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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

v.

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

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**SUPPLEMENTAL BRIEF OF  
RESPONDENT AND CROSS-PETITIONER  
INFOFLOWS CORPORATION**

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**I. INTRODUCTION**

Over the course of a three-week trial, InfoFlows pled and proved a valid conversion claim based on Corbis' unauthorized retention of copies of InfoFlows' proprietary source code and related documentation and information and its improper assertion of ownership over these materials.

In short, Corbis significantly interfered with InfoFlows' right to control its property – and, consistent with applicable law, the jury so found.

After denying a CR 50(a) motion, the trial court granted Corbis' post-verdict CR 50(b) motion to dismiss InfoFlows' conversion claim as a matter of law, and the Court of Appeals affirmed.

The law and evidence support the jury's verdict, which should be upheld. This Court should reverse the portion of the Court of Appeals' March 26, 2012 decision affirming the dismissal of InfoFlows' conversion claim, reinstate the jury's verdict on that claim and the associated damages, and direct entry of an amended judgment accordingly.

**II. ASSIGNMENT OF ERROR**

The Court of Appeals erred in affirming the trial court's dismissal of InfoFlows' conversion claim. Op. at 28-30; CP 1478-79, 1482-83.

**III. STATEMENT OF FACTS**

**A. INFOFLOWS AND STEVE STONE**

InfoFlows is a start-up software and services company and Steve

Stone is its founder and CEO. Op. at 3. After leaving Microsoft in 2004, Stone, on his own and through InfoFlows, has been developing a proprietary system or technology implementation focused on identifying, tracking and managing digital objects on the Internet. *Id.* This system is called “Fedmark” and was previously known as the “Jazz Service” and the “Object Management Service.”<sup>1</sup> *Id.* The ideas for Fedmark pre-date any work with Corbis and are set out in, among other things, a PowerPoint presentation Stone prepared in May 2004. Ex. 1; RP 2462-63, 2469.

#### **B. CORBIS REACHES OUT**

After Stone left Microsoft, the CEO of Corbis contacted him. RP 2460; Ex. 150. On June 1, 2004, Stone met with Corbis and presented his PowerPoint to demonstrate his experience in a specific ongoing project. RP 2463-82; Ex. 1. Stone and Corbis subsequently entered into two consulting agreements (“SOW #1” and “SOW #2”), concerning digital rights management strategy and the potential acquisition of another company. Ex. 2; RP 2511; Exs. 9, 397, 162; RP 2523-25.

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<sup>1</sup> 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. These can be video files, image files, music files or, even, software. 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 concerning the relevant digital object. The database allows reporting, including use patterns, which enables business intelligence (*e.g.*, determining industry verticals evidencing particular use), as well as other business decisions (*e.g.*, digital rights enforcement, including license management). Ex. 1; *see also* [www.infoflows.com](http://www.infoflows.com).

### **C. INFOFLOWS' TECHNOLOGY DEVELOPMENT**

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

### **D. CORBIS EXPLOITS INFOFLOWS**

In September 2005, Stone met with David Weiskopf, a Corbis in-house attorney, to discuss whether Corbis might be interested in licensing the Object Management Service and having InfoFlows develop software applications for Corbis that would be enabled by InfoFlows' underlying technology. Op. at 4. Stone showed Weiskopf a PowerPoint and on-line demo, and also made explanatory drawings. *Id.*; Ex. 175; RP 2537-44; RP 1329. A few days later, Weiskopf sent an email to Jim Mitchell (GC of Corbis), representing that he had "been doing a lot of thinking on a Licensing Management solution" and had "actually developed a very realistic solution" that would "return very significant revenue[.]" Ex. 13.

Weiskopf's "solution" was an appropriation of InfoFlows' ideas and Stone's drawings. RP 2544-46. At trial, Weiskopf testified that "the concept of a licensed management solution that validates licenses used on the Internet" was his idea. RP 1298-99. Indeed, Weiskopf claimed that virtually all of the information in the PowerPoint that Stone created in

May 2004 (Ex. 1), including the very words, was information that Weiskopf had “provided to Stone” – although Weiskopf did not meet Stone until 2005.<sup>2</sup> RP 1306; *see also* RP 1306-20, 1333-36.

After the September meeting, Weiskopf arranged a meeting with Stone and senior Corbis executives, and Stone presented a working demo/prototype of the Object Management System. Exs. 178, 180; RP 2555-61. Corbis management was interested in InfoFlows’ technology and ideas, and the parties began discussing a potential development project. *E.g.*, Exs. 189, 190, 193-195. At the same time, Corbis was analyzing the economic benefits of InfoFlows’ ideas and technology, as well as the risk of not working with InfoFlows. Ex. 185 at 16046; RP 640-42; Ex. 188 at 16079; RP 657-59; Ex. 198 at 16095; RP 982-83.

In November 2005, Corbis and InfoFlows entered into a consulting agreement (“SOW #3”) to prepare a demonstration, in order to obtain the approval of Corbis’ sole shareholder (Bill Gates) to fund the development of software applications that would run on InfoFlows’ platform. Ex. 10; RP 2566-67; *see also* Ex.18, Op. at 4.

Concurrently, Corbis was internally discussing a potential license management service, including material from Stone’s May 2004

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<sup>2</sup> The trial court found Weiskopf’s credibility “particularly questionable.” CP 1741.

PowerPoint. *E.g.*, Ex. 188 (at 16074-76); RP 657. And in December 2005, Corbis began sending materials to its outside patent attorney, including Stone's drawings and schematics. Ex. 206 (at 16061-62); *see also* Exs. 219-221; RP 665-68. 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 two Corbis employees, including Weiskopf. *Id.* Stone was not informed that his materials were sent to Corbis' patent counsel, or that Corbis filed the patent application. RP 668; 995; 2916-20.

#### **E. THE DEVELOPMENT AGREEMENT**

In the Spring of 2006, the parties moved forward with discussing the development project. RP 1113-14; Exs. 35-36, 242, 253, 257. InfoFlows continued to work on its Object Management Service, which it re-named Jazz Service. *E.g.*, Ex. 244. In May 2006, Corbis again assessed the financial benefits that it would obtain by use of InfoFlows' technology and platform. Ex. 272; RP 647-52, 1393-96.

InfoFlows and Corbis entered into a Development Agreement in June 2006. 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-specific applications were to be developed as works-for-hire, and Corbis would own the resulting “Work Product,” as that term is defined. *Id.* at §6.

On September 11, 2006, InfoFlows timely delivered to Corbis the Alpha version of the first application for “[e]valuation and [a]cceptance.” Exs. 43 (at Ex. A), 77, 332. At Corbis’ request, and as a courtesy, InfoFlows also delivered source code for its JazzSpider web crawler and platform, and related source code documentation. Ex. 77.

Corbis accessed the delivered files, held a review meeting with InfoFlows personnel (at which InfoFlows provided another copy of the materials), and Corbis internally documented its acceptance of the Alpha. Op. at 9; Exs. 331, 80, 340 (“Alpha completed and delivered to Corbis”), 349; RP 1650-56; RP 2876-77; CP 1737-39 (at ¶¶ 9-17); CP 1814-15 (at ¶¶ 2-4). Corbis did not communicate its acceptance to InfoFlows.

InfoFlows continued to work, *e.g.*, providing Corbis with architecture and functional mapping documentation, including regarding Jazz Service. Exs. 361, 354. And Corbis reviewed that documentation. Ex. 361; *see also* RP 2214-15; CP 1737 (at ¶ 10). On October 12, 2006, Corbis terminated the Development Agreement, ostensibly “for cause,” despite its internal acceptance of InfoFlows’ work. Exs. 374, 371.

**F. CORBIS RETAINS AND ASSERTS OF OWNERSHIP OVER INFOFLOWS' CODE AND DOCUMENTS**

After Corbis terminated the Development Agreement, it refused to return InfoFlows' Jazz Service source code and related documentation, claiming that everything was "Work Product" under the Development Agreement and belonged to Corbis. Ex. 380. Corbis reiterated its assertion of ownership the day after InfoFlows publicly announced the launch of Fedmark Service (f/k/a Jazz Service), claiming that it "uses intellectual property owned by Corbis under the Development Agreement" and demanding that InfoFlows remove the product from its website. CP 1981-82 (at ¶ 61). Days later Corbis filed suit seeking, among other things, to preclude InfoFlows from using Corbis' "trade secrets or other confidential and proprietary information", and to require InfoFlows to return materials "that constitute work product owned by Corbis." CP 18-19. At trial, Weiskopf testified that a "good chunk" of what InfoFlows delivered to Corbis—including code and "all kinds of descriptions of what the system was, and designs"—belonged to Corbis. RP 1506.

**G. THE RULINGS ON THE CONVERSION CLAIM**

Before the case went to the jury, Corbis made an oral motion under CR 50(a) for judgment as a matter of law on InfoFlows' conversion claim, arguing that no claim could be stated based on deprivation of copies of source code. RP 2946. The trial court denied the motion, ruling that "the

trend in the law was for applying the tort of conversion to intangible property, including the copying of source code.” *Id.*; *see also* CP 457.

The jury found for InfoFlows on all its claims—and against Corbis on its claims. CP 525-29. The verdict form expressly requested the jury to determine ownership of the materials delivered by InfoFlows in September 2006. CP 526-27 (at Question 5); Ex. 77. The jury held that InfoFlows’ Jazz Service materials did not belong to Corbis, and that Corbis had converted InfoFlows’ property. *Id.*; CP 528.<sup>3</sup> The jury awarded InfoFlows \$16.6 million in conversion damages. CP 528.

Corbis subsequently moved under CR 50(b) for dismissal of InfoFlows’ conversion claim, arguing (i) that there was no evidence that InfoFlows was deprived of its property, (ii) preemption under the Copyright Act and/or trade secret law, and (iii) conversion of intangible property is not recognized in Washington law. CP 702-11. Corbis made a separate motion regarding the jury’s damage awards, including with respect to the conversion damages. CP 724-25.

The trial court granted Corbis’ CR 50(b) motion on conversion,

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<sup>3</sup> In its Reply to Answer to Petition for Review (“Reply”), Corbis makes at least two misstatements of the evidence with respect to the Jazz Service materials at issue: (i) “The source code developed by InfoFlows pursuant to the Development Agreement Corbis [sic] belonged to Corbis” (*see* Reply at 8, n.3); and, (ii) “InfoFlows also failed to identify any ‘information related to the Jazz Service’ taken by Corbis.” Reply at 9. These statements are contrary to the jury’s holdings (CP 526-27 at Question 5), the evidence on which they were based (Ex. 77), and the evidence identified in InfoFlows’ briefing (*see* Ans. to Pet. for Review at 17, referencing Reply Br. at 3-7 and CP 1737-40 (at ¶¶ 9-19)).

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[.]”<sup>4</sup> CP 1483. The trial court otherwise affirmed the jury’s verdict and entered judgment accordingly.<sup>5</sup> CP 1810-17. The Court of Appeals affirmed the trial court’s dismissal of the conversion claim. Op. at 28-30.

#### **IV. ARGUMENT**

##### **A. CORBIS CONVERTED INFOFLOWS’ PROPERTY**

At issue is the very nature of the tort of conversion and its application and continuing existence in an increasingly digital age. In short, does a claim for conversion lie where there has been significant interference with one’s control over copies of information and materials that are, at least in part, in digital form? The answer—based on the evidence, the modern trend of case law reflecting the development of technology, as well as long-standing precedent—must be affirmative. Corbis’ refusal to return copies of InfoFlows’ source code and related documentation after termination of the Development Agreement and its wrongful assertion of ownership over that material, constitute conversion

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<sup>4</sup> The court did not rule on preemption as this argument was not raised in Corbis’ CR 50(a) motion. CP 1483. The court did not reach Corbis’ damages argument because it dismissed the conversion claim on other grounds. CP 1484, n.2.

<sup>5</sup> The judgment included a declaratory judgment in favor of InfoFlows and a permanent injunction against Corbis. CP 1814-15 (at ¶¶ 2-4).

under Washington law.

Conversion is commonly defined as “the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession.” *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008); *see also* CP 1482; Op. 28. In analyzing conversion claims, Washington courts look to the Restatement (Second) of Torts, which recognizes claims for conversion in a variety of circumstances.<sup>6</sup> *See* Restatement (Second) of Torts §§ 221–241.

Under Washington law, significant interference with an owner’s right to control his or her property constitutes conversion. *In re Marriage of Langham & Kolde*, 153 Wn.2d 553, 106 P.3d 212 (2005). In *Langham*, this Court held that stock options were converted when the options were exercised because the exercise of a stock option constrains the “range of elective action” available to the rightful owner – *i.e.*, it “limit[s] the owner’s available choices” as to what she may do with the property in which she has an interest. 153 Wn.2d at 566.

The Restatement emphasizes this very same point. “Conversion is an intentional exercise of dominion or control over a chattel” that “seriously interferes with the right of another to control it[.]” Restatement

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<sup>6</sup> *Potter*, 165 Wn.2d at 88; *Brown ex rel. Richards v. Brown*, 157 Wn.App. 803, 820, 239 P.3d 602 (2010).

§ 222A; *see generally*, §§ 221-241. “[I]mportant” factors in determining the seriousness of the interference include the “intent to assert a right in fact inconsistent with . . . [and] the extent and duration of the resulting interference with the other’s right of control[.]” *Id.* at § 222A(2)(b)-(d).

“A single, temporary, and unimportant use which does not damage the chattel or inconvenience the owner, and is not intended as a defiance of his rights, may not be enough for a conversion, whereas an extended use . . . or one intended as the assertion of an adverse claim may be sufficient.”

*Id.*, at § 227 cmt. b (emphasis supplied) and illustrations 1-3 (brief use of desk not conversion; use over time or assertion of ownership is conversion); *see also* § 228 cmt. d and illustrations 4 and 5 (exceeding authorized use of a car by 10 miles to assert ownership is conversion).

Corbis obtained InfoFlows’ source code and related documentation and information for the Jazz Service, refused to return these materials after termination of the Development Agreement, and then wrongfully asserted ownership. InfoFlows had to file suit (and defend Corbis’ suit) in order to vindicate its rights and to assure that its exclusive ownership right was not further impaired or compromised.<sup>7</sup> At trial (nearly three years later), the jury held that InfoFlows’ Jazz Service materials over which Corbis

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<sup>7</sup> CP 61; CP 18-19.

asserted ownership did not belong to Corbis. CP 526-27 (Q. 5). And the trial court entered judgment accordingly, including declaratory judgment in InfoFlows' favor and a permanent injunction against Corbis. CP 1814-15 (at ¶¶ 2-4).

Under the applicable law and record evidence, it was error to dismiss the conversion claim.<sup>8</sup> Both the trial court and the Court of Appeals misconstrued the pertinent legal issue as a binary question of “deprivation” and whether mere “possession of a copy [ ] deprive[s] the owner of use of the property.” CP 1483; Op. at 29. Neither court acknowledged the Restatement. Instead, both courts erroneously relied on cases cited by Corbis in dismissing InfoFlows' claim as a matter of law. But these cases are inapposite because none of them involves an assertion of ownership or similar exercise of dominion over a rightful owner's property interest,<sup>9</sup> and neither court's analysis addressed Corbis' improper

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<sup>8</sup> This Court applies the same standard as the trial court in reviewing that court's decision granting judgment as a matter of law. *Schmidt v. Coogan*, 162 Wn.2d 488, 491, 173 P.3d 273 (2007). “Judgment as a matter of law should be limited to circumstances in which there is no doubt as to the proper verdict.” *Id.*, 162 Wn.2d at 493.

<sup>9</sup> See *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); *Monarch Fire Prot. Dist. of St. Louis County, Missouri v. Freedom Consulting & Auditing Services, Inc.*, 678 F.Supp.2d 927, 933, 944-45 (E.D. Mo. 2009) aff'd, 644 F.3d 633 (8th Cir. 2011) (no conversion where copies of documents retained “for purposes of [ ] defense in ... lawsuit” by owner; no claim of ownership by entity holding copies); *Calence, LLC v. Dimension Data Holdings*, C06-0262RSM, 2007 WL 1526349 at \*7 (W.D.Wash. May 23, 2007) (no conversion where defendant downloaded

assertion of ownership over InfoFlows' property.

In addition to Corbis' claim of ownership, its unauthorized retention of copies of InfoFlows' software code and related information independently constitutes conversion. This accords with the modern trend of case law. "Courts dealing with this issue [*i.e.*, 'theft of a copy' of electronic files] have begun to update the tort of conversion so that it keeps pace with the contemporary realities of widespread computer use." *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083, 1105 (W.D. Wash. 2011).

In *Aventa*, the plaintiffs converted defendant KCDL's electronic files by accessing, copying, and destroying them following termination of their employment. The court denied plaintiffs' motion to dismiss:

The fact that KCDL has access to another copy of the files at issue does not mean that it was not deprived of its possession of the copies accessed, made, or destroyed by Plaintiffs. Further, the court can find no logical basis for distinguishing between theft of a copy and theft of the original electronic document.

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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); *Furash & Co., Inc. v. McClave*, 130 F. Supp. 2d 48, 58-59 (D.D.C. 2001) (former employee did not convert documents and information when returned to prior employer and new employer in-house counsel kept a copy in the event of litigation; no claim of ownership, so no "exercise of ownership, dominion, or control over the personal property of another in denial or repudiation of that person's rights"); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 201 (2d 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).

830 F. Supp. 2d at 1105-06. *Aventa* focuses on an owner's right to possess and control all copies, and this analytical framework reflects the trend of courts' recognizing the development of technology in relation to the tort of conversion.<sup>10</sup>

Here, Corbis' unauthorized retention of copies of InfoFlows source code and related information deprived InfoFlows of the right to control possession and dissemination of its property and comprises an independently actionable exercise of dominion inconsistent with InfoFlows' property rights. This conduct was further amplified and

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<sup>10</sup> See, e.g., *Weingand v. Harland Fin. Solutions, Inc.*, C-11-3109 EMC, 2012 WL 2327660 at \*1, \*6 (N.D. Cal. June 19, 2012) (leave to file counterclaim for conversion granted; company alleged former employee accessed and copied and/or retained its information and licensed software for use in his own business); *Han v. Futurewei Technologies, Inc.*, 11-CV-831-JM JMA, 2011 WL 5118748 at \*1, \*4 (S.D. Cal. Oct. 28, 2011) (leave to file counterclaim for conversion granted where company alleged former employee illegally copied and deleted files from company-issued laptop); *In re Yazoo Pipeline Co., L.P.*, 459 B.R. 636, 652-54 (Bankr. S.D. Tex. 2011) (vacating dismissal of conversion claim based on allegations of copying proprietary seismic data from computers owned by bankruptcy estate); *In re Outsidewall Tire Litigation*, 1:09CV1217, 2010 WL 2929626 at \*5 (E.D. Va. July 21, 2010) (denying FRCP 50(b) motion on conversion claim; defendants' possession of copies of blueprints deprived plaintiffs of the right to control possession and dissemination of their property – “[t]he mere fact that defendants may not have converted the only copy of these blueprints does not somehow negate the deprivation to the plaintiffs[;]” emphasis in original); *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc.*, 688 F. Supp. 2d 443, 455 (E.D. Va. 2009) (denying motion to dismiss conversion claim “even if based exclusively on the transfer of copies of electronic information[;]” holding that “the purloining of copies of documents would constitute conversion because such an action is an action of ‘dominion’ inconsistent with the true owner’s property rights. . . . The reasoning of *FMC Corp.* [915 F.2d 300 (7th Cir. 1990)] would deprive the owner of the stolen copy of a time-tested means of redressing the injury sustained when property is stolen which, of course, is the traditional office of a conversion claim.”); *Ali v. Fasteners for Retail, Inc.*, 544 F.Supp.2d 1064, 1072 (E.D. Cal. 2008) (denying motion to dismiss conversion regarding copies of source code and related information; plaintiff had right to exclusive ownership).

exacerbated by Corbis' purposeful and improper assertion of ownership over InfoFlows' property. Corbis' acts were intended to and did constrain the "range of elective action" available to InfoFlows; these acts necessarily "limit[ed] [InfoFlows'] available choices" – by creating uncertainty as to title and impeding InfoFlows' ability to economically exploit its property interest, *e.g.*, through licensing or development and integration work analogous to the Development Agreement with Corbis. *Langham*, 153 Wn.2d at 566; Restatement §§ 222A, 223, 227, 228.

**B. CORBIS' ALTERNATIVE GROUNDS FOR AFFIRMANCE ARE BASELESS**

Corbis raises two collateral arguments to support affirming the trial court. These arguments concern issues that were not ruled on by the trial court (or the Court of Appeals) and, thus, are not properly before this Court. Corbis' arguments are also untimely and have been waived. More fundamentally, they are substantively wrong.

**1. Corbis' Preemption Defense Is Meritless and Has Been Waived.**

Corbis belatedly asserted copyright preemption as a defense to InfoFlows' conversion claim. But this avoidance defense has been waived. Corbis failed to allege preemption as an affirmative defense in its answer, Corbis never sought to remove based on preemption, and Corbis

never asserted the defense by a motion to dismiss.<sup>11</sup> Likewise, Corbis never argued preemption in its CR 50(a) motion on conversion and this failure constituted a waiver of Corbis' ability to bring a CR 50(b) motion regarding its late-asserted preemption defense.<sup>12</sup> CP 1483.

Regardless, InfoFlows' conversion claim is not preempted.

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

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<sup>11</sup> *See, e.g., Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1266 (9th Cir. 1996) (preemption waived; "[f]ailure to raise an affirmative defense below results in waiver"); *Schneider v. Wilcox Farms, Inc.*, C07-1160JLR, 2008 WL 2367183 at \*2 (W.D. Wash. June 6, 2008) ("Avoidance defenses such as federal preemption are waived if not raised in the pleadings."); *Integrated Bar Coding Sys., Co. v. Wemert*, 04-60271, 2007 WL 496464 at \*9 (E.D. Mich. Feb. 12, 2007) (copyright preemption defense waived when not asserted as an affirmative defense; collecting cases holding federal preemption "is relevant only as a defense.").

<sup>12</sup> CR 50(b) was amended in 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 (2d ed.) at 88. This is consistent with federal law. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.6, 128 S.Ct. 2605 (2008); C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2537 (3d ed. 2008). *See also* RAP 2.5(a); *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) ("Arguments not raised in the trial court generally will not be considered on appeal."); *Wingert v. Yellow Freight Sys., Inc.* 146 Wn.2d 841, 852-54 (2002) (federal preemption "is not an issue that satisfies any of the exceptions to the general rule").

copyright” are preempted.<sup>13</sup> 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.

[I]f 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, 440 798 P.2d 1146 (1990) (no preemption of theft of software because criminal charge had elements other than mere unauthorized duplication) (citation omitted; emphasis supplied).

In contrast to a copyright action, InfoFlows’ conversion claim is not based on allegations that Corbis engaged in unauthorized reproduction, performance, distribution or display of InfoFlows’ property. InfoFlows’ claim is detailed in both its initial Complaint and its Amended Complaint:

- Subject to a Mutual Nondisclosure, 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

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<sup>13</sup> Two conditions must be satisfied for preemption under the Copyright Act. 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).

“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 testimony that InfoFlows presented at trial. *See, e.g.,* III(E)-(F) *supra*.

There is no preemption here because InfoFlows’ claim is based on allegations and evidence that are “qualitatively different from a copyright infringement claim.” *Terarecon, Inc. v. Fovia, Inc.*, C05-4407 CW, 2006 WL 1867734 at \*10 (N.D.Cal. July 6, 2006) (additional elements; no preemption).<sup>14</sup> InfoFlows’ conversion claim includes additional or other elements that are not part of copyright law – *e.g.*, the wrongful possession, retention and deprivation of InfoFlows’ property interest, materials not

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<sup>14</sup> *See also Smith, supra; Downing*, 265 F.3d at 1003 (no copyright preemption of state law claims regarding statutory and common law rights of publicity); *Rasmussen*, 958 F.2d at 904 (no preemption where conversion claim not based on allegation of wrongful copying); *Complete Pharmacy Res., Ltd. v. Feltman*, CIV.A. H-04-3477, 2005 WL 1949540 at \*5-6 (S.D. Tex. Aug. 12, 2005) (no preemption where conversion claim was based, in part, on defendant’s failure to return copies of software).

subject to copyright protection, and the improper assertion of ownership.<sup>15</sup>

## 2. The Evidence Supports the Damages Award.

It is “strongly presume[d] the jury’s verdict is correct.” *Bunch v. King County Dept. of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005) (citation omitted). 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. Grays Harbor Comty. Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985).

Here, the evidence supports the jury’s finding that \$16.6 million represented the “value of money or goods belonging to InfoFlows that was converted by Corbis.” CP 528; 562. By way of example only, Steve Stone valued InfoFlows’ services at \$30 million. Ex. 232. Corbis itself internally valued the use of the Jazz Service as implemented for Corbis, with revenue projections ranging from \$3-20 million per year. Ex 188. And in May 2006, David Weiskopf of Corbis projected increased revenue over just 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

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<sup>15</sup> Corbis relies on run-of-the-mill preemption cases concerning conversion claims based on unauthorized reproduction or distribution. *See, e.g., Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115 (N.D. Cal. 2001) (preemption of conversion claim based on alleged unauthorized reproduction of software); *Apparel Bus. Sys., LLC v. Tom James Co.*, CIV.A.06-1092, 2008 WL 858754 at \*18 n.9 (E.D. Pa. Mar. 28, 2008) (same); *Butler v. Cont’l Airlines, Inc.*, 31 S.W.3d 642 (Tex.App. 2000) (same).

August 24, 2009, approximately three years from the date of Corbis' conversion. *E.g.*, Ex. 380. This award is supported by and within the range of the evidence.<sup>16</sup>

**V. CONCLUSION**

InfoFlows respectfully requests that this Court reverse the dismissal of its conversion claim, reinstate the jury's verdict on that claim and the associated damages, and direct the trial court to enter an amended judgment accordingly.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of February 2013.

**SAVITT BRUCE & WILLEY LLP**



By: \_\_\_\_\_

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Attorneys for Respondent / Cross-Petitioner

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<sup>16</sup> Corbis' argument that there was no evidence of the value of the converted property ignores the fact that it asserted ownership over the entirety of InfoFlows' technology platform, including the web crawler and related search and reporting, which formed the basis of its value and novelty. This is the same value proposition that Corbis saw as providing it revenue of up to \$20 million per year. When the jury awarded damages of \$16.6 million it could have reasonably concluded that the value of InfoFlows' converted property was a portion of the ultimate value to Corbis. *Outsidewall*, 2010 WL 2929626 at \*6 (denying FRCP 50(b) motion on conversion damages regarding copies of blueprints; damages properly based on evidence of "ultimate value of the blueprints to defendants," *i.e.*, "the potential value of commercial exploitation of the blueprints").

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this date I caused a copy of the attached document – SUPPLEMENTAL BRIEF OF RESPONDENT/CROSS-PETITIONER INFOFLOWS CORPORATION – to be served by U.S. Mail (with a courtesy copy by email) on 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 8<sup>th</sup> day of February 2013, at Seattle, Washington.



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Stephen C. Willey  
WSBA #24499

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