

Future of Innovation and Commerce Confluence of Copyright in Audio Visual Trade Industry and the Underlying Issues

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ABSTRACT:

We are the inhabitants of the 21st Century, an era full of skyscrapers, global warming, and a generation endorsing the 'Netflix and chill' phenomenon. Trade incentivizes development and innovation. Intellectual property rights provide an impetus for innovation. Thus trade indirectly and constantly demands innovation so as to reach out to consumers in various forms. Audio-visual industry is one such form of trade facilitated innovation which has gathered importance in the recent past. With the advancement of technology, subject matters of copyright do not remain restrained in their country of origin. It is attributed to the development in the field of trade and commerce which has facilitated access to such audio-visual work around the globe. The audiovisual service sector has experienced drastic increase in the last few years. Technological developments have permitted greater quantities of content to be delivered and have given allowed customers to exercise more control over what they want to consume and when. Thus the confluence of trade and innovation creates a dynamic industry with worldwide consumers. The boom in consumers of Netflix, Amazon prime videos, Hotstar etc are to name a few. With rights come responsibilities and thus spring the issues of copyright while the audio-visual work travels trans-boundary. Up until today, practically every strategy that has been deployed to try to thwart unauthorized copying of digital audiovisual work has been unsuccessful or defeated by readily available applications that are developed almost as quickly as new methods of copy protection come online. The audio-visual sector of trade is a recent phenomena and thus requires all the more attention given its susceptibility to IP issues. This paper seeks to dwell into the concept, meaning and analysis of the issues with respect to copyright in the audio-visual industry.

Keywords: Intellectual property rights, innovation, trade, audio-visual industry.

I. INTRODUCTION

Services have, of late, grown into the most dynamic section of international trade. Since 1980, world services trade has grown faster, albeit from a relatively modest basis, than merchandise flows.¹ The circumference of the service sector is undoubtedly the largest as well as one of the most rapidly growing sectors of the world today. It not only accounts for 60 percent of the global output and contribution to the economy but also serves as an employment generation mechanism.² Approximation of value of cross order trade is highly unlikely, but even so UNCTAD estimated the total value of global e-commerce transactions, both domestic and cross-border, at

¹ *Basic Purpose and Concepts*, Handbook of WTO. Available at https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c1s1p1_e.htm.

² Mrs. Debra Steger, *Dispute Settlement under World Trade Organization*, United Nations Conference on Trade and Development (2003). Available at https://unctad.org/en/Docs/edmmisc232add31_en.pdf.

US\$ 25 trillion in 2015. This represents an increase of around 56 per cent compared to 2013.³

1995 witnessed the coming into force of The General Agreement on Trade in Services (the “GATS”), which was a result of Uruguay Round on multilateral trade negotiations. GATS was the first multilateral agreement covering this important and growing area of services trade.⁴ The GATS is a child conceived after intricate, prolonged and complicated negotiations between both developed as well as developing countries. This agreement has a broad scope of application, i.e. most of the government imposed measures be it national, regional or local which affect trade in services, fall under the purview of the agreement with the important exception of services supplied in the exercise of governmental authority.⁵

Amongst other traditional and non-traditional service sectors, a new sector called the audio visual industry has emerged which is a result of rapidly advancing technology. The role of audio visual services is extremely important and influential in any society.⁶ These services help maintain the social values and are intertwined with the conservation of cultural distinctiveness of a society. It is also crucial with regard to the role it plays in influencing public opinion, protecting democratic system and developing creative potential. It is for these reasons that governments of countries including developed and developing nations provide incentives for encouraging audio visual services in their domestic industry. At the same time there are strict vigilance on the content that these services provide.

When the negotiations were being carried out during the Uruguay Round of WTO (World Trade Organization) the audio-visual sector did not receive much liberalization. Countries including major players like Canada & Australia were hesitant to commit to this sector. The hesitation was so that their domestic industries did not have to compete and suffer against the foreign players and also to protect their culture from foreign invasion. Despite repeated concerns, audio-visual industry today occupies a large market and with the rampant advancement and spread of technology trading of these services has become lucrative and easier. Amidst this scenario the issue of copyright emerges since audio-visual service content comprises of the subject matter of copyright. Even with many regulations and protective measures the content gets dissipated in violative forms thus infringing the right of the copyright owner. This paper dwells into this issue of copyright infringement and what can be the possible solutions to overcome the issue considering the world has become a borderless state and tracing the course of infringement becomes a potential problem.

³*The Future Of World Trade: How Digital Technologies Are Transforming Global Commerce*, World Trade Report (2018). Available at https://www.wto.org/english/res_e/publications_e/world_trade_report18_e.pdf.

⁴ Ibid; 2.

⁵*Article 3.13 of GATS*, Module of Dispute Settlement under World Trade Organization, United Nations Conference on Trade and Development (2003). Available at https://unctad.org/en/Docs/edmmisc232add31_en.pdf.

⁶ Mohammad Farooq and Tariq Mahmood, *WTO Regulations and the Audio-visual Sector: An Analytical Framework for Pakistan*, The Pakistan Development Review, Vol. 42, No. 4, Papers and Proceedings PART II pp. 587-606.

II. WHAT ARE AUDIO VISUAL SERVICES

Audio-visual, as the name itself suggests, comprises of audio-visual content which may be in any form i.e. music, dance, movies, etc. This content may be distributed nationally and at international level through the T.V and Radio broadcasting, cinema, video sales and rental etc.⁷ To sum up, audio-visual service encompasses an extensive variety of services including motion picture, video tape, television and radio programme production and distribution services; post production services; sound recording services; motion pictures and video projection services; radio and television broadcasting services; talent agency services; coaching services; and other services such as, the content of multimedia products.⁸

The Services Sectoral Classification List defines audiovisual services as Communication Services. There are six sub-categories listed under this head , and their associated listing under the United Nations "Provisional Central Product Classification" (CPC) are as follows;

- Motion picture and video tape production and distribution services
- Motion picture projection service
- Radio and television services
- Radio and television transmission services
- Sound recording; and
- Other (No CPC categories specified, but could cover, for example, the contents of multimedia products).⁹

This sector is undoubtedly one of the fastest growing services sectors in the world. With technological advancements over the years the source for dissipation of entertainment has shifted from radio to television to internet eventually. Growth rate of audio-visual services is closely related to the level of development of the country, growth of per capita income, level of urbanization, literacy level, and existence of restrictions on entertainment options.¹⁰ Traditional content of audiovisual media was restricted to motion pictures, radio and television programmes and sound recording. But with the advent of technology and internet this scope has broadened to such an extent that it has blurred the boundaries between the IT (Information Technology), telecommunication and audio-visual sector. It is because of internet and technology that everyone has access to a plethora of movies, music etc. Watching a spanish movie in Bihar is now possible in a blink of an eye

⁷Ibid; 6.

⁸*Audiovisual Services*, A Background Note By The Secretariat, Council for Trade in Services, WTO, S/C/W/40, 15 June 1998. Available at https://www.wto.org/english/tratop_e/serv_e/w40.doc.

⁹Ibid; 8.

¹⁰For example, in countries such as Bhutan there are various restrictions on entertainment options, resulting in very little scope for growth of the sector.

courtesy many media platforms like Netflix, Hotstar etc which allow a user anywhere in the world to access any content they wish to in no time.

III. RECENT WORLDWIDE DEVELOPMENT AND INTERNATIONAL SCENARIO WITH REGARD TO AUDIOVISUAL SERVICES

Every sector displaying minimal potential of growth is covered trade today. Audio-visual industry may have been a late addition to the field but it in no way lags behind. With advancement of technology, better and cheaper delivery systems of multimedia content have risen up which have made the process more cost and time effective in addition to giving consumers a wide variety to choose from. For instance, Conditional access system (CAS) has give the freedom to consumers to choose the television channels they wish to view and pay only for those selected channels. The cost of audio visual production has tremendously been curtailed due to development of digital camcorders and graphic design equipment.¹¹ The introduction of concept of video-on-demand allows consumers to obtain programmes at a time that is suitable for them. Television production companies are in the process of launching (or have already launched) entertainment portals, which enables the customers to view their favorite programmes at any time in any time zones.¹² The development in infrastructure supporting audio-visual content has also paved way for better facilitation of the content. For instance, the expansion of multiplexes, where both foreign and locally produced films can be viewed, together with digital sound system and modern infrastructure have made movie going a broader based leisure and consumption experience. Globally, the number of screens has increased while the number of seats per screen has decreased.¹³

Bringing foreign content into domestic market hassle free has also been possible solely due to the coming of internet which facilitates easy as well as timely access. This easy dissemination of audio visual content through the medium of internet has not only reduced the cost of the product and services but also provided a global sale of products like online music, online delivery of music on demand and web casting.

With the world becoming a global village, it is most likely that the audio visual trade services would be led by private players in deciding the most favorable environment essential for the expansion and progress of network based content production and delivery, while the government takes secondary responsibility of facilitating appropriate regulatory reforms to promote the growth and development of this services.¹⁴ The US dominates the market for audio-visual product along with being the biggest producer and exporter of these services. The EU,

¹¹ Arpita Mukherjee, *India's Trade Potential in Audio-visual Services and the GATS*, ICRIER Working Paper No. 81, April, 2002.

¹² Ibid.

¹³ Ibid; 11.

¹⁴ *Services Sectorial Classification List*, A Note By The Secretariat, Council for Trade in Services, WTO, MTN.GNS/W/120, 10 July 1991. Available at https://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc.

however, dominates in worldwide music recordings, with three European groups BMG (Germany), EMI (UK) and Polygram (Netherlands) controlling over 40 per cent of the world market. In 1998, the US film, television and home video industries earned over US\$12 billion through exports to 105 countries. Collectively the copyright industries generated over US\$70 billion in foreign exchange earnings in the same year.¹⁵

Trade in the audio-visual sector is bent towards developed country even though countries like India and Brazil have significant export potential in music. The reason for this is attributed to the fact that the developing countries fail to possess the financial structure required for investment of considerable capital into sophisticated marketing and distribution machinery which is capable of global reach. Other factors affecting the growth and exports of music are weak institutional support, low levels of entrepreneurial capability, massive copyright infringements, etc.¹⁶

IV. GATS AND AUDIO-VISUAL SERVICES

The trade sector of Audio-visual service is undeniably one of the most restraining service sectors. More so, many principal WTO member countries have forced trade barriers to guard and encourage their local culture and avert competition from foreign players. The General Agreement on Trade in Services (GATS), which was established in the Uruguay Round (1986-1994), is the first of its kind, set of multilateral, lawfully enforceable set of rules governing trade in services.

The audio-visual services were listed under the sector of communication services in the Services Sectoral Classification List¹⁷ which was made during Uruguay Round and was based on the Provisional Central Product Classifications of the United Nations. In the Uruguay Round, audio-visual service sector witnessed restricted liberalization.

Many countries voiced their concerns during the course of negotiation regarding the potential of the GATS framework especially with regard to democratic, social and cultural issues. Countries like EU, Canada and Australia being the major players, refrained from making any commitments primarily for cultural preservation and for promotion of domestic audiovisual industries. The negotiations concluded with as little as only 19 WTO member countries making commitments in the audio visual sector. Overall, the commitments were limited both in terms of coverage by the sector as well as the modes of delivery of services. Majority of commitments

¹⁵The Motion Picture Association of America (MPAA) 2001; is a film rating system is used in the United States and its territories to rate a film's suitability for certain audiences based on its content.

¹⁶ Arpita Mukherjee, *India's trade potential in audio-visual services and the GATS*, Indian Council for Research on International Economic Relations, ICRIER Working Paper No. 81, April, 2002.

¹⁷Ibid; 14

undertake by the small developing countries included services in both radio and television and radio and television transmission services.

V. COPYRIGHT-NATURE AND SCOPE IN THE AUDIO VISUAL SECTOR

The essential object of IPR is the safeguard and enforcement of work that is the result of intellect and has the potential to contribute to the development of technological improvements, dissemination of the same in a way that is conducive for social and economic welfare, thus balancing rights of the creator and the need of the society. The TRIPS Agreement provides minimum standards which the members have to adhere to and can go beyond the same too. Members are left free to determine the appropriate method of implementing the provision of the Agreement within their own legal system.¹⁸

Copyright is a form of intellectual property rights (IPR) that bestows upon the creator of an original work certain rights over that work for a limited period of time. The copyright holder possesses an exclusive right of reproduction of work in various forms such as printed publications or sound recordings, distribution and translations, broadcasting, to licensing adaptation etc. The subject matter of copyright protection is literary works, dramatic works, musical works, artistic works, maps and technical drawings (including cartographic works, plans, blueprints, diagrams etc.), photographic works, cinematographic works, and computer programmes and the creative aspects of databases.¹⁹

The general provision of TRIPS is to oblige all member countries to provide protection of IPR to the persons of other Member countries also. Article 3, 4 and 5 of the agreement include the fundamental rules on national and most favored Nation treatment of foreign nationals, which are common to all categories of IPR covered by the agreement. These obligations cover not only the substantive standards of protection but also matters affecting the availability, acquisition, scope, maintenance and enforcement of IPR, as well as those matters affecting the use of IPR specifically addressed in the agreement.²⁰ Article 9.2 of the agreement obliges members to grant copyright protection over expressions and not to ideas, procedures, and method of operations or mathematical concepts. With respect to cinematographic work, the exclusive rental right is subject to impairments test: a member is given exemption from the obligation unless such rental has lead to widespread copying of such work which is materially impairing the exclusive right of reproduction conferred on that member or author and their successors. As per Article 14.1 of the agreement, performers shall have the rights to prevent the fixation of

¹⁸ PART I - GENERAL PROVISIONS AND BASIC PRINCIPLES, A HANDBOOK ON WTO. AVAILABLE AT [HTTPS://WWW.WTO.ORG/ENGLISH/DOCS_E/LEGAL_E/27-TRIPS_03_E.HTM](https://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm).

¹⁹ *Copyright In The Digital Era: Country Studies*, Enquiries Into Intellectual Property's Economic Impact, A Report by the Organisation For Economic Co-Operation and Development (2015). Available at <https://www.oecd.org/sti/economy/Chapter5-KBC2-IP.Pdf>

²⁰ *Agreement On Trade Related Aspects Of Intellectual Property Rights (TRIPS)*. Available at https://www.wto.org/english/docs_e/legal_e/27-trips.pdf

performance on a phonogram unauthorized. There shall also be the possibility of preventing the unauthorized broadcasting by wireless means and the communication to the public of their live performance. Article 14.2 grants the producer of phonogram the exclusive reproduction right. Article 14.4 grants an exclusive rental right to the producer of phonogram. Article 14.3 provide the right to prohibit the unauthorized fixation, the reproduction of fixation and the rebroadcast by wireless means of broadcast as well as the communication to the public of their television broadcast. Article 14.6 provide that any member may in relation to the protection of performer, producer of phonogram and broadcasting organization, provide for condition, limitation, exception and reservation. The copyrightable material utilized by activities and industries accounts for contribution to the economy of the country. The contribution of these materials, in the form of music, movies, t.v. series etc forms a large portion of revenue generated from the entertainment sector. Internet has made the transmission of this material easier and time saving. The amount audio-visual of content available 10 years back was restricted to local services provided in the form of movies, music and performances. But today, with the advent of technology and the internet becoming a boon, we are able to access a plethora of content at nominal or no charges. In such a lucrative scenario, pirates lurk around for undue advantage. These pirates infringe the copyright of the holder by using or disseminating the audio-visual copyright protected content.

The audio visual content world over is channelized and disseminated on the assurance of it being copyright protected so that no pirate anywhere in the world is able to exploit the efforts of someone else and benefit from the same. Even with the strict protection standards, there are some who manage to cause losses to the owners of the copyright holders, broadcasters, the economy and also the viewers who are paying to access this content. It is not just piracy of the content which is made available online without the permission of the copyright holder, but also reproduction of the content in other forms. For example, a made-for-television movie may be exhibited on either a network or independent television station. A movie initially exhibited in a movie theater may also be exhibited on television. A television program broadcast on a network may later be syndicated and broadcast on other stations, on cable, or via satellite. Movies originally exhibited in theaters or on television may be transferred to video-cassette and sold or rented.²¹

VI. ISSUES OF COPYRIGHT ENCIRCLING THE AUDIO VISUAL ARENA

Despite various agreements and legal framework in place, intending to regulate hassle free dissemination of audio-visual content, there arise issues so inherently attached to the service sector by the virtue of the very subject matter. The ‘social workers’ of the society work constantly towards providing this content to the general public free of cost & without any fear of legal consequences. The facilitation of such content is possible due to

²¹ Anne Moebes, *Copyright Protection for Audiovisual Works in the European Community*, 15 *Hastings Comm. & Ent.L.J.* 399 (1992). Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol15/iss2/3

the untraceability of the offender who disseminates the audio-visual material across order through the medium of internet generally. With the possibility and requirement of disseminating the audiovisual sources on the Internet, researchers come across a contradictory condition. On one hand, it has never been easier to access pictures, films, and sounds, thanks to the proliferation of documents available on the web and the availability of affordable and easy-to-use digital tools and software for capturing and displaying new research materials. On the other hand, restrictions limiting or even preventing the dissemination of many of these sources have also multiplied, due to researchers' new legal and ethical obligations.²² Internet has become a bane ever since it started facilitating copyright offences along with information and media content.²³ In addition to the already existing issues regarding broadcasting & dissemination, a number of copyright issues have also arisen in the audio visual content dissemination.

- **PIRACY**

It was late fifteenth century that witnessed the birth of piracy but it was only in 1710 the first law on copyright in the modern sense of the term came into existence in England. The law which was known as 'Queen Anne's Statute' provided authors with the right to reprint their books for a certain number of years.²⁴

Copyright piracy is wide ad prevalent a phenomena as global warming. It means unauthorized reproduction, importing or distribution either of the whole or of a substantial part of works protected by copyright. The author of a copyrighted work, being the owner, enjoys certain exclusive rights with respect to his or her works. These include right to reproduce, to publish, to adopt, to translate and to perform in public. The owner can also sell, assign, license or bequeath the copyright to another party if he wishes so. If any of the above activities is carried out without the required permission from the copyright author/owner, it will amount to infringement. Piracy is thus theft of the copyrighted work which results in loss to the author/owner and gain to the pirate. Besides economic loss, piracy also adversely affects the creative potential of a society as it denies creative people such as authors and artists their legitimate due.²⁵ Recent technological advances such as music and video compression and high-speed Internet connections have helped make the legal storage and dissemination of such

²² Myriam Fellous Sigrist & Véronique Ginouvès, *Legal And Ethical Issues Surrounding The Online Dissemination of Audiovisual Archives: Needs, Practices And Solutions Developed In France*, IASA Journal, pp.63-69 (2014). Available at <https://hal.archives-ouvertes.fr/halshs-00945213/>

²³ Dana Beldiman, *Copyright and the Challenges of the Digital Age – Can All Interests Be Reconciled?*, Legal Issues In The Global Information Society, Oceana Publications Inc. of Dobbs Ferry, New York (2005) . Available at SSRN: <https://ssrn.com/abstract=2049074>.

²⁴ Robin Andrews, *Copyright Infringement and The Internet: An Economic Analysis Of Crime*, B.A. 2002, The University of Chicago; J.D. Candidate 2005, Boston University School of Law. Available at <https://www.bu.edu/law/journals-archive/scitech/volume112/andrewsnoteweb.pdf>

²⁵ *Study On Copyright Piracy In India*, A Report by Ministry of Human Resource Development Government of India (1999). Available at <http://copyright.gov.in/documents/study%20on%20copyright%20piracy%20in%20india.pdf>.

works more efficient and marketable.²⁶

Most of the audio visual content which may be exhibited via tv, radio, or internet is more often than not pirated and made available for access for free. Even though it is beneficial for those avoiding paying lofty or evening petty sums for viewing the content, it not only causes loss of revenue but is also infringement of the copyright of the author/owner. The creativity & labour one invests is offended by the pirate, leaving no incentive for creation.

- **VIOLATION OF MORAL RIGHTS**

In the process of piracy, moral rights of the author of the work also get violated. Even though moral rights do not encompass within them monetary advantages, yet due credit to the author of the work also forms an important part of a copyrighted work. Attribution to the author of the copyrighted work forms part of moral rights which represent social values relating to authorship, creativity and artistic work. Their existence is built on the belief that artistic creation is something more than an attempt to earn a livelihood. Moral rights flow from the fact that a literary or artistic work reflects the personality of the creator, just as much as the economic rights reflect the author's need to keep body and soul together. The creativity impulse and the work are of value to society, through his work, the artist provides an important service to society. By recognizing these aspects of artistic life, moral rights bring a culture focus to copyright law.²⁷ Piracy of an audio-visual content not only deprives the rightful owner of the revenue but also violates the labor & creative content the author puts in to the work, which are recognized as moral rights. Due credit of a work is as important and inseparable aspect of a copyrighted work as the revenue generated from it.

- **TRACKING ISSUE**

The fact that the identity of a pirate is limited to his I.P address, adds to the difficulty of tracing him. This untraceability is not due to lack of adequate technology but due to issues with changing IP address of the pirate. There is a plethora of software flooded on the internet which disguises the identity of the pirate thus changing his IP address every hour or even minute to keep him from getting tracked. There have been a number of cyber cells set up over the world which work for the cause of uprooting piracy by tracking down the pirate who disseminates unauthorized content through internet. Even so, it is very difficult to track the identity of the pirate given the number of options that help escape the pirate scot free.

- **ISSUES WITH ANONYMOUS/PSEUDONYMOUS WORKS**

There are times when a work is anonymous or pseudonymous. The use of pseudonyms has a long-standing

²⁶Tomlinson, *Intellectual Property in the Digital Age: The Piracy/Counterfeiting Problem and Antipiracy and Anti counterfeiting Measures*, 8 CURRENTS:INT'L TRADE L.J. 3, 3 (1999).

²⁷Nidhi Kumari, *Moral Rights of Author*, April 6, 2015. Available at <https://www.lawctopus.com/academike/moral-rights-author/>.

tradition in newspaper and magazine publishing. The Economist, for example, operates a well-established practice of editorial anonymity in that all of their columnists publish under pseudonyms such as Bagehot, Lexington and Schumpeter.²⁸ Anonymous works are the works the author/owner of which cannot be identified. A work is pseudonymous if the author is identified on copies or phonorecords of the work by a fictitious name.²⁹ In such a scenario where the author/owner of the work cannot be tracked, how will the one intending to utilize this work take permission and use the same. It is due to unavailability of author/owner that leads to subsequent infringement of the copyrighted work since there may be claims later on by any representative of the author/owner.

- **ADAPTATION**

There may be a scenario where audio-visual content disseminated may be adapted and turned into another subject matter of copyright ex. A story or novel etc. There can be no track of such adaptations done with minimal labor & creativity which gives the already copyright work a whole new personality which strikingly similar to the previous work has elements of difference rendering it an original character. This risk inherently hovers the audio-visual sector and even with copyright protections in multiple jurisdictions such form of piracy cannot be regulated.

VII. CONCLUSION

The intention of copyright protection is to incentivize as well as reward the creator for his creation. Internet has aided in the dissemination of these creative content in the form of audio visual media. With inherent risks associated in this trade service sector, how well does the incentive of copyright protection work is the real question worth pondering over. Pirates of the internet work on the agenda of dissemination of copyrighted work sometimes for free and sometimes at minimal monetary rates. Even though such a scenario may be beneficial for common masses but the owner of the copyrighted work loses his due revenue and the creator of the work loses his due credit for the same. It is for countries regulating dissemination of audio visual content, broadcasters and multiple media platforms to scrutinize the content before availing it to other people. Foremost it is the responsibility of the public accessing and demanding such audio visual content to not access pirated version. The miserliness of people leads to supply of pirated content, thus the onus of reducing tariff on such content for permitting access should also be reduced so that there is no demand for free or cheaper pirated content. Reduced or no demand will eventually lead to cease of supply since there will be no consumers. It is

²⁸Ronan Deazley & Kerry Patterson, *Copyright In Pseudonymous And Anonymous Works*, CREATE Working Paper. Available at https://www.digitisingmorgan.org/uploads/BN3-pseudonymous%20works_DigiMorgan.pdf.

²⁹*Pseudonyms*, Library of Congress, U.S. Copyright Office, FL-101. Available at <https://www.copyright.gov/fls/fl101.pdf>.

thus, in the interest of the copyright owner, the general masses, the performers & others associated with the audio-visual content and ultimately the country which else suffer due to such issues of copyright infringement.

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