

Appreciation of Electronic Evidence

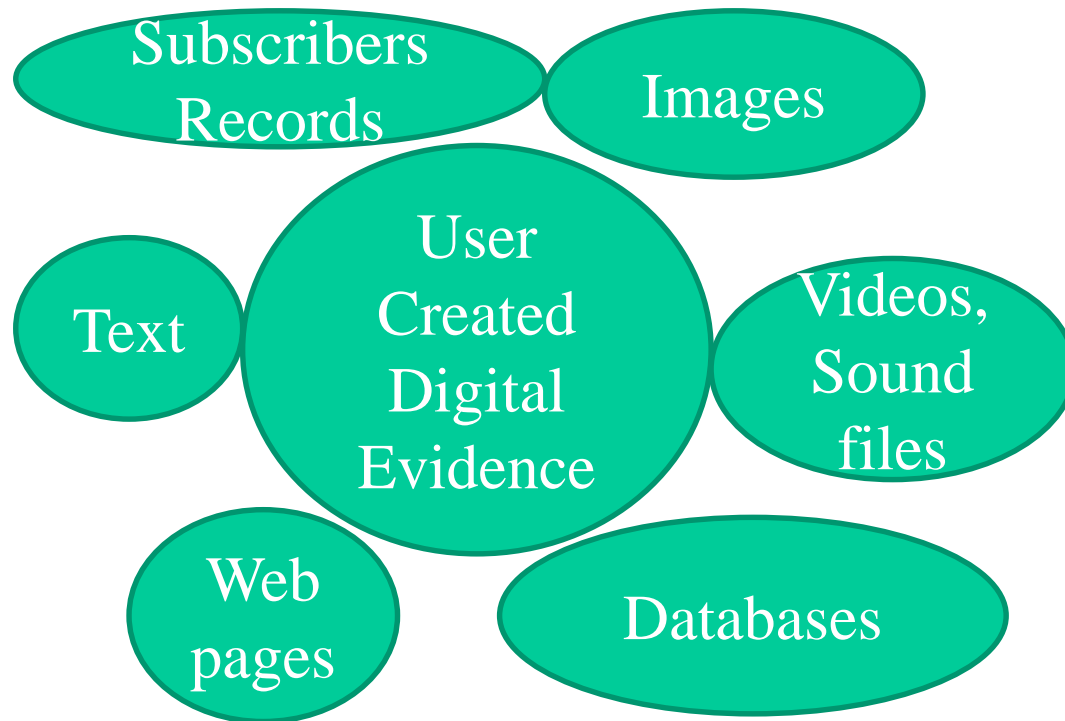
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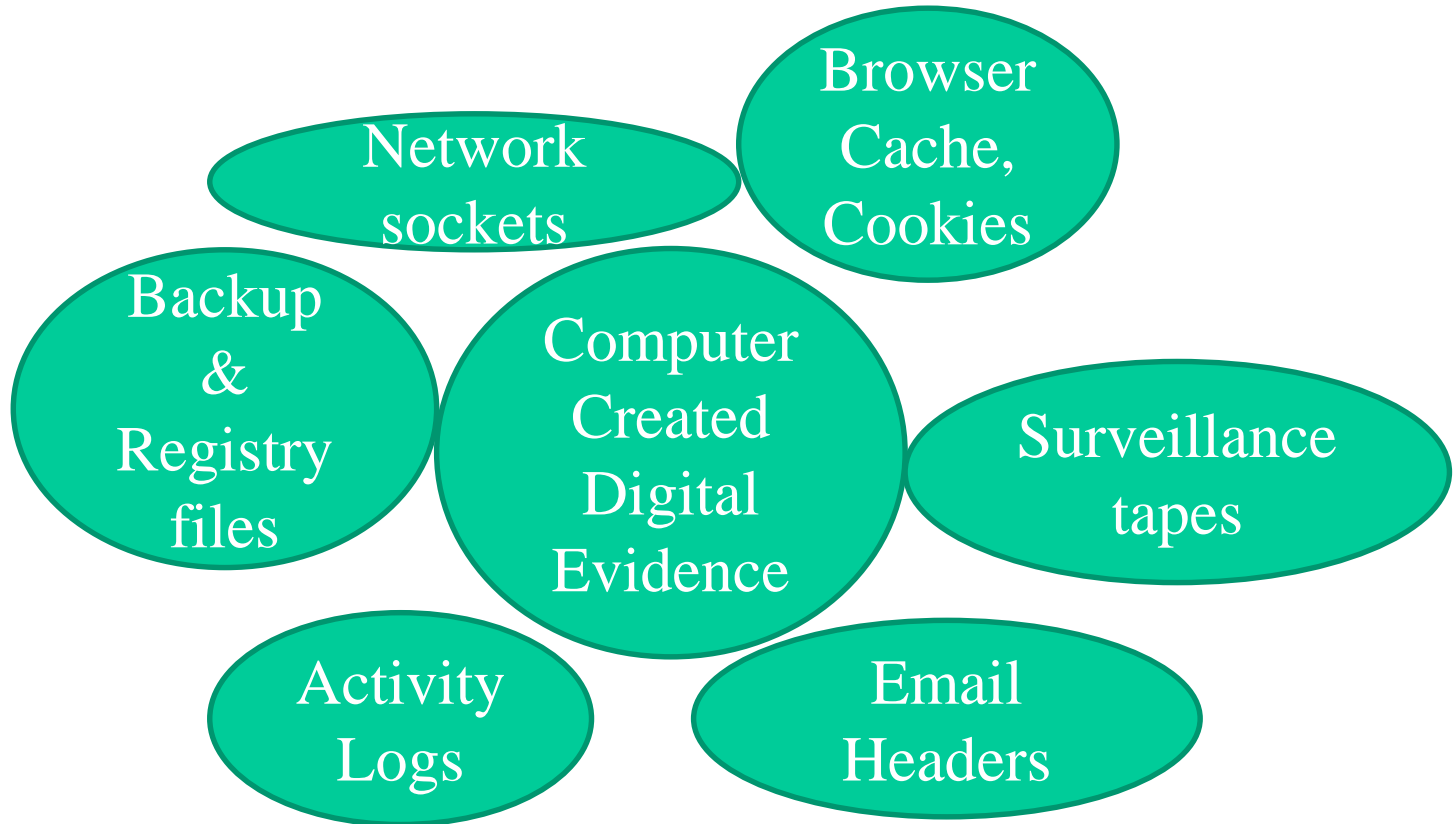
Electronic evidence is “any probative information stored or transmitted in digital form that a party to a court case may use it at trial”*

* Casey, Eoghan (2004), Digital Evidence and Computer Crime

User Created Evidence



Computer Created Evidence



Electronic Evidence - Collection

- Emails
- Digital photographs/videos/social media postings
- ATM transactions
- E-commerce transactions
- Instant Messengers/VoIP/Web-chats
- Internet browsers/search engines key words
- Databases (Call Data Records, etc.)

- Hard discs
- Data Cards/SIM cards/magnetic cards
- Digital devices/servers/IP addresses
- Device memory
- Media storage devices (pen drives, CD/DVD, etc.)
- Routers/Ports

Appreciation of Evidence

“The process by which a judge concludes whether or not a fact is proved is called appreciation of evidence. It is a duty of the court to appreciate evidence minutely, carefully, and to analyse it.”

Kajal Sen v.State of Assam AIR 2002 SC617

Electronic Evidence

Electronic evidence means that the “evidence which existed in electronic (intangible) form is being produced in tangible form.

Electronic Record

S.2(1)(t) “Electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

Human Intervention

The entire process of procuring electronic evidence is controlled by human agencies.

Can it be manipulated, tampered with?

The science may be infallible, but human action, which controls the result of the scientific forensic examination, may be fallible.

Appreciating Technology

Applying technology and getting desired results is one thing, but appreciating the value of the ‘evidence’ is another.

One may lose evidence not because of ‘lack of technology’, but because of ‘lack of appreciation of technology’.

Whether judicial officers to act as technocrats?

Earlier, it was unthinkable to view judges as technocrats, but over a period of time, the way judges have been weaving technology with judicial wisdom and coming out with judicial interpretation of technology.....

Questions before Judges?

- Did the investigators/litigants take care in gathering the evidence?
- Could they fake the evidence?

*Mohammed Ajmal Mohammad Amir Kasab v
State of Maharashtra & Ors**

The Hon'ble Supreme Court appreciated the electronic evidence, whether in the form of CCTV footage, mobile devices, memory cards, data storage devices, intercepted communications over VoIP, IP Addresses, etc. while delivering the judgment.

* (2012) 9 SCC 1

- Detailed forensic examination, including digital evidence in the form of CCTV footage, SIM cards, DNA (sweat found on jackets in inflatable boat), GPS devices, Thuraya Satellite phones, call interception, IP Addresses, VoIP, etc.

*Tukaram S.Dighole v.Manikrao Shivaji Kokate**

Hon'ble Supreme Court held that “**standard of proof**” in the form of electronic evidence should be “**more accurate and stringent**” compared to other documentary evidence....

* (2010) 4 SCC 329

In *Trimex International FZE Ltd.v. Vedanta Aluminium Ltd. India**

The Court held that in the absence of signed agreement between the parties, **it would be possible to infer from various documents duly approved and signed by the parties in the form of exchange of e-mails, letter, telex, telegrams and other means of telecommunications.**

*(2010)3 SCC1

Similarly in *Shakti Bhog Foods Ltd. v. Kola Shipping Ltd.*, (2009) 2 SCC 134

Sanjay Kumar Kedia v. Narcotics Control Bureau & Anr

CRIMINAL APPEAL NO. 1659 OF 2007
(SLP (Crl.) No. 3892 of 2007)

The company (Xponse Technologies Ltd. And Xpose IT Services Pvt. Ltd. Headed by Sanjay Kedia) has designed, developed, hosted the pharmaceutical websites and using these websites, huge quantity of psychotropic substances (Phentermine and Butalbital) have been distributed in USA with the help of his associates.

ALADIESPHARMACY.com, EXPRESSPHENTERMINE.com,
FAMILYONLINEPHARMACY.com
ONLINEEXPRESSPHARMACY.com, SHIPPEDLIPITOR.com
DELIVEREDMEDICINE.COM , TRUEVALUEPRESCRIPTIONS.COM

That IP address was **203.86.100.76**

In *Mrs. Nidhi Kakkar v Munish Kakkar**, the court held “ If person produced text of information generated through computer, it should be admissible in evidence, provided proof was tendered in manner brought through Evidence Act...”

* (2011)162 PLR113

Dharambir v. CBI

The Delhi High Court has held:

“Given the wide definition of the words ‘document’ and ‘evidence’ in the amended Section 3 of the IEA, read with section 2(o) and 2(t), of IT Act, a hard disc which at any time has been subject to a change of any kind is an electronic record would therefore be a document within the meaning of section 3 of IEA.”

* 148 (2008) DLT 289

Gajraj v. State (NCT of Delhi), (2011) 10 SCC 675:

- The prosecution in this case relied upon the Instrument Manufactured Equipment Identity (“IMEI”) number of the deceased’s mobile handset. The handset was found in the accused’s possession and the call records of the accused’s SIM card showed that they were made from the mobile bearing the same IMEI number as that of the deceased’s mobile. In such circumstances, the Supreme Court noted the “irrefutable fact” that the IMEI number of a handset is exclusive in nature and no two handsets have the same IMEI number. Every time a mobile handset is used for making a call, besides recording the number of the caller as well as the person called, IMEI number of the handset is also recorded by the service provider. Therefore, this piece of evidence, establishing the link between the accused and the deceased, was held by the Supreme Court to be of ‘conclusive nature’.
- The Supreme Court also relied upon the exclusive nature of IMEI number in *Mohd. Arif v. State (NCT of Delhi), (2011) 13 SCC 621*.

In *Sanjaysinh Ramrao Chavan v. Dattatray Gulabrao Phalke*, (2015) 3 SCC 123, the evidence relied upon was a voice recording obtained during a sting operation. The Director, State Forensic Science Laboratory reported that the conversation was inaudible and therefore, it was not considered for spectrographic analysis. The counsel for the prosecution argued that the conversation had been translated and it had been verified by the panch witnesses. However, the voice recorder was not subjected to examination and therefore, the Supreme Court refused to place any reliance on the translations of the conversation. **The Court held that** *“source and authenticity are the two key factors for an electronic evidence”*.

K.K Velusamy vs N.Palanisamy 2011 (11) SCC 575

- The Supreme Court held that a **compact disc can be produced as a piece of evidence** as per amended definition of ‘evidence’ in Section 3 and ‘electronic record’ in Section 2(t) of the Information Technology Act,2000 that includes a compact disc containing an electronic record of a conversation. The Court held that it is similar to a photograph and can be received in evidence under Section 8 of the Evidence Act, 1872. The tests indicated in *R.M Malkani vs. State of Maharashtra* (AIR 1973 SC 157) for proving authenticity of recording, in addition to the requirements of Section 65-B would apply.

*Shamsher Singh Verma v State of Haryana**
(Crl.Appeal No. 1525 of 2015)

That compact disc is also a document.

Earlier, the High Court rejected the application of the accused for getting exhibited the compact disc, filed in defence and to get the same proved from FSL.

Supreme Court held that the compact disc is also a document under s.294(1)Cr.PC.

* 24.11.2015

Section 65 B of IEA

S.65 B Admissibility of Electronic Records

(1) Any information contained in an electronic record which is printed on a *paper*, stored, recorded or copied in optical or magnetic media produced by a computer shall be *deemed to be also a document*, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be *admissible in any proceedings*, without further proof or *production of the original*

(2) The conditions:

- (a) the computer output containing the information was *produced by the computer* during the period over which the computer was used regularly to *store or process* information for the purposes of any activities regularly carried over that period by the person having *lawful control* over the use of the computer;
- (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into computer in the ordinary course of said activities;

- (c) throughout the said period, the computer was operating properly or if not then in respect of any period in which it was not operating properly or was out of operation.....was not as such to affect the electronic record or the accuracy of its contents; and
- (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of said activities.

(3) Where over any period, the function of storing or processing informationregularly performed by computers, whether in combination, or succession, or by different combinations.....in whatever order,

all the computers used for that purpose during that period shall be treatedas constituting a single computer

(4) A certificate signed by a person occupying a responsible official position in relation to operation of the relevant device or the management of the relevant activities to include any of the following things:

- identifying the electronic record containing the statement and describing the manner in which it was produced
- giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer

The objective behind aforesaid step-by-step processes is to identify whether the computer in question has properly processed, stored and reproduced whatever information it received.

*State v. Mohd. Afzal**

Held. That under S.65 B, computer generated electronic records is an admissible evidence at trial if proved in manner specified by section.

Electronic record in the form of a print out.....compliance with sub-section Sub-section (1) and (2) of section 65 B is enough to make admissible and prove electronic records. This conclusion flows out, even from the language of sub-section (4).

* 107(2003) Delhi Law Times 385 (DB)

P.Padmanabh v. Syndicate Bank Ltd., Bangalore

The High Court of Karnataka held:

“Clear admission of malfunctioning of either ATM machine or computer.....provisions of section 65B cannot be pressed into service by plaintiff”.

* 2008 (2) Kar.L.J. 153

In *State v. Navjot Sandhu** ...It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court.....Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of section 65B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely sections 63 and 65. It may be noted that the certificate containing the details in sub-section (4) of section 65B is not filed in the instant case, but that does not mean that secondary evidence cannot be given in the circumstances mentioned in the relevant provisions, namely sections 63 and 65.

* (2005)11 SCC 600

Irrespective of the compliance with the requirements of section 65B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely sections 63 and 65.

- In *Anvar PV v P.K. Basheer & Ors.* [CA No. 4226 of 2012]*
September 18, 2014

Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. **The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a *non obstante* clause.** Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2).

It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. **Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence.**

All these safeguards are taken to ensure the **source and authenticity**, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

- *Tomaso Bruno v. State of UP*, Supreme Court decision dated 20 January 2015) in Criminal Appeal No. 142 Of 2015).
- >The trial court in its judgment held that non-collection of CCTV footage, incomplete site plan, non-inclusion of all records and SIM details of mobile phones seized from the accused are instances of faulty investigation and the same would affect the prosecution case.

- Non- production of CCTV footage, non-collection of call records (details) and SIM details of mobile phones seized from the accused cannot be said to be **mere instances of faulty investigation but amount to withholding of best evidence.** It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made.

Harpal Singh @ Chhota v State of Punjab
[Crl.Appeal 2539 of 2014]

As apparently the prosecution has relied upon the secondary evidence in the form of printed copy of the call details, even assuming that the mandate of Section 65B(2) had been complied with, **in absence of a certificate under Section 65B(4), the same has to be held inadmissible in evidence.**

*Kundan Singh v State**

“....we do not accept the legal ratio in *Ankur Chawla v CBI* wherein it has been held that the certificate under section 65B must be issued when the computer output was formally filed in the court and certificate under section 65B cannot be produced when the evidence in form of electronic record is tendered in the court as evidence to be marked as an exhibit. The said certificate can be produced when the electronic record is to be admitted and taken on record, i.e., when the prosecution, defence or a party to the civil litigation wants the electronic record to be marked as an exhibit and read in evidence.”

*2015SCC OnLine Del 13647.

For the purpose of admissibility of electronic record, a three prong test is important:

1. Document in question – is an electronic record [as defined under S.2(1)(t) of the IT Act, 2000],
2. Produced by a computer [as defined under S.2(1)(i) of the IT Act, 2000], and
3. Accompanied by a certificate, fulfilling the conditions laid down S.65 (B)(2)-(B)(4).

In *SIL Import, USA v. Exim Aides Silk Importers**, the Hon'ble Supreme Court observed the need of the judiciary to interpret a statute by making allowances for any relevant technological change that has occurred.

* (1999) 4 SCC 567

Thanks

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