

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 (8th 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

Are Eye-Popping Emails in Facebook Ownership Lawsuit Legit?

By Jeremy A. Kaplan
Published April 14, 2011 | FoxNews.com



A screenshot of Ceglia's Facebook page.

What sort of smell does \$78 billion give off?

Paul Ceglia claims a string of emails prove he loaned \$1,000 to Facebook founder Mark Zuckerberg -- and therefore should by rights own half of the world's biggest social network, recently valued in the neighborhood of \$78 billion.

Ceglia's case may hang on proving the validity of the 7-year-old emails between himself and the genius founder of Facebook, and experts told FoxNews.com that doing so technologically presents a near impossible challenge. Instead, it all may come down to how legit they appear.

Robert Brownlie, a partner with giant law firm DLA and Ceglia's chief legal advisor, explained his firm believes the evidence is legitimate, and already did the forensic work required to prove it.

"Before agreeing to come on the case, we did a lot of due diligence or research on our part to determine to our level of comfort that the evidence is genuine," he said. But Facebook lawyers angrily note they have yet to see the emails, making a response from Zuckerberg and his lawyers a challenge.

OKAY, WE'RE CONVINCED: The Guy Who Says He Owns 50% Of Facebook Is A Fraud

Henry Blodget | Jun. 2, 2011, 10:04 PM | 16,404 | 46

Well, after today, we suspect the folks at DLA Piper are wishing they had never heard of Paul Ceglia.

Last fall, after Ceglia filed his original complaint, Facebook did a few things.

First, they hired the investigation firm Kroll to investigate Ceglia and see what else they could dig up on him. Ceglia, of course, had already been charged with fraud in connection with his wood-pellet company, which wasn't an asset to his case, but, hey, everyone makes mistakes, and maybe Ceglia really had intended to deliver the wood pellets that he took cash deposits on.

Well, Kroll found that Ceglia had once tried to sell a Florida orange grove he didn't own. Kroll found that Ceglia had sold several plots of land in Florida on eBay that Ceglia represented as "buildable" that weren't buildable and were later declared worthless. Kroll found that, to jack up the prices of these worthless land sales, Ceglia had engaged in shill-bidding on eBay. Kroll found that Ceglia had forged government documents to aid in the Florida land sales. Kroll found that Ceglia had sold land that he didn't own in New York State and pretended to sell land that he did own--taking the money and keeping the land.

In short, Kroll basically found that Ceglia is a career con-artist.

The second thing Facebook did, after Ceglia filed his amended complaint with the purported emails last month, was hire an investigator to analyze Mark Zuckerberg's Harvard email account (the one through which he had presumably corresponded with Ceglia).

The investigator found approximately 175 emails between Zuckerberg and Ceglia in the relevant period, but none of Ceglia's purported emails.

The investigator also found emails showing that, far from Ceglia getting screwed by Zuckerberg (which the purported emails show), Zuckerberg got screwed by Ceglia! Specifically, the real emails, which are still resident in Zuckerberg's Harvard email account, show that Zuckerberg did contract development work for Ceglia and that Ceglia never paid him for it.



Paul Ceglia
Image: Classmates.com www.classmates.com

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Title search: Admissibility of Electronic Evidence

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First appeared as part of the conference materials for the
36th Annual Page Keeton Civil Litigation Conference session
"The Admissibility of Electronic Evidence"