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Mariusz Nowak
Nicolaus Copernicus University in Toruń, Poland
ORCID: 0000-0002-5307-8958
mnowak@doktorant.umk.pl

Electronic Evidence in Civil Proceedings on the Background of Comparative Law

Dowody elektroniczne w postępowaniu cywilnym na tle prawnoporównawczym

ABSTRACT

Constant technological development changes all aspects of human life. The digital revolution has created many new opportunities for obtaining and presenting evidence, irretrievably changing the taking of evidence. As a result of increasing computerization, the civil process has become more streamlined – its speed and quality have improved. The role of modern technologies is manifested, among others, by the possibility of taking evidence proceedings with the use of devices transmitting images and sounds or the possibility of using data and information recorded in electronic form in court. The consequence is the presence of electronic evidence. In Polish legal literature, the issue of electronic evidence has been taken up for the purposes of criminal trial and forensics. However, there have not been many studies in the field of civil proceedings, despite the fact that the evidence in question is deeply rooted in civil cases and has long been used in evidence proceedings. Due to the title issue, it was necessary to formulate its definition for the purposes of civil proceedings. The author indicated the place of electronic evidence in the legal system and came to the conclusion that it would be worth considering separating them as an independent means of evidence due to the significant differences between it and other types of evidence and their complex nature. The considerations made confirm the belief that electronic evidence should be distinguished as a separate type of evidence, because their admissibility should be examined on an individual basis, and the lack of detailed regulations may create numerous practical problems.

Keywords: electronic evidence; civil proceedings; computerization; civil proceedings; evidence proceedings

CORRESPONDENCE ADDRESS: Mariusz Nowak, PhD Student, Nicolaus Copernicus University in Toruń, Doctoral School of Social Sciences – Academia Rerum Socialium, Władysława Bojarskiego 1, 87-100 Toruń, Poland.

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INTRODUCTION

Internet users are increasingly creating a digital footprint. According to the latest research by the Pew Research Center, 96% of Americans own a mobile phone, 90% use the Internet systematically, 81% have a smartphone, 75% have a desktop or laptop computer, and 50% have a tablet. An estimated 1.7 MB of data is created for every person on Earth every second, which is an incredible 2.5 trillion bytes of data created each day.[1] Progressive computerization has led to the emergence of new possibilities for global communication and interaction – a global communication space has been created, without the usual constraints of time and distance.[2] Electronic communication is becoming an increasingly dominant means of communication due to its advantages over traditional (paper) communication:

- data is generated, transmitted and processed in the same environment (cyberspace) and using the same means;
- data is transferred from one place in the world to another without time delays and regardless of the distance;
- the process of duplicating and copying electronic data is relatively fast and inexpensive;
- electronic data is easy to store, it does not require much space for archiving.[3]

Besides the advantages, there are also problematic aspects of the use of electronic data that are worth noting. It can be difficult to detect and track the manipulation of electronic data.[4] In a traditional paper document, changes or modifications leave physical traces. An expert witness with particular knowledge in forensics may analyze the chemical properties of the ink on the paper document to determine whether more than one writing instrument was used or whether the ink was used at the time the document was allegedly written. Thus, in the case of recorded data in physical form, the change of information can be detected using standard methods long known in forensics, while in the case of electronic data, conventional forensic methods will prove to be useless.[5] Moreover, electronic communication can take place anonymously – people who communicate electronically may not know or see each other, which creates a problem of identifying the person who sent or created the electronic data.[6]

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[1] See L.A. Sannicandro, *Digital Evidence in Civil and Criminal Tax Cases*, "Journal of Tax Practice & Procedure" 2019, vol. 21(5), p. 24.

[2] See R. Čėsna, *Aspects of Using Electronic Evidence in Civil Proceedings*, "Jurisprudencija" 2007, no. 10, p. 92; S. Mason, D. Seng, *Electronic Evidence*, London 2017, p. 25.

[3] See R. Čėsna, *op. cit.*, p. 92.

[4] *Ibidem*.

[5] S. Mason, D. Seng, *op. cit.*, p. 89.

[6] See R. Čėsna, *op. cit.*, p. 92.

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It is worth noting that in some civil proceedings the existence of such activities or the results of such processes can only be proven by means of electronic data.[7] The obtained electronic data may therefore turn out to be indispensable and be the only possible way to arrive at the truth and the basis of evidence, which undoubtedly emphasizes the importance of data saved in electronic form and may be very important in specific civil cases (e.g. in cases where billing data are used).[8] Improving communication has also led to easier and faster contracting and service provision. As a result, there has been a development of trade relations – e-commerce.[9] New possibilities for collecting data and sending documents have arisen.[10] Using the Internet, companies exchange data, negotiate contracts, accept consumer complaints, and conclude transactions by selling goods in online stores. Electronic data messages are created and sent using modern means of electronic communication.[11] The transfer of some business processes to electronic space has led to the generation of electronic data in cyberspace.[12] This is how electronic evidence is created. The aspect of the use of electronic data in civil proceedings seems to be one of the most important issues in the harmonization of the use of information stored in cyberspace or in the real world. The legal system should allow electronic data to be presented to a court and used as evidence. Therefore, there is a need for scientific analysis of the use of electronic data and the reliability of such data.

In theory, it is indicated that the concept of information is ambiguous and undefined due to its primary, elementary nature.[13] The PWN dictionary indicates that information is "computer-indicated data".[14]

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[7] *Ibidem*.

[8] See resolution of the Supreme Court of 6 August 2020, III CZP 78/19, Legalis no. 2422748.

[9] See R. Čėsna, *op. cit.*, p. 92.

[10] Electronic data is very often used in economic (commercial) cases. On 1 January 2021, the amendment to the Commercial Companies Code entered into force, implemented by the Act of 30 August 2019 amending the Commercial Companies Code and certain other acts (consolidated text, Journal of Laws 2021, item 1090). One of the most important changes is the new register of shareholders, in which the shares of companies other than natural persons are registered (Article 328^1 § 1 of the Commercial Companies Code). Pursuant to Article 328^1 § 2 of the Commercial Companies Code, the register of shareholders is kept in an electronic form, which may take the form of a distributed and decentralized database.

[11] See R. Čėsna, *op. cit.*, p. 92.

[12] *Ibidem*.

[13] See B. Stefanowicz, *Społeczne funkcje informacji*, "Studia Informatica" 2009, no. 24, p. 279; M. Kłodawski, *Pojęcie informacji w naukach teoretycznoprawnych*, 2012, https://depot.ceon.pl/bitstream/handle/123456789/316/Maciej_Klodawski_-_Pojecie_informacji_w_naukach_teoretycznoprawnych.pdf (access: 27.4.2024), p. 1; *Informacja*, https://encyklopedia.pwn.pl/haslo/informacja;3914686.html (access: 27.4.2024).

[14] See *Informacja*, https://sjp.pwn.pl/sjp/informacja;2466189.html (access: 27.4.2024).

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Initially, the term "information" was used sporadically, primarily in the field of social sciences. As a result of the development of science, its application has been extended to cybernetics and biology.[15]

Information is intangible, but it is transmitted and saved with the help of material objects.[16] According to the Polish legal system, information cannot be a thing, so it cannot be property. It is worth noting, however, that it may have an economic value and may also be the subject of property rights. Based on Article 44 of the Civil Code, property rights may constitute property and are also subject to criminal law protection.[17]

The issue of electronic evidence is very topical as the amount of information stored in digital form, as well as its use, is constantly increasing. In addition, they can be used in various spheres of life, which justifies the need for scientific research, as well as the introduction of an optimal approach to information technology in court proceedings. There is no doubt that in recent years more and more civil lawsuits have been related to cases involving a dispute over information stored in electronic form (i.a. posted on the Internet, e.g. on social networks, social media). In this category of cases, it is necessary to analyze evidence recorded in digital form by the courts.[18] Development of possible improvement in the use, processing, collection and presentation of electronic evidence that may be useful in court proceedings in Poland should be preceded by the formulation of a definition of electronic evidence, the indication of its features and its place in the legal system.

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[15] A. Lach, *Dowody elektroniczne w procesie karnym*, Toruń 2004, p. 18.

[16] See B. Stefanowicz, *Informacja*, https://depot.ceon.pl/bitstream/handle/123456789/4341/Rep'InformacjaCalosc'2014.docx?sequence=1&isAllowed=y (access: 27.4.2024), p. 8.

[17] A. Adamski, *Prawo karne komputerowe*, Warszawa 2000, p. 99. An example of property rights to information that benefits from criminal law protection may be proprietary copyrights to a computer program.

[18] Currently, European countries do not have developed rules governing electronic evidence. The exception is Ukrainian law, which significantly expanded the regulations on digital evidence (see K. Drogoziuk, N. Golubeva, *Web-Page Screenshots as Evidence in Civil Procedure of Ukraine*, "Masaryk University Journal of Law & Technology" 2019, vol. 13(1), p. 88). It seems that the progressing computerization of civil proceedings is associated with the introduction of many new information technologies, including artificial intelligence. This is indicated by the adoption of the CEPEJ European Ethical Charter on the use of artificial intelligence in judicial and related systems (see European Commission for the Efficiency of Justice, *European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment*, 2018, https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c, access: 27.4.2024). Possibilities of using artificial intelligence in the work of civil courts when resolving certain categories of disputes (issuing a court order, considering cases under a simplified judgment, i.e. entrusting decisions to a machine instead of a judge) raises a lot of controversy. Some people oppose entrusting any court decision-making functions to artificial intelligence on ethical and moral grounds. See N. Kirsanova, V. Gogoleva, T. Zyabkina, K. Semenova, *The Use of Digital Technologies in the Administration of Justice in the Field of Environmental Crime*, "E3S Web of Conferences" 2021, vol. 258.

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THE CONCEPT OF ELECTRONIC AND DIGITAL EVIDENCE

The use of modern technologies in judicial practice is manifested, i.a., by the possibility of using electronic evidence in civil proceedings.[19] The Civil Procedure Code[20] does not contain a legal definition of electronic evidence. In Polish legal literature, the issue of electronic evidence has been taken up for the purposes of the criminal trial and forensics, but there have been few studies in the field of civil proceedings, despite the fact that the evidence in question is deeply rooted in civil cases and has long been used in evidence proceedings.

In both domestic and foreign literature, many definitions of electronic evidence are formulated. Most often they consist of three elements:

- data references (which relates to information stored in electronic form, such as text, audio, video, video and audio);
- the word *computer* (which should be understood in the broadest possible sense and include any device that stores, processes or transmits data);
- making the assumption that the evidence must be relevant and admissible.[21]

The Committee of Ministers guidelines for member states on electronic evidence in civil and administrative proceedings adopted a broad concept of the definition of electronic evidence, according to which "electronic evidence means any evidence derived from data contained in or produced by any device, the functioning of which depends on a software program or data stored on or transmitted over a computer system or network".[22] As defined by the Scientific Working Groups on Digital Evidence and Imaging Technology, electronic evidence is "information of a probative value that is stored or transmitted in binary form".[23]

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[19] A significant problem may be the protection of rights and interests consisting in collecting, presenting and certifying evidence saved in electronic form. Electronic devices such as smartphones, utility cameras or tablets, are very common and may therefore contain evidence. It should be pointed out that in some proceedings the evidence saved in electronic form may be the only possible means of evidence in the case or have a higher probative value as compared to other evidence provided.

[20] Act of 17 November 1964 – Civil Procedure Code (consolidated text, Journal of Laws 2021, item 1177).

[21] See S. Mason, D. Seng, *op. cit.*, p. 19.

[22] See Council of Europe, *Electronic Evidence in Civil and Administrative Proceedings: Guidelines Adopted by the Committee of Ministers of the Council of Europe on 30 January 2019 and Explanatory Memorandum*, https://rm.coe.int/guidelines-on-electronic-evidence-and-explanatory-memorandum/1680968ab5 (access: 27.4.2024), p. 6. The Guidelines contain general rules on electronic evidence as well as practical advice related to its use in civil proceedings. In my opinion, due to the fact that in Polish law and in the science of civil procedure little attention is paid to the use of electronically processed information in evidence proceedings, it is worth using Guidelines as practical guidelines for dealing with this type of evidence.

[23] See Scientific Working Groups on Digital Evidence and Imaging Technology, *Best Practices for Digital Evidence Laboratory Programs Glossary: Version 2.7*, 2011, https://www.crime-scene-investigator.net/swgde_swgit_glossary_v2-4.pdf (access: 27.4.2024), p. 6.

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The definition of digital evidence proposed by the International Computer Evidence Organization (IOCE) is the most frequently quoted in domestic and foreign doctrine: "Digital evidence is information stored or transmitted in binary form that may be relevant in court proceedings".[24] This definition was adopted by the Office of Justice Programs of the U.S. Department of Justice in the publications *Electronic Crime Scene Investigation: A Guide for First Responders* and *Forensic Examination of Digital Evidence: A Guide for Law Enforcement*.[25] The definition of electronic evidence formulated in this way is universal – it can be used not only in civil and criminal proceedings, but also in court and extrajudicial proceedings (e.g. mediation proceedings, preparatory proceedings). There were also narrower definitions, e.g. in the publication *Electronic Crime Scene Investigation: A Guide for First Responders* from 2008, in which electronic evidence was defined as "information and data valuable to an investigation that is stored, received or transmitted by an electronic device".[26] A. Lach indicates as the definition of electronic evidence "information in electronic form with evidentiary significance".[27]

For the purposes of civil proceedings, it can be said that electronic evidence is any information recorded in electronic form, of evidence significance for civil proceedings. This definition seems sufficiently broad and at the same time precise and helpful for the purposes of classifying evidence. This brief overview of the different concepts shows that there is not much variety in the definition of electronic evidence. Definitions are formulated depending on the needs of a given area of law. Their characteristic feature is that they operationalize the concept of electronic evidence – they provide a hint on how to analyze it, e.g. "with evidence significance".

Electronic evidence is referred to by many other names such as "digital evidence", "computerized evidence", "computer-generated evidence", "IT evidence".[28] The concept of "electronic evidence" encompasses a broader scope of evidence

[24] See Federal Bureau of Investigation (FBI), https://archives.fbi.gov/archives/about-us/lab/forensic-science-communications/fsc/april2000/swgde.htm (access: 27.4.2024); A. Lach, *Dowody elektroniczne…*, p. 28; idem, *Dowody cyfrowe w postępowaniu karnym, wybrane zagadnienia praktyczne i teoretyczne*, 2004, http://www.bibliotekacyfrowa.pl/Content/24720/PDF/Dowody_cyfrowe_w_postepowan.pdf (access: 27.4.2024), p. 1; M. Szachnitowski, *Dowód elektroniczny w postępowaniu karnym*, [in:] *Katalog dowodów w postępowaniu karnym*, eds. P. Czarnecki, M. Czerwińska, Legalis 2014, point 1; S. Mason, D. Seng, *op. cit.*, p. 19.

[25] See U.S. Department of Justice, *Electronic Crime Scene Investigation: A Guide for First Responders*, 2001, https://www.ojp.gov/pdffiles1/nij/187736.pdf (access: 27.4.2024), p. 48; U.S. Department of Justice, *Forensic Examination of Digital Evidence: A Guide for Law Enforcement*, 2004, https://www.ojp.gov/pdffiles1/nij/199408.pdf (access: 27.4.2024), p. 39.

[26] See U.S. Department of Justice, *Electronic Crime Scene Investigation: A Guide for First Responders*, 2008, https://www.ojp.gov/pdffiles1/nij/219941.pdf (access: 27.4.2024), p. 10.

[27] See A. Lach, *Dowody elektroniczne…*, p. 28.

[28] See S. Mason, D. Seng, *op. cit.*, p. 18 ff.; A. Lach, *Dowody elektroniczne…*, p. 28.

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than "digital evidence" as it also covers analog records.[29] Moreover, most of these names link evidence recorded in electronic form with a computer, which in turn reduces the scope of such evidence to only those in which the computer participated in its creation. The concept of electronic evidence understood in this way should be considered too narrow, as it eliminates records obtained with other devices (e.g. a dictaphone, digital camera).[30] Electronic evidence may come from various sources (including illegal ones), which seem to be far from traditional computers in terms of form and function: servers, mobile devices (such as smartphones and tablets), game consoles, connected devices (e.g. smart speakers, smart TVs, and other smart devices), wearable technologies (e.g. fitness bands, smart watches), warehouse in the so-called cloud (cloud computing service) and Internet (including dark web).[31]

PLACE OF ELECTRONIC EVIDENCE IN THE LEGAL SYSTEM

In the science of civil procedure, there are several types of evidence, important from the point of view of specific features and criteria. Due to the code criterion, we can distinguish evidence regulated by the Civil Procedure Code by name,[32] as well as other evidence (the so-called unnamed evidence) that may be introduced to civil proceedings pursuant to Article 309 of the Civil Procedure Code (e.g. evidence from the genetic code, evidence from anthropological research).[33] The catalog of

[29] It should be emphasized that at present devices that enable the recording of information in a digital form (e.g. smartphones, digital cameras) have irretrievably replaced devices used for recording analog signals (e.g. a tape recorder allowing to record sound on an audio tape). Therefore, it seems that it is worth using the term "digital evidence" to emphasize the dominant role of information recorded in digital form. See A. Lach, *Dowody elektroniczne…*, pp. 29–30.

[30] *Ibidem*.

[31] See S. Mason, D. Seng, *op. cit.*, p. 1.

[32] Evidence regulated by the name of the Civil Procedure Code includes documentary evidence, evidence from witnesses, evidence from expert opinions, evidence from a visual inspection, evidence from a group blood test, evidence from interrogation of the parties and evidence from devices transmitting images or sounds. Documentary evidence can be divided into text-based documents to which use will find Articles 243[1]–257 of the Civil Procedure Code and documents containing other content than the text to which use will find Article 308 of the Civil Procedure Code (which can also be in electronic form). More on documentary evidence and electronic document, see F. Zedler, *Dowód z dokumentu elektronicznego w postępowaniu cywilnym*, [in:] *Ius est a iustitia appellatum. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Wiśniewskiemu*, eds. T. Ereciński, J. Gudowski, M. Pazdan, Warszawa 2017, pp. 562–563. For historical remarks, see B. Kaczmarek-Templin, *Pojęcie dokumentu a pojęcie dokumentu elektronicznego*, [in:] *Dowód z dokumentu elektronicznego w procesie cywilnym*, Legalis 2012, § 1.

[33] Pursuant to Article 309 of the Civil Procedure Code, the manner of taking evidence by means of evidence other than those mentioned in the preceding articles will be determined by the court in accordance with their nature, applying the provisions on evidence accordingly. More on other means

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evidence is open and the regulations do not unequivocally determine their value. In the Polish legal system, electronic evidence, despite some of its specific properties, does not constitute an independent category of evidence. The electronic data offered in the evidence application will usually constitute a document in the light of the applicable provisions of civil procedure. The court may also determine the manner of their conduct in accordance with their nature, applying the provisions on evidence accordingly. However, it is possible to try to locate them in the system, based on the traditional criteria of evidence classification.

Could electronic evidence qualify as physical evidence? Initially, it may appear that electronic evidence could qualify as material evidence because the source of the information is the thing (e.g. like document evidence in terms of examining its external features or visual inspection evidence). This solution was adopted by the Civil Procedure Code of Ukraine, which included electronic evidence as material evidence. In 2004, Article 65 of the Civil Procedure Code of Ukraine specified that material evidence also includes magnetic, electronic and other carriers containing audiovisual information about the circumstances relevant to the case.[34] It has been assumed, i.a., that audio and video recordings belong to physical evidence because the information contained therein is stored on a material object of an inanimate nature, in a state that does not develop.[35] Electronic evidence, however, does not have many of the properties of physical evidence.[36] Such features include:

- the basis of the material evidence is the object of the material world;
- evidence information in the evidence material is expressed in the material properties of the object;
- the information contained in the material evidence is generally perceived directly.[37]

The difference between electronic and traditional evidence decided to depart from the original concept and it was rightly considered that electronic evidence should be treated as a standalone means of evidence in civil proceedings.[38] In 2017, a new category of evidence was distinguished – electronic evidence.[39] From 2017, in accordance with Article 100 of the Civil Procedure Code of Ukraine, electronic

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of proof to which Article 390 of the Civil Procedure Code can be applied, see K. Flaga-Gieruszyńska, *Inne środki dowodowe*, [in:] *System Postępowania Cywilnego*, vol. 2: *Dowody w postępowaniu cywilnym*, ed. Ł. Błaszczak, Warszawa 2021, p. 1407.

[34] See C.A. Chvankin, *Audio and Video Recordings as a Type of Electronic Evidence in Civil Proceedings*, "Theory and Practice of Jurisprudence" 2020, vol. 2(18), p. 2.

[35] *Ibidem*.

[36] For more on this subject, see A. Shtefan, *Electronic Evidence Characteristics and Features of Use*, "Theory and Practice of Intellectual Property" 2019, no. 6, p. 2.

[37] See C.A. Chvankin, *op. cit.*, p. 4.

[38] For more on this subject, see A. Shtefan, *op. cit.*, p. 2.

[39] See C.A. Chvankin, *op. cit.*, p. 5.

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evidence is "information in electronic (digital) form containing information about circumstances relevant to the case, in particular electronic documents (including text documents, graphics, plans, photographs, video and audio recordings, etc.), pages Internet, text, multimedia and voice messages, metadata, databases and other data in electronic form".[40] It seems that due to the significant differences between electronic evidence and classic (traditional) evidence, the separation of electronic evidence as a separate type of evidence in civil proceedings could be considered in the future.

FEATURES OF ELECTRONIC EVIDENCE

Electronic evidence is a relatively new issue in civil proceedings. Different jurisdictions have adopted different strategies for their use and implementation. Some systems have introduced new regulations regarding evidence recorded in electronic form (e.g. the Civil Procedure Code of Ukraine which lists electronic evidence as separate means of evidence). Others, on the other hand, similarly apply the binding provisions on evidence (e.g. the Polish Civil Procedure Code).[41]

The new regulations usually emphasize the differences between traditional and electronic evidence. Such a solution may prevent lawyers from using their experience and knowledge of the law of evidence when assessing and interpreting electronic evidence, often creating a feeling of uncertainty and confusion. When properly applied, the emphasis is on the similarities between electronic and traditional evidence. Lawyers can use their experience and knowledge of the rules of evidence, but the lack of rules on the use of electronic evidence may result in the wrong application of the rules of evidence.[42] Moreover, the rules provided for in the provisions of civil procedure may turn out to be insufficient to properly carry out electronic evidence and to evaluate them, as evidenced by numerous errors of courts in the use of billing data.[43] Therefore, regardless of the solutions adopted,

[40] *Ibidem*.

[41] See S. Mason, D. Seng, *op. cit.*, p. 84.

[42] *Ibidem*.

[43] See Najwyższa Izba Kontroli, *Informacja o wynikach kontroli. Uzyskiwanie i przetwarzanie przez uprawnione podmioty danych z bilingów, informacji o lokalizacji oraz innych danych, o których mowa w art. 180 c i d ustawy Prawo telekomunikacyjne*, 2013, https://www.nik.gov.pl/plik/id,5421,vp,7038.pdf (access: 27.4.2024), p. 11 ff. Billing (billing data) is a registered call list that contains data such as: date and time of call start and its duration; calling number; called number; serial number of the device (IMEI number – International Mobile Equipment Identity) that received the call or invoked them; other additional data. Billing can be understood as a list of connections, which will constitute another special means of proof within the meaning of Article 309 of the Civil Procedure Code, to which the provisions on documentary evidence should be applied accordingly. More on the use of billing data in civil proceedings, see J. Misztal-Konecka, *Billingi i nagrania rozmów*

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lawyers must know the specific features of electronic evidence in order to be able to use electronic evidence correctly. The possibility of using electronic evidence also means that it can be collected and presented to the court. It seems that it is worth pointing out a few specific features of this evidence, especially due to the fact that in the theory of Polish civil procedural law, no attempts have been made to identify them.

Electronic evidence has the following features:

- intangible nature. Electronic evidence is created (with the use of specific devices and software) and exists in a specific environment – in intangible space, so they do not have the characteristics of traditional evidence or features characteristic of objects of the material world (e.g. they cannot be seen or analyzed without the use of appropriate technical means);[44]
- device and software dependency. Information saved in electronic form cannot be viewed directly. Electronic evidence consists of data encoded by certain types of signals that are not directly accessible to the human senses without the use of appropriate technical means.[45] In order to extract information from encoded electronically captured data, the encoded data must first be converted by devices with appropriate software capable of transforming it into human readable form (e.g. text, image, or sound).[46] Obtaining information from electronic evidence therefore requires the use of appropriate hardware and software;
- easy to copy. Electronic evidence may be copied and transferred to other data carriers or technical devices without losing their content. Such a feature certainly makes it easier for procedural authorities and experts who can examine and perform other activities without fear of losing or damaging the evidence.[47] However, the ease of duplicating electronic evidence means that they can also be manipulated and offered in a distorted form in the evidence application. It can therefore be difficult to establish the authenticity of the electronic evidence. The copies of an electronic document from the original can only be distinguished by the metadata. In many cases, judges are not able to distinguish between primary and secondary records on their own, so it is necessary to ask experts;

jako dowody w postępowaniu cywilnym, [in:] *Ewolucja prawa polskiego pod wpływem technologii informatycznych. Elektroniczne aspekty wymiaru sprawiedliwości*, eds. J. Misztal-Konecka, G. Tylec, Lublin 2012, pp. 150–153.

[44] See D.M. Tsekhan, *Tsyfrovi dokazy: poniattia, osoblyvosti ta mistse u systemi dokazu vannia*, „Naukovyi Visnyk Mizhnarodnoho Humanitarnoho Universytetu" 2013, vol. 5, p. 257.

[45] For more on this subject, see A. Shtefan, *op. cit.*, p. 3.

[46] *Ibidem*.

[47] See A. Lach, *Dowody elektroniczne…*, p. 32.

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– no specified storage medium. Electronic data format means that the data can be stored on tangible data carriers or on the Internet. Electronic evidence, unlike traditional evidence, is therefore not linked to a strictly defined medium.[48]

The listed features of electronic evidence indicate their special character. The literature indicates a growing number of cases where digital evidence has been overlooked or misinterpreted. In order to reduce the risk of errors and misinterpretations, it is necessary to standardize the method of their analysis. Judges should be able not only to assess electronic evidence, but also to justify their assessments in a transparent, correct, consistent and understandable way for participants in the proceedings. One solution could be a development of guidelines for the conduct and evaluation of electronic evidence by selecting appropriate strategies for its analysis and interpretation.[49]

The special nature of electronic evidence also justifies the need to use a separate method of taking electronic evidence. In the Polish legal system, electronic evidence has not been separated as an independent means of evidence. Electronic data will usually constitute a document due to the wide scope of this notion or the way in which it is carried out, it will be determined by the court according to their nature, applying the provisions on evidence accordingly (Article 309 of the Civil Procedure Code). The application of the law is therefore mainly left to the court. The lack of detailed regulations creates wider possibilities for the assessment and possible use of electronic evidence in specific civil proceedings.

It seems that different pieces of evidence should meet different admissibility criteria, therefore the admissibility of evidence recorded in electronic form should be examined on a case-by-case basis. The lack of detailed regulations may be a challenge for parties who, when applying procedural law, do not have legal education or do not use the help of a professional attorney. Moreover, a problem may be the state of uncertainty of the participants of the proceedings, in which they do not know intentions of the court as to the manner of taking and analyzing evidence. The solution could be to classify electronic evidence as a special means of evidence and define the rules for its execution, which would allow the use of electronic evidence in civil cases in a uniform manner and on the same terms, better preparation of the parties for the trial, and elimination of the uncertainty in which the parties do not know the court's intentions as to the manner of taking evidence.[50]

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[48] See A. Shtefan, *op. cit.*, p. 3.

[49] E. Casey, *Standardization of Forming and Expressing Preliminary Evaluative Opinions on Digital Evidence*, "Forensic Science International: Digital Investigation" 2020, vol. 32, p. 1.

[50] When examining the probative value of the submitted electronic data, the court must decide whether the data has a probative value, and also assess whether the information stored in electronic form is reliable. In Poland, there are no guidelines yet that would apply to the evaluation of electronic evidence, but in the USA such recommendations were already indicated in 2001. The Rules

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CONCLUSIONS

It seems necessary to tackle the issue of electronic evidence also in the context of civil proceedings, because in judicial practice electronic materials are increasingly used to prove claims, which indicates an increasing awareness of the use of electronic evidence. The regulations are becoming more and more perfect, and their continual improvement will provide space for the widespread use of electronic evidence in court cases while demonstrating their enormous advantages. The right and efficient use of electronic evidence translates not only into the quality and speed of the procedure, but also its economy. In my opinion, in order to streamline court proceedings, it is worth continuing to create and improve the existing IT systems, such as the National Court Register (KRS), the Central Registration and Information on Business (CEIDG), programs enabling work with electronic documents (such as *sędzia 2.0*), and to conduct training in the field of working with documents drawn up in electronic form. It is also worth developing electronic justice mechanisms (such as the Electronic Remembrance Procedure, EPU), and considering the introduction of an electronic justice system that would allow parties to the proceedings to submit documents online and remotely monitor the progress of the case. The introduction of rules, guidelines or recommendations could also be a solution regarding the handling of digital data. Addressing these issues seems necessary for the further development of the institution of electronic evidence in Polish civil proceedings.

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of Procedure of the Supreme Court of the United States lists what factors may be taken into account when assessing the probative value of electronic documents in civil proceedings. According to the regulations, the court, when assessing the probative value of an electronic document, may take into account the following criteria: 1) reliability of the manner or methods in which it was transmitted, generated or stored; 2) credibility of the method used to identify its creator; 3) the integrity of the ICT system in which it is stored or saved; 4) the quality and nature of the information that entered the ICT system on which the electronic message or electronic document was based; 5) other factors which, in the opinion of the court, could affect the accuracy or integrity of an electronic document or electronic message containing data. See ChanRobles Virtual Law Library, *Rules on Electronic Evidence*, 2001, https://www.chanrobles.com/rulesonelectronicevidence.htm#.YFWpd51KhPY (access: 27.4.2024).

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ABSTRAKT

Nieustanny rozwój technologiczny zmienia wszystkie aspekty życia człowieka. Rewolucja cyfrowa doprowadziła do powstania wielu nowych możliwości pozyskiwania i przedstawiania dowodów, bezpowrotnie zmieniając postępowanie dowodowe. Na skutek zwiększającej się informatyzacji proces cywilny uległ usprawnieniu – poprawiła się jego szybkość i jakość. Rola nowoczesnych technologii przejawia się m.in. w możliwości przeprowadzenia postępowania dowodowego przy wykorzystaniu urządzeń przenoszących obrazy i dźwięki lub w możliwości wykorzystywania w sądzie danych i informacji zapisanych w formie elektronicznej. Konsekwencją jest występowanie dowodów elektronicznych. Problematyka dowodu elektronicznego została poruszona w literaturze prawa karnego i kryminalistyki. Nie doczekała się jednak zbyt wielu opracowań z zakresu postępowania cywilnego, mimo że omawiane dowody są mocno zakorzenione w sprawach cywilnych i od dawna wykorzystywane są w postępowaniu dowodowym. Poczynienie rozważań w zakresie tytułowego zagadnienia wymagało sformułowania jego definicji dla potrzeb postępowania cywilnego. Autor wskazał miejsce dowodów elektronicznych w systemie prawa i doszedł do wniosku, że warto byłoby rozważyć wyodrębnienie ich jako samodzielnego środka dowodowego z uwagi na istotne różnice między nimi a innymi rodzajami dowodów oraz ich skomplikowany charakter. Poczynione rozważania wskazują, że dopuszczalność elektronicznego materiału dowodowego należy badać w sposób zindywidualizowany, a brak szczegółowych regulacji może stwarzać liczne problemy praktyczne.

Słowa kluczowe: dowody elektroniczne; postępowanie cywilne; informatyzacja; proces cywilny; postępowanie dowodowe