

Legal Protection of Intellectual Property of Insolvent Debtors in Bankruptcy Perspective

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ABSTRACT

Intellectual Property can be certain patents, copyright, trademarks, industrial designs, trade secrets, and other rights that are part of the origin of the intellectual property regime. These certain intellectual property rights may be the primary asset that the debtor possesses or at least something of value. In addition, the Law No. 37 of 2004 on Insolvency and the PKPU does not specify in detail whether the property of the property is property of a thing or the right of an entity, because the law only regulates the property that is excluded or the property which is not able to be paid. The curator who wants to administer and manage the property of the bankrupt does not exist like the right has always had difficulties in evaluating the property.

INTRODUCTION

Indonesia means a country rich in intellectual property. Protection of intellectual property is provided in the form of Intellectual Property Rights (Negesa, 2022) (IPR). IPR can be interpreted as the right to ownership of works that arise or are born because of human intellectual abilities in the fields of science and technology (Disemadi, 2022). Dance works are intangible objects which are the impact of a person's intellectual abilities or humans in the fields of science and technology through their creativity, taste, charity, and work, which have moral, practical, and economic values (Auliazahara & Putra, 2022).

Intellectual work, whether in the field of science, art, literature, or technology, is born using the sacrifices of energy, time, and porto (Lynall, 2020). This sacrifice resulted in the work being obtained as having value. When added using economic benefits that can be enjoyed, the inherent economic value fosters the concept of property towards intellectual work (Wright, 2020). For the world of struggle, intellectual work is said to be an asset of the company.

Intellectual property can be in the form of exclusive rights of patents, copyrights, trademarks, industrial designs, trade secrets and other rights that are part of the origin of the intellectual property regime (Majmudar, 2021). This exclusive intellectual property right is often the primary asset owned by the bankrupt debtor or at least as something valuable. In addition, Law No. 37 of 2004 concerning Bankruptcy and PKPU does not say in detail whether the property in question is property in the form of property or property rights, because the law only regulates exempt assets or assets that cannot be used as bankruptcy assets. The curator who intends to manage and settle intangible bankruptcy assets such as IPR always finds it difficult to evaluate the property (Harjono, 2023).

The place of work of Public Appraisal services, hereinafter referred to as KJPP, means that a business body that has received a business license from the Minister becomes a forum for Public Appraisers in providing their services (Azizah & Merliyana, 2020). The assessment standard used or SPI is a guideline that must be obeyed by the public appraiser in conducting the assessment.

Curator in managing bankruptcy assets is needed in order to achieve the purpose of bankruptcy in order to settle debts from debtors that are the right of creditors, Curators must be able to carry out the principle of justice in making settlements.

The principle of justice for a Curator is being able to be fair when recording all bankruptcy assets, both hidden assets and concrete ones, seeking or maximizing bankruptcy assets, maintaining or increasing the value of bankruptcy assets, selling bankruptcy assets at aporismatic prices, dividing the impact of bankruptcy sales to each synchronous creditor using his terms and dissolving debtors who have been insolvent(Jakes, 2020).

The Curator in carrying out his duties to manage and settle the bankrupt assets is certainly obliged to classify the assets of the bankrupt debtor, in addition to classifying the bankrupt assets, of course the Curator will appraisal all assets of debtors who become bankrupt boedels, both tangible and intangible similar to Intellectual Property Rights.

The role of the estimating institution is the institution that is given the authority to make an assessment(Ostrom, 2019). Assessing tangible objects, the estimator forum has no difficulty choosing the market price and/or liquidation of bankruptcy assets. But in order to assess intangible bankruptcy assets in the form of intellectual property, the assessment agency accepts difficulties for a myriad of reasons. This certainly has consequences for the performance of the Curator. Curators will find it difficult to settle bankruptcy assets in the form of intellectual property(Ostrom, 2019). In sync with this background, it is necessary to conduct research on the practice of valuation of bankruptcy assets in the form of intellectual property in Indonesia.

METHODS

This type of research uses juridical-normative research methods. Research conducted by the author of "Valuation of Bankruptcy Assets in the Form of Intellectual Property." is a type of normative juridical research, namely related research obtained from regulatory regulations, norms, principles, rules and laws and regulations, namely the Civil Code, Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, Law No. 19 of 2002 concerning Copyright, Law No. 29 of 2000 concerning Protection Plant Varieties, Law No. 30 of 2000 on Trade Secrets, Law No. 31 of 2000 on Industrial Design, Law No. 32 of 2000 on Integrated Circuit Layout Design, Law No. 14 of 2001 on Patents, Law No. 15 of 2001 on Trademarks.

Minister of Finance Regulation No. 125/PMK.01 concerning Public Appraisal Services, OJK Regulation VIII.C.5. Guidelines for Appraiser and Presentation of Intangible Asset Statements in Capital Market. As well as books, research results, and journals that are references to find out about the provisions of bankruptcy assets in the form of intellectual property in bankruptcy law, as well as an overview of the assessment of bankruptcy assets in the form of intellectual property in bankruptcy law.

RESULTS AND DISCUSSION

Management and Settlement of Intellectual Property Rights by the Curator.

Article 21 of Law No. 37 of 2004 concerning Bankruptcy and PKPU states, that bankruptcy includes all assets of debtors at the time the bankruptcy declaration decision is pronounced and everything obtained during bankruptcy(Saputra & Luthviati, 2020). Thus, bankruptcy assets also include everything (property) obtained during bankruptcy(Kusuma, Dewi, & Sari, 2021). For the above purposes, Law No. 37 of 2004 concerning Bankruptcy and PKPU determines the party who will take care of the case between creditors and bankrupt debtors by appointing a Curator who will later manage and settle the debtor's bankruptcy assets and resolve the legal correlation between the bankrupt debtor and its creditors.

The confiscation of all debtors' wealth is part of the origin of management estate(Callaway, 2023). This management means a systematic method of managing the debtor's wealth while waiting for bankruptcy proceedings to be carried out by leading several creditor representatives to control all the debtor's wealth, and are given the power to prevent in the form of regulations against fraudulent transactions or acts to transfer wealth, then collect, manage, and distribute it to creditors.

1. Intellectual Property Rights as Property

Intellectual property rights is a translation of the term Intellectual Property Right the word consists of three terms, namely, Rights, Property, and Intellectual(Rizzo, Bertini, & Montesi, 2019).

if interpreted one by one, the three words have meanings that concern the interests of individuals, such as Rights in civil law have the following meanings, Rights are interests protected by rules, while interests are individual or group demands that are expected to be fulfilled. If interpreted grammatically, IPR is an intangible object, which means that the original results of one's intellectual activities are then poured into works or innovations both in the fields of science, art and technology. In the Black Law Dictionary what is meant to use wealth (Wealth), namely: has been expended, e, which have, by such labor, been either reclaimed from nature extracted or gathered from the earth or sea, manufactured from raw materials, improved, adopted, or cultivated. "the aggregate of all the things, whether material or immaterial, which contribute to comfort and which are objects of frequent barter and sale, is what we usually call " wealth" Bowen, Pol, Econ, See *Branham v, State*, 96 Ga. 307, 22 S.E. 957.

In a systematic interpretation of Article 499 of the Civil Code, a thing (Zaken) is every good (geodern) and every right (rechten) that can be an object derived from property rights (Harjono, 2023). Thing means something useful to the subject of law or everything that is the main problem and interest for the subject of law or anything that can be the object of property rights (Mill, 2020). In the approach of article 503 of the Civil Code, it is stated that there are goods that are not bodied, then in Article 504 of the Civil Code, it is stated that there are goods that are involved and goods that do not work. After grammatical interpretation of Article 503 and Article 504 of the Civil Code, it is stated that objects can be divided into two types, namely:

a. Material Objects (Materiekgoderen)

1) Material objects are objects whose properties can be seen, touched, felt using five tools, consisting of the origin of changing / tangible objects, which include:
Movable objects / not permanent.

2) This non-working object is distinguished as several kinds, which are as follows:

- a) Objects do not work because of their nature.
 - b) Objects don't dabble because of their purpose.
 - c) Objects do not take part due to the provisions of the law.
- b. Immateriekgoderen

Its nature can only be felt by the five tools and then can be realized as a reality.

IPR is a material right. Intellectual property rights are included as intangible moving objects, then IPR is included in intangible assets / assets (Mashdurohatun, Laksana, & Mansyur, 2023). Intangible assets mean that non-monetary assets are identified without physical intangibles (Visconti & Weis, 2020). Rights, or advantageous positions to generate income in forming or delivering goods or suits, are leased to other parties or for administrative purposes.

An asset / asset can be included in the category of intangible assets:

- a) These assets can be identified
- b) The Company has control over such activities
- c) The company benefits from these assets in the future. after being systematically interpreted IPR into an intangible asset / asset that has economic value because it can contribute to profit. IPR can also be a collateral in addition to claiming security for creditors by taking over all debtor assets, also adding a line of financial origin for debt recovery.

2. Intellectual Property Rights as Property Rights that are in the nature of debt repayment

In the systematic interpretation of debt repayment using collateral based on Article 1331 of the Civil Code, it is stated that all property debtors are good (Schiantarelli, Stacchini, & Strahan, 2020). And those who will be good at dabbling as well as those who do not move are collateral for the repayment of the debt they make. Article 1332 of the Civil Code discloses the debtor's assets as collateral simultaneously for all creditors who give debts to him (Skemperis, 2020). The revenue from the sale of these objects is divided according to equilibrium, that is, the size of each receivable, unless among the receivables there are legitimate reasons for precedence. In this case, objects that can be used as repayment of public collateral if they meet the requirements include:

- a. The object is economical (can be evaluated using money)
- b. The object can be transferred to another party.

The bankruptcy decision has regulatory implications for the assets of the insolvent debtor, if the bankrupt debtor has property in the form of objects of intellectual property rights, the property can be determined to be bankruptcy property (Wright, 2020). If you want to determine IPR to become a bankruptcy property, you need a study of property law, as stated in book II of the

Civil Code. in Article 499 of the Civil Code, which is based on the understanding of the law, the so-called property is every item and every right controlled by the property. So to be able to become a treasure there are conditions that must be met, namely human domination and have economic value. As for whether all objects can be used as collateral for debt payments, it depends on what objects are used to claim the objects.

Based on Article 1331 of the Civil Code, all property of the debtor, both movable and non-moving, both existing and new ones will be in the future, become dependent for all individual engagements (Swisher, 2014). An IPR object certainly has inherent economic value. Similar to when a party wants to display or use a copyrighted work, it must use the original consent of the creator and / or copyright holder. in the process of obtaining rights to use IPR objects, the party will generally be asked to pay royalties to obtain a license.

Copyright of one type of IPR can be used as an object of fiduciary guarantee, then a patent can also be used as a fiduciary object. Industrial design rights, industrial design rights, plant variety protection rights (PVP), integrated circuit layout design rights, trade secret rights, trademark rights and geographical indications (Rachman, Iriantoro, Valentina, Rahardjo, & Kalani, 2023). Some types of IPR other than Copyright and Patent Rights are not expressly stated that these rights can be used as fiduciary objects, but these rights can be transferred or transferred by inheritance, grant, will, agreement, written, or other causes allowed by laws and regulations, with an economic value, IPR motorcycle taxis are eligible to be used as bankruptcy assets.

Objects can be used as bankruptcy assets as long as they have a price/selling value. Assets under the control of the Curator or Balai Harta Warisan (BHP), if it is felt to have a selling value, the property is sold through auction or diras has a selling value to be developed, then the object will be sought so that it can continue to generate and increase the profits of bankruptcy assets in order to settle debtors' debts. The curator is obliged to settle debtors owed to creditors. Debtors who have an asset in the form of Intellectual Property Rights that have commercial value will be managed to settle debts to creditors (Prananingtyas, 2022). Curator in clearing bankruptcy assets, it is necessary to do an appraisal. The appraisal is based on recommendations from the Public Appraisal Service Office (KJPP) as the Indonesian appraiser standard for an object.

Bankruptcy property is the property of a person or entity that has been declared bankrupt controlled by the heritage property hall, however, bankruptcy assets can be in the form of objects, in the form of goods or rights. The receivership stipulated in the bankruptcy judgment is immediately tasked with managing and controlling the bankruptcy property, under the supervision of the Supervising Judge, even though legal remedies are submitted in the form of cassation or judicial review. Through a systematic interpretation built by IPR as a bankruptcy asset to pay off debtors' debts.

Interpretations that can be applied to make the object of IPR as bankruptcy property is actually a necessity for bankruptcy proceedings in Indonesia, because currently Law No. 37 of 2004 concerning Bankruptcy and PKPU cannot accommodate the pace of sociological development in society, especially in the economic sector. Currently, the development of science and technology has grown rapidly producing various kinds of findings, creations or innovations which have economic value and can be used as bankruptcy assets.

Bankruptcy Law is a field of law related to any field of law, including civil law and intellectual property law. Property matters, for example, are regulated according to the Civil Law in force in Indonesia, as stated in Article 499 of the Civil Code, it is stated that what is meant by objects is every item and every right that can be controlled by property rights. The definition contained in article 499 of the Civil Code is a thing in the real / material sense, while there are other types of objects, namely intangible / immaterial / invisible objects, which are usually in the form of rights. This is in accordance with the classification of objects according to article 503 of the Civil Code, namely the classification of objects into groups of tangible objects and intangible objects. Intangible objects are usually a type of right, one of which is intellectual property rights.

IPR as a type of object, related to bankruptcy proceedings, is one type of object that can be used as part of assets in the process of paying debtors to creditors. Intangible Assets are part of the bankruptcy estate. Article 1131 of the Civil Code states that: All property of the debtor, both movable and immovable, both existing and new in the future, shall be borne by all individual engagements. The word "all" / "all" of the debtor's property means without exception is a

dependent for all engagements made by the debtor. Furthermore, Article 1132 of the Civil Code states that:

"The property shall be common security to all who owe it, the proceeds from the sale of the property shall be divided according to the balance according to the size of their respective receivables, unless among the debtors there are valid reasons for precedence."

Article 1132 of the Civil Code provides that the proceeds from the sale of the debtor's property (as referred to in Article 1131) are divided according to the ratio of their respective receivables unless among the creditors there are valid reasons for precedence. To determine the valid reason for precedence refers to Article 1133 of the Civil Code which provides that the right to precedence among creditors originates in privilege, on liens and on mortgages. The problem that occurs is that the Curator as the party who manages and settles bankruptcy assets is not easy in carrying out its duties when meeting with types of intangible assets. Such assets must first be assessed by a recognized / certified Appraisal. Later it will be known, what is the true value of certain types of IPR, taking into account its benefits for the Company and market value. The obstacles faced by the Curator in maximizing IPR during Bankruptcy include, among others, the first is that IPR is not sold. All debtors' assets should be sold during the settlement period and distributed to creditors without exception, but there are types of IPR that are difficult to sell because the protection is fully attached to the creator or copyright holder. Copyright protection properties are lifelong. Article 29 of the Copyright Law states that almost all types of copyright protection are valid during the life of the Creator and continue until 50 (fifty) years after the Creator dies. From this we can imagine how inherent copyright protection is in the creator.

The second reason is when there is a type of IPR owned by the debtor but has not been registered so that it cannot be said that the debtor is the legal owner of the IPR. As is known, there are several types of IPR that adhere to the first to file system, so that who registers new IPR can be called the legal owner of the IPR. IPR does not embrace automatic recognition of rights, except copyright, so it is the obligation of the Curator to register in advance to be able to declare legally valid that the IPR in question is part of the debtor's bankruptcy boedel. The third reason is when there is a type of IPR owned by the debtor is in dispute with a third party. This is considering that all cases filed against bankrupt debtors since bankruptcy was imposed are declared null and void (article 29 of the PKPU Law), it is not clear who is called the legal owner of the IPR concerned. And IPR in conditions like this certainly cannot be declared solely as part of the bankrupt debtor's boedel. The exception is when the debtor acts as a plaintiff, then the case will still be carried out pending the outcome of the court decision.

3. The concept of going consent to bankrupt debtors who own bankruptcy assets in the form of intellectual property rights (IPR) based on Indonesian bankruptcy law

The duties of a curator and administrator in bankruptcy are spread out in articles in the UUKPKPU However, the most fundamental duty of the curator and administrator (as stipulated in Article 67(1) of the UUKPKPU), is to manage and settle bankruptcy assets. In carrying out this task, the curator and management have one main vision, which is to make the best decision to maximize the value of bankruptcy assets. Curators can maximize the utilization of IPR during bankruptcy by:

a. At the management stage, namely so that the company continues to run (going concern), the Curator can utilize IPR for the continuation of the company's business so that the bankrupt company (debtor) can run as before; or can license the IPR to third parties (either exclusive or non-exclusive licenses) so that the bankrupt debtor will get royalties that can be used to increase the value of the IPR, furthermore.

b. At the settlement stage, the Curator can sell the IPR through the auction process, or if the auction fails it can be done by selling under hand so that the debtor's assets can be settled and distributed to creditors and bankrupt debtors.

With regard to protection addressed to debtors, the Insolvency Law is primarily not expressly stated in any of its articles, against the following principles:

- a. Principle of Balance
- b. Business continuity principle.
- c. The Principle of Justice.
- d. The principle of integration, in this Law contains the understanding that the formal legal system and its material law constitute an integral part of the civil law system and national civil procedural

law. Going concern or the principle of business continuity, is the principle of survival of an entity (business entity).

Looking at the explanation of these principles, it can be said that the Bankruptcy Law has provided protection for both creditors and debtors themselves.

Going concern shows that an entity (business entity) is considered to be able to maintain its business activities in the long term, will not be liquidated in the short term. Evidence of the potential and survivability of a business entity or company that is included in the category is evidenced in the form of an auditor's report as a party who has competence in assessing whether a company can properly carry out its business or deserves bankruptcy.

According to Erman Rajagukguk, going concern plays an important role in a bankruptcy application process, especially a bankruptcy application decision, even though it has fulfilled the requirements for bankruptcy application as stipulated in Article 2 Paragraph (1) junto Article 8 Paragraph (4) of the Bankruptcy Law, commercial court judges should consider the debtor's condition, namely:

"The judge needs to consider the condition of the Debtor in deciding the bankruptcy case, when the Debtor concerned still has hope to get back on his feet, able to pay his debts to the Creditor, if there is sufficient time and a large number of workers who depend on their fate on the company concerned. In certain cases the opportunity to continue trying needs to be given to honest debtors and with that decision at the same time the interests of creditors and the needs of the community can be protected."

Consideration through this principle is not only used as an ethical basis in a bankruptcy and bankruptcy case, but also becomes a consideration in a decision that prioritizes the importance of protecting the rights of debtors in addition to encouraging the fulfillment of debtor obligations to creditors as interested parties in the bankruptcy case.

Decree of the Minister of Finance of the Republic of Indonesia Number 423 / KMK.06 / 2002 concerning Public Accountant Services, is the basis that can be taken into consideration. This provision states that the Independent Auditor's Report is a report signed by the Public Accountant containing a statement of the Public Accountant's opinion or consideration on whether an entity's assertions are in accordance with the material aspects that have been determined and determined.

Black's Law Dictionary, interpreting business continuity or going concern is:

"Going Concern Is An enterprise which is being carried on as a whole, and with some particular object in view. The term refers to an existing solvent business, which is being conducted in the usual and ordinary way for which it was organized. When applied to a corporation, it means that it continues to transact its ordinary business. A firm or corporation which, though financially embarrassed, continues to transact its ordinary business."

Going concern is a company that is being run as a whole, and by taking into account several things. This term refers to an ability to solve existing business problems, which are carried out normally and reasonably.

The application of the concept of this principle in a company, it can be said that the company continues to transact business reasonably, even though it is financially experiencing problems, continues to transact business reasonably. The existence of an audit report on going concern is an indication that in the auditor's assessment there is a risk of the auditee (the company being audited) determining whether or not it can survive in business.

Through an accounting point of view that involves several stages of analysis, the auditor must consider the results of operations, economic conditions affecting the company, ability to repay debts, and future liquidity needs.

According to Article 1 paragraph (1) Fv, a debtor can apply for bankruptcy declaration only if the debtor has stopped paying his debts. The state of stopping paying must be an objective condition, that is, because the debtor's financial condition has experienced an inability (has been in a state of inability) to pay his debts.

The debtor must not simply not be willing to repay his debts, but the objective financial state of the public accounting firm that is unable to repay his debts, to determine whether his financial condition is in a state of inability to pay his debts, or in other words the debtor has been in an insolvent state, must be able to be determined objectively and independently.

This can only be done based on a financial audit or financial due diligence conducted by an independent public accounting firm.

Financial Accounting Standards, published by the Indonesian Institute of Accountants (IAI), the Assumption of Business Continuity (going concern/continuity) indicate that each company will have a long life or will not be liquidated in the future to fulfill their goals and commitments, despite the fact that the company's life is uncertain how long.

This opinion has an influence on the principle of valuation of financial statement items, for example assets where assets are generally valued using the historical cost principle rather than using liquidation value (Fernández, 2019). This assumption will not apply if a business entity or company is established with a predetermined age limit.

The bankruptcy application of a company cannot be separated from the books, because through the books can be seen the company's financial condition (Fridson & Alvarez, 2022). Checking the debtor's books in bankruptcy practice is the first thing that must be done by the curator in settling bankruptcy assets (Tryandari, 2021). The opening is a financial information center, which includes liabilities, capital, income and costs, which are contained in the balance sheet of the income statement of a business entity or company.

Bookkeeping in a business entity or company has an important meaning to know the rights and obligations contained in each structure that forms and builds the business entity or company, the nature of this bookkeeping is confidential, unless there are circumstances and conditions that allow disclosure of confidentiality, as stipulated in the law, including:

- a) For settlement in the matter of division of inheritance;
- b) For those who are interested in joint efforts;
- c) For the benefit of the company;
- d) For those who also appoint agents or *chargés d'affaires* who are directly interested;
- e) In bankruptcy for purposes on creditors.

Similarly, the provisions stipulated in the UUPT regarding financial statement audits. Because financial statements have a very important position in running a company, this is explained in Article 68 of the PT Law, which reads: "(1) The Board of Directors must submit the Company's financial statements to the public accountant for audit if:

1. the Company's business activities are collecting and/or managing public funds;
2. The Company issues debt acknowledgment letters to the public;
3. The Company is a Public Company;
4. The Company is a company;
5. The Company has assets and/or total business circulation with a total value of at least Rp50,000,000,000.00 (fifty billion rupiah); or
6. Required by laws and regulations."

These financial statements can easily show whether a business entity can be bankrupt or not, with the understanding that if a company's business has the ability to continue its business, it would be better if the company continues to run its business.

The goal is to be able to fulfill its obligations periodically to its creditors. A company becomes the opposite if, after being audited but does not have the potential and ability to survive due to continuous losses, but the company does not want to pay or fulfill its obligations to its creditors, then it is appropriate to avoid greater losses, then it is feasible for the company to apply for bankruptcy.

Financial statements are generally used by large-scale and small-scale companies to determine the development and continuity of the company's business in the future (going concern).

Financial statements are the result of the process of recording, merging, summarizing all transactions carried out by the company with all parties related to its business activities and important events that occur within the company. Financial statements provide information about a company's financial position.

Financial statements must be presented fairly, transparently, easily understood and can be compared with the previous year or between similar companies. The bankruptcy of a business entity or company must be interpreted not only to have legal consequences for debtors, but to have an influence on tax interests, employee interests, investment interests. This protection is intended only for debtors who have good faith to repay their debts to creditors.

CONCLUSION

Bankruptcy assets as long as they have a price/selling value. who under the domination of the Curator is obliged to settle the debtor's debt to the creditor. Debtors who have an asset in the form of Intellectual Property Rights that have commercial value, the property will be managed by collateral to settle debts to creditors. If you want to decide IPR to become a bankrupt property, you need a study of property law, as stated, in Article 499 of the Civil Code, about whether all objects can be used as collateral for debt payments, it depends on what object is used to claim the object. Curators in settling bankruptcy assets, require appraisal. The appraisal was based on the recommendation from the Public Appraisal Service Office (KJPP) to be Indonesia's evaluation standard of a treasure.

Going concern or the principle of business continuity is not expressly regulated in the provisions of Law No. 37 of 2004 concerning Bankruptcy and PKPU, meaning that the principle of biodiversity of an entity (fighting body), with the principle of Going concern can be applied Curator is able to maximize the utilization of IPR during bankruptcy is to use how to utilize IPR for the continuation of the company's business so that the bankrupt company (debtor) can run as usual or be able to license The IPR to third parties (either exclusive or non-exclusive licenses) as a result of which the bankrupt debtor will receive royalties that can be used to increase the value of the IPR.

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