

64505-6

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NO. 64505-6

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

CORBIS CORPORATION, a Nevada corporation,
Appellant and Cross-Respondent,

v.

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

**RESPONDENTS' BRIEF AND CROSS-APPELLANT INFOFLOWS
OPENING BRIEF**

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I. INTRODUCTION

This case fundamentally concerns a dispute about the ownership of intellectual property concerning a license management system for digital objects on the Internet. InfoFlows developed and was continuing to work on valuable ideas and technology implementations that Corbis wanted. The evidence presented to the jury demonstrated that Corbis engaged in a protracted and multi-front effort, via multiple acts and with multiple injuries, to effect an intellectual property “land grab.” For example:

- Corbis learned of a license management system from Steve Stone and InfoFlows, and was enthusiastic about the technology and economic benefit to be gained. Corbis was worried about losing a “first-to-market” opportunity and decided to use InfoFlows’ ideas to file a non-public patent application, not disclose this material fact to InfoFlows, and then usurp InfoFlows’ work to flesh out its application – all the while hiding what it was doing.
- Corbis executed its plan, despite discussions with InfoFlows about coordinating on patent applications that would protect *both* parties’ IP – even as its General Counsel agreed to so cooperate.
- Corbis negotiated the Development Agreement to create ambiguity and mislead InfoFlows, particularly with respect to IP.
- Corbis failed to perform in good faith under the Development Agreement and, after extracting as much information as it could from InfoFlows, Corbis improperly terminated the contract, refused to pay or return InfoFlows’ property, and asserted that it owned effectively everything InfoFlows had ever created.

A jury found for InfoFlows on all of its claims – and ruled against Corbis on its claims against InfoFlows and Steve Stone, InfoFlows’ CEO.

After a three-week trial, and extensive post-trial motion practice, Corbis now seeks a do-over, arguing a grab-bag of new theories. But Corbis has waived the bulk of its arguments and the central premise of its appeal is wrong. Corbis argues that InfoFlows' two separate fraud claims are based on or arise out of the parties' contract, i.e., the Development Agreement, and are duplicative or barred. This argument is contrary to the evidence and it is inconsistent with the factual basis of the claims actually asserted by InfoFlows. The jury's verdict got it right, and the trial court affirmed and buttressed the verdict in its post-trial rulings, with one exception.

The jury found for InfoFlows on its conversion claim and awarded substantial damages. The court granted Corbis' post-trial CR 50(b) motion and dismissed the claim, reversing its prior denial of the same motion under CR 50(a). Additionally, the pre-trial summary judgment in favor of Corbis on the Jazz Service advance claim should be reversed and, instead, judgment entered for InfoFlows on this claim.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in its post-trial dismissal of InfoFlows' conversion claim on Corbis' CR 50(b) motion. CP 1478-79, 1482-83.

B. The trial court erred in granting summary judgment on Corbis' Jazz Service advance license fee claim. CP 102-05.

III. RESTATEMENT OF FACTS

A. INFOFLOWS AND STEVE STONE

InfoFlows is a start-up software and services company. Steve Stone, the founder and CEO of InfoFlows, is a respected veteran of the software and computer industry. See www.infoflows.com; RP 2446-59; 2438-46. After leaving a senior position at Microsoft in 2004, Stone – first on his own and then through InfoFlows – has been developing a proprietary system or technology implementation focused on identifying, tracking and managing control of digital objects on the Internet. This system is called “Fedmark” and in earlier incarnations it was known as the “Jazz Service” and the “Object Management Service.” RP 2368, 2406.

Fedmark is essentially a “smart” search engine – analogous to a common search engine like Google, but more specialized and with additional capabilities. Fedmark is a scalable web-based service that searches (or “crawls”) the Internet for targeted digital objects. It is agnostic as to the type of digital object it tracks; e.g., these can be video, image, or music files. When the crawler detects a targeted digital object (identified by an embedded digital identifier or “handle” *or* by a digital fingerprint), it generates a database of information. The database allows reporting, including use patterns, which enable business intelligence (e.g., determining industry verticals evidencing particular use), as well as other

business decisions (e.g., digital rights enforcement, including licensing). Fedmark has obvious appeal for owners and distributors of digital content, particularly as the market for digital distribution develops and expands.

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, which describes a rights management service for monitoring and validating license rights of digital objects used on the Internet, as well as related “business intelligence.” Ex 1 (App. A); RP 2462, 2469.

B. CORBIS REACHES OUT TO STONE

After Stone left Microsoft in the Spring of 2004, Steve Davis (the CEO of Corbis) contacted Stone to have a meeting. RP 2460; Ex 150. On June 1, Stone met with Davis and Ingvar Petursson (the CTO of Corbis), and Stone presented his PowerPoint to illustrate his thinking and to show the Corbis representatives what he was doing and the implementation of 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. Ex 2. Under SOW #1, Stone did a broad assessment concerning the subject of digital rights management (“DRM”). RP 2484-89. Stone’s work was part of a project known as “Project Baker,” a high-level effort within Corbis to develop a coherent approach to DRM. RP 510-11; Exs. 3, 152. Project Baker was terminated when Petursson

abruptly left Corbis in the Spring of 2005. RP 2511.

The primary work product Stone produced was a presentation entitled “Project Baker: Scenarios using Digital Object Technologies for New Business at Corbis,” which Stone presented to Corbis in April 2005. Exs. 9, 397 (App. D), Ex 162; RP 2511-16. Stone provided an overview of DRM technologies and services, offered observations on the same, as well as general thoughts on strategy. *Id.* Project Baker did not concern a “license management service.” RP 2514-15; CP 1795 at ¶ 2.

Shortly thereafter, in May 2005, Stone met with Steve Davis and Mark Sherman (a Senior Vice President of Corbis). At this meeting, Stone discussed the work he had done on Project Baker and he showed Davis and Sherman his Project Baker PowerPoint with an additional section labeled “Corbis Legal / License Management Discussion,” containing slides substantively identical to those contained in the PowerPoint previously shown to Davis and Petursson in June 2004. RP 2515-18; compare Ex 1 with Ex 9 (and Ex 397). These prior slides were a pitch; Stone hoped to interest Corbis in licensing or investing in the technology implementation he was working on.¹ RP 2518-19; 1302-05.

¹ In May 2005, Stone entered a second consulting agreement with Corbis, which involved his assisting Sherman with a specific business assessment (“SOW #2”). *Id.* SOW #2 did not involve license management and terminated in June 2005. RP 2523-25.

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. The InfoFlows team began developing a digital object tracking system to the end of building a business. *Id.* During the summer of 2005, InfoFlows continued work on the Object Management Service, including the development of a working demo and prototype. RP 2535, 2554; Ex 180.

D. THE “IMMACULATE INVENTION”

In late August 2005, David Weiskopf, an in-house attorney at Corbis, solicited a meeting with Stone, indicating that he needed help with technology issues.² Ex 173; RP 2534-35. On September 1, Stone met with Weiskopf 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 platform. RP 2537-44. Stone presented a PowerPoint regarding a license-management service, as well as on-line demo, and he did additional explanatory drawings.³ Ex 175; RP 2542-43; RP 1329. Weiskopf was interested and told Stone he would be following up with him. RP 2544.

² Stone met Weiskopf earlier in 2005 and had suggested that Corbis consider InfoFlows’ license management system. E.g., Ex 154; RP 2517-18.

³ The PowerPoint Stone showed Weiskopf in September 2005 was substantively identical to the PowerPoint Stone initially prepared in May 2004. Ex 1; Exs. 175, 397.

A few days later, on a Sunday evening, Weiskopf sent an email to his boss 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[.]” Ex 13. Weiskopf’s solution – an “immaculate invention” – was an appropriation of InfoFlows’ ideas and Stone’s drawings. RP 2544-45. Weiskopf, however, took the position that “the concept of a licensed management solution that validates licenses used on the Internet” was *his* idea. RP 1298-99. 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.” RP 1306. According to Weiskopf, it was all his idea, although he was stymied to explain how this could be when he did not meet Stone until 2005. RP 1306-20. Nor could Weiskopf identify any documentation of “his” idea prior to meeting with Stone in September 2005. RP 1333-36. The trial court observed: “Mr. Weiskopf’s credibility was particularly questionable. He claimed to have invented the license management system; the jury plainly did not believe him.” CP 1741.

E. CORBIS NEEDS INFOFLOWS

After the September 1 meeting, Weiskopf followed up with Stone and arranged a meeting with senior Corbis executives, including Sue

McDonald (CFO) and Jim Mitchell (GC). Ex 178. Stone presented a working demo/prototype of the Object Management System, which showed its capabilities, including the available reporting. Ex 180; RP 2555-61. Corbis management was extremely 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 same time, Corbis was analyzing the economic benefits of InfoFlows' ideas and technology, and the risk of not working with InfoFlows:

- Corbis projected that InfoFlows would be able to “go to market” any time after January 2006, whereas Corbis alone would not be able to do so until late 2006. Ex 185 at 16046; RP 640-42.
- Corbis projected revenue working with InfoFlows to be \$15-20 million in 2007 (vs. \$5-7 million in 2007 if Corbis did not work with InfoFlows). Ex 188 at 16079; see also RP 657-59.
- Corbis advised its Governance Board that a License Management System had the “[p]otential of \$20+ million increased sales revenue/year[.]” Ex 198 at 16095; see also RP 982-83.

On or about November 20, 2005, Corbis and InfoFlows entered into a consulting agreement (“SOW #3”) for the development of a demonstration of a license management system. Ex 10. The purpose of SOW #3 was to obtain the approval of Corbis' sole shareholder (Bill Gates) to fund the development of software applications that would run on InfoFlows' platform. The approach of SOW #3 was to describe a license management solution and show an illustrative demonstration. RP 2567.

Despite Stone's efforts, the ownership provision of SOW #3 was ambiguous. RP 2565-75; Exs 18-21. Weiskopf assured Stone that "we both understand what it means." RP 2575-77. During the discussions of SOW #3, Corbis never suggested to InfoFlows that Corbis had any right to the Object Management System. Id. But Weiskopf and Corbis' outside counsel exchanged a draft of SOW #3 that indicated Corbis' real goal: to own the Object Management System. Ex 199. This draft was *not* shared with InfoFlows. RP 2569-71; compare Ex 199 with Ex 19.

F. CORBIS FILES A NON-PUBLIC PATENT APPLICATION ON INFOFLOWS' IDEAS

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

In the same time frame, Corbis was internally discussing a potential license management service, and including materials from Stone's May 2004 PowerPoint but labeling them "Corbis Confidential." E.g., Ex 188 (at 16074-76); RP 657. In December 2005, Corbis (through Aspelund and Weiskopf) began sending materials to John Branch, an

outside patent attorney, including Stone's drawings and schematics. Ex 206 (at 16061-62); see also Exs. 219-221. Aspelund described Corbis' use of Stone's work as a "labor-saving device." RP 671. Aspelund admitted that Stone was never informed of what Corbis was doing. RP 668.

On January 18, 2006, Corbis filed a non-public patent application entitled "Method and System for Managing Licenses to Content." 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.⁴ In a post-trial finding of fact, the court stated:

[T]he evidence (as evaluated by the jury) does not support the contention that the license management system concept belongs to Corbis. Indeed, based 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. CP 1741 (emphasis supplied).

G. JIM MITCHELL AGREES THAT THE PARTIES WILL COOPERATE AND SEEK PATENTS SO AS TO PROTECT BOTH PARTIES' INTERESTS

As SOW #3 proceeded, there were numerous communications between InfoFlows and Corbis regarding a contractual relationship for the

⁴ Sue McDonald, Corbis' CFO, annotated an email from Stone; she wrote: "1st to Market Opportunity" and "Patents." Ex 229. In deposition, McDonald disclaimed any memory of the annotations. She said she sometimes "doodled" when she was "bored."

development of applications for Corbis that would operate on InfoFlows' platform. E.g., Exs. 203, 211, 226, 228, 229. Stone flagged the issue of defining each party's intellectual property. E.g., Ex 234 ("What is Corbis IP and what is InfoFlows IP?"). On February 2, 2006, Stone met with Mitchell (Corbis' GC) and they discussed IP issues and potential patents and, among other things, agreed to "[p]atent the systems to protect both Corbis and Infoflows investments and strategic interests." Ex 232 (at 5593); see also Ex 233 (App. C). Following this meeting, Stone sent an email to Mitchell that memorialized their discussion and agreement. Id.

Mitchell admitted that he met with Stone on February 2, that they discussed patents, and that they "may have" discussed the fact that both Corbis and InfoFlows had interests to protect – but he denied that there was any agreement. RP 991-93. Mitchell admitted that he never told Stone there was no agreement and never made any effort to address the ostensible misimpression – even as he forwarded Stone's email to multiple other attorneys within Corbis (Ex 233; RP 995-97) and had another meeting with Stone on the very day of the email. RP 994-95. Moreover, despite discussing patents, Mitchell never mentioned to Stone that Corbis had, in fact, filed a non-public patent application for a license management system just two weeks earlier. Ex 222; RP 995. According to Mitchell, "[i]t didn't occur to me that that would be of interest to him." RP 2917.

H. THE PRESENTATION TO BILL GATES AND THE UNDISCLOSED “GROWTH OPPORTUNITY”

On February 16, 2006, Stone attended a meeting held in Bill Gates’ private conference room at Microsoft (the “Owner’s Meeting”). A primary purpose of the Owner’s Meeting was to gain Gates’ approval for the “Boulder Ridge” project (i.e., Corbis’ internal name for InfoFlows’ development of two software applications for Corbis, which would operate on InfoFlows’ platform). Stone assisted in making a presentation, which was also provided to Gates in hard-copy (“he thumbed through [it]”). Ex 33; RP 2590. The presentation referred to patents and a *prospective* process: “[i]dentify and patent the key business process patent(s) that describes the Boulder Ridge system. Ex 33 (at 11). The presentation also included a detailed summary of the Object Management Service, which was identified as belonging to InfoFlows. Id. (at 16).

But there was another document prepared for the Owner’s Meeting that was *not* shared with Stone. This document was entitled “Growth Opportunities” and it highlighted Corbis’ non-public patent application. Ex 236. Mitchell admitted that this document was to educate Bill Gates about “important things going on at the company,” and that it was given to Gates – but not to Stone. RP 2920-23.

I. CORBIS’ SECRET PLAN TO USE INFOFLOWS TO “ADD SPECIFICS” TO ITS PATENT APPLICATION

After the Owner’s Meeting, the parties moved forward with

discussions about the project. RP 1113-14, Exs. 34-36, 242, 253, 257. InfoFlows continued to educate Corbis about its technology and implementation, including a presentation to Corbis' CFO, as well as to emphasize the need to be clear about IP. E.g., Exs. 243, 246 and RP 2598-2602; Ex 242 (at 6350). And InfoFlows continued to work on the Object Management Service, which was re-named Jazz. E.g., Ex 244, 249.

Meanwhile, Corbis was continuing its efforts to exploit InfoFlows. In April 2006, Corbis communicated with 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 of this plan. And Corbis was again assessing the financial benefits that it would obtain by use of InfoFlows' license management system. A financial plan prepared by Weiskopf determined that, in a three-year period, Corbis would gain an additional \$15 million in revenue. Ex 272; RP 647-52, 1393-96.

J. THE DEVELOPMENT AGREEMENT

1. The “muddled waters” of ownership

InfoFlows and Corbis entered into a Development Agreement in June 2006 (Corbis signed the contract on June 2). 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 built a works-for-hire, and Corbis would own “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.

At the outset of contract negotiations, InfoFlows had expressly warned of the specter of ambiguity regarding ownership:

[T]he terms used to define Proprietary Information and ownership of the Work Product . . . have the potential to create ambiguity regarding the respective ownership rights and interests of the parties. Ex 242 (at 6350)

But Corbis insisted on maintaining definitional ambiguity regarding central contract terms, e.g., defining “System” only 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. And even as the Development Agreement recognized that the Jazz Service belonged to InfoFlows, the contract also defined “Jazz Service” *two* different ways.⁵ Ex 43 (compare §6(a) with §9).

Corbis’ outside counsel (Martin Smith) testified that the term “Jazz Service” – as defined in the “ownership” provision (§6) – was language he proposed and that the words used implied that Jazz Service was *more* than what was defined in SOW #3. RP 1839-42. Indeed, Smith admitted that

⁵ Corbis argues that Jazz Service is defined only by §9. Br. at 16. But Corbis’ contract scrivener admitted to an “inconsistency” between §6 and §9. RP 1852.

“there was probably more to [Jazz Service] than what was in statement of work handle injection technology.” RP 1841; see also RP 2621:3-6.

Smith also admitted that his contract language “*muddled the waters*.” RP 1845 (emphasis supplied). It was, Smith said, a “gimme” in response to Stone’s requests to clarify ownership. RP 1849-50; see also RP 1839-56.

2. InfoFlows performs its obligations and Corbis acts in bad faith, obtains InfoFlows’ proprietary code, wrongly terminates and refuses to pay

During the summer of 2006, InfoFlows worked under the Development Agreement and continued its own development of Jazz Service.⁶ InfoFlows provided deliverables (e.g., Ex 58), but Corbis took the position that it would not formally “accept” them; doing so would trigger payments. Ex 43 at §7(a). Ultimately, the parties reached a resolution and Corbis reviewed InfoFlows’ work: “I think what they will deliver for Phase 1 will pretty much work as advertised.” Ex 336; see also Exs 318, 324, 336, 350, 353, 354, 361; RP 1640-45.

On September 11, 2006, InfoFlows delivered the Alpha release to Corbis. Ex 77; Ex. 332. As a courtesy at Corbis’ request, InfoFlows also delivered its proprietary source code for the JazzSpider web crawler and

⁶ Prior to signing the Development Agreement, Corbis asked InfoFlows to assist it in finding images that had been pirated. InfoFlows did so and demonstrated the utility and effectiveness of the Jazz Service. Exs 284-286, 288-291. Corbis’ response at the time: “Seriously, this is HUGE and you guys ROCK!” Ex 286.

Platform, and related source code documentation. Ex 77. Corbis accessed the delivered files. Ex 331. Corbis held a review meeting with InfoFlows and internally documented its acceptance of the deliverable. Ex 340 (“InfoFlows met the Alpha delivery due date” and “[a]ll deliverables were acceptable”); see also Ex 326; RP 1650-56; Exs 342, 346. Corbis did not communicate acceptance to InfoFlows and Corbis did not pay.

InfoFlows continued to work: delivering a UI specification; providing Corbis with architecture and functional mapping documentation, including regarding Jazz Service; and discussing the Acceptance Criteria Corbis had drafted. Exs 79, 361, 354, 363. On October 12, Corbis terminated the Development Agreement “for cause – this despite its internal acceptance of InfoFlows’ work. Ex 374; see also Ex 371.

IV. ARGUMENT

A. CORBIS WAIVED ITS DAMAGES ARGUMENTS

“A party is bound by the basic legal theories pleaded and argued *before* a verdict is rendered.” Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 193 at n.20 (2001) (emphasis in original).

1. Corbis’ CR 50(b) motion was properly denied

A CR 50(a) motion must “specify the judgment sought and the law and facts on which the moving party is entitled to judgment.” A party may “renew” a previously-denied CR 50(a) motion under CR 50(b), but a renewed motion cannot present arguments not raised on the initial CR

50(a) motion. Karl B. Tegland, WASHINGTON PRACTICE, Vol. 14A (2nd Ed.) at 88; Mega v. Whitworth College, 138 Wn. App. 661, 669 (2007).

Corbis made CR 50(a) motions on three of InfoFlows' claims: (a) fraudulent misrepresentation (but *not* fraudulent concealment), (b) trade secret misappropriation, and (c) conversion. RP 2930-34, 2946. The court denied Corbis' motions. Id.; see also CP 457.

Post-verdict, Corbis moved for judgment under CR 50(b) or for a remittitur or new trial. CP 714-726. Corbis sought judgment based on alleged duplicative damages, a purported \$1 million cap on InfoFlows' fraud and breach of contract damages, alleged lack of damages caused by Corbis' affirmative fraud, and alleged lack of damages caused by Corbis' conversion. CP 717-25. Corbis also argued that the damages were excessive and unsupported. CP 719-24. The trial court denied Corbis' motion and also issued a letter ruling. CP 1474-75; CP 1481-85.

The trial court held that Corbis "never made a CR 50(a) motion" on the damages arguments made in its CR 50(b) motion and, thus, could not bring a "renewed" motion after the verdict based upon those arguments. RP 2930-34, 2946; CP 1484.

2. Corbis failed to make its damages arguments prior to submission to the jury

"Counsel cannot, in the trial of a case, remain silent as to claimed errors, and later, if the verdict is adverse, urge his trial objections for the

first time in his motion for a new trial, or on appeal.” Sherman v. Mobbs, 55 Wn.2d 202, 207 (1959); Estate of Stalkup v. The Vancouver Clinic, Inc., 145 Wn. App. 572, 588 (2008). An appellate court may “refuse to review any claim of error which was not raised in the trial court” and “will not vacate a verdict . . . for errors of law if the party seeking a new trial failed to object to or invited the error.” RAP 2.5(a); Postema v. Postema Enterprises, Inc., 118 Wn. App. 185, 193 (2003).

Here, the jury received separate instructions on the elements of fraudulent inducement by concealment (Nos. 31-32, CP 563-64) and fraudulent misrepresentation (Nos. 34-35, CP 566-67), and separate instructions on the measure of damages for those claims. Nos. 33 and 38, CP 565; 570.⁷ Corbis took exception to Instruction No. 33 (damages for fraud by concealment), referencing only its proposed instruction. RP 2945-49. Corbis did not object to Instruction No. 38 (damages for fraudulent misrepresentation) or to Instruction No. 22 (damages for breach of contract).⁸ Id. Thus, Corbis did not object to the court’s final instructions on the basis that they permitted duplicative damages.

⁷ The trial court and the parties engaged in extensive discussion and argument regarding the jury instructions before they were finalized. E.g., RP 2948.

⁸ Corbis’ proposed a contract damages instruction based on WPI 303.02. CP 281. The instruction given was consistent, providing for expectation damages. CP 554. Corbis did not initially propose a fraud damages instruction. Corbis later proposed a California model instruction, with a measure of damages “sometimes referred to as the

Nor did Corbis argue its \$1 million damages theory at any point. Corbis' proposed instructions for InfoFlows' breach of contract claim did not reference any purported \$1 million limit on damages. CP 274, 281. Nor did any other instruction (proposed or as submitted) reference such a limit. CP 250-301; CP 410-14; CP 530-73. And Corbis did not object to the trial court's instructions on this basis. RP 2945-49.

Finally, the verdict form set forth a separate line for damages following the liability questions for each of the fraudulent inducement, fraud by misrepresentation, and breach of contract claims. CP 525-29. Corbis itself proposed two "Amended Proposed Verdict Forms" that included separate damage determinations for (a) breach of contract, (b) fraudulent inducement, and (c) fraudulent misrepresentation. CP 359-64, 438-42, 453-56. Corbis did not object to separate damages determinations on any basis and it did not object to the verdict form on the basis of duplicative damages *or* a \$1 million damages limit. The jury returned a verdict in favor of InfoFlows. CP 525-29. In relevant part, the jury awarded damages of \$7 million for fraudulent concealment, \$9.28 million for fraud by misrepresentation, and \$3.25 million for breach of contract. Id. Corbis did not challenge the verdict before entry.

'benefit of the bargain.'" CP 369-385 at 370-376; see also CP 410-414.

Corbis failed to preserve these theories for consideration under CR 59, and they need not be considered by this Court on appeal.⁹ Estate of Stalkup, 145 Wn. App. at 584; Conrad v. Alderwood Manor, 119 Wn. App. 275, 289-90 (2003); RAP 2.5(a). Corbis' damages arguments were:

not made prior to instructing the jury – indeed, its \$1 million theory was never argued; Corbis did not except to the jury instructions on this basis; Corbis actually proposed ‘benefit of the bargain’ fraud damage instructions, and it proposed a verdict form with separate lines for contract and for each of the fraud damages. CP 1484 (emphasis in original).

B. THE COURT PROPERLY DENIED CORBIS' MOTION FOR REMITTITUR OR NEW TRIAL

Waiver aside, the jury instructions in this case were proper and the damages were supported by the evidence and non-duplicative. The court denied Corbis' motion for remittitur or new trial and detailed the bases for its decision. CP 1484-85. The denial of a new trial or remittitur is reviewed for abuse of discretion. Locke v. City of Seattle, 162 Wn.2d 474, 486 (2007). It is “strongly presume[d] the jury’s verdict is correct.”¹⁰ Bunch v. King County Dept. of Youth Servs., 155 Wn.2d 165, 179 (2005). A trial court’s denial of a remittitur strengthens the verdict. Id. at 180.

⁹ Corbis asserts that it “preserved its objection” to Instruction Nos 31-35 and 38. Br. 3, n.1. But Corbis did not object to the instructions it now challenges when it had the opportunity or it did not do so with adequate specificity to preserve its current arguments. A general objection or exception to a jury instruction is insufficient. Postema, 118 Wn. App. at 194; Trueax v. Ernst Home Ctr., Inc., 124 Wn.2d 334, 342 (1994).

¹⁰ The amount of damages is “peculiarly within the province of the jury” and “courts should be and are reluctant to interfere with the conclusion of a jury when fairly made.” Bingaman v. Gray’s Harbor Community Hospital, 103 Wn.2d 831, 835 (1985).

1. The damages award for breach of contract and breach of the duty of good faith and fair dealing was within the range of evidence.

The jury determined that Corbis breached the Development Agreement *and* breached its duty of good faith, and awarded InfoFlows \$3,250,000. CP 526. Corbis asserted that this award represented the “full amount” that it would have owed InfoFlows under the parties’ contract. CP 718; but see Ex 43 at § 7 (Corbis required to pay \$3,950,000 for services related to the applications). Corbis only made the initial \$250,000 payment under § 7, thus InfoFlows was not paid \$3,700,000 it would have earned “if both parties had performed all of their promises under the contract” in good faith. CP 554 (Instr. No.22); CP 1485.

In denying Corbis’ motion, the trial court concluded that “the jury could justifiably conclude that InfoFlows would have performed in good faith and assume that if Corbis had been willing and able to have done so, InfoFlows would have earned the \$3.25 million.”¹¹ CP 1485. This conclusion, and the damages award—*less* than what InfoFlows reasonably expected to earn under the contract—is supported by the evidence.

Corbis argues that because Section 13(c) of the Development Agreement permits it to terminate the contract without cause, the contract

¹¹ Further, “the evidence suggested that Corbis either had little intention of performing its obligations under the contract or had insufficient technical support to work with InfoFlows on the joint development of a license management system.” CP 1485.

damages award should be reduced to \$1 million (payment for milestones InfoFlows delivered), or a new trial granted “limited to InfoFlows’ legitimate expectation damages[.]” Br. 41-43. Despite Corbis’ waiver of this argument, the trial court considered it substantively and rejected it. CP 1485. Corbis’ argument cannot be reconciled with how the jury was instructed to measure contract damages.¹² CP 554 (Instr. No. 22). And Corbis does not assign error to that instruction. Br. 2-4. Corbis’ argument that the award was excessive because it did not deduct InfoFlows’ costs of performance likewise fails. Br. 43. As Corbis notes, the jury was presented with evidence of InfoFlows’ costs. Br. 43. Whether and how it factored those costs into the award is not for *post-hoc* second-guessing. Alger v. City of Mukilteo, 107 Wn.2d 541, 551-52 (1987). The contract damages award is supported by the evidence and the trial court did not abuse its discretion in denying Corbis’ motion for remittitur or a new trial.

2. The damages awards for Corbis’ fraudulent concealment and fraudulent misrepresentation were within the range of evidence.

To determine InfoFlows’ damages on its fraudulent inducement by concealment claim, the jury was instructed to “award all such damages as naturally and proximately resulted from the fraud” and that it “may

¹² Moreover, none of the cases that Corbis cites involve a contract induced by an independent fraudulent act or a breach of the duty of good faith and fair dealing.

consider” three non-exclusive factors.¹³ CP 565 (Instr. No. 33).

Regarding the value the parties placed on the Development Agreement and the possible licensing and use of the Jazz Service, Section 9 provides that if Corbis desired exclusive use of the Jazz Service, the combined fees and costs it would owe InfoFlows through 2008 would not exceed \$7,000,000. Ex 43. And prior to the parties entering into that contract, Corbis itself assessed and placed a very substantial value on the economic benefit to be gained from InfoFlows technology.¹⁴

Regarding the likelihood the parties would have entered into the Jazz Service Agreement, there was, as the trial court observed, “ample evidence that, as a practical matter, the Jazz Service was essential to operation of the Corbis-specific application designed by InfoFlows.” CP 1736 at ¶ 7; RP 2599-2606, 1990-91, 2091; see also RP 707-08.

The jury heard evidence about the value of being “first to market” with a license management system like the one InfoFlows offered. E.g.,

¹³ These are “(1) the value the parties placed on the Development Agreement, keeping in mind that the price in the contract is not necessarily determinative of its value; (2) the value the parties place on the possible licensing and use of the Jazz Service and the likelihood the parties would have entered into the Jazz Service Agreement; and (3) the likelihood that InfoFlows would have secured other business opportunities had it not entered into the Development Agreement.” CP 565. See also IV.D.1 below.

¹⁴ As noted, Corbis projected increased revenues of \$10-13 million in 2007, the “[p]otential of \$20+ million increase sales revenue/year;” and more than \$16 million over three years. Ex 188 (at 16079), RP 657-59; Ex 198 (at 16095), RP 982-83; and Ex 272; RP 647-48. See also RP 649-52, 1393-96.

RP 804-5, RP 640-42; Ex 188 at 16079; see also RP 657-59, 250. The jury also heard Stone's testimony that had InfoFlows not entered into that agreement he believes he would have been funded by a venture group given the value of the Fedmark system. RP 2828-30. The trial court thus ruled that "there was ample evidence upon which the jury could award \$7 million in damages for fraudulent inducement." CP 1485. It did not abuse its discretion in denying Corbis' motion.

The damages award for Corbis' fraudulent misrepresentation was also within the range of evidence. 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. "[T]he benefit of the bargain would have been for Corbis and InfoFlows to have coordinated on patent applications." CP 1485. If Corbis had not misrepresented its promise to protect *both* parties' interests by coordinating on patents – and not filed its own secret patent application – the jury could have concluded that InfoFlows' patent application would have been first-filed or, at least, not compromised by Corbis' application.¹⁵ The trial court noted that "[t]he evidence showed that Stone valued InfoFlows' service at \$30 million and

¹⁵ Stone testified that InfoFlows had to disclose Corbis' application (and the suit), could not get investment to move forward, and so came "to a screeching halt". RP 2828.

Corbis valued it at ranging from \$3 million to \$20 million per year.” CP 1485; see also Ex 232; RP 1509-10. The court did not abuse its discretion: “There was evidence ... to support [the jury’s] determination that the value of the exclusive rights in InfoFlows’ service that patent protection would provide could have been \$9.28 million.” CP 1485.

Corbis cannot refute the evidence and its alternative tack is to lump the fraud damages together and claim that they are “\$16 million in profits” for a “new business with no profit history.” Br. 30. This argument mischaracterizes InfoFlows’ claims, the relief it sought and the law.

InfoFlows’ fraud claims were based on separate wrongful conduct: (1) Corbis’ deliberate concealment and failure to disclose its non-public patent application (based on InfoFlows’ ideas), and (2) Corbis’ affirmative misrepresentation to “patent the systems to protect both Corbis’ and InfoFlows’ investments and strategic interests.” The jury thus determined different damage awards remedying different injuries to InfoFlows. And there are independent evidentiary bases for the fraud damages.

InfoFlows never claimed, did not put on evidence of, and was not awarded damages for “lost profits.”¹⁶ Nor did the damages instructions for the two fraud claims provide for an award of “lost profits.” Corbis’

¹⁶ Corbis did not argue in the trial court that the damages award for fraudulent inducement lacked support on a “lost profits” basis. CP 722-723; see also CP 1485.

newly-asserted analytic framework is inconsistent with InfoFlows' claims and the evidence. Accordingly, the cases it cites are inapposite. These involve: (i) claims for lost profits and application of the "new business rule;" or (ii) the failure to prove an aspect of damages that – like "new business" lost profits – is not at issue in this case.¹⁷

Finally, Corbis' assertions regarding the evidentiary record are erroneous. Corbis asserts there was no evidence that InfoFlows was unable to patent Jazz Service or of any quantifiable loss due to Corbis' possession of InfoFlows' intellectual property. Br. 31-32. But this ignores the reality the Corbis filed a non-public patent application based on InfoFlows' ideas as a "labor-saving device." RP 671, Ex. 222. And it is refuted by the court's finding that Corbis' application "covers what the jury determined was InfoFlows' technology." CP 1741 at ¶ 22; CP 526-27 (No. 5.) The fraud damages are supported by the evidence and Corbis' motion for remittitur or a new trial was properly denied.

C. THE DAMAGE AWARDS FOR FRAUD AND BREACH OF CONTRACT ARE NOT DUPLICATIVE

InfoFlows' contract and fraud claims arose at different times from

¹⁷ Larson v. Walton Plywood Co., 65 Wn.2d 1, 15-20 (1964) (discussing new business rule and recoverability of lost profits); Farm Crop Energy, Inc. v. Old Nat'l Bank of Washington, 109 Wn.2d 923, 927-31 (1988) (new business rule barred recovery of lost profit); Bell Atlantic Network Services, Inc. v. P.M. Video Corp., 322 N.J. Super. 74, 97-101 (1999) (projected lost profits proof too speculative); ESCA Corp. v. KPMG Peat Marwick, 86 Wn. App. 628, 639-41 (1997) (failure to prove damages.)

different obligations and facts. Contrary to Corbis' assertion, the claims are not based on a single wrongful act. They are not alternative legal theories seeking to redress the same injury. InfoFlows' claims were each based on separate wrongful conduct by Corbis that the jury reasonably determined resulted in separate injuries to InfoFlows.

"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); Schnabel v. Lui, 302 F.3d 1023, 1038 (9th Cir. 2002) (accord).¹⁸

Schnabel case was an action for breach of contract and fraudulent inducement. 302 F.3d 1023. The trial court entered judgment including separate damage awards for each claim. Id. at 1028. The Ninth Circuit affirmed, noting that the findings of fact distinguished the bases for the breach of contract damages and fraud damages, even as the court recited facts relevant to both claims. Id. at 1038-39. "Where the fraud damage is a distinct harm, there is no double counting in the damage award." Id.

¹⁸ See also Theme Promotions, Inc. v. News America Marketing FSI, 546 F.3d 991, 1005-06 (9th Cir. 2008) (damage awards not duplicative where injuries "did not arise from the same act"); Conrad v. Alderwood Manor, 119 Wn. App. 275, 288-92 (2003) (affirming denial of CR 59 motion based on alleged double recovery); Wilson v. Key Tronic Corp., 40 Wn. App. 802, 810-12 (1985) (damages awards upheld because "each distinct item of damage was supported by independent facts").

Corbis asserts the trial court erred in authorizing the recovery of duplicative damages for “the same legal harm” and that InfoFlows “is limited to one recovery for any economic loss arising from its *contractual relationship with Corbis*.” Br. 24-28 (emphasis supplied). The latter is a generally accurate statement of the law, but the former is simply wrong.¹⁹

The jury instructions make clear that InfoFlows’ fraud claims and its contract claim are each subject to a different measure of damages. CP 554, 565, 570. The jury’s award of three different amounts indicates remedy of three separate harms; the jury did not perceive these measures as providing for the same type of recovery, or redressing the same injury.

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. As noted above at IV.B.1, the jury awarded InfoFlows \$3,250,000 for Corbis’ breach of contract and for its 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.

¹⁹ In ruling on InfoFlows’ application for attorneys’ fees, the court found that InfoFlows’ fraud claims did *not* arise out of the Development Agreement and, thus, InfoFlows was not entitled to its attorneys’ fees for those claims. CP 1805 at ¶ 11.

InfoFlows' fraudulent inducement by concealment claim was based on Corbis' failure to disclose to InfoFlows, during the course of contract discussions, that it was planning to file, or had filed, a non-public patent application based, at least in substantial part, on InfoFlows' ideas. RP 665-671 (Exs 206, 207); Ex 222; RP 2613-14; 2587-90; CP 1735 at ¶¶ 3-4. InfoFlows would not have entered into the Development Agreement if Corbis had disclosed this material fact. RP 2613-14.

The damages measure for this harm permitted the jury to consider several non-exclusive factors. CP 565. Among other things, the instruction "allow[ed] the jury to determine an amount that would reflect InfoFlows' 'opportunity cost' for its choice to enter into a contract with Corbis rather than pursue other business opportunities." CP 1485. The jury's award could thus have been directed, in part, at remedying InfoFlows' inability to pursue or loss of other business opportunities, which were foreclosed by Corbis' fraud.

Finally, InfoFlows' fraudulent 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. RP 2587-90 (Ex 233); see also Exs 232, 222; RP 3009-10; CP 1795 at ¶ 3. Regarding the measure of damages, the trial court noted that "the benefit of the bargain would have been for Corbis and InfoFlows

to have coordinated on patent applications.” CP 1485; 570. The jury could have reasonably determined that the harm implicated by Corbis’ wrongful conduct here was injury to InfoFlows from the fact of Corbis’ patent application.²⁰ As the trial court held, Corbis’ patent application covered what the jury determined was InfoFlows’ technology. CP 1741 at ¶ 22; see also RP 665-71 (Exs 206, 207).

The jury could have concluded that the harm it was remedying was Corbis’ filing of a patent application that necessarily impacted InfoFlows’ own patent application and, when issued, would give Corbis a monopoly to the extent of its patent.²¹ The award was to remedy InfoFlows’ loss “of the exclusive rights in [its] service that patent protection would provide.” CP 1485. This is a “distinct harm” from InfoFlows’ loss of fees under the Development Agreement, or the lost opportunity or foreclosure of other Jazz Service licensing deals and/or development work. The contract and fraud damage awards are not duplicative. Schnabel, 302 F.3d at 1038-39; Conrad, 119 Wn. App. at 292.

²⁰ In closing, Corbis asked the jury to consider precisely that : “Damaged how? What has the existence of a patent application prevented [InfoFlows] from doing?” RP 2967-68; see also RP 2588-89 (Stone testified: “If I wrote the patent wrong and it included Corbis’ technology, I could prevent Corbis from using the system.”).

²¹ The jury awarded InfoFlows \$9.28 million and one of the jury questions during its deliberations was: “Does the jury have any ability to request a cancellation/withdrawal of one of the patent applications?” CP 574. Corbis’ application has now issued as a patent. See U.S. Patent No. 7,818,261 (issued October 19, 2010).

Corbis did not commit “a single wrong”, and the damages measures (and resulting awards) did not redress the “same legal harm”. Br. 29-30. Evidence was presented from which the jury could have concluded that each of Corbis’ wrongful acts resulted in three distinct harms to InfoFlows. The contract and fraudulent misrepresentation instructions did not “both allow[] the jury to award InfoFlows the benefit of its bargain *under the Development Agreement*.” Br. 27 (emphasis supplied); CP 554; 570. The trial court rejected Corbis’ argument: “the benefit of the bargain would have been for Corbis and InfoFlows to have coordinated on patent applications.” CP 1485. This measure is entirely distinct from fees “InfoFlows could have expected to have earned had both side[s] performed under the contract in good faith.” CP 1485; 554. The jury’s different awards reflect this difference. CP 526.

Finally, Corbis attempts to reframe the damages measure for fraudulent inducement to assert it awarded InfoFlows “claimed lost business opportunities” that were “premised on” repudiation of the Development Agreement. Br. 28-30. But this ignores the fact that Corbis engaged in more than one wrongful act. Corbis breached the parties’ contract and breached its duty of good faith and fair dealing, and Corbis also and separately failed to disclose its secretly patent application. The jury could have concluded these two acts caused two separate harms to

InfoFlows: (i) loss of software development fees owed and those it could have earned (had Corbis performed under the contract in good faith), and (ii) forgoing other business opportunities having been induced to enter into the contract. The award for the latter was not “premised on” repudiation (Br. 28-29); there was evidence from which the jury could have concluded it was premised on a separate wrongful act. As the trial court concluded: “fraud in the inducement was not alleged as a defense to Corbis’ contract claims, but rather as a separate claim with damages distinct from contract damages. CP 1805 at ¶ 11; emphasis supplied.

Corbis’ assertion also cannot be reconciled with the instruction. The jury was instructed to award “all such damages as naturally and proximately resulted from the fraud.” CP 565. InfoFlows did not have “claimed lost business opportunities”; nor did this measure award such. Br. 28. The instruction provided the jury with *three* factors that it “*may*” consider in calculating InfoFlows’ damages from having entered into the Development Agreement due to Corbis’ failure to disclose facts related to its patent application. CP 565. The possibility of other business opportunities was only one factor. Moreover, that factor did not require that the jury award lost opportunities or lost profits; it merely allowed the jury to consider “*the likelihood* that InfoFlows would have secured other business opportunities had it not entered into the Development

Agreement.” CP 565; emphasis supplied. The jury awarded \$7 million pursuant to this instruction, even though it heard evidence of, e.g., Corbis’ valuation of InfoFlows’ service as high as \$20 million per year. Ex. 188. The fact that the jury awarded less than half that could suggest the jury applied a discount to reflect risks associated with InfoFlows procurement of other business. Regardless, Corbis’ assertion that this measure awarded InfoFlows damages “premised on” repudiation is meritless.

D. THE COURT PROPERLY INSTRUCTED THE JURY

Where an instruction correctly states the law, “the court’s decision to give the instruction will not be disturbed absent an abuse of discretion.” Singh v. Edwards Lifesciences Corp., 151 Wn. App. 137, 151 (2009).

1. The instructions for the fraud claims were proper.

There is no Washington pattern jury instruction regarding fraud damages. Instruction No. 38 (CP 570) stated a measure of damages for fraudulent misrepresentation and applied a “benefit of the bargain” measure consistent with the law as to affirmative misrepresentations. Corbis has no argument regarding Instruction No. 38, which is consistent with the instruction Corbis proposed. Compare CP 411 with CP 570.

Instruction No. 33 (CP 565) stated a different measure of damages for fraudulent inducement by concealment. It reflects the applicable and relevant law regarding the need for a flexible damages measure where

contracts for services are induced by fraud.

In a run-of-the-mill fraud case, the misrepresentation concerns the value of tangible real or personal property, and “the difference between the represented value and the actual value can be . . . readily determined and demonstrated.” Chapman v. Marketing Unlimited, Inc., 14 Wn. App. 34, 38 (1975). In such a case, the “benefit of the bargain” measure of damages is appropriate.²² But in some fact contexts, a “benefit of the bargain” measure of damages is inapt and cannot adequately compensate a plaintiff. Courts from numerous jurisdictions have found that the benefit of the bargain is “ill-suited” to claims for fraudulent inducement of contracts concerning services and a “flexible” approach is necessary to insure that a plaintiff is fully compensated for the fraud. Chapman, 14 Wn. App. at 38-40 (citing cases). “[W]here the ‘benefit of bargain’ and ‘out of pocket’ rules are inappropriate, the plaintiff will be awarded damages for all losses proximately caused by defendant’s fraud. Id. Among the cases cited by Chapman is Espaillet v. Berlitz, 383 F.2d 220 (D.C. Cir. 1967). In Espaillet, the court held that for a contract for services was induced by fraud, the plaintiff “should have the benefit of a rule which will allow her to measure her loss by first determining the

²² An alternative and related measure of fraud damages sometimes used is the “out of pocket” rule, *i.e.*, the “the difference between the amount paid or value of the thing given in exchange and the actual value.” Salter v. Heiser, 39 Wn.2d 826, 833 (1951).

value of the contract” and “the worth of her services is one element of that value.” 383 F.2d at 223.²³ Further:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate[.]

Id at 222-23.²⁴ The trial court’s Instruction No. 33 (CP 565) was appropriate under the applicable law.

2. The duty-to-disclose instruction was proper.

Corbis asserts the trial court erred in giving Instruction No. 32 (CP 564). Br. 44-46. But Instruction No. 32 was a correct statement of the law under the evidence; the duty to disclose does not arise solely within

²³ Other factors include (a) the value of the plaintiff’s services to the defendant, (b) the plaintiff’s qualifications, and (c) her earning power in various capacities reasonably related to the nature of the contracted services. 383 F.2d at 223. See also Hocks v. Hocks, 95 Ore. App. 40, 46 (1989) (“When the alleged fraud does not involve the sale of property, the proper measure of damages must be flexible to compensate the plaintiff for whatever loss he has suffered.”); Elizaga v. Kaiser Foundation Hospitals, Inc., 259 Ore. 542, 549 (1971) (benefit of the bargain and out of pocket measures inapplicable to misrepresentation claim regarding employment contract).

²⁴ Other courts have found that employees are entitled to the value of their employment contract even where they are terminable at will, have no guarantee of continued employment and have been terminated. See Berger v. Security Pacific Information Systems, Inc., 795 P.2d 1380, 1385 (Colo. App. 1990) (at-will employee entitled to recover what she would have earned absent termination); Walsh v. Ingersoll-Rand Co., 656 F.2d 367, 371-72 (8th Cir. 1981) (rejecting defendant’s objection that measure of damages was too speculative because contracts were terminable at will and plaintiffs therefore had no right to future earnings).

fiduciary relationships. Washington has adopted Section 551 of the Restatement of Torts. See, e.g., Colonial Imports, Inc. v. Carlton Northwest, Inc., 121 Wn.2d 726, 731-33 (1993) (§551(2)(b) creates a duty “which is wholly independent from the fiduciary relationship discussed in § 551(2)(a)”); Favors v. Matzke, 53 Wn. App. 789, 796 (1989). Section 551 is not new law in Washington; it extends back in time more than six decades. More recently, the Washington Supreme Court described certain circumstances under which the duty to disclose arises:

The duty to disclose in a business transaction arises if imposed by a fiduciary relationship or other similar relationship of trust or confidence *or if necessary to prevent a partial or ambiguous statement of facts from being misleading.*

Van Dinter v. Orr, 157 Wn.2d 329, 334 (2006) (emphasis supplied).

Corbis cites Colonial Imports for the proposition that “[s]ome type of special relationship must exist before the duty will arise.” Br. 44-45. But a fiduciary or like relationship is only one of the circumstances effecting a duty to disclose under Section 551(2). “[B]y the clear terms of the Restatement, a duty to disclose can be found outside of the fiduciary context[.]” Colonial Imports, 121 Wn.2d at 731-32. Thus, Corbis’ Proposed Instruction No. 35 mischaracterized the law. CP 297.

Further, Colonial Imports specifically cited with approval Oates v. Taylor, 31 Wn.2d 898 (1948), which is apposite and illuminating:

[T]he duty to speak does sometimes arise when the parties are dealing at arm's length. That duty arises where the facts are peculiarly within the knowledge of one person and could not be readily obtained by the other[.]

Oates, 31 Wn.2d at 904. Corbis' proposed instruction suggests otherwise and does not accurately reflect the law for this additional reason. CP 297. The trial court properly refused to give Corbis' instruction.

The trial court's Instruction No. 32 was an accurate statement of the law given the evidence in this case. Who owns or would own which intellectual property was a matter of material importance in the parties' discussions prior to and regarding the Development Agreement. Corbis knew that InfoFlows was concerned about its IP and this was an important factor in working with Corbis. Stone raised the issue of patents, sought agreement to coordinate, and confirmed the agreement with Corbis. E.g., RP 2578-81 (Ex 201); Ex 232; RP 2656-57; see also Ex 276. Yet, Corbis filed a non-public application on a "method and system for managing licenses to content" in January 2006. Ex 222. Mitchell's agreement to coordinate on patents was, at a minimum, a partial or ambiguous statement of fact that was misleading. Paragraph 1 of Instruction No. 32, based on Section 551(2)(b) and Comment c, was appropriate.

Paragraph 2 of Instruction No. 32 was also appropriate. It was based on Section 551(2)(e), Comment 1 and Oates, Colonial Imports and

Van Dinter). Corbis knew that InfoFlows was trying to build its business based on the Jazz Service platform (e.g., CP 1795 at ¶ 2), and Corbis’ asserted invention and ownership of a license management system via the patent application was a fact “basic to the transaction” about which Corbis knew InfoFlows was mistaken. E.g., Exs 277; 49. Corbis’ plans to file that patent application and the non-public application itself were facts “peculiarly within the knowledge of [Corbis]” and InfoFlows had no “means of acquiring the information.” Instruction No. 32 correctly states the law given the evidence and the trial court did not abuse its discretion.

3. The privilege instruction was proper.

The trial court instructed the jury regarding attorney-client privilege. CP 537. Corbis contends the court should have given its proposed instruction, although it does not claim that the instruction given fails to accurately state the law. Br. 49. But Corbis argues that the verdict was somehow “tainted by speculation” about what was in redacted trial exhibits.²⁵ Id. Neither the record evidence nor the law support Corbis.

For context, there is Stanger v. Gordon, 244 N.W.2d 628 (Minn. 1976), which Corbis cites. Br. 49. Counsel “asked redundant questions designed to force the witness to assert privilege” and he referred to

²⁵ Three of Corbis’ primary witnesses were lawyers. Many trial exhibits relating to these witnesses were redacted for privilege. Corbis claims that InfoFlows’ counsel “repeatedly encouraged the jury to speculate” about assertions of privilege. Br. 48.

“missing evidence,” alluded to Watergate, referenced the privilege assertion and suggested a cover-up. *Id.* at 631. The record here is in stark contrast. None of the examples Corbis offers support its argument.

Two of these concern examinations about a partially-redacted exhibit that is stamped “Privileged Material Redacted.” Counsel clarified that this designation means only that there has been a redaction based on an assertion of privilege. RP 922-27 (Ex 332); RP 995-97 (Ex 233).

The third cite concerns a Corbis witness being questioned about why he sent materials prepared by Stone to Corbis’ patent counsel. The witness gave a generic answer about keeping counsel apprised, and InfoFlows’ counsel did not inquire further. RP 1371-74.

The fourth cite involves questions of Weiskopf about a non-privileged email from Corbis’ outside counsel to Stone concerning an apparent communication from Weiskopf. RP 1430-33 (Ex 65). And the fifth cite is to InfoFlows’ closing. InfoFlows’ counsel does not comment on Corbis’ claims of privilege nor is there supposition about the substance of redacted communications. InfoFlows does, however, critique Corbis’ attorneys for enabling the improper efforts to obtain InfoFlows’ IP and facilitating Corbis’ fraud by. RP 3009-17.

The jury instruction given accurately states the law. Corbis cites no Washington authority mandating the “cautionary” instruction it proposed – and InfoFlows is unaware of any. There is no reversible error.

E. THE FRAUD CLAIMS ARE NOT PRECLUDED BY THE DEVELOPMENT AGREEMENT OR THE ECONOMIC LOSS DOCTRINE

Corbis asserts that the judgment on both fraud claims should be vacated under the economic loss doctrine because the fraud claims “arise out of” and “were inconsistent with” the Development Agreement. Br. 4, 35. Yet Corbis acknowledges that the contract “contains no obligation on Corbis to jointly patent” the license management system with InfoFlows, or “to disclose Corbis’ own patent applications.” Br. 38. This recognition emphasizes that the fraud claims were not within the scope of the contract; rather, they were based on *independent duties*. They were thus not barred by the contractual integration clause or the economic loss rule.

1. Corbis waived argument based on the economic loss rule and as to fraudulent inducement.

This is the first time Corbis has raised the economic loss doctrine. In its CR 50 motions, Corbis argued only that the integration clause barred InfoFlows’ fraudulent misrepresentation claim. RP 2930-32; CP 689-94. It did not argue economic loss and it did not make any argument as to the fraudulent inducement claim. In fact, Corbis expressly clarified that it was *not* making an argument as to that fraud claim. RP 2930; CP 690, n.1.

For purposes of appeal, Corbis has waived argument based on economic loss *or* as to the fraudulent inducement claim.

2. The trial court properly denied Corbis' CR 50 motions.

“Judgment as a matter of law is not appropriate if, after viewing the evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences, substantial evidence exists to sustain a verdict for the nonmoving party.” Schmidt v. Coogan, 162 Wn.2d 488, 491 (2007). In denying Corbis' CR 50 motions, the trial court rejected Corbis' argument that an integration clause precluded InfoFlows' fraudulent misrepresentation claim.²⁶ RP 2930-32; CP 1483.

Corbis asserted in its CR 50 motions that Section 6 of the Development Agreement addressed the parties' agreements regarding patent ownership. RP 2930; CP 690; 693-94. On appeal, it similarly asserts that Section 6 addressed “the parties' respective patent rights” and gives Corbis “the exclusive right to patent any work product created under the Development Agreement.” Br. 37-39, 14-15.

In fact, Section 6 provides only that Corbis is the owner of “Work Product” (as that term is defined), that Corbis may seek patents on “Work Product,” and InfoFlows will cooperate with Corbis. Ex 43, § 6. The

²⁶ FMC Technologies, Inc. v. Edwards, 2007 U.S. Dist. LEXIS 42512 (W.D. Wash., June 12, 2007); Helenius v. Chelius, 131 Wn. App. 421, 439-42 (2005).

contract addresses patent ownership only with respect to patents Corbis might file regarding specific “Work Product.” It does not address InfoFlows’ IP or Corbis’ agreement to protect “both” parties’ investments and strategic interests by coordinating on patent issues. Exs 232; 233.

Nor does Section 6 address patent rights regarding inventions that are *not* “Work Product.” “Work Product” was a disputed term, and it was dependent upon, and derivative of, other disputed contract terms (e.g., “System” and “Services”). RP 2932. The verdict confirmed InfoFlows’ understanding of “Work Product” – it did not include the Jazz Service, InfoFlows’ proprietary platform. CP 1740 at ¶ 21; CP 526-27; Ex 77; RP 2644-45; see also Ex 354; RP 2618; CP 1806 at ¶ 15; CP 1741 at ¶ 22. In denying Corbis’ motion, 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 trial court properly denied Corbis’ CR 50 motions on the fraudulent misrepresentation claim.

3. The fraud claims are not barred under the economic loss doctrine.

The economic loss doctrine is inapplicable. The Washington Supreme Court has recently clarified what it deems more aptly named the “independent duty doctrine.” “An injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract.” Eastwood v. Horse Harbor Foundation, Inc., 2010 WL

4351986, *3-9 (Nov. 4, 2010); see also Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc., 2010 WL 4350338, *3-4 (Nov. 4, 2010).

Nomenclature aside, Corbis never made an economic loss argument to the trial court. The court did, however, make a relevant finding when it denied InfoFlows recovery of fees on its fraud claims. CP 1805 at ¶ 11; CP 1472. This was consistent with the court’s ruling that an integration clause does not preclude a fraud claim. The fraud claims did not “arise out of” the contract. The resulting injuries trace back to Corbis’ breach of tort duties arising *independently* of the contract.

The cases Corbis cites are not contrary. In those cases, the misrepresentations at issue were within the scope of the parties’ contract. There was no independent tort duty. Alejandre v. Bull, 159 Wn.2d 674, 686 (2007); Borish v. Russell, 155 Wn. App. 892, 902 (2010); Carlile v. Harbour Homes, Inc., 147 Wn. App. 193, 203-06 (2008).

F. THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY REGARDING CONTRACT TERMS

The ambiguity of contract terms was addressed in motion practice and the Court denied Corbis’ summary judgment motion asserting the absence of ambiguity. RP 3-97; CP 115-16; CP 118-19. Prior to trial, the court heard further argument and issued two orders providing guidance regarding permissible contract-related testimony. CP 365-66, RP 333-44; see also CP 341; RP 107-25; 158-65. In part, the court ruled that:

[P]eople involved in negotiating this contract may testify about what they understood contract terms to mean ... and how they communicated that understanding to the opposing party. They may not testify about promises wholly independent of the written contract. Their testimony must be tied directly to the words on the page. Additionally, surrounding circumstances and subsequent conduct may be considered. RP 343.

Corbis does not claim error as to the trial court's orders, but rather argues that the court erred in its evidentiary rulings at trial. "Decisions involving evidentiary issues lie largely within the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion." Faust v. Albertson, 167 Wn.2d 531, ¶ 34 (2009). Here, the record reflects the court's considered evidentiary rulings. E.g., RP 725-27, 886-88, 2607-08. The court ruled even-handedly, too. Corbis witnesses were allowed to testify about their understanding of contract terms.²⁷ E.g., RP 1159-61; RP 1129-31.

Corbis is incorrect in claiming that the trial court allowed Stone to "repeatedly" testify to his understanding "of the definition of 'Jazz Service.'" Br. 46-47. Indeed, Stone did not testify about the definition of Jazz Service in the Development Agreement in either of the two passages Corbis cites. Further, the parties and the court discussed the distinction between the contractual definition of Jazz Service and what Jazz Service

²⁷ For example, Corbis cites testimony by Stone regarding the absence of the words "plug-and-play" or any related concept in the Development Agreement. RP 2603-04. Corbis' outside counsel offered testimony on the same subject. RP 1827-37.

was in actuality (i.e., functionality and development), and Corbis acknowledged testimony about the latter was appropriate. RP 161-65; see also RP 351-52. The trial court did not abuse its discretion.

V. INFOFLOWS' CROSS-APPEAL

A. CORBIS CONVERTED INFOFLOWS' PROPERTY

Conversion is the willful and unjustified interference with another's property interest which deprives them of possession or limits their available choices for use. In the Matter of Langham, 153 Wn.2d 553, 565-66 (2005). InfoFlows demonstrated at trial that Corbis unjustifiably retained *and* asserted ownership of InfoFlows' proprietary source code.²⁸ E.g., Ex 380. By wrongly asserting ownership, Corbis created uncertainty as to title and limited InfoFlows' ability to license its product or obtain investment to further develop that product. Under Washington law, InfoFlows has demonstrated a claim for conversion and the trial court's post-verdict dismissal of that claim should be reversed.²⁹

²⁸ The law is unsettled as to whether source code is tangible or intangible. Regardless, Washington law recognizes conversion of intangible property. Lang v. Hougan, 136 Wn. App. 708, 718 (2007); Langham, 153 Wn.2d at 565.

²⁹ Corbis argued below that the conversion claim was preempted by copyright and trade secret law. Corbis waived any trade secret preemption defense because it did not make the argument on its CR 50(a) motion. CR 50(b); Karl B. Tegland, WASHINGTON PRACTICE, Vol. 14A (2nd Ed.) at 88. Regardless, InfoFlows' conversion claim is not preempted; it includes "extra elements" of retention and deprivation of InfoFlows' property interest that are not part of copyright or trade secret law. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 49 (1987); LaFrance Corp. v. Wertemberger, No. C07-1932Z, 2008 WL 5068654 *2 (W.D. Wash., Nov. 24, 2008); Carson v. Dynegy, Inc., 344 F.3d 446, 457 (5th Cir. 2003); Berge v. Bd. of Trustees of the Univ. of Alabama, 104

InfoFlows delivered its proprietary source code to Corbis on September 11, 2006. CP 1737; Ex 77. There was evidence that Corbis' staff "accessed and reviewed in detail the proprietary information InfoFlows had provided." CP 1737; Exs 331, 340, 349. The court held that there was "no question" that the source code was "proprietary to InfoFlows." CP 1741. Yet after Corbis terminated the Development Agreement, it refused to return InfoFlows' source code and related materials, claiming they were "Work Product" under the Development Agreement and belonged to Corbis. CP 1738; Ex 380. Corbis further asserted ownership over InfoFlows' code the day after InfoFlows' publicly announced the launch of its first product, claiming that it "uses intellectual property owned by Corbis under the Development Agreement" and demanding that InfoFlows remove the product from its website. CP 1738-29; CP 55 ¶53, Sub No. 45 at ¶61 (CP __). Corbis' assertion of ownership over InfoFlows' source code created uncertainty as to title and constrained InfoFlows from licensing its product or obtaining investment necessary to further develop its product. E.g., RP 2840, 2659-61.

Applying the "older approach" to conversion that was rejected by the Washington Supreme Court in Langham, 153 Wn.2d at 565-66, the trial court held that "InfoFlows failed to establish that it was deprived of

F.3d 1453, 1463 (4th Cir. 1997); Shmueli v. Corcoran Group, 802 N.Y.S.2d 871 (2005); .

its source code,” ostensibly because Corbis only had copies of InfoFlows code and documentation. CP 1483. But the court’s holding ignores Corbis’ assertion of ownership over the code. By retaining a copy of the code *and* asserting ownership over it, Corbis deprived InfoFlows of its ability to fully utilize its code and the product it was developing. Such deprivation supports a conversion claim under the “modern view.” Id.

In Ali v. Fastners for Retail, Inc., 544 F.Supp.2d 1064 (E.D. CA, 2008) the plaintiff alleged that the defendant was liable for conversion because it had unjustifiably accessed and copied files containing the plaintiff’s proprietary source code. The court held that the plaintiff pled sufficient facts to establish a conversion claim because: (1) the source code was a well defined interest; (2) plaintiff had exclusive ownership and controlled access to the code; and (3) *the plaintiff had a legitimate claim to its exclusivity* because he had invested a substantial amount of time, effort and resource in creating the source code and keeping it private. Id. at 1072. Washington has adopted this modern approach to conversion noting that the “older approach,” which focuses exclusively on whether the plaintiff is deprived of possession of his property, is “archaic and formulistic,” and is “misguided when applied to intangible property”. Langham, 153 Wn.2d at 565-566. In contrast the “modern view” finds sufficient deprivation where the conversion has limited the owners

“available choices” to use their property. Id.

The cases relied on by the trial court in support of its holding are inapplicable because they address the mere retention of copies of the plaintiff’s property. None of the plaintiffs in the cases relied on by the court demonstrated that the defendants’ actions interfered with their ability to use their property in any way. Internet Archive v. Shell, 505 F.Supp.2d 755, 762-63 (D. Col. 2007) (deprivation was defendant’s copying of a public website); Calence, LLC v. Dimension Data Holdings, No. C06-0262RSM, 2007 WL 1526349 *7 (W.D. Wash. 2007) (plaintiff failed to establish deprivation of beneficial use); Furash & Co. v. McClave, 130 F.Supp.2d 48, 58 (D.C. 2001) (retention of copies of documents did not interfere with ability to use converted information). None of the cases cited by Corbis or the court address the situation here, where Corbis’ retention of *and* assertion of ownership over InfoFlows’ source code deprived InfoFlows of its ability to fully utilize its product.

B. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE JAZZ SERVICE ADVANCE

In 2007, Corbis moved for summary judgment, seeking return of a \$500,000 advance license fee for Jazz Service. Ex 43 (§9). Corbis argued that the Development Agreement required return of the advance if “the parties do not enter into a Jazz Service Agreement on or before August 1, 2006” (id.) and this was “unrelated to and independent of” InfoFlows’

development of software applications under the contract. Sub No. 86 at 5:1 (CP ___). The court erred in granting Corbis' motion. CP 102-05. "[T]o determine whether covenants [are] dependent or independent, the court must look to the contract as a whole to discover the intent of the parties." Esmieu v. Hsieh, 20 Wn. App. 455, 460 (1978). Courts will construe covenants to be dependent unless the contrary intention appears. Ihrke v. Continental Life Ins. & Inv. Co., 91 Wash. 342, 352 (1916).

Here, the central purpose of the Development Agreement was to develop software applications for Corbis. The contract required that the software applications "operate on" and be "enable[d]" by InfoFlows' Jazz Service. Ex 43 at §§6(b), 9. The contract acknowledged that InfoFlows was continuing to build the Jazz Service. Id. at §9. The Development Agreement thus provided for an advance on the license as funding for further development of the Jazz Service, which, among other things, Corbis would necessarily license for use as the platform to enable its applications. Id.; see also Exs 210, 228, 229, 234; CP 1736.

There could be no final product for Corbis' use without a license agreement for to use the Jazz Service.³⁰ In this context, the contract provision providing for a refund of the advance if a license agreement is

³⁰ CP 1736-37 at ¶ 7; see also RP 2599-06, 1990-91, 2091.

not entered into by August 1, 2006 is a dependent covenant.

The record demonstrates the interdependency of the Corbis applications and the Jazz Service and necessary license (e.g., 77, 350, 354, 361), as well as Corbis' failure to act in good faith and its effective waiver of the August 1, 2006 date. Ex. 81 (Corbis' "first draft" of Jazz Service Agreement dated September 20). The jury found that Corbis breached its duty of good faith and fair dealing. This breach was premised on evidence of Corbis' bad faith performance of its obligations, e.g., withholding "acceptance" of deliverables (and payment to InfoFlows) and inventing a "for cause" termination – all contrary to Corbis' own internal documents. The court's initial decision was erroneous and the evidence presented at trial and the verdict confirm that the claim was wrongly decided.

VI. CONCLUSION

The Judgment should be affirmed with two exceptions: InfoFlows' conversion claim and the associated damages should be reinstated, and the summary judgment in favor of Corbis on the Jazz Service advance fee should be reversed and, instead, judgment entered for InfoFlows on this claim. Pursuant to RAP 18.1 and the Development Agreement, InfoFlows should be awarded its fees on appeal as the prevailing party.

RESPECTFULLY SUBMITTED this 8th day of December 2010.

WIGGINS & MASTERS, P.L.L.C.

SAVITT BRUCE & WILLEY LLP

By: Charlie Wiggins by son

By: Stephen C. Willey

Charles Wiggins, WSBA #6948

Stephen C. Willey, WSBA #24499
Michele L. Stephen, WSBA #39458

Attorneys for Respondents and Cross-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the attached document – RESPONDENTS’ BRIEF AND CROSS-APPELLANT INFOFLOWS OPENING BRIEF – to be hand delivered to the attorneys of record listed below:

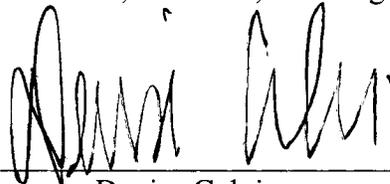
Howard M. Goodfriend
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Attorneys for Corbis Corporation

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

DATED this 8th day of December 2010, at Seattle, Washington.



Denise Colvin

APPENDIX A



Digital Rights Management System Using Handle System

6/1/04

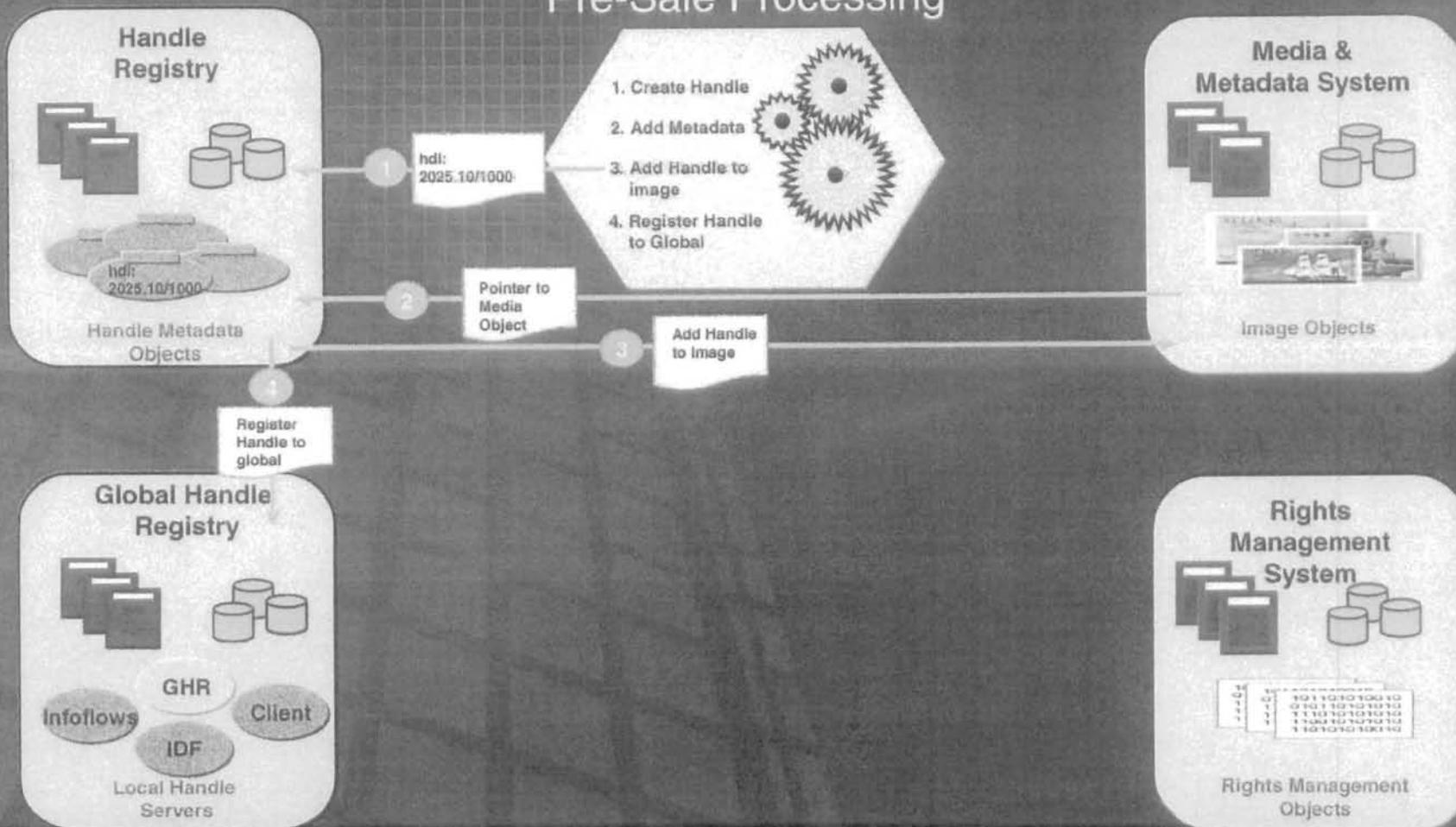
Steve A. Stone
InfoFlows Corporation

License Management Service

- Elevator pitch - Service that monitors and validates licenses for images used in the internet
- Target markets – Professional image, video and music licensing industry
- Business model – Service fee (flat fee or percentage of recovery)
- Hurdles – Low
 - Technology is understood
 - Current products ineffective
 - Industry is unconsolidated.
- Business Value Proposition
 - Recovery of lost licenses
 - Business intelligence of image use

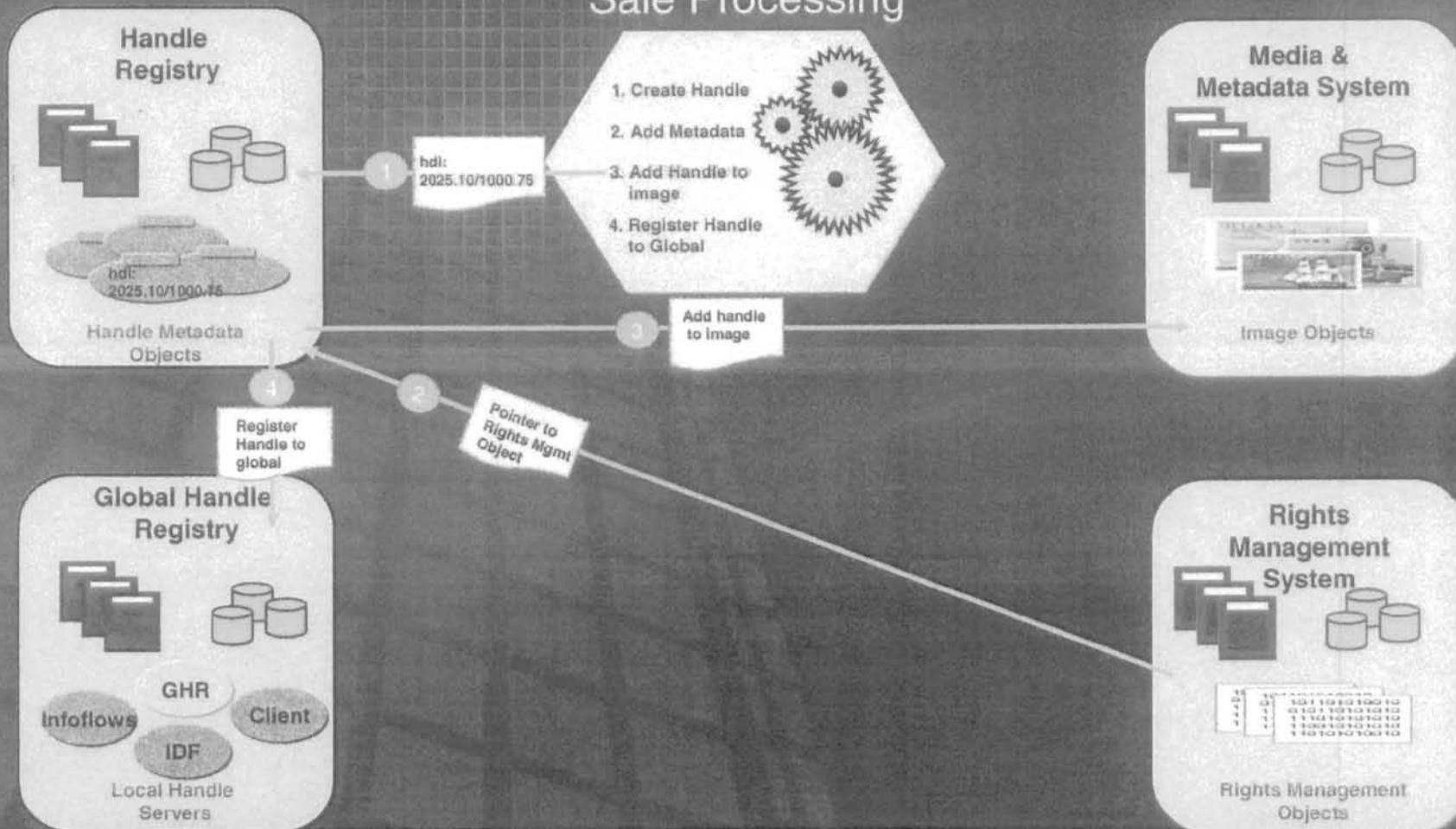
License Compliance Service

Pre-Sale Processing



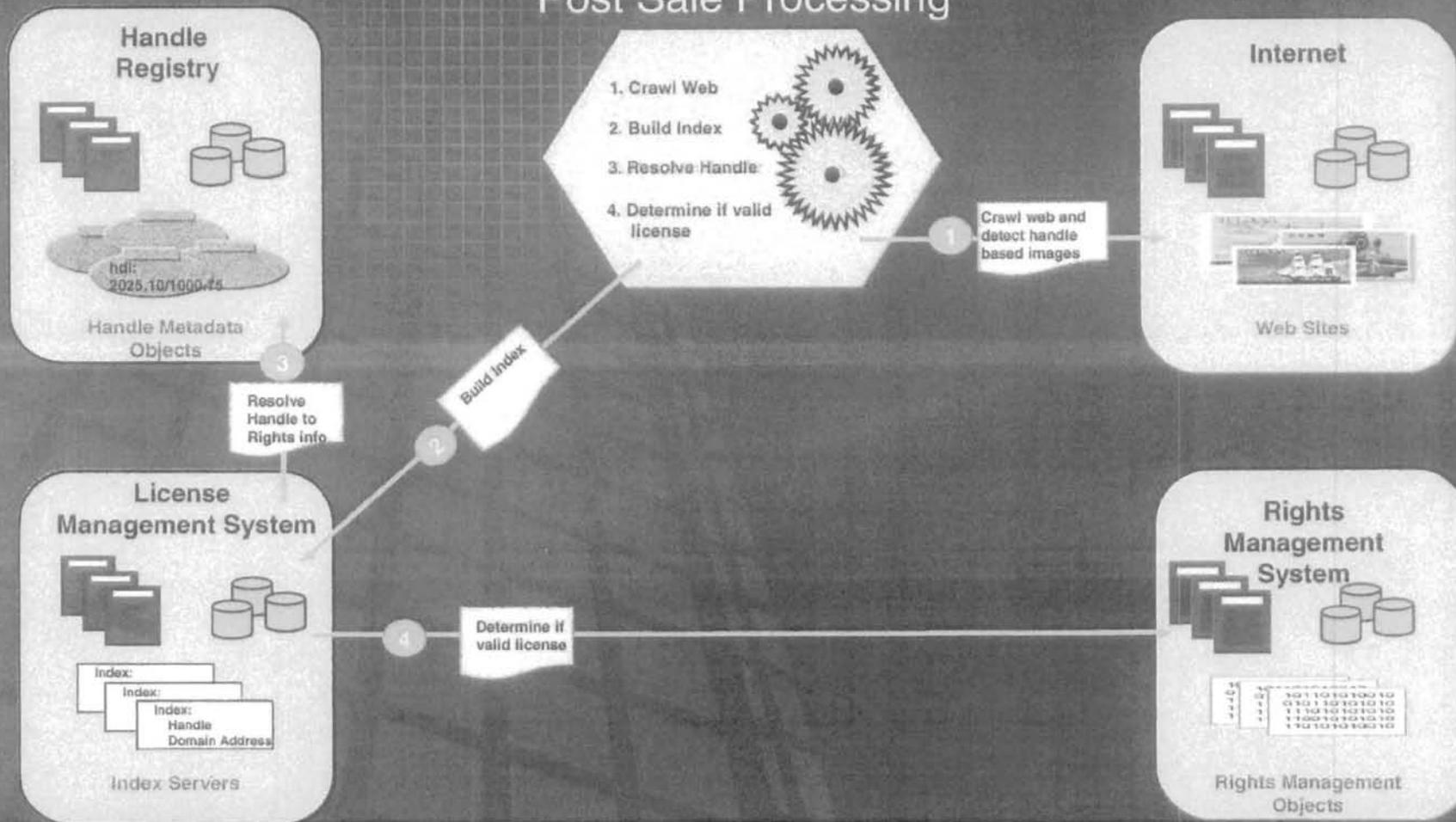
License Compliance Service

Sale Processing



License Compliance Service

Post Sale Processing



Next Steps

- Build a prototype of a distributed repository collection using handles as links to images

Infoflows

Products and Services

InfoFlows

What is the problem?

- Managing information in the Net over very long periods of time – e.g. centuries or more
- Dealing with very large amounts of information in the Net over time
- When information, its location(s) and even the underlying systems may change dramatically over time
- Respecting and protecting rights, interests and value

Digital Object Architecture

- **Digital Objects (DOs)**
 - Structured data, independent of the platform on which it was created
 - Consisting of “elements” of the form <type,value>
 - One of which is its unique, persistent identifier
- **Resolution of Unique Identifiers**
 - Maps an identifier into “state information” about the DO
 - Handle System is a general purpose resolution system
- **Repositories**
 - From which DOs may be accessed
 - And into which they may be deposited
- **Metadata Registries**
 - Repositories that contain general information about DOs
 - Supports multiple metadata schemes
 - Can map queries into unique DO specifications (via handles)

What is a Digital Object

- **Defined data structure, machine independent**
 - Consisting of a set of elements
 - Each of the form <type,value>
 - One of which is the unique identifier
- **Identifiers are known as "Handles"**
 - Format is "prefix/suffix"
 - Prefix is unique to a naming authority
 - Suffix can be any string of bits assigned by that authority
- **Data structure can be parsed; types can be resolved within the architecture**
- **Associated properties record and transaction record containing metadata and usage information**

Handle System

- **Distributed Identifier Service on the Internet**
 - First General Purpose Resolution system
 - Used to locate repositories that contain digital objects given their handles
 - Optimized for speed and reliability
 - Open, well-defined protocol and data model
 - Provides infrastructure for application domains, e.g., digital libraries, electronic publishing
- **Accommodates interoperability between many different information systems**
 - DNS was demonstrated on the Handle System in preparation for Y2K
 - Can support ENUM, RFID, and more
- **Enforces unique names**
 - Enables association of one or more typed values, e.g., URL, with each name

Attributes of the Handle System

- The basic Architecture of the Handle System is flat, scaleable, and extensible
- Logically central, but physically decentralized
- Supports Local Handle Services, if desired
- Handle resolutions return entire “Handle Records” or portions thereof
- Handle Records are also
 - digital objects
 - signed by the servers
 - doubly certificated by the system

InfoFlows

Core Technologies

- **Windows 2003 and Longhorn Handle Server SDK.**
 - Enterprise ready
 - Native port to Windows 2003 and Longhorn – runs as a service.
 - Windows 2003 UI administration – Built into MMC as a snap-in
 - Windows 2003 event management – Built into the event manager
 - Windows based Handle Admin Tool
- **Windows SQL Server 2003 and Oracle Database 10g SDK**
 - Integration into SQL Management UI
 - Integration into contingency management services

InfoFlows

Core Handle Resolution Solutions and Services

- **Handle System in a Box**
 - Intranet – Leading fortune 500 knowledge work companies
 - Internet – DNS companies
 - Support Services
 - Windows SQL Server 2003/Longhorn and SQL Server
- **Resolution Rights Licenses Management**
 - Prefix Management
- **Registration, Resolution and Repository Services**
 - Services for companies that choose not to host their own resolution services. Global Server Mirror site – West Coast
- **Global Handle Registry**
 - Global Server Mirror site – West Coast
 - Running on Windows 2003 and SQL Server
 - Including redundancy management system.
 - Administration

InfoFlows

InfoFlows

APPENDIX B

From: Erling Aspelund
Sent: Wednesday, November 16, 2005 3:27 PM
To: 'steve.stone@infoflows.com'
Cc: David Weiskopf
Subject: Notes from today's meeting
Attach: Notes - Meeting with InfoFlows(16NOV2005).doc

Steve:

Thanks again for our meeting earlier. Attached are David's notes and mine combined.

Talk soon!

—EA

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Meeting with InfoFlows
16 NOV 2005

Opening Remarks

1. Business Value Proposition

a. Assertions vs. Assumptions

- i. Not sure what overall industry problem equates, or even how we compare
- ii. Industry Analyst (who covers Getty?) Have we at least looked and compared our assumptions/assertions against what is there? [REDACTED] [InfoFlows to consider as well]
- iii. Financial Analyst [REDACTED]
 - 1. Audit Ability – [Interview Sue McDonald on this issue]
- iv. ROI
 - 1. Hard ROI
 - a. If we do this, we will spend \$Z to \$W
 - b. We *do* know we spend \$X to get \$Y now
 - c. RF vs. RM
 - i. Only company that can police RF and show that that instance of the RF came from Corbis (largest growing market)
 - 2. Soft ROI
 - a. Business intelligence
 - b. New customers
 - c. Existing customers using technology for other purposes (similar search)
 - d. Inventory Control
- b. What is the problem?
- c. Identified lost revenue opportunity
- d. How much money do we need?

2. Demonstration

a. Team

- i. Jeff - Programmer (MS Project)
- ii. Eddie – Designer
- iii. Carlo – Project Manager

b. Solid Proof of Concept

- i. What is the first release's most important feature – Need to showcase this.

ii. Elements

1. Demo v. Future Iterations

2. eMotion integration point possibilities [REDACTED]

3. Parts

a. Self-Compliance ('Rights Assurance to Detect Handle')

- i. [Need to identify person for UI-External consulting]
- ii. Provide API-access to InfoFlows
- iii. Provide evaluation box from PixLogic to InfoFlows
- iv. Conflate integration a number of concepts (e.g. automated online sales)
 1. Can have lots of features. David and EA to brainstorm and prioritize scenarios.

v. Handle injection – example and testing

b. Corbis Enabled Enforcement

[REDACTED]

3. Implementation

- a. What are the patentable items? [Need to Consider How to Proceed – Could Be Sticky]
- b. Why handles (and not something else)? What is Microsoft doing? [REDACTED]
- c. Why visual fingerprinting? (In addition? Instead of?) How do the vendors differ?

- d. General architecture review (from one who has (i) passionate about idea, (ii) credibility and (iii) understands it) [Need to Identify]

Next meeting scheduled for November 30th at InfoFlows.

APPENDIX C

From: Jacqueline Ryall <Jacqueline.Ryall@corbis.com>
Sent: Monday, February 6, 2006 9:34 AM
To: Jim Mitchell; David Weiskopf
Subject: RE: Spam: Hi level terms of a relationship

Privileged Material Redacted

---Original Message---

From: Jim Mitchell
Sent: Monday, February 06, 2006 9:33 AM
To: David Weiskopf; Jacqueline Ryall
Subject: FW: Spam: Hi level terms of a relationship

Privileged Material Redacted

From: Steve Stone [mailto:steve.stone@inflows.com]
Sent: Monday, February 06, 2006 9:17 AM
To: Jim Mitchell
Subject: RE: Spam: Hi level terms of a relationship

Great. See you then. I can have Van available if we need him.

Steve

From: Jim Mitchell [mailto:Jim.Mitchell@corbis.com]
Sent: Monday, February 06, 2006 8:43 AM
To: Steve Stone
Subject: RE: Spam: Hi level terms of a relationship

Steve - why don't you come by at 2:30. I will try to have something ready for us to discuss.

From: Steve Stone [mailto:steve.stone@inflows.com]
Sent: Monday, February 06, 2006 8:33 AM
To: Jim Mitchell
Subject: Spam: Hi level terms of a relationship

Jim,

I wanted to make this short. I embedded the actions. Item nine speaks to the immediate item of getting started. Obviously I am not an attorney so if this is too high level and you want deeper detail, please poke on the areas of concern.

With respect to the proposal, what we agreed that we would like to do is structure an agreement such that:

1. Inflows would license a service to Corbis based on some agreed to annual fee. The action here is to describe in detail what the service is and how we would license it. This is a longer term thing but the net is that it has to meet the vision of what we set and it has to make business sense for both parties from a license sense. We also need to start building out our data center. This cost \$.
2. Inflows integrate the service into the Corbis systems on a WFH basis. The action here is to really understand now your systems and get started. This costs \$.

In order to make this happen, I proposed the following:

1. Corbis would invest \$6M into Inflows in exchange for 20% of the Inflows. This values this at \$30M and I am prepared to show you how we arrived at this number. The \$6M number was not arrived at by happen stance. We calculate though our models that this is what it will take to build the system and operate it until the license fees are in place to pay for the operational costs. This number is inclusive of any licensing of technologies from third parties.

2. Corbis would earmark \$1M – \$2M for the integration work. This is an allocation as we are not yet sure of the entire integration costs as the specific requirements have not been set yet.
3. In advance of the above, Corbis will allocate \$500,000 to this project this week. My reasons for this are that we need to get started.

On Thursday we agreed to:

1. Patent the systems to protect both Corbis and Inflows investments and strategic interests. I like that approach. My action is to detail this some more in another email.
2. Inflows providing our valuation model to Corbis. My action is to provide this shortly.
3. Think of how we would structure something for the short term in order to get started. Our action here is to do a quick contract. One way to structure the \$500K is some type of debt instrument that is paid back when the investment occurs. We can also bill against it for the work for hire. All of the WFH is to be invoiced to Corbis so that you can see what is happening.

I am meeting with my attorney today at 1:00 – 2:00. I can walk over at 2:30 if you would like to meet you.

Regards,
Steve

APPENDIX D

Project Baker
Scenarios using Digital Object Technologies
for New Businesses at Corbis

Steve A. Stone
InfoFlows Corporation

EXHIBIT

STONE 4

Agenda

- Goals
- Landscape
- Customer Assessments
- Results

Landscapes

- Digital Rights Management technologies, workflows, and services will emerge in the next 3-10 years within the professional media world.
- Services based on DRM technologies have the opportunity to increase revenue and profitability for businesses as well as improve the customer experience.
- Early providers of these services will have the potential of changing the competitive landscape in their favor.
- Corbis as a leader in the image rights and clearance industry wishes to develop a strategic advantage by offering new services based on these technologies.

New Services

- **Media management services**
 - Whereby third party image providers sell their content through the Corbis publishing channel.
- **Assignment Services**
 - Whereby customers can work with Corbis to hire commercial photographers for commissioned photo shoots.

Goal

- Given Corbis' goal to be the leader in the image rights and clearance industry:
 - Identify key technologies, strategies and investments that Corbis should make.
 - Identify how digital rights management and digital object identification technology can add value to new service offerings.

Image Rights & Clearance Service

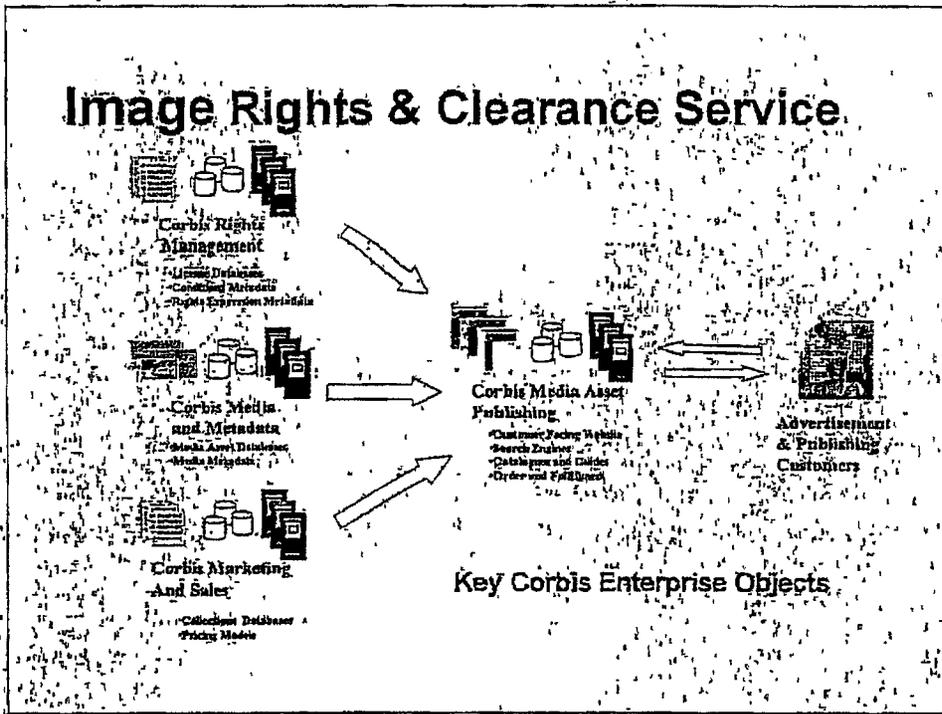
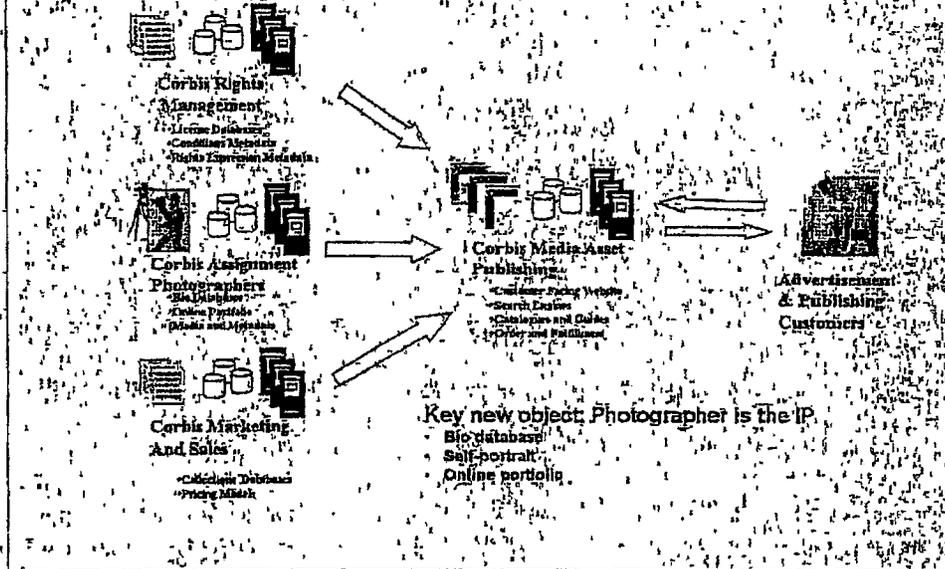
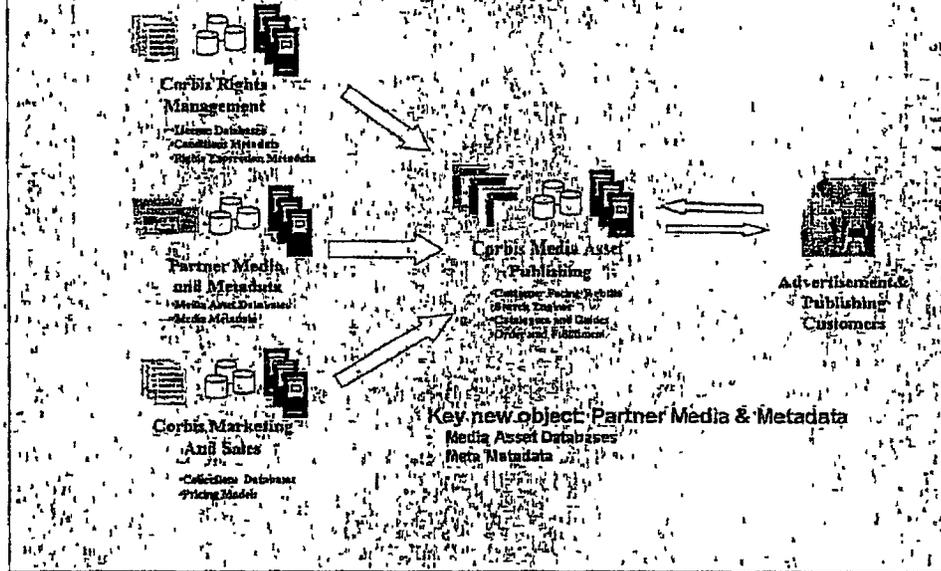


Photo Assignment Service



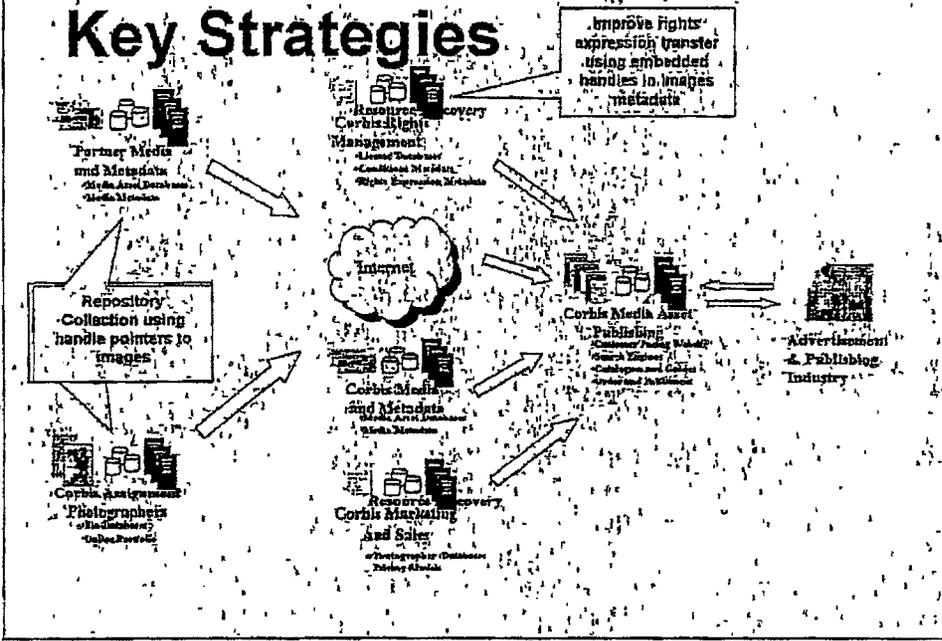
Media Management Service



Observations

- To date, digital rights management has been successful in lowering costs.
 - All three Corbis services should share a common rights management object.
 - Any improvement in rights expression, and potentially rights protection, will then be leveraged across all three businesses.
 - Improving in rights management should begin first with the current image clearance business where opportunity has been identified today. See Project Baker Customer Assessments.
- To date, digital object identifier technologies have been successful in increasing revenue.
 - Scenarios include linking and multi-linking via the handle system.
 - Both an enterprise image rights clearance service and a photo assignment service could use DOI's or Handles to increase revenue but it is not a first order of business requirement.
- A Media Management Service and a Photo Assignments Service should leverage the digital rights platform built based on needs of the current Image Rights Clearance service.
 - A key difference between the Corbis Image Rights Business and a Corbis Media Management Service or Photo Assignment Service is the location of the partner repository database.
 - As a result, both the Media Management Service and the Photo Assignment Service should use DOI's or Handles to link their databases.

Key Strategies



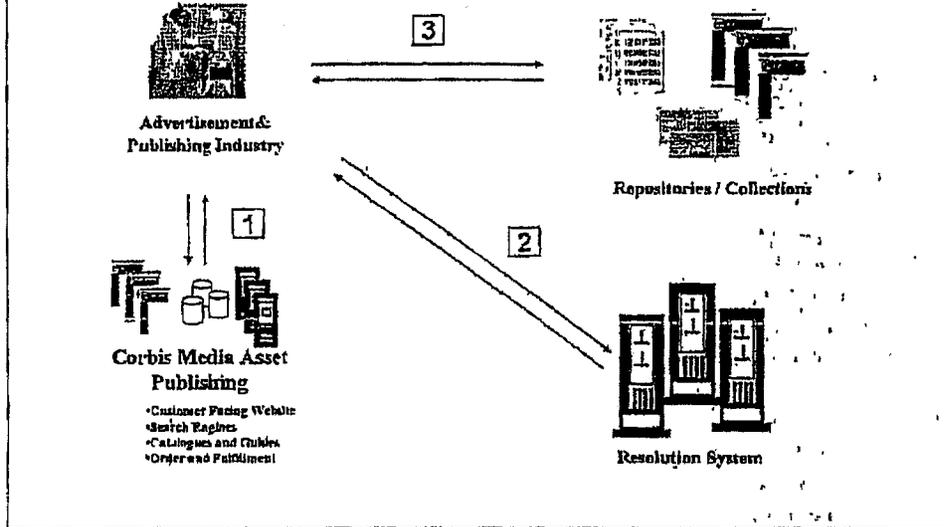
CORDRA

Content Object Repository Discovery & Registration Architecture.

CORDRA is:

- A formal model that can be used to design federations of repositories (the CORDRA reference model).
- A collection of operational systems built from the CORDRA model, including:
 - a prototype implementation of a repository federation, and
 - an operational federation of federations used to combined different CORDRA federations.
- The activities and projects surrounding the definition of the CORDRA model and creation of the operational systems.
- The CORDRA activities are being coordinated by the Advanced Distributed Learning Initiative, (ADL) the Corporation for National Research Initiatives, (CNRI) and the Learning Systems Architecture Lab (LSAL).

Digital Object Resolution in a Federated Environment



Corbis Legal

License Management Discussion

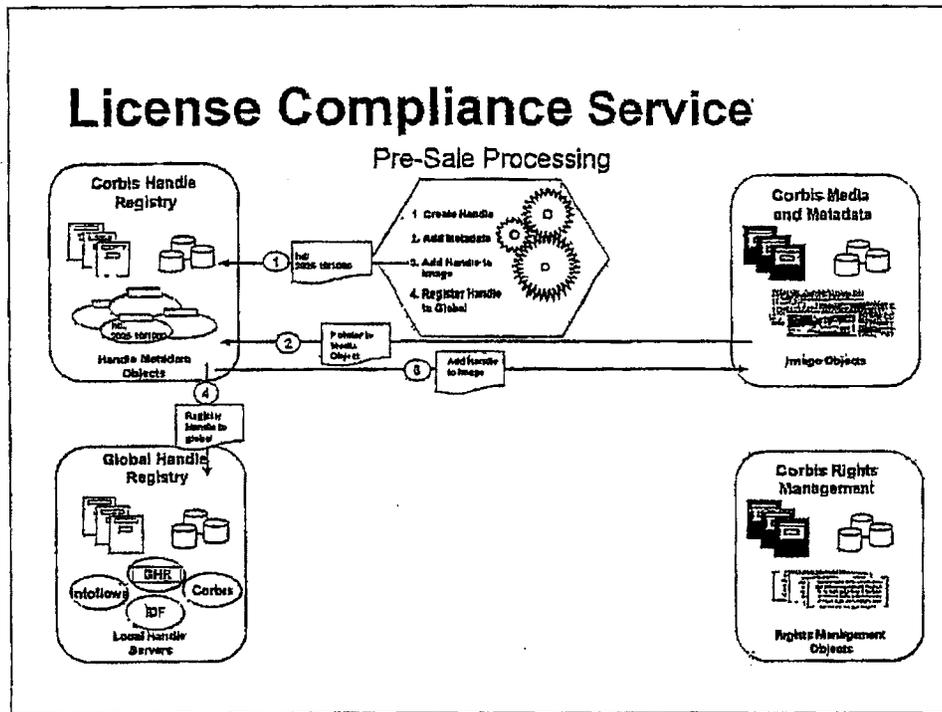
**David Weiskopf
Corporate Attorney**

Corbis License Management Services

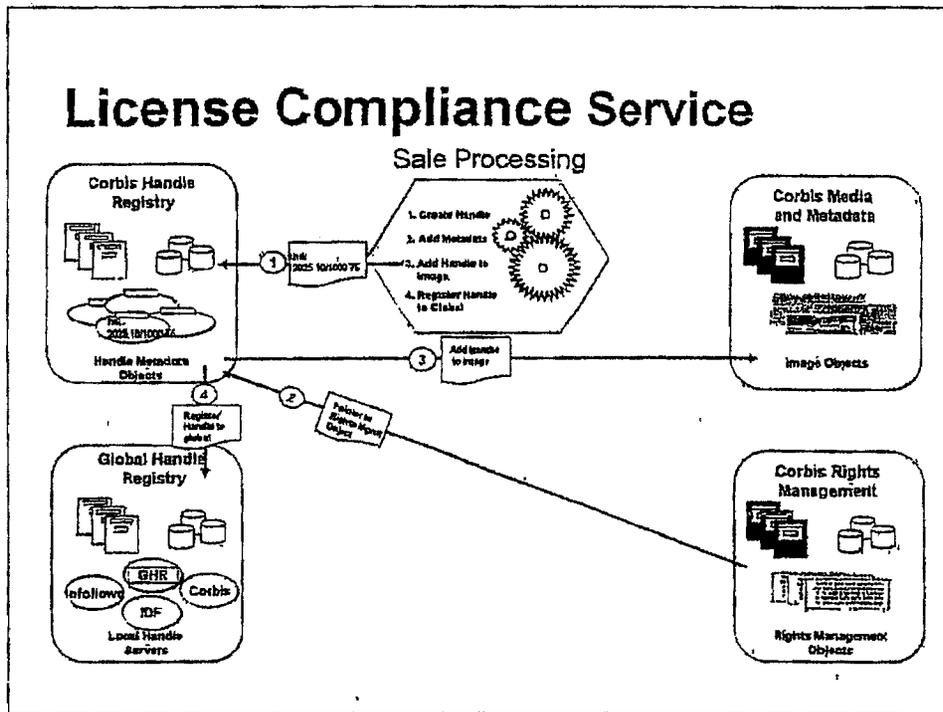
- **Elevator pitch - Service that monitors and validates licenses for images used in the internet**
- **Target market – \$1.5B professional image licensing industry of which 10% may be improperly licensed**
- **Business model – Service fee (flat fee or percentage of recovery)**
- **Hurdles – Low**
 - > Technology is understood
 - > Current products ineffective
 - > Industry is unconsolidated.
- **Business Value Proposition**
 - > Immediate return based on recovery of lost licenses
 - > Strategic advantage for Image Licensing, Assignment and Media Management businesses

License Compliance Service

Pre-Sale Processing

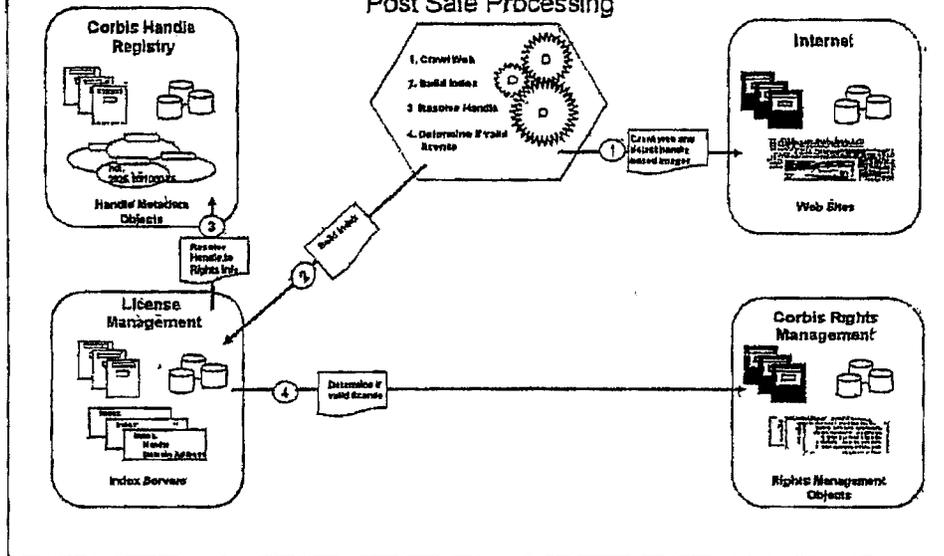


License Compliance Service



License Compliance Service

Post Sale Processing



Next Steps

- **Build a focused solution**
 - **MSN workflow solution to improve rights expression transfer using embedded handles in images metadata**
 - **License Management solution that monitors and validates licenses for images used in the internet**
- **Build a prototype of a distributed repository collection using handles as links to images**

Infloows

Products and Services

What is the problem?

- **Managing information in the Net over very long periods of time – e.g. centuries or more**
- **Dealing with very large amounts of information in the Net over time**
- **When information, its location(s) and even the underlying systems may change dramatically over time**
- **Respecting and protecting rights, interests and value**

Digital Object Architecture

- **Digital Objects (DOs)**
 - Structured data, independent of the platform on which it was created
 - Consisting of "elements" of the form <type,value>
 - One of which is its unique, persistent identifier
- **Resolution of Unique Identifiers**
 - Maps an identifier into "state information" about the DO
 - Handle System is a general purpose resolution system
- **Repositories**
 - From which DOs may be accessed
 - And into which they may be deposited
- **Metadata Registries**
 - Repositories that contain general information about DOs
 - Supports multiple metadata schemes
 - Can map queries into unique DO specifications (via handles)

What is a Digital Object

- **Defined data structure, machine independent**
 - Consisting of a set of elements
 - Each of the form <type,value>
 - One of which is the unique identifier
- **Identifiers are known as "Handles"**
 - Format is "prefix/suffix"
 - Prefix is unique to a naming authority
 - Suffix can be any string of bits assigned by that authority
- **Data structure can be parsed; types can be resolved within the architecture**
- **Associated properties record and transaction record containing metadata and usage information**

Handle System

- **Distributed Identifier Service on the Internet**
 - First General Purpose Resolution system
 - Used to locate repositories that contain digital objects given their handles
 - Optimized for speed and reliability
 - Open, well-defined protocol and data model
 - Provides infrastructure for application domains, e.g., digital libraries, electronic publishing
- **Accommodates interoperability between many different information systems**
 - DNS was demonstrated on the Handle System in preparation for Y2K
 - Can support ENUM, RFID, and more
- **Enforces unique names**
 - Enables association of one or more typed values, e.g., URL, with each name

Attributes of the Handle System

- **The basic Architecture of the Handle System is flat, scaleable, and extensible**
- **Logically central, but physically decentralized**
- **Supports Local Handle Services, if desired**
- **Handle resolutions return entire "Handle Records" or portions thereof**
- **Handle Records are also**
 - **digital objects**
 - **signed by the servers**
 - **doubly certificated by the system**

InfoFlows

Core Technologies

- **Windows 2003 and Longhorn Handle Server SDK.**
 - **Enterprise ready**
 - **Native port to Windows 2003 and Longhorn – runs as a service.**
 - **Windows 2003 UI administration – Built into MMC as a snap-in**
 - **Windows 2003 event management – Built into the event manager**
 - **Windows based Handle Admin Tool**

- **Windows SQL Server 2003 and Oracle Database 10g SDK**
 - **Integration into SQL Management UI**
 - **Integration into contingency management services**

InfoFlows

Core Handle Resolution Solutions and Services

- **Handle System in a Box**
 - Intranet – Leading fortune 500 knowledge work companies
 - Internet – DNS companies
 - Support Services
 - Windows SQL Server 2003/Longhorn and SQL Server
- **Resolution Rights Licenses Management**
 - Prefix Management
- **Registration, Resolution and Repository Services**
 - Services for companies that choose not to host their own resolution services. Global Server Mirror site – West Coast
- **Global Handle Registry**
 - Global Server Mirror site – West Coast
 - Running on Windows 2003 and SQL Server
 - Including redundancy management system.
 - Administration

InfoFlows