LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2014-03]

Music Licensing Study: Notice and Request for Public Comment

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: The United States Copyright Office announces the initiation of a study to evaluate the effectiveness of existing methods of licensing music. To aid this effort, the Office is seeking public input on this topic. The Office will use the information it gathers to report to Congress. Congress is currently conducting a review of the U.S. Copyright Act, 17 U.S.C. 101 *et seq.*, to evaluate potential revisions of the law in light of technological and other developments that impact the creation, dissemination, and use of copyrighted works.

DATES: Written comments are due on or before May 16, 2014. The Office will be announcing one or more public meetings to address music licensing issues, to take place after written comments are received, by separate notice in the future.

ADDRESSES: All comments shall be submitted electronically. A comment page containing a comment form is posted on the Office website at http://www.copyright.gov/docs/musiclicensingstudy. The website interface requires commenting parties to complete a form specifying their name and organization, as applicable, and to upload comments as an attachment via a browser button. To meet accessibility standards, commenting parties must upload comments in a single file not to exceed six megabytes (MB) in one of the following formats: the Portable Document File

(PDF) format that contains searchable, accessible text (not an image); Microsoft Word; WordPerfect; Rich Text Format (RTF); or ASCII text file format (not a scanned document). The form and face of the comments must include both the name of the submitter and organization. The Office will post the comments publicly on the Office's website in the form that they are received, along with associated names and organizations. If electronic submission of comments is not feasible, please contact the Office at 202-707-8350 for special instructions.

FOR FURTHER INFORMATION CONTACT: Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, by email at jcharlesworth@loc.gov or by telephone at 202-707-8350; or Sarang V. Damle, Special Advisor to the General Counsel, by email at sdam@loc.gov or by telephone at 202-707-8350.

SUPPLEMENTARY INFORMATION:

I. Background

Congress is currently engaged in a comprehensive review of the U.S. Copyright Act, 17 U.S.C. 101 *et seq.*, to evaluate potential revisions to the law in light of technological and other developments that impact the creation, dissemination, and use of copyrighted works. The last general revision of the Copyright Act took place in 1976 ("Copyright Act" or "Act") following a lengthy and comprehensive review process carried out by Congress, the Copyright Office, and interested parties. In 1998, Congress significantly amended the Act with the passage of the Digital Millennium Copyright Act ("DMCA") to address emerging issues of the digital age. Pub. L. No. 105-304, 112 Stat. 2860 (1998). While the Copyright Act reflects many sound and enduring principles, and has enabled the internet to flourish, Congress could not have foreseen all of today's

technologies and the myriad ways consumers and others engage with creative works in the digital environment. Perhaps nowhere has the landscape been as significantly altered as in the realm of music.

Music is more available now than it has ever been. Today, music is delivered to consumers not only in physical formats, such as compact discs and vinyl records, but is available on demand, both by download and streaming, as well as through smartphones, computers, and other devices. At the same time, the public continues to consume music through terrestrial and satellite radio, and more recently, internet-based radio. Music continues to enhance films, television, and advertising, and is a key component of many apps and video games.

Such uses of music require licenses from copyright owners. The mechanisms for obtaining such licenses are largely shaped by our copyright law, including the statutory licenses under Sections 112, 114, and 115 of the Copyright Act, which provide government-regulated licensing regimes for certain uses of sound recordings and musical works.

A musical recording encompasses two distinct works of authorship: the musical work, which is the underlying composition created by the songwriter or composer, along with any accompanying lyrics; and the sound recording, that is, the particular performance of the musical work that has been fixed in a recording medium such as CD or digital file. The methods for obtaining licenses differ with respect to these two types of works, which can be—and frequently are—owned or managed by different entities. Songwriters and composers often assign rights in their musical works to music publishers and, in addition, affiliate themselves with performing rights organizations ("PROs").

These intermediaries, in turn, assume responsibility for licensing the works. By contrast, the licensing of sound recordings is typically handled directly by record labels, except in the case of certain types of digital uses, as described below.

Musical Works – Reproduction and Distribution. Under the Copyright Act, the owner of a musical work has the exclusive right to make and distribute phonorecords of the work (*i.e.*, copies in which the work is embodied, such as CDs or digital files), as well as the exclusive right to perform the work publicly. 17 U.S.C. 106(1), (3). The copyright owner can also authorize others to engage in these acts. *Id.* These rights, however, are typically licensed in different ways.

The right to make and distribute phonorecords of musical works (often referred to as the "mechanical" right) is subject to a compulsory statutory license under Section 115 of the Act. *See generally* 17 U.S.C. 115. That license—instituted by Congress over a century ago with the passage of the 1909 Copyright Act—provides that, once a phonorecord of a musical work has been distributed to the public in the United States under the authority of the copyright owner, any person can obtain a license to make and distribute phonorecords of that work by serving a statutorily compliant notice and paying the applicable royalties. *Id*.

In 1995, Congress confirmed that a copyright owner's exclusive right to reproduce and distribute phonorecords of a musical work, and the Section 115 license, extend to the making of "digital phonorecord deliveries" ("DPDs")—that is, the transmission of digital files embodying musical works. *See* Digital Performance Right in Sound Recordings Act of 1995 ("DPRSRA"), Public Law 104-39, sec. 4, 109 Stat. 336,

344-48; 17 U.S.C. 115(c)(3)(A).[1] The Copyright Office has thus interpreted the Section 115 license to cover music downloads (including ringtones), as well as the server and other reproductions necessary to engage in streaming activities. *See* In the Matter of Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, Docket No. RF 2006-1 (Oct. 16, 2006), http://www.copyright.gov/docs/ringtone-decision.pdf; Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 FR 66173 (Nov. 7, 2008).

Licenses under Section 115 are obtained on a song-by-song basis. Because a typical online music service needs to offer access to millions of songs to compete in the marketplace, obtaining the licenses on an individual basis can present administrative challenges.[2] Many music publishers have designated the Harry Fox Agency, Inc. as an agent to handle such song-by-song mechanical licensing on their behalf.

The royalty rates and terms for the Section 115 license are established by an administrative tribunal—the Copyright Royalty Board ("CRB")[3]—which applies a standard set forth in Section 801(b) of the Act that considers four different factors. These

[1] Under the terms of Section 115, a record company or other entity that obtains a statutory license for a musical work can, in turn, authorize third parties to make DPDs of that work. *See* 17 U.S.C. 115(c)(3). In such a "pass-through" situation, the statutory licensee is then responsible for reporting and paying royalties for such third-party uses to the musical work owner.

[2] Concerns about the efficiency of the Section 115 licensing process are not new. For instance, in 2005, then-Register of Copyrights Marybeth Peters testified before Congress that Section 115 had become "outdated," and made several proposals to reform the license. *See Copyright Office Views on Music Licensing Reform*: *Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 4-9 (2005). In 2006, the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property forwarded the Section 115 Reform Act ("SIRA") to the full Judiciary Committee by unanimous voice vote. *See* H.R. 5553, 109th Cong. (2006). This bill would have updated Section 115 to create a blanket-style license. The proposed legislation was not reported out by the full Judiciary Committee, however.

[3] The Copyright Royalty Board ("CRB") is the latest in a series of administrative bodies Congress has created to adjust the rates and terms for the statutory licenses. The first, the Copyright Royalty Tribunal ("CRT"), was created in 1976. *See* Public Law 94-553, sec. 801, 90 Stat. 2541, 2594-96 (1976). In 1993, Congress replaced the CRT with a system of ad-hoc copyright arbitration royalty panels ("CARPs"). *See* Copyright Royalty Tribunal Reform Act of 1993, Public Law 103-198, sec. 2, 107 Stat. 2304, 2304-2308. Congress replaced the CARP system with the CRB in 2004. *See* Copyright Royalty and Distribution Reform Act of 2004, Public Law 108-419, 118 Stat. 2341.

include: the availability of creative works to the public; economic return to the owners and users of musical works; the respective contributions of owners and users in making works available; and the industry impact of the rates.[4]

The Section 115 license applies to audio-only reproductions that are primarily made and distributed for private use. *See* 17 U.S.C. 101, 115. Reproductions and distribution of musical works that fall outside of the Section 115 license—including "synch" uses in audiovisual media like television, film, and videos; advertising and other types of commercial uses; and derivative uses such as "sampling"—are licensed directly from the copyright owner according to negotiated rates and terms.

Musical Works – Public Performance. The method for licensing public performances of musical works differs significantly from the statutory mechanical license provided under Section 115. Licensing fees for such performances are generally collected on behalf of music publishers, songwriters, and composers by the three major PROs: the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and SESAC. Songwriters and composers, as well as their publishers, commonly affiliate with one of the three for purposes of receiving public performance income. Rather than song-by-song licenses, the PROs typically offer "blanket" licenses for the full range of music in their repertories. These licenses are available for a wide variety of uses, including terrestrial, satellite, and internet radio, on-demand music streaming services, website and television uses, and performance of music in bars, restaurants, and other commercial establishments. The PROs monitor the use of musical works by these various entities and apportion and distribute collected royalties to their publisher, songwriter, and composer members.

[4] *See* 17 U.S.C. 801(b)(1).

Unlike the mechanical right, the public performance of musical works is not subject to compulsory licensing under the Copyright Act. Since 1941, however, ASCAP and BMI's licensing practices have been subject to antitrust consent decrees overseen by the Department of Justice.[5] These consent decrees were designed to protect licensees from price discrimination or other anti-competitive behavior by the two PROs. Under the decrees, ASCAP and BMI administer the public performance right for their members' musical works on a non-exclusive basis. They are required to provide a license to any person who seeks to perform copyrighted musical works publicly, and must offer the same terms to similarly situated licensees. In addition, ASCAP's consent decree expressly bars it from offering mechanical licenses.[6] Since 1950, prospective licensees that are unable to agree to a royalty rate with ASCAP or BMI have been able to seek a determination of a reasonable license fee in the federal district court for the Southern District of New York.[7]

The two PRO consent decrees were last amended well before the proliferation of digital music: the BMI decree in 1994,[8] and the ASCAP decree in 2001.[9] The consent

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[5] *See generally United States* v. *Broadcast Music, Inc.*, 275 F.3d 168, 171-72 (2d Cir. 2001) (describing the history). SESAC, a smaller performing rights organization created in 1930 to serve European publishers, is not subject to a similar consent decree, although it has been involved recently in private antitrust litigation. *See Meredith Corp*. v. *SESAC LLC*, No. 09-cv-9177, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014).

[6] *United States* v. *ASCAP*, No. 41-cv-1395, 2001-2 Trade Cas. (CCH) ¶ 73,474, 2001 WL 1589999, *3 (S.D.N.Y. June 11, 2001). Although BMI has taken the position that a strict reading of its consent decree does not bar it from offering mechanical licenses, it generally has not done so. *See* Broadcast Music, Inc., Comments on Department of Commerce Green Paper 4-5 (Nov. 13, 2013), *available at* http://www.ntia.doc.gov/files/ntia/bmi_comments.pdf.

[7] Significantly, musical work owners are precluded from offering evidence concerning the licensing fees paid for digital performances of sound recordings as a point of comparison in the district court ratesetting proceedings. Section 114 of the Copyright Act provides that license fees payable for the public performance of sound recordings may not be taken into account "in any administrative, judicial, or other governmental proceeding to set or adjust the rates payable to" musical work copyright owners. 17 U.S.C. 114(i).

[8] *United States* v. *Broadcast Music, Inc.*, No. 64-cv-3787, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), *as amended*, 1996 Trade Cases (CCH) ¶ 71,378, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

[9] *United States* v. *ASCAP*, No. 41-cv-1395, 2001-2 Trade Cas. (CCH) ¶ 73,474, 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

decrees have been the subject of much litigation over the years, including, most recently, suits over whether music publishers can withdraw digital licensing rights from the PROs and negotiate public performance licenses directly with digital music services.[10]

Sound Recordings – Reproduction and Distribution. Congress extended federal copyright protection to sound recordings in 1972. That law, however, did not provide retroactive protection for sound recordings fixed prior to February 15, 1972, and such works therefore have no federal copyright status.[11] They are, however, subject to the protection of applicable state laws until 2067. *See* 17 U.S.C. 301(c).[12]

The owner of a copyright in a sound recording fixed on or after February 15, 1972, like the owner of a musical work copyright, enjoys the exclusive right to reproduce and distribute phonorecords embodying the sound recording, including by means of digital transmission, and to authorize others to do the same. 17 U.S.C. 106(1), (3), 301(c). Except in the limited circumstances where statutory licensing applies, as described below, licenses to reproduce and distribute sound recordings—such as those necessary to make and distribute CDs, transmit DPDs, and operate online music services, as well as to use sound recordings in a television shows, films, video games, etc.—are negotiated directly

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[10] *See In re Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395, 2013 WL 5211927 (S.D.N.Y. Sept. 17, 2013); *Broadcast Music, Inc.* v. *Pandora Media, Inc.*, Nos. 13-cv-4037, 64-cv-3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013).

[11] In 2009, Congress asked the Copyright Office to study the "desirability and means" of extending federal copyright protection to pre-February 15, 1972 sound recordings. Public Law 111-8, 123 Stat. 524 (2010) (explanatory statement). In 2011, the Office completed that study, issuing a report recommending that federal copyright protection be so extended. United States Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings* (2011), *available at* http://www.copyright.gov/docs/sound/pre-72-report.pdf.

[12] Thus, a person wishing to digitally perform a pre-1972 sound recording cannot rely on the Section 112 and 114 statutory licenses and must instead obtain a license directly from the owner of the sound recording copyright. *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 FR 23054, 23073 (Apr. 17, 2013) (determination of the CRB finding that "[t]he performance right granted by the copyright laws for sound recordings applies only to those recordings created on or after February 15, 1972" and adopting provisions allowing exclusion of performances of pre-1972 sound recordings from certain statutory royalties).

between the licensee and sound recording owner (typically a record label). Thus, while in the case of musical works, the royalty rates and terms applicable to the making and distribution of CDs, DPDs, and the operation of interactive music services are subject to government oversight, with respect to sound recordings, licensing for those same uses takes place without government supervision.

Sound Recordings – Public Performance. Unlike musical works, a sound recording owner's public performance right does not extend to all manner of public performances. Traditionally, the public performance of sound recordings was not subject to protection at all under the Copyright Act. In 1995, however, Congress enacted the DPRSRA, which provided for a limited right when sound recordings are publicly performed "by means of a digital audio transmission." Pub. L. No. 104-39, 109 Stat. 336; 17 U.S.C. 106(6), 114(a). This right extends, for example, to satellite radio and internet-based music services.[13] Significantly, however, the public performance of sound recordings by broadcast radio stations remains exempt under the Act. 17 U.S.C. 114(d)(1).[14]

[13] In 1998, as part of the DMCA, Congress amended Sections 112 and 114 of the Copyright Act to clarify that the digital sound recording performance right applies to services like webcasting. *See* Pub. L. No 105-304, secs. 402, 405, 112 Stat. 2860, 2888, 2890.

[14] The Copyright Office has long supported the extension of the public performance right in sound recordings to broadcast radio. *See Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners With Those of Broadcasters: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. 6-7 (2004) (statement of David Carson, General Counsel, U.S. Copyright Office), *available at* http://www.copyright.gov/docs/carson071504.pdf. Only a handful of countries lack such a right; in addition to the United States, the list includes China, North Korea, and Iran. This gap in copyright protection has the effect of depriving American performers and labels of foreign royalties to which they would otherwise be entitled, because even countries that recognize a public performance right in sound recordings impose a reciprocity requirement. According to one estimate, U.S. rights holders lose approximately $70 million each year in royalties for performances in foreign broadcasts. *See generally* Mary LaFrance, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings*, 2 Harv. J. of Sports & Ent. L 221, 226 (2011)

For certain uses, including those by satellite and internet radio, the digital public performance right for sound recordings is subject to statutory licensing in accordance with Sections 112 and 114 of the Act. Section 112 provides for a license to reproduce the phonorecords (sometimes referred to as "ephemeral recordings") necessary to facilitate a service's transmissions to subscribers, while Section 114 licenses the public performances of sound recordings resulting from those transmissions. This statutory licensing framework applies only to noninteractive (*i.e.*, radio-style) services as defined under Section 114; interactive (or on-demand services) are not covered. *See* 17 U.S.C. 112(e); 17 U.S.C. 114(d)(2), (f). For interactive services, sound recording owners negotiate licenses directly with users.

The rates and terms applicable to the public performance of sound recordings under the Section 112 and 114 licenses are established by the CRB. *See* 17 U.S.C. 801 *et seq.* The royalties due under these licenses are paid to an entity designated by the CRB—currently SoundExchange, Inc.—which collects, processes, and distributes payments on behalf of rights holders.[15]

Notably, under Section 114, the rate standard applicable to those satellite radio and music subscription services that existed as of July 31, 1998 (*i.e.*, "preexisting" services[16]) differs from that for other services such as internet radio.[17] Royalty rates for pre-existing satellite radio and subscription services are governed by the four-factor

[15] The Act requires that receipts under the Section 114 statutory license be divided in the following manner: 50 percent to the owner of the digital public performance right in the sound recording, 2½ percent to nonfeatured musicians, 2½ percent to nonfeatured vocalists, and 45 percent to the featured recording artists. 17 U.S.C. 114(g)(2).

[16] 17 U.S.C. 114(j)(10), (11). Today, Sirius/XM is the only preexisting satellite service that seeks statutory licenses under Section 114. *See* Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 FR 23054, 23055 (Apr. 17, 2013). There are two preexisting subscription services, Music Choice and Muzak. *Id.*

[17]

standard in Section 801(b) of the Act—that is, the standard that applies to the Section 115 license for musical works.[18] By contrast, under the terms of Section 114, rates and terms for noninteractive public performances via internet radio and other newer digital music services are to be determined by the CRB based on what a "willing buyer" and "willing seller" would have agreed to in the marketplace.[19]

SUBJECTS OF INQUIRY:

The Copyright Office seeks public input on the effectiveness of the current methods for licensing musical works and sound recordings. Accordingly, the Office invites written comments on the specific subjects above. A party choosing to respond to this Notice of Inquiry need not address every subject, but the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted.

Musical Works

1. Please assess the current need for and effectiveness of the Section 115 statutory license for the reproduction and distribution of musical works.

[18] *See* 17 U.S.C. 114(f)(1), 801(b)(1).

[19] 17 U.S.C. 114(f)(2)(B) instructs the CRB to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and willing seller." The provision further requires the CRB to consider "whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings," and "the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk." *Id.*

For all types of services eligible for a Section 114 statutory license, the rates for the phonorecords (ephemeral recordings) used to operate the service are to be established by the CRB under Section 112 according to a "willing buyer/willing seller" standard. 17 U.S.C. 112(e). In general, the Section 112 rates have been a relatively insignificant part of the CRB's ratesetting proceedings, and have been established as a subset of the 114 rate. *See, e.g.*, Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 FR 23054, 23055-56 (Apr. 17, 2013).

2. Please assess the effectiveness of the royalty ratesetting process and standards under Section 115.

3. Would the music marketplace benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities, rather than on a song-by-song basis? If so, what would be the key elements of any such system?

4. For uses under the Section 115 statutory license that also require a public performance license, could the licensing process be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner? How might such a unified process be effectuated?

5. Please assess the effectiveness of the current process for licensing the public performances of musical works.

6. Please assess the effectiveness of the royalty ratesetting process and standards applicable under the consent decrees governing ASCAP and BMI, as well as the impact, if any, of 17 U.S.C. 114(i), which provides that "[l]icense fees payable for the public performance of sound recordings under Section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works."

7. Are the consent decrees serving their intended purpose? Are the concerns that motivated the entry of these decrees still present given modern market conditions and legal developments? Are there alternatives that might be adopted?

Sound Recordings

8. Please assess the current need for and effectiveness of the Section 112 and Section 114 statutory licensing process.

9. Please assess the effectiveness of the royalty ratesetting process and standards applicable to the various types of services subject to statutory licensing under Section 114.

10. Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?

11. Is the distinction between interactive and noninteractive services adequately defined for purposes of eligibility for the Section 114 license?

Platform Parity

12. What is the impact of the varying ratesetting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms. Do these differences make sense?

13. How do differences in the applicability of the sound recording public performance right impact music licensing?

Changes in Music Licensing Practices

14. How prevalent is direct licensing by musical work owners in lieu of licensing through a common agent or PRO? How does direct licensing impact the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees?

15. Could the government play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms? If so, how and for what types of uses?

16. In general, what innovations have been or are being developed by copyright owners and users to make the process of music licensing more effective?

17. Would the music marketplace benefit from modifying the scope of the existing statutory licenses?

Revenues and Investment

18. How have developments in the music marketplace affected the income of songwriters, composers, and recording artists?

19. Are revenues attributable to the performance and sale of music fairly divided between creators and distributors of musical works and sound recordings?

20. In what ways are investment decisions by creators, music publishers, and record labels, including the investment in the development of new projects and talent, impacted by music licensing issues?

21. How do licensing concerns impact the ability to invest in new distribution models?

Data Standards

22. Are there ways the federal government could encourage the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process?

Other Issues

23. Please supply or identify data or economic studies that measure or quantify the effect of technological or other developments on the music licensing marketplace, including the revenues attributable to the consumption of music in different formats and through different distribution channels, and the income earned by copyright owners.

24. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

Dated: March 11, 2014.

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Jacqueline C. Charlesworth,
General Counsel and Associate,
Register of Copyrights.

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