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# Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age

Orna Rabinovich-Einy\*

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## **I. Introduction**

1. It is evident to all who are living through the unfolding information revolution that the contemporary world is being transformed by it; new resources are available, old relationships have been altered, balances are shifting, and a new order is in formation. One important outcome of the ubiquity of information and ease of access, duplication, and transmission of data is the emergence of a more transparent society. This process challenges conventional distinctions between public and private, transparency, and opacity. Personal information about individuals is becoming increasingly public, while the privatization of such public social and legal institutions as dispute resolution is being expedited by new technologies. The pace of technological change is swifter than that of social and individual attitudes. People still attach significance to informational privacy, and institutions – governmental and corporate – still protect the opacity of their workings. But it is already possible to observe the way in which the Internet is eroding these mindsets. We can expect the emergence in the foreseeable, if not immediate, future of a society in which greater transparency and looser attitudes toward privacy will predominate.
2. This paper examines the interplay between the issue of privacy and a new, evolving form of alternative dispute resolution (ADR) made possible by the Internet – online dispute resolution (ODR). The rise of ADR in the recent past was primarily the product of growing dissatisfaction with the inability of the traditional court system to cope with its caseload. The development of ADR has been expedited during the last few years by new technologies. These technologies have produced new disputes and confronted the traditional legal system with greater pressures and new complexities. ODR, which initially was conceived as a way to resolve Internet disputes, has since come to be recognized as a valuable modality for resolution of disputes in the Internet age, whether the disputes arose online or not. In this article, I have chosen to focus on one mode of ODR, online mediation, which poses an exceptional challenge in the shift to the online format because of traditional mediation's intimacy and face-to-face interaction.
3. It is my contention that a growing number of disputes will be resolved through private dispute resolution institutions, many of them online, and that this trend will further contribute to the obfuscation of traditional distinctions between private and public. Moreover, we can expect private dispute resolution processes to become more transparent and to allow for public scrutiny, which has been formally reserved for public dispute resolution mechanisms such as the courts. There are several reasons for this. First, online mediation is inherently less conducive to privacy than traditional mediation conducted in an enclosed, presumably private room. Second, by virtue of being online, this form of mediation facilitates the widespread publication of resolutions and decisions and renders them easily accessible to users. Third, it can be expected that once the privatization of dispute resolution reaches a critical mass, pressure will be generated to release resolutions to the public domain to supplement traditional

publication of court rulings.<sup>1</sup> Last, the trend toward transparency of online mediation will be reinforced by the broader cultural changes taking place in a society in which a growing share of people's private and public transactions take place online.

4. But these changes are still unfolding. In the shorter term, while traditional attitudes towards privacy still prevail, online mediation is likely to play a limited role precisely because of its relative transparency. As attitudes change, online mediation's appeal will increase, but even then it will not displace traditional ADR. Eventually, we can envisage a diverse dispute resolution landscape in which some types of conflicts lend themselves naturally to traditional ADR while others are better suited for the online setting.

### **The Internet Society**

5. Living in the Internet society has implications that go beyond living in a society in which the Internet is a dominant means of communication. The Internet produces a social condition in which everyone, worldwide, is actually or potentially connected to everybody else without boundaries or intermediaries.<sup>2</sup> Although the Internet society is still in the making, the social and cultural implications of living under such conditions are already becoming apparent. This is particularly true with respect to the issue of privacy. The Internet is changing our approach to privacy issues to the point of transforming our very understanding of the concept and our preferences and wishes with respect to it. Why this is happening and what the possible outcomes of this new reality are, especially with respect to the processes of disputation and dispute resolution, are the questions that lie at the heart of this paper.
6. The Internet society is often referred to as the information society. It is a society in which we have more information than ever before, but at a larger than ever cost to our privacy. The introduction of earlier technologies and means of communication such as the printing press, telegraph, telephone, television and computer, contributed to similar changes in the past. Those changes, however, pale in comparison to the transformation in our understanding of the notion of information, mainly in the last decade, as a result of the increasing use of digital communication.
7. When we examine the Internet's implications for our society's understanding and use of information, and hence, for privacy, a complex picture emerges. On one hand, by making enormous amounts of information available to everyone and by

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<sup>1</sup> The question arises whether the information regarding the disputes and their resolutions conducted through private dispute resolution services will be privately owned data or public goods released to the public sphere.

<sup>2</sup> Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, First Monday (August 1999), at [http://firstmonday.org/issues/issue4\\_8/moglen/index.html](http://firstmonday.org/issues/issue4_8/moglen/index.html) (last visited on May 17, 2001) (stating that the Internet is not a "place" or a "thing" but a social condition in which everyone is connected directly, actually and potentially, to everyone else without intermediaries).

- enabling all users to become disseminators, even publishers, of information, the Internet has had an equalizing effect. On the other hand, with respect to informational privacy, its effects have been far from equal, because the Internet enables corporations to make use of private information about people in ways that individuals cannot, are not aware of, or do not grasp.
8. Corporations have found the Internet to be a uniquely useful tool for improving a company's personalization abilities. Through sophisticated "push" technology, companies now are able to follow users' preferences and habits, store that information, crosscheck it with other data and make efficient application of the information when offering consumers tailored products and services. In addition, the Internet has revolutionized the "pull" capabilities through customization – allowing customers to state their preferences with respect to products, services and content, thereby enabling businesses and governments to gather private information on individuals in a more effective and comprehensive manner than ever before. Since the information is digital, it is never completely lost, and it can be stored and retrieved easily for future use as well as disseminated effortlessly to a large number of recipients. Most private individuals disclose private information about themselves on the Internet without being fully aware of the consequences of such disclosure and of the inability to ever erase that information from the public domain.
  9. Ironically, the fact that each of us is also potentially a manufacturer and publisher of information on the Internet only serves to reinforce the loss of individual privacy. We supply websites with personal information through such means as subscriptions (name, email, address, age, etc.), purchases (name, credit card information, and the like) and use of "cookies" (surfing and purchasing habits).<sup>3</sup> Although there have been some efforts to regulate this phenomenon, it may be that the general weakening of the regulatory power of national governments that is characteristic of the Internet society<sup>4</sup> will make it difficult to control this trend.
  10. The new relationship between technology, privacy, and law presents new possibilities, as well as risks and dilemmas: Does our society want to protect informational privacy, and if so, to what extent? And how can this be done in the Internet age? As part of the transformation our society is undergoing, it is possible, and in my view even probable,<sup>5</sup> that our attitudes toward privacy will change together with technology, resulting in a greater acceptance of transparency. But, in the short term, it seems more likely that lawmakers and the public will opt to preserve and strengthen opacity, although this would require

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<sup>3</sup> See *infra* notes 66-68 and accompanying text for explanation on cookies.

<sup>4</sup> See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 188-209 (1999) (describing how the Internet, given its current architecture, poses substantial difficulties to national sovereignty); Alejandro E. Almaguer & Roland W. Baggott III, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711, 712 (1998).

<sup>5</sup> See *infra* notes 159-180 and accompanying text.

adapting privacy laws to the new technological capabilities for privacy infringements, a task which may very well prove to be practically impossible.<sup>6</sup>

11. The Internet, as a transformer of social processes, is also changing disputation and dispute resolution processes as we have come to know them. Some complaints and disagreements that now result in disputes soon will become automated processes that will not require human interaction,<sup>7</sup> while some of what used to be handled through dispute resolution processes (such as negotiation) is now performed by automated online bidding.<sup>8</sup> With other disputes and dispute resolution processes, the transformation will be different. These disputes will not be obviated by technology, but fundamental aspects of the process will be transformed. Such is the case with online mediation, which, by being conducted online, brings into question the historically private nature of mediation.
12. ODR services offer traditional ADR processes, such as arbitration, mediation and negotiation, online. ODR is a growing phenomenon that promises to grow still further, but it poses challenging questions regarding the relationship among technology, privacy and dispute resolution. Can the traditionally private nature of such dispute resolution processes be maintained while employing new technologies? Does the online setting offer narrower or broader privacy protection than the offline setting? Would we want to maintain private dispute resolution processes if our attitudes towards privacy changed? How do we feel about the fact that a growing number of our disputes will be resolved through private mechanisms at the expense of the public realm? Even if our social attitudes towards privacy are not transformed, how do we use technology to maintain privacy? And, if opacity of online dispute resolution cannot be achieved, what types of disputes would be the most likely candidates for online resolution? Predicting future answers to these questions with certainty is impossible, but I think some conclusions can be drawn from past and present experiences in this area.

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<sup>6</sup> The potential difficulty that faces these attempts is exemplified in the current attempts by copyright owners such as record companies, publishers and movie studios to prevent unregulated dissemination of digital information.

<sup>7</sup> Brenda Pomerance, Online Mediation: Why it Works and What the Future Holds, Panel Discussion before the Association of the Bar of the City of New York (April 2, 2001) (describing how their site allows merchants to program solutions before disputes arise so that certain types of complaints are resolved automatically). Another example would be the change in the way complaints regarding lost luggage are made and handled: Such complaints are now filed with an airline's customer service department, but we envisage this process being replaced by automatic notification of the misplacement of luggage through a smart card attached to the luggage.

<sup>8</sup> See <http://www.clickandsettle.com/> (last visited May 9, 2001).

## II. Understanding Privacy

### A. Terminology: What is Privacy?

#### 1. General

13. There is no single definition of the term “privacy;”<sup>9</sup> its meaning differs from time to time, place to place, culture to culture and even within different cultures and societies. However, the various definitions share some common ground. Privacy matters fall into one of three categories: seclusion or the right to be left alone,<sup>10</sup> the right to make fundamental decisions, and informational privacy. When discussing privacy in the online world and in the online mediation context, I usually will be referring to informational privacy.<sup>11</sup> Within informational privacy, a further distinction exists between secrecy, anonymity, and control of information.<sup>12</sup> In order to address the implications of Internet personal privacy, it is helpful to discuss these three facets of informational privacy separately.

#### 2. Secrecy

14. Secrecy is the confidentiality of the content of information. By definition, secret information may not be disclosed to any recipient who is not privy to it. People can be obliged to secrecy under different circumstances. In some cases, one can request (orally or in writing) that the recipient(s) of the information not disclose it to others. In other cases, it is the duty of the recipients not to disclose certain information, either because they hold certain posts (government officials) or are of a particular profession (lawyers) and are thus required by law or ethical codes and standards to refrain from revealing that information, regardless of whether they are requested to keep it private or not.<sup>13</sup>
15. Once imposed, secrecy must be achieved and maintained. One way to obscure secret information is to refrain from putting it in writing, so as to make it more difficult for a recipient to repeat it accurately. Another way is encrypting information. Encryption methods vary in their level of sophistication and accordingly, in their effectiveness in keeping unwanted readers in the dark. Encryption has been used since the early days of writing. It is used commonly

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<sup>9</sup> Definitions of privacy in legal scholarship and cases vary widely, but all seem to cover at least some of these categories. See *infra* Part IIA5; FRED H. CATE, PRIVACY IN THE INFORMATION AGE 19-28, 52-64 (1997); LESSIG, *supra* note 4, at 142-149; Anne W. Branscomb, *Emerging Media Technology and the First Amendment: Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1641-1645 (1995).

<sup>10</sup> The right to be left alone has both a physical component (the right not to be intruded on in one’s own home by searches and seizures) and a mental one (the right to think, read and express thoughts without intrusion).

<sup>11</sup> It should be noted that informational privacy does overlap, to a certain extent, with the right to be left alone (the right that other people not intrude upon your private information).

<sup>12</sup> Eben Moglen, lecture on “Privacy, Computers and the Constitution,” February 22, 2001.

<sup>13</sup> For example, lawyers’ duty of confidentiality toward their clients could arise under ethical duties (ABA Model Rules of Professional Responsibility, Rule 1.6) as well as under tort and contract law.

today by diplomats reporting home, by cable companies to limit their broadcasts to paying subscribers, by banks storing and sending sensitive financial information, and by other businesses as well as private individuals who wish to keep their communications confidential. Encryption has accommodated itself to the means of communications used. In earlier times, when written communications were sent by mail, the encryption was applied to the text itself, through some code that both the sender and recipient possessed and that enabled the recipient to decrypt the message.

16. In later periods, computers were used to scramble secret messages, and instead of employing a single systemic code for encryption, communicating parties sought to use a one-time random code that changed with each transmission, thereby decreasing the odds of the code being broken.<sup>14</sup> Although this method was much safer than systemic codification, it had its problems. For instance, both parties had to possess the same key for the message to be read at both ends (the key had to be symmetric) and longer keys (which are more difficult to break) could not be used in a symmetric system of encryption. In the early 1970s, public key encryption was developed.<sup>15</sup> The basic idea was that encryption was no longer based on symmetric keys, but on a combination of public and private keys. Public keys are accessible to others, while private keys are secret and only the person to whom it belongs knows the number. When the sender sends a message, she encrypts it with the recipient's public key, and the recipient uses her private key to decrypt the message.
17. Currently, only a small percentage of the communications on the Internet are encrypted,<sup>16</sup> despite the fact that programs such as Pretty Good Privacy (PGP)<sup>17</sup> are widely available at no charge. The reasons for this conceivably may be apathy, ignorance or the presence of cognitive biases in the minds of users.<sup>18</sup>

### 3. Anonymity

18. Unlike secrecy, anonymity is not related to the content of information, but rather to the identities of those communicating it. Anonymity can exist between the original parties to the communication (internal anonymity) or between the original parties and any future recipients of the information (external anonymity). In the former case, the original recipient does not know the identity of the source of the communication, while in the latter case, the original communicators know each other's identities, but future audiences do not. It is difficult to maintain internal

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<sup>14</sup> See *Bernstein v. U.S. Dep't of State*, 974 F.Supp. 1288, 1292 (1997) ("Encryption basically involves running a readable message known as 'plaintext' through a computer program that translates the message according to an equation or algorithm into unreadable 'cyphertext.' Decryption is the translation back to plaintext when the message is received by someone with an appropriate 'key.'").

<sup>15</sup> See LESSIG, *supra* note 4, at 36-37.

<sup>16</sup> See *id.* at 157.

<sup>17</sup> See <http://web.mit.edu/network/pgp.html> (last visited May 9, 2001).

<sup>18</sup> See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L.REV. 630 (1999) (explaining the types of cognitive biases we systematically exhibit).

anonymity in face-to-face communications, but it is certainly possible to do so in written transmissions such as letters, faxes,<sup>19</sup> emails<sup>20</sup> and chat-rooms<sup>21</sup> or in oral telephone communications.<sup>22</sup> Establishing external anonymity seems less difficult since it can be achieved even when the information initially is communicated face-to-face.

19. In the online context, anonymity means being able to send an electronic message without being traced.<sup>23</sup> Current examples of this include anonymous email messages and anonymous postings in chat-rooms, in news groups, and on bulletin boards. All these were made possible by the establishment of anonymous “remailers.” By redirecting digital communications through these intermediate transmission links between sender and recipient, an originator of a message can preserve anonymity.<sup>24</sup>
20. Given all that we expect the Internet to do for us, anonymity has its limitations. There are times when total opacity is not only elusive but undesirable, and the communication and/or transaction requires the opposite of internal anonymity – authentication. Authentication is the ability to verify the identity of the originator of a message, for example, when making an online purchase.
21. Interestingly, one of the major mechanisms for achieving secrecy, public key encryption, can also be used for authentication. If a sender wants a recipient to know that she is the author of a message, then regardless of whether the content of the message is confidential or not, she can encrypt the message with her private key; the recipient can then decrypt the message with the originator’s public key.
22. Finding a reasonable balance between the crucial and at times dueling needs for authentication and anonymity will be the chief challenge to revolutionizing financial services through the Internet.

#### **4. Control of Information**

23. “Control of information” refers to the ability of an individual with privacy rights over certain communications to determine who can gain access to information and on what terms. In essence, the controller of information decides whether the information – all or parts of it – will be kept secret and whether its communicators

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<sup>19</sup> In certain cases fax machines insert the fax number and/or name of fax owner that transmitted the message, but this can be avoided and it is always possible that the person who sent the fax may be using a random fax machine solely for that purpose.

<sup>20</sup> Although email messages do bear the address of the originator of the message, the use of anonymous remailers can help bypass this structural hindrance to anonymity.

<sup>21</sup> Often people assume phony identities which are difficult, if not impossible, to trace and detect.

<sup>22</sup> The possibility of conducting anonymous phone calls is limited somewhat by caller I.D. technology, but even through caller I.D. not all calls can be traced and one can always use a pay phone to avoid detection. In some countries, such as Spain, people can purchase cellular phones anonymously.

<sup>23</sup> See Branscomb, *supra* note 9, at 1641.

<sup>24</sup> See CATE, *supra* note 9, at 52.

will be anonymous. Secrecy and anonymity are thus determined through control of information.

24. For the individual seeking control of her private information, the Internet has been a double-edged sword. It has fostered a staggering increase in data collection and dissemination, frequently without the informed consent of the subjects concerned. But the Internet has also offered its users sophisticated mechanisms for exerting control over the use and spread of data relating to them. As stated above, very advanced means of encryption are widely available. For example, Zero-Knowledge Systems<sup>25</sup> is a company that sells tools that enable Internet users to leave no traces, through use of pseudonyms. American Express, in its recent “Anonymity” campaign, offered its customers one-time use credit card numbers for Internet purchases. Obviously, the plan as offered did not protect the consumer’s identity, only her credit card information, but one could think of a more advanced version of this offer that would provide a code name in addition to the credit card number and offer complete privacy protection. However, these means are not yet widely used, and there is a vast amount of personal information about individuals that has already been disclosed online, and may never be completely lost.

## **5. Legal Protection of Privacy**

25. Legal protection of informational privacy is a recent development that reflects growing social concern over the collection, storage, use, and dissemination of private information by both government and private commercial entities. However, despite the public’s anxiety over invasions of privacy, legal counter-measures have been limited and inadequate, especially with respect to privacy issues on the Internet.
26. Privacy protection in the U.S. has been applied to both the public and private spheres. In the former, privacy concerns have received both Constitutional and legislative protection. The U.S. Supreme Court, at various times, has recognized a right to privacy even though there is no explicit constitutional guarantee of such a right. In defining privacy rights, the Court has drawn upon the First Amendment (freedom of speech and association), Third Amendment (restriction on quartering soldiers in private homes), Fourth Amendment (prohibition against unreasonable searches and seizures), Fifth Amendment (Due Process, Equal Protection and guarantee against self-incrimination), Ninth and Tenth Amendments (reservation of power in the people and in the states, respectively) and the Fourteenth Amendment (Equal Protection and Due Process clauses).<sup>26</sup>
27. In general, the First Amendment has not been a helpful tool in protecting informational privacy, though it has provided limited protection, for example restricting a state’s ability to require groups to submit member lists under the

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<sup>25</sup> See <http://www.zeroknowledge.com> (last visited on May 8, 2001).

<sup>26</sup> See CATE, *supra* note 9, at 52.

group's right of association.<sup>27</sup> Both *McIntyre v. Ohio Elections Commission*<sup>28</sup> and *Buckley v. American Constitutional Law Foundation*<sup>29</sup> provide at least some constitutional protection for the right to anonymous speech under the First Amendment; the cases deal with political speech but nothing in the Court's decisions restricts this right solely to that context. In *Bernstein v. U.S. Department of State*,<sup>30</sup> the District Court for the Northern District of California recognized computer language as a language entitled to First Amendment protection of freedom of speech.<sup>31</sup> In its decision, the court, drawing upon *Yniguez v. Arizonans for Official English*,<sup>32</sup> held that "the functionality of a language does not make it any less like speech."<sup>33</sup> This logic may be employed by future courts to support protection of encrypted language under the Free Speech Clause.<sup>34</sup> It is important to note that informational privacy also received limited protection under the Fourteenth Amendment when the Court recognized the individual interest in avoiding disclosure of fundamental personal matters.<sup>35</sup>

28. The constitutional protection of privacy in the U.S. has significant limitations. First, it protects individuals solely from governmental interference with privacy. Second, the Constitution is commonly interpreted to impose only negative obligations on the government (e.g., to refrain from interfering with people's right to privacy), but not positive ones (e.g., to ensure the fulfillment of the right to privacy).<sup>36</sup> In addition to constitutional constraints, the government is subject to several statutes regulating its collection, use, and dissemination of information. The main pieces of legislation in this regard are the Freedom of Information Act

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<sup>27</sup> See *NAACP v. Alabama*, 357 U.S. 449 (1958), cited in *Cate*, *supra* note 9, at 52.

<sup>28</sup> See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 879-880 (1996) (stating that *McIntyre* establishes a limited constitutional principle of anonymity).

<sup>29</sup> See *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999).

<sup>30</sup> See *Bernstein v. United States Dep't of State*, 974 F. Supp 1288, 1292 (1997).

<sup>31</sup> In 1999, the Clinton administration liberalized the encryption export controls, allowing the export of encryption software from the U.S. to most countries, subject to the requirement that the exporter of such materials make the encryption algorithm available to the government. This liberalization of the export controls, which has amounted to their de-facto abolition, was hastened by the filing of a lawsuit by an academic named Bernstein who was prevented from exporting his doctoral dissertation by the export controls. The case in *Bernstein v. U.S. Department of State* was decided by the 9th Circuit Court of Appeals in May 1999, but the case is to be reheard by the same court en banc at a later date, which has not yet been scheduled.

<sup>32</sup> See *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

<sup>33</sup> See *Bernstein v. United States Dep't of State*, 922 F. Supp 1426, 1435 (1996).

<sup>34</sup> See Eben Moglen, *So Much for Savages: Navajo I, Government 0 in Final Moments of Play*, NYU Law School (1999), at <http://emoglen.law.columbia.edu> (last visited May 17, 2001) (stating that encrypted language should be deemed protected speech under the First Amendment).

<sup>35</sup> See *Whalen v. Roe*, 429 U.S. 589 (1977) (The Court recognized, under the concept of personal liberty identified in *Roe v. Wade*, 429 U.S. 589, 599, n.23 (1977) two different interests: the interest in independence in making certain kinds of important decisions, and the individual interest in avoiding disclosure of personal matters. But, since the interest in that specific case was not deemed fundamental and the Court applied a standard lower than strict scrutiny, the ordinance was not struck down. Other lower federal courts have struck down statutes that have infringed upon personal control of information based on the principle recognized by the Court in *Whalen* while applying intermediate scrutiny).

<sup>36</sup> See *CATE*, *supra* note 9, at 50-51.

of 1966<sup>37</sup> and the Privacy Act of 1974,<sup>38</sup> both intended to allow for public scrutiny of government action, including collection of private information.

29. Similar attempts have been made to regulate the collection, storage, use, and dissemination of information by private parties, through legislation on both the federal and state levels. These attempts, like the regulation of government activities mentioned above, have had significant limitations. First, they have focused almost exclusively on the dissemination rather than on the collection, use, and storage of information.<sup>39</sup> Second, they have tended to focus fairly narrowly on specific categories of information instead of offering broader solutions to the problem.<sup>40</sup>
30. In the federal arena such statutes cover a number of areas, such as financial transactions, telecommunications, workplace information,<sup>41</sup> medical data,<sup>42</sup> and educational records.<sup>43</sup> In the financial field, several major statutes are worth noting: the Fair Credit Reporting Act of 1970,<sup>44</sup> the Electronic Funds Transfer Act of 1978,<sup>45</sup> the Right to Financial Privacy Act of 1978,<sup>46</sup> and the Gramm-Leach-Bliley Act of 1999.<sup>47</sup> Regulatory efforts in the telecommunications field have included the Wiretap Act of 1968,<sup>48</sup> the Electronic Communications Privacy Act of 1986,<sup>49</sup> certain provisions in the Telecommunications Act of 1996,<sup>50</sup> the Cable Communications Policy Act of 1984,<sup>51</sup> the Video Privacy Protection Act of

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<sup>37</sup> See Freedom of Information Act, 5 U.S.C. § 552a (1994 & Supp. IV 1998).

<sup>38</sup> See Privacy Act, 5 U.S.C. § 552 (1974).

<sup>39</sup> See CATE, *supra* note 9, at 99.

<sup>40</sup> See *id.* at 80-100.

<sup>41</sup> There is very little legislation purporting to regulate the collection, use and dissemination of private information at the workplace. In fact, the only federal piece of legislation relating to this matter is the Employee Polygraph Protection Act of 1988 that substantially restricts the ability of private employers to conduct polygraph tests on their employees.

<sup>42</sup> The Clinton Administration promulgated new rules to provide extensive privacy protection of medical information. The Bush administration, after considering freezing or abolishing the rules, decided to adopt them, but then rolled back some of the major privacy protections for medical records. See Robert Pear, *Medical Industry Lobbies to Rein in New Privacy Rules*, N.Y. TIMES, February 12, 2001, at A1 (stating that new privacy standards for the medical industry issued by Clinton in final days of presidency and projected to take effect on February 26, 2001 are too costly and are therefore the subject of heavy lobbying efforts aimed at weakening or withdrawing the rules); Robert Pear, *Bush Accepts Rules to Protect Privacy of Medical Records*, N.Y. TIMES, April 13, 2001, at A1; Robert Pear, *Bush Rolls Back Rules on Privacy of Medical Data*, N.Y. TIMES, August 10, 2002, at A1.

<sup>43</sup> Educational records must be made available to students once they reach the age of 18 and to their parents according to the Family Education Rights and Privacy Act, 20 U.S.C. § 1232 (1994). The act also prohibits the distribution of this information to others, subject to certain exceptions.

<sup>44</sup> See Fair Credit Reporting Act, 15 U.S.C. §§ 1681, 1681t (1994 & Supp. IV 1998).

<sup>45</sup> Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r (West 2002).

<sup>46</sup> Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3420, 3422 (West 2002).

<sup>47</sup> Graham-Leach-Bliley Financial Modernization Act of 1999, Pub. L. No. 106-102, 89 Stat. 1338 (to be codified at scattered sections of 12 U.S.C. and 15 U.S.C.).

<sup>48</sup> United States Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 (West 2002).

<sup>49</sup> Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2513, 2515-2520, 2701-2709 (West 2002).

<sup>50</sup> Telecommunications Act, 47 U.S.C. § 222 (Supp. 2001).

<sup>51</sup> Cable Communications Policy Act, 47 U.S.C. § 551(a)(1) (Supp. 2002).

1988,<sup>52</sup> and the Children’s Online Privacy Protection Act of 1998.<sup>53</sup> Finally, traditional tort law has provided a basis for many local statutes in different states that protect against intrusions on individual privacy such as appropriation of another’s name in a manner offensive to a reasonable person for commercial gain.<sup>54</sup> However, it must be said that traditional tort law overall has not been a good resource for protecting informational privacy.<sup>55</sup>

31. To summarize, although the right to privacy has been recognized and given some legal protection in the U.S., the protection in both public and private spheres has targeted mainly dissemination of information while leaving fairly unregulated information’s collection and storage. Even when collection of personal data has been restricted, the exceptions to the rules in question have been so extensive that in many cases they have rendered the laws virtually meaningless.<sup>56</sup> A more central problem has been that this legislation seems to be tailored to print-era conceptions of information rather than to the new digital capabilities, failing, in particular, to take into account the fact that digital data, once collected, is never lost.
32. But even with adequate, up to date legal protections of online privacy, the ubiquity of online transactions using credit and debit cards might render these laws nugatory. Until a system of anonymous digital cash is set in place, control of private information will be illusory and, in fact, unattainable for those transacting online. Without being fully aware of it, by making use of the extraordinary convenience of purchasing online goods and services, we are headed in the direction of a transparent society.

**B. The Interconnections of Privacy, Technology, Means of Communication, Media and Culture**

33. Although legal recognition and protection of informational privacy, which arose from the invention of the printing press and the development of modern media, are very much the products of recent times, other aspects of privacy have existed since the inception of social life. Anthropological research shows that even in ancient, non-literate societies there existed a yearning for private space and periodic distancing of the individual from the group.<sup>57</sup>

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<sup>52</sup> Video Privacy Protection Act, 18 U.S.C. § 2710 (Supp. 2001).

<sup>53</sup> Children’s Online Privacy Protection Act, 15 U.S.C. § 6501–6506 (Supp. 2001) (designed to ensure that certain commercial websites obtain parental consent before collecting, using or disclosing personal data on children under 13).

<sup>54</sup> CATE, *supra* note 9, at 89.

<sup>55</sup> *See id.* at 89-90.

<sup>56</sup> *See id.* at 99-100.

<sup>57</sup> BARRINGTON MOORE, JR., *PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY* 276 (M.E. Sharpe 1984).

34. Before the invention of the printing press, the written word was considered less credible than oral testimony.<sup>58</sup> With the widespread dissemination of printed material and the growing knowledge of reading and writing, the importance and credibility of written texts grew dramatically,<sup>59</sup> and the relationship between technology and privacy became apparent. Writings now could reach unintended readers, and since writing in the print era had a stable and permanent quality, revelation of written information was viewed as a more serious violation of personal privacy than oral dissemination of the same information.<sup>60</sup>
35. The technology of writing and printing was employed by states and other entities to keep track of personal data, which was collected, sorted and stored by different categories. The telephone and telegraph supplied additional channels through which private information could be transmitted, and the interception of telexes and phone calls provided new means for information collection. The emergence of general-purpose credit cards<sup>61</sup> opened up additional possibilities for comprehensive tracking of people's activities and purchasing habits. The carbon copy, the Xerox copier and the computer, together with the credit card, radically expanded and enhanced means for collecting, storing, retrieving and crosschecking personal data.
36. In the 1950s, television became prevalent. It was the epitome of a "push" medium: The same content was offered to all in an attempt to capture consumer eyeball and eardrum. The ratings were the driving force behind the content of television shows; the more people who liked the show, the more viewers there were, and the more viewers the show had, the higher the price of advertising could go. Measuring show popularity entailed the use of phone surveys and the people-meters.<sup>62</sup> These tools, which represented unprecedented intrusions into people's homes, were understood as relatively benign by television viewers, who, for the most part, embraced the opportunity to affect the content of the shows.<sup>63</sup> As an early, less flexible and less sophisticated version of "cookies,"<sup>64</sup> people-meters enabled networks and advertisers to follow viewer preferences, although

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<sup>58</sup> ETHAN KATSH, *LAW IN A DIGITAL WORLD* 96 (Oxford University Press 1995).

<sup>59</sup> See ETHAN KATSH, *THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW* 33–39 (Oxford University Press 1989).

<sup>60</sup> This is evidenced in stronger legal protection accorded against written dissemination of information, while oral transmissions are viewed in many cases as gossip, a social wrong that is morally reprehensible but is not punished by law. See KATSH, *supra* note 59, at 189.

<sup>61</sup> HARRY HENDERSON, *PRIVACY IN THE INFORMATION AGE* 20 (Facts On File 1999) (stating that the first general purpose credit card to emerge was the Diners Club card in 1949 and stating that ATM debit cards appeared only in the 1970s).

<sup>62</sup> People-meters are a method of measuring audience demand for programs that involves having each member of a household being assigned a different number to press on a control when watching or changing shows.

<sup>63</sup> HARRY J. SKORNIA, *TELEVISION AND SOCIETY: AN INQUEST AND AGENDA FOR IMPROVEMENT* 128 (McGraw-Hill 1965) (stating that approximately two-thirds of the homes originally designated to have a people-meter installed in their home agreed to do so in return for a meager compensation of several cents a week).

<sup>64</sup> See *infra* notes 66–68. See also JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 8 (Random House 2000).

their presence and purpose arguably was far more conspicuous than their 21<sup>st</sup> century analogues.

37. On a more general level, television has inculcated into its viewers a culture of voyeurism and intrusion of privacy. Coverage of romantic affairs and other intimate details of celebrities' lives have become routine in all forms of media. Series such as "Lifestyles of the Rich and Famous," the coverage of the O.J. Simpson trial, President Clinton's impeachment proceedings, and the coverage of the deaths of Princess Diana and John F. Kennedy, Jr., are good examples, as is the popularity of reality television series that focus on non-celebrities, like "Survivor," "Temptation Island," "Donahue" and "Jerry Springer." There is also a fascination with quotidian conflicts and legal problems faced by ordinary people, as evidenced by the success of "Court TV" and programs such as "Judge Judy." In fact it is precisely this culture of sensationalism cultivated by these television programs and by the tabloids that has created the privacy heuristic: We view invasion of privacy as the revelation of the one big secret we would like to keep, but ignore the staggering amount of private information relating to us that is collected and disseminated by others on a daily basis, since we systematically underestimate the frequency of such intrusions as well as the harm caused by them. But it is precisely the collection of vast amounts of "ordinary" information about individuals that should worry us, especially in the age of digital communications.<sup>65</sup>
38. One key repository of such non-sensational information is the "cookies" system. Due to the architecture of the Internet, web searches can be monitored, and files tracing a user's Internet activity can be transmitted back to the relevant company. A corporation is thus able to collect a detailed profile of a user's previous purchases and consequently, her likely future ones. The advantage of this system, as Lessig points out, is "seamless verification."<sup>66</sup> But, he continues, the disadvantage is that the information stored on a cookie can be manipulated, copied or shared with other sites – uses of which the user may or may not have been aware. DoubleClick, for example, the biggest Internet advertising company, has collected enormous amounts of data on consumer surfing habits through cookies. It came under attack from privacy advocates in 2000 after merging with Abacus Direct, a company that tracks consumers' mail-order catalog purchases. The merging of the two companies created the possibility that DoubleClick would combine the two databases, thereby matching surfing habits with the identities of users.<sup>67</sup> These criticisms caused DoubleClick to announce that it would refrain from merging the databases.<sup>68</sup>

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<sup>65</sup> Eben Moglen, Lecture on Privacy, Computers and the Constitution, (January 25, 2001).

<sup>66</sup> LESSIG, *supra* note 4, at 34.

<sup>67</sup> See Bob Tedeschi, *Critics Press Legal Assault on Tracking of Web Users*, N.Y. TIMES, Feb. 7, 2000, at C1.

<sup>68</sup> See JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 8 (Random House 2000).

39. More and more information has been given out by people without their being aware of it. Most people do not know, for example, that when dialing a company's 800 number, the caller's phone number is revealed to the company even if her number is unlisted.<sup>69</sup> Certain companies have been replacing discounts with rebates, forcing customers who want a price reduction to mail in a rebate form along with extensive personal data. Supermarket club membership cards have emerged, offering customers reductions in exchange for information on their purchasing habits. Not everyone is aware that the price being paid in exchange for the discount is the information that is revealed. Some supermarkets, which are member-only stores, exert some degree of coercion in that they require membership as a precondition to shopping at their stores.<sup>70</sup> The renewed prevalence of the store-specific credit card is an interesting phenomenon since a limited number of these cards were actually introduced in the early days of credit cards, before the emergence of general-purpose credit cards.<sup>71</sup> In those days, the cards were offered in few exclusive stores and the stores' ability to make use of the data collected was far inferior to modern capabilities.
40. The government's role in the collection, storage and use of private information is by no means minor. Lately, attention has been focused on breach of privacy protections by corporate entities, but research has shown that the government has not been following its own regulations on these matters.<sup>72</sup> The recent development of wireless location devices that can be attached to cellular phones and cars, or implanted beneath human skin – in order, for example, to track the origin of a 911 call – presents an opportunity for privacy intrusions more radical and pervasive than ever before by both commercial entities and the government.<sup>73</sup> In 1999, the Clinton administration surrendered to pressure, primarily from academics and the high-tech industry, to liberalize encryption export restrictions.<sup>74</sup> As most information on the Internet is not encrypted, this development has had only limited direct impact on the general public, although its eventual ramification for the protection of individual privacy may turn out to be vast.
41. The amount of information given away voluntarily by users of digital communications is prodigious. The digital format itself makes the information especially easy to manipulate, and in that sense makes it difficult to maintain control of information once it is distributed. The information, in one sense, is

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<sup>69</sup> See Robert O'Harrow Jr., *A Hidden Toll on Free Calls: Lost Privacy*, WASHINGTON POST, Dec. 19, 1999, at A1.

<sup>70</sup> In order to shop at Price Club, for example, one must have a member card.

<sup>71</sup> See HENDERSON, *supra* note 61, at 20.

<sup>72</sup> See Jeri Clausing, *New Bill Keeps Online Privacy at Center Stage*, N.Y. TIMES, April 17, 1999 (stating that "a review by the Center for Democracy and Technology showed that only one-third of federal agency web sites have 'privacy notice' or 'privacy policy' links from the agency home page, and only half had notices that could be found with only a few short links").

<sup>73</sup> See Simon Romero, *Location Devices' Use Rises, Prompting Privacy Concerns*, N.Y. TIMES, March 4, 2001, at A1, A25.

<sup>74</sup> See Jeri Clausing, *In a Reversal, White House Will End Data-Encryption Export Curbs*, N.Y. TIMES, Sept. 17, 1999, at C1.

more flexible and temporary since it can be changed easily and at a fast pace.<sup>75</sup> On the other hand, the effects of disclosure are more lasting, since information disclosed online is never completely lost.<sup>76</sup> Although the Internet, like other technologies introduced before it, does offer people ways of protecting their private information, such as encryption and disclosure of privacy policies by websites, experience has shown that only a small minority of people chooses to encrypt their email communications; most people choose the “I accept” slot on a website’s privacy policy page without reading the text. The potential for non-encrypted information reaching untold numbers of Internet users has stunned even the press and other media, as in the marketing of the independent movie “The Blair Witch Project,” the widespread dissemination of the Starr Report, and the posting of confidential documents exchanged in the Microsoft – Department of Justice mediation.<sup>77</sup>

42. When faced with this breathtakingly efficient means of information distribution, societies must question whether it is possible, or even desirable, to control it in the same manner as they do other means of communication. Historically, new technologies and social circumstances have fostered both the desire for privacy and the need to protect against its infringement. The printing press, for example, produced newly widespread reading matter, much of which was meant to be read in private or in small, intimate groups. Perhaps unsurprisingly, the print era was accompanied by the flourishing of ideas regarding the importance and centrality of the self.<sup>78</sup> On the other hand, print introduced new means of invading that same privacy. The law intervened as a regulator of privacy infringement, but protection of privacy has never been absolute; in fact, protection of privacy has often been subordinated to other, sometimes competing, doctrines such as free speech.<sup>79</sup>
43. Our malleable understanding of privacy is currently being shaped by the introduction of the technology of the Internet. It is likely that this new technology, with new properties and a different relationship to information, will change our cultural attitudes towards privacy as well as our capability of controlling information flow and regulating infringements of privacy. We cannot assume that our pre-Internet conceptions of privacy and privacy-related doctrines of control of information will suit new technologies.

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<sup>75</sup> See KATSH, *supra* note 58, at 95.

<sup>76</sup> See Eben Moglen, lecture on “Privacy, Computers and the Constitution,” (March 1, 2001); ROSEN, *supra* note 68, at 7 (describing how every search on the Internet creates “electronic footprints ... revealing detailed patterns about our tastes, preferences, and intimate thoughts”).

<sup>77</sup> See <http://www.contentville.com> (last visited on Jan. 29, 2001).

<sup>78</sup> See KATSH, *supra* note 59, at 191-92.

<sup>79</sup> See *supra* Part IIA5.

### III. Privacy and Dispute Resolution

#### A. General

44. Disputation and privacy have been intimately related since the earliest stages of human society. It has been claimed that disputing and dispute resolution were among the factors that contributed to the creation of a distinction between private and public in non-literate societies.<sup>80</sup> In those societies, it has been said, the existence of “feuds,” generating cyclical acts of revenge, led to the conception of a larger social interest superseding the private-individual one. Dispute resolution contributed to an even stronger perception of the public sphere through the nomination of public figures and the establishment of institutions that fulfilled dispute resolution functions in the public interest.
45. This connection has not been severed in modern times. Since they necessarily involve more than one party, disputes place the participants in the public realm. Resolving disputes and restoring social harmony, cooperation, and order are beneficial to the general public as well as to the disputing parties. Sociologists have described disputing as a three-stage process: “naming” (internally recognizing that one has been harmed), “blaming” (confronting the wrongdoer) and “claiming” (pursuing legal remedies).<sup>81</sup> The last two stages primarily occur outside the private sphere and require an awareness of the dispute by others, thereby placing the dispute in the public realm. But, since there are varying degrees of acceptable privacy in different situations, it is difficult to refer to disputes as being conducted purely in public or in private; there are different degrees of privacy and publicity associated with disputing in different contexts. The more public a dispute, the less control over the information regarding the dispute the parties have, and, accordingly, the less room there is for secrecy and anonymity.
46. In the United States, parties seeking to resolve a dispute are faced with two options – either going before the court system, or resorting to any one of several ADR methods, including negotiation, mediation, and arbitration. Court proceedings are by design public, and litigants are offered little, if any, privacy, while the ADR options tend to be more private, to varying degrees. Litigation, for the most part, is a public event: The disputants plead their case before the judge, jury and general public in a public space designated for this purpose and centrally located. The transcripts of the hearings become public record and the court’s decisions are published. In recent years such decisions have become even more widely accessible through distribution on the Internet, either directly by the courts or through services such as Lexis and Westlaw. Since the details of the dispute, the decision and reasoning of the court, and the identity of the disputants are all made public, litigation offers the parties neither secrecy nor anonymity. In certain

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<sup>80</sup> See MOORE, *supra* note 57, at 36-41, 269.

<sup>81</sup> See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming*, 15 L. & SOC. REV. 631 (1981).

limited cases, court proceedings are closed to the public, the records are sealed and in some of these instances the identities of the parties are secret.<sup>82</sup> However, these cases are the exception and not the rule.

47. ADR processes, on the other hand, tend to be private: Mediation proceedings, for example, are closed to the public; they often take place in locations other than a court building; the resolutions are not necessarily published, and the parties themselves, as well as the mediator, are often sworn to secrecy regarding the dispute and the terms of its settlement.<sup>83</sup> Although arbitration is a hybrid that is less confidential than mediation, in general when disputants choose ADR, the promise of at least some external privacy is an important, if not crucial, consideration. ADR's provision of internal privacy – the degree to which the parties can keep information from each other – varies.
48. However, the introduction of ODR and of online mediation specifically is likely to break down the traditional dichotomy between transparent, public court proceedings and private ADR, and we probably will witness the rise of private dispute resolution processes that are transparent and, often, more accessible to the general public than court decisions.

## **B. Background: The Evolution of Modern Day Mediation**

49. In the past few decades the conflict resolution role of litigation has been complemented, to a greater extent than previously, by free-standing ADR processes<sup>84</sup> and by settlements administered within the court system.<sup>85</sup> Currently, mediation programs are administered within the court system, in community centers, at university clinics, schools and government agencies.<sup>86</sup> Although ADR has ancient roots, I will focus on its more recent manifestations.
50. The current practice of ADR, and more specifically of mediation, is commonly said to have been nourished by two different sources. The first was a quest for social justice and community empowerment, while the second was the hope that such a process would reduce the caseload of the court system and enable disputants to obtain justice sooner and at a lower cost. Mediation and to some

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<sup>82</sup> See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.1(b) (3<sup>rd</sup> ed, 2000).

<sup>83</sup> Email correspondence with David Geronemus, Mediator, JAMS, and Adjunct Professor on Dispute Resolution at Columbia School of Law, (May 11, 2001) (on file with author) (stating that generally parties opt for confidentiality of agreements); Phone Interview with David Ross, Mediator, JAMS, and Adjunct Professor on Dispute Resolution at Columbia School of Law, May 21, 2001 (stating that the vast majority of agreements in which he participated as mediator were confidential).

<sup>84</sup> See Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 FLA. ST. U. L. REV. 903, 903 (1997).

<sup>85</sup> See Thomas D. Rowe, *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 879 (1989); Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 1 (1999) (stating that "[f]ewer than five percent of all civil cases filed will result in a verdict").

<sup>86</sup> See 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 (2000).

extent other forms of ADR such as arbitration were perceived by their proponents as carrying a promise for much needed reform for a severely backlogged court system, which subjected litigants to brutal delays. As a remedy to the ills of the court system, ADR seemed to promise advantages such as party involvement,<sup>87</sup> flexibility of process and remedies,<sup>88</sup> lower costs,<sup>89</sup> time effectiveness,<sup>90</sup> privacy,<sup>91</sup> and party satisfaction with the process and its outcomes.<sup>92</sup>

51. The term ADR encompasses different dispute resolution processes, including mediation, fact-finding, med-arb, neutral evaluation and negotiation. On one end of the spectrum is negotiation, in which the parties negotiate directly with one another without the aid of a third to resolve their conflict. At the other extreme, arbitration is the form of ADR closest to litigation. The arbitrator, much like a judge, decides the outcome of a case, but the process is quicker and the procedural aspects are more flexible and can be determined by the parties.
52. Mediation is somewhere between the two. On the one hand, a neutral mediator helps manage the interaction between the disputants and therefore it is more than mere negotiation between the parties themselves. On the other hand, the mediator does not decide the case, but rather facilitates communication between the parties to help them resolve their differences.<sup>93</sup> In this process the mediator serves as more than a mere go-between. Her reframing of the issues, the interplay between joint sessions and caucuses, her attempts to move parties from positional to interest-based bargaining and to drive them towards creative “win-win” solutions – all provide the mediator with a substantial role, despite her lack of power to dictate decisions. The mediation process is consensual in that parties must create a solution and agree to comply with it. Also, the fact that the parties can retire from the process at any stage if they are not satisfied with the mediator or the mediation process means that, by remaining in the process, they are signaling their consent to the process and to the choice of mediator.

## **C. Advantages of the Mediation Process in the Internet Age**

### **1. General**

53. The volume of transactions conducted online and across national borders is growing rapidly and underscores the need for quick and flexible means for resolving new types of disputes, both on- and offline. It is anticipated that the use

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<sup>87</sup> See Tom R. Tyler, *Citizen Discontent With Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 888 (1997).

<sup>88</sup> See Carol A. Wittenberg et al., *Why Employment Disputes Mediation Is on the Rise*, 578 PLI/LIT 747, 750 (1998).

<sup>89</sup> See *id.* at 750-51.

<sup>90</sup> See *id.* at 751.

<sup>91</sup> See Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U.L.Q. 47, 54 (1996).

<sup>92</sup> See Tyler, *supra* note 87, at 895.

<sup>93</sup> See Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 556 (1995).

of ADR processes, mediation among them, will grow with the transition to an Internet society.<sup>94</sup> Among the principal reasons for this are the speed, access and flexibility of the mediation process, the expertise of the mediator and issues of jurisdiction and enforceability of mediated resolutions.

## 2. Speed

54. The Internet society is a fast-paced one in which ever higher volumes of communication (largely asynchronous) are conducted over ever shorter periods of time. In such an environment, disputes arise frequently and also must be resolved quickly.
55. The court system has long been criticized for its heavy backlog. In many courts a civil trial can last several years. This situation may be further exacerbated if predictions anticipating growing numbers of disputes in the Internet society materialize.<sup>95</sup> By contrast, the mediation process is relatively quick, and in certain cases may be concluded in a matter of hours. There is no queue to wait on before the matter is heard, and there is no decision to await at the conclusion of the process.
56. Of course, the swift pace of mediation depends on the good will of the parties, though if one of the parties seeks to procrastinate there is always the option for the other to turn to the court system. And, in general, if the parties have something at stake, such as their reputation or an (actual or potential) ongoing relationship, then they are likely to refrain from such strategic conduct and to choose to cooperate in an attempt to promote a quick resolution of their dispute.

## 3. Access and Availability

57. In a way that is increasingly out of step with the ultra fast pace of the Internet age, courts tend not to be easily accessible or efficient. It is difficult to administer a lawsuit without an attorney who is familiar with the ins and outs of the system, especially if the other side is represented by one. But, even if one does manage to file a case and reach the trial stage, litigants often have complained of feeling a lack of control over the court proceedings and a sense of alienation from their own story as presented by their lawyers<sup>96</sup> – this is at a time when the Internet fosters a do-it-yourself, hands on approach to problem-solving.
58. These difficulties in access and availability are ameliorated by the mediation process. Mediation is dramatically less expensive and quicker than litigation, and, in some cases, neither party is represented by an attorney. Parties are less

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<sup>94</sup> See KATSH, *supra* note 59, at 105.

<sup>95</sup> See *id.* at 103, 105 (stating that the number of disputes will rise due to the widespread use of electronic communication).

<sup>96</sup> See *Wittenberg et al.*, *supra* note 88, at 750 (demonstrating how the mediation process was able to help a plaintiff who felt disassociated from the process and her goals to identify her feelings and interests).

restricted with respect to the story they can tell than in court and therefore feelings of alienation and loss of control can be avoided.<sup>97</sup>

#### 4. Flexibility

59. The typical structure of mediation processes consists of an initial joint session of the mediator and the parties in which the mediator addresses the parties and hears their opening statements, followed by a series of joint sessions and caucuses (private sessions of the mediator with each party) in which discussions of possible resolutions takes place and a final agreement is drafted. However, this structure is not mandatory, and it can be modified to accommodate the specifics of different types of disputes, as well as the styles of the mediator and the preferences of the parties.<sup>98</sup>
60. This flexibility extends to the freedom mediation affords parties to resolve their dispute without being tied to the relevant substantive law.<sup>99</sup> Unlike courts, with their rigorous criteria for admissibility of evidence, the mediation process can allow for more information to be presented so as to reveal the parties' underlying interests. Since the amount of accessible information in our society has increased radically, disputants may feel more comfortable with a broader dispute resolution process that does not require the exclusion of information that does not fit pre-determined legal rubrics.
61. Finally, as opposed to the legal "winner takes all" dichotomous resolutions resulting from the narrow framing of disputes and their possible remedies, the parties in a mediation proceeding are not limited to monetary remuneration and may choose either non-monetary compensation or a combination of payment and other compensatory measures.

#### 5. Expertise

62. Although a mediator does not resolve the dispute, mediator expertise in the relevant area is important, at times even crucial. The mediator often conducts what are called "reality checks" during caucuses, helping a party to realize that

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<sup>97</sup> See KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 109 (1988) (stating that people who have received discriminatory treatment resist legal recourse because they fear being portrayed as victims within legal discourse).

<sup>98</sup> See, Barry Winograd, *Men as Mediators in Cases of Sexual Harassment*, 50 *DISP. RES. J.* 40, 41 (1995); *Wittenberg et al.*, *supra* note 88, at 753 (altering the typical structure in the case of mediation of disputes involving power imbalances such as sexual harassment cases or divorce cases; to this end, the number of mediators used and their gender is also a variable that can be modified so as to achieve a more balanced distribution of power). It is interesting to see how the Internet technology enables different mediators that work with online mediation services to design the structure of the process and indeed many mediators choose to do so differently. One may design a series of different "rooms" that stand for a stage in the mediation. Others create decision-making trees that the parties can rely on when reflecting upon their options.

<sup>99</sup> Although mediations do occur "in the shadow of the law," i.e. the likely outcome of a court decision often affects the mediated resolution, especially in evaluative mediation (*see infra* note 169 on evaluative mediation).

her position is unreasonable. The mediator also may raise possible solutions at caucuses and help the parties further develop their own solutions. The more familiar the mediator is with the specific type of dispute in question the more likely she is to grasp the underlying issues and what would constitute a comprehensive and lasting resolution to the problem.<sup>100</sup>

## 6. Jurisdiction and Enforceability in the Face of Globalization

63. As part of national governments' weakening of control, national court systems are facing increased difficulty resolving disputes and enforcing decisions. More and more cases "spill" across national borders and affect people, entities and interests around the globe. The national solution in such cases is thus only partial and frequently conflicts with local solutions rendered elsewhere, creating a "race to the bottom" among different national jurisdictions. In addition to the local resolution being inadequate, it also can be difficult to enforce, and therefore may prove futile despite the great costs and time spent reaching it.
64. Against this backdrop, ADR solutions, administered internationally, frequently under the umbrella of international organizations,<sup>101</sup> are becoming a popular dispute resolution mechanism in the Internet setting. The difficulties courts face resolving cross-jurisdictional Internet disputes may not apply to the mediation process, which avoids jurisdictional questions<sup>102</sup> and operates in a non-authoritative manner. Mediation, as opposed to arbitration, has always been a non-binding process that leaves the onus of complying with the resolution reached on the parties themselves (although the resolution reached is a contract, subject to enforcement by courts according to contract law). Supporters of mediation often emphasize that it is precisely because the parties reach the resolution themselves rather than its being dictated to them that they feel committed to it and in fact do comply with it.<sup>103</sup> Thus, without doing away with national courts and authoritative decisions, it is plausible that in certain circumstances (such as an international dispute involving an ongoing relationship and/or where the parties' reputations are at stake), mediation may prove preferable to litigation. This is especially so in light of the inherent difficulty in regulating compliance with judicial decisions

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<sup>100</sup> Substance expertise relates to the mediator's knowledge of the subject matter of the dispute, while process-expertise relates to the mediator's level of expertise with respect to the process itself. There is a controversy within the mediation community whether what is required from the mediator is subject matter expertise or process expertise, a controversy that to some extent mirrors the evaluative vs. facilitative approaches adopted by mediators. See *infra* note 169 on evaluative vs. facilitative mediation.

<sup>101</sup> See <http://arbiter.wipo.int/center/index.html> (last visited on May 9, 2001);

[http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) (last visited on May 9, 2001).

<sup>102</sup> Although mediation does not rely on substantive law in resolving disputes and thus avoids jurisdictional questions, it does operate "in the shadow of the law." The question then arises: In the shadow of which law does online mediation operate? Katsh suggests that the online marketplace in which the transaction or communication took place determines the shadow of the relevant e-law; in his case it was "eBay law" (see Katsh et al, *supra* note 86).

<sup>103</sup> See Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1377 & n.167 (1994).

that involve cross-jurisdictional elements.<sup>104</sup> At the very least, we can say that if courts are finding it more and more difficult to enforce their decisions, they lose one of the central advantages the court system has had over its alternatives.

## **D. The Private Nature of Mediation**

### **1. General**

65. Mediation, as opposed to litigation, traditionally has been a private, confidential process. Indeed, confidentiality – as opposed to secrecy or anonymity – is the term that is used most often in dispute resolution literature to describe the private nature of mediation. There is no one definition of “confidentiality,” and its meaning varies according to the subject matter of the dispute, the context in which the dispute takes place, the explicit wishes of the parties as expressed in the agreement to mediate and in the ultimate resolution, and relevant norms dictated by the relevant dispute resolution mechanism or by statute.<sup>105</sup> In certain cases, the parties may wish to keep the mere existence of the dispute confidential and thus require anonymity, in addition to secrecy.

### **2. Secrecy**

66. Upon entering a mediation, parties usually sign a confidentiality agreement as to the content of the mediation sessions. The mediator is sworn to secrecy as well, and is protected by law from future attempts by either party to have her testify regarding the mediation.<sup>106</sup> Furthermore, the physical setting of the mediation process lends itself more easily to secrecy than that of litigation. Mediation is conducted in a private room solely in the presence of the parties, sometimes their representatives, and the mediator. In their opening statements, many mediators promise later to destroy all notes taken by them during the sessions. An agreement, if reached, will not be published and the parties may agree on it, too, remaining confidential. When conducted outside the court system, the mediation process is not conducted in a revealing location, such as a courtroom, and thus the comings and goings of the parties would be difficult to monitor.

### **3. Anonymity**

67. In disputes involving an individual or a company with a public face, maintaining external anonymity can be an overriding concern. Obviously, the existence of the dispute cannot be concealed if the dispute originated in the court system and was

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<sup>104</sup> See Almaguer & Baggott, *supra* note 4, at 712.

<sup>105</sup> See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES 419-28 (3<sup>rd</sup> ed. 1999); See also [http://www.jamsadr.com/mediation\\_guide.asp](http://www.jamsadr.com/mediation_guide.asp) (last visited on July 31, 2001) (providing examples of JAMS confidentiality agreements as well as JAMS Ethics Guidelines for Mediators that deal with, among other things, the mediator’s duty of confidentiality).

<sup>106</sup> See Goldberg et al., *supra* note 105, at 421 (stating that mediation privilege statutes and rulings differ with respect to who may assert or waive the privilege, scope of privilege and whether the privilege is qualified or absolute, but, in general, the privilege is usually asserted to “block compelled disclosure”).

only later referred to ADR. In such cases, only the information generated during the mediation sessions themselves and the resolution – if reached – can be confidential. As for internal anonymity, it seems difficult if not impossible to envision face-to-face mediation in which one or more parties were anonymous to the other(s), or could communicate with one another under a pseudonym. In that respect, the introduction of online mediation opens up interesting new possibilities.<sup>107</sup>

#### 4. Control of Information

68. Despite the generally private nature of mediation, there is a potential tension between conducting mediation and maintaining privacy. The literature explains the success of mediation in cases when other methods have failed by invoking the ability of mediators to overcome strategic barriers that have prevented parties from divulging information to each other regarding their interests and desires, for fear of exploitation of this data by the other side.<sup>108</sup> However, such information can be revealed to a neutral or third party who has no interest or stake in the dispute or its outcome and who is trusted to keep the information confidential. The mediator can then envision “win-win” solutions that the parties could not reach on their own because they lacked the necessary information that would enable them to see these solutions as such. In dispute resolution terminology, the mediator often helps them discover integrative solutions<sup>109</sup> they do not envisage on their own, as well as reveal the “zone of possible agreements”<sup>110</sup> that is invisible to the disputants in distributive conflicts. Mediation, then, to be successful, should be about the transfer of data from each party to the mediator so as to supply the mediator with all the relevant information. The mediator, in turn, uses this information to steer the parties in the direction of possible acceptable agreements.
69. Privacy, on the other hand, has to do with control of information. The parties’ desire for privacy regarding the dispute and their relevant interests and preferences can be in tension with the need to share that information so as to reach an optimal solution. Placing the information in trust, in the hands of a third party, enables the parties to maintain privacy while seeking resolution. The neutral is thus in the difficult position of trying to move the parties towards resolution without forcing it upon them, and without revealing, through the discussion of possible solutions, private information disclosed to her by each party in confidence.

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<sup>107</sup> See *infra* notes 175-77 and accompanying text.

<sup>108</sup> See Goldberg et al., *supra* note 105, at 419 (stating that “the outcome of future mediation may hinge on whether the parties are relaxed and candid as they negotiate,” a prospect which is more likely if they can be certain that information disclosed in mediation sessions will not be used in any future litigation).

<sup>109</sup> See Galanter & Cahill, *supra* note 103, at 1375-76 & n.160 (1994).

<sup>110</sup> See ROBERT MNOOKIN, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 18-21 (2000).

## E. The Privacy Debate

### 1. Justifications: Why Privacy?

70. The state of affairs in which the court system has allowed parties to employ *its* dispute resolution facilities in exchange for public disclosure of their dispute seems natural to us. Why, then, have we accepted, almost intuitively, the idea that alternatives to the court system, mediation among them, should enable parties to keep disputes confidential?
71. This disparity can be explained in several ways. First, successful mediation depends on meaningful and candid information exchange, and since the mediators, unlike judges, cannot compel parties to reveal information, confidentiality provides an incentive for maximal disclosure of information.<sup>111</sup> Second, proponents of ADR claim that certain types of complaints, for example sexual harassment claims, would not be brought forth at all were there not confidential ADR channels available. In addition, at least with respect to non-court-annexed mediation programs and in the case of purely civil matters, it could be claimed that since mediation is conducted by private individuals through privately-run institutions, it is justified that disclosure should be at the discretion of the parties. In fact this always has been the case, whether in mediation, negotiation or arbitration.

### 2. Critiques and Counter-Justifications

72. The confidential nature of mediation has generated a number of objections. First, it has been claimed that processes such as mediation and arbitration enable wealthy parties and large corporations to obtain private justice, i.e. to settle justified claims against them in secret and at lower costs than through litigation.<sup>112</sup> It has further been asserted that such private ADR processes lead to the erosion of the public realm since they deprive the courts of their role in interpreting society's authoritative texts and sending educational messages to the public about those texts' meanings.<sup>113</sup> Not only does the confidential aspect of mediation deny the courts this educational role, it also prevents public scrutiny of the mediator's conduct and of the agreement reached. These circumstances, it is said, emphasize the need for transparency, as the lack of procedural safeguards and public monitoring disproportionately works against less powerful groups such as minorities and women.<sup>114</sup> Arguing that private processes and agreements should

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<sup>111</sup> See Goldberg et al., *supra* note 106.

<sup>112</sup> See Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 892 (1993) ("The courts face a burgeoning industry in alternative dispute resolution, including private judging, that threatens to siphon off many civil cases, including those of litigants wealthy enough to afford it and who find the possibility of avoiding public regulation or scrutiny attractive.").

<sup>113</sup> See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

<sup>114</sup> See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

be left to the private sphere recreates the private-public distinction that has often been used to disenfranchise such groups.

73. In response to these allegations, proponents of ADR have voiced various counter-claims, arguing that mediation and other ADR processes should not be scrutinized out of context and must be compared instead to the existing court system, which is itself riddled with disparities and imperfections. The expense and delay associated with litigation have made the court alternative an option mostly for the wealthy, especially due to their access to better legal services.<sup>115</sup> In addition, the litigation process exacts emotional, as well as financial, costs. In litigation, once a claim is filed with the court, the parties to a large extent lose control over it; they may be subjected to an exacting, often demeaning cross-examination, and they may be compelled by the court to reveal personal, even humiliating, information. Mediation, on the other hand, allows people to retain control over the process<sup>116</sup> since both parties can end the proceedings at any stage, and they can choose what they wish to discuss or reveal in telling their story. Furthermore, litigation offers parties a rigid set of remedies, often monetary, that may inadequately address the parties' needs in a given case. Mediation, on the other hand, allows parties to devise creative remedies that address a broader set of concerns.
74. Regarding the claim that mediation has contributed to the erosion of the public realm, several responses have been offered. First, many civil claims brought before the court system end up being resolved through private settlements in any case.<sup>117</sup> Second, at least in certain contexts, as mentioned above, the existence of private channels for dispute resolution actually motivates people to present claims they would not have presented otherwise; in that respect, ADR actually leads to a broadening of the range of disputes that are pursued by claimants. Finally, some mediation supporters view the process as performing an educational role, no less important and, in some ways, stronger and more personal than that of litigation.<sup>118</sup>
75. As for the allegation that the lack of procedural safeguards and the private nature of mediation hurt weaker parties such as minorities and women, it could be argued that court procedures are conducted in language that is as far removed from ordinary speech. Mediation, in this view, can be conducted using common sense and intuition and is therefore more accessible to these groups.

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<sup>115</sup> See Marc Galanter, *Why the "Haves" Come Out Ahead*, 9 LAW & SOC'Y REV. 95, 97 (1974).

<sup>116</sup> See Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOT. J. 161, 165-66 (1990) (stating that more than 50% of complainants regarding sexual harassment feel that they do not want to lose control over the dispute).

<sup>117</sup> Barbara J. Gazeley, *Venus, Mars, and the Law: On Mediation of Sexual Harassment Cases*, 33 WILLAMETTE L. REV. 605, 606 & n.7 (1997).

<sup>118</sup> See Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 11-12 (1989).

### 3. Future Direction

76. The implications of the information and communication revolutions for mediation are profound, especially in the challenges they pose to mediation's promise of privacy and confidentiality.
77. It is clear that the future nature of mediation and the specific question of its privacy will be determined by society's attitude towards privacy in general and privacy issues on the Internet in particular. It is becoming more and more difficult to preserve privacy in face of the technological capabilities to store and crosscheck information. New measures for protecting privacy in the future are being introduced in the shadow of the great amount of information that has already been disclosed by individuals in recent years and the distribution of which cannot be controlled in the same manner that non-digital information had been in the past. These developments have led to initiatives to regulate privacy on the Internet<sup>119</sup> as well as predictions that our understanding of privacy in the Internet society may have to change and allow for more transparency.<sup>120</sup>

## IV. Technological Change and Alternative Dispute Resolution

### A. General: The Rise of Online Dispute Resolution

78. The growing use of the Internet, alongside the increasing popularity of ADR, has created an interesting convergence: ODR. To its proponents, ODR makes sense for several reasons. First, the Internet, as a new technology, has opened up a whole new arena in which disputes occur. Since these disputes involve Internet-related matters, and since the parties to the disputes are Internet users, it seems logical to attempt to resolve the disagreements online as well. Second, the Internet as a dispute resolution arena offers several advantages – speed, efficiency, and low costs, among others – whether the dispute arose online or not. Finally, disputants have begun to realize that online dispute resolution services are not mere duplicates of similar services offered offline, albeit more efficient ones, but in certain cases are substantially different from traditional ADR.
79. To date, three different processes have emerged as promising avenues for ODR: online mediation, online bidding, and online arbitration. As I have chosen online mediation as the case study of this paper, I will briefly describe the two other forms of ODR before focusing on online mediation.
80. Online bidding, which is a specific form of online negotiation, is perhaps the most successful application of a dispute resolution process to the online medium thus

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<sup>119</sup> The U.S. approach is drawing closer to the European one and calls for a shift from industry self-regulation to extensive regulation for privacy protection.

<sup>120</sup> See KATSH, *supra* note 59, at 196-97.

- far, and currently is being offered through various ODR services.<sup>121</sup> Online bidding is designed to resolve distributive financial disputes by overcoming parties' fear of revealing their "bottom lines," which often is the cause of their inability to settle such claims. The process can be coarsely described as follows: Each party discloses its settlement amount, and if these figures are within a certain range of one another (often 30%) then the online bidding program splits the difference and a resolution is reached. In effect, software displaces the need for a human intermediary whom parties can trust with information that reveals whether they are within a settlement range or not.
81. Although online bidding potentially could be used in any case involving strictly distributive monetary negotiations, it has been used extensively in the context of insurance claims between businesses.<sup>122</sup> It could be that the modest application of this technology is driven by concerns regarding the potential for manipulation of settlement offers by savvy users who are able to calculate what would be an optimal figure for them to offer or accept given the relatively wide range (30%) that can exist between the sums put forth by the parties.<sup>123</sup>
82. Online arbitration is another dispute resolution mechanism that is now being conducted online.<sup>124</sup> The online medium enables parties to transfer written documents and pleas to the arbitrator and the other party with relative ease and speed. The arbitrator and the parties can communicate with one another through textual communication<sup>125</sup> and the arbitrator can release her decision online. The main advantage offered by the shift in medium is the cost reduction in cases that can be decided through inspection of documents and do not require face-to-face interaction and intricate testimonies. However, the binding nature of arbitration decisions, coupled with the sometimes-oppressive use of binding agreements to arbitrate prior to the emergence of a dispute between businesses and consumers, have drawn sharp attacks on the process. Online mediation, a voluntary, non-binding process, could, provide a better forum than online arbitration for resolving certain types of disputes, especially in the business-consumer context.<sup>126</sup>

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<sup>121</sup> See <http://www.clickandsettle.com> (last visited on May 9, 2001); <http://www.cybersettle.com> (last visited on Apr. 20, 2002). Charles Brofman, cybersettle.com, Panel Discussion: "Online Mediation: Why it works and what the future \_\_\_," The Association of the Bar of the City of New York, April 2, 2001 (stating that Cybersettle handled 36,000 claims through 2000 and is expected to handle 150,000 cases in 2001).

<sup>122</sup> Brofman, *supra* note 121.

<sup>123</sup> *Id.* (stating that consumers are not sophisticated enough to conduct such negotiations vis-à-vis insurance companies and therefore these tools should be limited to B2B disputes).

<sup>124</sup> See, e.g., <http://www.onlineresolution.com/index-oa.cfm> (last visited on Apr. 20, 2002); <http://arbitrator.wipo.int/arbitration/index.html> (last visited on Apr. 20, 2002).

<sup>125</sup> At this point in time technology allows for textual communication, but in the future we will be able to conduct videoconferencing over the web.

<sup>126</sup> See *infra* Part IV.D.2(a).

## B. Case Study: Online Mediation

### 1. What is Online Mediation?

83. Online mediation, as opposed to face-to-face mediation, is conducted on the Internet through digital communication between the parties and the mediator. Current technology makes use of textual communication among all concerned, either through email or other platforms with specially designed software. Different ODR services offer various versions of the process. Some attempt to reproduce, as faithfully as possible, traditional face-to-face mediation, while others offer processes deviating from traditional mediation. For example, OnlineResolution<sup>127</sup> reproduces many of the features of traditional face-to-face mediation by capturing the different steps followed by mediators. The process thus starts with an opening statement made by the mediator to all the parties. This statement usually describes the nature of the process, its goals, the role of the mediator and some basic ground rules as to what is expected from the parties. Then the mediator, as in traditional mediation, allows each side to make a brief presentation of its story. During the mediation itself, the mediator alternates between joint sessions (either through email addressed to all parties or through discussions on joint platforms) and caucuses (discussions held with each party in confidence). If successful, these communications result in the parties formulating a consensual agreement.
84. Online mediation services offered through SquareTrade,<sup>128</sup> on the other hand, are quite different. First, SquareTrade requires its users to go through a two-pronged process in which the first stage is technologically facilitated negotiation (at no fee), which resolves approximately 80% of the cases.<sup>129</sup> Only the remaining 20% unresolved cases may proceed to mediate their dispute (for a low fee). However, the mediation does not enable the parties and the mediator to conduct joint sessions online, but rather only allows for caucuses.<sup>130</sup>
85. It seems, then, that online mediation, as conducted today, differs from traditional mediation in several important ways. First, as mentioned above, at the current stage of technology, online mediation offers only textual communication, although this can be supplemented by telephone calls and face-to-face meetings; the current infrastructure does not allow for widespread videoconferencing over the web. Textual communication has its limitations; there is no tone of voice, no accompanying body language, and no ability to monitor reactions to statements made. Obviously, this problem could be addressed by the introduction of new technologies, but the question remains whether these new settings will be able to

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<sup>127</sup> See <http://www.onlinerresolution.com/index-oa.cfm> (last visited on May 9, 2001).

<sup>128</sup> See <http://www.squaretrade.com> (last visited on Apr. 20, 2002).

<sup>129</sup> See Cara Cherry Lisco, Director, SquareTrade Network, Phone Interview, March 29, 2001.

<sup>130</sup> See *id.*

offer the wealth of subtle information available in a face-to-face meeting.<sup>131</sup> Textual digital communication, unlike face-to-face oral discussions, has permanence, a distinction that, as will be further demonstrated below, is bound to have a significant impact on the process.<sup>132</sup> As for people's feelings towards conducting a mediation in writing, it naturally differs from one person to another. Some people feel more comfortable speaking and find oral communication easier, while for others, textual communication offers a better opportunity for free and candid discussion of their feelings and interests.

86. A second and related point is that online communication is generally asynchronous. This has several implications. First, when the technology allows for it, messages sent by a party can be retracted at a later point in time by the sender before the other side has read them – perhaps after the sender has had a chance to cool off or think things over. In addition, the fact that the parties need not respond immediately allows them to digest what has been sent to them, and perhaps consult with others before answering. These delays also allow the mediator time to strategize and approach each party with suggestions. Moreover, asynchronous communication maximizes the efficiency of the mediation by allowing each side to communicate at her convenience, including on different days and hours of the day.
87. Another major difference between traditional and online mediation is the fact that in face-to-face mediation, the mediator must bring the mediation to a halt in order to caucus with the parties. In online mediation, even when conducted synchronously, the mediator can both communicate jointly with both parties and address the parties separately through the caucus “spaces.”<sup>133</sup>
88. Last, as described in further detail below, traditional face-to-face mediation is highly conducive to privacy, while online mediation may be less so. This feature – some would say drawback – of online mediation may prove to be its most significant characteristic and most likely will have far-reaching effects on mediation specifically and dispute resolution in general in the Internet society.

## **2. The Advantages of Online Mediation over Traditional Mediation**

89. Speed has always been one of the main advantages of traditional mediation over litigation. When mediation is conducted online, its potential for time-saving is maximized. The parties need not spend time away from home or work while “convening,” and since their communication need not be synchronous, they can

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<sup>131</sup> See Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 4 B.Y.U.L. REV. 1305, 1354 (1998) (raising concerns regarding a mediator's ability to accurately interpret parties' intent without body language or tone of voice accompanying the textual communications transmitted online).

<sup>132</sup> See *infra* notes 179-182 and accompanying text.

<sup>133</sup> See Colin Rule, *New Mediator Capabilities in Online Dispute Resolution*, at <http://www.mediate.com/articles/rule.cfm> (last visited on May 9, 2001). Obviously, this may change with the wide availability of videoconferencing on the web.

communicate at different times, either because such communication fits their schedules or because they are in different time zones.

90. Furthermore, the ease with which mediation, when offered online, can be initiated and administered is its greatest appeal in the age of the pull economy. Retailers simply can add a link to an ODR service to their website or can refer users to any one of the numerous services that offer online mediation and other ODR processes. Users will be able to draw information about the process and use it at their leisure and from the comfort of their own homes. Whatever transformations the traditional court system will undergo<sup>134</sup> it will not, it seems to me, ever reach this degree of accessibility and availability.
91. The online environment can protect users against party strategic behavior in ways that are not possible in face-to-face transactions. Experience has shown that e-commerce marketplaces can create mechanisms that provide incentives for individuals and companies to maintain high standards of conduct, even in “one shot” transactions between strangers. One such example is eBay’s rating service, which allows for ratings of buyers and sellers and deters those who wish to use eBay’s services in the future from behaving strategically. eBay also provides escrow service that allow a buyer to transfer payment to an escrow account that will in turn transfer the payment to the seller only upon completion of the seller’s obligations.<sup>135</sup>
92. Technological advancements have turned the already flexible mediation process into an even more malleable procedure that can be shaped to accommodate different types of disputes and different parties’ wishes. Various ODR services currently offer different formats for dispute resolution, using such means of communication as email, secure web pages and instant messaging. But even within each service, mediators are encouraged to experiment and to create their own formats for resolving disputes.<sup>136</sup>
93. The issue of expertise becomes all the more pressing when disputes arise online and/or when the mediation is conducted online.<sup>137</sup> At present most disputes mediated online stem from conflicts that originated online. Some online ADR services have limited themselves to such disputes, but this phenomenon is also typical of services that do not have any such limitation. The reason seems to be that those who conduct their business and personal affairs online are also more comfortable having conflicts mediated on the Internet. Online mediators must be

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<sup>134</sup> See Austin Amisshah, “The Courts and New Technologies,” WIPO International Conference on Dispute Resolution in Electronic Commerce, November 7, 2000, at <http://arbiter.wipo.int/events/conferences/2000/program/index.html>.

<sup>135</sup> See Katsh et al, *supra* note 86, at 729--30; <http://pages.eBay.com/help/community/escrow.html> (last visited on May 9, 2001).

<sup>136</sup> Telephone Interview with Colin Rule (March 9, 2001).

<sup>137</sup> See Ken Auletta, *Final Offer: What Kept Microsoft from Settling its Case?*, NEW YORKER, Jan. 15, 2001, at 40-41 (stating that Microsoft viewed Judge Jackson as “a technological caveman” who rarely used his computer and did not use email at all).

able to understand the technical subtleties and complications that may arise in conflicts that occur online.<sup>138</sup>

94. In ODR disputes, unlike in face-to-face mediation, the choice of an expert mediator is not constrained by physical locale. When discussing mediator substance expertise,<sup>139</sup> an important question is whether parties are free to choose their own mediators, and, if they are assigned one, whether she is to be assigned on the basis of her expertise. One online service that assigns mediators to parties also allows disputants and freelance mediators to lease virtual space from the service,<sup>140</sup> thus allowing them more freedom in the choice of mediator.
95. But beyond specific advantages, it seems that there is something about online culture that makes it especially well suited for the mediation. Although the Internet is by no means the uncharted territory it was a decade ago, it is still very much an open system that favors bottoms-up solutions. The use of mediation is especially palatable to individuals and companies who are at home in this informal culture that values flexibility and innovation.

### 3. Critiques of Online Mediation

96. ODR, like other forms of dispute resolution, is not only a promising avenue for resolving disputes, but is also fraught with potential problems and dangers, especially for certain groups of disputants.
97. One such problem is what is commonly referred to as “the digital divide.”<sup>141</sup> Although Internet access has increased at an accelerated pace, and nearly half of American households are currently connected to the Internet,<sup>142</sup> these numbers pale in comparison to the number of people across the globe who have no Internet access and/or do not own a computer. Many American elementary and high schools do not have computer labs and do not offer Internet services.<sup>143</sup> Many people in the United States and elsewhere are not computer proficient, and even those who are possess different skill levels. In a manner similar to the early days of writing, reading and writing on the Internet have become separate skills: There are those who can only “read” on the Internet, i.e. access and retrieve information and make certain publications, while others can “write” as well, i.e. write source code.

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<sup>138</sup> The online setting combines subject matter expertise with process expertise.

<sup>139</sup> See *supra* note 100 (on process expertise vs. substance expertise by mediators).

<sup>140</sup> Telephone Interview with Colin Rule, *supra* note 136.

<sup>141</sup> See Katie Hafner, *We're Not All Connected, Yet*, N.Y. TIMES Jan. 27, 2000, at G1.

<sup>142</sup> See Staff Report, *Most in U.S. Embracing New Technologies*, CNN.com, June 6, 2000, at <http://www.cnn.com/2000/TECH/computing/06/06/digital.innovation/> (last visited on May 17, 2001).

<sup>143</sup> See Edward Wong, *Poorest Schools Lack Teachers and Computers*, N.Y. TIMES, August 13, 2000, at A16 (stating that “high-poverty schools had less access to technology than low-poverty schools in terms of the quantity, quality and connectivity of computers”); Katie Hafner, *A Credibility Gap in the Digital Divide*, N.Y. TIMES, March 5, 2000, at Week in Review, 4 (stating that the figures relating to connectivity in poor schools are deceptive since the numbers do not reflect the fact that these are slow connections that do not enable users to experience “the full scope and power of the Internet”).

98. We commonly think of the digital divide as parallel to the socio-economic or racial divide.<sup>144</sup> However, there has been concern that technology also increases existing gender gaps. According to some sources, women users of the Internet, as well as women who work as computer system analysts and scientists, are substantially outnumbered by men.<sup>145</sup>
99. These statistics are bound to change over time, and we can expect a growing number of people to be connected to the Internet and become computer proficient. There is, however, no reason to expect that the digital divide will be eliminated, given that the propagation of written and printed language has still left glaring disparities in proficiency levels.
100. Another potential hazard that lies in the use of online mediation is that the process might systematically benefit “repeat players” at the expense of one-time disputants. Repeat players are those parties who have recurring claims that are brought before the same dispute resolution entity or mechanism. Repeat players have a higher incentive than one-time disputants for securing a favorable outcome, since they have more at stake than the current case. They fear setting an unfavorable precedent and are therefore often willing to spend more on a case than its dollar value would suggest. One-time disputants have neither the time, the money, nor the incentive to do so. Typically, repeat players are companies, large institutions, and government agencies, and their disputes with one-time players can arise in a variety of areas such as employment, torts and contracts.
101. In 1975, Marc Galanter<sup>146</sup> showed how the court system and litigation process systematically favor repeat players who can offer lawyers long-term business opportunities. Thus, repeat players and their attorneys both have an incentive to strive to set precedents in their favor or avoid precedents being set to their detriment, even if that requires investing in the case more than that dispute’s value to a one-shot disputant.<sup>147</sup> The combination of a legal system that is based on precedents and the exploitation of a lengthy and expensive litigation process allows repeat players with “deep pockets” to achieve leverage over one-shotters.
102. Lisa Bingham<sup>148</sup> later demonstrated how employment arbitration, like litigation, produces the same structural biases associated with repeat players and one-shotters. Although formally there is no system of precedent in the arbitration

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<sup>144</sup> Indeed, some believe that digital communication will only increase the gap between rich and poor. See Michael L. Dertouzos, *What Will Be?* 242 (1997); Michel Marriott, *Money is Pledged to Close Digital Divide on Campuses*, N.Y. TIMES, March 16, 2000, at G6 (stating that “there is a 45% gap between American Households and African-American households that own computers”).

<sup>145</sup> See Keth A. Dithavong, *Paving the Way for Women on the Information Superhighway: Curbing Sexism Not Freedoms*, 4 AM. U. J. GENDER & LAW 455, 466-67 (1996); Editorial Desk, *Technology’s Gender Gap*, N.Y. TIMES, Sept. 5, 2000, at A26 (stating that “women make up only 20 percent of the information technology work force”).

<sup>146</sup> See Galanter, *supra* note 115.

<sup>147</sup> See *id.* at 97-104, 114-119.

<sup>148</sup> See Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998).

- context, arbitrators do in fact turn to prior decisions rendered by arbitrators under similar circumstances, for reference and guidance. The potential advantage to repeat players is enhanced by the fact that often it is the parties themselves who hire the arbitrator (unlike a judge) and therefore repeat players often have informal continuing relationships with arbitrators. Even though the majority of arbitrators do not consciously consider the fact that repeat players are a stable source of future income, this seems to have some bearing on the outcome of cases in the field of labor arbitration.<sup>149</sup>
103. In the mediation context, there are no decision-makers and therefore at first glance, it would seem that the process would be free of such hazards, but certain factors cause mediation to suffer from similar potential structural biases.<sup>150</sup> Repeat players such as employers and customer service departments of large corporations often resort to mediation in disputes with their employees or customers. In such cases, there is danger that the repeat player will be able to select mediators who, even though are not decision-makers, historically have performed in a manner advantageous to them; such mediators will benefit from the recurring business they will receive from the repeat players. These concerns are heightened by the fact that mediation, like arbitration, is a private and confidential process, and therefore not subject to public scrutiny. In addition, mediation and arbitration are not conducted in a vacuum. The shadow of the law, which indirectly affects the outcome of mediation and arbitration sessions, has inevitably incorporated the unjust division between one-shotters and repeat players.
104. As for online mediation, the existing potential for mediator selection by repeat players could be expanded due to the relative transparency of the process, as described below,<sup>151</sup> which allows parties to better predict the inclinations of any given mediator.<sup>152</sup> On the other hand, transparency of proceedings could yield more public scrutiny that could in turn serve to control the phenomenon of favoring repeat players.<sup>153</sup>
105. Nevertheless, even if mediation (traditional and online) suffers from the same structural biases that affect courts and the arbitration process, online mediation may still prove a desirable alternative if it offers parties other advantages over traditional dispute resolution processes. Moreover, the potential for such biases

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<sup>149</sup> See *id.* at 242.

<sup>150</sup> I have not found empirical data directly on this point, but studies have found that women and minorities are more vulnerable to exploitation in mediation. See Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metro Court Study*, 20 HAMLINE J. PUB. L. & POL'Y 211 (1999).

<sup>151</sup> See *infra* notes 178-180 and accompanying text.

<sup>152</sup> But see Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27, 48-49 (1993) (claiming there is a better market selection of arbitrators than mediators when referring to traditional arbitration and mediation processes).

<sup>153</sup> Transparency has not proven to be a helpful tool in this regard with respect to litigation, but an argument could be made that litigation outcomes have not been truly accessible to people, while mediated resolutions – if published online – would be far more accessible and therefore effective in this regard.

can be mitigated through proper structuring of the process of mediator selection.<sup>154</sup>

106. A third problematic aspect of online mediation arises from the fact that online mediation is and will often be used in the future to resolve disputes between parties from diverse backgrounds and different cultures. As the current mediation movement arose in the U.S., in itself a diverse culture, concerns about sensitivity to cultural differences are not new to dispute resolution and have traditionally been addressed through mediator diversity training.<sup>155</sup>
107. Cultural differences are bound to become increasingly visible as more and more international disputes arise online and as dispute resolution processes become increasingly detached from physical locale. How this will affect the mediation process is yet to be seen, but it is clear that the forms of mediation that have evolved to date are bound to change as they encounter users of different backgrounds with different needs and preferences. In the short term, we already have seen a rise in demand for multi-lingual mediators.<sup>156</sup> In the long term, we can expect the requirement to shift from mere knowledge of a language to a deeper familiarity with local traditions and cultures. This will enable mediators to communicate with parties in a deeper and truer sense, and to overcome linguistic and cultural barriers that may have been the cause of the dispute, or at least may have decreased the likelihood of the parties resolving the dispute on their own.
108. Another source of potential problems in online mediation arises from parties not acting in a truly informed manner, but rather basing their decisions and actions on cognitive biases. Over the last few decades, research in the field of cognitive psychology has revealed a set of heuristics applied by the human brain to help people deal with information. Some of these heuristics lead to systematic cognitive errors upon encountering certain types of information.<sup>157</sup> For example, people often do poorly in understanding probabilities, frequently overestimating low risks (the probability of an airplane crash) while downplaying high probabilities (the chance of a divorce). In the mediation field, cognitive barriers have been discussed mostly in the context of the mediators' framing of issues and how that could affect parties' understanding and behavior during the mediation sessions.<sup>158</sup>

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<sup>154</sup> For example, offering random assignment of mediators by the dispute resolution service, as done by OnlineResolution.com (but the service also enables the parties to lease virtual spaces in which they can conduct mediations with the mediator of their choice and even if the mediation is conducted with a mediator appointed by the service, the parties can obviously request to change mediators).

<sup>155</sup> See Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & L. 269, 291 (1996).

<sup>156</sup> Troy Morgan, OnlineResolution, Panel Discussion: "Online Mediation: Why it Works and What the Future Holds." The Association of the Bar of the City of New York, April 2, 2001.

<sup>157</sup> See Hanson & Kysar, *supra* note 18.

<sup>158</sup> See Robert Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993).

109. With the shift from face-to-face to online mediation, we must examine how the new medium affects parties' cognitive perceptions, and what can be done to prevent the resulting negative consequences of any such changes, especially if their effect is one-sided and consistently disadvantages specific categories of disputants. One such problem has to do with the processing of textual information. The fact that information is transmitted in writing (rather than orally) could, in certain cases, make the problem of accurate processing and understanding of information even more extreme than it otherwise would have been. The solution could lie in regulation of the design of ODR sites, but there are no such measures in sight. Our cognitive limitations are especially noticeable in the field of privacy and, in the context of online mediation, we should be concerned about users being aware of how much information they are giving away, what will be done with that information, and how this will affect their legal rights with respect to the subject matter of the dispute as well as their control over their personal information in general.

### **C. Privacy and Online Mediation**

#### **1. General**

110. The decline in individuals' control over their privacy that has been hastened by the Internet could lead to one of two results.
111. First, our attitude towards privacy may change and we may be willing to accept less privacy in our lives. Evidence that this process has already begun includes the growing readiness of individuals to conduct transactions online and to disclose private information while doing so. Many consumers are pleased with the possibilities created by the accumulation of such information regarding their purchasing habits, for example receiving emails about discounts in their favorite stores. But the widespread tolerance of transparency may be related as well to a deeper social change. As more private information about us becomes known, we may come to view such data in a new and different light. Our perceptions of others may become more complex and therefore less reducible to the labels that can be drawn from the limited information collected about them. In such a society, it is understood that each of us is more than the websites we have visited, the controversial book we ordered on Amazon.com, our vacation destinations, or our grocery lists. In the long run, such an environment may inculcate tolerance and an acceptance of plurality that may reduce prejudice and biases.<sup>159</sup>
112. Another, very different possibility is that we would not accept less privacy, but rather lean more heavily on statutory intervention so as to restrict and prevent breaches of privacy. This could be reinforced by the future shift to online currency such as digital cash and digital checks that would require sophisticated

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<sup>159</sup> See *Rosen*, supra note 68, at 9 (stating that "when our reading habits or private e-mails are exposed to strangers, we may be reduced, in the public eye to nothing more than the most salacious book we once read or the most vulgar joke we once heard.").

content encryption to ensure anonymity of the payer. As encryption becomes increasingly prevalent, it will be more difficult to uncover additional private information about Internet users. While it might be claimed that information already disclosed by users is so substantial that efforts to safeguard privacy are by now futile, the counter-argument is that preventing additional information from being disclosed involuntarily and regulating the use of already disclosed information are still essential and achievable goals.

113. The balance society chooses to strike between transparency and opacity will inevitably affect the mediation process. The nature of mediation is tied to and influenced by both the properties of the medium through which it is conducted and the surrounding social climate. The combination of a change in medium due to the emergence of online mediation and a change in society's views towards privacy will alter traditional mediation. If the Internet society ends up being a more transparent one, as seems likely in the long-term, then online mediation will give rise to a more public form of mediation. Such a process will preserve the essential characteristics of the mediation process as we know it today, although ODR's public nature will affect some of its properties, such as the role played by mediators and intermediaries. On the other hand, if we evolve into an opaque Internet society, which seems to be the more likely outcome in the short term, then online mediation may offer new means for conserving and enhancing privacy.

## **2. Mediation in the Internet Society: Striking a Balance between Opacity and Transparency**

114. Ethan Katsh, who has written about technology, the Internet and ADR, has predicted that in the long-term there will be a decline in privacy considerations and a shift to a more transparent society.<sup>160</sup> Mediation will not be immune to these changes if they occur. Online mediation, which is likely to become more and more prominent in the future, may, according to this view, lack what is considered by many to be one of the defining characteristics of the traditional mediation process – complete confidentiality of the proceedings and often of the resolution as well. This prospect raises several questions: In a society in which transparency is the norm, what kind of information about a mediation process is likely to be revealed – about the dispute, about the mediation sessions, or perhaps only about the agreement if one is achieved? Can mediation be conducted without complete confidentiality? Is such a process still mediation? And, how will these changes affect other aspects of mediation as we know it today?
115. With regard to the extent of loss of confidentiality in online mediation, it seems likely that most, if not all, agreements will be made public, while the mediation sessions themselves will remain confidential. Traditional mediation does not mandate that resolutions be confidential, and the proposed Uniform Mediation Act even states that the default rule is that recorded resolutions are not deemed

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<sup>160</sup> See *Katsh*, supra note 59, at 197.

- confidential unless the parties provide otherwise.<sup>161</sup> The reality is, however, that many resolutions are kept confidential by the parties (especially in commercial disputes), and that even when they are not, there is no efficient means for the general public to access such resolutions. One online arbitration service, WIPO (World Intellectual Property Organization), has already adopted a policy of transparency and has mandated the publication of resolutions on its website, which is accessible to all Internet users.<sup>162</sup> A similar phenomenon may occur in the mediation field, and relevant online service may post an agreement on the web after the parties have filed a copy of the agreement with the service.
116. Why might agreements become public,<sup>163</sup> while mediation proceedings remain private? As I stated above, it seems likely that the use of ADR in the Internet society will increase dramatically at the expense of the court system. Court decisions, in addition to resolving the case before them, communicate implicit messages to future disputants regarding possible resolutions of their own disputes. Mediation and other ADR processes have traditionally limited themselves to the disputes before them and have refrained from communicating their resolutions to future disputants. It has been understood that the private nature of mediation is precisely what has rendered it successful in resolving disputes. But this view is bound to change as the roles of ADR and ODR grow. Both pressure exerted by the public and incentives towards more transparency in the online world will drive these processes to become more public through publication of resolutions.<sup>164</sup>
117. But, as mentioned above, the fact that, historically, no mechanism has existed for the publication of mediated resolutions, even if they were not deemed confidential by the parties, has been a significant factor in maintaining the privacy of such agreements. This does not apply to online mediation; the Internet provides a convenient and effortless means to communicate such resolutions to an unprecedentedly large audience. The combination of the following factors: (1) an increasingly transparent Internet society, (2) the growing role of mediation in dispute resolution in the Internet society, (3) the new capabilities for digital distribution of mediated agreements, and (4) the fact that publication of mediated agreements (as opposed to the content of mediation sessions) will not change the essence of the mediation process, implies that we will move towards the

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<sup>161</sup> See Uniform Mediation Act, December 15, 2000 Interim Draft, Section 6(a)(1) <http://www.pon.harvard.edu/guests/uma/> (last visited on May 15, 2001).

<sup>162</sup> See <http://arbiter.wipo.int/domains/index.html> (last visited on May 9, 2001).

<sup>163</sup> Although some mediated resolutions are not confidential nowadays, the shift to the online setting, will, in my view, render the vast majority of resolutions public, in that they will not be confidential and that they would be published online in a manner accessible to users.

<sup>164</sup> The question remains whether all resolutions would be published, and if so whether we would allow for anonymous publication of all or some of the cases. If we allow for selective publication (of the resolution and/or the identities of parties) then another important issue is who decides what information to publish and according to which guidelines. One could claim that by choosing to mediate on a certain ODR service the parties have freely chosen to accept that service's publication policy, but it is questionable whether such an issue should be dealt with on a private level since we as a society may have an interest in determining when resolutions and/or the identities of the parties should be made public.

publication of mediated resolutions on the Internet.<sup>165</sup> This would place mediated disputes in the public space, and thus alleviate many of the concerns raised about the confidential aspect of mediation, such as uneasiness with respect to private justice, the need for sending messages to the public, and the parallel need for public scrutiny of mediated agreements.<sup>166</sup>

118. Such publication might be viewed as a deterrent to parties, since the confidentiality of mediation has always been one of its attractions. But if it is only the agreement that is disclosed, and not the information raised during the mediation sessions themselves, then it seems that parties will still be motivated to mediate, since proceedings will remain private if the disputants fail to reach an agreement. It also might be argued that the loss of complete confidentiality may drive parties to behave strategically during a mediation, precisely the sort of behavior that the promise of confidentiality was intended to prevent. However, there may be other factors at play that will motivate the parties to cooperate and refrain from strategic behavior.<sup>167</sup>
119. Would publication of resolutions transform mediation into a different form of conflict resolution? Mediation, as it is currently defined, is rooted in two related characteristics – its voluntary nature, and the mediator’s lack of power to dictate a resolution. Confidentiality of the resolution reached, although a characteristic of many current agreements, is not in fact indispensable to the mediation process.
120. Finally, how will the publication of resolutions affect other properties of mediation? It seems that a significant effect will be on the process of mediator selection. Although a mediation agreement is not a decision rendered by the mediator, but rather an agreement formulated by parties themselves, it is probable that the public will view an agreement as having been influenced by the specific mediator who facilitated the settlement. A pool of published agreements will thus enable potential disputants to evaluate the types of resolutions reached by parties under the supervising eye of a particular mediator and will provide them with an additional tool in choosing their own mediator should the need arise.<sup>168</sup>
121. An important value of an intermediary in a mediation process is her ability to recommend an appropriate mediator. Her selection criteria might include mediators’ approaches to the mediation process (i.e. evaluative/facilitative),<sup>169</sup> her

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<sup>165</sup> See *infra* notes 179-182 and accompanying text for the main reasons underlying this change.

<sup>166</sup> See *supra* notes 113-115 and accompanying text.

<sup>167</sup> See *infra* notes 201-208 and accompanying text (one such factor may be the need to provide reputational capital to e-commerce).

<sup>168</sup> It is not clear that this would be a positive development. Evaluation of mediators according to resolutions reached in mediations conducted by them might lead them to strive for resolution at any price, even where inappropriate or unfair to one or more parties and may give rise to repeat player favoritism by mediators. There are ways to avoid or minimize such unwanted developments and the processes need to be devised with these dangers in mind.

<sup>169</sup> Evaluative mediation entails applying strategies and techniques intended to evaluate matters that are central to the mediation, while facilitative mediation involves applying strategies and techniques that

assessment of the optimal number and gender of mediators for a given case,<sup>170</sup> and specific mediators' histories of biases in favor of repeat clients.<sup>171</sup> The publication of mediation agreements will undoubtedly have an impact on the role of intermediaries in the process. Two opposing results can be envisioned. One outcome might be that intermediaries would become redundant with the widespread public availability of information about mediators that could affect choice of mediators. An alternative possibility is that the publication of agreements will create an even more distinct market for intermediaries who specialize in deciphering the agreements and how they reflect on the mediators who administered the processes. Such services may become all the more important as transactions and communications become increasingly global, resulting in more transnational disputes that require cross-border mediation and the use of mediators not familiar to the parties.

122. Although, as stated above, I view the eventual trend towards transparency as the likely outcome, in the shorter term, it seems more plausible that the alternative approach to transparency – that of ensuring a greater degree of privacy online – will prevail. There are currently several legislative efforts in the U.S. aimed at that end.<sup>172</sup> Although online mediation does not by nature ensure external privacy in the same manner as traditional mediation, it actually can be designed so as to ensure a *greater* degree of protection of information vis-à-vis outsiders, through encryption.
123. Another area of concern is the possibility that one of the parties to a mediation may take advantage of the fact that the communications are stored in digital form and decide to disseminate the information to others. This concern is not new. In traditional mediation, the parties could also – although not as easily – distribute to third parties either information generated during the mediation proceedings or a confidential agreement. What has prevented parties from doing so has rarely been the breach of contract litigation, but rather their reluctance to jeopardize their reputation or to violate trust in the context of an ongoing relationship.<sup>173</sup> These implicit mechanisms are at work in the online world as well. The speed at which information can travel on the Internet and the ease with which it can be made available to vast numbers of people have created unprecedented mechanisms by which individuals and companies can investigate the reputations of repeat players. eBay, for example, has created just such a reputation market in the form of rating systems for buyers and sellers for the benefit of its users in an attempt to

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facilitate the parties' negotiation with less mediator interference. See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 79-81 (1998).

<sup>170</sup> See Winograd, *supra* note 98, at 41 (recommending comediation by mediators of different genders in cases of sexual harassment).

<sup>171</sup> See *supra* notes 146-154 and accompanying text.

<sup>172</sup> See John Schwartz, *Giving Web A Memory Cost Its Users Privacy*, N.Y. TIMES, September 4, 2001, at A1 (stating that at least 50 privacy related bills were awaiting consideration at the time the article was published).

<sup>173</sup> But see *infra* note 182 and accompanying text that explain why the existence of such a digital trail in online mediation may nonetheless create new incentives and temptations to make use of such readily available information.

overcome users' incentives to act strategically in the one-shot transactions between strangers that are typical of the site.<sup>174</sup>

124. In order to ensure confidentiality of online mediation, communications will need to be secured through encryption. Electronic transmissions like email are infamous for their facile interception, a problem compounded by the failure of most people to encrypt their email. However, electronic communication can be made secure vis-à-vis outsiders with currently available technology with regard to both the content of the mediation sessions and the identity of the sender and/or recipient.
125. Ironically, the Internet, which has been responsible for so much of the transparency of current day society, is actually capable of more extensive anonymity than offline communication, not less. Online mediation, unlike traditional mediation, can offer anonymity even between the parties themselves and between parties and the mediator. This anonymity could either extend to the very identity of the parties or could mean preserving privacy with regard to a considerable amount of important but perhaps irrelevant information. Such information might relate to race, gender, nationality (although the name itself might reveal this information), or education; online written language is simple and thus potentially less revealing as to education, origin and background than face-to-face discussions. And, in an opaque Internet society it would be prohibitively difficult – or at least far more difficult than it is today – to crosscheck a person's name with other data about her on the Internet.
126. Much of the criticism of traditional mediation has to do with the claim that it unfairly disadvantages weaker parties such as minorities and women. Critics have claimed that such factors influence the conduct not only of the parties themselves but of mediators as well, leading to consistently less favorable outcomes, especially for minorities.<sup>175</sup> By narrowing the information given to a disputant or mediator, online mediation may provide color-blind, gender-blind, and hence fairer results.<sup>176</sup> This characteristic of online mediation may act in a similar manner to the publication of mediated agreements: both may reduce disadvantaging of minorities, women, and others, either directly (by excluding information about race or gender), or indirectly (by increasing external supervision of mediated outcomes).<sup>177</sup>

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<sup>174</sup> See <http://pages.eBay.com/services/index.html> (last visited on May 9, 2001).

<sup>175</sup> See *supra* notes 115, 150.

<sup>176</sup> See Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1131, 1133 (2000) (stating that anonymity on the Internet can eliminate racial discrimination in cases such as used car sales: Research has shown that minorities are consistently discriminated against in the sale of used cars and the Internet, by providing a colorblind platform for conducting such sales, could ameliorate the problem). Drawing upon Kang's observations, it is possible that the possibility for anonymous communication in the online setting will not only allow for more race-neutral transactions, but also for race-neutral outcomes in ODR.

<sup>177</sup> At least in the short term, the question of the digital divide arises most potently with respect to minorities, and according to some studies, with respect to women. If these groups lack access to the Internet, then offering online mediation would not ameliorate the problems they are facing in traditional mediation. However, I believe that this problem is a transitional one since the gap is bound to shrink in the

127. The anonymity of online mediation may have less beneficial effects as well. Keeping more information about the parties confidential may further decrease the intimacy of an already relatively “cold” process. How, after all, can one participate in a mediation with another person without being able to picture her? Can one party truly imagine what it is like to be in the other’s position – which is often an important part of the mediation process – if one does not even know if that entails being a man or woman, black or white? Would such a setting allow for a meaningful exchange in which parties can apologize, and express compassion and forgiveness? In the pre-Internet world we have come to associate intimacy with face-to-face meetings in closed physical surroundings with few people present. Would the online setting be able to reproduce that feeling of intimacy? One possibility is that the meaning of intimacy, much like the meaning of many other socially constructed concepts, will undergo dramatic changes, altering and the perception of online mediation as a “cold” and distant process.<sup>178</sup>
128. As with anonymity, control of information in an opaque Internet society will be determined by encryption technology. In the context of online mediation, that would require ensuring that outsiders will not be able to intercept and/or read parties’ communications, and that neither party distribute the information to outsiders, breaking her promise to maintain confidentiality.
129. One factor that may diminish party control of information transmitted through online mediation is the fact that it inevitably leaves a trace behind and that even if communications are erased, they can, in certain cases, be resurrected and subpoenaed in the future.<sup>179</sup> This risk attained notoriety in two relatively recent high-profile investigations. In the Lewinsky scandal, important pieces of information were retrieved from email Lewinsky thought she had deleted, but that was preserved on her hard drive. Top executives at Microsoft, including Bill Gates, similarly found to their detriment that long-deleted email could be resurrected and used against them. Though it might be argued that clandestine taping of face-to-face meetings leaves a similar trail, the difference is that for secret taping to occur the party must go out of her way and take active, potentially risky, measures, while online communications are recorded automatically. This might be crucial in the case of a mediation that starts off amicably and only sours at a later stage.
130. The real obstacle to ensuring control of digital information seems to be preventing the parties themselves from distributing it, in breach of their promise to maintain secrecy. Technologies for prevention of such actions have been developed. Xerox

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long run and therefore it is important to recognize the potential online mediation has in strengthening such groups and balancing the power dynamics in mediations.

<sup>178</sup> See SHERRY TURKLE, *LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET* 206-07 (1995) (demonstrating already apparent differences in our perception of intimacy on and offline).

<sup>179</sup> See ROSEN, *supra* note 68, at 7; Felicity Barringer, *Ideas & Trends; Using Books as Evidence Against Their Readers*, N.Y. TIMES, Apr. 8, 2001, Week in Review, at 3 (discussing the problems associated with the existence of computerized records of reading and viewing habits at bookstores, libraries, and video stores).

- and Microsoft have cooperated in the development of “Content Guard,” a product that erases data after one reading of it and that may permit the recipient to print the information once or more, depending on the instructions of the data’s sender. There are methods of sending emails that cannot be forwarded to others or printed.
131. All these tools have been developed to address the difficulties faced by copyright owners in the online world. Copyright doctrines control information flow by granting certain individuals or entities control over specific data, subject to particular limitations (such as the fair use doctrine or the right of first sale). Digital communications and the architecture of the Internet have rendered copyright protections difficult, if not impossible. The challenge of containing information that can be distributed effortlessly and instantaneously has surfaced in a wide variety of intellectual property arenas, most noticeably the music and movie industries.<sup>180</sup> The same difficulty is encountered in trying to enforce data control between mediating parties. A solution could be envisaged in which the parties jointly control the future possibility of distributing the information generated through the online resolution of their dispute. The parties could have the information re-encrypted after a certain date and split the key in half, each party retaining one piece of the code (the equivalent of key escrow). Then, in the future, if either party wishes to access the information and use it, perhaps distribute it, then she will have to cooperate with the other party in order to do so. This mechanism uses technology to steer parties towards cooperative solutions rather than strategic behavior, but depends on the parties’ inability to retain other copies of the encrypted information prior to its re-encryption.<sup>181</sup>
132. Whatever technologies are developed to safeguard control of information, it seems clear that online mediation will always be less secure than face-to-face mediation, and thus more prone to violations of promises of confidentiality. Even though mechanisms such as trust and incentives may help suppress such violations, the automatic permanence of the digital trail makes online mediation unusually vulnerable to adverse developments that may occur *after* – potentially years after – the mediation itself. In particular, even deleted dormant digital information can be retrieved by a party to the mediation who has since turned hostile, and private information may be exposed in the case of a government subpoena that requires handing over the information.<sup>182</sup> Given the inevitable lesser degree of privacy, not all disputes will be mediated online.

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<sup>180</sup> See, e.g., *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

<sup>181</sup> Interview with Eben Moglen, Professor of Law & Legal History, Columbia Law School (Apr. 5, 2001).

<sup>182</sup> Government’s power to subpoena includes the right to require the parties to turn over the information in legible form if it is encrypted when intercepted, subject to 5th Amendment protections. The mere possibility to subpoena records of mediation sessions, which rarely exists in traditional mediation, may create a temptation for the judges and parties to rely on this power.

## D. Privacy and the Different Modes of Online Mediation

### 1. Broadening the Dispute Resolution Landscape

133. Galanter, in 1983, observed that what happens to grievances – whether they are pursued as disputes as well as the choice of forum in which they are dealt with – depends mainly on the type of grievance involved and on “the institutionalized ways of handling different kinds of disputes, not on broader cultural propensities to dispute.”<sup>183</sup> As noted above, disputants have traditionally been faced with two major institutional choices for dispute resolution mechanisms: courts and ADR processes. Each institution has unique characteristics, and therefore winnows out different types of disputes, shapes disputes that go through it in various ways, and offers resolutions of a different nature. A third institutional choice – ODR – currently is emerging. ODR, since it is often a significantly less costly and more accessible process than litigation or traditional ADR, allows for a broader base of low dollar value grievances to mature into full-blown disputes.<sup>184</sup> The emergence of this new avenue for dispute resolution has far greater implications than merely providing another arena for resolving conflict; it is creating a new social condition that affects the disputation process as a whole.
134. The evolution of grievances into claims and later into litigated claims is described by Galanter as a Darwinian process in which the vast majority of grievances end up not being litigated. Many grievances do not reach the litigation stage at all, either because they are not perceived as grievances, or even if they are perceived as such, because people “lump it” or deal with the dispute through ADR, self-help or “exit” strategies.<sup>185</sup> In other cases, a case is filed with the courts merely as a negotiation strategy, and the parties end up settling on their own, often even before the case is heard.<sup>186</sup> Most cases litigated end up being settled either with the court’s assistance or through the parties’ own efforts.<sup>187</sup> According to Galanter, a marginal percentage of grievances, certainly those suffered by individuals, are able to reach the courts; disputes that are not litigated are either resolved through ADR or not resolved at all.<sup>188</sup>
135. The introduction of a new medium for dispute resolution is changing the landscape of disputes and the balance of power that allows for grievances to mature into disputes. The decision whether to pursue a grievance, and if so through which forum, is largely an economic one. Once a grievance is perceived, pursuing it requires time, effort, and financial stamina. The higher the value of a dispute to a claimant, the more she will be willing to spend on resolving it. In the

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<sup>183</sup> See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 61 (1983).

<sup>184</sup> In Galanter’s terms, it broadens the base of the disputing pyramid. *See id.* at 12.

<sup>185</sup> *See id.* at 13-18, 27.

<sup>186</sup> *See id.* at 20-21.

<sup>187</sup> *See id.* at 26-27.

<sup>188</sup> *See id.* at 51 (“Cost and remoteness remove the courts as an option in almost all disputes for almost all individuals.”).

- U.S., the complexity and high costs associated with litigation render it a non-option for most individuals. Studies have found that roughly one quarter of consumers end up “lumping it,” instead of seeking to resolve their disputes.<sup>189</sup> Consumers often lack the necessary information to translate a grievance into a claim or to substantiate a claim once presented.<sup>190</sup> This state of affairs is being altered somewhat by the widespread use of the Internet, which is supplying consumers with more information than ever before, enabling them to voice their discontent with businesses before a mass audience, and providing them with an inexpensive means for resolving disputes with companies.
136. The cost-benefit analysis in deciding whether to pursue a grievance is further affected by the fact that many disputes now arise online between parties who are geographically, and in many cases also culturally, far apart from one another. In such cases, it is especially costly to resolve the conflict face-to-face, and pursuing the expensive court alternative does not even guarantee that the resolution reached will be implemented in the desired jurisdiction(s).
  137. Attempting to resolve such disputes online is a relatively inexpensive process that can be initiated with ease. Thus, ODR lowers the threshold for pursuing low dollar value grievances, whereas in the past the aggrieved individual would have “lumped it.”
  138. The promise of online mediation may be constrained by two main factors. The first, a familiar concern, is that online mediation, like traditional mediation, is a voluntary process and thus the question arises whether the non-aggrieved party would cooperate and participate whole-heartedly in the process. Such parties may prefer to forestall agreement. However, when the parties have something at stake beyond the resolution of the specific dispute, such as an ongoing relationship with the other party or a reputation that could be marred by the publication of the dispute or of their unwillingness to settle it, we can expect parties to cooperate and strive to achieve resolution through a voluntary non-binding resolution mechanism.
  139. Second, the fact that the online setting is less private than traditional ADR may discourage online resolution of disputes in an era in which disputants attach importance to the confidentiality of proceedings and resolutions. Although it is true that control of information can be ensured through technological tools, it is equally true that no technology is infallible and that unforeseen events may result in unwanted disclosures. It seems likely that for many people, online communications *feel* less private than words spoken face-to-face. But in certain types of disputes, parties are likely to prefer online mediation to other dispute resolution mechanisms despite its being relatively transparent because other considerations are felt to be more important. Looking more closely at specific categories of disputes through the parameters presented above – cost,

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<sup>189</sup> See *id.* at 14.

<sup>190</sup> See *id.* at 20.

geographical distance, cultural differences, problems with courts and traditional ADR – reveals some of the cases in which we can expect parties to use online mediation, even in the near future while social attitudes towards privacy persist.

## 2. Transparent Dispute Resolution Processes as Reputational Capital

### a. Complaints: B2C Disputes

140. Dispute prevention and resolution mechanisms for consumer complaints are notorious for discouraging consumers while being advantageous to businesses.<sup>191</sup> It has been shown repeatedly that whether the means for consumer dispute resolution has been the court system, government agencies, or private ADR mechanisms, these processes all have had an unequal effect on the consumer. The consumer usually lacks the information and funds necessary to establish a strong case against the corporation.<sup>192</sup> The corporation, since it deals with many consumers and is a repeat player, has a strong incentive to keep consumers in the dark and to make it more difficult for them to prove their cases. A corporation's financial strength also gives it more resistance power and enables it to conduct a war of attrition against unsatisfied consumers. This is part of a larger pattern. The power of individuals in modern day society to bargain for products and services is meager, and the terms of the bargain are, in most cases, dictated to them. Whether dealt with through the court system or through ADR processes, consumer complaints, even when addressed in a satisfactory manner on the individual level, have not been successful in bridging this power gap.<sup>193</sup>
141. The emergence of the Internet has changed the balance of power somewhat between large corporations and consumers. The ability of every connected individual to publish information and make it available to many others with little effort and at virtually no cost has made much more information accessible across state lines and international borders.<sup>194</sup> Problems associated with products or services are therefore more difficult to hide. Anyone who feels she has been wronged by a company can publish the matter on the web and bring it to the attention of countless others.<sup>195</sup> The possibility of filing complaints online decreases the traditional barriers faced by complainants and has contributed to an

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<sup>191</sup> See NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 29, 32, 40, 66 (Laura Nader ed., 1980).

<sup>192</sup> See *id.* at 23, 26.

<sup>193</sup> See *id.* at 29, 40, 64, 86.

<sup>194</sup> See Mike France, *The Litigation Machine*, BUS. WK., Jan. 29, 2001, at 114 (describing how tort plaintiffs have been empowered by the Internet and the creation of “assembly-line litigation” – the exchange of documents and information online while sharing the cost of conducting the research).

<sup>195</sup> See Posting of email exchange between Jonah H. Peretti, email@an.edu, and Personalize, NIKE iD, nikeid\_personalize@nike.com, at <http://ad-rag.com/modules.php?op=modload&name=News&file=article&sid=132> (last visited May 11, 2001) (posting the email exchange between Nike and a teenager who, in response to Nike's “design your own shoe campaign,” tried to order Nike shoes with the word “sweatshop” on them).

- increased number of complaints.<sup>196</sup> Possible causes for this might include a deterioration in customer service as well as an increase in bogus complaints. However, it most likely reflects the lower costs in time and money required to register justified complaints.<sup>197</sup>
142. Traditionally, companies have shied away from public resolutions of disputes with clients, employees and other businesses. However, the e-commerce environment actually encourages disclosure of resolutions of consumer disputes, or, at the very least, causes companies to place a lower value on maintenance of privacy regarding complaints in light of other advantages offered by online mediation of such disputes. Online B2C dispute mediation offers a promising example of the possibilities for online mediation, despite the fact that the online setting offers less confidentiality than the offline one, or perhaps even because of this feature.
  143. One potential mode of transparent dispute resolution processes that, arguably, would help create reputational capital for online services would be for a major online retailer such as Amazon.com and Buy.com (online companies), or BananaRepublic.com and Bloomingdale's.com (both offline and online retailers) to offer ODR services. In such transactions, the site itself would be a party to the transaction, and therefore would be a repeat player with a great deal at stake with respect to control of information regarding the dispute. The customer would be either a one-time user or repeat player, but the site has an interest in turning all users into repeat players. Often it is not the consumer (whether a one-time user or repeat player) who seeks confidentiality in commercial disputes. It is the business that wishes to refrain from disclosing the details of the dispute and its resolution in order to maintain its good reputation and to deprive future claimants of information that could be used in claims against the company.
  144. The online context seems to provide incentives for more transparency of dispute resolution processes from the retailers' points of view; at the very least, the Internet makes these concerns seem less important, and encourages compromising confidentiality in favor of other advantages offered through ODR. Much has been written about people's fears of e-commerce, which has been a persistent finding despite growth in the volume of online transactions in recent years.<sup>198</sup> The online

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<sup>196</sup> See Randolph E. Schmid, The Associated Press, *Consumer Gripes Against Airlines Continue to Rise* (April 11, 2000) (attributing some of the increase in the number of complaints against airlines to the possibility of filing complaints online), at [http://enquirer.com/editions/2000/04/11/loc\\_consumer\\_gripes.html](http://enquirer.com/editions/2000/04/11/loc_consumer_gripes.html); <http://www.bbb.org/alerts/bbbstats.asp> (last visited on May 17, 2001) (reporting on dramatic shift to the online setting in consumer complaints to the Better Business Bureau).

<sup>197</sup> We need to think about the costs to us as a society of dealing with these additional disputes and compare them to the costs of leaving these disputes unresolved while the expense is borne, in most cases, on the consumers' end.

<sup>198</sup> See John Schwartz, *Compressed Data; Microsoft to Put Digital ID Into Its Products*, N.Y. TIMES, May 7, 2001, at C4 (stating that the user-ID system would be an additional measure that would enhance the public's trust in online transactions); Laurie J. Flynn, *Personal Business; Homebuyers Slowly Warm to the*

market could grow substantially if users were confident that any problems or conflicts arising from transactions on commercial websites would be resolved with relative ease and speed and in a fair manner. Publishing the resolutions of such disputes online would, perhaps, be the quickest and most straightforward way to engender such confidence, though this policy does not seem likely to be adopted by companies in the near future. But, even without publication, the potential benefits of online mediation spurring an increase in online sales may outweigh concerns over the relative lack of control of information transmitted online.

145. To date, retailers (on and off the web) have tended to view the dispute resolution function as being in their customer service departments, and have tended not to offer full-fledged ODR.<sup>199</sup> It would seem that there could be a separate role for online mediation, as a follow-up to failed negotiations between consumers and customer service departments. A free-standing ODR service would presumably be perceived by consumers as neutral and unbiased, at least far more so than a company's own grievance department. We can expect that offering links to reputable external ODR services will, in time, become an industry standard among major commercial websites as a means of assuring customer satisfaction and confidence.<sup>200</sup> Retailers who conduct business both on- and offline may end up offering ODR to all customers, whether the customers had made the disputed purchase online, by telephone or in a store. Although, as stated above, ODR, at least currently, does not offer the maximum in privacy protection, it is likely that the vast majority of consumers who have made innocuous purchases will not be concerned about this lack of privacy protection as long as credit card and bank account information is kept safe. This is one advantage to ODR services being outsourced to separate entities whose files would not include credit card and bank account information. From the company's standpoint, making ODR services available for offline purchases as well may be a draw to attract customers to its brick-and-mortar stores.

#### **b. Online Marketplaces**

146. The emergence of online marketplaces, and specifically of online auction sites, has resulted in a high number of buyer-seller disputes.<sup>201</sup> These disputes lie somewhere between P2P and B2C, since a user's complaint is usually not with the website, but with her counterpart to the transaction reached through the site.

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*Net*, N.Y. TIMES, Dec. 31, 2000, Money and Business, at 9 (stating that most consumers are still not comfortable with divulging personal information online).

<sup>199</sup> Telephone Interview with Colin Rule (March 9, 2001).

<sup>200</sup> Such is the case with SquareTrade's seal program: A seller can demonstrate commitment to consumer satisfaction and willingness to resolve disputes through SquareTrade if and when disagreements arise. See [http://www.squaretrade.com/sap/jsp/lnm/overview\\_seal.jsp?vhostid=tomcat3&stmp=squaretrade](http://www.squaretrade.com/sap/jsp/lnm/overview_seal.jsp?vhostid=tomcat3&stmp=squaretrade) (last visited May 9, 2001).

<sup>201</sup> Email from Cara Cherry Lisco, Director, SquareTrade Network (August 27, 2001) (stating that SquareTrade is currently handling roughly 10,000 disputes a month arising from transactions on eBay alone).

147. Since most parties transacting through eBay are strangers cooperating on a one-time basis, the temptation to act strategically and to breach the confidentiality of their communication when advantageous is high. Online auction houses, in order to increase the appeal of their services, have a stake in making transactions conducted on its site safe and convenient. Offering rating systems that allow users to rate those with whom they interact is one way to fulfill this goal.<sup>202</sup> Providing online dispute resolution services is another.<sup>203</sup> eBay, the biggest online auction house, offers its users ODR processes through SquareTrade. The dispute resolution services available on SquareTrade include online mediation<sup>204</sup> and direct negotiation between disputants.<sup>205</sup> The online mediation process is conducted through a password-protected Case Page,<sup>206</sup> though there is nothing to stop the parties themselves from disseminating the communications exchanged during the mediation. This lack of control of information does not seem to be a significant problem, since these usually are not emotional disputes that reveal intimate or embarrassing information about the disputants; rather, the controversy ordinarily involves a damaged shipment, a product not performing as promised, a delay in delivery or the like. In addition, these are typically one time deals between relatively small commercial entities or private individuals (P2P), as opposed to routine transactions conducted between large companies and their clients (B2C). In such cases there is less emphasis on keeping resolutions confidential since it is not certain, and in some cases not even likely, that the parties will find themselves in analogous situations in the future. Further, eBay's rating system provides additional incentive for buyers and sellers to settle their disputes quickly and to the satisfaction of both sides, especially in collectibles markets.<sup>207</sup> So important has a vendor's or buyer's "grade" become that many resolutions negotiated and/or mediated through SquareTrade include clauses about adding favorable or deleting unfavorable ratings on eBay.<sup>208</sup>
148. As for eBay itself, since the site provides a meeting place for the transacting parties rather than transacting with users directly, it has no direct interest in maintaining confidentiality of dispute resolution processes between its users regarding purchases, unless promoting confidentiality would attract more users. eBay, in this respect, functions almost like a government, offering dispute resolution services for its "citizens," thereby enabling people to feel secure in using their facilities and transacting through them.

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<sup>202</sup> See <http://pages.eBay.com/services/forum/feedback.html> (last visited May 15, 2001); see also <http://auctions.yahoo.com/phtml/auc/us/promo/safe.html> (last visited May 15, 2001).

<sup>203</sup> The ODR services are not intended for criminal acts of fraud, but for ordinary disputes arising out of the transactions.

<sup>204</sup> This version of mediation is different from the offline version and from that offered through other ODR services, such as [onlineresolution.com](http://onlineresolution.com), since it does not allow for joint sessions to take place. Instead, there are only caucuses between each party and the mediator.

<sup>205</sup> See [http://www.squaretrade.com/learnmore/odr\\_090600\\_answers.jsp#Direct](http://www.squaretrade.com/learnmore/odr_090600_answers.jsp#Direct) (last visited May 9, 2001).

<sup>206</sup> See *id.*

<sup>207</sup> See <http://pages.eBay.com/services/forum/feedback.html> (last visited May 15, 2001).

<sup>208</sup> Telephone Interview with Cara Cherry Lisco, Director, SquareTrade Network (March 29, 2001).

### 3. Multi-Party Disputes

149. Though traditional mediation can be and is used for multi-party disputes,<sup>209</sup> some of the constraints of traditional mediation are even more pronounced when several entities are involved. In particular, convening all the parties in one place, as well as having the mediator shuttle between caucuses with each party and joint sessions with all parties is more difficult as the number of parties increases. Although it is possible to have fewer representatives present at the sessions in response to scheduling conflicts, such a procedure seems cumbersome and may be inconsistent with the goals and spirit of the mediation process. Also, being represented by a proxy at a mediation session may be problematic because the relative lack of records makes it difficult to monitor what actually occurred in the mediation and thus may give rise to misunderstandings.
150. Online mediation, on the other hand, is ideally suited to multi-party communications. There are no physical space constraints on the number of people who can be present and there is no need to coordinate schedules so that people can be present at the same time. In particular, the net's capabilities of both synchronous and asynchronous communication are especially well suited to mediation. Communicating asynchronously allows parties and the mediator to be full participants in a mediation without disrupting their schedules. Synchronous communication in "real time," along with the capability of establishing private two-way exchanges within a broader multi-party exchange, allows the mediator to caucus with several different parties at once. If a multi-party mediation involves, as is often the case, far-flung disputants covered by different rules of law (not to mention different time zones), and both litigation and traditional mediation are infeasible, then online mediation, despite its potential privacy concerns, may become the most practical resolution process.

### 4. Routine Business Controversies between Repeat Players (B2B Disputes)

151. In business transactions between repeat players, disputes are bound to arise. In such cases, both parties have an interest in maintaining their business relationship and in resolving the dispute in a quick and fair manner that would ensure smooth cooperation in the future. In a world of fast-paced and often complex business transactions, disputants cannot afford a long wait for a trial, the high costs associated with conducting a trial and an "all-or-nothing" resolution that might leave their relationship impaired. In certain cases, B2B disputes may be highly technical in their subject matter and parties would prefer to choose a knowledgeable expert rather than rely on litigation in which the case may be assigned to a judge or jury with little experience or familiarity with the field.<sup>210</sup> Moreover, in highly technical cases, disputants may want to avoid the high cost of

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<sup>209</sup> See Eisen, *supra* note 131, at 1309 (stating that mediation is the dominant form of ADR used in environmental disputes).

<sup>210</sup> See *supra* note 137 and accompanying text.

introducing potentially large amounts of relevant information through formal evidentiary procedures, with their painstaking requirements for admissibility and time-consuming process of objections and arguments. Also, since court documents normally become public record, companies may wish to avoid the risks of exposing sensitive commercial information that litigation imposes.

152. In view of all this, there are many occasions in which businesses may prefer online mediation despite the relatively insecure nature of online transmissions. In an increasingly globalized economy, B2B conflicts are increasingly international, making online mediation an attractive option. Also, the increased pace with which money is made and lost and with which important business decisions are made has rendered the relative speed of online mediation ever more important. The fact that B2B disputants are often repeat partners should reduce a party's fear that the other will disseminate information from the mediation since this would destroy trust and credibility in the long term.

### **5. Employment Disputes**

153. At first glance it seems that the desire for privacy would be high when dealing with an employment dispute (including a dispute between employees, between management and an employee, or between management and the company), since these are often highly emotional disputes, the publication of which could have long-term effects on both sides, and that therefore use of ODR could be problematic. From a company's perspective, publicizing details of disputes with employees could harm its reputation, lead to the disclosure of confidential information regarding the company's operations, or give rise to similar complaints by other employees. From the employee's perspective, public knowledge of a dispute might harm her reputation with future employers, and if the dispute is with a manager, she might fear retaliation. These disadvantages also apply to litigation, which is precisely why traditional ADR has been so successful in this arena,<sup>211</sup> and why one might think that ODR would not be viewed as sufficiently secure. However, it does appear that ODR for employment disputes will probably become a reality, as some workplaces are showing a growing interest in making these services available for their employees (for employment and other types of disputes the employees face), hoping to save costs.
154. If ODR is to be offered for employment disputes, it will have to make use of information-protecting technology. The dominant concern will be party distribution of information and not the interception of communications by outsiders. This may be a possibility in cases of termination of employment, but if the parties are in an ongoing relationship then there probably is less of a danger of their distributing the information to outsiders. Furthermore, because of the considerations noted above, both sides in an employment dispute have an interest

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<sup>211</sup> See Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 150-56 (1999).

in preventing widespread dissemination of information and thus will refrain from disclosure to outsiders.

155. Another reason for using ODR in employment disputes is that weight is sometimes given to considerations other than privacy. Again, if the case does not involve termination, then the return to work is of utmost importance to both sides. Disruption of work and employee dissatisfaction are obviously costly to an employer, and an employee would also prefer to reach a quick resolution for both financial and psychological reasons. The online setting may, in certain cases, prove to be uniquely well-suited to the resolution of disputes that have an emotional component because the parties are not forced to face each other. Furthermore, the possibility of asynchronous communication may allow parties to better calculate and think over what they are about to say.<sup>212</sup> In a dispute involving an employee and employer (or management), the online setting may actually create an equalizing effect between the two sides. This is certainly true as compared to face-to-face mediation in which the employer sits with an army of lawyers at one end of the table and the employee, either represented by a single lawyer or on her own, sits at the other end.<sup>213</sup>
156. Obviously, the use of ODR in this context may be complemented by traditional ADR processes as well as by use of the courts. It may be that ODR will always be inappropriate for ultra-sensitive disputes in which privacy is of utmost concern, for example, sexual harassment complaints. But for a wide array of employment disputes, ODR seems to be an attractive option for the reasons outlined above. One concern will be how to prevent an external ODR service from favoring the employer, who, after all, is a repeat player, over the employee. This concern could be mitigated through workplace policies mandating random selection of ODR services (especially as their numbers grow).<sup>214</sup>

## **6. Disputes with the Government**

157. It is generally accepted that acts of government should not be confidential so as to enable public scrutiny. There are, of course, exceptions: National security has long been recognized as a justifiable cause for secrecy, and some have reasoned that the government is under no disclosure obligation when it acts as a private entity transacting in the marketplace, as opposed to fulfilling its public duties. In general, society seems to expect transparency in governmental actions. This

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<sup>212</sup> Of course the exact opposite may be said, i.e. that in emotionally charged disputes it is of utmost importance that the parties face one another and that harsh written statements exchanged by the parties without the accompanying tone of voice or the opportunity to retract or explain their intentions could have a much more devastating effect on the parties' relationship. It is possible that in such cases a hybrid of traditional and online mediation is the optimal solution, allowing the parties to interact online at first and then to straighten things out face-to-face at a later stage after some of the issues have been resolved.

<sup>213</sup> In addition, ODR services can provide a forum for anonymous employee complaints by which an employee can complain without fear of retaliation and the company can detect problems at an early stage and address them. Anonymous complaints are difficult to investigate, and in certain cases may be driven by vengeance or mere dislike, but their potential for improving the workplace environment is significant.

<sup>214</sup> See *supra* notes 150-153 and accompanying text.

- tolerance or even desire for transparency will naturally affect how we view online resolution of disputes involving government.
158. Government, unlike private actors, is subject to Constitutional constraints, such as the Due Process Clause. Due Process forbids denying disputants' recourse to litigation. Since online mediation, unlike online arbitration, is a non-binding voluntary process, questions of due process should not arise.
  159. In addition, the easy access, low costs and quick results of online mediation seem especially appealing in disputes involving the government. People tend to view dealings with government bureaucracies as time-consuming, laborious, and often unsuccessful. It seems that the population would welcome a dispute and complaint resolution process that can be conducted online, precisely because it is impersonal and transparent: the digital trail becomes an asset in documenting bureaucratic abuses or mistakes vis-à-vis private individuals and might function as a deterrent to government employees who know that any communication can be monitored and reproduced. Reducing costs and increasing the efficacy of resolving disputes with the government is in the public interest since we all pay the expenses of governing. The possibility of asynchronous communication is valuable when mediating with a government official who is only accessible during limited, non-flexible hours. Although government offices and agencies are at times slow to adapt to technology, by now they all have websites from which it should be possible to create links to ODR services; most government departments and agencies already offer traditional ADR services. In fact, ADR has been extremely successful in the public realm: The post office ADR program, for example, has had impressive results and achieved high levels of satisfaction.<sup>215</sup>
  160. Possible areas of application are online resolution of parking ticket disputes between municipalities and individuals as well as resolution of disputes regarding tax payments or refunds.<sup>216</sup> In the former case, online mediation makes sense because the dollar amounts in contention tend to be relatively small, not justifying costly court time. Moreover, by providing a forum for dispute resolution, municipalities would increase individuals' willingness to pay fines, thereby addressing a chronic problem of non-compliance and lack of enforceability. In the latter case, as tax returns may already be filed online, it seems only a natural progression. In addition, online mediation could serve as an incentive to encourage people to file their returns online by tying together the right to mediate a dispute online with online submission of tax returns. Clearly, there is a difference in the level of sensitivity between information regarding parking tickets and that regarding personal financial matters addressed in a tax return. However,

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<sup>215</sup> See Jonathan F. Anderson & Lisa Bingham, *Upstream Effects From Mediation of Workplace Disputes: Some Preliminary Evidence from the USPS*, 48 LAB. L.J. 601 (1997).

<sup>216</sup> In fact, the EEOC is already experimenting with ODR. Ethan Katsh, Panel Discussion: "Online Mediation: Why it works and what the future," The Association of the Bar of the City of New York (Apr. 2, 2001).

the significant number of people already filing tax returns online,<sup>217</sup> seems to indicate that people are willing to pay a price in exchange for convenience. In the broader picture, this is indicative of growing societal trust of disclosure of sensitive personal information online.

## V. Conclusion

161. The use of mediation has risen in recent decades and there are many reasons to believe that this trend will continue. Among these reasons are the increasing number of disputes as society and the economy become more complex, and the obstacles faced by the court system in handling the disputes that are typical of the Internet age. In some cases, these advantages of mediation over litigation become more pronounced when the mediation is conducted online, leading to an increased role of online mediation in the future. This may result not only in online mediation's replacing traditional mediation in certain instances, but in an expansion of the percentage of grievances initially pursued and turned into disputes.
162. Traditional mediation has been associated with, among other things the privacy of its proceedings and resolutions. Online mediation, by contrast, is not privacy-conducive because of the persistence and retrievability of the "digital trail." As it seems, at least in the short term, that our society will continue to place a high value on maintenance of privacy in general and privacy with respect to dispute resolution processes in particular, this attribute of online mediation will remain significant and will most likely affect people's willingness to use it. The relative lack of control of information in ODR will remain a reality in spite of recent and future advances in the sophistication and widespread use of encryption technology. Because digital information can never be assumed to have been permanently erased, unless extreme and unrealistic measures are taken, online mediation will always be a less secure means of communication than its face-to-face counterpart. However, as discussed above, online mediation offers significant, often crucial advantages over other forms of dispute resolution that in many cases, outweigh privacy considerations. Ironically, in one important aspect of privacy – anonymity – online mediation actually offers users more privacy than face-to-face communication ever could.
163. Clearly the ongoing societal decision-making about ODR will occur in the context of a broader debate about transparency versus opacity in the Internet age. People continue to place high value on privacy in samplings of popular opinion,<sup>218</sup> even as they have disclosed unprecedented amounts of personal information online, primarily to corporations. Obviously, greater public education about what

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<sup>217</sup> See Jan M. Rosen, *Trying to Relieve April's Angst; Tax Filing Seem Easier? Thank Software, Not Congress*, N.Y. TIMES, Apr. 14, 2001, at C1 (stating that, to date, 44% of returns were submitted online).

<sup>218</sup> See <http://www.epic.org/privacy/survey/> (last visited May 8, 2001) (listing a variety of surveys on Internet users' privacy concerns and their favoring more anonymity and enactment of additional privacy laws); see also Schwartz, *supra* note 172 (stating that according to a Republican polling organization 67% of Americans see online privacy as a major concern).

- happens to information transmitted online, as well as a greater understanding of the capabilities and limitations of information-protecting technologies, will be key factors in the future conduct of personal and potentially sensitive affairs online, including online mediation.
164. I believe that the future of online mediation is assured, but the shape it takes will reflect the choices we make about the larger issues and challenges presented by the Internet age. ODR will never replace traditional ADR, but will continue to coexist with it. One can envision a hybrid form of dispute resolution incorporating components of both traditional and online mediation.
165. But perhaps the greatest impact of ODR will be the simplest and most obvious. By presenting disputants with yet another alternative to litigation – and an extremely convenient, inexpensive and appealing one at that – ODR will further privatize the landscape of dispute resolution.<sup>219</sup> Because of ODR, fewer disputes and resolutions will become part of the official public record and will not be included in the corpus of resolutions that is our reference point for the ongoing interpretation of the law. Instead, especially if the trend toward publication of ODR resolutions prevails, we will see a growing body of agreements, readily available to all via the Internet, that were generated extra-judicially in the private sector. The central question regarding this increasingly important body of agreements is whether the agreements and other related information will become part of the public domain, or whether they will continue to be viewed as private information belonging to the relevant ODR service and/or the parties.

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<sup>219</sup> See Elizabeth G. Thornburg, *Going Private: Technology, Due Process and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151 (2000).