



NEWSLETTER ON THE TREATMENT OF
BROADCASTING RIGHTS IN THE TWO LARGEST
MARKETS IN SUB-SAHARAN AFRICA



TREATMENT OF BROADCASTING RIGHTS IN THE TWO LARGEST MARKETS IN SUB-SAHARAN AFRICA NEWSLETTER PUBLICATION

Broadcasting rights are and have continually become a source of vibrant discussion amongst the various key players, notably the broadcast rights holders and regulatory authorities trying to find a delicate balance between what oftentimes are competing interests.



The aim of this Guide is to provide an overview and comparison of the broadcasting rights regimes in Nigeria and South Africa by asking pertinent questions on the regulatory landscape (future and present) for broadcasting in Nigeria and South Africa. This Guide also aims to give different perspectives from the regulators and broadcast rights holders' standpoints in each jurisdiction. We hope the Guide will provide a better understanding of the interplay between broadcast rights holders' contractual rights and the complex array of broadcast regulation, particularly in the pay per view television space as well as relevant information for prospective new entrants.

1. DESCRIPTION OF THE LEGAL FRAMEWORK FOR BROADCASTING RIGHTS IN YOUR JURISDICTION.

NIGERIA

The National Broadcasting Commission Act, (the "**Act**") regulates the broadcasting sector and broadcasting rights in Nigeria. The Act established the National Broadcasting Commission (the "**NBC**"), which is empowered to regulate the broadcast industry in Nigeria.

The NBC, by virtue of the Act, is empowered to issue a code for the purpose of setting the minimum standards with regards to the content and quality of materials amongst others for broadcasting. The sixth (6th) edition of the Nigeria Broadcasting Code (including the amendment issued on March 26, 2020) (the "**Code**") is currently in operation.

SOUTH AFRICA

The Broadcasting Act 4 of 1999 ("BA") establishes and aims to develop a broadcasting policy in the public interest. Accordingly, the objects of the BA include:

- a. Contributing to democracy, development of society, gender equality, nation building, provision of education;
- b. Safeguarding, enriching and strengthening the cultural, political, social and economic fabric of South Africa;
- c. Encouraging ownership and control of broadcasting services through participation by persons from historically disadvantaged groups;
- d. Catering for a broad range of services and specifically for the programming needs in respect of children, women, the youth and the disabled;
- e. Encouraging investment in the broadcasting sector
- f. Ensuring fair competition in the broadcasting sector

The Electronic communications Act 36 of 2005 ("ECA") regulates, amongst other things, broadcasting services. Notably, the objects of the ECA include:

- a. Promoting an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communication services;
- b. Promoting the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all languages and cultural groups and provide entertainment, education and information;
- c. Ensuring that broadcasting services and electronic services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in South Africa;
- d. Providing assistance and support towards human resource development within the ICT sector;
- e. Ensuring the provision of a variety of quality broadcasting services; and
- f. Promoting the development of public, commercial and community broadcasting services which are responsive to the needs of the public.

2. WHO REGULATES BROADCASTING RIGHTS IN YOUR JURISDICTION?

NIGERIA

The NBC is responsible for regulating broadcasting rights in Nigeria.

SOUTH AFRICA

The Independent Communications Authority of South Africa ("**ICASA**"), established in terms of the Independent Communications Authority of South Africa Act 13 of 2000 ("**ICASA Act**"), is responsible for, amongst other things, regulating the broadcasting sector in South Africa.



3. HAVE THERE BEEN ANY RECENT OR PROPOSED CHANGES TO THE LEGAL FRAMEWORK FOR BROADCASTING RIGHTS? WHAT HAS BEEN THE RESPONSE TO THE DEVELOPMENTS BY STAKEHOLDERS? HAS THE REGULATOR TAKEN INTO CONSIDERATION THE RESPONSE BY THE STAKEHOLDERS?

NIGERIA

Yes. There have been significant changes, these are captured in the Code. The Code, by virtue of the amendments issued on March 26, 2020, introduced new matters which are departures from previous editions.

Key amongst the changes are:

- Wholesale offer, which essentially grants the NBC the power to compel broadcasters to sublicense broadcast rights;
- Prohibition of agreements in restraint of trade/abuse of a dominant position, which prohibits broadcasters and licensees from entering into any form of broadcasting rights acquisition in Nigeria or anywhere in the world to acquire any broadcasting right(s) which exclude persons, broadcasters or licensees in Nigeria from sub-licensing the same;
- Acquisition of sports rights, the Code prohibits the exclusivity of sporting rights in Nigeria; and
- Local content requirements, the Code states local content requirements and thresholds which apply to all categories of programming.

The Code has been widely criticised by business owners and operators in the broadcast industry. The criticism has centred on the legality of amendments to the Code in light of the right to ownership of intellectual property as guaranteed under the Nigerian Constitution; the Nigeria Copyright Act and International Treaties to which Nigeria is a signatory. The Code has also been criticised for attempting to abrogate the right of parties to freely agree the terms of their contracts, by modulating the right to ownership of property and the power to compel the sublicensing of a work or production.

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The Sports Broadcasting Services Regulations, 2010 ("**2010 Regulations**") were issued in terms of the ECA and aim to:

- a. Regulate the broadcasting of national sports in South Africa;
- b. Set the criteria to be used when listing national sporting events;
- c. Identify and list national sporting events; and
- d. Provide a dispute resolution mechanism.

In 2018, ICASA proposed amendments ("**Proposed Amendments**") to the 2010 Regulations. The ECA provides that subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events which are identified to be in the public interest, as identified by ICASA from time to time. In its explanatory memorandum on its review of the 2010 Regulations, ICASA explained that in accordance with section 60 of the ECA and Regulation 7 of the 2010 Regulations (which permits ICASA to review the list of national sporting events every four years), it was exercising its authority to review the listed sporting events and codes, as contained in the 2010 Regulations.

The Proposed Amendments seek to, amongst others, amend Regulation 5 of the 2010 Regulations by adding previously unlisted sporting codes and grouping the sporting events and codes according to the level of public interest in each sporting code and event. Specifically, the 2010 Regulations set out a single list of national sporting events whereas the Proposed Amendments create the following three categories:

- a. Group A: compulsory listed sporting events for free-to-air with full live coverage
- b. Group B: National sporting events offered to subscription on a non-exclusive basis under sub-licencing conditions; and
- c. Group C: minority and developmental sporting events to be broadcast by subscription and free-to-air services.

The 2010 Regulations have been lauded internationally for having adopted a sensible approach in balancing the needs of various stakeholders, including sports fans, sports federations, broadcasters and advertisers. The proposed amendments, however, have been widely criticised for seemingly curtailing the ability of sports federations to licence their broadcasting rights on an exclusive basis.

ICASA held public consultations on the Proposed Amendments and received 33 written submissions from numerous interested stakeholders, including broadcasters, universities as well as local and international sports federations. During the oral hearings which took place in May 2019, most stakeholders submitted that the current regulatory regime created by the 2010 Regulations accords with international best practice and strikes the appropriate balance between the needs of all material stakeholders.

During the consultation process, it was argued that the Proposed Amendments will, amongst other things, hamper the ability of sports federations to earn

sufficient income to invest into the local sporting industries, which is necessary to produce internationally competitive senior national squads. Stakeholders submitted further that if the sports federations are unable to attract sufficient revenue from the licensing of their broadcasting rights on reasonable and discretionary commercial terms, various sporting initiatives are likely to suffer, including various grassroots development programmes and programmes designed to invest in international competitiveness.

Following the consultation process, ICASA published a revised draft of the Proposed Amendments in 2020 ("Revised Amendments"). The Revised Amendments, which are currently out for public comment, propose several changes to the Proposed Amendments (and by implication, the 2010 Regulations), including:

1. Reducing the list of sporting events and abandoning the categories set out in the Proposed Amendments;
2. Increasing the penalty for non-compliance with the Regulations from R500 000.00 to R1 000 000.00.



4. ARE THE RECENT OR PROPOSED DEVELOPMENTS CONSIDERED PURELY PRO-CONSUMER / CONSUMER CENTRIC?

NIGERIA

The Code is largely hinged on national interest, by ensuring that consumers have access to certain services, hence the perception of the Code being viewed as consumer centric.

Salient features of the consumer centric approach under the Code include, the mandate to owners of rights to live foreign sports events to offer broadcast of such events across multiple broadcast platforms such as satellite (DTH), multipoint microwave distribution system, cable (fibre optics), DTT (terrestrial), internet, mobile, internet protocol television, and radio therefore granting access to consumers who ordinarily based on current pricing by providers would not have access to sports broadcast services.

The Code also contemplates that rights owners will enter into negotiations to discuss the pricing of sublicensing, it further states that in the event of a dispute, the NBC can conduct a review, and its decision is binding on the parties, this introduces an issue of how a consumer centric regulator can determine a fair price.

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ICASA advised that its objective in proposing the Proposed Amendments is "[to] reach a wider audience and to strike a balance between audience and revenue". ICASA has also stated that the Proposed Amendments seek to advance equality and human dignity through access to sport that is of national interest to all citizens". While ICASA has noted the need to consider the financial implications of the Proposed Amendments, it seems to have nevertheless taken the view that citizens' access to certain sporting events should take precedence, which suggests that ICASA has taken a consumer-centric approach in drafting the Proposed Amendments.





The 2010 Regulations have been lauded internationally for having adopted a sensible approach in balancing the needs of various stakeholders, including sports fans, sports federations, broadcasters and advertisers. The proposed amendments, however, have been widely criticised for seemingly curtailing the ability of sports federations to licence their broadcasting rights on an exclusive basis.



5. HOW DOES THE CURRENT FRAMEWORK AFFECT BROADCASTERS WITH CONTENT, SPORTS RIGHTS AND THE ACQUISITION OF SUCH RIGHTS?

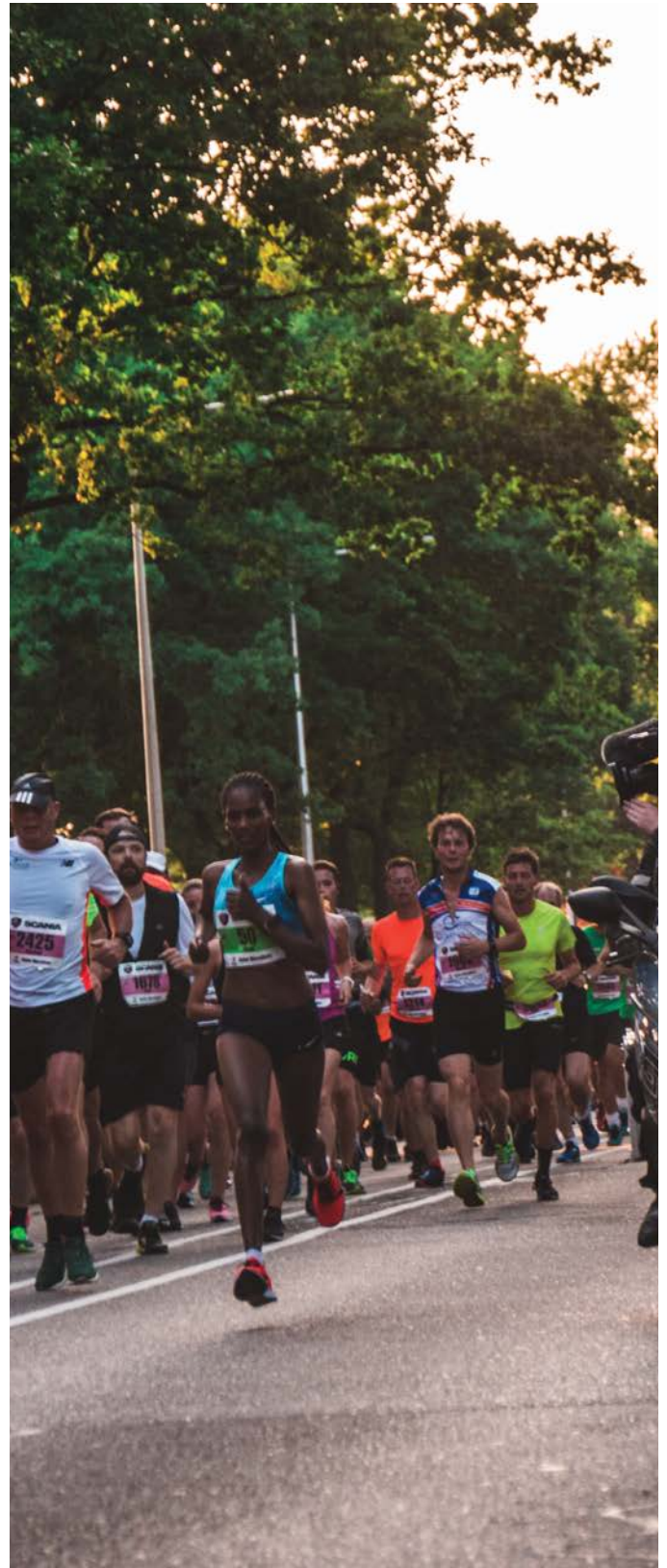
NIGERIA

The Code contains provisions aimed at improving local content in the Nigerian Broadcasting Industry, by mandating broadcasters to sublicence programmes that enjoy great viewership, it is anticipated that this will result in an increase in advertising revenue for local broadcast stations and content producers. Despite the ambitious contents of the Code, there are concerns on the validity of the provisions of the Code which tend to undermine the exclusivity rights of broadcasters in Nigeria. Put differently, questions been raised on whether these provisions do not conflict with the provisions of the Nigeria Copyright Act on the exclusive right granted by right owners to broadcasters in respect to their broadcast/content. It is the case that the removal of exclusive sporting rights will affect broadcasters severely. This development may also lead to a situation where broadcasters may not be willing to acquire content where they are unable to exercise an exclusive right to broadcast. Furthermore, this imposition may lead to broadcasters breaching contractual obligations, if there are clauses limiting sublicensing.

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Under the current framework, stakeholders in sports are not permitted to grant exclusive broadcasting rights to broadcasters in respect of a sporting event that is listed in Regulation 5 of the 2010 Regulations. The national sporting events listed in Regulation 5 include:

- Summer Olympic Games;
- Commonwealth Games;
- FIFA World Cup;
- Africa Cup of Nations;
- Two Oceans Marathon; and
- The Comrades Marathon.



6. WHAT ARE THE PROVISIONS AND TERMS FOR WHOLESALE OFFER OF BROADCASTING RIGHTS UNDER THE FRAMEWORK?

NIGERIA

The Code mandates broadcasters to ensure that all Pay TV platforms provide access to premium content in the sports and news genres to generate effective competition at the wholesale level for such genres. This is to ensure the widest possible distribution and viewership of content considered critical to the success and sustainability of new entrants in the Nigerian Pay TV industry.

A broadcaster is mandated to offer its sports and news programmes and/or channels to other broadcasters for retail to residential subscribers in Nigeria on the following terms on a reasonable request in writing;

- i. Within a reasonable time;
- ii. On a non-exclusive basis;
- iii. Without any undue discrimination; and
- iv. In accordance with the requirements and directions
- v. issued by the nbc.

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ICASA has not yet set any conditions regarding wholesale offer of broadcasting rights. However, in its Draft Findings on the Inquiry into Subscription Television Broadcasting Services, (Gazetted on 12 April 2019), ICASA considered the potential need for regulations to regulate relevant wholesale and retail markets by imposing appropriate licence conditions in order to maintain competition within the sector. ICASA's recommendations include:

- a. reducing rights contract duration;
- b. rights unbundling; and
- c. limiting the number of agreements with major movie studios.



7. WHAT ARE THE REGULATORY REQUIREMENTS OF PAY TV/ WEBTV BROADCASTERS IN YOUR JURISDICTION? ARE LAWS GOVERNING PAY TV/WEB TV BROADCASTING EXTRATERRITORIAL IN NATURE (I.E. ARE FOREIGN PAY TV/ WEB TV REQUIRED TO REGISTER IN YOUR JURISDICTION)?

NIGERIA

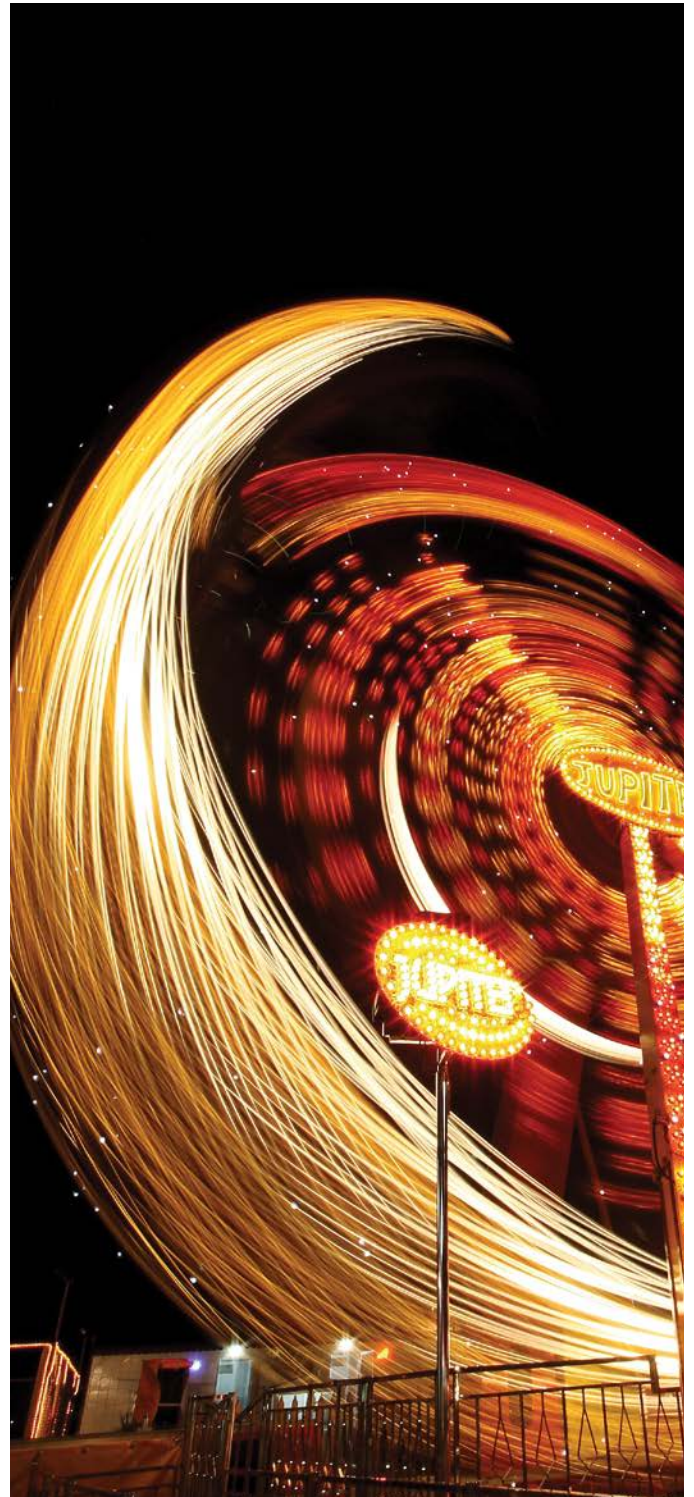
PayTV/Web TV broadcasters are required to be registered with the NBC where the broadcasting occurs in Nigeria. Such Pay TV/ WebTV broadcasters are required to adhere to the provisions of the Act and the Code.

The laws governing Pay TV/WebTV are not extraterritorial in nature as the requirement to be licensed and regulated by the NBC is only applicable where the broadcasting is from Nigeria. Thus, foreign Pay TV/WebTV would not be mandated to register in Nigeria to the extent that they do not broadcast from Nigeria.

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In terms of the Subscription Broadcasting Service Regulations, 2006 ("Subscription Broadcasting Regulations"), subscription broadcasting services are subject to regulation by ICASA. The Subscription Broadcasting Regulations provide that ICASA may impose payment obligations on subscription broadcasters in respect of subscription broadcasting licences, including applications of all descriptions, the issue, renewal and amendment of subscription broadcasting licences. ICASA may also prescribe conditions for the authorisation of channels in multi-channel environments and must ensure that subscription broadcasting services' largest revenue source is not advertising or sponsorships or a combination thereof.

ICASA does not, at present, regulate online content providers as these are considered "over-the-top" ("OTT") services which fall outside the scope of ICASA's statutory powers.







8. ARE THERE ANY LIMITATIONS OR PROHIBITION OF EXCLUSIVITY IN CONTRACTUAL ARRANGEMENTS ENTERED INTO BROADCASTERS AND OWNERS OF RIGHTS?

NIGERIA

Yes. The Code prohibits broadcasters/licensees from entering into any form of exclusive arrangement, this is viewed under the Code as creating restriction or distortion of competition in, or any part of, the broadcast media industry in Nigeria. Broadcasters/licensees are prohibited from entering into contractual arrangements which restrict broadcasting rights from being sublicensed to other third-party Nigerian broadcasters/licensees. Such arrangements will be deemed void.

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Currently, the national sporting events listed in Regulation 5 of the 2010 Regulations may not be licensed on an exclusive basis. More specifically, a subscription broadcaster who has acquired rights to a sporting event listed in Regulation 5, must inform free-to-air broadcasting service licensees within five days of acquiring such rights of the opportunity to tender for same.

9. CAN BROADCASTERS BE COMPELLED TO SUBLICENSE THEIR BROADCASTING RIGHTS IN YOUR JURISDICTION?

NIGERIA

Yes, broadcasters can be compelled by the NBC to license its broadcast and/or signal rights in any genre of programming to another licensee or broadcaster in Nigeria if the following circumstances are present:

- i. If the genre of programme(s) enjoys compelling viewership by Nigerians;
- ii. It relates to a product or service that is objectively necessary to be able to compete effectively in a downstream market;
- iii. It is likely to lead to the elimination of effective competition in the downstream markets; and
- iv. The refusal is likely to lead to consumer deprivation

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Yes, in terms of the 2010 Regulations, where a subscription broadcaster has acquired broadcasting rights to an event listed in Regulation 5, such broadcaster must give free-to-air broadcasters a right to tender for a sublicense to broadcast the event.



10. ARE THERE PROVISIONS FOR DISPUTE RESOLUTION MECHANISMS IN THE FRAMEWORK?

NIGERIA

Yes, there are dispute resolution mechanisms provided in the Code.

The Code provides for sanctioning processes and procedure and encourages the amicable settlement of disputes. However, where this is impossible, the NBC is empowered to arbitrate under the Arbitration and Conciliation Act and its decision is binding on parties. Furthermore, under the Code, disputes in relation to stipulated prices are subject to the review of the NBC upon complaints by affected parties.

The Act does not have a dispute resolution section, however it empowers the NBC to revoke a licence where it is of the opinion that a broadcast station has been used in a manner that is detrimental to national interest or where a complaint from the public has been upheld after a public hearing instituted by the NBC and whose decision is upheld by a majority of the members of the NBC.

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The 2010 Regulations, the Proposed Amendments and Revised Amendments all include a dispute resolution mechanism which must be incorporated into agreements concluded between broadcasting service licensees entering into commercial agreements.





About Webber Wentzel and Aluko & Oyeboode

Webber Wentzel and Aluko & Oyeboode signed a bilateral agreement in December 2018 to deepen and formalise their relationship and create a stronger platform to serve clients operating in Africa.

Webber Wentzel is the leading full-service law firm on the African continent and Aluko & Oyeboode is the largest full-service law firm in Nigeria.

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