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978-1-108-84420-8 — Artistic Freedom in International Law
Eleni Polymenopoulou
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Introduction

The topic of this study might appear puzzling to creative artists and art worlds,[1] namely painters, musicians, dancers, film-makers, playwriters, composers, all those who make artworks or work with artists, museum staff, art faculty, gallerists, collectors, art buyers and art lovers. What does international law have to do with art? And why is there a need to write a legal monograph on a topic that is self-evident? From the perspective of the aforementioned stakeholders, arts are and should remain free. Freedom is a vital condition for the realization of the creative process. This is true philosophically,[2] while even psychologists have argued that creativity is generated by working in an unhindered and non-conformist manner.[3] Art exists *in* freedom, and occasionally also *for* freedom – be it as a vehicle of communication, a weapon against repression and injustice or simply a means of aesthetic expression. The motto 'To every age its art. To art its freedom!' that was once proclaimed by the Vienna Secessionists still echoes in exhibitions, museums, galleries, biennales, concerts, cinemas and theatre halls. The popularity of the actual product derived from the creative process too (i.e. the artwork, performance or song,

[1] Throughout the book, I use the expression 'art worlds'. The term is borrowed from Howard Becker, who sees the creative process as a collective activity. See Howard Becker, *Art Worlds* (25th ed, University of California Press 2008) 1 ('all artistic work, like all human activity, involves the joint activity of a number, often a large number, of people. Through their cooperation, the artwork we eventually see or hear comes to be and continues to be. The [art]work always shows signs of that cooperation. The forms of cooperation may be ephemeral, but often become more or less routine, producing patterns of collective activity we can call an art world. The existence of art worlds, as well as the way their existence affects both the production and consumption of art works, suggests a sociological approach to the arts').

[2] Haig Khatchadourian, 'Artistic Freedom and Social Control' (1978) 12 *Journal of Aesthetic Education* 23, 25.

[3] Teresa Amabil, *Creativity in Context: Update to the Social Psychology of Creativity* (Westview Press 1996) (referring e.g. to Karl Rogers (1954); Koestler (1964); and Crutchfield (1962)).

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etc.) is in principle independent of its creator. Save for the occasional psychopath labelling a murder as an 'artistic performance', the illegality of the act, or even the criminality of the author, is in principle unrelated to the actual artwork. This is why works made by the American serial killer John Wayne Gayce, the infamous 'Pogo the Clown', are available for sale at online auctions, and *Lolicons* (Japanese *anime* that involves sexualized representations of children) have thousands of dedicated fans. Artworks and performances have in fact good chances of becoming acceptable and even popular, even when initially perceived as shocking or disturbing.

These remarks are surely not very helpful for lawyers and judges, who at some point in a dispute involving artistic freedom will necessarily be confronted with the dilemma of defining the legal contours of art. Such an exercise is more challenging than it may appear. At least three stumbling blocks can be identified. First, accepting anything as 'art' (by a plaintiff, or applicant before a human rights body) cannot be automatically rejected as non-art. This is because art need not serve a particular function in society – or at least not anymore. There has been much written about the presumed function (and functionality) of the arts, including the need for art to serve a highly moral or pedagogical purpose,[4] and the highly influential Marxist approach on art being the expression of capitalist societies.[5] People write poems to express their deepest thoughts and communicate these to the public at large (as in the case of the poem *The Love that Dares to Speak Its Name* that was published in a gay magazine in the United Kingdom in the early 1990s and which gave rise to court proceedings for blasphemy),[6] or to protest against injustice and repression (as in the case of Mr Karataş, who expressed with his 'colourful imaginary' his deep-rooted discontent with the population of Kurdish origin in Turkey).[7] Yet, they also write poems that no one will ever read, simply to express themselves.

Second, 'art' cannot be subject to one universal definition, whether in law or the art worlds. Value-judgements and judgements about the function of art should in principle therefore be excluded from a definition of the arts, and be seen with suspicion even in art-funding processes. The inverse scenario (i.e. predefining what is acceptable 'art') is morally and legally impossible in the

[4] Ernst Cassirer, *The Educational Value of Art* (Yale University Press 1979) (compiling Cassirer's lectures 1935–45).
[5] Indicatively, Ernst Fischer, *The Necessity of the Art* (Penguin 1963) (based on the author's series of essays, written in 1949).
[6] *X. Ltd and Y. v United Kingdom* App no 8710/79, Commission Report, 7 May 1982, following the House of Lords decision in *Lemon and Gay News Ltd v Whitehouse* [1979] AC 617.
[7] *Karataş v Turkey* App no 23168/94, ECHR 1999-IV.

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post-World War II world, as it legitimizes censorship, allowing State authorities and organs (the executive, the legislative or the judiciary) to reject dissident and otherwise unwanted art. It moreover does not resonate well with the history of art, and the fact that masterpieces revered today were rejected during their lifetime (Vincent van Gogh's paintings, Egon Schiele's drawings, Edgar Allan Poe's poems among others). The celebration of spaces once rejected by the institutional art worlds (such as the *Salon des Refusés* in Paris and the Secession Building in Vienna)[8] is proof that the next generation might cherish what its predecessors loathed. The problem is equally acute in attempting to draw the boundaries of 'art' (that remains unregulated and legitimate) as opposed to pornography or obscenity. The fine line between the two may not be immediately perceptible, and in any event is subject to subjective appreciations. It took a long time for films such as the *Realm of Senses* (1976) – and its sequel, the *Empire of Passion* (1978) – to be considered part of the 'cinematography' genre. Domestic jurisdictions have a privilege in establishing their own standards in order to differentiate between the two. Until the 1970s the Supreme Court of Japan (*Saikô saibansho*) rejected such expressions as 'shameful', holding that even high artistic value cannot preclude upholding a conviction for obscenity.[9]

In this sense, art can be intelligent, creative and powerful, as well as bad, boring and meaningless, or even cruel and shameful. Should such art then be rejected as unlawful? Framing the arts within the realm of the law raises immediate suspicion, as explained above. Yet, there must be something special about art – the distinct and 'autonomous' nature of art, that has been so well defined by the German Constitutional Court in *Mephisto*.[10] People more often than not react to works of art. Art history shows that art has the power to move, fascinate and exalt human spirit, as well as profoundly shock and disturb it. Artworks will be cherished and loved, placed in valuable positions within households, displayed in galleries and bought at astronomical prices. The mere existence of the art market, despite its fallacies, is evidence of

[8] The fringe of which appears on a collectors' 100-euro golden coin, issued by the Austrian government, see <https://coinweek.com/world-coins/austria-2004-vienna-secession-100-euro-gold-coin/>.

[9] *Koyama et al. v Japan* 11 Keishu 997, 13 March 1957 (DH Laurence, *Lady Chatterley's Lover*); *Ichii et al. v Japan* 23 Keishu 10, 15 October 1969 (*Marquis De Sade's Prosperities of Vice*). See generally, Shigenori Matsui, 'Freedom of Expression in Japan' (1991) 38 Osaka Law Review 13, 31; James Alexander, 'Obscenity, Pornography, and the Law in Japan: Reconsidering Oshima's "In the Realm of the Senses"' (2003) 4 Asian-Pacific Law and Policy Journal 148. Also Chapter 6 of this book.

[10] *Mephisto* 1 BvR 435/68 (24 February 1971) BVerfGE 30, 173 at para 49. See Edward Eberle, 'Art as Speech' (2007–08) 11 *University of Pennsylvania Journal of Law and Social Change* 1, 7.

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human attachment to artworks. The death of an artwork resembles the death of a human being. How can one explain otherwise that the day after the theft of the Mona Lisa (in August 1911) the Louvre was flocked with people – to see, not a painting, but the absence of it.[11] Hot-blooded spectators may even end up hugging and kissing artworks; although not without consequences, as in the case of the woman who left a red lipstick mark on Cy Twombly's painting during an exhibition in Avignon, France.[12]

'It happened to me', writes Leonardo da Vinci in his *A Treatise on Painting*, 'to paint a religious picture which was bought by someone who loved him so much that he would have liked to have all the sacred decoration disappear in order to be able to kiss it without remorse'.[13]

Others have attempted to take artworks with them to eternity – not that long ago a Japanese millionaire made headlines by insisting that he be buried along with Van Gogh's *Portrait of Dr. Gachet*.[14]

Akin to human beings, artworks are not only loved. They may be hated and loathed, vandalized and become objects of ferocious attacks. Creators of despicable, blasphemous, obscene or otherwise transgressive artworks have been the object of curses and aphorisms. The case of Nikos Kazantzakis, whose novels *The Last Temptation of Christ* and *Capitan Michalis* cost him an aphorism by the Greek Orthodox Church provides an apt illustration. In fact, both censorship and vandalism are quite common in the art worlds, especially in respect of works perceived as blasphemous, or offensive to religious sensibilities. Many controversial artworks that have become objects of legal disputes have been attacked, including for instance Andres Serrano's *Piss Christ*,[15] Otto Muehl's *Apocalypse*[16] and the works exhibited at the *Caution, Religion!* ('Осторожно, религия!') exhibition in the Sacharov Museum in Moscow.[17] Yet, vandalism does not necessarily involve or give

[11] Darian Leader, *Stealing the Mona Lisa: What Art Stops Us from Seeing* (Counterpoint 2004) 3.

[12] AFP, 'Le baiser au rouge à lèvres sur une toile de Cy Twombly: 1500 euros' (Libération, 16 November 2007) <www.liberation.fr/societe/2007/11/16/le-baiser-au-rouge-a-levres-sur-une-toile-de-cy-twombly-1500-euros_8379> [in French].

[13] Ernst Gombrich, *Art and Illusion: A Study in the Psychology of Pictorial Representation* (Princeton University Press 1960) 82–83.

[14] Anon, 'Ashes to Ashes, but Not with Your Van Gogh' (Newsweek, 26 May 1991) <https://www.newsweek.com/ashes-ashes-not-your-van-gogh-203950> (noting that by cremating the artworks, the heirs would avoid paying inheritance tax for the two masterpieces that were bought for more than $70 million each).

[15] See Chapters 6 and 7 of this book.

[16] *Vereinigung Bildender Künstler v Austria* App no 68354/01, Merits and Just Satisfaction, 25 January 2007, chapter 1 and 6.

[17] *Yuriy Samodurov and Lyudmila Vasilovskaya* App no 3007/06, 15 December 2009 (inadmissible).

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rise to legal disputes as such. For example, in 1999, despite the sensation created by Italian artist Maurizio Cattelan's *La Nona Ora*, which depicted the Pope struck down by a meteorite, during its exhibition in Warsaw, there were no criminal charges, damage or legal dispute submitted to the courts.[18]

A discussion concerning the vandalism of artworks and the 'colourful imaginary' of poems from an international law perspective might appear paradoxical to international lawyers. 'Traditionalists' may well perceive artistic freedom as irrelevant, or at best peripheral, to the field of international law. Key arguments may suggest that although the individual (and their rights) is a concern of international law, cultural matters typically remain within the sphere of State sovereignty, and that limitations to artistic freedom, including prior restraints, are legitimate exercises of State sovereignty – especially in matters pertaining to morality and religion. These arguments would, however, not do justice to the evolution of international law during the last couple of decades – including the expansion of human rights law as an important area of law and the advent of individuals (and to some extent also communities) as subjects of international law.[19] In fact, international law sets the framework for the realization of artistic freedom in various ways.

First, artistic freedom is beyond doubt part of the international human rights edifice. Most States have undertaken obligations to respect artistic freedom with reference to treaty law, chiefly with a view to protecting both free speech and cultural rights. Universal human rights bodies have been especially proactive in striving to safeguard this freedom of the artist – as well as its limits vis-à-vis unacceptable expressions of hatred, racial superiority or religious intolerance – as discussed further in Chapters 2 and 3 of this book. To date, the European Court of Human Rights has issued over thirty judgments that are directly relevant to artistic freedom (especially with respect to satire) and elaborated a detailed methodology with respect to balancing this right against other rights and public interests. Because of the evolution of human rights law, States are or should be held accountable for the violation of artistic freedom. This is especially true in respect of States that regularly impose prior restraints and discriminate without reasonable and objective justifications against certain types of art. Most States routinely promote certain

[18] See Jean-Cristophe Claude, *Les grands scandales de l'Histoire de l'Art : cinq siècles de ruptures, de censures et de chefs d'œuvre* (Beaux Arts 2008).

[19] Indicatively, Andrew Clapham, 'The Role of the Individual in International Law' (2010) 21(1) *European Journal of International Law* 25; Rosalyn Higgins, 'Human Rights in the International Court of Justice' (2007) 20 *Leiden Journal of International Law* 745.

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forms of expressions over others, including by privileging particular types of art (e.g. arts that are in line with the State's cultural or religious identity). Even this well-established State prerogative, however, has been eroded with the increased participation of communities in cultural – and artistic – governance.[20] In other words, States can no longer freely ban films, plays and songs or seize books and artworks as they please without being subjected to some type of accountability. Human rights mechanisms, intergovernmental organizations, civil society and increasingly also courts and tribunals have the power to scrutinize States' restrictions to artistic freedom; discriminatory policies that impede artistic freedom; and even those that inhibit the promotion of cultural diversity.

Second, artistic freedom is indirectly promoted by the safeguarding of artists' intellectual property (IP) rights.[21] The Berne Convention's guarantees of moral and economic rights have been also incorporated in article 15(1)(c) of the International Covenant on Economic Social and Cultural Rights (ICESCR).[22] Consequently, any prejudice against authors' IP rights also falls within the protective scrutiny of the Committee on Economic, Social and Cultural Rights (CESCR), State reporting and individual complaints (by virtue of the 2009 Optional Protocol to the ICESCR). Intellectual property rights can also be claimed before regional human rights bodies on the ground that they constitute property rights; privacy rights (with respect to moral rights); and eventually also as cultural rights. Intellectual property claims could, therefore, also be addressed by human rights bodies. The American Convention on Human Rights specifically addresses cultural rights in article 26 and the Additional Protocol of San Salvador (which in turn recognizes the right to take part in the *artistic* life of the community). Moral rights are directly relevant to the promotion of artistic freedom in the public space, as the latter is clearly of no use if any member of the public is given a right to request the government to stop or remove from the public space anything it finds controversial or offensive. These questions will be discussed in more detail in Chapter 5 of this book.

[20] International Law Association, International Law Association Committee on Participation in Global Cultural Heritage Governance – Final Report (2022).

[21] cf UN Human Rights Council, 'Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed', 14 March 2013, UN Doc A/HRC/23/34, paras 6–8.

[22] Article 15 of the ICESCR contains a provision that guarantees authors' rights, both moral and copyright. For an overview on the human rights 'lens' see indicatively, Peter Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property' (2016) 69 *SMU Law Review* 37–95; also UN Human Rights Council, 'Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed', 24 December 2014, A/HRC/28/57.

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Third, various international agreements and declarations promote cooperation in cultural matters. UNESCO is mandated precisely to promote the arts, as part of its 'cultural cooperation' objective. When UNESCO was set up in 1945, the States parties to the UNESCO Constitution agreed to collaborate in the fields of culture and education, with the aim of contributing to peace and security, and 'in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world'.[23] Most UNESCO conventions, recommendations and statements equally have an impact on the realization of artistic freedom, and the work of many artists in the field, especially those whose work is engaged and politically coloured. This is even more true since the protection of the art is no longer associated with high arts alone, taken in their elitist sense. In the 1980s, UNESCO solemnly defined 'artists' extremely broadly,[24] emphasizing the role of freedom in the creative process, and in cultivating talent:

> Member States, recognizing the essential role of art in the life and development of the individual and of society, . . . have a duty to protect, defend and assist artists and their freedom of creation. For this purpose, they should take all necessary steps to stimulate artistic creativity and the flowering of talent, in particular by adopting measures to secure greater freedom for artists, without which they cannot fulfil their mission . . ..[25]

Fourth, the actual 'product' of artistic practice is to be protected and safeguarded as part of States' cultural heritage, whether tangible or intangible, for the benefit of present and future generations. In addition, the promotion of artistic expressions are equally part of State agendas in terms of media and artistic content, and in some cases they are synonymous with the promotion of intangible cultural heritage (and also, living traditions and 'traditional cultural expressions). This is also the case with respect to indigenous and tribal arts, as well as certain types of art, such as, for instance, performance, oral arts and other arts that manifest particular know-how. In other words, a good part of cultural heritage law may at times overlap or eventually also conflict with artistic freedom. Competing claims over cultural heritage and artistic freedom may lead to conflict and impair the right of communities to enjoy their heritage. As the first UN Special Rapporteur on Cultural Rights noted, a sensible balance needs to be achieved between the protection of artistic

[23] UNESCO Constitution (1945), adopted in London, United Kingdom, 16 November 1945, Preamble.
[24] UNESCO, 'Recommendation concerning the Status of the Artist' (Belgrade 1980), article 1(1).
[25] ibid at para 3.

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freedom and the boosting of creativity on the one hand, and the protection of cultural heritage against misappropriation[26] on the other.[27] In addition, within the context of UNESCO and other intergovernmental organizations, various initiatives have been undertaken by States to promote the principle of cultural diversity in a spirit of openness to different cultures and religions. This is self-evident given that States are also increasingly interested in strategies to attract tourists by means of cultural cooperation, as well as enhancing their profile as open and culturally diverse.

Fifth, artists (as well as musicians, performers, film-makers, writers, cartoonists, etc.) working to promote the cause of human rights are protected also in their capacity as human rights defenders. The starting point is the Declaration of Human Rights Defenders (HRDs).[28] Article 2(1) of this declaration refers to the general responsibility of States to protect, promote and implement all human rights on their territory, whereas article 2(2) refers to the duty of States to take all necessary steps in order to ensure that these rights are effectively guaranteed. It is not possible to dissociate in this scenario artistic freedom from the defence and promotion of human rights.[29] One should think of the case of Tuany Nascimento, for example, the Brazilian dancer who initiated a 'favela dance school' teaching girls how to dance in slums and helping them to 'make something with their lives',[30] or Tousin Chiza (Tusse), the Congolese-Swedish singer with a refugee background who participated in the 2021 Eurovision Song Contest.[31]

[26] Misappropriation and copyright related to artistic freedom involving communities and indigenous peoples' rights are not part of this study. Chapter 5, however, is specifically dedicated to questions touching upon IP rights in the case of street art and 'urban identities', to the extent that these issues relate to artistic freedom and the values that States ultimately aim at safeguarding.

[27] UN Human Rights Council, 'Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed', 21 March 2011, UN Doc A/HRC/17/38, para 12.

[28] UN General Assembly Resolution, 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms', 8 March 1999, UN Doc A/RES/53/144, Preamble.

[29] UN Human Rights Council, 'Report of the Special Rapporteur in the Field of Cultural Rights, Karima Bennoune', 20 January 2020, A/HRC/43/50, at 3, para 8 (d) (noting that 'cultural rights defenders' include those who 'use their work in the arts or culture to defend human rights generally').

[30] Priscilla Frank, 'How One Brazilian Dancer Is Changing the Lives of Young Girls through Ballet', 10 April 2016 <www.huffpost.com/entry/tuany-nascimento-ballet-brazil-teacher_n_57f3df18e4b0703f75913e5c>.

[31] UNHCR, 'Three Performers with Refugee Backgrounds Participate in Eurovision 2021', 18 May 2021 <www.unhcr.org/news/press/2021/5/60a3f1214/three-performers-refugee-backgrounds-participate-eurovision-2021.html>.

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Finally, since the end of the Cold War, the international community has witnessed the rise of religious extremism, including in particular Islamic fundamentalism. A certain manifestation of this extremism has found fertile ground in controversies related to artistic expression. The deliberate and systematic destruction of cultural heritage in many parts of the world and especially the Middle East is arguably part of the same narrative, although it has consistently been condemned by Muslim scholars and international lawyers alike,[32] and also by well-known religious figures from the Islamic world, such as Imam Qaradawi.[33] Subsequently, questions related to artistic freedom and offences to religious beliefs are broader than artistic freedom per se, touching upon sensitive issues related to the dynamics between States of different cultural and religious identities, beliefs, customs, traditions, wealth, values and ideologies.[34] States are deemed to coexist harmoniously and be able to cooperate inter alia with the aim of promoting and encouraging respect for human rights.[35] In practice, however, the symbiosis is far from easy. The variety of approaches to artistic freedom controversies, precisely reveals the need for tolerance and a better management of cultural diversity not only at the national level, but also in international law.

This book does not aim to offer a one-size-fits-all solution, nor does it intend to provide answers to all questions touching upon artistic controversies, or 'cultural conflicts'. Rather, it endeavours to contribute towards a better interpretation of the legal dimension of such controversies, the specificity of art and eventually also corroborating arguments that suggest distinctive legal treatment for artworks and artists. Artistic freedom is only the first step of the creative process and as such it should be thoroughly understood and preciously safeguarded. Imagination can never be limited – yet this should not be an excuse for intolerance, hatred or fanaticism. Many of the questions addressed in this book touch upon sensitive issues, at the heart of the cultural (and religious) sphere and way beyond the boundaries of international human rights law.

[32] Indicatively, see Francesco Francioni and Federico Lenzerini, 'The Destruction of the Buddhas of Bamiyan' (2003) 14 *European Journal of International Law* 619, 621–24; Maulana Wahiduddin Khan, 'The Preservation of Culture' in *Proceedings of the Doha Conference of 'Ulamâ on Islam and Cultural Heritage* (UNESCO, 2005) 65.

[33] Hamid Al-Ansari, 'Islam and the Preservation of the Human Heritage' in *Doha Conference supra* note 32 at 27, 31.

[34] On coexistence and divergences, see Georges Abi-Saab, 'Whither the International Community' (1998) 9 *European Journal of International Law* 248, 250.

[35] Article 1(3) of the UN Charter.

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1

Defining Art

'Art' as an object of legal exploration is a fascinating topic. The first feature of this fascination is arguably law's love for rules, order and definitions. In discussing the nature of law, Joseph Bingham explained the process of advancing knowledge through definitions:

> Definitions are made of words, phrases, and other labels. Formulae are devised. Orderliness and systematization are aimed at throughout. All of these mental processes . . . are inspired by the purpose of acquiring, retaining, and communicating knowledge concerning concrete objective phenomena.[1]

There are various instances where a definition is crucial in determining the legal status of either an object or a person. Definitional imprecision is typical in legal disputes involving aesthetic judgements. Dilemmas associated with the definition of an artwork arise even in cases that are seemingly unrelated to the arts, at least in the sense that most people understand this term. A good illustration is offered by a case discussed by the US Supreme Court, whereby an expert baker and devout Christian running a bakery in Colorado refused to sell a wedding cake to a gay couple.[2] The couple subsequently filed a complaint with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.[3] The baker in turn invoked not only his religious freedom, but further, his constitutional right to free speech, and the fact that he could not be compelled 'to exercise his artistic talents to express a message with which he disagreed'.[4] In the opinion delivered by Justice Kennedy for the

1 Joseph W Bingham, 'What Is the Law' (1912–13) 11 *Michigan Law Review* 1, 7.
2 *Masterpiece Cakeshop, Ltd. v Colorado Civil Rights Commission* 584 US (2018).
3 ibid at 1.
4 ibid at 7.

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