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E-Service: Ensuring the Integrity of International E-Mail Service of Process

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Notes & Comments

E-Service: Ensuring the Integrity of International E-Mail Service of Process

INTRODUCTION

Imagine that one day you are surfing the internet and you log into your e-mail account. You click on one of the new, unfamiliar looking e-mail messages and presto, you have just been served with process. While this scenario currently may seem quite far-fetched, without the proper mechanisms in place to ensure the integrity of the service regime, this frightening hypothetical may become a common reality. Prior to 2002, no United States court of appeals had ever authorized service of process on an international defendant via e-mail.[1] The Ninth Circuit, however, changed the landscape of international service of process in *Rio Properties, Inc. v. Rio International Interlink*.[2] While there are clear advantages to using e-mail in this area of civil procedure, there are serious shortfalls to consider as well. [3] Therefore, this comment proposes that while service of process via e-mail may be a viable way to effectuate service on defendants located outside of the United States, courts should administer a balancing test to assure that e-mail is practical and sufficient to give reasonably calculated notice.[4]

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1. *See* Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002).
2. *Id.* at 1012, 1017-19 (holding that e-mail service of process pursuant to Federal Rule of Civil Procedure 4(f)(3) was proper).
3. *See infra* Part V.
4. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314

Part I of this comment will trace the history and evolution of service of process. Part II will discuss the two cases that started the recent trend in permitting e-mail service, *Broadfoot v. Diaz*[5] and *Rio*, followed by a discussion of how other courts have reacted to the broad balancing test employed by the *Rio* court[6] in Part III. Part IV will then analyze whether e-mail service is permitted under the Hague Service Convention,[7] and Part V will discuss the benefits and shortfalls of such service abroad. Finally, Part VI of this comment proposes a more exacting balancing test than the Ninth Circuit's[8] to further ensure that e-mail is appropriate.

I. THE HISTORY AND EVOLUTION OF SERVICE OF PROCESS

A. The Constitutional Standard

Service of process is required under the Federal Rules of Civil Procedure in both the domestic[9] and international context.[10] Furthermore, the United States Supreme Court has established that service under the appropriate statute or rule is necessary to acquire personal jurisdiction over the defendant.[11] As both personal jurisdiction[12] and proper service of process are required for courts to exercise authority over defendants,[13] it is important

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(1950) ("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.") (citing Milliken v. Meyer, 311 U.S. 457 (1940)).

5. (*In re* Int'l Telemedia Assocs., Inc.), 245 B.R. 713 (Bankr. N.D. Ga. 2000).

6. *See Rio*, 284 F.3d at 1018.

7. *See* Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

8. *See Rio*, 284 F.3d at 1018.

9. *See* FED. R. CIV. P. 4(e).

10. *See* FED. R. CIV. P. 4(f).

11. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 105 (1987).

12. Personal jurisdiction will not be covered in this comment, but note that it is required for courts to assert power over the defendant. *See, e.g.*, LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION 7-59 (Michie 1996).

13. *See* Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) ("In the absence of service of process . . . a court ordinarily may not exercise power over a party . . . ."); *see also Omni Capital Int'l*, 484 U.S. at

to understand the history and evolution of proper service. Therefore, this comment will first discuss the constitutional standard for service of process.

The United States Supreme Court discussed the constitutional standard for proper service in *Mullane v. Central Hanover Bank & Trust Co.*[14] There, a trustee petitioned for judicial settlement of accounting of a common trust fund.[15] Following New York law, the beneficiaries of the trusts were notified of the petition by publication in a local newspaper.[16] The special guardian and attorney appointed for the beneficiaries argued that such notice failed to afford them due process.[17] In announcing the constitutional standard, the Court stated that notice to the parties must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[18] Using this standard, the Court held that notice by publication satisfied due process with regard to the beneficiaries whose interests or addresses were unknown and could not be discovered with due diligence.[19] Such notice, however, failed to satisfy the due process rights of those beneficiaries whose addresses were known, "because under the circumstances [publication was] not reasonably calculated to reach those who could easily be informed by other means at hand."[20]

B. Alternative Methods of Service of Process

Since *Mullane*, courts have satisfied due process by authorizing alternative methods of service when traditional personal, published, and registered mail have been insufficient. In *Levin v. Ruby Trading Corp.*,[21] the Southern District of New

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104 ("[b]efore a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.").

14. 339 U.S. 306, 314 (1950).

15. *Id.* at 309.

16. *Id.* at 309-10.

17. *Id.* at 310-11.

18. *Id.* at 314. The Court also reiterated that "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Id.* (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

19. *Id.* at 317-18.

20. *Id.* at 319.

21. 248 F. Supp. 537 (S.D.N.Y. 1965).

York authorized service by ordinary mail.[22] There, service by both registered mail (returned "unclaimed" to the clerk) and personal service (the defendant, a Canadian resident, was in Alaska at the time) proved ineffective.[23] As a result, the plaintiff received a court order that authorized service by ordinary mail to three different addresses.[24] In another alternative measure, the Second Circuit authorized the plaintiff to mail service of process to the defendant's last known address,[25] using the court's power under former Rule 4(i)(1)(E).[26] Moreover, the District of Maine has permitted service on the defendant's attorney.[27]

The preceding cases illustrate various means that have satisfied the constitutional standard articulated in *Mullane*.[28] However, no court had moved so far as to allow service of process via e-mail until the year 2000.[29]

II. *BROADFOOT* AND *RIO*: THE BIRTH OF E-MAIL SERVICE

The *Broadfoot* and *Rio* decisions ushered in the new era of international service of process via e-mail.

A. Broadfoot v. Diaz

The United States Bankruptcy Court for the Northern District of Georgia became the first court to authorize e-mail service.[30] The dispute centered around the trustee of International Telemedia Associates, Inc. (Broadfoot), who was

22. *Id.* at 541.
23. *Id.* at 540-41.
24. *Id.* at 540.
25. Int'l Controls Corp. v. Vesco, 593 F.2d 166, 176-78 (2d Cir. 1979).
26. *Id.* at 176. Rule 4(i)(1)(E) is now Rule 4(f)(3). *See* FED. R. CIV. P. 4(f)(3); Broadfoot v. Diaz (*In re* Int'l Telemedia Assocs., Inc.), 245 B.R. 713, 719 (Bankr. N.D. Ga. 2000). In permitting such service, the Second Circuit noted that "no one form of substitute service is favored over any other so long as the method chosen is reasonably calculated, under the circumstances of the particular case, to give the defendant actual notice of the pendency of the lawsuit and an opportunity to present his defense." *Vesco*, 593 F.2d at 176.
27. Forum Fin. Group, LLC v. President and Fellows of Harvard Coll., 199 F.R.D. 22, 22-24 (D. Me. 2001) (because the defendant's attorney had accepted service in prior proceedings and the defendant had been evading service, the court allowed service on the attorney).
28. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
29. *See Broadfoot*, 245 B.R. at 720 & n.5, 721.
30. *Id.*

seeking damages for mismanagement by Diaz, a former officer and director of the company.[31] However, despite the best efforts of the trustee, Diaz could not be located to effectuate properly service of process.[32] Indeed, the trustee never received a permanent address or a telephone number; instead, the trustee had a facsimile number and an e-mail address.[33] Therefore, the court held that it was authorized under Rule 4(f)(3)[34] to direct service to the defendant's last known address, and his facsimile and e-mail address.[35]

Rule 4(f)(3) proved pivotal to the court's authorization of service via e-mail. The court noted that the rule's flexibility permitted the "utilization of modern communication technologies to effectuate service when warranted by the facts."[36] Therefore, because traditional means of service proved futile in reaching Diaz,[37] Rule 4(f)(3) authorized the court to fashion alternative methods of service upon him.[38] Furthermore, the court found that

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31. *Id.* at 715.
32. *Id.* at 718.
33. *Id.*
34. Rule 4(f)(3) provides:

> (f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:
>
> . . . .
>
> (3) by other means not prohibited by international agreement as may be directed by the court.

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

35. *Broadfoot*, 245 B.R. at 720-21. The actual motion before the court was for entry of default judgment against Diaz. *Id.* at 715. In deciding the motion, the court discussed whether its previous order directing service of process via e-mail was proper. *Id.* at 719-21.
36. *Id.* at 720.
37. *Id.* at 718. The court noted that Diaz eluded service by refusing to provide the trustee with a permanent business or residential address and telephone number, and by traveling throughout Europe and the Far East without identifying where he would be at any given time. *Id.* Even Diaz's mother could not locate him. *Id.*
38. *Id.* at 720. It is important to note that "[i]n the absence of any dispute or evidence to the contrary," the court presumed that the order authorizing the disputed means of service did not violate any international agreements. *Id.* at 720 n.4. A discussion of whether the Hague Service Convention prohibits e-mail will take place *infra* Part IV.

because Diaz preferred to communicate via e-mail and facsimile, serving him by such methods provided reasonably calculated notice that an action had been initiated against him.[39] Thus, with authorization within the federal rules for courts to direct alternative means of service that are constitutionally sufficient, e-mail service of process was born.

B. Rio Properties, Inc. v. Rio International Interlink

Two years after *Broadfoot*, the Ninth Circuit Court of Appeals authorized service via e-mail on an international defendant.[40] There, two companies were both using the "Rio" name in their respective internet gambling businesses.[41] Because the plaintiff had several registered trademarks with that name, it sued the defendant for trademark infringement.[42] The plaintiff tried to serve the defendant's attorney (who declined to accept service) and the defendant's international courier, IEC (which was not authorized to accept service).[43] Finally conceding the difficulty of traditional service, the plaintiff filed a motion for alternative service of process.[44] The district court granted the plaintiff's motion and ordered, *inter alia*, service via e-mail.[45]

On appeal, the Ninth Circuit discussed the use of e-mail service pursuant to Rule 4(f)(3).[46] First, the court rejected the defendant's arguments that Rule 4(f) created a hierarchy of service mechanisms that required parties to attempt service under subsections (1) and (2) before petitioning for alternative relief under subsection (3).[47] Instead, it held that Rule 4(f)(3) is an equal means of effectuating service as the other alternatives listed under section (f).[48]

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39. *Broadfoot*, 245 B.R. at 721.

40. Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017-19 (9th Cir. 2002).

41. *Id.* at 1012.

42. *Id.* at 1012-13.

43. *Id.* at 1013.

44. *Id.*

45. *Id.* The district court also ordered service by mail to the defendant's attorney and IEC. *Id.*

46. *Id.* at 1014-16.

47. *Id.*

48. *Id.* In examining Rule 4(f), the court found that subsections (2) and (3) are independent alternatives because they are separated by the conjunction "or." *Id.* at 1015; *see also* FED. R. CIV. P. 4(f)(2)-(3).

Next, in applying Rule 4(f)(3), the court noted that because the defendant was a Costa Rican entity, the district court was not prohibited by any international agreement from issuing an order pursuant to the rule.[49] Moreover, the court held that the plaintiff "need not have attempted every permissible means of service of process before petitioning the court for alternative relief,"[50] and because the defendant's elusive nature thwarted the plaintiff's attempts at service, the district court properly exercised its authority in "craft[ing] alternate means of service."[51]

Finally, the court had to decide whether the alternative methods of service satisfied due process. Turning to this question, the court found that e-mail was reasonably calculated to afford notice to the defendant.[52] The defendant did not list an easily discoverable address in either the United States or Costa Rica, but did advertise its e-mail address on its website and print media.[53] Indeed, it seemed as if the defendant could only be contacted by e-mail. [54] The court also noted some of the potential weaknesses of e-mail service, such as difficulties in confirming receipt, but deferred the question of whether it is the proper mode of service to the district courts.[55]

Note that in both *Broadfoot* and *Rio* e-mail was not the only method of service authorized by the courts under Rule 4(f)(3).[56] Even if e-mail were the only option, the courts would have likely still ruled the same way unless e-mail failed to provide the defendants with notice reasonably calculated to afford them an

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49. *Rio*, 284 F.3d at 1015 n.4; *see also* FED. R. CIV. P. 4(f)(3) (permits service of process by means not prohibited by international agreement). Costa Rica is not a signatory to the Hague Service Convention. *Rio*, 284 F.3d at 1015 n.4.

50. *Id.* at 1016.

51. *Id.* The Ninth Circuit also emphasized that the district court's order authorizing e-mailed service "ensure[d] the smooth functioning of . . . courts." *Id.*

52. *Id.* at 1017.

53. *Id.*

54. *Id.* at 1018.

55. *Id.* at 1018-19. The court directed the district courts to weigh the costs and the benefits of e-mail service. *Id.* at 1018.

56. In *Broadfoot*, the court directed service by facsimile transmission and mail to the defendant's last known address, (*In re* Int'l Telemedia Assocs., Inc.), 245 B.R. 713, 720-21 (Bankr. N.D. Ga. 2000), and in *Rio*, the district court ordered service by mail to the defendant's attorney and international courier, 284 F.3d at 1013, 1017.

opportunity to be heard. It must be true, however, that likelihood of satisfying due process increases with the use of other service methods.

III. POST-*RIO*: THE TREND TOWARDS AUTHORIZING E-MAIL SERVICE

Since *Broadfoot* and *Rio*, the issue of email service has reached other courts. While several courts have authorized e-mail service,[57] others have held that such service does not satisfy constitutional due process.[58] This comment will next discuss how other courts have handled the issue of e-mail service of process.

A. Courts that Have Authorized Email Service of Process

First, this comment will examine cases decided by courts authorizing e-mail service.

The Northern District of California held that e-mail service was proper in *Viz Communications, Inc. v. Redsun*.[59] This case involved a trademark dispute regarding a website that allegedly infringed on the plaintiff's rights in a magazine entitled "Animerica."[60] The plaintiff petitioned the court to serve the defendants—a Japanese entity and an individual residing in Japan—by e-mail after it unsuccessfully tried to serve them at several addresses listed on the defendants' domain name registry.[61] In upholding its previous order permitting e-mail service of process, the court noted that "e-mail is the sole means of contact on the animerican.com [website]. Changes in the registration of the animerica.com domain name, and ambiguity in the mailing address, suggest that the operators of the . . . [website] well may have sought to avoid disclosure of appropriate contact information."[62] Therefore, under the circumstances, e-

57. *See* D'Acquisto v. Triffo, No. 05-C-0810, 2006 WL 44057, at *2 (E.D. Wis. Jan. 6, 2006); Williams v. Adver. Sex LLC, 231 F.R.D. 483, 488 (N.D. W. Va. 2005); Popular Enters., LLC v. Webcom Media Group, Inc., 225 F.R.D. 560, 563 (E.D. Tenn. 2004); Viz Commc'ns, Inc. v. Redsun, No. C-01-04235 JF, 2003 WL 23901766, at *6 (N.D. Cal. Mar. 28, 2003).

58. *See* Ehrenfeld v. Salim A Bin Mahfouz, No. 04 Civ. 9641(RCC), 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005); Pfizer, Inc. v. Domains By Proxy, No. Civ.A.3:04 CV 741(SR., 2004 WL 1576703, at *1 (D. Conn. July 13, 2004).

59. 2003 WL 23901766, at *6.

60. *Id.* at *1-2.

61. *Id.*

62. *Id.* at *6.

mail service satisfied constitutional due process because it sufficiently informed the defendants "of the pendency of [the] lawsuit."[63]

The Eastern District of Tennessee permitted the use of e-mail service in another trademark infringement case.[64] Pursuant to Rule 4(f)(3), the court granted such service because the defendant's address was unknown and service by mail proved unsuccessful.[65] Furthermore, the court briefly addressed e-mail service and its interplay with the Hague Service Convention.[66] The court noted that the plaintiff first attempted service pursuant to the Convention, but because the defendant had not provided a known address, it was inapplicable.[67] Therefore, the court did not decide the difficult question of whether the Hague Service Convention allows service via e-mail.

Next, the Northern District of West Virginia authorized e-mail service in *Williams v. Advertising Sex LLC*.[68] There, the plaintiff moved the court pursuant to Rule 4(f)(3) for an order permitting her to serve three of the defendants—an individual and two business entities located in Australia—by e-mail, international registered mail, and international standard mail.[69] In support of her motion, the plaintiff averred that she had tried physical service on the defendants thirteen times, contacting them by phone, and serving them via international registered mail, all of which had failed.[70] In granting the plaintiff's motion, the court first found that it had the power to order alternative service of process pursuant to Rule 4(f)(3) because such service was not prohibited by any international agreement.[71] Next, the court held that the alternative service requested comported with due process because the defendants were "sophisticated participants in e-

63. *Id.*
64. Popular Enters., LLC v. Webcom Media Group, Inc., 225 F.R.D. 560, 561, 563 (E.D. Tenn. 2004).
65. *Id.* at 562-63.
66. *See id.* at 562.
67. *Id.; see also* Hague Service Convention, *supra* note 8, art. I ("This convention shall not apply where the address of the person to be served with the document is not known.").
68. 231 F.R.D. 483, 488 (N.D. W. Va. 2005).
69. *Id.* at 485.
70. *Id.* at 486.
71. *Id.*

commerce,"[72] making e-mail a reliable method of communication, and because they were aware that the plaintiff was trying to serve them and resisted.[73] Thus, e-mail service was reasonably calculated to afford the defendants notice and an opportunity to contest the plaintiff's allegations.[74]

Additionally, in *D'Acquisto v. Triffo*,[75] the Eastern District of Wisconsin authorized service of process via e-mail under Rule 4 (f)(3).[76] The court directed e-mail service mainly because it appeared the defendant was avoiding service, the plaintiff's previous service attempts had failed, and the parties had previously communicated by e-mail.[77] The defendant resided in Canada, which is a member nation of the Hague Service Convention.[78] However, the court did not discuss whether e-mail was prohibited by the Convention, but instead discussed the Canadian rules of procedure for authorizing alternative service.[79] This discussion of Canadian rules of procedure is interesting because Rule 4(f)(3) permits service that is not prohibited by *international agreement*, never mentioning foreign rules of civil procedure.[80] Whether the court purposefully avoided the issue or misunderstood the applicable standard, it is clear that the court did not properly follow Rule 4(f)(3).[81]

State courts have also allowed e-mail service under their state rules. The New York Supreme Court of Oswego County permitted e-mail service of process in *Hollow v. Hollow*.[82] In this divorce proceeding, the defendant-husband relocated to Saudi Arabia and boasted via e-mail to his wife that "there's nothing anyone can do

72. *Id.* at 487. The plaintiff also increased the reliability of e-mailed service by proposing to serve process through a website called "'Proof of Service-electronic,' which offers encrypted on-line delivery of documents and returns a digitally signed proof of delivery once the document has been received by the target e-mail . . . ." *Id.*

73. *Id.* at 488.

74. *Id.*

75. No. 05-C-0810, 2006 WL 44057 (E.D. Wis. Jan. 6, 2006).

76. *Id.* at *2. The court also directed service "by hand deliver[y] and mail[] . . . to [the] defendant['s] . . . sister." *Id.*

77. *Id.* at *1-2.

78. *Id.* at *1.

79. *Id.* at *2.

80. *See* FED. R. CIV. P. 4(f)(3); *see also* Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002).

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

82. 747 N.Y.S.2d 704, 705, 708 (N.Y. Sup. Ct. 2002).

to me here."[83] The wife petitioned the court to authorize service pursuant to section 308(5) of the New York Civil Practice Law and Rules.[84] According to the record, personal service would have been nearly impossible and service by letters rogatory could have taken up to eighteen months.[85] The court thus found that service by the methods prescribed in section 308 was impractical, giving the court the power to direct alternative means of service.[86] In authorizing service of process to the defendant's last known e-mail address,[87] the court noted that the defendant "secreted himself behind a steel door, bolted shut, communicating with the plaintiff and his children exclusively through e-mail."[88] Furthermore, because the defendant only communicated via e-mail with his wife,[89] it was probably the surest way to apprise him of the pendency of the action.

The trend toward allowing international service of process via e-mail is a developing area of law with some common threads. First, most courts have dealt with the issue in the context of Rule 4(f)(3).[90] Second, the issue only arises when the plaintiff has petitioned the court to authorize alternative means of service.[91] Third, as the Ninth Circuit held, Rule 4(f) does not create a hierarchy of service mechanisms, and all methods listed under section (f) are of equal standing and availability to the plaintiff.[92]

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83. *Id.* at 705.

84. *Id.* Under this section, a court cannot grant service by alternative means unlisted in section 308, unless the moving party has shown that he has made actual prior efforts to effectuate service pursuant to paragraphs (1), (2), and (4) that proved to be impracticable. N.Y.C.P.L.R. 308(5) (McKinney 2001); *Hollow*, 747 N.Y.S.2d at 706.

85. *Hollow*, 747 N.Y.S.2d at 705.

86. *Id.* at 707-08; *see also* 308(5).

87. The court also directed "service by international registered air mail and international mail standard." *Hollow*, 747 N.Y.S.2d at 708. The Southern District of New York also used section 308(5) in directing service via e-mail. D.R.I., Inc. v. Dennis, No. 03 Civ. 10026(PKL), 2004 WL 1237511, *1-2 (S.D.N.Y. June 3, 2004).

88. *Hollow*, 747 N.Y.2d at 708.

89. *Id.* at 705.

90. Courts have also used New York law in permitting e-mail service of process. *See Dennis*, 2004 WL 1237511, at *1-2; *Hollow*, 747 N.Y.S.2d 704, 706-08 (N.Y. Sup. Ct. 2002).

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

92. Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014-16 (9th Cir. 2002); *see also* Williams v. Adver. Sex LLC, 231 F.R.D. 483, 485-86 (N.D. W. Va. 2005).

And finally, the factors mostly considered by these courts include defendant's elusiveness,[93] defendant's familiarity with e-mail,[94] and whether the defendant was a business that conducted or communicated frequently via internet or e-mail.[95] The courts do not articulate what factors weigh more or are required for e-mail service, but rather broadly balance the benefits and burdens of e-mail on a case by case basis as in *Rio*.[96]

B. Courts that Rejected E-mail Service

Other courts have rejected service of process via e-mail.

In 1999,[97] the Eastern District of Pennsylvania rejected e-mail service of process in *Wawa, Inc. v. Christensen*.[98] The court stated that e-mail was not an approved method of service under Rule 4.[99] The court also noted that despite the fact that the Judicial Conference Rules Committee recommended changing the rule to permit e-mail service, it was not adopted by the rules as it stands.[100]

Two years after *Rio*, the District of Connecticut rejected the plaintiff's request to serve process via e-mail.[101] After considering *Rio*, the court rejected e-mail because it was not reasonably calculated, under the circumstances, to provide notice to the defendant.[102] Indeed, the plaintiff was not clear where it intended to serve process.[103] The plaintiff offered six possible web addresses under two domain names.[104] When the court entered the given domain names into a web browser, no website materialized.[105] The court noted that traditional means of service

93. *See* D'Acquisto v. Triffo, No. 05-C-0810, 2006 WL 44057, at *2 (E.D. Wis. Jan. 6, 2006); *Hollow*, 747 N.Y.S.2d 704, 708 (N.Y. Sup. Ct. 2002).
94. *See D'Acquisto*, 2006 WL 44057, at *2.
95. *See Williams*, 231 F.R.D. at 487.
96. *See Rio*, 284 F.3d at 1018.
97. One year before *Broadfoot*.
98. 44 Fed. R. Serv. 3d (West) 589, 590-91 (E.D. Pa. 1999).
99. *Id.* at 590-91.
100. *Id.* at 591.
101. 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).
102. *Id.* at *1.
103. *Id.*
104. *Id.*
105. *Id.* One of the domain names led to a blank website with an e-mail address and the other did not. *Id.* Under these circumstances, the court

were not precluded just because the defendants' primary presence was on the internet; indeed, the plaintiff failed to show that it investigated other means of service, such as determining whether the defendants had designated agents in the United States to receive service of process.[106] Interestingly, the court was concerned with whether the e-mail address itself was accurate,[107] and despite failures in other means of service, the court still felt that traditional means were possible and more practical.[108]

Finally, the Southern District of New York, which had previously authorized e-mail service in *D.R.I. v. Dennis*,[109] rejected it in *Ehrenfeld v. Salim a Bin Mahfouz*.[110] In *Ehrenfeld*, the plaintiff petitioned for court directed service pursuant to Rule 4(f)(3) upon the defendant, who resided in Saudi Arabia. [111] Specifically, the plaintiff sought to serve the defendant by e-mail; mail to a business address and defendant's post office box, both being in Saudi Arabia; and by service to defendant's attorneys located in both the United Kingdom and the United States.[112] The court rejected service by e-mail because the plaintiff did not present any evidence that the defendant maintained the alleged website, monitored the alleged e-mail address, or would otherwise receive e-mail messages.[113] While the defendant in *Rio* conducted business through its e-mail address, it appeared in *Ehrenfeld* that the e-mail address was only used for receiving requests for information.[114]

Although these courts did not authorize e-mail service, it seems clear that, with the exception of *Wawa*, they all employed the *Rio*'s broad balancing test. The fact that the courts rejected e-mail service is immaterial; rather, what is important is that they

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"[did] not feel confident that [e-mails] to any of the proposed [e-mail] addresses [were] likely to reach the defendants." *Id.*

106. *Id.* at *2.

107. The court double-checked the addresses. *See id.* at *1.

108. *Id.* at *2.

109. D.R.I. 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).

110. No. 04 Civ. 9641(RCC), 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005).

111. *Id.* at *1.

112. *Id.*

113. *Id.* at *3.

114. *Id.*

all applied the Ninth Circuit's test. Accordingly, in the area of Rule 4(f)(3), *Rio* is the majority trend.

IV. SERVICE OF PROCESS UNDER THE HAGUE SERVICE CONVENTION

As discussed above, the courts that have considered service of process via e-mail to international defendants have mostly relied upon Rule 4(f)(3).[115] This rule requires authorization from the court, and a method of service that is not prohibited by any international agreement.[116] The Hague Service Convention is an international agreement that could prohibit e-mail service of process.[117] The question of whether the Convention prohibits service via e-mail is important because the United States and many of its principle trading partners are members.[118] However, the Convention is silent on the issue.[119] In order to analyze whether it would permit or prohibit e-mail service, this comment will cover how federal courts have resolved the question of registered mail.

The default means of conducting service under the Convention is for member states to designate a central authority that receives requests for service, certifies that parameters have been complied with, and then forwards service to the appropriate parties.[120] However, Article 10(a) has created confusion.[121] Article 10(a) provides: "Provided the State of destination does not object, the present Convention will not interfere with - (a) the freedom to send judicial documents by postal channels, directly to persons abroad."[122] The "send" provision has split the circuit courts over whether "send judicial documents" includes service of process via postal channels.[123] Two approaches have developed

115. *See supra* Parts II-III.

116. FED. R. CIV. P. 4(f)(3); *see also* Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002).

117. *See* Hague Service Convention, *supra* note 8.

118. This includes the United Kingdom, Japan, China, Canada, France, Russia, Mexico, and Italy. *See* Authorities, Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, http://www.hcch.net/index_en.php?act=conventions.authorities&cid=17 (last visited Oct. 7, 2007).

119. Of course, e-mail was not fathomable in 1965.

120. *See* Hague Service Convention, *supra* note 7, art. 2-6.

121. *Id.* art. 10(a).

122. *Id.*

123. *See id.*

which will be discussed briefly.

The Second Circuit's *Ackermann v. Levine*[124] is the chief case cited for courts that hold that "send" means "service."[125] *Ackermann* actually dealt with service via mail on an American defendant from a German plaintiff.[126] In holding that the Hague Service Convention authorizes service of process via registered mail, the court noted that the United States had not objected to Article 10(a).[127] Therefore, it would be gutting the purpose of the Convention not to allow mail service on an American defendant when other federal courts have consistently permitted such service on defendants located in signatory countries that have not made an Article 10(a) objection.[128] The court was persuaded that Article 10(a) uses "send" instead of "service" as a result of careless drafting, and not construing it as such would make the provision superfluous.[129]

On the other hand, the Eighth Circuit did not construe "send" to mean "service" in *Bankston v. Toyota Motor Corp.*[130] The court reasoned that subparagraphs (b) and (c) use the word "service," whereas subparagraph (a) uses the word "send"; therefore, if the drafter's had intended to include service of process in this provision, they would have explicitly done so.[131] Relying on the statutory construction that calls for a statute to be interpreted by the language itself,[132] the court denied service via registered mail.[133]

This dispute was essentially won by the side that construed send to mean service when the Special Commission to the Hague Convention recommended that service is implicit in send.[134] The

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124. 788 F.2d 830 (2d Cir. 1986).
125. *Id.* at 839.
126. *Id.* at 833-34.
127. *Id.* at 839.
128. *Id.* at 839-40; *see also* Hague Service Convention, *supra* note 7 art. 10(a).
129. *Ackermann*, 788 F.2d at 839 (citations omitted).
130. 889 F.2d 172, 173-74 (8th Cir. 1989).
131. *Id.* at 173-74.
132. *Id.* at 174 (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).
133. *Id.*
134. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW: CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, EVIDENCE AND SERVICE

recommendations clearly state that send is understood as meaning service of process through postal channels.[135] Even though this interpretation effectively ends the dispute, the Western District of Kentucky is still steadfast in its contrary interpretation of Article 10(a).[136]

The analysis of service via registered mail under the Hague Service Convention can prove instrumental in deciding whether or not e-mail service is permitted. Up until now, courts have, at best, skirted around the issue of whether the Convention prohibits e-mail service.[137] However, in examining the Convention, it does not expressly prohibit service of process via e-mail, which alone may be sufficient for a Rule 4(f)(3) petition, because as the rule states, the method of service cannot be *prohibited* by international agreement.[138] Thus, a court could rule that because e-mail is not prohibited by the Convention, it is permissible.[139]

V. THE BENEFITS AND SHORTFALLS OF E-MAIL

With this new manner of service being authorized by courts around the country in order to serve process to international defendants, it is important to look at the manner of service itself to determine whether it is a reliable method that provides reasonably calculated notice. While the benefits of e-mail, such as ease of use and convenience, may be obvious, there are some serious shortfalls to consider before endorsing it.

The benefits of e-mail as a means of communication are quite obvious. E-mail is becoming an accepted and the preferred mode of communication in the world today. It is estimated that 147 million people use e-mail to communicate.[140] As for adults, 88%

CONVENTIONS 11 (2003), http://hcch.e-vision.nl/upload/wop/lse_concl_e.pdf.

135. *Id.*

136. *See* Uppendahl v. American Honda Motor Co., 291 F. Supp. 2d 531, 534 (W.D. Ky. 2003) (holding that while the Special Commission Report states that service via mail is allowed under Article 10(a), "the court simply cannot alter the text of the treaty to add matters not contained therein.").

137. *See supra* Part III.

138. FED. R. CIV. P. 4(f)(3); *see also* Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002).

139. Note, however, that e-mail service is also not explicitly authorized by the Hague Service Convention. *See* Hague Service Convention, *supra* note 8. But because the standard is "not prohibited," *see* FED. R. CIV. P. 4(f)(3), authorization is likely not required.

140. EmailLabs, Email Marketing Statistics and Metrics, http://www.

are estimated to have personal e-mail accounts.[141] Furthermore, e-mails can reach the recipient's inbox literally seconds after they are sent. As noted by the Court of Appeals of New York, e-mail is the "evolutionary hybrid of traditional telephone line communications and regular postal service mail."[142] Thus, e-mail will continue to serve the mainstream in ways similar to traditional means of communication.

The Ninth Circuit noted in *Rio* that it was "cognizant of [e-mail's] limitations."[143] In describing these limitations, the court stated:

> [I]n most instances, there is no way to confirm receipt of an [e-mail] message. Limited use of electronic signatures could present problems in complying with the verification requirements of Rule 4(a) and Rule 11, and system compatibility problems may lead to controversies over whether an exhibit or attachment was actually received. Imprecise imaging technology may even make appending exhibits and attachments impossible in some circumstances.[144]

In addition to these limitations, there are other shortfalls of e-mail service worth noting. How can we be sure the intended recipient actually received the e-mail or actually monitors their inbox? Additionally, if the inbox is full, delivery will fail and thus frustrate service. There is also the issue of lost e-mail messages, or failed deliveries. It is estimated that during the first quarter of 2006, 14% of e-mail messages failed to reach the addressed inbox.[145] Considering that a projection of 2007 estimates 2.7 trillion e-mail messages in the United States, 14% is an astounding amount of failed deliveries.[146]

In essence, however, these failings are tolerable. The

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emaillabs.com/tools/email-marketing-statistics.html (last visited Sept. 24, 2007).

141. *Id.*

142. Lunney v. Prodigy Servs. Co., 723 N.E.2d 539, 541 (N.Y. 1999).

143. *Rio*, 284 F.3d 1007, 1018 (9th Cir. 2002).

144. *Id.*

145. EmailLabs, Email Marketing Statistics and Metrics, http://www.emaillabs.com/tools/email-marketing-statistics.html (last visited Sept. 24, 2007).

146. *Id.*

constitutional standard is not actual notice, but rather notice reasonably calculated to provide parties with an opportunity to be heard.[147] Moreover, other means of service have their flaws. The United States Postal Service is vulnerable to human error, resulting in lost mail and deliveries to wrong addresses. Notice by publication also carries imperfections because it can be misprinted. Because every manner of service has its moments of inaccuracy, a 14% failure rate is arguably reasonable. Furthermore, as with all technology, e-mail transmissions will likely improve in the future. In any event, these deficiencies are real, and reliability should play a central role in the balancing test that courts should consider in deciding whether e-mail is reasonably calculated to give the defendant notice of the pendency of the action.

VI. PROPOSED COURT ADMINISTERED THREE PART TEST AIMED AT ENSURING THE INTEGRITY OF SERVICE OF PROCESS INTERNATIONALLY.

As discussed above, e-mail service is a viable option for plaintiffs. However, because e-mail service is only available under court direction,[148] the broad balancing test employed by the Ninth Circuit[149] is insufficient to ensure the integrity of service. The wide discretion inherent in merely balancing the limitations and benefits of e-mail service creates a great deal of uncertainty in whether a plaintiff can obtain court approval. Therefore, a tighter standard is necessary for something as controversial as e-mail service of process.

Courts should use a three-part test in deciding whether to direct e-mail service. Under the test, the plaintiff must meet the burden of the first two parts or else e-mail service should not be granted. If the plaintiff successfully meets the first two requirements, courts should consider relevant, yet not indispensable, factors to be weighed collectively in the third part of the test. This tighter standard will aid litigants in predicting the accessibility of e-mail as an option for service of process. Moreover, individuals and business entities will be able to better

147. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
148. FED. R. CIV. P. 4(f)(3).
149. *See Rio*, 284 F.3d at 1018.

assess whether their current conduct makes them vulnerable to e-mail service.

Before this comment discusses the three-part test, it is imperative to note that for proceedings in federal courts, e-mail service of process should only be available under Rule 4(f)(3). In other words, e-mail service should *not* be permitted under any other rule or section of the Federal Rules of Civil Procedure. If a plaintiff should attempt to serve via e-mail without court direction, he should be precluded from using Rule 4(f)(3) for failure to seek court approval and such service should be held *per se* invalid.

A. Mandatory Elements

The two mandatory elements of the three-part test are crucial to the goal of ensuring the integrity of e-mail service of process. These two elements are (1) a prima facie showing by the plaintiff that traditional means of service have proved impractical, and (2) a showing by the plaintiff that service to this particular e-mail address is reasonably reliable.

First, and likely the most important, a plaintiff seeking court authorization for e-mail service of process must make a prima facie showing that traditional means of service have proved impractical.[150] The *Rio* court stated that the plaintiff "need not have attempted every permissible means of service of process before petitioning the court for alternative relief. Instead, [the plaintiff] need[] only . . . demonstrate that the facts and circumstances . . . necessitate[] the . . . court's intervention."[151] The problem with this standard is that it is vague and provides little guidance as to what "facts and circumstances" are sufficient to necessitate court involvement. Also, it is unclear how many attempts at serving the defendant are necessary before a court can grant alternative relief. The *Rio* standard undermines predictability, which is essential to the "smooth functioning of our courts of law."[152] Additionally, the rigid standard of e-mail as a

150. *See supra* Part I for a discussion of traditional means of service, including personal service, notice by publication, and service via mail to the defendant's last known address.

151. *Rio*, 284 F.3d at 1016.

152. *Id.*

last resort—that e-mail service of process may only be granted after the plaintiff has shown that every available means of service has been exhausted—is unnecessary.[153] This standard is too taxing and could render e-mail service impossible in many cases. Instead, the standard articulated by the *Hollow* court should be adopted, which requires a showing that other methods of service are impracticable.[154] Impracticability requires "a competent showing as to the actual prior efforts that [have been] made to effect service."[155] Once the plaintiff shows that actual and reasonable efforts to effect service have been made to no avail, the prima facie burden under this test is satisfied.

The second element is a showing that the recipient's e-mail address is reasonably reliable. The e-mail address need only be *reasonably* reliable because minimum due process requires notice reasonably calculated to apprise parties of the action.[156] This element can be satisfied, for example, with evidence of prior communications using the e-mail address, which clearly shows the address's inherent reliability. Courts could also examine any websites held by defendants to see if an e-mail address is listed, as was done by the *Pfizer* court.[157] In short, requiring plaintiffs to prove the reliability of the recipient's e-mail address will prevent them from submitting fraudulent addresses, or ones that are unlikely to reach the intended recipient.[158]

B. Non-Mandatory Factors

Assuming that the first two elements are met, the court should then weigh other factors to assess the likelihood that e-mail service of process will reach the defendant.

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153. *See* 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, 1150 (2005) ("E-mail should only be available as a last resort, meaning only after the court has determined that the plaintiff has exhausted all traditional means of serving the defendant.").

154. Hollow v. Hollow, 747 N.Y.S.2d 704, 706-07 (N.Y. Sup. Ct. 2002) (interpreting section 308(5) of the New York Practice Law and Rules).

155. *Hollow*, 747 N.Y.S.2d at 706.

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

157. 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).

158. *See Mullane*, 339 U.S. at 314.

The first factor is related to the mandatory showing of reasonable attempts at service.[159] Here, the court will evaluate the extent to which traditional means of service have failed. The more attempts that have failed, the stronger the balance is in favor of e-mail service of process. If all means of service have been exhausted, making e-mail the last resort,[160] a strong inference will arise that service by e-mail is not only appropriate, but necessary. These circumstances are not necessary to permit e-mail service, but due to the strong inference created by e-mail being the last resort, it may be in the plaintiff's best interest to exhaust all means of traditional service.

The next factor is whether there has been prior communications via e-mail between the parties. This factor is particularly important because the existence of prior communications creates the presumption that the defendant monitors and communicates through his e-mail address. Note that prior communications may also satisfy the mandatory showing of a reasonably reliable e-mail address, yet if this mandatory component is satisfied for reasons separate and distinct, courts may still decline to direct e-mail service because of no prior e-mail communications between the parties.

Another factor is the defendant's conduct during the service period. Specifically, this factor concerns the defendant's elusiveness. For example, the elusive, globe-trotting nature of the *Broadfoot* defendant convinced the court to authorize e-mail service.[161] This factor is not mandatory because traditional means of service may still be impractical with non-elusive defendants.[162] However, a showing that the defendant was elusive should weigh heavily in favor of authorizing the use of e-mail in order to deter affirmative conduct that frustrates service of process.

Additionally, the issue of whether the defendant is a business

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159. *See supra* Part VI(a).

160. *See* Schreck, *supra* note 153, at 1150.

161. Broadfoot v. Diaz (*In re* Int'l Telemedia Assocs., Inc.), 245 B.R. 713, 718, 720-21 (Bankr. N.D. Ga. 2000); *see also* D'Acquisto v. Triffo, No. 05-C-0810, 2006 WL 44057, at *2 (E.D. Wis. Jan. 6, 2006).

162. *See* Ryan v. Brunswick Corp., No. 02-CV-0133E(F), 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002) (court held that service by e-mail would be constitutionally permissible "[a]though [the defendant] does not appear to have been as elusive as the defendant in *Rio* . . . .").

entity operating in e-commerce or an individual may be pivotal in deciding the service issue. The *Rio* court noted that the defendant had "embraced modern e-business and profited immensely from it."[163] Several other cases have also principally relied on the fact that the defendant was a player in e-commerce, especially in cases where e-mail was the defendant's "preferred contact."[164] Thus, courts should favor authorizing e-mail service on business entities that regularly communicate and conduct business via e-mail. As for individuals, assuming they are not acting as a business entity, courts should consider the other factors discussed above.

Finally, there should be a residual factor reserved for consideration by the court. This factor will encompass factors not discussed that arise in specific cases. The plaintiff would still have to satisfy the two mandatory requirements for this to be even considered. Furthermore, the new factor to be considered must be necessary. More specifically, without it e-mail service is unlikely under the balancing test. Additionally, the new factor must be material, in that it significantly relates to service of process or to the technologies involved with e-mail. If necessity and materiality are satisfied (along with the mandatory requirements) the factor should be considered by courts.

CONCLUSION

E-mail is clearly a viable option for service of process. Nevertheless, the integrity of constitutional notice must be preserved. There is no need to amend the Federal Rules of Civil Procedure, as the proper mechanism for e-mail service is found in Rule 4(f)(3), which gives courts the power to direct alternative means of service of process. By straying from the broad and unpredictable balancing test imposed by the Ninth Circuit, and instead using the three part test discussed above, courts will be able to preserve and ensure the integrity of service of process, while at the same time ushering the judiciary into the new age of

163. Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007, 1017-18 (9th Cir. 2002).

164. *Id.* at 1018; *see also* Williams v. Adver. Sex LLC, 231 F.R.D. 483, 487 (N.D. W. Va. 2005) (defendants were "sophisticated participants in e-commerce"); Viz Commc'ns, Inc. v. Redsun, No. C-01-04235 JF, 2003 WL 23901766, at *6 (N.D. Cal. Mar. 28, 2003) (defendant's website only listed e-mail address as contact information).

communication.

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