mediating disputes arising from online activities since 1996. Some typical disputes mediated by the OOO were quarrels between people in a news group or on a listserv and disagreements involving domain names, copyrighted materials, termination of online services, spamming, and fraud. Recently, the OOO completed a pilot mediation project with eBay concerning online auction disputes, and the findings of that project were formally

---

based models that have some built-in intelligence and that improve as experience with online dispute resolution grows.

Katsh Comments, *supra* note 7, at 2.

78. See, e.g., <http://www.consensus.uk.com/cybersolve.html> (providing a U.K. Web site for Consensus Mediation which offers e-Mediator, online mediation services) (last visited July 18, 2000); <http://www.internetneutral.com/> (last visited July 18, 2000) (providing a Web site for Internet Neutral online mediation services); <http://www.onlinemediators.com/> (last visited July 18, 2000) (offering online mediation services by online mediators); <http://www.newcourtcity.com> (last visited July 18, 2000) (using a Web site for Virtual Mediator which provides automated blind bid and online mediation services).

79. See Cona, *supra* note 3, at 988-92; Eisen *supra* note 8, 1313-14.

80. See Cona, *supra* note 3, at 988-92; Eisen *supra* note 8, 1313-14; see also *infra* notes 87-95 and accompanying text.

81. See <http://www.aaron.sbs.umass.edu/center/default.htm> (last visited July 18, 2000).

82. See <http://www.squaretrade.com> (last visited June 17, 2000).

83. See <http://www.internetneutral.com/> (last visited July 18, 2000). See generally Bruce Leonard Beal, *Online Mediation: Has Its Time Come?*, 15 OHIO ST. J. ON DISP. RESOL. 735 (Summer 2000) (providing overview of Internet Neutral process).

published in summer 2000.<sup>84</sup> After a pilot program with the OOO, eBay established SquareTrade in February 2000 to help resolve online auction disputes over \$100.<sup>85</sup> InternetNeutral offers a variety of fee-based online mediation options aimed at disputes between e-businesses and their customers and suppliers.<sup>86</sup>

All three of these providers allow complaining parties to enter their concerns online. The mediator or case administrator then reviews the complaint and may contact the claimant by e-mail to try to clarify problematic issues. The mediator or case administrator may then e-mail the other party to gain his participation in the mediation process. If the respondent agrees to participate, they can e-mail or post their response to the complaint. After each side has expressed their views online, the parties may have a better understanding of the dispute and may resolve the matter on their own without further assistance of the mediation service. If the dispute is not resolved, then the mediator may use several different technological approaches to help the parties frame their issues, consider their interests, and

---

84. See Katsh et al., *supra* note 8; see also *infra* notes 99-103 and accompanying text.

85. See <http://pages.ebay.com/services/buyandsell/disputeres.html> (last visited July 18, 2000) (providing an overview of Square Trade's mediation process). The SquareTrade pilot program with eBay has attracted a great deal of press coverage. See Rhine, *supra* note 6, at 12; Said, *supra* note 2, at C1, C3; Liedtke, *supra* note 2; Johnston, *supra* note 6, at 26; Alistair Christopher, *Deal in Review: SquareTrade Solves Online Disputes*, VENTURE CAPITAL J., June 2000, at 43. The pilot program is currently free to eBay customers with disputes in excess of \$100. See [http://www.squaretrade.com/fast/help\\_mediation.cfm](http://www.squaretrade.com/fast/help_mediation.cfm) (last visited June 17, 2000); <http://pages.ebay.com/services/buyandsell/disputeres.html> (last visited July 18, 2000). However, it is anticipated that SquareTrade will require fees (ranging from \$10-\$15 plus two to five percent of the total transaction) from eBay disputants in the future. See Claire Barliant, *And Now, Dispute Resolution Online*, N.J. L.J., July 3, 2000, available at (LEXIS-NEXIS Academic Universe-Document). Some have questioned whether online consumers will be willing to pay fees for online mediation services. See *id.*; Liedtke, *supra* note 2. "It remains to be seen whether eBay veterans who live for a bargain will mind the fee." Barliant, *supra*.

SquareTrade anticipates that it will also provide its services to non-eBay customers, including those in business-to-business disputes. Barliant, *supra*; Justin Kelly, *Online ADR Providers Plan Broader Range of Settlement Services*, ADRWORLD.COM, June 12, 2000 (courtesy of SquareTrade Press Kit, on file with author). Recently, SquareTrade agreed to provide dispute resolution services for Onvia, a small business marketplace site. See Barliant, *supra*. Currently, non-eBay customers of SquareTrade are charged \$10 plus 2.5% of the amount in dispute. See [http://www.squaretrade.com/fast/help\\_mediation.cfm](http://www.squaretrade.com/fast/help_mediation.cfm) (last visited June 17, 2000).

86. See <http://www.internetneutral.com/> (last visited July 18, 2000) (home page of InternetNeutral). The costs for this service vary depending upon the online technology utilized during the process and the time expended in the mediation sessions. For online mediation other than by e-mail, each party must pay a nonrefundable \$250 half-day fee and any time beyond that period is charged at \$125 an hour to be split by the parties equally. Time spent in these mediation sessions outside of the hours of 7:00 a.m.-7:00 p.m. are fifty percent higher. Parties using e-mail only in factually simple disputes must pay a retainer based on the estimated mediation time for the dispute. Parties pay anywhere from \$1 to \$6 per minute based on the amount in dispute. See <http://www.internetneutral.com/fees.htm> (last visited July 18, 2000).

address potential mediation solutions.<sup>87</sup> For example, the OOO primarily uses e-mail to communicate between the mediator and the parties.<sup>88</sup> However, the OOO has experimented with IRC and chat rooms as well as videoconferencing to help replicate face-to-face mediation sessions.<sup>89</sup>

SquareTrade also utilizes e-mail to communicate initially with the parties.<sup>90</sup> The complaint and response are then posted on a password-protected Case Page where the parties can exchange their perspectives with the help of electronic forms. Often, the parties may settle the dispute on their own after they have communicated and clarified the problem through the Case Page exchanges.<sup>91</sup> If the parties do not resolve the conflict on their own, a mediator will be assigned who will communicate through e-mail with the parties to try to help them resolve their dispute.<sup>92</sup> The parties are notified by e-mail when a new comment has been posted on the Case Page.<sup>93</sup>

Typically, the InternetNeutral process uses e-mail to communicate with the parties. But InternetNeutral also expects to offer parties the opportunity to use instant messaging, chat conference rooms, and videoconferencing to handle online mediation sessions.<sup>94</sup> In joint

---

87. See <http://www.internetneutral.com/rules.htm> (last visited July 18, 2000) (summarizing basic online mediation process); <http://www.internetneutral.com/forms.htm> (last visited July 18, 2000) (providing mediation request, demand and response forms which may be filed electronically); <http://www.aaron.sbs.umass.edu/center/ombuds/description.html> (last visited July 31, 2000) (discussing the OOO process through frequently asked questions format); <http://www.aaron.sbs.umass.edu/center/ombuds/indexauction.html> (last visited Aug. 5, 2000) (providing OOOs online mediation request form); [http://www.squaretrade.com/fast/help\\_mediation.cfm](http://www.squaretrade.com/fast/help_mediation.cfm) (last visited June 17, 2000) (providing pictorial overview of SquareTrade online mediation process); <http://www.squaretrade.com/demo/5tour-8tour.cfm> (last visited June 17, 2000) (providing form for electronically filed case complaint).

88. See <http://www.aaron.sbs.umass.edu/center/ombuds/description.html> (last visited July 31, 2000).

89. See *id.*; See Cona, *supra* note 3, at 988-89.

90. See <http://www.squaretrade.com/demo/6tour.cfm> (last visited June 17, 2000).

91. See *id.*

92. See *id.*; <http://www.squaretrade.com/demo/7tour.cfm> (last visited June 17, 2000).

SquareTrade indicates that it has over 200 national and international mediators on its consumer panel. [http://www.squaretrade.com/aboutus/aboutus\\_mediators.cfm](http://www.squaretrade.com/aboutus/aboutus_mediators.cfm) (last visited June 17, 2000).

93. See E-mail of Stephanie Brugler, Vice President of Marketing, SquareTrade, to Lucille M. Ponte, Associate Professor, Bentley College (June 21, 2000) (on file with author). If the parties agree to settlement terms, they click on an "I Agree" button and the resolution is documented. See <http://www.squaretrade.com/demo/8tour.cfm> (last visited June 17, 2000); Christopher, *supra* note 85, at 43. SquareTrade estimates that conflicts can normally be resolved in ten to fourteen days online. [http://www.squaretrade.com/fast/help\\_mediation.cfm](http://www.squaretrade.com/fast/help_mediation.cfm) (last visited June 17, 2000).

94. See <http://www.internetneutral.com/forum.htm> (last visited July 18, 2000); <http://www.internetneutral.com/nutshell.htm> (last visited July 18, 2000). The InternetNeutral has adopted videoconferencing as its preferred method of online mediation. See <http://www.internetneutral.com/nutshell.htm> (last visited July 18, 2000).

online sessions, the mediator may communicate with parties through conferencing software using designated chat rooms or channels accessed through passwords. Using the conferencing software, parties at their respective computers may communicate through two separate channels, one for private caucuses with the mediator, and the other for communication with both the mediator and the other mediation participants.<sup>95</sup>

Despite the impressive array of technological methods at the disposal of online mediation, there has been limited use of or success with online mediation in dealing with consumer disputes.<sup>96</sup> Despite a great deal of online interest in InternetNeutral, no dispute has advanced to an actual online mediation.<sup>97</sup> Cost will remain an important factor as most online consumer disputes involve low dollar value complaints.<sup>98</sup> Both the OOO and SquareTrade pilot program offer free online mediation services. Yet even when the process is free, as seen in the earlier OOO pilot program with eBay, there is still consumer reluctance to use these online mediation services. In the pilot program, the mediation process was free for eBay customers.<sup>99</sup> Out of 225 complaints, 90 were rejected as not appropriate for online mediation. Of the remaining 145 conflicts, about 26% (another 37 disputes) could not be resolved because at least one of the parties refused to participate in the program.<sup>100</sup>

Low settlement rates may also make online mediation unappealing to e-commerce disputants. In the OOO pilot program with eBay, of the remaining disputes, only 46% reached settlement.<sup>101</sup> Thus, only about 50 out of the 145 disputes suitable for mediation (about 34%) were successfully mediated to settlement.<sup>102</sup> Therefore,

---

95. See <http://www.internetneutral.com/forum.htm> (last visited July 18, 2000).

96. See *supra* notes 8, 72 and accompanying text; see also *infra* notes 98-103 and accompanying text.

97. See Beal, *supra* note 83, at 741. Since January 1998, the site has been visited about 722 times per month or about 14,448 hits per year. See *id.*

98. See *supra* notes 3-4, 61, 85 and accompanying text.

99. See Kaplan, *supra* note 3, at 1. One of the main concerns, similar to the Virtual Magistrate project, is the level of consumer interest in using online mediation services, particularly if a fee must be paid. See also *supra* note 61 and accompanying text; *infra* note 102 and accompanying text.

100. See Katsh et al., *supra* note 8, at 709, 711 tbl. 1, 712. Although the text refers to 144 cases, the referenced table clearly indicates that 145 disputes were subject to mediation. See *id.* at 711 tbl. 1.

101. See *id.*

102. The OOO hired mediator Mark Eckstein to handle the eBay auction quarrels and he cautioned that the eBay pilot program was a small sample and should not be generalized to support conclusions about large-scale online mediation projects. See Kaplan, *supra* note 3, at 3. Professor Ethan Katsh, co-director of the Center for Information Technology and Dispute



the use of online facilitative mediation to resolve online consumer disputes will require a great deal more research and experimentation before its true benefits and limitations can be assessed.<sup>103</sup>

### C. Adjudicatory Mechanisms in the Online Environment

ODR providers today also offer online adjudicatory options. There is a mix of online mediation and arbitration (med-arb), arbitration, and jury proceedings available for online consumers to consider. In some cases, mandatory pre-dispute arbitration clauses or agreements (PDAAs) require the use of online adjudicatory proceedings while in other instances parties may opt for online adjudicatory mechanisms after a dispute has arisen.

#### 1. Online Med-Arb Services for Consumer Disputes

Some ODR providers offer online med-arb services for online consumer disputes. WebAssured.com is an example of a med-arb provider for online consumer disputes.<sup>104</sup> Established in 1995, WebAssured.com was the first online consumer protection service.<sup>105</sup> Similar to the BBB OnLine, WebAssured.com established a code of professional e-business conduct, which member firms must comply

---

Resolution, University of Massachusetts at Amherst which runs the OOO, indicated that he was pleased with the response to the free pilot program, but disappointed with the settlement rate. "I would hope that our batting average will get better, but this was our first large-scale cybermediation." Liebowitz, *supra* note 8, at 5. Detailed analyses of party satisfaction with the process or the outcomes do not appear to have been assessed. In addition, it might be useful to determine why about twenty-six percent of the parties flatly refused to participate at all in this free process in order to help guide future ODR efforts. See *infra* notes 154-172 and accompanying text.

103. The low settlement rates for online mediation may merely be a reflection of the need to have at least some face-to-face meetings with the parties in order for mediation to be effective. See *supra* note 8, 62 and accompanying text. Also, mediators may need better specialized training for the online environment before they can take their offline expertise into cyberspace. See Public Comments of Steve Abernathy, President and CEO, Square Trade, Cara Cherry, Director, Square Trade Mediation Network, to Federal Trade Commission 2-3 (Apr. 19, 2000), available at <http://www.ftc.gov/bcb/altdisresolution/comments> (last visited July 18, 2000) [hereinafter Abernathy Comments]; Eisen, *supra* note 8, at 1331-33. In addition, public confidence in online mediation and other forms of ODR may grow with increased public awareness about the processes and benefits of ODR as well as greater exploration of user-friendly, cost-effective technologies. See Consumers Groups Comments, *supra* note 3, at 1, 3-4; Katsh Comments, *supra* note 7, at 2; Baker Comments, *supra* note 7, at 10-11; Diaz Comments, *supra* note 8, at 1; Underhill Workshop Comments, *supra* note 70, at 7.

104. See <http://webassured.com/> (last visited June 17, 2000); *Premier On-Line Consumer Protection Site Warmly Embraces Disgruntled On-Line Shoppers, Gratis!*, PR NEWSWIRE, Dec. 28, 1999, available at (LEXIS-NEXIS Academic Universe).

105. See [http://webassured.com/profiles/corp\\_profile.cfm](http://webassured.com/profiles/corp_profile.cfm) (last visited June 17, 2000).

with in order to retain the WebAssured.com Certification Seal.<sup>106</sup> Member e-tailers must agree to participate in WebAssured.com's online med-arb services when online consumer disputes arise.<sup>107</sup>

Under its Automated Dispute Resolution System (AddResS), consumers may enter their complaints online against either participating or nonparticipating e-tailers.<sup>108</sup> Once a complaint has been filed electronically, AddResS begins an online conciliation process on behalf of the consumer. If attempts to conciliate the dispute are unsuccessful, the AddResS system, using algorithms to identify which cases require human intervention, assigns a mediator to try to resolve the complaint.<sup>109</sup> If the mediator's shuttle diplomacy is unsuccessful, the AddResS mediator will decide on a fair settlement, which the company must abide by in order to retain their certification.<sup>110</sup> E-tailers that fail to abide by AddResS settlements will lose certification and will be highlighted on the firm's Watchlist of companies to avoid doing business with online.<sup>111</sup>

## 2. Online Arbitration Services

Despite the difficulties experienced by the Virtual Magistrate program, online arbitration programs are in place, but none specifically deal with online consumer disputes. Three representative examples are Resolution Forum, Inc.,<sup>112</sup> WEBdispute.com,<sup>113</sup> and the Internet Corporation for Assignment Names and Numbers (ICANN) domain name arbitration programs.<sup>114</sup> Resolution Forum, Inc. uses conferencing software to bridge the distance between parties in arbitration proceedings and mediation sessions,<sup>115</sup> while

---

106. *See id.* WebAssured.com indicates that it has over 5200 e-merchants in its seal program. *See id.*

107. *See* <http://webassured.com/faq/consumerfaq.cfm> (last visited June 17, 2000); <http://webassured.com/address/address2.cfm> (last visited June 17, 2000); *see also* Diane E. Levine, *Who You Gonna Call? Fraudbusters*, PLANET IT, Nov. 11, 1999, available at [http://webassured.com/Planet\\_ITpress\\_release.cfm/](http://webassured.com/Planet_ITpress_release.cfm/) (last visited June 17, 2000).

108. *See* <http://webassured.com/address/compsearch.cfm> (last visited June 17, 2000); <http://webassured.com/address/address2.cfm> (last visited June 17, 2000).

109. *See* <http://webassured.com/address/address2.cfm> (last visited June 17, 2000). The mediators are typically retired business people and legal professionals, who may charge a fee for their services. *See id.*

110. *See* <http://webassured.com/faq/consumerfaq.cfm> (last visited June 17, 2000); <http://webassured.com/address/address2.cfm> (last visited June 17, 2000).

111. *See* <http://webassured.com/faq/consumerfaq.cfm> (last visited June 17, 2000); <http://webassured.com/watchlist/watchlist.cfm> (last visited June 17, 2000).

112. *See* <http://www.resolutionforum.org> (last visited July 18, 2000).

113. *See* <http://www.webdispute.com/> (last visited July 18, 2000).

114. *See* <http://www.icann.org/udrp/udrp/htm> (last visited June 20, 2000).

115. *See infra* notes 117-124 and accompanying text.

WEBdispute.com and ICANN use only e-mail in their arbitration processes.<sup>116</sup>

Resolution Forum, Inc. is a nonprofit education organization based at the Center for Legal Responsibility at the South Texas College of Law. Although the Center's mission is to promote ADR in general, it has experimented with ODR through its CAN-WIN process.<sup>117</sup> The CAN-WIN conferencing system can be adapted for use in both arbitration and mediation proceedings. The program allows parties in different locations to undertake an arbitration hearing or mediation sessions completely online.<sup>118</sup>

Using standard Internet browser software, disputants may request time on the conferencing system and are assigned a user name and password by the case administrator. Each party logs into the conference room by entering their user name and, optionally, their e-mail address. The program generates a list of all online parties who have logged into the conference room, which appears on the screens of all participants.<sup>119</sup>

Parties may send private messages to other participants or the mediator by clicking on that person's name on the list, which brings up a window to draft an e-mail message to that participant. This function may be useful for parties wishing to caucus either with their counsel or with the mediator to discuss information that has been communicated during the conference before responding to the entire group. In the alternative, a party can send a message to the entire group by clicking on the "Say It" icon and their e-mail message appears on the screens of all participants, indicating who sent it and when it was sent. If a party logs on or off, a message will appear on the screens of the other participants stating the time that disputant joined and departed, and automatically adds or removes that name from the participant list.<sup>120</sup>

The mediator or arbitrator may use an online break out room in which the parties may not communicate with each other, but the mediator or arbitrator can simultaneously communicate with both sides. The CAN-WIN system also provides mediators and arbitrators the options of removing a party from the conference room on either a

---

116. See notes 123, 127 and accompanying text.

117. See <http://www.resolutionforum.org/> (last visited July 18, 2000). The firm is collaborating with the State Bar of Texas Corporate Counsel Section and the State of Texas ADR section to "[t]est new ADR processes and technology such as the CAN-WIN process which merges ADR with the Internet and advanced communications technology." *Id.*

118. See [http://www.resolutionforum.org/real\\_time.html](http://www.resolutionforum.org/real_time.html) (last visited July 18, 2000).

119. See *id.*

120. See *id.*

permanent or temporary basis. In addition, the mediator or arbitrator may clear the system of all messages saving a transcript of the proceedings as a permanent record to a file on the organization's server.<sup>121</sup> Although the organization does not specifically target online consumer disputes,<sup>122</sup> its CAN-WIN process could be used to deal with online consumer disputes, using either mediation or arbitration.

Unlike the sophisticated CAN-WIN process, WEBdispute.com uses a combination of postal mail and e-mail to deal primarily with online commercial or business-to-business disputes.<sup>123</sup> After agreeing to arbitrate, the parties submit written evidence via postal mail or e-mail to the other parties and the arbitrator. No in-person or online arbitration hearing is held. Instead the parties and the arbitrator review the written evidence offline. The arbitrator will allow the parties one week to contest the other side's position by e-mail. The arbitrator will then decide the case by an agreed-upon closing date, and the decision will be communicated to the parties within twenty business days.<sup>124</sup>

Using e-mail, ICANN, which assigns domain names (i.e., .com, .org, .net), has adopted a mandatory arbitration program to resolve disagreements over domain names. All parties seeking to register a domain name must agree to the organization's Uniform Domain Name Dispute Resolution Policy, which includes a mandatory administrative proceeding administered by its accredited ODR providers.<sup>125</sup> The ICANN policy applies to any accredited domain name registrar.<sup>126</sup> All communications between the parties and ICANN's accredited arbitration providers occur through e-mail over the Internet, and there are no in-person hearings.<sup>127</sup> The arbitral

---

121. *See id.*

122. *See* <http://www.resolutionforum.org/> (last visited July 18, 2000).

123. *See* <http://www.webdispute.com/> (last visited July 18, 2000); <http://www.webdispute.com/Forms.htm> (last visited July 18, 2000).

124. *See* <http://www.webdispute.com/Forms.htm> (last visited July 18, 2000).

125. Disputes.org (Center for Information Technology and Dispute Resolution, University of Massachusetts at Amherst) in collaboration with eResolution.ca (University of Montreal), the Center for Public Resources, the National Arbitration Forum, and the World Intellectual Property Organization (WIPO) are the ICANN-approved ODR providers. *See* ICANN, Approved Providers for Uniform Name Dispute Resolution Policy, May 21, 2000, at 1, at <http://www.icann.org/udrp/approved-providers.htm> (last visited June 20, 2000).

126. *See* ICANN, Uniform Domain Name Dispute Resolution Policy, Aug. 26, 1999, at Notes ¶ 4, at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (last visited June 20, 2000); *see also* Jonathan E. Moskin, *Internet Governance System Evolves*, N.Y. L.J., Mar. 15, 1999, at S6. *See generally* FERRERA ET AL., *supra* note 1, at 38-59 (discussing trademark concepts and their application to domain names, specifically, and cyberspace, in general).

127. *See* ICANN, Rules for Uniform Domain Name Dispute Resolution Policy §§ 2(b)(iii), 2(f)(iii), 13 (Aug. 26, 1999), at <http://www.icann.org/udrp/udrp-rules-24oct00.htm>

decision is communicated to the parties and then typically posted on a publicly accessible Web site, unless otherwise stated by the arbitral panel.<sup>128</sup>

Unlike the Virtual Magistrate project, there has been no problem attracting a pool of ICANN cases or ensuring party participation due to the mandates of the PDAA. With the PDAA, over 530 ADR proceedings have been commenced since December 1999.<sup>129</sup> However, there is a great deal of opposition to the use of mandatory ADR proceedings for online consumer disputes.<sup>130</sup> Additionally, ICANN has the advantage of being able to enforce the arbitrator's determination by canceling or transferring domain name registrations.<sup>131</sup> Unfortunately, in most business-to-consumer transactions, there is no organized authority available to enforce an ODR provider's determination. Under the ICANN dispute resolution policy, parties are not prevented from bringing a legal action in a court of competent jurisdiction.<sup>132</sup> Therefore, the issues of jurisdiction and choice of law still remain under the ICANN arbitration process.

### 3. Online Jury Proceedings

Some ODR providers have sought to put decision-making for online disputes back in the hands of juries. Two firms, Cyberjury.com<sup>133</sup> and iCourthouse.com,<sup>134</sup> pioneered the use of modified online jury proceedings to render verdicts in a wide range of disputes. However, Cyberjury.com no longer has a Web site, but iCourthouse continues to resolve both online and offline disagreements for free. Many of these

---

(last visited June 20, 2000). The rules indicate that no in-person hearing also means no Web or video conferencing options. *See id.* ¶ 13.

128. *See id.* ¶ 16.

129. *See Johnston, supra* note 6, at 26. About 199 decisions have been handed down since December 1999. *See id.*

130. *See* Consumer Group Comments, *supra* note 3, at 3; European Commission Comments, *supra* note 5, at 6; Underhill Post Workshop Comments, *supra* note 4, at 7.

131. *See* ICANN, Uniform Domain Name Dispute Resolution Policy, Aug. 26, 1999, ¶¶ 3, 4(I), available at <http://www.icann.org/udrp/udrp-policy-24oct99.htm> (last visited June 20, 2000).

132. *See id.* ¶¶ 4(k), 5. The courts in recent years have dealt with a number of domain name cases. *See, e.g.,* Playboy Enterprises, Inc. v. Calvin Designer Label, 985 F. Supp. 1220 (N.D. Cal. 1997) (granting injunctive relief, including cancellation of domain names, due to trademark infringement and dilution and unfair competition as to unauthorized use of Playboy and Playmate trademarks); Toys "R" Us v. Akkaoui, 1996 U.S. Dist. LEXIS 17090 (N.D. Cal. 1996) (granting injunctive relief against adult-oriented Web site called "Adults R Us" under trademark infringement and tarnishment).

133. *See* Bordone, *supra* note 3, at 188 n.59.

134. *See* <http://www.i-courthouse.com/> (last visited July 18, 2000); *see also* Kate Rix, *Virtual Reality*, THE RECORDER, May 19, 2000, at 1; Carolyn Said, *Web Court Invites Surfing Jurors*, S.F. CHRON., June 12, 2000, at C1, C3; Johnston, *supra* note 6, at 26.

disputes are consumer disputes, which use online juries in an informal manner similar to a small claims court.<sup>135</sup>

Under the iCourthouse process, the “plaintiff” registers on the site and completes an electronic claims form.<sup>136</sup> In the complaint form, the registering party provides a brief summary of the facts of the case and determines whether the case will be resolved through a peer jury or a panel jury.<sup>137</sup> A peer jury case is open to the general online public and an unlimited number of registered jurors can review the evidence, ask the parties questions, and render a verdict. A panel jury case is private with a limited number of online jurors chosen from the jury pool based on the parties’ specified demographics.<sup>138</sup> Both types of cases are currently handled free of charge, but fees are anticipated for panel jury cases once the next phase of development is completed.<sup>139</sup>

If the opposing party has agreed to use iCourthouse,<sup>140</sup> the “defendant” is summoned to the site by e-mail and must register within ten days of the summons. If the defendant does not respond, then the jurors may render a verdict based on the information

---

135. See [http://www.i-courthouse.com/main.taf?area1\\_id=cases](http://www.i-courthouse.com/main.taf?area1_id=cases) (last visited July 18, 2000) (providing summaries of pending iCourthouse cases); Rix, *supra* note 134, at 1; Said, *supra* note 134, at C3; *infra* note 139 and accompanying text.

136. See Public Comments by H. Clyde Long, CEO, iCourthouse.com, to the Federal Trade Commission 1 (n.d.), available at <http://www.ftc.gov/bcp/altdisresolution/comments/> (last visited July 18, 2000 [hereinafter Long Comments]; [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=faqs](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=faqs) (last visited July 18, 2000).

137. See Long Comments, *supra* note 136, at 1. In peer jury cases, parties are limited to one megabyte of evidence, and are allowed ten megabytes of evidence in panel jury cases. Evidence exhibit files may not be larger than one hundred kilobytes. See iCourthouse Rules of Procedure, Rule 2, at [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=rules\\_of\\_proc](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=rules_of_proc) (last visited July 18, 2000).

138. See [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=faqs](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=faqs) (last visited July 18, 2000). People can sign up online to become a registered iCourthouse juror. See [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=jurors](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=jurors) (last visited July 18, 2000). The juror pool for iCourthouse numbers in the thousands. See E-mail of H. Clyde Long, CEO, iCourthouse, to Lucille M. Ponte, Associate Professor of Law, Bentley College, July 18, 2000 (on file with author). Unfortunately, iCourthouse jurors are not screened for impartiality. See *id.*

139. See [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=faqs](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=faqs) (last visited July 18, 2000).

140. The parties are bound by contract agreement and iCourthouse provides suggested language on their Web site. See Long Comments, *supra* note 136, at 1; [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=faqs](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=faqs) (last visited July 18, 2000). However, a court of competent jurisdiction must enforce a decision against a noncompliant party, which could be quite difficult in cross-border Internet disputes. See [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=faqs](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=faqs) (last visited July 18, 2000); see also *supra* notes 3-4 and accompanying text.

provided solely by the plaintiff.<sup>141</sup> Within seventy-two hours of registering, each party completes a trial book, which includes opening statements, supportive evidence, trial arguments, citations to legal authorities, and jury instructions.<sup>142</sup> The evidence is not screened for admissibility, but is only screened for the use of obscenity or any personally identifying information.<sup>143</sup> After the completion of the trial books, registered jurors are supposed to review the trial books online.<sup>144</sup> The online jurors may ask the parties questions and then may render verdicts along with any comments or feedback for the disputants.<sup>145</sup> The parties determine how long the jurors have to deliberate and determine what proportion of the verdicts will signal a victory in the case.<sup>146</sup> The parties may also decide whether the verdict will be binding or merely advisory to guide them in subsequent ADR proceedings.<sup>147</sup> To date, iCourthouse has handed down verdicts in more than 250 cases.<sup>148</sup>

---

141. See iCourthouse Rules of Procedure, Rule 4, available at [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=rulesof proc](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=rulesof%20proc) (last visited July 18, 2000); Long Comments, *supra* note 136, at 1.

142. See Long Comments, *supra* note 136, at 1; iCourthouse Rules of Procedure, Rule 5, at [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=rulesof proc](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=rulesof%20proc) (last visited July 18, 2000); [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=claims](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=claims) (last visited July 18, 2000) (providing access point to registration process for plaintiffs and defendants). In the site's FAQs, potential disputants are informed about the "simplicity" of instructing jurors about the law. The site states that

[i]t is easy to tell jurors about applicable law. In your Trial Book, in Opening Argument, Evidence, and Closing Argument, you can cite legal authorities. You can refer to general legal principles, jury instructions, statutes, and cases. You can also type in URLs of sites containing legal resources for jurors to use.

[http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=faqs](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=faqs) (last visited July 18, 2000). Clearly, this FAQ response oversimplifies the process and seems to assume that all potential disputants have ready access to legal research materials and some understanding of established legal concepts.

143. See E-mail of H. Clyde Long, CEO, iCourthouse, to Lucille M. Ponte, Associate Professor of Law, Bentley College, July 18, 2000 (on file with author).

144. See iCourthouse Rules of Procedure, Rule 7, available at [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=rulesof proc](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=rulesof%20proc) (last visited July 18, 2000).

145. See Long Comments, *supra* note 136, at 1.

146. See *id.*; [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=faqs](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=faqs) (last visited July 18, 2000); E-mail of H. Clyde Long, CEO, iCourthouse, to Lucille M. Ponte, Associate Professor of Law, Bentley College, July 18, 2000 (on file with author). The parties can decide whether a simple majority, two-thirds, or some other proportion wins the case. See [http://www.i-courthouse.com/main.taf?area1\\_id=about&area2\\_id=faqs](http://www.i-courthouse.com/main.taf?area1_id=about&area2_id=faqs) (last visited July 18, 2000).

147. See Long Comments, *supra* note 136, at 1; E-mail of H. Clyde Long, CEO, iCourthouse, to Lucille M. Ponte, Associate Professor of Law, Bentley College, July 18, 2000 (on file with author).

148. See E-mail of H. Clyde Long, CEO, iCourthouse, to Lucille M. Ponte, Associate Professor of Law, Bentley College, July 18, 2000 (on file with author).

Although iCourthouse incorporates the traditional notion of judgment by peers, certain core aspects of the program need to be addressed to insure fundamental fairness for all parties and to provide full protection of consumer rights in online consumer disputes. First, jury pools need to be screened for bias.<sup>149</sup> It would be inappropriate for jurors in league either with the online consumer or the e-tailer to participate in rendering the verdict. Second, an e-merchant is more likely to have legal counsel than an online consumer. Since the parties prepare their own trial books, including citations to legal precedent and suggested juror instructions, the represented e-tailer is going to be able to draft a more thorough and authoritative trial book.<sup>150</sup> Therefore, the online consumer's rights may not be adequately protected. Third, the evidence in trial books is not screened for admissibility, which may mean that documents and information, which are irrelevant, misleading, inaccurate, or unauthentic may be used to support a party's case.<sup>151</sup> In addition, if a party lacks access to the necessary technological tools, such as a document scanner or language translation software, that party may be unable to present relevant and essential evidence for jury review.<sup>152</sup> Finally, there is no method for ensuring party compliance with iCourthouse verdicts short of bringing a case to the courts for enforcement—a thorny issue in the global environment of the Internet.<sup>153</sup>

#### IV. THROWING BAD MONEY AFTER BAD?

Part II illustrates a wide range of ODR options including automated blind bidding, consumer complaint services, mediation, software-based mediation, med-arb, arbitration and streamlined jury proceedings. A broad array of online technological methods have been explored to handle these disputes. Yet the question still remains: can ODR deliver a fast, fair, efficient, and effective method of dispute resolution on the global Internet? As it currently stands, ODR cannot guarantee these qualities for unhappy online consumers. Certainly, a great deal more experimentation, research, and collaborative action must occur before consumers can be confident about ODR options. Below are five essential areas for improvement before ODR can be credible and reliable for online consumer disputes.

---

149. See *infra* notes 154-155 and accompanying text.

150. See *infra* note 142 and accompanying text.

151. See *infra* notes 154-155 and accompanying text.

152. See *infra* note 169 and accompanying text.

153. See *infra* note 159 and accompanying text.



A. *Specialized Training and Standards for ODR Practitioners*

Online consumers need to be certain that ODR providers are offering quality conflict resolution services. Currently, there are no formal standards for the practice of ODR and no uniform specialized training for ODR practitioners.<sup>154</sup> Currently, anyone in the world with a Web site can claim to be an ODR provider. Clearly, international ADR organizations need to work together to develop some basic standards for specialized ODR training and practice. Issues such as confidentiality, impartiality, conflicts of interest, ODR disclosure policies, educational and training requirements, linguistic and cultural skills, and adequate party representation need to be fully addressed and applied to ODR service providers.<sup>155</sup> Either self-regulating Internet bodies<sup>156</sup> or a single government entity within each participating nation<sup>157</sup> needs to oversee ODR provider standards. ODR trustmark programs could provide consumers with a level of confidence about their ODR provider regarding basic standards of

---

154. A number of commentators have suggested the importance of appropriate ADR standards and training programs. See MITI Comments, *supra* note 1, at 3-5; Consumer Group Comments, *supra* note 3, at 8; Underhill Post Workshop Comments, *supra* note 4, at 2-5; Abernathy Comments, *supra* note 103, at 2-3; Baker Comments, *supra* note 7, at 11; Eisen, *supra* note 8, at 1331-32; Underhill Workshop Comments, *supra* note 70, at 8. SquareTrade indicated that it already provides an ODR training program for its panel of mediators. See Abernathy Comments, *supra* note 103, at 2-3. As Square Trade further indicated in its comments:

There is not a direct correlation between offline mediation skills and effective online mediation ability. Therefore, Square Trade's online training program teaches mediators how to translate their skills to the new online forum. In addition, it is imperative to implement a system for screening mediators who will not be able to work effectively online.

See *id.*

155. See MITI Comments, *supra* note 1, at 3-4; Consumer Group Comments, *supra* note 3, at 1, 8; Bordone, *supra* note 3, at 203; Underhill Post Workshop Comments, *supra* note 4, at 8-9; E-Commerce Group Guidelines, *supra* note 4, at 12; European Commission Comments, *supra* note 5 at 5; Abernathy Comments, *supra* note 103, at 2-3; Baker Comments, *supra* note 7, at 11; Benyekhief, *supra* note 7, at 6-7; Eisen, *supra* note 8, at 1333-34; Underhill Workshop Comments, *supra* note 70, at 4-5, 7.

156. See Bordone, *supra* note 3, at 201-02; Benyekhief, *supra* note 7, at 9-10; Underhill Post Workshop Comments, *supra* note 4, at 10; Public Comments by Ethan Katsh, Professor of Legal Studies and Director of Center for Information Technology and Dispute Resolution, University of Massachusetts at Amherst, to Federal Trade Commission at 2 (Mar. 24, 1999), at <http://www.ftv.gov/bcp/icpw/comments/ethankarsh.htm>. (last visited July 31, 2000).

157. Representatives of SquareTrade indicated that the FTC should take a leading role in setting quality control and disclosure requirements for ODR service providers. See Abernathy Comments, *supra* note 103, at 4-5. The European Commission has made it clear that it will not accept the development of ODR and codes of good business conduct, which do not involve the direct supervision by governmental entities. See European Commission Comments, *supra* note 5, at 6-7. MITI has similarly indicated that the creation of effective ODR guidelines requires the involvement of all e-commerce stakeholders, including the government. See MITI Comments, *supra* note 1, at 4.

quality and fairness. Providers failing to live up to these standards would lose their trustmark certification, a clear signal to online consumers about the quality and reputation of an ODR provider.<sup>158</sup>

*B. Need for International Enforceability*

Some ODR providers tout their ability to settle cases, but reaching settlement is only part of the conflict equation. Settlement can only be useful if the outcome is enforced within a relatively short period of time.<sup>159</sup> Online consumers may spend time and money using ODR services to resolve a dispute, only to find that the terms are not enforceable. In the global market of the Internet, it is unlikely that a consumer will cross state or national borders in order to enforce a low cost online disagreement. It is also suspect whether a court in another jurisdiction will agree to enforce a decision reached in cyberspace that does not comport with established legal, ADR, and public policy standards.

There needs to be international cooperation and agreement on the enforcement of ODR settlements without resort to traditional courts. ODR determinations should be similar to standard arbitration proceedings. International government institutions should work together to draft and sponsor a convention in which nations agree to enforce the settlements reached in ODR, provided that the ODR service comports with basic standards of fairness as determined by an international trustmark program.<sup>160</sup> Signatory nations could agree to yield some authority to an international, governmental, or self-regulatory Internet body that would enforce ODR settlements against any noncomplying party.<sup>161</sup> The international institution could threaten

---

158. Several organizations have indicated the importance of trustmark programs for e-businesses as the first line of defense in the arena of consumer protection. See MITI Comments, *supra* note 1, at 3; Consumer Group Comments, *supra* note 3, at 2-3; E-Commerce Group Guidelines, *supra* note 4, at 11-12; Underhill Post Workshop Comments, *supra* note 4, at 2-3, 8-9; European Commission Comments, *supra* note 5, at 3; Underhill Workshop Comments, *supra* note 70, at 8-9. Clearly, the idea of trustmarks programs could also be applied to the quality and responsiveness of ODR providers.

159. Enforceability of ODR decisions or settlements within a short period of time is certainly one of the main hurdles to effective ODR. See MITI Comments, *supra* note 1, at 3; Consumer Group Comments, *supra* note 3, at 4-7; E-Commerce Group Guidelines, *supra* note 4, at 2, 12; Underhill Post Workshop Comments, *supra* note 4, at 7; European Commission Comments, *supra* note 5, at 3-4; Underhill Workshop Comments, *supra* note 70, at 9.

160. See Bordone, *supra* note 3, at 196-97 (suggesting international entity create seal for ODR services and encourage e-businesses to place links to that entity on their sites); *supra* note 158 and accompanying text.

161. See Bordone, *supra* note 3, at 206 (recommending that system operators be gatekeepers for enforcing ODR); Katsh et al., *supra* note 8, at 731-32 (indicating that

the temporary or permanent loss of trustmark certification or the right to do business on the Internet until the noncompliant party complies with the ODR settlement or determination.<sup>162</sup> In addition, parties who do not comply with monetary awards could be subject to a credit card chargeback, as most Internet commercial activity is handled through credit cards.<sup>163</sup>

### C. Importance of Low or No-Cost ODR Options

A number of entrepreneurial ODR providers see the wave of online consumer disputes as a potentially enormous stream of revenue.<sup>164</sup> Yet in reality, most Internet consumer disputes involve relatively low-cost transactions.<sup>165</sup> In order for ODR to be of value to online consumers, ODR services must be provided at low or no cost.<sup>166</sup> The costs of ODR services could be covered through a variety of self-regulatory schemes. As a cost of doing business, most businesses carry some level of insurance to deal with disputes, such as products liability or malpractice insurance. Similarly, e-tailers could be covered by insurance programs that include the payment of costs for ODR services as part of a comprehensive package of business insurance protections. Alternatively, e-tailers participating in trustmark seal programs could fund ODR programs.<sup>167</sup> Similar to traditional insurance programs, these participating e-tailers could pay fees based on a sliding scale, with those companies involved in greater numbers of online conflicts paying higher fees to the trustmark program to fund ODR services. In addition, other nonprofit

---

marketplace owners, such as eBay, may best be able to enforce ODR determinations through threat of exclusion from applicable marketplace).

162. *See id.* Mr. Bordone recommends the use of monetary sanctions, removing or banning postings, or the temporary or permanent loss of cyberspace citizenship rights as ways to enforce ODR results. *See id.* Others suggest that the threat of removal of a trustmark will ensure compliance with ODR outcomes. *See* MITI Comments, *supra* note 1, at 3; Consumer Group Comments, *supra* note 3, at 6-7; E-Commerce Group Guidelines, *supra* note 4, at 11-12; Underhill Post Workshop Comments, *supra* note 4, at 8-9; European Commission Comments, *supra* note 5, at 3, 6-7; Underhill Workshop Comments, *supra* note 70, at 7. It has also been suggested that escrow payments by parties involved in a dispute as well as incentives for rapid compliance written into ODR agreements may also aid enforcement. *See* Baker Comments, *supra* note 7, at 7-8.

163. *See* Consumer Group Comments, *supra* note 3, at 7; Underhill Post Workshop Comments, *supra* note 4, at 5-6.

164. *See* Eurochambres' Comments, *supra* note 1, at 1-2; Perritt, *supra* note 22, at 689-94; *see also supra* notes 61, 85 and accompanying text.

165. *See supra* notes 4, 164 and accompanying text.

166. *See* Consumer Group Comments, *supra* note 3, at 4; Underhill Post Workshop Comments, *supra* note 4, at 4.

167. *See* Consumer Group Comments, *supra* note 3, at 4, 6; Underhill Post Workshop Comments, *supra* note 4, at 6; European Commission Comments, *supra* note 5, at 5.

and educational entities may seek private and public funding of ODR services to broaden access to ODR services for online consumers.<sup>168</sup>

*D. Continued Technological Experimentation for ODR Services*

Certainly there is a variety of technological methods being applied to ODR services. ODR providers have utilized conferencing systems, automated software, password-protected chat rooms and neutral sites, listservs, and e-mail. But in order for consumers to feel that they have truly been heard, more technological experimentation is needed. To add the human element to ODR proceedings, the development of cost-effective video and web-conferencing devices and other similar real time options need to be encouraged. In addition, there should be increased public and private support of initiatives that improve public access to ODR technological tools that are central to improving the quality of the ODR experience.<sup>169</sup> As with public library access to the Internet or public support for national court systems, there should be public spaces that provide technological support to those with online disputes. If these disputes are not resolved online, they will lead to a flood of litigation and a continued lack of public confidence in ODR specifically, and e-commerce in general.<sup>170</sup>

*E. Greater Public Awareness and Understanding of ADR Concepts and Processes*

ODR programs have had difficulty attracting substantial public interest in their services when there is no mandatory predispute ODR clause.<sup>171</sup> Currently, ODR, with a few technological twists, reflects traditional ADR models. Therefore, ODR faces one of the main obstacles that haunts ADR today: the lack of public awareness and education about ADR principles and methods. Few laymen have been exposed to ADR, and, therefore, they will likely be reluctant to use ODR services. Before ODR can gain credibility, ADR must be better understood and valued by the public. All e-commerce stakeholders—educational institutions, judicial authorities, e-tailers, government

---

168. See European Commission Comments, *supra* note 5, at 5; Underhill Post Workshop Comments, *supra* note 4, at 7, 9; Baker Comments, *supra* note 7, at 11; Katsh Comments, *supra* note 7, at 2.

169. See Underhill Post Workshop Comments, *supra* note 4, at 7; Baker Comments, *supra* note 7, at 11; Katsh Comments, *supra* note 7, at 2.

170. See Underhill Post Workshop Comments, *supra* note 4, at 7; see also *supra* notes 1, 4-5 and accompanying text.

171. See *supra* notes 30, 129-130 and accompanying text.

institutions, online nonprofit organizations, and profit service providers—need to work together to establish initiatives that will broaden public understanding and confidence in ADR and ODR.<sup>172</sup> Through the insertion of ADR/ODR information onto ODR providers and e-tailer home pages, Web news content, and public service banner advertisements, the online community will become more informed about ADR. Without a concerted educational effort focusing on the benefits of ADR, ODR will continue to exist on the fringes of Web consciousness.

## V. CONCLUSION

The Internet offers online consumers the opportunity for twenty-four-hour access to a global marketplace. This increased access means more online transactions and online consumer disputes. The court system does not have the resources or expertise to deal with a flood of Internet litigation that involves numerous, thorny cross-border issues. A number of ODR providers have posted Web sites offering to help bridge the gap between disputants and to provide fast, fair, and effective ODR services. However, certain essential issues must be addressed before online consumers can gain confidence in the credibility and reliability of ODR services. ODR settlements and determinations must be enforceable in a global environment without requiring court intervention. Additionally, professional standards and effective trustmark programs need to be established to ensure the quality of ODR services. Since most Internet disputes involve low dollar amounts, ODR services must be provided at low or no cost, funded, at least in part, by participating e-tailers. Further technological experimentation must be undertaken to introduce more human interaction and to improve the quality of the ODR experience. Lastly, all of the e-commerce stakeholders must take an active role in

---

172. See Bordone, *supra* note 3, at 196-97; Underhill Post Workshop Comments, *supra* note 4, at 9; Baker Comments, *supra* note 7, at 10-11; Abernathy Comments, *supra* note 103, at 4; Díaz Comments, *supra* note 8, at 1. Mr. Baker of WebMediate, Inc. stated:

The principal obstacles to the broad implementation of online ADR for online consumer transactions are education and inertia. Education has to take place on two levels. The first level concerns the basic security of transacting on the Internet. The second level concerns ADR as a reliable and fair mechanism for dispute resolution online and off-line . . . Disputants in the online commercial transaction context will also have to believe ADR is a process that can improve the resolution of a commercial dispute. General confidence in ADR relates to both the online and off-line context. Because ADR is a relatively recent phenomenon, many parties to consumer transactions may not know much about ADR, or more specifically, about online ADR.

Baker Comments, *supra* note 7, at 10.

educating the public about ADR concepts and methods. Not until these issues are addressed will ODR truly be able to deliver the goods for the disgruntled online consumer.