

Evidence**Internet**

Twenty years ago, taking judicial notice of Internet evidence was rare. Today, however, it is becoming common practice, and even the U.S. Supreme Court has jumped on the bandwagon. Joseph Hage Aaronson LLC founder Greg Joseph outlines in this Insight some of the reasons for the shift in philosophy and the types of internet evidence that are most likely to receive judicial notice.

Judicial Notice of Internet Evidence

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When Internet evidence was first proffered in the 1990s, courts were skeptical. In 1999, a federal district judge captured the sentiment in words occasionally still quoted:

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. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretations of the hearsay exception rules found in Fed. R. Evid. 807.

St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F. Supp. 2d 773, 774-75 (S.D. Tex. 1999).

Eight years later, the Tenth Circuit could accurately observe that: "It is not uncommon for courts to take judicial notice of factual information found on the world wide web." *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1224 (10th Cir. 2007), quoted with approval in, *inter alia*, *Juniper Networks, Inc. v. Shipley*, 394 F. App'x 713, 713 (Fed. Cir. 2010) and *Jeandron v. Bd. of Regents of Univ. Sys. of Md.*, 510 Fed. App'x 223, 227 (4th Cir. 2013).

How can a source that, not that long ago, was deemed insufficiently trustworthy to satisfy a hearsay

exception now be considered — in hundreds of decisions — a “source whose accuracy cannot reasonably be questioned,” within Federal Rule of Evidence 201(b)(2)? Part of the answer lies in the somewhat overstated premises giving rise to the initial condemnation. Websites are not impregnable and some sources are inherently dubious (Facebook profile pages, for example), but many websites are monitored for accuracy. Some contain material filed with governmental agencies subject to penalty of perjury. Some are official governmental websites whose contents are deemed so reliable as to be self-authenticating.¹ Others are the web equivalents of sources whose reliability has been unquestioned for years.² Yet others are regularly consulted and relied on by millions of people, and have proved their reliability in everyday life (e.g., Google Maps). It is necessary to avoid broad generalizations and to consider each website on its own merits.

I. Key Judicial Considerations

The key factors that courts consider in deciding whether to take judicial notice of a given website are:

1. The Nature of the Website

Governmental v. Private Websites. Governmental websites are self-authenticating; few private websites are. Self-authentication has broad ramifications for judicial

¹ See, e.g., *Newton v. Holland*, 2014 BL 24020, 2014 U.S. Dist. LEXIS 10625, at *2-3 n.1 (E.D. Ky. Jan. 29, 2014) (“records and information located on government websites are self-authenticating under Fed. R. Evid. 902(5)”; *Haines v. Home Depot U.S.A., Inc.*, 2012 BL 82478, 2012 U.S. Dist. LEXIS 47967, at *26 (E.D. Cal. Apr. 4, 2012) (“Federal courts consider records from government websites to be self-authenticating under Rule 902(5).”); *Scurmont LLC v. Firehouse Restaurant Grp.*, 2011 BL 180323, 2011 U.S. Dist. LEXIS 75715, at *48-49 n.11 (D. S.C. July 8, 2011) (“Records from government websites are generally considered admissible and self-authenticating.”); *United States ex rel. Parikh v. Premera Blue Cross*, 2006 BL 136046, 2006 U.S. Dist. LEXIS 70933, at *10 (W.D. Wash. Sept. 29, 2006) (GAO reports and Health and Human Services’ reports found on government websites are self-authenticating under Fed.R.Evid. 902(5)); *Hispanic Broad. Corp. v. Educ. Media Found.*, 2003 U.S. Dist. LEXIS 24804, at *20 n. 5 (C.D. Cal. Nov. 3, 2003) (“exhibits which consist of records from government websites, such as the FCC website, are self-authenticating.”); *E.E.O.C. v. E.I. Du Pont de Nemours & Co.*, 2004 BL 2265, 2004 WL 2347559, at *2 (E.D.La. Oct. 18, 2004) (webpage printout sufficiently authenticated where (1) printout contained the address from which it was printed, (2) printout contained the date on which it was printed, (3) court accessed the website and verified that the page existed, and (4) webpage was maintained by a government agency and thus was self-authenticating under Fed.R.Evid. 902(5)); *Sannes v. Jeff Wyler Chevrolet, Inc.*, 1999 U.S. Dist. LEXIS 21748, at *10 n. 3 (S.D. Ohio March 31, 1999) (“The FTC press releases, printed from the FTC’s government world wide web page, are self-authenticating official publications under Rule 902(5) of the Federal Rules of Evidence”).

² See, e.g., *United States v. Mosley*, 672 F.3d 586, 591 (8th Cir. 2012) (citing online version of PHYSICIAN’S DESK REFERENCE).

notice because it means that the authenticity of the site and its contents are “taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension.” Advisory Committee Note to Federal Rule of Evidence 902 (1972). Courts take judicial notice of the contents of governmental and other self-authenticating websites, often for their truth but always for the fact that the contents are posted on the relevant site. Frequently that, in itself, has operative legal significance.

Party v. Non-Party Websites. The fact that the contents appear on a party’s website can easily be confirmed by the court, if they have not been removed or altered, but the authenticity of the substance of those contents may be questionable. Party control over a website raises concerns as to whether the contents are self-serving or otherwise skewed. Certain types of contents on a party’s website, however, are subject to strict government regulation (e.g., prescription drug label warnings required by federal law), which may strongly enhance their presumption of accuracy. As to certain other types of website contents, it is precisely because of the self-interestedness of the website owner that, in the words of the Advisory Committee, “practical considerations reduce the possibility of unauthenticity to a very small dimension” — e.g., a retail business’s listing of its retail locations. Moreover, in some circumstances, a court may be able to take judicial notice of the truth of statements on a party’s website on the same rationale that underlies the hearsay exemption for party admissions — namely, “there is no risk of adversarial unfairness when the possibly untrustworthy declarant is the very party against whom the statement is offered.”³

Familiar and Trusted Third-Party Websites v. Familiar but Debatable v. Openly Subject to Artifice. A few websites have become a part of daily life — their accuracy is both objectively verifiable and actually verified millions of times a day. Google Maps and MapQuest fall in this category, and courts regularly take judicial notice of geographic locations and distances that they reflect. Other websites are the online versions of sources that courts have taken judicial notice of for years, and the courts find little reason to distinguish a reputable web equivalent from a reputable hard copy edition.

Most websites, even if familiar, are of debatable authenticity and therefore not appropriately the object of judicial notice. Wikipedia is a prime example. It “is written collaboratively by largely anonymous Internet volunteers who write without pay. Anyone with Internet access can write and make changes to Wikipedia articles, except in limited cases. . . . Users can contribute

³ 4 SALTZBURG, MARTIN & CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 801.02[6][a], at 801-44 (10th ed. 2011).

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anonymously [or] under a pseudonym”⁴ While opinions not infrequently cite Wikipedia in a variety of contexts (generally for background or illustrative facts), courts decline requests to take judicial notice of the contents of Wikipedia entries,⁵ except for the fact that the contents appear on the site as of a certain date of access,⁶ unless there is no objection to the court’s taking judicial notice.⁷ The courts’ uneasy relationship with Wikipedia is neatly illustrated by the Fourth Circuit decision in *United States v. Lawson*, 677 F.3d 629 (4th Cir. 2012), in which the court overturned a jury verdict due to jurors’ consultation of Wikipedia during deliberations (noting that “we are not the first federal court to be troubled by Wikipedia’s lack of reliability”) but at the same time acknowledging that “this Court has cited Wikipedia as a resource in three cases.” *Id.* at 650-51 & n.28.⁸

Some websites, especially social media, are notoriously open to manipulation and artifice — generally, anyone can create a social media identity in anyone else’s name. Far from being subject to judicial notice, social media and similarly suspect websites require either an admission, forensic evidence or circumstantial

⁴ Wikipedia’s self-description (presumably). See <http://en.wikipedia.org/wiki/Wikipedia:About> (visited February 23, 2014).

⁵ See, e.g., *Blanks v. Cate*, 2013 U.S. Dist. LEXIS 11233, at *8 n.4 (E.D. Cal. Jan. 28, 2013) (refusing to take judicial notice of a Wikipedia entry “as such information is not sufficiently reliable”); *Stein v. Bennett*, 2013 BL 235602, 2013 U.S. Dist. LEXIS 126667, at *20-21 n.10 (M.D. Ala. Sept. 5, 2013) (“Wikipedia is not a source that warrants judicial notice”); *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”); *Flores v. State*, 2008 BL 241208, 2008 Tex. App. LEXIS 8010, at *5 n.3 (Tex. Ct. App. Oct. 23, 2008) (“We decline appellant’s invitation to take judicial notice of the Wikipedia. . . . See James Glerick, *Wikipedians Leave Cyberspace, Meet in Egypt*, WALL ST. J., Aug. 8, 2008, at W1 (“Anyone can edit [a Wikipedia] article, anonymously, hit and run. From the very beginning that has been Wikipedia’s greatest strength and its greatest weakness.”)).

⁶ See, e.g., *McCrary v. Elations Co., LLC*, 2014 BL 19957, 2014 U.S. Dist. LEXIS 8443, at *4-5 n.3 (C.D. Cal. Jan. 13, 2014) (“While the court may take judicial notice of the fact that the internet, Wikipedia, and journal articles are available to the public, it may not take judicial notice of the truth of the matters asserted therein”).

⁷ See, e.g., *Games Workshop, Ltd. v. Charterhouse Studios, LLC*, 2012 BL 309451, 2012 U.S. Dist. LEXIS 168360, at *40 (N.D. Ill. Nov. 27, 2012) (“[Defendant] asks the Court to take judicial notice of H.R. Giger’s 1976 painting, *Necronom IV*, posted on Wikipedia. [Plaintiff] does not contest the motions. The Court grants [defendant’s] requests for judicial notice”).

⁸ Wikipedia co-founder Jimmy Wales, in *TIME* magazine in 2007, responded as follows to the question, “How can I persuade my teachers to allow me to use Wikipedia as a legitimate research source?”: “I would agree with your teachers that that isn’t the right way to use Wikipedia. The site is a wonderful starting point for research. But it’s only a starting point because there’s always a chance that there’s something wrong, and you should check your sources if you are writing a paper.” See <http://content.time.com/time/magazine/article/0,9171,1601837,00.html> (last visited February 23, 2014). If Wikipedia is unworthy of student citation, *a fortiori* it does not merit judicial notice.

corroboration before the court will consider receiving their contents into evidence.⁹

2. The Nature of the Evidence Extracted From the Site

Self-Serving (corporate advertising, puffing). The same content that may be untrustworthy for one purpose may be sufficiently trustworthy to warrant judicial notice for another. Pages of a corporate website offered by the corporation to prove the truth of self-serving advertising claims are inherently dubious, but the same pages may be appropriate for judicial notice when offered or used to show that the claims were made, and other pages on the same site reflecting the corporation’s headquarters and retail locations (for example, if offered or used to assess the amenability of the corporation to personal jurisdiction) might be judicially noticed for their truth on a personal jurisdiction or venue motion (factor 3, below).

Regulated Content (governmental filings, mandated warnings). Thus, for example, a court may take judicial notice of a prescription drug website for the drug’s uses, warnings, and label information.¹⁰

Highly likely to be accurate because accuracy is in the interest of the website owner. That a fact can be confirmed from multiple reputable online sources may, collectively, warrant the court’s taking judicial notice of it, even if the court might otherwise hesitate to do so based on one of them, alone.¹¹

3. The Nature or Stage of the Proceedings

Substantive. (summary judgment or trial);

Procedural. (personal jurisdiction, venue transfer);

Something in between. (motion to dismiss).

The court may take judicial notice at any stage of the proceedings, and the test for doing so remains the same (FED. R. EVID. 201(b), (d)), but judges are understandably more reticent to foreclose debate on a question of fact that may have merits consequences than they are on, for example, a venue transfer motion. Further, for any matter that bears on the merits, a party may have a right to a jury determination of authenticity under Federal Rule of Evidence 104(b).¹²

⁹ See generally Joseph, MODERN VISUAL EVIDENCE § 15.02[h] (Supp. 2014) (discussing, *inter alia*, *Parker v. State*, 2014 Del. LEXIS 49 (Del. Sup. Ct. Feb. 5, 2014); *Griffin v. State*, 419 Md. 343, 19 A.3d 415 (Md. Ct. App. 2011); and *Tienda v. State*, 358 S.W.3d 633 (Tex. Ct. Crim. App. 2012)).

¹⁰ See, e.g., *Snyder v. Cindy Law, P.A.*, 2010 U.S. Dist. LEXIS 139539, at *2-3 n.1 (N.D.N.Y. Dec. 21, 2010) (taking judicial notice of the fact that “Clozaril® . . . is prescribed for the treatment of schizophrenia” from <http://www.clozaril.com>).

¹¹ *Johnson v. Colvin*, 2013 U.S. Dist. LEXIS 58406, at *13 & n.1 (W.D. Mo. Apr. 24, 2013) (taking judicial notice of the fact that “metoprolol is used to treat hypertension” and reasoning as follows: “The Court takes judicial notice of this fact, which can be confirmed at multiple sources, including web sites operated by the Mayo Clinic . . . and by the publisher of the Physician’s Desk Reference”) (website addresses omitted).

¹² Rule 104(b) (*Relevance That Depends on a Fact*) provides:

When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding

A procedural note: One Circuit has been construed as holding that a district court should not take judicial notice of facts from a website that is not self-authenticating on a motion to dismiss.¹³

4. The Purpose for Which the Evidence Is Received

For the Truth v. For the Fact the Contents Are Published on the Site.

A court, by accessing a site, can take judicial notice that its contents are as they appear at the time they are accessed, and the contents as of that date may have operative legal significance. For example, the interactivity of the defendant's website may be relevant to a determination as to whether the defendant is amenable to personal jurisdiction. Or the site may publish an alleged defamation or reflect a claimed trademark infringement or contain a filing made by a party with a government agency subject to penalty of perjury.

5. The Importance to the Outcome of the Case of the Fact Which the Evidence Is Received to Prove

Is it critical, ancillary or somewhere in between?

Is it background or explanatory?

6. By and Against Whom the Evidence Is Offered or Used

For example, is it a party admission?

7. Whether Any Party Has Contested the Taking of Judicial Notice

These factors point in different directions. Governmental websites are inherently trusted. Private sector websites are not, but some have earned the trust of millions of people and are relied on in the ordinary course of business, and of life, every day. Contents that may be admissible for their truth on summary judgment may be received solely for the fact that they appear on a website on a motion to dismiss.

The operation of Federal Rule of Evidence 201, and particularly the right to contest the taking of judicial notice afforded in subdivision (e), is of enormous practical importance for three reasons. First, "given that the Internet contains an unlimited supply of information with varying degrees of reliability, permanence, and accessibility, it is especially important for parties to have the opportunity to be heard prior to the taking of judicial notice of websites."¹⁴ Second, absent an objection, the court does not abuse its discretion in taking judicial notice and the issue is not preserved for appellate review.¹⁵ Third, the parties' right to be heard militates

that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

¹³ See *McGown v. Silverman & Borenstein, PLLC*, 2014 BL 28621, 2014 U.S. Dist. LEXIS 12823, at *10 & n.56 (D. Del. Feb. 3, 2014).

¹⁴ *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648 (7th Cir. 2011).

¹⁵ See, e.g., *Boyd v. Georgia*, 512 Fed. App'x 915, 917 (11th Cir. 2013); *United States v. Beltran-Carranza*, 227 Fed. App'x 660, 661 (9th Cir. 2007).

against the pre-Rule 201(e) tradition of exercising "extreme caution" before taking judicial notice.¹⁶

II. Judicial Notice Under Rule 201

Federal Rule of Evidence 201 governs judicial notice in federal court. Because it has been widely adopted (it is tracked verbatim in Uniform Rule of Evidence 201), it governs in almost all state courts as well.¹⁷ Rule 201 provides:

(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.

Rule 201 deals only with judicial notice of adjudicative facts, which the rule distinguishes from legislative facts.¹⁸ The Advisory Committee Note not only makes this distinction but also distinguishes between evidentiary facts and "non-evidence facts."¹⁹ The latter is a distinction not always drawn by the courts. It is not necessarily either clear cut or of great moment outside of academia.²⁰

¹⁶ See *Banks v. Schweiker*, 654 F.2d 637, 640 & n.4 (9th Cir. 1981) (quoting Professor Kenneth Culp Davis, whom the Advisory Committee also quotes extensively in the Note to Rule 201).

¹⁷ See <http://www.law.cornell.edu/uniform/evidence>.

¹⁸ "Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance 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." Advisory Committee Note to Fed. R. Evid. 201(a) (1972).

¹⁹ "[E]very case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says 'car,' everyone, judge and jury included, furnishes, from non-evidence sources within himself, the supplementing information that the 'car' is an automobile, not a railroad car, that it is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. . . . Another aspect . . . is the use of non-evidence facts to appraise or assess the adjudicative facts of the case." *Id.*

²⁰ See, e.g., Richard M. Fraher, *Adjudicative Facts, Non-Evidence Facts, and Permissible Jury Background Informa-*

The pertinent type of judicial notice for present purposes is that taken pursuant to Rule 201(b)(2) — judicial notice of facts that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Rule 201(e), which confers on all parties a right to contest the propriety of the Court’s taking judicial notice, is critical. “[G]iven that the Internet contains an unlimited supply of information with varying degrees of reliability, permanence, and accessibility, it is especially important for parties to have the opportunity to be heard prior to the taking of judicial notice of websites.”²¹ The absence of any objection to the Court’s taking judicial notice is usually, and appropriately, dispositive.²²

III. Internet Use and the Importance of Transparency

According to the U.S. Census, by 2011, 90% of college-educated Americans were using the Internet.²³ Given the pervasiveness of Internet usage, the question of judicial notice of Internet evidence in one sense becomes one of transparency. Judges will in fact frequently access the Internet to take judicial notice because virtually every educated American accesses the Internet — there is no more convenient way to recall, refine, review and remind oneself of facts. Judges do not always identify the sources they consult before taking judicial notice — that was true before and remains true since the dawn of the Internet era.²⁴ Expressly ac-

tion, 62 IND. L.J. 333, 343-44 (1987) (“The boundary . . . between the ‘non-evidence’ facts that the jury may permissibly use and the background information that would impinge upon the realm of the ‘adjudicative facts’ will vary case by case. . . . It is the parties and the court who make facts ‘adjudicative’ by identifying the contentious issues and presenting all the information they regard as relevant to those issues in an effort to convince the jury”).

²¹ *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648 (7th Cir. 2011).

²² See, e.g., *United States v. Mills*, 2014 BL 41316, 2014 U.S. App. LEXIS 2818, at *15 & n.2 (5th Cir. Feb. 14, 2014) (judicial notice taken *sua sponte*); *Watkins v. Vital Pharms., Inc.*, 720 F.3d 1179, 1182 (9th Cir. 2013) (judicial notice taken on motion).

²³ See Thom File, *Computer and Internet Use in the United States* (May 2013), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=4sqi=2&ved=0CEUQFjAD&url=http%3A%2F%2Fwww.census.gov%2Fprod%2F2013pubs%2Fp20-569.pdf&ei=5IUH8ffLMmVrgeg7IC4Ag&usg=AFQjCNF3CiZQwy1mU467F-4RaOQJAA-0JQ&sig2=8nAq7_EBG9DYudU4CEoylw.

²⁴ See, e.g., *Third Nat’l Bank in Nashville v. Impac Ltd., Inc.*, 432 U.S. 312, 317 (1977) (“We may take judicial notice of the historical fact that 1873 was the year of a financial panic”); *Ex parte Boyer*, 109 U.S. 629, 631 (1884) (“We take judicial notice of the historical fact that the canal, 96 miles long, was completed in 1848, and is 60 feet wide and 6 feet deep, and is capable of being navigated by vessels which a canal of such size will accommodate, and which can thus pass from the Mississippi river to Lake Michigan and carry on inter-State commerce, although the canal is wholly within the territorial bounds of the State of Illinois”); *United States v. Bari*, 599 F.3d 176, 180-81 (2d Cir. 2010) (approving district court’s taking judicial notice—based on its use of an unidentified Internet search engine to access unidentified websites—to “confirm its intuition that there are many types of yellow rain hats for sale” in the context of a supervised release revocation hearing

knowledging reliance on the Internet and specifying the source of fact noticed is fair to the parties, permits them to decide on an informed basis whether it is worth objecting pursuant to Rule 201(e), and facilitates appellate review. Each of the cases discussed below that takes judicial notice of Internet evidence identifies the website whose contents are being judicially noticed.

IV. Categories of Websites and Their Susceptibility to Judicial Notice

1. Government Websites

Federal, state and municipal websites, including those of governmental agencies, are considered self-authenticating under FED. R. EVID. 902(5), which provides that “official publications” are self-authenticating and defines them to include: “A book, pamphlet, or other publication purporting to be issued by a public authority.” While electronically stored information (“ESI”) is not explicitly mentioned in this rule, ESI was for years deemed captured by the phrase “other publications.”²⁵ Since December 1, 2011, FED. R. EVID. 101(b)(6) has included a definition rendering explicit reference to ESI unnecessary in any of the Evidence Rules. Under Rule 101(b)(6), “a reference to any kind of written material or any other medium includes electronically stored information.” (Rule 1001(d), as amended in 2011, further reflects the rulemakers’ desire to make it clear that writings include ESI, providing that any printout of ESI is an “original” for purposes of the best evidence rule.²⁶

General Rule: Judicial Notice of Governmental Websites Permitted. It is well-settled that, “[b]ecause records and information located on government websites are self-authenticating under FED. R. EVID. 902, the Court may take judicial notice of them.”²⁷

“where only a relaxed form of Rule 201 applies.” Also noting that “[a]s broadband speeds increase and Internet search engines improve, the cost of confirming one’s intuitions decreases. 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.”)

²⁵ See, e.g., *Williams v. Long*, 585 F. Supp. 2d 679, 688 n.4 (D. Md. 2008) (“Rule 902(5) provides for self-authentication of ‘other publications,’ and it is the act of posting information on the Internet by a qualifying public authority that is the act of publication”) (emphasis in original).

²⁶ Rule 1001(d), as amended Dec. 1, 2011, provides:

An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. *For electronically stored information, “original” means any printout — or other output readable by sight — if it accurately reflects the information.* An “original” of a photograph includes the negative or a print from it.

²⁷ *Newton v. Holland*, 2014 BL 24020, 2014 U.S. Dist. LEXIS 10625, at *2-3 (E.D. Ky. Jan. 29, 2014); *United States v. Head*, 2013 BL 292022, 2013 U.S. Dist. LEXIS 151805, at *7 n.2 (E.D. Cal. Oct. 22, 2013) (“The court may take judicial notice of information posted on government websites as it can be ‘ac-

Court Websites. Judges frequently take judicial notice of the contents of other court's website²⁸ (docket sheet, filings, judgments, convictions, appeals, sentences) — and even their own²⁹ — because prior proceedings are pertinent to the matter at hand.³⁰

Agencies, Departments and Other Entities. Courts also often take judicial notice of the contents of the websites of federal,³¹ state³² and municipal³³ agencies,

curately and readily determined from sources whose accuracy cannot reasonably be questioned.'"); *Puerto Rico v. Shell Oil Co. (In re Methyl Tertiary Butyl Ether "MTBE" Prods. Liab. Litig.*, 2013 U.S. Dist. LEXIS 181837, at *16 (S.D.N.Y. 2013) ("Courts routinely take judicial notice of data on government websites because it is presumed authentic and reliable"); *Castlerline v. Onewest Bank, F.S.B.*, 2012 BL 331152, 2012 U.S. Dist. LEXIS 179085, at *6 (S.D. Tex. Dec. 19, 2012) ("governmental websites are proper sources for judicial notice"); *McGaha v. Baily*, 2011 BL 178557, 2011 U.S. Dist. LEXIS 73389 (D.S.C. July 7, 2011) ("this federal court may take judicial notice of factual information located in postings on governmental websites in the United States"); see also *Cannon v. District of Columbia*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013) (taking judicial notice of facts available on D.C. government website); *Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (taking judicial notice of contents of National Mediation Board's website).

²⁸ See, e.g., *Slater v. Doe*, 2013 U.S. Dist. LEXIS 177531, at *22-23 n.9 (M.D. Pa. Nov. 20, 2013) (taking judicial notice of date of sentencing from state court website); *Whittington v. Isgrig*, 2013 BL 237815, 2013 U.S. Dist. LEXIS 127297, at *2-3 n.1 (E.D. Mo. Sept. 6, 2013) (judicial notice of guilty plea from state court website); *Porter v. Valenzuela*, 2013 U.S. Dist. LEXIS 149084, at *2-3 n.3 (C.D. Cal. Aug. 26, 2013) (judicial notice of fact plaintiff filed appeal in state court according to that court's website); *Aragon v. Hedgpeth*, 2013 U.S. Dist. LEXIS 70240 (C.D. Cal. Apr. 9, 2013) (judicial notice of the absence of any record of appeal on the state supreme court's website); *Mortensen v. Mortgage Elec. Registration Sys.*, 2012 BL 250672, 2012 U.S. Dist. LEXIS 140923, at *5, *8-9 n.5 (D. Idaho Sept. 26, 2012) (judicial notice of judgment entered by state court in prior proceeding as reflected on state court website); *Feingold v. Graff*, 516 Fed. App'x 223, 226 (3d Cir. 2013) (judicial notice of bar disciplinary history as reflected on website of disciplinary board of state supreme court).

²⁹ See, e.g., *Isler v. Wands*, 2012 U.S. Dist. LEXIS 64865, at *3 n.1 (D. Colo. May 9, 2012) ("The court may take judicial notice of its own records as well as those of other courts").

³⁰ See generally *Trigueros v. Adams*, 658 F.3d 983, 987 (9th Cir. 2011) (courts "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue"); accord *Brown v. Matauszak*, 415 Fed. App'x 608, 614 (6th Cir. 2011).

³¹ See, e.g., *Chapman v. Stations, Inc.*, 2011 BL 261821, 2011 U.S. Dist. LEXIS 114750, *29-30 (E.D. Cal. Oct. 4, 2011) (figures showing accessibility requirements of Americans with Disability Act as appearing on U.S. Access Board's website); *In re Amgen Inc. Sec. Litig.*, 544 F. Supp. 2d 1009, 1023-24 (C.D. Cal. 2008) (taking judicial notice of drug labels taken from the Food & Drug Administration's website). See also *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 81 U.S.L.W. 4514, 2013 BL 167359, 133 S. Ct. 2517, 2531 (2013) (citing Equal Employment Opportunity Commission website as showing that: "The number of these [retaliation] claims filed with the Equal Employment Opportunity Commission (EEOC) has nearly doubled in the past 15 years—from just over 16,000 in 1997 to over 31,000 in 2012").

³² See, e.g., *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of information on websites of school districts); *United States v. Washington*, 2013 U.S. Dist. LEXIS 48850, at *58 & n.26 (W.D. Wash. 2013) (taking judicial notice that state Department of Trans-

departments and other entities, including government-owned corporations.³⁴

Foreign Government and International Organizations' Websites. The websites of foreign governments have been relied on, particularly to establish the law of the relevant foreign jurisdiction.³⁵ So, too, have data compiled by international organizations.³⁶

Nature of Content/Purpose of Use. The cases taking judicial notice of the contents of governmental websites do not necessarily receive the contents for their truth. This is due to the fact that there are at least two kinds of material posted on governmental websites — (1) data compiled or generated by the governmental entity (e.g., interest rate tables on the Federal Reserve's website³⁷), and (2) material derived from, or posted by, others. Courts commonly take judicial notice of website data compiled or generated by a governmental entity for the truth of the matters asserted,³⁸ provided that, in the cir-

portation completed certain projects based on report on state DOT's website); *Golden v. Absolute Collection Servs.*, 2013 BL 145302, 2013 U.S. Dist. LEXIS 77998, at *2 (M.D.N.C. June 4, 2013) (judicial notice that defendant is a corporation based on data on state Secretary of State's website); *Craft v. Middleton*, 2012 U.S. Dist. LEXIS 130945, at *4-5 (W.D. Okla. Aug. 20, 2012) (judicial notice of disciplinary policy reflected on state prison website); *Hartley v. Villa Scalabrini Nursing & Rehab. Ctr.*, 2009 BL 208822, 2009 U.S. Dist. LEXIS 91188, *2-3 (N.D. Ill. Sept. 30, 2009) (judicial notice that defendant is a corporation in good standing, and the active or inactive nature of certain of its assumed names, based on data on state Secretary of State's website); *Desclafani v. Pave-Mark Corp.*, 2008 BL 190768, 2008 U.S. Dist. LEXIS 64672, at *24 (S.D.N.Y. Aug. 22, 2008) (taking judicial notice of fact that defendant filed annual reports with Florida Secretary of State (as reflected on its website) for five years after plaintiff claimed it was defunct). See also *United States v. Windsor*, 81 U.S.L.W. 4633, 2013 BL 169620, 133 S. Ct. 2675, 2690 (2013) (citing State of Maine website for results of citizens' initiative on same sex marriage).

³³ See, e.g., *Taylor v. Shore*, 2013 BL 171926, 2013 U.S. Dist. LEXIS 90603, at *3 (M.D. Fla. June 27, 2013) (taking judicial notice of county's personnel policy manual as reflected on county's website); *McDaniel v. GEICO Gen. Ins. Co.*, 2013 U.S. Dist. LEXIS 60252, *23-24 & n.3 (E.D. Cal. Apr. 25, 2013) (judicial notice of flight schedule as reflected on City of Fresno's Yosemite International Airport on venue transfer motion); *Davis v. Nice*, 2012 BL 230543, 2012 U.S. Dist. LEXIS 128452, at *1-2 n.1 (N.D. Ohio Sept. 10, 2012) (judicial notice of identity of public official as reflected on Akron Police Department website).

³⁴ *El-Aheidab v. Citibank (S.D.)*, N.A., 2012 BL 41828, 2012 U.S. Dist. LEXIS 19038, 2012 WL 506473 at *4 n.3 (N.D. Cal. Feb. 15, 2012) ("[T]he Court notes that the postal service's website indicates that each of Plaintiff's mailings were in fact delivered. The Court takes judicial notice thereof" (i.e., of U.S. Postal Service, Track & Confirm, <https://tools.usps.com/go/TrackConfirmAction>)).

³⁵ See, e.g., *United States v. Broxmeyer*, 699 F.3d 265, 296 (2d Cir. 2012) (websites of the governments of Vietnam and Brazil cited for their respective laws concerning age of consent).

³⁶ See, e.g., *Kirtsang v. John Wiley & Sons, Inc.*, 81 U.S.L.W. 4167, 2013 BL 72102, 133 S. Ct. 1351, 1367 (2013) (citing World Bank website data showing "the ever-growing importance of foreign trade to America").

³⁷ <http://www.federalreserve.gov/releases/h15/update>.

³⁸ See, e.g., *Marshek v. Eichenlaub*, 266 Fed. App'x 392, 392 (6th Cir. 2008) ("according to BOP's [the Bureau of Prisons'] Inmate Locator—which may be accessed through its official website (www.bop.gov), and of which we take judicial notice—Marshek was transferred to a CCC [Community Corrections Center] during the pendency of this appeal"); *United*

cumstances, the facts at issue are not subject to reasonable dispute. If the government-generated data themselves contain third-party assertions, courts generally take judicial notice only of the fact that the third-party assertions were made and do not notice them for their truth.³⁹

Similarly, material posted on governmental websites by third parties or otherwise provided by them is generally subject to judicial notice solely for the fact that the material appears on the website, and for whatever operative effect that may have, but not for the truth of what it asserts. For example, court websites contain pleadings and other court papers filed by litigants that are generally subject to judicial notice for the fact that they (i) were filed and made certain assertions, or (ii) had a particular procedural effect, but not for the truth of the matters asserted.⁴⁰ Similarly, governmental bodies may post on their websites third parties' applications of which a court may take judicial notice.⁴¹ Some material posted by others on governmental websites —

States v. Green, 2011 BL 8812, 2011 U.S. Dist. LEXIS 3410, at *9-10 (W.D. Mo. Jan. 12, 2011) (“In the alternative, the Court can take judicial notice of Commerce Bank’s insured status by review of www.fdic.gov, which shows an FDIC certificate number for Commerce Bank”); *Newton v. Holland*, 2014 BL 24020, 2014 U.S. Dist. LEXIS 10625, at *2-3 (E.D. Ky. Jan. 29, 2014) (criminal conviction and sentence imposed on plaintiff as reflected on state court website); *United States v. Head*, 2013 BL 292022, 2013 U.S. Dist. LEXIS 151805, at *7 n.2 (E.D. Cal. Oct. 22, 2013) (Secretary of State website showing corporation’s suspended status); *Puerto Rico v. Shell Oil Co. (In re Methyl Tertiary Butyl Ether “MTBE” Prods. Liab. Litig.)*, 2013 U.S. Dist. LEXIS 181837, at *16 (S.D.N.Y. 2013) (fact that defendant was importing gasoline into Puerto Rico as of a certain date, as reflected on Energy Information Administration website); *Casterline v. Onewest Bank, F.S.B.*, 2012 BL 331152, 2012 U.S. Dist. LEXIS 179085, at *6 (S.D. Tex. Dec. 19, 2012) (judicial notice of FDIC website to establish that a note—on the basis of which plaintiff’s home was foreclosed—was transferred from originating bank to FDIC conservatorship); *Pate v. Norris*, 2007 BL 25687, 2007 WL 990698, at *19 & n.10 (E.D. Ark. Mar. 29, 2007) (taking judicial notice of historical weather data contained on the website of the National Climatic Data Center (www.ncdc.noaa.gov/oa/ncdc.html)).

³⁹ See, e.g., *Claborn v. Montgomery*, 2012 BL 237955, 2012 U.S. Dist. LEXIS 131569, at *14-16 & n.3 (S.D. Ohio Sept. 14, 2012) (state inspector general report contains allegations of misconduct by plaintiff made by her employer; court takes judicial notice of report on inspector general’s website solely for the fact that the allegations were made, not for their truth).

⁴⁰ See, e.g., *Johnson v. Mitchell*, 2013 BL 41116, 2013 U.S. Dist. LEXIS 21692, at *8 (E.D. Cal. Feb. 14, 2013) (“The last document includes the first two pages of a pleading from the Superior Court of California. The court may take judicial notice of this court document without admitting any facts contained therein. See *U.S. v. Corinthian Colleges*, 655 F.3d 984, 998-999 (9th Cir. 2011) (court may take judicial notice of matters of public record but not of facts that may be subject to reasonable dispute by either party). Therefore, the court notices that this pleading was, in fact, filed in the Superior Court of California in Sacramento County by defendants Berrocal and Arosemena, but need not admit anything more about its substance”); *Porter v. Valenzuela*, 2013 U.S. Dist. LEXIS 149084, *2-3 n. 3 (C.D. Cal. Aug. 26, 2013) (fact that state court appeal filed as reflected on state court website); *McGaha v. Baily*, 2011 BL 178557, 2011 U.S. Dist. LEXIS 73389, at *4 (D.S.C. July 7, 2011) (judicial notice of county clerk’s website to establish identity of counsel representing plaintiff in pending criminal case).

⁴¹ See, e.g., *Code Rebel, LLC v. Aqua Connect, Inc.*, 2014 U.S. Dist. LEXIS 2824, at *9-10 (C.D. Cal. Jan. 3, 2014) (taking

such as Securities and Exchange Commission filings by public corporations or Federal Deposit Insurance Corporation filings by banks or regulatory filings with state agencies — may be judicially noticed simply for the fact of the disclosures or statements they make,⁴² or for their truth.⁴³

A governmental entity may itself post material from a third party that requires further authentication or foundation before it may be considered for its truth.⁴⁴ The fact that material is posted on the governmental website, however, is subject to judicial notice, at least as of the day and time the court accesses it, and it may be relevant to determination of matters before the court even if it is not considered for its truth.

2. Non-Governmental Websites

Generally, courts are reluctant to take judicial notice of non-governmental websites because, in general, the Internet “contains an unlimited supply of information with varying degrees of reliability, permanence, and accessibility” and “is an open source” permitting anyone to “purchas[e] an Internet address and create a website.”⁴⁵ Most websites are, therefore, not considered to be sources “whose accuracy cannot reasonably be questioned” within the meaning of Rule 201(b)(2). There are, however, many circumstances in which judicial notice of non-governmental websites is appropriate.

judicial notice both of pending patent application and granted patent as reflected on usptc.gov).

⁴² See, e.g., *Jaimes v. JPMorgan Chase Bank, N.A.*, 2013 BL 49313, 2013 U.S. Dist. LEXIS 27991, at *3-4 & n.2 (N.D. Ill. Feb. 25, 2013) (judicial notice of agreement between JPMorgan and FDIC as filed on FDIC website); *Deutsche Bank Nat’l Trust Co. v. Adolfo*, 2013 BL 230044, 2013 U.S. Dist. LEXIS 122805, at *4-6 n.4 (N.D. Ill. Aug. 28, 2013) (“The FWP [free writing prospectus] attached to Deutsche Bank’s brief was filed with the SEC, and . . . we may take judicial notice of it” (website address omitted)); *Lindsay v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 129694, *5-6 (D. Mass. June 14, 2013) (“This court takes judicial notice of the prospectus which is located on the Securities and Exchange Commission’s website” (website address omitted)); *Pascal v. JP Morgan Chase Bank, N.A.*, 2013 BL 62750, 2013 U.S. Dist. LEXIS 33350, at *12-13 n.4 (S.D.N.Y. Mar. 11, 2013) (“the Court notes that it may take judicial notice of the P&A [Purchase and Assumption] Agreement, as it is publicly available through the FDIC’s website.”).

⁴³ See, e.g., *Zucco Partners, LLC v. Digimarc Corp.*, 2009 BL 24959, 2009 U.S. App. LEXIS 7025, at *64 (9th Cir. Feb. 10, 2009) (party admission in 10-K judicially noticed); *In re Am. Apparel Shareholder Derivative Litig.*, 2012 U.S. Dist. LEXIS 146970, at *35-36 (C.D. Cal. July 31, 2012) (same). See also *Daimler AG v. Bauman*, 82 U.S.L.W. 4043, 2014 BL 9151, 134 S. Ct. 746, 766-67 (2014) (Sotomayor, J., concurring) (reciting that corporate plaintiff Daimler’s annual report on its website shows that “California sales account for 2.4% of Daimler’s worldwide sales, which were \$192 billion in 2004” (explaining why it was wise for Daimler to concede that it was subject to general jurisdiction in California)).

⁴⁴ See, e.g., *Aikens v. County of Ventura*, 2011 BL 173149, 2011 Cal. App. Unpub. LEXIS 4986 (Cal. Ct. App. June 30, 2011) (non-precedential opinion) (federal government document posted on county website does not constitute an admission of the county as to the contents of that document, which is, therefore, inadmissible hearsay). *But cf. Momah v. Bharti*, 144 Wash. App. 731; 182 P.3d 455 (2008) (posting self-laudatory articles on website constitutes adoptive admission).

⁴⁵ *United States v. Kane*, 2013 BL 298182, 2013 U.S. Dist. LEXIS 154248, at *24-25 (D. Nev. Oct. 28, 2013).

Websites of Corporations and Other Organizations.

The extent to which a court may take judicial notice of the contents of a corporate or other private-sector organization's website depends largely on the nature of the contents at issue and the purpose for which judicial notice is taken. The Third Circuit in 2007 identified two concerns raised by taking judicial notice of the contents of a corporate website to establish facts about the company's business:

First, . . . [a]nyone 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. . . . Second, 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 "sources whose accuracy cannot reasonably be questioned," FED. R. EVID. 201(b), that our judicial notice rule contemplates.

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

The first of these concerns, while perhaps appropriate on the facts of that case, would by its terms preclude the taking of judicial notice of the contents of any website, including governmental, because the risk of a phony website always exists. This concern can usually be managed by the procedural protection of Rule 201(e) — the right of any party to object to the court's taking of judicial notice.⁴⁶ If there is a legitimate reason to doubt the ownership of, or authenticity of the relevant content on, the website, any party may oppose the taking of judicial notice. In reality, corporations and other entities are generally highly motivated to police their websites and the use of their names, and there is no reason to indulge the assumption that every private website is fraudulent.

The second concern — that a corporate website is often a marketing tool and replete with "imprecise puffery" — is valid. Perhaps for that reason, the Third Circuit was careful to make it clear in *Victaulic* that its concern primarily related to the trustworthiness of a corporation's website description of its own business. That concern does not, however, lead to the conclusion that those descriptions may never be the appropriate object of judicial notice — that depends on the purpose for which judicial notice is taken or by whom it is requested — nor does it mean other aspects of corporate websites are necessarily subject to this concern and cannot merit judicial notice in certain contexts. Consider the following, for example:

First, corporations and other business entities that are subject to the federal securities laws or analogous regulation are subject to civil and criminal penalties for

⁴⁶ *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648 (7th Cir. 2011) (Rule 201(e) "emphasizes that a party 'is still entitled to be heard' when a court takes judicial notice before notifying a party. Underlying this rule is the notion that '[b]asic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed.' FED. R. EVID. 201(e) advisory committee's note. Thus, Rule 201 contains a procedural requirement—'namely, that the parties be given notice and an opportunity to object to the taking of judicial notice.'").

false statements in, for example, their website descriptions of financial conditions and business operations. It may be appropriate for a court to take judicial notice of such information, for example, to inform its conclusion as to whether the entity is large or small, or sophisticated or unsophisticated, or is engaged in a particular line of business.⁴⁷ Judicial notice of this sort of information is premised on the presumptive truthfulness of published information whose accuracy is subject to criminal and civil sanction. When it is offered or used against the party publishing that information on its website (e.g., to determine reliance or assess venue or personal jurisdiction), the presumption is enhanced by the same circumstantial guarantees of accuracy that give rise to the hearsay exception for party admissions.

Similarly, pharmaceutical companies' descriptions of their prescription drugs are strictly regulated by the Food & Drug Administration. Courts feel comfortable taking judicial notice of the nature and purpose of a prescription drug from its website.⁴⁸

Second, the entity may have strong motivation to ensure the accuracy of certain information on its website. For example, a retail or other commercial entity will be highly motivated to ensure the accuracy of information about its retail locations or web payment processing (which may be relevant to jurisdictional, venue or other issues)⁴⁹ or the packaging of its products.⁵⁰ Judicial notice of this sort of information is premised on the presumptive truthfulness of information that, to a commercial establishment, is vital to its survival. Again, when it is offered or used against the party publishing that information on its website (e.g., to determine reliance or assess venue or personal jurisdiction), the presumption is enhanced by the same circumstantial guarantees of accuracy that give rise to the hearsay exception for party admissions.

⁴⁷ See, e.g., *Liberty Mut. Ins. Co. v. Consol. Elec. & Tech. Assocs. Corp.*, 2007 BL 217236, 2007 U.S. Dist. LEXIS 1791, *10 & n.2 (E.D. Mich. Jan. 10, 2007) (finding plaintiff's size, sophistication and line of business—derived from information on plaintiff's website—raised questions of fact as to reliance, *inter alia*, that prevented the issuance of summary judgment for the plaintiff on its claim of promissory estoppel).

⁴⁸ See, e.g., *Snyder v. Cindy Law, P.A.*, 2010 U.S. Dist. LEXIS 139539, at *2-3 n.1 (N.D.N.Y. Dec. 21, 2010) (taking judicial notice of the fact that "Clozaril® . . . is prescribed for the treatment of schizophrenia" from <http://www.clozaril.com>).

⁴⁹ See, e.g., *Gemstar Group U.S., Inc. v. Ferragamo U.S., Inc.*, 2008 BL 251219, 2008 U.S. Dist. LEXIS 91190, *21-22 n.8 (S.D. Tex. Nov. 10, 2008) (on personal jurisdiction motion, taking judicial notice of the fact that defendant's website routes customers to Neiman Marcus, through which defendant's products may be purchased).

⁵⁰ See, e.g., *Elec. Arts, Inc. v. Textron Inc.*, 2012 BL 187763, 2012 U.S. Dist. LEXIS 103914, 6-7 (N.D. Cal. July 25, 2012) (taking judicial notice of the website of a video game manufacturer for the purpose of ascertaining the game's packaging, but not taking judicial notice of the entire game and all of its permutations: "[T]he interactive nature of the game, especially in the multiplayer mode, makes it an improper subject of a request for judicial notice. . . . Taking judicial notice of the entire game and all of its permutations would be like taking notice of a dynamic Internet site such as Google. That said, judicial notice is appropriate for facts that may be accurately and readily determined, such as the game packaging").

Third, a nonparty commercial website might be noticed for the brand name of one of its products,⁵¹ information that is crucial to the survival of the enterprise and is, for that reason, extremely likely to be accurate.

Fourth, the capability of a party's website itself may have legal significance. For example, the degree of interactivity of a website is a factor in determining whether a defendant is amenable to personal jurisdiction in a state in which its contacts are otherwise limited or non-existent.⁵² A court may access the defendant's website to take judicial notice of where on the spectrum of interactivity the website falls.⁵³

Fifth, the contents of a website may also have independent legal significance — for example, the website may contain an alleged trademark infringement⁵⁴ or reflect unfair trade practices⁵⁵ or publish allegedly defamatory statements.⁵⁶ If the relevant content remains on the website, the court may take judicial notice of it simply by accessing the site, or confirm its existence if

⁵¹ See, e.g., *Magnoni v. Smith & Laquercia, LLP*, 701 F. Supp. 2d 497, 501 (S.D.N.Y. 2010). See also *Patsy's Italian Restaurant, Inc. v. Banas*, 575 F. Supp. 2d 427, 443, n. 18 (E.D.N.Y. 2008) ("It is generally proper to take judicial notice of articles and Web sites published on the Internet"—taking judicial notice of two articles and a third-party hotel's website, all reflecting that one of the parties had opened a restaurant in a particular location).

⁵² See, e.g., *Ward v. Rhode*, 2013 BL 118665, 2013 U.S. App. LEXIS 9104, at *7-8 (5th Cir. May 3, 2013) ("At the one end of the spectrum, there are situations where a defendant clearly does business over the Internet by entering into contracts with residents of other states which involve the knowing and repeated transmission of computer files over the Internet. In this situation, personal jurisdiction is proper. At the other end of the spectrum, there are situations where a defendant merely establishes a passive website that does nothing more than advertise on the Internet. With passive websites, personal jurisdiction is not appropriate. In the middle of the spectrum, there are situations where a defendant has a website that allows a user to exchange information with a host computer. In this middle ground, the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Website").

⁵³ See, e.g., *W. Marine, Inc. v. Watercraft Superstore, Inc.*, 2012 U.S. Dist. LEXIS 18973 (N.D. Cal. Feb. 14, 2012) (taking judicial notice of defendant's website and finding that: "[C]ustomers can browse available products and place orders online. Online purchases require customers to input personal information such as their names, email addresses, payment information, and billing/shipping information. Customers can also subscribe to [defendant's] mailing list and establish accounts through the website. . . . [Defendant] operates a virtual store that acts just like a brick and mortar store and is 'largely designed so as to approximate physical presence in a forum.' . . . As measured by the Zippo test, Watercraft's store website clearly falls on the 'highly interactive' end of the spectrum, where the entity clearly does business over the Internet."); *Giles v. Custom Creative Plastics*, 2007 BL 267906, 2007 Cal. App. Unpub. LEXIS 10324, at *10 n.3 (Cal. Ct. App. Dec. 19, 2007) ("We take judicial notice of appellant's web site . . . because it exemplifies web site 'interactivity'").

⁵⁴ See, e.g., *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1353-54 (11th Cir. 2013); *Anago Franchising, Inc. v. IMTN, Inc.*, 477 Fed. App'x 383, 386 (7th Cir. 2012).

⁵⁵ See, e.g., *Flexiteek Ams., Inc. v. Plasteak, Inc.*, 2013 U.S. Dist. LEXIS 169591, at *2 (S.D. Fla. Dec. 2, 2013) (alleged unfair trade practice of deceptive posting on website).

⁵⁶ See, e.g., *Henriquez v. El Pais Q'Hubocali.com*, 500 Fed. App'x 824, 828 (11th Cir. 2012); *JTH Tax, Inc. v. Grabert*, 2013 BL 359761, 2013 U.S. Dist. LEXIS 181800, at *15 (E.D. Va. Dec. 30, 2013).

judicial notice is requested by a party. There is no need for an intermediary to access the site and present the contents to the court.⁵⁷

Selected Trusted, Judicially Noticed Websites.

There are certain websites and types of websites that courts turn to repeatedly to take judicial notice.

Geography/Internet Maps. Traditionally, courts have taken judicial notice of geographic facts.⁵⁸ A great many courts have taken judicial notice of the reliability and accuracy of Google Maps,⁵⁹ MapQuest⁶⁰ and similar websites,⁶¹ for the purpose of determining both locations and distances.

⁵⁷ A proponent's burden of proof as to the authenticity of website evidence is light. A party makes a prima facie showing of authenticity by offering testimony—or, under FED. R. EVID. 902(11) or (12), a certification—from a witness that the witness typed in the website address; that he or she logged on to the site and reviewed what was there; and that a printout or other exhibit (which should reflect the web address and date accessed) fairly and accurately reflects what the witness saw. See, e.g., *Lebewohl v. Heart Attack Grill, LLC*, 2012 U.S. Dist. LEXIS 93945, at *39-40 (S.D.N.Y. July 6, 2012); *Foreword Magazine, Inc. v. OverDrive Inc.*, No. 10-cv-1144, 2011 BL 279413, 2011 WL 5169384, at *4 (W.D. Mich. Oct. 31, 2011). *Compare Estate of Konell v. Allied Prop. & Cas. Ins. Co.*, 2014 U.S. Dist. LEXIS 10183, at *4 (D. Or. Jan. 28, 2014) (excluding exhibit that bore "no other circumstantial indicia of authenticity, such as the date of the printout and the web address").

⁵⁸ See, e.g., *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 344 (1952) ("We may, of course, take judicial notice of geography").

⁵⁹ See, e.g., *United States v. Brooks*, 715 F.3d 1069, 1078 (8th Cir. 2013); *Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013); *United States v. Schultz*, 2013 BL 209544, 2013 U.S. App. LEXIS 16557, at *8 n.1 (9th Cir. Aug. 9, 2013); *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 118 n. 9 (Ill. Ct. App. Dec. 16, 2013); *McCormack v. Hiedeman*, 694 F.3d 1004, 1008 n.1 (9th Cir. 2012); *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012); *United States v. Sessa*, 2011 BL 19243, 2011 U.S. Dist. LEXIS 7090, at *75 n.12 (E.D.N.Y. Jan. 25, 2011), *aff'd*, 711 F.3d 316, 321 (2d Cir.), *cert. denied*, 134 S. Ct. 353 (2013); *Rindfleisch v. Gentiva Health Sys.*, 752 F. Supp. 2d 246, 259 n.13 (E.D.N.Y. 2010); *Access 4 All, Inc. v. Boardwalk Regency Corp.*, 2010 BL 277509, 2010 U.S. Dist. LEXIS 124625 (D.N.J. Nov. 23, 2010); *Dynka v. Norfolk S. Ry. Corp.*, 2010 BL 134917, 2010 U.S. Dist. LEXIS 59664 (E.D. Pa. June 15, 2010); *People v. Clark*, 406 Ill. App. 3d 622, 633-34, 940 N.E.2d 755 (2010); *Knapper v. Safety Kleen Sys.*, 2009 BL 71510, 2009 U.S. Dist. LEXIS 30118, at *18-19 n.5 (E.D. Tex. Apr. 3, 2009); *Hartford Life Ins. Co. v. Rosenfeld*, 2007 BL 70166, 2007 U.S. Dist. LEXIS 55819 at *24 n.5 (D.N.J. Aug. 1, 2007).

⁶⁰ See, e.g., *Xtreme Caged Combat v. ECC Fitness*, 2013 U.S. Dist. LEXIS 162055, at *6 n.4 (E.D. Pa. Nov. 12, 2013); *Miller v. Bennett*, 2013 U.S. Dist. LEXIS 129011 (D. Colo. Aug. 12, 2013); *Godshall v. Independence Commc'ns, Inc.*, 2011 BL 301329, 2011 U.S. Dist. LEXIS 137216, *11-12 n.6 (E.D. Pa. Nov. 30, 2011); *Wat Buddha-Dhamma, N.F.P. v. Stang*, 2010 BL 185811, 2010 U.S. Dist. LEXIS 81874, at *5 n.2 (N.D. Ill. Aug. 12, 2010); *Inaganti v. Columbia Props. Harrisburg LLC*, 2010 BL 134102, 2010 U.S. Dist. LEXIS 59166 (E.D. Pa. June 14, 2010); *People v. Clark*, 406 Ill. App. 3d 622, 633-34, 940 N.E.2d 755 (2010); *United States v. Brown*, 636 F. Supp. 2d 1116, 1124 n.1 (D. Nev. 2009).

⁶¹ *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1219 n.2 (10th Cir. 2007) (milermeter.com); *United States v. Hernandez-Lopez*, 761 F. Supp. 2d 1172, 1181 n.4 (D.N.M. 2010).

Financial Data. Published financial data is the subject of a hearsay exception.⁶² The basis for the inference of trustworthiness supporting this exception “is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.” Advisory Committee Note to Rule 803(17) (1972). The same inference of trustworthiness and reliability leads courts to take judicial notice of financial data, such as stock prices,⁶³ interest rates⁶⁴ or foreign exchange rates,⁶⁵ on websites.

Calendar Information. Judges turn to Internet calendars, much as they have traditionally relied on printed calendars, to take judicial notice of the particular relevant days of the week events occurred on past dates.⁶⁶

Archived Versions of Websites. Courts have taken judicial notice of the Internet archive known as the Wayback Machine (archive.org), which displays websites as they existed at particular points in time.⁶⁷

Self-Authentication: Newspaper and Periodical Articles. Rule 902(6) provides that “[p]rinted material purporting to be a newspaper or periodical” is self-authenticating. Because Rule 101(b)(6) defines “any kind of written material” to include electronically stored information), newspaper and periodical articles

⁶² See Rule 803(17) (*Market Reports and Similar Commercial Publications*), which excepts from the hearsay rule:

Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

⁶³ See *Freeland v. Iridium World Commc'ns, Ltd.*, 233 F.R.D. 40, 44 (D.D.C. 2006) (stock price data as reflected on <http://bigcharts.marketwatch.com>).

⁶⁴ See *Habersham Plantation Corp. v. Art & Frame Direct, Inc.*, 2011 U.S. Dist. LEXIS 145761, at *14 n.4 (S.D. Fla. Dec. 15, 2011) (prime rate as reported on the Wall Street Journal website for purposes of computing prejudgment interest).

⁶⁵ See *In re Transam. Airlines*, 2009 BL 162188, 2009 Del. Ch. LEXIS 127, at *47 & n.57 (Del. Ch. July 22, 2009) (taking “judicial notice of the average daily exchange rate provided by www.oanda.com” on the date judgment was entered in Nigeria, for purposes of computing prejudgment and post-judgment interest), *aff'd*, *Transam. Airlines, Inc. v. Akande*, 991 A.2d 19, 2010 Del. LEXIS 96 (Del. 2010).

⁶⁶ See, e.g., *Tyler v. United States*, 2012 U.S. Dist. LEXIS 184007, *9-10 n.6 (N.D. Ga. Dec. 6, 2012) (“The Court takes judicial notice that Monday, February 16, 2009, was Presidents’ Day. See <http://www.when-is.com/presidents-day-2009.asp>”); *Local 282, Int’l Bhd. of Teamsters v. Pile Found. Constr. Co.*, 2011 BL 203507, 2011 U.S. Dist. LEXIS 86644, *17-18 n.5 (E.D.N.Y. Aug. 5, 2011) (“The court takes judicial notice of the October 2009 calendar, available at <http://www.timeanddate.com/calendar/monthly.html?year=2009&month=10>.”);

⁶⁷ See *Martins v. 3PD, Inc.*, 2013 BL 83001, 2013 U.S. Dist. LEXIS 45753, 2013 WL 1320454, at *16 n.8 (D. Mass. Mar. 28, 2013) (taking judicial notice of “the various historical versions of a website available on the Internet Archive at Archive.org as facts readily determinable by resort to a source whose accuracy cannot reasonably be questioned”); *Puerto Rico v. Shell Oil Co. (In re Methyl Tertiary Butyl Ether “MTBE” Prods. Liab. Litig.)*, 2013 U.S. Dist. LEXIS 181837, at *16-18 n. 65 (S.D.N.Y. Dec. 30, 2013) (“Courts have taken judicial notice of the contents of internet archives” (also using Internet Archive)). Cf. *Keystone Retaining Wall Sys., Inc. v. Basalite Concrete Prods., LLC*, 2011 BL 321586, 2011 U.S. Dist. LEXIS 145545, at *24-25 & n.9 (D. Minn. Dec. 19, 2011) (receiving Wayback Machine printouts on preliminary injunction motion without further authentication; noting that “The Internet Archive has existed since 1996, and federal courts have regularly accepted evidence from the Internet Archive.”).

published on the Internet fall within this type of self-authentication. Courts point to distinctive newspaper and website designs, dates of publication, page numbers and web addresses as sufficient to support self-authentication of Internet articles under Rule 902(6).⁶⁸

As with the contents of governmental websites that are similarly self-authenticating, courts may take judicial notice of newspaper and periodical articles on the Internet, almost always limited to “judicial notice of the publication of the[] articles, but not the truth of their content.”⁶⁹

To the extent that other information on the Internet is self-authenticating, there is usually no good reason to require proof to establish it, particularly given that all parties have the right to object under Rule 201(e) and bring to the Court’s attention any reason why it should refrain.

Governmental Data on Private Websites. Judicial notice has been taken of government records obtained through Westlaw,⁷⁰ on which judges and lawyers rely on every day — or on the absence of records on the site.⁷¹

Online Versions of Authoritative Texts. The websites of sources whose reliability is unquestioned are commonly consulted, on the eminently sensible premise that there is no more reason to doubt the reliable source’s website than to doubt a hard copy version of the material presented to the court. This analysis has been applied in scores of contexts — to, for example, the online versions of the PHYSICIANS’ DESK REFERENCE;⁷²

⁶⁸ See, e.g., *Ciampi v. City of Palo Alto*, 2011 BL 125230, 2011 U.S. Dist. LEXIS 50245 (N.D. Cal. May 11, 2011) (“the Court finds that most of the articles are sufficiently authenticated . . . [p]ursuant to Federal Rule of Evidence 902(6). . . . [They] contain sufficient indicia of authenticity, including distinctive newspaper and website designs, dates of publication, page numbers, and web addresses. . . . Only the internet printouts of the Daily News articles. . . , which do not contain a web address and lack other identifying characteristics, appear to be insufficiently authenticated. The Court will not consider these two articles, but overrules the objection as to the remainder of the articles”).

⁶⁹ *Ford v. Artiga*, 2013 BL 202239, 2013 U.S. Dist. LEXIS 106805, at *19 n.5 (E.D. Cal. July 30, 2013); *accord HB v. Monroe Woodbury Cent. Sch. Dist.*, 2012 BL 251064, 2012 U.S. Dist. LEXIS 141252 (S.D.N.Y. Sept. 27, 2012) (“I will take judicial notice of the Internet and news articles for the fact of their publication, but not for the truth of the statements contained therein”).

⁷⁰ See, e.g., *Gray v. Washington*, 2012 BL 313015, 2012 U.S. Dist. LEXIS 170241, at *4 n.1 (E.D. Mich. Nov. 30, 2012); *Brown v. Rivard*, 2013 U.S. Dist. LEXIS 142381, at *2 n.1 (E.D. Mich. Oct. 2, 2013).

⁷¹ See, e.g., *Enochs v. Walton*, 2012 BL 96360, 2012 U.S. Dist. LEXIS 55024, at 812 n.1 (E.D. Mich. Apr. 19, 2012) (neither the state court of appeals website nor Westlaw reflected any appeal of petitioner’s state court conviction); *Porter v. Sanders*, 2012 BL 91980, 2012 U.S. Dist. LEXIS 52959 (E.D. Mich. Apr. 16, 2012) (same).

⁷² See, e.g., *United States v. Mosley*, 672 F.3d 586, 591 (8th Cir. 2012) (taking judicial notice of drug information from PHYSICIANS’ DESK REFERENCE online edition); *Butler v. Onyeje*, 2014 U.S. Dist. LEXIS 8582, at *17-18 & nn.7-8 (E.D. Cal. Jan. 22, 2014) (“The Court takes judicial notice of the public existence of this material, and hence its availability to Defendant, only insofar as a failure to act in accordance with it may evidence a knowing disregard to an excessive risk. The Court makes no finding as to the truth of the information contained in this material and cautions that it likely would not suffice to refute con-

the Commercial Arbitration Rules of the American Arbitration Association;⁷³ organizational charter documents on the organization's website;⁷⁴ OXFORD ENGLISH DICTIONARY;⁷⁵ the AMERICAN HERITAGE DICTIONARY;⁷⁶ the MERRIAM-WEBSTER DICTIONARY;⁷⁷ and many other sources.

GPS Data. The Eight Circuit affirmed taking judicial notice of the accuracy and reliability of global positioning system (GPS) data in *United States v. Brooks*, a bank robbery prosecution in which a GPS device was hidden in a stack of twenty-dollar bills and used to track, and capture, the defendant.⁷⁸ While other courts

trary competent medical evidence directly on point"); *Johnson v. Colvin*, 2013 U.S. Dist. LEXIS 58406, at *13 & n.1 (W.D. Mo. Apr. 24, 2013) (taking judicial notice of the fact that "metoprolol is used to treat hypertension" and reasoning as follows: "The Court takes judicial notice of this fact, which can be confirmed at multiple sources, including web sites operated by the Mayo Clinic . . . and by the publisher of the PHYSICIANS' DESK REFERENCE") (website addresses omitted); *Smith v. State*, 2008 BL 139006, 2008 Tex. App. LEXIS 4779, at *5 n.4 (Tex. Ct. App. June 26, 2008) (taking judicial of the fact that Vicodin and Lortab both contain hydrocodone); *McMurtrey v. Ryan*, 539 F.3d 1112, 1121 (9th Cir. 2008) (citing PHYSICIANS' DESK REFERENCE online edition for the nature and treatment purpose of Dilantian, Elavil and Librium); *Weidman v. Colvin*, 2014 BL 45485, 2014 U.S. Dist. LEXIS 21235, at *16-17 & nn.2-6 (W.D. Ark. Feb. 20, 2014) (citing PHYSICIANS' DESK REFERENCE online edition for the nature and treatment purpose of multiple drugs); *Oliver v. Penn. Dep't of Corr.*, 2014 BL 5151, 2014 U.S. Dist. LEXIS 2368, at *7 (E.D. Pa. Jan. 8, 2014) (citing PHYSICIANS' DESK REFERENCE online edition for nature and treatment purpose of Ratiidine).

⁷³ See, e.g., *Dealer Computer Servs. v. Monarch Ford*, 2013 BL 20695, 2013 U.S. Dist. LEXIS 11237, at *11 & n.3 (E.D. Cal. Jan. 25, 2013).

⁷⁴ See, e.g., *Famous Music Corp. v. 716 Elmwood, Inc.*, 2007 U.S. Dist. LEXIS 96789, at *12-13 n.7 (W.D.N.Y. Dec. 28, 2007) (Articles of Association of ASCAP as displayed on ASCAP's website).

⁷⁵ See, e.g., *Shuler v. Garrett*, 2014 BL 39822, 2014 U.S. App. LEXIS 2772, at *7 (6th Cir. Feb. 14, 2014); *United States v. Lyle*, 2014 BL 31796, 2014 U.S. App. LEXIS 2220, at *6 (9th Cir. Feb. 5, 2014); *In re Nortel Networks, Inc.*, 737 F.3d 265, 271 (3d Cir. 2013).

⁷⁶ See, e.g., *Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1017 (9th Cir. 2013); *United States v. Ramirez*, 708 F.3d 295, 303 (1st Cir. 2013).

⁷⁷ See, e.g., *Larson v. Nationwide Agribusiness Ins. Co.*, 739 F.3d 1143, 1147 (8th Cir. 2014); *Davis v. City of Lake City*, 2014 BL 17318, 2014 U.S. App. LEXIS 1209, at *15-16 (11th Cir. Jan. 23, 2014); *United States v. Lyle*, 2014 BL 31796, 2014 U.S. App. LEXIS 2220, at *7 (9th Cir. Feb. 5, 2014).

⁷⁸ See *United States v. Brooks*, 715 F.3d 1069, 1078 (8th Cir. 2013). The Brooks court also affirmed the trial court's ruling that the GPS-provider's tracking reports were admissible as business records. *Id.* at 1079.

have disagreed, they have not required expert evidence to authenticate GPS technology because of its inherent familiarity and reliability, suggesting that it may not be long before they, too, conclude that judicial notice is warranted.⁷⁹

Conclusion

The Supreme Court has described the Internet as "comparable . . . to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services."⁸⁰ The Supreme Court regularly avails itself of this resource, citing and relying on Internet material in more than 100 opinions in the past five years (March 2009 to February 2014), and more than 200 in the past decade.⁸¹ Other courts are emulating this, not only for purposes of taking judicial notice but also for this purpose.

The key to judicial notice is reliability. Every decision as to whether to take judicial notice of Internet evidence is context and fact specific. The decision must be made with care. It is now beyond question, however, that "[t]he Court generally has the discretion to take judicial notice of internet material,"⁸² and courts are increasingly doing so.

⁷⁹ See, e.g., *United States v. Espinal-Almeida*, 699 F.3d 588, 610-12 (1st Cir. 2012) (declining to take judicial notice that Garmin devices produce accurate results but nonetheless affirming admission in the absence of expert testimony and even though the authenticating witness "was not specifically asked, and did not precisely testify, whether the GPS and the software were in good working order or whether he was confident they produced accurate results" because, based on the considerable testimony given, "it is reasonable to infer that [he] would have said that the GPS and software were working fine and turning out accurate results"); *United States v. Thompson*, 393 F. App'x 852, 858-59 (3d Cir. 2010) (same; finding that a lay witness's testimony concerning the operation of a GPS device, including authentication of the GPS's data, was properly allowed by the trial court); *Commonwealth v. Suarez-Irizzary*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 380 (Ct. Com. Pl. Aug. 6, 2010) ("Neither expert testimony nor testimony from those who created the satellite imaging system are necessary in order to authenticate maps or distances derived from the use of the satellite mapping system").

⁸⁰ *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

⁸¹ In *Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009), for example, the Supreme Court — in reviewing a complaint under Rule 12(b)(6) for plausibility — relied for facts on a Department of Justice Inspector General's report located on the DOJ website.

⁸² *Boarding Sch. Review, LLC v. Delta Career Educ. Corp.*, 2013 BL 90271, 2013 U.S. Dist. LEXIS 48513 (S.D.N.Y. Mar. 29, 2013).