No. 25-30108

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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*CYRIL E. VETTER;
VETTER COMMUNICATIONS CORPORATION,
Plaintiffs - Appellees*

v.

ROBERT RESNIK; RESNIK MUSIC GROUP,
Defendants - Appellants

On Appeal from the United States District Court for the Middle District of Louisiana
No. 23-1369-SD-EWD

BRIEF OF NATIONAL SOCIETY OF ENTERTAINMENT & ARTS LAWYERS IN SUPPORT OF AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. The interested persons are listed below:

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10. American Association of Independent Music
11. Motion Picture Association, Inc.
12. National Society of Entertainment & Arts Lawyers
13. Music Artists Coalition
14. Black Music Action Coalition

15. Artists Rights Alliance
16. Songwriters of North America
17. Screen Actors Guild – American Federation of Television & Radio Artists (SAG-AFTRA)
18. The Authors Guild, Inc.
19. Dramatists Legal Defense Fund, Inc.
20. Novelists, Inc.
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INTERESTS OF *AMICI CURIAE*

This Brief is filed in accordance with Rule 29(a) of the Federal Rules of Appellate Procedure.

NATIONAL SOCIETY OF ENTERTAINMENT & ARTS LAWYERS ("NSEAL"), previously known as California Society of Entertainment Lawyers, is a non-profit 501(c)(3) organization that was founded in 2013. This national organization advocates for artists' and entertainers' rights and is comprised of attorneys across the United States who represent authors, screenwriters, songwriters, musicians, and other creative professionals in the entertainment and arts industries. Its members have litigated thousands of entertainment and art cases in trial and appellate courts throughout the country, including many of the most important recent copyright, art, and entertainment cases, and have advised scores of creative professionals on litigation, licensing, and intellectual property strategy. Its members have also argued for and obtained crucial decisions at the appellate court level in cases involving artists' rights and entertainment law. The organization has submitted *amicus* briefs in support of the prevailing party in three previous cases, *viz.*, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663

(2014) *Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.*, 142 S. Ct. 941 (2022), *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), and *Nealy v. Warner Chappell Music, Inc.*, 60 F.4th 1325 (2023), all of which involved important issues of copyright law, and all of which reached conclusions consistent with the reasoning in NSEAL's briefs.

SUMMARY OF ARGUMENT

The Copyright Act, a statute promulgated to encourage artistic creativity by incentivizing the creation of new works, should be applied in the most straightforward and practical manner with an eye toward protecting artists' rights. The text of 17 U.S.C. §§ 203 and 304(c) makes clear that the copyright *transfer* is what is being terminated and any application of the statute that splinters the copyright for a single work into a separate right for each country on the planet must be rejected.

There are at least four reasons to affirm the district court. First, there is no indication in the statute that the termination is somehow limited in geographic scope. Second, creating a multitude of discrete copyrights—one for each country—is impractical and contravenes numerous international treaties. Third, the Copyright Act's intent militates in favor of a uniform application. Fourth, in the present case, it is effectively undisputed that the § 203 termination at issue implicates *no* foreign rights or law. For these reasons, as more fully explained below, NSEAL strongly urges the Court to affirm.

Per F.R.A.P. 29(a)(4)(E), no party's counsel or party other than NSEAL authored the brief in whole or in part or contributed funds therefor.

This *amicus* brief is authorized by Federal Rule of Appellate Procedure 29 because all parties have consented to its filing.

ARGUMENT

I. The Copyright Act's Text Establishes That an Artist's Transfer Termination Applies to All Transferred Copyrights

The district court's decision should be affirmed based on the plain language of the Copyright Act. In interpreting the Copyright Act, "we follow the text of the statute." *Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.*, 142 S. Ct. 941, 946 (2022) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). So, here, "we begin by analyzing the statutory language." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) (citation omitted). ("If the statute is unambiguous, this first step of the interpretive inquiry is our last. *Id.* (citation omitted)").

The Act provides that, "[i]n the case of any copyright subsisting in either its first or renewal term on January 1, 1978, . . . the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, . . . is subject to termination." 17 U.S.C. § 304(c).

By its clear text the termination right applies to the termination of the transfer between the artist and the transferee and includes no language limiting this termination to domestic rights only. The termination is as to the transfer itself and any rights that flowed from that transfer are extinguished, with this extinguishment applying without geographic limitation.

The Second Circuit has held that issues of copyright ownership "are determined by the law of state with 'the most significant relationship' to the property and the parties." *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90-91 (1998) (citing Restatement (Second) of Conflict of Laws § 222 (A.L.I. 1971)). In *Itar-Tass*, Russia was deemed to be the "country of origin" of the copyrighted work at issue, and Russian law was applied to determine copyright ownership. *Id.* Similarly, where the "country of origin" of a work is the United States, Title 17 governs issues of international copyright ownership.

While true that the Act states that "[t]ermination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws[,]" 17 U.S.C. §§ 203(b)(5), 304(c)(6)(E),[1] the most sensible reading of that language is that the termination applies to

[1] The language in both subsections is identical, though § 203(b)(5) deals generally with terminations of transfers and licenses and § 304(c)(6)(E) pertains to terminations covering an extended renewal term.

all copyrights but no rights under other U.S. statues like Chapter 11 (bankruptcy) or state statutes like California Civil Code 3344 (right of publicity) or foreign laws, such as moral rights, which are not recognized "under this title."

Reading 17 U.S.C. §§ 203(b)(5) and 304(c)(6)(E) to limit the termination to only domestic copyrights is nonsensical. Appellants' interpretation of the statute ignores the fact that "foreign laws" is preceded by "Federal" and "State," both of which are domestic. *Id.* And it ignores that the phrase "rights arising under this title," refers to rights arising under Title 17 of the U.S. Code—the Copyright Act—including the author's exclusive rights, 17 U.S.C. § 106, and termination right. *Id.* § 203.

The Supreme Court has held that language similar to "arise under," namely "lawfully made under this title" should be read as "'in accordance with' or 'in compliance with' the Copyright Act." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 530, 133 S. Ct. 1351, 1358, 185 L. Ed. 2d 392 (2013). So, here, a work's copyright "arises under" the Copyright Act when the work's creation arises under the Copyright Act's requirements, namely originality and fixation. 17 U.S.C. § 202. Thus, the § 203 termination right “arises under” that section. *Id.* § 202. The statutory language in *Kirtsaeng* was held to have “nongeographical purposes” and the language here should be treated the same. *Id.* at 551.

The Fifth Circuit has conclusively held that “exclusive federal district court jurisdiction exists in an action for a declaratory judgment to establish joint authorship of a copyrighted work.” *Goodman v. Lee*, 815 F.2d 1030, 1032 (5th Cir.1987). Such exclusive jurisdiction over authorship could not exist unless the authorship issue “arose under” U.S. law.

17 U.S.C. § 201 provides both that copyright vests initially in the author of the work and that copyright ownership interests can be transferred. Neither the initial vesting of the copyright, nor its transfer are subject to any geographical limitation. *Id.* It does not follow that Title 17 would vest in authors the right to assign their copyright internationally without providing a mechanism to terminate the assignment internationally as well. Appellants urge this court to adopt a definition of “terminate” that results in less than the termination of the full scope of rights assigned. That defies the statute’s language.

II. There Exists No Multiverse of Copyrights

Appellants' reading of the statute creates a universe where each country in the world recognizes a unique and discrete copyright for each work. It is not only wholly impractical but out of line with the Copyright Act's text, international treaties, and basic tenets of intellectual property protection.

An author that creates a new work obtains a copyright in that work upon its fixation in a tangible medium. *Valancourt Books, LLC v. Garland*, 82 F.4th 1222, 1227 (D.C. Cir. 2023). As mentioned above, this copyright arises under the Copyright Act, which holds that copyright attaches upon fixation. At this moment, the author has a copyright that they can enforce against anyone in the world that infringes—or violates any of the author's 17 U.S.C. § 106 rights pursuant to—that copyright.

Those protections are guaranteed through much of the international world by treaty or convention, primarily the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention"), which, "is the principal accord governing international copyright relations." *Golan v. Holder*, 565 U.S. 302, 306–07 (2012). Per the Berne Convention, "[n]ationals of a member country, as well as any author who publishes in one of Berne's 164 member states, thus enjoy copyright protection in nations across the globe." *Id.*, citing Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Stockholm on July 14, 1967, arts. 1, 2(6), 3, 5(1), 5(2), 828 U.N.T.S. 221. Indeed, "authors automatically" enjoy these global rights. *Lexmark Int'l, Inc. v. Impression Prods.*, Inc., 816 F.3d 721, 762 (Fed. Cir. 2016), rev'd and remanded, 581 U.S. 360, 137 S. Ct. 1523, 198 L. Ed. 2d 1 (2017) (quoting *Golan,* 565 U.S. at 308).

Appellants propose a tortured theory that upon the author's fixation of a work, copyright vests "as essentially a bundle of national, territorially defined, rights," one for each nation party to the Berne Convention. Jane C. Ginsburg, *International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code*, 47 J. Copyright Soc'y U.S.A. 265, 289 (2000). However, this theory contravenes the Berne Convention's principle of "national treatment." Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and as amended on Sept. 28, 1979, art. 5(1), S. Treaty Doc. No. 99-27 (1986). "National treatment" provides that "authors shall enjoy . . . in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals." *Id.* Appellants interpret this provision as vesting separate copyrights in each member country, whereas the plain reading of the provision only requires that member countries recognize foreign copyrights within their borders and afford protection consistent with their domestic laws. Appellants' interpretation fails because the existence of a "bundle of national copyrights" confuses the *enforcement* of foreign copyrights with the *vesting* of a domestic copyright in foreign works.

In practice, even though Berne Convention members must remain in compliance with its provisions, nations can, and do, apply and interpret these provisions differently. For example, Canada's Copyright Act, R.S.C. 1985, c. C-42, explicitly vests a Canadian copyright in authors from all "treaty countr[ies]." *Id.* § 5(1)–(1.03). By contrast, U.S. copyright law specifically distinguishes "United States work[s]," 17 U.S.C. § 101, and subjects them to additional requirements. *Id.* § 411. Appellants' "bundle of copyrights" theory conflicts with the complicated interplay of national copyright regimes.

When an author executes a global transfer for their U.S. work, as is standard, they are conveying global rights to a copyright whose protection "arises under" the Copyright Act. When that same transfer is terminated, it would be nonsensical to rewrite and fragment the geographic scope of the transfer. Thus, a U.S. author that creates a work obtains a copyright that "arises under" the protections of the Copyright Act and that copyright is recognized across the globe per the Berne Convention.

The Supreme Court, by all indications, agrees with the foregoing reasoning. It has noted that an author who assigns "all of his exclusive rights in the copyrighted work by assigning the renewal copyright without limitation" grants no rights in the renewal period if the author dies before "commencement of the renewal period." *Stewart v. Abend*, 495 U.S. 207, 208, 110 S. Ct. 1750, 1753, 109 L. Ed. 2d 184 (1990). This result inures because the recipient received only "an unfulfilled and unenforceable expectancy if the author dies before the renewal period," and thus holds "**nothing**" unless the author survives. *Id.* (emphasis added). The Supreme Court acknowledges, if tacitly, that the renewal applies to *all* rights under the transfer and not just those in the U.S. The

Supreme Court also notes that the renewal copyright, should the author not survive, is obtained by the author's kin "free of any claim founded upon an assignment made by the author in his lifetime." *Id.* at 219. Again, they do not state that obtainment is "free of any claim related to U.S. use" or anything of that ilk. The clear message is that the renewal applies to *all* rights.

Copyrights are divisible but only in connection with their licensing and transfer, in which an author can convey one or more of their 17 U.S.C. § 106 rights to recipients in different markets. Surely, an "author holds a bundle of exclusive rights in the copyrighted work, among them the right to copy and the right to incorporate the work into derivative works." *Stewart v. Abend*, 495 U.S. 207, 220, 110 S. Ct. 1750, 1760, 109 L. Ed. 2d 184 (1990). When an author assigns all those rights and then terminates their assignment, they should receive the return of all rights.

The instant case revolves around the assignment of a copyright in a U.S. work, between two U.S. parties, made pursuant to a U.S. contract. As such, any rights to exploit the work internationally arise under the grant made under Title 17. To suggest that only part of that grant—that which assigned the right to exploit the work domestically—is terminable controverts the statutory language that "*all rights* under this title *that were covered by the terminated grants* revert to the author." 17 U.S.C. § 203(b) (emphasis added). Here, there is only a single assignment at issue: one that granted the rights to exploit the work throughout the world. To limit the termination of this grant to only domestic rights defeats the intent of the parties to that initial grant. And it certainly would not achieve the statutory ends of uniformity, certainty, and artist protection.

While true that *infringement* actions must be pursued in other countries, it misreads the Copyright Act (and defies international treaties) to assert that *ownership* claims must be litigated in other countries. And, crucially, the Copyright Act clearly distinguishes between the two claims when addressing substantive issues such as the statute of limitations. For example, courts hold that when "[c]reation, rather than infringement" is the "gravamen of plaintiffs' co-ownership claim," a claim will "not accrue upon subsequent publication." *Zuill v. Shanahan*, 80 F.3d 1366, 1371 (9th Cir. 1996). Here, ownership is at issue and infringement is not and as with the statute of limitations there is a difference. The Copyright Act's lack of extraterritoriality as to infringement is thus irrelevant.

The rationale behind requiring that infringement actions be pursued in the country where the infringement occurred is salient specifically *because* of the practicalities of infringement enforcement. Copyright infringement is a tort, *Porter v. U.S.*, 473 F.2d 1329, 1337 (5th Cir. 1973), and U.S. courts generally cannot bind parties outside of the United States' jurisdiction. *See e.g., Daimler AG v. Bauman*, 517. U.S. 117 (2014). As such, foreign states open their doors to U.S. copyright holders for actions against infringers within their borders under their own infringement regime. Berne Convention for the Protection of Literary and Artistic Works, art. 5(1). While actions to determine the ownership of a copyright do not always "arise under" the Copyright Act for purposes of U.S. federal jurisdiction, *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 825 (2d Cir. 1964), as here, where "the complaint . . . asserts a claim requiring construction of the [Copyright] Act," the "suit 'arises under' the Copyright Act" and is sufficient to confer original jurisdiction in U.S. federal courts. *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 349 (2d Cir. 2000) (citing *T.B. Harms*, 339 F.2d at 828).

Appellants' *amici* including the Motion Picture Association rely on cases such as *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 581 U.S. 360, 379 (2017), and *Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 797 (5th Cir. 2017), for the proposition that U.S. Copyright Act does not apply extraterritorially, but that is misplaced as they concern patent infringement, *Impression Prods., Inc.*, 581 U.S. at 360, and copyright *infringement*, *Geophysical Serv., Inc.*, 850 F.3d at 788–89, respectively, and do not touch on ownership at all.

The copyright ownership issue here—namely, the extraterritorial effect of copyright termination under 17 U.S.C. §§ 203, 304(c)—"cannot be answered without reference to the Copyright Act," and it therefore arises under the Act. *Gaiman v. McFarlane*, 360 F.3d 644, 652–53 (7th Cir. 2004), citing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199–202, 41 S.Ct. 243, 65 L.Ed. 577 (1921).

III. Policy Favors a Complete Transfer Termination

The Copyright Act's intent is to protect artists and incentivize the creation of new works. The "manifest congressional intent behind" § 203 is "the protection of authors" and that the purpose of § 203 "is to help authors, not publishers or broadcasters or others who benefit from the work of authors." *Korman v. HBC Florida, Inc.*, 182 F.3d 1291, 1296 (11th Cir. 1999) (citing *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172–73 n.39, (1985)). The preeminent copyright treatises are in accord. See 3 Nimmer on Copyright § 11.01[B], at 11–6 (1995) ("Section 203 is designed to protect authors and to confer on them an additional opportunity to profit from their works, notwithstanding an antecedent grant to the contrary."); 1 Boorstyn on Copyright § 8.14, at 8–28 (1999) ("[T]he federal termination provisions were intended to facilitate, not restrict, authors' rights of termination and copyright recapture.").

The intent of § 203 is clear from its legislative history. In amending the Copyright Act, legislators were faced directly with the problem of the previous Act's treatment of copyright renewal and reversion for authors. Congress found that the "provisions of section 203 are based on the premise that the reversionary provisions of [the Copyright Act of 1909] should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers." H.R. Rep. No. 94-1476, at 124 (1976). The report cites the "unequal bargaining position of authors" as a target of the legislation. *Id.*

In addition to the foregoing, the legislative history surrounding the provisions of § 203(b)(5) fails to indicate any intent by Congress to limit the effects of termination to only the United States. Indeed, the § 203(b)(5) discussion merely restates the statutory text without much additional context. H.R. Rep. No. 94-1476, at 126 (1976). If Congress had intended for § 203(b)(5) to serve as a carve-out from termination of international copyrights, it certainly would have enumerated this purpose fully and clearly.

Any precedent that materially narrows the artist's termination rate thus runs *contra* to statutory intent. In declining to follow *Siegel v. Warner Bros. Entertainment, Inc.*, 542 F. Supp. 2d 1098 (C.D. Cal. 2008), the district court recognized as much and applied the statute's plain language and the clear Congressional intent to protect authors from "unremunerative transfers." *Vetter v. Resnik*, No. CV 23-1369-SDD-EWD, 2024 WL 3405556 (M.D. La. July 12, 2024). Resnik argues that the termination right should be reduced by 99.5% and apply to only one of the planet's 195 countries. This argument fails.

Appellants rely on language in the 1965 Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright

Law, House Committee Print, 89th Cong., 1st Sess., stating that "termination affects only those rights arising under the U.S. Copyright Act and has no effect, for example, on foreign rights that may be covered by the same contract" as evidence that termination does not impact foreign ownership rights. *Id. at 75.* However, the rights conveyed *do* arise under the U.S. Copyright Act; Appellants' interpretation implicitly and incorrectly assumes that the foreign rights assigned do not arise under the U.S. Copyright Act and, further, that a contract assigning a copyright worldwide may not also contain provisions conveying additional foreign rights *other than copyright*. Simply put, the foreign rights referred to in that report are rights arising under foreign law. The rights here, arise not under foreign law, but under U.S. law, and enforced globally per the Berne Convention.

Further, Appellants' interpretation of the relation between international and U.S. copyright law controverts the clear intent of Congress when the United States joined the Berne Convention. Prior to the Berne Convention Implementation Act of 1988, H.R. 4262, 100th Cong. (1988), U.S. copyrights only received international protection on the basis of bilateral agreements entered into between the United States and other countries. 134 Cong. Rec. 28306 (1988) (statement of Sen. Orrin Hatch). However, in acceding to the Berne Convention, Congress did not intend to expand the rights available under U.S. copyright law: "[I]t is important to note that the provisions of the Berne Convention are not self-executing. This means the provisions are not enforceable in U.S. courts; instead, the private rights exist only to the extent provided by U.S. law." 134 Cong. Rec. 28302 (1988) (statement of Sen. Dennis DeConcini). In short, U.S. courts have no duty to uphold the provisions of the Berne Convention—they must only uphold the Copyright Act.

In effect, the United States' accension to the Berne Convention only made minor changes to how U.S. copyright is enforced under 17 U.S.C.—enforcement of U.S. works remained completely unchanged, but *foreign* works seeking enforcement in the U.S. became exempt from the U.S. registration requirement. Berne Convention Implementation Act of 1988, H.R. 4262, 100th Cong. (1988). Congress was hesitant to "disrupt the assumptions . . . governing relations among creators, publishers, distributors, and consumers of copyrighted works" and thus made only "the minimal change needed [for] Berne adherence." 134 Cong. Rec. 28300 (1988) (statement of Sen. Patrick Leahy). Thus, the practicalities of how the U.S. fits into the Berne Convention have no bearing on how the U.S. courts interpret U.S. copyright doctrine. Despite some amendments, the foundation of American copyright law has remained virtually unchanged since The Copyright Act of 1976 went into effect. Absent intervention by Congress, we should not allow international copyright theory to supplant *actual* U.S. copyright law.

An author, when terminating a transfer for a copyright, reclaims all rights that were conveyed pursuant to that transfer.[2] Any other interpretation would lead to massive harm for U.S. artists and introduce massive uncertainty in the arts and entertainment industries. Authors seeking to regain full control of their copyright would have to terminate their transfer in every country in the world pursuant to each country's respective copyright laws—a burden so impractical, time-consuming, and costly as to be prohibitive. Unsuspecting artists will find themselves signing away their copyright with no recourse to recover their rights in all but one country.

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[2] Of course, if the transfer itself was limited to, for example, granting rights for use of the work only in the U.S., then the termination would not revoke rights other than those for U.S. use. But that is not the case here.

Such an outcome is entirely inconsistent with one of the fundamental principles of intellectual property protection as enumerated in the U.S. Constitution—that rights should inure to the benefit of "Authors and Inventors." U.S. Const. art. I, § 8, cl. 8. The termination right provides an important protection intended to empower and incentivize artists to create works. To deprive artists of the ability to recover their rights in 194 of 195 countries around the globe would contravene § 203's text and intent, and be wholly impractical.

CONCLUSION

This court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 29, the undersigned certifies that this brief was created in 14-point Microsoft Word font and contains 3,964 words and is otherwise in compliance with the formatting rules of this Circuit.

Date: June 19, 2025

By: *<u>/s/ Scott Alan Burroughs</u>*
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CERTIFICATE OF SERVICE

The undersigned certifies that brief set forth hereinabove was served on all necessary parties on the date set forth below through the Electronic Court Filing ("ECF") system. The brief was filed via ECF and thereafter distributed to the relevant parties.

Date: June 23, 2025

By: *<u>/s/ Scott Alan Burroughs</u>*
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