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Much Ado About Authentication

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Much Ado About Authentication

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Much can be said about how libraries are adapting and new ways that we can continue to adapt to the rise in importance of digital resources and services. But there is a unique challenge that law libraries face that this article will attempt to address: the problem of authenticating digital legal materials. This necessity of authenticating legal materials has been articulated many times. However, there may actually be no need for authentication at all.

Why Authenticate? Part 1

The question of authentication is a very important one to answer because law libraries have the responsibility of providing accurate versions of primary legal materials. It is thought that since digital materials can be altered and distributed so easily, there is increased danger that inaccurate versions of judicial opinions and legislative materials will be distributed to lawyers and lay people who will be confused over which versions are accurate, and therefore reliable. On its face, this is a very grave concern. Imagine that someone with an axe to grind comes into

possession of a judicial decision that hurts his/her case and that this party decides to simply re-write the decision so that it comes out in his/her favor. Or, in a less nefarious scenario, suppose that an information service provider is simply sloppy and publishes on its website or service an inaccurate version of the decision. Obviously, in either case, the party who uses the variant version of the opinion can be in a very embarrassing or difficult position because he/she can be sanctioned for using or relying on an inaccurate or false version of the opinion. This is also bad for libraries that rely on service providers or publishers for accurate information to make available to patrons, who rely on libraries to possess accurate copies of these materials.

Authentication of legal materials in this context provides a crucial element of reliability so that libraries and users can confidently use a particular document of primary law, knowing that it is the accurate version of the document produced and released by the court or legislature. Typically authentication involves the use of a digital attachment to the document which, when activated, executes an algorithm that verifies that the document is what it says it is. The code executed by the algorithm is encrypted and is virtually impenetrable and un-editable by ordinary users. (Hackers, of course, can hack anything....)

The general consensus of how an authentication scheme would be executed is that the publisher of the legal materials, such as the Government Printing Office or the Reporter of Decisions of the Supreme Court, would release on their website a digital version of the official opinion with authentication file attached. Every copy of the opinion made from this original version would carry with it the digital authentication device. Any version found from any source that does not carry this digital signature would be presumed to not be accurate, or, at best would be *prima facie* evidence of the opinion, but would, in ordinary practice, be authenticated via some mechanism or other.

What to Authenticate?

Legislative and judicial are two types of primary legal materials that are the main subjects of the authentication discussion. Legislative materials are the ones most in need of authentication because of the numerous changes that every legislative action goes through as it matures. Our legal system also has a strong tradition in

which each version of every piece of legislation is published and preserved for posterity. Every bill is published when introduced and it is republished as it is amended during the legislative process. It is crucial to distinguish between the many drafts from the final version of proposed legislation that was passed and signed by the executive. Having the statute authenticated assists researchers determining official versions of laws from drafts or other unofficial versions.

Judicial decisions, on the other hand are by their nature different. Only one official version of a decision is ever released and distributed from a single source, the court. Even when a judicial opinion is available from multiple sources and formats (as all are today), there is only one source of the opinion, the Reporter of Decisions for that court. Here, too, there are often delays by the official publisher of decisions as the Reporter prepares the final volumes or advance sheets for publication. However, slip opinions released by the court are immediately picked up by numerous commercial and nonprofit publishers and distributors for redistribution. Any opinion issued by any court in the nation is immediately available on as many ten additional websites and services, in a variety of formats. Since no third party has access to drafts of opinions, there is virtually no confusion as to which version is the official one, especially if it is derived from the one issued by the court. (Where else can anyone obtain, *legally,* any other version of an opinion?)

How to Authenticate?

What kinds of measures must be taken (and by whom) to ensure that users of any stripe—lawyers, students, scholars or lay people—who want to read a judicial decision can be assured that the one they are reading is an accurate version of the one released by the court? Software algorithms that are self-authenticating, such as the system offered by Adobe that authenticates PDF versions of opinions, are the most common type mentioned by proponents. This method is very easy for the end user to execute and does not interfere with the user's experience. It is, however, not free and not without long-term difficulties. Visiting the Government Printing Office's website, gpo.gov/authentication/, and reading the Authentication page demonstrates the present and future challenges: According the website, in order to authenticate PDFs, one must have Acrobat 7.0 or 8.0. The page also

mentions that authentication for 9.0 has been demonstrated. The version of Acrobat that is installed on my computer (new within the last six months) is 11.0. Of course, this doesn't mean that my newer reader won't be able to authenticate GPO documents, but complications are sure to arise.

Other methods have been suggested that require storage on the courts' servers of key algorithms that automatically unpack encrypted code strings that authenticate any document. This method is simple and virtually free and requires that the court maintain the code files and that users have access to the court's website when they want to authenticate it. Such processes can be automated and require little work to maintain, but they do require considerable work to set up.

Whatever methods are used to authenticate judicial decisions, the value of the process is peace of mind that cases that legal researchers use are the actual, authenticate copies of the decision rendered and issued by the court. But all authentication systems have start-up and maintenance costs.

Why Authenticate? Part 2

The version of the opinion released by the court may have some form of authentication attached to it, a watermark or some other authenticating device, but, by virtue of the fact that it is derived from the court, under the signature of the judges who wrote it, and prepared for publication and distribution by the Reporter of Decisions, or the Clerk of the Court, it is *the* decision of the court. So even though judicial opinions can be authenticated, the very process by which opinions are published electronically raises the question; do judicial opinions issued by a court need any kind of additional authentication at all? When an opinion is released for publication by the court, it is immediately picked up by a number of third-party publishers, both commercial and not for profit.

It is safe to say that within hours of its release, any *published* (the modern meaning of the term, "published," has been largely obscured today and means, essentially, any opinion released as a decision on a matter before the court) opinion is available through many sources—Lexis, Westlaw, Fastcase, Legal Information Institute, etc.—each of which has an enormous interest in making sure that the version of the opinion it is distributing is accurate. Should any of these

parties, including any individual who has obtained the opinion either from the court itself or from a third-party publisher, find that the version that they are using is inaccurate or flawed in any way, they will most certainly seek to obtain the correct version and discard the erroneous one. How will they find out that their copy is flawed? Depending on the circumstance, there are numerous ways: any case verification tool, opposing parties, colleagues, secondary materials that treat the topic, etc., will reveal very quickly that the opinion being referred to is an anomaly.

Conclusion

One can argue that electronic case law is self-authenticating by virtue of the fact that it is immediately replicated in a variety of reliable channels and that an official copy is stored on a secure server at the court's headquarters. What more needs to be done? Once an opinion is released from the court via its official website in any electronic format (PDF, Word, RTF, etc.) nothing more is necessary. When we receive print copies of official reports from the courts, we do not require any special method to ensure that what we are looking at is authentic; we simply *know* that the version is official because we recognize it as such by recognizing various characteristics of the artifact before us—the binding, the source of the document, etc. We are used to trusting the particular provenance of the materials that we use every day. I suspect that the same sort of trust will develop as we move further along in the digital future.

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