

No Infringement Intended — Can a Coach's Playbook Be Copyrighted?

Hosts: Rusty Close and Austin Padgett

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Austin Padgett (00:13):

Come one and come all. Welcome to *No Infringement Intended*, an Intellectual Property podcast of our law firm, Troutman Pepper Locke, hosted by the so-called bad boys of intellectual property, Rusty Close, and myself, Austin Padgett. While you're settling in for this episode, please make sure that you're subscribed and pour some five stars out for your friends over here. It's time to reach into the old mailbag before we get started and address some of the questions that have come up. Jennifer Campbell writes in and asks, "What are your faithful listeners of your podcast supposed to call themselves? We need a name for our movement." That's a heavy question, Rusty. I didn't want to answer it without your input, so you have any thoughts?

Rusty Close (00:51):

It's a good question. I kind of want to lean toward calling the listeners "The Infringers", but this is *No Infringement Intended.*

Austin Padgett (00:58):

Right.

Rusty Close (00:59):

It doesn't quite fit. I don't know. Have you come up with anything good? You're usually better at this stuff than me.

Austin Padgett (01:04):

I'm going to dodge this one just because I'm hesitant to call ourselves a movement. I don't want to have any sort of cult implications or anything like that. I want everyone to live their lives and call themselves what they want to be called and go and be free, and to the extent that we can provide some entertainment and information. Awesome.

Rusty Close (01:25):

Yeah, I mean, when the merch is ready, we'll have come up with something by then.



Austin Padgett (01:29):

Absolutely. When we're ready to sell and sell some more advertising as well, we'll get it on. Well, let's reach into the mailbag again. We've got Peter McDougall, has a simple question. He says, "I love everything you're doing, fellas." – well, thank you, Peter – "but when will you turn this into a sports podcast?" Peter, that's a great question. When we're recording this, we're in week one right now of college football season, so it's going to be a couple months before this is actually released, but that is where we're at now, so it's top of mind. So while we need to keep this about intellectual properties to some extent -

Rusty Close (02:01):

Barely.

Austin Padgett (02:02):

Yeah. Let's fire up the marching band baby. Let's get the tailgate set to make a fan's wish come true today. To start with, Rusty, can you give me some favorite sports plays of yours of all time? Any sport?

Rusty Close (02:13):

Yeah, of course I can. First one that comes to mind, gosh, I can't remember if this is '91 or '92, but it's when Sid slid. Sid Bream, outfielder for the Braves, lumbering around the bases, comes sliding into home base to beat the Pirates. Just an amazing memory. Then the other one, much more recent, but when Kelee Ringo intercepted Alabama's quarterback, Bryce Young. Ran it back for a touchdown, sealed the victory in the national championship game. I truly had an out-of-body experience. I was on the couch when the play started. I was standing in front of the TV when the play ended. I have no idea how I got from point A to point B, but that one I have watched probably a hundred times. I don't know if you've seen any of the clips where they put the Titanic music over the clips.

Austin Padgett (03:05):

Oh, I have not seen that. I love that.

Rusty Close (03:06):

It's got the Celine Dion singing "Near, far, wherever you are", and I could cue that up right now and get the chills going.

Austin Padgett (03:13):

Oh man, that'll make me run through a wall for somebody right there. Absolutely. Yeah. I don't think I – I may have seen it in the moment or on a highlight, but one of the ones that comes up often in me from my algorithm is Bo Jackson climbing the wall in the outfield – where he's made



some significant speed and steps to go cover and catch a ball, but he's fairly short of the track, but just keeps going and starts running up the wall in the outfield. It's unbelievable.

Rusty Close (03:42):

Very familiar. I love Bo Jackson highlights. Give me em' all day.

Austin Padgett (03:46):

Yeah, either sport, whatever he wants to do. I mean, it was amazing. Here's another one of my favorites to watch over and over again, is Ickey Woods highlights, because you get to see the Ickey Shuffle.

Rusty Close (03:57):

Absolutely.

Austin Padgett (03:58):

To people who don't know, the uninitiated, this is a famous end zone celebration dance. Often imitated, never duplicated. Ickey had his own style with it. You'll see reference to it now, even some modern players when – I love a good celebration at the end of a touchdown – but you'll see some players pay some reverence, really, to Ickey and what he did.

Rusty Close (04:19):

Well deserved.

Austin Padgett (04:20):

Absolutely. And so here, Peter McDougall, we're going to come back to your question. Let's say that Ickey gets in the huddle and draws up a play. He makes the play call as well as designs his shuffle. Which one, or both, or none, which of them gets protection? Today we're really looking at the copyright aspect as well. Let's start with some "choreographed works" thoughts on copyright. It's a kind of weird area of copyright, but it's very interesting. When you think about an end zone dance or a football play, both are choreographed to some extent in the high-level thought of that term. You have people moving around with some sort of planned movement. The 1976 Copyright Act lists choreographic works as protectable subject matter. Before this time, choreography was not included in the list. Choreographers claimed copyright as a dramatic work or a musical accompaniment.

The issue you get to is there's a fixation requirement. You have to remember that to be copyrightable, the work at issue has to be "fixed in a tangible medium". I should throw air quotes around that for our listeners, "fixed in a tangible medium" under the Copyright Act. We discussed this in the Mike Tyson tattoo episode a few episodes back. It comes up again with performing arts, like jazz solos. Anything that someone's doing just in the freedom of the



moment, no one's really writing it down or recording it, it's just happening. If it isn't written down and it's not recorded, it was great, but it's not copyrightable.

Rusty Close (06:03):

It's like me at a Phish concert.

Austin Padgett (06:05):

Right.

Rusty Close (06:05):

It's just in the moment.

Austin Padgett (06:07):

Yeah, and you're kind of known around the firm too for just, you're a poet, you're a bard. You'll just come up with free verse any and every time, but nobody's really jotting it down. They're just standing in awe.

Rusty Close (06:17):

Free verse and free movement.

Austin Padgett (06:20):

Yes, exactly. Very free. For dance, the same issue arises. You need video or notation, instruction, whatever it is to convey how to do this dance. I'm not even going to try with the Ickey Shuffle, of trying to describe how to do it just because you have to see it to even attempt it. If you wanted a fun rabbit hole to kill some time with, there's this notation system called, I think it's called labanotation, where it's like these bars. Each of the little pieces of it looks like, I don't know, like Picasso came up with hieroglyphics or something. You kind of have to see it, but each little item in it represents some sort of pose or movement, and then you string 'em all together and it tells you how to move your body. It looks just impossible to keep up with, but much respect to those who can do it. Anyway, this is where we get to the Ickey Shuffle. We have Ickey shuffling on video. I checked, I didn't see a registration covering the dance. Let's say that we file to register the copyright in the dance with the copyright office. That's going to be similar to the "Floss", if you know that one, Rusty.

Rusty Close (07:32):

I'm well aware of the Floss. Yes.

Austin Padgett (07:33):

Yeah, the dance that all children know, and all dads try.



Rusty Close (07:37):

I don't know if my children know it. They certainly try it though.

Austin Padgett (07:40):

Oh yeah, that's very true. We have some weird variations in our household of the Floss that shouldn't be seen. There's a registered copyright on the Floss. The Floss kid, I can't remember what his name is, but he owns a registration in that dance.

Rusty Close (07:55):

Can we just pause – practically speaking, is the registration for instructions, more or less, for doing that dance?

Austin Padgett (08:05):

The work is the dance itself, but you have to have something in fixed form to protect it. That's the recording of it happening or the instructions that tell you how to do it.

Rusty Close (08:18):

But in that example – because there are other examples we've used where you have a copyright on a particular recording – but here it's not the recording so much that we're worried about as having the rights. It is what's shown in the recording.

Austin Padgett (08:34):

Yeah, and it's an interesting question. There would be kind of like music, there would be two copyrights happening.

Rusty Close (08:40):

Right? Right.

Austin Padgett (08:40):

Yeah. You're recording the dance as what we call the deposit to put in with the Copyright Office. The Copyright Office is linked to the Library of Congress, and so they use the word deposit as if you're going to put your dance into the deposits –

Rusty Close (08:55):

In the bank. That's where I put all my deposits.



Austin Padgett (08:56):

Right into the Library of Congress. I have to imagine any dance that I could contribute would go right to the dumpster there at the Library of Congress. But yeah, there would be multiple layers there. Potentially you'd have two copyrights happening. I mean, if you have a professional game, we'll get to this in a minute, but usually you have the copyright notices. The league owns the video tele-broadcast that's happening.

They would own that depiction, but the dance itself, if it weren't done by an employee – let's say they just kind of catch it and maybe it's a fan dancing or something like that. The fan would probably own that, absent some other agreement otherwise. But that's who owns it. It's going to come up here in a second when we get to talking about what players are doing on the field. Comparing the Floss though, you also have the Carlton dance from the Fresh Prince of Bel Air.

Rusty Close (09:50):

Of course.

Austin Padgett:

That actor, Alfonso Ribeiro, he applied to register that dance. He had danced over the song, "It's Not Unusual". But the Copyright Office refused to register it and said that the steps were too simple and short. I had this come up with a client who did choreography for children's music, very simple. We're talking like pre-K music and the Copyright Office is like, no, this is too simple.

It's kind of like, well, yeah, maybe one motion by itself. But the argument was string them together and you have a sequence of movements, and that's what we're seeking to protect. Not just the idea of raising your arms and things like that. But yeah, the Carlton dance is not registered. If that was going to be asserted against someone, it's a tough position to be in because you have to go in and you can still sue based on a copyright that didn't register as long as you made the effort to register it. But you're disclosing that it wasn't registered because the Copyright Office took the posture that it's non registerable. That, in a sense, it's not copyrightable.

Rusty Close (10:54):

It's interesting that they get to be the arbiter of where there is enough, sort of, creativity. Where's the line of, "there's enough movement there."

Austin Padgett (11:03):

Yeah, it will drive you crazy in practice if you do enough of it, but that is the system that we're in, and they take a substantive look now at the works that are deposited trying to get a registration. Well, let's assume that Ickey Shuffle has enough creativity to achieve registration, that it's more like the Floss than the Carlton. What about the football play itself, Rusty? Imagine Ickey is drawn up some inside zone. There's a lot of movement at the line.



Rusty Close (11:32):

Eye candy. We call that eye candy.

Austin Padgett (11:34):

Yeah. We've got maybe a couple of receivers out who are trying to sell this as something different than a straight run so that the box isn't loaded, et cetera, et cetera. Do you have any thoughts about the copyrightability of that play?

Rusty Close (11:47):

I mean, if we're thinking about our spectrum from the Floss on one end and the Carlton dance on the other, I feel like a choreographed football play is much closer to the Floss and should in theory be copyrightable.

Austin Padgett (12:01):

Yeah, it's going to be an interesting question. Let's jump into a couple of cases and see where we come out on it. I need to tell you about a couple of them. The first one, let me paint a picture of just an entirely foreign scenario. You go back to the mid-eighties and we're talking about some of the great days of baseball that you and I probably remember. Titans like Roger Clemens, Ozzie Smith, Wade Boggs, Don Mattingly, the workhorse Cal Ripken Jr., Darryl Strawberry, Nolan Ryan is still throwing heat at this point in time. It coincides, Rusty, with the emerging TV sports boom in the eighties where the networks are starting to pay billion-dollar packages for broadcast rights for these games now. Baseball landscape is changing in a lot of different ways. Free agency revolution has come after the 1970s. There was some litigation in action there. Players have killed with the so-called reserve clause, and now there's free agency, where there's a new market value being set for players. When I say that I'm painting an entirely foreign picture, I'm joking because it's – anyone who follows college football, this is very much the landscape of where we're at now, where there's a lot of money involved, a lot of TV money. There's players who weren't getting paid. Now are some getting paid, which pots those are coming from? Who knows? We can talk about that in a totally different podcast, but –

Rusty Close (13:26):

We can also announce our intention to enter the transfer portal. If management doesn't come through with what we've demanded.

Austin Padgett (13:33):

Hashtag respect my decision.

Rusty Close (13:35):

No interviews.



Austin Padgett (13:36):

Right, exactly. You can call my management. So, at this point in time, salaries have really started to increase for baseball players. If you saw the numbers that ballplayers are making beforehand, you're starting to see multiples of those year over year. Now, as things are starting to really ramp up and teams are starting to go to war and buying players, so built with the television price booming, of course the team revenues are ballooning even more. The players begin – it's actually a series of cases that end up getting kind of wrapped up into one – against the teams because the teams are licensing their games out to television stations. The players assert that they have ownership of the performance that is being televised, such that the players should own at least part of the copyright in the broadcast themselves.

So the case notes this background, and this is a quote from the case, "after decades of negotiation concerning the allocation of revenues from telecasts of the games, the players in May of 1982 sent letters to the clubs and to television and cable companies with which the clubs had contracted, asserting that the telecasts were being made without the player's consent and that they misappropriated the player's property rights and their performances." Here's where the little twist comes in. The performances they're asserting, Rusty, are not really the performances on the field, and probably baseball's not the best case anyway to litigate copyright because your players are standing there. They may shift from time to time strategically, but there's not a lot of coordinated activity like there is in football where you have a bunch of grown men moving in concert and trying to achieve something happening with pretty synchronous steps and those sorts of things.

I'm trying to make it sound like a dance, but that's the type of activity that's happening. Here's the twist: you might think that this is a copyright in their performances that they're asserting, but the players actually argued that their performance on field was not copyrightable because that's the only real way to hang onto their publicity rights, which is what the performance rights that they're asserting is that "I'm on the field, I'm a big deal. People know me for my name and my persona, and that's what makes me part of the broadcast such that I should own a piece of that pie." So, they don't normally need a license from the team. They need a license from the players as well. The court, and I've skipped ahead here to the appellate court's decision for those keeping track at home, looks at the telecast and determines that the telecast themselves are copyrightable works.

There are production choices being made. There's angles where you place the camera when you switch between cameras for the play, that that's enough to create a copyrightable work. Those rights are copyrightable and belong to the clubs by an agreement with the television production companies. There's an agreement that says "you can come into our field and you can film the games and exploit them and distribute them on your channels and other means, but the teams themselves are going to own the product that you create as the broadcast." To the extent that the players are involved, they're involved as employees of the team. Any copyright that comes up is a work made for hire that belongs to the team as the employer. We've talked about this a little in that cross episode we did on the Labor and Employment Podcast, but this is the work made for hire doctrine that if you do something within the scope of your employment as an employee, your employer owns the work products.



When Rusty and I record these podcasts, our firm owns it as our employer. In this case, what they're arguing about is whether there's a separate right in their publicity rights apart from what would've been the copyright and their performance on field. If that is actually part of the copyright, then a rule called preemption applies and the players cannot bring a separate claim because the Copyright Act has this rule that prevents you from trying to repackage a copyright as something else. It's a really technical and nuanced area, but that's what's forcing the players into this position because to the extent there is a copyright, they want to own it because they're employees. They need there to not be a copyright so they can insert their rights of persona. That's what's happening here. This is what the court finds: that the televised athletic performances, to the extent that they are copyrightable, and there's some language in here that sounds like they probably are, they're part of the copyrighted work. This is where they're saying "that's preempted", that if there's not really a publicity right, separate and apart from your performance on the field, which would be the copyrighted work. Here's some quotes from the case: "Contrary to the player's contention, aesthetic merit is not necessary for copyrightability." The players are arguing, no, no, no, it's not a copyright, what we're doing is just totally functional and it achieves a goal of scoring points or preventing the other team from scoring a point.

Rusty Close (18:43):

It's not a choreographed dance. This is just the movements incident to the overall goal, which is score runs, prevent them from scoring runs.

Austin Padgett (18:51):

Right. But you see a beautiful double play, and you might think otherwise, friend.

Rusty Close (18:56):

That is artistic.

Austin Padgett (18:57):

Right? Here's another one: "Judged by the above standard, the player's performance possessed the modest creativity required for copyrightability, as Justice Holmes once declared, if certain works command the interest of any public, they have a commercial value, it would be bold to say that they have not an aesthetic or an educational value, and the taste of any public is not to be treated with contempt." Well, take that back to the Carlton dance, and you may think twice about whether that's copyrightable or not, with the court saying limited aesthetic value is necessary. We'll have an episode, I'm sure, coming up here in the near future about how low a bar of creativity – there is a creativity requirement for a copyright, but it's not the type of creativity requirement that you think that it has to be some work of genius. It's actually a very low threshold, and we should, I'm going to flag that.

Maybe that'll be one of our next few episodes here in next several months. Last quote from this case, I'll share: "moreover, even if the players' performances were not sufficiently creative, the players agree that the cameramen and director contribute creative labor to the telecast. The work that is the subject of copyright is not merely the player's performances, but rather the



telecast of the player's performances." This is a weird case because the players are saying, yeah, yeah, there's not enough here. We don't do enough to merit copyright so that they can assert this other claim. But the court in this language seems to say, oh, there is a copyright in the performance itself. Well, let me take you to a second case, Rusty, around professional basketball. I know that you're a big basketball hero in your hometown. Did you ever dial up a scripted play?

Rusty Close (20:44):

Yeah, I mean, hero is probably not even a strong enough word if we get down to it. We were not a basic elementary school offense, so we ran a motion offense, which has some movements that are built in, but really you're supposed to react to what's going on with the defense. But of course, there were certain circumstances, sideline plays, end of a quarter, something like that where, yeah, we'd run something out of the old playbook.

Austin Padgett (21:08):

When I was playing as a little kid, not in high school, but little league, for lack of a better word, we had this enormous dude on our team named Willie Jackson who could throw the ball the whole length of the court. For a little kid at that time, that was pretty impressive. Later in the game, we'd often catch the other team loafing. If they hit a goal on an inbound play, we would've already called a play called Snowbird, where Willie takes it quickly and John John has already run down the entire length of the court and is standing basically right under the goal. Willie just tosses the thing, and it's an easy two-point layup.

Rusty Close (21:46):

It's a beautiful thing.

Austin Padgett (21:47):

Oh man. Nobody scouts little league, so he could do it once a game pretty much. Sometimes twice if the other team was really dense.

Rusty Close (21:55):

This is really going off course here, but when I was a freshman, me and my best friend, our brothers were in fourth grade, and we coached their little league, so to speak, team, and we had three plays – mainly just pick and rolls. The parents from the other teams were furious at us for having plays. I mean, we were winning games by 60 points, and they did not take it really well.

Austin Padgett (22:23):

That's tough. That is tough. You learn a lot of lessons in those years.



Rusty Close (22:27):

Yeah, big time.

Austin Padgett (22:27):

Building a lot of character one way or the other. Okay, so the second case you've got the basketball league is suing because another company is providing real-time game scores and play-by-play information. There's no copying of the broadcast that's happening. This is reporting on the events of the game, the sequence of the events, and sometimes to a relatively granular level of who's passing to who, who's scoring, what the type of play is, those sorts of things. The league takes the view that the encore performance is copyrightable and it's owned by the league because the players are employees. The court ultimately finds the facts about who scores and what's happening in the game are just facts, and they're not protectable by copyright. But to get there, the court has to venture into whether the encored events themselves merit copyright. I have some quotes from this case to think through measuring them against the earlier baseball case.

It says, "sports events are not authored in any common sense of the word. There is, of course, at least at the professional level, considerable preparation for a game. However, the preparation is as much an expression of hope or faith as a determination of what will actually happen. Unlike movies, plays, television programs or operas, athletic events are competitive and have no underlying script. Preparation may even cause mistakes to succeed like the broken play in football that gains vardage because the opposition could not expect it. Athletic events may also result in wholly unanticipated occurrences. The most notable recent event being in a championship baseball game, in which interference with a flyball caused an umpire to signal erroneously a home run. What authorship there is in a sports event, moreover, must be open to copying by competitors. If fans are to be attracted, if the inventor of the T formation in football had been able to copyright it, the sport might've come to an end, and instead of prospering, even where athletic preparation most resembles authorship, figure skating, gymnastics, and some would uncharitably say, professional wrestling" - that's a cold move. This is a side note from Austin. That's cold, that hurts real bad - "A performer who conceives and executes a particularly graceful and difficult, or in the case of wrestling, seemingly painful, acrobatic feet, cannot copyright it without impairing the underlying competition in the future. A claim of being the only athlete to perform a feat doesn't mean much if no one else is allowed to try." Rusty, let's discuss.

Rusty Close (25:09):

Yeah, there's a lot to take in there.

Austin Padgett (25:10):

Yeah, there's a line being drawn between art and sport, it seems, and it's not particularly satisfying in my view.



Rusty Close (25:19):

Well, I mean particularly for me because a lot of my dancing is competitive, you know what I mean?

Austin Padgett (25:24):

Oh yeah. Anytime I do anything, it's competitive.

Rusty Close (25:27):

That's right. What are the stakes here?

Austin Padgett (25:28):

If you ain't first, you're last.

Rusty Close (25:30):

I can kind of see what they're getting at – the preparation aspect of it, it's almost aspirational that these things are going to work. But you can almost imagine the drawn up plays themselves being copyrightable. It almost goes back to our Taylor Swift episode and our bundle of rights, the performance aspect of it and the sheet music aspect of it. You can see an argument for why that drawn up version would be copyrighted or copyrightable. But I also see what they're saying. If you're the only one that could ever run it, that takes the competitive nature out of it.

Austin Padgett (26:07):

Yeah, it's probably the right thought, but I can certainly understand it for a competitive sport where you have two teams at the same time operating against one another, but the argument seems to fall apart when it comes to, let's say, synchronized swimming, where one team is in the pool at a time. It's essentially a dance in water being judged, but it's being judged for a competitive purpose. But the idea that you can't prevent a competitor from doing the same thing to score the same points, it feels like the right result. But the reasoning behind—

Rusty Close (26:41):

The rationale. Yeah.

Austin Padgett (26:43):

Yeah. If you've ever, I remember I went to a conservatory to study music, and everyone there was very nice, but there are some gunners at any school that you go to – law school's included.

Rusty Close (26:57):

Especially law school.



Austin Padgett (26:57):

Oh yeah. I remember someone saying, "I'm not here to make friends." It was kind of like, alright. I mean, that is a competitive environment. Everyone's competing for jobs, to be the best, to do something that other people haven't done. It's very athletic and sport-like in a lot of ways. The rationale, I think it feels like the right result, but I don't know that we have words yet to describe why.

Rusty Close (27:21):

I mean, it's like a lot of the stuff we talk about where we're using laws, things that were made available to us many, many, many years ago. Not to say that dance or sport or those things didn't exist at the time, but I'm not sure that's what they had in mind when they came up with copyrights. I mean, you even mentioned above it was the whatever, 1976 amendment – I think is the right word? – to the Copyright Act that I always think about, okay, why are they putting, what was going on in that time period that they're adding choreography to this? Who was pushing for that in that time period?

Austin Padgett (27:56):

Yeah, no, for sure. I mean, it really adds a wrinkle to Mighty Ducks – I think it's Mighty Ducks 2, where they have a figure skater on the team. I mean, fortunately, I guess everything's a sport, but I mean, you start to run into some real problems there with the flying V, and not only that formation, but then having the plays where actual dancing and ice dancing are being done.

Rusty Close (28:21):

Right. Yeah, really blurring the lines. Mighty Ducks 2 is a real thinker.

Austin Padgett (28:26):

That film set a lot of precedent. I'm just going to say that. In a lot of ways. Okay, so let's sum up the current position. The Copyright Office takes the same position as this case, basically, the basketball case. They say, "the Office takes the position that functional physical movements such as sports games, exercises, and other ordinary motor activities do not represent the type of authorship intended to be protected under copyright law." Getting back to our Ickey Woods question, it seems that a single play put together in the huddle isn't going to cut it. I imagine that a coach's playbook though, probably hits the threshold of what we need to be copyrightable. It's not the actual running of the play itself, but that's a communication to players of the available plays and the concepts, and at least that arrangement of plays and sequences probably has some protection around it.

Rusty Close (29:18):

It's not a direct analogy, but it kind of reminds me of recipes. You can copyright a cookbook, but it's not like you can prevent others from making the recipes that are in there, sort of thing.



Austin Padgett (29:29):

Right? Yeah. For all our listeners who are out there coaching, just know that you have some work product that's probably protectable, and so when that assistant coach goes to the other team and takes that playbook with them, you might have some legal recourse and you should call Rusty and myself about that.

Rusty Close (29:44):

Well, and we always say put it down in an agreement, right? We'll get some non-competes in there. We'll treat this as confidential information.

Austin Padgett (29:51):

That's right. Exactly. Those seven-year-olds aren't going to win any games without you, sir.

Rusty Close (29:54):

That's right.

Austin Padgett (29:55):

Well, thanks to everyone for listening. We'll wrap it up there. Be sure to like and subscribe, and if you would, give us a five-star rating to help everyone know what we're up to here, and of course, there's *No Infringement Intended*.

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