

Articles

Challenging Judicial Notice of Facts on the Internet under Federal Rule of Evidence 201

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Introduction

Twenty years ago, to confirm an intuition about the variety of rain hats, a trial judge may have needed to travel to a local department store to survey the rain hats on offer. Rather than expend that time, he likely would have relied on his common sense to take judicial notice of the fact that not all rain hats are alike. Today, however, a judge need only take a few moments to confirm his intuition by conducting a basic Internet search.¹

LIKE THAT JUDGE confirming his intuition about the variety of rain hats, courts use the Internet as their substitute for a shopping expedition and, increasingly, they are taking judicial notice to recognize the existence of a fact without requiring specific proof of that fact. But appropriate facts for judicial notice must be “‘within the domain of the indisputable.’”² As the Internet has grown in breadth and in depth, courts have increasingly run into the question of whether to accord judicial notice to the information found there.

Under Rule 201 of the Federal Rules of Evidence, a court “may judicially notice a fact that is not subject to reasonable dispute”³ if its

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1. United States v. Bari, 599 F.3d 176, 180 (2d Cir. 2010).
2. Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 82 (Roscoe Pound et al. eds., 1964) (quoting Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 293 (1944)).
3. FED. R. EVID. 201(b).

provenance is satisfactory, meaning that the fact either “(1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”⁴ The judicial notice rule is intended to streamline judicial proceedings by acknowledging that there are some things so universally known or beyond challenge that requiring proof of their existence would be a waste of time and resources.

As an illustration, consider a case in which the plaintiff alleged that defendant music and recording companies owed her royalties for songs she recorded with Elvis Presley in 1999.⁵ Using the Internet to confirm that the King was not alive that year, the magistrate judge quickly dispatched the matter:

According to sources on the World Wide Web, Mr. Presley died on August 16, 1977[,] and, considering the recent celebration of the 30th anniversary of Mr. Presley’s death, the Court will take judicial notice that Mr. Presley was deceased in 1999 and not capable of personally recording with plaintiff, and this matter will be dismissed as frivolous.⁶

As the *Presley* case illustrates, judicial notice is an expedient way to confirm indisputable facts. Neither much time nor many resources are needed to locate factual information on the Internet, and that is certainly part of its attraction to legal and judicial researchers. Entering relevant search terms into a search engine, such as Google, retrieves links to hundreds—if not thousands—of websites whose contents may contain exactly what the researcher is looking for. Many courts are hesitant, however, to regard websites in general as appropriate sources for judicial notice, and they often have good basis for that reluctance.⁷ While the Internet furnishes a convenient mechanism for ready determination of a fact, not all the sources on the Internet are unquestionably accurate.⁸ Furthermore, a fact is not necessarily “generally known”⁹ simply because it easily can be found online. Whether

4. *Id.*

5. *Presley v. RCA*, Nos. 07-508-RET-CN, 07-05-259-M2, 2007 WL 4139716, at *1 (M.D. La. Nov. 16, 2007).

6. *Id.*

7. *See infra* notes 49-66 and accompanying text.

8. *See, e.g.*, SNOPEs, <http://www.snopes.com> (last visited Sept. 24, 2013) (a popular fact-checking website with a category for debunked computer- and Internet-related myths).

9. *E.g.*, *United States v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999) (quoting 21 CHARLES A. WRIGHT & KENNETH A. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5105, at 407 (1977)) (“By ‘generally known’ Rule 201(b)(1) ‘must refer to facts which exist in the unaided memory of the populace; if the fact is one that a reasonable person would not know from memory but would know where to find, it falls within subdivision (2),’ not (1).”).

the contents of any website will satisfy the requirements of judicial notice under Rule 201 can be a difficult question to determine.

Some of the difficulty in applying Rule 201 to facts contained in online sources stems from the Internet's relatively new status as a publication medium. Rule 201 itself gives no specific guidance for electronic sources of facts. Although other federal court rules, discovery rules in particular, have been amended to reflect their applicability to evidence in electronic form,¹⁰ Rule 201 has not undergone similar amendment. Rule 201 has been amended only once since its adoption, and that amendment served merely stylistic purposes.¹¹ An inquiry is warranted, therefore, into Rule 201's applicability and functionality when the facts to be judicially noticed are published on the Internet.

Part I of this Article examines the basic standards for according judicial notice in civil cases in the federal courts. Part II addresses the authoritativeness and the reliability of web-based factual sources, in-

10. For example, Rules 16, 26, 33, 34, 37, and 45 of the Federal Rules of Civil Procedure were amended in 2006 to clarify their applicability to discovery of electronically stored information. *See, e.g.*, FED. R. CIV. P. 16 advisory committee's note, *reprinted in* 28 U.S.C. app. at 129 (2006). In contrast, it was not until 2011 that Federal Rule of Evidence 101 was amended to specifically include electronically stored information in the evidentiary rules' references to "written material." FED. R. EVID. 101 advisory committee's note. In that same year, the best evidence rule's definition of "original" was amended to include an electronic source's "printout—or other output readable by sight" provided that it "accurately reflects the information." FED. R. EVID. 1001(d).

11. *See* FED. R. EVID. 201 advisory committee's note. The current text of the federal rule is as follows:

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

- (1) is generally known within the trial court's territorial jurisdiction; or
- (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

- (1) may take judicial notice on its own; or
- (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

FED. R. EVID. 201.

cluding online reference works such as Wikipedia. Part III discusses evidentiary challenges that may be raised when a party proposes that specific factual information is an appropriate candidate for judicial notice. Such challenges address evidentiary requirements such as authenticity, relevance, hearsay, and accuracy. By extension, this part of the Article also serves to demonstrate the “necessary information”¹² that counsel offering such evidence should consider and secure before requesting judicial notice from the court. Finally, Part IV deals with due process considerations related to judicial notice, particularly with regard to the timeliness of the request for notice and the opportunity for a hearing giving the opponent of the evidence an opportunity to raise objections, a significant matter when a court takes notice *sua sponte*.

This Article cites a wide range of cases examining these issues, and for the greatest part, they support the author’s conclusion that although courts are wise to view Internet-based sources for judicial notice with some caution and a dose of skepticism, they should not reject such sources for the sole reason that they are online. This Article also shows that the judicial notice rule does not need modification to deal with Internet-based sources.¹³ Case law amply demonstrates that by using familiar standards for admissibility of evidence, courts will be able to identify unsuitable web-based sources that are inappropriate sources for judicial notice.

I. Judicial Notice Standards in the Federal Courts

Long in use as a common-law evidentiary doctrine,¹⁴ judicial notice was officially codified for courts of the United States in

12. FED. R. EVID. 201(c)(2).

13. *But see* Christopher Onstott, *Judicial Notice and the Law’s “Scientific” Search for Truth*, 40 AKRON L. REV. 465, 487–88 (2007) (recommending a “new judicial notice standard” for scientific evidence); Dorothy F. Easley, *Judicial Notice on Appeal: A History Lesson in Recent Trends*, 84 FLA. B.J. 45, 48 (2010) (suggesting that it may be necessary to “codify an appellate rule clarifying judicial notice provisions in the appellate context”).

14. *See* 9 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 535 (3d ed. 1940) (“That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so.”); Arthur John Keeffe, William B. Landis, Jr. & Robert B. Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 664 (1950) (“[N]ot every fact is proved during the course of a law suit—*manifesta probatione non indigent* (what is known need not be proved). This practice has its roots far back in the civil and canon law. It is part and parcel of legal or judicial reasoning, no step of which can be taken without assuming something that has not been proved. The capacity to perform this process with competent judgment and efficiency is imputed to judges and juries as part of their necessary mental outfit.”).

1975¹⁵ when Congress adopted the Federal Rules of Evidence.¹⁶ Rule 201 of the Federal Rules of Evidence is limited in its scope; it explicitly “governs judicial notice of an adjudicative fact only, not a legislative fact.”¹⁷ Adjudicative facts are those facts connected to the subject of the litigation: “[T]he parties, their activities, their properties, their businesses.”¹⁸ Put another way, adjudicative facts are “‘those facts that gave rise to and must be proved to resolve the action.’”¹⁹ They are the sorts of facts normally found by a jury.²⁰

In contrast to adjudicative facts, legislative facts “are necessary to interpret the scope and meaning of the law.”²¹ They “do not directly relate to the matters in dispute between the parties.”²² As one court explained the distinction, “[W]hether a fact is adjudicative or legislative depends upon the manner in which it is used. A legal rule may be a proper fact for judicial notice if it is offered to establish the factual context of the case, as opposed to stating the governing law.”²³ Legislative facts are those relevant “to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.”²⁴ Therefore

15. Considering this article’s focus on the Internet, it is noteworthy that even though the year 1975 is ancient history for technology (and the Federal Rules of Evidence), it was still a watershed year for personal computing and the eventual development of the Internet. For example, it marked the appearance of the Altair 8800 microcomputer, it saw the emergence of the first modern email program, and it was the year Bill Gates and Paul Allen founded Microsoft. PAUL E. CERUZZI, *A HISTORY OF MODERN COMPUTING* 226 (2d ed. 2003) (describing the announcement of the Altair 8800 as “rank[ing] with IBM’s announcement of the System/360 a decade earlier as one of the most significant in the history of computing”); Cameron Chapman, *The History of the Internet in a Nutshell*, SIX REVISIONS (Nov. 15, 2009), <http://sixrevisions.com/resources/the-history-of-the-internet-in-a-nutshell/>; *Facts About Microsoft*, MICROSOFT NEWS CENTER, http://www.microsoft.com/presspass/insidefacts_ms.msp (last visited Mar. 17, 2013).

16. Act of Jan. 2, 1975, Pub. L. No. 93–595, 88 Stat. 1926.

17. FED. R. EVID. 201(a). For useful insights on courts’ judicial notice of non-adjudicative facts, see Richard B. Cappalli, *Bringing Internet Information to Court: Of “Legislative Facts,”* 75 TEMP. L. REV. 99 (2002).

18. *Qualley v. Clo-Tex Int’l, Inc.*, 212 F.3d 1123, 1128 (8th Cir. 2000) (quoting FED. R. EVID. 201(a) advisory committee’s note).

19. Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence*, 171 F.R.D. 330, 340 (1997) (quoting a proposed Federal Rule of Evidence, Rule 201(a), defining adjudicative facts).

20. *See id.*

21. *Id.* at 385 (quoting a proposed Federal Rule of Evidence, Rule 202, governing legislative facts).

22. *Id.* (quoting a proposed Federal Rule of Evidence, Rule 202, governing legislative facts).

23. *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002) (citation omitted).

24. FED. R. EVID. 201 advisory committee’s note, *reprinted in* 28 U.S.C. app. at 129 (2006).

a court would be correct in refusing to take judicial notice of, for example, the holding of a case.²⁵ But this does not mean that a court is precluded from relying upon legislative facts in its decision-making; Rule 201 simply does not cover such facts.

When a court judicially notices a fact in the course of trial in a civil case, it instructs the jury to accept the fact as conclusive.²⁶ The use of judicial notice is not restricted to trial settings, however. It is not uncommon for courts to judicially notice facts in the course of deciding dispositive motions such as motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) or motions for summary judgment under Federal Rule of Civil Procedure 56.²⁷ And because judicial notice of undisputed facts may be taken “at any stage of the proceeding,”²⁸ appellate courts are empowered to take judicial notice of facts in the course of an appeal.²⁹

Rule 201 permits a court to judicially notice facts that are “generally known”³⁰ or facts that can easily be located within “sources whose accuracy cannot reasonably be questioned.”³¹ From a policy perspective, if a fact is widely known or indisputable, there is no good reason to make a party jump through evidentiary hoops for its admission. On the other hand, “[j]udicial notice is not a mechanism by which a party can offer into evidence documents that do not fall into one of the specific categories” that Rule 201 identifies.³²

25. See, e.g., *Johnson v. Grays Harbor Cmty. Hosp.*, 385 F. App'x 647, 649 n.2 (9th Cir. 2010) (declining request to take judicial notice of case standing for the proposition that “medical staff appointments constitute implied contracts”).

26. FED. R. EVID. 201(f). In a criminal case, in contrast, the jury is instructed that it has the choice whether to treat the fact as conclusive. *Id.*

27. See, e.g., *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (“In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.”); *Nat'l Ass'n for Gun Rights, Inc. v. Murry*, No. CV 12-95-H-DLC, 2013 WL 5200756, at *3 (D. Mont. Sept. 17, 2013) (“A court may take judicial notice at any stage in the proceedings, including when ruling on summary judgment motions.”).

28. FED. R. EVID. 201(d).

29. See, e.g., *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1212-13 (10th Cir. 2012) (taking notice of the existence, although not the truthfulness, of vehicle defect documents in an administrative agency's files). For a discussion of the concerns surrounding assessment of Internet evidence for its truthfulness, see *infra* Part III.C and the text accompanying notes 91-100. Some appellate courts have viewed judicial notice as tantamount to fact finding, however, and have declined invitations to employ it. See *infra* text accompanying notes 147-51.

30. FED. R. EVID. 201(b)(1).

31. FED. R. EVID. 201(b)(2).

32. *Meeker v. Belridge Water Storage Dist.*, No. 1:05-CV-00603 OWW SMS, 2006 U.S. Dist. LEXIS 91775, at *33 (E.D. Cal. Oct. 18, 2006).

Despite its broad use, the judicial notice doctrine has always had limits and challenges.³³ While “judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities,”³⁴ it must be remembered that “[f]or all practical purposes, judicially noticing a fact is tantamount to directing a verdict against a party as to the noticed fact.”³⁵ Accordingly, “[b]ecause the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b).”³⁶ In the case of facts sought to be noticed from sources on the Internet, such caution is no less warranted.

II. Authority and Reliability of Facts on the Internet

To accord judicial notice to facts contained in a proffered source, a court must be satisfied that the information there is authoritative and reliable.³⁷ Our views of what materials are authoritative and reliable are somewhat different today from what they were a decade or two ago, and they are radically different from what they were a hundred years ago. Professor Robert Berring gave us a revealing illustration of the American legal community’s view of authority when he compared sources cited by the United States Supreme Court in its opinions issued one hundred years apart, in 1899 and in 1999.³⁸ The century-old cases relied almost exclusively on cases and statutes, with almost no citation of secondary materials.³⁹ Professor Berring found that the representative modern cases, in contrast, also relied on “authorities from all corners of the information galaxy.”⁴⁰ Today’s courts are increasingly willing to consider, and even to cite, sources outside the

33. See, e.g., *Vowles v. Craig*, 12 U.S. (8 Cranch) 371, 377 (1814) (“No evidence appears in the record to shew that military surveys do usually contain surplus lands, and it is supposed without such proof the Court cannot take judicial notice of such an allegation.”).

34. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 347 (5th Cir. 1982).

35. *LaSalle Nat’l Bank v. First Conn. Holding Group, L.L.C.* XXIII, 287 F.3d 279, 290 (3d Cir. 2002).

36. *Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998).

37. See, e.g., *United States v. Horn*, 185 F. Supp. 2d 530, 549 (D. Md. 2002) (“The doctrine of judicial notice is predicated upon the assumption that the source materials from which the court takes judicial notice are reliable.”).

38. Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1683–91 (2000).

39. *Id.* at 1686–87.

40. *Id.* at 1689.

traditional mainstream of authority—sources that some have labeled as “nonlegal.”⁴¹ As Professors Frederick Schauer and Virginia Wise have observed, “[T]he sources we designate as ‘nonlegal’ are sources that would only rarely have been available even in a well-stocked law library and would generally have been the subject of at least a raised eyebrow if included in a first-year moot court brief.”⁴²

Familiarity breeds respect, however. In evaluating the suitability of sources for judicial notice, courts today confront their familiar—as well as unique—features, often comparing them to more traditional print sources that have long been deemed authoritative and reliable. The Federal Rules of Evidence explicitly recognize, for example, that treatises “can be established as reliable authority . . . by judicial notice.”⁴³ And courts have routinely used almanacs,⁴⁴ dictionaries,⁴⁵ encyclopedias,⁴⁶ and textbooks⁴⁷ in print as acceptable sources of facts for judicial notice. The propriety of judicially noticing analogous information on the Internet, however, is an issue that has provoked different responses from courts across the country. Some courts judicially notice facts from web-based sources with no discussion or fanfare, demonstrating a liberal willingness to accept websites as ac-

41. See Ellie Margolis, *Authority Without Borders: The World Wide Web and the Delegalization of Law*, 41 SETON HALL L. REV. 909, 920 (2011) (finding that use of nonlegal sources in judicial opinions has increased significantly over the course of the twentieth century); Jeremy Patrick, *Beyond Case Reporters: Using Newspapers to Supplement the Legal-Historical Record (A Case Study of Blasphemous Libel)*, 3 DREXEL L. REV. 539, 539–40 (2011) (finding that the realm of potentially relevant authority has increased significantly); Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 495 (2000) (finding that increased access to nonlegal information has increased citations to such materials); John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427 (2002) (finding a broad pattern of use of nonlegal materials in the opinions of the Supreme Court Justices).

42. Schauer & Wise, *supra* note 41, at 499.

43. *United States v. Norman*, 415 F.3d 466, 473 (5th Cir. 2005) (citing FED. R. EVID. 803(18)).

44. *E.g.*, *Allen v. Allen*, 518 F. Supp. 1234, 1235 n.2 (E.D. Pa. 1981) (using an unnamed almanac to establish a date).

45. *E.g.*, *Turman-Kent v. Merit Sys. Prot. Bd.*, 657 F.3d 1280, 1290 n.5 (Fed. Cir. 2011) (citing three medical dictionaries for the proposition that “brain damage resulting from a stroke is irreversible”); *United States v. Henry*, 417 F.3d 493, 494 (5th Cir. 2005) (citing a dictionary as one of several sources for the judicially noticed fact that “both a 12-gauge shotgun and a 16-gauge shotgun have bore diameters in excess of one-half inch”).

46. *E.g.*, *Singh v. Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004) (taking notice of an article in the Encyclopædia Britannica).

47. *E.g.*, *Tex. & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 254 n.4, *amended sub nom.* *Tex. & Pac. Ry. Co. v. First Nat’l Bank of El Paso, Tex.*, 291 U.S. 649 (1934) (reflecting contents of treatises and textbooks on banks and banking practices); *In re Norris*, 179 F.2d 970, 973 (C.C.P.A. 1950) (addressing facts represented in organic chemistry texts).

ceptable compendia for these facts, with no apparent mistrust of the online medium itself.⁴⁸ Others have categorically dismissed facts appearing on an Internet source as unreliable, regardless of their provenance.⁴⁹ One federal district court took this view of facts taken from the United States Coast Guard's online vessel database:

While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time.⁵⁰

It is certainly true, as *St. Clair* declares, that anyone can publish on the Internet, particularly as today's computers and software have taken much of the complexity out of website construction. Thus, to the extent that traditional print publishers have served as filters or hurdles to would-be authors, the self-publication aspect of the Internet makes judges mistrustful of the reliability of the sources available there. And to be sure, a number of websites contain no clues as to their provenance, their authors, or the sources upon which they pur-

48. See, e.g., *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web."); *Road Dawgs Motorcycle Club of the U.S., Inc. v. Cuse Road Dawgs, Inc.*, 679 F. Supp. 2d 259, 276 n.41 (N.D.N.Y. 2009) (citing print and online sources for judicial notice of the meaning of the phrase "road dawg"); *LaGatta v. Penn. Cyber Charter Sch.*, No. 08-1268, 2011 WL 3957294, at *5 n.4 (W.D. Pa. Sept. 7, 2011) (describing its citation of an online medical dictionary and declaring that "[a] court may rely on and take judicial notice of dictionary definitions"); *Birmingham v. Mizuno U.S.A., Inc.*, No. 5:09-CV-0566 (GTS/GHL), 2011 WL 1299356, at *7 n.8 (N.D.N.Y. Mar. 31, 2011) (citing online sources in taking judicial notice of various meanings of the phrase "soft hands"); *Solid 21, Inc. v. Breitling U.S.A. Inc.*, No. CV 11-0457 GAF (PLAx), 2011 WL 2938209, at *4 n.1 (C.D. Cal. July 19, 2011) ("Defendant submitted a copy of the Oxford English Dictionary that is virtually illegible. However, the Court takes judicial notice that the Oxford English Dictionary website lists this definition").

49. E.g., *Grabein v. Jupiterimages Corp.*, No. 07-22288-CIV, 2008 WL 2704451, at *9 (S.D. Fla. July 7, 2008) (refusing to give judicial notice to Wikipedia's definition of "credit card numbers" because anyone could edit the definition).

50. *St. Clair v. Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1999) (emphasis omitted). Although *St. Clair* was not a judicial-notice case, it has been cited in support of a court's refusal to accept Internet-based sources for judicial notice of facts. See, e.g., *Crochet v. Wal-Mart Stores, Inc.*, No. 6:11-01404, 2012 WL 489204, at *4 (W.D. La. Feb. 13, 2012). For years, the federal judge who wrote *St. Clair* maintained his position on the suspect nature of Internet-sourced information. See *Perforaciones Maritimas Mexicanas S.A. de C.V. v. Seacor Holdings, Inc.*, 443 F. Supp. 2d 825, 832 (S.D. Tex. 2006).

portedly rely, raising concerns about the propriety of viewing them as unquestionably accurate.⁵¹

The dynamic, evolving nature of the Internet also contributes to some judges' fears of the medium. Unlike static physical objects such as books, which exist in multiple identical copies, existing web pages may disappear overnight, or at least, may be substantially modified from their previous appearance, whether in terms of their content, organization, or navigation.⁵² Many scholars, including this author, have documented the fragility of citations to web-based sources, concluding that over a significantly short time period, they change, disappear, or become difficult to locate.⁵³ Certainly all legal researchers, the author included, have encountered hyperlinks that are no longer functional. An article in the Washington Post quotes a researcher in the sciences who likens the prevalence of dead web links to the burning of the library at Alexandria.⁵⁴ The same article quotes a digital librarian's view of these dismal statistics: "The average lifespan of a Web page today is 100 days. This is no way to run a culture."⁵⁵

Some websites are amazingly robust, however. The immensely popular Wikipedia, "the free encyclopedia that anyone can edit,"⁵⁶ first went online in 2001.⁵⁷ Presently containing more than four mil-

51. See, e.g., *Quan v. Gonzales*, 428 F.3d 883, 891 n.1 (9th Cir. 2005) (O'Scannlain, J., dissenting) (citation omitted) ("The majority's reliance on a website of unknown reliability to establish that 'banks in China are typically open on Sundays,' is a novel—and, I would respectfully suggest, misguided—application of the doctrine of judicial notice.").

52. See, e.g., *Mullinax v. United Mktg. Grp., L.L.C.*, No. 1:10-CV-03585-JEC, 2011 WL 4085933, at *6 (N.D. Ga. Sept. 13, 2011) (refusing to take judicial notice of screenshots that altered over time); *Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2010 WL 3910169, at *3 (N.D. Cal. Oct. 5, 2010) (declining to take judicial notice of a reconstructed web page that differed from its original version).

53. See, e.g., Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 419 (2002); Mary F. Casserly & James E. Bird, 64 COLLEGE & RES. LIBR. 300, 301 (2003); Sarah Rhodes, *Breaking Down Link Rot: The Chesapeake Project Legal Information Archive's Examination of URL Stability*, 102 LAW LIBR. J. 581, 582 (2010); Mary Rumsey, *Runaway Train: Problems of Permanence, Accessibility, and Stability in the Use of Web Sources in Law Review Citations*, 94 LAW LIBR. J. 27 (2002); Carmine Sellitto, *The Impact of Impermanent Web-Located Citations: A Study of 123 Scholarly Conference Publications*, 56 J. AM. SOC'Y FOR INFO. SCI. & TECH. 695 (2005).

54. See Rick Weiss, *On the Web, Research Work Proves Ephemeral; Electronic Archivists Are Playing Catch-Up in Trying to Keep Documents From Landing in History's Dustbin*, WASH. POST, Nov. 24, 2003, at A08 (quoting Robert Dellavalle of the Veterans Affairs Medical Center in Denver).

55. *Id.* (quoting Brewster Kahle of the Internet Archive in San Francisco).

56. WIKIPEDIA, http://en.wikipedia.org/wiki/Main_Page (last visited Mar. 17, 2013).

57. *History of Wikipedia*, WIKIPEDIA, https://en.wikipedia.org/wiki/History_of_Wikipedia (last visited June 6, 2013).

lion English language articles⁵⁸ on an almost impossibly broad array of topics, Wikipedia is a popular portal for twenty-first century researchers making preliminary inquiries into a topic.⁵⁹ As an easily accessed source of facts in popular culture, it has no equal. And yet it has provoked the greatest degree of commentary and scholarly analysis of the pros and cons of reliance on Internet-based sources.⁶⁰ Courts have also generally been unwilling to accept Wikipedia as a source for facts to be judicially noticed, most often giving the reason that Internet sources like Wikipedia are not consistently reliable.⁶¹

58. *Id.*

59. See Kathryn Zickuhr & Lee Rainie, *Wikipedia, Past and Present*, PEW INTERNET & AMERICAN LIFE PROJECT (Jan. 13, 2011), <http://pewinternet.org/Reports/2011/Wikipedia.aspx> (reporting findings of a Pew Internet survey stating that “[t]he percentage of all American adults who use Wikipedia to look for information has increased from 25% in February 2007 to 42% in May 2010”). The percentage has likely increased since this survey was conducted.

60. See, e.g., Daniel J. Baker, *A Jester’s Promenade: Citations to Wikipedia in Law Reviews, 2002–2008*, 7 I/S: J.L. & POL’Y FOR INFO. SOC’Y 361 (2012); Tina S. Ching, *The Next Generation of Legal Citations: A Survey of Internet Citations in the Opinions of the Washington Supreme Court and Washington Appellate Courts, 1999–2005*, 9 J. APP. PRAC. & PROCESS 387 (2007); Joseph L. Gerken, *How Courts Use Wikipedia*, 11 J. APP. PRAC. & PROCESS 191 (2010); Dorothy A. Harbeck & Yoonji Kim, *Is the Internet “Voodoo”?: Evidentiary Weight of Internet-Based Material in Immigration Court*, 10 CONN. PUB. INT. L.J. 1 (2010); Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites Is Appropriate*, 84 ST. JOHN’S L. REV. 633 (2010); Diane Murley, *In Defense of Wikipedia*, 100 LAW LIBR. J. 593 (2008); Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J.L. & TECH. 1 (2009); Kenneth N. Rashbaum, Matthew F. Knouff & Dominique Murray, *Admissibility of Non-U.S. Electronic Evidence*, 18 RICH. J.L. & TECH. 1 (2012), <http://jolt.richmond.edu/v18i3/article9.pdf>; Michael Whiteman, *The Death of Twentieth-Century Authority*, 58 UCLA L. REV. DISC. 27 (2010), available at <http://www.uclalawreview.org/pdf/discourse/58-3.pdf>; Bryan C. Berman, Note, *You Can’t Trademark That! Wikipedia Said So*, 30 WHITTIER L. REV. 825 (2009); Amber Lynn Wagner, Comment, *Wikipedia Made Law? The Federal Judicial Citation of Wikipedia*, 26 JOHN MARSHALL J. COMPUTER & INFO. L. 229 (2008); David J. Dansky, *The Google Knows Many Things: Judicial Notice in the Internet Era*, 39 COLO. LAW. 19 (2010); R. Jason Richards, *Courting Wikipedia*, 44 TRIAL 62 (2008); Joe Palazzola, *Which Federal Appeals Court Cites Wikipedia Most Often?*, WALL ST. J. LAW BLOG (Apr. 23, 2012, 7:35 PM), <http://blogs.wsj.com/law/2012/04/23/which-federal-appeals-court-cites-wikipedia-most/>.

61. E.g., *Gonzales v. Unum Life Ins. Co. of Am.*, 861 F. Supp. 2d 1099, 1104 n.4 (S.D. Cal. 2012) (“The Court declines Plaintiff’s request to take judicial notice of the Wikipedia definition of Parkinson’s Disease because the internet is not typically a reliable source of information. Although Defendants did not object to the reference, the Court prefers a more credible source.” (citation omitted)); *BP Prods. N. Am. Inc. v. United States*, 716 F. Supp. 2d 1291, 1295 n.10 (Ct. Int’l Trade 2010) (“Based on the ability of any user to alter Wikipedia, the court is skeptical of it as a consistently reliable source of information. At this time, therefore, the court does not accept Wikipedia for the purposes of judicial notice.”); *Steele v. McMahon*, No. CIV S-05-1874 DAD P., 2007 WL 2758026, at *8 n.5 (E.D. Cal. Sept. 21, 2007) (denying a request for judicial notice of a Wikipedia article on tunnel vision).

Professor Ian Gallacher, while arguing the need for more “open-access” sources of law, has expressed several reservations about Wikipedia:

[T]he Internet’s unmediated “Wikipedia” site contains articles that have the appearance of authority, even though they could be completely inaccurate The open-access nature of the Wikipedia site means that anyone can post or edit an entry, and the sophisticated presentation software available as part of the site means that any entry, whether it be completely accurate or entirely fictitious, will look the same. Unwitting users of the site could be misled into following a theory supported by a Wikipedia entry that has no actual substance in reality. For this reason, many scholars mistrust anything that appears on the Wikipedia site and do not recognize it as a viable research source.⁶²

Where, in contrast, courts have revealed their willingness to accord judicial notice to facts found in Wikipedia articles, they typically have justified their actions by stating that the noticed facts are not subject to dispute,⁶³ or by stressing Wikipedia’s value in addressing topics not likely to be found in traditional scholarly works.⁶⁴ Federal Appellate Judge Richard Posner has cited Wikipedia in several Seventh Circuit opinions,⁶⁵ even while acknowledging in an interview with the *New York Times* that “[i]t wouldn’t be right to use . . . in a critical issue.”⁶⁶ Judge Posner added that “[i]f the safety of a product is at issue, you wouldn’t look it up in Wikipedia.”⁶⁷

Wikipedia’s acceptance of—indeed, its reliance upon—open-source editing is responsible for the perception that it is unreliable

62. Ian Gallacher, *Cite Unseen: How Neutral Citation and America’s Law Schools Can Cure Our Strange Devotion to Bibliographical Orthodoxy and the Constriction of Open and Equal Access to the Law*, 70 ALB. L. REV. 491, 503 n.63 (2007) (citations omitted).

63. *E.g.*, *First Nat’l Bank in Sioux Falls v. First Nat’l Bank S.D.*, 655 F. Supp. 2d 979, 992 n.6 (D.S.D. 2009) (taking notice of geography and population statistics); *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1145 n.8 (N.D. Cal. 2008) (taking notice of the ability of multiple users to share an IP address).

64. *E.g.*, *AVS Found. v. Eugene Berry Enter., L.L.C.*, No. 11 CV 01084, 2011 WL 6056903, at *6 (W.D. Pa. Dec. 6, 2011) (citing Wikipedia’s coverage of a sports towel in trademark action as source for judicial notice of a trademark’s fame).

65. *See, e.g.*, *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 757 (7th Cir. 2012) (citing a Wikipedia article about YouTube); *United States v. Ford*, 683 F.3d 761, 768 (7th Cir. 2012) (citing a Wikipedia article about DNA profiling); *Prude v. Clarke*, 675 F.3d 732, 734 (7th Cir. 2012) (citing a Wikipedia article about anal fissures).

66. Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, N.Y. TIMES, Jan. 29, 2007, at C3, available at <http://www.nytimes.com/2007/01/29/technology/29wikipedia.html> (quoting Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit) (Internal quotations omitted).

67. *Id.* (Internal quotations omitted).

and unstable.⁶⁸ Obviously aware of this perception, Wikipedia takes pains to explain to would-be contributors its standards for reliability:

Articles should be based on reliable, third-party, published sources with a reputation for fact-checking and accuracy. This means that we only publish the opinions of reliable authors, and not the opinions of Wikipedians who have read and interpreted primary source material for themselves.

• • • •

The reliability of a source depends on context. Each source must be carefully weighed to judge whether it is reliable for the statement being made and is an appropriate source for that content. In general, the more people engaged in checking facts, analyzing legal issues, and scrutinizing the writing, the more reliable the publication. Sources *should directly support* the information as it is presented in an article. If no reliable sources can be found on a topic, Wikipedia should not have an article on it.⁶⁹

Moreover, in defense of its disclaimer policy,⁷⁰ Wikipedia points to the existence of similar disclaimers from a broad array of publications, including sources such as the Associated Press, the New York Times, the Wall Street Journal, and the Oxford English Dictionary,⁷¹ all of which—in print as well as online—courts have found acceptable for judicial notice.⁷²

68. Gallacher, *supra* note 62.

69. *Identifying Reliable Sources*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia:Reliable_sources (last modified Mar. 4, 2013, 3:05 AM).

70. Wikipedia posts a broad disclaimer:

Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information.

That is not to say that you will not find valuable and accurate information in Wikipedia; much of the time you will. However, *Wikipedia cannot guarantee the validity of the information found here*. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.

General Disclaimer, WIKIPEDIA, <http://en.wikipedia.org/wiki/Wikipedia:Disclaimers> (last modified Nov. 6, 2012, 9:52 PM).

71. *Non-Wikipedia Disclaimers*, WIKIPEDIA, http://en.wikipedia.org/wiki/Wikipedia:Non-Wikipedia_disclaimers (last modified Feb. 9, 2013, 1:32 PM).

72. See, e.g., *Igartua-De La Rosa v. United States*, 417 F.3d 145, 176–77 (1st Cir. 2005); *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 598 n.2 (3d Cir. 2000); *Am. Fed. Bank v. United States*, 72 Fed. Cl. 586, 621 n.47 (Fed. Cl. 2006); *Am. Dairy Queen Corp. v. Blume*, No. 11-358 (RHK/TNL), 2013 WL 1748436, at *2 (D. Minn. Jan. 11, 2013).

III. Strategies for Challenging Judicial Notice of Facts on the Internet

Challenging a court's judicial notice of essential facts may furnish a viable way to oppose dispositive motions such as motions to dismiss, motions for summary judgment, or motions for judgment on the pleadings, as well as keeping a disputed fact alive for determination by a jury or judicial fact-finder. The elements of judicial notice delineated by Rule 201(b) suggest several possibilities for challenge by an opponent of the proffered fact:

- (1) The fact is not something generally known within the trial court's territorial jurisdiction.
- (2) The fact is subject to reasonable dispute.
- (3) The fact cannot accurately or readily be determined from the cited source.
- (4) The accuracy of the source can reasonably be questioned.⁷³

These four requirements are not the only possible bases for challenge. While a court has considerable discretion in determining whether and when to judicially notice facts relevant to the resolution of a case, it cannot bypass or ignore the basic requirements of the rules of evidence by opting to use a judicial notice shortcut.

Rule 201 also states that a court "must take judicial notice if a party requests it and the court is *supplied with the necessary information*."⁷⁴ Although the rule does not identify just what sort of information is needed, it appears that courts expect to be provided with fairly specific details. For example, the Sixth Circuit Court of Appeals refused to accord judicial notice to certain driver's license records contained in an online database when the Government "offered . . . nothing but a vague reference to 'westlaw.com.'"⁷⁵ The Sixth Circuit held "that fact alone, without any guidance from the government as to where in Westlaw one might locate the information, hardly fulfill[ed] the mandate of Rule 201(d)."⁷⁶

The phrase "necessary information" also contemplates that the evidence to be judicially noticed is otherwise acceptable under federal evidentiary standards. As one federal circuit court has outlined, "[c]aution must . . . be taken to avoid admitting evidence, through the

73. FED. R. EVID. 201(b).

74. FED. R. EVID. 201(c)(2) (emphasis added). A previous version of the rule used slightly different wording to express the same concept: "A court shall take judicial notice if requested by a party and supplied with the necessary information." FED. R. EVID. 201(d), Pub. L. 93-595, 88 Stat. 1931 (Jan. 2, 1975) (amended 2011).

75. *United States v. Husein*, 478 F.3d 318, 337 (6th Cir. 2007).

76. *Id.* (emphasis omitted).

use of judicial notice, in contravention of the relevancy, foundation, and hearsay rules.”⁷⁷ In affirming a magistrate judge’s refusal to give judicial notice to facts that were more prejudicial than probative under Federal Rule of Evidence 403, another court explained the inquiry this way:

Rule 201 does, indeed, say that judicial notice is “mandatory” when a party requests it and supplies the necessary supporting information. But facts subject to judicial notice are not exempt from analysis under the other rules of evidence.⁷⁸

A party challenging judicial notice of facts should therefore be prepared to show the court the necessary information that is lacking, including the bedrock requirement of relevance. Depending on the nature of the factual information to be noticed, challenges may assert, for example, that the material is insufficiently authenticated (under Rule 901), that it either is inadmissible hearsay (under Rule 801), or fails to qualify for the hearsay exceptions for business and public records (under Rules 803(6) and 803(8)) because it lacks trustworthiness, or that it is demonstrably disputable or inaccurate (under the judicial notice rule itself). While there may be other grounds for challenging judicial notice of Internet-based facts, the author’s research reveals that these are the grounds that are asserted with the greatest frequency in this context.

A. Challenging Judicial Notice on the Basis of Relevance

No matter how well known or indisputable a fact may be, no fact should be judicially noticed—even upon a party’s request—if it is not relevant to the litigation.⁷⁹ Under the Federal Rules, relevant evidence must satisfy two criteria: (1) it must have the “tendency to make a fact more or less probable than it would be without the evidence,”⁸⁰ and

77. *Am. Prairie Constr. Co. v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009).

78. *Sunstar, Inc. v. Alberto-Culver Co.*, Nos. 01 C 736, 01 C 5825, 2006 U.S. Dist. WL 6505615, at *3 (N.D. Ill. Nov. 16, 2006). *See also* *United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000) (holding in mail- and wire-fraud case that even if the appellate court was “wrong about the [the defendant’s proffered] web postings being unfairly prejudicial, irrelevant, and hearsay, [the district judge] still was justified in excluding the evidence because it lacked authentication”).

79. *See, e.g.*, *Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010) (“[A] court may properly decline to take judicial notice of documents that are irrelevant to the resolution of a case.”); *United States v. Falcon*, 957 F. Supp. 1572, 1585 (S.D. Fla. 1997) (“[W]hile the Rule . . . [says] the court ‘shall take judicial notice if requested by a party and supplied with the necessary information’ . . . a court may refuse to take judicial notice of facts that are irrelevant to the proceeding or (in certain contexts) otherwise excludable under the Federal Rules.”).

80. *FED. R. EVID.* 401(a).

(2) it must be “of consequence in determining the action.”⁸¹ What is relevant may vary according to the nature of the matter being decided by the court, as the following examples illustrate:

- In two antitrust cases, the district courts used distances shown in Internet mapping services to determine the relevant “geographic market,” i.e., the area in which potential buyers might choose to look for goods and services they wished to purchase.⁸²
- When it decides a motion to dismiss, a “court’s review is limited to the complaint and matters judicially noticeable.”⁸³ In a case in which the court had to determine whether to grant Facebook’s motion to dismiss on grounds of subject-matter jurisdiction, the district court refused to grant judicial notice to certain web pages on the social media site because they were “neither documents on which the Complaint ‘necessarily relies,’ nor documents whose relevance and authenticity are uncontested.”⁸⁴
- In reviewing an order of dismissal, the District of Columbia Circuit ruled that the district court did not abuse its discretion in denying judicial notice to certain legislative documents. The court observed that the relevance of the facts to be noticed “turns on the adequacy of the well-pleaded factual allegations in the complaint, which are assumed to be true.”⁸⁵
- In considering a First Amendment challenge to an arts center’s policy restricting use of its grounds to artistic- or performance-related events, the Second Circuit declined to take judicial notice of a city website listing the space as a “park”:

While it may be appropriate to take notice of the fact that the website makes such a designation, as the authenticity of the site has not been questioned, the fact itself has little relevance with regard to park dedication. The website refers to various types of properties as “parks” under this menu, including gardens and school playgrounds.

. . . Moreover, whatever label is used, the City has affirmatively demonstrated an intent *not* to treat the Plaza as it would a typical city park.⁸⁶

81. FED. R. EVID. 401(b).

82. See *Untracht v. Fikri*, 454 F. Supp. 2d 289, 309–10 n.11 (W.D. Pa. 2006); *Gordon v. Lewistown Hosp.*, 272 F. Supp. 2d 393, 429 (M.D. Pa. 2003).

83. *Reid v. Johnson & Johnson*, No. 11CV1310 L(BLM), 2012 WL 4108114, at *13 (S.D. Cal. Sept. 18, 2012).

84. *Fralely v. Facebook, Inc.*, 830 F. Supp. 2d 785, 794–95 (N.D. Cal. 2011) (explaining that “[u]nder the doctrine of incorporation by reference, the Court may consider on a Rule 12(b)(6) motion not only documents attached to the complaint, but also documents whose contents are alleged in the complaint, provided the complaint ‘necessarily relies’ on the documents or contents thereof, the document’s authenticity is uncontested, and the document’s relevance is uncontested”).

85. *Whiting v. AARP*, 637 F.3d 355, 364 (D.C. Cir. 2011) (citations omitted).

86. *Hotel Emps. & Rest. Emps. Union, Local 100 v. City of New York Dep’t of Parks & Recreation*, 311 F.3d 534, 549 (2d Cir. 2003) (citations omitted).

Further, given that even relevant evidence may be deemed inadmissible if it is more prejudicial than probative,⁸⁷ it is certainly arguable that according judicial notice to irrelevant facts is prejudicial. At a minimum, it risks distracting the fact-finder or confusing the issues. While the concept of relevance is broad and generally favors admission,⁸⁸ parties opposing judicial notice should consider relevance as a ground for objection to facts offered for judicial notice. If the facts offered for judicial notice are not relevant to an issue being decided by the court, the appropriate action is for the court to decline to judicially notice them.

B. Challenging Judicial Notice on the Basis of Authenticity

The authenticity inquiry examines whether the proffered evidence is what it purports to be. To satisfy the requirement of authenticity, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”⁸⁹ Challenging a request for judicial notice of facts is appropriate when the authenticity of their sources on the Internet can reasonably be disputed.⁹⁰

The possible bases for questioning the authenticity of an Internet source are varied. A challenge may raise questions about a website’s ownership or the identity of the author(s) of its contents, among other things. As one court explained:

The issues that have concerned courts include the possibility that third persons other than the sponsor of the website were responsible for the content of the postings, leading many to require proof by the proponent that the organization hosting the website actually posted the statements or authorized their posting. One commentator has observed “[i]n applying [the authentication standard] to website evidence, there are three questions that must be answered explicitly or implicitly. (1) What was actually on the website? (2) Does the exhibit or testimony accurately reflect it? (3) If so, is it attributable to the owner of the site?”⁹¹

87. FED. R. EVID. 403.

88. As one district court recently paraphrased a classic line from *McCormick on Evidence*, “[T]o be relevant, evidence need only be a brick, not a wall.” *Davis v. Duran*, 276 F.R.D. 227, 230 (N.D. Ill. 2011).

89. FED. R. EVID. 901(a).

90. See, e.g., *Francarl Realty Corp. v. Town of E. Hampton*, 628 F. Supp. 2d 329, 332 n.3 (E.D.N.Y. 2009) (“This Court may take judicial notice of the contents of a website assuming, as in this case, its authenticity has not been challenged and it is ‘capable of accurate and ready determination.’”), *aff’d in part, vacated in part*, 375 F. App’x 145 (2d Cir. 2010).

91. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 555 (D. Md. 2007) (citations omitted) (quoting Gregory P. Joseph, *Internet and Email Evidence*, 13 PRAC. LITIGATOR, Mar.

Questions of ownership and attribution caught the attention of the Third Circuit in a case in which statements on a company's website were at issue, and the court explained why it was vacating and remanding the district court's judicial notice of those statements:

[W]e allow judicial notice only from sources not reasonably subject to dispute. Anyone may purchase an internet address, and so, without proceeding to discovery or some other means of authentication, it is premature to assume that a webpage is owned by a company merely because its trade name appears in the uniform resource locator.⁹²

Many good examples may be found showing successful authenticity challenges to judicial notice in a variety of contexts. In holding that a defamation claim survived a defendant's motion for judgment on the pleadings, one district court declined to take judicial notice of a YouTube video on the Internet, pointing to questions of authenticity regarding the proposed evidence.⁹³ In another case, dealing with a Rule 12(b)(6) motion to dismiss, the district court refused to take judicial notice of deed search results or a press release from a mortgagee's website where those materials had not been authenticated.⁹⁴ And in a case involving a Rule 12(b)(6) motion to dismiss, the district court explained what would be necessary to persuade it to consider the contents of a website in determining whether the complaint's allegations might incorporate website materials by reference:

If it was undisputed that the documents provided by Defendants' counsel came from Defendants' website, and were viewed by visitors, during the time period referenced in Plaintiffs' Amended Complaint, the Court would have some difficulty excluding them from consideration, because most of them would appear [to be] incorporated by reference in and/or integral to Plaintiffs' Amended Complaint. However, Plaintiff[s] sufficiently dispute the genuineness and/or accessibility [of] those documents. Simply stated, the Court is not confident that the documents provided by Defendants are the documents that are in fact incorporated by reference in and/or integral to Plaintiffs' Amended Complaint.⁹⁵

Challenges to a website's authenticity may also center on its contents, its date, or its contents on a particular date. While a court may take judicial notice of the fact that a party maintained a website, where

2002, at 21, *reprinted in* 5 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL, pt. 4, at 21 (9th ed. 2006)).

92. *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007) (citations omitted).

93. *Point Ruston, L.L.C. v. Pac. Nw. Reg'l Council of United Bhd. of Carpenters & Joiners of Am.*, 658 F. Supp. 2d 1266, 1279 (W.D. Wash. 2009).

94. *Trevino v. Merscorp, Inc.*, 583 F. Supp. 2d 521, 527 (D. Del. 2008).

95. *Car-Freshner Corp. v. Getty Images, Inc.*, 822 F. Supp. 2d 167, 175 (N.D.N.Y. 2011) (citation omitted).

the content on that website is subject to change, judicial notice is not appropriate.⁹⁶ For example, in considering a motion to dismiss in a class-action suit against an online buyer reward program, the court declined to take judicial notice of web pages due to a “reasonable dispute” over whether the pages were those that the plaintiffs would have viewed during their online transactions, given that the pages underwent several changes over time.⁹⁷

Creative proponents requesting judicial notice for a website might suggest that it could be authenticated by using an online archive such as Internet Archive’s Wayback Machine⁹⁸ to demonstrate its contents on a particular date in the past. Such archives maintain vast repositories of archived and searchable web pages, preserved as they appeared at various points in time.⁹⁹ In response to such an argument, however, the party challenging judicial notice should point to the analysis of the Eastern District of New York, finding documents from the Wayback Machine not properly authenticated. Because the Internet Archive relies on data from third parties concerning the past contents of a website, “the authorized owners and managers of the archived websites play no role in ensuring that the material posted in the Wayback Machine accurately represents what was posted on their official websites at the relevant time.”¹⁰⁰

96. See, e.g., *In re Poirier*, 346 B.R. 585, 588–89 (Bankr. D. Mass. 2006) (taking judicial notice of fact that Department of Education maintained a website but declining to notice its contents because, *inter alia*, content was subject to change).

97. *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1167–68 (S.D. Cal. 2010). See also *Hancock v. Hartford Life & Accident Ins. Co.*, No. CIV 2:06-CV-00208-FCD-DAD, 2006 U.S. Dist. LEXIS 39774, at *12 (E.D. Cal. June 14, 2006) (noting that one of the goals of the limitations placed on judicial notice via Rule 201 is to allow both parties to “examine each other’s evidence and to present all sides to the trier of fact,” and explaining how that goal would be frustrated if judicial notice could properly be taken of facts that are susceptible of reasonable dispute).

98. *Wayback Machine*, INTERNET ARCHIVE, <http://archive.org/web/web.php> (last visited Mar. 17, 2013).

99. As of early 2013, the Wayback Machine claimed to have more than “240 billion web pages archived from 1996 to a few months ago.” *Id.* By the date you read this footnote, the number will have undoubtedly increased.

100. *Novak v. Tucows, Inc.*, No. 06–CV–1909(JFB)(ARL), 2007 WL 922306, at *5 (E.D.N.Y. Mar. 26, 2007), *aff’d*, 330 F. App’x 204 (2d Cir. 2009). See also *St. Luke’s Cataract & Laser Inst. v. Sanderson*, No. 8:06-CV-223-T-MSS, 2006 WL 1320242, at *2 (M.D. Fla. May 12, 2006) (excluding Internet Archive printouts for lack of authentication, but instructing the plaintiff that “a statement or affidavit from an Internet Archive representative with *personal knowledge* of the contents of the Internet Archive website” would be satisfactory to the court); *Chamilia, L.L.C. v. Pandora Jewelry, L.L.C.*, No. 04-CV-6017 (KMK), 2007 WL 2781246, at *6 n.4 (S.D.N.Y. Sept. 24, 2007) (“In support of its claim, Plaintiff has submitted a series of archived web pages from an Internet service called the ‘Wayback Machine,’

It should be noted, however, that although the Internet Archive recommends that legal users “seek judicial notice or simply ask [their] opposing party to stipulate to the documents’ authenticity,” it also contains instructions for obtaining authenticated copies of its contents, for a fee.¹⁰¹

The inherently evolving and impermanent nature of web pages will always furnish possible grounds for challenge. Counsel considering raising such challenges should be prepared to examine a site’s authorship, its ownership, its contents, and its modifications over the relevant time at issue in a case.

C. Challenging Judicial Notice on the Basis of Hearsay

Despite opinions such as *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*¹⁰² expressing courts’ mistrust of information from websites, courts today are increasingly willing to consider Internet evidence. One district court explained its disagreement with *St. Clair’s* broad prohibition against reliance on the Internet, stating, “[t]he truth of anonymous postings on a white supremacist website would be markedly different than, for example, the truth of postings made by a well-established business on its own website.”¹⁰³ Such willingness should nonetheless be challenged where judicial notice is unwarranted, as is the case with evidence that is inadmissible because it violates one or more evidentiary rules. An objection based on the evidentiary prohibition against hearsay may provide a basis for a viable challenge.

One of the bedrock principles of the rules of evidence is that an out-of-court statement being offered for “the truth of the matter asserted” is inadmissible hearsay,¹⁰⁴ unless it fits one of the non-hearsay classifications¹⁰⁵ or can otherwise be admitted under an exception to the basic hearsay rule.¹⁰⁶ When a party proffers the contents of a website into evidence, a court should determine whether those contents are offered to prove the truth of the matter asserted, and consequently, whether such material constitutes hearsay under Federal Rule of Evidence 801 or whether it qualifies for one of the Rule 803 excep-

which Defendant moves to strike. This putative evidence suffers from fatal problems of authentication under [Federal Rule of Evidence] 901.”)

101. *Information Requests*, INTERNET ARCHIVE, <http://archive.org/legal/> (last visited Mar. 17, 2013).

102. 76 F. Supp. 2d 773 (S.D. Tex. 1999). *See also supra* text accompanying note 51.

103. *United States v. Cameron*, 762 F. Supp. 2d 152, 161 (D. Me. 2011).

104. FED. R. EVID. 801(c)(2).

105. *See* FED. R. EVID. 801(d).

106. *See* FED. R. EVID. 803; FED. R. EVID. 804.

tions.¹⁰⁷ Because such a statement is made out of court, it is not made under oath. And even though an out-of-court statement may qualify as admissible under the rules of evidence, it may still fail to convince a jury to rule in favor of the party who offers it. Even if a hearsay statement comes in, a factfinder still has to decide among competing versions of the facts proffered by opposing parties. As one commentator explains, “[h]earsay and judicial notice considerations overlap but are not identical: ‘It takes more than an exception to the hearsay rule . . . to justify judicial notice.’ That something more is indisputability.”¹⁰⁸

For example, litigants frequently request judicial notice of documents filed in other courts and in other cases, and to the extent that such requests ask only that the *existence* of such documents be judicially noticed, they are permissible. While it is appropriate for a court to take judicial notice of the *fact* of the filing or the other litigation, it is error for a court to take judicial notice of the *contents* of those filings for the truth of the matters asserted therein (unless they meet a hearsay exception).¹⁰⁹ In one instance, the Second Circuit cautioned that “[f]acts adjudicated in a prior case do not meet either test of indisputability contained in Rule 201(b): they are not usually common knowledge, nor are they derived from an unimpeachable source.”¹¹⁰ In another case involving an alleged Ponzi scheme, the Eighth Circuit reversed the district court’s grant of judicial notice to a company’s online records emphasizing that facts to be judicially noticed should not be subject to any form of reasonable dispute:

It is unclear whether the district court took judicial notice of the truth of the matter contained in the records, i.e., that [one of the plaintiffs] is in fact a director [of a company controlled by one of the defendants], or simply took judicial notice that the records so stated. Judicial notice of a fact is only to be taken when that fact is not subject to reasonable dispute. In his declaration supporting his

107. See, e.g., *Novak v. Tucows, Inc.*, No. 06–CV–1909 (JFB) (ARL), 2007 WL 922306, at *5 (E.D.N.Y. Mar. 26, 2007) (granting, on hearsay and authentication grounds, a defense motion to strike exhibits consisting of printouts of web pages), *aff’d*, 330 F. App’x 204 (2d Cir. 2009); *Milo v. Galante*, No. 3:09cv1389 (JBA), 2011 WL 1214769, at *3 (D. Conn. Mar. 28, 2011) (“The Court may take judicial notice of these public records . . . only to establish the timing and existence of the information contained in them or the existence of litigation and related filings; the Court may not take judicial notice of the truth of the facts asserted in the media reports or legal filings.”).

108. *Dansky*, *supra* note 60, at 19, 21 (quoting *Doss v. Clearwater Title Co.*, 551 F.3d 634, 640 (7th Cir. 2008)).

109. See, e.g., *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (holding that facts contained in a bankruptcy court order were an improper subject for judicial notice).

110. *Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998).

opposition to the motion for judicial notice, [the plaintiff] disputed that he was ever a director on National Investments' board. This subjects the issue to reasonable dispute. Accordingly, to the extent that the district court took judicial notice of the truth of the document's content, this was an abuse of discretion.¹¹¹

In cases in which a party wants the court to take judicial notice of the contents of its *opponent's* website, counsel may be able to argue such indisputability. For example, in *O'Toole v. Northrop Grumman Corporation*,¹¹² the plaintiff asked the district court to take judicial notice of the actual earnings history posted on his former employer's website and gave the complete address for the page to which its quarterly reports were linked, arguing that because Northrop Grumman created the information, it should not be able to dispute it.¹¹³ Although Northrop Grumman argued on appeal that the lower court's judicial notice was erroneous, the Tenth Circuit regarded the corporation's arguments as unpersuasive because it failed to explain "why its own website's posting of historical retirement fund earnings is unreliable."¹¹⁴ Furthermore, although Northrop Grumman could have asked the district court for a hearing under Rule 201(e),¹¹⁵ it did not do so. The court of appeals concluded that "Northrop Grumman's failure to dispute its own information . . . contributes to its indisputability."¹¹⁶

In another case, in which one of the issues was whether an employee had been forced to sign a release of his medical records, the plaintiff asked the trial court to take judicial notice of his records on the National Personnel Records Center's website.¹¹⁷ Although the trial court initially accorded judicial notice to the website records, it later withdrew that notice because the plaintiff also testified about them. In holding that the trial court erred, the Seventh Circuit observed both that "[t]he information on the website was not duplicative . . . [and that] the fact that the [National Personnel Records Center] maintains medical records of military personnel is appropriate for judicial notice because it is not subject to reasonable dispute."¹¹⁸ Exercising its prerogative to take judicial notice of the website on appeal, the Seventh Circuit pointedly accused the defend-

111. *Lustgraaf v. Behrens*, 619 F.3d 867, 885–86 (8th Cir. 2010) (citations omitted).

112. 499 F.3d 1218 (10th Cir. 2007).

113. *Id.* at 1224–25.

114. *Id.* at 1225.

115. "On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed." FED. R. EVID. 201(e).

116. *O'Toole*, 499 F.3d at 1225.

117. *Denius v. Dunlap*, 330 F.3d 919, 925 (7th Cir. 2003).

118. *Id.* at 926.

ants of causing “additional judicial work by contesting a factual issue that, according to information readily available in the public domain, cannot be reasonably disputed.”¹¹⁹

Although courts routinely—and without much hesitation—overrule hearsay objections when public records or business records are offered into evidence, when challenging judicial notice of website evidence, opponents will be more successful if they can show the court the improper evidentiary purposes for which the fact and the source being proffered serve.

D. Challenging Judicial Notice on the Basis of Accuracy

Another potential evidentiary challenge concerns the accuracy of the facts appearing on a website. Rule 201 permits judicial notice of facts when they “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”¹²⁰ Such challenges to accuracy may elicit a response similar to the following remarks made *sua sponte* by a district court when asked to take judicial notice of web pages from two different sites:

Taking judicial notice of facts on a webpage . . . poses heightened concerns because anyone can say anything on a webpage, and the posting of a “fact” on a webpage does not necessarily make it true. The unregulated content of webpages poses significant hurdles for the court to find that a webpage, or its host or author, is necessarily “a source whose accuracy cannot reasonably be questioned.”¹²¹

The question of a website’s accuracy, for judicial notice purposes, was also the subject of the following commentary by another district court: “I doubt that a website can be said to provide an ‘accurate’ reference, at least in normal circumstances where the information can be modified at will by the web master and, perhaps, others.”¹²²

Establishing the accuracy of the facts to be judicially noticed is vital. For example, courts have often used Internet mapping tools such as Mapquest¹²³ or Google Maps¹²⁴ to take judicial notice of facts demonstrating geography or the distances between locations.¹²⁵ In so

119. *Id.* at 927.

120. FED. R. EVID. 201(b)(2).

121. Knight v. Standard Ins. Co., No. CIV 07-1691 WBS EFB, 2008 WL 343852, at *2 n.2 (E.D. Cal. Feb. 6, 2008) (citations omitted).

122. Fenner v. Suthers, 194 F. Supp. 2d 1146, 1148–49 (D. Colo. 2002).

123. MAPQUEST, <http://www.mapquest.com/> (last visited Mar. 17, 2013).

124. GOOGLE MAPS, <https://maps.google.com/> (last visited Mar. 17, 2013).

125. See, e.g., Citizens for Peace in Space v. Colorado Springs, 477 F.3d 1212, 1218 n.2 (10th Cir. 2007) (taking judicial notice of the 310 yard distance between two locations, as measured using a web application, www.gmap-pedometer.com); Rindfleisch v. Gentiva

doing, they typically refer to there being no reasonable dispute about the accuracy of the distances or locations shown. Yet, such mapping tools are not necessarily flawless, and a challenger may be able to raise a court's concerns about their accuracy. For example, in a Pennsylvania case in which it was critical to know the distance between a school and the scene of a drug crime, the appellate court ruled that by taking judicial notice of the distance shown by Mapquest, the trial judge abused his discretion.¹²⁶ The court consequently reversed and remanded the case.¹²⁷ Concluding that the accuracy of Internet sites such as Mapquest is not so reliable as to be beyond reasonable questioning, the court also observed that "[a]n internet site determining distances does not have the same inherent accuracy as do professionally accepted medical dictionaries, or encyclopedias, or other matters of common knowledge within the community."¹²⁸ The same may well be true of any number of general reference sites on the Internet, and judicial-notice challengers would be well advised to compare their data with what is available in more traditional reference sources as well as what is available in comparable Internet reference sites.¹²⁹

Another important factor in determining a website's accuracy is whether its contents are susceptible to bias, overstatement, or other matters that would suggest inaccuracy. Finding error in the lower court's judicial notice of facts on a business party's website, the Third Circuit observed:

[A] company's website is a marketing tool. Often, marketing material is full of imprecise puffery that no one should take at face value. Thus courts should be wary of finding judicially noticeable facts amongst all the fluff; private corporate websites, particularly when describing their own business, generally are not the sorts of

Health Sys., Inc., 752 F. Supp. 2d 246, 259 n.13 (E.D.N.Y. 2010) (using Google Maps to take judicial notice of the miles and estimated driving time between courthouses); *United States v. Williams*, 476 F. Supp. 2d 1368, 1378 n.6 (M.D. Fla. 2007) (taking judicial notice of driving distances by using Mapquest); *Marcavage v. New York*, No. 05 Civ. 4949 (RJS), 2010 U.S. Dist. LEXIS 107724, at *21–22 (S.D.N.Y. Sept. 29, 2010) (using a Google Map and a satellite photograph to take judicial notice of the location of a demonstration). *See also supra* note 81.

126. *Commonwealth v. Brown*, 839 A.2d 433, 435–37 (Pa. Super. Ct. 2003).

127. *Id.* at 437.

128. *Id.* at 435–36.

129. For an illustration of this point, consider the following personal anecdote. The author has lived in the same house since 1997. The distance between her home and a neighbor's is correctly shown as 0.2 miles on Google Maps and Bing Maps, but is incorrectly shown as 0.09 miles on Mapquest. While an error of slightly more than a tenth of a mile is not much, it still suggests that counsel opposing a request for judicial notice should check for accuracy by comparing results using different mapping services.

“sources whose accuracy cannot reasonably be questioned” that our judicial notice rule contemplates.¹³⁰

Finally, courts should be wary of the possibility of deliberate misstatements being posted to a website for reasons antithetical to justice or to the public interest. Reversing a lower court’s grant of judicial notice to a statement of purpose on a governmental website, the Sixth Circuit identified a potential—and alarming—consequence if such a misstatement is taken as accurate. Namely, that “government agencies could defuse any complaint alleging improper governmental motives merely by stating an arguably proper motive on their website,” thereby eviscerating laws requiring inquiry into governmental motives.¹³¹

IV. Timeliness and Due Process Considerations

Federal Rule of Evidence 201(d) declares that “[t]he court may take judicial notice at any stage of the proceeding.”¹³² Although litigants are entitled to be heard on “the propriety of taking judicial notice and the nature of the fact to be noticed,” they must make a “timely request” for that hearing.¹³³ Alternatively, if a court takes judicial notice on its own before notifying a party of its action, the party, “on request, is still entitled to be heard.”¹³⁴ All of these provisions indicate the critical importance of timing in making requests for, or challenges to, judicial notice.

Although the plain language of the judicial notice rule indicates that courts may take judicial notice whenever they wish,¹³⁵ in some instances the judicial notice decision comes so early that it effectively disadvantages one of the litigants. When a case is still in the pleadings stage, for example, taking judicial notice may be reversible error. In the *Victaulic* covenant-not-to-compete case discussed earlier,¹³⁶ the court declared error in the district court’s decision to take judicial notice of facts external to the pleadings in deciding a motion to dismiss:

130. *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007) (citations omitted) (vacating and remanding the district court’s order taking judicial notice of facts set out on a website).

131. *Passa v. Columbus*, 123 F. App’x 694, 698 (6th Cir. 2005).

132. FED. R. EVID. 201(d).

133. FED. R. EVID. 201(e). In the original wording of the rule, “[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.” FED. R. EVID. 201(e), Pub. L. 93–595, 88 Stat. 1931 (Jan. 2, 1975) (amended 2011).

134. FED. R. EVID. 201(e).

135. FED. R. EVID. 201(d).

136. *See supra* text accompanying notes 91, 129.

While the rules allow a court to take judicial notice at any stage of the proceedings, we believe that it should be done sparingly at the pleadings stage. Only in the clearest of cases should a district court reach outside the pleadings for facts necessary to resolve a case at that point. Resolving a thorny issue like reasonableness by resorting to a party's unauthenticated marketing material falls far short of the bar.¹³⁷

Waiting too long to object to a trial court's decision to take judicial notice will be fatal to that issue on appeal. As a bankruptcy appellate panel explained, "[w]here a party does not make a timely request to be heard on the issue of . . . judicial notice, that party has waived its right to appeal the propriety of taking judicial notice."¹³⁸

Rule 201 provides no guidance for determining what is timely. Some courts have set out a specific time frame for requesting a hearing,¹³⁹ while others recognize that the question of timeliness ought to be treated with more flexibility.¹⁴⁰ The Advisory Committee note to Rule 201 supports the latter approach.¹⁴¹

Because a court can take notice on its own motion,¹⁴² judicial notice opponents should be attuned to the timeliness of the court's notification to the parties that it is doing so. Taking such notice without observing the niceties of due process may constitute an abuse of discretion.¹⁴³ For example, in calculating attorneys' fees, one district court was held to have abused its discretion when it took judicial notice *sua sponte* of data in the Consumer Price Index, without giving the other party notice and opportunity to be heard.¹⁴⁴

137. *Victaulic Co. v. Tieman*, 499 F.3d 227, 236–37 (3d Cir. 2007) (citation omitted).

138. *Hertzel v. Educ. Credit Mgmt. Corp.* (*In re Hertzel*), 329 B.R. 221, 233 (B.A.P. 6th Cir. 2005).

139. *E.g., In re Henderson*, 197 B.R. 147, 156–57 (Bankr. N.D. Ala. 1996) (“[T]he request for an opportunity to be heard must be filed within ten days of the entry on the docket of the order accompanying this opinion.”).

140. *E.g., Beasley v. U.S. Welding Serv., Inc.*, 129 Fed. App'x 901, 902 (5th Cir. 2005) (suggesting that party could have requested hearing “after the district court entered its findings of fact and conclusions of law by way of a post-trial motion following the court's entry of final judgment”).

141. FED. R. EVID. 201(e) advisory committee's note, *reprinted in* 28 U.S.C. app at 321 (2006), (“No formal scheme of giving notice is provided. . . . And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely.”).

142. FED. R. EVID. 201(c)(1) (“The court . . . may take judicial notice on its own.”).

143. For well-reasoned arguments against appellate courts' making *sua sponte* decisions in general, some of which would be applicable in the judicial-notice context, see Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 TENN. L. REV. 245 (2002).

144. *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648–49 (7th Cir. 2011) (finding the Consumer Price Index (CPI) judicially noticeable but holding that district court's *sua sponte* notice “deprived plaintiff of an opportunity to contest the application of the CPI

The importance of providing a party with notice and opportunity to be heard cannot be overstated. In *American Prairie Construction Company v. Hoich*,¹⁴⁵ one issue before the court was whether a certified public accountant present at a settlement hearing should be regarded as the agent of one of the defendants, John Hoich. The district court found a book written by Hoich that was available online and that contained photographs of the accountant with captions identifying him as the defendant's personal accountant.¹⁴⁶ The court took judicial notice of the book, its photographs, and the captions.¹⁴⁷ This evidence—along with other more tangible evidence—supported the court's holding that the accountant served as an apparent agent for Hoich during the settlement hearing and that Hoich was thereby liable as a principal to the agreement reached there. In reversing that decision, the Eighth Circuit held that “[w]hile courts are often required to conduct independent research regarding questions of law, ‘[o]n fact questions, the court should not use the doctrine of judicial notice to go outside the record unless the facts are matters of common knowledge or are capable of certain verification.’”¹⁴⁸

Finally, despite Rule 201's language indicating that courts may take judicial notice at any stage of the proceedings,¹⁴⁹ asking an appellate court to take judicial notice of facts in order to establish error in the lower court can backfire on the party making that argument. In *F & G Research, Inc. v. Paten Wireless Technology, Inc.*,¹⁵⁰ the question on appeal was whether the court had personal jurisdiction over the defendants. The plaintiff-appellant asked the circuit court to take judicial notice of information on the defendants' websites to establish that they had done business in the jurisdiction and to contest the lower court's dismissal of the case on jurisdictional grounds.¹⁵¹ The higher court refused, explaining:

or to argue for a particular manner of applying it to the present case”). *But cf.* *Osage Tribe of Indians of Oklahoma v. United States*, 96 Fed. Cl. 390, 401 n.20 (Fed. Cl. 2010) (“[O]nly a rare case insists that a judge must notify the parties before taking judicial notice of a fact on his own motion, and some authorities suggest that such a requirement is needless.” (quoting 2 MCCORMICK ON EVIDENCE § 333 (Kenneth S. Broun et al. eds., 6th ed. 2006))).

145. 529 F. Supp. 2d 1061 (D.S.D. 2007), *rev'd*, 560 F.3d 780 (8th Cir. 2009).

146. *Id.* at 1068.

147. *Id.*

148. *Am. Prairie Constr. Co. v. Hoich*, 560 F.3d 780, 798 (8th Cir. 2009) (quoting *Alvary v. United States*, 302 F.2d 790, 794 (2d Cir. 1962)).

149. FED. R. EVID. 201(d).

150. No. 2007-1206, 2007 WL 2992480, at *1 (Fed. Cir. Oct. 15, 2007).

151. *Id.* at *2.

Even if the information on the companies' websites qualifies as information from a source whose accuracy cannot reasonably be questioned, the problem with that information is that it was not offered to the district court, and that court therefore was not able to make a determination as to its relevance and weight.¹⁵²

Conclusion

I have a close friend whose bankruptcy practice keeps her in court quite often. According to her, asking a court to take judicial notice is the “lazy way” to get facts admitted into evidence. While I disagree with that opinion as a general matter, I have to admit my concerns that easy access to web-based data—particularly given the ubiquity of smartphones, tablets, and Wi-Fi access—as well as the ever-expanding content on the Internet are significant factors that will tempt more lawyers and more courts to overlook or shortcut the requirements of the judicial notice rule. As this article has demonstrated, judicial attitudes toward the Internet as a repository of knowledge are shifting. Fewer courts are exhibiting *St. Clair* levels of mistrust of Internet-based sources, and even Wikipedia is coming to be seen as an acceptable source for certain kinds of data.

But the change of attitude does not call for other change. There is no need for drafting a new rule to cover judicial notice of facts on the Internet, nor does the current Rule 201 need to be amended to do so. Rule 201 is up to the task for which it was designed, even in this situation. Familiarity invites a relaxation of standards; however, the requirements of the rule should be carefully examined and applied each time it is invoked. Finally, in our enthusiasm for using these easily accessed sources on the web, we should never forget—whether we are proponents or opponents of such evidence—that evidence offered via judicial notice may in fact be challenged and found inadmissible under other provisions of the Federal Rules of Evidence.

152. *Id.*