

What qualifies as a signature?

Many requests for copies now arrive in libraries by e-mail, so one of the questions I am frequently asked is 'What is meant by "an electronic signature"?' In this discussion of two recent court decisions, Ian McDonald of the Australian Copyright Council sheds some light on whether a name on an e-mail is really a 'signature'.

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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 those instances 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 per cent 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 e-mail address 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 e-mail – 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 e-mail was signed because it had the name of the person who had written the e-mail in the e-mail 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 e-mail 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 e-mail address was not a 'signature'. In large part, this conclusion was based on the fact that e-mail addresses are automatically placed at the top of the e-mail 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 e-mail. 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 an e-mail as signed because it has a person's name in the e-mail 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 e-mail 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 declarations to be delivered via e-mail 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.)

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