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Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts

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I. INTRODUCTION: FEDERAL COURTS & TECHNOLOGY

> Supposing however that the Act had said in terms, that though a person sued in the island [of Tobago] had never been present within the jurisdiction, yet that it should bind him upon proof of nailing up the summons at the Court door; how could that be obligatory upon the subjects of other countries? Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?[2]

"Everything old is new again."[3]

Currently, electronic service of process[4] is only available in federal practice under Federal Rule of Civil Procedure 4(f)(3). It is permitted only in the context of "Serving an Individual in a Foreign Country."[5] This article proposes amendments to the Federal Rules of Civil Procedure (Federal Rules) allowing domestic electronic service of process. When the Federal Rules were first drafted, the typewriter and telephone were on the cutting edge of communications technology.[6] Personal computers and email[7] did not exist.[8] In recent years, computing technology has revolutionized the way people live,

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2. Buchanan v. Rucker, (1808) 103 Eng. Rep. 546 (K.B.) (Ellenborough, C.J.).

3. PETER ALLEN, *Everything Old is New Again*, *on* THE VERY BEST OF PETER ALLEN: THE BOY FROM DOWN UNDER (A&M Records 2004).

4. The term "electronic service of process" is used throughout this article to refer to electronic service of process upon individuals, in both the domestic and international context.

5. *Compare* FED. R. CIV. P. 4(f)(3) (allowing electronic service of process in foreign countries "by other means not prohibited by international agreement, as the court orders"), *with* FED. R. CIV. P. 4(e) (providing no other means of accomplishing proper service, thus preventing electronic service).

6. The Federal Rules were adopted in 1938, long before the advent of the personal computer and electronic discovery issues. *See* Joseph Gallagher, *E-Ethics: The Ethical Dimension of the Electronic Discovery Amendments to the Federal Rules of Civil Procedure*, 20 GEO. J. LEGAL ETHICS 613, 613 (2007) ("[I]nitially adopted in 1938, the Federal Rules of Civil Procedure . . . were crafted at a time when the sole discovery device available to litigants at law was the deposition.").

7. The Supreme Court often uses both "email" and "e-mail" within the same opinion. *See* United States v. Williams, 128 S. Ct. 1830, 1845 (2008); *see also* Donald E. Knuth, *Email (let's drop the hyphen)*, http://www-cs-faculty.stanford.edu/~knuth/email.html (last visited Oct. 20, 2009) (noting that English words are often spelled with a hyphen when newly coined, but the hyphen is dropped once the words become widely used). *Compare* Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 473 (2007) (using email), *with Williams*, 128 S. Ct. at 1845 (using e-mail).

8. While email has arguably been around since the late 1960s, email did not exist in its modern form until 1972, when an engineer named Ray Tomlinson chose the "@" symbol for email addresses and wrote software to send the first network email. *See* Barry M. Leiner et. al., *A Brief History of the Internet*, Jan. 23, 1999, http://arxiv.org/html/cs/9901011v1 (last visited Oct. 20, 2009).

communicate, and conduct business.[9] The format of most business communications—and a great deal of social interaction—would be completely alien to the drafters of the Federal Rules. Email and other methods of electronic communication have irreversibly affected the way we exchange information with one another. The Federal Rules addressing service of process need to be rethought, much as they were amended in 2006, to keep pace with the transition of discovery from paper to electronically stored information.

"Email combines the accountability of a pen-and-ink letter with the convenience of a phone call,"[10] and it can be instantly accessed from a computer anywhere in the world. Some argue that the existence of these two qualities—accountability and convenience—in a single method of communication is risky, and that "email is more like a dangerous power tool than like a harmless kitchen appliance [and] many, perhaps most, of us have suffered the equivalent of burns, lost fingers, electric shocks, and bone fractures."[11] The number of emails sent and received daily, about 60 billion in 2006,[12] is exponentially greater than the amount of letters sent in the same period of time.[13] However, email is but one form of electronic communication. Instant messages,[14] blogs,[15] social networking websites,[16] and other technologically sophisticated methods of

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9. *See* Stephen J. Snyder & Abigail E. Crouse, *Applying Rule 1 in the Information Age*, 4 SEDONA CONF. J. 165, 167 (2003) ("Computers have revolutionized the way people live and do business . . . and email has revolutionized the way people communicate.").

10. *See* Adam C. Losey, Note, *Clicking Away Confidentiality: Workplace Waiver of Attorney-Client Privilege*, 60 FLA. L. REV. 1179, 1186 (2008)

11. Janet Malcolm, *Pandora's Click*, N.Y. REV. OF BOOKS, Sept. 27, 2007 at 8 (reviewing DAVID SHIPLEY & WILL SCHWALBE, SEND: THE ESSENTIAL GUIDE TO EMAIL FOR OFFICE AND HOME (2007)).

12. *60 Billion Emails Sent Daily Worldwide*, REUTERS, Apr. 26, 2006, *available at* http://news.cnet.co.uk/software/0,39029694,49265163,00.htm.

13. *See* JOHN MAZZONE & JOHN PICKETT, U.S. POSTAL SERVICE, THE HOUSEHOLD DIARY STUDY, MAIL USE & ATTITUDES IN FY 2008, at 13 (2008), *available at* http://www.usps.com/householddiary/_pdf/USPS_HDS_FY08_FINAL_PUBLIC _web2.pdf (noting that total U.S. mail volume in 2008 was "almost 203 billion" pieces of mail).

14. *E.g.*, United States v. Kaye, 451 F. Supp. 2d 775, 776 n.2 (E.D. Va. 2006) ("As its name describes, an 'instant message' is a one-on-one communication whereby two parties are able to engage in real-time dialogue by typing messages to one another and sending/receiving the messages almost instantly.").

15. Quixtar Inc. v. Signature Mgmt. Team, LLC, 566 F. Supp. 2d 1205, 1209 n.3 (D. Nev. 2008) (A blog is "[a] frequently updated web site consisting of personal observations, excerpts from other sources, etc.").

16. Doe v. MySpace, Inc., 528 F.3d 413, 415 (5th Cir. 2008) ("Online social networking is the practice of using a Web site or other interactive computer service to expand one's business or social network.").

communication are no longer the exclusive domain of technophiles and college students. Such tools are quickly becoming ubiquitous in social interaction and commerce.

Social networking technologies have even been allowed in federal courts. United States District Judge J. Thomas Marten recently allowed reporters to use the micro-blogging service Twitter to provide constant updates from a racketeering gang trial.[17] However, not all courts have allowed streaming Internet coverage of courtroom proceedings. In early 2009, the First Circuit Court of Appeals prohibited streaming Internet coverage of a hearing in a recording industry case against a university student accused of illegal file sharing.[18]

While the law hardly advances at the speed of technology, federal courts have adapted to new technology. There is a bevy of precedent for amending the Federal Rules to keep up with technology. In 2002, pursuant to the E-Government Act,[19] federal courts nationwide created Internet websites. These websites contain, among other things, court rules, docket information for each case, written opinions issued by the court in a text-searchable format, access to documents that are filed in electronic form, and access to those filed in paper form and converted to electronic form. Courts that are not required to establish a web presence by the E-Government Act, such as the United States Tax Court, have voluntarily complied with the provisions of the E-Government Act[20] due to the recognized value of an established web presence.

Another example of federal courts adapting to communications technology is the nationwide use of electronic filing. "[Electronic filing systems] are now in use in 99% of the federal courts."[21] The use of this electronic filing system "not only replaces the courts' old electronic docketing and case management systems, but also provides

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17. Roxana Hegeman, *Twitter Use Allowed In A Federal Court* (Mar. 6, 2009), *available at* http://www.redorbit.com/news/display/?id=1650430.

18. Debbie Rosenbaum, *First Circuit Bans Webcast in Trial Court*, HARV. J.L. & TECH., Apr. 2009, *available at* http://jolt.law.harvard.edu/digest/copyright/in-re-sony-bmg-music-entertainment-et-al.

19. *See* Paperwork Reduction Act, Pub. L. No. 107-347, 116 Stat. 2910 (2002) (codified at 44 U.S.C. § 3501 (Supp. 2004)).

20. *See* Press Release, John O. Colvin, Chief Judge, United States Tax Court, Notice of Proposed Amendments to Rules, at 5 (Jan. 16, 2007), http://www.ustaxcourt.gov/press/011607.pdf.

21. U.S. Courts, Case Management/Electronic Case Files (CM/ECF), http://www.waeb.uscourts.gov/CM-ECF/CM-ECF.USCourts.Press.Release.pdf (last visited Sept. 27, 2009).

courts the option to have case file documents in electronic format, and to accept filings over the Internet."[22]

> [T]he adoption of electronic filing and access by the federal courts was not just motivated by efficiency, but also by a recognition that such a system would make the courts more accessible to the public and make court filings equally available despite geographic limitations. There is a reason why the federal case docket database is called PACER: Public Access to Court Electronic Records.[23]

From the universal adoption of electronic filing, it is clear that federal courts are moving toward an understanding that electronic communications are now the default and predominate form of nonverbal communication in the United States.

Federal courts see the many advantages of using electronic communications in lieu of pen-and-ink pleadings. Indeed, international service by electronic means is already accepted in federal courts, as well as some jurisdictions outside the United States. Filing by electronic means is now the default by virtue of its ease, convenience, and cost-effectiveness. Service by electronic media is an idea that has now come of age.

This Article proposes amendments to the Federal Rules of Civil Procedure to allow domestic electronic service of process. Part II of this Article discusses service of process on foreign nationals via electronic communications. Part III advocates amending the Federal Rules to allow domestic electronic service of process in a manner akin to international service of process. Part IV contains proposed amendments to the Federal Rules that would allow domestic electronic service of process, with some limitations.

II. INTERNATIONAL ELECTRONIC SERVICE OF PROCESS

A. Evolution in the Federal Courts

The rationale behind allowing international electronic service of process forms the foundational support for amending the Federal Rules to allow domestic electronic service of process. Thus, an analysis of international electronic service of process is the logical starting point in considering the wisdom of amending the rules.

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22. *Id.*

23. Lisa C. Wood & Marco J. Quina, *The Perils of Electronic Filing and Transmission of Documents*, 22 ANTITRUST 91, 95 (2008).

International service of process must comply with the flexible standard set out in Federal Rule 4(f)[24] and comport with constitutional notions of due process. A method of service of process comports with constitutional notions of due process if it is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[25] Electronic service of process via email is permitted in federal courts under Federal Rule 4(f)(3), albeit only under court direction and in the context of international service.

As far back as 1980, federal courts have allowed electronic service of process. In *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*,[26] a group of American plaintiffs were unable to serve process on Iranian defendants as a result of the diplomatic breakdown between the United States and Iran.[27] The district court ordered service of process via telex, a form of electronic communication now obsolete, stating that:

> I am very cognizant of the fact that the procedure which I have ordered in these cases has little or no precedent in our jurisprudence. 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.[28]

In 2000, the United States Bankruptcy Court for the Northern District of Georgia was the first federal court to authorize international service of process via email.[29] Other federal courts later

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24. Federal Rule 4(f)(3) allows international service of process "by other means not prohibited by international agreement, as the court orders," which permits a Federal court to allow creative methods of service, so long as they continue to satisfy constitutional due process concerns. *See* FED. R. CIV. P. 4(f)(3).

25. "To be sure, the Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond." Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)); *see also* Ronald J. Hedges, Kenneth N. Rashbaum & Adam C. Losey, *Virtual Jurisdiction: Does International Shoe Fit in the Age of the Internet?*, 9 DIGITAL DISCOVERY & E-EVIDENCE (BNA) 31, 53, 54 (Feb. 1, 2009).

26. 495 F. Supp. 73, 76 (S.D.N.Y. 1980).

27. *Id.* at 75-76.

28. *Id.* at 81.

29. *See In re* Int'l Telemedia Assocs., Inc., 245 B.R. 713, 720 n.5 (Bankr. N.D. Ga.

followed suit.[30] The landmark federal appellate decision involving international email service is *Rio Properties, Inc. v. Rio International Interlink*,[31] where the court discussed the concept of electronic service:

> We acknowledge that we tread upon untrodden ground. The parties cite no authority condoning service of process over the Internet or via e-mail, and our own investigation has unearthed no decisions by the United States Courts of Appeals dealing with service of process by e-mail and only one case anywhere in the federal courts. Despite this dearth of authority, however, we do not labor long in reaching our decision. Considering the facts presented by this case, we conclude not only that service of process by e-mail was proper—that is, reasonably calculated to apprise RII of the pendency of the action and afford it an opportunity to respond—but in this case, it was the method of service most likely to reach RII.
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> To be sure, the Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond (citation omitted). In proper circumstances, this broad constitutional principle unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance.[32]

In *Rio Properties*, the plaintiff owned and operated a Las Vegas casino, and held several registered trademarks in the name of casinos and other operations.[33] To expand its Internet presence, Rio Properties registered the domain www.playrio.com.[34] Rio Properties later became aware of Rio International, a Costa Rican entity operating an Internet gaming business.[35] Rio Properties then sent a letter to Rio International, demanding that it shut down its Internet gaming website. Rio International eventually complied.[36]

However, "[a]pparently not ready to cash in its chips, [Rio

2000) ("[T]he Court's Order Authorizing Service constitutes the first time that service of process by electronic mail has been authorized in a case pending in the United States.").

30. *See In re* LDK Solar Secs. Litig., No. C 07-05182 WHA, slip op. at 6 (N.D. Cal. June 12, 2008); Bank Julius Baer & Co. v. Wikileaks, No. C 08-00824 JSW, slip op. at 4 (N.D. Cal. Feb. 13, 2008); Williams v. Adver. Sex LLC., 231 F.R.D. 483, 488 (N.D. W. Va. 2005); Nanya Tech. Corp. v. Fujitsu Ltd., No. 06-00025, slip op. at 8 (D. Guam Jan. 26, 2007).

31. 284 F.3d 1007, 1013 (9th Cir. 2002).

32. *Id*. at 1017.

33. *Id*. at 1012.

34. *Id*.

35. *Id*.

36. *Id*.

International] soon activated the URL http://www.betrio.com to host an identical sports gambling operation."[37] Rio Properties quickly sued for trademark infringement, but was unable to locate Rio International in the United States or Costa Rica, or serve process on the international courier that Rio International had designated as its address when registering its website.[38]

Stymied, Rio Properties sought alternate service of process, and the district court ordered service via the e-mail address, email@betrio.com, provided on Rio International's website.[39] Next, counsel for Rio Properties served Rio International via email.[40] Rio International appealed the district court's order allowing email service.[41] The Ninth Circuit affirmed the trial court's order.[42]

Email service is appropriately ordered by a court when it is not prohibited by international agreement[43] and is reasonably calculated to provide notice and an opportunity to respond.[44] In *Rio Properties*, the court looked to the facts and determined that email service was warranted as Rio International set up a business model where it could only be reached by email.[45] Thus, an email to Rio International's email address (its sole communications avenue for the world-at-large) was "reasonably calculated" to reach Rio International.[46] *Rio Properties*, carrying the torch of *New England Merchants*, acknowledged the necessity of adapting traditional concepts of service of process to the modern world.

Still, using the *Rio Properties* standard, some courts later concluded that international service via email may not satisfy due process concerns in situations where there is a reasonable chance the email would never reach the defendant. In *Ehrenfeld v. Salim A Bin Mahfouz*,[47] the court distinguished the facts from those in *Rio Properties*[48] and refused to authorize email service because the

37. *Rio Properties*, 284 F.3d. at 1012 (emphasis removed).
38. *Id*. at 1013.
39. *Id*.
40. *Id*.
41. *Id*. at 1014.
42. *Id*. at 1017.
43. *Id.* at 1014.
44. *Id.* at 1017.
45. *Id.* at 1018.
46. *Id*.
47. No. 04 Civ. 9641(RCC), 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005).
48. *Id.* ("Although courts have upheld service via e-mail, those cases involved e-mail addresses undisputedly connected to the defendants and that the defendants used for business purposes.").

defendant's email address was "apparently only used as an informal means [of communication]," and thus was not a reliable enough channel of communication to ensure that the defendant would receive the email.[49]

Courts reaching conclusions similar to those reached in *Ehrenfeld* have done so based on the defendants' infrequency of use, rather than on the logic that electronic communications are uniquely unreliable. Courts that disallowed service of process via email still fall under the rubric of *Rio Properties*[50] in that they accept the concept of service by electronic means where the interests of justice are served.[51] This is particularly true where the defendant has repeatedly evaded traditional service, and where it is uncontested that the defendant used email for business purposes.[52] This makes sense. International electronic service of process requires the plaintiff to obtain a court order; therefore, for the sake of efficiency, a party would naturally exhaust traditional methods of service that do not require a court order.

Moreover, repeated evasion of traditional types of service is likely the tipping point which causes judges to allow electronic service of process. Yet, under the *Rio Properties* rubric, a clever plaintiff could seek a court order to serve a defendant via email prior to attempting traditional methods of service if the plaintiff thought the defendant would likely attempt to evade service.[53] A technologically savvy plaintiff could also use a free online service to automatically track receipt of an email, and would then be able to show that the defendant opened the email containing service of process.[54] For the

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49. *Id*. at *4.

50. *See* Prewitt Enters., Inc. v. OPEC, 353 F.3d 916, 927-28 (11th Cir. 2003) (denying plaintiff's request to serve defendant via electronic service of process, but adhering to the *Rio Properties* rubric); *see also* U.S. Aviation Underwriters, Inc. v. Nabtesco Corp., No. C07-1221RSL, 2007 WL 3012612 (W.D. Wash. Oct. 11, 2007) (same); Nabulsi v. H.H. Sheikh Issa Bin Zayed Al Nahyan, 2007 WL 2964817 (S.D. Tex. Oct. 2007) (same); *Ehrenfeld*, 2005 WL 696769 (same).

51. *See U.S. Aviation Underwriters*, 2007 WL 3012612, at *2 (refusing to allow electronic service of process, as the factual situation was "unlike *Rio Properties* where the defendant was 'elusive' and 'striving' to evade service of process.").

52. *Ehrenfeld*, 2005 WL 696769, at *3 ("Although courts have upheld service via e-mail, those cases involved e-mail addresses undisputedly connected to the defendants and that the defendants used for business purposes.").

53. The plaintiff would want to do this because email service is far more difficult to evade than traditional methods of service. Moreover, by first obtaining the court order, the defendant would have less time to take steps to prevent receipt of email service (i.e., deactivating all email accounts and removing social networking profiles).

54. The sender of an email can easily use a free service to receive an automatic

same rationales articulated in *New England Merchants National Bank* and *Rio Properties* which justify electronic service of process in the international context, federal courts should allow electronic service of process in the domestic context.[55]

B. The English Approach & The Hague Convention

Some courts cast a skeptical eye towards electronic service of process, yet it is clear that international electronic service of process is permitted in federal courts. The federal courts, however, are not alone. In 1996, long before *Rio Properties*, the Queens Bench Division of the Royal Courts of Justice considered the issue of email service in a sealed proceeding involving what amounted to internet-based blackmail.[56] The case involved a "media personality . . . faced with the prospect of the awesome power of the Internet being used to disseminate defamatory material about [him]."[57] The anonymous media personality's counsel received a series of email messages threatening to defame the media personality on a specific date.[58]

The media personality's attorneys could not locate the defendant to personally serve him with a court-issued injunction.[59] From envelope postmarks and fax numbers, counsel knew the defendant was somewhere in Europe, but the only specific address counsel had was the defendant's email account.[60] Sensibly showing "imagination and pragmatism," the court allowed service on the defendant through email.[61] However, the court required that the defendant receive actual notice of the injunction for it to be enforceable.[62] This wound up being a non-issue as the defendant sent an email message to

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confirmation when the recipient opens the email. For example, a simple and free service known as SpyPig offers instant verification of receipt. The sender writes the email in HTML format, and inserts a picture or blank image hosted at a SpyPig server. When the recipient opens the HTML formatted message, the image is loaded from the server, and the logs of the server will reflect when the image is loaded. This creates a record when the email is opened. SpyPig then notifies the sender that the email has been opened. *See* SpyPig Requirements & Limitations, http://www.spypig.com/requirements.php (last visited Oct. 11, 2009).

55. *See infra* Part II(B).

56. Paul Lambeth & Jonathan Coad, *Serving the Internet: Nowhere to Hide in Cyberspace from a Cyber Lawyer*, 1 CYBERSPACE LAW. 6, 6-7 (1996) *available at* http://www.lectlaw.com/files/elw07.htm.

57. *Id*. at 6.

58. *Id*.

59. *Id*.

60. *Id*.

61. *Id.* at 7 (counsel describing the court's actions).

62. *Id*

plaintiff's counsel acknowledging receipt and withdrawing all threats.[63] As the English court recognized, sometimes time is of the essence in service of process situations. Email is quicker, more reliable, and more efficient than most other forms of communication.

The international community has also been receptive to electronic service. International electronic service is addressed by the 1965 Hague Convention on the Service of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (the Hague Convention),[64] a multi-lateral treaty that provides for internationally-agreed methods of transmitting requests for service on defendants. The Hague Convention has 69 member states,[65] and the Supreme Court stated, in dicta, that "compliance with the [Hague] Convention is mandatory in all cases to which it applies."[66]

Because the Hague Convention was drafted in 1965 and has not been superseded or amended by another treaty, it is not shocking that it "neither explicitly authorizes nor explicitly prohibits service of process by e-mail."[67] "Article 10(a) of the Hague Convention permits litigants to 'send judicial documents, by postal channels, directly to persons abroad' if the 'State of destination does not object.'"[68] Therefore, the Hague Convention may permit service by electronic means to the extent that such means constitute "postal channels" within the meaning of Article 10(a).[69]

Moreover, the Hague Convention does not apply where the address of the person being served is unknown.[70] This is exactly the type of situation where courts have permitted email service. Thus, the Hague Convention is no impediment to email service and, by virtue of its provision that service may be made in any manner if the state in which the recipient is located does not object, may be construed to

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63. *Id*. at 8.

64. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters art. 10, Nov. 15, 1965, 20 U.S.T. 361, 58 U.N.T.S. 163.

65. *See* Hague Conference Members, http://hcch.e-vision.nl/index_en.php (follow "HCCH Members" hyperlink) (last visited Sept. 27, 2009).

66. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 705 (1988).

67. Richard J. Hawkins, Comment, *Dysfunctional Equivalence: The New Approach to Defining "Postal Channels" Under the Hague Service Convention*, 55 UCLA L. REV. 205, 224 (2007) (citing Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 351-52 (2003)).

68. *Id.*

69. *See id.*

70. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 64, art. 1.

permit its use, unless there is a provision in a signatory state to the contrary.[71]

C. Policies Behind Electronic Service of Process

Today, the speed of international communication is frighteningly fast and efficient. Anyone hooked into the technological grid via computer or telephone can send a message to a fellow gridder in a matter of seconds. Email and social networking websites, such as Facebook,[72] are spectacularly successful creatures of the information age. Professionals, laymen, and judges all over the world have rapidly embraced electronic communications and social networking technology for a rainbow of reasons, from networking to knitting. Yet not all forms of electronic service are the same. For example, Twitter "tweets"[73] are not the same as emails, but Facebook messages are.[74] However, a tweet is analogous to a Facebook status update.[75]

Whenever a new manner of service is authorized, it is important to look at the manner of service itself to determine whether it is a reliable method that provides reasonably calculated notice. The benefits of email are obvious and numerous. The overwhelming majority of Americans use email,[76] and nearly every business organization has an email address. Receipt of an email can be automatically confirmed by the sender when opened by the recipient.[77]

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71. David P. Stewart & Anna Conley, *E-mail Service on Foreign Defendants: Time for an International Approach?*, 38 GEO. J. INT'L L. 755, 759 (2007).

72. Facebook is arguably the dominant social networking website, and its functions will be described in further detail throughout this Article. ConnectU LLC v. Zuckerberg, 522 F.3d 82, 86 n.1 (1st Cir. 2008) ("As of March 2008, Facebook boasted over 60,000,000 users and had become the fifth most trafficked website in the United States.").

73. *See* Hegeman, *supra* note 17 (describing tweets as updates which are limited to 140 characters and accessible online).

74. Facebook messages are essentially emails using Facebook's internal email system.

75. A Twitter "tweet" is analogous to a Facebook status update as both involve posting a passive message on the user's personal page that others can publicly view. On Twitter, the Twitter account holder posts messages (or "tweets") available publicly to all those able to view the tweet per the account holder's settings. On Facebook, either the account holder can post status messages or others designated by the account holder can post messages on an electronic bulletin board ("wall") on the account holder's user profile page that is visible to members per the account holder's settings.

76. Approximately 94% of college-educated people in the United States use the Internet, and it is a reasonable assumption that the majority of those using the Internet also use email. Pew Internet & American Life Project, Demographics of Internet Users, http://www.pewinternet.org/trend-data/whos-online.aspx (last visited Nov. 07, 2009).

77. *See* SpyPig, *supra* note 54.

In a service of process context, there is a strong efficiency argument for the use of email. An email can be sent for little or no cost and can reach the recipient's inbox literally moments after it is sent. However, the *Rio Properties* court noted that it was "cognizant of [email's] limitations."[78] These limitations, articulated by the Ninth Circuit and others, are that normally there is no way to confirm receipt of an email message, technological problems might lead to "controversies over whether a [document] was actually received," and "imprecise imaging technology may make appending [documents] impossible in some circumstances."[79]

The *Rio Properties* criticisms are no longer valid in the face of recent technological advances. A free service is now available online that automatically confirms and records receipt of an electronic message when the message is opened.[80] Email servers and standardized file formats have eliminated any generalized technological problems articulated by the *Rio Properties* court. Imaging technology has advanced to the point that appending exhibits and attachments is possible in all circumstances.[81] Although *Rio Properties* is less than a decade old, its criticisms are already woefully dated.

Even assuming, arguendo, that the *Rio Properties* criticisms are still legitimate, electronic service of process remains reasonable. Email is often reasonably calculated to provide parties with an opportunity to be heard. Non-electronic service has serious flaws, flaws far beyond the few that exist with modern electronic service.

"The United States Postal Service is vulnerable to human error, resulting in lost mail and deliveries to wrong addresses. Notice by publication also carries imperfections because it can be misprinted . . .

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78. *Rio Properties*, 284 F.3d at 1018.

79. *Id.*; *see also* Matthew R. Schreck, *Preventing "You've Got Mail"™ from Meaning "You've Been Served": How Service of Process by E-mail Does Not Meet Constitutional Due Process Requirements*, 38 J. MARSHALL L. REV. 1121, 1140 (2005) ("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; (2) e-mail accounts often having limitations on the amount of e-mails that can remain in a mailbox at once; (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.").

80. *See* SpyPig, *supra* note 54.

81. The argument that imaging technology may make exhibits illegible is no longer valid. Scanning and imaging technology have now evolved to the point where this argument is moot. Other criticisms of email that stem from the 1980s are equally antiquated in the face of modern computing technology.

every manner of service has its moments of inaccuracy."[82] The core of the policy argument and justification behind electronic service of process in an international context is based in pragmatism. Many cases presumably involve defendants who can be served electronically. In these cases, electronic communications are often the most efficient and reliable means of service.

III. DOMESTIC ELECTRONIC SERVICE OF PROCESS

A. International Approaches

In 2008, the Supreme Court of the Australian Capital Territory considered, and allowed, personal service via a message sent on Facebook.[83] Shortly thereafter, in 2009, New Zealand followed suit, citing the Australian case and allowing service of process via Facebook in an intra-familial business dispute.[84] In the arena of international electronic service, England first allowed email service and a number of federal courts in the United States followed suit.[85] It is likely that history will repeat itself in the international adoption of domestic and international electronic service of process via email and social networking communications, only this time around the United States will follow the lead of Australia and New Zealand.

The first step in considering the efficacy and propriety of electronic service of process via social networking, internationally or domestically, is to understand how social networking works. Using the Australian decision as an example, the technology behind Facebook can be easily understood. Then, once the Australian factual situation is parsed out and viewed with some understanding of the technological background, the Australian court's conclusion that domestic electronic service of process via a Facebook message was appropriate makes perfect sense.

In the Australian case, an Australian law firm made several failed attempts to effectuate service of a default judgment on two

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82. Kevin W. Lewis, Comment, *E-Service: Ensuring the Integrity of International E-Mail Service of Process*, 13 ROGER WILLIAMS U. L. REV. 285, 302 (2008).

83. *See* Bonnie Malkin, *Australian Couple Served with Legal Documents via Facebook*, TELEGRAPH.CO.UK (Dec. 16, 2008), http://www.telegraph.co.uk/news /newstopics/howaboutthat/3793491/Australian-couple-served-with-legal-documents-via Facebook.html (last visited May 13, 2009).

84. *See* Rick C. Hodgin, *New Zealand Judge Allows Papers Served via Facebook*, TGDAILY, http://www.tgdaily.com/content/view/41733/118/ (last visited Mar. 16, 2009).

85. *See supra* Part II(B).

Australian defendants in person.[86] Notably, the two defendants had already been served in person regarding the foreclosure proceeding that led to the default judgment, and they both failed to appear in court to defend the matter.[87] The defendants had "public" Facebook profiles,[88] meaning that they voluntarily allowed anyone to seek them out and contact them via Facebook.[89] No privacy controls, which would have blocked access to the defendants' Facebook profile by the public, had been implemented by the defendants.

Eventually the Australian court ordered that service of the default judgment be effectuated by three methods: (1) leaving a sealed copy of the order of default judgment at the defendants' last known addresses,[90] (2) sending a copy of the order of the default judgment via email to the second defendant, and (3) sending a private message via computer to the Facebook accounts of both defendants informing the defendants of the entry and terms of default judgment.[91]

Sending a private message via Facebook is basically the same as sending an email via a private email server. Facebook incorporates an internal message system that can be treated as an internal email server.[92] Notice via email has a legion of precedent, and the Australian court authorized service through Facebook's private email server in conjunction with two other methods of service.[93] In fact, under Federal Rule 4(f)(3) and per *Rio Properties*, international electronic service via a Facebook message could easily be ordered by a federal court.

The due process concerns for a Facebook message mirror those

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86. Malkin, *supra* note 83.

87. *Id.*

88. *Id.*

89. Profile information submitted to Facebook is by default fully available to users of Facebook who belong to at least one of the profile-holder's networks (*e.g.*, school, geography, friends of friends). Moreover, a profile-holder's name, network names, and profile picture thumbnail are available to the world through third party search engines. *See* Facebook Principles, http://www.facebook.com/policy.php (last visited May 13, 2009).

90. *Facebook Used to Find Defendants in Australian Court Case*, OTTAWA CITIZEN (Sydney), Dec. 15 2008, *available at* http://www.ottawacitizen.com/technology/technology/1081894/story.html.

91. Malkin, *supra* note 83.

92. While differences exist between Facebook's internal message system and a true email server in the traditional sense, they are trivial in the context of service of process. *See* Facebook Product Overview, http://facebook.com/press/product.php (last visited Oct. 11, 2009).

93. Facebook's internal message system allows users to send each other private user-to-user messages available via the Facebook interface, and the court ordered that this method be utilized instead of a Facebook wall posting. *See id.*; Malkin, *supra* note 83.

for email or, for that matter, any other method of service. The issue is whether a court finds that a Facebook message is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. In many cases, a Facebook message would pass muster.

Such determination would likely turn on how often the user checks the Facebook message center.[94] The notice requirement can be satisfied by showing that the user checks Facebook frequently. This would not be difficult to ascertain, as Facebook displays when a user takes an action and other informational blurbs that would demonstrate a user's frequency of activity (e.g., if the user posts on another user's Facebook wall or comments on another user's photos or notes, the posting is dated).

Facebook allows users to post messages, documents, and Internet links on other user's public Facebook wall,[95] which are spaces on every user's profile page that the world-at-large can see.[96] Although Facebook wall postings are truly sui generis, they are analogous to postings on a virtual bulletin board that are accessible to anyone with an Internet connection, and in that they can link to postings on other bulletin boards and hold large documents, photos, and videos.

Service via a public wall posting on Facebook should, accordingly, pass constitutional muster in the United States. Satisfying the notice requirement via a public posting on a Facebook wall would likely be easier than doing so with a private message or email. Facebook wall postings are dated where they are posted, and the user can disable the wall or control who can see posted messages, as well as delete or further comment on wall postings.[97]

Assuming that the user allows a wall posting by a party attempting to effectuate service, it would be far easier to show that the user received actual notice.[98] If the user logs onto Facebook and

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94. This is where the difference between Facebook's internal message system and a true email server would come into play. Facebook's internal message system requires you to log onto Facebook to check your Facebook messages, thus a user cannot enable forwarding as they could with a traditional email server. However, this is countervailed by Facebook's default enabling of an automatic email message sent by Facebook to the user's registered email address alerting them to the message. Moreover, like traditional email, Facebook messages are also instantly accessible via any personal data assistant ("PDA").

95. If a Facebook profile has been designated "private" only users who have been granted access to a profile are able to post on that particular wall.

96. *See* Facebook Product Overview, *supra* note 92.

97. *See* Facebook Product Overview, *supra* note 92.

98. Although actual notice is not necessary to satisfy due process, the point is still

views his or her profile, the user would not be able to ignore a public wall posting because it is immediately visible to the user and all the user's friends. By default, the user would receive an email to the email account tethered to the user's Facebook registration notifying the user of the posting and including a portion of the posted text. Here, service considerations conflict with privacy concerns; the friends and family of the user would be able to view the notice, making it more likely that the user would learn of the notice through collateral sources.

It is likely that the user receiving notice via public posting on the user's Facebook page would delete the posting after reading it, as the user would not want an embarrassing legal notice cluttering his or her Facebook page. This deletion would serve as compelling evidence that the user was actually notified. Since a Facebook user chooses to allow wall postings and to make them public, he in essence invites the world to communicate publicly with him; therefore, questions related to privacy of service likely would be avoided due to the user's own actions and selected Facebook settings.

Still, the Australian and New Zealand Facebook service decisions involved domestic service of process.[99] Currently, the Federal Rules do not allow domestic electronic service of process, although constitutional considerations permits such service, and common sense and efficiency favor its use.

B. Allowing Domestic Electronic Service of Process in the Federal Courts

The Judicial Conference of the United States should propose amendments for domestic electronic service of process for the same reasons the Federal Rules allow electronic service of process in an international context.[100] In the past, some have argued, "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."[101] There is now an easy and free way to automatically

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salient as it bolsters the reliability of Facebook as a notice medium and illustrates parallel methods of service between the electronic realm, where Facebook walls could be used, and the paper world, where posting on the front door is acceptable.

99. *See* Malkin, *supra* note 83; Hodgin, *supra* note 84.

100. *See supra* Part II(A).

101. Schreck, *supra* note 79, at 1135.

confirm receipt of an electronic message.[102] Methods currently allowed under the Federal Rules, such as leaving a copy with someone at the defendant's dwelling house or abode, cannot easily and automatically be confirmed. Still, email accounts are free to create, and a defendant may have dozens of email accounts that go unchecked for years. Likewise, a defendant served via Facebook may never check his or her Facebook account.

Therefore, as is the trend in international electronic service of process, a plaintiff should be required to make some showing that the electronic medium that he is attempting to use to serve the defendant has been recently used by that defendant. To do so, the plaintiff could show the court a message that he recently received from the defendant via the electronic medium. Depending on the factual circumstances, the court could logically infer from this that the defendant currently utilizes that electronic medium. Moreover, if the plaintiff used an automatic verification service, he could simply present the court with the logged record showing that the defendant accessed the email which contained the service of process.

Much has also been made of the argument that a defendant could claim that email service was treated as "junk" email by the defendant's email service or that he deleted the email containing service without opening it because he did not recognize the sender.[103] Again, these problems could be overcome by requiring the plaintiff to make some showing that the defendant has used the electronic medium. Then, if the defendant had received and responded to an email from the plaintiff, the court could logically infer that the plaintiff's email address was not treated as a "junk" sender by the defendant's email server, and that the defendant should have recognized the sender of the email. Further, if the plaintiff has evidence that the defendant opened the email containing service of process, the defendant's claims that the email was sorted as "junk" or that he did not recognize the sender's address would be implausible.

Criticisms regarding the technological limitations of email fail in light of the advances in technology. System compatibility problems

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102. *See* SpyPig, *supra* note 54.

103. Schreck, *supra* note 79, at 1136-37 ("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 or if the e-mail looks suspicious. The reasons that e-mail users delete mail from those they do not know varies, ranging from spam to the fear of getting a virus. 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.") (internal citations omitted).

which cause controversies over whether an exhibit or attachment was actually received are moot in light of the standardized file formats utilized by federal courts in electronic filings.[104]

Arguments that imprecise imaging technology can make appending exhibits and attachments impossible to read are similarly antiquated in the age of electronic filing and standardized file formats. Additionally, the concern that email inboxes could be "full" and unable to receive more email is laughable in light of the near unlimited amount of email storage space anyone can acquire for no cost. Lastly, free services now provide instant verification that an email was received and opened, making criticisms of email receipt as "unverifiable" moot.[105]

The strongest criticism remaining against electronic service of process is that it lacks the ritual function that only paper-based, in-hand service can provide.[106] Since hand delivery of a paper document is already unusual, receipt of a paper document from a process server ensures that service is taken seriously. Hand delivered service of process is stamped into American culture. Hence the popularity of the ubiquitous term "you got served," a phrase that has morphed beyond its service of process origins into one whose urban meaning "is street talk for 'you have been defeated and thoroughly humiliated.'"[107] This terminological metamorphosis unintentionally highlights the embarrassing and monumental nature of being served with process, and thus the ritual function of service of process. Since this ritual function is unique to the common law, the absence of ritual in electronic international service of process is less important than it is in a domestic context.

However, by instituting electronic filing, federal courts have dismissed the ritual importance of paper as relatively trivial. If the ritual weight of paper documents were a cardinal policy consideration, federal courts would mandate that important documents be filed in

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104. *See Document Issues & Resolutions*, ANNOUNCEMENTS (PACER Service Center, San Antonio, Tex.), April 2007), at 1, http://pacer.psc.uscourts.gov/announcements/quarterly/qa200704.pdf (mandating filing in PDF format); *see also* Patrick Marshall, *PDF Seen Gaining on Paper as Storage Medium*, GOVERNMENT COMPUTER NEWS, Jan. 22, 2009, http://gcn.com/articles/2009/01/22/aiim-study-on-pdf-format.aspx (noting 90% of organizations are using the PDF format for long-term storage of scanned documents).

105. *See* SpyPig, *supra* note 54.

106. *See generally* Hagmeyer v. U.S. Dep't of Treasury, 647 F. Supp. 1300, 1303 (D.D.C. 1986) (noting that one of the functions of service of process is to provide "a ritual that marks the court's assertion of jurisdiction over the lawsuit.").

107. Dave Kehr, *A Hip-Hop Dance Team Duels Some Menacing White Boys*, N.Y. TIMES, Jan. 30, 2004, at E11.

paper form, but that is not the case. Also, paper-based service of process is conducive to evasion—a calculating defendant can easily detect and evade a process server. This is not so with service via email.

Though a defendant could still delete an email that he suspects contains service of process, the very act of deletion would validate the fact that the defendant was aware of being served. Therefore, the deleting defendant would have been successfully served when the email went into his email inbox and he became aware it contained service of process. Deletion would be an ostrich-like attempt to evade. This is analogous to a defendant tearing up paper-based service of process after service was mailed to him or posted on his door.

Even if all the arguments against electronic service of process hold true, when electronic service of process is used as a secondary or tertiary channel of service it is more secure and more reliable than the channels currently used. Federal courts already allow service via means that are less reliable than normal channels, provided that more reliable channels are first exhausted.

Electronic documentation is already the norm in federal courts; service of process is the last true paper holdout in federal practice. "A modern trend exists in the law toward universal electronic service,"[108] and as far back as 2003, academics have advocated the adoption of electronic service of process.[109] Technology has evolved to the point that electronic service is superior to many forms of traditional service. Electronic service should now be treated as an equal to paper media by the Federal Rules.

IV. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule 4, governing service of process, is highly segmented. Thus, a single provision addressing domestic electronic service of process would run contrary to the current rule rubric. The proposed amendments will be addressed and explained individually. Together, these changes would allow domestic and international electronic service of process in situations not involving minors and incompetent persons where the plaintiff can demonstrate that the defendant has accessed the electronic medium to where process is

108. Colby, *supra* note 67, at 337.
109. *Id*. at 372.

being served within the past 60 days.

The final portion of Federal Rule 4(d)(1)(G) should be amended to include the phrase "including electronic means to a location previously accessed by the defendant within 60 days before the request is sent." This would simply allow electronic communications, along with first-class mail, to be used to request waiver. Electronic communications sent to an electronic medium accessed by the defendant within 60 days are certainly as reliable as first-class mail. Therefore, following the amendment, Federal Rule 4(d), Waiving Service, would read as follows:

> (d)(1) Requesting a Waiver. An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:
>
> (A) be in writing and be addressed:
>
> (i) to the individual defendant; or
>
> (ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized
> by appointment or by law to receive service of process;
>
> (B) name the court where the complaint was filed;
>
> (C) be accompanied by a copy of the complaint, 2 copies of a waiver form, and a prepaid means for returning the form;
>
> (D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;
>
> (E) state the date when the request is sent;
>
> (F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and
>
> (G) be sent by first-class mail or other reliable means, *including electronic means to a location previously accessed by the defendant within 60 days before the request is sent*.

Federal Rule 4(e)(2)(D) should be added to Federal Rule (4)(e)(2). The new provision would read "delivering a copy of each by electronic means at a location previously accessed by the individual within 60 days before the copy is delivered." Following the amendment Federal Rule 4(e)(2) would read:

> (e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:
>
> (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or
>
> (2) doing any of the following:
>
> (A) delivering a copy of the summons and of the complaint to the individual personally;
>
> (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
>
> (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process*; or*
>
> *(D) delivering a copy of each by electronic means at a location previously accessed by the individual within 60 days before the copy is delivered.*

Federal Rule 4(f)(2)(C) should be amended to add a new section, 4(f)(2)(C)(iii): "delivering a copy of the summons and of the complaint by electronic means at a location previously accessed by the individual within 60 days before the summons and complaint are delivered." The section would then read:

> (f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:
>
> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
>
> (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
>
> (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
>
> (B) as the foreign authority directs in response to a letter rogatory or letter of request; or

> (C) unless prohibited by the foreign country's law, by:
>
> (i) delivering a copy of the summons and of the complaint to the individual personally; or
>
> (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
>
> (iii) *delivering a copy of the summons and of the complaint by electronic means at a location previously accessed by the individual within 60 days before the summons and complaint are delivered; or*
>
> *(iv)* by other means not prohibited by international agreement, as the court orders.

These amendments, if proposed by the Judicial Conference and adopted by the United States Supreme Court, would bring service of process into line with the information age. Allowance of electronic service of process in the domestic context would satisfy constitutional requirements while increasing efficiency and reliability.