

Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'

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*

I'm responding as:

- An individual in my personal capacity
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*Please provide your first name:

Dirk

*Please provide your last name:

Heckmann

*

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Deutsche Gesellschaft für Recht und Informatik e.V. (German Association for
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- Luxembourg
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My institution/organisation/business operates in: *(Multiple selections possible)*

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If other, please specify

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 No

*

Please indicate your organisation's registration number in the Transparency Register.

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The role of publishers in the copyright value chain

In its Communication Towards a modern, more European copyright framework of 9 December 2015, the Commission has set the objective of achieving a well-functioning market place for copyright, which implies, in particular, "the possibility for right holders to license and be paid for the use of their content, including content distributed online." [1]

Further to the Communication and the related stakeholders' reactions, the Commission wants to gather views as to whether publishers of newspapers, magazines, books and scientific journals are facing problems in the digital environment as a result of the current copyright legal framework with regard notably to their ability to licence and be paid for online uses of their content. This subject was not specifically covered by other public consultations on copyright issues the Commission has carried out over the last years. In particular the Commission wants to consult all stakeholders as regards the impact that a possible change in EU law to grant publishers a new neighbouring right would have on them, on the whole publishing value chain, on consumers/citizens and creative industries. The Commission invites all stakeholders to back up their replies, whenever possible, with market data and other economic evidence. It also wants to gather views as to whether the need (or not) for intervention is different in the press publishing sector as compared to the book/scientific publishing sectors. In doing so, the Commission will ensure the coherence of any possible intervention with other EU policies and in particular its policy on open access to scientific publications. [3]

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Selection

Do you wish to respond to the questionnaire "The role of publishers in the copyright value chain"?

- Yes *(Please allow for a few moments while questions are loaded below)*
 No

[1] [COM\(2015\)626 final](#).

[2] Neighbouring rights are rights similar to copyright but do not reward an authors' original creation (a work). They reward either the performance of a work (e.g. by a musician, a singer, an actor) or an organisational or financial effort (for example by a producer) which may also include a participation in the creative process. EU law only grants neighbouring rights to performers, film producers, record producers and broadcasting organisations. Rights enjoyed by neighbouring rightholders under EU law generally include (except in specific cases) the rights of reproduction, distribution, and communication to the public/making available.

[3] See Communication [COM\(2012\) 401](#), Towards better access to scientific information: Boosting the benefits of public investments in research, and Recommendation [C\(2012\) 4890](#) on access to and preservation of scientific information.

Category of respondents

*Please choose the category that applies to your organisation and sector.

- Member State
- Public authority
- Library/Cultural heritage institution (or representative thereof)
- Educational or research institution (or representative thereof)
- End user/consumer/citizen (or representative thereof)
- Researcher (or representative thereof)
- Professional photographer (or representative thereof)
- Writer (or representative thereof)
- Journalist (or representative thereof)
- Other author (or representative thereof)
- Collective management organisation (or representative thereof)
- Press publisher (or representative thereof)
- Book publisher (or representative thereof)
- Scientific publisher (or representative thereof)
- Film/audiovisual producer (or representative thereof)
- Broadcaster (or representative thereof)
- Phonogram producer (or representative thereof)
- Performer (or representative thereof)
- Advertising service provider (or representative thereof)
- Content aggregator (e.g. news aggregators, images banks or representative thereof)
- Search engine (or representative thereof)
- Social network (or representative thereof)
- Hosting service provider (or representative thereof)
- Other service provider (or representative thereof)
- Other

If other, please specify

DGRI is the leading academic, independent, non-profit think tank in IT law in Germany.

DGRI's principal purpose is to address issues lying at the interface between computer technology and the law, and, namely, to comment on drafts of laws touching upon IT issues from a scientific perspective.

Questions

1. On which grounds do you obtain rights for the purposes of publishing your press or other print content and licensing it? (*Multiple selections possible*)

- transfer of rights from authors
- licensing of rights from authors (exclusive or non-exclusive)
- self-standing right under national law (e.g. author of a collective work)
- rights over works created by an employee in the course of employment
- not relevant
- other

Please explain

2. Have you faced problems when licensing online uses of your press or other print content due to the fact that you were licensing or seeking to do so on the basis of rights transferred or licensed to you by authors?

- yes, often
- yes, occasionally
- hardly ever
- never
- no opinion
- not relevant

If so, please explain what problems and provide examples indicating in particular the Member State, the uses you were licensing, the type of work and licensee.

3. Have you faced problems enforcing rights related to press or other print content online due to the fact that you were taking action or seeking to do so on the basis of rights transferred or licenced to you by authors?

- yes, often
- yes, occasionally
- hardly ever
- never
- no opinion
- not relevant

If so, please explain what problems and provide examples indicating in particular the Member State, the type of use and the alleged infringement to your rights.

4. What would be the impact on publishers of the creation of a new neighbouring right in EU law (in particular on their ability to license and protect their content from infringements and to receive compensation for uses made under an exception)?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

Under existing European and national laws in the European Union publishers are already able to license and protect their content against infringements on the basis of the rights granted to them by the authors. Accordingly, there is no legal requirement for the introduction of a neighbouring right for publishers (cf. in detail infra in our response to question 16). Also under economic considerations there is no need for such new right for publishers; rather, it would distort competition and have negative effects on all participants including consumers. The creation of a new neighbouring right for publishers would only be justified, if there was a market failure that requires the intervention of the legislator. With regard to a new neighbouring right for publishers, there is no such market failure to be observed. Quite the opposite, empirical evidence shows that the effects of (news) aggregators in the internet as the main addressees of such new neighbouring right have rather a positive economic effect for the publishing market and the publishers (cf. our response to question 16 for details).

The negative impact on publishers can be drawn from the absence of a market failure and the predicted and occurred reactions of service providers: A neighbouring right for publishers will directly result in the removal of an important source of traffic for publishers sites and consequently in decreased advertising revenues. Surveys in Spain after the coming into force of the neighbouring right showed a decrease in traffic between 6 and 15%, with smaller publications losing more traffic than larger one's (NERA report, *ibid.*, p. iii). The latter result indicates another negative impact of a neighbouring right on publishers, i.e. the creation of barriers to market entry and expansion for new entrants and smaller publications, and obstacles to the development of new business models. As a result, the MPI concluded that domestic publications will lose visibility, putting - transferred to the EU - European publications at a competitive disadvantage (MPI, *ibid.*, p. 5 f.).

5. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on authors in the publishing sector such as journalists, writers, photographers, researchers (in particular on authors' contractual relationship with publishers, remuneration and the compensation they may be receiving for uses made under an exception)?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

Other than in the case of phonogram producers, film producers or broadcasting companies, where there is a clear delineation between the copyright protected work and the subject matter of the neighbouring right (sound recording, film, broadcast), a new neighbouring right for publishers – this has shown past experience in Member States – does not differentiate between the subject matter of the author's copyright and the subject matter of the envisaged right of the publisher. Rather, such neighbouring right for publishers would capture the text or the photograph per se, leading to two rightowners with rights the subject matter of which at least overlap (Cf. Ohly, Gutachten F für den 70. Deutschen Juristentag, F 35 [Expert Opinion to the German Legal Association's Annual Meeting]). Accordingly, the Legal Counsel of the German Publishers and Booksellers Association (Börsenverein des deutschen Buchhandels) pointed out that a (neighbouring) right for publishers cannot be linked to the work of the author, because this work is already protected by copyright laws and such an approach would inevitably lead to unsolvable conflicts between the two laws and their right holders (Sprang, http://www.boersenblatt.net/artikel-analyse_von_boersenvereinsjustiziar_christian_sprang.1141624.html). With the same argument, the MPI concludes that such neighbouring right will inevitably lead to collisions between the rights of the author and the publisher (MPI, *ibid.*, p4 f.).

With two rightowners regarding the same subject matter, there will be collisions of interest. With the new neighbouring right for publishers in place, the author of the work would no longer be the exclusive right holder with regard to the communication/making available to the public of his text, but would have to “share” this right with the publisher. This amounts to a violation of the minimum protection for the author as granted by Art. 2 lit. a), Art. 3 (1) of Directive 2001/29/EC. The new neighbouring right would also distort the balance between the author and the publisher with regard to the work, and lower his leverage in his negotiations with the publisher.

6. Would the creation of a neighbouring right limited to the press publishers have an impact on authors in the publishing sector (as above)?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

As above (response to question 5). Journalists, in particular, have a strong interest that their articles published online are being linked to. Therefore, they would suffer specifically from the consequences of a new neighbouring right as laid out in our response to question 4.

7. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on rightholders other than authors in the publishing sector?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

The complexity that is increased by the introduction of a new rightholder with regard to a copyright protected work will impact all rightholders who include other works or parts thereof or link to such works in their creations, be it filmmakers, software developers (apps, games), database rightholders.

8. Would the creation of a neighbouring right limited to the press publishers have an impact on rightholders other than authors in the publishing sector?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

Same as above (see response to question 7).

9. Would the creation of a new neighbouring right covering publishers in all sectors have an impact on researchers and educational or research institutions?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

More than others, researchers and educational and research institutions rely heavily on the (free) access to, the gathering, indexing of and linking to other publications relevant to their research, and the unrestricted making available to the public of their publications. Accordingly, they are subject to distinct copyright exceptions provided under Directive 2001/29/EC and it is unclear whether such exceptions would apply to a new neighbouring right for publishers. Where these exceptions are subject to the payment of fair compensation, a new neighbouring right and a new rightholder will increase the overall amount of compensation. Research and education may thus face significant additional financial burdens if a new neighbouring right for publishers leads to further levies or license fees.

10. Would the creation of a neighbouring right limited to press publishers have an impact on researchers and educational or research institutions?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

Same as above (response to question 9).

11. Would the creation of new neighbouring right covering publishers in all sectors have an impact on online service providers (in particular on their ability to use or to obtain a licence to use press or other print content)?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

This and the following question appear to address the impact of a new neighbouring right for publishers on those parties who are considered as possible “infringers” of such right. The term “online service providers” seems too narrowly defined to cover the parties that may be affected by this right, as it will likely have a widespread impact on a variety of different players, not confined to online service providers. Instead, every user of published products will be the addressee of such neighbouring right, as already a simple reproduction might infringe the rights of the publisher. Addressees of such right are search engine providers, news aggregators, but also social networks, e-commerce platforms (providing reviews and/or excerpts from offered publications), hosting incl. cloud services, platforms for text (blogging and chat services), audio- and video-content, libraries, archives and databases, and even access providers, as all of them to a certain extent may reproduce and/or make available publishers’ products in that they give users the opportunity to access the subject matter of this right generally found on other websites. If the distribution right were to be included (see footnote 2 in this questionnaire’s chapter “The role of publishers in the copyright value chain”), all distributors of publishers’ products would potentially be affected as well as they would have to obtain licenses and – dependent on the exact implementation of such a right – pay levies. As described in our response to questions 9 and 10, educational and research institutions will also be negatively affected by such a right.

With the Commission calling for a review of the communication to the public right, the potential addressees of such right would even further extend to any services allowing for hyperlinks, such e.g. chat or other social media services, where users can share information via hyperlinks, web-catalogues and hyperlink collections. In its communication of 9 December 2015 the Commission points to “certain online platforms and aggregation services” and concerns that “the value generated by some of the new forms of online content distribution is fairly shared”. In this context, the Commission further identifies “contentious grey areas and uncertainty about [...] which online acts are considered ‘communication to the public’ (and therefore require authorisation by right holders)” and, as a result of this uncertainty, sees “the basic principle of copyright that acts of exploitation need to be

authorised and remunerated” put into question (European Commission, COM(2015) 626 final, p. 9). This refers to the ECJ’s several judgements on hyperlinks. As the communication specifically calls into question whether actions are needed with regard to “news aggregators”, a new neighbouring right may extend to hyperlinking as well, thus putting the established case law of the ECJ and the underlying rationale at risk (CJEU, case C-466/12 - Svensson; case C-348/13 - BestWater; cf. also opinion of AG Wathelet in case C-160/15 - GS Media). The ECJ ruled that a right holder cannot prohibit links to a protected work if the work has first been made available to the public via the Internet. In the GS Media-case, AG Wathelet pointed out that the posting of hyperlinks by users is both systematic and necessary for the current internet architecture: “If users were at risk of proceedings for infringement of copyright whenever they post a hyperlink to works freely accessible on another website, they would be much more reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society.”

Bearing this breadth of possible addressees in mind, all of these addressees will incur additional costs as a result of the creation of such right, as they have to pay a compensation for their use (or face takedown claims). If this compensation were to be administered by a collecting society, as was the case in both Spain and Germany, noticeable overhead costs will have to be added in light of the millions of different users and uses. These costs will disproportionately hurt smaller players and start-ups, threatening the viability of their business models. This will (and has in the case of Spain) lead to the closure of services or the relocation of businesses to countries and markets outside the European Union (for a list of services that closed as a result of the new law in Spain see NERA report, *ibid.*, p. 39 f.). Similarly, these additional costs would impose barriers to market entry for new operators, hinder the development of new business models and thus suffocate innovation. The definition of the beneficiaries of such new neighbouring right, its scope, the exceptions to such right, as well as the possible addressees will be subject to a lengthy process of multiple legal disputes creating legal uncertainty in the Common Market (see BITKOM, *ibid.*, p. 5).

12. Would the creation of such a neighbouring right limited to press publishers have an impact on online service providers (in particular on their ability to use or to obtain a licence to use press content)?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

Same as above (response to question 11), but adding further uncertainty as the definition of “press publisher” seems impossible in an online environment with its ever evolving new business models of creating and disseminating news content.

13. Would the creation of new neighbouring right covering publishers in all sectors have an impact on consumers/end-users/EU citizens?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

The negative impact on consumers, end-users or EU citizens respectively follows from the responses to the preceding questions. Regardless of how addressees will react to a new neighbouring right, the costs of consumers will increase. There will higher prices to be paid for publishers' products, as any costs incurred by addressees of the neighbouring right would be passed on to the consumer (Cf. Sprang, http://www.boersenblatt.net/artikel-analyse_von_boersenvereinsjustiziar_christian_sprang.1141624.html; the German Federal Court of Justice in its recent judgement left open the question whether Art. 5 of Directive 2001/29 allowed a compensation (for publishers) in excess of the fair compensation owed to the copyright owner, BGH, judgement of 21 April 2016, I ZR 198/13). More likely in light of the experience in Member States that have introduced such right, however, is that businesses will shut down or change their services to avoid infringements of such right and the payment of a fee, increasing not only the search costs for consumers, as it makes it harder for them to access news from aggregators, apps, blogging services, social networks, etc. (Cf. EDiMA, The Impact of Ancillary Rights in News Products, available at http://edima-eu.org/pdfs/EDIMA%20-%20Impact%20of%20ancillary%20rights%20in%20news%20products.pdf?utm_source=hootsuite). More importantly, the new neighbouring would as result lead to less diversity of expression and hinders the free flow of information. Especially smaller new publishers, new business models in online news dissemination, start-ups and other new entrants will find it harder to find their audience. On the other, this puts larger publisher with strong brands at an advantage, thus reducing media pluralism. The breeding ground in Europe for the much needed new business models for content dissemination would be severely jeopardized and barriers to innovation erected to the detriment of consumers in the common market.

14. Would the creation of new neighbouring right limited to press publishers have an impact on consumers/end-users/EU citizens?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain

Same as above (response to question 13).

15. In those cases where publishers have been granted rights over or compensation for specific types of online uses of their content (often referred to as "ancillary rights") under Member States' law, has there been any impact on you/your activity, and if so, what?

- strong positive impact
- modest positive impact
- no impact
- modest negative impact
- strong negative impact
- no opinion

Please explain, indicating in particular the Member State.

Our organisation is currently undergoing major changes in light of its use of its website, social media and other ways to communicate with our members. As a scientific organisation we rely heavily on the access to information and its dissemination to our members (including the providing of hyperlinks). Barriers to such access or increased costs will impact these plans.

16. Is there any other issue that should be considered as regards the role of publishers in the copyright value chain and the need for and/or the impact of the possible creation of a neighbouring right for publishers in EU copyright law?

- Yes
- No

If so, please explain and whenever possible, please back up your replies with market data and other economic evidence.

Under the existing European and national laws in the European Union publishers are already able to license and protect their content against infringements on

the basis of the rights granted to them by the authors. The Court of Justice of the European Union provided guidance for the threshold of such protection (ECJ, case C-5/08 - Infopaq). Also, publishers may invoke rights granted to them under directive 96/9/EC against the repeated and systematic extraction and/or re-utilization of the whole or of a substantial part of a database (cf. BGH GRUR 2003, 958, 962 - paperboy). In the legal discussion of a neighbouring right for press publishers in Germany, it was therefore the predominant position in copyright literature and among intellectual property associations that there was no need for such neighbouring right (see Schricker/Loewenheim, Urheberrecht, Vor §§ 87a ff. para. 7; GRUR, statement available at http://www.grur.org/uploads/tx_gstatement/2012-12-19_GRUR_Stn_Leistungsschutzrecht_Presseverleger.pdf, p. 2; Max-Planck-Institut (MPI), http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/leistungsschutzrecht_fuer_verleger_01.pdf, p. 1 f.).

Also under economic considerations there is no need for a neighbouring right for publishers; rather, it would distort competition and have negative effects on all participants including consumers. The creation of such new right would only be justified, if there was a market failure that requires the intervention of the legislator. It is received opinion in economic theory that legislative measures without a market failure imply the risk of introducing distortions to competition and have negative impacts on the market participants and general welfare. With regard to a new neighbouring right for publishers, there is no such market failure (MPI, *ibid.*, p. 3; BGH GRUR 2011, 436, 438). Empirical evidence shows that the effects of (news) aggregators in the internet as the main addressees of such new neighbouring right have rather a positive economic effect for the publishing market and the publishers (on empirical studies on this issue cf. NERA Report for AEEEEPP, available at [http://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEEPP%20\(VERSION%20FINAL\).pdf](http://www.nera.com/content/dam/nera/publications/2015/090715%20Informe%20de%20NERA%20para%20AEEPP%20(VERSION%20FINAL).pdf), p. 26 ff.). While publishers claim that aggregators deflect traffic from their websites because users would not follow the links to the publishers' sites with the full article, aggregators insist that they rather aid publishers' websites by increasing story exposure and driving users to their sites. The NERA report based on empirical studies finds that even if there was a negative effect as claimed by publishers, the increase in traffic would have a larger positive impact for them outweighing the potential harm (*ibid.*, p. 33 f.). The fact that publishers have not imposed restrictions on aggregators for linking their content, which they could have easily done, and that they did not demand compensation payments for such linking, proves this finding (see MPI, *ibid.*, p. 2). Also, the experience from Germany suggests that, rather than damaging publishers, news aggregators are beneficial in that they drive web traffic to the publishers' sites (see LG Berlin, judgment dated 19.2.2016 - 92 O 5/14 kart, juris). The introduction of a neighbouring right for press publishers in Germany (sec. 87f of the German Copyright Act) led aggregators to exclude publishers from their services in order to avoid the fee, and resulting in publishers asking to be linked back without demanding a payment in return. Hence, the press publishers considered the traffic generated by the aggregating website to be an advantage that outweighs possible detrimental effects, if any. In its statement in the legislative proceeding regarding the neighbouring right for press publishers in Germany, the MPI predicted already

that the envisaged neighbouring right would “run idle”, as aggregators would not be willing to pay for their linking to press products, while publishers would agree to this linking without any compensation (MPI, *ibid.*, p. 5). In Spain, a similar law was established as a mandatory, non-waivable fee, and led many online service providers (including Google News) to shut down their services (see NERA, *ibid.*, p. 39 f.), the detriment of which is being obvious: Service providers, publishers and consumers alike lost in this particular story, and the law created an artificial barrier to establish and maintain sources of information and to find and access information in an efficient way. Similarly, also in Germany small and medium-sized businesses and innovative start-ups suffered the hardest from the introduced right for publishers and the legal uncertainty connected with it (see BITKOM, *Ancillary Copyright for Publishers - Taking Stock in Germany*, p. 5 with reference to cases, available at <https://www.bitkom.org/Bitkom/Publikationen/Ancillary-Copyright-for-Publishers-Taking-Stock-in-Germany.html>).

Use of works, such as works of architecture or sculpture, made to be located permanently in public places (the 'panorama exception')

EU copyright law provides that Member States may lay down exceptions or limitations to copyright concerning the use of works, such as works of architecture or sculpture, made to be located permanently in public places (the ‘panorama exception’) [1]. This exception has been implemented in most Member States within the margin of manoeuvre left to them by EU law.

In its Communication Towards a modern, more European copyright framework, the Commission has indicated that it is assessing options and will consider legislative proposals on EU copyright exceptions, among others in order to “clarify the current EU exception permitting the use of works that were made to be permanently located in the public space (the ‘panorama exception’), to take into account new dissemination channels.”[2]

This subject was not specifically covered by other public consultations on copyright issues the Commission has carried out over the last years. Further to the Communication and the related stakeholder reactions, the Commission wants to seek views as to whether the current legislative framework on the “panorama” exception gives rise to specific problems in the context of the Digital Single Market. The Commission invites all stakeholders to back up their replies, whenever possible, with market data and other economic evidence.

*

Selection

Do you wish to respond to this questionnaire "Use of works, such as works of architecture or sculpture, made to be located permanently in public places (the 'panorama exception')?"

- Yes *(Please allow for a few moments while questions are loaded below)*
- No

[1] Article 5(3)(h) of [Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society](#).

[2] [COM\(2015\) 626 final](#).

Submission of questionnaire

End of survey. Please submit your contribution below.

Useful links

[Webtext EN \(https://ec.europa.eu/digital-agenda/news-redirect/29674\)](https://ec.europa.eu/digital-agenda/news-redirect/29674)

Background Documents

[Privacy Statement DE \(/eusurvey/files/08c163a2-8983-4d3b-ae3e-21f69b5957cd\)](/eusurvey/files/08c163a2-8983-4d3b-ae3e-21f69b5957cd)

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[Webtext FR \(/eusurvey/files/df02a573-838f-45e7-912d-8231ee8cdbcd\)](/eusurvey/files/df02a573-838f-45e7-912d-8231ee8cdbcd)

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