NO. 87555-3

SUPREME COURT
OF THE STATE OF WASHINGTON

CORBIS CORPORATION, a Nevada corporation,

Petitioner and Cross-Respondent,

v.

STEVE A. STONE, d/b/a "InfoFlows" and "Stone Consulting," an individual; and INFOFLOWS CORPORATION, a Washington corporation,

Respondent and Cross-Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT AND CROSS-PETITIONER

InfoFlows Corporation ("InfoFlows") asks this Court to accept review of that portion of the Court of Appeals March 26, 2012 decision affirming the trial court judgment, which dismissed InfoFlows' conversion claim. The Court should deny Corbis Corporation's Petition for Review.

II. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether a defendant's unauthorized retention of and improper assertion of ownership over copies of plaintiff's source code and related documentation constitutes conversion?

III. RESTATEMENT OF THE CASE

A. INFOFLOWS AND STEVE STONE

InfoFlows is a start-up software and services company and Steve Stone is its founder and CEO. Op. at 3. After leaving Microsoft in 2004, Stone, on his own and through InfoFlows, has been developing a proprietary system or technology implementation focused on identifying, tracking and managing digital objects on the Internet. Id. This system is called "Fedmark" and was previously known as the "Jazz Service" and the "Object Management Service." Id. The ideas for Fedmark pre-date any work with Corbis and are set out in, among other things, a PowerPoint presentation Stone prepared in May 2004. Ex. 1; RP 2462, 2469.

B. CORBIS REACHES OUT

After Stone left Microsoft, the CEO of Corbis contacted him for a meeting. RP 2460; Ex. 150. On June 1, 2004, Stone met with Corbis executives and presented his PowerPoint to demonstrate his experience in a specific ongoing project. RP 2463-82; Ex. 1. Stone and Corbis entered into a consulting agreement ("SOW #1") in June 2004. Op. at 3.[1]

C. INFOFLOWS DEVELOPS ITS IDEAS

In January 2005, Stone began working and meeting with a group of people, most of whom became InfoFlows founders and employees. E.g., RP 2526-34; Exs.153, 157, 161, 163, 171. During the summer of 2005, InfoFlows built the Object Management Service, including a working demo and prototype. Op. at 4; RP 2535, 2554; Ex. 180.

D. THE "IMMACULATE INVENTION"

On September 1, 2005, Stone met with David Weiskopf, a Corbis in-house attorney, to discuss whether Corbis might be interested in licensing the Object Management Service and having InfoFlows develop software applications for Corbis that were enabled by InfoFlows' underlying technology platform.[2] Op. at 4; RP 2537-44. Stone presented a PowerPoint and on-line demo, and he did additional explanatory

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[1] SOW #1 concluded when Corbis' CTO left in the Spring of 2005. Op. at 4; RP 2511. Stone produced was a PowerPoint presentation surveying digital rights management. Exs. 9, 397, Ex. 162. SOW #1 did not concern a "license management service." RP 2511-16; CP 1795 at ¶ 2. In May 2005, Corbis engaged Stone in a second consulting agreement ("SOW #2") for a potential business acquisition. SOW #2 did not involve license management and ended in June 2005. RP 2523-25.

[2] Weiskopf solicited the meeting, indicating that he needed help with technology issues. Ex. 173; RP 2534-35. Stone met Weiskopf earlier in 2005 and had suggested that Corbis consider InfoFlows' license management system. E.g., Ex. 154; RP 2517-18.

drawings. Id.; Ex. 175; RP 2542-43; RP 1329. A few days later, Weiskopf sent an email to Jim Mitchell (GC of Corbis), representing that he had "been doing a lot of thinking on a Licensing Management Solution" and had "actually developed a very realistic solution" that would "return very significant revenue[.]" Op. at 4; Ex. 13.

Weiskopf's "solution" was an appropriation of InfoFlows' ideas and Stone's drawings. RP 2544-45. Weiskopf testified that "the concept of a licensed management solution that validates licenses used on the Internet" was *his* idea. RP 1298-99. Indeed, Weiskopf claimed that virtually all of the information in the PowerPoint that Stone created in *May 2004* (Ex. 1), including the very words, was information that Weiskopf had "provided to Stone." – although Weiskopf did not meet Stone until 2005.[3] RP 1306; see also RP 1306-20, RP 1333-36.

E. CORBIS NEEDS AND EXPLOITS INFOFLOWS

After the September meeting, and his email to Mitchell, Weiskopf arranged a meeting with Stone and senior Corbis executives, and Stone presented a working demo/prototype of the Object Management System. Exs. 178, 180; RP 2555-61. Corbis management was interested in InfoFlows' technology and ideas, and the parties began discussing a potential development project. E.g., Exs. 189, 190, 193, 194, 195. At the

[3] The trial court found Weiskopf's credibility "particularly questionable." CP 1741.

same time, Corbis was analyzing the specific economic benefits of InfoFlows' ideas and technology, as well as the risk of not working with InfoFlows. Ex. 185 at 16046; RP 640-42; Ex. 188 at 16079; see also RP 657-59, Ex. 198 at 16095, and RP 982-83.

In November 2005, Corbis and InfoFlows entered into a consulting agreement ("SOW #3") for the development of a demonstration of a license management system, in order to obtain the approval of Corbis' sole shareholder (Bill Gates) to fund the development of software applications that would run on InfoFlows' platform.[4] Op. at 4; Ex. 10; RP 2567.

While working on SOW #3, the parties discussed the need to be attentive to and to segregate the parties' respective IP. Notes prepared by Weiskopf and Erling Aspelund of Corbis state the issue clearly: "What are the patentable items? [Need to Consider How to Proceed – Could be Sticky]." Ex. 201 (at 2141); see also RP 659-63.

Concurrently, Corbis was internally discussing a potential license management service, including material from Stone's May 2004 PowerPoint. E.g., Ex. 188 (at 16074-76); RP 657. In December 2005,

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[4] Despite Stone's efforts, the ownership term of SOW #3 was ambiguous. RP 2565-75; Exs. 18-21. Weiskopf assured Stone: "We both understand what it means." Op. at 5. During discussions of SOW #3, Corbis never suggested it had a right to InfoFlows' IP. But Weiskopf and Corbis' outside counsel exchanged a draft of SOW #3 that indicated Corbis' intent: to own the Object Management System. Ex. 199. This draft was *not* shared with InfoFlows. RP 2569-71; compare Ex. 199 with Ex. 19.

Corbis began sending materials to its outside patent attorney, *including Stone's drawings and schematics*. Ex. 206 (at 16061-62); see also Exs. 219-221. At trial, Aspelund described Corbis' use of Stone's work as a "labor-saving device." RP 671. Stone was not informed. RP 668.

On January 18, 2006, Corbis filed a non-public patent application entitled "Method and System for Managing Licenses to Content." Op. at 5; Ex. 222. The named inventors were Weiskopf and Aspelund. Id. This was consistent with Corbis' internal goal: "[d]etermining clear ownership now is critical." Ex. 207 (at 962); RP 669-70. Aspelund acknowledged that Corbis wanted the "product platform." RP 670. This goal was a focus of Corbis' management.[5] Stone was not informed. Op. at 5.

F. THE AGREEMENT TO COOPERATE

As SOW #3 proceeded, InfoFlows and Corbis communicated regarding a potential contract for the actual development of applications for Corbis that would operate on InfoFlows' platform. Op. at 5-6. Stone flagged the issue of defining each party's intellectual property. On February 2, 2006, Stone met with Mitchell (Corbis' GC) and they discussed IP issues and specifically agreed to "[p]atent the systems to protect *both* Corbis *and* InfoFlows investments and strategic interests."

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[5] Sue McDonald, Corbis' CFO, annotated an email from Stone: "1st to Market Opportunity" and "Patents." Ex. 229. In deposition, McDonald disclaimed any memory of her annotations. She said she "doodled" when she was "bored." CP 4897-901.

Op. at 6; Ex. 232 (at 5593; emphasis supplied); Ex. 233. After the meeting, Stone sent an email to Mitchell that memorialized their discussion and agreement.[6] Id.

G. CORBIS' SECRET PLAN TO USE INFOFLOWS TO "ADD SPECIFICS" TO ITS PATENT APPLICATION

In the Spring of 2006, the parties moved forward with discussing the development project. RP 1113-14, Exs. 35-36, 242, 253, 257. InfoFlows educated Corbis about its technology, and emphasized the need to be clear about IP. E.g., Exs. 243, 246 and RP 2598-2602; Ex. 242 (at 6350). InfoFlows continued to work on its Object Management Service, which was re-named Jazz Service. E.g., Ex. 244, 249.

Meanwhile, Corbis was continuing its efforts to exploit InfoFlows. In April 2006, Corbis communicated with its outside patent counsel and set a plan to "add specifics to the patent app" using InfoFlows. Ex. 265; RP 1618-21, 1381-84. InfoFlows was not informed. And Corbis was again assessing the financial benefits that it would obtain by use of InfoFlows' license management system. Ex. 272; RP 647-52, 1393-96.

H. THE DEVELOPMENT AGREEMENT

InfoFlows and Corbis entered into a Development Agreement in

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[6] Mitchell admitted that he met with Stone and discussed patents, and they "may have" discussed the fact that *both* Corbis and InfoFlows had interests to protect. RP 991-93. But Mitchell didn't mention that Corbis had filed a non-public patent application for a license management system just weeks before. Op. at 6. According to Mitchell: "[i]t didn't occur to me that that would be of interest to [Stone]." RP 2917.

June 2006. Op. at 6; Ex. 43. The premise of the contract was that InfoFlows would build two software applications for Corbis. Id. at §1. Both applications were to be designed so that they would "operate on" and be "enable[d]" by InfoFlows' Jazz Service (f/k/a Object Management Service) – and Corbis would pay an ongoing license fee to InfoFlows for the use of the Jazz Service. Id. at §§6(b), 9. The Corbis applications were to be developed as works-for-hire, and Corbis would own the resulting "Work Product," as that term is defined. Id. at §6. The Development Agreement acknowledged that InfoFlows was "on its own initiative and at its own expense" continuing to build the Jazz Service. Id. at §9.

During negotiations, InfoFlows warned of ambiguity regarding ownership. Ex. 242 (at 6350). But Corbis sought and insisted on definitional ambiguity for central contract terms.[7]

During the summer of 2006, InfoFlows worked under the Development Agreement and continued its development of Jazz Service. On September 11, 2006, InfoFlows delivered the Alpha release to Corbis.

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[7] Corbis insisted on defining "System" by reference to SOW #3 and "other SOW's as applicable." Ex. 43 at §1; see also Ex. 121 (at A-7), RP 1387-93. The Development Agreement recognized that Jazz Service belonged to InfoFlows, but then defined "Jazz Service" *two* different ways. Ex. 43 (compare §6(a) with §9). Corbis' counsel (Martin Smith) testified that "Jazz Service" – as defined in §6 – was language he proposed, which implied that Jazz Service was *more* than what was in SOW #3. RP 1839-42; see also RP 1841; RP 2621:3-6. Smith admitted his language "***muddled the waters***." RP 1845 (emphasis supplied); see also RP 1839-56. Smith admitted there is an "inconsistency" between §6 and §9. RP 1852. This "muddl[ing]" of ownership was consistent with Corbis' prior conduct. See n.3 supra.

Ex. 77; Ex. 332. At Corbis' request, and as a courtesy, InfoFlows also delivered source code for its JazzSpider web crawler and Platform, and related source code documentation. Ex. 77. Corbis accessed the delivered files. Ex. 331. Corbis held a review meeting with InfoFlows and documented its acceptance of the Alpha. Ex. 340 ("InfoFlows met the Alpha delivery due date" and "[a]ll deliverables were acceptable"); Op. at 9. Corbis did not communicate acceptance to InfoFlows.

InfoFlows continued to work, e.g., delivering a UI specification; and providing Corbis with architecture and functional mapping documentation, including regarding Jazz Service. Exs. 79, 361, 354, 363. On October 12, 2006, Corbis terminated the Development Agreement, ostensibly "for cause" – despite its internal acceptance of InfoFlows' work. Exs. 374, 371. Corbis refused to make payment to InfoFlows and refused to return to InfoFlows its source code and related documentation.

I. THE COURT OF APPEALS OPINION

A jury found for InfoFlows on all its claims – and against Corbis on its claims. Op. at 1-2. The trial court affirmed the jury's verdict, with one exception. It granted Corbis' CR 50(b) motion and dismissed InfoFlows' conversion claim, reversing its prior denial of the same motion under CR 50(a). Id. The Court of Appeals affirmed the trial court with respect to its conversion decision. Id. at 28-30.

IV. CORBIS' PETITION SHOULD BE REJECTED

A. THERE IS NO INCONSISTENCY: INFOFLOWS' MISREPRESENTATION CLAIM IS INDEPENDENT OF THE DEVELOPMENT AGREEMENT.

The evidentiary record is clear: Corbis' agreement to coordinate on patents in order to protect both InfoFlows' and Corbis' interests was separate and apart from, and not addressed by, the Development Agreement. Corbis is simply wrong when it argues that "the Development Agreement comprehensively defined the parties' respective intellectual property rights." Br. at 9. It does nothing of the sort – and InfoFlows' misrepresentation claim is *not* based on "the terms of that contract [i.e., the Development Agreement]." Id. at 7; 12.

Accordingly, the trial court held and the Court of Appeals confirmed that InfoFlows' misrepresentation claim was independent of the parties' contract. E.g., CP 1805 at ¶ 11; Op. at 16. The Court of Appeals decision neither contravenes established precedent nor presents an issue of substantial public interest; review should not be accepted. RAP 13.4(b).

Corbis argues that Section 6 of the Development Agreement gives it the exclusive right to patent "the digital license management system that Corbis was paying InfoFlows to develop on its behalf." Br. at 10-11; 3. But Section 6 only provides that Corbis is the owner of defined "Work Product," which Corbis may seek to patent with InfoFlows' cooperation.

Ex.. 43, § 6. That is, the contract addresses patent rights ownership only with respect to specific "Work Product." It does not address InfoFlows' IP in general nor does it reflect Corbis' agreement to protect "both" parties' investments and strategic interests by coordinating on patent issues. Exs. 232; 233. And Section 6 says nothing about IP rights for anything that is *not* "Work Product." "Work Product" was a disputed term, dependent upon and derivative of other disputed contract terms (e.g., "System" and "Services"). RP 2932 and n. 7 supra.

The jury's verdict contradicts Corbis' untethered definition of "Work Product" – as a contractual matter, "Work Product" is limited and does *not* include Jazz Service, which is InfoFlows' proprietary platform. CP 1740 at ¶ 21; CP 526-27; Ex. 77; RP 2644-45. The trial court ruled that "[o]nly if one accepts Corbis' theory of the case could the integration clause defeat InfoFlows' fraudulent misrepresentation claim." CP 1483. The jury and the trial court rejected Corbis' theory.[8] InfoFlows' misrepresentation claim is independent of the parties' contract and the Court of Appeals properly held that it was not precluded.

B. THERE IS NO DUPLICATION OF DAMAGES.

In making its duplicative damages argument, Corbis ignores the

[8] See e.g. CP 1741 ("[B]ased on the jury's verdict, much of the material Corbis asserts is proprietary does not belong to Corbis. A prime example is Corbis' patent application: it covers what the jury determined was InfoFlows' technology.")

factual basis of InfoFlows' claims and misrepresents the jury instructions. Corbis did not commit a "single wrong" and the damages measures (and resulting awards) did not redress "the same injury." Br. at 13-14. InfoFlows' breach of contract and misrepresentation claims were based on *separate* wrongful conduct by Corbis, the jury instructions set forth *different measures of damages*, and the jury determined the claims resulted in *separate injuries* (and it awarded *different* amounts).

Corbis raised this exact issue on appeal below and the Court of Appeals rejected Corbis' contention, holding that "the court's instructions to the jury were designed to address different types of damages claimed by InfoFlows." Op. at 2. "Regarding the fraudulent misrepresentation claim, the instructions permitted the jury to award InfoFlows for any damages relating to Corbis' failure to coordinate on patent applications." Id. at 22. In contrast, the jury instruction for contract damages directed an award "that will put InfoFlows in as good a position as it would have been if both parties had performed all of their promises under the contract." Id. at 24. The Court of Appeals analysis is sound and its conclusion correct.

"If there is some separate basis for the fraud and breach of contract claims, plaintiff may recover on both." Kammerer v. Western Gear Corp., 27 Wn. App. 512, 527 (1980), aff'd 96 Wn.2d 416 (1981). "Where the fraud damage is a distinct harm, there is no double counting in the damage award." Schnabel v. Lui, 302 F.3d 1023, 1039 (9th Cir. 2002).[9] Here, InfoFlows' breach of contract claim was based on Corbis' breach of the Development Agreement, including its failure to pay a $1 million invoice for deliverables. Ex. 43 at §7; Ex. 116; RP 2647-48; CP 542; RP 3020-21; see also Op. at 16, 24. The jury awarded InfoFlows $3,250,000 for Corbis' breach of contract and for its related breach of the duty of good faith and fair dealing. CP 526. This amount comprises reasonable *contract expectation damages*, i.e., a portion of the payments due InfoFlows for development work under the contract. Op. at 24.

As a separate matter, InfoFlows' misrepresentation claim was based on Corbis' affirmative misrepresentation that it would work with InfoFlows to protect both parties' strategic interests by coordinating on patent issues. Op. at 17, 22; see also Exs. 232, 233; RP 2587-90, 3009-10; CP 1795 at ¶ 3. This claim is unrelated to the Development Agreement.

Corbis' argument thus hinges on a willful misreading of the phrase "benefit of the bargain" in the misrepresentation instruction. Br. at 15. As both the trial court and Court of Appeals noted, "the benefit of the bargain [for misrepresentation] would have been for Corbis and InfoFlows to have coordinated on patent applications." CP 1485; Op. at 17. Both courts also

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[9] Accord Conrad v. Alderwood Manor, 119 Wn. App. 275, 288-92 (2003); Wilson v. Key Tronic Corp., 40 Wn. App. 802, 810-12 (1985).

described the purpose of the award and that it was a "distinct harm" from InfoFlows' loss of fees under the Development Agreement. Compare Op. at 20, n.2 with id. at 24; see also CP 1485. The misrepresentation and contract damage awards are based on different facts and conduct; they are not duplicative; and there is no basis for this Court's review.

C. THE MISREPRESENTATION DAMAGES AWARD IS WITHIN THE RANGE OF EVIDENCE.

The Court of Appeals upheld the trial court and the jury's verdict with respect to the misrepresentation damages awarded to InfoFlows, finding that "the jury's award was well within the range of evidence, and the trial court did not error in declining to remit." Op. at 22. In doing so, the court noted the applicable legal framework (Op. 20-21), the jury instruction at issue (Op. at 22), and the supporting evidence (Op. at 22).

Corbis now argues that this Court should accept review because the jury's award comprises impermissible "lost profits" and InfoFlows' misrepresentation damages should be limited to "InfoFlows' maximum potential profit under [the] Development Agreement[.]" Br. at 16, 20.

Corbis made a "lost profits" argument in the Court of Appeals, and the court accepted this argument with respect to InfoFlows' fraudulent inducement claim. Op. at 22-24. In contrast, the court considered the evidence supporting InfoFlows' misrepresentation claim and found the damages to be "well within the range of evidence."[10] Op. at 22.

At the outset, jury instructions matter. Here, the jury was instructed to award damages constituting the "difference between the actual value of that which InfoFlows received and the value which it would have had if there had been no misrepresentation." CP 570. The instructions thus "permitted the jury to award InfoFlows for any damages relating to Corbis' failure to coordinate on patent applications." Op. at 22; see also CP 1485. As the Court of Appeals ruled, "the evidence showed that Corbis place a value of somewhere between $18 and $25 million on its revenues over a two-year period *should it work together and coordinate patents with InfoFlows*." Op. at 22 (emphasis supplied).

Corbis' argument for review is flawed for multiple reasons.

Corbis acknowledges the purpose of the jury's award in passing, but nonetheless asserts that the Court of Appeals should have limited InfoFlows' award to what it could have earned "from its relationship with Corbis." Br. at 19. Corbis' argument is based on two faulty premises. First, Corbis claims there was no evidence of the Jazz Service's value separate and apart from its value as licensed to Corbis as contemplated by

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[10] The law regarding lost profits does not preclude a new business from obtaining damages, rather there must be "factual data [sufficient to] furnish a basis for computation of probable losses." Larsen v. Walton Plywood Co., 65 Wn.2d 1, 17 (1964) . The "best evidence available" rule "pertains to the substance of the evidence, not its source." Eagle Group, Inc. v. Pullen, 114 Wn.App. 409, 418 (2002) . See also Op. at 21.

the Development Agreement. Br. at 18. The trial court noted, however, that "[t]he evidence showed that Stone valued InfoFlows' service at $30 million." CP 1485; see also Ex. 232. This is evidence of the Jazz Service's value independent of the Development Agreement.

Second, Corbis asserts that InfoFlows' "share of [Corbis'] revenues was limited to $7 million," as provided in Section 9 of the Development Agreement. Br. at 18. This is factually incorrect and the argument is premised on a theory of the case that the jury rejected. Corbis' argument assumes that it did not have to use the Jazz Service for the operation of its license management application. But, as the trial court observed, there was "ample evidence that, as a practical matter, the Jazz Service was *essential* to operation of the Corbis-specific application designed by InfoFlows." CP 1736-37 at ¶ 7 (emphasis supplied); RP 2599-2606 (Ex. 246), 1990-91, 2091; see also RP 707-08. The Court of Appeals echoed this assessment and identified the long-term import:

> InfoFlows would build the 'completely operational' version of a license management system for Corbis [which would] 'operate on' InfoFlows 'Jazz Service' ... and Corbis would pay an *ongoing* fee to InfoFlows for use of Jazz Service.

Op. at 6, quoting Ex. 43, § 9 (emphasis supplied). In reality, Corbis is not arguing about the sufficiency of the evidence. Rather it is re-arguing the meaning of the evidence – an argument that was rejected by the jury, the trial court and the Court of Appeals.

Because the Jazz Service platform was required to operate Corbis' applications, Corbis' revenue projections about working with InfoFlows necessarily meant concurrent and "ongoing" license fees to InfoFlows.[11] These detailed projections were a proper evidentiary basis for the jury's award. Larsen, 65 Wn.2d at 17 (1964) ; Eagle Group, 114 Wn.App. at 418. "At trial, the evidence showed that Corbis placed a value of somewhere between $18 and $25 million on its revenues over a *two-year period* should it work together and coordinate patents with InfoFlows." Op. at 22. The Court of Appeals did not err in holding that "the jury's award of $9.28 million on this claim (approximately 50% of the lower estimate) was well within the range of evidence, and the trial court did not err in declining to remit." Op. at 22.

V. THE COURT SHOULD ACCEPT REVIEW OF THE DISMISSAL OF INFOFLOWS' CONVERSION CLAIM

Under Washington law (and the Restatement, which Washington

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[11] Ex. 43 at § 9 (contemplating license agreement with fees for 2007-08, and future fees not exceeding "$2 million per year."); CP 1485 ("Corbis valued [InfoFlows' service] at ranging from $3 million to $20 million per year."); Ex. 188 at 16079 (projecting revenue working with InfoFlows to be $3-5 million in 2006 and $15-20 million in 2007), RP 657-59; Ex. 198 at 16095 ("[p]otential of $20+ million increased sales revenue/year"); Ex. 272 (projecting $16+ million of increased revenue over three years).

courts have adopted[12]), significant interference with an owner's *right to control* his or her property constitutes conversion. In the Matter of Langham, 153 Wn.2d 553 (2005) ; see also Restatement (Second) of Torts § 222A (1965). In Langham, this Court held that stock options were converted when the options were exercised because the exercise of a stock option constrains the "range of elective action" available to the rightful owner – i.e., the conversion "limit[s] the owner's available choices" as to what she may do with the property in which she has an interest. 153 Wn.2d at 565-66. The Restatement emphasizes this very point. *See* § 227 cmt. b and illustrations 1-3 (brief use of desk not conversion; use over time or assertion of ownership is conversion); § 228 cmt. d and illustrations 4, 5 (exceeding authorized use of a car in order to assert ownership is a conversion).

As detailed in InfoFlows' Reply Brief on appeal, Corbis obtained InfoFlows' source code *and* its related documentation and information for the Jazz Service, refused to return these materials after termination of the Development Agreement, and then wrongfully asserted ownership. Reply Br. at 3-7; see also CP 1737-40 (at ¶¶ 9-19). InfoFlows had to file suit in order to vindicate its rights and to assure that its exclusive ownership right

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[12] Potter v. Washington State Patrol, 165 Wn.2d 67, 88 (2008) ; Judkins v. Sadler-Mac Neil, 61 Wn.2d 1, 5 (1962) .

was not further impaired or compromised.[13] InfoFlows pled and proved a valid claim for conversion and it was error to dismiss that claim.

The applicable legal analysis properly turns not on the fact that Corbis possessed copies of InfoFlows' information and materials, but on Corbis' actions and assertions as to those copies. Respectfully, both the trial court and the Court of Appeals misconstrued the issue to be whether "deprivation is required" and whether mere "possession of a copy [ ] deprive[s] the owner of use of the property." CP 1483; Op. at 29. Neither court's analysis factored in Corbis' assertion of ownership over the copies.

Further, the Court of Appeals decision misstates the applicable law. It discussed Langham, but did not accurately describe the relevant facts (e.g., plaintiff did not have "possession" of stock options), or focus on the salient legal point (i.e., it noted a cognizable deprivation occurred in Langham, but did not explain this Court's reasoning as to *why*). Op. at 28-29. Nor did the court acknowledge the Restatement. It noted the cases cited by Corbis but failed to explain them. See Reply Br. at 9-10, n. 6.

The Court of Appeals stated only: "We decline to adopt InfoFlows' analysis." Op. at 29-30. The decision fails to undertake the appropriate

[13] CP 61 (seeking to enjoin Corbis from asserting ownership over Fedmark and requesting return of "proprietary information and materials regarding the Jazz Service").

analysis, and it misstates the legal issue and the applicable law.[14]

The decision also conflicts with Aventa Learning, Inc. v. K12, Inc., 830 F. Supp. 2d 1083 (W.D. Wash. 2011) . In Aventa, the plaintiffs allegedly converted defendant KCDL's electronic files by accessing, coping, and destroying them following termination of their employment. The court denied plaintiffs' motion to dismiss: "The fact that KCDL has access to another copy of the files at issue does not mean that it was not deprived of its possession of the copies accessed, made, or destroyed by Plaintiffs." 830 F. Supp. 2d at 1105-06. The analysis focused on an owner's right to possess and control *all copies*. "Courts dealing with this issue have begun to update the tort of conversion so that it keeps pace with the contemporary realities of widespread computer use." Id. at 1105. Even absent Corbis' improper ownership assertion, its wrongful retention of copies of InfoFlows' material is conversion under Aventa.

Because the Court of Appeals decision conflicts with Langham and Aventa, this Court should accept review. It should also accept review because the Court of Appeals decision alongside Aventa creates uncertainty as to whether and when possession of copies triggers liability for conversion. Given the increasingly prevalent use of digital material,

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[14] The Court of Appeals appears to follow FMC Corp. v. Capital Cities/ABC, Inc., 915 F.2d 300 (7th Cir. 1990), which has been criticized. Op. at 29-30; but see E.I. DuPont de Nemours and Co. v. Kolon Indus., Inc., 688 F. Supp. 2d 443, 455 (E.D. Va. 2009).

and how easily such material may be copied and stored, determining whether and under what circumstances unauthorized retention of such material constitutes conversion is paramount. This is an issue of substantial public interest because the law of conversion is unclear in Washington as to whether possession of copies, digital or otherwise, constitutes conversion. The Court should accept review. RAP 13.4(b).

VI. CONCLUSION

InfoFlows requests that this Court accept review of the Court of Appeals opinion solely with respect to the dismissal of InfoFlows' conversion claim. The Court should deny Corbis' Petition for Review.

RESPECTFULLY SUBMITTED this 23rd day of July 2012.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the attached document – ANSWER TO PETITION FOR REVIEW – to be hand delivered to the attorneys of record listed below:

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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 23rd day of July 2012, at Seattle, Washington.

/s/ Stephen C. Willey
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