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Superpoked and Served: Service of Process via Social Networking Sites

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COMMENT

SUPERPOKED AND SERVED: SERVICE OF PROCESS VIA SOCIAL NETWORKING SITES

I. INTRODUCTION

Who doesn't love those familiar Facebook notifications? "Elly Pepper tagged you in four photos." "Stephen Taylor requested to be your friend." "The lending company secured a default judgment against you; you have 30 days to pack your bags!"

If you thought that last one sounded out of place, think again. On December 12, 2008, in "what appears to be a [world] first," Master David Harper of the Supreme Court of the Australian Capital Territory authorized service of a default judgment via the social networking site Facebook.[1]

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1. Nick Abrahams, *Australian Court Serves Documents via Facebook*, SYDNEY MORNING HERALD, Dec. 12, 2008, *available at* http://www.smh.com.au/articles/2008/12/12/1228585107578.html. The defendant couple had defaulted on a $150,000 home refinancing loan. Noel Towell, *Lawyers To Serve Notices on Facebook*, SYDNEY MORNING HERALD, Dec. 16, 2008, *available at* http://www.smh.com.au/articles/2008/12/16/1229189579001.html. After the couple failed to appear in court, lawyers for the lending company applied to the court for a judgment for the loan amount and for possession of the defendants' home. *Id.* The court granted default judgment on October 31, 2008. *Id.*

Australian law required that the lending company locate the defendants and serve them with notice of the judgment. *Id.* Although notification of default generally requires personal service or mailing the judgment to a defendant's home, Australian courts had previously authorized substituted service via e-mail and even by text message to a defendant's mobile phone. *Id.*

Lawyers for the plaintiff lending company published notice in The Canberra Times and hired private investigators to serve the judgment. *Id.* After eleven failed attempts to find the couple at their home between November 8 and December 6, the lawyers applied to the Supreme Court to serve notice of the judgment via Facebook. *Id.* The Facebook profiles of the defendants showed the defendants' names, dates of birth, and e-mail addresses. *Id.* Additionally, the friend lists of the co-defendants showed that the co-defendants were friends with one another. *Id.* On this evidence, the lawyers satisfied the judge that the profiles were those of the defendants. *Id.*

The Australian case represents the reality that the judiciary, both domestic and abroad, has "begun to accept electronic methods of communication."[2] Litigation processes have developed in response to innovative methods in information processing.[3] This comment will focus on one specific procedural aspect which has been so affected: service of process.

American law has evolved to permit service of process via telex,[4] fax,[5] and, most recently, e-mail.[6] Facebook, which started as a social networking site for college students,[7] is one of the latest innovations in electronic communication to take the world by storm.[8]

This comment explores the propriety of service of process via social networking sites such as Facebook under American federal law.[9] Parts II through V provide the analytical framework for analyzing this novel method of effectuating service of process. Specifically, Part II outlines the fundamental requirements of due process and Rule 4 of the Federal Rules of Civil Procedure. Part III explores the evolution of service of process mechanisms, but reserves service via e-mail for discussion in Part IV. Part V addresses electronic service abroad, most notably service pursuant to the Hague Convention. Part VI provides a critical analysis of the potential for service of process via Facebook. Finally, Part VII concludes that service of process through Facebook may be permissible under Rule 4(f)(3) for serving elusive defendants abroad, and that, although Facebook has a number of weighty limitations, such service would not constitute a per se violation of due process.

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2. Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 381–82 (2003).

3. Yvonne A. Tamayo, *Are You Being Served?: E-Mail and (Due) Service of Process*, 51 S.C. L. REV. 227, 227–28 (2000) [hereinafter Tamayo, *Are you Being Served?*] (noting the advent of electronic court filing systems, admission of electronic documents as evidence, and expanded notions of service of process).

4. *See, e.g.*, Cooper v. Church of Scientology of Boston, 92 F.R.D. 783, 786 (D. Mass. 1982).

5. *See, e.g.*, *In re* Int'l Telemedia Assocs., 245 B.R. 713, 720–21 (Bankr. N.D. Ga. 2000).

6. *See, e.g.*, Rio Props. Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002).

7. *See* Soraya Nadia McDonald, *Making College Friends Easy as Point and Click*, WASH. POST, Aug. 7, 2005, at A9.

8. *See infra* text accompanying notes 195–200.

9. The propriety of the Australian ruling under Australian law is beyond the scope of this comment.

II. DUE PROCESS AND RULE 4

The requirement that plaintiffs give notice to defendants of claims against them has existed in some form for over 4,000 years.[10] As far as American law is concerned, notice is "a fundamental procedural component of commencing litigation."[11] Serving notice provides a defendant with notice of a claim against him and allows him the opportunity to appear to defend his interests.[12] "Both personal jurisdiction and proper [notice] must exist in order for a court to exercise its authority over a defendant."[13]

Expanding notions of personal jurisdiction over the years catalyzed corresponding changes in the scope of permissible service of process.[14] In 1878, the Supreme Court in *Pennoyer v. Neff* held that effective service of process for in personam actions required that the defendant be personally served in the forum state.[15] In the decades that followed, however, the growth and commercial expansion of the country rendered *Pennoyer*'s conception of per-

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10. *See* REUVEN YARON, THE LAWS OF ESHNUNNA 118–19 (Magnes Press 1988) (1969). One of the earliest known legal codes, the Code of Eshnunna, required plaintiffs to "shout" or "speak" their cause of action. *See id.* at 127–28.

11. Aaron R. Chacker, Note, *E-ffectuating Notice:* Rio Properties v. Rio International Interlink, 48 VILL. L. REV. 597, 599 (2003) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). *But see* Kent Sinclair, *Service of Process: Amended Rule 4 and the Presumption of Jurisdiction*, 14 REV. LITIG. 159, 160–63 (1994) (contending that the 1993 amendments to the Federal Rules of Civil Procedure "proceed from the premise that service of process is a pesky ministerial responsibility.").

12. *See Mullane*, 339 U.S. at 314 ("[N]otice . . . [must] apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); Chacker, *supra* note 11, at 599 n.15 ("[T]he core function of service is to supply notice of the pendency of a legal action, in a manner and at a time that affords the defendant a fair opportunity to answer the complaint and present defenses and objections." (quoting Henderson v. United States, 517 U.S. 654, 672 (1996))).

13. Colby, *supra* note 2, at 339–40 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980)); *see also* John M. Murphy III, Note, *From Snail Mail to E-Mail: The Steady Evolution of Service of Process*, 19 ST. JOHN'S J. LEGAL COMMENT. 73, 77 (2004).

14. *See* Burnham v. Sup. Ct. of Cal., 495 U.S. 604, 616–18 (1990) (discussing the transition from *Pennoyer v. Neff*, 95 U.S. 714 (1878), to *Int'l Shoe v. Washington*, 326 U.S. 310 (1945)); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222 (1957) ("[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. . . . attributable to the fundamental transformation of our national economy."); Colby, *supra* note 2, at 340, 344; *see also* Murphy, *supra* note 13, at 77–81 (providing a chronological discussion of personal jurisdiction cases).

15. 95 U.S. at 733.

sonal jurisdiction unworkable.[16] Accordingly, the Court in *McDonald v. Mabee* found that delivery of summons to a defendant's "last and usual place of abode" might be sufficient in some circumstances.[17]

The Court in *International Shoe v. Washington* established the modern "minimum contacts" test for personal jurisdiction and set the standard that a particular form of substituted service is adequate where it "gives reasonable assurance that the notice will be actual."[18] The Court concluded that, on the facts of the case, sending notice via registered mail was reasonably calculated to notify the defendant of the suit.[19]

Not long after *International Shoe*, the Court issued a landmark decision in *Mullane v. Central Hanover Bank & Trust Co.*[20] In *Mullane*, a trust company in New York had established a common trust fund, and sought to settle its first account as common trustee.[21] The action concerned many beneficiaries, some of whom were not residents of the State of New York, the situs of the action.[22] In compliance with the requirements of the applicable New York Banking Law, the trust company provided notice only by publication in a local newspaper.[23] The notice set forth the "name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds."[24]

Mullane, special guardian and attorney for persons not appearing or who had or might have an interest in the income of the common trust fund, appeared specially to contest the constitutional sufficiency of the notice and the statutory provisions for notice.[25] The New York Surrogate's Court held that "the notice required and given was sufficient," and entered a final decree

16. Colby, *supra* note 2, at 340–41.
17. 243 U.S. 90, 92 (1917).
18. 326 U.S. at 320.
19. *Id.*
20. 339 U.S. 306 (1950).
21. *Id.* at 309.
22. *Id.* The record did not disclose the exact number or residence of the beneficiaries. *Id.*
23. *Id.*
24. *Id.* at 310.
25. *Id.* at 310–11.

accepting the accounts.[26] The Appellate Division of the Supreme Court and the Court of Appeals of the State of New York affirmed.[27]

On appeal, the issue considered by the *Mullane* Court was whether the notice comported with Fourteenth Amendment Due Process.[28] The Court regarded the opportunity to be heard as the "fundamental requisite of due process," and noted that the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."[29] The Court acknowledged that it had not committed itself to a formula for determining when constructive notice may be utilized or what test it must meet, but announced what has become *the* constitutional standard for adjudging the adequacy of alternative means of service:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.[30]

The Court concluded that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[31] The Court offered one caveat: where no available method of effectuating notice could satisfy the "reasonably calculated" standard, the form of service chosen need only be "not substantially less likely to bring home notice than other of the feasible and customary substitutes."[32]

Applying those principles to the facts of the case, the Court held that, for those beneficiaries "whose interests or whereabouts could not with due diligence be ascertained," notice by publication was constitutionally sufficient.[33] For the beneficiaries of known

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26. *Id.* at 311 (citing *In re* Cent. Hanover Bank & Trust Co., 75 N.Y.S. 2d 397, 410 (1947)).

27. *Id.*

28. *Id.* at 307.

29. *Id.* at 314.

30. *Id.* (internal citations omitted).

31. *Id.* at 315. The Court remarked, "[P]rocess which is a mere gesture is not due process." *Id.*

32. *Id.*

33. *Id.* at 317.

places of residence, however, notice by publication was inadequate.[34]

The "reasonably calculated" standard announced in *Mullane* has provided the constitutional framework for notice for over fifty years.[35] Various means of alternative service have passed constitutional muster under this standard.[36] Under American law, however, adequate notice requires not only compliance with constitutional due process, but also compliance with the applicable service of process statute.[37]

Rule 4 of the Federal Rules of Civil Procedure governs notice for federal courts in the civil realm.[38] The text of Rule 4 permits service by: "(1) personal service; (2) mail; (3) means permitted by federal law; (4) alternative forms of service; (5) means allowed under state law; or (6) means allowed by the law of the country where the summons is to be served or an internationally agreed means of service."[39] Subsection (f)(3), which permits "other means" of service directed by the court and not prohibited by international agreement,[40] "was designed to be a 'catch-all' to permit service of process by means that are not listed explicitly in the Federal Rules."[41] Although the Rule "places a strong empha-

34. *Id.* at 318. The beneficiaries of known residence could easily have been reached via more reliable means, such as the mails. *Id.* The Court's holding did not rest upon whether the action should properly have been classified as *in rem* or as *in personam*. *Id.* at 312.

35. Chacker, *supra* note 11, at 604 & n.41 (collecting cases).

36. Kevin W. Lewis, Comment, *E-Service: Ensuring the Integrity of International E-Mail Service of Process*, 13 ROGER WILLIAMS U. L. REV. 285, 287–88 (2008); *see, e.g.*, Int'l Controls Corp. v. Vesco, 593 F.2d 166, 176–78 (2d Cir. 1979) (describing mail service of process to defendant's last known address under former Rule 4(i)(1)(E)); Levin v. Ruby Trading Corp., 248 F. Supp. 537, 541 (S.D.N.Y. 1965) (noting that ordinary mail to three different addresses satisfies due process).

37. Weiss v. Glemp, 903 P.2d 455, 458–59 (Wash. 1995) (citing Thayer v. Edmonds, 503 P.2d 1110, 1113 (Wash. Ct. App. 1972)). Because notice is essential to commencing litigation, "every American jurisdiction has codified its particular requirements for effectuating proper notice." Chacker, *supra* note 11, at 599–600.

38. Chacker, *supra* note 11, at 600; *see* FED. R. CIV. P. 4. For an overview of Rule 4, see 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1089.1 (3d ed. 2002).

39. Matthew R. Schreck, *Preventing "You've Got Mail"™ From Meaning "You've Been Served": How Service of Process by E-Mail Does Not Meet Constitutional Procedural Due Process Requirements*, 38 J. MARSHALL L. REV. 1121, 1125–26 (2005) (citing FED. R. CIV. P. 4(f)).

40. FED. R. CIV. P. 4(f)(3).

41. Murphy, *supra* note 13, at 105.

sis on the need to save costs,"[42] it must be remembered that the Constitution requires more than speed and efficiency.[43]

III. EVOLUTION OF SERVICE OF PROCESS

Service of process necessarily evolved from the days that required personal service in the forum state.[44] Personal service, which is effectuated "by delivery to the defendant of the summons and complaint by a person authorized by law," is considered "the most reliable manner of giving a defendant notice of a legal action in which the defendant has an interest."[45] Plaintiffs favor personal service due to its certainty, but it is often difficult to "achiev[e] the physical contact between process server and defendant necessary to comply with the requirements of applicable service of process statutes."[46]

Because personal service is not always possible, the law has expanded to permit, in certain circumstances, service by publication, mail, telex, facsimile, and e-mail.[47] Courts have deemed defendants on notice where "substituted" or "constructive" methods of service have been employed.[48] Where the defendant is a natural person, substituted service is commonly effectuated by leaving

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42. Frank Conley, Comment, *:-) Service With A Smiley: The Effect of E-Mail and Other Electronic Communications on Service of Process*, 11 TEMP. INT'L & COMP. L.J. 407, 411 (1997); *see also* FED. R. CIV. P. 4(d) (governing waiver of formal service).

43. *See* Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972).

44. Murphy, *supra* note 13, at 110.

45. Tamayo, *Are You Being Served?*, *supra* note 3, at 234 (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding.")).

46. *Id.* For example, in *Weiss v. Glemp*, a summons left on the windowsill of a rectory did not comply with the state statutory requirement of personal service to the defendant because the statute required that the papers be delivered to the defendant personally or left at his abode with someone of suitable age and discretion. 903 P.2d 455, 456–57 (Wash. 1995). Service was held insufficient despite the fact that the process server was within view and hearing of the defendant. *Id.* Conversely, other courts, "have held . . . that 'in hand' delivery is not required to effectuate personal service." Tamayo, *supra* note 3, at 234 n.45 (collecting cases).

47. *See* Murphy, *supra* note 13, at 110; *see also* Tamayo, *Are You Being Served?*, *supra* note 3, at 237–44 (discussing methods for effectuating substituted service). New technologies, however, have by no means supplanted more traditional modes of service such as "tagging" a defendant within the forum state. Colby, *supra* note 2, at 344 n.28.

48. Tamayo, *Are You Being Served?*, *supra* note 3, at 234. Commentators differ in their use of the terms "substituted" and "constructive" in regard to notice. *Id.* at 237 n.69. In this comment, as in Professor Tamayo's article, the terms will be used interchangeably to connote any form of service other than personal service.

papers at the defendant's home.[49] Though generally accepted, this method poses problems, "such as identification of the defendant's residence when the defendant occupies more than one home."[50]

Absent personal service, the Supreme Court has found that service of process by certified or registered mail may be constitutionally sufficient.[51] The federal rules and many state rules explicitly permit mail service.[52] Service by mail generally requires that the carrier "obtain a manually executed signature from the defendant and . . . mail the return receipt bearing that signature to the plaintiff, who must then file the return receipt with the court."[53] "[S]ervice of process through posting or publication often provides less certainty" that the defendant will receive notice, and thus has only been permitted under more limited circumstances.[54]

As communication technologies evolved, litigants sought to employ new technologies to effectuate notice.[55] In the first of a line of cases embracing technological innovations for service of process, the court in *New England Merchants National Bank v.*

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49. *Id.* at 237–38. Under the Federal Rules, such service requires that the summons and complaint be left "at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there." FED. R. CIV. P. 4(e)(2)(b).

50. Tamayo, *Are You Being Served?*, *supra* note 3, at 238; *see, e.g.*, Nat'l Dev. Co. v. Triad Holding Corp., 930 F.2d 253, 257–58 (2d Cir. 1991) (finding "sufficient indicia of permanence" at defendant's New York dwelling despite defendant's contention that he lived primarily in Saudi Arabia). Similar problems arise in the corporate context where service is attempted upon "an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process." FED. R. CIV. P. 4(h)(1)(B). For example, in *Buckley & Co. v. Secretary of Labor*, decided under then-Rule 4(d)(3), the predecessor to 4(h)(1), a construction company shop superintendant who acted as the company's representative in other capacities was not authorized to receive service of process. 507 F.2d 78, 80–81 (3d Cir. 1975).

51. Tamayo, *Are You Being Served?*, *supra* note 3, at 236 & n.59 (citing Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983); Hess v. Pawloski, 274 U.S. 352, 354 (1927)).

52. *Id.* at 236; *see, e.g.*, FED. R. CIV. P. 4(f)(2)(ii) (individuals in foreign countries); COLO. R. CIV. P. 4(g); MINN. R. CIV. P. 4.05; VT. R. CIV. P. 4(f). Additionally, plaintiffs commonly use first-class mail for mailing complaints and requests for waiver of formal service. Tamayo, *Are You Being Served?*, *supra* note 3, at 237. Although such use of the mails does not technically effect service, it may obviate the need for formal service altogether. *Id.*

53. Tamayo, *Are You Being Served?*, *supra* note 3, at 236.

54. *Id.* at 242–44.

55. Chacker, *supra* note 11, at 604. For a chronological breakdown of technological developments in service of process, see *id.* at 604–14; Murphy, *supra* note 13, at 82–91; Maria N. Vernace, Comment, *E-Mailing Service of Process: It's a Shoe in!*, 36 UWLA L. REV. 274, 285–300 (2005) (discussing judicial decisions on internet service of process).

Iran Power Generation and Transmission Co. authorized service of process via telex.[56] Although the case dealt specifically with telex, the decision affirmed the principle that "new communication technologies could effectuate notice within constitutional boundaries."[57] In what would become an oft-cited passage for courts analyzing new technological applications, the court said:

> Courts, however, cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.[58]

Other courts soon followed suit.[59]

In the wake of *New England Merchants*, commentators theorized about whether the then-emerging technology of facsimile could similarly effectuate proper notice.[60] "Despite the dearth of case law on the constitutionality of notice through facsimile, numerous courts have considered facsimile's application in other procedural contexts."[61] The court in *Calabrese v. Springer Personnel of New York, Inc.* permitted facsimile service of an order to answer interrogatories.[62] After noting widespread use of fax machines,[63] Judge Lane remarked that perhaps, under a literal reading of the statute,

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56. 495 F. Supp. 73, 81–82 (S.D.N.Y. 1980).

57. Chacker, *supra* note 11, at 606.

58. *New England Merchants*, 495 F. Supp. at 81.

59. *See, e.g.*, Cooper v. Church of Scientology of Boston, 92 F.R.D. 783, 784 (D. Mass. 1982) (permitting use of telex to serve notice upon an evasive defendant).

60. Chacker, *supra* note 11, at 607 & n.57 (collecting law review articles).

61. *Id.* at 608 n.62; *see also* Murphy, *supra* note 13, at 83. For example, "several jurisdictions . . . accommodate service of pleadings and other papers by electronic means, including facsimile, upon [the] recipient's consent." Chacker, *supra* note 11, at 608 n.62; *cf.* FED. R. CIV. P. 5(b)(2)(E) & (d)(3).

62. 534 N.Y.S.2d 83, 83–84 (N.Y. Civ. Ct. 1988). *Calabrese* marked the first known case permitting service via fax machine. *See id.*; *see also* Conley, *supra* note 42, at 423 (asserting the same).

63. *Calabrese*, 534 N.Y.S.2d at 83 ("[Fax] machines have been around for many years, but recently they have become so sophisticated and user-friendly that they have become overwhelmingly the method of choice for the transmission of documents in today's world. Indeed their use has become so widespread that business stationery now commonly carries a 'fax' telephone number in addition to an ordinary one, and, in common usage, 'fax' has been converted into a verb as well as an adjective and noun.").

> [T]here could now ensue controversy as to whether the recipient's office is open, whether anyone is in charge, and whether the fax machine is in a conspicuous place. I refuse, however, to engage in such Augustinian folly. Of course the office is open when the fax machine is receiving. If an operator is present, of course there is delivery. If no operator is present, of course the fax machine, which is visited regularly, is in a conspicuous place.[64]

A number of states subsequently permitted "facsimile to play some role in service of initial process."[65]

Another crucial decision in the evolution of service of process came in *In re International Telemedia Associates, Inc.*[66] In *International Telemedia Associates*, upon plaintiff's motion, the court authorized three forms of substituted service on an elusive defendant under Rule 4(f)(3): facsimile transmission, e-mail, and mail to the defendant's last known address.[67] The court's approval of service by fax and e-mail rested in large part on the fact that the defendant commonly used and preferred electronic communication.[68] Channeling *New England Merchants*, the court remarked, "[C]ommunication by facsimile transmission and electronic mail have now become commonplace in our increasingly global society. The federal courts are not required to turn a blind eye to society's embracement of such technological advances."[69] Thus, *International Telemedia Associates* further endorsed the "use of new communication technologies to effectuate notice."[70]

Finally, under a rather unusual factual scenario, the court in *Smith v. Islamic Emirate of Afghanistan* approved alternate service of process via television under Rule 4(f)(3).[71] The plaintiffs in *Smith* had filed a complaint against The Islamic Emirate of Afghanistan, the Taliban, Al-Qaeda, and Osama Bin Laden for deaths resulting from the 9/11 World Trade Center attacks.[72] After noting the flexibility inherent in Rule 4(f)(3), the court ap-

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64. *Id.* at 84.

65. Chacker, *supra* note 11, at 608 n.62 (citing IDAHO R. CIV. P. 4(c)(3); MONT. CODE ANN. 25-3-501); *see also* ILL. SUP. CT. R. 11(b)(4)(i).

66. 245 B.R. 713 (Bankr. N.D. Ga. 2000). The case is also commonly referred to as *Broadfoot v. Diaz*.

67. *Id.* at 722.

68. *Id.* at 721.

69. *Id.*

70. Chacker, *supra* note 11, at 610.

71. Nos. 01 CIV 10132(HB), 01 CIV 10144(HB), 2001 WL 1658211, at *3 (S.D.N.Y. Dec. 26, 2001).

72. *Id.* at *1.

proved service on Bin Laden and Al-Qaeda by publication in various media outlets, including broadcasters such as Turkish CNN and BBC World.[73] *Smith* is the only known authority on record to address the constitutionality of televised notice.[74]

IV. E-MAIL

The Internet and e-mail have become "a part of everyday vocabulary and everyday life, both business and personal."[75] E-mail is not simply garnering use, but it is beginning to displace more traditional modes of communication such as traditional mail, fax, and telephone.[76] As online communication took the world by storm, commentators posited about the use of e-mail in litigation processes.[77]

In time, the judiciary began to adapt the litigation process to reflect these "revolutionary trends in information processing."[78] Courts, both state and federal, implemented electronic filing systems;[79] electronic documents gained an increasing role in evidence;[80] discovery rules were adapted to permit electronic discov-

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73. *Id.* at *3–4. The whereabouts of the defendants could not be determined, as Bin Laden was then, and currently remains, the subject of an international manhunt. *See id.* at *3.

74. Chacker, *supra* note 11, at 610.

75. Conley, *supra* note 42, at 414; *see also* Murphy, *supra* note 13, at 73. In 2000, an estimated 1.6 billion non-commercial e-mails were sent out daily in the United States alone. Murphy, *supra* note 13, at 74. An America Online survey found "that the average e-mail user checks [e-mail roughly] five times [per] day, . . . and 59% of [people] who use portable e-mail devices check [their e-mail] every time a new message arrives. . . ." David Harsanyi, *Survey Says: Wait, I Have an E-Mail*, DENVER POST, July 27, 2007, at B-01, *available at* 2007 WLNR 14443950 ("We're reading and writing e-mails in our cars, in our bathrooms, at the park when our children play and at church.").

76. *See* Stefanie Scott, *Firms Find Advantages in E-Mail*, POST-CRESCENT (APPLETON, WIS.), Aug. 27, 2002, *available at* 2002 WLNR 9048717 (stating that over 80% of corporations are replacing mail with e-mail: 72% sent fewer faxes, and 45% made fewer phone calls).

77. *See* Chacker, *supra* note 11, at 612.

78. Tamayo, *Are You Being Served?*, *supra* note 3, at 227–28; *see* Colby, *supra* note 2, at 375, 381–82.

79. Murphy, *supra* note 13, at 92–95. Nationwide implementation of the judiciary's Case Management and Electronic Case Files system is nearly completed in the district and bankruptcy courts and is advancing to the appellate courts. Case Management/Electronic Case Files (CM/ECF), http://www.uscourts.gov/cmecf/cmecf_about.html (last visited Apr. 8, 2009) (explaining the system and reporting progress toward nationwide implementation).

80. Electronic evidence has been admitted in both civil and criminal contexts. *See* Conley, *supra* note 42, at 416; *Tamayo, Are You Being Served?*, *supra* note 3, at 247–48. For example, the court in *Strauss v. Microsoft Corp.* admitted into evidence lewd e-mail

ery requests and discovery of computerized data;[81] and notions of service expanded to encompass service via electronic means.[82]

The first known case permitting service of a judicial order by e-mail came out of England in 1996.[83] In the English case, Mr. Justice Newman of the Queens Bench granted a request by solicitors to serve notice of an extraterritorial injunction via e-mail.[84] The lawyers in the English case used an Internet service provider that "ha[d] an option for notifying the sender . . . when the recipient's service provider . . . received the message" but did not have the capacity to notify the sender "when the recipient actually read the note."[85] The defendant, however, "proved that he had read the message by responding to it, thus satisfying the substituted service requirement."[86] Notably, the English rule governing service of documents was similar in language and effect to Rule 4 of the Federal Rules in the United States.[87]

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messages sent by an employee editor to prove sex discrimination in the workplace. No. 91 Civ. 5928 (SWK), 1995 WL 326492, at *4, *6 (S.D.N.Y. June 1, 1995); *see also* United States v. Ferber, 966 F. Supp. 90, 99 (D. Mass. 1997) (admitting e-mail contents as a present sense impression); Lois Timnick, *Judge Will Allow Race Evidence in King Case*, L.A. TIMES, June 11, 1991, at B1 (discussing admission of electronic messages written by officers involved in the Rodney King beating).

81. Conley, *supra* note 42, at 415; *see* FED. R. CIV. P. 34(a) (permitting parties to request that information such as computerized data be translated into useable form).

82. *See, e.g.*, FED R. CIV. P. 5(b)(2)(D) (amended in 2001 to permit service of pleadings and other papers by electronic means where the person being served expressly consents in writing); FED. R. CIV. P. 5(e) (permitting district courts to adopt rules allowing electronic filing); IND. TRIAL R. P. 5(F) (defining "filing with the court" in a manner allowing the filing of documents by all forms of electronic transmission, including facsimile). Congress permits service of process via e-mail under the AntiCybersquatting Consumer Protection Act. *See* 15 U.S.C. § 1125(d) (2006). Also, "many federal circuits have adopted local rules for the submission of electronic briefs, and some states even mandate the submission of briefs by computer disk." Murphy, *supra* note 13, at 93.

83. Conley, *supra* note 42, at 408. For further discussion of the English case, see Tamayo, *Are You Being Served?*, *supra* note 3, at 244–46.

84. Conley, *supra* note 42, at 408. The order stated, "The Plaintiff do [sic] have leave to serve notice of the Writ herein, and to serve the Affidavit and this Order, . . . by E-Mail, at the number and addresses stated on the Writ herein." Paul Lambeth & Jonathan Coad, *Serving the Internet—Nowhere To Hide in Cyberspace from a Cyber Lawyer*, CYBERSPACE LAW, Sept. 1996, at 6–7, *available at* http://www.lectlaw.com/files/elw07.htm. The Order was issued in sealed proceedings. Tamayo, *Are You Being Served?*, *supra* note 3, at 244 n.121.

85. Conley *supra* note 42, at 409–10.

86. *Id.* at 410.

87. *Id.* At that time, the Rules of the English Supreme Court provided: "Service of any document [with noted exceptions] . . . may be effected – (a) by leaving the document at the proper address of the person to be served, or (b) by post, or (c) through a document exchange [involving a numbered box], or (ca) [sic] by FAX [sic] . . . ., or (d) in such other manner as the Court may direct." *Id.* (quoting R. SUP. CT. O. 65, p.5(1)). Order 65 under-

Only three years later, an American court addressed electronic service of process in *Columbia Insurance Co. v. Seescandy.com*.[88] When determining whether the plaintiffs had made a good faith effort to identify and serve the defendant, the court in *Seescandy* stated flatly that service via e-mail was "not sufficient to comply with the Federal Rules of Civil Procedure."[89] The court provided no analysis or citation to any authority.[90]

That same year, the court in *WAWA, Inc. v. Christenson* held that Rule 4 did not permit the use of e-mail to serve notice on a foreign defendant.[91] The decision did not involve extensive analysis; the court simply asserted that e-mail was "not an approved method of service under" Rule 4.[92] Although the court noted that the Rules Committee had discussed and recommended a change in Rule 4 to permit electronic transmission, the court concluded that e-mail was not "a valid means for delivering a summons and complaint."[93]

Rio Properties, Inc. v. Rio International Interlink, however, "ushered in the new era of international service of process via e-mail."[94] Although the court in *International Telemedia Associates* authorized service of process via e-mail as one of three methods of substituted process under Rule 4(f)(3),[95] *Rio* "marked the first federal appellate court assessment of the core issue underlying service of process through electronic mail: procedural due process."[96]

In light of the Ninth Circuit's "groundbreaking analysis"[97] and the potential impact of *Rio*, the case merits a somewhat detailed discussion. In *Rio*, "Las Vegas hotel and casino operator Rio

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went substantial revision in 1998; the provisions governing service are now located at Rule 6.12.1 of the Civil Procedure Rules. *See* WHITE BOOK cxviii (Sweet & Maxwell 2001).

88. *See* 185 F.R.D 573, 579 (N.D. Cal. 1999).

89. *Id.*

90. *See id.* A few years before *Seescandy*, the court in *Greebel v. FTP Software Inc.*, upheld notice of a class action that was sent via the Internet to print publishers and wire services for circulation. 939 F. Supp. 57, 63–64 (D. Mass. 1996).

91. No. Civ. A 99-1454, 1999 WL 557936, at *1–2 (E.D. Pa. July 27, 1999).

92. *Id.* at *1.

93. *Id.*

94. *See* Lewis, *supra* note 36, at 288 (citing Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002).

95. *See supra* notes 66–69 and accompanying text.

96. Chacker, *supra* note 11, at 620.

97. *Id.*

Properties, Inc. ("RIO") sued Rio International Interlink ("RII"), a [Costa Rican] Internet business entity, asserting various statutory and common law trademark infringement claims."[98] RIO first attempted service of process by conventional means in the United States.[99] Unable to effect service domestically, RIO hired a private investigator to determine RII's whereabouts in Costa Rica.[100] The investigator, however, "learned only that RII preferred communication through its e-mail address, *email@betrio.com,* and received snail mail . . . at the IEC [its international courier] address in Florida," which was not authorized to receive service.[101]

Unable to serve RII by traditional means, RIO filed an emergency motion to effectuate alternative service of process.[102] RII did not respond to RIO's motion.[103] The district court granted the motion and, pursuant to Federal Rules 4(h)(2) and 4(f)(3), ordered service of process on RII through mail to RII's attorney and IEC and to RII directly via e-mail.[104] RIO served RII in accordance with "these court-sanctioned methods."[105] RII then filed a motion to dismiss for insufficient service of process and want of personal jurisdiction, but the district court denied its motion.[106]

The district court ultimately imposed sanctions and entered a default judgment against RII.[107] RII appealed to the Ninth Circuit, contesting the sufficiency of service, the district court's exercise of personal jurisdiction, and the entry of default judgment and award of attorney's fees.[108]

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98. *Rio*, 284 F.3d at 1012.

99. *See id.* at 1013. RII claimed a Florida address, but that address housed only IEC, RII's international courier, which was not authorized to accept service on RII's behalf. *Id.* IEC did, however, agree to forward the summons and complaint to RII. *Id.* RII received the summons and complaint and consulted a Los Angeles attorney. *Id.* Following talks between RII's attorney and RIO, RIO requested that the attorney accept service for RII; the attorney declined. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* "RII then filed its answer, denying RIO's allegations and asserting twenty-two affirmative defenses." *Id.* RII subsequently refused to provide good faith answers to RIO's discovery requests and interrogatories. *Id.*

107. *Id.*

108. *Id.* at 1014.

The Ninth Circuit affirmed.[109] The court examined the text of Rule 4(f)(3) and accompanying advisory committee notes and concluded that service of process under Rule 4(f)(3) is neither a "last resort" nor "extraordinary relief," but rather "one means among several which enables service of process on an international defendant."[110] Because the subparts of Rule 4(f) are not listed hierarchically, the court concluded that "RIO need not have attempted every permissible means of service of process before petitioning the court for alternative relief."[111] Rather, "RIO needed only to demonstrate that the facts and circumstances of the present case necessitated the district court's intervention."[112] Additionally, the court found that "service under Rule 4(f)(3) must be (1) directed by the court; and (2) not prohibited by international agreement."[113] The court concluded that "the district court properly exercised its discretionary powers to craft alternative means of service" when RIO presented the court "with its inability to serve an elusive international defendant."[114]

The Ninth Circuit then addressed whether the selected alternative methods of service comported with due process.[115] The court found that each alternative method of service ordered by the district court—service through IEC, service upon the attorney, and service directly to RII via e-mail—was reasonably calculated under these circumstances to apprise RII of the pendency of the action and to afford it an opportunity to respond.[116]

Despite a dearth of authority condoning service of process over the Internet or e-mail, the court concluded without hesitation that service via e-mail was not only proper, but it was in fact the method most likely to reach RII.[117] Citing *Mullane*, the court reasoned that the Constitution does not require any particular means of service of process, but only that the method selected be reasonably calculated to afford notice and an opportunity to re-

109. *Id.* at 1023.

110. *Id.* at 1014–15.

111. *Id.* at 1014–16.

112. *Id.* at 1016.

113. *Id.* at 1014. Further, "[A]s long as court-directed and not prohibited by an international agreement, service of process ordered under Rule 4(f)(3) may be accomplished in contravention to the laws of the foreign country." *Id.*

114. *Id.* at 1016.

115. *See id.*

116. *Id.* at 1017.

117. *Id.*

spond.[118] The court stated that, "In proper circumstances, [*Mullane*'s] broad constitutional principle unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance."[119] The court noted the zealous embrace of communication via e-mail and the Internet in the business community, and emphasized that RII utilized and preferred communication via e-mail.[120] The court concluded that, "[W]hen faced with an international e-business scofflaw, playing hide-and-seek with the federal court, e-mail may be the only means of effecting service of process."[121]

Although the court did approve service of process via e-mail, the court noted some limitations.[122] Specifically, the court pointed to the difficulty in confirming receipt and complying with verification requirements, and noted that system compatibility problems could make appending exhibits and attachments impossible in some circumstances.[123]

Ultimately, however, the court "[left] it to the discretion of the district court to balance the limitations of e-mail service against its benefits in any particular case."[124] The court concluded that in the instant case, "the district court performed the balancing test admirably, crafting methods of service reasonably calculated under the circumstances to apprise RII of the pendency of the action."[125]

Commentators pounced on *Rio* from all different angles.[126] Some heralded the decision,[127] while others focused on infirmities of the opinion and of e-service of process generally.[128] Commenta-

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118. *Id.* (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

119. *Id.*

120. *Id.* at 1017–18.

121. *Id.* at 1018. The court distinguished *WAWA, Inc.* on the grounds that the plaintiff in *Wawa* "attempted to serve the defendant via e-mail absent a court order." *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1018–19.

126. *See, e.g.*, Chacker, *supra* note 11, at 598–99; Lewis, *supra* note 36, at 286; Heather A. Sapp, *You've Been Served!* Rio Properties, Inc. v. Rio International Interlink, 43 JURIMETRICS J. 493 (2003); Schreck, *supra* note 39, at 1123; Vernace, *supra* note 55, at 275.

127. *See, e.g.*, Lewis, *supra* note 36, at 301–02 (describing how the benefits of e-mail service of process outweigh its burdens); Vernace, *supra* note 55, at 295.

128. *See, e.g.*, Chacker, *supra* note 11, at 623 ("[T]he Rio Properties court imparted a troublesome legacy on future courts."); Schreck, *supra* note 39, at 1134–45 (discussing

tors also split on *Rio*'s application beyond e-mail: some contended it was a fact-specific holding,[129] while others saw it as a landmark case presenting a "larger doctrine relevant to notice through any modern technology."[130] Notwithstanding any shortcomings, commentators seemed to agree that, although *Rio* was only binding on district courts within the Ninth Circuit, other courts would look to the decision and likely follow suit.[131]

Sure enough, at least two courts outside the Ninth Circuit quickly cited to *Rio*.[132] In *Ryan v. Brunswick Corp.*, the Western District of New York similarly looked to Rule 4(f)(3) as an "independent basis of service of process."[133] The *Ryan* court agreed with *Rio* that a party "need not have attempted every permissible means of service before petitioning for alternative relief," but noted that district courts may, in their discretion, impose a "threshold requirement for parties to meet before seeking the court's assistance."[134] The court required that parties seeking relief under 4(f)(3) "show that they reasonably attempted to effectuate service on the defendant(s) and that the circumstances are such that the district court's intervention is necessary to obviate the need" for unduly burdensome or futile attempts at service.[135] Satisfied by those conditions, the court addressed whether service via e-mail comported with due process under *Mullane*.[136] The court, reasoning that the defendant conducted business via mail, phone, fax, and e-mail, held that it was constitutionally permissible to authorize service on the defendant by regular mail, fax, or e-mail.[137] Notably, the defendant in *Ryan* was not as elusive as the defendant in *Rio*.[138]

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technological problems associated with service of process by e-mail and how such service is not permissible under the current Federal Rules).

129. *Cf.* Sapp, *supra* note 126, at 499 (explaining that *Rio* did not answer whether e-mail was a proper method of serving U.S.-based defendants).

130. Chacker, *supra* note 11, at 626.

131. *See, e.g.*, *id.* at 625; Colby, *supra* note 2, at 364.

132. Chacker, *supra* note 11, at 626.

133. No. 02-CV-0133E(F), 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002).

134. *Id.* (quoting Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1016 (9th Cir. 2002)).

135. *Id.*

136. *See id.*

137. *Id.*

138. *Id.*

Similarly, in *Hollow v. Hollow*, the court approved service directed to the defendant's last known e-mail address and service by international and standard mail.[139] Hollow, the defendant in a divorce action, had fled to Saudi Arabia.[140] The defendant contacted his wife and children only by e-mail; in one e-mail, he remarked, "I am a resident of Saudi Arabia and there's nothing anyone can do to me here."[141] The court noted the potential difficulty in verifying receipt of e-mail, but concluded that e-mail was permissible under the circumstances because it was the defendant's sole method of communicating with the plaintiff.[142]

Despite the sweeping picture painted by *Ryan* and *Hollow*, not all post-*Rio* courts have approved service of process via e-mail in the cases before them.[143] First, approval of e-service is contingent upon the filing of a petition for alternative service under Rule 4(f)(3).[144] Second, courts balance a number of factors, including the defendant's elusiveness, familiarity or preference for electronic communication, and whether the defendant conducted business or communicated frequently by Internet or e-mail.[145] Courts have not attributed weights to the various factors or stated whether certain factors were required; rather, the courts employed the

139. 747 N.Y.S.2d 704, 708 (Sup. Ct. 2002).

140. *Id.* at 705.

141. *Id.* at 705, 708.

142. *Id.* at 708.

143. *Compare* D'Acquisto v. Triffo, No. 05-C-0810, 2006 WL 44057, at *2 (E.D. Wis. Jan. 6, 2006) (authorizing e-mail service of process); Williams v. Adver. Sex LLC, 231 F.R.D. 483, 488 (N.D. W. Va. 2005) (same); Popular Enters., LLC v. Webcom Media Group, Inc., 225 F.R.D. 560, 563 (E.D. Tenn. 2004) (same); D.R.I., Inc. v. Dennis, No. 03 Civ. 10026(PKL), 2004 WL 1237511, at *2 (S.D.N.Y. June 3, 2004) (directing service via e-mail pursuant to section 308(5) of the New York Civil Practice Law and Rules); Viz Commc'ns, Inc. v. Redsun, No. C0104235JF, 2003 WL 23901766, at *6 (N.D. Cal. Mar. 28, 2003) (service by e-mail is constitutionally sufficient); FTC v. Zuccarini, No. 01CV4854, 2001 WL 34131411, at *7 (E.D. Pa. Sept. 25, 2001) (permitting a court order to be served via e-mail); *Hollow*, 747 N.Y.S.2d at 708; *with* Ehrenfeld v. Mahfouz, No. 04 Civ. 9641(RCC), 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005) (rejecting service via e-mail because plaintiff did not present evidence that defendant maintained the website, monitored an e-mail address, or would otherwise receive the message); Pfizer, Inc. v. Domains By Proxy, No. Civ.A.3:04 CV 741(SR.), 2004 WL 1576703, at *1–*2 (D. Conn. July 13, 2004) (service by e-mail not likely to reach defendant and conventional service not impossible).

144. *See* Lewis, *supra* note 36, at 295. Courts have consistently recognized that Rule 4(f) does not create a "hierarchy of service mechanisms." *Id.*; *see also* Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014–15 (9th Cir. 2002).

145. Lewis, *supra* note 36, at 296.

benefit-burden balancing prescribed by *Rio* on a case-by-case basis.[146]

Notably, even courts that did not authorize service by e-mail employed *Rio*'s balancing test.[147] As one commentator aptly noted, "The fact that the courts rejected e-mail service is immaterial; rather, what is important is that they applied the Ninth Circuit's test."[148] In sum, commentators and courts alike are recognizing a trend in universal electronic service.[149]

V. E-SERVICE ON PARTIES ABROAD

Service of process requirements have, in a sense, "developed into a procedural loophole through which wily defendants can avoid litigation" in federal courts through a game of "hide and seek."[150]

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146. *Id.*

147. *Id.* at 297–98.

148. *Id.*

149. Colby, *supra* note 2, at 337.

150. Chacker, *supra* note 11, at 597; *see also* Aries Ventures Ltd. v. AXA Finance S.A., No. 86 CIV 4442 (WCC), 1990 WL 37814, at *1–2 (S.D.N.Y. Mar. 30, 1990) (finding insufficient service of process where defendant failed to return the acknowledgement required for waiver and defendant could not be served by any other method under the applicable rule); Hollow v. Hollow, 747 N.Y.S.2d 704, 705, (Sup. Ct. 2002) (defendant attempted to evade service by fleeing to Saudi Arabia). The following excerpt, taken from the deposition of an evasive defendant who gave up his residence to avoid notice, illustrates the point:

Q. What is your current address?

A. 957 Bristol Pike, Apartment D-6, Andalusia, Pennsylvania, 19020.

Q. Is that where you currently reside?

A. Not necessarily.

Q. Where do you currently reside?

A. I don't have—that's my legal address. I really don't have a permanent address at this time.

Q. Where do you currently reside?

A. Right now I am staying at the Millennium Hotel in New York.

. . .

Q. When you are not in New York for a deposition, where do you live? Where have you lived in the past two weeks?

A. I have been living in various places.

Q. What are the various places that you have been living?

A. Friends' places. You know, that type of thing. Different hotels.

. . .

Q. Do you live in Pennsylvania?

A. I don't know. I don't have a permanent address so I can live anywhere. I don't live anywhere right now. I can't give you a permanent address.

Elecs. Boutique Holding Corp. v. Zuccarini, No. 00-4055, 2001 U.S. Dist. LEXIS 765, at *15 n.6 (E.D. Pa. Jan. 25, 2001).

Such difficulties in effectuating service are especially salient where plaintiffs attempt to serve foreign defendants.[151]

Rule 4(f) sets forth the methods of service for individuals outside the United States.[152] Subsection (f)(1) permits service by means established by international agreement, so long as such means are "reasonably calculated" to put the defendant on notice.[153] Where no treaty exists or where a treaty is silent on the issue, subsection (f)(2) permits service by any method provided by foreign local law, letters rogatory, or, where not prohibited by local law, personal service or "any form of mail" dispatched by the clerk of court and accompanied with a signed receipt.[154] Subsection (f)(3) permits service by "other means" so long as those means are directed by the court and are not prohibited by international agreement.[155]

"Courts have permitted electronic service of process on parties located outside the United States pursuant to [Rule] 4(h)(2) and [Rule] 4(f)(3) where some combination of the following circum-

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151. *See, e.g.*, Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002). Service of process abroad has been called "one of the most challenging [problems] that a district court can be called upon to face." Mayoral-Amy v. BHI Corp., 180 F.R.D. 456, 458 (S.D. Fla. 1998).

152. Colby, *supra* note 2, at 347. Rule 4(f) provides:

> Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:
>
> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
>
> (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
>
> (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
>
> (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
>
> (C) unless prohibited by the foreign country's law, by:
>
> (i) delivering a copy of the summons and of the complaint to the individual personally; or
>
> (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
>
> (3) by other means not prohibited by international agreement, as the court orders.

FED. R. CIV. P. 4(f).

153. FED. R. CIV. P. 4(f)(1).

154. FED. R. CIV. P. 4(f)(2).

155. FED. R. CIV. P. 4(f)(3).

stances were present": (1) "the proposed methods are reasonably calculated to provide the defendant with notice"; (2) "traditional methods of service are, or are likely to prove, futile or inadequate"; (3) the defendant is difficult to find because his identity is unknown, his whereabouts are unknown, he is a moving target, or he is actively evading service; and (4) the defendant has used electronic methods of communication with the plaintiff or with customers.[156]

When evaluating petitions under Rule 4(f)(3), courts commonly look to the Hague Convention "because of the large number of signatory nations."[157] Because the Convention was drafted in 1965, it makes no express references to electronic media such as e-mail, Internet, or fax machines.[158] Rather, the convention provides for service through a designated "Central Authority,"[159] through diplomatic channels,[160] through postal channels,[161] and by any method permitted by the internal laws of the country where service is made.[162] Additionally, signatory countries may ratify the provisions of the convention subject to any conditions or objections to specific articles that it chooses to include.[163]

Modern application of the terms of the Hague Convention brought strong disagreement amongst courts, but "there is a trend toward recognition of the broader interpretation" of acceptable methods of service under the existing wording.[164] The stated

156. Colby, *supra* note 2, at 370–71. Rule 4(h)(2) authorizes service of process on business entities outside the United States via the same methods of service permissible for individuals under 4(f), with the exception of personal delivery. *See* FED. R. CIV. P. 4(h)(2).

157. Jonathan W. Fountain, *Service of Process Abroad*, 16 NEV. LAW. 10, 11 (2008).

158. Charles T. Kotuby, Jr., *International Anonymity: The Hague Conventions on Service and Evidence and Their Applicability to Internet-Related Litigation*, 20 J.L. & COM. 103, 111 (2000).

159. *See* Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, arts. 2–6, Feb. 10, 1969, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Convention].

160. *Id.* art. 8.

161. *Id.* art. 10.

162. *Id.* art. 19.

163. *Id.* art. 21.

164. Conley, *supra* note 42, at 414. For example, "the Special Commission Report on the Operation of the Hague Service Convention and a United States Department of State Opinion have stated that Article 10(a) does provide for service by mail." Uppendahl v. Am. Honda Motor Co., 291 F. Supp. 2d 531, 534 (W.D. Ky. 2003). But courts have nonetheless split on whether the Convention permits service of process via mail. *Compare* Sibley v. Alcan, Inc., 400 F. Supp. 2d 1051, 1055 (N.D. Ohio 2005) (permitting service of process by registered mail under Article 10(a)), *with Uppendahl*, 291 F. Supp. 2d at 534 ("The court simply cannot alter the text of the treaty to add matters not contained therein."). The di-

goal of the Convention is to improve the organization of mutual judicial assistance for the purpose of service of process by simplifying and expediting the procedure.[165] At least one commentator has argued that Article 10(a) could permit service by e-mail to the extent that the term "postal channels" is interpreted to include e-mail.[166] As another commentator put it, "[I]f [the Hague Convention's] letter is to be interpreted alongside its general spirit, as well as according to generally accepted definitions, Article 1 will most likely permit service upon electronic addresses."[167]

Indeed, a 1999 Special Commission of the Hague Convention adopted this view.[168] Commission V, which generally reviewed service abroad, considered transmission by electronic means.[169] The Commission recommended that the transmissions in Article 10 be carried out by electronic means, provided they meet a set of enumerated security requirements.[170] Compliance with the security requirements would entail: confidentiality, integrity, inalterability, ability to identify the sender, keeping records of the exact date of dispatch and receipt, and that the technology be

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vergence of opinion is based upon the interpretation of the term "send." Some courts hold that "send" encompasses "service," and thus have permitted service of process by mail. *See, e.g.*, Ackermann v. Levine, 788 F.2d 830, 839 (2d Cir. 1986). Other courts, however, did not construe "send" to mean "service" because subparagraphs (b) and (c) employ the term "service." *See, e.g.*, Bankston v. Toyota Motor Corp. 889 F.2d 172, 173–74 (8th Cir. 1989); Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1082 (E.D. Pa. 1992).

165. Hague Convention, *supra* note 159, pmbl.

166. Colby, *supra* note 2, at 352 n.60.

167. Murphy, *supra* note 13, at 107 (quoting Kotuby, *supra* note 158, at 114).

168. *See* Yvonne A. Tamayo, *Catch Me if You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J.L. & TECH. 211, 240 (2003) [hereinafter Tamayo, *Catch Me if You Can*].

169. *See* CATHERINE KESSEDJIAN, PRELIMINARY DOCUMENT NO. 7 ON ELECTRONIC DATA INTERCHANGE, INTERNET AND ELECTRONIC COMMERCE 27 (2000), *available at* http://www.hcch.net/upload/wop/gen_pd7e.pdf [hereinafter ELECTRONIC DATA INTERCHANGE].

170. *Id.* ("In order to ensure rapid and effective communication . . . for . . . the subsidiary transmissions in Article 10, the Commission recommends that *these transmissions should be carried out by electronic means, provided they meet the following security requirements.* The technique used to send the documents by electronic means should guarantee the *confidentiality* of the message (ensure, through cryptographic or other methods, that the message sent cannot be intercepted by another person), the *integrity* of the message (ensure that the message is not broken up in the course of despatch), the *inalterability* of the message (ensure that no change can be made to the message, either by the addressee or by any other person). The technique should also make it possible to *identify* beyond doubt the sender of the message. In addition, an irrefutable record should be kept of the *exact date of despatch and receipt* of the message. Finally, in order to be productive and effective the technology must be *operational at any time* (avoiding overload, known as *spam* in technical language.")) (emphasis in original).

operational at any time.[171] Ultimately, the Commission concluded, "[T]here is no doubt that transmission of documents by electronic means would significantly enhance the usefulness and effectiveness of the Convention. . . . [O]pening the Convention to electronic means of communication in this way does not call for a formal revision of the Convention."[172]

Regardless of whether the terms of the Hague Convention explicitly authorize electronic service, they do not prohibit service of process via e-mail, which might alone be sufficient under a Rule 4(f)(3) petition—the Rule requires only that the method chosen not be prohibited by international agreement.[173] The advisory committee notes for Rule 4(f)(3) confirm the point, stating that "the court may direct a special method of service not explicitly authorized by international agreement if not prohibited by the agreement."[174]

The Supreme Court of the United States has held that the Hague Convention "pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies," but that it applies only when serving parties abroad.[175] In other words, to the extent that a court would construe electronic service as effecting

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171. *Id.*

172. *Id.* at 28. In regard to revising the Convention, the Commission noted,

> The use of electronic means to ensure the proper working of the Convention poses few problems in the sense that the wording of the clauses concerned is *neutral* as to the communication techniques to be used. It is this very absence of any reference to a specific technique which makes it possible now to take account of the progress made in means of communication. Moreover, the use of means of communication as rapid and simple as electronic mail reflects two fundamental aims of the Convention, which are to bring the document in question "to the actual knowledge of the addressee in due time to enable the defendant to prepare a defence" and to "simplify the method of transmission of these documents from the requesting country to the country addressed."

Id. at 27–28.

173. Lewis, *supra* note 36, at 300; *see also* Colby, *supra* note 2, at 352–53.

174. FED. R. CIV. P. 4(f)(3) advisory committee's note (1993); *see also* Sinclair, *supra* note 11, at 163 ("In the international sphere, the 1993 amendments. . . free courts and litigants to invent and experiment with new means of serving process"). As some courts have noted, service of process ordered under Rule 4(f)(3) may in fact contravene laws of the foreign country, so long as they are court-directed and not prohibited by international agreement. *See* Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002). However, it should be noted that if a U.S. judgment requires enforcement abroad, it must comply with that country's laws. Tamayo, *Catch Me if You Can, supra* note 168, at 235–36 (2003).

175. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699, 707–08 (1988).

notice domestically, the Hague Convention would be inapplicable.[176]

VI. FACEBOOK

In accordance with the framework set forth above, if service of process via Facebook is to be permitted under federal law, it must comport with (a) the Federal Rules of Civil Procedure, and (b) due process. Both requirements are addressed below.

A. *Rule 4*

Courts have held that service of process can be effectuated by electronic means when foreign defendants are evasive.[177] At least one commentator has suggested that electronic service should be permitted in domestic cases, even though doing so would require amending the current Federal Rules.[178] Absent an amendment to the Federal Rules, the only logical prong under which service of process via Facebook might suffice is Rule 4(f).

Subsection (f)(1) permits service on a foreign individual "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents."[179] The Hague Convention, written some forty years ago, obviously does not expressly authorize service of process via social networking sites.[180] Further, whereas service via e-mail could arguably be permitted under Article 10's "postal channels" provision,[181] it is doubtful that a message sent or posted on an online social networking site could ever be construed to fall under this provision.

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176. *See* Colby, *supra* note 2, at 353 n.62 (citing *Volkswagenwerk*, 486 U.S. at 707–08).

177. *See supra* Parts III–IV.

178. *See* Colby, *supra* note 2, at 372–82. Colby suggests that the following provision be added to Rule 4(e): "(3) by delivering a copy of the summons and of the complaint to the individual via electronic means such as electronic mail or facsimile where directed by the court." *Id.* at 376. He contends that proposed Rule 4(e)(3) should be coupled with a corresponding amendment to Rule 4(h)(1). *Id.* at 376–77. Full examination of whether the Rules should be amended to expressly permit service via electronic means is beyond the scope of this article.

179. FED. R. CIV. P. 4(f)(1).

180. *See supra* text accompanying notes 158–64.

181. *See* Colby, *supra* note 2, at 352 n.60.

Although the Hague Commission endorsed electronic service and broad interpretations to favor developing technology, the Commission pointed to a number of criteria to ensure security. Service via Facebook, in its present form, would likely fail at least on the prong requiring "an irrefutable record . . . *of the exact date of despatch* [sic] *and receipt*."[182] Facebook currently lacks the return receipt features that are increasingly available for e-mail messages.[183]

Rule 4(f)(2), which governs in the absence of international agreement or where an international agreement permits but does not specify other means, authorizes methods of service that are reasonably calculated to give notice:

> (A) as prescribed by the foreign country's law for service in that country in an action its courts of general jurisdiction; (B) as the foreign authority directs in response to a letter rogatory or letter of request; or (C) unless prohibited by the foreign country's law, by (i) delivering a copy of the summons and of the complaint to the individual personally; or (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt.[184]

There is no indication that service via social networking sites has been prescribed by any foreign country's law for service in its courts of general jurisdiction. Perhaps a foreign authority could direct service of process by Facebook in response to a letter rogatory or letter of request, satisfying Rule 4(f)(2)(B).[185] But as to subsection (f)(2)(C), regardless of whether any foreign country prohibits service of process through Facebook, service via Facebook would neither constitute "deliver[y] . . . to the individual personally," nor "any form of mail that the clerk addresses . . . and that requires a signed receipt."[186] Thus, service of process under Rule 4(f)(2) would likely fail, except perhaps under subsection (f)(2)(B) as noted above.

The prong of Rule 4(f) that would most reasonably permit service of process via Facebook appears to be Rule 4(f)(3)'s provision

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182. *See* ELECTRONIC DATA INTERCHANGE, *supra* note 169, at 27 (emphasis in original).

183. This is not to say, however, that Facebook could not or will not upgrade to include such features in due time. As with all technology, Facebook features will likely improve in the future. *Cf.* Lewis, *supra* note 36, at 302 (stating the same in regard to e-mail).

184. FED. R. CIV. P. 4(f)(2).

185. *See* FED. R. CIV. P. 4(f)(2)(B).

186. FED. R. CIV. P. 4(f)(2)(C)(i) & (ii).

allowing "other means."[187] Relevant here is the Ninth Circuit's guidance that "service under Rule 4(f)(3) must be (1) directed by the court; and (2) not prohibited by international agreement."[188]

The fact that the Hague Convention does not expressly permit service of process through social networking sites is not detrimental; the Convention does not expressly permit service through other technological means such as fax and e-mail, but these methods have been approved by a number of courts and were even endorsed by the Hague Commission.[189] The Rule requires only that the methods not be prohibited by the international agreement. And again, "as long as court-directed and not prohibited by an international agreement, service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country."[190] Moreover, in the case of an extremely elusive defendant whose exact whereabouts abroad are unknown, analysis of the terms of the Hague Convention would arguably be wholly unnecessary—Article 1 of the Convention makes clear that the "Convention shall not apply where the address of the person to be served with the document is not known."[191] Provided that a plaintiff sought and attained prior court approval, the Federal Rules may very well permit service of process via Facebook under Rule 4(f)(3)'s "other means" provision.

B. *Due Process*

In order to pass muster under the Due Process Clause as interpreted by *Mullane* and its progeny, service of process via Facebook must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[192] As the Australian case approving service via Facebook in December 2008 appears to be a world-first,[193] there is an obvious lack of authority on point for any U.S. court that might encounter this issue.

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187. *See* FED. R. CIV. P. 4(f)(3).

188. Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002).

189. *See, e.g.*, *Rio*, 284 F.3d at 1018; Ryan v. Brunswick Corp., No. 02-CV-0133E(F), 2002 WL 1628933, at *3 (W.D.N.Y. May 31, 2002); *In re* Int'l Telemedia Assocs., Inc., 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000) (W.D.N.Y. May 31, 2002).

190. *Rio*, 284 F.3d at 1014.

191. Hague Convention, *supra* note 159, art. 1.

192. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

193. *See supra* note 1.

Courts that have upheld as constitutional service of process through new communication technologies generally have begun by noting the widespread societal embrace of the technology in other facets of life.[194] In theory, this should have virtually no bearing on whether service is upheld in a given case because due process analyses in this context are, by nature, fact specific. In other words, the fact that the technology is widely employed in the community at large does not entail that it is reasonably calculated to provide the particular defendant notice. What is good for the goose is not always good for the gander.

Nonetheless, even assuming that widespread use plays a role in the court's decision, Facebook could reasonably be taken as widespread enough to gain approval. The site boasts over 120 million users worldwide[195] and began translating its site into different languages in 2008 to broaden its user base.[196] Political candidates, including President Barack Obama, have utilized Facebook to rally support.[197] About 80,000 small businesses already have profiles on Facebook, and the credit card giant Visa recently launched a campaign to encourage businesses to join the social network.[198] Facebook has even launched applications enabling users to access their accounts from portable devices such as BlackBerrys, Smartphones, and iPhones.[199] In short, Facebook use is booming, and users can access their accounts twenty-four hours a

194. *See, e.g.*, *Rio*, 284 F.3d at 1017 ("Although communication via email and over the Internet is comparatively new, such communication has been zealously embraced within the business community."); Calabrese v. Springer Personnel of N.Y., Inc., 534 N.Y.S.2d 83, 83 (N.Y. Civ. Ct. 1988) ("[Fax] machines . . . have become so sophisticated and user-friendly that they have become overwhelmingly the method of choice for the transmission of documents in today's world.").

195. *See Facebook Wins Spam Case*, ORLANDO SENTINEL, Nov. 25, 2008, at C3; Ellen Lee, *Facebook Beat MySpace in May*, S.F. CHRON., June 21, 2008, at C1.

196. Lee, *supra* note 195, at C1.

197. *See* Donna Cassata, *Enthusiasm Doesn't Translate to Votes: Young People Rally Behind Candidates Early But Many Don't Go to The Polls, Statistics Show*, ORLANDO SENTINEL, Mar. 4, 2007, at A9.

198. *Visa Helps Firms Pay for Ads on Facebook; Credit Card Giant Hopes Venture Will Lure Clients*, CHI. TRIB., June 24, 2008, at C3.

199. *See* Ryan Kim, *Facebook Extends Reach with BlackBerry Program*, S.F. CHRON., Oct. 25, 2007, at C6. "[E]xperts in England released a study claiming that BlackBerry devices can be so addictive than owners may soon need to seek treatment comparable to that given to drug users and sex addicts." David Harsanyi, *Survey Says: Wait, I Have an E-Mail*, DENVER POST, July 27, 2007, at B1.

day, seven days per week, whether at home, at the office, or even in the car.[200]

The due process reasonableness analysis set forth by the Ninth Circuit in *Rio* requires a benefit-limitation balancing.[201] The benefits of service of process via Facebook are much akin to the advantages associated with e-mail—sending messages through Facebook is fast, easy, and inexpensive. For an elusive defendant with an unknown e-mail address, Facebook could be the only means by which to notify the defendant of action.[202] In the context of service of process via e-mail, courts have frequently looked to the defendant's familiarity or preference for electronic communication.[203] Given that a number of business entities now direct would-be customers to visit their Facebook or MySpace pages, a persuasive plaintiff could convince a court that a corporate defendant has a preference for such communication. Directing patrons to a Facebook page where they have options to send messages to the entity could be analogized to a company who directs patrons to a website where they have options to send messages to the company via e-mail.

At least one commentator has argued that e-mail provides greater assurance than other methods of service that the defendant will actually be apprised of notice, noting that, "[U]nlike

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200. Facebook use in the workplace has even caused a loss in office productivity. "Research by Computerweekly.com found that 63% of organisations were planning to monitor or limit staff access to [sites such as Facebook and MySpace] over the next six months, and 17% intended to ban their use entirely" because of lost productivity. Cath Everett, *Career Moves*, COMPUTER WKLY., Mar. 11, 2008. Another survey found that nineteen percent of workers questioned visited social networking sites while on the job. *Id.*

201. *See* Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002). This comment assumes that courts will continue to employ the test developed by the *Rio* court despite the fact that *Rio* is only binding authority for lower courts within the Ninth Circuit. Mr. Lewis has argued that, while service of process via e-mail may be a viable way to effectuate service on defendants located outside of the United States, "the test must be more exacting than the broad balancing test of the *Rio* court. *See* Lewis, *supra* note 36, at 285. Mr. Lewis proposed a three-part test to ensure the integrity of service of process internationally: "(1) a prima facie showing by the plaintiff that traditional means of service have proved impractical; [ ] (2) "a showing by the plaintiff that service to this particular e-mail address is reasonably reliable;" and (3) proper consideration by the court of non-mandatory factors such as the extent to which traditional means of service have failed, the defendant's conduct/elusiveness, whether the defendant is a business entity operating in e-commerce, and other necessary and material factors that arise in specific cases. *Id.* at 302–06.

202. *But see* Schreck, *supra* note 39, at 1145 (arguing that the mere fact that "e-mail may be the only means of informing a defendant of an action does not necessarily mean that it satisfies due process" per *Mullane*).

203. Lewis, *supra* note 36, at 296.

documents delivered by substituted service of process to someone other than the defendant, notice sent to a defendant's e-address has no potential for post arrival physical movement and will remain in the defendant's mailbox until retrieved, thereby eliminating the risk of misplacement."[204] A comparable argument can be made for messages sent via Facebook.[205]

As promising as the benefits of service of process via Facebook might appear to be, the limitations are more severe than those associated with e-mail. The Ninth Circuit in *Rio* noted the difficulty in confirming receipt of e-mail messages, complying with verification requirements, and appending exhibits and attachments.[206] A number of commentators have elaborated on further limitations associated with e-mail.[207] Return receipts have garnered most of the attention, as commentators note that mere receipt does not necessarily mean that the message was actually read, and that return receipts are unable to provide the identity of the person who actually opens the e-mail message.[208] Other problems include the fact that many e-mail users maintain several e-mail accounts, e-mail inboxes often have limited storage capacity, and there is currently no way to determine whether an attachment has been read.[209]

Some commentators have suggested that, with the advent of improved return receipt features, confirmation of receipt is not as problematic as the *Rio* court suggested.[210] However, no such feature currently exists for Facebook. At first glance, this might appear fatal to an attempt to serve process through Facebook. But the *Hollow* court concluded e-mail was permissible, notwithstanding the difficulty in verifying receipt, because it was the defen-

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204. *See* Tamayo, *supra* note 3, at 256.

205. It might not be wholly accurate, however, to contend that notice sent to a defendant's e-mail address will remain there until retrieved. Many e-mails are deleted without ever being opened for a variety of reasons, including the abundance of spam mail and the threat of computer viruses. *See* Schreck, *supra* note 39, at 1136–40. Facebook arguably fairs better than e-mail on these points because user inboxes are not bombarded with spam mail.

206. *See* Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1018 (9th Cir. 2002).

207. *See* Schreck, *supra* note 39, at 1134.

208. *Id.* at 1134–36; *see also* Lewis, *supra* note 36, at 301.

209. Lewis, *supra* note 36, at 301; Schreck, *supra* note 39, at 1140.

210. *See* Colby, *supra* note 2, 363 n.138. There are in fact companies that now specialize in providing service of process documents via e-mail. *See* Schreck, *supra* note 39, at 1135 n.108 (discussing the companies Proof of Service-electrônic ("PoS-e") and ReadNotify).

dant's sole method of communicating with the plaintiff.[211] Nonetheless, if Facebook, whose founders were reportedly thrilled with the Australian court's decision to permit service through its site,[212] implemented a reliable return receipt feature, effectuating service through Facebook under American law would become much more plausible.[213]

One major difficulty in effectuating constitutional notice through Facebook might be identifying the defendant—i.e., proving that the person behind the profile contacted is actually the defendant.[214] In order to register and maintain a Facebook profile, a user need only enter his or her name, e-mail address, sex, date of birth, and create a password.[215] A profile should, in theory, actually be that of the registrant because the Terms of Use require users to:

> (a) provide accurate, current and complete information . . . as may be prompted by any registration forms on the Site . . . (b) maintain the security of [his or her] password and identification; (c) maintain and promptly update the Registration Data, and any other information [he or she] provide[s] to [Facebook], to keep it accurate, current and complete; and (d) be fully responsible for all use of [his or her] account and for any actions that take place using [his or her] account.[216]

The Terms of Use, however, include a large disclaimer to the effect that "Facebook does not pre-screen or approve Facebook pag-

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211. *See supra* notes 140–43 and accompanying text.

212. Rod McGuirk, *Australia OKs Facebook for Serving Lien Notice*, IT WORLD, Dec. 16, 2008, http://www.itworld.com/node/59345.

213. Commentators would likely continue to attack return receipt features on the grounds that mere confirmation of delivery or receipt does not establish that the recipient actually read the message. But "a defendant's assertion that she did not read an electronic notice that was otherwise properly delivered may be rebuffed by the legal presumption that the defendant will read the contents of notice properly served." Tamayo, *Are You Being Served?*, *supra* note 3, at 256.

214. *Cf.* Christopher Maag, *When the Bullies Turned Faceless*, N.Y. TIMES, Dec. 16, 2007, at 9-9 (discussing the infamous cyberbullying case in which neighborhood mother Lori Drew created a MySpace profile under the name "Josh Evans" to harass a thirteen-year-old girl).

215. *See* Facebook Homepage, http://www.facebook.com (last visited Apr. 9, 2009).

216. Facebook Terms of Use, http://www.facebook.com/terms.php (last visited Apr. 9, 2009). Similar provisions govern registrants of Facebook Pages for commercial or other entities. *Id.* ("Facebook Pages are special profiles used solely for commercial, political, or charitable purposes. You may not set up a Facebook Page on behalf of another individual or entity unless you are authorized to do so. This includes fan Facebook Pages, as well as Facebook Pages to support or criticize another individual or entity.").

es, and cannot guarantee that a Facebook page was actually created and is being operated by the individual or entity."[217]

Ease in identifying the defendant could vary drastically from case to case because Facebook users control the amount and quality of information presented on their pages. In the Australian case, counsel convinced the judge that the profiles were those of the defendants by pointing to identifying information such as name and date of birth within the profiles, and by confirming the relationship of the co-defendants using Facebook's friend lists.[218] Depending on the information available, a judge could reasonably be convinced that the profile is in fact that of the defendant.

The inability to attach documents is also problematic for attempting service of process through Facebook. As of this writing, Facebook users can send only hyperlinks and messages; they are unable to send attachments through the site. Courts evaluating service of process by e-mail have specifically pointed to the difficulty and inability to attach documents when addressing limitations of the technology,[219] and service though Facebook would encounter severe resistance on this ground.

Although attempted service through Facebook obviously has its flaws, it should be remembered that flaws and limitations are not unique to service through technological means. Other more traditional means of service certainly have their flaws as well.[220] Manual delivery via postal service is vulnerable to human error, resulting in lost mail and misdeliveries.[221] Notice by publication can be misprinted,[222] and courts have consistently noted the slim chances that modern day defendants will ever actually receive notice by publication.[223] Moreover, the standard is not that the defendant actually receive and read such notice, but rather that the service be "reasonably calculated" to apprise the defendant of action.[224] If service through Facebook is coupled with attempts

217. *Id.*
218. *See* Towell, *supra* note 1.
219. *See, e.g.*, Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1014, 1018 (9th Cir. 2002).
220. *See* Lewis, *supra* note 36, at 302.
221. *Id.*
222. *Id.*
223. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 320 (1950).
224. *See id.* at 319–20.

through other means, the likelihood of satisfying due process increases.[225]

In sum, while service through Facebook should not be touted as a prime method for service of process, in limited circumstances, courts may consider it to be permissible under Rule 4(f)(3) and "reasonably calculated" per *Mullane*.

VII. CONCLUSION

"Technological advancement often presents difficult barriers for courts to overcome in the application of traditional law," but service of process is "so fundamental to the operation of law that historically [it has] been more open to adaptability and change."[226] Courts are beginning to find electronic service constitutionally permissible under *Mullane*,[227] and the trend toward electronic service is "a logical step forward in the evolution of civil procedure and reflects the popular use of new technologies in common communication."[228] Facebook is one such new technology.

The Australian case permitting service of a default judgment via Facebook foreshadows future attempts to employ social networking sites to effectuate legal ends. As this comment illustrates, attempted service of process through Facebook may very well be permissible under Rule 4(f)(3) for serving foreign defendants, and such service does not appear to constitute a *per se* due process violation, no matter how narrow the circumstances permitting such service might be. Necessity, the mother of invention, has frequently been the catalyst for adapting the law to implement new technologies,[229] and if a situation arises in which a message sent via Facebook is the only available means to serve an elusive defendant abroad, the law might, in due time, adapt accordingly.

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225. Lewis, *supra* note 36, at 291–92.
226. Conley, *supra* note 42, at 417.
227. Colby, *supra* note 2, at 380.
228. Conley, *supra* note 42, at 407.
229. *See id.* at 421.