



This edition of our newsletter is dedicated to a brief overview of some of the more important trade mark cases that have been decided by the Court of First Instance (CFI) and the European Court of Justice (ECJ) over the last year or so. The first section covers various issues concerning the registrability of marks. It has been notable that these Courts have adopted a progressively tougher stance in determining what is and what is not acceptable.

PART 1 – DISTINCTIVENESS

KIT PRO

In an application to OHIM by Robert Bosch GmbH to register not only KIT PRO but also KIT SUPER PRO in respect of "parts for repairing drum brakes in land vehicles" in Class 12, there had been an initial objection by both the Examiner and the Board of Appeal that the marks express the idea of a professional set or a professional set of exceptional quality.

The applicant contended that in each case the marks consisted of invented terms and relied on previous decisions from the Board of Appeal for marks containing the element "PRO", such as PROBANK and PROCARE.

The CFI issued a straightforward decision rejecting the applicant's arguments. The main point worthy of note (paragraph 29) is that the Court confirmed where a trade mark is made up of several components, for the purposes of assessing its distinctive character, the mark should be considered as a whole. However, they said this is not incompatible with an examination of each of the mark's individual elements in turn. The Court stated that where the individual components are devoid of any distinctive character, then this generally justifies the conclusion that the trade mark, when considered as a whole, will also be devoid of distinctive character.

Such a conclusion can only be dismissed if "concrete evidence" can be provided, for example, showing that the way in which the various components are combined results in a whole which is greater than the sum of its parts.

BioID

This theme of considering the distinctiveness of constituent elements of a composite mark was continued in the case of Bio ID AG v OHIM before the CFI. The mark applied for was represented as follows:

BioID[®]

The application at OHIM had been filed in respect of a broad range of goods and services in Classes 9, 38 and 42 including data processing. The objection raised by OHIM, confirmed at the Board of Appeal level, stated that the mark was simply an abbreviation of BIOMETRIC IDENTIFICATION and that, in relation to the goods and services claimed, the mark was devoid of any distinctive character. Many people might consider that on first impression, BIO ID would not automatically be seen as an abbreviation of BIOMETRIC IDENTIFICATION. Indeed, the applicant asserted that BIO could relate to any number of words including biology, biological or biometrical. The applicant also asserted that the term did not appear in any dictionary and was not actually used, other than as a trade mark by the applicant. Notwithstanding this, the CFI held that when looking at the mark in relation to the goods and services and considering the impact of the mark on the relevant public (being those with experience in the sector of goods and services in question), the mark applied for did not represent an exception to the lexical rules and is not unusual in its structure. The step by step, analytical approach adopted by the CFI is easy to follow; however the case must have been considered as borderline and, in the writer's view, could easily have gone the other way. Once again it is interesting to note the CFI's statement that despite the figurative elements making up the composite mark, "concrete evidence" would be required to show that the various elements when combined produce a whole which is greater than the sum of its parts. The case is now on further appeal to the ECJ.

In addition to their earlier arguments, the applicant may have an additional ground for appealing the decision to the ECJ. The Board of Appeal in this case rejected the application under Article 7(1)(c) of the Regulation, stating the mark described the characteristics of the goods and services claimed. The CFI, however, upheld the Office's original decision that the mark was devoid of any distinctive character under Article 7(1)(b). Surprisingly, they did not consider the 7(1)(c) claim, the subject of the Board of Appeal's decision and the consequent appeal to the CFI.

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DOUBLEMINT

Perhaps the most important case of the last 12 months concerns the application by Wm Wrigley Jr Company for the word mark DOUBLEMINT. The Advocate-General's opinion, issued on 10 April 2003, provides a clear and distinct exposition as to why, in his opinion, the CFI was wrong to allow the mark. The CFI had held that DOUBLEMINT was not exclusively descriptive with the result that the term could not be refused registration. Advocate-General Jacobs pointed out, however, that they incorrectly interpreted Article 7(1)(c) which states that trade marks may not be registered which consist exclusively of signs or indications which may serve in trade to designate characteristics of the goods or services concerned. The word "exclusively" in that provision qualifies the verb "consist". Therefore, a decision on registrability which is based on the premise that there is another, non-descriptive meaning is, *prima facie*, wrong in law.

The second, and more serious flaw discussed, is that "DOUBLE" and "MINT" in combination give rise to a multiplicity of possible meanings which are ambiguous or suggestive. The Advocate-General gives the example of DOUBLE LIQUEUR CHOCOLATE. This could contain two different types of liqueur and/or chocolate or twice as much liqueur and/or chocolate. Nevertheless, a consumer would not understand the descriptor DOUBLE LIQUEUR CHOCOLATE as obscuring the overall designation or characteristic of the goods in question. Consequently, there were very good legal reasons for overturning the CFI's decision.

The Advocate-General also considered Wrigley's arguments concerning the admittedly imprecise semantic content of DOUBLEMINT and whether this might take it out of the realm of the descriptive and into the realm of the merely allusive or suggestive.

He suggested a sliding scale which would consider a three point test for whether a word mark would designate a characteristic of the particular goods in question or merely allude suggestively to them:



- i) The way in which the mark relates to a product or one of its characteristics. The more factual and objective that relationship, the more likely it is the term would be used as a designation in trade. The more imaginative and subjective, the more acceptable the term would be for registration.
- ii) The way in which the term would be perceived. How immediately is the message conveyed? The more ordinary, definite and down-to-earth a term is, the more readily and immediately the consumer will apprehend the designation of a characteristic. At the other end of the scale, if the skills, as the Advocate-General puts it, of a cryptic-crossword enthusiast are required in order to detect any connection, then the grounds for refusing registration will be very weak.
- iii) The significance of the characteristic in relation to the product, in particular, in the consumer's mind.

Applying these tests to DOUBLEMINT, the Advocate-General viewed the mark as being factual and containing an objective reference to mint flavour in some way doubled. Second, the term would be perceived and understood almost immediately by the public and, as such a flavour would be viewed as being a salient feature of the goods, chewing gum; thus, DOUBLEMINT would not pass any of the elements of the Advocate General's test. This opinion on the facts is

unusual and may not be considered binding by OHIM when the case is remitted for reconsideration.

The Advocate-General's Opinion also considers the earlier BABY-DRY decision and concludes this can be differentiated from this on the grounds that DOUBLEMINT does not display any inversion of the usual word order. In addition, there is an interesting commentary on the compatibility between the WINDSURFING CHIEMSEE and BABY-DRY decisions previously issued by the ECJ.

Of course the Advocate-General's opinion is not determinative of the law, but certainly set a useful backdrop to the ECJ which issued their judgement on the 23 October 2003. The Court held that, under Article 7(1)(c) of the Regulation, a mark must be refused if at least one of its possible meanings designates, or may in future designate, a characteristic of the goods or services concerned. If the mark was capable of being used by other economic operators to designate a characteristic of their goods and/or services, and is likely to be used as such in the future, this provides OHIM with valid grounds for objecting to a mark under Article 7(1)(c). As a result, whether there is any unrelated third party use of the mark at the time of the application is not relevant (as had been argued by BioID AG in their case referred to above). Whilst the WINDSURFING CHIEMSEE decision confirmed a trade mark should not necessarily be granted on a first come – first served basis and that there should be a certain category of marks which are kept free and available for general use without being monopolised, the ECJ has taken this a step further by confirming that there is a public interest in preventing descriptive signs or indications relating to the characteristics of goods and services from being registered as trade marks.

SLOGANS

REAL PEOPLE, REAL SOLUTIONS

At the end of 2001, the CFI decided that the slogan DAS PRINZIP DER BEQUEMLICHKEIT (The Principle of Comfort) should be accepted for furniture and that the test of distinctiveness for slogans should be no higher than for ordinary word marks. In the two years since their decision, slogans have had a tough time. In the United Kingdom HAVE A BREAK was held to be unregistrable in relation to chocolate bars. In addition, the CFI has had to consider another slogan mark, REAL PEOPLE, REAL SOLUTIONS, applied for in relation to "telemarketing services" in Class 35, "computer hardware maintenance services" in Class 37 and a broad range of computer based services in Class 42. The CFI held that the slogan condensed the meaning of the words into one linguistically correct phrase with the result that it lacked any distinctive character. The Court also indicated that signs which will be perceived by the relevant public primarily as promotional slogans rather than trade marks will not fulfil the function of a mark namely, immediately indicating the commercial origin of the goods or services in question. There is no reference in the decision to the earlier case of DAS PRINZIP DER BEQUEMLICHKEIT. Perhaps this is because the Court had some difficulty in trying to explain why The Principle of Comfort would not be viewed as a mere promotional slogan. In the REAL PEOPLE, REAL SOLUTIONS case, the right conclusion appears to have been reached but possibly for the wrong reasons. The slogan was commonly used in the sector concerned; however, applicants will now have the additional hurdle of persuading any relevant trade mark authority in the European Union that their slogan will not be perceived by the public primarily in the promotional sense. Perhaps all is not lost; the UK Office had already accepted REAL PEOPLE, REAL SOLUTIONS for the identical services, although the validity of this registration must now be questioned.

SOUND MARKS



The Dutch Courts referred a case to the ECJ to clarify whether the Community Trade Mark Directive permits the registration of sounds as trade marks. Shield Mark BV (a trade mark attorney firm) had filed various sound trade marks in Benelux dating back to 1992, four of which consisted of the first nine notes of Für Elise. Shield Mark launched a radio advertising campaign in October 1992 using the well known tune. Mr Kist, who operates as a communications consultant and deals in trade mark law, brought out an advertising campaign also using a melody consisting of the first nine notes of Für Elise. Shield Mark brought an action for infringement against Mr Kist. The Court of Appeal in the Hague asserted that the trade marks were invalid. Shield Mark appealed to the Dutch Supreme Court which, in turn, referred a number of questions relating to the registration of sound marks to the ECJ. In a judgement issued on the 27 November 2003 the ECJ ruled that sounds may be registered providing that they are:

1. capable of distinguishing the owner's goods and services; and
2. capable of being represented graphically in a manner that is clear, precise, self-contained, easily accessible, intelligible, durable and objective.

They expressly stated that the representation of the sound by way of notes on a musical stave would be acceptable; however, the description of a sound only using written language such as "The crow of a cockerel" was not held to be sufficiently precise. The Dutch (and other national) Courts will therefore have to interpret the ECJ's ruling as to whether sound marks that are applied for without a musical stave are sufficiently clear and precise for them to be easily understood and immediately intelligible to the relevant public.

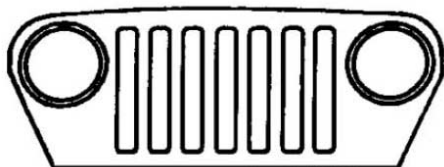
COLOUR MARKS

On 6 May 2003, the ECJ issued their judgement in the case of Libertel's application to register the single colour Orange. Libertel had sought to protect the colour Orange by itself; this was shown on the form of application as a mere rectangle of colour without any description in words or any reference to any colour code. Libertel's principal activity is the supply of mobile telecommunication services and it is now part of the Vodafone group. The ECJ's decision may well limit future applications for colour marks. The Court decided that colours per se which are not spatially limited can be protected, provided that they are represented graphically and in a way that is "clear, precise, self-contained, easily accessible, intelligible, durable and objective". This phrase was quoted in the Shield Mark case (above) concerning sounds referred to above but was first adopted by the Court in Ralph Siekmann's application to protect a "smell" mark. The Court held that, other than in exceptional circumstances, it is unlikely that distinctiveness for colour marks can be demonstrated without prior use, especially where the relevant mark is limited to one colour. The Court confirmed that the public interest is a factor which needs to be taken into consideration, especially where the applicant seeks protection for a broad range of goods and services.

Whilst the decision clarifies a number of points, namely that use of an internationally recognised colour code is almost certainly going to be required to provide a clear and durable graphic representation, it is still not clear how marks which consist of a range of colours, or various shades of a colour, can be protected. On the face of it, the Libertel decision does not envisage such marks as being capable of graphic representation with the result that they cannot be registered. This cannot be right. The result must mean that further cases relating to colour marks are likely to be appealed to the CFI and ECJ or referred to the Court for additional clarification.

SHAPE / THREE DIMENSIONAL MARKS

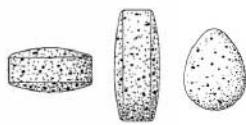
Daimler Chrysler had applied to register a two dimensional representation of their grille commonly as shown used in their JEEP vehicles.



The CFI rejected their application upholding the adverse decision from the OHIM Board of Appeal and confirming that further survey evidence could not be admitted at such a late stage. Daimler Chrysler argued that the design of the mark is not functional and this was confirmed by an expert witness in evidence which had been placed before OHIM during the course of the original application. The CFI latched onto this point and decided that, because such grilles no longer have a purely technical function, they are nowadays merely regarded as one of the features that are helpful in visually identifying a model or range of cars. The fact that a grille may also serve to ventilate the vehicle engine has no bearing on the distinctiveness of the mark, particularly if the distinguishing function outweighs the other functions, according to the CFI. Interestingly, the Court also commented on the fact that the grille in question is unusual in that it looks old-fashioned and would not therefore be viewed as common place.

The Court also held that as land vehicles are large goods, applicants may find it appropriate not only to use a word mark but also a figurative or three dimensional mark so as to enable the public to identify the goods visually. The decision implies that applicants for figurative or three dimensional marks may stand a better chance of success if the goods are "large" as opposed to small items such as....dishwasher tablets.

UNILEVER DISHWASHER TABLETS



The CFI in March 2003 issued their decision refusing protection for Unilever's dishwasher tablets, various representations of which are shown above. Despite its ovoid shape, the Court held that the mark consists of the appearance of the goods and that consumers would not associate the tablet with any trade mark function. The Court made reference to the fact that the applicant had failed to put in any evidence to counter this argument. The applicant had tried to claim that the general public had been educated by various dishwasher tablet manufacturers that colour and shape can serve to assist in distinguishing the goods originating from one manufacturer to another. The Court was not persuaded that the evidence showed such an advanced level of perception on the part of the relevant public.

made by the Judge in the recent Viennetta case in the UK). So, despite the assertion that all marks are treated equally, shape marks do have a higher hurdle to overcome, given that there are additional constraints on their ability to meet the requirements for distinctiveness. It should be borne in mind that the filing of evidence of use will not assist in overcoming any of the objections raised under Article 3(1)(e).

The ECJ also confirmed that in practice it may be more difficult for applicants to establish distinctiveness in relation to a mark consisting of the shape of a product than a word or figurative mark. Part of the problem is establishing the likely perception of the relevant consumers and, in particular, that the mark is capable of distinguishing the applicant's goods from competitors. Needless to say, these cases along with the Unilever decision have shown how difficult it is to obtain trade mark protection for shape marks. It is not a coincidence that 2003 saw the introduction of the Registered Community Design, regarded by many as the more suitable route for protecting new shapes and 3D designs.

An alternative approach was adopted by two Swiss parties in relation to separate applications for three dimensional marks. The first was for a representation of a three dimensional chocolate cigar and the second resembled a gold ingot.

Both were applied for in relation to goods in Class 30 and had been refused by OHIM. The applicants argued that OHIM had abused the principle of equal treatment and detailed a number of other three dimensional marks previously accepted by OHIM and asserted that they had been unfairly treated. The CFI confirmed, as they do in virtually every decision, that a Community trade mark must be assessed solely on the basis of the Community Trade Mark Regulation as interpreted by the Community Courts and not on the basis of previous practice or decisions from OHIM or the Board of Appeal. Thus, whilst there exists a principle of equal treatment, the Court held that it was not infringed by either OHIM or the Board of Appeal in these two cases.

LINDE, WINWARD and RADO

The last three cases on registrability discussed here concern referrals by the German Federal Court of Justice of applications by the three above mentioned companies. In each case, the applicants had sought protection of three dimensional shapes depicting the goods themselves, namely a forklift truck, a torch and Rado's application for a watch (respectively).



The ECJ confirmed in a judgement dated 8 April 2003 that, as a matter of principle, the test for assessing the distinctiveness of three dimensional marks should be no more strict than for any other type of trade mark. However, Article 3(1)(e) of the Regulation clearly indicates that there are certain circumstances whereby shape marks will be refused protection, namely (i) where they result from the nature of the goods themselves; or, (ii) the shape of the goods is necessary to obtain a technical result; or, (iii) the shape gives substantial value to the goods (a comment concerning this point was

There have been a number of important infringement cases which have reached the CFI or the ECJ during the past 12 months.

DAVIDOFF vs DURFFEE

One of the most interesting is the ECJ's judgement in the case between Davidoff and Gofkid. DAVIDOFF is registered internationally for a broad range of goods and is in particular known for cigars, cigarettes and related accessories. Gofkid, a Hong Kong based company, has used and registered the trade mark DURFFEE for cigar and cigarette cases, cigar holders and a number of other similar items. Davidoff brought infringement proceedings in Germany and was unsuccessful at the first instance and then again on appeal. The case reached the German Federal Supreme Court who referred a number of questions to the ECJ.

Davidoff's dilemma was that whilst the German Supreme Court had held that the two marks are similar (as can be seen from the representations shown below), and that in a number of cases the goods were also similar, there was no evidence of a likelihood of confusion in the minds of the public. The German Court was unsure whether Davidoff should be entitled to broader rights extending anti-dilution protection to cover not only dissimilar goods under Article 5(2) but also similar goods. The ECJ held (surprisingly) that Article 5(2) enables Member States to provide specific protection for well known registered trade marks used on the same or similar goods, as well as dissimilar goods.



Whilst any layman's reading of the Directive would not

reach this conclusion, it is surely incorrect that the owner of a well known brand enjoys broader protection against potential infringement by third parties in relation to non-similar goods than is the case in relation to similar or even identical goods. The ECJ's judgement in this case substantially strengthens the rights of brand owners in relation to well known marks.

ADIDAS vs FITNESS WORLD

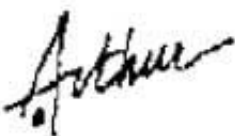


Adidas are the owners of the well known three stripe trade mark. Fitnessworld market fitness clothing, some of which bears a double stripe motif. Adidas sued Fitnessworld for trade mark infringement in the Netherlands claiming that their use of two stripes would cause confusion and, that such use took an unfair advantage of its well known three stripe mark, with the result that its exclusivity would be impaired. At first instance Adidas succeeded, however, on appeal the Dutch Court found that customers would not, in fact, be confused as the defendant was only using their two stripe motif for embellishment or decoration.

Before the Dutch Supreme Court Adidas then argued, for the first time, that because their mark was so well known it should enjoy enhanced protection (referencing Davidoff). The Dutch Supreme Court referred various questions to the ECJ including a request for a decision whether Article 5(2) of the Directive only relates to non-similar goods or whether it also applies to similar goods. Secondly, the ECJ was asked to opine whether infringement could still be found even where the public would only view the sign as being a mere decoration as opposed to trade mark use.

Not surprisingly in answer to the first question, the ECJ reaffirmed its judgement in the DAVIDOFF v DURFFEE case referred to above. The Court went on to confirm, contrary to the observations submitted on behalf of the United Kingdom Government, that Member States are bound to grant protection to the proprietors of well known trade marks under Article 5(2). The Court also confirmed that protection exists for such marks even without a finding of confusion on the part of the relevant public, although they would have to establish a link between the sign and the mark.

On the second point, in the Court's judgement, the fact that a sign is viewed as an embellishment or mere decoration by the relevant public is not, in itself, an obstacle to the protection conferred by Article 5(2); however, if the national Court finds, in fact, that the relevant public view the sign purely as an embellishment and mere decoration, "it necessarily does not establish any link with a registered trade mark" with the result that infringement cannot be found under the provisions of Article 5(2). It will be interesting to see whether the Dutch Supreme Court interprets the evidence in the Dutch case such that Fitnessworld's "sign" would only be seen as an embellishment or mere decoration. It is entirely possible that in practice the defendants will find it difficult to establish that there are no trade mark connotations whatsoever attached to the sign in dispute. Incidentally, the website owned by Fitnessworld which advertised many of their items of clothing, shows at least one garment which bears not two but three stripes. Whether Adidas are aware of this is not entirely clear. No doubt Fitnessworld will once again claim that such use is merely decorative....



ARTHUR vs ARTHUR ET FÉLICE

his case concerns an infringement action that was brought in French Courts by LTJ Diffusion against Sadas. LTJ are the proprietors of the trade mark ARTHUR (in script) in respect of clothing. Sadas also owned a French registration for the words ARTHUR ET FÉLICE. The French Courts referred to the ECJ the question whether the definition of "identical" under Article 5(1)(a) can extend to a

continued on page 6...

reproduction of the mark together with additional elements. In its judgement, the ECJ confirmed that the concept of identity between two marks must be interpreted strictly. A broader interpretation would catch cases which should be properly dealt with under Article 5(1)(b). The Court did, however, say that the perception of identity must be assessed globally with respect to an average consumer and taking into consideration the goods in question. Consumers only have a rare opportunity to make a direct comparison of marks. Therefore, if there are additional elements which are so insignificant that they may go unnoticed by an average consumer, they can be disregarded for the purposes of an identity comparison. This still leaves considerable scope for national Courts to interpret the question of what might be deemed unnoticed by the average consumer. In this particular case, in the examples given very few, if any, of the public would be likely to regard the marks involved as being identical.

PARMA HAM

The last case concerns the action brought by the consortium of Parma ham producers against Asda stores which was initially heard by the UK Courts and referred by the House of Lords to the ECJ. The ECJ's judgement found that in certain circumstances, strict rules relating to protected designations of origin (PDO's) may be justified in restricting the free movement of goods, a restriction which would ordinarily be in breach of Article 29 of the Treaty of Rome.

Many commentators at the time reported that Asda were prevented from importing Parma ham and slicing and packaging it in the United Kingdom rather than doing so in the Parma region, as required by the detailed specifications under the PDO. However, what was much less widely reported was one of the other questions referred to the ECJ, namely, could the Parma ham producers enforce their rights under the PDO where their regulations were not made widely available in the Italian language and not at all in English? On this latter point, the ECJ confirmed that the principle of legal certainty must always be adhered to.

In effect, the Court stated that if legislation is only published in one language and is not easily accessible, then the EU transparency requirement (whereby an EU citizen or undertaking should be able to easily ascertain the extent of their rights) has not been met. Consequently, the Parma ham producers had not provided sufficient publicity throughout the EU relating to the prohibitions, with the result that they could not rely on their PDO to take action in the EU national courts, either by way of criminal or civil proceedings. The result is that today you can still today buy your Parma ham in Asda - a somewhat pyrrhic victory for the Parma ham producers.

WHAT WILL THE NEXT 12 MONTHS BRING?

The ECJ is set to rule shortly on the question of registrability of surnames. The UK has referred the NICHOLS case for consideration as to whether surnames should be registrable on a first-come, first-served basis or if, like geographical names, they should be reserved for general public use and should not be registered as readily as has previously been the case before OHIM.

The ECJ is also set to rule on the question of retail services. It is to be hoped that the Court will regard these as being protectable under Class 35 of the Nice Classification Treaty and that the term "retail services" can be officially recognised. This would allow the UK Trade Mark Office to do away with their alternative description:

"The bringing together for the benefit of others of a variety of goods enabling customers to conveniently view and purchase those goods..."

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ROBERT BOSCH GMBH v OHIM (KIT PRO) CFI T-79/01 20.11.02 - BioID AG v OHIM CFI T-91/01 20.12.03 - OHIM v Wm Wrigley Jr Company (DOUBLEMINT) A.G Opinion C-191/01P 10.04.03 ECJ C-191/01P 23.10.03 - SYKES v OHIM (REAL PEOPLE, REAL SOLUTIONS) CFI T-130/01 05.12.02 - SHIELD MARK BV v JOOST KIST (not in English) A.G Opinion C-283/01 03.04.03 - LIBTEL GROUP v BENELUX OFFICE (ORANGE) ECJ C-104/01 06.05.03 - DAIMLER CHRYSLER v OHIM (Jeep Grille) CFI T-128/01 06.03.03 - UNILEVER v OHIM CFI T-194/01 05.03.03 - LINDE (and others) reference to the...ECJ C-53/01 08.04.03 - AXION SA and C BELCE v OHIM CFI T-324/01 T-110/02 30.04.03 - DAVIDOFF v GOFKID reference to the...ECJ C-292/00 09.01.03 - ADIDAS v FITNESSWORLD TRADING A.G Opinion C-408/01 10.07.03 ECJ C-408/01 23.10.03 - LTJ Diffusion and SADAS reference to the...ECJ C-291/00 20.03.03 - CONSORZIO DEL PROSCIUTTO DI PARMA v ASDA reference to the ECJ C-108/01 20.05.03

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