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A Winding Path for Well-Known Marks in Indonesia

Prior to the introduction of Ministry Regulation 67/2016, Indonesia's courts had previously reached a mutual agreement through the issuance of Supreme Court Circular No. 3 of 2015 on the Implementation of the Conclusion of the Supreme Court Plenary Meeting for the Year 2015 as Implementing Guidelines for Courts (“SC Circular 3/2015”), which rejected any claims relating to the cancellation of non-similar marks.

Overview

The concept of “well-known marks” has been adopted in Indonesia for a number of years. The concept was originally derived from the Paris Convention for the Protection of Industrial Property (“**Paris Convention**”), whereby a product with a well-known mark is distinguished from a normal mark. The degree of protection enjoyed by well-known marks remains relatively high in comparison with that enjoyed by normal marks. As a consequence, many businesses would love to have their marks classified as well-known marks.

Indonesia became a signatory to the Paris Convention way back on 24 December, 1950, although it wasn't until 1992 that Indonesia finally recognized the protection of well-known marks through the issuance of Law No. 19 of 1992 on Trademarks. However, the journey towards the stamping of well-known marks in Indonesia has not been an easy one. Even in the wake of Law No. 15 of 2001 on Trademarks repealing and replacing Law No. 19 of 1992, the protection of well-known marks has remained relatively unclear. At present, one year after Law [No. 20 of 2016](#) on Marks and Geographical Indications (“**Marks Law**”) was introduced,¹ the protection afforded to well-known marks has now been redefined. With the goal of

¹ For more information on the Marks Law, see ILB [No. 2992](#) and ILD [No. 478](#).

explaining and providing solutions in regard to this much discussed issue of marks, this edition of Indonesian Law Digest (ILD) will examine this issue from the following angles:

- I. Brief Description of Marks:
 - A. Scope and Categories of Marks; and
 - B. Mark Rights.
- II. Definition and Scope of Well-Known Marks:
 - A. Based on International Legal Frameworks;
 - B. Based on Indonesian Legal Frameworks; and
 - C. Based on Court Practices.
- III. Recommendations Based on Best Practices.

I. Brief Description of Marks

A. Scope and Categories of Marks

Under the Marks Law, a mark is defined as a graphical sign which ultimately distinguishes a certain commercial commodity from others of the same type. Such graphical signs may either stand-out individually or can consist of a combination of the following elements:²

1. A picture;
2. A logo;
3. A name;
4. A word;
5. A group of letters of numbers;
6. A combination of colors;
7. A two-dimensional or three-dimensional logo or picture;
8. A sound; and/or
9. A hologram.

Marks themselves are further categorized into trademarks, which are assigned to commercial goods; and service marks, which are used in commercial services.³

B. Mark Rights

In Indonesia, mark rights adopt the so called “first-to-file” mechanism.⁴ This means that rights over marks may only be obtained by individuals or legal entities (“**Applicants**”) after they have first been duly registered.⁵ Accordingly, any such registration should be preceded by the submission of an application for the registration of mark rights by Applicants (or their proxies) to the Ministry of Law and Human Rights

² Arts. 1 (1) and 2 (3), Marks Law.

³ Art. 1 (2-3), Marks Law.

⁴ For a more detailed explanation on the first-to-file rule, see Hukumonline Legal Clinic: [“Apakah Merek Terdaftar Berarti Terkenal?”](#)

⁵ Art. 3 and Art. 1 (9) and (19), Marks Law.

(“Ministry”) via the Directorate General of Intellectual Property, either via electronic or manual means. Moreover, all applications should be made in the Indonesian language.⁶

II. Definition and Scope of Well-Known Marks

The criteria and characteristics of any mark which a party wishes to categorize as a well-known mark are inevitably influenced by how the international community defines and classifies a mark as one that is well known. However, ultimately, competent authorities in each country have the responsibility of deciding whether a mark is well-known or not.

The following section will analyze the definition and scope of well-known marks from three different perspectives: 1) International frameworks; 2) National frameworks; and 3) Court practices.

A. Based on International Legal Frameworks

Any legal provisions which relate to marks and patents are outlined in the Paris Convention on the Protection of Industrial Property (“Paris Convention”). Indonesia is a signatory to the Paris Convention, which follows as a direct consequence of its participation in the World Trade Organization (“WTO”), and this is especially pertinent in relation to the ratification of Agreements on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).⁷

The Paris Convention demands that its members prohibit, refuse or cancel the registration of any trademarks which are deemed to be well known in a relevant country by the country’s relevant competent authority.⁸ Under the formulation of this provision, such refusals or cancellations may only be granted towards trademarks. So what does this mean for service marks?

Initially, the Paris Convention was not intended to offer any protection for well-known service marks. As a result, the various signatory states to the convention were not obliged to enforce the provision of well-known marks in a way that included service marks, although they remained free to do so in analogous situations.⁹ However, latterly, TRIPS has straightforwardly mandated that Article 6*bis* of the Paris Convention regarding well-known marks should also be applied *mutatis mutandis* (i.e., applied identically) to service marks.¹⁰

Nevertheless, any refusal or cancellation of a given registration does not stand on its own *per se*, as such conditions must be legitimized through the issuance of domestic legislation by the relevant countries.¹¹ This condition should be deemed as a manifestation of the sovereignty of its members.

⁶ Art. 4 (1), Marks Law.

⁷ Art. 1 (3), TRIPS. A complete list of signatory states to the Paris Convention can be viewed at: http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2.

⁸ Art. 6^{bis} (1), Paris Convention.

⁹ United International Bureaux for the Protection of Intellectual Property (“BIRPI”), *Guide to the Application of the Paris Convention for the Protection of Industrial Property*, (“Paris Convention Guide”), page 90.

¹⁰ Art. 16 (1), TRIPS.

¹¹ Art. 6^{bis} (1), Paris Convention.

1. Cancellation Periods

In terms of cancellations of mark registrations, the Paris Convention sets a period of at least five years from the date of the mark registration for the owners of well-known marks to request cancellations.¹² The use of “at least” in this provision is designed to provide enough time for domestic legislation to set out a different timeline, although five years is the minimum time frame.¹³ However, no time limitation is set for requesting the prohibition or cancelation of the use of any marks which have been registered or used in bad faith.¹⁴

2. Determination of Well-Known Marks

The determination of well-known marks is provided under the TRIPS and takes into account the knowledge possessed by the relevant sector of the public as regards the trademark in question, including knowledge of the relevant countries which has been obtained as a result of the promotion of the trademark.¹⁵

3. Non-Similar Marks

In principle, the refusal or cancellation of any registrations of Marks may only be requested in relation to any reproductions, imitations or translations of marks which are used by identical or similar goods.¹⁶ TRIPS, however, broadens this scope by allowing for the refusal or cancellation of mark registrations for any goods or services which do not fall under the same class of goods and/or services as the well-known mark (non-similar mark) in question, provided that the use of that mark would indicate a connection between those goods or services and its owner in a way which is likely to damage the interests of the owner of any such mark.¹⁷

4. Recommended Criteria

In 1999, the World Intellectual Property Organization (“WIPO”) established a Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks (“**Joint Recommendation**”). Under the Joint Recommendation, WIPO set out lists of criteria which should be met before a mark can be recognized as a well-known mark and these employ clearer and more measureable methods than TRIPS does. The recommended criteria to be met by a mark in order that it be classified as a well-known mark are as follows:¹⁸

No.	Recommended Criteria of Well-Known Marks
1.	<p>Public Knowledge or Recognition</p> <p>A degree of knowledge or recognition as regards the mark within the relevant sector of the general public. The relevant sector of the public encompasses but should not be limited to the following factors:¹⁹</p> <p>a. Actual and/or potential consumers of the marked goods and/or services;</p>

¹² Art. 6^{bis} (2), Paris Convention.

¹³ Paris Convention Guide, page 92.

¹⁴ Art. 6^{bis} (2), Paris Convention.

¹⁵ Art. 16 (2), TRIPS.

¹⁶ Art. 6^{bis} (1), Paris Convention.

¹⁷ Art. 16 (3), TRIPS.

¹⁸ Art. 2 (1b), Joint Recommendation.

¹⁹ Art. 2 (2a), Joint Recommendation.

	<p>b. Persons involved in the distribution channels of the marked goods and/or services; and</p> <p>c. Business circles dealing with the marked goods and/or services.</p>
2.	<p>Usage of the Mark</p> <p>The duration, extent and geographical area of any use of the mark.</p>
3.	<p>Mark Promotion</p> <p>The duration, extent and geographical area of any promotion of the mark, including advertising, publicity and presentations at fairs or exhibitions of the goods and/or services to which the mark applies.</p>
4.	<p>Mark Registration</p> <p>The duration and geographical area of any registrations, and/or any applications for registrations of the mark, to the extent that they reflect use or recognition of the mark.</p>
5.	<p>Successful Legal Enforcement</p> <p>Record of successful enforcement of rights for the mark, in particular the extent to which the mark was recognized as well known by the competent authorities.</p>
6.	<p>Value</p> <p>The associated value within the mark.</p>

In addition to the criteria set out above, the Joint Recommendation also sets out certain factors that should not be taken into consideration during the determination of well-known marks, specifically:²⁰

No.	Irrelevant Factors
1.	<p>Mark Registration by signatories to the Paris Convention</p> <p>The mark has been used in or has been registered by or an application for the registration of the mark has been filed in or in respect of, a signatory member state.</p>
2.	<p>Mark Registration by non-signatories to the Paris Convention</p> <p>The mark is well known in or has been registered by or an application for registration of the mark has been filed in or in respect of, any jurisdiction other than that of a signatory member state.</p>
3.	<p>Popularity among signatories to the Paris Convention</p> <p>The mark is well known by the public at large within the relevant member state.</p>

²⁰ Art. 2 (3a), Joint Recommendation.

5. Conflicting Marks

As stated above, the privilege of being categorized as a well-known mark offers a degree of protection. Thus, any mark will be deemed to be in conflict with a well-known mark in cases where the following conditions are met:²¹

- a. A mark (or its essential part) constitutes a reproduction, an imitation, a translation or a transliteration, which is likely to result in confusion as regards the well-known mark, if the mark is used; and
- b. A mark is the subject of a registration application or is registered, in respect of goods and/or services which are identical or similar to the goods and/or services to which the well-known mark applies.

In a more general sense, a non-similar mark may also be in conflict with a well-known mark in cases where the mark (or its essential parts) constitutes a reproduction, an imitation, a translation or a transliteration of the well-known mark in question, and if one of the following conditions is fulfilled:²²

- a. The use of the mark would indicate a connection between the marked goods and/or services and the well-known mark and would be likely to damage the interests of the owner of the well-known mark;
- b. The use of the mark is likely to unfairly impair or to dilute the distinctive characteristics of the well-known mark; or
- c. The use of the mark would lend an unfair advantage in terms of the distinctive characteristics of the well-known mark.

B. Based on Indonesian Legal Frameworks

The criteria for well-known marks which are set out under domestic legislation can be found in Ministry Regulation [No. 67 of 2016](#) on the Registration of Marks (“**Ministry Regulation 67/2016**”). Ministry Regulation 67/2016 sets out a number of crucial parameters which are to be used in order to determine whether or not a mark is to be classified as a well-known mark, as well as to determine the knowledge level of the general public in connection to any such mark within the relevant business sector.²³ Such general knowledge may be inferred from consumers or laymen which have a connection (i.e., either through production, promotion, distribution or at the level of sales) to the goods and/or services which fall under the protection of the mark in question.²⁴

²¹ Art. 4 (1a), Joint Recommendation.

²² Art. 4 (1b), Joint Recommendation.

²³ Art. 18 (1), Ministry Regulation 67/2016. For more information on Regulation 67/2016, see ILB [No. 3093](#).

²⁴ Art. 18 (2), Ministry Regulation 67/2016.

At present, nine basic variables should be considered during the determination of well-known marks, as set out in the table below:²⁵

Indonesian Criteria for Well-Known Marks	
1.	<p>Public Knowledge A degree of public knowledge or recognition as a well-known mark as regards the mark in question within the relevant business sector.</p>
2.	<p>Sales Volume and Profits Sales volume of goods and/or services and profits acquired from the usage of the mark by its owners.</p>
3.	<p>Market Share Market share which is controlled through the use of the mark in question and which involves the circulation of goods and/or services within the marketplace.</p>
4.	<p>Area Reach Area reach of the usage of the mark.</p>
5.	<p>Usage Duration Duration of the usage of the mark.</p>
6.	<p>Promotion Intensity and promotion of the mark, including the investment value expended during any such promotion.</p>
7.	<p>Mark Registration Registration of marks or applications for the registration of marks in other countries.</p>
8.	<p>Legal Enforcement The degree of legal enforcement as regards the mark, specifically in relation to the acknowledgement of the mark as a well-known mark by the relevant authorities.</p>
9.	<p>Reputation and Quality Control The value which is attached to the mark in question and which is obtained as a result of its reputation and of the quality control of the marked goods and/or services.</p>

²⁵ Art. 18 (3), Ministry Regulation 67/2016.

• Rejection of Mark Registrations

The classification of a well-known mark is not only beneficial from the perspective of brand prestige but is also important for the registration of well-known marks. Consequently, any applications for the registration of marks will be rejected in cases where marks possess strong similarities (either partially or in their entirety) to:²⁶

1. Well-known marks which are owned by other parties and which lie within the same categories of goods and/or services; or
2. Well-known marks, which are owned by other parties and which do not fall into the same categories of goods and/or services (non-similar marks), but which fulfill the following conditions:²⁷
 - a. An objection has been filed by the owner of the well-known mark against the mark registration application; and
 - b. The well-known mark has already been registered.

Ministry Regulation 67/2016 finally overcame the previous lack of clarity which persisted for years in Indonesia as regards criteria for well-known marks. Prior to the introduction of Ministry Regulation 67/2016, Indonesia's courts had previously reached a mutual agreement through the issuance of Supreme Court Circular [No. 3 of 2015](#) on the Implementation of the Conclusion of the Supreme Court Plenary Meeting for the Year 2015 as Implementing Guidelines for Courts ("**SC Circular 3/2015**"), which rejected any claims relating to the cancellation of non-similar marks.²⁸ This firm stance was followed up by the Indonesian judicial system, since no implementing regulation on the cancellation of non-similar marks had been mandated under the previous law on marks, specifically Law [No. 15 of 2001](#) on Marks ("**Mark Law 2001**").²⁹

C. Court Approach

The following section will elaborate upon the approach adopted by Indonesian courts to disputes involving well-known marks and will assess two points of view: (1) Supreme Court jurisprudence; and (2) Recent court decisions for cases involving well-known marks.

1. Supreme Court Jurisprudence

As mentioned above, the first piece of national legislation to adopt the concept of well-known marks was Law [No. 19 of 1992](#) on Marks, as amended by Law [No. 14 of 1997](#) (collectively referred to as "**Mark Law 1992**"). However, in a manner similar to Mark Law 2001, Mark Law 1992 did not ultimately offer any definition as regards the concept of well-known marks. However, the absence of this definition did not necessarily mean that Mark Law 1992 did not offer any protection to well-known marks, as it recognized the protection of well-known marks as one of its underlying principles.³⁰ In fact, Mark Law 1992 only defines three factors which were to be used in order to determine a well-known mark, specifically:³¹

²⁶ Art. 16 (2b) and (2c) and Art. 19 (1), Ministry Regulation 67/2016.

²⁷ Art. 19 (2-3), Ministry Regulation 67/2016.

²⁸ P.3, Appendix to SC Circular 3/2015.

²⁹ P.3, Appendix to SC Circular 3/2015.

³⁰ General Elucidation, Mark Law 1992 (Amendment).

³¹ Elucidation of Art. 6, Mark Law 1992 (Amendment).

- a. Public knowledge;
- b. The reputation of the mark as a result of the promotion of its owner; and
- c. Mark registration in other countries (if any).

In a bid to overcome this loophole, on 28 November 1995, the Supreme Court rendered Decision No. 1486 K/Pdt/1991 (“**SC Jurisprudence 1991**”), which asserted that a mark was to be considered as a well-known mark in cases where the mark in question:³²

- a. Had been circulated internationally outside of its country of origin; and
- b. Had had its registration proven in a number of countries.

SC Jurisprudence 1991 was adhered to by fellow judges in connection with well-known mark cases that were brought before the courts in Indonesia right up until 2000. Post-2000, the Supreme Court rendered another decision on well-known marks based on Mark Law 2001, specifically Supreme Court Decision No. 022 K/HaKI/2002 (“**SC Jurisprudence 2002**”). SC Jurisprudence 2002 set out the following characteristics which were to be attributed to well-known marks and which were substantially similar to the various characteristics which were originally set out under Mark Law 2001, including:³³

- a. Public knowledge in connection to the mark in question within the relevant business sector;
- b. The reputation of the mark, which is obtained through its promotion; and
- c. The receipt of the registration of the mark in question in another country.

2. Recent Court Decisions on Well-Known Mark Cases

In order to give a flavor of the bigger picture as regards the stance of Indonesian courts in relation to well-known marks cases, this edition of ILD will take a brief look at three renowned cases involving well-known marks, specifically: 1) the Pierre Cardin case; 2) the IKEA case; and 3) the Hugo Boss case.

Pierre Cardin Case	
Decisions	
<ol style="list-style-type: none"> 1. Commercial Court (“CC”) Decision No. 15/Pdt.Sus-HKI/2015/PN.Niaga.Jkt.Pst. (“CC Decision on Pierre Cardin Case”); and 2. SC Decision No. 557 K/Pdt.Sus-HKI/2015 (“SC Decision on Pierre Cardin Case”). 	
Claimant	Defendants
<ul style="list-style-type: none"> • Pierre Cardin, French national 	<ol style="list-style-type: none"> 1. Alexander Satryo Wibowo, Indonesian national; and 2. The Directorate of Marks at the Ministry of Law and Human Rights.

³² P.2, SC Decision No. 210 K/Pdt.Sus-HKI/2013.

³³ P.5, SC Decision No. 92 K/Pdt.Sus-HKI/2017.

Analysis of Well-Known Mark

CC Tribunal

The CC Tribunal asserted that a well-known mark is protected if the mark in question is well known among the general public at the time that the mark in question is registered with the relevant competent authority and not just at the time at which the claim is filed. Thus, the CC Tribunal rejected the claim on the grounds that when the Pierre Cardin mark was registered by the defendants, specifically on 29 July 1977, it was not/not-yet well-known.³⁴ Thus, the tribunal asserted that the defendants did not have any intention to benefit from the popularity of the Pierre Cardin brand.³⁵

SC Tribunal

In line with the CC Tribunal, the SC Tribunal also used the argument that when Pierre Cardin was first registered as a mark, it was not yet well-known.³⁶ Hence, the “first-to-file” principle prevailed during the Pierre Cardin registration.³⁷

Dissenting Opinion

However, the dissenting opinion of one of the SC Tribunal judges should also be noted. According to the dissenting judge, the Pierre Cardin mark was already a well-known mark in several countries, since it had become popular and had been registered in several countries.³⁸ In addition, since the Pierre Cardin mark was originally the name of the claimant, who is known as a fashion designer, it was clear that the defendants had acted in bad faith in order to benefit from the popularity of the Pierre Cardin mark, since the registered mark was identical to the original.³⁹ Thus, the claim should have been granted, according to this dissenting judge.

IKEA Case

Decision

• **SC Decision No. 264 K/Pdt.Sus-HKI/2015 (“SC Decision on IKEA Case”)**

Claimant	Defendants
<ul style="list-style-type: none"> • Inter IKEA System B.V., Dutch company 	<ol style="list-style-type: none"> 1. PT Ratania Khatulistiwa; and 2. The Directorate of Marks at the Ministry of Law and Human Rights.

³⁴ P.51, CC Decision on the Pierre Cardin Case.

³⁵ P.55, CC Decision on the Pierre Cardin Case.

³⁶ P.30, SC Decision on the Pierre Cardin Case.

³⁷ P.31, SC Decision on the Pierre Cardin Case.

³⁸ P.31, SC Decision on the Pierre Cardin Case.

³⁹ P.32, SC Decision on the Pierre Cardin Case.

Analysis of Well-Known Mark

SC Tribunal

The cassation petition was rejected by the SC Tribunal for the single reason that the IKEA mark had not yet been commercially used by its owner for a period of three consecutive years and had consequently been deleted from the General List of Marks.⁴⁰ Thus, the IKEA mark was deemed to be no longer protected within Indonesia.

Dissenting Opinion

According to one of the SC Tribunal judges, the IKEA mark had already been proven to be a well-known mark because IKEA products had already been sold in stores throughout Indonesia. Hence, since the IKEA mark was a well-known mark, there was no legal basis for the deletion of the mark from the General List of Marks.⁴¹

Hugo Boss Case

Decision

- CC Decision No. 30/Pdt.Sus.Merek2016/PN Niaga.Jkt.Pst. (“CC Decision on Hugo Boss Case”)
- SC Decision No. 92 K/Pdt.Sus-HKI/2017 (“SC Decision on Hugo Boss Case”)

Claimant	Defendants
<ul style="list-style-type: none"> • Hugo Boss Trade Mark Management GmbH & Co. KG, German company 	<ol style="list-style-type: none"> 1. Teddy Tan; and 2. The Directorate General of Marks at the Ministry of Law and Human Rights.

Analysis of Well-Known Mark

SC Tribunal

The SC Tribunal annulled the CC Decision in the Hugo Boss Case because the Hugo Boss mark is essentially a well-known mark and has been registered in Indonesia since 24 January 1989, while the Hugo mark owned by the defendants had only been registered since 3 March 2008.⁴² Hence, it seemed clear that the defendant (Teddy Tan) had acted in bad faith when he registered the Hugo mark, which bears a substantial similarity in its entirety to the Hugo Boss mark and was thus seen as misleading and confusing to the general public.⁴³

⁴⁰ P.50, SC Decision on the IKEA Case.

⁴¹ P.51, SC Decision on the IKEA Case.

⁴² P.43, SC Decision on the Hugo Boss Case.

⁴³ Pp.43-44, SC Decision on the Hugo Boss Case.

III. Recommendations Based on Best Practices

Through a consideration of all of the abovementioned factors, the Indonesian legal system is indeed far from perfect in terms of affording protection to well-known marks. However, there are several recommendations which companies should take note of if they are in possession of well-known marks that they wish to protect in Indonesia, specifically:

No.	Recommendations
1.	<p>Register your mark as soon as possible</p> <p>As Indonesia adopts the “first-to-file” principle, it is highly advisable that the owners of any well-known marks who operate or who plan to operate businesses in Indonesia register their marks. In most cases, however, owners of well-known marks who finally decide to enter the Indonesian marketplace usually find that their marks have already been registered in bad faith by local parties. In order to tackle this difficult issue, there are several measures that owners of well-known marks can take, specifically:</p> <ol style="list-style-type: none"> a. Exhaust the function of the Protocol Relating to the Madrid Agreement concerning the International Registration of Marks (“Madrid Protocol”), as Indonesia joined the Madrid Protocol on 2 October 2017 through the issuance of Presidential Regulation No. 92 of 2017; and b. Another possible approach involves owners of well-known marks simply asking domestic distributors of their products to file mark registrations with the Directorate of Marks. Later on, when these owners of well-known marks have started to directly invest in Indonesia (i.e., through the establishment of companies in Indonesia), then said owners may request transfers of rights from their distributors.
2.	<p>Build and maintain a good relationship with a competent authority</p> <p>Owners of well-known marks should be proactive in advocating to the competent Indonesian authorities that their marks are well-known, based on relevant facts and data. This includes the implementation of any measures designed to promote the marks among the Indonesian public.</p>
3.	<p>Utilize the new concept of well-known marks described under Ministry Regulation 67/2016</p> <p>Despite only recently being issued, Ministry Regulation 67/2017, theoretically speaking, offers far better protection for well-known marks. Prior to the issuance of Ministry Regulation 67/2017, the Indonesian judiciary tended to decide against the owners of well-known marks. However, it is expected that Ministry Regulation 67/2017 will offer greater certainty to owners of well-known marks, so that they can ultimately better protect their interests.</p>

Conclusion

Overall, owners of well-known marks should take note that Indonesia is still adapting to the protection of such marks. This is exactly why any owners of well-known marks should be proactive in applying protection to their marks and, most importantly, should ensure that they can prove the nine variables mentioned under Ministry Regulation 67/2016.

Nevertheless, the enactment of the Marks Law surely offers new hope in terms of the protection which is afforded to well-known marks, including the ratification of the Madrid Protocol. Ultimately, mark owners should not lose heart, as Indonesia is increasingly falling into line with international trends.^{RP}

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