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INFORMATION INTERMEDIARIES IN THE DIGITAL ENVIRONMENT: COPYRIGHT PROBLEMS AND TRENDS OF LEGAL REGULATION

The article addresses several challenges in copyright protection within the digital landscape. The topic is particularly relevant given the expansive capabilities of modern information and communication technologies, which continually introduce risks to the rights of authors and copyright holders in science, literature, and art shared on the global web. In this context, providers–acting as information intermediaries–play a central role in online interactions, yet many countries' laws have gaps in regulating their status and responsibilities. This study focuses on protecting authors' rights on the Internet and clarifying the legal status and responsibilities of information intermediaries in Kazakhstan. The article aims to pinpoint deficiencies in the regulation of intermediary activities in Kazakhstan and to suggest legislative improvements. To meet these objectives, both general scientific and specialized research methods were employed. The novelty of this topic lies in the fact that Kazakhstan's legal framework does not yet define the role of information intermediaries or their involvement in copyright protection on the Internet, and there is a lack of academic literature on this subject. This article is among the first to explore these issues. Key conclusions emphasize the need for a structured legal framework in Kazakhstan that defines information intermediaries, along with the scope and limits of their liability in cases of copyright infringement on the Internet.

Key words: copyright, copyright infringement, global network, information society, information intermediary, provider, DMCA, responsibility of information intermediaries.

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Сандық кеңістіктегі ақпараттық делдалдар: авторлық құқық мәселелері және құқықтық реттеу тенденциялары

Мақалада цифрлық ортадағы авторлық құқықты қорғаудағы бірнеше мәселелері қарастырылған. Бұл тақырып қазіргі заманғы ақпараттық-коммуникациялық технологиялардың кең мүмкіндіктеріне байланысты өзекті болып табылады, өйткені олар авторлар мен авторлық құқық иелерінің ғаламдық желі арқылы бөліске түскен ғылым, әдебиет және өнерге деген құқықтарына үнемі тәуекелдер туғызуда. Бұл тұрғыда ақпарат делдалдары ретінде әрекет ететін провайдерлер онлайн арқылы өзара әрекеттесуде маңызды рөл атқарады, дегенмен көптеген елдердің заңдарында олардың мәртебесі мен міндеттерін реттеуде олқылықтар бар. Бұл зерттеу авторлардың интернеттегі құқықтарын қорғауға және Қазақстандағы ақпараттық делдалдардың құқықтық мәртебесі мен міндеттерін нақтылауға бағытталған. Мақала Қазақстандағы делдалдық қызметті реттеудегі кемшіліктерді анықтауға және заңнамалық жетілдірулерді ұсынуға бағытталған. Осы мақсаттарға жету үшін жалпы ғылыми және арнайы зерттеу әдістері қолданылды. Бұл тақырыптың жаңалығы – Қазақстанның заңнама жүйесінде ақпараттық делдалдардың рөлі немесе олардың интернеттегі авторлық құқықты қорғауға қатысты мәртебесінің анықталмауы және аталған сұрақ бойынша отандық ғылыми зерттеулердің аздығы болып табылады. Ғылыми мақаланың ерекшелігі – осы мәселелерді алғашқылардың бірі болып зерттейді. Негізгі тұжырымдар ретінде Қазақстанда ақпараттық делдалдардың мәртебесін анықтайтын құрылымдық құқықтық базаның қажеттілігі және интернетте авторлық құқықты бұзу жағдайлары бойынша олардың жауапкершілігінің көлемі мен шектерін анықтау қарастырылады.

Түйін сөздер: авторлық құқық, авторлық құқық бұзушылық, ғаламдық желі, ақпараттық қоғам, ақпараттық делдал, провайдер, DMCA, ақпараттық делдалдардың жауапкершілігі.

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Информационные посредники в цифровой среде: проблемы авторского права и тенденции правового регулирования

В статье рассматриваются несколько проблем, связанных с защитой авторских прав в цифровом пространстве. Тема особенно актуальна, учитывая широкие возможности современных информационных и коммуникационных технологий, которые постоянно создают риски для прав авторов и правообладателей в области науки, литературы и искусства, публикуемых в глобальной сети. В этом контексте провайдеры, выступающие в качестве информационных посредников, играют центральную роль в онлайн–взаимодействиях, однако в законодательстве многих стран имеются пробелы в регулировании их статуса и обязанностей. Данное исследование посвящено защите прав авторов в Интернете и разъяснению правового статуса и обязанностей информационных посредников в Казахстане. Целью статьи является выявление недостатков в регулировании посреднической деятельности в Казахстане и предложения по совершенствованию законодательства. Для достижения этих целей были использованы как общенаучные, так и специализированные методы исследования. Новизна данной темы заключается в том, что законодательная база Казахстана пока не определяет роль информационных посредников или их участие в защите авторских прав в Интернете, а также отсутствует научная литература по этому вопросу. Данная статья является одной из первых, в которой рассматриваются эти вопросы. Основные выводы подчеркивают необходимость создания в Казахстане структурированной правовой базы, определяющей информационных посредников, а также объем и пределы их ответственности в случаях нарушения авторских прав в Интернете.

Ключевые слова: авторское право, авторское правонарушение, глобальная сеть, информационное общество, информационный посредник, провайдер, DMCA, ответственность информационных посредников.

Introduction

Copyright relations encompass the public interactions involved in the creation, use, and protection of literary, scientific, and artistic works, governed by legal standards. These relations are well-regulated at both the international and national levels. However, rapid advances in science and technology have created a unique environment for the widespread use of creative works – the Internet, a global network enabling millions of users on computers, gadgets, and other devices to participate in a unified information system. Once a work – such as an article, painting, or musical piece – enters this network, it can be replicated and accessed by vast numbers of people almost instantly. This reality poses significant risks to authors' personal non-property and exclusive rights, including rights related to authorship, publication, reproduction, distribution, import, public display, performance, communication, and other associated rights as outlined in Articles 15 and 16 of the Republic of Kazakhstan's Copyright Law) (Law on Copyright and Related rights).

The global network's technical and technological capabilities continuously give rise to new instances of copyright infringement, including blatant plagiarism, unauthorized transfer of others' works to Internet providers for financial gain, and public sharing of content without the author's consent. For over three decades, these and other online methods of exploiting copyrighted materials have been commonplace. A network of institutional participants, such as information intermediaries and providers (including hosting providers), facilitates the posting of creative works on the Internet. Ideally, copyright legislation should evolve alongside these technological advancements, accurately addressing the rapidly changing realities of information and communication technologies. Yet, in practice, the legal framework has struggled to keep pace.

Materials and methods

The main material for the preparation of this article was the law of the Republic of Kazakhstan dated 10 June 1996 №6-I on «Copyright and the Related Rights», as well as foreign relevant legislations and legal cases from the US, EU and Russia on information intermediary issues in the digital landscape. In this article, the author mostly relied on general philosophical and private methods such as dialectical, analysis and synthesis, structural and functional, formal legal, comparative legal.

Result and discussion

Internet intermediaries tend to have a pivotal role in distributing copyrighted works or content through the web and occupying complex place between copyright owners and the public. The WIPO has raised their role by claiming that they were «main challenge for copyright in digital space». It should be noted that the diversity of the Internet world has brought about methods through which content might be distributed lawfully or unlawfully. According to the OECD, internet intermediaries are organizations that provide access to, host, transmit, and index products and service which come from users on the internet. This definition appears to be too general which may include intermediaries with different goals, commercial or non-commercial, legal or illegal, and private or public (Klein 2015: 32).

According to the Digital Millennium Copyright Act (DMCA), there are two ways to define internet intermediaries: first, they are entities which offer transmission, route or provide connections for the digital world between users and they do not change the transmitted materials when they are sent or received; second one defines too generally, by claiming that they are the provider of online services or the operator of facilities (Kahandawaarachchi 2007).

It has been argued that not all contents which intermediaries transmit or host are copyrighted materials. Apart from copyrighted materials, their service may also link with human rights issues such as the freedom of speech, privacy and others.

It is noteworthy that intermediaries play a central role what we do online. As Kohl notes that «our actions and communications are, in the offline world often and in the online world always, mediated by third parties". Since they provide the means in which copyrighted materials are transferred legally and illegally, they are vital participants in copyright debates. Internet intermediaries are important for copyright owners not only in finding a market for their products (intermediaries usually let users to locate and sort materials, and to access them, purchase them) and but also combatting internet piracy for which intermediaries are a conduit (Klein 2015: 33).

According to Kohl, there are different types of internet intermediaries. Firstly, there are internet service providers (ISPs) which provide us with the internet. These intermediaries seem to be essential as they own and control the networks through which we gain access to the internet; secondly, there are search engines that usually help us to find relevant online content; thirdly, there are some social networks and other platforms that host applications and content. These internet intermediaries have different relations to copyright, the cultural industries and right holders. Some tend to claim that intermediaries are legal tools which helps to return money to creative owners, while others view intermediaries as illegal site that may contribute to copyright infringement (Kohl 2012: 185-210).

The first type of intermediaries or connectivity intermediaries appears to be organizations which provides users with access to the internet and includes from cable companies to Internet service providers to wi-fi operators such as libraries, cafes and others. What they do is to provide web access, but do not «host» contents.

What makes them as regulatory targets is they operate as a gatekeeper to cyberspace and they are relatively few in numbers. For example, in the UK local citizens are subscribed to major ISPs such as Virgin Media, TalkTalk and SkyBroadband, including BT which has over 5 million subscribers.

In terms of intellectual property issues, it is believed that copyright law creates more legal issues for connectivity intermediaries than other problems like defamation. Besides, their role has been assessed by two ways, first, they operate as information repository where injured parties may access to them to identify primary copyright abusers; second, they also act as gatekeepers by filtering or blocking websites or contents to those primary infringers (Kohl 2012: 185-210).

However, under copyright law connectivity intermediaries may face legal issues because of copyright abuse. According to a case Roadshow Films Pty ltd v iiNet Ltd, a court found that iiNet, the ISP located in Australia was not responsible for secondary copyright infringement of its users. The main argument was that by providing access to the web, the ISP just provided precondition rather than a tool of infringement, like BitTorrent system where intermediaries had no control. Therefore, the ISP had not any intentions to copyright abuse unlike providers such as Napster, Kazaa and Pirate bay. But, on appeal, the court took a different view by removing the difference between «precondition» and «means» and argued that the iiNet would be assessed liable for copyright infringement, if it had failed to address to right holders' notices where they have evidences of alleged copyright abuse. And this latter decision is considered to be more reasonable to assess the ISP's behavior in terms of secondary infringement (Kohl 2012: 185-210).

In another case, Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc, considering the interest of injured parties, some UK companies and studios, a court brought lawsuit against BT to block access to pirated Newzbin website. It is believed that a blocking order was the most effective way against BT to stop piracy, since the operators of Newzbin had moved website abroad once they have been found guilty for copyright infringement.

According to the court, both the users of BT and the operators of Newzbin used BT service to commit copyright violation. The court did not accept that the internet intermediary had «actual knowledge of a specific abuse of a specific copyrighted work by a specific person», though the injunction initially made on an argument that the ISP's actual knowledge of another party of using their service to commit copyright infringement (Case Twentieth Century Fox Film Corp v British Telecommunications plc [2011] EWHC 1981).

Given above mentioned cases of the ISPs, it is fair to say that a blocking injunction could be easily accessible when a court finds that a third party is responsible for copyright abuse. Apparently, the cases demonstrate that the active involvement of internet intermediaries in copyright protection and indicate these measures might be effective copyright protection on the web. It should be noted that after Newzbin case, copyright industry sought to extend this measure to other pirated sites like Pirate Bay and other internet intermediaries (Kohl 2012: 185-210).

It could be argued that the current regulatory framework towards intermediaries has taken place in global provisions of copyright law such as WIPO, WTO, and TRIPS. Having flexible effect, these agreements showed member states how to deal with intermediaries and therefore, in most states, the basic principle works where intermediaries are not accountable for copyright violation that happens through their service. However, it could be seen that intermediaries' claim for immunity is dependable on some conditions such «having knowledge about copyright abuse», the degree of control on a content which transmitted via their service (Edwards 2009).

It is worth mentioning that intermediaries are not obliged to control all materials which they host and they cannot be automatically responsible for copyright abuse. But, copyright owners may raise awareness or ask compensation when their rights are infringed and this may put intermediaries position at risk of being legally responsible, in case they have knowledge about violation, but do not do anything to stop it. They can avoid responsibility after finding out the illegal materials and remove them as soon as possible. Thus, this sort of approach is sometimes called as «notice and takedown approach». However, this approach seems to be undisputed, because there are some cases have shown where ISPs liability cannot be limited. 2004/48/EC Directive on the enforcement of IP rights argues that member states should ensure that copyright owners can apply for an injunction against ISPs whose service used by third parties to violate IP rights, without any prejudices.

In case L'Oreal SA v eBay International AG, there was a question on whether eBay could be responsible for listings posted by subscribers of their website which violated L'Oreal's trade mark rights. In its defense, L'Oreal argued that the point eBay was liable for the use of its trademarks by showing them on the website and on the search engines such as Google. The court took a decision in favour of eBay, ruling that the site was not supposed to be jointly liable in this situation and asked ECJ to make clarification. In turn, the ECJ held that the provider could not be liable when it acts as mere an intermediary and «does not play an active role of such a kind as to give it knowledge of, or control over, those data [entered by recipients] » (Case L'Oréal v eBay [2009] EWHC 1094 https://globalfreedomofexpression.columbia.edu/cases/loreal-sa-v-ebay-international-ag/). Additionally, the ECJ ruled that the member states should ensure that the local courts can order the operator of an online service provider to take measures which helps not only to stop copyright infringements, but also prevent such violations in future. Such measures must be effective, reasonable and proportionate and must not make any obstacles to free trade.

However, in another case, SABAM, a management company located in Belgium, who represents the rights of composers, musicians, and other authors, sought an injunction against Scarlet, an ISP. The claimant argued that the subscribers of Scarlet were downloading copyrighted materials in SABAM's catalogue without the permission through P2P system. Thus, the claimant wanted from Scarlet to take necessary measures including to block or make impossible for its users to share music works. At first, a local court found that there was copyright abuse in Scarlet's action and ordered it to block illegal use of file sharing by its users. On appeal, the court stayed the proceedings and referred it to the ECJ by raising a question whether it could be in harmony with EU law when a national court issues an injunction against ISPs whose service used by third

parties to violate copyright materials and force the companies to install a filtering system to block illegal use of P2P program (Case Scarlet Extended SA v Societe Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM) (C-70/10) EU:C:2011:771 https://globalfreedomofexpression.columbia.edu/cases/scarlet-extended-sa-v-sabam/).

Finally, the ECJ ruled that the courts could not order the ISPs to put filtering system which includes continuous monitoring since it would contradict with articles of Electronic Commerce Directive. The Directive says that the member states are not allowed to require intermediaries to continuously watch the content what they transmit, store and there is no obligation to seek facts or circumstances which may lead to illegal actions (Tian, Winn 2008). It should be mentioned that recently there have been a high demand to intermediaries, in particular ISPs from some right holders and governments to combat copyright piracy. But, Klein and others argue that apart from supporting ISPs to play an active role in tackling copyright abuse, policymakers also should consider other human rights issues such as freedom of expression, access to information, right to privacy and others, because these values could be at risk, if intermediaries make too much control on their service (Klein 2015: 33).

As above mentioned a great number of copyrighted works might be uploaded or downloaded at the same time because of the P2P technology. Thus, it is not easy to catch and sanction every user who committed illegal actions. Moreover, tracking every infringer is not only expensive and time-consuming, but in some cases it will be unlikely to confirm the true identity of the infringer, because of the anonymity issues in digital environment. To protect their rights and interests, copyright owners including music and movie industries have taken action against intermediaries like ISPs that supply technologies which contribute to copyright infringement. And these industries not only seek judicial injunctions, but also lobby some law makers to enact new harsh legal acts against the intermediaries (Tian 2008).

Above mentioned cases actually rose the importance of ISPs who participate in transferring and making available the material over the internet. Some started to pay much attention to ISPs role in the digital environment, especially in copyright and infringement problems. The infringement issues in the digital environment are appearing not only because a person who is illegally using the copyrighted material, but also the ISP. The ISP's problem may appear when a copyrighted work is distributed or communicated to the public by them without any right holder's authorization. In fact, the ISP may contribute or provoke the online copyright infringement (Sinha 2017: 233).

The cases also led to some questions whether those who innocently host, store or facilitate the transmission of illegal copyright materials over the internet be liable for copyright infringement? Yet, the point is what we mean by «innocent».

As previously mentioned there are a plenty of intermediaries in the digital environment who involve in enabling the storing and transmission of Internet contents. At the beginning of internet development, some US cases examined the liability of website or electronic bulletin board and ISPs when they involved in hosting infringing contents. And this in turn led to the application of US copyright law concepts such as contributory and vicarious infringements. Moreover, it raised a number following issues:

a) Are ISPs under a duty to control the sites they host or monitor infringing copyright materials?

b) What if they made clear in terms of use that users posting or hosting material on their websites were liable for infringing contents, not the host or operator?

c) What if such users are innocent throughout and have put infringing content with no knowledge?

It should be mentioned that from 1990s some countries have attempted to clarify when liability appears in such situations. The first major act was the US DMCA 1998, which provides «safe harbor» for those who hosts, transmits, and stores infringing materials. Then EU Electronic Commerce Directive used similar provisions, too. According to the Electronic Commerce Directive and the Information Society Directive, those who caches, hosts, or «mere conduits» may escape liability if they take down infringing materials as soon as they become aware it is illegal. It can be noted that a lack of knowledge may help operators or providers to escape liability.

Recently, the safe harbour rules under the Electronic Commerce Directive have faced careful examination, because of some platforms like Youtube. The matter is that the music industry often mentions about a 'value gap' in laws such as the Electronic Commerce Directive where there is a mismatch between the value that some digital platforms like Youtube extract from music and the revenue returned to the music community. Moreover, inconsistent application of laws has encouraged some digital platforms to claim that they are not liable for

the music they made available to the public (Stokes 2019: 67).

Since 2013, the Civil Code of the Russian Federation has defined types of information intermediaries in Article 1253.1, titled «Special Responsibilities of an Information Intermediary». An information intermediary is classified as:

- a party that transmits content via an information and telecommunications network (ICS),

including the Internet;

- a party that enables the posting of materials or information required to access them on the

ICS; and a party that provides access to materials on this network.

The Civil Code establishes the rights, obligations, activity limitations, and liability of information intermediaries. It does this by first setting a general rule in paragraph 1 and then categorizing two types of intermediaries in paragraphs 2 and 3: those who transmit material on the ICS and those who enable material to be posted on the ICS.

Under the general rule, information intermediaries are liable for intellectual property rights violations within the ICS based on general grounds as defined by the Civil Code, contingent on fault and with specifics outlined in paragraphs 2 and 3 of Article 1253.1. An intermediary's liability may arise from either actions that infringe on authors' rights and other copyright holders' rights or from failing to act to prevent infringements, such as neglecting a request to remove illegally posted content.

Paragraphs 2 and 3 provide conditions under which intermediaries are exempt from liability for their specific activities. When these conditions are met, the intermediary may still be required to protect intellectual property rights in ways not involving civil liability, such as removing infringing information or restricting access to it. Clause 4 of Article 1253.1 further specifies actions to safeguard rights, such as removing or restricting access to content that infringes or threatens intellectual property rights.

Additionally, paragraph 5 of this article recognizes another category of information intermediaries: «persons who enable access to material or to information necessary for obtaining it via ICS». This broadens the scope of information intermediaries, allowing for a wider interpretation, as evidenced by Russian judicial precedents over the past decade. In practice, this category includes hosting providers, telecom operators, copyright holders, and software and website developers who provide platforms for users to post and share materials, such as email and messaging services on social networks such as Yandex, Mail.ru, WhatsApp, Telegram (https://www.garant.ru/products/ipo/prime/doc/405914839/).

Thus, information intermediaries–including providers and hosting services–serve as central players in Internet-based information and communication relations. Like other participants in public relations, they should be granted specific legal rights and obligations. However, despite the long-standing and rapidly evolving role of intermediaries in public relations–more than 30 years globally and actively growing in Kazakhstan–their legal status remains undefined in Kazakh legislation. Even the Law of the Republic of Kazakhstan «On Informatization» lacks provisions on information intermediation, although it does provide definitions for some related terms, such as «information and communication infrastructure», which it describes as «a set of facilities designed to support the technological environment for the formation of electronic information resources and access to them» («Ob informatizacii». Zakon Respubliki Kazahstan ot 24 nojabrja 2015 g. № 418-V ZRK. URL: https://adilet.zan.kz/rus/archive/docs/Z1500000418/11.02.2024).

It appears that the activities of information intermediaries in Kazakhstan should be regulated by legislation, drawing on the experience of legal frameworks like the Civil Code of the Russian Federation, especially in the absence of comparable regulations in Kazakhstan. We align with the viewpoint of researchers who argue that gaps in legislation concerning the «legal status of information intermediaries» lead to instability in online legal relationships. Although the rights of the key participants are formally guaranteed by law, these rights may become unenforceable due to the unresolved status of information intermediaries (Gavrik 2020).

Therefore, in addition to defining the concept and types of information intermediaries/providers and setting the limits of their legal responsibility in the copyright domain, we propose introducing the following provisions:

- providers should be required to verify the identity of a person when posting materials on an online platform. When submitting text works that display someone else's name (Article 15 of the Civil Code of the Republic of Kazakhstan), providers should have the right to refuse to accept such material;

- providers must display rules for copying/reprinting texts on their online platform, including the automatic addition of a link to the source when content is copied;

- providers should include a warning indicating the presence of copyright holders/authors associated with the content posted on the site.

Upon receiving notification of a copyright infringement, the provider must immediately prevent the copying or distribution of the material, request supporting documentation, and delete the infringing content. If necessary, they should publish a notice about protecting the rights of the author or copyright holder.

After receiving a notification of copyright infringement, the provider should review all pages of the hosting or online platform, and if similar infringing content is found, delete all related materials of the copyright holder.

These proposals are also inspired by the practical application of the US DMCA, which established an electronic method for filing complaints against providers, such as the «DMCA Complaint» used to report plagiarism or block content on platforms like Google, YouTube, Google Play, Google Drive, and others. The process has strict deadlines for addressing complaints, and a warning regarding the liability for filing unfounded complaints is prominently displayed on the page (https://www.lumendatabase.org/).

When defining the concept of an information intermediary, we suggest considering the differing approaches between Russia and Europe regarding the definition and classification of information intermediaries, as well as the importance of framing the concept within the broader scope of an «information service» (Chubukova 2017). Unfortunately, there is a lack of doctrinal studies on this issue within Kazakhstani scholarship, which is why we refer to the works of scholars from other countries (Ivanov 2015).

We argue that it is essential to require mandatory pre-trial resolution of copyright disputes on the Internet, particularly concerning information intermediaries. In most cases, providers are likely to prefer settling disputes out of court. We also support the view of some researchers who advocate for holding information intermediaries jointly responsible with the actual copyright infringer (Grjazeva 2023).

In Kazakhstan, it is necessary to establish specialized courts to handle intellectual property disputes. Many scholars and experts highlight the success of the Intellectual Property Rights Court of the Russian Federation, which has been in operation for over 10 years (Loginova 2020).

Conclusion

The study found that the legislation of the Republic of Kazakhstan lacks provisions for regulating public relations concerning the circulation of intellectual creative works on the global Internet, particularly regarding the main participants in these relations–information intermediaries/providers.

In light of this, we propose several amendments. First, Article 6 of the Law of the Republic of Kazakhstan «On Copyright and Related Rights» should be revised to address copyright objects in electronic/digital form. Additionally, we suggest introducing the concept of information intermediaries into the conceptual framework of the Law «On informatization» and including provisions on their rights and responsibilities regarding copyright materials on the Internet within this law.

We also recommend incorporating procedures for the placement of copyright objects on online platforms into the Copyright Law, with a mandatory reference to these procedures in the Law «On informatization».

Furthermore, we propose adding norms on the mandatory pre-trial settlement of disputes between authors/copyright holders and providers into Article 49 of the Copyright Law.

The implementation of these proposals will likely stimulate further scientific research in this field. Accurately reflecting legal realities in legislation is a hallmark of the rule of law and will contribute to the advancement of both legal scholarship and the protection of authors' and other copyright holders' rights.

Әдебиеттер

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