The Use of Document Depositories and the Internet in Large Scale and Multi-jurisdictional Products Liability Litigation

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THE USE OF DOCUMENT DEPOSITORIES AND THE INTERNET IN LARGE SCALE AND MULTI-JURISDICTIONAL PRODUCTS LIABILITY LITIGATION

Paul Dieseth†

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I. INTRODUCTION

The time has come to put the Internet to use in products liability litigation. The Internet is becoming increasingly important in virtually every sector of our society. Consumers use the Internet

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to find and purchase goods and services. Businesses use the Internet not only to connect with these consumers but to promote transactions with other businesses. Experts predict that these Internet uses will keep growing, and confidently state that the Internet will soon revolutionize telephones, televisions, and even our kitchen appliances. Before too long, the Internet will be a ubiquitous phenomenon of our everyday lives.

Although our legal institutions are normally conservative and slow to change, they also have begun to use the Internet. Many law firms and law schools have created websites to promote themselves and the services they offer. Internet legal research tools are not only available from large commercial providers, but are also increasingly being offered by the judiciary and state and federal governments.  

It is safe to say, however, that the practice of law has not yet taken full advantage of the Internet. In particular, those who litigate disputes, including those who work in the products liability area, have not yet fully exploited this highly flexible and powerful device. This article explores just one way in which the Internet could make an immediate difference in litigation practice— as a document production tool.

Large product liability proceedings, in particular, are well suited for taking advantage of the Internet. They typically result in extremely voluminous document productions by defendants that must be re-created in jurisdictions around the country, if not around the globe. Until now, one of the few methods available to reduce the costs associated with such productions was a central document depository, housing all potentially relevant materials in a single location. Because of the costs and limitations of document depositories, however, they have been used in relatively few proceedings. This article examines document depositories and the cases in which they are suitable, considers how the Internet might

1. The Eighth Circuit Court of Appeals, for example, offers opinions, court Rules, docket sheets and other materials on its Website at http://ls.wustl.edu/8th.cir/cindex.html. Opinions from the Minnesota Supreme Court and the Minnesota Court of Appeals are available from the Minnesota State Law Library at http://www.courts.state.mn.us/library/archive/.

be employed to create a "virtual" document depository that could be used more effectively in such actions, and suggests that the Internet could ultimately play a similar role in all litigation, large or small.

II. DOCUMENT DEPOSITORIES CAN BE USED IN LARGE PRODUCT LIABILITY PROCEEDINGS TO REDUCE THE BURDENS ASSOCIATED WITH DOCUMENT PRODUCTION

Typically, of course, a party responds to document requests by making and providing hard copies of responsive documents. Although this is a relatively efficient and inexpensive process in simple proceedings involving few documents and parties, costs of production escalate as the factual issues in dispute become complex, the number of parties mounts, and the universe of potentially relevant documents expands. In complicated product liability actions involving products that have allegedly injured many persons in numerous jurisdictions, the expense of repetitive document productions in multiple venues can become prohibitive.

Document depositories can, in the right cases, efficiently reduce these costs. The Manual for Complex Litigation notes that "[c]entral document depositories can help meet the need for efficient and economical management of voluminous documents in multiparty litigation." 3 They may not only "reduce substantially the expense and burden of document production and inspection," but also help verify "which documents have been produced and what information is in them, minimizing the risk of later disputes." 4

Document depositories, of course, are not cost-free. They are, in fact, quite expensive. Warehouse and office space must be obtained and furnished. Although such items as shelving and furniture are generally one-time costs, rent and utilities will have to be paid on a monthly basis. Additional costs will be incurred in retaining and paying depository document administrators. Personnel must be hired to control access to the depository, to provide document copies to depository users, and to ensure continued integrity of the collection as counsel sift through the documents. 5 Because

3. THE MANUAL FOR COMPLEX LITIGATION THIRD 77 (1995)
4. Id.
5. Even careful document reviewers can easily create disorder. Disorder threatens a litigant's ability to find specific documents upon request, one of the key requirements of a depository. Thus, effective depository administrators will need to implement quality control procedures to monitor the status of the collec-
most of these expenses continue to be incurred throughout the lifetime of a depository, its total aggregate cost can become quite substantial.

The efficiencies of document depositories must also be weighed against the burdens imposed upon counsel who are litigating their cases in far-off jurisdictions. Although these burdens are nominal for nearby counsel, the costs and inconvenience of travel become more significant for those located in distant states.  

For all of these reasons, document depositories are not appropriate in most proceedings. Nevertheless, in the proper case, usually involving numerous defendants, a large volume of potentially responsive documents, and multiple jurisdictions, a document depository can make sense. In In Re: Latex Gloves Products Liability Litigation, MDL 1148, for example, the court established a document depository under the control of plaintiffs' counsel to house defendants' documents. This multi-district litigation consisted of over 250 pending federal cases assigned to one federal district court for discovery and other pretrial purposes. There were, in addition, over 125 state court cases that were permitted access to the depository.

In late 1992, the court in In re: Silicone Gel Breast Implants Products Liability Litigation, MDL 926, ordered the parties to establish a

tion and correct problems that users will inevitably cause.

6. As always, courts must balance the burdens imposed upon the parties. Thus, even where a depository's distant location may cause difficulties for a litigant, the party that is producing the documents may convince a court that making documents available at that out-of-state depository satisfies its document production obligations. Lestelle v. Asbestos Claims Mgmt. Corp., No. 00-CC-0007, 2000 WL 222807 (La. Feb. 25, 2000) (defendant's offer to New Orleans counsel to make documents available at defendant's Pennsylvania document repository was a reasonable accommodation—order compelling defendant to transport the documents to New Orleans was an abuse of discretion).


8. A summary of this litigation, provided by the court, is found at http://www.paed.uscourts.gov/opinions/MDL/MDL1148/SUMMARY.HTM. Plaintiffs in these cases are largely healthcare workers who allege that they have developed latex hypersensitivity allergy as a result of exposure to defendants' natural rubber latex gloves. Id.

joint plaintiffs-defendants document depository. The depository, which was placed within the United States Courthouse in Cincinnati, Ohio, was created to store documents produced by "parties and third-parties that may be needed in more than a single case, including documents, interrogatories, requests for admission, requests for production of documents, depositions, trial transcripts, and similar materials." By 1996, the national defendants had produced over nine million pages of documents into the depository, all of which were made available to litigants in any federal or state case involving breast implant product liability claims.

One of the largest document depositories ever built housed the documents produced by the parties in the State of Minnesota's action against various tobacco companies. In that proceeding, the court and the parties agreed at the onset of the litigation to place all produced documents into a central tobacco document depository located in Minneapolis, Minnesota, with the costs of the depository to be shared pro rata among the litigants. This depository was initially inaccessible to all but the parties to the litigation. It thus does not fit the usual pattern in which depositories are established to accommodate the demands of numerous cases in a multitude of jurisdictions. The volume of the documents produced, however, clearly justified the use of a central, document management system. By the close of the Minnesota case, the defendants had produced approximately 26 million pages of documents into the depository. Moreover, as time passed, access to the Minnesota tobacco depository was given to counsel for other plaintiffs. Eventually, near the end of the case, the Minnesota litigants and the Court agreed to open the depository to the public.

11. Id. at ¶7(c).
14. The tobacco industry Website, at http://www.tobaccoarchive.com/doc.html, discusses the volume of documents produced to the Minnesota tobacco document depository and provides a brief summary of its history and operation.
15. Even though the Minnesota case has been concluded, the Minnesota to-
Document depositories seem to be used most frequently in multidistrict litigation cases that have been consolidated for pretrial proceedings under 28 U.S.C. §1407. These cases usually present the paradigm document depository scenario – multiple parties, numerous actions, and tremendously large document collections. Because the MDL proceeding consolidates all of these elements before a single judge, the court can effectively evaluate the aggregate document production burdens faced by the parties, and can fashion a single comprehensive remedy – a document depository – to reduce those burdens.

III. THE INTERNET CAN BE USED AS A "VIRTUAL" DOCUMENT DEPOSITORY

The recent and ongoing evolution of the Internet presents courts and litigants with an attractive alternative to the traditional document depository. Backed by powerful computers and high-speed communications links, the Internet can be used to host an electronic "virtual" depository, instantly accessible by any counsel at any time.

The tobacco document depository remains open for use by counsel for litigants, as well as any member of the public, and the domestic tobacco companies continue to place documents into the depository that are produced in other litigation. The May 8, 1998, settlement in the Minnesota action provided that the defendants would maintain the depository for ten years, and that during its lifetime, defendants would continue to place into the depository documents produced in other litigation. State of Minn. v. Philip Morris Inc., No. Cl-94-8565, Consent Judgment (Minn. D. Ct. May 8, 1998) available at http://stic.neu.edu/MN/consent.htm.

16. E.g., In re Telectronics Pacing Systems, Inc., MDL 1057, 186 F.R.D. 459 (S.D. Ohio 1999) (referring to 1995 pretrial order establishing a joint plaintiff/defendant document depository in multidistrict litigation involving 435 transferred cases); In re Lease Oil Antitrust Litigation, MDL 1206, 186 F.R.D. 403 (S.D. Tex. 1999) (noting that document depository established in proceeding involving fifteen lawsuits and thirty-two defendants held five million documents); In re Orthopedic Bone Screw Products Liability Litigation, No. MDL 1014, 1998 WL 118060 (E.D. Pa. Jan. 12, 1998) (referring to pretrial order establishing a document depository, operated by plaintiffs' liaison counsel, for multidistrict litigation involving 2,300 civil actions and 5,000 plaintiffs); In re Norplant Contraceptive Prods. Liab. Litig., No. MDL 1038, 1995 WL 116134 (E.D. Tx. Feb. 22, 1995) (establishing document depository available to litigants in both the multidistrict litigation and related state actions); As demonstrated by the use of a depository in the State of Minnesota tobacco action, however, they can also be justified in other large, complex, document-intensive cases venued in a single district. see also In re Two Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation, 994 F.2d 956, 959, 965 (1st Cir. 1993) (noting the creation of a document depository in a proceeding involving more than 2000 parties and over 270 cases).
A. "Virtual" Depositories That Reside On The Internet Are Feasible And Advantageous Alternatives To Traditional Document Depositories

Using the Internet to store and provide access to voluminous document productions is eminently feasible from a technical standpoint. A number of large document collections have already been placed on-line. The Library of Congress, for example, offers selected collections of its archival materials on the Internet as part of its National Digital Library Program. The University of Michigan's Making of America project, a digital library of documents relating to American social history, currently contains 634,068 pages of materials, with further documents to be added in the coming years.

The most compelling proof of the feasibility of a "virtual" document depository are the Websites that have been established to provide access to tobacco company documents. Tobaccoarchive.com serves as a portal to Internet sites that contain documents produced in litigation by six tobacco defendants. These Websites provide Internet access to a staggering number of documents. As of last fall, they contained more than 26 million pages of material. Moreover, as additional documents are produced by these entities in litigation, images of those documents are added to the Websites, and will continue to be added for another ten years.

Although tobacco litigation is certainly unique in many respects, the presence of such a large collection of discovery materials on the Internet suggests that a "virtual" depository is not only logis-
tically possible, but also that it may be the best method of reducing document production burdens in large document cases. It certainly presents certain advantages over a traditional document depository. No warehouse or office space has to be rented or furnished. No utilities must be paid, and no depository administrator is needed to control the stacks of paper. Moreover, opposing counsel will find it difficult to object to the form of production, since access to the "virtual" depository is far superior to the traditional depository, and even arguably better than hard copy productions. The time and cost of traveling to a traditional depository will no longer be a factor. Images of documents produced to a "virtual" depository can be instantly called to the screen of the nearest computer. Attorneys with portable personal computers are never further away from the documents than they are from the closest telephone jack.

Using the Internet as a "virtual" document depository would provide internal case management advantages in addition to those associated with the production process. It would permit cocounsel to share a common collection of documents without having to maintain duplicate versions of that collection in various locations. In addition, it would improve document access for the producing party. That improved access would come both in the form of instant on-line recall, and, if counsel has developed a database containing information about the documents, that database can be linked to the Internet images, creating a powerful document search and retrieval tool.

Another interesting, albeit unquantifiable advantage of a "virtual" depository arises from the ease of producing electronic documents over the Internet. As computers proliferate and com-

22. Unlike users of a traditional depository, users of a "virtual" depository cannot create disorder among the documents or otherwise threaten the integrity of the collection.

23. This ease of access will also reduce the need for counsel who requested the documents to assemble large, duplicative document collections in their offices. Instead of copying every potentially relevant document from the traditional depository, as many counsel are forced to do to in order to avoid repeated visits to the facility, they can leave those materials within the "virtual" depository, readily accessible at any time, until a copy of a particular document is needed.

24. If, for example, counsel wishes to use the database to identify and retrieve hard copies of documents associated with particular persons or subject matters, that task becomes far more simple if the database on which the search is performed is linked to the documents, allowing those documents to be quickly identified, and then printed with the touch of a button.
panies increasingly rely upon e-mail and the electronic transmission of documents, documents stored on company computers become an ever larger portion of the documents that have to be produced in litigation. The logistical burdens of dealing with the collection and production of this electronic data can be immense. Merely printing and copying all of the relevant electronic documents, some of which can be quite lengthy, are costly and time-consuming tasks. With a "virtual" depository, these steps can be eliminated. The data can be transferred in electronic form to the "virtual" depository server, where it can easily be produced in precisely the same format as the format in which it was created and stored.

There are, of course, costs associated with constructing a "virtual" depository. The principal expenses will be incurred in converting the documents into digital images that can be stored on a computer and in paying an Internet service provider to host the Website. The cost of document imaging is not necessarily, however, an added expense that a litigant must bear if it decides to construct a "virtual" depository. In many cases, particularly in the large products liability cases in which depositories make the most economic sense, litigants image the documents they produce for their own internal use both in discovery and at trial. The court in In re: Silicone Gel Breast Implants Products Liability Litigation, for example, noted in one of its depository orders that "[m]ost documents produced to the depository by the defendants have been 'imaged' and are available on CD-ROM disks . . . ." 25 Had current technology been available then, it certainly would have made more sense simply to download those disks onto an Internet server 26 and completely substitute a "virtual" depository for the cumbersome brick and mortar depository established in that case. 27


26. Some might argue, of course, that producing the imaged versions of the documents on CD-ROMs would be a better option than using either a traditional depository or the Internet. Although this certainly is an attractive alternative in cases that involve few documents, CD-ROMs become cumbersome in large-scale product liability proceedings involving large numbers of documents and multiple actions. In the breast implants products liability litigation, for example, it took two hundred CD-ROMS to encode the data for the approximately 3,000,000 pages that had been imaged. Id.

27. In one of its orders in the latex gloves multidistrict litigation, the court clearly contemplated giving remote access to digital images of the documents by
The costs incurred in paying an Internet service provider to host the Website are more difficult to quantify. There are no "standard" fee structures. Instead, a litigant interested in establishing a "virtual" depository must seek competitive bids from firms offering web hosting services. Interestingly, several litigation support vendors have already anticipated the use of the Internet as a document production tool and are offering their services to build and support Internet depository websites. Undoubtedly, as litigants become more accustomed to the possibility of using the Internet as a document production tool, and as additional litigation support vendors become aware that this service is a viable product, prices will become competitive with alternative means of document production.

B. Before Implementing A "Virtual" Depository, Several Issues Must Be Considered And Resolved

The authority of a trial court to mandate the creation of a "virtual" depository in an appropriate case cannot be questioned. As noted above, there is broad recognition that in complex proceedings, courts may order the creation of a central document depository, and even allocate the costs of such a depository among the parties. Where a "virtual" depository makes even greater sense than a traditional depository, ordering its creation would thus surely be within the broad authority granted to lower courts to control discovery.

The establishment of a "virtual" depository, however, raises several novel questions. While these issues need to be considered telephone, thus foreshadowing the use of the Internet. In re Latex Gloves Prods. Liab. Litig., MDL 1148, CMO No. 27 (E.D. Pa. March 4, 1998) available at http://www.paed.uscourts.gov/opinions/MDL/MDL1148/CMO27.htm. That court, however, envisioned housing the electronic database within the traditional document depository created in that case, and did not suggest using the Internet as the parties' access route. Id.

28. These companies, which include a court reporting firm and a large traditional document production vendor, offer not only to host the Website, but also to image the documents.

29. Litigation support vendors, of course, are not the only companies that can enter this market. Virtually any sophisticated Internet service provider could host a "virtual" depository.

30. In re Two Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation, 994 F.2d 956, 965 (1st Cir. 1993) (noting that in that proceeding, involving over 2000 parties, the trial court's "power to mandate contributions to, inter alia, a central document depository can scarcely be doubted").
and resolved, they do not present substantial barriers to the use of a "virtual" depository.

1. **Document Admissibility**

Some may question whether hard copies of the documents generated from the electronic Internet images would be admissible at trial. The Federal Rules of Evidence, and most state rules, clearly provide that a "duplicate is admissible to the same extent as an original," and define "duplicate" to include counterparts generated by "mechanical or electronic re-recording..."\(^{31}\) Although electronic versions of documents are particularly susceptible to alterations that may be difficult to detect, this does not render hard copies made from those electronic versions inadmissible. It merely places on the producing party the obligation to ensure that the documents presented at trial are accurate and, if they are not, to make the appropriate objection.\(^{32}\)

2. **Security Concerns**

Issues will also arise regarding how to restrict access only to those who are entitled to view the documents. Courts and litigants will want to ensure that non-parties cannot enter the Website, alter its data, or intercept the transmission of that data over the Internet.\(^{33}\) Although there can never be a complete guarantee that enterprising hackers will be thwarted, the use of properly monitored passwords, firewalls and the sophisticated encryption software that is now available will provide reasonable assurance as to the security of the Website.

More traditional access concerns, involving trade secrets and other confidentiality issues, are also easily accommodated on the Internet. A court will normally respond to a party's confidentiality concerns by issuing a Protective Order that gives certain documents heightened protections. Typically, the Protective Order will provide that those documents must bear a specified legend. A party producing its documents to a "virtual" depository could simply

\(^{31}\) FED. R. EVID. 1001, 1003; Minn. R. Evid. 1001, 1003.

\(^{32}\) 11 R. THOMPSON, MINNESOTA PRACTICE § 1003.01 (2d ed. 1992).

\(^{33}\) Although the tobacco defendants' Internet Websites are used to satisfy document production obligations, they are open to public viewing. The considerations which led to the use of completely public Websites in that situation are likely unique. Most litigants will undoubtedly prefer to restrict access only to parties and their counsel.
stamp its confidential documents with that legend before they are imaged, and ensure that the court's Protective Order encompasses not only the hard copy documents made from that image, but also the image itself. If a party wishes to segregate a portion of its documents from the rest of its document production for confidentiality reasons or because of other case management concerns, it can easily do so on the Internet by creating a separate Website, accessible with a separate password.

3. Providing A Searchable Database

One of the more difficult issues to resolve may be whether a database containing objective information about the document collection should be part of the "virtual" depository. Normally, of course, document indices are not provided with produced documents. Responding parties are required merely to produce their documents either "as they are kept in the usual course of business" or organized and labeled "to correspond with the categories in the request." The format of a "virtual" depository, however, requires something more. At the very least, it demands a rudimentary database that displays a unique name for each document and contains a link between that name and its associated document image. This will allow Internet users to select the documents they wish to view from the list of names, and will permit the host server, using the links, to identify and transmit to the user the images of the documents they have chosen. Although the unique names can be as simple as sequential numbers (documents "1," "2," "3," for example), such basic identifiers provide little helpful information to the user.

The Internet would support the construction of far more sophisticated indices and databases that could be used as powerful tools in searching the document collection. A database could be prepared, for example, that provides fundamental, objective information about each document, such as the identification number

34. A party, for example, might anticipate that not all parties will need, want, or be entitled to access to its confidential documents, and thus provide an unrestricted site for all litigants containing non-confidential documents, and a separate site with limited access for its confidential materials.

35. In multidistrict litigation involving a multitude of parties, for example, a party might want to give all counsel access to a core set of documents applicable to all actions, and provide restricted access to documents responsive to unique, case-specific issues.

stamped on the original document, its date, its title, the name of the author, the name of the recipient and persons or organizations mentioned in the document text. Upon entering the "virtual" depository, users could search this database to locate documents in which they are particularly interested, avoiding the burden of having to review every single document that has been produced. 37

Litigants will likely have sharply divergent views as to whether a sophisticated document database needs to accompany the "virtual" depository. The party requesting the documents will claim that without a database, the initial document review and later searches will be slow and cumbersome, an argument that becomes more persuasive as the size of the collection increases. The party producing the documents will argue, in reply, that the "virtual" depository production should be treated no differently from other document productions. They may assert that the requesting party can review each image one at a time, and if they want to create an index or a sophisticated database relating to those documents, they are free to do so.

Courts' treatment of traditional document depositories provides some indication of what they may require of "virtual" depositories. In the Breast Implants Products Liability Litigation, the Court ordered the plaintiffs' steering committee to review and code documents produced to the depository and prepare "a computerized database that identifies by number and describes (in neutral words suitable for use by a court preparing a list of exhibits) the various documents produced to the Depository." 38

37. This article contemplates storing and displaying documents in the form of digital images. It would also be possible to store most documents in full text format, using scanning equipment and OCR (optical character recognition) software. If the latter format were adopted, no database or index would be necessary, since the user could search every word of text contained in the documents. Although this approach would place a very dynamic search device in the hands of "virtual" depository users, OCR technology is not suitable for use with most document collections. OCR software has difficulty reading handwritten documents or low quality images (such as some facsimiles or third or fourth generation copies of documents). Even with high quality material, every document would have to undergo manual inspection to detect and eliminate the inevitable processing errors that will occur. Moreover, documents that have been replicated with an OCR process will face admissibility objections at trial, since the full text document is not a precise reproduction of the original. Handwritten documents or documents with marginalia, for example, cannot be completely and accurately portrayed by their full text counterpart.

Co. v. First California Mortgage Co., the federal district court ordered that plaintiff's depository document index be shared by all parties, and that plaintiff and defendant split the cost of its preparation. In the State of Minnesota tobacco litigation, the Court ordered every party to generate comprehensive objective document indices for all the documents they produced.

Courts are obviously sensitive to the difficulties faced by parties in reviewing and using large document collections. In particular, where the document collection is large and where numerous counsel will be using the "virtual" depository, a court may be easily convinced that the depository should be accompanied by a sophisticated database providing information about the collection's contents. To minimize burdensomeness objections, a court can allocate responsibility for creating the database among the parties or, alternatively, can assign that task to one litigant and apportion the costs of that project equitably among the parties.

4. Access Time

Another difficulty that will inevitably accompany the creation of a "virtual" depository, and may in fact have to be weighed in determining whether a "virtual" depository is feasible in particular cases, involves access time. Everyone who has used the Internet is undoubtedly familiar with the frustrating delays occasionally encountered in obtaining information from a Website. These delays could easily be exacerbated when using a "virtual" depository, since sending document images over the Internet may require the transmission of relatively large amounts of data. The solution to these delays involves upgrading the communications line on which the information is being transmitted. Virtually every entity that might serve as the host of a "virtual" depository is linked to the Internet by a high speed, high capacity cable. Those Website hosts are not the problem. The principal difficulty lies with the users, many of whom access the Internet through slow modems and limited telephone lines. Although this is clearly a problem that must

available at http://earth.fc.gov/BREIMLIT/ORDERS/order30.rtf. The defendants in that case were given the right to comment upon the accuracy of this index. Id.

be recognized and considered, it probably is not a significant barrier to the establishment of a "virtual" depository. Many of the law offices whose attorneys will be using the "virtual" depository will have already installed high-speed Internet access lines. Even those who have not yet upgraded their communications link will likely do so in the near future, as cable companies, telephone companies, and access providers compete to install high-bandwidth Internet connections in our communities.

Another factor that will influence the speed of the Internet connection is the processing capability of the server on which the "virtual" depository is placed. In selecting a company to host the Website, litigants must ensure that the company's computer has the capacity and the processing power to handle anticipated traffic and data volume.

5. Providing Copies Of Documents To "Virtual" Depository Users

Parties must also take into account how they are going to fulfill the requests of reviewing parties for copies of produced documents. Several options are available. Most obviously, visitors to the "virtual" depository can use their Internet browsers to print hard copies from the images displayed on their personal computers. They can also copy those images onto the electronic storage devices within their computer or on their office network. Both of these approaches, however, suffer from the same problem. They require users to deal with documents one at a time, a time-consuming task for users who want to copy large numbers of pages.

To simplify the process, software can be installed on the host server to permit users to select a number of different documents for simultaneous downloading. Alternatively, the Internet host can develop an order fulfillment program, allowing users to order copies of specified documents from the host. The host would either make hard copies of the requested documents or burn them onto CDs, and ship them to the users.

In developing a protocol that governs the duplication of "virtual" depository documents, courts and litigants must consider an unusual feature unique to the Internet – the ability of "virtual" depository users to visit the Web site and copy documents without the knowledge of the producing party. With standard document pro-

41. Presumably, the host would charge users for supplying the requested copies.
ductions, the producing party knows exactly which documents are taken by opposing counsel. Even traditional document depositories can track the flow of document copies furnished to depository visitors, allowing that information to be given to those who produced those documents. Similar information is, in contrast, unavailable to parties if "virtual" depository users make copies of documents while they are on-line. Producing parties who want this data will have to convince the courts that they are entitled to know which of their documents are in the hands of opposing counsel. The courts then will have to issue an order that either compels users to obtain their copies exclusively through an order fulfillment program that is controlled and tracked by the Internet host, or requires users to inform the producing parties of the documents they copy while on-line.

6. Documents Not Susceptible To Digital Imaging Techniques

Not all documents, of course, can be imaged. Videotapes, audio tapes, and oversize documents must continue to be produced in the traditional manner. Such materials, however, usually represent only a small fraction of the total document collection, and thus do not present a barrier to the use of a "virtual" depository.

IV. THE INTERNET MAY SOON BECOME A USEFUL DOCUMENT PRODUCTION TOOL IN MOST PRODUCT LIABILITY ACTIONS

This article suggests that the Internet can and should take the place of traditional document depositories. Litigants and courts who confront cases involving large document collections, numerous litigants, and multiple case venues, should carefully consider whether it would make more sense to construct a "virtual" depository than to build a brick and mortar depository.

It is more difficult to advocate use of the Internet instead of standard document production procedures in smaller cases. If a party is only going to produce two hundred documents, it cannot justify the expense of imaging the documents and retaining a company to host the needed Internet site. This, however, may soon

change.

Although no one can forecast technological progress with any certainty, it is possible to make certain general predictions with some confidence. As time passes, the Internet will be used with greater frequency in a broader number of applications. Specifically, the Internet will be used more often to provide access to databases and to transmit document images. In addition, Internet access will become easier. Data will be transmitted over the Internet at increasingly higher speeds in ever-increasing volumes. Document imaging capabilities will improve.

Each of these advances will make it easier and cheaper to use the Internet to produce documents. As costs and inconvenience decrease, "virtual" depositories will become viable in a broader variety of cases.

The impact of commercial vendors also cannot be ignored. As noted above, several enterprising companies are already promoting themselves as potential hosts of Internet depository sites. Once "virtual" depositories begin to be accepted within the legal community, large numbers of firms can be expected to enter the market. This will further drive down the costs of "virtual" depositories through competitive pressures. It will also undoubtedly result in "virtual" depositories that are more convenient to use as vendors strive to market their products and to find ways to distinguish themselves from their competitors.

V. CONCLUSION

The time has come to abandon brick and mortar depositories in favor of "virtual" depositories. Parties and courts should harness the power of the Internet to make large scale, document intensive products liability litigation more efficient and to decrease the parties' document production burdens. They should also keep a watchful eye on the possibility of using "virtual" depositories in a wider variety of circumstances, and not be surprised if trading hard copies of documents seems as archaic in the not-too-distant future as carbon paper seems today.