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Legislative and Executive Efforts to Curb Section 230 of the 1996 Communications Decency Act

Natalie Fay
Suffolk University, natfay4@gmail.com

Natalie Fay
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Abstract

The Telecommunications Act of 1996 was intended to reform the telecommunications industry, most especially with its inclusion of the Communications Decency Act (CDA). The CDA can be viewed as the first act of Congress attempting to regulate the Internet. One of the most prominent parts of this act includes Section 230, which states that websites and Internet providers are not legally responsible for third-party content, including the content of their users and consumers (1996).

Since the rapid growth of social media and advancement of technology, Section 230 of the CDA has been a subject of debate. Congress is debating whether to repeal this form of protection. On one hand, taking away this form of protection would demand platforms to be more cognizant of the content they host. In doing so, this can put an end to the spread of hate speech, white supremacy, conspiracy theories and other forms of misinformation, all of which have rattled American politics (McNamee, 2020). However, removing Section 230 can also lead towards an increase in censorship (Cooke, 2020). This creates fears over the possibility that platform regulation could violate the First Amendment. This case study will analyze previous legislative attempts at either repealing or curbing the influence of Section 230 of the CDA.

Introduction

In 1996 the internet that has the power to dominate societies today was still in its infancy. Not only was the power of the virtual world smaller, but it had a far less influential presence in our daily lives (St. John, 2021). That is why, in 1996, Congress passed the Communications Decency Act (CDA) in response to the emergence of pornography and other possibly offensive content found on online platforms (Pike, 2020). Section 230 of the CDA states that, “No provider

or use of an interactive computer service as the publisher or speaker of any information provided by another information content provider" (1996).

In the event that any content on a social media platform or website was to be disputed in a court of law, Section 230 of the CDA has become a classification tool and shifted this liability from the platform itself to the account or user who posted (Cooke, 2020). Individual accounts became the publishers to be held liable, while the platforms themselves became merely distributors (Ruane, 2018). Not only was this the precedent, but was considered successful for protecting the evolution of new start-ups and promoting a more competitive market (St. John, 2021). Without it, there is reason to believe that popular sites such as Facebook, Twitter, or Wikipedia would not be in existence today (Allyn, 2020).

In order to benefit from the protections provided by Section 230 of the CDA, social media platforms must meet three criteria. First, they must be an interactive computer service and all content posted is not coming directly from the company itself (Allyn, 2020). Second, the content posted on the platform is based on information provided by another source (Allyn, 2020) For example, users can tweet about what they agree or disagree with on major news programs. Twitter can curate and promote news on the trending page because they are not the primary source of information. Rather, they obtain it from other media outlets. Lastly, the hypothetical claim would treat the defendant as the publisher or speaker of the information, not the distributor (Allyn, 2020).

However, what the 104th Congress could not have foreseen was the rapid advances in Internet technology, the overwhelming influence of social media on the American people, and the constitutional minefield that had to be crossed to mediate between the wars on

misinformation and censorship that divide societies today (St. John, 2021). Social media platforms are no longer "passive conduits" for national and global conversations (Lavi, 2020). Instead of sharing ideas and discourse on the platforms, they have become the topic of these national and global conversations (Lavi, 2020).

The dilemma behind repealing entirely

It is these circumstances that bring Section 230 of the CDA into the congressional spotlight for repeal, despite that the cause for its controversy can heavily depend on the political party those affiliate themselves with (St. John, 2021). Both believe that platforms can unintentionally shield online criminal behavior, but that is where the consensus ends (Pike, 2020). American liberals fear the dangers of misinformation and the belief that platforms are ineffective at acting upon hate speech and discrimination (Bambauer, 2021). By possibly exposing companies to more litigation, the belief is that it encourages platforms to protect consumers and regulate accounts who post harmful content (St. John, 2021). This belief portrays Section 230 of the CDA as a form of "corporate welfare" despite being at the center of debates revolving around topics such as anti-vaxxers, COVID-19 deniers, and climate change deniers (McNamee, 2020).

Another school of thought comes from the conservative side of American politics, which fears the dangers of censorship and the ability of major social media platforms to play God (Rodrigo, 2021). After a misinformation campaign spread by Twitter bots during the 2016 Presidential Election, Twitter became more hyper-vigilant of political content that was posted (Pike, 2021). A growing consensus among conservatives believes that this has resulted in a massive increase in conservative censorship due to lack of compliance with the corporate

cultures of social media companies (McNamee, 2020). Section 230 of the CDA has set up social media to differentiate from traditional media (Stewart, 2013). Social media is now seen as a beacon of free speech values with no fear of editors or the need to comply (Stewart, 2013).

Arguments exist as to whether instances of misinformation and facilitating crimes are truly why a platforms should lose Section 230 protections (Bambauer, 2021). While censorship is allowable in circumstances involving traditional media, the notion of censoring social media raises fears of violating the free speech principles these platforms were started on (Allyn, 2020). Twitter CEO Jack Dorsey stated during a congressional hearing that Section 230 of the CDA, "Is the most important law protecting Internet speech, and removing Section 230 will remove speech from the Internet" (Bond, 2020).

A separate argument, going the completely opposite direction, uses fear of censorship to argue that Section 230 of the CDA should not be repealed at all (Rodrigo, 2021). Bambauer (2021) writes that this piece of legislation, "Embodies American free speech norms that favor open discussion and dialogue. Even if our shared commitment to those norms wavers at times, it ultimately endures, and the longer-term online landscape for free expression will reflect that." This statement argues that Section 230 of the CDA holds the power of free expression for the people (Rodrigo, 2021). Similarly, feasibility can be an issue on the corporate side of debate. Shannon McGregor (Isaac & Browning, 2020), professor at UNC Chapel Hill and senior researcher at the Center for Information, Technology, and Public Life argues that, "If there is no one to argue with, no omnipresent journalists or media entities to react to, how long will it last?" (Isaac & Browning, 2020) If misinformation is spread, there is no way for people to know that

the content is wrong (Johnson, 2021). It also threatens free speech ideals that wish to be preserved on both sides of the aisle (Bambauer, 2021).

Regardless of the grounds Section 230 of the CDA are repealed on, the effects of this seemingly inevitable act can bring serious ramifications on the algorithms major platforms are built on (Ghosh, 2021). These algorithms are designed to hold the attention of the user for as long as possible, regardless of what content is keeping them active on the platform. According to an article in the Harvard Business Review, the social media business model "relies on leveraging individual users' data to push highly personalized content in order to maximize scroll time" (Ghosh, 2021). Currently, the type of content is not as high as a priority to platforms as long as content is available to keep consumers present (Ghosh, 2021). Without legal protections, platforms will be forced to monitor such content and comprehend the effects it will have on its user population (Pike, 2020).

Types of reform

Multiple types of reform exist when it comes to Section 230 of the CDA. Some of which aim to repeal the law as a whole (Jeevanjee et al., 2021). Some limit the scope of Section 230 depending on a certain industry or set of conditions, such as the Fight Online Sex Trafficking Act (Morgan, 2020). Others give online platforms new sets of regulations or obligations to meet in order to receive the protections of Section 230 of the CDA, treating the law as a privilege instead of a right (Jeevanjee et al., 2021). Finally, other proposals sought to hold online platforms accountable for bias and censorship, as opposed to other reforms seeking accountability for the content these platforms lets slide (Jeevanjee et al., 2021). The struggle with reforming Section 230 of the CDA is balancing current issues of disinformation and online crime with what

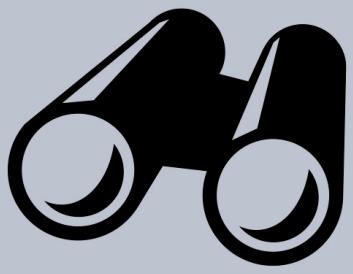
TYPES OF REFORM

Trying to change or eliminate Section 230 of the CDA

REPEAL

Seeks to get rid of Section 230 of the CDA completely

Example: Executive Order on Preventing Online Censorship



LIMITING THE SCOPE

Seeks to remove Section 230 protections when it comes to a certain matter or set of conditions, such as sexual content

Example: Fight Online Sex Trafficking Act (FOSTA), Platform Accountability and Consumer Transparency (PACT) Act, Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act

PRIVILEGE VS. RIGHT

Currently, Section 230 of the CDA is a right granted to any online platform. However, certain legislative actions can change this so it is treated as a privilege

Example: Ending Support for Internet Censorship Act, Eliminating Abuse and Rampant Neglect of Interactive Technologies (EARN IT) Act

NATALIE FAY

Figure 1

originally made the law great: the ability to protect competition in the technology industry and allow for growth. The fears for these reforms is that they "hamper the development of the internet-online service providers would either excessively censor user content or not get into the internet business at all if they thought they might be liable for someone else's unlawful conduct" (Morgan, 2020).

Fight Online Sex Trafficking Act

One of the first efforts to curb the effects of Section 230 of the CDA is the Fight Online Sex Trafficking (FOSTA) Act (Morgan, 2020). It was introduced in November of 2017 in an effort to make online platforms more liable for sexual content in the event that it was not consensual (Morgan, 2020). It is also known as the FOSTA-SESTA Act, as FOSTA originated from a previous bill titled the Stop Enabling Sex Traffickers (SESTA) Act (Newton, 2020). The purpose of this law was to limit or eliminate Section 230 protections for any post that may facilitate or promote sex trafficking (Pike, 2020). This means that any site that acts with a disregard for unlawful sexual content would not shielded in the event of a defamation case (Morgan, 2020). It's only exceptions were that it would not apply to civil and criminal charges of sex trafficking, as a number of case precedents since the CDA had proven that online service providers were immune from claims regarding the promotion of sex advertising or child sexual exploitation (Morgan, 2020). It would also be inapplicable to any content that promotes prostitution or sex work (Newton, 2020). Because its intent was to protect individuals from sex trafficking and sexual exploitation, it passed with overwhelming bipartisan support from the

House and the Senate. It was signed into law by President Trump on April 11, 2018, (Morgan, 2020).

The intentions of this FOSTA were to curb sex trafficking and sexual exploitation on social media, yet it had not come to fruition the way its founders had intended. According to advocates against sex trafficking, as well as advocates for sex work, FOSTA has been said to do very little in reducing the amount of sex trafficking on social media (Pike, 2020). Furthermore, FOSTA had actually done more harm to the legal sex work industry despite its feminist goals of ending online sex trafficking (Morgan, 2020). In practice, it has actually resulted in higher risks for sex workers who could previously use online platforms to vet potential clients, and restricting the free speech rights of legal sex workers (Pike, 2020). The online platforms most affected by FOSTA were most trusted by sex workers, which they could no longer use because the platforms did not want to risk liability (Morgan, 2020).

In December 2019, Democrats inquired for a study conducted by the Department of Health and Human Services on how sex workers were negatively impacted by FOSTA (Kelly, 2019). This inquiry was introduced by Rep. Ro Khanna (D-CA) and sponsored by Rep. Barbara Lee (D-CA) as well as Senators Elizabeth Warren (D-MA) and Ron Wyden (D-OR) (Kelly, 2019). The Department of Health and Human Services found slight increases in homelessness rates among legal sex workers, and noted reports of exploitation, mental health challenges, and challenges in negotiating with clients (Kelly, 2019).

Ending Support for Internet Censorship Act

On June 19, 2019, Senator Josh Hawley (R-MO) introduced the Ending Support for Internet Censorship Act (Kelly, 2019). This purpose of this bill was to ensure that companies would lose the protections of Section 230 if they revealed any political bias, or moderated in a way that favors a certain political candidate, party, or viewpoint (Kelly, 2019). Hawley explained that, "with Section 230 (of the CDA), tech companies get a sweetheart deal that no other industry enjoys: complete exemption from traditional publisher liability in exchange for providing a forum free of political censorship. Unfortunately, and unsurprisingly, big tech has failed to hold up its end of the bargain" (Kelly, 2019).

Hawley also stated, "There's a growing list of evidence that shows big tech companies making editorial decisions to censor viewpoints they disagree with. Even worse, the entire process is shrouded in secrecy because these companies refuse to make their protocols public (Kelly, 2019). While this is partially inspired by the 2016 US Presidential election, and of growing discussions of the relationship between social media and the Trump administration, Hawley had argued for a history of bias within the most powerful platforms supposedly representing free speech and promoted this bill as a step towards political transparency (Kelly, 2019)."This legislation simply states that if the tech giants want to keep their government-granted immunity, they must bring transparency and accountability to their editorial processes and prove that they don't discriminate" (Kelly, 2019).

While this bill is no longer active, its intended purpose was to give the Federal Trade Commission (FTC) the responsibility of moderating these platforms instead of trusting the platforms to moderate themselves, as the FTC is historically neutral on politics (Newton, 2020).

However, the notion of taking away the power to self-moderate had caused a stir for some of the most influential platforms today (Newton, 2020). The Internet Association, a lobbying group founded by several major platforms such as Google and Facebook, argued that, "CDA 230 is the law that allows online companies to moderate and remove content that no reasonable person wants online - including content that could have a 'political viewpoint.' This bill forces platforms to make an impossible choice: either host reprehensible, but First Amendment protected speech, or lose legal protections that allow them to moderate illegal content like human trafficking and violent extremism. That shouldn't be a tradeoff" (Kelly, 2019). The bill was ultimately never signed into law and is no longer active (Newton, 2020).

Eliminating Abuse and Rampant Neglect of Interactive Technologies (EARN IT) Act

The EARN IT Act was introduced by Senator Lindsey Graham (R-SC) in March of 2020 (Goldman, 2020). As the acronym suggests, this piece of legislation would amend Section 230 of the CDA and require companies to "earn" similar protections with a certain level of government compliance (Feeney, 2021). In order to maintain these protections, the EARN IT Act would require states to demonstrate that they are actively and consistently fighting child sex abuse through the creation of a "National Commissions on Online Child Sexual Exploitation Prevention" (Goldman, 2020). This congressional commission would create and submit best practices to the Attorney General for online platforms to prevent the exploitation of children. If these practices were agreed by the Attorney General, Secretary of Homeland Security, and the FTC Chairman, they will become the new regulations for social media platforms (Goldman,

2020). These regulations would stay in perpetuity unless they were amended by the commission (Feeney, 2021).

This bill is no longer active for several reasons regarding the process it requires, and whether Section 230 of the CDA should be considered a right or a privilege. In the event that the commission cannot agree on best practices, or one out of the three approvers reject the proposals, social media platforms do not have a clearly defined fallback for regulations (Goldman, 2020). Even if the bill had been passed into law, platforms would be constantly anticipating what the "best practices" will be (Goldman, 2020).

Executive Order on Preventing Online Censorship

On May 28 of 2020, President Donald Trump signed the Executive Order on Preventing Online Censorship (Pike, 2020). A result of conservative beliefs regarding censorship on social media platforms, this executive order demanded a federal review of Section 230 to ensure that the most common and popular social media forms were not censoring content solely based off their viewpoint (Pike, 2020). This caused political stir for two reasons, the first was that it was directed towards limiting an online site's ability to remove content while most bills that are introduced focus on the content sites choose to keep online (Robertson, 2020). The second reason is that subjecting Section 230 of the CDA to a review by the Department of Justice bypasses the authority of both Congress and the court system (Newton, 2020).

Less than a month later on June 17, 2020, the DOJ issued recommendations on amending Section 230 of the CDA (Pike, 2020). The first recommendation was to create a newer version of

the law that specifically outlines how platforms should police illegal online conduct, promote greater transparency on how they operate, and avoid monopolizing the technology industry (Pike, 2020). It was also recommended that this hypothetical new version of Section 230 should involve input from the Federal Communications Commission and the Federal Trade Commission (Barrett, 2020).

Platform Accountability and Consumer Transparency (PACT) Act

As an alternative to the EARN IT Act, Senator Brian Schatz (D-HI) proposed the Platform Accountability and Consumer Transparency (PACT) Act in June of 2020 (Newton, 2020). This legislation would require online platforms to set up complaint systems for users to report content and remove any "illegal" content within 24 hours of the complaint, which can later be subject to an appeal (Pike, 2020). If a platform fails to do this, they lose the protections that would otherwise be given to them through Section 230 of the CDA (Pike, 2020). Platforms must disclose how they moderate content and provide a quarterly report explaining this (Kelly, 2020). These reports must be easily accessible and understandable to consumers, and explain how content can be removed, demonetized, or purposefully limited by the algorithm (Kelly, 2020).

This legislation differs from its predecessors in limiting the scope of Section 230 of the CDA. This is primarily because it makes platforms accountable to the public and not just the government (Kelly, 2020). It also allows them to be subject to civil lawsuits from federal regulators (Kelly, 2020).

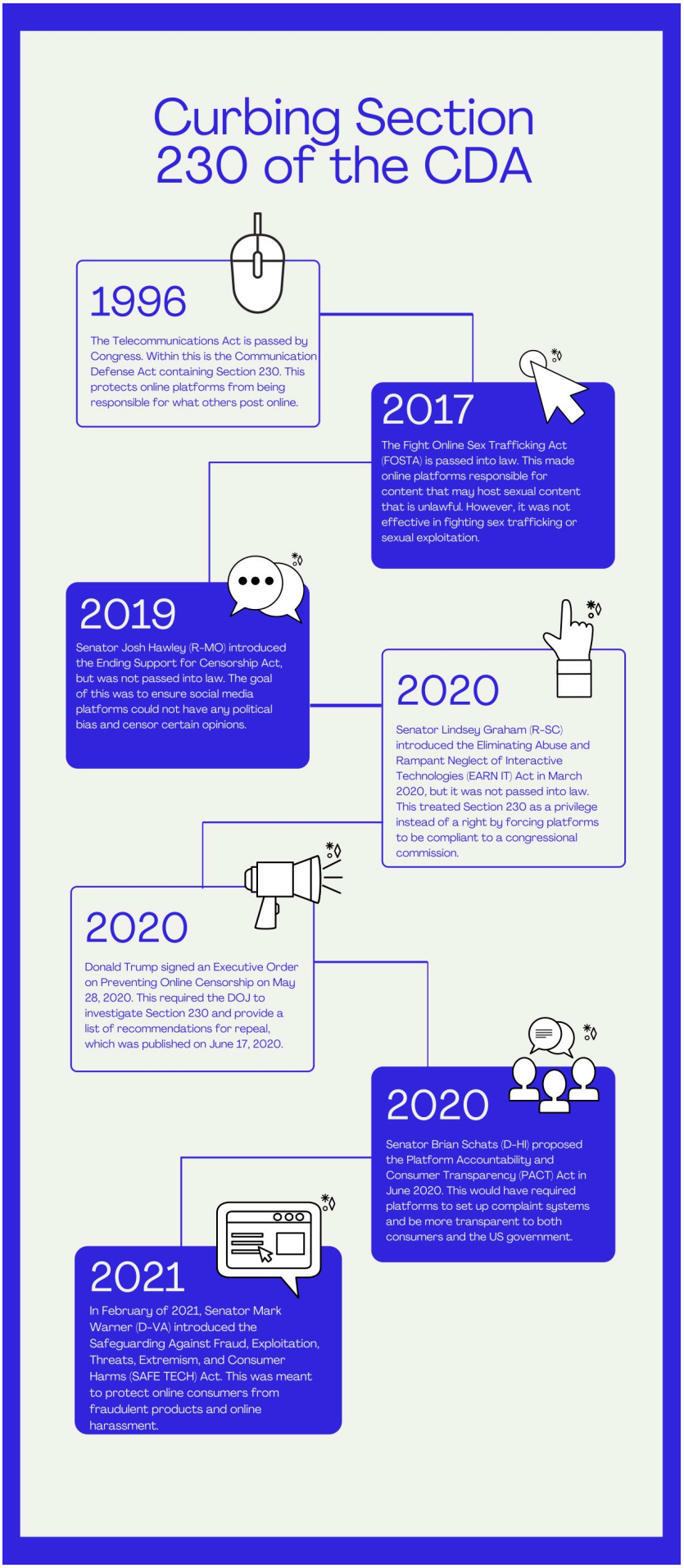

Curbing Section 230 of the CDA
1996
The Telecommunications Act is passed by Congress. Within this is the Communication Defense Act containing Section 230. This protects online platforms from being responsible for what others post online.
2017
The Fight Online Sex Trafficking Act (FOSTA) is passed into law. This made online platforms responsible for content that may host sexual content that is unlawful. However, it was not effective in fighting sex trafficking or sexual exploitation.
2019
Senator Josh Hawley (R-MO) introduced the Ending Support for Censorship Act, but was not passed into law. The goal of this was to ensure social media platforms could not have any political bias and censor certain opinions.
2020
Senator Lindsey Graham (R-SC) introduced the Eliminating Abuse and Rampant Neglect of Interactive Technologies (EARN IT) Act in March 2020, but it was not passed into law. This treated Section 230 as a privilege instead of a right by forcing platforms to be compliant to a congressional commission.
2020
Donald Trump signed an Executive Order on Preventing Online Censorship on May 28, 2020. This required the DOJ to investigate Section 230 and provide a list of recommendations for repeal, which was published on June 17, 2020.
2020
Senator Brian Schats (D-HI) proposed the Platform Accountability and Consumer Transparency (PACT) Act in June 2020. This would have required platforms to set up complaint systems and be more transparent to both consumers and the US government.
2021
In February of 2021, Senator Mark Warner (D-VA) introduced the Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act. This was meant to protect online consumers from fraudulent products and online harassment.

Figure 2

Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act

In February of 2021, Senator Mark Warner (D-VA) introduced the Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act (Feiner, 2021). This piece of legislation targeted platforms for protecting online consumers in cases of scams, selling of fraudulent products, stalking, harassment, and intimidation (Feiner, 2021). This curbs Section 230 of the CDA because it gives plaintiffs and victims greater chances of success in court when suing platforms for abusive or harmful content (Feiner, 2021). The SAFE TECH Act can also enable families to sue platforms in the event of wrongful death suits where the harm was a direct result of online content (Feiner, 2021). Senator Warner argued that, "Section 230 has provided a 'Get Out of Jail Free' card to the largest platform companies even as their sites are used by scam artists, harassers, and violent extremists to cause damage and injury" (Manfredi, 2021).

Conclusion

Unfortunately, no clear answer or solution to reforming Section 230 of the CDA currently exists (St. John, 2021). The flaws in these systems and a history of a controversial tech industry promote the idea that platforms have an obligation to sort through what content is real and what is false (Pike, 2020). Whether corporate knows it or not, platforms have unintentionally promoted false information, defamation, terrorism, sex trafficking, and a range of other serious offenses (McNamee, 2020). The question is how to regulate an industry that processes thousands

of pieces of new content every second, and using past efforts to determine what serves Americans best.

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