
The Right of Publicity and Social Media: A Challenging Collision

Cydney Tune and Lori Levine

Cydney Tune is a senior counsel at Pillsbury in San Francisco, CA, and leads the law firm's Copyrights group and Media & Entertainment industry teams. Her practice includes a wide variety of intellectual property issues, including copyrights and trademarks, as well as a broad array of entertainment, licensing and E-Commerce matters.

Lori Levine is an associate in the Intellectual Property practice at Pillsbury in Los Angeles, CA. Her practice focuses on trademark, unfair competition, copyright law, and complex civil litigation. Ms. Levine's litigation practice includes matters involving trademark infringement, copyright infringement, false advertising, products liability, and breach of contracts. She also has experience in prosecuting trademark registrations and trademark enforcement.

In 2011, sisters Elizabeth and Sarah Turner were contacted by two fellow classmates who asked them to model for a class project. The sisters agreed, signed a release for the photographs, and after the shoot they never spoke to those classmates again.

The classmates turned out to be the founders of Snapchat, a social media application used to send pictures that self-delete after a number of seconds. The photographs were ultimately used to promote the Snapchat mobile app across various platforms (iPhone, Android, etc.). However, the images were cropped and edited to suggest that Elizabeth was pulling off Sarah's bathing suit top and that they were nude on the beach. As the popularity of the app grew, Snapchat became prominently used as a "sexting app," used by individuals to send sexually graphic photographs, text and images. Soon, the Turner sisters began appearing in Google searches for offensive phrases such as "snapchat sluts" or "snapchat whores." In 2014, Sarah and Elizabeth Turner sued social media Web site Snapchat and its founders in California state court, alleging, among other claims, violations of the statutory and common law rights of publicity.¹

The right of publicity—the right of every person to control the commercial use of his or her identity—is an important right.² Basically, right-of-publicity law prevents persons from capitalizing on an individual—his name, his voice, his likeness, his signature—without his prior agreement.³ This right is distinct from other intellectual property rights, as the right of publicity is specific to a person's identity, not the medium in which the person is shown (governed by copyright law).

Historically, the right of publicity has only applied to celebrities, as it is clear that their unique "identities" can have monetary value.⁴ But now, in the age of social media, a new line of case law has emerged wherein everyday people are claiming violations of their rights of publicity. Because of its social characteristics and the tendency for social media content to go "viral," social media pushes the envelope of this right.

The interaction between the right of publicity and social media is a nascent area of law, and the Turner sisters are certain to face hurdles in maintaining their infringement claims.⁵ First, the Turner sisters will have to prove that their specific identities, as distinguished photographs themselves, have commercial value. Second, the sisters signed a release form by which they consented to the use of their images and in order to prevail against Snapchat, they will have to show that the misappropriation was outside of the scope of the release.

This article addresses the various issues that have emerged with respect to right-of-publicity law in the context of social media. The article analyzes litigation matters, including choice-of-law considerations, standing requirements, substantive elements, and potential defenses to a right-of-publicity claim, and also provides additional insight into how social media platforms may protect themselves from liability.

Right of Publicity Basics and Where to Bring a Claim

The right of publicity is a right independent from other intellectual property rights. It is a state right,

so before bringing a claim, a party must determine in which state or states his right of publicity has been infringed.⁶ For example, some states, including California, have both statutory and common law rights of publicity. Other states have only a common law right of publicity. Some states limit the right of publicity to protect only certain persons or classes, such as celebrities⁷ or soldiers.⁸ Still other states have not expressly recognized a right of publicity at all.

Further, while some courts recognize the right of publicity as a privacy right, other states recognize the right as one in property, and thus protect the posthumous right of publicity (as the right is inheritable and devisable). In fact, California has a separate statute protecting the posthumous rights of publicity.⁹ Other states do not recognize posthumous rights of publicity.¹⁰

Last, a party must consider the various statutes of limitations for bringing an infringement claim (the statutes generally lie between two and four years). States also may vary on when the statute starts to run. For example, in California, both the statutory and common law right of publicity claims are subject to a two-year statute of limitations.¹¹ But the Ninth Circuit has held that, for material appearing on a Web site, the statute is not retriggered every time aspects of the Web site are amended or revised; rather, the statute is only retriggered if “the statement itself is substantively altered or added to, or the website is directed to a new audience.”¹² Thus, a plaintiff must confirm, based on the law of the state, that his or her right-of-publicity claim is not barred by the applicable statute.

Therefore, before bringing an infringement action, plaintiffs must first ascertain that and how their rights of publicity are protected in their forum state.

Bringing a Claim: Standing

In order to state a claim for infringement of the right of publicity, a plaintiff must first allege Article III standing in that he has suffered a concrete and particularized injury.¹³ In *Turner v. Spiegel* (the above mentioned Snapchat case), the Turner sisters were able to allege injuries-in-fact that included: “emotional distress, embarrassment, and loss of pecuniary value of the use of their photographs, images and likenesses.”

But where there is no emotional harm, a plaintiff must assert that he has suffered economic injury by the appropriation of his identity. When a celebrity alleges infringement of his or her right of publicity, standing is easy to establish as economic injury is apparent. The Ninth Circuit has explicitly recognized that “[t]elevision and other media create marketable

celebrity identity value.”¹⁴ The use of a celebrities name or likeness can “directly affect the commercial and professional value of the services and performances.”¹⁵ Thus, in the case of a celebrity claiming infringement of his or her right of publicity, economic harm is almost presumed because celebrity, in and of itself, has value.¹⁶

However, when an ordinary person (*i.e.*, a social media user) claims that he or she has been harmed by the commercial exploitation of his or her identity, standing is more difficult to establish. The value of a layperson’s identity to the public at large is not quite so apparent. As such, a non-celebrity plaintiff may not merely claim, without more, economic harm. There must be a “clearly articulated economic harm” and plaintiffs must allege facts showing why defendant, and the public at large, have a “commercial interest in their likeness.”¹⁷

To do so, courts have found standing where a plaintiff alleges that his “Internet presence” has value. For instance, in *Maremont v. Susan Fredman Design Grp., Ltd.*,¹⁸ a plaintiff sued her employer for posting to plaintiff’s personal Twitter account while she was on leave. Defendants challenged Plaintiff’s standing to bring her false endorsement claim. The court rejected Defendants’ challenge, finding that plaintiff was able to establish standing because she had a commercial interest in her Twitter and Facebook accounts that may have been harmed by Defendant’s appropriation of her identity *via* Twitter. The court held that in the digital age, the ability to promote to ones “followers” has become a “marketable commercial interest.”

A plaintiff also may create an inference of value (and thereby establish standing) by showing that the social media platform has benefitted economically from the appropriation of plaintiff’s identity. In doing so, a plaintiff may establish standing by showing his “individual, personalized endorsement of products, services, and brands...has concrete, provable value.”¹⁹

For instance, in *Perkins v. LinkedIn Corp.*,²⁰ social networking Web site LinkedIn was sued by LinkedIn users who alleged that LinkedIn had infringed on their rights of publicity. The basis for the claim is as follows: Upon joining LinkedIn, new users were prompted to “Grow your network on LinkedIn,” which if the users accepted, LinkedIn would be able to access their email addresses and contacts. If the users agreed, their personal contacts would appear in LinkedIn, and the users were eventually prompted to invite their contacts who were not already members of the site to join LinkedIn. If the user agreed, LinkedIn would then send an initial invitation to all email addresses the user has selected (all contacts were selected by

default). The emails would be sent from the users *via* LinkedIn and would read: “I’d like to add you to my professional network.” If one week after receiving the initial invitation email, the recipient had not joined LinkedIn, LinkedIn would send a reminder email encouraging the recipient to join. The reminder email is titled: “Reminder about your invitation from [LinkedIn user].” The body of the email contained the text: “This is a reminder that on [date of initial email], [LinkedIn user] sent you an invitation to become part of their professional network at LinkedIn.” If after a second week, the recipient of the reminder email had still not joined LinkedIn, LinkedIn would send a second, similarly personalized reminder email.

In bringing their infringement claims, Plaintiffs alleged that LinkedIn had used their names and likenesses to personally endorse LinkedIn’s services for the commercial benefit of LinkedIn and to the detriment of plaintiffs. LinkedIn moved to dismiss the action for lack of standing, claiming that Plaintiffs had no coherent theory that they had suffered economic harm. The court rejected LinkedIn’s argument, writing that the measure of personalization of the endorsement had “concrete and provable economic value.” LinkedIn had misappropriated its users’ names to promote LinkedIn and grow its membership, which was “indisputably economically valuable to LinkedIn.”

In sum, right of publicity claims in the context of social media calls on plaintiffs to establish a different kind of injury-in-fact than similar claims in the context of celebrities. Whereas celebrities have an *inherent* value in their identities, in the case of social media users, the value of users’ identities is determined by the value to the defendant. This value can be established where a social media platform profits from its users’ identities or when the site has used its members’ personas to grow its business.

Bringing a Claim: Appropriation

The right of publicity is a state right, and the substantive elements vary from state to state. The Restatement lays out the basic elements of a claim, writing that the publicity is infringed when: (1) plaintiff owns an enforceable right in the identity of a human being (indicia of identity); (2) plaintiff’s identity or persona has commercial value (commercial value); and (3) defendant has used plaintiff’s identity for purposes of trade without consent (appropriation).²¹

Courts must distinguish between circumstances wherein a person’s identity has been “appropriated”

and situations where it has not. Social media has added an enormous layer of complexity to this inquiry because of the seemingly infinite number of ways that any person’s identity (name, pictures, avatars, videos, etc.) can be disseminated online.²² For instance, a person’s “name” can be used on any number of social media platforms including Instagram, Twitter, or even Tinder. A person’s images or pictures are available on any number of social networking sites. A person’s “likeness” can now be recreated through avatar-creation applications such as Bitmoji. People regularly post images of themselves on the Internet—but where is the line between consensual sharing and misappropriation drawn?

The answer hinges on whether the use of the person’s likeness created a false impression of “endorsement”²³ or whether an actual “impersonation” took place, without that person’s prior approval. Take “twitterjacking” for example. “Twitterjacking” is a newly coined term for the practice of creating a Twitter account using another’s name and likeness and tweeting unauthorized messages to the followers of that Twitter account, who are under the impression that the account belongs to another.

In order to state a claim for infringement of one’s right of publicity on the grounds of “twitterjacking,” it is essential that an actual appropriation of one’s identity has occurred. For instance, in *La Russa v. Twitter Inc.*²⁴ Anthony La Russa, then-manager of the St. Louis Cardinals, sued Twitter after an unknown Twitter user created a Twitter account and pretended to post updates as La Russa. Though the parties settled the case before the court could speak to the merits of La Russa’s claims, one line of the “twitterjacked” La Russa account suggests that La Russa would not have prevailed, as there was no actual appropriation. The fake Twitter bio read: “Bio Parodies are fun for everyone.” This line revealed that the page was a parody, evidencing that the user had no intent to actually appropriate La Russa’s identity.

In response to fake profiles, social media platforms have taken steps to prevent “twitterjacking” and other similar misappropriations. For instance, Twitter has an account verification program used to verify the authenticity of individuals and brands on Twitter, by which verified accounts will receive a blue verified badge on their Twitter profiles.²⁵ Other social media platforms including Facebook and Instagram too have verified account systems to ascertain the authenticity of their users’ profiles.

Social media Web sites also have added mechanisms to report fake accounts. For instance, Facebook’s Help Center reads: “We don’t allow accounts that: pretend to be you or someone else; Use your photos;

List a fake name; Don't represent a real person."²⁶ Facebook users who identify fake accounts can file reports to have the account deactivated. Instagram, Twitter, MySpace, and LinkedIn all have similar reporting systems.

Though social media companies have taken steps to insulate themselves from liability, they may still be liable to users whose identities are appropriated by third parties. For instance, in *Doe v. Friendfinder Network, Inc.*,²⁷ a plaintiff sued defendant, operator of "AdultFriendFinder.com," which bills itself as "the World's Largest SEX and SWINGER Personal Community." Someone had created a fake profile of plaintiff with biographical data, a nude photograph, and a variety of information regarding her sexual proclivities. Though plaintiff said that the photograph did not depict her, and the information regarding her sexual activity was inaccurate, she nonetheless claimed that her right of publicity had been infringed as the information "reasonably identified her." Upon request, defendant took down the profile, but plaintiff alleged that defendants had used portions of the fake profile (including some true biographical information about plaintiff) as advertisements and "teasers" on other third party Web sites and, furthermore, that the defendant did so in an effort to increase the profitability of its businesses. The court found this sufficient to state a claim of misappropriation.

Doe v. Friendfinder highlights the importance of oversight of social media platforms with respect to the dissemination of third party information. The development of right of publicity law with respect to social media will dictate the way in which social media platforms police "twitterjacking" and similar infringement by its users. New safeguards to prevent the misappropriation of users' identities by others coupled with more full disclosure in Web sites' terms of service, and greater oversight of users' profiles, may eventually eviscerate infringement claims. In the meantime, social networking services must vigilantly monitor their users because, as demonstrated in the above cases, they could be liable for their violations of others rights of publicity.

Defense: Consent

Consent is a complete defense to a right of publicity infringement claim. Conduct that would otherwise infringe the commercial interests protected by the right of publicity is not actionable if the holder of the right permits the use.²⁸ Thus, with respect to right-of-publicity law, a key concern for social networks should be whether their terms of service are broad

enough to insulate them from potential claims of infringement.

Social networking services must be strategic in formulating their terms of service in order to obtain express consent to use its members' personas for commercial gain. A party who has consented only to a limited release of rights may still bring (and possibly prevail on) a misappropriation claim that is outside the scope of the release. For instance, in *Turner v. Spiegel*, the Snapchat case, the Turner sisters claim that the model release form they signed was limited. In the model release form, the sisters agreed that Snapchat could use their pictures "exclusively for the purpose of promoting the Picaboo application [now Snapchat] for iPhone." The sisters allege that this release did not grant defendants the right to use their images to promote Snapchat for Android, iTunes, and other Internet platforms. If successful, their claims will remain because the use of the images was outside the scope of consent.

Social media companies must additionally keep in mind that the right of publicity is only one of many intellectual property rights, and thus the terms of service should aim to inoculate the companies from liability for the full gamut of intellectual property rights. For instance, in 2007, Susan Chang sued Virgin Mobile on behalf of her daughter after Virgin Mobile used her daughter's image, taken from social media Web site Flickr, in an advertising campaign to promote its services.²⁹ Plaintiff alleged that although the photographer had given Virgin Mobile permission *in copyright*, the license does not "eviscerate or supplant a person's independent right of privacy." Though the case ultimately was dismissed on jurisdictional grounds, this case illuminates the importance of precise and broad drafting.

Further, though social media companies can obtain express consent to exploit an individual's right of publicity, if third parties are depicted, clearance is the only way to avoid risk. Consider the case *La Russa v. Twitter Inc.* (discussed earlier), where a Twitter user created a fake Twitter page for Cardinals manager Anthony LaRussa. Though the case was dismissed early in the proceedings, the court likely would have looked to Twitter's Terms of Service to determine whether Twitter could have been held liable for its users' activity.

Consider social media Web site Myspace.com. The "Myspace Services Terms of Use Agreement" is a clear example of language meant to combat potential publicity rights issues.

First, the Myspace terms of service contains a California choice-of-law provision. State laws vary considerably and choice of law clauses will dictate

all liability that the social media company needs to protect itself from.

Second, the terms of service has a clause whereby users expressly grant Myspace the right to use their likenesses for commercial gain, which reads:

You consent to this, and irrevocably grant us the sublicensable right to use and exploit your name, persona, likeness, pseudonym, Profile picture, information and Content, and to share it with others, without any obligation or remuneration to you. This may include, without limitation, associating you with commercial, sponsored or related content (such as a brand you like or the sponsors of an ad you click on). As examples, if you listen to a song by an artist, or become their fan, other Users may be told that and we may serve you ads for other artists or Content you might like.

Last, as to liability for the misappropriation of third-party users, the terms of service read: “information, materials, products or services provided by other Myspace Members (for instance, in their Profiles) or Linked Services may, in whole or in part, be unauthorized, impermissible or otherwise violate this Agreement, and Myspace assumes no responsibility or liability for this material.” This clause shifts liability from the Web site to the user.

In sum, the “Terms of Use” governing social media platforms are instrumental in determining whether a party can claim infringement. In drafting their terms of service, social media companies must be thorough and specific in insulating themselves from all potential right-of-publicity claims under their state law. As mentioned, consent is a full defense to a claim of infringement, and plaintiffs may not maintain a claim where they have consented to a social media platforms use of their identities for commercial gain.

Defense: Preemption by the Communications Decency Act

Plaintiffs bringing infringement claims also should consider whether the claims are preempted by the Communications Decency Act (CDA). The CDA immunizes providers of interactive computer services against liability arising from content created by third parties where the provider did not play an active role in soliciting or creating the offending content. If the content at issue is solely attributable to a third party, the interactive computer service will not be considered the “speaker” of the information, even if the

content is available on its Web site.³⁰ However, when the computer services providers is *also* an “information content provider,” which is defined as someone who is “responsible, in whole or in part, for the creation or development of,” the offending content, the CDA will not preempt state law.³¹ Thus, depending on whether a social media company is a mere interactive computer service or an interactive content provider, a plaintiff’s state law right of publicity claim may be preempted.

The line between a Web site that creates content and one that does not is far from clear. CDA immunity applies only where a service *relays* or *disseminates* content (is not actively involved in the creation of the content). But where an online service prompts or encourages content, CDA immunity is waived. For instance, a message board owner will not be liable for defamatory comments posted on a message board if the comments are made without any prompting or encouragement.³² On the other hand, the CDA does not protect a Web site that prompts its users to answer a series of questions about themselves and provides information to the Web site, as this encouragement is sufficient to waive CDA immunity.³³

As applied to social media, when a social media company alters or changes information, or provokes its users to provide information, the CDA will not insulate it from liability. For instance, in *Perkins v. LinkedIn* (mentioned earlier), the court found the plaintiff’s claims were not preempted by the CDA even though LinkedIn used information provided by its users, it had prompted the users for information and also *created* content based on Plaintiff’s information, and thus was not immune from liability. On the other hand, more passive Web sites such as Pinterest or Reddit that merely provide a space for user-generated content (similar to a message board), may be able to invoke the protections of the CDA.

Defense: First Amendment

It is clear that the right of publicity may encroach on First Amendment rights; thus, the First Amendment may serve as a complete defense to an infringement action. But as noted by a New Jersey District Court: “no judicial consensus has been reached on the contours of the First Amendment vis-a-vis the right of publicity.”³⁴

As a general guideline, where the appropriation of another’s identity relates to expressive works only, or has some social purpose other than to commercially benefit (*i.e.*, parody, newsworthiness, etc.), any alleged infringement is likely protected by the First

Amendment. In fact, California's right of publicity statute explicitly carves out exceptions for uses related to news, public affairs, sports, and politics.³⁵ Florida's statutory right of publicity law creates a safe harbor for press coverage of legitimate public interest.³⁶

On the other hand, misappropriations that are no more than the appropriation of the person's economic value, or that are false and/or misleading, are not protected expression under the First Amendment.³⁷

Parties must look to state laws to determine which test their courts apply in analyzing First Amendment defenses, and whether a specific appropriation of a person's persona may be protected by the First Amendment.

Defense: Incidental Use

An insignificant or fleeting use of a person's name, image, or likeness is not actionable in some states, including California and New York. The rationale

underlying this doctrine is that an incidental use has no commercial value, so allowing recovery to anyone briefly depicted or referred to would unduly burden expressive activity.³⁸ In order to be actionable, there must be a direct and substantial connection between the appearance of the plaintiff's likeness and the main purpose or subject of the work.³⁹

Under the incidental use doctrine, social media users likely may use its users names, photos, or other indicia of identity in its advertising or promotion, so long as the advertisement does not feature or highlight any one user.

Conclusion

The right of publicity has expanded as non-traditional media and will continue to expand. While social media and other new media are used in new and creative ways, the law has struggled to keep up. As more issues arise and more claims are brought, hopefully there will be more clarity.

1. <http://www.businessinsider.com/sarah-and-elizabeth-turner-sisters-sue-snapchat-for-slut-modeling-photos-2014-9>.
2. *Miller v. Glenn Miller Productions, Inc.*, 454 F.3d 975, 988–989 (9th Cir. 2006).
3. Restatement (Third) of Unfair Competition § 46 (1993).
4. See, e.g., *Wendt v. Host Intl., Inc.*, 197 F.3d 1284 (9th Cir. 1999); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992).
5. Snapchat demurred to the complaint on December 26, 2014.
6. *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), cert. denied, 456 U.S. 927 (1982).
7. *Pooley v. Nat'l Hole-In-One Ass'n*, 89 F. Supp. 2d 1108, 1112 (D. Ariz. 2000) (the right of publicity in Arizona at least protects a "celebrity's name and likeness").
8. A.R.S. §§ 12-761, 13-3726.
9. Cal. Civ Code § 3344.1.
10. For instance, New York does not recognize a posthumous right of publicity. *Mirone v. MacMillan*, 894 F.2d 579, 585 (2d Cir. 1990).
11. *Christoff v. Nestle USA, Inc.*, 213 P.3d 132, 135 (Cal. 2009).
12. *Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012).
13. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).
14. *White v. Samsung Electronics Am., Inc.* 971 F.2d 1395, 1399 (1992).
15. See *Weingand v. Lorre*, 231 Cal. App. 2d 289, 294 (1964).
16. See *id.*
17. *Fraleigh v. Facebook, Inc.*, No. 10–5282, 2011 WL 5117164 (N.D.Cal. Oct. 27, 2011).
18. *Bittman v. Fox, et. al*, No. 10 C 7811, 2014 WL 812401, at *4 (N.D. Ill. Mar. 3, 2014).
19. *Fraleigh v. Facebook, Inc.*, 830 F. Supp. 2d 785 (N.D. Cal. 2012).
20. *Perkins v. LinkedIn Corp.*, No. 13-CV-04303-LHK, 2014 WL 2751053, at *11 (N.D. Cal. June 12, 2014).
21. See Restatement (Third) of Unfair Competition § 46 (1993); 5 McCarthy on Trademarks and Unfair Competition § 28:7 (4th ed.) With respect

- to social media, the issue of whether the plaintiff's likeness has commercial value is identical to the standing inquiry discussed in detail above.
22. Boisineau, Lynne M., "The Right of Publicity and the Social Media Revolution," *GPSolo*, May/June 2013, at 66.
 23. See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 396 (2001); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1245 (N.D. Cal. 2014).
 24. *La Russa v. Twitter Inc.*, No. 09-2503 (N.D. Cal. June 26, 2009).
 25. <https://support.twitter.com/articles/119135-faqs-about-verified-accounts#>.
 26. <https://www.facebook.com/help/167722253287296>.
 27. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 291 (D.N.H. 2008).
 28. Restatement (Third) of Unfair Competition § 46 (1993).
 29. http://www.dmlp.org/sites/citmedialaw.org/files/2007-09-00-Alison%20Chang%20Complaint_0.pdf.
 30. 47 U.S.C. § 230(c).
 31. *Id.* § 230(f)(3).
 32. *Universal Communication Systems v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007).
 33. *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008).
 34. *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 774 (D.N.J. 2011) *rev'd*, 717 F.3d 141 (3d Cir. 2013).
 35. Cal. Civ. Code § 3344.
 36. Fla. Stat. Ann. § 540.8.
 37. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 400 (2001).
 38. *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089, 1100 (E.D. Cal. 2009).
 39. *D'Andrea v. Rafla-Demetrious*, 972 F. Supp. 154, 155-156, 157-158 (E.D.N.Y. 1997).

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