MEDIA LAW NOTES

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Volunteering for the Division

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"Get involved," they say at the members' meeting. The question you may have—I certainly did when I was new to the division—is how.

You don't think you can run for office because, from what you see at the members' meeting, the election looks, well, rigged. Yet you are reluctant to believe that because, after all, this is a group that highly values the democratic process. Surely it can't operate like a communist regime. …

It doesn't, at least in that there is surely no central plan. All it takes to get involved is to look for a task you'd like to do, and then step up and volunteer.

For starters, you might consider writing an article for Media Law Notes. It's a clearly defined task that you can work into

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INSIDE THIS ISSUE

Thanks for a great convention

By Anthony L. Fargo
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A number of people have told me that they believe the 2005 AEJMC conference in San Antonio was one of the best they have ever attended. I concur. It seemed this year that all of the divisions, including Law, went the extra mile to put together outstanding panels, pre-conference workshops, and paper sessions.

We have a great locale for the 2006 convention – San Francisco – so let's begin working on making the program as exciting as the city. If you have not already done so, get your ideas for panel sessions and pre-conference workshops to Jennifer Henderson at Trinity University (Texas) as soon as possible. Her e-mail address is Jennifer.Henderson@trinity.edu.

We have a little unfinished business left over from San Antonio and we need to start work on some issues for San Francisco.

Thanks. I promised in an earlier column that I would thank, by name, all of the people who helped put the program together for Law Division panel and paper sessions in 2005. I now realize the folly of making that promise. There are so many people who contributed to making the Law Division programming a success that I fear I will either run out of room or forget someone. Instead, let me thank categories of people.

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Volunteering for the Division

your schedule at your own convenience. Do you have a teaching tip you'd like to share? Is there a case making its way through your federal district court that you think others should know about? Contact the newsletter editor and propose an article. Editors usually welcome submissions, particularly in the earlier issues, when they first start soliciting copy.

If you are ready for a slightly bigger commitment, you could volunteer to compile one of the bibliographies for Media Law Notes. Each quarterly issue contains a legal and a non-legal bibliography. The legal bibliography is an annotated list of law review articles on communication law that were published in the previous several months. The non-legal bibliography is an annotated list of communication law articles from the trade press magazines such as *Broadcasting & Cable*, *Editor & Publisher*, *Quill* and *CJR*. Electronic databases make these easy to research—no need to get to the library during certain hours and hunt down publications in the stacks. They can be surprisingly interesting to compile, and they keep you abreast of the latest news in the field—sometimes getting you to read things you otherwise might not make the time to read.

Another way to get involved is to propose a panel for the annual convention. Think about an issue or problem you would like to see discussed in depth. Then write up a one-page proposal that gives a summary of the session, possible speakers, and estimated costs, if any. Try to think of another division that might want to co-sponsor the session; if it's jointly sponsored, it's eligible for a travel grant for an outside speaker. The program vice head collects the proposal in October for submission to the central office Nov. 1. The vice head will work at the mid-winter meeting to get the session on the convention schedule. After it's scheduled, you'll get the go-ahead to confirm the details with the speakers.

The convention offers other opportunities to participate as well. You can serve as a panelist for a joint session, or as a moderator for a joint session or a research paper session. Let your colleagues who are proposing panels know of your interest, as well as the vice head and research chair. If you aren't submitting a paper to the division's research competition, you can offer to review papers in the spring for the research chair.

Also consider volunteering for an appointed position in the division, such as teaching chair or professional freedom and responsibility chair. Responsibilities for these positions can include proposing appropriate convention panel sessions and writing relevant articles for *Media Law Notes*. When you are ready to take on a substantial commitment, you might consider serving as research chair—the person who organizes the research paper competition.

Eventually you might offer to take on the three-year commitment of Law Division leadership. This involves a year of serving as clerk, which means editing *Media Law Notes*; a year as vice head, the person responsible for the division's convention programming; and a year as head, the one who oversees the operation and ensures that tasks are completed on time. The vice head and head attend the mid-winter meeting that takes place in early December, so it's a significant time commitment. If you have carried out other duties for the division in a timely and competent manner, the membership most likely will be delighted to nominate you as clerk at a future members' meeting. And don't be surprised if you are the sole nominee. ❖

Karen Markin is immediate past head of the Law Division

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Head Notes

First, thanks to all of the people who proposed panel sessions for Law this year, whether the sessions were selected or not. If your panel idea did not make the program this year, please consider proposing it again for 2006. I didn't see any bad proposals; some didn't make the program simply because we couldn't find a co-sponsoring division and had success in finding co-sponsors for others.

Second, thanks to all of the people who served on panels sponsored or co-sponsored by Law and who helped with the pre-conference workshop on covering the courts. You folks really worked your butts off.

Third, thanks to all of the people who served as reviewers for the paper competition. We received 54 papers, each read by three people, and accepted 27, and I'm told the process was pretty smooth this year. We couldn't do it without you.

Fourth, thanks to all of the people who attended sessions that Law sponsored or co-sponsored. I tried to make it to all of our panel and paper sessions and I kept track of how many people were at each. By my count, more than 400 people attended our sessions this year, and that doesn't include attendance at the paper session I missed. Several panel sessions were standing-room-only, including the session on how to get published in journals and a fascinating session on the WLBT license case (co-sponsored, respectively, by Mass Communication and Society and History).

Fifth, thanks to all of my counterparts in other divisions who worked with me and panel planners to get the program together, arrange for guest speakers, and organize the discussions. I learned a lot from many of you and my organizational skills, always suspect at best, have improved as a result.

Congratulations. One more time, three cheers for Law Division member Sandra Chance of Florida, the 2004 Journalism Teacher of the Year. Also, thanks, Sandi, for inviting Floyd Abrams to be your guest for the Wednesday evening program. You and he led a fascinating discussion on past and present First Amendment challenges, and it was a bonus to have him stick around to autograph copies of his book, *Speaking Freely*.

Follow-up on IRB's. We had a spirited discussion at this year's business meeting about whether Institutional Review Boards (IRB's) act in violation of the First Amendment when they require prior review of research projects that are more journalistic than scientific. This topic has been on our radar for several years but we have yet to take any action. Indeed, part of the reason debate was so spirited this year was because there was little consensus about what action to take, if any. Also, there is disagreement among the members about whether there is a constitutional issue, or uncertainty about what IRB's do that some members find objectionable. One thing that would help, I believe, is a clear statement of the issue and a clear proposal about what to do next, if anything. The members voted to have a committee come up with such a proposal for next year's meeting.

Robert Kerr of Oklahoma was suggested as a likely chair of that committee, but he had to decline. So I need volunteers to agree to study the issue this year and write a proposal for the membership to consider. I'll need the proposal by around June 1 so I can include it in my last "Head Notes" column in *Media Law Notes* and/or mail it to the Law Division members before we reach San Francisco. If you would like to volunteer to study this issue and draft a proposal, e-mail me by Nov. 1.

Speaker's bureau idea. Toward the end of the Law Division business meeting in San Antonio, I asked for volunteers to join me in studying a way to better share the expertise of our members with the media and public. Thanks to Amy Gajda of Illinois, Martin Kuhn of North Carolina, and Nancy Whitmore of Butler for expressing interest in raising Law Division members' visibility. If anyone else would like to join us in our discussions (via e-mail) this year about what we as a division could do to help our members contribute to local, regional, and national debates about communication law issues, please let me know.

And finally: Be nice. During one of the Council of Divisions meetings I attended in San Antonio, the subject of paper reviewers' comments to writers came up. Apparently there was considerable concern expressed to AEJMC leaders this year about the ways in which some reviewers were, shall we say, less than encouraging to writers. Law Division was not singled out, so I don't know if any of the complaints concerned our reviewers. But let me use this opportunity to remind reviewers that you often will be dealing with papers from graduate students or new assistant professors. Your comments can do a lot to either encourage those folks or drive them away from law, AEJMC, or academics. I know at least one person who refuses to this day to send papers to AEJMC or participate in the organization because of harsh comments from reviewers years ago. Please be diplomatic. A rejection is much easier to take if the reviewer demonstrates a thoughtful attitude and offers suggestions for improvement – not suggestions for how to turn the paper into origami. ❖

Legal Bibliography

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ACCESS TO INFORMATION

Robert Zelnick, "Essay on Source Confidentiality: Journalist and Confidential Sources," 19*Notre Dame Journal of Law, Ethics and Public Policy*, 541 (2005). Citing Justice Potter Stewart's warnings in *Branzburg* of the press becoming an arm of the government, the author suggests the press now seems to be viewed as agents for enforcement of court orders, the court itself cannot enforce. Within the context of journalist Judith Miller's jailing, a criminal contempt conviction of Rhode Island reporter James Taricani, and civil fines levied against five reporters for refusing to tell who linked a Los Alamos scientist to espionage acts, Zelnik argues the scales have been tipped too far against media. He suggests, despite problems such as defining *journalist* and laws of general applicability in criminal and civil litigation, the Miller and Taricani cases may be a good place to drive home the need for a sensible federal shield law.

FIRST AMENDMENT

Edward L. Carter, "Defining Government Speech: Recent Approaches and the Germaneness Principle," 82/2 *Journalism and Mass Communication Quarterly* 398 (2005). The author suggests three approaches to classify government speech, given the Court's suggestion that government's selection of its own messages may well overwhelm private speech. Carter argues that when government may choose to take sides on an unsettled issue, unrelated to the government's role, it poses a significant risk to private speech rights. He demonstrates these potential threats through such viewpoint discrimination examples as allowing pro-life but not pro-choice specialty license plates and not allowing a Winter Solstice sign beside a Christmas tree, crèche or Santa Clause. Carter proposes that the approaches courts of appeal have used (funding, control and nexus) result in an overinclusive definition of government speech. The Court, he asserts, would be better served to examine government speech for its germaneness to the task of governing as outlined in *Abood v. Detroit Board of Education* and subsequently applied in *Keller*.

Schauer, Frederick, "Toward an Institutional First Amendment," 89 *Minnesota Law Review*, 1256 (2005). In this essay, the author ponders arguments against an institutional First Amendment doctrine which might present less coherence in the abstract but provide more practical ability to consider institutional autonomy through the core of First Amendment justifications. Schauer claims current doctrine focuses on the form of actors' behaviors without regard for their identity while readily distinguishing between categories of speech, but it does not distinguish between institutions (e.g., media/non-media; adult theaters/Internet; individuals/magazine publishers). He claims the courts have shied away from real world institutions in designing doctrine because 1) social institutions are not clearly demarcated; 2) empirical inquiry by the court would produce deficient records, and 3) a belief that the First Amendment exists as an individual right. Schauer proposes that continuing to treat institutions, settings and contexts like individuals might result in "institutional compression" which levels down rather than up (e.g. Bob's Peepshow will be subject to the same regulations as the CBS Super Bowl rather than vice versa). With the stated goal of discussing rather than providing a foundation for an institutional First Amendment, the author concludes that perhaps the arguments against such an approach as a technique in First Amendment analysis may be weaker than traditionally believed.

INDECENCY/OBSCENITY

Alan E. Garfield, "Protecting Children From Speech," 57 *Florida Law Review* 565 (2005). The author provides a detailed analysis of child protection censorship, and offers a method for constitutional and practical analyses. Conceptualizing around the notion that protecting children is "as dangerous as it is compelling," Garfield provides both empirical and regulatory discussions including: maturity levels of children; the state as parental assistant; the uncertain nature of effects; appropriate levels of judicial scrutiny; vagueness/overbreadth; and dangers to freedom of speech. He warns that judges must: determine that harm is real; keep any censorship to an absolute minimum; and ensure less restrictive means will not work. Garfield further argues that any regulations must be specific ensuring adult access while not penalizing in a way that would chill legitimate speech.

INTELLECTUAL PROPERTY

Diane M. Barker, "Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA," 20 *Berkeley Technology Law Journal*, 47 (2005). In this Note, the author, examining the development of case law under the DMCA, finds that while the act's anti-circumvention provisions, including durable goods after markets, regulatory exemptions and the act's constitutionality are well established. Less clearly delineated, Barker claims, are parameters of the safe harbor provisions, including recognition of potential abuse of cease and desist orders, the issue of notice and requirements of both ISPs and copyright holders. She suggests that those accused of violating anti-circumvention provisions would be

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Legal Bibliography

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most successful in claiming an exception or those fair use/misuse defenses available in traditional copyright arena, and warns Internet Service Providers must adhere strictly to the act's provisions in order to have immunity.

TELECOMMUNICATIONS

James McClintick, "Web-surfing in Chilly Waters: How the Patriot Act's Amendments to the Pen Register Statute Burden Freedom of Inquiry," 13 *American University Journal of Gender, Social Policy and the Law*, 353 (2005). The author claims PATRIOT Act revisions on pen register and trap and trace device use, used as law enforcement and investigation tools since the 1968 Wiretap Act, threaten academic and intellectual inquiry in controversial areas on First Amendment as well as Fourth Amendment grounds. McClintick argues Internet addresses, unlike telephone numbers, contain content such as search terms, concepts, titles and trademarks as well as names of businesses, schools or political organizations. The 1968 Act expressly forbids collection of communication content which should have resulted in an evidentiary showing of probable cause when the PATRIOT Act modifications were passed, he said. Drawing from *Sweezy v. New Hampshire* and *Keyishian v. Board of Regents*, McClintick suggests long-term data collection, information sharing and record keeping done through Internet pen registers can put a strait jacket on intellectual life, chilling inquiry in areas that may or may not be *relevant to a criminal investigation.* ❖

Non-Legal Bibliography

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ACCESS TO INFORMATION

Campbell, Joel, "Sunshine Laws Should Be Updated for an E-World." *Quill* (August 2005): 44.
Campbell reports on the "haphazard state laws and policies" regarding whether e-mails constitute a public record. Campbell shares the results of a report from the Public Affairs Research Council of Louisiana, which offers suggestions to lawmakers about drafting rules on electronic records.

Campbell, Joel. "Sunshine Week Helps Public Meet Everyday FOI Heroes." *Quill* (May 2005): 36.
Campbell summarizes "five FOI hero tales" that emerged from Sunshine Week, an event to educate the public about open government, held in March 2005.

Campbell, Joel. "Lawmakers Should Let Sun Shine on Quasi-Public Groups." *Quill* (March 2005): 22.
Campbell documents a series of cases involving private government contractors who have refused to open up their records to public review. Campbell argues that as "government shifts power and money to private institutions and organizations, advocates should insist that these, too, be accountable to the public by pushing for changes in open records laws or taking the fight to court."

Davis, Charles. "Reporter's Tale Shines Light on FOI Struggles." *Quill* (April 2005): 28.
Davis reports on a five-part series by Macon (Ga.) Telegraph environment reporter Heather Duncan, who used public records to document lax enforcement and oversight of toxic chemicals in the Macon area. Duncan also documented the difficulties she encountered in her requests for records.

PRIVILEGE

"Cincy's Ironic Shield." *Editor & Publisher* (March 2005): 25.
This E&P editorial reported on the Sixth Circuit's decision to uphold Ohio's shield law preventing a news source from claiming legal damages after he was outed by fired *Cincinnati Enquirer* reporter Michael Gallagher. Gallagher botched an investigation about Chiquita Brands International after illegally gaining access to the voicemail system at Chiquita. The editorial applauds the Sixth Circuit's decision but says the *Enquirer* still has "an unpaid debt to readers" to say what was true or false in its reporting on Chiquita's business practices.

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Kirtley, Jane. "Not So Privileged." *American Journalism Review* (February/March 2005): 62.
Kirtley comments on the issue of a reporter's privilege under the First Amendment, reporting on the Jim Taricani case. U.S. District Court Judge Ernest Torres sentenced Taricani to six months of home confinement after Taricani refused to reveal the source that leaked to him a sealed FBI surveillance tape showing a government witness in a corruption case handing over a bribe. Kirtley writes that Torres ruled that reporters must obey court orders: "End of discussion." If most of the federal judiciary agrees with him, she argues, "we are in big trouble."

Kunkel, Thomas. "The Rout is On." *American Journalism Review* (April/May 2005): 4.
Thomas Kunkel comments on the round of reporter's privilege cases in the courts and what he views as the "open season on journalists." Kunkel reports that the tension within newsrooms is high enough that at least one paper held a meeting so that its editors and lawyers could educate staffers about the legalities of phoning sources. He argues against a federal shield law – "it would be weaker than many states now afford,"—and reminds the industry that Dan Rather's signature phrase, "courage," is needed now more than ever.

McCollam, Douglas. "Attack At the Source." *Columbia Journalism Review* (March/April 2005): 29.
McCollam talks to more than two dozen reporters, lawyers and editors for this in-depth article on the recent wave of reporter's privilege cases. He argues that such a "moment of peril" in journalism is in part due to the public's low regard for the journalism industry. On the basis of his interviews, he also concludes that the Valerie Plame case "could put a stake through" the heart of reporter's privilege because it was "the kind of sleazy Beltway maneuver that represents the worst of confidential information."

VanArsdall, Kelsey. "A Law to Protect." *Quill* (January/February 2005): 15.
VanArsdall reviews Jim Taricani's reporter's privilege case and the promise of a federal shield law, sponsored by U.S. Senator Christopher Dodd of Connecticut.

LIBEL

Kirtley, Jane. "Merely the Messenger." *American Journalism Review* (April/May 2005): 74.
Kirtley reviews the details of the case of the Daily Local News in West Chester, Pa., which was sued for libel by Parkesburg Borough Council President James B. Norton III and Borough Mayor Alan M. Wolfe. The paper reported that William T. Glenn Sr., a council member, made a statement to the paper saying that Norton and Wolfe were "queers and child molesters." The newspaper asserted a neutral reportage defense, which was rejected by Pennsylvania courts. The Daily Local News asked the U.S. Supreme Court to review and reverse the case.

CENSORSHIP

Kirtley, Jane. "Paying the Piper." *American Journalism Review* (August/September 2005): 78.
Kirtley argues that the high price of government subsidized media is censorship. Kirtley reports on recent criticisms of the Corporation for Public Broadcasting as a venue for "liberal advocacy journalism," and the case of *Hosty v. Carter*, in which the Seventh Circuit ruled that if an extracurricular student newspaper at a university is "underwritten at public expense," it may be subject to "reasonable regulation even at the college level." Kirtley comments that, "The government has no obligation to support the media, but if it does, then those who choose to accept its money may find that the price is pretty high."

INTERNATIONAL LAW

Roumani, Rhonda. "Between Winter and Spring." *Columbia Journalism Review* (May/June 2005): 54.
Roumani reports on the hopes for a more open press in Syria, hopes that have been dashed by a series of government censorship actions, including the shut down of Al-Domari, begun in 2001 as Syria's first privately owned publication in 40 years. A new print law, also adopted in 2001, prohibits publications from running any article that "hurts the national security and social unity" or impugns the "dignity of the state." Reporters there face a three-year prison term for printing "false information." Roumani also reports on some bolder efforts by Syrian journalists to take their news onto the Internet, which is not covered by the state's print law.

SPEECH

Stabbe, Mitchell H. "Fair or Fowl?" *American Journalism Review* (August/September 2005): 68.
Stabbe reports on professional sports leagues that are challenging the use of sports-related names and trademarks for purposes of expressive speech. Stabbe is critical of the trend and warns that news organizations need to "be aware of the potential risks" of such speech, including the revocation of press credentials. Stabbe concludes that the phenomenon is in part due to sports organizations that view news organizations as competitors.

COLLEGE PRESS

Wicklein, John. "Censor or Be Sacked." *Quill* (August 2005): 30.
Wicklein addresses the "steady increase in dismissals, reassignments and forced resignations" of college newspaper advisers in the past several years. The actions "raise a question: Is firing the adviser a surrogate for direct censorship?" The article discusses adviser problems at four institutions. ❖

Editor's note…

Beth Blanks Hindman, Washington State University (ehindman@wsu.edu)

This is my first issue as editor of *Media Law Notes*; I hope it has use for you. I know I like newsletters that give me good information, or advice for teaching, or perhaps something that sparks a research idea. Of course, the two bibliographies (see pages 4 and 5) always point me in great directions; this edition's are no exception. In future editions I hope to include some guest columns on some of the issues important to us in the Law Division (take this as a hint, and a request, to submit—I'd love to have some provocative columns).

What I love most of all about teaching law of free expression is the constant reminders of the importance of free speech and press, and how those rights are continually challenged. One of my main goals it to make sure my students understand how important those freedoms are. Three recent examples:

In September I visited Washington, D.C. (or the "other" Washington, as my Northwest-born students quickly note) for a meeting on F.C.C. policy. While that meeting was great in itself, it happened to coincide with the Senate Judiciary Committee's hearings on the nomination of John Roberts to the Chief Justice seat. I grabbed a law-professor friend and we headed to the Hill to see if we could get in. Getting tickets was no problem at all—but we did have to wait over two hours for our assigned time in the committee room. We watched the protestors (the anti-Roberts group was small, organized and young; the pro-Roberts contingent consisted of one young man asleep under a tree, next to his signs), and finally were ushered in. We heard Sen. Hatch exploring judicial philosophy and *Roe v. Wade*, and Sen. Kennedy discussing civil rights. I was impressed with Roberts, not so much with the senators. That's okay, I told my students, because Roberts will have far more impact on their lives than any individual senator will.

Later that day I went to see my favorite D.C. sight, the protestors in Lafayette Park, across Pennsylvania Avenue from the White House. If you've been to Lafayette Park any time in the last two decades you've seen them, Thomas and Concepcion, exercising their First Amendment right to protest nuclear weapons. I wanted to take photos, because the next class period I planned to discuss *Clark v. Community for Creative Non-violence (CCNV)*—in which the Supreme Court concluded that camping as a form of protest is not allowed in Lafayette Park. You may remember that after that decision, CCNV continued their protest without sleeping, and thus were not "camping." Anyway, Thomas and Concepcion have been in the park 24 hours a day ***since 1981*** (they take turns). They've set up a shelter but, they assure me, do not sleep. In fact, Concepcion told me that when she lies down the Park Police shine a laser in her face to ensure she's not sleeping. That's good—I think…

Finally, a little closer to home: Last year Barnes & Noble took over management of my university's student-owned bookstore. Several bookstore employees left to begin their own competing bookstore, and the university promptly "suggested" that faculty use only the student-owned store. That ruffled some feathers, but nothing like a recently revealed policy that student groups and university employees (including, presumably, faculty) may not "advertise" the competing store. That includes residence hall bulletin boards, student orientation sessions, and mentions in class and on syllabi. As my syllabi indicate students can buy books at both stores, and, as of now, I have a poster for the "other" store on my office door (right above the text of the Bill of Rights), I'm waiting for action against me. I'll let you know if anything happens. At least it makes for good class discussion. ❖

Submit your panel ideas for AEJMC 2006

The Law Division of AEJMC is looking for panel ideas for the 2006 convention in San Francisco. Proposed panels should be either 1) Teaching Panels (focus on some aspect of teaching, appointment/tenure/promotion, or faculty-administration relationships) or 2) Professional Freedom & Responsibility (PF&R) Panels (focus on free expression, ethics, media criticism and accountability, racial, gender, and cultural inclusiveness or public service). All panel proposals must be received by October 17, 2005.

To propose a panel, please include the following information:

1. Proposed panel title
2. One or two paragraphs describing the background and importance of the topic and what issues panelists might discuss.
3. Whether this would be a Teaching Panel or Professional Freedom and Responsibility (PF&R) Panel.
4. A list of *possible* panelists. For co-sponsored panels, be sure to leave panelist slots available for members of co-sponsoring divisions or interest groups.
5. Suggestions for likely co-sponsoring divisions or interest groups.
6. Your contact information including name, mailing address, phone number and e-mail address.

Please send all panel proposals to:

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