Kentucky Courts have embraced the Internet for research as well as for citation in their published opinions. Like many other states, Kentucky courts are citing to online sources without any real procedure in place to deal with the frequent disappearance of these sources. In this article we have studied citation to the Internet by Kentucky’s appellate courts and found that the problem of link rot is alive and well in the opinions of the Commonwealth’s judiciary. We examine the patterns of citation and the depth of link rot and offer a proposal for how the courts might deal with this problem with an eye towards preserving information for the future generations of Kentucky lawyers.

The citation to online sources by appellate courts is not a new phenomenon. There have been numerous studies of appellate court citations to Internet sources and the corresponding issue of link rot amongst these cited sources. The findings of our study show that Kentucky is not out of line with the practices found in other states, but this should provide small comfort for the legal community. The idea that a court could cite (possibly authoritatively) to material that will no longer be available to future researchers presents a problem when trying to ascertain the rationale behind a judge’s opinion.

How big is this problem in Kentucky? According to our study the courts cited to the Internet 123 times in 93 cases. As of June 2011 the URLs for only 52.8% (or 65) were still active and brought the researcher to the cited websites, leaving 47.2% (or 58) of the URLs as dead links. This is an alarmingly high number when one considers that the first Internet citation dates back to only 2000, with some of the dead URLs dating back to only 2010.

The increased citation to Internet sources raises two issues for consideration; 1) dead links lead to a loss in the understanding of the underlying rationale for why a court decided a case in a particular manner, and 2) it raises the question of what a shift from traditional sources of authority to a more open source of authority will mean to legal research and reasoning in the Commonwealth. The second of these two issues is beyond the scope of this article, while the former is one that has a direct impact upon the way lawyers and judges use judicial opinions.

The ability to look at the authority relied upon by a court in coming to its decision underlies the system of Stare Decisis which forms the basis of the Common Law. Increased use of Internet citations in judicial opinions, especially ones that fall victim to link rot, may undermine this system and make it much more difficult for future lawyers and judges from determining exactly how to use a judicial opinion.

By way of example, in Commonwealth v. Lopez, 292 S.W.3d 878 (Ky. 2009), the court in footnote 6 claims:

“Although that order is not in the record before us, it is available to the public in PDF form at: http://www.cemml.colostate.edu/cultural/09476/pdf/GeneralOrderGO-1A.pdf.

Paragraph 2e of that order provides that the “[t]he introduction, possession . . . or display of any pornographic or sexually explicit photograph, video tapes, movie, drawing, book, magazine, or similar representations” is prohibited.”

The Court directs readers to a document not in the record but available to the public in PDF form at: http://www.cemml.colostate.edu/cultural/09476/pdf/GeneralOrderGO-1A.pdf.

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In Hardy v. Commonwealth, 2008 WL 466135 (Ky. App. 2008) the court in reviewing the facts of the case wrote:

“Hardy exhibiting signs of extreme nervousness—broken speech, repeated flatulence (a clinically recognized manifestation of distress), and a quivery voice.”

How does an attorney explain this passage to his client?

Footnote 1 informs the reader as follows: “A website (http://harvdatoz.demo.staywellsolutionsonline.co/71, AZ-s0011) indicates that some people swallow a lot of air when they are nervous, and since that air needs an escape route, flatulence results.” Since this URL is currently dead, there is no way to determine what information was published there. Given that this evidence...
was amongst the evidence used to deny a motion to suppress the fruits of a strip search, it is possible than in the future, this passage can be used by courts as a basis for evidence that can support an officer’s search of a defendant. In effect this dead URL is resurrected in the jurisprudence of the Commonwealth without any real chance to understand what was actually published and relied upon by the Court.

“When . . . a court purportedly bases its understanding of the law or the law’s application to case facts upon a source that cannot subsequently be located or confirmed, the significance of the citation to that source becomes more ominous. If present readers of the opinion cannot determine how much persuasive weight was or should be accorded to the unavailable source, they have little reason to place much confidence in the opinion’s authoritative ness.”

Either a judge’s opinion citing a dead-end source loses some of its authoritative ness or the system becomes one in which we no longer try to tease out a judge’s reasons for a decision.

If this train cannot be stopped, and the authors do not suggest that the train should be stopped, then guidelines should be put in place to ensure that online materials cited by the courts are somehow preserved for future generations.

One such solution to this problem is already being tested by the federal judiciary. The U.S. Supreme Court handles this issue by requiring the clerk’s or reporter’s office to maintain a hardcopy of any internet source cited in the opinion. This solution would allow future researchers access to an online source even if the website disappears.

The Judicial Conference of the United States has recognized that disappearing websites are a growing problem and has begun to address the issue as well. The Judicial Conference noted in a memorandum that “[j]udges are citing to and using Internet-based information in their opinions with increasing frequency. Unlike printed authority, Internet information is often not maintained at a permanent location, and a cited web page can be changed or deleted at any time.”

The Guidelines on Citing to, Capturing, and Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in Judicial Opinions suggest the following procedures be taken for preserving online authority cited in a judicial opinion: “[A]n Internet resource to be cited in an opinion is to be captured, . . . downloaded and preserved as closely as possible to the time it is viewed by chambers, to ensure that the exact version of the Internet resource that was relied upon by the judge will be preserved.” The Guidelines further suggest that the downloaded internet resource be placed together with the opinion on the court’s CM/ECF system (or state equivalent).

These guidelines provide an “easy” system for ensuring future access to authority cited by the courts. As the charts below indicate this issue is not going away; rather, the citation to Internet sources continues to grow. If something is not done to preserve the information cited by judges, the current

### Total URL citations in 93 cases

<table>
<thead>
<tr>
<th>Links Good</th>
<th>Links Bad</th>
</tr>
</thead>
<tbody>
<tr>
<td>123</td>
<td>93</td>
</tr>
<tr>
<td>52.8%</td>
<td>47.2%</td>
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</table>

### Citations by Year

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<th>2009</th>
<th>2010</th>
<th>2011*</th>
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<td>50</td>
<td>10</td>
<td>11</td>
<td>8</td>
<td>6</td>
<td>12</td>
<td>14</td>
<td>15</td>
<td>8</td>
</tr>
</tbody>
</table>

*through May 2011
system will, as one commentator has cautioned, do “a disservice to clients, and posterity, to create a body of precedent written on the wind.”14

ENDNOTES
1. “Link rot” is the term used to describe the effect of a Uniform Resource Locator (URL), sometimes referred to as the “web address” of an internet site, that no longer works.
3. This does not include citations to legal databases such as Westlaw or LexisNexis.
6. Michael Whiteman provides a full discussion of this topic in The Death of Twentieth-Century Authority, 58 UCLA L. Rev. Disc. 27 (2010).
10. Id.
11. Id., at 3.
12. Id.
13. Id.

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