

The evolving treatment of Wayback Machine evidence by U.S. federal courts

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authentication + admissibility overview

- Internet Archive Wayback Machine (IAWM) cited in 300+ U.S. federal court cases
- authentication challenges
- strategies include:
 - judicial notice
 - IA affidavit
 - witness w/ personal knowledge
 - expert witness



judicial notice

judge exercises discretion to admit evidence that is not subject to reasonable dispute

IA standard affidavit

standard legal affidavit provided by IA that attests that printed IAWM screenshots are authentic copies of its records

witness w/ personal knowledge

testimony by a knowledgeable witness that the evidence is what it is claimed to be

April 29th 2020
Choke Cherry
currently in Bloom

Prunus
Virginiana
Native

Teal
drop
shaped
leaves
with serrated
edges

White
Blossoms

expert witness

testimony by a witness w/
specialized knowledge, who applies
accepted methods of analysis

performance of judicial notice – U.S. federal courts

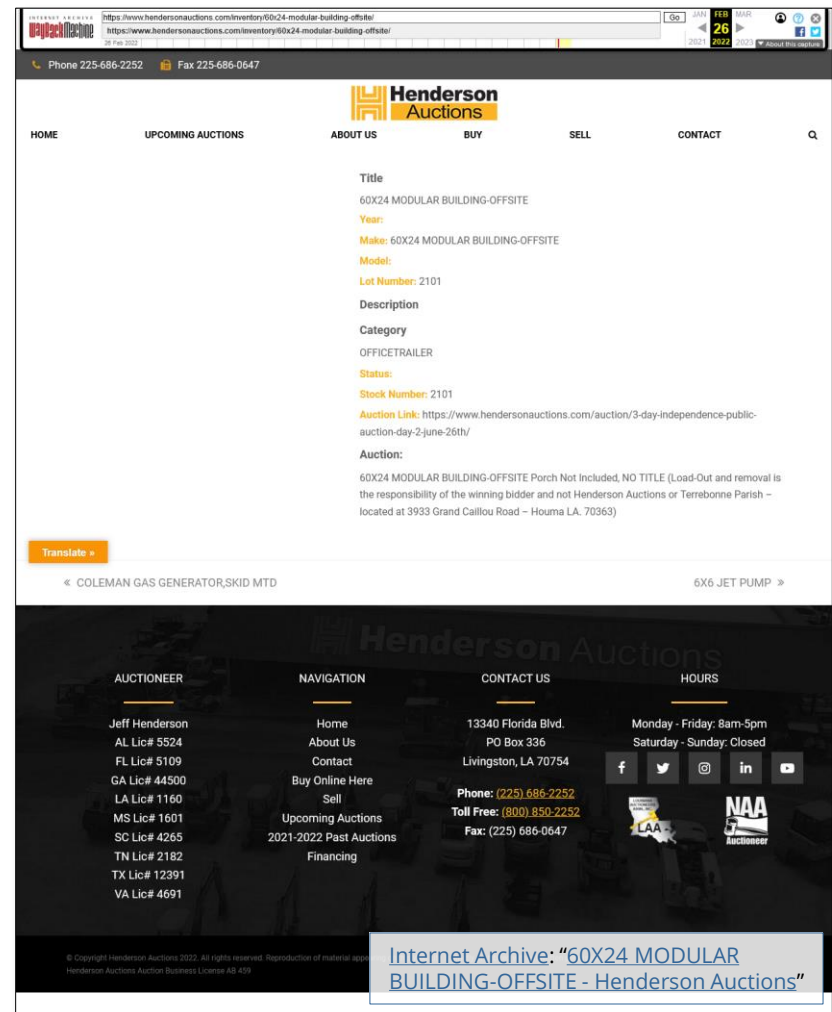
	judicial notice		IA standard affidavit		witness w/ personal knowledge		expert witness	
admitted?	yes	no	yes	no	yes	no	yes	no
U.S. district court	44	11	12	2	6	3	7	0
U.S. circuit court	1	2	2	0	3	1	2	0

Weinhoffer v. Davie Shoring, Inc. (2022)

- IAWM used to show online auction terms of sale
- district court's admission of IAWM evidence via judicial notice reversed

*"Here, there was no testimony to authenticate the archived webpage. Our sister circuits' decisions that the Wayback Machine is not self-authenticating are persuasive in the context of judicial notice. In sum, **the district court erred in taking judicial notice of the terms because a private internet archive falls short of being a source whose accuracy cannot reasonably be questioned** as required by Rule 201."*

*Weinhoffer v. Davie Shoring, Inc., No. 20-30568, at *7 (5th Cir. Jan. 20, 2022)*



Internet Archive: "60X24 MODULAR BUILDING-OFFSITE - Henderson Auctions"

performance of IA standard affidavit – U.S. federal courts

	judicial notice		IA standard affidavit		witness w/ personal knowledge		expert witness	
admitted?	yes	no	yes	no	yes	no	yes	no
U.S. district court	44	11	12	2	6	3	7	0
U.S. circuit court	1	2	2	0	3	1	2	0

performance of witness w/ personal knowledge – U.S. federal courts

	judicial notice		IA standard affidavit		witness w/ personal knowledge		expert witness	
admitted?	yes	no	yes	no	yes	no	yes	no
U.S. district court	44	11	12	2	6	3	7	0
U.S. circuit court	1	2	2	0	3	1	2	0

performance of expert witness – U.S. federal courts

	judicial notice		IA standard affidavit		witness w/ personal knowledge		expert witness	
admitted?	yes	no	yes	no	yes	no	yes	no
U.S. district court	44	11	12	2	6	3	7	0
U.S. circuit court	1	2	2	0	3	1	2	0



observed in many cases

judge was the one to introduce IAWM
evidence, to supplement the record



observed in many cases

judge was disposed towards
admission of IAWM evidence,
absent credible opposing arguments



observed in many cases

judge was disposed against
admission of IAWM evidence,
absent credible justifying arguments



observed in multiple cases

judge recognized + tolerated the fact
of IAWM archival incompleteness



observed in multiple cases

judge had concerns w/ IAWM's
disclaimers of its own reliability
+ archival completeness

The background of the slide is a photograph of a teal-colored folder or binder, which is slightly out of focus. In the upper right corner, a computer mouse is visible, also blurred. The overall lighting is soft and indoor.

observed in one case

party argued that mixed provenance of content in IAWM is a reliability concern

The background of the slide is a photograph of a desk. In the foreground, there is a teal-colored folder or binder. To the right, a computer mouse is visible on the desk surface. The lighting is soft, and the overall tone is professional.

observed in one case

party argued that IA affidavit preparer (i.e., IA Office Manager) didn't run the archival crawls + therefore not qualified to attest

The background of the slide is a photograph of a desk. In the foreground, there is a teal-colored folder or binder. To the right, a computer mouse is visible, slightly out of focus. The overall lighting is soft, and the colors are muted.

observed in one case

judge demonstrated understanding of IAWM webpages as temporal composites by noting that relevant text was in HTML

main takeaway

w/ rare exceptions, legal professionals appear to have only a general understanding of IAWM limitations



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