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THE CHALLENGES AND PROSPECTS ON LEVERAGING THE EVIDENTIAL POTENTIALS OF INTERNET ARCHIVE IN INTELLECTUAL PROPERTY LITIGATION IN NIGERIA

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Abstract

The potentials of leveraging on the ‘Internet Archive,’ for useful retrieval records beneficial to human society cannot be over-emphasised. In fact, harvested records will redound as evidential value, more specifically in the regime of litigations. There is no gainsaying the fact that archival record will operate as a push-drive in harnessing and processing, most particularly intellectual property litigations. As a matter of fact, the internet archive, particularly its ‘way back’ machine, provides access to historical snapshots of websites, which almost all the time operates as a catalyst in harvesting invaluable data for establishing timelines of content use in trademark, patent and copyright disputes. The prospects for integrating the internet archive into Nigeria's IP litigation landscape are promising, suggesting that its use could foster a more robust intellectual property regime. Furthermore, the embrace of digital archives operates to strengthen IP enforcement and support innovation in Nigeria's evolving digital economy. It is against this background that the authors examine the subsisting challenges and prospects on leveraging on the available evidential potentials of archival records and harvested data in support of litigations in the regime of intellectual property in Nigeria, if regard is had to the fact, that Nigeria is a developing country. The paper therefore demonstrated that courts stand a good chance of utilizing these ‘archived records’ for many and diverse use, ranging, for instance, in enhancing the evidentiary process, promote transparency, and support fair use defences. The authors further maintained the presence of significant challenges, including the lack of subsisting legal frameworks to recognize archived content as admissible evidence. Consequent on the above, the paper demonstrated concerns over the authenticity of such data as well as limited awareness among legal practitioners on the relevance of internet archive.

Keywords: information technology, intellectual property, Internet archive, way-back machine, archive record

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1. Introduction

Information and communication technologies (ICTs) have significantly advanced in both their functionality and scope. The Internet, in particular, has become a key force in driving social and economic change, transforming how governments, businesses, and individuals interact and presenting new solutions to development issues.

Since the widespread introduction of internet in the 1990s,¹ internet has become a vital tool for communication, research, and leisure activities leading to the creation of new products and services, improved economic efficiency, transformed access to information, and has fostered increased collaboration among governments, businesses, and individuals. The internet offers myriad opportunities to people worldwide in various ways. Alongside the internet, other new digital technologies have also become integral to daily life.² The widespread availability of these technologies enhances people's lives and provides numerous advantages. People now easily access information online and use it for social, educational, entertainment and other purposes.

Fundamentally, the internet provides two key benefits: communication and information.³ More broadly, the internet serves several functions, including (i) being a vast repository of information, (ii) enabling seamless communication, (iii) offering interactive online learning, (iv) supporting electronic and online research, (v) driving innovation, (vi) sparking greater interest in learning, (vii) facilitating global education, and (viii) providing access to information catalogues.⁴

Consequent on the above, the paper examines the nature and scope of internet archive, the interaction and relatedness between internet archive, particularly Way back Machine, and Intellectual Property Litigation in Nigeria. Furthermore, the paper strived to consider attendant challenges in the use of evidence from internet archive in Intellectual Property Disputes in Nigeria

¹Bernard Aboba, *The Online User's Encyclopedia: Bulletin Boards and Beyond* (Addison-Wesley Longman Publishing Co., Inc.; 1993) 32

² John Naughton, *A Brief History of the Future: The Origins of the Internet*. (Spain, Phoenix, 2000) 13.

³ Adam Warren et al, *Technology in Teaching & Learning: An Introductory Guide* (Kogan Page 1998). 2.

⁴ H. W. Park, Academic Internet Use: Issues and Lessons in e-Research. A paper presented to the Communication and Technology Division, the 59th Annual ICA (International Communication Association) Conference, Chicago, Illinois USA (Chicago Marriott Downtown Magnificent Mile, May 21-25, 2009).

2. Nature and scope of Internet archive

Indeed, the influence of the internet and digital technologies has impacted almost every aspects of human life. The various dispute resolution systems are not exempted, and this is clearly demonstrated in how most countries in the world have radically altered the landscape of their dispute resolution processes, ranging from how disputes are launched in courts or tribunals, managed, evidence is tendered and admitted or rejected, and settled. For instance, the legislators enacted the Evidence Act 2011 in recognition of the introduction of impact of ICT, internet and digital developments such as Artificial intelligence (AI), block chain, and online platforms.⁵ Most courts in Nigeria have commenced the electronic filings of court processes and introduction of virtual hearing shortly after the COVID 19. These improvements have become part of legal system in Nigeria.⁶

A major milestone in the regime of ICT and the internet development has been the establishment of the Internet Archive by Brewster Kahle. Founded in 1996, this American non-profit digital library provides free access to a wide range of digitized resources, including websites, software, music, audio-visual content and print materials.⁷ Additionally, the internet archive supports an open and free internet while focusing on preserving digital content for future generations.⁸

The essence of the internet archive is to ensure universal access to all knowledge and so it enables users to upload and download digital content to its database, though most of its collection is gathered automatically by web crawlers that strive to preserve as much of the public web as possible.⁹ A prominent aspect of the internet archive is the Way back Machine. The Internet Archive uses the Way back Machine, its web archive, to hold hundreds of billions of web snapshots. Additionally, the Archive manages a variety of book digitization projects, making it one of the largest such efforts globally.

The Way back Machine is a tool that allows users search for and view archived versions of the World Wide Web. This service provides access to snapshots of previously captured

⁵ This law has been further amended by the Evidence Act 2023, to deal with further/ current technological advancement.

⁶ For instance, the High Court of Rivers State Practice Directions No. 1 of 2020, was issued to allow e-filing of court processes, The Federal High Court (Practice Direction on E-Affidavit), 2024 provides for electronic filing of affidavits, etcetera.

⁷ R. Greg, "The Way back Machine: The Web's Archive"(2002) *Online*. **26**: 59–61

⁸ Internet Archive, 'About the Internet Archive' <<https://archive.org/about/>> Accessed 10 September 2024

⁹ Carole A Levitt.; Mark E. Rosch, *Find Info Like a Pro: Mining the Internet's Publicly Available Resources for Investigative Research*.(Tom 1. American Bar Association 2010) Pp. 194, 196

web pages.¹⁰ Created through a partnership between Alexa Internet (a division of Amazon.com) and the Internet Archive, the Way back Machine uses a three-dimensional index to facilitate browsing through archived web content.¹¹ It stores hundreds of billions of websites and related data, such as images, source code, and documents. Users can examine past versions of websites, recover original source code from sites that are no longer available, or access sites that have vanished entirely. However, not all websites are included, as some site owners choose to exclude their content from being archived. Furthermore, as with any web-based data service, the Internet Archive's coverage may be incomplete due to various factors.

It follows that the Internet Archive through the use of the Way back Machine becomes a repository of digital history that serves as an inestimable resource for researchers, historians, and, more recently, litigants and legal practitioners involved in intellectual property litigation. More specifically, the Internet Archive provides a unique and great opportunity to intellectual property litigants as well as lawyers to obtain historical snapshots of web pages, digital assets and online content, all of which can be used to support claims of copyright, trademark disputes, and patent validity disputes, etcetera.

The usage of resources from the Internet Archive has been a subject of great legal debate. In some jurisdictions, the courts or tribunals automatically accept the documents or resource,¹² while other jurisdictions such as Nigeria, provides for certain requirements to enable the documents or resource to pass before it can be admitted as evidence in Court. The main factor underpinning this disparity in the treatment of evidence from the Way back machine is the difference in the various laws regulating evidence in these different jurisdictions. For instance, in some countries there are issues such as documentary hearsay which will be a stumbling block for tendering documents from the Internet Archive if an officer of the Internet Archive organization is not directly putting the documents before the court.

Whatever the case is though, the Way back Machine is here to stay and the importance in intellectual property matters is overwhelming and has gradually spread across the globe. From serving as a repository for tracking and accessing websites of different brands on specific dates in time past in order for a party to demonstrate history of use of an

¹⁰ Arora, Sanjay & Li, Yin & Youtie, Jan & Shapira, Philip, "Using the Wayback Machine to Mine Websites in the Social Sciences: A Methodological Resource," (2015) *Journal of the Association for Information Science and Technology*, 67. 1904–1915. 10.1002/asi.23503

¹¹ *ibid*

¹² Deborah Eltgroth, "Best Evidence and the Way back Machine: Toward a Workable Authentication Standard for Archived Internet Evidence." (2009) *Fordham Law Review*. 78.

intellectual property or to establish the invalidity of a patent in the sense that it was in public space long before it was registered or to establish infringement of a mark, i.e, evidence of marketing a brand similar to another etc.

With the rising pace of inventions, brand development and registrations with the various Intellectual Property agencies in Nigeria, it has become imperative to understand the functionality, how the Internet Archive operates as well as how successfully to leverage on same as evidence in intellectual property litigations, here in Nigeria.

3. The Interaction/Relatedness between Internet Archive (Way back Machine) and Intellectual Property Litigation in Nigeria

The Internet Archive, particularly through its Way back Machine, has had a significant impact on intellectual property litigation. These are some key ways it has influenced intellectual property litigation cases.

A. Evidence Preservation and Documentation

Legal practitioners can leverage archived content from the Internet Archive as evidence to establish the existence, appearance, and usage of intellectual property assets, providing historical context and supporting legal claims in intellectual property litigation. It goes without saying that the Internet Archive offers a mechanism for preserving digital evidence crucial to intellectual property litigation. By capturing web content, including websites, social media posts, and online advertisements, the Archive provides a historical record that can substantiate claims of copyright infringement, trademark violations, or trade secret misappropriation.

In the field of intellectual property litigation, evidence preservation and documentation are critical in substantiating claims, fighting against charges, and eventually obtaining favourable outcomes for rights holders. In today's digital era, where digital assets and online material are readily available, the necessity to efficiently preserve and document evidence has become crucial. The Internet Archive functions as a digital time capsule, capturing snapshots of web material from various points in time. This archival feature is very useful in intellectual property disputes, when evidence preservation is critical. In cases of copyright or trademark infringement, for example, the Archive can give indisputable evidence of the existence and display of a webpage or digital material at a specific time, thereby supporting claims of original production or previous use.

The Internet Archive's vast collection contains not only web pages but also multimedia assets like films, audio recordings, and photographs. This breadth of stored resources makes it even more useful as evidence in a variety of IP challenges, including those involving multimedia content infringement, digital piracy, and online brand dilution.

B. For proof of Prior Use or historical use / Reputation and Goodwill

In trademark disputes, establishing the historical use of a mark in commerce or business is critical for proving ownership and priority rights. The Internet Archive contains a variety of archived web pages that can be used as strong evidence of trademark use over time. Litigants can demonstrate the continuous and bona fide use of the disputed mark in commerce by presenting archived pages featuring the mark in combination with specific goods or services. This evidence not only increases the credibility of the trademark owner's claims, but it also gives a clear historical record of the mark's usage, which can help legal arguments in trademark litigation processes.

Furthermore, the Internet Archive can help prove the mark's distinctiveness and consumer familiarity by demonstrating its consistent market presence. Archived web pages that show the mark in conjunction with products, ads, and promotional materials demonstrate its commercial relevance and brand identification. This evidence is especially useful in cases of trademark infringement or dilution, where showing the mark's distinctiveness and repute is critical for asserting legal rights and preventing unauthorized usage.¹³ Likewise, the Internet Archive can help establish priority rights by documenting the initial instances of trademark use and public visibility. By tracing the growth of the mark through archival content, lawyers can create a timeline of usage and demonstrate their dominance in the market. This historical material not only supports priority claims, but also serves as a factual foundation for contesting competing claims or defending against trademark infringement complaints. Date-stamped websites can also contain proof of past infringing use of copyrighted or trademarked content.

In the American case of *Marten Transport v Platform Advertising*, the plaintiff, a trucking company, filed a trademark infringement lawsuit against the defendant, a truck driver job posting website, claiming unauthorized use of its trademark on the defendant's site.¹⁴ To establish the defendant's use of the trademark, the plaintiff presented screenshots of the

¹³Idorenyin Ekpenyong, "The Concept Of Distinctiveness In Trademark Law"(2024) *Mondaq* <<https://www.mondaq.com/nigeria/trademark/1409644/the-concept-of-distinctiveness-in-trademark-law>> Accessed 10 September 2024

¹⁴ 184 F. Supp. 3d 1006 (D. Kan. 2016)

defendant's website sourced from the Way back Machine, accompanied by authentication testimony from an employee of the Internet Archive.

It is worthy to note that this also applies to Patent. In patent disputes, the Archive enables litigants to trace the evolution of technology by examining archived technical documentation, software repositories, or online forums. This historical perspective facilitates the identification of relevant prior art, enabling parties to challenge the novelty, non-obviousness, or utility of asserted patent claims effectively.¹⁵

In Nigeria for instance, Section 13 of the Patents and Designs Act¹⁶ provides that:

- (1) Subject to this section, an industrial design is registrable if—
 - (a) it is new; and
 - (b) it is not contrary to public order or morality.
- (2) Where application is made for the registration of an industrial design, the design shall be presumed to be new at the time of the application except in so far as the following provisions of this section provide otherwise.
- (3) An industrial design is not new if, before the date of application for registration, it has been made available to the public anywhere and at any time by means of description, use or in any other way, unless it is shown to the satisfaction of the registrar that the creator of the design could not have known that it had been made so available.
- (4) An industrial design shall not be deemed to have been made available to the public solely by reason of the fact that within the period of six months preceding the filing of the application for registration the creator has exhibited it in an official or officially recognised exhibition.

To establish the invalidity of a design on the ground that it was made available to the public six months prior to the filing of the application for registration, a party can rely on web pages saved on the internet archive in making such a claim.¹⁷

Furthermore, the internet archive provides a Plaintiff under Nigerian law can rely on the internet archive to provide evidence of goodwill and reputation is a case for passing off. In

¹⁵ International Bureau, Enlarged Concept of Novelty: Initial Study Concerning Novelty and the Prior Art Effect of certain Applications under Draft Article 8 (2) of The SPLT (2004) <<https://www.wipo.int/scp/en/novelty/documents/5prov.doc>> Accessed 10 September 2024.

¹⁶ CAP P2 LFN 2004

¹⁷ This is the concept of Prior Art in the US. The Court in the United States allows evidence from the Internet Archive to challenge the validity of registrations.

Nigerian law, one of the key elements to establish in a passing off action is reputation.¹⁸ This also extends to copyright cases which most times involve online records and artistic works.

Overall, leveraging the Internet Archive to verify trademark usage strengthens the evidential foundation of trademark claims, aids in the enforcement of intellectual property rights, and helps to resolve trademark disputes through factual and historical data. By presenting convincing evidence of trademark usage gathered from archived web content, lawyers can enhance their legal position, safeguard their brand assets, and achieve favourable outcomes in trademark litigation processes.

C. Corroborating Witness Testimony and Expert Opinions

In intellectual property litigation, corroborating witness testimony and expert opinions are critical for strengthening legal arguments and establishing claims or defences. The law in Nigeria places the burden of proving any allegation on any party who asserts.¹⁹ In *Adighije v Nwaogu*, the Court per Ogunwumiju JCA held that:

Section 137 of the Evidence Act 2004 provides that for a burden of proof in civil cases. The burden of first proving the existence or non-existence of a fact lies on the party against whom the judgement of the Court would be given if no evidence were produced on either side regard being had to any presumption that may arise in the pleadings. If such party adduces evidence which might reasonably satisfy a Court that the fact sought to be proved is established, the burden lies on the party against whom judgment will be given if no more evidence were adduced, and so on successively until all the issues in the pleadings have been dealt with.²⁰

Also in *M.O. Kanu, Sons & Co, Ltd v Nzeribe & Anor*, the Court held per Abba Aji JCA (now JSC) as follows:

...The law is still trite that the party who asserts has the onus or duty to prove his assertion or claim by adducing credible evidence. By Section 136 of the Evidence Act, the burden of proof in civil cases lies on the party who would fail if no evidence at all was adduced on either side. Thus the onus or burden lies on the claimant to adduce credible evidence in proof of his claim, or defence, but strictly on the strength of his own case. The basis of

¹⁸ See *Banire v. Nta-Star Tv Network Ltd (2021) LPELR-52824 (CA)*, where the Court held that: “Essentially the ingredients needed to prove the tort of passing off are: goodwill or reputation, misrepresentation by the defendant to the public and a damage suffered or likely to be suffered.”

¹⁹ Section 136 (1) of the Evidence Act 2011; See also *AWUSE v ODILI (2005) 16 NWLR (Pt. 952); MOGAJI v ODOFIN & ORS. (1978) 4 SC 91 at 94; ELIAS v OMO-BARE (1982) 5 SC 25; DAODU v NNPC & amp ORS. (1998) LPELR 927 SC*

²⁰ (2010) 12 NWLR (Pt. 1209) 419 at 463

proof in civil cases is on the balance of probability or preponderance of evidence so far adduced.²¹

It follows that any party who alleges infringement especially one carried out on the internet may in addition to making such allegations support such claims with evidence from internet in order to sufficiently dislodge the evidential burden. The Internet Archive appears as a useful corroborative tool in this setting, providing preserved web information that corresponds to witness statements and expert analysis. This corroborative function improves the credibility, trustworthiness, and persuasiveness of arguments submitted in court, which helps to resolve intellectual property conflicts.

Witnesses and experts in these disputes frequently testify on the development, publishing, or dissemination of intellectual property assets such as copyrighted works, trademarks, and patented inventions. These witnesses can provide actual evidence for their claims by citing archived web pages from the Internet Archive. For example, a witness claiming to have published a copyrighted work online can use archived web pages from the Internet Archive to demonstrate the work's existence and accessibility on specified dates.

The combination of witness testimony and preserved evidence from the Internet Archive increases the evidentiary foundation of legal arguments, giving corroborative support for important claims or defences. When testimony is supported by actual evidence from reputable sources such as the Internet Archive, judges and juries are more inclined to believe it is trustworthy and persuasive. This link strengthens the overall case given by litigants, boosting the likelihood of a favourable outcome in intellectual property litigation proceedings.

By aligning witness testimony with archival evidence and cross-referencing different sources, lawyers can enhance their legal position and raise their likelihood of victory in the court. Typical example of how it can be used to substantiate claims includes:

I. Use in Substantiating Honest Concurrent Use Claims

The defence of honest concurrent use as set out in section 13 of the TMA is a Defence available to the registrar in the event where there is a double registration of similar marks. The provision of section 13 provides as follows:

(2) In case of honest concurrent use, or other special circumstances which in the opinion of the court or the Registrar make it proper so to do, the

²¹ (2014) LPELR 228 390 CA at p. 59

court or the Registrar may permit the registration of trademarks that are identical or nearly resemble each other in respect of the same goods or description of goods by more than one proprietor subject to such conditions and limitations, if any, as the court or the registrar, as the case may be, may think it right to impose.

The claim for honest concurrent use can be made by a party who can substantiate through evidence that the use of a mark was honest. Honesty in this context has been described to mean evidence of carrying out basic due diligence in form of searches at the trademark registry and the internet to ensure that such a similar mark is not in use.²² A defendant can make a claim that the mark was not on the internet after due diligence search on the Internet Archive and as such, its use was not in bad faith.

II. Challenging Claims of Infringement

Defendants can use archived content to demonstrate that they were not infringing on a copy right or trademark at a particular time, countering claims of unauthorized use.

III. Providing evidence on market analysis

Reputation and goodwill is key in intellectual property matters. The archive serves as a valuable resource for analysing market trends and the evolution of branding and content,²³ which can be critical in assessing damages or the likelihood of confusion in trademark cases.

Flowing from the above, it is clear that the Internet Archive's function as a repository of digital history and data is crucial for substantiating claims, defending against allegations, and obtaining favourable outcomes in intellectual property disputes.

4. Challenges confronting the Use of Evidence from Internet Archive in Intellectual Property Disputes in Nigeria

Notwithstanding the plethora of prospects associated with the interrelatedness between internet archive and intellectual property litigation cases in Nigeria, there are however subsisting challenges. These challenges include the following issues.

²² Tivo Inc. v Vivo International Corporation Pty. Ltd., [2012] FCA 252 at P. 293, where Dodds-Streeon J found “there had not been honest concurrent use in circumstances where, amongst other things, the applicant had failed to carry out an adequate search, seek professional advice or take reasonable precautions in relation to its adoption of a trade mark.”; See also Insight Radiology Pty Ltd v Insight Clinical Imaging Pty Ltd [2016] FCA 1406 and Sensis Pty Ltd v Senses Direct Mail and Fulfillment Pty Ltd [2019] **FCA 719**,

²³ Hamilton, Trina & Cavello, Seth.. “Ethical product havens in the global diamond trade: Using the Wayback Machine to evaluate ethical market outcomes.” (2021) *Environment and Planning A: Economy and Space*. 55.

A. Authentication and Integrity Concerns

Internet Archive evidence offers tremendous potential in intellectual property litigation, as it provides an immense database of historical web information that can be used to support legal claims and defences. However, the authenticity and integrity of archival records pose substantial issues that must be addressed in ensuring their admissibility and reliability in court. Courts require evidence that accurately represents the state of the web at the time of collection, without interference or alteration. However, the decentralized architecture of the internet and the changing nature of web information make it difficult to authenticate the credibility of archived materials. Without reliable authentication methods, archived content can be edited, manipulated, or misrepresented, reducing its evidence value in legal processes.

Localizing this challenge to Nigerian law on evidence, the question that arises is whether the courts would consider evidence sourced from the Internet Archive as admissible. To answer this question, we must first consider the category that this sort of evidence would fit under Nigerian law. A reading of the Evidence Act 2011 (as amended) makes it clear that evidence produced by a computer (any device for storing and processing information, including mobile phones) would be referred to as computer-generated evidence and would need certain requirements before such evidence may be admissible.²⁴

Any form of information gotten from Internet Archive, whether webpages or multimedia assets like films, audio recordings and photographs would definitely fall under the definition or categorization of computer-generated evidence under Nigerian Law. Therefore, when litigants seek to tender evidence derived from Internet Archive, they would be required to fulfil the conditions necessary for the admissibility of such evidence. These conditions are:

- a. That the document (evidence sought to be tendered) was produced by the computer during the ordinary use of that computer.
- b. That information, the nature of which is contained in the document, was regularly supplied to the computer during its ordinary use over the relevant period.
- c. That the computer was operating properly or failed to operate properly at a time not material in affecting the accuracy or production of the document (evidence).
- d. That the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.²⁵

²⁴ Sections 84 and 258 of the Evidence Act 2011, as amended

²⁵ Section 84 (2) of the Evidence Act, 2011

Consequently, the litigants will be required, by virtue of this section, to present a certificate:

- a) Identifying the document containing the statement and describing the manner in which it was produced.
- b) Giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer.²⁶

Failure to comply with the provisions of section 84 of the Evidence Act will result to the evidence being rejected.²⁷

By fulfilling these obligations, evidence gotten from Internet Archive would become admissible under section 84 of the Act, however, this does not resolve the more fundamental problem, which is the authenticity of the information gotten from the Archive. This is even more important considering the fact that the Internet Archive does not guarantee the accuracy of the information that is contained on it. In its “Term of Use,” the archive states thus:

Because the content of the Collections comes from around the world and from many different sectors, the Collections may contain information that might be deemed offensive, disturbing, pornographic, racist, sexist, bizarre, misleading, fraudulent, or otherwise objectionable. The Archive does not endorse or sponsor any content in the Collections, nor does it guarantee or warrant that the content available in the Collections is accurate, complete, non-infringing, or legally accessible in your jurisdiction, and you agree that you are solely responsible for abiding by all laws and regulations that may be applicable to the viewing of the content. In addition, the Collections are provided to you on an as-is and as-available basis.²⁸

This kind of disclaimer may affect how courts will treat evidence sourced from the Internet Archive, especially where it is pointed out by the opposition party. In the case of *INEC v Atuma & Ors*, the Supreme Court described the effect of a disclaimer in the following words:

The appearance of a disclaimer on a document is not as important as what was expressed to be disclaimed. It is not the case that a disclaimer destroys out-rightly the document on which it appears. A more correct approach is that it limits the scope and operation of the document, for the express purpose tied to the disclaimer.²⁹

²⁶ Section 84 (4a and b) of the Evidence Act, 2011

²⁷ *Dickson v. Sylva & Ors* (2016) LPELR-41257(SC)

²⁸ Internet Archive, *Terms of Use* <<https://archive.org/about/terms.php>> Accessed 12th September 2024

²⁹ (2013) LPELR-20589(SC)

This will clearly impact on the reliability on such evidence and consequently the weight to be attached to such evidence by the court as admissibility is different from weight to be attached to a document.

There is also the hurdle of documentary hearsay and the uncertainty on how the court will interpret same when put side by side with the provision of section 84 of the Evidence Act. Generally speaking, a document is said to amount to a "documentary hearsay", when the person who purports to have made and/or signed the document is not the one tendering it in Court and consequently cannot vouch for the authenticity of the contents of the document as it did not come from his personal knowledge.³⁰

With the current trend where the witnesses or a cyber-cafe typically makes certificate of compliance with section 84 of the Evidence Act in Nigeria, it will be difficult for documents produced from the Internet Archives to pass this test as they are clearly not generated by the witnesses. In the United States, declarations from witnesses or attorneys are insufficient to authenticate printouts from the Internet Archive if the witnesses do not have personal knowledge of the archive's contents. Instead, the majority of courts require that the Way back machine webpages be authenticated by an affidavit from a Way back machine representative having personal knowledge of their contents and who can verify that they are true and accurate copies of Way back machine's records.³¹

Even though the platform for certification by the officers of the Internet Archive is online, they are not based in Nigeria or governed by Nigerian law and as such, obtaining a signed authentication certificate will pose additional issues such as whether the authentication meets the requirements under Nigerian law, cost etcetera.

I. Temporal Limitations and Evidentiary Gaps

Another challenge with using Internet Archive evidence is the time constraints associated with the archiving process. The periodic nature of web crawls, coupled with delays in capture and indexing, can create gaps in the evidence, particularly for time-sensitive or rapidly changing digital content.³² Furthermore, the Way back Machine does not capture every web page ever created due to the limitations of its web crawler. It struggles to fully archive pages with interactive elements like Flash applications, JavaScript forms, and progressive web apps, as these features require interaction with the host site. For instance, since around 9 July 2013, the Way back Machine has been unable to display YouTube

³⁰ Maku v State (2021) LPELR-56324 (CA)

³¹ Novak v Tucows, Inc., 2007 U.S. Dist. LEXIS 21269

³² Beryl A. Howell, "Proving Web History: How to Use the Internet Archive" (2006) *J. Internet L.*, 4.

comments when saving video watch pages, as comments are no longer "loaded within the page itself," according to the Archive Team.³³ Additionally, the web crawler has difficulty extracting content not coded in HTML or its variants, which can lead to broken links and missing images.³⁴ It also cannot archive "orphan pages" that aren't linked from other pages. Furthermore, the crawler only follows a limited number of hyperlinks based on a pre-set depth limit, preventing it from archiving every link on every page.³⁵

These possibilities go further to strengthen the unreliability arguments. There is a strong possibility for a case to be made that certain information are missed out in the page saved.

II. Cross border nature of the Internet Archive Evidence

Admissibility rules for Internet Archive evidence differ by country, making it difficult for effective adoption in intellectual property disputes. While some courts see the Internet Archive as a credible source of evidence, others are wary due to issues about data accuracy, relevancy, and potential hearsay.

Likewise, courts in some jurisdictions may be hesitant to accept Internet Archive evidence because they are concerned about its dependability and legitimacy. Questions may emerge about the veracity of stored content, the integrity of meta-data, and the possibility of manipulation or tampering. Furthermore, questions of hearsay and relevance may influence the admission of Internet Archive evidence, especially if the competing party objects.

III. Lack of Awareness of the Internet Archive and a Unified Framework on Authenticity and Admissibility of Evidence from the Internet Archive

Another significant challenge in leveraging the Internet Archive in legal contexts is the general lack of awareness among legal practitioners and stakeholders about its capabilities and potential uses. Many lawyers may not be familiar with how to effectively access and utilize archived content for evidence in intellectual property cases. This gap in knowledge can hinder the integration of digital archives into litigation strategies.

³³ YouTube - Archiveteam, <https://wiki.archiveteam.org/index.php?title=YouTube#Comment_loading> (Accessed 10 September 2024)

³⁴ M. E. Bates, "The Way back Machine"(2002). *Online*.**26**: 80.

³⁵ Using The Wayback Machine – Internet Archive Help Center, <<https://help.archive.org/help/using-the-wayback-machine/>> Accessed (10 September 2024)

Additionally, the absence of a unified framework governing the authenticity and admissibility of evidence sourced from the Internet Archive creates further complications. Different jurisdictions may have varying standards for what constitutes admissible evidence, leading to inconsistencies in how archived material is treated in court. A lack of clear guidelines can result in challenges during litigation, as parties may struggle to prove the reliability of the archived content.

5. Conclusion and Recommendations

The authors have demonstrated that using the internet archive as evidence in intellectual property litigation in Nigeria offered various opportunities and challenges. Proactive engagement, technological advancements, and collaboration among stakeholders can enhance its effectiveness and reliability in judicial processes. By addressing authentication issues, advocating for admissibility standards that consider technological progress, and applying best practices in archiving, legal practitioners can utilize digital preservation to achieve equitable outcomes and strengthen the protection of intellectual property rights in the digital era.

Beyond the general recommendations, we believe that courts should recognize properly presented evidence from the Internet Archive as admissible. However, the weight given to such evidence should depend on the specific circumstances of each case, balancing fair hearings with careful consideration of the evidence to ensure justice.

We also advocate for partnerships among legal professionals, digital forensics experts, and archivists to establish best practices and standards for authentication and chain of custody for Internet Archive data. By creating clear guidelines for the collection, preservation, and presentation of archived content, stakeholders can mitigate authentication challenges and enhance the credibility of such evidence in IP litigation. Courts could even take judicial notice of evidence that meets these standards. Additionally, digital forensics experts can assist in authenticating evidence presented before the court, and litigants should back this evidence with corroborating information and expert testimony. Over time, some archived blog posts, web pages, and multimedia content may gain judicial recognition.

To address timing issues, lawyers should strategically prioritize acquiring important web content from the Internet Archive and supplement it with actual documents, screenshots, or third-party evidence. Furthermore, advancements in online archiving technologies, such as real-time indexing and continuous monitoring, could enhance the timeliness and comprehensiveness of archived evidence in future litigation.

To resolve admissibility concerns, proactive collaboration among court authorities, legal scholars, and professional organizations is essential. Advocating for consistent admissibility rules and judicial guidelines can bolster the acceptance and impact of Internet Archive evidence in IP litigation. By increasing awareness of the Archive's processes and evidential value, stakeholders can enhance its credibility as a vital resource for supporting legal claims and protecting intellectual property rights.

Moreover, legal practitioners should take the initiative to educate judicial authorities and stakeholders about the reliability and evidentiary significance of Internet Archive data. This could involve citing case law where courts have accepted Internet Archive evidence, highlighting the Archive's rigorous methodologies, and demonstrating how archived content can substantiate legal claims.

Finally, engaging with professional associations and academic institutions can help develop rules and best practices for admitting Internet Archive evidence in IP litigation, fostering consistency and fairness across jurisdictions. By promoting clear admissibility standards and raising awareness of the Archive's potential as a valuable evidentiary resource, stakeholders can increase its utilization and facilitate more informed decision-making in intellectual property litigation.



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