ARTICLE A07n04

What qualifies as a signature?

Article for *Incite*

Ian McDonald

February 2007

There are a number of situations when, in order to rely on provisions in the Copyright Act, a written declaration and a signature are required – including when clients (or remote clients) want a library to copy material for their research or study, and when a library officer wants to copy more than "the usual" 10% or one chapter from material that is not commercially available "within a reasonable time".

Generally, a signature shows that someone agrees with, assents to, or endorses the contents of some document; it is something which, because it can be verified (for example, by people who witnessed the signature or by handwriting experts), carries with it a high level of "authenticity" and authority.

In the off-line world, thumbprints and clumsy "Xs" are acceptable as signatures. In the electronic environment, however, there has been some uncertainty as to what qualifies. Can something electronic or digital be a signature at all? Will a scanned signature qualify? What about an email adress or a typed name? Does it have to be something encrypted and secret?

In part, the *Electronic Transactions Act 1999* (Cth) addresses these issues in the digital environment, but there have been a couple of court cases since 1999 which have discussed what might qualify as a signature under general law.

The first of these is a New South Wales case on whether or not an email – which contained the words "yes, I spent the money and I shouldn't have" – was sufficient legal confirmation that someone owed money. New South Wales legislation requires that any such confirmation will only be binding if it is in writing and signed. The court held that the email was "signed" because it had the name of the person who had written the email in the email address.

A second case – also far removed from copyright – came to a different conclusion. It's a British case which looked at whether or not an email that a Mr Mehta had apparently sent was a binding financial guarantee for debts owed by his company. Under the UK Statute of Frauds, such a guarantee is not binding unless it is in writing and signed.

Unlike the finding in the New South Wales decision, the judge held that the mere appearance of Mr Mehta's name in the email address was not a "signature". In large part, this conclusion was based on the fact that email addresses are **automatically** placed at the top of the email when they are sent and therefore cannot be said to indicate that the person has, in line with UK case law, actually "authenticated" the contents of the email. However, the judge went on to state that, in his view, someone **can** sign a document by typing in their full name or their last name prefixed by some or all of their initials or by typing their initials. The judge also stated that someone could "possibly" sign even if they used a pseudonym or a combination of letters and numbers.

So what does this all mean for libraries in Australia?

I am wary of recommending that libraries treat a mere email as being "signed" on the basis that it has a person's name in the email address. However, the reasoning in the British decision gives good grounds for believing that an Australian court could conclude that a person typing their name into an email is "signing" – that they are indeed doing something which signifies their assent to whatever it is they have signed.

Libraries in Australia could bear the British case in mind when setting up electronic systems to handle declarations that must be signed, including when declarations are to be delivered via email or a web-interface, or

when they are to be made and stored in a database. In each case, in the words of the British judge, the issue a library needs to bear in mind is that the person "signing" any declaration uses their name or initials "in order to give, and with the intention of giving, authenticity to" the relevant declaration; the insertion of the person's name or initials must be "intended as a signature".

(The British case is *Mehta v J Pereira Fernandes SA* [2006] EWHC 813 (Ch); it is available at http://www.bailii.org/ew/cases/EWHC/Ch/2006/813.html. See also a New South Wales Supreme Court decision relating to acknowledgements of debts: *McGuren v Simpson* [2004] NSWSC 35 (18 February 2004), available at http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2004/35.html.)

Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.

The Australian Copyright Council has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.

© Australian Copyright Council 2007

PO Box 1986, Strawberry Hills NSW 2012
ABN: 63 001 228 780

info@copyright.org.au
www.copyright.org.au

T +61 2 8815 9777
F +61 2 8815 9799