

Friday, August 24, 2007

**Cutting and pasting leads to inadmissible computer chats.**

Bill of Rights. (From the public domain.) Your tax dollars pay for a brigade of law enforcement people working online to seek out purchasers and sellers of child pornography, and adults to solicit sexual activity with minors, where the "minors" are actually the cops. Sometimes cops get sloppy, technically inept, or both in saving such online chats onto paper or onto a computer disk. Consequently, this always is a line of analysis for any such criminal defense case, sometimes necessitating a computer forensics expert. Underlining the power of investigating for sloppy, incomplete, doctored, and falsified online chats is *U.S. v. Jackson*, 488 F. Supp. 2d 866 (D. Neb. May 8, 2007). Jackson describes the cut-and-paste situation as follows, in pertinent part: The court finds the cut-and-paste document is not admissible at trial. First, the burden is on the government to show the document is authentic. *United States v. Black*, 767 F.2d 1334, 1342 (8th Cir. 1985); *Fed. R. Evid. 901(a)*; *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000). The government must make a foundational showing that the transcript is trustworthy. *United States v. Webster*, 84 F.3d 1056, 1064 (8th Cir. 1996) (with regard to recording). The government attempts to introduce the editorialized version of the cut-and-paste document. However, the court finds the evidence offered by Peden is credible and supportable. Peden testified about a number of methods that could have been utilized to accurately capture the chats, but none of these methods were used. As set forth above, there are numerous examples of missing data, timing sequences that do not make sense, and editorial information. The court finds that this document does not accurately represent the entire conversations that took place between the defendant and Margritz. The defendant argues that his intent when agreeing to the meeting was to introduce his grandniece to the fourteen-year-old girl. Defendant is entitled to defend on this basis, as it goes to the issue of intent. Defendant alleges that such information was excluded from the cut-and-paste document or from a lost audiotape of a phone conversation between him and Margritz. The court agrees and finds the missing data creates doubt as to the trustworthiness of the document. See, e.g., *Webster*, 84 F.3d at 1064 (government must show trustworthiness of tape recording). Changes, additions, and deletions have clearly been made to this document, and accordingly, the court finds this document is not authentic as a matter of law. Second, in the alternative, defendant argues that the cut-and-paste document is not admissible as it is not the best evidence. This rule provides an original writing or recording to prove the truth of the contents. *Fed. R. Evid. 1002*. A computer printout is considered the original if it accurately reflects the data. *Fed. R. Evid. 1001(3)*. The same is true of a duplicate. *Fed. R. Evid. 1001(4), 1003*. As the court has previously stated, the cut-and-paste document offered by the government is not an accurate original or duplicate, because, as previously noted herein, it does not accurately reflect the entire conversations between the defendant and Margritz. In addition, Margritz changed this document by including his editorial comments. Unlike the cases relied on by the government in its brief, in the case before the court there is expert testimony that the cut-and-paste document has been altered. Accordingly, for these same reasons the court likewise finds the cut-and-paste document inadmissible. In that same regard, the court finds the document is inadmissible under *Fed. R. Evid. 1004* (allows for the secondary evidence when original is destroyed). See *United States v. Gerhart*, 538 F.2d 807, 809 (8th Cir. 1976). It is clear that the proposed document does not accurately reflect the contents of the original. The government relies heavily on *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000) and *United States v. Simpson*, 152 F.3d 1241, 1249-50 (10th Cir. 1998) for the proposition that chat room logs are admissible. The court finds the cases relied on by the government to be of little assistance. In both cases, it appears that the actual computer files were offered as evidence, not a cut-and-paste version of the computer files. The court would have no difficulty admitting evidence which had been saved on the computer and was the actual computer printout. The cut-and-paste document is not a computer record nor is it a computer printout. The government also argues that Margritz can use the cut-and-paste document to refresh his memory at trial. If the court permitted Margritz to use this document to refresh his memory, then defendant would be forced to show how the information contained therein is unreliable. The court is very concerned that on cross-examination the defendant would be forced to have Margritz testify about the cut-and-paste document. That would cause the jurors to speculate that some part of an actual transcript exists. Allowing Margritz to use the document to refresh his memory would allow the government to present this evidence to the jury, albeit indirectly. See *Hall v. American Bakeries Co.*, 873 F.2d 1133, 1136 (8th Cir. 1989). Accordingly, the government will not be permitted to allow Margritz to refresh his memory with the cut-and-paste document. The motion in limine is granted and the cut-and-paste document is excluded for all purposes. Thanks to my brother First Amendment Lawyers Association member Andrew Contiguglia for posting this Jackson case to the First Amendment Lawyers Association's listserv. Thus far, Underdog links to the following three FALA members' blogs: Andrew Contiguglia, Cari Wiggins, and Marc Randazza. Jon Katz.

Posted by Jon Katz in Criminal Defense at 01:00