

Open Access Is Almost Here: Navigating Through Copyright, Fair Use, and the TEACH Act

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2. Read each question and record your answers. After completing all questions, compare your answers to those provided within this issue.
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Objectives: After studying the article, "Open Access Is Almost Here: Navigating Through Copyright, Fair Use, and the TEACH Act," in this issue, the participant will:

1. Explain key points related to copyright, fair use, Digital Millennium Copyright Act legislation, and the TEACH Act.
2. Discuss the concept of open access publishing.
3. Identify strategies for correctly using copyrighted materials in the development of online or classroom materials.

abstract

Dealing with the complexities of copyright, fair use, the TEACH Act, and the concept of open access can confuse even the most experienced educator. Online education has added to the dilemma. This article discusses the latest information on copyright issues, current guidelines for interpreting fair use and incorporating the TEACH Act, and recent developments in open access publishing.

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Open access describes the concept of no-cost, no-wait, online access to scholarly works. An open access article has limited copyright and licensing restrictions, which means that anyone, anywhere, with access to the Internet, may read, download, copy, and distribute that article (Suber, 2007). There are no user fees or permissions—just click, copy, and transform, and anyone can use materials for any purpose. "The only constraint on reproduction and distribution should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited" (Open Society Institute, 2002). Open access is the ideal that all educators would like to see. The problem is that not all research is available in an open access format.

TIMELINE TO OPEN ACCESS

The timeline to open access (Sidebar 1) began with the first copyright laws enacted in the 1700s (Association of Research Libraries, n.d.). These laws had limited

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SIDEBAR 1

TIMELINE FOR OPEN ACCESS

- 1700s** U.S. copyright laws enacted
- 1976** Copyright Act (Title 17, U.S. Code, Section 107, Fair Use)
- 1994 to 1996** Conference on Fair Use
- 1998** Copyright Term Extension Act (Sonny Bono Copyright Term Extension Act)
- 1998** Digital Millennium Copyright Act
- 2002** Technology, Education, and Copyright Harmonization Act
- 2008** Prioritizing Resources and Organization for the Intellectual Property Act of 2008
- ?** Open access legislation

time restrictions for copyright and later required the use of the copyright symbol and a renewal process to retain copyright (Association of Research Libraries, n.d.). These laws were followed by the Copyright Act of 1976, also called Title 17 of the U.S. Code. Within that code is Section 107, which discusses a concept called “fair use.” This code, which is still in effect today, has been modified. In the early 1990s, the World Wide Web became a part of everyday lives and teaching formats. Questions began to arise about copyright and the web. In 1994, as a part of the U.S. government’s National Information Infrastructure Initiative, interested parties from industry, academia, and libraries formed a working group to negotiate guidelines for the fair use of copyrighted electronic content in nonprofit educational environments (Association of Research Libraries, n.d.). This group had a series of meetings that came to be known as the “conference on fair use” (CONFU) and in 1996 agreed on “multimedia fair use guidelines” (Lehman, 1998). In 1998, the Digital Millennium Copyright Act was passed in response to new treaties adopted by the World Intellectual Property Organization (Association of Research Libraries, n.d.). In an effort to decrease confusion, the TEACH Act of 2002 was developed. More recently, the Prioritizing Resources and Organization for the Intellectual Property Act of 2008 (PRO-IP Act) provided additional amendments to U.S. copyright laws. The PRO-IP Act imposes stiffer fines for those who engage in Internet piracy (Udell & Pressman, 2008).

WHAT IS COPYRIGHT?

Copyright is Title 17 of the U.S. Code and gives legal protection to a person who creates a fixed work. This work can be musical, artistic, performed (i.e., dance), or written (U.S. Copyright Office, n.d.). Creators of these works are entitled to exclusive rights, such as the right to display, perform, transmit, and copy their own work

and prepare new works based on the original work (derivative works) (Stim, 2007). This law was created to give authors time to benefit from the revenue that the artistic work generated so that they would be able to keep creating future work. Copyright falls under the umbrella of U.S. Intellectual Property Law. Copyright today is automatically applied when a work is created and “fixed in a copy,” even if it does not mention the word “copyright” or use the copyright symbol (©) (Stim, 2007). There was a brief time when works needed to be registered with the copyright office to renew a copyright. This is not the case today. A small fee of \$45.00 is all that is needed to register with the copyright office to have the author named as the original author of a work (U.S. Copyright Office, n.d.). However, copyright does not need to be registered to retain the author’s rights (Kelly, 2006). Registering with the copyright office strengthens the author’s position if someone is challenging the author as the original creator of the work. The bottom line for all educators is to assume that everything is copyrighted unless noted otherwise.

The original length of copyright was 14 years, with a renewal option for another 14 years (Association of Research Libraries, n.d.). After that time, the work would be released to the public. Today copyright lasts for the lifetime of the author plus 70 years, after the implementation of the Copyright Term Extension Act, otherwise known as the Sonny Bono Copyright Term Extension Act of 1998 (U.S. Copyright Office, n.d.). Any work created before 1923 is open to the public.

There is no such entity as the “copyright police.” To determine culpability, those who violate copyright laws must be sued, and the court makes a judgment. The minimum fine is \$750 per infringement (whether done intentionally or not). Willful violators can be fined up to \$250,000.00 per infringement. A prison sentence can be included for up to 5 years, as per the PRO-IP Act (Udell & Pressman, 2008).

There are some exceptions to copyright, such as ideas, short phrases, and common knowledge. Slogans can be protected under trademark laws (Stim, 2007). Works that are in the public domain are also exempt from copyright law (Stim, 2007).

PUBLIC DOMAIN

Works in the public domain (Sidebar 2) include a range of abstract materials that are not owned or controlled by anyone (Stim, 2007). This designation indicates that these materials are considered “public property” and are available for anyone to use for any purpose. “Of all the books found in the world’s libraries, it is estimated that currently, only about 15 percent are in the public do-

SIDEBAR 2

FOUR WAYS FOR WORKS TO ENTER THE PUBLIC DOMAIN

Copyright expired: Illustrations from *Gray's Anatomy* are old enough to enter the public domain because they were published before 1923.

Owner failed to follow copyright rules: Owner did not renew copyright during the right time frame.

Dedication: Author deliberately placed the work in the public domain (e.g., Flickr, Creative Commons).

Work was not protected by copyright: Federal government work and laws are examples. However, work created by state workers is subject to copyright protection.

Note. Data adapted from Stim (2007).

main. Only 10 percent of all books are still in print; the remaining 75 percent are books which remain unavailable because they are still under copyright protection” (Kelly, 2006).

A website (www.librarycopyright.net/digitalslider) can be used to determine a work’s copyright protection status quickly by sliding the red arrow to the date of the work in question. A yes, no, or maybe answer will be provided, with the option of clicking on additional information that links to key copyright websites (Sidebar 2).

FAIR USE

Another exemption to copyright in certain circumstances is discussed in Sections 107-121 of Title 17. Section 107 relates to the concept of fair use (Sidebar 3). Fair use is a legal principle that provides certain limitations on the exclusive rights of copyright holders. Fair use is not a specific law that exempts a person from copyright infringement; rather it is a legally defensible position if copyrighted materials are used without the holder’s permission.

The language and criteria for determining fair use are deliberately vague. The idea is for a court to determine whether an infringement has occurred. Each of four factors must be considered when deciding whether to use copyrighted materials (Sidebar 3).

First Factor

The literature notes that courts have upheld the first factor as the primary indicator of fair use: the purpose of the work, meaning what is the work being used for? Nonprofit educational purposes versus commercial ventures would favor fair use (Stim, 2007).

Second Factor

What is the nature of the work? Is it published or unpublished? Using unpublished works is less likely to be

SIDEBAR 3

FAIR USE

The exact quote from section 107 is:

“Fair use of copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

In determining whether the use made of a work in any particular case is ‘fair use,’ the factors to be considered shall include:

The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

The nature of the copyrighted work;

The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

The effect of the use upon the potential market for or value of the copyrighted work.”

Note. Data from U.S. Copyright Office (n.d.).

seen as fair use. Is the work factual or artistic? The more a work leans toward factual expression, the more likely it is that the use would be judged as fair (Stim, 2007). This factor can come into play when an educator thinks about adding music or a cartoon to instructional materials versus a factual chart from a scientific journal.

Third Factor

The third factor that is considered is the amount of the work that is used. Less is best; it is important to avoid using the heart of an author’s work if economic gain could be affected (Stim, 2007).

Fourth Factor

The last factor is the use of the copyrighted work on the potential market. Will the copyright holder lose money from the use of the work? If the answer is yes, then the use may not be fair.

Fifth Factor

Some of the literature refers to a “fifth factor” for determining fair use—good faith. Consideration is given if efforts were made to obtain permission and if the proposed uses are deemed “honorable.” This consideration has come about because in studying court cases, judges tended to favor fair use if the user made attempts to contact authors or cited their source and used the works for efforts seen as worthy or honorable (i.e., educational as opposed to entertainment) (Copyright Website, Field vs. Google, n.d.).

SIDEBAR 4

FAIR USE GUIDELINES FOR EDUCATIONAL MULTIMEDIA ("THE GUIDELINES")

Portions of works can be used for instructional activities at educational institutions if:

The network is secure, and only for 2 years.

You make exactly two copies of the work, one for yourself and one for an archive.

Movies: 10% or 3 minutes.

Text: 10% or 1,000 words.

Poems: less than 250 words.

Music, lyrics, and videos: 10% or 30 seconds.

Illustrations or photos: no more than 5 per author or 10% or 15 images from a collection.

Numerical data: 10% or 2,500 cell entries

Note. Data from Lehman (1998).

Provisions of the law are still at best vague. These laws were written in 1976. As technology grew, educators wanted clear guidelines to determine fair use in the educational setting. This led to the Conference on Fair Use (CONFU).

CONFERENCE ON FAIR USE

On November 18, 1996, the Working Group on Intellectual Property Rights in the Electronic Environment convened at the CONFU to work with copyright owners who wished to participate in the development of fair use guidelines for electronic multimedia in certain nonprofit educational settings (Lehman, 1998). The CONFU met for 2 years and did not reach a consensus or adopt official guidelines. However, it did provide a model for many institutions to use in developing their own guidelines. Although the CONFU guidelines do not carry the weight of law, many people support them as "reasonable" measures to protect the rights of copyright owners while also advancing nonprofit educational efforts through multimedia (Lehman, 1998). These guidelines, known as "Fair Use Guidelines for Educational Multimedia" or "the Guidelines," are not laws and were intended to reflect the minimum amount of material that could be used without getting into legal difficulty. The CONFU guidelines were endorsed by the American Association of Community Colleges; the Society of Journalists and Authors; the American Society of Composers, Authors and Publishers; the United States Copyright Office; McGraw-Hill and Time Warner; and others (Lehman, 1998) (Sidebar 4).

These guidelines finally provided educators with clear-cut "rules" about copying. Unfortunately, follow-

ing the rules can be restrictive and also requires measuring and counting numbers of letters. The guidelines refer to teaching in the classroom setting, leaving distance learning and online instruction in states of continued confusion.

DIGITAL MILLENNIUM COPYRIGHT ACT

The CONFU was followed by the Digital Millennium Copyright Act, a U.S. Copyright Law that implements two 1996 treaties of the World Intellectual Property Organization. Its main focus is Internet piracy and other crimes. The Digital Millennium Copyright Act heightens the penalties for Internet copyright infringement. It attempted to include distance learning language in the copyright law (http://hrrc.org/File/H.R._2281-_final_text.pdf). Section 110 refers to classroom activities, but was changed to include a broadened definition of classroom. It clarified the meaning of educational transmissions and redefined teaching activities within a course (http://hrrc.org/File/H.R._2281-_final_text.pdf). Section 107 on fair use remained unchanged because the courts believed that the language was "technology neutral." Unfortunately, this law still left educators confused about copyright violation, especially in the areas of online and distance learning.

TEACH ACT

The TEACH Act (Technology, Education, and Copyright Harmonization Act), was passed on November 2, 2002. This act essentially revised Sections 110(2) and 112 of the existing copyright law that governs the conditions under which accredited nonprofit educational institutions in the United States may use copyrighted materials without permission from the copyright owner and without payment of royalties (Gasaway, 2001).

Language was added to Section 110 that allows the use of a multitude of works as long as certain criteria are met (Sidebar 5). First and foremost, the institution must be an accredited nonprofit educational institution, which would include K-12 schools, colleges, universities, teaching hospitals, and certain continuing nursing education providers. Then, the accredited nonprofit educational institution must have formal policies that govern the use of copyrighted materials (Gasaway, 2001).

Once the accreditation and institutional requirements are met, the faculty/student criteria would be applied to the development of any educational project (Copyright Management Center, 2008). For example, when creating online continuing education modules, the first criterion to consider is the amount of content to be provided. Is it comparable to the amount of content shown during a "live" classroom session or "trans-

SIDEBAR 5

TEACH ACT CRITERIA

Institutional criteria

- Has policies that govern the use of copyrighted materials.
- Distributes accurate information on copyright to faculty and students.
- Promotes compliance with copyright law.
- Provides students or participants with notice that materials may be covered under copyright law.

Faculty and student criteria

- Amount used is comparable to a usual live session.
 - Content is delivered under the direction of an instructor.
 - Works used are directly related to the course topic.
 - Works are made available only to students enrolled in the course for a limited time.
- Faculty and students must demonstrate compliance with institutional copyright policies.

Note. These criteria apply only to accredited, nonprofit, educational institutions. Data adapted from Copyright Management Center (2008) and Gasaway (2001).

mission”? If the answer is yes, criteria a, b, c, and d are applied. Is the course content delivered under the direction of an instructor (criterion a)? In the example of the online module, the answer is yes if each module is taught by a faculty member or content expert to supervise the learning. Is the work directly related to the content of the transmission (criterion b)? The nurse planner or role equivalent should review each module and speak to the presenter if there is a question about the relationship of copyrighted material to the course content (usually cartoons and certain photographs are potential violators). Is the copyrighted material available to participants for a limited time (criterion c)? In the online module example, the Blackboard teaching platform that is used is password-protected. The participants have access to the materials for 2 months, and modules have a 2-year expiration date. Does the institution have policies on copyright and actively promote compliance (criterion d)? In this case, the website has clear policies on the home page and posted copyright notices on every module. The author even saved a copy of a local newspaper article written about the ways that her institution enforces student compliance with its copyright policies. An instructor who can answer yes to all of the TEACH Act criteria questions can feel confident in invoking the TEACH Act if questioned about the use of a copyrighted item.

Under the TEACH Act, it is much easier to decide what is legal to use and what is not legal to use (Sidebar 6). Materials that are not permitted to be used without

SIDEBAR 6

WORKS THAT ARE PERMITTED AND NOT PERMITTED UNDER THE TEACH ACT

Permitted under the TEACH Act

- Nondramatic literary or musical works, including poetry, short story readings, and all other music except opera.
- Still images.
- Reasonable portions of other works.

Not permitted under the TEACH Act

- Digital media designed to be sold for use in a classroom setting through mediated instruction (textbooks and course packs).
- Electronic reserve supplemental reading.
- Unlawfully acquired copies.

Note. Data adapted from Crews (2003).

permission are items from digital textbooks and course packs, electronic reserves, and unlawfully acquired copies (Crews, 2003). These are all materials that could take money away from the people who created the materials and thus potentially impair their ability to create future educational works. Content that a student would normally have to purchase, such as cardiopulmonary resuscitation certification materials, should not be placed in educational materials without permission, unless the publisher's license includes online use. Works that are allowed under the TEACH Act include nondramatic literary or musical works, including poetry, short story readings, and all other music except opera; still images; and reasonable portions of other works (Crews, 2003).

“Reasonable portions” of other works can be difficult to define. Some educators have chosen to apply the 1996 CONFU guidelines. According to the Medical Library Association's 2007 publication *Copyright Law and the Health Sciences Librarian*, still images and reasonable portions of works are defined as amounts that would be used in a normal classroom setting. Regardless of copyright status, all works must be cited in the reference section, where the creator of the work (author or photographer) receives credit.

Although this act is not a blanket statement allowing the use of copyrighted materials, it is reassuring that educators can use certain works without breaking the law. The language in the TEACH Act essentially spreads liability for infringements among the educational organization, the instructor, and the participants enrolled in a course.

PROGRESS OF THE OPEN ACCESS MOVEMENT

The timeline (Sidebar 7) shows that the open access movement is a global initiative. The general concept of

SIDEBAR 7

EXAMPLES OF WORLDWIDE OPEN ACCESS INITIATIVES

- 2002** Budapest Open Access Initiative
- 2003** Bethesda Statement on Open Access Publishing
- 2003** Berlin Declaration on Open Access Knowledge in Science and Humanities
- 2005** DAREnet (Digital Academic Repositories website started in the Netherlands)
- 2005** National Institutes of Health Public Access Policy
- 2006** Federal Research Public Access Act
- 2007** Howard Hughes Medical Institute Open Access Mandate
- 2009** Reintroduction of the Federal Research Public Access Act

open access provides free online access to full-text, peer-reviewed journal articles arising from taxpayer-funded research. In 2002 and 2003, nations began to draft statements embracing the benefits of open access. DAREnet (Digital Academic Repositories), launched in the Netherlands, is a website that facilitates free access to scientific research. The National Institutes of Health (NIH) is the largest funder of medical research in the world and the largest funder of nonclassified research in the U.S. federal government (NIH, 2009). Its budget for fiscal year 2009 is approximately \$30 billion (NIH, 2009). NIH now asks every scientist who receives an NIH research grant and publishes the results in a peer-reviewed journal to deposit a digital copy of the article in the PubMed Central depository, the online digital library maintained by the NIH. PubMed Central will then provide free online access to its copy at some point after the article is published in a journal, with the length of the delay determined by the author (NIH, 2008).

In April 2008, “in a move to disseminate Harvard faculty research and scholarship more broadly, the Faculty of Arts and Sciences voted in 2008 to give the University a worldwide license to make each faculty member’s scholarly articles available and to exercise the copyright in the articles, provided that the articles are not sold for a profit” (de Rosnay, 2008).

The Howard Hughes Medical Institute also announced that it will require its scientists to publish their original research articles in scientific journals that allow the articles and supplementary materials to be made freely accessible in a public repository within 6 months of publication (Howard Hughes Medical Institute, 2007). On May 2, 2006, Senators John Cornyn and Joe Lieberman introduced the Federal Research Public Access Act of 2006 in the U.S. Senate. This act would mandate open access to most federally funded research

SIDEBAR 8

OPEN ACCESS WEBSITE INITIATIVES

Creative Commons (www.creativecommons.org): Nonprofit corporation dedicated to making it easier for people to share and build on the work of others, consistent with the rules of copyright. The site provides free licenses and other legal tools to mark creative work with the freedom the creator wants it to carry, so that others can share the material, remix it, use it commercially, or any combination thereof.

Flickr (www.flickr.com): Online photo management and sharing application website where many users have chosen to offer their work under a Creative Commons license.

Wikipedia (www.wikipedia.org): Multilingual, web-based, free-content encyclopedia project.

Teachertube (www.teachertube.com): Website designed for teachers to provide an online community for sharing instructional videos.

Disease database (www.diseasedatabase.com): Information on diseases, symptoms, physical signs, nonbrand drugs, and common laboratory abnormalities in conjunction with the U.S. National Library of Medicine.

SciVee (www.SciVee.com): Public website that provides rich media solutions to the scientific, technical, and medical market and is open for users to access and researchers to upload videos of interest, with a distribution option for publishers and other content providers.

Open Access Directory (www.oad.simmons.edu): Wiki (website allowing input by users) where the open access community can create and support simple factual lists about open access for science and scholarship.

Directory of Open Access Journals (www.DOAJ.org): List of open access journals (i.e., scientific and scholarly journals that meet high quality standards by exercising peer review or editorial quality control and are free to all from the time of publication, based on the Budapest Open Access Initiative definition of open access).

PubMed Central (www.pubmedcentral.nih.gov): U.S. National Institutes of Health free digital archive of biomedical and life sciences journal literature.

(Albanese, 2009) and was reintroduced to the U.S. Senate in 2009. An opposing bill called “Fair Copyright in Research Works Act” (HR801) attempted to prohibit initiatives such as the Howard Hughes Medical Institute mandate, citing its unfairness to publishing companies (Albanese, 2009).

OPEN ACCESS WEBSITES

Sidebar 8 shows examples of open access websites. Users need to check their policies on use and citation. Creative Commons, founded by Stanford University Law School professor Larry Lessig, provides a searchable database for items in the public domain that are freely available for noncommercial use, if the author is given credit. Flickr is a database of photography. The directory of open access journals can be used to determine which journals are open and when certain issues will be

SIDEBAR 9

AVAILABLE TOOLS

- North Carolina State University Teach Act Toolkit
- University of Texas Copyright Crash Course and UT Rules of Thumb System Guidelines available at <http://www.utsystem.edu/ogc/intellectualproperty/teachact.htm>
- Indiana University Checklist for Fair Use
- Association for the Protection of Internet Copyright fair use visualizer and fair use algorithm available at www.benedict.com/Info/FairUse/Visualizer/Visualizer.aspx
- Stanford University website
 - Duke University Teach Act Flow Chart
 - Baruch University Copyright Metro available at http://fairuse.stanford.edu/charts_tools

Best practices

- Check institutional copyright policies to see if you comply with the TEACH Act criteria.
- Know and apply fair use criteria and Conference on Fair Use guidelines within the confines of the TEACH Act.
- Use works in the public domain (<http://www.librarycopyright.net/digitalslider>).
- Use open access websites.
- Include all copyrighted items used to create a paper or project in the bibliography. For example, cite books, newspaper articles, Internet pages, images, and multimedia information included in the project.
- Try to obtain permission, especially for enduring materials.

Web resources

- For-profit photography usage
www.Stockasylum.com
- Copyright law
www.Copyright.gov
- All things government
www.USA.gov
- Health topics from trusted sources
www.Healthfinder.gov
- Copyright website
www.Benedict.com
- U.S. Department of Health and Human Services
www.NIH.gov
- American Library Association
www.ala.org

opened to the public (usually after a 6-month waiting period). Peter Suber of Earlham.edu maintains a website related to all things open access.

AVAILABLE TOOLS

Sidebar 9 shows examples of tools to use when making decisions about the use of copyrighted materials.

The Benedict tool on the Association for the Protection of Internet Copyright website provides a fair use

key points

Open Access

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- 1 Teaching in the new millennium is complex and most educators are not sure about copyright issues.
- 2 Educators can use copyrighted materials both on campus and in online classrooms if they know the parameters or constraints of "Fair Use" and the TEACH Act.
- 3 Open access publishing should make copying of educational materials easier for educators, and it is important for educators to become familiar with open access initiatives.

checklist similar to the Indiana University site's Checklist for Fair Use, but weights the fair use criteria (1 = 35%, 2 = 10%, 3 = 10%, and 4 = 35%) and calculates a percentage (50% or greater favors fair use). The Stanford University website also provides useful tools to help with copyright and fair use decisions. This website includes tools from different universities, such as Duke University and Baruch College. The Baruch College example offers an interactive journey on the "copyright metro" while learning about copyright issues.

Caution must be used when investigating websites. Several keep CONFU guidelines as their state-of-the-art policies on copyright. Others have not incorporated TEACH Act legislation. Website information should be dated since at least 2002.

Until there is an absolute, clear, and concrete way to determine fair use, or until all fixed items have some kind of label (e.g., "oa" or "o" to indicate open access), the assumption must be made that everything is copyrighted. Using these strategies can minimize exposure to potential copyright infringement.

CONCLUSION

The goal for educators is open access, and open access is getting closer. Pending legislation as well as the growing debate by young people in the creative arts areas of music remixing and video works will likely lead to specific laws regarding transformative creations. It is best to remember that each case is different and that there are no clear-cut rules to avoid legal issues. However, by being aware of the copyright laws and developing content within best practices recommendations, educators should be able to provide creative multimedia presenta-

tions without the worry of legal trouble. Open access is almost here!

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