Computer-Related Evidence In Nigeria: Has The New Evidence Act Cured The Old Defects?*

Abstract

This article discusses two major defects in the Nigerian law of evidence as it existed before the enactment of the Evidence Act 2011. First, the former Evidence Act did not make provision for the admissibility of computer-related evidence despite the existence of computer before the Act. Courts faced with such evidence either admitted it or rejected it depending on their interpretation of extant provisions of the law. Secondly, it was unclear whether computer-related evidence was primary or secondary documentary evidence. Case law appeared to have treated it as secondary evidence though there was room for deciding otherwise. The Evidence Act 2011 now provides for the admissibility of this type of evidence. It also provides that where a number of documents are produced by a uniform process from a computer, each shall be taken as primary evidence of the contents of the rest. The present Act seems to have cured the two defects. However, the article argues that there are still lingering problems. This is because the admissibility provision applies to computer-generated paper evidence specifically, instead of computer-related and electronic evidence generally. And by the meaning of primary evidence, a sole document produced by a computer can

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only be secondary evidence. The article therefore concludes that the old evidential defects on admissibility and classification of computer-related evidence have not been completely cured by the Evidence Act 2011.[1]

Introduction

It is undoubtedly important to consider the law on computer-related evidence in Nigeria. On the one hand, development in science and technology has brought about the unprecedented use of technological devices in human life generally and in commercial transactions in particular. The computer is an upshot of such technological advancement and it is now so much in vogue that paper-based transactions are giving way fast to paperless transactions in both private and public circles. Litigated transactions often require proof in the form of evidence and this evidence may have been produced by or stored in the computer. On the other hand, the law of evidence in Nigeria has hitherto not made direct provisions dealing with computer-related evidence. The principal legislation on evidence in the country, the Evidence Act, was enacted during British colonial administration way back in 1945 when the computer was hardly known. Unfortunately, despite the evidential challenges brought about by modernity, this legislation has not gone through a major change since then except for the recent review process which produced the Evidence Act 2011.

To make matters worse, the case law in Nigeria which was supposed to fill-in legislative gaps through judicial activism has not been quite helpful. In particular, there have been contradictory decisions on the admissibility or otherwise of computer-related evidence in court proceedings over the time. The Evidence Act 2011 has now made provision dealing with the admissibility of this type of evidence. Thus, it is important to examine this

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[1] So far, the author was able to lay hands only on the following relevant material published shortly after the enactment of the Evidence Act 2011: BB Kanyip, "Evidential Landscape in Cyberspace: Coping with the Challenges of Electronically Generated Evidence" (2011) 1 *Current Trends in Law & Practice Journal* 35; AM Adebayo, *Evidence Act 2011 Annotated with Cases*, Lagos: Princeton Publishing, 2012. There is no detailed analysis of the topic in the former, while the latter merely reproduced the section on the issue and gave a summary of a case decided before the enactment of the 2011 Act. See also Obianer Nnamdi, *Contemporary Law of Evidence in Nigeria*, Justice Jeco Printing Global, 2012.

issue in order to reveal what defects there were when there was no such provision under the former Evidence Act; how the new Evidence Act 2011 has sought to cure the defects through the new provision; and whether the new provision can be said to have cured the defects completely.

This article therefore sets out to examine how computer-related evidence could be, and was in fact accommodated under the old Evidence Act; whether it was treated as primary or secondary evidence; the innovative provisions dealing with the subject under the new Evidence Act 2011; and finally, by way of conclusion, whether the new provisions have adequately covered various aspects of computer-related evidence and unequivocally determined the classification of such evidence. Apart from an examination of decided cases which show judicial attitude to this kind of evidence, the article will refer to literature representing scholarly views on the issue as it existed under the old Evidence Act. This will then provide the context within which to discuss the innovative provision dealing with it under the new Evidence Act 2011. Because of the novelty of the provision, it may be premature to determine judicial attitude thereto; and moreover, there is not yet much scholarly view or literature on the new provision.[2]

Computer-Related Evidence under the Old Evidence Act[3]

As noted above, computer-based transactions are increasingly replacing paper-based transactions in the modern world. For instance in banking,[3] the practice of recording customers' statements of account on hard paper has long given way to computer-stored information always available for printing on paper on demand by customers. The pertinent questions under the old Evidence Act[4] were that when a customer's statement of

[2] For details on the issues discussed in this part, see Y. Osinbajo, "Electronically Generated Evidence" in A Babalola (2001), *Law and Practice of Evidence in Nigeria*, Ibadan: Sibon Books, 2001, 243; Y Osinbajo, *Cases & Materials on Nigerian Law of Evidence*, Lagos: Macmillan Nigeria Publishers, 1992, 270.

[3] Banking transactions offer the best example of the use of computer-related evidence. In fact, most of the cases where this issue was considered had to do with the admissibility of computer printout of customers' statement of account. There are however other forms of computer-related evidence such as telephone bills, electricity bills, WAEC results, records of the Corporate Affairs Commission, etc.

[4] Cap E14, Laws of the Federation, 2004.

[5] Quoted in T Osipitan, "Admissibility of Computer Print Out under the Nigerian Law of Evidence", (1995) 2 (2) *Lawyers' Bi-Annual*.

account stored in a computer is printed out on paper would it be admissible in evidence before a court of law? If it would be admissible, what form of evidence would it be, primary or secondary evidence? If it would not be admissible, what would be the reason for the inadmissibility? If inadmissible, is it because it is considered hearsay evidence?

The legal objections to the admissibility of computer evidence appear to be three fold. It offends against the best evidence rule in that with computer print-outs the legible means by which the statement can be read is not the original which exists in the magnetic form in the computer. It is therefore plausible to treat it as hearsay evidence. Also, there is the danger of inaccuracy or unreliability of the statement which may have been tampered with or damaged by the faulty computer system.[5]

Though there was no direct provision on computer-related evidence under the old Act, this did not mean that such evidence was *ipso facto* inadmissible. Of course, the admissibility of evidence was (and still is) regulated principally by the Evidence Act[6] and the test for admissibility of a piece of evidence was (and still is) generally the relevance of such evidence to the proceedings at hand.[7] *A fortiori*, a piece of evidence could only be rejected on the basis of the Act and not any other enactment or law.[8] And evidently, there was no provision in the Act which disallowed admissibility of computer-related evidence. Such evidence may therefore be admissible, but the legal basis was controversial.

The closest provisions which could, and was in fact used by courts to accommodate this type of evidence were the sections dealing with

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[6] Provision was made under section 5(a) of the Act to permit the admissibility of evidence on the basis of another law, e.g. the common law, when the Act was silent on an issue. For instance, the common law rule on admissibility of illegally obtained evidence was applied in Nigeria on the basis of this section. However, the new Evidence Act 2011 has changed the position of the law now making common law rules of evidence inapplicable.

[7] Section 6 of the Evidence Act Chapter E14, Laws of the Federation of Nigeria 2004. Though all admissible evidence must be relevant, not all relevant facts are admissible. For instance, section 6(a) of the Act provides that when a relevant fact is too remote or is expressly made inadmissible by law, it cannot be admissible.

[8] Section 33 (b) of the Evidence Act, Chapter E14, Laws of the Federation of Nigeria 2004

exceptions to the hearsay rule. For instance, computer print outs were considered exceptions to the hearsay rule. Exceptions to the hearsay rule could be interpreted in such a way as to permit admissibility of computer-related evidence. Some of these provisions appear relevant on their face value. For instance, section 33 (c) dealt with the admissibility of statements by a person without need for calling him where the statements were against the pecuniary or proprietary interest of the person making it and the said person had peculiar means of knowing the matter and has no interest to misrepresent it. Similarly, section 33 (d) would allow a statement "which gives the opinion of any public right or custom or matter of public interest, of the existence of which, if it existed he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom, or matter had arisen."

A critical look at the above two provisions would however reveal that they were too narrow to be relevant to the admissibility of computer-related evidence. Section 33 (c) was limited to statements which are against the pecuniary or proprietary interest of the maker while section 33 (d) is limited to the opinion of the maker as to the existence of public right, custom or public interest. However, there were provisions which were more relevant and at least an attempt could be made to accommodate computer-related evidence under them. A good example was a provision on the admissibility of statements, written or verbal of relevant facts made by a person who is dead and when the statement is made a person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty, or of an acknowledgement written or signed by him, or the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.[9]

The section proved useful in the admissibility of computer-related evidence particularly bank statements. This is so for a number of reasons. First, it mentions 'statements' which is a term akin to bank statements. Secondly,

[9] Query- can relying on information in a computer which is subsequently printed out be regarded as written? Is a similar standard required for typewriter information?

the word "written" may include typed information in a computer. Thirdly, the requirement of the relevance of the facts contained in the statement could easily be satisfied since the fact of customer's credit or debit balance in his statement of account would be relevant to a determination by a court of law whether or not the customer is indebted to his bank. Fourthly, it cannot be doubted that information about a customer's account stored by a bank staff in the bank's computer must have been made in the "ordinary course of business". Lastly, such storage can be described as "an entry" and may be for "the receipt of money". The section though appeared relevant, it had the following limitations:

The statement was only admissible where the maker is dead. So for instance, if a bank officer who fed information into a computer is alive, the computer printout of the information would be inadmissible. The section envisaged statements which were "written" or "verbal". Computer printouts are certainly not verbal. If "written" meant the traditional ink on paper writing, the printouts may not be accurately described as "written" because in the case of a bank statement, a bank officer merely keys in information into a computer to record a deposit or withdrawal of money.[10]

Another provision which appeared relevant to the admissibility of computer-related evidence reads as follows: "Entries in books of account, regularly kept in the course of business are relevant whenever they refer to a matter into which the court has to inquire, but such statement shall not alone be sufficient evidence to charge any person with liability."[11] This section was clearly better than section 33 because admissibility under it was not dependent on the condition of the death of the maker of the statement. But it seems from the wordings of the section that the entries must be made in "books of account" which envisaged an existing book or bound volume specifically designated as "book of account". However, in interpreting the section, the Supreme Court held that it was an authoritative basis for the admissibility of computer-related evidence and that it did not only apply to bound books of account. In *Esso West Africa Inc. v. T. Oyagbola*,[12] the Supreme Court stated as follows:

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[10] Section 38 of the Evidence Act, Chapter E14, Laws of the Federation of Nigeria 2004
[11] [1969] 1 NMLR 194
[12] Ibid, at 198

Section 37 of the Evidence Act does not require the production of "Books of Account" but makes entries in such books relevant for the purpose of admissibility. The evidence describes the card sought to be tendered as ledger cards meaning that they are cards from a ledger or constitutes a ledger. The law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer. In modern times reproduction or inscriptions on ledgers or other documents by mechanical process are common place, and section 37 cannot therefore only apply to books of account ... so bound and the pages not easily replaced.[13]

The above encouraging dictum of the Supreme Court has been restated by the Court in a later case of *Festus Sunmola Yesufu v. African Continental Bank Ltd*[14] and it was substantially quoted by the Court of Appeal much later in *Trade Bank Plc v. Khaled Barakat Chami*.[15] The interpretation of the section by the Supreme Court though purposive, did not do away with all the problems of the section. For instance, the requirement of the section that "such statements shall not alone be sufficient to charge any person with liability" reduced the potency of the provision because the statement, without more evidence, cannot prove criminal liability or successfully prove a civil suit on, for example, recovery of debt owed to a bank.

The Evidence Act was later amended and section 37 thereof was renumbered section 38 while retaining the provision as it had been. It was the new section which fell for interpretation again in the case of *Trade Bank Plc v. Khaled Barakat Chami*.[16] This case emanated from the Kano State High Court. In it, the appellant as plaintiff filed a suit to recover some money against the respondent/defendant who gave personal guarantee to a loan granted to a company, Rasha Enterprises Ltd. The plaintiff called three witnesses and tendered four documents as exhibits. Exhibit 4 was a statement of account printed from a computer in the plaintiff bank evidencing the indebtedness of the company. It was tendered through PW2 and it was admitted into evidence without objection from the

[13] [1976] 4 SC 1 at 16
[14] (2004) All FWLR (pt. 235) 118 at 163-164
[15] ibid
[16] Ibid, 163-164

defendant's side. However, at the point of judgment, the learned trial judge, Adamu J., *suo motu* considered whether the document offended section 91 (3) of the Evidence Act which renders inadmissible a document prepared by a party interested during the pendency of an action. He answered the question in the affirmative and therefore expunged the evidence. He, in the end, dismissed the suit in its entirety.

On appeal to the Court of Appeal, one of the issues considered was whether the learned trial judge was right in expunging Exhibit 4, the statement of account contained in a computer printout. First, the Court of Appeal found that the trial Judge was wrong in holding that the exhibit offended section 91 (3) of the Evidence Act because from the evidence before the court, it was clear that PW2 did not prepare the exhibit. The content of the exhibit was stored in a computer by another person and PW2 merely printed it out and took it to the court when going to give evidence. The Court did not only hold that the exhibit was relevant and admissible in evidence but also that section 38 has "expressly stated" it to be so relevant and admissible. It was held to be good evidence to support the liability of the respondent/defendant as personal guarantor especially that there was another evidence of the indebtedness of Rasha Enterprises Ltd (from the oral testimonies of PWs 1-3) thereby taking care of the warning that the statement "shall not alone be sufficient to charge any person with liability" as contained in the section. The Court was unequivocal in its holding when it stated, per Salami JCA (as he then was) (drawing from the decisions of the Supreme Court mentioned above) stated that:

Section 38 of the Evidence Act (supra) puts admissibility of exhibit 4 above board. … This section of the Evidence Act (supra), does not require the production of 'books of account' but makes entries in such books relevant for admissibility. Exhibit 4 is a mere entry in the computer or book of account. Although, the law does not talk of 'computer' and 'computer print out' it is not oblivious to, or ignorant of modern business world and the technological advancement of the modern jet age ... the provisions of section 38 covers, in my respectful opinion, also, electronic processes such as computer and the computer print out comprised in exhibit 4 are admissible and have been wrongly rejected by the learned trial judge.[17]

[17] Section 39 of the Evidence Act, Chapter E14, Laws of the Federation of Nigeria 2004

The Court of Appeal finally allowed the appeal by setting aside the judgment of the trial court and granting all the reliefs sought by the plaintiff.

Another relevant provision of the Evidence Act on computer evidence is section 39. It states that:

An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.[18]

The section appears to be wider than the previous sections examined. It covers entries in any public or other official register or record. If "register" envisages a kept book, certainly "record" is wide enough to accommodate computer-stored information which can be printed out. Yet this section is not without limitations. For instance, it requires that the record must be that of a public officer in the discharge of his official duty or the record which any person is enjoined by law to keep. Private commercial records were therefore excluded.[19]

Though the old Evidence Act did not provide for computer-related evidence directly, it can be asserted that the definition of a document under section 2 was wide enough to cover computer print outs, SMS messages, e-mails, information on disks, tapes, microfilms and other storage devices. The section provides that a document "includes books, maps, plans, drawings, photographs and also includes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter". The section has expressly mentioned items which are documents but its use of the word "includes" at the beginning suggests that the list of items which could fall within the definition of "document" has not been exhausted.

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[18] (2010) All FWLR, (pt. 534) 181

[19] This section is now section 89 of the Evidence Act 2011. It is dealing with the circumstances under which secondary evidence of a document is admissible.

More recent decisions on the admissibility of computer-related evidence include the case of *Federal Republic of Nigeria v. Femi Fani Kayode*.[20] In this case, the Economic and Financial Crimes Commission (EFCC) arraigned the accused person, a former Minister of Aviation, before the Federal High Court on a 47-count charge of money laundering. The prosecution sought to tender in evidence a certified copy of the accused person's bank statement of account contained in a computer print out. The defence objected to the admissibility of the statement of account under section 97 of the Evidence Act.[21] Notwithstanding previous decisions of appellate courts such as the ones mentioned above, the court upheld the objection and rejected the document in evidence. According to the trial judge, Mohammed, J.

> A statement of account produced by way of computer print-out is not admissible under section 97(1)(b) and (2)(e) of the Evidence Act Cap. E14 LFN 2004, even if the statement of account was relevant to the proceedings ... there is urgent need for an amendment of the evidence law to cover admissibility of documents made by means of computer printout since it is clear that technological methods of producing document now form part of day to day activities in business transactions particularly in business circles.[22]

The Court of Appeal however considered section 97 (1) (h), (2) (e) of the Evidence Act[23] and held that the document satisfied all the requirements for admissibility and it did not fall within the category of evidence made completely inadmissible by the law. The Court therefore admitted the document in evidence.

It is important to state that the trial judge, Mohammed J, did not reject the computer printout without some precedent. He merely followed the decision of Omoghen JCA (as he then was) in the case of *Nuba Commercial Farms Ltd v. NAL Merchant Bank Ltd*[24] and Muntaka-Coomassie JCA, in *UBA Plc v. Sani Abacha Foundation for Peace and Unity*.[25] In the latter case, Muntaka-Coomassie, JCA, held that a trial court was wrong in admitting a statement of account contained in a computer printout into evidence because according to him, though relevant, such statement did not satisfy the conditions necessary for admissibility.[25]

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[20] Quoted in BB Kanyip, op. cit., at 37-38.
[21] Now section 89 (b) and section 90 (c) of the Evidence Act 2011
[22] (2001) 16 NWLR (pt 742) 510 at 523
[23] (2004) 3 NWLR (pt. 861) 516 at 542-543
[24] See BB Kanyip, op. cit., 38
[25] See section 2 of the (former) Evidence Act, 1945.

The above analysis clearly shows that under the old Evidence Act, it was possible to admit into evidence computer-related evidence though with some difficulty at least in finding a direct authority for the admissibility. Let me now consider the class of evidence into which it fits. In other words, was such evidence admissible as primary evidence or secondary evidence?

Is Computer-related Evidence Primary or Secondary Documentary Evidence?

The question whether computer-related evidence is primary or secondary evidence is relevant because of some reasons. Firstly, computer-related evidence was treated as documentary evidence perhaps because the definition of 'document' under the Evidence Act was wide enough to cover writing contained in electronic devices or mobile phone sets.[26] When printed on paper, such writing obviously becomes content of a document even if the electronic version cannot be accommodated under the definition of a document. Secondly, documentary evidence has been classified by the Evidence Act into primary and secondary evidence.[27] For instance, a written agreement between parties to a business transaction signed by them is the primary documentary evidence of the transaction while a photocopy of it is secondary evidence.[28] Thirdly, it is a general rule of evidence that in proving a fact, what the court requires is the best evidence available in the case. Thus, for documentary evidence, the best evidence is the original document whether electronic (soft) or paper (hard) version.[29] Fourthly, for secondary evidence to be admissible a proper foundation must be laid, that is the non-availability of the primary evidence must first be explained.[30] Because of these reasons, it is not only important but also necessary for one to know whether computer-related evidence was primary or secondary evidence.

Since there was no direct provision under the Act on this type of evidence, it would be out of place to expect a classification of it (as primary and

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[26] See sections 92-97 of the old Evidence Act.
[27] See section 93(1) and section 94(b) of the old Evidence Act.
[28] See section 95 of the (former) Evidence Act, 1945.
[29] This requirement does not apply to primary documentary evidence.
[30] Supra

secondary evidence) from the Act. In *Federal Republic of Nigeria v. Femi Fani Kayode*,[31] it was an issue predicated on section 97 of the Act dealing with circumstances for the admissibility of secondary documentary evidence. Even when, on appeal, the Court of Appeal admitted the evidence, it did so mainly on the ground that the statement of account contained in a computer printout was secondary evidence and true representation of the statement of account kept by the bank in the computer thereby making it (i.e. the computer printout) substantially compliant with section 97(2) (c) of the Act.[32]

In treating and admitting the computer printout as secondary documentary evidence in the above case, the Court of Appeal must have been influenced by the decision of the Supreme Court in *Anyeabosi v. R. T. Briscoe Nigeria Ltd*.[33] In this case, the respondent, a company dealing in spare parts, sought to recover some money from its distributor/agent, the appellant. In proving the claim, the respondent tendered a computer printout of the appellant's statement of account indicating the latter's indebtedness to the former. There was no objection to the tendering and it was admitted in evidence. Judgment was subsequently given in favour of the respondent and it was confirmed by the Court of Appeal. On appeal to the Supreme Court, the appellant contended that the computer printout was wrongfully admitted because it violated section 96(2) of the Evidence Act.[34] The Court however held that the evidence was rightly admitted adding that such evidence fell within the conditions prescribed in section 96(1) & (2) of the Evidence Act. In essence, the argument before the Court centred on the evidence being secondary documentary evidence and the Court treated it as such.

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[31] This provision dealt with admissibility of secondary evidence of the existence, condition or contents of a document when the document is an entry in a banker's book provided that: as at the time of the entry, the book was one of the ordinary books of the bank; the entry was made in the usual and ordinary course of business; the book was in the control of the bank; and the copy has been examined with the original entry and was correct, which proof must be given by some person who did the examination. The equivalent provision under the Evidence Act 2011 is section 90(1)(e).

[32] (1987) 3 NWLR (pt. 59), p. 84

[33] This was the section which was later renumbered as 97 and it dealt with circumstances under which secondary documentary evidence was admissible.

[34] T Osipitan, op. cit.

While discussing this case, Taiwo Osipitan,[35] stated that the admissibility of the computer printout as primary evidence was not argued and therefore not decided by the Court. Consequently, according to the learned commentator, whether a computer printout is admissible as primary evidence or not was still an open question. His answer to this "open question" was that computer printout can legitimately be admitted as primary evidence arguing that whether or not a document is original will depend on the intention of the maker of the document. In addition to citing some foreign authorities, he sought to fortify his position with the provision of section 93(1) of the Evidence Act which provided that "primary evidence means the document itself produced for the inspection of the court". This position is with due respect, more wrong than right. First, it will not be correct to say that the Supreme Court did not decide on the admissibility of the printout as primary evidence. The Court did not have to specifically mention primary evidence in its decision in order for the decision to categorise the printout as non-primary evidence. The holding that the evidence was secondary evidence implicitly meant that it was not primary evidence. The law recognises a document only as either primary or secondary evidence just like nature recognises a woman only as either pregnant or not pregnant; there is no yet recognisable third status for either.

Second, the Evidence Act does not give room for the intention of the maker of a document to play a role in determining whether such document would be primary or secondary evidence. The nature of a document is determined by the provisions of the Act itself.[36]

Third, section 93 (1) of the Act which gave the meaning of primary evidence does not lend support to the admissibility of computer printout as primary evidence. The section stated that "primary evidence means the document itself...". The pertinent question to ask is "which document? Since "document is used with a definite article in the section, reference must be"

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[35] See section 93 (1)-(4) and section 94 (a)-(c) of the Act

[36] The author has himself referred to the case of *Grant & Anor. v. Southern Country Properties Ltd* [1974] 2 All ER 465 as authority that even tape recording was a document. See his footnotes 21 & 22.

to a document immediately before the section without a definite article. And this will be found in section 92 which provided that "the contents of documents may be proved either by primary or by secondary evidence". What is more, the Act defined the word as quoted above in such a manner as to encompass electronic writing in a magnetic material such as the computer, not just writing on a hard paper.[37] This means that "the document itself" could mean "the computer itself" within the meaning of 'document' in the Act so that any other material produced by the computer and presented as evidence can at best be secondary evidence; the primary evidence being the material in its original electronic form. In the face of the clear provisions of the Evidence Act, the foreign authorities cited by the learned author are inappropriate. It was therefore more appropriate to consider computer-related evidence in the form of computer printout as secondary documentary evidence, a position taken by the court in the *Femi Fani-Kayode* and *R. T. Briscoe* cases.

From the above analysis, it could be argued that the judiciary attempted some activism by interpreting the provisions dealing with the exceptions to the hearsay rule to accommodate computer-related evidence. Yet, the provisions were clearly inadequate for the purposes of admitting such kind of evidence. That explains the contradictory decisions of the courts. If there existed clear provision on the admissibility of computer-related evidence, one court would not hold such evidence admissible and another court, particularly of co-ordinate jurisdiction, to consider it inadmissible. Again, there would have been clear provisions stating what computer-related evidence qualifies as primary evidence and what its secondary evidence includes. Arguably, it was the difficulty in resolving these issues, among others, in the decided cases which ignited the need to reform Nigeria's principal legislation on evidence, the Evidence Act. Thus, under the former Chief Justice of Nigeria, Modibbo Alfa Belgore, a committee was set up which reviewed the legislation. Subsequently, the National Assembly passed the new Evidence Act 2011, the President assented to it and it became law. One of the innovations in the new Act is a provision on computer-related evidence. How then has this provision changed the law on this important area of evidence?

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[37] The Act however proposed to allow admissibility of computer-related evidence in civil proceedings only. See Y Osinbajo, "Electronically Generated Evidence", in A. Babalola (2001), op. cit., at 269.

Computer-related Evidence under the Evidence Act 2011

For the first time in the history of the law of evidence in Nigeria, there is now a direct provision on computer-related evidence in the principal legislation, the Evidence Act 2011. However, it must be placed on record that this was not the first time an attempt to come up with this provision was made. During the military regime, the Nigerian Law Reform Commission had suggested for the inclusion of this provision in the proposed Evidence Decree of 1998.[38] The Evidence Act 2011 now contains this provision under Part V of the Act dealing with documentary evidence generally. The provision states as follows:

In any proceedings, a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in sub-section (2) of this section are satisfied in relation to the statement and the computer in question.[39]

In recognition of the fact that computer-related evidence has now been specifically provided for, the new Act has now defined "computer" to mean "any device for storing and processing information".[40] This definition is wide enough to cover not only the popular desk-top, laptop or Ipad computers but also mobile phones (having facilities such as memory, internet, etc.) and digital cameras. The Act refers to 'storing and processing' information meaning that for a device to qualify as computer, it must be capable of both 'storing' and 'processing' information. The conjunctive requirement has therefore excluded storage devices such as disc, CD rom and detached external hard drive.

The Act has now resolved the controversy over the admissibility of computer-related evidence in the form of a computer print out. Such evidence is now clearly admissible. And by the opening phrase "in any proceedings", it means it is admissible in both civil and criminal proceedings including election petition matters which are held to be neither civil nor

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[38] Section 84(1) Evidence Act 2011
[39] Section 258 of the Act.
[40] See for instance decisions of the courts in *Abubakar v. INEC* (2004) 1 NWLR (pt. 865) 215) and *INEC v. Efezie* (2011) All FWLR (pt. 596) 452 at 480-481, paragraphs H-A.

criminal but are rather *sui generis*, that is in a class of their own.[41] However, one would expect the provision to cover documents as interpreted under section 258 of the Act that is including disc, tape, sound track or other device in which sounds on other data (not being visual images) are embodied and capable of being reproduced from it (with or without the aid of some other equipment). If so covered, it means disc, tape, etc would in themselves be admissible as computer-related documents. But the language of the Act being "a statement contained in a document produced by a computer" appears to envisage the conventional papered document printed from a computer, that is computer print out. Thus, while the definition of 'document' under the Act accommodates a computer device, the section's reference to 'document produced by a computer' means that 'document' and 'computer' are not or cannot be the same. In this sense, the Act is arguably self-contradictory. The implication of this approach is to limit the coverage of the provision by leaving out other forms of computer-related documents as accommodated by the Act under the definition of "document".

It is worth noting that the provision also implies that the computer-related evidence admissible is regarded as hearsay evidence and not direct evidence. This could be seen in the qualified reference to the (admissible) statement as only that "of which direct oral evidence would be admissible". What the provision contemplates in essence is the existence of direct oral evidence on the statement contained in the document so that the statement would in itself be at best hearsay though admissible. This would mean therefore that the contemplation of the law is limited to the form of computer-related evidence where human agency is involved in feeding information into the computer which information is capable of being produced therefrom. The direct oral evidence would be the testimony of the individual who fed the computer with the information. When the information is produced from the computer in the form of a print out, it cannot be anything other than hearsay which is admissible.

The implication of the above implied position of the law is that it has left out an important form of computer-related evidence, such as where the computer calculates and computes information without the intervention of human agency. In this instance, the dichotomy between direct and hearsay evidence becomes irrelevant thereby making section 84 (1) of the Act apparently inapplicable.

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[41] Section 84(5) (c) of the Act
[42] These conditions are contained in section 84 (2) (a) – (d) of the Act.
[43] The conditions must be satisfied conjunctively because section 84 (1) clearly states that a document produced by a computer is only admissible "if it is shown that the conditions in sub-section (2) of this section are satisfied".
[44] Section 84 (2) (a) of the Act
[45] Section 84(2) (b) of the Act

What does it mean to say production of a document by a computer? Does it mean production directly from the computer? Or is it permissible to use some other devices in aid? The Act provides answers when it states that "a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment".[42] This means that connecting a printer for instance to a computer and printing out information from the computer or a disc or CD rom connected to it is production of a document by a computer envisaged by the law.

Conditions for Admissibility

Be that as it may, the admissibility of computer-related evidence under section 84 (1) of the Act is not absolute. There are four conditions attached to such admissibility,[43] and all of them must be satisfied at once.[44] These conditions are in relation to the statement in a document produced by a computer and also in relation to the computer itself. We shall discuss them one after the other hereunder:

Time of Production

The time of the production of the document containing the statement must be such "a period over which the computer is used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual".[45]

This condition is meant to avoid production of a document from a computer at a time when the computer has long been out of regular use for the storage or processing of information. What is required for instance is to produce a statement of account for a customer to a bank from a computer at a time when the computer is regularly used by the bank. The condition applies to a profit and non-profit making activities.

By virtue of sub-section (3) (a)-(d), the storage or processing of information will be taken to have been done by a single computer even where it was done by a combination of computers, different combinations of computers operating in succession, or in any other manner or whatever order of one or more computers and one or more combinations of computers. This provision recognises networking of computers for business and other purposes whereby information is not stored and processed in a single computer. For the purposes of the application of section 84 of the Act, several computers involved are treated as one so that the production of the document could be from one of them, some of them or all of them.

Regular Supply of Similar Information

It is required that over the period the computer is in use, there is regular supply of information similar to the information contained in the statement produced and that supply is in the ordinary course of activity.[46] For instance, this condition would be satisfied if information on other customers' statement of account is being supplied to the computer from which a particular customer's statement of account is produced. Thus, it would be insufficient to devote a computer exclusively for the storage of information regarding one customer only. But the question can be asked, is this not a defect? Even though the computer can store large volume of information, can the bank not devote a computer to a customer with large transactions, say a multi-national company?

Proper Computer Operation

It is expected that throughout the material part of the period of use mentioned above, the computer from which the document is produced is operating properly or, if not operating properly or is out of operation for a part of the period, such improper operation or non-operation is not such as to affect the production of the document or the accuracy of its contents.[47] This condition is meant to ensure currency and accuracy so that a non-operating or epileptically operating computer would not be used to produce

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[46] Section 84(2) (c) of the Act

[47] Section 84(2) (d) of the Act

a document particularly when such situations would affect the production or the accuracy of the content of the document produced.

However, it is pertinent to ask how it could be determined whether a computer is not properly operating or is completely out of operation for a material time and yet such wanting situations would not affect the production of a document or the accuracy of its contents. It is herein submitted that such determination would require the opinion of an expert on computers to assist the court in arriving at a just decision. The opinion would be admissible under section 68 of the Act, as, arguably, issues of computer can be accommodated under “opinion upon a point of science” as provided under the section. Since most computers record dates and times of the day, is it not a simply thing to know if it is in use over a period of time?

Reproduction or Derivation from Information Supplied

The requirement here is that the information contained in the statement produced must have been reproduced or must have been derived from the information supplied to the computer in the ordinary course of activity.[48] This condition has two legs. The first leg deals with the reproduction of information from information supplied to the computer. An example here could be an electronic mail (e-mail) sent to a business partner in the ordinary course of business correspondences. It is expected that a copy of the mail printed out should reproduce the mail as typed in the computer and sent by the author. Human intervention here is necessary as far as the material information is concerned.

The other leg of the condition covers the derivation of information in the statement concerned from information supplied to a computer. This will be exemplified by feeding-in examination scores for students in various subjects or modules (i.e. raw marks) and the computer working out or computing their total scores, cumulative total points (CGPAs) and class of degrees (i.e. final result). When the information concerned is the statement of the total scores, CGPAs and class of degrees of the students contained in a document produced from a computer, such statement could be said to be have been derived from the raw marks supplied to the computer.

[48] Section 84(5) (a) of the Act

Thus, the condition would not be satisfied if the e-mail produced does not reproduce the mail typed-in by the business partner as exactly typed, or when the final students' result is not derived from the raw marks supplied to the computer. It is important to pause here and ask: when can information be taken to be supplied to a computer? The answer is in the Act where it provides that "information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment".[49]

The Evidence Act specifically emphasizes use of computer or supply of information to it in the ordinary or regular course of activity.[50] This is important in order to avoid the admissibility of a document produced from information in a computer stored or processed in the course of an activity entirely unconnected with the activity relevant to the document. However, a situation might arise where "the ordinary course of activity" requirement is satisfied but the computer used is not being used in the ordinary course of activity. For instance, banking transactions are ordinarily recorded by official computers in the bank. A situation might arise when the personal computer of the bank manager will be used to record some transactions. These transactions might be printed out and sought to be used as evidence in court. What is the position of the law on this? The Act provides that the information supplied shall be taken to be supplied in the ordinary course of activity if it was duly supplied to the manager's personal computer.[51]

As seen above, the admissibility of a statement contained in a document produced by a computer is dependent on the satisfaction of all the conditions stated under section 84 (2) (a) – (d) of the Act. However, there is a provision for the certification of such statement where it is sought to be used in evidence.[52] Such certificate shall: (a) identify the document containing the statement and shall describe the manner in which it was produced;[53] (b) give particulars of the device involved in the production, in order to show that the document was produced by a computer;[54] and (c)

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[49] Section 84 (2) (a), (b) and (d) of the Act
[50] Section 84 (5) (b) of the Act
[51] Section 84 (4) (a) – (c) of the Act
[52] Section 84(4) (a) of the Act
[53] Section 84(4) (b) of the Act
[54] Section 84(4) (b) (ii) of the Act

be signed purportedly by a person in a responsible position in relation to the operation of the relevant device or management of the relevant activities, as the case may be.[55]

What is not clear from the above is whether the certificate is required or is merely desired. It is clear however that the certificate is not a condition for the admissibility of the evidence because the conditions have been expressly limited to those mentioned under section 84(2) of the Act. If the Act intended to make certification a condition, it would have brought it under subsection (2). It can equally be argued that the certificate is not a requirement either since by the language of the Act, it is not expressly put as such. It is therefore submitted that what the Act rather seeks to achieve by the provision is evidently to underscore the evidential value of the matter stated in the certificate.

Is the Question of Primary or Secondary Evidence still open?

The point was made above that though there was no direct provision on computer-related evidence under the old Evidence Act, some courts managed to admit such evidence under certain provisions. Other courts rejected the evidence for various reasons. Even when admitted, the Act did not provide a guide as to whether the evidence was primary or secondary evidence. It was case law which pointed to the fact that it was treated as secondary evidence. Yet Osipitan argued that the question whether such evidence could be admitted as primary evidence was still open.[56] While I submitted that such view may not be tenable, it was far from arguing that the clouds were clear thereby making the sky visible. In other words, we did not suggest that the debate whether computer-related evidence under the old Act was admissible as primary or secondary evidence had been closed. The question was open to debates and interpretations for lack of express provision in the Act and absence of consistent categorical position of the courts from the decided cases. Such has been the position up to the time of the enactment of the Evidence Act 2011. The question now is: has the controversy been resolved by the new Act? Put differently, is computer-related evidence under the Evidence Act 2011 primary documentary evidence or secondary documentary evidence?

[55] T Osipitan, op. cit.

It can be stated that this question is one of the questions which the Evidence Act 2011 has attempted to answer. Unlike the old Evidence Act, the new Act contains a provision which seems to answer the question. This provision reads as follows:

> Where a number of documents have all been made by one uniform process, as in the case of printing, lithography, photography, computer or other electronic or mechanical process, each shall be primary evidence of the contents of the rest; but where they are all copies of a common original, they shall not be primary evidence of the contents of the original.[57]

The above provision is an improvement upon section 94(4) of the old Evidence Act. The old provision was improved by the inclusion of the highlighted words, "computer or other electronic or mechanical process" in the new provision in apparent recognition of the introduction of provisions dealing with computers.[58] Having seen the new provision, can one say that one is now not left in doubt as to the classification of a document produced by a computer which is declared admissible under section 84(1) of the Act? Can one say that such document has now been expressly classified as primary evidence? A careful look at the provision will reveal that it does not make reference to 'a document produced by a computer'. Instead, it talks of "a number of documents ... made by one uniform process". Thus, it envisages uniform production of several documents from a computer and treating each of these documents as primary evidence of the contents of the remaining documents. For instance, if ten copies of a customer's statement of account in a bank have been produced from a computer where such information has been stored, provided all were produced through the same process of, e.g., printing on hard paper, each of the ten documents is primary evidence of the contents of the remaining nine. Any one of such ten documents can be tendered in court and admitted as primary evidence.

What then would be the position of the law if a document sought to be tendered in evidence is not one of "a number of documents" produced

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[56] Section 86(4) of the Act
[57] Particularly section 84 of the 2011 Act on the admissibility of document produced by a computer and section 258 defining the word "computer".
[58] Section 87 (b) of the Act

uniformly by a computer but rather simply a document produced by a computer? Does this give problem? I submit that a document not one of “a number of documents” is a different document. This is because of the conundrum that we stated above that the provision merely seems to answer the question. Of course, the provision does not deal with such document directly. But there is reference to documents which “are all copies of a common original”. Here, two set of documents emerge: one set is composed of “copies” while the other set is “a common original” from which the “copies” are made. By the provision, the “copies” are not primary evidence. They can at best be secondary evidence. In fact, some other provisions in the Act have already described as secondary evidence copies of documents “made from the original by mechanical or electronic processes”,[59] or “made from or compared with the original”.[60] The “common original” document from which copies are made is original document as the section clearly mentions. This original document when tendered in court is undoubtedly primary evidence because the Act provides that “primary evidence means the document itself produced for the inspection of the court”.[61]

The problem is solved if we consider the “common original” document to be the document produced alone by a computer. In this case, such document is simply primary evidence and any copies made from it are secondary evidence. However, the conundrum still remains if the “common original” document is interpreted to mean the computer itself from which the document was produced. This interpretation is possible because, as we saw earlier, the definition of ‘document’ under section 258 of the Act is wide enough to include magnetic devices such as the computer. The implication of this interpretation is that even the single document produced by a computer can only be secondary evidence, the primary evidence being the electronic material stored in the computer. In this sense, it would not make any difference whether what is produced by the computer is “a number of documents” or just a single document. Both would be copies of a common original document in the form of a computer and therefore secondary evidence. The primary evidence would only be available when the computer itself is produced for the inspection of the court.

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[59] Section 87 (c) of the Act
[60] Section 86 (1) of the Act
[61] Supra

The foregoing simply suggests that the question whether a document produced by a computer is primary evidence or secondary evidence is still open to debate and interpretation. Kanyip (extra-judicial) however seems to have been swayed by the improvement made in section 86(4) of the Act leading to his conclusion that such a document is now clearly primary evidence. He even went further to argue that "by the combined effect of sections 86(4) and 87 (b) [of the Evidence Act 2011], it would appear that the Supreme Court decision in *Anyeabosi v. RT Briscoe*[62] to the effect that a computerised statement constitutes secondary evidence of the original is no longer tenable".[63] Based on the arguments we have made above, it appears that, with due respect, it is the position of the learned Justice which may be incorrect and not the decision of the Supreme Court. Moreover, it would not be right for the learned Justice to assess the decision of the Supreme Court given on the basis of an old provision when such assessment is made in the light of a new and different provision. Given the still unclear provision of the law on this matter, it would not be surprising for the Supreme Court to maintain its position that such evidence is secondary evidence even in the face of the new provision.

Conclusion

The new Evidence Act 2011 can be described as a revolutionary legislation which could revolutionise the conduct of trials before the courts in Nigeria. It was particularly hailed and received with nostalgia due to its novel provisions such as the ones dealing with computer-related evidence.[64] With the coming of the Act, there is now a provision dealing directly with computer-related evidence. In any event, since a statement contained in a document produced by a computer is now clearly made admissible by the new Act, it can be argued that one old defect has been cured. However, the cure is incomplete. This is because the provision tilts more towards computer-related evidence in the form of documents produced by a computer e.g. computer printout of a customer's statement of account in a bank. It does not cover other computer-related evidence such as where the computer or a mobile phone is produced as documentary evidence before the court. In other words, what the new Act has done is to concentrate

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[62] BB Kanyip, op. cit., at 48

[63] See for instance *ThisDay* newspaper of Tuesday July 26, 2011, "The A-Z of the New Evidence Act : How It'll Revolutionise the Conduct of Trials", p. viii-x.

on computer-generated evidence rather than computer-related evidence. The new Evidence Act 2011 has also attempted to cure the defect of lack of express classification for computer-related evidence in the old Evidence Act. This it did by treating a number of documents made by a uniform process through a computer as primary evidence. Each of these documents is primary evidence of the contents of the remaining documents. But there is no provision dealing with a situation where what is produced from the computer is not “a number of documents” but rather a document alone. The absence of such provision is more fatal when one considers the fact that the new Act in making computer-related evidence admissible simply focuses on “a document produced by a computer”. I humble suggest that the problem can be solved by considering the “common original” document (referred to in the Act and from which copies are made) as the document produced alone by the computer. But the defect still remains if the “common original” document is interpreted to mean the computer itself since by the Act, a document could include a computer.

On the whole, there is no gainsaying the fact that the new Evidence Act 2011 has attempted to cure many of the defects in the old Evidence Act relating to the admissibility of computer-related evidence. The legislature in enacting the Act was responding to an old call for a review of the evidence law with a view to catching up with modern business dealings where paper-based transactions are being replaced by paperless transactions courtesy of the computer. But from the lacunae in the Act highlighted, it appears the review was not painstakingly made by experts in the law of evidence. A thorough review of this area which has been crying for legislative attention would have produced a much better result. As it is, though the new Act has creditably introduced provisions on computer-related evidence, it is difficult to say that it has completely cured the defects contained in the old Act.