



E-Commerce Law Interpreting the Obligations and Legal Liability of E-Commerce Platforms

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Overview

The E-Commerce Law was adopted on August 31, 2018 by the Standing Committee of the Thirteenth National People's Congress and will come into effect on January 1, 2019. The adoption of the law lays the basic legal framework for the development of e-commerce in China. It is particularly notable that the E-Commerce Law devotes considerable length to provide clear provisions on the obligations of e-commerce platform operators ("**e-commerce platforms**"), and to establish conduct that e-commerce platforms "shall" and "shall not" engage in:

E-commerce platforms shall:

- ✓ Examine and register platform merchants, and encourage merchants to register with industry and commerce authorities;
- ✓ Formulate cybersecurity incident preparedness plans, maintain cybersecurity;
- ✓ Record and preserve platform transaction information for a period of no fewer than three years;
- ✓ Distinguish in-house operations in a prominent manner to avoid misleading consumers;
- ✓ Clearly mark paid listings of products or services as "advertisements";
- ✓ Prominently display platform service agreements and transaction rules;
- ✓ Timely forward intellectual property rights infringement notices and statements, take relevant necessary measures, etc.;

E-commerce platforms shall not:

- ✓ Offer standardized contracts for e-commerce between merchants;

- ✓ Abuse market dominance, exclude or restrict competition;
- ✓ Unreasonably restrict or attach unreasonable conditions to platform transactions, or charge platform merchants unreasonable fees;
- ✓ Adopt implied consent for “tie-in” sales;
- ✓ Delete consumer reviews, etc.

A major highlight of the E-Commerce Law is that it clearly states the foregoing legal obligations while also explicitly stipulating the legal consequences to an e-commerce platform in the case of violations, which include administrative penalties such as facing corrective orders, confiscation of illegal gains, fines, orders to suspend business for rectification, entries into credit records, and also the potential undertaking of civil liability. Of these, it is notable that the law stipulates that e-commerce platforms are subject to joint civil liability in certain circumstances, including the failure to properly handle intellectual property rights disputes, which deserve the full attention of e-commerce platforms. Here, we briefly review and interpret the relevant content of the law:

I. E-Commerce Law confirms the business scope of e-commerce platforms

The E-Commerce Law separately defines the concepts of “e-commerce operators” and “e-commerce platform operators.” Article 9 of the E-Commerce Law establishes that “e-commerce operators” refer to “natural persons, legal persons and unincorporated associations that carry out business activities through information networks such as the Internet to sell products or offer services, which include e-commerce platform operators and platform merchants, and e-commerce operators that sell products or offer services through their own websites and other network services.” “E-commerce platform operators” refer to “legal persons and unincorporated associations that provide network location, transaction intermediary, information publishing and other services to two or more parties in e-commerce, so that two or more parties are able to independently carry out transactions.”

It is worth noting that Article 46 of the E-Commerce Law stipulates that, in addition to the foregoing services, e-commerce platforms may also provide warehousing and logistics, payment settlement, delivery and other services for e-commerce between merchants in accordance with platform service agreements and transaction rules. However, e-commerce platforms that provide services for e-commerce between merchants may not conduct transactions in a centralized manner, such as by adopting centralized bidding or market-making, or executing transactions based on standardized contracts.

We believe that the foregoing provisions in fact confirm the business scope of e-commerce platforms at the legislative level, and provide clear business guidelines for current e-commerce platforms to conduct business legally, sustainably and soundly. It must be noted that violating

the foregoing provisions by conducting transactions in a centralized manner or executing transactions based on standardized contracts will potentially result in the assumption of legal liability.

II. The E-Commerce Law establishes industry and commerce registration of e-commerce operators as the rule rather than the exception, thus increasing the relevant obligations of e-commerce platforms to assist in conducting registrations

Article 10 of the E-Commerce Law provides that “e-commerce operators shall register themselves as market subjects in accordance with law, except for individuals who sell self-produced agricultural and sideline products or family handicrafts, individuals utilizing their own skills to engage in labor activities for the convenience of people, and occasional small-sum transaction activities that do not legally require licensure, and other circumstances for which no registration is required under laws and administrative regulations.”

There is known to have been considerable debate during the legislative process for the E-Commerce Law as to whether all e-commerce operators should be required to conduct industry and commerce registration. The final promulgation of the E-Commerce Law established that industry and commerce registration was a general principle, but that registration was not required for personal sales of self-produced agricultural and sideline products, household handicrafts, certain labor activities and occasional small-sum transactions.

At present in e-commerce, individual online shops do not need conduct industry and commerce registration, and the threshold for merchants to open online stores on platforms is practically nil — they are only necessary to comply with the platform’s certification requirements and procedures. The E-Commerce Law establishes registration as a principle, and the law further stipulates that e-commerce platforms are obligated to assist merchants with industry and commerce registration. Article 28 of the E-Commerce Law provides that “[e-commerce platforms] shall, in accordance with the relevant provisions, submit information on the identification of operators on its platform to the department for market regulation, prompt operators that have not registered themselves as market operators about handling such registration, and cooperate with the department for market regulation in providing convenience to operators for their market operator registration, in consideration of the characteristics of e-commerce.” In practice, it still awaits further exploration as to how e-commerce platforms will remind merchants to conduct registration and how platforms will provide convenience to merchants with respect to market operator registration.

III. E-Commerce Law stipulates e-commerce platform obligations

Articles 11 to 26 of the E-Commerce Law provide for legal obligations of e-commerce operators, which include: (1) tax compliance, (2) obtaining administrative licenses (as required), (3)

prohibiting the sale or provision of products or services that are prohibited by laws or administrative regulations, (4) lawfully providing invoices, such as proofs of purchase or service receipts, (5) fulfilling information disclosure obligations, including displaying AIC registration information in a prominent position on homepages, and disclosing goods or services information in comprehensive, true, accurate and timely manner; (6) when providing search results for goods and services based on a consumer's individual characteristics, also providing the consumer with options that are not specific to his or her individual characteristics, (7) prohibiting implied consent for tie-in sales, (8) timely refunding consumer deposits, (9) not abusing market dominance, excluding or restricting competition, (10) protecting personal information, (11) providing reasonable convenience to examine user information and to modify and delete such information, (12) providing relevant e-commerce data to the authorities in accordance with law, engaging in cross-border e-commerce in compliance with laws, administrative provisions and relevant national provisions on import-export administration.

E-commerce platforms, as e-commerce operators, will undoubtedly be required to comply with the foregoing provisions. In addition, however, the E-Commerce Law also provides particular provisions for e-commerce platforms, which include the obligation to verify and register platform merchants, the obligation to ensure platform cybersecurity, and the obligation to ensure fair dealing and the legitimate rights and interests of consumers on the platforms:

i. Merchant examination and registration obligations

1. Examine merchants' identities, cooperate with the market regulatory administrative department and tax administrative department to conduct merchant industry and commerce and tax registrations (E-Commerce Law, Articles 27, 28)

Specifically, an e-commerce platform "shall require [merchants] that apply to sell products or offer services on its platform to submit identity, address, contact ... information, and shall examine and register [such information], establish registration archives, and regularly verify and update [such information]." E-commerce platforms are also required to cooperate with and report merchant identity information to the market regulatory departments, and coordinate with merchants to conduct industry and commerce registration. E-commerce platforms must also submit merchant identity and tax payment-related information to the tax authority, and notify merchants to conduct tax registrations.

2. Adopt necessary measures for the unlawful activities of platform merchants, report to the relevant competent authorities (E-Commerce Law, Article 29)

Under the E-Commerce Law, e-commerce platforms are required to adopt handling measures for the unlawful conduct of platform merchants, which includes: engaging in business activities for which administrative licensing is required but has not been obtained, and offering products or services that are prohibited for sale by laws or

administrative regulations. It is necessary to clarify in practice the measures that e-commerce platforms may adopt that are sufficient to meet the “necessary handling measures” requirement of the E-Commerce Law. We believe that e-commerce platforms should, upon the discovery of unlawful activity, suspend the merchants’ qualifications to operate on the platform or suspend the sale of the relevant products or services.

ii. Obligations to maintain network security: formulate cybersecurity incident preparedness plans and prevent cybercriminal activity

According to the E-Commerce Law, an e-commerce platform “shall take technical measures and other necessary measures to guarantee the security and normal operation of its networks, prevent illegal crimes from being committed online ... and shall prepare a cybersecurity incident preparedness plan. When a cybersecurity incident occurs, [the e-commerce platform] shall immediately activate its preparedness plan, take corresponding remedial measures, and report the same to the relevant competent authority.” (E-Commerce Law, Article 30)

The above requirements are consistent with the relevant provisions of the Cybersecurity Law, which was promulgated in 2017, and reflect the application of the basic principles of the Cybersecurity Law in the field of e-commerce.

iii. Obligation to publicize transaction information preservation and transaction rules

1. Platform transaction information is to be recorded and preserved for a period of no fewer than three years (E-Commerce Law, Article 31)

According to the E-Commerce Law, e-commerce platforms are obligated to record and preserve “information released on platforms about products and services and transaction information,” and to ensure the integrity, confidentiality and utility of the information. The E-Commerce Law expressly requires e-commerce platforms to preserve information for no fewer than three years following the conclusion of a transaction. We understand this three-year record preservation requirement is the same as the three-year statute of limitations provision found in the General Provisions of the Civil Law, and that this was considered to be the legislative starting point for the convenience of parties to dispute resolutions.

2. Perform information disclosure obligations, formulate platform service agreements and transaction rules and publicize them in a prominent position, the revised agreements or rules are to be open for public comment (E-Commerce Law, Articles 32 to 34)

According to the E-Commerce Law, e-commerce platforms are required to formulate platform service agreements and transaction rules that are prominently displayed on the

platform's homepage for merchants and consumers to conveniently view and download. If platform service agreements and transaction rules are to be modified, the changes are required to be placed on the homepage to solicit public comments, and a reasonable method should be used to ensure all concerned parties can fully express their opinions in a timely manner.

iv. Obligation to ensure fair dealing on the e-commerce platform

According to the provisions of the E-Commerce Law, e-commerce platforms are obliged to ensure fair dealing on their platforms to safeguard the legitimate rights and interests of consumers. Specifically, the e-commerce platforms are required to comply with the following provisions:

1. E-commerce platforms must not set unreasonable restrictions or attach unreasonable conditions to the transactions within the platform, or charge unreasonable fees on merchants within the platform.
2. E-commerce platforms are required to mark in-house operations in a prominent manner so as to avoid misleading consumers.
3. E-commerce platforms are required to establish and improve credit evaluation systems, and publicize credit evaluation rules, and must not delete the consumer reviews.
4. With respect to search services, e-commerce platforms are required to display search results in various ways in terms of price, sales volumes, credit, and should clearly mark paid product or service listings as "advertisements."

v. Intellectual property protection obligations: timely forwarding of infringement notices and statements, take relevant necessary measures

It is worth noting that the E-Commerce Law implements the provisions of the Tort Liability Law on network tort liability, and clarifies that, in the field of e-commerce, e-commerce platforms are to use the "notify-delete" rule to handle intellectual property disputes.

In fact, the judicial organs in China have been actively exploring and defining liability for e-commerce platforms as network service providers where network users engage in acts of infringement. For example, the Beijing Higher People's Court has specified preliminary rules on how rights holders may notify e-commerce platforms and what necessary measures the e-commerce platforms should take in case of infringement in a question and answer format in an intellectual property dispute case¹.

¹ According to Jing Gao Fa [2013] No. 23, *The Answers of the Beijing Higher People's Court to Several Questions Concerning the Trials of Cases of Infringement of Intellectual Property Rights in E-Commerce*:

"The rights holder shall have the right to notify the e-commerce platform operator via letters, faxes or emails to adopt necessary measures including removing, blocking and disconnecting the web link, if the right holder

Subsequently, the Supreme People's Court established the “notify-delete” rule in Guiding Case No. 83 (dispute over infringement of invention patent rights), issued on March 6, 2017. Specifically, the “effective notice” of the rights holder should include the identity information of the infringed party, the ownership certificate, the infringer's network address, the preliminary factual evidence of the infringement, and the “necessary measures” that the e-commerce platform is to take should be determined in a prudent and reasonable manner based on the nature of the rights infringed, the specific circumstances of the infringement and technical conditions, including but not limited to deleting, blocking and disconnecting hyperlinks².

By summarizing the above judicial practices, the E-Commerce Law further clarifies the obligations of e-commerce platforms in case of intellectual property infringement disputes.

1. An e-commerce platform that was unaware of the infringement has the obligation to transfer infringement notices and the non-infringement statements between rights holders and the merchants on the platform. Where the e-commerce platform obtains preliminary evidence of the infringement, it should delete, block and disconnect hyperlinks, terminate transactions and services. (E-Commerce Law, Articles 42, 43 and 44)
2. An e-commerce platform is required to take necessary measures such as deleting, blocking and disconnecting hyperlinks, and terminating transactions and services if it knows or should have known of any infringement occurring on its platforms (E-Commerce Law, Article 45).

These provisions of the E-Commerce Law in fact provide a complete set of clear rules for

believes that the [merchants] on the e-commerce platform have infringed its intellectual property rights through the network services provided by the e-commerce platform operator... If the notice of the rights holder and the accompanying evidence can prove that the infringement of the alleged infringing transaction information is highly likely to be true, the operator of the e-commerce platform should take necessary measures timely. The e-commerce platform operator shall forward the non-infringement notice received from the [merchants] to the rights holder and request the rights holder to confirm within a reasonable period of time whether the [merchant's] non-infringement statement is true. If the rights holder withdraws the infringement notice within a prescribed period of time, or fails to confirm the non-infringement notice, the e-commerce platform operator shall cancel the necessary measures in time to recover the deleted content or resume the links that have been blocked or disconnected.”

² The Supreme People's Court, Guiding Case No. 83: Weihai Jiayikao Household Electrical Appliances Co., Ltd. v. Yongkang Jinshide Industry and Trade Co., Ltd. and Zhejiang Tmall Network Co., Ltd. adopted two principles:

1) Where an internet user commits the infringement by the use of internet services, the notice, including such contents as the identity of the infringed, ownership certificate, network address of the infringer and preliminary evidence for infringement facts, issued by the infringed in accordance with the tort law to the internet service provider requiring it to take necessary measures is a valid notice. The complaint rules that the internet service provider itself establishes shall not affect the rights holder's protection of its legitimate rights and interests under the law.

2) The necessary measures that shall be taken by the internet service provider upon receipt of a notice as specified in paragraph 2 of Article 36 of the tort law include, but are not limited to, deleting contents, screening and breaking links. "Necessary measures" should be determined comprehensively in line with the principles of prudence and reasonableness and based on the nature of the infringed rights, specific circumstances of the infringement and technical conditions.

e-commerce platforms to legally handle intellectual property infringement disputes. Specifically, upon receipt of the notice specifying preliminary evidence for alleged infringement, an e-commerce platform is required to take necessary measures in a timely manner, such as deleting, blocking and disconnecting the hyperlinks, terminating transactions and services, and to forward notices to merchants on its platform. If the merchants believe that no infringement has occurred, they may submit a non-infringement statement and preliminary evidence to the e-commerce platform. The e-commerce platform is obliged to forward the non-infringement statement to the rights holders. Further, the e-commerce platform is required to lift all measures that it has taken within 15 days of delivery of the non-infringement statement if the rights holder does not provide notice to the e-commerce platform that the holder has made a complaint or brought a lawsuit. E-commerce platforms are also required to make public the notices and statements they have received as well as resolutions in a timely manner.

IV. E-commerce platforms may be held legally liable

Many hot topics have captured public attention in recent years that are closely related to e-commerce platforms. Problems have emerged in the current development of e-commerce platforms that need supervision, from defrauding frequent customers by using big data and default tie-in sales to the difficulty of obtaining deposit refunds in the sharing economy and the arbitrary deletion of reviews, etc. What kind of civil liability e-commerce platforms should bear in these contractual and infringement disputes is also a highly controversial issue.

In order to protect consumer rights and maintain fair competition, the E-Commerce Law clearly stipulates the legal liabilities that may arise from the violation of relevant obligations of e-commerce platforms, including the administrative penalties and civil liabilities that may be imposed. The relevant penalties and liabilities are described as follows:

i. Administrative penalties

The E-Commerce Law clearly stipulates that upon violation of relevant legal obligations, e-commerce platforms may face administrative penalties including corrective orders, confiscation of illegal gains, fines, orders to suspend business for rectification and entries into credit records based upon severity of circumstances.

1. “The department for market regulation shall order [an e-commerce platform] to make corrections within the required time limits and confiscate its illegal gains, and may additionally impose a fine of more than RMB 50,000 but less than RMB 200,000 if it displays search results in violation [of these provisions], or [unlawfully] sells tie-in products or services...; in serious cases, the fine may be increased to more than RMB 200,000 but less than RMB 500,000.” (E-Commerce Law, Article 77)
2. E-commerce platforms that fail to fulfill merchant examination and registration

obligations, which do not report relevant information to the industry and commerce and tax authorities, or which do not preserve product, service and transaction information, among others, will “be ordered by the relevant competent authority to make corrections within a required time limit ... [e-commerce platforms that] fail to make corrections within the required time limit shall be fined more than RMB 20,000 but less than RMB 100,000; in serious cases, [the e-commerce platform] shall be ordered to suspend business operations and be fined more than RMB 100,000 but less than RMB 500,000.” (E-Commerce Law, Article 80)

3. E-commerce platforms that fail to consistently display information about the platform service agreement or transaction rules in a prominent position on their platform homepages, or fail to distinguish in-house operations with distinct labels from those of other merchants on their platforms or arbitrarily remove consumer reviews will “be ordered by the department for market regulation to make corrections within a required time limit, which may additionally impose a fine of more than RMB 20,000 but less than RMB 100,000; in serious cases, [the e-commerce platform] shall be fined more than RMB 100,000 but less than RMB 500,000.” (E-Commerce Law, Article 81)
4. Where an e-commerce platform imposes on merchants “unreasonable restrictions on or adds unjustified conditions to transactions, or charges [merchants] on its platform any unreasonable fees, the department for market regulation shall order [the e-commerce platform] to make corrections within a required time limit and may additionally impose a fine of more than RMB 50,000 but less than RMB 500,000; where the case is serious, [the e-commerce platform] shall be fined more than RMB 500,000 but less than RMB 2 million.” (E-Commerce Law, Article 82)
5. Where e-commerce platforms fail to take necessary measures against merchants on its platform that infringe the intellectual property rights of others, “the administrative department for intellectual property shall order [them] to make corrections within the required time limits; where [an e-commerce platform] fails to make corrections within the required time limit, it shall be fined more than RMB 50,000 but less than RMB 500,000; in serious cases, the fine may be increased to more than RMB 500,000 but less than RMB 2 million.” (E-Commerce Law, Article 84)

The provisions of E-Commerce Law echo and supplement those of other relevant laws and regulations. E-commerce platforms that violate personal information protection obligations or cybersecurity safeguarding obligations, fail to mark paid product or service listings as “advertisements” or engage in false advertising will be punished in accordance with the relevant provisions of the Cybersecurity Law, the Advertising Law, and the Anti-Unfair Competition Law, among others.

ii. Civil liabilities

The E-Commerce Law clearly stipulates the civil liabilities that e-commerce platforms may face in certain circumstances, and the relevant provisions should draw the attention of e-commerce platforms.

In short, the E-Commerce Law stipulates that e-commerce platforms may face civil liability for failure to fulfill obligations to protect the personal safety of consumers, or failure to properly perform obligations to provide original contracts or materials in the handling of e-commerce disputes. Under certain circumstances where e-commerce platforms are also at fault, the e-commerce platforms will also bear joint and several liability with the merchant or intellectual property infringer.

1. Scenarios resulting in joint liability

Scenario 1: An e-commerce platform will be held jointly liable with merchants on its platform where the e-commerce platform fails to take necessary measures when it knows or should have known that merchants were selling products or offering services that failed to safeguard personal or property safety, or were committing any other acts that impaired the lawful rights and interests of consumers (E-Commerce Law, Article 38, para. 1).

Scenario 2: Where an e-commerce platform knows or should have known that a merchant on its platform has infringed any intellectual property rights, the e-commerce platform is required to take necessary measures such as deleting or blocking relevant information, disabling relevant hyperlinks, and terminating transactions and services. E-commerce platforms that fail to do so will be held jointly liable with the infringing party (E-Commerce Law, Article 45).

Scenario 3: E-commerce platforms that receive infringement notices from intellectual property rights holders are required to take necessary measures in a timely manner and forward the notice to merchants on its platform. E-commerce platforms that fail to timely take such measures will be held jointly liable with the merchants involved for additional damages (E-Commerce Law, Article 42, para. 2).

From the above, it can be seen that there are two conditions for an e-commerce platform to bear joint and several liability. First, the e-commerce platform knew or should have known the relevant facts, which means that the e-commerce platform is subjectively at fault. Secondly, the e-commerce platform did not take necessary measures against the violation, which means the e-commerce platforms objectively responded passively to the violation. The above provisions, particularly the joint liability referenced in scenarios 2 and 3, are consistent with the provisions of the existing Tort Liability Act

regarding the joint liability of network service providers for network infringement³.

In practice, the E-Commerce Law does not clearly provide standards for determining whether an e-commerce platform “knows or should have known” the relevant facts and what measures e-commerce platforms may take would be regarded as “necessary measures,” so as to avoid assuming joint and several liability legal risk. It appears that these questions still await answers in judicial practice. In this regard, the ideas reflected in the Supreme People's Court's Guiding Case No. 83 are of great reference value. In the case, the court found that in order to determine whether the e-commerce platform has committed infringement, the facts required to be considered include whether the e-commerce platform meets the conditions to be a network service provider, whether the notice provided by the rights holder is valid, whether the e-commerce platform should have taken measures after receiving the notice from the rights holder, and the necessity and timeliness of the measures that were taken.

2. Other types of legal liability

Scenario 1: Where an e-commerce platform “fails to fulfill its obligations to examine the qualifications of the [merchants] on its platform which provide products or offer services having a bearing on consumers' life and health, or fails to fulfill its obligations to safeguard the safety of consumers, which results in harm to consumers, the [e-commerce platform] shall bear the corresponding liability.” (E-Commerce Law, Article 38, para. 2)

The foregoing provision drew wide attention of all interested parties during the drafting of the E-Commerce Law. It is understood that the liabilities with respect to the above violations had been changed back and forth from “joint and several liability” to “supplementary liability” several times in the drafting process and was ultimately determined to be “corresponding liability.” The reason for these changes was that the legislators were considering the relative complexity of circumstances involving e-commerce platforms' failure to fulfill obligations to implement the qualification reviews and to protect consumers' personal safety. It was determined that liability may be determined according to actual circumstances, since it would be not be appropriate for the law to simply stipulate either joint or supplementary liability.

We understand that the term “corresponding liability” lends considerable flexibility to the courts to determine the liability to be undertaken by e-commerce platforms in judicial

³ According to Article 36 of the Tort Liability Law, “Internet users and internet service providers shall bear tort liability if they utilize the internet to infringe upon civil rights of others. If an internet user commits tort through internet services, the infringed shall be entitled to inform the internet service provider to take necessary measures, including, inter alia, deletion, blocking and disconnection. If the internet service provider fails to take necessary measures in a timely manner upon notification, it shall be jointly and severally liable with the said internet user for the extended damage. If an internet service provider is aware that an internet user is infringing on the civil rights and interests of others through its internet services and fails to take necessary measures, it shall be jointly and severally liable with the said internet user for such infringement.”

practice, although the specific rules for such determination still await to be developed and tested in the future.

Scenario 2: When handling e-commerce disputes, if the e-commerce platform causes original contracts and transaction records “to be lost, forged, tampered with, destroyed or concealed or refuses to provide such materials, which results in the people's court, the arbitral institution, or the relevant authority to be unable to ascertain the facts, such [e-commerce platform] shall bear the corresponding legal liability.” (E-Commerce Law, Article 62)

According to the foregoing provisions, e-commerce platforms may face other relevant legal liabilities for failing to properly record transactions and preserve the relevant contracts and transaction records, in addition to the administrative penalties mentioned above. However, the E-commerce Law does not clearly provide the specific forms of such legal liability, which remain to be further clarified in detailed rules or in judicial practice.

V. Conclusion

The E-Commerce Law becomes effective on January 1, 2019. E-commerce platforms should be attentive, comprehensively study the relevant provisions and enhance legal awareness. Before the end of 2018, e-commerce platforms should rectify non-compliance and further improve operating mechanisms in accordance with provisions of the E-Commerce Law, including for merchant verification and registration, transaction record preservation and information disclosure, intellectual property infringement dispute handling, consumer rights protection, etc., to avoid or reduce unnecessary legal liability risks and to ensure long-term, sound enterprise development.

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