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Internet Electronic Mail: A Last Bastion for the Mailbox Rule

Paul Fasciano

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NOTE

INTERNET ELECTRONIC MAIL: A LAST BASTION FOR THE MAILBOX RULE

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The [mailbox] rule has no application to substantially instantaneous means of communication, such as the telephone, telex, and electronic mail; the increasing use of such means has undoubtedly diminished the practical importance of the rule.

—Professor E. Allan Farnsworth

I. INTRODUCTION

Is the mailbox rule\(^2\) dying? A review of recent literature, a sample of which is provided above, suggests that this might be the case. The mailbox rule, a chestnut rule of contract law, holds that an acceptance to an offer is effective upon dispatch by the offeree (for instance, by placing a letter in a mailbox), rather than upon receipt by the offeror, regardless of whether it is ever received by the offeror, and regardless of whether the offeree receives a revocation from the offeror while the acceptance is in transit.\(^3\) Although the mailbox rule has enjoyed unanimous application by common law jurisdictions in the context of the post,\(^4\) some have theorized that it may be facing obsolescence as the post gives way to more modern methods of communication that are better suited to the receipt rule.\(^5\)

What makes many modern methods of communication better suited to the receipt rule than to the mailbox rule is their “substantially instantaneous two-way” nature.\(^6\) These qualities make them more analogous to face-to-face communication than to correspondence by post, thus dictating that they be governed by the same rule as face-to-face

2. The term “dispatch rule” is used interchangeably with “mailbox rule” throughout this Note.
3. The drafters of the Restatement articulate the rule as follows: “Unless the offer provides otherwise, (a) an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree’s possession, without regard to whether it ever reaches the offeror.” RESTATEMENT (SECOND) OF CONTRACTS § 63 (1981).
4. See infra note 20 and accompanying text.
5. See infra Part II.E.
6. “Substantially instantaneous” and “two-way” are the terms of art used by the Restatement to describe the two qualities that a method of communication must possess in order to justify dispensing with the mailbox rule in its context. See RESTATEMENT (SECOND) OF CONTRACTS § 64. The terms “substantially instantaneous” and “instantaneous” are used interchangeably throughout this Note and describe a length of time not exceeding a few seconds. A “two-way” method of communication is one in which interaction among the communicating parties is possible, allowing each to ensure that the other has clearly understood the messages conveyed. See infra text accompanying note 48. Synonymous terms include simultaneous, synchronous, and interactive.
communication with respect to the effective time of an acceptance—the receipt rule.

This theory about the demise of the mailbox rule has some merit in that many methods of communication have come into widespread usage that are indeed better suited to the receipt rule—examples include the telephone and electronic data interchange. This Note posits, however, that there exists a very viable, but somewhat overlooked and misunderstood, modern method of communication which is actually better suited to the mailbox rule—Internet electronic mail, or as more commonly called, Internet "e-mail."\footnote{7}

Part II of this Note presents the mailbox rule and the controversy as to whether dispatch or receipt of acceptances should be required for contract formation. Whereas receipt of acceptances is generally required in the context of face-to-face communication, mere dispatch is required in the context of the post. Regarding other methods of communication, the Restatement rule is presented which dictates that substantially instantaneous two-way methods of communication receive the same treatment as face-to-face communication with respect to the effective time of an acceptance. The rule is then explored through its application to the telephone, electronic data interchange, and the facsimile.

The focus of the Note then shifts to Internet e-mail and its suitability to the mailbox rule. Part III provides a brief introduction to Internet e-mail, offers some of its advantages and disadvantages as compared to other forms of communication, and relates some figures which illuminate the extent to which it is utilized. Part III also addresses the threshold issue of whether Internet e-mail is a legally acceptable medium for transmitting an acceptance, and also examines the nature of dispatch and receipt of Internet e-mail messages.

Part IV examines the transmission of an Internet e-mail message and posits that Internet e-mail is neither substantially instantaneous, nor two-way. Accordingly, Part V concludes that the emerging trend to discard the mailbox rule in the context of substantially instantaneous two-way methods of communication should not be applied to Internet e-mail. Rather, acceptances transmitted via Internet e-mail should receive the

\footnote{7}{For a description of electronic data interchange, and a discussion of how it is better suited to the receipt rule, see infra text accompanying notes 52-54.}

\footnote{8}{For convenience, the simple term "e-mail" is used throughout this Note to refer to Internet e-mail, as opposed to intrasystem e-mail, although in some instances the distinction is irrelevant. Where the distinction is particularly relevant, Internet e-mail and intrasystem e-mail are referred to as such. See infra Part III.A for a description of these two types of e-mail transmissions.}
same treatment as postal acceptances, and should be effective upon dispatch.

II. THE MAILBOX RULE

A. Effective Time of Acceptance—Dispatch or Receipt?

Generally speaking, a contract is a promise made between two entities that the law will enforce. A promise is usually brought into fruition through the process of offer and acceptance: an offeror makes an offer to an offeree, who subsequently accepts the offer. Acceptance by the offeree is the last step in contract formation—it creates obligations where they did not previously exist. The acceptance itself, therefore, has been the subject of much discussion and controversy.

One aspect of the acceptance that deserves special scrutiny is its timing. Assuming that the content of the acceptance is satisfactory, at what point in time does it become effective? When does that magic moment arise where two entities become legally bound to conduct certain affairs in a particular manner? Since dispatch of the acceptance by the offeree is distinct from receipt of the acceptance by the offeror, a controversy is created as to which of these two events should denote the formation of a contract.

9. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1.

10. "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Id. § 24.

11. One author has identified 11 situations which are analytically distinct in determining whether dispatch or receipt should form a contract. See Ian R. Macneil, Time of Acceptance: Too Many Problems for a Single Rule, 112 U. Pa. L. Rev. 947, 947-48 & n.1 (1964). For instance, in one scenario an offeree dispatches an acceptance and subsequently receives a revocation from the offeror before the offeror receives the acceptance. A different scenario is presented where the offeror dispatches an acceptance which is never received by the offeror. As the title of his work suggests, Macneil proposes that neither the mailbox rule nor the receipt rule can deal appropriately with all 11 situations. See id. at 978.

For purposes of this Note, it is unnecessary to distinguish between the various scenarios in which the mailbox rule may be applied. In the context of the post, the significant time lapse between dispatch and receipt requires that a choice be made between the two as to which will form a contract; according to Macneil, this choice is made by examining the peculiarities of each scenario. This Note, on the other hand, addresses the proposition that in the context of substantially instantaneous two-way methods of communication, receipt of an acceptance can be promptly ascertained by the offeree, and thus receipt is always preferable to dispatch, regardless of the peculiarities of each scenario.
Intuitively, receipt of the acceptance should be required for contract formation. The acceptance is a communication, and a communication, by its very nature, must be heard and understood; in other words, it must be received. After all, it is only after receipt of the acceptance that both parties become aware of their mutual agreement. Contract formation by mere dispatch disturbs one’s common sense—it smacks of unfairness to the offeror, who remains unaware of the contract until the acceptance is received, if ever. In line with this notion that communications must be received is the fact that offers, revocations, and rejections are effective only when received.

B. Face-to-Face Communication—Receipt Required

Indeed, in the context of the simplest form of communication, face-to-face correspondence, the law follows the intuitive preference described above, and a contract is formed only upon actual receipt of the acceptance by the offeror. At first glance, one might not see “dispatch” of the acceptance—the words being spoken by the offeree—as being distinct from “receipt” of the acceptance—the words being heard and understood by the offeror—but various complications bring out the distinction. For example, the offeree may utter the acceptance in a low tone of voice, or a loud airplane may pass overhead while the acceptance is leaving the offeree’s mouth, such that it is not heard by the offeror. In such cases, a contract has not been formed—though the offeree has dispatched an acceptance, it has not been received by the offeror.

It is critical to note that there is no reason to depart from the intuitive preference for receipt of acceptances in the context of face-to-face correspondence. More specifically, it is simply not a burden for the offeree to ensure receipt in a timely fashion, so there should be a requirement to do so. The offeree is in the presence of the offeror, and may

12. See, e.g., FARNSWORTH, supra note 1, § 3.10, at 137 (“An offer is not effective until it reaches the offeree.”).

13. See, e.g., id. § 3.17, at 162 (“The revocation is not effective . . . until it is received by the offeree.”). A few jurisdictions give effect to revocations upon dispatch. See, e.g., 2 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 6:41, at 443 (4th ed. 1991).


15. See, e.g., 2 id. § 6:34, at 367-71. One caveat is that receipt is not required where nonreceipt is the fault of the offeror. See id. The Restatement rule incorporates this caveat by requiring “reasonable diligence” on the part of the offeree in lieu of actual receipt by the offeror, “since in cases of misunderstanding acceptance turns on what each party knew or had reason to know.” RESTATEMENT (SECOND) OF CONTRACTS § 56 cmt. b.
easily seek some sort of indication that the acceptance was heard and understood.\textsuperscript{16} Perhaps the offeror will shake the offeree's hand, express happiness that a contract has been formed, or begin to discuss the specifics or preliminaries of the performance of the contract. Indeed, it would be odd if an offeree were to utter an acceptance, and then receive no acknowledgment whatsoever from the offeror, verbal or physical, that the acceptance was heard.

C. Communication by Post and the Birth of the Mailbox Rule—Mere Dispatch Required

This straightforward analysis is complicated when the contracting parties are not in the presence of each other, but are at a distance. For the moment, consider the case where the offeree mails an acceptance to the offeror. Unlike where the parties are in the presence of each other, the offeree in this scenario has no ability to ensure that the offeror “heard” the acceptance. In fact, the offeree has no way of ascertaining when, if ever, the offeror receives the acceptance. Consequently, the burden of communication must be placed on one of the parties, meaning that there will be a period of time during which one of the parties is unaware of the existence of a contract. If mere dispatch forms a contract, the offeror will be unaware of the existence of a contract from the time the offeree dispatches the acceptance until the time the offeror receives it. In the worst case scenario, the acceptance will never be received, and the offeror will learn of the contract only upon some further communication by the offeree. Much damage may have been done by this time. The offeror may have already breached the contract (having been unaware of its existence), in which case it may be a summons and complaint that bring news of the existence of the contract, or the offeror may have contracted elsewhere, rationally believing that the offeree was uninterested in the offer.

In the alternate scenario, where receipt forms a contract, the offeree has no way of ascertaining the exact time of contract formation. In the worst case scenario, a contract is never formed, perhaps because the acceptance is lost in transit, or because the offeree receives a revocation before the offeror receives the acceptance. Thus, the offeree must await

\textsuperscript{16} As the Restatement puts it, “[w]here the parties are in each other’s presence, the offeree can accept without being in doubt as to whether the offeror has attempted to revoke his offer or whether the offeror has received the acceptance.” \textsc{Restatement (Second) of Contracts} § 64 cmt. a.
notification from the offeror before performing, preparing for, or relying on the contract. In the meantime, other opportunities to contract must be foregone, and certain resources, such as personnel and machinery, must be kept idle. The offeree’s plight may be summarized by a very familiar observation—time is money. The important point here is that justification now exists for departing from the intuitive preference for receipt—it is prejudicial to the offeree because there is no way of ensuring such receipt.

Faced squarely with this issue in 1818, the King’s Bench sided with the offeree and adopted the dispatch rule, basing its decision on a rationale of necessity. The court reasoned that the dispatch rule is necessary for contract formation by post since without it an endless series of notifications would proceed between the contracting parties. In other words, if we require X to receive Y’s acceptance, then Y should have the right to receive notification from X that the acceptance was received, and X should have the right to receive notification from Y that the notification of receipt of the acceptance was received, etc.

Common law jurisdictions have followed this decision and have unanimously adopted the mailbox rule, as has the Restatement and

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18. The court stated that notification between the parties “might go on ad infinitum.” Id. at 251.
19. As a counterargument, one author has submitted that “the . . . dispatch rule is no more convenient than the [receipt] rule. Under the [receipt] rule, the advantage is merely shifted from the offeree to the offeror . . . .” Beth A. Eisler, Default Rules for Contract Formation by Promise and the Need for Revision of the Mailbox Rule, 79 KY. L.J. 557, 568 (1990-91).

This argument is flawed in three ways. First, under this rationale, the mailbox rule is not, as the author suggests, a rule of convenience, but is a rule of necessity. Second, the author’s statement is conclusory because it merely states that the dispatch rule is no more convenient than the receipt rule, but does not state how the dispatch rule is no more convenient. Third, the author introduces the unrelated concept of “advantage” into the discussion of “convenience.”


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the UCC. This is not to say that the rule has created no controversy. On the contrary, there has been exhaustive debate over its wisdom, which has produced a dizzying myriad of justifications and criticisms, arguments and counterarguments. The debate has essentially produced a stalemate and there now seems to be a consensus that either the dispatch or receipt rule could be used, but one must be chosen. Accordingly, it seems that the mailbox rule has survived not so much because of its merits, but because the receipt rule has not been demonstrated to be any more desirable. Although an in-depth discussion of this debate is beyond the scope of this Note, the arguments for and against the rule are briefly presented to provide a flavor of the controversy.

The mailbox rule faces a number of criticisms. First, as described


21. See RESTATEMENT (SECOND) OF CONTRACTS § 63.
22. See U.C.C. § 1-201(26), (38) (1990).
25. One author has offered a myriad of criticisms of the mailbox rule, which are not discussed in this Note, in calling for its complete abolishment. See Eisler, supra note 19. These criticisms, which have been termed "radical," see CORBIN & PERILLO, supra note 24, § 3.24, at 442 n.10, are largely unpersuasive. For instance, the author states that the mailbox rule does not mirror proposed models of contract formation, see Eisler, supra note 19, at 565, inexplicably overlooking the fact that the rule is indeed in accord with what are arguably the two most prominent models of contract formation, the Restatement and the UCC, see supra text accompanying notes 21-22. The author also criticizes the mailbox rule in that it does not mirror other rules of contract formation, see Eisler,
above, there exists a span of time under the mailbox rule, the time between dispatch and receipt, during which only the offeree is aware of the existence of the contract, thus prejudicing the offeror. The counterargument to this, of course, is that the receipt rule prejudices the offeree, who is unable to ascertain the time of receipt of the acceptance so as to rely on or begin performance of the contract, and who must live in fear that the contract may be thwarted by revocation before receipt of the acceptance.26

A second criticism of the mailbox rule is that it is antithetic to the principle that courts should supply default contract rules in accordance with what the parties themselves would have decided had they addressed the issue. In other words, the rule is counterintuitive and belies the expectations of laypeople.27 This point is corroborative by my personal, though admittedly sparse survey of laypeople, who almost unanimously expect that a contract would be formed upon receipt.

Finally, Professors Williston and Langdell have suggested that the mailbox rule is technically flawed in that the acceptance inherently requires communication since it is the return promise required to create a bilateral contract.28 As described by one author:

The consideration for the offer was the offeree's return promise. But a promise by its nature is not complete until communicated; a "promise" into the air is no promise at all. Since there was no promise, there was no consideration and there could be no contract, until the letter of acceptance was received and read. The mailbox rule could not be good law.29

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26. See infra notes 33-36 and accompanying text.
27. See, e.g., Eisler, supra note 19, at 558; Marianne M. Jennings, The True Meaning of Relational Contracts: We Don't Care About the Mailbox Rule, Mirror Images, or Consideration Anymore—Are We Safe?, 73 DENV. U. L. REV. 3, 4 n.7 (1995) (relating an anecdote in which an offeree, unaware of the mailbox role, fails to realize that a contract has been formed, and contracts elsewhere).
28. See 2 WillisToN & Lord, supra note 13, § 6:32, at 362 ("Because the concept of promise connotes a requirement of communication, . . . the rule that a bilateral contract is completed by mailing the acceptance has . . . been criticized and the contention made that actual communication should be required.").
Theoretical and fairness-based counterarguments may be made to this position. On a theoretical level, it can be argued that communication of a promise is not inherently required, but that a promise need merely be declared. For instance, consider the situation in which X, in a room with the proverbial fifty nuns, accepts an offer made by Y, who is not present. Indeed, it seems as if a return promise has been made, and that the parties should be required to uphold their respective promises, despite the fact that the return promise has not (yet) been communicated to Y. This is not to say that communication of the acceptance should be dispensed with, as it is essential to protect the offeror’s interests. Rather, communication to the offeror should be viewed as an afterthought, or a mere formality created by a limitation of the human mind.

This position, which has been offered by Professor Farnsworth, may be summarized as follows: An acceptance should form a contract upon manifestation, and receipt by the offeror should be a condition subsequent without which the offeror will not be obliged to perform.

A second counterargument to the position that a promise must be communicated is that the offeree may be prejudiced by the offeror’s failure to read the acceptance in a timely fashion. Such failure may be negligent or even intentional in the case of the opportunistic offeror who has had a change of heart about the contract. The formalistic view that a promise must be communicated should yield to considerations of fairness.

Turning to the rationales in favor of the mailbox rule, the drafters of the Restatement assert that it gives the offeree a dependable basis upon which to form a contract—he need not fear that the contract will be thwarted by a revocation received while the acceptance is in transit.

30. Dictionary definitions of a promise seem to support the proposition that a promise need not be communicated, but simply declared. See, e.g., BLACK’S LAW DICTIONARY 1213 (6th ed. 1990) (a promise is “[a] declaration which binds the person who makes it . . . to do or forbear a certain specific act, and which gives to the person to whom made a right to expect or claim the performance of some particular thing”); THE RANDOM HOUSE COLLEGE DICTIONARY 1059 (rev. ed. 1984) (a promise is “a declaration or assurance that something specified will or will not happen, be done, etc.”).

31. This limitation being the inability of the human mind to instantaneously transmit thoughts to the minds of desired recipients.

32. See FARNSWORTH, supra note 1, § 3.14, at 154.

33. These are in addition to the necessity rationale on which the case was originally established. See supra notes 17-19 and accompanying text.

34. See RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. a (1981); see also FARNSWORTH, supra note 1, § 3.22, at 181 (“allowing the offeror to revoke until the acceptance is received would aggravate the already vulnerable situation of the offeree, which may have relied, even though unable
Under this rationale, the privilege of revocation that the common law extends to offerors—a privilege which is unavailable in many legal systems—is viewed as an evil or an unfair advantage. It leaves the offeree standing on a trap door, with the triggering mechanism in the control of the offeror. The mailbox rule counteracts this advantage by terminating this unfair power to revoke at the earliest possible time and upon the occurrence of an event which is fully in the control of the vulnerable offeree—the dispatch of the acceptance. This rationale, however, pertains only to the situation in which the offeree receives a revocation while the acceptance is in transit. The Restatement acknowledges that the determination as to whether dispatch or receipt should form a contract is not as easily made where the acceptance is lost or delayed, and extends the mailbox rule to these situations merely “[i]n the interest of simplicity and clarity.

Another justification for the mailbox rule is that it is economically efficient because it allows the offeree to rely on dispatch, and to begin performance of obligations immediately, as opposed to awaiting notification of receipt of the acceptance by the offeror. As one author has stated: “[T]he [mailbox] rule . . . has the merit of closing the deal more quickly and enabling performance more promptly. It must be remembered that in the vast majority of cases the acceptance is neither lost nor delayed, and promptness of action is of importance in all of them.” So, for example, after dispatching an acceptance, a contractor may order supplies for construction, hire additional personnel, or obtain construction permits—without awaiting notification of receipt of the acceptance by the offeror.

Justification for the mailbox rule has also been based on the cornerstone premise of contract law that the offeror is the master of the offer. As the controlling party, the offeror may condition contract formation on receipt of the acceptance. Failure to include such a
condition in the offer implies indifference as to the effective time of the acceptance. The counterargument to this position is that the typical offeror is unaware of the counterintuitive mailbox rule, and thus has no reason to deal with it in making an offer.\footnote{See supra note 27 and accompanying text.}

Moving to some of the weaker and highly criticized rationales of the mailbox rule, it has been suggested that because the post office is an agent of the offeror, the latter constructively receives the acceptance upon dispatch.\footnote{See, e.g., 1 CORBIN & PERILLO, supra note 24, § 3.22, at 439; FARNSWORTH, supra note 1, § 3.22, at 181; RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. a.} But this rationale is now almost universally viewed as absurd since the post office is actually an independent contractor and is no more an agent of the offeror than of the offeree.\footnote{See, e.g., 1 CORBIN & PERILLO, supra note 24, § 3.22, at 439; FARNSWORTH, supra note 1, § 3.22, at 181 n.4; Macneil, supra note 11, at 958 ("The dispatch rule does not depend on the oft-destroyed agency concept. It has sounder functional foundations....") (footnote omitted)).}

Another suspect rationale for the mailbox rule is that dispatch of an acceptance puts it irrevocably out of the offeree's control.\footnote{See, e.g., 1 CORBIN & PERILLO, supra note 24, §§ 3.26, at 449; RESTATEMENT (SECOND) OF CONTRACTS § 63 cmt. a; 2 WILLISTON & LORD, supra note 13, § 6:38, at 399. This formed the basis for dispensing with the mailbox rule in two very controversial United States Court of Claims cases. See Rhode Island Tool Co. v. United States, 128 F. Supp. 417 (Ct. Cl. 1955); Dick v. United States, 82 F. Supp. 326 (Ct. Cl. 1949). These highly criticized cases have not been followed. See, e.g., 1 CORBIN & PERILLO, supra note 24, § 3.26, at 449 ("Such decisions have been rejected outside of [the Court of Claims]."); Macneil, supra note 11, at 954-55 (suggesting that the court inappropriately repudiated the dispatch rule, overlooking the functional problem of mistake).} As a preliminary matter, this rationale has been turned on its head since a letter may now be recalled from the mail.\footnote{See, e.g., 1 CORBIN & PERILLO, supra note 24, § 3.26, at 449; FARNSWORTH, supra note 1, § 3.22, at 181.} But more fundamentally, it is not clear how the ability to withdraw an acceptance addresses the merits of the rule. Irrespective of this ability, an offeree might nevertheless receive a revocation while the acceptance is in transit, and the acceptance might nevertheless get lost in transit. This hypertechnical rationale has been properly dismissed—it is now generally accepted that the possibility of withdrawal alone is not a sufficient basis for dispensing with the mailbox rule.\footnote{See, e.g., Morrison v. Thelke, 155 So. 2d 889, 905 (Fla. Dist. Ct. App. 1963) (stating that the change in postal regulations allowing withdrawal of a letter is an insufficient basis upon which to dispense with the mailbox rule); 2 WILLISTON & LORD, supra note 13, § 6:38, at 404 ("[T]he rule is now firmly developed in the majority of jurisdictions that a contract is formed by a properly dispatched acceptance, despite the offeree's ability to recall the acceptance.").}

This issue is of little relevance in the context of e-mail communications since e-mail messages which are sent over the Internet, or even within certain systems, cannot be retracted. See, e.g., E-mail from Julie Bryant, Customer Service Representative, Compuserve (Jan. 25, 1996) (on
D. "Substantially Instantaneous Two-Way" Forms of Communication—Treat as Face-to-Face

Thus far, two scenarios have been addressed: where acceptances are transmitted via face-to-face communication, receipt is required, and where acceptances are transmitted via the post, mere dispatch is required. But what of acceptances transmitted via other, more modern methods of communication? Reasoning by analogy, receipt should be required only if the method of communication in question is more similar to face-to-face communication than to the post.

In determining whether a method of communication is more similar to face-to-face communication than to the post, a mere intuitive analogy proves unsatisfactory. Rather, a more structured framework for analysis is required—one which identifies the particular characteristics of face-to-face communication that distinguish it from the post and make it amenable to the receipt rule. Such a framework has been provided by the drafters of the Restatement: "Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptances where the parties are in the presence of each other."[46]

This two-prong test requires that a method of communication be both substantially instantaneous and two-way for it to receive the same treatment as face-to-face communication with respect to the effective time of an acceptance. The first prong of the test, substantial instantaneousness, requires that the acceptance be transmitted within a few seconds.[47] The second prong of the test, the quality of being "two-way," requires that there be interaction among the communicating parties, allowing each to ensure that there has been understanding by the other. The following passage clearly describes this quality of being "two way":

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46. Restatement (Second) of Contracts § 64.
47. Actually, the term "substantial" may be vague enough to support an argument that transmission within a minute or two, or perhaps a larger period of time, is substantially instantaneous.
In [two-way] communication, one party can determine readily whether the other party is aware of the first party’s communications, through immediate verbal response or, when the communication is face-to-face, through nonverbal cues. When the communication is not instantaneous and is not face-to-face, there is much greater uncertainty as to whether the other party is aware of a particular communication.\footnote{48} 

This two-prong test for determining whether a method of communication should be treated in the same manner as face-to-face communication with respect to the effective time of an acceptance is perhaps best understood through its application. The telephone, electronic data interchange, and the facsimile are considered in turn.

The telephone, explicitly delineated by the Restatement as a substantially instantaneous two-way method of communication, is perhaps the quintessential example. Telephonic communication is substantially instantaneous in that there is no delay in communication—one’s words are immediately transmitted to the other party. It is two-way in that the parties communicate in a “back-and-forth” manner such that they can respond to or interrupt each other; compare this to communication by post, where the sender corresponds without any feedback from the addressee, who has no opportunity to alter the course of the communication.

English courts have followed this analysis and have held that communications by telephone—as well as by telex,\footnote{49} a similar method of communication—are better analogized to face-to-face communication than to the post, and thus acceptances by such methods are effective where and when received.\footnote{50} Curiously, though, a majority of American courts have shown an arguably unwarranted allegiance to the mailbox rule, treating telephoned and telexed acceptances as effective where and


\footnote{49. Telex is a “two-way teletypewriter service channeled through a public telecommunications system for instantaneous, direct communication between private subscribers at remote locations.” The Random House College Dictionary 1351 (rev. ed. 1984). Functionally, the sender types a message into a teletypewriter as if it were a regular typewriter. The message is instantaneously transmitted through standard telephone lines to the recipient teletypewriter, which automatically types the message onto paper.}

\footnote{50. See, e.g., Entores Ltd. v. Miles Far East Corp., [1955] 2 Q.B. 327, 332-34 (Eng. C.A.) (noting that although it is unanimous in common law countries that acceptance by post is effective upon dispatch, “[c]ommunications by [telephone and telex] are virtually instantaneous and stand on a different footing,” and thus concluding that the “contract is only complete when the acceptance is received by the offeror”).}
when dispatched, despite the greater similarity of these methods of communication to face-to-face correspondence.\textsuperscript{51}

The two-prong Restatement test has also been applied to electronic data interchange, or as commonly called, EDI.\textsuperscript{52} EDI is a computerized contracting system characterized by an ongoing, automatic exchange of very specific data, such as the quantity of an item to be ordered, between entities that have a continuous course of dealing.\textsuperscript{53} An EDI transaction might take place, for example, when the inventory of widgets for company \( X \) falls below a specified minimum, and an order is automatically placed by a computer to purchase a specified amount of widgets from company \( Y \).

Although EDI communications are substantially instantaneous, satisfying the first prong of the Restatement test, EDI seems, at first glance, to fail the second prong of the test since EDI communications are not literally two-way—the communicating computers do not "interact" in any way so as to clear up any potential "misunderstandings" between them. If the analysis ended here, EDI would not be treated in the same manner as face-to-face communication with respect to the effective time of an acceptance; rather, it would be treated in the same manner as the post, and the mailbox rule would apply in its context.

But the analysis does not end here because there exists a substitute

\textsuperscript{51} This issue usually arises in jurisdictional or choice of law cases in which the offeror and offeree are located in different states. See, e.g., Docutel Corp. v. S. A. Matra, 464 F. Supp. 1209, 1215 (N.D. Tex. 1979) (where acceptance was sent by telex from France to Texas, contract was made in France, although Texas law was deemed controlling on other grounds); Cardon v. Hampton, 109 So. 176, 177 ( Ala. Ct. App. 1926); Ledbetter Erection Corp. v. Workers' Compensation Appeals Bd., 203 Cal. Rptr. 396, 400-01 (Ct. App. 1984); Dudley A. Tyng & Co. v. Converse, 146 N.W. 629, 630 (Mich. 1914); Pierce v. Haley Bros., 168 N.W.2d 346, 349, 355 (Minn. 1969); National Furniture Mfg. Co. v. Center Plywood Co., 405 S.W.2d 115, 118 (Tex. Civ. App. 1966); State ex rel. Hartwig's Poultry Farm, Inc. v. Bunde, 170 N.W.2d 734, 736-47 (Wis. 1969).


\textsuperscript{53} See generally BAUM & PERRITT, JR., supra note 48, § 1.2; BENJAMIN WRIGHT, THE LAW OF ELECTRONIC COMMERCE 22-25 (1991); \textit{Model Trading Partner Agreement}, supra note 52.
for the two-way quality of a method of communication. Since the purpose of the two-way requirement is to provide for assurance of receipt, if receipt can be ensured in another manner, such as through an accurate computer acknowledgment, than the requirement that a communication be two-way can be eliminated. Michael S. Baum and Professor Henry H. Perritt, Jr. have stated that “[t]he two-way part of the Restatement description may be problematic for EDI exchanges that are not two-way, but it is important to understand that the Restatement drafters used the term ‘two-way’ because that type of communication enhances awareness and reduces mistake potential.”

Thus, although EDI communications are not literally two-way, EDI should nevertheless be afforded the same treatment as face-to-face communication—and acceptances transmitted via EDI should be effective only upon receipt—because such receipt can be confirmed with an accurate computer acknowledgment.

The facsimile is similar to EDI in that fax transmissions are substantially instantaneous, but are not literally two-way—fax machines do not interact with each other. Thus, a faxed acceptance will satisfy the second prong of the Restatement test, and should be effective upon receipt, only if it is transmitted from a fax machine that is capable of accurately confirming its error-free transmission. On the other hand, an acceptance transmitted from a fax machine that lacks such an ability to confirm receipt will fail the second prong of the Restatement test, and should be effective upon mere dispatch.

E. The Demise of the Mailbox Rule?

The above analysis indicates that substantially instantaneous two-way forms of communication are better suited to the receipt rule than to the mailbox rule. Accordingly, a number of commentators have suggested that the mailbox rule may be facing its demise as the use of substantially instantaneous two-way forms of communication begins to predominate over the use of the post. But this Note posits that these commentators

54. BAUM & PERRITT, JR., supra note 48, at 324 n.63.
55. See FARNSWORTH, supra note 1, § 3.22, at 182 ("The [mailbox] rule has no application to substantially instantaneous means of communication, such as the telephone, telex, and electronic mail; the increasing use of such means has undoubtedly diminished the practical importance of the rule."); EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 340 (4th ed. 1991) (suggesting that the mailbox rule may be facing its demise as more and more contracting occurs via EDI); Eisler, supra note 19, at 583 (suggesting that the receipt rule be used in all circumstances because "[m]ail and telegram are the exception," while "[t]elephone, fax, and EDI are
have overlooked and misunderstood what may be the last bastion for the mailbox rule—Internet electronic mail, or Internet “e-mail.” The next two Parts of this Note demonstrate, respectively, that Internet e-mail is a very viable modern method of communication that should not be overlooked, and that it possesses somewhat misunderstood characteristics that make it better suited to the mailbox rule than to the receipt rule.

III. INTERNET ELECTRONIC MAIL

A. Introduction

Electronic mail\(^56\) refers to a method of communication whereby the sender types a message into a computer terminal or workstation and then electronically transmits it to the receiver, who reads the message on a computer terminal or workstation.\(^57\) The sender and receiver must each be part of an e-mail system, which is loosely defined as a group of individuals who use a common entity, and a common server, to handle their messaging needs. A server is a central computer which acts as an intermediary in collecting and dispatching both outgoing and incoming messages for its various users. A typical e-mail system might be comprised of the employees of a company or the subscribers to an e-mail service provider such as Compuserve or MCI Mail.\(^58\)

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56. E-mail as discussed in this Note must be distinguished from a related technology, EDI, described supra text accompanying notes 52-54.

57. Much of the computer information presented herein has been acquired through my experience as a Local Area Network ("LAN") Administrator and as an independent computer consultant. I have worked with e-mail on LANs, see infra note 59, mainframe systems, see infra note 59, and through the on-line service Compuserve, see infra note 58. I have also conducted interviews with a number of institutional system administrators, and have made various inquiries to the customer support representatives of the on-line service Compuserve. For general descriptions of e-mail, see LEE SPROULL & SARA KIESLER, CONNECTIONS 177-84 (1991); Amelia H. Boss & William J. Woodward, Scope of the Uniform Commercial Code: Survey of Computer Contracting Cases, 43 BUS. LAW. 1513, 1520 (1988); Robert H. Thomas, "Hey, Did You Get My E-Mail?" Reflections of a Retro-Grouch in the Computer Age of Legal Education, 44 J. LEGAL EDUC. 233, 236-37 (1994).

58. Individuals will generally obtain e-mail access through a provider which collects and distributes the messages of its various subscribers. On-line services, including Compuserve, America On-Line and Prodigy, will invariably provide e-mail access to all of its users. Any individual who has a computer and a modem can subscribe to one of these services, which provide a plethora of features in addition to e-mail for a monthly fee of approximately 11 dollars. The "basic services" included in the monthly fee typically include weather reports, stock quotes, reference materials, and on-line shopping. For additional fees, users may enter what are known as "forums." A forum is an arena in which people with a common interest can exchange ideas. For instance, in a cooking forum, one can go into a library and look for recipes that other members of the forum may have posted.
Being a member of a system is only the most basic requirement of e-mail messaging. In a more physical sense, an e-mail user must access an “end-user” computer which can communicate with the server. Such communication requires physical connection to the server and the installation of the appropriate software. Physical connection between an end-user computer and the server is achieved either through direct cabling or through telephone lines, in which case both the end-user computer and the server must be equipped with a modem. Software refers to the nonphysical component of computer operation; it is computer programming which manipulates information and provides the user with an interface to the physical computer. Interfaces are generally of two types, textual and graphical. Textual interfaces present information as simple text on the computer monitor; users generally perform functions by typing in commands at a prompt. Graphical user interfac-

One can also “chat” with another user and ask questions or exchange ideas. “Chatting” is the term given to simultaneous or “real-time” communication between the parties. In other words, both parties are sitting at their terminals, typing messages, and immediately awaiting responses from the other party. See generally DAN GOOKIN & ANDY RATHBONE, PCs FOR DUMMIES 279-99 (3d ed. 1995); TINA RATHBONE, MODEMS FOR DUMMIES 317-45 (2d ed. 1994).

MCI Mail is a worldwide service, introduced in 1983, which focuses on transmitting messages via various media including e-mail. See Eisler, supra note 19, at 567.

59. Cabling a number of computers together has the advantage of allowing them to share information (such as e-mail messages) and resources (such as printers). Such connection is generally accomplished through two types of configurations, namely, computer networks and mainframe systems. Computer networks (LANs, which are confined to discrete locations, or Wide Area Networks, or “WANs,” which span distant locations) consist of a number of fully functional personal computers, or workstations, that are connected together and share the resources of a central computer called the file server. Personal computers are typically of one of two types: IBM machines (or a plethora of IBM-compatible machines such as Gateway, Zeos, and Compaq), known as “PCs,” and Macintosh machines, known as “Macs.” Being “fully functional” means that each computer on the network has independent resources such as memory and hard disk space, and can function as a stand-alone unit. See generally GOOKIN & RATHBONE, supra note 58, at 267-77; RON WHITE, HOW COMPUTERS WORK 150-61 (2d ed. 1995).

Mainframe systems, on the other hand, involve a central computer which does all of the necessary processing and then sends information to the users through “dumb terminals.” These terminals typically have no resources and no processing power and thus would be useless apart from the mainframe system; they simply pass on the information that the mainframe computer sends to them. See, e.g., GOOKIN & RATHBONE, supra note 58, at 267.

60. See, e.g., GOOKIN & RATHBONE, supra note 58, at 247. Typical types of software include wordprocessors, spreadsheets, databases, presentation packages, and of course, e-mail. With mainframe systems, the software is actually installed on the central mainframe computer, not on the “dumb terminals,” which have no independent resources. See supra note 59. With networks, the software may be installed centrally on the file server, for use by all workstations, or may be installed locally on each workstation.

61. DOS (which uses a C> prompt) and UNIX (which uses a $ prompt) are popular operating systems which use a textual interface.
MAILBOX RULE AND INTERNET ELECTRONIC MAIL

es (or GUIs) present information in a descriptive, colorful, and pictorial manner and allow users to perform functions by clicking on parts of the screen with a mouse, rather than by typing in complicated, nonintuitive keystrokes.  

The simplest e-mail transmissions are intrasystem, involving only the sender, the recipient, and their common server. Until recently, intersystem communications were not possible because of hardware and software incompatibilities, so that the audience with which an e-mail user could communicate was limited to those within the user’s particular system. Thus an employee of company $X$ could not send an e-mail message to an employee of company $Y$, and similarly, a Compuserve subscriber could not send an e-mail message to an MCI Mail subscriber. This severe limitation that hampered e-mail is perhaps best understood through an analogy with the telephone—imagine the frustration facing an AT&T subscriber who is unable to telephone a business associate because the latter subscribes to MCI.

Lifting this limitation and greatly increasing the usefulness of e-mail was the development of Internet technology—a standard method of computer connectivity and file transmission which allows for communication between dissimilar systems. By connecting its server to the Internet, a system may thereby allow its members to communicate with members of other systems that have likewise connected their servers to the Internet. The bottom line is that an e-mail user can now send a message to just about any other e-mail user, regardless of the identities of their respective service providers.

62. Microsoft Windows is a popular graphical user interface which is used on IBM compatible computers. A graphical user interface is inherent in Macintosh computers.

63. One computer dictionary defines the Internet as "[a] system of linked computer networks, worldwide in scope, that facilitates data communication services such as remote login, file transfer, electronic mail, and newsgroups. The Internet is a way of connecting existing computer networks that greatly extends the reach of each particular system." BRYAN PFaffenberger, QUE'S COMPUTER & INTERNET DICTIONARY 269 (6th ed. 1995). Internet connectivity is now rather extensive and is increasing at a rampant pace. See id. (estimating its number of users in 1995 at 20 million, increasing at a rate of 1 million per month, and its number of computers at 2 million); RATHBONE, supra note 58, at 19 (estimating its number of users in 1994 at 20 million, increasing at a rate of 20% per month).

To access the Internet, one typically needs a computer, a modem, Internet software (popular packages include Netscape and Mosaic), and a contract with an Internet service provider, which may charge a flat monthly fee or a fee based on usage. Many on-line services have now incorporated Internet access into their software, eliminating the need to utilize a separate entity solely to provide this service.

64. See RATHBONE, supra note 58, at 324 for a good schematic diagram of Internet connectivity.
B. Advantages and Disadvantages

E-mail combines a variety of useful features which make it superior in many respects to communication by post, phone, or fax—it is kind of a hybrid of the three, combining the best features of each. It enjoys at least four advantages over each of the post, phone, and fax. First, an e-mail message can be sent to hundreds of dispersed recipients at once. By comparison, although a voice mail message can be sent to multiple recipients within the same system, it cannot be sent to recipients that are outside of the system, such as employees of other companies. As for the post, although procedures can be implemented to make mass mailing more efficient, it is still necessary to produce a copy of the message and a customized envelope for each recipient, steps which are unnecessary in the context of e-mail.

Second, e-mail messages are in a computer readable format, and thus can be saved, manipulated, edited, and used in other documents. Compare this to a phone call or voice mail, creating a record for which requires taking notes. Similarly, useful information from a facsimile generally must be retyped into a computer document. Third, e-mail
provides excellent message management. Messages are easy to skim and scan since relevant information, such as the sender and subject of each message, is usually displayed in a very structured format, allowing the user to quickly decide which messages to read immediately, which to read at a later time, and which to delete without reading. Finally, there may be some situations in which there is no other choice but to use e-mail, this being the case when the parties know of each other only through computer connectivity. For example, one may post an advertisement over the Internet which requires that interested parties reply through e-mail.

E-mail enjoys a significant advantage specifically over the telephone—an advantage that it shares with the post and the fax—namely, asynchronism, meaning that the sender and the recipient do not communicate simultaneously. Three distinct benefits are gained from this characteristic. First, messages can be sent and read at one's convenience—there is no need to determine a time which is mutually convenient for the communicating parties. Second, its asynchronous nature makes e-mail less spontaneous than the telephone, giving the sender the opportunity to communicate information in an organized manner without interruption. Third, there is no need for social interaction when sending an e-mail message. This allows for the avoidance of time-consuming conversations, and also gives the less social among us, who may have much to contribute, a forum in which to freely present their ideas.

E-mail has three advantages—which it shares with the telephone—over the post and the fax. First, e-mail messages can be sent and received from any location with a phone line, provided that the user has a personal computer equipped with a modem. Second, sending e-mail is very simple and convenient, especially for those who have computers at their desks. As compared to the post, there is no need to find a piece of paper, an envelope, a pen, and a stamp, and no need to physically mail a letter. As compared to the fax, there is no need to produce a hardcopy, and no need to walk to the fax machine, where there may be crisp and clean, and when the user does not desire to retain formatting. In the end, disgruntled users will often wish they had avoided this technology and simply retyped the information.

68. Of course, when issues are unclear or need to be resolved through collaboration, interaction is required.

69. The phone is actually superior to e-mail in this respect since retrieving voice mail messages requires no special equipment.
a line, to physically fax a letter. Third, e-mail and the phone are more environmentally friendly than the post and the fax because they do not use paper.

E-mail does have a number of disadvantages. As compared to each of the phone, the post, and the fax, there are at least two. First, e-mail users must exercise care in considering the content of their communications in that e-mail messages may leave a discoverable written trail and may be intercepted. Of course, it is possible that a phone line could be tapped, or that mail could be intercepted by a postal or mailroom employee, but the newly-created, ever-evolving, and somewhat mysterious realm of e-mail—and particularly the Internet, which is not regulated or administered by any particular organization—is much more susceptible to undetected intrusion by computer "hackers" or experts. Second, it is not uncommon for some recipients to ignore e-mail messages, so it can be dangerous for a sender to assume that a message has been read in a timely fashion.

With respect to the phone, e-mail—along with the post and the fax—is inferior in that it cannot communicate the emotion or tone of a message as can a telephone conversation or a voice mail message. As compared to the post and the fax, e-mail—along with the phone—is lacking in at least two ways. First, systems which notify the user of incoming messages can be very distracting. Although the notification function of an e-mail software package may be deactivated (as may the ringer on a telephone), this must be weighed against the desire or necessity of prompt notice of incoming communication. Second, it is

70. Actually, the technology now exists whereby a facsimile may be sent or received from a personal computer, limiting this advantage with respect to faxes to those which are sent via traditional fax machines. A number of software packages are now available, such as Delrina Winfax Pro, which allow for this functionality. A document which is composed in any software package may be faxed without ever exiting the software package simply by “printing” to a modem as one would print to a printer. Incoming faxes are stored graphically in the computer, this can be a useful feature when a hardcopy is lost.

One caveat to this very reliable, useful, and highly recommended technology is that outgoing faxes are limited to computer files. Faxes which are not computer files, such as invoices or handwritten notes, cannot be sent unless they are first scanned into the computer as graphics files. See supra note 67 for a description of scanning.


72. See generally Cutlip et al., supra note 65; sources cited supra note 57. This material has been supplemented with some personal experiences and observations.

73. This is not entirely true, as various means may be used to communicate emotion in e-mail messages. For instance, a user may type in CAPITAL LETTERS to imply a raised tone of voice, or may type a rotated smiling face, :-) , to indicate laughter.
often necessary to communicate not a text message, but a specific
document such as an invoice or a copy of a memorandum. While this
can be done by post or fax, it cannot be done by phone or e-mail.\textsuperscript{74}

\subsection*{C. Viability}

As discussed above, certain characteristics of e-mail distinguish it
as a viable form of communication. It has substantive merits that make
it superior to other forms of communication,\textsuperscript{75} and the infrastructure is
now in place (the Internet) which allows for the exchange of messages
between users of varying e-mail systems.\textsuperscript{76} But the ultimate litmus test
of the viability of a method of communication is the frequency with
which it is used, and e-mail posts some impressive numbers in this
respect. Projections indicate that by the year 2000, forty million
Americans will subscribe to an e-mail service, transmitting sixty billion
messages per year.\textsuperscript{77} Thus it is clear that e-mail is a now a viable and
widely used method of communication.\textsuperscript{78} But more specifically, and
more significantly with respect to this Note, it is clear that e-mail is now
a viable contracting medium.\textsuperscript{79} Perhaps the greatest tribute to e-mail in
this respect are proposed revisions to Article 2 of the UCC which deal
with paperless communication technologies.\textsuperscript{80}

\subsection*{D. A Proper Medium for Transmitting an Acceptance?}

The foregoing section discusses the general viability of e-mail as a
form of communication. A related issue is whether the law will recognize
the use of e-mail where it is used to transmit an acceptance.

\textsuperscript{74} Actually, some e-mail systems allow images to be attached to e-mail text messages, but
the process can be cumbersome and limited. Also, utilization of this capability requires that the
sender have access to a scanner so that the image can be converted into a computer file. See supra
note 67 for a description of scanners.

\textsuperscript{75} See supra Part III.B.

\textsuperscript{76} See supra Part III.A.

\textsuperscript{77} See Thomas R. Greenberg, Comment, \textit{E-Mail and Voice Mail: Employee Privacy and the

\textsuperscript{78} See, e.g., Carl P. Deluca, \textit{Legal Bytes}, R.I. B.J., Nov. 1996, at 23, 23 ("It will only be a
matter of a year or so before everybody but the most antiquated businesses, professionals, and
individuals have e-mail accounts.").

\textsuperscript{79} See, e.g., Matthew R. Burnstein, Note, \textit{Conflicts on the Net: Choice of Law in Transna-
tional Cyberspace}, 29 Vand. J. Transnat'l L. 75, 86 (1996) ("Offer and acceptance occurs in e-
mail. . . . Disputes will certainly arise regarding the formation . . . of contractual obligations.").

\textsuperscript{80} See generally Lockhart & Miles, Jr., supra note 52. Although these changes seem to be
directed more toward EDI, they do contemplate e-mail communications as well.
Under the modern view, the medium used by the offeree to transmit an acceptance is proper if it conforms to the offer's specifications, or, if the offer is silent, if it is the medium used by the offeror or any other medium reasonable under the circumstances. The situations where the offeror specifies the medium to be used and where the offer and acceptance are transmitted via the same medium lend themselves to straightforward analyses. The more difficult situation is presented where the offer is silent as to the mode of acceptance and where the acceptance and offer are transmitted via different media. Although the above rule begs a case-specific inquiry into the reasonableness of the medium used by the offeree to transmit the acceptance, courts tend to designate the post as reasonable in a conclusory fashion, only straying from this determination in unusual circumstances. A recent case has afforded the facsimile similar treatment.

81. See Restatement (Second) of Contracts § 65 (1981); see also Polhamus v. Roberts, 175 P.2d 196, 199 (N.M. 1946) (holding that authorized methods of acceptance are determined by what can be reasonably expected by the contracting parties); Farley v. Champs Fine Foods, Inc., 404 N.W.2d 493, 494-95 (N.D. 1987) (holding that any "reasonable and usual" mode of acceptance may be used where the mode of acceptance is not specified by the offeror).


83. See, e.g., Hayne, 109 N.W.2d at 196.

84. See, e.g., APC Operating Partnership v. Mackey, 841 F.2d 1031, 1034 (10th Cir. 1988); Palo Alto Town & Country Village, Inc. v. BBTC Co., 521 P.2d 1097, 1100 (Cal. 1974); Travelers Ins. Co. v. Tufte, 435 N.W.2d 824, 829 (Minn. Ct. App. 1989); see also Restatement (Second) of Contracts § 65 cmt. c. But see Eisler, supra note 19, at 583 ("Mail and telegram are the exception. Telephone, fax, and EDI are now the common and reasonable means of communication.").

For a case where use of the post was deemed to be unreasonable, see Parks Enterprises v. New Century Realty, Inc., 652 P.2d 918, 921 (Utah 1982) (holding acceptance by mail unreasonable where vendor's agent personally delivered offer to vendor and counteroffer to purchaser and where counteroffer required acceptance within 48 hours).

85. See Hofer v. Young, 45 Cal. Rptr. 2d 37, 39 (Ct. App. 1995) ("Defendants elected to communicate their assent by fax, a reasonable and increasingly common means of modern communication."). As with the post, the use of the fax has been deemed unreasonable in some instances. See, e.g., Clow Water Sys. Co., Div. of McWane, Inc. v. NLRB, 92 F.3d 441, 445-46 (6th Cir. 1996) (holding use of fax unreasonable where past practice of parties was to communicate by
It is questionable whether courts will afford e-mail this same presumption of reasonableness. Until e-mail more firmly establishes itself, it is more likely that courts will scrutinize carefully the facts surrounding the transmission of acceptances via e-mail, and that outcomes will be highly fact dependent. Factors to be considered are the speed and reliability of e-mail, the prior course of dealing between the parties, and the usage of trade. The Restatement adds that "[t]he concept of reasonableness is flexible, and its applicability may be enlarged as new media develop or existing media become more speedy or reliable or come into more general use." This bodes well for e-mail, as its usage numbers are quite impressive.

E. Nature of Dispatch

As this Note concludes that courts are likely to retain the dispatch rule in the context of e-mail, a discussion of the nature of such dispatch is in order. Generally, an acceptance is considered to be dispatched when it is put out of the possession of the offeree into the control of a third party authorized to receive it. The third party may be a public service instrumentality, such as the United States Postal Service, or a private service which is independent of the offeree and which can be relied on to keep accurate records, such as the United Parcel Service or Federal Express. On the other hand, the third party may not be a mail clerk within the office of the offeree or an agent of the offeree.

With respect to e-mail, for a message to be "put out of the possession of the offeree," it must, as a preliminary matter, be dispatched from the offeree's end-user computer. This is accomplished by performing the system-specific function for sending the message, and

86. See RESTATEMENT (SECOND) OF CONTRACTS § 65 cmt. b.
87. Id.
88. See supra text accompanying note 77.
89. See RESTATEMENT (SECOND) OF CONTRACTS § 63(a) & cmt. e. One court has described this "control test" as follows: "There must be some irrevocable element such as depositing the acceptance in the mail so that it is placed beyond the power or control of the sender before the acceptance becomes effective and the contract is made." Pribil v. Ruther, 262 N.W.2d 460, 462 (Neb. 1978).
90. See RESTATEMENT (SECOND) OF CONTRACTS § 63(a) cmt. e.
93. This may mean clicking the "Send" button in Microsoft Windows-based systems or typing the keystroke combination Ctrl-Z in some UNIX-based systems.
receiving the system acknowledgment that the message was sent successfully. If such an acknowledgment is unavailable, the offeree must check for any indications that the message was not sent properly. For instance, if the computer “freezes” upon sending the message, meaning that the computer does not respond to any keystrokes or mouse movements, the offeree should be on alert that the message may not have been sent successfully, and should resend the message.

Where the offeree’s server is not under the offeree’s control, but is under the control of an independent entity such as an on-line service provider, such that the message cannot be retracted, nothing further is required for proper dispatch. As the “third party” in this case, the entity which controls the server might be analogized to the United Parcel Service or Federal Express in the context of the post.

A different scenario is presented where the server is within the control of the offeree, as is typically the case with large companies that operate their own mail servers. Here, the offeree’s dispatch of the acceptance from the end-user computer is insufficient because the message has not been handed over to an independent third party. Rather, it is sitting in the offeree’s own server and it presumably can be retracted, thus failing the control test. Accordingly, in this scenario there is an additional requirement for a proper dispatch—the offeree’s server must pass the message onto the Internet. Only at this point is the message truly out of the control of the offeree and in the possession of a “third party.”

F. Nature of Receipt

Although this Note argues that the dispatch rule should be applied to acceptances transmitted via e-mail, a discussion of what constitutes receipt of an e-mail message is relevant for at least two reasons. First, where e-mail is an unauthorized medium of communication, an acceptance will nevertheless be effective if it is received seasonably.

94. Usually an annotation such as “message sent successfully” will appear in a designated area on the screen.
95. The server is the intermediary computer which receives the message from the sender and then dispatches it to the Internet. See supra Part III.A.
96. As with private entities that handle the post, the entity that controls the server must meet certain standards regarding reliability and recordkeeping.
97. The Internet is not truly a third party because it is not controlled by any single entity. But what is significant is that the sender cannot retract the message once it has reached the Internet.
98. See supra note 81.
Second, while acceptances are normally effective upon dispatch, offers, revocations, and rejections are generally effective only upon receipt.\textsuperscript{99}

Using the post as a starting point for analysis:

A written revocation, rejection, or acceptance is received when the writing comes into the possession of the person addressed, or of some person authorized by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him.\textsuperscript{100}

A letter need not be read for it to be considered received, nor need it reach the hands of the addressee. For example, receipt may be proper where a letter is delivered to a servant of the addressee, or is placed in the addressee's mailbox.\textsuperscript{101}

In a similar vein, it should not be necessary for an e-mail message to be read to be considered received. Rather, an e-mail message should be deemed received when it reaches the server—or "computer mailroom"—of the addressee.\textsuperscript{102} Note that receipt is a simpler concept with e-mail than with the post because e-mail messages are computer files which do not have the freedom of movement of tangible letters. For instance, whereas a letter addressed to an executive may be placed on the desk of an assistant, it is not possible for an e-mail message addressed to an executive to mysteriously or accidentally appear in the e-mail account of an assistant. The only "place" where an e-mail message may feasibly be "deposited" is the server of the addressee.

Three corollaries to this rule are of significance. First, just as there is no receipt where a postal employee fails to deposit a letter in the addressee's physical mailbox, there is no receipt where the Internet, due to its own error, fails to deliver an e-mail message to the addressee's server. Second, an addressee of an e-mail message may not claim

\textsuperscript{99} See supra notes 12-14 and accompanying text.

\textsuperscript{100} Restatement (Second) of Contracts § 68 (1981).

\textsuperscript{101} See, e.g., id. § 68 cmt. a, illus. 1; see also Logan v. Corinth-Alcorn County Joint Airport Bd., 665 F. Supp. 506, 511 (N.D. Miss. 1987) (holding that letter hand-delivered to recipient's secretary was received within the meaning of a statute); Holmes v. Myles, 37 So. 588, 589 (Ala. 1904) (holding effective an acceptance left at the house of the offeror before the expiration of the option period but not actually read until after the expiration of the option period); Town of Newport v. State, 345 A.2d 402, 404 (N.H. 1975) ("Receipt of the notices by the town office constituted actual delivery as a notice by mail is considered to have reached a recipient when it is delivered where he normally receives mail."); Howard v. Daly, 61 N.Y. 362, 365 (1875) (holding effective an acceptance which never actually reached the offeror, but was deposited in the offeror's letter box at his theater, which was sometimes used for the deposit of such acceptances).

\textsuperscript{102} See supra Part III.A.
nonreceipt based on a failure to retrieve a message that was sitting in the server—there is a duty to check for e-mail messages just as there is a duty to check for physical mail.

A third, related corollary is that the addressee of an e-mail message may not claim nonreceipt based on the failure of the addressee's server to dispatch the message to the end-user computer—the above rule requires only that the message reach the server, not that the server properly dispatch it to the addressee. This is the case even though a diligent addressee may be unaware that the message is awaiting retrieval. Where the server is within the control of the addressee, the rationale for finding receipt is that an entity should be charged with the proper operation of its equipment; analogously, one court charged a company with the proper functioning of its mailroom. A more difficult situation is presented where the server is not within the control of the addressee, because one of two innocent parties must suffer. The addressee should be the one to suffer because, unlike the sender of the message, it has a direct relationship (contractual) with the blameworthy party.

There is one important exception to the general rule that an e-mail message is deemed received when it reaches the server of the addressee: Where a message fails to reach the server of the addressee due to the inoperation of the server, the message will nevertheless be deemed received. The rationales for this exception—which deals with a defective server which will not accept messages from the Internet—are similar to the rationales for finding receipt where a defective server accepts messages from the Internet but fails to properly dispatch them to the appropriate addressees.

103. I had an experience where a corporate server received but did not deliver messages for a period of two weeks. Once the problem was corrected, the accumulated messages were delivered simultaneously.

104. See Thomson Printing Mach. Co. v. B.F. Goodrich Co., 714 F.2d 744, 748 (7th Cir. 1983) ("[W]e think Goodrich's mailroom mishandled the confirmatory writings. This failure should not permit Goodrich to escape liability by pleading nonreceipt.").

105. The injured addressee is not left without a remedy as recourse may be sought against the operator of the server.

106. Unable to reach its destination, the message will float back over the Internet to the sender with an indication that delivery was not possible.

107. See supra notes 103-05 and accompanying text.
IV. IS INTERNET ELECTRONIC MAIL A "SUBSTANTIALLY INSTANTANEOUS TWO-WAY" FORM OF COMMUNICATION?

As stated above, to justify dispensing with the mailbox rule in the context of a particular method of communication, the method of communication must be substantially instantaneousness and two-way. Internet e-mail is now examined for each of these characteristics in turn.

A. Substantially Instantaneous?

Varying perceptions about the instantaneousness of e-mail may be found throughout the literature. Some have designated e-mail as absolutely instantaneous, without qualification. Others have retreated to some extent, describing e-mail as "substantially," "nearly," or "almost" instantaneous. One author has shown an even greater degree of uncertainty about the speed of e-mail transmissions, stating merely that "some would consider" e-mail to be "almost" instantaneous. Another author seems unable to reach a conclusion on the issue, adopting the position that e-mail is "virtually" instantaneous, then somewhat contradictorily stating that e-mail messages "take a few minutes to get around the internet." At the other end of the spectrum, a minority of commentators have suggested that e-mail is not instantaneous.

Whether the term instantaneous is being misunderstood or is being applied with varying degrees of precision is largely irrelevant. For purposes of this Note, the term is being used to determine the existence
of contractual obligations, and thus a clear and consistent meaning must be adopted. As the following account of the transmission of an e-mail message indicates, the journey that an e-mail message makes in reaching its destination is less akin to a world class sprinter dashing from the start to the finish line, than to a cross-country backpacker travelling from the East to the West Coast in a circuitous manner, stopping periodically to rest or to await the arrival of colleagues. Thus, the proper view is that e-mail is not instantaneous.

After being typed into existence at the computer of the sending party, an e-mail message begins its journey by travelling to the server of the sending party, which acts as a central point for the collection and dispatch of messages from a number of computers, much like a corporate mailroom in the context of the post. The server then sends the message through a gateway into the Internet, much like a corporate mailroom hands a letter over to the postal service. At this point the message and its security are out of the control of the sending party.

Next, the message travels over the Internet in an acrobatic and disjointed fashion—it is broken up into a number of smaller pieces, which independently find their way to their common destination, travelling over and residing on a number of computers along the way. The message travels in this manner so as to avoid heavily congested or inoperative parts of the Internet, thus reaching its destination in as timely a fashion as possible. Finally, the Internet hands the message over to the server of the recipient, which puts the fragmented message back together and places it in the recipient’s computer mailbox, where it awaits retrieval.

Despite common belief, the process described above does not take

116. The information in this Part has been gathered from a number of sources, including my experience as a LAN administrator and as an independent computer consultant. I have also conducted interviews with a number of institutional system administrators, and have made various inquiries to the customer support representatives of the on-line service Compuserve.

117. A gateway is a computer, on which the appropriate software is installed, which manipulates the message into a standard form which is acceptable to the Internet and the various dissimilar systems connected to it. It might be thought of as a universal translator.

118. See, e.g., E-mail from Ryan Robbins, Customer Service Representative, Compuserve (Jan. 17, 1996) (on file with the Hofstra Law Review).

119. See, e.g., Lapidus, supra note 115, at 39.

120. In a physical sense, an e-mail user’s computer mailbox is that portion of the server’s storage capacity that is designated to hold e-mail messages. In a practical sense, a message being in a user’s computer mailbox means that it is available for retrieval.

121. Note that delivery is complete not when the message reaches the computer of the recipient, but merely when it reaches the recipient’s server. See supra Part III.F.
place in a substantially instantaneous manner. Rather, it will typically
take minutes, hours, or in some cases, days.\textsuperscript{122} Perhaps what creates
confusion is the true substantial instantaneousness of \textit{intrasystem}
messages, which do not involve the Internet, or the occasional transmis-
sion of an Internet e-mail message in a substantially instantaneous
manner. Or perhaps the cause of confusion is the substantially instanta-
neous nature of message transmission as the message passes through the
wires themselves. But often overlooked are the "stops" that the message
makes along the way, at the various servers and nodes that process it,
breaking it up into pieces and reassembling it, or redirecting it to a less
congested portion of the Internet, or holding it until other messages are
received, for a simultaneous, periodic dispatch. Further, one of the stops
may be inoperative, causing the message to be delayed or never received
at all.

Authors Baum and Perritt, Jr. have captured the enigmatic nature of
the speed of e-mail transmissions in stating that "[c]omputerized offers
and acceptances can involve 'substantially instantaneous two-way
communication,' although delays occur when store-and-forward . . .
techniques are used."\textsuperscript{123} They suggest, as does this Note, that where
such delays are involved, some type of mailbox rule may be appropri-
ate.\textsuperscript{124}

\textbf{B. Two-Way?}

The second characteristic that a method of communication must
possess, in addition to substantial instantaneousness, to warrant the same
treatment as face-to-face communication with respect to the effective
time of an acceptance, is the quality of being two-way. Curiously, the
focus on the instantaneousness of modern methods of communication
often causes this two-way quality to be overlooked. For instance, one
author simply omits a two-way analysis and focuses solely on instanta-
neousness in suggesting that the mailbox rule be dispensed with due to
the availability of modern methods of communication.\textsuperscript{125} Similarly,
Professor Farnsworth fails to discuss whether e-mail is two-way in

\begin{itemize}
  \item \textsuperscript{122} See, \textit{e.g.}, E-mail from Ryan Robbins, Customer Service Representative, Compuserve (Jan.
  \textsuperscript{17}, 1996) (on file with the Hofstra Law Review); Friedman, \textit{supra} note 115, at 43.
  \item \textsuperscript{123} \textsc{Baum \\& Perritt, Jr.}, \textit{supra} note 48, at 324.
  \item \textsuperscript{124} See \textit{id.} at 320 n.46.
  \item \textsuperscript{125} See Eisler, \textit{supra} note 19, at 583 ("If the offer and acceptance can be transmitted in an
  instant, the situation becomes more like a face-to-face bargaining.").
\end{itemize}
stating that the mailbox rule has no application in its context.  

As discussed above, a two-way communication is one in which the two parties are communicating simultaneously such that any misunderstandings between them can be cleared up immediately. This is simply not the case with e-mail since when the sender dispatches a message, the recipient is not positioned at a computer awaiting the receipt of the message. Thus, the recipient has no way of signaling to the sender that the transmission was not received or was garbled, should that be the case. As Baum and Perritt, Jr. have stated:

There is . . . a certain noninstantaneous characteristic of computerized offers and acceptances . . . . Telephonic and teletype communications are addressed to humans, who hear or read them and form some conscious understanding of their meaning. The need for human interpretation ensures awareness of contents, one of the main concerns of offer and acceptance.

. . . [E-mail messages] may be more like telegraph messages or letters, which differ from telephonic or face-to-face communications primarily because of the possibility of an error in the message transmission that is not detected immediately through party interaction.

But the inquiry does not end here, as there exists a substitute for the two-way quality of a method of communication. Since the purpose of the two-way requirement is to provide for assurance of receipt, if receipt can be ensured in another manner, as with an accurate computer acknowledgment, than the requirement that a communication be two-way can be discarded. In this vein, it may be argued that because a “receipt” may be requested upon sending an e-mail message, the offeree does indeed have the ability to ensure receipt of the message, and thus the two-way prong of the Restatement test is effectively satisfied. This theory is problematic in that a “receipt” can be misleading in the context of Internet e-mail. When a user receives a receipt for an intrasystem message, this does indeed indicate that the recipient acknowledged the

126. See supra text accompanying note 1.
127. See supra text accompanying note 48.
128. Compare this to “chatting” in a forum, which is two-way. See supra note 58.
129. BAUM & PERRIT, JR., supra note 48, at 324.
130. See supra text accompanying note 54.
131. This function is very typical of e-mail systems. It simply provides that a message of acknowledgment automatically be sent to the sender when the original message is “received” by the recipient. As discussed in this Part, “receipt” is an elusive term.
132. This theory has been advanced in the context of EDI. See supra text accompanying note 54.
message and either read or deleted it.\textsuperscript{133} But when a user receives a receipt for a message sent out over the Internet, this indicates only that the Internet received it, not that it reached its destination.\textsuperscript{134} So even after a receipt is received, the sender remains uncertain as to the state of the message because it may have gone astray after reaching the Internet.

V. CONCLUSION

The foregoing analysis demonstrates that Internet e-mail is a very viable modern medium of communication, and that it does not warrant similar treatment as face-to-face communication with respect to the effective time of an acceptance because it is neither substantially instantaneous nor two-way. Rather, acceptances transmitted via Internet e-mail should be treated in the same manner as postal acceptances. While this Note gives no opinion on the longstanding controversy of the merits of the mailbox rule—curious readers are free to examine the exhaustive literature on the subject\textsuperscript{135} and to draw their own conclusions—the fact remains that American courts have unanimously applied the rule in the context of the post since its creation in 1818. Thus, it is likely that they will apply the rule in the context of Internet e-mail as well.

Further, even if the thrust of this Note is disregarded, and Internet e-mail is considered better analogized to face-to-face communication than to correspondence by post, it is likely that the mailbox rule will nevertheless be applied to acceptances transmitted via Internet e-mail in a majority of American courts, which have seemingly ignored the emerging trend to abolish the mailbox rule in the context of substantially instantaneous two-way methods of communication, treating telephoned and telexed acceptances as effective where and when dispatched.

Paul Fasciano*