

**Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.**

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| In the Matter of Orphan Works and Mass Digitization |)))))) | Docket No. 2012-12 |
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**COMMENTS OF
THE NATIONAL MUSIC PUBLISHERS’ ASSOCIATION, INC., AND
THE HARRY FOX AGENCY, INC. IN RESPONSE TO
FEBRUARY 10, 2014 NOTICE OF INQUIRY**

The National Music Publishers’ Association, Inc. (“NMPA”) and The Harry Fox Agency, Inc. (“HFA”) submit these comments in response to the Copyright Office’s Notice of Inquiry examining issues raised by orphan works and mass digitization dated February 10, 2014. 79 Fed. Reg. 7,706.

Introduction

NMPA, founded in 1917, is the principal trade association representing the interests of music publishers in the United States. As such, NMPA works to protect the interests of the music publishers and songwriters and has served as the leading voice of the American publishing industry in Congress and the courts. With over 3,000 members, NMPA represents both large and small music publishing firms throughout the United States.

HFA, which is solely owned by NMPA, provides licensing and administrative services to over 46,000 music publishing clients that, in turn, control over four million copyrighted musical works. On behalf of its affiliated publishers, HFA issues licenses for

the use of music in both physical and digital formats, and collects and distributes royalties due pursuant to those licenses.

I. NMPA and HFA Reaffirm Their Orphan Works Comments from 2012.

NMPA and HFA reassert their comments from the Copyright Office’s 2012 Notice of Inquiry regarding “orphan works.”¹ For a detailed argument on each of the following, NMPA and HFA draw the Copyright Office’s attention to the 2012 Comments submission. That submission drew several conclusions, which can be summarized as follows:

A. Musical Works Would Not Be an Appropriate Subject Matter for an Orphan Works System.

NMPA and HFA believe the problem of orphan musical works is minimal because Congress has already created a statutory framework in Section 115 of the Copyright Act to ensure that musical works, including those whose owners allegedly cannot be located, are widely available to the public.² Additionally, the music industry has extremely sophisticated, thorough, and constantly improving databases and other mechanisms to identify songwriters and publishers that are easily accessible by any user, thus allowing potential subsequent users to identify and locate copyright owners of musical works, making an orphan works system unnecessary when applied to musical works.³ This commitment to accurate and complete data extends to working with rights holder entities worldwide to establish a Global Repertoire Database.⁴

¹ See Comments of the National Music Publishers’ Association, Inc., and The Harry Fox Agency, Inc. In Response To October 22, 2012 Notice Of Inquiry (Feb. 4, 2013), *available at* http://www.copyright.gov/orphan/comments/noi_10222012/National-Music-Publishers-Association-Harry-Fox.pdf [hereinafter “2012 COMMENTS”]. See *also* 77 Fed. Reg. 64,555 (Oct. 22, 2012).

² 2012 COMMENTS, *supra* note 1, at *2.

³ *Id.*

⁴ *Id.* at *2-3.

In addition to existing databases maintained by the music industry, the emergence of content identification software and algorithms, such as YouTube’s ContentID system, provide an alternative means of identifying content owners.⁵ As these databases and search tools become increasingly sophisticated, the likelihood that copyrighted works will become “orphaned” will likely decrease. Improved search and identification tools also reduce the burdens on subsequent users seeking to identify the owners of copyrighted works.

B. Orphan Works Should Only Include Works Whose Owners Cannot Be Determined After Subsequent Users Have Fulfilled Specific and Rigorous Due Diligence Requirements.

Although NMPA and HFA are opposed to the inclusion of musical works into the subject matter of an orphan works system, if an orphan works system is adopted, it must protect the rights of copyright owners by ensuring that any subsequent user is required to engage in a rigorous due diligence search for the copyright owner, guided by a set of best practices developed by copyright owners, in coordination with the Copyright Office.⁶ Subsequent users of copyrighted works stand in the best position to give notice to an owner that his or her copyrighted work is being used, and infringement does not rely upon discovery by the owner.⁷ Therefore and at a minimum, subsequent users must be required to take rigorous affirmative steps, as part of their due diligence requirement, to find copyright owners and avoid infringement.⁸

⁵ See HOW CONTENT ID WORKS – YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> (describing the ContentID system as allowing content owners to “easily identify and manage their content on YouTube.”).

⁶ 2012 COMMENTS, *supra* note 1, at *3.

⁷ 17 U.S.C. § 501(a) (2012).

⁸ 2012 COMMENTS, *supra* note 1, at *3.

NMPA and HFA also believe it is important that the due diligence requirement go beyond simply searching pre-existing commercial databases.⁹ Indeed, insomuch as the orphan works question is pointed at those works for which ownership is not readily ascertained, due diligence must by definition exceed the basic duty of searching readily available and freely accessible databases.¹⁰ Requiring more also befits the goal of helping identify the types of small or individual copyright owners, who are among those most likely to have works that appear to be “orphaned.”¹¹

C. An Orphan Works System Should be Limited to Non-Commercial Uses by Non- Commercial Parties.

Commercial uses of copyrighted works should not be included in an orphan works system. While some parties contend that both non-commercial and commercial uses should be included in an orphan works framework, permitting the use of an orphan work can only be justified in cases in which using some or all of a copyrighted work is necessary to further public discourse or education.¹² The profit motive of a third party distributor is not sufficient justification for encroaching on a copyright owner’s exclusive rights. Even authorizing the non-commercial uses of orphaned musical works goes too far because such lines are difficult to draw and markets have developed for the licensing of educational and other uses of music for which the distributor is a commercial, profit making enterprise.¹³ Moreover, as a general matter, most music is distributed by profit-seeking, commercial enterprises.¹⁴

⁹ *Id.*

¹⁰ *Id.* at *4.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at *5.

D. An Orphan Works System Should Not Re-Implement Registration Requirements

Some parties continue to argue for imposing a registration requirement on copyright owners as a means of reducing the number of so-called “orphan” works. However, such an approach merely reimposes the registration burden on copyright owners that was flatly rejected by Congress with the passage of the 1976 Copyright Act, and defies the Berne Convention’s ban on formalities.¹⁵ Furthermore, requiring copyright owners to register unfairly reverses the current copyright regulatory scheme from an opt-out to an opt-in system.¹⁶

E. Content Owners in Each Creative Industry Must Create Best Practices for Due Diligence Search Requirements

Content owners in each creative industry are uniquely positioned to provide valuable input about practices that would be best suited for each particular industry.¹⁷ As such, content owners across different industries should participate in the process of creating best practices to determine what constitutes due diligence.¹⁸

NMPA and HFA further suggest the following prerequisites for satisfying a due diligence search: (1) a search of registrations in the Copyright Office and the Copyright Office archives; (2) a search of various publicly accessible databases maintained by HFA, ASCAP, and BMI and other similar collecting societies or organizations; (3) retention and hiring of a professional search firm with experience in locating this type of information; (4) review of copyright notices on, and label copy of, sound recordings of such musical works; (5) upon identifying individual or organizational owners of musical

¹⁵ *See id.* at *6-7.

¹⁶ *Id.*

¹⁷ *Id.* at *7.

¹⁸ *Id.*

works, search databases maintained by relevant secretaries of state and courts to identify successors in interest, heirs or assigns as the case may be; and (6) undertake reasonable efforts to contact owners (and their successors-in-interest, heirs or assigns, as the case may be), either directly or through their authorized agents, identified through the searches listed in (1) through (5) above.¹⁹

F. Any Subsequent User Must Be Required to Submit the Details of Its Search and Notice of Intent to Use a Work to the Copyright Office

As is seen in European copyright regimes addressing this concern, an “orphan works” system should implement a requirement that any subsequent user be required to provide to the Copyright Office both the details and results of its diligent search, as well as notice of an intent to make use of a work that has been determined to be an “orphan work.”²⁰ The Notice should minimally include: (1) details of the reasonably diligent search; (2) information regarding the planned use of an orphan work; and (3) the user’s contact information, which must be updated as appropriate. Furthermore, copyright owners should be able to use this information as a resource and have the opportunity to access the database to determine whether their works are being used as an orphan work.²¹

G. Copyright Owners Identified After Use of an Orphan Work Must Receive Reasonable Compensation

An orphan works system must also anticipate situations in which a copyright owner is identified after a subsequent user has performed a diligent search and used an orphan work. In these situations, the original owner must be entitled to receive compensation for the use of his work.²² This issue could best be addressed by the creation

¹⁹ *Id.* at *7-8.

²⁰ *Id.* at *9.

²¹ *Id.* at *10.

²² *Id.*

of a database in which each subsequent user would file notice of his intent to use a particular work so that the Copyright Office has a record of uses of orphan works. Creators could then search the database to determine whether their works have been designated as an orphan work and used in any subsequent work in order to receive compensation for this work.

Further, with the creation of this database, subsequent users should also be required to pay a fee for the use of orphan works that would be deposited in a self-regulated trust. In order to ensure that the original creator of a work that has been designated as an orphan will be compensated if he is identified, the trust would serve as a repository from which original creators could be paid for such uses.

H. Owners of Copyrights Must Not Bear the Burden of Legal Fees Incurred Litigating Ownership Claims

If the copyright owner and subsequent user are not able to come to a mutually agreeable settlement to set a reasonable fee, the copyright owner must have an effective legal mechanism to ensure fair compensation for prior use and cessation of the subsequent use. In addition, the copyright owner should be entitled to recover any legal fees incurred if it is forced to turn to the courts to obtain fair compensation.²³

II. Mass Digitization, Particularly Through Orphan Works Legislation, Will Undermine the Purposes of Copyright if it Removes from Subsequent Users the Burden of Identifying and Securing Copyright, Even When the Copyright Owner is Easily Found.

Orphan Works Legislation is an inappropriate vehicle for addressing Mass Digitization. Mass Digitization is not fundamentally about so-called “orphan works,” but rather about entities daunted by the burden of identifying and compensating owners for

²³ *Id.* at *10-11.

the reproduction and distribution of copyrighted works.²⁴ As such, mass digitization requires a separate search solution and legal framework to accommodate entities seeking to reproduce and distribute massive quantities of copyrighted works via digital forms.

While the creation and sustenance of libraries and archives is a legitimate purpose potentially benefited by mass digitization, the reality is that reproducing any work, let alone a substantial body of work, and making those works readily available in digital media has been undercut revenues for copyright holders and encourages piracy and exploitation of copyrighted works.²⁵ In order to ensure that copyright owners' basic reproduction and distribution rights are protected against exploitive misuse, any provisions for mass digitization must balance the availability of works with the property rights of copyright owners, and must do so while ensuring that copyright owners are informed about and approve of the mass digitization of their protected works.

A. Mass Digitization Should Require the Permission of Owners

In cases of mass digitization, the issue is typically not about the difficulty of identifying owners, but concerns the administrative burden of processing and obtaining the permission of a large number of copyright owners.²⁶ However, administrative difficulties and even the public interest are not sufficient justifications for stripping

²⁴ In one example overstating the scope and extent of "orphan works," the Copyright Office's 2006 study on orphan works noted that nearly 40% of the comments submitted on the "orphan works problem" failed to even "identify a specific instance where a copyright owner could not be identified or located, while another 10% of the comments provided enough information for the Office to conclude that the problem presented by the comments was "not in fact an orphan works situation." COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 21 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

²⁵ See, e.g., IFPI, DIGITAL MUSIC REPORT 2010 18-19 (2010), available at <http://www.ifpi.org/content/library/dmr2010.pdf> (noting that the availability of music online through illegal file sharing is a "major factor in the decline in legitimate music sales, resulting in a "significant, and sometimes disastrous, impact on investment in artists and local repertoire."); Rafael Rob and Joel Waldfogel, *Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students*, 49 J.L. & ECON. 29, 55 (2006) (finding evidence of sales displacement and decreased valuation when music is available for download).

²⁶ Lois F. Wasoff, *If Mass Digitization is the Problem, is Legislation the Solution? Some Practical Considerations Related to Copyright*, 34 Colum. J.L. & Arts 731, 731 (2011).

owners of vested rights, and should not be used as a pretext for wholesale evasions of copyright's granted protections.

1. Protecting Copyright Owners' Exclusive Rights Through Carefully Limited Exceptions Comports with the Fundamental Purpose of Copyright.

Limits on copyright owners' exclusive rights have long been seen as reflecting a carefully prescribed Congressional balance between the public interest in the creation of new works versus subsequent access to those works.²⁷ For instance, the limited exceptions provided to libraries and archives in Section 108 reflect Congressional efforts to provide for carefully circumscribed access while protecting the rights of copyright owners.²⁸ The spirit of Section 108 should be continued with the drafting of a mass digitization provisions by reaffirming and securing copyright owners' exclusive rights to reproduce and distribute protected works against the backdrop of mass digitization.

2. Inconvenience to secondary users is not a sufficient justification for preempting copyright owners' exclusive rights.

The fact that a secondary user seeks to digitally copy and distribute large quantities of content should not justify excusing them from obtaining distribution permission from copyright owners. Doing so would effectively preempt owners' exclusive rights under Section 106. Such a structure is consistent, for instance, with the narrow permissions to make a very small number of copies of a work available for limited purposes under Section 108, a permission that does not work a wholesale elimination of copyright owners' reproduction and distribution rights under Section 106.

²⁷ *Stewart v. Abend*, 495 U.S. 207, 230 (1990); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (citing to *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

²⁸ Compare 17 U.S.C. § 108(a) with 17 U.S.C. § 108(g), (h)(2).

B. Any Mass Digitization Solution Should Secure Rights for All Copyright Owners, Even Those Whose Works Were Originally Published Prior to the Digital Era.

It is important to recognize that mass digitization will impact not only works created during the digital age, but also works created at any point in history that are still under copyright.²⁹ Protecting the rights of all copyright owners, regardless of when the protected work was created, is critical to securing the financial incentives going forward for copyright owners, otherwise future changes in technology may strip owners of their granted rights. Therefore, any solution meant to support mass digitization must secure copyright for all copyright owners, including electronic distribution rights, regardless of whether or not the works in question were originally published in the pre-digital era.

The Copyright Act makes clear that copyright is not granted based on specific technologies available at the time of a work's creation, but rather purely on the creation of original works.³⁰ Furthermore, limits on the scope of rights based on technology are already carefully ensconced in the exclusive rights under Section 106 where they are assessed separately from the basic question of whether a work is entitled to protection under Section 102.³¹ This careful balance reflects copyright's core purpose of protecting the vested rights of authors upon a work's creation, and to reward authors for their labor as a means of encouraging the creation of new works. Limiting the rights of authors based on the state of technology at the time of creation would have the unprecedented consequence of voiding copyright owners' vested rights based on unforeseeable technological change. Doing so would in turn inject deep uncertainty into the monetary

²⁹ Wasoff, *supra* note 26, at 736.

³⁰ 17 U.S.C. § 102(a) (2012).

³¹ 17 U.S.C. § 106.

incentives intended by copyright, to the detriment of copyright owners and the public interest in the creation of new works.³²

C. Mass Digitization Should be Limited to Non-Commercial Uses by Non-Commercial Entities.

As noted above, the availability of digital copies of works has an immediate and significant negative impact on copyright owners' revenues due to the ease with which such copies can be exploited and distributed without the knowledge or permission of copyright owners.³³ As discussed with regards to orphan works, the commercial motives of distributors are not sufficient justification for eliminating the exclusive rights of copyright owners.³⁴ The mass digitization of large volumes of copyrighted works also poses a direct and extraordinary risk to those exclusive rights. Any statutory provisions allowing mass digitization must therefore limit this risk by first limiting the scope of the permission to conduct mass digitization. If mass digitization is to be permitted as a matter of public interest, that interest is only served by limiting mass digitization to noncommercial uses by noncommercial entities, such as educational, library, or archival uses.

However, limiting mass digitization on the basis of noncommercial entity status is not sufficient. Noncommercial entities oftentimes have commercial potential or commercial partners.³⁵ It is critical, therefore, that noncommercial entities not be able to

³² See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 151, 156 (1975) (noting that when interpreting copyright against the backdrop of technological change, the Copyright Act “must be construed in light of [its] basic purpose” of benefitting the public by rewarding the labor of authors); Randall C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 *Antitrust Bull.* 423, 441 (2002).

³³ *Supra* note 25 and accompanying text.

³⁴ See *supra* Part I.C.

³⁵ Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document* 13, 20 (2011), available at http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf (noting that “some actors have commercial motives for digitizing The fact that a digitization project is intended to

exploit mass digitization as a backdoor through which to create new revenue streams without licensed authority from copyright owners.³⁶ Protecting authors from unauthorized reproduction and distribution stemming from mass digitization further requires that the law explicitly forbid engaging in mass digitization in support of commercial ends.

In addition to protecting copyright owners, limiting the scope of permissible uses will also protect competitors and innovators seeking to lawfully distribute copyrighted works for commercial purposes. Failing to forbid commercial uses of mass digitization would create market failures and competitive imbalance. In sidestepping licensing and owner permissions, the market would fail to capture the full value of a copyright owner's contributions, effecting an unauthorized transfer from owner to user.³⁷ As a result, and by allowing some market participants to avoid the full cost of obtaining a license to commercialize the distribution of a protected work, the market would unfairly disadvantage business innovators when a mass digitization permission is not available based on their given business model.

D. Mass Digitization Should be Distinct From the Libraries and Archives Exceptions Granted Under Section 108.

To protect both rightsholders and a fair and free market, any mass digitization structure should explicitly state that any reproduction or distribution of copyrighted works beyond the narrow permissions granted to libraries and archives in Section 108 will require licensing by copyright owners to any and all subsequent users, including

make money may not change the fact that it is beneficial to the public, but it may change the application of copyright law and the acceptable reach of limitations and exceptions [I]t is difficult to imagine an exception to copyright applying to commercial partners of libraries.”)

³⁶ Wasoff, *supra* note 26, at 739-40 (presenting several ways in which digitization facilitates commercial enterprise and exploitation of copyright).

³⁷ Rob and Waldfoegel, *supra* note 25, at 29.

entities pursuing mass digitization.³⁸ In protecting rights holders, entities interested in mass digitization should be responsible for identifying and obtaining permissions from rights holders, and should be held to a standard of due diligence based on best practices guidance.

1. Any entity seeking to mass digitize copyrighted works should be required to conduct a due diligence search for owners.

Entities seeking to mass digitize a catalog of works are the parties in the best position to know whether or not a work is being considered for mass digitization. On the other hand, asking copyright owners to be ever-vigilant in monitoring any and all possible entities that may or may have digitized their work imposes an insurmountable burden on copyright owners. Indeed, the inefficiencies resulting from a burden on owners to monitor possible digitized distribution can be seen in the notice and takedown procedures under the DMCA.³⁹ Under a structure that requires the owner to identify and pursue infringers online, the incentives within the DMCA encourage rather than dissuade piracy by making the monitoring task pragmatically impossible and deeply ineffective.⁴⁰

Taking a lesson from the DMCA's notice and takedown system, any mass digitization provisions should require that the user of content, rather than the owner, be responsible for pursuing permissions through the conduct of a due diligence search. Given the vast body of works for which owners can be readily identified through publishers and other private rights organizations such as ASCAP, Harry Fox, and BMI, a user seeking to obtain permission for mass digitization will frequently have little trouble

³⁸ See 17 U.S.C. § 108 (allowing limited archival copying without the permission of the copyright owner).

³⁹ BRUCE BOYDEN, THE FAILURE OF THE DMCA NOTICE AND TAKEDOWN SYSTEM: A TWENTIETH CENTURY SOLUTION TO A TWENTY-FIRST CENTURY PROBLEM (Dec. 2013), *available at* <http://cpip.gmu.edu/wp-content/uploads/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf> (noting that “the enormous effort required . . . is a waste of everyone’s resources”).

⁴⁰ *Id.* (stating that the notice and takedown’s burden on owners “may create perverse incentives.”).

identifying the owner of a given work.⁴¹ Since only a small percentage of musical works are apt to require longer investigations to satisfy a due diligence standard, such duties should not be used as a pretext for stripping owners of their reproduction and distribution rights. Finally, and as a corollary to granting permission to distribute an orphan work after a due diligence search, providing a method of securing permission to mass digitize a work of unknown authorship after a due diligence search balances the rights of copyright owners—particularly small copyright owners—against the public interest in making works available through mass digitization.

2. Best practice guidance should be formulated by the Copyright Office and relevant content industry participants in identifying owners and uses that comport with any mass digitization provisions.

Just as in the case of orphan works, industry participants working with the Copyright Office are in the best position to provide best practice guidance to copyright content users. As such, the Copyright Office should engage industry and provide best practice guidance to fulfilling the due diligence search requirements of any mass digitization provisions. Similarly, the Copyright Office should work with industry to provide best practice guidance on uses that comport with any mass digitization provisions.

For consistency and based upon the due diligence requirements for orphan works searches, NMPA and HFA further suggest the following prerequisites for satisfying a due diligence search: (1) a search of registrations in the Copyright Office and the Copyright Office archives; (2) a search of various publicly accessible databases maintained by HFA, ASCAP, and BMI and other similar collecting societies or organizations; (3) retention and hiring of a professional search firm with experience in locating this type of information; (4) review of copyright notices on, and label copy of, sound recordings of

⁴¹ See *supra* notes 2-5 and accompanying text.

such musical works; (5) upon identifying individual or organizational owners of musical works, search databases maintained by relevant secretaries of state and courts to identify successors in interest, heirs or assigns as the case may be; and (6) undertake reasonable efforts to contact owners (and their successors-in-interest, heirs or assigns, as the case may be), either directly or through their authorized agents, identified through the searches listed in (1) through (4) above.⁴²

E. There Should be No Extension of Fair Use as a Basis for Mass Digitization.

The fair use provisions and analysis embodied in Section 107 codify preexisting judicial doctrine meant to “permit courts to avoid rigid application of the copyright when on occasion, such application would *stifle the very creativity which copyright law is designed to foster.*”⁴³ Furthermore, Section 107 was not meant to “change, narrow, or enlarge” fair use.⁴⁴ As such, fair use is not intended to support the expansion of commercial applications, nor is it intended to circumvent the exclusive rights of copyright owners by allowing the wholesale reproduction of works.⁴⁵

Because fair use serves the protection of creativity and weighs against commercial or merely duplicative reproduction and distribution, extending fair use to incorporate mass digitization would misappropriate the doctrine and undermine its role in balancing the need to further creativity with the protection of copyright owners’ interests. As a result, there should be no expansion of fair use to accommodate or serve as the basis for mass digitization.

⁴² 2012 COMMENTS, *supra* note 1, at *7-8.

⁴³ *Iowa State Univ. Research Found. v. Am. Broadcasting Cos., Inc.*, 621 F.2d 57 (2d Cir. 1980) (emphasis added).

⁴⁴ *Meeropol v. Nizer*, 560 F.2d 1061, cert denied 434 U.S. 1013 (1978).

⁴⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (upholding the use of fair use for the direct parody of one song, but noting that in the absence of transformative use, commercial use and mere reproduction weigh against fair use). *See also Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560-61 (1985) (rejecting a fair use claim in a case of commercial reproduction).

NMPA and HFA appreciate the opportunity to provide comments on these issues and looks forward to the opportunity to continue their involvement as the Copyright Office addresses the issues of orphan works and mass digitization.

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Respectfully submitted,



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