

# LICENSING DIGITAL RESOURCES: HOW TO AVOID THE LEGAL PITFALLS

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*This document was compiled as an aid to understanding the consequences of certain clauses in a contract. It starts by dealing with the issue of copyright versus licensing, before examining in detail the clauses which are common to most contracts. Clauses to avoid are identified and a final checklist emphasises the conditions that should not be accepted in a contract.*

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## **Introduction**

In the paper environment, the librarian buys books to which its users have potentially unlimited access. Once bought, the book is the library's forever. In the digital environment by contrast the librarian in many cases is expected to buy access to the electronic copy for a specific period of time and usage. Access is mostly bought via a licence. A licence is a formal authority to do something which would otherwise be unlawful. Licences are mostly regulated by contract law. The degree of access to and use permitted of an electronic journal depends heavily on the terms and conditions negotiated in the licence for that specific product.

When a copyright owner (in many cases the publisher) sends a licence agreement, it should be kept in mind that he is actually sending an invitation to negotiate the terms and conditions under which the product(s) can be used. Usually a model licence is sent, which should be read, amended as necessary and returned to show on what terms the library would be prepared to contract. In the case of CD-ROMs the licence is on the back of the package.

Most of the licences are written by lawyers, and the technical language used puts many librarians off reading it. However, it is important to understand what is being agreed to.

Failing to sign or ignoring the terms and conditions will not be enough to avoid such terms applying. Indeed using the product or service after the terms and conditions have been notified to you will often be construed as acceptance of those terms and conditions.

This licensing warning list has been compiled in order to help you understand the consequences of certain clauses in a licence.

## **Copyright versus licensing**

For many years librarians and their representative organisations have argued that the existing exceptions granted under copyright

should be retained for materials in print format and extended to also cover for the use of digital resources.

The introduction of contract law to regulate the use of digital resources has brought the question of the status of copyright exceptions on the fore. Contract law is dominated by the concept of freedom of contract, which means that parties to a contract are free to negotiate the terms of use of copyrighted material or indeed waive the rights that the copyright law grants them.

This is all fair and good when negotiations are conducted by equal parties. In the case of copyright it should not be forgotten that one party has an exclusive right (monopoly right) and the other party, in this case the library, is eager to have access to the work to fulfil its mission. Furthermore, the library is not always aware of the fact that licences may override copyright exceptions.

At the moment, the legal world is divided over the status of copyright exceptions and the responsibilities of governments in this area. In the meantime, we would advise anybody negotiating such licences to incorporate the following clause:

“For the avoidance of doubt nothing in this Licence shall in any way exclude, modify or affect any statutory rights which may from time to time be granted to libraries and their users under the applicable national Copyright law.”

At least this will safeguard that the statutory rights granted by the national Copyright Act cannot be overridden by the licence.

### Licence framework

Generally, a licence agreement consists of clauses that deal with:

- The Parties
- Recitals
- Interpretation of the Agreement
- Definitions
- Choice of law
- The Agreement
- The Rights granted under the Licence
- Usage Restrictions
- Term and Termination
- Delivery and Access to the Licensed Materials
- Licence Fee

- Licensee’s (Library) Undertakings
- Implementation and Evaluation
- Warranties, Undertakings, Indemnities
- Force Majeure
- Assignment
- Notices
- Dispute Settlement
- Schedules
- Signatures

Instead of using the words Licensee and Licensor we have opted for calling the Licensee ‘the Library’ and the Licensor ‘the Publisher’. Not all the clauses will be discussed in detail. Some of them speak for themselves.

### Clause by clause explanation

#### *Recitals*

After the details of the parties, a set of paragraphs called recitals will usually appear. The recitals give a brief overview of what is intended to be achieved by the contract. Strictly speaking it is not really part of the contract. Its role is to form a brief record of the parties objectives and the factual context in which the contract was originally written for use when, at some date in the future, the contract comes to be interpreted when disputed.

#### *Interpretation of the Agreement*

##### **definitions**

Legal drafting requires the use of precise wording. Thus where concepts are complex or it might take some time to explain a short phrase, a word is chosen as shorthand to signify them. Often people skim over the interpretation clause but it is important not to overlook these clauses; a subtle change in the meaning for a definition can have a significant impact throughout the whole contract. Also if an unpleasant surprise is going to be slipped into the contract this is where it is most likely to be introduced.

##### **choice of law**

A fundamental clause in this section is the law chosen for the interpretation of the licence and the court chosen for submitting a claim against the Publisher or the Library. In most licences you will find the law that is most suitable for the Publisher. From a perspective of cost, it is

advisable that you amend this clause to the law and the court that is most convenient for you or both of you. You don't want to end up using US law for the interpretation of your licence and having to go to a US court to advocate your case.

#### *The agreement*

This is the heart of the contract. It summarises what is being bought or provided for the price. It must be phrased in clear and unequivocal terms. If matters are phrased in terms of desires or wishes this will not be binding. Most importantly, it must identify what is being bought for the price you are paying. Anything you forget to list, you won't get and may have to come back to buy for an extra fee.

#### *The Rights granted under the licence*

The clauses under this header determine what you are allowed to do with the Licensed Materials. Make sure you list here every activity you wish to do or you would like your users to be able to do with the Licensed Materials. Matters not mentioned will not be allowed, unless you either renegotiate the licence or buy extra rights later under a further licence. The list of activities can be as long or as short as you choose and this will depend on how much you can afford to pay. Be aware that you should not negotiate over the statutory rights that are already granted to you by your national copyright law or international treaties (see also section Copyright versus Licensing on page 2 and in specific the suggested clause which will safeguard the statutory rights). These rights should not even be listed in the licence, but we have noticed that many librarians prefer to list them as an "aide mémoire" in the licence for convenience purposes.

How the authorised users and the places from where the *Licensed Materials* can be accessed are defined becomes of pre-eminent importance under this section.

The most common division of authorised users used by publishers nowadays are "Authorised Users" and "Walk-in Users". However, what these terms cover can vary starkly from licence to licence.

The ECUP Steering Group did not opt for the division between 'Authorised Users' and 'Walk-in

Users' because it was perceived confusing. 'Walk-in Users' are also authorised to use the Licensed Materials, but in many cases not in the same way as Authorised Users.

A more comprehensive division is into "Members" of the institution and "Non-Members". The "Non-Members" can be divided into "Registered Walk-in Users", "Unregistered Walk-in Users" (such as visitors to a public library) and "Registered Remote Users".

In the end it does not matter what you call the users as long as the definitions cover the user groups that you want to provide access to. Members, Registered Walk-in Users, Registered Remote Users and Site could be defined as follows:

**Members of the institution** – members of staff employed by or otherwise accredited to the institution and students of that institution, who are permitted to access the secure network and who have been issued with a password or other authentication

**Registered walk-in users** – members of the public who are registered by open registration as permitted users of the library service and who are permitted to access the secure network by means of work stations located at the library facility and who have been issued with a password or other authentication.

**Unregistered walk-in users** – members of the public who are not registered as users of the library service and who are permitted to access the secure network by means of work stations located at the library facility for certain purposes as defined in this Agreement.

**Registered remote users** – an organisation or individual members of the public registered as permitted user of the library service and who are permitted to access the secure network from places other than the library facility.

**Site** – means the premises of the Library and other such places where members work and study, including without limitations halls of residence and lodgings and homes of members.

The following list will give you a flavour of the kind of rights that have been included in site-licences that are on the market nowadays.

The right:

- to access the publisher's server;
- to store the Licensed Materials locally;

- to integrate the Licensed Materials into the local system infrastructures and information services;
- to index the Licensed Materials;
- to make the Licensed Materials accessible to the Members of the institution on Site for their research, teaching and private study purposes;
- to permit Members of the institution to print and/or download individual articles for their research, teaching and private study purposes;
- to provide access to and permit copying by Registered Walk-in Users for their research, teaching and private study purposes;
- to permit the reproduction and inclusion of copies (hard copy or electronic form) in course packs.

Difficult subjects remain Inter-library Loan and Electronic Document Delivery. Inter-library Loan (ILL) of printed material has long been an accepted activity in the print world. In an electronic environment, the term ILL and the activity itself are hotly contentious issues. For several years, librarians and publishers have been trying to reach a common position. One of the obstacles in reaching agreement is the lack of clear definitions that cover the wishes of librarians over how they propose to share their resources.

It is of utmost importance to distinguish Inter-library Loan of print documents from Inter-library Loan of electronic documents. First of all the term loan suggests that the material is sent back at one point in time. This is only the case for books in the print environment but not for material in the electronic environment. Terms that could cover the activity more accurately are Inter-library Resource Sharing and Inter-library Use. As long as this is limited to sharing the information between libraries and not with third parties, these terms could be used alongside on demand Electronic Document Delivery to end-users (third parties).

Inter-library Loan in an electronic environment has not been a subject of extensive research. There is more research material available in the area of Electronic Document Delivery. A very useful publication is the Comparative Analysis of the Copyright Problems of Electronic Document Delivery, by Dr P. Bernt Hugenholtz and Dirk J.G. Visser. In 1994, the European Commission (DGXIII) asked the Institute for Information Law

of the University of Amsterdam to analyse and compare the copyright laws in the EU and EFTA countries in respect of electronic document delivery. One of the conclusions of the comparative analysis was that the absence of legislative and juridical guidance has made it difficult, if not impossible, to precisely define the copyright status of electronic document delivery in many European countries.

Clearly, it will take quite some time to find legally satisfactory solutions for the parties involved. In the meantime, it is of the utmost importance that librarians and publishers try to understand each others positions and wishes and try to find workable solutions by defining the activities they want to conduct as precisely as possible. This will not only assist the decision makers in the legislative process, but will also assist librarians and publishers in their negotiations for licences of electronic resources. Initiatives are going on in the Netherlands and in the United Kingdom. In the Netherlands publishers and scientific institutions have agreed to an experiment into Inter-library Loans in an electronic environment (<http://www.surfbureau.nl/iwipress.htm>). In the United Kingdom, the Joint Information Systems Committee/Publishers Association ILL Working Party has held discussions to reach a common understanding on activities that would qualify as Inter-library Loans in an electronic environment (<http://www.ukoln.ac.uk/services/elib/papers/pa/>).

#### *Usage restrictions*

These clauses will tell what you are not allowed to do with the Licensed Materials. The most common are:

- substantial or systematic reproduction
- re-distribution, re-selling, loan or sub-licensing
- systematic supply or distribution in any form to anyone other than to Members of the institution

#### *Term and termination*

##### **Term**

If there is no specific provision concerning the commencement of the licence, than the agreement

will commence from the date upon it is signed. It is, however, usual to include a provision which deals with this point, in order to avoid misunderstanding. Where there is a starting date other than the date of signature there is no reason why this cannot be before the date of signature if the parties so wish.

The term of the licence is the period over which the publisher must provide access and the library must pay. The licence can only be "cancelled" before the end of the term if there is a fundamental breach of the licence or there is some other provision allowing for sooner termination (such as on the happening of a certain event, eg insolvency, or by one party giving the other a period of notice).

Licences can be as long or as short as the parties decide and can always be renewed. In the interest of precision state the date of termination explicitly rather than the length of the term. It is possible to have a licence which will carry on for an indefinite period and can be brought to an end by due notice.

### **Termination**

A licence should always contain terms which set out a mechanism or circumstances upon which the licence must terminate. This is to prevent the library from being locked into a contract where it is obliged to pay for products or services the publisher no longer provides properly or the library no longer wants.

Under the general law a contract may be terminated at any time by notice if the other party defaults by failing to perform any obligations on its part. This applies only if there has been a serious breach.

A practical solution is to provide a mechanism under the agreement for an opportunity to be given to the breaching party to remedy his default. A common period is thirty days after receipt of the written notice. If the default is remedied in this period of time the termination will not become effective. If the default is not remedied within the time span given then the contract is terminated. Upon termination on a default by the Publisher it would be fair to provide that the Publisher repays the Library a rateable proportion of the licence fee as represents the paid but unexpired term. This provision should be incorporated in the breach of contract clause.

### **Perpetual access**

Certain provisions may be required to continue to be in force after the termination of the agreement. A very important one is perpetual access to the Licensed Material. This should apply in the event that the licence terminates because of expiration or, under certain conditions, breach of contract. Perpetual access is not something that is automatically granted. A specific provision needs to be included in the licence. In both events the Library should ask the Publisher to provide continuing access to the Licensed Material under that licence either from the Publisher's server, or through a third party, or by supplying electronic files to the Library.

Whether the licence terminates on the default of the Publisher or the Library, perpetual access should be granted to that part of the Licensed Material to which the Library was lawfully entitled until the breach occurred. Usually, perpetual access will only be granted by the Publisher on the condition that the Library continues to observe the obligations as negotiated under the licence with respect to restriction on usage, alterations and security.

### **Delivery and access to the licensed materials**

It is important to be as precise as possible about the date of delivery of the Licensed Materials, their frequency, the format and media. It perhaps goes without saying that the media must be in a form which the Library can both access and use; to avoid the risk of later dispute the licence should specify what these are clearly. Should the materials not arrive in time, the Publisher will have usually 30 days to remedy the breach (see termination). It is advisable to put the details in a Schedule instead of in the main clauses of the licence.

Should you wish to receive the electronic copy before or at the same time as the print copy, a clause to this end can be incorporated in the licence. In the event that parts of the Licensed Material are withdrawn or discontinued, it would be fair for provision to be made that the Library can ask the Publisher to reimburse it for that proportion of the fee representing the price of that Licensed Material that has been withdrawn or discontinued.

Under this header, you will also find clauses

relating to accessing the Licensed Materials like the delivery of access codes and adequate capacity and bandwidth of the Publishers server to support the usage of the Library, etc.

#### *Licence fee*

The licence fee can be included in the main clause or in a separate Schedule. Make sure that the licence fee is an all inclusive fee, inclusive of all services and products provided by the Publisher and inclusive of all sales, use or similar taxes, so that hidden costs cannot be charged at a later stage. Provisions for when the licence fee should be paid and, where it is paid in stages, also the frequency and value of each payment.

#### *Library undertakings*

As you can understand, this section is very important to publishers. You will find here provisions where the Library promises that it or its users will not infringe copyright or any other proprietary rights by for example modifying, adapting, transforming, translating and creating derivative works of the Licensed Materials or parts of it.

The Library also promises here that it will use or let its users use the Licensed Materials in accordance with the terms and conditions as laid down in the licence. Libraries should watch out for clauses that place too heavy a responsibility on the Library for acts that are not performed in accordance with the licence, e.g. for acts that are not within its direct control. In the event of an infringement, it should be perceived reasonable, to ask the Library to notify the Publisher of any infringement that comes to the Library's notice and that the Library will co-operate with the Publisher to stop further abuse should it occur. Though the Library should not be made responsible for an infringement by an authorised user, it is proper that the library should be liable if it condoned or encouraged a breach to continue after being notified of the infringement by the Publisher.

#### *Warranties and indemnities*

In general publishers do not like to give warranties, especially in an electronic

environment. The warranty that is needed by the Library is that the Publisher is the owner of the intellectual property rights in the Licensed Material and has the authority to grant the licence. If a licence has no warranty clause or a warranty clause that is ambiguous, the Library could end up paying twice, once to the Publisher and once to the person that claims to own the intellectual property rights instead of the Publisher. Most commonly this would be the author.

An ambiguous warranty is one that says that the Publisher is "to the best of its belief" the owner of the copyright in the Licensed Material. The words 'best to its belief' create a heavy burden of proof on the Library. How can the Library know what is in the head of the Publisher? The fact that the Publisher honestly but misguidedly believed he was entitled to grant the licence can provide little comfort to the Library who has to face an angry author demanding compensation. That is why a clear warranty is so important. You would not buy a car from someone who was unprepared to say that he owned the very car he is selling.

Moreover, it is similarly important that the Library gets assurances that the Publisher will retain and keep the intellectual property rights for the duration of the licence. The Library needs to know that the Publisher granting the licence will have the authority to do so throughout the term of the agreement or it may find itself having to buy a fresh licence from a new owner.

Publishers have argued that this is unrealistic because of the frequent mergers and take-overs in the industry. Such an argument misunderstands what happens to intellectual property rights on such transactions.

On a merger, the maker (the original contractor/publisher) merges with another body to form a new composite entity. The intellectual property rights held by the maker are not lost (and thus the warranty is not broken) as the rights are retained by the new composite entity which continues the existing contracts in the place of the original publisher.

On a take-over, by contrast, there is no change in the maker of the warranty (only of the ownership of the maker) and so there would be no transfer of intellectual property rights (and therefore no breach). They stay with the original contractor.

Tied in with the provision of the warranty is an indemnity from an action by a third party over the intellectual property rights licensed. The indemnity should be drafted to cover all the losses, damages, costs, claims and expenses and not be restricted to, for example, the costs of the licence. The potential claims for infringement of intellectual property rights and the costs of defending such claims can far exceed the amount the library originally paid for using those rights in the first place.

Examples of warranty and indemnity clauses might be:

"The Publisher warrants to the Library that it has full rights and authority to grant the Licence to the Library and that the use by the Library of the Licensed Material in accordance with this Agreement will not infringe the rights of any Third Party. The Publisher undertakes to indemnify the Library against all loss, damage, costs, claims and expenses arising out of any such actual or alleged infringement. This indemnity shall survive the termination of this Licence however terminated. The indemnity shall not apply if the Library has modified the Licensed Material in any way not permitted by this Licence."

"The Publisher warrants to the Library that it will retain and keep for the duration of this Agreement the full rights and authority to grant the licence to the Library and will indemnify the Licensee for and against all loss, damage, costs, claims and expenses arising out of any such infringement."

#### *Force majeure*

A force majeure is a condition beyond the control of the parties such as war, strikes, floods, power failures, destruction of network facilities, etc., which was not foreseen by the parties and which prevented performance under the contract. Most licences build in provisions that any party's failure to perform any term of condition under the licence due to a force majeure will be excused and the failure to perform in those circumstances will not be deemed a breach of the Agreement.

#### *Assignment and sub-contracting*

In most jurisdictions, commercial contracts are not easily assignable. An assignment enables a

party to release himself from all obligations under the contract and to pass them on to the assignee. The case law on assignment is complex and not always certain. In addition sub-contracting is often permitted under general law since the original party to the contract remains liable for the performance of his sub-contractor. In most site-licences you will come across the following clause:

"This Licence may not be assigned by either party to any other natural or legal person, nor may either party sub-contract any of its obligations hereunder, without the prior written consent of the other party, which consent shall not unreasonably be withheld."

Where libraries want to set up a consortium with an intermediary (whether a new or an existing entity) to whom certain tasks will be sub-contracted to, care must be taken to ensure that the Publisher does indeed give his written consent. It is easiest to incorporate a reference to that "consent" in the body of the licence.

Such a provision could read along the lines of:

"Nothing in this term shall preclude the Library from performing any of its obligations through an Agent."

What is meant by an Agent needs to be further explained under the list of definitions. The definition of Agent should not be too specific; this leaves the Library with some flexibility for later changes.

#### *Dispute settlement*

There are several ways to settle a dispute. These are in the courts, by arbitration and by experts.

#### *Litigation*

Neither an arbitration nor an expert clause removes the need for a proper law clause, specifying the legal system that will govern the contract and its performance and interpretation, and for a clause deciding which court shall have jurisdiction in the case of legal disputes.

Litigation through the national courts is suitable for disputes both over fact and law. The judge is paid for by the state. Litigation may be commenced by either party and does not require the agreement of the other. The decision of the court is binding in all cases and there is usually an established appeals procedure.

**Arbitration**

Arbitration is a dispute settlement through an arbitrator appointed by the parties by contract and not by the state. The arbitrator's fees are usually shared by both parties. It is more private and less formal than court proceedings although it is becoming more and more formalised. Awards made by an arbitrator are binding on the parties and can be enforced by the court. Appeals are possible, for example, in the UK appeals are made, with leave, to the High Court.

**Expert**

Expert Determination is an informal procedure where the parties agree by contract to refer a dispute of fact to an expert appointed by the parties for his resolution. It is not really suitable for any dispute where issues of law are likely to be canvassed. The expert's fees are usually shared by both parties. It is binding on both parties and determinations may be enforced by the court. There is no possibility of appeal, save perhaps in the case of outright fraud or manifest error.

**Schedules**

Schedules are included in agreements so that the sense of the agreement is not lost or obscured under a welter of details. These usually contain the more detailed provisions of the licence and can be used to "bolt on" lengthy or technical specifications or flow charts. Schedules are a substantive and integral part of the agreement. There should always be a specific provision in the main clauses about the status of the Schedules. Usually, in licences, the Schedules will include a list of the Licensed Materials, the dates of delivery, the format and media of delivery and a list of locations where the Licensed Materials can be used.

You will usually find the Schedules after the main provisions but before the signature of the Library and the Publisher.

**Clauses to Avoid***Reasonable and best effort clauses*

In the European Union we find countries with civil law (Roman law) and common law (case law) traditions. The distinction between civil law and common law concepts is even found among

the states of the USA. For example, the law of the State of Louisiana is civil law dominated and the law of the State of Washington is governed by common law. This distinction is very important for the interpretation of certain clauses of a licence, especially the so called "reasonable effort" or "best effort" clauses.

The words "reasonable effort" and "best effort" are ambiguous. As a general proposition, doubt as to the meaning of a vital term in a contract will make that clause unenforceable. Common law courts, especially in the UK, are reluctant to engage in guessing exercises over what is "reasonable". Prices, quantities, time, obligations and performance are among the terms where certainty is vital.

Apparent intention and certainty about the meaning of terms are also requirements under civil law, but of less significance. The courts will give effect to the meaning the parties could and should have attributed to what they have agreed, and to what they could reasonably expect from each other in this connection.

General advice is to avoid badly defined or vague terms like 'reasonable' or 'best effort'. They should be amended and replaced by clear/unambiguous terms and conditions. It is better to be absolutely clear from the outset what the obligations are than to make cost to get a judge to interpret if a specific performance was reasonable or not.

*Non-cancellation clauses*

More and more librarians tend to give priority to the acquisition of resources in digital format. Non-cancellation clauses in licences intend to prohibit libraries from cancelling their current print subscriptions, taking out a subscription for the electronic copy only or to set a minimum limit to the number of journals subscribed to or licensed. This qualifies as misuse of a dominant position and should not be accepted and should be deleted from the licence.

*Non-disclosure clauses*

These confidentiality clauses prohibit libraries from sharing pricing, usage information and other significant terms and conditions of the licence with others. Especially, in the case of a

consortium this is an unreasonable request. Publishers should give librarians the opportunity to monitor use, gather the relevant management information needed for collection development and to share this information with others. Needless to say, compilation of usage data must be consistent with the applicable privacy laws. However, it should be born in mind that there are instances where sharing specific information could harm the publishers' activities substantially. That is why it is important to define in a licence what information is subject to the obligations of confidentiality and what information can be shared freely.

#### *Clauses with ambiguous periods of time*

It is important to spell out each period of time in a contract. Loose references to days, months and years in agreements are to be avoided. A week may be 7 days or 5 working days. A year can mean any consecutive period of 12 months or the remainder of a specific year. An easy way to get around this is to define a day, week, month and a year in the list of definitions.

#### **Checklist**

Do not sign a licence that:

- isn't governed by the law and courts of the country where your institution is located;
- doesn't recognise the statutory rights for usage under copyright;
- doesn't grant perpetual access to the Licensed Material;
- doesn't include a warranty for IP rights and an indemnity clause against claims;
- holds the Library liable for each and every infringement by an authorised user;
- has a non-cancellation clause;
- has a non-disclosure clause;
- has reasonable and best effort clauses;
- has clauses with ambiguous periods of time;
- doesn't allow for sub-contracting to an Agent;
- hasn't got a licence fee that is all inclusive.

#### **Conclusion**

Negotiating the price of a licence alone is not enough. We hope that this Guide will help you when you are negotiating a site-licence. Awareness of the type of pitfalls and the issues that do arise goes a long way towards the negotiation of a better licence for your institution. However, legal advice should always be sought before you sign a licence. Further help can be found in two very useful documents, which focus on licensing principles. The first one is the Dutch/German Licensing Principle of 27 October 1997 (<http://cwis.kub.nl/~dbi/english/license/licprinc.htm>). The second one is the Statement of Current Perspective and Preferred Practices for the Selection and Purchase of Electronic Information of the International Coalition of Library Consortia (<http://www.library.yale.edu/consortia/statement.html>). Examples of model licensing clauses can be found in the ECUP Heads of Agreements for national, university, public and company libraries (<http://www.kaapeli.fi/ebliida/ecup> under ECUP-docs) and the UK Model NESLI Site Licence (<http://www.nesli.ac.uk>).

#### **Note:**

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