

Existing Problems and Perfection of Digital Evidence in Civil Proceeding

Xia Yuxin

Dalian Ocean University, Dalian, Liaoning, 116000, China

Abstract: According to article 66 of the civil procedure law of the People's Republic of China, evidence includes electronic data, etc. In the past when science and technology were not very developed, digital evidence has not appeared in the legislation, but with the development of science and technology, digital evidence as a new kind of evidence appears in civil litigation has always been controversial in the legal field, it is related to the realization of social fairness and justice and the construction of a harmonious society. Because digital evidence has important research value in the practice of civil action, therefore, in this paper, the application of digital evidence in civil action analysis of its shortcomings and explore the proposed solutions.

Keywords: digital evidence; new evidence; civil proceeding; evidence collection; evidence preservation

1. Introduction

Nowadays, we are living in an era of Internet. The new era of Internet as well as the big era of data are great milestone of the third revolution of science and technology. In our daily life, electronic data, as a new way for people to communicate and contact, plays an important role and significance in disputes when contradictions or disputes occur. When it comes to legal system, more and more problems related to the application of digital evidence are involved in civil proceedings. In today's society, the most important thing is about the collection, preservation, identification and protection of digital evidence. Nowadays, the era of the Internet has come. Digital evidence has become one of the important methods of providing evidence in China's civil proceeding, and it is also a common method of providing evidence, which is of great significance to the court to solve and deal with civil disputes^[1].

2. Overview of Digital Evidence

2.1. Concept of Digital Evidence

Digital evidence is a kind of evidence with electronic technique, digital devices, and kinds of electronic devices as its carrier. With the development of electronic technique, data and content included in digital evidence can not only be separated from material carrier devices but also can be copied for many times and saved in the documents of other material carrier devices through some measures.

Chinese scholars' research on digital evidence and related concepts rose in the 1980s. Because the concept of digital evidence is not clearly stipulated in China's law, presently, there are two most representative remarks in their research on the relevant concepts of digital evidence. Professor He Jiahong believes that "digital evidence is all materials and derivatives existing in electronic form and used as evidence.", while Professor Liu Pinxin believes that "digital evidence is evidence formed based on modern information technology^[2].

2.2. Characteristics of Digital Evidence

First the characteristics of objectivity and fairness. The technical nature of digital evidence determines its objective importance. Under normal operating conditions, the operation, transmission, reception, storage and demonstration performed by electronic and digital devices such as computers can be called "impartial and incorruptible". Therefore, digital evidence is much more objective and fair than the form of traditional evidence.

Second is the characteristics of high-tech. Digital evidence is rich in content and can be stored for a

long time without loss. It can also form a new kind of digital evidence by text, photos, videos or any combination of them, and can also record the facts of the case. It is more technical than traditional evidence.

Third is the characteristics of vulnerability and fragileness. Digital evidence and its carrier are easy to be destroyed, utilized, stolen and tampered with artificially by scientific and technological means. When there is no reference material or copy, it is difficult to judge the authenticity of its data^[3]. With everyone in contact with the network, everyone's privacy may be exposed to the open network, which is due to the vulnerability of digital evidence.

2.3. Significance of Studying Digital Evidence

With the gradual development and optimization of network information technology, human society has entered a new era of data information and a new era of the Internet. The study of digital evidence has at least the following significance:

Firstly, the study of digital evidence will help legislators to establish digital evidence and its related concepts, principles, legal rules, application and identification steps in the law as soon as possible. Since the development of network information technology in the 1990s, China has been characterized by submitting paperless digital evidence in court cases, which will be a common method for parties to provide evidence to the court in the future.

Secondly, the study of digital evidence will be conducive to theory development of evidence. In evidence science, digital evidence is completely different from the traditional form of evidence. The former has a great impact on China's traditional concept of evidence, and even on the collection, identification, examination and preservation of evidence.

Finally, the study of digital evidence will also affect the development and optimization of network information technology. Nowadays, digital evidence is closely related to network information technology. Without network, digital evidence will no longer exist. As people deepen the research on the information related to digital evidence, we will also have a new round of thinking on the future development direction of computer and its related equipment and its associated network information technology^[4].

3. Problems of Digital Evidence Existed in Civil Proceedings

3.1. Lack of Perfect Laws and Regulations as a Guarantee

Because China's economy was relatively backward and information technology was relatively backward in the past, the practical application of digital evidence in China's law starts relatively late and the legislative time is not long. Therefore, there are still many problems in the practical application of digital evidence in civil cases^[5]. China's current legal norms on digital evidence usually only briefly mention the relevant concepts of digital evidence, and do not clearly stipulate how the court should collect, identify and preserve digital evidence, or how the parties should submit digital evidence to the court. The form, type and deadline are not accurately displayed in the legal provisions, which makes the laws and regulations far behind the judicial practice. At present, there is still a phenomenon of "no legal basis" in the application of digital evidence.

3.2. Problems Existed in the Process of Digital Evidence Collection

3.2.1. Digital Evidence Collection with High Cost and Low Effectiveness

Due to the fragility and destructiveness of digital evidence, a lot of manpower and material resources can be applied for the judiciary to recover the deleted information or prevent the information from being invaded by hackers. Therefore, the cost of obtaining evidence in the process of digital evidence collection is very high, and there may be a large amount of information irrelevant to the facts to be proved in the information recovered by the judiciary, which may result in the low efficiency of the judiciary, or it may take a lot of time. In the process of collecting digital evidence of a case, although the judiciary has spent a lot of human and material resources, the proof results obtained cannot completely solve the problems related to the case, and it is also very likely to cause a waste of professional resources and manpower.

3.2.2. Original Document Problems Existed in the Process of Digital Evidence Collection

In principle, the court needs the parties to provide the original of the evidence to collect digital

evidence in the process of hearing civil cases. Whether at home or abroad, how the judiciary should distinguish or identify the original or copy of the evidence submitted by the parties has always been a controversial issue. Therefore, in practice, most of them identify the identification target as the material carrier equipment with digital evidence, but using the attribute of the material carrier devices to determine the attribute of digital evidence is not the most reasonable and legal method. Therefore, legislators should find the best solution to solve the original document problem in the collection process.

3.3. Problems existed in the Digital Evidence Preservation

In the civil field, with the popularization of information technology and the emergence of electronic data related service industries, the procedural operation form and final determination of digital evidence preservation also show complex and diverse characteristics in judicial practice^[6]. Although the preservation of digital evidence has many advantages, there are several problems in the preservation of digital evidence because there is no clear legal basis in judicature and there are no useful precedents to learn from in practice

3.3.1. Unclear Object of Civil Digital Evidence Preservation

Because digital evidence has the characteristic that it must exist according to the carrier (such as electronic devices, computer devices, etc.), the problem about whether the object of preservation of judicial organs in civil judicial practice is carrier devices or electronic data arises. The author believes that the preservation object of digital evidence is digital data, instead of its attached carrier devices. For example, the preservation object of digital evidence should be a file on the computer desktop, not the whole computer equipment itself. However, in judicial practice, the judicial organ usually preserves the material carrier devices containing electronic data in the process of preserving electronic data. The author believes that its purpose is not to preserve the data irrelevant to the case, but to fix the devices environment and data environment involving the electronic data files that can prove the course of the case.

3.3.2. Whether to Detain the Original Document for Civil Digital Evidence Preservation

Generally speaking, the evidence carrier in the traditional sense may only be a necklace, a mobile phone, a box of cosmetics and other physical objects. If a necklace, a mobile phone and a box of cosmetics of the party are detained, the normal use of any items other than the seizure will not be affected, and the court will not abuse its private right to detain any other items of the party. However, different from traditional evidence, digital evidence's attached carrier devices may also store other electronic information unrelated to the case, and the carrier equipment itself is not related to the case. If the court directly detains the party's material carrier devices, the carrier equipment and electronic data unrelated to the case can no longer be used by the party. Obviously, this is unreasonable.

4. Perfection of Collection, Preservation and Application of Digital Evidence

4.1. Perfection of Legislative System

4.1.1. Perfection of Collection System

The characteristics of electronic data itself are very different from traditional evidence. Therefore, the legislation should be inclined to electronic data evidence. The collection of electronic data evidence should establish legal rules suitable for electronic data^[7]. Therefore, the author believes that the judiciary should discuss how to improve the collection system of digital evidence from two aspects: the authenticity and legitimacy of the collected digital evidence. First, it is required to ensure the authenticity of the collected digital evidence. The biggest problem is that any kind of digital evidence usually involves whether the digital evidence collected by the judiciary is true. The premise for the court to collect digital evidence is to trust that the evidence submitted by the parties is true and effective, but what the court does not trust is the artificial and destructive characteristics of digital evidence. From the perspective of information technology, even with the help of computer professionals and experts, it is unrealistic to prevent it from any damage in the process of digital evidence collection. Therefore, in our daily life, we should vigorously develop tools that can stabilize electronic data to avoid the untrue collection of digital evidence in the process of application. Finally, it is required to ensure the legitimacy of the collected electronic evidence. From the perspective of legal provisions, there are few rigid provisions on the collection of civil electronic evidence in the laws and regulations formulated in China. If there are any, it is almost just a simple concept or definition. In judicial practice, these simple words cannot help the

judicial authorities to determine the legitimacy of civil digital evidence in any sense. In short, legislators should clarify as soon as possible the laws and regulations on how the court can legally collect digital evidence and how the parties should reasonably and legally collect digital evidence.

4.1.2. Perfection of Preservation System

In the era of the popularization of Internet technology, digital evidence has become the important evidence for judicial organs to deal with criminal and civil and commercial cases. However, in light of the inherent defects of network electronic evidence, it has become an important part of the business of notary organs^[8]. However, there are many objects of digital evidence preservation, and the operation steps of each evidence preservation cannot be completely consistent. Therefore, the basic steps should be uniformly stipulated to ensure the standardization of preservation^[9]. Even though the newly formed digital evidence in recent years is very different from the previous traditional evidence, both digital evidence and traditional evidence belong to a type of evidence. The legislative purpose, legislative method and legislative value of the preservation of both of them by the court are similar. They are all to help the judiciary, which can save the time of hearing cases related to the preservation of digital evidence and it can also avoid wasting the human and material resources management of the judiciary. What's more, it can not only better solve the dispute focus of both parties, but also more fairly listen to the statements and opinions of the parties to deal with the case. Legislators must also think carefully and repeatedly when formulating the law to preserve traditional evidence. Therefore, we can learn from the domestic traditional evidence preservation methods to better formulate the legislation of electronic evidence preservation, instead of copying completely.

4.2. Perfection of Judicial Practice

In China's current laws and regulations, the information about digital evidence is only a classification of digital evidence in the civil procedure law. Even in the judicial practice of judicial organs, judges have no special legal basis for the collection, identification and preservation of electronic evidence. However, judges can solve this kind of problems according to previous precedents or reasonably use their power. Therefore, the following contents are the author's opinions on improving the collection and preservation of digital evidence from the perspective of trial practice:

4.2.1. Perfection of Digital Evidence Collection

In the period of the internet technique highly developing, it is an inevitable trend for the society to formulate the digital evidence collection rules of the parties. For example, the parties themselves how to obtain evidence online, how to save the evidence obtained online, and how to obtain evidence according to the specific operation process of the organ. Only when the parties carry out it according to clear, specific and complete rules can we change the current situation of high cost and lack of access to digital evidence.

4.2.2. Perfection of Digital Evidence Preservation

The law stipulates that the digital evidence is very likely to be lost or difficult to obtain that the condition when it comes to digital evidence preservation before, during and outside the litigation in the future. However, the author believes that whether before, during or after the litigation, the judicial organ should handle it according to the preservation application of the parties, rather than setting conditions and restrictions for digital evidence preservation. If too many restrictions are set, things will develop in the opposite direction when they become extreme, so that the people have something to preserve but not enough application conditions, and can only watch the loss of things. If so, it is bound to violate the legislator's original will to serve the people when making legislation. Therefore, as long as people meet the basic conditions for submitting applications, they should be counted and accepted by the court. Only in this way can we preserve digital evidence more quickly and accurately for the trial of cases in the later litigation stage. It is conducive to safeguarding the legitimate interests of the parties, conducive to the ruling of the judicial organ, and the case meets the requirements of judicial fairness and justice.

5. Conclusion

With the advent of the era of science and technology, digital evidence, as a new kind of evidence, provides practical and strong support for the settlement of disputes^[10]. In civil litigation cases, the judges also rely on the collection, identification and preservation of digital evidence. Therefore, it is essential to establish and improve an effective and reasonable legal framework and institutional guarantee for the

collection, identification and preservation of digital evidence, but we can't anxious for success. This is a process that needs continuous reform and development. Solving the application of digital evidence will not only benefit the country, society and the broad masses of the people, but also strive for greater legitimate rights and interests for the broad masses of the people.

References

- [1] Cong Yuhong. *On the Application of Digital Evidence in Civil Proceeding [J]. Legal System and Society*, 2015 (07): 127-128.
- [2] Meng Si, Wu Hebin. *On the Application of Digital Evidence in Civil Proceeding [J]. Legal System and Economy (MID)*, 2014 (06): 118-120.
- [3] Yang Cuiping. *On the Important Role of Digital Evidence in Civil Proceeding [J]. Legality Vision*, 2016 (02): 223-224.
- [4] Dong Dujiao. *Cognitive Starting Point of Digital Evidence Research [J]. Science & Technology Progress and Policy*, 2003,20 (01): 139-140.
- [5] Liang Wanying. *On the Application of Digital Evidence in Civil Proceeding [J]. Legal System and Society*, 2015 (20): 130-131.
- [6] Ding Wendan. *On the Preservation of Digital Evidence in Civil Proceeding [D]. Southwest University of Political Science & Law*, 2015:4.
- [7] Liu Fu, Zhou Huili. *Research on the Application of Electronic Data Evidence in Civil Proceeding [J]. Legal and Economy*, 2018 (03): 84-85.
- [8] Zheng Fenggang. *Exploration on the Preservation of Network Digital Evidence [J]. Legal System and Society*, 2017 (12): 116-117.
- [9] Wu Yuqi. *Research on Notarization and Preservation System of Digital Evidence [J]. The New Orient*, 2018 (03): 50-56.
- [10] Ma Weihai. *Application of Digital evidence in Civil Proceeding [J]. Legality Vision*, 2017 (19): 134-135.