

## **EIFL Recommendations for Library-friendly Amendments April 2013**

### **Kenya Copyright Act, 2001**

#### **I. SUMMARY**

The analysis covers the following activities that are core to the provision of effective library services in the 21<sup>st</sup> century: library lending, preservation and replacement, collection development, user copies, accessible format copies, libraries supporting education, other library uses, technological protections and contractual restrictions. Some library activities may be covered by current exceptions in the 2001 Act to an extent. Nevertheless, in many cases, the provisions are very limited and ambiguous, and do not address contemporary technologies. In other words, they do not enable libraries in Kenya to function well in the digital age. In addition, they also fall short of the copyright exceptions for libraries in other countries. Recommendations for amendments are set out at the end of this document. The Recommendations are compatible with Kenya's international obligations.<sup>1</sup> As countries such as Estonia, Ireland, Poland and the UK are undertaking reviews of their IP system "to see if we can make them fit for the internet age,"<sup>2</sup> there is an opportunity for Kenya to adopt a modern, forward looking law that reflects international developments.

#### **II. FAIR DEALING**

Before proceeding into specific issues, the potential of fair dealing must be addressed. Section 26(1)(a) includes an exception for fair dealing based on UK copyright law: "the doing of any of those acts by way of fair dealing for the purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source." UK courts have described the test for fair dealing as the objective standard of whether a fair minded and honest person would have dealt with the copyright work in the

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<sup>1</sup> E.g., the Berne Convention, the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty.

<sup>2</sup> UK Prime Minister David Cameron, <http://www.ipso.gov.uk/about/press/press-release/press-release-2010/press-release-20101104.htm>

manner in which the defendant did, for the relevant purpose. A criticism of fair dealing is that the list of permitted purposes is narrow. Indeed, the purposes in the Kenyan Act arguably are narrower than in the current UK law, in that the Kenyan provision refers to “scientific research,” while the UK Act refers to “research” generally.

In contrast to the “closed list” of permitted purposes in the UK and Kenyan law, the fair use provision of the U.S. Copyright Act, 17 U.S.C. §107, contains a non-exclusive list of favored purposes, including criticism, comment, news reporting, teaching (including multiple copies or classroom use), scholarship or research. Courts thus are free to recognize additional purposes which may be fair. Additionally, the statute sets forth four factors a court must consider in determining whether the use made in any particular case is a fair use. These factors are: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work. Libraries in the United States have relied heavily on fair use to engage in activities not permitted by the library exception 17 U.S.C. § 108, which will be discussed below in more detail.<sup>3</sup>

What is important to note is the degree to which many Commonwealth countries have expanded their fair dealing provisions to allow the flexibility permitted by the U.S. fair use statute.<sup>4</sup> In Canada, much of this expansion has occurred through judicial interpretation. For example, its fair dealing provision, like the UK’s, refers to “research,” but the Canadian Supreme Court has allowed uses for research by for-profit entities, or uses by for-profit entities that enable research by consumers. The expansion has also occurred via legislation. In Canada, education was added as a permitted purpose. In Australia, parody, satire, or professional advice were added as permitted purposes. Still other countries, such as the

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<sup>3</sup> A white paper explaining in detail how U.S. libraries rely on fair use can be found at: <http://www.librarycopyrightalliance.org/bm~doc/lca-flex-library-experience-15feb13.pdf>.

<sup>4</sup> A listing of the fair use and fair dealing provisions in the copyright laws around the world can be found at: <http://infojustice.org/archives/29136>.

Bahamas, Singapore, and Malaysia, have converted the closed list of purposes into an open one by adding a few inclusive words: “a fair dealing ... for any purpose” (Singapore); “by way of fair dealing including for the purposes of...” (Malaysia); “fair dealing ... including such use ... for purposes such as ...” (Bahamas). Accordingly, the Kenyan fair dealing provision could be significantly broadened by adding one word: “the doing of any of those acts by way of fair dealing, *including* for the purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source.”

Additionally, Kenya should specify the factors a court should consider in determining whether a particular dealing is fair. These factors appear in the copyright laws of many Commonwealth countries, as well as the United States.

**Provided that in determining whether a dealing constitutes a fair dealing, the factors to be considered shall include:-**

- (i) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;**
- (ii) the nature of the copyright work;**
- (iii) the amount and substantiality of the portion used in relation to the copyright work as a whole; and**
- (iv) the effect of the dealing upon the potential market for or value of the copyright work.**

### **III. LENDING**

One of the most basic library activities is the lending of copies of books and other materials. The permissibility of lending by libraries in Kenya is unclear. Section 26(1) provides the rights holder with the right to control “the distribution to the public by way of sale, rental, lease, hire, loan, importation, or similar arrangement....” The Kenyan Copyright Act does not appear to contain an “exhaustion” provision that indicates that the distribution right in a particular copy is exhausted after

the sale of that copy. In the absence of such an exhaustion provision, the circulation of books and other materials by a library could be considered an infringement of the distribution right, unless it could be treated as a fair dealing.

Many other copyright systems contain broad exhaustion provisions. Article 6(2) of the WIPO Copyright Treaty (WCT) states that “Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of [the making available right] applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.” Consistent with this Article of the WCT, Section 109(a) of the U.S. Copyright Act provides that notwithstanding the distribution right, “the owner of a particular copy or phonorecord lawfully made under this title ... is entitled, without the authority of the copyright owner, to sell or otherwise dispose of that copy or phonorecord.” Similarly, the European Copyright Code developed by the Wittem Project<sup>5</sup> provides in Article 4.3 that “the right of distribution does not apply to the distribution of the original or any copy that has been put on the market by the holder of the copyright or with his consent.” The EIFL Draft Law on Copyright provides that the distribution right applies only to “the original or a copy of the work that has not already been subject to a sale or other transfer of ownership authorized by the owner of copyright.”<sup>6</sup> Thus, the following section 26(7) could be added to the Kenyan copyright law: **“Notwithstanding Section 26(1), the owner of the original or any copy of the work that has been made with the authorization of the rights holder or the law is entitled to sell or otherwise dispose of that original or copy.”**

Alternatively, a library specific exception could be created. There are two drawbacks to a library specific distribution. First, a broader exception would garnish more support among a broad cross-section of Kenyan consumers and retailers. Second, a library specific exception could easily be converted during the legislative process into a “public lending right,” *i.e.*, the libraries would be

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<sup>5</sup> The Wittem Project was an effort by European copyright scholars “to promote transparency and consistency in European copyright law.” The scholars involved believed “that a European Copyright Code drafted by legal scholars might serve as a model or reference tool for future harmonization or unification of copyright at the European level.”

<sup>6</sup> In Canada, the distribution right is narrower to begin with; it provides the copyright owners with the exclusive right “to sell or otherwise transfer ownership of the tangible object.” Canadian Copyright Act, Section 3(1)(j). This narrower right would not interfere with library

allowed to lend works only if they compensated the rights holder. Many European countries, for example, have such a provision.<sup>7</sup> For these reasons, a general exhaustion provision along the lines described above would be preferable.

#### **IV. PRESERVATION AND REPLACEMENT**

Another critical library function is preservation. There are at least three different types of preservation that require the making of reproductions: 1) preservation or replacement of damaged, deteriorating, or lost copies; 2) “preemptive” preservation of materials before they deteriorate; and 3) preservation of transient materials such as websites. The permissibility of libraries in Kenya making these preservation copies turns on the interpretation of the library exception in section 26(1)(h). Your memorandum indicates that there is disagreement over the meaning of the term “public libraries.” Additionally, the meaning of the phrase “as may be prescribed” is ambiguous. Who is to prescribe the institutions under section 26(1)(h)? By what criteria?

One possible approach for making section 26(1)(h) more useful is to amend it to read as follows: **“the reproduction of a work by or under the direction or control of the Government, or by noncommercial libraries, archives, documentation centers and scientific institutions, where the reproduction is in the public interest and no profit is derived therefrom.”**<sup>8</sup>

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lending, which does not involve a transfer of ownership. In any event, this right to sell is exhausted after the first sale of the object.

<sup>7</sup> IFLA believes that the “Lending right should be rejected in the greater public interest in situations where a country can not afford to fund PLR without diverting resources earmarked to fund more fundamental public services. In particular, lending right should not be established in countries that are not considered high or middle income by the World Bank.” IFLA Position on Public Lending Right, Recommendation 2 Developing Countries <http://www.ifla.org/publications/the-ifla-position-on-public-lending-right>.

<sup>8</sup> This paper does not offer a definition of “libraries” because a definition is likely to be limiting. (The U.S. Copyright Act also does not define “library” or “archives.”) In the course of a legislative process, it may be necessary to propose a definition of these entities. In this case, it might be useful to reference the definition in the Treaty Proposal on Limitations and Exceptions for Libraries and Archives drafted by IFLA, EIFL, ICA and Innovarte at [http://www.eifl.net/system/files/201209/tlib\\_v4.3\\_050712.pdf](http://www.eifl.net/system/files/201209/tlib_v4.3_050712.pdf):

**“Library”** means an organisation that systematically collects, preserves, and facilitates access to published and unpublished information resources for non-commercial purposes. Libraries adhere to professional standards that may be subject to review by professional societies. A library may be

It may also be helpful to provide additional guidance on the kinds of preservation copies that would be “in the public interest.” Section 108(b) of the U.S. Copyright Act, for example, permits a library to make three copies on an unpublished work “for purposes of preservation and security or deposit for research use in another library.” Section 108(c) permits a library or archives to make three copies of a published work for purposes of replacement or format shifting “if the existing format in which the work is stored has become obsolete.” The preservation and format shifting can be performed on a systematic basis, and not just in isolated cases.<sup>9</sup>

The Canadian Copyright Act likewise allows all three forms of preservation. Section 30.1 permits a library, archive, or museum to make, “for the maintenance or management of its permanent collection,” a copy of published or unpublished works in its collection if “the original is rare or unpublished and is (i) deteriorating, damaged or lost, or (ii) at risk of deterioration or becoming damaged or lost.” Additionally, a library can make a copy in an alternative format of the library “considers that the original is currently in a format that is obsolete or is becoming obsolete.” Further, a library can make copies for the purpose of internal record keeping, cataloguing, or restoration. Website archiving likely would be permitted under Canada’s fair dealing provision, Section 29, which has been interpreted as expansively as fair use in the United States.<sup>10</sup> Moreover, Section 30.5 grants the national library, Library and Archives Canada, the right to archive a representative sample of Canadian websites.

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formed as a standalone entity consistent with domestic law or common practice, or it may form part of a larger organisation, serving the general interests of the public and the needs of the organisation.

<sup>9</sup> Fair use supplements these specific exceptions. A court in *Authors Guild v. HathiTrust* recently held that the fair use doctrine allowed a consortium of libraries to make digital copies of millions of published books for preemptive preservation purposes. Fair use is also helpful for the archiving of websites. Large amounts of culturally valuable material are born digital and appear only online. Unless libraries can harvest and store these materials, they could be lost to posterity. Libraries in the United States routinely engage in website archiving, treating it as a fair use.

<sup>10</sup> Section 29 of the Canadian Copyright Act provides: “Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright.” Most Commonwealth countries have an open-ended fair dealing provision, but the permitted

The Wittem European Copyright Code permits “use for the purpose of non-commercial archiving by publicly accessible libraries, educational establishments or museums, or archives,” to the extent justified by the purpose of the use. This appears to cover all three forms of preservation discussed above.

The current UK preservation exception is narrower. It allows libraries and archives to make a copy of a literary, dramatic, or musical work in its permanent collection for preservation purposes if it is not reasonably practicable to purchase a copy of the item in question to fulfill the purpose. Based on recommendations in a review by Professor Ian Hargreaves, the UK government proposed extending that exception to all classes of works (i.e., artistic works, sound recordings, and films) and to museums and galleries. Additionally, the work could be copied as many times as necessary for it to be preserved, and the exception could not be undermined by restrictive contract terms.<sup>11</sup> Libraries, archives, and museums would be allowed to provide access to these digitally-preserved materials on the premises by electronic means at dedicated terminals for research and private study. This proposal has not yet been adopted.

The revised section 26(1)(h) should be followed by the following sentence: **“Provided that reproduction in the public interest includes: a) the making of a copy of a work, including in digital format, for the purpose of preservation or replacement of a copy in its collection or that of another library.”**<sup>12</sup>

## V. COLLECTION DEVELOPMENT

Kenyan libraries may seek to purchase books and other materials in other countries either because they are not available for sale in Kenya or because they are much more expensive in Kenya than elsewhere. Section 35(1) appears to provide that the importation of noninfringing copies is not an infringement of copyright, but section 35(2) could prevent the importation of a noninfringing copy covered by performance rights, e.g., a sound recording.

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purpose varies from country to country. Fair use in the U.S. evolved from the fair dealing doctrine developed by British courts.

<sup>11</sup> Modernising Copyright: A modern, robust and flexible framework at 44-45 (2011), available at <http://www.ipo.gov.uk/response-2011-copyright-final.pdf>.

There is great variety in the scope of the importation right in different copyright laws. In some countries, countries, such as Singapore, the importation right applies only to piratical copies. Thus, the importation right is exhausted after the purchase of a lawful copy anywhere in the world (known as international exhaustion). The Supreme Court of the United States has ruled that the importation right is subject to international exhaustion.<sup>13</sup> In the European Union, the general rule is that exhaustion occurs on a regional basis, i.e., only with respect to copies purchased within the EU. Thus, a person in France can import a lawful copy from Germany, but not the United States. However, libraries are permitted to import books for their own use, such as lending, but they may not re-sell them. Still other countries do not permit any importation without the authority of the copyright owner (known as national exhaustion). It is recommended that the international exhaustion rule reflected in section 35(2) be adopted in section 35(2). This would permit libraries to purchase copies abroad, and to allow them to accept donated or exchanged works materials originating from outside the territory of their location. Accordingly, section 35(2) should read: **“imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.”**

Sometimes a Kenyan library might want to copy a work that is in another library’s collection, but not its own, for the purpose of developing its collection. This could be viewed as a form of preservation if the work in question is rare. But if the work is not rare, and the library’s motivation for copying the work really is just to make the work available for its users, it might not fall within the preservation exception suggested above.

Section 108(b) of the U.S. Copyright Act allows the reproduction of three copies of an unpublished work for “deposit for research use” in another library. Fair use might allow the reproduction of published works for a similar purpose if the book was out-of-print, such that the reproduction did not harm the market for the work. Section 30.1(1)(a) of the Canadian Copyright Act allows the copying of a work for another library of the original is rare or unpublished. Accordingly, the following should be added as an example of a reproduction in the public interest under 26(1)(h):

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<sup>12</sup> All amendments need to be drafted broadly enough to provide exceptions to all exclusive rights under copyright and related rights.



**“(b) the making of a copy of a work, including in digital format, for deposit for research use in another library, if an unused copy cannot be obtained for a fair price.”**

## **VI. USER COPIES**

Kenyan libraries may want to make copies to provide to their own users or to the users of other library. Such activity might not be allowed under the existing fair dealing and library exceptions. Section 108(d) of the U.S. Copyright Act allows a library to make and provide to a user a copy of an article or contribution to a collection or periodical issue, or a “small part” or another work, if the library has no notice that the user will use the copy for a purpose other than private study, scholarship, and research. Furthermore, Section 108(e) of the U.S. Copyright Act allows a library to make and provide to a user a copy “of an entire work, or a substantial part of it,” if a copy of the work “cannot be obtained at a fair price.”

Furthermore, a Kenyan library may wish to make copying equipment, such as a photocopier or scanner, available to users so that they could make their own copies. It is unclear whether the making of the copy might qualify as a “private copy” under the fair dealing exception, and what liability the library may have for the making of such a copy. Section 108(f)(1) of the U.S. Copyright Act limits the liability of library or its employees for “the unsupervised use of reproducing equipment located on its premises: Provided That such equipment displays a notice that the making of a copy be subject to the copyright law.” Section 108(f)(2) further clarifies that the user may be liable for infringement for copies he makes with the library’s equipment, to the extent that the use exceeds fair use under Section 107.

Section 30.2 of the Canadian Copyright Act allows a library to make a copy of an article from a scholarly, scientific, or technical periodical for a user for the purpose of “research or private study.” Additionally, a library can make for a user a copy of an article from a newspaper that was published more than a year before the copy was made. Further, the Supreme Court of Canada found the Section 29 fair dealing provision permitted a law library to provide copies of articles and legal materials to its users.

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<sup>13</sup> *Kirtsaeng v. John Wiley & Sons*, \_\_U.S.\_\_ (2013).

Kenyan libraries and their users should be no worse off than U.S. and Canadian libraries and their users. Thus, the following should be added as an example of a reproduction in the public interest under 26(1)(h): **“(c) making, including in digital format:**

**i) a copy of an article, or a pictorial or graphic work, or a small part of any other work, if the library has no notice that the user will use the copy for a purpose other than private study, criticism, comment, news reporting, teaching, scholarship, and research;<sup>14</sup> or**

**ii) a copy of an entire work, or a substantial part of it, if the library has no notice that the user will use the copy for a purpose other than private study, criticism, comment, news reporting, teaching, scholarship, and research, and a copy of the work cannot be obtained at a fair price.”**

Additionally, the following provision should be included in section 26: **“A library or archives, or its employees, shall not be liable for the unsupervised use of reproducing equipment located on its premises. It is not infringement for the user of such equipment to make:**

**1) a copy of an article, or a pictorial or graphic work, or a small part of any other work for private study, criticism, comment, news reporting, teaching, scholarship, or research; or**

**2) a copy of an entire work, or a substantial part of it, for private study, criticism, comment, news reporting, teaching, scholarship, or research, if a copy of the work cannot be obtained at a fair price.”**

## **VII. ACCESSIBLE FORMAT COPIES**

Kenyan libraries want to convert materials to formats accessible to people with disabilities. The relevant exception in the U.S. Copyright Act, section 121, allows “authorized entities” to reproduce or distribute copies in “specialized formats” exclusively for use by “blind or other persons with disabilities.” Section 121 provides specific definitions for the terms “authorized entity,” “specialized format,” and “blind or other persons with disabilities.” Additionally, the court in *Authors Guild v. HathiTrust* recently held that the fair use doctrine allowed a consortium of libraries to make digital copies of millions of published books available to print disabled students.

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<sup>14</sup> This list of permitted purposes could be shorter if a general fair use provision is also adopted.

The European Copyright Code permits “use for the benefit of persons with a disability, which is directly related to the disability and of a non-commercial nature,” to the extent justified by the purpose of the use. The EIFL Draft Law on Copyright states that “it shall be permitted without the authorization of the author or other owner of the copyright to make an accessible format of a work for the benefit of a person with a disability by any means...”<sup>15</sup>

The following language should be added to section 26: **“It is not infringement for a nonprofit organization or a governmental agency that provides services to persons with visual or hearing impairments, including a library, or a person acting under its authority, to make or import copies in formats accessible to such persons, and to provide these copies to such persons by any means.”**

## VIII. SUPPORTING EDUCATION

All libraries, but particularly libraries affiliated with educational institutions, engage in a variety of activities that support education. The library might: assist instructors in identifying and copying newspaper articles covering current events to hand out in a classroom; provide “course reserves,” where the library copies articles or book chapters and “reserves” them for students enrolled in a class; or screen films contained in the library’s collection to students enrolled in a class. Digital technology simply expands the range of support libraries can provide instructors and students. The library might maintain an electronic course reserve system; stream films to students; or assist the student in the development of a multimedia project that involves the remixing of existing materials.

The existing exceptions in the Kenyan copyright law do not allow libraries to provide robust support to education. Section 26(1)(d) allows “the inclusion in a collection of literary or musical works of not more than two short passages from the work in question” if the collection is designed by for use an educational institution. Section 26(1)(e) allows the broadcasting of a work for systematic instructional activities. Section 26(1)(f) permits the reproduction of that broadcast for use in that educational institution.

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<sup>15</sup> The World Intellectual Property Organization currently is in the process of developing a treaty on copyright exceptions and limitations for persons with print disabilities. In June 2013, the World Intellectual Property Organization (WIPO) will convene a Diplomatic Conference in Marrakesh to conclude this treaty. <http://www.wipo.int/dc2013/en/>.

In the U.S., there are two narrow exceptions directly aimed at educational activities: Section 110(1), which allows the performance and display of works in classrooms; and Section 110(2), which permits the performance of parts of works in distance education. Far more important is the fair use doctrine. One of the favored purposes of fair use specifically identified in Section 107 is “teaching (including multiple copies for classroom use),” in addition to scholarship, research, criticism, and comment, which all touch on education. Moreover, the first fair use factor inquires whether the use is for “nonprofit educational purposes.” The court in *Cambridge v. Becker* recently concluded that the vast majority of the excerpts included in Georgia State University’s electronic course reserve system were fair uses. In *Authors Guild v. HathiTrust*, discussed above, the court found that fair use allowed a library consortium to create an electronic database of millions of books for the purpose of indexing and researching the information contained in the books. In *AIME v. UCLA*, a court found that fair use allowed the copying incidental to the streaming of films assigned to students as part of their coursework. Also, in *CCH Canada v. Law Society of Upper Canada*, the Canadian Supreme Court ruled that the Section 29 fair dealing provision permitted reproduction by teachers for classroom use.

Furthermore, the Association of Research Libraries (ARL) has developed a *Code of Best Practices in Fair Use for Academic and Research Libraries*. The Code identifies principles for how fair use should be applied to eight sets of common current practices for the use of copyrighted materials in and around academic and research libraries. The practices include: supporting teaching and learning with access to library materials via digital technologies; maintaining the integrity of works deposited in institutional repositories; and creating databases to facilitate non consumptive research uses (including search).<sup>16</sup>

It is impossible to draft a specific copyright exception that would cover the diversity of current and future needs of educational institutions and the libraries that support them. Broadening fair dealing in the manner recommended above would be the best means of achieving this objective. In

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<sup>16</sup> Other common practices identified in the Code relate to some of the activities discussed in previous sections of this paper: digitizing to preserve at-risk items; reproducing material for use by disabled students, faculty, staff, and other appropriate users; and collecting material posted on the World Wide Web and making it available.

addition to the three expanded fair dealing examples cited above, the following countries have open-ended fair dealing or fair use provisions: Korea, Israel, Taiwan, Hong Kong, the Philippines, Liberia, and Sri Lanka.

## **IX. OTHER LIBRARY USES**

Broad fair dealing has the benefit of being sufficiently open-ended to permit other uses libraries may seek to make. The ARL Code, for example, addresses using selections from collection materials to publicize a library's activities, or to create physical and virtual exhibitions. Further, the ARL Code discusses the employment of fair use to enable the creation of digital collections of archival and special collections materials. In this manner, fair use/broad fair dealing can provide a practical solution to the orphan works problem. It is often difficult, if not impossible, to identify or locate the copyright owner of materials in archives and special collections. This material can be of great cultural and historic value, but of little economic value. Fair use/broad fair dealing could allow a library to digitize and make available the presumptively orphaned material in archives and special collections.

To be sure, a degree of uncertainty accompanies the flexibility of fair use. Until a court rules on a particular use, one does not know for sure that the use is permissible. For this reason, the best approach is a combination of specific, clear exceptions for mission critical activities libraries now perform, and broad fair dealing for activities that may now be harder to define in categorical terms or that may not yet exist.

With respect to orphan works in particular, it may be worth considering the approach adopted last year in the EU Directive on Orphan Works (2012).<sup>17</sup> The Directive requires Member States to establish an exception to the rights of reproduction and making available for certain permitted uses of orphan works. It applies to “libraries, educational establishments or museums, archives, film or audio heritage institutions and public service broadcasting organizations” that are located in Member States and that have public service missions. However, the Directive contains several drawbacks. It excludes photographs unless embedded in other works, and requires a diligent search for the copyright owner. The Directive calls for a single registry to maintain data on all works deemed orphan. A rights holder

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<sup>17</sup> EIFL plans to issue a guide on best implementation of the Orphan Works Directive for those countries affected by it.

who later resurfaces may reclaim ownership of a work once deemed orphan and claim fair compensation for the use of the work as provided by individual Member States' laws.

The greatest drawback to the EU approach is the cost of performing a diligent search for the copyright owner. While a library may be able to afford such a search for the owners of individual works, it could not afford the search for thousands of owners in mass digitization project. Fair use, on the other hand, would not involve the cost of the search, but might provide the library with less certainty concerning the permissibility of its actions. The following orphan works limitation could be considered: **“It is not infringement for a library, archives, or museum to use a work after conducting a diligent, but unsuccessful, search for the owner of the work’s copyright. If the copyright owner claims the work, the library may continue to use the work only if it pay the copyright owner fair compensation.”**

## **X. TECHNOLOGICAL PROTECTIONS AND CONTRACTUAL RESTRICTIONS**

Even if the Kenyan copyright law is amended to include appropriate exceptions to infringement liability, a right holder can unilaterally undo the exceptions by licensing the work to a library subject to contractual use restrictions. Moreover, the right holder can place technological protections on digital copies. Section 35(3)(a) prohibits the circumvention of an effective technological measure designed to protect works.

Article 6.4 of the European Union’s Information Society Directive requires member states to take appropriate measures to ensure that rights holders provide the beneficiaries of exceptions the means of benefiting from them, notwithstanding the prohibition on circumvention. *See* also Article 5.8 of the European Copyright Code. Furthermore, the EU Software Directive prohibits enforcement of contractual restrictions on the exceptions provided under the Directive. And the UK government proposal to expand the library preservation exception provides that the exception could not be undermined by restrictive contract terms. Accordingly, the following should be included in section 26: **“A library, archives, or museum, or a person acting under its authority, shall have the right to circumvent a technological protection measure, and to import or manufacture a device needed to engage in such circumvention, for the purpose of engaging in a lawful use of a work,**

**including the uses specified in this section. A term of a contract that prohibits a library from engaging in an activity permitted under this section shall not be enforceable.”**

## **XI. RECOMMENDATIONS**

The following amendments to the Kenya Copyright Act of 2001 should be adopted:

### **26(1)**

**(a) the doing of any of those acts by way of fair dealing, including for the purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source;**

**Provided that in determining whether a dealing constitutes a fair dealing, the factors to be considered shall include:-**

**(i) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;**

**(ii) the nature of the copyright work;**

**(iii) the amount and substantiality of the portion used in relation to the copyright work as a whole; and**

**(iv) the effect of the dealing upon the potential market for or value of the copyright work.**

**(h) the reproduction of a work by or under the direction or control of the Government, or by noncommercial libraries, archives, documentation centers and scientific institutions, where the reproduction is in the public interest and no profit is derived therefrom;**

**Provided that reproductions in the public interest include:**

**a) the making of a copy of a work, including in digital format, for the purpose of preservation or replacement of a copy in its collection or that of another library;**

**b) the making of a copy of a work, including in digital format, for deposit for research use in another library, if an unused copy cannot be obtained for a fair price;**

**c) the making, including in digital format:**

- i) a copy of an article, or a pictorial or graphic work, or a small part of any other work, if the library has no notice that the user will use the copy for a purpose other than private study, criticism, comment, news reporting, teaching, scholarship, and research; or**
- ii) a copy of an entire work, or a substantial part of it, if the library has no notice that the user will use the copy for a purpose other than private study, criticism, comment, news reporting, teaching, scholarship, and research, and a copy of the work cannot be obtained at a fair price.**

**26(7) Notwithstanding Section 26(1), the owner of the original or any copy of the work that has been made with the authorization of the rights holder or the law is entitled to sell or otherwise dispose of that original or copy.**

**26(8) A library or its employees shall not be liable for the unsupervised use of reproducing equipment located on its premises. It is not infringement for the user of such equipment to make:**

- a) a copy of an article, or a pictorial or graphic work, or a small part of any other work for private study, criticism, comment, news reporting, teaching, scholarship, or research; or**
- b) a copy of an entire work, or a substantial part of it, for private study, criticism, comment, news reporting, teaching, scholarship, or research, if a copy of the work cannot be obtained at a fair price.**

**26(9) It is not infringement for a nonprofit organization or a governmental agency that provides services to persons with visual or hearing impairments, including a library, or a person acting under its authority, to make or import copies in formats accessible to such persons, and to provide these copies to such persons by any means.**

**26(10) It is not infringement for a library to use a work after conducting a diligent, but unsuccessful, search for the owner of the work's copyright. If the copyright owner claims the work, the library may continue to use the work only if it pay the copyright owner fair compensation.**

**26(11) A library or a person acting under its authority shall have the right to circumvent a technological protection measure, and to import or manufacture a device needed to engage in**



**such circumvention, for the purpose of engaging in a lawful use of a work, including the uses specified in this section. A term of a contract that prohibits a library from engaging in an activity permitted under this section shall not be enforceable.**

**35(2)**

**(b) imports, or causes to be imported, otherwise than for his private and domestic use, an article which he knows to be an infringing copy.**