

NOTES

I Didn't Say That: The Ninth Circuit's Novel and Important Extension of Copyright Protection in *Garcia v. Google, Inc.*

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I. OVERVIEW OF THE CASE

Cindy Lee Garcia took an acting role in what she thought to be *Desert Warrior*, a low-budget adventure film set in Arabia.¹ Only after seeing the film on YouTube did she discover that the director, Mark Youssef, had instead used her performance in an anti-Islamic film entitled *Innocence of Muslims*.² For her performance, Garcia received \$500—followed by death threats, worldwide news coverage, and the issuance of a *fatwa* against her.³ Garcia tried in vain to remove the video from YouTube, filing numerous takedown notices; upon Google's refusal, Garcia sought a temporary restraining order in the United States District Court for the Central District of California.⁴

The district court analyzed Garcia's claim as if it were a motion for a preliminary injunction.⁵ The court held that because she had delayed in bringing suit, failed to demonstrate that the injunction would prevent harm, and was not likely to succeed on the merits because of the implied license she granted Youssef, Garcia was not entitled to an injunction.⁶ Garcia appealed, arguing that her acting performance was independently copyrightable and that her claim satisfied the requirements for a preliminary injunction.⁷ The United States Court of Appeals for the Ninth Circuit *held* that Garcia's performance was copyrightable, that she had a copyright interest in the performance, that she was likely to succeed on the merits, that irreparable harm was likely, and that the balance of equities was in her favor. *Garcia v. Google, Inc.*, 743 F.3d 1258 (9th Cir. 2014).

1. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1261 (9th Cir. 2014).

2. *Id.*

3. *Id.* at 1262.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

II. BACKGROUND

Copyright law exists to promote creative expression by granting to those who create it the right to protect their expression against usurpation by others.⁸ To serve this end, the Copyright Act of 1976 grants protection for “original works of authorship” that are “fixed in any tangible medium of expression.”⁹ The Act does not define “works of authorship” except with a list of categories: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”¹⁰ As indicated in the Act, this list is “illustrative and not limitative”—it exists to exemplify the general types of works protectable under the Copyright Act, not to limit protection strictly to the listed categories.¹¹ Indeed, for over a century, copyright law has seen a trend of gradual expansion in the types of works it protects.¹²

To qualify for copyright protection, a work of authorship must be both “fixed” and “original.”¹³ A work is “fixed” when it is embodied for more than “transitory duration” in any form, such as a recording, sufficient to allow its perception or reproduction.¹⁴ For a work to be “original” under the Copyright Act, it must be an independent creation of the author, and it must possess “at least some minimal degree of creativity.”¹⁵ Originality of a work is, then, inextricably linked with authorship—an author to whom a work is original has the right to protect it.¹⁶ In *Burrow-Giles Lithographic Co. v. Sarony*, the United States Supreme Court defined *author* in the copyright sense to mean the originator or maker of a work or the person to whom the work owes its origin.¹⁷

8. See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56 (1884).

9. 17 U.S.C. § 102(a) (2012).

10. *Id.*

11. *Id.* § 101; H.R. REP. NO. 94-1476 (1976), reprinted in 17 U.S.C. chs. 1, 11.

12. H.R. REP. NO. 94-1476, reprinted in 17 U.S.C. chs. 1, 11; see *Burrow-Giles*, 111 U.S. at 60 (expanding copyright protection to include photographs).

13. 17 U.S.C. § 102.

14. *Id.* § 101. Compare *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1143 (9th Cir. 2006) (holding that a recorded vocal performance was protectable by copyright), with *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (holding that imitation of a vocal performance was not copyright infringement because no *fixed* vocal performance had been copied).

15. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

16. See *Burrow-Giles*, 111 U.S. at 58.

17. *Id.*

Works, including derivative works and factual compilations, that contain both original elements and preexisting material may be protected by copyright as well; however, protection extends only to the portions of the work that are original to the author.¹⁸ To prove infringement of a derivative work, an author must prove that the work is “the product of [the author’s] intellectual invention”—original to the author, even if only minimally so.¹⁹ In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court noted that a telephone directory could be copyrightable if the factual information inside it were arranged or selected in a minimally original fashion.²⁰ Because it was neither, the Court held that the telephone directory did not contain the requisite modicum of originality and therefore was not copyrightable.²¹

The author of a work comprising copyrightable subject matter initially owns the copyright in that work.²² In the case of a joint work—a work created by two or more authors who intend to merge their contributions into “inseparable or interdependent parts” of a whole²³—the authors co-own the copyright in the work.²⁴ To be a joint author, one must first be an author of the work as a whole.²⁵ The Ninth Circuit in *Aalmuhammed v. Lee* set forth several factors, including the exercise of control over the work and the objective manifestation of intent to be coauthors, to determine whether a person is a joint author.²⁶ In that case, the court held that the plaintiff, a consultant on the film *Malcolm X*, was not a joint author in the work because he neither exercised control over the work nor objectively manifested intent to be a coauthor.²⁷

When a copyrightable work is made for hire, the employer is considered the “author” for copyright purposes and, unless otherwise agreed in writing, owns the copyright to the work.²⁸ The court in *Community for Creative Non-Violence v. Reid* articulated that a work made by an employee within the scope of employment is a “work made for hire.”²⁹ Whether or not the creator of a work is an “employee” is determined under the general common law of agency by considering a

18. 17 U.S.C. § 103; *Feist*, 499 U.S. at 348.

19. *Burrow-Giles*, 111 U.S. at 60; see *Feist*, 499 U.S. at 345.

20. 499 U.S. at 362.

21. *Id.* at 363-64.

22. 17 U.S.C. § 201(a).

23. *Id.* § 101.

24. *Id.* § 201(a); see H.R. REP. NO. 94-1476 (1976), reprinted in 17 U.S.C. ch. 1, ch. 11.

25. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000).

26. *Id.* at 1234.

27. *Id.* at 1235.

28. 17 U.S.C. § 201(b).

29. *Id.* § 101.

list of factors suggested by the court.³⁰ A work commissioned for inclusion into another work that fits into one of several categories enumerated in 17 U.S.C. § 101 may likewise be a “work made for hire” only if the parties agree in a signed writing that the work is to be considered as such a work.³¹

Even without a writing, the creator of a motion picture may still be able to use a work incorporated into it without infringing upon its author’s rights if the author has granted the creator a “nonexclusive license” to do so.³² A nonexclusive license does not require a writing and may even be implied by the conduct of the parties.³³ When an author’s contribution to another party’s work would be of minimal value to the other party without a license, and when the author intends that the other party distribute the contribution along with the work, the author grants a nonexclusive license to the other party.³⁴

The Ninth Circuit has considered whether a vocal performance is within the subject matter of the Copyright Act. In *Midler v. Ford Motor Co.*, the court allowed Bette Midler’s claim that Ford had infringed her right of publicity by employing a “sound alike” to record an imitation of Midler’s song, “Do You Want To Dance.”³⁵ Because Midler’s voice in this case had not been fixed in a tangible medium of expression, it did not fall within the ambit of the Copyright Act.³⁶ In *Laws v. Sony Music Entertainment, Inc.*, the court confronted a similar right of publicity claim by Debra Laws after Sony had released a song that contained a sample of Laws’s song, “Very Special.”³⁷ Unlike the voice in *Midler*, the vocal performance used by Sony had been lifted from a *recording* of Debra Laws’s voice; because Laws’s voice was fixed in a tangible medium of expression, the court held that it fell within the subject matter of the Copyright Act.³⁸ The court therefore held that Laws’s right of publicity claim was preempted by the Copyright Act.³⁹

A court may issue a preliminary injunction to prevent or restrain copyright infringement if the plaintiff can establish that success on the merits is likely, that irreparable harm is likely if an injunction is not

30. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 741, 751-52 (1989).

31. One such category is “motion picture[s].” 17 U.S.C. § 101; *see also Reid*, 490 U.S. at 746-48 (explaining the legislative history behind the selection of categories).

32. *See Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990).

33. *Id.*

34. *See id.* at 558-59.

35. 849 F.2d 460, 461 (9th Cir. 1988).

36. *Id.* at 462.

37. 448 F.3d 1134 (9th Cir. 2006).

38. *Id.* at 1139.

39. *Id.* at 1143.

granted, that the “balance of equities” favors the plaintiff, and that the injunction would serve the public interest.⁴⁰

III. COURT’S DECISION

In the noted case, the Ninth Circuit applied the framework of *Winter v. Natural Resources Defense Council, Inc.*, analyzing the merits of Garcia’s claim under the copyright law to determine whether she was entitled to a preliminary injunction.⁴¹ First, the court held that Garcia had an independent copyright interest in her acting performance and that the “joint work” analysis did not apply because she was not trying to assert a claim to the work as a whole.⁴² The court then held that Garcia’s performance was not a “work for hire” because she was not an “employee” and did not sign an agreement transferring her rights.⁴³ Next, the court held that, though Garcia had granted Youssef an implied license to use her performance, the license did not extend to the film Youssef actually made.⁴⁴ The court then held that Garcia had made a sufficient showing of likelihood of irreparable harm.⁴⁵ Finally, the court held that the balance of equities tipped in Garcia’s favor and that granting the injunction for Garcia served the public interest.⁴⁶

The Ninth Circuit first addressed whether Garcia has an independent copyright interest in her performance in the film.⁴⁷ The court determined that her performance met the minimum requirements for copyright protection because her contributions to it—expressions, body language, and reactions to the scene—were at least minimally creative, and because the performance was “fixed” when it was recorded to film.⁴⁸ The court explained that *Aalmuhammed* did not control because, unlike the plaintiff in *Aalmuhammed*, Garcia neither intended to be a joint author of the film nor claimed a copyright interest in the film as a whole.⁴⁹ Indeed, as the court explained, the plaintiff in *Aalmuhammed* might have had a separate copyright interest in his contribution to the work even though he wasn’t a joint author.⁵⁰ The court next stated that

40. 17 U.S.C. § 502 (2012); *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008).

41. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1269 (9th Cir. 2014).

42. *Id.* at 1263.

43. *Id.* at 1265-66.

44. *Id.* at 1266-67.

45. *Id.* at 1267.

46. *Id.* at 1268-69.

47. *Id.* at 1263.

48. *Id.* (citing *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)).

49. *Id.* at 1263-64 (citing *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000)).

50. *Id.* at 1264 (citing *Aalmuhammed*, 202 F.3d at 1232).

Midler did not bar Garcia's claim because it concerned a voice, not a fixed vocal performance; Garcia's performance was fixed in a motion picture.⁵¹ Finally, although Garcia's performance was a derivative work based on Youssef's screenplay, Youssef granted her an implied license to create that derivative work when he hired her; though she cannot claim a copyright interest in the underlying material, she can claim a copyright interest as to the parts of her performance which were original to her.⁵²

The court then addressed whether Garcia's performance was a "work for hire" under the Copyright Act.⁵³ The court determined that Youssef was not Garcia's "employer" under the traditional principles of agency and was not "in the 'regular business' of filmmaking."⁵⁴ Further, though Garcia and Youssef certainly could have entered into a written work for hire agreement, they did not.⁵⁵ The court therefore determined that Garcia's performance was not a work for hire, so the rights in Garcia's performance did not vest in Youssef.⁵⁶

Next, the court sought to determine whether the implied license to use Garcia's performance extended to Youssef's use of the performance in *Innocence of Muslims*.⁵⁷ The court explained that the implied license is necessarily broad, or else filmmakers would not be able to edit, modify, or show their films without worrying about potential copyright infringement claims from actors.⁵⁸ Broad does not mean unlimited, however; the court concluded that because the film *Innocence of Muslims* was so radically different in form and function from the Arabian adventure to which Garcia thought she was contributing, the implied license she granted Youssef could not have covered the eventual use of her performance.⁵⁹

The court then determined whether a likelihood of irreparable harm existed and, if so, whether issuing an injunction could prevent that harm.⁶⁰ The court first dismissed the district court's insistence that Garcia's delay in bringing suit barred her from an injunction—while her suit did come several months after *Innocence of Muslims* debuted on YouTube, Garcia sued immediately after she had started to receive death

51. *Id.* at 1264 (citing *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988)).

52. *Id.* at 1264-65; *see also Aalmuhammed*, 202 F.3d at 1231.

53. *Id.* at 1265.

54. *Id.* at 1265-66 (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 741 (1989)).

55. *Id.* at 1265 (citing *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990)).

56. *Id.*

57. *Id.* at 1266.

58. *Id.*

59. *Id.* at 1266-67.

60. *Id.* at 1267-68.

threats.⁶¹ On the facts, the court noted that Garcia was indeed already subject to serious harm—ongoing, serious threats against her life—which had caused her to move her business and her home as a safety measure.⁶² The court explained that an injunction was proper because Youssef’s infringement of Garcia’s copyright in her performance caused the threats.⁶³ Because Youssef exceeded the implied license in using Garcia’s performance to make an anti-Islamic film, and because Google continued to host it on YouTube, Garcia was threatened with death—and, as the court recollected, death is perhaps the most irreparable harm of all.⁶⁴

The court then addressed the two remaining factors in the *Winter* framework: whether the balance of equities tipped in Garcia’s favor, and whether an injunction would serve the public interest.⁶⁵ The district court had addressed neither of these factors, so the court addressed them as a matter of first impression.⁶⁶ The court rejected Google’s argument that an injunction would be an unconstitutional prior restraint on speech because “the First Amendment doesn’t protect copyright infringement.”⁶⁷ The court thus determined that the balance of equities and public interest both tilt in Garcia’s favor, in turn enabling the issuance of an injunction.⁶⁸

In his dissenting opinion, Circuit Judge N.R. Smith argued that the majority’s application of the *Winter* factors was improper.⁶⁹ Smith first argued that the majority applied the incorrect standard of review in the case, “mak[ing] new law” instead of taking the caution necessary in applying an abuse of discretion standard.⁷⁰ Smith then took issue with the majority’s finding that Garcia was likely to prevail on the merits.⁷¹ First, Smith doubted whether an acting performance was a “work” under the Copyright Act, reading the definition of “perform” in § 101 to “differentiate[] a work from the performance of it”⁷² and describing acting as a “procedure or process” barred from copyright protection by § 102(b).⁷³ Purporting to follow *Almuhammed*, Smith then rejected the

61. *Id.* at 1267.

62. *Id.*

63. *Id.* at 1268.

64. *Id.*

65. *Id.*

66. *See id.* at 1262.

67. *Id.* at 1268.

68. *Id.* at 1269.

69. *See id.* at 1269-78 (Smith, J., dissenting).

70. *Id.* at 1269-70.

71. *Id.* at 1270.

72. *Id.* (citing 17 U.S.C. § 101 (2012)).

73. *Id.* at 1271 (citing 17 U.S.C. § 102(b)) (internal quotation marks omitted).

contention that Garcia was an “author” of the film in question because she did not have creative control over the movie and contributed significantly less than Youssef did.⁷⁴ Smith then insisted that Garcia’s performance was “too personal to be fixed,” declaring it more similar to the voice in *Midler* than to the vocal performance in *Laws*.⁷⁵ Next, Smith addressed the work for hire doctrine, arguing that application of the *Reid* factors to the facts does not make it clear that Garcia was not working for hire.⁷⁶ He supported his contention by placing special weight in the fact that Youssef “controll[ed] both the manner and means of making the film.”⁷⁷ Smith then contended that the district court had not abused its discretion in finding that Garcia had not suffered irreparable harm simply because a few months had passed between the film’s upload to YouTube and Garcia’s suit.⁷⁸ Smith then argued that the balance of equities did not clearly favor Garcia because she was “only faced with *potential* infringement of her *potential* copyright interest *pending* a final disposition of this lawsuit.”⁷⁹ Finally, Smith contended that the public interest in the First Amendment carries significant weight, because an injunction could potentially serve as a prior restraint on speech.⁸⁰

IV. ANALYSIS

Unusual circumstances beget unusual opinions. When those circumstances call for novel applications of existing law, however, a court should not be afraid to apply the law to produce a just result, especially when the law in question is deliberately broad.⁸¹ In the noted case, the Ninth Circuit does just that—though it is “extraordinarily rare” for a filmmaker to exceed the implied license granted by a performer, it is not impossible.⁸² Chief Judge Kozinski recognizes this in the court’s opinion,

74. *Id.* at 1271-73. *But see* *Aalmuhammed v. Lee*, 202 F.3d 1227, 1230 (9th Cir. 2000) (“He is not claiming copyright merely in what he . . . contributed, but rather in the whole work . . .”).

75. *Garcia*, 743 F.3d at 1274 (citing *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988)).

76. *Id.* at 1275-76 (citing *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989)).

77. *Id.* at 1275 (quoting *Reid*, 490 U.S. at 751 (internal quotation marks omitted)).

78. *Id.* at 1276 (citing *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010)).

79. *Id.* at 1277.

80. *Id.* at 1277-78.

81. *See* H.R. REP. NO. 94-1476 (1976), *reprinted in* 17 U.S.C. chs. 1, 11 (explaining that the Copyright Act is meant to cover the expression of authors regardless of method or medium).

82. *Garcia*, 743 F.3d at 1267.

rejecting the fallacy that the lack of directly analogous precedent necessarily bars a successful claim at common law.⁸³

That the Ninth Circuit chose to protect an actor's contribution to a film should be no surprise; the "Hollywood Circuit" has been criticized for tailoring its laws to serve the needs of celebrities.⁸⁴ This case, however, shows that the Ninth Circuit is willing to protect the aspiring actor just as well as it protects the Oscar nominee—without it, any "schmuck with a videocamera"⁸⁵ could put an ad on Craigslist under false pretenses, pay an unwitting actor a few hundred bucks, insert the actor's performance into what is essentially a racist tirade, and potentially ruin a life. The court is certainly not wrong in noting that this is a "troubling case."⁸⁶ Were Garcia a witting participant in the creation of *Innocence of Muslims*, the disposition would have been different.⁸⁷ But she was not, and it is quite clear that the balance of equities favored the unwitting actor.⁸⁸ Indeed, though it may be novel, the reasoning in the noted case comports quite well with the outer limits of the Ninth Circuit's precedents: Kozinski recognizes that *Aalmuhammed* is not relevant where there is no claim of joint authorship,⁸⁹ that the distinction between *Laws* and *Midler* rests on whether a work is fixed rather than whether a work is not "too personal,"⁹⁰ and that even a broad license can be exceeded.⁹¹

Those who distrust a court that "makes new law . . . in order to reach the result it seeks"⁹² may be tempted to follow Judge Smith's dissenting opinion, but the reasoning behind it is flawed, misinterpreting multiple precedents to achieve its result. Smith applies the Copyright Act's definition of "perform"⁹³ to exclude acting performances from copyright, but his definition would make fixation of entire classes of works of authorship, including some of those specifically listed in the

83. *See id.*

84. *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting) (lamenting the court's overextension of the right of publicity to a clear parody). The "right of publicity" tort is particularly strong in California. *See Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

85. *Garcia*, 743 F.3d at 1266.

86. *Id.* at 1269.

87. *See id.* at 1266 (discussing the implied license).

88. *Id.* at 1268-69.

89. *Id.* at 1263-64 (citing *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000)).

90. *Id.* at 1264 (citing *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1141 (9th Cir. 2006)).

91. *Id.* at 1266-67.

92. *Id.* at 1270 (Smith, J., dissenting).

93. 17 U.S.C. § 101 (2012) (defining "to 'perform'" as "to recite, render, play, dance, or act").

Copyright Act, impossible.⁹⁴ Smith also misconstrues § 102(b), claiming that it bars copyright protection for an acting performance⁹⁵ while ignoring that § 102(b) exists not to limit the scope of copyright, but to separate patent right from copyright and to preserve the “basic dichotomy between expression and idea.”⁹⁶ Smith then applied the *Aalmuhammed* standard for joint authorship, though Garcia’s claim was for her own performance, not for the entire film.⁹⁷ Smith also misremembered the factual background in *Laws*; he claimed that the vocal performance in *Laws* was only copyrightable because the entire song recording was used,⁹⁸ where, in fact, only “brief samples” were at issue in that case.⁹⁹ In his work for hire analysis, Smith seems to dispose of the Supreme Court’s holding in *Reid* that control is not dispositive in analyzing the employer-employee relationship.¹⁰⁰ Finally, Judge Smith’s dissenting opinion accused the majority of failing to apply the proper deference to the district court¹⁰¹—neglecting to mention, however, that the district court had failed to address most of the legal concepts at issue in the case.¹⁰²

Any worries that the noted case might be used by actors to prohibit filmmakers from fully realizing their films should be allayed by Judge Kozinski’s discussion of the matter.¹⁰³ Garcia granted an implied license to use her performance in a movie meant to entertain; Youssef exceeded it by using it in a movie meant to spew hate.¹⁰⁴ In the past, the high cost of producing and distributing a motion picture has presumably deterred would-be infringers from seeking to create hateful propaganda using acting performances obtained under false pretenses. The increasing ubiquity of technology, the prevalence of free distribution platforms such as YouTube, and the viral video phenomenon combine to make the circumstances behind the noted case possible. By setting forth the opinion in the noted case, the Ninth Circuit has provided a precedent that

94. *Garcia*, 743 F.3d at 1270 (Smith, J., dissenting) (emphasis omitted). There is no reasonable way to fix “musical works,” “choreographic works,” and “dramatic works” or “pantomimes” other than to “play, dance, or act” them. *See* 17 U.S.C. §§ 101-102.

95. *Garcia*, 743 F.3d at 1271 (Smith, J., dissenting).

96. H.R. REP. NO. 94-1476 (1976), *reprinted in* 17 U.S.C. chs. 1, 13; *accord* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56 (1884).

97. *Garcia*, 743 F.3d at 1271-72 (Smith, J., dissenting).

98. *Id.* at 1274.

99. *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006).

100. *Garcia*, 743 F.3d at 1275-76 (Smith, J., dissenting); *see* Cmty. for Creative Non-Violence v. *Reid*, 490 U.S. 730, 742 (1989).

101. *Garcia*, 743 F.3d at 1270 (Smith, J., dissenting).

102. *See id.* at 1262 n.2.

103. *See id.* at 1266.

104. *Id.* at 1267.

will guide other courts, if they are willing to follow, to deter such appalling conduct in the future.

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