

# Laying Foundation for Meta Data and Websites

A growing trend in litigation is the need to introduce electronically stored information (“ESI”) as evidence. ESI may, among other things, include website content or metadata. Metadata is electronic data that provides information about other ESI, such as when it was revised and by whom.

As with all evidence, ESI must be admissible under rules of civil procedure. Unfortunately, the Federal Rules of Civil Procedure are silent on how to authenticate ESI.

Still, there is some guidance on the issue. With respect to metadata, eleven factors were set forth in the case of [In re Vee Vinhnee](#), 336 B.R. 437 (B.A.P. 9th Cir. 2005). These factors were formulated by Edward J. Imwinkelried, a UC Davis law professor.

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.
7. The witness used the proper procedures to obtain the readout.
8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

The Court noted that the fourth factor “warrants amplification”:

The “built-in safeguards to ensure accuracy and identify errors” in the fourth step subsume details regarding computer policy and system control procedures, including control of access to the database, control of access to the program, recording and logging of changes, backup practices, and audit procedures to assure the continuing integrity of the records.

As for websites, one author suggested in a recent article that a method of authenticating a website for evidence purposes is to use the Internet Archive Company ([www.archive.org](http://www.archive.org)) which records snapshots of websites at various times and archives them. [[Can I Use Archive.org to Authenticate Electronic Evidence?](#) (Nov. 21, 2012)]

A few courts have found this method to be useful. For instance, see [Telewizja Polska USA v. Echostar Satellite Corp.](#), 2004 U.S. Dist. LEXIS 20845, 17-18 (N.D. Ill. Oct. 14, 2004) in which the court found that authentication through information provided by the Internet Archive Company met the requirements of Federal Rules Of Evidence Section 901.

ESI from social media sites poses a special challenge for authentication as evidence, because such content evolves and changes so frequently. This is the nature of social media and the manner in which users exploit the medium.

For now, courts will continue to lead the way in establishing appropriate factors to use in authenticating ESI as evidence, until codification occurs in the rules of evidence and procedure at the federal and state level.

For over 35 years small businesses, major corporations, public entities, individuals and insurance companies have depended on Tharpe & Howell, LLP, to deliver pragmatic, innovative, cost-effective civil litigation and

transactional solutions. For more information, please contact us at (818) 473-5720 or email your request to [cabusinesslawreport@tharpe-howell.com](mailto:cabusinesslawreport@tharpe-howell.com).