

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DESPEGAR ONLINE SRL, DONUTS INC.,) ICDR CASE NO. 01-15-0002-8061
FAMOUS FOUR MEDIA LIMITED,)
FEGISTRY LLC, AND RADIX FZC,)
)
and)
)
LITTLE BIRCH, LLC AND MINDS +)
MACHINES GROUP LIMITED)
)
Claimants,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

**ICANN'S SUR-REPLY TO THE REPLY OF CLAIMANTS LITTLE BIRCH, LLC
AND MINDS + MACHINES GROUP LIMITED**

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For Assigned Names and Numbers

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Sur-Reply to the Reply submitted by claimants Little Birch LLC and Minds +Machines Group Limited on 19 October 2015.

1. Claimants each submitted standard applications to ICANN to become the operator of the .ECO gTLD. An entity called Big Room, Inc. (“Big Room”) submitted a community based application to operate .ECO and participated in Community Prior Evaluation (“CPE”). Claimants’ IRP Request arises out of a third party panel (“CPE Panel”) expert determination that Big Room’s application prevailed in CPE (“CPE Report”). Because Big Room’s application prevailed in CPE, only that application for .ECO will proceed. Specifically, ICANN’s Applicant Guidebook (“Guidebook”) provides that applications that qualify for “community” treatment have priority over “standard” applications such as those that Claimants submitted.

2. Claimants filed two reconsideration requests with ICANN’s Board Governance Committee (“BGC”) with respect to the CPE Report. One sought reconsideration of the CPE Report. The second sought reconsideration of ICANN staff’s determination, pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”), that certain documents related to the CPE Report were not appropriate for public disclosure under the DIDP criteria.

3. The BGC denied both reconsideration requests, finding that neither the CPE Panel nor ICANN staff had violated any established policy or procedure (which, under ICANN’s Bylaws, must be shown in order to demonstrate a basis for reconsideration). Like their IRP Request, Claimants’ Reply presents no evidence that the BGC violated ICANN’s Articles or Bylaws in denying Claimants’ reconsideration requests. Also like their IRP Request, Claimants’ Reply improperly challenges the CPE process set forth in the Guidebook and argues that the Board should have intervened further with respect to the CPE Report.

4. Since the filing of Claimants' IRP Request, the IRP panel in *Vistaprint Ltd v. ICANN* ("*Vistaprint* ") issued a final determination in an IRP proceeding where the claimant: (1) argued that ICANN's Board should have intervened with respect to a third-party expert report issued by one of ICANN's vendors in conjunction with the New gTLD Program; and (2) sought to challenge the established procedures for how the third-party expert would render its determination. Like the IRP panel in *Booking.com v. ICANN*,¹ ("*Booking.com*") the panel in *Vistaprint* determined that the claimant improperly sought to challenge the independent judgment of ICANN's Board and that the claimant's challenges to procedures established in 2012 were time-barred.

5. As explained further below, a determination consistent with both *Booking.com* and *Vistaprint* is appropriate here. ICANN's Board has not taken *any* action that violates any provision of ICANN's Articles or Bylaws. ICANN's Board was not involved in the creation of the CPE Report and did not substantively review that report. Instead, the Board properly limited its review on reconsideration to assessing whether the CPE Panel had violated established policy and procedure, and correctly concluded that it had not. And, as in *Booking.com* and *Vistaprint*, Claimants' challenges to the CPE procedures are long since time-barred.

6. Lastly, Claimants repeat their allegation that granting priority to a community based application for a highly sought after gTLD (such as .ECO) is unfair.² However, as explained in ICANN's response to Claimants' IRP Request ("*IRP Response*"), the Generic Names Supporting Organization—the part of the ICANN community designated by the Bylaws as "responsible for developing and recommending to the [ICANN] Board substantive policies

¹ Claimants in this IRP are represented by the same law firm that represented the claimant in the *Booking.com* IRP, and are making the same arguments.

² Reply ¶ 45.

relating to generic top-level domains”³—specifically recommended that applications representing a community be given priority in string contention. Moreover, as that recommendation was incorporated into the Guidebook several years ago, any such challenge is long since time-barred.

7. In the end, the only Board actions properly reviewable in this IRP are the BGC’s denial of Claimants’ reconsideration requests. As explained in ICANN’s IRP Response and below, the Board acted in accordance with ICANN Articles and Bylaws in denying those requests.

ARGUMENT

I. THE BOARD PROPERLY DECLINED TO CONDUCT A SUBSTANTIVE REVIEW OF THE CPE REPORT.

8. Claimants argue that the CPE Report was “not a final decision,” and that the Board should have taken further action with respect to it.⁴ However, the Board took precisely the action that the Guidebook contemplates: the Board (through the BGC) reviewed Big Room’s application in conjunction with Claimants’ reconsideration request to assess whether the CPE Panel had acted inconsistently with any established policy or procedure in rendering the CPE Report. The BGC did not conduct a substantive evaluation of the CPE Report because doing so is outside of the Board’s mandate on reconsideration.

9. Specifically, ICANN’s Bylaws provide for review of “staff actions or inactions” only to determine whether those actions or inactions “contradict[ed] established ICANN policy(ies).”⁵ In the context of the New gTLD Program, the BGC recommended—and the

³ *Id.*, Art. X, § 1 (Cls. Ex. RM-2). Claimants submitted two sets of numbered exhibits with their IRP Request: (1) “Annexes”; and (2) “Reference Materials.” Citations to “Cls. Ex. Annex-___” refer to exhibits submitted in Claimants’ Annexes; citations to “Cls. Ex. RM-___” refer to exhibits submitted in Claimants’ Reference Materials. Citations to “Resp. Ex. ___” refer to exhibits submitted by ICANN.

⁴ *See, e.g.*, Reply ¶ 29.

⁵ Bylaws, Art. IV, § 2.2 (Cls. Ex. RM-2).

NGPC agreed—that reconsideration requests generally be permitted with respect to the actions of third-party experts and panels (“Third Party Providers”).⁶ Even though ICANN’s Board has extended reconsideration to Third Party Providers (reasoning that they are essentially acting in place of ICANN staff), in no way did it expand the scope of the review, which is still limited to whether the Third Party Providers’ actions contradicted established policies. As the NGPC has explained:

Reconsideration is not, and never has been, a tool for requestors to seek the reevaluation of substantive decisions. . . . ***[T]he Board is not a mechanism for direct, de novo appeal of staff (or evaluation panel) decisions with which the requester disagrees.*** Seeking such relief from the Board is, in itself, in contravention of established processes and policies within ICANN.⁷

10. The BGC has explained in detail the reasons that it does not conduct substantive reviews of expert determinations by reiterating the NGPC’s rationale that “the Board is not a mechanism for direct, de novo appeal of [] decisions with which the requester disagrees,” and further explaining that “there is not—nor is it desirable to have—a process for the BGC or the Board (through the NGPC) to supplant its own determination . . . over the guidance of an expert panel formed for that particular purpose.”⁸

11. As the BGC has indicated several times, expert panels – including those appointed by the EIU – were selected because they had specific expertise that the ICANN Board does not have, should not have, and was not expected to have.

12. Specifically with respect to CPE, the Guidebook is clear that it “will be performed by a community priority panel appointed by ICANN.”⁹ The Guidebook further explains that:

⁶ See Recommendation on Request 13-5 (Resp. Ex. 6). The BGC’s recommendation was adopted by the NGPC. NGPC Resolution 2013.09.10.NG02, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en>.

⁷ Rationale for NGPC Resolution 2013.05.18.NG04 (emphasis added) (Resp. Ex. 7).

⁸ BGC Recommendation on Request 13-5 at 9-10 (Resp. Ex. 6).

⁹ Guidebook, § 4.2.2 (Cls. Ex. RM-5).

(1) it is “the panel’s role [] to determine whether [a] community-based application[] fulfills the community priority criteria”; (2) “[r]esults of each [CPE] will be posted when completed”; and (3) those results will determine the outcome of a contention set (assuming only one community based applicant in that contention set prevails in CPE).¹⁰ The Guidebook does not contain **any policy or procedure** for appealing the determinations of CPE panels on substantive grounds, and this was an intentional decision by ICANN and the community.¹¹ Accordingly, the BGC’s decision not to conduct a substantive review of the CPE Report does not violate any provision of ICANN’s Articles or Bylaws. Rather, the BGC’s review was properly limited to whether the CPE Panel followed established policies and procedures in rendering the CPE Report.

13. Claimants have not identified any Article or Bylaws provision that the BGC violated in determining that Claimants had not stated a basis for reconsideration or in electing not to intervene further with respect to the CPE Report. Moreover, the fact that the Board determined that further action was warranted with respect to an entirely unrelated CPE report (regarding Dotgay LLC’s application for .GAY), or with respect to an entirely different Guidebook procedure (string confusion objections) does not change this analysis.

14. As the *Booking.com* IRP panel explained:

So long as the Board acts without conflict of interest and with due care, it is entitled—indeed, required—to exercise its independent judgment in acting in what it believes to be the best interests of ICANN

In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN’s best interests; where it does so, the only question is whether its actions

¹⁰ *Id.*

¹¹ *Id.* As Claimants acknowledge, the Guidebook procedures, including the CPE procedures, were adopted by ICANN after years of rigorous policy development and implementation that included extensive review and analysis by ICANN, as well as input and comment from legal and arbitration experts, numerous ICANN constituents and Internet stakeholders, and community members from around the world, all in compliance with ICANN’s Articles and Bylaws. IRP Request ¶ 17; *see also* ICANN Board Rationales for the Approval of the Launch of the New gTLD Program at 93-105 (Cls. Ex. RM-11); *see also id.* at 5-6.

are or are not consistent with the Articles, Bylaws, and, in this case, with the policies and procedures established by the Guidebook.”¹²

Just as the Board was not properly tasked with second-guessing the judgment of the CPE Panel, this IRP panel is not tasked with second-guessing the Board’s independent judgment that no further intervention was warranted with respect to the CPE Report.

II. NOTHING IN CLAIMANTS’ REPLY DEMONSTRATES THAT THE BOARD’S DENIAL OF CLAIMANTS’ RECONSIDERATION REQUESTS WAS INCONSISTENT WITH ICANN’S ARTICLES OR BYLAWS.

15. As explained above, the only Board actions properly at issue in this case are the BGC’s review of Claimants’ reconsideration requests. As such, the ultimate issue for this IRP Panel to address is whether the BGC’s review of those requests was in accordance with ICANN’s Articles and Bylaws. Claimants’ Reply presents no evidence that it was not. Instead, Claimants rely solely on the conclusory statement that they “have demonstrated that numerous process violations in the CPE process have led to erroneous advice by the CPE Panel.”¹³

16. ICANN’s IRP Response already refuted this assertion in detail. In denying Claimants’ request for reconsideration of the CPE Report, the BGC examined each of Claimants’ contentions regarding the CPE Report and the process followed by the CPE Panel, and correctly found that the Claimants had not demonstrated *any* violation of established policy or procedure (which is the standard of review for reconsideration requests).¹⁴

17. Insofar as Claimants continue to argue that the CPE Panel erred in finding that Big Room’s application prevailed in CPE, that allegation does not involve any Board action and thus is not properly the subject of independent review. In addition, as explained in ICANN’s

¹² *Booking.com* Final Declaration ¶¶ 108-109 (Resp. Ex. 1); *see also Vistaprint Ltd. v. ICANN*, Final Declaration ¶ 123 (“The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgment in taking a decision believed to be in the best interests of ICANN.”) (Cls. Ex. RM-50).

¹³ Reply ¶ 39. Claimants’ Reply does not address the Board’s denial of Claimants’ reconsideration request relating to ICANN staff’s response to Claimants’ DIDP request.

¹⁴ IRP Response ¶¶ 53-56; *see also* BGC Determination on Request 14-46 at 5-10 (Cls. Ex. Annex-9).

IRP Response, Claimants’ arguments rely on inaccurate characterizations of the CPE Report and on comparisons to irrelevant CPE reports for entirely unrelated strings.¹⁵

III. CLAIMANTS’ CHALLENGE TO THE CPE PROCEDURES IS TIME-BARRED.

18. The Guidebook, including the CPE procedures, was developed as part of a lengthy, open, transparent process that culminated in 2011 with the Board’s approval of the New gTLD Program.¹⁶ The current version of the Guidebook was published in 2012.¹⁷ As such, any challenges to the procedures set out in the Guidebook are long since time-barred because challenges to the Guidebook were due 30 days following its adoption.¹⁸ Indeed, the only two IRP panels to consider whether challenges to procedures set out in the Guidebook were proper, have found that such challenges are time-barred.¹⁹

19. For example, the IRP panel in *Booking.com* found that:

the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to [Guidebook processes], including Booking.com’s claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN’s Articles and Bylaws.²⁰

The *Vistaprint* IRP panel declared that “the time for challenging [Guidebook processes]—which w[ere] developed in an open process and with extensive input—has passed.”²¹

20. Claimants argue that the *Booking.com* IRP panel erred because it failed to consider that, in Claimants’ view, claimants “were effectively barred from challenging the

¹⁵ IRP Response ¶¶ 54-57.

¹⁶ IRP Response ¶¶ 40-44.

¹⁷ *Id.* at 42, 45.

¹⁸ Bylaws, Art. IV, § 3.3 (30-day deadline to file IRP request) (Cls. Ex. RM-2).

¹⁹ *Booking.com* Final Declaration ¶ 129 (Resp. Ex. 1); *Vistaprint* Final Declaration ¶ 172 (Cls. Ex. RM-50).

²⁰ *Booking.com* Final Declaration ¶ 129 (Resp. Ex. 1); *see also* IRP Response ¶¶ 46-47.

²¹ *Vistaprint* Final Declaration ¶ 172 (Cls. Ex. RM-50). Claimants fail to mention the *Vistaprint* panel’s finding, despite addressing that panel’s declaration in other portions of their Reply. And, contrary to what Claimants imply, no IRP panel has allowed claims challenging the Guidebook procedures. (*See, e.g.*, Reply ¶ 23.)

Guidebook because they could not – at that time – show any harm.”²² Booking.com made precisely the same argument in its IRP, but the *Booking.com* IRP panel rejected the argument, finding that “[a]s did all stakeholders, Booking.com had the opportunity to challenge the Board’s adoption of the Guidebook, at the time, if it considered any of its elements to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.”²³

IV. CLAIMANTS’ ARGUMENTS REGARDING PROCEDURAL ISSUES ARE UNSUPPORTED.

21. Claimants devote a substantial portion of their Reply to procedural issues, but none of these alleged issues involves a violation of ICANN’s Articles or Bylaws.

A. Under Any Standard of Review, Claimants Have Not Demonstrated that ICANN’s Board Violated Its Articles or Bylaws.

22. ICANN’s independent review process is an internal corporate accountability mechanism that ICANN voluntarily established via its Bylaws. California law expressly authorizes California non-profit public benefit corporations, such as ICANN, to establish such mechanisms and to define the scope and form of those mechanisms.²⁴ Pursuant to this explicit authority, ICANN defined the procedures and standard of review that would govern the independent review process.

23. Accordingly, IRP is available only to review the actions of ICANN’s Board and, as Claimants acknowledge, ICANN’s Bylaws specifically identify the standard of review that the IRP panel must apply when evaluating those actions, focusing on:

- a. Did the Board act without conflict of interest in taking its decision?;
- b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

²² Reply ¶ 6.

²³ *Booking.com* Final Declaration ¶ 130 (Resp. Ex. 1).

²⁴ Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation’s bylaws).

- c. Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?²⁵

24. As the IRP panels in *Booking.com* and *Vistaprint* each found, this defined standard of review reflects the fact that IRP panels are not intended to substitute their judgment for the independent judgment of ICANN’s Board.²⁶ Claimants have presented no evidence that ICANN’s Board: (1) had a conflict of interest; (2) failed to exercise due diligence or care; or (3) failed to exercise independent judgment in denying Claimants’ reconsideration requests.

B. The Determinations of IRP Panels Are Not Binding.

25. Claimants argue that this IRP Panel’s declaration will be binding on ICANN’s Board.²⁷ However, ICANN’s Bylaws are clear that ICANN’s Board is required to “review[]” and “consider” the declaration, thereby exercising its discretion as to whether and in what manner to adopt and implement that declaration.²⁸ This is precisely what happened in all four IRPs that have gone to a final declaration to date—following the issuance of the final declarations in the *ICM*, *Booking.com*, *DotConnectAfrica*, and *Vistaprint* IRPs, the ICANN Board promptly reviewed and ultimately determined to adopt the relevant portions of the panels’ declarations.²⁹

26. ICANN recognizes that a single IRP panel in the *DotConnectAfrica* matter issued a finding that its declaration would be legally binding, in contrast to the findings made by the

²⁵ Bylaws, Art. IV, § 3.4 (Cls. Ex. RM-2); Reply ¶ 37.

²⁶ *Booking.com* Final Declaration ¶ 108 (“[T]here can be no question that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care it is entitled—indeed required—to exercise its independent judgment in acting in what it believes to be the best interest of ICANN.”) (Resp. Ex. 1); *Vistaprint* Final Declaration ¶ 124 (“[T]he Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”) (Cls. Ex. RM-50).

²⁷ Reply ¶¶ 9-18.

²⁸ Bylaws Art. IV, § 3.11.d (Cls. Ex. RM-2).

²⁹ NGPC Resolutions 2015.04.26.14-2015.04.26.16, available at <https://www.icann.org/resources/board-material/resolutions-2015-04-26-en#2.b> (*Booking.com*); NGPC Resolutions 2015.07.16.01 – 2015.07.16.05, available at <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en> (*DotConnectAfrica*); Board Resolutions 2010.03.12.39-41 (*ICM*); Board Resolutions 2015.10.22.17-19 (*Vistaprint*), available at <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en>.

panels in the *Vistaprint* and *ICM* matters that their declarations were not legally binding.³⁰ As ICANN has emphasized repeatedly to all IRP panels, the ICANN Board has announced that it will take (and is required by the Bylaws to take) any declarations of IRP panels seriously and to date has adopted the recommendations of all IRP declarations.

C. IRP Panels Do Not Have the Authority to Grant Affirmative Relief.

27. ICANN’s Bylaws (as well as the Supplementary Procedures that govern this IRP) limit an IRP panel to stating its opinion as to “whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and recommending, if requested, that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP panel.³¹ Even if there were a basis for some kind of relief here (which there is not), neither this IRP Panel nor any IRP panel has the authority to award affirmative relief.³² As the *Vistaprint* IRP panel recently affirmed: “[A]n IRP Panel does not have authority to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision.”³³

28. Claimants argue that IRP panels do have the authority to grant affirmative relief, and that the *Vistaprint* IRP panel “[d]id not act in accordance with the ICDR Rules, as it did not finally resolve the dispute.”³⁴ The *Vistaprint* IRP panel “recommend[ed] that the ICANN Board exercise its judgment on the question of whether an additional review mechanism [was]

³⁰ *DotConnect Africa Trust v. ICANN*, Declaration of the IRP Procedure ¶¶ 98-115 (Cls. Ex. RM-39); *Vistaprint* Final Declaration ¶ 149 (An IRP panel’s declaration is a “non-binding declaration” when it comes to recommending that the Board take or refrain from taking any action or decision . . .”) (Resp. Ex. 1); *ICM v. ICANN*, Declaration of the Independent Review Panel ¶¶ 131-134, available at <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>. The *Booking.com* Panel did not address the issue of whether its declaration was binding.

³¹ Bylaws, Art. IV, §§ 3.4, 3.11(c-d) (Cls. Ex. RM-2).

³² Indeed, the IRP panel in the first ever IRP found that “[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.” See *ICM Registry, LLC v. ICANN*, Declaration of the Independent Review Panel ¶ 133, available at <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>.

³³ *Vistaprint* Final Declaration ¶ 149 (Cls’ Ex. RM-50).

³⁴ IRP Request ¶¶ 22-23.

appropriate to re-evaluate the [expert declaration at issue in *Vistaprint*].”³⁵ This recommendation was exactly the type of “relief” that an IRP panel has authority to issue – a recommendation of how the Board should proceed. ICANN’s Board considers and acts upon the recommendation of all IRP panels, and it is that action by ICANN’s Board that, in conjunction with the declaration of the IRP panel, finally resolves the dispute between the parties. Even though Claimants cite to the final declaration of the IRP panel in *DotConnectAfrica* and the declarations of emergency panelists in other IRPs,³⁶ affirmative relief was not “awarded” or “mandated” by those IRP panels but rather by ICANN’s Board, which considered and then accepted the recommendations contained in those panel determinations.³⁷

V. CLAIMANTS’ RESPONSE TO BIG ROOM’S SUBMISSION ADDRESSES ISSUES OUTSIDE THE SCOPE OF THIS IRP.

29. Big Room submitted a letter to the IRP Panel on 7 October 2015 (“Big Room’s Submission”) and Claimants responded to it in their Reply. Both Big Room’s Submission and Claimants’ response primarily concern the merits of the CPE Report. As discussed above, ICANN does not conduct a substantive evaluation of every expert determination and doing so is outside of the Board’s mandate. Accordingly, any discussion of the merits of the CPE Report (which is the focus of Claimants’ response to Big Room’s Submission) is outside the scope of this IRP.

CONCLUSION

30. Claimants’ Reply, like their IRP Request, does not demonstrate that ICANN’s Board failed to act in conformance with its Articles and Bylaws. To the contrary, ICANN’s

³⁵ *Vistaprint* Final Declaration at 70 (Cls’ Ex. RM-50). ICANN’s Board accepted the *Vistaprint* Panel’s recommendation on 22 October 2015. See Board Resolutions 2015.10.22.17-19, available at <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en>.

³⁶ Reply ¶ 20.

³⁷ See, e.g., NGPC Resolutions 2015.07.16.01 – 2015.07.16.05, available at <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en> (*DotConnectAfrica*).

Board properly declined to engage in a substantive review of the CPE Report. ICANN's Board also properly: (1) declined to intervene further with respect to the CPE Report; and (2) declined Claimants' request for reconsideration of ICANN staff's response to Claimants' DIDP request. Claimants have not identified any other Board actions that are appropriate for review. For these reasons, ICANN urges the IRP Panel to declare that Claimants have not identified any basis for independent review and to declare that ICANN is the prevailing party.

Respectfully submitted,

JONES DAY

Dated: 10 November 2015

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