



Annual ADFSL Conference on Digital Forensics, Security and Law

2015
Proceedings

May 20th, 9:00 AM

A Review of Recent Case Law Related to Digital Forensics: The Current Issues

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Cole, Kelly A.; Gupta, Shruti; Gurugubelli, Dheeraj; and Rogers, Marcus K., "A Review of Recent Case Law Related to Digital Forensics: The Current Issues" (2015). *Annual ADFSL Conference on Digital Forensics, Security and Law*. 2.

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A REVIEW OF RECENT CASE LAW RELATED TO DIGITAL FORENSICS: THE CURRENT ISSUES

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ABSTRACT

Digital forensics is a new field without established models of investigation. This study uses thematic analysis to explore the different issues seen in the prosecution of digital forensic investigations. The study looks at 100 cases from different federal appellate courts to analyze the cause of the appeal. The issues are categorized into one of four categories, 'search and seizure', 'data analysis', 'presentation' and 'legal issues'. The majority of the cases reviewed related to the search and seizure activity.

Keywords: Computer Investigation, Case Law, Digital Forensics, Legal Issues, and Courts

1. INTRODUCTION

Digital forensics (DF) is still in its infancy, resulting in rapid growth and formation. Legal concerns surrounding this field must soon be addressed in order for it to function fittingly as a scientific field. Several dominating legal issues relevant to DF have come to light including lack of standards and certifications, analysis and preservation concerns and admissibility of evidence issues (Meyers & Rogers, 2004). For this paper, the issues in appellate court proceedings surrounding the digital forensics field are examined and more fully addressed. But first what is digital evidence?

The DoJ (2008) describes digital evidence as, "information and data of value to an investigation that is stored on, received, or transmitted by an electronic device. This evidence is acquired when data or electronic devices are seized and secured for examination" (pg.1). For example, illegal photos, chats, log files and emails are examples of potential digital evidence used in the courts. Who relies on digital forensic evidence and research related to cyber crimes?

Academia, law enforcement, the military, the private sector and the legal system all rely on digital forensic evidence and research related to cyber crimes as they are all using and or

interpreting the same technologies (Palmer, 2002). Differences exist among how each of these disciplines put digital forensics into practice. Investigators in law enforcement (LE) conducting investigations in search of electronic evidence useful for a prosecution must follow the exact guidelines set by the court. The primary objective for the private sector is to maintain business continuity in the face of an incident. Thus, the goal of the digital investigation is recovery from the incident, in real time, and prosecution goals (if any) are secondary.

The military acquires digital evidence in the same way that businesses do except that their objectives are more focused on the protection of highly confidential digital data (Palmer, 2002). They all look to digital forensic research in order to formulate best practices when using digital technology and they also look to the courts for protection and retribution against malicious attacks. Currently the courts are facing rather tough questions from the fairly new digital world.

Smith and Kenneally (2008) ask the question of how do we prevent previous case law decisions from overlooking new issues or disregarding more complex ones. For instance they proposed the question, "should an e-mail or log be denied admissibility because it was retrieved from a database that was unsecured and

subject to tampering” ? Information technology experts are frequently called upon to objectively answer such data integrity questions for the court. Currently the bar for proving reliability and authenticity of digital evidence is not very high (Smith & Kenneally, 2008). Typically, evidence will be admitted if the testifying witness had firsthand knowledge of the evidence, if the evidence is a product of an automated process or system, or the digital record(s) meet the business records exception to the Hearsay Rule. Thus, data tampering is considered unlikely by the courts (Smith & Kenneally, 2008). As courts become more familiarized with digital evidence vulnerabilities, they will start scrutinizing the trustworthiness of evidence from computer systems and investigative methods (Chaikin, 2007). Over time the courts will also better apply constitutional amendments to the digital world.

There is still ambiguity about the interpretation of the 4th Amendment protections to the digital world (Nance & Ryan, 2011). In regards to the 4th Amendment and digital evidence searches, the plain view exception and the closed container rule has brought up significant attention. When an investigator is conducting a search within the scope of a warrant and comes across contraband in plain view, the officer is allowed to seize it. The issue with digital evidence is that the scope is sometimes overbroad. With a valid warrant the investigator can search the whole hard drive as if it were a container, thus all of its contents are in plain view. Depending on the judge and evidence submitted, courts may limit the scope of such searches (Trepel, 2007).

Stahl et al., (2012) claim that lawyers, computer experts, legislators and judges do not share the same knowledge and understanding of computer technologies that is needed in order to address the conflicts between forensic technology and law. The following section provides the related work surrounding legal issues in the computer forensics field, followed by the methods, results, limitations and our conclusion.

2. RELEVANT LITERATURE

Meyers and Rogers (2004) discussed that search and seizure methods are disputed most often in regards to digital forensic investigations

and that improper search and seizure methodology (missing steps) used during the digital investigation could potentially impact in the inadmissibility of the evidence. The current research investigates if this is true over the past 10 years and which steps are missed most often.

Shinder (2003) addresses the legal issues in a similar manner as the present paper. She identifies the various issues and discusses the case law that highlights those issues. However, she restricts her discussion mostly to an in-depth analysis of the issues related to search and seizure. This paper looks at all the issues that arise within the dataset of cases. Also, Shinder (2003) looks at milestone cases instead of examining “random” cases like the present study.

Meyers and Rogers (2004) presented an overview of the issues faced in the field on computer forensics. They highlighted the lack of standardization as the biggest issues but also explain the legal hurdles related to search and seizure and expert qualifications. Brungs and Jameison (2005) conducted research to identify and classify the main legal issues associated with digital forensics. Conducting the research in Australia, they recruited eleven experts to discuss and identify the legal issues related to computer forensics. They then ranked the issues and provided a classification scheme for the various legal issues.

Wegman (2006) discusses the various issues related to the admissibility of evidence in the court of law. He outlines the main laws related to computer forensic investigation and highlights the difficulties in interpreting the usual criminal laws to digital investigations. He provides more of an overview of the legal aspects. Liles et al. (2009) furthered the research by Brungs and Jameison (2005) but conducting a similar survey but in the United States. They increased the survey size to sixty-nine respondents and performed a comparative analysis of the results with those of Brungs and Jameison.

Greiman and Chitkushev (2010) deal with the legal aspects of computer forensics from an academic perspective. They delve into the ramifications of understanding the legal framework for digital investigations. They attempt to design an academic curriculum to effectively

address legal concepts like cyber-law, jurisdiction issues etc.

3. METHODS

The appellate cases were randomly selected using the FindLaw database and through using the keywords ‘computers’, ‘computer’, ‘online’, ‘digital’, ‘computer crime’, ‘digital evidence’, and ‘computer investigations’. The researchers examined 100 appellate court cases from all districts related to digital forensic investigations within the past 10 years, in search of the most profound issues during digital investigations (see Appendix A for a list of reviewed cases).

The thematic analysis method was used (Braun & Clarke, 2006). Thematic analysis involves the searching across a dataset to find repeated patterns of meaning (Braun & Clarke, 2006). The researchers took an inductive data analysis approach. An inductive approach means the themes identified are strongly linked to the data themselves and are not fit to a pre-existing coding frame (Patton, 1990). The researchers read and re-read the cases many times, and used open coding of the data until major themes related emerged. 87 cases fell into 4 themes. The 4 themes presented next, offer valuable insights into the issues taking place in courts surrounding digital technologies (see figure 1).

4. RESULTS

Overall, 24 of the cases were reversed and the rest of the cases were upheld in favor of the prosecutor. Four major themes emerged from the data:

4.1 Search and Seizure

Among the 100 cases that the researchers examined, 41 of the appeals deal with issues during the collection phase of the digital forensic process. The issue most dealt with by the court was exceeding the scope of the warrant (15), followed by the defendants claim to an expectation of privacy which includes warrantless searches

(9), followed by the claim that standards for probable cause were not met (7), followed by the claim that consent to search was not given (5) and lastly, staleness or invalid warrant (5). Our findings are consistent with the research of Meyers and Rogers (2004) who suggested that search and seizure methods would be disputed most often in regards to digital forensic investigations. Improper search and seizure methodology (missing steps) used during the digital investigations results in the inadmissibility of the evidence (Meyers & Rogers, 2004).

4.2 Data Analysis

Among the 100 cases that the researchers examined 10 fell into the data analysis theme. The issues dealt with the most were errors in a programs’ output or a program not working correctly (4), unreliability of time stamps and mac times (3), computer was wiped or contaminated during examination (3).

4.3 Presentation Issues

Among the 100 cases that the researchers examined, 5 of the appeals fell into the presentation and expert witness theme. The issue most dealt with by the courts was the failure to preserve text messages or images for presentation (3), followed by whether or not an expert witness must fully understand the source code of a tool or how it works (2).

4.4 Legal Issues

Among the 100 cases that the researchers examined, 31 fell into the legal theme. A popular issue dealt with by the court was whether or not an image of an abused child was real, virtual, or computer generated (6). Followed by the defendants refusal to decrypt passwords or files (1), unauthorized access or whether one had access or not to specific files (6), sentencing issues which includes double counting and sentence enhancement issues (13) and lastly, knowing possession (4). The four major themes that have emerged revealed the major issues being brought up by the courts.

Figure 1 Theme Frequencies

Search and Seizure	Affirmed	Reversed
Exceeding the scope of the warrant	15	4
Expectations of privacy/warrantless search	9	2
Standards for probable cause were not met	7	2
Consent to search was not given	5	1
Staleness or invalid warrant	5	1
Total	41	10
Data Analysis	Affirmed	Reversed
Errors in a programs' output or a program not working correctly	4	
Unreliability of time stamps and mac times	3	1
Computer was wiped or contaminated during examination	3	1
Total	10	2
Presentation and Expert Witness	Affirmed	Reversed
Failure to preserve text messages or images for presentation	3	1
Must an expert witness fully understand the source code of a tool or how it works	2	
Total	5	1
Legal Issues	Affirmed	Reversed
Whether or not an image of an abused child was real, virtual, or computer generated	6	1

The defendants refusal to decrypt passwords or files or pleading the 5th	2	1
Unauthorized access or whether one had access or not to specific files	6	2
Sentencing issues which includes double counting	13	6
Knowing possession	4	1
Total	31	11
Overall Total	87	24

4. CONCLUSION

This study consisted of a small sample size. While it would be difficult to make generalizations about the nature of prosecution issues in digital forensics investigations, the study gives us a good glimpse into a subset of problems that are experienced.

One major opportunity for knowing the issues that are being brought up in the courts surrounding digital evidence is awareness for law enforcement. Now that we are aware of the specific search and seizure issues we can better educate police officers in that area of computer investigation. The study showed that 24 of the cases had their decisions reversed in the appellate court. This is a concern for the digital forensics community.

The study also reaffirms that search and seizure procedures need to be carefully adapted to work within the digital realm. The largest issue seen was ambiguity in the scope of the warrant. There were also issues where law-enforcement officers did not stop the search when encountered with new information and apply for another warrant. Another warrant related issue seen was that the warrant was not

specific enough. For most of these cases, the court ruled in good faith but this could change as courts become more strict regarding the scope of the warrant. In general, law enforcement officers need specific training in search and seizure procedures for digital evidence. Another issue observed was related to defendant claims that the tool was not functioning properly. The reliability of tools is often discussed as an area of concern, with most of the tools used not subject to scientific testing. The real authenticity of digital images was also questioned in court. With child pornography being a major cyber crime to contend with, ways to prove the “realness” of an image will be important.

This study is limited to 100 cases within the last 10 years. The cases were randomly selected using the FindLaw database and through using the keywords ‘computers’, ‘computer’, ‘online’, ‘digital’, ‘computer crime’, ‘digital evidence’, and ‘computer investigations’. The researchers could not get access to police reports therefore some of the issues may have not been brought up in the appellate court briefs.

As mentioned earlier, the study employed a small sample size, which makes it difficult to generalize the results. However, the trend seen among the 100 cases is consistent with the discussion in the digital forensic community about the nature of the issues seen. With attention drawn to these issues, it might be possible to speedup the prosecution of cases and lower the rate at which cases are appealed. Future work in this area should target a much bigger sample size and perform a more detailed analysis of the issues seen.

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APPENDIX A REVIEWED CASES

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5. U.S. v. Marinko, No. 09-30430 (9th Cir. 10-22-2010)
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9. U.S. v. Rosa, 09-0636-cr (2nd Cir. 10-27-2010)
10. U.S. v. Dye, No. 09-3410 (3rd Cir. 10-22-2010)
11. U.S. v. Merz, No. 09-3692 (3rd Cir. 10-12-2010)
12. U.S. v. Dennington, No. 10-1357 (3rd Cir. 10-7-2010)
13. U.S. v. Jean-Claude, 09-5138 (10th Cir. 10-29-2010)
14. U.S. v. Suarez, Criminal Action No.: 09-932 (JLL) (N.J. 10-21-2010)
15. U.S. v. Christie, No. 09-2908 (3rd Cir. 9-15-2010)
16. In Matter of the Application of U.S., No. 08-4227 (3rd Cir. 9-7-2010)
17. U.S. v. Comprehensive Drug Testing, Nos. 05-10067, 05-15006, 05-55354 (9th Cir. 9-13-2010)
18. U.S. v. Williams, No. 10-10426 Non-Argument Calendar (11th Cir. 9-22-2010)
19. U.S. v. Norman, CASE NO. 2:09-CR-118-WKW [WO] (M.D.Ala. 9-24-2010) expectation of privacy for p2p
20. Maggette v. BL Development Corp., NO. 2:07CV181-M-A LEAD CASE, NO. 2:07CV182-M-A (N.D.Miss. 9-2-2010)
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23. United States v. Hill, 459 F.3d 966, 977-78 (9th Cir. 2006).
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26. US v. Stanley, United States Ninth Circuit 08/02/11 10-50206
27. People v. Stipo, B218512 (05/16/11)
28. ED* US v. Nosal, 10-10038, ninth circuit 04/28/2011
29. US v. Rodriguez, 09-15265 US eleventh circuit 12/27/2010
30. US v. Koch, 10-1789 US Eighth Circuit 11/16/2010
31. US v. Allen, 09-50283 US fifth circuit 11/05/2010
32. US v. Payton, 07-10567 US 9th circuit Decided 07/21/2009
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UNITED STATES of America, Appellee, v. José Angel PERAZZA-MERCADO, Defendant, Appellant. No. 07-1511. January 21, 2009

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56. UNITED STATES v. ROBINSON

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58. UNITED STATES v. KING

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59. UNITED STATES v. TENUTO UNITED STATES of America, Plaintiff-Appellee, v. Vincent J. TENUTO, Defendant-Appellant. No. 09-2075. Argued Nov. 12, 2009. -- February 03, 2010

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LVRC HOLDINGS LLC, Plaintiff-Appellant, v. Christopher BREKKA; Employee Business Solutions Inc.; Carolyn Quain; Stuart Smith; Brad Greenstein; Frank Szabo, Defendants-Appellees. No. 07-17116.

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