

Online Dispute Resolution: Designing New Legal Processes for Cyberspace

Ethan Katsh¹

National Center for Technology and Dispute Resolution

University of Massachusetts

Amherst, MA 01002

There has been considerable and, sometimes, heated debate during the last ten to fifteen years about the relationship between law and the Internet. For the public, as well as for those actively participating in the debate, the focus of attention has been on whether an array of laws and rules should be replaced or modified.² Legal doctrines involving information and communication, such as privacy, copyright and free expression, have received most of the attention but other areas, such as the formation of contracts and the protection of consumers, have been of concern as well.

Cyberspace has been both an enticing and a frustrating environment for those wanting to develop an effective and relevant code of laws. Court decisions, legislation and regulations are frequently in the news and we expect and assume that they are influential in promoting order, building trust, protecting rights and reducing risk. Our current challenge with law, however, is not merely one of anachronistic rules and particular problem areas, such as file sharing, spam or pornography, but a lack of effective legal institutions and processes. The purpose of this paper is to suggest that our field of vision needs to be broader and somewhat different if law is to achieve what we want and expect of it. We do have a need to draft and effectively enforce rules but tweaking or even replacing the rules cannot be a solution if we do not have institutions and processes that complement and support the rules. We have, as Paul Schiff Berman has written, “an unfortunate tendency to assume that legal norms, once established simply take effect and constitute a legal regime.”³

This paper suggests a legal future that is oriented around virtually-based legal processes as much as it is about legal rules. During the past fifteen years, as courts and governments have been endeavoring to define their roles and understand whether the authority of legal rules of some jurisdiction is eroding, the need for what law has been relied on for in the past has only grown larger. Yet, the most effective mechanisms for responding to those needs of have probably been non-governmental. These have involved providing safety through technological means, stability by using agreements that specify responsibilities and that can be enforced, and by embedding online dispute resolution in ecommerce and other online ventures.⁴ This essay focuses on the last of these.

¹ Email: katsh@legal.umass.edu This article derives from research supported by National Science Foundation award #0429297., *Process Families and Their Application to Online Dispute Resolution*, <http://www.fastlane.nsf.gov/servlet/showaward?award=0705772>

² David R. Johnson and David Post, “Law And Borders — The Rise of Law in Cyberspace,” 48 *Stan. L. Rev.* 1367 (1996); Jack L. Goldsmith and Tim Wu *Who Controls the Internet?: Illusions of a Borderless World* (2006)

³ Paul Schiff Berman, “From International Law to Law and Globalization,” 43 *Colum. J. Transnat’l L.* 485, 498 (2005).

⁴ E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (2001)

Cyberspace is an active place, a creative place and, for some, a lucrative place. It is not, however, a harmonious place. Cyberspace has been recognized as an environment that generates novel kinds of disputes but less noticed and equally important is that it generates increasingly large numbers of disputes. The link between the growth of cyberspace and the generation of large numbers of disputes is not difficult to identify. It is a byproduct of the following:

- Increase in online transactions
- Increase in online relationships and interactions
- Increase in value of information
- Increase in distribution of and access to information
- Increase in novel uses of information
- Increase in virtual goods and virtual property
- Increase in innovation and creative activity
- Increase in complexity
- Increase in pace of change
- Increase in bugs in software

During the period when scholars have been debating the nature of official legal authority in cyberspace, states have, with relatively little notice, been quite willing to give up responsibility for providing the dispute resolution processes that may be needed by their citizens. Rather than being threatened by this development or considering it to be an attack on their sovereignty, states have actually encouraged the privatization of dispute resolution, viewing this development not as a problem but as a solution to a problem. In the United States, at least, this has resulted in the phenomenon of the “vanishing trial”, a situation in which the percentage of cases going to trial in the federal courts declined from 11.5 percent in 1962 to 1.8 percent in 2002.⁵ Or, as the title of an article by Judge Patrick Higgenbotham asks, “So Why Do We Call Them Trial Courts?”⁶

This has contributed to entities ranging from ICANN⁷ to eBay⁸ to Wikipedia⁹ to SecondLife¹⁰ recognizing that what is labeled “alternative dispute resolution” offline will be primary dispute resolution processes online. Web 2.0 entities, in particular, understood early that users provided these sites with value but value and use would decline if there were no mechanisms for resolving disputes quickly. As a result, sites like Wikipedia and eBay have

⁵ Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts", (2004) 3 *Journal of Empirical Legal Studies* 459; Ostrom, et al, "Examining Trial Trends in State Courts: 1976-2002", (2004) 3 *Journal of Empirical Legal Studies* 757.

⁶ Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. REV. 1405, 1405-07 (2002)

⁷ <http://www.icann.org/udrp>

⁸ <http://pages.ebay.com/help/buy/disputes.html>

⁹ http://en.wikipedia.org/wiki/Wikipedia:Resolving_disputes

¹⁰ "Online Dispute Resolution in SecondLife," <http://ict4peace.wordpress.com/2007/11/08/online-dispute-resolution-odr-in-second-life> ; see also [Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code.](#) New York Law School Law Review, v. 49, 2004, pp. 1101-1121 /

multiple systems to help users resolve differences. Ebay, in particular, is noteworthy in that it handled almost 40 million disputes in 2008 using software and automated processes to assist parties to problem solve.¹¹

Many assume that law emerges first with rules and, at some later time, institutions are set up to enforce or interpret the rules. The experience of online dispute resolution as well as standards-setting organizations such as the International Organization for Standardization (ISO), the National Institute of Standards and Technology (NIST) and the American National Standards Institute (ANSI) supports a more complicated sequence, one, in which the question “where does law come from” has multiple answers. There are certainly instances in which the making of rules, the interpretation of rules and the application and enforcement of rules will occur in that order. In other instances, however, a starting point may be attempts to resolve problems that occur in the absence of rules, an activity that may later lead to the development of new rules or, at times, to new ways of thinking about methods for shaping behavior and protecting rights. There are linkages between legal structures and informal methods of social control and, as Robert Ellickson has written, “lawmakers who are unappreciative of the social conditions that foster informal cooperation are likely to create a world in which there is both more law and less order.”¹² Systems for social ordering, in other words, should be appropriate for the culture and community involved and the Internet, with a still developing culture and community, is likely to be a challenge for some time.

Online dispute resolution (ODR) is, to some extent, a way of compensating for the vacuum or slow movement in rule making. It is, in addition to endeavoring to resolve disputes, being employed to do some of the tasks we expect to come from law. For example, trust is often built by enacting and publicizing enforceable standards but it can also be achieved by providing assurances to parties in any relationship or transaction that they will have opportunities to resolve any problems that might arise. This is not to suggest that there is no need for authoritative, clear and even uniform rules, only that some of the same ends can be achieved through a variety of means. Nor is it to say that all strategies to pursue some end are equally effective. Indeed, the pressure for a rule making authority in cyberspace may be heightened as a result of inadequacies of some of these substitute methods.

The late law professor Lon Fuller pointed out that “just as a society may have rules imposed on it from above, so it may also reach out for rules by a different kind of inarticulate collective presence.”¹³ Laws, rules and standards begin life via informational processes that identify problems, values and desired standards of behavior. We have increasingly sophisticated sensors for generating feedback about problem areas and we are acquiring increasingly sophisticated informational tools for building responses to problems that are identified. As noted earlier, it is hard to predict exactly what the path is from ODR to mechanisms that embody group expectations but the short experience with ODR suggests that the old model in which rules came from courts and all other forms of dispute resolution are private, affecting the parties but not the public, was linked to information handling practices and information segregation practices that can be managed differently in cyberspace.

¹¹ Conversation with Colin Rule, Director of Online Dispute Resolution for eBay and PayPal, February 19, 2009

¹² Robert Ellickson, *Order Without Law*, (1991), p. 286.

¹³ Lon Fuller, “Human Interaction and the Law,” In: Robert Paul Wolff, ed., *The Rule of Law* (1971).

If one assumes that law can only emerge from a sovereign power, as rules imposed on individuals and groups, the relevance of how online sites deal with problems may be difficult to see. Yet, if one views law as an information processing system, opportunities to displace law through software should be apparent. Indeed, this is largely the theme of the expression “code is the law.”¹⁴ The phrase originally embodied the idea that behavior can be constrained or liberated by software code, thus providing an alternative to legal rules. Software code is law, however, in another sense, namely that software is what drives and shapes the heart of many emerging online dispute resolution processes.

It can be expected that many activities in the future will be governed not by the law of the state but by processes in which trust and dispute prevention are software generated, where standards of behavior are embedded in code, and where dispute resolution processes are also guided by software. These alternatives to law will derive from new information processing and communications opportunities that are now becoming possible. Yet, communication combined with information processing also holds open an additional possibility. This is that the new media will not simply resolve disputes or deter disputes or shape behavior through code, but, in some instances at least, will enable laws and rules to emerge out of behaviors and activities.

Marc Galanter, one of our most distinguished law and society scholars, once observed that law

usually works not by exercise of force but by information transfer, by communication of what’s expected, what forbidden, what allowable, what are the consequences of acting in certain ways. That is, law entails information about what the rules are, how they are applied, with what costs, consequences, etc. For example, when we speak of deterrence, we are talking about the effect of information about what the law is and how it is administered. Similarly, when we describe ‘bargaining in the shadow of the law’, we refer to regulation accomplished by the flow of information rather than directly by authoritative decision. Again, ‘legal socialization’ is accomplished by the transmission of information. In a vast number of instances the application of law is, so to speak, self administered — people regulate their conduct (and judge the conduct of others) on the basis of their knowledge about legal standards, possibilities and constraints.”¹⁵

It may still be too early to predict what kinds of novel ordering, trust enhancing and dispute resolution institutions will emerge in cyberspace but it is not too early to be confident that the need and demand for such institutions will continue to grow. It may be true, as one critic has written, that “[T]he possibilities for private legal ordering are not limitless”¹⁶ but it is quite possible that information processing capabilities will expand the various models of private ordering and even, at times, allow public law models to emerge. Under such a scenario, rule

¹⁴ The phrase originated with William J. Mitchell, *City of Bits: Space, Place, and the Infobahn* (Cambridge, Mass.: MIT Press, 1995), p. 111. See also Lawrence Lessig, *Code and Other Laws of Cyberspace* (1999), Ethan Katsh, “Software Worlds and the First Amendment: Virtual Doorkeepers in Cyberspace,” *University of Chicago Legal Forum* (1996) 335, 338. Joel Reidenberg, “Lex Informatica: The Formulation of Information Policy Rules Through Technology,” *76 Texas Law Review* (1998): 553.

¹⁵ Marc Galanter, “The Legal Malaise: Or, Justice Observed,” *19 Law and Society Review* 537, 545 (1985).

¹⁶ Jack L. Goldsmith, “Against Cyberanarchy,” *65 U. Chi. L. Rev.* 1199, 1209 (1998).

making may emerge tentatively and gradually over time, rather than with a single act of recognition. Rules may also emerge from shared spaces rather than sovereign spaces and from a concept of distributed authority rather than a model of a supreme authority. Standard setting bodies, for example, may fill part of this void by building consensual agreements where authoritative rules are not present or feasible.

Alternative dispute resolution in the physical world is an alternative to litigation but ODR in the online world is an alternative to law in a broader sense by performing some public functions such as lowering the risk level of participating online. The ongoing development of ODR is a history of the building of an online civic institution that can be linked to other online civic institutions in ways that were not possible when information was tied to physical objects and spaces.

In the scenario envisioned here, the state does not remove itself completely from prescribing laws for cyberspace but it is also may not be the driving force behind the growth of an online legal regime. The state's reach and authority is being challenged not simply by geography and the movement of huge numbers of bits across borders but by the information processing engines that use these bits to build the complex online systems we interact with daily. In other words, while the cross-border flow of information may weaken the application of the law of a particular jurisdiction, information processing leads to ever increasing levels of online activity, to new kinds of online interactions, and to increasingly complex online relationships. These are all developments which will encourage experimentation with various forms of online law-related processes.

Justice Oliver Wendell Holmes once wrote that, “[i]t cannot be helped, it is as it should be, that the law is behind the times.”¹⁷ Yet Holmes also wrote “[t]he life of the law has not been logic; it has been experience.”¹⁸ This is a period of unprecedented experiences with communicating and processing information and the underlying goal of stability that is suggested by Holmes first quote is unlikely to dominate how the law evolves. More likely, the “life of the law” will be shaped by how creative we can be in working with and understanding the powerful information processing and communications tools and resources presented by this environment.

¹⁷ Holmes, Oliver Wendell, *Speeches* (Boston: Little, Brown and Co., 1934), p. 102.

¹⁸ Holmes, Oliver Wendell, *The Common Law* (Boston: Little, Brown and Co., 1881), p. 5.