

Evolution of Technical Protection Measures (TPMs) in the Negotiating Texts: Marrakesh Note 5

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June 20th, 2013

This note shows the evolution of the negotiating texts on the issue of TPMs.

2009

SCCR 18/5

PROPOSAL BY BRAZIL, ECUADOR AND PARAGUAY, RELATING TO LIMITATIONS AND EXCEPTIONS: TREATY PROPOSED BY THE WORLD BLIND UNION (WBU)

Article 6. Circumvention of Technological Measures

Contracting parties shall ensure that beneficiaries of the exception provided by Article 4 have the means to enjoy the exception where technological protection measures have been applied to a work, including when necessary the right to circumvent the technological protection measure so as to render the work accessible.

2010

In 2010, there three new proposals, by the United States of America, the African Group and the European Union. The African Group proposal used the same language as was in Article 6 of SCCR/18/5.

SCCR/20/10

Draft Consensus Instrument, Proposal by the Delegation of the United States of America

No mention of TPM

SCCR/20/11

Draft WIPO Treaty on Exceptions and Limitations for the Disabled, Educational and Research Institutions, Libraries and Archive Centers Proposal by the African Group

Article 13: Circumvention of technical measures

Contracting parties shall ensure that beneficiaries of the exceptions and limitations listed in Article 2 have the means to enjoy the exception where technical protection measures have been applied to a work, including when necessary the right to circumvent the technical protection measure so as to make the work accessible.

SCCR/20/12

Draft Joint Recommendation concerning the improved access to works protected by copyright for persons with a print disability Proposal by the Delegation of the European Union

No mention of TPMs

2011

In 2011, there were five proposals.

SCCR/22/12, June 3, 2011

Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives Proposal by the African Group

Article 18: Circumvention of technical measures

Contracting parties shall ensure that beneficiaries of the exceptions and limitations listed in Article 2 have the means to enjoy the exception where technical protection measures have been applied to a work, including when necessary the right to circumvent the technical protection measure so as to make the work accessible.

SCCR/22/15/REV1, June 22, 2011

Proposal on an international instrument on limitations and exceptions for persons with print disabilities document presented by Argentina, Australia, Brazil, Chile, Colombia, Ecuador, the European Union and its Member States, Mexico, Norway, Paraguay, the Russian Federation, the United States of America and Uruguay

ARTICLE F

TECHNOLOGICAL PROTECTION MEASURES

Member States/Contracting Parties should/shall ensure that beneficiaries of the exception provided by Article C have the means to enjoy the exception where technological protection measures have been applied to a work.

In the absence of voluntary measures by rightholders and to the extent that copies of the work in the accessible format are not available commercially at a reasonable price or via authorized entities, Member States/Contracting Parties should/shall take appropriate measures to ensure that beneficiaries of the exception provided by Article C have the means of benefiting from that exception when technical protection measures have been applied to a work, to the extent necessary to benefit from that exception.

SCCR/22/15, June 20, 2011

Consensus document on an international instrument on limitations and exceptions for persons with print disabilities presented by Argentina, Australia, Brazil, Chile, Ecuador, Mexico, Paraguay, and the United States of America

ARTICLE F

TECHNOLOGICAL PROTECTION MEASURES

Member States/Contracting Parties should/shall ensure that beneficiaries of the exception provided by Article C have the means to enjoy the exception where technological protection measures have been applied to a work.

In the absence of voluntary measures by rightholders and to the extent that copies of the work in the accessible format are not available commercially at a reasonable price or via authorized entities, Member States/Contracting Parties should/shall take appropriate measures to ensure that beneficiaries of the exception provided by Article C have the means of benefiting from that exception when technical protection measures have been applied to a work, to the extent necessary to benefit from that exception.

SCCR/22/16, November 4, 2011

Proposal on an international instrument on limitations and exceptions for persons with print disabilities Document prepared by the Chair

**ARTICLE F
TECHNOLOGICAL PROTECTION MEASURES**

Member States shall ensure that beneficiaries of the exception provided by Article C have the means to enjoy the exception where technological protection measures have been applied to a work.

In the absence of voluntary measures by rights holders and to the extent that copies of the work in the accessible format are not available commercially at a reasonable price or via authorized entities, Member States shall take appropriate measures to ensure that beneficiaries of the exception provided by Article C have the means of benefiting from that exception when technological protection measures have been applied to a work, to the extent necessary to benefit from that exception.

SCCR/23/7, December 16, 2011

WORKING DOCUMENT ON AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS FOR VISUALLY IMPAIRED PERSONS/PERSONS WITH PRINT DISABILITIES

adopted by the Committee

Comments on Article F

F.01 The wording of the article should change as follows:

“Member States shall ensure that beneficiaries of the exception provided by Article C are not prevented from enjoying the exception in cases where technological protection measures have been applied to a work.

A Member State may fulfill Article F(1) by permitting, under its national copyright law, circumvention of technological protection measures for the purposes of, and to the extent necessary for benefiting from an Article C exception” (Australia, Japan).

F.02 The phrase “In particular” should be added at the beginning of the second paragraph. This article should be seen in connection with the WCT and should be a matter of further discussion as it could be construed as giving technical protection measures precedence over other exceptions and limitations, which is not the case under WCT (Switzerland).

F.03 Change “the work” to “a work,” and change “Member States” to “a Member State/Contracting Party” because the intent of this article is to express the capacity of a single Member State or a single Contracting Party, not member states working together. Add “may” before “should/shall”. After “should/shall”, add

“authorize competent authorities to”. The first paragraph of the Article would read “Member States/Contracting Parties may/should/shall authorize competent authorities to take appropriate measures to ensure that beneficiaries of the exception provided by Article C have the means to enjoy the exception where technological protection measures have been applied to a work”. The second paragraph remains the same (United States of America).

F.04 Revise the title as “Obligations concerning Technological measures”, and delete paragraph (2) (India).

F.05 There are works that have fallen in the public domain and others that are still protected but can be used under certain exceptions, for instance, for scientific research purposes. Those works may be locked by the use of technological protection measure used by the rightholders which hamper the correct exercise of limitations and exceptions (Egypt).

[End of comments on Article F]

ARTICLE F33

OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES

Member States shall ensure that beneficiaries of the exception provided by Article C have the means to enjoy the exception where technological protection measures have been applied to a work.

In the absence of voluntary measures by rights holders and to the extent that copies of the work in the accessible format are not available commercially at a reasonable price or via authorized entities, Member States/Contracting Parties should/shall take appropriate measures to ensure that beneficiaries of the exception provided by Article C have the means of benefiting from that exception when technological protection measures have been applied to a work, to the extent necessary to benefit from that exception.

2012

In 2012, there were two proposals, including one that was not published until 2013.

SCCR/24/9, July 26, 2012

REVISED WORKING DOCUMENT ON AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS FOR VISUALLY IMPAIRED

PERSONS/PERSONS WITH PRINT DISABILITIES, adopted by the Committee

**ARTICLE F
OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES**

1. Member States/Contracting Party should/shall ensure that beneficiaries of the exception provided by Article C are not prevented from enjoying the exception in the exception where technological protection measures have been applied to a work.

2. Alternative A

[In particular] [In the absence of voluntary measures by rights holders and to the extent that copies of the work in the accessible format are not available commercially at a reasonable price or via authorized entities,] Member States/Contracting Parties should/shall take appropriate measures to ensure that beneficiaries of the exception provided by Article C have the means of benefiting from that exception when technological protection measures have been applied to a work, to the extent necessary to benefit from that exception.

2. Alternative B

[A Member State/Contracting Party may fulfill Article F(1) by permitting, under its national copyright law, circumvention of technological protection measures for the purposes of, and to the extent necessary for benefiting from an Article C exception.]

[A Member State/Contracting Party should/shall adopt effective and necessary measures to ensure that a beneficiary person may enjoy limitations and exceptions provided in that Contracting Party's national law, in accordance with Article C, where technological measures have been applied to a work and the beneficiary person has legal access to that work, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that work to enable the beneficiary person to enjoy the limitations and exceptions under that Member State/Contracting Party's national law.]

2013

SCCR 25/2/REV, February 22, 2013

DRAFT TEXT OF AN INTERNATIONAL INSTRUMENT/TREATY ON LIMITATIONS AND EXCEPTIONS FOR VISUALLY IMPAIRED PERSONS/PERSONS WITH PRINT DISABILITIES, adopted by the Committee

**ARTICLE F
OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES**

Alternative A

1. Member States/Contracting Party should/shall ensure that beneficiaries of the exception provided by Article C are not prevented from enjoying the exception in the exception where technological protection measures have been applied to a work.
2. A Member State/Contracting Party may fulfill Article F(1) by permitting, under its national copyright law, circumvention of technological protection measures for the purposes of, and to the extent necessary for benefiting from an Article C exception. Member States/Contracting Parties may encourage rightholders to take adequate, effective and readily accessible voluntary measures to ensure the exercise of limitations and exceptions by beneficiaries.

Alternative B

Where the national law of a Member State/Contracting Party provides adequate legal protection and effective legal remedies against the circumvention of technological measures, a Member State/Contracting Party should/shall/may adopt effective and necessary measures to ensure that a beneficiary person may enjoy limitations and exceptions provided in that Member State's/Contracting Party's national law, in accordance with this instrument/Treaty, where technological measures have been applied to a work and the beneficiary person has legal access to that work, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that work to enable the beneficiary person to enjoy the limitations and exceptions under that Member State/Contracting Party's national law.

SCCR 25/2/REV2 February 22, 2013

ARTICLE F OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES

Alternative A

1. Member States/Contracting Party should/shall ensure that beneficiaries of the exception provided by Article C are not prevented from enjoying the exception in the exception where technological protection measures have been applied to a work.
2. A Member State/Contracting Party may fulfill Article F(1) by permitting, under its national copyright law, circumvention of technological protection measures for the purposes of, and to the extent necessary for benefiting from an Article C exception. Member States/Contracting Parties may encourage rightholders to take adequate, effective and readily accessible voluntary measures to ensure the exercise of limitations and exceptions by beneficiaries.

Alternative B

Where the national law of a Member State/Contracting Party provides adequate legal protection and effective legal remedies against the circumvention of technological measures, a Member State/Contracting Party should/shall/may adopt effective and necessary measures to ensure that a beneficiary person may enjoy limitations and exceptions provided in that Member State's/Contracting Party's national law, in accordance with this instrument/Treaty, where technological measures have been applied to a work and the beneficiary person has legal access to that work, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that work to enable the beneficiary person to enjoy the limitations and exceptions under that Member State/Contracting Party's national law.

SCCR/SS/GE/2/13/4 April 20th

DRAFT TEXT OF AN INTERNATIONAL INSTRUMENT/TREATY ON LIMITATIONS AND EXCEPTIONS FOR VISUALLY IMPAIRED PERSONS/PERSONS WITH PRINT DISABILITIES, adopted by the Committee

**ARTICLE F
OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES 14**

Alternative A

1. Member States/Contracting Parties should/shall ensure that beneficiaries of the exception provided by Article C are not prevented from enjoying the exception in the exception where technological protection measures have been applied to a work.
2. A Member State/Contracting Party may fulfill Article F(1) by permitting, under its national copyright law, circumvention of technological protection measures for the purposes of, and to the extent necessary for benefiting from an Article C exception. Member States/Contracting Parties may encourage rightholders to take adequate, effective and readily accessible voluntary measures to ensure the exercise of limitations and exceptions by beneficiaries.

Alternative B

Where the national law of a Member State/Contracting Party provides adequate legal protection and effective legal remedies against the circumvention of technological measures, a Member State/Contracting Party should/shall/may adopt effective and necessary measures to ensure that a beneficiary person may enjoy limitations and exceptions provided in that Member State's/Contracting Party's national law, in accordance with this instrument/Treaty, where technological measures have been applied to a work and the beneficiary person has legal access to that work, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that work to enable the beneficiary person to enjoy the limitations and exceptions under that Member State/Contracting Party's national law.¹⁶

Note on Article F: Proposed addition from US: It is understood that a Contracting Party may adopt such effective and necessary measures [only where] [provided that] [on the condition that] the actual or likely adverse impact of the Contracting Party's law protecting technological measures on the beneficiary person's lawful use of the work is established by credible evidence in a transparent legislative or administrative proceeding.

Note on Article F: Alternative Proposal: [[It is understood that] a Contracting Party [that has a law protecting technological measures against circumvention] [may/should] adopt effective and necessary measures to ensure that beneficiary persons [with legal access to a work,] are not prevented from enjoying the exceptions provided under Article C where technological measures have been applied to a work [in circumstances such as where appropriate and effective measures have not been taken by rightsholders to enable the beneficiary person to enjoy the exceptions], [and may/should permit under its national law, circumvention of technological measures], taking due account of that contracting party's relevant [rights and] obligations under international law.]

Note on Article F: Other proposals raised during the discussion include deleting Article F and possibly drafting an agreed statement on technological measures.

Note on Article F: Egypt proposed the addition of the word "legally" so the phrase reads "enjoying legally the exception".

VIP/DC/3 REV, April 20th 2013

DRAFT TEXT OF AN INTERNATIONAL INSTRUMENT/TREATY ON LIMITATIONS AND EXCEPTIONS FOR VISUALLY IMPAIRED PERSONS/PERSONS WITH PRINT DISABILITIES
prepared by the Secretariat*

ARTICLE F

OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES

Alternative A

1. Member States/Contracting Parties should/shall ensure that beneficiaries of the exception provided by Article C are not prevented from enjoying¹⁵ the exception in the exception where technological protection measures have been applied to a work.
2. A Member State/Contracting Party may fulfill Article F(1) by permitting, under its national copyright law, circumvention of technological protection measures for the purposes of, and to the extent necessary for benefiting from an Article C exception. Member States/Contracting Parties may encourage rightsholders to take adequate, effective and readily accessible voluntary measures to ensure the exercise of limitations and exceptions by beneficiaries.

Alternative B

Where the national law of a Member State/Contracting Party provides adequate legal protection and effective legal remedies against the circumvention of technological measures, a Member State/Contracting Party should/shall/may adopt effective and necessary measures to ensure that a beneficiary person may enjoy limitations and exceptions provided in that Member State's/Contracting Party's national law, in accordance with this instrument/Treaty, where technological measures have been applied to a work and the beneficiary person has legal access to that work, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that work to enable the beneficiary person to enjoy the limitations and exceptions under that Member State/Contracting Party's national law.¹⁶

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VIP/DC/3 Rev. Annex, page 3

April 20

REVISED WORKING DOCUMENT ON AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS FOR VISUALLY IMPAIRED PERSONS/PERSONS WITH PRINT DISABILITIES

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ARTICLE F

OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES

Member States/Contracting Party should/shall ensure that beneficiaries of the exception provided by Article C are not prevented from enjoying the exception in

the exception where technological protection measures have been applied to a work.

1. Alternative A

[In particular] [In the absence of voluntary measures by rights holders and to the extent that copies of the work in the accessible format are not available commercially at a reasonable price or via authorized entities,] Member States/Contracting Parties should/shall take appropriate measures to ensure that beneficiaries of the exception provided by Article C have the means of benefiting from that exception when technological protection measures have been applied to a work, to the extent necessary to benefit from that exception.

2. Alternative B

[A Member State/Contracting Party may fulfill Article F(1) by permitting, under its national copyright law, circumvention of technological protection measures for the purposes of, and to the extent necessary for benefiting from an Article C exception.]

[A Member State/Contracting Party should/shall adopt effective and necessary measures to ensure that a beneficiary person may enjoy limitations and exceptions provided in that Contracting Party's national law, in accordance with Article C, where technological measures have been applied to a work and the beneficiary person has legal access to that work, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that work to enable the beneficiary person to enjoy the limitations and exceptions under that Member State/Contracting Party's national law.]