

No. 18-1763

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

RUSSELL BRAMMER,

Plaintiff-Appellant,

v.

VIOLENT HUES PRODUCTIONS, LLC,

Defendant-Appellee.

*On Appeal from the United States District Court
for the Eastern District of Virginia*

BRIEF OF VOLUNTEER LAWYERS FOR THE ARTS, INC. AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure,
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STATEMENT OF THE IDENTITY AND INTEREST OF *AMICUS CURIAE*

Volunteer Lawyers for the Arts, Inc. (“VLA”) was established in 1969 with a mission to provide low-income arts-related legal aid, education, and advocacy to artists and arts and cultural organizations. To achieve this mission, VLA provides its members with pro bono legal representation, legal counseling, and innovative educational programs. Over the last 49 years, VLA has served more than 300,000 low-income artists and nonprofit organizations. VLA currently provides an estimated \$20 million worth of pro bono legal services annually.

Many of the artists seeking VLA’s assistance are low-income creators of copyrighted works of every variety, including many photographers. In this age of digital technology and the Internet, these photographers face ever-growing challenges in promoting their work online, including the ever-increasing risk that their photographs will be copied and exploited by others without their authorization. The boundaries of the fair use doctrine are of particular importance to these artists, whose ability to earn a livelihood from their work hangs in the balance when plainly infringing uses are excused by the overbroad application of the doctrine.

VLA submits this *amicus* brief to lend its unique voice on behalf of these low-income photographers and other artists, who will be adversely affected if the ruling of the District Court in this case is permitted to stand.

No party or party’s counsel authored this brief in whole or in part, and no person other than the *amicus curiae* or the undersigned counsel contributed money intended to fund preparing or submitting this brief.

STATEMENT OF ISSUES ADDRESSED BY *AMICUS CURIAE*

1. Whether the District Court erred by granting the summary judgment motion of defendant-appellee Violent Hues Productions, LLC (“Violent Hues”), and finding that Violent Hues’ unauthorized use of a copyrighted photographic work created and owned by plaintiff-appellant Russell Brammer (“Brammer”) constituted a “fair use” under the Copyright Act.

2. Whether the District Court’s expansion of the fair use doctrine would undermine the economic incentives for the creation of new expressive works and harm low-income photographers and other artists served by VLA.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the unapologetic misappropriation of an artistic work by a for-profit enterprise, which used the work without permission to entice customers to buy tickets to its film festival. The District Court below granted summary judgment to Violent Hues because it wrongly concluded that Violent Hues’ unauthorized reproduction, display, and commercial exploitation of Brammer’s photograph constituted fair use under Section 107 of the Copyright Act. In doing so, the District Court upended numerous well-settled principles of the fair use doctrine, and

significantly expanded what was meant to be a limited exception “for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.” 17 U.S.C. § 107.

Among other things, the District Court: erroneously found that Violent Hues “transformed” the photograph at issue by using it for “informational” purposes; ignored clear evidence that Violent Hues’ use was commercial in nature; improperly considered the role of Violent Hues’ purported “good faith” in the analysis; failed to account properly for the creative nature of the photograph; incorrectly held Brammer’s prior publication of his work against him; disregarded the substantiality of the portion of the work used by Violent Hues; and misapprehended the adverse effect that a finding of fair use would have on the market for the photograph.

If permitted to stand, the District Court’s unprecedented expansion of the fair use doctrine will have disastrous consequences for the low-income photographers and other artists that VLA has spent nearly 50 years fighting to protect. Those creators depend on the revenue generated by the use of their copyrighted works to support the creation of new works. If those creators are unable to generate income from their work by licensing it for uses such as the one at issue here, it will impair their ability to make a living and discourage them from engaging in future creative endeavors, undermining the very purpose of the Copyright Act.

For these reasons, as discussed further below, the District Court’s finding of fair use and grant of summary judgment should be reversed.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN FINDING THAT THE FIRST STATUTORY FACTOR FAVORED FAIR USE

The District Court committed three fundamental errors in finding that the first statutory factor (the purpose and character of the use) favored fair use: (1) the District Court erred in finding that Violent Hues’ simple cut-and-paste of Brammer’s photograph was transformative; (2) the District Court erred in finding that Violent Hues’ unauthorized use of Brammer’s photograph to entice consumers to purchase tickets to Violent Hues’ Film Festival was not a commercial use; and (3) the District Court erred in considering and giving weight to Violent Hues’ purported “good faith” in using Brammer’s photograph without authorization.

A. The District Court Erred in Finding That Violent Hues’ Cut-and-Paste of Brammer’s Photograph Was Transformative

As explained in greater depth in appellant’s brief and those of other *amici*, the District Court erred in finding that Violent Hues’ use of the photograph at issue was “transformative,” favoring a finding of fair use. (Memorandum Opinion, *Brammer v. Violent Hues Prods., LLC*, No. 1-17-CV-01009 (E.D. Va. June 11, 2018), ECF No. 69 (“Op.”), at 4.) This error goes to the heart of the fair use inquiry. Moreover, this error further compounded the District Court’s misapplication of the fair use

doctrine, because where—as here—defendant’s use is non-transformative, market harm (the fourth statutory factor) is typically presumed. (*See* Section IV, *infra*.)

In applying the first statutory factor, courts consider whether “the new work merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (internal citations omitted). This case does not concern so-called appropriation art or other uses of a work in which the work itself is altered or augmented and thereby arguably transformed. Thus, for Violent Hues’ use to be considered transformative, it must have changed the work’s “function or purpose.” (Op. at 4 (citing *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009)).)

The District Court disposed of this critical and highly fact-sensitive inquiry in a single conclusory sentence that deemed Brammer’s photograph to be “promotional and expressive” in function or purpose, while declaring Violent Hues’ use to be purely “informational.” (Op. at 4.) The court’s analysis of this issue made no reference to the analogous case law of this Circuit, and failed to provide any explanation of how it determined the functions or purposes of either Brammer’s original photograph or Violent Hues’ unauthorized use.

The leading treatise on copyright law has lamented the frequent misuse of the transformation test, observing that it has become a conclusory label which is “all

things to all people.” MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.05 [A][1][b], 13–168–70 (2011). The decision below highlights this danger. Violent Hues used Brammer’s expressive photograph of the Adams Morgan neighborhood in Washington, D.C. to highlight an appealing location near its upcoming film festival. In doing so, Violent Hues simply cut and pasted Brammer’s photograph without alteration (other than to crop the image slightly to fit the web page). By finding such use to be transformative, the District Court significantly and erroneously expanded the meaning of that term under U.S. copyright law.

In particular, the District Court erred by relying on the purported difference between “Brammer’s purpose in capturing and publishing the photograph” with “Violent Hues’ purpose in using the photograph.” (Op. at 4.) The District Court failed to cite any authority supporting such a comparison for purposes of determining whether an unauthorized use of a copyrighted work was transformative, nor are we aware of any such authority. Indeed, as Brammer correctly notes in his appeal brief, the proper inquiry involves a comparison of the character and purpose of Brammer’s original photographic *work* with the character and purpose of the purportedly transformed *work* as used by Violent Hues. (Appellant’s Brief (“Br.”) at 11 n.1.) The District Court failed to undertake any such comparison, which would have

demonstrated that both Brammer and Violent Hues used the photograph to highlight the aesthetic appeal of the Adams Morgan neighborhood.

The recent fair use analysis in *Bigelow v. Garrett*, No. 6:18-CV-00039, 2018 WL 4102821 (W.D. Va. Aug. 28, 2018), decided after the District Court’s opinion in this case, illustrates the proper application of this inquiry. In that case, defendant was a politician who used on his campaign website, without authorization, a copyrighted photograph of people seeking to gain entry into the United States by climbing a wall on the Mexican border. The court properly found that such use was indistinguishable from the original function or purpose of the photograph itself—namely, to convey a “crossing at the U.S./Mexico border.” *Id.* at *2. In doing so, the court expressly rejected defendant’s claim that he put a different “gloss” on the photo by “transform[ing] it from a mere historical depiction of a border crossing into a political stance on illegal immigration,” finding that the mere difference in motivation for using the photograph did not cause defendant’s cut-and-paste use of the image to be transformative. *Id.* Instead, as the *Bigelow* court correctly held, what matters is the purpose of the *photograph* as used by defendant. *See id.* To that end, as the court noted, “a picture of, say, a mountaintop, would be meaningless as part of an anti-immigration stance.” *Id.*

The same reasoning applies in this case. Just as the politician in *Bigelow* could not argue that he transformed the photograph at issue “from a mere historical

depiction of a border crossing into a political stance on illegal immigration” by putting that photograph on a website that itself had the “gloss” of a political stance on illegal immigration, Violent Hues cannot argue that it transformed Brammer’s expressive depiction of the Adams Morgan neighborhood by using it on a website to highlight the aesthetic allure of that neighborhood in order to entice consumers to buy tickets to a film festival in the vicinity.

If the District Court’s erroneous reasoning were adopted, any use of a copyrighted photograph, for nearly any purpose, would be considered transformative, simply because a defendant could articulate some purportedly different motivation or purpose for its unauthorized use of the image. This is not and should not be the law. Accordingly, this Court should correct the District Court’s clear error.

B. The District Court Erred in Finding That Violent Hues’ Use of Brammer’s Photograph to Entice Consumers to Purchase Tickets Was Not Commercial

The District Court also erred in finding that Violent Hues’ use of Brammer’s photograph was non-commercial “because the photo was not used to advertise a product or generate revenue.” (Op. at 4.) This conclusory assertion misapprehends the law and misapplies the facts. “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary

price.” *Bouchat v. Balt. Ravens Ltd. P’ship*, 619 F.3d 301, 311 (4th Cir. 2010) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)). Here, Violent Hues, a film festival promotion corporation, used an expressive photograph of the Adams Morgan neighborhood to entice consumers into purchasing tickets to its film festival by highlighting the aesthetic appeal of the neighborhood in which the festival would take place. In finding that this use was non-commercial, the District Court ignored that a photograph serves a commercial purpose when it is used to “entice” customers to purchase a product. *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000); see also *Bigelow*, 2018 WL 4102821, at *2 (finding that photo used on website for fundraising purposes was commercial in nature).

That standard is easily met here. Why else would Violent Hues feature an expressive photo of the Adams Morgan neighborhood on its website if not to entice consumers to purchase tickets to its film festival and experience that neighborhood firsthand? In choosing the photograph at issue, Violent Hues plainly determined that there was some commercial value in using the Brammer photograph to highlight the attractiveness of the nearby Adams Morgan neighborhood to potential consumers, rather than using a stock photograph or map of the neighborhood. The District Court erred in finding otherwise.

**C. The District Court Erred in Considering
Violent Hues’ Purported Good Faith**

The District Court further erred by relying in part on a finding that Violent Hues acted in good faith because its principal purportedly did not see any indication that the photograph was copyrighted when he chose to use it on the company’s website. (Op. at 2.) This portion of the District Court’s analysis is erroneous in two significant respects.

First, the District Court cites no authority for the proposition that a finding of “good faith” is relevant to the analysis of the first fair use factor. Nor are we aware of any such authority. Indeed, as Brammer correctly observes in his appeal brief, while it is well-established that bad faith may weigh against a finding of fair use, the inverse is not true. (Br. at 23, citing *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1203–04 (Fed. Cir. 2018) (“[W]hile bad faith may weigh against fair use, a copyist’s good faith cannot weigh in favor of fair use.”).) Accordingly, it was error for the District Court to conclude that Violent Hues’ purported good faith supported a finding of fair use.

Second, even if the purported “good faith” of Violent Hues were somehow relevant to the fair use analysis, there was no basis for the District Court to determine that issue in Violent Hues’ favor at the summary judgment stage because there is a material disputed issue of fact as to whether Violent Hues’ principal saw a copyright notice with respect to the photograph at issue, or otherwise should have known that

copyright protection extends to photographic works regardless of whether they are accompanied by such notice.

If allowed to stand, the District Court’s erroneous “good faith” analysis would impermissibly shift the burden to copyright owners (including the low-income artists represented by VLA) to police the re-publication of their works by others throughout the virtually limitless corners of the Internet, and effectively require—contrary to the plain language of the Copyright Act (*see* 17 U.S.C. § 401(a))—that in each and every instance the work is accompanied by a notice of copyright. That simply is not—and should not be—the law.¹

II.

THE DISTRICT COURT ERRED IN FINDING THAT THE SECOND STATUTORY FACTOR FAVORED FAIR USE

The District Court erroneously concluded that the second statutory factor (the nature of the copyrighted work) weighed in favor of fair use based on (1) its unwarranted finding that the photograph at issue is “a factual depiction of a real-world location,” and (2) its unprecedented reliance on the fact that the photograph had been previously published. (Op. at 5.)

¹ Such a result also would cause the United States to be in violation of its obligations under the Berne Convention for the Protection of Literary and Artistic Works, which specifically precludes any such notice requirement.

First, the District Court erred by giving little or no consideration to the creative elements of the photograph at issue (including choice of subject matter, angle, lighting, time-lapse effects, etc.), and instead focusing on the fact that the photograph depicts “a real-world location.” (*Id.*) This error appears to derive from the District Court’s misreading of fair use cases involving written or filmed works, in which some courts have drawn a distinction between factual and fictional works, without any regard to how (if at all) that distinction has been applied in cases involving photographic works. (*Id.* at 4–5.) Indeed, the District Court simply ignores analogous case law involving photographs. Those cases make clear that such works—regardless of their subject matter—are entitled to broad protection. (See Br. at 27–28.)

Second, the District Court erred in holding that “the scope of fair use is broadened when a copyrighted work has been previously published.” (Op. at 5.) Once again, the District Court cited no authority in support of this purported statement of the law. Nor are we aware of any such authority. Although the fact that a work is unpublished may weigh in favor of infringement, the inverse is not true. (See Br. at 28–30.) Indeed, such an inverse rule would have the perverse effect of incentivizing photographers and other creators *not* to make their works available to the public, a result that is directly at odds with the very purpose of copyright law.

III.

THE DISTRICT COURT ERRED IN FINDING THAT THE THIRD STATUTORY FACTOR FAVORED FAIR USE

The District Court erroneously concluded that the third statutory factor (the amount and substantiality of the portion used in relation to the copyrighted work as a whole) weighed in favor of fair use because Violent Hues cropped the photograph and used “no more of the photo than was necessary to convey the photo’s factual content.” (Op. at 6.) In doing so, the District Court ignored that Violent Hues copied the entire photograph before posting it on its website, thereafter made only minimal alterations to the photograph, and then published the very “heart” of the photograph on its website, all without authorization. (Br. at 31–35.) The District Court’s flawed reasoning would effectively grant a free license to any would-be infringer to copy an artist’s entire work, and then publish the creative heart of the work. Such a ruling, if permitted to stand, would eviscerate the market for licensing such works.

IV.

THE DISTRICT COURT ERRED IN FINDING THAT THE FOURTH STATUTORY FACTOR FAVORED FAIR USE

Finally, the District Court erroneously concluded that the fourth statutory factor (the effect of the use upon the potential market for or value of the copyrighted original) weighed in favor of fair use by considering Violent Hues’ unauthorized use in isolation, and failing to take into account the potential market effect if the defendant’s conduct were to become widespread. The District Court also gave

undue weight to the fact that Brammer was able to sell the photograph after Violent Hues' use, and that Brammer was not currently marketing the photo. In deciding this factor in Violent Hues' favor, the District Court lost sight of the fundamental purpose of copyright law—namely, to encourage creators to invest the time, labor, and expense in creating new works for the benefit of society.

The Constitution authorizes Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I. § 8, cl. 8. The purpose of such a monopoly is “to motivate the creative activity of authors and inventors by [providing] a special reward,” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984), and ensure that copyright owners receive “a fair return for their labors.” *Harper & Row*, 471 U.S. at 545–46. To that end, the Copyright Act grants copyright owners the exclusive right to, among other things, reproduce their work, prepare derivative works based on it, and distribute copies of it. *See* 17 U.S.C. § 106.

The affirmative defense of fair use empowers courts to excuse infringement where the societal benefits of the infringement outweigh the costs to the copyright owner and society of doing so. *See Campbell*, 510 U.S. at 576–77 (“[t]he fair use doctrine [] ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is

designed to foster.”” (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)) (internal quotation marks and citation omitted)).

The fourth fair use factor is of crucial importance in protecting the creative interests that the Copyright Act is intended to promote, particularly when it comes to low-income artists who may not yet have established a robust marketplace for their works. To that end, the Supreme Court has made clear that a plaintiff need not show that defendant’s unauthorized use, standing alone, impaired the market for the copyrighted work at issue; instead, “one need only show that if the challenged use should become widespread, it would adversely affect the *potential* market for the copyrighted work.” *Harper & Row*, 471 U.S. at 568 (emphasis in original) (internal quotation marks and citation omitted).

The District Court failed to undertake any such analysis in this case, and instead based its examination of this factor solely on whether Violent Hues’ use, by itself, adversely affected the market for Brammer’s photograph. This was error. Under the District Court’s reasoning, there would be no need for users such as Violent Hues to pay creative artists such as Brammer anything at all for the use of their works, so long as each individual use of that work, in isolation, did not prevent the artist from marketing his or her works to others. Such a result would make it less likely that the artists represented by VLA, who are already struggling to make a living from their creative endeavors, would want, or be able, to create new

photographs or other artistic works. Such a result also would create significant incentives against those artists making those works available for licensing purposes. This, in turn, would make it difficult, and potentially impossible, for users such as Violent Hues to find the very images on which their websites depend.

In sum, if the District Court’s decision is permitted to stand, all artists would be harmed, and the symbiotic relationship that should exist between those who generate new copyrighted works and those who seek to use such works would be undermined. *See Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 551 (S.D.N.Y. 2008) (users “should not be permitted to ‘plunder’ the works of original authors . . . ‘without paying the customary price,’ lest original authors lose incentive to create new works that will also benefit the public interest” (quoting *Harper & Row*, 417 U.S. at 562) (citations omitted)); *see also New Era Publ’ns Int’l, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1526 (S.D.N.Y. 1988), *aff’d*, 873 F.2d 576 (2d Cir. 1989) (“The copyright seeks to ensure that authors will not be deprived of the fruits of their labors and will be encouraged to employ their creative talents by confidence that the rewards will not be taken from them.” (citing *Harper & Row*, 471 U.S. at 557)).

In purported support of its erroneous analysis of the fourth factor, the District Court noted that Brammer has sold and licensed the photograph at issue on numerous occasions, and that “[a]t least two of these sales occurred after Violent Hues’ alleged

infringement began, demonstrating that Violent Hues’ use did not affect the market for the photo.” (Op. at 6.) In actuality, these facts indicate precisely the opposite. Because there was a pre-existing market for the licensing of Brammer’s photograph, there was a viable market that was harmed. By using the photograph without authorization and compensation, Violent Hues deprived Brammer of the licensing revenue he otherwise would have received for that use.

The District Court also noted that Brammer “currently makes no effort to market the photo.” (*Id.*) But the fact that Brammer has ceased to market the photo after Violent Hues’ infringing use only further demonstrates the market harm caused by Violent Hues’ infringing conduct, especially since the District Court specifically acknowledged that Brammer had successfully licensed the photograph prior to the infringing use. In any event, an artist may have any number of reasons for not marketing a photograph at a given time. For this reason, numerous courts have deemed it irrelevant whether the creator presently wishes to market his or her work.

See, e.g., Balsley v. LFP, Inc., 691 F.3d 747, 761 (6th Cir. 2012) (plaintiffs’ “current desire or ability to avail themselves of the market . . . is immaterial to the issue outlined by the statute, namely, whether there is potential for an adverse effect on the market for the photograph should the challenged use become widespread”); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000) (finding market harm where copyright holder had no plans to publish

because the relevant analysis was of the potential market); *Castle Rock Entm't, Inc. v. Carol Pub. Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) (noting that although plaintiff had shown little interest in exploiting the trivia book market, “copyright law must respect that creative and economic choice”).

These principles are of particular importance to VLA’s constituency—artists who depend on revenues from the sale and licensing of their work to earn a living. Low-income artists must bear significant upfront costs to produce their work, and have to rely on the hope or expectation that they can recoup those expenses later by exploiting their work commercially. Photographers, for example, must invest thousands of dollars in equipment like camera bodies and lenses, tripods, film or digital storage, lighting equipment, computers, and photo storage and editing software.² On top of those basic costs, photographers must further invest time and effort in choosing and traveling to the right location, setting up, and capturing their images.

Few low-income photographers could afford to take on such expenses if not for the hope of payment down the road, a reward that is contingent on enforceable property rights in their creations. In order to earn a living, such photographers

² *How Much Does It Cost To Start a Photography Business?*, THE MODERN TOG, <https://www.themoderntog.com/cost-start-a-photography-business/> (last visited Oct. 26, 2018).

require that someone notices and pays for the use of their works. This means a lesser-known photographer has to assume risks—not only the risk of investing time and resources into a work that may not earn money, but also the risk of publishing that work online in the hope that it is discovered and someone seeks to license the image or buy a print of it, all of which exposes the work to the possibility of unauthorized use by others.

As technological changes make it more challenging for low-income artists to protect their work, courts should acknowledge the resulting economic realities and enforce copyright law to help these creators safeguard their livelihoods.

CONCLUSION

For these reasons, the District Court’s order should be reversed.

Dated: October 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system.

Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this memorandum of law complies with the requirements of Federal Rule of Appellate Procedure 27(d)(2). The memorandum contains 4,415 words, excluding the parts of the memorandum exempted by Federal Rule of Appellate Procedure 27(d)(2) and Federal Rule of Appellate Procedure 32(f).

Pursuant to Federal Rule of Appellate Procedure 27(d)(1)(E), this memorandum complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The memorandum has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman font.

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