

Analysis on the Determination of Electronic Evidence in Civil Litigation

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ABSTRACT

With the development of big data, electronic devices have become an important medium of communication between people, and the use of electronic evidence in civil cases has become more and more widespread. Although our country in the newly revised civil procedure law will be electronic evidence established as an independent type of evidence, but in judicial practice for the determination of electronic evidence there are still many problems, there is no uniform determination standard, for the confirmation of the proof of electronic evidence, the confirmation of the original may have problems. This paper will try to provide a solution to pursue electronic evidence in civil litigation to maximize the advantages of proof.

KEYWORDS

Electronic evidence; Civil litigation; Big data

1 Concept and Characteristics of Electronic Evidence

1.1 The concept of electronic evidence

The revised Civil Procedure Law in 2012 added electronic data as a statutory type of evidence, which established the independent legal status of electronic evidence in civil litigation evidence. China's current legislation for the expression of electronic evidence using the term "electronic data". The supreme people's court on the application of the civil procedure law of the People's Republic of China "interpretation" of article 116 on the electronic data for the enumeration of the concept of definition, that is, electronic data refers to e-mail, electronic data interchange, online chat records, blogs, blogs, cell phone text messages, electronic signatures, domain names and so on, or the formation of the information stored in the electronic media. Broadly speaking, it is believed that all evidence materials and their derivatives in electronic form are electronic evidence^[1], and narrowly speaking, it is believed that only in the process of computer operation, can reflect the facts of the case of the data information can be called electronic evidence^[2]. However, from the relevant provisions of the procedural law, the definition of the broad definition can better cover electronic evidence.

1.2 The characteristics of electronic evidence

Electronic evidence is essentially a binary digital code that can not be directly identified, need to be transformed into a certain carrier through certain procedures, in order to become a human being can identify the information. Therefore, electronic evidence is destined to be different from the characteristics of traditional evidence, electronic evidence of independent features are as follows.

First of all, electronic evidence has intangible. Electronic evidence is a kind of data information, exists in the information equipment or network virtual space, is not touchable entity evidence, must be transferred to a specific carrier party can present its content. Secondly, electronic evidence has vulnerability. Electronic evidence is mainly stored in computers, cell phones and other media, it is easy to be forged and altered, sometimes non-professionals can not identify the situation, many times inadvertently deleted as a whole. Similarly, the professionalism and technology of data and information, which makes it difficult for unusual people to preserve electronic evidence, very vulnerable to remote tampering or destruction^[3]. of course, electronic evidence also has the recoverability, electronic evidence is easy to be damaged, but at the same time can also be repaired, unlike traditional evidence once damaged is difficult to repair. Finally, electronic evidence has professional, electronic evidence, electronic evidence, transportation, presentation and other aspects are professional, so ordinary people collect electronic evidence is difficult to get the judge's approval, usually need a third party notary public company into the fairness can be recognized.

2 The recognition of electronic evidence in civil litigation dilemma

2.1 The authenticity of electronic evidence is difficult to determine.

For the determination of the authenticity of electronic data, the legislative level is more dispersed and general, can not clearly guide the judge in specific cases to make a judgment. Civil Prosecution Evidence Provisions in Article 93 of the civil electronic evidence of the authenticity of the identification of specific steps and standards, but the provisions of the law

are expressed as “whether”, rather than the objective “yes” or “no”. The situation^[4], still need the judge according to the relevant knowledge and experience to judge and come to a conclusion, the lack of uniform standard guidelines, which leads to in cases involving electronic evidence, the judge's discretion is too large, easy to be abused^[5].

In addition, electronic evidence than traditional evidence has the vulnerability, in the dissemination, collection process are easy to change, electronic evidence is maliciously modified, deleted, it is easy to electronic evidence of the authenticity of doubt. And electronic evidence of the virtual nature of the decision, for the electronic data information issuer, the actual manipulation of the person is unable to determine, the judge usually can only be combined with other evidence of the case comprehensive determination, which actually weakened the electronic evidence of the power of proof. In addition, the presentation of electronic evidence in practice is not standardized, commonly used presentation of screenshots, printing, copying, court display, photo and video, etc., which also involves another issue, whether these ways to present the electronic evidence as the original, or a copy.

2.2 For the legality of electronic evidence is difficult to determine

Electronic evidence of the legitimacy of the difficulties mainly reflected in the collection of evidence of the subject is legal, whether the evidence to show the form of lawful, followed by the evidence collection program is legal. Electronic evidence in accordance with the traditional evidence collection attribution obviously can't completely guarantee its legitimacy, but China's litigation law has not yet stipulated the collection of electronic evidence specific rules. The parties are very likely to collect electronic evidence at will, which will affect the authenticity and integrity of the evidence, so that electronic evidence of proof greatly reduced, such evidence may also be excluded through illegal evidence exclusion rules, resulting in the parties to lose the case.

Secondly, the main body of electronic evidence collection is not standardized. As electronic evidence is essentially composed of binary code data information, and these binary code is dynamic, non-continuous, so its tampering compared to traditional evidence is relatively simple, which also requires the collection of electronic evidence subjects need to have a certain degree of computer knowledge. However, from the existing civil litigation related legal provisions, the legislation does not collect electronic evidence of the main body, the collection process to make clear provisions. Therefore, the collection procedure is not clear not only to the parties to collect the work has brought difficulties, but also led to the electronic evidence in judicial practice is not high. In addition, the collection of electronic evidence at the same time may violate the privacy of other people's information, for example, wechat chat record extraction, may violate the freedom of expression, privacy and so on. Therefore, the subject of electronic evidence collection and legal procedures should be clarified to increase the operability.

2.3 Difficulty in determining the relevance of electronic evidence

Electronic evidence is often due to the relevance of doubt and not be adopted, but the traditional evidence of relevance of the determination of attribution can be applied to the relevance of electronic evidence? The virtual nature of electronic evidence determines the existence of electronic evidence of space is different from the real space, that is, the virtual space where electronic evidence should be with the case of facts exist in the physical space corresponding. In addition, electronic evidence contains data information should be closely linked with the facts of the case, any aspect of the relevance is indispensable, which is also put forward by Prof. LiuPinXin “double connection principle”^[6]. Electronic evidence of the relevance of the determination of the problem is mainly reflected in the electronic information and the carrier is difficult to correspond to the time, place, person need to correspond to, but the reality is often a person can log on over an account or more people can log on to an account, which also affects the login location. In practice, it is usually difficult to determine the correlation between the evidence information and the sender, take wechat as an example, can only be confirmed by wechat avatar, circle of friends background and the parties to self-recognition, etc., but can not really solve the problem.

3 Electronic evidence in civil litigation to determine the attribution of responsibility to improve the proposal

3.1 The authenticity of electronic evidence

In practice, often because of the failure to confirm the original electronic evidence is not adopted, but what is the original electronic evidence, there is no relevant specific provisions. In response to the problem can establish electronic evidence as the original rules, direct extraction of original data information on the device carrier should be considered as the original content. Secondly, to print and other means of direct output of evidence information, and the two in the

content of no difference can be recognized as the original, it is only the two in the form of presentation of the difference. In addition for the review of the integrity of the electronic evidence, can be demonstrated through the court logging demonstration, in addition to professional and technical personnel can be invited to identify, but the method for small cases is not conducive to the judicial efficiency, for the parties is also an unwarranted increase in material pressure. Now judicial practice also began to use blockchain, time stamp and other ways to prove the authenticity of electronic evidence.

In judicial practice, electronic evidence such as emails, text messages, microblogs or online chat records submitted by one party are often challenged by the other party. The other party may deny that the information was sent or published by itself, and even if it admits that the account belongs to it, it may raise defenses such as account security issues or evidence forgery. In the absence of a clear admission by the other party, the party submitting the evidence needs to further prove the identity of the sender or publisher of the electronic evidence. Unlike traditional documentary evidence that relies on signatures, electronic evidence lacks physical features that can directly verify identity. If electronic evidence is accompanied by a reliable electronic signature, the identity of its subject can be directly confirmed. For electronic evidence that lacks an electronic signature or whose reliability is insufficient, the court needs to conduct a comprehensive analysis in conjunction with other evidence in the case, such as considering the technical details of the electronic evidence and the routine use of the account. For example, it examines whether the electronic mailboxes have encryption functions and the attribution of control, whether the chat accounts have been authenticated with real names and their usage patterns, as well as the real-name authentication status and usage records of cell phone SMS and microblogging accounts. Often, real-name authenticated social accounts can be combined with other evidence to infer the identity of the subject of the electronic evidence. For accounts without real-name authentication, a more comprehensive chain of evidence may be required to establish their identity^[7].

3.2 Determination of the legitimacy of electronic evidence

The judgment of the legitimacy of electronic evidence should follow the following rule: "Where the generation, transmission, storage, and manifestation of electronic evidence is not legal, and the degree of its illegality is sufficient to affect the authenticity of the evidence, or sufficient to affect a major right or interest, it can be considered to exclude it". In response to the electronic evidence collection mentioned above and the problems involving the invasion of privacy, improvements can be made in the following two aspects. First, a sound electronic evidence collection procedure should be established, such as clarifying the scope of the main body of electronic evidence collection, to avoid the situation where electronic evidence is excluded because the main body of the collection does not have legitimacy. Again, should be clear collection procedure requirements, to avoid the parties to collect evidence at will, or the provisions in the lawyer's witness collection of evidence, can effectively avoid the legitimacy of electronic evidence of doubt. On the other hand, the establishment of electronic evidence exclusion rules, such as the use of illegal invasion of other people's cyberspace collected electronic evidence does not have the legitimacy, should be excluded; in the carrier equipment can not run normally when the electronic evidence, will affect the authenticity and integrity of the evidence, so should also be excluded. For the collection process may violate the privacy of others in the type of electronic evidence, should obtain the consent of the parties in advance, without their consent to obtain evidence privately, the evidence should be excluded.

3.3 The determination of the relevance of electronic evidence

In order to accurately grasp the relevance of electronic evidence and carrier, can be clearly identified focus, such as whether the parties control or hold the storage media^[8]; manipulate the electronic evidence of information whether the user is associated with the case; if necessary, can be through a third-party platform to issue a professional opinion. Whether the party's behavior and the content of the electronic evidence has relevance, should be combined with other evidence to determine the comprehensive, if there is no other evidence and electronic evidence can not reflect the behavior of the parties, of course, weakening the electronic evidence of proof. Relevance can not be determined, because the electronic evidence has high-tech, if necessary, should apply for technical appraisal. Of course, the relevance of electronic evidence is not necessary to determine all aspects, only for the content of the reasonable doubt can be verified, which is also conducive to improving judicial efficiency^[9].

In addition, it is also necessary to train judicial personnel to use big data to implement the relevance of the determination of the ability to review. To make full use of intelligent data integration of legal information and knowledge, to achieve a more scientific and accurate analysis of the case judgment, can effectively reduce and eliminate the occurrence of miscarriage of justice. Although the relevance of big data is often indirect, but for the accurate determination of the facts of the case can still play a certain role in promoting. In the usual concern about the relevance of electronic evidence, we should be good at using the law of big data analysis to identify the facts of the case more quickly. In judicial practice, the relevance of electronic evidence identified review, as the trial staff should strengthen the

subjective cognition of electronic evidence, targeted learning related technology, actively explore the formation of judges and technicians business combination model, and ultimately draw on the professional opinion and big data, to build electronic evidence related to credit and deposit platform^[10].

4 Conclusion

Electronic evidence is adopted more and more widely, and as a new legal evidence, in theory and practice are facing challenges. For the determination of electronic evidence, from the authenticity, legitimacy, relevance of three perspectives, the determination of electronic evidence rules need to be further improved, from the authenticity point of view, need to establish the original determination rules, at the same time comprehensively using the blockchain technology and timestamping technology, the authenticity of the electronic evidence to determine. For the determination of the legitimacy of electronic evidence, should establish the electronic evidence collection procedures, as well as electronic evidence exclusion rules. Determination of the relevance of electronic evidence, it is necessary to analyze from different perspectives, when the judge can not directly determine whether there is relevance, it can be determined by way of judicial appraisal. For the accurate determination of electronic evidence, not only can the electronic evidence play out the maximum proving power, but also can improve the judicial efficiency.

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