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Researching the Early History of the Patent Policy: Getting Started

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Researching the Early History of the Patent Policy: Getting Started

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There are a lot of reasons to research the early history of American patent policy. It is an inherently interesting history that provides a framework making contemporary patent policy more comprehensible and a foundation for interpreting historic patent records. For students it provides an opportunity to become familiar with some of basic primary sources that are a staple of research into American history. Also, of course, questions may arise from time to time that can only be authoritatively answered by researching this history.

The approach described below seeks to balance comprehensiveness with feasibility, and emphasizes the importance of creating a structure for the research before wading into the vastness of the historical record. This approach will allow researchers new to this area to get up to speed quickly.

Statutes

It makes sense to start research into early patent policy by identifying the salient statutes—such as the Patent Acts of 1790, 1793, 1836, 1837, and 1870. Because patent policy is derived from these statutes they are an indispensable source for understanding the basic requirements of patent policy and for identifying the major periods in Patent Office history.

While current patent law is codified in Title 35 of the *United States Code* (abbreviated in citations as “U.S.C.”), the historic statutes or session laws can be found in *United States Statutes at Large* (abbreviated in citations as “Stat.”). *United States Statutes at Large* is available in print in many university and law libraries. Digital versions include those available at the Library of Congress, *A Century of American Lawmaking for a New Nation Collection (1790-1875)*, through the HathiTrust Digital Library (various volumes), and at the Government Printing Office’s *United States Statutes at Large* page (as of this writing 1951-2011).

Analyzing the major historic statutes can be done fairly quickly and provides a concise overview of the history. Depending on the focus of a project, additional statutes can be examined as well. One started point for nineteenth century statutes would be the following set:

- Patent Act of 1790, Ch. 7, 1 Stat. 109 (April 10, 1790).
- Patent Act of 1793, Ch. 11, 1 Stat. 318 (Feb. 21, 1793).
- Patent Act of 1836, Ch. 357, 5 Stat. 117 (July 4, 1836).
- Patent Act of 1837, Ch. 45, 5 Stat. 191 (March 3, 1837).
- Patent Act of 1870, Ch. 230, 16 Stat. 198 (1870) (“An Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights”).

Even a cursory look at these statutes reveals their importance. The 1790 Act established a Patent Board (sometimes called the Board of Arts or Patent Commission) to examine petitions for letters patent and to ensure that an invention was sufficiently useful and important for a patent to issue. Section 2 of the 1790 Act anticipated the specification requirement in later laws—including the current requirement, codified at 35 U.S.C. § 112(a) — by requiring a petitioner to:

deliver to the Secretary of State a specification in writing, containing a description, accompanied with drafts or models, and explanations and models (if the nature of the invention or discovery will admit of a model) of the thing or things, by him or them invented or discovered, and described as aforesaid, in the said patents; which specification shall be so particular, and said models so exact, as not only to distinguish the invention or discovery from other things before known and used, but also to enable a workman or other person skilled in the art or manufacture, whereof it is a branch, or wherewith it may be nearest connected, to make, construct, or use the same, to the end that the public may have the full benefit thereof, after the expiration of the patent term;

[Patent Act of 1790, Section 2]. The Patent Act established actions at law for infringement and cancellation. The 1790 Act adopted a fourteen-year term, echoing the English Statute of Monopolies passed in 1624 [cited in some sources as Statute of Monopolies, 1623, 21 Jac. 1, c. 3 (Eng.)].

According to Jefferson biographer Dumas Malone, the Patent Board (comprised of Secretary of State Thomas Jefferson, Attorney General Edmund Randolph, and

Secretary of War Henry Knox) granted fifty-seven patents, while rejecting others as unworkable, frivolous, or obvious improvements on existing inventions. Although Jefferson's background as an inventor made him well-suited to patent examination, Jefferson quickly realized that he lacked the resources to do the job justice and recommended to Congress that the patent law be revised. [Dumas Malone, *Jefferson and the Rights of Man* (Boston: Little Brown & Co., 1951), 281-85].

The 1793 Act abolished the Patent Board, anticipated current law (35 U.S.C. § 101) by carefully defined the scope of patentability, and clarified that a mere change in form or proportion would not constitute a new discovery. The 1790 and 1793 acts are, however, also important for what they did not do. The 1793 Act did not require a substantive examination for novelty or utility, and neither act required that a specification include claims. The lack of a claims requirement, and, after 1793, the lack of an examination requirement, meant that the burden for determining the scope and validity of patents was relegated to the courts. In this era the art of patent drafting developed largely in response to litigation and judicial decisions (and not predominantly in response to the requirements of the Patent Board or the Board's successors, the Superintendents of Patents). [Karl B. Lutz, "Evolution of the Claims of U.S. Patents" *Journal of the Patent Office Society*, 20 (1938): 139-40]. The inclusion of claims in a specification did not become a statutory requirement until the Patent Act of 1870 was enacted.

The 1790 and 1793 acts also did not require that the complete specification be annexed to the letters patent. This requirement was added by Section 5 of the 1836 Act. This explains some of the incongruities in the restored patent records for the retrospectively numbered X-Patents. These records are often incomplete and may contain either letters patent issued to the inventor (often handwritten) or printed specifications supplied by the inventor to re-record a patent destroyed by the December 15, 1836 Patent Office fire.

The 1836 Act marked a major turning point in patent history by creating a Patent Office under a Commissioner, with a Chief Clerk, and other officers, including an examining clerk (§§ 1, 2). The 1836 Act also required the examination of applications

for novelty and utility (§ 7); allowed an inventor whose application was rejected to withdraw the application and be refunded \$20 (or to persist and pay \$25 to appeal to a board of examiners) (§ 7); established procedures for Patent Interference cases (§ 8); provided for assignments to be recorded (§ 11); provided for the filing of Patent Caveats (§ 12); and provided for the filing of Additional Improvement Patents and Reissue Patents (§ 13), among other things.

The 1837 Act provided for restoration of patent records and models that had been destroyed in the 1836 fire. Consequently the 1837 Act, like the 1790 and 1793 Acts, is important for understanding the nature of the restored records. The 1870 Act (titled “An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights”), revised and consolidated existing patent statutes and created more nuanced procedures for patent examination, among other things. The 1870 Patent Act also included provisions relating to trademarks (Sections 77-84) and copyright (Sections 85-110).

Once a basic framework of major statutes is established, it is a relatively straightforward matter to incorporate additional statutes into the analysis. There are, of course, many statutes that amended different aspects of patent law and impacted patent policy, a few of which are set forth here for illustration:

- Act of June 7, 1794, Ch. 58, 1 Stat. 393 (1794) (restoring lawsuits dismissed as a result of the repeal of the 1790 Act).
- Act of April 17, 1800, Ch. 25, 2 Stat. 37 (1800) (extending the protection of the 1793 Act to aliens with two years’ residence and providing for treble damages for infringement).
- Act of Feb. 15, 1819, Ch. 25, 3 Stat. 481 (1819) (giving the United States Circuit Courts jurisdiction over patent cases).
- Act of July 3, 1832, Ch. 162, 5 Stat. 559 (1832) (requiring the annual publication of expired patents and providing for reissue patents).
- Act of July 13, 1832, Ch. 162, 5 Stat. 577 (1832) (extending the protection of the 1793 Act to aliens who reside in the United States and declare an intention to become citizens).

One source for identifying these statutes in the Lists of Public Acts, in *United States Statutes at Large*. The acts mentioned above were also cited in a note accompanying

the 1793 Act, at 1 Stat. 393, note (a). Notes for statutory history can also be found in relevant sections of the *United States Code*. Additionally, secondary literature such as law journal articles can be a rich source of information about historic statutes.

It is also a fairly straightforward process, once the major patent acts have been identified, to extend one's research to include statutes affecting other aspects of intellectual property. For instance, an 1874 amendment to the Patent Act of 1870 required commercial prints and labels to be registered with the Patent Office (which was done until 1940). The amendment specified "[t]hat in the construction of this act, the words 'Engraving,' 'cut' and 'print' shall be applied only to pictorial illustration or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office." [Act of June 18, 1874, Ch. 301, § 3, 18 Stat. 78, 79 (1874)]. The following 1900 label for Richmond Abattoir Corned Beef Hash was registered under 1874 amendment:



The Richmond Abattoir label is part of the National Archives Record Group 241 and is one of several labels for which digital images are available. These are accessible, for instance, by searching NARA's Online Public Access search tool for: "**record group 241**" and **labels**, then clicking on *View all Online Holdings*.

Other intellectual property statutes might include copyright acts, such as the Copyright Act of 1790, Ch. 15, 1 Stat. 124 (May 31, 1790), which protected maps, charts, and books (for a 14-year term with one 14-year renewal term), or its successors which protected wider ranges of materials. For instance:

- Copyright Act of 1836, Ch. 16, 4 Stat. 436 (Feb. 3 1831) [books, maps, charts, or musical compositions].

- Copyright Act of 1909, Ch. 320, 35 Stat. 1075 (March 4 1909) [books, periodicals, lectures, dramatic compositions, musical compositions, maps, works of art, reproductions of works of art, scientific or technical drawings, photographs, and prints].

Major trademark statutes would include the trademark provisions of the 1870 Act to Revise, Consolidate, and Amend the Statutes Relating to Patents and Copyrights 1870, 16 Stat. 198 at 210-12 (July 8, 1870), which is cited in some contexts as the 1870 Trademark Act (or as the 1870 Copyright Act).

Bills and Legislative Reports

In addition to statutes, it is often interesting and useful to research bills and legislative reports. Some of these materials are, of course, comparatively important. The 1836 *Ruggles Report*, for instance, examined deficiencies in patent law and problems with the building that the patent records and models were stored in. The report included a Bill, later numbered S. 239. Under the 1793 Act, the report explained, a lot of the patents that had been granted were worthless and provided little protection to inventors due to rampant infringement and fraud. Moreover, “[o]ut of this interference and collision of patents and privileges, a great number of lawsuits arise, which are daily increasing in an alarming degree, onerous to the courts, ruinous to the parties, and injurious to society.” [John Ruggles, *Select Committee Report on the State and Condition of the Patent Office*, S. Doc. No. 24-338 (1836), at page 3]. Senate Reports were published in the United States Congressional Serial Set, which is indexed in the *CIS US Serial Set Index* (1789-1969).

With regard to the inadequacy of the patent building, Ruggles wrote that the models were “crowded together in a manner unfavorable for exhibition or examination” and that “the present building is much exposed to destruction by fire.” [*Ruggles Report*, at page 7]. The report also provides insights into some of the policy considerations behind some of the 1836 Act’s provisions. Because American citizens could register patents in Great Britain, there should be reciprocity, the report recommended. The bill’s provision for patent caveats was thought desirable because it might take inventors some time to perfect their inventions. [*Ruggles Report*, at page 6]. John Ruggles, a Senator from Maine was also an inventor. The first patent issued under the 1836 Act,

U.S. Patent 1 (July 13, 1836) was issued to Senator Ruggles for his Traction Wheels for trains.

Bills are also often useful parts of the historical record. For example, three important bills introduced in the 24th Congress (December 7, 1835 to July 4, 1836) were S. 239, *A Bill To Promote the Progress of the Useful Arts*, which became the 1836 Patent Act; S. 296, *A Bill providing for the Construction of a Building for the Accommodation of the Patent Office*; and H.R. 216, *A Bill making Appropriations ... for the Year of 1836*, which included the provision of \$108,000 for the construction a new patent building. Bills and Resolutions can be searched using *A Century of American Lawmaking for a New Nation Collection (1790-1875)*, part of the Library of Congress American Memories collections.

Annual Reports of the Commissioners of Patents and Patent Lists

Under Section 14 the 1837 Act Commissioners of Patents were required to prepare a report to Congress “in the month of January, annually,” which included “a detailed statement of the expenditures and payments” as well as:

a list of all patents which shall have been granted during the preceding year, designating, under proper heads, the subjects of such patents, and furnishing an alphabetical list of the patentees, with their places of residence; and he shall also furnish a list of all patents which shall have become public property during the same period; together with such other information of the state and condition of the Patent Office, as may be useful to Congress or to the public.

Patent Act of 1837, § 14, Ch. 45, 5 Stat. 191, 195 (March 3, 1837). The first report issued pursuant to the 1837 Act was for the year 1837 (published in 1838) and can be found in the *U.S. Congressional Serial Set*. [Henry L. Ellsworth, *Report from the Commissioner of Patents for the year 1837*. H. Doc. No. 112, 25th Cong., 2d Sess., January 17, 1838, Serial 325]. In addition to appearing in the *Serial Set*, the reports are available in some research libraries in print and also through major digital depositories such as the HathiTrust Digital Library and Google Books.

Thus, in addition to valuable lists of patents and patentees, the *Annual Reports* also provide a fascinating and detailed view of the administration of the Patent Office. For example, Commissioner Ellsworth in his Report for 1837 describes the immediate impact of the 1836 fire on his office:

The destruction of the Patent Office compelled the Commissioner to seek new accommodations, and an arrangement was accordingly made, with the approbation of the honorable Secretary of State, for the use of a part of the City Hall, where fire-proof rooms were found adapted to the purpose. Every facility on this subject has been afforded by the city authorities, and no rent is required or expected. Some alterations were required to accommodate both the Corporation and the Patent Office; for these, pecuniary remuneration is justly due; and the undersigned respectfully recommends that measures be adopted to satisfy this claim.

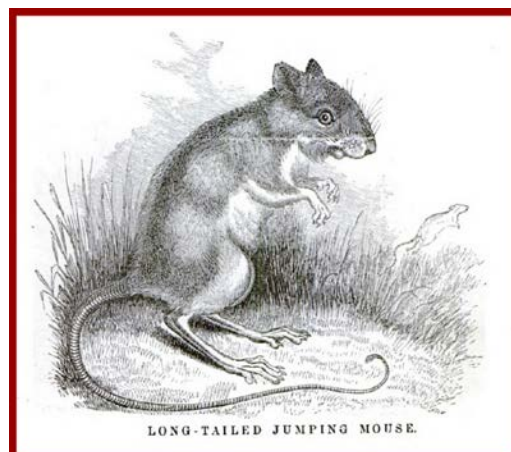
The records destroyed contained an alphabetical as well as classified digest of all the patents granted by the United States. A new record has been nearly completed from sundry authentic documents, with an improved classification. Several copies will be needed for reference in the Patent Office; and since printed duplicates will be cheaper than manuscripts, I here respectfully suggest the propriety of an appropriation for publishing a new edition as soon as practicable. The expediency of distributing a number of copies to the respective States is also suggested. This would enable those interested to obtain information with less delay to themselves, and much less interruption to the regular business of the office.

[*Report from the Commissioner of Patents for the year 1837*, at pp. 3-4]. One advantage of the digital repositories is that you can do full text searching. Thus a full text search of the HathiTrust Digital Library for “destruction of the Patent Office compelled the Commissioner” (in quotes) will retrieve a handful of results, one of which will contain a link to *United States Congressional serial set 325*, which contains the report for 1837 (H. Doc. No. 112).

Commissioners also directed that more comprehensive lists be compiled and published. Exemplifying these is *List of Patents for Inventions and Designs, issued by the United States, from 1790 to 1847*, which was compiled under the direction of Commissioner Edmund Burke and published in 1847. This list, available through the HathiTrust Digital Library and Google Books, lists the inventions, the patentees, their residences, and the dates of issue for the patents. The list is organized in twenty-two

classes and is accompanied by an index of patentees that includes the inventors' names with reference to their inventions and the class and the page where invention can be found in the list. Accessing the *List of Patents* through the HathiTrust allows you to conduct full text searches. For example, a search for the terms **plough**, **Jethro** and **Wood** quickly found the references for Wood's July 1, 1814 and September 1, 1819 plough patents under the Agriculture class, as well as in the Index of patentees. The *List of Patents* also includes the text of the patent statutes and a digest of salient judicial decisions.

The *Reports* of the Commissioners of Patents also contain a wealth of interesting and often unexpected information. The Commissioner of Patents was responsible for reporting agricultural statistics prior to the establishment of a Department of Agriculture in 1862 and issued "Agricultural Reports." Commissioners also distributed seeds to members of Congress. [Charles Mason, *Report of the Commissioner of Patents for the Year 1856: Agriculture*, Ex. Doc. No. 65, 34th Cong., 3d Sess. February 17, 1857, at page iv.]. The Agricultural Report for 1856 included a 160-page discussion of animals accompanied by a few dozen illustrations, including the Long-Tailed Jumping Mouse:



Commissioner Burke's *The Report of the Commissioner of Patents for the Year 1845* included a large compilation of information—much gathered from the reports and speculations of farmers—about the disease in potatoes that was damaging crops in the United States and Europe (and which since has been identified as the oomycete

Phytophthora infestans [Joseph Stromberg, “Scientists Finally Pinpoint the Pathogen that Caused the Irish Potato Famine,” *Smithsonian.com* (May 21, 2013)]).

Journal of the Franklin Institute & Journal of the Patent Office Society

Among the many journals that are valuable for patent history research, two in particular stand out: *The Journal of the Franklin Institute* and the *Journal of the Patent Office Society*. *The Journal of the Franklin Institute* was established in 1826 and reported closely on United States patents. It is available through the HathiTrust. The *Journal of the Patent Office Society* is a leading source for highly nuanced discussions of Patent Office history. The *Journal* is available in many libraries and in the HeinOnline database maintained by the New York law publisher William S. Hein.

The Journal of the Franklin Institute—whose first editor was Thomas P. Jones, Superintendent of Patents from 1828-1829—provided information about recently issued patents which included brief descriptions, the editors’ evaluations of the originality of inventions, and, in some cases, reprinted specifications. For this reason *The Journal* is a primary source for information about patents from this period. For instance, if one were to search the USPTO Patents Full Text database for patents that issued on April 2, 1835 one would find four patents. These are X87,36N or 8,736 $\frac{7}{8}$ X (A. Hale, Wheel); X87,36L or 8,736 $\frac{3}{4}$ X (L. Carman, Horse Power [Thrashing Machine]); X87,36H or 8,736 $\frac{1}{2}$ X (O. Mack, Bee Hive); and X87,36D or 8,736 $\frac{1}{4}$ X (J. Deakyne, Straw Cutter). Note that the letters corresponding to the fractional numbering, found on some X Patents, are based on a system of sixteenths: A = 1/16, B = 1/8, C = 3/16 and so on up to O = 15/16).

Consulting *The Journal of the Franklin Institute*, however, one would discover an additional eight patents that likely issued on that date. Volume XVI (New Series) of the *Journal*, at pages 306-33, sets forth a list of American Patents which issued in April of 1835 with editorial “Remarks and Exemplifications.” Looking at the entries for April 2, 1835 would reveal brief descriptions for a Pump to regulate water height in boilers, a Fire Alarm, a Tread Pump, a Grist Mill, a Cooking Stove, a Papillary Shield, a Spindle, and a Truss.

6. For an improvement in the *Grist Mill*, applicable also to the grinding of paint and plaster; Cephas Manning, Littleton, Middlesex county, Massachusetts, April 2.

This is another portable mill for grinding grain, &c., in which is claimed, "A new and useful method of arranging and supporting the stone of a grist mill, by which the upper stone shall be stationary, and the lower stone shall be the runner, or revolving stone. A new and useful method of dressing the stones of a mill by curved grooves, hereinafter to be described. A new and useful method of supporting, and of preserving the parallelism of, the runner."

As the lower stone has repeatedly been made the runner in such mills, the doing this cannot become the subject of a valid claim, and we do not see any thing peculiar in the mode of effecting it, as described by the patentee. The manner of dressing the stones is by laying out the furrows in curved lines from the eye, or centre, to the periphery; the curves to vary according to the velocity intended to be given to the stone, &c. The lower stone is to be made fast to the vertical shaft by passing screws through four arms upon which its under side rests, these screws serving also to regulate its parallelism.

7. For a *Cooking Stove*; Anthony Abbott, Portland, Cumberland county, Maine, April 2.

The *Journal of the Patent Office Society* contains a wealth of information about the history of patent policy. This journal, for example, provides a very good overview of patent policy in Volume 18, which was a special volume done at the Centennial of the 1836 Act (and the institution of the modern Patent Office) and was compiled from several articles that had previously been published:

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The journal also has reprinted historical documents, thus it is not surprising to find that scholars often rely on the *Journal of the Patent Office Society* to research patent history. For example Jefferson biographer Dumas Malone cites frequently to the

Journal of the Patent Office Society when discussing the Jefferson's Patent Board. In the following excerpt Dumas describes some of the procedures employed by the Patent Board:

The procedure was slow and tedious. The Board of Arts met the last Saturday of every month and then read all the applications received since the last meeting. These lay over for another month, but were not acted on then unless suitable specifications, drafts, or models had been submitted. Beginning in July, 1791, the three members read the descriptions separately in their own lodgings, the Attorney General first in order that he might pass on the propriety of the forms. The criticisms and amendments suggested by all three were consolidated by Remsen, the chief clerk of the department, and were considered by the entire group. The question of conflicts with patents already issued could hardly have been important at this early stage, but there were cases of rival claims, as when John Fitch, James Rumsey, and two others applied for steamboat patents.

[Dumas Malone, *Jefferson and the Rights of Man* (Boston: Little Brown & Co., 1951), 282, citing to "Undated memorandum by Henry Remsen, Jr. printed in *Jour. Patent Office Soc.*, XXV, pp. 603-604; TJ to General Knox, July 22, 1791 (*Ibid.*, XIX, 353)" and "P. J. Frederico in *Jour. Patent Office Soc.*, XVIII, 248-251"].

Judicial Decisions

Judicial decisions are another vital source of information about patent policy history. Under the 1973 Act, for instance, there was no substantive examination of patent applications. It was thus left to the courts to interpret the statutes, determine the adequacy of specifications, and develop legal doctrines.

Moreover, because courts resolved patent disputes, their decisions often included language from the specifications. So, for example, the specification for patent 3131X, a lathe for turning irregular forms (Thomas Blanchard, Jan. 20, 1820) was not restored—only the drawings exist in PatFT. However the entire specification for 3131X is set forth in the decision *Blanchard's Gun-Stock Turning Factory v. Warner*, 3 F. Cas. 653 (C.C. D. Conn. 1846), which was identified by searching a legal database for federal cases having the terms "Blanchard" and "irregular forms." The first three paragraphs of the lengthy specification are as follows:

The schedule referred to in these letters patent, and making part of the same, containing a description, in the words of the said Thomas Blanchard himself, of his improvement, being an engine for turning or cutting irregular forms out of wood, iron, brass, or other material or substance, which can be cut by ordinary tools, called 'Blanchard's Self-Directing Machine.'

'First. The said machine consists of a wooden frame, and of divers parts constructed in brass and iron, with bands to propagate the motion from the power which puts the machine in operation to its several parts.

'The wooden frame consists of the different parts connected together, as in the drawing annexed to, and making part of, this specification, marked fig. 1 and fig. 2.

Blanchard's Gun-Stock Turning Factory v. Warner, 3 F. Cas. 653, 659 (C.C. D. Conn. 1846).

Conclusion

Working from the major historic statutes to a wider array of materials allows the researcher to define the major periods in patent policy history and to create a structured approach that allows for a comprehensive survey of this area. Moreover working with primary sources provides a sense of discovery and allows the researcher to reach authoritative, well-founded conclusions. Nonetheless, while the materials discussed above—major statutes, amendments to statutes, bills, legislative reports, journals, and judicial decision—are all important resources, they are by no means a complete list. For example, there are many good treatises, casebooks, and other sources that provide a detailed examination of patent policy, or a particular aspect of it. These materials can also provide you with citations to additional documents to locate as you continue your journey further into the exciting history of patent policy.

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Act of July 3, 1832, Ch. 162, 5 Stat. 559 (1832).

Act of July 13, 1832, Ch. 162, 5 Stat. 577 (1832).

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Patent Act of 1836, Ch. 357, 5 Stat. 117 (July 4, 1836).

Patent Act of 1837, Ch. 45, 5 Stat. 191 (March 3, 1837)

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