



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 188

Date of Decision: 2021-08-25

IN THE MATTER OF AN OPPOSITION

prAna Living, LLC

Opponent

and

PTM Guard, SIA

Applicant

1,693,010 for PRANAMAT ECO

Application

INTRODUCTION

[1] prAna Living, LLC (the Opponent) opposes registration of the trademark PRANAMAT ECO (the Mark), which is the subject of application No. 1,693,010 by PTM Guard, SIA (the Applicant).

[2] The Mark is applied for in association with the following goods:

Massage carpets from natural and environmentally friendly materials; carpets, rugs, yoga gymnastics mats and therapeutic massage mats.

[3] The opposition is primarily based on an allegation that the Mark is confusing with the Opponent's trademark PRANA, previously used and/or registered in association with goods that either directly overlap or are related to the applied-for goods.

THE RECORD

[4] The application for the Mark was filed on September 9, 2014 and was advertised for opposition purposes on March 2, 2016. The application claims i) use in Canada since at least as early as November 2013 and ii) use in the Russian Federation and registered in or for WIPO on July 25, 2013.

[5] Numerous amendments to the *Trademarks Act*, RSC 1985, c T-13 (the Act) came into force on June 17, 2019. Pursuant to section 70 of the Act, the grounds of opposition will be assessed based on the Act as it read immediately before June 17, 2019, an exception being that, with respect to confusion, sections 6(2) to (4) of the Act as it currently reads will be applied.

[6] On July 28, 2016, the Opponent opposed the application by filing a statement of opposition under section 38 of the Act. The grounds of opposition are based on non-registrability under section 12(1)(d), non-entitlement under section 16(3), and non-distinctiveness under section 2 of the Act.

[7] In support of its opposition, the Opponent filed the affidavit of Michael Pogue, sworn September 26, 2018 in San Diego, California (the Pogue Affidavit).

[8] In support of its application, the Applicant filed the affidavit of Vladimirs Grigorenko, sworn January 28, 2019 in Riga, Latvia (the Grigorenko Affidavit). I note that at the time of filing this evidence, the application was in the name of Prokapital Management, SIA (Prokapital), the Applicant's predecessor in title.

[9] Neither affiant was cross-examined. Both parties submitted written representations; an oral hearing was not requested.

[10] Before assessing the grounds of opposition, I will provide an overview of the parties' evidence, the evidential burden on the Opponent, and the legal onus on the Applicant.

Applicant's Requests for Leave to Amend and Submit Additional Evidence

[11] As a preliminary matter, however, I note that the Applicant's written representations appear to include a request for leave to amend the Grigorenko Affidavit [Applicant's written

representations at para 7] as well as a request for leave to submit additional evidence [paras 11u to 11x].

[12] The request for leave to amend relates to Mr. Grigorenko’s statement regarding the sale of Prokapital’s products in Canada since at least as early as “November 2014” at paragraph 7 of his affidavit, which appears to contradict the November 2013 date as claimed in the application and as indicated at paragraph 13 of his affidavit.

[13] The request for leave to submit additional evidence relates to purported third-party use of the term PRANA [paras 11u to 11x].

[14] I note that these leave requests were improper. In this respect, the purported leave “evidence” was simply in the form of paragraphs incorporated into the Applicant’s written representations rather than in the form of an affidavit or statutory declaration. Thus, contrary, to the practice notice *Practice in trademark opposition proceedings*, the Applicant’s leave requests were not accompanied by at least a draft copy of the affidavit or statutory declaration proposed to be submitted, and were not accompanied by an indication that the deponent would be made available for cross-examination. Accordingly, I confirm that the Applicant’s requests for leave are refused. In any event, as discussed below, I note that neither the amendment nor additional purported evidence would likely have impacted the disposition in this case.

OVERVIEW OF THE OPPONENT’S EVIDENCE

[15] The Opponent is the owner of the following trademark registrations (collectively, the PRANA Trademarks):

Registration	Goods and Services
PRANA TMA558079 2002-02-18	Adult and children's biking, hiking, and climbing clothing, namely, shorts, T-shirts, sweatshirts, hats, tank tops, and trousers.
PRANA TMA759499 2010-02-15	Goods: (1) Climbing accessories, namely chalk bags, backpacks and tote bags; yoga exercise mats; yoga exercise accessories, namely rugs and rug holders. (2) Yoga clothing, namely shorts, pants, tops, hats, headbands and eye covers for use in yoga practice; yoga mat carriers.

	<p>(3) Prerecorded audio and video cassettes, CD's, CD-ROM's and DVD discs and other encoded or prerecorded computer readable discs, chips, cards, audio and video tapes, all featuring educational information in the fields of climbing, biking, hiking and yoga.</p> <p>(4) Books, workbooks, monographs, pamphlets and printed instructional cards, posters and pictures with graphic illustrations, all featuring educational information in the fields of climbing, biking, hiking and yoga.</p> <p>(5) Yoga clothing, namely shorts, pants, tops, hats, headbands, eye covers, sports bras, sweaters and jackets for use in yoga practice; yoga mat carriers.</p> <p>Services: Educational services in the fields of climbing, biking, hiking, and yoga including individual instruction, classes, courses, seminars, workshops, lectures, demonstrations, retreats, field trips, and teacher training.</p>
PRANA TMA877305 2014-05-07	<p>(1) Educational services, namely, providing online instruction in the field of yoga, meditation, dance, rock climbing and exercise and fitness; Providing classes, workshops, seminars and camps in the fields of fitness, exercise, rock climbing and yoga.</p> <p>(2) Internet-based social networking services.</p>
PRANA TMA917145 2015-10-15	Online journal, namely, a blog featuring content relating to yoga, climbing, hiking, biking, swimming, surfing, standup paddleboarding and other water-based activities.

[16] The Opponent is also the owner of trademark registration No. TMA877306 for PRANA LIVING, registered on May 7, 2014 in association with, *inter alia*, educational services in relation to fitness and yoga.

The Pogue Affidavit

[17] Mr. Pogue is the Chief Financial Officer of the Opponent [para 1]. The Opponent's business is designing, manufacturing, distributing, selling and marketing a wide variety of men's and women's clothing, clothing accessories, swimwear, and yoga and climbing accessories [para 4]. The Pogue Affidavit evidences the following:

- The background and history of the Opponent's business [paras 3 to 5];
- The Opponent's PRANA and PRANA LIVING trademarks and registrations in Canada [paras 6 to 9, Exhibit A];

- The Opponent’s PRANA products in Canada, including yoga mats, yoga apparel and yoga accessories [para 10];
- Screenshots from the Opponent’s website, *global.prana.com*, showing the Opponent’s PRANA-brand products available in Canada [para 11, Exhibit B];
- The Opponent’s various PRANA yoga mats and the manner of display of the Opponent’s PRANA trademark on the mats directly [paras 12 to 14, Exhibits B-2 and C];
- The distribution and sale of the Opponent’s PRANA products in Canada since 1998, including selected sales figures and volumes for sales through the following retailers: Mountain Equipment Co-op, Sail Outdoors, Sportium, Sporting Life and Atmosphere [paras 16 to 27, Exhibits E to S]; and
- Promotion of the Opponent’s PRANA products in Canada, including through the Opponent’s website [paras 29 and 30]; through co-operative advertising with the aforementioned retailers [paras 31 and 32, Exhibits T to V]; through activities by sales agencies [paras 33 and 34]; and through sponsored yoga classes, yoga tours, and festivals in Canada [para 35 to 37, Exhibits W and X].

OVERVIEW OF THE APPLICANT’S EVIDENCE

The Grigorenko Affidavit

[18] Mr. Grigorenko is the Owner of Prokapital, the Applicant’s predecessor in title [para 1]. Established in Latvia in 2005, Prokapital sells “proprietary studded massager matts and pillows used by yoga enthusiasts around the world”, which Mr. Grigorenko defines as the “Prokapital Products” [para 5].

[19] Generally, Mr. Grigorenko attests to Prokapital’s registration, use and advertisement of its trademarks, including the Mark, in Canada and internationally [paras 9 to 12], He also attests to the nature of Prokapital’s yoga mat products, as well as their availability internationally and in Canada via its website, *pranamateco.com* [paras 13 to 17].

[20] Mr. Grigorenko states at paragraph 7 of his affidavit that “Prokapital has advertised, marketed and sold the Prokapital Products in Canada, under the trademark PRANAMAT ECO since at least as early as November 2014”. He later states, however, that “Prokapital has been using the Prokapital Products in Latvia since at least as early as 2010 and in Canada since at least as early as November 2013” [at para 13]. This discrepancy is addressed below.

[21] Mr. Grigorenko concludes his affidavit by stating that “Prokapital has had ... 1,416 orders in Canada for an approximate total of \$332,128.00 CAD and 122,000 orders worldwide for an approximate total of \$22,644,759.00 CAD” [para 18].

EVIDENTIAL BURDEN AND LEGAL ONUS

[22] In accordance with the usual rules of evidence, there is an evidential burden on the Opponent to prove the facts inherent in its allegations pleaded in the statement of opposition [*John Labatt Ltd v Molson Companies Ltd*, 1990 CarswellNat 1053, 30 CPR (3d) 293 (FCTD)]. The presence of an evidential burden on the Opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist.

[23] For those allegations for which the Opponent has met its evidential burden, the legal onus is on the Applicant to show that the application does not contravene the provisions of the Act as alleged in the statement of opposition. The presence of a legal onus on the Applicant means that, if a determinate conclusion cannot be reached once all the evidence has been considered, then the issue must be decided against the Applicant.

SECTION 12(1)(D) GROUND OF OPPOSITION – CONFUSING WITH A REGISTERED TRADEMARK

[24] The Opponent pleads that the Mark is not registrable for use in association with the applied-for goods pursuant to section 12(1)(d) of the Act because the use of the Mark in association with such goods would cause confusion with the Opponent’s PRANA Trademarks. Specifically, the use of the Mark and the Opponent’s PRANA Trademarks in the same area would likely lead to the inference that the Applicant’s goods and the Opponent’s goods and services are manufactured, sold, leased, hired or performed by the same person.

[25] The material date with respect to confusion with a registered trademark is the date of this decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd et al*, 1991 CarswellNat 1119, 37 CPR (3d) 413 (FCA)]. I have exercised my discretion and checked the register to confirm that the Opponent's PRANA Trademarks remain extant [per *Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. Accordingly, the Opponent meets its initial burden with respect to this ground.

[26] As such, the Applicant must establish, on a balance of probabilities, that there is not a reasonable likelihood of confusion between the Mark and any of the Opponent's PRANA Trademarks.

[27] For purposes of this ground, I will focus the confusion analysis on the Opponent's registration No. TMA759499 for PRANA, as I consider it represents the Opponent's strongest case. In this respect, I note that the registration includes the following goods, which directly overlap or are closely related to the applied-for goods: "yoga exercise mats", "yoga exercise accessories, namely rugs and rug carriers", "yoga clothing", and "yoga mat carriers".

Test to determine confusion

[28] The test to determine the issue of confusion is set out in section 6(2) of the Act which provides that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification.

[29] The test to be applied is a matter of first impression in the mind of a casual consumer "somewhat in a hurry" who sees the Mark in association with the applied-for goods at a time when they have no more than an imperfect recollection of the Opponent's trademark and does not pause to give the matter any detailed consideration or scrutiny [see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 20].

[30] In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act: the inherent distinctiveness of the

trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods, services or business; the nature of the trade; and the degree of resemblance between the trademarks in appearance, or sound or in the ideas suggested by them.

[31] The criteria or factors in section 6(5) of the Act are not exhaustive and different weight will be given to each one in a context-specific assessment [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 54]. In *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, the Supreme Court of Canada stated that section 6(5)(e), the resemblance between the trademarks, will often have the greatest effect on the confusion analysis [at para 49] and that, while the first word in the trademark may be the most important in some cases, the preferable approach is to consider whether there is an aspect of the trademark that is particularly “striking or unique” [at para 66].

Inherent Distinctiveness and the Extent Known

[32] In its written representations, the Applicant submits that the term PRANA is widely known in the yoga field [para 11j], submitting that “in Hindu philosophy including yoga, Indian medicine and Indian martial arts, prana permeates reality on all levels including inanimate objects” [para 11h, citing *Wikipedia.org*]. Indeed, as the Registrar may take judicial notice of dictionary definitions [*Tradall SA v Devil’s Martini Inc*, 2011 TMOB 65], I note that *dictionary.com* provides the following definitions of PRANA:

Prana: *Yoga, Jainism*: the vital principle.

Prana: *Yoga*: one of five vital breaths moving in the body.

[33] Accordingly, I accept that the term PRANA has at least some suggestive meaning with respect to yoga-related goods and services.

[34] Nevertheless, the distinctive element of the Mark is the word PRANAMAT, the first portion of which is PRANA. In association with the applied-for goods, I consider the suffix MAT and the second word ECO to be suggestive if not descriptive of the applied-for goods. In this respect, I do not agree with the Applicant’s submission that the word ECO is highly distinctive [per Applicant’s written representations at para 11n]. One of the definitions of ECO found at *dictionary.com* is “not harmful to the environment”, which is at least suggestive of the

applied-for goods, in particular, “massage carpets *from natural and environmentally friendly materials*”.

[35] Accordingly, while there is nominally some distinctiveness to the particular combination of suggestive and descriptive elements that form the Mark, the parties’ trademarks essentially have a similar degree of inherent distinctiveness.

[36] With respect to the extent to which the Mark has become known, I agree with the Opponent that the Grigorenko Affidavit is somewhat ambiguous. Having said that, the Opponent chose not to cross-examine Mr. Grigorenko. Therefore, notwithstanding the apparent discrepancy between the claimed date of first use in Canada and Mr. Grigorenko’s statement at paragraph 7 of his affidavit that “Prokapital has advertised, marketed and sold the Prokapital Products in Canada, under the trademark PRANAMAT ECO since at least as early as November 2014”, Mr. Grigorenko later states in his affidavit that “Prokapital has been using the Prokapital Products in Latvia since at least as early as 2010 and in Canada since at least as early as November 2013” [at para 13]. It would therefore appear that the 2014 date in paragraph 7 is simply a typographical error.

[37] In any event, Mr. Grigorenko also states that, since 2010, the Applicant’s *pranamateco.com* website “has received nearly 1 million visits from Canadian IP addresses” and “has had 1,416 orders in Canada for an approximate total of \$332,128.00 CAD”, in addition to worldwide sales [paras 17 and 18]. I agree with the Applicant that the website’s availability since 2010 is not inconsistent with the Applicant’s claimed date of first use set out in the application which, in any event, is not at issue in this proceeding under the pleaded grounds.

[38] While it is left to be inferred that any sales of “Prokapital Products” were in fact for products corresponding to the applied-for goods and sold in association with the Mark, read generously, I accept that the Grigorenko Affidavit evidences that the Mark has become known at least to some extent in Canada. In this respect, I also note that the Applicant furnished some evidence of advertisement and promotion of the Mark through social media and advertisements in third-party publications [Grigorenko Affidavit at para 12 and Exhibit VG-4].

[39] However, I agree with the Opponent that the Opponent's PRANA trademark has become known in Canada to a greater degree for purposes of this surrounding circumstance. In this respect, the Opponent has been selling its PRANA products in Canada since 1998 [Pogue Affidavit at para 16] and, since 2010, has sold over 1.8 million units of PRANA products in Canada through various retailers [para 26]. This includes significant sales of yoga-related goods and accessories, such as over 20,000 units of "E.C.O. Yoga Mats" sold in Canada since 2010 [para 27]. I note that the Opponent's yoga mats displayed the PRANA trademark [for example, Pogue Affidavit at Exhibits C and N].

[40] The Opponent also evidenced relatively significant advertising expenditures, having an annual marketing budget for Canada of approximately USD\$150,000 [Pogue Affidavit at para 28]. Although the Pogue Affidavit speaks to the Opponent's promotional initiatives with respect to the PRANA products generally, at least some of the evidenced marketing materials relate to the Opponent's PRANA-branded yoga clothing and accessories.

[41] In view of the foregoing, this factor favours the Opponent.

Length of Time In Use

[42] Although the Grigorenko Affidavit is somewhat ambiguous as to the length of time the Mark has been in use in Canada, for purposes of this analysis I am prepared to take the "since at least as early as November 2013" claim set forth in the application and at paragraph 13 of the affidavit at face value.

[43] In its written representations, the Opponent appears to rely on the claims set out in its registration, namely use in Canada since at least as early as February 2002 (in association with yoga clothing) and use in Canada since at least as early as January 28, 2010 (in association with yoga exercise mats and yoga exercise accessories). Indeed, the Pogue Affidavit confirms that the PRANA trademark has been used in association with yoga mats and the like in Canada since at least 2010 [para 27]. I also accept that the claim of use since February 2002 with respect to yoga clothing is consistent with the Pogue Affidavit and the assertion that the Opponent's PRANA products have been sold in Canada since 1998 [para 16].

[44] Accordingly, this factor favours the Opponent.

Nature of the Services or Business / Nature of the Trade

[45] When considering the nature of the goods of the parties in respect of the issue of confusion, it is the statements in the subject application and registration that govern [*Mr Submarine Ltd v Amandista Investments Ltd*, 1987 CarswellNat 749 (FCA); *Miss Universe Inc v Bohna*, 1994 CarswellNat 1443 (FCA)].

[46] In this case, both parties' goods include yoga mats and the like. Furthermore, while the Applicant's goods appear to be offered in Canada only through the Applicant's website [Grigorenko Affidavit at paras 13 to 17], both parties' goods are retail consumer goods focused on the yoga community and available online. Accordingly, I consider there to be overlap in the nature of the parties' businesses and trades as well.

[47] Accordingly, these factors favour the Opponent.

Degree of Resemblance

[48] Given the descriptiveness or at least suggestiveness of the MAT suffix and ECO element in the Mark, the striking element is also the first portion of the Mark, PRANA. This is shared with the Opponent's PRANA trademark.

[49] Given this shared first portion, there is some resemblance in appearance and when sounded between the parties' trademarks. I also consider there to be some resemblance in the ideas suggested, as both parties' trademarks potentially invoke the aforementioned yoga concept of "prana".

[50] In view of the foregoing, this factor favours the Opponent.

Additional Surrounding Circumstance – Absence of Evidence of Actual Confusion

[51] In its written representations, the Applicant submits that the absence of evidence of actual confusion over a relevant period of time – despite an overlap in the parties' goods and channels of trade – entitles the Registrar to draw a negative inference regarding the likelihood of confusion [para 11s]. In this respect, the Applicant notes that the application for the Mark is

based on actual use, submitting that there has been “a fair degree of concurrent use” of the Opponent’s trademarks and tradename with the Mark since at least 2013 [para 11t].

[52] However, while the parties’ goods are both available online, the Grigorenko Affidavit indicates that the Applicant’s goods are only available through the Applicant’s website [para 16 and 17]. Accordingly, in this case, I do not consider the absence of evidence of actual confusion to be significant. Even if I were to give some weight to this apparent absence of confusion to date, it would be outweighed by the aforementioned surrounding circumstances.

Additional Surrounding Circumstance – Third Party Use of the Term PRANA

[53] As noted above, by way of its written representations, the Applicant attempted to submit “evidence” regarding third-party use of the term PRANA in association with yoga-related goods and services [paras 11u to 11x]. This included reference to the following four registrations: TMA679320 for PRANASTUDIO; TMA895535 for PRANASENS; TMA682310 for PRANA GROUP; and TMA785337 for PRANALI & Design; as well as a link to a third-party website purporting to sell PRANASENS essential oils.

[54] However, if the Applicant wished these registrations and any purported use in the marketplace to be considered, it should have timely and properly furnished such as evidence.

[55] In any event, state of the register evidence is only relevant insofar as one can make inferences from it about the state of the marketplace [*Ports International Ltd v Dunlop Ltd*, 1992 CarswellNat 1431 (TMOB); and *Welch Foods Inc v Del Monte Corp*, 1992 CarswellNat 178 (FCTD)]. Such inferences can only be drawn from state of the register evidence where large numbers of relevant registrations are located [*Maximum Nutrition Ltd v Kellogg Salada Canada Inc*, 1992 CarswellNat 124 (FCA)]. In this case, there is no evidence regarding the extent to which these third-party trademarks have been used or become known in Canada. I also note that while the goods and/or services of the aforementioned registrations appear to relate to yoga or fitness generally, they do not appear to more directly overlap with the relevant applied-for goods in this case, namely, mats, rugs and carpets for yoga or massage.

[56] In view of the foregoing, I do not consider this to be a relevant surrounding circumstance in this case.

Conclusion – Confusion with the Opponent’s PRANA Trademark Registration

[57] Having considered all of the surrounding circumstances and applying the test for confusion as a matter of first impression and imperfect recollection, I conclude that, on a balance of probabilities, there is a reasonable likelihood of confusion between the Mark and the Opponent’s PRANA trademark in association with the applied-for goods. I reach this conclusion based on the resemblance between the trademarks, the overlap in the parties’ goods, and the extent to which the Opponent’s PRANA trademark has become known in association with similar and related goods.

[58] In view of the foregoing, the section 12(1)(d) ground of opposition based on confusion with the Opponent’s PRANA trademark is successful.

SECTION 16(1)(A) GROUND OF OPPOSITION – NON-ENTITLEMENT

[59] As the Mark is applied for on the basis of use in Canada as well as on the basis of use and registration abroad, the Opponent pleads six separate grounds under section 16 of the Act. Again, however, for purposes of this analysis, I consider it sufficient to focus on the ground relating to prior use of the Opponent’s PRANA trademark.

[60] In this respect, the Opponent pleads that the Applicant is not the person entitled to registration of the Mark in association with the applied-for goods pursuant to section 16(1)(a) of the Act since, in November 2013, the alleged date of first use of the Mark in Canada in association with such goods, the Mark was confusing with the Opponent’s PRANA Trademarks, which have been previously used and/or made known in Canada by the Opponent and/or its predecessor in title.

[61] As the Opponent has evidenced use of its PRANA trademark in association with, *inter alia*, yoga exercise mats, yoga exercise accessories, and yoga clothing since at least January 2010 in Canada, the Opponent meets its initial burden under this ground.

[62] Furthermore, I consider the confusion analysis above to be substantially similar with respect to this ground. As such, having considered all of the surrounding circumstances and applying the test for confusion as a matter of first impression and imperfect recollection, I

conclude that, on a balance of probabilities, there is a reasonable likelihood of confusion between the Mark and the Opponent's previously-used PRANA trademark in association with the applied-for goods. I reach this conclusion based on the resemblance between the trademarks, the overlap in the parties' goods, and the extent to which the Opponent's PRANA trademark has become known in association with similar and related goods.

[63] In view of the foregoing, this ground of opposition based on non-entitlement is successful.

REMAINING GROUNDS OF OPPOSITION

[64] As the Opponent is successful with respect to two grounds of opposition, it is not necessary to address the remaining grounds of opposition, namely the 12(1)(d) ground relating to the Opponent's PRANA LIVING trademark, or the further grounds based on section 16 and section 2 of the Act.

[65] In this respect, each of these remaining grounds ultimately turn on the issue of confusion and I have already decided on that issue with respect to what I consider to be the Opponent's strongest cases.

DISPOSITION

[66] In view of all of the foregoing, pursuant to section 38(12) of the Act and the authority delegated to me under section 63(3) of the Act, I refuse the application.

Andrew Bene
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE: No hearing held

AGENTS OF RECORD

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