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No. 87555-3

SUPREME COURT
OF THE STATE OF WASHINGTON

CORBIS CORPORATION, a Nevada corporation,

Petitioner,

v.

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

Respondents.

REPLY TO ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

Attorneys for Petitioner

ORIGINAL

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I. Introduction.

The Court of Appeals properly affirmed the dismissal of InfoFlows' conversion claim as a matter of law because InfoFlows presented no evidence that Corbis even copied InfoFlows' proprietary software or code, let alone interfered with InfoFlows' possession, control or use of its property. The Court of Appeals' unpublished decision conflicts with no decisions of this Court, the Court of Appeals or, for that matter, other jurisdictions, which have never authorized a conversion claim where the plaintiff's property rights remain unfettered. RAP 13.4(b)(1), (2), (4).

Moreover, InfoFlows' claim that Corbis copied or misappropriated InfoFlows' software is a copyright claim that is preempted by federal law. 17 U.S.C. § 301(a). Finally, InfoFlows had no evidence that it suffered any damages for which InfoFlows had not already been compensated under InfoFlows' \$12.5 million damages award. This Court should deny review of the cross-petition for any, or all, of these reasons.

II. Restatement of Issues.

1. Does a claim for conversion require, at a minimum, that the defendant interfere with the plaintiff's right to possess, use or control personal property?

2. Is a claim that the defendant copied the plaintiff's software preempted by the Copyright Act, 17 U.S.C. § 301(a)?

3. Does a claim for conversion require some evidence of the monetary value of the property interest that was allegedly interfered with?

III. Restatement of Facts.

A. InfoFlows Asserts a Flawed Conversion Claim Arising Out Of the Parties' Underlying Contractual Dispute.

InfoFlows' allegation of conversion arises from the termination of the parties' Development Agreement, signed in June 2006. (Ex. 43) In that agreement, Corbis agreed to pay InfoFlows a total of \$3.95 million upon Corbis' acceptance of a fully operational digital license management system for Corbis' proprietary collection of digital images, known as Boulder Ridge. The Development Agreement called for payments to InfoFlows' upon its successful completion of a series of milestones and Corbis' acceptance of InfoFlows' deliverables. (Ex. 43 § 7)

The second milestone of Phase One of the Development Agreement called for InfoFlows to deliver a working "alpha" demonstration of Boulder Ridge. InfoFlows' "delivered" the milestone by posting software code to a "SharePoint" site owned

and controlled by InfoFlows for Corbis to review and access. (Ex. 332) Corbis reviewed but did not download the computer code that InfoFlows allowed it to access. (RP 1194-95, 1508, 1589-92, 1767) Corbis then rejected the "alpha" demonstration as unacceptable. (RP 1592) After InfoFlows declined Corbis' proposal to amend the Development Agreement to allow InfoFlows more time to deliver acceptable specifications, (Ex. 84), Corbis terminated the Development Agreement on October 12, 2006. (RP 853-57, 862-65; Ex. 122)

Several months later in January 2007, InfoFlows announced the release of its "Fedmark" license management system on its website. InfoFlows described the Fedmark system as a tool for owners of stock images and others to track and monitor the use of digital objects. InfoFlows claimed that Fedmark included most or all of the features that Corbis had paid InfoFlows to develop the Boulder Ridge license management system, using both handles and visual comparison technologies to identify, track, and report digital images on the internet. (RP 2395-97, 2803)

B. The Trial Court Dismissed InfoFlows' Conversion Claim As A Matter of Law Because Corbis Never Interfered with InfoFlows' Possession or Use of Its Property.

On January 22, 2007, Corbis sued InfoFlows and its principal Steve Stone for trade secret misappropriation, breach of contract, and unfair business practices in King County Superior Court. (CP 5) Later that day, InfoFlows sued Corbis for trade secret misappropriation, conversion, breach of contract, breach of the duty of good faith, unjust enrichment, and fraud. (CP 900-917) InfoFlows alleged that Corbis had "stolen" Stone's idea for a license management system, that Corbis had an obligation under the contract and in tort to inform InfoFlows that it had already filed a patent application for its license management system design in the months before the parties negotiated and signed the Development Agreement, and that Corbis fraudulently induced InfoFlows to enter into the Development Agreement by representing that Corbis and InfoFlows would jointly patent the Boulder Ridge license management system design. (CP 321-27, 541)

The actions were consolidated pursuant to CR 42(a). (CP 21-23) The superior court denied both parties' requests for temporary injunctions on May 10, 2007. (CP 28-35) InfoFlows filed

a patent application on its "Fedmark" license management system on August 3, 2007. (RP 2368; Ex. 100)

In a special verdict, the jury awarded InfoFlows damages of \$7 million for fraudulent inducement, \$9.28 million for fraudulent misrepresentation, \$3.25 million for breach of contract, \$16.6 million for conversion, and \$25,000 for unjust enrichment. (CP 525-29) The trial court granted Corbis judgment under CR 50 dismissing InfoFlows' conversion claim as a matter of law because Corbis never interfered with InfoFlows' use of any property, never used InfoFlows' software or code, and never implemented any digital license management system. (CP 1478-79, 1482-83) The trial court otherwise denied Corbis' motions for judgment as a matter of law, remittitur, or a new trial (CP 1483-85), and entered a \$19,055,000 judgment against Corbis, plus prejudgment interest, fees and costs, for a total judgment of \$20,013,593.86. (CP 1810-16) Finding that Corbis had "accessed and reviewed" proprietary information, the court also entered an injunction prohibiting the use of "trade secret and proprietary information and materials regarding the Jazz Service." (CP 1737, 1741) It was undisputed, however, that Corbis did not implement any form of the digital license

management system contemplated by the Development Agreement.¹

The Court of Appeals reversed the \$7 million fraudulent inducement award because it was unsupported by the evidence and because it was duplicative of the \$9.28 million awarded InfoFlows for fraudulent misrepresentation, but otherwise affirmed the judgment in favor of InfoFlows. InfoFlows has not sought review of this aspect of the Court of Appeals decision.

In its unpublished decision, the Court of Appeals also rejected InfoFlows' challenge to the trial court's grant of judgment as a matter of law on InfoFlows' claim of conversion. Citing *In re Langham and Kolde*, 153 Wn.2d 553, 565-66, 106 P.3d 212 (2005), the court held that Corbis did not commit the tort of conversion because Corbis never interfered with InfoFlows' possession of its software or code. (Op. 29-30) InfoFlows seeks review of the Court of Appeals' affirmance of the trial court's judgment as a matter of law dismissing its conversion claim.

¹ As Corbis made no use of the Jazz Service after terminating the Development Agreement, it did not challenge the equitable order on appeal, and InfoFlows made no post-judgment allegations that Corbis failed to comply with it.

IV. Argument Why Cross-Petition Should Be Denied.

A. InfoFlows' Conversion Claim Fails As A Matter Of Law Without Evidence Of Deprivation.

The Court of Appeals correctly held that InfoFlows' conversion claim failed for want of proof that Corbis deprived or interfered with InfoFlows' possession of its property. (Op. 28-30) The Court of Appeals' unpublished decision is consistent with this Court's precedent, see *Phillipos v. Mihran*, 38 Wash. 402, 405, 80 P. 527 (1905) (“[C]onversion is any unauthorized act which deprives a man of his property permanently”); *In re Langham and Kolde*, 153 Wn.2d 553, 564, 106 P.3d 212 (2005) (“Conversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession.”), and does not conflict with any decisions of the Court of Appeals. See *Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 817, ¶ 24, 239 P.3d 602 (2010) (“Conversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.”) (quotations omitted). RAP 13.4(b)(1), (2).

The Court of Appeals properly relied on *In re Langham and Kolde*, 153 Wn.2d 553, 106 P.3d 212 (2005) (Answer 17), to hold that conversion requires an interference with the plaintiff's use or

possession of property. In *Langham*, the wife was awarded a portion of the husband's employee stock options in their divorce. The husband exercised the wife's options and later sold them (at a reduced price), all without the wife's permission. 153 Wn.2d at 563. The Court concluded that stock options were "property" that was converted by the husband's actual exercise of the options belonging to the wife. 153 Wn.2d at 564 ("Conversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession."). Accord, *Potter v. Washington State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008).²

InfoFlows' failure to offer any evidence that Corbis in any way interfered with its "proprietary source code and its related documentation³ and information for the Jazz Service" (Answer 17), is fatal to its claim of conversion. The husband in *Langham* interfered with and deprived his wife of the beneficial interest in her property when he exercised her stock options and kept for himself

² In *Potter*, the Court held that temporary impoundment of a vehicle by the State Patrol was actionable as a conversion. 165 Wn.2d at 78-79. In *Brown*, the Court of Appeals held that the defendant's wrongful receipt and retention of money could form the basis of a conversion claim. 157 Wn. App. at 817-18.

³ The source code developed by InfoFlows pursuant to the Development Agreement Corbis belonged to Corbis. (Ex. 43 § 6(a))

the proceeds of sale. Here, however, InfoFlows failed to show that Corbis took, used, or for that matter, made copies of, anything.

InfoFlows cites emails documenting that Corbis "accessed" InfoFlows' code on a shared web site with InfoFlows' express permission when InfoFlows tendered its "alpha" milestone under the Development Agreement. (Answer 8, *citing* Exs. 77, 331) InfoFlows' tender consisted of placing the source code on a server hosted by InfoFlows. But Corbis never downloaded the code to its own server. (RP 1193-95, 1590-92, 1767) InfoFlows retained full and complete access to the code on its server at all times. InfoFlows also failed to identify any "information related to the Jazz Service" taken by Corbis. (Answer 17) To the contrary, InfoFlows continued to develop its Jazz Service after the termination of the Development Agreement, unhindered by Corbis. (RP 2653-54, 2383, 2396-97)

Because InfoFlows could not establish that Corbis even copied the code, or that it used InfoFlows' Jazz Service in any way, the "modern trend" to allow a claim for conversion for illegally copying computer files, is of no benefit to InfoFlows. The *Restatement*, relied upon by InfoFlows (Answer 19), comports with both the Court of Appeals decision and this Court's settled

precedent: "Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *Restatement (2nd) Torts*, § 222A(1). The Court of Appeals followed this rule by requiring at least some minimal showing that Corbis interfered with InfoFlows' possession and control over its computer code when it was given access to it by InfoFlows.⁴

The Court of Appeals also adhered to this Court's precedent in rejecting InfoFlows' argument that Corbis could be liable for conversion by allegedly limiting InfoFlows ability to "obtain investment," of which there was in any event no evidence whatsoever (Op. 22-23), or by allegedly creating "uncertainty as to title" when it filed the instant lawsuit. (Op. 29) Indeed, this Court long ago rejected InfoFlows' argument that "asserting ownership"

⁴ InfoFlows cites *Aventa Learning, Inc. v. K12, Inc.*, 830 F.Supp.2d 1083 (W.D. Wash. 2011), in which the district court denied a Rule 12(b)(6) motion to dismiss a conversion counterclaim against ex-employees who allegedly formed a new company to compete against KCDL, their former employer, "accessing, copying, download, deleting, or erasing KCDL's electronic records following the termination of their employment." 830 F.Supp.2d at 1092. Under the liberal standard for reviewing allegations in a complaint under Rule 12(b)(6), Judge Robart held that plaintiffs sufficiently alleged that the former employees wrongfully deprived "KCDL of its possession or control over" its electronic files. 830 F.Supp.2d at 1105. Here, by contrast the trial court granted judgment as a matter of law after a trial.

over property in a judicial proceeding is sufficient to establish conversion. In *Martin v. Sikes*, 38 Wn.2d 274, 287, 229 P.2d 546 (1951), the plaintiff leased a dairy farm and purchased a milking machine from the defendant. The parties disputed whether the sale included a pipeline used with the machine. 38 Wn.2d at 274-75. After the lease ended, the defendant obtained a criminal complaint for plaintiff's arrest if he removed either the milking machine or the pipeline. 38 Wn.2d at 275. This Court reversed the trial court's judgment against defendant for conversion based upon the complaint, because "if the wrongful act falls short of a disseisin⁶ of the property, the wrongdoer is not guilty of a conversion." 38 Wn.2d at 287.

The *Martin* Court rejected the plaintiff's conversion claim even though plaintiff's access to his property was actually "interfered with" by judicial process. 38 Wn.2d at 287. Here, by contrast, the superior court *denied* both parties' requests for orders enjoining the other's "use" or "possession" of disputed property. (CP 28-35) Under InfoFlows' faulty reasoning, every party to a commercial lawsuit that asserts an ownership interest in any type of

⁶ Disseisin is defined as: "The act of wrongfully depriving someone of the freehold possession of property; dispossession." Black's Law Dictionary (9th Ed. 2009).

property would be liable for conversion merely by exercising the right to have the courts resolve the dispute. No authority or public policy supports chilling the right to access the courts to peaceably resolve disputes by such an unwarranted extension of liability for the conversion of property.

The Court of Appeals correctly held that InfoFlows' conversion claim failed as a matter of law. This aspect of its unpublished decision comports with this Court's settled precedent and raises no issue of substantial public interest. RAP 13.4(b)(1), (4).

B. Federal Copyright Law Preempts InfoFlows' Conversion Claim Even If Corbis Had Possessed A Copy Of InfoFlows' Code.

Even if Corbis "possessed" InfoFlows' property when, with InfoFlows' express permission, it "accessed" electronic files on a shared site, copying another's software is not conversion, but is, subject to statutory and common law exceptions not relevant here⁶, by definition copyright infringement. Although the courts below did not base dismissal of InfoFlows' claim on this ground, federal copyright law preempts InfoFlows' claim of conversion as a matter

⁶ See, e.g., 17 U.S.C. § 117; *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (fair use doctrine).

of law.

The Federal Copyright Act broadly preempts “[a]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . .” 17 U.S.C. § 301(a). See also 28 U.S.C. § 1338(a). Computer programs and software are protected under the Copyright Act as “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a); see 17 U.S.C. § 101. “[M]ost courts faced with software conversion claims have found those claims preempted.” ***Apparel Business Systems, LLC v. Tom James Co.***, 2008 WL 858754 *18 n.9 (E.D. Pa. 2008); see also ***Micro Data Base Systems, Inc. v. Nellcor Puritan-Bennett, Inc.***, 20 F.Supp.2d 1258, 1263 (N.D. Ind. 1998); ***Firoozye v. Earthlink Network***, 153 F.Supp.2d 1115, 1130 (N.D. Cal. 2001); ***Butler v. Continental Airlines, Inc.***, 31 S.W.3d 642, 651 (Tex. App. 2000).

Section 301 of the Copyright Act preempts a plaintiff’s claim under state law if plaintiff seeks to protect rights that are the “*equivalent* to any of the exclusive rights within the general scope of copyright.” ***Alcatel USA, Inc. v. DGI Technologies, Inc.***, 166 F.3d 772, 786-87 (5th Cir. 1999) (emphasis in original). Claims are “equivalent” unless “one or more qualitatively different elements are

required to constitute the state-created cause of action being asserted." *Alcatel*, 166 F.3d at 787. In order to avoid preemption, InfoFlows had to establish "extra elements" beyond "accessing" or copying InfoFlows software. See *Alcatel*, 166 F.3d at 787; compare *State v. Smith*, 115 Wn.2d 434, 440, 798 P.2d 1146 (1990) (by requiring proof of defendant's intent to deprive, prosecution for theft of software punishes "the *manner in which* defendant obtained the computer materials, rather than the fact he copied them," and is not preempted) (emphasis in original).

While there is no evidence that Corbis did so here, InfoFlows' bare allegation that Corbis "retained" a copy of its software, does not establish the requisite extra element to avoid preemption of a copyright claim absent evidence that Corbis also "retained the physical object embodying the plaintiff's work." *Tire Engineering and Distribution, LLC v. Shandong Linglong Rubber Co., Ltd.*, 682 F.3d 292, 310 (4th Cir. 2012), (quotation omitted); *Micro Data*, 20 F.Supp.2d at 1263 ("the retention of the

software is simply the retention of the intellectual property”);⁸ see ***U.S. ex rel. Berge v. Board of Trustees of the University of Alabama***, 104 F.3d 1453, 1463 (4th Cir.) (“[Section] 301(a) will preempt a conversion claim where the plaintiff alleges only the unlawful retention of its intellectual property rights”) (quotation omitted), *cert. denied*, 522 U.S. 916 (1997) (Resp. Br. 45-46 n.29). InfoFlows’ conversion claim, which is premised on the bare allegation that Corbis copied its software code, is preempted by the Copyright Act.

C. InfoFlows Had No Evidence Of Conversion Damages Based On Corbis’ “Access” To Electronic Files That It Never Used.

InfoFlows could in no event recover conversion damages for the additional reason that there was no evidence to support the jury’s special verdict finding that InfoFlows suffered any damages, let alone \$16.6 million - more than five times what InfoFlows could have hoped to earn under the parties’ contract had InfoFlows successfully delivered all Phase I and Phase II milestones.

⁸ In ***Micro Data***, plaintiff alleged the theft of tangible media – the computer disks – as well as the software itself. The court allowed the plaintiff to recover as conversion damages only the value of the tangible materials. Plaintiff’s conversion claim for the value of the software itself was preempted. 20 F.Supp.2d at 1263 (“the disks have value only as disks and not as mediums of expression for the software.”). Here, InfoFlows does not claim that Corbis retained any tangible media, only its intellectual property.

InfoFlows had no proof of the "value of the money or goods belonging to InfoFlows that was converted by Corbis." (CP 528, 562) These instructions, to which no exception was taken nor error assigned on appeal, establishes the law of the case with respect to the elements of InfoFlows' conversion claim. ***Allen v. B.F. Goodrich***, 67 Wn.2d 587, 588, 408 P.2d 900 (1965).

Even if there were some evidence from which the jury could have found that Corbis "converted" InfoFlows' proprietary material, there is no evidence anywhere in the record of the value of this property to InfoFlows, to Corbis, or to anyone else. InfoFlows had no evidence of the value of the source code and documentation that it claims Corbis "converted" when it "accessed" the electronic files with InfoFlows' permission. Moreover, the value of a completed license management system *to Corbis* provides no evidence of the value of the code that was accessed as part of InfoFlows' delivery of the Alpha version under Phase One of the Development Agreement InfoFlows failed to establish the "value of the money or goods belonging to InfoFlows" that could support a damages award for conversion. The most InfoFlows could have ever expected to earn from Corbis, InfoFlows' only customer, was \$7 million, and then only if it successfully completed its obligations under the

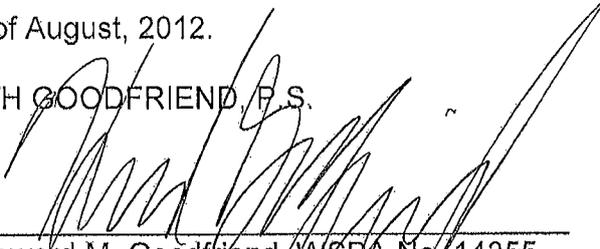
Development Agreement *and* then negotiated and fulfilled a Jazz Service licensing agreement with Corbis. The Court of Appeals' award of over \$12.5 million more than compensated InfoFlows for any property interests allegedly taken by Corbis.

V. Conclusion.

This Court should deny InfoFlows' cross-petition.

DATED this 8th day of August, 2012.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend, WSBA No. 14355
Catherine W. Smith, WSBA No. 9542

Attorneys for Petitioner

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 8, 2012, I arranged for service of the foregoing Reply to Answer to Petition for Review, to the clerk to the court and to the parties to this action as follows:

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William Brewer Attorney at Law 6231 27 th Ave NE Seattle WA 98115-7113	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Stephen C. Willey Savitt & Bruce LLP 1425 4th Ave, Suite 800 Seattle WA 98101-2272	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 8th day of August, 2012.



Victoria K. Isaksen

OFFICE RECEPTIONIST, CLERK

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Cc: howard@washingtonappeals.com; 'Catherine Smith'; brewerthoroughbreds@gmail.com; swilley@jetcitylaw.com
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Attached for filing is the Reply to Answer to Petition for Review, in *Corbis Corporation v. InfoFlows Corporation, et al.*, Cause No. 87555-3. The attorney filing this document is Howard M. Goodfriend, WSBA No. 14355, e-mail address: howard@washingtonappeals.com.

Victoria Isaksen
Paralegal
Smith Goodfriend, P.S.
500 Watermark Tower
1109 1st Ave
Seattle WA 98901
(206) 624-0974