ARTICLE:

DIGITAL EVIDENCE – DO NOT CONFUSE DIGITAL ARCHIVING WITH BACKUPS[1]

By **Philippe Bazin**

While the dematerialization of documents previously published on paper must now be reckoned with, a decree by the French court of cassation has recently reminded us that making back-up copies is not the same as archiving.[2] Before focusing on the decree proper, the fundamental principles of French law regarding the burden of the proof will be outlined before considering the principles relating to digital evidence. A summary of the fundamental principles governing the French law on the burden of proof might be summarized by Johann Wolfgang von Goethe's famous aphorism (Die Belagerung von Mainz, recorded on 25 July 1793) 'Es liegt nun einmal in meiner Natur: ich will lieber eine Ungerechtigkeit begehen, als Unordnung ertragen' 'It is now once in my nature: I will prefer to commit an injustice than to bear disorder'.

In a state governed by the rule of law, the burden of proof lies with the party making the claim. Consequently, it is preferable to indicate the party has failed to prove their case, rather than facing social riots which a judgment passed without proof would inevitably cause. In French law, a signed, original written document constitutes a perfect proof. However, this type of document is not always available. Courts often have to deal with copies of original documents or the commencement of proof in writing.

To have probative value, the document must be a trustworthy and durable copy of the original document. The phrase 'commencement of proof in writing' describes an (unsigned) document produced by the person against whom the document is used, and which makes probable the alleged fact. These rules concerning evidence refer to a civilization based on writing, and writing is inseparable from its traditional support, namely paper.

For a long time, courts considered that a photocopy could not be considered as a proper written document, but only as commencement of proof in writing. In a judgment dated 2 December 1997, the Court of Cassation went even further, by making copies (in this particular case a telecopy) a writing in its own right.[3] More recently, a decree by the Court of Cassation stated that several bank transfers, written in identical terms, constituted a commencement of proof in writing.[4] This rule is all the more interesting as, strictly speaking, a bank statement does not come from the debtor, but from the bank, and the accuracy of the contents of the statement should be for the bank to prove.

So, as far as paper documents are concerned, the rule has been softened over the years and signed, original documents can be replaced by less formal evidence more in tune with the business world and easier means of communication. This evolution also applies to digital evidence.

[1] *This article is translated from an article originally published in the French magazine 'Archimag' n°222, March 2009, www.archimag.com, and reproduced (with some changes) with their kind permission.*

[2] *Cass. Civ 2, December 4th, 2008, Continent France c/CPAM de la Marne, n° 07-17.622.*

[3] *95-14.251 Société Descamps, Banque Scalbert Dupont, Commercial Chamber of the Cour de cassation (Cour de cassation chambre commerciale), Tuesday 2 December 1997. For a translation of this case, see the Digital Evidence and Electronic Signature Law Review, 5 (2008) 106-107.*

[4] *Cass. Civ 1, 25 June 2008, F-D, Y.F c/E.N, n° 07-12.545. For a translation of this case, see page 247.*

Where there is a conflict in documentary evidence, the rules to determine the validity of proof can be agreed by the parties contractually, thus allowing the adaption of new techniques and market opportunities.

Dematerialization of information and legal rules concerning digital evidence

French legislators have welcomed the concept of digital evidence, and have given it a particular framework to ensure its validity. Digital evidence is well enshrined in French law. The Act n°. 2000-230 on Adaptation of the Law of Evidence on Information Technology and Relevant to e-signatures (LOI no 2000-230 du 13 mars 2000 portant adaptation du droit de la preuve aux technologies de l'information et relative à la signature électronique),[5] and later texts introduced fundamental principles. The form of the document is now irrelevant: from now on, a written document can no longer be defined by its form but by its content, as provided by the Civil Code (Code Civil):

> Art. 1316 (inserted by Loi n° 2000-230 du 13 mars 2000 art. 1 Journal Officiel du 14 mars 2000)
>
> La preuve littérale, ou preuve par écrit, résulte d'une suite de lettres, de caractères, de chiffres ou de tous autres signes ou symboles dotés d'une signification intelligible, quels que soient leur support et leurs modalités de transmission.
>
> Documentary evidence, or evidence in writing, results from a sequence of letters, characters, figures or of any other signs or symbols having an intelligible meaning, whatever their medium and the ways and means of their transmission may be.

Therefore, any message, in whatever form its medium might be (a computer screen, a portable telephone, a video projector or paper), is considered as a writing. Digital evidence is receivable: evidence can be used in the form of a digital document (especially e-mail) in the same way that a paper-based document is accepted. The same probative value applies: writing on paper is no more valid than writing in digital format. Both are on an equal footing. Where there is a conflict in documentary evidence, the rules to determine the validity of proof can be agreed by the parties contractually, thus allowing the adaption of new techniques and market opportunities.

Specific conditions of validity

These conditions stem from the requirements concerning identity and integrity, as mentioned in article1316-1 of the Civil code which states:[6]

> L'écrit sous forme électronique est admis en preuve au même titre que l'écrit sur support papier, sous réserve que puisse être dûment identifiée la personne dont il émane et qu'il soit établi et conservé dans des conditions de nature à en garantir l'intégrité.
>
> A writing in electronic form is admissible as evidence in the same manner as a paper-based writing, provided that the person from whom it proceeds can be duly identified and that it be established and stored in conditions calculated to secure its integrity.
>
> Art. 1316-2
>
> Lorsque la loi n'a pas fixé d'autres principes, et à défaut de convention valable entre les parties, le juge règle les conflits de preuve littérale en déterminant par tous moyens le titre le plus vraisemblable, quel qu'en soit le support.
>
> Where a statute has not fixed other principles, and

[5] *Entered into force on the 13 March 2000, amending the Civil Code except, as always, the provisions that require specific regulations to enter into force (décrets ou arrêtés d' application).*

[6] *All the translations of the law have been taken from the English version of the Legifrance web site, http://www.legifrance.gouv.fr.*

> failing a valid agreement to the contrary between the parties, the judge shall regulate the conflicts in matters of documentary evidence by determining by every means the most credible instrument, whatever its medium may be.
>
> Art. 1316-3
>
> L'écrit sur support électronique a la même force probante que l'écrit sur support papier.
>
> An electronic-based writing has the same probative value as a paper-based writing.

As a consequence, a 'screen writing' holds the same probative value as a paper-based writing, providing that both the identity of the author of the message is undoubted, and proof of the integrity of the message is established.

As a general rule, the issue is not on the identity of the author, because the context usually dispels any such ambiguity. However, questions may arise concerning the integrity of the message, that is to say concerning the absence of difference between the message sent and the message received. Indeed, it has been established that the obsolescence of computer systems can be a real cause for concern, although the possibility of a hacker intercepting messages to alter them is irrelevant, although appealing to sensationalist media.

Obsolescence of computer systems

The fast evolution of materials and software means that digital objects produced today are very likely to be unreadable tomorrow for want of proper tools to read them. Indeed, we make sure we save our files, thinking they are protected against time. The recent decree by the Court of Cassation (discussed below) is a useful reminder that making a back-up copy is merely a technique of data management, and it must not be confused with the preservation of the integrity of a digital object in order to retain its probative value, which is the technical issue discussed here.

The decree dated December 4 2008:[7] do not confuse backups with digital archiving

The facts of this case are simple. The State Health Insurance Office (la Caisse Primaire d'Assurance Maladie) of the French department of Marne dealt with a case of work-related illness; once the hearing was over, they informed the employer of their decision. The employer challenged their decision on the grounds that he had never received prior notice of the grievance. The State Health Insurance Office produced a copy of the letter which had been sent to the employer within the time limit. The employer denied having received this letter. To prove his point, the employer argued that the heading of the letter did not exist at the time it was sent. The State Health Insurance Office pointed out that they only saved the document in its electronic file form, and the document was just a copy of this file. The Court of Appeals accepted this argument, and considered that

> 'la cour d'appel, après avoir observé que la preuve de l'envoi de la lettre d'information pouvait être faite par tous moyens, énonce qu'il ne saurait être fait grief à la caisse de n'avoir conservé que la seule copie informatique du courrier en date du 20 janvier 2003'
>
> 'the Court of Appeal, having noted that proof that the letter had actually been sent, could be made by any means, ruled that *Caisse Primaire d' Assurance Maladie* could not be held responsible for only having kept a digital copy of the letter sent on 20 January 2003.'

The Court of Cassation overturned this judgement on the grounds that the Court of Appeals should have determined whether the document produced complied with the requirements set out in article 1348 ('faithful and enduring')[8] and 1316-1 ('identity and integrity') of the Civil Code.

In this case, it was considered more than likely that the content of the letter produced by the State Health Insurance Office had not been modified. But the only formal difference, namely the heading of the letter,

[7] *2 Cass. Civ 2, december 4th, 2008, Continent France c/CPAM de la Marne, n° 07-17.622.*

[8] *Les règles ci-dessus reçoivent encore exception lorsque l' obligation est née d' un quasi-contrat, d' un délit ou d' un quasi-délit, ou lorsque l' une des parties, soit n' a pas eu la possibilité matérielle ou morale de se procurer une preuve littérale de l' acte juridique, soit a perdu le titre qui lui servait de preuve littérale, par suite d' un cas fortuit ou d' une force majeure.*
Elles reçoivent aussi exception lorsqu' une partie ou le dépositaire n' a pas conservé le titre original et présente une copie qui en est la reproduction non seulement fidèle mais aussi durable. Est réputée durable toute reproduction indélébile de l' original qui entraîne une modification irréversible du support.
The above rules are also subject to exceptions where the obligation arises from a quasi-contract, an intentional or unintentional wrong, or where one of the parties either did not have the material or moral possibility to procure a written proof of a legal transaction, or has lost the instrument which served him as written proof in consequence of a fortuitous event or of force majeure.
They are also subject to exceptions where a party or a depositary has not kept the original instrument and presents a copy which is a reproduction that is not only faithful but also enduring. Is deemed enduring an indelible reproduction of the original which involves a non-reversible alteration of the medium.

made it possible to challenge the copy as unfaithful. The decree points out to a common mistake – the confusion between a simple back-up copy, and a document whose integrity is proved. This is often called 'legal archiving', for the sake of simplicity. Archiving means being able to prove the integrity of a particular message. Not every system designed to store documents can be considered as an archiving system, because they do not meet the legal requirements of trustfulness and integrity. Handing the document over to a trusted repository, or placing it in an electronic safe, with the possibility of obtaining access to it but not modifying it, are two fundamental aspects of an archiving system with a probative value. Consequently, archiving entails forbidding the possibility of modifying a document, either by trusting it to a third party (archiving by a trusted repository) or by 'sealing' it and storing it in its original form where it can be read but not altered – for example by converting it into a PDF or PDFA format by scanning the original document. It is by complying with these essential requirements that arguably, a document can be considered as an 'archived document', that is a document with a probative value.

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