No. 08-448

IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC., ET AL.,
Petitioners,

v.

CSC HOLDINGS INC. AND CABLEVISION SYSTEMS CORP.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMICI CURIAE MAJOR LEAGUE BASEBALL, NATIONAL FOOTBALL LEAGUE, NATIONAL COLLEGIATE ATHLETIC ASSN., METRO-GOLDWYN-MAYER STUDIOS INC., CARSEY-WERNER DISTRIBUTION, DICK CLARK PRODUCTIONS, INC., LITTON SYNDICATIONS INC., TELCO PRODUCTIONS INC., WESTERN INTERNATIONAL SYNDICATION, AND THE PROGRAM EXCHANGE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

Amici ("Section 111 Copyright Owners") are all owners of copyrighted programs ("works") broadcast by television stations whose signals are retransmitted by cable systems under the compulsory licensing plan enacted in 17 U.S.C. § 111. The Section 111 Copyright Owners have actively participated in legislative, administrative, and judicial proceedings involving the Section 111 cable compulsory licensing plan. The Section 111 Copyright Owners share in the cable compulsory royalties paid by cable systems and distributed to copyright owners under the statutory license.

Major League Baseball receives Section 111 royalties on behalf of all Major League Baseball clubs whose live baseball games are broadcast by retransmitted television stations.

National Football League ("NFL") receives Section 111 royalties on behalf of its clubs whose live football games are broadcast by retransmitted television stations.

National Collegiate Athletic Association ("NCAA") is a voluntary organization through which

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[1] Petitioners and Respondents have consented to the filing of this brief in letters on file in the Clerk's office. Counsel of record for all parties received timely notice of *amici's* intent to file this brief. Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no counsel, party, or person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

the nation's colleges and universities govern their athletics programs. NCAA receives Section 111 royalties on behalf of itself and its members for live college team sports events, such as college football and basketball games that are broadcast by retransmitted television stations.

Metro-Goldwyn-Mayer Studios Inc. ("MGM") receives Section 111 royalties for movies such as "Goldfinger," "The Good, The Bad and The Ugly," and "Rocky" that are broadcast by retransmitted television stations.

Carsey-Werner Distribution receives Section 111 royalties for series programs such as "Roseanne" and "The Cosby Show" that are broadcast by retransmitted television stations.

Dick Clark Productions, Inc. receives Section 111 royalties for program specials such as "The Golden Globe Awards" that are broadcast by retransmitted television stations.

Litton Syndications Inc. receives Section 111 royalties for series programs such as "Business Week" and "Animal Adventures" that are broadcast by retransmitted television stations.

Telco Productions, Inc. receives Section 111 royalties for series programs such as "Missing" and "Animal Rescue" that are broadcast by retransmitted television stations.

Western International Syndication receives Section 111 royalties for series programs such as

"It's Showtime At The Appollo" and "Showtime in Harlem" that are broadcast by retransmitted television stations.

The Program Exchange receives royalties for animated series programs such as "Dennis The Menace" and "Garfield and Friends" that are broadcast by retransmitted television stations.

The new service at issue (Cablevision's RS-DVR service) allows cable systems to deliver for a separate fee to subscribers those same television programs, including *amici's* programs, that cable systems are allowed to offer their subscribers under the Section 111 plan. The decision below finds cable systems incur no liability to any owner for this separate program delivery via RS-DVR service. That result directly contravenes Section 111's purpose and intent. Section 111 resolved the contentious issue of cable systems' commercial use of television station programming by permitting delivery of that programming without consent of owners under a set of rules that requires *simultaneous* retransmission of the programming and submission of royalty reports and payments to the Copyright Office.

A cable system that fails to follow those rules when delivering television station programs to its subscribers commits an act of infringement. As the RS-DVR service does not comply with the statutorily-prescribed rules, its use to deliver television station programming to subscribers is an infringing act.

The Section 111 Copyright Owners offer the viewpoint, which was not addressed by the decision below, of the copyright owners who are compelled by the Section 111 plan to allow their television station programming to be delivered by cable systems to paying subscribers without any right to negotiate the terms and conditions of such delivery. The Section 111 Copyright Owners seek to uphold the intent of Section 111, which was to redress the inequity of the then-exiting law under which cable systems captured the entire value of their commercial use of retransmitted television station programming without any liability to copyright owners. To carry out that intent, Congress struck a balance that allows cable systems to deliver the programs embodied in retransmitted television station signals without copyright liability *only* upon compliance with statutorily-prescribed conditions. The decision below upsets that balance by allowing cable systems to gain the entire commercial value of the new RS-DVR system's ability to deliver television station programming to subscribers in a manner that violates the plan established by Congress in Section 111.

SUMMARY OF ARGUMENT

This case again raises what has been a controversial issue since cable systems first began to operate roughly a half century ago: the copyright liability of cable systems for delivering to their subscribers programs broadcast by retransmitted television stations. This Court addressed the issue in two decisions (*Fortnightly* and *Teleprompter*) decided under the prior copyright law, and Congress

spent nearly a decade seeking to resolve the issue before finally passing Section 111 of the current law. Since passage of Section 111, the issue has been raised repeatedly as new systems for delivering television station programming to subscribers have been introduced.

Cablevision's RS-DVR service is the latest system for delivering television station programming to subscribers, and, as has been the case with virtually all earlier program delivery systems, it has engendered copyright liability controversy and litigation. Despite the fact that the RS-DVR service will deliver television programs broadcast by retransmitted television signals, a matter clearly within the ambit of Section 111, the Second Circuit's decision does not address the Section 111 issue. Instead, the decision below, despite the seismic shift in the law since that time, follows essentially the same path that this Court took in its two pre-Section 111 opinions on the subject. As this Court's approach was expressly overturned by passage of the new copyright law, including Section 111, the decision below fails to follow the new statutory regime as to how copyright liability of cable systems in these circumstances is to be determined.

Section 111 establishes conditions for cable systems to obtain the benefit of its compulsory licensing plan, and specifies that non-complying cable systems commit an act of infringement by delivering programs from retransmitted television stations to their subscribers. Cablevision's RS-DVR service does not meet the statutory conditions. In particular, Section 111 requires that the television

programs be delivered to subscribers simultaneously with their broadcast on the retransmitted television stations. The purpose of the RS-DVR is, however, to allow subscribers to view such programs after their broadcast, and thus delivery is not simultaneous.

The Second Circuit did not undertake a statutory compliance analysis in examining Cablevision copyright liability for the RS-DVR service. This failure adversely affects the rights of all copyright owners, including the *amici*, whose programs broadcast by retransmitted television stations can now be separately provided to subscribers without liability even though RS-DVR delivery does not comply with the requirements of Section 111. That result is inconsistent with the congressional conclusion that cable systems are liable for their commercial use of such programming.

REASONS FOR GRANTING THE WRIT

1. The circumstances here call to mind the maxim: "Plus ça change, plus c'est la même chose." The same principles considered as controlling nearly 40 years ago in two cases related to cable's delivery of copyrighted works embodied in retransmitted television station signals were again found controlling below, despite the fact that in the intervening years both the technology involved and the legal context have changed dramatically. In *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399-400 (1968), this Court examined the liability for delivery of such works through the prism of whether the function performed by a cable (or CATV, as it was then called) system in

retransmitting television station signals was akin to that of a viewer or to that of a broadcaster:

> CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

Footnote omitted; *see Teleprompter Corp. v. Columbia Brdcstg. Sys., Inc.* 415 U.S. 394, 408-09 (1974) (applying same analysis to retransmitted distant television station signals).

The instant decision below followed much the same path, albeit modified to fit the more sophisticated computer technology involved. Thus, the Second Circuit reasoned that if a subscriber could save a television station program for later viewing on his or her own DVR without liability, then Cablevision could provide a centralized RS-DVR service for paying subscribers without liability.

The Second Circuit analogized the RS-DVR service to a photocopying store that offers a centralized place in which customers can make copies without the store's incurring liability as an infringer: "Cablevision more closely resembles a store proprietor who charges customers to use a photocopier on his premises, and it seems incorrect to say, without more, that such a proprietor 'makes' any copies when his machines are actually operated by his customers." Pet. App. 22a (citation omitted); *see id.* 20a-21a (same, but using VCR analogy).

Additionally, in both situations, this Court and then the Second Circuit considered whether a cable (CATV) system had an active role in selecting the television station programming being delivered to subscribers as determinative of the copyright liability question.

> Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold the CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.

Fortnightly, 392 U.S. at 400-01 (footnote omitted); *see Teleprompter*, 415 U.S. at 409-10 (same). The Second Circuit below employed much the same

reasoning, albeit again with changes to reflect the current technology:

> Cablevision has no control over what programs are made available on individual channels or when those programs will air, if at all. In this respect, Cablevision possesses for less control over recordable content than it does in the V[ideo]O[n]D[emand] context, where it actively selects and makes available beforehand the individual programs available for viewing. For these reasons, we are not inclined to say that Cablevision, rather than the user, "does" the copying produced by RS-DVR system.

Pet. App. 23a-24a.

While the similarities between the analytical approach taken by the Second Circuit and that of this Court in *Fortnightly* and *Teleprompter* might be expected on precedential grounds (though the Second Circuit cited neither case), that expectation fails to consider the tectonic shift in the legal landscape concerning cable systems' copyright liability for delivering retransmitted television station programming to their paying subscribers. That shift occurred shortly after *Teleprompter* was decided with enactment of the new copyright law, 17 U.S.C. § 101 *et seq.*, ("the 1976 Act") including the Section 111 statutory license, which directly overturned *Fortnightly* and *Teleprompter*, and thus

resolved a long-simmering contentious issue between program owners and cable systems.

2. Congress employed a two-part fix to the issue. First, it expanded the definition of exclusive rights that an owner enjoys to include "to perform the copyrighted work publicly" and "to display the copyrighted work publicly." 17 U.S.C. § 106 (4) and (5), respectively. Second, it defined "publicly" in 17 U.S.C. § 101 to include: "to transmit or otherwise communicate a performance or display of the work . . . by means of any device or process . . . ." Thus, an owner's exclusive rights under the Copyright Act includes the right to "transmit," which § 101 defines as "to communicate [a performance or display] by any device or process whereby images or sounds are received beyond the place from which they are sent." Those expansions of exclusive rights and the definitional changes were explicitly designed to overturn *Fortnightly* and *Teleprompter*:

> Under the definitions of "perform," "display," "publicly," and "transmit" in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus for example: . . . a cable television system is performing where it retransmits the broadcast [of a television station program] to its subscribers.

H.R. Rep. No. 1476, 94th Cong. 2d Sess. 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659 ("H.R. No. 1476"). *Compare Fortnightly*, 400 U.S. at 401 ("We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.") (footnote omitted).

Whether, in light of the statutory changes, the same reasoning as applied in *Fortnightly* and *Teleprompter* (both decided under the prior copyright law) can continue to control analysis of cable systems' liability for a new means of delivering retransmitted television station programming is a critical question of national importance that should be addressed by this Court. The Section 111 Copyright Owners submit that the changes instituted by the 1976 Act render the Second Circuit's analysis invalid to determine Cablevision's copyright liability for its delivery via the RS-DVR service of copyrighted programs embodied in retransmitted television station signals.

Having created an exclusive right to "transmit" and having established cable systems' liability for delivering television station programming to subscribers, Congress next set about to formulate a liability plan applicable to delivery of such programming. *See* H.R. No. 1476 at 89 (noting goal of legislation was "to consider and determine the scope and extent of such liability"); *see also Teleprompter*, 415 U.S. at 414 & n. 16 ("Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress."). Resolution of the copyright liability of

cable systems for delivery of television station programming slowed passage of the current Copyright Act with a decade-long debate that involved not only difficult and contentious copyright issues, but also "intricate and complicated rules and regulations" governing communications policy. *See generally* H.R. No. 1476 at 88-89; *see also id.* 47-50 (giving a more complete discussion of the 1976 Act's long history).

Congress resolved those many sensitive and important problems by creating an entirely new compulsory license plan designed specifically for cable's delivery of television station programming. H.R. No. 1476 at 90. This new plan shifted the paradigm for liability questions concerning cable's delivery of such programming from traditional infringement considerations to a compliance determination based on the new plan. Congress eschewed this Court's approach of determining whether cable systems are more like broadcasters or more like viewers in favor of one resting on economic realities of the cable business. "[T]he Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs." H.R. No. 1476 at 89; *see also id.* at 88 (same). To avoid what Congress saw as "impractical and unduly burdensome" private negotiations to determine payments for delivery of television station "copyrighted program material," *id.*, Congress established a royalty reporting and payment plan

with statutorily-imposed fees to be administered by the Register of Copyrights. *Id.* at 91.

3. The express language of Section 111 demonstrates the encompassing nature of the compulsory licensing plan as governing cable systems' delivery of television station programming. The provision, 17 U.S.C. § 111(c)(1), that "establishes the compulsory license for cable systems generally," H.R. No. 1476 at 93, states in relevant part: ". . . secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station . . . shall be subject to statutory licensing upon compliance" with specified conditions. The plan's focus for liability questions on the programs embodied in retransmitted television station signals is also seen in the royalty payment scheme, which depends on a newly-created term, "distant signal equivalent," under which "the copyright liability of cable television systems under the compulsory license [is] limited to the retransmission of distant non-network programming." H.R. No. 1476 at 90. That intent is carried over to the definitional provision, 17 U.S.C. § 111(f), which defines "distant signal equivalent" as the value assigned to "any nonnetwork programming carried by a cable system" on a distant basis. *Id.*; *see* 17 U.S.C. § 111(d)(1)(B) (royalty payment schedule using sliding scale tied to total distant signal equivalents). Finally, the distribution of the royalty fees thus collected by the Register of Copyrights is made to "copyright owners who claim that their works were the subject of secondary transmissions by cable systems." § 111(d)(3).

Because the copyrighted works subject to the compulsory license are embodied in retransmitted television station signals, Congress identified retransmission (or "secondary transmission," as it is called in Section 111) as incorporating a key limitation to cable systems' carriage rights under the plan, *viz.*, that retransmission occur "simultaneously with the primary transmission" for systems within the continental United States. § 111(f); *see* 17 U.S.C. § 111(e) (allowing limited non-simultaneous retransmission outside the continental United States). The limitation restricts the manner in which cable systems within the continental United States may deliver television station programming to their subscribers: "the section does not cover or permit a cable system, or indeed, any person, to tape or otherwise record a program off-the-air and later to transmit the program from the tape or record to the public." H.R. No. 1476 at 81.

Section 111(c), 17 U.S.C. § 111(c), establishes the compliance requirements for cable systems under the plan. Those conditions include: limiting what television station signals can be retransmitted to those "permissible under the rules, regulations, or authorizations of the Federal Communications Commission," § (c)(2)(A);[2] requiring deposit of

[2] The FCC's rules, regulations, or authorizations at the time of enactment covered both the number and type of television station signals that could be carried as well as exclusivity protection for certain types of programming. *See* 17 U.S.C. §§ 801(b)(2)(B) and (C) (providing for royalty payment adjustments under the plan for changes to the two types of

statements of account and royalty fee payments with the Register of Copyrights, § (c)(2)(B); and, mandating that delivery include both the programming itself and "any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after" the program, § (c)(3). On this last point, Congress considered that "any willful deletion, substitution, or insertion of commercial advertisements of any nature by a cable system . . . significantly alters the basic nature of the cable retransmission[] service and makes its function similar to that of a broadcaster." H.R. No. 1476 at 93.

Subsection 111(d) sets out the initial royalty fees with provision for adjustment "as the Register of Copyrights may from time to time prescribe by regulation." Section 111(d)(1)(A). The royalty payment plan is hinged on "the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters," *id.* This "gross receipts" figure is used to determine the fee payment category within which individual cable systems fall and, for larger cable systems in conjunction with the distant signal equivalent value, to calculate the royalty fees owed. *See generally* 17 U.S.C. §§ 111(d)(1) (B), (C), and (D) (setting out payment calculations for different categories of cable systems). The Register of Copyrights was given authority to implement the royalty reporting and payment plan. *See* § 111(d)(1)

FCC rules); *see also* H. R. No. 1476 at 175-76 (legislative history of sections).

(requiring deposit of royalty forms and payment "in accordance with requirements that the Register [of Copyrights] shall . . . prescribe by regulation"); *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599, 608 (D.C. Cir.), *cert. denied*, 487 U.S. 1235 (1988) (upholding Register's authority); *SBCA v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994) (same).

In sum, the statutory language and the legislative history demonstrate that Congress intended Section 111 to be a comprehensive plan governing cable systems' delivery of retransmitted television station programming to their subscribers. *See, e.g.*, H.R. No. 1476 at 89 (noting cable systems use of retransmitted television signals is "based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs").

4. Cablevision's new RS-DVR service for delivering retransmitted television station programs to subscribers must be examined in the context of this comprehensive statutory plan. Section 111 specifies the prerequisites to make such delivery "subject to statutory licensing." § 111(c)(1). First, the work must be delivered to subscribers "simultaneously" with its broadcast on the television station signal. § 111(f). Second, a cable system must comply "with the requirements of subsection (d)," which sets out the reporting and payment filings to be submitted to the Register of Copyrights. § 111(c)(1). Third, a cable system's carriage of particular television station signals must be "permissible under the rules, regulations, or

authorizations of the Federal Communications Commission." *Id.* Failure to meet any prerequisite (except for non-pertinent exceptions listed in § 111(c)(4)), makes delivery of a signal "embodying a performance of display of a work [] actionable as an act of infringement." § 111(c)(2).

In addition, § 111(c)(3) makes delivery of a signal embodying a copyrighted work actionable as an infringement "if the content of the particular program in which the perform or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions." Removal or substitution of advertising in or surrounding a program "harms the advertiser and, in turn, the copyright owner whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach." H.R. No. 1476 at 94. As a result, this provision "attempt[s] broadly to proscribe the availability of the compulsory license if a cable system substitutes [or removes] commercial messages." *Id.*

The statutory language reflects congressional intent that cable systems may deliver television broadcast programming only through the auspices of the compulsory licensing plan, and that delivery not in compliance with the plan's requirements is actionable as an act of infringement. Thus, and insofar as Cablevision's RS-DVR service offers to subscribers television station programming,

Cablevision's liability for copyright infringement should have been judged by the extent to which the RS-DVR service complies with the terms of the Section 111 plan.

5. The decision below did not analyze Cablevision's RS-DVR program delivery system for compliance with Section 111, despite the fact that the system proposes to deliver television station programming falling within the ambit of Section 111. *See, e.g.*, Section 111(c)(1) ("a work embodied in a primary transmission made by a broadcast station . . . shall be subject to statutory licensing . . .").

As noted, § 111(c) includes five prerequisites for delivery of an embodied work on a retransmitted signal not to be an act of infringement. It appears premature to determine whether two conditions – the reporting and payment requirements of § 111(d) – will be met as Cablevision had not yet begun operation of its RS-DVR service at the time of the decision below. Even assuming those prerequisites as well as a third one (the works are embodied on television station signals that Cablevision is authorized to retransmit) are met, the proposed RS-DVR service would run afoul of the remaining two. First, the RS-DVR system seems to be the antithesis of simultaneous delivery, which requires that the embodied work be delivered to subscribers simultaneously with the program's broadcast transmission. Instead, the RS-DVR system allows subscribers to request a work be copied during its broadcast for later delivery. *See* Pet. App. 6a ("RS-DVR users can only play content that they

previously requested to be recorded"); *see also id.* 59a-60a (more detailed explanation).

Second, delivery via the RS-DVR system appears not to include any commercial advertising or station announcements transmitted by the television station immediately before or after the program being recorded. *See* Pet. App. 58a-59a (noting that "[w]hen the time comes for a program selected for recording to run," the Arroyo server receives a request and "finds the packets for that particular program" and copies them). Such delivery contravenes the requirement of § 111(c)(3) that such advertising be delivered to subscribers along with delivery of the program. The statutory proscription against delivering a program without its adjacent advertising was intended to protect "copyright owners whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach." H.R. No. 1476 at 94.

Failure to meet those prerequisites of statutory licensing means that Cablevision's RS-DVR delivery of works embodied in retransmitted television station signals "is actionable as an act of infringement." § 111(c)(3). The Second Circuit did not apply the Section 111 framework to its copyright liability analysis. That failure directly contravenes the intent of Congress to have the extent and scope of cable systems' liability for delivery of television station programming determined consistently with the plan expressly crafted to address those circumstances. Instead, the Second Circuit, though not acknowledging the precedent, followed the same

path that this Court used in *Fortnightly* and *Teleprompter*. As enactment of the 1976 Act, including the Section 111 plan, supplanted that approach to liability questions in this area, the decision conflicts with the express intent of Congress and should be rectified by this Court.

As the Second Circuit copyright liability analysis in the decision below as applied to television station programming delivered by the RS-DVR service contravenes clear congressional intent expressed in Section 111, review by this Court is appropriate. The logical extension of the decision below would lead to a result similar to the situation after *Fortnightly* and *Teleprompter*, *viz.*, that cable systems could deliver to their subscribers television station programming without incurring any copyright liability. That result would occur because the Second Circuit's analysis, in effect, replicates the *Fortnightly* and *Teleprompter* analysis for a new delivery system (substituting a centralized DVR delivery system for a centralized antenna delivery system) as controlling the copyright liability question without considering the impact of the intervening Section 111 plan on liability.[3]

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[3] The decision below also usurps the Register of Copyrights' initial role in recommending, followed by Congress' ultimate role in deciding how to treat new systems for delivering television station programming, and whether such systems fall under an existing compulsory licensing plan or should be the subject of a new plan. *See* Satellite Home Viewer Extension and Reauthorization Act of 2004, § 109, Pub. L. No. 108–447, 118 Stat. 3394 (2004) (requiring Register to file a report with Congress that, among other things, discusses whether the current compulsory licensing plans should be modified to fit new technological developments).

CONCLUSION

The petition for a writ of certiorari should be granted.

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