

Luxury & Fashion 2021

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**Meryl Rosen Bernstein, Sahira Khwaja and
Kelly Tubman Hardy**

Hogan Lovells

Lexology Getting The Deal Through is delighted to publish the second edition of *Luxury & Fashion*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on France and Hong Kong.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Meryl Rosen Bernstein, Sahira Khwaja and Kelly Tubman Hardy of Hogan Lovells, for their continued assistance with this volume.



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Mexico

Begoña Cancino

Creel García-Cuellar Aiza y Enriquez SC

MARKET SPOTLIGHT

State of the market

- 1 | What is the current state of the luxury fashion market in your jurisdiction?

According to figures obtained by Statista Digital & Consumer Market Outlook, accessible through www.statista.com, revenue in the luxury fashion segment in Mexico amounts to US\$545 million in 2021 and the market is expected to grow annually by 3.48 per cent between 2021 and 2025. The largest segment is Luxury Apparel with a volume of US\$380 million in 2021. The most notable market players are LVMH (with brands such as Louis Vuitton), Kering (Gucci, Balenciaga, Saint Laurent and other brands), Ralph Lauren and PVH (Calvin Klein, Tommy Hilfiger).

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

- 2 | What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships?

These include:

- The Mexican Constitution http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Constitucion_Politica.pdf;
- Code of Commerce http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Codigo_de_Comercio.pdf Federal Tax Code http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Codigo_Fiscal_de_la_Federacion.pdf;
- Customs Law http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_Aduanera.pdf ;
- Foreign Trade Law http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_de_Comercio_Exterior.pdf;
- General Import and Export Tax Law http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_de_los_Impuestos_Generales_de_Importacion_y_de_Exportacion.pdf;
- Federal Law for the Protection of Industrial Property and Regulations http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_Federal_de_Proteccion_a_la_Propiedad_Industrial.pdf;
- Federal Copyright Law and Regulations http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_Federal_del_Derecho_de_Autor.pdf;
- General Health Law http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_General_de_Salud.pdf;
- Regulations of the General Health Law on Sanitary Control of Activities, Establishments, Products and Services http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LGS_MCSAEPs_281204.pdf
- Regulations of the General Health Law on Advertising http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LGS_MP.pdf;

- Federal Consumer Protection Law and Regulations http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_Federal_de_Proteccion_al_Consumidor.pdf;
- Quality and Infrastructure Law and Mexican Official Standards http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_de_Infraestructura_de_la_Calidad.pdf
- Federal Employment Law http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_Federal_del_Trabajo.pdf
- Federal Economic Competition Law and Regulations http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_Federal_de_Competencia_Economica.pdf
- Federal Law for the Protection of Personal Data held by Private Parties http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_Federal_de_Proteccion_de_Datos_Personales-Posesion-Particulares.pdf
- Telecommunications Law http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_Federal_de_Telecomunicaciones_y_Radiodifusion.pdf ;
- USMCA <https://www.gob.mx/t-mec/acciones-y-programas/textos-finales-del-tratado-entre-mexico-estados-unidos-y-canada-t-mec-202730?state=published> ;
- TRIPS http://www.wto.org/spanish/docs/s/legal_s/27-trips_01_s.htm ;
- Paris Convention https://www.wipo.int/edocs/lexdocs/treaties/es/paris/trt_paris_001es.pdf ; and
- Berne Convention <https://wipolex.wipo.int/es/treaties/textdetails/12214> .

Distribution and agency agreements

- 3 | What legal framework governs distribution and agency agreements for fashion goods?

In general terms, the Code of Commerce governs distribution and agency agreements for fashion goods, however, it worth mentioning that agency and commercial distribution agreements are not specifically regulated under Mexican laws, therefore, are considered atypical. These agreements are usually complemented with clauses or additional agreements containing a licence to use intellectual property rights, either to manufacture protected products (by means of legal structures such as industrial designs) or to use specific trademarks. In addition, there could be agreements or works made for hire, when the provider is commissioned to develop certain designs on behalf of its client and such designs could be eligible for copyright protection.

- 4 | What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

The most common structure of distribution for fashion goods in Mexico is a producer-customer through the producer's own stores (either physical premises or online); however, there is also a tendency to include a retailer (with inner boutiques), therefore implementing the structure producer-retailer-customer. Each party purchases the goods to sell them to the next participant of the distribution chain.

Import and export

- 5 | Do any special import and export rules and restrictions apply to fashion goods?

Because of further amendments to the General Import and Export Tax Law, as of 29 October 2019, and until September 2024, the import duty for footwear, textiles and clothing will be between 25 per cent and 30 per cent for countries with which Mexico does not have a free trade agreement.

Corporate social responsibility and sustainability

- 6 | What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

An in-depth due diligence from the intellectual property and consumer protection' business practices is highly recommendable, not only to assess the components of the company's IP portfolio and advertising strategies – as required in all acquisition processes – but a deeper one to determine if the company promotes a positive brand image and builds conscious relationships inside with stakeholders and outside with consumers and competent authorities in the relevant jurisdiction. The diligence of a company's activities on its social media accounts is crucial as this has now become the principal tool to spread and promote corporate social responsibility campaigns. Diligence on environmental matters is also essential to the extent that the company may demonstrate that their processes create less environmental impact (ie, by using fewer chemical products, less waste). Lastly, due diligence on health matters when it comes to cosmetics is also necessary, to confirm that such products are manufactured under the applicable health laws and create no risk to the users.

- 7 | What occupational health and safety laws should fashion companies be aware of across their supply chains?

The Mexican Constitution provides for the standards and principles to be observed within the employment relationships in general, including employer's duties in connection with the occupational health and safety, the Federal Employment Law, the Federal Regulation on Occupational Safety and Hygiene and the Working Environment, Regulations of the Secretariat of Labour and Social Welfare and several Mexican official standards relating to topics such as: manufacturing, commercialisation, transport and storage activities or services; working with pesticides and fertilisers at agricultural facilities, forest exploitation, the operation and maintenance of railways, and construction and mining; and standards on occupational health and safety applicable to manufacturing, commercialisation, distribution and use of fire protection equipment and personal protective equipment, and more recently, the official standard on psychological risk factors within the labor environment.

ONLINE RETAIL

Launch

- 8 | What legal framework governs the launch of an online fashion marketplace or store?

First, it is important to clarify that there is no specific law in Mexico specially devoted to governing e-commerce. The Code of Commerce and the Federal Consumer Protection Law include a brief section dedicated to online business transactions, which mainly focuses on establishing the dispositions related to authentication of the parties participating in the online business transaction. The Civil Code is also applicable to these transactions, in relation to the matters not covered by the Code of Commerce. Also, there are guidelines on e-commerce ruled by the head of the Consumer Protection Agency and the Mexican Standard NMX-COE-001-SCFI-2018 for e-commerce, which introduces the differences between intermediary providers and third-party providers, where the first one is understood as the person who operates a platform used by the second one to offer its products, goods or services to consumers.

Sourcing and distribution

- 9 | How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

Click-through and click-wrap agreements, are considered standard agreements and are applicable to any business transaction according to the Code of Commerce. Usually for their execution the signatory only needs to agree them in an express or tacit form, without amending or negotiating any of their terms and conditions. However, in case of any dispute regarding these types of agreement, the party seeking enforcement will most likely face the problem of attributing such consent to its counterparty.

Terms and conditions

- 10 | What special considerations would you take into account when drafting online terms and conditions for customers when launching an e-commerce website in your jurisdiction?

Terms and conditions should be drafted into Spanish and must appear within the virtual store or electronic commerce platform in a visible, easily accessible place for the consumer; they should be applicable in all purchases.

The virtual store or e-commerce platform referred to in the terms and conditions should give access to hyperlinks whose purpose is to facilitate access, file and print information to improve the experience and provide certainty to the consumer when using the site. The application of the terms and conditions will be subject to the provisions of the Federal Consumer Protection Law. Consequently, the consumer will enjoy all the rights recognised in the Federal Consumer Protection Law, in addition to those granted in the terms and conditions. All the rights, duties, benefits and guarantees contained in the Federal Consumer Protection Law must be recognised and strictly applied by the companies in the terms and conditions. As a minimum, the terms and conditions should include:

- the applicable contracting conditions;
- the term of validity of offers and promotions;
- the payment or delivery restrictions, and
- all necessary conditions for use or delivery with penalties in case of cancellations.

Tax

- 11 | Are online sales taxed differently than sales in retail stores in your jurisdiction?

There are no online sales taxes different than those provided for retail stores in Mexico.

INTELLECTUAL PROPERTY**Design protection**

- 12 | Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

From the industrial property standpoint, the rights available to fashion goods under the applicable federal law are: industrial designs, three-dimensional trademarks, conventional trademarks (wordmarks, composite), non-conventional trademarks (shapes, holograms, scents, textures, trade dress). From the copyright standpoint, the protection afforded to fashion goods under the applicable Federal Law includes designs, indigenous knowledge and cultural expressions.

- 13 | What difficulties arise in obtaining IP protection for fashion goods?

In general terms, IP protection for fashion goods is available under Mexican laws. There are some practical obstacles, for example, when it comes to the protection of perfume's bottles as three-dimensional trademarks, as it has been the regulator's criteria to consider that protecting the shape of a bottle to distinguish bottles (regardless of their contents) falls into the descriptiveness prohibition for registering trademarks in Mexico. Nevertheless, it is possible to achieve IP protection over such bottles by means of other legal figures such as copyrights.

Brand protection

- 14 | How are luxury and fashion brands legally protected in your jurisdiction?

Luxury and fashion brands are legally protected in Mexico as registered trademarks (conventional or non-conventional), industrial designs and copyrights, the last do not require registration to afford exclusive protection, while trademarks and industrial designs should be registered in order to provide exclusive protection to its owner. Domain names are usually anticipated by trademark protection, as in all cases, the owner of a domain name replicating a registered trademark without the authorisation of the trademark holder may lead to a dispute before WIPO by means of which, the trademark holder may be able to recover or shut down the site accessible to the relevant domain. Nevertheless, it is important to consider that domain names are not considered a type of intellectual property right under Mexican law.

Licensing

- 15 | What rules, restrictions and best practices apply to IP licensing in the fashion industry?

The same rules and restrictions applicable to other industries apply in the fashion industry, for example: all licence agreements should be executed in written form, if the licence refers to a copyright, it should necessarily be granted in exchange for a consideration and for a specific period that should not exceed of five years, unless the investment justifies a broader period of licensing; there are no similar restrictions to trademarks and when it comes to industrial designs, it should be considered that the length of the licensing term should not exceed the validity term of the industrial design licensed. As a best practice is

recommended to register each licence agreement before the applicable regulator, this is, before the Copyright Office (if the subject of the licence is a copyright) or before the Mexican Patent and Trademark Office (if the subject of the licence is a trademark or an industrial design).

Enforcement

- 16 | What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

IP rights holders have the option to enforce them through administrative and judicial actions. Administrative actions include infringement proceedings against unauthorised users or unfair competition, preliminary injunctive measures, border measures to prevent unauthorised imports or imports of knockoffs that may endanger the competitiveness of a businesses, and in extreme cases, the health and safety of consumers, to that end, there is a recordation process that allows IP owners to protect their rights at the border, by recording their trademarks with Mexican Customs. On the other hand, judicial actions include litigations before Mexican courts if a Mexican authority violated the exclusive rights or any provision of the applicable laws in prejudice of an IP owner, these actions also include the possibility for the IP owner to claim for damages in specific cases.

DATA PRIVACY AND SECURITY**Legislation**

- 17 | What data privacy and security laws are most relevant to fashion and luxury companies?

Federal Law on Protection of Personal Data held by Private Parties and its Regulations and guidelines ruled by the federal regulator.

Compliance challenges

- 18 | What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

There are no particular challenges in the Mexican Privacy Law for the luxury and fashion industry per se; however, considering their business models and the constant rotation of employees that may navigate between competitors, it is highly recommended to implement clear internal policies and document correctly any time an employee leaves the company, so as to ensure that there would be no risk of misuse of personal data collected within their former job and even of confidential information that may entail a competitive advantage for the former employer, which according to the Mexican IP Laws may constitute a trade secret. There are also challenges to the processing of personal data to online fashion retailers, who should be aware of specific guidelines on the processing of personal data in the sector of e-commerce that should be taken into account not only for the provision of the services but also, for the implementation of advertising strategies, as in Mexico, the Consumer Protection Law and its Regulations provide for specific rights on the consumers who do not want to receive advertising materials and not to be bothered for marketing purposes using the information they have provided to the fashion retailer; in fact, under Mexican laws, consumers are entitled at all times to demand suppliers and companies that use their information not to assign or transfer the same to third parties, except when such assignment or transfer is determined by a judicial authority.

Innovative technologies

- 19 | What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Under Mexican privacy laws, biometrics (physical characteristics) are considered sensitive data (defined as personal data touching on the most private areas of the data owner's life, or whose misuse might lead to discrimination or involve a serious risk for said data owner). As regards sensitive data it should be understood all personal information that may reveal items such as racial or ethnic origin, present and future health status, genetic information, religious, philosophical and moral beliefs, political views, sexual preference) and, as such, should be treated with the maximum level of protection, even preparing a database containing sensitive data should be justified for a specific purpose and during a specific term, which should be limited to the minimum required. Please note that for the collection and processing of sensitive data, the data controller must obtain express written consent from the data owner, through any authentication mechanism established for such a purpose (this poses a particular effort when it comes to e-commerce transactions). As regards sensitive personal data, the penalties for misuse or violations of the applicable law, will be doubled.

Content personalisation and targeted advertising

- 20 | What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

All legal requirements in connection with the use and all kind of processing of personal data, as well as all required consents for the companies to be able to send advertising to consumers that have either authorised or have provided their consent to receive such advertising. The Consumer Protection Agency keeps a public registry of consumers who do not wish their information to be used for marketing or advertising purposes, in connection with such registry, all interested parties may inform the Agency – either in written or via electronic mail – their request to be registered in such a registry, which shall be free of charge. In this regard, under the Federal Consumer Protection Law, all companies that use information on consumers with marketing or advertising purposes, are prohibited to send advertising to consumers that have expressly stated their volition not to receive it, or who are registered in a public registry managed by the Consumer Protection Agency. Finally, it should be considered that suppliers of the goods advertised, shall be jointly responsible for handling the information of consumers when such advertising is sent through third parties; therefore, failure to comply with these provisions would trigger administrative fines not only on the advertiser, but also on the supplier of the goods advertised.

ADVERTISING AND MARKETING

Law and regulation

- 21 | What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

Those provisions of the Federal Consumer Protection Law, its Regulations and regarding cosmetics, those regulations of the General Health Law on Advertising. In addition, the code of conduct of specific chambers related to the industry; however, such provisions would only be binding to affiliates.

Online marketing and social media

- 22 | What particular rules and regulations govern online marketing activities and how are such rules enforced?

There is no specific law in Mexico specially devoted to governing online marketing activities. The Federal Consumer Protection Law includes a brief section dedicated to online business transactions, which mainly focuses on establishing the dispositions related to authentication of the parties participating in the online business transaction. The Civil Code is also applicable to these transactions, in relation to the matters not covered by the Code of Commerce. Also, there are guidelines on e-commerce ruled by the head of the Consumer Protection Agency and the Mexican Standard NMX-COE-001-SCFI-2018 for e-commerce, which introduces the differences between intermediary providers and third-party providers, where the first one is understood as the person who operates a platform used by the second one to offer its products, goods or services to consumers.

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

- 23 | What product safety rules and standards apply to luxury and fashion goods?

The same general rules and standards applicable to other industries apply to luxury and fashion goods. Those set forth in the Federal Consumer Protection Law and the Quality and Infrastructure Law provide specific obligations regarding product safety and consumer protection. Also, and when it comes to cosmetics, it should be considered that the General Health Law and related Regulations include specific safety provisions.

Product liability

- 24 | What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

The same regime applicable to other industries, based on the Civil Code and the Consumer Protection Law. Each Mexican state has a Civil Code that regulates civil liability, which includes product liability and hidden defects, and there is a Federal Consumer Protection Law.

M&A AND COMPETITION ISSUES

M&A and joint ventures

- 25 | Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

The same considerations applicable to other industries may apply, particularly those around the name of the designer and his or her heritage should be considered a very valuable part of the company's intellectual property's assets. Also, the employment or contractual relationship with creative directors should be carefully considered from a legal standpoint as most of the heritage of certain brands are linked to them.

Competition

- 26 | What competition law provisions are particularly relevant for the luxury and fashion industry?

The same provisions applicable to other industries, the Federal Economic Competition Law and its Regulations.

Pursuant to the Federal Antitrust Law, there are certain practices that companies with substantial market power may carry out that have adverse effects on the process of competition and free concurrence. A company or economic agent with substantial market power is one that has an important capacity to make decisions and influence the normal development of the market (ie, they are agents that, due to their size and importance, constitute an important reference in the decision-making process).

Some of the practices that affect the competition process are:

- exclusivities, which may be originated when one or several agents agree to fragment the market and thus obtain special benefits (ie, two companies agree that one will limit itself to producing and selling pants, and the other will dedicate itself to producing and selling shoes);
- the so-called resell price maintenance, which consists of the establishment of prices or various conditions, which the distributors must maintain, for example, a jacket company delivers its merchandise to the distributor, with the condition that it sells its jackets at a minimum or fixed price of MXN \$100; and
- bundling, referring to the purchase of one article conditioned to the purchase of other articles, for example, a department store only sells two independent accessories as a package but refuses to sell them separately.

It is essential to mention that, as mentioned above, the Law sanctions these conducts, known as relative monopolistic practices, with a fine of up to 8 per cent of the revenues of the company or economic agent.

EMPLOYMENT AND LABOUR

Managing employment relationships

- 27 | What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

There is no particular provision pursuant to the fashion companies. In general terms, the applicable provisions are those of the Federal Employment Law, but also it is possible to enter into a service agreement with certain providers. The usual contractual arrangements depend on a case-by-case basis; generally, employees are hired per indefinite period, regardless of the industry. As regards worker classification, it is important to clarify that in Mexico classification relates to a company's casualty rates instead of worker's casualty rates. Companies devoted to the manufacturing of clothing are typically classified under very low rates.

Trade unions

- 28 | Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

There are no special legal or regulatory considerations for fashion companies, when dealing with trade unions or works councils they are subject to the same considerations applicable to other industries.

Immigration

- 29 | Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

There is no special law for attending immigration aspects related to this particular industry, the applicable law in these cases would be the Migration Law.

UPDATE AND TRENDS

Trends and developments

- 30 | What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

There have been claims from indigenous communities in Mexico, alleging that some Fashion and Luxury brands (ie, Carolina Herrera, Isabel Marant, Inditex, Louis Vuitton, Desigual) are copying their fabric patterns or designs, disregarding existing provisions contained in the Mexican Copyright Law and even the United Nations Declaration of Rights of Indigenous Peoples (section 31). Under the Mexican Copyright Law, the use of such patterns and designs do not require an authorisation but an express acknowledgement of the community to show respect to its heritage, cultural expressions and folklore. To reframe the legal needs and provide support to Indigenous communities, the World Intellectual Property Organization has ruled 'Practical Guidelines about Intellectual Property for indigenous and local communities' with the aim of incentivising the protection of cultural expressions through the available intellectual property rights in each jurisdiction. There is a legal initiative to enact the 'General Law to safeguard the cultural elements of the identity of indigenous peoples and communities' its purpose is to promote the respect and acknowledgement of cultural and identity elements from indigenous communities enabling them to authorise the use of their cultural expressions. As of the date of this document, the Mexican Senate has already approved this initiative and now it is under analysis of the Chamber of Deputies.

CORONAVIRUS

Coronavirus

- 31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In Mexico, there was no emergency legislation, relief programmes or other initiatives specific to the fashion area to address the pandemic, in addition, there were no amendments to address such concerns, other than the 'Order to establish the extraordinary measures to respond to the sanitary emergency caused by the SARS-CoV2 virus' (the Order), where the authorities established the period of suspension of non-essential activities. The Order does not clearly make the essential activity treatment extensive to the supply chain of goods and services that needs to flow to ensure that the core essential activity continues operating undisputedly; it contains a limited and vague reference to the supply chain concept with respect to the health sector, and with respect to some segments of the transportation industry, but is silent, however, on a supply chain approach for other essential activities. A criterion that was applied by Mexican authorities when determining the essential nature of manufacturing activities was whether the goods manufactured were sold in the Mexican market: according to this interpretation, only goods supplied domestically into Mexico would be considered essential. Manufacturing facilities that export all or most of their production for integration into essential industries were faced with the prospect of having to shut down because of failing to meet the criterion.

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