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INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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LACK OF CLEAR PROTECTION FOR NON-TRADITIONAL TRADEMARKS UNDER THE INDIAN TRADEMARKS ACT, 1999: A CRITICAL ANALYSIS OF JUDICIAL RESPONSES AND REFORM PROPOSALS

AUTHORED BY - SURBHI KUMARI

Abstract

Non-traditional trademarks (NTTMs) including shape, color, sound, motion and other sensory marks are increasingly central to modern branding strategies, yet their protection under Indian law remains fragmented and uncertain. Although the Trademarks Act, 1999 (TMA) adopts a broad, TRIPS compliant definition of a "mark", the combined effect of the graphical representation requirement, high distinctiveness thresholds and functionality-based exclusions has significantly constrained the registration and enforcement of many NTTMs. This paper critically examines the statutory framework governing NTTMs in India, recent judicial approaches and administrative practice, and argues that the absence of clear doctrinal standards has led to inconsistent outcomes and a chilling effect on sensory branding. Drawing on leading Indian and comparative case law, recent scholarly writing and available registry trends, the paper identifies structural and evidentiary hurdles that undermine NTTM protection and evaluates the extent to which courts have mitigated or reinforced these weaknesses. It concludes by proposing targeted legislative and administrative reforms – including clarifying NTTM categories, modernising representation requirements, developing registry guidelines on distinctiveness and calibrating functionality analysis – with a view to harmonising Indian practice with global developments while safeguarding competition and consumer interests.

1. Introduction

Trademark law has long moved beyond words and simple logos, as businesses increasingly use shapes, colours, sounds and other sensory cues to distinguish their goods and services in crowded markets. This turn towards "sensory branding" is especially visible in sectors such as fast-moving consumer goods, entertainment, technology and luxury products, where the consumer experience is shaped as much by visual and auditory impressions as by traditional brand names. As branding practices evolve, legal systems are under pressure to adapt classical

concepts such as distinctiveness, graphical representation and functionality to non-traditional subject-matter without unduly restricting competition or confusing consumers.

In India, the TMA 1999 replaced the colonial-era Trade and Merchandise Marks Act, 1958 and introduced a broad and ostensibly technology-neutral definition of "mark" and "trademark" that appears wide enough to cover non-conventional, non-visual indicators. At the same time, the lived experience of applicants and litigants reveals that the protection of NTTMs under this framework remains partial and unpredictable: only a small number of sound, shape and colour marks have progressed to registration, and reported decisions that directly engage with NTTMs are rare. Recent scholarship and practitioner commentary consistently describe the Indian approach as "cautiously receptive" but lagging behind jurisdictions such as the European Union and the United States, where courts and offices have developed more detailed doctrines for non-traditional marks.

This paper focuses on the central research problem of the "lack of clear protection" for NTTMs under the Indian TMA and its implications for rights-holders, competitors and consumers. It asks whether the statutory framework and case law supply adequate certainty and predictability for NTTM registration and enforcement, and whether reforms are necessary to align Indian practice with evolving international standards. In addressing this problem, the paper does not seek to romanticise non-traditional marks: it recognises the real risk that strong protection for colours, shapes and sensory cues can slip into over-protection and market foreclosure if not carefully calibrated. Instead, the aim is to chart a principled middle path that protects genuinely distinctive NTTMs while keeping functional and basic aesthetic features in the public domain.

2. Concept and Legal Framework of Non-Traditional Trademarks in India

1.1 Definition and Categories of Non-Traditional Marks

Non-traditional or non-conventional trademarks are typically understood as marks that depart from the standard categories of word marks, device marks and composite word-device marks, and instead rely on shape, position, pattern, single colours or colour combinations, sound, motion, holograms, scent, texture or other sensory indicators. Indian scholarship often groups these into visual NTTMs (such as shape, position, pattern and colour marks) and non-visual NTTMs (such as sound, scent, taste and texture), reflecting both the statute's focus on graphical representation and the technical challenge of representing non-visual stimuli.

From a functional perspective, NTTMs perform the same essential role as traditional marks: they indicate commercial origin and help consumers distinguish one trader's goods or services from those of others. However, they frequently deepen emotional engagement and brand recall by appealing to multiple senses, as evidenced by iconic examples such as the sound of the Yahoo! "yodel", the shape of Zippo lighters or the gold-foil packaging of Ferrero Rocher chocolates. The proliferation of digital interfaces and streaming platforms has further expanded opportunities to deploy sound, motion and other non-visual marks in everyday consumer interactions.

2.2 Statutory Basis under the Trade Marks Act, 1999

The TMA defines a "mark" broadly in section 2(1)(m) to include "a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof". Section 2(1)(zb) defines a "trademark" as a mark capable of being represented graphically and of distinguishing the goods or services of one person from those of others or being proposed to be so used. When read together, these provisions clearly open the door to NTTMs at least in relation to shapes, packaging and combinations of colours and, in principle, do not exclude other types of signs.

Nevertheless, two features of the statutory framework have posed persistent difficulties for NTTMs. First, the requirement that a trademark be "capable of being represented graphically" has traditionally been interpreted as demanding a visually perceptible depiction, which sits uneasily with the protection of sound, scent and taste marks. Secondly, section 9 of the TMA introduces absolute grounds for refusal, including lack of distinctiveness and descriptiveness, while section 9(3) specifically precludes registration of marks that consist exclusively of the shape of goods resulting from their nature, necessary to obtain a technical result or giving substantial value to the goods. These exclusions directly affect the registrability of shape marks and, by analogy, other NTTMs with functional or aesthetic elements.

The Trademarks Rules 2017 partially modernised this framework by recognising sound marks and permitting the filing of sound files along with graphical musical notation, signalling administrative openness to at least one category of non-visible mark. However, the Rules remain silent on scent, taste, motion and other emerging categories, leaving their status to be inferred from the general requirements of graphical representation and distinctiveness and from sporadic practice at the Trademarks Registry.

2.3 Graphical Representation, Distinctiveness and Functionality

Indian courts and commentators have consistently treated graphical representation, distinctiveness and non-functionality as central filters for NTTM protection. In the pre-reform European Union, the so-called *Sieckmann* criteria required that the representation of a mark be clear, precise, self-contained, easily accessible, intelligible, durable and objective, and Indian scholarship has often invoked these standards when discussing non-traditional marks. However, while the EU has since abandoned the strict requirement of graphical representation in favour of a more flexible notion of "representation" that can include sound files and multimedia formats, Indian law continues to insist on "graphical" representation in the statutory text.

Distinctiveness poses a second, and often more formidable, hurdle. For most NTTMs, Indian authorities insist on strong evidence of acquired distinctiveness or secondary meaning, typically through longstanding use, advertising, sales figures and sometimes consumer surveys. This is particularly true for colour marks, where courts remain wary of granting monopolies over primary colours that competitors may need to use and therefore require applicants to demonstrate that the relevant colour, or colour combination, has become uniquely associated with their goods or services.

Finally, the functionality exclusions in section 9(3) constrain shape marks and, by implication, other NTTMs that might capture functional or aesthetically significant product features. While these exclusions rightly prevent trademark law from encroaching on the territory of patents and designs, their application to NTTMs has sometimes been cautious and under-theorised, contributing to a structural bias against non-traditional subject-matter.

3. Judicial Treatment of Non-Traditional Trademarks in India

3.1 Domain Names and the Yahoo! Line of Cases

The Delhi High Court's decision in *Yahoo! Inc v Akash Arora & Anr* is formally a passing-off and domain-name dispute, but it has become an important touchstone for non-traditional trademark protection in India. Yahoo! sought to restrain the defendants from using the domain name "yahooindia.com" for internet services similar to those offered under the famous "yahoo.com" brand. The Court held that domain names can carry substantial goodwill, function as source identifiers and, consequently, be protected under the law of passing off even without registration.

What makes *Yahoo!* particularly relevant for NTTMs is the Court's willingness to apply

trademark principles beyond traditional marks affixed to goods or packaging, recognising instead that non-traditional indicia such as domain names may be the primary means by which consumers encounter and recognise a brand. In doing so, the judgment affirms a functional approach to trademarks – focused on consumer perception and the role of the sign in the marketplace – that is capable, at least in principle, of extending to non-visual and multi-sensory marks.

3.2 Trade Dress and Colour Schemes: Colgate and Ferrero Rocher

Indian courts have engaged most consistently with non-traditional indicia in the context of trade dress litigation. In *Colgate Palmolive Co v Anchor Health & Beauty Care Pvt Ltd*, the Delhi High Court granted an injunction in favour of Colgate, holding that the defendants' toothpowder containers, which used a similar red-and-white colour scheme, layout and get-up, were likely to confuse consumers. Justice J.D. Kapoor emphasised that the court must consider the impression created on the "illiterate, unwary and gullible" consumer and held that the overall trade dress of Colgate's packaging had acquired distinctiveness through consistent use and extensive advertising.

The decision is significant because it treats the combination of colours, layout and packaging configuration as protectable indicia, even though the legal vocabulary of "trade dress" does not appear in the TMA. Rather than isolating each element, the Court looks at the cumulative visual impression and recognises that this composite can serve as a source identifier a conceptual move that underpins modern understandings of non-traditional marks.

In *Ferrero Spa & Anr v Ruchi International & Anr*, the Delhi High Court confronted virtually identical copies of Ferrero Rocher chocolates, including the gold-foil wrapping, brown pleated paper cups and transparent plastic boxes. The Court found that the defendants had deliberately imitated Ferrero's well-known get-up and that the combination of elements in Ferrero's packaging constituted a distinctive trade dress deserving of protection. The court awarded compensatory and punitive damages, with later commentary noting that the judgment signalled a strong judicial willingness to use trade dress to curb parasitic copying in the absence of registered non-traditional marks.

These cases show that Indian courts are willing to protect colour schemes, packaging and overall product configuration where there is clear evidence of misrepresentation and consumer confusion. At the same time, the analysis often remains rooted in passing off and does not always engage explicitly with the statutory categories of shape marks or combinations of colours under the TMA, leaving some doctrinal questions unresolved.

3.3 Shape Marks and Product Configuration: Zippo and Related Precedents

Shape marks and product configurations have also received some attention in Indian case law, albeit less systematically than trade dress claims. In *Zippo Manufacturing Co v Anil Moolchandani & Ors*, the Delhi High Court considered whether the defendants' cigarette lighters infringed Zippo's rights in its distinctive flip-top lighters. The Court noted that Zippo had used the same configuration, including the rectangular metal case and the characteristic three-two-three pattern of air holes on the chimney, for decades and that consumers associated these features with a single source.

Justice V.K. Jain held that the shape and external features of the Zippo lighters had acquired distinctiveness and that the defendants' near-identical products amounted to infringement and passing off. Significantly, the judgment acknowledges that the shape of goods can function as a trademark under the TMA, referring to the express inclusion of "shape of goods" in section 2(1)(m), and recognises that three-dimensional marks may be protected where they have come to denote source.

However, the Court did not engage in depth with section 9(3)'s functionality exclusions, nor did it articulate a clear test for distinguishing between functional, aesthetically valuable and purely source-indicating features. This leaves open how future courts will handle shape marks that sit closer to the line between function and brand identity and underscores the need for more precise doctrinal guidance.

3.4 Colour Marks and the Christian Louboutin Red Sole

The *Christian Louboutin* litigation illustrates both the promise and the limits of colour-based non-traditional marks in India. In *Christian Louboutin SAS v Pawan Kumar*, a single judge of the Delhi High Court held that Louboutin's red-coloured sole enjoyed the status of a well-known trademark in India and granted an injunction, relying heavily on the brand's global reputation and consistent use of the red sole as a source identifier. Commentators quickly hailed the ruling as recognising a single-colour mark – a particular shade of red applied to the sole – and as aligning Indian law with the United States Supreme Court's decision in *Qualitex Co v Jacobson Products Co* and related EU jurisprudence.

Subsequent analysis has been more cautious. Scholars have pointed out that the TMA refers explicitly to "combination of colours" but not to single-colour marks and that section 9's absolute grounds and competition-based policy concerns make it difficult to sustain long-term monopolies over basic colours. Later decisions and commentary have therefore suggested that *Christian Louboutin* may be confined to its facts, particularly given the unique manner in which

the red sole is used and perceived within the high-end fashion market.

From a broader perspective, however, the case demonstrates that Indian courts are open to recognising non-traditional colour marks where there is compelling evidence of reputation and association, even if the doctrinal basis for such recognition is not yet fully settled. It also highlights the tension between aligning domestic practice with international trends and faithfully interpreting the statutory text and underlying competition policy.

3.5 Sound Marks and Non-Visible NTTMs

Sound marks have fared somewhat better than other non-visible NTTMs in India. Following the acceptance of the Yahoo! "yodel" and other sound marks by the Trademarks Registry, the 2017 Rules explicitly provided for sound marks to be filed in MP3 format with accompanying musical notation. Reported decisions involving sound marks are scarce, but doctrinal and practitioner sources indicate that once registered, sound marks are treated analogously to traditional marks in infringement analysis, with courts focusing on similarity of sounds and likelihood of confusion.

By contrast, smell and taste marks remain largely aspirational. The insistence on graphical representation, coupled with the absence of explicit statutory or regulatory provisions on non-visual representation, has made it practically impossible for applicants to secure registration for scents or flavours in India. Recent reports of the first accepted smell trademark have generated considerable interest, but commentators warn that such milestones may reflect isolated administrative decisions rather than a systemic shift in practice.

Overall, the judicial engagement with non-visible NTTMs is still embryonic. Courts have not yet articulated clear tests for distinctiveness, representation or functionality in relation to scents or tastes, leaving examiners and litigants with little guidance beyond foreign jurisprudence and scattered registry decisions.

4. Contemporary Trends and Systemic Gaps in Protection

Official statistics from the Office of the Controller General of Patents, Designs and Trade Marks reveal a significant growth in trademark activity in recent years, but they rarely disaggregate NTTMs as a distinct category. According to a recent ministerial statement, India recorded more than 5.5 lakh trademark registrations in 2024–25, the highest in a single year, while CGPDTM data indicate hundreds of thousands of applications, examinations and publications in 2023–24 alone. Practitioners and scholars agree that NTTMs constitute only a

very small fraction of this overall volume of filings and registrations, even though precise figures are difficult to obtain.

Recent academic work paints a consistent picture. Articles in Indian and international journals describe India as having a broadly compatible statutory framework but a cautious and sometimes conservative administrative and judicial culture towards NTTMs. Some commentators emphasise the structural capacity of the TMA to accommodate NTTMs and highlight positive developments such as the registration of sound marks and the protection of distinctive packaging and trade dress. Others focus on the persistent obstacles posed by the graphical representation requirement, high evidentiary thresholds for acquired distinctiveness and uncertainty around functionality, especially for shape and colour marks.

Technological change and the increasing sophistication of Indian brands are likely to intensify demand for NTTM protection. Studies of digital branding and non-visual marks argue that sound and motion marks are particularly important for online services, streaming platforms and mobile applications and that Indian law will need to adapt if it wishes to support domestic innovation in these fields. If the current combination of statutory ambiguity and cautious practice persists, there is a risk that businesses will either forgo protection for NTTMs or turn to alternative regimes such as copyright and design law, which may not be well-suited to the functions of trademarks.

5. Critical Evaluation of the Indian Approach

5.1 Doctrinal Ambiguity and Evidentiary Burdens

A first source of uncertainty is the gap between the TMA's broad definition of "trademark" and the lack of explicit recognition for several key NTTM categories. While shapes, packaging and combinations of colours are expressly included, other marks – sound, scent, taste, motion, holograms, position – must be inferred from general provisions and occasional registry decisions. This silence encourages a cautious, case-by-case approach rather than a principled, predictable regime, and places a heavier interpretive burden on examiners and courts than is necessary.^[216]

A second concern is the consistently high evidentiary threshold imposed on NTTM applicants, particularly for colour, shape and non-visible marks. Indian authorities routinely demand extensive evidence of use, advertising and consumer recognition before accepting that such

marks function as source identifiers, which can be prohibitively expensive for smaller businesses. While rigorous proof is justifiable for marks that deviate from conventional indicia, the absence of clear guidance on what evidence is sufficient creates unpredictability and may discourage meritorious applications.

5.2 Functionality, Competition and Over-Protection Concerns

Functionality-based exclusions are a widely accepted mechanism for protecting competition, and section 9(3) performs this role for shape marks in Indian law. However, the application of functionality to NTTMs has sometimes been blunt and under-articulated, with courts and examiners treating aesthetic appeal as functionally significant without carefully distinguishing between essential features and decorative or source-indicating elements.

From a competition perspective, there is an understandable fear that strong NTTM protection could allow firms to lock up basic colours, shapes or sensory experiences and thereby foreclose rivals, especially in concentrated markets. Yet this risk can be managed through calibrated analysis rather than by systematically disfavouring NTTMs. A more nuanced approach would ask whether the claimed feature is necessary to achieve a technical result, whether alternative designs or colours remain available to competitors and whether the grant of trademark protection would materially impede market entry or innovation.

At present, the Indian approach tends to combine doctrinal ambiguity with high evidentiary thresholds and conservative functionality analysis, producing a structural bias against NTTMs that goes beyond what is necessary to safeguard competition.

5.3 Comparative Perspective: EU and US Developments

Comparative experience suggests that Indian law could do more to clarify and modernise its approach to NTTMs without abandoning core principles. The EU's 2015 trade mark reform removed the requirement of graphical representation and instead requires that a mark be represented in a manner that enables authorities and the public to determine the clear and precise subject-matter of protection, whether through images, sound files or other formats. This has significantly lowered technical barriers for registering sound and motion marks while maintaining legal certainty.

In the United States, courts have long accepted non-traditional marks, including colours and product configurations so long as they are non-functional and have acquired distinctiveness, as exemplified by *Qualitex* and the extensive jurisprudence on trade dress under the Lanham Act.¹² Scholars who compare these developments with the Indian situation often conclude that while

Indian law is not conceptually hostile to NTTMs, its failure to articulate clear standards and to collect transparent data on NTTM registrations has slowed doctrinal development.

The point of this comparison is not that India should simply copy EU or US law but that certain institutional innovations, such as modernised representation rules and detailed registry guidance, could be adopted without undermining local policy choices about competition and consumer protection.

6. Findings

The foregoing analysis supports several findings about the state of NTTM protection under Indian trademark law.

First, the TMA's broad definition of "mark" and "trademark" is structurally capable of accommodating many forms of NTTMs, and the 2017 Rules' recognition of sound marks demonstrates a willingness to adapt to non-traditional subject-matter. In practice, however, the continuing insistence on graphical representation, the lack of explicit recognition for several categories of NTTMs and the absence of detailed guidance on representation and evidence sharply narrow the range of protectable non-traditional signs.

Secondly, in the broader context of rapidly increasing trademark filings and registrations, NTTMs make up only a marginal and poorly documented portion of the Indian trademark landscape. The scarcity of reported decisions and the limited number of publicly known NTTM registrations suggest that many businesses either do not view NTTM protection as viable or rely instead on alternative legal strategies such as trade dress claims and design registrations.

Thirdly, applicants for NTTMs face stricter evidentiary and doctrinal filters than those applying for traditional marks, especially when seeking protection for colours, shapes and non-visible signs. While these filters serve important policy functions, their application has often been conservative and insufficiently transparent, resulting in uncertainty and potentially deterring investment in distinctive non-traditional branding.

Fourthly, judicial engagement with NTTMs remains fragmented. Cases such as *Yahoo!*, *Colgate*, *Ferrero Rocher*, *Zippo* and *Christian Louboutin* show that courts are prepared to protect non-traditional indicia where there is compelling evidence of misrepresentation and

confusion, but they have not yet produced a coherent and generalisable doctrine for NTTMs. As a result, examiners, practitioners and brand owners must navigate a patchwork of precedents and informal practices.

Finally, there is a growing recognition in the literature that technological change and global competition will intensify pressure on India to clarify and strengthen its NTTM regime, and that targeted reforms could support domestic innovation while maintaining robust competition.

7. Recommendations for Reform

7.1 Clarify Statutory Recognition of NTTM Categories

Parliament should consider amending sections 2(1)(m) and 2(1)(zb) of the TMA, or inserting an interpretative provision, to explicitly recognise a non-exhaustive list of NTTM categories, including sound, motion, scent, taste, texture, hologram and position marks, in addition to the already recognised shapes and colour combinations. Explicit recognition would not guarantee registrability but would send a clear signal that the statute is intended to accommodate non-traditional signs and would reduce interpretive hesitation at the registry and judicial levels.

7.2 Modernise Representation Requirements for Non-Visual Marks

Building on the 2017 Rules' acceptance of sound files, Indian law should adopt a more flexible representation standard inspired by EU reforms, allowing any form of representation including audio files, video clips and other digital formats that is clear, precise, self-contained, easily accessible and durable. This would facilitate the registration of sound, motion and potentially scent and taste marks, while maintaining legal certainty for third parties.

To operationalize this shift, the Trade Marks Rules and the Manual should provide detailed guidance on acceptable representation formats and technical specifications for each category of NTTM, including examples of compliant and non-compliant representations.

7.3 Develop Registry Guidelines on Distinctiveness and Evidence

The CGPDTM, in consultation with stakeholders and informed by comparative practice, should issue guidelines specifically addressing distinctiveness and evidentiary requirements for NTTMs. These guidelines could clarify what types of use, marketing and consumer survey evidence are appropriate for establishing acquired distinctiveness in relation to colour, shape

or sound marks and how long a period of use is typically required.

Clear, publicly available guidelines would reduce uncertainty for applicants and help standardise examination practice across different registry offices, without lowering the substantive threshold for distinctiveness. They would also encourage more systematic data collection on NTTM applications and decisions, creating a stronger empirical basis for future policy discussions.

7.4 Calibrate Functionality and Competition Analysis

Courts and examiners should adopt a more explicit and structured approach to functionality analysis for NTTMs. Rather than treating aesthetic appeal as functionally disqualifying per se, decision-makers should ask whether the claimed feature is necessary to achieve a technical result, whether it gives substantial value to the goods independent of brand reputation and whether granting trademark protection would materially impede competition.

Competition concerns can be addressed by carefully limiting NTTM protection to features that truly function as source identifiers and by refusing registration where protection would effectively monopolise essential product characteristics. This more nuanced approach would protect the public domain without systematically disfavoring non-traditional subject matter.

7.5 Strengthen Judicial Engagement and Capacity-Building

Finally, greater judicial engagement with NTTM issues is essential for building a coherent body of doctrine. Higher courts should use appropriate cases to articulate clear tests for distinctiveness, similarity, confusion and functionality in relation to NTTMs, drawing on comparative jurisprudence while adapting it to Indian statutory language and market conditions.

Capacity-building initiatives for judges, examiners and practitioners, including specialised training, workshops and dissemination of best-practice materials, could improve the consistency and quality of decision-making in NTTM cases. Over time, a more informed and confident judiciary and registry would be better placed to balance the demands of brand innovation with the need to preserve open competition and consumer choice.

8. Conclusion

Non-traditional trademarks occupy an increasingly important but still precarious position in Indian trademark law. On paper, the TMA's broad definitions and the 2017 Rules' recognition

of sound marks provide a framework that can accommodate many forms of NTTMs, and case law on trade dress, shape and colour marks shows a judiciary that is willing to adapt classical principles to new types of indicia. In practice, however, the combination of statutory ambiguity, stringent representation requirements, high evidentiary burdens and limited jurisprudential guidance has resulted in a regime in which NTTMs remain marginal, under-protected and often avoided by rights-holders.

As Indian businesses increasingly invest in sensory branding and compete in global markets where NTTM protection is more developed, the shortcomings of the current framework are likely to become more pronounced. Addressing the "lack of clear protection" for NTTMs, therefore, requires not only technical amendments to the TMA and Rules but also a broader shift in institutional attitudes, encompassing clearer statutory recognition, modernised representation standards, transparent evidentiary guidelines, calibrated functionality and competition analysis and sustained judicial engagement.

If these reforms are undertaken in a principled and evidence-based manner, Indian trademark law can evolve into a more coherent and innovation-friendly system that recognises the legitimate interests of brand owners in protecting non-traditional signs while preserving the public domain and promoting fair competition. In that event, NTTMs can move from the margins to the mainstream of Indian IP practice, reflecting and supporting the country's dynamic and increasingly sophisticated marketplace.

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