

# European Workshop

Copyright Regulation in Europe –  
An Enabling or Disabling Factor for  
Science Communication

## **GREEN PAPER** **Copyright in the** **Knowledge Economy**

COMMISSION OF THE EUROPEAN  
COMMUNITIES

Brussels, 16.7.2008 COM(2008) 466 final

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 **HEINRICH BÖLL STIFTUNG**  
The Green Political Foundation



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# Coalition for Action "Copyright for Education and Research" Aktionsbündnis „Urheberrecht für Bildung und Wissenschaft“

<a href="#">Göttingen Declaration</a>	<a href="#">Subscribers</a>	<a href="#">How to subscribe?</a>	<a href="#">Activities</a>	<a href="#">Links</a>	<a href="#">Contact</a>	<a href="#">Imprint</a>	
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## The Göttingen Declaration on Copyright for Education and Research of 5 July 2004

Göttingen Declaration for printout: [\[PDF-file\]](#) [\[RTF-file\]](#) [\[DOC-file\]](#)

### Preliminary Remarks

The answer to the question 'How accessible are knowledge and information?' will determine the opportunities for education and development open to every citizen in the information society and the opportunities future generations will have to build on existing knowledge. The legal provisions set out in German copyright law will determine whether open, networked communications structures will continue to develop in our society in the long term. They will also affect the quality of our education system, the inventiveness of the sciences and the innovative capacity of trade and industry. In a global, competitive environment, they play a vital role in promoting social, cultural and economic development and hence in securing the future of our society.

***In a digitised and networked information society, access to global information for the purposes of education and science must be guaranteed at all times from any place.***

### Goals

**Education and research** must be allowed unrestricted use of the new ways of disseminating and acquiring knowledge and information. However, the limitations in German copyright law (particularly sections 52a and 53) no longer set out the privileges needed by education and science in a positive, clearly understandable and practicable way. Instead, these privileges are subject to considerable restrictions which are likely to create uncertainty or even criminalise those working in education and science, instead of offering the legal certainty they require to perform work for the benefit of the general public.

**Next Relevant Dates**

December 11<sup>th</sup> 2008:  
**„Das Urheberrecht zwischen den nationalen Körben und dem internationalen Rahmen“**  
 Workshop des „Urheberrecht für Bildung und Wissenschaft e.V.“ in Berlin, 13 bis 18:30 Uhr.  
 Am 12.12. vormittags: **Vollversammlung des Aktionsbündnisses** [\(more...\)](#)

**News**
RSS 0.92

October 20<sup>th</sup> 2008:  
 Bildungsgipfel ohne Informationsfreiheit nur eine Schimäre [\(more...\)](#)

July 24<sup>th</sup> 2008:  
 Vorsichtiger Optimismus — Bewegung im europäischen Urheberrecht? Ein neues Grünbuch der EU-Kommission [\(more...\)](#)

# The questions mailed to participants

1. Are there special rights for authors in science and education in your Copyright regulation?
2. What are the exceptions and limitations in favour of science and education in your copyright regulation?
3. What are the rights and the practice of libraries and other information services in your countries in order to provide people working in science and education with the information that they need for their work?
4. To what extent are technical protection means (digital rights management) protected in your copyright regulation and which consequences do these technical protection means have for science and education?
5. Are there any norms in your copyright regulation or any suggestions or plans in your parliament or government which will support open access publishing in science and education?

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**Knowledge Economy**

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# GREEN PAPER

## Copyright in the Knowledge Economy

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# The purpose of the Green Paper

The purpose of the Green Paper is to foster a debate on how knowledge for research, science and education can best be disseminated in the online environment.

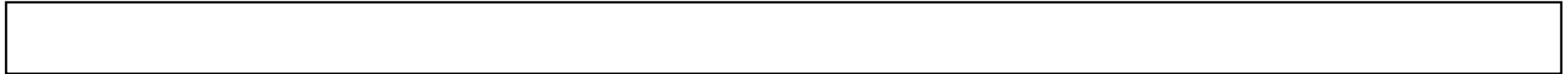
The Green Paper will address all issues in a balanced manner taking into account the perspective of publishers, libraries, educational establishments, museums, archives, researchers, people with a disability and the public at large.



# The scope of the Green Paper

the need to promote free movement of knowledge and innovation as the "Fifth Freedom" in the single market.

The Green Paper will focus on how research, science and educational materials are disseminated to the public and whether knowledge is freely circulating in the internal market.



# A high level of copyright protection is crucial for intellectual creation.

Copyright ensures the maintenance and development of creativity in the interests of authors, producers, consumers and the public at large. A rigorous and effective system for the protection of copyright and related rights is necessary to provide authors and producers with a reward for their creative efforts and to encourage producers and publishers to invest in creative works.

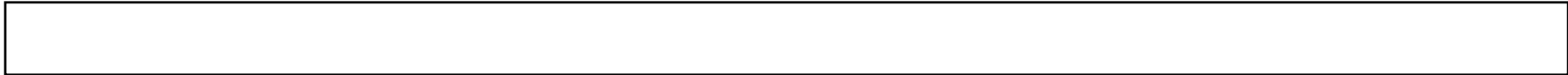
The Commission solicits the views of researchers on new ways of delivering digital content. These new modes of delivery should allow consumers and researchers to access protected content in full respect of copyright.



# List of exceptions

the Directive introduced an exhaustive list of exceptions to copyright protection, although there was no international obligation to do so.

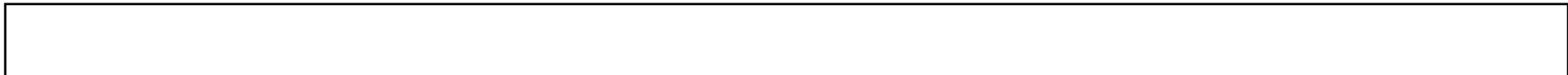
The primary reason for having such a list of exceptions appears to be to limit Member States' ability to introduce new exceptions or extend the scope of the existing ones beyond what is allowed under the Directive.



## three-step test – holy cow

Article 5(5) of the Directive provides that the exceptions and limitations permitted by the Directive are to be applied in certain special cases, which do not conflict with the normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder. This provision is known as the "three-step test".

The three-step test is therefore part of the international copyright framework which the Community and its Member States are bound to respect. It has become a benchmark for all copyright limitations.



# EXCEPTIONS: SPECIFIC ISSUES

The Green Paper focuses on the exceptions to copyright which are most relevant for the dissemination of knowledge, namely:

- The exception for the benefit of libraries and archives;
- The exception allowing dissemination of works for teaching and research purposes;
- The exception for the benefit of people with a disability;
- A possible exception for user-created content.

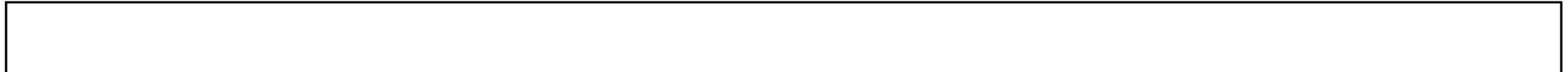


# Exceptions for libraries and archives

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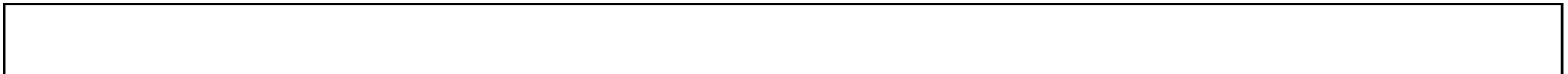
As regards the libraries and other similar establishments, two core issues have arisen: the production of digital copies of materials held in the libraries' collections and the electronic delivery of these copies to users. Digitisation of books, audiovisual material and other content can serve a twofold purpose – preservation of content for future generations and making it available for end users online.

In recent years libraries and other public interest establishments have become increasingly interested not only in preserving (digitising) works but also in making their collections accessible online.



## libraries, educational establishments, archives and museums benefit from two exceptions in the Copyright Directive

- an exception to the **reproduction right** for specific acts of reproduction for non-commercial purposes (Art. 5(2)(c) of the Directive) and
- a narrowly formulated exception to the **communication to the public right** and the making available right for the purpose of research or private study by means of dedicated terminals located on the premises of such establishments (Art. 5(3)(n) of the Directive).



# Reproduction right (libraries etc.)

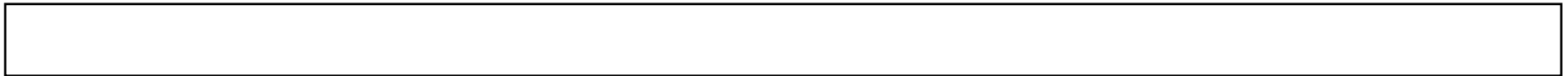
The exception from the reproduction right is limited to "specific acts of reproduction". [according to the "three-step test,,"]

The careful wording of this exception would thus imply that it does not provide libraries or other beneficiaries with a blanket exception from the right of reproduction.



## *The making available of digitised works*

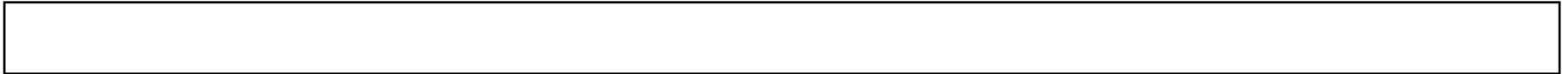
Under current copyright legislation, publicly accessible libraries, educational establishments or museums and archives benefit from a narrowly formulated exception to the right of communication to the public or to making available to the public works or other subject matter, if this is done for the purpose of research or private study by means of dedicated terminals located on the *premises of such establishments (Art. 5(3)(n) of the Directive)*.



# Orphan *works*

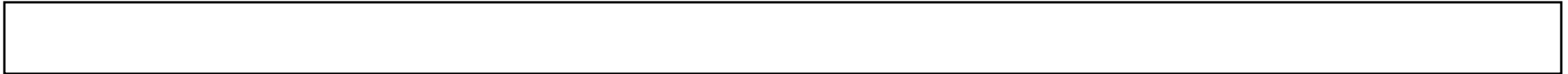
# *Orphan works*

Orphan works are works which are still in copyright but whose owners cannot be identified or located. There is a significant demand for the dissemination of works or sound recordings of an educational, historical or cultural value at a relatively low cost to a wide audience online. It is often claimed that such projects are held up due to the lack of a satisfactory solution to the orphan works issue



## orphan works - mainly a rights clearance issue

Copyright clearance of orphan works can constitute an obstacle to the dissemination of valuable content and can be seen as hampering follow-on creativity. However, the extent to which orphan works actually impede uses of works is not clear. There is a scarcity of the necessary economic data which would allow the problem to be quantified on the pan-European level.



## orphan works – need for harmonisation

The majority of the Member States have not yet developed a regulatory approach with respect to the orphan works issue. The potential cross-border nature of this issue seems to require a harmonised approach.



**Dissemination of works for  
teaching and research  
purposes**

# Dissemination of works for teaching and research purposes

While dissemination of study materials through online networks can have a beneficial effect on the quality of European education and research, it may also carry a risk of copyright infringement where the digitization and/or making available of copies of research and study materials are covered by copyright.



## Science/Education - Public interest – interests of the right

The public interest exception for teaching and research purposes was designed to reconcile the legitimate interests of the rightholders with the wider goal of access to knowledge.

The Copyright Directive allows Member States to provide for exceptions or limitations to the rights of reproduction and communication to the public when a work is used "for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible." This exception has often been implemented in a narrow sense and distance or Internet-based learning at home is not covered. Also, the exception often only covers copying excerpts of the research material rather than the entire work.



# Science/Education - What is 'teaching', or 'scientific research'?

At the time of the adoption of the Directive, both traditional classroom instruction and modern e-learning methods were taken into consideration.

Recital 42 thus states that Article 5(3)(a) may also apply to distance education. However, this is not further reflected in the wording of Article 5(3)(a) itself, as it contains neither the definition of the concepts of 'teaching', 'scientific research' or 'illustration' nor any further clarification as to the scope of the exception. Recital 42 refers to the non-commercial nature of teaching and scientific research as the determining criterion for the application of the exception, irrespective of the organizational structure and the means of funding of the institution where these activities are undertaken.



## Science/Education - Different rights in different countries

In some countries ... the use of works for purposes of illustration for teaching and research is subject to the conclusion of extended collective agreements between the collecting societies and educational establishments. Despite the advantages of a system of extended collective licensing (the institutions can negotiate the contracts which are best adapted to their needs), this form of licensing presents the risk that no agreement or a rather restrictive agreement will be reached, thus creating legal uncertainty for educational establishments



## Science/Education – analogue - digital

As regards the mode of copying, most Member States do not make any distinction between analogue and digital copies, and both of them are therefore covered by the exception.

But many countries restrict the scope of the exception to analogue reproductions only.

Different treatment of the same act in different Member States may lead to legal uncertainty with regard to what is permitted under the exception, especially when teaching and research are carried out within a transnational framework.



# Science/Education – using online access

An increasing number of students and researchers prefer to have access to relevant learning resources not only in a traditional classroom environment, but also using online networks, without any constraints of time or geography.



## Science/Education – length of the excerpts

Another divergence between the Member States concerns the length of the excerpts from works which can be reproduced or made available for teaching and research purposes.



# Science/Education – which institutions are privileged?

With regard to the institutions that could benefit from the exception for teaching and scientific research, the Member States have also adopted different solutions.



# Science/Education – a need for a general mandatory exception

there have been calls to introduce a mandatory exception for teaching and scientific research, with a clearly defined scope in the Directive. For example, the Gowers Review recommends that the educational exception "should be defined by category of use and activity and not by media or location".

However, making the exception mandatory and further clarifying its scope does not imply its extension, because the interests of the rightholders must be taken into consideration.



## Science/Education – balances

Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter."

The proper balance needs to be struck between ensuring an adequate level of protection of exclusive rights and at the same time enhancing the competitiveness of European education and research.



# User-created content

# User-created content – balances

Consumers are not only users but are increasingly becoming creators of content. Convergence is leading to the development of new applications building on the capacity of ICT to involve users in content creation and distribution. Web 2.0 applications such as blogs, podcasts, wiki, or video sharing, enable users easily to create and share text, videos or pictures, and to play a more active and collaborative role in content creation and knowledge dissemination.



## User-created content – a need for a new exception?

The Directive does not currently contain an exception which would allow the use of existing copyright protected content for creating new or derivative works. The obligation to clear rights before any transformative content can be made available can be perceived as a barrier to innovation in that it blocks new, potentially valuable works from being disseminated.



# User-created content – a need for a new exception?

However, before any exception for transformative works can be introduced, one would need to carefully determine the conditions under which a transformative use would be allowed, so as not to conflict with the economic interests of the rightsholders of the original work.



# User-created content – a need for a new exception?

There have been calls for the acceptance of an exception for transformative, user-created content. In particular, the Gowers Review recommended that an exception be created for "creative, transformative or derivative works", within the parameters of the Berne Convention three-step test. The Review acknowledges that this would be contrary to the Directive and accordingly calls for its amendment. The objective of allowing such an exception would be to favour innovative uses of works and to stimulate the production of added value.



# ***EU-Green Paper - Conclusion***

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Is there some hope for a new science- and education-friendly directive?

For the EU the concept of the **knowledge economy** is based on the assumption that knowledge and education (also referred to as "human capital") can be treated as a commercial asset or as educational and intellectual products and services that can be exported for a high value return.

**but**

# *EU-Green Paper - Conclusion*

## Cautious optimism

- The discussion about a closed or open list of limitations is reopened.
- The discussion about the extent of document delivery is reopened, too
- The discussion about the scope of electronic material to be communicated to users in science and education is reopened, too
- There will a new debate about a general principle for exceptions (“fair use“)
- There will a new debate about a general science, education and library privilege.

# *EU-Green Paper - Conclusion*

The EU Commission supports the unhampered free flow of knowledge and innovation in favour of the EU domestic market  
but

Raising the general knowledge level of all EU citizens seems to be part of the new EU social agenda

**Fifth freedom:  
Knowledge?**

Will there be a renaissance of **common property rights** on knowledge opposite to exclusive **private property rights** on knowledge?

# ***EU-Green Paper Questions***

- (1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions**

**(1) Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions**

**No**

The information economy prefers private contractual arrangements and licences in order to make each usage liable to pay costs.

For libraries and end-users licences agreements have always/mainly negative consequences.

Contractual arrangements and licences can easily override copyright exceptions (in the law) which should protect use with permission as users' rights-

## *EU-Green Paper Question 2 - contractual arrangements*

**(2) Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?**

**(2) Should there be encouragement, guidelines or model licenses for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?**

**No**

Contractual arrangements outside the law threaten free access to already published works.

Already published work should no longer be at complete disposals of creators/authors let alone exploiters.

## *EU-Green Paper Exception Question 3*

**(3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?**

**(3) Is an approach based on a list of non-mandatory exceptions adequate in the light of evolving Internet technologies and the prevalent economic and social expectations?**

**Yes and no**

A list of mandatory exceptions might be useful – but this does not supersede a general principle for usage without permission (such as the fair use principle)

## *EU-Green Paper Exception Question 4, 5*

**(4) Should certain categories of exceptions be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions?**

**(5) If so, which ones? [in particular in favour of science and education – RK ]**

**(5) Which categories of exceptions should be made mandatory to ensure more legal certainty and better protection of beneficiaries of exceptions??**

- quotation right
- reproduction
- (electronic) document delivery
- communication to the public
- orphan works
- Information brokering
- eLearning
- Derivative (creative) work
- Collaborative work

## *EU-Green Paper Library Question 6*

**(6) Should the exception for libraries and archives remain unchanged because publishers themselves will develop online access to their catalogues?**

## *EU-Green Paper Library Question 7*

**(7) In order to increase access to works, should publicly accessible libraries, educational establishments, museums and archives enter into licensing schemes with the publishers? Are there examples of successful licensing schemes for online access to library collections?**

## *EU-Green Paper Library Question 8*

**(8) Should the scope of the exception for publicly accessible libraries, educational establishments, museums and archives be clarified with respect to:**

- (a) Format shifting;**
- (b) The number of copies that can be made under the exception;**
- (c) The scanning of entire collections held by libraries**

## *EU-Green Paper Library Question 9*

**(9) Should the law be clarified with respect to whether the scanning of works held in libraries for the purpose of making their content searchable**

## *EU-Green Paper Library Question 10*

**(10) Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?**

## *EU-Green Paper Library Question 10, 11*

**(10) Is a further Community statutory instrument required to deal with the problem of orphan works, which goes beyond the Commission Recommendation 2006/585/EC of 24 August 2006?**

**(11) If so, should this be done by amending the 2001 Directive on Copyright in the information society or through a stand-alone instrument?**

## *EU-Green Paper Library Question 12*

**(12) How should the cross-border aspects of the orphan works issue be tackled to ensure EU-wide recognition of the solutions adopted in different Member States?**

## ***EU-Green Paper Disability Questions 13-18***

- (13) Should people with a disability enter into licensing schemes with the publishers in order to increase their access to works? If so, what types of licensing would be most suitable? Are there already licensing schemes in place to increase access to works for the disabled people?**
- (14) Should there be mandatory provisions that works are made available to people with a disability in a particular format?**
- (15) Should there be a clarification that the current exception benefiting people with a disability applies to disabilities other than visual and hearing disabilities?**
- (16) If so, which other disabilities should be included as relevant for online dissemination of knowledge?**
- (17) Should national laws clarify that beneficiaries of the exception for people with a disability should not be required to pay remuneration for using a work in order to convert it into an accessible format?**
- (18) Should Directive 96/9/EC on the legal protection of databases have a specific exception in favour of people with a disability that would apply to both original and sui generis databases?**

## *EU-Green Paper Teaching/Research Question 19*

**(19) Should the scientific and research community enter into licensing schemes with publishers in order to increase access to works for teaching or research purposes? Are there examples of successful licensing schemes enabling online use of works for teaching or research purposes?**

## *EU-Green Paper Teaching/Research Question 20*

**(20) Should the teaching and research exception be clarified so as to accommodate modern forms of distance learning?**

## *EU-Green Paper Teaching/Research Question 21*

**(21) Should there be a clarification that the teaching and research exception covers not only material used in classrooms or educational facilities, but also use of works at home for study?**

## *EU-Green Paper Teaching/Research Question 22*

**(22) Should there be mandatory minimum rules as to the length of the excerpts from works which can be reproduced or made available for teaching and research purposes?**

**(23) Should there be a mandatory minimum requirement that the exception covers both teaching and research?**

**(24) Should there be more precise rules regarding what acts end users can or cannot do when making use of materials protected by copyright?**

## *EU-Green Paper User-created content Question 25*

**(25) Should an exception for user-created content be introduced into the Directive?**

**Thank you for your attention**

**And now the workshop**

**The Green Paper “Copyright in  
the Knowledge Economy”**

# The questions mailed to participants of the workshop

1. Are there special rights for authors in science and education in your Copyright regulation?
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4. To what extent are technical protection means (digital rights management) protected in your copyright regulation and which consequences do these technical protection means have for science and education?
5. Are there any norms in your copyright regulation or any suggestions or plans in your parliament or government which will support open access publishing in science and education?

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