

COPYRIGHTAGENCY

Response to Productivity Commission final report on Intellectual Property Arrangements

February 2017

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PRODUCTIVITY COMMISSION FINAL REPORT ON INTELLECTUAL PROPERTY ARRANGEMENTS

Summary of our response	3
Intellectual property supports innovation	3
PC's copyright recommendations disproportionate	4
Alternative approaches to improving Australia's copyright system	4
PC's misunderstandings	4
Publishers are more than 'intermediaries'	7
Export of Australian educational resources	8
Aligning the law with 'community expectations'	8
'Orphan works'	9
Review of collecting societies	9
Information sought by licensees	9
Statutory licensing	10
Summary responses to 'findings' and recommendations	12
Current copyright regime favours rightsholders	12
Governance of collecting societies	12
Fair use	12
Orphan works	12
Contract override; TPM circumvention	13
Government arrangements for IP policy	13
Safe harbour scheme	13
Small claims	14

SUMMARY OF OUR RESPONSE

We oppose the Productivity Commission's central recommendations for changes to the copyright system. They are based on faulty premises and factual errors, and are not supported by evidence. Even if one accepts the PC's central 'finding' that copyright lasts 'too long', its recommendations are completely disproportionate to that concern.

The PC's report is regarded by Australian creators as extraordinarily hostile, and indifferent to the complex processes of creating, producing and distributing content of a quality that Australians want and expect. Australian creators face unprecedented challenges in an increasingly globalised world. They are not looking for preservation of the status quo, but for opportunities to continue their craft and earn a living in a rapidly changing environment.

There are areas in which the legislation could be updated in the light of changes in technology and consumer behaviour, but there are better ways to do this than transplanting a provision from the US copyright statute into Australia's quite different system.

The PC recognises the efficiency of collective management of copyright rights, particularly for high-volume low-value transactions. It also highlights increasing interest in how collective management works. Copyright Agency looks forward to working with the Department of Communications and the Arts on further information Copyright Agency could provide on its operations and relationships with members and licensees.

We have not repeated all the points made in submissions to the Productivity Commission, and to the Australian Law Reform Commission's inquiry into Copyright and the Digital Economy. As requested, we have focused on matters not covered in previous submissions.

INTELLECTUAL PROPERTY SUPPORTS INNOVATION

Intellectual property is widely recognised as a facilitator of innovation and creativity. It enables the development and commercialisation of clever ideas by enabling return on investment in production, marketing and distribution.

The 2016 report on Australia's innovation system from the Chief Economist of the Department of Industry¹ sets out findings on the role of intellectual property (IP) in the Australian innovation system, including:

- investment in IP and other forms of intangible capital have been shown to facilitate business growth and spur productivity improvements;
- businesses that innovate ten or more times per year are almost twice as likely to use some type of IP protection compared to businesses that innovate less than three times a year;
- innovative exports are twice as likely to invest in IP compared to non-innovative exports;
- improving IP protection and enforcement in destination countries increases Australia's exports to those countries; and
- there is a significant correlation between IP Protection, R&D (research and development), and new-to-market innovation around the world.

¹ <https://www.ipaustralia.gov.au/about-us/news-and-community/blog/new-findings-how-intellectual-property-ip-impacts-innovation-system>

Australia’s copyright industries contribute billions to the Australian economy and provide employment for a significant proportion of Australia’s workforce.²

While there are some who assert that the copyright system inhibits innovation, there is scant evidence that this is the case.

PC’S COPYRIGHT RECOMMENDATIONS DISPROPORTIONATE

The PC’s central concern is the duration of copyright protection. Because of Australia’s international treaty obligations, it is not open to the Australian Government to reduce the period of protection (as the PC acknowledges), though it is certainly open to the Government to modify the *scope* of protection over time through the application of the exceptions regime (that is, the exceptions regime can apply more broadly as a work ages). In addition, as we noted in our response to the Draft Report,³ it is open to Australia to introduce ‘formalities’ requirements for the final 20 years of protection.

The PC’s recommendations, however, would apply as soon as a work is created. Thus, even if one agrees with the PC’s concern, its recommendations are a disproportionate response.

ALTERNATIVE APPROACHES TO IMPROVING AUSTRALIA’S COPYRIGHT SYSTEM

Copyright Agency would be pleased to discuss further with the Department of Communications and the Arts ways that Australia’s copyright system could be improved.

The Government has committed to introducing a package of copyright amendments to benefit Australian teachers, libraries and people with disabilities. These amendments are based on consensus proposals from those sectors and content creator representatives. They demonstrate the potential for sensible reform that can be achieved from processes that are less polarising than that of the PC inquiry.

PC’S MISUNDERSTANDINGS

The PC report contains a large number of misunderstandings and errors. They include the following.

PC statement	Response
The average life of a copyright work is five years	In its submission on the PC’s draft report, the Australia Council for the Arts provided a considered and convincing analysis showing why the PC’s conclusion, based on misinterpretation of Australian Bureau of Statistics (ABS) data, ⁴ is wrong. The PC does not refer to this in its final report.
The extension of copyright from life plus 50 years to life plus 70 years ‘resulted in Australian users paying an additional	This is based on the ridiculous premise that the royalties in the first year of release remain the same for the life of copyright. The PC does not refer to criticisms

² *The Economic Contribution of Australia’s Copyright Industries 2002–2014*, http://www.copyright.org.au/acc_prod/ACC/Research_Papers/The_Economic_Contribution_of_Australia_s_Copyright_Industries_2002-2014.aspx

³ At page 6. The point is noted in PC’s final report at page 90.

⁴ And that the PC, wrongly, *attributes* to the ABS.

<p>\$88m a year'</p>	<p>of this estimate, provided to it in submissions. Nor does it address the inconsistency between this estimate, and its view that the average commercial life of a copyright work is five years.</p>
<p>Australia's copyright regime is 'narrow' and 'prescriptive'</p>	<p>A recent study commissioned by the World Intellectual Property Organization (WIPO) shows that Australia has one of the most extensive exceptions regimes in the world for education.⁵ Other studies have shown that Australia's exceptions regime is also extensive for libraries and archives, people with disabilities, and the digital environment.⁶</p> <p>Most of Australia's exceptions are 'technology neutral' and have been applied successfully to changing circumstances. For example, the statutory licence for education has been able to encompass developments such as learning management systems, electronic whiteboards, tablets and Massive Open Online Courses (MOOCs).⁷</p> <p>In Australia, the broad <i>purposes</i> for which content can be used without permission (such as research, education, criticism, reporting news) are determined by Parliament, whereas in the US these can be determined by the courts.⁸ In the Australian system, a purpose can be achieved by any technology: for example, the exception for reporting news applies to news delivered online or via social media channels.⁹</p>
<p>Australia's copyright system is 'now skewed too far in favour of copyright holders'.</p>	<p>All changes increasing the scope of protection have been accompanied or followed by extension of the exceptions regime.</p> <p>For example, the introduction of a 'making available online' right in 2000 (acknowledged by the PC to be justified) was accompanied by exceptions and limitations for the education sector, libraries and online service providers.</p> <p>The extension of copyright terms in 2004 was followed, in 2006, by a package of exceptions, including for private use, education, libraries and people with</p>

⁵ http://www.wipo.int/edocs/mdocs/copyright/en/sccr_33/sccr_33_6.pdf (the study found that Australia has more exceptions and limitations for education than any of the other 188 countries surveyed).

⁶ <http://www.wipo.int/copyright/en/limitations>

⁷ The education sector's arguments about the limitations of the statutory licence for MOOCs are based on participants who are not registered with an educational institution or are overseas, neither of which would be solved by fair use in the US or here.

⁸ The US also has purpose-specific exceptions, such as those for libraries.

⁹ There are some exceptions that are 'technology specific', usually where the technology is a proxy for a policy setting. There is certainly scope to simplify and update these provisions.

	<p>disabilities.</p> <p>Copyright Agency provided a comprehensive list of amendments in its response to the PC's issues paper (in contrast, the PC report lists increases in protection, but not the corresponding increases in exceptions).</p>
<p>The statutory licence for education requires separate payment for every single use.</p>	<p>It doesn't. The education sector and Copyright Agency negotiate and reach agreement on which uses are recorded by teachers in surveys of usage, and also agree on which of the recorded uses are taken into account in fee negotiations and which are not. This is partly because Copyright Agency's expert researchers are better able to implement the data processing protocols agreed between the school sector and Copyright Agency than busy teachers.</p> <p>If agreement is not reached, and a determination is made by the Copyright Tribunal, the Tribunal's approach is to evaluate the ultimate 'consumption' of content, irrespective of how it was provided.</p>
<p>A 'fair use' exception could 'coexist with the current education statutory licence scheme'</p>	<p>It could in theory, but the experience in Canada was that the education sector chose to stop paying licence fees. This was despite education sector representatives saying, before the changes, that they would continue to pay licence fees.</p> <p>The Australian schools sector currently says it is looking for an \$18.3m reduction in licence fees (about 30%).</p>
<p>'Fair use is not free use'</p>	<p>Of course it is. Fair use would allow people to use content without payment, even if they are currently doing those activities now under remunerated licensing arrangements.</p>
<p>Uses allowed by fair use in the US require a licence in Australia.</p>	<p>Many of the uses allowed by fair use are already allowed in Australia. In its response to the PC's draft report, Copyright Agency provided information showing that most of the activities listed in Table 6.1 of the PC's final report are already occurring in Australia.</p> <p>Some of the activities listed in the table are controversial in the US, and similarly controversial in Australia. Of particular concern to Australian content creators is an opportunity to license content inputs that support the business models of multinational technology companies.</p>
<p>More countries have embraced fair use than rejected it.</p>	<p>Very few countries have <i>adopted</i> fair use.</p> <p>The recent copyright reform proposals in the European Union (28 countries) do <i>not</i> include fair use.</p>
<p>Canada's publishing industry has not been affected at all by changes to the</p>	<p>While other changes affecting publishing can certainly be identified, it is difficult to assert that reducing income</p>

<p>Canadian copyright system.</p>	<p>to a publishing industry by tens of millions of dollars has <i>no</i> effect whatsoever.</p> <p>In Australia, payments from Copyright Agency make a significant contribution. In its response to the Productivity Commission’s Issues Paper, Macmillan Publishers said that the 2014 Australian Publishers Association industry report showed that Copyright Agency contributed 7.3% of revenues to the schools sector, equivalent to 43.4% of net profit.¹⁰</p> <p>The PC report does not refer to this submission.</p>
<p>‘Reform efforts have more often than not succumbed to misinformation and scare campaigns’</p>	<p>The PC inquiry process was a polarising one, exacerbated by misinformation in the PC’s own ‘fact sheets’ and media engagement. These appeared to be directed at advocating the PC’s recommendations rather than encouraging informed debate.</p> <p>The process that led to consensus proposals for amendments benefiting teachers, librarians and people with disabilities show that a more productive approach to reform is possible.</p>
<p>‘the EY analysis [<i>Cost benefit analysis of changes to the Copyright Act 1968</i>], (unlike others commissioned by inquiry participants) provides a sound assessment of the impact of fair use on Australian consumers and the broader community’.</p>	<p>The EY analysis is based on a number of factual misunderstandings and erroneous assumptions, particularly regarding the use and licensing of content in the education sector. In addition, the particular methodology it adopted focused <i>solely</i> on user-based criteria. By contrast, the report provided to the Commission prepared by PwC assessed the effect of a ‘fair use’ exception on the production of new content, particularly new <i>Australian</i> content.</p>

PUBLISHERS ARE MORE THAN ‘INTERMEDIARIES’

While the PC acknowledged the role of publishers, it did not seem to understand the extent to which publishers originate and develop content-based products and services. This involves collaboration with freelance creators, but also creative input from publishers’ staff.

Two useful descriptions of the publishing process for education publishers are:

- ‘How a textbook is made in 25 steps’: <https://blog.oup.com.au/2016/05/25/how-a-textbook-is-made/> (infographic published by Oxford University Press).

¹⁰ The submission goes on to say: ‘Much of these Copyright Agency payments are reinvested in development of further resources. It is clear to those in the industry that without Copyright Agency payments many publishers would not exist, and neither would many of the freelance professionals that they use to produce published resources for schools.’ http://www.pc.gov.au/__data/assets/pdf_file/0003/194439/sub016-intellectual-property.pdf

- ‘Overview of general stages in publishing a trade and education book or learning resource’: Appendix to ‘Macquarie Economics Research Papers: Disruption and innovation in the Australian book industry: Case studies of trade and education publishers’.¹¹

This meant that the PC did not understand how changes to the copyright system affect incentives for publishers to originate and develop new content.

EXPORT OF AUSTRALIAN EDUCATIONAL RESOURCES

The PC took the view that because Australia is, overall, a ‘net importer’, it should adopt an inward looking copyright system focussed on the cheapest possible prices for Australian consumers. It essentially treated all content as equal and substitutable, and did not think there should be any special consideration for local content.

The PC’s approach did not differentiate between different industries. As the Business Council of Australia said in its submission:

*Taking an aggregate view of Australia’s imports of intellectual property can obfuscate the dynamics specific to individual industry sectors. Despite being a net importer, Australia will continue to have specific sectors that are net exporters of intellectual property.*¹²

One sector that is successfully exported is educational publishing.

A recent report by Sapere Research Group found that over \$165 million of annual revenue for Australian publishers is associated with exports.¹³

ALIGNING THE LAW WITH ‘COMMUNITY EXPECTATIONS’

The copyright system is not unique in tolerating small scale infringements at the edges that do not, in aggregate, have a significant deleterious effect.

An analogy is often made with speeding offences. For example, US academic Professor Justin Hughes has said:

*there are intriguing parallels between copyright and driving laws. In both cases, violations are individual acts that increase individual utility but are believed in the aggregate to lower overall societal utility. Both involve individual acts that seem hard to detect. For that reason, each law has huge amounts of non-compliance. And, just as with speed limits, it may be that non-compliance with copyright law is widespread, but not severe.*¹⁴

But in some cases, the aggregate effect *is* harmful, and the government should impose rules to constrain behaviour that significantly impedes policy objectives. Large scale unauthorised filesharing is an example.

¹¹ <http://apo.org.au/node/68152>

¹² http://www.pc.gov.au/_data/assets/pdf_file/0012/202071/subdr587-intellectual-property.pdf The Council also said: ‘Being a net importer is not necessarily undesirable. Intellectual property is a key input in the production of many goods and services. Economic efficiency is increased when countries specialise in their comparative strengths.’

¹³ Sapere Research Group, Value of Australian educational publishing exports (November 2016)

¹⁴ ‘How (Dis)respected is Copyright Law?’, <http://www.mediainstitute.org/IPI/2011/121311.php>

‘ORPHAN WORKS’

The term ‘orphan work’ refers to a work for which a rightsholder cannot be located by a particular user for a particular use.

Copyright Agency remains willing to work with cultural institutions (libraries, galleries and museums) and the Department of Communications and the Arts on a workable solution to providing access to ‘orphan works’ in the institutions’ collections.

There are quite separate issues for uses of individual ‘orphan works’ in other circumstances, particularly for commercial purposes, and particularly where substitutable works are easily available. And quite separate issues again for ‘orphan works’ covered by ‘blanket’ licensing arrangements, such as the statutory licences for education and government.

It is important to note that the ‘orphan’ status is not intrinsic to a work itself, but rather an outcome of circumstances that include:

- the contextual information, such as attribution, available to the particular user; and
- the skill of the user in identifying and locating rightsholders; and
- the consequences of unauthorised use (i.e. the higher the consequences of unauthorised use, the more effort is likely to be spent in identifying and locating a rightsholder).

This is acknowledged by the PC: ‘[w]orks can be orphaned by circumstance’.

REVIEW OF COLLECTING SOCIETIES

Copyright Agency welcomes interest in its role and operations, and is keen to ensure that people with an interest in various aspects of our operations receive the information they are looking for.

Copyright Agency provides detailed information in its annual reports, which are provided to the Minister and tabled in Parliament. We have added information to the reports over time in response to requests from the Department and other stakeholders.

Stakeholders such as licensees can, and do, ask the Department to ask us to include additional information in our annual reports. We have always provided the information requested, and will continue to do so. We look forward to working with the Department on ways in which understanding of our operations could be improved, and confidence in collective management can be maintained.

Any review of the Code would be best done by the Department given its expertise in collective management, its role in establishing the Code and guidelines for ‘declared’ collecting societies, and its familiarity with international standards. While the ACCC has appeared as a party in proceedings for the Copyright Tribunal to determine licence terms, and has authorised APRA’s membership, licensing, distribution and international arrangements, it is not clear that it has the relevant expertise to review the Code. The ACCC’s interest is in ‘instances where intellectual property rights may confer market power’, whereas the focus of the Code is on collecting societies’ governance and accountability to members and licensees.

Information sought by licensees

The PC says that it is ‘particularly concerned by the submissions of licensees that they are not able to access the information needed to allow them to effectively negotiate directly with rights holders’.

Licensees can and do negotiate directly with rights holders. Copyright Agency has agreed processes with licensees for excluding direct licensing arrangements from estimates of the overall extent of usage under licences.

Licensees have access to *all* information about usage provided by their sector, and to analysis of that information.

For the education sector, surveys of usage in samples of school and university staff are done by an independent research company following survey designs agreed between the education sector and Copyright Agency. The education sector has access to all the results. Copyright Agency has also agreed to provide the school sector with information about publishers of content recorded in surveys, derived from Copyright Agency's research (rather than information provided by the teachers).

The information provided by the government sector is currently quite limited, except in relation to sales of survey plans. Copyright Agency is working with the Commonwealth and other governments improve the data provided, but even with that it will not be anywhere near as extensive as that provided by the education sector.

Recent distributions of licence fees from governments have been based on content available for use, rather than content actually used. The exception is sales of survey plans, for which licence fees are distributed in accordance with sales and/or lodgement data provided by the various state governments.

As noted in our submission to the PC, Copyright Agency has accommodated requests from the schools and government sectors for more information about how licence fees from those sectors are distributed, and about licence fees held in trust. Copyright Agency's position remains, however, that it should not disclose amounts of money paid to individual recipients without their consent. But in any event, it is difficult to see how this information assists licensees, particularly where the usage information provided by the licensee sector is scant.

STATUTORY LICENSING

The PC notes the consensus amendments to simplify the statutory licence for education that the government has undertaken to introduce this year.

The statutory licences for education and government do *not* require the 'counting' of each and every use, let alone that every 'counted' activity is separately 'remunerated'.¹⁵

Copyright Agency reaches agreements with licensees about monitoring arrangements, and about licence fees.

In the rare situation that agreement is not reached, a determination can be made by the Copyright Tribunal. The Tribunal's approach is to evaluate the ultimate 'consumption' of content, irrespective of whether it is delivered in a 'hardcopy' or digital form.

The Tribunal made the following comments in a recent case regarding sales of survey plans under the statutory licence for governments:

... whilst it is true that each electronic sale of a plan involves ... multiple acts of uploading, storage and sending, there is no reason to treat these as other than what they, in substance, are: i.e. the provision to a single user of a copy of a plan. In substance, all that is involved is the distinction in practical terms between provision of a hard copy and the provision of a soft copy.

¹⁵ That is the case under the current arrangements, and will continue to be the case following the amendments.

The Tribunal sees no reason, in light of that conclusion, to treat the position of physical copies handed over the counter any differently to electronic copies communicated using various formats.¹⁶

¹⁶ <http://www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acopyt/2013/2013acopyt0001> at [69]–[70]

SUMMARY RESPONSES TO ‘FINDINGS’ AND RECOMMENDATIONS

Finding/recommendation	Our response
<p>Current copyright regime favours rightsholders FINDING 4.1</p> <p>The scope and term of copyright protection in Australia has expanded over time, often with no transparent evidence-based analysis, and is now skewed too far in favour of copyright holders. While a single optimal copyright term is arguably elusive, it is likely to be considerably less than 70 years after death.</p>	<p>There have been at least as many developments favouring users as rightsholders. The PC cites increases in the scope of protection, but omits to cite the increases in limitations and exceptions that accompanied or followed.</p>
<p>Governance of collecting societies RECOMMENDATION 5.4</p> <p>The Australian Government should strengthen the governance and transparency arrangements for collecting societies. In particular:</p> <ul style="list-style-type: none"> • The Australian Competition and Consumer Commission should undertake a review of the current code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees. • The review should consider whether the current voluntary code: represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies. 	<p>We welcome interest in the role and operation of Copyright Agency, and we are committed to providing clear information about what we do.</p> <p>We take our obligations under the Code of Conduct very seriously, as well as other governance commitments such as the government guidelines for declared collecting societies.</p> <p>There is nothing in our licensing arrangements that prevents licensees making direct arrangements with any of our members, and licensees have made these direct arrangements.</p>
<p>Fair use RECOMMENDATION 6.1</p> <p>The Australian Government should accept and implement the Australian Law Reform Commission’s final recommendations regarding a fair use exception in Australia.</p>	<p>Australia’s copyright system is superior to that in the US in a number of respects, including the breadth of its access provisions for the education sector, libraries and people with disabilities.</p> <p>Australia should not introduce a change that will benefit big technology companies at the expense of Australian creators.</p> <p>There are ways to improve Australia’s copyright system but this is not it. Experience has shown that consensus-driven reform is achievable, and this is the best way to approach the future development of Australia’s copyright system.</p>
<p>Orphan works RECOMMENDATION 6.2</p> <p>The Australian Government should enact the Australian Law Reform Commission</p>	<p>We support a solution that enables digitisation of orphan works by Australia’s cultural institutions. We are wary, however, of changes that would enable commercial entities to replace licensed content such as images with ‘orphan</p>

<p>recommendations to limit liability for the use of orphan works, where a user has undertaken a diligent search to locate the relevant rights holder.</p>	<p>works’.</p>
<p>Contract override; TPM circumvention RECOMMENDATION 5.1</p> <p>The Australian Government should amend the <i>Copyright Act 1968</i> (Cth) to:</p> <ul style="list-style-type: none"> • make unenforceable any part of an agreement restricting or preventing a use of copyright material that is permitted by a copyright exception • permit consumers to circumvent technological protection measures for legitimate uses of copyright material. 	<p>We support the comments of the Australian Copyright Council on each of these issues.</p> <p>Institutions and corporations can and do negotiate terms of contracts that they elect to enter into. There may be sound commercial reasons for them agreeing not to rely on copyright exceptions, such as favourable terms to make uses for which they do need a licence.</p> <p>Exemptions that allow the circumvention of technological protection measures have been granted in accordance with the process set out in the Copyright Act, and any proposals for additional exemptions should follow this process.</p>
<p>Government arrangements for IP policy RECOMMENDATION 17.1</p> <p>The Australian Government should promote a coherent and integrated approach to IP policy by:</p> <ul style="list-style-type: none"> • establishing and maintaining greater IP policy expertise in the Department of Industry, Innovation and Science • ensuring the allocation of functions to IP Australia has regard to conflicts arising from IP Australia’s role as IP rights administrator and involvement in policy development and advice • establishing a standing (interdepartmental) IP Policy Group and formal working arrangements to ensure agencies work together within the policy framework outlined in this report. The Group would comprise those departments with responsibility for industrial and creative IP rights, the Treasury, and others as needed, including IP Australia. 	<p>We support any developments that assist informed and coordinated development of policy.</p> <p>We also support the continuation of responsibility for copyright policy in the Department of Communications and the Arts.</p>
<p>Safe harbour scheme RECOMMENDATION 19.1</p> <p>The Australian Government should expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services.</p>	<p>We oppose expansion of the safe harbor scheme in ways that reduce fair payments to content creators.</p>

<p>Small claims</p> <p>RECOMMENDATION 19.2</p> <p>The Australian Government should introduce a specialist IP list in the Federal Circuit Court, encompassing features similar to those of the United Kingdom Intellectual Property Enterprise Court, including limiting trials to two days, caps on costs and damages, and a small claims procedure.</p> <p>The jurisdiction of the Federal Circuit Court should be expanded so it can hear all IP matters. This would complement current reforms by the Federal Court for management of IP cases within the National Court Framework, which are likely to benefit parties involved in high value IP disputes.</p> <p>The Federal Circuit Court should be adequately resourced to ensure that any increase in its workload arising from these reforms does not result in longer resolution times.</p> <p>The Australian Government should assess the costs and benefits of these reforms five years after implementation, also taking into account the progress of the Federal Court's proposed reforms to IP case management.</p>	<p>We support changes that would assist our members to be fairly paid for use of their work, including by assisting them to enforce their rights.</p>
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