

# Copyright and the Digital Economy

*Supplementary Submission by the Australian Digital Alliance and*

*Australian Libraries Copyright Committee*

*In response to*

*The Australian Law Reform Commission's Discussion Paper*

September 2013

## Summary

The ADA and ALCC welcome this opportunity to provide additional assistance to the ALRC in its *Copyright and the Digital Economy* inquiry.

In light of the questions posed at the last ALRC consultation with the libraries sector, this submission focuses on document supply ('DS') and inter-library loan ('ILL'). It provides evidence of the essential function these play, the way they currently operate and suggests a legislative format to support these services into the future.

The data provided is taken from the National Library of Australia (NLA) records, and used as an illustrative case-study. Through the user-friendly interfaces of "Copies Direct"<sup>1</sup> and "Trove"<sup>2</sup> the NLA receives the greatest number of Australian DS requests, and thus was seen as an illustrative example. As always, we are happy to source any further evidence that the Commission would find useful.

The evidence shows that libraries are very aware and respectful of copyright. From the National Library's figures, 13% of all NLA DS requests are not supplied due to copyright restrictions, and within the important subset of requests for material from the general published collection and newspapers, this number climbs to 21% of requests not supplied due to copyright.

This supplementary submission also illustrates the importance of the DS services to the creative industries, with a multitude of requests from publishers, authors and broadcasters. While in-copyright material can only currently be supplied for the purposes of research and study, this is a great help to creators researching in order to write/create new works. In our proposal for a revised s49 we suggest that DS should be expanded to other fair dealing and/or fair use purposes. This would greatly assist authors, publishers and broadcasters, who already make use of the DS infrastructure to request out of copyright material.

The submission is set out in two major sections, the first providing evidence of how DS currently operates and the second looking to the future and proposing the bones of a rewritten DS provision. The order is as follows:

### Document Supply – Current status in Australia

- **Overview**
- **NLA General Published Collection including Newspapers**
  - **Requests denied due to copyright restrictions**

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<sup>1</sup> Copies direct is an online portal where user can request materials from the NLA's collection. Materials are discoverable through Trove, Libraries Australia or the NLA catalogue and can be accessed here - <https://copiesdirect.nla.gov.au/>

<sup>2</sup> Trove is a discovery portal focussed on Australian content and linking to over 3,000,000 sources <http://trove.nla.gov.au/>

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- **Use by creative industries**
- **Pictures Collection**
  - **Overview**
  - **Use by creative industries**

## **Document Supply – Proposal for the future**

## Document Supply – Current status in Australia

### Overview

Document Supply is a key exception provided for in s49 of the *Copyright Act 1963* ('the Act') that allows libraries to provide materials (small portions of commercially available in-copyright works, or the entirety of non-commercially available works) to users for the purposes of research and study. The Library also supplies (through the Copies Direct portal but not under s49) requests for out of copyright work and requests that are accompanied by permissions granted by the rightsholders.

DS has an obvious link to the ILL provision, s50, as ILLs are often requests for the purposes of supplying a s49 DS request (the other reasons for an ILL are to include the reproduction in the collection and to supply a member of parliament). Our submission to the *Copyright and the Digital Economy* Discussion Paper illustrated in some depth the complex systems that are in place to support DS and ILL in Australia.

The following evidence is separated into two of the major areas of DS requests from the NLA collection, general published collection and pictures. The figures provided illustrate two major points;

- DS does not impinge unduly on the market for copyright works; and
- DS is an important service for those in the creative industries such as publishing, writing and the media.

### NLA General Published Collection including Newspapers 2012-2013

#### Requests denied due to copyright restrictions

Document supply requests come to the National Library through the Copies Direct portal. The Copies Direct portal explains copyright requirements in clear language <http://www.nla.gov.au/copyright-in-library-items>.

Section 49 restricts supply of copyright works by limiting the allowable portion for commercially available works, requiring permissions to be completed and only allowing supply for the purposes of research and study.

**Over the 2012-2013 financial year 13% of total collection requests received by the Library and 21% of General Published (including Newspapers) DS requests were not supplied because they didn't comply with copyright restrictions.**

- **Commercial Availability and restrictions on quantity**

There are strict restrictions (averaging at 10%, and detailed below) on the quantity of material that can be supplied if the work<sup>3</sup> can be obtained within a reasonable time at an ordinary commercial price. This includes the work being available electronically.

With the increasing capacity of internet searches and efficient distribution portals, it is becoming increasingly easy to ascertain whether a work is available at an ordinary commercial price and within a reasonable time. If it is, and the user has requested more than a 'reasonable portion' they will be directed to the commercially available source. In these cases, libraries are often acting as pointers to direct business to publishers and authors.

The current quantity limitations, that of a *reasonable portion*, are defined in s10(2) and 10(2A)

(2) Without limiting the meaning of the expression *reasonable portion* in this Act, where a literary, dramatic or musical work (other than a computer program) is contained in a published edition of that work, being an edition of not less than 10 pages, a copy of part of that work, as it appears in that edition, shall be taken to contain only a reasonable portion of that work if the pages that are copied in the edition:

- (a) do not exceed, in the aggregate, 10% of the number of pages in that edition; or
- (b) in a case where the work is divided into chapters exceed, in the aggregate, 10% of the number of pages in that edition but contain only the whole or part of a single chapter of the work.

(2A) Without limiting the meaning of the expression *reasonable portion* in this Act, if a person makes a reproduction of a part of:

- (a) a published literary work (other than a computer program or an electronic compilation, such as a database); or
- (b) a published dramatic work;

being a work that is in electronic form, the reproduction is taken to contain only a reasonable portion of the work if:

- (c) the number of words copied does not exceed, in the aggregate, 10% of the number of words in the work; or
- (d) if the work is divided into chapters--the number of words copied exceeds, in the aggregate, 10% of the number of words in the work, but the reproduction contains only the whole or part of a single chapter of the work.

There is a further restriction that two or more (or parts of two or more) articles from the same periodical cannot be supplied unless they are requested for the same research or study.

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<sup>3</sup> Not including second hand copies

- **Research or study**

Currently the work requested, whether commercially available or not, must be for the purposes of research or study. (We have recommended a change to this requirement in our proposal for a revision of s49 below). To establish this requirement a user must make a declaration<sup>4</sup> that states:

- (i) that he or she requires the reproduction for the purpose of research or study and will not use it for any other **purpose**; and
- (ii) that he or she has not previously been supplied with a reproduction of the same article or other work, or the same part of the article or other work, as the case may be, by an authorized officer of the library or archives.

- **Requests supplied and denied**

In the 2012-2013 financial year, the NLA had a supply rate of 76%, meaning 24% of requests were not supplied. **13% of those requests, or 53% of the requests not supplied, were not supplied due to copyright restrictions.**

The percentages vary depending on the type of collection resource being requested. In the table below, the DocSS<sup>5</sup>/Newspaper heading indicates requests for copies of material from general published collections or newspapers. 'Other section' requests, are for copies of material from the NLA's special collections (such as Pictures, Maps, Manuscripts and Oral History) which often follow extensive consultation with Library staff. The percentage of these works not supplied due to copyright restrictions is unsurprisingly lower, at 3.8%, as Library staff will have provided advice and assistance as part of the reference transaction which may precede a DS request. In contrast, DocSS/Newspaper requests, which are likely to be made with no prior staff consultation, were rejected 21% of the time due to copyright restrictions.

The detailed figures are as follows

<b>DocSS/Newspaper Requests</b>	<b>Number</b>	<b>Percentage of total</b>
• DocSS/Newspaper requests received	8270	100
• DocSS/Newspapers items supplied	5256	63.5

<sup>4</sup> In writing, unless they are too remote to easily make one, which in the days of electronic communications would be a very rare occurrence, see s49(2A)(iii)

<sup>5</sup> NLA Document Supply Service, so requests of the general collection, mainly books and periodicals

• <i>DocSS/Newspaper requests not supplied due to copyright</i>	1733	21
• DocSS/Newspaper items not supplied due to E-resource restriction	33	0.4
• DocSS/Newspaper items freely available not supplied	54	0.7
• DocSS/Newspaper items not supplied for other reasons ie year not held etc	1206	14.6
<b>Other area requests</b>		
• Other section requests received	7165	100
• Other section items supplied	6422	90
• <i>Other sections request not supplied due to copyright</i>	275	3.8
• Other sections request not supplied for other reasons	468	6.2
<b>Total Document Supply requests</b>		
• Total requests received – all collections	15435	100
• Total items supplied - all collections	11678	75.7
• <i>Total requests not supplied due to copyright</i>	2008	13
• Total requests not supplied for other reasons	1749	11.3

## Use by creative industries

Requests for printed collections material not supplied under s49 also come through the Copies Direct portal. For these requests the material must either be out of copyright or accompanied by permission from the rights owner. This service is heavily utilized by creators and publishers.

Unfortunately, due to commercial and privacy restrictions, we cannot make the details of individual DS requests public. We have, however, for the confidential information of ALRC staff only, attached a record of the requests accompanied by permissions received during the 2012-2013 financial year (attached for the ALRC at Appendix A "Summary 2012-2013 works Supplied from Document Supply").

The aggregated results from that report are produced below. As you can see, in the 2012-2013 financial year, creative industries made heavy use of this resource.

### Works supplied from DS by requestor 2012-2013

Requestor	Number of requests
Publisher	105
Author	106
Broadcaster	99
Commercial	31
Performances	29
Other (includes govt, museums, education)	568



## Document Supply - Pictures Collection

More than 150,000 pictures from the Pictures Collection have been digitized and are available in low-resolution quality online, through the Library portal Trove. Trove links through to both NLA collections and to other available digital collections (such as the Australian War Memorial and the National Archives).

For NLA collections, the low-resolution images are available for non-mediated use if they are out of copyright or for a person's private research and study. All requests for high resolution images, as well as requests for any other purpose than research or study, must be directed through the Copies Direct portal and handled by Library staff.

For purposes other than research or study, the user must complete an "intention to publish" form.<sup>6</sup> The Library staff match it against copyright, permissions and/or licensing information, and let the requestor know if they can use the low-resolution image/be sent a copy of the high resolution image and inform them of the correct citation in use of the work.

For works that are in copyright or not licenced to the Library with conditions that allow further publication, the user must obtain the permission of the copyright holder. The Library maintains a dedicated rights management system and can sometimes facilitate communication between the user and the copyright holder to the benefit of both parties. The work flow for this is contained in Appendix B 'Intention to publish workflow'.

### **Pictures Collection - Authors' and Publishers' use of materials**

We analysed 'the request to publish' requests that came into the NLA Pictures and Manuscripts branch for the months May-July 2013, to see what percentage of use was from creators and publishers. The figures for the last three months (below) show that the creators of content, authors and publishers, make up 60% of these uses. These users include major commercial publishers including Allen & Unwin, Oxford University Press, Wiley, Harper Collins, Macmillan Education, Hardy Grant, Penguin, Hachette and Random House; media production companies making work for channels such as the ABC, BBC and Foxtel as well as individual authors, government agencies, schools, museums and historical societies. [The complete data is listed for the confidential information of the ALRC in Appendix C 'use of artistic works from the pictures collection'.]

In the last three months Publishers made up 23% of the requests, Authors 27%, Broadcasters 10% and others the remaining 40%. However this is quite variable from month to month, for example authors' use ranges from 14% in March to 47% in July. Overall, creators and publishers accounted for 60% of the requests over the last 3 months.

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<sup>6</sup> A simple explanation of the process is here <http://www.nla.gov.au/how-do-i-declare-my-intention-to-publish> and the form can be found here <http://reftracker.nla.gov.au/ref100.aspx?key=Permissions>

### NLA Picture Orders May-July 2013

Requestor	Number of requests	Percentage of total requests
Publishers	323	23
Authors	387	27
Broadcasters	135	10
Others	566	40

## Document Supply – Proposal for the future

The current DS (s49) and ILL (s50) provisions are convoluted, complex and confusing. They are used and applied daily by people with little or no legal training, who wrestle valiantly with the 3422 words of outdated, rigid rules. However at its core document supply has these main characteristics.

- Purpose of the request
- Portion of the work
- Commercial availability
- Not being supplied by the library at a profit
- Method of supply

These are explored below, and this section ends with suggestions for the essentials of a redrafted DS provision.

- Purpose of the request

At the moment requests for in-copyright work are limited to those for a user's research and study. This restriction applies to both non-commercially available works and the small portions allowed for commercially available works. It does not, of course, stop anybody from walking into a library and accessing the entire work onsite. In this way, people who live near major libraries (for example who are lucky enough to live in Canberra) have much greater access than those who live remotely, or those who have accessibility issues.

We propose that this purpose requirement is expanded so that libraries could supply requests for any fair dealing (current or expanded)/fair use purpose. In this way a critic who wished to review an adaptation could request a copy of the out-of-print original work, or a news outlet could request a copy of an otherwise inaccessible newspaper as background for a news report.

Should fair use, or potentially revised fair dealing, be enacted it would also mean that librarians would be able to supply works in a number of sensitive, public good, circumstances. As we noted in our submission to the issues paper for this inquiry, libraries currently receive many requests for materials not otherwise available, which they cannot supply under s49.

*“A user asked for a copy of the sheet music When a boy from Alabama meets a girl from Gundagai. The words and music are by Jack O’Hagan 1898-1987 and the sheet music was published in 1942 in Melbourne by Allan’s. It is four pages long. The user listed their use as ‘research or study’ and noted that ‘it is an old Australian war song I just remember and I would like to play and sing it on my piano for my own private only enjoyment’. An online search of a few minutes found no evidence that this publication was available new.”*

It currently seems ‘unfair’ that a researcher could request a photo of the winner of the Miss Gympie 1956 competition for a study of local history, but the photographer who took the photo cannot request a copy for reminiscence, and her grandchildren cannot be supplied with the same, out of print, photo to display at her funeral.

By extending the allowable purpose, it means that people who live remotely, or with access difficulties, will be on the same playing field as those who can easily access the physical library building.

- Request form

In line with the above proposal, we would propose that users simply agree to use the material in a way that is allowed under Australian copyright law. We would be happy to work with other institutions to produce material for guidance on what this may entail, or other sensible solutions.

As in the current system, the library would discharge responsibility once it had dispatched materials in response to a request. Should that user misuse the materials in any way that would be their breach of copyright, not the library’s responsibility.

- Reasonable portion and commercial availability

While the current ‘reasonable portion’ requirements are slightly convoluted, as they are based on a more widely used definition (s10(2)) we could understand if it was decided it was most efficient to keep them. However we would suggest the removal of the anachronistic provision that requires that the work not have been requested before, which we also see serves no useful purpose in the modern age.

- Cost recovery only

Currently libraries generally charge a fee that recovers a portion of the costs of supplying a copy to users and cannot exceed the cost of providing the service. We propose no change to this.

- Method of supply

Physical supply of paper copies seems to cause little contention. We have already, at length, outlined our concerns with imposing too restrictive a delivery method for digital copies<sup>7</sup>. In summary, libraries have the capacity to provide digital copies in a non-alterable standard, as long as .pdf will suffice, but other restrictions on access are likely to impose unworkable administrative burdens on libraries. And ideally we would prefer not to have that restriction, as it hinders users and seems to offer little benefit to rightsholders.

While we understand the legitimate worries of copyright holders about piracy, considering that DS requests are either of non-commercially available material (so are not damaging markets) or of a small portion, it seems unlikely that they would be used for piracy, especially considering the more available avenues for sourcing illegitimate content. Indeed, there was no evidence we noted in the submissions to this inquiry that linked DS to systematic piracy.

Finally, with what we hope would be sensible recommendations as to digital DS, we would see no reason for retaining the dumb terminal provision, which is outdated. Further the requirement that digital copies made in order to supply DS requests be destroyed after each request serves no purpose except inefficiency, and should also be removed<sup>8</sup>.

## Ideal Provision

So, in summary, our proposed DS provision would have the following elements, simply stated.

- It will not be a breach of copyright to supply material in compliance with this section
- User agrees to use the material in a way that is allowed under Australian copyright law<sup>9</sup>
- Library may supply a reproduction of a 'reasonable portion' of the material, or for material not available within a reasonable time and at an ordinary commercial price, the whole of the material.
- While the library can charge a fee to recover some of the costs of document supply, the fee charged cannot exceed the costs of making and supplying the work.

This would be a lot clearer than the current 1623 word provision.

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<sup>7</sup> See ADA/ALCC submission to the Discussion Paper, ALRC Copyright and the Digital Economy Inquiry (2013)

<sup>8</sup> See ADA/ALCC submission to the Issues Paper, ALRC Copyright and the Digital Economy Inquiry (2013) p41

<sup>9</sup> Libraries would be happy to continue to keep these declarations on file, but have no pressing need for that to be written in as a legislative requirement

## Inter-Library Loan

Similarly to DS, we would recommend a revision of s50. We would propose the following key elements.

- It is not an infringement of copyright law to act in accordance with this section.
- A library can request material from supplying library, for purposes of inclusion in the requesting library's collection, supplying a s49 request or assisting a member of parliament
- The requesting library must agree to use the material in a way that is allowed under Australian copyright law
- The supplying library can charge a fee for cost recovery, but it cannot exceed the cost of making and supplying the copy.

## Contracting Out

Finally, we take this opportunity to emphasise again the importance of protecting ILL and DS from contracting out. Despite the lack of evidence of these public-good services impacting negatively on markets or increasing piracy, ILL and DS provisions are still routinely prohibited in contracts. We have written about this matter extensively in our previous submissions, but should the Commission require further information about this, or any matter, we will be only too happy to assist.

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