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A REGULATORY PERSPECTIVE ON THE INTERESTS AND MOTIVATORS OF CREATIVE INDIVIDUALS

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ABSTRACT

The copyright regime is based on the assessment that many, if not most, individuals are creative. To date, much of the literature assumes that copyright law is an effective instrument of innovation policy simply because the legislated rights to reproduce a creation are seen to be an incentive – even though it is acknowledged that many creators are, in fact, ‘intrinsically motivated’. There have been few attempts to provide a more expansive understanding of the relationship between the diverse reasons a person has to create and the law in this area. To try and correct this state of affairs, this article uses insights from the regulatory theory in order to better understand those who produce copyrightable works. Specifically, this work discusses the motivators of creative individuals in terms of the categories of ‘internal motivators’, ‘external motivators’ and ‘reputational motivators’. This understanding suggests that the notion of ‘copyright as a carrot to creators’ is an overly simplistic assessment of the contexts in which individuals create.

I. INTRODUCTION

The creative individual is central to the copyright regime; yet these individuals are not central to the analysis of copyright law.ⁱ For most, the law is justified on the basis that some of these individuals need an incentive to produce works of art or more suburban entertainment (see, for example, Landes and Posner, 2003). The literature does, of course, acknowledge that the incentive is not necessary for all creations – with the label of ‘intrinsically motivated’ being attached to those who are not tempted by the carrot of copyright.ⁱⁱ Little work, however, has been done in terms of trying to conceptualise what is meant by “intrinsic” motivation in the copyright arena.

In order to try and probe this state of affairs, this paper seeks to use insights from the field of regulatory theory to better understand those who are sought to be regulated by copyright law. Admittedly, copyright does not fit into the standard models of regulation – such as those involving a centralised regulator (like the Victorian WorkCover Authority in the area of

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occupational health and safety); however, there are still actions carried out by the State in the pursuit of a public good. The law may be seen, for example, as a piece of legislation that has, as a focus, the “intentional activity of attempting to control, order or influence the behaviour of others” (Parker et al, 2004, p. 1). This article proceeds from the basis that, so as to better understand the operation of the law, there needs to be a better understanding of why it does not always produce creations and why not all creations are exploited. The approach taken here is to explore, from a theoretical standpoint, the motivators that may inform the actions of creative individuals.

First, though, it is necessary to emphasise that the term ‘creative individuals’ is used in a broad sense here. The ordinariness of creativity is not often acknowledged in the copyright literature – though the sheer quantity of protected material in print and in the electronic media reinforces creativity’s widespread existence. More generally, there is a “fetishism of discovery and invention” that is “an obstacle” to understanding creativity (Schaffer, 1994, p. 18).ⁱⁱⁱ This article, because of its relevance to the copyright literature, sees creativity as ordinary and would see the extraordinary acts of creativity as works of ‘genius’; it, therefore, proceeds on the basis that its analysis can be applied to the person on the street (whether or not carrying a can of spray paint), as well as the professional artists.

II. THE ‘SELF’ IN SELF-REGULATION

The basis of the approach is the unpicking of one strand of regulatory theory; a strand that has individuals as ‘ungovernable’. For Black, there are five components of this ‘ungovernability’ – all that relate to the behaviour, attitudes, and autonomy of the regulated (2002, 6-7). Taken together, the components do not suggest that those who are to be regulated by the copyright law are, in fact, ungovernable but simply that there are great challenges associated with the external regulation of their behaviour. Instead, there should be a focus on how those subject to the law regulate their own behaviour. In order to do that, there needs to be a clear conception of these individuals.

First, individuals are seen to be both capable of action and of knowing, and acting in accordance with, their own interests. This assumption means that individuals are considered to be self-aware subjects with an understanding of how they must act to pursue their ‘vision’ of where they would like to be in society. Individuals have specific interests with respect to their families, with respect to the work environments, their social, political and religious

communities as well as with respect to their own senses of self. Of course, there are commonalities across these interests but there also may be distinct differences.

A key interest is that relating to (self) expression. In modern Western society at least, speech is seen as “an integral aspect of each individual’s right to self-development ... [that] instantiates or reflects what it is to be human” (Barendt, 2005, p. 13). This is, of course, a key interest relevant to this analysis; however, it is not the only one. People have interests in their financial well-being, they also have interests in maintaining their places in a family unit, in other social structures and their work and/or professional environments. Finally, individuals also have an interest in maintaining their health – in particular, people have an interest in activities that facilitate ‘down-time’ from the pressures of either their family or work relationships and responsibilities.

The second characteristic of individuals that underpins the approach of this article relates to the capacity of individuals to ‘calculate’ both those actions that are in their interests and the possible consequences of particular actions that they may take. That is, individuals are seen to understand the options available to them and to weigh them up and decide which option to take based upon their own interests. In other words, we, as members of modern society, are “obliged to be free” (Rose, 1999, p. 87) – with that freedom being choosing between the many options that face an individual each hour in every day.

Tied to the assertion of the ‘calculating individual’ is the assumption that any decision made by an individual will be constrained by a number of factors.^{iv} A number of these factors will be the individual’s conscious assessment of her or his own interests; other factors will be the interests of others – including the interests of their family, their colleagues, their employer and even of those not actually connected to them. Many of these factors will be consciously, or unconsciously, acknowledged norms of behaviour that have been internalised of the course of the individual’s life (see, for example, Dent, 2012). It is these norms that guide an individual’s calculation in a given set of circumstances. The acknowledgement of these constraints reinforce the common sense view that an individual’s actions are not entirely controlled by the laws and regulations, but it does allow for the perspective that an individual will base her or his behaviour, in part at least, on her or his knowledge of what the law allows.

III. CATEGORIES OF MOTIVATORS

Of course, an individual will have many interests and many motivators that relate to those interests – with the combination of the interests, motivators and decisions around them that constitutes the individual’s regulation of him or herself. For the sake of analytical simplicity, these motivators are grouped into three categories – external motivators, internal motivators and reputational motivators; these accord with the understanding that “individuals have a utility function with three main components: they value extrinsic rewards, enjoy doing an activity and care about their image” (Gneezy, Meier and Rey-Biel, 2011, p. 192).^v

A. External Motivators

For a motivator to be ‘external’, it means that those motivators are offered by parties other than the individual her or himself. These other parties may be the employer of the individual, someone within the person’s social or professional networks or it could be an entity that is not in a pre-existing relationship with the creative individual.

1. Positive Motivators

The two key forms of these motivators are ‘pay’ and ‘prizes’. The distinction between the two focuses on the risks taken by the creator when being motivated by each form. Pay is understood as any monetary reward for a creation that was promised before the individual started creating a work. This may be in the form of wages as part of a contract of employment or it may be in the form of a payment that was owed under a contract for service. Examples of the former include the journalist writing articles for a newspaper (though not a freelance journalist); and an example of the latter is a writer who is paid to create a script for a movie or a television show. The key point here is that the creator could have confidence in the fact that she or he would receive a financial benefit should they satisfactorily complete the act of creation. There is little risk assumed, on the part of the creator, with respect to the creation – all the risk is on another party. In the first example, the newspaper is taking the risk that the article will attract readers (and, therefore, advertisers); and in the second example, it is the studio that is assuming the risk with respect to the script.

Prizes, in the form of monetary rewards, are different to pay because there is no guarantee, at the time of creation, that the artist will receive an award for the end product of the creative endeavour. A prize such as the Hugo Award or the Pulitzer Prize for fiction, for example, is not going to be a sure thing for any writer when she or he starts a novel. The creator, therefore, is taking a risk in creating – all the effort may pay off in a significant way or it may

all be for nought. In this context, a publishing contract may also be seen as a form of prize for an unpublished writer; alternatively, someone who works in the visual arts who produces pieces for display and sale in a gallery is also taking a risk as there is no certainty that the artworks will be sold. In all these examples, the creator may base their decision to create on a calculation that, despite there only being a chance of reward, the effort of creation is worth it.

Given the dichotomy between pay and prizes, it is worth considering the role that copyright plays in this understanding. Strictly speaking, copyright itself operates as both forms of reward. When an individual begins a creative endeavour, there is no guarantee that the product of the effort will be sufficiently original for it to attract copyright. The chances are, nonetheless, good given the low level of originality required – so there is a (very) small degree of risk around whether it will be original enough for protection;^{vi} so there is a degree of risk around whether it will be original enough for protection (see, for example, Samuelson, 1994; Littrell, 2001). However, where a piece is sufficiently original, copyright is like pay – it is automatic.

On the other hand, simply owning the copyright in a novel is not likely to further the interests of the writer. There is little innate value in copyright itself. What the intellectual property protection does provide, however, is the capacity to enter into contracts around the creation on the basis that copyright is seen as a personal property right. This property right means the creation may be sold with little fear that a copy of it will reduce its value (where the value of the piece arises from its uniqueness, such as in the case of a painting). Alternatively, the right allows the creation to be licensed so that the licensee can make copies of it (where value arises from it being made available to many people, such as in the case of a book). In short, copyright gives the creator a degree of control over the creation. Of course, just because a product of creative effort attracts copyright does not mean that the creator will enter into contracts to either sell or licence the good. The possibility of a contract, therefore, may be seen as a prize that tempts a creator rather than a guaranteed ‘payment’ to her or him.

2. Negative Motivators

Here an external motivator is a negative consequence that will occur if the individual does not produce a creation. There are, therefore, not many instances where a potential creator will be faced with negative *external* motivators around the act of creating. An individual may resist the expenditure of a significant amount of time on writing a novel or a screenplay because of the effort involved – but the issue of the investment of time is an internal and not

an external motivator. As a result, this discussion is limited to the formal and informal sanctions that may be imposed in circumstances where an individual, after having committed to create something, does not produce that creation.

The most significant formal sanctions that may befall an individual who does not create relate to the consequences of failing to comply with any contractual obligations agreed to by the individual. These contracts can either be in form of employment contracts or contracts in which an individual agrees to produce a creation in circumstances other than in the employment context. If the contract is the former, then the impact a failure to create may include dismissal from employment, the non-payment of bonuses or simply the institution of processes, internal to the workplace, aimed at encouraging, or enabling, the employee to fulfil her or his obligations. Where the contract to provide a creation is not one of employment, then a breach of the contractual obligations may result in litigation and an order to pay damages to the other party to compensate them for the failure to produce the creation.

If an individual does not create after she or he told someone that she or he would, then informal sanctions may also be imposed. In these circumstances, the individual's social, professional or familial circles may consider that the person has failed to meet a norm of that group. Here, a norm is defined to be the "common measure" of behaviour within a group (Ewald, 1987, p. 108). This means two things: that norms are tacitly accepted by the members of that group and that it is a standard against which the actual behaviour of individuals may be judged. Where that measure is not met, then the other members of the community may impose informal sanctions upon the transgressing individual. These sanctions could include harsh words, temporary shunning or permanent ostracising. These, therefore, may be seen to be counter to the interests of the individuals in terms of maintaining their relationships. This avoidance of unpleasant consequences operates as an internal motivator because it is the individual who dislikes the sanctions. In some instances, these informal sanctions will have less of an impact than any formal sanctions; however, some informal sanctions may represent a bigger impost on the individual than any formal ones.

B. Internal Motivators

It is clear from observations of wider society that the fear of external sanctions is not sufficient to get all individuals to comply with their legal obligations. This section discusses the internal motivators in terms of the individual's perception of what her or his "proper conduct" should be with respect to the creative process.^{vii}

1. Proper Conduct for Self

The first of these motivators may be seen in terms of the individual's 'self-image'. This is the conception of motivators that is most common in the literature – people create because they are creative people. Such a circular assessment, however, is not useful for the analysis of behaviour or innovation policy. The approach here suggests that the internal motivators that contribute to a decision to create something can still be understood in terms of the individual's interests – specifically, the interests each of us have in conducting ourselves in the way we think we should.

How we think we should act is a product of the norms of behaviour of society and our experiences in trying to meet those norms. With respect to the norms, we learn both specific norms of behaviour around acts of creation and we learn the *idea* of the norm itself. That is, we learn that there is a standard of behaviour for most, if not all, acts that relate to being human. These standards are what we are taught is proper conduct in the relevant circumstances. So, we see going to the doctor as proper conduct for looking after our health and we see getting a job as proper conduct for looking after our financial well-being.^{viii} Of course, our behaviour does not always meet the expected standard; however, we know that there is a standard that we should meet.

In terms of the norms of behaviour around creativity, we learn that self-expression is part of the proper conduct of members of society. A subset of self-expressive practices is those that can be seen as 'creative'. These days, our 'training' includes the exposure to visual art materials in the formal education system and in the home. Creative practices are also facilitated by the availability of musical instruments in many schools; and, perhaps most importantly, the vast majority of individuals in the Western world are able to write and, as part of their training, are encouraged to write stories. Proper conduct as a school student involves our participation in these training exercises and, therefore, by the time most leave the formal education system, we can, at the very least, produce copyrightable literary works if not other forms of protectable expressions.

As a result of our experiences during the learning processes, some of us enjoy the acts of creating and/or we are told that we have an aptitude for creating. This may direct us to careers where we have the opportunity to create – with the interest in receiving a financial return for our creativity a function of our interest in financial self-reliance. This enjoyment and/or aptitude encourages us to see ourselves as creative people. This self-definition means that we

have a personal standard of proper conduct that equates being creative with behaving properly. This standard, along with the pleasure felt that comes from creativity, is then an internal motivator for being creative. When we create, we feel good about ourselves because we are acting as we should.

2. Proper Conduct for Others

It is also possible that individuals may feel that, to conduct themselves in the way that they should, they are under an obligation to create things for the benefit of other people – whether for a specific person or for the general public. Behavioural economists refer to this as ‘pro-social behaviour’ (see, for example, Bénabou and Tirole, 2006). More generally, this is seen as altruistic behaviour. This kind of behaviour is still seen as a form of proper conduct; however, the beneficiaries of the creative act are other people instead of the creative person themselves.

There are a number of different motivators that fall within this category. Someone may create a love poem as a gesture of romance; a child may produce a drawing as a gesture of love for a parent; or a group of people could join together to create an installation for the benefit of their community. Each of these reflects a different relationship between the creator and the beneficiary of the creation and, therefore, each reflects a different interest of the creator being furthered. Each, nonetheless, is an example of proper conduct within that relationship.

Another specific example of proper conduct for others may be discussed. That example relates to the open licensing movements that have gathered pace over the past decade or two.^{ix} Under these schemes, a number of people allow their creations to be consumed or used by others with no thought of financial profit. The conscious construction of a shared ‘community’ of creators (Leach with Nafus and Krieger, 2009, p. 51) has established a set of practices that constitute proper behaviour with respect to the work of others. Those who contribute creations to the community do so, in part, because it is a community constituted by people with similar approaches to the benefit and use of creations. Any requirement that the use of shared creations include an attribution as to the original creator is suggestive of an additional motivator on the part of the creator – a desire to be seen to have created. As with proper conduct for the self, these acts of creation do not have to be carried out all the time in order to be proper; they just have to reflect a norm of behaviour that is accepted and encouraged across the broader society.

C. Reputational Motivators

The motivators in the third category are neither fully external nor fully internal to the creative individuals. That is, they are internally-based but relate to external actors. In short, these motivators relate to the role creations have in altering how other people react to the creator.

1. *'I Made This!'*

The first of these motivators relates to an interest in establishing a separation from others. That is, an individual may create something to show that she or he is a being distinct from other beings. A creation is, from this perspective, seen as an embodiment of the creator's self or experience – concrete *proof* of their self-expression. This motivator, therefore, goes beyond the simple desire to express oneself; it is a motivator that has, at its heart, the demonstration of the creator's self to the rest of the world.

In itself, this choice of form of expression does not operate as a distinct motivator for the creative individual. It does, however, provide a link with the copyright regime. The law of copyright dictates that the scope of protection offered to the different forms of creation varies. For example, the provisions differentiate between, amongst other things, literary works, audio-visual works, pictorial, graphic and sculptural works and sound recordings (*Copyright Act 1968* Part III). Further, the law does provide for rights, for certain authors, to attribution and integrity (or 'moral rights' – *Copyright Act 1968* Part IX); in essence, these rights enabling the author to say 'I made this' and to maintain some role in how the creation is to be treated even after the creator has parted with it.

2. *Esteem of Others*

The final motivator considered here relates to creating something in order to get someone else to consider the individual as a creator – the individual creates because they want a positive acknowledgement from another individual. In other words, this motivator relates to the gaining, or altering, of a reputation as a creative individual. This reputation could be in the professional context – such as a journalist writing to impress an editor; or it could be in the social sector – a musician writing a tune to impress friends. In each of these examples, the opinion of the target is of importance to the creator and the creation is made with the intention to garner a good opinion.

There is, therefore, a strong link between the motivator of 'esteem of others' and the external positive motivators of pay and prizes – though they are different in that a desire to seek a reputation comes from within the individual, rather than an external person offering an

inducement. This motivator may be differentiated from two others discussed here. First, it is different from that of creating for others on the basis that the former has the ‘selfish’ motive – proper conduct for others as a motivator focuses on how the creative individual sees her or himself, rather than focusing on how another person sees the creative individual. The creation for reputation is also different to creation for the sake of a marker of the self on the basis that the former requires others to assess the ‘quality’ of the creation, whereas for the latter, it is simply sufficient that the creation is there to be noticed.

IV. MOTIVATORS AND SELF-REGULATION

All that remains is for there to be a discussion as to how this breakdown of motivators may be used to further the understandings of creative individuals as self-regulating. Here, self-regulation means the making of decisions, by an individual, that are in accord with the relevant policy positions of the wider society. Self-regulation is not simply the capacity for individuals to make decisions for themselves as this is a feature of most people who have turned four. Children, teenagers and many adults may not make great decisions – at least as far as their community goes – but they do make decisions for themselves. So, self-regulating means the making of decisions, by individuals, that relate to them being (more) creative.

As discussed above, individuals here are seen to be both possessors of interests that they are aware of and capable of making calculations based on those known interests. Obviously, different people have different interests. Some interests relate to ‘surviving’ in Western society – such as the interests in food, shelter, health and financial well-being. Others are social interests – such as those relating to family, friends and religion. A third group would be more personal – those relating to hobbies and media preferences. These different interests also mean that each individual may make a different decision when calculating what action to take; further, the experiences of individuals with their interests and decisions about their interests will also vary dramatically – adding another layer of variation to the outcomes.

Another way of expressing the range of interests of individuals is to say that they are embedded within a range of different relationships – employment, familial, social – which produce within them different norms or different forms of ‘proper conduct’. This notion of proper conduct applies to all categories of motivator – with such conduct operating in terms of norms of behaviour. As a result, a person’s internal motivators relate to internalised norms of behaviour that have built up over time. It may also be seen that the external motivators, those acting as incentives established at the behest of other people, relate to proper conduct in

the workplace. The desire for a reputation also operates as a form of proper conduct in both professional and social arenas.

Given that all motivators are a form of proper conduct what may be said about creativity and self-regulation? Alternatively, if self-regulation is about individuals' decisions aligning with the policy directions of the wider society, how is that the policies enter into the operation of the norms and incentives? It is the nature of norms as the 'common measure' of a group that provides the connection. Many of the foundations for the norms are broadly accepted in society – the use of incentives in the employment context, the spirit of giving in the familial context, the role of reputation and personal opinion in social and professional relationships and, of course, the value ascribed to innovation and creativity in modern times.

Taking a familiar example – the act of producing a journal article in the academic world – the impact of societal norms on the three categories of motivators is obvious. First, with respect to the employment setting, academics are paid by universities to produce publications. This process of paid labour is a norm that contributes to production of new knowledge. In terms of the motivators, the university offers a positive incentive, pay, in return for output. There are also negative incentives, the threat of disciplinary action, should an academic not publish. The new knowledge itself is a norm of society – a form of proper conduct for others. Individuals, as a result of past experiences of enjoying the process, see themselves as academics and are then internally motivated to produce more publications. Finally, reputational motivators play a significant role in this sector. First, an academic may write a paper because she or he had an idea and wanted to use it differentiate her or himself from the rest of the community. Second, academics produce publications in order to gain a reputation in the field – for the purposes of promotion or just so that they can be seen as experts. Even the peer-review process for publications is an example of the reputational motivator – a journal article will only be deemed worthy of publication if other experts say it is. Obviously, not all of the norms highlighted here are dedicated to the production of new creations; however, their existence contributes directly to individuals regulating themselves to the end of producing new publications.

V. CONCLUSION

More generally, people who create do so because it is the proper thing for them to do – in terms of their interests and their relationships. Of these, external motivators, such as financial incentives, are only one set of motivators that stimulate creative endeavours. Each individual

will attach different weights to the various motivators and, as a result, there cannot be a blanket statement that monetary payments are the best way to produce innovation. The range of interests of people who may create, and their experiences in creating, are such that each creator will respond differently to any external attempt to increase creative output.

There is little room for a role for copyright in processes that facilitate creation on the part of the creative individual – copyright itself is neither a norm nor an example of proper conduct.^x There may be more room for copyright to act as a motivator for entities that are focused on profiting from the sale, or licensing, of creations; however, the managers of Disney or Sony are not the same individuals as those who create the movies or music. The interests of the two groups are likely to be different – an executive may be much more driven by financial returns than the ‘good feelings’ that may attach to a well-executed piece of music or poetry. The pay an executive earns may be linked to the number of deals that are done or the profit that is earned from the copyrighted products owned by the company. In terms of reputational motivators, an executive’s colleagues will value, and reward, actions that result in additional sales – such actions may be ‘creative’ but not necessarily protectable by copyright. In short, the norms of behaviour of the population of entertainment company executives are different from the norms of screen-writers or musicians. As many of the benefits of copyright are aimed at the exploitation of creations, it is not surprising that it may be best seen as a motivator for those who carry out the practices of exploitation rather than those who, in fact, produce the creations. Such an acknowledgement may require a re-thinking of the purposes, and scope, of copyright itself. Of course, there is not the space to undertake that task here.

ⁱ Jaszi has suggested that ‘authorship’ is the “most central, and certainly the most resonant, of the foundational concepts of copyright” (1991, p. 455). Such an understanding, however, takes the personhood away from the creative individual.

ⁱⁱ For recent doctrinal discussions of the incentive role of the copyright regime, see Balganesch (2009) and Tushnet (2009). For an exploration of how copyright may, in fact, reduce creativity, see Nadel (2004).

ⁱⁱⁱ For a recent review of the field of creativity studies, see McIntyre (2012).

^{iv} The assertion of the individual being ‘calculating’ is distinct from an assumption that all individuals are rational. As the consequences may be physical, emotional, psychological or financial, the motivators and justifications that form an individual’s choice may arise from the rational or emotional aspects of her or his self. Further, the person making the decision may not be doing so only on the basis of the immediate consequences, to her or himself, of the decision.

^v Others use different categories of motivators. Barbuto and Scholl, for example, use five in their attempt at integrating all the psychological research in the area of motivation studies (1998).

^{vi} There are concerns over the test of originality. One commentator, quoting Northrop Frye, suggests that “all literature is conventional, but in our day the conventionality of literature is ‘elaborately disguised by a law of copyright pretending that every work of art is an invention distinctive enough to be patented’” (Rose, 1993, p. 2). Further, it is arguable that there is no such thing as absolute originality any more; in other words, the “whole of human development is derivative” (Laddie, 1996, p. 259).

^{vii} Of course, there is a strong Foucauldian flavour to the concept of ‘proper conduct’. Foucault’s work on ‘governmentality’ emphasises the notion of the ‘conduct of conduct’. For an introduction to the idea of

governmentality, see Foucault (1991). Black explicitly references the work of Foucault in her discussion of ‘decentred regulation’ (2002, p. 3).

^{viii} For Foucault, one aspect of modern governance is the constitution of all modern subjects as *homo oeconomicus*, with *homo oeconomicus* being an ‘entrepreneur ... being for himself his own capital, being for himself his own producer, being for himself the source of his earnings’ (2008, p. 226). “Economic Man”, then, is constituted as being responsible for “his” own financial well-being and as being endowed with the capacity to fulfil that responsibility; “he” is constituted as being self-regulating with respect to his own income, his own debts and his own economic future. This individual is, however, constituted as functioning within the broader practices of governance that include policy strategies and techniques of those in power.

^{ix} The best known of these is, of course, the Creative Commons set up by Lawrence Lessig and others. For a legal discussion of the system, see Elkin-Koren (2005).

^x This approach, therefore, is at odds with Rose’s characterisation of copyright as being “deeply rooted in our conception of ourselves as individuals”: (1993, p. 142). The practices of creation and the desire to create may be that tied to our individuality, but copyright is only a technology of governance.

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