Online Dispute Resolution

Resolving Conflicts in Cyberspace

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process. If ODR is to be successful it must place information on the screen in a manner that enhances communication and allows it to occur in ways that may not be present in face-to-face interactions.

We conclude Chapter Six by looking at the ODR practitioner. Just as the online environment is bringing changes to those who practice law, sell stocks, or run for office, it will affect those who are concerned with dispute resolution. There are not only issues of skills and competencies but concerns about ethical standards that need to be addressed. There are challenges for the dispute resolution community and also opportunities. We hope that this book contributes to overcoming the challenges and building upon the opportunities.

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The Impact of Cyberspace on Disputes and Dispute Resolution

The Demand for ODR, *What ODR Offers*; **ADR and ODR,** *The Limits of Litigation in the Information Age, Behind the Growth of ODR*; **Virtual Places and Virtual Processes,** *What Is a Virtual Space? Describing and Understanding Virtual Spaces, Online Tools and Online Spaces*; **Current Types of Online Spaces,** *Online Auctions, Online Banks*; **Building a Dispute Resolution Space,** *Where Should Dispute Resolution Spaces Be?; Basic Building Choices, Enhancing ODR Space.*

One morning in late 1998, we received a letter from a lawyer in Los Angeles threatening to sue us for trademark violation. It seems that we had recently registered the domain name "cyberjustice.org" without first checking to see whether the word "cyberjustice" had been trademarked. The lawyer said that he had trademarked the word and that under trademark law he owned it. He said that for us to use the domain name would infringe upon his trademark. He demanded that we transfer the domain name to him, and if we did not do that and do it quickly, he would file suit.

Although we had been involved in our share of disputes, this was actually the first time either of us had been threatened with litigation. What was particularly surprising to us was that of all the possible kinds of lawsuits that we might have been threatened with, we were involved in a trademark dispute. Trademarks were the business of corporations like CocaCola or IBM. Domain names

aside, if we had wanted to violate a trademark, it would have been difficult to think of a way to do it.

Among other things, the letter caused us to think of all the new activities that the Internet makes possible that were not possible before. We can form relationships with people in faraway places and we can transact business with anyone anywhere. In the pre-Internet world we would not have had the opportunity to violate trademark law, but the Internet empowers us to do all kinds of novel things. Getting into disputes in new ways is one of them.

We had registered the "cyberjustice" domain name with the thought that we might use it for ODR activities. It certainly seemed ironic that the word had brought us into a dispute rather than helping us to resolve disputes. We thought, however, that we should suggest to this lawyer that we employ ODR to resolve the problem and, at least, we might gain some ODR experience. Unfortunately, the lawyer had no interest in anything short of total victory. By this time, as well, we had realized that his claims about our violating his trademark were not as clear as he had made them out to be. For example, there was no reason for him to think that our activities would be confused with his, which is one of the key issues in trademark law. Finally and fortunately, we stopped hearing from him.

We were sorry that our offer to try to resolve this dispute online was not accepted. We had mediated a variety of domain name disputes and had usually found that acceptable solutions in domain name disputes were possible. We still believe that because cyberspace is such a large and expandable place, a place where there should be no real need to compete for space, creative mediation can lead to interesting win-win, or at least sharing, opportunities. This is not, unfortunately, an argument that most trademark holders are willing to accept. We shall discuss later the ODR system that is currently being used, and being used quite often, to arbitrate domain name disputes. Our dispute occurred before this system had been put in place, and we felt fortunate that we did not end up in court.

The system for arbitrating some domain name and trademark disputes emerged because there were a great number of such disputes and there was pressure for a dispute resolution process that was quicker and less expensive than litigation. During 2000, online mediation systems were also set up to deal with consumer-related E-commerce disputes—another arena in which disputes are plentiful. It is not surprising that ODR is emerging most rapidly in such environments. As the value of ODR is proven in these arenas, however, we believe that the demand for broader-based dispute resolution systems will grow. ODR is part of the movement to build civic institutions online, and these institutions and systems are greatly needed to encourage online activity and growth.

ODR is not totally new. In the next chapter, we shall discuss a variety of experiments and projects that have occurred over the last ten years. What has changed recently is the level of entrepreneurial activity and the demand for high-quality online tools and resources that could be employed in ODR. ODR is a response to the disputes and other activities that are appearing online, and it is also a user of resources becoming available in cyberspace. Its nature, therefore, will reflect various qualities and features of the online environment.

ODR is also not totally new in a second way. ODR has roots in the ADR movement that has been growing for the last twenty-five years. ODR has qualities acquired from the online environment, but it also has traits acquired from ADR. This chapter explores the nature of this new organism, and how the novel qualities of the Internet are shaping its emerging form. More particularly, this chapter discusses three key issues.

1. Where is the demand for ODR coming from and why is demand accelerating?
2. What existing resources, models, approaches, and people with appropriate expertise can this new civic institution build upon?
3. What can we build online and what should we build?

The Demand for ODR

In his 1989 book *The Cuckoo's Egg*, Clifford Stoll described the detective work that was needed to track down a seventy-five cent accounting discrepancy in the computer account at Lawrence Livermore Laboratory. Stoll quickly discovered that a hacker had broken into the system and had used a little time that could not be billed to any existing user. Stoll then approached the local FBI office and asked them to try to find the hacker.

The FBI refused Stoll's request, indeed laughed at it, because all they could see was a possible crime involving seventy-five cents. They told Stoll that if he encountered a crime involving a million dollars, they might become interested.

Since that time, the Federal government has built a significant infrastructure to deal with online crime. It has recognized that to be successful it needs online tools and resources and relationships with counterparts in other countries. Breaking into computer systems is now understood to be as serious, and often more serious, than breaking into a physical structure. This is not a book about online crime, but there are some clear lessons that can be learned from the more than decade-long experience with cybercrime. We know, for example, that the range and variety of interactions at a distance is probably much greater than we would have thought, that they are of greater value than we might have imagined, and that disruptions in service can be very costly. Many of us are more dependent on our Internet connection than we would have predicted. It is still not possible to physically assault someone online—although we shall recount the story of a "virtual rape in cyberspace" in the next chapter—but the opportunities for creating and being involved in many different kinds of online conflict are growing.

Using the Internet, we have devised new ways to create value and new ways to cause problems. Stoll's hacker turned out to be located in Germany. Stoll gradually learned that not only did he have a problem getting the attention of the FBI in this country, but that once he did, the "arm of the law" lost most of its strength when it tried to cross a national border. The law has a very large set of

rules to answer jurisdictional questions, but even these rules do not cover every problem arising out of cross-border transactions. ODR largely ignores jurisdictional questions, relying instead on the desire of the parties to resolve a problem out of court. Consequently, demand for ODR grows every time the issue of jurisdiction surfaces.

One of the technological facts in Stoll's book that is easy to skip is that the hacker was connecting to the Internet at 1200 bytes per second. Many of us now connect one hundred times faster than that. The screen that the hacker was looking at in Germany probably had green or white letters on a black background, with no variation in font size and no images as we have today. The hacker was not clicking on links or spending time surfing the Web for the simple reason that there was no World Wide Web in 1986.

Changes in all these aspects of computing are important because how fast one communicates affects how much interaction is possible. It affects how many cycles of interaction can occur in a particular period of time. When we learn to employ images and communicate graphically, our expressive capabilities further expand. We can do more both in terms of time and in terms of range of expression, and get feedback from others faster. We could not have had an efficient ODR process in 1986 with the equipment available then, but we also, except for the occasional hacker or two, would not expect many disputes either.

One thing was understood in 1986 that is still of central importance; text, images, pictures, and sounds can all be stored and communicated as strings of zeroes and ones. Information that formerly was transmitted in some kind of physical format can now be stored, organized, and communicated in electronic form. To paraphrase Nicholas Negroponte, we can now transmit bits when before we had to transport atoms.[1]

What ODR Offers

Marshall McLuhan once wisely wrote that when "a new technology comes into a social milieu it cannot cease to permeate that milieu until every institution is saturated."[2] What McLuhan wisely

did not predict was how fast this would occur. The rate of change is affected by both technology and culture. With a fast network and powerful machines connected to the network, there are opportunities for doing new things in new ways. The possible market for anything I might wish to sell includes anyone who is online. When my product is composed of bits, which is almost anything that has to do with information, I can create it faster and deliver it faster.

While all this is true, technological advances alone are rarely enough to change old institutions and practices. People must also be ready, able, and willing to use the technology. As we shall examine in detail in Chapter Three, powerful systems will not bring change if they are not used, and they will not be used if they are too difficult to use or are not trusted. Those arenas in which incentives to make use of ODR are highest and resistance is lowest will likely be in the first wave of ODR applications. Therefore, the attention given to ODR in the consumer arena and its growing use there is not surprising. Consider the following:

- *Tools*—The tools employed for relatively simple transactional disputes need not be as sophisticated as the online resources that will be required for more complex transactions or disputes involving ongoing relationships. More powerful tools generally require more training and this will deter some participants.
- *Skills*—By the mere fact that they have purchased or sold something online, the parties to a consumer dispute are likely to have a higher than average comfort level with the online environment. In general, they are more likely to be able to use Web-based tools and not be limited only to email. Again, more powerful tools will require a higher level of skills from all participants. As we shall discuss later, interactions among the participants will occur at the skill level of the least skillful, not the most skillful.
- *Acknowledgment of disputes*—While businesses often have customer service departments, they are also often reluctant to

acknowledge that their transactions lead to disputes. Having an ODR service at an online marketplace constitutes an admission that there are disputes and, perhaps, an admission that disputes are at such a level that action needs to be taken. This concern about what ODR might signify to users surprised us at first since we encountered it even in marketplaces in which everyone was quite aware that there were disputes. Yet, it was still a commonly held belief that if one competitor admitted that disputes occurred and the other did not, the first might be perceived less positively and be at a competitive disadvantage.

Offering ODR at a marketplace should be seen as positive, as adding value to the marketplace, and as something that provides a competitive advantage. We think that the presence of an ODR provider at a marketplace should attract new users and increase willingness to participate in transactions. As market leaders such as eBay insert dispute resolution as a basic feature of their sites, we would expect the positives of an ODR presence to be more widely recognized.

In many online marketplaces, such as those involving auctions or barter, the marketplace owner is not a party to disputes that occur there and may be more willing to admit that all transactions may not go smoothly. Perhaps more importantly, many small businesses that are selling in such marketplaces do not have customer service departments and have little experience dealing with dissatisfied customers. As a consequence, online businesses need to find ways to assure people that their service is reliable and trustworthy. In particular, they need the kind of seals or trustmarks offered by BBBOnLine, TrustE, SquareTrade, or WebAssured to indicate that the seller has met the standards imposed by these groups in order to acquire a seal.

- *Cost*—For ODR, like any new service, it takes some period of time for the marketplace to determine its value. If its value to a marketplace is high, the marketplace may be willing to

subsidize an ODR process and consider it one more service being provided to users. If the value of the item in dispute is high but the transaction is not complex, parties may find it in their interest to pay for the service since the cost may be relatively low. Over time, the use of technology should also make intervention in some common disputes less costly. Currently, SquareTrade offers its "Direct Negotiation" process for free but charges when a mediator gets involved.

The "Direct Negotiation" process, which we shall examine in more detail later, allows disputants to communicate with each other through SquareTrade's software. The success rate is close to 80 percent, a rather astonishing percentage. When this fails, parties pay a fee for a human mediator to work with the parties. What is clear from the SquareTrade experience and what had never been achieved before, is that consumers will pay for ODR. How much particular disputes should cost and how much mediators and arbitrators with online skills might be able to charge has not yet been determined. We strongly believe that parties to disputes, even offline disputes, will expect third parties to have online skills and will see less value in third parties who are not as comfortable online as the parties themselves.

In the next section, we shall discuss the relationship between ODR and ADR. While we are often asked how dispute resolution can occur without face-to-face sessions, over time the question may be how one can resolve disputes without use of technology. ODR does borrow from ADR, but in the future, ADR will also borrow from ODR.

ADR and ODR

One of us, Janet, has focused her career on the area of dispute resolution. The other one of us, Ethan, has worked mainly in the area of law and technology. Our interest in ODR arose from trying to see whether there were points of intersection between technology and

ADR and, if so, what kinds of sparks might result from their coming together?

We understood that technology is often employed to create new tools and we also understood that technology is employed to create new environments in which the tools can be used. As we looked at ADR, we wondered whether any of the new tools would be of value in ADR and whether ADR would be of value in the new environments that were being created. We knew alternative dispute resolution had started out as an alternative to litigation but had become the primary means for dispute resolution. Would the new information technologies create an alternative to the alternative or would it simply change the alternative and, if so, what kind of change was likely?

There is no mystery to the recent popularity of ADR. Compared to litigation, ADR has the following advantages:

- Lower cost
- Greater speed
- More flexibility in outcomes
- Less adversarial
- More informal
- Solution rather than blame-oriented
- Private
- Fewer jurisdictional problems

We still employ trials, and even encourage them, when the goal is to protect someone's rights, clarify a point of law, or set a standard for public behavior. Sometimes plaintiffs want to go to trial when the outcome they seek is a finding in which one party wins and the other loses. In addition, if revenge or destroying the other party is a goal, courts and trials will continue to be attractive.

ADR has grown because rights and revenge are not the focus of most disputes. Many disputes involve misunderstandings, accidents, or other situations where getting the problem resolved quickly is more important than placing blame. Disputes may involve parties

who might see some possibility of working together in the future, and removing hostility might even be more valuable than getting compensation. Frequently, getting something resolved quickly is important because taking too much time will cost more than the value of whatever is involved in the dispute. In the Internet environment and in information-related industries, these factors are likely to be even more important. Where the value of information declines quickly over time, litigation becomes an even less desirable option. The dispute described in the case of *Whelan* v. *Jaslow* discussed in the next section is a good illustration of the limits of litigation in this context.

ADR moved dispute resolution "out of court." ODR moves it even further away from court. The paradigm of dispute resolution had traditionally been the trial, a process that only took place in a physical place: a courtroom. Part of the attraction of ADR was that it moved dispute resolution out of the courtroom and courthouse, moving it from an identifiable place to any place. Courts today are eager to send cases to mediation and arbitration, but twenty-five years ago, the idea of moving dispute resolution "out of court" encountered concern similar to the concern expressed today about moving dispute resolution to the arena of cyberspace.

The trend toward nonlegalistic systems of settling conflict is likely to continue, pushing mediation and arbitration more clearly into the foreground and litigation further into the background. Looked at in a different way, the growth of ADR represented a move away from a fixed place and also away from a fixed and formal process. As this has occurred, we have become increasingly comfortable with dispute resolution taking place anywhere, whether in a school, factory, store, or office. ODR, by designating cyberspace as a location for dispute resolution, is, we believe, simply extending this trend further, moving the process not only from some mutually agreed-upon physical place but to a virtual place. As we discuss the nature of "virtual places" below, we shall see how feasible it is to accomplish this.

The emergence of ODR is closely linked to the appearance of powerful networking capabilities, but it is the broad acceptance

of alternatives to litigation and the idea that justice can be applied anywhere, that might be considered the beginning of the road to ODR. Over the last quarter century, ADR has proven that moving justice away from the courthouse is often desirable and that the arena of dispute resolution, once thought to be the exclusive domain of law and courts, is markedly different from what it was several decades ago. Mediation, arbitration, and other forms of "alternative" dispute resolution are now the most common approaches to dealing with conflict. While at one time the thought of suing and "going to court" may have been the first thought of someone with a problem, we know today that "going out of court" is the route that is most likely to bring satisfaction. As an example of how hiring lawyers to battle in court can be more destructive than beneficial, consider the following dispute. This occurred some time ago, but it is one dispute in which winning in court may not have been the most desirable outcome.

The Limits of Litigation in the Information Age

One of the landmark cases of copyright law as it relates to software is the case of *Whelan* v. *Jaslow*.[3] The plaintiff, Whelan, was a computer programmer who had created software to automate the defendant's dental laboratory. The software, which ran on a minicomputer, satisfied the defendant, and the two parties began a joint venture—using Whelan's programming expertise and Jaslow's contacts in the dental service industry—to market the program, called Dentalab, to other dental laboratories. The relationship between Whelan and Jaslow was not harmonious, but the business venture was viable and survived until a significant event in the history of computing occurred: the arrival of the IBM personal computer in 1981.

The Dentalab program, which was owned by the programmer Whelan, would not run on the IBM PC, and Jaslow decided that he had learned enough so that he could conquer the PC market without Whelan. In creating a new program that would run on the PC,

Jaslow not only looked at the source code for Dentalab but modeled many of the screens and functions of the new program on Dentalab. The similarities between the two programs were so stark that the judge ruled that Whelan's rights had been infringed. She was awarded attorneys' fees and $101,000, the amount of the profits Jaslow had made from sales of his PC program.

As we have thought about this dispute over the years, we have always believed that the lost opportunity was the most important lesson in this case. Although the court clearly did rule that screen displays are protectable, it is equally clear that the business partnership was ruined and economic opportunities were lost. There is, of course, no guarantee that mediation or any dispute resolution process could have successfully restored and refocused the Whelan-Jaslow partnership or that the partnership would have conquered the turbulent 1980s software environment. Yet, no one seemed cognizant of or prepared to do anything about the fact that the value of the information at the heart of this dispute was declining rapidly as time passed.

It may be that the attorneys, and probably the parties as well, saw the Whelan-Jaslow relationship, at the time the litigation commenced, as being over and without any possibility of salvaging. Perhaps it was. Yet, mediators and other experts in dispute resolution might have had a different perspective. One difference between litigation and mediation is that mediators recognize that by maintaining lines of communication, by placing few or no limits on what issues are raised, and by placing the burden for resolution on the parties, more often than not the unanticipated occurs and the seemingly unresolvable is resolved.[4] It is of little concern that ideas for how this relationship might have been restored are difficult to imagine. Imagining reasonable outcomes is often a fruitless exercise at the beginning of a mediation. What mediators assume is that the mediation process is able to tap the creativity of the parties and elicit ideas that were hidden or appeared to be irrelevant. As a result, damaged relationships are often rebuilt or reestablished in ways that had not appeared possible at the start.

Litigation can be damaging to both parties because it can distract the parties from what they need to do in the marketplace. Mediation can strive to reduce hostility between the parties, to fashion an agreement about tasks each party is willing to assume, and to reach agreement on methods for making certain that tasks have been carried out. In *Whelan* v. *Jaslow*, what might have become clear in mediation was that everything they had built was losing value quickly as time passed. They had a small time window to exploit any advantage they might have had, and only by somehow creating a working relationship could that happen. Either side may have thought that they might obtain a high market share and a competitive advantage from a court decision. Yet, when technology is changing rapidly and the value of almost anything decreases rather than increases over time, standards that are announced in a judge's decision may be less significant than they would be in a slowly changing environment.

Behind the Growth of ODR

There have been two main catalysts behind ADR's growth. For some, ADR is viewed as an opportunity for better or more appropriate resolutions than can be provided in court. As the *Whelan* case illustrates, litigation tends to end with one party being the winner and the other the loser. The ideal of ADR is a win-win solution, an outcome that the parties are satisfied with and which might even allow them to work together further in the future.

The second force fueling the growth of ADR is bureaucratic. It is viewed as a means to save money and reduce court caseloads by moving disputes out of court. The largest source of referrals for mediators remains the court system. The enthusiasm of the justice system for ADR is less a concern over obtaining better or fairer solutions than it is a way to meet bureaucratic needs and to process cases faster and more cheaply than can be done at trial.

As we observe the growth of ODR, we shall also see it employed for a range of reasons. Governmental authorities support ODR

because it is costly for parties who are at a distance to sue, and there can be difficult jurisdictional problems to solve, particularly in cross-border transactions. ODR certainly will also be assumed to reduce costs by avoiding the expenses of face-to-face meetings. Others will view ODR as a means to meet the needs of persons or groups who might have no other options for dispute settlement or who would not go to court even if they could. And for still others, often those involved in offline disputes, ODR will be looked to not as something that will be employed in lieu of ADR, but something that can be employed to enhance ADR.

We shall no doubt also see experiments by courts to use the Internet to expedite litigation and enhance access.[5] The legal system, however, is subject to rules and standards enforced by bar associations and others. Lawyers and the legal system are responding to the forces of technology, but as developments in dispute resolution during the last two decades indicate, much more innovation and experimentation is likely to occur outside the legal system than within it.

It is interesting to note that there are several Internet start-ups that hope to provide legal services online.[6] The motivating idea is that if lawyers have expertise and the expertise is informational in nature, it should be deliverable electronically. These ventures may ultimately be successful, but at every step of the way there are fifty state bar associations looking at them, trying to assess whether law is being practiced without a license and whether rules of legal ethics are being violated. ODR is "out of court" and out of the focused eye of the state and the profession. It is as free to design and apply the technological applications described in the next section as any other venture in E-commerce would be.

Virtual Places and Virtual Processes

A basic attraction of the Internet is the ability to do at a distance what previously required physical presence. Anyone who has used the Internet is also aware that informational exchanges and

interactions can occur more quickly than before. The word "cyberspace," however, suggests that as these exchanges accelerate and multiply, what occurs is more than the accumulation or rapid transmission of a large batch of data. In addition to all this, we are gaining access to new spaces, "cyberspaces," that allow users anywhere to accomplish many tasks that might have previously occurred in physical spaces.

We have, of course, always had some capability to communicate at a distance. The spoken word can be passed on from person to person, and the development of writing thousands of years ago enabled documents to travel over space and also, when a document was preserved, to travel over time. More recently, the telephone, television, and fax machine have enabled us to accelerate communication at a distance and to interact and exchange documents in ways that were not possible from afar. What the Internet allows are many different forms of communication and interaction to be structured and organized on a Web "site" in a way that gives us something novel: virtual places and virtual processes. It is as a result of this new capability to build sophisticated online spaces and processes that we can try to consider what a virtual dispute resolution space might look like and what varieties of dispute resolution spaces we can expect to see.

What Is a Virtual Space?

The Internet is often said to reduce the importance of space and distance. This is true in the sense that communication can occur easily among persons in different places, and information can be accessed quickly from anywhere. Space and distance interfere less with the process of communication than they used to. If information is online, we can get it quickly and conveniently. And if people are online, we become closer to them.

In another sense, however, the Internet makes space more important and the use of space more complicated. The Internet allows us to create new kinds of spaces—spaces that are not physical

in nature but exist online in virtual form. The Internet can be viewed as having an unlimited number of building lots, with the capabilities for building structures improving as tools and materials improve. These are spaces where we can structure interactions that we never thought of before, because time and distance factors had led us to believe that they were not possible. Some of these online spaces are already the focal point of great activity but how best to build them, design them, and use them for different kinds of services is not yet perfectly clear.

Any space, physical or virtual, is an environment where many different interactions, usually focused on one or a small set of goals, occur. A courthouse, for example, is a space oriented around law, a store is focused on business, a health club about exercise, and so forth. As noted earlier, ADR was a movement that moved dispute resolution out of the courthouse. Leaving the courthouse involved leaving a space that was formal and, for nonlawyers, was intimidating. Among the goals of ADR was to make access to justice more accessible than it might be in a courthouse, and one way of doing this was to bring the parties together wherever it was convenient. ADR was less concerned than law with the symbolism a particular place might represent. Indeed, the flexibility of ADR was emphasized when the parties and the third-party neutral met in an office, factory, schoolyard, office building, indeed anywhere.

With ODR and the creation of effective online spaces, access to justice-related processes can be increased even further. Participants can be anywhere, and entry to any virtual dispute resolution space is as easy as clicking a mouse. Where ODR does differ from ADR, however, is that while the characteristics of the space in which parties meet is not important for ADR, the nature and design of the virtual space in which ODR occurs is extraordinarily important, indeed critical. We shall describe later our suggestion that technology can be considered to be a "fourth party." Part of the influence of this "fourth party" comes from the online "space" in which ODR takes place. The nature of the online space will shape how expertise is delivered and the manner in which the parties will be able to

interact. With ODR, the place *is* the process in the sense that the functions built into a site, and the appearance and arrangement of a site, will structure what is and what is not possible to occur there. Success rates can change significantly by redesigning a Web site or even changing a detail or two. An ODR site with fewer features may be quite adequate for simpler disputes, just as email alone may be adequate for many disputes. Yet, a space with broad information processing built in can enhance a third party's skills in ways that may not be possible offline. As ODR grows, we can expect to have a range of spaces developed, with those at the high end fostering a richer, and possibly also more complex, interaction among the parties. This would be a space that not only allows a mediator to exercise a range of skills but also enhances the mediator's expertise.

Describing and Understanding Virtual Spaces

Margaret Wertheim has written that "every different kind of space requires a different kind of language."[7] Our language about space is largely, and not surprisingly, related to physical settings. The labels that tend to be used to describe virtual spaces are labels that have been used in connection with physical spaces. Thus, we have online stores, online malls, online casinos, online conference centers, online auctions, and so forth. Using these labels has the effect of making them seem familiar and making us more comfortable with these sites. We use these labels because we do not yet have an adequate set of words to describe the novel qualities of these virtual spaces. Yet, these online places are not identical to their physical counterparts. In many instances, therefore, the use of familiar labels masks significant differences and misleads us into thinking that the virtual and the physical entities are identical, or that the virtual is just a copy of the physical that can be accessed anywhere and at any time.

The struggle to describe and explain how the Web is both similar to and different from physical counterparts is one that has been with us since Web sites first started to appear. Early Web sites were

built by persons who discovered that colorful and informative "home pages" could be built by persons with relatively little technical skill. These home pages tended to consist of a single screen that usually had some information about the person who developed the site and a list of hyperlinks, items that a user could click on that would "take them" to some other site. One could have a site that was useful not because there was original content on it but because there were links to other sites that did have rich content. What was attractive and novel at the time, was that at low cost and with modest skills, one could provide access to all the information about a topic that existed on any Web site anywhere. Anyone, it was said, could become a publisher and "pages" were what publishers produced. Interestingly, as Web sites have become more dynamic environments with the screen looking and acting less and less like a fixed page of print, the use of the term "home page" has been declining.

Some, at that time, described the Web as being a giant library or a library without walls. The Web was, of course, an informational space just as a library is an informational space, and the library label probably helped a bit in allowing new users to understand that there was much informational content on the Web. Today, we rarely see the Web labeled as a library. The library metaphor has faded partly because the Web now contains stores, meeting places, and other nonlibrary kinds of spaces, but partly because the label was not really appropriate. Physical libraries are places that have filtered and organized information and employ librarians who add value to information. The Web, with no space limits to deal with, provided access to information anywhere, but the lack of space limits also meant that many decisions were not made because they did not have to be made. The Web had one of a library's most significant ingredients, information, but little else that a library has.

As time has passed, we have seen a variety of metaphors for cyberspace come and go. For example, cyberspace is rarely referred to any more as an "information superhighway." That metaphor focused attention on the capability for communicating information

at electronic speed but ignored all other features of the online environment. We seem to have already reached the point when no single metaphor can work very well. The Internet is a multifunction space just as most physical spaces are, and what is ongoing is the building online of spaces for an enormous variety of purposes, one of which being dispute resolution. The inability to suggest what the Web is in a single word should be taken as a good sign and a sign of its growth and development. It also indicates that there are few limits to the kinds of novel spaces that can be built online.

Online Tools and Online Spaces

As we see more and more specialized ODR spaces appearing, it is easy to confuse virtual spaces with virtual tools. Before you begin to think through how you might want to utilize ODR in your work, it is important for you to distinguish between these two. Tools provide a means for doing a particular informational task or a small set of informational tasks. Every online space will have tools as a component—perhaps a large array of tools. What will give these spaces character, however, and indeed differentiate them from each other, will be a combination of the tools included, the manner in which they are presented and coordinated, and the other resources that are made available.

The relationship of specialized tools to specialized spaces has parallels in the physical office environment. Once an empty office is furnished and arranged, it will have an array of tools, and it will be organized in some fashion that is believed to further the mission of the enterprise. Just as there can be many designs for airports, arenas, shopping malls, and other physical spaces, we can expect there will be many versions of online dispute resolution spaces. Some virtual spaces may be primarily concerned with complex disputes, others with offline disputes, others with consumer disputes, and so on. As electronic tools improve, such spaces will become more powerful and perhaps more varied than physical spaces because there are no obstacles of time and space to limit designs.

The most familiar online tool is probably email. The first experience of most persons when they are introduced to the Internet typically involves email, a tool for sending messages from one place to another at electronic speed. It is an easy-to-use tool and a tool whose value is easy to see. Email has the virtue of simplicity, and for quick exchanges between people, it is a highly effective and appropriate tool. Our challenge is that no tool can be expected to handle all informational and communication tasks equally well. For ODR, we need online spaces, not simply an online tool or two. We need a range of communication and information management tools that are easy to use, powerful, and flexible. Email may certainly be one of these tools. It is a moderately flexible tool and it may be flexible and powerful enough to be employed when parties are few, exchanges are few, and issues are few. The more ambitious we wish to be, however, the more we will benefit from, for example, Web-based tools designed to organize information, allow collaboration in drafting agreements, evaluate information, foster brainstorming, monitor performance, clarify interests and priorities of the parties, and more.

Current Types of Online Spaces

We are at a stage in which we have some tools, but there are still opportunities to create more advanced tools and to create multifaceted and flexible virtual spaces where the tools can facilitate ODR. Email is so familiar that imagining other ways of interacting online may be difficult. If so, here are a few examples of online spaces that are widely used, are easy to use, and that manage and focus the flow of information and data very efficiently.

Online Auctions

Online auctions allow sellers to determine who among many bidders is willing to pay the highest price. Online auctions allow an efficient many-to-many communication pattern and, as this occurs

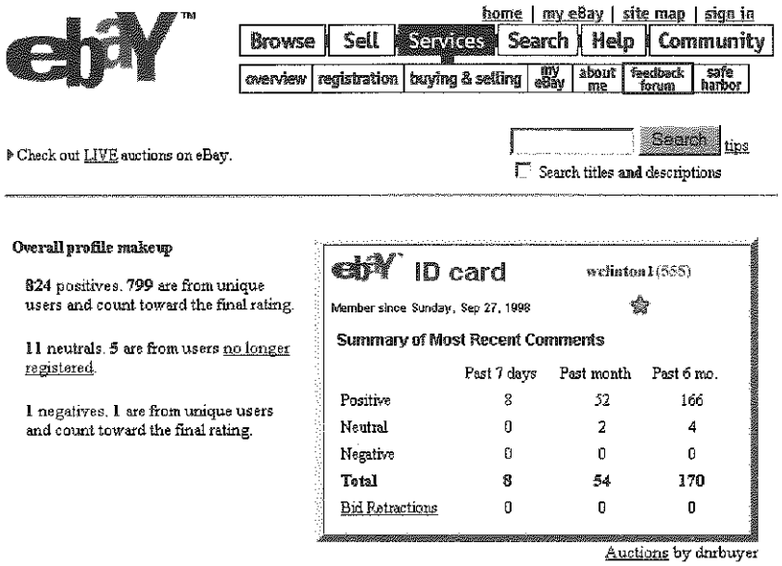
according to the rules prescribed at the site, knowledge of who is willing to pay the highest price emerges. As with any online space where something happens and where there is a process rather than simply information that can be accessed, managing the flow of information is critical. At most online auctions, for example, communication among bidders is limited to price. Communication between any bidder and a seller, however, can involve anything.

Online auctions are not extremely complex spaces but they are not simple either. In addition to informing bidders of information items such as what the object being sold is and looks like, what the highest bid is, and how much time is left in the auction, there must be information that encourages interested bidders to actually place a bid. Sellers usually do not have recognizable brand names, and trust among participants in the auctions may not be high. Every seller therefore, must figure out how to build trust, something that is not easy when it may not be clear where someone is physically located. Building the software that announces items for sale and manages bidding, therefore, was not all that was needed before the auction sites would be used. What was added was a system for allowing bidders to check on the reputation of the seller; this feature was needed in the virtual space, while an offline auction site might not have needed to provide it. This is done through a feedback system. Here in Figure 1.1 is a typical feedback rating screen that is used by eBay.

Auction sites have attracted a wide following partly because they allow a form of interaction that cannot take place offline at the same scale. In addition, they provide mechanisms for building trust and offer informational and communication options so that parties can feel comfortable that they know what they are bidding on, can make their own assessment of its value, and can feel confident that the item will be delivered if they place the highest bid. It should be obvious that the process of online auctions would not have grown as it has if offers had to be submitted via email, viewed by a human, and parties then were notified via email.

Auction sites are relevant to ODR not only because they have been designed with the information management capabilities of the

FIGURE 1.1 Sample eBay Feedback Rating.



Internet in mind, and not only because they are another example of an Internet space that was not thought of by persons in the offline auction industry, but because they can be looked at as a kind of specialized ODR site in which differences are resolved. What the auction does is foster a multiparty competition in which a winner is determined. The best auction sites not only have many items for sale but have an array of tools for locating and evaluating information, for engaging users, for building trust, and for reducing the sense of risk. The ultimate issue in an auction is price, but no one will participate if there is a lack of trust. Online auctions, even though they have an innately distrustful atmosphere, have

succeeded because of software that makes the auction a convenient multiparty negotiation space and that integrates devices for building trust.

Online Banks

Virtual banking spaces are possible because, while banks may appear to most people to be financial or monetary institutions, they are actually informational institutions. Banks need to be able to maintain records and accounts, transfer data about these accounts (this is called making a payment, or withdrawing money, or depositing money), and persuade users that they can be trusted to perform these functions without error. Many of us have salary checks deposited directly in our bank accounts, not by having our employer carry a huge bundle of paper checks to the bank, but by sending electronic messages that end up moving data (money) out of the employer's account and into that of the employee.

Online banking spaces try to make users comfortable doing what they have traditionally done inside physical banks, and then add capabilities for working with their accounts. Once money is represented by bits, it can be sent or received as payments, or even sent instantaneously to an online brokerage house.

We shall discuss later how any ODR space must be convenient, trustworthy, and deliver value. For those who use online banking spaces, these conditions are satisfied. They are certainly convenient for paying bills, they deliver value by allowing you to view accounts from anywhere at any time, and they are trustworthy to the extent that there are ways to contact a physical person at the bank if needed.

The value that online banks provide in the speed with which one can pay bills or check accounts is matched by the ability to do things that cannot be done inside physical banks. Any online informational space can do anything it wants to do with the information it has. A bank's information is not information as we normally think of it, but money. As the tools present in online banking

spaces are increased and enhanced, they will, as long as trust is maintained, provide value that is not available in physical banks.

Building a Dispute Resolution Space

We are interested in what dispute resolution spaces should look like, not how auction, bank, or marketplace spaces are set up. It is useful for you to think about the appearance, functions, and approaches of such sites and how they reveal the kind of thought and imagination that is needed to build any site where the challenge is to manage online information and interactions, thereby providing both convenience and trust. It is the successes and failures of these sites that can guide our thinking about what we would like to have in an ODR space, what the minimum array of features such a space should contain, and what we might hope to see added on over time.

Where Should Dispute Resolution Spaces Be?

You may think this is an odd question, since one of the most prized features of cyberspace is that a site can be accessible regardless of where it is physically located. Yet, the question of "where" does arise when we consider whether a dispute resolution space should be freestanding or connected in some way with another site.

There are many sites that are only usable by those who share some affiliation or have some other quality in common. A site, for example, may be accessible to AOL members and only after they have logged into the AOL site. If AOL wished to have a dispute resolution service, as it very well may, it has several choices. It can provide AOL subscribers with a special password that identifies them as AOL members and thus gains them access any time they wish to some external Web site. Or, the dispute resolution service could be integrated into the AOL site. A dispute resolution service is simply a software product. Once the product exists it can be duplicated, modified for different uses, and licensed. There

can be "private label" ODR spaces if that is what a site owner wishes to have.

The Web has been a relatively free and open place. There is a saying, traceable back to the Web's early days, that "on the Internet, information wants to be free." Much information and many sites are, and will continue to be, accessible at no cost. But it does not have to be that way. Technically, levels of permissions can be designed that are limited only by the creativity of a programmer. There have already been a huge number of online spaces created and whether these spaces are free or costly, open or restricted, convenient and trustworthy, or inconvenient with a high risk is a function of how the software code has been written.

Flexibility in configuring dispute resolution approaches online is both an opportunity and a challenge. The opportunity is that any business can, quite quickly, have its own "court" or, if it prefers, provide easy access of various kinds to external "courts." The challenge is that the choice of how easy access will be and how closely the ODR space will be identified with the sponsor can affect the independence and neutrality of the third party.

Any action that compromises the independence and neutrality of third parties diminishes their authority and effectiveness. There is a value, in other words, in promoting accessibility and yet trying to preserve some distance. The best way to handle this is to provide users with details of any relationship that exists between the Web site owner and the dispute resolution service. Is there a financial relationship between the Web site owner and the ODR service? Is dispute resolution subsidized by the Web site owner, or do fees or some other source cover the expense of the service?

Different marketplaces will face different kinds of challenges in explaining the relationship between the third party and the sponsoring Web site. In a marketplace like eBay, for example, SquareTrade.com acknowledges that dispute resolution is subsidized by eBay. Yet, it is the buyers and sellers who use eBay, not eBay itself, who are the parties in any dispute. A subsidy in this kind of marketplace is not a problem since it does not raise problems of

neutrality. If an ISP were to have a dispute resolution site and were to subsidize the service, possibilities for impropriety would be greater. In these cases, clear acknowledgment of the subsidy and why the ODR service believes its neutrality would not be compromised, should be explained.

Basic Building Choices

What approaches would provide the most fluid process of interaction and exchange? What media should be employed and what should the appropriate balance be between reliance on technology and reliance on people? These questions will resurface more than once in later chapters, but here are a few of the issues that must be faced.

- *Synchronous versus asynchronous communication*—An example of synchronous communication would be a chat room or other "place" where all are "present" and interact at the same time. Examples of asynchronous communication would be email or Web-based exchanges where one communicates at a time that is most convenient.
- *Image versus text versus numbers versus video*—The medium may not be the message but media do affect the message. Videoconferencing would allow real-time interactions with many of the qualities of face-to-face meetings. Text has other virtues, in that complex ideas can be explained and details of agreements can be preserved. Images, particularly animated or colored graphics, can show patterns and changes over time.
- *Automated versus human interaction*—How much and what kind of reliance should be placed on interaction with a machine, and when should trained third parties be employed? How can machines be employed to enhance the skills of the third party and to work with the third party rather than in lieu of it?

Enhancing ODR Space

Choices involving all three of the above categories of issues will be present in any attempt to construct a dispute resolution space. These are mostly choices about the manner in which exchanges should take place, and they will lead to considerable differences in ODR approaches. A further, and very significant, difference in sites will be a result of the degree to which information is processed as well as communicated.

Until a year or two ago, most Web sites were simply collections of files that were stored on a server. Clicking on a link meant that one of these files would appear on your screen. Anyone else who clicked on the same link would see the same information on their screen. Such Web sites are easy to set up, and costs for hosting them, if you do not own your own server, are relatively low.

More recently, it has become likely that clicking on a link will bring you something that will be different from what other people clicking on the same link will receive. This occurs because the server either knows something about you or you have been able to provide some specific criteria about the information that you want. Web servers are increasingly machines that not only store files that are sent whole to users but are machines that contain applications that collect information, assess it, and respond to requests for discrete data.

The simplest information processing of this sort occurs when one fills out an online form and clicks "submit." If I wish to purchase a new computer, I can go to a manufacturer's Web site and see a form on which I can select a processor speed, hard disk size, video monitor, sound card, and various other features. When I press "submit," I see on the screen, a few seconds later, what the configuration I want will cost.

More complex information processing occurs as information is obtained about users in more sophisticated ways. Network computers can be silent observers that keep track of one's online behavior and see patterns of behavior over time. If I have made several

airline reservations to San Francisco over the past few months, the next time I go to the travel site that I use it may alert me to any reduced airfares there might be to San Francisco. This may be a convenience to me. It is also a situation that raises many privacy concerns, since I may not want my travel patterns to be available to others without explicitly giving my permission first.

Dynamic Web sites, ones that collect and process information as well as store it, have flexibility in interacting with users that static sites do not have. They can direct certain information to some users and not to other users. They can provide "feedback" about a transaction that assures the user that the action actually took place. Most generally, information processing can add new levels of convenience by anticipating user needs and can contribute to trust building by monitoring the process and enhancing communication among all the participants.

Increasing convenience and trust are critically important goals in any online process, but information processing will also challenge skills and decision making. As just one relatively simple example, information processing allows great choice over how to present information to disputants. Would something be clearer if it were in the form of a table or graph, or presented in color rather than black and white? Once data are in electronic form, their manner of presentation can be altered quickly. For many third parties, there may be some new skills that will be needed. Those third parties that wish to employ their skills online will be challenged to expand their array of skills in various ways, but these new skills will probably also be increasingly useful in traditional face-to-face settings as well.

The next chapter reviews a decade of dispute resolution in cyberspace. Just as activity in general has accelerated greatly in the last year or two, so has ODR activity. Our consideration of what is needed to design an effective ODR space continues in Chapter Three.

2

A Brief History of ODR

Stage One: Pre-1995, *Listservs and Flaming, Changing Identities in Cyberspace, The Most Famous Early Dispute in Cyberspace;* **Stage Two: 1995–1998; Emerging Institutions: 1998 to the Present,** *Government and ODR, Blind Bidding Models, SmartSettle, Domain Name Disputes, SquareTrade;* **Beyond 2000.**

When we received our first email accounts in 1990, we were also given a detailed set of rules called an "Acceptable Use Policy." What surprised us most about these rules was the simple fact that they existed. A set of rules of this sort usually means that there have been problems serious enough or frequent enough to cause a policy to be developed. The mere existence of the policy, therefore, indicated to us that the Internet, even then, was not a conflict-free space.

One of the rules prohibited users from sending "chain letters." Obviously, it had occurred to a creative user that if chain letters worked with what was called "snail mail," they would also work, and work more quickly, with email. Since there was no financial cost to the sender of "chain emails," the number that might circulate was quite high. Our university, like other universities, banned the sending of electronic chain letters claiming that if large numbers of students started circulating chain emails, the computer system would be overloaded. It was not clear how valid this