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"You've Got Service!"

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Cover Page Footnote

The author would like to thank his family and friends for their constant support and encouragement.

"YOU'VE GOT SERVICE!" *RIO PROPERTIES, INC. V. RIO INTERNATIONAL INTERLINK*, 284 F.3D 1007 (9TH CIR. 2002)

Terry W. Posey, Jr.[*]

I. INTRODUCTION

Service on a foreign defendant is almost always difficult. Could the advent of the Internet and the rise of electronic correspondence make it easier? The Ninth Circuit Court of Appeals thinks so. In *Rio Properties, Inc. v. Rio International Interlink*,[1] the Ninth Circuit became the first federal appellate court to affirm an order of service via email. The decision, however, is plagued with both legal problems and technical misunderstandings.

The controversy in *Rio* arose when a Las Vegas casino ("Rio Properties") filed suit against an Internet gambling operation, Rio Interlink International ("RII"), because of RII's use of Internet domain names that were similar to the registered trademarks of Rio Properties. Rio Properties had difficulty effecting service against the Costa Rica-based RII, and to that end, successfully sought an order under Federal Rule of Civil Procedure 4(f)[2] to allow alternative methods of service, one of which included emailing the complaint. After a default judgment was entered against RII for failure to comply with discovery requests, it appealed, seeking in part to overturn the order permitting service by email. The Ninth Circuit held that such service was permissible, provided due process requirements were satisfied.

This Note argues that the Ninth Circuit incorrectly concluded that email was a viable method of service on a foreign defendant. In arriving at its conclusion, the court in *Rio* incorrectly applied case law supporting the assertion that a technological method of service was necessary. Further, the *Rio* court drastically misconstrued the nature and capabilities of email in its determination that email was a reliable method of service. As precedent, the

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[1] *Rio Properties, Inc. v. Rio Intl. Interlink*, 284 F.3d 1007 (9th Cir. 2002).

[2] This rule provides several acceptable methods of service on individuals in a foreign country. Rule 4(f)(1) permits service "by any internationally agreed means reasonably calculated to give notice." Fed. R. Civ. P. 4(f)(1) (2000). Rule 4(f)(2) permits service in the manner prescribed by the law of the foreign country, as directed by the foreign authority in response to a letter rogatory, or personal service in the foreign country unless prohibited by that country's law. Fed R. Civ. P. 4(f)(2) (2000). Rule 4(f)(3), which is of most importance to this note, permits service "by other means not prohibited by international agreement as may be directed by the court." Fed R. Civ. P. 4(f)(3) (2000).

Rio holding will have a negative effect on the due process rights of foreign defendants being sued in federal courts. Foreign defendants with an Internet presence now risk being uninformed of a federal lawsuit due to the vagaries and limitations of email. Lastly, in order to avoid the detrimental effects engendered in the *Rio* decision, an alternative is suggested by which email service can suffice as a constitutionally adequate method of service.

Section II of this Note highlights the background of this case and examines the court's reasoning in the *Rio* case. Section III provides a critical analysis of the faults in the *Rio* decision and offers a solution to help ensure that email and the Internet do provide a viable alternative for expeditious and efficient service of process. Lastly, Section IV concludes that the decision in *Rio* has established a dangerous first step into the Internet age, by failing to ensure that constitutional requirements are met.

II. BACKGROUND

The facts and circumstances that gave rise to the *Rio* controversy are becoming increasingly common as Internet businesses clash with their brick and mortar counterparts. This section will detail the facts of the *Rio* case, including the attempts at service, which eventually brought the case before the Ninth Circuit. Finally, the holding and reasoning of the Ninth Circuit will be fully explained.

A. The Facts of Rio Properties, Inc. v. Rio International Interlink

Rio Properties owns and operates the Rio All-Suite Casino Resort in Las Vegas.[3] In addition, it also operates the Rio Race & Sports Book, which offers individuals the ability to gamble on professional sporting events. In order to maintain exclusivity over the "Rio" name, Rio Properties registered several trademarks with the United States Patent and Trademark Office. In addition, to extend its business presence onto the Internet, Rio Properties registered the domain name "playrio.com."[4] The company uses this website to advertise and take reservations for its hotel properties.[5]

RII is a Costa Rican entity, which also facilitates gambling, albeit solely through the use of technology. RII enables those who wish to wager on

[3] *Rio Properties*, 284 F.3d at 1012.

[4] A domain name is a mnemonic device chosen to allow users to remember a specific word or string of words to access a particular Internet address. *See generally* InterNIC, *InterNIC FAQs on the Domain Names, Registrars, and Registration* <http://www.internic.net/faqs/domain-names.html> (last updated Feb. 25, 2003).

[5] *Rio Properties*, 284 F.3d at 1012.

sporting events to do so either via the Internet or through a toll-free telephone number. To enhance its business traffic, RII advertised in both print and radio media.[6]

Through these advertisements, Rio Properties became aware of RII's Internet activities, and more specifically, their domain names. RII operated its Internet gambling site through the domain name "riosports.com." After a cease and desist letter from Rio Properties, RII ceased using "riosports.com" and instead began using "betrio.com" as their primary Internet address.[7]

Rio Properties subsequently brought an action in the United States District Court for the District of Nevada.[8] In their complaint, Rio Properties alleged various trademark infringement claims and sought an order enjoining RII from using any variant of the word "Rio" in RII's gambling operations.[9]

B. Serving Rio

Rio Properties, after initially filing the complaint, had severe difficulties in effecting service on RII. RII had listed a Miami, Florida mailing address on their domain name registration information. This address, however, was for a courier company that was not able to accept service, but was able to forward the complaint to RII in Costa Rica.[10]

A Los Angeles attorney contacted Rio Properties on behalf of RII, inquiring about the lawsuit. Counsel for Rio Properties requested that this attorney accept service for RII, but he declined. Rio Properties subsequently investigated "international directory databases" in attempts to discover an address with which to serve RII in Costa Rica.[11]

Rio Properties' address search only yielded the finding that RII preferred contact via its email address and that all postal mail was forwarded through the Miami courier. In order to successfully effect service, Rio Properties filed a motion seeking approval for alternative service of process. The district court granted Rio Properties' motion. Pursuant to Federal Rules of Civil Procedure 4(h)(2)[12] and 4(f)(3),[13] it

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[6] *Id.*

[7] *Id.*

[8] *Rio Properties, Inc. v. Rio Intl. Interlink*, 2001 U.S. Dist. Lexis 24054 (Feb. 12, 2001).

[9] *Id.*

[10] *Rio Properties*, 284 F.3d at 1013.

[11] *Id.*

[12] Federal Rule 4(h)(2) provides that service upon a foreign corporation outside the United States shall be effected pursuant to Federal Rule 4(f). Fed. R. Civ. P. 4(h)(2) (2000).

ordered service on RII through postal mail to the Los Angeles attorney and the Miami courier, as well as by email through RII's stated email address.[14]

RII then filed a motion to dismiss for insufficient service of process and lack of personal jurisdiction. After the issues were fully briefed by both sides, the district court denied the motion without a hearing. The case then proceeded through discovery. After a failure to comply with a discovery order, the district court granted Rio Properties' motion for sanctions and entered a default judgment against RII, which included attorneys' fees and costs as a result of a determination of bad faith.[15]

C. The Appeal and the Ninth Circuit's Decision

RII appealed the sufficiency of the district court's order regarding service of process, the district court's exercise of personal jurisdiction, the entry of default judgment, and the award of attorneys' fees and costs.[16] The Ninth Circuit affirmed the district court's opinion in all aspects, but for the purposes of brevity and relevancy, this Note will only discuss the Court's holding as it applies to the alternative service of process issue.

The Court began its discussion of the sufficiency of the alternative methods of process by reviewing the Federal Rules of Civil Procedure. Rule 4(h)(2) provides that service upon a foreign business entity may be made under any provision of Rule 4(f), which provides methods of service upon *individuals* in a foreign country. Rule 4(h)(2) does not incorporate personal service under Rule 4(f)(2)(C)(i) as an acceptable method of service. Rule 4(f) provides several methods for effecting service on a foreign defendant.[17] The last of these Rule 4(f) provisions allows service of process to be effected "by other means not prohibited by international agreement as may be directed by the court."[18] The Court rejected RII's argument that the Rule 4(f) provisions created a hierarchy of preferred methods for service of process, and it held that court-directed service is as favored as the other methods.[19]

The Court noted, however, that even if permitted by Rule 4(f)(3), the alternative method of service must also comport with constitutional notions of due process. The Court held that the method of service must be

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[13] Fed. R. Civ. P. 4(f)(3).

[14] *Rio Properties*, 284 F.3d at 1013.

[15] *Id.*

[16] *Id.* at 1014.

[17] *Supra* n. 2.

[18] Fed. R. Civ. P. 4(f)(3).

[19] *Rio Properties*, 284 F.3d at 1016.

"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."[20] The Court quickly discussed and determined that service on the Miami courier would be appropriate because the address was the primary point of contact for RII in the U.S. Moreover, it was apparent that mail delivered to the Miami address was successfully forwarded to RII because RII was made aware of the lawsuit by the initial unsuccessful attempts on the courier. Next, the Court determined that service on the Los Angeles attorney was also acceptable because RII had consulted him regarding the lawsuit and was in contact with the organization in Costa Rica.[21]

The discussion of service by email was slightly more involved. The Court began by noting that the Constitution only requires that the method of service selected be reasonably calculated to provide notice and the opportunity to respond. The Court utilized language from a New York district court opinion describing the occasional technological leap necessary to modernize jurisprudence. The opinion highlighted the crucial role email plays in RII's business, and thus the Court concluded email was an appropriate service method "reasonably calculated to [give] notice."[22]

The final portion of the opinion approving the alternative methods of service consisted of a recognition of the limitations of email. The Court highlighted the difficulties in confirming receipt of an email message, complying with verification requirements, and the possibility of issues in system compatibilities. As a result, the Court held that the discretion of the district court was necessary to balance the limitations of email service with the benefits offered.[23]

III. ANALYSIS

Attempting service of process on a foreign defendant has been described as a "twisting process bordered on all sides with fatal pitfalls."[24] This Note will argue that the Ninth Circuit incorrectly concluded that email was a permissible alternative method of service under Fed. R. Civ. P. 4(f)(3). The court in the *Rio* case misapplied the case law it used to support

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[20] *Id.* (quoting *Mullane v. C. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

[21] *Rio Properties*, 284 F.3d at 1017.

[22] *Id.* at 1018.

[23] *Id.*

[24] Gary N. Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 Intl. Law. 637, 638 (1980).

the proposition that technological methods of service were acceptable. Second, its own analysis of the limitations and capabilities provided by email leads to the conclusion that as authorized by the district court, email should not be available as a method of service. In doing so, the *Rio* decision creates poor precedent with the capability of causing constitutional harm to foreign defendants, and indeed such harm may have already arisen. However, solutions do exist for establishing a more constitutionally permissible Internet method of judicial service.

A. The Misapplication of the Law

An inherent fault in the *Rio* court's decision approving email as an alternative method of service is that the law supporting the decision was either flawed or misapplied. In establishing the constitutional support for service via email, the court glossed over the Supreme Court decisions in which notice has been described as being of paramount importance. In analyzing other decisions utilizing a technical service of process, the court ignored the specific factual scenarios that brought about the decisions. All of the preceding causes the *Rio* decision to be strangely devoid of legal authority in a new and important area of the law.

1. Failure to Evaluate Alternative Service Standards

Alternative methods of service were first endorsed as fully meeting the requirements of due process[25] by the Supreme Court in 1917, in *McDonald v. Mabee*.[26] Since that time, the methods of service required to satisfy due process concerns have been premised primarily on the concept of giving the adverse party "reasonable notice" of the claim pending against them:

> [A]dequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice implicit . . . in due process are satisfied.[27]

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[25] As provided for by the Fifth and Fourteenth Amendments to the U.S. Constitution.

[26] 243 U.S. 90, 91 (1917).

[27] *Miliken v. Meyer*, 311 U.S. 457, 463 (1940) (internal citations omitted).

The "reasonableness" requirement was further refined in *Mullane v. Central Hanover Bank & Trust Company*,[28] as requiring "notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections."[29]

Inherent in *Mullane* and its progeny is the concept that due process rights require effective service of process—that is, a method of service calculated to effect notice. The Supreme Court described this concept in *Mullane* as requiring notice in a manner "appropriate to the nature of the case."[30] The Supreme Court clarified this statement by holding that the constitutionality of a method of service must be evaluated keeping in mind the "realities of the case."[31] However, as noted by the court in *Greene v. Lindsey*,[32] "the reasonableness of the notice provided must be tested with reference to the existence of 'feasible and customary' alternatives and supplements to the form of notice chosen."[33]

To that end, the court in the *Rio* case analyzed the three methods of service authorized by the district court: postal service on the Miami courier, service on the Los Angeles attorney who contacted Rio Properties counsel on behalf of RII, and service by email via an address listed on RII's Internet site.[34] Any decision made as to the reasonableness of service was tainted, however, because the concern of ensuring notice was absent from the Court's decision-making process. It is important to recognize that both the district court and the Ninth Circuit were not dealing with a defendant upon whom default judgment had been reached because of a failure to notify him or her of a pending action. Rather, all parties were aware that the defendant had notice of the case through the original service on the Miami courier.

This distinction enabled the Ninth Circuit to lightly evaluate the constitutionality of email as a method of service. The court in the *Rio* case merely concentrated on the "reasonably calculated" language in *Mullane* in arriving at their decision.[35] Discussion only centered on how RII presented itself to the world. Minor mention was made of RII having "no easily discoverable street address in the United States or in Costa Rica."[36] Yet, the

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[28] 339 U.S. 306.

[29] *Id.* at 314.

[30] *Id.* at 313.

[31] *Greene v. Lindsey*, 456 U.S. 444, 451 (1982).

[32] 456 U.S. 444.

[33] *Id.* at 454 (quoting *Mullane*, 339 U.S. at 315).

[34] *Rio Properties*, 284 F.3d at 1016-17.

[35] *Rio Properties*, 284 F.3d at 1017.

[36] *Id.* at 1018.

only listed search for such an address was in the nebulously described "international directory databases."[37]

Given this weak discussion, the Court should have determined that service by email was unnecessary. As indicated in *Greene*,[38] a consideration of the available alternatives indicates that service by email was redundant. Postal mail to the Miami courier obviously reached RII as the California attorney contacted Rio Properties. Moreover, it is easily presumable that the California attorney retained by RII would have imparted notice to them. These two methods are more traditional, reliable, and acceptable. They existed as the quintessential "feasible and customary" alternatives envisioned in *Greene* that negated the need to establish a new alternative method of process.[39] By ignoring the relevance of the two prior approved methods, the District Court and the Ninth Circuit overstepped their bounds in adopting email as an appropriate method for effecting service.

2. Ignoring Effort in Effecting Service

In several cases cited by the court in the *Rio* case, alternative service of process was generally either permitted or denied based in part on the degree of effort made in effecting service on the defendant.[40] However, the court in *Rio* steps away from this rule, holding that Rio Properties "needed only to demonstrate that the facts and circumstances of the present case necessitated the district court's intervention."[41] However, the "facts and circumstances" only indicate that aside from serving RII's mailing address in Miami, Rio Properties only investigated "international directory databases" in attempting to locate a proper mailing address in Costa Rica.[42]

Contrast this circumstance with the Ninth Circuit's highly touted interpretation of *Mayoral-Amy v. BHI Corporation*,[43] in which the court held that it was necessary to investigate the laws and provisions of the

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[37] *Id.* at 1013.

[38] 456 U.S. at 454.

[39] *Id.* at 451 (quoting *Mullane*, 339 U.S. at 315).

[40] *New Eng. Merchants Natl. Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 80 (S.D.N.Y. 1980) (authorizing service by telex after many attempts of service in Iran); *In re Intl. Telemedia Assoc., Inc.*, 245 B.R. 713, 719-20 (Bankr. N.D. Ga. 2000) (authorizing service by email against a defendant who would give no traditional address and who moved frequently); *Mayoral-Amy v. BHI Corp.*, 180 F.R.D. 456, 459-60 (S.D. Fla. 1998) (refusing to authorize alternative methods of service while legal avenues in Belize remained unexplored).

[41] *Rio Properties*, 284 F.3d at 1016.

[42] *Id.* at 1013.

[43] 180 F.R.D. at 456.

country of Belize before permitting an alternative method of service, even when the defendant already had notice of the case.[44] In the present action, the record indicates that there was no investigation of Costa Rican laws in an effort to properly effect service. While the distinction may be minor, it does bear weight on the validity of such an important holding. Given that a lower bar was established in determining that an alternative method of service was necessary, the Court severely weakened the protection available to foreign defendants.

B. Email as a Method of Service

Before there was the web, there was email. This nearly instantaneous communication service has been a definite enabler of e-business worldwide. However, email is not without limitations that necessitate caution in its use in business and judicial processes. This section will outline the history of email, as well as give a general description of its underpinnings and usage. The court in the *Rio* case drastically underestimated the impact of the few shortcomings of email it actually recognized, which should have led to the conclusion that email, under current technology, should not suffice to establish effective service. Lastly, the shortcomings that the court in the *Rio* case ignored or of which it was unaware more strongly indicate that email is not constitutionally sufficient for service of process as it is currently used.

1. The Concepts Behind and History of Electronic Mail

At the end of 2001, the Internet boom had resulted in almost 150 million net users in the U.S., and nearly half a billion users worldwide.[45] While the World Wide Web has provided shopping, social, and educational opportunities, the original "killer app"[46] for the Internet was email.[47] Email, the shortened form of "electronic mail," is an asynchronous communication method by which one individual sends text or files to another individual.[48] The only necessary requirement is that both individuals have access to an

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[44] *Id.* at 460.

[45] Computer Industry Almanac, Inc., *Internet Users Will Top 1 Billion in 2005, Wireless Internet Users Will Reach 48% in 2005*<http://www.c-i-a.com/pr032102.htm> (Mar. 21, 2002).

[46] A "killer app" is "[a]n application that becomes so indispensable to the way people work that it creates a larger market for the operating systems and platforms for which it is available." Bryan Pfaffenberger, *Webster's New World Computer Dictionary* 213 (9th ed., Webster 2001).

[47] David Wood, *Programming Internet Email* 24 (O'Reilly & Assoc., Inc. 1999).

[48] Pfaffenberger, *supra* n. 46, at 131.

email account[49] and that the sending party knows the correct email address for delivery of the message.

From its auspicious beginnings,[50] email has blossomed into a communication tool that will soon carry more messages to individuals across the world daily than the U.S. Postal Service.[51] Given its ubiquitous use, the question then becomes: *Why is email not appropriate for service of process?* Simply put, email has a number of limitations that render it extremely insecure for important transactions.

2. Email Limitations Identified by the Court in the *Rio* Case

The court in the *Rio* case identified several limitations of email. First, except in rare circumstances, there is no way to confirm receipt of an email message.[52] While it is important to note that some email programs do provide the capability of requesting a "return receipt," the actual sending of this receipt is completely optional, and in certain cases, completely absent in the email received by the end user. This limitation renders it practically impossible to determine if an email was actually received by the party to whom it was sent.

Second, a lack of widespread use of electronic signatures[53] creates significant problems in verifying who sent the message.[54] The Court correctly identified here that in attempting to effect service via email, authentication of the return address (i.e. the party who sent the message) is nearly impossible without the use of electronic signatures. Moreover, email "spoofing"—falsifying the email address of the originator of the message—is trivial and easily done.[55] Service by email would thus be an issue of trust—in that an individual or corporation receiving a message indicating that it was being served cannot be easily assured such a message is actually from the party indicated rather than a friend or foe attempting harassment.

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[49] An email account is most easily analogized as access to the electronic equivalent of a post office box. *Id.*

[50] Reportedly, the first email message contained only the characters "QWERTYIOP"—letters on the top row of the standard keyboard. Todd Campbell, *The First E-Mail Message: Who Sent It and What It Said* <http://www.pretext.com/mar98/features/story2.htm> (accessed Nov. 5, 2002).

[51] Pfaffenberger, *supra* n. 46, at 131.

[52] *Rio Properties*, 284 F.3d at 1018.

[53] As defined in 15 U.S.C. § 7006(5) (2002).

[54] *Rio Properties*, 284 F.3d at 1018.

[55] CERT Coordination Center, *Spoofed/Forged Email* <http://www.cert.org/tech_tips/email_ spoofing.html> (last updated Sept. 4, 2002).

Third, computer system differences can lead to a question over whether documents or exhibits were actually received.[56] The Court correctly identified here that there are extreme differences among computer users and the way email is handled. There are three major operating systems utilized by Internet users[57] and file formats in each of the three are not necessarily handled the same way. For example, if a court wished to effect service by mailing a Microsoft Word document containing the complaint, two major difficulties arise depending on whether or not the file was created in a Windows-based or MacOS-based computer.

First, not al email systems support single or multiple attachments.[58] Thus, in sending the email, the court would believe it was sending the individual the complaint with all the required information, when in reality information of critical importance may not actually be included.

Second, and this was the actual issue the court in the *Rio* case raised, is that there is no actual guarantee that a document or exhibit created on one platform may be read by another user—even when using the same operating system. Unlike paper, in which the capacity for sight is the only necessary tool to process the information, documents sent in an electronic format require a compatible interpreter. If the originator used Microsoft Word, and the defendant used WordPerfect, there is the possibility of a complete document mismatch in which the defendant would be unable to read or view what he or she was sent. Moreover, variants in compatibility even within versions of the *same product* create extreme difficulties ensuring that a party with an unknown computer system and software will be able to open a document.

3. Limitations of Email that the Court in the *Rio* Case Missed

While the court in the *Rio* case stopped at these limitations, there are several others that need to be addressed. First, access to email accounts is limited. Intrinsically, access to email accounts is limited both physically and technologically. Physically, email requires an active participation by the recipient in order to receive the message, meaning that the email account holder must actively choose to access and read his or her mail. This means

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[56] *Rio Properties*, 284 F.3d at 1018.

[57] Windows based operating systems, MacOS based operating systems, and UNIX derivatives. Hans U. Zoebelein, *The Internet Operating System Counter* <http://leb.net/hzo/ioscount/> (accessed Mar. 3, 2003).

[58] As of late 2002, AOL, the largest Internet service provider in the United States, supports only one file attached per email—including more than one may result in AOL recombining the files into a single attached compressed file.

that an email sent may lie unread if the recipient chooses to stop using the computer due to physical injury (to the user or the computer) or as a personal choice.

Technologically, the user may lose access to his email account.[59] In *In re International Telemedia Associates, Inc.*,[60] the Bankruptcy Court authorized email service on an email address provided by Hotmail. Hotmail provides free Internet email accounts. However, Hotmail's terms of use provide that they may delete your account for any number of reasons, including inactivity.[61] If a user's email account was deleted after an attempt at service was emailed, but before he or she had a chance to access it, then notice of an impending case would fail solely because of the nature of the account. Similarly, traditional Internet service providers may suspend email accounts for non-payment, rendering the account inaccessible with little or no actual notification to the outside world.

In these circumstances, the sender of an email that is not received by the desired recipient may or may not receive a message that the email was undeliverable or unacknowledged by the recipient. It is easy to contrast these circumstances with those of service by mail or facsimile, in which an actual mailing may be "returned to sender" or a fax machine, which requires an actual working fax machine on the other end to successfully complete its transmission.

Second, email can be avoided. An intrinsic problem with email is the standard operating procedures under which it is used. Much like the individual who avoids his usual haunts to escape personal service of process, email can be rerouted, deleted, or returned as part of an intentional or unintentional process. Whether or not sending an email to an individual who would automatically delete it is *reasonably calculated to effect service* may be a debatable question, but the technology supports the capability that it could happen with or without the email recipient's knowledge.

Email may be actively filtered by the end user through the use of an email reader. Programs like Microsoft Outlook, as well as free web-based mail services like Hotmail or Yahoo! Mail, enable a user to define "rules" on how to deal with incoming email.[62] Email that identifies itself as being from a specific domain name, a specific individual, or containing specific text or

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[59] *See generally* Evan Hansen, *Who owns your e-mail?* <http://news.com.com/2100-1023-963631.html> (October 29, 2002).

[60] 245 B.R. 713.

[61] Microsoft Corporation, *MSN Website Terms of Use and Notices* <http://privacy.msn.com/tou/ default.asp> (last updated Oct. 2002).

[62] *Id.* (describing Hotmail's terms of service). Yahoo!'s terms of service may be accessed at Yahoo! Inc., *Yahoo! Terms of Service* <http://docs.yahoo.com/info/terms/> (accessed Mar. 3, 2003).

attachments may be deleted automatically, without the user even being aware it was received. Granted, this methodology requires an affirmative duty to avoid such an email, but this meshes the importance of notice with the question of responsibility of awareness regarding that notice.

There is a similar method by which email may be deleted over which the email recipient may or may not have control. Email may be similarly discarded under "rules" by the mail server.[63] If the user is the controller of the mail server, the question of responsibility is again raised. However, most email users are utilizing accounts provided by their respective Internet service providers. The decision on whether or not to implement these rules would be out of their concern, and presumably outside of their knowledge. As a result of this capability, an email address can never be presumed to be calculated to effect notice, because the email server may recognize a sender, a domain name, or even a legal document, and delete the email without notifying either the recipient or the sender.[64]

Third, the identity of the recipient cannot be verified. Much like the court's concern in the *Rio* case over verifying the sender of an email, it is also impossible to verify the recipient of the email. Although presumably the recipient is the account holder (and thus the intended defendant), the nature of email does not guarantee that such is the case.

This issue can be generalized into a concern over email access. In the physical realm, Fed. R. Civ. P. 4(e)(2) governs who may accept service on behalf of another individual in the United States; it must be a person of "suitable age and discretion" residing at the "individual's dwelling house or usual place of abode."[65] Translating such a requirement to email indicates that any adult who accesses the recipient's email account will suffice to effect service. But this raises the question: *What if the email account is shared?* More specifically, consider the possibility that the email account is shared by a minor individual who reads and deletes the email containing the attempt at service. An analogous situation under Federal Rule 4(e)(2) would indicate that service was invalid. A similar argument should stand here considering that as it presently exists, it is impossible to determine the physical recipient of an email.

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[63] A mail server is the analogue to a post office and a post office box—the mail server receives, processes, and stores messages until retrieval by the user. *See* Computer Hope, *Computer Dictionary "Mail Server"* <http://www.computerhope.com/jargon/m/mailserv.htm> (accessed Mar. 3, 2003).

[64] The most common reason a mail server would be set to filter mail is to avoid the plague of most Internet users: spam (unsolicited commercial email). One common server-side mail filtering program is SpamAssassin, *SpamAssassin: Welcome to Spam Assassin* <http://www.spamassassin.org> (accessed Mar. 3, 2003).

[65] Fed. R. Civ. P. 4(e)(2) (2000).

All of these issues lead to the unfortunate conclusion that email, as a messaging service, does not contain the vital necessities to ensure that actual notice is received. As a result, email by itself *should not* be considered as being "reasonably calculated" to impart notice to a defendant.[66] Using it as such leaves a dangerous constitutional hole: that a judicial process may be undertaken in which the defendant is unaware a suit is proceeding.

C. A Constitutionally Perilous Result, or the Judicial Dot Com Bust

The most significant problem with a flawed decision like that in *Rio* is that the analysis may be deemed persuasive by other courts. Given the limitations described above, the usefulness of email as an alternative method of service poses a dangerous due process issue in violation of the mandate of *Mullane*.[67] As mentioned previously, *Mullane* established the requirement that an alternative method of process be "reasonably calculated" to impart notice.[68] This "reasonableness" must be viewed in line with "the realities of the case"[69] and keeping in mind other available alternatives and supplements.[70] For the reasons described in the previous section, the tenuous nature of email communication and its severe limitations in communicating data other than plain text email should not be used as a method of alternative service, especially when viable alternatives like an actual postal address exist.

As noted in *Grannis v. Ordean*,[71] "[t]he fundamental requisite of due process of law is the opportunity to be heard."[72] Courts authorizing service by email on foreign defendants may be violating this crucial tenet of constitutional law under the auspices of facilitating what can be a difficult process.

Unfortunately, for the practicing advocate, service by email is an attractive option: it is practically free, instantaneous, and unverifiable. An attorney having difficulties in locating a foreign defendant that has a recognizable email address may simply attempt to pursue such an alternative method of service to save time, money, and energy.

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[66] *Mullane*, 339 U.S. at 314.
[67] *Id.*
[68] *Id.*
[69] *Greene*, 456 U.S. at 451.
[70] *Id.* at 454.
[71] 234 U.S. 385 (1914).
[72] *Id.* at 394.

Indeed, the *Rio* decision is having such an effect. In *Ryan v. Brunswick Corporation*,[73] the district court for the Western District of New York approved method of service by postal, fax, and email on a company in Taiwan.[74] The court did so without a consideration of the limitations of email as described above, rather just noting that the defendant "conducts its business through these means of communication."[75]

D. An Alternative for Constitutionally Effective Email Service (a.k.a. the Greeting Card Plan)

The most disappointing aspect of the *Rio* decision was that better alternatives existed to establish email as an alternative method of service. With the advent of the technological age, and the Internet-only businesses that came with it, the need to update the traditional notions of civil procedure was never more apparent than in the *Rio* case. Email does exist as an inexpensive and efficient method of communication, but it is not without its flaws. However, combining email and the web may provide a methodology for ensuring constitutionally and technologically adequate methods of servic e.

The primary issue in using email to effect service is ensuring that the defendant has proper notice of the action against him. Utilizing a web page, combined with notification by email, creates a system in which successful delivery of the complaint can be more reasonably assured. The system would work as follows:

1. The court approves email as an alternative method of service.

2. The plaintiff or the court causes the complaint to be digitized and posted on a unique URL.[76]

3. An email is sent to the defendant's known email address indicating that he had been served, and that he must visit that website to obtain a copy of the complaint.

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[73] 2002 U.S. Dist. Lexis 13837 (W.D.N.Y. May 31, 2002).

[74] *Id.* at *9.

[75] *Id.*

[76] A URL, or uniform resource locator, specifically identifies the Internet location at which a webpage or document can be found. The address <http://www.udayton.edu/~lawrev>, for instance, is the URL for the University of Dayton Law Review's website. University of Dayton Law Review, *UD Law Review Home* <http://www.udayton.edu/~lawrev> (accessed Mar. 3, 2003); *See generally* Pfaffenberger, *supra* n. 46, at 378.

4. The defendant visits the website, which offers the capability of downloading or printing the complaint in any number of standardized formats. Simultaneously, the web server records the date, time, and Internet address from which the defendant accessed the site creating a record that service has been effected.

5. The court and the plaintiffs are notified via email that the defendant has viewed the site and that proper service has been effected.

6. The suit proceeds appropriately.

What is proposed is similar to a service offered by any number of websites offering online greeting cards. Online greeting cards are a web page created by the user's input to be sent to a specific recipient.[77] The recipient is notified via email that a card has been created and is informed of the URL to visit to view their card. Most such websites offer the sender the ability to be notified whenever the recipient accesses the actual card.[78] It is this combination of email and web technology that ensures the card (and in the suggested alternative, the complaint) has been received. Where the "Return Receipt" option available on certain email programs is unable to guarantee delivery, this methodology provides factual assurance that a party at the defendant's email address was in actual receipt of the email itself.

While this process ensures that notice of a lawsuit has been received, it is unable to guarantee notice will be imparted. As described above, email can be ignored, rerouted, filtered, or accessed by a non-party. These limitations are not easily overcome under current technological standards. However, understanding that the only requirement is that the method used be *reasonably calculated to effect notice*, such a process effects notice without the concerns of operating system or document compatibility and with the factual assurance of when the complaint is viewed.

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[77] Websites that provide such a greeting card service (either complimentary or for a fee) include AG.com, Inc., *AmericanGreetings.com* <http://www.americangreetings.com> (accessed Jan. 15, 2003); EGCB, Inc., *BlueMountain.com* <http://www.bluemountain.com> (accessed Jan. 15, 2003); Hallmark Cards, Inc., *Hallmark.com* <http://www.hallmark.com> (accessed Jan. 15, 2003); and Yahoo! Inc., *Yahoo! Greetings* <http://greetings.yahoo.com> (accessed Jan. 15, 2003).

[78] *See supra* n. 77. Internet greeting cards sent from the Blue Mountain or Hallmark sites have the option of notifying the sender when the recipient views the card.

IV. CONCLUSION

The Ninth Circuit has stated that "Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint."[79] The rule outlined in *Rio* fails to comport to this instruction. While seemingly concluding too quickly that email may be an appropriate method of service, the Ninth Circuit ignored constitutional law and misunderstood the technical nature of email. Their casual discussion of the importance of a method of service being "reasonably calculated" to impart notice fails to consider the nuances implicit in an email transaction. Moreover, the numerous limitations and difficulties associated with email communication lead to the strong conclusion that email should not suffice as a method of service without additional safeguards. The advent of technology into the courtroom and judicial proceedings will enable greater efficiency and access for all participants. This technology, however, needs to be met with a careful understanding of technological implications if constitutional notions of due process are to be upheld. The Ninth Circuit's decision in *Rio* is a positive indicator that the entry of modern judicial systems into the 21st century needs to be strongly tempered by a clear understanding of the offerings and limitations email and the Internet provide.

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[79] *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988).