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5th Circuit Raises Bar for Introducing Historical Snapshots of Websites Into Evidence

Evidence is time-sensitive and attorneys thinking of relying on web snapshots would be well-advised to secure web-based documentation sooner rather than later.

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As commerce and business transactions continue to move online at a rapid pace, relevant evidence is increasingly found on web pages. Web pages may contain not only facts, such as "who said what and when," but also applicable contractual terms. The web, however, is in a constant state of flux. That creates challenges for attorneys, who may find themselves needing to rely on copies of web pages that have since been modified. In *Weinhoffer v. Davie Shoring*, the U.S. Court of Appeals for the Fifth Circuit addressed the novel issue of when district courts can properly take judicial notice of contract terms evidenced only by a "snapshot" of a web page from a web archive such as the Internet Archive's "Wayback Machine."

The case, decided in January, arose from an online auction conducted in connection with a bankruptcy liquidation proceeding. Under the auction contract, the bidder's liability was limited to 20% of the bid price if the bidder breached the auction contract. Defendant Davie Shoring Inc. won the auction for a modular housing module, but refused to pay its bid, citing difficulties in physically removing the housing module from storage.

David Weinhoffer, the liquidating trustee, sued for breach of contract. At trial, Davie Shoring argued that the auction contract limited its liability. The auction terms, however, had been linked from the auction web page, which was no longer accessible. Davie Shoring therefore offered a snapshot of the page retrieved from the Internet Archive's "Wayback Machine." The Internet Archive is a nonprofit digital library that seeks to maintain an archive of publicly accessible web pages at various instants in time. The district court took judicial notice of the Wayback Machine snapshot and admitted it into evidence.

The Fifth Circuit reversed, finding that the evidence was not admissible. For a district court to take judicial notice of a document under Federal Rule of Evidence 201, it explained, the document must come from a source "whose accuracy cannot reasonably be questioned." The Fifth Circuit observed that no other court of appeals had squarely

addressed whether a district court can take judicial notice of a copy of a web page from a web archive. Some district courts, relying on dicta in a 2010 order issued by the Federal Circuit in *Juniper Networks v. Shipley*, had taken judicial notice of such snapshots. Other district courts, however, had disagreed.

The Fifth Circuit noted that the Second, Third, and Seventh circuits had found archive snapshots admissible only when they could be authenticated under Rule 901. The Second and Third circuits had upheld admission of evidence where someone with personal knowledge had authenticated the archive copy, while the Seventh Circuit had rejected evidence because it had not been authenticated. Those decisions, the Fifth Circuit reasoned, implied that web archive snapshots "are not inherently or self-evidently reliable," but must be authenticated by someone with personal knowledge. Because Davie Shoring had not submitted such authentication evidence, the district court erred in taking judicial notice of the snapshot.

Weinhoffer, while straightforward, may have significant repercussions. The web is constantly changing. A 2014 article in the Harvard Law Review, for example, found that nearly half of web pages referenced by URLs in Supreme Court opinions could no longer be retrieved using that URL. Over 70% of URLs in three major legal journals no longer worked, either. Web archives such as the Wayback Machine, which maintain a copy of websites as they existed at specific snapshots in time, are thus indispensable to demonstrate historical facts in online materials in legal proceedings conducted years later. Cases of all types—from patent and trademark litigation to criminal prosecutions to commercial disputes—routinely rely on snapshots of old web pages to adjudicate historical facts.

Weinhoffer itself illustrates the problem. A footnote in the opinion includes a link to a page on the Internet Archive's website explaining how to obtain an affidavit from the library authenticating material retrieved from the Wayback Machine, a practice that will now be required after *Weinhoffer*. Unfortunately, just two months later, that link itself is already broken.

Moreover, the Internet Archive's affidavit protocol is no panacea. First, the organization discourages the practice; it emphasizes its status as a nonprofit with limited resources, and that providing legal documentation distracts from its mission. It remains to be seen whether *Weinhoffer* will result in a deluge of requests that the organization will not be able to fulfill.

Second, the Internet Archive is not comprehensive. There are many web pages the Wayback Machine's automated "crawlers" have not retrieved and copied. And the copies it does have are often incomplete due to technical limitations. For example, due to storage constraints, many snapshots from the popular social media site Instagram do not contain attached images. There are competing tools, including perma.cc (created by the authors of the Harvard Law Review study) and archive.today, which allow "on-demand" snapshot creation and in some cases contain higher-quality snapshots. Those organizations, however, do not offer legal verification documentation, so their copies would be difficult to introduce into evidence after *Weinhoffer*.

The *Weinhoffer* rule is likely to be adopted by other courts. The Fifth Circuit framed its decision as a corollary to decisions of other circuits. State courts where rules of evidence are patterned after the federal rules may find the decision instructive as well. Evidence will not get any fresher, so attorneys thinking of relying on web snapshots would be well-advised to secure authentication evidence sooner rather than later.

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