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Going Private: Technology, Due Process, and Internet Dispute Resolution

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INTRODUCTION

Despite clichés about "Internet speed," disputes that arise on and about the Internet can be time-consuming to resolve, legally murky, and factually complex.[1] In response, Internet players with market power are opting out; mandatory arbitration is replacing both substantive law and court procedure and technological "remedies" are providing self-help without any "dispute resolution" at all. These alternative procedures tend to move faster than courts and cost their corporate creators less than lawsuits. They are also structured to maximize the success of the powerful. But faster is not always better. Cheap is not always fair or accurate. Market power is not always used to achieve the public good. And the power to make the rules is often the power to win the game. The Internet is a largely privatized world, and private actors are creating structures under which governments and their courts are increasingly irrelevant.[2]

This article will discuss four important contexts in which Internet disputes have become privatized in ways that provide substantial advantages to the already-powerful: 1) the domain name dispute policy of the Internet Corporation for Assigned Names and Numbers (ICANN), a form of mandatory online arbitration for the benefit of trademark owners; 2) the safe harbor take-down provisions of the Digital Millennium Copyright Act,[3] encouraging an Internet service provider to remove content from Web sites, without prior notice to the Web site owner, whenever a copyright holder alleges infringement; 3) "trusted systems" and the use of "digital rights management technology" to provide computer-activated self-help to those seeking to impose and automatically enforce contract terms, even terms at variance with real world substantive law; and 4) contractual "shrinkwrap" or "clickwrap" clauses creating their own "law" by mandating binding arbitration in

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[1] Michael E. Schneider & Christopher Kuner, *Dispute Resolution in International Electronic Commerce*, J. INT'L ARB., Sept. 1997, at 5, 10-11. In addition to the complexity inherent in most disputes, Internet transactions may also involve persons from multiple states or nations whose dealings with each other did not take place in physical space, were not based on face-to-face encounters, and are not clearly governed by the law of a particular jurisdiction or international treaty.

[2] The impact of the computer chip on the future of civil procedure may thus be even more drastic than that envisioned by Professor Carrington in his 1998 article. Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516 (1998).

[3] Digital Millennium Copyright Act of 1998, 17 U.S.C.A. § 512 (Supp. IV 1998) [hereinafter DMCA]; *see also* Pub. L. No. 105-304, 112 Stat. 2860 (1998) (originally H.R. 2281, 105th Cong. (2d Sess. 1998)).

consumer transactions.[4]

If left unchecked, these privatized systems and their probable technological extensions will have several consequences for the power of courts as institutions and for due process to litigants. First, they result in privatized justice. These processes take place independently, with little or no participation or sanction from government actors. Rather, private or even automated decision makers have sole power to control the rights of the parties. Second, the processes shift procedural advantage to certain powerful players. Rules can be designed to promote desired outcomes. Interim relief can be obtained without the need to prove irreparable injury or probable success on the merits and without a balancing of interests. Third, the mechanisms do not protect certain traditional components of due process in dispute resolution. Aspects of litigation such as affordable access to justice, notice, discovery, collective action, live hearings, confrontation of witnesses, a neutral decision maker, and a transparent process may be absent from these privatized processes. Fourth, by eliminating the courts as the arbiters of disputes, these processes decrease the power of government to shape and enforce substantive law. The "law" becomes what is specified in the contract or programmed into the software, and courts lose the ability to enforce mandatory rules and to subject contractual "law" to the needs of public policy.[5] These privatized systems can result in granting trademark owners protection they would not be granted under trademark law, copyright owners rights to prevent or license publications that they could not control under copyright law, and sellers rights to impose terms they could not impose under commercial law. They need not include public interests, such as free speech, an intellectual commons, and consumer protection, that real world governments balance against private property rights.

Governments can sit back and let this happen, or they can choose to intervene. Neither voluntary industry self-regulation nor ad hoc case law developments will be enough to assure that important values are protected in Internet dispute resolution. Rather than repeat platitudes

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[4] This article addresses only arbitration clauses that are imposed ex ante in transactions between a business and a consumer, especially those included in standard form contracts of adhesion. It does not question the potential benefits of arbitration clauses genuinely negotiated between parties with equal bargaining power, voluntary mediation programs, or even arbitration options meaningfully presented to a consumer after a dispute has arisen when there is no attached exhaustion requirement.

[5] Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 531 (1999) ("Consequences that a court might resist . . . the code can impose without hesitation.").

about the "unique qualities of the Internet"[6] we must choose the shape of dispute resolution for the future.

Section I of this article discusses the philosophy of privatization that prevails on the Internet. It describes how this philosophy has developed from the libertarian notions of the early Net users to the *laissez faire* market freedom of the "new economy." Section II describes four situations in which technology, private contract, and government encouragement and/or acquiescence have privatized Internet dispute resolution. Section III considers the consequences of this trend toward privatization for the parties, society, and government.

I. PRIVATIZATION AND THE INTERNET

Since its scientific beginnings,[7] the Internet has been largely self-regulated. That de facto status has come to be seen as a sort of natural phenomenon or political entitlement. Early Net architects deliberately designed a system based on open code and the sharing of information.[8] The "Declaration of Independence of Cyberspace" expresses traditional libertarian Internet values:

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.
>
> We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you

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[6] The White House, *A Framework for Global Electronic Commerce* (July 1, 1997), http://www.ecommerce.gov/framewrk.htm (last visited Nov. 21, 2000) [hereinafter Magaziner Report], at 3.

[7] For general history of the development of the Internet and World Wide Web, see Douglas Dangerfield, *Web Surfing, or "The Internet for the Uninformed"*, AM. BANKR. INST. J., Mar. 1996, *available at* 1996 ABI JNL. LEXIS 496; Walt Howe, *Delphi FAQs: A Brief History of the Internet, at* http://www.delphi.com/navnet/history.html (last modified Sept. 24, 2000); David P. Miranda, *Defamation in Cyberspace:* Stratton Oakmont, Inc. v. Prodigy Services Co., 5 ALB. L.J. SCI. & TECH. 229, 230-31 (1996); Bruce Sterling, *Short History of the Internet*, THE MAGAZINE OF FANTASY AND SCIENCE FICTION, Feb. 1993, at F&SF Science Column #5, *available at* http://www.eff.org/pub/Publications/BruceSterling/FSF_columns /fsf.05 (last visited Dec. 5, 2000).

[8] Lawrence Lessig, *Open Code and Open Societies: Values of Internet Governance*, 74 CHI.-KENT L. REV. 1405, 1406, 1410-1415 (1999).

possess any methods of enforcement we have true reason to fear.[9]

The early Net users were scientists and academics, and they used the Internet to collaborate and trade information. However, the development of the World Wide Web, including its graphics, colors, links, and browsers made it a medium that could be used easily by the public at large, and in 1991 the Internet was opened to commercial use.[10] In 1995, the World Wide Web took off, with the number of users growing at a rate of twenty percent per month.[11] As many as 90 million Americans now regularly use the Internet, and about 69% of them shopped online in the third quarter of 1999.[12] The ideological hostility to government intervention shared by early Internet enthusiasts has now been bolstered by the free market vision of the commercial users. "Privatization is all the rage"[13] in commercial law, and it is perhaps nowhere as popular as on the Internet.[14] Some cyber-theorists argue that Web "governance" should be created by Web users rather than imposed by the government. This law created by contract is alleged to be both more efficient[15] and more fair than whatever a traditional legal system

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[9] John Perry Barlow, *A Cyberspace Independence Declaration* (Feb. 9, 1996), *at* http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration (setting forth principles of Electronic Frontier Foundation, organization created for purpose of protecting Internet from government intervention).

[10] This overturned the policy that commercial traffic was not an acceptable use of the publicly-funded information infrastructure.

[11] Dangerfield, *supra* note 7, at *4-*5.

[12] *Tech giants suggest rules to protect Net shoppers*, REUTERS (June 6, 2000), http://news.cnet.com/news/0-1007-200-2026227.html (last visited June 22, 2000) (on file with author).

[13] Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704 (1999). For a discussion of privatized procedure and substantive law in the tort context, see Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413 (1999) (explaining shift from public law model of mass tort litigation to hybrid form that shares attributes of both private law and public law models).

[14] Mark A. Lemley, *The Law & Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1257 (1998).

[15] "In the world of the Web, service providers are better than lawmakers at creating effective ways to resolve conflicts and regulate wrongdoing by users . . . ." David R. Johnson, *Industry and Government Have Swapped Traditional Roles of Advocacy and Oversight in Shaping Internet Policy*, LEGAL TIMES, Oct. 12, 1998, at 28; *see* David G. Post & David R. Johnson, *Chaos Prevailing on Every Continent: Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI.-KENT L. REV. 1055, 1086-88 (1998) (arguing that allowing individuals to define limits of their movement in and out of governing bodies will allow for faster responses to trends in Internet). Such theorists often refer to desirable Net ordering as "bottom-up," a term coined by Freidrich Hayek that refers to "the laissez-faire network of promises among individuals, the growing-up of customary norms" (good), as opposed to "top-down" law laid down by the state (bad). Margaret Jane Radin & R. Polk

can offer.[16]

Sometimes this privatization is outward and visible as, for example, with a contractual clause calling for mandatory binding arbitration. Sometimes this exercise of power is hidden because it is embedded in the very architecture of the Internet. When a result is compelled by software programming, or by the way the Internet is structured, it obtains the power of law.[17] Some enthusiasts, in fact, look forward to the day when computer code makes courts unnecessary. Bill Frezza, in *Internet Week*, envisioned complete automation of Internet dispute resolution and enforcement: "What if there were a way . . . that does not rely on judicial intervention to interpret rights or the police power of the state to enforce them? A way in which laws, *along with their enforcement*, could be designed into the products or transactions themselves?"[18]

Ironically, this freedom from government control is supported by the government.[19] In 1997, the Clinton Administration released a document setting out a blueprint for the promotion of electronic commerce.[20] The "Framework for Global Electronic Commerce" (more commonly called

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Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1297 (1998) (criticizing ideal of "private ordering" in cyberspace).

[16] *See* David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing that architecture of cyberspace precludes notice of governing law that is crucial to law's legitimacy, and that "spillover" effects lead to application of law of nation with no right to govern particular transaction); *see also* Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 401 (2000) (explaining that for supporters of cyberspace self-government, "cyberspace is partly a model and partly a metaphor for a fundamental restructuring of our political institutions"). Professor Netanel further notes:

> Cyberians view cyberspace as a realm in which 'bottom-up private ordering' can and, indeed, should supplant rule by the distant, sluggish, and unresponsive bureaucratic state. By its very architecture and global reach, they contend, cyberspace will ultimately elude the strictures of state-created law, challenging the efficacy and theoretical underpinnings of the territorial sovereign state.

Id.

[17] *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (Basic Books 1999) (asserting that code is law); *see also* James Boyce, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177 (1997) (discussing government and power on Internet); Lessig, *supra* note 5 (discussing some problems of regulation in cyberspace and suggesting particular approach to resolving question of regulation).

[18] Bill Frezza, *How the Internet Will Change the Rule of Law*, INTERNET WEEK, Sept. 22, 1997, *available at* 1997 WL 12653363 (emphasis added).

[19] "Not since the days of oil barons and railway tycoons has Washington been so in the thrall of a group of corporate executives." Jeffrey H. Birnbaum, *Getting to Know the Hill*, TIME, Aug. 14, 2000, at B12, B15, *available at* http://www.time.com/time/magazine/articles/0,3266,52104,00.html (last visited Nov. 21, 2000).

[20] Magaziner Report, *supra* note 6.

the "Magaziner Report") is organized around a set of principles encouraging privatization:

- "The private sector should lead."
- "Governments should avoid undue restrictions on electronic commerce."
- "Where governmental involvement is needed, its aim should be to support and enforce a predictable, minimalist, consistent and simple legal environment for commerce."[21]

While the Magaziner Report notes that government action may be necessary to protect consumers, its general rule is that "parties should be able to do business with each other on the Internet under whatever terms and conditions they agree upon."[22] As Professor Michael Froomkin has pointed out, the Magaziner Report portrays "the private sector . . . in its heroic mode, needing only to have moribund rules removed to allow its unleashed animal spirits to carry the day. In effect, the private sector rules, or should rule."[23] The role of the government is to provide a legal environment that allows private parties to rely on and enforce the deals they have made and to take full advantage of what technology makes possible.[24]

This combination of private forces, government cooperation, and technological feasibility is creating a disturbing trend. The courts are being marginalized and squeezed out of dispute resolution. When the technology of the Internet is capable of providing a remedy attractive to those with the power to design it, there is incentive to use it. When the "law", procedural as well as substantive, is unappealing, a combination of contract and technology minimize its impact.[25] Further, the benefits of this privatization are not evenly distributed but result in some clear winners: trademark owners, copyright holders, and corporate repeat players. The use of contract is already moving much of this dispute resolution out of the courtroom. We are not far from a time when technology makes it possible to move it out of the human realm.

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[21] *Id.* at 2-3. Note that this legal environment should be "based on a decentralized, contractual model of law rather than one based on top-down regulation." *Id.*

[22] *Id.* at 6.

[23] A. Michael Froomkin, *Of Governments and Governance*, 14 BERKELEY TECH. L.J. 617, 620 (1999).

[24] The Report tacitly assumes that technology is incapable of doing harm.

[25] Lemley, *supra* note 14, at 1259 ("[T]he common goal of these quasi-private ordering advocates is to decentralize governance and return control to the people—at least, the people who write the contracts.").

II. FOUR WORLDS OF PRIVATIZED DISPUTE RESOLUTION

A. Domain Name Disputes

1. The Problem

On the Internet, a system called "domain names" is used to locate people and organizations. Domain names translate the long strings of numbers that computers use to send data from one computer to another into words that are easier for humans to use.[26] For example, the domain name www.amazon.com locates an Internet site for Amazon.com, Inc. at Internet address 208.216.182.15 and a particular host server named "www." The "com" part of the domain name reflects the purpose of the organization (in this example, "commercial") and is called the top-level domain name.[27] The "amazon" part of the domain name defines the organization or entity and together with the ".com" is called the second-level domain name.

These second-level domain names must be unique on the Internet; there can be no more than one amazon.com. That was no problem in the early days of a small number of largely academic and governmental users. It poses a huge problem now, with businesses all over the world scrambling to acquire the second-level domain name that the public associates with their business and to wrest those domain names from people who first registered them.[28] According to Professor Jonathan Zittrain, "Major trademark holders, somewhat late to the Internet

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[26] For a more complete and technical explanation of domain names, Internet protocol (IP), transmission control protocol (TCP), and the domain name system, see Whatis, *at* http://www.whatis.com (last modified Mar. 23, 2000). *See also* Jon Postel, Information Science Institute, *Domain Name System Structure and Delegation, Request for Comments: 1591*, *at* http://info.internet.isi.edu/in-notes/rfc/files/rfc1591.txt (Mar. 1994).

[27] Although there are about 260 approved top-level domains, most of them are country codes (ccTLDs). There are seven "generic" top-level domains (gTLDs), but the three most popular are .com, .net, and .org. This popularity stems in part from the fact that the early search engines only indexed these three domains. Diane Cabell, *Name Conflicts, Top Level Domains*, Learning Cyberlaw in Cyberspace, *at* http://www.cyberspacelaw.org/cabell/index.html (last modified Aug. 25, 1999). ICANN has recently adopted a tentative plan to create additional top-level domain names.

[28] The uniqueness of second-level domain names means that domain name holders will have broader rights than those granted by trademark law, where multiple companies can have the same trademark so long as there is no danger of confusion. For example, "Amazon" could be a travel company in Texas, a women's health club in Massachusetts, and a book store in California, all without infringing each other's rights. The Internet allows no such flexibility at present.

themselves, found their marks already registered when they attempted to take up shop online."[29] Many were registered by individuals or small businesses who intended to use the name. In addition, a new type of entrepreneur, called a "cybersquatter," made a business out of registering well known domain names for the purpose of selling them back to the trademark owner at inflated prices.[30] The price reflected both the trademark owner's strong desire to use its name as a domain name and the probable cost of litigation to acquire the domain name.

2. The System

The Internet's domain name system is currently (since 1998) administered by ICANN, a private not-for-profit corporation, under the authority of a series of understandings with the U.S. Department of Commerce.[31] One of its first charges was to create a dispute resolution policy to allow cheap, fast resolution of conflicts regarding rights to domain names. ICANN approved its Uniform Domain Name Dispute Resolution Policy[32] and Rules for Uniform Domain Name Dispute Resolution Policy[33] on October 24, 1999, and they went into effect on December 1, 1999. ICANN imposes this policy on all approved Registrars, and through them onto all who acquire domain names.[34]

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[29] Jonathan Zittrain, *ICANN: Between the Public and the Private— Comments Before Congress*, 14 BERKELEY TECH. L.J. 1071, 1079 (1999). Domain registration is done on a first-come, first-served basis.

[30] Whatis, *Cybersquatting, at* http://www.whatis.com (last modified, Oct. 13, 2000).

[31] *See* ICANN, *Approved Agreements among ICANN, the U.S. Department of Commerce, and Network Solutions, Inc., at* http://www.icann.org/nsi/nsi-agreements.htm (Nov. 10, 1999). ICANN is pronounced EYE-can, as in "I can at least try to manage the Internet." Whatis, *ICANN, at* http://www.whatis.com (last modified Mar. 16, 2000). In a sense, ICANN is the successor to the Internet Assigned Numbers Authority (IANA), which in turn derived its authority under a contract from the U.S. government which financed the original research network, ARPANET, from which the Internet grew. The need to internationalize the governing of the Internet led the U.S. government to recommend the origin of ICANN as a global, non-government entity. *Id.* For a fuller (and more gossipy) account of the transfer of authority to ICANN, see Laura Pearlman, *Truth, Justice and the Dot-Com Wars*, LAW NEWS NETWORK, *at* http://www.lawnewsnetwork.com/practice/techlaw/news/A20216-2000Mar31.html (Mar. 31, 2000).

[32] ICANN, *Uniform Domain Name Dispute Resolution Policy, at* http://www.icann.org/udrp/udrp-policy-24oct99.htm (Aug. 26, 1999) [hereinafter *ICANN Policy*].

[33] ICANN, *Rules for Uniform Domain Name Dispute Resolution Policy, at* http://www.icann.org/udrp/udrp-rules-24oct99.htm (Aug. 26, 1999) [hereinafter *ICANN Rules*].

[34] Registrars are companies, licensed by ICANN, that have the power to assign new domain names. Registrars must be accredited by ICANN, and they must agree to abide by

The ICANN policy allows a trademark holder who alleges that a domain name infringes on its mark to submit a complaint to any dispute resolution provider (DRP) approved by ICANN.[35] The complainant must allege and convince the arbitrator that:

1. the domain name is identical or confusingly similar to the complainant's trademark or service mark; and

2. the domain name holder has no rights or legitimate interests in the domain name; and

3. the domain name has been registered and is being used in bad faith.[36]

The Policy also provides a non-exhaustive list of circumstances that are "evidence" of bad faith:

1. the domain name holder registered or acquired the domain name primarily for the purpose of selling it to the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of documented out-of-pocket costs; or

2. the domain name was registered in order to prevent the owner of the trademark or service mark from using its mark in a domain name, provided that the domain name holder has engaged in a pattern of such conduct; or

3. the domain name was registered primarily for the purpose of disrupting the business of a competitor; or

4. by using the domain name, the owner has intentionally attempted to attract, for commercial gain, Internet users to its Web site, by creating a likelihood of confusion as to the source,

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ICANN's rules. *See* ICANN, *Registrar Accredidation: Process*, http://www.icann.org/registrars/accreditation-process.htm (last modified June 22, 2000). ICANN's rules require the registrars to incorporate the UDRP into the registration agreements between the registrar and the domain name holders. Paragraph 1 of the ICANN Policy informs domain name holders that the dispute resolution policy is "incorporated by reference into your Registration Agreement." *ICANN Policy*, *supra* note 32, § 1.

[35] There are currently four approved DRPs: 1) World Intellectual Property Organization (WIPO); 2) The National Arbitration Forum (NAF); 3) eResolution (eRes); and 4) CPR Institute for Dispute Resolution (CPR). *See* ICANN, *Approved Providers for Uniform Domain Name Dispute Resolution Policy*, *at* http://www.icann.org/udrp/approved-providers.htm (last modified Oct. 17, 2000).

[36] *ICANN Policy*, *supra* note 32, § 4(a).

> sponsorship, affiliation, or endorsement of its Web site or of a product or service on its Web site.[37]

The domain name holder (the "respondent" under the ICANN policy) has three possible affirmative defenses (note, however, that their elements overlap considerably with the complainant's burden of proof):

> 1. before any notice of the dispute, the domain name holder used, or made demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offer of goods or services; or
>
> 2. the domain name holder has been commonly known by the domain name (even absent a trademark or service mark); or
>
> 3. the domain name holder is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.[38]

These standards, then, involve the resolution of fact-intensive issues such as confusing similarity, bad faith, the intent behind registration, fair use, and whether conduct would tarnish a trademark or service mark. You might expect the resolution of such disputes to involve procedural devices such as discovery or live hearings or cross examination. You would be wrong. Rather, the main point of this policy is that it is fast and cheap.[39] The complaint is filed[40] in writing, and it must describe the manner in which the domain name is similar to the trademark, why the

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[37] *Id.* § 4(b).

[38] *Id.* § 4(c). The ICANN Policy is similar to U.S. law, but it is not in fact the same as the law of any actual country. For example, compare the Policy to the recently-enacted Anti-Cybersquatting Consumer Protection Act (ACPA), 15 U.S.C.A. § 1125(d) (West Supp. 2000) (section 43(d) of the Lanham Act). *See* Emerson H. Tiller, *ICANN's Uniform Domain Name Dispute Resolution Policy: An Overview and Critique*, 1 INTERNET L. & BUS. 589, 591-93 (2000) (explaining requirements of each affirmative defense).

[39] Tiller, *supra* note 38, at 589.

[40] Just as a plaintiff in litigation could choose the forum (within limits), the complainant here can choose any of the approved dispute resolution providers. *ICANN Policy*, *supra* note 32, § 4(d). While it is somewhat too early to draw conclusions, it appears that the different providers have statistically stronger and weaker tendencies to rule in favor of the trademark owner. As of late summer 2000, WIPO has ruled for the trademark holder more than 80% of the time, while eResolution has done so about 55% of the time. The complainants seem to have noticed. While WIPO got 29% of the complaints filed in January, 2000, it got 61% of the complaints filed in July, 2000. *See* Michael Geist, *WIPO wipes out domain name rights*, THE GLOBE AND MAIL, Aug. 24, 2000, *available at* http://www.globetechnology.com/archive/gam/E-Business/20000824/TWGEIS.html.

domain name holder has no rights in it, and why the domain name should be considered as having been registered and used in bad faith. The complaining trademark owner must also attach documentary or other evidence, including the trademark or service mark registration.[41] The complainant pays the filing fee.[42] Since this complaint will, in effect, form the basis for the decision, it will probably contain more factual detail than "notice pleading" would require.[43]

The domain name holder/respondent must be notified within three calendar days[44] and has twenty days from the commencement of the proceeding to submit a response.[45] That response must address specifically the statements in the complaint as well as any applicable affirmative defenses.[46] If the respondent wants a three-member panel rather than a single arbitrator, it must pay half of the applicable fee.[47] If the respondent fails to respond, the case will be decided based on the complaint.[48] The arbitrator has the power to determine the admissibility,

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[41] The DRP is allowed to impose page or word limits on the complaint, response, and opinion. *ICANN Rules, supra* note 33, §§ 3, 5.

[42] *ICANN Policy, supra* note 32, § 4(g); *ICANN Rules, supra* note 33, § 19(a).

[43] The legal fees involved would likely be more than required for merely drafting a court complaint, but far less than would be required to litigate a preliminary injunction request. It is possible, therefore, that a trademark owner who expects the domain name holder to default would actually be better off filing a lawsuit in federal court, where the filing fees would be less than $750. Both filing fees and the cost of preparing the initial document will be lower in federal court. The Eastern District of Virginia, the federal district in which Network Solutions, Inc. is located, has held that the act of registering the domain name is a sufficient basis for specific personal jurisdiction there in a suit under section 1125(d) of the Anticybersquatting Consumer Protection Act, 15 U.S.C.A. § 1125(d) (West Supp. 2000). *See* Lucent Techs., Inc. v. Lucentsucks.com, 9 F. Supp. 2d 528, 534 (E.D. Va. 2000). *But see* Am. Online, Inc. v. Huang, 106 F. Supp. 2d 848 (E.D. Va. 2000) (granting defendant's motion to dismiss for lack of personal jurisdiction). Even if the defendant unexpectedly answers, the Eastern District is the home of the "rocket docket" which emphasizes limited discovery and early trial settings. The ACPA also has an in rem provision which has been upheld by some courts. *See, e.g.*, Heathmount A.E. Corp. v. Technodome.com, 106 F. Supp. 2d 860 (E.D. Va. 2000); BroadBridge Media, L.L.C. v. Hypercd.com, 106 F. Supp. 2d 505 (S.D.N.Y. 2000).

[44] *ICANN Rules, supra* note 33, § 4(a).

[45] *Id.* § 5(a).

[46] *Id.* § 5(b)(i).

[47] The fees vary by provider, and vary according to the number of domain names in dispute, but the total fee for multiple panelists would be between $2,000 and $4,000 for most cases. *See, e.g.*, CPR Institute for Dispute Resolution, *CPR's Supplemental Rules and Fee Schedule*, http://www.cpradr.org (last visited Nov. 21, 2000); eResolution, *Schedule of Fees*, http://www.eresolution.ca/services/dnd/schedule.htm (last modified Oct. 2, 2000); National Arbitration Forum, *Schedule of Fees*, http://arbforum.com/domains (last visited Nov. 21, 2000).

[48] Recent decisions have indicated that the failure to respond is proof of bad faith. *See, e.g.*, AFC Enters. V. Max Mktg., Case No. D2000-0975 (WIPO Oct. 12, 2000),

relevance, materiality, and weight of the evidence, and may request further statements and documents from the parties.[49] The ICANN Rules provide that there "shall be no in-person hearings (including hearings by teleconference, videoconference, and Web conference)" unless the arbitrator "determines, in its sole discretion and as an exceptional matter, that such a hearing is necessary for deciding the complaint."[50] They direct the arbitrator to forward his decision on the complaint to the DRP within fourteen days of his appointment.[51] The decision is supposed to be in writing and provide the reasons on which it is based.[52] If the arbitrator rules for the complainant, ICANN will require the cancellation of the domain name or its transfer to the complainant.[53] The only way for the domain name holder to prevent the cancellation or transfer is to file a lawsuit against the trademark owner and provide a file-stamped copy of the complaint to ICANN within ten business days.[54] Thus, the whole process should thus be resolved in less than two months.

The original purpose for the ICANN dispute resolution process was to create a remedy for a narrowly defined group of particularly egregious cases. During the initial drafting process, the procedure was said to be available "only in respect of deliberate, bad faith, abusive, domain name registrations or 'cybersquatting.'"[55] ICANN's staff repeated this promise after receiving public comments on the proposed policy. They assured concerned commentators that "the policy . . . calls for administrative resolution for only a small, special class of disputes," namely those "involving 'abusive registrations' made with bad faith intent to profit commercially from others' trademarks."[56]

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http://arbiter.wipo.int/domains/decisions/html/d2000-0975.html; Mars, Inc. v. Vanilla, Ltd., Case No. D2000-0586 (WIPO Sept. 1, 2000), http://arbiter.wipo.int/domains /decisions/html/d2000-0586.html; Ty, Inc. v. O.Z. Names, Case No. D2000-0370 (WIPO June 27, 2000), http://arbiter.wipo.int/domains/decisions/html/d2000-0370.html; Suntex Int'l, Inc. v. 24game, Case No. D2000-0408 (WIPO June 26, 2000), http://arbiter.wipo.int /domains/decisions/html/d2000-0408.html.

[49] *ICANN Rules*, *supra* note 33, § 10(d).

[50] *Id.* § 13.

[51] *Id.* § 15(b).

[52] *Id.* § 15(d).

[53] *ICANN Policy*, *supra* note 32, § 3. There are no provisions for money damages. *Id.*

[54] *Id.* § 4(k). The lawsuit must be filed in a "mutual jurisdiction," which will generally be either the location of the domain name registrar's principal office or the domain name holder's residence as shown in the registrar's Whois database at the time the complaint is filed. *Id.*

[55] WIPO, *Final Report of the WIPO Internet Domain Name Process* § 135(i) (Apr. 30, 1999), http://wipo2.wipo.int/process1/report/finalreport.html (last visited Nov. 27, 2000).

[56] Anonymous, *Does the UDRP Provide for Constructive Notice of Trademarks?*, 1

Nevertheless, the dispute resolution procedure has been used in all sorts of trademark/domain name disputes and even disputes involving un-trademarked famous names. Between December 1, 1999 and July 31, 2000, 1330 new complaints were filed, involving 2252 domain names.[57] Of the 1193 domain names disposed of by decision, only about 19% were decided in favor of the domain name holder. The rest resulted in transferring the domain name to the trademark owner (900), canceling the domain name (14), both canceling and transferring challenged names (4), or in a split decision (44).[58]

The ICANN process is mandatory in the sense that once a complaint is filed it will be processed by the dispute resolution provider unless the complaint is settled or withdrawn. If the domain name holder does not respond, it will almost certainly lose, and ICANN will order its domain name transferred or canceled. It is not mandatory in the sense that the ICANN rules do not preclude the filing of a lawsuit, either during the proceeding or after its conclusion.[59] A trademark owner who believes that, given its particular circumstances, a federal lawsuit would be more advantageous is free to pursue that option instead of, or in addition to, the ICANN procedure.[60]

3. ICANN Scenarios

The year is 1995. Imagine four possible dot-coms: 1) Caleb South registers the domain name delta.com to display pictures and news about his new baby girl, Delta;[61] or 2) Delta Fishing Trips, a new company that

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INTERNET L. & BUS. 584, 586 (2000), (quoting ICANN, *Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy* § 4.1(c), *at* http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm (Oct. 25, 1999)).

57 ICANN, *Statistical Summary of Proceedings Under Uniform Domain Name Dispute Resolution Policy*, http://www.icann.org/udrp/proceedings-stat.htm (last visited Nov. 21, 2000) [hereinafter *ICANN Statistics*] (providing daily-updated summary of status of proceedings).

58 *Cf. ICANN Statistics, supra* note 57 (displaying updated numbers).

59 *ICANN Policy, supra* note 32, at § 4(k). The arbitrator has the discretion to stay the ICANN proceeding (or not) during the pendency of court litigation. *ICANN Rules, supra* note 33, § 18(a). It is unsettled at this time whether ICANN decisions will be entitled to some degree of deference in any related litigation. *See, e.g.*, Weber-Stephen Prods. Co. v. Armitage Hardware & Bldg. Supply, Inc., 54 U.S.P.Q.2d 1766 (N.D. Ill. 2000); Weber-Stephen Prods. v. Armitage Hardware, Case No. D2000-0187 (WIPO May 11, 2000), http://www.arbiter.wipo.int/domains/decisions/html/d2000-0187.html.

60 *ICANN Policy, supra* note 32, § 4(k).

61 *Cf.* Karen Kaplan, *What's in a Name? A Legal Tangle for a Little Girl*, L.A. TIMES, Jan. 18, 1999, *available at* http://www.wcbcourses.com/wcb/schools/LEXIS/law07/llew/2/files/veronicadomainname.htm (last visited Nov. 27, 2000).

plans to organize fishing trips in the Louisiana bayous registers the domain name delta.com in order to advertise its services to tourists visiting the area;[62] or 3) the Association of Unhappy Travelers registers the domain name delta.com for the purpose of satirizing Delta Airlines;[63] or 4) Dave Smith registers delta.com for the purpose of selling it to some "delta" based business, who will want that domain name when they wake up to the commercial possibilities of online advertising or sales.[64]

Now it's the year 2000. Delta Airlines wants to start its own Web site and wants the domain name most customers will try first, delta.com.[65] Imagine that Delta Airlines files a complaint under the ICANN procedure against any of the four hypothetical domain name registrants. Delta Airlines will choose the DRP and file a complaint that includes the required information.

Caleb South, who cannot afford to hire a lawyer to defend his baby's Web site, and who is intimidated by the prospect of a legal dispute with a big company, defaults. ICANN will order his Web site transferred to Delta Airlines.[66] Delta Fishing Trips likewise cannot afford a lawyer. Its

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[62] *See* 3636275 Canada v. eResolution.com, Case No. D2000-0110 (WIPO Apr. 10, 2000), http://www.arbiter.wipo.int/domains/decisions/html/d2000-0110.html (finding both no legitimate interest and bad faith registration even though domain name was registered prior to existence of complainant, which was doing business as eResolution); *cf.* Rockport Boat Line (1994) Ltd. v. Gananoque Boat Line Ltd., File No. FA00040000094653 (NAF May 10, 2000), http://www.arbforum.com/domains/decisions/94653.htm (finding no evidence of bad faith where Gananoque Boat Line registered domain rockportboatline.com, despite fact that Rockport Boat Line operated business under that name out of Rockport, Ontario, and Gananoque is competitor that does not operate out of Rockport). *See generally* Lisa Naylor, *Individuals Getting Wiped Out by WIPO*, THE STANDARD, Sept. 5, 2000, http://www.thestandard.net/article/display/0,1151,18239.00.html (discussing award to complainants of lemond.com and barcelona.com).

[63] *Cf.* Compagnie de Saint Gobain v. Com-Union Corp., Case No. D2000-0020 (WIPO Mar. 14, 2000), http://www.arbiter.wipo.int/domains/decisions/html/d2000-0020.html (noting that respondent who registered domain name for use in conjunction with web site on which shareholders of complainant could exchange views did not have rights or legitimate interest in respect of domain name).

[64] *Cf.* Hearst Communications, Inc. v. Spencer, File No. FA0093763 (NAF Apr. 13, 2000), http://www.arbforum.com/domains/decisions/93763.htm (finding esquire.com not generic in holding that mark of David Spencer, doing business as Mail.com, Inc., was both confusingly similar and registered in bad faith).

[65] In fact, delta.com is registered by Delta Funding Company of Woodbury, NY. For an explanation of why a commercial enterprise wants the domain name associated with its trademark, see Carl Oppedahl, *Analysis and Suggestions Regarding NSI Domain Name Trademark Dispute Policy*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 73, 77-81 (1996). The real Delta Airlines home page is located at www.delta-air.com.

[66] Ironically, then, the domain name holder who probably has the best claim to good faith registration under the ICANN policy may be the least likely to assert his rights when challenged.

owner files a response claiming that it really intends to start a company with the Delta name, and has begun to do so, but that argument is rejected by the arbitrator who orders the domain name transferred to Delta Airlines. Delta Fishing Trips also cannot afford the legal fees to file suit to prevent the transfer. The Association of Unhappy Travelers files a response claiming non-commercial fair use, loses, and likewise is unwilling to spend its resources in major litigation against a multinational corporation.[67] Dave Smith, whose business revolves around registering generic "dictionary word" domain names and offering them for sale to the general public, hires a lawyer and responds, and spends the money to request a three-arbitrator panel. He loses the ICANN proceeding. Since delta.com is just one of Dave's many domain names for sale, he writes it off as a loss and also chooses not to file a lawsuit.[68]

In each hypothetical case, the trademark owner achieved its goal: fast, comparatively inexpensive transfer of the domain name. The decisions may or may not be "correct" applications of ICANN's Policy, but they were rendered quickly and they are in effect final.

As technology develops, this process may become automated, rendering even faster and less expensive dispute resolution. Trademark owners could develop software to search out domain names that they deem confusingly similar to their trademark. The software could then automatically generate a cease and desist letter, which it could send by e-mail to the domain name owner identified in the Registrar's "whois" database.[69] If the domain name is not transferred or canceled within a short period of time, the computer could generate an automated Complaint, which it could file with the company's favored DRP. The DRPs could also automate the decision making process.[70] Most fact

[67] *Cf.* Wal-Mart Stores, Inc. v. Walsucks, Case No. D2000-0477 (WIPO July 20, 2000), http://www.arbiter.wipo.int/domains/decisions/html/d2000-0477.html (holding that several "Wal-Mart sucks" domains constituted extortion and not free speech).

[68] *Cf.* J. Crew Int'l, Inc. v. crew.com, Case No. D2000-0054 (WIPO Apr. 20, 2000), http://www.arbiter.wipo.int/domains/decisions/html/d2000-0054.html (holding that repondent was domain name speculator who both had no legitimate interest in "crew.com" and registered domain name in bad faith).

[69] Network Solutions, Inc. (NSI), the original private Registrar, allows a search of its database from its website, which will lead the researcher to information about the name and contact information for the domain name owner. *See* Network Solutions, *Whois Lookup*, *at* http://www.networksolutions.com/cgi-bin/whois/whois (last visited Sept. 30, 2000).

[70] Actually, if the process becomes automated it should no longer be necessary to have DRPs; the computer that decides the case could be centralized at ICANN and a single program used to resolve the cases. While we tolerate different humans making different decisions on the same facts, it seems unlikely that we would tolerate computers with different programming making different decisions on the same facts.

patterns will become so routine as ICANN builds its database of ICANN decisions (they are, after all, based on paper allegations) that no human arbitrators would be required: an algorithm could resolve the dispute. This would not even take the fourteen days currently allotted for decision. The DRP's computer could notify both parties and ICANN of the result by e-mail. If the trademark owner prevails and the ICANN computer doesn't receive notice that the domain name owner files a lawsuit within ten days, ICANN's computer could automatically order the relevant Registrar to cancel or transfer the domain name to the complainant. Fanciful? Maybe. It would require a complex and sophisticated program. A human might at least be required to examine the supporting documentation to see if it is consistent with the parties' allegations.[71] Greater automation and speed, however, are sufficiently prized that there would be incentive to design such a program, and generous rewards for its designer.[72]

B. Notice and Take-Down of Web Sites under the Digital Millennium Copyright Act[73]

1. The Problem

The purpose of copyright law is to give authors an incentive to create and distribute new works.[74] Without such protection, it is feared, authors would not be adequately compensated and would not, therefore,

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[71] The current ICANN Rules require both complainant and respondent to include a statement that "the information contained . . . is to the best of [the filer's] knowledge complete and accurate, that [the pleading] is not being presented for any improper purpose, such as to harass, and that the assertions . . . are warranted under these Rules and under applicable law, as it now exists or as it may be extended by a good-faith and reasonable argument." *ICANN Rules, supra* note 33, §§ 3(b)(xiv), 5(b)(viii), 15(d). These provisions appear to be modeled after Rule 11 of the Federal Rules of Civil Procedure. There is, however, no sanction available against a party who falsely makes these statements.

[72] Compare the kind of programming required for domain name decisions, which require information about events happening outside the computers themselves, with the kind of programming required for digital rights management technology, discussed in Part I.C, *infra*.

[73] This section of the article focuses on Title II of the DMCA, known as the Online Copyright Infringement Liability Limitation Act, codified at 17 U.S.C.A. § 512 (West Supp. 2000), and in particular on the notice and take-down provisions of § 512(c).

[74] *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984). *See also* William Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) ("Striking the correct balance between access and incentives is the central problem of copyright law.").

create. The incentive to create serves the broader public purpose of providing public access to a larger body of material. However, as Professor Matt Jackson notes, too much copyright protection is counterproductive, "The paradox for policymakers is that as the author's control over the work is increased, public access is decreased — and public access is why the author is being given an incentive to create in the first place."[75] Copyright law thus involves a balancing of interests between the needs of authors and the needs of the public. Because of these public interests, the rights of copyright holders are not absolute. For example, the doctrine of "fair use" gives individuals power to use limited portions of a copyrighted work to further education or debate on the topic.[76] Also, the buyer of copyrighted works (at least in traditional media) acquires "first sale" rights, allowing her to dispose of the purchased copy as she sees fit She can keep it, loan it out, or give it away.[77]

Improvements in technology have often been seen as a threat to copyright owners.[78] The Internet poses a new threat to copyright owners for at least two reasons. First, digital technology has both reduced the cost and increased the quality of copies of copyrighted material. An infinite number of almost perfect copies can be made for almost no cost.[79] More importantly, the Internet allows multi-directional communication; people with digital copies of copyrighted works can share their copies with a huge number of other users. Instead of worrying about one record purchaser making one audiotape copy of music for a friend, copyright holders are worried about Web sites making free, unauthorized copies of copyrighted material available to literally millions of Internet users.[80]

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[75] Matt Jackson, *The Digital Millennium Copyright Act of 1998: A Proposed Amendment to Accommodate Free Speech*, 5 COMM. L. & POL'Y 61, 64 (2000).

[76] 17 U.S.C. § 107 (1994) (providing that criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research, are not infringements of copyright).

[77] 17 U.S.C. § 109 (1994 & Supp. IV 1998).

[78] *See generally* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 456 (1984) (holding that sale of home videotape recorders did not constitute contributory infringement of television program copyrights).

[79] Jackson, *supra* note 75, at 66-67 (noting that "digital ones and zeros can be reproduced effortlessly and perfectly").

[80] John Markoff, *The Concept of Copyright Fights for Internet Survival*, N.Y. TIMES, May 10, 2000, *available at* http://www.nytimes.com/library/tech/00/05/biztech/articles/10digital.html (describing creation of Freenet program that will make it possible to find and acquire files without reference to central database, providing no single target for aggrieved copyright holders).

2. The Statute

Internet technology, then, has led to widespread fear among copyright owners that the value of their copyright has been dramatically decreased. As a result of this concern, Congress passed the Digital Millennium Copyright Act of 1998 (DMCA). Title II of the act, called the Online Copyright Infringement Liability Limitation Act, creates a safe harbor, from liability for vicarious or contributory infringement, for an Internet service provider (ISP) who takes down Web pages alleged to infringe anyone's copyright.[81] These mechanisms are often referred to as the "notice and take-down" provisions of the DMCA. The DMCA targets the ISPs rather than the individual users, probably for strategic reasons; it is much easier to locate and motivate one large corporation with a fixed location than one thousand individual infringers with anonymous screen names. Further, the safe harbor provisions of the statute represent a compromise between "copyright owners, who wanted to impose strict liability on computer networks in order to maintain complete control over their content," and network operators, who wanted complete immunity from liability for vicarious or contributory infringement.[82]

Under the DMCA safe harbor provisions, an ISP that is providing storage space for its users (hosting user Web pages) is not liable to the copyright owner as long as it: 1) does not have constructive knowledge that the material is infringing; 2) does not receive a direct financial benefit from the infringing activity; and 3) follows the notice and take-down procedures set out in the statute. The notice and take-down procedures effectively require the ISP to remove alleged infringing material from a Web site without any procedural safeguards for the Web site owner and thus constitute privatized dispute resolution.[83]

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[81] "Whatis" defines an Internet service provider (ISP) as a "company that provides individuals and other companies access to the Internet and other related services such as Web site building and virtual hosting. An ISP has the equipment and the telecommunication line access required to have [points-of-presence] on the Internet for the geographical area served." Whatis, *Internet Service Provider, at* http://www.whatis.com (last visited June 22, 2000). ISPs are sometimes contrasted with "online service providers," who provide content as well as access (such as AOL), but the terms are sometimes used interchangeably. The DMCA defines "service provider" as "a provider of online services or network access, or the operator of facilities therefor," including "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, for material of the user's choosing, without modification to the content of the material as sent or received." 17 U.S.C.A. § 512(k) (West Supp. 2000).

[82] Jackson, *supra* note 75, at 72-73.

[83] The ISP must also have sent contact information to the copyright office in order to

A copyright holder begins the process by notifying the ISP that works are being infringed and identifying the allegedly infringing materials.[84] The notice must state under penalty of perjury that the party sending the notice is authorized to act on behalf of the copyright owner, but the complaint itself need not be made under oath. When the ISP receives a notification that substantially conforms to the statute's requirements, the ISP must "expeditiously . . . remove, or disable access to, the material that is claimed to be infringing."[85] In other words, it must block access to the accused Web site. The ISP must then notify the alleged infringer that access to the allegedly infringing materials will be blocked permanently unless the accused infringer submits a counter notice to the ISP contesting the allegation of infringement.[86] If this happens, the ISP must forward the counter notification to the copyright owner. It must also wait ten business days (but not more than fourteen business days) and restore access to the material.[87] However, if within that time the copyright owner notifies the ISP that the copyright owner has *filed* a court action against the alleged infringer, the service provider is not obligated to restore access to the work.[88] As long as it follows this procedure, the ISP is liable neither to the copyright owner for infringement nor to the accused infringer for damages should it turn out that the claim of infringement was erroneous.[89] A rational ISP, then, will always choose to take down the content when it receives a notice of alleged infringement. The safe harbor provisions turn the ISP into the copyright owner's enforcer, and the copyright owner often will not need to file a legal proceeding, or even directly confront the alleged online infringer.[90]

From the standpoint of the copyright holder, this procedure is fast and cheap. If the alleged infringer does not respond (whether because they are infringing, don't know whether they're infringing, or don't want to

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qualify for the safe harbor provisions. 17 U.S.C.A. § 512.

[84] *Id.* § 512(c)(3)(A).

[85] *Id.* § 512(c)(1)(C).

[86] This counter notification must be made under penalty of perjury. *Id.* § 512(c)(3)(A)(vi). If the alleged infringer "knowingly materially misrepresents" the substance of its counter notification, it may be liable for damages and attorneys' fees. *Id.* § 512(f).

[87] *Id.* § 512(g)(2)(C).

[88] *Id.* § 512(g)(2)(C). Note that the lawsuit need only be filed; the copyright holder does not need to obtain a preliminary injunction ordering the site to be taken down. *Id.*

[89] *Id.* § 512(g)(1). In contrast, if the ISP does not expeditiously remove the challenged content, it is potentially liable for damages for contributory infringement. *Id.* § 512(g)(2).

[90] Jackson, *supra* note 75, at 81.

fight an expensive battle), the copyright owner will have succeeded, by destroying access to the material, almost immediately. The cost will be limited to the cost of drafting a notice that need include only: 1) the physical or electronic signature of the person authorized to act on behalf of the copyright owner; 2) identification or a representative list of the copyrighted works being infringed; 3) identification of the alleged infringing materials; 4) contact information for the complaining party; 5) a statement that the complaining party in good faith believes the material to be infringing; and 6) a statement that the notification is accurate and that the complaining party is authorized to act on behalf of the copyright owner.[91] Although a lawyer could be consulted in drafting such a notice, it could be done by a non-lawyer quite easily.[92] If the alleged infringer files a counter notification, the cost will increase to include the attorney fees required to file a lawsuit, but the lawsuit itself will keep access to the site blocked.[93] The copyright holder need not pay its lawyers the legal fees and other costs required to prepare and present a motion for preliminary injunction.

3. Notice and Take-Down Scenarios

Imagine two Web sites. One is maintained by Sarah Virtue, a former member of the Church of Faith (CF) who is now one of its staunchest critics.[94] Virtue has devoted a portion of her Web site to debunking claims and exposing what she sees as its weaknesses.[95] Her Web site includes portions of previously unpublished, copyrighted CF documents.[96] Virtue's Internet service provider is Scientific Networking.[97] The other Web site belongs to Cases.com, a Web-based resource for legal research.[98] Cases.com's service is free; the founders

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[91] 17 U.S.C. § 512(c)(3)(A)(vi).

[92] The tricky part, of course, is deciding whether the accused material really infringes the copyright. But the complainant will not be liable to the accused infringer, even if the material is not protected, unless it "knowingly materially misrepresents" the claim. *Id.* § 512(f).

[93] *Id.* § 512(g)(2)(C).

[94] *Cf.* Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1365 (N.D. Cal. 1995).

[95] *Cf. id.*

[96] *Cf. id.* at 1365-66.

[97] *Cf. id.* at 1366 (holding that Internet access provider not directly liable for copies made and stored on users' computers).

[98] *Cf.* T.R. Halvorson, *Jurisline.com Suit Could Shift the Foundations of the Online Legal Marketplace*, INFO. TODAY, Mar. 2000, at 25 (describing dispute between Jurisline.com and Reed Elsevier, Inc.).

believe that they can sustain the site through advertising revenue.[99] Cases.com gets its data, in part, from LEXUS Legal CD-ROMs, using the core text of court opinions from the LEXUS data after removing all editorial enhancements.[100] LEXUS belongs to BelgianCo, Inc.[101] Cases.com's Web site is hosted by Lawnet.

Neither the Church of Faith nor BelgianCo is entranced by the two hypothetical Web sites. CF files a notice with Scientific Networking, alleging that Virtue's material is infringing. BelgianCo files a notice with Lawnet that Cases.com's material is infringing. Both ISPs must block access to the offending sites expeditiously or face potential liability for copyright infringement.[102] As long as they notify Virtue and Cases.com as required under the DMCA, neither ISP is liable to its customers for damages.[103] Virtue gives up, not wanting to deal with what she knows to be the tenacious litigiousness of CF. Cases.com files a counter notification claiming that reported cases are government works and not copyrightable and expects access to its site restored after ten days. However, BelgianCo, to whom this matter is immensely important, files suit within ten days and the challenged portions of Cases.com's site stay down until that litigation is completed. Soon, Cases.com settles the case because the start-up company cannot afford the cost of the litigation and needs to get its site back up and running.[104] In both cases, the DMCA notice and take down provisions compelled the outcome of the dispute without any court decision to fairly determine the outcome.[105]

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[99] *Cf. id.*

[100] *Cf. id.*

[101] *Cf. id.*

[102] *See* 17 U.S.C.A. § 512(c)(1) (West Supp. 2000).

[103] *See id.* § 512(g)(1).

[104] *Cf.* Jurisline.com, *Jurisline.com Ends Litigation with Reed Elsevier and Matthew Bender* (June 20, 2000), *available at* http://www.jurisline.com/templates //press_releases.cfm?release=pr000620 (last visited Nov. 25, 2000) (discussing settlement agreement).

[105] Another phenomenon that raises similar issues are accusations of Internet defamation. In countries that lack the more expansive American first amendment speech protections, ISPs have been taking down web sites at the mere allegation of defamation. *See, e.g.*, Jean Eaglesham, *Web site takes fight to Europe*, FIN. TIMES, Apr. 13, 2000, http://news.ft.com/ft/gx.cgi/ftc?pagename=View&c=Article&cid=FT3ZE77U07C&liv (reporting that three web sites closed within two weeks following ISP's agreement to pay more than £200,000 to settle libel action over material posted on one of its news groups).

C. *Trusted Systems and Digital Rights Management Technology*

1. The Problem and the Technology

The problem here is much like the problem discussed above: intellectual property owners fear that they are losing control over the distribution of their content. The procedures created by the DMCA are faster and cheaper than conventional litigation; they may be extremely fast and cheap when the opponent has modest resources. Nevertheless, the disputes can be protracted and expensive, and the interim losses great, if a person insists on litigating her competing rights to the relevant intellectual property. There are also certain kinds of Internet copyright disputes not governed by the take-down provisions of the DMCA.[106] As a result, companies are integrating protective software into copyrighted material such as digital copies of books, music, video, and computer programs distributed over the Internet.[107] Such "trusted systems" allow the copyright holder to precisely restrict use of the material and automatically enforce those restrictions. This software assures that music, videos, documents, and programs can be stored and used only by the buyer, and only in the ways authorized by the copyright holder.[108] Such "trusted systems" (also called "digital rights management systems") turn the threat of digital technology into an opportunity for copyright owners not only to protect rights under existing law but also quietly to attain a number of new ones.[109]

Trusted systems are attached to the digital copies of the work, and they ensure that copyright holders can track every use made of the digital copies, trace where every copy resides on a network, and

[106] For example, current controversies over use of the Internet to share copyrighted works such as music, movies, and cross-stitch patterns without the permission of the copyright holder are not solved by notice and take down of an alleged offender's Web site.

[107] Actually, this software will also be included in media sold in traditional stores, but this article will focus on its Internet implications.

[108] *See, e.g.*, Lawrence M. Fisher, *Xerox and Microsoft Create Digital Safeguard Company*, N.Y. TIMES, Apr. 28, 2000, *available at* http://www.nytimes.com/library/tech/00/04/biztech/articles/28xerox.html (reporting that Xerox Palo Alto Research Center and Microsoft teaming up to form ContentGuard, Inc., which already has partnerships with companies including Adobe Systems and Hewlett-Packard). It has also been reported that Microsoft intends to deploy trusted systems software with an upcoming version of Windows. Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 553 n.181 (1999).

[109] Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 134, *available at* http://www.wired.com/wired/archive/4.01/white.paper.html (last visited Nov. 25, 2000).

determine what is being done with the work at any given time.[110] Trusted systems also "have the ability to secretly report back to the copyright owner via the network on what the user was doing with the work, and the ability to search the consumer's hard disk and report back on what else was there."[111] If an unlicensed use is detected, the system can disable the product from working at all.[112]

Trusted systems, then, "delegate enforcement and control to computers"[113] and create a self-enforcing digital contract. Consumers have no way to disregard the digital contract: the software simply will not make an unauthorized copy, or any other act not allowed by the trusted system software. Whatever terms are in the contract are automatically enforced. Consider the following clause, which is already in the clickwrap for RealNetworks, Inc:

> The Software may include third party [Digital Rights Management Systems (DRMs)] as Plug-in components . . . DRMs are designed to manage and enforce intellectual property rights in digital content purchased over the Internet. You may not take any action to circumvent or defeat the security or content usage rules provided or

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[110] Trusted systems, from a technical standpoint, are just a pieces of software or hardware that "can be relied on to follow certain rules." Mark Stefik, *Trusted Systems*, SCI. AM., Mar. 1997, at 78. They recognize "approved" customers and allow only authorized users to access information or programs. Trusted systems, which use a kind of encryption technology, are already common in computer networks that require security from unauthorized would-be hackers.

In the context of copyright disputes, trusted systems work to prevent purchasers/licensees from making unauthorized copies or using legally protected works. Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1093 (1998); Samuelson, *supra* note 108, at 553 n.180. The systems works by attaching machine-readable code to digital works. These codes allow the copyright holder to identify separate possible uses of the work and control their use. For example, the Digital Property Rights Language currently being developed by Xerox allows control of the user's right to play, print, export, copy, transfer, loan, extract, edit, embed, backup, and restore digital works in ways the user has not paid for, because the trusted system prevents the use. *See* Mark Gimbel, Note, *Some Thoughts on the Implications of Trusted Systems for Intellectual Property Law*, 50 STAN. L. REV. 1671, 1676-80 (1998) (explaining in detail rights involved and operation of system).

Trusted systems can also take the form of disabling subprograms embedded in licensed material. These subprograms can cause the software to cease operation if an unauthorized use is detected. In addition, they can report back to the licensor over the Internet so that the licensor can charge for or disable the use. Samuelson, *supra* note 108, at 543-44 n.136.

[111] *See id.* at 543 n.134.

[112] Samuelson, *supra* note 108, at 543 n.136.

[113] Mark Stefik, *The Bit and the Pendulum: Balancing the Interests of Stakeholders in Digital Publishing*, 16 COMPUTER LAW. 1, 4 (1997).

> enforced by either the DRM or the Software. DRMs may be able to revoke your ability to use applicable content. [RealNetworks (RN)] is not responsible for the operation of the DRM in any way, including revocation of your content. RN is not responsible for any communications to or from any third party DRM provider, or for the collection or use of information by third party DRMs. You consent to the communications enabled and/or performed by the DRM, including automatic updating of the DRM without further notice.[114]

Trusted system enthusiasts note that they provide for greater control than copyright law; the DRM, rather than copyright law, controls the use of the product.[115] For example, the creators of trusted systems anticipate that fair use of copyrighted material must be purchased with a license.[116] So would first sale rights: the right to read, watch, or listen to a work would be licensed separately from the right to read it again, copy it, print it, or whatever.[117] So would the right to make a backup copy.[118] Each use would be licensed and charged an associated fee.[119]

For procedural purposes, the point is that trusted systems constitute automated self-help.[120] They are not a dispute resolution system in the traditional sense. Rather, this technology preempts the court system by building its mechanism for asserting its claimed property rights into the product itself. The copyright holder needs no recourse to the courts to enforce its copyright — the copyright is self-enforcing. There will be no "efficient breach" of a copyright license, because there can be no breach at all. Because there will be no way to use breach to test purported agreements, courts will not be examining the legality of the bargain.

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[114] This term popped up as paragraph 6 of the End User License Agreement associated with a download of "free" beta software for RealNetworks version 8. Since it appeared as a dialog box that the user had to click to accept or reject the terms, it had no associated URL, nor could it be directly printed off the screen.

[115] *Id.*; *see also* Radin & Wagner, *supra* note 15, at 1315 ("Trusted systems . . . can be programmed . . . to prevent all copying of a piece of content or the making of more than *n* copies, . . . to prevent reading it more than once or more than *n* times, to destroy the content if the user attempts to do something prohibited, and so on. Many of the theories for self-ordering in the information context – the shift from copyright to contract, for example – rest on the assumption that all of the details of these contracts will be rendered self-enforcing through the use of trusted systems.").

[116] Stefik, *supra* note 113, at 10-12.

[117] *Id.*

[118] *Id.*

[119] *Id.* Stefik also argues that such digital contracts should be enforceable even for uncopyrightable works. *Id.* at 9.

[120] Cohen, *supra* note 110, at 1089.

This is a very efficient method of dispute resolution from the standpoint of the copyright holder. From the standpoint of the consumer, it may feel different:

> [Trusted systems] are more like building high fences than relying on nuisance law; more like moving out the tenant's furniture and changing the lock than relying on landlord-tenant law; and more like sending over a committee of one's friends to intimidate a storekeeper into paying a debt than relying on legal enforcement of contract.[121]

At a minimum, the trusted system flips the parties' procedural posture. Instead of the copyright holder suing to enjoin a breach and to collect damages, the user who believes his rights were restricted by the trusted system must bring a lawsuit to sue for damages for being denied what he believes to be a legitimate use of the product. Since any individual user's money damages may be fairly minimal, these lawsuits may never materialize.[122]

One might think that just as fast as engineers can design trusted systems, other engineers can figure out how to disable them. The government, however, has once again come to the rescue of the copyright owners. The DMCA prohibits the circumvention of technological protection measures,[123] and bans devices whose primary purpose is to enable circumvention of technical protection systems.[124] There are serious criminal penalties for willfully violating the anti-circumvention rules,[125] and it is not a defense that no act of underlying infringement (e.g. illegal copying of a protected work) ever took place.[126] Banning circumvention technologies while allowing digital rights management technology "creates a sort of mandatory unilateral disarmament in the technological arms race."[127]

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[121] Radin & Wagner, *supra* note 15, at 1315.

[122] Since many of these contracts also include arbitration clauses, an unhappy user may still be barred from a conventional court and from the use of a class action device. *See* discussion *infra* Part I.D.1-2.

[123] 17 U.S.C.A. § 1201 (West Supp. 2000).

[124] *Id.* § 1201(a) (setting forth anti-circumvention rules). For an informative discussion of one of the first cases brought under the anti-circumvention rules, see Amy Harmon, *Free Speech Rights for Computer Code?*, N.Y. TIMES, July 31, 2000, *available at* http://www.nytimes.com/library/tech/00/07/biztech/articles/31rite.html.

[125] 17 U.S.C. § 1204(a)(1) (mandating up to 5 years in jail and fine of up to $500,000 for first offense).

[126] Samuelson, *supra* note 108, at 556.

[127] Lemley, *supra* note 14, at 1292 n.155. Critics of the anti-circumvention provisions have asked the librarian of Congress to use a power granted under the DMCA to create

2. Trusted System Scenarios

Rebecca Penny operates a small accounting business out of her home. In order to help her with her clients' records, Penny purchases from NetTax.com some tax accounting software. It is an expensive but very helpful program, and she pays the "license fee" in monthly installments of $50. On April 1, NetTax.com's accounting software erroneously concludes that Penny's most recent payment is overdue. It contacts, through the Internet, Penny's software and its digital rights management system immediately disables the software. In so doing, it also deletes the stored files containing Penny's clients' financial information. By the time the misunderstanding is cleared up, tax day has come and gone and Penny has lost several clients.[128] The warranty disclaimer on which Penny clicked before downloading the program eliminated all claims for consequential damages, attorney's fees, and costs. It further requires binding arbitration of any disputes between the user and NetTax.com.

Professor Plum teaches history at Western Methodist University. He has paid for and downloaded a database containing copies of various historical documents such as the Magna Carta, the Declaration of Independence, and the United Nations Charter. He wants to copy parts of those documents to his Web site for his class's use. When he tries to do so, the database won't allow the digital copies to be made. In response to his violation of the "terms and conditions" contained in the software, a DRM disables his access to the database. Professor Plum cannot afford to sue the seller/licensor and the dispute ends there.

Bill Daly buys a digital version of a book. He wants to make a copy of one page to show his friend Gail Bridge, a teacher who is interested in the subject. When he tries to print out a copy of that page, the trusted system pops up a screen with some choices. For a fee, he can make a hard copy of that page. If he agrees, the page as printed will contain a machine-readable watermark. If Gail tries to make 20 copies of her copy to pass out to her class, trusted digital photocopy systems will detect the watermark and charge for the privilege of copying. Bill and Gail will either pay these fees and achieve their desired uses, or they will choose not to pay them and not make the copies. In either case, the book's copyright holder need not file a lawsuit to prevent or collect damages for

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rules that would protect fair use and free speech rights. Oscar S. Cisneros, *Fear of a Pay-Per-Use World*, WIRED, Oct. 9, 2000, http://www.wired.com/news/print/0,1294,39330,00.html.

128 Compare the problem described in the Memorandum from Michele Kane, to Raymond T. Nimmer regarding proposed UCC article 2B section 2B-712 (now UCITA) (Jan. 27, 1997), *available at* http://www.2bguide.com/docs/mkane.html.

what it believes to be unauthorized use.[129]

D. Mandatory Binding Arbitration of Consumer Disputes

1. The Problem and the Law

In a perfect world, businesses would always sell products that conformed to their descriptions and were free from defects. Further, consumers would pay for those products promptly and reliably. Since neither the Internet nor the physical world reaches such perfection, disputes arise between merchants and consumers. The processing of those disputes can be disruptive to businesses, distressing to the consumer, and expensive for both. In the case of modestly-priced consumer goods, the cost of resolving a dispute can easily exceed the cost of the items themselves. It is therefore natural that businesses have sought alternatives to conventional litigation for such matters. These alternatives are imposed as conditions of the purchase contract. They include choice of law clauses, choice of forum clauses, and (most powerful of all) binding arbitration clauses.

The Internet is certainly not the only locus for such contracts in consumer transactions. These clauses have, however, been embraced by Internet businesses, and that should not be surprising.[130] Some commentators have suggested that Internet businesses are particularly likely to adopt non-court methods of dispute resolution.[131] The types of pressures that lead merchants to impose clauses resolving uncertainty in their favor are intensified on the Internet.[132] What are these pressures

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[129] Compare the proposal in Stefik, *supra* note 113, at 10.

[130] "ADR is also apt for disputes involving online commerce between geographically disparate parties.... The availability of reliable dispute resolution can help Internet commerce reach its full market potential." *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1851, 1856 & n.38 (2000); *see also* Ron N. Dreben & Johanna L. Werbach, *Top 10 Things to Consider in Developing an Electronic Commerce Web Site*, 16 COMPUTER LAW. 17, 18 (1999) (discussing likelihood that "clickwraps" and "terms and conditions" limiting Web site operator's liability will be upheld as vaild).

[131] *See* Martin C. Karamon, Note, *ADR on the Internet*, 11 OHIO ST. J. ON DISP. RESOL. 537, 537 (1996) (noting Internet technology's influence on increasing use of alternative dispute resolution); Ethan Katsch, *The New Frontier: Online ADR becoming a global priority*, DISP. RESOL. MAG., Winter 2000, at 6, 8 (warning that online alternative dispute resolution should not replace face-to-face encounters); E. Casey Lide, Note & Comment, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 216-22 (1996) (asserting that rapid technological growth compels use of non-court methods).

[132] *See* Jody Storm Gale, Note, *Service Over the "Net": Principles of Contract Law in*

that lead Internet businesses to include choice of law, choice of forum, and binding arbitration clauses?

One source of uncertainty is the difficulty of predicting the applicable law. Because of the global nature of the World Wide Web, goods sold online tend to be offered to potential customers in all states and all countries. It may be possible to determine the applicable law in some of these locations, but learning and complying with the law of all possible consumers is an overwhelming task. Further, the choice of law task is complicated by the difficulty of knowing where the contract was made and, sometimes, knowing the identity and location of the contracting parties.

A company wishing to sell over the Internet could respond in a number of ways. It could attempt to comply with the law of all possibly applicable jurisdictions. It could attempt to subdivide its Web site so that customers from certain states or countries purchase only from the portion of the Web site designed to meet the requirements of the law of their domicile.[133] A more common response is to try to control this variable by incorporating a choice of law clause into the contract. These are generally enforceable, at least in U.S. courts, as long as the law chosen has a reasonable relationship to the parties or the transaction and the law chosen is not contrary to the fundamental public policy of a significantly more interested state.[134] There is therefore a strong temptation for Internet businesses to adopt a choice of law clause.

Should a dispute arise, it is also difficult for an Internet business to predict the location of the forum. Bricks and mortar businesses at least know where, in physical space, the product in question was sold. While not inevitably true, physical world consumers are apt to file suit in the state in which they live and in which the seller has a physical sales location. Internet businesses, on the other hand, connect with the purchaser only through the electronic impulses of cyberspace. If the product is downloaded directly by the consumer, the seller will lack even a shipping address.[135] The buyer may be anywhere in the United

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Conflict, 49 CASE W. RES. L. REV. 567 (1999) (discussing unique nature of Internet service contracts).

133 Since potential customers could probably access any part of the web site, however, it could become a serious marketing problem if consumers were to realize that their counterparts in other countries received a significantly better deal than the one available to them.

134 *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (Supp. 1988).

135 The Internet seller will, presumably, have access to the buyer's credit card billing address. There will also be identifying information associated with the buyer's computer, although that computer may have been relocated in physical space since it was originally

States or even in another country. Businesses would prefer not to find themselves defending a consumer lawsuit in a distant location, be it California, Germany, or Singapore. A company selling over the Internet may respond to this concern by including a contractual choice of forum clause: a term in the sales agreement limiting litigation of any dispute to the courts of a particular jurisdiction (e.g. "King County, Washington").[136] These are generally enforced, even when the clause "looks like, acts like, and is, part of an adhesive consumer contract."[137]

Merchants have a strong incentive to pre-select a privatized decision maker to enforce the "law" as specified in the contract.[138] To this end, they can include an arbitration clause specifying the arbitral body, the location of the arbitration, the substantive and procedural law to be applied (or creating its own "law"), and the grounds, if any, for appeal.[139] Two developments[140] have made mandatory arbitration clauses

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acquired. Where physical products are delivered to the consumer, the seller's uncertainty is greatly decreased, although it may still prefer to include a clause requiring that any litigation be had in a convenient and sympathetic forum.

[136] In addition to decreasing uncertainty, a forum may be chosen because it is likely to enforce the choice of law, choice of forum, and arbitration clauses.

[137] Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 325 (1992), *citing* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). Even a consumer who finds and reads the choice of law and choice of forum clauses may not appreciate their significance. The effects of such clauses are "more visible and important to 'repeat players' positioned to insist on standardized provisions than they are to 'one-shot players' with whom they contract." Ex ante, then, a repeat player values more highly a favorable dispute resolution clause. Paul D. Carrington, *Regulating Dispute Resolution Provisions in Adhesion Contracts*, 35 HARV. J. ON LEGIS. 225, 226 (1998).

[138] For multi-national sellers, arbitration has an added advantage. While judgments rendered in one country may be difficult to enforce in another, international arbitral awards are widely enforced under the New York Convention on Recognition and Enforcement of Arbitral Awards. In the United States, federal courts are given a broad grant of jurisdiction to enforce these awards. 9 U.S.C. § 201 (1994).

[139] "Arbitration procedure is entirely a creature of the arbitration agreement. Thus, whether discovery is permitted, whether fact or notice pleading is to be utilized, and the applicability of different rules of evidence are all matters to be defined by the parties in their arbitration agreement." Henry H. Perritt, Jr., *Jurisdiction in Cyberspace: The Role of Intermediaries*, *in* BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFORMATION INFRASTRUCTURE, at 186 (Brian Kahin & Charles Nesson eds., 1997).

[140] There is actually a third development that removed a technical barrier to making online contracts binding. The new Electronic Signatures in Global and National Commerce Act, signed by President Clinton on July 4, 2000, at Independence Hall, makes expressions of assent such as clicking on the computer screen an adequate "signature" for purposes of contract formation. S. 761, 106th Cong. (2000), *available at* http://thomas.loc.gov (last visited Oct. 25, 2000). For discussions of this new law, see Barnaby J. Feder, *Law on Electronic Signatures Is Seen as a Boon to E-Business*, N.Y. TIMES, July 4, 2000, *available at* http://www.nytimes. com/library/tech/00/07/biztech/articles/04digital.html, and

increasingly feasible: 1) American courts' increasing willingness to enforce arbitration agreements, even those contained in consumer contracts of adhesion;[141] and 2) a creeping acceptance of "buy now, terms later" contracts in which terms such as arbitration clauses are added after the consumer's initial purchase.[142]

Under the Federal Arbitration Act,[143] where parties have entered into a contract that calls for mandatory binding arbitration, that agreement will be enforced.[144] That means that if a consumer attempts to ignore an arbitration clause and file suit in court instead, that suit will be dismissed. It also means that courts will enforce the arbitral award. The federal courts have interpreted the Act broadly. For example, an ambiguous contract will be interpreted in favor of arbitration rather than litigation.[145] When a party seeks to avoid an arbitration agreement on grounds of coercion, fraud, or duress, those defenses are to be construed narrowly.[146] The Federal Arbitration Act preempts all state legislation that might try to limit the reach of binding arbitration.[147] Finally, also relying on the preference for arbitration, courts have severely limited the grounds for appealing an arbitral award.[148]

Nicholas Morehead, *The Age of E-Sigs Is Here*, WIRED, Oct. 25, 2000, *available at* http://www.wired.com/news/print/0,1294,37342,00.html.

[141] *See generally* Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995) (discussing types of arbitration clauses and governing federal and state statutes); Carrington, *supra* note 137 (proposing legislation to protect rights of employees, consumers, and franchisees regarding choice of law and forum selection); Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, *in* 12 STUDIES IN LAW, POLITICS, AND SOCIETY 367 (Susan S. Silbey & Austin Sarat eds., 1992) (comparing private justice and public justice and trend toward their combination); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U.L.Q. 637 (1996) (criticizing courts' increasing deferral to mandatory binding arbitration clauses).

[142] *E.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997); *see also* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (enforcing choice of forum clause printed on consumer cruise ticket received after payment).

[143] 9 U.S.C. §§ 1-16 (1994 & Supp. V 1999).

[144] *Id.* § 2.

[145] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

[146] David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 248 (2d Cir.) (holding party to arbitration clause absent showing of special circumstances), *cert. dismissed*, 501 U.S. 1267 (1991); Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 285 (9th Cir. 1988) (rejecting unconscionability defense in light of policy favoring arbitration).

[147] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (holding that FAA preempts Montana statute mandating statement on first page of contract that contract contains arbitration clause).

[148] IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT 40.1.4 (1996) ("Over the years, the courts

The technology of the Internet also makes arbitration clauses extremely simple to impose. They are generally included in the contract by: 1) listing them in the "Terms and Conditions" section of the seller's Web page;[149] 2) including them with the product so that the customer receives that information after she has paid but as she opens the box; or 3) included as so-called "clickwrap" — made part of a box that pops up on the computer screen as the consumer attempts to download or install software that requires the consumer to click "I Accept" before the software will be installed.[150] While traditional contracts scholars had considered arbitration clauses imposed by any of these means to be unenforceable attempts to add terms after the contract had been formed, some courts have begun to endorse these so-called "layered contracts."[151] Although a majority of jurisdictions might find some of these methods to be unenforceable,[152] they are nevertheless often incorporated in the documents and software. Many software licensing lawyers believe them to be enforceable,[153] and a consumer may believe a later claim that

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have taken a fairly uniform approach to awards: Awards should be confirmed and enforced as is unless there is clear evidence of a gross impropriety.").

[149] Although there are some exceptions, these are generally indicated in tiny typeface at the bottom of the seller's home page. Sometimes they will be cross-referenced while the consumer is in mid-purchase, and sometimes they are just there in case anyone knows to look for them.

[150] When the software is purchased from a physical store in a sealed box and the contract terms appear while the program is being installed at home, the terms are sometimes referred to as "shrinkwrap" terms. *See, e.g.*, Dreben & Werbach, *supra* note 130, at 19.

[151] *See, e.g.*, Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 246 A.D.2d 246 (App. Div. 1998); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305 (Wash. 2000). The trend towards recognizing layered contracts began with Judge Easterbrook's opinions in ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996), and Hill v. Gateway 2000, Inc. 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997). It is incorporated in the newly proposed Uniform Computer Information Transaction Act (UCITA), which has now been adopted by the states of Maryland and Virginia. For a thoughtful discussion of the self-help provisions of UCITA (which started life as proposed article 2B of the UCC but was rejected by the American Law Institute), see Cohen, *supra* note 110.

[152] Mark A. Lemley, *Beyond Preemption: The Federal Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 120 n.20 (1999) (citing numerous cases that rejected shrinkwrap licenses as unenforceable); *see, e.g.*, Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332 (D. Kan. 2000) (refusing to enforce certain terms).

[153] A 1995 survey of software licensing lawyers (that is lawyers who generally represent software vendors) found that roughly two-thirds of them believed the terms of their shrinkwrap license would govern any contract dispute. Lemley, *supra* note 14, at 1274; *see also* Dreben & Werbach, *supra* note 130, at 18 ("Does your site have an applicable agreement? Since the Seventh Circuit strongly upheld the viability of shrinkwrap licenses in ProCD, Inc. v. Zeidenberg, it now seems more likely than not that 'clickwraps' and 'terms and conditions' governing use of a web site will be enforceable."). A rational lawyer for the software company could be expected to include any kind of clause favoring her

litigation is unavailable and not challenge the clause.

The online seller may also be attracted by the availability of online arbitration.[154] This allows both the original transaction and the resolution of any related disputes to take place without the physical presence of the parties. There are currently more than half a dozen online dispute resolution providers, as well as conventional providers offering online options. Some provide online mediation, some have algorithms that settle cases based on offers from opposing parties, and some actually resolve the disputes[155] based on an e-mailed complaint and response.[156] These providers tend to be for-profit entities, and the drafter of the contract (the seller) gets to choose the provider. They can thus choose a system of online arbitration with an acceptable cost structure and an attractive set of procedural rules.[157]

The trend toward privatization through mandatory arbitration has helped the repeat player achieve its goal of more favorable substantive law, more favorable procedural law, and a potentially more favorable decision maker. Assuming that this type of arbitration is cheaper and faster than conventional litigation, it has achieved both efficiency and preferred outcomes. The consumer, on the other hand, has potentially been deprived of her home state's consumer protection law, forced to litigate or arbitrate in an inconvenient forum, and been given procedural systems that may limit her ability to prove a meritorious case.[158]

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client that had been approved by some court somewhere (or maybe even those that had not been disapproved in the relevant jurisdiction). Such clauses may therefore tend to push the envelope on pro-seller terms and conditions, and would certainly include terms that have been enforced, regardless of the disapproval of legal academics. *See generally* Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845 (1988) (discussing benefits to drafter of including unenforceable terms).

[154] Perritt, *supra* note 139, at 187.

[155] *See, e.g.*, I-Courthouse, *at* http://www.i-courthouse.com (last visited Oct. 25, 2000). I-Courthouse allows opposing parties to prepare competing trial notebooks. Anyone with access to the Internet can then sign up as a juror, read the parties' presentations, and participate in the decision of any of the cases. For a fee, the parties can agree to submit the case to an expert jury that meets specified demographic requirements.

[156] *See generally* M. Scott Donahey, *Current Developments in Online Dispute Resolution*, J. INT'L ARB., Dec. 1999, at 115 (discussing various electronic settlement systems that allow parties to submit complaints and responses via electronic file transfers); Katsch, *supra* note 131, at 6 (discussing emergence and growth of online dispute resolution). These online services tend to come and go as their business plans succeed or fail, or their grants expire. For a current list of existing providers of online dispute resolution (which would include mediation as well as arbitration), see University of Massachusetts, Amherst, *Center for Information Technology and Dispute Resolution*, *at* http:// www.umass.edu/dispute (last visited Oct. 25, 2000).

[157] *See infra* text accompanying notes 255-64.

[158] If the consumer has paid for the transaction using a credit card, federal law passed

2. Arbitration Scenarios

Jack decides to buy a new home computer. He orders one online from Pathway Computers, and it arrives in a box at his front door about a week later. As Jack opens the box, he notices that it contains many pieces of paper and other documentation. Some are advertisements for other Pathway products, as well as other kinds of computer software. Some are instruction manuals. One is a large diagram showing how to connect all the pieces. Another is his limited warranty. Paragraph 9, on page 6 of this document provides:

> You agree that any Dispute between You and Pathway will be resolved exclusively and finally by arbitration administered by the American Arbitration Forum (AAF) and conducted under its rules, except as otherwise provided below. The arbitration will be conducted before a single arbitrator, and will be limited solely to the Dispute between You and Pathway. The arbitration shall be held at any reasonable location near your residence by submission of documents, by telephone, online or in person. Any decision rendered in such arbitration proceedings will be final and binding on each of the parties, and judgment may be entered thereon in any court of competent jurisdiction. Should either party bring a Dispute in a forum other than AAF, the arbitrator may award the other party its reasonable costs and expenses, including attorneys' fees, incurred in staying or dismissing such other proceedings or in otherwise enforcing compliance with this dispute resolution provision.

Jack does not actually read this document, but he keeps all the stuff that came with the computer in the bottom drawer of his desk.

Two months later, when the computer crashes and loses all his data, Jack contacts Pathway. They attempt to repair the computer but are unable to do so. Jack believes that the crash was caused by a manufacturing defect. He has heard that a number of Pathway

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in the 1970s may provide a better remedy than the arbitration clause. Among its other requirements, Regulation Z requires the issuer to provide certain dispute and error resolution services. 12 C.F.R. § 226.13 (2000). This will provide incentive for online sellers to help perfect the technology required for other kinds of electronic payment systems that would not be burdened by Reg Z's consumer protections. *See* Jane Kaufman Winn, *Clash of the Titans: Regulating the Competition Between Established and Emerging Electronic Payment Systems*, 14 BERKELEY TECH. L.J. 675, 686-88 (1999); *see also* Alternative Dispute Resolution for Consumer Transactions in the Borderless Online Marketplace, *Comments to the Federal Trade Commission from the National Consumers League, the Electronic Privacy Center, and Consumer Federation of America* (June 23, 2000), http://www.ftc.gov/bcp/altdisresolution/comments/ncl.htm.

customers have had the same problem. He files a class action lawsuit against Pathway in federal court in his home district. The federal judge, relying on the arbitration clause, dismisses the case, and orders Jack to pay Pathway's cost and attorneys fees.

Jack, determined to get some compensation, files a claim with the AAF. He pays the $49 filing fee for consumer cases worth less than $5,000.[159] He requests discovery from Pathway, but the arbitrator determines that the cost of producing the requested information would be unduly expensive given the size of Jack's claim. (This is due in part to the warranty's limitation of damages to a refund of the purchase price, with all incidental, consequential, and punitive damages disclaimed, and in part to AAF rules which prohibit class actions by limiting the dispute to that between the complaining party and the respondent.) Jack requests a "participatory hearing," pays the additional $75 fee, and presents his case at the one-hour hearing. Jack loses. The arbitrator also orders Jack, pursuant to AAF rules, to pay the fees paid by Pathway, which total an additional $325.[160]

Josh McMahon lives in Maryland. He uses the FalseNetworks media player to listen to the local college radio station. The FalseNetworks software informs him automatically over the Internet that a free upgrade is available should he choose to download it. Josh decides to do so. As part of this process, a pop up screen appears with FalseNetworks terms and conditions. At the end, under Miscellaneous, the following clause appears:

> This License Agreement shall be governed by the laws of the State of Washington, without regard to conflicts of law provisions, and you hereby consent to the exclusive jurisdiction of the state and federal courts sitting in the State of Washington. Any and all unresolved disputes relating in any way to, or arising out of, the Software, your use of the Software or this License Agreement shall be submitted to arbitration in the State of Washington; except that, to the extent that you have breached or have indicated your intention to breach this License Agreement in any manner which violates or may violate FN's intellectual property rights, or may

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[159] This is an improvement over Pathway's former arbitration clause, which required arbitration with a service that required a $4,000 filing fee, only half of which was refundable if the complainant prevailed. *Cf.* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997).

[160] *Cf.* National Arbitration Forum, *Code of Procedure*, Rule 37(C), http://www.arbforum.com/library/code.html (last visited Oct. 26, 2000) [hereinafter *NAF Code of Procedure*] (permitting arbitrator to shift fees and costs in award).

> cause continuing or irreparable harm to FN (including, but not limited to, any breach that may impact FN's intellectual property rights, or a breach by reverse engineering), FN may seek injunctive relief, or any other appropriate relief, in any court of competent jurisdiction. Any arbitration of a dispute under this Agreement shall be conducted under the rules then prevailing of the American Arbitration Association. The arbitrator's award shall be binding and may be entered as a judgment in any court of competent jurisdiction. This License Agreement will not be governed by the United Nations Convention on Contracts for the International Sale of Goods, the application of which is hereby expressly excluded.

Josh, wanting to maximize the performance of his FalseNetworks software, clicks "I Agree" so that he can download the software. Unfortunately, the download wreaks havoc on his computer. He hires a computer technician who, after four billable hours, is able to restore Josh's computer to its original settings. He considers suing FalseNetworks in small claims court, but remembers the terms and conditions which he accepted. Although unable to return to it on his computer (the pop up screen had no URL and could not be directly printed), the computer-savvy Josh had copied the text into his computer's Notepad and kept it for safekeeping. He discovers that FalseNetworks had made no warranty whatsoever and limited his damages to $5.00. Josh decides not to file an arbitration proceeding thousands of miles from home when his total possible remedy is smaller than the filing fee.

FalseNetworks learns (using a trusted system) that Josh has been trying to reverse engineer the program to try to make some improvements in the player. They fear that he will try to market such an improved product. Because FalseNetworks is not bound by its own arbitration clause it sues Josh for injunctive relief and damages in federal court in the state of Washington.[161]

III. Consequences of Privatized Dispute Resolution

The technology of the Internet, together with its surrounding political and legal environment, provide new contexts for old problems: the effects of differing resources on procedural systems, the advantages of

[161] One indication that the drafters of form contracts are well aware of the procedural limitations of the arbitration device can be found in "one-way" arbitration clauses. These clauses limit the consumer to arbitration, but retain for the seller the option to file suit in a conventional court.

repeat players, the cost of justly resolving economically small disputes, the allocation of the burden of legal uncertainty, the disharmony of potentially applicable law. When it comes to the Internet, the government's awe of the booming "new economy," the rapid speed of technological change, and the market power of the major players tends to lead toward private solutions to these public problems. This section of the article will discuss some of the consequences of this choice: 1) procedural privatization; 2) shift of procedural advantage to the already-powerful; 3) due process gaps; and 4) privatized substantive law in favor of trademark holders, copyright owners, and sellers. Just as in the physical world differential resources and repeat player status provide advantages, so too with the Internet. These processes shift the cost of making a claim and the burden of uncertainty onto the less powerful disputant.

A. Procedural Privatization

It may go without saying that the dispute resolution systems discussed in Section II are privatized systems,[162] at least in part. Part of the motivation for opting out of the court system is the ability to create a system of one's own in which the rules and the decision maker are not those of traditional courts. The extent of privatization should be critically examined because of the other consequences that follow from the fact that private parties are making or enforcing the rules.

The ICANN dispute resolution procedure is essentially a private one. ICANN is a private non-profit corporation. Although it serves a public function,[163] ICANN needed and still needs "the concurrence of every powerful party with an interest in domain name policy."[164] In addition to governments (especially the U.S. and the European Union) this

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[162] In a jurisprudential sense, concepts of private and public law are artificially distinguished. All law is in a sense public law. *See* Radin & Wagner, *supra* note 15, at 1295-97. This section of the article uses the word "private" in the sense that the procedural rules are made and implemented by non-government actors.

[163] Management of Internet Names and Addresses, 63 Fed. Reg. 31,741 (Dep't Commerce June 10, 1998), *available at* 1998 WL 298883 (calling for a new organization to administer the domain name system).

[164] Zittrain, *supra* note 29, at 1083. Others have accused WIPO of being captive to corporate interests. "What we're looking at here is a coup by WIPO over every other body set up to resolve Internet argy-bargy. And how do you run a coup? You get either military [or] the money-makers on your side. Seeing as there isn't any Internet military, it has gone for the fat and rich corporations." Kieren McCarthy, *Who the hell does WIPO think it is?*, THE REGISTER, Aug. 16, 2000, http://www.theregister.co.uk/content/5/12638.html.

includes Internet engineering groups and trademark interests.[165] ICANN "faces swift dispatch if it strays too far from the desires of . . . powerful corporate interests."[166] ICANN itself, then, is a sort of hybrid institution, and ICANN developed[167] its domain name dispute policy and the rules for implementing it with the input of these key groups.

The ICANN Policy for domain name disputes operates through wholly private means. The dispute resolution providers are not courts and judges but rather providers of private arbitrators. The rules of procedure are sui generis, with their own pleading rules, service rules, time limits, and decision makers. The dispute resolution provider decides the sufficiency of the complaint. The arbitrator has discretion to conduct the proceedings "in such manner as it considers appropriate."[168] The arbitrator also determines the "admissibility, relevance, materiality and weight of the evidence."[169] The arbitrator decides whether to consolidate multiple disputes, and whether to suspend or terminate the ICANN proceedings if a court proceeding is filed.[170]

The notice and take-down provisions of the DMCA are also privately-operated.[171] They depend on turning the ISP into the copyright holder's enforcer. Thus a private copyright holder complains to a private ISP, which in turn privately implements the remedy of disabling access to the challenged portions of a Web site. Unless the Web site owner files a lawsuit, the entire process takes place out of the public eye. It is commenced by a private party in a private setting and enforced by another private party. There is no court, no hearing, and no decision on the issue of copyright infringement.

Trusted systems and DRMs are even farther from a court system. Both the DRMs that restrict use and those that disable software in response to perceived violations of intellectual property rights operate automatically.

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165 Zittrain, *supra* note 29, at 1083.

166 *Id.* at 1091.

167 The initial version of the policy was actually developed by the World Intellectual Property Organization (WIPO). A number of governments have recently appealed to WIPO to consider amending the domain name system to handle issues such as famous names, geographic locations, and un-trademarked trade names. *See* Geist, *supra* note 40 (discussing pending WIPO discussion paper that would expand domain name dispute process to geographical, personal, and trade names).

168 *ICANN Rules*, *supra* note 33, at § 10(a).

169 *Id.* § 10(d).

170 *Id.* § 10(e).

171 The rules themselves were adopted by Congress rather than by a private body. They were, however, the product of negotiations between copyright holders and Internet service providers and were then endorsed by Congress. The voice of the general public was not generally represented in fashioning this legislation. Jackson, *supra* note 75, at 65.

There is no complaint, no response and no dispute resolution provider. There is certainly no court involvement in determining the remedy.[172] There is not even a human involved in invoking the DRM.

Arbitration clauses likewise provide for a private procedural scheme. Each arbitration provider has its own rules of procedure. The parties choose (or are assigned) their arbitrator, a private individual (who may or may not be a lawyer) who is not part of a court system. The arbitrator implements the privately-determined rules according to the parties' privately-negotiated contract.

If a person is unhappy with the results of any of these processes, and has sufficient resources, all can be challenged in court to some extent. The results of the ICANN process are not binding. A party who wishes to challenge the results can file a lawsuit against the party who prevailed in the private process. Absent such a challenge, however, the ICANN remedy will take effect. Similarly, the Web site owner whose site has been taken down under the DMCA notice and take-down provisions, may restore it to the Internet by prevailing in the copyright holder's lawsuit. The site will stay down while the suit is pending. A party who believes that a trusted system has unlawfully denied it some lawful use may file suit against the seller/licensor, unless prevented from doing so by an arbitration clause. Absent a lawsuit, the system has already taken effect. A party who believes an arbitration clause is unenforceable can challenge it in court and if successful, resolve her dispute in court rather than through private arbitration. A party who believes that an arbitrator's ruling is subject to challenge may file suit to try to set aside the arbitral award.[173] Thus, in many cases, a public forum is ultimately available, but only to the well-funded. Further, the force of inertia works in favor of the private process outcome.

Privatization in and of itself does not necessarily disadvantage either party. However, three of the privatized systems shift procedural advantages from one disputant to the other. Further, all four privatized processes circumvent meaningful due process protections that are implicit in a court of law.

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[172] Government is indirectly involved if it passes legislation such as UCITA which endorses this technology and allows adhesion contracts to legitimize it.

[173] The standard of review, however, makes it extremely unlikely that the arbitral award will be set aside. MACNEIL, *supra* note 148, at 40.1.4.

B. Shift of Procedural Advantage

The ICANN domain name process, the DMCA notice and take-down provisions, and trusted system technology all operate to give one disputant the equivalent of a preliminary injunction without requiring the usual quantum of proof or applying the normally-applicable law. A preliminary injunction is an order from the court, issued before the lawsuit is finally determined on the merits, directing the defendant to do something, or refrain from doing something, during the pendency of the lawsuit.[174] Courts generally approach preliminary injunctions with caution, because they operate under several disadvantages. The issue must be determined before full discovery; there has been little time to research the applicable law; there has been no determination that the plaintiff will ultimately be entitled to an injunction; and granting the injunction for the interim may do significant harm to the defendant or to third persons, sometimes harm which is difficult to compensate retroactively.

Because of these circumstances, courts generally use a balancing test in deciding whether to issue a preliminary injunction. They consider the plaintiff's probability of success on the merits and the harm to the plaintiff if the preliminary injunction is not granted.[175] It must be the type of harm that cannot be adequately redressed by awarding an injunction and/or damages at the conclusion of the lawsuit.[176] This is generally referred to as showing irreparable injury. They balance against this the probable harm to the defendant if the injunction is wrongfully granted, and also consider the impact of a preliminary injunction on the public interest.[177] If the plaintiff successfully convinces the court that the balance of equities favors the preliminary injunction, it will generally be required to post a bond to help compensate the defendant for the damages that may be done by an injunction that is later reversed.[178]

From a procedural standpoint, the party seeking the injunction must hire a lawyer to draft a complaint, gather information both informally and through discovery, and request a hearing in which it presents to the judge the evidence that it believes justifies the preliminary relief. Such

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[174] *See* 1 DAN B. DOBBS, LAW OF REMEDIES, PRACTITIONERS TREATISE § 2.11(1), at 249-50 (2d ed. 1993) (explaining that preliminary injunctions issue after notice to defendant and opportunity to be heard and remain in place until further order of court).

[175] *See id.* § 2.11(2), at 253.

[176] *See id.* § 2.11(2), at 253-54.

[177] *Id.* § 2.11(2), at 253-63 (discussing general requirements for preliminary injunctions).

[178] FED. R. CIV. P. 65(c).

hearings can be elaborate and expensive since the court must consider the strength of the plaintiff's case on the merits, and the damages to both parties that could flow from issuing or not issuing the injunction.[179] The more fact-intensive the issues, the more evidence-intensive the hearing is apt to be; live testimony, cross-examination of witnesses, introduction of documents and other tangible evidence, and oral argument from the attorneys would all be typical of a preliminary injunction hearing.

1. ICANN Domain Name Disputes

In the case of domain name disputes, the trademark holder is in the position of a plaintiff. Absent the informal ICANN process, the trademark holder has to file a lawsuit against the domain name owner, alleging trademark infringement and violation of the newly-passed Anti-cybersquatting Consumers Protection Act (ACPA).[180] The lawsuit will seek cancellation or transfer of the domain name and, possibly, statutory or actual damages.[181] The plaintiff will have to locate and serve the domain name owner.[182] To secure a preliminary injunction hearing, it will need to assemble (and put into admissible form) the information needed to prove that it will ultimately prevail on the merits, and that it will be irreparably injured if it has to wait until the conclusion of the litigation for relief. Its lawyer will need to write a brief arguing to the court why it satisfies the requirements for preliminary relief.[183]

What about the domain name holder? It will need to file an answer which, in federal court, will require a paragraph by paragraph response to the complaint.[184] It will also be allowed to assemble evidence for the preliminary injunction hearing, including evidence showing that its use

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[179] *But see* 1 DOBBS, *supra* note 174, § 2.11(1), at 249 (observing that motion may be decided based on affidavits).

[180] 15 U.S.C.A. § 1125(d) (West 1996 & Supp. 2000) (amending section 43 of Lanham Act).

[181] The Lanham Act specifically authorizes injunctive relief. *Id.* § 1116(a).

[182] The ACPA also allows an in rem civil action against the domain name if the trademark owner shows that it was unable to find the defendant despite due diligence. *Id.* § 1125(d)(2)(A). The Fourth Circuit (which is the geographic location of Network Solutions, Inc., and therefore the most probable location for in rem actions) has reserved the issue of the constitutionality of this provision, and it has been upheld by the Eastern District of Virginia. *See* Porsche Cars N. Am., Inc. v. Allporsche.com, 55 U.S.P.Q.2d 1158 (4th Cir. 2000) (noting that Porsche filed in rem action against 128 domain names); Lucent Techs. Inc. v. Lucentsucks.com, 95 F. Supp. 2d 528 (E.D. Va. 2000); Caesars World, Inc. v. Caesars-Palace.Com, 54 U.S.P.Q.2d 1121 (E.D. Va. 2000).

[183] Preliminary injunctions in trademark cases are subject to the same constraints as preliminary injunctions generally. *See* 2 DOBBS, *supra* note 174, § 6.4(5), at 100.

[184] FED. R. CIV. P. 8(b).

of the domain name is legitimate and that it has acted in good faith. At the hearing, it will be allowed to call its own witnesses and cross-examine the witnesses called by the trademark owner. It, too, will write a brief addressing its defenses on the merits and its probable harm should an injunction be granted.

Compare this to the ICANN process which grants the equivalent of a preliminary or even permanent injunction to a trademark holder with much lower procedural hurdles. The trademark owner files a complaint amounting to a fact pleading, and attaches evidence of the trademark. If the domain name owner has done anything in writing that suggests bad faith (such as offering to sell the domain name at an inflated price), the writing can also be attached. The trademark owner pays a filing fee. The domain name holder prepares and files a written response, and can also attach any documents that might be in its possession showing good faith. There is no discovery. There is no hearing to prepare for. There is no brief to write, except to the extent that arguments are included in the complaint or response. The substantive standards to be applied are unique to ICANN, and require somewhat less of the trademark owner than the corresponding U.S. law.[185] The case is quickly assigned to an arbitrator, and a decision reached within 14 days.[186] If the arbitrator rules for the trademark owner (as they have 80% of the time), the ruling results in cancellation or transfer of the domain name, which is the final relief the trademark owner seeks.[187] In the absence of a lawsuit, then, the ICANN process operates not as a preliminary injunction but as a final, permanent one. Even if the domain name owner has the will and resources to challenge the ICANN result, the procedural advantage has shifted: it is the domain name holder, not the trademark owner, who must file a lawsuit and it is cancellation or transfer that becomes the default result.

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[185] *See supra* note 38. It may even require less than the language of the ICANN Policy itself would seem to indicate. For example, the Policy requires a finding of bad faith registration *and* use. Some arbitrators have nevertheless ordered domain names transferred when the domain name has not been *used* at all (except that it has been registered). *See, e.g.*, Telestra Corp. v. Nuclear Marshmallows, Case No. D2000-0003 (WIPO Feb. 18, 2000), http://www.arbiter.wipo.int/domains/decisions/html/d2000-0003.html. *But see, e.g.*, Sporoptic Pouilloux S.A. v. Wilson, Case No. D2000-0265 (WIPO June 16, 2000), http://www.arbiter.wipo.int/domains/decisions/html/d2000-0265.html (requiring both registration and use).

[186] *ICANN Rules*, *supra* note 33, § 15(b).

[187] *ICANN Policy*, *supra* note 32, § 3(c).

2. Notice and Take-Down under the DMCA

The DMCA deals with copyright rather than trademark. Prior to the DMCA notice and take-down provisions, the copyright holder who believed its copyright was being infringed had to file a lawsuit against the offending user. In order to get preliminary relief stopping the challenged use, it had to follow the procedures described above. This is generally somewhat simpler in copyright cases, since much of the evidence is documentary.[188] Courts are also more prone to grant preliminary injunctions in copyright infringement cases.[189] There is still a requirement, however, that the copyright holder prove probable success on the merits (e.g. that it holds the copyright and that the challenged material infringes it). The burden for injunctive relief is appropriately high; "even if free expression is adequately protected by the fair use and other copyright rules, injunctive relief against expression is a troubling remedy at best. With this concern in mind, the copyright owner may be left to the money remedies in some cases, or at least denied a preliminary injunction."[190] In order to obtain relief against an ISP, the copyright holder had to file a lawsuit charging contributory infringement or vicarious liability and prove its entitlement to a preliminary injunction.[191]

Under the DMCA, the copyright holder merely needs to file, with the ISP, a notice of infringement listing its copyrighted material and the alleged infringing Web pages. Having done that, the copyright holder achieves, at a minimum, a ten to fourteen working day take down of the challenged material. This is, in a sense, the equivalent of a temporary restraining order (TRO), a kind of very temporary injunction parties sometimes request ex parte when filing a lawsuit. Such orders, however, are generally issued to preserve the status quo until a judge can hold an evidentiary hearing with all parties present.[192] The notice and take-down provisions, in contrast, reverse the position of the parties. Before the notice is filed the Web site is up and accessible; after the notice it is

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[188] Interview with John Cone, Partner, Akin, Gump, Strauss, Hauer & Feld (July 10, 2000).

[189] Injunctions, including preliminary injunctions, are authorized by the copyright statute. 17 U.S.C. § 502 (1994 & Supp. IV 1998).

[190] 2 DOBBS, *supra* note 174, § 6.3(2), at 55.

[191] Injunctive relief against the ISP is provided for in the DMCA. 17 U.S.C.A. § 512(j) (West Supp. 2000).

[192] The concept of status quo is, of course, a manipulable one. Judges sometimes issue orders that in fact change the positions of the parties, and claim that the status quo was the situation that existed before defendant violated plaintiff's rights. *See generally* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 728 (1990) (discussing costs preliminary orders impose on defendants).

down. Even if the Web site owner files a counter notification, the take-down will last at least ten days. The advantage to the copyright owner also continues: if it merely files a lawsuit, the Web site will remain down. It need not request and prove the need for interim relief. Thus without any consideration of evidence or any proof of copyright infringement, the copyright holder has been given the equivalent of a preliminary injunction.[193]

3. Trusted Systems

It's difficult to compare an automated process, which most closely resembles self-help, to the process for acquiring a preliminary injunction. There are, however, some parallels. Consider the relationship of the copyright owner to its licensee absent the DRM. If the owner believes the licensee is breaching the license agreement by engaging in unlicensed uses, it must file a lawsuit. In that lawsuit it can seek damages for past breaches, and it may seek injunctive relief,[194] although damages are the norm in breach of contract cases.[195] It might request a preliminary injunction ordering that the challenged practice cease for the duration of the lawsuit. To secure such an injunction, it would have to meet the requirements discussed above.

The DRMs eliminate the need for an injunction and completely reverse the parties' procedural posture. One type of DRM prevents the licensee from engaging in an unauthorized use (or charges fees for expanded use, as if it were an award of damages measured by a license fee). This is the equivalent of a permanent injunction against the expanded use. Another type of DRM disables the software when it detects an unauthorized use.[196] This constitutes a permanent injunction against the expanded use

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193 Jackson, *supra* note 75, at 83.

194 *See* Brookings Mall, Inc. v. Captain Ahab's Ltd., 300 N.W.2d 259, 263-65 (S.D. 1980) (enjoining shopping center tenant from selling certain articles forbidden by lease).

195 Under the traditional rule, injunctive relief will be denied if damages provide an adequate remedy. This often results in the denial of specific performance decrees in breach of contract cases. 3 DOBBS, *supra* note 174, § 12.8(2), at 197-98. Where damages would be difficult to measure, however, an injunction may be warranted.

196 *See* John Markoff, New System for PC Music Stirs Concern Over Piracy, N.Y. Times, May 3, 1999, at C1 (noting that RealNetworks strategies for protecting and distributing music over Internet includes tethering technology whereby digital copies of tracks from audio CDs are limited to single copies); *see also* RealNetworks.com, *Sony and RealNetworks Announce Strategic Alliance for Secure Electronic Music Distribution* (Jan. 7, 2000), *at* http://www.realnetworks.com/company/pressroom/pr/00/sony.html (describing Sony's digital rights management system consisting of "MagicGate" and "OpenMG" components, which limit where and how many times given song may be copied).

and a penalty against the user, termination of her license. Whether the best analogy is a preliminary rather than a permanent injunction depends on the reaction of the licensee. If she does nothing, the DRM has in effect granted a permanent injunction. If the licensee has sufficient motivation and resources to contest the DRM's action, she can file a lawsuit charging that the licensor has breached the license agreement and seeking damages. During the pendency of that lawsuit, however, the licensee has still lost use of the product. In this sense, the action of the DRM functions as a preliminary injunction.

The DRMs arguably provide the starkest shift of procedural advantage. The licensor does not even have to file a complaint, much less prove an entitlement to an injunction from a balance of the equities. The enforcement procedure was pre-programmed into the software. The licensee receives no notice of the action, no opportunity to argue that it had not breached the license, no third party decision maker considering the law and the facts. And it is, once again, the party on the "losing" end of the Internet process that must fight inertia and file a lawsuit.

C. Due Process Gaps and Repeat Player Advantages

When a lawsuit is filed and processed in a court in the United States, certain procedural steps are available of right to the parties.[197] Some of these are required by Constitutional due process.[198] Others have come to be assumed as part of a fair system for learning about and resolving complex factual disputes, and for applying the law to those facts. Privatized processes can be designed to eliminate those procedures that their designers deem too expensive or too disadvantageous.[199] The processes discussed in this article tend to eliminate or minimize many important procedural rights implicit in a court proceeding: affordable access to the courts, notice, discovery, collective action, live hearings and cross-examination of witnesses, the use of unbiased decision makers, process transparency, and written, reasoned opinions. Changes to these procedural devices are not mere matters of institutional quirk or

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[197] *See, e.g.*, FED. R. APP. P. 3 (granting appeal as matter of right from United States district court to court of appeals)

[198] For example, the Due Process Clause of the Fourteenth Amendment prohibits the exercise of jurisdiction over a defendant in the absence of reasonable notice. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950); *see also* FED. R. CIV. P. 4. In addition, the United States Supreme Court has held that due process requires that a defendant be afforded an opportunity to be heard. Fuentes v. Shevin, 407 U.S. 67 (1972).

[199] Private processes such as arbitration are "entirely a creature of the arbitration agreement." Perritt, *supra* note 139, at 186.

economic efficiency. Litigators know that procedural rules affect substantive outcomes.[200] It is not surprising that the repeat players who have created (or lobbied in favor of) the privatized processes have created processes that work to their benefit.[201]

1. Access to Justice

As discussed in Section III.B above, the dispute resolution processes created for the Internet sometimes shift the burden of initiating suit. This shift affects access to justice. If the domain name holder who has lost the ICANN proceeding cannot afford to hire an attorney to draft a complaint and to pay the filing and service fees for a lawsuit, the domain name is gone. If the consumer whose software has been disabled by a DRM cannot afford to pay the filing and service fees for a lawsuit, the software is gone. The mere fact of shifting the benefit of inertia has changed the likelihood that a party can seek outside adjudication of its claims.[202]

In addition, some of the private processes charge higher initial filing fees than would a corresponding court process. This is particularly true of mandatory arbitration clauses, although the cost will vary from provider to provider, and the impact will vary from consumer to consumer and with the cost of the disputed item. If the costs are too high for the consumer to afford, the claim will not be filed.[203] If the costs

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[200] Sternlight, *supra* note 141, at 680. *Cf.* Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1 (1995) ("[F]or those who think that, in theory, rules of procedure should be outcome neutral, the extent to which substance is, in fact, modulated by process can be hard to appreciate.")

[201] *See* Garth, *supra* note 141, at 368; Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

[202] Even non-binding but mandatory arbitration can decrease access by increasing costs. If, for example, a consumer were required to first exhaust any internal dispute procedure used by the merchant, then to use a third-party arbitration procedure that is not binding on either party, and only *then* file a lawsuit, the process has increased the consumer's cost in time and money of seeking relief. This explains why the dispute resolution proposal of the e-commerce giants requires such exhaustion and why consumer groups object to it. *See* Brian Krebs, *Groups Embrace E-commerce Dispute-resolution Plan*, NEWSBYTES, June 7, 2000, *available at* http://www.computeruser.com/news/00/06/07/news13.html (last visited Oct. 30, 2000) (describing industry-led proposal regarding dispute resolution methods for e-commerce consumers); Electronic Commerce and Consumer Protection Group, *Guidelines*, § XIV, http://www.ecommercegroup.org/guidelines.htm (last visited Oct. 30, 2000) [hereinafter *Guidelines*] (explaining dispute resolution guidelines for e-commerce merchants).

[203] While courts tend to have provisions allowing a plaintiff to prove indigency and institute a lawsuit without paying the usual fees, not all arbitration services do so. The

are excessive in relation to the value of the disputed product, the claim will not be filed. Best practices within the dispute resolution community indicate that arbitration services in consumer cases should be available at a "reasonable cost to [c]onsumers based on the circumstances of the dispute, including among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the [c]onsumer to pay."[204] In a private system, however, the drafter of the arbitration provision need not follow best practices.

The problem of excessive fees is not an imaginary one. In *Hill v. Gateway 2000, Inc.*,[205] Gateway's arbitration clause called for a dispute resolution provider, the International Chamber of Commerce, whose filing fee was $4,000. This far exceeded the cost of the computer that was the subject of the dispute. Even modest sounding fees can be excessive under certain circumstances. The National Arbitration Forum has a relatively modest $49 fee for filing consumer claims.[206] However, there are additional fees for hearings. And, if the consumer loses, NAF has a cost-shifting system that means that the consumer could be required to pay the merchant's fees.[207] Even a $49 fee is a sufficient deterrent when filing a claim for damages from a defective $50 program or $75 dress ordered off the Internet.[208] Some courts will refuse to enforce arbitration clauses if they find the fees to be excessive.[209] Other courts enforce them

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Better Business Bureau runs a consumer arbitration system in which the consumer pays no fee. *See generally* Better Business Bureau, http://www.bbb.org/complaints/aboutResolution.asp (last visited Oct. 30, 2000) (outlining details of Better Business Bureau's consumer arbitration program).

[204] American Arbitration Association, *Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes Advisory Committee*, Principle 6(1) (1998), http://www.adr.org/education/education/consumer_protocol.html (last visited Oct. 30, 2000) [hereinafter *AAA Statement of Principles*].

[205] 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997).

[206] The American Arbitration Association's filing fee for consumers is $125. American Arbitration Association, Arbitration Rules for the Resolution of Consumer-Related Disputes (Apr. 1, 2000), http://www.adr.org (last visited Nov. 25, 2000). Responding parties also pay a $125 fee for the arbitrator plus a $500 administration fee. *Id.*

[207] *See* discussion *supra* Part II.D.2 (setting forth Jack Just hypothetical).

[208] This problem of the cost of disputing small ticket items is also a problem in real world transactions. Consumers in such situations are probably better served by effective return/refund policies than by an inexpensive dispute resolution process.

[209] Letter from F. Paul Bland, Jr., Staff Attorney, Trial Lawyers for Public Justice, to Secretary, Federal Trade Commission, at 6 (Mar. 20, 2000), *available at* http://www.ftc.gov/bcp/altdisresolution/comments/blandjr.pdf (last visited Oct. 30, 2000) [hereinafter TLPJ Letter to FTC]; *see, e.g.*, Randolph v. Green Tree Fin. Corp., 178 F.3d 1149 (11th Cir. 1999) (finding that defendant failed to show costs would be reasonable); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (dicussing within context of employment arbitration); Brower v. Gateway 2000, 676 N.Y.S.2d 569 (N.Y.

without seriously discussing the problem of costs.[210] When this happens, the fees restrict access to justice.[211]

2. Notice and Opportunity to Respond

Another component of procedural fairness is the right to receive timely and meaningful notice that a claim has been asserted.[212] This kind of notice is not required to be provided under two of the privatized systems. First, the DMCA notice and take-down procedures require the ISP to disable access to the challenged Web site "expeditiously" in order to avoid potential liability of its own. The duty to notify the Web site holder of the take-down does not take effect until *after* the site has been disconnected, and the site will stay down for at least ten business days. The copyright holder thus achieves ex parte suppression of the allegedly infringing material without demonstrating to a court why it should receive such relief, and without further demonstrating why it should be granted that relief before contacting the Web site owner for a response.[213]

App. Div. 1998) (finding $4,000 International Chamber of Commerce filing fee excessive but ordering arbitration under FAA); Myers v. Terminex Int'l, 697 N.E.2d 277 (Ohio Ct. Com. Pleas 1998) (holding that undisclosed and costly filing fee rendered arbitration clause unconscionable and unenforceable).

[210] TLPJ Letter to FTC, *supra* note 209, at 6; *see, e.g.*, Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 15-16 (1st Cir. 1999); Hill v. Gateway 2000, Inc. 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997); Doctor's Assocs. v. Stuart, 85 F.3d 975 (2d Cir. 1996) (examining commercial franchise agreement).

[211] Fees are not the only barrier to access. Another common device is the forum selection clause. The adhesion contracts may specify not only arbitration but also choose a forum that is convenient to the seller but extremely inconvenient for the consumer. Unfortunately, this problem is not confined to Internet transactions but also exists in litigation generally. *See* discussion *supra* Part II.D.1. For that reason, ICANN is to be commended for generally making the domain name holder's domicile a proper forum for a lawsuit challenging the arbitral findings. *See ICANN Rules*, *supra* note 33, § 1. Similarly, the DMCA seems to envision (although it does not require) that the lawsuit filed by the copyright holder to retain suppression of the web site will be filed in the federal district that includes the web site owner's home. 17 U.S.C.A. § 512(g)(3)(D) (West Supp. 2000).

[212] *See generally* Mullane v. Cent. Hanover Bank & Trust, 339 U.S. 306 (1950) (holding notice to be component of due process).

[213] The notice and take-down provisions thus operate as a kind of court-free TRO, a surrogate emergency ex parte injunction. Many courts, however, will not grant temporary restraining orders unless the plaintiff demonstrates both the urgency of the request (e.g., that an irreplaceable tree is about to be cut down) and the reason that the defendant has not been contacted and given an opportunity to appear before the court and present its side of the argument (e.g., defendant would quickly act to subvert the injunction—cut down the tree—if given advance notice). In order to receive such an order, plaintiff would also have to post a bond to compensate the defendant for its damages should it turn out that the TRO was erroneously granted.

Second, DRMs can operate like a notice-free lawsuit. The software detects what it believes to be a violation, by surreptitiously contacting the licensee's computer, and then imposes its own sanction. The licensee is not given notice that a violation is suspected, nor given an opportunity to explain herself. The self-help remedy proceeds automatically. Similarly, if less drastic, are the DRMs that merely prevent the licensee from using the product in some way. These DRMs act as a substitute for suits to enjoin that use and to collect damages. Depending on the clarity of the online contract, the consumer may have generalized notice that such action is possible, but her first notice that the right has been invoked will be the remedy itself.[214]

3. Adequate Discovery

Discovery exists as a litigation tool in order to provide all parties with access to all relevant information. Once the parties are aware of that information, they can present a fuller account to the trier of fact. This, in turn, leads to more fair and accurate trial outcomes.[215] Discovery is particularly necessary because at the outset of many lawsuits, the stronger party is most likely to have the bulk of relevant information, while the weaker party is apt to lack such information.[216] When a private dispute resolution system limits discovery, it limits a device that otherwise serves to equalize the parties' relative positions within the lawsuit; "to the extent that the private system's inquiry is less thorough, the private system permits the underlying power of the stronger party to persist undeflected."[217]

None of the systems under review permit as much discovery as a civil lawsuit, and many provide none at all. Arbitrators under the ICANN

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[214] Professor Julie Cohen compares these systems with self-help repossession of a sofa. Imagine a "license" term that prohibits more than three people from sitting on the sofa at one time. Suppose three adults are sitting on the sofa and the child of one of those adults wants to sit on his parent's lap. DRMs that prevent unlicensed uses would have the effect of creating a force field around the sofa so that the child could not sit. DRMs that disable software on perceived violation would cause the sofa to vanish, dumping its former occupants onto the floor. Cohen, *supra* note 110, at 1115-16. Neither action resembles a customary sort of pre-resolution notice.

[215] *See* Hickman v. Taylor, 329 U.S. 495 (1947) (discussing value and purpose of discovery).

[216] 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 5422, at 674 (1980); Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 203 (1993).

[217] Garth, *supra* note 141, at 382.

dispute resolution system base their decisions on a complaint from the trademark owner and, in the absence of default, a response from the domain name registrant.[218] Each side only gets one chance to submit its position and attach documents to which it already has access.[219] Although theoretically the arbitrator can request further statements or documents, the arbitrator can only request documents that she knows about, and such action seems highly unlikely when the decision must be rendered in fourteen days. That process leaves the complainant with no method of learning more about the respondent's intent or use of the domain name; it leaves the respondent with no method of learning more about the trademark owner's right to the mark. This lack of discovery might be relatively insignificant in the egregious cases of cybersquatting for which the process was designed. It will be more problematic in genuinely contested cases and cases in which the complainant is relying on a common law right rather than a registered trademark.[220]

Arbitration of consumer disputes may or may not involve discovery.[221] Since the arbitration system is created by a contract drafted by the seller, it is unlikely to include discovery if the seller believes that discovery would be either harmful or too expensive. Neither the American Arbitration Association's "Statement of Principles" for consumer arbitration nor the "Guidelines" recently promulgated by the Electronic Commerce Consumer Protection Group mentions a right to discovery.[222] It is apparently not considered to be an industry "best practice."

Limits on discovery will not operate even-handedly on the parties to consumer arbitration:

> One way defendants can decrease a consumer's expected return is

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[218] *See ICANN Rules*, *supra* note 33, § 15.

[219] *See ICANN Rules*, *supra* note 33, § 12.

[220] The virtually automatic procedures of the DMCA and trusted systems naturally employ nothing like discovery. There is no discovery prior to web site take-down under the DMCA; this action is triggered by a complaint that consists of a naked claim with a list of copyrighted materials and infringing materials. The trusted systems software operates automatically, so clearly there is no discovery involved. *See* discussion *supra* Parts II.A.2-3, II.B.2 (discussing ICANN and DMCA).

[221] Perritt, *supra* note 139, at 186.

[222] *AAA Statement of Principles*, *supra* note 204. Nor do the AAA consumer arbitration rules contain any mention of discovery. *See* American Arbitration Association,http://www.adr.org (last visited Nov. 21, 2000); *Guidelines*, *supra* note 202. Contrary to what one might expect from its name, the Electronic Commerce Consumer Protection Group is not composed of consumer advocates but of America Online, AT&T, Dell Computer Corporation, IBM, Microsoft, Network Solutions, Time Warner Inc. and Visa U.S.A. Inc. *See* Electronic Commerce and Consumer Protection Group, http://www.ecommercegroup.org (last visited Nov. 21, 2000).

> to prevent the consumer from engaging in adequate discovery. Because the consumer will be more needful of discovery than will the company, which maintains the relevant records and has continuing access to the decision makers, even a seemingly neutral restriction on discovery will affect consumers adversely.[223]

The online consumer knows that the product she purchased is defective. She knows the way(s) in which she believes the product has failed to meet her needs, or to live up to its description. She does not, however, have access to records concerning the product's design or manufacture, complaints from others that might show the existence of a defect or the seller's knowledge of the problem, or internal communications concerning the product. Neither does the consumer have access to the people who made the relevant decisions. An arbitration system that allows a dispute to be decided when only the defendant has access to this relevant and potentially incriminating information will lead to inaccurate and one-sided results.[224]

A move toward arbitrating consumer complaints online seems unlikely to make any difference, at least not with current providers. Existing online dispute resolution systems are not particularly geared either toward arbitration (except ICANN arbitration) or toward compelled processes. Cybersettle,[225] ClicknSettle,[226] and SettleOnline[227] are all aimed at streamlining settlements. The parties, if they elect to participate, submit confidential settlement offers which are compared by the companies' software.[228] This kind of process does not involve fact finding, and so there is no discovery process (the parties may, of course, have engaged in conventional litigation including discovery before using the computerized settlement software). I-Courthouse, which is also

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[223] Sternlight, *supra* note 141, at 683.

[224] *See* Budnitz, *supra* note 141, at 271-72 (noting that limiting or eliminating discovery gives advantage to non-consumer); Sternlight, *supra* note 141, at 683-84 (observing that even seemingly neutral restriction on discovery will adversely affect consumers because of consumers' greater need for discovery than company that maintains relevant records and has continuing access to decisionmakers).

[225] Cybersettle, *at* http://www.cybersettle.com (last visited Oct. 30, 2000).

[226] ClickNSettle, *at* http://www.clicknsettle.com (last visited Oct. 30, 2000).

[227] SettleOnline, *at* http://www.settleonline.com (last visited Oct. 30, 2000).

[228] *See* ClickNSsettle, *Online Negotiation, at* http://www.clicknsettle.com/onlineneg.cfm (last visited Oct. 30, 2000); Cybersettle, *About Cybersettle, at* http://www.cybersettle.com/about/index.htm (last visited Oct. 30, 2000); SettleOnline, *How it Works, at* http://www.settleonline.com (last visited Oct. 30, 2000). If the parties' offers are within a certain range, the computer will end the dispute by splitting the difference. *See* ClickNSettle, *Online Negotiation, supra* (stating that automatic split triggered when plaintiff's demand comes within 30% of defendant's offer).

voluntary, focuses on the trial portion of dispute resolution and enables online jurors to find for a plaintiff or defendant based on trial notebook presentations.[229] It also assumes that the parties already have all needed information before invoking its process.[230] Other online providers focus primarily on mediation rather than arbitration, and similarly do not include discovery as part of their procedures (except for the fact that some information may be discovered during the course of negotiations).[231]

The cost of undertaking thorough discovery for very small claims is a problem for both real space and cyberspace. It may not be rational to spend $10,000 resolving a dispute over a single $50 product. Decisions about how to allocate cost are political decisions about policy, not simple economic calculations. Should the consumer bear the cost? Should the manufacturer? Should the taxpayer? For cases in which discovery is required for a fair and accurate resolution, however, a process which eliminates discovery is a sham. The apparent existence of an inexpensive mechanism for resolving disputes may convince the buyer ex ante that it is safe to make a purchase.[232] But it will not serve the unhappy consumer

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[229] *See* I-Courthouse, supra note 155.

[230] *See id.* Attorneys may use I-Courthouse to get a kind of mock jury assessment of their claims at a very reasonable price (free for making the case accessible to the general pool of volunteer jurors; $200 for a demographically selected jury that participates in a sort of chat room deliberation). As was true for the settlement-based sites, see sources cited *supra* note 228, attorneys may already have engaged in conventional discovery before using I-Courthouse to evaluate their cases. *See* I-Courthouse, supra note 155.

[231] *See,e.g.*, Internet Neutral, *at* http://www.internetneutral.com (last visited Nov. 27, 2000); Onlineresolution, *Mediation: Welcome to Online Mediation, at* http://www.onlineresolution.com/index-om.cfm (last visited Nov. 27, 2000); SquareTrade, *at* http://www.squaretrade.com/learnmore/odr_090600.jsp (last visited Nov. 27, 2000). The fees charged by these mediators vary. *See, e.g.*, Internet Neutral, *How Much Will This Cost?*, at http://www.internetneutral.com/fees.htm (last visited Nov. 27, 2000) (listing $250/hr fee for online mediation other than by email and per-minute fee chart for online mediation by email only); Onlineresolution, *About Us: Costs for ADR Services, at* http://www.onlineresolution.com/costs.cfm (last visited Nov. 27, 2000) ($50/hr for disputes under $10,000, $75/hr for disputes between $10,000 and $50,000, and $100/hr for disputes above $50,000); SquareTrade, *Pricing for SquareTrade Mediation, at* http://cf.squaretrade.com/assign_mediator/mediation_pricing.cfm (last visited Nov. 27, 2000) (listing various fees depending on where transaction took place). For an example of an intermediary undertaking investigatory activities, see the transcript of the first online mediation (by e-mail) undertaken by the Online Ombuds Office at the University of Massachusetts, *Transcript of a Dispute, at* http://aaron.sbs.umass.edu/center/ombuds/narrative1.html (July-Aug. 1996).

[232] Indeed, bolstering the consumer's faith in Internet purchases seems to be the goal of industry groups working on e-commerce dispute resolution. *See, e.g.*, *Introduction* to *Guidelines, supra* note 202 ("Consumer protection, which generates consumer confidence, is as critical for the continued growth of electronic commerce as are traffic lights and rules of

of a complex and defective product.

4. Collective Action

One of the ways to change the ratio of product cost to dispute-related transaction costs is through collective action. In other words, if one purchaser of a $50 defective widget is unhappy, it seems irrational to spend $10,000 resolving her claim. However, if 100,000 purchasers of that widget are unhappy, the $10,000 seems more reasonable. The problem of the potential defendant who does a small amount of harm to a large number of people is one reason that courts allow class actions.[233]

The potential for class actions is also exactly the reason some businesses require arbitration rather than litigation of consumer disputes. Consider this advice given to businesses developing commercial Web sites: "Companies should consider including dispute resolution clauses requiring arbitration, which may, in some instances, serve as a defense to the certification of a class action against the site owner."[234] Shrinkwrap with an arbitration clause will often protect the seller from a consumer class action. While a few courts have allowed class arbitration,[235] many have found that the existence of the arbitration clause precludes a class action.[236]

Without the ability to bring a class claim, consumers are deprived of a mechanism that helps undo the repeat player advantage.[237] A single

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the road to traffic on a concrete highway.").

[233] FED. R. CIV. P. 23 advisory committee's note (discussing subdivision (b)(1)).

[234] Dreben & Werbach, *supra* note 130, at 19; *see also* Budnitz, *supra* note 141, at 268 ("Arbitration programs [imposed by financial institutions] were initially intended to avoid class action lender liability suits demanding punitive damages.").

[235] *See* Blue Cross of Ca. v. Superior Court, 78 Cal. Rptr. 2d 779 (Ct. App. 1998) (allowing class action because arbitration agreement did not prohibit it); Navarro-Rice v. First USA Bank, No. 97009-06901 (Or. Ct. App. 1998) (noting that bank added arbitration clause after class action was filed), *cited in* Mark E. Budnitz, *Recent Developments in Consumer Arbitration Case Law: 1997—Jan. 1999*, *in* PRACTICING LAW INST., CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 744 (Apr.-May 1999), WL 1113 PLI/Corp 725; *see also* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

[236] *See* Champ v. Siegel Trading Co., 55 F.3d 269, 275-77 (7th Cir. 1995) (denying class certification in arbitration proceeding because no provision for such certification in arbitration agreement); Lieschke v. Realnetworks, Inc., Nos. 99 C 7274, 99 C 7380 (N.D. Ill. 2000), 2000 WL 198424 (dismissing as unnecessary and premature plaintiffs' motion regarding future court proceedings); Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410 (M.D. Ala. 1997) (denying class certification because agreement between parties did not provide for class certification for arbitration purposes); Med Ctr. Cars v. Smith, 727 So. 2d 9 (Ala. 1998) (holding plaintiffs not entitled to class-wide arbitration).

[237] None of the other processes allows for class treatment. The ICANN process does

consumer may easily decide that the costs of arbitration are too high given her personal stake in the outcome. Consumers are also deprived of a dispute structure that changes availability of discovery. Where discovery is allowed at all in arbitration, it is apt to be discovery that is reasonable in relation to the amount in controversy and the resources of the parties.[238] Discovery that would be denied for the single claim might be permitted for a class claim. Limiting arbitration to a single transaction by a single buyer provides a double advantage to the seller; fewer claims will be filed, and those that are filed are less likely to succeed.

5. Meaningful Hearings

Conventional litigation includes, as a matter of fairness, a right to present evidence to the fact finder and to respond to evidence offered by one's opponent. In an adversarial system, the reliability of evidence is tested through the combined effects of physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. The DMCA and trusted systems allow no presentation at all, and hence no use of hearings to test evidence. The ICANN process and consumer arbitration, however, purport to include adversarial fact-finding, but the fact finder acts either without a live hearing or with a sharply curtailed one. When the operative facts are essentially uncontested, a decision based on written statements should be sufficient. When facts are disputed, however, the lack of a hearing can distort the fact finding process.

Under the ICANN dispute resolution procedure, any kind of hearing would be highly unusual. The ICANN Rules virtually prohibit video conferences, telephone conferences, and Web conferences.[239] Instead of hearing witnesses, the arbitrator makes her decision based on written submissions and accompanying documents. The pleadings are not even made under oath, but rather under an assertion of good faith similar to a federal court Rule 11 assertion.

Arbitration, as always, depends on the rules agreed to by the parties. While traditional commercial arbitration may include an elaborate hearing that is hardly different from a non-jury trial to the court,

allow the trademark owner to include multiple domain names in the same complaint, as long as they are all owned by the same person. *ICANN Rules*, *supra* note 33, at § 3(c). The DMCA take-down process works on an individual web site basis. The trusted systems' automated self-help works computer-by-computer.

[238] *See, e.g.*, *NAF Code of Procedure*, *supra* note 160, Rule 29.

[239] *ICANN Rules*, *supra* note 33, § 13.

consumer arbitration clauses are apt to prohibit or limit hearings.[240] Even when a hearing is provided, it is more likely to be an opportunity to orally present one's claim, and to listen to the other side present its claim, than a chance to cross-examine witnesses.[241] The procedure provided may be called a hearing but is actually a "document hearing," a euphemism for the arbitrator sitting down and reading the relevant papers. A hearing may also be an "online hearing," in which the parties participate through e-mail.[242] Another way arbitration rules limit the scope and content of the hearing is through time limits. Arbitration providers may severely limit the number of minutes available to both sides to present their cases in small consumer disputes.[243] None of these processes is well suited to resolve contested facts.[244]

How might this lack of an evidentiary hearing impact consumers? First, it deprives them of the chance to "tell their story" that is an important part of a litigants' feeling that they have been given meaningful hearings.[245] Second, procedures that make it harder to present a sufficient quantum of credible information will systemically hurt the party with the burden of proof. If the consumer's complaint was drafted by the consumer herself, without lawyer assistance, it may

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[240] The consumer arbitration service provided by the Better Business Bureau, however, generally uses live hearings and allows the party to present witnesses as well as to question the witnesses presented by the other party. Better Business Bureau, *Rules of Arbitration [Binding]* § 20 (1998), http://www.bbb.org/complaints/bindarb.asp (last visited Nov. 27, 2000) [hereinafter *BBB Rules*].

[241] *See, e.g., Guidelines, supra* note 202, *Commentary to Guidelines* (stating that "procedure allows parties to present their arguments and facts to the forum and to hear the arguments and facts of the other party"). Under the AAA's own rules for consumer arbitration, the default "desk hearing" (covered by the $125 fee) involves only the arbitrator reviewing the documents. For an extra $100, either party can secure a telephone hearing. The only way to get an in-person hearing is to switch to the gigantically more expensive Commercial Arbitration Rules.

[242] Under NAF rules, for example, hearings for claims less than one million U.S. dollars will be conducted online unless all parties agree otherwise. *NAF Code of Procedure, supra* note 160, Rule 26. Online hearings are conducted using e-mail or other electronic means. *Id.* Rule 2.

[243] NAF limits consumer hearings (for which one must pay extra) to a maximum of one hour if the claim is for less than $5,000. *Id.* Rule 34.

[244] Appellate courts, for example, are not permitted to substitute their own factual findings for those of the trial court because the written record is inherently less reliable than the live observation of the witnesses. Arbitration procedures can go even farther, and substitute canned written statements, that cannot be cross-examined, for live interactions.

[245] *See generally* E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 980-91 (1990); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 439-42 (1992).

seem less "credible" compared to the seller's response, where legal involvement is more likely. The writing may be less clear or less sophisticated; it may include facts that are not legally relevant, or it may omit facts that would have been both relevant and helpful. Even clearly drafted consumer statements are less helpful than live testimony and a chance to challenge defense witnesses. As the consumer has the burden of proof, any weakness, or even any "tie" in terms of the weight of the written evidence will go to the seller. Further, if the arbitrator has any pro-defendant bias, the lack of live evidence may make it less likely that the consumer's presentation can counteract that bias.

The industry trend seems to be toward more rather than less automation of arbitration processes. There is already substantial use of an all-paper decision absent a live hearing. Use of an online process to resolve online disputes is also mentioned often, purportedly as a way to solve the problem of consumer inconvenience or overcome personal jurisdiction limits.[246] When technology will allow computers to actually resolve the dispute itself, that will be the next step. The consumer would still instigate the arbitration procedure, probably paying the filing fee with some form of electronic cash. Then each party could be directed to answer a series of questions, the answers to which are deemed relevant to the outcome. For example, if dealing with a dispute about a computer, its peripherals, or anything that can run on it, the dispute resolution program would also have access through the Internet to the consumer's computer to help it make a determination about the claim.[247] Then the program would take that information and determine the outcome.[248] The seller, as the party who writes the contract and thus chooses the arbitration rules would get to write the program.

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[246] *See, e.g.*, Llewellyn Joseph Gibbons, *Rusticum Judicium? Private "Courts" Enforcing Private Law and Rights: Regulating Virtual Arbitration in Cyberspace*, 24 OHIO N.U. L. REV. 769, 785 (1998) (noting that consumers can participate from home); Krebs, *supra* note 202("Maybe the answer would be to have a new Cyber court to handle these disputes") (quoting Nancy Ellis of Webdispute.com); Brandon Mitchener, *Cybercourts Emerge As Way to Resolve Internet Disputes*, WALL ST. J., Mar. 21, 2000, at B9.

[247] This part would not work for a dispute concerning hard goods merely ordered over the Internet. In those cases the computer would have to decide based on the party's allegations. But that is what the arbitrator does now in cases involving only "document hearings" (aka "desk hearings").

[248] The parties would be notified of the result by e-mail or its future technological equivalent.

6. Unbiased Decision Makers

Due Process also requires a neutral decision maker.[249] Among other things, this requires that the tribunal not have a personal interest in the outcome.[250] It also requires an unbiased decision maker. Sometimes bias is direct: the arbitrator has a prior financial relationship with one of the parties or a financial stake in the dispute.[251] For example, direct bias could be found in an arbitral system in which "in house" arbitrators are employed by the defendant company. Other times it is indirect, growing out of "such subtle heuristics as cultural and professional biases."[252]

The DMCA take-down provisions empower a directly biased decision maker. The ISP is the decision maker in considering how to react to the complaint filed by the copyright holder. It is not required to take down the site, but if it does so it receives immunity from suit. If it does not take down the site, it is potentially liable for damages for copyright infringement.[253] Thus the ISP itself is directly affected by its decision whether to disable the Web site.

Contract-based arbitration of consumer disputes may involve a more subtle kind of direct bias. Responsible providers of arbitral services have codes of ethics requiring arbitrators to disclose any direct conflicts of interest such as prior representation of a party, a financial stake in the outcome, or family relationship to a party.[254] Rather, the kind of direct bias arises from the volume of business that a repeat player can bestow.[255] Sellers write the contracts with the arbitration clauses and thus get to choose the arbitration provider; "in this era of entrepreneurial ADR, the arbitrator often does have a subtle but substantial economic interest in the outcome of the case in that his or her ability to get future

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[249] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[250] Tumey v. Ohio, 273 U.S. 510, 522-23 (1927) (holding that when judge is compensated from proceeds of fines, accused is denied due process of law).

[251] Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1058 (2000).

[252] *Id.*

[253] *See* 17 U.S.C.A. § 512(b) (West Supp. 2000).

[254] The Federal Arbitration Act makes "evident partiality" by the arbitrator a ground to set aside an arbitral award. *See* Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., 146 F.3d 1309, 1311-12 (11th Cir. 1998). However, this provision has been narrowly construed. *Id.* at 1312. An allegation of arbitrator bias might not be enough to prevent the arbitration from proceeding to a decision. *See, e.g.*, Hunt v. Mobil Oil Corp., 583 F. Supp. 1092, 1094-95 (S.D.N.Y. 1984).

[255] Garth, *supra* note 141, at 382 ("If decision makers depend on a certain clientele for their business, and that clientele has a particular perspective or long-standing practice, we should not be surprised if that perspective or practice is not challenged.").

cases depends, at least in part, on party satisfaction."[256] It is not the one-shot consumer that the arbitrator needs to satisfy for business development; it is the repeat player seller who is capable of bringing numerous cases to the arbitrator.[257]

Indirect bias is harder to pin down. Arbitrators, unlike conventional judges, are often valued for their substantive expertise in the subject area. The expertise is considered to be a positive factor, but it comes with a flip side; with expertise can come bias. For example, 89% of the arbitrators in the securities industry have been shown to be white males with an average age of sixty, many of whom spent their professional careers in the brokerage industry.[258] It would not be surprising if former brokers were more likely to sympathize with the broker's side of the dispute. In health care arbitration, it would not be surprising if doctor-arbitrators were more likely to sympathize with the doctor's side of the dispute.

Is indirect bias likely to be a problem in any of the privatized systems? It would be interesting to study the identity and backgrounds of the arbitrators participating in the ICANN cases (and it may vary by provider). Are they trademark lawyers? If so, do they tend to represent parties taking a particular position in trademark litigation? Are they former judges? Academics? Is there any statistically significant correlation between the arbitrators' backgrounds and their decisions in contested cases? Various commentators have begun to point to the fact that WIPO is far more likely to rule for the trademark owner than are the other providers.[259] Similarly, a study of arbitrators in consumer disputes would be interesting. Are they tilted toward corporate defense lawyers?[260]

If there is an indirect bias of the arbitrators in the ICANN process and consumer arbitration, repeat players, with their informational advantage are in the best position to capitalize on it. In the ICANN process, it is the

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[256] Reuben, *supra* note 251, at 1063.

[257] Trial Lawyers for Public Justice, for example, alleges that the National Arbitration Forum markets its arbitration services as providing a defense for financial services companies against lawsuits from their consumers, and that MCI has a very close financial relationship with its mandatory arbitration service provider. TLPJ Letter to FTC, *supra* note 209, at 8-9.

[258] U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES 2 (1994).

[259] *See* McCarthy, *supra* note 164; Naylor, *supra* note 62 (asserting that 83% of WIPO complaints result in findings for complainant).

[260] TLPJ Letter to FTC, *supra* note 209, at 8.

trademark owner who gets to choose the dispute resolution provider.[261] The trademark holder has the expertise to access and analyze the outcome of prior ICANN proceedings and take advantage of any perceived patterns. For example, if statistics would show that WIPO[262] arbitrators were more likely to rule for trademark holders than eResolution arbitrators, trademark holders would file with WIPO.[263] In consumer dispute arbitration, the seller has already chosen the provider. Once that is done, individual arbitrators may be assigned, subject to challenge. Alternatively, parties may be permitted to choose from a list. The consumer is unlikely to have any information about the prior rulings or background of the suggested arbitrators. The seller, however, may have a record or other source of information on arbitrator-by-arbitrator decisions.[264] This superior knowledge about the general attitudes and tendencies of the arbitrator gives a further advantage to the repeat player.

7. Process Transparency

In addition to the litigants' interest in disputes, the public has an interest in the fairness of the process, the subjects under dispute, and the outcome of those disputes. When disputes are litigated in a court, the public generally has access to this information. Privatized processes, in contrast, allow the parties to keep the matter secret. This may result in the public, or even the government, lacking information about important issues of public health or safety or product reliability.[265] It may allow companies who have committed hard-to-discover wrongs to hide the problem from a greater number of people. It allows material to be

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[261] *ICANN Policy*, *supra* note 32, § 4(d).

[262] "The World Intellectual Property Organization (WIPO) is an international organization dedicated to promoting the use and protection of works of the human spirit." WIPO, *About WIPO*, *at* http://www.wipo.org/about-wipo/en (last visited Nov. 27, 2000).

[263] *See* McCarthy, *supra* note 164 ("One rule of domain name argument is that the complainant can decide which body to take its dispute to. Is it any surprise then that big, powerful companies choose WIPO when it has a crystal-clear policy of favouring Goliath over David."); *see also* Milton Mueller, *Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy*, *at* http://dcc.syr.edu/roughjustice.htm (last visited Dec. 6, 2000) (finding forum shopping and bias in ICANN dispute resolution process).

[264] For example, filings with the FCC allege that MCI's dispute resolution provider gave MCI quarterly reports on the dispute outcomes, and specially trained arbitrators who would hear MCI cases. It also received financial benefits if it asserted jurisdiction over cases brought to it by MCI. Reuben, *supra* note 251, at 1059 n.531.

[265] For this reason, some state judicial systems have even put limits on the ability of parties to seal records of discovery and settlement in certain kinds of cases. *See, e.g.*, TEX. R. CIV. P. 76(a).

removed from public access without public knowledge. It also allows questionable processes to persist free of public scrutiny.[266] This section assesses the comparative transparency of the Internet processes, considering the amount of information available to the public and the content of that information.

ICANN is to be commended for its policy making most decisions freely available on the Internet at its Web site.[267] In addition, the ICANN decisions tend to set out the allegations of the parties and describe the supporting documents, and they explain the arbitrator's reasons for her decision. This process, then, is largely transparent.

The other three processes, however, proceed in secrecy. In the DMCA cases, the copyright holder privately complains to the ISP which privately disables the Web site. Only if a counter notification forces a lawsuit is there any potential public access to information about the copyright holder's claims and the Web site's defenses. The trusted system automatically "resolves" the dispute through its ability to control the software; it happens automatically in the licensee's home or office. One would have to read the code to understand the process. This is about as opaque as a system can get.

Arbitration providers advertise privacy as one of their major advantages.[268] In truly consensual arbitration proceedings, secrecy may be desired by both parties. In the kind of consumer arbitration discussed here, it is the seller/contract drafter who has chosen the secret process. If 1,000 lawsuits were filed against a manufacturer, the public would certainly find out. If 1,000 claims in arbitration were filed against the same company, it is much more easily hidden. Further, the arbitration processes themselves tend to be relatively opaque. Each party presents its position, but there is no record made of the proceeding, and generally the arbitrator need not explain her decision. Where the arbitrator has drawn on her own expertise, in addition to material submitted by the parties, there is no information about what, if anything, the arbitrator considered.

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[266] Opaque processes are also a problem for the parties. It is difficult to know whether one has been treated fairly, and difficult to know the reason one won or lost.

[267] The arbitrator does have the discretion to order, if a sufficient showing is made, that a decision not be published.

[268] See, for example, the NAF chart on "arbitration vs. litigation," National Arbitration Forum, *About the Forum: Choose the Forum*, http://www.arbforum.com/about/index.html (last visited Nov. 21, 2000).

There is a growing trend toward encouraging arbitrators in consumer cases to at least briefly explain their decisions.[269] For example, the AAA Statement of Principles state that at "the timely request of either party, the arbitrator should provide a brief written explanation of the basis for the award."[270] Similarly, the CPR Institute for Dispute Resolution rules require that the arbitrator "shall state the reasoning on which the award rests unless the parties agree otherwise."[271] From a democratic standpoint, a written opinion helps demonstrate that the private process was legitimate, rational, and fair. It can help either or both parties guide their future conduct. Public availability of opinions might also narrow the knowledge gap between the parties when choosing arbitrators.[272] Currently there is no requirement that opinions be explained, and contract drafting parties can even prohibit the publication of opinions.[273] The result is "maximum freedom and minimal public scrutiny for the institutions with the economic power to take full advantage of what private dispute resolution has to offer."[274]

D. Loss of Government Control over Law

The privatization of dispute resolution transfers control over the process from the courts to the party who creates the procedural rules. Perhaps less obviously, it also transfers control over the substantive rules applied within those processes. Part of the appeal of the private systems is their ability to circumvent the law that would otherwise apply. The result is a depreciation of public order; "The disputants, through

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[269] The consumer arbitration rules of the Better Business Bureau do require that the arbitrator render a written decision that explains the reasons for the award. *BBB Rules, supra* note 240, § 28.

[270] *AAA Statement of Principles, supra* note 204, Principle 15. This is an interesting development, as AAA rules for consumer disputes do not require the arbitrator to explain her decision. Indeed, the former tendency was *not* to explain so as to make it harder to show, on appeal, that the arbitrator did not follow the law. Statutorily, neither the Federal Arbitration Act nor the state laws under the Uniform Arbitration Act require arbitrators to make findings of fact or conclusions of law or otherwise to reveal the reasoning behind their awards. Reuben, *supra* note 251, at 1083.

[271] *Id.* at 1084.

[272] Granted, trial level decisions in courts are not always informative. A general jury verdict merely finds for one of the parties. However, it will be based on a theoretically complete explanation of the law to be applied. A trial court decision in a non-jury trial generally includes some mechanism for requiring the judge to make findings of fact and conclusions of law. *See, e.g,* FED. R. CIV. P. 52; TEX. R. CIV. P. 296.

[273] In addition, contract drafting parties can also charge extra for an opinion and thus discourage the consumer from requesting an explanation.

[274] Garth, *supra* note 141, at 386.

contract, create private law and private courts to adjudicate their dispute, and, so long as their own private laws are applied, they have contracted for and achieved private justice adjudicated by a . . . decision-maker of their choice."[275] A court would apply, to the best of its ability, the law created by the government, whether through legislation, regulation, or common law. Even when considering the parties' contractual agreement, courts will sometimes refuse to enforce it because it is overridden by mandatory law.[276] However, mandatory law is jeopardized when private processes and private decision makers are involved. The private system allows the more powerful party to avoid the impact of what would have been mandatory law.[277]

In all of the processes considered by this article, privately-chosen rules are being substituted for public law. ICANN's Policy and Rules were developed by a private body.[278] Many groups had input into these rules, but they were not primarily looking out for the interests of the public at large. Each private participant has its own agenda; "[t]he dearth of consumer representatives, public interest groups, and citizens groups . . . should serve to remind us all of the many reasons why we entrust major aspects of social policy making to elected officials."[279] Now the arbitrators privately accredited by ICANN, and privately chosen by trademark owners, are creating their own body of ICANN common law. With a body of hundreds of decided cases, ICANN arbitrators have

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275 Gibbons, *supra* note 246, at 772. Note the dream of one technology believer: "[T]hink about the impact on commerce of laws that . . . are algorithmically defined and enforced with certainty, anywhere and everywhere. Imagine laws in which mobs of uninvolved third parties have no say, have no power and have to mind their own business." Frezza, *supra* note 18.

276 Mandatory rules are also called "market-inalienable." Rights that are "governed by an immutable rule are 'market-inalienable' because they cannot be traded as part of a contractual exchange. Rights governed by default rules are 'alienable' because parties may alter the rules as part of a market transaction." G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 444 (1993). Privatized processes which deter the parties from resorting to the court system increase the power of the market and thus make more rules alienable.

277 Ware, *supra* note 13, at 711; *see also* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 338 (asserting that enforcement of arbitration agreements allows parties "to contract out of effective private enforcement of regulations adverse to their interests").

278 Not surprisingly, at least one ICANN complainant has already responded to a domain holder's claim of a first amendment right to expression by arguing that as a private body, ICANN cannot violate the first amendment. Wal-Mart Stores, Inc. v. Walsucks, Case No. D2000-0477 (WIPO July 20, 2000), http://www.arbiter.wipo.int/domains/decisions/html/d2000-0477.html

279 Froomkin, *supra* note 23, at 628.

begun to cite other ICANN arbitrators.[280] Although they also may cite to national law, it is clear that "the law of ICANN" is developing as a body of law about domain names, separate and apart from the law of any country or from any international treaty.[281] For example, some ICANN decisions have gone beyond the provisions of the ICANN Policy, protecting people's names and geographic names when the policy does not do so.[282] ICANN arbitrators transferred domain names when there has been no *use* of the name, despite the policy's requirement that the respondent have registered *and used* the name in bad faith.[283] And the ICANN arbitrators appear to have little sympathy for the free speech interests of those who register domains for the purpose of criticizing an entity.[284]

In the area of copyright, both the notice and take-down provisions of the DMCA and the planned operation of trusted systems allow contract to triumph over copyright. Web sites that infringe no copyright are summarily removed from the public eye. No access to copyrighted works is granted without permission. Professor Lessig identifies the costs of such far reaching control by the copyright holder asserting that:

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280 Michael Geist, *Domain name wars heat up*, THE GLOBE AND MAIL, May 4, 2000, *available at* http://www.globetechnology.com/archive/gam/E-Business/20000504/TWGEIS.html (remarking that early cases are forming basis for new global cyberlaw, with standards and legal tests divorced from traditional intellectual property law); *see, e.g.*, 3636275 Canada v. eResolution.com, Case No. D2000-0110 (WIPO Apr. 10, 2000), http://www.arbiter.wipo.int/domains/decisions/html/d2000-0110.html (finding in favor of complainant, doing business as "eResolution," and stating that "Although entitled to consider principles of law deemed applicable, the Panel finds it unnecessary to do so in any depth. The jurisprudence which is being rapidly developed by a wide variety of Panelists world-wide under the ICANN Policy provides a fruitful source of precedent.").

281 This could create a strange situation where a party actually files a lawsuit to avoid the result of the ICANN decision. That lawsuit will be decided under the laws of some actual country, which may differ from the domain name policy. The WIPO global standards may work only as long as they're not challenged.

282 Laurie J. Flynn, *Trademarks Winning Domain Fights*, N.Y. TIMES, Sept. 4, 2000, *available at* http://www.nytimes.com/library/tech/00/09/biztech/articles/04neco.html.

283 Tiller, *supra* note 38, at 595-96.

284 *See, e.g.*, Steven Bonisteel, *Guinness "Sucks" Domain Disputes Come to a Head*, NEWSBYTES, Aug. 28, 2000, *at* http://www.newsbytes.com/pubNews/00/154332.html (also discussing FreeserveSucks.com, DixonsSucks.com, NatWestSucks.com, StandardCharteredSucks.com); Flynn, *supra* note 282 (noting critics' claim that WIPO decisions de-emphasize free speech in favor of commercial interests); John Partridge, *"Cybergripers" lose rights*, THE GLOBE AND MAIL, Aug. 19, 2000, *available at* http://www.globetechnology.com/archive/gam/News/20000819/RGRIP.html; David Streitfeld, *Making Bad Names for Themselves: Firms Preempt Critics with Nasty Domains*, WASHINGTON POST, Sept. 8, 2000, at A01.

> From the economic perspective, [the development of trusted systems] threatens to empower individual authors against the interests of the class; from the constitutional perspective, it threatens to bottle up speech regardless of its relation to matters of public import; and from the perspective of the [intellectual] commons, it fundamentally changes the nature of access . . . .
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> . . . .
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> Trusted systems . . . are forms of privatized law.[285]

The parties' agreement is said to trump the content of copyright law, as if there were no federal component to it and no interests involved other than those of the contracting parties.[286] Further, the potential for the anti-circumvention provisions of the DMCA to suppress speech has already become clear in the first-litigated case on the issue.[287]

Even within the realm of contract law, the loss of court supervision is a serious matter.[288] From the standpoint of the legal system, as well as for individual transactions, private systems eliminate the ability of courts to apply mandatory contract and consumer protection law. A court might hold that certain contract terms are unenforceable, or that certain warranties cannot be disclaimed, or that certain remedies cannot be waived. It might require certain indications of true consent or adequate notice before other terms are enforced.[289] When these values are incorporated into published opinions, they help not only the individual consumer in the case before the court but also consumers as a group. When a private arbitrator rules, it binds no one other than the parties

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[285] Lessig, *supra* note 5, at 529.

[286] For an argument that federal copyright law preempts certain kinds of contract terms that would be allowed under UCITA, see Garry L. Founds, *Shrinkwrap and Clickwrap Agreements: 2B or Not 2B?*, 52 FED. COMM. L.J. 99 (1999).

[287] Damien Cave, *A bug in the legal code?*, SALON, Sept. 13, 2000, *at* http://www.salon.com/tech/feature/2000/09/13/touretzky/print.html (discussing DeCSS/DVD case).

[288] From a systemic perspective, it decreases the supply of case precedent that guides commercial actors in planning their conduct and informs consumers of their rights. Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 188 (1999-2000).

[289] Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986)("[I]f ADR is extended to resolve difficult issues of constitutional or public law—making use of nonlegal values to resolve important social issues or allowing those the law seeks to regulate to delimit public rights and duties—there is real reason for concern. An oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of private values.")

before her. Even if she were to rule for the consumer, it would create no precedent. Further, the arbitrator, applying the private law contained in the terms and conditions page, or trusted systems software applying its program, need not apply laws benefiting consumers.

Some arbitration providers represent that the arbitrators will apply the applicable law, although this would include the provisions of the contract. Under the AAA rules of consumer arbitration, for example, the arbitrator is to apply "any identified, pertinent contract terms, statutes, and legal precedents."[290] The National Arbitration Forum also advertises that its arbitrators are supposed to apply applicable law.[291] The former online service, Cybertribunal (perhaps because it was administered by a law faculty), said that it would apply the law agreed to by the parties or, absent agreement, the "national law with which the conflict has the closest links."[292]

Arbitrators, in fact, need not apply the law at all. The consumer arbitration service offered by the Better Business Bureau provides in its rules that "[a]rbitrators are not bound to apply legal principles in reaching what the arbitrator considers to be a fair resolution of the dispute."[293] Online services may also be law-free. The original online dispute resolution service, the Virtual Magistrate, said that it would apply a standard of "reasonableness in light of all available information."[294] The volunteer jurors for I-Courthouse cases are provided with no "law" to guide them. According to its CEO, the site "decided to avoid jurisdictional issues by not having applicable law."[295]

Whether or not the arbitrator theoretically applies any law outside the contract, an error of law is not a ground for vacating the award.[296] Only by showing "manifest disregard of law" — that the arbitrator knew what the law was and deliberately choose not to apply it — will legal

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[290] American Arbitration Association, *Arbitration Rules for the Resolution of Consumer-Related Disputes* § 13(c), http://www.adr.org/rules/commercial/000411ab.htm (Apr. 1, 2000).

[291] National Arbitration Forum, *An Overview of the Forum*, http://www.arbforum.com/about/index.html (last visited Nov. 27, 2000).

[292] Donahey, *supra* note 156, at 125(noting that Cybertribunal has been succeeded by eResolution).

[293] *BBB Rules*, *supra* note 240, § 28..

[294] Alejandro Almaguer & Roland W. Baggott III, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. ON DISP. RESOL. 711, 726 (1998).

[295] E-mail from Clyde Long, CEO, I-Courthouse, to Beth Thornburg, (Mar. 26, 2000, 13:25:00 PST) (on file with author).

[296] Ware, *supra* note 13, at 723.

error serve as the basis for vacating an arbitral award.[297] In a system in which no transcript of the proceedings is kept and awards are not explained, it will be a highly unusual case in which the manifest disregard test is met.[298]

Some parties are willing to be bound by some jurisdictions' actual law, but want to avoid laws that it finds unappealing. Such a company can bolster its chances of success through careful use of choice of law and choice of forum clauses. This is a device for circumventing jurisdictions that would override contractual choices with mandatory law. The first step would be to choose favorable applicable law in the contract. The second step would be to choose arbitration in a forum that will enforce that choice of law clause, and not override the chosen law with some public policy based device.[299] A defecting party with access to a forum that will insist on invalidating the arbitration clause and applying some less favorable law is still a danger, but many nations and states already enforce choice of forum and arbitration clauses.[300] Jurisdictions wanting to attract e-businesses may help this process along by passing statutes that facilitate the enforcement of such clauses, leading to a kind of race to the bottom in accommodating corporate desires.[301]

When governments lose control over disputes, they lose a large amount of control over the law. This is particularly true in a country like the United States in which much of the implementation and enforcement of legal norms is left to private litigation. The trend in Internet dispute resolution to move disputes out of the courts and into private processes is changing not only the litigants' own process rights but also the substantive law.

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[297] *Id.* n.19. *See generally* Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 774-78 (1996) (describing development of "manifest disregard" of law construct).

[298] Empirical studies, however, have long demonstrated that arbitrators often do not apply the law. *See, e.g.*, Heinrich Kronstein, *Arbitration Is Power*, 38 N.Y.U. L. REV. 661, 669-79 (1963); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 865-67 (1961).

[299] If this chosen forum is an inconvenient distance from the consumer's residence, it has the added bonus of creating more disincentives to the consumer even pursuing a claim.

[300] For a discussion of the probable efficacy of this plan, see Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1245-46 (1998).

[301] *Cf.* Froomkin, *supra* note 23, at 623 (discussing possible sources of harmonization of global law). Note, for example, that in being the first state to adopt UCITA, Virginia hopes that it will "further its reputation as a center of high-technology and attract more businesses to the state." Craig Timberg, *Gilmore Signs 1st Internet Commercial Code Into Law*, WASHINGTON POST, Mar. 14, 2000, *available at* http://www.washingtonpost.com/wp-dyn/articles/A6866-2000Mar14.html (last visited Nov. 27, 2000).

CONCLUSION

Privatization is indeed all the rage, but some of its manifestations need to go the way of the pet rock. Professor Lessig states that there must be limits to privatization; "[J]ust as we don't privatize every public park, every street, and every idea, we can't privatize every feature of cyberspace."[302] The privatization currently reigning on the Internet is not the kind of libertarian Nirvana envisioned by Net architects. The old-style libertarians are busy designing open source code, creating programs that provide free access to music even more untraceably than Napster, and acting as vigilantes in the war against spam. The new privatization is instead the anti-regulation sentiment of corporate actors seeking to maximize their profits.

This is not an area where we can expect industry self-regulation to provide adequate limits to overreaching.[303] Evidence of market choices is already emerging. Trademark owners strive to stretch local marks to global control through the dot-com domain name. Copyright owners are preparing to license every conceivable use of copyrighted material and to use self-help to avoid outside supervision.[304] And merchants are using standardized contracts to impose both substantive and procedural terms that dilute the rights of the consumer. Companies purporting to adopt consumer-friendly "best practices" are agreeing to little more than the bare minimum required by the most lenient jurisdiction's law.[305] Consumer transactions in particular often take place under conditions of pervasive, persistent market failures which prevent an economically rational outcome from being reached through pure market forces.[306]

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[302] Lessig, *supra* note 8, at 1420.

[303] Given the trend toward privatization, a developing body of case law will also not be available to create a useful set of legal limits. Many disputes will not reach courts, especially courts that issue published decisions. Further, courts are by their nature limited to deciding the cases before them on the facts before them and are thus less able to implement rules that have a broader effect.

[304] They have also quietly succeeded in significantly extending the temporal length of copyright protection. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended at 17 U.S.C. §101 (Supp. IV 1998)).

[305] *Guidelines*, *supra* note 202. Professor David Sorkin commented that the Guidelines "fall far short of the protections guaranteed to consumers under existing law in many jurisdictions, and may be applied in ways that prevent consumers from asserting their rights under these existing laws." Chris Oakes, *Net Guidelines a Good Start*, WIRED, June 7, 2000, *available at* http://www.wired.com/news/politics/0,1283,36811,00.html (last visited Nov. 27, 2000).

[306] The factors creating these market failures include information asymmetries, unequal bargaining power, and collective action problems that prevent consumers from banding together to bargain as a group for fair terms from merchants. Memorandum from

Both code and contract can be controlled.[307] Governments can provide minimum acceptable standards even for private systems of resolving disputes,[308] and can where appropriate prohibit the parties from using technological devices to administer self-help remedies. Although technology-specific regulation would be quickly outdated, certain actions can be required or prohibited.[309] Further, governments can identify substantive law that may not be varied by contract.[310]

Professor Jane K. Winn, to Federal Trade Commission, Consumer Protection Division (May 20, 1999), *at* http://www.ftc.gov/bcp/icpw/comments/ftcjwinn.htm (last visited Nov. 29, 2000); *see also* Sternlight, *supra* note 141, at 686-93 (discussing why market will not correct power imbalances involved in consumer transactions).

[307] The European Union, for example, requires that consumers be allowed to sue in their home and that the law of the consumer's habitual residence be applied to the transactions. Dreben & Werbach, *supra* note 130, at 19 ("A European Community directive that has been implemented in all member states of the European Union mandates that the choice of law is always the law of the domicile of the consumer in consumer contracts."); *see also* Robert L. Hoegle & Christopher P. Boam, *The Internet and Jurisdiction—International Principles Emerge but Confrontation Looms*, 3 J. WORLD INTELL. PROP. 31, 45-46 (2000) (observing that draft EU directive would allow consumers to sue in their own national courts, regardless of whether seller had "actively sought" to sell its product in that forum); Paul Meller, *Online Buyers Gain Ability to Sue*, N.Y. TIMES, Dec. 1, 2000, *available at* http://www.nytimes.com/2000/12/01/technology/01NET.html (last visited Dec. 6, 2000); Maureen A. O'Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity?*, 14 BERKELEY TECH. L.J. 635, 654-55 (1999) (noting that under EU law, consumers receive the benefit of the protection of mandatory rules of their own jurisdiction); Peter P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INTL LAW. 991, 994 (1998)(citing Rome Convention).

[308] *See* Gibbons, *supra* note 246, at 775 (arguing that arbitration on Internet must be responsive to some institution or policy outside will of contracting parties); Menkel-Meadow, *supra* note 201, at 60 (recommending statutory changes in Federal Arbitration Act to guarantee protections such as representation, discovery, written opinions, and more meaningful judicial review); Radin & Wagner, *supra* note 15, at 1317 (suggesting international system for minimum standards of due process and public policy limits on Internet).

[309] For an example of this kind of regulation (although an ill-conceived one), see the Digital Millennial Copyright Act prohibition of devices that circumvent digital rights management devices. 17 U.S.C.A. § 1201 (West Supp. 2000). The goal of the device, rather than any particular mechanism, is what is prohibited by the statute.

[310] For example, Germany's highest civil court has just ruled that Microsoft cannot prevent dealers from unbundling the software and selling it separately. This appears to enforce traditional first sale rights despite Microsoft's desire to interpret the transaction as a license that limits future uses. *See* Rick Perera, *German court says OK to unbundling*, INFOWORLD.COM, July 7, 2000, *at* http://www.infoworld.com/articles/hn/xml/00/07/07/000707hnunbundle.xml (last visited Nov. 27, 2000). Following this decision, prices for various Windows programs have decreased from 20 - 30% as a secondary market develops. John Lettice, *German court ruling triggers 30% price cuts on Windows*, THE REGISTER, Sept. 5, 2000, *available at* http://www.theregister.co.uk/content/1/12985.html (last visited Nov. 1, 2000).

Left unchecked, market forces and their legislative allies are ignoring important public interests. The e-commerce boom comes with associated costs, and absent government regulation the companies involved will externalize those costs onto consumers and the public at large. Governments need to impose certain standards, or technological choices will make it increasingly difficult to embed important values in the dispute resolution process. Reasonable minds can disagree about the exact dimensions of government intervention that would protect procedural due process guarantees and require the enforcement of substantive norms. It is clear, however, that regulation is required. The government has bent over backward in its effort to please the major players on the Internet. It's time to lean the other way.