

4-1-2001

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Recommended Citation

Richard Michael Victorio, *Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century*, 1 Pepp. Disp. Resol. L.J. Iss. 2 (2001)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol1/iss2/8>

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Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century

Richard Michael Victorio

I. INTRODUCTION

As the popularity of the Internet grows, more and more people are making it a part of their lives.¹ Going beyond mere communication, people monitor their stock portfolios, get their weather reports, manage their checking accounts, and even find love, as evidenced by the film "You've Got Mail!" But just as the Internet opens up new ways to bring people together who may never have met in "real life," it also opens up new ways for people who may never have met each other in "real life" to have conflicts with each other.² Consequently, there needs to be a way to deal with these head-on collisions on the Information Superhighway.³ Cyber-citizens, generally disposed towards libertarianism, have opposed imposing traditional legal systems onto the "Wild West" environment of the Internet.⁴ It is in that twilight zone of a virtual society that ADR has its best chance of success.⁵

It was only a matter of time before ADR hit the Internet.⁶ The Internet has sweepingly transformed society⁷ just as ADR has wrought tremendous

1. See M. Ethan Katsh, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953, 959 (1996). See also, *Internet Isolation? Study Suggests Heavy Internet Use Leaves Little Time For Anything Else*, ABCNEWS.COM, (Feb. 16, 2000) <http://abcnews.go.com/sections/living/DailyNews/internet_isolation000216.html>. (Discussing the extent to which Americans are spending time on the Internet, what they are doing on the Internet, and what they are not doing when not connected).

2. See Katsh, *supra* note 1 at 956.

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

4. See Joel B. Eisen, *Are We Ready For Mediation In Cyberspace?*, B.Y.U. L. REV. 1305, 1307 (1998). See generally, Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement Or Social Contracting For Governance In Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475 (1997) (on issues of cyberspace law and proposed models of governance of cyberspace).

5. See Lide, *supra* note 3 at 222.

6. See William T. D'Zurilla, *Alternative Dispute Resolution: ADR Hits the Internet*, 43 LA. B.J. 187, 187 (1995).

7. See George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 HASTINGS COMM.&ENT. L.J. 695, 699 (1997). See also *infra* notes 149, 151 and accompanying text.

change in our society, by enabling the swift and economical settlement of disputes, and unclogging the legal system in the process.⁸ The application of alternative dispute resolution methods to the Internet, termed “iDR” in this comment, has the potential to impact the landscape of both traditional ADR and the Internet itself. It brings the communication technology of the Internet to the practice of traditional, non-virtual, “real world” ADR, reducing costs and speeding up the exchange of information, increasing its efficiency even more.⁹ At the same time ADR may civilize the Internet without requiring a centralizing authority.¹⁰ In classic ADR parlance, this would be a *win-win* situation. This article outlines the ways in which ADR exists on the Internet, explores schemes to mediate and arbitrate disputes in cyberspace, and discusses some challenges to the full use of iDR. This article is not meant to be an exhaustive listing of online ADR resources, as online resources change constantly.¹¹ More current listings may be obtained by searching Yahoo!¹² or Findlaw.¹³

II. ADR’S USE OF THE INTERNET

A. *Information Resource for People Who Know Nothing About ADR*

ADR exists on the Internet in multiple forms because the Internet itself is multifaceted, meaning many things to many people. It is a postal system, a bulletin board, and a marketplace — it is simultaneously everywhere and nowhere. One of the first uses ADR practitioners found for the Internet was as an information booth or clearinghouse of information for people who were first learning about ADR.¹⁴ Explanations of the various traditional ADR processes helped raise awareness of the alternatives to litigation.

Some of these sites include:

8. See Catherine Kessedjian and Sandrine Cahn, *Dispute Resolution On-line*, 32 INT’L LAW. 977, 978 (1998).

9. See David R. Johnson, *Screening the Future for Virtual ADR*, 51-SEP DISP. RESOL. J. 117, 117 (1996). See also *infra* notes 75-77 and accompanying text.

10. See Alejandro E. Almaguer and Roland W. Baggott III, *Shaping New Legal Frontiers: Dispute Resolution For the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711, 717 (1998).

11. See D’Zurilla, *supra* note 6 at 187.

12. <<http://www.yahoo.com>>.

13. <<http://www.findlaw.com>>.

14. See D’Zurilla, *supra* note 6 at 187.

1. *Mediation Information and Resource Center (MIRC)*
<http://www.mediate.com>

This is the one of the most comprehensive Web sites available. From MIRC, one can get referrals for mediators (even internationally) and learn about mediation and arbitration. One can search for mediators by state, country, or practice area. Mediation service providers can list on this directory for a nominal fee, register their website off their domain (i.e. “<http://www.mediate.com/mediationserviceprovider>”), and sign up for various other Internet hosting services. One can also join discussion forums, read articles, locate academic and training programs in addition to other resources.

2. *International Chamber of Commerce (ICC)*
<http://www.iccwbo.org>

The ICC’s web site allows users to find out about the ICC, its procedures, and how to contact them. The New York Convention, the UNCITRAL model law, the ICC’s rules and statistics as well as ICC events and initiatives are available in several languages. Information on various business areas of international commercial arbitration is also available. As of this writing, parties cannot yet file a claim with the ICC, but contact information for the national committees is available.

3. *EFF Legal - Virtual Arbitration & Online Dispute Resolution Archive*
<http://www.eff.org/pub/Legal/Arbitration>

The Electronic Frontier Foundation is committed to cyberspace issues and has a few articles about virtual arbitration and online dispute resolution.

4. *The American Arbitration Association (AAA)*
<http://www.adr.org>

This web site has information about the AAA, its practice, and its rules and codes. “One can gain access to various educational resources . . . listings of regional offices, and membership information.”¹⁵ The rules, guides, and

15. Martin C. Karamon, *ADR on the Internet*, 11 OHIO ST. J. ON DISP. RESOL. 537, 542 (1996).

forms necessary to submit a dispute to the AAA are available for download.¹⁶ Links to recent articles on hot topics relating to ADR, such as mass torts, toxic torts, international commercial disputes, etc. are also on the site.¹⁷

B. Marketing brochure for “real world” dispute resolution firms

The Internet serves as a supplement to both traditional and alternative dispute resolution. Many mediators make their e-mail addresses available to participants for contact, in addition to providing their fax numbers work telephone numbers.¹⁸ In the traditional arena, e-filing of court documents is reducing the paper burden on both the lawyers’ and court’s part, and streamlining the process of litigation.¹⁹ The Shawnee County, Kansas, court conducted a study in 1997 which found that electronic filing would save 9.63 work hours, or \$218.86, for every 100 documents filed. If, for example, the L.A. County Superior Court division, which receives 4,000 documents a day, adopted e-filing wholesale, it would result in an estimated savings of nearly \$9,000 a day in handling costs, totaling more than \$3 million a year.²⁰

The World Wide Web is being used as a marketing brochure for “real world” dispute resolution firms. Mediators use the web to advertise their ADR business, apply for posted employment positions, and register for real world training programs over the Internet.²¹ In addition, mediators can register for “virtual” training programs, conducted by videoconference or webcams.²²

1. Mediation Works

<http://www.mediationworks.com>

Mediation Works is a resource for those seeking to “manage workplace conflict.” It is basically a mediation training institute featuring articles, schedules for public seminars, public speakers who are available for hire, and credit and non-credit courses on mediating workplace disputes through affiliated universities.

16. *See id.*

17. *See id.*

18. *See* Johnson, *supra* note 9 at 118.

19. *See* Johnson, *supra* note 9 at 119.

20. *See* Katlin Quistgaard, *Order in the Court*, WIRED MAGAZINE 7.03, (Mar. 1999) <<http://www.wired.com/wired/archive/7.03/courts.html>>.

21. *See* Karamon, *supra* note 19 at 537.

22. *See id.*

III. IDR SCHEMES AND EXAMPLES OF PUBLIC PROJECTS AND PRIVATE FIRMS

Finally, the latest use of the Internet is its use as the actual forum for dispute resolution for disputes arising both in and out of cyberspace.

A. Arbitration

1. Virtual Magistrate²³

Perhaps the best-known and most-cited example of iDR is the Virtual Magistrate Project (VMP) sponsored by the National Center for Automated Information Research (NCAIR), the Cyberspace Law Institute (CLI), the American Arbitration Association (AAA), and the Villanova Center for Information Law and Policy.²⁴ This was a pilot project launched in 1995 to arbitrate disputes involving system operators ("sysops").²⁵ The type of dispute the Virtual Magistrate was designed to handle would be one where a party posts a message or file on the sysop's system that another party finds offensive.²⁶ The file or message could be considered defamatory, libelous, an infringement of the complaining party's trademark or copyright, fraudulent, obscene, lewd, etc.²⁷ The offended party would then demand that the sysop remove the offending message.²⁸ Disputes could be submitted by e-mail or by web form without fee.²⁹ After receiving complaints, VMP would randomly select an impartial magistrate from a pool of arbitrators familiar with cyberlaw, qualified by CLI and the AAA and trained by the AAA.³⁰ Proceedings would take place by e-mail, and the stated goal was to reach a decision within three

23. Formerly at <<http://vmag.law.vill.edu>>, but since the program ended, the link is dead.

24. See Robert J. Ambrogi, *Cyberspace Becomes Forum for Resolving Disputes*, 40-JUL RES GESTAE 28, 28 (1996).

25. See Katsh, *supra* note 1 at 965.

26. See Kessedjian & Cahn, *supra* note 8 at 980.

27. See Katsh, *supra* note 1 at 965.

28. See Ambrogi, *supra* note 29 at 28.

29. See Karamon, *supra* note 19 at 548.

30. See Kenneth D. Saloman & David J. Wittenstein, *Avoiding Entanglement in Online/Internet and Network Disputes: The Virtual Magistrate Project*, DOW, LOHNES & ALBERTSON, PLLC. <<http://www.dlalaw.com/newmedia/articles/virtual-magistrate.html>>.

business days after receiving the initial complaint.³¹ Contrary to traditional ADR practice, and since this was a pilot project, the decided cases were available at the web site. It was less than a resounding success. In fact, only one case was decided,³² and in that case a key participant refused to participate,³³ calling into question the efficacy of enforcement.³⁴ On the other hand, two other disputes they actually received were settled before even going into “cyberarbitration.”³⁵

B. Mediation

1. University of Massachusetts Online Ombuds Office (OOO) <http://www.ombuds.org>

The University of Massachusetts sponsors the OOO.³⁶ Like a “real” ombuds office, the OOO is a place to obtain information or consult any of the Online Ombudspersons — experienced ombudspersons who may be physically located anywhere.³⁷ It is an attempt to bring the ombuds model of dispute resolution into cyberspace.³⁸ The OOO is specifically designed to resolve online disputes.³⁹ Users can help themselves by browsing through the OOO site to retrieve information that is helpful in dealing with their disputes.⁴⁰ Users can also ask for the assistance of one of the online ombudspersons.⁴¹

Here’s how the OOO works: a user provides the OOO with information on the dispute.⁴² An ombudsperson is assigned to the case and usually contacts the user via e-mail.⁴³ The ombudsperson may ask questions about what happened or what the user wants.⁴⁴ The ombudsperson may have questions

31. See Friedman, *supra* note 7 at 704.

32. Press Release, *Virtual Magistrate Issues Its First Decision; Recommends that AOL Remove a Subscriber Message Offering Millions of Email Addresses For Sale*, (May 21, 1996) <<http://www.jmls.edu/cyber/docs/vml.html>>.

33. See Kassedjian & Cohn, *supra* note 8 at 981.

34. See Almaguer & Baggott, *supra* note 10 at 730.

35. See *id.* at 734.

36. See Katsh, *supra* note 1 at 966.

37. See Friedman, *supra* note 7 at 706.

38. See Katsh, *supra* note 1 at 967.

39. See *id.*

40. See Friedman, *supra* note 7 at 706.

41. See Katsh, *supra* note 1 at 968.

42. See Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 988 (1997).

43. See *id.*

44. See *id.*

about the other party.⁴⁵ If both parties agree to use the OOO, then the ombudsperson will mediate the dispute.⁴⁶ If one party refuses to cooperate, another strategy must be used.⁴⁷ The OOO also has an Online Ombuds Conference Room where, using Internet Relay Chat, the ombudsperson can have live discussions with the parties.⁴⁸ The ombudsperson can meet with all the parties in one chat room or can put each party in a different chat room and shuttle back and forth.⁴⁹

2. University of Maryland's Online Mediation Service *<http://www.mediate-net.org>*

The Online Mediation Service, based at the Center for Law Practice Technology at the University of Maryland, specifically deals with family law and health care disputes arising in Maryland.⁵⁰ The site serves as a gateway to their in-person service by providing mediation rules, a copy of the agreement to mediate, information about the backgrounds of the mediators, and a copy of the mediation handbook.⁵¹ Additionally, mediation discussion is conducted by way of newsgroup-like discussion groups, with exhibit and document filings done by e-mail.⁵²

The service is limited to two types of disputes: (1) domestic disputes such as custody, visitation, child support, and property division; and (2) health care disputes between either customers and insurance companies, or customers and health care device manufacturers.⁵³ Only cases that arise in Maryland under Maryland law will be selected for mediation.⁵⁴

45. *See id.*

46. *See id.* at 988-89.

47. *See id.* at 989.

48. *See id.*

49. *See id.*

50. *See* Richard S. Granat, *Creating an Environment for Mediating Disputes on the Internet: A Working Paper for the NCAIR Conference on On-Line Dispute Resolution*, Introduction ¶ 3 (May 22, 1996) <<http://www.mediate-net.org/researchpaper.htm>>.

51. *See id.* at §2 ¶ 3.

52. *See id.* at §2 ¶ 6.

53. *See id.* at Introduction ¶ 3.

54. *See id.*

3. Internet Neutral

<http://www.internetneutral.com>

Beginning with the end in mind, Internet Neutral provides a standard mandatory mediation clause, which the parties can insert in their contracts before performance is rendered. However, even if the parties do not specify beforehand that they want to settle disputes through this service or any other type of mediation, a complaining party can serve a written notice upon the other party and the Internet Neutral. That party must then respond via e-mail to the disputing party and the Internet Neutral indicating their willingness or unwillingness to participate.

Preparation for mediation is straightforward. The parties and the Internet Neutral execute a mediation agreement specifying confidentiality, cooperation, and other matters. The Internet Neutral schedules delivery of further mediation documents to/from the parties for their review. The Internet Neutral schedules a mediation session at the parties' convenience within contract time limitations. The Internet Neutral will advise the parties in advance how the mediation will be conducted and what they can expect.

A mediation session may be conducted in one of four ways, singly or in any combination: e-mail, instant messaging, chat conference rooms, and/or video conferencing. The parties may also request a face-to-face meeting. Each party, sitting in front of their computer, has access to two virtual conference channels: one for private conversations between the party and the mediator and another for private conversations among both parties and the mediator. The parties gain access through the Internet Neutral web site through the use of a password that has been previously e-mailed to the parties.

Once the Internet Neutral believes that settlement has been achieved, he or she will assist the parties in memorializing the settlement in a memorandum of settlement. The parties may choose to convert this memorandum into a more formal settlement agreement depending upon the value and complexity of the settlement.

4. Online Mediators

<http://www.onlinemediators.com>

To begin the Online Mediation process, a complaining party completes a confidential disagreement information form. Online Mediators contacts the other party to see if they would be willing to participate in an online mediation. If the other party agrees to mediate, they must also complete a confidential disagreement information form. Once both sides agree to participate, an Online Mediator is assigned and contacts each participant. The mediator

works with both parties to try to resolve the dispute. If both sides reach agreement, the mediator drafts an agreement form. As part of completing this form, participants determine whether they want their agreement to be legally enforceable. Service fees vary depending on the value of the dispute and can be charged to Visa or Mastercard.

C. Negotiation

1. clickNsettle

<http://www.clicknsettle.com>

ClickNsettle boasts that it is the only fully interactive dispute resolution web site on the Internet.⁵⁵ In contrast to the sites described previously, clickNsettle specializes in those disputes that can be resolved through a monetary settlement.⁵⁶ One party submits their dispute, a \$15 submission fee, and the amount of their initial offer or demand. The other party responds with their offer or demand. Either party may submit new demands or offers at any time, for a period of 60 days. All offers and demands are "blind" — neither party knows the amount of the other party's offer or demand. If the last demand is ever within 30% of the last offer, the case will settle for the midpoint of the offer and demand. Parties pay each time they file an offer or demand. If the case settles for less than \$10,000, each party pays a \$100 settlement fee. If the case settles for \$10,000 or more, each party pays a \$200 settlement fee.

2. Cybersettle

<http://www.cybersettle.com>

Cybersettle offers another computer-assisted method for settling claims, similar to clickNsettle, but limits its scope to insurance claims. Cybersettle claims to have settled more than \$20 million in (small) claims online and is used by more than twenty large insurance companies.⁵⁷

Cybersettle matches offers with demands via computer program, with no human intervention. Each party makes confidential offers for three rounds. If

55. Cybersettle, described below, also offers this type of interactivity.

56. Insurance or breach of contract claims, for example, in contrast to family law or other types of disputes where the amount of damages is not the only issue.

57. *See id.*

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the insurance company's offer is within a preset formula, typically 30% or \$5000 of the claimant's demand, the case immediately settles for the median amount. Offers and demands are completely confidential. Once a settlement occurs, only the settlement amount is revealed. Should the parties fail to reach a settlement, the parties can pursue other courses of actions, including litigation. Each case is password-protected to ensure privacy and prevent unauthorized access. Because each participant creates a range of acceptable settlement for each case, no claim can settle unless each participant agrees to the amount in advance. Since offers and demands that do not result in a settlement are never disclosed, the system prevents posturing, thus encouraging the parties to take a realistic approach to settlement.

3. SettleOnline⁵⁸

<http://www.settleonline.com>

To file a case, the disputing party logs onto the SettleOnline web site or calls the SettleOnline administrator. Once an account is created, the disputing party can log onto their SettleOnline Account to file a case. The complaining party enters information about the case and the parties. Then the filing party enters three demands (if the filing party is the plaintiff) or three offers (if the filing party is the defendant). Upon receiving the completed case and party information from the filing party, a SettleOnline Administrator contacts the opposing party and informs the opposing party of the filing party's interest in attempting to settle the case using SettleOnline. If the opposing party is interested in participating, it must set up an account and create a user name and password. The opposing party then reviews the case file created by the filing party for any incorrect information.

Subsequently, each party enters five offers/demands in five rounds of negotiation. E-mail is automatically sent to each party if: 1) the case settles, 2) all rounds have been attempted, 3) the case does not settle, or 4) if the case expires. Each party can check the case status by logging on to the web site. The case status will only report the number of rounds attempted by the parties and the last login date for each party and will not disclose the dollar values of either party's offers or demands. Settlement is determined by several different complex formulas, similar to clickNsettle and CyberSettle, but beyond the scope of this paper.⁵⁹ If the case does not settle, both parties may

58. See Resolute Systems, Inc., Settle Online, at <http://www.settleonline.com> (last visited October 8, 2000).

59. See *id.* at 17-20.

consult a live “ADR Consultant” to explore other dispute resolution procedures.

SettleOnline uses several systems in order to ensure a safe and private session. In order to access any information about a case, a username and password is required. SettleOnline encrypts all data between the server and workstation when filing a new case, or viewing any information about an existing case. This ensures that a hacker cannot eavesdrop on the session, steal passwords, or view any offers or demands that were made. SettleOnline provides insurance against economic loss due to theft, impersonation, corruption, etc.

IV. ADVANTAGES OF IDR

A. Cost

The resolution of disputes online would eliminate fairness issues related to the expense of travel and accommodations.⁶⁰ Modern business is worldwide in scope, and travel to resolve relatively small disputes may be too expensive and time-consuming.⁶¹ Mediation sessions that take place on the Internet via e-mail, instant messaging, chat conference rooms, or Internet videoconferencing, mitigate the costs related to travel.

Communication problems due to parties and counsel being in different time zones diminish greatly through the use of iDR.⁶² While some may say that faxing or telephone conference calls can have the same benefits as the Internet, this is not true.⁶³ Sending multiple faxes to several recipients, or calling lots of parties is time-consuming and expensive.⁶⁴ Sending a document via e-mail or posting it on a web site for the parties to view is virtually effortless.⁶⁵

Not only is electronic transmission or publication of documents easier and faster, it is also cheaper, as the documentation required for litigation creates mountains of paper and spent cash.⁶⁶

60. See Lide, *supra* note 3 at 220.

61. See *id.* at 222.

62. See Friedman, *supra* note 7 at 711.

63. See *id.*

64. See *id.*

65. See *id.*

66. See Cona, *supra* note 48 at 991.

B. Speed

Traditional ADR practitioners often tout ADR's speed advantages compared to litigation. While traditional ADR cases may take months or weeks to resolve, iDR promises settlement of disputes within days or even minutes.⁶⁷ Scheduling an ADR hearing can be time-consuming, with phone and fax-tag being quite common.⁶⁸ E-mail simplifies this task.⁶⁹ Indeed, as discussed previously, some iDR providers have chat rooms where the hearing can be held electronically. With the increasing ubiquity of "web cams," the online videoconference may become common.

C. 24/7 Availability

iDR makes it simple for potential participants to find the starting point for service with click of a mouse button.⁷⁰ A party in mediation or arbitration who has a question for the mediator or arbitrator or must get information from the physical office is limited to the ADR provider's office hours.⁷¹ In contrast, most of the Internet mediation services previously described are available 24 hours a day, 7 days a week.⁷² A party does not need to go to the office of an arbitrator, a mediation clinic, or a lawyer.⁷³ He or she merely points their browser to the appropriate site, and fills out a web form or writes an e-mail.⁷⁴ Delays associated with waiting for forms are avoided.⁷⁵ Dockets are visible to participants, changes to them immediately available, and the full content of all materials is directly accessible.⁷⁶ No telephonic, written, or in-person request is necessary to obtain documents.⁷⁷

D. Expertise In Arbitration Of A Person In The Field

Though judges are often knowledgeable in the law of a particular commercial area, they do not always present the benefit of the expertise of those

67. See Almaguer & Baggott, *supra* note 10 at 716.

68. See Friedman, *supra* note 7 at 711.

69. See *id.*

70. See Cona, *supra* note 48 at 991.

71. See Friedman, *supra* note 7 at 712.

72. See *id.*

73. See Cona, *supra* note 48 at 991.

74. See *id.*

75. See *id.*

76. See *id.*

77. See *id.* at 992.

experienced in the field.⁷⁸ When arbitrating or mediating a dispute, the parties can choose arbitrators or mediators with expertise in the area of their dispute and obtain a more equitable solution than could be gotten in court.⁷⁹

E. Less Confrontational

By removing the physical presence of the opponent, iDR provides the parties with a dispassionate way to look at the merits of their cause of action.⁸⁰ iDR may be effective where there is a lack of trust between the parties and emotions stand in the way of effective communication.⁸¹ The computer provides an emotional distance between the parties, allowing them to accurately evaluate the merits of their respective cases.⁸² A party that cannot focus on “the enemy” will be able to focus on the merits and demerits of an argument as crystallized on the screen.⁸³ Because e-mail dialogues do not take place in “real time,” participants can choose when to send their messages. This gives them time to reflect on their positions before articulating them without the time pressure of an immediate confrontation.⁸⁴ Forcing the participants to articulate their positions in writing forces them to think about their disputes. It reduces emotional hostility and diminishes expressions of power or bias. E-mail or separate chat sessions between the mediator and each of the parties is a way to simulate private caucuses and/or shuttle diplomacy that is common in traditional ADR.⁸⁵

Additionally, any economic or other power imbalance that exists between the parties is masked by the medium.⁸⁶ In a traditional mediation one party may try to dominate or intimidate the other side.⁸⁷ A competent mediator will seek to prevent power grabs by a dominant party.⁸⁸ iDR can assist the mediator further by rendering ineffective a party’s attempt to dominate.⁸⁹ Without

78. *See id.* at 985.

79. *Id.*

80. *See Johnson, supra* note 9 at 118.

81. *Id.*

82. *Id.*

83. *Id.*

84. Granat, *supra* note 57 at § I ¶ 28.

85. *See id.* at § II ¶ 7.

86. *See id.*

87. *See Granat, supra* note 57 at § I ¶ 23.

88. *See id.*

89. *See id.*

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the power distortions, the parties can have a clearer understanding of each other's positions.⁹⁰

F. *Provides A Neutral Forum*

Depending upon the nature of the dispute, the parties may not want to have the mediation, arbitration, or negotiation at either party's office, or at either party's lawyer's office. This can be another type of power ploy. Where the proceeding is held determines who has the power in traditional ADR, just as in litigation. Thus, a neutral location, such as the mediator's office or the Internet, is essential. The "conference table in cyberspace" denies a dominating party the potential to exploit the "home court advantage."

V. DISADVANTAGES TO IDR

A. *The Missing Element Of Human Interaction*

A mediator assists the parties in reaching an agreement that resolves their dispute, whether or not they in fact do so.⁹¹ There is value to the mediation process, not just in the outcome.⁹² Mediation participants value the transformative and reconciliatory potential of traditional ADR; that is one reason parties favor it over litigation.⁹³ Mediation can be about healing, educating, informing, and persuading.⁹⁴ It can open lines of interpersonal communication where none previously existed, allowing parties to recharacterize the nature of their dispute.⁹⁵ It can develop a base for the parties' future relationship and potentially help them create empathy for one another.⁹⁶ "Mediators attempting to establish trust via writing over an electronic distance is as effective as a therapist treating a patient by reading her journal."⁹⁷ Sending e-mail is a solitary endeavor, bereft of the opportunity to engage the parties in a therapeutic conversation, to listen to and understand their concerns, emotions, and feelings.⁹⁸

Previous works on "virtual mediation" analogize IDR with telephone

90. See Johnson, *supra* note 9 at 118.

91. Eisen, *supra* note 4 at 1322.

92. See *id.* at 1319.

93. See *id.* at 1322.

94. See *id.*

95. See *id.*

96. See *id.* at 1323.

97. See *id.* at 1325.

98. See *id.*

mediation.⁹⁹ The problems are analogous — mediators emphasize that the process of mediation itself can contribute to a settlement, even if no settlement is reached.¹⁰⁰ In a mediation where the parties are not even in the same room, it is difficult for the mediator to ensure that the parties are actively engaged in the process.¹⁰¹ Additionally, traditional mediators attempt to provide a friendly, informal and comfortable atmosphere for negotiations.¹⁰² Posture, facial expression, body language, and other non-verbal cues, which are a normal part of the process of establishing rapport with the parties are absent in an iDR session.¹⁰³ Also absent are race and gender.¹⁰⁴ While on the one hand this abstraction of the parties may help to mitigate dominating aspects (i.e. race and gender), at the same time it alienates the parties from each other. Dispute resolution is not just about resolving disputes, it is also about understanding the other person — an understanding that is lost when one does not even know the race or gender of the other side. Bridging the physical distance through technology does nothing to alleviate the psychological distance between the parties.¹⁰⁵ Even videoconferencing or “web cams” does not adequately address this party alienation. The subtleties of non-verbal communication are still lost in a web cam iDR session, though less so than when using telephones because the parties can see each other.

Mediation conducted by e-mail lacks the tone of voice and other cues to indicate the sender’s intent.¹⁰⁶ There is also a dual problem: the sender may not express him/herself well in writing (thus the message sent was not the intent of the sender) and the recipient may misread what was received, regardless of whether the sender accurately expressed him/herself. The problem is compounded with a mediator who may filter the messages in an e-mail exchange before revealing it to the other party in a caucus situation.

In general, face-to-face interaction is important in ADR because it helps build confidence.¹⁰⁷ Eye contact between the parties, mediators or arbitrators

99. See Daniel Yamshon, *The New Age of Dispute Resolution by Telephone & Electronic Communications: Dial “M” For Mediation*, 49-MAR DISP. RESOLJ. 32, 32 (1994).

100. See *id.*

101. See *id.* at 33.

102. See *id.*

103. See *id.* at 34.

104. See Katsh, *supra* note 1 at 974.

105. See Yamshon, *supra* note 109 at 33.

106. See Eisen, *supra* note 4 at 1327.

107. See Kassedjian & Cohn, *supra* note 8 at 986.

Pepperdine Dispute Resolution Law Journal, Vol. 1, Iss. 2 [2001], Art. 8 is often crucial to a better understanding of the arguments pleaded.¹⁰⁸ Face-to-face interactions can result in a catharsis that is lacking in virtual conferencing.¹⁰⁹ The emotional impact of articulating one's position is attenuated if an electronic distance separates one from the listener.¹¹⁰ If an element of the catharsis is not simply to tell one's story, but also to have an effect on the listener, then iDR is hampered by the limitations of one's ability to express emotion online.¹¹¹

Alternatively, virtual interactions by e-mail may do more harm than good. Instead of decreasing tensions it may worsen the dispute. Participants, instead of reflecting before writing their e-mail, may instead take advantage of the ability to respond quickly and write messages that are anything but thoughtful.¹¹² Participants may misunderstand that the messages were meant to be constructive.¹¹³ The fact that parties in dispute do not trust each other to begin with means that they are more likely to misinterpret messages.¹¹⁴ Conversely, messages composed upon reflection may be more heated than those sent instantaneously.¹¹⁵ The parties would have a chance to stew and compose very angry messages.¹¹⁶ In traditional ADR, mediators can control hostilities by interrupting a party speaking heatedly.¹¹⁷ In mediations conducted by e-mail, the mediator is severely hampered to control hostilities.¹¹⁸ That parties are not present in the same room, while it may help for parties hostile to each other, may also prevent spontaneous interaction and proposals that can lead to a resolution.¹¹⁹

A party can frustrate the iDR process by not responding to e-mail or chat requests, and a mediator would not know whether the party is having technical difficulty or being uncooperative.¹²⁰ Without body language, a mediator would not be able to tell whether a party was lying or distorting the truth.¹²¹

108. *See id.*

109. *See Eisen, supra* note 4 at 1323.

110. *See Eisen, supra* note 4 at 1323.

111. *See Eisen, supra* note 4 at 1323.

112. *See id.* at 1327.

113. *See id.*

114. *See id.* at 1328.

115. *See id.*

116. *See id.* at 1329.

117. *See id.* at 1354.

118. However, in mediations conducted in chat rooms, the mediator may have the technological ability to cut off party hostility.

119. *See Eisen, supra* note 4 at 1329.

120. *See Katsh, supra* note 1 at 976.

121. *See Eisen, supra* note 4 at 1327.

B. Enforcement Of Agreements

Just as there is recognized enforceability of traditional ADR arbitral decrees and of contracts to (non-virtually) arbitrate, there should not be a problem getting judicial recognition and enforcement of iDR decisions.¹²² The only reason the Virtual Magistrate case did not work out was because one of the parties to the dispute did not accept the arbitrator's authority.¹²³ In such a context, absent a contractual arbitration clause,¹²⁴ even a real world arbitration would have difficulty.¹²⁵

C. Uncertainty With Regard To Confidentiality, Privacy, Anonymity And Authenticity

Confidentiality is a key feature that makes alternative dispute resolution more attractive than traditional dispute resolution, i.e. litigation.¹²⁶ Where litigation is a public affair with court-filed documents open to public scrutiny, settlement resulting from ADR is private, not open to public scrutiny, and completely confidential. Nothing disclosed in mediation or settlement talks can be used as evidence at trial. Ensuring this same level of confidentiality in cyberspace is key to iDR's success.¹²⁷ The participants must feel that what they disclose in an Internet arbitration or mediation stays in the virtual conference room and does not become public knowledge.¹²⁸ Unfortunately, the Internet, designed by academicians with a view towards public dissemination of information, is by nature an unsecured medium, not conducive to guaranteeing confidentiality. All too often in the news we hear and read of hackers breaking into financial sites and stealing confidential information and of private e-mail being read by outside parties.¹²⁹ Worryingly, hackers who break into a website can not only consult the information but can modify it as

122. See Lide, *supra* note 3 at 221.

123. See Cona, *supra* note 48 at 998.

124. Within the arbitration contract, the parties may agree to be bound by the contract law of a particular state and the rules of a particular organization, such as the AAA or ICC.

125. See Cona, *supra* note 48 at 998.

126. See Katsh, *supra* note 1 at 971.

127. See Almaguer & Baggott, *supra* note 10 at 735.

128. See *id.* at 736.

129. Courtney Macavinta, *Hotmail Breach Prompts Microsoft Security Audit*, C-NET NEWS.COM, (Sept. 9, 1999) <<http://news.cnet.com/news/0-1005-200-114773.html?tag=st.cn.1>>.

Pepperdine Dispute Resolution Law Journal, Vol. 1, Iss. 2 [2001], Art. 8 well.¹³⁰ In a less sinister vein, e-mail sent between the parties or from a mediator to a party in a virtual caucus session can be copied and distributed, destroying confidentiality.¹³¹ To some extent, iDR can foster trust in its confidential nature by the use of certain technologies, such as encryption, that permit messages to be read only by their intended recipients.¹³² Similarly, just as the mediator lays down ground rules as to what is said which cannot be disseminated, the cyber mediator can lay down similar ground rules for the parties to act in good faith to honor the confidentiality of the iDR session. In sum, the electronic record created by an iDR session is a double-edged sword. Though there is a risk of easy breach of confidentiality, the fact that a permanent record of the session is created so easily helps the parties document each stage of the negotiation leading to the settlement of each issue and the overall dispute.¹³³

iDR presents a unique difficulty unknown to traditional ADR, that of authenticity.¹³⁴ In a real world mediation or arbitration, one can be sure that the party one is dealing with is or is not the party with whom one actually has the dispute or on whose behalf the party in dispute speaks.¹³⁵ In cyberspace, as the saying goes, “no one knows you’re a dog.” This takes on a certain comic flair with regard to Internet romances started in chat rooms and carried out over e-mail. The fling is over when one participant finds out the other is not the woman of his dreams, but a 60-year-old retired Floridian male.¹³⁶ Absent digital signature technology, it would be possible for someone to impersonate or misrepresent one of the parties in a dispute.¹³⁷ What this means for iDR is that the virtual magistrate, online ombudsmen, or cyber mediator must take certain precautions and safeguards to ensure the parties are who they say they are, and that the ideas discussed in the virtual forum are protected from malicious disclosure.

Related to the problem of authenticity is the problem of receipt.¹³⁸ Just as a party may not know that the other party is whom he or she says he or

130. See Kassedjian & Cohn, *supra* note 8 at 985.

131. See Katsh, *supra* note 1 at 972.

132. *Why Do I Need Encrypted Mail?*, HUSHMAIL FREQUENTLY ASKED QUESTIONS, ¶ 6 (Mar. 27, 2000) <<http://www.hushmail.com/faq.htm#five>>.

133. See Granat, *supra* note 57 at § I ¶ 25.

134. See Katsh, *supra* note 1 at 973.

135. See Eisen, *supra* note 4 at 1330.

136. See also, Jonathon Dube, *Former High-Tech Exec Guilty of Sex Crime*, ABCNEWS.COM, (Mar. 17, 2000) <<http://abcnews.go.com/sections/tech/DailyNews/naughton000317.html>>. In Patrick Naughton’s case, the 13-year-old girl he tried to seduce in a chat room was actually an undercover law enforcement officer.

137. See Katsh, *supra* note 1 at 974.

138. See Friedman, *supra* note 7 at 714.

she is, a party may not know that a message sent by a party was actually received by the other party.¹³⁹ Certified mail and return receipts are the obvious answer to that dilemma, but while the technology is improving all the time, for now it still has a long way to go.

D. Accessibility To Computer Resources; The Problem Of The "Digital Divide"

iDR providers and projects that deal only with disputes arising in cyberspace presume that parties and counsel have access to the Internet and e-mail capability.¹⁴⁰ While e-mail use and Internet accessibility may be increasing, it is by no means universal.¹⁴¹ Presently, only a relatively small percentage of the total population has access to and use of the Internet. Recent statistics reveal that the dominant group of web users is seventy-seven percent male and twenty-three percent female. Ninety-seven percent of this group has had more than two years of college education.¹⁴² President Clinton, in his 2000 State of the Union Address, emphasized the need to close the gap between the technology haves and have-nots.¹⁴³ With so many people using the Internet, and the Net becoming a major engine of economic growth, those people left out of the Internet revolution stand to lose out on the benefits of a wired nation.¹⁴⁴ Until computers and Internet access is as universal as telephone coverage, iDR's effectiveness as a tool for settling disputes arising in the physical world may be hindered.

E. Asymmetry Of Computer Expertise

Related to the problem of the Digital Divide is the problem of varying computer expertise. In any iDR hearing, the party who is more comfortable with computer technology will be at an advantage as compared to the party with less computer expertise.¹⁴⁵ In addition, the computer expertise imbalance

139. *See id.*

140. *See id.* at 713.

141. *See* Kurt Oeler, *Clinton Touches on "Digital Divide" in Address*, C-NET NEWS.COM, (Jan. 27, 2000) <<http://news.cnet.com/news/0-1005-202-1534451.html>>.

142. *See* Granat, *supra* note 57 at § I ¶ 17.

143. *See* Patricia Jacobus, *Clinton Wants \$50 Million to Close Digital Divide*, C-NET NEWS.COM, (Feb. 2, 2000) <<http://news.cnet.com/category/0-1005-200-1540155.html>>.

144. *See* Jacobus, *supra* note 154 at ¶ 17.

145. *See* Eisen, *supra* note 4 at 1335.

Pepperdine Dispute Resolution Law Journal, Vol. 1, Iss. 2 [2001], Art. 8 can add to gender imbalance, especially in family or sexual harassment mediations.¹⁴⁶ To the extent that males tend to be more comfortable in using computer technology they would have an advantage over females who tend to be less experienced in using online resources.¹⁴⁷ The disadvantaged party can overcome this difficulty by hiring an expert to take care of the technical details. This cost, however, adds to the expense of iDR, possibly making it a less desirable option as compared to traditional ADR.¹⁴⁸

VI. CASES BEST SUITED FOR IDR

A. Disputes Originating In Cyberspace

The law of cyberspace is not fully defined. It is not merely the application of existing law to the new medium.¹⁴⁹ For example, one of the first problems had to do with jurisdiction.¹⁵⁰ The current issues with regard to cyberspace law are beyond the scope of this article.¹⁵¹ In this area of legal flux, ADR is the system of dispute resolution flexible enough to accommodate an extremely dynamic area.¹⁵² A primary strength of ADR is its acceptance in commercial disputes generally.¹⁵³ A strong incentive for the use of ADR in commercial disputes is the opportunity to avoid potential jurisdictional problems.¹⁵⁴ Parties can develop arbitration agreements that stipulate their choice of law, eliminating potential delays that may result from a dispute over jurisdiction.¹⁵⁵

1. Intellectual Property Disputes

The nature of the Internet allows the instantaneous transfer and copying of copyrighted images, music, and software programs without the required royalty payments to the artist or creator.¹⁵⁶ The protection of intellectual property in cyberspace cannot solely rely on civil or criminal sanctions, or even

146. See Granat, *supra* note 57 at § I ¶ 16.

147. See *id.*

148. See Eisen, *supra* note 4 at 1340.

149. See Lide, *supra* note 3 at 200.

150. See *id.*

151. See generally, Gibbons, *supra* note 4 (discussing different forms of cyberspace regulation).

152. See Lide, *supra* note 3 at 200.

153. See *id.*

154. See *id.*

155. See *id.*

156. See *id.* at 201.

technology.¹⁵⁷ It may be more efficient for parties to choose neutrals who already know the subject and customs of the matter at hand rather than expend resources teaching a judge or jury about complex technological issue and hoping they will grasp the issues.¹⁵⁸ If technological development has outpaced the law's ability to resolve disputes efficiently and effectively, ADR may be preferred.¹⁵⁹

2. E-commerce

Millions of users buy and sell each day on the various e-commerce sites on the Internet. One of them, eBay,¹⁶⁰ partnered with the Online Ombuds Office to offer buyers and sellers mediation of auction-related disputes.¹⁶¹ (The pilot program has now ended, and eBay and OOO are evaluating the program). Most of the complaints received at eBay were from buyers regarding items not received, items damaged in transit, misunderstandings about color or quality, and complaints about a negative comment placed in a feedback file.¹⁶² Of the cases handled, twenty-five percent never got off the ground because one of the parties refused to participate in the voluntary mediation.¹⁶³ Of the remainder, fifty percent resulted in settlements.¹⁶⁴ The eBay project, despite its small size and the small amount in dispute, shows promise as a model for iDR for commercial Internet sites.

B. Disputes Which Are Fundamentally Economic

Where the dispute is not emotional at all, but involves a disagreement over an amount of money, such as in insurance claims, construction defect

157. See *id.* at 206.

158. See Lide, *supra* note 3 at 208. See also, Jeri Clausung, *Hundreds of Net Disputes in International Mediation*, NEW YORK TIMES ONLINE, (Feb. 24, 2000) <<http://search.nytimes.com/search/daily/homepage/bin/fastweb?getdoccyber-libcyber-lib104930wAAADispute%7EResolution>>.

159. See Lide, *supra* note 3 at 208.

160. <<http://www.ebay.com>>.

161. See Carl S. Kaplan, *Mediators Help Settle Online Auction Disputes*, NEW YORK TIMES ONLINE, (May 7, 1999) <<http://search.nytimes.com/search/daily/homepage/bin/fastweb?getdoc cyber-lib cyber-lib 5632 4 wAAA Dispute%7EResolution>>.

162. See *id.* at ¶ 17.

163. See *id.* at ¶ 18.

164. See *id.* at ¶ 18.

Pepperdine Dispute Resolution Law Journal, Vol. 1, Iss. 2 [2001], Art. 8 disputes, and e-commerce, iDR can help the bargaining process move swiftly and quickly, and may even preserve the contractual relationship.

C. *Disputes In Areas Of The Law That Are Not Fully Developed*

iDR could play a very large role in the resolution of many disputes involving recent information technologies.¹⁶⁵ Its self-regulatory nature would promote, rather than stifle, the natural evolution of a coherent body of cyberspace customary law.¹⁶⁶ And as a continuation of its recent growth, ADR would alleviate some legal-application problems relating to the rapid development of both technology and a global economy.¹⁶⁷

VII. CONCLUSION

Traditional ADR took conflict resolution out of the courtroom.¹⁶⁸ iDR has brought ADR directly into each party's home or office.¹⁶⁹ iDR is not a replacement for ADR, but a subsidiary within traditional ADR. An iDR system is inevitable given the world's gravitation towards cyberspace. With the increasing colonization of cyberspace, disputes are bound to arise.¹⁷⁰ iDR is well situated to those participants, as they are conditioned to interacting in the virtual setting. At the same time, non-cyberspace disputes can be resolved in cyberspace if participants are savvy enough to use the technology. ADR's adaptation to the cyberspace setting may evolve as merely the application of the Internet to traditional ADR,¹⁷¹ but in typical Internet fashion, the Internet may transform ADR into a creature all its own — iDR.¹⁷² The Internet has the potential of creating whole new methods of resolving disputes applicable only in the cyber-realm creating benefits beyond our wildest imaginations.¹⁷³

165. See Almaguer & Baggott, *supra* note 10 at 714.

166. See *id.* at 716.

167. See *id.* at 747-48.

168. See Karamon, *supra* note 18 at 548.

169. See *id.*

170. See Katsh, *supra* note 1 at 956.

171. See *id.* at 958.

172. See Lide, *supra* note 3 at 193.

173. See Eisen, *supra* note 4 at 1358.