

Winter 2012

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Svetlana Gitman

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Recommended Citation

Svetlana Gitman, (Dis)service of Process: The Need to Amend Rule 4 to Comply With Modern Usage of Technology, 45 J. Marshall L. Rev. 459 (2012)

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(DIS)SERVICE OF PROCESS: THE NEED TO AMEND RULE 4 TO COMPLY WITH MODERN USAGE OF TECHNOLOGY

SVETLANA GITMAN*

I. RULE 4 IS DOING A DIS-SERVICE TO THE FEDERAL RULES OF CIVIL PROCEDURE

The legal profession is grounded in deep tradition. A major part of their tradition is to embrace new technologies at a snail's pace.

Jim Klein, a spokesman for SCT, an e-filing software developer.¹

When the e-filing system² was introduced to the federal circuits, the legal field was less than excited to embrace it.³ One Dallas attorney was so upset with the new e-filing system that he filed a lawsuit in the Northern District of Texas alleging computer skills discrimination caused by mandatory federal e-filing in the

* Svetlana Gitman graduated in 2012 from The John Marshall Law School in Chicago, Illinois, where she served as a Staff Editor on The John Marshall Law Review. This Comment was inspired by Svetlana's interest in technology and desire to improve the legal field through available technological advances. Svetlana would like to thank Professors Susan Brody and Mary Nagel for their assistance in helping her craft a unique proposal. She also wishes to thank her parents for being the best parents in the world and supporting her in everything she does.

1. Quoted in John Christian Hoyle, *E-Filing Rides to Rescue and... Stumbles*, CHRISTIAN SCI. MONITOR (June 3, 1999), <http://www.csmonitor.com/1999/0603/p19s1.html>.

2. See generally Joseph H. Firestone & James C. Horsch, *Are You Ready for E-Filing?*, 84 MI. BAR J. 22, 22-25 (Oct. 2005) (describing how the e-filing system works). An attorney logs into the court's website with a court-issued password and uploads all documents. *Id.* at 23. The attorney then receives a receipt of the filing and a notice of the filing is automatically sent to other parties in the case. *Id.* The e-filing system saves time in transmitting documents between parties, saves costs in printing and mailing, permits parties to view filed documents without leaving their offices, and allows for filing outside of the court's hours of operation. *Id.*

3. Mary Wahne Baker, Comment, *Where There's a Will, There's a Way: The Practicalities and Pitfalls of Instituting Electronic Filing for Probate Procedures in Texas*, 39 TEX. TECH. L. REV. 423, 446 (2007) (explaining that transitions to the e-filing system have glitches, often come with a heftier price-tag than expected, and benefit clerks and legal support staff more than judges or attorneys).

cases he litigated.⁴ Today, almost a decade after the introduction of e-filing to the federal court systems, e-filing is mandatory in almost all federal courts⁵ and many state courts have also started implementing e-filing systems.⁶ The legal field has finally embraced e-filing because of its efficiency.⁷ Now that the legal field has accepted e-filing, this Comment encourages the legal field to adopt e-mail service of process so that parties are served at something faster than a snail's pace.

Part II of this Comment will give an overview of procedural due process and the notice requirement under Federal Rule of Civil Procedure 4. Part II will then explain how the concept of notice has evolved over time and will also discuss the legal system's skepticism, yet eventual acceptance, of advances in communication and technology with respect to service of process.

Part III will discuss the benefits of allowing e-mail service of process on defendants in certain situations without first having to attempt traditional methods. This part will illustrate how most courts thwart the purpose of the Federal Rules of Civil Procedure by mandating that traditional methods be attempted first. Therefore, Part IV will propose an amendment to Rule 4 to allow for service of process by e-mail, in limited situations,⁸ without having to first attempt traditional methods. In certain situations, e-mail service of process is the most efficient method of service and best comports with the purpose of the Federal Rules of Civil Procedure even if personal or substitute service (as directed by the current Rule 4) is possible.

4. *Id.* at 448.

5. *About CM/ECF*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/CMECF/AboutCMECF.aspx> (last visited Jan. 2, 2012). According to the federal judiciary, Case Management/Electronic Case Files (CM/ECF) systems are in use in every federal district court, all but one federal bankruptcy court, the Court of International Trade, the Court of Claims, and all but two federal appellate courts. *Id.* Today, more than thirty-seven million cases are on the CM/ECF systems, and more than 450,000 attorneys and others have used the system. *Id.*

6. Peter Mierzwa, *File Your Pleadings Electronically: Saving Money on the Paperless Trail*, 24 CBA REC. 16, 16 (Jan. 2010). In 2007, the Illinois Supreme Court approved the Circuit Court of Cook County's application for their e-filing pilot project covering cases in the commercial litigation section of the Law Division. *Id.* In May of 2009, the e-filing system was launched. *Id.* Over 2600 users registered to e-file on the Clerk's system since the launch to January 2010. *Id.* See also Baker, *supra* note 3, at 431-39 (describing how Colorado, Florida, and Arizona state courts have started implementing e-filing systems).

7. *Feature: Going Green: Texas Law Firms and Environmental Responsibility: The Environmental Impact of Electronic Filing*, 72 TEX. B.J. 268 (Apr. 2009) (Interview by the Texas Bar Journal with David Maland, U.S. District Clerk for the Eastern District of Texas).

8. These specific situations are discussed in the Analysis, Part B.1.

II. NEW COMMUNICATION TECHNOLOGIES MAKE TRADITIONAL METHODS OF SERVICE IMPRACTICABLE

A. *Evolution of Service of (Due) Process*

In order to formally commence a lawsuit, a plaintiff must notify the defendant of the pending action.⁹ A defendant is given adequate notice when the summons and complaint are served in a method permitted by Rule 4 of the Federal Rules of Civil Procedure.¹⁰ If service is not effectuated pursuant to Rule 4, the

9. See generally Adriana L. Shultz, *Superpoked and Served: Service of Process Via Social Networking Sites*, 43 U. RICH. L. REV. 1497, 1499 (2009) (“As far as American law is concerned, notice is ‘a fundamental procedural component of commencing litigation.’” (citing Aaron R. Chacker, Note, *E-effectuating Notice: Rio Properties v. Rio Interlink International*, 48 VILL. L. REV. 597, 599 (2003))).

10. FED. R. CIV. P. 4(e)–(f). Rule 4(e)–(f) governs proper service. Rule 4(e) states that, in order to serve an individual within a judicial jurisdiction of the United States:

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 in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

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

Rule 4(f) states:

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

court does not have jurisdiction over the defendant because the defendant's constitutionally guaranteed due process rights have been offended.¹¹

Historically, a defendant had to be physically within the jurisdiction of the court for the court's decision to be binding upon the defendant.¹² However, with rapid advances in technology and transportation, this concept became impractical.¹³ In its 1945 *International Shoe v. Washington* decision, the Supreme Court held that a defendant only had to have certain minimum contacts within the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"¹⁴

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).

11. 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, 1123-25 (2005) (explaining that the phrase "due process of law" comes from an English statute and when the Framers adopted the phrase in the Fifth and Fourteenth Amendments, the intention was to prevent the government from encroaching on certain procedural rights). According to the Supreme Court, the purpose of procedural due process is to give parties a right to be heard when their rights under the Fifth or Fourteenth Amendments are at stake. *Id.* at 1124; see also Maria N. Vernace, *E-Mailing Service of Process: It's a Shoe In!*, 36 U. WEST. L.A. L. REV. 274, 276 (2005) (explaining that due process rights are guaranteed to all citizens under the Fifth and Fourteenth Amendments of the United States Constitution). See, e.g., *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (stating that notice must reasonably convey the required information); *Roller v. Holly*, 176 U.S. 398 (1900) (stating that notice must give a defending party a reasonable time to make objections).

12. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). See also *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945) (explaining that "[h]istorically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person."). In other words, a defendant's presence within the territorial jurisdiction of a court was required in order for the judgment to bind the defendant.

13. See generally Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFFALO L. REV. 337, 340-44 (2003) (noting that the quick rate at which the nation was expanding geographically in the nineteenth and early twentieth centuries made service of process in the forum difficult and courts were forced to develop modern standards to permit personal jurisdiction over defendants outside the forum).

14. *Int'l Shoe*, 326 U.S. at 317 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). A court could assert jurisdiction over a defendant when the defendant's activities were continuous and systematic and gave rise to the liabilities underlying the lawsuit. *Id.* See, e.g., *Pa. Lumbermen's Mut. Fire Ins. Co. v. Meyer*, 197 U.S. 407, 414-15 (1905) (holding that the Court had jurisdiction over the defendant when nearly one-third of the amount of defendant's total fire risks were in New York and the provisions of the contract at issue clearly contemplated the presence of an agent of the company at the place of the loss after it has occurred); *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 610-11 (1899) (holding that defendant, Connecticut

Five years later, in *Mullane v. Central Hanover Bank & Trust Company*, the Supreme Court decided that, “at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”¹⁵ Under these criteria, defendants’ due process rights are protected when notice is “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.”¹⁶ In other words, notice must be effectuated in such a manner that it might reasonably inform the defendant of the pending lawsuit against him.¹⁷

Today, in order to meet the constitutional notice requirements

Mutual Life Insurance Company, was doing business within Tennessee at the time of the service because it had many agents therein and had issued policies of insurance to citizens of Tennessee); *St. Clair v. Cox*, 106 U.S. 350, 355 (1882) (holding that when a corporation sends its officers to do business in a different state, the corporation is, in effect, as much represented in the new state as in the state it is incorporated in).

15. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The Court noted that the right to be heard is worthless if a defendant is not notified of the pending action. *Id.* See also Schreck, *supra* note 11, at 1129 (explaining that a method of service that is permissible and does not offend due process requirements under one set of facts may not be permissible under a different set of facts). Schrek suggests that courts have to look to the facts of each case closely to determine whether the method of service used is the most likely to reach the defendant. *Id.*

16. *Mullane*, 339 U.S. at 314. In *Mullane*, the only notice required (according to New York banking law) was through a newspaper publication stating only 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.” *Id.* at 310. The Court held that this form of service was not reasonably calculated to notify those with an interest in the pending action because it was not reasonably calculated to reach known beneficiaries. *Id.* at 319. The Court noted that, for those beneficiaries whose names were known, a mailed notice would have been sufficient. *Id.*

17. Vernace, *supra* note 11, at 279; see also *Mullane*, 339 U.S. at 314. The Court stated:

The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, . . . or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes. It would be idle to pretend that publication alone . . . is a reliable means. . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper. . . . The chance of actual notice is further reduced when . . . the notice required does not even name those whose attention it is supposed to attract

Id. at 315. The Court reasoned that because the trust company had been able to give mailed notice to known beneficiaries at the time the common trust fund was formed, this indicated that postal notification was possible. *Id.* at 319.

set forth in *Mullane*, notice must be fair and reasonable.¹⁸ The method of service may still be adequate and comport with traditional notions of due process even if the defendant does not actually receive the notice because, under the criteria established by the court in *Mullane*, notice need only be reasonably calculated to reach interested parties.¹⁹

B. Post-Mullane Advances in Notice Technologies

1. The Telex

One of the earliest instances of a court's willingness to adapt to new technology was in 1980, when the United States District Court for the Southern District of New York allowed a plaintiff to serve a defendant via telex.²⁰ In *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, plaintiffs were unable to serve defendants by any of the statutorily permitted methods.²¹ The district court allowed service via telex, holding that this method was reasonably calculated to reach the Iranian defendants since most defendants in their position had access to telex.²² The court emphasized that:

Courts . . . cannot be blind to changes and advances in technology. No longer do we live in a world where communications are

18. Vernace, *supra* note 11, at 280 (citing Yvonne A. Tamayo, *Are you Being Served?: E-mail and (Due) Service of Process*, 51 S.C. L. REV. 227, 232 (2000)).

19. *Mullane*, 339 U.S. at 318–19. The Court never mentions whether the defendant must actually receive the notice, only that the notice is reasonably calculated to reach interested parties. *Id.* See also *U. S. Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1372 (2010) (holding that *Mullane* is still good law).

20. *New Eng. Merch. Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81–82 (1980). Telex is a form of telegraph service that links “one typewriter keyboard to another that prints, copies, [and] enables subscribers to send messages and data directly to other subscribers throughout the world.” Chacker, *supra* note 9, at 605 n.46.

21. *New Eng. Merch.*, 495 F. Supp. at 75. Plaintiff brought suit against defendants during the Iranian hostage crisis. *Id.*

22. *Id.* at 81 n.4. The court, concerned with service under the provision of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 et seq., held that serving the Iranian defendants would be nearly impossible in a time when diplomatic ties with Iran were severed. *Id.* at 78. However, FSIA provides that if other methods are unavailable, the court may fashion a mode of service “consistent with the law of the place where service is to be made.” 28 U.S.C. § 1608(b)(3)(C) (2011). FSIA only requires that the mode of service allowed by the court not be prohibited under the law of the foreign state, that the defendant receives notice of the action, and that the defendant has an adequate opportunity to defend the case. *New Eng. Merch.*, 495 F. Supp. at 79–80. The court mentioned that it investigated the availability of telecommunication services between the United States and Iran and found at least two companies that offered service of process via telex. *Id.* at 81 n.4. As a result, the court held that telecommunications remained a sound method to notify defendants of the pending action. *Id.* at 81.

conducted solely by mail carried by fast sailing clipper or steam ships. . . . 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.²³

New England Merchants was a seminal case because it set the precedent that service of process through advanced communication and technological methods did not violate defendants' due process rights.²⁴

2. Facsimile and E-mail

In 2000, two decades after *New England Merchants*, the United States Bankruptcy Court for the Northern District of Georgia authorized service of process on a defendant by facsimile when the plaintiff had exhausted all acceptable methods of service.²⁵ In *Broadfoot v. Diaz*, the district court judge found that an evasive defendant was intentionally concealing his location.²⁶ The court authorized three forms of alternate service, including facsimile and e-mail, because the facts of the case suggested that the defendant preferred to receive all communications through either e-mail or facsimile.²⁷ The court reasoned that effectuating notice through the communication channels that defendant preferred adequately protected defendant's due process rights.²⁸ Similar to *New England Merchants*, *Broadfoot* recognized new

23. *New Eng. Merch.*, 495 F. Supp. at 81.

24. Chacker, *supra* note 9, at 604–07.

25. *Broadfoot v. Diaz* (*In re Int'l Telemedia Assocs.*), 245 B.R. 713, 722 (Bankr. N.D. Ga. 2000).

26. *Id.* at 718. The court described defendant as “a ‘moving target,’ making it virtually impossible for the Trustees to find him and effect service by any of the traditional means specified in the Federal Rules of Civil Procedure.” *Id.* The court explained that plaintiff spoke with defendant by telephone six to ten times trying to establish a location where service of process could be sent to, but all mail sent to the addresses defendant provided was refused. *Id.*

27. *Id.* Defendant had provided plaintiff with a permanent facsimile number, and an e-mail address. *Id.* In a letter sent in March 1999, defendant also instructed plaintiff to use the new permanent facsimile number for any future correspondence. *Id.* Defendant specifically stated in the letter that “the received FAXes are forwarded to me and stored on my E-mail” and “[f]rom now on, you may contact me by FAX.” *Id.* Based on these correspondences, the court determined that defendant preferred to be reached by facsimile and e-mail. *Id.*

A facsimile is “a method or device for transmitting documents . . . or the like, by means of radio or telephone for exact reproduction elsewhere.” RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 690 (2d ed. 2001).

28. *Broadfoot*, 245 B.R. at 721 (suggesting that “[i]f any methods of communication can be reasonably calculated to provide a defendant with real notice, surely those communication channels utilized and preferred by the defendant himself must be included among them. Moreover, communication by facsimile transmission and electronic mail have now become commonplace in our increasingly global society.”).

communication technologies to effectuate notice.²⁹

3. The Television

In 2001, one year after *Broadfoot*, the United States District Court for the Southern District of New York authorized service of process via another form of technology.³⁰ In *Smith v. Islamic Emirate of Afghanistan*, the court authorized service of process via television.³¹ In *Smith*, the plaintiffs brought an action against defendants Osama bin Laden,³² Al Qaeda,³³ the Taliban,³⁴ and the Islamic Emirate of Afghanistan, based on defendants' alleged involvement in the September 11 attacks on the World Trade Center.³⁵ Because some of the defendants' whereabouts were unknown, service by traditional methods was impossible and plaintiffs moved for service by alternative methods.³⁶ The court authorized service of process upon defendants bin Laden³⁷ and Al

29. *Id.* at 722. "A defendant should not be allowed to evade service by confining himself to modern technological methods of communication not specifically mentioned in the Federal Rules. Rule 4(f)(3) appears to be designed to prevent such gamesmanship by a party." *Id.*

30. *Smith v. Islamic Emirate of Afg.*, Nos. 01 Civ. 10132(HB), 01 Civ. 10144(HB), 2001 U.S. Dist. LEXIS 21712 (S.D.N.Y. Dec. 20, 2001).

31. *Id.*; see also Chacker, *supra* note 9, at 610 (noting that this is the only known decision assessing the constitutional sufficiency of notice by television).

32. Osama Bin Laden was a wealthy Saudi businessman known worldwide for financing terrorism. *Osama bin Laden (1957-2011)*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/people/b/osama_bin_laden/index.html (last updated Mar. 30, 2012). Bin Laden was most associated with funding the bombings of embassies in Africa in 1998, destroying the U.S.S. Cole in 1999, and the September 11 attacks. *Id.*

33. Al-Qaeda is an international terrorist group, founded by Osama bin Laden, determined to eradicate Muslim countries of western influence and instill a fundamentalist Islamic regime. Jayshree Bajoria & Greg Bruno, *Al-Qaeda*, COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/publication/9126/alqaeda_aka_alqaida_alqaida.html (last updated Aug. 29, 2011).

34. The Taliban is a Muslim fundamentalist group that took control of Afghanistan's government in 1996. Jayshree Bajoria, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/publication/10551/taliban_in_afghanistan.html (last updated Oct. 6, 2011). In 2001, the Taliban was ousted in a U.S. led invasion of Afghanistan. *Id.*

35. *Smith*, 2001 U.S. Dist. LEXIS 21712, at *1-2. Plaintiffs, the administrators of the estates of those killed in the events of September 11, 2001, brought suit seeking damages for their relatives' deaths. *Id.*

36. *Id.* at *2-3 (explaining that plaintiffs sought to serve defendants by alternative means of service including personal service and publication because the preferred methods of service, codified in FED. R. CIV. P. 4(f)(1)-(2), were ineffective).

37. *Id.* at *5-6. The court permitted service on bin Laden by publication, stating that bin Laden is "the subject of an international manhunt" and his whereabouts are unknown until he can be captured. *Id.* at *9. The court reasoned that it would be unfair to make plaintiffs wait to commence their lawsuit until bin Laden was captured. *Id.* at *9-10. Moreover, if bin Laden

Qaeda³⁸ via newspaper publication and television broadcast³⁹ because it was virtually impossible to ascertain the location of these defendants.⁴⁰

C. There Is No Need for Traditional Methods of Service if E-Mail Is More Efficient

In 2002, the United States Court of Appeals for the Ninth Circuit allowed a plaintiff to serve an evasive foreign defendant via e-mail.⁴¹ More importantly, the Ninth Circuit held that Rule 4(f)(3), which authorizes any means of service not prohibited by international law, is not a fallback provision when traditional methods have failed, but rather is an equally viable option of service.⁴² In *Rio Properties v. Rio International Interlink*, the plaintiff owned and operated a Las Vegas casino and held several

was never captured or was killed, plaintiffs would have a very difficult time going after his estate in Saudi Arabia, where he was no longer a citizen, or in Afghanistan, where the legal system was in turmoil. *Id.*

38. *Id.* at *12–13. The court decided that serving Al Qaeda in one of the methods permitted by Rule 4 would be just as difficult as serving bin Laden. *Id.* at *12. While some Al Qaeda members had been captured in Afghanistan, none were high-ranking enough that they could accept service on behalf of Al Qaeda. *Id.* The court feared that if service by publication was prohibited, plaintiffs would not be able to pursue their lawsuit against Al Qaeda in the event that Al Qaeda dissolved before any officials capable of accepting service were captured or surrendered. *Id.*

39. *Smith v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217, 220 n.2 (2003). Plaintiffs effectuated notice on Al Qaeda and Osama bin Laden by publishing notice on six consecutive weekends in March and April of 2002 in the Afghani newspapers *Hewad*, *Anis*, *Kabul News*, and *Kabul Times*, and in the Pakistani newspaper *Wahat*. *Id.* Additionally, plaintiffs broadcast notice on Al Jazeera, Turkish CNN, BBC World, American Radio Network, and ADF. *Id.* In 2003, plaintiffs initiated this subsequent action seeking damages under the Antiterrorism Act of 1991 and the Foreign Sovereign Immunities Act. *Id.* at 220–22. The court implied that service of process via publication on Al Qaeda and Osama bin Laden and via personal service on the Taliban and the Islamic Emirate of Afghanistan was proper by holding that all defendants were liable for the damages. *Id.* at 240–41. However, the court dismissed the claim against Saddam Hussein and the Republic of Iraq because a U.S. president would have diplomatic immunity in a similar situation. *Id.* at 226.

40. *Smith*, 2001 U.S. Dist. LEXIS 21712, at *13–14. Although the court allowed service by publication on bin Laden and Al Qaeda, the court ordered service on the Taliban via personal service on a high-ranking official and service on the Islamic Emirate of Afghanistan via personal service upon Ambassador Abdul Salaam Zaef. *Id.* The court determined that the Taliban and the Islamic Emirate of Afghanistan were “not entirely hidden from view” and with the help of international investigators, personal service was possible. *Id.*

41. *Rio Props. v. Rio Int’l Interlink*, 284 F.3d 1007 (9th Cir. 2002).

42. *Id.* at 1015. The Ninth Circuit held that alternative service of process by e-mail was proper since defendant actively evaded traditional means of service attempted by plaintiff. *Id.* at 1013.

registered trademarks in its name.⁴³ When plaintiff became aware that a Costa Rican company was operating an Internet gaming business under a similar name, plaintiff brought suit and contacted defendant demanding that defendant terminate its website.⁴⁴ Defendant did so, but almost immediately launched an identical sports gambling website, at which point plaintiff sued for trademark infringement.⁴⁵ After plaintiff showed that locating defendant in the United States or Costa Rica was impossible, as was serving process on the international courier defendant had designated, the district court ordered service via the e-mail address provided on defendant's website.⁴⁶

On appeal, the Ninth Circuit affirmed the lower court's decision to permit service of process by e-mail, explaining that e-mail service was appropriate because it was not prohibited by international agreement and was reasonably calculated to provide notice and an opportunity to respond.⁴⁷ Furthermore, e-mail service was acceptable because defendant's business was set up so that it could *only* be reached by e-mail.⁴⁸

The Ninth Circuit paid particular attention to the language of Rule 4 when deciding whether e-mail service was warranted in this situation.⁴⁹ The court explained that the three provisions of Rule 4(f), which deal with service of process on individuals in a foreign country, are equally important and that there is no evidence that Congress preferred any one of the methods of service to another.⁵⁰ The court emphasized that, "no language in Rules 4(f)(1) or 4(f)(2) indicates their primacy, and certainly Rule 4(f)(3) includes no qualifiers or limitations which indicate its availability

43. *Id.* at 1012. Plaintiff owns the RIO All Suite Casino Resort. *Id.* The casino consists of Rio Race & Sports Book, which allows customers to wager on professional sports. *Id.* In order to protect its exclusive rights to the "RIO" name, plaintiff registered a number of trademarks with the United States Patent and Trademark Office. *Id.* Plaintiff also registered the domain name, www.playrio.com. *Id.*

44. *Id.*

45. *Id.* After shutting down the original site, riosports.com, defendant almost immediately launched www.betrio.com. *Id.*

46. *Id.* at 1013. Defendant designated IEC as its international courier, but IEC was not authorized to accept service on defendant's behalf. *Id.*

47. *Id.* at 1014. There is no international agreement between Costa Rica and the United States prohibiting service of process by e-mail. *Id.*

48. *Id.* at 1017-18. The court explained, "[i]f any method of communication is reasonably calculated to provide [the defendant] with notice, surely it is email—the method of communication which [defendant] utilizes and prefers." *Id.* at 1018.

49. *Id.* at 1016.

50. *Id.* at 1015. The court stated, "Rule 4(f)(3) is one of three separately numbered subsections in Rule 4(f), and each subsection is separated from the one previous merely by the simple conjunction 'or.' Rule 4(f)(3) is not subsumed within or in any way dominated by Rule 4(f)'s other subsections . . ." *Id.*

only after attempting service of process by other means.”⁵¹ In fact, the court emphasized that according to the advisory committee notes to Rule 4, “in cases of ‘urgency’ Rule 4(f)(3) may allow the district court to order a ‘special method of service,’ even if other methods of service remain incomplete or unattempted.”⁵²

Nonetheless, the Ninth Circuit recognized the limitations of e-mail service of process and left it up to the discretion of the district courts to balance the “limitations of e-mail service against its benefits in any particular case.”⁵³ Under the *Rio* standard, courts that have denied e-mail service of process have tended to do so because a defendant’s e-mail address was used sporadically and informally, and therefore, there was insufficient proof that e-mail was reasonably calculated to reach the defendant.⁵⁴

III. THERE IS NO ROOM FOR TRADITION IN RULE 4

The *Rio* decision was significant because the Ninth Circuit allowed a plaintiff to serve a foreign defendant via e-mail without first making the plaintiff attempt every conventional method of service listed in Rule 4.⁵⁵ Most courts that have permitted service of process via e-mail have done so only after plaintiff has been unable to serve the defendant by traditional methods *and* e-mail was a method reasonably calculated to reach the defendant.⁵⁶

51. *Id.*

52. *Id.*

53. *Id.* at 1018.

54. See Ronald J. Hedges, Kenneth N. Rashbaum & Adam C. Losey, *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 2009 FED. CTS. L. REV. 55, 62–64 (2009) (explaining that courts refusing to allow e-mail service of process do so based on lack of evidence of defendants’ e-mail use, rather than on the theory that e-mail service of process is *per se* unreliable).

After *Rio* was decided, courts that have denied e-mail service of process have not held that e-mail is an ineffective method of communication, but rather that under the specific facts of the given case, e-mail was not accessed by defendant enough to be considered the best way to reach the defendant. See, e.g., *Jimena v. UBS AG Bank*, No. CV–F–07–367 OWW/SKO, 2010 U.S. Dist. LEXIS 57359, at *20–21 (E.D. Cal. June 10, 2010) (holding that e-mail service of process was improper because plaintiff made no showing that the e-mail account belonged to defendant); *Ehrenfeld v. Mahfouz*, 04 Civ. 9641 (RCC), 2005 U.S. Dist. LEXIS 4741, at *9 (S.D.N.Y. Mar. 23, 2005) (holding that e-mail service of process did not meet the constitutional standards because, in this situation, the e-mail address was only used for informal requests for information, not for “important business communications”); *Pfizer, Inc. v. Domains By Proxy*, Civil Action No. 3:04cv741 (SRU), 2004 U.S. Dist. LEXIS 13030, at *3–4 (D. Conn. July 13, 2004) (holding that e-mail was not reasonably calculated to reach the defendant because the court could not locate either of defendant’s internet domains associated with the e-mail addresses plaintiff provided).

55. *Rio*, 284 F.3d at 1015–16.

56. See *infra* text accompanying notes 75, 82, and 88 for an explanation of

While courts outside the Ninth Circuit have recognized certain circumstances where e-mail is a method reasonably calculated to reach the defendant, those courts are thwarting the purpose of the Federal Rules of Civil Procedure by mandating that plaintiffs first attempt traditional methods even though those methods will almost certainly be inefficient.⁵⁷

A. In Certain Situations, It Is Reasonable for Plaintiff to Attempt Traditional Methods of Service Before Attempting to Serve via E-mail

Service via one of the methods permitted in Rule 4 is appropriate when plaintiff has no reason to believe traditional service will be time-consuming, overly expensive, or unsuccessful.⁵⁸ Where the identity and location of defendant is easily ascertainable and a plaintiff has no reason to think personal or substitute service would be impracticable, traditional methods of service should be attempted first.

In *D.R.I., Inc. v. Dennis*, plaintiff attempted unsuccessfully to serve defendant at his last known address.⁵⁹ Although a search provided two addresses for defendant, one of which was the address listed with the Department of Motor Vehicles, plaintiff's service at these addresses were unsuccessful.⁶⁰ The court ordered plaintiff to attempt service by certified mail to defendant's last known addresses, by publication in a local newspaper, and by e-mailing a copy of the summons and complaint to the e-mail

when courts have determined that e-mail service of process is the most efficient method of service calculated to reach the defendant.

57. Rule 1 of the Federal Rules of Civil Procedure states, "[t]hese rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

58. If plaintiff has no reason to suspect that service by traditional methods will fail, and defendant has not indicated that e-mail is the preferred method of communication, there is no reason to think that traditional methods will be inefficient.

59. *D.R.I., Inc. v. Dennis*, No. 03 Civ. 10026 (PKL), 2004 U.S. Dist. LEXIS 22541, at *1 (S.D.N.Y. June 2, 2004). *D.R.I.* is a corporation existing under New York law whom defendant hired to provide financial, marketing, and promotional services for his national step-dancing show. *D.R.I., Inc. v. Dennis*, No. 03 Civ. 10026 (PKL)(KNF), 2006 U.S. Dist. LEXIS 85170, at *4 (S.D.N.Y. Aug. 3, 2006). In *D.R.I.*, the plaintiff was promised one-third of the gross revenue generated by the shows in exchange for his services. *Id.* Plaintiff purchased advertising material in order to market and promote defendant's shows. *Id.* at *5. Close to the time of the first performance, plaintiff discovered that a show had already been performed. *Id.* Defendant refused to share any of the revenue from the show(s) or to reimburse plaintiff for the costs it had incurred in marketing and promoting the show up to that point. *Id.*

60. *D.R.I.*, 2004 U.S. Dist. LEXIS 22541, at *1.

address that plaintiff stated defendant had used.⁶¹ Accordingly, plaintiff was only allowed to serve defendant via e-mail if e-mail service was effectuated in conjunction with traditional methods of service set out in Rule 4. The court was correct in allowing e-mail service only in conjunction with traditional methods because there was a known address for defendant, plaintiff had continuous contact with defendant by telephone, and plaintiff had no reason to think defendant would be elusive.⁶²

In *Prediction Co., LLC v. Rajgarhia*, the court allowed plaintiff to serve defendant by e-mail when plaintiff demonstrated that it “actively, though unsuccessfully, attempted to obtain” defendant’s address in India.⁶³ Defendant’s lawyer acknowledged

61. *Id.* at *3–4. The court held that plaintiff has shown “that service is impracticable. . . . Plaintiff has attempted . . . to serve defendant Dennis at his last known addresses. Plaintiff has performed searches for defendant Dennis’s address [T]hese diligent efforts have proved unsuccessful.” *Id.*

62. *Id.* Plaintiff had no reason to believe defendant would be elusive because defendant was an Internet company that had an address registered with the Department of Motor Vehicles, and plaintiff had no problems contacting defendant in the past by telephone. *Id.* at *1. As a result, there was no reason to suspect that personal or substitute service under Rule 4 of the Federal Rules of Civil Procedure and New York Civil Practice Law and Rules § 308 (as they are almost identical) would be impracticable. *Id.* at *1–2.

New York Civil Practice Law and Rules § 308 states:

Personal service upon a natural person shall be made by any of the following methods:

1. by delivering the summons within the state to the person to be served; or

2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business . . .

3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318 . . .

4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business . . .

5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

N.Y. C.P.L.R. 308 (CONSOL. 2010).

63. *Prediction Co., LLC v. Rajgarhia*, No. 09 Civ. 7459 (SAS), 2010 U.S.

that he was in contact with defendant about the lawsuit, but did not have defendant's current address in India and was not authorized to accept service on his client's behalf.⁶⁴ The court ultimately held that it was reasonably likely that an e-mail sent to defendant's recently used e-mail address, containing the summons and complaint, was reasonably calculated to reach the defendant.⁶⁵ Nonetheless, similar to *D.R.I.*, it was reasonable for the plaintiff in *Prediction* to first attempt traditional methods of service because there was no reason to anticipate that defendant would be elusive, especially in light of defendant's constant contact with his lawyer, which made it likely that plaintiff could obtain an address for defendant to be served at via defendant's attorney.⁶⁶

B. In Situations When Defendant Is an Online Entity Operating Exclusively Online or Conducting a Substantial Amount of Its Business via the Internet, E-mail Service Should Be the Primary Method of Service

1. E-mail Is a Reliable Source of Communication

Currently, there are over 240 million Internet users in the United States.⁶⁷ Based on the total U.S. population, this means that more than seventy-five percent of the U.S. population uses the Internet.⁶⁸ More importantly, e-mail is the third most popular activity for Internet users in the United States and the most

Dist. LEXIS 26536, at *5 (S.D.N.Y. Mar. 22, 2010). Defendant was plaintiff's former employee. Brief for Plaintiff at 1, *Prediction Co., LLC v. Rajgarhia*, 2010 U.S. Dist. LEXIS 26536 (S.D.N.Y. Mar. 22, 2010) (No. 09 Civ. 7459 (SAS)). Plaintiff was a financial trading company. *Id.* Plaintiff alleged that defendant continued to use plaintiff's "highly valuable and confidential proprietary quantitative trading strategy" while employed at other companies. *Id.*

64. *Prediction*, 2010 U.S. Dist. LEXIS 26536, at *1.

65. *Id.* at *6. The court reasoned that, although counsel for defendant did not know defendant's address, it appeared as though the two were in contact (based on the complaint submitted by plaintiff's attorney), which strongly indicated to the court that counsel for defendant would succeed in forwarding the summons and complaint to defendant and that it was reasonably likely that defendant would receive the summons and complaint. *Id.*

66. Here, more efficient is used to mean less time consuming and less expensive. In some situations, traditional methods will be the only viable way to serve the defendant. FED. R. CIV. P. 1. The Advisory Committee Notes from 1993 state that "[t]he purpose of this revision . . . is to recognize the affirmative duty of the court to exercise the authority . . . fairly, but also without undue cost or delay." *Id.*

67. *Internet Usage and Population Statistics for North America*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats14.htm#north> (last updated Mar. 22, 2012).

68. See *U.S. & World Population Clocks*, U.S. CENSUS BUREAU, <http://www.census.gov/main/www/popclock.html> (last visited Jan. 3, 2012) (showing that the U.S. population is over three hundred million).

popular activity for mobile Internet users in the United States.⁶⁹ Furthermore, there are over two billion Internet users in the world.⁷⁰ Based on the world population, which is about 6.9 billion, about thirty percent of the world's population currently uses the Internet.⁷¹ Because e-mail and Internet use has grown exponentially in the United States and worldwide, in certain circumstances e-mail seems to be a method reasonably calculated to reach a defendant without offending traditional notions of due process.⁷²

2. *E-mail Can Be the Most Efficient Way to Notify Defendant of a Pending Action*

In certain situations, a plaintiff should not have to make a showing that all the prescribed methods of Rule 4 have failed before e-mail service is authorized. Where the defendant is either an online business entity with no physical presence that conducts its business primarily online or a business entity with a physical presence that does a substantial amount of business online, a plaintiff should be allowed to serve a defendant by e-mail without first attempting traditional methods. This is because in these instances, e-mail is the most efficient method of service, use of e-mail furthers the goal of the Rules, and it does not violate a defendant's due process rights.⁷³

In *Williams-Sonoma v. Friendfinder*, defendants owned and operated various pornographic sites and made use of the POTTERY BARN trademark without consent from plaintiff, the trademark owner.⁷⁴ The court granted plaintiff permission to serve

69. *What Americans Do Online: Social Media and Games Dominate Activity*, NIELSONWIRE (Aug. 2, 2010), http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/.

70. *Internet Usage Statistics*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last visited Jan. 3, 2012).

71. See *U.S. & World Population Clocks*, U.S. CENSUS BUREAU, <http://www.census.gov/main/www/popclock.html> (last visited Jan. 3, 2012).

72. If all business is done online, including by e-mail, it is safe to assume that this is defendant's preferred method of communication and the method most likely to reach it.

73. In fact, in some situations, e-mail service of process best safeguards defendants' due process rights. See generally Rachel Cantor, Comment, *Internet Service of Process: A Constitutionally Adequate Alternative*, 66 U. CHI. L. REV. 943, 964-65 (1999) (stressing that "internet service may be the alternative method of service most likely to result in actual notice."). Therefore, Cantor argues that e-mail service exceeds the constitutional standard when the parties' sole contact is an e-mail address, especially in situations where a defendant's physical address is unknown, personal service is impossible, and e-mail service is the only cost effective means of informing the defendant of the pending action. *Id.* at 966.

74. *Williams-Sonoma, Inc. v. Friendfinder, Inc.*, No. C 06-6572 JSW (MEJ), 2007 U.S. Dist. LEXIS 98118, at *2-3 (N.D. Cal. Dec. 6, 2007).

defendants via e-mail, finding that plaintiff had communicated with defendants via e-mail on a number of occasions and that e-mail communication would ensure that defendants had adequate notice of the action.⁷⁵ Although plaintiff filed the complaint in October 2006, the court did not grant permission to serve defendants via e-mail until April 2007.⁷⁶ The lawsuit was delayed by six months because the court forced the plaintiff to first attempt to serve the defendants through traditional methods of service.⁷⁷ Because all of the defendants were online entities that did all of their business online, e-mail service of process was reasonably calculated to reach defendants; permitting plaintiff to serve via e-mail would have avoided the six-month delay in effectuating service.⁷⁸ E-mail service of process would not only have been more efficient than traditional methods of service, but would have also been more in line with the overarching purpose of the Federal Rules of Civil Procedure: efficiency.⁷⁹

Similar to *Williams-Sonoma*, the plaintiff in *Popular Enterprises v. Webcom Media Group* was allowed to serve the defendant, an online business, by e-mail only after other attempts to serve defendant failed.⁸⁰ Because the physical address registered to the internet domain did not belong to defendant, and e-mails previously sent to the domain did not bounce back and presumably reached the defendant, the court allowed e-mail

75. *Id.* at *12 n.3. The court permitted e-mail service of process along with other methods when plaintiff presented evidence that it was impossible to locate physical addresses for a number of the named defendants. *Williams-Sonoma, Inc. v. Friendfinder, Inc.*, No. C 06-6572 JSW, 2007 U.S. Dist. LEXIS 31299, at *4-5 (N.D. Cal. Apr. 17, 2007). Plaintiff also established that it had previously communicated with defendants via the e-mail accounts defendants provided. *Id.* Therefore, e-mail was an effective means of communication, ensuring that defendants would receive adequate notice of the pending action and would have an opportunity to be heard. *Id.* at *5.

76. *Id.* at *1.

77. Plaintiff filed suit on October 20, 2006. *Id.* at *2-3. After six months of attempting to serve defendant by traditional methods, plaintiff asked the court for permission to serve defendant by e-mail. *Id.* The court approved the request on April 17, 2007. *Id.*

78. *Id.* at *5. Plaintiff established that e-mail was an effective means of communicating with defendants. *Id.* According to plaintiffs, the named defendants were located in the Ukraine, Czech Republic, Israel, Switzerland, Philippines, Norway, Canada, India, and England. *Id.* Thus, based on the geographic locations of defendants it would be most efficient to serve all via e-mail.

79. See discussion of Rule 1, *supra* note 57 (emphasizing that Rule 1 stresses speed and minimal expense).

80. *Popular Enters., LLC v. Webcom Media Grp., Inc.*, 225 F.R.D. 560, 563 (E.D. Tenn. 2004). Defendant is an Internet marketing group with a registered address in Belarus. *WEBCOM MEDIA*, <http://www.webcom-media.com/> (last visited Jan. 3, 2012). Plaintiff claimed defendant infringed upon its trademark and directed users to numerous pornographic sites. *Popular*, 225 F.R.D. at 561.

service of process on defendant.⁸¹ While the court eventually allowed plaintiff to serve defendant by e-mail, this was another situation where it would have been more efficient to serve defendant by e-mail without first attempting traditional methods. Since defendant was an online entity and plaintiff had only communicated with defendant via e-mail in the past, there should not have been any due process concerns as e-mail was reasonably calculated to reach the defendant.⁸² More importantly, had plaintiff been allowed to serve defendant by e-mail as soon as its complaint was filed, the lawsuit could have been well under way by the point at which the court finally authorized e-mail service.⁸³

In *Philip Morris v. Veles*, plaintiff once again had to attempt all accepted methods of service of process before being allowed to serve defendant by e-mail.⁸⁴ In *Philip Morris*, plaintiff alleged that defendant, an online store, was infringing on plaintiff's trademark.⁸⁵ Defendant was a foreign corporation of unknown citizenship and did not have a physical contact address posted on any of its websites.⁸⁶ Plaintiff demonstrated both the inadequacy of service on defendant by methods under Rule 4(f)(1)-(2) and the likelihood that e-mail service of process would succeed.⁸⁷ Plaintiff also showed that defendant conducted business almost exclusively through its websites and corresponded regularly with customers via e-mail.⁸⁸ As a result, the court permitted plaintiff to serve defendants by e-mail after making plaintiff attempt traditional

81. *Id.* at 562.

82. *Id.* The court recounted plaintiff's numerous attempts at trying to contact defendant by e-mail. *Id.* The court determined that, because some e-mails sent to defendant bounced back, those that did not should be presumed to have reached the defendant. *Id.* Most importantly, the court stated that "[Rule 4] is expressly designed to provide courts with broad flexibility in tailoring methods of service to meet the needs of particularly difficult cases." *Id.* The court went on to quote the Ninth Circuit in *Rio*, which stated that "when 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." *Id.* at 563.

83. Plaintiff filed suit in October 2003. *Id.* at 562. The court authorized e-mail service in November 2004. *Id.* at 563. It took thirteen months for plaintiff to serve defendant.

84. *Philip Morris USA, Inc. v. Veles, Ltd.*, No. 06 CV 29988 (GBD), 2007 U.S. Dist. LEXIS 19780, at *5-9 (S.D.N.Y. Mar. 12, 2007).

85. *Id.* at *1-2.

86. *Id.* at *2.

87. *Id.* at *4.

88. *Id.* at *3. Plaintiff, in its Memorandum for Leave, stated that defendants' online business appeared to be "conducted entirely through electronic communications." *Id.* Defendants took and confirmed customer orders through their websites and gave shipping notices via e-mail. *Id.* Plaintiff also stated that e-mail "sent to e-mail addresses on defendants' websites were successfully transmitted." *Id.*

methods first.⁸⁹

While physical addresses for defendants existed in *Williams-Sonoma*, *Popular*, and *Philip-Morris* (even though those addresses did not always belong to defendants), it would have been far more efficient to serve defendants initially via e-mail because e-mail was defendants' preferred method of communication.⁹⁰ In these circumstances, where defendants were online entities conducting business primarily through e-mail, e-mail was the most efficient method of service and was truest to the overarching purpose of the Federal Rules of Civil Procedure.⁹¹

C. Previous Concerns About E-mail Service of Process Are No Longer Relevant

Although service via e-mail is not perfect, the benefits of e-mail service of process outweigh the drawbacks. One concern frequently raised by opponents of e-mail service is the inability to verify whether the e-mail reaches the defendant.⁹² Today, however, many e-mail providers offer programs where senders are notified whether and when their e-mail was received and opened.⁹³ Moreover, there is no guarantee that a defendant served by traditional means will actually receive the notice.⁹⁴ Another drawback that opponents of e-mail service have often voiced is the

89. *Id.* at *4 n.3.

90. In all three cases mentioned in Analysis Part B.1, the fact that defendants conducted most of their business via the Internet, including by e-mail, signifies that e-mail is their preferred method of conduct. See *supra* notes 78, 82, and 88.

91. FED. R. CIV. P. 1. According to the plain language of Rule 1, *supra* note 57, service must be given in the most efficient manner. In these cases, e-mail is cheaper, quicker, and more likely to give notice to defendants of the pending action because defendants demonstrated that e-mail was their preferred method of communication. In these circumstances, taking a lot of time to locate a physical address for these online entities and then spending a lot of money to effectuate service by traditional methods is anything but efficient. By the time defendants were served in the above mentioned cases, the lawsuits could have been well underway.

92. Frank Conley, *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, 424 (1997).

93. See Tamayo, *supra* note 18, at 255 (explaining that private companies offer software that provides "return receipt" confirmation of the document delivery to an electronic addressee by tracking not only when the message is delivered, but when the recipient "opens" the e-mail). But see Schreck, *supra* note 11, at 1135-36 (noting that a return receipt merely confirms that someone opened an e-mail message, but does not provide the identity of the individual that actually opened the e-mail message).

94. See Vernace, *supra* note 11, at 302-03 (explaining that documents delivered by e-mail remain "in the recipient's mailbox until opened, compared to documents delivered by substituted service, which may be subject to post arrival movement and misplacement" (citing Tamayo, *supra* note 18, at 256)).

difficulty in verifying the owner of an e-mail account.⁹⁵ Again, though, there is no guarantee that a summons and complaint left with an individual of suitable age and discretion, or served upon someone that has been authorized as an agent of the defendant, will actually reach the defendant either.⁹⁶

Opponents of e-mail service of process will probably raise concerns over the credibility of e-signatures.⁹⁷ Yet, issues over electronic signatures should no longer be of concern due to the extensive use of electronic signatures and the fact that the Global and National Commerce Act of 2000 made e-signatures legally binding.⁹⁸ At the very least, e-mail service of process is a viable method that guarantees that a defendant will receive a higher level of due process than other recognized methods of service, such as service by publication.⁹⁹

D. Other Technological Innovations Have Been Greeted with Hesitation

E-mail service of process is not the first technological advancement in legal procedure to be met with distaste. The e-filing system has become a huge success even though many courts were very hesitant to implement it.¹⁰⁰ The e-filing system has

95. See Schreck, *supra* note 11, at 1136–40 (describing that “it is not uncommon for an e-mail to be opened by someone other than the registered individual, including by an unknown stranger, namely a hacker.”).

96. *Id.*

97. If opponents of e-mail service of process are concerned about someone other than the defendant receiving the notice, they are likely to be concerned about someone other than the defendant signing. Nonetheless, electronic signatures are a substitute for handwritten signatures and have become a part of our daily lives. See Jeff Hynick, Comment, *May I Borrow Your Mouse? A Note on Electronic Signatures in the United States, Argentina and Brazil*, 12 SW. J.L. & TRADE AM. 159, 160 (2005) (demonstrating the various ways e-signatures are used today from entering a PIN number at the ATM to using a credit card to buy things online).

98. See generally Michael J. Hays, Note, *The E-Sign Act of 2000: The Triumph of Function Over Form in American Contract Law*, 76 NOTRE DAME L. REV. 1183, 1186–87 (2001) (explaining that digital signatures have become legally binding signatures). See also Cantor, *supra* note 73, at 965 (suggesting that digital signatures employed in e-mails are harder to forge than written signatures).

99. See Adam Liptak, *How To Tell Someone She’s Being Sued, Without Really Telling Her*, N.Y. TIMES, Nov. 19, 2007, <http://www.nytimes.com/2007/11/19/us/19bar.html> (explaining how notice by publication hardly ever notifies a defendant of a pending lawsuit). See also Jessica Klander, *Recent Minnesota Supreme Court Decisions: Case Note: Civil Procedure: Facebook Friend or Foe?: The Impact of Modern Communication on Historical Standards for Service of Process – Shamrock Development v. Smith*, 36 WM. MITCHELL L. REV. 241, 245 (2009) (cautioning against the overuse of service by publication because it is not always reasonably calculated to reach interested parties).

100. See *supra* text accompanying note 5.

made more information available to more people in a faster and cheaper way.¹⁰¹ E-filing also minimizes the use of paper and reduces the cost of fuel consumed in filing, serving, and retrieving hard copies of litigation papers.¹⁰² In the case of e-filing, convenience and efficiency conquer tradition and the payoffs have been tremendous. The same is likely to be the case with more widespread use of e-mail service of process.

IV. MODIFYING PROCEDURE TO ADAPT TO REALITY

The purpose of the Federal Rules of Civil Procedure is set out in Rule 1, which states that “[t]he Federal Rules of Civil Procedure] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹⁰³ If service of process is to comport with Rule 1, then Rule 4 should be administered in the most just, speedy, and inexpensive fashion. Echoing *Rio*, in circumstances where the chances of reaching a defendant are best via e-mail, plaintiffs should be allowed to do so without first exhausting all other contemplated methods.¹⁰⁴

If a defendant with limited or no physical location conducts over seventy percent of its business on the Internet, including through e-mail, a plaintiff should be allowed to serve defendant by e-mail.¹⁰⁵ For companies that operate primarily on the Internet,

101. See *Feature: Going Green*, *supra* note 7, at 268–70 (illustrating that operating costs have been reduced in a number of areas and less money is being spent on postage, copiers, and fax machines as a result of e-filing). Overall utilization of space, computer equipment, and people also improved with the use of the e-filing system. *Id.*

102. Ann Pfau, *E-Filing: Then and Now*, L. TECH. NEWS, Jan. 26, 2010, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202439497847>. Having documents in electronic form allows lawyers to access and file documents from anywhere in the world. *Id.*

103. FED. R. CIV. P. 1.

104. There are specific situations in which e-mail is the quickest and most cost-effective method of notifying defendant of a pending action. For example, when defendant is a company without a physical presence, conducting its business primarily via the Internet, including by e-mail, e-mail service of process is most efficient. “Primary” should be taken to mean first or highest in rank, quality, or importance. THE AMERICAN HERITAGE DICTIONARY 1438 (3d ed. 1992).

105. It is counterintuitive and inefficient to make a plaintiff go through the methods of service permitted by Rule 4 and attempt to serve defendant personally, or by substitute method, when e-mail is a defendant’s preferred method of service and serving said defendant by e-mail would avoid the hassle of tracking down a physical address. Even after a physical address is obtained, there is no guarantee that the specific address actually belongs to a defendant. Moreover, with the recent rise in the amount of companies conducting business exclusively online, it is certainly most compatible with the Federal Rules of Civil Procedure that these types of defendants be served by e-mail. “Research show[s] that an estimated 400,000 U.S. small businesses sold their

sending acknowledgements and confirmations via e-mail, e-mail is the primary form of communication and seventy percent is an easy threshold to meet.¹⁰⁶

Similarly, if a defendant is a company with a physical location, but conducts a substantial amount (at least thirty-three percent) of its business through the Internet, including using e-mail to communicate with customers, suppliers, etc., a plaintiff should be allowed to serve that defendant by e-mail without first attempting traditional methods.¹⁰⁷ If a defendant conducts at least one-third of its business on the Internet, including via e-mail, e-mail is a method reasonably calculated to reach and notify defendant of the pending action. Whether the defendant conducts business primarily or substantially through the Internet, a plaintiff must be familiar with defendant's e-mail and Internet usage at the time of filing in order for the amendment to be applicable.¹⁰⁸

Thus, the final portion of Rule 4(e)(2) and 4(f)(2)(C) should be amended to allow for service by e-mail in those situations outlined above, without having a plaintiff first attempt personal or substitute service even if personal or substitute service is possible. Therefore, following the amendment, Rule 4(e), Serving an Individual Within a Judicial District of the United States, would read as follows:

Unless federal law provides otherwise, an individual . . . may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought

products and services on e-business sites in 1998, and that number jumped 50 percent to 600,000 in 1999." BRAHM CANZER, *E-BUSINESS: STRATEGIC THINKING AND PRACTICE* 17 (Houghton Mifflin Co., 2nd ed. 2006). "During the same period, online transactions and purchases grew more than 1,000 percent, rising from \$2 billion to \$25 billion . . ." *Id.* Today, online activity continues to grow as 66 percent of small businesses have already implemented the Internet as a tool to help them run their business. *Id.*

106. This amendment will be particularly useful if defendant is considered an "Internet pure play." Businesses that do not conduct business outside the Internet have come to be known as Internet pure plays. Jeremy Horey, *Pure Plays Leave Old Ways Behind*, *THE AUSTRALIAN*, May 25, 1999, at C08. In other words, Internet pure plays are companies formed solely to take advantage of online opportunities. *Id.*

107. "Substantial" should be taken to mean considerable in importance, value, degree, amount, or extent. *THE AMERICAN HERITAGE DICTIONARY* 1791 (3d ed. 1992).

108. Plaintiff must attest that, at the time of filing, plaintiff has had e-mail contact with defendant within six months prior to the date of filing and further attest that e-mail is a method used consistently by defendant in the course of defendant's business. Plaintiff will be responsible for filing an affidavit attesting that plaintiff is familiar with defendant's e-mail and Internet usage at the time of filing, such that would lead plaintiff to believe that e-mail is defendant's preferred method of communication.

in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process[; or]

*(D) sending a copy of each by e-mail if defendant is an online business entity with no physical presence and conducts its business primarily via the internet, including by e-mail—where an e-mail address is posted on defendant's website or defendant has indicated its preference to be contacted at given e-mail address—and plaintiff attests to knowledge of defendant's internet and e-mail usage at the time of filing; or*¹⁰⁹

*(E) sending a copy of each by e-mail if defendant is a business entity with a physical presence, but conducts a substantial portion of its business via the internet, including by e-mail—where an e-mail address is posted on defendant's website or defendant has indicated its preference to be contacted at given e-mail address—and plaintiff attests to knowledge of defendant's internet and e-mail usage at the time of filing.*¹¹⁰

Similarly, Rule 4(f), Serving an Individual in a Foreign Country, would read as:

Unless federal law provides otherwise, an individual . . . 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

109. An Advisory Committee Note should follow the amendment, explaining that the definition of "primarily" would mean that a business must conduct at least seventy percent of its business online to be considered a business that primarily conducts business online, including through usage of e-mail.

110. An Advisory Committee Note should follow the amendment, explaining that the definition of "substantial" would mean that a business must conduct at least thirty percent of its business online to be considered a business that conducts a substantial portion of its business online, including through usage of e-mail.

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

(iii) *sending a copy of each by e-mail if defendant is an online business entity with no physical presence and conducts its business primarily via the internet, including by e-mail—where an e-mail address is posted on defendant's website or defendant has indicated its preference to be contacted at given e-mail address—and plaintiff attests to knowledge of defendant's internet and e-mail usage at the time of filing.*¹¹¹or

(iv) *sending a copy of each by e-mail if defendant is a business entity with a physical presence, but conducts a substantial portion of its business via the internet, including by e-mail—where an e-mail address is posted on defendant's website or defendant has indicated its preference to be contacted at given e-mail address—and plaintiff attests to knowledge of defendant's internet and e-mail usage at the time of filing.*¹¹²

The Advisory Committee Notes to Rule 4 reiterate the language of Rule 1 and emphasize a quick, efficient, and inexpensive process.¹¹³ The fact that the Advisory Committee has created part (d) to Rule 4, which permits waiver of service in order to make service of process less expensive, suggests that e-mail service of process in the specific situations proposed above would be in line with the Committee's thinking. The waiver of service option suggests that the Rules Committee desired to make service of process faster and cheaper. This intent is further illustrated by incentives such as extended time to reply if service is waived and placing the burden on the plaintiff to pay for service of process if plaintiff failed to waive without a valid reason.¹¹⁴ Furthermore, the Judicial Conference Rules Committee has previously discussed and recommended a change to Rule 4 to permit e-mail service of process.¹¹⁵

111. See *supra* note 109 and accompanying text.

112. See *supra* note 110 and accompanying text.

113. FED. R. CIV. P. 4. The 1993 amendment to Rule 4 states that "the revised rule clarifies and enhances the cost-saving practice of securing the assent of the defendant The aims of the provision [authorizing waiver of service] are to eliminate the costs of service . . ." *Id.*

114. FED. R. CIV. P. 4(d).

115. See *WAWA, Inc. v. Christensen*, No. 99-1454, 1999 U.S. Dist. LEXIS 11510, at *4 (E.D. Pa. July 27, 1999) (explaining that a change permitting e-

Limiting e-mail service of process to the two specific situations mentioned is an excellent way to ease the legal community into a new form of technology without causing too much of a commotion. A 2009 article by Ronald J. Hedges, Kenneth N. Rashbaum, and Adam C. Losey proposed an amendment to Rule 4 that would allow for e-mail service of process on any individual.¹¹⁶ The authors suggested adding or amending certain provisions of Rule 4 to allow for service of process “by electronic means.”¹¹⁷ Such proposals simply go too far by allowing service by e-mail on *any* defendant.¹¹⁸ Moreover, concerns voiced by opponents to e-mail service cannot be as easily rebutted when any potential defendant can be served via e-mail.¹¹⁹ Limiting e-mail service of process to the two specific situations proposed above is a step towards incorporating technological advances into legal procedure—a modest step the legal community would be

mail service of process had been discussed and recommended, but never implemented).

116. Hedges, Rashbaum & Losey, *supra* note 54, at 74–75.

117. *Id.* at 75–77. Hedges, Rashbaum, and Losey propose that Rule 4(d)(1)(g), which allows for plaintiffs to request a waiver of service from defendant, should be amended to include the phrase “including electronic means to a location previously accessed by the defendant within 60 days before the request is sent.” *Id.* at 75. The authors also propose that Rule 4(e)(2), which sets out the methods for serving an individual within a Judicial District of the United States, should be amended to allow plaintiff to serve defendant by “delivering a copy of [summons and complaint] by electronic means at a location previously accessed by the individual within 60 days before the copy is delivered.” *Id.* Finally, they also propose that Rule 4(f)(2)(C), which prescribes the method of service on individuals in a foreign country, should be amended to add a new section which states that individuals in foreign countries can be served by “delivering a copy of the summons and of the complaint by electronic means at a location previously accessed by the individual within 60 days before the summons and complaint are delivered.” *Id.* at 76.

118. According to the changes proposed by Hedges, Rashbaum, and Losey, a plaintiff only has to prove that defendant has used e-mail sixty days prior to the filing of the lawsuit. *Id.* at 75–77. In that sense, the authors propose that *any* defendant, including private individuals, can be served by e-mail as long as the defendant has accessed the e-mail account plaintiff sends notice to within sixty days prior to the notice being sent.

119. Allowing e-mail service on *anyone* with an e-mail address raises legitimate concerns. When the defendant is a business entity that has specified an e-mail address on its website (rather than a phone number or physical address), a defendant business is indicating that e-mail is its preferred method of contact and e-mail is therefore reasonably calculated to reach it and notify it of the pending action. This is not the same type of situation when an individual creates an e-mail address. An individual does not necessarily indicate that e-mail is the preferred method of communication by simply having an e-mail address. As a result, concerns over whether e-mail is reasonably calculated to reach an individual carry more weight than concerns over e-mail service on a business that operates primarily or substantially via the Internet.

more inclined to take when compared with the approach Hedges, Rashbaum, and Losey advocate.

V. E-MAIL IS THE NEW BLACK

Rule 4 is outdated and needs to be amended to better comport with Rule 1 when looking at current technological trends. As technology advances, the legal field must adapt with it.¹²⁰ In situations where e-mail is reasonably calculated to reach a defendant and notify it of the pending action, e-mail service of process should be allowed without requiring plaintiff to demonstrate that all traditional methods of service have been exhausted. The purpose of the Federal Rules of Civil Procedure is to make the litigation process as efficient as possible. Making a plaintiff spend a significant amount of time and money to serve a defendant in a traditional manner runs counter to the purpose and spirit of the Rules. Thus, amending Rule 4 in the fashion proposed above will keep Rule 4 in service and in style.

120. A recent Hofstra University Law Review article discussing the need for service by publication to evolve because print newspapers are slowly becoming extinct illustrates the need to amend Rule 4 to conform to modern technology. See Lauren A. Rieders, Note, *Old Principles, New Technology, and the Future of Notice in Newspapers*, 38 HOFSTRA L. REV. 1009, 1013 (2010) (advocating for states to amend their publication statutes to require that where notice by newspaper is acceptable, such notices must be posted in online newspapers rather than solely in print newspapers or elsewhere on the Internet). Rieders highlights the shocking rate at which newspapers have gone out of business and the alarming rate at which well-established newspapers have stopped printing newspapers and now publish their content online only. *Id.* at 1028–29.

