Intellectual Property (2059) - Essay

'How well does Intellectual Property law balance the interests of IP creators, owners and the general public?'

Introduction

This essay discusses the proposed *Resale Royalty Scheme* for visual artists which the Commonwealth government is currently considering. The authors of *Intellectual Property Text and Essential Cases* write:

> The type of subject matter protected as intellectual property is gradually expanding …
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> The extension of the concept of intellectual property to cover such personal interests [viz moral or neighbouring rights] means that there is no real limit to what might be characterised as intellectual property in the future. It is sometimes suggested that indigenous culture and knowledge, for example, should be protected as intellectual property … [1]

Droit de suite is literally a 'follow-up right' and its application constitutes royalties for visual artists on the resale of works. Australia is currently considering the expansion of intellectual property rights to include such a scheme, known here as resale royalty.

Resale royalty is a contentious issue receiving considerable currency, a decision on the introduction of legislation being anticipated later this year. In this essay I examine the concept of resale royalties, the background in other countries, the history in Australia, the possible content of the foreshadowed legislation and the likely administrative, socio-political and economic implications from the perspective of the authors, buyers, public and institutions, with a particular focus on the Australian indigenous community. Following the analysis I will present the arguments for and against a resale royalty scheme and my conclusion as to whether it should be implemented, either in its proposed form, with amendments or alternatively abandoned.

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[1] Rocque Reynolds and Natalie Stoianoff*, Intellectual Property Text and Essential Cases,* The Federation Press, Second edition, 2005, pp 1, 3.

I was prompted to investigate this component of intellectual property following an article in *The Australian*.[2] In doing so have researched the internet, various newspapers, reference books and legislation as well as discussed the issue with officials from the offices of various federal politicians, the Art Gallery of South Australia, friends with experience in the visual arts and members of the aboriginal community.

History of droit de suite overseas

France has had *droit de suite* since the 1920s when it was introduced to give financial assistance to widows of the Great War, having first been suggested in the 1860s.[3] *The Report of the Myer Inquiry into the Contemporary Visual Arts and Crafts Sector* of 2002 (subsequently referred to in this essay as the 'Myer Report') specified that it applied, albeit differently, in 29 countries from various parts of the globe as well as in the State of California in the United States.[4] The European Union agreed in 2001 on 'harmonisation' in member countries. It is to be introduced in Great Britain by 2006 on a progressive basis, although there has been considerable resistance by vested interests, particularly art dealers who fear the loss of sales to the United States. Rates and methods of collection vary.[5]

History of resale royalty in Australia

I have outlined the history of the notion of resale royalty in Australia from 1978, although I am sure it was attractive to artists well before then. In that year Australia became a signatory to the *Berne Convention for the Protection of Literary and Artistic Works* which was revised the following year and Article 14ter incorporated. It concerns resale, laws and procedure for *droit de suite* in works of art and manuscripts and states:

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[2] Katrina Strickland, 'Doing the bidding for the creator', *The Australian*, (Adelaide), 29 August 2005, p 16.
[3] Caslon Analytics profile, *Droit de suite: Overview,* <http://www.caslon.com.au/droitprofile.htm> at 18 September 2005.
[4] The Contemporary Visual Arts and Crafts Enquiry, *The Report of the Myer Inquiry into the Contemporary Visual Arts and Crafts Sector,* 2002, <http://www.dcita.gov.au/arts/consultation/resale_ royalty> at 18 September 2005.
[5] Caslon Analytics profile*, Droit de suite: Application,* <http://www.caslon.com.au/droitprofile1.htm> at 18 September 2005.

> The author, or after his death the persons or institutions authorised by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.[6]

It goes on to specify that procedures for collection and amounts shall be determined by member countries (but see reference to 'harmonisation' above).

In February 1989 the Australian Copyright Council presented a report entitled *The Art Resale Royalty & Its Implications For Australia* which was commissioned by the Australian Council for the Arts. It supported a resale royalty 'as mechanism for encouraging creative endeavour by rewarding visual artists with a share in the increasing value of their creative product'. It went on to recommend public debate and investigation of the best way to examine such a scheme and importantly that it be incorporated in amendment to the *Copyright Act 1968* rather than discrete legislation. [7]

The Contemporary Visual Arts and Crafts Enquiry lodged its report, known as the Myer Report, with the Minister for the Arts and Sport, Senator the Hon Rod Kemp, on 14 June 2002. Its findings under 'Resale Royalty' included (my dot points):

- 'If resale royalties were introduced, a substantial amount of benefit would be enjoyed by artists … ' (Page 163.)
- 'The creation of a resale royalty scheme would have a theoretical impact on current owners of works as a small percentage of potentially achievable sales prices would revert to the original makers. While theoretically there would also be a transfer in wealth from the early career of the artist to the later life

[6] Article 14ter, '"Droit de suite" in Works of Art and Manuscripts', *Berne Convention for the Protection of Literary and Artistic Works*, cited in *Butterworths Intellectual Property Collection 2005,* LexisNexis Butterworths, Australia, 2005, p 823.
[7] Australian Copyright Council, *The Art Resale Royalty & Its Implications For Australia,* 1989, cited in Caslon Analytics profile, *Droit de suite: Application,* p 3, <http://www.caslon.com.au/droitprofile1.htm> at 18 September 2005.

of the artist, the Inquiry does not believe there would be an appreciable impact on markets in practice.' (Page 164.)

- 'As demand in the art market is highly volatile, it is unlikely that resale royalties would have an impact on the art market over time.' (Page 165.)
- 'The case for a resale royalties scheme is particularly strong for indigenous artists.' (Page 167.)
- 'The proceeds of resale royalties should be paid directly to the individual artists, rather than to a communal fund, as this scheme is a type of taxation on secondary art sales, rather than a legitimate royalty for artists.' (Page 169.)

The report's recommendation 5.1 was to '[i]ntroduce a resale royalty arrangement'.[8]

Government's position

Subsequently the Department of Communications, Information Technology and the Arts (DCITA) issued a paper 'Proposed Resale Royalty Arrangement Discussion Paper'[9] which invited submissions on the *droit de suite* provisions of Myer Report by13 August 2004. Possible aims of such an arrangement were listed on page 16 and are confined to the benefits for the author and not other stake holders. They are:

- Providing income support for artists.
- Ensuring that artists share in the increased value of their work.
- Enshrining a perceived right of visual artists.
- Redressing a perceived inequity between the rights of visual artists and other creative artists.
- Providing additional incentives for artists to continue practicing.
- Empowering artist by recognising their contribution to the economic and cultural life of the nation.

[8] The Contemporary Visual Arts and Crafts Enquiry, above n 4.
[9] Australian Government Department of Communications, Information Technology and the Arts, *Proposed Resale Royalty Arrangement Discussion Paper*, <http://www.dcita.gov.au/arts/consultation/resale_royalty> at 18 September 2005.

A total of 34 submissions were recorded on the DCITA web site as at 16 September 2005 as having been received. I spoke to Mr Adrian Chippendale, Chief Adviser to Senator Kemp on that day who informed me that the matter was now the province of the Attorney-General, Phillip Ruddock, who has responsibility for copyright matters, and he has announced that a decision on the future of resale royalties will be made by the end of 2005. On 19 September 2005 Mr Tim McKinnon of Senator Ruddock's office verified the time frame for that announcement which will be contingent on a recommendation by the Attorney-General's Department and may need to be considered beforehand by Cabinet.

Opposition's position

In 2005 Senator Kate Lundy, the then Shadow Minister for the Arts, introduced a private member's Bill to the Senate with the title 'A Bill for an Act to amend the *Copyright Act 1968* to introduce a Resale Royalty Scheme for the visual arts, and for related purposes', the short title being 'Resale Royalty Bill 2004'. Mr Jake Winter, the Senator's Senior Adviser, apprised me by phone on 6 September 2005 that the Bill had lapsed but undertook to email me a copy which he did.[10] Effectively it proposes a regime which I have summarised as follows:

- 'The object of the Act is to provide for the payment of a resale royalty to visual artists if their work is resold thus ensuring they enjoy a direct financial benefit from the increasing value of their work.'
- Royalties to be paid for a painting, sculpture, drawing, engraving or photograph.
- Artists at time of sale are to be Australian nationals or are to have resided in Australia for a minimum of two years. Reciprocal arrangements will apply.
- The royalty is to be paid for works sold in Australia through an 'art market intermediary' defined as 'an auction house, online auction, private gallery, agent or other art market professional who acts on the behalf of the seller of an artistic work'.

[10] Email from Jake Winter to Donald Boyle, 6 September 2005.

- It would be payable for the duration of the copyright of the work. Subsection 33(2) of the *Copyright Act 1968* specifies at present to the effect copyright continues for 70 years after the year of the author's death.
- A royalty of the total resale price of five per cent is to apply, paid to the artist or an intermediary.
- Royalties collected by an intermediary are to be paid to a collecting society which is authorised to take action in instances of non-compliance.

A Media Release, dated 26 August 2005, by Peter Garrett MP, the Shadow Parliamentary Secretary for Reconciliation and the Arts, advocates the implementation of a resale royalty scheme as a matter of urgency, outlines Labor's efforts in that regard and emphasises its benefits for indigenous artists.[11]

Legal issues

The nature of property and ownership is somewhat contentious at law and has been the subject of considerable legal writing. '[Property] refers to a degree of power that is recognised in law as power permissibly exercised over the thing. … Usually it is treated as a "bundle of rights"'[12] Whilst the matter in question related to fauna the preceding judicial observations are useful to have in mind when considering resale royalties. Anecdotal evidence suggests that in the concept of property held by the public at large (ie not members of the legal profession) ownership effectively implies absolute control over the possession in question. This is a misconception and in considering works of art and *droit de suite* the word 'ownership' might be more beneficially described as 'stewardship or 'custodianship' and such terms might make the notion of resale royalties more palatable to the public at large.

[11] Peter Garrett MP, 'Ruddock should fast-track resale royalty legislation for visual artists', (Media Release, 26 August 2005).

[12] Per Gleeson CJ, Gaudron, Kirby and Hayne JJ, *Yanner v Eaton* (1999) 201 CLR 351 High Court of Australia, cited in Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Property Law Cases and Materials*, Lawbook Co, Australia, Second edition, 2003, p 23.

The Australian Copyright Council describes the objectives of copyright rights as 'incentive for the production of new works, and reward for the value of those works to society' and suggests that definition also applies to resale royalty.[13] In *droit de suite* the 'reward' seems principally confined to the author. The observation of Association of Northern, Kimberley and Arnhem Aboriginal Artists that 'Resale Royalty should be an economic right similar to copyright legislation and moral rights for the artist'[14] seems more realistic.

As outlined above Australia is a signatory to the Berne Convention. Of course being a signatory to an international agreement does not make it law - legislation is necessary to put Article 14ter of the Berne Convention into effect in Australia. Nevertheless it is arguable that Australia should comply with its international undertaking in this regard.

My questions

There are a number of questions and concerns which I initially had regarding proposed resale royalties for visual artists before I undertook wider reading. They were:

- The anomaly of resale royalties applying to public and not private sales. However it now seems evident to me that this is dictated by the inability to effectively monitor private sales.
- Reselling and multiple royalties. A work could theoretically be resold many times, each sale attracting another royalty.
- A corollary of the previous point is the implication (if any) when the sale price of an art work is less when it is on-sold.
- Some visual works are fixtures (the Doctrine of Fixtures and the common law maxim *quicquid plantatur solo, solo cedit* refer) and as such form part of an estate at land. An example would be a

[13] Australian Copyright Council, Submission 10, p 3, <http://www.dcita.gov.au/arts/consultation/resale_royalty> at 18 September 2005.
[14] Association of Northern, Kimberley and Arnhem Aboriginal Artists (ANKAAA), Submission 3, p 2, <http://www.dcita.gov.au/arts/consultation/resale_royalty> at 18 September 2005.

fresco such as '*The Last Supper*'. Could a royalty apply in some way to the sale of the estate at land to which the work was attached as presumably it would add value to it?

- What are the implications of questionable provenance of works and forgeries? The art market is rife with fakes although it is impossible to ascertain the extent of fraud with any certainty.
- What are the implications for acquisitions by public galleries and also bequests and donations to galleries?
- What are the implications for communal works? This is of particular relevance to indigenous communities. The *Copyright Act 1968* provisions for joint ownership of copyright are limited and defines a 'work of joint authorship' in section 10, viz:

  '**work of joint authorship** means a work that has been produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contribution of other authors.'
- Bogus bidding at art auctions to inflate sale prices could be exacerbated. This is a practice which prevailed in the real estate industry until action was taken to eradicate it.
- What if the frame of a painting was sold and the work itself included *gratis*? (This would seem to be a fanciful scenario but there are no limits to human ingenuity and other scams readily present themselves.)

Understandably answers to those questions were not provided in Labor's draft 'Resale Royalty Bill 2004' and if legislation does come into effect it would seem that some of my concerns will need to be addressed in any future statute or through alternative strategies. Others are beyond the scope this essay.

Authors

The Australian Copyright Council supports the introduction of resale royalties and its submission, which puts the case *for*, includes:

> The main rationale for our position is that there are limited benefits from the copyright system for fine artists as their work is not disseminated in ways which generate copyright income. By contrast writers receive royalties from book sales and composers receive royalties from the performance and broadcast of their music; they have an opportunity to receive income from their work as long as their work continues to be used. The income increases as the value of the work increases; that is as its desirability for consumers, reflected in the level of use, increases. Artists, on the other hand, often have only one opportunity to receive income from their work: when they sell the original. They do not benefit from the future increased value of the work or future uses of it.[15]

This argument is countered in the submission by Brenda May Gallery in which the author quotes:

> The concept of royalties for works of fine art is derived from a false analogy with the royalties paid to writers and composers whose work is expandable through further production.[16]

The Arts Law Centre of Australia submitted that '[r]esale royalties could be seen as a type of superannuation for artists (who often have not been in a position to contribute to such a scheme during their careers as an artist).'[17] This is a common theme.

It is self evident that artists and their heirs would reap considerable benefit from a resale royalties and so it would be reasonable to assume that authors would be unanimously in favour of the notion of *droit de suite,* however, this is not so. On a recent visit to Australia the well known and very successful painter, Geoffrey Smart, was cited as opposing resale royalties and quoted as saying '[t]he French are trying to do it, but it won't work because human corruption is too strong … I wish it would work but it won't because people are just naturally corrupt.' Notwithstanding Smart's jaundiced view of humanity, with which I disagree, he makes more sense when he advocates an alternative, namely 'private sponsorship'.[18] This was once known as

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[15] Australian Copyright Council, Submission 10, above n 13 p 2.
[16] Ben Bloch, William Damon and C Elton Hinshaw, 'Visual Artists Rights Act of 1987: A Case of Misguided Legislation', (1988), vol 8 no 1 (Spring/Summer), *Cato Journal*, p 76, cited by Brenda May Gallery, Submission 12, p 2, <http://www.dcita.gov.au/arts/consultation/resale_royalty> at 18 September 2005.
[17] Arts Law Centre of Australia, Submission 4, p 2, <http://www.dcita.gov.au/arts/consultation/resale_ royalty> at 18 September 2005.
[18] Andrew Fraser, 'It's never been so good for the Smart painter', *The Australian* (Adelaide), 6 September 2005, p 7.

patronage and is probably fine in theory but unlikely to flourish in contemporary Australian society or indeed modern Florence.

It is of interest that some galleries claim to currently pay a royalty to artists, no doubt extracted as a premium from the purchaser. Even so I don't see this being of significant relevance to any legislative implementation of resale royalties. Copyright Agency Limited has observed that Deutscher-Menzies have implemented their own form of resale royalties and have provided indigenous communities with some assistance.[19]

Sotheby's, unsurprisingly, is opposed to resale royalty and has provided some interesting statistics which include:

- The estimated number of Australian artists to have received a royalty in 2003 was 1391, being 15 per cent.
- The top five selling artists would have received between 24-39 per cent of all royalties (contingent on modelling) and all five were deceased.[20]

Owners

Assignability conflicts with the principles of resale royalties and so ownership remains with the creator. These rights are inalienable. This is not to say that Australia could deviate from this concept if legislation were to be introduced accordingly.

Purchasers

Buyers of art on the open market (ie sales which are not private) will be required to pay a premium of, say, five per cent (which the Labor Bill proposed). My limited understanding of economics suggests that the total value of sales will fall proportionally.

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[19] Copyright Agency Limited, Submission 13, p 4, <http://www.dcita.gov.au/arts/consultation/resale_royalty> at 18 September 2005.

[20] Sotheby's, Submission 30, p 1, <http://www.dcita.gov.au/arts/consultation/resale_royalty> at 18 September 2005.

In her submission Pamela Aldred relates an (apocryphal?) anecdote about a client who in early 2003 purchased a painting by well known Australian artist for $75 000 but the best offer has been $45 000 and asks whether the artist should be responsible for the loss. She goes on to observe that the Australian art market is a buyer's market, inflated and precarious, which would be undermined by a resale royalty.[21]

Indigenous community

In the beginning of 1970 I left home for the first time to start a job at the Commonwealth Employment Service (CES) at Port Augusta. At that time (and perhaps still now) Port Augusta had a 'racist' reputation, reflected by the ultra right wing opinions of the local newspaper, *The Transcontinental*. A local hotel (next to the CES at the time) had been prosecuted for discrimination on the grounds of race (and was a second time some years later). The town had a large permanent aboriginal population as well as numerous indigenous itinerants. As a part of my job I visited various aboriginal communities in the north of the state, including Amata and Fregon, amongst others. I was overwhelmed by the primitive conditions in which the people had to live and have no reason to believe that they have improved since - rather they have got worse. Much later for a time I was personally financially responsible for the administration of a range of indigenous programs by the (then) Department of Employment, Education and Training and observed at first hand a mentality of perceived entitlement. Accordingly those experiences have prompted an ongoing interest in indigenous issues.

There is a history of exploitation of aboriginal artists by dealers, particularly but not exclusively those living on remote communities.[22] A concomitant concern of indigenous people is that of collective ownership of designs and motifs, a case having been resolved in favour of the plaintiffs following action under the

[21] Pamela Aldred, Submission 2, <http://www.dcita.gov.au/arts/consultation/resale_royalty> at 18 September 2005.

[22] Simon Georgoff, 'Kimberley painters in a legal bind', discusses artists, but principally, Rover Thomas, from the Warmun Aboriginal Community and allegedly exploitative contracts. Susan McCulloch, 'Fairness depends on ethics', discusses arrangements established at the artists' cooperative at the Papunya Community. Both articles were published in *The Australian* (Adelaide), 14 August 1998, p 19.

Copyright Act 1968.[23] Whilst both these issues are substantial, avenues of legal redress currently exist and such inequities cannot legitimately be advocated as justifications for a resale royalty scheme.

The submissions sourced from indigenous groups are consistent in support for resale royalties. The Association of Northern, Kimberley and Arnhem Aboriginal Artists wrote 'for indigenous artists … a fully legislated scheme would ensure all artists would be fairly acknowledged … [o]ther access issues include literature (sic) and numeracy disadvantages across the regions'.[24]

The Australian Copyright Council has expressed the likelihood that royalties from indigenous art sales will be shared amongst members of the artist's community.[25] To me this is an uncontentious proposition.

Public Institutions

The Director of the National Gallery of Victoria is 'in favour of the principle, but with some concerns about its effective implementation' and observes that in France 70 per cent of royalties are paid to the descendants of seven artists.[26]

The scheme was also supported by the National Gallery of Australia, particularly in the light of support provided to extended indigenous families.[27] The issue of acquisitions was not a concern in either submission.

Other comment

Editorial comment in *The Australian* newspaper on 29 August 2005 regarding this matter is headed 'Still-life with ripoff. Don't try to create a unique property right for artists' and predictably argues against an 'ongoing

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[23] 'Aboriginal art copyright win', *The Advertiser*, 14 December 1997, p 6.
See *George Milpurrurru, Banduk Marika, Tim Payunka and the Public Trustee for the Northern Territory v Indofurn Pty Ltd, Brian Alexander Bethune, George Raymond King and Robert James Rylands* (1994) 54 FCR 240, 130 ALR 659.
[24] Association of Northern, Kimberley and Arnhem Aboriginal Artists, above n 13, p 3.
[25] Australian Copyright Council, Submission 10, above n 13, p 4.
[26] National Gallery of Victoria, Submission 25, <http://www.dcita.gov.au/arts/consultation/resale_royalty> at 18 September 2005.
[27] National Gallery of Australia, Submission 24, <http://www.dcita.gov.au/arts/consultation/resale_royalty> at 18 September 2005.

financial interest' for artists in their work.[28] Whilst in no means indicative of public opinion it appears to herald the beginning of a 'no campaign'. No doubt the expressed opinions of the newspaper and that of Michael Kroger, who is also cheerleading a negative campaign,[29] are based on their respective careful and reflective analyses and their common political inclinations are merely coincidental.

A subsequent editorial on 7 September 2005 is also a veiled criticism of resale royalties and the editorialist writes 'artists have never had it so good'.[30] In response there was an extraordinary letter, published on 8 September 2005, from Cynthia Breusch of Pullenvale, Queensland advocating 'welfare on tap' to artists.[31]

Conclusion

Initially I thought the idea of a resale royalties scheme had a superficial moral attraction. But on consideration of the evidence and overseas experience, an examination of Labor's lapsed legislation and the views of various interested parties has led me to conclude that *droit de suite* is inequitable and anomalous.

In the format foreshadowed in the materials resale royalty does not balance the interests of authors, buyers and the general public and is biased in favour of a privileged group of authors and their fortunate heirs. Theoretically such a scheme should broaden the range and quality of the visual artworks produced and in particular address the unique issues facing indigenous art, but in practice would in all probability be most beneficial to 'dead megastars'. The argument regarding Australia having a compulsory obligation to comply with the Berne Convention is spurious. There is no international pressure to adopt resale royalties. Political realities dictate Australia being a signatory of the convention does not automatically imply endorsement of all its provisions - they are not chiselled in granite.

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[28] Editorial, 'Still-life with ripoff', *The Australian* (Adelaide), 29 August 2005, p 9.
[29] 'Liberal heavyweight lobbies against artists**',** *The Weekend Australian* (Adelaide), 27 August 2005, p 9.
[30] Editorial, 'Artistic rewards', *The Australian* (Adelaide), 7 September 2005, p 13.
[31] Cynthia Breusch, Letter to the Editor, 'Artists should be supported', *The Australian* (Adelaide), 8 September 2005, p 13.

I do not envisage such a scheme having any significant long term impact on the overall art market. At present it seems to be quite buoyant, particularly for indigenous works, and has absorbed the impact of the GST. It is not immune from changes in tastes and market forces such as a recession but these are different drivers.

Whilst my observations pre-empt any possible legislation, based on my research I cannot foresee anything radically different to extant regimes. However, if a resale royalties scheme were to be introduced there a number of inclusions I would advocate, namely:

- That the *Copyright Act 1968* be amended to incorporate the notion of collective copyright for indigenous communities.
- At the time of the first sale, ie that not attracting a royalty, the details of the work be registered with a collection society (easily achievable on line and including photographs of the work). This would enable identification of the author, facilitating provenance and limiting the implications of forgery and, subject to the above amendment, record the details of group authorship. Failure to register would preclude any future royalties.
- A royalty to be levied only on the difference between the second and third sale prices (at the time of the third sale), the third and fourth sale, and so on, thus eliminating windfall gains for artists whose work changes hands regularly. Any losses would be absorbed by the buyer under the principle of *caveat emptor*.
- The legislation to apply prospectively - reflecting the principle that a statute should not apply retrospectively.

Notwithstanding, my prediction is that the political realities and overall lack of merits of *droit de suite* render such a scheme unlikely in Australia for the foreseeable future, nor would I advocate one. A final concern is

that an unscrupulous administration could see the channelling of substantial royalty monies to particular indigenous communities as a reason for reduction of funding from other sources.

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