# Litigation/Legislative Update

## CPTWG #146

## July 19, 2017


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# Litigation

- *Packingham v. North Carolina* (SCOTUS 2017)
- *BWP Media USA, Inc. v. National Photo Group LLC. (5th Cir 2017)*
- *Design Basics, LLC v. Lexington Homes, Inc.* (7th Cir. 2017)
- *Mavrix Photographers, LLC v. LiveJournal, Inc.* (9th Cir. 2017)
- *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC* (11th Cir. 2017)
- *Milo & Gabby LLC v. Amazon.com, Inc.* (Fed. Cir. 2017)
- *Blizzard Entertainment et al v. Lilith Games et al.* (ND CA 2017)
- *Dr. Seuss Enterprises, L.P. v. Comicmix LLC,* (SD CA 2017)
- *Artifex Software, Inc. v. Hancom, Inc.* (ND CA 2017)
- *Estate of James Oscar Smith v. Cash Money Records* (SD NY 2017)

# *Packingham v. North Carolina* (SCOTUS 2017)

- North Carolina law – felony for sex offender to access social networking sites
- Held violates First Amendment
  - Cyberspace most important place to speak and listen
  - Unlimited low-cost communications
  - State barring access to principle source of news, other information and communications
  - Can enact narrower prohibitions
- In *BMG v. Cox Communications* 4th Cir. appeal, Cox raises constitutionality of DMCA effective termination policy requirement

# *BWP Media USA, Inc. v. National Photo Group LLC.* (5th Cir 2017)

- No agent, so no safe harbor
- D asserts volitional-conduct defense
- P claims *Aereo* erased volition defense & safe harbor eliminated common law defenses
- 5th Cir grants D Summary Judgment
  - Like 9th Cir, interprets *Aereo* narrowly – CATV-like system, plus Scalia dissent
  - Safe Harbor doesn't eliminate common law defenses – see §512(l)
  - 4th Cir *CoStar* – codification does not abrogate common law unless Congress explicitly states, didn't do so; common law "touchstone" for interpretation

# *Design Basics, LLC v. Lexington Homes, Inc.* (7th Cir. 2017)

- P sued for copyright infringement based on its house design
- Court calls P a troll
- Access: no proof of D's access (independent creation) – P public website insufficient
- No infringement if D used "unprotected elements"
  - Hard to find originality where tightly constrained by functional requirements
  - Scènes à faire – Colonial resembles common home design "throughout suburbs"

# *Mavrix Photographers, LLC v. LiveJournal, Inc.* (9th Cir. 2017)

- D social media website, users supplied photographs infringing P's copyright
- D claimed Safe harbor; but question whether "posted at users direction"
- D had "moderators" reviewing material before posting
- Reversed DC – were the moderators D's agents under agency common law and acts attributable to D?
- Remanded to DC: apply agency law

# *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC* (11th Cir. 2017)

- P only filed registration application
- Circuits split on whether may file upon copyright application or registration
- "no civil action for infringement…shall be instituted until preregistration or registration of the copyright claim...." 17 U.S.C. §411(a)
- Like 10th Circuits, 11th chooses registration approach relying on the Act's text
- 5th and 9th Circuits – application
- Significant issues: 6-8 month wait, statue of limitations

# *Milo & Gabby LLC v. Amazon.com, Inc.* (Fed. Cir. 2017)

- Amazon acts to fulfill third-party vendors sales on its site, sued by P for infringing sales
- Court disagrees that Amazon is the seller of allegedly infringing products
  - Role merely to provide logistical and shipping services
  - Seller retains title until after seller has completed transaction with buyer, Amazon not a seller under the Act
- Also, not a distributor as does not constitute "other transfer of ownership" as Amazon's acts do not include transfer of title

# *Blizzard Entertainment et al v. Lilith Games et al.* (ND CA 2017)

- In computer programming world complicated issues of what is a work and who is the author
- P's Popular *Warcraft III: Reign of Chaos* video game published by Blizzard
- Encouraged gamers to make "mods," *DotA* became popular mod
- P Valve published *Dota 2* based on *DotA*
- Ds release cellphone versions of Dota 2
- Were moders (Eul, Guinsoo, and Icefrog) authors of DotA and are their versions' unitary works?

# *Blizzard Entertainment et al v. Lilith Games et al. (Con't)*

- Moders assigned copyrights to P Valve
- D claims "Valve did not create, and does not independently own, the underlying work from the original DotA that is reused in Dota 2."
- Under *Aalmuhammed v. Lee,* court finds Eul, Guinsoo, and Icefrog were authors "Master mind"
- D argues no copyright to collective works
- Judge Finds 200 DotA versions each a work (*Star Wars* analogy)
- Valve still have to prove Ds copied protected elements

# *Dr. Seuss Enterprises, L.P. v. Comicmix LLC* (SD CA 2017)

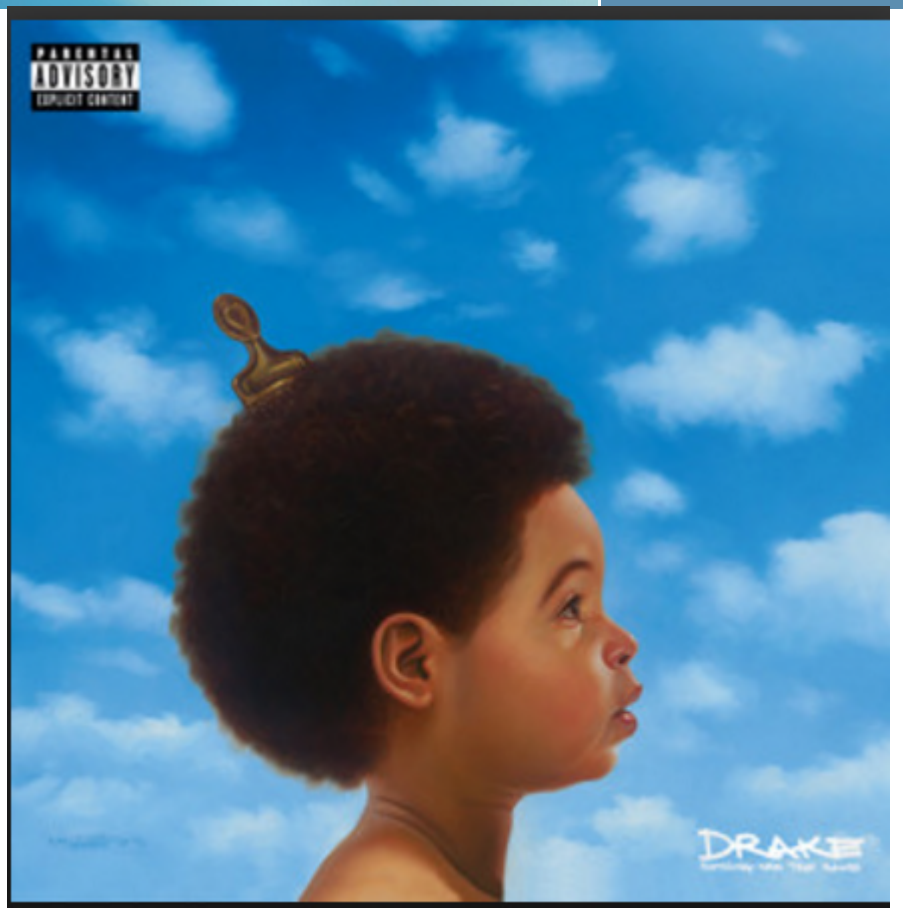
- Allegedly infringed work: "Oh the Places You'll Go!"
- Mashup "Oh the Places You'll Boldly Go!" combines Dr. Seuss and *Star Trek*
- Motion to Dismiss; D claims fair use
- Court examines four fair use factors
  - Not parody, but a transformative mash-up
  - While fictional, published so only slight favor P
  - Reformatted Seuss illustrations from unique *Star Trek* perspective – not against D
  - Not a substitute, serves different market, but because D Motion to Dismiss, without more evidence weighs for P
- Dominate 1st and 4th factors "in equipoise" denies Motion to Dismiss

# *Artifex Software, Inc. v. Hancom, Inc.* (ND CA 2017)

- Open source .pdf interpreter
- D incorporated into office suite under GNU GPL, but didn't distribute source code as required
- Judge held cognizable harm results under open-source license even if no money changed hands (cites *Jacobsen v. Katzer* Fed. Cir.)
- Korean D files motion to dismiss, argues suit based on extraterritorial acts
- Judge agrees if all predicate acts occur outside US can't proceed
- But since MTD, give P reasonable inferences, sufficiently plead at least some acts occurred in US

# *Estate of James Oscar Smith v. Cash Money Records* (SD NY 2017)


JSR




Pound Cake/Paris Motion

# *Estate of James Oscar Smith v. Cash Money Records (Con't)*

- Past opinions: "get a license or don't sample"
- Court considers fair use
  - Drake transformed key phrase from JSR's "brazen dismissal" of all non-jazz music to only "real music," sharply different from JSR
  - JSR fictional, but because Drake recording transformative, of "limited usefulness"
  - Quantity and value reasonable to the use
  - Effect on market "single most important element"
    - Different markets addressed by tracks
    - P never attempted to establish market – 31 years to register
    - Coupled with "highly transformative" nature, not a competing work
  - Judge found fair use

# Administrative – Legislative Developments

# Register of Copyrights Selection and Accountability Act of 2017 (H.R. 1695)

- Update – recall:  would amend Copyright Act to require Presidential appointment the Registrar with the advice and consent of the Senate
- House passed 378-48
- Received in Senate, referred to Committee on Rules and Administration
- Rumor some Republican Senators unhappy with the President appointing head of a Congressional body

# IPEC Appointed

- President appointed Vishal J. Amin of Michigan to be Intellectual Property Enforcement Coordinator
- Awaiting Senate confirmation
- Amin was Senior Counsel on House Judiciary
- In Bush II White House and Department of Commerce

# *U.S. Copyright Office Section 1201 Study*

- Release last month, found 1201 working as Congress intended, no need for fundamental changes
- Recommends legislative "updates:"
  - Expand security & encryption research provisions
  - Exceptions for use of assistive reading tech and device repair
  - Give Librarian discretion to authorize 3rd party assistance to those granted triennial exemptions
- Identifies regulatory changes it can make to streamline the triennial exemption process

# *Exemptions to Permit Circumvention of Access Controls on Copyrighted - NOI*

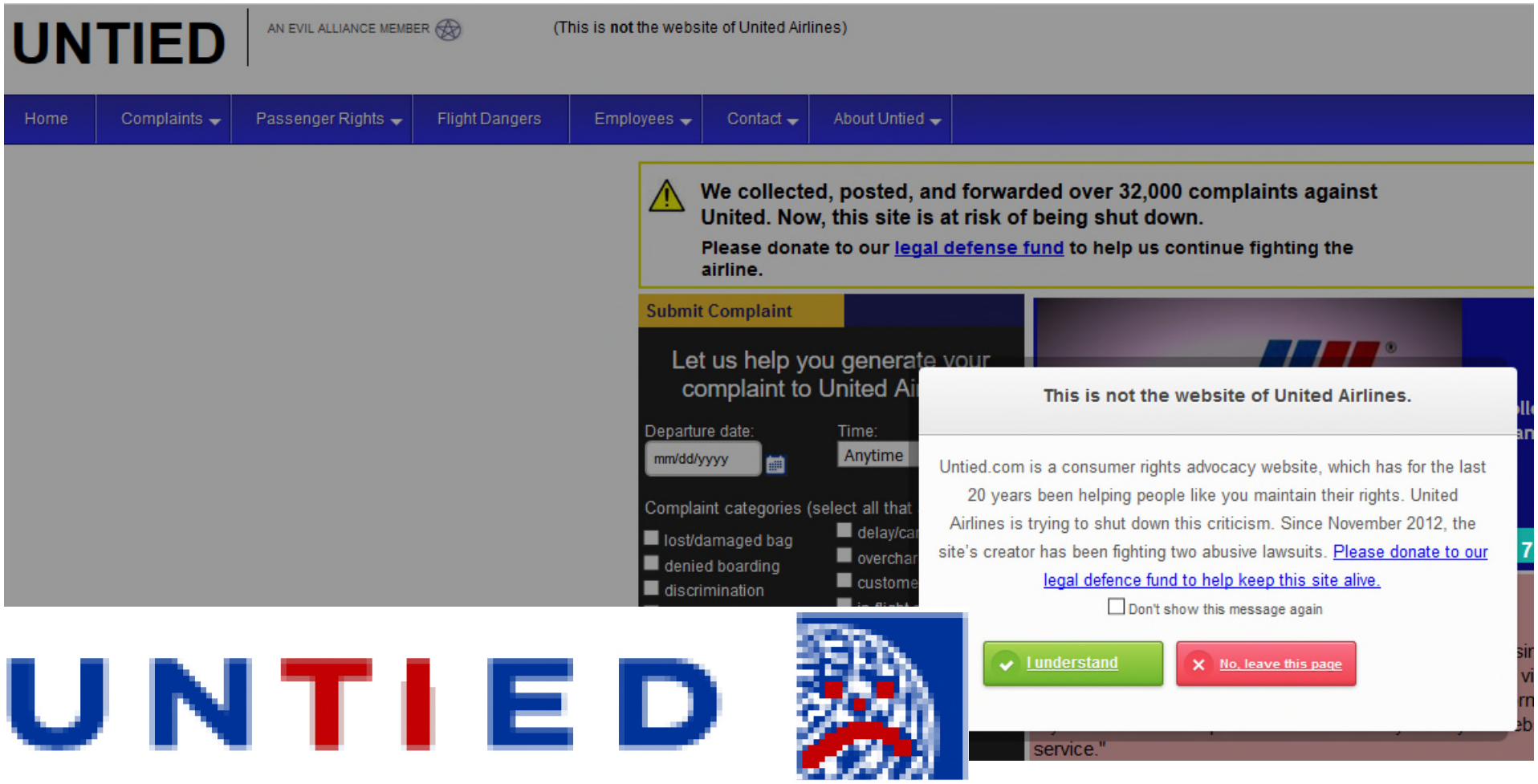
- 7th Triennial under the DMCA
- Determine whether to grant exemptions from §1201(a) prohibiting circumvention of an effective technological measure
- Difference: streamlined renewal
- Renewal petitions: July 31, 2017
- Comments in response: September 13
- New exemption petitions: September 13

# International

# Canada: *Google Inc. v. Equustek Solutions Inc*

- In trade secrets case trial court issued injunction requiring Google to de-index Datalink worldwide – Google.ca insufficient
- Supreme Court affirmed finding only effective remedy because the "Internet has no borders"
- Dismissed as hypothetical potential conflict with other countries' laws
- Rejected freedom of expression issues as outweighed by need to prevent harm from "Google's facilitation" of Datalink's breach of court orders
- Dissent notes remedy not very effective and other avenues of redress (e.g., freeze assets in France)

# *United Airlines, Inc. v. Cooperstock* (CA Fed. Ct. 2017)



# *United Airlines, Inc. v. Cooperstock (Con't)*

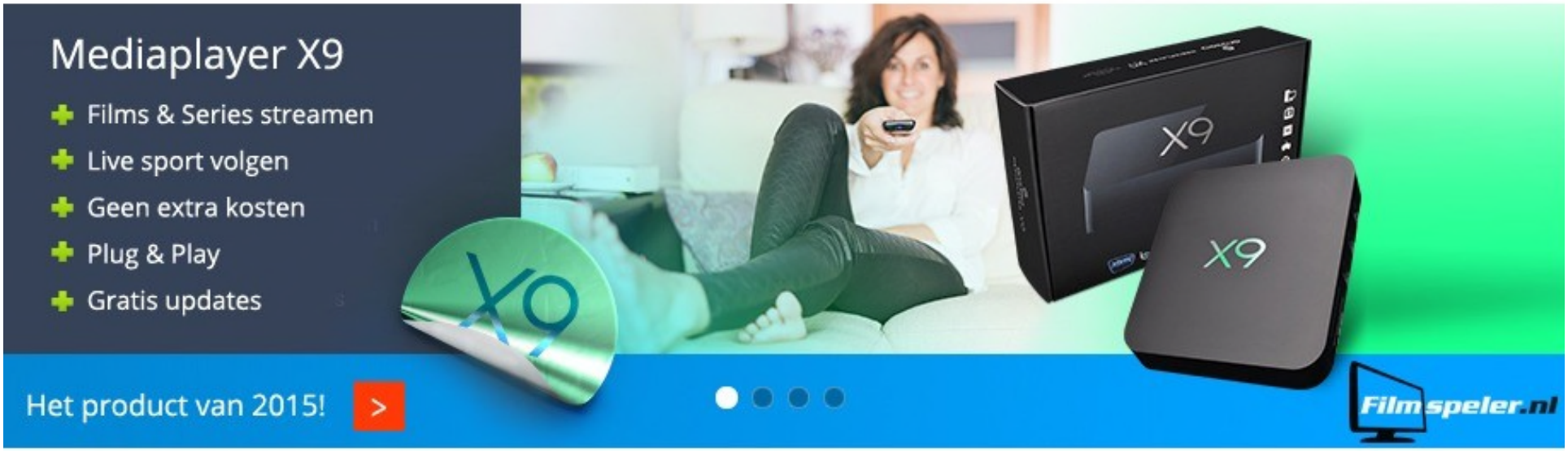
- Operator of site devoted to criticizing UAL sued for ™ and © infringement
- Found work original and Δ copied
- Question whether "fair dealing"
  - Two step test – (1) allowable purpose (defined in law) and (2) dealing was fair
  - US fair use and precedent not automatically imported into Canada

# *United Airlines, Inc. v. Cooperstock (Con't)*

- Satire allowable – untied.com is parody: evokes work, with some differences, and expresses mockery
  - Purpose – assessment of real purpose, punish/defame P
  - Character – found works widely distributed
  - Amount – substantial, copied home page
  - Alternatives – found were available
  - Nature – UAL widely available
  - Effect – substantial copying harm of confusion
- Fails second step – questionable purpose, amount of dealing, and effect weigh against fair dealing

# *Stichting Brein v. Ziggo BV* (EU Court of Justice)

- Netherlands Supreme Court asked ECJ whether Pirate Bay platform communicates works to the public in violation of the EU Copyright Directive
- PB system connects Internet users to share BitTorrent segments of protected works, operates a site where users can download torrent files, and indexes torrent files so that segments of protected works can be downloaded as a whole
- ECJ found that making available is an act of communication – PB did so in full knowledge of consequences of providing easy access to protected works
- In addition to "making available," works must be communicated to a "public," found the "several dozens of millions of 'peers'" on the platform fulfilled that requirement
- ECJ found that such a platform could be found in violation of the Directive




Welcome to Filmspeler

# Watch everything!

## You decide what you want to watch!

Unlimited access to the best films, series and sports without a subscription.
That's what you want too, right?

Thats now possible with the Mediaplayer X9!

Works world wide
we do free shipping world wide!

# *Stichting Brein v. Jack Frederik Wullems* (ECJ)

- ECJ found Wullems sales of filmspeler likely to be copyright infringement
- Note ads make it clear easy to watch "pirate" movies
- Issue: was marketing a "communication to the public"
- ECJ: interpret broadly – pre-installation of software to find and access protected works
- Because widespread distribution of the device, a communication to the public

# *Scanbox Entm't A/S v. Telenor AS*, Norges (Supreme Court of Norway)

- No disclosure of ISP subscribers' information without demonstration of "grave and harmful effects"
- District Court had ordered Telenor to reveal
- Appeals court reversed saying Ps failed to show sufficient scale of filing sharing under the Copyright Act
- Supreme Court affirmed saying failed to show grave and harmful effects outweigh subscribers' privacy rights
- Burden on rightsholders to demonstrate balance

# Draft EU Copyright Directive

- New provisions seem to make compromise before October vote near impossible
  - “Quality journalism against fake news” &
  - Save copyright on the Internet
- Special press publishers provision (ancillary ©)
  - Fee for “snippets”
  - Opponents point to Spain and Germany
- SP intermediate liability for user uploads
  - Compete with licensed services
  - Should be liable for use of content and enter into licenses
  - Must filter and monitor (ECJ decision against)

# New EU Copyright Rules

- Marrakesh Treaty implementation
  - EU Parliament 609 to 22 approved rules for EU-wide copyright exceptions to ease access to works for the visually impaired
  - Won't need permission to make accessible-format books
  - Better access to special-format books from abroad
  - 29 countries have ratified, vote allows EU ratification
- Cross-Border portability for online services
  - Allow Member State consumers temporarily present in another Member State to access services they subscribed in home state
  - Covers TV, recorded music, e-books, video games, sporting events and "entertainment programs"
  - Allies to all 28 member countries plus 3 EEA countries
  - Geo limiting provisions are "unenforceable"

# *Relatório de Discussão e Votação na Especialidade* (Portugal)

- Permit DRM circumvention for "lawful" purposes, e.g.,
  - Private right to copy
  - Accessing public domain or government works
- Awaiting President's signature

# *Australia Copyright Amendment (Disability Access and Other Measures) Bill 2017*

- After at least five years of debate, Australian Parliament passes an amendment to their Copyright Act
- Permits disable person (or assistant) to access copyrighted material under fair dealing
- Fair dealing criteria similar to US
  - Purpose and character
  - Nature of material
  - Effect on potential market or value
  - Amount taken in relation to whole
- Education copying permitted if pay "equitable remuneration" to collecting society
- Library preservation (if version or format not available)
- No fair dealing for individuals nor ISP safe harbors to OSPs


Thank You
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