Smoothing Some Wrinkles in Online Dispute Resolution

BRUCE L. MANN*

Abstract

This paper describes a persistent problem in online dispute resolution, namely substandard ODR presentations made by inarticulate and lesser dispute-wise disputants make the bargaining conditions uneven. Three innovations are introduced to address the problem: the SSF design solution, expert-peer online assessment, and a formula for expert-peer assessment. The innovations build on previous work, and have been modified to accommodate the limitations and requirements of online dispute resolution and address the problem in section 1. The paper is organized in five sections. Section 1 describes the uneven condition favoring the reputable disputants in online dispute resolution, that affects inarticulate and disadvantaged, lesser dispute-wise disputants. Section 2 is a review of the literature of three common solutions to the problem: structured argument solutions, technology-intensive solutions and design presentation solutions. The four research questions addressed at the end of Section 2 are concerned only with the factors contributing to the stated problem. Section 3 is an introduction to the SSF design solution for online dispute presentations to address the uneven conditions for less dispute-wise claimants and respondents. Section 4 introduces a method of presenting communications in online dispute resolution called expert-peer online assessment, and an expert-peer formula for evaluating online dispute presentations. Section 5 is a discussion of the research questions introduced in section 2 over the concerns expressed about ODR, and a considered review of the innovations in light of the literature on ODR.

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1 Introduction to the Problem

This section is an introduction to a persistent problem in online dispute resolution, namely that presentations made by inexperienced disputants are ‘less dispute-wise’ according to the American Arbitration Association (2006),1 and make the bargaining conditions uneven when compared to professionally presented cases of more dispute-wise respondents.2

Context of the Problem Addressed in This Paper

Most people in a dispute would likely be more attracted to online dispute resolution than formal litigation because it is less costly, more convenient, operates outside the formal court structure, and does not require legal representation. Legislation promotes the idea. Article 17 of the Directive 2000/31/EC states that member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way that provides adequate procedural guarantees for the parties concerned.3 Consistent with the Directive, the Scottish Parliament recently held a debate where Cabinet Minister for Justice Kenny McAskill disclosed plans for an ADR Centre in Scotland. The Scottish Government also indicated a willingness to look to other jurisdictions for best practice examples.4

These same reasons that attract most people to online dispute resolution however, also attract richer, more powerful clientele with the money to hire lawyers that have greater resources at their disposal than their less fortunate counterparts. Equal bargaining power between disputing parties should be more than a convenience. It is a necessary quality of any fair system of dispute resolution, and a requirement of justice within a civilised society. The problem is exacerbated by instructions about the process that are not explicit enough for some disputants, as Hammond’s (2001) study showed,5 with written instructions that are intimidating, FAQ’s that are too long, and few or no pictorial renditions of the meeting space.

A specialised field called ‘AI and Law’ has attempted to address particular differences in the ability of people to argue logically and convincingly, as described in section 2. The solutions have some limitations however. One is that the reliance on structured argumentation with rules, inserting

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1 See the survey of Fortune 1000 companies (n=101) using ADR identified eight particular traits that characterized “most dispute-wise” from “moderate-” and “least dispute-wise” business management. In the American Arbitration Association (2006). Dispute-wise business management: Improving economic and non-economic outcomes in managing business conflicts. New York, NY: AAA.
legal interpretation and other rule-based reasoning, does little to address questions of fact. Another is that AI and Law solutions usually originate in an overly rationalist epistemology where the better argument automatically wins. The technology-intensive solution, also described in section 2, is a different approach to the stated problem, that offers users enhanced interaction between the dissenting parties, but also requires specialized knowledge of the technology, disadvantaging the technologically unskilled user. The presentation design solutions, a third approach to the problem, promises to support the development of dispute presentations. However most of the guidelines used in presentation design tend to be either too broad, too narrow, or too outdated to actually use.

In sum each of these different approaches aims to offer users distinct advantages with the single objective of leveling the playing field to minimise extraneous differences between the disputants. This mutual objective, more than a mere convenience, is instead a requirement of justice and even necessary if online dispute resolution is to fulfill its potential.

Statement of the Problem Addressed in This Paper

This paper is only concerned with the uneven condition favoring reputable and wealthy disputants in online dispute resolution that leaves inarticulate and lesser dispute-wise disputants disadvantaged, and three factors identified by Hörnle (2002) that contribute to this inequitable situation.

The first factor resides in substandard ODR presentations made by inarticulate and lesser dispute-wise disputants that could be readily addressed with an online tutorial or job aid. In fact many ODR providers do offer stepwise instructions and FAQ’s. They are by all accounts, not explicit enough - not on point.

A second contributing factor concerns the quality of assessment procedures in dispute resolution, due either to favoritism for one party, or due to technocentrism over favourite features in the technology.

The third contributing factor to the stated problem is about how ODR assessment data are analysed, and decisions made.

Section 1 is an introduction to the problem and factors contributing to the problem addressed in this masters dissertation. Chapter 2 will highlight some of the available literature relating to the questions raised in online dispute resolution.

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2 Review of the Literature

This section is a review of the literature on three common solutions to the stated problem: structured argument solutions, technology-intensive solutions and design presentation solutions. The section begins with some background to these solutions beginning with the structured argument for online dispute resolution (ODR).

Background

Advocates of group decision support systems acknowledge Winograd and Flores (1986) as having laid the groundwork for using technology to support the resolution of communicative breakdowns.8 Winograd and Flores have in turn, credited Plato and his ‘rationalistic orientation’ as the main-spring of Western science and technology. Winograd and Flores characterized the Platonic approach as:

- Having identifiable objects and well-known properties
- Finding general rules that apply to situations associated with those objects and properties
- Applying rules logically in the situation of concern, drawing conclusions about what should be done

Plato wrote about resolving disputes predominantly through his character Socrates, principally in his dialogue ‘The Gorgias’,

SOCRATES: You Gorgias, like myself, have had great experience of disputations, and you must have observed, I think, that they do not always terminate in mutual edification, or in the definition by either party of the subjects which they are discussing; but disagreements are apt to arise-somebody says that another has not spoken truly or clearly; and then they get into a passion and begin to quarrel, both parties conceiving that their opponents are arguing from personal feeling only and jealousy of themselves, not from any interest in the question at issue.10

Winograd and Flores opted to reject the objective stance introduced in Plato’s rationalistic orientation (i.e., that the physical world is the primary reality), and his subjective stance (i.e., that my feelings and thoughts are the primary reality), arguing instead with Heidegger, that it is impossible for one to exist without the other. Aakhus correctly noted that Winograd and Flores’ pragmatic approach to communication was consistent with Simon, Searle and Habermas. The ideal outcome of communication

then, for Winograd and Flores was “inter-subjectivity” and “consensus.” For them, the design of technology entailments works into the flow of human interaction in a manner that helps people to collaboratively manage breakdown through a network of commitments.\(^{11}\)

Just as Winograd and Flores credited Plato for his impact on dispute resolution, Fodor (1980) credited Aristotle for his impact on Artificial Intelligence (AI) decision support systems.\(^{12}\) Aristotle developed argumentative modes of persuasion as the essence of rhetoric, the flip side of dialectic. Aristotle’s syllogistic logic always contains a minor premise, a major premise and a conclusion. Like Plato however, Aristotle observed that argumentative modes of persuasion could appeal to human emotions, and sometimes warp our judgments.

Aristotle introduced a belief-desire-intention model of reasoning, and labeled implicit premises of practical reasoning in deliberation *endoxa*, or opinions that are reputable, because they are either accepted by everyone, accepted by the majority, or accepted by the wise.\(^{14}\) In making and defending a proposal, then argumentation often rests on generally accepted opinions of the audience that are not explicitly stated as premises. Walton (2000) noted that inferences based on *endoxa* in public deliberations tend to be fallible, and inherently subject to critical questioning.

**Structured Argument Solutions**

Muecke and Stranieri (2007) proposed an alternative to Aristotle’s syllogistic logic and *endoxa*, to capture expert reasoning for online disputes, that is \(^{15}\) based on Toulmin’s (1958) argument structure. Toulmin argued that although Aristotelian logic is well suited to analytical argument, it was inadequate for uses with other types of arguments.\(^ {16}\) The argument structure proposed by Muecke and Stranieri \(^ {17}\) and illustrated in Table 1 may well be

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\(^{13}\) Aristotle (350 B.C.) *Rhetoric*.

\(^{14}\) Aristotle, *Topics* (100b22-24).


Table 1. Two arguments are shown in the same format. Argument A shows a typical Aristotelian syllogism with two True propositions yielding a Valid conclusion. Argument B shows how Muecke and Stranieri’s adaptation of Toulmin’s argument structure can be imposed-over and extends a syllogism.

**Argument A:**\(^{18}\)

**Premise 1:** Socrates is a man in town. A particular, affirmative proposition, is True.

**Premise 2:** All men in town are stonecutters. A universal, affirmative proposition, is True.

**Conclusion:** Socrates is a stonecutter in town. A valid syllogistic argument.

**Argument B:**\(^{19}\)

**Premise 1:** Mustafa is an Arab in town. A particular, affirmative proposition, is True.

**Premise 2:** Most (Aristotle would say ‘Some’) Arabs in town are Muslims. A conditional, affirmative proposition, is True. (Thus far, still consistent with Aristotelian logic).

**Conclusion:** Mustafa is most likely a Muslim in town. An inconclusive argument, invalid. (As Aristotelian syllogism, this argument would require at least one and likely two more premises, to sort ‘Some Arabs are Muslim’ from ‘Some Arabs are Not Muslim’). In Toulmin’s logic, these premises and conclusion could constitute the *thesis* in the claim.

**Data** on Mustafa’s beliefs in town, the Muslims and non-Muslims in town, Arabs and non-Arabs in town, etc.

**Warrant** on the connection between Mustafa, the Muslims and Arabs in town, etc.

**Backing.** Maybe this is all hearsay. Nobody has seen Mustafa in months. Maybe he got married and left town. Where’s the evidence?

**Qualifiers.** Is there more than one “Mustafa” in town, especially if the town is located in an area where there is likely to be more than one.

**Counter-arguments.** Religious conviction is a private matter, and nobody else’s business.

**Limitations.** Mustafa was seen with a Sikh girl (it is customary for Muslims and Sikhs to keep their distance).

\(^{18}\) Based on Aristotle’s examples, in *Categories, The Rhetoric,* and *Metaphysics.*

\(^{19}\) Muecke and Stranieri’s example.

compatible with the three innovations proposed in this document, though they are as yet untested in a dispute resolution context.

In sum, the emphasis in the structured arguments solution for online dispute resolution requires some combination of information technology law and artificial intelligence to develop a legal knowledge system, manage extant knowledge, or develop a model of legal argumentation and legal ontology as in Table 1. The field is interdisciplinary. A main concern with the structured argument noted in Rule (2002), is the tendency to interrupt during synchronous communications exchanges (e.g., during text messaging in a Chat, wall-writing in a social networking website, or voice-over IP, giving the faster typist an unfair advantage). Walton and Godden (2005) believe that interrupting the other party in this way violates Grice’s principles of ‘cooperation’. 

Technology-Intensive Solutions

Technology-intensive solutions have a different emphasis from structured argument solutions, in that the features offered in the Internet programs (e.g., email attachments, break-out meeting rooms, simulated courtrooms) can affect the range of presentation possibilities, and subsequently affect the outcome of a dispute. Katsh and colleagues (2006) argued that a technology-intensive approach should be widely accepted in dispute resolution as a “fourth party”. ODR technology can play various roles in consensus building, in decision making, and in the interaction between the parties in dispute and a third-party neutral. A feature in an ODR system is ‘an influence on the process of communication and negotiation, something that adds value to the third party by providing an ally or assistant alongside’. Cortés (2008) determined that Internet technology has not only changed the status of ODR from an alternative to the primary method of dispute resolution, but has changed the way disputes are resolved. Similarly Out-Law. Com reported recently ‘it is possible that the Internet will become a popular medium for dispute resolution. In the US, Virtual Court Room initiatives have already been launched. Bodies such as the European Union and the International Chamber of Commerce are also looking at the potential of

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24 Hammond. Ibid 5.
on-line services with a view to more efficient dispute resolution. Dieguez (2008) would go further, stating that technology can even replace human expertise in dispute resolution ‘it [the software] has proven to be very effective obtaining 85 per cent of cases settled through the use of online-assisted negotiation’. His favourite feature being ‘the electronic form’, wherein ‘the use of ADR must be implemented by ICT in order to deal effectively with disputes arising from e-commerce.

**Definitions of ODR**

Formal definitions of ‘online dispute resolution’ have remained similar even bland, over the years, defined in 2003 for example, as an omnibus term that describes any one of several classifications of dispute resolution systems or procedures, and four years later as a broad category that can encompass any mediation, arbitration or dispute resolution that takes place outside of court and at least partially online. Farah (2005) conservatively defined ‘online dispute resolution’ as the use of information technology particularly the Internet, in the conduct of alternative dispute resolution processes. Zondag and Lodder (2007) described the process of ‘online dispute resolution’ as an attempt to use the Internet to mainstream alternative dispute resolution (ADR). Schiavetta (2004) included dispute resolution that is conducted exclusively online, as well as those supported by the Internet to varying degrees.

**Classification Systems for ODR**

There isn’t one classification system for online dispute resolution. A review of the literature could show no empirical evidence to promote one classification system over any other. The following listing and description of extant classification systems for online dispute resolution is meant to be illustrative, not exhaustive. Table 2 shows in one location, some of the more common terminologies and descriptions used in classifying online dispute resolution.

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28 Out-Law.Com (February 2008). Dispute resolution. Pinsent Masons LLP.
### Table 2. Some common terminologies and descriptions used in classifying online dispute resolution

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Rosener-McAveney’s Technology-Intensive Spectrum
The Rosener-McAveney spectrum is a refinement of Schiavetta’s ‘varying degrees of Internet use’. Although it was originally intended as a classification system for Mediation only, the Rosener-McAveney spectrum can be applied to all kinds of online dispute resolution.

Technology-Support Role
At the far end of the Rosener-McAveney spectrum, traditional mediation is used alongside Internet technology in a technology-support role. A case begins when parties agree to use the free service and can begin negotiating directly by email, chat room, listserv or videoconference. ‘Squaretrade’ is one example of traditional mediation using online technology.

Software and a Neutral Third-Party
Toward the middle of the Rosener-McAveney spectrum is some combination of software and neutral third-party facilitator. The software generates suggestions based on party preferences and concessions. Neutral, third-party facilitators using software, work with the parties to develop an agreeable settlement. If they accept the same package, the dispute is settled. ‘Smartsettle’ is one example of such a service.

Fully-Automated Computer System
At the other end of the Rosener-McAveney spectrum, is the fully-automated computer system that can generate high-speed settlements by matching offers and demands using an online, double blind bidding system. ‘Cybersettle’ is a good example of a fully automated computer system. Another is ‘Second Life’. Law students in a dispute resolution class at the University of Dayton Law School are honing their mediation skills in Second Life, where each participant’s avatar communicates through its presenter’s voice or by text messages. In addition to the general communication among the group, separate private Instant Messages can occur simultaneously. The presenter’s personality according to DeBrosse (2008), comes through in how the avatars are dressed and move, and biases based on appearance or voice are eliminated, while gestures and facial expressions that are important to communication are also lost.

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**Hart’s Categories**

Another popular classification system is Hart’s (1999) categories. Hammond (2001) noted that Hart’s ODR classification is preferred among dispute resolution professionals, because it describes the process of resolution as a function of third-party intervention in the dispute. Hart’s (1999) categories are: unassisted negotiation, conciliation and mediation, and neutral third party. “Unassisted negotiation” requires no intervention by a third party. This category could also be applied to a number of other types of ODR. “Neutral evaluation” is an online evaluation that requires a neutral third party making non-binding decisions on the basis of the written submissions and documentary evidence provided by the parties.

**WIPO’s Categories**

The World Intellectual Property Organisation or WIPO (2008) posited four categories of dispute resolution: mediation, arbitration, expedited mediation, and expert determination. “Expedited Arbitration” is a time-sensitive version of arbitration which, depending on the parties’ choice, may be preceded by mediation or expert determination. “Expert Determination” is a procedure in which a dispute or a difference between the parties is submitted to one or more experts who make a determination on the matter referred to by the parties. The determination is binding, unless the parties have agreed otherwise. Depending on the parties’ choice, expert determination may be preceded by mediation, or followed by (expedited) arbitration.

**Hörnle’s Categories**

Julia Hörnle (2002) classified six ODR categories: documents-only arbitration, online evaluation, mock trial, online mediation, automated settlement systems, and complaints assistance. “Evaluation” involves a neutral third party making a decision on the basis of disputants’ written submissions and documentary evidence. Unlike arbitration however, the decision is a non-binding recommendation. The non-binding characteristic of online evaluation ensures greater participation. In Hörnle’s Mock Trial (aka summary jury trial), the neutral third party is replaced by a number of volunteers (Internet users) acting as if they were an online jury in a civil trial. This jury of peers makes a non-binding determination of the issues via a web-based platform. The website i-courthouse is an

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example of mock trial. Complaints Assistance has a built-in self-help system, a job aid that works as kind of online law center, for improving ODR performance.

**Motion’s Categories**

Paul Motion (2005) published five general categories of ODR: mediation, arbitration, automated negotiation, assisted negotiation, and the UDRP (Uniform Dispute Resolution Procedure). Notably Motion included domain name disputes, “The UDRP”, in his listing of ODR providers. The UDRP is intended to resolve disputes between trademark holders and domain name owners. Companies and organizations like to use the domain name as their trade mark. A domain name is good value as both a trade mark, and as an intellectual property asset. However even the UDRP has inequities – uneven impact, often predictably uneven impact caused by procedures in UDRP, some call it, that frequently favour complainants, and disadvantage the respondents. Another inequity is called domain kiting. ‘Domain kiting takes millions of good names off the system, and makes them unavailable for the purposes for which those names were originally intended which places an unnecessary burden on every registry.’

‘You Say Tomatoes, I Say…’

Sometimes different terms describe the same, or similar things. What follows are a few instances of overlapping meaning.

**Arbitration**

Arbitration according to Motion’s (2003) classification, also called documents-only arbitration (Hart 1999; Hörnle 2002), is a neutral procedure in which the dispute is submitted to one or more arbitrators who make a binding decision on the dispute. Documents-only arbitration has been used for a considerable time to solve consumer disputes. Depending on the parties’ choice, arbitration may be preceded by mediation or expert determination. An expedited arbitration is a procedure carried out in a short time and at a reduced cost.

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Automated Negotiation

Motion’s (2005) term “Automated Negotiation” also known by Hörnle (2002) as an Automated Settlement System, is well suited to monetary claims, and may also be used as a negotiation tool as part of another dispute resolution procedure. The process involves the parties making successive blind bids. This means that the bids are not disclosed to the other party. Disputants type their bids into the web form until the bids are within 30% of one another (sometimes less). “Settlement” occurs as a function the mean of the numbers.

Mediation

Mediation is a non-binding procedure, according to WIPO (2008), in which a neutral intermediary, the mediator, assists the parties in reaching a settlement of the dispute. Online mediation is custom-made for small consumer disputes. Depending on the parties’ choice, mediation may be followed, in the absence of a settlement, by arbitration, expedited arbitration or expert determination. In conciliation and mediation, the third party facilitates communication between the parties who wish to come to their own resolution Hart (1999). The three main categories in Rosener-McAveney (2006) spectrum discussed earlier, are intended to describe online mediation along a technology-intensive spectrum, from technology-supported to fully-automated. The presence of a neutral intermediary should not replace the need for a good job aid or tutorial for ODR novices.

Finally, there is a tendency in discussing technology-intensive solutions, to compare synchronous and asynchronous technologies to determine which is best suited to a particular purpose. Yet synchronous communication and asynchronous communication for example, are quite different from one another. For that reason they cannot be fairly compared. Not surprisingly a recent comparison of synchronous vs. asynchronous communication on dispute resolution produced conflicting results. This result is consistent with previous technologies comparisons. The same can be said for synchronous and face-to-face communication, and asynchronous and face-to-face communication. The interactions are simply not comparable and therefore, should not be compared. However this outcome has not stopped individuals from seeking large grants and publishing papers to do just that. A fairer comparison of technology intensive solutions would be email vs. fax machine since both are synchronous and text-based, and no nonverbal communication is possible. Another

fair comparison would be an audio conference and voice-over IP. This tendency to compare technologies against one another has fuelled the critics rebuttal of the technology-intensive approach to ODR as ‘technocentrist’, a term applied from Piaget’s ‘egocentric’, arguing instead that “electronic forms” for example, in and of themselves, cannot resolve a dispute. Rather it may be truer to say that for some, ODR is better than ADR (e.g. for cross-border disputes), and court litigation (i.e., lower cost), but not as good in others (e.g., cases concerning equality of bargaining power between consumers and sellers of products or services).

**Presentation Design Solutions**

Presentation design solutions are different from structured argument solutions, and from technology intensive solutions. Whereas structured arguments solutions aim to support language-based communication between parties, and technology intensive solutions support aim to improve user interactions between parties, presentation design solutions aims to support the design of communication messages within online dispute presentations. Communication messaging at present, comprises: text presentation via e-mail, asynchronous text postings into e-mail, instant messaging, bulletin boards, or social networking websites, synchronous text messaging, audio and video podcasting and website streaming, and video conferencing and real-time voice-over protocols.

Online disputes arise through or because of online communication methods, according to Conley-Tyler and Bretherton (2003). So it is fair to say that the design of a presentation is important to the satisfactory resolution of online disputes. Lodder and Bol (2003) determined that the full range of possibilities for successful online communication has *not* been fully explored in ODR, and recommended that developers of ODR strive to combine traditional means of electronic communication with advanced or innovative methods (p. 9). Lodder and Zeleznikow (2005) have offered an example where presentation design solutions could support the design of communication messages within an ODR presentation.

‘A dispute regarding a purchased item that is not delivered or was damaged on arrival is an example where not all information is available electronically. That said, electronic evidence, such as a digital picture of the damaged product, might still be of help’.  

Mann’s (2008) recent interdisciplinary review of presentation design solutions reveals eight different guidelines to assist in the design of audio-
visual presentations. Some of these design guidelines are idiosyncratic. Others are untested. Still others have only been tested with highly educated subjects (e.g., university students, apprentice technologists, apprentice teachers). Only the SSF (structured sound function) model has shown long term positive results with many different kinds of presentation content, and across different ages and cognitive abilities.

Research Questions

The four research questions addressed in this paper are only concerned with the factors contributing to the problem presented in section one.

1. What process should an ODR Developer follow to design a tutorial from which inexperienced disputants could learn how to prepare their own dispute-wise presentations?

2. What method of presentation should an inexperienced claimant or respondent use to prepare their own presentation for an online dispute?

3. What procedure should be used to ensure critical, independent assessment of dispute presentations?

4. How should the assessments of experts and peers be used to judge online dispute presentations?

Section 2 reviewed the literature in online dispute resolution. Subsequent sections will address the research questions presented above. Section 3 will explore the first research question: What process should an ODR Developer follow to design a tutorial from which inexperienced disputants could learn how to prepare their own dispute-wise presentations?

3  The SSF Design Solution

Section 3 is an introduction to the SSF (structured sound function) design solution, a conceptual scheme for developing online dispute presentations. Its origins are in Zuckerman’s 1949 instructional film sound categories.58 The first computer application of SSF appeared in 1992.59 The present version is unique to online dispute resolution, and modified from its predecessor to suit the limitations and requirements of dispute-wise presentations for online dispute resolution. A full discussion of the development of the model is beyond the scope of this paper.60

59 Mann, B.L. (1992). The SSF model: Structuring the functions of the sound attribute.
For the ODR Developer

The SSF design solution has been retrofitted to answer the first research question asked at the end of section 2 in this paper, namely what process should an ODR Developer follow to develop a tutorial from which an inexperienced disputant could learn how to prepare their own dispute presentation? Essentially the ODR Developer has two concerns. The first is the ‘dispute-wisdom the ODR process’ identified in section 1, and not only the features on the ODR site. Four traits identified in “most dispute-wise” business managers are particularly relevant to ODR. Under the right conditions, these traits could be acquired by “lesser dispute-wise” business managers

1. Have a primary focus on reviewing contracts and agreements
2. Spend a lot of time on highly complex and technical issues
3. Acquire a good understanding of the broader issues involved
4. Take an aggressive approach.

The second concern of the ODR Developer is to determine what function of sound works well with the visual events in the tutorial. Sound is critical in contemporary tutorial software because of its durability in human memory, and resistance to interference and forgetting.

Table 3 shows the remodeled SSF design solution to be used by the ODR Developer to design a tutorial from which an inexperienced disputant might learn how to design their own presentation for an online dispute.

Visual Events and a Function for Sound

The left-hand column in table 2 shows five different functions for sound with a visual event. A visual event can be a sketch, diagram, photo, static or moving image, animated gif or cartoon, or linked reference. A visual can include formatted text, unformatted text or hypertext, scanned handwriting, a static or animated photograph, pictograph, film or video. The visual could be a character in a video or graphic, such as a computerized tutor, coach or mentor (human likeness or cartoon), appearing as an avatar or agent (static or moving). Visuals can be displayed on a computer screen of any size. Given a purpose or function, a sound prompt will alert, caution, warn, remind or direct the presenter to visual events displayed by a computer program or Internet site. The desired effect is that the opposing party will focus their attention from the desired point of view, character’s background, etc, which makes the tutorial useful in preparing for an online dispute.

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Table 3. The remodeled SSF design solution for online dispute presentations

The Structure of a Sound with a Visual Event

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<tr>
<th>The Goal</th>
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<td>Character or Personality Sound</td>
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<tr>
<td>Atmosphere or Feeling Sound</td>
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*Temporal Sound*
Temporal sound can be an effect, some music, or an utterance (human or computerized) that alerts, cautions, or directs the viewer to a future event, or reminds them about a past event. Temporal sound can be delivered by a computerised talking coach, a non-player character in a role-playing game or virtual world, or a pedagogical agent on a word processor or website.

An ODR presentation early on may have helped to avert the intense reaction in the higher education and legal magazines and peer-reviewed journals over the threat of a patent infringement lawsuit.

**Blackboard, Inc. v Desire2Learn Inc.** Blackboard didn’t contact Desire2-Learn prior to filing their patent infringement suit, yet Blackboard asked the court to award it treble damages for “willful” infringement, according to Desire2Learn CEO John Baker. Blackboard and Desire2Learn are both Web course management systems (WCMS’s). The stability and reliability of a school’s WCMS is a top-ten concern among technology leaders in higher education. WCMS’s offer developers and content providers, tutorial instruction, teaching and assessment tools, all enclosed behind a password-protected shell which by default. In so doing, WCMS’s have reclassified the stakeholders in online distance education, and extended the forms of intellectual property protection. Temporal sound might have saved much cost and anxiety by directing viewer attention to past events prior art.

**Location / Locale Sound**

Location or locale sound can fill an informational role when it is associated with a visual event presented in a video clip, graphic, or a paragraph of formatted text. Most often familiar sounds establish a place, real or imaginary, as in a virtual world dispute.

**Eros LLC v. Leatherwood.** In a virtual world dispute, Second Life player Kevin Alderman (aka Stroker Serpentine) filed a lawsuit in the U.S. court against Second Lifer Volkov Catteneo for selling copies of Alderman’s Eros SexGen bed, seeking damages three times those sustained by Eros or three times the defendant’s profits. Perhaps a more cost-efficient out-court settlement could have been reached with the comparison of beds and

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voice-over’s showing *where* there were *substantive* similarities. Location or locale sound could also have been presented to explain the code.

**POV Sound**

When a point of view (POV) is presented in sound, it should provide more information about a person’s perspective than what is stated in the visual event. Point of view (POV) sound prompt can be made to reflect the *emphasis* in the differing opinions between political performers, or a deeply felt moral, cultural or religious belief, all potentially critical to morally- and culturally-sensitive disputes.

*Multani v. Commission scolaire Marguerite-Bourgeoys.*\(^{70}\) The Supreme Court case of Canadian Sikhs not being allowed to wear a ceremonial dagger to school, could have been settled more quickly and cost-effectively out of court. An ODR version of the kirpan dispute could have had an online presentation prepared by Balvir Singh Multani using point-of-view sound to explain that Orthodox Sikhs had been required to carry a kirpan since the 17th century, and then insisting it was not a weapon. Spoken language would inform the viewer about *how* the object in the graphic or picture (i.e. the kirpan) should be interpreted, explaining the religious and spiritual significance of the kirpan, and its various kinds. Similarly a presentation by the other party would have shown a different POV. POV sound in the presentation by Claude Bouchard, Quebec Federation of Parents’ Committees for example, would emphasize personal safety in the school, perhaps quoting statistics of increasing violence in some school districts. “As a parent, is the life and safety of a child more important than religious freedom? I think so,” and perhaps yet another POV by a representative from la Commission Scolaire de Marguerite-Bourgeoys.

*MacLeod v. Newsquest.*\(^{71}\) In a case before Lord Macphail, Angus Macleod, Scottish Political Editor of The Times and contributor to BBC radio and television, sued the publishers of The Sunday Herald for alleged defamation in an item in “Alan Taylor’s Diary”. The court action for defamation was dismissed ‘as it was manifest from the language used that the article concerned was in no way an attack upon Mr Macleod; the ordinary reader would have understood that the article had been written for his or her entertainment in a cheerful, irreverent and playful spirit, and had contained elements of fantasy’. The outcome may have been different if arbitrators, peers and disputants in an online dispute were asked to “listen to the words being read” from a podcast with all its intended emphasis, rather than “read the words” from a page or screen.


**Atmosphere Sound**

Atmosphere sound can provide a context for events not shown or partially shown visually. Atmosphere sound might help to determine culpability in happy slapping cases. ‘Happy slapping’ is a form of cyberbullying recorded on video and uploaded as a video clip to a social networking website for the purpose of impersonating, denigrating or aggressive solicitation.\(^{72}\) Happy slapping videos depict small groups of aggressive poorly educated youths known in England as ‘chavs’ (in Scotland, ’neds’) hitting a random person in the school, on a bus, or on a street corner, whilst the act is recorded on a mobile phone camera. The victims can be the same age as the attackers, but not always, as in the following example.

**Anderson, R. v EWCA**\(^{73}\) In a video clip, a 27-year-old man can be seen shouting into the camera of his mobile phone, “this is YouTube material” as he urinates on a disabled 50-year-old woman who lay dying in the street. The woman later died in hospital.\(^{74}\) Aside from visual evidence of the recorded assault, atmosphere sound can help investigators to establish whether there was intent of the attackers or whether the ‘victim’ had taunted the attackers, and whether the video would later be used to denigrate the victim later on a public website.

**Character Sound**

A character or personality sound or refers to a specific trait of a person shown in the visual event. Consider two examples where character or personality sound could have filled-in information that was absent in the visuals.

**Koon, S. v United States.**\(^{75}\) Consider the example of the videotaped incident of black motorist Rodney King as he was being clubbed and kicked by four white Los Angeles police officers in 1991. The officers claimed that King had resisted arrest. Videotaped footage of the event was the central piece of evidence for both sides in this case. However the poor quality of the tape made it difficult to determine who started the fight and who was hitting whom. In a frame-by-frame analysis of the videotape, the expert police witness supported the prosecutor’s contention that only reasonable force was used against King.\(^{76}\) No one questioned this act of freeze-framing


the visual event. In the blow-by-blow account counting and recounting the event of the beating, the defense presented the photographs in sequence. ‘The chilling effects of warping the video into freeze-frame photography cannot be under-estimated. The temporization that reading video [and listening to the audio] entails, was halted by spatial determinations that reconfigured the violence to which Mr Rodney King was submitted.’

This changed the experience. By arguing that every individual ‘mini-action’ was legal and in compliance with regulations, they implied that also the overall action was legal, thus undermining the impression given by the film the way it is perceived as a whole.

After the trial, a television station analysed the sound on the videotape with the assistance of sound evidence expert George Papcun. Notably and relevant to this essay, was Dr Papcun’s analysis of the words shouted by men on that videotape that added context to the visual event, and the character of the arresting officers, taken here from Dr. Papcun’s transcript:

12:53:04 Voice 1: “Nigger, hands behind your back!”

12:53:09 Voice 2: “Hands behind your back!”


Again, character sound could have helped to define a person’s character in this case, perhaps the police officers’.

**Necessary force with a Taser.** The second example of sound defining a person’s character is clear from the recording of Robert Dziekanski dying after being stunned with a Taser by federal police at Vancouver Airport in 2007. In the video he can be seen taking office chairs and putting them in front of the security doors.

Officer: ‘Hit him again. Hit him again’

Several loud cracking sounds

Second Officer: Code red!

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78 Schafer, B. Commentary on the Rodney King trial, personal communication.


An ambulance team arrived a few minutes later, and he was declared dead.\textsuperscript{82} Did the use of a Taser by police officers in this case constitute ‘necessary force’? Will the visual events in the Dziekanski video be depicted without the audio, as in the Rodney King trial? Perhaps the outcome will be the same. In previous cases, where the subjects refused to comply with directions or commands by police officers, the decisions had been mixed.\textsuperscript{83}

Visual Events and the Structure of the Sound

The top row in table 1 shows a structure for the goal, constancy and density of the sound with its visual event. For the ODR Developer, the process is analogous to describing a scientific process, or telling a story, which has application in law and criminal justice.

Goal setting can promote convergent thinking in the user (e.g. answer look-up), or divergent thinking (e.g. answer construction), important aspects of an ODR presentation. Sound that promotes convergent thinking would have the user’s attention directed toward a solution in a single, stepwise procedure. Sound that promotes divergent thinking would have the user’s attention directed toward visual authoring tools, libraries of resources, or advice that permits easy access and experimentation in the online environment. During convergent goal setting the user is encouraged to use a variety of sources to bear on a problem to produce ‘the correct result’. During divergent goal setting, the user is encouraged to brainstorm possible solutions, generating multiple accounts, testing-out analogies from interdisciplinary sources that may arrive at a short list of possible scenarios.

The constancy of a sound describes its duration and is either continuous or discontinuous with the visual event. A continuous sound structure has uninterrupted sound at regular intervals throughout the presentation. Continuous sound requires a specific purpose or function for the visual event – temporal, POV, locale, atmosphere, character.

The density of a sound describes the periodicity for each chosen sound function in a script or sound with a visual event. When fit with a temporal, POV, locale, atmosphere or character function, the sound density can be massed, spaced or summarized with the visual event. A spaced, massed or summarized sound describes when and how often an auditory warning, music or speech is reviewed with a visual event. Problem solving skills can be effectively presented with a spaced sound density. Personal goal areas on video clips or still graphics can be presented all at once and even out of program context using a massed sound density. Corporate applications tend to use a review sound density to


reinforce role-modeling techniques. Internet news overdubs, use summarized sound density to recap main stories. Some self-check questions for associating sound with its visual event for the ODR Developer:

- Is this sound synchronised with a visual event?
- Is this sound continuous within a visual event?
- How often should this sound occur with the visual event (start, middle, end)?

**FOR THE DISPUTANT**

Not everyone may want or feel they need to take the time to complete an online tutorial on how to enhance their presentation for an online dispute. In these circumstances, the SSF design solution is recommended as a job aid (e.g., see table 3). The novice disputant may well understand the need for having a dispute-wise presentation, but not know the specific sequence of steps involved in completing making one.

Section 3 has been an overview of the SSF design solution, and how it can be used by ODR developers and disputants to address substandard ODR presentations made by inarticulate and lesser dispute-wise disputants. Section 4 will address the second and third research questions.

### 4 Expert-Peer Online Assessment and Formula

Section 4 is an introduction to expert-peer online assessment and formula for evaluating online dispute presentations, on the assumption that the quality of justice is not enough, that it *must also be effective*. ODR aims to maintain access, quality and effective online justice consistent with Article 6 ECHR. By ensuring a measure of quality and fairness in ODR, “benchmarks” become relevant and important. Benchmarking requires looking, measuring and analysing data of the kind presented in this paper.

**Expert-Peer Online Assessment**

The origin of the assessment method and the formula introduced here are attributable to common statistical methods for increasing accuracy rates from multiple assessors. The online version of this method and formula

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were first applied in 1999 to evaluate Australian aboriginal students’ unique way of learning that could not be properly assessed using conventional means. The validity of the method and formula were tested in 2005, and the method and formula further developed in 2006, adding anonymity and accountability factors to prevent ceiling effects and friendship marking. A full discussion of the development of the method is beyond the scope of this paper. The present iteration of the method and formula is modified from its predecessor to best suit the limitations and requirements of presentations for online dispute resolution. Figure 1 illustrates the four steps in expert-peer online assessment of an online dispute presentation.

Expert-peer online assessment of an online dispute presentation requires that claimants and respondents post their cases anonymously and independently into a secure area. Next, two or more peers review the cases, assign a numerical mark, and then write comments on each presentation, without knowledge of expert’s assessment. A designated expert assigns a numerical mark and writes comments independently of the peers. The scores are tallied and compared with the comments.

An ODR version of the kirpan dispute for example, could have had an online presentation prepared by Balvir Singh Multani using point-of-view sound on a Voice-over IP (VoIP) platform to explain that Orthodox Sikhs had been required to carry a kirpan since the 17th century, and then insisted it was not a weapon. VoIP recordings permit two-way, real-time audio discussions, and continuous instant messaging during interactive slide presentations. ODR Director for eBay and PayPal Colin Rule has said that VoIP is becoming mainstream, and that for ODR services, this development is a watershed event because now disputants have the option of communicating synchronously over their computers at low or no cost.

The process is somewhat more complicated than annotating and saving screen recordings because more happens in real time.

1. Disputants to generate some ideas for making the presentation, make a paper mock-up, and then the slides. Early on it is a good idea to email the ODR facilitator to gain access to the VoIP platform and try talking through some preliminary ideas for possible inclusion in the real-time presentation.

2. Disputants enter the VoIP software in real time, one party receives “moderator” status from the facilitator who then uploads PowerPoint slides to the whiteboard (a document presentation area) and begins to speak to them, introducing each slide and answering their spoken and instant text messages. Upon conclusion the entire real time session is saved as a playable file.

3. Assessors review the recording, then login to the ODR platform and type a numerical score and comments into a survey tool on the secure ODR platform. In the kirpan dispute for example, likely assessors would include representatives from: The World Sikh Organization of Canada, the Canadian Civil Liberties Association, the Canadian Human Rights Commission and the Ontario Human Rights Commission.

Expert-peer online assessment may also be appropriate for assessing annotated screen recordings. Annotated screen recordings are playable computer files that can be independently reviewed and assessed. Screen recording software enables the novice disputant to record and save. The process involves recording what happens on the screen as a compressed video file, narrating the screen recording with a microphone from the script, and previewing the recorded clip. Assessors would then review the recorded clip that was sent to them as often as necessary, then login to the ODR platform and type a numerical score and comments into a survey tool on the secure ODR platform. This format could have been a good platform in the patent dispute between WCMS rivals Blackboard, Inc. and Desire2Learn.

Finally, crimes recorded by video camera also record sound, as in the Rodney King beating, the Dziekanski Tasering death, and the happy
slapping video. The audio should not be excluded from scrutiny by experts and peers, but rather it should be admitted together as bona fide audio-visual evidence, to promote open debate among and between the parties.

**Expert-Peer Formula**

- What if there existed a standard method of counting the opinions and comments of an arbitrator or expert that included anonymity for the assessors?
- And what if inter-rater and intra-rater consistency data were used to weight the opinions of each peer, arbitrator or expert?

The expert-peer assessment formula shown in figure 2 is recommended for that purpose as a response to the third research question asked at the end of section 2, namely “how should the assessments of experts and peers be used to judge online dispute presentations?” The expert-peer assessment formula has been modified for online dispute presentation. The original version has high statistical validity, and can have the positive side effect of democratising the online assessment process. The new version uses the same mathematics as the original, except the update proposes qualitative changes for evaluating online dispute presentations that includes an appointed arbitrator or expert, and volunteers or “peers”.

Figure 2 shows the expert-peer assessment formula for evaluating online dispute presentations.

The formula in figure 2 can accommodate online disputes in which the neutral third party is replaced by a number of interested volunteers (peers) acting as if they were an online jury in a civil trial, as in Hörnle’s Mock Trial (e.g. a summary jury trial). The neutral third party could also be retained, all as bona fide voting members. The “Arbitration” process described in Motion’s, Hart’s, and Hörnle’s classification systems described earlier, is commensurate with WIPO’s “Expert Determination”, a neutral procedure in which the dispute is submitted to one or more arbitrators / experts who make a decision on the matter presented before them by the parties.

![Figure 2. The expert-peer assessment formula](image-url)

92 Hörnle, note 2.
93 Motion, note 39.
94 WIPO, note 38.
Assessing the Kirpan in Schools Dispute

The procedural alternative to deciding the kirpan in schools dispute for example, would be to:

1. Choose a voting arbitrator or legal expert, plus 4 peers – i.e., a member of the Sikh community, a representative from the Parents’ Committee at the School, a School Board official, and an Orthodox Sikh elder, or a representative from any of the organisations associated with the case that were mentioned earlier.

2. Everyone remains anonymous.

3. Expert and peers review the online presentations anonymously and independently from one another, assigning each presentation a mark, and justifying their mark in writing.

4. Intra-rater consistency (written/numerical). Total the scores according to the formula and determine intra-rater consistency between the scores and the written justification, as determined by a facilitator. If there is a discrepancy, expert and peer reviewers could be asked to remove the discrepancy between their written and numerical assessment.

Table 4 shows some hypothetical concatenated scores of online presentations in the kirpan dispute.

One further step can be taken. Intra-rater consistency (by occasion) where the scores assigned by each rater for evaluating dispute presentations can also be used to rate the raters to ensure high-quality raters in online dispute resolution. Experts and peer reviewers could be rated by other reviewers (peer assessment), by program administrators, and even by themselves (self-assessment). The results can then be used for self-improvement, job placement or promotion. The procedure in the evaluation formula for online dispute presentations could easily accommodate the opinions of the disputants, self-assessments, and those of a program administrator.

Wissler and Rak’s (2004) study of attorneys’ assessments in rating the skillfulness of particular mediators for example, revealed information that could be useful to prospective employer and novice mediators alike. However there were problems with the research design of that study. The first problem was that per centiles were reported that could not capture the variation within the group scores on any particular mediator.

A better approach, given that all attorney assessments were given equal weighting, would have been to obtain a single number - the average (the

Table 4. Hypothetical concatenated scores of online presentations in the kirpan dispute

<table>
<thead>
<tr>
<th>Complainant’s Dispute Presentation: Commission Scolaire de Marguerite-Bourgeoys</th>
<th>Respondent’s Dispute Presentation: Balvir Singh Multani</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.9125 = 6.5+6+5+7/4 = 6.125 + 7.7/2</td>
<td>7.20 = 7+6+6+7/4 = 6.5+7.9/2</td>
</tr>
</tbody>
</table>

mean or median) of all attorney assessments, and associated standard deviations, and effect sizes would have been more revealing. A second problem with the method of analysis was that all the raters had equal ‘clout’. A better method would have been to use a weighting formula like the evaluation formula for online dispute presentations\textsuperscript{96} to include the “rater’s experience” or “rater’s skill-level” in the analysis of a particular mediator. A third problem is that per centiles should not have been compared against one another, as rater assignment across mediators was not random. Care should be taken on comparing scores across mediators.

Section 4 has been an overview of the post-and-vote assessment, host and vote assessment, and an evaluation formula for online dispute presentations to address the second and third research questions. Section 5 is a discussion of these innovations in light of the literature on ODR.

5 Discussion

This paper has introduced three ways to smooth some of the wrinkles in online dispute resolution. First, there is the SSF design solution for making dispute-wise presentations. Second, there is the method of assessing online presentations by an expert and the peers. Third, there is the formula for weighting and analysing the opinions of the expert and peers. Hammond (2001) listed other factors affecting disputants abilities to function effectively online, including the context in which the discussions occur, the type of conflict and its intensity, the prior relationship between the dispute and the physical conditions such as time and level of comfort with technology.\textsuperscript{97} Rabinovich-Einy (2003) suggested that differences between parties may be more extreme in writing capabilities than with oral speech, due to unequal literacy levels (p.45).\textsuperscript{98} Additional factors bearing on the effectiveness of online mediation in particular, might pertain to the disputant’s belief in the process, trust in the mediator, quality of mediator interventions, ability of the online environment to accommo-

\textsuperscript{96} Mann, B.L. (2005). Ibid 76.
date the parties’ the need to engage interactively. Clearly some problems are solely administrative, others political.

The main contributions of this paper to the interdisciplinary field of online dispute resolution, include the SSF design solution introduced in section 3, and the expert-peer assessment process and formula presented in section 4. Under most conditions the long-standing need described in the literature for purposeful advice can be met with these innovations. However these hypotheses are as yet untested in ODR conditions. In the wider social context, it is also hoped that this paper may improve ODR literacy, and be a practical resource for the ODR Developer seeking new ways to assist inarticulate, novice and lesser dispute-wise claimants to design their presentations more effectively.

Further research is needed, using the SSF design solution in many and various ODR systems. Testing the efficacy of the design solution, method of assessing presentations, and formula should include variables other than presentation, assessment and testing measures, such as environmental, content and user variables that affect thinking and performance. Developers should note that since online tutorials and job aids must take a neutral, one-size-fits-all approach, some individuals may still feel disadvantaged. Also not everyone may want or feel they need to take the time to complete an online tutorial. In these circumstances, the SSF design solution was recommended as a job aid. Whereas not all inequities can be resolved with a tutorial or job aid, a greater percentage will be served by the procedures for designing job aid or online tutorials for novice disputants introduced in this paper.

In disputes involving peer assessors only, a standard inter-rater agreement should be pre-established and the average score considered final in light of the comments. The facilitator (or expert) should then ensure intra-rater consistency between numerical score and written comments about the presentations. That is, if the respondent made a good case, the assessment should reflect this in the numerical score and in the comments. Peers working more than one case for an ODR Provider could themselves, be monitored for their intra-rater consistency across different cases.

Disputes wherein expert deliberation can be tempered by peer assessment, the formula introduced in section 4 for weighting scores is recommended. An important point is that judging presentations and presenters should always be a private matter, not a committee decision. Each peer should individually evaluate the online presentation without reference to other influences, in keeping with the principles of the Commission 2001/310/EC that were confirmed by the European Code of Conduct for Mediator: Impartiality, transparency, effectiveness and fairness. The agreed solution resolving the dispute should be recorded and made available to the parties by the body responsible for the procedure to avoid later uncertainty or misunderstanding, consistent with Commission
Recommendation 2001/310/EC. In any case, the outcome should not preclude the option of referring the dispute to another out-of-court dispute resolution mechanism, in particular within the scope of the recommendation.

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