Copyright Law

Prof. Madison
University of Pittsburgh School of Law

Topics:

- The Elements of the Case for Copyright Infringement
- The Idea of “Improper Appropriation”
- Section 106 of the Copyright Act

Copying, or independent creation

Issue: Did the defendant copy the plaintiff's work? OR: Did the defendant independently create the accused work? *Where does the Copyright Act require proof of copying "in fact"?*

Burden of proof: Ordinarily, plaintiff must prove copying (and must disprove independent creation by the defendant).
An "objective" standard; dissecting the work, using expert testimony, is often appropriate (but perhaps it's inappropriate at this stage – and courts are inconsistent).

Question: Is this consistent with *Three Boys Music Corp. v. Bolton?*

Question: Must the plaintiff introduce evidence of both similarity *and* access? *Skidmore v. Led Zeppelin (yes); the former "striking similarity" standard seems to be dead, along with the Selle v. Gibb "sliding scale" standard.*

Pleading the elements of a claim for © infringement

1. Ownership of a valid copyright. US authors must plead possession of a Certificate of Registration, which creates a (rebuttable) presumption of validity.

2. Defendant's unauthorized exercise of a right provided exclusively to the copyright owner in Section 106:

2(a) Defendant actually copied the plaintiff's work of authorship (copying in fact):

2(a)(1) Direct evidence (admission by deft, or documentary/ testimonial evidence) OR

2(a)(2) Circumstantial evidence, consisting of (i) access AND (ii) (probative or substantial) similarity

2(b) AND: Defendant improperly appropriated the plaintiff's work (copying - literally, or by substantial similarity).

Improper appropriation?

1. Did the defendant copy the plaintiff's work?

    a. Access

    b. **Substantial similarity ("probative" similarity)**

2. If the defendant copied the plaintiff's work, did the defendant unlawfully appropriate the plaintiff's work?

    a. **Literal** similarity (comprehensive or **partial**)

    b. Non-literal (i.e., **substantial**) **similarity** (comprehensive)

Improper appropriation?

Issue: Did the defendant copy "too much" of the plaintiff's work?

Burden of proof: Ordinarily, plaintiff must prove improper appropriation.

A question of fact, for the finder of fact. "Dissecting" the work, using expert testimony, is usually not appropriate – but may be necessary to prevent © from having anti-competitive effects, as in non-literal copying in computer software cases.

(Compare copying itself, for which dissection and expert testimony is often accepted.)

Question: If the defendant argues that only (unprotectable) ideas or facts were copied, who bears the burden of sorting protectable from unprotectable material as a matter of liability for appropriation?

Substantial similarity, or nonliteral infringement?

Arnstein v. Porter
(2d Cir. 1946):
If the plaintiff submits sufficient evidence from which the jury might conclude that copying took place, then the question of substantial similarity should be submitted to the jury;
"the test is the response of the ordinary lay hearer"

Substantial similarity, or nonliteral infringement?

"Whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work" (*Steinberg*) or "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same" (*Boisson v. Banian,* relying on *Peter Pan Fabrics*)

Doctrinal variables:

- ✓ Patterns of generality (effective for dramatic works)
- ✓ Comparison of works as a whole v. comparison of expressive elements (the latter is more common for creative works; the former for compilation works)
- ✓ Qualitative v. quantitative significance of what was appropriated
- ✓ What was taken by the defendant (which matters) vs. what was added by the defendant (which usually does not, until we get to fair use)
- ✓ Copying what the plaintiff created (not OK) vs. copying from public domain/from ideas (OK)
- ✓ Sophistication of the audience for the works (if audience appeal matters, when which audience are we talking about?)

Policy variables:

- ✓ Policy: scope of the plaintiff's ability to prevent competition with its work
- ✓ Policy: $$$ value earned by defendant // $$$ value based on plaintiff's work
- ✓ Policy: Damage to incentive model on which plaintiff relies vs. damage to legitimate downstream creators

Section 106: The exclusive rights of the copyright owner

Subject to sections 107 through 122 [recall: Section 107 is fair use], the **owner** of copyright under this title has the **exclusive rights** to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Section 106: The exclusive rights of the copyright owner

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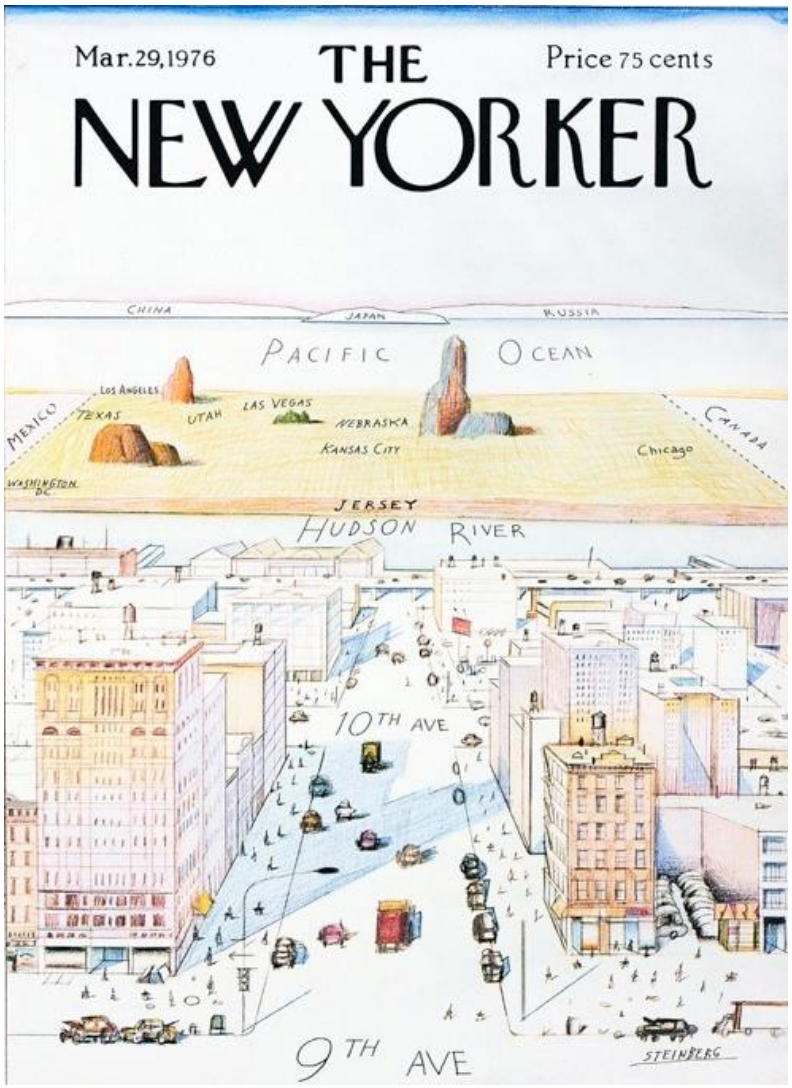
Sec. 101. - Definitions

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

Substantial similarity, or nonliteral infringement?

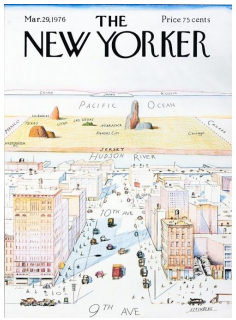
Steinberg v. Columbia Pictures Industries (S.D.N.Y. 1987):
the "average lay observer"



Substantial similarity, or nonliteral infringement?

Steinberg v. Columbia Pictures Industries (S.D.N.Y. 1987): the "average lay observer"

How to litigate the case:
Approximate the real physical size of both works?



Did the defendant copy from the plaintiff? Unquestionably.
Was the copying wrongful?
Discuss.

Substantial similarity, or nonliteral infringement?

Steinberg v. Columbia Pictures Industries (S.D.N.Y. 1987):
the "average lay observer"

How to litigate the case:
Did the defendant appropriate the plaintiff's expression?

(Daniel Wallingford, 1937, showing lack of originality by Steinberg??)

Substantial similarity, or nonliteral infringement?

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How to litigate the case:
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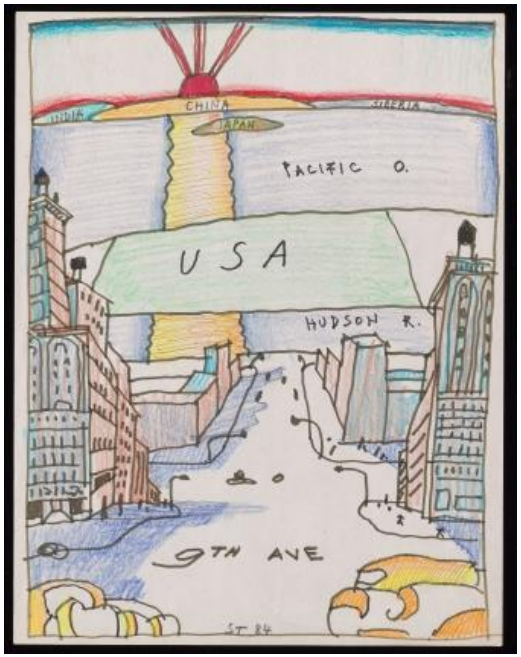

(Early draft of the Steinberg image, showing shift from "expression" in the draft to "fact" in the final version??)

Substantial similarity, or nonliteral infringement?

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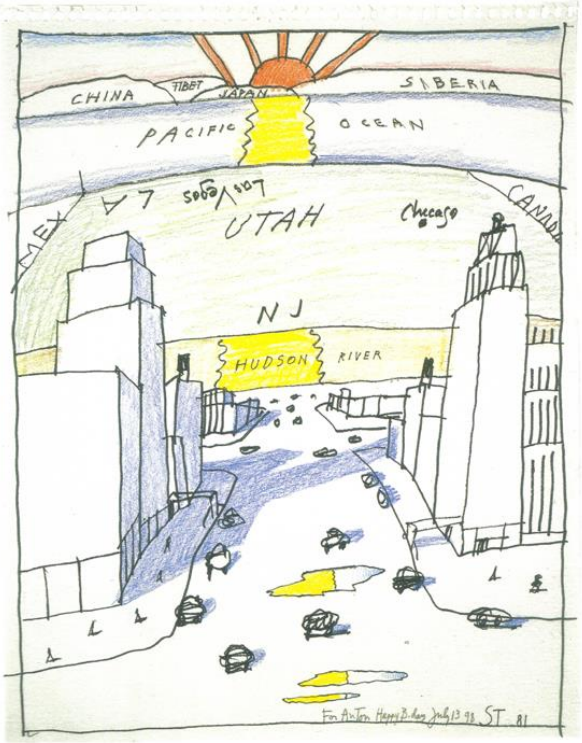
How to litigate the case:
Did the defendant appropriate the plaintiff's expression?



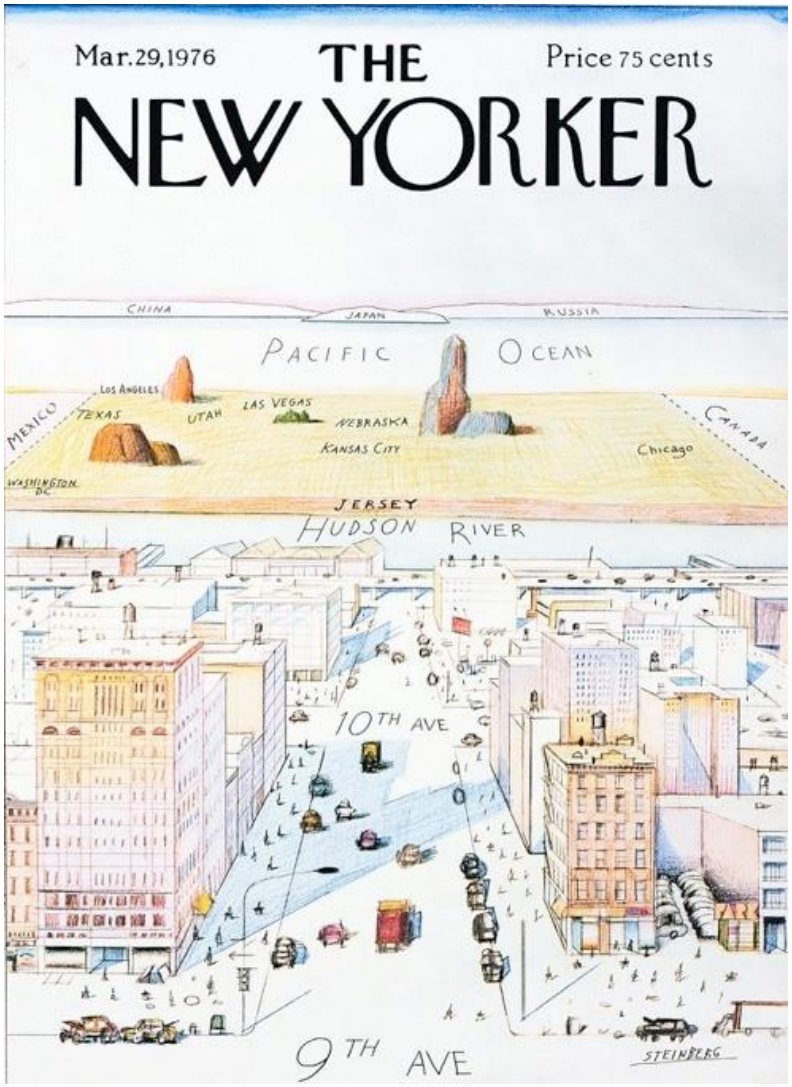
(Post-publication sketch of the Steinberg image by Saul Steinberg, showing what he regarded as his "expression"??)

Substantial similarity, or nonliteral infringement?

Steinberg v. Columbia Pictures Industries (S.D.N.Y. 1987):
the "average lay observer"

How to litigate the case:
Did the defendant engage in fair use of the plaintiff's work?

Given the illustrations and examples dating from before and after this dispute, do you think that the court reached the right result in Steinberg v. Columbia Pictures Industries (S.D.N.Y. 1987)?



Boisson v. Banian (2d Cir. 2001): a "more discerning observer" standard b/c both protectable and unprotectible elements are present in the plaintiff's work.

Plaintiff's "School Days I" quilt

Defendant's "ABC Green" quilt (infringing)

Boisson v. Banian (2d Cir. 2001): a "more discerning observer" standard b/c both protectable and unprotectible elements are present in the plaintiff's work.

Plaintiff's "School Days I" quilt

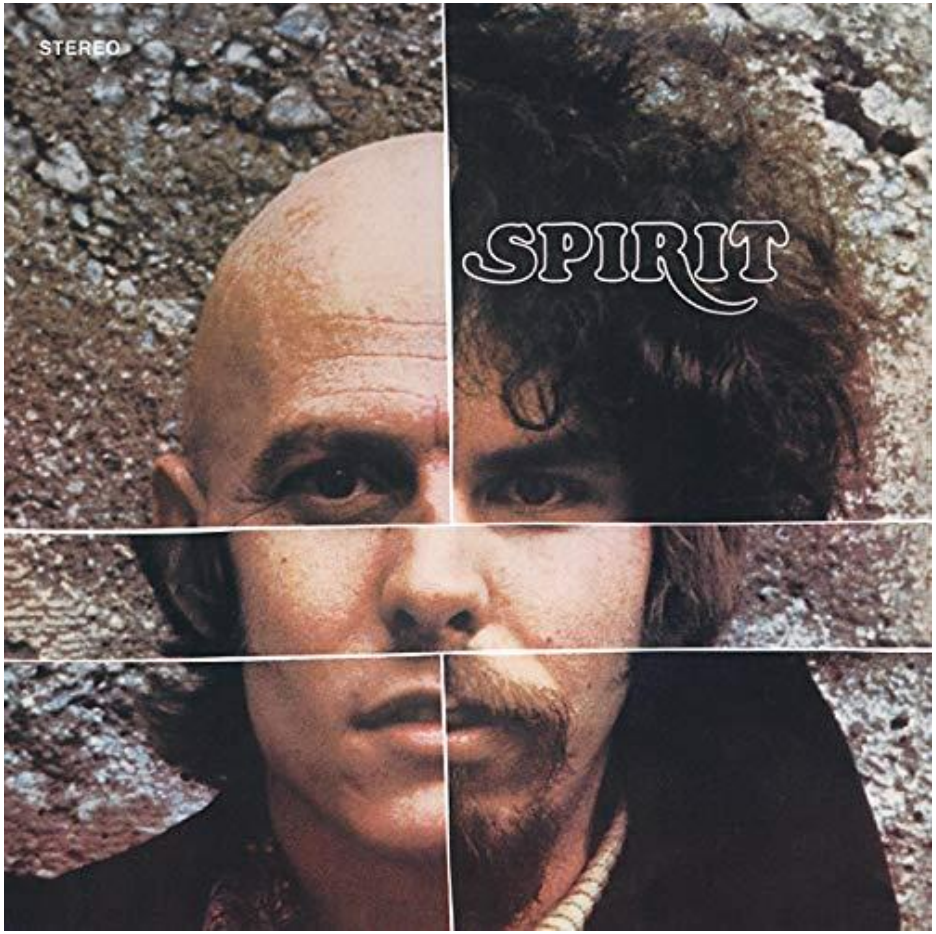
Defendant's "ABC Navy" quilt (noninfringing)

Ninth Circuit (older law, still making the occasional appearance despite *Skidmore*): Both "extrinsic" copying (objective elements: plot, themes, characters, dialogue) and "intrinsic" copying (ordinary person's subjective impression) must be shown.

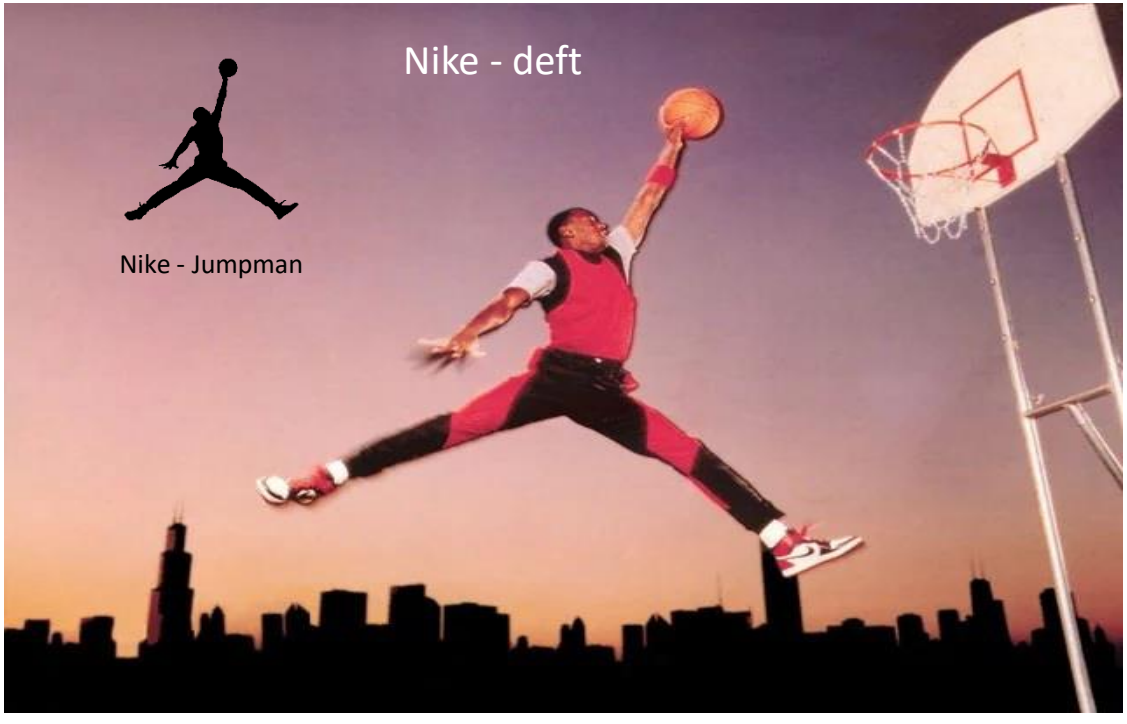
Sid & Marty Krofft v. McDonald's (9th Cir. 1977): "the response of the ordinary reasonable person"; "total concept and feel" may be enough.

Led Zeppelin,
Stairway to Heaven (1971)

Accused by **Spirit**
(song: Taurus) (1968)



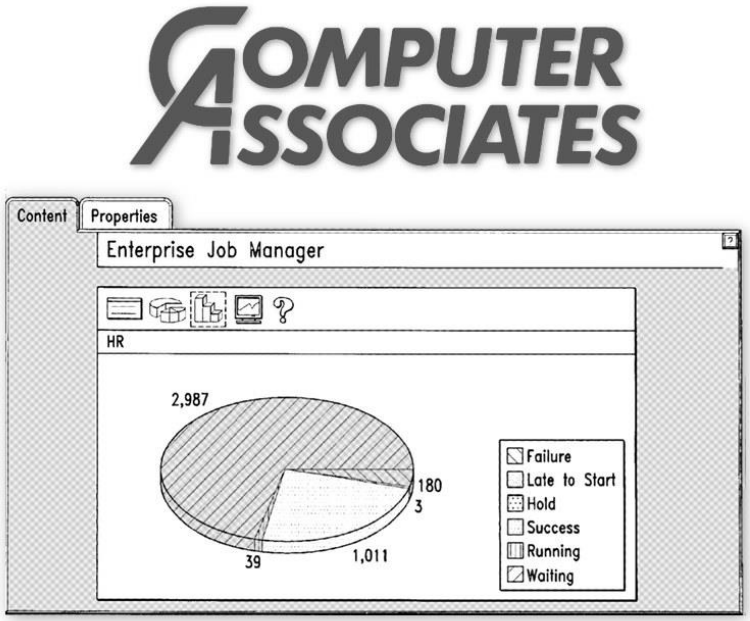

UNITED STATES



Rentmeester v. Nike, Inc. (9th Cir. 2018):

- Plaintiff poses MJ and shoots his photo. It is published in *LIFE* magazine (1984).
- Nike obtains color transparencies of the photo from the plaintiff, who authorizes Nike to use them "for slide presentation only."
- Nike hires a photographer to produce its own photo of MJ in late 1984/early 1985; in 1985, Nike obtains permission from plaintiff to use the photo on posters and billboards for 2 years; Nike pays the plaintiff $15,000.
- Nike creates its Jumpman logo in 1987.
- Plaintiff sues in 2015, claiming that both the Nike photo and the Jumpman logo infringe the copyright in the 1984 photo. He seeks damages for the 3-year limitations period.
- District court grants Nike's motion to dismiss under Rule 12(b)(6).
- Should the Court of Appeals affirm (no infringement as a matter of law) or reverse and remand (fact finding is necessary)?
- "The two photos' selection and arrangement of elements must be similar enough that 'the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them." (*Peter Pan Fabrics*)

Are computer programs ("literary works") different, for purposes of infringement analysis?



Software copyrights may be narrower, because of the functional attributes of software.

Computer Associates, Int'l v. Altai, Inc. (2d Cir. 1992):

"abstraction" (what are the work's structural components?), then "filtration" (are any of those components unprotected because of the doctrines of merger, scenes a faire, or the public domain?), then "comparison":
Only expressive elements "count" for infringement purposes -- but don't forget that © may consist of a (minimally) original combination of unprotected elements.

But see Oracle v. Google **(U.S. 2021)**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