

**PROVIDING SUSTAINABLE
&
EQUITABLE ACCESS TO
INFORMATION:
PERSPECTIVES FROM NIGERIA**



Festschrift In Honour of

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**TAI SOLARIN UNIVERSITY OF EDUCATION PRESS
IJAGUN, VIA IJEBU-ODE, NIGERIA**

Published by

Tai Solarin University of Education Press

Ijagun, Ogun State, Nigeria

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First Published, 2016

ISBN: 978-978-956-607-5

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**DIGITIZATION AND ADMISSIBILITY OF DIGITAL
RECORDS IN NIGERIAN COURTS: STRATEGIES AND
LESSONS FOR THE LIS PROFESSION**

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Abstract

The global impetus and preference for automation of records management systems arising from propensity for greater efficiency and preservation imperatives has sustained the digitization of records from creation, retention, archival to disposal. The paper examined the admissibility of digital records as evidence in Nigerian courts. It noted that the Nigerian Evidence Act has not been reviewed for over sixty years hence it is largely deficient in accommodating technological developments compared to its counterparts in advanced nations. The requisite laws place highest premium on primary evidence as exemplified by original documents and regard digital records as surrogate and secondary evidence hence not admissible. The courts can only be persuaded to recognize third party authenticated versions. It is recommended inter alia that records of legal value should be notarized before digitization.

Introduction

Modern records management practices require that organizations and libraries digitize their records and have same processed, stored, transmitted and retrieved electronically. The era of digital records has increasingly necessitated the deployment of diverse Document Management Systems, either open source or proprietary and Institutional Repositories. Cleveland (2005) posited that the propensity for greater efficiency derivable from digital records has sustained the impetus and preference for automated control of records or documents through their lifecycle from creation, retention, archival to disposal. This method lends itself to easy document identification, classification, storage, tracking, retrieval, version control, workflow management and presentation.

Beyond the desirability and omnibus advantages of digital records over the paper counterpart, the issue of admissibility as documentary

evidence in Nigerian courts is a major concern of librarians and university administrators. Okonkwo (2014) averred that:

A case in point is the on-going trial of former Minister of Aviation, Chief Femi Fani-Kayode, on money-laundering charges. In a recent ruling at the Federal High Court in Lagos, Justice Ahmed Ramat Mohammed rejected a computer print-out of the defendant's statement of account as evidence. He opined that such a print-out was secondary evidence which was not authenticated and was therefore, inadmissible under Sections 97 (1) (h) and (2) (e) of the Evidence Act even if the print-out was relevant to the proceedings. Relying on UBA Plc V S. A P. U (2004) 3 NWLR Past 861 p. 516 at p. 543 paragraph A-G, and the Supreme Court's decision in Yesufu V ACB Ltd. (1976), (ANLP Past 1, 328) the Judge ruled that a computer print-out cannot be admissible as an entry in a banker's book.

Having recourse to the current legal framework in which Nigerian libraries operate where electronically-generated documents or digital records are regarded as secondary evidence, and not admissible because they are not original, it becomes a herculean task and poses a great deal of complexity tendering electronically generated records as evidence in the event of litigation.

Juxtaposing the above scenario with the spate of automation in libraries where university documents such as inventory records, examination answer scripts, financial records, policies, employment records, students' records, email web page files, library bibliographic records, back-up tapes, architectural drawings and building designs, patients' and medical records, general memoranda and so on are held in digital formats in line with global best practices, how sustainable is digital records management under the Nigerian legal system with respect to judicial pronouncements of inadmissibility of digital documentary evidences.

The chapter therefore seeks to explore valid strategies for mitigating and circumventing limitations imposed by such inadmissibility clauses as well as encourage sustainable digital records management within the LIS Profession. The specific objectives would include examination of digitization and current records management practices, evaluate the position of the Nigerian Evidence Act and electronically-generated records as well as provide strategies for ensuring admissibility of digital records in Nigeria.

Records Management Practices in Libraries

Records remain largely vital assets of any organization especially in a knowledge-based economy. Records constitute critical institutional memories for defining pathways and determining continued corporate existence based on explicit facts, data and objective parameters. It forecloses decisions anchored on sheer speculation and myths. It helps to preserve institutional memory so that informed decisions are possible and thus facilitate action by officials and their successors. In the ordinary course of daily activities and transactions, people generate records as evidences, for accountability or as an agreed narrative of events and decisions. Stewart and Melesco (2002) defined record as a piece of information created by or received by an organization or individuals that

gives evidence of a business decision or transaction and requires general preservation and retention. It is agreed that certain values must be discernable to justify a piece of information as records worthy of retention. They include:

- a) **Administrative Value:** that the records are adjudged relevant and valid for the performance of organizational operations.
- b) **Fiscal Value:** that the records are useful for present or future financial tasks or obligations of the organization. For example, tax returns, invoices, purchase and sales orders, bank statements etc.
- c) **Legal Value:** that the records provide evidence for proof of transactions in the event of possible litigations such records include articles of incorporation, deeds to property, contract agreements, minutes etc.
- d) **Historical Value:** that records furnish details on people, places and events defining organizational milestones relevant for research.

The need to effectively manage records has been the concerns of governments, organizations, universities and researchers over the years. State of Florida (2009) posited that “proper records management guarantees the availability of information when and where it is needed, in an organized and efficient manner”. It encapsulates a gamut of activities involving record creation, retention, utilization, storage, retrieval, disposal, recordkeeping requirements and policies that regulate institutional control over information flow.

Characteristics of a Record

Government Records Service (2011) identified basic characteristics of a record as comprising the following:

- v **Authenticity** - an authentic record is one that can be proven:
 - i. to be what it purports to be;
 - ii. to have been created or sent by the person purported to have created or sent it; and
 - iii. to have been created or sent at the time purported.

- v **Reliability**- a reliable record is one whose content can be trusted as a full and accurate representation of the transactions, activities or facts to which they attest and can be depended upon in the course of subsequent transactions or activities.

- v **Integrity** -the integrity of a record refers to its being complete and unaltered.

- v **Usability**- a usable record is one that can be located, retrieved, presented and interpreted.

It is important to recognize that records have lifespan signifying various progressive phases ranging from creation to disposal. Hoke (2011) outlined five stages of records lifecycle.

Lifecycle of records

Lifecycle of records is usually a global phenomenon mediated however by national laws, policies, procedures, customs and jurisdiction. However, UTMB Health (2013) conceptualizes five stages in the life cycle of records namely: Creation, Utilization, Maintenance, Retention and Disposition.

1. **Creation:** This refers to a phase when record contents are created and received in diverse formats such as paper, electronic, magnetic, photographic etc. At this point, the Record Retention Schedule defining the lifespan of each record item is also attached.

2. **Utilization:** Records are transmitted to those who require them for the conduct of organizational transactions and activities. At this stage, they are classified and filed according to Records Retention Schedule.
3. **Maintenance:** Records are stored in a device according to a logical scheme for subsequent retrieval. They are protected and maintained to preserve the integrity of the information. This category of records is known as active records because of the frequency of consultation and utilization for the daily business transaction.
4. **Retention:** when information and records decline in value of usage and termed inactive records due to noncurrent reference and are transferred from office to the Central Record Centre for the duration of their retention as specified by the Retention Schedule Policy.
5. **Disposition:** when records reach the end of their retention and have no more value for the institution, they are safely destroyed in line with approved methodologies. However, some records enjoy permanent retention for research and reference purposes.

Digitization and Records Management Initiatives

One of the drivers of change in the twenty-first century is undoubtedly information and communication technology. It has caused a radical departure from the manual and paper-based records management systems. The current practice is that institutions and libraries digitize their records using appropriate Document Management Systems or stored in their Digital Institutional Repository. National Archives of Australia (2010)

justified the digitization of records on the grounds that it confers benefits such as:

- the ability to locate and retrieve information in a fraction of time required for paper documents.
- the ability to save once and then share documents easily with colleagues anywhere, encouraging and facilitating new approaches to work.
- avoiding 'reinventing the wheel', that is, easy access to past work that can be re-used to support current tasks.
- reduced duplication of time and effort.

Digitization is the process of converting analogue information to a digital format (Feather and Sturges, 2003). Library materials such as books, papers, manuscripts, research papers, monographs, photographs, maps, architectural drawings are converted into electronic formats and made searchable online. Pandey and Misra (2014), Fabunmi, Paris and Fabunmi (2006) identified the processes of digitization of library resources as follows:

- * **Policy enactment and Approval:** The need for policy guidelines regulating digitization activities, workflow and access issues duly approved by top management as well as widely publicized and internalized within the organization.
- * **Planning, budgeting and Monitoring:** This recognizes the need to properly anticipate financial implications to equipment, software, staff training, source of funding, maintenance, license charges, contingency.
- * **Acquisition of Appropriate Technology:** This refers to hardware and software required for the project. The decision as to the choice

of open source or proprietary software as well as available technical support.

- * **Administrative Decision on the Procedure:** This involves establishing workflows, operational processes, timelines, outsourcing imperatives or in-house digitization depending on the availability of skills and cost implications.
- * **Sensitization, psychological Preparation and Retraining of Staff:** Faculty and Staff members have the tendency to show aversion for the digitization project and thus resist the change. There is need therefore to sensitize the entire community on the intricacies and benefits of the exercise, entertaining questions and clarifying issues with the aim of eventual buy-in to the project. The top management must show passion and willingness to manage the transition.
- * **Legal/Copyright Issues:** Recognizing the intellectual property rights of authors and publishers over materials to be digitized. Apart from internal documents or publications of the organization, the need to solicit and obtain permission from copyright holders prior to digitization is crucial. It also extends to protecting the digital records against copyright infringements.
- * **Selection Criteria:** The UNESCO, IFLA and ICA suggest that digitization initiatives should be user-centered or based on high demand for access (UNESCO, IFLA & ICA, 2002). This presupposes attempt at encouraging accessibility to certain records. Preservation of documents might necessitate or justify inclusion of specific records in a digitization project.
- * **Verifications:** the need to avoid duplications requires that institutions painstakingly ascertain whether digital copies already

exist or for re-digitization as a result of new technologies replacing older ones.

- * **Metadata:** This provides detailed description of digital records as a facilitating mechanism for easy retrieval and accessibility to contents. The quality of the metadata would invariably determine the extent or unique characteristics of the digital records and other technical information that could be captured. The decision of the type of metadata to be adopted is critical in digitization.

It may be interesting to note heightened preference for digital archives among world-class institutions and their sophisticated and ICT-savvy clientele as such records guarantee rapid and comprehensive access from anywhere at any time with multi-user possibilities of a single document (Pandey and Misra, 2014, Fabunmi, Paris and Fabunmi, 2006; Stefano, 2001).

Some universities like Covenant University seek to establish a smart campus ambience leading to digitization of almost all documents including students answer scripts and recycling past paper records in a waste to wealth initiative, thus archiving a preponderance of digital records. In other climes, the hardcopy records are disposed off at the end of the life cycle following the retention schedule policies while the digital versions are archived and retained for a longer period. Apart from technological advancement and its multifaceted advantages to records management, the legal framework under which the activities take place must be properly interrogated to avert unintended consequences. The question is, are digital records admissible under Nigerian Evidence Act and in the face of possible litigations, can electronically-generated documents be accepted as valid justification of institutional past transactions.

Nigerian Evidence Act and Digitally-generated Records

In every modern society, it is the primary responsibility of the judiciary as exemplified by the court system to adjudicate in disputes involving individuals, organizations and governments and ensure justice to the litigating parties and the society in general. In dispensing this onerous function the judges and lawyers rely, interpret and apply intricate rules and procedures for impartial objectivity. One of such is the rule of evidence. Ali (2010) asserted that evidence "includes all the means by which all alleged matter of fact, the truth of which is submitted to investigation, is established or disapproved. It has also been defined to mean any species of proof legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents or concrete objects, and the like". Evidence represents therefore incontrovertible demonstration of proofs of alleged or purported facts. It is one of the legally dependable ways of arriving at the truth devoid of bias, prejudice or misconception. Types of evidence range from oral evidence, real evidence, documentary evidence, primary evidence, secondary evidence and circumstantial evidence. Lawal (2011), posited that the Nigerian Evidence Act principally defines the various forms of evidence and the conditions for their admissibility in the Nigerian courts. Lawal (2011) further averred that the Evidence Act has not grown in tandem with technological advancement such that its provisions appear uncertain in the admissibility of digital records.

Digital records or electronically-generated records refer to "computer print-outs, information storage devices such as flash drives, tapes, hard disks, microfilms, telegraphic transfers, faxes, electronic funds transfer, emails, telephone records, text messages, digital cameras, mobile phones, letters or other documents processed in a computer or electronic device or stored in a computer based storage device" (Oyewole, 2009).

In understanding the position of the Nigerian Evidence Act on electronically-generated records or digital records, it would be most helpful to reproduce in detail hereunder Ali (2010) citing Akinyede (2009) for better appreciation of the Nigerian legal perspective of the issue:

Senator Sola Akinyede¹² when he sponsored a bill on July 7th 2009 at the Senate for the amendment of the 1945 Evidence Act gave this scenario as an example thus:

“Mr. A sends an e-mail to Mr. B, asking him to kill Mrs. C, promising that he (Mr. A) will pay a sum of \$500,000 to Mr. B and that as an indication of his seriousness, he will pay a first installment of \$250,000 into Mr. B’s account by electronic transfer. Mr. B sends his account number by e-mail or by text and the sum of \$250,000 is wired electronically to Mr. B’s account. Fortunately for Mrs. C, someone tips her off and on the appointed day, Mr. B is caught by the police in Mrs. C’s compound with a knife, a rope with which he intended to strangle her”.

He posited further thus;

“As our Evidence law stands today, in spite of the overwhelming evidence, the worst that can happen to Mr. B is to be convicted for trespass or at best burglary because the e-mail asking him to kill Mrs. C is not admissible in a court of law in Nigeria by virtue of the provisions of Sections 93, 94, 95 and 96 of the Evidence Act, which state that documents must be proved by primary evidence (and) primary evidence is defined by Section 94 (1) as the document itself produced for the inspection of the court. “

The distinguished senator also added;

“What is the document in a computer system? Is it the word on the monitor? Many people will argue that it is not because what appears on the monitor comes from the hard drive. Unfortunately, the information on the hard drive cannot be read by sight and even if it can, are persons expected to carry their computers with hard drives to the court every time they want to prove their cases? The text message providing the account number is not admissible. The computer printout evidencing the payment of \$250,000 is not admissible because it is not an original and does not qualify as secondary evidence under Section 97 of the Evidence Act. Of course, the initiator of the assassination attempt, Mr. A, will go scot-free because his e-mail and printout of the statement of account are inadmissible.” 13

From these narratives, it is clear that the Evidence Act places highest premium on primary evidence referred to as the “original document itself to be produced for the inspection of the court”. It is problematic tendering surrogate version of records for litigation purposes. Most digital records fall under secondary evidence. Except in few cases where the courts applied discretion in interpreting the requisite sections of the law more liberally to recognize digital records and noted inter alia:

“The law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of computer. In modern times reproductions or inscriptions or 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” (Osinbajo Yemi, 2001).

There are many inhibitions contained in the Act to the admission of digital records (Ali, 2010). The major constraint is that the relevant

Nigerian laws were enacted long ago envisaging only the analogue documents. Even as at today, Nigerian judges still record court proceedings through long hands instead of tape-recording like in developed nations. The extant laws only recognize the handwritten records. The problem would persist until the laws are amended to reflect current technological advancement and best practices. Given the above scenario, what lessons and strategies can the library and information profession adopt to sustain digitization and mitigate the admissibility challenges.

Strategies for Ensuring the Admissibility of Digital Records in Nigeria Court

The latent and intrinsic premise for the judicial skepticism over digital or electronically-generated records is the fear of manipulation, alteration or distortion of the contents. The possibility of hacking or unauthorized intrusion into digital devices thereby compromising the original contents calls for watertight protection and assurances. The court would want to be persuaded beyond any iota of doubt that the contents of the digital records are authentic and accurate, representing the absolute truth. In the event of litigations requiring digital records as evidence, the technical details of convincing the court of the integrity of the records lies with the lawyers but the processes of digitization which guarantee integrity of records that makes proof of evidence easy and admissible lies with the librarian and university administrators. Some of such processes include:

- * Third party authentication or certification: such documents which are adjudged to have legal value and may be required as evidence in case of possible litigation should be duly authenticated by the Notary Public before digitization. In Nigeria, Notaries are senior members of the Nigerian Bar Association who have been called to the Nigerian Bar for at least 7 years, prior to the day of

appointment as Notary Public. They are lawyers who have been empowered to authenticate, prepare, attest, verify, witness and certify original and copies of legal documents for use in Nigeria and internationally (Notary Public Services Nigeria, 2016)

- * Digitization must strive to preserve to the greatest extent possible the authenticity and integrity of the original information. Digital enhancements may be performed on copies to improve access, but an “authentic” unaltered version (the original analogue document or a digital version) must always be kept. (Canadian Council of Archives, 2016).
- * Records should be chosen for digitization only after a careful selection devoid of legal encumbrances. That is they must meet copyright and Evidence Act requirements.
- * Since digital information is at risk of loss due to technological obsolescence, the librarian must be aware of this danger and engage requisite software and devices to mitigate possible occurrence.
- * The library must strive for the highest standard of security both in the creation of digital files and in their delivery, to ensure that the authenticity of the digital version of the original work is not compromised (The University of Melbourne, 2012).

Conclusion

The chapter has explored the ubiquity and heightened preference for digital records in the modern records management practices. Leveraging on technology for digitization of institutional records represents global best practices. It guarantees multi-user functionality and unhindered access to information as well as the preservation of records by limiting

physical handling of original documents. The legal framework must be clearly understood and respected for effectiveness of digital records as evidence in the court system. The Nigerian Evidence Act which has not been reviewed for over sixty years appear uncertain and having no specific provisions for accommodating technological advancement, thus, makes the admissibility of digital records problematic as most judicial pronouncements emphasize primary evidence showing preponderance acceptance for original documents while digital records as seen as surrogate, secondary evidence and not admissible. However, the major strategy in mitigating this challenge and guarantee admissibility is to secure third party authentication of documents otherwise known as notarization prior to digitization of records.

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