

# *Definition of technical measures to circumvent the constraints of accessible format versions*

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**Abstract:** The Marrakesh Treaty guarantees the right of the visually impaired to read, but in the process of implementation, there has been controversy in China's academic circles over the limitations of the circumvention of technological measures. The interpretation of "normal route" should not be overly expansive, requiring the authorized entity to exhaust any remaining means;" Although the "normal route" does not include the precondition of "commercial availability", it should not be overly restrictive and limit the route to the database of the production agency. It is more reasonable to limit the "normal channels" to the resource support channels provided by the government and the channels for daily procurement and donation, which does not increase the search obligations of authorized entities and balances the balance of interests between copyright owners and visually impaired groups.

## **1. Introduction**

According to the 2017 edition of the WBU Handbook of the World Blind Association, approximately 253 million people worldwide are blind and visually impaired (hereinafter referred to as "visually impaired persons"),<sup>[1]</sup> while according to a 2006 survey by the World Intellectual Property Organization, less than 60 countries have exceptions to the "special edition for the visually impaired" in their copyright laws,<sup>[2]</sup> and some of them exclude some visually impaired groups from the scope of beneficiaries. The lack of awareness of the reading needs of the visually impaired in most countries also contributed to the fact that less than 10% of publications in the same year in 2017 were accessible to the visually impaired.<sup>[1]</sup> This greatly affects the realization of the reading rights of the visually impaired.

In an attempt to balance the protection of private copyright rights with the interests of the visually impaired community, WIPO has adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (hereinafter referred to as "the Treaty"). The treaty pays more attention to whether the visually impaired people have reading difficulties, and guarantees the realization of the right to information and reading as much as possible, so as to help the visually impaired realize their right to education, cultural rights, labor rights, and political rights, and to help the visually impaired people develop healthily and promote the development of human rights in various countries.<sup>[3]</sup>

However, in the process of implementing the Treaty, there has been controversy in Chinese academic circles about the qualifying conditions for circumventing technological measures. This

paper aims to clarify the scope of the "normal pathway" and to explore the best practices for the production of accessible format versions, so as to promote a win-win situation for the protection of intellectual property rights and the rights and interests of persons with disabilities.

## 2. Formulation of the question

China's 2010 Copyright Law does not provide for exceptions to technological protection measures for persons with print disabilities. However, Article 4 of the Treaty requires Parties to take measures to avoid technological measures that prevent beneficiaries from enjoying the limitations and exceptions provided for in the Treaty. In order to implement this provision, Article 50, Paragraph 2 of the People's Republic of China Copyright Law (hereinafter referred to as the "Copyright Law") revised in 2020 adds an exception to the prohibition of circumvention of technological measures. Give a clear explanation.

The ambiguity of this provision may also lead to many litigation that could have been avoided, increase the litigation costs of relevant entities, and bring huge economic burdens to non-profit authorized institutions, which is not in line with the original intention of the legislation. A reasonable definition of the scope of "normal channels" will help authorized entities correctly understand the legal risks, guide authorized entities to obtain works in a legal and compliant manner to produce accessible format versions, and promote the correct application of relevant legal provisions.

## 3. Perspective analysis of the scope of the "normal pathway".

Since the enactment of the Treaty, many scholars in China have engaged in intense discussions on the provisions of the Treaty and have put forward suggestions on the scope of the "normal way". The interpretation of the "normal way" should be moderate, otherwise it is not conducive to balancing the interests of all parties.

### (1) The "normal pathway" should not be overextended.

According to the provisions of the Treaty, the circumvention of technological measures should be based on the basis of not hindering the implementation of the content of the Treaty, and the interpretation of the restrictions should not be excessively extended, otherwise the rights and interests of the right holder may be excessively harmed. The view was expressed that the "normal route" should be based on the fact that "the work cannot be accessed unless technical measures are circumvented".<sup>[4]</sup>In the author's opinion, this view is too harsh, and in fact imposes excessive search obligations on authorized entities, requiring authorized entities to exhaust any possible means of obtaining them, increasing the possibility of infringement by authorized entities, and the relevant provisions on restrictions on overhead technical measures. At the same time, this standard also increases the production cost of the authorized entity, which is not conducive to the realization of the purpose of the amendment.

### (2) The "normal pathway" does not include the element of "commercial availability".

Article 4(4) of the Treaty provides for the option of a contracting party to circumvent the limitation of technological measures by using "commercial availability", i.e. that an authorized subject who produces a work in an accessible format must confirm that it is not commercially available in the market for a work in a particular accessible format on reasonable terms for the benefit of the recipient." The original intention of the "commercial accessibility" clause was to incentivize publishers or copyright owners to produce initial accessible versions by appropriately compensating the interests of publishers or copyright owners,<sup>[5]</sup> but according to the implementation effect of similar systems established in the early days of the United Kingdom, "commercial accessibility" has limited incentive effect on copyright owners and hinders the realization of cross-

border exchange clauses.<sup>[6]</sup>At the same time, the "commercial availability" requirement also increases the time and expense cost for the authorized entity to confirm whether the "commercial unavailability" has been met.<sup>[7]</sup>Given that China is still a developing country, the filing letter submitted by China to the Director General of the World Intellectual Property Organization does not advocate the restriction of "commercial availability" as a "normal route". In other words, according to Article 50, Paragraph 2 of the Copyright Law provides for the "normal route" that allows authorized subjects to obtain works in specific accessible formats through commercial channels and on reasonable terms.

### **(3) The "normal pathway" should not be overly restricted**

It has been argued that the premise of circumventing technological measures to obtain a work is only "not for profit", not excluding "commercial availability", and that the "reasonable conditions" for commercial availability should be limited to "minimum conditions" from the perspective of protecting the rights of beneficiaries.<sup>[8]</sup>However, the scholar did not give an explanation for the "minimum conditions". However, in light of the purpose of protecting the human rights of the beneficiaries and the fact that the scholar also proposed the concept of "general conditions" that conform to the laws of the market, the author believes that the ultimate purpose of the "minimum conditions" here is to minimize the cost of the beneficiaries to bear the final accessible format version, in other words, the lower the final selling price, the better. However, the production cost of the authorized entity is basically fixed, and the accessible version of the object is basically fixed, so in order to meet the "minimum conditions", the cost of obtaining the ordinary version of the work should be as low as possible. That is, the minimum standard means that authorized subjects only need to check the books in their databases, and if they do not have inventory, they can circumvent technological measures to obtain works in accessible formats.

This condition is suspected of being overly restrictive. If the restrictive requirements for circumvention of technological measures only require that the authorized entity exhaust the inventory, it is equivalent to allowing the authorized entity to arbitrarily circumvent the technical measures. However, it should be noted that internal resources do not require the licensee to take technical circumvention measures, and the combination of the two is tantamount to declaring that the licensee can arbitrarily circumvent the technical measures in order to obtain a common version of the work. If the legislator has such an intention, why should he add the restriction of "normal channels" in the third amendment to the Copyright Law?

The Interim Provisions issued in 2022 further reflect the attitude of legislators. Paragraph 1 of Article 10 of the Interim Provisions stipulates that: "Accessible format copy service institutions (including cross-border exchange institutions) shall implement informative filing, and the relevant institutions shall file with the National Copyright Administration in accordance with the filing guidelines for accessible format copy service institutions (including cross-border exchange institutions)." That is, China's authorized entities adopt the informative filing model. If the legislator believes that the "normal channels" should be limited to the "minimum standard" and allow the authorized entity to circumvent the technical measures as much as possible, then at least certain review standards should be formulated for the authorized entity with production qualifications, so as to prevent the imbalance of interests caused by giving too many entities the production qualifications.

## **4. "Normal pathway" should include the channels of receiving grants and the channels of procurement**

The author believes the "normal way" restrictions for authorized entities to circumvent reasonable measures should be reasonably restricted, limited to the donor channel and the

procurement channel. Some authorized entities, especially special education schools, accept donations of books from the community. The distribution rights of the relevant books are usually exhausted, do not infringe on the interests of the copyright owner, and can be classified as "normal channels".

Procurement channels should include resource channels and daily procurement channels provided by the government of the authorized entity. According to Article 11 of the Interim Provisions, copyright authorities at all levels and relevant departments will also provide resource docking for authorized entities. This resource should be classified under the "normal pathway".

Article 50, paragraph 2, requires "not for profit", and this restriction is not intended to exclude commercial channels. But it is also important to note that "commercial channels not excluded" cannot be equated with "commercial availability". The day-to-day procurement channel does not require the exhaustion of market sources, nor does it require the authorized entity to spend a lot of money to confirm the "commercial unavailability". In view of the fact that China's authorized entities only need to implement informative filing after meeting the relevant conditions, this means that China's authorized entities will continue to increase. In some cases of procurement business, the inclusion of daily procurement channels in the "normal route" limitation will not excessively increase the search obligation of the authorized entity, and can prevent the authorized entity from in fact fulfilling the "commercial availability" restriction in order to meet the requirements of the "normal channel" and avoid infringement; It is also possible to give the copyright owner certain copyright benefits through normal procurement behavior, so as to avoid evading the compensation of interests and resulting in an imbalance of interests.

## 5. Conclusion

In summary, this paper argues that the "normal channels" qualification stipulated in Article 50, Paragraph 2 of the Copyright Law for the production of works in accessible formats should be limited to "the resource support channels and their daily supply channels of the copyright authorities at all levels and relevant institutions", so as to avoid excessive expansion or restriction.

## References

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