Commercial Filming of Patient Care Activities in Hospitals

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Commercial filming of patient care activities is common in hospital settings. This article reviews common circumstances in which patients are commercially filmed, explores the potential positive and negative aspects of filming, and considers the ethical and legal issues associated with commercial filming of patients in hospital settings. We examine the competing goals of commercial filming and the duties of journalists vs the rights of patients to privacy. Current standards and recommendations for commercial filming of patient care activities are reviewed and additional recommendations are offered.

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FILMING PATIENT CARE ACTIVITIES for broadcast television is a long-standing practice that appears to be growing more common as we approach the era of 500-channel programming and as reality-based offerings regularly breach old barriers and taboos.[1-4] Recently, the ethical and legal issues that should be considered when filming patients while they are receiving care have begun to be addressed.[5-11] This article will review the common circumstances in which patients are commercially filmed in hospitals, explore potential positive aspects and negative consequences, address ethical and legal considerations, review current standards and recommendations, and suggest additional recommendations. For the purpose of this article, the terms *filming* and *taping* will be used interchangeably, although they are technically different. Filming for educational, quality improvement, or documentation purposes is not addressed.[12-16]

What Is Commercial Filming and Why Is It Done?

Health care features are a staple of television news, broadcast magazine programs, documentaries, and reality television shows. Patients are filmed before, during, and after care in multiple settings, including emergency departments, clinics, operating rooms, intensive care units, open wards, and private hospital rooms. Sometimes, a health care facility is used as a backdrop for a story. Pharmaceutical companies or device manufacturers may film patient care activities for marketing or training purposes. All of these are examples of commercial filming.

The question of why there is such interest in filming patient encounters for television merits study, although research in this area is lacking. Fictional accounts of patient-physician encounters have been popular for decades, as demonstrated by the production of more than 60 prime-time television medical series between 1952 and 1995.[17]

The public has a robust interest in matters of science and health.[18,19] Television is one of the most frequently cited sources for health-related information.[20,21] In addition, hundreds of popular Web sites[22-24] and an entire cable channel (Discovery Health) are devoted to medical and health-related topics.[25] A symbiosis exists among the public with its desire for more knowledge regarding health-related matters, the health care industry with an interest in marketing to and educating the public, and television broadcasters seeking to fill their expanded schedules.[26,27]

Added to the quest for information is the current public appetite for reality-based television programs that transmit images of real-life, often intimate situations into the home.[4] Currently, there are 29 Web sites devoted to reality-based programs and 62 programs either on the air or in production.[2,3] Standard offerings of reality-based television programs include pursuits, hostage standoffs, televised court proceedings, voyeuristic fare in which participants are filmed in personal situations, and programs that videotape work activities of police, paramedics, and physicians. The latter 2 examples involve filming patients, their family, and staff members in hospitals.

Positive Aspects of Filming Patient Encounters

From a societal perspective, there are potential benefits derived from filming medical encounters. The demystification of some aspects of health care may create an environment in which patients may be more likely to seek care.[26] This

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can be especially important when there is fear of having a condition, or when there is fear of treatment. Furthermore, the educational aspects that accompany medical stories may help the public understand the presentations of diseases and may encourage patients to seek early examination or treatment.[27-30]

Another potential benefit is the prevention of illness, injury, substance abuse, or acquired disease.[19,31,32] As the commonly used expression "poster child" suggests, a value is accorded a visual image of a person actually afflicted with a disease or the beneficiary of a treatment. The approach of focusing on individual patients may be used to garner support either for those patients or to increase research funding for highlighted diseases.[1,33-35]

Filming patient encounters may, theoretically, have the effect of improving patient care.[36-38] Performing in front of a camera could cause caregivers to be more careful, attentive, or courteous. Video also provides a visual and auditory record of clinician performance and clinical events that would otherwise not be available.[16] Commercial filming can highlight safety issues related to either the delivery of care or injury and illness prevention.[17]

Physicians and health care organizations also have an interest in instructing the public about the latest modalities available to treat certain diseases. The public has a right to know that there are differences in outcomes when some diseases are treated at particular institutions, that there are new treatments or research protocols available in some locations, or, alternatively, that some treatments, institutions, or professionals put them at risk for adverse outcomes.[39-42] Similar to advertising, as long as there are no misleading or deceptive statements or unjustified claims of success or advantage over others, such information is ethical and may be useful.[43]

Individual patients might benefit by being filmed. For some, appearing on television may raise self-esteem for having fought an illness and may improve psychological well-being.[6,37] Individuals may feel psychologically rewarded by sharing their story with others who might benefit from it. Individual institutions also may expect to benefit from the exposure they receive by allowing filming of patient care activities.[4] This has resulted in participation by prestigious academic medical centers.[4,27]

From the standpoint of the medical profession, positive media coverage provides an opportunity to buttress public perception and trust. As a countervailing force against eroding public confidence, news stories about medical heroes, therapeutic triumphs, and selfless clinicians paint a favorable portrait that may increase funding or support for patients, facilities, programs, or health care professionals.[1]

Negative Aspects of Filming Patient Encounters

There are also potential negative consequences of filming patient-physician encounters. Filming may violate the privacy of patients and others.[27] This can usually be handled with adequate informed consent. However, patients may feel obliged or compelled to appear at the behest of those who are in charge of their care and welfare. Filming in the emergency setting poses particular problems because patients may either lack capacity to consent or may feel under duress to give consent. Another vulnerable setting is the operating room, where an unconscious patient undergoing emergency surgery might not have the opportunity to consent to filming in advance.

Once a film is obtained, there is also the possibility that it could be used inappropriately. Even in noncommercial filming of patient encounters, it has been observed that "recordings not only widen the access, they provide unfiltered detail and potentially last forever."[44] In this setting, it was also demonstrated that procedures for protecting patients, their data, and storing tapes were "clumsy and inadequate."[44]

An additional concern is that when camera crews are present and caregivers' attention is drawn to them, it could negatively affect the care rendered to the patient whose care is being filmed and might also diminish attention to other patients.[45,46]

Individual caregivers might also be harmed as a result of commercial filming. There is concern about medicolegal exposure (though some argue that a video record is either protective or may lead to faster resolution of a legal claim when there truly is fault).[17] In addition, staff members have reportedly received unwelcome communications from prisoners and others who have seen their images on television and become infatuated with them (H. G. Hern, MD, written communication, March 3, 2001). Some films also may negatively portray individual facilities, caregivers, or specialties.[4,27] For example, in the series "Hopkins 24/7," emergency department staff were filmed having beer and eggs after they were off call, guffawing over a patient who had urinated on a nurse's leg.[27]

When problems in the health care delivery system are highlighted, the effect may taint all medical professionals. As an example, stories that portray problems with managed health care tend to contain only villains rather than heroes.[17] Although business executives and insurers may be at the heart of a particular problem, physicians and hospital administrators may also appear greedy or uncaring. If patients have been exploited for the purposes of filming, and this is obvious to the public, it might cast health care professionals in a bad light for allowing this to occur.

Television depiction of "medical miracles" and success stories may inflate expectations or raise false hopes among patients with various illnesses or injuries.[17,33,47,48] For instance, a myth that has been perpetuated by both fictional programs and broadcast journalism is that cardiopulmonary resuscitation is usually successful, when the reality is just the opposite.[49]

Televised news has been criticized for being too sensational and for not taking time to provide context for a story.[30,33] The adage "if it bleeds it leads" is often followed by the press and is defended by journalists as appropriate practice.[50] It has also been shown that some local televi-

sion news programs do not convey an accurate sense of proportions of the causes of injuries and deaths.[51,52] Additionally, risks of acquiring certain diseases are sometimes exaggerated, needlessly raising public alarm.[30,34,53-56]

Health care facilities and individual clinicians may also cast a false impression of their success rates or may claim or imply advantages over others that have not been proved. This may occur either purposely or inadvertently.[57] Indeed, selection of a particular practitioner or institution to be featured in a news story may enhance credibility and create an appearance of superior performance that is unwarranted.

Patients who are being filmed may be less forthcoming and honest with their physicians than they might otherwise be, since people modify their behavior according to whom, if anyone, is watching.[36-38,44,58] Finally, the presence of camera crews in public areas may deter some patients from seeking care in that location, especially in the emergency department. In fact, the Joint Commission on the Accreditation of Healthcare Organization's (JCAHO's) standard of posting signage warning that filming is taking place could have the effect of deterring patients even before they receive a medical examination. This is similar to the concern that has been raised about mandatory reporting laws deterring patients from seeking care in emergency departments, although measuring the actual number of patients deterred in either circumstance is difficult.[59-62] One study[63] that surveyed patients immediately after they had been treated in a county hospital emergency department where television filming had taken place found that 12.5% of filmed patients and 4% of all patients surveyed were less willing to return to the same emergency department for care. It is unknown how many patients actually left or avoided the facility because of the presence of cameras. However, most of these patients (71% of filmed patients and 88% of all patients) responded that filming would have no effect on their willingness to return for care; 17% of filmed patients and 9% of all patients said that filming would actually increase their willingness to return to that emergency department for care.

Ethical Considerations

The right to privacy is at the center of the ethical debate regarding the commercial filming of patient encounters.[5-7,64] Privacy refers to "a state of physical or informational inaccessibility" where the access is controlled by the individual who enjoys the right of privacy.[65]

The duty to protect patients' rights to privacy is well recognized in health care. A patient's right to privacy can only be violated when there is an overriding moral or legal duty to protect the welfare of that individual patient or other members of society.[66-71] Yet, even in a noncommercial arena in which patient interactions were filmed, it was observed that "the richness of the data tended to obscure the importance of . . . privacy."[44] In filming of patient care activities, the journalist's duty to inform the public may run counter to the patient's right to privacy.

To preserve patients' rights to control their privacy during filming, a priority is to obtain informed consent from an individual with intact decisional capacity under conditions of nonduress. Under informed consent, patients may accept a certain risk, usually in exchange for some hoped for benefit, but it is not clear whether patients always understand the risks and consequences of filming and freely agree to accept them.[44] In addition, written and oral explanations of filming may be vague or uninformative.[44]

One prospective study using a standardized test of cognitive function demonstrated that 32% of patients who are acutely ill with myocardial infarction had impaired capacity to give consent for participation in emergency medical research.[72] This may also be true for consent to film, especially in emergency situations. Patients or relatives of those who are distraught might also be unable to appreciate the ramifications of ever-present cameras and might not appreciate that filming may not be in their best interests.[27]

Advanced consent for filming is not always possible in settings such as the emergency department. In such situations, some producers and hospitals have taken the approach of filming without consent and not using the film if consent is later withheld by patients or their surrogate.[6] The problem with this approach is that by the time consent is sought, the patient's privacy has already been violated by the film crew and others that have not been authorized by the patient to be present.[5-7] Some have defended this practice as comparable with deferred consent for research in the emergency setting, although drawing such an analogy appears questionable.[4,65,73]

Surrogates are supposed to make medically necessary decisions that are in the best interest of the patient.[10] Accordingly, consent from a surrogate decision maker for filming is not ethically appropriate, because filming cannot benefit the patient medically and has the potential to cause harm to the patient.[10] A possible exception exists if the person in question is permanently or indefinitely incompetent. Ideally, this exception would only be invoked if the surrogate is reasonably certain as to what the patient would want.

Patients undergoing care can be viewed as being of inferior rank in a "status relationship."[74] In research, such relationships have resulted in calls for bans on recruitment of students or others in positions subordinate to the researcher.[74] This raises the question of whether physicians and nurses should ever be involved with securing consent for filming. In any event, when seeking permission to film patients, it should be made clear that patient care will not be affected, regardless of whether they consent to participate.[1]

Concerns about autonomy and consent to intrusion on privacy might best be addressed by examining patient expectations and desires regarding filming. Unfortunately, there is a paucity of research into patients' expectations regarding their privacy in general and filming in particular.[70,75] Recently, patient and staff attitudes toward commercial film-

ing were assessed in an emergency department of a county teaching hospital during the filming of a reality-based television program during several weeks. Rodriguez et al[63] approached a convenience sample of 293 patients, 39 physicians, and 39 nurses. Patients were asked if they had noticed the presence of film crews. Those patients (n=80), physicians, and nurses who had noticed the film crews were then surveyed about their attitudes toward being filmed. Of the 293 patients, 73% (n=213) indicated that they had not been aware that filming was taking place. Of the 27% (n=80) who were aware of the filming, 61 reported that the filming had invaded their privacy "not too much" or "not at all," and 19 reported that their privacy had been "somewhat" or "very much" invaded.

The principles of nonmaleficence and beneficence obligate health professionals to minimize harms and maximize benefits to patients.[65,76] In addition to promoting the public's "right to know," filming may provide benefits to individual patients who genuinely desire to be filmed; however, these goods do not outweigh the potential burdens of unwanted exposure and intrusion on privacy resulting from aggressive filming practice. Unfettered filming undermines patient dignity, societal trust of the health care system, and the perceived safety of the health care setting. This could result in a loss of professionalism, a barrier to care, and patient unwillingness to disclose information to clinicians.

In addition, filming for commercial purposes may exploit patients by appealing to a desire for fame or by offering financial incentives. Financial incentives may exploit a patient's disadvantaged economic situation and may not be commensurate with the value that accrues to the producers of the program being filmed.[27,44]

Although some argue that filming patient encounters is justified because, on balance, there is a societal benefit, appeals to public beneficence fail to adequately account for principles of fairness or justice.[64] Under an egalitarian conception of justice, the relative social benefits and burdens of a policy or program should be distributed fairly and should not confer morally arbitrary advantages on some persons at the expense of others.[77] Extrapolating this notion of fairness to commercial filming in health care, the principle of justice would presume that public education should not be at the expense of those who, through no real fault of their own, find themselves exposed before a camera.[78] Since acutely ill and injured individuals are generally not responsible for their plight, they should not be exploited, exposed, or denied their rights to privacy as a result of their illness. Thus, justice would favor the privacy rights of patients over the interests of nonpatients to be informed, and filming without prior and appropriate consent would be proscribed.

Legal Considerations

Constitutional Issues. The right to privacy is not specifically articulated in the US Constitution.[79] The origin of the legal term *right to privacy* is attributed to Warren and Brandeis, who, in 1890, argued that the right to privacy is derived from the fundamental rights of life, liberty, and property and concluded that this amounted to "the right to be let alone."[80] In a 1928 case, Justice Brandeis wrote, "the right to be let alone—[is] the most comprehensive of rights and the most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[81]

In 1965, in *Griswold v Connecticut*, a contraception case, the US Supreme Court identified a zone of privacy that is protected from intrusion by the state.[82] In this and subsequent decisions, the US Supreme Court found that, although the right of privacy was not explicitly identified in the Bill of Rights, the right arose from the penumbra of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the US Constitution. In other words, a right to privacy exists under the US Constitution because it is implied by so many other amendments.[65] It should be noted, however, that the constitutional right to privacy applies only to the protection of individuals from governmental intrusion.

Civil Issues. Private rights of action (other than contract claims) that form the bases of civil actions (torts) are established at the state level by statute or judicial common law and must not interfere with any federal constitutional right. An influential article published in 1960 by Prosser[83] largely shaped today's tort laws involving invasion of privacy. Among the rights of action delineated was the "intrusion upon a person's seclusion, solitude, or private affairs." For this claim to succeed, several conditions must be met: (1) the intrusion must be into a private aspect of a person's life; (2) the intrusion must be deliberate; and (3) the intrusion must be highly objectionable to the sensibilities of the average person.[84] These circumstances may be extant if a patient has not consented in advance to being videotaped in an ambulance, emergency department, hospital room, or other health care setting.[84,85]

Case Law. Although the privacy rights of individuals are not explicitly mentioned in the US Constitution, the First Amendment explicitly protects freedom of the press. Thus, the right of protection of individual's privacy from journalists is limited and generally does not extend to public figures. Nonetheless, certain restrictions on the press do apply. For example, in *Dietman v Time, Inc*,[86] the US Court of Appeals for the Ninth Circuit held that, "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."

In 1986, *Miller v NBC*[87] specifically dealt with the issue of a television crew entering a private home during a "ride-along" with paramedics. In this case, the family of a man who was filmed during a failed attempt at cardiopulmonary resuscitation sued NBC news for invasion of privacy under an intrusion

claim and argued that such an activity was "highly offensive to a reasonable person" (the legal test that must be met for such a claim to succeed). The family further alleged trespass and infliction of emotional distress. The trial court initially denied all 3 claims. However, in an opinion that reversed the lower court, the US Court of Appeals noted, "There is little California case law . . . to assist us in making this determination, probably because even today most individuals not acting in some clearly identified official capacity do not go into private homes without the consent of those living there . . . not only do widely held notions of decency preclude it, but most individuals understand that to do so is either a tort, a crime, or both."[87] Following this ruling, the television network entered into a confidential settlement agreement with the family.

In 1998, *Shulman v Group W Productions, Inc*[88] involved an action for invasion of privacy brought by a patient against a television production company that surreptitiously videotaped, voice recorded, and broadcast a documentary showing her rescue from a trauma scene. The California State Supreme Court again ruled that the case could proceed on an intrusion claim, resulting in an out-of-court settlement.

Also in 1998, the US Supreme Court ruled in *Wilson v Lane*[89] that reporters who accompanied police into a suspect's home violated his privacy rights, and as a result, a lawsuit could be brought. Although this case does not address filming of medical care, it does establish limits, by the highest court of the land, on filming of reality-based television programs.

Standards and Recommendations

The JCAHO first addressed the issue of filming in hospitals in July 2000.[8] Two standards clarifications have subsequently been issued.[9,10] The JCAHO frames the issue as a "classic ethical conflict" between 2 competing goals: "informing the public to better understand health care" and "protecting the privacy of individual patients," and recommends that health care organizations use their usual mechanisms to resolve such dilemmas (eg, ethics committee).

Five specific questions are addressed in the JCAHO standards clarification, the answers to which are summarized in BOX 1. These are the minimal standards to which health care organizations must adhere to avoid a citation at the time of accreditation. Individual organizations may choose to exceed them as they set their own standards, especially if they involve ethics committees, which ideally are structured to include community members.

The Council on Ethical and Judicial Affairs of the American Medical Association adopted more restrictive guidelines than the JCAHO standards when it reported a set of recommendations entitled "Filming Patients in Health Care Settings" that was adopted by the American Medical Association House of Delegates in 2001 (BOX 2).[11] Filming without prior consent is specifically proscribed as is the use of surrogates to grant consent for filming in all but exceptional cases. Additional rights and safeguards are recommended for patients and staff members, and the role of physicians in the process of filming is specifically addressed.

Box 1. JCAHO Standards: Patient Rights and Informed Consent When Videotaping or Filming*

1. Filming of patient care activities in the emergency department is permissible under certain circumstances.
2. Informed consent must be obtained from a patient or a surrogate decision maker. In situations where a patient is comatose or otherwise unable to give informed consent, the hospital may film or "retain" another party to film, provided it is within an established policy of the organization and informed consent is obtained before the film is used for any purpose. The decision to permit filming in such circumstances should be made through an appropriate ethical mechanism (eg, an ethics committee). Anyone participating in the filming must sign a confidentiality agreement.
3. The film must remain in the possession of the health care organization and not be used for any purpose until and unless consent for release is obtained.
4. If consent cannot be obtained, the film or videotape must either be destroyed or the nonconsenting patient must be removed from the segment.
5. The health care organization has an obligation to inform the community it serves that filming may be occurring when emergency services are provided. This may be done through advance notice signage, signage warning that taping is currently in progress, or placing notices in advertisements.

*These guidelines do not distinguish between filming for educational and commercial purposes, although these activities are clearly different. Adapted with permission from JCAHO.[10]

Recommendations for Commercial Filming in Hospitals

The following are suggested recommendations for commerical filming of patient care activities based on previously released standards and recommendations, and the ethical and legal principles elucidated herein.

- General policies and specific requests for filming should be approved by hospital ethics committees, which should include physicians and community members.[1,11]
- Filming should only commence after valid informed consent has been obtained from the patient.[1,11] The patient should be made aware of exactly who will be present and what to expect during the recording.
- Consent should be obtained from patients who are awake and alert enough to understand the consequences of their actions. Patients who are severely ill or injured, intoxicated, psychologically disturbed, or experiencing severe pain, anguish, or grief frequently lack capacity to give consent and should not be approached.

Box 2. Report of the American Medical Association Council on Ethical and Judicial Affairs: Filming Patients in Health Care Settings*

1. Educating the public should be encouraged and filming of patients may help accomplish this. Only consenting patients should be filmed. Where this is not possible, dramatic reenactments should be considered, rather than violating patient privacy.
2. Filming can only occur after consent, so not to violate patient privacy. Surrogate decision makers are generally unacceptable in this situation, although a limited exception possibly exists in the case of a person who is permanently or indefinitely incompetent.
   a. Patients and caregivers have the right to request cessation of filming and removal of the film crew from the patient care area.
   b. Patients have the right to rescind consent up until a reasonable time before broadcast. The consent procedure should outline the patient's right to view and edit the tape and whether it will be destroyed, if requested.
   c. Informed consent should be obtained by a disinterested third party.
3. Persons who are present during filming who are not part of the health care team must understand and be committed to maintaining confidentiality. Where possible, stationary cameras are desirable.
4. Physicians should avoid direct compensation for their participation in filming or for the recruitment of patients to be filmed, in order not to unduly influence patient recruitment. Physicians should participate in institutional decisions regarding participation in filming activities.

*Adopted as American Medical Association policy in 2001. Adapted with permission from Council on Ethical and Judicial Affairs, American Medical Association.[11]

• Consent should not be obtained under conditions of duress or when the patient might feel compelled to consent out of fear or gratitude.[1] Individuals in "status relationships," such as students, should not be approached.[75]

• Deferred consent is not acceptable, since the patient's privacy will already have been violated before this can be obtained.[5]

• Surrogate decision makers are generally unacceptable in this situation. A possible exception exists if the person in question is permanently or indefinitely incompetent.[11]

• Consent should be obtained by a disinterested third party rather than by a member of the media, film crew, or production team.[5,11,32,44]

• Ideally, a representative of the hospital's public relations department who is familiar with the organization's policies should supervise the consent process and be present during filming.

• There must not be any discrimination, except for medical reasons, as to who is or is not asked to participate.[5]

• Payment for airing a taped segment should represent fair compensation that is established before taping commences. Payments should not be so great as to be coercive and should not be an inducement for the right to broadcast vulnerable individuals.[44]

• Physicians and others in a position to recruit patients for filming should not be compensated directly for their participation.[11]

• Patients have a right to view a tape in which they appear before its airing. They may withdraw their consent for use of the tape and/or order the portion containing their image destroyed up until a reasonable time before it is broadcast.[11]

• Cameras can be permitted in public areas, such as corridors, where they could view general activities that the average public might view. (This is similar to the placement of security cameras in public spaces where they are permitted in corridors or open work areas but not in offices, conference rooms, or locker rooms because there is a reasonable expectation of privacy in the latter but not the former.) These cameras should not film patients and should not be allowed to zoom for close-ups that might identify individual subjects without their permission.[5]

• Appropriate signage advising of the presence of the cameras should be posted.[1,8-10]

• Individual staff members should be given the option of whether to appear on camera and must consent before they are filmed.[1] The right to refuse should be reflected in the hospital's human resources policies.

• During filming, efforts should be made to minimize disruption of other patient care activities and to avoid distracting caregivers from their duties to other patients. Extra personnel should be scheduled as necessary if caregivers will be preoccupied with the filming.

• Patients who are being filmed have the right to have the filming stopped at any time, and the film crew may be asked to leave the area.[11] Caregivers who feel that medical care is being jeopardized can also request that filming be halted.

• Televised reports should not overstate the success of a particular therapy or procedure or imply unique skills or abilities of individual practitioners or facilities unless such claims can be justified.

These recommendations would preclude filming in emergency departments of most urgent patient-physician interactions (eg, trauma, cardiopulmonary resuscitation) and of children and others deemed vulnerable.

The simultaneous goals of educating and informing the public and protecting patient privacy while commercially filming patient encounters can be achieved if meticulous attention is paid to the rights of patients, especially the most vulnerable.

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