



Mr George Nyakweba, Ag Executive Director
Kenya Copyright Board (KECOBO)
SHA Building, 5th Floor
Ragati Rd, Upper Hill,
Nairobi, Kenya
By email: <feedback@copyright.go.ke>

March 31, 2026

Subject: Invitation for public comment - Proposed Copyright and Related Rights Bill, 2026

Dear Mr. Nyakweba,

Electronic Information for Libraries (EIFL) and the Geneva Centre on Knowledge Governance appreciate the opportunity to comment on the Copyright and Related Rights Bill, 2026.

In Kenya, EIFL partners with the Kenya Libraries and Information Services Consortium (KLISC), a membership organization of 153 university, college and polytechnic libraries, public and special libraries, and the National Library. The Geneva Centre on Knowledge Governance advises diplomatic missions in Geneva on international copyright negotiations, and has held several workshops with the African Group, including delegates from Kenya.

EIFL has a long history of engagement with Kenya's copyright laws, including commenting on ISP liability proposals (2015), the draft IP Bill (2020), the draft policy framework for the regulation of CMOs (2021), and most recently the proposed Copyright and Related Rights Bill (2025). In 2023, we co-launched in Nairobi the Kenyan edition of 'Getting Started. Implementing the Marrakesh Treaty for persons with print disabilities' with KECOBO, Bookshare Africa and KLISC.

The provisions of the 2026 Bill relating to exceptions and limitations are significantly different from those in the 2025 Bill, making succinct comments difficult. In certain respects, the 2026 Bill is an improvement on the 2025 Bill from the perspective of research, education, and cultural heritage institutions, but in other respects some of the amendments will have a negative impact. For these amendments, the provisions in the previous draft should in our view be reinstated. In our comments below, we will start with the positive aspects before discussing the provisions that could be improved.

We trust that our comments and recommendations are useful. We would be happy to meet with KECOBO to discuss our concerns in more detail.

Respectfully,

Teresa Hackett

Teresa Hackett
Copyright and Libraries Programme Manager
Electronic Information for Libraries (EIFL)
Email: teresa.hackett@eifl.net

Sean Flynn

Sean Flynn
Director
Geneva Centre on Knowledge Governance
Email: sean.flynn@graduateinstitute.ch

EIFL (Electronic Information for Libraries) works with libraries to enable access to knowledge in developing and transition economy countries in Africa, Asia Pacific, Europe and Latin America. The EIFL Copyright and Libraries programme advocates for a fair and balanced copyright system, and supports librarians to become advocates for access to knowledge. In Kenya, EIFL partners with the Kenya Libraries and Information Services Consortium (KLISC). More information: www.eifl.net

The **Geneva Centre on Knowledge Governance** conducts [research](#) and provides [technical assistance](#) and [teaching](#) from offices in the heart of International Geneva. Our work promotes information justice and knowledge equity within and between countries. The Centre coordinates a network of scholars and research institutes around the world and we provide support to government delegations and non-governmental organisations. More information: <https://knowledgegov.org/>

Comments and Recommendations

Fair dealing and text and data analysis simplified. The provisions relating to fair dealing in the 2026 Bill are simpler and more direct than those in the 2025 Bill. The 2026 Bill accomplishes this simplification by consolidating the acceptable purposes for fair dealing in new subsection 29(2); including conditions on the exercise of fair dealing in subsections 29(1), 29(4), and 29(6); and adding four factors for determining fair dealing in subsection 29(5). This simplification of fair dealing should make it easier for courts and users to apply.

Likewise, section 34 of the 2026 Bill concerning text and data analysis is more straightforward than section 40 of the 2025 Bill, and will hasten the adoption of this technology in Kenya for scientific and research uses.

Purposes of fair dealing have been limited. The 2025 Bill contained an unambiguously open fair dealing provision. Section 36 stated that “the exclusive rights conferred by copyright shall not extend control over uses such as ... fair dealing for purposes including research, private use, criticism, review, commentary, education, teaching, scholarship, facilitating access to works for persons with disabilities or the reporting of current events.” This structure made it clear that the fair dealing privilege could apply for purposes other than those enumerated.

By contrast, subsection 29(2) of the 2026 Bill provides:

“The following constitute fair dealing: (a) research or private study; (b) criticism, review, or short quotation; (c) reporting current events; (d) parody, caricature, pastiche, or satire; (e) illustration for educational instruction.”

Conceivably other activities might also constitute fair dealing, to the extent they satisfy the factors set forth in subsection 29(5). However, the structure of subsection 29(2) could be interpreted as creating a closed list limited to the enumerated purposes. If the 2026 Bill is intended to create an open fair dealing provision, subsection 29(2) should be amended to read: “Activities such as the following constitute fair dealing....” Alternatively, Subsection 29(5) could be amended to read, “In determining whether activities other than those in subsection 29(2) constitute fair dealing, a court shall consider....”

As we have previously communicated to KECOBO, an open fair dealing provision would future-proof the Kenyan Copyright Act by building in the flexibility necessary to accommodate technological change. Copyright is an important component in Kenya's regulatory framework advancing policies on science, research and innovation, and this flexibility ensures that the law is sufficiently agile and responsive to emerging technologies. By creating the necessary linkages, it also helps to achieve policy coherence and meaningful outcomes in research-based innovations¹. Several other countries have already made this policy choice. Nigeria's 2022 Copyright Act amended its fair dealing provision to make it more flexible, as have numerous other former British territories, including Singapore, Malaysia and Israel.

¹ www.nacosti.go.ke/2026/03/20/science-and-innovation-take-centre-stage-as-kenya-launches-new-blueprint/

Insertion of Three-Step Test. New subsection 28(2) provides that “Exceptions and limitations shall be applied in a manner that— (a) does not conflict with the normal exploitation of the work; [and] (b) does not unreasonably prejudice the legitimate interests of the rights holder....” This language (which comes directly from the three-step test in Article 9(2) of the Berne Convention) is properly viewed as a directive for legislatures to employ when they are formulating exceptions, rather than as a standard to be applied when a particular exception is exercised in a specific case to a given author, work, and user. How is an individual in Kenya expected to determine whether his exercise of a specific exception conflicts with the normal exercise of the work or unreasonably prejudices the legitimate interests of the rights owner? These are policy matters for a legislature to determine. Including this language in subsection 28(2) introduces a level of uncertainty that will discourage the use of the exceptions contained in Part IV. We are aware that some countries include the language of the three-step test in their national copyright laws, but we believe this is an unfortunate practice encouraged by certain interest groups. Accordingly, subsections 28(2)(a) and (b) should be deleted.

Deletion of contract override (that safeguards exceptions from contract terms). Subsection 35(4) of the 2025 Bill provided that “to the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.” We applauded the inclusion of this provision in the 2025, while proposing replacement of the word “section” with “part” to clarify the provisions scope.

Unfortunately, all of section 35 has been removed from the 2026 Bill, including most notably the safeguards for statutory exceptions from terms in contracts. An increasing share of content is distributed in digital formats (subject to licences), rather than in physical formats (subject only to copyright law). These licences often contain terms which purport to limit copyright exceptions granted by the legislature. We note that contract override prevention clauses have been retained in the 2026 Bill for certain exceptions: in sections 30 (private and personal use), 31 (education use), and 36 (computer programs), but we believe that all the exceptions are important and should be protected. At the very least, such clauses should be added for section 32 (libraries), and section 33 (people with disabilities). We note that the EU Marrakesh Directive (2017) renders void contract terms inconsistent with the uses permitted by the Directive, as does Art. 7 of the Directive on Copyright in the Digital Single Market (2019) with respect to exceptions for the purpose of scientific research (Art. 3), cross border education activities (Art. 5), and making preservation copies by cultural heritage institutions (Art. 6).

Deletion of exception for temporary copies. Section 37 of the 2025 Bill allowed the making of transient or incidental copies which are an essential part of the technological process and of no independent economic significance, such as for enabling the transmission of a work in a network. This exception, which bore similarities to Article 5(1) of the EU Information Society Directive, appears to have been removed from the 2026 Bill. Because the making of temporary copies are inevitable incidents of the use of digital technologies, it is a common sense measure that should be permitted.

Introduction of a commercial availability test for the making of accessible format copies.

The provision domesticating the Marrakesh Treaty for persons with print disabilities has been amended in section 33(1)(c) of the 2026 Bill by making it applicable only when “the work is not commercially available in an accessible format at a reasonable price.” This provision is not required by the Marrakesh Treaty and we urge KECOBO to delete 33(1)(c).

Libraries and other entities that provide services to people with disabilities strongly oppose the introduction of a commercial availability test. As a practical matter it would be difficult, or in some cases impossible, to determine whether a particular title is available in the appropriate accessible format on reasonable terms at any given time, especially in cross-border situations. Many libraries simply do not have the resources to undertake checks on a case-by-case basis, and as a result will decide it is too burdensome and legally risky to offer the service. Further, most published works are not available commercially in accessible formats (hence the need for a treaty). Where an item is readily available, a library will usually opt to purchase it as the making of an accessible format copy is a resource-intensive activity.

A number of prominent analysts have urged countries to avoid adding a commercial availability test to their implementation of the Marrakesh Treaty. The ARIPO Guidelines for the domestication of the Marrakesh Treaty in Africa state,

“In view of diverse socio-economic and cultural situations prevailing in developing countries, and in most ARIPO Member States, it may be difficult for authorised entities or beneficiary persons and persons acting on their behalf to ascertain whether or not accessible format copies are obtainable commercially and reasonably in the market”².

The World Blind Union (WBU) Guide to the Marrakesh Treaty states,

“Although the MT permits ratifying countries to adopt a commercial availability requirement, doing so increases the challenges for and burdens on print-disabled individuals. ...

“Such a restriction would be fundamentally inconsistent with the MT’s overarching goal of ensuring that individuals with print disabilities have an equal opportunity to enjoy covered works on the same terms as sighted persons....The lack of clarity about what constitutes commercial availability would also create significant legal risks for authorized entities and beneficiaries that could deter the effective exercise of their rights under the Treaty”.³

² Available at: https://www.aripo.org/storage/copyright-publication/1687439173_ARIPO%20Guidelines%20for%20the%20Domestication%20of%20the%20%20Marrakesh%20Treaty.pdf

³ See p. 119-123 for a discussion on commercial availability
Available at: https://ipo.gov.tt/downloads/Relevant_Studies/wbc_guide_mt.pdf

Jim Fruchterman, Founder of Bookshare, the world’s largest accessible online library for people with print disabilities, has stated that they will not supply countries with a commercial availability requirement:

“The diversion of limited resources available for accessibility work to commercial availability research is, from our point of view, an unacceptable waste of philanthropic and public resources. Therefore we won’t provide Bookshare content under the Marrakesh Treaty to countries with a commercial availability test. Nor will we offer the Bookshare technology platform for domestic accessible library services in such countries.”⁴

We urge Kenya to delete the commercial availability requirement in 33(1)(c).

END

⁴ EIFL calls on Malawi: embrace spirit of Marrakesh - EIFL, AfLIA and IFLA call for the removal of a commercial availability test on the making of accessible format copies in Malawi, <https://www.eifl.net/news/eifl-calls-malawi-embrace-spirit-marrakesh>