

SERVICE OF PROCESS VIA SOCIAL MEDIA IN CIVIL CASES: AN EXPLORATION OF THE POTENTIAL USE OF SOCIAL MEDIA PLATFORMS FOR BRINGING NOTICE TO DEFENDANTS IN BELGIUM

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Abstract: In common law systems, there has recently been a trend to permit plaintiffs to serve process on defendants through social media networks. This trend raises the following question: Is this form of service also beneficial in civil law countries, in particular, Belgium? To answer this question, this Article analyzes the conditions under which this type of service has been allowed by US courts, where most of the new development has occurred. This Article concludes that social media service may be a valuable additional means of notice when the defendant does not have a known address. In such circumstances, Belgian law currently prescribes service on the public prosecutor as the last resort method; however, service via social media platforms is far more effective at actually reaching the defendant. Consequently, the Belgian legislature could consider introducing social media service as a method supplementing service on the public prosecutor, provided the necessary safeguards are implemented.

KEYWORDS: publicity; notification; summons; evidence

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I. INTRODUCTION

In the last decade, a new phenomenon has arisen in a number of common law jurisdictions around the world. In Australia, the United States, New Zealand, Canada, South Africa, and England, there are cases in which social media platforms were used to notify the defendant of the commencement of civil proceedings, or “serve process.” Social media can be defined as “a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User-Generated Content.”¹ The Web 2.0 model refers to the shift that the traditional internet has made to a landscape increasingly dominated by user-generated content. Another oft cited definition of social media is the one by Boyd and Ellison: “[W]eb-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection and (3) view and traverse their list of connections and those made by others within the system.”² In layman’s terms, “social media” refers to websites and applications that allow users to communicate as well as create and share content on the internet. The list of social media is extensive, though not limited to: Facebook, Twitter, LinkedIn, Snapchat, YouTube, WhatsApp, Pinterest, Google Plus+, Tumblr, Instagram, VK, Flickr, Vine, Meetup, Tagged, Ask.fm, MeetMe, and ClassMates.

In civil law nations, on the other hand, effecting service of process through social media is completely unknown. Thus far, legal scholarship in continental EU Member States has not devoted any attention to this relatively new development within the common law world. This is remarkable in light of the obvious importance of this topic for the continental EU Member States, given the digital reality and the continuous objective to increase the functionality of dispute resolution.

This Article aims to fill this gap in the literature by examining whether service of process via social media can serve a purpose in the civil law country of Belgium. Part II maps out the existing practice in common law nations, exploring the United States in particular because it has the largest number of cases in which social media service of process has been employed. Part III subsequently describes the current framework for service of process in civil cases in Belgium and considers whether service of process through social media can play a role. Part IV attempts to list the requirements of service by social media if this type of service is implemented. Finally, Part V concludes. The subject matter is controversial and this Article represents a cautious yet thought-provoking first dip of one’s toe in the water.

¹ Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 Bus. Horizons 59, 61 (2010).

² Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 *J. Computer-Mediated Comm.* 210, 211 (2007).

II. USE OF SOCIAL MEDIA FOR SERVICE OF PROCESS IN COMMON LAW SYSTEMS

A. First Seed: The Australian Case of *MKM Capital v Corbo & Poyser*

A case before the Supreme Court of the Australian Capital Territory in December of 2008 was the first reported use of a social media network to serve a legal document on a defendant.³ In the matter of *MKM Capital Property Ltd v Corbo & Poyser*, the master allowed the plaintiff MKM Capital to effect service of a default judgment on defendants Corbo and Poyser by Facebook.⁴ The couple had taken out a home financing loan with mortgage provider MKM Capital but failed to keep up with payments.⁵ They ignored emails from MKM's lawyers and did not appear when MKM started a lawsuit. MKM was eventually granted a default judgment permitting seizure of the property.⁶ Before the judgment could be executed, it had to be served on the defendants. As it happened, the defendants had moved away, switched jobs, and changed their phone numbers.⁷ Personal service—nearly a dozen attempts⁸—as well as service by mail and publication proved unsuccessful.⁹ MKM's law firm therefore took the innovative step of requesting the court to allow MKM to effect service through the defendants' Facebook accounts.¹⁰ MKM's lawyers showed how traditional methods of service had failed.¹¹ They also demonstrated how the defendants' personal information, which was provided to MKM in the loan paperwork, matched the information found on their Facebook accounts.¹² The defendants had not implemented any privacy settings and had thus not limited who could view the information on their profiles.¹³ The lawyers pointed to the defendants' dates of birth, their email addresses, their lists of friends, and the fact that they were friends on Facebook.¹⁴ In a world's first,¹⁵ the master permitted the use of a private Facebook message to inform the defendants of the entry and terms of the default

³ *MKM Capital Pty Ltd v Corbo & Poyser* [2008] SC 608 (16 December 2008) 1–2 (unreported); John G. Browning, *Your Facebook Status—"Served": Service of Process Using Social Networking Sites*, 2 Reynolds Cts. & Media L.J. 159, 166–67 (2012).

⁴ See *MKM Capital Pty Ltd*, [2008] SC 608 at 2.

⁵ John G. Browning, *Served Without Ever Leaving the Computer: Service of Process via Social Media*, 73 Tex. B.J. 180, 181 (2010).

⁶ *Id.*

⁷ *Id.*

⁸ Browning, *supra* note 3, at 166.

⁹ Browning, *supra* note 5, at 181.

¹⁰ *Id.*

¹¹ Browning, *supra* note 3, at 166.

¹² Browning, *supra* note 5, at 181.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Browning, *supra* note 3, at 167.

judgment.¹⁶ In addition, the order had to be served via email and by leaving a sealed copy at their last-known address.¹⁷

The ruling has been described as “the shot heard ‘round cyberspace.”¹⁸ Courts in Australia,¹⁹ Canada,²⁰ New Zealand,²¹ and England²² followed its example and issued decisions allowing a party to serve legal documents on the opposing party through social media. The United States was quite late to the party, with its first reported case in 2011.²³ It is, nevertheless, interesting to focus on the United States, because the country has since then accumulated the largest body of case law. Furthermore, US doctrine on the subject is far more extensive than in any of the other jurisdictions. For continental Europeans, the American experience with social media service is, therefore, the most useful one to become familiar with.

B. The US Legal Framework for Service

1. Method of Service Needs Statutory Basis

In the United States, service of process has to be effected in accordance with federal or state law, depending on the court which has to adjudicate the matter. Civil cases in federal court are governed by the Federal Rules of Civil Procedure (FRCP). FRCP 4 deals with the service of the summons and a copy of the complaint on the defendant.²⁴ It makes a distinction between serving an individual within a judicial district of the United States²⁵ and serving an individual in a foreign country.²⁶

¹⁶ *MKM Capital Pty Ltd v Corbo & Poyser* [2008] SC 608, 2 (Austl.).

¹⁷ *Id.*

¹⁸ Browning, *supra* note 5, at 181.

¹⁹ *Byrne v Howard* [2010] FMCafam 509 (21 April 2010) (discussing service via Facebook in a family law case involving proof of paternity); *Graves v West* [2013] NSWSC 641 (24 May 2013) (discussing service *inter alia* via LinkedIn in a claim for damages resulting from an assault on a football field); *Mothership Music Pty Ltd v Ayre* [No. 2] [2012] NSWDC 111 (3 August 2012) (discussing service *inter alia* via Facebook in a contractual dispute), *set aside on appeal by Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268 (20 August 2013).

²⁰ *Knott v Sutherland* (5 February 2009), Edmonton 0803 02267 (Alta. Q.B.) (discussing service of an employment-related action *inter alia* via Facebook); *Boivin & Associés v. Scott*, 2011 QCCQ 10324 (discussing service via Facebook on defendant with no known address in Canada and who had moved from her last known address in the United States).

²¹ Browning, *supra* note 3, at 169 (discussing *Axe Market Garden Ltd. v. Axe*, where defendant in a shareholders dispute was served via Facebook).

²² *Id.* at 173–74 (discussing *Blaney v. Persons Unknown*, where an injunction was served via direct message on Twitter, and *AKO Capital LLP & another v. TFS Derivatives & others*, where defendant was served via Facebook in the context of overcharged commission).

²³ *Mpafe v. Mpafe*, No. 27–FA–11–3453 (4th Jud. Dist. Fam. Ct. Div. of Minn. May 10, 2011) (discussing service *inter alia* via Facebook, Myspace, or other social networking site on defendant in divorce case who had presumably moved to Ivory Coast and for whom plaintiff had no physical address); *see* Browning, *supra* note 3, at 177.

²⁴ Fed. R. Civ. P. 4(e)–(f).

²⁵ Fed. R. Civ. P. 4(e).

²⁶ Fed. R. Civ. P. 4(f).

When a defendant needs to be served within the territory of the United States, personal service pursuant to FRCP 4(e)(2)(A)—that is, delivering a copy of the summons and of the complaint to the individual personally—is the gold standard.²⁷ The FRCP also allow service at the individual’s dwelling or usual place of abode with someone of suitable age and discretion who resides there²⁸ or service on an agent authorized to receive service of process.²⁹ Service within the United States may also be fulfilled by 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 effected.³⁰

When a defendant needs to be served abroad, the FRCP provide that the defendant may be served 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 in Civil or Commercial Matters.”³¹ If there is no internationally agreed means, or if an international agreement allows but does not specify other means, FRCP 4(f)(2) lists a number of available service methods.³² Finally, the court may order any other means not prohibited by international agreement.³³

An analysis of the available case law reveals that there currently are two grounds for service of process via social media in federal court. The first one is FRCP 4(e)(1), which allows domestic service in federal cases to be effected by following the state law of the state where the district court is located or of the state where the service is to be made.³⁴ The federal system thus incorporates state rules via FRCP 4(e)(1).³⁵ State law service statutes are often more liberal and unconventional than the FRCP.³⁶ These statutes allow methods such as mail, publication, posting, and email. No statutory state law explicitly permits service through a social media platform. Legislation to allow it was proposed in Texas in 2013 but failed.³⁷

²⁷ See *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950) (“Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding.”).

²⁸ Fed. R. Civ. P. 4(e)(2)(B).

²⁹ Fed. R. Civ. P. 4(e)(2)(C).

³⁰ Fed. R. Civ. P. 4(e)(1).

³¹ Fed. R. Civ. P. 4(f)(1).

³² Fed. R. Civ. P. 4(f)(2).

³³ Fed. R. Civ. P. 4(f)(3).

³⁴ Fed. R. Civ. P. 4(e)(1).

³⁵ Angela Upchurch, “*Hacking*” *Service of Process: Using Social Media to Provide Constitutionally Sufficient Notice of Process*, 38 U. Ark. Little Rock L. Rev. 559, 563 n.33 (2016).

³⁶ Lauren A. Rieders, *Old Principles, New Technology, and the Future of Notice in Newspapers*, 38 Hofstra L. Rev. 1009, 1021 (2010); Keely Knapp, Comment, *#serviceofprocess @socialmedia: Accepting Social Media for Service of Process in the 21st Century*, 74 La. L. Rev. 547, 574 (2014).

³⁷ H.R. 1989, 83d Leg., Reg. Sess. (Tex. 2013) (proposed by Representative Jeff Leach) (adding to the Texas Civil Practice and Remedies Code Section 17.031 entitled “Substituted service through social media website”).

However, some states have catch all provisions in place.³⁸ Under a catch all provision, the plaintiff can move the court to authorize any form of service that would otherwise be constitutional.³⁹ In order to invoke these types of provisions, the plaintiff must convince the court that the other methods authorized by the state service rules would not bring home notice to the defendant.⁴⁰ Under these types of provisions, the judge has the freedom to allow any form of service as long as it passes constitutional muster.⁴¹

In the federal case of *Ferrarese v. Shaw*, for instance, Judge Cheryl Pollak applied New York's catch all provision through the operation of FRCP 4(e) (1).⁴² The plaintiff brought an action against his ex-wife, who he alleged had absconded with their daughter.⁴³ He sought to secure the immediate return of his child and to ensure his rights of custody.⁴⁴ His lawyers were unable to locate his ex-wife.⁴⁵ The latter took active measures to avoid being located and to evade service.⁴⁶ Service at her last-known address proved unsuccessful, as the house was occupied by the defendant's sister who refused to cooperate.⁴⁷ Judge Pollak agreed that it would be impracticable to serve the defendant using traditional methods and relied on New York's catch all provision⁴⁸ to order service via email, Facebook message, and certified mail on defendant's last-known address and on defendant's sister.⁴⁹

As is the case for the other states, in Utah, a pioneer state of alternative service methods, the statutory law does not explicitly provide for social media service. The judiciary has, however, explicitly mentioned social media as a viable means of service.⁵⁰ In its online guide, the Utah State Courts website specifically refers to social media—namely, Facebook and Twitter—as a possible method of service under the state's catch all provision.⁵¹ The forms and affidavits for alternative service reflect this option. Social media service requires “[p]osting a message on the person’s Facebook page, or send[ing] a message via Twitter notifying them that the case has been filed, the court where it has been filed, and the court case number (and whatever else the judge ordered).”⁵²

³⁸ Upchurch, *supra* note 35, at 566.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *infra* Section II.B.2.

⁴² *Ferrarese v. Shaw*, 164 F. Supp. 3d 361, 363–64, 368 (E.D.N.Y. 2016).

⁴³ Jacob Gershman, *Plaintiff Can Use Facebook to Notify Ex-Wife of Lawsuit*, Wall Street J.: L. Blog (Jan. 22, 2016, 4:58 PM), <http://blogs.wsj.com/law/2016/01/22/plaintiff-can-use-facebook-to-notify-ex-wife-of-lawsuit/> [<https://perma.cc/8SAV-CP23>].

⁴⁴ *Ferrarese*, 164 F. Supp. 3d at 363.

⁴⁵ Gershman, *supra* note 43.

⁴⁶ *Ferrarese*, 164 F. Supp. 3d at 366.

⁴⁷ *Id.* at 363, 366.

⁴⁸ N.Y. C.P.L.R. § 308(5) (McKinney 2018).

⁴⁹ *Ferrarese*, 164 F. Supp. 3d at 368.

⁵⁰ *Motion for Alternative Service*, Utah Cts., https://www.utcourts.gov/howto/service/alternate_service.html [<https://perma.cc/TL46-VGG6>] (last modified Sept. 11, 2019).

⁵¹ *Id.*

⁵² *Id.*

The second legal basis for service of process via social media platforms is FRCP 4(f)(3). It represents a federal catch all provision for service abroad.⁵³ FRCP 4(f) does not create a hierarchy, so the plaintiff is not required to exhaust the other methods contained in FRCP 4(f) before turning to FRCP 4(f)(3).⁵⁴ FRCP 4(f)(3) encompasses any nonprohibited method, which includes service via a social network.

In *WhosHere v. Orun*, for example, the court ordered service via Facebook, LinkedIn, and email on the basis of FRCP 4(f)(3).⁵⁵ The plaintiff sued the Turkish defendant for trademark infringement.⁵⁶ Service via the Turkish Ministry of Justice under the Hague Service Convention in accordance with FRCP 4(f)(1) failed because the defendant could not be located at the Turkish address provided by the plaintiff.⁵⁷ The court noted that the plaintiff could have sought an order pursuant to FRCP 4(f)(3) without first resorting to FRCP 4(f)(1) or 4(f)(2)⁵⁸ and subsequently approved service via Facebook and LinkedIn as well as via email.⁵⁹

2. Method of Service Must Satisfy the Due Process Clause of the Fourteenth Amendment to the Constitution

In addition to being statutorily anchored, social media service, like any method of service, must comply with the Constitution. The Fourteenth Amendment to the US Constitution contains a sentence forbidding any state to “deprive any person of life, liberty, or property, without due process of law.”⁶⁰ In *Mullane v. Central Hanover Bank & Trust Co.*, the US Supreme Court developed a standard to determine whether a particular method of service comports with this due process clause.⁶¹

The case involved a common trust fund that had been established by Central Hanover Bank & Trust Company.⁶² The pooling of many small trusts into a single common trust fund reduced the costs of administering these trusts.⁶³ When the trust company wanted to settle its first account as common trustee,

⁵³ See Phillip A. Buhler, *Transnational Service of Process and Discovery in Federal Court Proceedings: An Overview*, 27 Tul. Mar. L.J. 1, 15 (2002); John M. Murphy III, Note, *From Snail Mail to E-Mail: The Steady Evolution of Service of Process*, 19 St. John's J. Legal Comment. 73, 105 (2004).

⁵⁴ *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002).

⁵⁵ *WhosHere, Inc. v. Orun*, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817, at *1 (E.D. Va. Feb. 20, 2014).

⁵⁶ *Id.*

⁵⁷ *Id.* at *1-2.

⁵⁸ *Id.* at *4.

⁵⁹ See *id.* at *5.

⁶⁰ U.S. Const. amend. XIV, § 1. The Fifth Amendment lays down the same prohibition for the federal government. U.S. Const. amend. V.

⁶¹ *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

⁶² *Id.* at 309.

⁶³ *Id.* at 307-08.

it had to bring notice to the beneficiaries.⁶⁴ The action concerned many beneficiaries, some of whom were not residents of the state of New York, where the action took place.⁶⁵ Central Hanover provided notice only by publication in a local newspaper, as prescribed by New York banking law.⁶⁶ The plaintiff, a special guardian representing potential beneficiaries, appeared specially to contest the constitutional sufficiency of this notice.⁶⁷

The US Supreme Court held that notice should be “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁶⁸ It further explained that “notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance.”⁶⁹ The Court underlined that “the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”⁷⁰ In other words, “process which is a mere gesture is not due process.”⁷¹ When none of the available methods of service meet the “reasonably calculated to apprise” threshold, a form of service is permissible so long as it is “not substantially less likely to bring home notice than other of the feasible and customary substitutes.”⁷² Although the desire to bring actual notice lies at the heart of service,⁷³ the Constitution does not demand actual notice.⁷⁴ The likelihood of accomplishing actual notice is nevertheless a consideration as to whether service was adequate.⁷⁵ On the particular facts before it, the Court decided that service published in a newspaper satisfied due process for those beneficiaries whose identities and addresses were unknown, but it was not sufficient for those beneficiaries for whom this information was known. For the latter, ordinary mail to their addresses was required.⁷⁶

The *Mullane* standard is flexible⁷⁷ and not bound by a specific form of technology but rather evaluates each method of service individually to see

⁶⁴ *Id.* at 309–10.

⁶⁵ *Id.* at 309.

⁶⁶ *Id.* at 309–10.

⁶⁷ *Id.* at 310–11.

⁶⁸ *Id.* at 314.

⁶⁹ *Id.* (citations omitted).

⁷⁰ *Id.* at 315.

⁷¹ *Id.*

⁷² *Id.* at 314–15 (citing *Milliken v. Meyer*, 311 U.S. 457 (1940); *Priest v. Bd. of Trs. of Las Vegas*, 232 U.S. 604 (1914); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Roller v. Holly*, 176 U.S. 398 (1900)); *Upchurch*, *supra* note 35, at 562.

⁷³ *Knapp*, *supra* note 36, at 564.

⁷⁴ *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (citing *Dusenbery v. United States*, 534 U.S. 161, 170 (2002)).

⁷⁵ *Mullane*, 339 U.S. at 315; *Knapp*, *supra* note 36, at 564.

⁷⁶ *See Mullane*, 339 U.S. at 319.

⁷⁷ *Upchurch*, *supra* note 35, at 583; Christopher M. Finke, Comment, *Friends, Followers, Connections, Lend Me Your Ears: A New Test for Determining the Sufficiency of Service of Process via Social Media*, 46 U. Balt. L. Rev. 139, 145 (2016).

whether it is reasonably calculated to apprise.⁷⁸ Every new means of communication is subjected to the *Mullane* criteria to verify its compatibility with the Constitution.⁷⁹ In that regard, the US Court of Appeals for the Ninth Circuit in *Rio Properties, Inc. v. Rio International Interlink* stated the following:

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. In proper circumstances, this broad constitutional principle unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance.⁸⁰

In the course of history, US courts have given their seal of approval to a wide range of technologically advanced service methods, including, but not limited to, telex,⁸¹ fax,⁸² television,⁸³ and email.⁸⁴

C. Advantages of Social Media Service

Does service via social media networks satisfy the due process clause of the Fourteenth Amendment? The answer to this question simultaneously sheds light on why, given the availability of a large variety of methods for service of process, plaintiffs, lawyers, and courts see social media platforms as an attractive means of effectuating service. As explained above,⁸⁵ the *Mullane* test is comprised of two separate standards. The method of service has to be “reasonably calculated to apprise.”⁸⁶ Actual notice is not required, but the likelihood of actual notice is an indicium of the method’s adequacy.⁸⁷ In cases where no method is “reasonably calculated to apprise,” the method is constitutional if it is “not substantially less likely to bring home notice” than other feasible and customary methods.⁸⁸

⁷⁸ Claire M. Specht, Note, *Text Message Service of Process—No LOL Matter: Does Text Message Service of Process Comport with Due Process*, 53 B.C. L. Rev. 1929, 1954 (2012).

⁷⁹ Melodie M. Dan, Note, *Social Networking Sites: A Reasonably Calculated Method to Effect Service of Process*, 1 Case W. Res. J.L. Tech. & Internet 183, 189 (2010).

⁸⁰ *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002) (citation omitted).

⁸¹ *New England Merchs. Nat’l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980).

⁸² *In re Int’l Telemedia Assocs.*, 245 B.R. 713, 720 (Bankr. N.D. Ga. 2000); *Calabrese v. Springer Pers. of N.Y., Inc.*, 534 N.Y.S.2d 83, 84 (Civ. Ct. 1988).

⁸³ *Smith v. Islamic Emirate of Afghanistan*, Nos. 01 CIV 10132(HB), 01 CIV 10144(HB), 2001 WL 1658211, at *3 (S.D.N.Y. Dec. 26, 2001).

⁸⁴ *Rio Props., Inc.*, 284 F.3d at 1017; *Ryan v. Brunswick Corp.*, No. 02–CV–0133E(F), 2002 WL 1628933, at *3 (W.D.N.Y. May 31, 2002); *In re Int’l Telemedia Assocs.*, 245 B.R. at 720; *Hollow v. Hollow*, 747 N.Y.S.2d 704, 708 (Sup. Ct. 2002).

⁸⁵ See *supra* Subsection II.B.2.

⁸⁶ *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950).

⁸⁷ *Id.* at 315, 319; Knapp, *supra* note 36, at 564 n.124.

⁸⁸ *Mullane*, 339 U.S. at 314–15 (citing *Milliken v. Meyer*, 311 U.S. 457 (1940); *Priest v. Bd. of Trs. of Las Vegas*, 232 U.S. 604 (1914); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Roller v. Holly*, 176 U.S. 398 (1900)); Knapp, *supra* note 36, at 564.

The first advantage of social media service lies in the fact that it is able to achieve a high likelihood of actual notice.⁸⁹ Users of social media platforms typically access their accounts on a regular basis.⁹⁰ A recent press release by Facebook, for instance, showed that there were 1.49 billion daily active users on average worldwide for September 2018 and 2.27 billion monthly active users as of September 30, 2018.⁹¹ Social media is oftentimes accessed on mobile devices.⁹² On these devices, users run applications that push instant notifications alerting the account holder of activity on his profile.⁹³ Besides, if service is performed via a private Facebook message or via a post on the defendant's Facebook Timeline, the likelihood of actual notice may even be amplified. Under the default settings, the defendant will receive an email notification of the message or post and any subsequent comments.⁹⁴ Furthermore, social media service is not substantially less likely to give notice than other alternative methods.⁹⁵ In the right circumstances, it is even better than other forms of service. Social media service holds greater potential, when compared to the traditional approaches, to achieve actual notice.⁹⁶

Service via publication in a newspaper is one alternative method of service commonly used in the United States as a last resort when the defendant cannot be found.⁹⁷ This method of service provides constructive notice, as opposed to actual notice.⁹⁸ Social media service and service via publication are competing for the last place in the service hierarchy.⁹⁹ At the moment, service via publication is the bottom—that is, the lowest constitutionally acceptable form of service.¹⁰⁰ However, it can be argued that service via publication should be replaced by social media service because the latter is more

⁸⁹ Knapp, *supra* note 36, at 564.

⁹⁰ *Id.*

⁹¹ *Facebook Reports Third Quarter 2018 Results*, Facebook: Investor Rel. (Oct. 30, 2018), <https://investor.fb.com/investor-news/press-release-details/2018/Facebook-Reports-Third-Quarter-2018-Results/default.aspx> [<https://perma.cc/59MX-LS5S>].

⁹² Upchurch, *supra* note 35, at 601.

⁹³ *Id.*

⁹⁴ William Wagner & Joshua R. Castillo, *Friending Due Process: Facebook as a Fair Method of Alternative Service*, 19 *Widener L. Rev.* 259, 274 (2013). Wagner and Castillo only discuss email notifications in the context of Facebook "Wall" (now "Timeline") posts, but the same applies to private messages. *FTC v. PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at *5 (S.D.N.Y. Mar. 7, 2013) ("Defendants would be able to view these messages when they next log on to their Facebook accounts (and, depending on their settings, might even receive email alerts upon receipt of such messages).").

⁹⁵ Knapp, *supra* note 36, at 564.

⁹⁶ Honorable Justice Margaret Joan Beazley, President, New S. Wales Court of Appeal, Address at the Fourth Judicial Seminar on Commercial Litigation: Social Media and the Courts: Service of Process 18 (May 16–18, 2013).

⁹⁷ Alyssa L. Eisenberg, Note, *Keep Your Facebook Friends Close and Your Process Server Closer: The Expansion of Social Media Service of Process to Cases Involving Domestic Defendants*, 51 *San Diego L. Rev.* 779, 781 (2014).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Jennifer Lee Case, Note, *Extra! Read All About It: Why Notice by Newspaper Publication Fails to Meet Mullane's Desire-to-Inform Standard and How Modern Technology Provides a Viable Alternative*, 45 *Ga. L. Rev.* 1095, 1097 (2011).

likely to achieve actual notice.¹⁰¹ Already in its *Mullane* judgment, rendered in 1950 when newspaper circulation was much higher than it is today,¹⁰² the US Supreme Court admitted that publication was an unreliable means of bringing notice.

Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation, the odds that the information will never reach him are large indeed.¹⁰³

Various courts over the years have echoed this distrust.¹⁰⁴ More recently, in *Baidoo v. Blood-Dzraku*, a trial court in New York dismissed the option of service by publication, describing it as “a form of service that, while neither novel nor unorthodox, is essentially statutorily authorized non-service.”¹⁰⁵ It opined that even for publications in more widely circulated newspapers, “the chances of it being seen by defendant, buried in an obscure section of the paper and printed in small type, are still infinitesimal.”¹⁰⁶

Newspaper readership is on the decline throughout the United States.¹⁰⁷ Only 28.3 percent of the adult population read a daily newspaper in 2015, a drop of 29 percent since 1999.¹⁰⁸ Among forty-five-to-fifty-four-year-olds, the decrease is the most significant: from 63 percent in 1999 to 28 percent sixteen years later.¹⁰⁹ Even in the sixty-five and older age category, containing the most loyal readers, the difference is remarkable: 72 percent in 1999 versus 50 percent in 2015.¹¹⁰ Given these figures, it is difficult to maintain that serving a defendant through a publication in a newspaper is “reasonably calculated

¹⁰¹ Lourens Grové & Sylvia Papadopoulos, *You Have Been Served... on Facebook!*, 76 J. Contemp. Roman-Dutch L. 424, 436 (2013); Eric Michael Liddick, “*You’ve Been Served! LOL!: Is Service Through Facebook Really Possible?*”, 56 La. B.J. 338, 340 (2009); Kristina Coleman, Note, *Beyond Baidoo v. Blood-Dzraku: Service of Process Through Facebook and Other Social Media Platforms Through an Indiana Lens*, 50 Ind. L. Rev. 645, 664–65 (2017); Dan, *supra* note 79, at 207–08; Eisenberg, *supra* note 97, at 781–82; Knapp, *supra* note 36, at 567–68.

¹⁰² Michael Barthel, *Newspapers Fact Sheet*, Pew Res. Ctr.: Journalism & Media (July 9, 2019), <http://www.journalism.org/fact-sheet/newspapers/> [<https://perma.cc/LBT9-44Y5>]. In 1950, 53.8 million weekday newspapers were circulated compared to 34.6 million in 2016. *Id.*

¹⁰³ *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950).

¹⁰⁴ *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (“[S]ervice by publication... is the method of notice least calculated to bring to a potential defendant’s attention the pendency of judicial proceedings.”); *Polansky v. Richardson*, 351 F. Supp. 1066, 1069 (E.D.N.Y. 1972) (“Service of process by means of publication has long been constitutionally suspect.”); *Abu-Dalbouh v. Abu-Dalbouh*, 547 N.W.2d 700, 703 (Minn. Ct. App. 1996) (“[S]ervice by publication is not a reliable means of notifying interested parties.”).

¹⁰⁵ *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 715 (Sup. Ct. 2015).

¹⁰⁶ *Id.* at 716. In the same vein, the court in *Mpafe v. Mpafe* considered service via publication in a legal newspaper but argued that it would be unlikely that the defendant would ever see it. *Mpafe v. Mpafe*, No. 27–FA–11–3453 (4th Jud. Dist. Fam. Ct. Div. of Minn. May 10, 2011).

¹⁰⁷ *Newspapers: Daily Readership by Age (2016)*, Pew Res. Ctr.: Journalism & Media (June 10, 2016), <https://www.journalism.org/chart/5802/> [<https://perma.cc/8CEM-VDUC>].

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

to apprise” that person of the lawsuit.¹¹¹ It is, therefore, clear that service of process via publication nowadays amounts to “a mere gesture,” insufficient to satisfy the qualitative demands of the Constitution.¹¹²

In contrast, there is a substantial growth in social media usage across the United States.¹¹³ Whereas only 7 percent of US adults used at least one social networking site in 2005, that number rose to 65 percent in 2015.¹¹⁴ Among eighteen-to-twenty-nine-year-olds, a staggering 90 percent of people use social networking sites.¹¹⁵ Even within the oldest part of the population, the sixty-five and over group, 35 percent are active on social media.¹¹⁶ The reach of social networking platforms is globally extensive as well, with Facebook as a prime example. Out of 7.7 billion people in the world,¹¹⁷ over 2 billion people are classified as monthly active users.¹¹⁸

With social media service, it is not necessary to know the defendant’s (approximate) location. Service via a social network enables plaintiffs to target the defendant directly¹¹⁹ and requires minimal effort on the defendant’s part. The notice arrives in his inbox; he does not have to stumble upon it in the oft skipped pages of a newspaper. A further advantage of social media as a channel for service lies in the costs attached to performing the service. Whereas publication in newspapers is relatively costly,¹²⁰ social media service is free¹²¹—or at least less expensive than traditional service methods.¹²²

Service via social media satisfies the “not substantially less likely to bring home notice” test in relation to service via mail. Postal service may not be very likely to bring home notice, as an address could be outdated or wrong.¹²³ In comparison, social media service has a much greater potential of reaching

¹¹¹ *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (citing *Milliken v. Meyer*, 311 U.S. 457 (1940); *Priest v. Bd. of Trs. of Las Vegas*, 232 U.S. 604 (1914); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Roller v. Holly*, 176 U.S. 398 (1900)).

¹¹² Knapp, *supra* note 36, at 567.

¹¹³ *Social Media Usage: 2005–2015*, Pew Res. Ctr.: Internet & Tech. (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/> [<https://perma.cc/E6CY-D5ZP>].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Current World Population*, Worldometers, <http://www.worldometers.info/world-population/> [<https://perma.cc/R7YC-TQ4W>] (last visited Sept. 27, 2019).

¹¹⁸ *Facebook Reports Third Quarter 2018 Results*, *supra* note 91.

¹¹⁹ Coleman, *supra* note 101, at 664–65 (arguing that service via a social media platform greatly increases the likelihood of providing actual notice of the pending litigation because it is directed at the defendant as the plaintiff sends a targeted message directly to the account under the exclusive control of the defendant).

¹²⁰ Grové & Papadopoulos, *supra* note 101, at 435. In *Baidoo v. Blood-Dzraku*, a trial court in New York found the cost to be substantial, stating that publishing the notice in more widely circulated newspapers such as the *New York Post* or the *Daily News* for a week may approach \$1,000. *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 716 (Sup. Ct. 2015). In *Mpafe v. Mpafe*, service by publication was called “antiquated and... prohibitively expensive.” *Mpafe v. Mpafe*, No. 27–FA–11–3453 (4th Jud. Dist. Fam. Ct. Div. of Minn. May 10, 2011).

¹²¹ Upchurch, *supra* note 35, at 606.

¹²² *Id.*

¹²³ Mindy P. Fox, *In Defense of Service of Process via Facebook*, N.J. L.J., Jan. 21, 2013, at 1, 2.

the defendant reliably because social media accounts offer comprehensive information about their owner, which lowers the possibility that the profile belongs to the wrong person.¹²⁴ What is more, a message sent on a social network platform reaches the defendant in mere seconds or even microseconds, whereas letters sent through postal channels might take days or weeks to arrive and service pursuant to the Hague Service Convention might take months to be fulfilled.¹²⁵ Moreover, the targeted nature of social media platform messaging will prevent the documents going to family members or other residents of the defendant's home, as could happen with postal service.¹²⁶

Social media service is also more constitutionally acceptable than service by posting. Service via posting is less likely to provide the defendant with notice than service via social media networks.¹²⁷ Posting is internally contradictory because it can only be employed when the defendant cannot be located, yet at the same time requires that the notice be posted in a place where the defendant is known to frequent. Employing the posting method implies that the plaintiff either knows where the defendant frequents, but did not make a genuine attempt to find the defendant, or does not know where he frequents, but guessed.¹²⁸ Furthermore, this type of service faces the risk of a third party removing the posting¹²⁹ or the posting falling down and getting lost.¹³⁰ Social media service alleviates the plaintiff of the burden of locating where the defendant frequents because the defendant can be served digitally, regardless of where he might physically be.¹³¹

Finally, the "interactive qualities of social networking sites, such as visitors' ability to post documents, photos, and links to a user's profile, and visitors' ability to see the date and time of a user's activity on a site"¹³² make them a more effective avenue for service than service via email.¹³³ It is easier to check how often a defendant uses his social media account than determine how frequently he accesses his email account.¹³⁴ In addition, social media possesses a verification aspect. The plaintiff can verify the identity of the holder of the profile by comparing known information about that person to information provided on the profile.¹³⁵ The party seeking to notify the social

¹²⁴ *Id.*

¹²⁵ Cf. Heidi Siltan & Amanda Sicoli, *Trending Methods of International Service of Process: @Elusivedefendant #Youcanrunbutyoucan'thide #HagueConvention*, Westlaw J. Computer & Internet, Feb. 27, 2014, at *1, *2 (discussing the superiority of email service to traditional modes of service).

¹²⁶ *Id.* at *3.

¹²⁷ Wagner & Castillo, *supra* note 94, at 274 (discussing service via Facebook Wall (now Timeline) posts).

¹²⁸ *Id.*

¹²⁹ This was noted by the US Supreme Court in *Greene v. Lindsey*, 456 U.S. 444, 453 (1982).

¹³⁰ Dan, *supra* note 79, at 206.

¹³¹ Upchurch, *supra* note 35, at 605–06.

¹³² Dan, *supra* note 79, at 208. Although, this depends on the privacy settings the user has enacted. *Id.* at 209.

¹³³ *Id.*

¹³⁴ *Id.* at 211.

¹³⁵ *Id.* at 209. Again, this depends on how private or open the user has set his profile. *Id.* at 217.

media user of the commencement of legal proceedings can thus scrutinize a social media profile he believes belongs to the defendant. Various elements can be used in the verification process: photographs, personal relationships, education background, and outdated addresses are just a few.¹³⁶ The mortgage lender's legal team in *MKM Capital v Corbo* established, aided by the lack of privacy settings, that the Facebook accounts belonged to the defendants by referring to the defendants' dates of birth, their email addresses, their lists of friends, and the fact that they were friends with each other on Facebook.¹³⁷

In the case of service via email, there is no possibility to determine whether the email address belongs to the defendant unless the defendant states so himself.¹³⁸ Additionally, email is more prone to spam attacks.¹³⁹ In that regard, social media networks fare better.¹⁴⁰ Spam messages are less common on social media platforms and malicious messages are less problematic because users can often view the sender's profile without opening the message, or they can adjust their settings to disallow messages from individuals who they have not added as friends.¹⁴¹

The various US courts that have approved social media service subscribe to the idea that this type of service meets the *Mullane* standard. However, not all courts confronted with a request for social media service agree that it passes the constitutional due process bar. The Oklahoma Supreme Court, in a split six-to-three ruling, for instance, expressly declared notice via Facebook message to be constitutionally insufficient.¹⁴² The case of *In re Adoption of K.P.M.A.* centered on the termination of a biological father's parental rights.¹⁴³ He had had sexual intercourse with the biological mother on several occasions but was not romantically involved with her.¹⁴⁴ Before the birth of the child, the biological mother informed the man through a Facebook message that she was pregnant and was planning to place the child for adoption.¹⁴⁵ The father argued that he had not read the message until after the child's birth.¹⁴⁶ The child was adopted soon after birth and the adoptive

¹³⁶ Hans Van Horn, Comment, *Evolutionary Pull, Practical Difficulties, and Ethical Boundaries: Using Facebook to Serve Process on International Defendants*, 26 Pac. McGeorge Global Bus. & Dev. L.J. 555, 575 (2013).

¹³⁷ Browning, *supra* note 5, at 181; *Are the English Courts Ready for Service Through Facebook?*, Herbert Smith Freehills: Litig. Notes (Mar. 25, 2009), <https://hsfnotes.com/litigation/2009/03/25/english-courts-ready-service-facebook/> [<https://perma.cc/6SEA-6CAL>]; see *supra* Section II.A.

¹³⁸ Knapp, *supra* note 36, at 569.

¹³⁹ Jeffrey Wolber, Note, *Opening a Can of Worms and Viruses: The Impact of E-Service on E-Mail Users Everywhere*, 61 N.Y.L. Sch. L. Rev. 449, 450 n.1 (2016/2017).

¹⁴⁰ Andriana L. Shultz, Comment, *Superpoked and Served: Service of Process via Social Networking Sites*, 43 U. Richmond L. Rev. 1497, 1525 n.205 (2009) (discussing service via Facebook).

¹⁴¹ Wolber, *supra* note 139, at 450 n.1.

¹⁴² *In re Adoption of K.P.M.A.*, 341 P.3d 38, 50 (Okla. 2014) (6–3 decision).

¹⁴³ *Id.* at 40.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

parents sought to terminate the rights of the genetic parents.¹⁴⁷ The mother voluntarily relinquished her rights, but the father contested the termination. The court had to determine whether the Facebook message was sufficient notice to terminate the biological father's parental rights.¹⁴⁸ The court ruled that it was not.¹⁴⁹

The court first established that the biological father was constitutionally entitled to notice of the existence of the child before his rights could be terminated for failure to exercise his opportunity interest.¹⁵⁰ The court subsequently evaluated whether the father had received that notice and held, "this Court does not believe that attempts to provide notice via Facebook comport with the requirements of due process."¹⁵¹ It remarked that more direct contact would have been possible instead of using an indirect means such as Facebook, calling the latter "an unreliable method of communication if the account holder does not check it regularly or have it configured in such a way as to provide notification of unread messages by some other means" and "a mere gesture."¹⁵² The majority's outward rejection of Facebook—and probably other social network platforms as well—as a viable method of service¹⁵³ stands in sharp contrast with the dissent's position on the matter. The dissent held that actual notice is the preferred method of satisfying due process requirements.¹⁵⁴ It found the Facebook message to constitute actual notice because the father admitted that his account contained the notice, he just asserted he did not read it.¹⁵⁵ The three dissenting judges believed Facebook to be "a dependable method for communication," referring to the biological mother and father's history of communicating via that medium.¹⁵⁶

D. Prerequisites for Social Media Service in Case Law

In order to learn from the US experience with social media service, it is essential to examine the conditions under which such service has been allowed in the United States. As mentioned above,¹⁵⁷ state catch all provisions offer an avenue for service through a social network platform. In federal matters, two distinct legal grounds facilitate service via social media: FRCP 4(e)(1) and FRCP 4(f)(3).¹⁵⁸ The first refers to state law and permits the use of state

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 50.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 51 (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950)).

¹⁵³ *Finke*, *supra* note 77, at 158.

¹⁵⁴ *In re Adoption of K.P.M.A.*, 341 P.3d at 54 (Winchester, J., dissenting) (citing *Dana P. v. State*, 656 P.2d 253, 255 (Okla. 1982)).

¹⁵⁵ *Id.* at 55.

¹⁵⁶ *Id.*

¹⁵⁷ *See supra* Subsection II.B.1.

¹⁵⁸ Fed. R. Civ. P. 4(e)(1), (f)(3).

catch all provisions in federal cases.¹⁵⁹ The second gives the court the freedom to approve any service it deems appropriate, provided it is not prohibited by international agreement, when service needs to take place abroad.¹⁶⁰ Against this backdrop, it is not surprising to find that federal as well as state courts have approved social media service. This Article therefore studies both federal and state law cases for the purpose of distilling common practice. Where appropriate, references to case law from other countries are made. The judge-made prerequisites supplement the constitutional requirement that service should be reasonably calculated to apprise the defendant.

1. Authentication

Courts that have recognized service by social media require the plaintiff to show that the social media account actually belongs to the defendant.¹⁶¹ Courts want to ensure that service is effected on the right person. As mentioned, social media offers the benefit of allowing the plaintiff to verify the ownership of the account through corroboration of the information found on it.¹⁶² The plaintiff needs to demonstrate with a reasonable degree of certainty that the information contained in the profile, such as education, occupation, hobbies, friends, interests, age, hometown, and possibly general location, matches information known about the defendant sought to be served.¹⁶³ The visual evidence thereof will have to be supplied through screenshots that the court can examine.¹⁶⁴

In *Baidoo*, a New York state trial court required the plaintiff to establish that the Facebook account she referenced was indeed that of the defendant.¹⁶⁵ The plaintiff was a married woman who wanted to divorce her husband.¹⁶⁶ She had no physical address for him, and he could not be served in person.¹⁶⁷ Therefore, the wife petitioned the court to permit service via Facebook.¹⁶⁸ She submitted an affidavit to which she annexed copies of the exchanges between her and the defendant on Facebook and in which she identified the defendant as the subject of the photographs on the Facebook page in question.¹⁶⁹ While such statements do not constitute absolute proof, the court was satisfied that the account did belong to the untraceable defendant.¹⁷⁰ The

¹⁵⁹ Upchurch, *supra* note 35, at 563 n.33.

¹⁶⁰ Fed. R. Civ. P. 4(f)(3).

¹⁶¹ Coleman, *supra* note 101, at 660.

¹⁶² See *supra* Section II.C.

¹⁶³ Knapp, *supra* note 36, at 576.

¹⁶⁴ Pedram Tabibi, *Facebook Notification – You’ve Been Served: Why Social Media Service of Process May Soon Be a Virtual Reality*, 7 Phoenix L. Rev. 37, 51 n.92 (2013).

¹⁶⁵ *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 714 (Sup. Ct. 2015).

¹⁶⁶ *Id.* at 711.

¹⁶⁷ *Id.* at 712, 713, 715.

¹⁶⁸ *Id.* at 711.

¹⁶⁹ *Id.* at 714.

¹⁷⁰ *Id.*

case illustrates that it is easier for a plaintiff to authenticate a defendant's account if they have previously communicated on the social media network.¹⁷¹ The plaintiff in *Qaza v. Alshalabi*, another case dealing with a summons for divorce, supported her request for Facebook service pursuant to Rule 308(5) of the New York Civil Practice Law and Rules by claiming that she had been in communication with her estranged husband via Facebook.¹⁷² However, the Brooklyn trial court noted that the plaintiff did not submit copies of this alleged Facebook correspondence with the defendant and subsequently rejected the plaintiff's request to serve via Facebook.¹⁷³

Some courts have expressed concern with the possibility of fake social media profiles or the plaintiff fabricating an account for the purpose of service. In *Baidoo*, the court noted that it is conceivable that the plaintiff herself, or someone at her behest, created the defendant's page, and that she could have fabricated exchanges and posted photographs.¹⁷⁴ In the early Australian case of *Citigroup Pty Ltd v. Weerakoon*, the Queensland District Court had already pointed to the possibility of a false social network profile: "[A]nyone can create an identity that could mimic the true person's identity."¹⁷⁵

In *Fortunato v. Chase Bank*, before the US District Court for the Southern District of New York, the bank was sued by Lorri Fortunato after Chase had collected unpaid credit card debts from her.¹⁷⁶ Chase had won a default judgment and eventually obtained the money owed through garnishment of Lorri's wages.¹⁷⁷ Lorri then brought suit against the bank in federal court for violation of the Fair Credit Reporting Act, conversion, and abuse of process.¹⁷⁸ She claimed that someone else had opened the credit card account in her name and had amassed the debts in question.¹⁷⁹ Chase subsequently sought to bring Lorri's daughter, Nicole, into the proceedings because it turned out she was the one who had opened a credit card account in Lorri's name.¹⁸⁰ In dismissing the motion for service¹⁸¹ of the third-party complaint on Nicole's purported Facebook account, the court remarked that "anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way for the Court to confirm whether the Nicole Fortunato the inves-

¹⁷¹ Cf. Browning, *supra* note 3, at 169. In *Axe Market Garden Ltd v. Axe*, before the High Court of New Zealand, the court had little concern with the authentication of the Facebook account of the defendant because the plaintiff and defendant had communicated with each other via the social networking site while the defendant was abroad. *Id.*

¹⁷² N.Y. C.P.L.R. § 308(5) (McKinney 2018); *Qaza v. Alshalabi*, 43 N.Y.S.3d 713, 716 (Sup. Ct. 2016).

¹⁷³ *Qaza*, 43 N.Y.S.3d at 716–17.

¹⁷⁴ *Baidoo*, 5 N.Y.S.3d at 714.

¹⁷⁵ *Citigroup Pty Ltd v Weerakoon* [2008] QDC 174 (16 April 2008) 3–4.

¹⁷⁶ *Fortunato v. Chase Bank USA, N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *1 (S.D.N.Y. June 7, 2012).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (applying N.Y. C.P.L.R. § 308(5) (McKinney 2018) through Fed. R. Civ. P. 4(e)(1)).

tigator found is in fact the third-party defendant to be served.”¹⁸² It gave no indication as to what proof would be needed to meet the authentication requirement.¹⁸³ Interestingly, the social media account did influence the service via publication because the court added the location found on the Facebook profile to the four locations where Lorri’s investigator thought Nicole could be living.¹⁸⁴ *Fortunato* offers an excellent example of how a lack of certainty regarding the identity of the account holder can thwart a request for service via social media.¹⁸⁵

Judges are trying to strike the right balance between, on the one hand, giving plaintiffs the opportunity to make service happen through a novel technology and, on the other hand, preventing defendants from getting involved in lawsuits via service on social media accounts they do not own. As *absolute* certainty can never be obtained, a *reasonable* degree of certainty that the defendant is the one behind the digital profile is sufficient.¹⁸⁶ The plaintiff in *MKM Capital v Corbo* was able to persuade the court that the defendants controlled the Facebook accounts by matching the information found on the social networking profiles with the information provided by the lenders in their application forms.¹⁸⁷ Their friendship on Facebook further strengthened the court’s conviction.¹⁸⁸ In *FTC v. PCCare247 Inc.*, the Federal Trade Commission (FTC) brought suit against two Indian companies and three Indian individuals who were operating a scheme to trick US consumers into spending money to repair nonexistent problems with their computers.¹⁸⁹ The Southern District of New York granted the FTC’s request for permission to serve post-complaint documents on the defendants via email and Facebook.¹⁹⁰ The court noted that the proposed service did not suffer from the same defect as

¹⁸² *Id.* at *2.

¹⁸³ Coleman, *supra* note 101, at 656.

¹⁸⁴ Tabibi, *supra* note 164, at 45–46.

¹⁸⁵ See *Fortunato*, 2012 WL 2086950, at *2. In a South African case, the court recognized the issue of mistaken or fake identity, but its concern was alleviated by the plaintiff’s submission of clear photos found on the defendant’s Facebook album, depicting the person easily identifiable in the company of friends. *CMC Woodworking Machinery (Pty) Ltd v. Kitchens* 2012 (5) SA 604 (KZD) at para. 12. In *AKO Capital LLP & another v. TFS Derivatives & others*, Justice Teare of the English High Court commented that “[i]f a claimant can identify the defendant from his or her photograph and establish that the Facebook account is active, this is a perfectly sensible way of serving a claim and giving the defendant the opportunity to respond.” Eversheds Sutherland (Int’l) LLP, *Personal Injury Bulletin: Costs and Procedure - Court Approves Service of a Claim via Facebook*, Lexology (Mar. 15, 2012), <https://www.lexology.com/library/detail.aspx?g=2442ea44-a15c-4757-98aa-4e9dd65931f0> [<https://perma.cc/ZXQ5-YRWB>]; see also Browning, *supra* note 3, at 175. In the Australian case *Byrne v Howard*, the court was satisfied after being shown the public entry for the defendant on Facebook, which included his photograph and details of his electronic friends, as well as the plaintiff identifying the picture as being the defendant. [2010] FMCAfam 509 (21 April 2010).

¹⁸⁶ Knapp, *supra* note 36, at 576.

¹⁸⁷ Browning, *supra* note 5, at 181.

¹⁸⁸ *Id.*

¹⁸⁹ *FTC v. PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at *1 (S.D.N.Y. Mar. 7, 2013).

¹⁹⁰ *Id.* at *6.

in *Fortunado*.¹⁹¹ It had confidence that the Facebook accounts were actually operated by the defendants.¹⁹² The three individuals had registered their Facebook accounts with verifiable email addresses, two of them had listed their job titles at the defendant companies, and the two were both connected as Facebook friends with the third individual.¹⁹³

Conversely, *Joe Hand Promotions v. Mario Carrette*, before the District of Kansas, provides an example of how a court could not be moved to allow Facebook service due to lack of evidence.¹⁹⁴ In this copyright infringement case, Joe Hand Promotions alleged that the defendants Mario Carrette and M & B—doing business as “EL TAPATIO”—unlawfully pirated the broadcast of a UFC fight in December 2011.¹⁹⁵ The plaintiff asked the court for permission to serve Mario Carrette via Facebook.¹⁹⁶ The request was denied because there were “very few, if any, factual assurances.”¹⁹⁷ There were links to “El-Tapatío, Spring Hill” and “El Tapatío Mexican Restaurant and Cantina,” but email addresses and other indicators of the profile’s authenticity were missing.¹⁹⁸ When the defendant bears a common name, the actual identity of the social media account holder may be even harder to prove.¹⁹⁹

Sometimes the pendulum unfairly swings too far in favor of the plaintiff. In *St. Francis Assisi v. Kuwait Finance House*, the plaintiff, a nonprofit corporation, initiated a lawsuit against a number of parties for damages arising from the defendants’ financing of the terrorist organisation ISIS, which resulted in the targeted murder of Assyrian Christians in Iraq and Syria.²⁰⁰ Attempts to serve one of the defendants, Hajjaj al-Ajmi, proved to be unsuccessful as the Kuwaiti national could not be located.²⁰¹ The plaintiff, therefore, asked the court for permission to serve al-Ajmi via Twitter, the social media platform used by the latter to fundraise large amounts of money for terrorist purposes.²⁰² The court granted the request. As to authentication, its reasoning was very sparse. It merely stated, “Al-Ajmi has an active Twitter account and continues to use it to communicate with his audience.”²⁰³ Commentators remark that Twitter is problematic in terms

¹⁹¹ *Id.* at *5 (citing *Fortunato v. Chase Bank USA, N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *2 (S.D.N.Y. June 7, 2012)).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Joe Hand Promotions, Inc. v. Carrette*, No. 12–2633–CM, 2013 U.S. Dist. LEXIS 109731, at *7 (D. Kan. July 9, 2013).

¹⁹⁵ *Id.* at *1–2.

¹⁹⁶ *Id.* at *2.

¹⁹⁷ *Id.* at *7.

¹⁹⁸ *Id.*

¹⁹⁹ *See FTC v. Pecon Software Ltd.*, No. 12 Civ. 7186(PAE), 2013 WL 4016272, at *8 (S.D.N.Y. Aug. 7, 2013).

²⁰⁰ *St. Francis Assisi v. Kuwait Fin. House*, No. 3:16–cv–3240–LB, 2016 WL 5725002, at *1 (N.D. Cal. Sept. 30, 2016).

²⁰¹ *Id.*

²⁰² *Id.* (citing Fed. R. Civ. P. 4(f)(3)).

²⁰³ *See id.* at *2.

of authentication.²⁰⁴ Unlike Facebook, Twitter does not oblige users to use their real names.²⁰⁵ Furthermore, accounts that violate the platform's Terms of Service—as was the case for al-Ajmi due to his designation as a global terrorist—are taken down and new ones are created in quick succession, complicating authentication even more.²⁰⁶ The court attempted to remedy the issue of authentication by ordering the public tweets to be directed to various accounts that may be associated with al-Ajmi.²⁰⁷

2. Evidence of Regular Use

A second condition that courts have required of social media service is the defendant's regular use of the authenticated social network account.²⁰⁸ If the person to be served does not regularly view and maintain his social media profile, service through that medium is not "reasonably calculated to apprise" the defendant.²⁰⁹

The existence of a recent communication trail between the parties on the social medium in question is a strong indicator that the defendant makes regular use of his account. In *Baidoo*, the parties had a history of conversing on Facebook.²¹⁰ The New York trial court noted that if the defendant is not diligent in logging on to his Facebook account, he runs the risk of not seeing the summons until the time to respond has passed.²¹¹ The court was, however, satisfied that the defendant regularly logged on to his account because the plaintiff's affidavit showed the exchanges the plaintiff had with the defendant on Facebook.²¹²

Previous conversations between the plaintiff and the defendant in cyberspace but *outside* the social medium platform intended to be employed for service may also be used to substantiate the defendant's affinity with or even preference for social media.²¹³ In *WhosHere*, the Eastern District of Virginia discussed the requirement of regular use after establishing that the social

²⁰⁴ Recent Case, *Civil Procedure — Service of Process — District Court Allows Service of Process on an International Defendant via Twitter Under Rule 4(f)(3)*. — St. Francis Assisi v. Kuwait Finance House, No. 3:16-cv-3240, 2016 WL 5725002 (N.D. Cal. Sept. 30, 2016), 130 Harv. L. Rev. 1962, 1967 (2017) [hereinafter *Civil Procedure—Service of Process*].

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1968.

²⁰⁸ Coleman, *supra* note 101, at 661; Eisenberg, *supra* note 97, at 799; Knapp, *supra* note 36, at 576.

²⁰⁹ Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) (citing Milliken v. Meyer, 311 U.S. 457 (1940); Priest v. Bd. of Trs. of Las Vegas, 232 U.S. 604 (1914); Grannis v. Ordean, 234 U.S. 385 (1914); Roller v. Holly, 176 U.S. 398 (1900)); see Coleman, *supra* note 101, at 665.

²¹⁰ Baidoo v. Blood-Dzraku, 5 N.Y.S.3d 709, 714 (Sup. Ct. 2015).

²¹¹ *Id.*

²¹² *Id.*

²¹³ Communication channels utilized and preferred by the defendant himself are surely methods of communication reasonably calculated to provide notice. See *In re Int'l Telemedia Assocs.*, 245 B.R. 713, 721 (Bankr. N.D. Ga. 2000).

networking accounts belonged to the Turkish defendant.²¹⁴ The parties had engaged in a conversation via email regarding an alleged trademark infringement.²¹⁵ In this digital exchange, the defendant had given the plaintiff an alternative email address and had stated that he could be found on all social networks with that email address.²¹⁶ The plaintiff identified a Facebook and a LinkedIn account under the defendant's name.²¹⁷ The district court therefore stated that "the content of defendant's email to plaintiff containing his social networking and email contacts strongly implies that these are his preferred methods of communication which he regularly uses."²¹⁸

Not all plaintiffs have been as fortunate. In addition to failing the authentication hurdle for Facebook service, the plaintiff in *Qaza* also could not satisfy the Brooklyn trial court as to the defendant's actual use of the account.²¹⁹ The court held that "assuming arguendo that plaintiff had demonstrated this to be defendant's Facebook profile, she has not demonstrated that defendant continues to use this profile currently since there is no indication that the profile has been used since April 2014."²²⁰ The fact that the plaintiff had not provided evidence of the correspondence she had had with her husband over Facebook also proved costly in light of the regular use requirement.²²¹ The court rejected the plaintiff's application for service by Facebook, noting that it could not confirm that the profile brought forward by the plaintiff was in fact the defendant's profile and that he accessed it. In the words of the court, "[g]ranted this application for service by Facebook under the facts presented by plaintiff would be akin to the court permitting service by mail and mail to a building that no longer exists."²²²

A case before a family court in New York demonstrates that conversations on the relevant social platform or elsewhere on the internet are not the only way to show the court that the defendant is actually using his account. In *Biscocho v. Antigua*, the plaintiff wanted to end the child support he had to pay for his son.²²³ He tried to serve the mother at her last-known address, but she had left the property.²²⁴ He also texted his children and even did a Google search to find out the new address but to no avail.²²⁵ In granting the man's request to send the notice via Facebook, the court noted that the plaintiff's

²¹⁴ *WhosHere, Inc. v. Orun*, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817, at *4 (E.D. Va. Feb. 20, 2014).

²¹⁵ *Id.* at *1.

²¹⁶ *Id.* at *4.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Qaza v. Alshalabi*, 43 N.Y.S.3d 713, 716 (Sup. Ct. 2016).

²²⁰ *Id.*

²²¹ *See id.* at 716–17 (citing *Fortunato v. Chase Bank USA, N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950 (S.D.N.Y. June 7, 2012)).

²²² *Id.* at 717.

²²³ *Noel B. v. Anna Maria A.*, No. F00787-13/14B, 2014 N.Y. Misc. LEXIS 4708, at *1 (Fam. Ct. Sept. 12, 2014).

²²⁴ *Id.*

²²⁵ *Id.* at *1–2.

current spouse maintained an active Facebook account and that the defendant had “liked” posted photos as recently as July 2014.

Liking pictures is a form of social media usage that may be enough to move the court to allow service via the networking site. Other ways of establishing that the defendant is habitually checking his account is the fact that he is accepting friend requests,²²⁶ posting status updates, or writing on other users’ Timelines.²²⁷ Recently updated job titles and pictures could also prove useful.²²⁸

The plaintiff may also convince the court of the defendant’s active use of his account by the fact that the conduct complained of took place on the social media to be used for service. In *K.A. & K.I.A. v. J.L.*, the plaintiffs had adopted a boy.²²⁹ The plaintiffs sued the defendant, a complete stranger, for purporting to be the boy’s biological father on social media.²³⁰ When reaching the defendant by mail turned out to be difficult, the plaintiffs sought leave to effect service via Facebook.²³¹ The New Jersey Superior Court granted permission.²³² It found that that method is “reasonably calculated to apprise” the account holder of the action and affords him an opportunity to defend against the claims, given that “the Facebook and Instagram accounts at issue are the sole conduits of the purported harm.”²³³ The court referred to the defendant’s recent activity on Facebook to conclude that the account was active and that receipt of the documents was probable.²³⁴ In the English case of *Blaney v. Persons Unknown*, an unknown Twitter user impersonated lawyer and blogger Donald Blaney.²³⁵ Blaney claimed that the imposter account was intended to make people believe the tweets were written by Blaney himself and that the account was making use of copyright-protected materials.²³⁶ The High Court of Justice delivered an injunction via a direct message on Twitter to the anonymous infringer.²³⁷ In such a fact pattern, the plaintiff can easily establish evidence of the defendant’s use of the account through which service will be effected.

²²⁶ In the case of *AKO Capital LLP & another v. TFS Derivatives & others*, the Facebook account of the defendant was known to be in use because he had recently accepted a few friend requests. Browning, *supra* note 3, at 175.

²²⁷ See Knapp, *supra* note 36, at 576.

²²⁸ See Eisenberg, *supra* note 97, at 799–800.

²²⁹ *K.A. v. J.L.*, 161 A.3d 154, 156 (N.J. Super. Ct. Ch. Div. 2016).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 159.

²³³ *Id.* at 157.

²³⁴ *Id.*

²³⁵ Browning, *supra* note 3, at 173 (discussing *Blaney v. Persons Unknown*).

²³⁶ *Id.*

²³⁷ *Id.*

3. Social Media Service in Combination with Other Methods

Another prerequisite that courts have considered is whether service via social media can be used as the sole method of notice or whether such service can only be permitted in conjunction with other forms. The available decisions almost unanimously require that social media service be supplemented by other, more traditional, methods of service.

In *Biscocho*, the plaintiff was allowed to effect service on the mother of his children by sending a digital copy of the summons and petition to her Facebook account.²³⁸ The court ordered, however, that the plaintiff follow up with a mailing to her previously used last-known address (even though an affidavit showed that the defendant was unknown to the current occupant of the address).²³⁹ The court referred to *WhosHere* and to *PCCare247 Inc.*²⁴⁰ It noted that, in both disputes, service via Facebook was authorized only in connection with other means of service.²⁴¹

The district court in *WhosHere* held that service via a combination of email, Facebook, and LinkedIn would comply with the due process clause of the US Constitution but did not discuss whether each individual method standing alone would comply with due process.²⁴² Similarly, in *PCCare247 Inc.*, the FTC was granted leave to serve the Indian defendants via email and Facebook.²⁴³ The federal court ruled that a proposal by the plaintiff to serve the defendants only by Facebook would give rise to the question of whether that service is in accordance with due process.²⁴⁴ However, because the plaintiff requested leave to serve by Facebook *and* by email, this constitutional question did not arise.²⁴⁵ The court gave the green light, noting, “history teaches that, as technology advances and modes of communication progress, courts must be open to considering requests to authorize service of process via technological means of then-recent vintage, rather than dismissing them out of hand as novel.”²⁴⁶

Ferrarese is another example of the judicial tendency to order social media service as part of a larger service package. The plaintiff’s ex-wife actively tried to evade service, and service at her last-known address did not render the

²³⁸ Noel B. v. Anna Maria A., No. F00787–13/14B, 2014 N.Y. Misc. LEXIS 4708, at *4 (Fam. Ct. Sept. 12, 2014).

²³⁹ *Id.* at *1, *4.

²⁴⁰ *Id.* at *4 (citing *WhosHere, Inc. v. Orun*, No. 1:13–cv–00526–AJT–TRJ, 2014 WL 670817 (E.D. Va. Feb. 20, 2014); *FTC v. PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at *6 (S.D.N.Y. Mar. 7, 2013)).

²⁴¹ *Id.*

²⁴² *WhosHere, Inc.*, 2014 WL 670817, at *3.

²⁴³ *PCCare247 Inc.*, 2013 WL 841037, at *6.

²⁴⁴ *Id.* at *5.

²⁴⁵ *Id.* at *3, *5.

²⁴⁶ *Id.* at *5 (citing *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002); *New England Merchs. Nat’l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980)).

desired result, as the house was occupied by the defendant's sister.²⁴⁷ The district court found that the proposed service by email and Facebook would not be reasonably calculated to bring notice to the defendant.²⁴⁸ It noted that the plaintiff had submitted little evidence that the defendant used the email address or that the Facebook page was actually maintained by the defendant.²⁴⁹ These defects did not deter the district court from granting the request, provided the plaintiff attempted service of process by certified mail on defendant's last-known address and on defendant's sister at this address as well.²⁵⁰ The district court presumably imposed this additional form of service due to the uncertainty regarding the authentication and regular use of the accounts.

Baidoo broke the trend. The Supreme Court of New York County, the trial court that decided *Baidoo*, referred to *PCCare247 Inc., WhosHere v. Orun*, and *Biscocho v. Antigua* and acknowledged that social media service had only been approved in combination with other methods.²⁵¹ It distinguished these cases by observing that, in the matter at hand, the plaintiff did not have an email address for the defendant and no way of finding one. Furthermore, she did not have a viable last-known physical address.²⁵² Therefore, the court concluded that the plaintiff had a compelling reason to employ Facebook as the sole means of service, without the need for any backup methods.²⁵³ The court did require the plaintiff and her attorney to call and text the defendant to inform him that the summons had been sent via Facebook,²⁵⁴ but this was likely an informal courtesy and not a requirement of social media service. The Supreme Court of New York County is, therefore, the first US court to endorse social media notice as a fully-fledged stand-alone method of service.²⁵⁵

4. Social Media Service as a Subsidiary Method

According to the existing body of US case law, social media service is not a form of service that replaces or serves an alternative to the conventional methods of service. It is instead a subsidiary option for when the long established service techniques are ineffective.²⁵⁶ In the US legal system, the courts'

²⁴⁷ See *Ferrarese v. Shaw*, 164 F. Supp. 3d 361, 363 (E.D.N.Y. 2016).

²⁴⁸ *Id.* at 367.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 368.

²⁵¹ *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 713–15 (Sup. Ct. 2015) (citing *WhosHere, Inc. v. Orun*, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817, at *4 (E.D. Va. Feb. 20, 2014); *PCCare247 Inc.*, 2013 WL 841037, at *5).

²⁵² *Id.* at 715.

²⁵³ *Id.*

²⁵⁴ *Id.* at 716.

²⁵⁵ *Coleman*, *supra* note 101, at 646. *Baidoo* was followed one year later by *St. Francis Assisi v. Kuwait Fin. House*, which granted the plaintiff's request to serve the defendant solely through Twitter. No. 3:16-cv-3240-LB, 2016 WL 5725002, at *1 (N.D. Cal. Sept. 30, 2016).

²⁵⁶ See *Ferrarese v. Shaw*, 164 F. Supp. 3d 361, 365 (E.D.N.Y. 2016); *Baidoo*, 5 N.Y.S.3d at 711, 713.

appraisals of requests for social media service generally thus hinge on whether such service is the plaintiff's reasonable last resort to notify the defendant of the lawsuit due to the failure of the familiar methods. This is unsurprising, given the language of the applicable service statutes.

For domestic service, the catch all provision of the Texas Rules of Civil Procedure, for instance, requires plaintiffs to show that an attempt at personal service or service by registered or certified mail has been unsuccessful.²⁵⁷ New York's equivalent provision is also only available if the expressly enumerated methods are shown to be impracticable.²⁵⁸ It is, however, more lenient, because the plaintiff need not have actually attempted these means of service.²⁵⁹

For service abroad, under the FRCP, the plaintiff is not required to exhaust the other methods enumerated in FRCP 4(f).²⁶⁰ However, in practice, plaintiffs usually must rely on the regular service channels (such as the Hague Service Convention) before requesting authorization for the less orthodox service via email or via a social network profile.²⁶¹

In sum, US courts permit social media service, just like email service,²⁶² when traditional methods are, or are likely to prove, futile. Such circumstances will usually only arise if the defendant is elusive, trying to evade service, or both—a situation courts take into consideration when permitting email service as well.²⁶³

5. Proof of Actual Receipt

Lastly, court orders for social media service do not require that the plaintiff provide proof of actual receipt.²⁶⁴ This is unsurprising as, under the US Constitution, the validity of service does not depend on actual notice to the

²⁵⁷ Tex. R. Civ. P. 106(b)(2).

²⁵⁸ N.Y. C.P.L.R. § 308(5) (McKinney 2018).

²⁵⁹ See *Fortunato v. Chase Bank USA, N.A.*, No. 11 Civ. 6608(JFK), 2012 WL 2086950, at *1 (S.D.N.Y. June 7, 2012) (citing *S.E.C. v. HGI, Inc.*, No. 99 Civ. 3866(DLC), 1999 WL 1021087, at *1 (S.D.N.Y. Nov. 8, 1999)).

²⁶⁰ See Fed. R. Civ. P. 4(f); *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002); *WhosHere, Inc. v. Orun*, No. 1:13-cv-00526-AJT-TRJ, 2014 WL 670817, at *2 (E.D. Va. Feb. 20, 2014) (citing *Rio Props., Inc.*, 284 F.3d at 1015; *Morningstar v. Dejun*, No. CV 11-00655 DDP (VBKx), 2013 WL 502474, at *1 (C.D. Cal. Feb. 8, 2013)).

²⁶¹ See *Rio Props., Inc.*, 284 F.3d at 1016; *St. Francis Assisi v. Kuwait Fin. House*, No. 3:16-cv-3240-LB, 2016 WL 5725002, at *1 (N.D. Cal. Sept. 30, 2016); *WhosHere, Inc.*, 2014 WL 670817, at *1; *FTC v. PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at *1 (S.D.N.Y. Mar. 7, 2013).

²⁶² Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 Buff. L. Rev. 337, 370-71 (2003); David P. Stewart & Anna Conley, *E-Mail Service on Foreign Defendants: Time for an International Approach?*, 38 Geo. J. Int'l L. 755, 764 (2007); Shultz, *supra* note 140, at 1516-17; Specht, *supra* note 78, at 1946.

²⁶³ Colby, *supra* note 262, at 370-71; Stewart & Conley, *supra* note 262, at 764; Shultz, *supra* note 140, at 1516-17; Specht, *supra* note 78, at 1946.

²⁶⁴ See Colby, *supra* note 262, at 369; see also Upchurch, *supra* note 35, at 588 (noting that, if anything, courts require evidence that the act of service of process was actually made).

defendant; service “reasonably calculated to apprise” is sufficient.²⁶⁵ In determining reasonableness, the likelihood of accomplishing actual notice is a factor.²⁶⁶ *Mullane* requires that the plaintiff provide notice in a manner that a reasonable individual who desired to contact the defendant would utilize.²⁶⁷ Although the US Constitution does not demand confirmation of receipt, a “read receipt” on a social networking platform can help the sender prove that the account is actually in use.²⁶⁸

III. INTRODUCTION OF SOCIAL MEDIA SERVICE AS A METHOD OF SERVICE IN BELGIUM

A. Current Legal Framework

In Belgium, civil proceedings are initiated either by a writ of summons or by means of a petition.²⁶⁹ The most common method is the delivery of the writ of summons to the defendant by the bailiff.²⁷⁰ The Belgian Judicial Code lists a number of methods to effect this service of process.²⁷¹ The bailiff will respect a certain order and will try to serve the defendant in person first. It is disputed whether this hierarchy is required by law.²⁷²

Service in person means that the bailiff hand delivers the writ of summons to the defendant.²⁷³ It can take place wherever the defendant can be found.²⁷⁴ If the defendant refuses to accept service, this refusal will not prevent service in person from being accomplished.²⁷⁵ The bailiff makes a note of this refusal on the writ.²⁷⁶

If service in person is not possible, service can be effected at the domicile or, in absence of a domicile, the place of residence of the defendant, by leaving a copy of the writ with a relative, servant, or agent, provided that the person is

²⁶⁵ *Hollow v. Hollow*, 747 N.Y.S.2d 704, 708 (Sup. Ct. 2002) (citing *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950)).

²⁶⁶ *Mullane*, 339 U.S. at 319; Knapp, *supra* note 36, at 564 n.124.

²⁶⁷ *Mullane*, 339 U.S. at 315.

²⁶⁸ Finke, *supra* note 77, at 164, 166.

²⁶⁹ Piet Taelman & Claudia Van Severen, *Civil Procedure in Belgium* 89, 93 (2018).

²⁷⁰ *Id.* at 89.

²⁷¹ Code Judiciaire [C.Jud.] arts. 33–35.

²⁷² Compare Jean Laenens, Dirk Scheers & Pierre Thiriar, *Handboek Gerechtelijk Recht* 363 (4th ed. 2016) (stating that while the bailiff takes into account the listed order of methods of service, there are no sanctions for not following the order), and Bruno Maes & Eric Brewaeyts, *Gerechtelijk privaatrecht: ... na de hervormingen van 2013–2014* 168 n.479 (8th ed. 2014) (holding that there is no violation of judicial rules when the listed order of methods of service is not followed), with Jacques van Compernelle et al., *Examen de Jurisprudence (1991 à 2001): Droit Judiciaire Privé*, R.C.J.B. 437, 443 (2002) (Fr.) (holding that the defendant has not been correctly served and judicial rules have been violated when the listed order of methods of service is not followed).

²⁷³ Code Judiciaire [C.Jud.] art. 33.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

sixteen years old or above.²⁷⁷ If the previous method of service is not possible, the bailiff can leave a copy of the writ in a sealed envelope at the domicile or, in absence of a domicile, the place of residence of the defendant.²⁷⁸ The next business day at the latest, the bailiff will send a letter to the defendant via registered mail, informing him of the date and time of the bailiff's visit and of the defendant's ability to obtain a copy of the writ at the bailiff's office within three months.²⁷⁹ Sending the registered letter is a precautionary measure, without any effect on the service.²⁸⁰

Since December 31, 2016—the date that the Potpourri III Act of May 4, 2016, entered into force—the bailiff may also serve process through email. In civil matters, the bailiff may choose the method of service (personal service²⁸¹ or electronic service via email), depending on the circumstances specific to the case.²⁸² The Royal Decree of June 14, 2017, implemented the details of the new method of service.²⁸³

The bailiff can either use the defendant's *gerechtelijk elektronisch adres*, a unique email address issued by the government,²⁸⁴ or, for people who do not have such an address, the *adres van elektronische woonstkeuze* (hereafter referred to as a “personal email address”). The personal email address is a regular email address, not issued by the government, that the bailiff suspects the defendant is using.²⁸⁵ In the latter case, explicit consent needs to be obtained from the defendant each time the bailiff wishes to serve him through that email address.²⁸⁶ To that end, the bailiff will send a request for consent to the defendant's personal email address.²⁸⁷ If the defendant does not consent within twenty-four hours, electronic service is not possible; the bailiff must serve process via the traditional service methods.²⁸⁸

²⁷⁷ Code Judiciaire [C.Jud.] art. 35.

²⁷⁸ Code Judiciaire [C.Jud.] arts. 38 § 1, 41.

²⁷⁹ Code Judiciaire [C.Jud.] art. 38 § 1.

²⁸⁰ Hof van Cassatie [Cass.] [Court of Cassation], Dec. 17, 1998, Arr. Cass. 528, 1155 (Belg.).

²⁸¹ Code Judiciaire [C.Jud.] art. 32quater/3 § 2. It is clear that that the reference to “personal service” should not be understood as solely the delivery of process personally to the defendant but as also comprising other forms of service, such as leaving the document with a relative of at least sixteen years old or leaving a copy of the document in the letterbox of the defendant. Code Judiciaire [C.Jud.] art. 35.

²⁸² Code Judiciaire [C.Jud.] art. 32quater/3 § 2.

²⁸³ Koninklijk besluit houdende uitvoering van de artikelen 32quater/1, § 1 en 32quater/2, §§ 1 en 6 van het Gerechtelijk Wetboek [Royal Decree implementing Articles 32quater/1, § 1 and 32quater/2, §§ 1 and 6 of the Judicial Code] of June 14, 2017, Belgisch Staatsblad [B.S.] [Official Gazette of Belgium], June 22, 2017.

²⁸⁴ Code Judiciaire [C.Jud.] art. 32 (because no such email addresses have been assigned, any electronic service will currently be effected through the *adres van elektronische woonstkeuze*).

²⁸⁵ Code Judiciaire [C.Jud.] art. 32.

²⁸⁶ Code Judiciaire [C.Jud.] art. 32quater/1 § 1.

²⁸⁷ *Id.* § 2.

²⁸⁸ Koninklijk besluit houdende uitvoering van de artikelen 32quater/1, § 1 en 32quater/2, §§ 1 en 6 van het Gerechtelijk Wetboek [Royal Decree implementing Articles 32quater/1, § 1 and 32quater/2, §§ 1 and 6 of the Judicial Code] of June 14, 2017, Belgisch Staatsblad [B.S.] [Official Gazette of Belgium], June 22, 2017.

In case the defendant does not have a known domicile or place of residence in Belgium, the plaintiff must serve the defendant abroad.²⁸⁹ Service in another EU member state is regulated by the EU Service Regulation.²⁹⁰ Service in non-EU states that are members of the Hague Service Convention is regulated by that Convention.²⁹¹ If the non-EU country where the defendant is domiciled or resides is not bound by the Hague Service Convention, the plaintiff must serve process by registered letter through air mail.²⁹² If the defendant does not have a known domicile or place of residence at all, neither in Belgium nor abroad, the bailiff will serve the writ on the public prosecutor of the jurisdiction of the court that will deal with the claim.²⁹³

B. Possible Role as a Supplementary Method for Defendants Without a Known Address

The previous Section set out the legal provisions regulating service of process in Belgium. This Section now contemplates whether social media service could be incorporated into the Belgian legal system. Belgium could consider incorporating social media service to supplement the existing service on the public prosecutor when the defendant does not have a known address. The choice to adopt such service, of course, constitutes a political decision. The legislature has only very recently opened the door to service via email as an independent method of giving notice.²⁹⁴ Although email has been around for decades, the reliance on email for the purpose of service amounts to a small revolution. The new procedure is still in its infancy, and its workability will only become apparent in the coming years. Even though service via social media platforms is superior to service via email in many ways,²⁹⁵ there are no voices in the legislature or in legal scholarship calling to introduce this far more controversial form of electronic service.

At the time of writing this Article, it seems unlikely that social media service will be accepted as a stand-alone, alternative form of service in Belgium. Allowing citizens to be served by social networking sites instead of in person or by email would represent too radical a transformation of the legal status quo, which would be met with hostility and aversion. This should come as no surprise because, even in the case law of the United States, this new avenue

²⁸⁹ Code Judiciaire [C.Jud.] art. 40.

²⁹⁰ Regulation 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service of Documents), and repealing Council Regulation (EC) No. 1348/2000, 2007 O.J. (L 324) 79.

²⁹¹ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

²⁹² Code Judiciaire [C.Jud.] art. 40.

²⁹³ *Id.*

²⁹⁴ See *supra* Section III.A.

²⁹⁵ See *supra* Section II.C.

for providing notice takes a subsidiary position.²⁹⁶ Most US proponents of social media service also do not envisage it as a channel fit to replace existing procedures but rather as an option when tried and tested methods fail.²⁹⁷ Similarly, the only US legislative proposal to date, Texas House Bill 1989, viewed service through social media as another tool in the arsenal of substituted service techniques.²⁹⁸

Service via social media could play a role in cases where there is no known address for the defendant. As noted, in that situation, the bailiff will serve the writ on the public prosecutor of the jurisdiction of the court that will deal with the claim.²⁹⁹ In Belgium, the *Nationale Kamer van Gerechtsdeurwaarders* (hereafter referred to as the “National Chamber of Bailiffs”) does not keep statistics as to the number of writs that are served in this way. However, in the Netherlands such figures are available. They were collected by the *Koninklijke Beroepsorganisatie van Gerechtsdeurwaarders* (hereafter referred to as the “Royal Professional Organization of Judicial Officers”) and expose the ineffectiveness of this form of service.³⁰⁰ This conclusion holds true for service on the prosecutor in Belgium as well. Belgium and the Netherlands are neighboring countries with an analogous legal framework for service of process. It is, therefore, useful to briefly consider the Dutch approach to last resort service.

The Dutch rules on service of process are largely similar to the Belgian ones. The last resort mechanism is identical in the sense that, if the defendant has no known domicile or place of residence, neither in the Netherlands nor abroad, the writ of summons has to be served at the office of the public prosecutor at the court where the claim will be heard.³⁰¹ The public prosecution service will try to ensure that the defendant receives the writ; the policy of the public prosecution service determines the measures to be taken to achieve this.³⁰² In addition, an abstract of the writ must be published in the *Staatscourant*.³⁰³ The *Staatscourant* is an official online gazette containing, *inter*

²⁹⁶ See *supra* Subsection II.D.4.

²⁹⁷ Alison McEwen & Cheryl Robertson, *At Your Substituted Electronic Service*, Kingston & 1000 Islands Legal Conf., Oct. 1, 2010, at 1, 2; Coleman, *supra* note 101, at 669; Dan, *supra* note 79, at 215; Eisenberg, *supra* note 97, at 803; Knapp, *supra* note 36, at 548; Shultz, *supra* note 140, at 1527–28. Upchurch, on the other hand, argues that legislators should fully embrace social media service and not limit it to a backup method, for use only when the traditional methods prove to be impracticable or impossible. Upchurch, *supra* note 35, at 607.

²⁹⁸ H.R. 1989, 83d Leg., Reg. Sess. (Tex. 2013) (proposed by Representative Jeff Leach to amend the Texas Civil Practice and Remedies Code by adding Section 17.031 entitled “Substituted service through social media website”).

²⁹⁹ Code Judiciaire [C.Jud.] art. 40.

³⁰⁰ J. Nijenhuis et al., *Openbare exploten en ambtelijke publicaties; Artikel 54 en enkele andere artikelen van het Wetboek van Burgerlijke Rechtsvordering opnieuw bezien. Preadvies ter gelegenheid van het 10-jarig bestaan van de KBvG* (2011) [hereinafter *Preadvies*].

³⁰¹ *Id.* at 75–76.

³⁰² See HR 27 November 1953, NJ 1955, (Neth.).

³⁰³ Art. 54 para. 2 Rv. The name and office address of the bailiff or the lawyer where the writ can be obtained is also published in the *Staatscourant*.

alia, different types of judicial announcements.³⁰⁴ Because these writs have to be published publicly, they are often referred to as “public writs.”

The legislature has imposed the use of this online publication tool since July 1, 2015.³⁰⁵ Before that date, the law required bailiffs to publish these public writs in daily newspapers, a far more expensive method.³⁰⁶ The Royal Professional Organization of Judicial Officers sparked the discussion regarding public writs with the issuance of an advisory document in 2011.³⁰⁷ According to a survey undertaken by the organization, the fourteen participating bailiff offices issued a total of 7,079 public writs over the course of three years, from 2008 to 2010.³⁰⁸ The number of responses to publication were negligible to nonexistent.³⁰⁹ Extrapolating from these findings, the organization estimated that in the whole country 44,954 public writs on average are served every year, leading to a publication cost of €0,968,190.³¹⁰ Furthermore, an inquiry into the course of action of the public prosecution service revealed that it merely receives the public writs and files them.³¹¹ All seven public prosecution offices reported that they do not make any efforts to try to locate the defendant.³¹² In the small-scale society of the nineteenth century, the prosecutor’s duty to trace the defendant made sense.³¹³ Nowadays, it is a hopeless task if even the bailiff has not been able to find him.³¹⁴ In essence, almost eleven million euros are spent on creating a fiction.³¹⁵

The legislature responded to these concerns and decided to require electronic publication instead of paper publication, in conjunction with service on the prosecutor.³¹⁶ The reasoning behind the legislative change was two-fold: (1) increasing the likelihood that the defendant will receive actual notice of the writ, and (2) lowering the cost of publication for the plaintiff.³¹⁷ The legislature’s explanatory memorandum reports that the cost of publishing a writ in the *Staatscourant* is five euros, leading to a total cost of €25,000, almost fifty times cheaper than newspaper publication.³¹⁸

³⁰⁴ *Staatscourant*, Overheid.nl Publicaties, <https://www.officielebekendmakingen.nl/staatscourant> [<https://perma.cc/CM83-6WEY>] (last visited Sept. 29, 2019).

³⁰⁵ Wet van 11 februari 2015, Stb. 2015, 82.

³⁰⁶ Art. 54 para. 2 Rv (2012) (amended 2015).

³⁰⁷ Preadvies, *supra* note 300.

³⁰⁸ *Id.* at 31.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 53–54.

³¹¹ *Id.* at 29–30.

³¹² *Id.*

³¹³ *Id.* at 14–15.

³¹⁴ *Id.* at 15.

³¹⁵ *Id.*

³¹⁶ Wet van 11 februari 2015, Stb. 2015, 82.

³¹⁷ I.W. Opstelten, Memorie Van Toelichting: Wijziging van het Wetboek van Burgerlijke Rechtsvordering en enige andere wetten in verband met bekendmakingen aan personen zonder bekende woon- of verblijfplaats 2, 9, 10 (2014).

³¹⁸ *Id.* at 4–5.

There is no reason to assume that the reach of public writs in Belgium is any better than in the Netherlands. On the contrary, as Belgian law only requires service on the prosecutor—subsequent hard copy or electronic publication is not required—the chance of actually notifying the untraceable defendant is probably even lower than in the Netherlands. There are no indications that Belgian prosecution offices actively search for defendants mentioned in those writs. The effect of this fictitious service in notifying the defendant is, therefore, virtually nil.

Social media service could be introduced to tackle this deficiency by increasing the likelihood that the defendant will become aware of the litigation initiated against him. Belgian civil procedural law could obligate plaintiffs to serve defendants with no known address by their social media accounts, in addition to service on the public prosecutor. Social media platforms offer a direct and instantaneous pathway to the defendant, unrivaled by any other subsidiary method. Even the passive defendant who makes no effort to look for legal notices containing his name either in newspapers or on internet sites could be informed of the suit this way. The defendant can be reached regardless of whether the person is hiding in bad faith or is genuinely unfindable.³¹⁹ This modest and cautious deployment of social media constitutes a step into uncharted territory but will cause less shock to the system than making it the new gold standard or a full-blown alternative to personal service.

The remarks formulated by the *Dutch Adviescommissie Burgerlijk Procesrecht* (hereafter referred to as “Advisory Committee Civil Procedural Law”) during the 2015 consultation process leading up to the amendment of the last resort service method demonstrates that this is not a far-fetched or absurd idea.³²⁰ The committee commented that both publication in a newspaper and publication in the *Staatscourant* only have a slight chance of actually reaching those for whom they are meant.³²¹ Therefore, the committee suggested that other means be used in addition to the service on the public prosecutor and publication.³²² If the defendant can be reached via email, Twitter, WhatsApp, or another social media service where messages can be placed, the law should require the bailiff to utilize those channels to notify the defendant.³²³ The bailiff’s duty should be described as a generally formulated duty of best efforts (known in Belgian law as an *obligation de moyens*).³²⁴ According to the committee, the judge should be able to nullify the writ of summons if he finds that the bailiff can be blamed for not communicating it

³¹⁹ Preadvies, *supra* note 300, at 22.

³²⁰ Letter from R.M. Hermans, Advocaat, De Brauw Blackstone Westbroek, to De Algemene Raad van de Nederlandse Orde van Advocaten (Sept. 19, 2013), https://www.eerstekamer.nl/overig/20140605/advies_consultatiedocument/document [<https://perma.cc/YN8P-M55G>] (last visited Oct. 11, 2019) (concerning the amendment to the Code of Civil Procedure concerning service to persons without a known address).

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

through email or via social media.³²⁵ Other sanctions, such as the disciplinary liability of the bailiff, should also not be excluded.³²⁶

IV. ANALYSIS OF POTENTIAL ISSUES CONCERNING SOCIAL MEDIA SERVICE IN BELGIUM

Assuming, arguendo, that social media service is incorporated into service laws, whether it be as a fully-fledged method or a truly subsidiary method, what would be the conditions under which such service would have to be effected? This Part does not seek to construe a complete legislative model for social media service but intends to identify and reflect upon various key issues that will need to be resolved. The US case law and doctrine provide valuable insights that can help Belgium build its approach.

A. Authentication and Regular Use

In the United States, social media service is subjected to two main requirements: authentication and evidence of regular use.³²⁷ “Authentication” means plaintiffs must show reasonable certainty that the social media account is owned by the defendant.³²⁸ As to the latter, the plaintiff must demonstrate that the defendant regularly accesses and keeps up with his account.³²⁹ In the United States, the plaintiff needs to seek permission from a judge before serving the defendant via social media. Both the state catch all provisions³³⁰ and FRCP³³¹ require preservice court authorization. In Belgium, the most common method of service in civil cases is delivery of the writ of summons to the defendant by the bailiff.³³² The Belgian Judicial Code lists a number of methods to effect this service of process.³³³ The bailiff respects a certain order and tries to serve the defendant in person first. In this whole process, the courts are not involved. Whatever the method the bailiff employs to effectuate service, judicial approval need not be sought.

Unless the legislature makes fundamental adaptations to the system of service, the bailiff would thus be the one who must investigate the authentication and regular use requirement. The dynamic is, therefore, completely different than in the United States. The bailiff will have to perform a thorough examination of any accounts that might belong to the defendant. The

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *See supra* Subsections II.D.1–2.

³²⁸ *See supra* Subsection II.D.1.

³²⁹ *See supra* Subsection II.D.2.

³³⁰ Parties may rely on state catch all provisions through Fed. R. Civ. P. 4(e)(1).

³³¹ Fed. R. Civ. P. 4(f)(3).

³³² Code Judiciaire [C.Jud.] art. 32.

³³³ Code Judiciaire [C.Jud.] art. 33.

requesting lawyer and his client will aid the bailiff to the fullest extent necessary to ensure the legality of the service. The bailiff is incentivized to make a genuine attempt at social media service because the Belgian judge will examine whether a defendant who fails to appear has been duly served.³³⁴ The bailiff will be required to submit reasonable evidence of authentication and regular use, similar to the proof of the searches in the *Rijksregister*³³⁵ (hereafter referred to as the “National Register”) enclosed with the writ when he transfers it to the court.³³⁶

With regard to authentication, the same indicia of ownership considered by US courts will undoubtedly be relevant. As discussed, a wide range of information about the defendant may be used to establish that the account belongs to him.³³⁷ Establishing regular use in Belgium will also require similar forms of supporting evidence as described in the US cases.³³⁸

The existence of fake accounts should not per se pose an insurmountable hurdle to the introduction of social media service. Although, for instance, Facebook’s Terms of Service oblige users to create only one account and to use their own name, fraudulent or fabricated accounts cannot be ignored.³³⁹ According to Facebook’s own estimations, however, fake accounts only represent approximately 5 percent of monthly active users.³⁴⁰ The social networking site monitors these accounts with detection technology and acts when other users report these accounts.³⁴¹ As a network aimed at connecting professionals, LinkedIn may be less susceptible to fake profiles.³⁴² The platform also offers benefits in the realm of authentication. New users can authorize LinkedIn to access email addresses and contacts from the email account used to create the LinkedIn account.³⁴³ LinkedIn subsequently matches the users in the individual’s contacts with LinkedIn’s membership database.³⁴⁴

³³⁴ See Richard Miller & Sarah Smeyers, *Verslag Van De Eerste Lezing: Namens De Commissie Voor De Justitie Uitgebracht Door 99* (2015); Rogier De Corte & Jean Laenens, *De verstekprocedure en de taak van de rechter bij verstek*, 17 *Tijdschrift voor Privaatrecht* [TPR] 447, 474–75 (1980) (Belg., Neth., Lux.); Piet Taelman & Karen Broeckx, *Rechtsmiddelen na Potpourri I*, in *De hervorming van de burgerlijke rechtspleging door Potpourri I* 110 (Benoît Allemeersch & Piet Taelman eds., 2016).

³³⁵ This is the database in which all inhabitants of Belgium are registered. *Rijksregister*, Federale Overheidsdienst Binnenlandse Zaken, <https://www.ibz.rrn.fgov.be/nl/rijksregister/> [<https://perma.cc/76CT-7RFR>] (last visited Sept. 29, 2019).

³³⁶ Taelman & Broeckx, *supra* note 334, at 110.

³³⁷ See *supra* Subsection II.D.1.

³³⁸ See *supra* Subsection II.D.2.

³³⁹ *Terms of Service*, Facebook, <https://www.facebook.com/terms.php> [<https://perma.cc/Z7QT-UYCA>] (last visited Sept. 29, 2019).

³⁴⁰ *Community Standards Enforcement Report*, Facebook: Transparency, <https://transparency.facebook.com/community-standards-enforcement#fake-accounts> [<https://perma.cc/H8ZX-JR2Q>] (last visited Sept. 29, 2019).

³⁴¹ *Id.*

³⁴² Coleman, *supra* note 101, at 662.

³⁴³ *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1226–29 (N.D. Cal. 2014); Coleman, *supra* note 100, at 662.

³⁴⁴ Coleman, *supra* note 101, at 662.

There is a risk that a devious litigant may covertly create an account in the name of the defendant for the purpose of sabotage.³⁴⁵ An effective way of dismantling this artifice is to look at the date of creation of the account. If the profile was set up a long time before the dispute, *in tempore non suspecto*, its longevity may support the plaintiff's position that it was not fabricated for the purpose of superficially satisfying service.

When there exist suspicions with regard to the real identity of the account holder, courts should heighten their scrutiny when examining the authentication and regular use factors. When serious doubts as to the veracity of the account present themselves, social media service in that particular case should be abandoned, especially if social media service is proposed as the only legal avenue for notification.

On the other end of the reliability spectrum, one can find verified accounts. These are indicated by a "badge" and have been designated by the social networking platform as authentic.³⁴⁶ On Twitter, for example, an account may be verified if it is determined to be an account of public interest.³⁴⁷ Typically these accounts are maintained by users in music, acting, fashion, government, politics, religion, journalism, media, sports, business, and other key interest areas.³⁴⁸ Similarly, Facebook badges indicate that the platform confirms that an account is the authentic profile or page for this public figure, media company, brand, business, or organization.³⁴⁹ Due to their trustworthiness, such accounts are the ideal targets for social media service. At the moment, only a small minority of accounts have the authentication badges.³⁵⁰ If social media sites expand this feature to the general public, it will be easier to confirm that the account belongs to the defendant.³⁵¹ Perhaps in the future, more accounts will be verified as it may become legally required to identify yourself with your identification card before creating an account.³⁵²

Along the same lines as verified accounts, confirmed family relationships on Facebook may help to authenticate a social media profile.³⁵³ One account holder can request another account holder to add the individual as a family member or as a partner.³⁵⁴ The second account holder must then accept the

³⁴⁵ Liddick, *supra* note 101, at 341.

³⁴⁶ Isuru Devendra & Raghav Gupta, *The Court Can't Even Handle Me – Flo Rida and the Lessons for Substituted Service via Social Media*, 87 Computers & L.J. 6, 7 (2014) (Austl.).

³⁴⁷ *About Verified Accounts*, Twitter: Help Ctr., <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts> [<https://perma.cc/K7BV-QVPM>] (last visited Sept. 29, 2019).

³⁴⁸ *Id.*

³⁴⁹ *What Is a Verified Page or Profile?*, Facebook: Help Ctr., https://www.facebook.com/help/196050490547892?helpref=popular_topics [<https://perma.cc/Z6WM-MK8N>] (last visited Sept. 29, 2019).

³⁵⁰ *Cf. id.*

³⁵¹ See Coleman, *supra* note 101, at 663.

³⁵² For instance to prevent children under the age of thirteen from joining Facebook or to better combat criminal activity. *Terms of Service*, *supra* note 339.

³⁵³ See Wagner & Castillo, *supra* note 94, at 277; Dan, *supra* note 79, at 217.

³⁵⁴ *How Do I Add a Family Member to My About Page on Facebook?*, Facebook: Help Ctr., https://www.facebook.com/help/155794876777120?helpref=faq_content [<https://perma.cc/JF43-NQZA>] (last visited Sept. 29, 2019); *How Do I Change My Relationship Status?*, Facebook: Help Ctr., https://www.facebook.com/help/155794876777120?helpref=faq_content (last visited Sept. 29, 2019).

request.³⁵⁵ Even though it, in essence, shifts the authentication question to another account, a large number of family-connected accounts is trickier to replicate and may help dispel suspicions about the profile marked for service.

As to the condition of regular use, some US scholars propose to lay down a minimum engagement with the account, calculated in days. For example, the defendant must have accessed the social media account on at least fifteen of the thirty days immediately preceding the service.³⁵⁶ Alternatively, the defendant must have been active on the site within two weeks prior to the motion for alternative service of process.³⁵⁷ When dealing with email service, some scholars advance that the defendant should have accessed the account within sixty days before the delivery of service.³⁵⁸ However, it is not desirable to measure the defendant's activity on his account in absolute terms. The mandatory minimal use should be assessed on a case-by-case basis.

B. Privacy Considerations

An important issue for Belgians to which relatively little attention has been paid in US case law and literature is the protection of the defendant's privacy. The defendant's right to protection of his personal life (as protected by Article 22 of the Belgian Constitution and Article 8 of the European Convention on Human Rights) could be jeopardized if the contents of the social media service can be viewed by people other than the defendant. Most social media platforms have two pathways for receiving information.³⁵⁹ Individualized pathways allow for the transmission to and from a very limited group of people, while generalized pathways facilitate the transmission of information between the account holder and large groups of people.³⁶⁰ Private messaging is an individualized pathway, whereas posting on a Facebook page or a Tweet linked to an individual's Twitter handle are examples of generalized pathways.³⁶¹ Notice communicated through such a generalized pathway affects the recipient's privacy.

In the South African case *CMC Woodworking Machinery (Pty) Ltd v. Pieter Odendaal Kitchens*, the court mentioned the privacy concern that publicly visible service could provoke.³⁶² The court noted, "the applicant's notice

facebook.com/help/251060974929772?helpref=faq_content [https://perma.cc/J9ZC-P8GH] (last visited Sept. 29, 2019).

³⁵⁵ *How Do I Add a Family Member to My About Page on Facebook?*, *supra* note 354; *How Do I Change My Relationship Status?*, *supra* note 354.

³⁵⁶ See Upchurch, *supra* note 35, at 607–08.

³⁵⁷ See Dan, *supra* note 79, at 217–18.

³⁵⁸ See Ronald J. Hedges et al., *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4 Fed. Cts. L. Rev. 55, 75–77 (2009).

³⁵⁹ Upchurch, *supra* note 35, at 596.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² See *CMC Woodworking Machinery (Pty) Ltd v. Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD) at para. 13.

would not impact on the defendant's right to privacy since it was requested that a message be sent to the defendant" via a personal Facebook message, which "no member of the public, including those people listed as friends, would have access to."³⁶³ However, it has been argued that posting on the defendant's Facebook Timeline may have been the better option, as it is much more likely that notice would come to the defendant's attention if it is visible to those connected to him on Facebook (and who might bring it to his attention).³⁶⁴ The latter view asserts that the defendant will be informed of the notice either by logging into Facebook and seeing it on his Timeline, by receiving an email notification that the notice was posted on his Timeline (or that someone commented on it), or by being informed by his Facebook friends who spotted the notice on their News Feeds.³⁶⁵ The fact that activity on one's Timeline triggers notification emails thus enhances the likelihood of actual notice,³⁶⁶ although this default setting may be modified by the account holder.³⁶⁷ Furthermore, the central position of the News Feed on every Facebook user's homepage makes it likely that the defendant's digital friends will see the notice and report it to the defendant.³⁶⁸ Moreover, if a Facebook user chooses to allow Timeline postings and to make them public, he invites the world to communicate with him, so questions related to privacy of service are likely avoided.³⁶⁹ That said, the increase in probability of actual notice is only nominal compared to private messaging and does not justify the potential infringement of the recipient's privacy. It is not fair that the defendant's personal affairs be put on display on the internet for many to see, especially given the fact that digital information may circulate like wildfire.³⁷⁰ Social media service is thus best effectuated through a private message to the defendant.³⁷¹ The majority of the judicial decisions granting social media service also ordered the sending of a private message.³⁷²

³⁶³ *Id.*

³⁶⁴ See Grové & Papadopoulos, *supra* note 101, at 434.

³⁶⁵ See Wagner & Castillo, *supra* note 94, at 273 n.114.

³⁶⁶ See *id.* at 274.

³⁶⁷ *How Do I Adjust My Email Notifications from Facebook?*, Facebook: Help Ctr., https://www.facebook.com/help/154884887910599?helpref=faq_content [<https://perma.cc/TV65-W4KQ>] (last visited Sept. 29, 2019).

³⁶⁸ See Wagner & Castillo, *supra* note 94, at 275–76.

³⁶⁹ See Hedges et al., *supra* note 358, at 71.

³⁷⁰ McEwen & Robertson, *supra* note 297, at 8.

³⁷¹ McEwen & Robertson, *supra* note 297, at 8; Finke, *supra* note 77, at 162; Knapp, *supra* note 36, at 576 n.204.

³⁷² See *FTC v. PCCare247 Inc.*, No. 12 Civ. 7189(PAE), 2013 WL 841037, at *5, *6 (S.D.N.Y. Mar. 7, 2013); *K.A. v. J.L.*, 161 A.3d 154, 157–58, 159 (N.J. Super. Ct. Ch. Div. 2016); *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 716 (Sup. Ct. 2015) (permitting service by a private message); *MKM Capital Pty Ltd v Corbo* [2008] SC 608 (16 December 2008) 2 (Austl.); *CMC Woodworking Machinery (Pty) Ltd v. Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD) at 15 paras. 2, 13 (S. Afr.); Browning, *supra* note 3, at 173 (discussing *Blaney v. Persons Unknown*); Browning, *supra* note 3, at 175 (discussing *AKO Capital LLP & another v. TFS Derivatives & others*). There is one decision in which a more generalized pathway was approved in the context of social media service. See *St. Francis Assisi v. Kuwait Fin. House*, No. 3:16-cv-3240-LB, 2016 WL 5725002, at *1 (N.D. Cal. Sept. 30, 2016) (service via a public tweet).

Proponents of using more generalized pathways for social media service assert that service by publication also does not respect privacy because a large number of readers can see it.³⁷³ The better view is that the degree of privacy violation depends on whether or not a third party is able to gain insight into the contents of the service. If the notice is formulated in such a way that only a minimum amount of information about the litigation is revealed and the defendant has to contact the bailiff or the court to obtain the full details of the case, the infringement of privacy is negligible. Only the act of service, not its background, is known to the public. If, however, the notice—whether in a newspaper or via a social media network—enables the whole world to consult the facts and reasons behind the litigation, the encroachment upon the right to privacy seems more problematic. Therefore, if more generalized pathways, such as the Facebook Timeline, are deemed the appropriate channel for service, the notice should at least be filtered in such a way that outsiders cannot find out the contents of the underlying lawsuit.

C. Social Media's Informality

Some critics of electronic service of process contend that electronic service lacks the ritualistic function that only paper-based, in-hand service can provide.³⁷⁴ Email, for instance, is treated as a casual form of communication.³⁷⁵ It is true that electronic methods of service do not create the same formality and finality as the hardcopy traditional methods of service.³⁷⁶ In legal proceedings, formality plays a vital role in that it distinguishes the moment from other mundane activities, defining the very event as significant.³⁷⁷

Social media platforms, probably even more than most other forms of electronic methods of communication, have a reputation of being informal, nonprofessional channels for interaction.³⁷⁸ Social media networks offer methods of communication predominately associated with one's free time and entertainment, not with official announcements. Therefore, despite being far less spam-prone than email,³⁷⁹ there is a risk that service of process via social media platforms will not be taken seriously by the recipient. If the defendant genuinely questions the believability and authenticity of the notice, the whole purpose of social media service is defeated.

There are safeguards that could be put in place to counterbalance the service recipient's bona fide suspicions regarding the credibility of the message informing him of the litigation. The notice should be transferred to the de-

³⁷³ See Grové & Papadopoulos, *supra* note 101, at 434.

³⁷⁴ See Hedges et al., *supra* note 358, at 73.

³⁷⁵ Anastazia Sienty, *E-Mail Service in New York State*, 36 Pace L. Rev. 998, 1015 (2016).

³⁷⁶ Specht, *supra* note 78, at 1956.

³⁷⁷ Upchurch, *supra* note 35, at 585.

³⁷⁸ See *Civil Procedure—Service of Process*, *supra* note 204, at 1969 n.61.

³⁷⁹ See *supra* Section II.C.

fendant in such a way that he is able to retain a permanent copy of the documents. If the documents are included in the message, they should preferably be in portable document format (PDF), which offers universal accessibility.³⁸⁰ This excludes social media networks, such as Snapchat, that quickly erase information after the recipient views the communication.³⁸¹ Although the defendant could take a screenshot of the shared information, the onus should not be on him. Rather, the method employed for service should ensure that the recipient can easily store the notice to prepare his defense.³⁸²

To improve the credibility of social media service, a document identifier system could be developed. Commentators have suggested the idea for consideration in the discussion on email service,³⁸³ but it would work equally as effectively for social media service. It entails that an index or docket number, given to the case when it is filed, is inserted in the subject line or the message body.³⁸⁴ The recipient can use this number on a central secured website to find the matter in which he is named and read the corresponding documents. The index number allows the defendant to confirm the reliability of the message on an independent website and helps him to differentiate between a legitimate notice and a spam attack.³⁸⁵ As fraudulent messages might try to emulate this verification process by directing the recipient to a sham website operated by the spammers,³⁸⁶ it would be crucial to continue to educate the general public on how to recognize trustworthy government-run websites. The document identifier can be used instead of or, preferably, in addition to attaching the relevant documents as PDF files.

The technique of providing a reference number to the defendant is a better solution than merely providing a link to a website where the documents can be consulted. In *St. Francis Assisi*, the documents were uploaded to a third-party hosting website outside the Twitter platform due to the social network's character limit on posts and the inability to attach files.³⁸⁷ The public Tweet only contained a link to that website but no other information that would have convinced the defendant that it was a legitimate notice.³⁸⁸ Placing the burden on the defendant to click on links to third-party websites from unknown and unverified Twitter accounts simply on the chance that the link contains official legal documents is too onerous.³⁸⁹

³⁸⁰ See Upchurch, *supra* note 35, at 604.

³⁸¹ *When Does Snapchat Delete Snaps and Chats?*, Snapchat: Support, <https://support.snapchat.com/en-US/a/when-are-snaps-chats-deleted> [<https://perma.cc/4L6A-WSY5>] (last visited Sept. 29, 2019).

³⁸² Upchurch, *supra* note 35, at 605.

³⁸³ See Wolber, *supra* note 139, at 468.

³⁸⁴ Wolber, *supra* note 139, at 468. This would, of course, require that the normal order in Belgian law of first serving the defendant and then filing the case with the competent court is reversed when serving via social media. See Taelman & Van Severen, *supra* note 269, at 89–90.

³⁸⁵ See Wolber, *supra* note 139, at 468.

³⁸⁶ See *id.*

³⁸⁷ See *St. Francis Assisi v. Kuwait Fin. House*, No. 3:16-cv-3240-LB, 2016 WL 5725002, at *1 (N.D. Cal. Sept. 30, 2016); *Civil Procedure—Service of Process*, *supra* note 204, at 1968–69.

³⁸⁸ See *Civil Procedure—Service of Process*, *supra* note 204, at 1965.

³⁸⁹ See *id.* at 1968–69.

Some commentators suggest that the defendant's failure to embrace the official nature of the communication could be resolved by sending the message more than once over a period of time.³⁹⁰ Sending the notice multiple times will help very little; seeing the same message pop up repeatedly might rather bring the defendant to the conclusion that it is indeed spam.

D. Who Is Authorized to Effect Social Media Service?

Connected to the issue of informality, the question of who has to effect the service needs to be addressed. The believability and appearance of authenticity depends in part on the person performing the service through the social media network. In the United States, typically any person over the age of eighteen not involved in the lawsuit can serve process.³⁹¹ In *Baidoo*, for example, the New York trial court noted that litigants are prohibited from serving other litigants.³⁹² It ordered the plaintiff's attorney to log into the plaintiff's Facebook account and message the defendant by first identifying himself and then either including a web address of the summons or attaching an image of the summons.³⁹³

The discussion over social media service in the United States mainly focuses on the plaintiff's lawyer's professional ethical limitations on the use of social media to contact the defendant.³⁹⁴ The ethics guidelines in force might enjoin an attorney from viewing, accessing, or deceptively friending or interacting with the opposing party's social media account.³⁹⁵ In Belgium, these issues will likely not surface for lawyers, as it can be assumed that service of process will remain the bailiff's prerogative. However, it will be necessary to clearly lay down how the bailiff can engage with the defendant via a social network. An important issue relates to whether he is allowed, in the course of verifying authentication and regular use, to request a friendship connection with the defendant in order to get deeper access to the profile. As to the mechanics of actually transferring the notice, it is conceivable that the bailiff is to create an official—perhaps even verified—account on the various social media networks and use this to serve the defending party's profile. The practicalities of sending a private message depend on the social media network in question. On Facebook, for instance, the sender and the recipient do not

³⁹⁰ Chris Chiou, David Russell & Stanley Chen, *Texting, Tweeting, Liking...Serving?*, L.A. Daily J., July 12, 2013.

³⁹¹ *Frequently Asked Questions*, ServeNow, <https://www.serve-now.com/resources/faqs> [<https://perma.cc/7HBE-5N49>] (last visited Sept. 29, 2019).

³⁹² *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 716 (Sup. Ct. 2015).

³⁹³ *Id.*

³⁹⁴ See Browning, *supra* note 3, at 182; Wagner & Castillo, *supra* note 94, at 278–79; Eisenberg, *supra* note 97, at 801; Van Horn, *supra* note 136, at 570–74; Kathleen O. Peterson, *Is California Ready for Service of Process by Social Media?*, Orange County Law., June 2015, at 37.

³⁹⁵ See for a discussion of various state approaches Van Horn, *supra* note 136, at 570–74.

need to be friends.³⁹⁶ If the sender and the recipient are not connected, the message will appear as a Message Request in their inbox.³⁹⁷ Direct messaging on Instagram operates along similar lines.³⁹⁸ If one sends the message to a person who is not following him, it will arrive in the recipient's inbox as a request.³⁹⁹ Twitter, on the contrary, does not allow users to send Direct Messages to people that do not follow the user, unless the recipient opted in to receive Direct Messages from anyone.⁴⁰⁰

There is an argument to be made for shifting the duty of social media service to the plaintiff when social media service is used as a last resort method together with service on the public prosecutor. The bailiff would remain the entity performing the service on the prosecutor, but his client would legally be burdened with the task of making a genuine attempt at social media service. This departure from the normal rules is motivated by the fact that the professional group of bailiffs would probably be opposed to having the responsibility to provide service via social media networks. They might find it too cumbersome and time-consuming to locate a social media presence for the defendant and to assess whether the profile actually belongs to the defendant and is regularly accessed by him. The plaintiff is, in most cases, better positioned to find the defendant online because he knows him better than the bailiff does. It would then fall to the plaintiff to collect sufficient evidence to convince the court that the defendant is behind the account and that the latter has an acceptable degree of interaction with that profile.

E. Proof of Actual Receipt

Proof of actual receipt of the notice by the defendant should not be a requirement for valid social media service.⁴⁰¹ Under Belgian procedural law, evidence that the defendant actually received the documents included in the service need not be provided. There is no reason why this should be any different for a new form of digital service. As explained before,⁴⁰² the bailiff may

³⁹⁶ *What Are Message Requests?*, Facebook: Help Ctr., https://www.facebook.com/help/907368596013605?helpref=faq_content [<https://perma.cc/68D8-DMQT>] (last visited Sept. 29, 2019).

³⁹⁷ *Id.*

³⁹⁸ *Can I Use Instagram Direct to Send Messages to People I'm Not Following?*, Instagram: Help Ctr., <https://help.instagram.com/1435783229983256> [<https://perma.cc/EZK3-AEVH>] (last visited Sept. 29, 2019).

³⁹⁹ *Id.*

⁴⁰⁰ *About Direct Messages*, Twitter: Help Ctr., <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts> [<https://perma.cc/K7BV-QVPM>] (last visited Sept. 29, 2019).

⁴⁰¹ Actual receipt might be proven *directly* through a “seen” or “read” feature or by a response or *indirectly* by an “active X hours ago” feature (tracking when the user was last active on the site) or another form of activity (post, comment, like, acceptance of a friend request—although it is difficult to determine who sent the latter) that dates from after the moment of service via private message, making it likely the defendant received notice. For an insight into how actual receipt of the notice may be established in case of service by Facebook Timeline post, see Hedges et al., *supra* note 358, at 70–71; Wagner & Castillo, *supra* note 94, at 278.

⁴⁰² See *supra* Section III.A.

effectuate service at the domicile or residence of the defendant by leaving a copy of the writ with a relative, servant, or agent, provided that the recipient is sixteen years old or older.⁴⁰³ The bailiff may also leave a copy of the writ in a sealed envelope at the domicile or the place of residence of the defendant.⁴⁰⁴ Whether the notice actually reaches the defendant is in both cases of no relevance for the validity and legality of the service.

This conclusion runs parallel to the situation in the United States. In US law, courts have more explicitly spelled out that the Constitution does not order proof of actual receipt.⁴⁰⁵ They acknowledge that traditional service methods have their flaws.⁴⁰⁶ However, despite these deficiencies, they are still treated as proper methods of notice because the law has never demanded a foolproof method of service of process.⁴⁰⁷ Consequently, US scholars also submit that electronic service of process should not be held to a higher standard.⁴⁰⁸ This position was clearly reflected in Texas House Bill 1989, the first legislative attempt to introduce social media service.⁴⁰⁹ The bill did not mandate actual receipt by the defendant but only that “the defendant could reasonably be expected to receive actual notice if the electronic communication were sent to the defendant’s account.”⁴¹⁰

V. Conclusion

Social media networks have infiltrated our daily lives like no communication channel before them. Their pervasiveness naturally leads to an exploration of their potential as an official avenue for service of process. Social media service is able to achieve a high likelihood of actual notice and offers several advantages over more established forms of notifying the other party of the launch of legal proceedings. Nevertheless, the emergence of social media service does not sound the death knell for the conventional means of service.

This Article takes the position that the addition of social media notice to the legal framework in Belgium may bolster the administration of justice. For now, at least, service through a social media platform could act as a supplementary method when the defendant cannot be found. Service on the public prosecutor is a fictitious form of notice incapable of actually informing the defendant,⁴¹¹ but social media accounts furnish an uninterrupted and immediate channel for the notice to reach even passive defendants at a minimal

⁴⁰³ Code Judiciaire [C.Jud.] art. 35.

⁴⁰⁴ Code Judiciaire [C.Jud.] art. 38 § 1.

⁴⁰⁵ See *supra* Subsections II.B.2, II.D.5.

⁴⁰⁶ See Hedges et al., *supra* note 358, at 67–68; Kevin W. Lewis, *E-Service: Ensuring the Integrity of International E-Mail Service of Process*, 13 *Roger Williams U. L. Rev.* 285, 302 (2008).

⁴⁰⁷ Upchurch, *supra* note 35, at 603.

⁴⁰⁸ Hedges et al., *supra* note 358, at 67–68.

⁴⁰⁹ H.R. 1989, 83d Leg., Reg. Sess. (Tex. 2013).

⁴¹⁰ *Id.*

⁴¹¹ See *supra* Section III.B.

cost. Social media service outperforms other seasoned subsidiary means of service, such as publication, mail, and posting, and holds specific advantages over email as well.⁴¹²

Embracing this type of service in last resort circumstances is provocative. However, it is worth reminding:

[A] concept should not be rejected simply because it is novel or nontraditional. This is especially so where technology and the law intersect. In this age of technological enlightenment, what is for the moment unorthodox and unusual stands a good chance of sooner or later being accepted and standard, or even outdated and passé.⁴¹³

Besides, this proposal is only a modest addition to the existing legal ecosystem; therefore, the risks associated with the addition are minimal.

In order to admit social media service into the Belgian legal order prudently, the new method should be subject to stringent conditions. There should be reasonable certainty that the account belongs to the defendant and that he actually uses it. The pioneering cases of the common law help shed light on the concrete operation of these conditions. It is further recommended from a privacy perspective that service is effectuated through the private messaging facilities of the respective social media platforms. Ideally, the message should also include a unique case number that can be verified on an independent governmental website in addition to a PDF of the documents as an attachment. It is expected that this type of service will be entrusted to the bailiff, but burdening the plaintiff with this duty holds merit as well. Only time will tell whether the legislature in Belgium will “like” or “unfriend” this suggestion.

⁴¹² See *supra* Section II.C.

⁴¹³ *Baidoo v. Blood-Dzraku*, 5 N.Y.S.3d 709, 713 (Sup. Ct. 2015).