# Admissibility of Electronic Evidence



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# There's nothing new under the sun

- Cunningham v. Fair Haven & Westvill R. Co., 72 Conn. 250, 43
   A. 1047 (1899)
  - either through want of skill on the part of the artist, or inadequate instruments or materials, or through intentional and skillful manipulation, a photograph may be not only inaccurate but dangerously misleading
- State v. Simon, 174 A. 867, 872 (N.J.Sup. 1934)
  - [w]e know of no case, and counsel cite none, in which a phonograph record of an alleged conversation was admitted in a court of law as evidence thereof
- United States v. Scholle, 553 F.2d 1109, 1125 (8<sup>th</sup> Cir. 1977)
  - the complex nature of computer storage calls for a more comprehensive foundation

# St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F.Supp.2d 773 (S.D.Tex. 1999)

"While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. . . . Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. . . . hackers can adulterate the content on any web-site from any location at any time. . . . any evidence procured off the Internet is adequate for almost nothing . . . Instead of relying on the voodoo information taken from the Internet, Plaintiff must hunt for hard copy back-up documentation in admissible form . . "

#### Tobar v. U.S., 2007 WL 1296717 (S.D.Tex. 2007)

"Plaintiffs claim that the only flights from Ecuador to San Diego stop through Houston.[FN1]

[FN1.] Plaintiffs do not address flights to the relatively nearby, enormous Los Angeles International Airport. While a quick search on the internet reveals that there are no nonstop flights from Ecuador to Los Angeles International at this time, it is generally substantially less expensive to fly from Ecuador to Los Angeles than it is to fly to San Diego. Furthermore, on some dates, it is less expensive to fly from Ecuador to Los Angeles (with the stop) than to fly nonstop to Houston."

Black v. State, 358 S.W.3d 823, 831 (Tex.App.—Fort Worth 2012, pet. ref'd)

This court is sympathetic with Appellant's position in trying to find law directly on point [authenticating a text message], given the speed with which technology has changed. To guide parties in raising and preserving such issues, courts are going to have to determine at some point whether a cell phone is akin to a computer, a file cabinet, a personal notebook or diary, or something else, and the rules of evidence should be modernized.

- •E-mails
- Websites
- •Text and instant messages
- Social media
- Digital photographs

## **Three Main Objections**

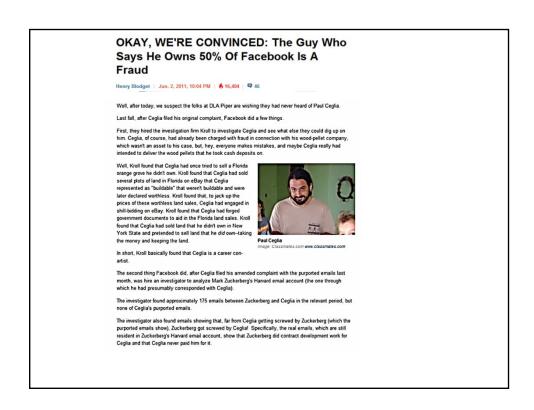
- Authentication
- Hearsay
- Best Evidence Rule

George L. Paul, Foundations of Digital Evidence (2008) Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007) State v. Swinton, 847 A.2d 921, 932–59 (Conn. 2004)

### Authentication

- Discovery
  - Interrogatories
  - Requests for admission
  - Opponent's production → presumptively authentic
    - TRCP 193.7









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