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L I N U S

Legal Innovations in the U.S.

Intellectual Property Rights and Cyberspace: The Legal and Economic Implications

Welcome to the fifth issue of **LINUS** - Legal Innovations in the U.S. - the U.S. Embassy's quarterly e-bulletin. In this edition, we will be examining ***Intellectual Property Rights and Cyberspace: The Legal and Economic Implications*.**

LINUS' goal is to examine innovative legal practices, ideas, experiments, and organizations, while providing references for further study. Although the U.S. and Israel have different theories and practices of law, we also see many similarities. We hope that the dissemination of information on important developments of U.S. law will raise awareness and encourage openness and debate among those in the Israeli legal community and the population they serve, as well as serving as a spring-board for a two-way exchange of information on U.S. and Israeli legal models.

Since 1995, the U.S. Embassy in Israel brought together American and Israeli legal professionals to share ideas and processes. This exchange continues to enrich both U.S. and Israeli legal professionals, broadening awareness of alternative legal approaches and innovations.

Each bulletin includes a bibliography and list of useful internet sites relating to the issue's central topic. For the latest information on legal issues and back issues of this bulletin, please visit:
http://israel.usembassy.gov/publish/law.html

Through its Office of Public Affairs and The American Center's Information Resource Center, the U.S. Embassy offers a variety of activities to strengthen the Israeli public's understanding of American society; it also conducts periodic seminars and videoconferences in Israel as well as educational and professional exchanges between the United States and Israel.

We welcome your feedback and, in particular, we welcome any comments on the content of this bulletin. Please send your emails to azizfr@state.gov.

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INTELLECTUAL PROPERTY RIGHTS AND CYBERSPACE: THE LEGAL AND ECONOMIC IMPLICATIONS

"If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening mine.... Inventions then cannot, in nature, be a subject of property."
Thomas Jefferson, one of the first individuals responsible for the U.S. Patent Office, in a letter to Isaac McPherson Monticello, August 13, 1813.

"*We are finding that both our substantive laws and procedural tools are not always adequate to keep pace with the rapid changes in technology*."
Former Attorney General Janet Reno, Testimony before U.S. Senate Committee on Appropriations, Subcommittee on Commerce, Justice, and State, February 16, 2000.

Intellectual Property is a frequently used term without a particularly concrete definition. While society has long debated private property, little has been said about the peculiar nature of this odd form of property. In general, private property is justified as a guarantee of the owner's use and the right to dispose of that property. This holds true for all material goods.

However, intellectual property is a different case. TimeLine's "History of Copyright in the United States" explains that legislation regulating intellectual property has its origin in England, in a law dating from 1710, which provided copyright protection to books and other writings. The passing of this act, following the 1709 Statute of Anne, introduced two new concepts - an author being the owner of copyright and the principle of a fixed term of protection for published works. The act also brought about the depositing of nine copies of a book to certain libraries throughout the country.

Until the mid 19th-century, the most important means of technology transfer was hiring skilled workers who brought needed technological knowledge. Skilled workers from industrially advanced countries were in high demand. In 1719 French and Russian attempts to recruit British workers - especially those skilled in wool, metal and watch-making industries - prompted the British government to ban skilled worker migration, making it punishable by fine or even imprisonment. Emigrant workers who failed to return home within six months of warning could lose their land, property and citizenship.

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As technologies became embodied in machines, the focus shifted to controlling their export. In 1750, Britain banned the export of "tools and utensils" in wool and silk industries, then in 1781 widened that to "any machine, engine, tool, press, paper, utensil or implement whatsoever." By the mid-19th century key technologies were too complex to acquire by hiring workers and importing machines, and licensing patents became increasingly important. Most of today's industrial countries introduced patents by 1850, followed by copyright and trademark laws.

However, it was in the United States where this idea was conceptualized and given form by the Founding Fathers. Section 8 of the U.S. Constitution states: "The Congress shall have the power.... to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries." It was understood that compensation was an important stimulus for the inventor to produce more and for society to progress in the direction of the common good. Section 8 is the sole legal justification for the creation of the immense body of law and diverse institutions that exist today, and its inclusion in the Constitution is by no means arbitrary. Like the rest of the Constitution, it was extensively debated by the framers. By creating a system of IP law, the United States government gave voice to a sense that there is a balance to be struck between the impossibility of restricting the circulation of ideas and the need to find some way to reward individuals who spent their lives inventing, writing, or creating and improving ideas. In 1790 Congress passed the first copyright statute, protecting three kinds of works: books, maps, and charts.

From the above Constitutional mandate, Congress and the courts cooperated in expanding the set of protected creations, and the law of intellectual property gradually became fragmented into industry-specific subfields -- for example, musical compositions were added in 1831; photographs in 1865 - today, not only is copying a landscape photograph illegal, but even taking a photograph substantially similar to a photograph someone has previously taken may give rise to an infringement claim. Sound recording was added in 1971, software in 1978, and architecture in 1990. These federal laws governing the legal and illegal aspects of IP created specific agencies within the Departments of Justice and Commerce to manage and oversee the issues. The three areas are copyright, patent and trademark. (It is in the area of trademark law that the explosion of intellectual property has been most striking. The notion that a manufacturer who places on his goods a particular mark can prevent others from using the same mark to sell similar goods first appeared in American law in the middle third of the nineteenth century.)

In the case of copyright, the Library of Congress was designated as the body which would house copyrighted works, maintain a registry, and publish circulars concerning the rules and regulations.

In the case of patents and trademarks, the Congress created a new office, the Patent and Trademark Office, which oversees patent law (Title 35) and trademark law (Section 22 of Title 15). In addition, this institution also publishes its own Code of Federal Regulations (CFR) that governs how the office will grant and review patents and trademarks.

No single factor explains why the coverage of intellectual property law has been expanding so steadily. Rather, several intertwined forces - economic, political and ideological - appear to be at work. Professor William Fisher III of Harvard Law School attempts to explain this growth in a presentation entitled "The Disaggregation of Intellectual Property" which appeared in the *Harvard Law Bulletin*, Summer 2004. He noted that the transformation of the U.S. economy, from agricultural to industrial to service-based to informational, has resulted in an increase in the number and variety of interest groups requesting greater protection for their intellectual products. At the same time, the U. S. has gone from a net importer to a net exporter of intellectual property. According to Professor Fisher, "there has been a dramatic increase, starting in the early 20th century, in the perceived importance of advertising, which has made strong trademark protection seem even more imperative to the firms that engage in it. Americans' deep commitment to the Lockean labor-desert theory of property," (which stresses that a person should benefit from their labor), "together with an associated equity theory of distributive justice," (which stresses the doctrine that a decision is just or right if all parties receive what they need or deserve), "has helped fuel arguments that creators deserve fair returns for their creativity. Popular suspicion, rooted in classical liberalism, of governmental involvement in the process of identifying and rewarding good words of art and socially valuable inventions has fueled hostility to governmental reward systems as alternatives to intellectual property law."

In 1984, the United States designated inadequate protection of patents, trademarks, and copyrights as an unfair trade practice that could invoke retaliation under Section 301 of the Trade Act of 1974. In the ensuing twenty years, intellectual property rights have moved from an arcane area of legal analysis and a policy backwater to the forefront of global economic policymaking.

In the 1990s, often under pressure from the U.S., dozens of countries, including Israel, strengthened their intellectual property laws and regulations. Numerous regional trade and investment agreements, such as the North American Free Trade Agreement (NAFTA) and bilateral accords between the European Union and countries in the Middle East, have protection of intellectual property at their core. At the multilateral level, the successful conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) as a founding component of the World Trade Organization (WTO) elevates recognition and the enforcement of IP to the level of inviolable international commitment. The TRIPs agreement represents a major turning point in

the global protection of intellectual property. However, its implementation in many countries is not complete and controversies are constantly emerging over perceived weaknesses in implementing legislation.

A crucial component of this economic globalization is that the costs of many creative activities rise even as it is becoming easier to copy them. Examples include pharmaceutical products, biotechnological inventions, operating software, and movies, which are costly to produce but are often straightforward to reproduce.

Misusing copyrighted material, stealing trade secrets, or counterfeiting trademarked products is a crime, and just as intellectual property has become more and more important for the economy and security of the United States, misuse of intellectual property has become easier and easier, and the consequences can be and are devastating.

In 1999, Eric H. Holder, Jr., former Deputy Attorney General, U.S. Department of Justice, explained the need to create an Intellectual Property Rights Initiative, the first comprehensive inter-agency plan to combat the growing surge in the theft of intellectual property - both in the U.S. and around the world; he also explained how the United States' economy is increasingly dependent on the production and distribution of intellectual property. Currently, the U.S. leads the world in the creation and export of intellectual property and IP-related products. This includes everything from software products to music, films, books, and all of the products that are protected by the U.S. copyright and trademark laws. In 2002, the combined U.S. copyright industries and derivative businesses accounted for more than $626 billion, or 6 % of the U.S. Gross National Product (GNP). Between 1977 and 1996, growth in this area soared at nearly twice the annual growth rate of the U.S. economy as a whole, and current studies estimate the growth rate to be five times the overall economic growth rate. In 1998, the software industry alone reported that it employed 2.7 million Americans in the U.S., far exceeding earlier estimates that the industry would employ one million people by the year 2005.

A recent Commerce Department report, released in October 2004, estimated that the combined copyright and trademark industries represent the second fastest growing sector of the U.S. economy behind Internet-related e-commerce. According to the International Intellectual Property Alliance, (IIPA), losses due to piracy of U.S. copyrighted materials around the world are estimated to reach $20-$22 billion annually (not including internet piracy).

According to the Business Software Alliance, software piracy alone cost the U.S. economy over 118,000 jobs and $5.7 billion in wage losses in the year 2000. By 2008, those numbers are estimated to rise to 175,000 lost jobs, $7.3 billion in lost wages and $1.6 billion in lost tax revenues.

It is estimated that overall U.S. companies lost $200 billion in 1997, due to worldwide copyright, trademark, and trade secret infringement. Industry estimates 25% of all business software programs used by U.S. companies is pirated; in some countries, that figure soars to 99%. Domestically, the U.S. Customs Service reported that in 1998, it seized more than $75 million in IP-infringing merchandise intended for sale in the United States. In every major U.S. city, countless street peddlers openly sell a wide variety of counterfeit goods, ranging from designer apparel to motion picture videos.

> In 2002, the U.S. "core" copyright industries (business software, films, videos, music, sound recordings, books and journals, and interactive entertainment software) accounted for an estimated 6% of the U.S. gross domestic product ($626.6 billion).
>
> In 2002, the U.S. "total" copyright industries accounted for an estimated 12% of the U.S. gross domestic product ($1.25 trillion).
>
> The "core" copyright industries employed 4% of U.S. workers in 2002 (5.48 million workers).
>
> The "total" copyright industries employed 8.41% of U.S. workers in 2002 (11.47 million workers). This level approaches the total employment levels of the entire health care and social assistance sector (15.3 million) and the entire U.S. manufacturing sector (14.5 million in 21 manufacturing industries).
>
> Between 1997-2002, the core copyright industries added workers at an annual rate of 1.33%, exceeding that of the U.S. economy as a whole (1.05%) by 27%.
>
> In 2002, the U.S. copyright industries achieved foreign sales and exports estimated at $89.26 billion, leading other major industry sectors such as: chemicals and related products, food and live animals, motor vehicles, parts, and accessories, and aircraft and associated equipment sectors.

Today, the emergence of global digital networks, such as the Internet, and digital technologies that enhance human abilities to access, store, manipulate, and transmit vast amounts of information has brought with it a host of new legal issues. With close to 70% of all Americans using the Internet, these technologies of cyberspace have linked the world in a complex of relationships unbounded by geography.

But cyberspace is not without risks. There are no laws governing conduct in this new frontier. Roberta Katz, Netscape's former general counsel, noted that what we see today is not the future; it's more like the toddler stage, with new Internet technologies being daily incorporated into our lives. Katz concludes that as more and more people

learn the advantages of using the Internet for their business transactions, the transformation of the U.S. economy would force the legal profession to redefine both the justice system and the very nature of how the legal profession delivers legal services.

The Committee on Intellectual Property Rights and the Emerging Information Infrastructure, National Research Council of the National Academies, chaired by Professor Randall Davis, Computer Science Department, MIT, believes that fundamental change is close by. As a society, the Committee states, we need to ask whether the existing mechanisms still work, and if not, what should be done and what options exist for accomplishing the important goals of intellectual property law and policy in the digital age? Test cases, such as the upheaval in music publishing and distribution caused by digital recording and the MP3 format, are becoming more and more common.

"Information has increasingly become an event to be experienced, rather than an artifact to be kept," said committee chair Professor Davis. "The question of how to control distribution and the use of digital information is much more than a legal issue alone. Law, business, and technology all interact, hence approaching the problem from a single viewpoint will be inadequate. Many stakeholders are affected; anyone with an interest in 'e-commerce' will feel the consequences of the decisions made on this topic. A broad framework is needed to address all aspects of the public and private interest and to ensure the future vitality of the Internet economy."

In his book, *Being Digital*, Nicholas Negroponte, Founding Director of the MIT Media Lab, says that the key to understanding the Internet economy is to focus on the difference between bits and atoms. Our present global economy is governed by treaties (GATT, for instance) that are about the movement of goods—atoms. "The information superhighway is about the global movement of weightless bits at the speed of light. As one industry after another looks at itself in the mirror and asks about its future in a digital world, that future is driven almost 100 percent by the ability of that company's product or services to be rendered in digital form," explains Negroponte.

The ease of distributing and altering digital information and the proliferation of computer networking, raises concerns about copyright and patenting -- protections rooted in the U.S. Constitution. As technology continues to evolve, policy-makers will experience ongoing uncertainty and frustration when grappling with the issues that these changes bring. The committee concluded that technology must be viewed as only part of the picture and not the driving force for new laws and policies. The focus needs to be on the underlying issues that influence market behavior, such as consumer attitudes regarding digital information and new opportunities to generate, distribute, and profit from it.

A report by the Digital Connections Council of the Committee for Economic Development examined this "digital dilemma" with the goal of determining what intellectual property policies are most likely to stimulate the innovation critical to economic growth. Federal Reserve Board Chairman Alan Greenspan asks, " If our objective is to maximize

economic growth, are we striking the right balance in our protection of intellectual property rights? Are the protections sufficiently broad to encourage innovation but not so broad as to shut down follow-on innovation? Are such protections so vague that they produce uncertainties that raise risk premiums and the cost of capital? How appropriate is our current system—developed for a world in which physical assets predominated—for an economy in which value increasingly is embodied in ideas rather than tangible capital?"

The information infrastructure has the potential to demolish a careful balancing of public good and private interest that has emerged from the evolution of U.S. intellectual property law over the past 200 years. The public good is the betterment of society that results from the Constitutional mandate to promote the "progress of science and the useful arts" while the private interest is served by the time-limited monopoly (a copyright or patent) given to one who has made a contribution to that progress. By and large the past 200 years of intellectual property history have seen a successful, evolving, balancing of details. But the continually evolving information infrastructure presents a rapid leap in technology that may upset the current balance, forcing a rethinking of many of the fundamental premises and practices associated with intellectual property.

While societies are seeing a shift in economies as significant as the industrial revolution, and the transition to knowledge and information is becoming a major source of wealth, intellectual property may well be the most important asset in the coming decades.

The Committee for Economic Development states somewhat philosophically: "Intellectual property will surely survive the digital age, although substantial time and effort may be required to achieve a workable balance between private rights and the public interest in information. Major adaptations may need to take place to ensure that content creators and rights holders have sufficient incentives to produce an extensive and diverse supply of intellectual property. Policy makers and stakeholders will have to work together to ensure that the important public purposes embodied in copyright law continue to be fulfilled in the digital context. The information infrastructure promises the possibility of greatly improved access to information for all of society. We as a society share the responsibility for developing reasonable compromises to allow the nation to benefit from the opportunities it can bring."

The United States is moving to crack down on trade in counterfeit and pirated goods, which global authorities say now accounts for as much as 7 percent of world trade.

At an October 4, 2004 briefing in Washington, former Commerce Secretary Don Evans and other senior officials outlined details of the new Strategy Targeting Organized Piracy (STOP). The plan included immediate steps to be taken by U.S. agencies, legal and administrative changes planned for the near future, and an intensified U.S. effort to build anti-counterfeiting coalitions with governments and private sectors overseas. "Just as geography no longer limits criminal activity, law enforcement will not be

deterred by the boundaries of our nations. We must cooperate with those around the world," Attorney General John Ashcroft said. He went on to say that the United States would seek to update its Mutual Legal Assistance and Extradition Treaties with trading partners to improve enforcement of crimes against intellectual property rights (IPR) and to break up the large criminal organizations that are involved in widespread sales of pirated products.

"The Department of Justice plans to work with Congress to overhaul U.S. IP laws to close loopholes and toughen penalties for people convicted of piracy," he added. Under the plan, the United States will publish for the first time an annual list of foreign companies known to be producing or trafficking in fakes.

"We're going to make life more onerous for our target firms, consistent with our international obligations," U.S. Trade Representative Robert Zoellick said, adding that his office would use its annual Special 301 Report, which identifies and ranks foreign countries that fail to provide effective IP protection, "to name and shame overseas companies that are producing and trafficking in fakes." The next Special 301 Report is scheduled for release in April 2005.

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The following is a bibliography of available books at The American Center's Information Resource Center. For general information regarding the IRC, please visit: http://israel.usembassy.gov/

INTELLECTUAL PROPERTY RIGHTS

Business: Its Legal, Ethical and Global Environment, by Marianne Moody Jennings. 5th edition. Cincinnati, Ohio, West Legal Studies in Business, 2000.

Business Law for a New Century, by Jeffrey F. Beatty and Susan S. Samuelson. 2nd edition. Cincinnati, Ohio, West Legal Studies in Business, 2001.

Digital Copyright, by Jessica Litman. Amherst, New York, Prometheus Books, 2001.

Intellectual Property: The Law of Trademarks, Copyrights, Patents, and Trade Secrets, by Deborah E. Bouchoux. Albany, N.Y., West Legal Studies/Thomson Learning, 2000.

Intellectual Property Rights in the Global Economy, by Keith E. Maskus. Washington, DC., Institute for International Economics, 2000.

Intellectual Property in the New Technological Age, by Robert P. Merges, Peter S. Menell & Mark A. Lemley. Gaithersburg, [Md], Aspen Law & Business, 2000.

Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property, by Michael P. Ryan. Washington, D.C., Brookings Institution Press, 1998.

Law & Ethics in the Business Environment, by Terry Halbert & Elaine Ingulli. 3rd edition. Cincinnati, Ohio, West Legal Studies in Business, 2000.

Intellectual Property: The Law of Copyright, Patents, and Trademarks, by Schechter and Thomas. West, 2003.

Essentials of Intellectual Property, by Poltorak and Lerner. Wiley, 2004.

Global Intellectual Property Rights: Knowledge, Access, and Development, by Drahos and Mayne. Palgrave MacMillan, 2002.

Steal This Idea: Intellectual Property Rights and the Corporate Confiscation of Creativity, by Michael Perelman. Palgrave MacMillan, 2002.

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Fundamentals of United States Intellectual Property Law: Copyright, Patent, and Trademark, by Halpern, Nard, and Port. Klawer, 1999.

Protecting Your Company's Intellectual Property: A Practical Guide to Trademarks, Copyrights, Patents, & Trade Secrets, by Deborah Bouchoux. American Management Association, 2001.

Copy Fights: The Future of Intellectual Property in the Information Age, by Thierer and Crews. Cato Institute, 2002.

Private Power, Public Law: The Globalization of Intellectual Property Rights, by Susan Sell. Cambridge, 2003.

The Future of Ideas: The Fate of the Commons in a Connected World, by Lawrence Lessig. Vintage, 2001.

Digital Copyright: Protecting Intellectual Property on the Internet, by Jessica Litman. Prometheus Books, 2000.

Digital Rights Management: Business and Technology, by Rosenblatt, Trippe, and Mooney. Wiley, 2001.

Promises to Keep: Technology, Law, and the Future of Entertainment, by William Fisher. Stanford University Press, 2004.

Cyberlaw: The Law of the Internet, by Jonathan Rosenoer. Springer-Verlag, 1997.

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The following Websites provide information on the subject of **Intellectual Property Rights and the Limits of the Legal System in Cyberspace Law.**

Copyright Law in Cyberspace
Included in this site by Georgia Harper is a crash course in copyright and specific copyright issues in distance learning.
http://www.utsystem.edu/ogc/intellectualproperty/distance.htm

The Disaggregation of Intellectual Property: How the Laws of Intellectual Property have Grown - and Grown Apart, by Professor William Fisher III
Harvard Law Bulletin, Summer 2004
http://www.law.harvard.edu/alumni/bulletin/2004/summer/feature_2-1.html

Law and Borders - The Rise of Law in Cyberspace
David R. Johnson and David Post
http://www.temple.edu/lawschool/dpost/Borders.html

Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing
Mark Stefik
http://www.law.berkeley.edu/journals/btlj/articles/12-1/stefik.html

Governing Cyberspace, or Where is James Madison When We Need Him?
David Post
http://www.temple.edu/lawschool/dpost/icann/comment1.html

A Primer in Modern Intellectual Property Law
Christopher Kelty
http://cnx.rice.edu/content/m11795/latest/

World Intellectual Property Organization: Important International Agreements Intellectual Property Law
http://www.wipo.int/treaties/en/index.html

Protecting Intellectual Property Rights
U.S. Department of State, Bureau of International Information Programs
http://usinfo.state.gov/ei/economic_issues/intellectual_property.html

Computer Crime and Intellectual Property
U.S. Department of Justice
http://www.cybercrime.gov/ip.html

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What are Patents, Trademarks, Servicemarks and Copyrights
U.S. Patent and Trademark Office
http://www.uspto.gov/main/definitions.htm

Glossary of Intellectual Property Terms
U.S. State Department
http://usinfo.state.gov/products/pubs/intelprp/glossary.htm

International Intellectual Property Alliance
The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of six trade associations, each representing a significant segment of the U.S. copyright community.
http://www.iipa.com/aboutiipa.html

International Intellectual Property Rights (IPR) Training Database
This database is maintained by agencies of the United States Government and industry associations who provide training and technical assistance relating to protecting IPR. The database is a tool designed to permit the IPR Training Coordination Group, composed of these U.S. private and public sector training providers, to share information in order to coordinate and plan IPR training, as well as respond to queries about U.S. IPR training activities.
http://www.training.ipr.gov/

The Commercial Law Development Program ("CLDP")
A Department of Commerce initiative, funded in part by the Agency for International Development, is one component of the US Government effort to support economic and political reforms underway around the globe. CLDP provides training and consultative services to lawmakers, regulators, judges, lawyers and educators seeking assistance in the evaluation, revision and implementation of evolving legal systems.
http://www.ogc.doc.gov/ogc/cldp/cldp.html

Digital Rights Management or Digital Restrictions Management (DRM)
An umbrella term for any of several arrangements which allows a vendor of content in electronic form to control the material and restrict its usage in various ways that can be specified by the vendor. The actual arrangements are called technical protection measures (although the distinction between the two terms is not particularly clear).
http://en.wikipedia.org/wiki/Digital_rights_management

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