

Copyright for Sound Designers
By Tom Mardikes

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COPYRIGHT *for* SOUND DESIGNERS: *Frequently Asked Questions*

Copyright issues are a constant concern among sound designers: the USITT Sound Commission has devoted at least one conference session to the topic, copyright questions are frequently asked during the commission's annual Open Sound Forum and copyright issues are a hot topic several times a year on the Theatre-Sound Mailing List, an Internet discussion group. There are two basic issues: knowing how to protect one's own work and knowing if someone else's work can be used for free or if fees must be paid. Using a question and answer format, this article will first explain some basic concepts of copyright law and then will get into some specific questions and scenarios related to the work of theatrical sound designers. At the end is a proposal (a dream of mine) for a copyright management system that takes into account the needs of theatre sound designers and a list of resources. Let's get started.

Are you an expert?

Thanks, the necessary disclaimer must be given. I am not an attorney or a copyright expert. Anyone with concerns over the use of someone else's material or the protection of his or her own work should consult with a lawyer who is familiar with copyright and entertainment law. Copyright law is amended by Congress almost every two years and court cases continually change the interpretation of the laws. Only an expert in the field can offer solid advice. With that said, I offer this article as a basic explanation of what I understand as a professional sound designer. My goal is to give readers the ability to ask knowledgeable questions when they talk to an attorney, a music publisher or a theatre general manager.

Copyright laws just complicate things and stop people from doing creative work. We would be better off without them, right?

Not at all. Copyright law came into existence to encourage and protect creators of intellectual property. It is a key component of our free market entrepreneurial system. One of the first uses of copyright protection was for chart and

map makers. No company wanted to spend the time and effort to prepare accurate maps if as soon the map was created a competitor bought one, copied it and began selling it cheaper. Our lawmakers have determined since the beginning of this republic that protection and time were the necessary values to encourage the creation of intellectual property, and this determination remains today. Maps, books, software, playscripts, songs, sound recordings and paintings are all considered intellectual property and are protected by copyright law. Inventions, hardware, mechanical, chemical and physical processes are all protected by patents. A fascinating part of our law is that copyright protects only works actually created in some fixed form and patent law protects only an invention that has a working prototype. Our laws do not allow the registration of ideas, only fixed works. Our government spots the creator of an intellectual work a number of years of protection, during which time the civil courts of the nation will hear cases and the FBI and various state agencies will investigate and prosecute copyright infringements. When that time runs out anyone can do whatever they want with the work. Essentially, the government guarantees the creator a short-term monopoly.

How long do you have to wait until a copyright's time has run out?

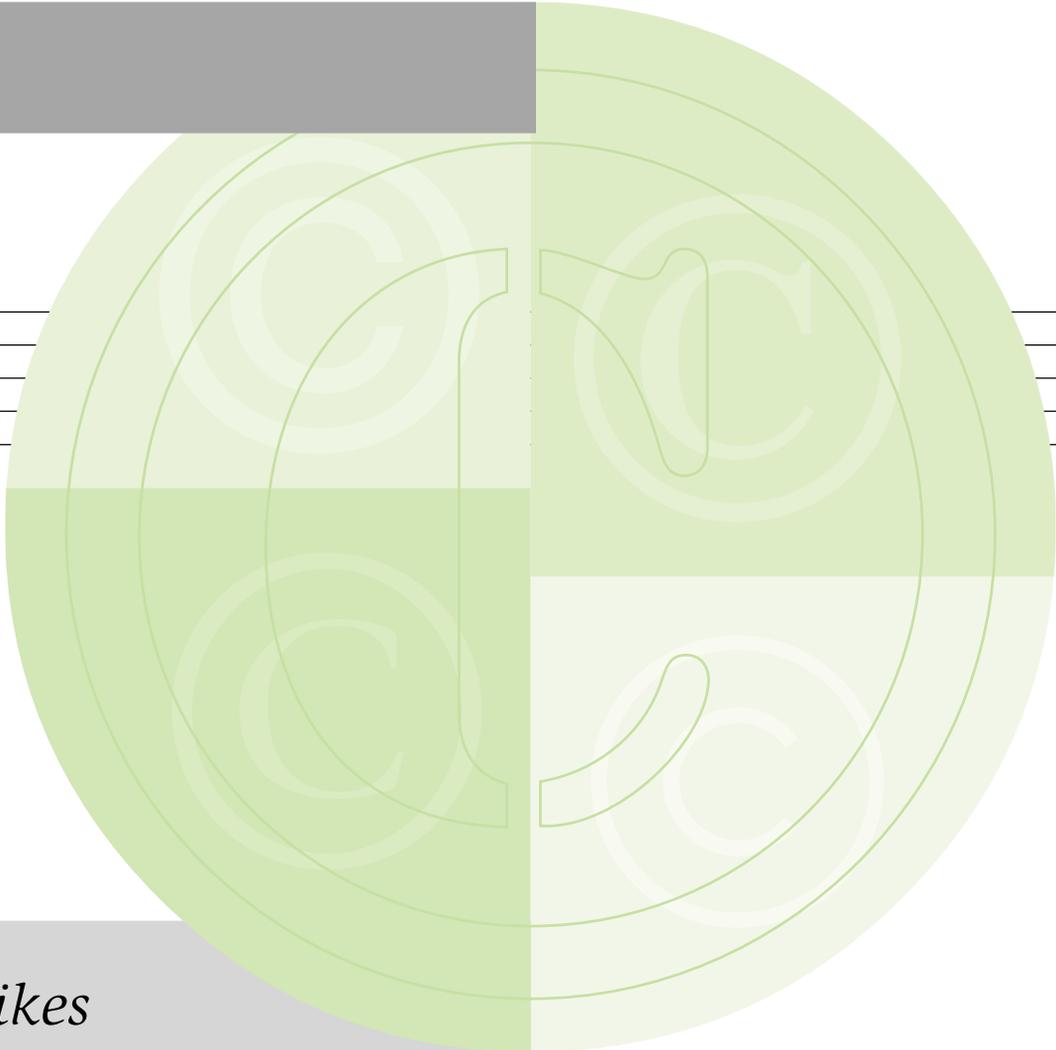
Longer and longer. In 1790 copyright protection lasted fourteen years and another fourteen could be earned by filing for a renewal. In 1909 protection was twenty-eight years with a twenty-eight-year renewal. In 1976 the law changed the duration to "life of the author plus fifty years." The Sonny Bono Copyright Term Extension Act (10/27/98) extended the term for most works to life plus seventy years. Notice that in the twentieth century the duration of copyright protection focused on the life of the author. This change has been driven by our compliance by treaty with other nations. The intent is to offer protection and control to creators during their lifetimes and allows heirs the same benefit for a number of years. Duration figures also exist for works owned by cor-

porations or companies. Currently a corporation that claims a copyright files for copyright registration as a "work-for-hire," which means that all the people working to create the property were employees or signed agreements assigning ownership to the corporation. Most films are produced as works-for-hire. Your theatre company may claim your design as a work-for-hire. Today a work-for-hire gets protection for ninety-five years from date of registration.

When a copyright expires, the work is said to go into the public domain. Public domain (PD) means we all own it. Whatever the United States government publishes is automatically considered to be in public domain and can be copied freely. The death stamp to a music publisher is PD: once a work goes PD it can never regain copyright protection (even if new legislation were to add more years of protection). No one wants his or her copyright protection to run out. Today, it's not uncommon for a forty-year-old songwriter to list an infant child as co-writer of a song, thereby significantly extending its copyright protection. A coming conflict I see however is that corporations never die, they just keep going or fold into another corporation. It's very possible that a corporation will still be around ninety-five years after receiving copyright protection for some valuable creation. Mickey Mouse, for instance, made his debut in 1927 so he was slated to go PD in 2002. The Walt Disney Corporation was saved by the Sonny Bono law in 1998. Now Mickey is protected until 2022. You can bet there will be Disney lobbyists working hard during that time to extend their copyright protections even further. Another example is J.M. Barrie's *Peter Pan* which almost went into public domain a few years ago. The British Parliament, however, noting that the beneficiary of the substantial licensing revenues from this beloved story happens to be a children's hospital in London decided to give *Peter Pan* copyright protection in perpetuity. Governments can do that.

How do I know if a copyrighted work is in public domain?

You first have to know when the work was cre-



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ated. Then you have to take into account the different copyright duration periods. The United States Copyright Office has a free booklet, *Circular 15a*, which explains the provisions of copyright law pertaining to duration. It's available in PDF format on the Web at www.loc.gov/copyright/circs/. Here are some examples of works now in public domain and some that are still protected: A work published in 1910 would have twenty-eight years initial protection and twenty-eight years renewal. It would have gone into public domain in 1966. A work published in 1920 would have twenty-eight years initial protection, twenty-eight years renewal and would have gone public domain in 1976. It stays in public domain because the 1976 law extending the term did not go into effect until January 1, 1978. A work published in 1966 would have gone PD in 1994 except for the changes in copyright law—the Copyright Act of 1976 and its amendments in 1992 and 1998. Assuming the work is owned by a corporation, these new laws would

give it a total of 95 years of protection, so it would go public domain in 2061. (We'll never get access to those songs by the Beatles!) A work published in 1980 would be given the life of the author plus seventy years, or ninety-five years as a work-for-hire (2075PD).

If I do a design for a theatre, creating music and sound, do I own my work?

Some theatres claim ownership. If you sign an agreement stating the design you create is a work-for-hire or if you are a full-time employee of the theatre and you receive a benefits package (health insurance, etc.) then the theatre can claim ownership. If you are an itinerant designer (better known as an independent contractor) and do a couple of shows a year for a theatre, then you own the design. In the United Scenic Artists' model design agreement all designers (including sound designers) own their designs and the theatre is essentially paying for a one-time use of it for

the production. The theatre may get a discounted fee on a remount but does not have any claim to your design if you want to license it to another theatre.

I have a few scores that I would like to protect. I've sold them to several theatres and I want to make sure another theatre doesn't take my work. How do I copyright my score?

Copyright law guarantees protection from the moment of fixation. Again, copyright laws do not protect ideas or creative expressions unless they are "fixed in a tangible form of expression." Fixing a work is accomplished when it is written down, recorded or built into a cue. Once something is fixed, protection is achieved. Period. Now you can go a step further. You can register your work with the Copyright Office at the Library of Congress. A musical composition would use Form PA (Performing Arts), a sound recording is Form SR

and you can register a collection (and save a lot of money) by using Form CA (Correction/Amplification). Please note that you do not have to send anything to the Copyright Office to protect your copyright. It is guaranteed by the government at the moment it is fixed. Registration of a copyright however, provides additional protection. Should you discover an infringement of your work, hire an attorney and go to trial, a victory for you means that the court will order the infringer to pay your attorney's fees and you will have the choice of receiving actual damages or statutory damages. Statutory damages established by the court are usually higher. Attorney's fees are always very expensive, maybe higher than the damages awarded to you by the court. So register your work if you think there is any possible chance you might need the added protection. It only costs \$30 to register an entire design. With that said, I know of no sound designer/composer who registers his or her work.

Why are there different copyright forms for composition and sound recording?

Whenever a musical composition is considered, two rights are always in play. There is the written musical score created by a composer and usually controlled by a music publisher *and* a sound recording of the music performed by recording artists and controlled by a record company.

Do you have to get permission from two parties in order to legally use someone else's music?

Maybe.

What are the rights of a copyright owner?

There are five basic rights for owners of copyrighted works. The right

- to reproduce,
- to prepare derivative works,
- to distribute,
- to perform,
- to display.

Of the five only two, possibly three, come into serious concern for the sound designer. Distribute and display are not really concerns since sound designers are probably not going to be mass marketing products from their designs or be visually representing someone else's music. Derivative work preparations definitely need to be licensed, and a license should be secured before a derivative work is commenced.

What about the other two, to perform and to reproduce?

Reproduction deals with the right to make copies and manufacture copies. Now this gets technical and theoretical. Anyone can purchase a recording and make their own home copy, but that does not include a professional use for the theatre. If a sound designer wants to use copyrighted material, a license is necessary to give him or her permission to copy a sound recording into a computer, or to copy it from say a purchased compact disc to minidisc. Actually, two licenses are necessary if a piece of music were being copied. A mechanical license from the music publisher is necessary to authorize use of a composer's work and another license is required from the record company. Let's be honest though, hardly any theatres bother to get reproduction licenses from publishers or record companies.

Have sound designers been prosecuted for not licensing copyrighted works?

Not yet. But record companies could get really nasty here if they wanted to. There are incredibly strong anti-counterfeiting and anti-pirating laws that could be applied to a theatre operation and its sound designer throwing them into criminal court if someone wanted to push the case. Sound designers often refer to what they do as "flying under the radar."

What does that mean?

It means that if we fly low enough we won't be spotted. It also means that the value of what we steal from record companies and music publishers is not significant enough yet for them to prosecute. It means that only a couple of theatres in music industry markets (NY, LA) really worry about clearing what they use. I know of a theatre in Chicago that didn't clear the use of "Happy Birthday" and several other popular songs in a production, but if the show had gone to Broadway, they would have. But now we are shifting our focus from reproduction rights to performance rights.

Aren't performance rights covered by an ASCAP or BMI license?

Performance is the strangest rights category that we will talk about, and it is where most of the licensing action takes place. According to copyright law as it relates to the music business, performance rights deal with live presentation to the public. This definitely includes all theatrical presentations but interestingly also includes broadcasting. In the

early twentieth century the main sources of revenue for a music publisher and a composer were dramatic performance royalties earned from Vaudeville productions or Broadway musicals, sheet music sales and an increasing stream on mechanical licenses from records sold. Performing Rights Societies, first ASCAP (American Society of Composers, Authors and Publishers) and later BMI (Broadcast Music Industries) were formed to license the use of music and collect money from the users of music. At first ASCAP was licensing/collecting for variety shows, restaurants and nightclubs. These were called Small Rights because the real money was in Vaudeville and on Broadway; these were the Grand Rights. The irony here is that Small Rights grew to include the explosion of radio and later television, cable and satellite broadcasting and Grand Rights have been totally dwarfed by this growth. ASCAP tried to license the use of music in movie theatres and lost the case in court many years ago. The outcome was that Performing Rights Societies are enjoined from licensing music in the movie industry. They are also very limited in what they can license in theatrical performance.

So the answer to your question is *no*. ASCAP/BMI can issue licenses covering the nondramatic use of preshow and intermission music in the theatre and in the lobby, but the theatre must go directly to the music publisher to license the use of a song to be included within a production. This use should be called a dramatic performance license but frequently music publishers refer to it as a grand license. Al and Bob Kohn in their illuminating book *Kohn on Music Licensing* have a whole chapter on the dramatic use of music called "The Grand Rights Controversy" where they try to demystify and correctly describe and define the use of Grand Rights. Very simply put, they consider a Grand Right to be only the licensing of an entire work from the creating producers, like a musical or opera, where the license might include everything from the music, score, book and even designs and staging. Licensing a single song from a musical doesn't call for a Grand Rights license according to the Kohns. In a way, their definition puts the grand back into Grand Rights. For them, that leaves two other categories, dramatic performance and nondramatic performance. Here the determination spins on whether the use of the song in a production is

participating in the telling of the story. They assert that a license is needed from a music publisher to use a song in a dramatic production that advances dramatic action. A variety show, say a presentation of a number of Broadway musical show tunes, tells no story and thus could actually be covered by an ASCAP/BMI license.

So how do we go about getting permission to use a piece of music?

Here is the beauty of the situation for the sound designer. All you have to do is give the information you have about a particular song to the theatre business office and it is their responsibility to negotiate the use and fees and to secure licenses. First, the sound designer's contract should state that the designer is only responsible for supplying the information that the designer has about music being used; a list including what can be taken off of the media like the song title, composer, publisher, performing rights society, year of copyright. (A couple of these is all the theatre needs to identify who controls the music. ASCAP and BMI have search engines on their Web sites that allow a user to find publishers for songs.) Second, the designer's contract should hold him or her harmless from legal action by a publisher against the theatre and place all responsibility upon the theatre. That is it as far as the sound designer is concerned. It might interest you to know that the business office may contact the publisher directly, may engage the services of a music clearing house, or may file your list of songs used in File 13. Based on my experience, I would expect a LORT theatre to pay a fee of about \$100 to \$150 for permission to use a song for a two-to-three-week run of a show. Clearing House services typically cost about as much as the fees paid to publishers. Sometimes the business office, trying to operate legitimately, will instruct the sound designer to pull a song from a show because a publisher refused to issue a license. Fortunately, publishers are getting more used to licensing bits of songs today because of the sampling rage.

So what can a sound designer use legally without having to get a license?

From the music perspective a song cannot be quoted in a recognizable way without the permission of the author/publisher. "Happy Birthday" cannot be hinted at without a license to do so, even embedded within an original musical score. So, the direct answer is, except for

very limited circumstances considered "fair use," if a designer wants to use a copyrighted work, he or she must get permission.

Some theatres try to pass off their unlicensed use of a song under the Fair Use provision of the copyright law. However, fair use is widely misunderstood and abused. The basic tests of fair use are whether the author is deprived of income and/or control of the work by its use, whether a substantial selection, one that represents the whole work, has been used, whether the use is for commercial or educational purposes, and whether a likelihood exists that damage might be inflicted on the work by its unauthorized use. Journalists are covered by fair use and they frequently use little snips of music, images or text in their reviews and criticisms. Scholars are also protected when they use copyrighted material in their research and teachers may use limited passages for instructional purposes. Parody too is interestingly and sometimes controversially considered fair use. Use of copyrighted material in a public performance, even if the theatre is non-profit or educational, is *not* considered fair use.

My director wants to use music from Mozart in this production of Amadeus. Is there any problem here?

Mozart's work is clearly in public domain. Most people will just use a recording that the director likes, edit as needed and put it into the show. But know that there could be a snafu with the orchestra sound recording. The use of sound recordings in live performance is very fuzzy; the copyright law does not offer sound recordings copyright protection for live performance so technically you do not have to secure permission from a recording artist/record company to use the recordings in the theatre. However, Musician's Union contracts may prevent that interpretation. The record company may also claim infringement because you copied its recording into a computer to edit without a mechanical license. They could also claim that you created a derivative work without their permission, but that would be stretching it. Bottom line here is that record companies generally do not want to be bothered since it is questionable as to whether they can demand a license and the value of that license is only a couple of hundred dollars. Dealing with this kind of theatre licensing is not really cost effective.

Alternatively, you could do your own recording. Take care though that the musical score you wish to use isn't protected by a copyright. The

music publisher that sells or rents the score might have copyrighted the orchestral parts, even though Mozart is public domain. When I did a production of *Amadeus* we hired an orchestrator to create a tailored score for our production and recorded our own orchestra.

I need to use a recent pop song in my design. What needs to be licensed?

Provide your business office with the title, composer, publisher and date of copyright, if possible. They should contact the publisher and let them know the song requested, length of run, number of performances, size of house, etc. If several songs are going to be used, any publisher may request what they call "most favored nation" status, which means that they all want to be paid equally. This makes it difficult for the business office when clearing ten songs and one publisher wants twice what the other publishers are asking. To get that song into the production now costs significantly more. The sound recording should be used without fee since it is for a live performance, but the theatre business office may wish to contact the record company for a mechanical license to copy the song.

I use sound effect CDs all of the time. Am I infringing anything there?

If you or the theatre purchased the discs from the manufacturer, your license permits you to do about anything but duplicate the disc to sell to someone else. If a friend gives you the sound effects then you are stealing.

I created a super dragon sound effect by pulling various sounds from a lot of different sources. A couple of them were off of VHS copies of movies. Am I infringing anything here?

Probably not. The sound recordings from the VHS movies would not have live performance copyright protection. Mixing many elements may also make any individual element truly unrecognizable.

I created some killer ambiances by slowing a source down by a factor of four, reversing the audio and mixing five or six elements together. The source was a disc of Japanese electronic music compositions. Am I infringing anything here?

Lack of recognition and a complex mix might make this difficult to prove, but technically the composer's rights are being infringed upon.

Blithe Spirit is the next show I have to design. The Irving Berlin tune "Always" is a necessary part of the play as written by Noel Coward. Do the rights to use the song come with the rights to do the play?

New plays are beginning to have the licensing for music bundled into the license to perform the play. For an older play...? Rarely. "Always" was written around 1925 and is still under copyright protection. The play and therefore the song are in constant production worldwide but the licensing of the two is not connected. The music publisher would need to be contacted to secure a license.

Let us address once again the sound recording copyright, which gets very complicated on this one. The designer could easily provide ten or more recorded versions of "Always." Because copyright law never addressed sound recordings until 1976 and because record pirating has been a problem since record companies began selling recordings, protection for sound recordings was offered on a state by state level for most of the twentieth century. Since an old recording of "Always" will probably be used, the old state laws may be applicable, which means the need to license the sound recording could depend upon where you produce *Blithe Spirit*.

Does my theatre company need an ASCAP/BMI license?

If your theatre plays music nondramatically you need a license. That would include preshow music, intermission music, postshow music, cocktail party music, even work music in the scene shop.

My dance school does concerts every year and we play mostly popular music in our program. What kind of license do we need?

An ASCAP/BMI license should cover your use of music since you are doing basically a variety show. Unfortunately, the sound recording conundrum applies to your situation as well.

I created an original score and did my own recording with musicians. I don't have to license anything, do I?

No you don't. You created it and you have fixed the work, so you own the copyright. Musicians who are recording your music in the studio for the production should agree that they are being paid in full for their participation in the recording and that they understand that you might license the design to

another theatre one day. Register your work with the Copyright Office, using Form SR, which will provide composition and sound recording registration when you created and own both. It's only \$30.

A Dream: A Copyright Management System

Music publishers control rights to thousands of songs and rarely have time to "manage" any specific property. These publishers contract several other companies to issue licenses and collect fees. The Harry Fox agency handles mechanical licenses for music publishers and ASCAP or BMI handle performance rights for them. Publishers generally negotiate and issue big dollar licenses for television and film and don't have time for much else. Where publishers would not make a lot of money dealing specifically with individual theatres, a lot of money could be made if a small fee were paid to a licensing agency and lots of these fees were transferred over to the publishers. In other words, a theatre might pay a \$25 fee per song, which is less than what a publisher would issue a license for now. So instead of twenty theatres paying \$100 each to a publisher for rights to a song, two hundred theatres might pay \$25 for that song through a licensing agency. This could be organized through ASCAP/BMI or better yet through Harry Fox which is owned by the National Music Publishers Association. Harry Fox is currently issuing mechanical licenses on-line with payment via credit card. Why not issue dramatic performance licenses as well? It would also be helpful for Samuel French or Dramatist Play Services to license and collect fees for music publishers when a play includes specific songs in the text. The play should not include the song if the composer/publisher does not wish the song to be used.

The sound recording issue is much more difficult. Theatres should be able to use sound recordings without license or fee as the copyright act seems to imply, but there are too many conflicting instances surrounding the use of sound recordings to make this totally "safe." Congress could help by declaring what it specifically intended. The fairest course of action would be for theatres to pay a fee to record companies similar to my proposal above for music compositions. A new agency would represent record labels and issue licenses for use of sound recordings, including professional transcriptions and copying them to a editing computer and/or a show playback

system. Under this system, the record companies would need to be required to share the fees collected with their recording artists.

Finally, it would be appropriate for Congress to convey to the theatrical community the same largess given to the recording industry in the Compulsory Mechanical License. It would be fair and appropriate if once a musical recording were released commercially to the public, any theatre company would automatically have permission to use the music and sound recording in a production as long as they paid the stipulated fee.

Recommended sources for more information:

Al and Bob Kohn, *Kohn on Music Licensing*, 2nd edition (Englewoods Cliffs, NJ: Aspen Law & Business, 1996)

Randy Poe, *Music Publishing: A Songwriter's Guide*, 2nd edition (Cincinnati, OH: Writer's Digest Books, 1997)

Mark Halloran, editor, *Musician's Business and Legal Guide*, 2nd edition (Upper Saddle River, NJ: Prentice-Hall, Inc., 1996)

Geoffrey Hull, *The Recording Industry* (Needham Heights, MA: Allyn & Bacon, 1998)

United States Copyright Office, Library of Congress (www.loc.gov/copyright/)

Kohn on Music Licensing (www.kohnmusic.com)

The Harry Fox Agency (www.nmpa.org/hfa.html)

The American Society of Composers, Authors and Publishers (www.ascap.com)

BMI.com (www.bmi.com)

Theatre-Sound Mailing List (www.brooklyn.com/theatre-sound/)

Music clearance agencies:

Evan M. Greenspan Inc. (EMG) (www.clearance.com)

Signature Sound (www.signature-sound.com)

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