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AN APPRAISAL OF CERTIFICATION AS A LEGAL CHALLENGE ON ADMISSIBILITY OF COMPUTER GENERATED EVIDENCE IN NIGERIA.

By

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ABSTRACT

A veritable condition that must be satisfied for the admissibility of computer generated piece of evidence under the Evidence Act 2011 in Nigeria is certification. However, inadequacy of legal literature on this assumed-to-be-known subject of certification of computer generated documents in law now constitutes a clog on the wheel of admissibility of such documents. This article is therefore an attempt to unravel the intricate misgivings and their practical application to the relevant provisions of the Evidence Act 2011 as it relates to certification of computer generated documents. In order to achieve the objective of its research the paper resorted to both primary and secondary sources of law. This paper showed in its findings that the improper or inadequate certification by the appropriate officer as envisaged by the Evidence Act 2011 can form the foundation for rejection of such piece of computer generated evidence.

1.1 Introduction

Contemporary developments in science and technology have made life easy as well as metamorphosed the world into a small village, whereby humans suffer little or no barrier in executing social activities. This is due to the fact that a substantial chunk of human transactions are carried out through electronic means or devices.[1] However, what constitutes a source of concern to many is the fact that humans are bound to have disagreements and disputes arising therefrom, irrespective of the means or device through which social or contractual transactions are carried out. As is conventional, when a dispute arises in such transactions conducted via electronic means, the appropriate and anticipated step to be taken by the parties is to approach the courts for adjudication. And central to adjudication is evidence, to be led by both disputing parties as to why the court should believe their story and grant their reliefs sought. For transactions substantially or totally conducted through electronic means, the challenge such parties will be faced with is the ability to gather electronic evidence and subsequently put them in an admissible state before tendering them in evidence.

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[1]Pendleton, Alan; 'Admissibility of Electronic Evidence: A New Evidentiary Frontier' accessed viahttp://mnbenchbar.com/2013/10/admissibility-of-electronic-evidence on 30 June 2016. Also see Fawei P. J., 'Advancing a Legal Framework for E-Crimes in Nigeria: A Comparative Study of Legislations of the United States, United Kingdom, China, and South Africa', Research Thesis for the award of LLM, University of Benin, Edo State (2015) 1.

Just recently[2], the Bayelsa State Governorship Election Petition Tribunal sitting in Abuja in a considered ruling disallowed the application of the petitioners to play and demonstrate a piece of yideo evidence contained in a DVD through a witness who was the maker. The tribunal based its ruling on the ground that the set of computers and computing devices to be used for the retrieval or demonstration of the DVD content were not certified[3] as envisaged by the relevant provision of the Evidence Act 2011. This was adjudged to be in consonance with the Court of Appeal's decision in ***Oluwarotimi Akeredolu & Anor. v. Rahman O. Mimiko & Ors.***[4] Granted that the position expressed by the tribunal was the operational position of the law in respect of certification of computer generated evidence, the position seem not to have been accepted by legal practitioners, and legal scholars. However, this and several other considerations and instances constitute this aspect of certification a major legal challenge in admissibility of computer generated evidence.

1.2 Meaning and Nature of Certification

Certification is a *sine qua non* for the admissibility of computer generated evidence in any proceedings where it is desired as envisaged by the Evidence Act 2011.[5] The word used in the said provision is 'certificate', which meaning this paper must ascertain in order to guide all subsequent findings herein. The word 'certificate' is a noun which is derived from the verb certify. Certify, put simply, means to authenticate or vouch for a thing in writing. It may also be said to mean 'to attest as being true or as represented.[6]However certificate means 'a document in which a fact is formally attested'.[7]

Certification also sometimes referred to as authentication basically is intended to achieve certain fundamental concerns. One legal scholar in a conference paper itemized three legal and jurisprudential bases for certification of computer generated documents. By way of definition he said thus:

> Authentication means satisfying the court (a) that the contents of the record have remained unchanged, (b) that the information in the record does in fact originate from its purported source, whether

[2]Sometime in May 2016, in the unreported petition of *Sylva &Anor. v INEC & 2 Ors.* with Petition No. EPT/BY/GOV./002/2016.

[3]Despite the fact that the computers used in producing the said DVD and the production process was duly certified, and the certificate tendered and admitted in evidence.

[4](2013) LPELR-20532 (CA)Per Jombo-Ofo, J.C.A. at Pp. 29-30.

[5]See the provisions of Section 84(4) of the Evidence Act 2011, which states that 'In any proceedings where it is desired to give a statement in evidence by virtue of this section, a *certificate* doing any of the following things, that is to say - .... (the

human or machine, and (c) that extraneous information such as the apparent date of the record is accurate.[8]

In simple terms the whole idea of certification is just to make certain the genuineness and trustworthiness of the piece of documentary evidence produced from a computer or computing device. It is basically intended to satisfy the court before which the document is sought to be tendered and relied upon, that the information contained in the said document is derived from the claimed source and that same is accurate.[9] This ordinarily does imply that any computer generated document presented in court as evidence with a certificate authenticating same is presumed to be regular, genuine, and accurate. Borrowing the reasoning of one legal scholar, certification would obviate the need to subject the piece of computer generated document to rigorous assessment by the court.[10]

The above reasoning appears to have been given legal teeth by the clear provisions of section 146 of the Evidence Act 2011, which presumes in favour of particular facts certified to be true and accurate as contained in a certificate. Such particular facts certified are presumed to be proved and needs no further proof.[11] This position has long been settled in a long line of cases that presumptions of law are to the effect that if a certain fact is proved, then the court must draw a certain conclusion from the proved facts.[12]

1.3 Rationale for Certification of Documents and Computer Generated Evidence

For a piece of computer generated documentary evidence to be admissible, it must comply with all the requirements of admissibility as provided for in the Evidence Act 2011. Computer generated documents like every other piece of evidence must first be relevant[13], must be pleaded, and must be admissible.[14] To satisfy the last requirement of admissibility, the piece of documentary evidence generated from computer must be shown to be authentic and reliable. This according to one learned author[15] 'is particularly

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[8] Reed, C., 'The Admissibility and Authentication of Computer Evidence - A Confusion of Issues', 5th British and Irish Legal Technology Association (BILETA) Conference 2005, accessed via http://www.bileta.ac.uk/90papers/reed.html on 30 June 2016.

[9] Odi, J. D., 'Admissibility of Electronic Evidence' accessed via http://www.awomoloandassociates.com Publication-admissibility of electronic evidence on September 4, 2013, at p. 3.

[10] Oshisanya, L. O., *An Almanac of Contemporary Judicial Restatements with Commentaries: Administration of Justice and Evidence* Vol. Ia (Lagos: Almanac Foundation, 2013) at 610.

[11] Section 145(3) of the Evidence Act 2011.

[12] ***Adighije v Nwaogu & Ors.*** (2010) LPELR-4941 (CA); *Amedu v FRN* (2009) LPELR-8212 (CA).

[13] Section 1 of the Evidence Act 2011, and proviso to section 2 thereof. Also see ***Abubakar v. Chuks*** (2007) 18 NWLR (Pt. 1066) 386 p. @ 402 paras. E-G,I agree with learned counsel for the respondent that what determines admissibility is relevancy. Section 6 of the Evidence Act provides in part. "Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others ..," Per Tobi, JSC.

[14] See ***Okonkwo Okonji & Ors v. George Njokanma & Ors*** (1999) 14 NWLR (PART 638) 250 at 266 D - E where Supreme Court per Achike, JSC laid down three main criteria for admissibility of documents in civil proceedings namely:-(1) Is the document pleaded?(2) Is it relevant to the inquiry being tried by the Court? and (3) Is it admissible in law?

[15] Okunoye, Jide; *Evidence Act 2011 with Cases and Materials*, (Lagos: Korona Press, 2012) at 109.

important because electronic evidence is susceptible to all kinds of modifications, distortions, processing errors and contamination' that may be caused with or without human intervention. This is especially so as there are copious instances of photo-shopped photos and computer created video clips of different footages that may look as authentic as real pictures or videos which may not be easily discernible.

The drafters of the Evidence Act 2011 were not oblivious of the above expressed fears and anticipated the possible abuse of computer generated evidence, hence informed the rationale behind the requirement of certification of such pieces of evidence.[16]The primary concern of the relevant provisions of the Evidence Act 2011, is that pieces of computer generated evidence should be accurate having regard to the information supplied to it and to dispel any incentive to conceal or misrepresent facts. The aforesaid provision of the Evidence Act 2011 is more or less a reproduction of the relevant provisions on computer generated documents under the English Police and Criminal Evidence Act 1984 and the Civil Evidence Act 1968. Taking into consideration the long period of time computer and computing devices have been in existence, the assumption that such devices are inherently unreliable and inaccurate so as to require a certificate on such seem not to be appreciated. The burden to prove that the computer or computing device as at the material time lacks the requisite competence to produce accurate documents should be on the party alleging so. This view appears to be similar to the rebuttable presumption contained in the Australian Uniform Evidence Act.[17]

Whereas some legal scholars[18] are of the opinion that the very foundation upon which certification or authentication of computer generated documents have its footing is section 34(1)(b) of the Evidence Act 2011, it does appear differently to this paper. This is because the provision is about estimating the right weight to be attached to a computer generated documentary evidence once admitted and not certification for purposes of admissibility as required by section 84(4) of the Evidence Act 2011. A reproduction of the said section 34(1)(b) will be of help in taking a second look at the above submission. The section provides thus:

1. In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular-
   a. ....; and
   b. in the case of a statement contained in a document produced by a computer-

[16] Section 84(4) Evidence Act 2011, thereof.

[17] Documentary Evidence: Reliability and accuracy of computer-produced evidence', http://www.alrc.gov.au/publications/6.%20Documentary%20Evidence/reliability-and-accuracy-computer-produced-evidence. accessed on 30 June 2016.

[18] See Okunoye (note 15).

(i) the question whether or not the information which the statement contained, reproduces or is derived from, was supplied to it, contemporaneously with the occurrence or existence of the facts dealt with in that information, and

(ii) the question whether or not any person concerned with the supply of information to that computer or with the operation of that computer or any equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent facts.

A juxtaposition of the above provision and some other provisions of the Evidence Act 2011 will reveal the intention of the draftsman. The provisions of sections 84 and 145 of the Evidence Act 2011 are latter or subsequent provisions to the above cited section of the Act. It is submitted that the said provisions are intended by the drafters of the Act to whittle down the effect of the provision of section 34(1)(b) of the Evidence Act 2011 specifically in respect of computer generated evidence. This is to the effect that a piece of computer generated document that has been admitted pursuant to section 84 of the Act together with a certificate of compliance, is conclusive proof of the facts stated therein and thus gives an irrebuttable evidential weight.[19]So that any attempt to test the incentive to conceal or misrepresent facts will be of no effect.

From the above provision, it therefore can be argued that authentication of computer generated documents under section 34(1)(b) applies to such documents already admitted in evidence, and as such can only derive a meaningful interpretation when read subject to sections 84(4) and 145(3) of the Evidence Act 2011. If section 34(1)(b) of the Act must be of any reasonable application in the light of the above postulation, section 84(4)(c) of the Act must be amended or qualified to have the effect of a rebuttable presumption and not conclusive proof of the facts stated in the certificate.

However, the rationale for certification of computer generated documents can be viewed from the philosophical basis for certification of documents generally restated by the Supreme Court very recently in *Emmanuel v. Umana&Ors*[20] that:

> The whole essence of the Court's insistence on the scrupulous adherence to the above certification requirement of public documents is to vouchsafe their authenticity, vis-a-vis, the original copies, to third parties...

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[19] Sections 84(4)(c) together with 145(3) of the Evidence Act 2011. See **Amedu v FRN (2009) LPELR-8212**, '...where the Court of Appeal said irrebuttable presumptions of law are to the effect that if a certain fact is proved, then the court must draw a certain conclusion from the proved fact. Evidence in rebuttal of such conclusion is inadmissible'. Also see ***Okon v Offeideh (2013) LPELR-21189 (CA)***; and ***Adighije v Nwaogu&Ors. (2010) LPELR-4941 (CA).***

[20] (2016) LPELR-40037 (SC),Per Nweze, JSC. At P. 51, Paras. A-E. Also see ***Araka v. Egbue*** (2003) 33 WRN 7; ***Tabik Investment Ltd and Anor v Guarantee Trust Bank Plc*** (2011) 6 MJSC (pt 1) 1, 21; Dagaci of Dere v. Dagaci of Ebwa (2006) 30 WRN 1; Iteogu v. LPDC (2009) 17 NWLR (pt 1171) 614, 634.

The above excerpt though a restatement of the rationale for insistence on certification of public documents amongst others, same arguably applies *mutatis mutandis* to documents generated through a computer or computing device. Having settled to an extent the rationale for certification of computer generated documents, it is pertinent at this stage to look into the components of certification under the Evidence Act of 2011.

1.4 What amounts to Certification of computer generated evidence under the Evidence Act 2011

The provisions of the Evidence Act 2011 requiring certification of certain pieces of evidence are many and not restricted to computer generated documents alone. Thus, in order to properly appraise what elements constitute certification of computer generated documents, the relevant provision must be examined closely. As stated above, the relevant section for the admissibility or otherwise of computer generated documents is section 84(4) of the Evidence Act 2011 which provides that:

> In any proceeding where it is desired to give a statement in evidence by virtue of this section a certificate-
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> 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.
>
> (i) 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 the matter stated in the certificate; and for the purpose 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 provision of the Evidence Act 2011 reproduced above did not provide for the format or mode the certification must take for it to be valid. The Act did not also specify elsewhere nor define the term 'certification' to enable the drawing of an inference on what form it ought to take. It is therefore submitted in agreement with the reasoning of a learned author that a letter, an affidavit, or any other written document containing the requirements of the above provision ought to be taken as satisfactory.[21]

Some scholars have considered the above provision and expressed different opinions on the form a certificate for computer generated documents can take. Agreeing with the view

[21] See Okunoye (note 15) at p 112.

of the English House of Lords in ***R. v Shepherd***[22], some scholars have taken the part that a computer generated document can be certified in two ways which are that it is either in writing or oral.[23] Hon's nod on the above English view is grounded on the fact that section 84(4) of Evidence Act 2011 is similar in wordings with paragraph 8 schedule 3 of the United Kingdom's Police and Criminal Evidence (PACE) Act of 1984.[24]Our courts have also through their decisions on the issue followed this part by holding that oral certification is valid and substantial compliance with the Evidence Act 2011. The Federal High Court which was amongst the courts that first addressed this issue of admissibility of computer generated documents on the basis of certification. In ***FRN v Senator Ali Ndume***[25], the court stated thus:

> My view is that against the elaborate testimony of PW3 as to what he did when he "exploited" Exhibit "P5" and "P5A" and the contents of exhibits "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 provisions in Section 84 (2) (a)-(d) of the Evidence Act... A testimony such as PW3 has given as to what he did whilst "exploiting" Exhibit P5" and "P5A" to produce the DVDs are in my view, sufficient to assuage any fear which learned Counsel for the defence entertained in the authenticity of the DVDs. The testimony of PW3 as the maker is in my view, sufficient proof of their attestation even without the need for any further "Certificate".[26]

As much as it is true that the provisions as referred above are similar, this paper do not share the view of the House of Lords, the decision of the Federal High Court, as well as the learned scholars who are in agreement with the above position. This paper is of the view that the House of Lords and the court in the ***Ndume case*** did not give a holistic interpretation to the provisions of Paragraph 8 schedule 3 of the PACE Act which is similar to section 84(4) of the Evidence Act 2011. This is because, the provision envisaged only a written certificate as it is only such that can be signed by a person occupying a responsible position in relation to the operation of the computer. In line with

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[22] (1993) 1 All ER 225 HL, as per Lord Griffiths at pp. 230 – 231.

[23] Seth, K. *Cyber Laws in the Information Technology Age*, (India: LexisNexis Butterworths, 2009) pp.174 -175; S. T. Hon, *S. T. Hon's Law of Evidence in Nigeria*, Vol. 1 (Port Harcourt: Pearl Publishers, 2012) pp. 485 – 487. Also See Section 24 of the UK Criminal Justice Act 1988.

[24] See Hon, ibid.

[25] Unreported case of the Federal High Court, decided by the Hon. Justice Gabriel Kolawole.

[26] The court reasoned as mere directory and not mandatory the provisions of section 84(2)(a) – (d) of the Evidence Act 2011. See **'Fgn v. Senator Ndume: A Test of Admissibility of Electronic Evidence', in Society, Business & Economy; accessed** viahttp://www.nigerianbestforum.com/index.php?topic=267938.0;wap, on May 17, 2016.

the aforesaid and use of 'shall'[27] in the provision, there cannot be drawn an inference that a computer generated document should qualify for admissibility as having passed the authenticity test without a certificate in writing.

It is therefore submitted that the only meaningful comprehension that can be given to section 84(4) of the Evidence Act 2011 on certification is that there must be tendered together with the computer generated document, a written certificate. As earlier posited, the form of the certificate having not been specified by the Act, can take any form so long as the minimum content required is satisfied by the certificate and appropriately signed.

1.5 Requirements for Certification of Computer Generated Documents

Under the extant regime on the admissibility of computer generated documents in Nigeria, once a certificate is produced in line with section 84(4) of the Evidence Act 2011, same is statutorily deemed to be sufficient proof on the issue in contention. The said provision is to the effect that the statement desired to be given in proof of a fact as contained in the computer generated document for which the certificate is made '...shall be evidence of the matter stated in the certificate;....'[28]. Having regard to this effect, the provision becomes a threshold provision which constitutes the basis of admissibility and proof of the content of a computer generated documentary evidence.

This paper has espoused the format a certificate should take for the purpose of admissibility of computer generated document. However, it is the content of the certificate that determines the admissibility or otherwise of the relevant document sought to be tendered. The minimum required content of a certificate has been clearly spelt out in section 84(4) of the Evidence Act 2011. The Act envisages the certification of the following:

a. the document containing the statement sought to be tendered;[29] and
b. the computer used for the production of the document and production process.[30]

Going by the relevant provision on certification, the first to be certified is the computer generated document sought to be tendered in evidence. In respect of the said document, the certificate must state <u>any</u> of the following:

a. that the statement sought to be tendered is contained in a document within the meaning of 'document'[31] as provided for in the Evidence Act 2011. Document as

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[27] ***Onochie v. Odogwu [2006] 6 NWLR (Pt.975) 65.*** The Supreme Court as per Ogbuagu, JSC stated that "shall" is used to express a command or exhortation or what is legally mandatory. See also the case of ***Amokeodo v. Inspector-General of Police & 2 Ors.*** (1999) 5 SCNJ 71 at 81 - 82; (1999) 6 NWLR (Pt. 607) 467."

[28] See the provision of Section 145(3) of the Evidence Act 2011 and the argument postulated above.

[29] It is worthy of note that section 84(4) of the Evidence Act 2011 states the requirements for the certification of the computer generated document only and not the computer.

[30] Section 84(2) of the Evidence Act 2011 on the other hand states the certification requirements for the computer used for the production and the process of production of the document sought to be tendered in evidence.

[31] "document" includes- (a) books, maps, plans, graphs, 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

defined in the Act does not envisage discs (i.e. VCDs or DVDs) with visual images as excluded by paragraph (b) of the definition. On the other hand, paragraph (c) which envisages visual images, only covers films, negatives, tape or other similar devices (which are not digital devices) as being documents. It is submitted that the definition simply excludes only digital devices that produces visual images but includes digital devices in the form of disc, tapes, sound track and the likes that produces only sound and similar output. The kind of statement that can be contained in a document to qualify as a statement 'includes any representation of fact whether made in words or otherwise'.[32]

b. describe in some details the manner in which the computer generated document sought to be tendered was produced. The statute is not interested in how the computer or any other device was produced but on how the document sought to be tendered was created or came into existence via the computer or allied devices. The document may be created by someone else in another computing device; made by inputting data; copied or downloaded from a network; or other known methods.

c. such relevant particulars of the devices that were involved in the production of the computer generated evidence sought to be tendered. The relevant particulars envisaged by the Evidence Act are those that may be appropriate for the purpose of showing that the document was produced by a computer. This correspondingly means that particulars that would not show that the document was produced by a computer are not relevant.

On the other hand, the Act further requires that even the computer or set of computers used in the production of the document be certified as to their functionality. Though, where more than one computing device was used in the production of the document, it is permissible to treat all as one computer for purposes of certification.[33] The certificate is expected to state the following facts:

a. that the document containing the statement was produced by the computer during a period over which the computer was used regularly[34] 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;

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other equipment) of being reproduced from it; and (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;

[32] See section 258(1) of the Evidence Act 2011. This implies that statement could be audio or visual

[33] This is provided for by section 84(3) of the Evidence Act 2011.

[34] The term as used implies that the computer should often be in use. This literal meaning may constitute some restriction, as there are personal computers that are not regularly used but are still very functional and reliable; some are constantly in use but are not in the best of shapes to produce accurate results or are not regularly used to process the kind of information being sought to be tendered.

b. that over that period there was regularly supplied to the computer in the ordinary course[35] 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 in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents[36]; 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.[37]

The Act does not intend that all the above conditions must be contained in the certificate in order for it to be valid, but necessarily implies that one or all of the above conditions can validate a certificate. This is because 'any' as used in the relevant section means 'one or some indiscriminately, whichever is chosen'.[38] However, this discretion also appears to have been restricted as the conditions specified in section 84(2) of the Evidence Act are mandatory. A careful study of subsections (1) and (2) shows that reference is made to each other with the conditions in subsection (2) made mandatory by the use of 'shall'. Hence, a meaningful interpretation of the entire section as a whole would imply that while the conditions in subsection (2) are compulsory, the conditions in subsection (4) are discretional. It therefore means that every certificate must have the conditions listed in subsection (2) and all or any of the conditions in subsection (4) of section 84 of the Evidence Act 2011.

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[35] Will the certification test be failed and the document inadmissible if the computer is not regularly supplied or used in the ordinary course of business to store and process the particular kind of information in question? Being a statutory provision, failure to comply with the conditions is fundamental and should amount to a rejection of the said document. See ***Nigercare Dev. Co. Ltd. v. Adamawa S.W.B.*** (2008) WRN (Vol. 20) 166 at 171, Pp. 189 - 190; lines. 40 - 5 (SC);***Prince Atolagbe v. AlhajiAwuni*** (1997) 9 NWLR (Pt. 522) 536; (1997) 75 SCNJ 1.

[36] Document in a computer can easily be ascertained through its meta-data as to the title of the document if it is stored, date of creation or modification, the author, its location in the computer and when the document may be transmitted. See Okunoye (note 15) at pp. 109 – 110. There are certain viruses the computer may have that will affect its production of accurate content, if such is proved, ought ordinarily to affect the weight to be attached to a document admitted. See N. V. Paranjape, *Criminology & Penology with Victimology* (India: Central Law Publications, 2011) pp. 144 – 145.

[37] Certification as required by the Evidence Act 2011, appears to have placed a very heavy burden on the party seeking to tender the document, so that his duty goes beyond proving that the document (whether the information in it is correct or not) reflects the original content in the computing device, but will have to show that the computer is in perfect working condition. The United States have gone beyond this level so that all the party needs to show is that the document reflects the content in the computer. Dean McCormick takes the position that an authenticating witness need only show that a printout is a "correct reflection of what is in the machine, rather than ... what is in the machine is correct." See Dean Mccormick, *Mccormick on Evidence* (Edward W. Cleary ed., 3rd ed. 1984) p. 314. Also see M. A. Johnson, *Computer Printouts as Evidence: Stricter Foundation or Presumption of Reliability?* 75 Marq. L. Rev. 439 (1992), at: http://scholarship.law.marquette.edu/mulr/vol75/iss2/6.

[38] The Court of Appeal gave this definition in ***APC v. Omisore & Ors.*** (2014) LPELR-24074(CA) as per Owoade, JCA (P.15, paras.A-C). The provision tends to have given the discretion to the party seeking to rely on the computer generated document, who is required to produce the certificate to choose which or all of the conditions that would be contained in the certificate and the discretion cannot be challenged in court in any way. Also see ***Nwaogwugwu v President F.R.N.*** (2007) WRN (Vol. 12) 24 at 50 Lines 25 - 35 (CA)

1.6 Inadmissibility arising from Issues of Certification

It is certain from the above that once a computer generated document is tendered together with a certificate and is admitted, it becomes conclusive proof of the contents therein. Therefore, the issue of proper certification is of grave relevance, so that failure to comply with the certification provisions of section 84 of the Evidence Act 2011 will amount to rejecting the computer generated document sought to be tendered. This was one of the basis of objection by respondents' counsel at the tribunal in the case of ***Chief Timipre Marlin Sylva &Anor. v. Independent National Electoral Commission & 2 Ors.,***[39] wherein the tribunal rejected a piece of computer generated document as having not met the conditions of certification. The tribunal held particularly that since the term production is envisaged in the retrieval process, the certificate ought to provide particulars of the devices sought to be used in open court in the retrieval. The tribunal found support in the decision of the court of appeal in ***Akeredolu v Mimiko***[40], but both the Court of Appeal and Supreme Court restated the law in ***Sylva v INEC***[41], and differentiated the view expressed in the Mimiko's case.

The Evidence Act 2011 having made certification a *sine qua non* for admissibility of computer generated documents, the failure to strictly comply with the provisions will amount to a rejection of the document sought to be tendered. In a related situation for certification of public documents, the Supreme Court in ***Tabik Investment Ltd v Guaranty Trust Bank Plc.***[42] stated that due to the use of 'shall' in section 104 of the Evidence Act, it is mandatory and not merely directory for all the requirements for certification to be satisfied. That failure to so comply will amount to inadmissibility of the said document. Some Nigerian scholars have viewed this provision as subject to section 34 of the Evidence Act 2011, by which they have argued that after admission of the document sought to be tendered, the other party has the duty to refute authentication.[43] With due respect to the learned scholars, it is submitted that the view held expresses more of the United States position which does not attach finality to such admitted documents.[44]

The obvious implication of the above is that the computer generated document being sought to be tendered will not be admissible where it is shown that any of the minimum content of the certificate envisaged by the Evidence Act 2011 is missing. That is, at the point of tendering the document sought to be relied on, both the court and other party should be vigilant to see that all the requirements of section 84 of the Evidence Act 2011 has been complied with. Failure to check properly would have the effect as espoused above that once the document and certificate is admitted, no evidence can be led to rebut

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[39] Supra.

[40] Supra.

[41] Unreported suit with Appeal No: CA/A/EPT/281/2016 for the Court of Appeal position.

[42] (2011) All FWLR (Pt. 602) 1592 SC; also see ***Peoples Democratic Party v Sidi-Ali*** (2004) All FWLR (Pt. 220) 1371 (CA).

[43] See Okunoye (note 15) and Hon (note 23).

[44] This was the position expressed by Judge Weinstein of the Supreme Court of Nebraska in ***Transport Indemnity Co. v Seib*** 132 N.W. 2d 871 (Neb. 1967).

the content of the said document and certificate which the Act declares to be conclusive proof of the fact sought to be proved.

1.7 Qualification to Certify Document or Computer

The certificate to be relied upon by the court in proof of computer generated documents is not one that can be made by anyone. For the certificate to be accepted as admissible. it must be proved by the party seeking to tender it as being qualified to make the certificate. What determines the qualification of a person to certify the creation of a computer generated document and the functionality of the computing devices of production. has been a subject of debate. However, the Evidence Act 2011 seems to have a relevant provision to guide the courts on this issue. Section 84(4) of the Act states thus:

> In any proceeding 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.
>
> (i) 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 the matter stated in the certificate; and for the purpose 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 arguments on this issue are polarized as to who can be so referred as 'occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities of the device'. Granted that from the provisions above, the person to certify should necessarily be the owner of the computer or a person in the employ of another which may be corporate or not; such person must satisfy either of the requirements. The person must either be the operator of the device or be responsible for the management of the activities of the computer.[45]The Court of Appeal in ***P. D. Hallmark Contractors Nigeria Ltd &Anor v. Gomwalk***[46]restated this position.

Our courts through decided cases seem to have taken a forked path on this issue as they have allowed the admission of certificates signed by persons who were not the operators

[45] This position if given its literal interpretation, may in some cases constitute an obstacle for the successful prosecution of claims against some institutions who may be in possession or management of the computing devices. For example, a bank or its staff in charge of an Automated Teller Machine (ATM) may refuse to give a certificate to a person who intends to sue the bank with such certificate as evidence.

[46] (2015) LPELR-24462. Also see the case of ***Federal Republic of Nigeria v Sen. Ali Ndume*** (supra).

of the computer or computing device, neither were they in charge of the management of such devices.[47] This case can be contrasted with the facts of ***FRN v Sen. Ndume***[48], wherein it was the DSS officer who operated and manipulated the digital phone of the accused person that came to court to personally testify of what he did to get the particular statement contained in the computer generated document sought to be tendered in evidence. The United States, and United Kingdom had long given the lead upon which our courts have dwelt to reach their decisions on this subject. Very apt is the case of ***United States v Linn***[49], where an officer in charge of communication in a hotel was held to be qualified to authenticate a self-recording computing machine.

In contrast to the above authorities some scholars have argued that a person can only be qualified to certify a computer generated document when he has the requisite knowledge on the workings of the computer. This argument tends to require that only an expert on the operations or management of the activities for which the computer is used can authenticate, as he is the only person with the knowledge to be able to face questions during cross examination. This is where it seems the provisions of section 34 of the Evidence Act 2011 would have been necessary if not for the conclusive nature of the certificate produced under section 84 of the Act.[50]There is however no decided authority in Nigeria where the effects of the statement in a computer generated document is whittled down by the other party resorting to section 34 of the Act. A few instances where it has been done are all cases decided in the United States.[51]

It is not the contention of this paper that any person who has knowledge on the functionality of a computer or computing device – without being a person 'occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities of the device' – cannot give oral testimony in court. It is however submitted that, for the certificate that should be tendered in proof of the contents of the computer generated document, it is only a person who operates or manages it that can sign the certificate for it to be valid and statute compliant. It is further submitted in line with settled law that our courts should be bound by the clear provisions of the Evidence Act 2011 and not be persuaded by foreign authorities that appear contradictory to our statute.[52]

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[47] This was the situation of facts at the tribunal in the case *Sylva v INEC* (supra), which was also upheld by both the Court of Appeal and the Supreme Court. Although the tribunal admitted the certificate in the said situation as counsel to the respondents at that stage did not oppose its admission.

[48] Supra.

[49] 880 F.2d 209, 216 (9th Cir. 1988); also see the United Kingdom case of ***R. v Shepherd*** (supra).

[50] The arguments and expositions made above on the heading 'Rationale for Certification of Documents and Computer Generated Evidence' are hereby adopted.

[51] S. A. Kurzban, 'Authentication of computer-generated Evidence in the United States federal courts', the Journal of Law and Technology, 1995. Successful challenges to witnesses' qualifications have all involved witnesses who were ignorant of the procedures involved in the processing of the records they were authenticating. ***People v. Bovio***, 455 N.E.2d 829, 833 (Ill. App. 2d Dist. 1983) – in this case the witness gave no testimony about the computer equipment; *U.S. Fidelity*, 600 P.2d at 82 –in this case the witness who authenticated gave no testimony about input of data that were subsequently printed as output.

[52] See the case of ***JimohAmoo v The Queen*** (1959) 4 FSC 113; [1959] NSCC Vol. 1, p. 91 lines 26 – 30.

1.8 Legal Challenges on Certification of Computer Generated Evidence

Computer generated documentary evidence being evidence of a *sui generis* nature has been statutorily made admissible upon proper certification. However, a consideration of the provisions on admissibility of computer generated evidence in the Evidence Act 2011 and through the spectacle of the courts, one would conclude that the law is yet to be settled on this issue. This unsettled situation of the law is submitted to be a product of the challenges posed both by statute and judicial attitude. Some of the challenges will be discussed below.

1. **Lack of proper understanding on the nature and functionality of computers.** It is a fact that computers and allied devices had long been in existence and has taken different forms but have not been well appreciated by our law makers and courts on their use and functionality.[53] This fact has contributed largely to the couching of the relevant provisions in such statutes by the legislature and has also constituted the bulk of interpretive impediments posed to the courts. This fact is made obvious by the position maintained by the apex court in the recent case of ***Omisore v. Aregbesola***[54], when it held to the effect that any document that is a product of a computer or computing device is a computer generated evidence. It is submitted most humbly that the said position maintained by the apex court would rather be too wide that the intendment of the law makers may lose its focus from judicial interpretation. This is particularly so, as in recent times, almost all documents are generated from one form of computing device or the other.
2. **The status of finality of the certificate on the facts contained in it.** Section 84(4) of the Evidence Act 2011 makes the admission of a certificate in favour of a computer generated document as proved on the facts contained in it. This therefore gives the certificate the status of finality upon admission, so that the other party nor his counsel cannot cross examine or lead evidence seeking to disprove or whittle down the effect of the facts contained therein as to their truth-value. This fact which has also been analysed and argued above, gives no effect to the provisions of section 34(1),(b) of the Evidence Act 2011, as nothing can be done further to cast doubt of validity on the statement as well as document the certificate tends to prove.
3. **The burden of proving functionality placed on the party seeking to tender computer generated document.** Computers have been in everyday use in almost all aspects of human endeavour, so that the products of computer have conventionally been accepted as reliable without question. This reasoning that a 'computer hardware is rarely a contributing factor to errors in computer-generated evidence' has found

[53] Odufuwa, F. 'Understanding What is Happening in ICT in Nigeria: a supply-and-demand-side analysis of the ICT sector', in Evidence for ICT Policy Action, Policy Paper 6, 2012. This 2012 survey finds that 62% of Nigerians are non-internet users, 3.4% of households have fixed internet connection, while 62% of Nigerians that are able to access the internet does so through mobile phones and not computer sets.

[54] Supra

support both academically and judicially.[55] The statutory requirement that the party seeking to rely on the document must also prove the functionality of the computing device is a heavy burden. This is particularly so when the document is intended to be used against the person who owns, operates, or manages the activities of the computer. This probably informed the reasoning of the South African court in ***Ex parte Rosche***[56], in resorting to a secondary interpretation of a similar provision.[57]

4. **Non-specification of format for certification**. One of the challenges posed by the tendering and subsequent consideration of admissibility of computer generated documents is the fact that the certification threshold does not specify any format that the certificate should take. This has prompted several objections in court at the stage of seeking to tender such computer generated documents.[58] The Evidence Act 2011 did not also clearly solve this problem by specifying what form the certificate should take as argued above[59], thereby giving the courts room to interpret or accept what they consider as meeting the minimum content requirement of a certificate. Whereas the relevant provision of the Evidence Act 2011 requires that to be tendered with the computer generated document is a certificate:

> ...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 the matter stated in the certificate...[60]

Despite the above provision of the Act, our courts seemed to have slavishly followed and agreed with the position taken by the English courts in ***R. v Shepherd***[61], as being envisaged by the above provision. This has prompted and established a line of authority permitting oral certification by a person who qualifies to certify the content of the computer generated document under the Act.[62] This line of authority appears to be a deviation from the clear wordings of the statute as reproduced above. It is submitted that it is only a document that can be signed or purportedly signed as the extant authorities[63] envisage and not an oral testimonial in court, as that seem not to

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[55] See Johnson (at note 34) and also the case of ***King v State ex rel. Murdoch Acceptance Corp***. 222 So. 2d 393 (Miss. 1969), where the court stated that: "The scientific reliability of such machines, electronic computing equipment, in the light of their general use and the general reliance of the business world on them can scarcely be questioned".

[56] [1998] 1 All SA 319 (W) at 327.

[57] The Southern African Computer Evidence Act 57 of 1983.

[58] See the cases of ***Sylva v INEC (supra); Akeredolu v Mimiko (supra); and FRN v Sen. Ali Ndume (supra)***.

[59] Whether the certificate should be in writing or a verbal certification would do; if it should be in writing, how should it look like – affidavit, academic certificate, the kind of certification required for other kinds of document under the Evidence Act 2011, mere handwritten document et cetera.

[60] See the Evidence Act 2011 in section 84(4) paragraph (b)(i).

[61] Supra.

[62] A very good example is the case of *FRN v Sen. Ali Ndume* (supra).

[63] ***Akinsanya&Anor. v. FMFL*** (2010) LPELR-3687 at P. 7, paras. C-F as per Mshelia, J.C.A. (CA) where the court defined the word signature to mean "A person's name or mark written by the person or at the person's direction. Any name, mark or writing used with the intention of authenticating a document."

have been envisaged by the statute. The non-specification of the format for certification has left the law unsettled on the right format to be followed or adopted.

5. **Primacy of the certificate over the computer generated document itself.** The legislature has in its wisdom placed priority on the certificate produced over the computer generated document and its content. This is clearly provided for in section 84(4)(i) of the Evidence Act 2011 to the effect that the content of the certificate is unquestionable once the certificate itself is admitted and that automatically qualifies the computer generated document for admissibility without further question.[64] This places more importance on the certificate over the substance of the computer generated document which in itself ought to first pass the test of relevancy before any other consideration. It implies therefore that, even if the document fails to comply with any other requirement, once a certificate has been provided, it stands admissible and unquestionable as already argued above.

1.9 Conclusion

The problems of study which form the crux of this research are the misgivings on the proper interpretation and practical application of the provisions of the Evidence Act 2011 as it concerns certification of computer generated documents for purposes of admissibility in court. And as stated earlier, there seem to be a very few legal literature on the basis of the 2011 Evidence Act upon which our courts can be guided. This paper has unravelled some of these misgivings on the import of certain provisions in relations to the admissibility of computer generated documents. Some of such issues that had arisen therefrom – both in the courts and the few literature on the subject – have been examined in logical details to enable the legislature take a vantage position and reconsider a possible amendment of the relevant provisions on admissibility of computer evidence. The courts will also take a guide from the analysis made on certification as it affects computer generated evidence, with the aid of foreign decisions referred to in this paper. On the whole, it is believed that a judicious adherence to the issues raised and addressed in this paper will go a long way to set the law on admissibility of computer generated documents straight.

Having mentioned and examined some of the challenges the threshold of certification as provided for by the Evidence Act 2011 has posed on the admissibility of computer generated documents, this paper shall now turn to make a few recommendations for the way forward.

1. The computer generated document that is sought to be tendered by the party seeking to rely on same should be treated independently of its certificate on grounds of admissibility. By this, the substantive document sought to be tendered will be considered in the light of the general conditions of admissibility (such as relevancy, whether it is pleaded, and whether it is legally admissible), so that the certificate will only be a condition and not the only condition for admissibility. Where such is done,

[64] See Section 84(1) and (2) of the Evidence Act 2011 when read together.

both documents will be treated and evaluated differently and not as one, whereby the certificate determines admissibility and weight to be attached.

2. It follows from the above that the issue of primacy of the certificate would have been taken care of as well. The principal document the court is expected to evaluate at the end of the trial is the computer generated document sought to be tendered and not the certificate. This is because it is the content of the said computer generated document that the parties seek to rely on in proof of their cases. The certificate is only a condition for admissibility of the computer generated document so that the current provisions of the Act[65]should be construed in a manner that the substantive document should be given priority only after it has been admitted upon certification.

3. The provision on certification in the Evidence Act 2011 should be reviewed to specify a format for certification, so as to avoid some of the arguments or construction challenges faced by parties and the court in tendering of computer generated documents. Right now the constructions to be given to the said provision seem to be unrestrictive so that anything that is close to certification will be allowed. Though, it is submitted that the position taken by the court in ***FRN v Ndume***[66] as expressed above does not come close to what is expected of certification as oral testimony does not qualify for the kind of certification required by the Evidence Act 2011.

4. It is also recommended that computer generated documents shown to be documents produced from a computer should in themselves be admitted and made reliable with the burden of showing otherwise to be placed on the other party who seeks to whittle down the weight to be attached. This appears to be the only way that section 34 of the Evidence Act 2011 can be given effect in the face of section 84(4) of the same Act. So that once a computer generated document sought to be relied upon is pleaded and frontloaded, the other party will have all the time to investigate the state and reliability of the document sought to be tendered. This is the only way that an appropriate weight can be attached to such document and not where they will have to be treated with finality upon production of a certificate.

5. Our legislators as well as courts should not only be given computers to work with but should also be trained appropriately to the extent that they can on their own appreciate the production process of a computer and not only to be told. This recommendation is also made in the light of the rather poor knowledge and appreciation of the use and workings of a computer or computing device that played out at the tribunal in the case of *Sylva v INEC*[67] when the petitioner sought to play the admitted DVD containing a particular piece of evidence.

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[65] The Evidence Act 2011, section 84(4).

[66] Supra.

[67] SSupra.