

Law & Business For Creative Artists

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Abstract

History of First Amendment

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First Amendment - Introduction

The First Amendment says:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

But as lawyers, agents and representatives working for artists, or as people who collaborate with and represent artists, we are usually not concerned about establishing religions or assembling to petition the government; we are concerned about SPEECH. So an edited version of the First Amendment for those in the entertainment and publishing industries might go like this:

Congress shall make no law ... abridging the freedom of speech.

So much for *Congress* not making laws. Then we add the Fourteenth Amendment, which says:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Read together, the First and Fourteenth Amendments prohibit *GOVERNMENTS* from making laws abridging the freedom of speech. Private parties using private, lawful means may “abridge” the speech of others without causing First Amendment problems (e.g. by firing “speakers,” or boycotting their performances, or slapping an NC-17 rating on their movies, or an [ESRB](#) warning on their video games.)

So always look for *STATE ACTION* first to determine if you have a First Amendment issue. The easiest way to check for state action? Look for a law (statute, ordinance, regulation), then look at the speech which supposedly violated the law.

What Is Speech?

In the United States, the First Amendment protects speech, but what kinds of speech? Spoken words? Printed words? Any behaviors meant to convey a message? Flag burning? Movies? Video games? Nude dancing? Child pornography? Writing a book called: *How To Make A Suitcase Nuke*?

What about slander? Isn't that speech? Or fraud, or hiring somebody to murder your spouse, or lying to an IRS agent, or soliciting a prostitute?

When courts try to decide whether speech is protected or unprotected they naturally wonder: Is this the sort of speech the Founding Fathers had in mind

when they wrote the First Amendment? As far as we know, no framer of the Constitution asked the question: Yes, but what IS speech? Did the Founding Fathers mean to say that public nudity, live sex acts, and bestiality are all speech, and therefore Congress had no power to pass laws against such “expressive conduct”? Did they believe that live sex acts are like flag burning or marching in the streets? And did this mean that they believed Congress had no power to pass laws against obscenity, indecency, pornography, nude dancing and the like?

The First Amendment obviously does not protect ALL speech. Author Kurt Vonnegut once observed that: “The First Amendment reads more like a dream than a law.” Indeed. So what speech does it protect? Or is it easier to ask what speech is NOT protected by the First Amendment?

If the First Amendment doesn’t mean what it says, then what does it mean? Some First Amendment absolutists ask: What part of make no law is it that you don’t understand?

What is the Purpose of the First Amendment?

Sounds like a question the professor might pose to kill twenty minutes of class time when he’s unprepared to teach the next case, but the question lurks in the background of many a Supreme Court opinion. If not all speech is protected, courts often consider what the Founders meant by the simple statement: Congress shall make no law abridging the freedom of speech.

Why was the First Amendment added to the Constitution in 1791? And if Congress meant what it said about passing no laws abridging the freedom of speech, then why seven years later (in 1798) did Congress pass the [Alien and Sedition Acts](#) which made it a crime for anyone to publish “false, scandalous, and malicious writing against the government or its officials?”

[Eugene Volokh](#) argues that the problematic words are not “make no law,” but rather “the freedom of speech.” In speculating on what the Founders had in mind, Volokh has this to say.

But nearly everyone, as best I can tell, saw “freedom of speech” and “freedom of the press” as providing less than complete constitutional protection for spoken or printed words. And this suggests that the term “freedom of” referred to some understanding that there is a proper scope of such freedom (even if the scope was unsettled in some particulars), rather than an unlimited freedom to say or print anything one pleases.

It’s much like, if tomorrow a state enacted a law protecting “the freedom to marry,” we probably wouldn’t think that it means the

freedom to marry a 10-year-old, or the freedom to marry one's daughter, or (depending on the circumstances) even the freedom to marry several people at once. "The freedom to marry" would be seen as referring to a broad but not unlimited concept that is less than the freedom to marry anyone one pleases.

Now, to be sure, during and after the controversy over the Sedition Act of 1798, some foes of the Act argued that the First Amendment did bar Congress from any authority to restrict spoken or printed words. But I'm rather skeptical that this was then or is now a sound interpretation of the constitutional text.

- Eugene Volokh on the meaning of "Congress shall make no law . . .".

Do we have a First Amendment because speaking one's mind is a basic human right? Like the freedom to travel, or freedom to buy birth control? Perhaps the colonists wanted only to be certain that their new American government would be prohibited from imposing [prior restraints](#) on speech, the sort of licensing schemes that inspired the poet John Milton to write [Areopagitica](#)? Maybe free speech is a kind of civic "safety valve" allowing aggrieved citizens to march in the streets or issue screeds on street corners instead of arming themselves and starting a civil war? Theories one and all that have been propounded as possible reasons we have a First Amendment.

The Marketplace of Ideas

When the Supreme Court addresses these questions, they steer between two competing principles of First Amendment jurisprudence that will never be reconciled (think [Scylla and Charybdis](#), a rock and a hard place, the horns of a dilemma).

One principle is called the marketplace of ideas, first formulated by Justice Oliver Wendell Holmes, who wrote:

The best test of truth is the power of the thought to get itself accepted in the competition of the market.

—[Abrams v. United States](#) (US 1919)

To fans of the marketplace of ideas, Justice Holmes was announcing a world where there's no such thing as good or bad speech, only speech that competes in the Darwinian marketplace and lives or dies. The Court's job is to strike down any attempts by the government to regulate the marketplace of ideas. Of course, there are the inevitable exceptions, because Holmes was also the Justice who wrote:

The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic.

–*Schenck v. United States* (US 1919)

Civic Republicanism

Justice Louis Brandeis offered a parallel and sometimes competing principle of First Amendment theory eight years later, when he described the purpose of the First Amendment:

Those who won our independence ... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile.

–*Whitney v. California* (US 1927)

See how Justice Brandeis suggests that the First Amendment does not exist to protect *all* speech; it exists to protect speech that leads to the discovery and spread of “political truth.” Brandeis wants to protect speech, not because it’s an absolute value or good for the soul, but because it’s essential for democracy and [civic republicanism](#). Quite a different concern than Justice Holmes’ marketplace where ideas fight it out for survival of the fittest. In fact, Holmes would probably say that there is no such thing as “political truth.” Truth is whatever the marketplace says it is. If cat videos beat out President Obama’s State of the Union address, so be it.

First Amendment cases in the United States Supreme Court are dramatic battles, usually between speakers with unpopular or dangerous views and governments that want to ban or censor their speech. What will happen when the family of a fallen veteran sues the Westboro Baptist Church for picketing their son’s funeral? Or what about virtual child pornography? Or pornography made without using real children, and all of the “actors” are computer generated? Is virtual child pornography subject to the same extremely serious penalties that the government imposes on creating, possessing, or distributing child pornography created by using real child actors?

But a film producer or a director or a screenwriter or author needs an entertainment lawyer, not a con law scholar.

Are Movies Speech?

Oh, what might have been! In 1915, when the motion picture business was still in its infancy many states censored movies as a matter of course. The first time a case arguing that the “boards of censors” interfered with the First Amendment rights of people who displayed the films or wanted to see them, the United States Supreme Court said: I beg your pardon? Movies are NOT speech.

Mutual Film Corp. v. Industrial Commission of Ohio

U.S. Supreme Court (1915)

- [case at Google Scholar](#)
- [case on Westlaw](#)
- [case at Wikipedia](#).

The state government of Ohio had passed a statute in 1913 forming a board of censors which had the duty of reviewing and approving all films intended to be exhibited in the state.

Under the Ohio law:

Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board.

The Ohio Board charged a fee for the approval service, and the Board could order the arrest of anyone showing an unapproved film in the state.

When Mutual Film Corporation, a movie distributor, sued the Board arguing that this licensing scheme and Ohio's censorship of movies violated its freedom of speech, the company lost in the lower court and then appealed to the United States Supreme Court.

In a unanimous opinion, the Supreme Court noted the insidious power of movies to affect the sensibilities of women and children and dismissed Mutual Film's "freedom of speech" arguments without a second thought:

The exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded ... as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.

The Hays Code

Hollywood panicked at the prospect of trying to distribute movies in fifty different states with fifty different boards of censorship and fifty different ideas about what makes a film "moral, educational or amusing and harmless."

From 1915 (the date of the *Mutual Film* decision) to 1952, the film industry zealously regulated itself to show the states they need not worry about censoring

Hollywood movies. The industry created the infamous Motion Picture Production Code aka the “Hays Code” and aggressively enforced it.

Named after Will H. Hays, president of the Motion Picture Producers and Distributors of America from 1922 to 1945, the Code had three general principles:

1. No picture shall be produced which will lower the moral standards of those who see it. Hence the sympathy of the audience shall never be thrown to the side of crime, wrong-doing, evil or sin.
2. Correct standards of life, subject only to the requirements of drama and entertainment, shall be presented.
3. Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation.

(From the Production Code, 1934)

Joseph Burstyn, Inc. v. Wilson

U.S. Supreme Court (1952)

- [case at Google Scholar](#)
- [how cited at Google Scholar](#)
- [case at Westlaw](#)
- [case at Wikipedia](#)

The Production Code became more stringent and obnoxious to filmmakers until 1952 when a “miracle” happened, namely, Roberto Rossellini’s *The Miracle* starring Anna Magnani as a dim-witted peasant girl who mistakes a bearded stranger (played by Federico Felini) for St. Joseph, her favorite saint. The bearded stranger plies the girl with wine and apparently ravishes her. When the poor girl discovers later that she is pregnant, she cries “It is the grace of God” and decides that she is the Virgin Mary and that this must be an Immaculate Conception.

Needless to say, the film offended and enraged Catholics all over the world, including the mighty Cardinal Spellman, Archbishop of New York, who issued a statement to be read aloud at mass in 400 New York parishes. Even though Spellman had not seen the movie, he called it “a despicable affront to every Christian” and “a blot upon the escutcheon of the Empire State” whose Board of Regents had issued a license to allow *The Miracle* to be shown in the first place.

Parades and picketing followed. The Paris Theatre on two different evenings was emptied on threat of bombings. Three members of New York’s Board of Regents viewed the film and concluded that *The Miracle* was “sacrilegious” and ordered the film producers to prove otherwise at a hearing. The hearing determined that the

film indeed constituted religious bigotry, and the Commissioner of Education rescinded the producer's license to exhibit the picture.

Joseph Burstyn, Inc., distributor of *The Miracle*, sued, first in New York courts, which upheld the Board of Regents' determination that the film was sacrilegious. New York's highest court held that there was "nothing mysterious" about the law that gave New York the right to censor films, saying: "It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule."

The Miracle then went to the United States Supreme Court, where, in 1952, thirty-two years after the Court had declared movies to be "a business pure and simple" and not speech protected by the First Amendment, the Court finally decided not only that movies were speech protected by the First Amendment, but that any Board of censors trying to define "sacrilegious" would be "set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies, New York cannot vest such unlimited restraining control over motion pictures in a censor."

The First Amendment sometimes "feels" powerful and protective enough to take for granted, but as Justice Oliver Wendell Holmes observed "We should be eternally vigilant against attempts to check the expression of opinions that we loathe." –Oliver Wendell Holmes

MR. JUSTICE CLARK delivered the opinion of the court.

Excerpts from the *Burstyn* opinion:

In a series of decisions beginning with *Gitlow v. New York*, 268 U. S. 652 (1925), this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. That principle has been followed and reaffirmed to the present day. Since this series of decisions came after the *Mutual* decision, the present case is the first to present squarely to us the question whether motion pictures are within the ambit of protection which the First Amendment, through the Fourteenth, secures to any form of "speech" or "the press."

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters v. New York*, 333 U. S. 507, 510 (1948):

The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.

It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree. That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

It is further urged that motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression. Even if one were to accept this hypothesis, it does not follow that motion pictures should be disqualified from First Amendment protection. If there be capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

For the foregoing reasons, we conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in *Mutual Film Corp.* is out of harmony with the views here set forth, we no longer adhere to it.

To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas. Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems. But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be

especially condemned. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that “the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.” *Id.*, at 716. In the light of the First Amendment’s history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case.

New York’s highest court says there is “nothing mysterious” about the statutory provision applied in this case: “It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . .” This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of “sacrilegious” given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor. Cf. *Kunz v. New York*, 340 U. S. 290 (1951).

Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority. Application of the “sacrilegious” test, in these or other respects, might raise substantial questions under the First Amendment’s guaranty of separate church and state with freedom of worship for all. However, from the standpoint of freedom of speech and the press, it is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

Since the term “sacrilegious” is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us. We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor’s conclusion that it is “sacrilegious.”

Reversed.

Categories of Unprotected Speech

In declaring that movies are indeed protected speech under the First Amendment, the United States Supreme Court in *Burstyn* took pains to point out that the film was not obscene within the meaning of another famous First Amendment case.

Chaplinsky v. New Hampshire

U.S. Supreme Court (1942)

- [case at Google Scholar](#)
- [case at Westlaw](#).
- [case at Wikipedia](#).

In late 1941, Walter Chaplinsky, a Jehovah's Witness, was preaching on a public sidewalk in downtown Rochester, New Hampshire. It was a busy Saturday afternoon, and Chaplinsky was passing out pamphlets and railing against organized religion, calling it a "racket." People complained to City Marshal Bowering, who responded by saying that Chaplinsky was "lawfully engaged." But Marshal Bowering also warned Chaplinsky that the crowd was getting restless.

Later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station. On a public sidewalk near City Hall, the officer and Chaplinsky met Marshal Bowering who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky. Chaplinsky then shouted at Bowering:

You are a Goddamned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.

Chaplinsky was arrested, charged and convicted in the municipal court of Rochester, New Hampshire, for violating a New Hampshire state law that provided:

No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Chaplinsky appealed all the way to the Supreme Court, claiming that the law was "vague" and that it infringed upon his First Amendment and Fourteenth Amendment rights to free speech.

Justice Murphy, writing for a unanimous court, upheld Chaplinsky's conviction under the statute and crafted one of the most widely quoted paragraphs in First Amendment jurisprudence, often cited in cases where the first amendment speaker is about to lose the case:

The right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.

Unprotected Speech

Some call this a "two-tier" or "category" approach to the First Amendment, meaning, some speech is protected by the First Amendment and some isn't. *Chaplinsky* is famous for listing the categories of speech historically not protected by the First Amendment, but also famous for planting the seed of the notion that not all speech is valuable or "essential" to the "exposition of ideas," a very Brandeis-like argument.

Some of the categories (the obscene, the libelous, fighting words) are still with us. The Court has outlined several others (incitement, child pornography), but as we'll soon see the current Roberts Court is not receptive to legislatures adding "new" categories of unprotected speech, like [stolen valor speech](#), or [animal crush videos](#).

Other governments have different concerns and different categories of offensive speech. France and Germany prohibit varieties of hate speech or speech denying the historical facts of the Holocaust. [Google and Facebook are under pressure from German authorities to abide by German laws banning racist sentiments](#). As Justice Minister Heiko Maas said in an interview with Reuters:

Holocaust denial and inciting racial hatred are crimes in Germany and it doesn't matter if they're posted on Facebook or uttered out in the public on the market square.

—Germany warns Facebook: Clamp down on Holocaust denial - or else.

By way of example, peek at the wide variety of free speech laws collected at Wikipedia: [Free Speech By Country](#). Canadian courts have held that pornography that is “degrading or dehumanizing” to women may be prohibited (see [R. v. Butler](#) an analysis explicitly rejected by Judge Frank Easterbrook in [American Booksellers v. Hudnut](#), 771 F2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986), Wikipedia.

When it comes to the United States, consider this [nice summary of speech restrictions and unprotected speech categories](#).

Child pornography and disclosing classified communications in violation of the Espionage Act are good examples. Both involve SPEECH, but the U.S. Supreme Court says that these categories of speech are not protected by the First Amendment. Child porn and disclosing classified information therefore are both categories of “unprotected speech,” meaning the government can fine you or send you to prison for engaging in them. [18 U.S. Code § 2251 - Sexual exploitation of children](#)

Totally Optional Reading

- [Eugene Volokh on the meaning of “Congress shall make no law . . .”](#). If the the tiny print bothers you, try [Readability](#).
- [Congress Shall Make No Law . . .](#), by Richard Dooling
- [ACLU: Freedom of Expression in the Arts & Entertainment](#)
- [The Atlantic: “The Most Powerful Dissent in American History”](#) (a book that reveals precisely how and why Oliver Wendell Holmes changed his mind about the first amendment).
- [The Atlantic: “It’s Time to Stop Using the ‘Fire in a Crowded Theater’ Quote”](#) (A nice take on the *US v. Schenk* and how it may have led to Holmes’ opinion in *Abrams*).
- [The Wall Street Journal: Even Speech We Hate Should Be Free Those who want to limit freedom of speech are misusing Oliver Wendell Holmes’s famous 1919 line about ‘shouting fire in a theater’](#)
- [The Hell You Say: The new battles over free speech are fierce, but who is censoring whom?](#), BY Kelefa Sanneh.
- [Fox Urges End to Broadcast Indecency Limits](#)
- [Highest criminal court in Texas strikes down “improper photography” statute](#)

Reference/Footnote Cases

In class, I may also refer to one or more the cases listed below. Again, the links simply provide more information if you are curious.

- *Yahoo! Inc. v. La Ligue Contre Le Racisme et l'antisemitisme (LICRA)*, 433 F.3d 1199 (9th Cir. 2006). [Wikipedia](#).
- *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) 72 S.Ct. 777, 96 L.Ed. 1098, 1 Media L. Rep. 1357. [Wikipedia](#).
- *Brandenberg v. Ohio*, 395 US 44 (1969). [Wikipedia](#).
- *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). [Wikipedia](#)
- *Miller v. California*, U.S. Supreme Court (1973) [Wikipedia](#)
- The *Miller test* at [Wikipedia](#).
- *New York v. Ferber*, 458 US 747 (1982). [Wikipedia](#).
- *American Booksellers v. Hudnut*, 771 F2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). [Wikipedia](#).

Changelog

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