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Analysis of Laws Regarding Software Piracy under Copyright Law

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ABSTRACT

The piracy of software includes illegal duplication of computer software and illegal usage of the same for generating revenue. The paper discusses issues of copying, distribution, sale and resale of the computer software without the consent of the creator of the software or without proper documentation. The digital piracy and software piracy are new emerging trends and the protective legislation safeguarding such malpractices and copyright theft is under question and not stringent enough to punish the violators. The paper discusses scope of 'literary works', 'computer database' and "computer software piracy' and the test to ascertain copyright piracy.

I. WHAT IS A SOFTWARE

Computer software[2], or just a software, is a part of a computer system which consists of data, information and computer instructions, as opposed to the physical hardware from which the system is built. In computer science and software engineering, computer software is all information processed by computer systems, programs and data. Computer software[3] consists of various computer programmes, libraries and related non-executable data, for example online documentation or digital media.

The Indian Copyright Law 1957 defined computer programs (software)in Sec. 2 (ffc) as follow: "Computer program means a set of instructions expressed in works, codes schemes or in any other form, including machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result"

II. WHAT IS SOFTWARE PIRACY

Software Piracy or Programming theft is the illicit duplicating, circulation, or utilization of programming. It is such a PROFITABLE "business" that it has attracted the attention of the

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[2] A software has no definition by includes computer Programme and database

[3] 'Computer software' and 'computer programme' have been used as a substitute for each other in Brainbridge David, Software Licensing, 2ndedn, (CLT Professional, Publishing Ltd, UK), 1999, p. 6

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organized wrongdoers in various nations. It is unauthorized copying of software . Most retail projects are authorized for use at only one PC site or for use by just a single client whenever. By purchasing the product, you turn into an authorized client as opposed to a proprietor. You are permitted to make duplicates of the program for reinforcement or back up purposes; however it is illegal to offer duplicates to companions and associates. So it can be easily concluded that use of software without proper license from the developer by multiple users for commercial gains or not is an offence of piracy.

Software Piracy or counterfeiting can be defined as the means adopted by illegal copying of software in addition with unauthorized duplication of authentic trademarks and documents.

III. DIFFERENT TYPES OF SOFTWARE PIRACY[4]

Counterfeiting

This involves the illegal duplication, distribution and/or sale of copyrighted material with the dishonest intention of imitating the copyrighted product. It is made in a form or designed in a manner where it ends up giving an impression of a legitimate copy.

Internet Piracy

Whenever the software is downloaded from the Internet it is invoked internet piracy is quickly turning into the speediest and most straightforward approach to get pirated software. Many organizations enable purchasers to download programming from the Internet. This disposes of the need to make a few treks to the store or conveying duplicates of programming on CD-ROM or floppy circle. In any case, these basic and time sparing systems have likewise expanded Internet theft. Web theft can happen in a wide range of structures, for example, downloading or transferring programming from/to an announcement board, appending a duplicate of programming by means of email or potentially transmitting programming programs by means of document exchange convention (FTP).

End User Piracy or Soft Lifting

End-User Piracy, now and then alluded to as soft lifting duplicating, is a common scenario in work environment. To outline, one duplicate of software has been acquired for a specific machine and that same bit of software is introduced on a several different computers without proper documentation (different site license). At times, representatives will likewise introduce that same bit of software on their home PCs.. End-user piracy also deals with individuals

[4] The types of software piracy has been listed on the website of SIIA and BSA, http://www.faithaca.org/SIIA.pdf on 6th July 2017

exchanging copies of software programs with friends or family members.

Client-ServerOveruse

This type of piracy is a result of usage of too many users on a network by means of a central copy of a program at the one particular time without any proper documentations or license policy. For example if you have a LAN with installed programs on the server for use by many people as prescribed under the license policy but if you have more than the prescribed number of users than it is termed as "overuse."

Hard-Disk Loading

This is when new computers are sold with illegal copies of software loaded on their hard disk.

CD-R Piracy

It is a common practice where CD-R recording technology is illegally copied for sale and transmission by making duplicate copies for distribution without any valid or proper documentation.

IV. COPYRIGHT PIRACY

Software piracy is also an unauthorized reproduction of the use of copyrighted software. The unauthorized reproduction can be done for various reasons. For example personal use , business use or even to derive commercial gains or benefits by exchange or sale of the pirated copy.

Copyright is a legal right given to the creators of literary, dramatic, musical and a variety of other works of mind. It essentially implies the maker alone has the privilege to make duplicates of his or her works or then again, keep all others from making such duplicates. The fundamental thought behind such insurance is to commence that the advancements require motivators. Copyright perceives this need and gives it a lawful authority. Also, business misuse of copyright yields pay to the makers and in this manner making monetary prizes to individual's imagination

The Indian Copyright Act protects copyright on (i) the original literary work , dramatic work, musical work and artistic works, (ii) cinematographic films and (iii) sound recordings. [5]

`Original' here implies that the work should be outcome of one's own independent efforts and should be genuine and authentic so as to justify the same.

The Act extends and empowers by promotion of the interest of copyright holder to do a number

[5] Section 13.of the Copyright Act 1957, " Works in which copyright subsists"

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of activities by giving authorization. A few of those exclusive rights are : [6]

A Right to reproduce

b. Right to get the work published

c. Right to perform in public

d. Right to produce or reproduce or perform or publish/ translate his work

e. Right to make a cinematographic film

f. Right to make adaptation.

Regardless there can be exceptions to this as in the following two cases :- [7]

a. When the creator has been employed under terms of contract by someone to create a work. The rights do not belong to the creator.

b. Through Assignment .

Issue of copyright Piracy

Copyright piracy is a worldwide problem. Piracy implies unapproved proliferation, bringing in or conveyance both of the entire and of a generous piece of works secured by copyright. The creator of a copyrighted work, being the proprietor, appreciates certain elite rights as for his or her works. This incorporate right to reproduce, to distribute, to adopt, to publish, to make an interpretation of and to perform in public. The proprietor can likewise offer, allot, sell , assign or bequeath , permit or give the copyright to another party as per his wishes. Any act in contravention the above said right amounts to infringement of the law. Thus piracy of copyrighted documents, database or programmes is a form of theft which is prejudicial and contrary to the notions of creativity and reaping profit out of one's legitimate and independent work.

V. LITERARY WORK

Piracy of artistic works implies illicit multiplication of books and other pieces of literature and circulation/selling of these for benefit. In India, the diaries, magazines, journals and different periodicals are not pilfered a lot. Here piracy of abstract works for the most part happens in three head ways. : 1) discount republishing of content books in wholesale 2) unapproved interpretations and translations and 3) business of photocopying of books/diaries or journals

[6] Section14 of the Copyright Act 1957 " Meaning of copyright"
[7] Section 17 of the Copyright Act 1957 ".First owner of copyright"

Numerous a period theft through piracy appears as distributing counterfeit books, where writers appeared in books are not the genuine writers..

Other than the abovementioned, piracy as mass copying of books is generally common in India, particularly in and around the foundations of educational institutions. Students acquire books from libraries and afterward get these copied from the scanner kept at the establishment where from the books are obtained. While copyright law licenses copying of artistic works for restricted private uses, for example, research, audit, review, criticism or analysis what occurs, numerous a period is that the whole book is copied including the cover pages. In the process student's network and the operators of photocopy gain, yet the distributers lose a tremendous income.

In a similar case **The Chancellor, Masters & others vs. Rameshwari Photocopy Services** [8] also referred to as Delhi University Photocopy case. The litigation history of the case was that on 2012, five noticeable publishers (Oxford University Press, Cambridge University Press and Taylor and Francis) filed a Suit against Rameshwari Photocopy Services and the University of Delhi for encroaching copyright in their productions by means of photocopying their certain concentrates of productions and by aggregating them into course packs for appropriation to students for a fee. On 16 September 2016, a Single Judge of the Delhi High Court held that the Defendants were not infringing the Plaintiff's copyright and dismissed the Suit on the grounds that the Defendant's activities fell within the exceptions of 52(1)(i) [9] of the Copyright Act 1957 . The publishers favored an interest against the judgment of the Single Judge

Division Bench's Decision

The decision of the Division Bench mainly focused upon section 52 of the Copyright Act 1957 which provides the category of certain acts which are not to be considered as copyright infringement. The literal interpretation of section 52(1)(i) which permits *'the reproduction of any work by a teacher or pupil in the course of instruction".*[10]gives away the scope for reproducing any work by a teacher to his student done strictly in course of academics . Also the principle of fair and just use of copyrighted material should be applied as a filter to distinguish cases of copyright violation. If the copyrighted material is used for the purpose of academics or imparting education it will deemed to be the fair use of it.

[8] IN THE HIGH COURT OF DELHI AT NEW DELHI, RFA(OS) 81/2016

[9] **Section 52(1) in the Copyright Act, 1957**

(1) The following acts shall not constitute an infringement of copyright, namely:(i) by a teacher or a pupil in the course of instruction

[10] ibid

Is computer software a literary work under Copyright Act ?

The meaning of " literary work "[11] under Section 2(0)[12] is said to include computer programmes, tables and compilations including computer "literary data bases "[13].Software, that is computer programs and further conversion of a program into or between computer languages and codes corresponds to " adaption " [14]of a work. Making a record by storing a work in computer will lead to copyright infringement further in addition, running the work without consent of the real owner will lead to an offence of infringement of copyright making an "infringing copy" [15] .under Section 2(m) [16]. Under the Indian law a computer programs amounts to literary works and is in par with musical or artistic works protection herein is extended to the original work only in form of 'expression' and not extended to the ideas. The prerequisite of claiming protection under the copyright act is to change an 'idea' into a 'tangible form'. If the tangible form is not given, the protection fails as literary work. The protection also includes right to contest a suit in situation of infringement of processes, systems, methods of operation, concepts and principles. The test to check a claim of infringement is:

a) Is the computer programme is new?

b) Is the idea is in tangible form?

Software Contracts

They are driven by the common principle of Indian Contract Act, The supreme court of India considered computer software as a 'good" and as a good would be it will be further liable to principles embodied under Sale of Goods Act, 1930 . In **Tata Consultancy Services v. State of Andhra Pradesh**[17], the **Supreme Court considered "computer software is intellectual property**, whether it **is conveyed in diskettes, floppy, magnetic tapes or CD ROMs, whether canned (Shrink-wrapped) or uncanned (customized), whether it comes as part of computer or independently , whether it is branded or unbranded, tangible or intangible; is a commodity capable of being transmitted, transferred, delivered, stored , processed"** , etc. and therefore as a 'good' liable to sale tax.

Labelling computer software as 'goods' would make them liable under different tax laws, viz.

[11] Subs. by Act 38 of 1994, s. 2.
[12] The Copyright Act, 1957
[13] 35A. . Subs. by Act 49 of 1999, Section 2, for databasis (wef 15.1.2000)
[14] Section 2(a) of The Copyright Act 1957
[15] Subs. by Act 38 of 1994, s. 2.
[16] The Copyright Act 1957
[17] Tata Consultancy Services v. State of Andhra Pradesh, 271 ITR 401 (2004)

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central excise duty customs duty[18] on imports[19], and royalty paid by the assessee for using the trademark of another person.[20]

Shyam Shah Vs. Gaya Prasad Gupta*[21]* the court discussed the procedure for establishing infringement. The prerequisites is that the work in question should not resemble the original work. The substantial copying of the work is prohibited wherein borrowing the essential idea of work does not amount to infringement.

VI. Why The Problem Of Copyright Piracy Cannot Be Solved

The primary purposes for copyright theft is poorly managed authorization and absence of mindfulness on matters relating to copyright. The copyright laws of India are comparable to those of many propelled nations in Europe and America, where concern for copyright is at alarming state. Disciplines recommended for violators are stringent and equivalent to those of several nations on). Be that as it may, laws alone can do pretty much nothing because laws alone can do little justice unless implemented properly.

VII. Legal Framework For Protection Of Software From Piracy

Currently, there are two modes of protection of software by means of A-copyright and B- patents . The eligibility essentially required to qualify for protection of patent are comparatively stringent as compared to acquiring protection under the domain of copyright laws.

Nonetheless, there is no particular law managing the computer software. Software is protectable under the copyright and licenses/ patent laws. But in spite of the legitimate insurance, the statute on programming security isn't very much evolved in numerous nations, and in a large portion of the cases, the courts follow the points of reference laid by American or British Courts. The Information Technology Act 2000 (later revised in 2008) agrees legitimate acknowledgment to digital signatures, gadgets records and the system for the counteraction of computer violation and crimes, however doesn't manage IP security to computer software consequently leaving a vacuum in the region of rigid software piracy laws.

Software Protection under Copyright laws

Under Copyright Act 1957, Computer software of computer programmes are viewed as

[18] Commissioner of Central Excise v ACER India Ltd,137 STC 596 (2004) [SC]; [2001] 4 SCC 593
[19] Associated Cement Co Ltd vCommissioner of Customs, 124 STC 59 (2001) [SC]; State Bank of India vCollector of Customs [2000] 1 SCC 727, [2000] 1 Scale 72.
[20] S P S Jayam and Co(2004) 137 STC 117 [Mad].
[21] AIR 1971 Allahabad 192

'literary works'[22]

Under the Copyright Act, 1957, computer programmes are considered 'literary works'. The scope of 'Literary work' ideally covers work which can be expressed in some material form by means of audible and visual representation recreating the original work.[23]

Computer software includes many items like the "programme manuals and papers, computer printouts, punch cards containing information in a particular notation, magnetic tapes, discs required for operation of computers or any perforated media or information storage device etc"

Computer databases are protectable as literary work[24] and it is a well-established principle now that copyright only protects "original" work of the author/owner. The interpretation of word "original "means his skill set, effort and creativity in respect of the computer database.

The word "original" is interpreted mainly by two prominent school of thought. The first school of thought is called "modieum of creativity rule" which requires minimum level of creativity while the other deals with creativity as an alien concept when compared in contrast to originality . It is called "sweat of the brow doctrine".

Modieum Creativity Rule

The modieum creativity rule lays down the minimum criteria of creativity which has to be present in the creation of database to claim protection within copyright laws. When such work lacks any amount of minimum creativity the shield under this application will not extend. For example, Rural

Telephone Service Co v Feist Publications Inc [25] the United States Supreme Court denied copyright assurance/ protection to the white pages of a directory made by Rural on the ground that it didn't fulfill the base imagination models of minimum creativity rule . The Court didn't discover anything unique in the determination or course of action of the white pages. Such databases, which neglect to meet the 'creativity' standards, have been named as 'non-original' or 'non-creative' databases.

Sweat of the Brow

Then again, as per the 'sweat of the brow' doctrine, creativity is an idea that is outsider to the necessities of 'originality'. A database is "original" only by reason of the way that the creator has contributed time, cash, work or ability in its creation. As it were, the length of a man has

[22] Section 2(o) of The Indian Copyright Act, 1957
[23] ibid
[24] Sham Lal Paharia v Gaya Prasad, AIR 1971 All. 182
[25] 499 US 340 (1991).

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spent a million dollars in the making of a database, the database would be qualified for copyright assurance, regardless of the possibility that such database needs in imagination. This doctrine depends on the rule that what merits replicating is unquestionably worth ensuring.

Indian Court has on more than a few occasions advocated this doctrine for protection and compilations of the database.[26]. For eg in the landmark case of **Burlington Home Pvt Ltd v Rajnish Chibber & Anr**[27], the High Court of Delhi granted protection of copyright on the alone ground that the author had invested his money , skill and hard work in creating it with no or minimum amount of unique pattern in arrangement of the data.

The above doctrine is highly questionable on the ground that it passes no creativity from the filter of infringement of copyright laws and allows such practice merely on the grounds of investment, labour, time consumption etc.

The above doctrine has been critiqued on various grounds because it advocates and protects the hard work of the author as opposed to the "level of creativity" and so it should be renounced by the Indian Courts for the sole reason that it fails completely to fulfill the requirements of original contributions of the author .

The Right of The Author

The Copyright Act protects economic, moral rights and special rights to the author [28] in the copyrighted work, and also included rights in a computer software . In the case of computer software the author has right "to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme." [29]

In relation to computer programmes, the following acts are not considered as infringement of copyright:[30] "(a) the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy – (i) in order to utilize the computer programme for the purpose for which it was supplied,or (ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilize the computer programme for the purpose for which it was supplied."

The proprietor of a copyright has the privilege to appoint or give permit in regard of his copyrighted existing or future work. The understanding for similar should be in writing to be

[26] V Govinda v E M Gopalakrishna Kone & Anr, AIR 1955 Mad 391; Burlington Home Shopping (P) Ltdv Rajnish Chibber & Anr, (1995) PTC 278 (Del)
[27] (1995) PTC 278 (Del)
[28] Section 57 in the Copyright Act,1957
[29] Section 14(b) in the Copyright Act, 1957
[30] Inserted in 1994 and 1997 in Section 52(a).

substantial. It should determine the term of the use, all relevant conditions, the demarcation of territory it is to be used in and the time of termination of the copyright. The task as a rule accommodates ownership of the programming for a particular timeframe. Toward the finish of the time of task, all rights in the work/programming come back to the proprietor, unless the task is reestablished[31]

VIII. The Test To Determine Copyright Violation In A Computer Software

In **Lotus Development Corporation v. Paperback Software International**,[32] the District judge Keeton has laid down "very popular 'three stage test' also known as '1-2-3 package' to determine copyright infringement in electronic spreadsheets intended to facilitate accounting data". The court in **Brown Bag Software v. Symantec Corp** [33]has rejected the test laid down in Lotus case and held that, it should engage in "analytical dissection not for purposes of comparing similarities and identifying infringement, but for the purposes of defining the scope of plaintiff's copyrights'. In other words, the court should first decide which elements are unprotectable by applying the traditional idea-expression and merger doctrine to each element". In **Computer Associates v. Altai, [34]**the court contended that the "approach taken in Whelan's case to "separating 'idea' from 'expression" in computer programs relies too heavily on metaphysical distinctions and does not place enough emphasis on practical considerations." The Court in **Computer Associates v. Altai**,[35] has suggested three-step procedure, it is also known as 'abstraction-filtration-comparison' test. "The three-stage strategy was already used to decide whether non-literal elements of computer programs are considerably comparable. There, the court evolved a three-stage test, commonly known as the 'abstraction-filtration-comparison" (AFC) test to come to the conclusion of infringement of copyright. This dichotomy, however, is of doubtful application in cases relating to design and structure (non-literal elements) of a computer programme.

IX. Software Protection Under Patent Law

The Calcutta HC in Imperial Chemical Industries Ltd. Vs. Controller General of Patents, Designs and Trade Marks and Anothers [36] specified the prerequisites of the patent :

[31] Section 30-a of the Copyright Act, 1857
[32] 49 F.3d 807 (1st Cir. 1995)
[33] (1992) 960 F 2d 1465
[34] 982 F.2d 693 (2d Cir. 1992)
[35] ibid
[36] AIR 1978 Cal 77

(1) The patent is invention not discovery.

(2) For one single invention there has to be one single patent.

(3) A patent concerns a substance or a due process.

(4) Bifurcation of a patent from substance or process should not be possible.

(5) Specifications and claims should be distinctively mentioned in patent.

(6) Claims will constitute patent.

Software is excluded from the subject matter of The Patent Act 1970[37]. It clearly states that 'a mathematical or business method or a computer program per se or algorithms' is not patentable.[38] But for patent protection, it has first to be established that whether computer software is merely an algorithm or a technical invention, entitled to protection under the Act. ? A computer programme mainly compromises mathematical algorithms and to be covered in the ambit of patent law a technical invention necessarily has to be proved, which is again open to the interpretation of court .

Article 10 of the TRIPS Agreement read with the Article 27(1) permits the grant of patents to the subject matter having the "technical character".[39] The Patent Act of 1970 was amended in 2002 and 2005 and did not exclude the patent of computer software. The invention has to fulfill inventive step and industrial application to fulfill eligibility criteria.[40] So under pre revised act the computer software was patentable only with embedded system as a part of hardware. After the revision of the act [41] the domain of computer programme was specifically excluded from patentability thus drawing a lot of confusion and critics. The purpose behind not considering software as patentable topic is to stay away from duality of protection accessible to software according to the aforesaid act . Also the need of the hour is to give judicial exposition to Section 3(k) of the act in order to determine what is and what not computer software is.

X. Conclusion And Suggestion

Inefficiency of copyright law in order to protect software piracy.

The software programs being the literary /artistic works under the arrangements of Indian

[37] Section 3 of the Patent Act, 1970
[38] Section 3k of the Patent Act, 1970, Sub clause (k) was inserted into the Section 3 by the Patent (Amendment)Act, 2002, (Act 38 of 2002)
[39] Article 10 of TRIPS Agreement refers to provisions of Computer Programs and Compilations of Data.
[40] Section 2(1)(j) of the Patents Act, 1970
[41]The Patents (Amendment) Act, 2002

Copyright law, the security is accessible just to the first articulations or original expression yet not to the ideas. A standout amongst the most drawbacks of the software assurance under the copyright is law is its treatment as the literary work. The literary works, for example, novels, poetry or similar works are abstracts and even after they are changed over into tangible form very little practical functional variance are conveyed. Though software programs per se are essentially are not of any utilization unless they are embedded into PCs or a few machines. There is a necessity of software and hardware mix for understanding its uses or useful conduct. In this way the thought of software as a literary work itself is a confound.

The tenure of protection[42] for literary work is lifetime of the maker of the work in addition to sixty years after his demise. The software being incorporated into the literary work likewise gets the insurance for a long time after the passing of the maker of the product program like any literary works. The software programs being a piece of the data, information and computer technologies, the headways are extremely frequent and new improvements make the current ones and more seasoned ones as outdated. At the end of the day, the life cycle of programming programs are short, in some cases constrained to couple of months moreover

The element of 'fair dealing′ as visualized in the Section 52(1) of the Copyright Act 195 7 is another issue of verbal confrontation and mishap in the insurance of the software programs. It engages the 'legal holder' of computer programmes to make duplicates or adaptation of computer programs. This provision[43] allows the people other than the proprietors to utilize the product programs with no authority for the reasons expressed in that. It will be difficult to track the utilization of the software programs sold or authorized/ licensed to see if they are utilized for the reason for which they are obtained. It gives sufficient degree for misappropriation and abuse. This arrangement weakens the insurance and supreme security won't be accessible for the software

“There is a need for a consolidated and effective protection to software under ‘sue generis’ model law.”

India is a center point of data innovation and software system frameworks. The efficiently accessible gifted laborers in India and its emphasis on the export of software and hardware to various nations including USA, Europe and Japan have made wonderful commitment to the developments in the zone of software and hardware.

[42] Section 22 of the Copyright Act 1957
[43] Section 52.of the Copyright Act 1957

The software and hardware is considered as the best monetary resources as they extensively add to the economy. In the event that they are not legitimately overseen and ensured, there is each probability of disintegration of the income being created by the software business. With a specific end goal to shield the interests of the software business when all is said in done and software experts or professionals in particular, it is hard to check the difficultly of draining out of incomes from India. As found in the before discussions, the product is ensured under the protection of the copyright law in India.

The software protection with many drawbacks under the copyright law, for example, the shorter life-cycles. Toward the path, the TRIPS have effectively offered rules to member nations to consider the patents for innovations including ‘technical character or technical contributions'. Legal provisions which are made for securing computer programs must give general pubic a "framework that energizes innovative advances, the spread of information, modern productivity & free competition in the area. The Universal Copyright Convention allows its member nations and forces an obligation to formulate their own legal provisions in respect to topics concerning copyrightable issues .As the present system of infringement protection i.e., copyright law security is insufficient to ensure the product in light of numerous complexities and details required in their developments and employments. There is no damage in establishing new enactments if not in counter heading with the current laws ensuring the topic of software protection. Subsequently the requirement for an extensive enactment overseeing every one of the parts of the software programs as the customary order and frameworks neglected to give sufficient protection to the software.

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