

Can I Use Archive.org to Authenticate Electronic Evidence?

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In today's world, websites are often used as evidence during litigation. A problem, however, arises because they can easily be changed by a simple click of the mouse. Take this blog for example. I can post this article today, and then tomorrow alter it by logging into WordPress and making edits in the [TinyMCE WYSIWYG editor](#), without a majority of our readers even realizing. Consequently, authenticating evidence obtained from a website may prove to be complicated.

Under the Federal Rules of Civil Procedure ("FRCP"), electronically generated or electronically stored evidence must be authenticated. FRE Rule 901(a), however, is silent regarding as to how to authenticate evidence, except for a list of ten illustrations demonstrating how authentication may be accomplished.^[1] As noted by the Advisory Committee's notes the ten illustrations provided by Rule 901(b) are non-exclusive.^[2]

Since websites can be changed easily and are changed often (e.g., according to Wikipedia's "About" page, there are more than 77,000 active who have made about 567,355,102 edits to its pages), trial attorneys need a way to authenticate the content they are using as an exhibit or evidence is the actual content that was on the website when they accessed it. One way to do just that is by using the "wayback machine" provided by the Internet Archive Company (www.archive.org).^[3] The "wayback machine" allows users to see snapshots of websites it has navigated and archived at various time periods. For example, here is a preview of what the "wayback machine" shows for Cullen and Dykman's website (<http://www.cullenanddykman.com>):

1. First, I entered the website's address in the "wayback machine".
2. The website then displayed a graph depicting how many times that particular website has been archived.
3. I then clicked on a date, and the "wayback machine" displayed a preview of what the website looked like at that particular time. For example, on October 20, 2000, Cullen and Dykman's website looked like this:
4. And on March 8, 2008, the website looked like this:

In general, the "wayback machine" only archives styles and context (basically anything that can be seen when you "right-click" your mouse on a website and go to "view source"); thus, not all images are properly archived. Nevertheless, archive.org is a valuable tool when confronted with an authentication issue involving a website. So, the next question is, "how do courts view the use of archive.org's services in regard to authentication?"

As of now, there have not been many federal decisions dealing with this issue. The cases that have all agree that the Internet Archive is a reliable and unbiased source for archiving websites; and consequently, is a valid method

of authentication.^[4]

In *Telewizja Polska USA*, the Plaintiff offered an affidavit from a representative of the Internet Archive Company, which stated that the Internet Archive retrieved copies of the Defendant's website at relevant dates to the litigation. The Defendant objected and contended that the Internet Archive was not a reliable source. In ruling on the objection, the Court disagreed, stating,^[7]

Federal Rule of Evidence 901 'requires only a prima facie showing of genuineness and leaves it to the jury to decide the true authenticity and probative value of the evidence.' Admittedly, the Internet Archive does not fit neatly into any of the non-exhaustive examples listed in Rule 901; the Internet Archive is a relatively new source for archiving websites. Nevertheless, Plaintiff has presented no evidence that the Internet Archive is unreliable or biased. And Plaintiff has neither denied that the exhibit represents the contents of its website on the dates in question, nor come forward with its own evidence challenging the veracity of the exhibit. Under these circumstances, the Court is of the opinion that [the affidavit from the representative of the Internet Archive Company] is sufficient to satisfy Rule 901's threshold requirement for admissibility.^[8]

Therefore, under this line of cases, the use of the Internet Archive's "wayback machine" can be a valuable method of authenticating a particular document as long as you are able to obtain a statement or affidavit from a representative of the Internet Archive stating that the Internet Archive accurately retrieved and archived the contents of that specific website.^[9]

Footnotes

1. ^[1] FED. R. EVID. 901.
2. ^[2] See *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 545 (D.Md. 2007) quoting FED. R. EVID. 901(b) advisory committee's note ("The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.").
3. ^[3] According to its "About" page, The Internet Archive is a 501(c)(3) non-profit that was founded to build an Internet library. Its purposes include offering permanent access for researchers, historians, scholars, people with disabilities, and the general public to historical collections that exist in digital format.
4. ^[5]
5. ^[6]
6. ^[4] See *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007); see also *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.*, 2004 U.S. Dist. LEXIS 20845, 17-18 (N.D. Ill. Oct. 14, 2004).^{5[1]} In *Lorraine v. Markel Am. Ins. Co.*, the Court noted that "courts have been willing to think 'outside of the box' to recognize new ways of authentication," and referred to the "non-traditional method of authentication" used by the Court in *Telewizja Polska USA, Inc. v. Echostar Satellite Corp.* when faced with determining "whether exhibits depicting the content of the defendant's website at various dates several years in the past were admissible."^{6[6]} 241 F.R.D. at **68-69.
7. ^[7] *Id.*
8. ^[8] *Telewizja Polska USA, Inc.*, at *17-18.
9. ^[9] See *St. Luke's Cataract and Laser Inst., P.A. v. Sanderson*, 2006 U.S. Dist. LEXIS 28873, 5-6 (M.D.Fla. May 12, 2006) (stating that "In order to satisfy the requirement of Fed. R. Evid. 901... Plaintiff must provide the Court with a statement or affidavit from an Internet Archive representative with personal knowledge of the contents of the Internet Archive website.").