

What can libraries in Malawi do under the Copyright Act (2016)?

COMMENTARY AND FACTUAL GUIDE

[What can libraries in Malawi do under the Copyright Act \(2016\)?](#) is in two parts.

[Part 1](#) is a brief commentary on the Copyright Act No. 26 of 2016¹ and its key provisions for libraries.

[Part 2](#) is a factual guide that unpacks the sections relating to libraries and their services. It aims to increase understanding of what library activities may, or may not, be permitted under the new law. Note that secondary legislation (regulations) implementing certain provisions in the copyright law have yet to be enacted, and may alter the analysis accordingly.

The Commentary and Factual Guide should be read together with two related documents: [Libraries and the copyright act of Malawi \(2016\)](#), an EIFL checklist for recommended activities and services, and [Rate my copyright law](#), an EIFL scorecard that measures how the copyright law works for libraries.

The three documents can be used by the library community in Malawi to raise awareness of what the law means for local library activities and services, and by the global library community to assess how national copyright laws are evolving.

[The analysis is a good faith interpretation of the Malawi Copyright Act \(2016\). We welcome comments and feedback. The information does not constitute legal advice, if in doubt seek local support.](#)

1. Available at http://www.eifl.net/sites/default/files/resources/201706/malawi_copyright_act_2016.pdf

1 Commentary

BACKGROUND

The Malawi Copyright Act (2016) was published on 2nd September 2016 after six years in the making. The objective was to update the 1989 Copyright Act for technological and legal developments.

In 2011, EIFL supported a submission by the Malawi Library and Information Consortium (MALICO) and the Malawi Library Association (MALA) on proposals in the Copyright Bill 2010. The submission by MALICO and MALA called for libraries to be allowed copy works for a range of common purposes such as preservation and backup, inter-library document supply, and online education. It advocated for the use of orphan works and the importance of fully updating the law for the digital environment.

On 14 July 2017, Malawi joined the Marrakesh Treaty for persons with print disabilities..

LIBRARY PROVISIONS IN THE COPYRIGHT ACT (2016)

Section 48 is the main provision in the new law setting out what libraries, archives, museums, scientific and educational institutions may copy and for what purposes.

Other provisions that facilitate library activities and services include Section 29 (Economic rights), Section 49 (people with disabilities), and Section 86 (technological protection measures).

A RANGE OF USES, COMPLEX CONDITIONS

Section 48 permits a range of activities such as making copies for research, use of works in virtual learning environments, and public lending by libraries. The law also recognizes the important principle of safeguarding library uses where access to a work is protected by a technological protection measure.

However complex conditions, especially regarding the use of works in the digital environment, limit in practice what libraries in Malawi are allowed to do. They are also more restrictive than in many other countries. Here are some examples:

- digitization of print material for preservation and backup is not allowed, unless special permission is obtained from the Minister;
- the making of digital copies for researchers is expressly barred, and is limited to published works;

- to complete a missing part of a work in the library's collection, the copy must be in the same format as the original e.g. print to print, or digital to digital (except for computer programs that must be print-outs).

MISSED OPPORTUNITIES

There are important omissions in the new law. Here are three examples:

- The issue of orphan works, where the holder of the copyright cannot be identified or cannot be found, has not been dealt with. Therefore works of high social and cultural value in Malawi will remain largely undiscovered in library collections for the foreseeable future, available only to those who can visit the library in person.
- Researchers in Malawi will not benefit from the text and data mining of material in library collections, unless permitted under a publisher licence. Described as the new frontier for science and research, text and data mining creates opportunities for innovation and discovery with huge potential economic and social value.
- The preservation of websites, blogs and other public online media, known as web archiving, is not covered. Web archiving has become a very important activity due to the transitory nature of websites. Therefore websites depicting national heritage, popular culture or important events in Malawi will not be preserved, depriving researchers in Malawi and around the world, of an important future resource.

RESTRICTIONS ON THE MAKING OF ACCESSIBLE FORMAT COPIES

Section 49 enables the reproduction of a work for the benefit of persons with disabilities.

However a commercial availability check must be undertaken before an accessible format copy can be made. EIFL has long opposed a commercial availability test because it restricts the ability of authorized entities to properly serve beneficiary persons.

If implemented, information requests would be delayed while the library undertakes the search, or they may be denied. For works published outside Malawi, it is impossible to ascertain with certainty if the particular work is available in a particular accessible format. And even if it is found somewhere in the world, it may not be available in Malawi at a reasonable price, for purchase in the local currency or within a reasonable time.

A commercial availability check is not required by the Marrakesh Treaty for persons with print disabilities. If introduced, it would put Malawi's law out of line with other countries in Africa and around the world that are ratifying the Marrakesh Treaty. In particular, it would hamper cross-border exchange and reduce the works available to Malawi's community of more than 10,000 people who are blind and visually impaired.

Section 49 also contains other conditions that appear to be somewhat ambiguous. If implemented at worst, they could sharply restrict the availability of accessible copies including in the form of sound recordings.

Implementing legislation that will address other important Marrakesh issues such as the ability to import and export accessible format copies, may provide an opportunity to clarify the ambiguities in order to mitigate these concerns, as well as the commercial availability problem.

ECLS AND A PUBLIC LENDING FEE: TWO NEW CONCEPTS IN MALAWI

In addition, two new concepts have been introduced in the new law.

In [Part VI Licences](#), the concept of Extended Collective Licences is established. An Extended Collective Licence (ECL) gives the reproduction rights organization, or other collecting society, a mandate to authorize the use of works for authors or other rightsholders it does not represent, and to collect monies on their behalf. Adopted originally in Nordic countries, this legal technique is not widely in use.

In [Part XIII The Copyright Fund](#), a new fund is established with the objective to enforce the law, promote creativity and artistic skills in Malawi, and preserve works that depict national cultural identity.

The Fund is to be financed in two ways. First, through levies on performances, sound recordings, digital storage devices, public sale of works of art and paper used by copy shops. Second, through a fee determined annually by the Minister in exchange for the free use of works in publicly funded libraries. The fee is to be paid from the Government budget directly to the Copyright Society of Malawi, that is charged with administering the Fund.

The scheme therefore differs from typical public lending right (PLR) systems whereby the annual PLR payment is based on data such as number of book loans or number of registered library users. Nevertheless libraries in Malawi must be involved as mechanisms for setting up the scheme are established that will presumably include determining the libraries, the amount of the annual fee, and the Government budget from which the fee is to be paid.

EIFL supports the [IFLA Position on Public Lending Right](#)² that lending right should not be established in countries that are not considered high or middle income by the World Bank. In June 2017, the World Bank classification of economies lists Malawi as a low income country.

2. <https://www.ifla.org/publications/the-ifla-position-on-public-lending-right--2016->

SUPPORTING PROGRESSIVE LEGISLATION

EIFL understands that policy-makers have a big job ensuring that the law keeps up-to-date with the fast pace of technological change. And we know that the legislative process takes time.

That's why EIFL supports a copyright law that is format neutral, flexible and able to respond quickly to changes in technology³ and new ways of learning and sharing. In fact, a flexible exception such as fair use/fair dealing could enable all three 'missed opportunities' described above.

We also understand that policy-makers try to balance the interests of different stakeholders in the information chain, and between industry and the public good.

We look forward to working with our partners in the Malawi library community, to engaging in more extensive consultations with policy-makers on the implementing legislation to ensure that the law properly serves libraries, education and the people of Malawi well into the future.

3. <http://www.eifl.net/blogs/copyright-today-and-tomorrow-and-there-life-mars>

2 Factual guide

In summary, under the Malawi Copyright Act (2016):

1. Libraries can lend works in their collections (except for computer programs) to the public.
2. Libraries designated by the Minister can make copies of works for the following purposes:
 - i preservation or safeguarding works in their collections, subject to the following conditions:
 - a works may be published or unpublished;
 - b copies of computer programs must be printouts;
 - c the number of copies of sound or audio-visual recordings should not exceed the number of copies already in the collection;
 - d machine-readable copies, and copies of sound or audio-visual recordings, can be used only on the premises, unless the Minister grants permission for limited use at another library;
 - e digitization of print materials is not allowed unless the Minister grants permission for a particular research;
 - f the making of such copies should not be construed as a general permission to digitize works in the collection for use on computer terminals.
 - ii completing copies contained in their collections, when parts are missing or lost, subject to the following conditions:
 - a published works only;
 - b the copy is in the same format as the original, except for machine-readable originals where a printout can be made;
 - c copies of computer programs must be printouts;
 - d the number of copies of sound or audio-visual recordings does not exceed the number of copies already in the collection;
 - e machine readable copies, and copies of sound or audio-visual recording, can be used only on the premises, unless the Minister grants permission for limited use at another library.

- iii assisting individual researchers, subject to the following conditions:
 - a published works only;
 - b copies must be in paper format;
 - c article or a short excerpt only;
 - d one copy only delivered directly to the individual, or through another library when requested by an individual.
- iv for works obtained under the Printed Publications Act, a copy may be made subject to the following conditions:
 - a the work is not commercially available;
 - b the copy is in the same format as the original, except for machine-readable originals where a printout can be made;
 - c but such copy may not be made available on a computer terminal on the library premises.

General condition for copying by libraries: the number of copies made should be limited to the needs of regular library activities, and should not be for any direct or indirect gain.

- 3. Libraries designated by the Minister can provide computer terminals on their premises to make works in their collection available to users, except for works obtained under the Print Publications Act.
- 4. Any library can make an accessible format copy for a person with a disability provided:
 - a the work is not commercially available in the required accessible format;
 - b the library has lawful access to the work;
 - c it makes no changes to the work other than those needed to make the work accessible;
 - d it supplies the accessible copy only to a person with a print disability;
 - e it does not make any profits from the activity; and
 - f it keeps appropriate records of its activities.

Section 49 (people with disabilities) also has other conditions that appear to be somewhat ambiguous that we hope may be clarified in implementing legislation.

- 5. A library can petition the Copyright Society of Malawi to circumvent a copy protection measure (e.g. encryption software or password control system) where it is not provided by the copyright owner in order to use a work according to Sections 48 and 49.

JULY 2017

Libraries in Malawi and the Copyright Act (2016)

CHECKLIST FOR PERMITTED ACTIVITIES AND SERVICES

This checklist compares standard library activities and services with provisions in the Malawi Copyright Act No. 26 of 2016, published on 2 September 2016.¹ Note that secondary legislation implementing certain provisions in the copyright law have yet to be enacted, and may alter the analysis accordingly.

The checklist should be read together with two related documents: [Rate my copyright law](#), an EIFL scorecard that measures how the copyright law works for libraries and [What can libraries in Malawi do under the Copyright Act \(2016\)?](#), an EIFL guide that summarizes library activities allowed under the new law.

The first part of the checklist features specific library activities and services. The second part deals with cross-cutting issues that affect the scope and effectiveness of the library exceptions contained in the law.

[The analysis is a good faith interpretation of the law. We welcome comments and feedback. The information does not constitute legal advice, if in doubt seek local support.](#)

The questions in the checklist are based on the [EIFL Core Library Exceptions Checklist](#), which set out provisions that every copyright law should have to support modern library activities and services, such as making an electronic copy of a journal article or book chapter for a user, providing library material for use in virtual learning environments, and undertaking digital preservation.

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1. Available at http://www.eifl.net/sites/default/files/resources/201706/malawi_copyright_act_2016.pdf

Library activities & services

COLLECTION DEVELOPMENT

- May a library buy lawfully produced books and other materials from another country for inclusion in its collection? **YES** See Sections 88(h), 91 and 90(e).
- May a library lend a physical book/CD/DVD to a library user, or to another library (known as inter-library loan)? **PARTLY** Computer programs are excluded. See Sections 29(2), 88(b) and 90(b). See Section 101(2) that introduces a public lending fee.
- May a library *by law* lend an e-book to a library user? **NO** Not covered by any of the exceptions.

SUPPORT FOR EDUCATION AND RESEARCH

- May a library supply a copy of a work, such as a journal article or book chapter, either in hard copy or electronically, to a person for research or private use, or to another library (known as inter-library document supply)? **PARTLY** Paper copies only. See Section 48(2)(a)(iv).
- May a library send and receive such copies across borders? **PARTLY** Can export a copy made under Section 48; can import copy if copy would be lawful if made under Section 48
- May a library create databases of collection materials, including e-resources managed by the library, to facilitate text and data mining by researchers? **NO** Not covered by any of the exceptions.
- May a library provide copies of collection materials for use in virtual learning environments to facilitate distance learning? **PARTLY** Section 42 allows public performance and display of works in an educational context, except for dramatic and audio-visual works.
- May a library digitize orphan works in its collection, and make them available online? **NO** Not covered by any of the exceptions.

PRESERVATION AND REPLACEMENT

- May a library make copies of works in its collection in any format for preservation purposes or back-up, and provide access to these copies? **PARTLY** Digitization of print material is not allowed. See Section 48(2)(a)(i), and 48(2)(c)(iii).
- May a library procure from another library the missing parts of any works in its collection? **PARTLY** Section 48(2)(a)(ii) clearly allows a library to copy missing pieces of one work from another copy in its collection, but is not clear whether a library can copy missing pieces of a work from another library.

May a library web archive, i.e. preserve publicly accessible websites?

NO Not covered by any of the exceptions.

PERSONS WITH DISABILITIES

May a library make an accessible format copy of a work and provide it to a person with a disability? Examples of accessible formats include Braille, large print, DAISY digital format.

PARTLY Only if the required format is not commercially available. See Section 49.

May a library send and receive accessible format copies to and from other countries?

PARTLY Import is likely within Section 88(h), export is unclear. Import/export provisions, in line with the Marrakesh Treaty, are expected in secondary legislation.

Cross-cutting issues

May a library make copies in any format, including digital copies?

NO Unless permission is obtained from the Minister, copies must be in the same format as the original (or in analogue) i.e. print to print, digital to digital or print. See Section 48(2)(c).

Are the exceptions granted to libraries in copyright law safeguarded from override by licence terms?

NO There is no provision in the copyright law.

Where legal protection is granted to technological protection measures (TPMs), may a library circumvent the TPM to avail itself of an exception to copyright?

PARTLY A library can request permission to circumvent; the Minister can order some libraries to automatically receive circumvention information. See Section 86.

Does the law protect librarians from being sued in the course of their duties?

NO There is no provision in the copyright law.

In addition to any specific library exceptions, are library activities also supported by a flexible exception such as fair use or fair dealing?

NO Fair dealing was removed in the 1989 Copyright Act of Malawi.



Rate my copyright law

How does your copyright law support activities and services in your library? This scorecard is a handy way to rate your national law for core library provisions. Check how the law performs, and compare with other countries. Identify any gaps, or see where it's doing well. The questions on the scorecard should be read together with the *EIFL Core Library Exceptions Checklist*. Tip: Library activities and services may be permitted through specific exceptions, a flexible exception such as fair use/fair dealing, case law, or related law. If in doubt, seek legal advice.

	YES 2	PARTLY 1	NO 0
COLLECTION DEVELOPMENT			
May a library buy lawfully produced books and other materials from another country for inclusion in its collection?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library lend a physical book/CD/DVD to a library user, or to another library?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library by law lend an e-book to a library user?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
SUPPORT FOR EDUCATION AND RESEARCH			
May a library supply a copy of a work, such as a journal article or book chapter, either in hard copy or electronically, to a person for research or private use, or to another library?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library send and receive such copies across borders?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library create databases of collection materials, including e-resources managed by the library, to facilitate text and data mining by researchers?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library provide copies of collection materials for use in virtual learning environments to facilitate distance learning?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library digitize orphan works in its collection, and make them available online?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
PRESERVATION AND REPLACEMENT			
May a library make copies of works in its collection in any format for preservation purposes or back-up, and provide access to these copies?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

	YES	PARTLY	NO
	<input type="text" value="2"/>	<input type="text" value="1"/>	<input type="text" value="0"/>
May a library procure from another library the missing parts of any works in its collection?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library web archive, i.e. preserve publicly accessible websites?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
PERSONS WITH DISABILITIES			
May a library make an accessible format copy of a work and provide it to a person with a disability?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
May a library send and receive accessible format copies to and from other countries?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
FORMAT NEUTRAL			
May a library make copies in any format, including digital copies?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
SAFEGUARDING EXCEPTIONS IN THE DIGITAL ENVIRONMENT			
Are the exceptions granted to libraries in copyright law safeguarded from override by licence terms?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Where legal protection is granted to technological protection measures (TPMs), may a library circumvent the TPM to avail itself of an exception to copyright?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
LIMITATION ON LIABILITY			
Does the law protect librarians from being sued in the course of their duties?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
A FLEXIBLE EXCEPTION			
In addition to any specific library exceptions, are library activities also supported by a flexible exception such as fair use or fair dealing?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Does your law measure up?

TOTAL SCORE	<input type="text"/>	%	<input type="text"/>	TYPE OF LIBRARY	<input type="text"/>	LAW*	<input type="text"/>
COUNTRY	<input type="text"/>			DATE	<input type="text"/>		

* VERSION/DATE