Legal Issues Involved with Optical/Image Implementation

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Introduction

The law has always had problems in coming to terms with new forms of technology. Optical and Image Systems technologies are no exception. In fact, the diversity of the underlying technologies creates a number of novel problems for litigants and courts alike.

There are problems with "Discovery" and the use of computer-stored evidence in the context of litigation. Computer systems make possible a number of applications which cut across the normal procedures used by courts to establish the authenticity, reliability and, therefore, admissibility of documents. With a few notable exceptions, courts are yet to fully come to terms with this problem.

In the case of 'conventional' documents, courts have traditionally made decisions relating to their admissibility according to the subject matter of the document. While this approach has been generally followed in Australia and overseas in relation to computer-stored documents, there have also been a number of noticeable departures. There is a distinction between 'Public', 'Business' and 'Personal' records which determine the admissibility of conventional documents.

Until recently, judges have uncritically admitted computer-stored evidence. On many occasions, serious questions existed about the reliability or authenticity of the evidence admitted. Courts, no doubt with an increasing awareness of computer technology, have started to require more information as to the process by which the document was generated, including the means by which it was initially entered on to the system.

This recent change in judicial awareness has a number of serious implications for the litigant (or potential litigant) that may have many digitally-stored contentious documents. First, procedures should be implemented which evaluate the reliability of the system function and which attempt to maximise the reliability of the information being scanned and the physical security of the system. Secondly, compliance with these procedures should be regularly checked and recorded. Thirdly, where data undergoes frequent change, the procedures, both human and machine, should leave a satisfactory audit trail. These practices may be critical.

Discovery

"Discovery" is the pre-trial process in which all parties are required to disclose to each other every document in their possession or control which could have any bearing on any matter in issue in the trial. This is done by each party filing a List of Documents and permitting the other parties to inspect the originals. There is a general principle that only 'documents' can be discovered. Let me summarise the decided cases by saying that both in Australia and abroad, Courts have extended the concept of 'document' to include material upon which documentary material is electronically recorded and maintained. In short, there is now no question that it is possible to discover the existence of a 'document' stored in an electronic form.

How should discovered documents be described? To be effective, a list of documents must describe a document with sufficient particularity to enable a party to identify the document for the purposes of inspection. This raises the practical problem of how an electronic document should be described. Suppose that I engage in litigation over breach of a contractual term for which all my evidence is stored on a single WORM disk platter, and the other party requests discovery. To state that I have in my possession a "WORM disk with the label

ARGY Ltd" borders on a failure to discover, since although it properly describes the disk, it does not adequately describe the several thousand documents which are held on that disk. It is no different to stating "Box of documents labelled ARGY Ltd". The description gives no indication that the disk includes invoices, photographs of the shipped equipment, and even sound recordings of the machinery running.

On the other hand, there may well be circumstances in which it is quite acceptable to describe a document as "Optical Storage Pack 20934". It is necessary to pay careful attention to context in litigation, and the requirement that the description be adequate in the circumstances.

The Problem of Inspection & Cost

Another problem raised by optical/image systems technology is that once a document has been discovered, how can the other side inspect the document. If the document is in human readable form, then it is simply a matter of providing a location at which to inspect the document. The Courts nowadays however require the party producing electronic documents for inspection either to provide a hard copy or to provide facilities to enable the party inspecting to read the relevant documents and take notes.

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Quite often the only way of discrediting the computer evidence stored by an opponent is to challenge the process by which that evidence came into existence, and what has happened to the 'document' since that time. One particularly important element in this process is whether or not an audit trail exists, and the reliability of that trail. A related issue to that of the audit trail is the way in which the data is physically stored. It might be possible to argue that the audit trail forms part of the document or forms a separate document which, since it may lead to a chain of inquiry, is relevant. As a related argument, the physical testing of a particular system may be more efficient than having to analyse a very long audit trail in order to check the reliability of the storage system.

Evidence

A growing number of litigants find that they can reach an agreement through negotiation and without the intervention of the court. Nevertheless, a vast body of complex rules has developed for use in determining which evidence should be accepted and the weight to be attached to it.

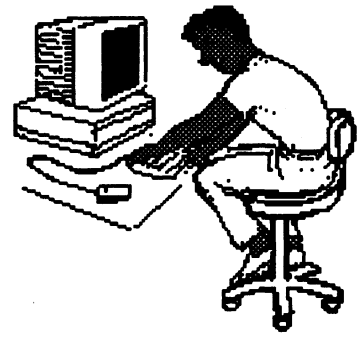
In general terms, all of these rules relate to proof of reliability and veracity of documents' contents to the extent to which this is relevant to the truth of what they purport to say. By way of example, a document may purport to state that A owes B $1,000. However, just because the document says that proves nothing. For that document to be admitted into evidence as proof of that fact it would be necessary to go into its antecedents: its author, the circumstances in which it was prepared, the time of its preparation etc. A handwritten document written and signed by A would obviously carry more weight than the same document by B.

Legislation has been introduced in many states and countries to help speed the acceptance of computer-stored or generated evidence. While the legislation has been introduced in different places to achieve similar objectives, different Australian States have approached the problem of both computer-generated/ stored evidence and reproductions in a variety of ways. These fall into two categories: those which are primarily concerned with whether computer evidence should be admissible in the first place, and those which assume its admissibility, and are therefore primarily concerned with what weight should be given to that evidence.

There has been an almost global preference for the second category, which is in keeping with the view held by a large number of judges that a determination of

weight is generally sufficient. In the presence of a jury, however, it may be more important to limit the actual evidence in the trial, since it is sometimes very tempting to give great weight to an irrelevant or doubtful document.

The Evidence (Reproductions) Act 1967 (NSW) was originally developed to cope with the problems of the admissibility of reproductions of documents made from microfilm or a similar kind of transparency, in situations where the original document had been destroyed or lost. Apart from dealing with the admissibility of reproductions of official documents, it also contains a part dealing with the reproduction of business documents. In my view the definition of 'Transparency' in the Act is too narrow to cover reproductions made from laser disks. South Australia has introduced, and New South Wales proposes to introduce, legislation to modify the 'best evidence rule' so as to allow courts to receive evidence relating to the operation of various devices and to then form a view about whether documents produced by means of such devices are generally or in particular cases to be admitted into evidence - this is plainly a sensible approach. The Federal Government before the last election announced plans to similarly amend the Evidence Act but no Bill has yet been introduced.



Update . . .

Circuit Layouts Act 1989

On 1 October, 1990 the provisions of the Circuit Layouts Act 1989 other than sections 1 and 2 of that Act were proclaimed.