

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.

**REPLY BRIEF OF CROSS-APPELLANT
INFOFLOWS CORPORATION**

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I. INTRODUCTION

The trial court erred in dismissing InfoFlows' conversion claim on a CR 50(b) motion. Consistent with the applicable law, InfoFlows pled and proved a valid conversion claim regarding Corbis' unauthorized retention of its proprietary information and materials (both source code and other related documentation, including architectural drawings) *and* its improper assertion of ownership over such materials. In short, Corbis wrongfully attempted to exercise dominion over and interfere with InfoFlows' exclusive property interest.

Corbis' belatedly asserted defense of copyright preemption fails, too. InfoFlows' conversion claim is not predicated on unauthorized copying or distribution, *i.e.*, the usual basis for a copyright claim, nor are the proprietary information and materials limited to source code. The jury's verdict in InfoFlows' favor on its conversion claim, including damages that are well within the range of the evidence, should be upheld.

The court also erred in granting summary judgment on Corbis' contract claim regarding the Jazz Service advance fee. In doing so, the court took an overly narrow view of the contract provision at issue, did not read the contract as a whole, and failed to acknowledge material factual disputes, including with respect to Corbis' conduct.

II. REPLY ARGUMENT

A. THE TRIAL COURT ERRONEOUSLY DISMISSED INFOFLOWS' CONVERSION CLAIM.

The trial court denied Corbis' CR 50(a) motion on InfoFlows' conversion claim, ruling that "the modern trend of the law was for applying conversion to intangible property, including the copying of source code." RP 2946; see also CP 1482. Following the jury's verdict in InfoFlows' favor, however, the court granted Corbis' CR 50(b) motion, holding that "it appears to me that InfoFlows failed to establish that it was *deprived* of its source code by virtue of making copies of it available to Corbis[.]" CP 1483 (emphasis supplied).

The court's post-verdict dismissal of InfoFlows' conversion claim as a matter of law implicates the theory and policy underlying the tort claim of conversion. What is at issue is the very nature of the tort and its application or continuing existence in an increasingly digital age. In short, does a claim for conversion lie where there has been an interference with one's dominion and control over information and materials that are, at least in part, in digital form? InfoFlows submits that the answer – based on the record evidence, the developing trend of case law, as well as older notions of equity – must be affirmative.

1. Corbis obtains InfoFlows proprietary information and materials, including source code.

Corbis argues that it is “undisputed here that InfoFlows was not deprived of anything.” Corbis Resp. Br, at 43. But the record evidence is contrary. On September 11, 2006, InfoFlows delivered to Corbis both its proprietary source code *and* related documentation for the Jazz Service, as well as for the “Alpha Deliverable” – the latter comprising code and documentation relating to Phase 1 of the Development Agreement (the first Corbis software application). Ex 77; see also CP 1737 (at ¶ 8). The InfoFlows information and materials made available to Corbis included:

- “the source code for the JazzSpider web crawler,”¹
- the source code for “the custom [Jazz Service] software Platform that provides a highly scalable mechanism for clustering and managing a large number of servers,” and
- “internal source code documentation.”

Ex. 77.

Corbis’ suggestion that it did not access or download the materials InfoFlows had delivered is contradicted by the evidence. The Alpha

¹ InfoFlows’ JazzSpider web crawler is composed of multiple interlocking applications, including (a) Crawler Service, (b) DNS Service, (c) Image Search Service, (d) Lead Consolidator Service, (e) Seed Service, and (f) URI Queue Service. Ex. 77. Corbis’ assertion of its alleged ownership of InfoFlows’ proprietary information, code and materials is illustrated by Question No. 5 of the verdict form, which expressly requested the jury to determine ownership of the materials delivered by InfoFlows on September 11. CP 526-27. The jury held that the InfoFlows’ Jazz Service materials did *not* belong to Corbis. Id.

materials delivered to Corbis on September 11 were specifically provided for Corbis' review – i.e., its evaluation and acceptance. Ex. 43 (at Ex. A). Moreover, prior to this date, there had been much discussion between the parties as to Corbis' desire to broadly review everything InfoFlows was doing, including with respect to the Jazz Service.²

The evidence shows that Corbis did access, download and undertake an extensive review of everything InfoFlows produced, including with respect to the Jazz Service.

- On September 12, 2006, Krista Hopper of Corbis notified InfoFlows that, regarding the information and materials delivered the prior day, “I was able to access the files just fine.”³ Ex. 331.
- On September 19, 2006, InfoFlows personnel met with Corbis personnel and did an extensive presentation about and discussed the information previously provided on September 11, and provided again on September 19. Ex. 80.
- Corbis' internal Status Report dated September 19, 2006 identifies as an accomplishment for the relevant time period that the “Alpha [was] completed and delivered to Corbis.” (Emphasis supplied.) The Status Report summary states that “InfoFlows met the Alpha delivery due date and a review

² E.g., Ex. 318 (8/22/06 email regarding, *inter alia*, Wayne Yerigan of Corbis reviewing InfoFlows' “Architecture Design” and Yerigan and Stephen Gillett of Corbis having “chalk talks” with InfoFlows), Ex. 324 (8/31/06 internal Corbis email regarding Gillett's reviewing “Boulder Ridge hardware configuration and support structure InfoFlows has put together”).

³ Corbis had a demonstrated practice of obtaining copies of and reviewing all materials produced by InfoFlows. E.g., Ex. 79 (document produced by Corbis, a 9/15/06 email chain regarding “BoulderRidge UI specification” and including attached copy of the specification).

meeting was held” – and “[a]ll the deliverables were acceptable.” Ex. 338; see also Ex. 340.

- Corbis’ internal Status Report dated September 26, 2006 indicates that Corbis had reviewed the Alpha deliverable to such an extent that it would be considered “complete as soon as additional Architecture documents are received.” Ex. 349.

Moreover, it is undisputed that Corbis sought and obtained substantial additional Jazz Service documentation and information from InfoFlows in the same time period:

- A September 14, 2006 internal Corbis email documents Wayne Yerigan’s meeting with Jell Lill of InfoFlows and Yerigan describes their “pretty technical discussions on [InfoFlows’] architecture,” notes that “[t]he code itself is reasonably well-written” and observes that InfoFlows’ work includes “a custom built messaging framework that Jeff built,” which “provides interprocess communication and supports their [InfoFlows’] scalability model.” Ex. 336.
- An October 2, 2006 internal Corbis email contains Stephen Gilletts’ review of InfoFlows’ operations and infrastructure planning, which he described as “looks good.” Ex. 354. In his meeting with InfoFlows, the subjects discussed included “the operations plan” and “a number of elements of the plan including performance, security, reliability and scalability.” Id.
- On October 2, 2006, Corbis received from InfoFlows, and reviewed, an Architecture Diagram that contained InfoFlows’ proprietary and confidential architecture design and implementation information regarding the Jazz Service. Ex 361; Ex 354 at p. 3 (designated “InfoFlows Proprietary and Confidential Information”); see also RP 2214-15.

In short, substantial evidence was presented to the jury demonstrating that “Corbis’ technical staff accessed and reviewed in detail

the *proprietary* material and information that InfoFlows had provided with the Alpha deliverable.”⁴ CP 1737-38 (at ¶¶ 9-12; emphasis supplied).

2. Corbis refuses to return InfoFlows’ proprietary information and materials – and Corbis wrongfully asserts ownership.

After Corbis terminated the Development Agreement, InfoFlows, through counsel, wrote and requested that Corbis “immediately return to InfoFlows any and all documents, data, source code or other information related to the Jazz Service.” Ex. 380. Corbis’ response was to claim that “the only materials” in its possession are “Work Product,” which Corbis claimed to own under the Development Agreement or a prior contract. Id. Corbis claimed it owned everything, both the work InfoFlows had done for Corbis and InfoFlows’ own proprietary information and materials.

Then, the day after InfoFlows’ publicly announced the launch of its Fedmark Service (f/k/a Jazz Service), Corbis’ attorneys wrote to InfoFlows, asserted that Fedmark “uses intellectual property owned by Corbis” and demanded that “any reference to or description of the ‘Fedmark’ system . . . be removed from the InfoFlows website.” CP 1738-39 (at ¶ 15). Corbis’ further assertion of ownership was a plain

⁴ As a related matter, the evidence further shows that just one hour after advising InfoFlows it was terminating the Development Agreement, Corbis was already using InfoFlows’ deliverables, specifically the User Interface (“UI”) Specification, to move forward on its own with the Boulder Ridge project. Ex 373; RP 1672-76.

effort to impair and impede InfoFlows' development and progress.

3. A property interest that has been interfered with will support a conversion claim; exclusive possession is not required.

The touchstone of conversion is the converting party's unauthorized and wrongful assumption and exercise of dominion and control over the property of another, to the exclusion of or *inconsistent with the owner's rights*. Neither physical possession nor physical deprivation is necessary; what is required is that a conversion claimant have a specific *property interest* in the goods allegedly converted.

As noted above, the trial court denied Corbis' CR 50(a) motion based on its understanding that the "modern trend of the law" made conversion applicable to intangible property – "including the copying of source code." RP 2946; see also CP 1482. Following the verdict, however, the court reversed itself and granted Corbis' CR 50(b) motion, stating that "it appears to me that InfoFlows failed to establish that it was deprived of its source code by virtue of making copies of it available to Corbis[.]" CP 1483.

The court's post-trial ruling was premised on a purely dichotomous possession/deprivation analysis that hearkens back to the "older approach" of conversion law, what Prosser and Keeton have described as "archaic and formalistic." In re Marriage of Langham, 153 Wn.2d 553, 565, 106

P.3d 212 (2005). Under Washington law, and especially in a world in which digitally-recorded and transmitted information is increasingly the norm, the “older approach” is no longer valid.

In Meyers Way Development Ltd. Partnership v. University Sav. Bank, 80 Wn.App. 655, 675, 910 P.2d 1308 (1996), this Court addressed and specifically *rejected* prior Washington authority holding that a conversion claim required “the plaintiff ... be in possession or have the immediate right to possession of the property.” 80 Wn.App. at 675 (citing Eggert v. Vincent, 44 Wn.App. 851, 854, 723 P.2d 527 (1986), *rev. denied*, 107 Wn.2d 1034 (1987)). Thus, in Meyers Way, this Court held that a bank's security interest in proceeds from the sale of sand located on financed property was a sufficient property interest to maintain a conversion action.⁵ Id. at 675.

More recently, the Washington Supreme Court discussed and approved of Meyers Way. Langham, 153 Wn.2d at 565. Langham concerned a dispute about a divorce-related property division. The husband had accrued certain Microsoft stock options and the trial court had awarded some of those options (both vested and unvested) to his former wife. Id. at 556-57. In defending a conversion claim arising from

⁵ The bank in Meyers Way never had possession of the sand, nor did it ever possess the proceeds of the sale of such sand, nor was the bank's security interest explicitly denied by the landowner.

his exercise of certain options, the defendant husband articulated some of the same arguments that Corbis has asserted, *e.g.*, that stock options are intangible and, thus, not chattel that may be converted, and that his former wife “did not have the right to possess the options since they were non-transferable.” *Id.* at 564-65.

These arguments were unavailing. Relying on and extending the property-interest analysis set out in Meyers Way, the Supreme Court held that intangible property may be converted and that, in the case of a stock option, such conversion occurs when an option is exercised. 153 Wn.2d at 566. This is because the exercise of a stock option constrains the “range of elective action” available to the rightful owner – *i.e.*, the conversion “limit[s] the owner’s available choices” as to what she may do with the property in which she has an interest. *Id.*

The legal authority relied upon by Corbis is inapposite. The cases it cites are straight-forward “copying” cases – none involve an assertion of ownership or the exercise of dominion over a rightful owner’s property interest.⁶ And Corbis fails to undertake any analysis or comparison based

⁶ See Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195, 201 (2nd Cir. 1983), rev’d on other grounds, 471 U.S. 539, 105 S. Ct. 2218, 85 L.Ed.2d 588 (1985) (copying some pages of a manuscript not conversion; copying party did *not* assert ownership); Monarch Fire Protection Dist. of St. Louis County, Missouri v. Freedom Consulting & Auditing Services, Inc., 678 F.Supp.2d 927, 933, 944-45 (E.D. Mo. 2009) (no conversion where copies of documents retained “for purposes of [] defense in ...

on the record evidence of this case.

InfoFlows acknowledges that there is no Washington authority that is directly factually analogous to this case. But Al Ali v. Fasteners for Retail Inc., 544 F.Supp.2d 1064 (C.D. Cal. 2008) is nearly on all-fours. Al Ali concerned, in pertinent part, a conversion claim by an inventor and patent-holder regarding an inventory control system. The plaintiff alleged that the defendants copied or intercepted and, thus, converted “source codes, cost data and parts numbers.” Id. at 1072. In denying the defendants’ motion to dismiss, the court found the plaintiff had an intangible property right in the information at issue, which the court

lawsuit” by owner; *no claim of ownership* by entity holding copies, defendant’s possession did not reduce value to plaintiff); Furash & Co., Inc. v. McClave, 130 F.Supp.2d 48, 58-59 (D.D.C. 2001) (former employee did not covert documents and information when returned to prior employer and new employer in-house counsel kept a copy in the event of litigation; former employer did *not* claim ownership to the documents and information, so no “exercise of ownership, dominion, or control over the personal property of another in denial of that person’s rights”); FMC Corp. v. Capital Cities/ABC, Inc., 915 F.2d 300, 303-04 (7th Cir. 1990) (holding that possessing copies of documents, as opposed to original documents, does not give rise to an interference with the owner’s property; party possessing copies did *not* assert ownership to documents); Pearson v. Dodd, 410 F.2d 701, 706-08 (D.D.C. 1969) (reporter’s receipt of photocopies of documents at issue do not comprise information gathered and arranged at some cost and sold as a commodity on the market” or “ideas formulated with labor and inventive genius”); Cadence, LLC v. Dimension Data Holdings, 2007 WL 1526349 at *7 (W.D.Wash. May 23, 2007) (no conversion where defendant downloaded copies of certain information onto his Blackberry, subsequently returned it, and *never claimed ownership*); Internet Archive v. Shell, 505 F.Supp.2d 755, 762-73 (D. Colo. 2007) (dismissing conversion claim based on archive of public website pages with *no ownership claim*). But see A.G. Design & Assocs., LLC v. Trainman Lantern Co., Inc., 2009 WL 230083 at *3-4 (W.D.Wash. Jan. 30, 2009) (denying summary judgment motion on conversion claim where defendant “retained copies of hundreds of pages of documents pertaining to [plaintiff’s] marketing, advertising and business operations” for more than a year signing contract requiring him to return all materials in his possession related to plaintiff’s business).

described as “distinct groupings of proprietary information.” *Id.* Further, the court focused on the plaintiff’s *ownership right*:

[O]wnership is exclusive in that Plaintiff controlled access to the information; only shared the information when it was in his economic interest; and required others, when viewing the information, to sign confidentiality agreements. . . . Plaintiff has a legitimate claim to exclusivity because he invested a substantial amount of time, effort and resources in compiling the information, marketing it and keeping it private.

Id. This same focus rightfully applies to InfoFlows’ Jazz Service materials and information.

4. The law and the factual record support the jury’s verdict.

Here, Corbis converted InfoFlows’ proprietary information concerning its Jazz Service by retaining both source code *and* related documentation and by asserting that it owned such materials. *E.g.*, Ex. 380. Accordingly, InfoFlows had to file suit in order to vindicate its rights and to assure that its valuable property interest – its exclusive ownership right – was not further impaired and compromised. *See, e.g.*, CP 61 (seeking to “enjoin Corbis from asserting any ownership to InfoFlows’ Fedmark Service (f/k/a Jazz Service)” and requesting that Corbis be “ordered to return to InfoFlows its proprietary information and materials regarding the Jazz Service, including all source code and related programming and design documentation”); *see also* CP 53-55 (at ¶¶ 48-

54).

At trial, the jury was specifically tasked with, among other things, determining and clarifying ownership of the proprietary information and materials that InfoFlows delivered to Corbis on September 11, 2006. Ex. 77 and CP 526-27 (at Question 5; holding that the InfoFlows' Jazz Service materials did *not* belong to Corbis). And the court entered judgment accordingly. CP 1814-15 (judgment including declaratory judgment in favor of InfoFlows and permanent injunction, including requirement that Corbis return to InfoFlows "proprietary information and materials regarding the Jazz Service, including but not limited to all source code, source files, and related programming, design, architecture and implementation documentation").

Under the applicable law and based on the record evidence, the jury's verdict on InfoFlows' conversion claim should be upheld.

5. InfoFlows' conversion claim is not preempted.

Corbis has waived any preemption argument. During trial, Corbis made a CR 50(a) motion regarding InfoFlows' conversion claim and it asserted a single argument regarding the purported failure of a conversion claim concerning intangible property or copying of source code. It did not raise any preemption argument.

Corbis thus waived its ability to bring a CR 50(b) motion with

respect to a preemption argument.⁷ Accordingly, the trial court did not address preemption in granting Corbis' CR 50(b) motion on InfoFlows' conversion claim because Corbis had waived the argument. CP 1483 ("I am specifically declining to reach that issue because it was not raised by Corbis as part of its CR 50(a) motion.").

Issues of waiver aside, however, Corbis is wrong on the merits. Corbis' preemption argument is that InfoFlows' conversion claim is "premised on the contention that Corbis copied its software code." Corbis Resp. Br. at 46. This summary statement is misleading and demonstrably inaccurate.

Federal copyright law (the "Copyright Act") fundamentally protects an owner's right to make copies of a work, *e.g.*, to reproduce it for

⁷ Under CR 50(a), a party may move for judgment as a matter of law after the opposing party has been "fully heard with respect to an issue." Such a motion "shall specify the judgment sought and the law and facts on which the moving party is entitled to judgment." CR 50(a). If the Court does not grant a CR 50(a) motion, then the moving party may "renew" the previously-denied motion under CR 50(b). But a *renewed* motion under CR 50(b) cannot present arguments not raised on the original CR 50(a) motion. In this respect, CR 50(b) was amended effective September 1, 2005 and "the drafters' comments accompanying the 2005 amendment make it clear that [CR 50(b)'s 'renewing'] language was intended to mean that a party who fails to make a motion before [the] case is submitted to the jury waives the right to make such a motion after the jury has reached a verdict." Karl B. Tegland, *WASHINGTON PRACTICE*, Vol. 14A (2nd Ed.) at 88. This is consistent with federal law; the failure to raise an argument by a Rule 50(a) motion operates as a complete waiver with respect to such argument on a "renew[ed]" Rule 50(b) motion. *See, e.g., Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003) (analyzing FRCP 50 and holding that "[a] party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion"); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003) (accord); *see also* Advisory Comm. Notes to the 1991 Amendments, Fed. R. Civ. P. 50 ("A post trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.").

distribution. 17 U.S.C. § 106; see also G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Service, Inc., 958 F.2d 896, 904 (9th Cir. 1992) (“Federal copyright law governs only copying.”). The Copyright Act preempts some state law claims, but only “legal or equitable rights that are *equivalent* to any of the exclusive rights within the general scope of copyright” are preempted.⁸ 17 U.S.C. § 301 (emphasis supplied).

Thus, a state law claim that involves an element different from or in addition to the elements of copyright infringement is not preempted:

If under state law the act of reproduction, performance, distribution or display, no matter whether the law includes all such acts or only some, will in itself infringe the state created right, then such right is preempted. *But if other elements are required, in addition to or instead of, the acts of reproduction, performance, distribution or display, in order to constitute a state created cause of action, then the right does not lie “within the general scope of copyright,” and there is no preemption.*

State v. Smith, 115 Wn.2d 434, 440 (1990) (quoting 1 M. Nimmer & D. Nimmer, Copyright § 1.01[B], at 1-13 (1989); emphasis supplied) (prosecution for theft of software by copying not preempted because criminal charge had elements other than mere unauthorized duplication).⁹

⁸ In order for preemption to occur under the Copyright Act, two conditions must be satisfied. First, the content of the protected right must fall within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103. Second, the right asserted under state law must be equivalent to the exclusive rights contained in section 106 of the Copyright Act. Downing v. Abercrombie & Fitch, 265 F.3d 994, 1003 (9th Cir. 2001)

⁹ In Smith, the court noted that the applicable criminal statute defined “theft” to

Here, InfoFlows' conversion claim is not based on allegations that Corbis wrongfully copied or distributed its software code. In fact, InfoFlows spelled out its claim in detail at the very outset of this case, in both its initial Complaint and its Amended Complaint. In particular:

- Subject to a Mutual Nondisclosure Agreement, InfoFlows “gave Corbis an in-depth presentation and provided it with detailed programming and design information, as well as source code relating to several aspects of InfoFlows’ Jazz Service.”
- On September 11, 2006, InfoFlows “provided Corbis substantial and proprietary information about aspects of the Jazz Service . . . including URL links to certain Jazz Service source code, as well as detailed programming and design documentation.”
- On September 19, 2006, InfoFlows made a presentation to Corbis, which included detailed discussion of the “Jazz Service, including relevant software architecture” and InfoFlows also “gave Corbis a CD with the Jazz Service code and related documentation[.]”
- In meetings with Corbis personnel, InfoFlows “shared with Corbis the architecture of the Jazz System,” provided “confidential information about web services” and shared “operation designs and capabilities[.]”
- After termination of the Development Agreement, InfoFlows requested that Corbis return InfoFlows’ proprietary information. Corbis failed and refused to do so, and asserted ownership over InfoFlows’ proprietary information and materials.

CP 49-55, 56-57, 61 (at ¶¶ 37-42, 48-50, 52-53, 62-65 and Prayer). These allegations are consistent with and supported by the evidence and

include “wrongfully obtain[ing] or exert[ing] unauthorized control over the property or services of another or the value thereto[.]” 15 Wn.2d at 438 (citing RCW 9A.56.020(1)).

testimony that InfoFlows presented at trial. See II.A(1)-(2) supra.

In short, InfoFlows' conversion claim is not preempted by federal copyright law because it is based on allegations and evidence that are "qualitatively different from a copyright infringement claim." Terarecon, Inc. v. Fovia, Inc., 2006 WL 1867734 at *10 (N.D.Cal. July 6, 2006) (conversion claim not preempted where it encompassed more than just computer code).¹⁰ InfoFlows' conversion claim includes additional or other elements that are not part of copyright law – e.g., the wrongful retention and deprivation of InfoFlows' property interest, and materials not subject to copyright protection.¹¹

6. The jury's award for conversion damages was supported by the evidence.

Corbis has waived any challenge to the sufficiency of evidence

¹⁰ See also Smith, 115 Wn.2d at 439-40 (no preemption where claim not based on wrongful copying); Downing, 265 F.3d at 1003 (reversing summary judgment; state law claims regarding statutory and common law rights of publicity arising from unauthorized use of a photograph not preempted by federal copyright law); Rasmussen, 958 F.2d at 904 (no preemption where conversion claim not based on allegation of wrongful copying); Complete Pharmacy Resources v. Feltman, 2005 WL 1949540 at *5-6 (S.D. Tex. Aug. 12, 2005) (no preemption where plaintiff's conversion claim was based, in part, on defendant's failure to return copies of software).

¹¹ In contrast, the authority Corbis cites are run-of-the-mill preemption cases. See, e.g., Firoozye v. Earthlink Network, 153 F.Supp.2d 1115 (9th Cir. 2001) (copyright preempts conversion claim based on unauthorized copying and distribution of software); Apparel Business Systems, LLC v. Tom James Co., 2008 WL 858754 at *18 n.9 (E.D.Pa. 2008)(same); Butler v. Continental Airlines, Inc., 31 S.W.3d 642 (Tex.App. 2000)(same). In Micro Data Base Systems, Inc. v. Nellcor Puritan-Bennett, Inc., 20 F.Supp.2d 1258 (N.D.Ind. 1998) the court's discussion and analysis of the conversion claim are cursory, but the court apparently perceived the gist of plaintiff's action to properly be a copyright claim: "Boiled down, [the plaintiff] complains about the reproduction and/or distribution of the software." Id. at 1263.

supporting the damages awarded by the jury on InfoFlows' conversion claim. After trial, Corbis moved for judgment under CR 50(b) or for a remittitur or new trial. CP 714-726. Corbis sought judgment based on, inter alia, the alleged lack of damages caused by Corbis' conversion. CP 717-25. The trial court denied Corbis' motion and also issued a letter ruling. CP 1474-75; CP 1481-85. The court held that Corbis waived any damages arguments for purposes of a CR 50(b) motion. RP 2930-34, 2946; CP 1484. While the court did not reach Corbis' argument regarding conversion damages because it dismissed the claim on other grounds (see CP 1484, n.1), the identical waiver reasoning applies. "Corbis never made a CR 50(a) motion as to any of these issues, so it cannot 'renew' its motion post-trial." CP 1484.

Regardless, Corbis is wrong when it asserts "there is no evidence anywhere in the record of the value of the allegedly converted material[.]" Corbis Resp. Br. at 47. In fact, there are numerous measures. By way of example only, Steve Stone valued InfoFlows' services at \$30 million. Ex. 232. Corbis internally valued its use of Boulder Ridge as enabled by the Jazz Service, with revenue projections ranging from \$3-20 million per year. Ex 188. And in May 2006, David Weiskopf of Corbis projected increased revenue over three years of \$16,662,906. Ex. 272.

The jury's award of conversion damages in the amount of \$16.6 million was rendered on August 24, 2009, approximately three years from the date of Corbis' conversion. E.g., Ex. 380. A jury's verdict is presumed correct and there is no way to go behind it on appeal, but one can reasonably infer conversion damages of \$16.6 million based on Corbis' own revenue projections regarding the benefit of using the Jazz Service. The jury's award is supported by and well within the range of the evidence.

B. THE COURT'S SUMMARY JUDGMENT RULING REGARDING THE JAZZ SERVICE ADVANCE WAS NOT BASED ON A READING OF THE DEVELOPMENT AGREEMENT AS A WHOLE AND FAILED TO ACKNOWLEDGE MATERIAL FACTUAL DISPUTES.

The trial court erred by granting summary judgment on Corbis' contract claim regarding the Jazz Service license fee advance. When reviewing a grant or denial of summary judgment, the reviewing court engages in the same standard as the trial court and conducts a *de novo* review. Davis v. Microsoft Corp., 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003). Facts and reasonable inferences are construed in the light most favorable to the nonmoving party. Our Lady of Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 452, 842 P.2d 956 (1993)

The premise of the Development Agreement entered into by InfoFlows and Corbis was that InfoFlows would develop two Corbis-

specific software applications that would “operate on” and be “enable[d]” by InfoFlows’ proprietary Jazz Service. Ex. 43 at §§1, 6(a)(ii), 9. The Corbis applications were to be works-for-hire, which Corbis would own, and the Jazz Service – the necessary operating system or platform – would be licensed from InfoFlows. Id. at §§6(a), 9.

The parties understood, and the Development Agreement expressly acknowledged, that InfoFlows was continuing to develop the Jazz Service. Ex. 43 at §9 (“InfoFlows is, on its own initiative and at its own expense, building the Jazz Service.”). Thus, in order to help fund further development of the Jazz Service – which Corbis would necessarily license for use as the platform to enable its applications – the Development Agreement provided that Corbis would pay InfoFlows a \$500,000 advance on the Jazz Service license fees “that will become due and owing[.]”¹² Id. The Development Agreement also provided that the Jazz Service advance fee would be refunded “in the event that (a) [the] Development Agreement is terminated by Corbis pursuant to Section 13(b); or (b) the Parties do not enter into a Jazz Service Agreement on or before August 1, 2006.” Id.

The Development Agreement does not require Corbis to license the Jazz License, but it does expressly require “good faith” negotiations

¹² The Development Agreement stated specific license fee parameters through 2008, both for Corbis’ exclusive and non-exclusive use of the Jazz Service. Ex. 43 (at § 9).

regarding such an agreement. Ex. 43 (at § 9). Moreover, the weight of the evidence demonstrates that the Corbis-specific software applications being developed by InfoFlows would not work or be enabled without the Jazz Service. The development of the Corbis applications was *dependent* on the Jazz Service. As the trial court later found: “[T]here is ample evidence that, as a practical matter, the Jazz Service was essential to the operation of the Corbis-specific applications designed by InfoFlows.” CP 1736-37 (at ¶ 7). The parties knew this and discussed it repeatedly. *E.g.*, Exs. 225, 228, 229, 250, 257, 276, 277; RP 2599-2605, RP 1990-91.

InfoFlows and Corbis did not enter into a Jazz Service Agreement on or before August 1, 2006. But Corbis’ consistent contemporaneous conduct and communications to InfoFlows demonstrated that the August 1 date was not an actionable deadline or trigger for refund. Indeed, on August 1, 2006, Corbis’ counsel sent InfoFlows’ counsel a proposed amendment to the Development Agreement, which extended the date for entering into a Jazz Service Agreement to September 1. Ex. 65. Subsequently, on September 20, 2006, Corbis’ counsel sent InfoFlows’ counsel the first draft of a Jazz Service Agreement. Ex. 81. And on September 26, 2006, Corbis’ counsel sent InfoFlows’ counsel another proposed amendment to the Development Agreement, which extended the date for entering into a Jazz Service Agreement to November 1. Ex. 84.

During this period of time, too, Corbis was actively obtaining information from InfoFlows, both about the software application being developed for it *and* about the Jazz Service.¹³

In the trial court, Corbis moved for summary judgment, seeking return of the \$500,000 advance license fee for Jazz Service. CP 1989-97. Corbis argued that because no Jazz Service Agreement had been entered into by August 1, 2006, Corbis was entitled to a refund of the advance license fee it had paid InfoFlows. CP 1991-92; see also CP 2225-30. Corbis asserted that “[i]t is indisputable that the two aspects of the Development Agreement” – the Corbis-specific applications that InfoFlows was developing and the Jazz Service and the operational need for Corbis to license it – “are separate and independent.”¹⁴ CP 1994.

In opposition, InfoFlows acknowledged that there was no Jazz Service Agreement but argued that: (1) Corbis had breached its duty of good faith and fair dealing, and there was a dispute concerning Corbis’ conduct and whether that conduct modified the parties’ agreement or prevented InfoFlows from performing its obligations; (2) Corbis’ conduct

¹³ E.g., Exs. 77, 80, 331, 338, 340, 349, 354, 361.

¹⁴ Only *after* Corbis terminated the Development Agreement did it take the position that the Jazz Service was not required, and that the software applications that InfoFlows was developing were “plug-and-play” – i.e., that they could operate on and be enabled by a software platform *other* than the Jazz Service. See, e.g., CP 2229. This convenient but erroneous framing was thoroughly debunked at trial. E.g., RP 1827-1832, 2187-96.

prevented execution of a Jazz Service Agreement; and (3) the Jazz Service advance repayment provision is a dependent term within the Development Agreement. CP 2031-36; see also CP 2039-2218.

The court granted Corbis' motion. CP 102-05. In doing so, and contrary to usual practice on a CR 56 motion, the court adopted "findings of fact" and "conclusions of law" drafted by Corbis' counsel. The central holding was the court's determination that the Jazz Service advance fee clause was an "independent provision" of the Development Agreement. CP 104.

The court erred in multiple ways. As an initial matter, courts will construe covenants to be dependent unless the contrary intention appears. Ihrke v. Continental Life Ins. & Inv. Co., 91 Wash. 342, 352, 157 P. 866 (1916). "[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, 580 P.2d 1105 (1978).

Here, the court failed to acknowledge the central provisions of the Development Agreement, which required that the Corbis-specific software applications would "operate on" and be "enable[d]" by InfoFlows' proprietary platform – the Jazz Service. Ex. 43 at §§ 6(a)(ii), 9. There could be no operable final product for Corbis' use without a corresponding

license agreement to use the Jazz Service. Thus, the contract provision providing for a refund of the advance if a license agreement is not entered into by August 1, 2006 is a dependent covenant. Similarly, the court did not address the material issues of fact concerning Corbis' conduct. *E.g.*, CP 2039-58. In light of the standard under CR 56, the trial court erred in granting summary judgment.

III. CONCLUSION

InfoFlows' respectfully submits that the Judgment should be affirmed with two exceptions: (1) InfoFlows' conversion claim and the associated damages should be reinstated, and (2) 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.

InfoFlows requests its fees on appeal as the prevailing party.

Submitted this 25th day of March 2011.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the attached document – REPLY BRIEF OF CROSS-APPELLANT INFOFLOWS CORPORATION – to be delivered by U.S. Mail to the attorneys of record listed below:

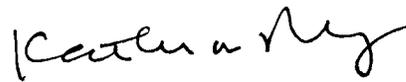
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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 25th day of March 2011, at Seattle, Washington.



Kathy M. Riley

AK