

Ninth Circuit Approves Service by E-mail Upon Foreign Corporation

In a case of first impression, the United States Court of Appeals for the Ninth Circuit held recently that service of a defendant via e-mail was appropriate. See Rio Properties, Inc. v. Rio International Interlink, 2002 U.S. App. LEXIS 4392 (9th Cir., Jan. 17, 2002). In that case, Rio Properties, a Las Vegas hotel and casino operator, sued Rio International Interlink, a foreign Internet business, alleging trademark infringement.

Before resorting to service by e-mail, Rio Properties made several attempts to serve the defendant in the United States. Rio Properties first attempted to serve Rio International at an address in Miami, Florida where the defendant had registered the allegedly infringing names. When Rio Properties attempted to serve Rio International there, it learned that that address housed only Rio International's international courier who was not authorized to accept service on Rio International's behalf. Rio International's courier did agree, however, to forward the summons and complaint to the defendant's Costa Rican courier. After serving the Complaint in this manner, Rio Properties received a telephone call from Rio International's Los Angeles attorney, who stated that the Complaint that Rio International received was illegible. Rio Properties agreed to re-send the Complaint and asked whether the attorney would accept service on Rio International's behalf. The attorney declined to accept service.

Rio Properties then attempted to serve Rio International in Costa Rica. The only address listed in an international database for Rio International was an e-mail address. Based on this, Rio Properties filed an emergency motion for alternative service. The District Court granted Rio Properties' motion and ordered service of process, pursuant to Federal Rules of Civil Procedure 4(h)(2) and 4(f)(3), through e-mail and upon Rio International's attorney in California.

The Ninth Circuit held that Federal Rule 4 (f)(3) permits service outside of the United States by any means that are directed by a District Court and not prohibited by an international agreement. This may even include forms of service impermissible under the laws of the foreign country. Upholding the decision of the District Court, the Ninth Circuit held that Rule 4(f)(3) was not a rule of last resort, but rather set forth several alternative means to serve an international defendant.

The Ninth Circuit also held that, in order to petition the District Court for an alternative form of service, Rio Properties was not required to demonstrate that it had tried every possible means of service, but needed only to establish that the circumstances of the case required the Court's intervention. Because Rio Properties was attempting to serve an elusive international defendant attempting to evade service, service was proper under Rule 4(f)(3).

Because a form of service that comports with Rule 4 (f)(3) must also comport with the Constitutional requirements of due process, the Ninth Circuit also considered whether service of process via e-mail was reasonably calculated to provide the company with notice. The Ninth Circuit held that, despite the lack of case law regarding service by

e-mail, in this case, e-mail was not only reasonably calculated to apprise the defendant of the action, but was actually the method most likely to reach the defendant. The Ninth Circuit noted that the Constitution does not require any particular method of service, but only that the method used be “reasonably calculated” to provide notice and an opportunity to respond. Further, Rule 5 has been amended as of December 1, 2001 and currently stipulates that service can be made, in certain circumstances, by “Delivering a copy by any other means including electronic means.” Federal Rule of Civil Procedure 5(a)(D).

Despite this, the Ninth Circuit also acknowledged that service by e-mail has limitations and is generally not permissible absent a court order. Specifically, the Ninth Circuit pointed out that there is generally no way to confirm receipt of an e-mail message, there may be problems using an electronic signature, and compatibility problems may make it difficult or impossible to send and/or receive exhibits or attachments.

As this is the first case in which a United States Court of Appeals has considered whether service via e-mail is appropriate, and only the second case in which the issue has been considered in a federal court, this issue is far from settled. This case does indicate, however, that when a defendant is particularly elusive and does business via e-mail, this may be a possible method of service. Further, as the technology improves and some of the limitations of e-mail are eliminated, courts may become increasingly willing to accept it as a form of service.