

Questionnaire February 2014
Special Committee Q228 - Patents
on Prior User Rights
- Response on behalf of the Swedish Group
by Jonas Westerberg, Reporter

Introduction

1. A prior user right is the right of a third party to continue the use of an invention where that use began before a patent application was filed for the same invention.
2. Prior user rights are provided for by the different national legislations and such provisions in national legislation only have national effect. Most if not all national legislations provide for prior user rights and defenses. National provisions on prior user rights have common ground, but also have differences in the conditions under which they may be acquired.
3. The main purpose of prior user rights is to strike a balance between the effects of the first-to-file principle on the one hand and third party considerations on the other.

Previous work of AIPPI

4. The issue of prior user rights has already been studied in Q89D, Prior Use (Amsterdam ExCo of 1989), which is part of the series of resolutions related to a draft Patent Law Treaty concerning the harmonization of substantive provisions of Patent Law (the draft never became final). In Q89D AIPPI resolved that the Treaty should contain a mandatory prior use right as set forth in the following provision:

Privilege of prior use

(1) (a) Subject to subparagraph (b), the owner of a patent shall not enjoy, under that patent, rights against activities within the scope of the patent, not authorized by him, of a person (the prior user) who, at the date of the filing of the application, or where priority is claimed, at the priority date of the application on which the patent is granted, and with a view to industrial or commercial exploitation,

(i) was actually engaged in such activities, or

(ii) was engaged in serious preparations, involving, from the viewpoint of the prior user, significant investment, for such activities,

in the territory and any other place or space to which the sovereignty of

the Contracting State extends and in or for which State the patent is granted.

It is understood that the expression „industrial or commercial exploitation“ comprises every form of exploitation for useful or economic purposes.

(b) Where the prior user engaged in activities or preparations therefore, obtained knowledge of the invention protected by the patent from or in consequence of acts performed by the owner of the patent or his predecessor in title, subparagraph (a) shall not apply in respect of the said activities.

(2) Paragraph (1) shall not apply to a successor in title of the prior user unless that successor in title is the owner of the enterprise or business, or that part of the enterprise or business, in which the prior user engaged in the activities or preparations referred to in paragraph (1) (a).

5. Q170, Substantive Patent Law Treaty (Lucerne ExCo of 2003), re-addressed the issue of prior user rights, but made full reference to Q89D.
6. In addition, as a partly related topic, AIPPI has studied grace periods for patents on four prior occasions: Q75, Prior disclosure and prior use of the invention by the inventor (Buenos Aires Congress of 1980, Moscow ExCo of 1982); as part of Q170, Substantive Patent Law Treaty (Lucerne ExCo of 2003); and in Q233, Grace period for patents (Helsinki ExCo of 2013).
7. The passage of time and changes in relevant national laws make this topic ripe for reconsideration at this time, in particular:
 - a) the passage of the AIA in the United States, representing an important move by the US towards global patent harmonization in many respects; specifically, the AIA expands the defense beyond just business methods to cover all technologies.
 - b) the perceived change of view of national groups on this issue;
 - c) the work of the “Tegernsee Group”, attended by heads of offices and representatives from Denmark, France, Germany, Japan, the UK, the USA and the EPO, which identified prior user rights as one of four topics being key to harmonization.

Tegernsee Group

8. During the second meeting of the “Tegernsee Group,” attended by heads of offices and representatives from Denmark, France, Germany, Japan, the UK, the USA and the EPO in April, 2011, prior user rights was one of four topics identified as being key to harmonization (along with the grace period, 18-month publication, and the treatment of conflicting applications). The Tegernsee Heads mandated the Tegernsee experts group to prepare reports on each of these topics. The report on the grace period was published on

September 24, 2012, and is available on the EPO website. The third meeting of the Tegernsee Group took place on October 4, 2012, during which it was agreed that the next step in the process would be to conduct broad surveys of stakeholders in each region. In September 2013, at its fourth meeting, the Tegernsee Group approved the Reports on the Tegernsee User Consultation drawn up by the individual delegations. The Tegernsee Experts Group has been mandated to conduct a joint factual summary analysing the results of the individual office reports including commonalities and differences in user views and to present the summary for approval to the next meeting of the Tegernsee Heads, to be called in the spring of 2014 in Europe.

Discussion

9. A first-to-file system (or first-inventor-to-file system) rewards an inventor who is first to file a patent application for his invention with the grant of an exclusionary right for a limited period of time. The current question involves whether this exclusionary effect has to be diluted – to a certain extent – to accommodate interests of third parties who may have already used the same invention earlier, but without filing a patent application. In this respect, various fundamental considerations of patent law need to be taken into account.
10. On the one hand, there seems to be a broad consensus that patents should have no “retroactive effect”, *i.e.*, any activity practiced before the filing date should by no means become illegitimate due to a later patent filing. It needs to be considered that there is no statutory duty to apply for patent protection. From an economic perspective, investments on the use of an invention should not be frustrated by later protective rights. Thus, there must be a legal mechanism that allows for legitimate, continued use of an invention in this case. The concept of prior user rights generally seems to fulfill this purpose.
11. On the other hand, the interests of the patent owner must also be taken into account. Prior user rights have to be regarded as a limitation on the exclusive right that is granted to the patent holder, *i.e.*, the exclusive right to exploit the patented invention and to authorize another to do so. It seems to be important that the exclusionary right of the patent holder not to be excessively limited by prior user rights; in particular, the nature and extent of the “use” of the claimed invention which occurred prior to filing must be weighed against the public disclosure of the invention by the patentee. Otherwise, the essential principles of patent law, *i.e.*, to encourage investment in innovation and, through the publication of patent applications, to disseminate information on the basis of which others may further innovate or compete, could be compromised. In addition, the requirements for a prior user right must comply with the general need for legal certainty so far as the scope of protection provided by a patent is concerned. It must be ensured that the instrument of prior user rights is not used as an abusive defense against patent infringement. Therefore, it seems desirable that the availability of prior user rights is tied to

a certain extent to actions of the prior user that go beyond a purely mental conception of the inventive idea.

12. When balancing these interests, a number of detailed questions need to be addressed. One major issue for consideration seems to be the definition of “use” in relation to prior user rights. Is it necessary that a real, present and practical exploitation of the invention must have taken place to establish a prior user right (as in Denmark) or is it sufficient that a sort of intellectual possession of the invention has been created to recognize a prior user right (as in France)? Depending on the definition, it is easier or more difficult to rely on and to prove a prior user right in infringement proceedings.
13. A further area of discussion is the scope of a prior user right. Based on the fundamental principle that a patent shall not have a “retroactive effect” (as explained above), it seems evident that the prior user should be at least allowed to continue its prior use to the exact extent as it occurred before the filing date. Should, however, the owner of a prior user right also be entitled to adjust or alter the embodiment of the prior use in a way that would fall within the patent’s scope of protection?
14. Another issue for consideration is the critical date of use. When must the invention have been used to establish a prior user right? For example, under US law, the prior use must have occurred at least one year before either the effective filing date of the claimed invention or the date of a qualifying grace period disclosure. In DK, DE, FR, UK and JP it is sufficient that the activity giving rise to the defense of prior use must have occurred prior to the filing or priority date. It is obvious that there is a serious time difference between these two regimes.
15. A further issue of significance is the possibility of transferring a prior user right to third parties. On the one hand it is clear that the transfer of a prior user right cannot be allowed without any restrictions. The rights of the patent holder would otherwise be severely limited, for example, if a third party could obtain a license to a prior user right in order to avoid patent infringement. In this respect, it is therefore important to discuss the conditions under which a transfer of a prior user right is allowed. In this context it should also be analyzed whether there are specific requirements under which a prior user right can be used and transferred within a corporate group.

Questions

I. Analysis of current law and case law

Groups are invited to answer the following questions under their national laws:

General remarks:

Prior user rights are granted by provisions in the Swedish Patents Act of 1967. However, prior user rights have existed in Swedish patent law since 1884 (the “1884 Patents Act”).

The main source of information regarding interpretation of the Swedish patent law on prior user rights is the preparatory works to the current Patents Act. The preparatory works to the current Act are published and considered a valuable source of information as an underlying explanation and understanding of the Act.. These official publications are quite detailed and provide a lot of information on the reasons and meaning behind the legal provisions.

To the Swedish AIPPI group’s knowledge, there are only five court decisions regarding prior user rights, three of which date before the current Patents Act (Supreme Court ruling October 23, 1940, published as NJA 1940 B 854 and 855, Supreme Court ruling on April 22, 1948, published as NJA 1948 p. 156, and Supreme Court ruling June 14, 1951, published as NJA 1951 p. 492). The other two court cases have been decided by the District Court of Stockholm, and were not appealed or the issue of prior user right was not tried on appeal (joined cases no T 927-04 and 2479-04, on October 19, 2006 and joined cases no T 26687-06, T 1370-07 and T 15455-07, on 31 March 2011).

The literature available on prior user rights is also limited. Distinguished professors have mentioned prior user rights in their respective work (see for instance Bengt Domeij in “The Law on Patent Contracts” [Swe. Patentavtalsrätten], 2003, p. 68 and in “Patent Law” [Swe. Patenträtt], 2007, p. 102-103, and Are Stenvik in “Patent Law” [Nor. Patentrett], 1999, p. 280 – 285, 385 and 391). However, no facts or theories are added to what is disclosed in the preparatory works mentioned above. This is also the case with commentaries to the current Patents Act, such as “The Patents Act” [Swe. Patentlagen] by Torwald Hesser and Eric W. Essén, 1968, “The Patent Law – A Commentary” [Swe. Patentlagstiftningen – en kommentar] by Måns Jacobsson, Erik Tersmeden and Lennarth Törnroth, 1980, “The Patent Handbook” [Swe. Patenthandboken] by Gunnar Reiland, 1984 and “The Patents Act – a commentary” [Swe. Patentlagen, En kommentar] Bengt G Nilsson and Catharina Holtz, 2012.

This means that most of the background material on prior user rights under Swedish law is of an early date, and that available case law is scarce and

possibly unreliable since it partly relates to older legal provisions.

However, apart from the age of the preparatory works, there are no indications that they would otherwise be irrelevant or invalid. Hence, the answers below are to a very large extent based upon these official publications.

1. Is there a provision in your national patent law that makes an exception to the exclusive right of a patent holder for parties who have used the invention before the filing/priority date of the patent (“prior user rights”)?

Yes, Section 4 of the Patents Act sets forth the following:

“Anyone who used an invention commercially in this country, when an application for a patent was filed, may continue such use while maintaining its general character, without being hindered by the patent, provided that such use did not involve an evident abuse in relation to the patent applicant or his legal successor. Such right to use shall under the same conditions also be enjoyed by anybody who has taken substantial measures for commercial use of the invention in this country.

A right according to the first paragraph may be transferred to somebody else only together with the business, where it has arisen or where the use was intended to take place.”

There are other similar rights in the Patents Act which are briefly mentioned below but not otherwise commented on in the remainder of this questionnaire.

In the situation that a patent is transferred to a new holder by order of the court (as the result of a dispute on superior title) the previous patent holder and existing registered licensees may continue an ongoing or start a planned use of the patent in question, provided they were in good faith about the defect in the title to the patent when such use started or was planned. In this case, the use is conditional on the payment of reasonable compensation (Section 53 of the Patents Act).

A user right is also available in case of restoration of a cancelled or dismissed patent/patent application (Section 74 of the Patents Act). This right is available to anyone who has started a commercial use of the invention during the time between the date on which the decision of cancellation/dismissal became final and the date of publication of the decision to restore the patent or patent application.

Furthermore, Section 48 of the Patents Act provides a right for anyone who used the invention commercially in Sweden, or had undertaken

substantial preparations for doing so, on the date of publication of a patent application, to request the court to grant a compulsory license to the patent if and when it is granted.

The right to a compulsory license requires special reasons, and that the user was not aware of the patent application and had not reasonably been able to obtain such knowledge prior to its publication. A license shall only be granted to someone who can be expected to use the invention in an acceptable manner and in accordance with the license. In order to be eligible for a license the (intended) user must also show that he/she has tried to obtain a voluntary license on reasonable terms from the patentee.

The license can have retroactive effect in the sense that it can cover also the time prior to the grant of the patent (the period of provisional protection). It can only be transferred together with the business where it is used or was intended to be used.

2. How frequently are prior user rights used in your country? Is there empirical data on how often prior user rights are asserted as a defense in negotiations or court proceedings?

There is no empirical data available but case law is, as noted, scarce. However, it occurs that an alleged infringer/defendant invokes prior user rights as a defense, often as a fall back defense where the first line defense is that the patent is invalid in view of the alleged infringer's/defendant's prior (public) use of the invention.

3. To what degree must someone claiming a prior user right have developed the embodiment which is asserted as having been used prior to the filing/priority date of the patent? Is it sufficient to have conceived of the embodiment, or must it have been reduced to practice or commercialized?

The invention must either have been put to commercial use or substantial measures shall have been taken to prepare for such use. It is thus not enough to have conceived the embodiment in question or reduced it to practice. Based on case law under the 1884 Patents Act, it appears that experimental use could be considered sufficient if it is ongoing at the time of the filing of the patent application in question and is undertaken with a real view of subsequent commercial use of the invention (NJA 1951 p 492).

4. Does it make a difference in your country if

- the prior use occurred before the priority date; or
- it occurred after the priority date, but before the filing date?

The critical date is the priority date, which for purpose of prior user rights is considered as the effective filing date of a patent application (Section 6 of the Patents Act). This means that commercial use or preparations for such use during the six month grace period for filing a patent application extending from the disclosure of an invention on a recognized international exhibition according to the Paris Convention of 1928 on such exhibitions (set forth in Section 2, paragraph 5 item 2 of the Patents Act) may form the basis for prior user rights.

5. Is there a territorial limitation with regard to the scope of prior user rights in your country? In other words, if a party has used the patented invention before the filing/priority date in a foreign country, can it then claim a prior user right in your country?

The use or preparations for use must concern Sweden. However, regarding the preparations as such, they may have been made outside Sweden. For example, purchasing equipment outside Sweden as part of the preparation for commercial use in Sweden could give rise to prior user rights.

6. Is there a provision that excludes prior user rights for those who have derived their knowledge of the invention from the patent holder and/or the inventor?

No. However, the requirement that the prior use must not involve evident abuse in relation to the relevant inventor (i.e. the inventor of the patent application) implies that a use that involves an *unauthorized* use of an invention where knowledge of the invention was obtained from the inventor or his/her successor (for example where such knowledge was obtained subject to a secrecy obligation and without the right to use the invention), cannot be invoked as a basis for a prior user right. This means that the patent applicant or the person from whom he derives his right must not himself been part of an unrestricted disclosure of the invention in order for the exception to apply. Also, the person directly or indirectly responsible for the disclosure must have behaved unduly towards the applicant or his predecessor in title. This “undue behavior” can for instance consist of obtaining information about the invention in an unlawful way or by forwarding information under circumstances that constitute a breach of confidence.

7. Is it necessary that the prior user has acted in good faith to be granted a prior user right?

Apart from the exclusion of cases where evident abuse has occurred in relation to the relevant inventor or his/hers successor (see answer to question 6 above) there is no further requirement of good faith.

8. Is there a material limitation with regard to prior user rights in your country? More specifically, if someone has used an embodiment of a patented invention before the filing/priority date of the patent, can he then claim a prior user right to anything covered by the patent? In particular, is the owner of a prior user right entitled to alter/change the embodiment of the patented invention used before the filing/priority date of the patent to other embodiments that would also fall within the patent's scope of protection or is he strictly limited to the concrete use enacted or prepared before the patent's application or priority date? In the event that changes/alterations are permitted by your national law, to what degree?

There is a general limitation of the user right in that it must maintain its "general character". Exactly what this means is uncertain in the absence of more specific case law, but in principle the prior user may neither start an import of the invention if the prior use was production of the patented invention, nor change his use to another embodiment of the invention. Changes made to the use of the invention as used prior to the effective filing date, which take advantage of information disclosed in the patent (application) are clearly not part of the prior user rights and would therefore constitute an infringement of the patent. It could however be acceptable to modernize the used embodiment based on the general progress of technology.

9. Does a prior user right in your country require the continued use (or the necessary preparations of the use) of the invention claimed by the patent at the moment in which the objection of the prior user right is asserted or is it sufficient if the invention claimed by the patent has been used before the priority/filing date of the patent but has been abandoned at a later stage?

The use must be ongoing at the effective filing date of the patent application. If prior use has ceased on said date, no rights can be based on the earlier use. However, a prior use is not deemed to have ceased because of temporary and insignificant suspensions. Temporary suspensions of a use can be due to the nature of the business, and the nature of the invention may be such that it is only needed in special situations. It would then be expected that the prior user will resume the use of the invention when such a situation occurs. In a case tried by the Supreme Court under the 1884 Patents Act (NJA 1951 s 492), the defendant (a pharmaceutical company) claiming prior user rights had manufactured the product in question, with the – later patented – method. The product

had however not been immediately used as a medicinal product but used in laboratory experiments. The Supreme Court ruled that defendant's intention was only to use a small quantity of the manufactured product in experiments and that they, at the time of the patent application, was not using the invention. In the latest decision from the District Court cited in the introduction above it was concluded that the signing of a distribution agreement and applying for an (amended) marketing approval was not sufficient as preparatory acts for use of the invention in Sweden. Partly, as it appears, due to that it was still unclear if the product would eventually be launched in Sweden at the effective filing date of the patent application.

The use must be intended to happen in immediate connection with any preparations for use, so there must not be any substantial time gaps between such preparations and the actual commercial use. On the other hand, specific circumstances may motivate such a time gap, for instance the need for extensive clinical trials in order to obtain marketing approval for a new medicinal product.

10. Is a prior user right transferable and/or licensable in your country? If yes, under what circumstances?

Prior user rights are transferrable but only as part of a transfer of the business in which they arose. If the prior user rights arose in, and are exercised in, a specific part of the business, the prior user rights may be transferred with such part of the business. Prior user rights may not be licensed separately.

11. Does your national law provide any exceptions or special provisions with regard to a prior user right owned by a company within a corporate group? In particular, can a prior user right be transferred or licensed to another group company?

There are no such exceptions or special provisions for intra group transfers/licenses.

12. Are there any exceptions for any specific fields of technology or types of entity with regard to prior user rights in your country?

No.

13. The Groups are invited to explain any further requirements placed on prior user rights by their national law.

II. Policy considerations and proposals for improvements to your current system

14. Should a prior user right exist in any legal system? If yes, what is the main legal justification for a prior user right?

Yes. The motives for providing prior user rights are both a question of public interest and of fairness. Considering that the use of an invention often requires major investments, it would be unfortunate for society if the production resources, employment opportunities etc. should be lost when such use must cease because of a later patent application. It would also appear unfair/unjust to a party who has started using an invention or made substantial investments to do so, without evidently abusing knowledge of the invention in relation to the applicant or his predecessor to the title, if such use or preparations for use would have to cease because of a later patent application.

As noted below prior user rights are probably also an important aspect in considerations of companies' freedom to operate, and the absence of such right would either force them to (possibly) strategies involving excessive patenting, or to publish results which could otherwise be more valuable as trade secrets.

In this context, it can be noted that prior user rights are probably most relevant for inventions concerning methods, which can be exercised as a trade secret without involving a public disclosure. Patents on methods are sometimes considered to be problematic from an enforcement point of view (since it could be difficult to detect and prove infringement) why there could be valid reasons for a company to decide to keep and exploit an invention of this type as a trade secret rather than a patent.

15. What is the perceived value of prior user rights in your country?

Given the rare occurrence of cases involving prior user rights, one could perhaps believe that they are of limited value. However, for the practical day to day decision among companies in respect of freedom to operate, they are probably rather important as a safeguard against severe disruptions to the business in case someone else later patents an invention that the company has made but decided to keep and use as a trade secret instead of publishing or patenting.

16. Are there certain aspects that should be altered or changed with regard to the existing implementation of the prior user right in your country? In particular, are there certain measures or ways that could lead to an improvement

and/or strengthening of your current system?

The limited number of cases on prior user rights could indicate that the current provisions work well as they are. A further specification of the scope of the prior user right in respect of the meaning of “maintaining the general character” of the prior use, could however be helpful.

III. Proposals for harmonization

Groups are invited to put forward proposals for the adoption of harmonized rules in relation to prior user rights. More specifically, the Groups are invited to answer the following questions:

17. Is harmonization of “prior user rights” desirable?

Yes since the users’ operations are often international and also to make the patentees’ position more predictable.

18. What should be the standard definition of “use” in relation to prior user rights? Must the use be commercial?

The purpose of prior user rights should be to protect substantial bona fide investments which are beneficial to the public. The starting point should therefore be that prior user rights should require something more than just conceiving an invention. Active exploitation of the invention (or substantial preparations for such) should thus be a basic requirement, even if exceptions might be motivated in areas where the research involved in creating an invention in itself is very costly.

19. What should be the definition of “date” (or “critical date”) for prior user rights? (*i.e.* when must the invention have been used to establish a prior user right?)

The priority date is the effective filing date in relation to other prior art and also appears to be the natural starting point for the required use (or substantial preparations for use). In countries with a grace period for filing a patent application following a first public disclosure by the inventor or his/her successors, the issue becomes more complex. However, the starting date for the grace period should then probably be the critical date for prior user rights. Alternatively, the effective filing date is kept as the critical date but a prior use during the grace period based on knowledge of the invention derived from the inventor or his/her successor does not qualify for prior user rights. The latter solution would protect a third party who has developed the invention independently and started or planned to start a prior use during the grace period.

20. Should a prior user right persist in the event that the use and/or preparation for use of the invention has already been abandoned at the time of the patent application/priority date or should the prior user right lapse upon the termination of the use and/or preparation of use?

For the purpose of protecting bona fide investments and the public interest in the benefits of these, it is sufficient if the prior user rights cover continuous use both at the filing date and thereafter. In case the use has ceased at the effective filing date or ceases later for reasons other than the relevant patent, there is no longer any valid motive for “re-creating” prior user rights in connection with a subsequent, new effort to exploit the invention.

An exception should exist for shorter gaps in the use of the invention which can be motivated by e.g. the seasonal or cyclical character of a certain market/business (i.e. where the use has not really ceased but only follows fluctuations in the demands/needs).

21. What should be the territorial scope of a prior user right? In particular, if a party has used the patented invention before the decisive date in a foreign country, should it then be entitled to claim a prior user right?

The territorial scope of the prior user right should follow the territorial scope of the patent right in question. It follows that for regional patents the prior user right should cover the region in question. It is noted however, that for the European patent with unitary effect a national prior user right has been adopted (cf. Article 28 of the Unified Patent Court Agreement).

22. Should there be a provision that excludes prior user rights for those who have derived their knowledge of the invention from the patent holder and/or the inventor? If yes, should it be necessary that the prior user has acted in good faith to be granted a prior user right?

The main purpose of prior user right should be to protect prior uses of inventions that have been developed independently of the inventor of the patent in question.

In case the prior user has derived the invention directly or indirectly from the inventor of the relevant patent this could happen either (i) by public disclosure, (ii) under a contract or (iii) by unauthorized access to the invention.

In case of (i) such disclosure would normally (absent a grace period)

prevent patenting and thus make prior user rights redundant. In respect of (ii) the parties have the opportunity to regulate any rights to use the invention in the contract and do not need the safeguard of statutory provisions. Finally, in respect of (iii) such behavior would not involve any contribution to the advance of technology or bona fide investment that motivates prior user right.

23. Should there be material limitation with regard to prior use rights? In particular, if someone has used an embodiment of a patented invention before the filing/priority date of the patent, should he then be entitled to claim a prior user right to anything covered by the patent?

The prior user right should only be as wide as is motivated by the underlying purpose i.e. to avoid disruption of an imminent or ongoing exploitation of an independently developed invention. This right should not be extended to parts of the relevant patent that are not covered by the prior use.

24. Should a prior user right be transferable and/ or licensable?

The transferability of prior user rights must be limited so that such rights do not unduly encroach on the monopoly otherwise afforded by the relevant patent. It should only be possible for one party – the original prior user or possibly his/her successor – to exercise the user right at any given time. This means that a user right should not be licensable. In respect of transferability of a user right this would give the original prior user the opportunity to recoup the value of the original investment not only by profits made over time on the use of the invention but also by a sale of the business. It appears reasonable to allow for such opportunity within the framework of a statutory prior user right.

25. Should there be any exceptions for any specific fields of technology or types of entity with regard to prior user rights?

No.

26. The Groups are also invited to present all other suggestions which may appear in the context of the possible international harmonization of “prior user rights”.

Procedure

It would be most helpful if the National Groups would fill out the Question-

naire and send in their answers to the General Secretariat of AIPPI by April 30, 2014 to:

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For inquiries, please contact the Chair of Q228

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