Admissibility of Computer/ Electronically Generated Evidence In Nigeria - A Welcome Development*

Abstract
A century ago, iPads, iPods, laptops and net books were science fiction, but are today's mode of communication. While telecommunications evolve by the day, e-mails, digital photos, automated teller machines, word processing, instant messages etc are now taking over paper documentations or works. This globally enjoyed technology is abused by deviants in our world today, leading to new ways of perpetrating criminal activities e.g. cyber crimes and electronic crimes. It is in this light that the Nigerian Evidence Act of 1945 was amended in 2011. This work will examine the admissibility of computer generated evidence under the Evidence Act of 2011 in Nigeria.

Introduction

Revolutionary technology, particularly with regards to commerce, communication and crime investigation renews interest in the understanding of the evidentiary standards for assessing the admissibility of electronically-generated evidence.[1] Every second, massive business transactions are conducted across varied electronic platforms resulting in

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*Mrs. Beatrice Shuwa, Senior Lecturer, Litigation Department, Nigerian Law School Headquarters, Abuja- Nigeria, (beatriceshuwa@yahoo.com).

[1] As far back as the case of *Esso West Africa Inc. v. T. Oyegbola* [1969] 1 N.M.L.R. 194 at 198, the Supreme Court of Nigeria had identified the potential transformative effect of technology and the need for a more dynamic approach in the legal treatment of digital

generation of electronic data interchanges and computer records. Questions regarding the analysis, authentication, admissibility and reliability of electronic evidence are predicted to generate heated controversy in the legal process as Nigerian Courts apply the provisions of the Evidence Act, 2011.

The practical complexities that commonly arise in the context of application of legislation dealing with admissibility of computer generated evidence include:

(a) are computer outputs or printouts primary or secondary evidence or are they to be treated as one of the hearsay exceptions?

(b) are computer devices themselves documentary evidence? Are they in fact reliable? Another critical question is whether computer-generated evidence can be admitted under any of the provisions of the Evidence Act, 2011 besides the specific provision of Section 84.[2]

The general principle governing the law of evidence is that all evidence which is sufficiently relevant to an issue before the court is admissible and all evidence that is not relevant are inadmissible in evidence. A court faced with the problem of the determination of a suit before it can only solve such problem after making an inquiry into the relevant facts of the case as put before it by the parties and by drawing inferences from those facts.[3] During trials, judges are often asked to rule on the admissibility of electronic evidence. How the court rules on questions of admissibility

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evidence when it held as follows: "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." See also *Yesufu v. ACB* [1980] All N.L.R 1;[1976] 4 S.C. 1. See generally Yemi Osinbajo, Electronically Generated Evidence (2001) in Afe Babalola (ed.), *Law and Practice of Evidence in Nigeria*, (Ibadan: Sibon Books, 2001) Ibadan.

[2] Other possible windows for admissibility of computer- generated documents include Section 90 (Previously Section 97) and Section 41 of the Evidence Act, 2011.

[3] OS Akinwumi & KT Lawal, "Admissibility of Computer-Generated Evidence Under Nigeria's (New) Evidence Act, 2011." Sourced at *https://litigationessentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=40+Int%27l+J.+Legal+Info.+583&srctype=smi&srcid=3B15&key=4c01c56473a8992291f5b6376dfdda2a*.

could substantially impact the outcome of a civil lawsuit or determine the difference between conviction or acquittal of an accused person.

Generally, computer evidence falls into one of five distinct categories:

a) Website Data;
b) Social Network Communications and Postings;
c) Email;
d) Text Messages;
e) Computer Stored/Generated Documents.

As courts continue to grapple with this new electronic frontier it is important to stress that electronic evidence is subject to the same rules of evidence as paper documents. However, the unique nature of e-evidence, as well as the ease with which it can be manipulated or falsified, creates hurdles to admissibility not necessarily faced with other evidence.[4]

The aim of this paper is to examine challenges that were hitherto encountered in the litigation process in relation to electronic/computer generated evidence in Nigeria under the former Evidence Act, 1945, to highlight the standard for the admissibility of electronically- generated evidence under the Evidence Act, 2011 and to address some of the practical complexities envisaged in the litigation process. Considering the fact that the Nigerian case law is still undeveloped on the application of this aspect of the Evidence Act 2011, this work reviews milestones in Nigerian law regarding the treatment of electronically- generated evidence.

Definition of Computer-Generated Evidence (Electronic Evidence)
Evidence has been generally defined as the collective mass of things, especially testimony and exhibits presented before a tribunal in a given dispute and include also, the body of laws regulating the admissibility of the mass of things.[5] It refers to the materials by which a court or tribunal

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[4] A Pendleton, "Admissibility of Electronic Evidence: A New Evidentiary Frontier". Sourced at *http://mnbenchbar.com/2013/10/admissibility-of-electronic-evidence/* last visited on 14th February, 2014 at 12.30 p.m. Also see GP Joseph, "A Simplified Approach to Computer-Generated Evidence and Animations" *http://www.jha.com/us/articles/viewarticle.php?8* last visited on 14th February, 2014 at 12.57 p.m.
[5] *Black's Law Dictionary*, 8th ed., (Minn.: West Publishing) 549.

may be convinced about the merits or demerits of a case. It also encompasses the rules that govern the admissibility of such objects or materials as are presented to the court in order to establish facts in a case pending before it.[6]

Although a precise definition of the computing process is beyond the scope of this work, a reminder of general computing technique will assist in analyzing the evidential issue presented by computer-generated evidence. The computer itself has been defined as an electronic machine which accepts inputs, processes, and brings out the final result. Computer generated evidence has no specific coverage but refers to the result of a computer process that is relevant as evidence to a particular case, for example, diskettes, tapes, video and audio recordings in handsets, computer printouts, contents of flash drives, etc.[7]

Section 258 Evidence Act, 2011 in Nigeria defines documents to include;[8]

(a) 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;

(b) any disc, tape, sound track, or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it;

(c) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; and

(d) any device by means of which information is recorded, stored or retrievable including computer output.

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[6] MM Stanley-Idum & VB Ashi, *Evidence Law and Practice in Nigeria*, (Abuja: MacDaniels Media Consult, 2011) 2.

[7] A Ojenike, "Admissibility of Electronically Generated Evidence in Nigeria". Being paper presented at the Law Firm of Simmons Cooper, Victoria Island, Lagos, Nigeria in 2013.

[8] Section 258 Evidence Act, 2011 is the Interpretation Section of the Act.

Earlier Challenges as to Admissibility of Computer/Electronically Generated Evidence in Nigeria

To say that the Evidence Act in Nigeria was in a frozen state before 2011 is an understatement. In spite of the giant strides made in information technology, which has raised serious legal challenges across the globe, the Evidence Act simply did not keep pace with the developments in information technology to fill the gap created. An author commented thus:

Statutory law in Nigeria has hardly kept pace with social realities. This is despite the fact that between such realities and the law there should ordinarily be a mutually beneficial interpenetration. This has ensured that in some important areas of life and business, statutory law has remained in yesterday while the society marched on in dynamism.[9]

It is against this background that the 3rd day of June, 2011 will for a long time to come, remain memorable to lawyers, judges and all those who are interested in the Nigerian legal system. On this day, President Jonathan, signed into law, the Evidence Act 2011.[10] Many areas in the 1945 Act were in dire need of reform, especially those areas relating to information technology, in the specie of computer/electronically-generated evidence.

Growth and development over the years makes computer a necessary business tool. Virtually every business transactions across the world, Nigeria inclusive, are largely computer-related. In the banking industry for instance, computer based devices such as Automated Teller Machines, Personal Identification Numbers, Electronic Fund Transfers, etc., are in constant use and these are all computer generated. But these modern devices are not without attendant legal challenges, for example, there is a need for legal categorization of say fraud committed through the ATM or Electronic Fund Transfer. Needless to say it would be most challenging to imagine modern banking is impossible without the use of computer. The use of computer is not limited to the banking industry. In fact, in some courts in Nigeria today, proceedings are now recorded electronically.[11]

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[9] AI Chukwuemerie, Affidavit evidence and Electronically Generated Materials in Nigerian Courts (2006) 6 (3) *Script-ed*, 177.

[10] Prior to that, it was the Evidence Act of 1945 that was applicable in Nigeria.

[11] JA Agaba, *Practical Approach to Criminal Litigation in Nigeria* (Pre-Trial & Trial proceedings, Abuja: Pamf Press (2011) 736-748.

When the former Evidence Act (1945) was enacted, there must have existed very limited computers. Means of record keeping was predominately through paper, files and cabinets. Today, the world has moved into more modern storage means ranging from audio recording, video recording, CDs, VCDs, micro-films, micro-chips, diskettes, SMS messages to e-mails. In the same way, new means of criminal activities have evolved. Criminals have moved from the conventional stealing of cash or food items to theft of money through electronic or other intangible means. From the conventional way of sending a threat through one person to another, there is a movement towards a simple text message from the GSM phone or an electronic mail through the internet. Unraveling such criminal activities becomes a serious challenge.[12]

Both in civil and criminal cases, the issue of admissibility of computer-generated evidence have been a common challenge. The need to evolve a dynamic approach for dealing with computer generated documents in the court's fact-finding process had been recognised several decades ago. The Supreme Court in one of the earlier and frequently cited Nigerian case law on the admissibility of electronic evidence in Nigeria, *Esso West Africa Inc. v. Oyegbola*[13], stated that 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 this case, the Supreme Court was considering the admissibility of a document signed in quadruplicate with carbon copies through one single process with the original copy. Relying on Section 93 of the Evidence Act, 1945, the court held that where a number of documents are made by one single process of the use of carbon paper, each of such document so reproduced is primary evidence of the other quadruplicate copies. The issue for determination was whether or not computer statements of account and their ledger copies were admissible in evidence as "books of account" under Section 37 of the 1945 Evidence Act.

In proof of a claim for the balance of an amount due and owed for petroleum products sold to the respondent, the appellants stated that they normally kept the respondent's accounts and that at the end of each month, statements of account were made out and sent to the respondent. The appellant's

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[12] Supra.
[13] [1969] 1 NMLR 194.

attempt to tender the ledger copies of the statements of account already sent to the respondent in the manner stated above was rejected by the trial court on the ground that they did not constitute the type of books of account contemplated by the law. In the view of the trial judge, what the law contemplated are "usually bound copies with pages that are not easily replaced". In rejecting that line of thought, the Supreme Court stated:

Besides, Section 37 of the Evidence Act does not require the production of "books" of account but makes entries in such books relevant for purposes of admissibility.... 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 apply to "books" of account...so bound and the pages not easily replaced.[14]

Following the same pro-active style by the Supreme Court in the above case, the Court of Appeal maintained that the express use of the word 'computer' in the Evidence Act should not preclude the admission of a computer printout of statement of account and that, in fact, the court should take judicial notice of the wave of computers. In *Ogolo v. I MB*, Omalaja JCA stated:

> The commercial and banking operations in the keeping of accounts by the old system has changed to computer, which makes Nigerian business to be modernised and in keeping with the computer age which system is so notorious that judicial notice of it can be taken under S. 74 of the Evidence Act. [15]

It must be stressed at the outset that the controversy over whether computer-generated evidence is admissible or not stemmed from the question of classification of evidence. Generally, evidence can be classified as oral, documentary, real and circumstantial. By its very nature, computer generated evidence appear more in the mould of documentary evidence. But herein lays the challenge. If it is largely paperless in nature, how then can it sit in the square of documentary evidence?

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[14] Ibid at 198.
[15] (1995)9 NWLR (pt. 419) 314.

Even if this hurdle is scaled, then next is to determine whether it is primary or secondary, for purposes of admissibility. According to Yemi Osinbajo, "such transactions, by their nature restrict the use of rules of proving documentary evidence. Even where such transactions are paper-based, the mode of their generation considerably strains the traditional rules of proof of evidence.[16]

If as suggested above, computer generated evidence is more documentary in nature, then, there is the hurdle of whether it so qualifies as documentary in view of the definition of 'document' provided in the Evidence Act of 1945. Chukwuemerie posits as follows:

> For instance, when information recorded or stored in the memory of a computer is printed out on paper it is not easy to say that the version in the memory is a document. Nor is it easy to assert that the print out is an original or a copy. It is also not easy to classify an audio tape recording, a video tape recording, a text message on a GSM telephone, an electronic mail on a computer screen, information contained in CDs, VCDs or such other things, as originals or copies.[17]

To appreciate the controversy, section 2 of the 1945 Evidence Act provides:

> '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.

From the above definition, computer or electronically generated evidence clearly does not expressly come within the definition of documents. Also, assuming that they do, the question still remains, what is the document? Is it the printout of the computer generated material or the computer where the information is stored? Which is a primary or a secondary evidence for purposes of complying with the best evidence rule in Section 94 of the same Act or is admissible as secondary evidence under Section 97 as the case may be?

Even though audio and video tapes do not come within the definition of documents in section 2 of the then Act, the courts have, most appreciatively

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[16] Yemi Osinbajo, "Electronically Generated Evidence" in Afe Babalola (ed) *Law and Practice of Evidence in Nigeria* (Ibadan: Sibon Books Limited 2001) Pp. 243-244.

[17] Op.cit at178.

filled in the gap over the years. Thus, in *Owodunni v. Registered Trustees of Celestial Church of Christ*[18], the court admitted in evidence a video recording. In the same way, in *Prince Edward Eweka & Ors v. Asonmwonriri Rawson & Ors*[19], a succession dispute, a tape recording showing where and when the respondent, an illegitimate child was acknowledged as the son of the late Enogie of Obagie in Edo State was admitted in evidence. Also, in *Gani Fawehinmi v. Nigerian Bar Association (No.1.)*,[20] the plaintiff sought to tender an audio tape of a reconciliatory meeting held between him and the defendant. The document was rejected by the court. But the reason for the rejection was that it was evidence obtained at a meeting for the amicable settlement of a dispute out of court and therefore not admissible. The reason for its rejection was not connected to the computer nature of the tape.

With a view to be purposive in interpreting the then Evidence Act and get around the difficulty created by the provision of section 2 of the 1945 Act, the courts have sometimes adopted a liberal interpretation of the section by stating that the definitions of 'document' and 'bankers' book' therein are not exhaustive.

That is commendable and in line with international jurisprudence. For example, in *Blakey v. Continental Airlines*[21], the Jersey Supreme Court held the respondent liable for the e-mail posted on its electronic bulletin by its chosen Internet Service Provider (ISP), which sexual harassed a female pilot. It originated from one of its airline workers. The Court held that e-mail on the company's bulletin from the company's workers was as good as emanating officially from the company.

Also, in *United States vs. Ferber*[22], the accused worked as a financial advisor and investment banker who concentrated his practice principally in the area of public finance. At various times, public entity clients retained the defendant and the firms for which he worked as financial advisors.

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[18] [2000] 6 SC (pt 3) 60.
[19] (2000) 10 NWLR (pt 722) 723.
[20] (1989) 2 NWLR (pt 105) 494.
[21] N.J.Sup.Ct 1 2007.
[22] 966 F. Supp. 90,92 (D Mass. 1997).

Prosecutors alleged that the defendant used his special relationship with these public entity clients to obtain kickbacks from an investment firm (Merrill Lynch). Specifically, the government attempted to show that the defendant told employees of Merrill Lynch that "if they wanted to get business with the public entity clients, they would have to do favours for him." During the trial, the prosecution attempted to introduce an e-mail written by a Merrill Lynch employee to his supervisor shortly after the employee had spoken with the defendant. The e-mail message was printed out as a multi-paragraph document recounting a telephone conversation between the employee and the defendant, "wherein Ferber inculpated himself" regarding his wrongdoings. The Court admitted the e-mail in evidence because, through the e-mail, the employee was explaining the conversation he had with the defendant immediately after the incident happened. Naturally, the entry of the destructive e-mail greatly weakened Ferber's defense. In fact, based primarily on this evidence, a jury ultimately convicted Ferber on fifty-seven counts.

In *Yesufu v. A.C.B*[23], there was an objection to the admissibility of a bank statement prepared by an operator from the ledger card of the bank. The operator obtained the entries from the vouchers generated in the ordinary course of business. The bank officer that tendered the statements did not personally prepare the statements or verify that the statements were correct. There was an objection to the bank statement on grounds that the bank failed to lay necessary foundation as to the existence of a banker's book from which the entries were extracted as well as its custody and control. In addition, it was contended that there was no evidence that the copy was examined with the original entry and found to be correct. The Supreme Court held that the bank statements purportedly derived from its day-to-day vouchers were inadmissible without proper foundation being laid under Section 97 (1) (h) of the Evidence Act 1945. Importantly however, the Supreme Court referred to its earlier decision in *Esso West Africa Inc v. Oyegbola* and stated that "it would have been much better, particularly with respect to a statement of account contained in a book produced by a computer, if the position is clarified beyond doubt by legislation as has been done in the English Civil Evidence Act- 1968. "[24]

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[23] [1976] 4 SC 1 at 9-14.

[24] Supra. Notably, s .5 of the English Civil Evidence Act 1968 relating to admissibility of computer-generated documents has now been adopted in the Nigerian Evidence Act, 2011.

In the later case of *Anyaebosi v. R. T. Briscoe*[25] a statement of account stored and reproduced from a computer was held to be admissible under Section 97 (1) and (2) of the (old) Evidence Act 1945. Section 97(1) and (2) permitted the admissibility of secondary evidence of bank statements upon the satisfaction of conditions stated under subsection 2(e). The court stated that the documents referred to under sub-section 2(e) can be generated through computer process and that documents so generated are not completely excluded by the Evidence Act. In *Ogwuma Associated Companies (NIG.) Ltd v. I.B.W.A Limited*[26] the Supreme Court made a notable pronouncement on the need for Nigerian courts to take cognisance of technological advancement in modern banking procedures and evolve a cautious approach in interpreting Section 97 of the old Evidence Act.

In *Federal Republic of Nigeria v. Fani-Kayode*[27], the Court of Appeal stated that the word 'include' used in the said section meant that the definition 'document' and 'bankers book' was not exhaustive. The respondent was arraigned before the Federal High Court on a 47 count charge of money laundering. He pleaded not guilty. In the course of the trial, the prosecution sought to tender a certified true copy of the computer generated statement of account of the respondent domiciled with the First Inland Bank Plc. The respondent's counsel objected to the admissibility of the document, citing section 97 of the (old) Evidence Act. The objection was upheld and the computer generated printout was rejected. On appeal, the sole issue for determination was whether computer printout of a statement of account is admissible under the combined provisions of sections 2, 37, 97(1) and (2) of the Evidence Act. Learned counsel for the respondent, Ladi Williams, SAN in urging the court to dismiss the appeal argued thus: "the Evidence Act was enacted before the computer age. The Judges have to apply the Evidence Act (Law) as it is and not as it ought to be."[28]

Rejecting the contention of the counsel, the Court made copious reference to the dictum of Lord Denning in *Packer v. Packer*[29] and held that the

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[25] (1987) 3 NWLR (pt 59)84 at 96-97.
[26] (1988) 1 NSSC (pt 59) 84at 413.
[27] (2010) All FWLR (pt 534) 181.
[28] Supra.
[29] (1954)(pt 15) 22. Cited in JA Agaba, op cit Pp 737 and 746.

Court must be proactive in interpreting provisions of a statute including the Evidence Act. It stated:

> While Judges must refrain from attempting to make laws from the Bench, they must not shy away from adopting a proactive approach to the interpretation of the law. Judicial officers must not place on themselves disabilities not imposed by law.

On the whole, the court held that the computer printout of the statement of account was admissible in evidence for purposes of the criminal trial.

Also, in the case of *Odiawa v. Federal Republic of Nigeria*[30] the Court admitted internet mails sent to the complainant by the accused, on which the complainant acted upon and was duped to the tune of Two Million United States Dollars (USD 2m). The Court also admitted the GSM phone used by the accused to communicate with the complainant. The court considered the fact that the mails were sent from the accused's computer and business centre as well as the admission by the accused that he changed his password before communicating with the complainant. The accused acted under the name of Abu Belgore throughout the transaction. In the same vein, the court can admit in evidence an unsigned document that is computer generated although such an unsigned document is generally worthless. The Court of Appeal, following the earlier Supreme Court decisions in *Yesufu v. ACB*[31] *Anyaebosi v. R. T. Briscoe*[32] held that the computer printout of a bank statement was admissible under Section 97 (1) and (2) of the old Evidence Act. Specifically, the Court held that the definition of a document under Section 2(1) of the old Evidence Act covers a computer-generated bank statement of account and was properly admitted having satisfied the conditions under Section 97(2) (e).

These cases are indicative of a liberal approach by Nigerian courts to admit computer- generated documents as secondary evidence within the permissible scope of Section 97 of the old Evidence Act now section 89 of the Evidence Act 2011. The monumental importance of these cases is in setting the direction for a far-reaching legislative intervention introduced by the Evidence Act, 2011.

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[30] (2000) All FWLR (pt 439) 436.

[31] Supra.

[32] Supra.

Admissibility of Computer-generated Documents under Section 84 of the Evidence Act, 2011

As an initial matter in law, facts in issue are established by admissible evidence. In general, the threshold test for the admissibility of evidence, including computer-generated documents is relevancy. Accordingly, only computer-generated documents, which establish the existence or non-existence of facts in dispute are relevant, provided they are not rendered inadmissible by other exclusionary rules of law.[33] This consideration of relevancy does not present any unusual difficulty for computer-generated evidence than other forms of documentary evidence or oral evidence.

As regards the standard for assessing the admissibility of computer-generated documents, the Act extensively provides:[34]

1. 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 subsection (2) of this section are satisfied in relation to the statement and computer.

2. The conditions referred to in subsection (1) of this section are-

(a) that the document containing the statement was produced by the computer during a period over which the computer was 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 any body, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of

[33] Sections 1 and 2 of the Evidence Act, 2011.
[34] Section 84 of the Evidence Act 2011.

that period was not such as to affect the production of the document or the accuracy of its contents; and

(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.

3. Where over a period the function of storing or processing information for the purposes of any activity regularly carried on over that period as mentioned in subsection (2)(a) above was regularly performed by computers, whether:

(a) by a combination of computers operating over that period;

(b) by different computers operating in succession over that period; or -

(c) by different combinations of computers operating in succession over that period; or.

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers.

All the computers used for that purpose during that period shall be treated for the purposes of this Part of this Act as constituting a single computer, and references in this section to a computer shall be construed accordingly.

The requirement for System Operator's Certificate

In any proceeding where computer-generated evidence is intended to be presented, section 84(4) requires a certificate[35], duly signed

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[35] Recently however, the Federal High Court in a ruling delivered by Hon. Gabriel Kolawole, J. in *F.G.N. v. Senator Mohammed Ndume* admitted a DVD tendered as evidence notwithstanding the proponent's failure to satisfy the conditions under Section 84 (2) (a-d) of the Evidence Act, 2011. The Court held that after a juxtaposition of the provision of Section 84 (2) (a)-(d) of the Evidence Act with the oral testimony of PW3 which was buttressed by Exhibit P7 (the account of how the contents of the phones were downloaded into the DVDs, merely on the ground that they were "Computer generated products" and the detailed procedure and steps prescribed by Section 84 (2) (a)-(d) of the Evidence Act were not allowed. The court held thus "My view is that against the elaborate testimony of PW3 as to what he did when he "Exploited" Exhibit "P5A" and the contents of exhibits

by the designated system operator or any person who has responsibility for the management or operation of the computer system.

Section 84(4) of the Evidence Act, 2011 provides as follows:

4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, 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;

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) above relate, and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities as the case may be, shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

The above conditions for admissibility of computer-generated evidence primarily deal with establishing that the relevant computer device had been in regular and routine use; was considerably functional and that the output generated is accurate. Failure to lay the necessary foundation for admissibility of computer-generated evidence would render the document inadmissible. This trend of Nigerian case law is predictable from the recent

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"P7" already tendered and admitted in evidence, it will be sheer affectation and a needless leaning on technicalities to reject these "computer generated" products for the simple reason that there has been non-compliance or substantial compliance with the provision in Section 84 (2) (a)-(d) of the Evidence Act, 2011. A testimony such as PW3 has given as to what he did whilst "Exploiting" Exhibit "P5A" to produce the DVDs. The testimony of PW3 as the maker is in my view, is sufficient proof of their attestation even without the need for any further "Certificate". Exhibit P7 was intended by my understanding of the general tenor of PW3's Evidence, to serve as a "Purveyor" as to how the contents of the three DVDs were produced." It will be interesting to see if the Federal High Court's decision can withstand appellate scrutiny considering the earlier decision of the Supreme Court in *Kubor v. Seriaki* (Supra).

Supreme Court decision in *Dr. Imoro Kubor & Anor v. Hon. Seriake Henry Dickson & Ors*[36]. The documents in this case were two printouts from the website of an online newspaper. The Supreme Court held that the documents were inadmissible for failure to satisfy the four conditions stated in Section 84(2) of the Evidence Act, 2011. Onnoghen JSC, said:

> Granted, for the purpose of argument, that Exhibits "D" and "L" being computer generated documents or e-documents downloaded from the internet are not public documents whose secondary evidence are admissible only by certified true copies then it means that their admissibility is governed by the provisions of section 84 of the Evidence Act, 2011. Section 84 (1) provides thus:
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>> "(1) 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 condition in subsection (2) of this section is satisfied in relation to the Statement and the computer in question.
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>> The conditions are:
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>> (a) that the documents containing the statement was produced by the computer during a period over which the computer was used regularly to store or process the information for the purpose of any activities regularly carried on over that period, whether for profit or not, by anybody whether corporate or not or by any individual.
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>> (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived.
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>> (c) that throughout the material part of that period the computer was operating properly or if not that in any respect in which it was not operating properly or was out

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[36] [2012] LPELR-SC. 369/2012. English Courts, applying an equivalent provision in Section 5 of the Civil Evidence Act, 1968, have emphasized the need to lay proper foundation for the admission of computer-generated evidence. See *R v. Wood* (1983) 76 CR App. Rep. 23. In criminal proceedings, computer-generated evidence is governed by Section 69 of the Police and Criminal Evidence Act 1984 which provides that computer-produced evidence is admissible as long as there exists no reasonable grounds for believing that the statement it contains is inaccurate because of improper use of the computer and that, at all material times, the computer was operating or that the malfunction did not affect the production of the document or the accuracy of the statement. See *R v Shepherd* [1993] 1 All ER 225, HL.

> of operation during that point or that period was not such as to affect the production of the document or the accuracy of its contents.
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> (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.[37]

Continuing, His Lordship stated:

> There is no evidence on record to show that Appellants, in tendering Exhibits "D" and "L" satisfied any of the above conditions. In fact they did not, as the documents were tendered and admitted from the bar. No witness testified before tendering the documents so there was no opportunity to lay the necessary foundations for their admission as e-documents under Section 84 of the Evidence Act, 2011. No wonder therefore that the lower court held, at page 838 of the record thus: - "A party that seeks to tender in evidence a computer generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under Section 84(2) of the Evidence Act, 2011. I agree entirely with the above conclusion. Since appellants never fulfilled the pre-conditions laid down by law, Exhibits "D" and "L" were inadmissible as computer generated evidence/documents."

Furthermore, under sub-section (3) all the computers used over the relevant period to store and process the information, whether operated as a combination of computers or in succession, are treated as a single computer.

Electronic evidence and the Hearsay Rule

It is also important to examine how the source of information and the mode of storage are relevant in determining whether the information constitutes hearsay or not. Computer information may be generated from a variety of sources which include:

(a) Information supplied by human beings (for example, where an operator inputs data into the computer),

(b) Information obtained from another device (e.g. shared data from equipment connected to network, and

[37] [2012] LPELR-SC. 369/2012

(c) Information independently or automatically perceived or sensed by the computer device (e.g. auto recording by CCTV Cameras, etc).[38]

Section 84(5) of the Evidence Act further outlines some of the varied sources of computer inputs and treats any document obtained from any of the sources as a document produced by the computer whether it is produced by it directly or (with or without human intervention) by means of any device. It provides that for the purposes of this section:

(a) 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;

(b) Where, in the course of activities carried on by any individual or body information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) 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.

In general, the way the information obtained is processed by a computer varies. For example, the information may be:

(a) Recorded by the computer without any material change and the computer serves as a means of storage.

(b) The original data or information may be processed. If the computer is used to record information supplied by human intervention (either directly or through another electronic device) to the computer, that would be hearsay and inadmissible unless an exception applies. Conversely, if the information is an authentic record of an event or thing perceived or sensed by the computer or interpretation of data externally supplied to the computer, it is not caught by the hearsay rule[39]. Such information is covered by

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[38] A Ojenike, (n. 7).

one of the two major common law hearsay exceptions to computer evidence.

These are:

(a) Where the computer is used as a calculator or scientific tool;

(b) Where the computer automatically recorded data that is not supplied by any human intervention.

R. v. Wood[40] is illustrative of the first exception. In this case, certain types of processed metals were stolen in transit from the processor and metals of the same type were found in the appellant's possession. To prove that the metals found in appellant's possession formed part of the stolen metals, a computer printout of figures generated from the processor's record of the chemical composition of the stolen metals were tendered. The trial court admitted the computer printout. On appeal against the admission of the printout, it was held that the computer in the instant case was used as a calculator, a scientific tool. That being so, the result produced by the computer was treated as admissible.

To avoid the controversy associated with classification of evidence and the question of what constitutes original and/or copy in relation to electronic/computer generated evidence, section 258 of the Evidence Act, 2011 defines what constitutes a copy of a document. It states that, a copy of a document includes:

(a) In the case of a document falling within paragraph (b) but not (c) of that definition of "document" in this subsection, a transcript of the sounds or other data embodied in it;

(b) In the case of a document falling within paragraph (b) but not (c) of that definition, a reproduction or still reproduction of the images embodied in it whether enlarged or not;

(c) In the case of a document falling within both those paragraphs, such a transcript together with such still reproduction; and

(d) In the case of a document not falling within the said paragraph (c) of which a visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether

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[39] DW Elliot, Mechanical Aids to Evidence (1958) 5 *Criminal Law Review* 12-13.
[40] (1983) 76 Cr. App. R. 23. See also: *R. v. Cross* (1984) 1 WLR 1372.

enlarged or not;

(e) And any reference to a copy of the material part of a document shall be construed accordingly.

This clarification embodied in this section is quite germane as it saves counsel and the court the trouble of inquiring into whether a printed picture, with or without negative, a transcript or a replayed audio qualifies as admissible secondary evidence. A careful look at sections 86 and 258 of the Evidence Act, 2011 shows clearly that primary evidence refers to an original of a writing or recording. This is so because the writing or recording itself or any counterpart is intended to have the same effect by a person executing or issuing it. In the same vein, the 'original' of a photograph would include the 'negative' or any print therefrom. Also, if data is stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, would qualify as an 'original.'

In addition to the above, the Evidence Act, 2011 provides for recognition and legal effect of electronic signature. Precisely, Section 93 (2) provides that where a rule requires a signature or provides for certain consequences if a document is not signed, an electronic signature is sufficient to satisfy that requirement or to avoid any such consequence. On proof of electronic signature, subsection (3) provides:

> An electronic signature may be proved in any manner including by showing that procedure existed by which it is necessary for a person, in order to proceed further with a transaction, to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person.

It is noteworthy that the two subsections referred to above are absent in the 1945 Act. The provision for electronic signature is a welcome innovation as virtually every electronic transaction requires one form of identification or another.

Conclusion and Recommendations

On the whole, the clarifications and innovations introduced by the Evidence Act, 2011, particularly as regards the admissibility of computer/electronically generated evidence, is a welcome development. However, it is plausible to argue that there remain a few problems that are being or are likely to be encountered in the application of section 84 the Act. These are:

1. **Reliability and Authenticity**

   This arises from the modes or the means by which the evidence/information is stored. The questions that now come to mind are; is the method and the material used in storing the information reliable? Is it of a quality that can remain untampered? Some software have been designed in such a way that makes any form of alteration or tampering difficult. On the other hand, documents saved in a computer and other devices such as recording devices are susceptible to tampering. This challenge raises the question of authenticity.

2. **Authorship**

   In the past, it was easy to prove authorship of documents or written statements and handwriting of the person peculiar to him merely by bringing in a handwriting expert or by calling as a witness someone acquainted with the handwriting, i.e. someone accustomed to dealing with the person whose handwriting is sought to be proved. All that can now be challenging with the computer era.

3. **Computer illiteracy among legal practitioners**

   Another major problem is that, most of legal practitioners in Nigeria today are not yet computer literate. They do not know how to operate a computer. Caution then is to be exercised by legal practitioners who are entrusted with evidence by their clients to avoid tampering or simply erasing the file, because electronic information is of a delicate nature.

4. **The Unpopular Nature of the IT (Information Technology) System in the Judiciary**

   Some sections of the judiciary are yet to embrace computer-friendly equipment. Judges still record long-hand. Advocacy proceeds in instalments. Processes are filed and served manually. Unlike some advance jurisdictions where police officers are increasingly using video and tape recording in the investigation process, most police stations in Nigeria still use hand written confessional statements, often denied by accused persons.

It is recommended that computer literacy, which is very important, should be taken more seriously by law students, legal practitioners and indeed, the entire judiciary, if the innovations introduced by the Evidence Act are to be fully appreciated. Also, our Courts need to be better equipped with adequate modern facilities to cope with this modern trend. The issue of electricity and better power supply needs to be addressed headlong, as matters relating to computer/electronic evidence depend largely on the availability of constant power supply. It is hoped that in the very near future, computer/electronically-generated evidence will assist in bringing about a faster, more accurate and more efficient dispensation of justice in Nigeria.