

# Electronic Evidence-Key Components

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There are great talks and discussions about cyber law in legal fraternity, likewise there is a lot of confusions about cyber law. In this article, the author is attempting to answer certain key issues pertaining to cyber law, specially proof and admissibility of electronic documents in court of law.

## **Cyber Law-Meaning**

Cyber law means law of the cyber space. It is an imaginary space created by binary expressions which can be better described as electronic documents. Cyber law can also be described as the law relating to internet. In the cyber space or internet, the transactions occur with the use of electronic documents. In India we can find cyber law mainly in I.T. Act, 2000, The Copyright, Act, 1957, Indian Contract Act, 1872, Evidence Act, 1882 etc.

## **Cyber Law-Important Definitions**

The biggest problem legal fraternity is facing about cyber law is admissibility of electronic records in the courts of law. To understand the concept of electronic records, we need to first understand certain key definitions.

**'Electronic record'** means data, record or data generated, image or sound stored, received or send in an electronic form or micro film or computer generated micro fiche.<sup>1</sup>

As is clear from the definition of 'electronic record', it can be said in simplest term, that the data, kept in optical or magnetic media or digital form is an electronic record.

**'Electronic form'**, with reference to information, means an information generated, send, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device.<sup>2</sup>

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The relevant information, if kept in the above mentioned media, it is said to be kept in electronic form

**'Information'** includes data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche.<sup>3</sup>

The definition of 'Information' further clarified that 'information' in relation to cyber law means the information kept in computer generated source.

**“Data”** means a representation of information, knowledge or facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form including computer printouts, magnetic, or optical storage media, punched cards, punched tapes or stored internally in the memory of the computer.<sup>4</sup>

The definition of “data” also shows that the knowledge or facts, if kept in computer- resource, then it becomes 'data'.

**“Computer resource”** means computer, computer system, computer network, data, computer data base or software.<sup>5</sup>

The definition of 'Computer resource' is very wide and incorporates all kinds of computers and its data base.

**“Computer”** means any electronic, magnetic, optical or other high speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network.<sup>6</sup>

The definition of “Computer” shows that it includes all the input, output, processing and communication facilities which are done or performed in any magnetic or optical media.

**“Computer network”** means the inter-connection of one or more computers or computer systems or communication device through-

- (i) The use of Satellite, microwave, terrestrial line, wire, wireless or other communication media and

- (ii) Terminals or a complex consisting of two or more inter-connected computer or communication device, whether or not the inter-connection is continuously maintained.<sup>7</sup>

The definition of “Computer network” shows that inter-connection of computers either through wired mode or wireless mode is a computer network.

“**Computer system**” means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files which contain computer programmes, electronic instructions, input data and output data that performs logic, arithmetic, data storage and retrieval, communication control and other functions.<sup>8</sup>

The definition of “**Computer system**” shows that it is a collection of input and output devices used to store and retrieve data and other communication controls. The simple calculators are outside the scope of computer system. Although, if the calculator is programmable and capable of being used in conjunction with external file, then it can also said to be a part of computer system.

“**Communication device**” means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image.<sup>9</sup>

The definition of “Communication device” shows that all digital or electronic devices which are used to communicate any form of data or information are communication devices.

We have learnt all the important definitions pertaining to cyber law or electronic documents. All these definitions signifies that if the data, information, facts, knowledge, instructions or any other content generated, kept, stored, sent, received and communicated through electronic, magnetic, optical and digital media, then it is a subject of cyber law and it can be dealt with as per the provisions of The Information Technology Act, 2000 and electronic records can be admitted in evidence and proved in court of law by the special procedure provided in the Indian Evidence Act, 1872.

### **Concept of Electronic Evidence**

Till now we have learnt about the electronic records. Now we will try

to understand as to how an '**electronic record**' may be used as an '**electronic evidence**' in court of law "**Evidence**" as defined in Sec.3 of the Indian Evidence Act, 1872 means and includes

- (1) All statements which the court permits or requires to be made before it by witnesses, in relation to matter of fact under inquiry, such statements are called oral evidence.
- (2) All documents including electronic-records produced for the inspection of the court, such documents are called documentary evidence.

The evidences can safely be divided into two categories-oral and documentary and 'electronic-records' are placed under the second category. But does this mean that if the electronic record consisting of recording of spoken words (eg. an intercepted telephonic conversation) to be considered as an "oral-evidence"? or is it a "documentary evidence"?<sup>10</sup>

As we know, that in the digital world, every document is a binary expression, hence a recording of an audio or video is actually a document written/ expressed in 'zero' and 'ones', therefore, the distinction of 'Oral' and 'Documentary' has no relevance, when it comes to an electronic document. There is simply no 'oral electronic document'. However, there can be a discussion on 'oral evidence as to the contents of an electronic document', which is different from an 'oral electronic evidence'. In an oral evidence, as to the contents of an electronic document, a person may orally state under oath that a certain electronic document contains or contained such and such things, as different from presenting a print out to say 'this is what the electronic documents contains' and certifies it under section 65 B, Indian Evidence Act.<sup>11</sup>

In **State (NCT of Delhi) Vs. Navjot Sandhu @ Afsan Guru**, AIR 2005 SC 3820 'oral evidence' about the contents of an 'electronic document' had been accepted without Sec.65B<sup>12</sup> certificate. This decision to accept the 'electronic documents' even though it was not certified under Sec.65B has now been over-ruled in **Anvar P.V. Vs. P.K. Basheer and others**, AIR 2015 SC 180, where it was held that Sec.65B certificate would be mandatory when the contents of an 'electronic document' are to be admitted in a court of law. However, it may be relevant to note that, if genuineness of Sec.65B certified evidence statement is questioned, then it may be appropriate and necessary to examine oral evidence relevant to the objection.<sup>13</sup>

## Electronic Records- Primary or Secondary

Prior to discussing admissibility of 'electronic-records' in terms of 'electronic evidence', we need to focus on the ongoing debate between primary electronic record vis a vis secondary electronic records. **Anvar P.V.** case (supra) is relevant for this purpose. Kerala Legislative Assembly Election, 2011 of first respondent P.K. Basheer was challenged by the appellant Anvar P.V., on the ground of corrupt practices and in support of which appellant submitted certain electronic records i.e C.D'S allegedly containing objectionable songs and speeches, but no certificate as required under Section 65B was submitted. These C.Ds were recorded by the appellant and were not the original CDs allegedly containing objectionable materials. In this background the Hon'ble Supreme Court in Para 24 said-

*“24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65B of the Evidence Act”.*

Part of the judgmental statements made above are significant since it makes a distinction between 'Primary' and 'Secondary' documents, holding CDs used in the commission of offence as 'Primary' evidence and CDs produced in copies as 'Secondary'. It also provided the option that primary evidence could have been proved without Sec. 65B certificate.<sup>14</sup> Cyber law scholars differ on this point. It is said that, it is not necessary to make a

distinction between 'Primary electronic record' and 'Secondary electronic record'. In practice 'electronic evidence' presented in a court is always 'Secondary'.<sup>15</sup>

When a CD played during an offence (Primary Evidence) is presented in a court, what is presented is a 'container' of electronic document and not the 'electronic document' itself. The electronic document is present inside the container in the form of 'Binary Expressions'. These binary expressions contains both 'Meta Data' and 'Data'. The Meta data is contained in the header information of the file which indicates what is the type of the file and what is it's dependency on an application and operating system.<sup>16</sup> When this CD is inserted in computer device, the device first read the header information and understands as 'This is a mp3 file' and 'I need to use an appropriate application' and 'send the instructions to the speaker'. Then the speaker will play the voice/music. If it is an mp4 file, the computer will understand 'I have to send the audio stream to the speakers and send the video stream to the screen using appropriate applications'. If the computer does not use the appropriate applications riding on appropriate operating systems, the output would be unintelligible and even if attempted, the judges cannot hear or experience the 'electronic document'. It would be similar to an encrypted text file which has no meaning until it is decrypted.<sup>17</sup>

The summary of this discussion is that in case of 'electronic documents', it is preferable if we do not discuss the 'Primary' and 'Secondary' versions of an 'electronic record'. It may be possible to bring the container which has the 'Primary Document' but it is like an 'intangible' object which cannot be touched or heard or seen, except when rendered in secondary form. Every electronic record is therefore to be considered as secondary documents only.<sup>18</sup>

The evidentiary value of an electronic record can be judged on these three parameters-

- (1) Admissibility or Proof of electronic records.
- (2) Genuineness of electronic records.
- (3) Exhibiting or playing the electronic records before court.

#### **(1) Admissibility or Proof of Electronic Records**

Any documentary evidence by way of an 'electronic record' under the

Indian Evidence Act, in view of sec. 59 and 65A, can be proved only in accordance with the procedure prescribed under Sec. 65B, Sec. 59 provides that all facts except the contents of document or 'electronic records', may be proved by oral evidence. As we have discussed above that there can be no oral electronic record, consequently production of an 'electronic record' as an evidence in court, is legally possible as per Sec. 65A and Sec. 65B of Evidence Act.

Sec.65A provides that contents of electronic records may be proved in accordance with the provisions of Sec.65B. It also provides that Sec.65B is a special provision relating to 'electronic records'

Sec.65B deals with the Admissibility of 'electronic records'. The purpose of these special provisions is to sanctify evidence in electronic form, generated by a computer. It may be noted that Sec.65B starts with a non-obstante clause. The very admissibility of such a document ie. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Sec.65B(2). For better understanding of the requirements under sec.65B, the same is reproduced below.

### **Section 65B. Admissibility of electronic records:-**

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:-

- (a) The computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

- (b) During the said period, information of the kind contained in the 'electronic record' or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
- (c) Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the 'electronic record' or the accuracy of its contents; and
- (d) The information contained in the 'electronic record', reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purpose of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether-

- (a) By a combination of computers operating over that period; or
- (b) By different computers operating in succession over that period; or
- (c) By different combinations of computers operating in succession over that period; or
- (d) In any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,

All the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,-

- (a) Identifying the 'electronic record' containing the statement and describing the manner in which it was produced;
- (b) Giving such particulars of any device involved in the production

of that 'electronic record' as may be appropriate for the purpose of showing that the 'electronic record' was produced by a computer;

- (c) Dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

And purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

- (5) For the purposes of this section,-

- (a) Information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) Whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
- (c) A computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

**Explanation.**- For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived there from by calculation, comparison or any other process.<sup>19</sup>

If we breakup this provision, then the following are the specified conditions under section-65B (2)-

- (i) The 'electronic record' containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by

- the person having lawful control over the use of that computer;
- (ii) The information of the kind contained in 'electronic record' or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;
  - (iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and
  - (iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.<sup>20</sup>

Under Section-65B (4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an 'electronic record', it is permissible provided the following conditions are satisfied:

- (a) There must be a certificate which identifies the 'electronic record' containing the statement;
- (b) The certificate must describe the manner in which the 'electronic record' was produced;
- (c) The certificate must furnish the particulars of the device involved in the production of that record;
- (d) The certificate must deal with the applicable conditions mentioned under Section 65B (2) of the Evidence Act; and
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.<sup>21</sup>

It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), Pen Drive etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to 'electronic record' sought to be used as evidence. 'Electronic records' being

more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of 'electronic records' can lead to travesty of justice.<sup>22</sup>

It is apparent that language of Sec. 65B is technical, hence everybody feels problem in understanding its true meaning. We have already seen definitions of certain technical words used in this provision, like **information, data, electronic-record, computer, computer-resource, computer-network, computer-system** etc., hence the same shall be kept in mind while interpreting Sec. 65B.

This provision contains five subsections followed by an explanation.

The title of the section is “**65B. Admissibility of electronic records**”.

It indicates that this is a provision independent of Section 65 and concerns with the “Admissibility”.

Section 65A confirms that what we are dealing here are “Special Provisions” as to evidence relating to electronic record and see 65B represents the provisions according to which contents of electronic records may be proved. Now we will examine Sec.65B in detail.

### **Sub-Section (1):**

The subsection (1) states as follows:

(1) Notwithstanding anything contained in this Act,

- Any information contained in an 'electronic record'.
- Which is **printed on a paper, stored, recorded or copied** in optical or magnetic media produced by a computer (hereinafter referred to as the **computer output**).
- Shall be deemed to be also a **document**.
- If the conditions mentioned in this section are satisfied in relation to the information and computer in question and
- **Shall be admissible** in any proceedings, **without further proof** or production of the original,
- As evidence of any contents of the original or of any fact stated therein or which direct evidence would be admissible.

This sub section explains the entire purpose of the section and refers

to a **“Computer Output”** which **shall be admissible** in any proceedings **without further proof or production** of the original.

The **“Computer Output”** is the **Print out** of the contents of an 'electronic record' or a **copy** rendered in a media such as a CD.

The sub-section makes a reference to the **“Conditions”** under which the **Computer output** shall be admissible which is available later in the section.

It is critical to notice that the entire section refers to **conversion of the contents of an electronic document into an admissible form of a computer output** and nothing else.

If we fail to notice that the provision is entirely on rendition of an electronic record into an admissible form of computer output, we are likely to make mistakes in interpreting further aspects of this section in the subsequent sub-section.

Section 65B also makes a clear statement in this regard that a computer output produced with Section 65B certificate is to be considered as **“also a document”** and does not state it is a primary or secondary document. It only states that this computer output is also deemed to be a document, acceptable without the production of the **“original”** and does not specifically state that it is a **“acceptable secondary document”**.<sup>23</sup>

### **Sub-Section (2):**

Sub-section (2) states as under:

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:-

- (a) The computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
- (b) During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

- (c) Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
- (d) The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

This sub-section introduces certain aspects of practical significance which require jurisprudential interpretation.

If we accept the interpretation of the sub-section (1), sub-section (2) should be applied to the process of rendering the computer output for the purpose of admissibility. This **“Printing Out”** or **“Copying”** of the original content into the **“Computer Output”** is done mostly by one **operator** who controls the computer in which the electronic content is being seen and there is a printer (or a CD writer or a USB Drive) attached to such a computer.

When an electronic document which lies in a web server is seen by a user, the copy of the electronic document in the web server has already been transmitted into the user's computer and the print out or copy when taken from the user's computer becomes print out or copy from the original content and the user is the operator or person who controls the computer and capable of giving required certificate under section 65B.

In an earlier paragraph, we explained that when a computer plays a video file which we humans see and hear, it user one or more applications and one or more output devices.

Similarly, when we see a web document on a computer, the **“Original”** binary file lies inside the web server and is broken into TCP/IP data packets and sent across multiple routers in multiple direction, sometimes multiple times and ultimately the browser in the user's computer recognizes these packets with reference to the meta data contained in them and assembles them into a contiguous form and then pushes them onto the output devices connected to the computer to provide the experience of the web document. Sometimes a single page on a website may be constructed dynamically in the user's computer with components coming from different web servers situated in different places.

Some people try to interpret the “**Said period**”, “**Computer**”, “**Lawful controller**” used in the sub-section as to;

- a) The period in which the content was compiled
- b) The web server
- c) Administrator of the web server

Such people think that Section 65B certificate to be issued by the administrator of the web host, but this interpretation is incorrect and infeasible.

If we are looking at a content which is compiled over a time such as a Bank account statement of an account for the period 1.4.2015 to 31.3.2016, the document is a compilation of activities over a one year period. The section 65B(2) does not refer to this period of one year.

If we are looking at the computer of the bank where the statement of account is compiled, it may involve multiple computers from which different data base elements are dynamically drawn to compile a viewable document. Also there could be multiple owners of such computers including the owners of internet routers through which the data passes through.

It is therefore not possible to expect the administrators of all these computers to certify the document.

We therefore, consider it necessary to apply this provision entirely to the process of **generating the computer output which is being produced to a Court for admission**. This process starts when the user of a computer sees the fully compiled user viewable document on his computer and gives a **CTRL+P** command to print the page he is viewing or **CTRL+C** and **CTRL+V** to copy the contents into another device. It is also possible that he may use a mouse command to print or copy or even use other automated processes.

Forensic people may also use some special tools of their own to see what others without the tools may not see and print out or copy such content which can be seen only with the use of special tools.

It is therefore, critical for us to accept that the Section 65B certification is like a photographer who takes a photograph and says that this is the photograph I have taken on such and such a day at such and such place and I have not tampered with it.

The expertise required by such a person is to the extent of using the tools required to view and print/copy the said computer output. Of course he should be competent and capable since he is providing a certification as part of Court documentation.<sup>24</sup>

**Sub-Section (3):**

The sub-section (3) states as follows:

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computer, whether-

- (a) By a combination of computers operating over that period; or
- (b) By different computers operating in succession over that period; or
- (c) By different combinations of computers operating in succession over that period; or
- (d) In any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers.

All the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

This sub-section is self-explanatory and does not require much elaboration. It however confirms that if the viewer has been using a networked device either to view or to print or to copy, all the connected devices will be considered as a single device for which he is providing the certification.<sup>25</sup>

**Sub-Section (4):**

(4) In any proceedings where it desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,

- (a) Identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) Giving such particulars of any device involved in the production

of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

- (c) Dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and

Purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

This sub-section indicates the contents that are required to be included in the Section 65B certificate. The Section 65B certificate will be a statement which should identify the electronic record (**Computer Output**) which is the subject matter of certification. It should also reasonably describe the devices involved in the production of the Computer Output and should be **“Signed”**. If it is a printed report, it should carry a physical signature and if it is another electronic copy, it should carry a digital signature.

**“Occupying a responsible official position”** may be relevant when the certificate is produced by an organization where multiple persons may be involved in operating the device or set of devices.

This also clarifies that in the case of an organization, the signature is provided in the name of the **“Official capacity”**. This could mean that when a subsequent deposition in a Court is required, it should be possible to depute an **“Official substitute”** without insisting on the same person who has signed to be present.

The sub-section also provides that the certificate may state **“it to best of the knowledge and belief”** of the person providing the certificate. This also is extremely important since the certificate is being provided in good faith of what the person sees under specific circumstances which may change.

An example could be that a website might have configured certain content to be customized to the viewer, say for example advertisements or language. When I view the page from Bangalore, I may view certain ads and

content which another person who views from Mumbai may not view. Hence there could be a difference between what two different witnesses may say while viewing the content which is assembled on a dynamic rule and controlled on the basis of cookies or IP address or recorded behavioral analytics etc.

The “**best of my knowledge and belief**” is therefore a necessary disclaimer that the Court should accept rather than considering that the statement is vague because of this provision.<sup>26</sup>

The '**best of my knowledge and belief**' also signifies that maker of the certificate under Sec 65B shall give it either in the form of an **affidavit** or an **affirmation** and it shall also be signed by it's maker. In **ARK Shipping Co. Ltd. Vs. CRT Ship management Pvt. Ltd.**, 2007 SCC Online Bombay 663, an affidavit was filed in compliance of Sec.65B, Hon'ble High Court said, 'The affidavit, therefore, in the facts and circumstances of the case, is sufficient compliance of Sec.65B of the Evidence Act'.

#### **Sub-Section (5):**

- (5) For the purposes of this section;
- (a) Information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) Whether in the course of activities carried on by **any official**, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
- (c) A computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with our without human intervention) by means of any appropriate equipment.

This sub-section provides accommodation for the activities of collection, processing and storing of information through automated devices and processes without human intervention.<sup>27</sup>

Sub-clause (b) to sub-section (5) rather ambiguously uses the expression “**any official**” without explaining what is meant by the said term. However, when we read sub-section (4) to Sec.65B, the meaning to be given to the expression “any official” emerges. Sub-clause (b) applies when information is supplied to “any official” in the course of activities carried on by him, i.e., in the course of “official” activities with a view that the said information shall be stored and processed for the purpose of the activities carried on by that officer or official. It is also elucidated that the information could be beyond or otherwise in the course of the said activities. Even in such cases the information is treated as supplied in the course of the activities of the official. It may be clarified that the word “official”, as used in clause (b) of sub-section (5) of Sec. 65B, is not intended to mean or be restricted to a person holding an office or employed in public capacity. It connotes, as exemplified by the use of the same expression (albeit in its adjective form) in sub-section (4), **a person primarily responsible for the management** or the use, upkeep or operations of such device. It would, thus, cover a computer device containing electronic records **in the hands or control of a private individual or entity.**<sup>28</sup>

**Explanation:**

The explanation to the section states:

**Explanation.-** For the purposes of this section any reference to information being derived there from by calculation, comparison or any other process.

The explanation is meant to remove any ambiguity as to the processes that may be involved in rendering the computer output which may include the reading of the header information, collation of different data packets etc.<sup>29</sup>

We may summarize the basic components of section 65B as under-

- (i) Section 65B explains the conditions under which an electronic document can be considered as “**Admissible**” in a Court as a “**Document**” and it needs to be suitably confirmed for the Court to accept the document, which is often termed as “**Section 65B certificate or Statement**”.
- (ii) Section 65B refers to a process of producing a “**Computer**

**Output”** of the electronic document which is the evidence to be admitted and such computer output can be either in the form of a **“Print Out”** or a **“Copy”**.

- (iii) There is a **“Process”** by which the electronic document becomes the **“Computer Output”** and Section 65B identifies this as the subject activity which needs to be conducted by a person having lawful control over the computer producing such output and that during the period of such production, the Computer should be working properly etc.
- (iv) The focus of Section 65B is the activity of conversion of the electronic document residing inside a system which can be seen by an observer into a **“Computer Output”**.
- (v) The other clarifications contained in the Section 65B such as that the Computer Output could be produced by a combination of computers, acting in succession, etc, as relating to dynamic creation of an electronic document from a data base and routing it through multiple devices to a final visible form in the computer of the observer and thereafter its porting into a printer.
- (vi) Considering these interpretations, the Section 65B certification is a **“matter of fact”** certification to the effect that ***“What I saw is what I reproduced as a computer output faithfully”*** and this can be done by any person who is observing an electronic document in his computer and wants it to be produced as an evidence. It is not necessary that a document from Yahoo website has to be certified only by a Yahoo server administrator. Similarly, a statement of account downloaded from an ICICI bank website need not be certified only by the ICICI Bank manager but by any person who can lawfully access the document in electronic form.
- (vii) There is also an important distinction that **“Content Owner”** is different from **“Content Viewer”** and Section 65B is meant to be produced by a content viewer. On the other hand the content owner in respect of say a Bank statement is the official Bank manager and he can provide a print out as the owner of the content who understands the content and is considered as an **“Expert”** in the domain. Anybody else who views the document provides a

Section 65B certificate that the print out (or a soft copy) is a faithful reproduction.

(viii) It is very important that the legal fraternity and the Judiciary interpret the provision properly. Any interpretation that only a **“Server Administrator”** can provide a certificate under Section 65B is considered incorrect. The server administrator can however provide the certificate but it is not mandatory. The Section 65B certifier is like a photographer who captures a photograph of an event and confirms the process of taking the photograph though he may not be aware of who is there in the picture and what they are doing. It is left to other **“Experts”** to interpret the **“Content”** and impute meaning as only a subject matter expert can do.<sup>30</sup>

We have elaborately understood the intricate aspects of section 65B, but still there are certain questions which need to be answered. The biggest question often raised in legal circles is, **'who will provide the certificate under section 65B'**? There may other similar question that, *'Is it necessary for the Admin of a server in which the electric record is present, to provide a certificate under section 65B'*? For example, *'is it not the admin of Airtel who has to provide the Sec 65B certificate for the call data records'*? *'Is it not the admin of flipkart who has to give certificate in respect of an electronic document pertaining to a sale on its site'*?

First of all we need to understand the point **'who has to certify under section 65B'**?

Section 65B indicates the manner in which electronic documents can be converted into **“Computer Outputs”** such that the **“Computer Outputs”** will be admissible as per the special provisions under Section 65A & 65B of Indian Evidence Act.

To understand **“Who has to sign”**? one needs to understand that what Section 65B refers to is to the process of creating the **“Computer Output”** and not the process of **“Creating the Electronic Document which is the subject matter of the computer output”**.

The **“Original” “Electronic Document”** is a **“Binary”** document which human beings are unable to understand and can be seen or heard or seen with the assistance of a combination of tools such as the Application

and the Operating System running on a hardware of a computer. Hence the **“Electronic Document”** needs to be appreciated by a Court only in a form which is the end result of many of the processes such as conversion of binary document to a humanly perceivable form on a computer device. However, such a **“Humanly perceivable form”** sits on a computer and cannot be always brought into the Court room. Even if it is brought, the Judge has to view it and form his opinion and if he incorporates his observation on the document, he will be a witness himself. (The hard disk in which a binary document resides is only a container and not the electronic document itself and has to be connected to a computer device to know what it contains).

The presence of Section 65B enables the Judge to avoid being a witness himself by introducing a role to the Section 65B Certifier who brings the binary electronic document to an **“Admissible”** form by creating a **“Computer Output”** as envisaged in the Section. Even after this, if there is a dispute, then it is open to the Court to call a section 79A recognized **“Digital Evidence Examiner”** to assist it in resolving the disputed electronic document.

If as some professionals suggest, it is necessary for the **“Admin of a Server in which the document is contained”** to provide the Section 65B certificate, then a situation would arise where if there are 1 lakh transactions that pass through Flipkart each day, any dispute arising out of these 1 lakh transaction involving multiple electronic documents will all have to be certified only by the admin if required for evidence. Obviously this is neither feasible nor is the intention of Section 65B.

While the admin who can view the electronic document on the server or any other hardware or software to which he has an access may provide the certified copies, it is not always necessary.

The purpose of Section 65B is to enable **“Any Contractually Capable person who knows how to view (or hear) an electronic document to present a copy (printed or on an electronic media) which can be admitted in the Court as also a *“document” “without further proof or production of the original”*. It is that person who prepares the Section 65B statements in which he says *“I viewed this document and converted it into a computer output and I certify”*.**

Hence a **“Third Party”** can provide a **“Section 65B Certified Copy”** for admission.

In practice, the person who provides the certificate should be a **“Trusted Third Party”** who may be cross examined by the defense which may state that the person is unreliable, is either not capable of understanding what he is certifying and is dishonest and produced a false certificate etc. The Section 65B certificate incorporates a declaration as to the **“Procedure adopted for producing the computer output”** which should indicate the manner in which any other person following similar process should be able to reproduce the same **“Computer Output”** except in circumstances where the original binary document has been removed.

The credentials of the person producing the Section 65B certificate become critical to the acceptance of the certified copy by the Court.<sup>31</sup>

Keeping in view the above discussion it can safely be said that anybody who possesses a reasonable understanding of handling computers and who is capable of taking a printout or a copy from the computer resource as a secondary electronic record, is competent to issue a certificate under Sec. 65B. The maker of certificate may be a government official like, investigating officer, any other officer, any computer operator in an office, any forensic cyber expert or a private individual, like any computer operator in cyber cafe, any private cyber expert or even an advocate (in civil disputes) is capable of writing certificate under Sec.65B.

### **Retention of original electronic records**

We have discussed in great detail that what requirements are to be fulfilled, when an electronic-record needs to be produced before court. We have also very much clear on this point that an electronic- record or evidence can only be produced in court as a **'computer output'** which shall necessarily be a secondary electronic evidence. But does this mean that once the secondary electronic evidence is generated as per Sec.65B, coupled with a certificate under sec.65B, the original electronic evidence need not to be preserved for any future reference? We may understand this problem with a practical example. Suppose some incriminating evidence is available in a CC.T.V. footage and its secondary electronic evidence is also generated as per Sec.65B, coupled with a certificate as well, under Sec.65B, can we destroy or delete the original electronic-record? or if it is destroyed or deleted during the continuation of trial or proceeding whether the secondary electronic evidence, generated prior to its destruction or

deletion, can still remain admissible in court?

The above mentioned problem can be answered taking resource to Sec.7 of the Information Technology Act. The same may be reproduced as under-

**Section 7 Retention of electronic records:**

(1) Where any law provides that documents, records or information shall be retained for any specific period, then, that requirement shall be deemed to have been satisfied if such documents, records or information are retained in the electronic form, if-

- (a) The information contained therein remains accessible so as to be usable for a subsequent reference;
- (b) The electronic record is retained in the format in which it was originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received;
- (c) The details which will facilitate the identification of the origin, destination, date and time of dispatch or receipt of such electronic record are available in the electronic record;

(2) Nothing in this section shall apply to any law that expressly provides for the retention of documents, records or information in the form of electronic records.

As per this provision if any law provides that documents, records or information are required to be retained for any specific period, then, that requirement shall be deemed to have been satisfied if the same is retained in electronic form. Although the Information Technology Act and Indian Evidence Act do not provide any period for retention of electronic record, but in the opinion of the author of this article the original electronic record must be preserved or retained till the pendency of trial in which its secondary evidence is sought to be given, so that if for any reason whatsoever the trial court or any appellate court or the accused or opposite party deems it justifiable, then the same may be utilized subsequently.

**2. Genuineness of Electronic Records**

The strict compliance of section 65B is necessary to sanctify the process of converting electronic document into “**Computer Outputs**”. The above made detailed discussion of the conditions under Section 65B and the person who can certify under Section 65B make these provisions clear and

understandable. Now we will examine the provisions relating to genuineness of 'electronic records'.

In Anvar P.V. Vs. P.K. Basheer, (35), in para 16, the Hon'ble Supreme Court said, "if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A Indian Evidence Act, opinion of examiner of electronic evidence."

Section 45A provides- ***Opinion of Examiner of Electronic Evidence.*** When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000 is a relevant fact.

**Explanation-** For the purposes of this section, an Examiner of Electronic Evidence shall be an expert.

Section 79A Information Technology Act, is also relevant to be mentioned here which says-

***Central Government to notify Examiner of Electronic Evidence***

The Central Government may, for the purposes of providing expert opinion on electronic form evidence before any court or other authority specify, by notification in the Official Gazette, any Department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence.

**Explanation-** for the purposes of this section, "electronic form evidence" means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines.

A combined reading of Section 45A Indian Evidence Act and Section 79A Information Technology Act made it clear that the genuineness of an electronic record can be verified by an examiner of electronic evidence, who is to be appointed by the Central Government. The expert can be any body or agency of Central Government or State Governments, like Central Forensic Science Laboratories or State Forensic Science Laboratories. Till date no agency has been notified by Central Government as an expert, of electronic evidence although the process to Identify competent agency is

being initiated in this regards.

An examiner of electronic evidence is an expert. 'Expert' means a person who is competent to interpret the content of any document. In this case, the document is in the form of an electronic record, hence the examiner of electronic record will explain to the court about the contents of the electronic evidence which is sought to be presented before court and certify to the court that the electronic evidence is not tampered with or in any way manipulated.

The **person** certifying under Section 65B and the '**expert**' certifying under Section 45A are not certifying the same thing and at the same time. Whereas the person certifying under Section 65B is certifying the accuracy and sanctity of the process of taking computer printout or making a copy for the purposes of producing secondary electronic evidence, from original 'electronic record', the examiner of 'electronic records' under Section 45A is certifying about the genuineness of the electronic records itself. The time and the persons involved in the processes under section 65B and Section 45A may not be the same, because the process envisaged under Sec. 65B is mostly performed at the place where original electronic record is available and by a person who is having the lawful control over the computer and process involved in making a computer printout or a copy from the original electronic record, but the place and examination envisaged under Sec. 45A is a laboratory and the person is an examiner of electronic record who is authorized under Sec. 79A I.T. Act. Although, both these processes can be performed at one place and by one person, if the original 'electronic record' is send to the laboratory notified under Sec. 79A I.T. Act. Here a computer printout or a copy of electronic record will be made for the purposes of secondary electronic record and consequently a certificate under Sec. 65B shall be issued and a certificate as to the genuineness of the electronic record shall also be issued by the 'expert'.

As is clear from the abovementioned discussion that for the **Admissibility** of the electronic evidences, it must not only be produced in a court along with a certificate under Sec.65B, but it's genuineness and relevancy must also be certified and proved as per Section 45A read with Section 79A I.T. Act. In the opinion of the author of this article, a Central

Forensic Science Laboratory or State Forensic Science Laboratory, though not authorized as per Section 79A I.T. Act, can issue certificate or opinion about the genuineness of an electronic record before a court, as per Section 45 Evidence Act, being the opinion on a branch of science.

### **3. Exhibiting the electronic record before court**

After collecting the electronic-records in terms of Sec.65B and judging it's reliability as per Sec.45A the same will be produced before the court. In Criminal cases normally these type of evidences are produced by prosecution. If it is a case investigated by the police, the electronic records should be filed by Investigation officer along with police report and Sec.173 (2) and (3) of The Code of Criminal Procedure. In cases of private complaints the same may be filed by complainant when complaint is filed or afterwards during the trial. In case of a private complaint compliance in terms of Sec.65B and 45A are equally applicable. In both types of criminal cases an accused can also submit electronic records, but he has also to fulfill requirements of twin provisions i.e. Sec.65B and 45A. In civil cases also electronic evidence can be produced in court, subject to fulfillment of requirements mentioned in Sec.65B and 45A. In *G. Shyamala Ranjini Vs. M.S. Tamizhnathan*, AIR 2008 Madras 476, a CD was produced at the time of cross examination without Sec.65B certificated, but the same was rejected by Hon'ble Court on the ground that, 'although the electronic record is admissible in evidence, but for that purpose the person who is producing the evidence has to satisfy the conditions mentioned under sub-section (2) of Sec. 65B of the Indian Evidence Act and is also required to produce a certificate as enumerated under sub-section (4) of Sec. 65B of Indian Evidence Act.'

In the aforesaid background, now we will examine as to '**How the electronic record can be exhibited in court?**' we have already discussed that all electronic records produced for inspection of the court, are 'documents' as per the scheme of Evidence Act and like any other document, it is also required to be exhibited in court during trial. In *Anvar P.V. Vs. Basheer* (supra), it is held by Hon'ble Supreme Court that a certificate under Sec.65B must accompany the electronic record like Computer Printout, Computer Disc (CD), Video Computer Disc (VCD), Pen Drive etc. pertaining to which a statement is sought to be given in evidence when the same is produced in evidence. We may analyze this statement to say that the

person, who has given the certificate U/s. 65B should be called in court to testify the factum of entire process undergone while a computer printout or copy was taken from original source and about which he issued a certificate U/s 65B. During his testimony he is also required to certify Sec.65B certificate which will be mark a specific exhibit number.

During his testimony he is also required to certify computer printouts (in cases of call detail reports or CDR and any other textual or email messages, printed on paper) and the CD, VCD, Pen Drive etc. filed as an electronic record, which shall also be marked as exhibit number. The said CD, VCD, should also be played in open court and should be viewed by parties, their counsels and the presiding judge also. In *Amulya Kumar Panda Vs. State of Orissa*, 2008 CRI.L.J. 1676, a CD containing Sec.27 Evidence Act was exhibited without objection of the accused and allowed to be played in the court to the extent of Sec. 27 statement.

Somebody may say that if judge is viewing the CD, VCD, then he may become a witness, but in my opinion the same may not be true. The presiding judge is not required to express any opinion about the authenticity, correctness, genuineness and relevancy of impugned contents/electronic evidence. He shall deal with these issues only in his judgment. As we know that other documentary or oral evidences are also adduced during the trial by both the parties in presence of presiding judge and the same are also exhibited, in these circumstamcas the judge never becomes a witness, therefore, how can he become a witness simply when the nature of evidence is electronic evidence. In *Anvar P.V. Vs. P.K. Basheer* (supra), The Hon'ble Supreme Court also said that “had those CD used for objectionable songs or announcements, been duly got seized through the police or election commission and same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true.” Although, The Hon'ble Supreme Court said this statement in context of primary evidence, but as we have discussed above practically primary evidence is not feasible to see without any external output device and as soon as it connects to any external output device, it becomes secondary electronic records, which needs certification as per Sec.65B to become admissible in evidence. But in any case the presiding judge can never become a witness merely his viewing the playing of electronic evidence in court.

Copies of electronic evidence should also be made available to the

opposite party, so that opposite party or accused may cross examine upon it. In an adversarial system like ours, whatever may be the nature of evidence of one party, the opposite party must be given a chance to rebut the same by cross examining and consequently creating doubts about the correctness of evidence. Same is true with regard to the electronic evidences.

The right of the accused with regards to copy of Hard Disc containing electronic record was recognized by Hon'ble High Court of Delhi in **Dharambir Vs. Central Bureau of Investigation**, (2008) DLT 289. In this case Prosecution intercepted the telephonic conversation between the accused persons and forwarded the relevant hard discs to Forensic lab and after certification same were submitted to Trial Judge. Trial Court took cognizance of the offence and issued process in four separate cases relating to corruption- Question before the court was Whether the hard discs can be considered as relevant document under Evidence Act.? Does the denial of the same will amount to violation of fundamental right to fair trial? Whether prosecution complied with section 207 Cr.P.C.? Hon'ble Court said that, ' HDs themselves would be electronic records and therefore documents for the purposes of Section 173(5)(a) read with Section 207(v) Cr.P.C During the pre-charge stage the trial court is not expected to insist that copy of each and every document gathered by the prosecution must be furnished to the accused irrespective of what the prosecution proposes to rely upon- Prosecution cannot obviate the statutory requirement under Sec. 207(v) of Cr.P.C for providing to the accused access to the original recording- At the present pre-charge stage, the accused has to be given access to the HDs as a relied upon document to the limited extent- As long as the said provisions of the Cr.P.C are strictly complied with, and they should be insisted upon being strictly followed, there can be no violation of principles of fair trial. Petitioners are permitted to listen to the original recordings of the relevant intercepted telephonic conversations relied upon by the prosecution'

Most of the times required certificate under Sec.65B is not filed initially at the time of submitting electronic record in a court either due to lack of knowledge on the part of investigation officers or due to any other reasons. Does that means that the same cannot be filed afterwards? **Whether a certificate under Sec. 65B can be filed at the time when electronic record is tended in evidence? Whether such certificate can be filed under Sec.311 of the Code of Criminal Procedure, if it is not filed**

**with the charge sheet? Whether a certificate under Sec. 65B can be filed at appellate stage, if it is not filed during trial?** These are some of the questions which needs to be answered. All these questions have been discussed and answered by Hon'ble High Court of Delhi in **Kundan Singh Vs. State** (supra). Hon'ble Justice Sanjeev Khanna authored the Judgment for Division Bench said that, 'Section 65B is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate under Sec.65B(4) is mandatory. Anwar P.V. (supra) does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under Sec.311 Cr.P.C or, at the appellate stage under Sec. 391 Cr.P.C. Evidence Act is a procedural law and in view of the pronouncement in Anwar P.V.(supra), the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. Of course, it is open to the court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and meet the requirements of Sec.65B.'

The Hon'ble High Court of Delhi also quoted a paragraph from **Baldeo Sahai Vs. Ram Chander and Others**, AIR 1931 Lahore 546, with says, "There are two stages relating to documents. One is the stage when all the documents on which the parties rely are filed by them in Court. The next stage is when the documents are proved and formally tendered in evidence. It is at this later stage that the Court has to decide whether they should be admitted or rejected. If they are admitted and proved then the seal of the Court is put on them giving certain details laid down by law, otherwise the documents are resumed to the party who produced them with an endorsement thereon to that effect."

In **Nyati Builders Pvt. Ltd. Vs. Mr. Rajat Dinesh Chauhan and Others**, 2015 SCC Online Bombay 7578, the Hon'ble High Court of Bombay justified the trial court's order allowing filing of Sec. 65B certificate at a later stage in a civil suit.

In **State of Rajasthan through the Special P.P. Vs. Sri Ram Sharma and others**, S.B. CrI. Misc. Petition No. 4383/2016 dt. 02.09.2016, the Hon'ble High Court of Rajasthan allowed prosecution application filed under Sec. 311 Cr.P.C. for submitting certificate under Sec.65B, prepared by investigation officer after closing of defence evidence, regarding

electronic evidence of conversation between complainant and accused, relating to illegal gratification. Similar view was expressed by Hon'ble High Court of Rajasthan in *Paras Jain Vs. State of Rajasthan*, S.B. CrI. Revision Petition No. 1329/2014 dt. 04.07.2016.

The similar issue was also raised in *Avadut Waman Kushe Vs. The State of Maharashtra*, CrI., Writ Petition No. 54/2016 dt. 03.03.2016, before Hon'ble High Court of Bombay. It was argued before Hon'ble Court that considering the provision of Section 65B and the purpose of the certificate, it was necessary for the prosecution to submit the same along with the CD and subsequent filing of the certificate cannot be treated as compliance with the mandatory provision. In support of this argument two case laws *Anvar P.V. Vs P.K. Basheer* (supra) and *Faim@Lala Ibrahim Khan Vs. The State of Maharashtra*, CrI. Appeal No. 1009/2012 dt.20.11.2015 (High Court of Bombay) were cited.

The Hon'ble High Court of Bombay considered both these case laws and held that both these cases simply hold that certificate under Sec.65B is mandatory and no electronic evidence in absence of this certificate can be admitted in evidence. It was also held by the Hon'ble Court that, "Perusal of the provision of Section 65B(4) shows that, there is nothing in the provision that specifies the stage of production of the certificate. If at all anything, the indication therein is in fact otherwise. Firstly, the provision of Section 65B is about admissibility of electronic record and not production of it. Next the opening words of Section 65B(4) are '**In any proceedings where it is desired to give statement in evidence**'. This can only be the stage at which the record is tendered in evidence for being considered it's admissibility. This definitely cannot be the stage of filing of the charge sheet which is absolutely the preliminary stage of the proceedings. Therefore, I find no substance in the submissions advanced on behalf of the petitioner. The certificate need not be filed at the time of production of the electronic record. It can be filed at the time, the record is tendered in evidence. The subsequent filing of the certificate cannot reduce it's effectiveness as a safeguard against tampering etc."

**In Ignatius Topy Pereira Vs. Travel Corporation (India) Pvt. Ltd. And another**, 2016 SCC online Bom 97, It was held by Hon'ble Bombay High Court that if the certificate under Sec.65B, which was produced, was rejected as not in compliance with the provision, a fresh certificate may be

produced in the Court.

It has been categorically ruled by all the Hon'ble Courts, that the certificate under Sec.65B can be filed at a later stage during the trial when electronic record is tendered in evidence. It can also be filed invoking discretionary powers of the trial court under Sec.91 and Sec.311 Cr.P.C read with Sec. 165 Evidence Act. The requisite certificate under Sec.65B can also be allowed to be filed at appellate stage under Sec.391 Cr.P.C.

### **Conclusion**

The law relating to electronic evidence is nascent in nature. The use of digital technology in every walk of life makes it highly significant. Owing to advancement of e-technology, variety of cyber crimes are increasing day by day. It is the need of the hour that the Judicial fraternity and investigating agencies must undergo psychological change and must adopt latest cyber tools to crack the crime and prepare a foolproof case against the accused. Prosecuting agencies must not forget that without requisite certificate under Sec.65B, no e-evidence will be admitted in court, therefore, as soon as there is an information regarding involvement of an e-evidence in a crime, not only those e-evidence be seized immediately, but a secondary e-evidence be generated and a certificate in terms of Sec.65B Evidence Act must also be obtained. Investigating agency/Prosecuting agency must also direct the informant or victim that they should not destroy original electronic record, because the same may be required for future references. The person signing the certificate under Sec.65B Evidence Act must also be arrayed as a witness in charge sheet or any other case.

A model or sample format of certificate under Sec.65B Indian Evidence Act is annexed as Addendum to this Article.

#### List of references used in this Article

1. S.2 (I)(t). I.T. Act.2000
2. S.(2)(I)(r). I.T. Act.2000
3. S.(2) (I)(v). I.T. Act.2000
4. S.(2)(I)(o).I.T. Act.2000
5. S.(2)(I)(k).I.T. Act.2000
6. S.(2)(I)(i).I.T. Act.2000
7. S.(2)(I)(j).I.T. Act.2000

8. S.(2)(1)(l).I.T.Act.2000
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10. See post by Vijay Shanker Na, Dt. 29-08-16, at [www.naavi.org](http://www.naavi.org)
11. Ibid.
12. Sec.65B, Indian Evidence Act. 1872
13. See (10) supra.
14. See (10) supra.
15. Ibid.
16. Ibid.
17. Ibid.
18. Ibid.
19. section. 65B Indian Evidence Act.1872
20. see, AIR 2015 SC, 180.
21. Ibid.
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23. Ibid.
24. Ibid.
25. Ibid.
26. Ibid.
27. See (10) supra
28. Kundan Singh Vs. The State, CRL. Appeal No. 711/2014 dt. 24.11.2015 (Delhi High Court)
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30. Ibid.
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