

## ELECTRONIC DISCOVERY IN LITIGATION

### Introduction

It is estimated that in excess of 90% of all new documents are created, communicated and stored electronically<sup>1</sup>, however a recent survey of South African litigation practitioners revealed that less than 25% of documents produced during discovery or at trial are produced in electronic form.<sup>2</sup> It therefore seems fair to deduce that South African practitioners routinely reduce electronic documents to paper during the course of litigious proceedings. This article explains why that habit falls short of best practice and why, apart from efficiency benefits, the diligent practitioner should be insisting on electronic discovery as part of delivering a professional service to clients.

### Electronic litigation

When the Electronic Communications and Transactions Act 25 of 2002 (the “ECT Act”) came into effect, litigation practitioners breathed a collective sigh of relief that the cumbersome provisions of the Computer Evidence Act requiring the authentication of computer print outs had been repealed. In its place, section 15(2) of the ECT Act introduced a stipulation that information in the form of a “*data message*” (broadly enough defined in the Act to include any document that is either generated or stored electronically) must be given its due evidential weight.

Most written communications generated today (including emails, electronically generated invoices, web pages, SMS messages) would be regarded as data messages in terms of the ECT Act and the admissibility and evidential weight of these data messages must be assessed in accordance with the ordinary rules of evidence as refined by the provisions of the ECT Act.

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<sup>1</sup> American Bar Association Digital Evidence Project (February 2005) published at <http://www.digev.e-symposium.com/papers/karticle5.pdf>.

<sup>2</sup> Full results of the 2007 Infology Electronic Discovery Survey are available at [http://www.infology.net/resources\\_za.php](http://www.infology.net/resources_za.php)

Section 15(1)(b) of the ECT Act also provides that a data message should not be regarded as being inadmissible on the grounds that it is not in its original form *“if it is the best evidence that the person adducing it could reasonably be expected to obtain”*. This refinement of the old ‘best evidence’ rule begs an important question: would a print-out of an electronic document be regarded as the *“best evidence”* that the adducer could reasonably be expected to obtain? The answer would generally be no, because a printed copy would lack the embedded information normally retained in an electronic copy that evidences when, and by whom, the document was originally created, whether it was revised or edited, to whom it may have been sent and when it was received.

### **Metadata discovery**

The embedded information referred to above is known as the *“metadata”* of an electronic document and is typically viewable in the Properties section of the File menu of most electronic documents. In the case of email in particular, an astonishing amount of detail is usually contained in the metadata of most messages, including the time a message was dispatched and received by the sending and receiving mail servers and the precise delivery path the message followed en route.

The Uniform Rules of Court that provide for the inspection and production of discovered documents do not expressly require the production of document metadata. However, rule 35(10) provides that any party may give to any other party who has made discovery of any document a notice to produce at the hearing the *“original”* of such document.

Section 14 of the ECT Act stipulates that where the *“original”* of a document is required by law, that requirement is met in the case of an electronic document where the *“integrity”* of the document produced passes an assessment of whether the information has remained complete and unaltered since it was created apart from the addition of any endorsement or change which arose in the normal course of its communication, storage or display and where that information is capable of being displayed or produced to the person to whom it is being presented.

Section 17(1) of the ECT Act provides further that where a law requires a person to produce any document that requirement is met if the person produces, by means of a data message, an electronic form of that document or information, and if, considering all the relevant circumstances at the time that the data message was sent, the method of generating the electronic form of that document provided a reliable means of assuring the maintenance of the integrity of the information contained in that document. Section 17(2) provides further that the integrity of the information contained in a document is maintained if the information has remained complete and unaltered, except for the addition of any endorsement or any immaterial change which arises in the normal course of its communication, storage or display.

It is respectfully submitted that the “*integrity*” of a data message can only be assessed by having regard for its metadata and that whenever practitioners are entitled during litigious proceedings to demand the production of a document, they are entitled, in the case of an electronic document, to insist on the production of an electronic copy containing (and capable of displaying) the document metadata. In the absence of credible metadata, the admissibility and evidential weight of any electronic document falls to be challenged.

In the Electronic Discovery Survey of South Africa litigation practitioners referred to above<sup>3</sup>, 84% of survey respondents were aware that the Uniform Rules of Court on discovery applied equally to paper and electronic documents alike and 50% stated that they “*often*” or “*always*” request the production of email correspondence when making a request for further and better discovery. However, in excess of 90% of South African respondents indicated that these electronic documents are nonetheless routinely produced and exchanged in paper form (and hence without any embedded metadata) because “*it is standard practice to do so*”. While 72% of survey respondents indicated that they anticipate a shift towards producing such documents electronically within the next 5 years, the strategic benefits and risks that metadata presents to the contemporary litigant emphasises that, in many cases, current practice might be falling short of best practice.

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<sup>3</sup> Full survey results are available at [http://www.infology.net/resources\\_za.php](http://www.infology.net/resources_za.php)

Metadata is often referred to as the “digital fingerprint” of a document and what fingerprinting did for Scotland Yard in 1902 (when Harry Jackson was the first person to be convicted on the evidence of fingerprints left on a freshly painted window sill) is akin to what metadata can potentially do for litigation practitioners today. Metadata is therefore not only relevant for purposes of complying with electronic discovery rules but is also increasingly being used to prove or disprove a broad range of issues in dispute between litigants.

Across the Atlantic, recent amendments to the discovery rules of the United States Federal Rules of Civil Procedure<sup>4</sup> have already left a host of judgments, costs orders and red-faced lawyers in their wake while in the United Kingdom, the increasing importance being placed on metadata was recognized by an amendment to the civil procedure rules relating to discovery in October 2005 such that the definition of “document” in the civil procedure rules now specifically includes “*additional information stored and associated with electronic documents known as "metadata"*”.<sup>5</sup>

The results of the survey of South African litigation practitioners indicate that local practitioners who have not adapted the way they give and receive documents that were either generated or stored electronically in light of the ECT Act are now at serious risk of prejudicing their clients and exposing their partners and their practices to severe consequences. Practitioners should therefore have regard for these issues not only at trial but should advise clients of the significance of metadata and electronic discovery early in litigious proceedings and certainly prior to the receipt of the first rule 35 notice.

While some lawyers may prefer to consign issues relating to metadata to the esoteric heap of questions forwarded to the IT helpdesk, the fact that metadata can be an important factor in determining both the admissibility and evidential weight of an electronic document, as well as of proving issues in dispute, means that partners must be conversant with the meaning of the term if they are to deliver a professional service to clients in an age where 90% of information is generated, communicated and stored electronically. Associates may well require an even more sophisticated

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<sup>4</sup> For a full discussion of the amendments to Rules 16, 26(a), 26(b)(5), 26(f), 33, 34 and Form 35 visit: <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>

<sup>5</sup> See UK Civil Procedure Rules, 2005, Vol.1, Practice Direction – Disclosure and Inspection Part 31 2a.1 – 5 (Supplement to Part 31) published at: [http://www.dca.gov.uk/civil/procrules\\_fin/contents/practice\\_directions/pd\\_part31.htm](http://www.dca.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part31.htm)

appreciation because of their proximity to the discovery coalface and should take particular heed of the advice of the Court in the *MV Urgup v Western Bulk Carriers* case where the Court stated that *“Discovery has been said to ‘rank with cross-examination as one of the mightiest engines for the exposure of truth ever to have been devised in the Anglo-Saxon family of legal systems. Properly employed where its use is called for, it can be, and often is a devastating tool’”*.<sup>6</sup>

In order to gain the maximum possible advantage, the diligent practitioner ought now to routinely insist on the production of copies of both their clients’ and opponents’ documents in the form they were originally produced, rather than simply accepting scanned images or paper copies so that the electronic metadata, admissibility and evidential weight of important documents can be properly evaluated.

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<sup>6</sup> The *MV Urgup*: Owners of the *MV Urgup v Western Bulk Carriers (Australia) (Pty) Ltd* 1999 (3) SA 500 (C) at 513G.