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Preventing "You've Got Mail"™ From Meaning "You've Been Served": How Service Of Process By E-Mail Does Not Meet Constitutional Procedure Due Process Requirements, 38 J. Marshall L. Rev. 1121 (2005)

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PREVENTING "YOU'VE GOT MAIL"™[1] FROM MEANING "YOU'VE BEEN SERVED": HOW SERVICE OF PROCESS BY E-MAIL DOES NOT MEET CONSTITUTIONAL PROCEDURAL DUE PROCESS REQUIREMENTS

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With the many advantages[2] that the Internet[3] provides, the number of people now using the Internet[4] and electronic mail[5] is rapidly growing.[6] As a

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1. Trademark owned by America Online, Inc., Serial No. 75535493.

2. Advantages to the Internet and electronic mail include speed, efficiency, reliability and security. Rachel Cantor, *Internet Service of Process: A Constitutionally Adequate Alternative?*, 66 U. CHI. L. REV. 943, 964–65 (1999); 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, 424–25 (1997).

3. The Internet is "an extensive computer network made up of thousands of other, smaller business, academic, and governmental networks. . . ." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 706 (3d ed. 1997). For a good discussion on how the Internet works and operates, see Brian E. Daughdrill, *Poking Along in the Fast Lane on the Information Super Highway: Territorial-based Jurisprudence in a Technological World*, 52 MERCER L. REV. 1217, 1218–20 (2001). *See also* RON WHITE, HOW COMPUTERS WORK 294–321 (6th ed. Que Corp. 2002) (1993) (discussing how the Internet operates and functions); Jennifer Mingus, *E-mail: A Constitutional (and Economical) Method of Transmitting Class Action Notice*, 47 CLEV. ST. L. REV. 87, 95–97 (1999) (discussing the "nuts and bolts" of the Internet and electronic mail).

4. In a recent survey, it was estimated that there were over 165 million Internet users in the United States, which accounts for more than fifty-nine percent of the population. Nua, *U.S. & Canada*, http://www.nua.com/surveys/how_many_online/n_america.html (last visited July 9, 2005). In the same survey, there was estimated to be over 580 million Internet users worldwide. *Id.* This counts for about ten percent of the world's population. *10% of the World's Population Now Have Internet Access*, EuropeMedia, August 12, 2002, *available at* 2002 WLNR 3394619. It is estimated that by the end of 2005 over one billion people around the world will be online. *Id.* One of the many reasons for this increase is declining connection prices. Charlene Marmer Solomon, *Trends in Technology and Global Relocation*, 11 INT'L HR J. 5 (2002).

5. Electronic mail is a "message. . . typed or loaded into a terminal and sent, as by telephone line, to a receiving terminal. . . ." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 437 (3d ed. 1997). Electronic mail is commonly referred to by its shortened name, e-mail. *See* WHITE, *supra* note 3 at 329–31 (discussing how e-mail works and operates); Mingus, *supra* note 3, at 95–97 (explaining the "nuts and bolts" of e-mail).

result, courts in the United States are now receiving requests to permit service of process[7] by e-mail. So far, the responses to such requests have varied, with only a handful of courts permitting service of process by e-mail.[8] The problem[9] courts are now facing is whether permitting service of process by e-mail meets constitutional procedural due process[10] requirements,[11] and if so, when is it permissible.

Generally, when determining the permissibility of a method of service, courts look first to the governing Rules of Civil Procedure. In federal courts, this rule is the rule on the service of process of summons and complaints,

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6. A recent study suggests that ninety-three percent of those online are active e-mailers. Nua, *More Email Accounts, More Spam*, http://www.nua.com/surveys/?f=VS&art_id=905358383&rel=true (last visited July 9, 2005) [hereinafter *More Email Accounts, More Spam*]. Other studies suggest that there are over 263 billion e-mailboxes in the world. Solomon, *supra* note 4, at 5. According to one survey, more than eighty percent of corporations are replacing traditional mail with e-mail, and are sending seventy-two percent fewer faxes and making forty-five percent fewer phone calls. Stefanie Scott, *Firms Find Advantages in E-Mail*, POST-CRESCENT, Aug. 27, 2002, *available at* 2002 WLNR 9048717.

7. Service of process is "[t]he formal delivery of a writ, summons, or other legal process." BLACK'S LAW DICTIONARY 1372 (7th ed. 1999). One scholar has stated: "Original 'process' is any writ or notice by which a defendant is called upon to appear and answer the plaintiff's declaration. The commencement of the suit at common law was formerly by original writ. Judicial process was by summons, attachment, arrest and outlawry." BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 17 (Henry Winthrop Ballantine ed., West Publishing Company 1923) (1894).

8. *See* Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1018–19 (9th Cir. 2002); Popular Enters., LLC v. Webcom Media Group, Inc., 225 F.R.D. 560, 563 (E.D. Tenn. 2004): D.R.I., Inc. v. Dennis, No. 03 CV 10026, 2004 WL 1237511, at *2 (S.D.N.Y. June 3, 2004) ; Viz Communications, Inc. v. Redsun, No. C-01-04235, 2003 WL 23901766, at *6 (N.D. Cal. Mar. 28, 2003); Ryan v. Brunswick Corp., No. 02 CV 0133E, 2002 U.S. Dist. LEXIS 13837, at *9 (W.D.N.Y. May 31, 2002); *In re* Int'l Telemedia Assocs., Inc., 245 B.R. 713, 722 (Bankr. N.D. Ga. 2000); Hollow v. Hollow, 747 N.Y.S.2d 704, 708 (N.Y. Sup. Ct. 2002). *But see* Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries, 353 F.3d 916, 928 (11th Cir. 2003); Ehrenfeld v. Salim A Bin Mahfouz, No. 04 CV 9641, 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005); Pfizer, Inc. v. Domains by Proxy, No. 04 CV 741, 2004 WL 1576703, at *1 (D. Conn. July 13, 2004): Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999); WAWA, Inc. v. Christensen, 44 Fed. R. Serv. 3d (Callaghan) 589 (E.D. Pa. 1999).

9. This problem is most likely to arise in cases where the defendant is outside of the United States, and in cases where the defendant is not identifiable because the contact with the defendant was strictly over the Internet and the Anticybersquatting Consumer Protection Act (ACPA) does not apply. *See infra* note 32 (discussing the ACPA).

10. Due process is "[t]he conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case." BLACK'S LAW DICTIONARY 516 (7th ed. 1999). The due process clauses in the Fifth and Fourteenth Amendments prohibit both federal and state governments from depriving a person of his life, liberty or property unfairly or arbitrarily. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

11. Procedural due process is "[t]he minimal requirements of notice and a hearing guaranteed by the Due Process Clauses" in the Fifth and Fourteenth Amendments. BLACK'S LAW DICTIONARY 517 (7th ed. 1999).

Federal Rule of Civil Procedure 4.[12] However, the current version of Rule 4 does not expressly permit service of process by e-mail.[13] Courts then look at the circumstances to determine if another method of service is permissible. However, technological problems[14] with e-mail suggest that permitting service of process by e-mail conflicts with procedural due process requirements.

Part I of this Article discusses procedural due process requirements and the forms of process permitted under Rule 4. It also discusses the different positions courts have taken on various forms of service of process that are permissible. Part II examines the problems that occur when e-mail is used to fulfill procedural due process requirements. Part III proposes an amendment to Rule 4 that sets guidelines as to when alternative forms of service of process, such as e-mail, are permissible.

I. METHODS OF SERVICE OF PROCESS: THE CONSTITUTION AND RULE 4

A. The Purpose of Service of Process Under the Due Process Clause

The phrase "due process of law" comes from an old English statute, which reads: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."[15] When the framers adopted[16]

12. FED. R. CIV. P. 4. Rule 5 governs the service of pleadings and other papers. FED. R. CIV. P. 5. Since 1991, Rule 5 has been amended several times and now permits service of pleadings and other documents electronically, including by fax and e-mail. FED. R. CIV. P. 5(b)(2)(D). *See* 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1142 (3d ed. 2002) (discussing the amendments made to Rule 5 and when service and filing by fax and e-mail is permitted). However, Rule 5 requires express written consent by the party for service by fax or e-mail to be permissible. *Service of Process—Foreign Defendant—E-mail Service*, 17 FED. LITIGATOR 110, 111 (2002) [hereinafter *Service of Process*].

13. FED. R. CIV. P. 4.

14. The phrase "technological problems" means that problems exist regarding the way e-mail works and operates. For a further explanation, see *infra* Part II.A.

15. EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 386 (Harold W. Chase et. al. eds., Princeton University Press 1978) (1920) (referring to chapter 3 of 28 Edw. III (1335)). This statute harks back to chapter 29 of the Magna Charta (issue of 1225), where the King promised that:

> [N]o free man (*nullus liber homo*) shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land (*per legem terrae*).

Id. The purpose of due process at that time was to protect individuals from oppressive authority and insecurity and to defend their lives and their property. NORMAN F. CANTOR, IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM 320 (1997).

16. The Supreme Court has stated that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta." Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1856).

the Due Process Clauses in the Fifth and the Fourteenth Amendments, the intention was for the Due Process Clauses to place certain procedures beyond the government's reach,[17] but its original importance has changed over the years.[18]

The long-standing tradition of the U.S. Supreme Court[19] is that the purpose[20] of procedural due process is that parties have a right to be heard when their rights under the Fifth and Fourteenth Amendments are at stake.[21] The constitutional right to be heard is one of the basic aspects of the government's duty to follow a fair process of decision-making when it acts to deprive a person of his possessions.[22] To ensure fair play to an

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17. The Due Process Clause is phrased as a limitation to the government's power to act; it does not guarantee minimal levels of safety and security. 16B AM. JUR. 2D *Constitutional Law* § 898 (2002). Rather, it was intended to prevent governments from abusing its power or using its power to oppress citizens. *Id.* (citing General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992)).

18. CORWIN, *supra* note 15, at 390. *See id.* at 386–403 (discussing the details of the history and evolution of the due process clause).

19. One of the first times the United States Supreme Court specifically addressed procedural due process and service of process was in *Pennoyer v. Neff.* 95 U.S. 714, 733 (1877). There the Court stated the phrase "due process of law," when applied to judicial proceedings, means:

> [A] course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent . . . to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Id.

20. The Court has stated that "[p]rocedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken." Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972). In fact, the Constitution requires more than speed and efficiency. *Id.* (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)). The Bill of Rights, in general, and the Due Process Clause of the Fifth Amendment, in particular, are "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize" the government. *Id.*

21. Referring to the meaning of the Due Process Clause the Court has said that "the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes*, 407 U.S. at 80 (quoting Baldwin v. Hale, 68 U.S. 223, 233 (1863)). The Court further stated that "it is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Id.* (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). In cases involving the seizure of a person's goods, the right to notice and hearing must be granted at a time when deprivation can still be prevented. *Id.* at 81. The Court has said that "[t]he fundamental requisite of due process of law is the opportunity to be heard. And it is to this end, of course, that summons or equivalent notice is employed." Grannis v. Ordean, 234 U.S. 385, 394 (1914). *See also* Roller v. Holley, 176 U.S. 398, 409 (1900) (finding that before a man can be deprived of his liberty or property he is entitled to some notice that is reasonable and adequate for the purpose).

22. *Fuentes*, 407 U.S. at 80.

individual,[23] the Due Process Clause works to protect an individual's use and possession of property from arbitrary encroachment by minimizing substantively unfair or mistaken deprivations of property.[24]

However, the right to be heard is not protected unless the party is notified that a claim is pending against him and he can choose whether he will appear or default, acquiesce or contest.[25] That is why a civil action cannot proceed until the defendant has been properly served with a copy of the filed complaint.[26] Service of the complaint and summons operates to give the defendant notice of the action against him and to inform him of who filed the claim, why it was filed, where it was filed, and when and where he is to appear so that he can be heard.[27] Notification of a claim is the "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality[,]"[28] and must be "reasonably calculated, under all the circumstances, to apprise [the] interested part[y] of the pendency of the action [against him] and afford [him the] opportunity to present [his] objections."[29]

B. *Methods of Service Permitted Under Rule 4*

The present form of Rule 4 permits service of process by: (1) personal service;[30] (2) mail;[31] (3) means permitted by federal law;[32] (4) alternative

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23. It is recognized that the purposes of the Due Process Clause are "[t]he ensuring of a fair and orderly administration of the laws." 16B AM. JUR. 2D *Constitutional Law* § 898 (citing Int'l Shoe Co. v. Washington., 326 U.S. 310, 319 (1945)).

24. *Fuentes*, 407 U.S. at 80–81. The *Fuentes* court stated that "the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Id.* at 81.

25. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). In *Mullane*, the Court found that service by publication was not a sufficient means of informing beneficiaries of interests in a trust when the names and addresses of the parties were available to the trustee. *Id.* at 318.

26. Cantor, *supra* note 2, at 945.

27. *See id.* (discussing the structure of service of process). *See also* FED. R. CIV. P. (4)(a) (detailing what information is required to be in a summons when a claim is in federal court); FED. R. CIV. P. (4)(c)(1) (stating that a copy of the complaint must accompany the summons).

28. *Mullane*, 339 U.S. at 314.

29. *Id.*

30. FED. R. CIV. P. 4(e)(2), (f)(2)(C)(i).

31. Rule 4 permits service of process by mail in the form of waiver of service by the party being served. FED. R. CIV. P. 4(d). In addition, several states authorize service by mail through statutes and rules not requiring the defendant to waive service. 62B AM. JUR. 2D *Process* § 265 (2002).

32. FED. R. CIV. P. 4(e). For an example of a federal law that has its own service provisions, see the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125 (d) (2000). As one of its forms of service of process, the Act permits e-mail to be used under certain circumstances as a way of informing the defendant of a claim against him. 15 U.S.C. § 1125(d)(2)(A)(ii)(II). *See* Elizabeth D. Lauzon, Annotation, *Validity, Construction, and Application of Anticybersquatting Consumer Protection Act, 15 U.S.C.A. 1125(d)*, 177 A.L.R. FED. 1 (2002) (discussing the Anticybersquatting Consumer Protection Act).

forms of service;[33] (5) means allowed under state law;[34] or (6) means allowed by the law of the country where the summons is to be served[35] or an internationally agreed means of service.[36] Most of these methods of service

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33. FED. R. CIV. P. 4(f)(3). Rule 4(f)(3) reads:

(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).

34. FED. R. CIV. P. 4(e)(1). Rule 4(e) reads in pertinent part:

(e) Service Upon Individuals Within a Judicial District of the United States. 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 any judicial district of the United States:

(1) pursuant to the law of the state in which the district court is located, or in which service is effected . . .

FED. R. CIV. P. 4(e)(1).

35. Rule 4(f)(2) provides in pertinent part:

(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:

. . .

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by . . .

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

36. FED. R. CIV. P. 4(f). The most common international agreement used and endorsed by Rule 4 is the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. FED. R. CIV. P. 4(f)(1). The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents is "[a]n international convention . . . that dictates the formal and usu[al] complicated procedures for effecting service of process in a foreign country." BLACK'S LAW DICTIONARY 717 (7th ed. 1999). The Hague Convention applies only to civil or commercial matters, where service of a judicial or extrajudicial document abroad is necessary and the address of the person to be served is known. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, art. I, 20 U.S.T. 361, 658 U.N.T.S. 163. Currently, fifty-two of the sixty-four Members of the Hague Convention on Private International Law are Contracting States to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Hague Conference on Private International Law, *Member States*, http://www.hcch.net/index_en.php?act=states.listing (last visited May 22, 2005); Hague Conference on Private International Law, *Status table*, http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last visited May 22,

are self-explanatory; however, several are misleading and require further discussion.

The current version of Rule 4(d), which allows a plaintiff to request that the defendant waive service,[37] is similar to the language used in the 1983 version of 4(c)(2)(C) and (D);[38] however, it is longer and more detailed.[39] The goal of Rule 4(d) is to "eliminate the costs of service of a summons on many parties and to foster cooperation among adversaries and counsel."[40] This waiver provision is most useful when the defendants are furtive, when process servers have difficulty serving defendants, or when the defendants are out of the United States and would require a substantial and unnecessary cost to serve the defendants.[41] However, waiver of service can only be used on a limited number of defendants.[42] The request for waiver can be made by first class mail or "other reliable means,"[43] which should be broadly interpreted.[44] The Advisory Committee's Notes to Rule 4(d), for example, note that electronic communications may be even more reliable and convenient for parties.[45] In either case, however, the receiver of a request to waive service has a duty to cooperate and avoid costs.[46]

Not only is it permissible to request waiver by mail, but many state laws also allow service of process by mail, though some states limit its use.[47] Service by mail or other means under state law is permissible in federal

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2005). *See* Yvonne A. Tamayo, *Catch Me If You Can: Serving United States Process on an Elusive Defendant Abroad*, 17 HARV. J.L. & TECH. 211, 235–45 (2003) (discussing serving process under international law, under the Hague Convention, and in countries not signatories to the Hague Convention and in countries not signatories to the Hague Convention); Conley, *supra* note 2, at 412–14 (discussing what forms of service are permissible under the Hague Convention).

37. *See supra* note 31 (discussing waiver of service).

38. FED. R. CIV. P. 4(d) advisory committee's note. For a discussion on why the 1983 amendment to Rule 4 permitted service of process by mail, see 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1092.1 (3d ed. 2002). *See also* Kent Sinclair, *Service of Process: Amended Rule 4 and the Presumption of Jurisdiction*, 14 REV. LITIG. 159, 160–63 (1994) (discussing the history of Rule 4).

39. WRIGHT, *supra* note 38, § 1092.1. The former text of Rule 4 described this method of process as service by mail, which mislead plaintiffs to think that service could be affected by mail without the defendant cooperating. *Id.*

40. *Id.* (quoting FED. R. CIV. P. 4(d) advisory committee's notes).

41. FED. R. CIV. P. 4(d) advisory committee's notes. In addition, the Advisory Committee saw it unnecessary to comply with all the formalities of service in a foreign country, including the cost of translation when the defendant is fluent in English, in cases where the defendant can waive service. *Id.*

42. *See* FED. R. CIV. P. 4(d) (limiting the use of waiver to parties that are subject to service under subsections (e), (f) and (h)).

43. FED. R. CIV. P. 4(d)(2)(B).

44. WRIGHT, *supra* note 38, § 1092.1.

45. FED. R. CIV. P. 4(d) Advisory Committee's Notes.

46. *Id.*

47. Tatyana Gidirimski, *Service of United States Process in Russia Under Rule 4(f) of the Federal Rules of Civil Procedure*, 10 PAC. RIM L. & POL'Y J. 691, 692–93 (2001). *See infra* notes 171–72 and accompanying text (discussing state laws about service of process by mail).

courts under Rule 4.[48] However, issues can arise as to whether these means are permissible after waiver is attempted under Rule 4(d).[49]

Service may be made on a foreign defendant under international or foreign law under Rule 4(f).[50] Rule 4(f) places high emphasis on complying with international and foreign law.[51] The Advisory Committee's Notes to Rule 4(f)(3) suggest that other methods of service should be limited under 4(f), so that the method used "is consistent with due process and minimizes offense to foreign law."[52] As a result, courts are mindful to respect international and foreign laws by not allowing plaintiffs to serve process in ways that might violate these laws,[53] since in some countries serving process other than by the means permitted is a criminal offense.[54]

C. *Personal Service of Process Preferred Over Alternative Forms of Service of Process*

Traditionally, personal service of process was deemed necessary in actions styled *in personam*.[55] This is because personal service is the best way to guarantee that an individual receives actual notice of a pending legal action and presents the ideal circumstances under which to commence legal proceedings against a person.[56] As a result, when parties use or ask courts to

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48. *See supra* note 34 (quoting Rule 4(e)).

49. *See* 62B AM. JUR. 2D *Process* § 231 (2002) (noting a split in the courts as to whether service by mail under state law is permissible after waiver of service under Rule 4(d) has failed).

50. *See supra* notes 35–36 and accompanying text (discussing what is permissible under Rule 4(f)).

51. Gidirimski, *supra* note 47 at 694. *See* FED. R. CIV. P. 4(f)(2)(C), (3) (prohibiting service in manners that are prohibited by foreign law or international agreement).

52. FED. R. CIV. P. 4(f)(3) advisory committee's notes.

53. *See generally*, *Prewitt*, 353 F.3d at 922–28 (finding that Austrian law prohibited service of process on OPEC as set forth in Rule 4(f)(c)(ii)); Mayoral-Amy v. BHI Corp., 180 F.R.D. 456, 460 (S.D. Fla. 1998) (finding service of process by facsimile insufficient on Belize defendant because facsimile was not an approved method of service in Belize and the plaintiff did not attempt to serve the defendant under Belize law); Proctor & Gamble Cellulose Co. v. Viskoza-Loznica, 33 F. Supp. 2d 644, 664–66 (W.D. Tenn. 1998) (finding several of plaintiff's attempts at service of process insufficient because they did not comply with Yugoslavian law and finding service insufficient under Rule 4(f)(2)(B) for one defendant because there was no record from the Yugoslav court that the defendant had been served directly or indirectly); Graval v. P.T. Bakrie & Bros., 986 F. Supp. 1326, 1329 (C.D. Cal. 1996) (invalidating service of process by mail with returned receipt because it violated Indonesian law). *But see* Resource Ventures, Inc. v. Resources Mgmt. Int'l, Inc., 42 F. Supp. 2d 423, 429–30 (D. Del. 1999) (upholding service of process by international registered mail on Indonesian defendants); New England Merchs. Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 81 (S.D.N.Y. 1980) (ordering service of process by mail and facsimile on Iranian entities that refused other methods of service).

54. *See* Tamayo, *supra* note 36, at 239 (noting, "Switzerland considers service of process by any means other than by letter rogatory through Swiss governmental personnel a criminal act").

55. McDonald v. Mabee, 243 U.S. 90, 92 (1917).

56. *Id.*

permit alternative or substitute forms of service,[57] which give an individual constructive notice,[58] courts often compare these other methods to personal service.[59]

Often a method of service that is permissible and sufficient to meet due process requirements in one case may not be permissible or sufficient in another.[60] Thus, courts balance the interests of the notice giver against the right of the individual being served.[61] In testing the method of service, courts often have to look to the realities of the case before it.[62] Courts hold that the reasonableness of the notice provided to an individual must be tested with reference to the existence of "feasible and customary" alternatives and supplements to the method of notice trying to be used.[63] However, the form to be used must be the most likely to reach the defendant.[64]

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57. Substituted service is "[a]ny method of service allowed by law in place of personal service." BLACK'S LAW DICTIONARY 1372 (7th ed. 1999).

58. Constructive service is "[s]ervice accomplished by a method or circumstance that does not give actual notice." *Id.*

59. The Supreme Court has stated, "[p]ersonal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding." *Mullane*, 339 U.S. at 313. In *Greene v. Lindsey*, the Court stated:

> Short of providing personal service, then, posting notice on the door of a person's home would, in many or perhaps most instances, constitute not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him.

Greene v. Lindsey, 456 U.S. 444, 452–53 (1982). *See also* Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 491 (1988) (holding that due process required actual notice to reasonably ascertainable creditors of estate before a nonclaim statute could begin to run); *Mullane*, 339 U.S. at 315–16 (explaining why actual notice is typically preferred over notice by publication); *Pennoyer*, 95 U.S. at 734 (advocating that personal service is required before a defendant could be bound by any judgment rendered against him); *Roller*, 176 U.S. at 403 (comparing service of process by publication to personal service).

60. Miserandino v. Resort Props., Inc., 691 A.2d 208, 212 (Md. 1997); Dobkin v. Chapman, 236 N.E.2d 451, 458 (N.Y. 1968).

61. *Mullane*, 339 U.S. at 313–14; *Miserandino*, 691 A.2d at 212.

62. *Greene*, 456 U.S. at 451. In *Greene*, the Court found that the posting of a notice of an eviction on the tenant's apartment door in an area where process servers knew that children frequently removed notices from doors was not a "reliable means of acquainting interested parties of the fact that their rights [were] before the courts." *Id.* at 454 (quoting *Mullane*, 339 U.S. at 315).

63. *Id.*

64. *McDonald*, 243 U.S. at 92. As a result, under certain circumstances, mail seems to be the second preferred method of service. *See Greene*, 456 U.S. at 455 (finding that under the circumstances mail was a more preferred method of service over posting). Service by publication, as well as other forms of service, are then typically permitted when it is not reasonably possible or practicable to give the defendant actual notice. *Mullane*, 339 U.S. at 317.

D. Permissibility of E-mail on the Rise

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

The most noteworthy decision to date on whether service of process by e-mail is permissible is *Rio Properties, Inc. v. Rio International Interlink*.[65] In that case, the Ninth Circuit Court of Appeals became the first appellate court to uphold a district court order authorizing service of process by e-mail.[66] The plaintiff attempted to serve the defendant through conventional means of service in the United States[67] and through the defendant's attorney.[68] After these means failed, the district court granted the plaintiff's request to use e-mail as an alternative form of service of process under Rule 4(f)(3).[69]

In upholding the order, the Ninth Circuit left it to the discretion of district courts to balance the limitations of e-mail service against its benefits in any particular case.[70] However, despite the endorsement of service of process by e-mail, the court recognized the possible limitations of service in this manner.[71] In addition, the court held that Rule 4(f)(3) is neither a "last resort" nor "extraordinary relief,"[72] and that a plaintiff need not attempt every permissible means of service of process before petitioning a court for alternative relief.[73]

2. Pre-Rio

Prior to the *Rio* decision, district courts took two opposing views regarding the issue of service of process by e-mail, either finding service by e-mail permissible or impermissible.[74] In *WAWA, Inc. v. Christensen*,[75] a district court in Pennsylvania held that service of process by e-mail was not permissible because it was not an approved method under Rule 4.[76] In making its decision, the court pointed out that the Judicial Conference Rules Committee discussed and recommended changes to Rule 4 to permit service

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65. 284 F.3d 1007 (9th Cir. 2002).

66. *Rio*, 284 F.3d at 1017. *See* cases cited *supra* note 8 (noting district courts prior to *Rio* that permitted service of process by e-mail).

67. The plaintiff tried serving one of the defendant's international couriers at a Florida address; however, the courier refused to accept service on the defendant's behalf. *Rio*, 284 F.3d at 1016.

68. *Id.* However, the plaintiff in *Rio* did not attempt to serve the defendant under Rule 4(f)(2) because the plaintiff's private investigator subsequently failed to discover the defendant's whereabouts in Costa Rica. *Id.*

69. *Id.* at 1018.

70. *Id.*

71. *See id.* (recognizing that the use of electronic signatures and the incompatibility of systems could cause problems when confirming that an e-mail has been received).

72. *Id.* at 1015 (quoting Forum Fin. Group v. President and Fellows of Harvard College, 199 F.R.D. 22, 23 (D. Me. 2001)).

73. *Id.* at 1016.

74. *See* cases cited *supra* note 8 (noting district court cases prior to *Rio* ruling on the permissibility of service of process by e-mail).

75. 44 Fed. R. Serv. 3d (Callaghan) 589 (1999).

76. *Id.* at 589.

by electronic transmission but did not change the rule to permit service by e-mail.[77] In another case, *In re International Telemedia Association, Inc.*,[78] a district court in Georgia, relying on Rule 4(f)(3) and its accompanying comments, authorized service of process on the defendant by e-mail, fax and mail.[79] The court authorized service in the case using these methods because the only means of communication utilized between the trustee and the defendant was e-mail.[80] In addition, the Georgia district court, like the court in *Rio*, distinguished the case before it from *WAWA* because the plaintiff requested the court to authorize service by e-mail and did not attempt to serve the defendant by e-mail on his own.[81]

*3. Post-*Rio

Due to a federal appellate court accepting e-mail as a means of service, district courts as well as state courts are now starting to permit service of process by e-mail following the same reasoning. A state court in New York permitted service of process on a defendant overseas by e-mail to a defendant's last known e-mail address, in addition to service by international registered airmail and international standard mail.[82] The court permitted service in these manners because the defendant locked himself out from the rest of the world and only communicated with the plaintiff through e-mail.[83]

In addition, a United States District Court in New York permitted service of process by e-mail on a foreign defendant in Taiwan[84] without first requiring the plaintiff to try serving the defendant under Rule 4(f)(2).[85]

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77. *Id.* *See* FED. R. CIV. P. 4 (showing how the Rule has not changed since the decision in *WAWA*).

78. 245 B.R. 713 (N.D. Ga. 2000).

79. *Id.* at 720.

80. *Id.*

81. *Id.* at 721 n.6. *See Rio*, 284 F.3d at 1018 (noting that the plaintiff properly requested and the district court ordered service of process by e-mail). *Cf. WAWA*, 44 Fed. R. Serv. 3d (Callaghan) at 589 (noting that the plaintiff did not request to serve the defendant by e-mail).

82. *Hollow*, 747 N.Y.S.2d at 708.

83. *Id.* In the case, the plaintiff, after filing for a divorce, attempted to serve her husband in Saudi Arabia by an international process server. *Id.* at 705. However, the international process server was unsuccessful because "the only legal and acceptable method of service in the Kingdom of Saudi Arabia [was] pursuant to . . . Letters Rogatory," which required the government's assistance and could take up to eighteen months to complete service. *Id.* In addition, the defendant worked within a company owned compound that made personal service impossible because criminal charges would have been brought against the process server if he tried to serve a member of the security force at the compound. *Id.* The defendant's employer also refused to accept service on the defendant's behalf or to become involved in assisting serving the defendant. *Id.* As a result, the court found that plaintiff exercised diligence in trying to serve the defendant and granted her an extension of time to serve the defendant and permitted her to serve the defendant under alternative means. *Id.* at 706, 708.

84. *Ryan*, 2002 U.S. Dist. LEXIS 13837, at *9. Taiwan was not a party to the Hague Convention or any other relevant international agreement. *Id.* at *4.

85. *See id.* at *8 (permitting service of process by e-mail and finding that a party need not exhaust all possible methods of service before petitioning the court for alternative

Similarly, a United States District Court in California granted service of process on two Japanese defendants by e-mail after service through the Hague Convention at various addresses listed on the defendants' website proved unsuccessful.[86] In yet another case, a United States District Court in Tennessee pursuant to Rule 4(f)(3) directed service upon a defendant by e-mail despite not knowing the defendant's e-mail address.[87] This type of conduct illustrates one of the concerns that arise when courts allow e-mail as a means of servicing a defendant because the rules regarding service of process are not followed.[88]

Fortunately, some courts are adhering to caution by following precedent and the rules regarding service of process. In *Prewitt Enterprises,*

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methods of service but must show that they reasonably attempted to perfect service on the defendant conventionally).

86. *Viz Communications*, 2003 WL 23901766, at *1–2. In the case, the defendants both resided in Japan, although the one defendant was actually a French citizen. *Id.* at *1. In denying the defendants' motions to dismiss, the court found that the plaintiff had presented sufficient evidence demonstrating its numerous attempts to locate and serve the defendants, despite the fact that the plaintiff did not attempt to serve the defendants in any manner other than through the Hague Convention. *Id.* at *2, 6. Rather, the court concluded that since the only means of contact listed on the defendants' website was e-mail, and since the mailing address listed on their domain name registration was ambiguous, the defendants were attempting to avoid service by avoiding disclosure of appropriate contact information. *Id.* at *6.

87. *Popular Enter.*, 225 F.R.D. at 562–63. In the case, the plaintiff filed its complaint and motion for a temporary restraining order by e-mail, however, the e-mail was returned undeliverable. *Id.* at 562. The court then sent a summons and a copy of the complaint to the defendant's address supplied by the defendant's domain name registrar. *Id.* Thereafter, the court sent the defendant a copy of the temporary restraining order by e-mail and overnight delivery to the same address. *Id.* However, the overnight delivery was returned as non-deliverable as the address was incorrect. *Id.* The court's restraining order was forwarded to the defendant by e-mail; however, the message was not deliverable. *Id.* Shortly thereafter, the court's preliminary injunction was forwarded to the defendant by certified mail and overnight delivery, but once again, these were returned. *Id.* However, an e-mail sent to the defendant at the same time presumably reached the defendant, as it was not returned. *Id.* In addition, a second e-mail regarding the preliminary injunction also presumably reached the defendant, as it was also not returned. *Id.* Thereafter, a copy of the complaint and summons were sent to the defendant by Federal Express and was once again returned. *Id.* Subsequently, the plaintiff attempted to serve the defendant with a summons and the preliminary injunction by e-mail to additional addresses provided by the defendant to his domain name registrar, of which only one was presumed to have reached the defendant, as it was not returned. *Id.* With the court's permission, the plaintiff then attempted to serve the defendant under the Hague Convention through the Portuguese Ministerio de Justica, however, once again, service was unsuccessful because the Portuguese Ministerio de Justica did not have a valid mailing address for the defendant. *Id.* Several months later, a summons, complaint, and the preliminary injunction were forwarded to an e-mail address the defendant had provided to its domain name registrar, which presumably reached the defendant, as it was not returned. *Id.* Upon plaintiff's motion, the court concluded that under the facts of the case, service upon the defendant by e-mail was fully authorized by Rule 4(f)(3). *Id.* at 563. In doing so, the court recognized that the Hague Convention did not apply as the defendant's address was unknown. *Id.* at 562.

88. *See infra* Parts II.B–C, III (discussing the concerns associated with not following service rules strictly).

Inc. v. Organization of Petroleum Exporting Countries,[89] the Eleventh Circuit held that a district court did not abuse its discretion in denying a plaintiff's motion to authorize alternative means of service under Rule 4(f)(3).[90] In that case, the plaintiff sought to serve the defendant, the Organization of Petroleum Exporting Countries, by e-mail after other means of service were held to violate Austrian law regarding the defendant.[91] In dismissing the case and denying plaintiff's motion to pursue alternative means of service, the court found that the defendant under Austrian law could not be effectively served with process without its consent and without the assistance of Austrian authorities.[92] The rationale behind the court's decision was that Rule 4(f)(3) required that the defendant be served in a manner that "minimize[s] offense to foreign law."[93] Since Austrian law had special service requirements for the defendant, the court respected foreign law by refusing to permit means of service under Rule 4(f)(3) that were not permissible under Rule 4(f)(2).[94]

In fact, the court dismissed the action even though the defendant had actual notice of the pending litigation, because service of process was ineffective and the court could not exercise personal jurisdiction over the defendant.[95] In doing so, the Eleventh Circuit cited *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*,[96] wherein the Supreme Court held "an individual or entity 'is not obligated to engage in litigation unless officially notified of the action . . . under a court's authority, by formal process.'"[97]

In another case, a United States District Court in Connecticut declined to permit service of process by e-mail on two defendants because it was not convinced that service by e-mail was "reasonably calculated to apprise [the]

89. 353 F.3d 916 (11th Cir. 2003).

90. *Id.* at 928. In the case, the plaintiff filed a complaint against the defendant, the Organization of Petroleum Exporting Countries (OPEC), an intergovernmental organization, and requested the court to serve the defendant by international registered mail with return receipt requested, which the court clerk did. *Id.* at 919. The summons and complaint were then received and signed by the defendant. *Id.* at 919–20. Without the defendant's participation, the court certified the plaintiff's class and entered default judgment and an order of injunction against the defendant. *Id.* at 920. The defendant then filed a special appearance and motion to set aside the default judgment and stay its enforcement, which the court later granted. *Id.* Thereafter, the defendant moved to dismiss the plaintiff's complaint on various grounds, including insufficient service of process, which the court also granted. *Id.* In upholding the district court's decision, the Eleventh Circuit noted that the plaintiff's initial means of servicing the defendant was prohibited by foreign law and not permissible. *Id.* at 923–24. In light of the dismissal, the plaintiff moved to pursue alternative means of effecting service by e-mail, however, this motion was denied as the court found that the defendant could not be effectively served with process. *Id.* at 920, 927.

91. *Id.* at 927.

92. *Id.* at 928.

93. *Id.*

94. *Id.* at 927–28.

95. *Id.* at 925.

96. 526 U.S. 344 (1999).

97. *Prewitt*, 353 F.3d at 925 (quoting *Murphy Bros.*, 526 U.S. at 347).

defendants of the pending action."[98] In that case, the court found that other permissible means of service existed and that the plaintiff failed to establish that the one defendant was in a foreign country.[99] Most recently, a United States District Court in New York declined to permit service of process by e-mail on a foreign defendant after finding that other permissible means of service were available and that the plaintiff failed to establish that the defendant had any contacts to an e-mail address other than a listing it on its website.[100] Due to the many problems associated with service of process by e-mail and the availability of traditional means of service, courts should exercise restraint as several courts have, as it is "inappropriate to conclude that simply because an entity's primary presence is on the internet, traditional means of service are automatically obsolete."[101]

II. HOW E-MAIL FALLS SHORT

Despite advantages[102] to service of process by e-mail, there are several problems with permitting service in this manner. First, there are technological problems with e-mail. The main technological problem is confirming that a defendant received notice of the claim against him. Second, the language of Rule 4 does not authorize service of process by e-mail. Third, and most importantly, service of process by e-mail conflicts with procedural due process requirements in most circumstances.

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98. *Pfizer*, 2004 WL 1576703, at *1.

99. *Id.* at *1–2. In the case, the plaintiff sought to serve two defendants by e-mail. *Id.* at *1. Although the one defendant resided in India, the plaintiff was unable to establish the address or country in which the second defendant resided. *Id.* at *1–2. In addition, in requesting the court's permission to serve the defendants by e-mail, the plaintiff failed to identify clearly the e-mail addresses it intended to utilize in perfecting service. *Id.* at *1. In fact, of the addresses proposed by the plaintiff, the court was unable to call up websites for the domain names identified by the plaintiff. *Id.* Further, the court noted that in requesting the court to permit service by e-mail, the plaintiff did not investigate other means of serving the defendants or determine whether service on the defendants could be perfected in some manner in the United States, such as through an agent. *Id.* at *2.

100. *Ehrenfeld*, 2005 WL 696769, at *3. In the case, the plaintiff sought to serve the defendant, a Saudi Arabia resident, by several means, including sending an e-mail to the e-mail address on the defendant's website. *Id.* at *2. In ruling on the plaintiff's motion to serve the defendant under Rule 4(f)(3), the court found several of the means proposed by the plaintiff, other than e-mail, permissible. *Id.* at *3. In declining to allow service of process by e-mail, the court found that the e-mail address proposed by the plaintiff was not undisputedly connected to the defendant or shown to be used by the defendant for business purposes. *Id.* Specifically, the court concluded that the information provided by the plaintiff failed to lead to the conclusion that the defendant maintained the alleged website, monitored the proposed e-mail address, or would likely receive information sent to the e-mail address. *Id.* In fact, the court distinguished the facts of the case from *Rio*, holding that the e-mail address proposed by the plaintiff was merely "an informal means of accepting requests for information rather than for receiving important business communications." *Id.*

101. *Pfizer*, 2004 WL 1576703, at *2.

102. *See supra* note 2 (discussing advantages to e-mail).

A. Technological Problems with Service of Process by E-Mail

There are several technological problems with permitting service of process by e-mail. Most of these problems go to one major disadvantage; there is no way to confirm that a defendant actually has notice of a claim against him. This is a problem despite the fact that the proof required in confirming that the defendant has notice of a claim under Rule 4 is different for substitute methods of service, such as e-mail, compared to traditional methods of service.[103]

1. Return Receipt, What Does it Confirm?

The first confirmation problem is that return receipt features, which allow a person either to be notified of the delivery of a sent e-mail[104] or to be notified of a read e-mail,[105] are frequently limited to e-mails sent to and from the user's server.[106] Another limitation of return receipt features is that systems that claim to be compatible often are not, so when a sender requests a return receipt he does not receive confirmation that the e-mail reached its destination.[107] However, there are now companies emerging online that specialize in providing service of process of documents via e-mail.[108]

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103. Jenna Karadbil, *Service by Email*, 10 NEV. LAW. 21, 31 (2002). Substitute methods of service only require proof that notice was sent to a particular place or in a particular manner. *Id.* Traditional methods of service, such as by mail or personal service, require proof that the defendant actually received notice in the form of an affidavit or certified mail receipt. *Id. See* FED. R. CIV. P. 4(d)(4) (stating that an action shall proceed after a waiver of service has been filed); FED. R. CIV. P. 4(l) (explaining the type of proof of service required for various means of service, including personal service). However, a party's failure to show proof of service does not affect the validity of the means of service. *Id.*

104. Some e-mail providers permit a user to receive confirmation that an e-mail has been delivered to a receiptant's e-mailbox. The Netscape Unofficial FAQ, *Why Doesn't Return Receipt Work*, http://www.ufaq.org/commonly/new-rrcpt.html (last updated Dec. 14, 2004) [hereinafter *Why Doesn't Return Receipt Work*].

105. America Online, for example, allows a user to request an e-mail notification when the recipient of his e-mail reads the e-mail and allows users to check the status of an e-mail after it has been sent. AOL Mail on the Web, Reading Messages, http://d04.webmail.aol.com/Help/detail_messages_reading.aspx (last visited July 10, 2005); AOL Help Library, Requesting a Return Receipt, http://www.aol.ca/help_files/canada_help9/About_Email/Sending_E-mail/Requesting_a_return_receipt.htm (last visited June 18, 2005).

106. The features on America Online are limited to users of the system. AOL Help Library, *supra* note 105.

107. A majority of e-mail software do not support return receipts, and those that do support return receipts often become disabled. ReadNotify, Return Receipt Email-FAQ, http://www.readnotify.com/readnotify/text/faq.asp (last visited July 10, 2005). *See Why Doesn't Return Receipt Work*, *supra* note 104 (discussing the technical aspects of when and how compatibility among e-mail providers allows a return receipt).

108. A company called Proof of Service-electronic (PoS-e) specializes in sending e-mail and attachments that require delivery confirmation. Proof of Service-electronic, Benefits of Using Proof of Service-electronic, http://www.pos-e.com/htmls/benefits.htm (last visited June 18, 2005). Users of the service send PoS-e the e-mail and any attachments they want sent, which PoS-e then sends to the recipient. *Id.* After the PoS-e e-mail has been sent, PoS-e sends the sender and the recipient a digital Certificate of Proof

In addition, systems that have the return receipt feature are not always accurate as to whether the e-mail was actually read by the recipient.[109] For example, Microsoft Outlook does not require a user to open his e-mail before being able to view it, so users can actually read a message on the computer screen without actually "reading" the e-mail in the sense that returned receipt requires for confirmation.[110] These limitations make it difficult to determine whether a defendant has actually received notice despite the use of return receipt features.

Even in instances when a return receipt confirms the delivery of a message to an e-mail address, problems of determining whether the defendant has received notice of a claim against him still exist. A return receipt merely confirms that someone opened an e-mail message. It does not provide the identity of the individual that actually opened the e-mail message, which further complicates the issue because in today's technological age, 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. Consequently, additional legal issues that are not the focus of this Article arise in cases when an e-mail has not been opened by the intended recipient, such as whether the individual opening the e-mail is an agent of the intended recipient or is likely to apprise the intended recipient of the e-mail message and its contents.

2. *Are You Sure You Want to Delete this Message?*

A second problem with confirmation is that over half of Americans delete e-mail messages without opening them, especially if the sender is someone that they do not know[111] or if the e-mail looks suspicious.[112] The reasons that e-mail users delete mail from those they do not know varies,

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of Service, which using encrypted codes verifies every detail of the transaction, including what documents were served, to whom and when. *Id.*

Another company, ReadNotify, has a similar service that even allows the e-mail sender to find out when the recipient opened and read the e-mail, how long it was open for and whether the e-mail was forwarded or published on the internet. ReadNotify, ReadNotify.com—What is it and how does it work?, http://www.readnotify.com/readnotify/about.asp (last visited June 18, 2005). The service works with all the popular e-mail programs and includes digital certificates to prove when the sender posted the e-mail, when it was delivered, and when and where it was opened and read. ReadNotify, ReadNotify.com Answers to Frequently Asked Questions, http://www.readnotify.com/readnotify/faq.asp#SendWhat (last visited July 10, 2005).

109. Karadbil, *supra* note 103, at 31.

110. *Id.* *See* Microsoft Corp., *Save Time with Effective Email Management*, http://www.homebizbuzz.co.nz/article.php3?ArticleID=270 (last visited Oct. 13, 2005) (discussing how to view portions or entire e-mails without opening an e-mail using Microsoft Outlook).

111. Nua, *Americans Delete Unrecognized Email*, http://www.nua.com/surveys/index.cgi?f=VS&art_id=905357968&rel=true (last visited June 18, 2005).

112. Laurianne McLaughlin, *Essentials of E-Mail Etiquette*, http://aolsvc.pcworld.com/computercenter/aol/article/0,aid,80624,00.asp (last visited May 29, 2005).

ranging from spam[113] to the fear of getting a virus.[114] Some e-mail users even delete or skip messages because the subject heading does not appear important or because the message is from someone they do not know.[115]

a. Spam, No Longer Just Skipped at Dinner

One reason why e-mailers delete a significant amount of the mail they receive is that the e-mail is often spam, which is annoying and bothersome.[116] Spam is so annoying and bothersome that some in the computer industry think that people will eventually give up on communicating through e-mail if the problem continues.[117] The reason for this is that there currently is a "spam explosion" that Internet companies cannot control.[118] As a result, over a third of all e-mail sent now consists of spam.[119] The problem is so bad that in 2002, Microsoft reported that eighty

113. Spam is unsolicited e-mail sent out in bulk to many e-mail users. *The Trouble with Spam*, 2002 A.B.A. SEC. PUB. UTIL., COMM. & TRANSP. L. REP. 215 [hereinafter ABA]. To e-mail users it is the same thing as getting junk mail. *Id.* Like junk mail, spam advertising varies. The most common types of spam are for adult-orientated or pornographic websites, general goods or services and financial marketing. Nua, *Pornographic Spam on the Increase*, http://www.nua.com/surveys/index.cgi?f=VS&art_id=905358127&rel=true (last visited July 10, 2005) [hereinafter *Pornographic Spam on the Increase*]. In particular, the most annoying and bothersome spam are those that advertise pornography, Viagra, sexual devices and other similar items, which normally contain graphic language and descriptions. ABA, *supra* note 113, at 217. This type of spam has increased dramatically over the last year and is one of the most common types of spam. *Pornographic Spam on the Increase*, *supra* note 113. *See also* David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F. L. REV. 325, 325–27 (2000) (discussing the problem with spam and the variety of mechanisms that can and have been used to fight it).

114. A computer virus is a "computer code that is designed to be functionally similar to a biological virus in the sense that it uses its host to spread itself through a system. Just as a biological virus exploits the characteristics of its host to survive and replicate, a computer virus is designed to exploit the characteristics of a computer system and the activities of its users." JULIE K. PETERSON, THE TELECOMMUNICATIONS ILLUSTRATED DICTIONARY 968 (2d ed., CRC Press 2002) (1999). *See id.* at 968–70 (discussing how a virus affects a computer system).

115. McLaughlin, *supra* note 112.

116. ABA, *supra* note 113, at 215 n.19 (noting the results of a survey conducted on e-mail users regarding their opinion of receiving spam).

117. Nua, *Spam Likely to Kill Off the Internet's 'Killer App'*, http://www.nua.com/surveys/index.cgi?f=VS&art_id=905358107&rel=true (last visited July 10, 2005) (quoting Eric Allman, the author of the world's first commercial e-mail application).

118. *Id.*

119. Some surveys report that around thirty-five percent of e-mail received by e-mail users is spam. Don Oldenburg, *Spam and Ughs*, WASH. POST., Sept. 2, 2002, at C01; *More Email Accounts, More Spam*, *supra* note 6. Another survey suggests that thirty-two percent of all e-mails sent is spam and that in 2002 the number of spam e-mails increased by fifteen percent. Nua, *A Third of All Email Sent is Spam*, http://www.nua.com/surveys/index.cgi?f=VS&art_id=905358370&rel=true (last visited June 20, 2005). It is estimated that by 2006, unsolicited e-mails will consist of over thirty-nine percent of all e-mails sent daily. *Id.*

percent of the messages that pass through its free e-mail accounts on Hotmail are spam, not including the spam automatically blocked from entering the system by its filtering software.[120]

The reason there is a spam problem is that spam is the most cost efficient way for website owners to advertise their sites.[121] This is because a spammer, a person sending spam to advertise a website, normally only gets paid a few cents for each time someone visits the site.[122] Therefore, to make money spammers have to maximize the number of people visiting the site by sending out spam with a hypertext link to the website hoping to entice people to click on it and visit the site.[123] To send the e-mail to the largest amount of people possible, spammers scan discussion groups,[124] acquire lists of e-mail addresses,[125] send random e-mails to addresses at popular domain names[126] and use software.[127] In addition, spam mail often contains a link in the e-mail allowing e-mailers to remove themselves from the spam address list; however, this only confirms the e-mail address for spam.[128]

One of the ways that service providers and e-mail users try to fight spam is through passing legislation.[129] However, legislation at the federal level is relatively new and whether it will be a solution to the spam epidemic remains to be seen.[130] The somewhat more effective way to fight spam is with the use of filtering systems.[131] However, there are problems with these filtering systems. First, if the filter is set too tight, messages that are not

120. *Hotmail Admits Spam Overload*, COMPUTING, August 15, 2002, at 19; Dave Birch, *Second Sight: Let's Make the Spammers Pay*, THE GUARDIAN (London), August 15, 2002, at 2, *available at* 2002 WLNR 3500492. In the same report, it was noted that the average e-mail account received approximately thirty to forty spams per day. *Id.*

121. ABA, *supra* note 113, at 215.

122. *Id.* at 215–16.

123. *Id.* at 216.

124. Earthlink, *Spaminator FAQ*, http://www.earthlink.net/home/tools/epa/spaminator/spamfaq/index.html (last visited May 29, 2005).

125. ABA, *supra* note 113, at 216.

126. *Id.* The most frequent targets of this type of spamming are the free e-mail services, such as Yahoo! and Hotmail, and large Internet and e-mail providers, such as America Online. *Id.*

127. Birch, *supra* note 120, at 2. For example, the software will send the spam to alex, bob, chuck at something.com then move on to alex1, bob1, chuck1 and so forth. *Id.* Using this software costs spammers little, so they can run their computers all day long sending spam. *Id.* The software is also automated so that hundreds of thousands of e-mails are sent out quickly without the spammer having to do anything but get it started. ABA, *supra* note 113, at 216.

128. Birch, *supra* note 120, at 2; Earthlink, *supra* note 124.

129. *See* ABA, *supra* note 113, at 222 (discussing types of spam regulation laws passed in some states); David E. Sorkin, *Spam Laws: United States: State Laws: Summary*, http://www.spamlaws.com/state/summary.html (last visited July 10, 2005) (discussing laws that have been passed in twenty-nine states regulating the use of spam).

130. Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM), 15 U.S.C. § 7701 (West Supp. 2005). Congress passed the Act on December 16, 2003 and it became effective January 1, 2004. *Id.*

131. Oldenburg, *supra* note 119.

spam wind up in the spam box.[132] Second, if the filter is not set tight enough, spam will get through to e-mailboxes.[133] In addition, some filters have an option to have e-mail immediately deleted if sent to the junk mail folder,[134] which means that e-mail diverted to the spam filter does not reach its intended audience. This creates an additional problem in confirming whether a defendant received an e-mail notifying him of a claim against him because the defendant is not deleting the e-mail from his mailbox, but rather, the filter is deleting the message because it thought the message was junk mail.

b. The Fear of Getting Your Computer Sick

Another reason e-mail users delete e-mail is because of the fear of contracting a computer virus. E-mail users know that if they send file attachments to someone that does not recognize the sender's e-mail address, the chances are that the recipient will delete the e-mail without ever reading the e-mail because of the fear of downloading a virus.[135] E-mail users are advised not to open e-mail attachments unless they are expecting them.[136] This holds especially true where the e-mail program automatically launches the attachment when the e-mail is opened.[137] However, attachments do not necessarily have to be downloaded or opened for a virus to attack a computer; some viruses under the right circumstances can infect a computer simply after an e-mail has been opened.[138]

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132. Yahoo! Mail admits that its filtering system, Spamguard, can put wanted messages in the Bulk Mail Folder intended for all spam. Yahoo! Mail, Yahoo! Mail Abuse Help, http://help.yahoo.com/us/mail/spam/spam-08.html (last visited July 10, 2005). Messages that are sent to this folder remain there for thirty days before the server automatically deletes them. *Id.* Hotmail's Junk Mail Filter can be set at three levels: low, enhanced or exclusive. MSN, Hotmail Plans, http://join.msn.com/?page=hotmail/plans&pgmarket=en-us&ST=1&xAPID=1983&DI=1402 (last visited June 18, 2005) [hereinafter Hotmail Plans]. When set on high, the filter catches most spam but requires users to check their Junk Mail Folder for messages that were blocked accidentally, and when set on exclusive, the filter blocks all mail that does not come from those send by people on the user's contacts or safe list. *Id. See also* Birch, *supra* note 120, at 2 (illustrating examples of types of messages that have been caught in spam boxes set up by computer companies and Internet service providers).

133. Earthlink's Spaminator, for example, only reduces the amount of spam sent but cannot eliminate all spam. Earthlink, *supra* note 124. Hotmail's filter when set on low only catches the most obvious spam, allowing other spam to get through to the user's e-mailbox. Hotmail Plans, *supra* note 132.

134. Hotmail Plans, *supra* note 132.

135. McLaughlin, *supra* note 112.

136. Scott Spanbauer, *Internet Tips: Stop Those Sneaky E-Mail Viruses in Their Tracks*, *available at* http://aolsvc.pcworld.aol.com/computercenter/aol/article/0,aid,92924,00.asp (last visited May 29, 2005). As part of this advice, e-mail users are told to delete e-mails without opening them if they were not expecting attachments and they end with .vbs, .scr, or .exe. *Id. See E-mail Safety Tips*, http://www.emailsafety.net/ (last visited July 10, 2005) (warning e-mailers not to open attachments from unknown sources).

137. Spanbauer, *supra* note 136. This feature, however, can be disabled on some programs. *Id.*

138. *See* Dickinson College, Virus Prevention—What you Need to Know, http://lis.dickinson.edu/Training/Online/General/virusprevention.htm (last visited Oct. 13,

3. Other Computer and Technological Problems

There are also a multitude of other problems with permitting service of process by e-mail that contribute to the problem of confirming whether an e-mail was delivered or opened. These problems include: (1) many e-mail users having several e-mail accounts;[139] (2) e-mail accounts often having limitations on the amount of e-mails that can remain in a mailbox at once;[140] (3) problems sending and receiving attached files; and (4) although it is possible in some cases to determine whether an e-mail has been opened, there is currently no way of determining whether an attachment to an e-mail has been opened and read.

B. Service of Process by E-Mail Not Expressly Permissible Under the Current Federal Rule

Another problem with service of process by e-mail is that the current version of Rule 4 does not expressly address or authorize service in this manner.[141] One author, trying to find a way for e-mail to fit into Rule 4, suggests that the answer to whether e-mail is a permissible form of service

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2005) (pointing out how several computer viruses have infected some Windows users using Microsoft Outlook programs).

139. Most Internet users have one or two e-mail addresses, while nearly a quarter of Internet users have three or more e-mail accounts. *More E-mail Accounts, More Spam*, *supra* note 6. In the United States, eighty percent of workers that have e-mail accounts at work also have at least one alternative account beyond the workplace. Scott, *supra* note 6. For example, if you have either AOL or Compuserve, you may already have a Netscape e-mail account. Netscape, Netscape Mail, https://my.screenname.aol.com/_cqr/login/login.psp?siteId=nscpenusmail&authLev=2&mcState=initialized&triedAimAuth=y (last visited June 19, 2005) [hereinafter *Netscape Mail*].

140. For example, Yahoo! Mail e-mailboxes are limited to one GB but can be expanded to two GB with Yahoo! Mail Plus. Yahoo! Mail, Take a Closer Look at Yahoo! Mail, http://info.mail.yahoo.com/ (last visited July 10, 2005). Netscape e-mailboxes have 250 MB for all messages. *Netscape Mail*, *supra* note 139. Once you reach the quota, e-mail cannot be received or sent until room is cleared and deleted messages are moved to Trash, which counts towards the quota until the Trash is emptied. Netscape, Netscape Mail Help, http://ncmail.netscape.com/help.adp?section+reading#ReachingQuota (last visited Sept. 2, 2005). AOL mail can hold 1,000 pieces of new mail, 550 of old mail and 550 of sent mail. AOL Help, Is There a Limit on How Many Messages I Can Have?, http://www.help.aol.com/help/search.do?cmd=displayKC&docType=kc&externalId=http—helpchannelsaolcom-SearchDatakjumpadpcatId1sCId102sSCId1021articleId190672&sliceId=&dialogID=64044446 (last visited July 10, 2005). Further, received mail stays in the mailbox for up to thirty days. AOL Help, Why are Some Messages No Longer Available?, http://www.help.aol.com/help/search.do?cmd=displayKC&docType=kc&externalId=http—helpchannelsaolcom-SearchData-kjumpadpcatId1sCId107sSCId1071articleId72208&sliceId=&dialogID=64072074 (last visited June 19, 2005). Unread e-mail remains in the New Mail list for twenty-seven days and read mail remains in the Old Mail list for up to three more days. *Id.* Hotmail limits its e-mailboxes to 250 MB e-mail. MSN Hotmail, MSN Announces Comprehensive Worldwide Upgrade to MSN Hotmail, http://www.imagine-msn.com/hotmail/en-US/faq.aspx (last visited July 10, 2005).

141. *See supra* Part I.B (discussing the methods of service permissible under Rule 4).

lies in whether e-mail is "mail" under Rule 4.[142] However, if e-mail is "mail" under Rule 4(d), this does nothing more than permit e-mail to be used as a means of requesting waiver of service.[143] If e-mail is not "mail" under the rule, then it may very well be an "other reliable means," which is a permissible means of requesting the defendant to waive service.[144] Since Rule 4(d) does not answer the question of whether service of process by e-mail is permissible under the Federal Rules, the inquiry must continue to other sections of the Rule.

The next likely place to look is 4(e), which permits service of process by means permitted under state law.[145] However, no state law at this time expressly permits service of process by e-mail under any circumstance,[146] nor does any state law define e-mail to be mail. However, even if a state did permit service of process by e-mail or define e-mail as mail, the state law would be subject to analysis under the Fourteenth Amendment.[147]

The next place to look is 4(f), as several courts have done, including *Rio*.[148] This portion of the Rule governs the "Service Upon Individuals in a Foreign Country."[149] In this section of the rule, the only part that allows for service of process in ways not permitted under international agreements or laws of the foreign country is 4(f)(3).[150] However, permitting service of process under this subsection would defeat the purpose of 4(f)(2),[151] which is in place to ensure that laws of the foreign countries are not offended.[152] That is why parties should attempt service by all other reasonable conventional methods of service before requesting permission to use e-mail as a method of service of process. Only if all traditional methods fail, should a plaintiff seek

142. *See* Cantor, *supra* note 2, at 956 (suggesting that if e-mail is considered mail, under Rule 4(e)(1) a plaintiff could serve a defendant under an applicable state rule).

143. *See* FED. R. CIV. P. 4(d) (permitting mail and other reliable means of communication to request that the defendant waive service).

144. *See supra* note 143 and accompanying text (noting the effect of defining e-mail as mail under Rule 4). In addition, e-mail is a permissible method to request waiver because it would meet the purposes of waiver by deterring costs. *See supra* note 44 and accompanying text (discussing the goals of Rule 4(d)).

145. *See supra* note 34 (quoting Rule 4(e)(1)).

146. *Contra* KAN. STAT. ANN. § 61-3003 (2001) (permitting service of process by facsimile or e-mail in garnishment cases). *But see* 2002 Kan. Sess. Laws 198 (amending KAN. STAT. ANN. § 61-3003 to limit service of process by e-mail only to e-mail addresses designated by the garnishee and stating that service is not complete until the garnishee replies to the e-mail).

147. *See supra* note 10 (noting the similarities between the Fifth and Fourteenth Amendment Due Process Clauses).

148. *See supra* Part I.D (discussing *Rio*, *Ryan*, *Int'l Telemedia*, *Viz Communications*, and *Popular Enters.*).

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

150. *See supra* note 33 (quoting Rule 4(f)(3)).

151. *See supra* note 35 (quoting Rule 4(f)(2)).

152. Methods of service of process, such as e-mail, that violate the law of the foreign country are not generally permitted under the federal rules. FED. R. CIV. P. 4(f) and the Advisory Committee's Notes.

a court order under Rule 4(f)(3). The use of means under Rule 4(f)(3) without attempting other forms of service first or without a court order will likely be deemed ineffective.[153]

The final place to look is 4(h).[154] This section permits service of process by personal service,[155] by methods permissible under 4(f),[156] and by means permitted under federal law.[157] Of these three means of service, the only one that may permit service of process by e-mail is a federal law.[158] However, right now there is only one federal law that permits service of process by e-mail and that particular law only permits service of process by e-mail in certain types of actions.[159]

C. *Service of Process by E-Mail Does Not Meet Procedural Due Process Requirements*

The right to be heard is useless unless the party is informed that a matter is pending against him and he can choose for himself whether to appear or default, acquiesce or contest.[160] In order for a party to exercise his right to be heard, he must have notification of the claim.[161] That is why after a complaint is filed, the suit cannot proceed without the defendant being properly served[162] in a manner that is prompt and certain.[163] A case has

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153. Lori E. Lesser, *Litigating in Cyberspace: New Trends in Internet-Related Litigation*, 712 PRACTISING L. INST. 9, 18–19 (2002); *Service of Process*, *supra* note 12.

154. Rule 4(h) provides:

> (h) Service Upon Corporations and Associations.
>
> Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:
>
> (1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy . . .
>
> (2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

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

155. FED. R. CIV. P. 4(h)(1).

156. FED. R. CIV. P. 4(h)(2). *See supra* notes 33, 35 and 36 and accompanying text (discussing what is permissible under Rule 4(f)).

157. FED. R. CIV. P. 4(h).

158. This assumes that there is no international law or agreement that makes e-mail a permissible means of service under Rule 4(f).

159. *See supra* note 32 (discussing the Anticybersquatting Consumer Protection Act).

160. *Mullane*, 339 U.S. at 314.

161. *Fuentes*, 407 U.S. at 80.

162. B-S Steel of Kansas, Inc. v. Texas Indus., Inc., No. 01-2410-JAR, 2002 WL 31006574, at *2 (D. Kan. Sept. 3, 2002) (citing Peay v. BellSouth Med. Assistance Plan, 205 F.3d 1206, 1209 (10th Cir. 2000)). In addition, a court must have personal jurisdiction over the defendant in order to proceed with a suit. *Id.* Personal jurisdiction and service of process are related concepts; however, they are distinct and require separate inquiries. *Id.* Additionally, the nature of an action has no bearing on the constitutional assessment of the reasonableness or the constitutionality of the procedures employed in that action. *Greene*, 456 U.S. at 450. This Article has focused on service of process and has assumed that in any particular case a court has personal jurisdiction over the

never been able to proceed without a court first being satisfied that an attempt to inform the defendant about a claim against him was made, even where the defendant is avoiding service.[164] This is because one of the "elementary and fundamental requirement[s] of due process in any proceeding[,] which is to be accorded finality[,] is notice reasonably calculated, under all the circumstances, to apprise [the] interested part[y] of the pendency of the action and afford [him] an opportunity to present [his] objections."[165]

It has been suggested that e-mail, unlike most other methods of service, is actually a better way to ensure that a defendant receives notice of a claim against him.[166] Part of this rational is that the delivery of an e-mail is quick and has none of the physical restrictions often found with traditional methods of service.[167]

Some argue that delivery confirmation of an e-mail is adequate because due process only requires that a plaintiff deliver notice to the defendant, not that the defendant read the notice.[168] However, confirming the delivery of an e-mail does not demonstrate that a defendant has notice of a claim against him. Other problems still exist.[169] For example, the defendant might delete the message without reading it because it is from someone that he does not know and believes that it may be either spam or contain a virus.[170] E-mail, unlike other forms of service such as mail, does not have the same guarantees that the defendant knows of claims against him. Mail, when permitted as a means of service,[171] requires confirmation that the summons

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defendant. Therefore, the distinctions between "in personam," "in rem" and "quasi in rem" have had no bearing on the analysis in this Article of whether service of process by e-mail is or should be permissible. *See Mullane*, 339 U.S. at 312–13 (noting that the distinctions between "in rem" and "in personam" have no baring on the power of a court to resort to the use of constructive notice).

163. *Greene*, 456 U.S. at 451.

164. Conley, *supra* note 2, at 427.

165. *Mullane*, 339 U.S. at 314.

166. *See* Yvonne A. Tamayo, *Are You Being Served?: E-Mail and (Due) Service of Process*, 51 S.C. L. REV. 227, 252 (2000) (relying on the ability of e-mail to circumvent physical restrictions that impede traditional methods of service); Cantor, *supra* note 2, at 964–66 (relying on the speed, security and efficiency of e-mail, as well as the habits of many users to check their e-mail frequently).

167. *See* Tamayo, *supra* note 166, at 252 (comparing e-mail to traditional methods of service of process that can be limited).

168. *See id.* at 166, at 256 (relying on the presumption in the law that papers delivered will be read). In *Dobkin*, the high court in New York also noted that notice is only required to be given and not received, but the court was primarily referring to cases in which publication is used as the means of notification. *Dobkin*, 236 N.E.2d at 458.

169. *See supra* Part II.A (discussing the technological problems with service of process by e-mail).

170. *See supra* Part II.A.2 (discussing reasons why e-mail users delete e-mail messages without reading them).

171. As stated previously, under the Federal Rules of Civil Procedure, mail is permitted to request waiver of service. *See supra* note 31 (discussing ways mail can be used as a form of service). However, some states allow service of process by mail under state law, which is permissible as a means of service in federal court under Rule 4(e)(1) and 4(h)(1). *See infra* note 172 (noting that some states permit service by mail).

and complaint were physically placed in the defendant's hands or in the hands of someone who will likely give it to the defendant.[172] The law presumes that served defendants will read delivered papers.[173] In the case of e-mail, the presumption fails to hold true because e-mail users currently have to sift through massive amounts of junk to get to the truly important messages.[174] Unlike mail, e-mail comes in the same form all the time and does not require a signature or have a sticker declaring its importance.[175] Proponents of service of process by e-mail note that the United States Postal Service now offers an electronic postmark[176] on e-mail.[177] However, that device has its own limitations.[178]

Some suggest that e-mail may be constitutionally required as a means of service in situations where e-mail is the only means of contacting the defendant because a contract or the activity involved in the suit occurred

172. *See* Cantor, *supra* note 2, at 954–55 n.69 (citing state statutes that allow service of process by mail, however, often require the mail to be sent by certified mail, registered mail or with a returned receipt).

173. Tamayo, *supra* note 166, at 256.

174. See Campbell v. Gen. Dynamics Gov't Sys. Corp., 321 F. Supp. 2d 142, 148–49 (D. Mass. 2004) (recognizing the difference between e-mail and mail, including the massive amount of e-mails an individual can receive). *See also supra* Part II.A (discussing problems associated with spam).

175. Requests for waiver and service of process by mail are often sent using certified mail. *See supra* note 172 (noting state law requirements to using mail as a form of service of process). Sending mail by certified mail provides the sender with a receipt that the item was sent and online access to confirm the date and time of delivery. United States Postal Service, Certified Mail, http://www.usps.com/send/waystosendmail/extraservices/certifiedmailservice.htm (last visited June 19, 2005). In addition, when the piece of mail is delivered the recipient's signature is obtained by the postal employee and maintained in the Postal Service's records. *Id.* In addition, return receipt is often used in conjunction with certified mail, which provides proof of delivery by containing delivery information and the recipient's signature. *Id.* The post office also offers restricted delivery, delivery confirmation and signature confirmation. United States Postal Service, Domestic Extra Services, http://www.usps.com/shipping/specialservices.htm (last visited July 10, 2005). Restricted delivery allows the sender to specify who can receive the piece of mail. *Id.* Delivery confirmation allows the sender to verify online when and where the piece of mail was delivered. *Id.* Signature confirmation allows the sender to verify online when and where a piece of mail was delivered and to have proof of who signed for the item. *Id.*

176. *See* United States Postal Service, Electronic Postmark, http://www.usps.com/electronicpostmark/welcome.htm (last visited July 10, 2005) (describing how the electronic postmark works).

177. Conley, *supra* note 2, at 424.

178. The United States Postal Service (USPS) electronic postmark currently is only available for business using special software. United States Postal Service, Developer's Toolkit, http://www.usps.com/electronicpostmark/tech.htm (last visited July 10, 2005). Compared to companies such as PoS-e and ReadNotify, the USPS electronic postmark does not provide senders of e-mail with confirmation of delivery or that the e-mail was read. *See supra* note 108 (discussing the services available through PoS-e and ReadNotify). Rather, the benefits of using electronic postmark are limited to the recipient of an e-mail because it allows the user to verify the date and time the e-mail was received and processed by the USPS. United States Postal Service, About EPM, http://www.usps.com/electronicpostmark/aboutepm.htm (last visited July 10, 2005).

entirely online.[179] Others suggest that service of process by e-mail is permissible in cases where time is of the essence or when the defendant is hard to reach and the only available method to give notice is by e-mail.[180] This notion rests upon the idea that fairness requires every reasonable attempt to inform the defendant be made so that a claim can proceed.[181] However, as previously noted, many of these types of situations already fall under a federal statute that permits e-mail as a means of service.[182] Further, just because e-mail may be the only means of informing a defendant of an action does not necessarily mean that it satisfies due process requirements. Rather, e-mail may not be a "reasonably calculated" means "under all the circumstances" to inform the defendant of the "action against him" affording him the "opportunity to present his objections."[183] The only way to determine if e-mail is a reasonable means to inform the defendant is by having a court consider all the circumstances involved in the situation, such as the relief requested by the plaintiff and the reasons for the plaintiff not perfecting service under traditional means of service.[184]

III. E-FFECTUATING SERVICE UNDER RULE 4 AND BALANCING MODERN TECHNOLOGY AND TRADITION

Recently, the Federal Rules of Appellate, Bankruptcy, Civil and Criminal Procedure have been amended.[185] However, an amendment to Rule

179. Cantor, *supra* note 2, at 966 (concluding that service of process by e-mail may be constitutionally required under certain circumstances).

180. Conley, *supra* note 2, at 427–28. See also John M. Murphy III, *From Snail Mail to E-Mail: The Steady Evolution of Service of Process*, 19 ST. JOHN'S J. LEGAL COMMENT. 73, 76 (2004) (concluding, "service of process via e-mail has been the natural response to the technological evolution and can be the most expedient method of maintaining justice where it is necessary").

181. Conley, *supra* note 2, at 428. This suggestion is similar to the holding in *Rio*. *See supra* Part I.D (discussing the *Rio* decision). Both of these suggestions would cover cases where the only truthful information the plaintiff has regarding the defendant is his e-mail address because the defendant is a cybersquatter. Karadbil, *supra* 103, at 21. However, these situations are already covered for under the ACPA, which permits e-mail as a form of service of process. *See supra* note 32 (discussing the ACPA).

182. *See supra* note 32 (discussing the ACPA).

183. *See supra* notes 288–29 and accompanying text (discussing and quoting the due process requirements set forth in *Mullane*).

184. One practitioner stated:

> [T]he judicial process has to find a way to recognize the manner in which commerce is conducted and the way in which people communicate, both of which seem to be changing at an increasing rate. Rule 4 should be the primary method of service but you are going to run into certain circumstances where you are going to need the court's help. Because the court has the discretion to view all of the circumstances, defendants' constitutional protections will likely be safeguarded and plaintiffs will not be unfairly denied the opportunity to enforce their rights[.]

Brian Keith Jackson, *Electronic Service of Process Creates Controversy*, 27 LITIG. NEWS 6 (A.B.A., Chicago, IL), July 2002, at 6 (quoting Daniel G. Dowd, Phoenix, Co-Chair of the Section of Litigation's Federal Practice Task Force).

185. Oran F. Whiting, *Supreme Court Approves Amendments to Federal Rules*, 28 LITIG. NEWS 1 (A.B.A., Chicago, IL), Nov. 2002. *See also* Charis A. Runnels, *The Latest Changes to the Federal Rules: What You Should Know*, 16 C.B.A. REC. 24, 27 (2002)

4 was not among the changes made to the Federal Rules of Civil Procedure.[186] As a result, the questions regarding e-mail as a form of service of process still linger. These questions cannot continue to linger because of the importance of service of process and satisfaction of the due process requirements.[187] If they are permitted to linger, the likelihood that a court will expand, misapply or abuse the decision reached in *Rio* will dramatically increase. This section of this Article addresses the way that the courts and legislatures should handle these questions. First, courts must continue to preserve precedent by preferring traditional methods of service to e-mail. Second, specific changes to Rule 4 need to be made limiting when e-mail may be used as a method of service of process, including the setting of strict guidelines as to the use of alternate methods of service of process.

A. Preferring History Over Technological Changes

History clearly shows that courts traditionally prefer personal service of process to other means of service.[188] Courts should continue to prefer traditional methods of service to non-traditional methods because of the assurance and certainty that the defendant is actually being informed of a claim against him.[189] In addition, to ensure that the defendant is receiving adequate notice, courts should continue to interpret the Rules of Civil Procedure strictly.[190]

(discussing the change to the Federal Rules of Appellate Procedure permitting service by e-mail if the opposing counsel consents and the party files with the court proof of service, including the e-mail address used for service).

186. *See* Whiting, *supra* note 185, at 1 (discussing the recent amendments to the Federal Rules of Civil Procedure).

187. *See supra* Part I.A (discussing the purpose of service of process).

188. *See supra* Part I.C (discussing the preference of personal service over alternative means of service). *See also* Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 799 (1983) (holding service by publication and posting were not reasonable means of notice because personal service or service by mail were constitutionally required to insure actual notice); Schroeder v. City of New York, 371 U.S. 208, 213–14 (1962) (finding service by publication inadequate when service by mail was available); Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956) (requiring service by mail or personal service over publication where the name and mailing address of the party was known).

189. *See supra* Part I.C (discussing the reasons behind preferring personal service to alternative forms of service).

190. *See, e.g.*, McDonald v. United States, 898 F.2d 466, 468 (5th Cir. 1990) (holding service by mail inadequate because under Rule 4(c)(2)(C)(ii) [new Rule 4(d)] the U.S. can not be served by mail); Staudte v. Abrahams, 172 F.R.D. 155, 156 (E.D. Pa. 1997) (interpreting Rule 4(d) to only permit waiver of service of process by mail and not service by mail); *Graval*, 986 F. Supp. at 1330 (noting "that Rule 4 must be complied with even if defendants have actual notice of the complaint"); Clark County v. City of Los Angeles, 92 F. Supp. 28, 32 (D. Nev. 1950) (holding that in federal courts service of process may be made in only the manners set forth in the Rules). *But see* Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103, 108 (2nd Cir. 1966) (holding that if service is available under Rule 4 or a local rule, and for some reason, that part of Rule 83 authorizing ad hoc rules cannot be used, the court may fashion a rule for service outside the rules); Adams v. School Board, 53 F.R.D. 267, 268 (M.D. Pa. 1971) (holding that the provisions of Rule 4 are to be interpreted broadly where defendant or defendants have received actual notice of a suit).

When determining whether a method of service of process is permissible, courts should look at the order in which rules governing service list the various methods of service and prefer methods listed in descending order.[191] Courts should require a plaintiff to use due diligence[192] and make a conscientious effort to use preferred methods of service before permitting the use of alternative means of notifying the defendant.[193] Before a court allows a plaintiff to serve a defendant by e-mail, all methods of notifying the defendant should be fully exhausted. Courts should only permit e-mail as a means of service when traditional forms of service fail and e-mail is the only remaining way to inform the defendant of the claim.[194] Courts should be reluctant and refuse to allow plaintiffs to use e-mail before attempting traditional methods, despite the Ninth Circuit's suggestions in *Rio*.[195] The justification for this response is that e-mail has limits.[196]

Over the past decade, scholars have advocated the use of facsimile as a form of service.[197] However, due to the problems that would accompany service of process by facsimile,[198] most jurisdictions have not adopted it as a method of service[199] and many courts continue to remain leery about permitting service in such a manner.[200] Courts and legislatures should be

191. *See* M. Meredith Hayes, *Parker v. Frank Emmet Real Estate: Should Plaintiff's Choice of Service of Process Method Matter?*, 32 CATH. U. L. REV. 974, 975–76 n.8 (1983) (referring to District of Columbia courts that define preferred methods of service of process in descending order as set forth in the statutes).

192. *See, e.g.*, Eisenberg v. Lin, No. 94 CV 2870, 1995 WL 468285, at *1 (E.D. N.Y. July 26, 1995) (requiring plaintiff to use due diligence in serving defendant before resorting to "nail and mail" service).

193. *See* Hayes, *supra* note 191, at 976 n.10 (referring to courts in the District of Columbia that require due diligence and a conscientious effort to use preferred methods of service before permitting the use of posting).

194. *Cf.* Hayes, *supra* note 191, at 976 (stating that service by posting is an acceptable last resort when attempts at personal and substitute service have failed). For example, courts should require a plaintiff to use a letter rogatory on foreign defendants before requesting service of process by e-mail because foreign governments are not corrupt and can service the defendant according to the foreign law. *But see Gravel*, 986 F. Supp. at 1330 (finding the plaintiff's notion that letters of rogatory would not be honored because the Indonesian government was corrupt without merit).

195. *See supra* notes 72–73 and accompanying text (noting that the *Rio* court found that service under Rule 4(f)(3) is permissible without requiring the plaintiff to attempt service through conventional methods of service).

196. *See supra* note 71 and accompanying text (noting the *Rio* court's recognition of limitations with service of process by e-mail). *See also supra* Part II.A (discussing the technological problems that accompany permitting service of process by e-mail).

197. *See* David A. Sokasits, *The Long Arm of the Fax: Service of Process Using Fax Machines*, 16 RUTGERS COMPUTER & TECH. L.J. 531, 533 (promoting the use of facsimile as a method of service).

198. *See* Catherine Rubio Kuffner, *Legal Issues in Facsimile Use*, 5 MEDIA L. & POL'Y 8, 11–12 (1996) (discussing the advantages and disadvantages to permitting facsimile to be used as a form of service of process).

199. 62B AM. JUR. 2D *Process* § 140 (2002).

200. *See Mayoral-Amy*, 180 F.R.D. at 460 (finding service of process by facsimile insufficient on Belize defendant because facsimile was not an approved method of service in Belize and the plaintiff did not attempt to serve the defendant under Belize law); Allstate Ins. Co. v. Allen, 590 N.W.2d 820, 822 (Minn. App. 1999) (finding that service of

hesitant in permitting service of process by e-mail, facsimile and other technological means and act cautiously in adhering to the famous words often cited from *New England Merchants National Bank v. Iran Power Generation & Transmission Co.*[201] because of the problems associated with technological advancements in communication.[202]

B. Proposed Amendments to Rule 4

To ensure that traditional methods of service continue to be the preferred methods of service, several changes need to be made to both the language and interpretation of Rule 4. Other commentators have suggested various changes; however, many of these suggestions are not feasible or practical.[203] For example, one commentator has suggested that an internet greeting card system be implemented to serve process.[204] Although this suggestion may be an effective method of achieving service and meet due process requirements, it does have its shortcomings. The most notable shortcoming with this proposal is that a system in which the defendant is deemed served after receiving a link and visiting a website will be ineffective, as few, if any defendants will actually click on the link if they know that they will be served upon visiting the website. In addition, like many recipients of online greeting cards, defendants may simply ignore the initial e-mail for the various reasons e-mails are routinely disregarded. In

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process by facsimile was insufficient because it is not permitted under the state rules for service of process). *But see Int'l Telemedia*, 245 B.R. at 722 (holding that service of process by facsimile and other methods were sufficient means of serving the defendants); *New England Merchs.*, 495 F. Supp. at 81 (ordering service of process by mail and facsimile on Iranian entities that refused other methods of service).

201. The court said:

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

New England Merchs., 495 F. Supp. at 81.

202. *See supra* note 198 and accompanying text (noting problems with facsimile as a form of service). *See also supra* Part II.A (discussing the technological problems associated with permitting service of process by e-mail).

203. It has been suggested that e-mail should be permitted to serve process in instances where the parties have previously consented to serve process in this manner. Heather A. Sapp, *You've Been Served! Rio Properties, Inc. v. Rio International Interlink*, 43 JURIMETRICS J. 493, 502–03 (2003). Although this may be a permissible manner of serving process, it too has its problems. The most significant is that it is not practical as the parties to a contract will likely see the potential problems associated with service in this manner, namely the distinct possibility that they may not receive actual notice of an action, and will not consent to such a means of service.

204. *See* Terry W. Posey, Jr., *"You've Got Service!" Rio Properties, Inc. v. Rio International Interlink, 284 F.3d 1007 (9th Cir. 2002)*, 28 U. DAYTON L. REV. 403, 417–18 (2003) (proposing that service of process by e-mail be effectuated by the plaintiff or the court sending the defendant an e-mail requiring them to visit a website in order to be served with process).

addition, the proposal fails to recognize the technological problems that accompany service of process electronically. Specifically, such a system fails to account for the possibility that a defendant will visit the designated website but be unable to download the summons and complaint due to problems with either the defendant's or the court's computer.

Any amendments to Rule 4 permitting service of process by alternate means, such as e-mail, need to balance traditional methods of service with modern technology. Any amended Rule 4 must continue to favor traditional means of service by limiting when and how alternate means, such as e-mail, may be utilized in serving process. Consequently, changes permitting the use of e-mail as a means of service must be slow and deliberate so as not to offend due process requirements. Rather, any changes made to Rule 4 must fall into two separate categories, those affecting domestic defendants, and those affecting foreign defendants. The reason for separating the amendments into two categories is to ensure that courts continue to respect international and foreign laws.

1. Proposed Amendments Affecting Domestic Defendants

Under the current version of Rule (4), it is not permissible for domestic defendants to be served by alternate means, such as e-mail. However, it is apparent that with courts permitting alternate means of service of process without knowing the defendant's exact location, domestic defendants may be inadvertently served under Rule 4(f)(3).[205] To keep domestic defendants from inadvertently being served in an impermissible manner, several revisions to Rule 4 should be made.

Initially, as several commentators have suggested, Rule 4 should be read or amended to permit e-mail to be utilized as a manner in which a plaintiff may request the defendant to waive service under Rule 4(d).[206] Permitting parties to request waiver by other means, such as e-mail, would promote and further achieve the primary purpose of waiver. Moreover, issues as to the constitutionality of modern technology being utilized as means of service are averted as defendants are waiving the issue. Coupled with expressly permitting modern technology to be used as manners of requesting service, Rule 4(d) needs to be amended to include tougher sanctions for defendants that had an opportunity to waive service and did not, but rather forced the court to approve service by alternate means. By making sanctions more severe, it would encourage more defendants to waive service and would allow the plaintiff and the court to not only avoid

205. *See supra* note 87 and accompanying text (discussing *Popular Enters.*).

206. *See* Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 378 (2003) (arguing that Rule 4(d) should be interpreted to permit e-mail to be used as a means of requesting waiver of service); Sapp, *supra* note 203, at 503 (suggesting that e-mail should be utilized as a means of requesting waiver).

unnecessary costs,[207] but also the necessity of having to permit service that normally is not permissible.

Further, Rule 4 should be read or amended to permit domestic defendants, like foreign defendants, to be served by alternate means or e-mail only in the rare cases that it is the only reasonable means of informing the defendant. Rule 4 should limit the use of e-mail as a form of service to circumstances where traditional methods of service[208] fail and the only way to inform the defendant is to send him an e-mail; or alternatively, in cases where it would be extremely difficult and expensive to serve the defendant under conventional methods of service.[209] 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. Moreover, service of process by e-mail should only be permissible on individuals and corporations because of the underlying policies prohibiting requests for waiver of service from incompetents, infants and the government.[210]

Next, under an amended Rule 4 permitting service of process by e-mail in limited circumstances, courts should not be given as much discretion as the Ninth Circuit suggests in *Rio*,[211] but rather given guidelines to follow as to what is required of the plaintiff before granting a request for alternative service. Firm guidelines must be established and instituted so courts are clear as to when a plaintiff asserts due diligence in attempting service using traditional means and when the cost of serving the defendant under traditional means is too burdensome.

In addition, any amendment permitting service by e-mail should require the plaintiff to file with the court a confirmation that the defendant received and read the e-mail and its attachments within thirty days of the order. The reason for this requirement is to overcome the substantial difficulties that currently exist in determining whether an individual has read an e-mail.[212] The best possible way to ensure that confirmation is received is to encourage plaintiffs to use services provided by some online companies.[213]

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207. *See* FED. R. CIV. P. 4(d) and advisory committee's notes (discussing the incentives a defendant has to waive service and the consequences a defendant faces if he does not waive service).

208. *See supra* Parts I.B–C. (discussing traditional methods of service).

209. *See supra* notes 37–46 and accompanying text (discussing the purpose of Rule 4(d)).

210. *See* FED. R. CIV. P. 4(d) and advisory committee's notes (discussing why requests for waiver on the government and its officers are burdensome and impractical and why incompetents and infants have the inability to understand a request of waiver and its consequences).

211. *See supra* note 70 and accompanying text (noting the discretion the *Rio* decision gives district courts in allowing e-mail as a form of service of process).

212. *See supra* Part II.A (discussing the difficulties in confirming whether an e-mail has been read).

213. *See supra* note 108 (noting companies that provide services to confirm when an e-mail has been delivered and/or read).

2. *Proposed Amendments Affecting Foreign Defendants*

Amendments affecting foreign defendants should mirror amendments affecting domestic defendants. In part, such changes have been proposed, namely amendments to Rule 4(h), which applies to both foreign and domestic defendants. Likewise, Rule 4(f)(3) should also be amended to allow e-mail and other means, such as facsimile. However, once again, these means should only be available with a court order and only as a last resort. Unlike cases involving domestic defendants, however, more must be required due to the practical aspects of trying to minimize offense to foreign law and international agreements, as the manner in which the defendant was served will continue to be an issue.

First, the foreign country where the defendant is receiving service might be asked to enforce the judgment against the defendant and may not recognize or enforce the judgment since it violated that country's law.[214] In this situation, if the country does not authorize the manner in which service was perfected it may find that the service was invalid because of national sovereignty, such as when foreign governments hold traditional methods of service invalid.[215] Second, if the defendant knows or believes that the service violates foreign law, he may not answer the complaint or move to dismiss the complaint under Rule 12(b)(5),[216] which will delay adjudication of the claim.[217]

Although the Hague Convention is now considering alternate means, such as e-mail, as part of the service process,[218] the Hague Convention recognizes that most countries do not permit service of process by electronic means, such as e-mail and facsimile.[219] In fact, the only other country to date to allow service of process by e-mail, other than courts in the United States, is England.[220] With these concerns in mind, courts should only permit service of process by e-mail after all traditional means and all international and foreign channels fail.

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214. *See* Gidirimski, *supra* note 47, at 694–95 (suggesting practical considerations that should encourage compliance with foreign law).

215. *See id.* at 695 (discussing how some foreign countries have invalidated service of process because it is seen as a sovereign act that must be carried out by state officials).

216. *See* FED. R. CIV. P. 12(b)(5) (allowing a party to bring a motion to dismiss a claim for insufficiency of service of process).

217. Gidirimski, *supra* note 47, at 695.

218. *See* Tamayo, supra note 36, at 240–243 (discussing how the Hague Convention has recently considered the use of e-mail as a permissible part of the international service process.

219. Hague Conference on Private International Law, *Conclusions and Recommendations of the Special Commission of October-November 2003*, at 12, *available at* http://www.hcch.net/index_en.php?act=publications.details&pid=3121&dtid=2 (last visited July 10, 2005).

220. *See* Tamayo, supra note 36, at 238 (discussing an English court decision authorizing the use of electronic service of process).

CONCLUSION

Courts and legislatures should strictly adhere to constitutional precedent and the rules of service of process by being leery of the use of new technology, such as e-mail, in serving process. Despite being necessary under special circumstances, e-mail alone does not generally meet constitutional due process requirements. Non-traditional methods of service, such as e-mail, are only constitutionally permissible in instances when traditional methods of service fail to notify the defendant and no other means exist to inform the defendant of the claim against him. In other words, e-mail is only constitutionally permissible to serve a defendant process when utilized as a last resort and with a court order.