



The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information

Report for the Committee on Culture, Science and Education -
Parliamentary Assembly, Council of Europe

by

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REPORT*

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The starting point for this report was the Council of Europe Parliamentary Assembly's motion for a resolution of 24 April 2007 (Doc. 11272)¹. This motion focuses on two rights presented as competing with one another - copyright and the right of access to information - and emphasises the need to take them into account in the new digital environment. This clearly shows the Council's desire to analyse the issues in a broader framework and reject the prioritisation of different rights, which is very much in line with an approach based on striking a balance between fundamental rights.

This report emphasises the need not to think in terms of opposing rights but of the complementary nature of copyright and the right of access to information so as to reconcile the two, which is both necessary and desirable. Copyright law in fact has no alternative but to include access to information in order to meet the challenges posed by the knowledge society. It is its ability to bring together opposing but complementary views that will testify to its durability in the future and to whether it can adapt to a new economic, technological and social environment. Copyright law has shown a remarkable ability to adapt to new developments in the past and has the necessary tools to ensure that this continues to be the case in the future.

Accordingly, it will be necessary, first of all, to reiterate a number of basic principles of copyright law and carry out a brief historical survey. A study will then need to be carried out of how the advent of the information society has changed the existing balances. This will be followed by a brief discussion of recent developments in the legal provisions currently in force. This in turn would lead us to consider both the changes necessary to those provisions to ensure better access to information as well as certain initiatives that are either under way or planned, with the aim of striking a balance between the interests involved.

1. Introduction: copyright law as the result of a reconciliation between diverging interests

First of all, it should be pointed out that copyright law relates not only to the rights of authors but refers to a much more complex legal situation. Since its inception, copyright law has attempted to reconcile the claims of the various players who are the author/creator, the public and commercial operators (exploiters such as producers and distributors). It is essential for

* An outline of this report was presented and discussed on 28 April 2009 at the meeting of the Committee on Culture, Science and Education at the Council of Europe in Strasbourg.

¹ The motion in question is reproduced in the appendix.

copyright legislation to balance these different interests. Although it is true that the position of these players may vary according to the national legislation concerned, there can be no doubt about the need to strike a fair balance between the various claims. However, it is not easy to do this, especially as the interests of the different players vary considerably and, depending on the situation concerned, may even clash.

For example, authors will have an interest in benefiting from the fruits of their labours by receiving payment for exploitation of their work. However, at the creative stage they will also have an interest in accessing existing works in order to build on them and use them as inspiration for their own work. This is particularly obvious when authors are producing a scientific work, since access to existing works will provide a guarantee of the professionalism of their own work. At the same time, exploiters will want to recoup their investment in the production of a work. Nonetheless, when they produce a work that incorporates elements already protected by copyright it will be in their interest not to be excessively obstructed by existing monopolies. Finally, the public will want to be able to have easy and affordable access to works for information and entertainment purposes. However, it will also be in its interest for payment to be made to creators so that new works continue to be created and produced. These examples illustrate the complexity of the interests involved and the need for a balanced approach that takes account of needs and requirements with regard to both protection and access.

2. Initial convergence between the rationale and principles of both copyright and the right to access information

It is worthwhile reiterating that access to information and copyright initially fully converged regarding both the rationale and the principles involved. Accordingly, there was no incompatibility but, on the contrary, genuine complementarity.

Copyright has its roots in the Enlightenment. The philosophers of the 18th century called for the recognition of an author's intellectual property rights in order to guarantee the fruits of their labour, with the higher aim of ensuring cultural and social development. As society needed to regenerate itself, question its values and be entertained, creators needed to be guaranteed a free space in which they could create works without having to compromise themselves vis-à-vis the authorities. The idea of giving the authors the right to allow the reproduction and representation of their work against the payment of a remuneration was intended to guarantee their financial and intellectual independence. Instead of having to flatter to receive payment, they could "free themselves" from their patrons for the greater benefit of the community, which in this way was enriched by the abundance of independent works created. Far from being a selfish right, copyright was clearly conceived as one imbued with an important social function that was to a large extent its *raison d'être*. Since its inception, therefore, it has maintained close links to freedom of expression and to its corollary the right of access to information. It is even possible to see its aim as, at least partially, guaranteeing that access.

This principle of striking a balance between the different interests involved is reflected in the very essence of copyright. In principle, copyright does not prevent access to information. An exclusive right is in fact subject to a number of limitations, the main or subsidiary aim of which is to ensure free access to information. There is first and foremost the distinction between expression and idea: copyright covers the expression, not the substance of a work, so different authors can write a book on the same subject and use the same information, and only the way they shape that information will be protected, not the content. Moreover, the

expression will be protected only if it contains a certain amount of creativity, when it is original. For example, the enumeration of historical events in a table will certainly have a expression but will probably not possess the necessary originality to be protected. Next, the expression is protected only for a specific period, after which it falls into the public domain. Lastly, the various copyright laws set out a number of cases where the expression can be used to grant access to information (these cases involve exceptions and limitations, especially for teaching or research purposes, for libraries, for quotations, for press reviews, for news reports, for certain cases of private copying, when the aim is to obtain information, etc).

However, this balance will be shaken by technological developments and their legal and technical consequences.

3. New technologies are upsetting the copyright balance: the need to redefine the rules to ensure that the various interests involved are taken into account

The new information technologies have fundamentally affected copyright law: new information technologies have made it difficult to control the way works are used. Technological progress has facilitated the reproduction and mass distribution of creative works, thus permitting the establishment in some cases of genuine parallel economies based on counterfeiting (a phenomenon sometimes improperly and legally incorrectly referred to as “piracy”). On the other hand, some non-commercial uses, such as “peer-to-peer” exchanges of digital files, have grown to such an extent that they are competing with the normal exploitation of works and challenging established commercial models.

At the same time, this development has been accompanied by the penetration of the new technologies into the community. The importance of the Internet in the daily life of citizens is constantly growing, and members of the public nowadays use it for entertainment, as well as for information or education purposes (in particular, the issue of distance learning and access to knowledge through digital libraries is taking on a whole new dimension thanks to the possibilities offered by the web). Alongside recognition of the dangers that the new technologies may pose for the protection of copyrights, there is also a general awareness that these technologies offer the possibility of broad and simple access to information and that they could play a leading role in the fields of education, research and culture in general. The Council of Europe is particularly sensitive to this, and the political declaration of the ministers of the states participating in the first Council of Europe Conference of Ministers Responsible for Media and New Communication Services, held on 28 and 29 May 2009 in Reykjavik, stated that “ Growing numbers of people rely on the Internet as an essential tool for everyday activities (communication, information, knowledge, commercial transactions, leisure) ultimately improving their quality of life and well-being. People therefore expect Internet services to be accessible and affordable, secure, reliable and ongoing. Access to these services also concerns the enjoyment of human rights and fundamental freedoms, as well as the exercise of democratic citizenship”.² The delicate balance between protection and access has clearly been called into question and the “digital revolution” has made it necessary to reassess and adapt the underlying balances.

Many initiatives have been taken to this end. First of all, at international level the first step was to strengthen the rightholders’ rights, adapt copyrights prerogatives to the digital environment and provide legal protection for technical measures (see the WIPO treaties of 20 December 1996). Given the difficulty in ensuring compliance with copyright rules on the

² 1st Conference of Council of Europe Ministers Responsible for Media and New Communication Services (Reykjavik, Iceland, 29 May 2009), MCM (2009)011, Political Declaration, paragraph 5

internet, rightholders have pinned great hopes on technical measures, which have in turn been protected against being circumvented. A solution was adopted at Community level with a Directive of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.³

There was, however, no real reflection on the exceptions and limitations to copyright to go hand in hand with these efforts to strengthen exclusive rights. Community harmonisation in the field of limitations and exceptions has in fact been a failure, with the aforementioned directive of 22 May 2001 merely providing an exhaustive and (with one exception) optional list, from which national legislators could pick the ones that suited them, with the additional possibility of adopting a more restrictive wording. The systems introduced to guarantee the effectiveness of the limits to copyright in the light of the technical means available have often been very complicated, poorly harmonised and difficult to implement. Finally, the directive provided for the possibility of derogating from the exceptions and limitations by contract in an “access on demand” context, thus enabling doubt to be cast on their actual benefit in the digital environment.

However, the exceptions and limitations are one of the best tools available to national and Community legislators to ensure the so-called “balance of interests” and, in particular, to guarantee that collective needs are taken into account in the provisions. Some of these exceptions and limitations provisions incorporate the right of access to information into the copyright legislation. Accordingly, their lack of effectiveness, the absence of harmonisation and the fact that they have been called into question as a result of recent developments in copyright law may be seen as establishing “one-way” legislation, that is to say legislation shifting towards a strengthening of the rights of the exploiters of works without sufficiently reflecting the interests of their creators and the community. Moreover, more and more scholars have stressed that the recent copyright amendments do not take enough account of freedom of expression and the public’s right to information.

In response, the European Commission adopted on 16 July 2008 a Green Paper on Copyright in the Knowledge Economy, in order to “foster a debate on how knowledge for research, science and education can best be disseminated in the online environment. The Green Paper aims to set out a number of issues connected with the role of copyright in the ‘knowledge economy’ and intends to launch a consultation on these issues”.⁴ The Commission believes that it is the exceptions and limitations within copyright law that ensure the dissemination of knowledge and which are the key to the balance to be sought by Community legislation.

However, the question of exceptions and limitations in the digital environment is now also being discussed at international level, as the World Intellectual Property Organisation (WIPO) has at last included this topic on the agenda of the Standing Committee on Copyright and Related Rights (SCCR) and begun discussions to study various proposals for a treaty in this field. Accordingly, this is now a global issue. The WIPO points out first of all that “copyright laws allow certain limitations on economic rights, that is, cases in which protected works may be used without the authorisation of the rightholder and with or without payment of compensation (...) *in order to maintain an appropriate balance between the interests of rightholders and users of protected works*” (emphases added). It goes on to say that “due to the development of new technologies and the ever-increasing worldwide use of the Internet, it

³ Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167 of 22 June 2001, 10.

⁴ Green Paper of the Commission of the European Communities on *Copyright in the Knowledge Economy*, Brussels, COM (2008) 466/3

has been considered that the above balance between various stakeholders' interests *needs to be recalibrated*" (emphases added).⁵ At a meeting in late May 2009, the discussions focused on the proposed treaty on exceptions to copyright for the visually impaired. However, the discussions are to be pursued in a broader context. The Conclusions of the Chair of the Standing Committee state that "the Committee reconfirmed its commitment to work on the outstanding issues of the limitations and exceptions (...) taking into account development-related concerns and the need to establish timely and practical result-oriented solutions. Likewise, the Committee reaffirmed its commitment to continue without delay its work in a global and inclusive approach, including the multifaceted issues affecting access of the blind, visually impaired and other reading-disabled persons to protected works."⁶ The Standing Committee also intended to draw up a questionnaire on "limitations and exceptions for educational activities, activities of libraries and archives, provisions for disabled persons, as well as the implications of digital technology in the field of copyright, including as they relate to social, cultural and religious limitations and exceptions"⁷ and to maintain the issue on the agenda of its forthcoming meetings.

4. Assessing and adapting the existing legal framework: the crucial role of limitations and exceptions to copyright and the possibilities of mandatory collective management

It is essential to guarantee in copyright law a fair balance between the different interests involved. This is clearly not the place for a detailed description of what the architecture of tomorrow's copyright law might look like since that would go well beyond the scope of this report. The issues to be resolved are highly complicated and the responses to them are still being studied. Moreover, they will depend to a large extent on future technical and social developments and on the ability of rightholders and the various players concerned to establish systems allowing for effective and proportionate access to information and to the knowledge contained in works. However, we will try to outline below a number of factors that could serve as a basis for adapting legislation at both national and supra-national level.

In this regard, the Green Paper on Copyright in the Knowledge Economy identifies a number of exceptions and limitations that have a particular impact on knowledge dissemination and proposes launching a discussion on the desirability of developing them in the digital era . Moreover, it is necessary to discuss ways of guaranteeing the adaptability of exceptions and limitations to new technical and social circumstances and to consider the case for introducing more flexibility in the present system. Ways should then be examined of guaranteeing the practical benefit of these limitations in the light of contractual arrangements and technical measures. Finally, it is crucial to ensure that rightholders receive fair and equitable remuneration. Granting access to information does not mean that the access should be free of charge.

In order to analyse the development of exceptions and limitations to copyright, it is clearly necessary to distinguish between those that allow access to information and those that do not. Not all the exceptions and limitations have the same justification and importance for the development of the information society. The limitations that necessitate particular attention include exceptions for libraries and archives, for teaching and research purposes, for news reports, for press reviews, for quotations and, more incidentally, exception for people with disabilities, as well as private copying when this allows access to information and is not

⁵ <http://www.wipo.int/copyright/en/limitations/index.html>.

⁶ Conclusions of the 18th session of the Standing Committee on Copyright and Related Rights, SCCR/18/CONCLUSIONS, 29 May 2009, Paragraph 1.

⁷ *Ibid.*, Paragraph. 6.

already covered by one of the exceptions already mentioned. The Green Paper also proposes studying the possibility of introducing an exception for creative uses.

These legitimate uses in relation to effective access to information must be clearly separated from other uses of works that are mainly for consumption purposes. A user who downloads Britney Spears' latest hit from the Internet is not seeking to obtain information but simply wants to listen to the music free of charge without having to buy the CD. Assuming the contrary, as has been sometimes maintained, would clearly be an abuse of the right to information and discredit the argument. This dimension needs to be included in the discussions on the future of the "private copying" exception (downloading a work from an illicit source could be excluded from such an exception) and a harmonised legal framework needs to be put forward to deal with the issue of file exchanges on the Internet. That does not necessarily involve a criminal law-based solution, and it is important to remember that certain fundamental rights to privacy and to personal data must also be taken into account. However, the aim is clearly not to put exceptions and limitations that are crucially important for the development of the knowledge society on the same footing as others that are not.

The other possibility which needs to be explored in order to facilitate access to certain works is less radical than providing for limitations and exceptions to copyright as it relates solely to the exercise of the exclusive right and not to its existence: mandatory collective management. Here, access can be guaranteed as users know that they can obtain the necessary authorisations from one and the same body: a collecting society. Certain Community directives authorise, or indeed impose, the use of mandatory collective management. This is the case with the Directive of 27 September 1993 regarding cable retransmission⁸, the Directive of 19 November 1992 authorising the imposition of collective management of rental rights⁹, and the Directive of 27 September 2001 which does the same for resale rights¹⁰. In France, the right to reproduction by ways of reprography is also subject to mandatory collective management (Article L. 122-10 of the Intellectual Property Code). In this case, exclusive rights come into play, giving the collecting society greater negotiating power. This possibility therefore deserves closer study. Moreover, a report of the French Supreme Council for Literary and Artistic Property (CSPLA) explicitly considered this approach for orphan works.¹¹

5. Contractual initiatives and the other access possibilities under discussion

Any initiative aimed at reviewing the existing legal framework to guarantee better access to works and to the information they contain, especially for teaching and research purposes, must obviously take account of any present contractual arrangements between the stakeholders concerned. Since regulation makes no sense if the parties manage to agree on establishing satisfactory means of access, it is necessary to be aware of initiatives in progress and model licences drawn up by means of consultation among the relevant protagonists, enabling citizens to access information on acceptable terms and conditions. However, the effectiveness of such agreements must also be examined closely since the existence of

⁸ Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJEC L 248 of 6 October 1993, 15; article 9.1.

⁹ Council Directive 2006/115/EEC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJEC L 346 of 27 November 1992, 61; article 4.

¹⁰ Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJEC L 272 of 13 October 2001, 32; article 6. 2.

¹¹ See the CSPLA report of 19 March 2008 regarding orphan works (in French only): <http://www.cspla.culture.gouv.fr/CONTENU/rapoeuvor08.pdf>.

arrangements that permit on-demand access does not necessarily mean that that access is possible on satisfactory terms and conditions. It will accordingly be necessary to verify that the cost of the service offered is not unreasonable or that the conditions of access are not too restrictive. Apart from considering the arrangements between the stakeholders concerned, it is also important to look at practices that are becoming established in the scientific community, especially the online availability of so-called “open content” works that use open licence mechanisms, such as the “creative commons” model.

It is therefore necessary to take note in this context of a number of initiatives. It is not a question of producing an inventory here but simply of mentioning a few examples. With regard to the digitisation of orphan works (works still covered by copyright but whose owners cannot be identified or located), the European “ARROW” project (Accessible Registry of Rights and Information on Orphan Works for the European Digital Library) has been set up to develop a database that makes it easier to search for rightholders.¹² A European legal initiative to authorise the digitisation of orphan works may therefore seem premature. In addition, the European Commission has set up a High Level Expert Group on Digital Libraries (whose terms of reference were renewed by a Commission decision of 25 March 2009¹³). This group brings together the main players concerned and aims to promote mechanisms drawn up on a voluntary basis. Thus, the effectiveness of the solutions that have been (or will be) developed in this connection need to be closely examined. In Europe, there is also the “Europeana” digital library project to digitise a large number of public domain and copyright protected works in agreement with rightholders.¹⁴

Finally, mention needs to be made of the agreement signed by Google in October 2008 with a number of publishers belonging to the Association of American Publishers to allow the full digitisation by Google of numerous works (especially orphan works and books that are out of print) in order to make them accessible online, in whole or in part. However, this very complicated agreement relates only to the United States and its legality has yet to be confirmed by an American court (United States District Court for the Southern District of New York) which will be considering the matter on 7 October 2009¹⁵. Moreover, it would not appear to be applicable in Europe in view of the fact that numerous points in the agreement contravene the legislation in force in numerous European countries, in particular provisions relating to copyright contract law. The agreement allows a number of authors and rightholders in the United States to withdraw retroactively if they so wish (via an “opt-out”- clause). A close watch will therefore need to be kept on these developments. While users can no doubt look forward to better access and research opportunities as a result of this digitisation initiative and the fact that library archives are made available online, such an agreement does pose a number of problems, especially in the context of competition law, since a single provider (a private player) will possess all the digital sources of libraries and archives (most of which are public institutions). As it has been rightly emphasised by Professor Annette Kur, President of ATRIP, at a hearing of the Council of Europe’s Committee on Culture, Science and Education regarding the motion for a resolution under consideration here, “if certain search engines become sole source-databases for library stocks and/or other sources of information and knowledge, this may lead to serious distortions on the market for informational products and services, potentially resulting in misuse of dominant positions, most notably in excess pricing. For this reason, the developments in this field must be subject

¹² <http://www.arrow-net.eu>

¹³ Commission Decision of 25 March 2009 setting up a High Level Expert Group on Digital Libraries (2009/301/EC), OJ L 82 of 28 March 2009, 9.

¹⁴ <http://www.europeana.eu>

¹⁵ <Http://www.googlebooksettlement.com>

to adequate control, in particular by the competition authorities.”¹⁶ Such a dominant position could entail risks of abuse, and continued vigilance will be required.¹⁷

6- Conclusions and recommendations

In discussing the future of copyright in Europe, therefore, we have to stress the need to strike a fair balance between protection and access to information. At the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services in Reykjavik, 28-29 May 2009, the government representatives clearly acknowledged this objective, since, after reasserting “the importance of copyright protection”, they underlined “the need to explore further, in close co-operation with relevant stakeholders, issues deriving from the use of copyrighted material or the exploitation of user-generated content by media-like services to protect and promote the freedom of expression and information”¹⁸.

In order to ensure this balance, a number of proposed recommendations may be made:

- Assist and encourage contractual initiatives to provide improved access to works and the information they contain, particularly in the fields of education and research. Verify their effectiveness and implementation by means of empirical studies.
- Facilitate and encourage the provision of a genuine offer of information operating in a “open-content” model.
- Guarantee rightholders fair and equitable remuneration for access to protected works. Granting access to information on no account means that the access should be free of charge. There are production costs in the case of work and quality-control costs in the case of information which have to be covered.
- Initiate substantive reflection on the system of exceptions and limitations by means of a transparent public debate, enabling each interested group to express its point of view.
- Identify the exceptions and limitations essential for the freedom of expression and information in a democratic society and ensure that these are fully effective. In contrast, identify the exceptions and limitations which are merely incidental to this objective and propose a differentiated approach.
- Explore the possibility of introducing mandatory collective management systems, especially where exclusive rights would be very difficult to implement and could have negative effects on access to information (for example, in the case of orphan works).

¹⁶ Presentation by A. Kur, President of ATRIP (International Association for the Advancement of Teaching and Research in Intellectual Property), Hearing on copyright in Europe, Parliamentary Assembly of the Council of Europe, Committee on Culture, Science and Education, Paris, 9 December 2009 (AS/Cult (2009) 05, 15 January 2009 (also available at www.atrip.org).

¹⁷ See, in this connection the background information memorandum on the “Google Books” agreement, submitted to the Council of the European Union by the German delegation on 20 May 2009, 10221/09 AUDIO 23 CULT 44 PI 47: “The German delegation would like to raise Member States’ awareness of the risks associated with this activity and draw their attention to the fact that Google’s actions (...) could have an impact on the concentration of media ownership and on cultural diversity in general, and especially in the European Union (...) The Commission is requested to take the matter up and examine the Google Books project as well as the impact of the settlement sought in the USA from the point of view of copyright law, law on restrictive practices and cultural policy and, where appropriate, to introduce new measures to protect right holders.”

¹⁸ 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services (Reykjavik, Iceland, 29 May 2009), MCM (2009)011, Resolutions.

- Initiate a major future-oriented study on copyright in the digital environment and reflection on the changes required to guarantee flexible legal provisions, enabling copyright law to adapt more easily to technical, economic and social developments.

- Facilitate inter-disciplinary work on copyright, and propose a framework in which such work can be carried out. Copyright law, which is a real societal issue, is not solely a legal question, but needs to be studied from the economic, philosophical, sociological, historical and psychological point of view. Questions relating to fundamental rights warrant particular attention.

APPENDIX

Doc. 11272

24 April 2007

Copyright in Europe

Motion for a resolution
presented by Mr Bodewig and others

This motion has not been discussed in the Assembly and expresses the views of only the members who have signed it.

1. The right of access to information and copyright practices are both playing an increasingly important role in today's information society and giving rise to more and more problems and questions, especially in the area of digital communication.
2. . When the commercial search engine, Google, in 2004 announced its intention to develop a digital library by digitising library stocks, many publishers and press companies, as well as individual users of information available free of charge with unlimited access, feared that the digitisation of the relevant works would infringe copyright and establish barriers to information access. There were angry responses throughout Europe and those concerned put up resistance. Following various disputes, some libraries and companies decided to hold negotiations with Google about conditions for publication and ultimately reached agreements. These sometimes involved financial compensation or supervision by the libraries and companies themselves of the articles published online. It is likely that other search engines and information services will now also follow these examples, and that the trend will extend to the audiovisual information sectors.
3. This demonstrates the great significance of the commercialisation of access to, and the dissemination of, information.
4. Everyone must retain the right to free access to information. This also applies to access by individuals to digital libraries, including audiovisual sectors in which major commercial firms are currently not allowed to commercialise, or establish access barriers to, freely accessible content and information. At the same time, copyright must continue to be protected in future.
5. The Council of Europe is asked to ensure informational self-determination in this area, too, and to consider what trends are likely and whether there is a need for standard-setting work at the Council so that free and unrestricted access to digital and audiovisual information continues to be guaranteed in future.

Signed (see overleaf)

Signed:

BODEWIG Kurt, Germany, SOC
AGER Hans, Austria, EPP/CD
ATEŞ, Abdülkadir, Turkey, SOC
BARNETT Doris, Germany, SOC
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DZEMBRITZKI Detlef, Germany, SOC
GACEK Urszula, Poland, EPP/CD
GRAF Angelika, Germany, SOC
GRIGNON Francis, France, EPP/CD
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