

The Infringement of the Author's Moral Rights In the Perspective of Making Spatial Copies of Works In Formats Accessible to People with Disabilities

The catalogue of copyright exceptions and limitations that allow the making of copies and exchanges of works in formats accessible to people with disabilities is one of the greatest achievements of the modern copyright system. The creation of such a catalogue was not only a response to the needs of persons with disabilities but also a signal for the further development of digital technologies to assist persons with disabilities to participate in society on an equal and non-discriminatory basis. Nevertheless, progress in the field of new digital technologies supporting the transformation of the content of works into accessible formats – especially as regards the production of spatial forms – has not been properly systematised within the international law, which may result in infringements of authors' moral rights. The author points to the legal grounds for transforming works into spatially accessible formats and the resulting potential infringements of the original work author's moral rights.

Anna Bober-Kotarbińska

MA in law

Wyższa Szkoła Bankowa w Gdańsku

ORCID – 0000-0003-0499-8253

e-mail: bober.kotarbinska@gmail.com

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1. The essence of the analyzed issue

The development of new digital technologies, supporting the transformation of the content of works into formats accessible for opening by persons with disabilities, has an impact not only on its beneficiaries but also on the legal situation of authors and copyright holders.

While copyright generally prohibits the unauthorized use of works, it also contains several exceptions and limitations that allow the copying and use of works in certain circumstances or under certain conditions¹. One such exception

1 Limitations and exceptions to copyright are meaning copyright provisions or provisions under which certain entities

is the power to create and distribute works in formats accessible to persons with print disabilities – which is guaranteed to its signatories by the Marrakesh Treaty (hereinafter referred to as the Treaty)². The Treaty, established in 2013, was a continuation of the international community's efforts to support persons with disabilities³, most strongly emphasized by the Convention on the Rights of Persons with Disabilities⁴ (hereinafter referred to as the Convention), which, while establishing the principles of equality of non-discrimination in access to cultural material, at the same time obliged the ratifying Countries to ensure that the provisions protecting intellectual property rights⁵ shall not constitute an unjustified barrier to access to cultural

may use copyrighted works in a certain way without obtaining the consent of the rightholder. Such exceptions and limitations exist both in international agreements (m.in Berne Convention, TRIPS Agreement, WCT), regional law (European Union Directives governing copyright, in particular Directive 96/9/EC on the legal protection of databases, Directive 98/71/EC on the legal protection of designs, Directive 2006/115/EC on rental and lending rights, Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society) and the solutions present in individual national regulations, distinguished according to the systemic jurisdiction of the *copyright* system or the *droit d'auteur* system.

- 2 Marrakesh Treaty on Facilitating Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. http://publications.europa.eu/resource/cellar/718e03f3-1699-11e8-9253-01aa-75ed71a1.0017.03/DOC_1. [accessed: 31.01.2022].
- 3 This intention is already indicated by the Preamble to the Treaty itself, which recalls the principles of non-discrimination, equal opportunities, accessibility and full and effective participation in society and social inclusion proclaimed in the Universal Declaration of Human Rights and in the United Nations Convention on the Rights of Persons with Disabilities.
- 4 Convention on the Rights of Persons with Disabilities, done at New York on 13 December 2006. <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20120001169>. [accessed: 11.01.2022].
- 5 Aside from the above considerations, the author considers it advisable to point out that in the Polish translation of the Convention on the Rights of Persons with Disabilities, in Art. 30 (3) of the CRPD, for unknown reasons, the term „copyright” was used and not, as the relevant content of the Convention, „intellectual property right”. This disadvantage is presented in the table:

materials (Article 30 (3) of the Convention). The obligations arising from the Treaty and the Convention, which require Member Countries to introduce appropriate exceptions and limitations to intellectual property rights, have undoubtedly influenced the development of cultural, creative and humanitarian benefits, including those resulting from the use of digital technologies. These technologies make an important contribution to meeting the needs of people with disabilities, m.in: enabling access to common information. However, digital technology has introduced tools to adapt various types of works of art, which in their original form were not possible for sensory perception by people with disabilities. The use of such devices to adapt works of art to formats accessible to the recipient's disabilities is undoubtedly a great opportunity to deepen the participation of people with disabilities in cultural life and to develop their creative potential for artistic expression. Technological innovations and the increase in the awareness of disabled audiences and their rights to participate in culture have accelerated the possibility of increasing the number of visual works for tactile, haptic, auditory and other experiences. People who, due to their properties and personal conditions, have so far been excluded from access to such materials, for at least a dozen or so years have been able to use the content in substitute forms, which are offered, m.in, by audiobooks, spatial printouts or even headphones adapted to hearing impairments emitting sound using bone conduction.

Although the benefits of introducing exceptions and limitations to copyright for persons with disabilities are indisputable, the conclusions of the considerations regarding potential infringements of intellectual property rights already raise some concern about the actual preservation of the author's well-being. The use of technology to adapt original works to a work in a format accessible to people with disabilities undoubtedly causes disruptions in all aspects of intellectual property law, starting from patent disputes or analysis of the moment of determining the work using 3D printers, to the infringements of moral rights analyzed by the author.

To ensure precision and illustrate the main legal challenges related to the issue presented, the problem has been analyzed in the context of the

Oryginal content Art. 30 (3) CRPD	Polish translation Art. 30 (3) KPN
States Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.	Państwa Strony podejmą odpowiednie środki, zgodne z prawem międzynarodowym, w celu zapewnienia, że przepisy chroniące prawa autorskie nie będą stanowiły nieuzasadnionej lub dyskryminacyjnej bariery dla osób niepełnosprawnych w dostępie do materiałów w dziedzinie kultury.

provisions of the Berne Convention⁶, as a universal instrument of international law for the intellectual property law system in the context of the legislative obligations established by the Convention on the Rights of Persons with Disabilities and the catalogue of exceptions and limitations to copyright based on the Marrakesh Treaty.

2. Legal bases for the transformation of copyrighted works into formats accessible to persons with disabilities

Although the literature on the subject has long pointed to the need to integrate the ideological system of intellectual property law with the human rights system⁷, the international community – in addition to the recognition of equality and the prohibition of discrimination against people with disabilities – has also taken legislative action, the key element of which was to establish a legal obligation to take support actions in the implementation of these rights. From the perspective of considerations concerning potential infringements of the author's intellectual property, the most important provision of the Convention is Article 30 (3)⁸, which also points to the obligation of the Member Countries to ensure that persons with disabilities participate in cultural life on an equal basis and to ensure that they have access to cultural material in formats accessible to them, and to establish a legal framework that excludes discriminatory or unjustified blockades that may result from intellectual property law. The reason for the introduction of the above regulation was the correct observation that the participation of people with disabilities in cultural life is most often hindered by factual circumstances – such as the lack of sufficient accessibility of works in digestible formats, appropriate to

6 Convention for the Protection of Literary and Artistic Works of 9/09/1886, revised in Berlin on November 13, 1908 and in Rome on June 2, 1928. <https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/Bernese-Convention-on-the-protection-of-literary-and-artistic-Ber-no-16778198>. [accessed: 02.02.2022].

7 Laurence R. Helfer, „Human Rights and Intellectual Property: Conflict or Coexistence?” *Minnesota Intellectual Property Review*, No. 1 (2003). <https://scholarship.law.umn.edu/mjlst/vol5/iss1/2>. [accessed: 31.01.2022].

8 Art. „1. States Parties recognize the right of persons with disabilities to participate, on an equal basis with others, in cultural life and shall take all appropriate measures to ensure that persons with disabilities: (a) have access to cultural material in forms accessible to them (...) 3. States Parties shall take appropriate measures, consistent with international law, to ensure that copyright laws do not constitute an unjustified or discriminatory barrier to access by persons with disabilities to cultural material”.

the characteristics and personal conditions of the recipient⁹. It is indisputable that, for example, a deaf-mute person, due to his properties and personal conditions, does not have the possibility of sensual reception of a film projection or a musical concert. For this reason, the failure to provide persons with disabilities with access to artworks in accessible formats, i.e., reproducible by a person with a specific disability, has been identified in the Convention precisely as a manifestation of discrimination. The result of the above was the creation of a regulation that would ensure that people with disabilities would make the most of their creative, artistic, and intellectual potential¹⁰ and ensure full and effective participation and inclusion in society¹¹. Corresponding to the above, another obligation was imposed on Countries by the Convention to ensure that there are no unjustified barriers to intellectual property rights – which implied the need to create national and regional directories of exceptions and limitations to copyright.

One of the consequences of the Convention was the adoption in 2013, under the auspices of WIPO (World Intellectual Property Organization), the Marrakesh Treaty, the purpose of which was to establish an international standard for the use by persons with visual disabilities of works published in print and protected by copyright. For this reason, the Treaty in its principles resembles the assumptions of the Convention¹² and establishes a binding normative framework precisely taking into account the obligation under Article 30(3) of the CRPD. It requires the Contracting Parties (i.e., countries that have ratified the Treaty) to accept such exceptions to copyright that will allow the creation and distribution, including cross-border exchange, of works – originally made available in printed format – in a format accessible to persons with print disabilities. The key benefits of the Treaty, therefore, derive from the obligation to provide, under certain conditions, limitations, and exceptions to:

- 1) making copies of literary works in an accessible format for persons with disabilities;
- 2) the national distribution of accessible format copies of those works;

9 Valentina Della Fina, Rachele Cera, Giuseppe Palmisano, *The United Nations Convention on the Rights of Persons with Disabilities*, 1st ed. (Switzerland: Springer International Publishing, 2017), 49-300.

10 In this way (m) of the Preamble and Art. 30 (2) of the Convention on the Rights of Persons with Disabilities.

11 Art. 3 (a) CRPD.

12 Helfer Laurence, Molly Land, Ruth L. Okediji, Jerome Reichman, *The World Blind Union Guide to the Marrakesh Treaty: Facilitating Access to Books for Print-Disabled Individuals* (Oxford: Oxford University Press, 2017), 58.

- 3) export of copies of processed works in an accessible format (including through digital transmission); and
- 4) import of copies of the above-mentioned works in an available format (including through digital download).

Providing for an exception allowing the creation and distribution in the country of works in accessible formats, without the authorization of the copyright owner, should also promote a greater number of works in accessible formats. Intentionally, the Marrakesh Treaty was also intended to help solve the problem of the hunger for the book (book famine¹³) by alleviating the shortage of works created in the country, as well as helping to save financial resources¹⁴ by making it possible to avoid duplication of the same works, by using cross-border exchanges – provided that countries ratify and implement the provisions of the Treaty.

3. Moral rights under the Berne Convention

From the perspective of the universal system of copyright, the most important act concerning the so-called moral rights¹⁵, of an economic nature,

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- 13 „book hunger” unsatisfied need for access to a book – this term was spread at the beginning of the 21st century and used by the British Royal National Institute of Blind People by using the phrase „global book famine”, as part of the „Right to Read” campaign and according to this concept, book famine is understood as an insufficient number of available books and other copyrighted materials to meet the needs of the blind, visually impaired and other people who, due to their personal characteristics and conditions, cannot meet your reading needs, the author’s own footnote.
 - 14 Countries with smaller collections of works in accessible formats will be able to greatly benefit from existing and growing collections elsewhere, especially where there is linguistic overlap (such as Spain and Argentina). As the publisher does not normally sell accessible format copies in a developing country, he does not lose any income from the operation of the Treaty authorizations. By introducing a restriction or an exception to enable the creation of works in an accessible format, the Marrakesh Treaty does not require Contracting Parties to limit the exception to cases where there is no commercially available format.
 - 15 It is worth mentioning that the Berne Convention itself does not directly name authors’ rights. Art.6 bis only indicates the author’s right to claim the authorship of the work and to oppose any distortion, mutilation or other alteration or any other action to the detriment of the work, which could disregard his honor or good name, which exist alongside the author’s economic rights. This construction of the provisions of Art.

in international law, is the Berne Convention. Berne Convention, which sets global standards for copyright¹⁶, Article 6bis(1) states that „notwithstanding the economic rights of copyright, and even after the transfer of these rights, the author retains the right to assert the authorship of the work and to oppose any distortion, mutilation or other alteration or any other action to the detriment of the work that could transfer the deed to his honour or good name”¹⁷. Thus, the moral rights of the author that appear in the Berne Convention and which have been given a minimum basis for protection are the right to (demand) authorship and the right to object to distortion, modification or derogatory action (right to the integrity of the work) – although, as Michał Wyrwiński points out, arguments are also raised in the doctrine for the fact that the cited provision may constitute the basis for the protection of the right to decide on the first public communication of work¹⁸. However, it is common ground that moral rights recognized and repeated in successive national and universal legal acts are the right to authorship of a work and the right to the integrity of a work.

The right for authorship entitles the author to mark the work with his name and surname or pseudonym, or anonymously, and at the same time to prohibit the use of the author’s name when marking the work of another

6bis was the result of a compromise between the disputed positions of the member states regarding the definition of the above-mentioned rights as personal rights, moral rights or honorary rights. These disputes were, moreover, of a semantic nature, as there was no doubt that the right to protect the good name of the creator, expressed, inter alia, in by the effects of his work, it is just as important a right as the protection of good name guaranteed by the protection of human rights. More: Ralph Brown, „Adherence to the Berne Copyright Convention: The Moral Rights Issue” *Journal of the Copyright Society of the U.S.A.*, No. 3 (1988): 196-209; Robert Plaisant, „Droit de Suite and Droit Moral under the Berne Convention” *Columbia-VLA Journal of Law & the Arts*, No. 1 (1986), 164.

- 16 Jane C. Ginsburg, Sam Ricketson, *International Copyrights and Neighbouring rights. The Berne Conventions and Beyond*, vol. I, 2nd ed. (Oxford: Oxford University Press, 2005), 8.
- 17 Art. 6bis ust 1 Berne convention.
- 18 Michał Wyrwiński, *Autorskie prawa osobiste w obrocie prawnym* (Warszawa: Wolters Kluwer, 2019), 33, pointing to Marcin Huczkowski, *Ochrona autorskich praw osobistych w powszechnym prawie międzynarodowym* (Warszawa: Centrum Doradztwa i Informacji Difin, 2016), 93.

person¹⁹, which results in associating the work with the person of the creator or cutting himself off from works that have been significantly changed by others or of which he was not the author²⁰.

The right to the integrity of the work gives the author the right to object to certain types of actions that may violate the integrity of his work, i.e. consist of, for example, any distortions, mutilations or other changes to the detriment of the work. Under Article 6bis(1), each of these acts must, in addition, at least potentially, have the potential to bring dishonour or good name to the author, so that the interpretation of the scope of protection provided for in Article 6bis includes those infringements which 'would be detrimental to the author'²¹, as well as for his „honour, reputation or other »intellectual interests« as an artist”²². Thus, Article 6bis protects the integrity of the work in terms of preventing harm to the creator²³, regardless of its economic dimension – the main objective is to protect the individual character of the author expressed in his work. The doctrine of protection of the author's personal rights²⁴, therefore, refers to the link with the work as an extension of

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- 19 Natalie Suhl, „Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?” *Fordham Intellectual Property Media and Entertainment Law Journal*, No. 4 (2002).
- 20 Burton Ong, „Why Moral Rights Matter: Recognizing the Intrinsic Value of Integrity Rights” *The Columbia Journal of Law & the Arts*, No. 5 (2003). „Rights of paternity relate to the artist's right to identify himself with his works and, conversely, to disassociate himself with works that have been significantly changed by others or that never originated from him”.
- 21 Ginsburg, Ricketson, *International Copyrights and Neighbouring rights. The Berne Conventions and Beyond*, vol. I, 2nd ed. (Oxford: Oxford University Press, 2005), 459.
- 22 Jacobs Samuel, „The Effect of the 1886 Berne Convention on the U.S. Copyright System's Treatment of Moral Rights and Copyright Term, and Where That Leaves Us Today” *Michigan Telecommunications and Technology Law Review*, No. 1 (2016): 169.
- 23 Roy Kaufman, „The Berne Convention and American Protection of Artists' Moral Rights: Requirements, Limits and Misconceptions” *Columbia-VLA Journal of Law & the Arts*, No. 3 (1990-1991): 421.
- 24 More in polish literature: Janusz Barta, Ryszard Markiewicz, *Prawo autorskie* (Warszawa: Wolters Kluwer, 2010); Janusz Barta, *System prawa prywatnego*, t. XII, *Prawo autorskie*, red. Janusz Barta (Warszawa: Wolters Kluwer, 2013); Stanisław Grzybowski, *System prawa cywilnego*, red. Witold Czachórski, t. I, *Część ogólna*, red. Stanisław Grzybowski (Wrocław: Ossolineum, 1985).

the author's personality, and thus the protection of moral rights is oriented primarily to the author's endowment with the right to decide whether, when, by whom and how the work is presented to the public. It is worth mentioning that these rights are inalienable, and therefore the author's authorization – even after the transfer of copyrights to another entity – does not expire and the author is entitled to block the publication for the rest of his life, determine how he claims the authorship of the work and otherwise prevents significant changes or use of the work in a way contrary to his artistic concept.

4. Confrontation of the rights enabling the adaptation of works for the needs of people with disabilities, and the author's moral rights of the creator

Until the development of modern creative tools, traditional, two-dimensional works protected by copyright were made using methods such as drawing, painting, photography or creating a literary work in written form. However, the development of digital technologies has enabled a much higher level of adaptation for new production methods, such as the aforementioned audiobooks – although this is currently particularly true of works produced using additive manufacturing devices. Therefore, the question arises about the scale to which the possibility of adapting the work to another format causes a violation of the rights granted to the author to preserve the authorship of the work and to maintain the integrity of the work. While in the scope of making copies of a book in an accessible format for people with visual disabilities, it should be pointed out that currently the first copy of a book is usually a digital file – and for the author of such a work it is rather irrelevant whether it will be re-copied to the format of large print, Braille or audiobook, in the case of other two-dimensional works the creator can rightly argue that in his creative intention this particular work was never to be presented in a spatial form²⁵. Moreover, many authors could argue that the very process of changing the structure of the work, consisting in moving away from the original format to a three-dimensional format, significantly violates the integrity of authorship, which consists in granting the author the full right to decide on the form of the work. The use of devices enabling three-dimensional printing is characterized by a high level of creative freedom, manifested both in the ability to scale copied files to different sizes - which can significantly affect the reception of the work. Another problem related to the creator's right to authorship remains the determination of the authorship of the work due to the multitude of people participating in the 3D printing process and the moment of actual determination of the work. It is also possible that a three-dimensional

25 Like this: *International Perspectives on Disability Exceptions in Copyright Law and the Visual Arts. Feeling art*, ed. Jani McCutcheon, Ana Ramalho (London: Routledge Taylor & Francis Group, 2021), 129-144.

representation of work will involve its material distortion or changes that threaten the message of the work in such a way that it will be detrimental to the author. The author of the original work, deprived of the possibility of influencing and deciding on the final version of such a work, may rightly claim that he has been deprived of the actual right to copyright.

According to the author, in the case of making three-dimensional copies of works to adapt them to formats accessible to persons with disabilities, the infringement of moral rights described in the Berne Convention is not an exception under any of the existing systemic restrictions of copyright law. Despite the obligation under Articles 30 (1) and (3) of the Convention to establish a national legal framework that excludes unjustified barriers to intellectual property rights and to ensure that persons with disabilities have access to works in accessible formats, the existing provisions of the copyright system - international law provisions have not specified the obligation to introduce exceptions to copyright for making copies of works in three-dimensional formats. Although the Marrakesh Treaty, which is currently the most recent copyright treaty on restrictions on the rights of authors, also requires parties to lay down exceptions and limitations in national legislation for copyright and related rights for persons with visual disabilities, it does refer to a narrow range of works. Although the purpose of the Treaty is indeed to establish an international accessibility standard for the use of beneficiaries and therefore recalls in its principles the principles of the Convention on the Rights of Persons with Disabilities²⁶, however, it contains significant substantive restrictions which exclude three-dimensional copies of works from its application. The making and exchange of copies guaranteed by the Treaty apply to audiobooks and other printed material in special formats which have been created from works that, in their original form, have been published or otherwise made public in the form of text, notation or related illustrations. Thus, while it can be accepted as a legal justification for drawing up a 3D print of an illustration located and integrated into the content of a book, which has been reproduced and transformed under the exceptions provided for the benefit of the beneficiaries of the Treaty, there is currently no uniform regulation justifying the creation of copies of other illustrations not directly related to the relevant work. Moreover, the preamble to the Treaty stresses the importance of and respect for the previously concluded conventions and treaties on the protection of copyright²⁷, and Article 1 of the Treaty makes it clear

26 Helfer, Land, Okediji, Reichman, *The World Blind Union Guide to the Marrakesh Treaty*, 58.

27 The Marrakesh Treaty states in the Preamble that: „REAFFIRMING the obligations of the Contracting Parties under existing international copyright treaties and the importance and flexibility of the three-step test applicable to the limitations and exceptions laid down in Article

that nothing in the Treaty shall derogate from or prejudice any obligations or rights which the Contracting Parties have undertaken towards each other under any other Treaties²⁸. The current copyright system does not provide for other restrictions on the rights of authors that would decriminalize infringements of moral rights.

From the perspective of the concept of extending exceptions and limitations of intellectual property rights, in the context of the development of a universal system of human rights, there is no regulation of the limits of transforming works into accessible formats, which is an important legal gap. There is therefore little doubt that the current copyright framework is not adapted to harness the potential of technology when transforming dimensional works to ensure their accessibility.

5. Summary and conclusions

In connection with the identification of the above problems, there is no doubt that the contemporary international legal framework requires legislative actions that would integrate the copyrights of creators with the potential of modern devices for spatial production, in formats accessible to people with disabilities. Making such arrangements will undoubtedly contribute to the wider implementation of the rights and needs of people with disabilities, especially since the dynamic development of technology and engineering allows us to assume that in the coming years the development of technologies supporting people with disabilities (assistive technologies²⁹) will expand significantly. At the same time, given the effects of existing devices supporting spatial printing, they lead to the view that limiting the potential that technology can offer to people with disabilities in accessing copyright-protected works would be significantly detrimental to society as a whole.

Given the above proposal, the question remains open: whether and on what legal basis can exploiting the potential of digital devices in transforming copyright-protected works into accessible formats be justified. In the author's opinion – for the issuance of such a justification, the basis should be each analysis of the legal situation in which the creator will be placed and the perspective of the needs and rights of people with disabilities. The examination and interpretation of both levels should include both a comparison of the potential benefits obtained by the recipients of the work and the potential harm suffered by the author as a result of the infringement of his moral rights during the process of transforming the work into the available format.

9(2) of the Berne Convention for the Protection of Literary and Artistic Works and in other international instruments”.

28 Art. 1 Marrakesh Treaty.

29 <https://www.atia.org/home/at-resources/what-is-at/>. [accessed: 03.02.2022].

It would also be useful to examine each time the scale of threats that the good name of the creator, his artistic reputation, the systematics of the presented work, and above all the actual probability of endangering the authorship of the work may suffer as a result of transformations of the work. The comparison of the above result should be confronted with the analysis of the benefits that people with disabilities experience thanks to the possibility of obtaining contact with the work. Undoubtedly, for people with disabilities, one of the biggest obstacles to participating in cultural life is the lack of sufficient accessibility of works in digestible formats. For this reason alone, the undeniable benefit of access to work in an accessible format is, therefore, not only the satisfaction of cultural needs but also the possibility of developing the potential of artistic creative expression in such a recipient. These needs and rights have been sanctioned in many international treaties and are undoubtedly included in the catalogue of the human rights system as arising from the inherent dignity of every human being. However, as the author points out, these rights should be confronted each time with the author's right to maintain ties with the work and with the analysis of the scale of infringements resulting from the transformation of the work into an accessible format and the existence of factual grounds for allegations of infringement of the right to authorship of the work or the right to its integrity. Just as promoting the protection of creativity is also important for achieving the objectives of social development and striking a balance between these two levels is not contrary to the ideas established in international treaties and conventions.

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