EFL Syllabus Design: Institutional Sustainability and Copyright

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Creative Commons; EFL; copyright; fair use; institutional sustainability; intellectual property; open source; public domain; syllabus design

Abstract
This paper considers the problems inherent in syllabus design, creation and implementation in the face of confusing, diverse and changing copyright legal regimes. It traces the historical development of copyright and discusses its present implementation in the United States, Japan, and internationally. Finally, it lists a number of alternative resources that a syllabus creator can make use of without concern of claims from copyright holders.

Introduction
This paper discusses copyright law as it pertains to institutional sustainability in teaching English as a foreign language in a Japanese tertiary educational context. Sustainability has been widely discussed in the context of a content-based EFL curriculum, and in this context, the interpretation of the term usually points to content relating to environmental issues such as climate change, pollution, water use and rights etc. There is sound reason for this. Research shows that comprehensible and meaningful input is a minimum requirement for language acquisition\(^1\), and since students will live in a world much affected by environmental problems, these issues are certainly relevant and meaningful. However, the present paper does not discuss sustainability in this context, and the author has set out a justification for such content elsewhere\(^2\). Rather, the focus is on institutional sustainability in the context of copyright law. This focus on institutional sustainability and English as a foreign language is intentionally narrow. However, many of the issues relating to copyright law have wider application to syllabus design in general.

Before beginning a discussion of relevant matters, it is necessary to define what I mean by institutional sustainability. I will define this term to mean the creation, development and adoption of course materials that are specifically targeted to a group
of learners, and importantly, that such materials can be amended and augmented over the long term so that they remain relevant. One may question at this point the necessity of taking the trouble to create such a syllabus when conventional textbooks are available in abundance. I have detailed elsewhere why I believe such institutionally created course materials can provide a superior alternative to traditional textbooks\(^3\). However, a brief summary is relevant here. In short, course materials should fulfill the following criteria:

From a learner perspective, the following five criteria are essential. They should fit the learners’ needs, being not too easy, nor too difficult. In addition, they should be relevant to the learners’ goals. In order to maintain motivation, they should be interesting and attractively presented. From an instructor’s perspective, course materials should incorporate flexibility so that they can be targeted to learners with disparate abilities. They should also be amenable to augmentation with auxiliary materials.

Traditionally published EFL textbooks face difficulty in achieving the above criteria. For commercial reasons, a typical textbook is targeted at a wide audience; often this audience is in different countries and comprises a different cultural and educational background. It’s an unfortunate fact that the goals of such a broad audience are unlikely to coincide with a particular group of learners. An obvious solution is to adjust and augment such materials to more aptly fit the needs of a particular group of learners. Unfortunately, as we shall see, copyright restrictions often prevent such a solution.

The EFL teacher today is offered a broad array of choice when it comes to including material in a syllabus. Compared to a quarter of a century ago, when all that was available was text and cassette-based audio, there is an almost limitless choice. There are various new forms of audio and video content, and as well as traditional cassette and CD forms, audio is available as MP3, audiobook, podcasts and various streaming audio forms. Streaming video is ubiquitous, not only in the popular YouTube\(^4\), but many news networks offer streaming video versions of their broadcast content. Some websites have used this availability to offer EFL materials for students and educators that include value added options such as built in subtitles and phonemic transcriptions, the ability to repeat all or part of a video or audio segment, the ability to slow down audio, translation in the L1 and voice recognition to monitor a student’s pronunciation.

Educators can use this wide variety of content to augment a syllabus and provide interesting, meaningful and topical content. In fact, one problem is the astonishing amount of potential content that is available; it takes time to sort through it
to find appropriate content. However, another and more serious limitation is the problem of ownership. How does copyright law apply to this content, and how much is available for inclusion in a syllabus? In addition, from the point of view of sustainability and in view of the rapidity that copyright law is evolving, how much of this content will be available?

The remainder of this discussion will address these intellectual property issues from the point of view of syllabus design. I will begin with a historical overview of copyright law. The focus will be on the law of the United States, but as will become plain, although there are regional variations, the pressure of a global media market means that through international treaty, there is abundant uniformity in the restrictions imposed by copyright regimes. Following this historical overview, I will consider the law as it applies to all aspects of syllabus design today and attempt to anticipate future trends. This will include, of course, an elaboration of the concept of fair use. Next, I will discuss trends that point to the need for caution when incorporating digital content into a syllabus. Finally, I will consider public domain and creative-commons alternatives that avoid some of the risks inherent in using proprietary content in a syllabus.

It should be noted that these risks are real but should not be over-emphasized. The law is complex, and, in the face of rapidly evolving technology, in a state of flux. Intellectual property owners are often large corporations with the resources to aggressively pursue copyright claims. In the face of this, school administrators and syllabus creators, who do not have the time to become experts on copyright law, naturally apply caution and follow an “if in doubt, leave it out” approach. The result is that content that might be available through fair-use or other provisions is left out. The further result is that administrators and syllabus creators often elect to avoid risk by choosing a conventionally published textbook. It is not hard to see that this state of ignorance of the law on the one hand and aggressive assertion of property rights on the other serve the interests of the rights holders.

History

In practical terms, the notion that a creator had what amounted to property rights in his or her creation could not have existed prior to the development and spread of printing in the fifteenth and sixteenth centuries. Prior to this time creative literary works were largely oral or, if they did exist in written form, were one-off editions or painstakingly hand copied. Governments reacted swiftly to the spread of printing, but at first it was a response to the fear that seditious or revolutionary works could be printed in large numbers. To address these concerns, laws were passed that limited the
number of printers. In England, for example, printing was allowed by two universities and a number of printers in London. The number of copies a printer could print was also controlled. Implementation of these laws led to a concern that relatively few printers, or stationers as they were then called, would have permanent monopoly rights over literary works. In practice, the result was a high cost and limited supply of available books. As a consequence, this permanent monopoly was ended, and printers were given exclusive rights to print a particular work for a limited period. This limited monopoly, originally designed to effectively censor publications, evolved into the copyright law that exists today.

Common justifications for a role for copyright take two forms: first that a creator deserves to be fairly compensated for a creative work, and second, that such protection in law will stimulate innovation and creativity. This second justification is incorporated in the title of the first modern copyright statute promulgated in 1710 in England: An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or purchasers of such Copies, during the Times therein mentioned. Commonly known as the Statute of Anne, Queen of Great Britain at the time, this law forms the foundation from which many of the copyright laws we have today developed. The Statute provided for a limited term of 14 years within which it was illegal to make copies of a work. This period was extendable for a further 14-year period, but only if the author was alive at the end of the original period. The newly founded United States passed its first copyright legislation in 1790. It largely followed the wording of the earlier British law and maintained the same initial and renewal periods. It did, however, go beyond the earlier law, and extended copyright coverage beyond books to maps and charts. In the succeeding two centuries two trends are apparent with regard to copyright law. First is the increasing internationalization of such law, and second is the expansion of both the length of copyright protection and the kinds of works it applies to. Both these trends are unsurprising in the context of increasing globalization and the spread of technology, but in the context of the present discussion, some elaboration is useful.

**Internationalization**

First, in the context of globalization, it is obvious that without international treaties covering copyright, it would be a trivial matter to copy a work in a different jurisdiction and suffer no penalty. Indeed, this is what happened in the early days of copyright. Benjamin Franklin notoriously reprinted the works of British authors without compensation, and William Wordsworth lobbied Westminster in this regard.
Charles Dickens went further and petitioned the US Congress during a speaking tour of America. Gradually, nations came to realize that to protect and promote literary development, some reciprocity between nations was necessary. This reciprocity was achieved in The Berne Convention. Established in 1886, and renewed and expanded on several occasions since, it was the first international copyright treaty to cover many countries. The convention applies to literary and artistic works including film and recorded audio. Signatory nations to the convention must agree to certain key concepts. One of these is the concept that member states grant the same rights to foreign copyright holders as those held by natives. Another key concept is that signatories agree to a minimum copyright period. Currently, for literary works, this period is the creator’s lifetime plus 50 years. Significantly, the convention sets out the principle that exemptions to the law exist, but it does not enumerate those exceptions other than quotations, educational and news-reporting use. These exemptions will be significant in our later discussion of fair use.

**Expansion of Owner Rights**

The second trend that has developed over the last two centuries is the expansion of both the length of copyright protection and the range of works it applies to. With regard to length, unsurprisingly, content creators have been energetic in advocating extension of the original 14-year term. Authors from Noah Webster to Mark Twain have lobbied in this regard, the latter arguing in 1909 for a period of the author’s life plus 50 years. Twain’s advocacy saw realization in 1976 with the US Congress passing law that extended the period precisely as Twain had advocated. This law came into effect in 1978 and contained two further provisions that are significant in the present discussion. First, it retroactively extended the copyright term to works that had earlier come into the public domain. The significance of this is plain. If copyright can be extended retroactively, reliance on the present public domain status of a work is a risky proposition for a syllabus creator. Second it enumerated what constitutes fair use, which up to that time had been open to interpretation. It is debatable as to whether this is in the interest of a syllabus creator. On the one hand, such enumeration can be seen as helpful in removing ambiguity; on the other, it can be viewed as restricting the ambit of fair use.

In 1998, the public domain was further eroded through the Copyright Term Extension Act, which added a further 20 years to the copyright of works published before 1978, now providing for the life of the author plus seventy years. One day after signing this legislation, President Clinton signed into law the Digital Millennium
Copyright Act (DMCA), which made the US a party to the World Intellectual Property Organization (WIPO) Copyright Treaty. As the name implies, the DMCA focuses on digital works. Among other provisions, prima facie it makes illegal the circumventing of digital rights management software that is built into digital media and criminalizes such practice even if there is no copyright infringement. Exemptions to these provisions of the law can be made upon application to the Registrar of Copyrights, and exemptions are granted or not following hearings that consider whether or not there is an adverse effect on the ability of the public to make a non-infringing use. Exemptions are valid for three years. Current exemptions provide that with regard to movies, circumventing digital rights management copy protection by professional educators is permissible for educational use as well as for making non-commercial videos.

The case law in the US is in a state of flux. Use of extracts of copyrighted works may be legal under fair use provisions, but circumventing digital rights management copy protection may be a criminal offense. Moreover, it appears clear that it is illegal for a software developer to provide software that makes possible such circumvention. Another gray area is the once common university practice of providing students with copies of chapters or extracts from a range of works at cost. Such practice may or may not be legal, but uncertainty in the application and scope of the law means that the practice has become much less common. As with so many aspects related to copyright law, this uncertainty operates to the advantage of the rights holder. The threat of litigation means that university legal counsels advocate minimizing risk. Accordingly, fair-use rights are not pursued to the extent that they might be.

Japan

In 2012 Japan passed an amendment to its copyright law that, if implemented, will have sweeping effect. The new law criminalizes three things: breaking the copy protection of digital media, the sale or distribution of software that makes possible the former, and the intentional downloading of illegally uploaded material. The first two provisions will make it impossible for an educator exercise fair-use exemptions to copyright restrictions because in order to access the exempted content, he or she will have to break the copy protection, thereby committing a criminal offense.

The third provision, the intentional downloading of illegally uploaded material, is also potentially limiting from the point of view of an educator. Increasingly, streaming video sites, for example, YouTube, have become a rich source of short meaningful and relevant video to provide to students. Indeed, some EFL websites have used this availability as a central feature. With the implementation of Japan’s new law on October
1, 2012, accessing such sites may well be a criminal offense. When a user accesses YouTube or a similar site in order to watch a video, the site sends data to be temporarily stored in the memory of the user’s computer. This is known as caching and is necessary to ensure the smooth playback of the video. When the video is over, this data is deleted. The problem is that upon a strict application of the law such an action constitutes a criminal offense. Legislators and rights holders may reassure us that criminalizing sites such as YouTube is not the intent of the law, but once again, academic administrators are likely to take a cautious view and prohibit such action on campus.

**Fair Use**

Fundamentally, the concept of copyright is a way of balancing the interests of the creator and/or publisher of a work and the interests of everyone else. Creators and publishers claim certain rights in their works or publications, and as justification for such rights make the following arguments:

That there is a fundamental natural law that provides a right to property. Traditionally, in the common law realm, two kinds of property were recognized: real estate (chattels real), which included immovables, and personal property (chattels personal), which included everything else. This latter category was further subdivided into tangible and intangible things. Tangibles comprise physical objects that we can touch; examples are cars, watches, bananas etc. Intangibles are made up of assets such as debts, shares or bonds, or anything else that can be subject to recovery in a legal claim. Copyright, as we have seen, is a latecomer to the category of personal property, and comes within a new class of intellectual property. It is not hard to imagine why copyright was a latecomer to be subject to jurisprudence. All other property is made up of objects that we can be deprived of. If, however, someone copies a literary or artistic work, the original owner or creator still retains his or her copy. Moreover, as mentioned above, the notion itself of copyright was practically irrelevant prior to the development and spread of the printing press. Notwithstanding its relatively recent addition to the sphere of property law, it is almost universally acknowledged that copyright is a property right. A further justification for copyright is that an author should be able to expect just compensation for his or her work, that such an expectation will serve to encourage creation and innovation, which in turn will serve the public good.

As a balance to these individual property rights is the concept that the public has certain associated rights, and this is explicit in both the Universal Declaration of
Human Rights (Article 25):

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

And the US Constitution (Article I, Section 8):

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Note, in particular, the reference to limited times in the US Constitution. This principle of a limit to exclusivity is universal in copyright regimes, including, as noted above the Berne Convention.

Also universally recognized are exceptions to copyright wherein some or all of a work may be used without the rights holder’s permission. These concepts are known as fair use or fair dealing, depending on the jurisdiction. The Berne Convention anticipates these uses in Articles 9(2) and 10:

Article 9

(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.

(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

Article 10

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.
(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author, if it appears thereon.

Other than a specific exemption for quotations, in paragraph 2 above, the treaty leaves it to individual nations to create exemptions for teaching uses. Note also the vague wording, “...extent justified by the purpose.”

In the US, the concept of fair use existed in common law before being incorporated into legislation in the Copyright Act of 1976®. The relevant section bears setting out in full:

Notwithstanding the provisions of sections 17 U.S.C. § 106 and 17 U.S.C. § 106A⁹, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
the nature of the copyrighted work;
the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

This sets out a general exemption using a fourfold test: First, the purpose of the use – is it for profit, or for a public purpose? Second, the character of the use – is the work merely informational? A timetable or short dictionary definition might not be copyrightable. Third, what proportion of the total work does the use comprise? Fourth, how will the use affect the marketability of the work and, accordingly, the financial well
being of the creator?

This test, while more specific than the relevant portions of the Berne Convention, still requires interpretation by the courts.

In contrast to the US, Japanese law has no general exemption to copyright exclusivity. Rather, it sets out specific exemptions in chapter 2, Section 3, Subsection 5 of the Japanese Copyright Law. For our purposes, the following exemptions are relevant:

Reproduction, etc. in schools and other educational institutions:

Article 35

(1) A person who is in charge of teaching and those who are taught in a school or other educational institutions (except those institutions established for profit-making) may reproduce a work already made public if and to the extent deemed necessary for the purpose of use in the course of lessons, provided that such reproduction does not unreasonably prejudice the interests of the copyright owner in the light of the nature and the purpose of the work as well as the number of copies and the form of reproduction.

Article 35, on the face of it, would allow reproduction of a copyrighted work without permission, provided that 2 conditions are fulfilled:

1. That the educational institution is not established for profit making.
2. That the reproduction does not unreasonably prejudice the interests of the copyright owner, having regard to the nature and purpose of the work, the number of copies and the form of the reproduction.

The first condition would admit all national universities in Japan and most, but not all, private universities. The second condition really depends on the circumstances. It is reasonable to surmise that, for example, inclusion of a short video clip or audio shown in a class followed by questions would not prejudice the copyright holder? Perhaps also, providing a homework CD, DVD or downloadable file with several such clips would also fulfill the exemption provisions.

Fortunately or unfortunately, we do not have to ponder this point because, as noted above, as of October 1, 2012, it will not be possible, without breaking the law, to obtain such clips in the first place. Changes to Japanese Copyright Law will make it a criminal offense to either download such clips or to break digital rights management encryption in order to extract such clips from a CD or DVD. Unlike the US, where breaking DRM copy protection a gray area, in Japan, as of October 1, 2012, it will be a criminal offense.
Avoiding the copyright issue

From the above discussion, it is plain that the syllabus creator faces a number of problems. In practical terms, it is often difficult, and sometimes impossible, to make contact with the copyright holder in order to obtain permission to reproduce a work. In the case of orphan works, the copyright holder might be unknown. In addition, the syllabus creator faces two barriers if he or she is to exercise fair-use copyright exemptions. The first barrier is the potential of the risk of a cease-and-desist notice or the threat of litigation from a copyright right holder. At that point, a decision will have to be made to either revise the syllabus, perhaps substantially, or face up to the threat of litigation. Neither option is tenable. The former involves disruption; perhaps materials will have to be retrieved from students, websites and handouts revised. The latter involves, at minimum, considerable expense. It must be emphasized that these risks are there regardless of whether or not the claim of copyright is valid or not. It isn’t any wonder that, in the face of this, the cautious and sensible option from the point of view of institutional sustainability is to avoid the risk completely by adopting a conventional textbook. However, there may be other options.

A Third Way

The first, and obvious, option is to create a syllabus from scratch – in other words, to design and create all components of the syllabus. This is a less than ideal strategy for several reasons. First, such a strategy would require a huge investment in time and resources, which may or may not be available to the syllabus creator. However, even if such time and resources were available, this still may not be an ideal approach. It is, in a sense, recreating the wheel. I will suggest that an array of available resources already exists and that use of these will offer a wider and hence more interesting and attractive syllabus than one created from scratch by a single creator or a small group.

What are these available resources that do not incur the risk of a future claim by a copyright holder? They can be broken down into several categories:

Public domain

For the purpose of this discussion, works that are in the public domain consist of those whose copyright has expired, or that existed prior to the existence of copyright statutes. Examples are the works of Shakespeare, most early silent movies, and nineteenth century authors such as Charles Dickens and Mark Twain (although some
of Mark Twain’s work was published long after his death and is still under copyright). The situation is complicated by the fact that the term of copyright varies between countries, but in the US, for example, any book first published before 31 December 1922 is now in the public domain. Several online sources are available for free public domain books. Project Gutenberg[^10] is one website that contains a large library of public domain books. The site is localized in different counties and the library will vary depending on local copyright regimes. Project Gutenberg also has links to self-published books some of which have Creative-Commons (see below) licenses. It also has links to audio versions of some books, again subject to a Creative-Commons license. A Japanese site, similar to Project Gutenberg is Aozora Bunko[^11].

Archive.org[^12] is a collection of 200,000 electronic books, 100,000 concert recordings, and 700,000 films, the majority of which are in the public domain or subject to Creative-Commons licenses.

**Creative Commons**

Creative Commons is a non-profit organization that facilitates the sharing of creative content through the provision of various licenses. From the Creative Commons website FAQ[^13]:

*What is Creative Commons and what do you do?*

Creative Commons is a global nonprofit organization that enables sharing and reuse of creativity and knowledge through the provision of free legal tools. CC has affiliates all over the world who help ensure our licenses work internationally and who raise awareness about our work. Our legal tools help those who want to encourage reuse of their works by offering them for use under generous, standardized terms, those who want to make creative uses of works, and those who want to benefit from this symbiosis. Our vision is to help others realize the full potential of the Internet.

Creative Commons provides six different licenses, all of which, at minimum, require attribution. Other provisions might be:

- **Non-commercial** – this prohibits commercial use of the work;
- **Non-derivative** – this permits reproduction provided that the work is not modified;
- **Share-alike** – this permits modification provided that the modified version is subject to the same license.

Wikibooks[^14] is an open-content repository of textbooks that use Creative-Commons licenses.
Open-source software

Open-source software is software that developers provide to the public under various licensing conditions. Open-source licenses are similar to Creative-Commons licenses in that they allow reproduction under various conditions. One condition is that any modification to the software be also subject to an open-source license containing the same conditions. This ensures that future iterations of the software remain open and available and encourages others to improve and adapt the software. One example of software that developed within the open-source movement is the Linux operating system.

Miscellaneous resources

Resources available to syllabus creators are abundant and growing every day. YouTube, although a risky source for content, provides publishing options that have attractive options for creators such as closed captions, subtitles, and the ability to stream video and audio at various resolutions. Creators can also choose levels of privacy in deciding to whom to make content available. Voice of America operates a website with public domain content specifically targeted at English language learners. Flatworld is a publisher of free and open textbooks and video seminars (webinars). Curriki is an open curriculum sharing resource aimed at K-12 students.

These are just a few of a growing number of sites that contain content available without traditional copyright restrictions. In addition to resources such as these, there are online encyclopedias and dictionaries, and it must also be emphasized that the Internet itself provides an environment in which people in disparate locations can cooperate in syllabus creation.

Conclusion

The challenges facing a syllabus developer are daunting. Not only is copyright law complex, but it also varies from region to region. Further, the law is not immutable, and as we have seen, there is no guarantee that a work in the public domain today will remain there in the future. The fair-use doctrine would appear to come to the aid of the developer, but in practical terms, the threat of litigation rather than the substance of a claim in any particular case is often sufficient to deter the fair use. However, despite this challenge, there is a large and growing resource of media in various forms that a developer might use. In addition, along with this growing source of materials, there is a growing community of developers who are cooperating to facilitate institutionally
sustainable curriculum development. These resources and this community provide an alternative to traditional licensing models that were set up in an age that did not contemplate digital distribution of works.

In contrast to the trends outlined above, wherein digital rights management regimes and copyright extension combine to limit the availability of resources, and the legal system, in practice, makes fair use impracticable, trends in technology are likely to make enforcement of present copyright law itself impracticable. Rapid change in computer processing power, data storage cost and data transfer speeds will combine to make present copyright enforcement impossible. The rational, and in my view reasonable, response will likely be an enforced license in which fees will collected in the form of a hardware, storage medium or bandwidth levy. At this stage, the resources available to the syllabus developer become virtually unlimited and institutional sustainability guaranteed.

Endnotes

4) http://www.youtube.com/
7) Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979
9) Section 106 sets out exclusive rights in copyrighted works, and Section 106A sets out rights of attribution.
10) http://www.gutenberg.org/
11) http://www.aozora.gr.jp/#main
12) http://Archive.org/
13) http://wiki.creativecommons.org/FAQ
14) http://en.wikibooks.org/wiki/Main_Page
15) http://learningenglish.voanews.com/
16) http://www.flatworldknowledge.com/
17) http://welcome.curriki.org/about-curriki/

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