

# Study Sessions on Electronic Evidence

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# What is electronic evidence?

- Essentially evidence produced by a computer.
- S. 3 of the Evidence Act 1950 defines what is a computer.

# What is electronic evidence?

- “Computer” means-

an electronic, magnetic, optical, electrochemical or other data processing device or a group of such interconnected or related devices, performing logical, arithmetic, storage and display functions and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices but does not include an automated typewriter or typesetter, or a portable handheld calculator or other similar devices which are non-programmable or which do not contain any data storage facility

# What is electronic evidence?

- Any data processing device which is programmable
- Computer would include laptops, desktops, mobile phones, digital camera, TV boxes, CCTV recorder, drone, and even a smart TV.

# Common electronic evidence used in Court these days

- Emails and scanned documents
  - Electronic agreements
- Digital photographs and videos (including live stream videos)
- Instant Messages
  - WhatsApp, WeChat, Telegram and Signal messages
  - Containing text, emojis, gifs, voice notes, etc

# Common electronic evidence used in Court these days

- Emoji cases
  - [South West Terminal Ltd. v Achter Land & Cattle Ltd](#) 2023 SKKB 116 👍
  - Malaysia's first emoji case - [SG Home Style Sdn Bhd lwn. Ng Kim Lian](#) [2023] SMCU 46 🙌
  - [CC Land Resources Sdn Bhd & Anor v. Geo Win Sdn Bhd](#) [2023] CLJU 1206

# Common electronic evidence used in Court these days

- Social media postings
- Public information
  - Wikipedia
    - [Ganga Gouri a/p Raja Sundram Mohd Faizal Bin Mat Taib \[2013\] 1 LNS 1100](#) cf. [Lee Lai Ching \(sebagai sahabat wakil Lim Chee Zheng dan untuk dirinya\) v Lim Hooi Teik \[2013\] 1 LNS 18, HC](#)

# Common electronic evidence used in Court these days

- Social media postings
- Public information
  - Google Maps / Streetview
    - [Jolene Lee Miao Chi v IFLIX Sdn Bhd](#) (Award No. 73 of 2021); [Eddy Salim & Ors v Iskandar Regional Development Authority & Ors \(No 2\)](#) [2017] 1 LNS 822; [Way Lime Products v. Gangga Marbles Sdn Bhd & Anor](#) [2023] CLJU 1594; [Pendakwaraya Iwn Karthikeson a/l Shammugam @ Shanmugam](#) [2020] 1 LNS 2186



# Common electronic evidence used in Court

- Metadata
  - “a set of data that describes and gives information about other data”
  - For example, a word document would state the name of author, date of creation or date of modification
  - Important to establish linkage, source, creation, modification and other information

# Common electronic evidence used in Court

- Metadata
  - Word file
  - [Sundra Rajoo Nadarajah v Leaderonomics Sdn. Bhd. & Anor \(2023\) 5 MLRH 284](#)

# Admissibility of Electronic Evidence in Civil Proceedings

- Common Bundle of Documents (CBOD) (O. 34 r 2(2)(d) and (3) of the Rules of Court 2012)
  - Part A - Authenticity of documents and contents are agreed and not disputed
  - Part B - Authenticity of documents is not disputed but contents not disputed
  - Part C - Authenticity of documents and contents are disputed

\* Rule originally created by Justice James Foong Cheng Yuen taken from running down cases

# Admissibility of Electronic Evidence in Civil Proceedings

- When to place in Part C?
  - Tampered, doctored, fabrication etc
    - [Ram Kumar a/l Gopal Ram & Anor v Ram Kailash a/l Gopal Ram](#) [2016] 6 AMR 471; [2016] 1 LNS 1337, HC
    - How to determine if it has been tampered?  
Study the evidence!

# Producing Electronic Evidence in Court

- Instant Messages (e.g. WhatsApp, WeChat)
  - Generally, by way of screenshots or could be generated by the application through, "Export Chat" function on WhatsApp.
  - The former would be most suitable if there are other elements in the conversation e.g. emojis, photographs, voice notes.

# Producing Electronic Evidence in Court

- Instant Messages (e.g. WhatsApp, WeChat)
  - The court may disregard screenshots that are defective
    - [Mohamad Azhar Abdul Halim v Naza Motor Trading Sdn Bhd](#) [2017] 1 ILR 292
  - Leading case on admissibility of WhatsApp messages
    - [Mok Yii Chek v Sovo Sdn Bhd & 2 Ors](#) [2015] AMEJ 650; [2015] 1 LNS 448, HC

# Producing Electronic Evidence in Court

- Video - screenshots of the video as part of the exhibits
  - See also [Public Prosecutor v Jasendran a/l Sanmugam](#) [2020] 1 LNS 1540
- Voice recording - accompanied with a transcript.
  - See also [Ramanesh Ramoo a/l Ramoo v 23 Motors Sdn Bhd & 2 Ors](#) [2021] CLJU 2052
- Image - of high resolution and if in colour, print it in colour

# Producing Electronic Evidence in Court

- Social media postings –
  - Screenshots
  - “Save as PDF” on Chrome (drawback: that it will not be in the proper format)
  - Use a full page screen capture software such as [GoFullPage](#) on Chrome (drawback: no date of printing and the URL of the page)

\* A certified translation must be filed together if it is not in Bahasa Malaysia or English (see also [Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd](#) [1994] 2 CLJ 729)



# Producing Electronic Evidence in Court

- Social media postings –
  - To prove adultery
    - [Tan Swee Ean v Adrian Tan Soon Beng & Anor](#) [2016] MLJU 377; [2016] 1 LNS 885
    - [GGC v CCC & Anor](#) [2016] MLJU 377; [2016] 1 LNS 885
  - Comments by third parties
    - [GGC v CCC & Anor](#) [2016] MLJU 377; [2016] 1 LNS 885
- Tip: Always check the original posting

# Producing Electronic Evidence in Court

- Social media postings –
  - Comments by third parties
    - [Imelda Nasreen Nasruddin @ Balchin v. Norizatul Amira Kamsan](#) [2023] CLJU 2356
    - [Linawaty Assim v Saidatul Hanum Sazali](#) [2021] CLJU 1884
    - [Jason Jonathan Lo v Star Media Group Berhad & 3 Ors](#) [2024] MLRHU 379
    - [Tuanku Nur Zahirah v Clare Louise Brown & Ors](#) [2023] CLJU 2877

# Producing Electronic Evidence in Court

- Printed or soft copy (in a CD or emailed or shared through a cloud service platform (e.g. Dropbox, Google Drive, OneDrive))

# Producing Electronic Evidence in Court

- Metadata
  - Screenshot
  - Preservation



Properties ▾

Size	3.06MB
Slides	26
Hidden slides	0
Title	Slide 1
Tags	Add a tag
Categories	Add a category

Related Dates

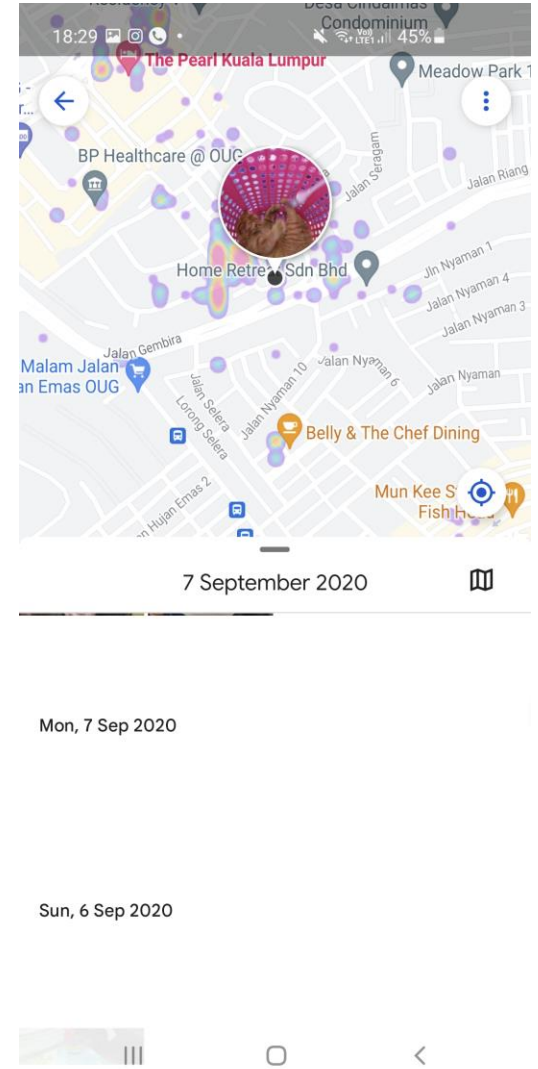
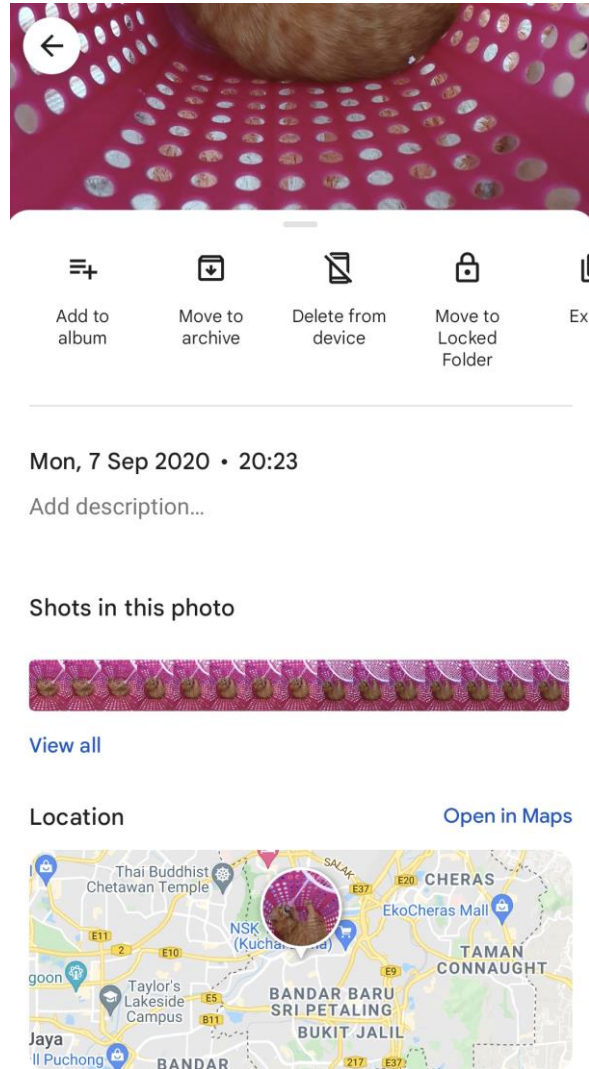
Last Modified	Today, 12:21
Created	04/04/2012 00:59
Last Printed	07/03/2014 19:52

Related People

Author	 FCL
	Add an author
Last Modified By	 F CL

# Producing Electronic Evidence in Court

- Metadata – Image



# S. 90A of the Evidence Act 1950

- Exception to the hearsay rule
- It governs the admission of electronic evidence. However, different Courts have different approach when dealing with s. 90A.
- Original usage is to admit documents generated by a computer. For example, a bank statement or a CCTV recording where no human intervention was involved. However, it has now expanded to all forms of electronic evidence

# S. 90A of the Evidence Act 1950

- Different Courts have different approaches.
  - [HLC v PTL & Anor](#) – original device that recorded the media file must be tendered in an adultery case
- Explanation 3 of section 62 of the Evidence Act 1950 provides that a document produced by a computer is primary evidence

# S. 90A of the Evidence Act 1950

- When maker is not called, rely on s. 90A.
  - Leading case: [Gnanasegaran a/l Perarajasingam v Pendakwa Raya](#) [1997] 3 AMR 2841; [1997] 3 MLJ 1; [1997] 4 CLJ 6
- Essentially all documents generated by a computer is admissible even if the maker is not called provided that it was produced by a computer in its ordinary use.
  - [Dato' Kanagalingam Veluppillai V. Majlis Peguam Malaysia](#) [2022] 2 CLJ 858



# S. 90A of the Evidence Act 1950

- There are two types of maker namely the author of the document, and the person who "made" the document for the production in Court.
- When both makers are not called as witness, a s. 90A certificate should be tendered. The certificate states that the person signing it is the person responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

# Sample 90A Cert

SIJIL  
(dibawah Seksyen 90A Akta Keterangan 1950)

Saya, \_\_\_\_\_ yang berkhidmat dengan

yang beralamat di

sebagai seorang

dengan ini mengakui bahawa saya adalah orang yang bertanggungjawab keatas pengurusan operasi komputer dan/atau bagi pengendalian aktiviti-aktiviti yang mana komputer tersebut telah digunakan, untuk menghasilkan dokumen berikut:-

Dokumen yang dihasilkan oleh komputer tersebut dilampirkan bersama ini.

Bertarikh

# S. 90A of the Evidence Act 1950

- Evidence must be led to admit them and marked as exhibits (unless Court expressly dispensed with it to save time). Evidence should state how the screenshots were made and s. 90A(2) requirements should be met (see [Norazlan Shah Bin Hazal v Mohd Dziehan Bin Mustapha](#) 1 LNS 1966 regarding admission of Facebook screenshots)

# S. 90A of the Evidence Act 1950

## Sample Q&A

Q1: Please refer to pages 1 to 2 of Bundle C. Please explain to this Court what is this document.

A: This is a screenshot of a Facebook posting by the Defendant published on 24 January 2022. I made this screenshot using a computer. I am responsible for the management of the operation that computer [for the conduct of the activities of that computer].

Counsel: I pray that this document be marked as an exhibit.

# S. 90A of the Evidence Act 1950

- Opposing counsel may challenge the admissibility of electronic evidence by, among others, the witness is not the person responsible for the management of the operation of the computer.
  - [Ahmad Azhar Bin Othman v Rozana Binti Misbun](#)  
[2020] 6 CLJ 314

# S. 90A of the Evidence Act 1950

- Sample cross question-

Q: I refer to the document X. Who printed this document?

A: I did.

Q: Whose computer did you use to print the document?

A: My colleague, Ms X.

Q: What is the source of the contents of this document?

A: Our customer database management system which is hosted on our company's server.

Q: Who maintain this software and server?

A: Our outsource service providers, ABC Sdn Bhd and XYZ Sdn Bhd respectively.

Q: Who entered the information for this particular document?

A: I don't know.

# S. 90A of the Evidence Act 1950

- Sample cross question-

Q: When was this information entered?

A: I don't know.

Q: Which department was in charge in inputting the information in this document?

A: I don't know

Q: Therefore, I put it to you that you are not the person in the management of the computer which printed this document, and the said server.

A: Yes

Q: You are also not the person responsible for the conduct of the activities of that computer.

A: Yes

# S. 90A of the Evidence Act 1950

- Sample cross question-

Q: I put it to you that you are also not the person in the management of the said server.

A: Yes

Q: You are also not the person responsible for the conduct of the activities of the said server.

A: Yes

Q: You therefore cannot guarantee the accuracy of this information?

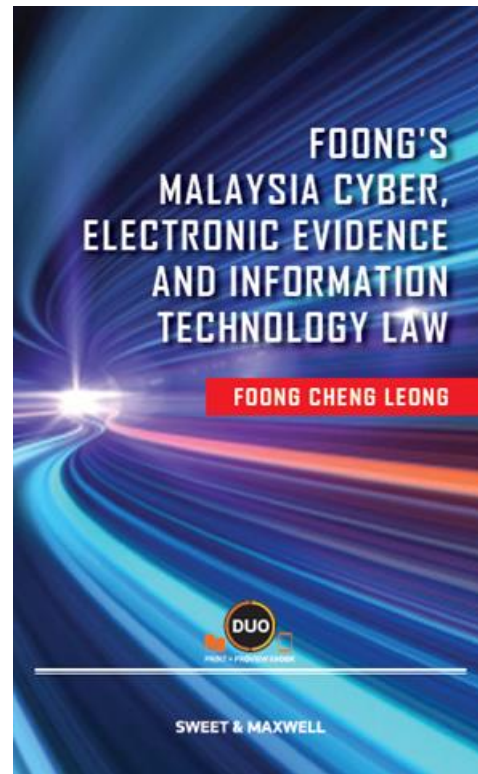
A: Yes



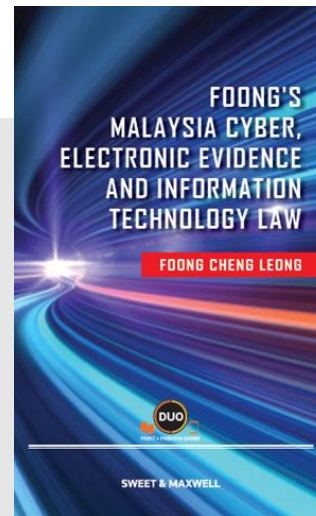
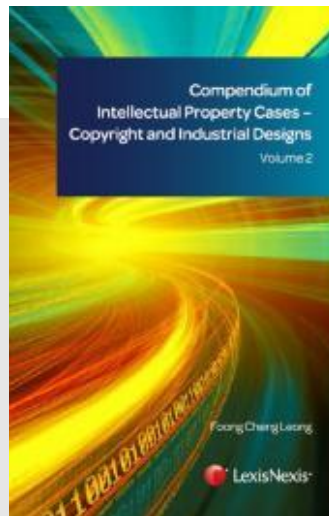
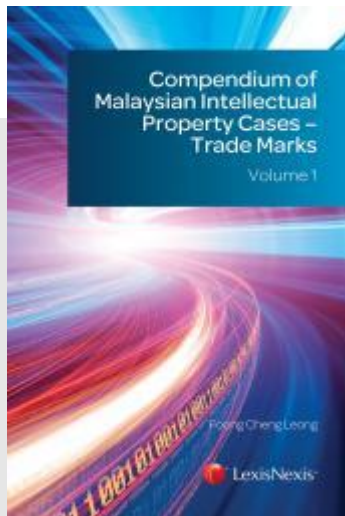
# S. 90A of the Evidence Act 1950

- Admissibility is merely the first step. The Court will still need to determine the weight to be attached to the document or statement contained in a document
  - s. 90B of the Evidence Act 1950
  - [Microsoft Corporation v Conquest Computer Centre Sdn Bhd](#) [2014] AMEJ 0261; [2014] 6 CLJ 876, HC

For more cases and writeups, please refer to Foong's Malaysia Cyber, Electronic and Information Technology Law available at [Thompson Reuter's website](#) (New edition coming soon!)



## Publications



# Thank you

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