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The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wine

I. INTRODUCTION

An important corollary to the tort of conversion is the rule that intangible property cannot be converted. Scholars, however, when they have written about the tort of conversion at all,[1] have disagreed on the rule's value. Professor Prosser

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1. It is customary to note how little scholarly commentary has been written on conversion and trover. William L. Prosser, *The Nature of Conversion*, 42 CORNELL L. REV. 168, 168 (1957); Lawrence H. Hill, Note, *"A New Found Haliday": The Conversion of Intangible Property—Re-Examination of the Action of Trover and Tort of Conversion*, 1972 UTAH L. REV. 511, 511 n.2; . Relatively little *has* been written on conversion and trover. In addition to the above citations, see FOWLER V. HARPER ET AL., THE LAW OF TORTS §§ 2.7-2.38 (2d ed. 1986); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 88-107 (W. Page Keeton, ed., 5th ed. 1984); *see also* RESTATEMENT (SECOND) OF TORTS §§ 222A-242, 253 (1977); JAMES B. AMES, LECTURES ON LEGAL HISTORY (1913); RENZO D. BOWERS, A TREATISE ON THE LAW OF CONVERSION (1917) (containing little or no history or theoretical analysis); C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 102-25 (1949); E. WARREN, TROVER AND CONVERSION (1936); James B. Ames, *The History of Trover*, 11 HARV. L. REV. 277, 374 (1897) (recounting the history of trover in terms generally identical to the Ames book cited *supra*); George L. Clark, *The Test of Conversion*, 21 HARV. L. REV. 408 (1908); John W. Salmond, *Observations on Trover and Conversion*, 21 LAW Q. REV. 43 (1905); A.W.B. Simpson, *The Introduction of the Action on the Case for Conversion*, 75 LAW Q. REV. 364 (1959); Daniel J. Blaugrund, Note, *Conversion: Bailee's Unauthorized Use of Bailed Chattel*, 21 CORNELL L.Q. 112 (1935); Comment, *Conversion of Choses in Action*, 10 FORDHAM L. REV. 415 (1941); John R. Faust, Jr., Note, *Distinction Between Conversion and Trespass to Chattel*, 37 OR. L. REV. 256 (1958); Aaron C. Lichtman, Note, *Commercial Exploitation of DNA and the Tort of Conversion: A Physician May Not Destroy a Patient's Interest in Her Body Matter*, 34 N.Y.L. SCH. L. REV. 531 (1989).

Accordingly, Prosser noted in 1957 that

> [c]onversion is the forgotten tort. Few courts or law professors have had any interest in it, and with few exceptions what little has been written about it has been quite perfunctory. There are as a matter of fact several hundred cases of conversion reported every year; but, as in the rather similar case of trespass to land, most of them are concerned only with the ownership of the disputed property, and the tort itself is not in issue.

Prosser, *supra*, at 168. Though more has been written on the tort since Prosser's

called it a "hoary limitation," for which there was "perhaps no very valid and essential reason."[2] Professors Harper and James, however, warn against extending the tort to cover intangibles.[3] The theory of conversion has from its beginning been based on fact patterns involving only tangible property.[4]

Notwithstanding the history of the tort, many courts have extended conversion to include intangibles.[5] This Comment examines this departure from history and its effects on the coherence of the tort as it has been generally applied. Because the abrogation of the old rule renders other history-bound rules inappropriate, this Comment recommends that courts doing away with the rule making conversion inapplicable to intangibles do away with the other rules, also. Specifically, allowing conversion of intangibles inconsistent with the tort's use of concepts such as *dominion* and *chattel* and the measure of damages traditionally applied to the tort.

Section II sets forth the substantive tort of conversion, using the *Restatement (Second) of Tort*'s formulation as a paradigm of the tort generally. Parts A and B of section II examine both the tort's use of concepts such as *dominion* and *chattel* and the measure of damages for the conversion and show how these implicitly assume that the property at issue in the conversion action is tangible. Section III notes the relatively recent development of intangible property and the courts' realization of the present need for an action for tortious misappropriation of such property. Section IV shows how such concepts as *dominion* and *chattel* and the historical measure of damages for conversion cannot be made to do justice in intangible property cases. Section V recommends solutions.

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article, the commentary remains relatively sparse. As to how often conversion is pleaded in a complaint, Prosser's estimate of the number of cases remains accurate. A computer database search for cases brought in conversion reveals hundreds, perhaps thousands, of such cases have been brought in recent years. The recent cases cited in this Comment are further proof of the tort's vitality. *See, e.g.*, *infra* note 74. Thus the court which stated that "[c]onversion is an ancient tort, yet it is rarely the basis of a cause of action in modern times," Northcraft v. Edward C. Michener Assocs., 466 A.2d 620, 624 (Pa. Super. Ct. 1983), was simply incorrect.

2. KEETON, *supra* note 1, at 91-92; *see also* Hill, *supra* note 1, at 511.
3. HARPER, *supra* note 1, § 2.13.
4. *See infra* notes 119-45 and accompanying text.
5. *See* sources cited *infra* note 74.

II. THE OLD BOTTLE: CONVERSION AND THE ASSUMPTION OF TANGIBLE PROPERTY

Conversion is an old bottle, an ancient theory of recovery.[6]

The theory and name of the tort of conversion grew out of the common law form of action trover.[7] An action in trover, in its most popular ancient use, applied to situations in which a defendant, after finding a lost chattel that belonged to the plaintiff, disposed of it or used it for her own purposes.[8] On learning what had happened, the owner-plaintiff had a right under the form of action trover to recover damages.[9]

The tort of conversion was simply the trover action renamed.[10] Though the tort of conversion was broadened in some states to cover a few more fact situations than did ancient

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6. Conversion's history was published in 1897. Ames, *supra* note 1, at 277, 374. The earliest case charging a defendant with "converting to his own use" the plaintiff's goods was brought in 1479. *Id.* at 384 (the case was *Anon*, Y.B. 18 Edw. 4, fo. 23, pl. 5 (1479)). Simpson, *supra* note 1, and HARPER, *supra* note 1, § 2.7, explain how the common law form of action in conversion developed as a species of case during the early 1500s. The Court of Queen's Bench used the word "trover" to describe a theory of recovery as early as 1601. Basset v. Maynard, 78 Eng. Rep. 1046 (Q.B. 1601). The Court of Common Pleas soon followed. Bishop v. Viscountess Montague, 78 Eng. Rep. 1051 (C.P. 1601). Ames notes that "[i]n the reign of Elizabeth it was common form to count upon a finding and conversion." Ames, *supra* note 1, at 384 n.2. At that time, of course, the theory of recovery conversion was entombed in the common law form of action trover. *See infra* text accompanying notes 119-45 for a more detailed history of the tort.

7. RESTATEMENT (SECOND) OF TORTS § 222A cmt. a (1977); Prosser, *supra* note 1, at 169. Trover, in turn, sprang from a form of detinue, detinue *sur trover*. *See* Ames, *supra* note 1, at 382 ("[N]o one can doubt that detinue *sur trover* was the parent of the modern action of trover."). Suing in trover was less risky than suing in detinue, since until 1833 the defendant in an action in detinue might defend himself by "wager of law," always a danger for the honest plaintiff. *Id.* at 385 n.8; *see* Prosser, *supra* note 1, at 169; *infra* text accompanying notes 135-41. In the slow evolution of the common law, trover eventually displaced detinue and trespass as the primary action for recovery of damages for chattels taken or destroyed. Ames, *supra* note 1, at 382-86 (trover available against a finder of a chattel by 1510, a wrongful seller of a chattel also by 1510, a wrongful taker of a chattel in 1601, a bailee who refused on demand to return a chattel in 1675, and one holding a chattel wrongfully under a lien in 1770).

8. *See* RESTATEMENT (SECOND) OF TORTS § 222A cmt. a (1977); Ames, *supra* note 1, at 277, 381-86; Hill, *supra* note 1, at 512; Salmond, *supra* note 1, at 43; *see also, e.g.*, Lawson v. Commonwealth Land Title Ins. Co., 518 A.2d 174, 175 (Md. Ct. Spec. App. 1987) ("In its earliest form, the action was used in, and apparently limited to, situations where finders of lost goods refused to return them to the true owners.").

9. RESTATEMENT (SECOND) OF TORTS § 222A cmt. a (1977); Ames, *supra* note 1, at 277; Hill, *supra* note 1, at 512.

10. *See* Prosser, *supra* note 1, at 168-171; Salmond, *supra* note 1.

trover,[11] in most ways the trover bottle was simply given a "conversion" label. Even the label "conversion" comes from the old pleading form for the action in trover.[12] As set forth by Professor Ames,

> [t]he classic count in trover alleges that the plaintiff was possessed, as of his own property, of a certain chattel; that he afterwards casually lost it; that it came to the possession of the defendant by finding; that the defendant refused to deliver it to the plaintiff on request; and that he *converted it to his own use*, to the plaintiff's damage.[13]

Professor Ames notes as well that in pleading conversion "[t]he averments of loss and finding are notorious fictions, and that of demand and refusal is surplusage."[14]

Though "forms of action are dead, . . . their ghosts still haunt the precincts of the law."[15] Even if much of the pleading

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11. The *Restatement (Second) of Torts* records that although when the forms were abolished conversion and trover were identical, subsequent modification of conversion has broadened the tort to include some factual situations which the action in trover would not have covered. RESTATEMENT (SECOND) OF TORTS § 222A cmt. b (1977). For instance, conversion now also often includes situations in which the plaintiff has merely a future right to possession of a chattel as opposed to a present right to possession. *Id.* In either case, a chattel is involved, and these distinctions have no relevance to the conclusions and analysis of this Comment.

12. Prosser, *supra* note 1, at 169. The word *trover* is "derived from the French word for finding." *Id.*; Hill, *supra* note 1, at 511 n.3.

13. Ames, *supra* note 1, at 277 (emphasis added); Hill, *supra* note 1, at 512; *see* Prosser, *supra* note 1, at 169.

14. Ames, *supra* note 1, at 277; *see also, e.g.*, Federal Ins. Co. I.C. v. Banco De Ponce, 751 F.2d 38, 41 (1st Cir. 1984) ("Trover's procedural prerequisite—an allegation that P had lost the chattel and D had found it—became a legal fiction."). It appears that losing and finding became fictions rather early. As to finding, the court in *Ratcliff v. Davies*, 79 Eng. Rep. 210 (K.B. 1611), held that "a trover and conversion well lies, although [the defendant] came to [the goods at issue] by a lawful delivery, and not by trover." Losing soon followed finding. The Court of Exchequer Chamber stated in *Kinaston v. Moore*, 79 Eng. Rep. 678, 678-79 (Ex. Ch. 1626) that "the losing is but a surmise and not material, for the defendant may take it in the presence of the plaintiff, or any other who may give sufficient evidence." It would seem that lawyers love a good fiction and cannot get over telling it.

15. Salmond, *supra* note 1, at 43. Salmond's observations are still true as applied to trover and conversion:

> In their [the forms'] life they were powers of evil, and even in death they have not wholly ceased from troubling. In earlier days they filled the law with formalism and fiction, confusion and complexity, and though most of the mischief which they did has been buried with them, some portion of it remains inherent in the law of the present day. Thus if we open a book on the law of torts, howsoever modern and rationalized, we can still hear the echoes of the old controversies concerning the contents and the

form of trover quickly became a mere fiction in alleging conversion,[16] several fiendishly formal rules began to trouble the tort of conversion early in its history and have haunted it since. Before this century, when most personal property was tangible—property one could find in a field and later sell at a market—the tort became encrusted, quite in line with the fact pattern outlined in the trover pleading form, with legal rules that assumed that the property taken was tangible.[17] As a result, courts have been reluctant to provide recovery for the conversion of intangible property.

This Comment is not the first to notice this reluctance. The *Ayres v. French* (1874)[18] court noted:

> [I]t is said that, in order to maintain this action [in trover], a party must have the right to the immediate actual possession of the thing for which he seeks in trover to recover the value . . . . If he has not this right, the conversion of the thing has not yet done the plaintiff any harm. But what matters it whether or not the thing itself is capable of being taken in hand and carried away, so long as it is personal property of as substantial value as any other, and in no case can the thing itself be recovered in this form of action, but only its value[?] There was force in the claim originally, when trover

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> boundaries of trespass and detinue and trover and case, and we are still called upon to observe distinctions and subtleties that have no substance or justification in them, but are nothing more than an evil inheritance from the days when forms of action and of pleading held the legal system in their clutches.
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> . . . [T]he law of trover and conversion is a region still darkened with the mists of legal formalism, through which no man will find his way by the light of nature or with any other guide save the old learning of writs and forms of action and the mysteries of pleading.

Id. No matter what may be said about the objective, metaphysical existence or even justification of the concept "cause of action," *see* John W. Van Doren & Patrick T. Bergin, *Critical Legal Studies: A Dialogue*, 21 NEW ENG. L. REV. 291 (1986), theories of recovery are essential to the law as the simplest way to describe and limit the kinds of wrongful acts which merit recovery in a court, if for no other reason.

16. The losing and finding requirements were fictions as early as 1626. *See supra* note 14 and sources cited therein.

17. There is an old hornbook rule stating that only tangible personal property or at least property represented by something tangible can be converted. 18 AM. JUR. 2D *Conversion* § 7 (1985); 89 C.J.S. *Trover and Conversion* § 11 (1955). This is the assumption stated as a rule of law. But this same rule, treated as if collateral to the tort, actually does, like any consistent collateral rule, underlie much of the tort theory itself. The rule was probably pronounced after the tort became so rigid that to hold otherwise seemed logically repugnant to judges.

18. 41 Conn. 142 (1874).

> was confined to property lost. From the nature of the action it could not then lie unless the property was tangible. The fiction of lost property is still retained in declarations of this kind, but the allegation has long since ceased to be substantial . . . . The truth is that, *when the allegation of lost property became a fiction by the extension of the action to cases not originally embraced within it, the courts carried the original characteristics of the action along with it into its new relations, without stopping to enquire whether all of them were still important*. This is the reason why authority can be found in support of the necessity of a tangible character to the subjects of the action.[19]

Of course, various reasons have been given by the cases for the rule against the conversion's application to intangibles: intangibles cannot be lost nor found, are not property, cannot be physically possessed, have no value, are not specific enough to be identified under pleading rules, are not represented by tangible symbols.[20] However, few will now dispute that intangibles have value, and the other reasons for denying recovery for converted intangibles are just what the *Ayres* court noted they were: holdovers from the old pleading requirements—hardly valid reasons to deny recovery today.[21]

Despite the *Ayres* court's exposition, the *Restatement (Second)* version of the tort adopted the assumption of tangible property in its entirety. As that version has been widely approved by many courts[22] and can be taken as typical,[23] it

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19. *Id.* at 150-51 (emphasis added) (The *Ayres* court held merely that shares of stock could be converted; the court's logic—that reasons for excluding intangibles are merely fictions held over from history—embraces all intangibles.); *see* Plunkett-Jarrell Grocery Co. v. Terry, 263 S.W.2d 229 (Ark. 1953) (rejecting an argument that the old common law formal limitations should govern the case; holding that book accounts were convertible when an account book was taken); Lawson v. Commonwealth Land Title Ins. Co., 518 A.2d 174, 175-76 (Md. Ct. Spec. App. 1987) ("Although the action and the tort have expanded beyond the case of lost goods and cover now nearly any wrongful exercise of dominion by one person over the personal property of another, that early use has had a continuing influence." (citations omitted)); Hill, *supra* note 1, at 511 ("No valid reason exists for limiting conversion to tangible personal property."); *id.* at 528-32 (examining and rejecting several proposed justifications for the rule limiting conversion to tangible property).

20. See Hill, *supra* note 1, at 528-31 and sources cited 528-31 nn. 101-33 for this list and various refutations of the validity of these reasons.

21. Hill, *supra* note 1, concludes that there is no valid reason not to extend conversion to cover intangibles. *Id.* at 532-33.

22. Many courts have cited the *Restatement (Second)* and its commentary in support of their assertions concerning conversion. *E.g.*, H.J., Inc. v. ITT Corp., 867 F.2d 1531, 1547 (8th Cir. 1989); Shidler v. All Am. Life & Fin. Corp., 775 F.2d

917, 925 n.10 (8th Cir. 1985); Federal Ins. Co. I.C. v. Banco De Ponce, 751 F.2d 38, 41 (1st Cir. 1984); Harley-Davidson Motor Co. v. Bank of New England-Old Colony Nat'l Ass'n., 85 B.R. 1, 3 (D.R.I. 1988), *aff'd in part, vacated in part*, 897 F.2d 611 (1st Cir. 1990) (citing only the *Restatement (Second)* as authority for conversion law in the district court; the court of appeals cited to the *Restatement (Second)* and other law in vacating the district court's conversion judgment); Woodring v. Jennings State Bank, 603 F. Supp. 1060, 1064 (D. Neb. 1985); *In re* Anderson, 15 B.R. 346, 350 (Bankr. W.D. Mo. 1982); Plaza 61 v. North River Ins. Co., 446 F. Supp. 1168, 1171 (D. Pa.), *aff'd*, 588 F.2d 822 (3d Cir. 1978); Dressel v. Weeks, 779 P.2d 324, 328 (Alaska 1989) (setting forth only the *Restatement (Second)* formulation as controlling in a conversion case); McKibben v. Mohawk Oil Co., 667 P.2d 1223, 1228 (Alaska 1983) (citing only the *Restatement (Second)* as authority for conversion law); Focal Point, Inc. v. U-Haul Co., 746 P.2d 488, 489, 490 (Ariz. Ct. App. 1986); Blanken v. Harris, Upham & Co, 359 A.2d 281, 281-83 (D.C. 1976); Trust Co. of Columbus v. Refrigeration Supplies, Inc., 246 S.E.2d 282, 286 (Ga. 1978); Luzar v. Western Sur. Co., 692 P.2d 337, 340 (Idaho 1984); *In re* Thebus, 483 N.E.2d 1258, 1260 (Ill. 1985); Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235, 247 (Iowa 1988); Scholfield Bros. v State Farm Mut. Auto. Ins. Co., 752 P.2d 661, 662-63 (Kan. 1988); Mauboules v. Broussard Rice Mills, 379 So. 2d 1196, 1198 (La. Ct. App.), *cert. denied*, 381 So.2d 1234 (La. 1980) (proclaiming the *Restatement (Second)* formulation "consistent with" Louisiana law); Northeast Bank v. Murphy, 512 A.2d 344, 347 (Me. 1986); Welch v. Kosasky, 509 N.E.2d 919, 922 (Mass. App. Ct. 1987) (citing only the *Restatement (Second)* as authority for conversion law); Lawson v. Commonwealth Land Title Ins. Co., 518 A.2d 174, 176 (Md. Ct. Spec. App. 1987); Inland Constr. Corp. v. Continental Casualty Co., 258 N.W.2d 881, 884 (Minn. 1977); Breece v. Jett, 556 S.W.2d 696, 709 (Mo. Ct. App. 1977); Bryant Heating & Air Conditioning Co. v. United States Nat'l Bank of Omaha, 342 N.W.2d 191, 195 (Neb. 1983); Heneghan v. Cap-A-Radiator Shops, 506 N.Y.S.2d 132, 134 (N.Y. Cir. Ct. 1986); Legg v. Allen, 696 P.2d 9, 13 (Or. Ct. App. 1985) (reciting that Oregon has adopted the *Restatement (Second)* formulation of conversion in a previous case); Northcraft v. Edward C. Michener Assocs., 466 A.2d 620, 624 (Pa. Super. Ct. 1983); Young v. Century Lincoln-Mercury, Inc., 396 S.E.2d 105, 110 (S.C. Ct. App. 1989) (per curiam) (quoting from the *Restatement (Second)* "[f]or the enlightment [sic] of the Bar"); Rensch v. Riddle's Diamonds, 393 N.W.2d 269, 271-73 (S.D. 1986); Guzman v. City of San Antonio, 766 S.W.2d 858, 861 (Tex. Ct. App. 1989); Lyon v. Bennington College Corp., 400 A.2d 1010, 1012 (Vt. 1979); Frisch v. Victor Indus., 753 P.2d 1000, 1002 (Wash. Ct. App. 1988).

23. The *Restatement (Second)* formulation speaks in terms of *dominion*, *control*, *chattels*, and wrongful acts warranting *damages for full value of the property converted*—all concepts which assume that tangible property is at issue. *See infra* text accompanying notes 28-47. Other formulations employ similar concepts in describing an actionable conversion. Compare the following with the *Restatement (Second)* form of conversion set out in the text:

> 1) Conversion is "an act of wilful interference with a chattel, done without lawful justification, by which the person entitled thereto is deprived of its use and possession." Hill, *supra* note 1, at 519 (quoting Allred v. Hinkley, 328 P.2d 726, 728 (Utah 1958));
> 2) Conversion is the unauthorized assumption and exercise of dominion of the right of ownership over property belonging to another. Heneghan v. Cap-A-Radiator Shops, 506 N.Y.S.2d 132, 134 (N.Y. Civ. Ct. 1986);
> 3) In order for there to be a conversion there must be an unlawful dominion and control over the personalty of another in denial or repudiation of his right to such property. Blanken v. Harris, Upham & Co., 359 A.2d 281, 283 (D.C. 1976);

serves as an influential illustration of how the tort itself embodies this assumption of tangible property. The *Restatement (Second)* formulation follows:

> § 222 A. What Constitutes Conversion
> (1) 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.*
> (2) In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:
> (a) the extent and duration of the actor's exercise of *dominion or control;*
> (b) the actor's intent to assert a right in fact *inconsistent with the other's right of control;*
> (c) the actor's good faith;
> (d) the extent and duration of the resulting *interference with the other's right of control;*
> (e) the harm done to the chattel;
> (f) the inconvenience and expense caused to the other.[24]

The words and phrases italicized in the *Restatement*'s formulation are those which generally assume that the property involved is tangible, as this Comment will shortly demonstrate.

Despite an assertion by one commentator to the contrary,[25] even the *Restatement*'s inclusion of "Documents and Intangible Rights" in its category of convertible property assumed that tangible property would be involved:

> § 242. Conversion of Documents and Intangible Rights
> (1) Where there is a conversion of a document in which

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4) A conversion is the deprivation of another's right of property in, or use or possession of, a chattel, or interference therewith, without the owner's consent and without lawful justification. Northcraft v. Edward C. Michener Assocs., 466 A.2d 620, 624 (Pa. Super. Ct. 1983).

But compare the following, which lacks the use of such concepts: "[Conversion] is any unauthorized act, which deprives a man of his property permanently or for an indefinite time." *In re* Thebus, 483 N.E.2d 1258, 1260 (Ill. 1985). And compare the following formulation as well, which appears to lack completely the assumption that tangible property is at issue: "A conversion occurs whenever there is a serious interference to a party's rights in property." Bader v. Cerri, 609 P.2d 314, 317 (Nev. 1980). For a long list of courts' attempts to define the tort of conversion, see Lichtman, *supra* note 1, at 537 n.48.

24. RESTATEMENT (SECOND) OF TORTS § 222A (1977) (emphasis added).

25. Hill, *supra* note 1, at 531-32.

> intangible rights are merged, the damages include the value of such rights.
> (2) One who effectively prevents the exercise of intangible rights of the kind customarily merged in a document is subject to a liability similar to that for conversion, even though the document is not itself converted.[26]

Subsection (1) of this paragraph provides protection for intangible rights, but requires that the rights be merged with a document to be converted. Subsection (2) provides protection for intangible rights even if such a document is not converted, but the rights involved must be of the kind customarily merged in a document—of a kind we can easily pretend are tangible; essentially this subsection retains by a fiction the very assumption of tangible property we have been discussing.[27]

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26. RESTATEMENT (SECOND) OF TORTS § 242 (1977). This section of the *Restatement (Second)* and its commentary have been widely relied on by courts, among them courts limiting the reach of conversion to intangibles embodied in paper, as the *Restatement (Second)* recommends. *E.g.*, Brand Iron, Inc. v. Koehring Co., 595 F. Supp. 1037, 1040 (D. Md. 1984) (citing to comment f of § 242); De Sanchez v. Banco Central De Nicar., 515 F. Supp. 900, 913 (E.D. La. 1981); Universal Computer Sys., Inc. v. Allegheny Airlines, Inc., 479 F. Supp. 639, 646 (M.D. Pa. 1979), *aff'd*, 622 F.2d 579 (3d Cir. 1980); Trust Co. of Columbus v. Refrigeration Supplies, Inc., 246 S.E.2d 282, 286 (Ga. 1978) (citing to comments a and d of § 242); General Motors Corp. v. Douglass, 565 N.E.2d 93, 96 (Ill. App. Ct. 1990) (citing to comment d to § 242); Lawson v. Commonwealth Land Title Ins. Co., 518 A.2d 174, 176, 177 (Md. Ct. Spec. App. 1987) (citing comment d of § 242); Ippolito v. Lennon, 542 N.Y.S.2d 3, 6 (App. Div. 1989) (refusing in dicta to extend the tort even to the *Restatement (Second)* limit); Lyon v. Bennington College Corp., 400 A.2d 1010, 1012 (Vt. 1979). *But cf.* McCain v. P.A. Partners Ltd., 445 So. 2d 271, 273 (Ala. 1984) (Embry, J., dissenting).

27. The *Restatement (Second)* does not intend to be close-minded, however:

> Thus far the liability stated in Subsection (2) has not been extended beyond the kind of intangible rights which are customarily represented by and merged in a document. It is at present the prevailing view that there can be no conversion of an ordinary debt not represented by a document, or of such intangible rights as the goodwill of a business or the names of customers. The process of extension [of conversion to cover more intangibles] has not, however, necessarily terminated; and nothing that is said in this Section is intended to indicate that in a *proper case* liability for intentional interference with *some other kind* of intangible rights may not be found.

RESTATEMENT (SECOND) OF TORTS § 242 cmt. f (1977) (emphasis added). Doubtless there is or will be some dispute as to what the reporters meant by a "proper case."

Both reporters' notes to section 242 and examples used in the comments show that a proper case did not include intangible property un-merged in a tangible object. The reporters note as examples under this section promissory notes, checks, bonds, drafts, stock certificates, bills of lading, warehouse receipts, saving bank books, insurance policies, tax receipts, receipted accounts, account books, and

An analysis of the *Restatement*'s terminology and its historical baggage brings the prominence of the assumption of tangible property to the fore. Particularly, the assumption of tangible property is represented in two of the tort's ingredients: the concepts of *dominion* and *chattel* and tort's general measure of damages.

A. *Dominion or Control and Chattel*

The notion of *dominion* stems, according to Prosser,[28] from the case of *Fouldes v. Willoughby*.[29] In that case, the plaintiff boarded the defendant's ferry boat with two horses.[30] After the defendant and plaintiff quarrelled and defendant removed the horses from the boat (not intending to keep them but merely get them off the boat), the plaintiff remained on the boat and was ferried across the river; the defendant allowed plaintiff the right to regain the horses a few days later for a

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motion picture films; each of these "documents" is a tangible embodiment of the intangible value at issue, the exclusive possession of which gives exclusive use of all such value (with the possible exception of motion picture films, which if converted by copy partake of the same difficulties outlined *infra*). *Id.* at cmts. a-f and appendix § 242 reporters' notes. The reporters note that "as to other intangible rights, it is generally agreed that there can be no conversion." *Id.* appendix § 242 reporters' notes.

Though open-ended, the statement recommending extension of the tort, as quoted *supra*, is preceded by the statement that there currently can be no conversion of an ordinary debt or intangible rights in the goodwill of a business or the names of customers. *Id.* at cmt. f. A fair reading of the quote above, then, is that these were improper cases contrasted with proper cases to which extension of the tort of conversion would be appropriate; some "other kind" of intangible rights might be a proper case, the reporter notes. *Id.* An example going further than the account book but not as far as the goodwill of a business might be architectural plans, a written idea for a business, etc. Yet even these examples of what the *Restatement (Second)* might allow do not approach some courts' views of conversion's expanded reach. *See* Schnucks Twenty-Five, Inc. v. Bettendorf, 595 S.W.2d 279 (Mo. Ct. App. 1979); Benaquista v. Hardesty & Assocs., 20 Pa. D. & C. 2d 227 (1959).

This argument limiting the scope of the *Restatement (Second)* recommendation is not conclusive, however, because the first sentence of the quote, *supra*, states only an outside limit to which most courts had been willing to extend conversion. The second sentence then might be taken as merely setting forth examples of what lay at that time outside those limits and not as setting forth "improper cases." Thus, a "proper case" could very well mean anything outside those limits outlined in the first sentence.

28. Prosser, *supra* note 1, at 171; *see also* RESTATEMENT (SECOND) OF TORTS § 222A cmt. a (1977).

29. 151 Eng. Rep. 1153 (Ex. 1841).

30. *Id.* at 1153.

fee.[31]

In discussing why the defendant's actions were not a conversion of the horses (the defendant lacked intent), Lord Alderson declared:

> Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places.[32]

Prosser notes that " '[d]ominion' has haunted the conversion cases ever since" *Fouldes* was decided.[33] Certainly one can see how "dominion has haunted" the *Restatement (Second) of Torts*,[34] for which Professor Prosser acted as reporter.[35]

The concept of dominion was bound up in *Fouldes* with the assumption that conversion operated only on tangible property. The very discussion in which the word "dominion" was coined is replete with references to "chattels,"[36] and "chattel" has generally been assumed to refer to tangible objects.[37] In addition,

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31. *Id.*
32. *Id.* at 1156.
33. Prosser, *supra* note 1, at 171.
34. *See supra* text accompanying note 24.
35. Prosser, *supra* note 1, at 169 n.5.
36. *See Fouldes*, 151 Eng. Rep. at 1156 (quoted in part *supra* text accompanying note 32).
37. *See* Hill, *supra* note 1, at 519-20; BLACK'S LAW DICTIONARY 236 (6th ed. 1990) (a "thing personal and movable"). Blackstone describes "chattels" as follows:

> But things personal, by our law, do not only include things *moveable*, but also something more. The whole of which is comprehended under the general name of *chattels*, *catalla*; which, sir Edward Coke says, is a French word signifying goods. And this is true, if understood of the Norman dialect; for in the *grand coustumier* we find the word chattels used and set in opposition to a fief or feud: so that not only goods, but whatever was not a feud, were accounted chattels. And it is, I apprehend, in the same large, extended, negative sense, that our law adopts it; the idea of goods, or moveables only, being not sufficiently comprehensive to take in every thing that our law considers as a chattel interest . . . .
>
> CHATTELS therefore are distributed by the law into two kinds; chattels *real*, and chattels *personal*.
>
> . . .
>
> CHATTELS personal are, properly and strictly speaking, things *moveable*; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book; having been unavoidably led to con-

the definition of the word *dominion* in the paragraph quoted above includes a reference to "asportation," which means "the removal of things from one place to another."[38] Professors of philosophy have wondered how to move an idea and where the right to property exists, but Lord Alderson in *Fouldes* was unconcerned with such sophistry and was thinking rather of asportating tangibles such as horses.

The general right of dominion is explained in *Fouldes* as the right to use the chattel "at all times and in all places." It appears the *dominion* concept is limited to that. In *Fouldes* a chattel was taken and there was no such interference with the dominion right since there was no act inconsistent with the right to that use; in short, the plaintiff could still use the horses if he exercised that right by getting off the ferry and using them. This implies that the absolute right to exclusive use was not included in the right of dominion. In fact, the court noted that scratching the panel of a carriage would not be a conversion, though it might be a use and a trespass.[39] Thus, a person can be deprived of exclusive use of a chattel yet retain both

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sider the nature of chattels real [previously] . . . .

2 WILLIAM BLACKSTONE, COMMENTARIES *385-87. Blackstone continues by distinguishing between property in chattels (such as a right to hunt such chattels as animals *ferae naturae*, *id.* at *393, or a future right to chattels as might be given in a will, *id.* at *398) and the chattels themselves. *Id.* at *389-99 (The chapter is entitled "Of Property in Things Personal" and begins, "Property, in chattels personal, may be either *in possession* . . . or . . . in *action*.") (a chose in action was thus a kind of property in a chattel—property "*in potentia*" rather than "*in esse*"—rather than a chattel itself, *id.* at *397). Blackstone seems to lack a category of chattels including intangible property rights such as licenses to hunt chattels. Consistent with this hypothesis, Blackstone continues by noting that "a property in goods and chattels may be acquired by *occupancy*," *id.* at *400. "A second method of acquiring property in personal chattels is by the *king's prerogative*," *id.* at *408, "by *custom*," *id.* at *422, and "by *succession*, *marriage*, and *judgement*," *id.* at *430.

Later authorities seem to have extended the word *chattel* to include intangible rights to other personal property, *e.g.*, State *ex rel.* Elvis Presley Int'l Memorial Found. v. Crowell, 733 S.W.2d 89, 97 (Tenn. Ct. App. 1987) ("Chattels include intangible personal property such as choses in action or other enforceable rights of possession."), but it seems that in the beginning such was not the case. Certainly *Fouldes v. Willoughby*, 151 Eng. Rep. 1153 (Ex. 1841), gives no indication that the word *chattel* might include a right to the horse as well as the horse itself.

38. BLACK'S LAW DICTIONARY 114 (6th ed. 1990). Prosser considered *Fouldes* to be the leading case distinguishing trespass from trover. KEETON, *supra* note 1, at 90; Prosser, *supra* note 1, at 170-71. If such is the case, the use of the word "asportation" is significant in *Fouldes* because the trespass action which trover replaced was originally known as trespass *de bonus asportatis*. Ames, *supra* note 1, at 282, 384-86.

39. *Fouldes*, 151 Eng. Rep. at 1157.

the right to use and the actual use of the property, and that deprivation will not be a conversion. The essence of *dominion* in conversion seems to be a right to the use of the chattel at all times and in all places.

A case making this point clearer is *Johnson v. Weedman*.[40] There the defendant, without authorization from the plaintiff, rode the plaintiff's horse for a distance of fifteen miles. No harm was done to the horse, and the court held no conversion had taken place because there was not sufficient interference with dominion.[41] Other cases in this line hold generally that "if the unauthorized use results in substantial damage to the chattel there is conversion, but . . . in the absence of such damage there is not, unless the use is an important interference with the rights of the plaintiff."[42] Such use may have been a trespass, but it was not a conversion.[43]

A few more cases explain this. Suppose John plants a biologically harmless electronic listening device on a horse owned by a mafia boss. It would seem, under the same limitation placed on the plaintiff in *Weedman,* that John has not converted the horse. The mafia boss may take the bug off if he will, and John has not interfered with the boss's general right to use the horse at all times and in all places if he will but take the horse and use it. And the horse is totally unharmed. John has just not interfered with his dominion as the term is limited in the *Fouldes* or by the facts of the *Weedman* case. Suppose now that John stows a bag of flour in some empty space on Harry's very large sailboat and Harry sails it to Europe without noticing the flour. Has John converted Harry's boat? It seems not, for the same reasons John did not convert the mafia boss's horse. Harry may throw the flour off, and John has not interfered with Harry's general right to use the ship. And the ship has not been harmed. Now take a very analogous case with something intangible. Suppose Harry runs a drive-in movie theater and radios the sound accompanying movies out to the car speakers so that patrons can hear as well as see the movie. John lives next door and can see the movie, and knowing something about radio electronics, John builds a receiver which

40. 5 Ill. 495 (1843).
41. *Id.* at 497.
42. Prosser, *supra* note 1, at 172-73 & n.20-21 (citations omitted) (citing cases from across the United States from 1837 to 1931).
43. *Id.*

picks up Harry's frequency. John listens to and watches Harry's movies from his upstairs bedroom. Harry can limit the frequency's range or install a cable system to the speakers, but John has not interfered with Harry's right to use the radio waves and equipment, show the movies, or to collect money from patrons. It is almost as if John has picked up Harry's waste—waste waves—and put them to use. One can easily imagine what would be a conversion in cases similar to these three. Suppose John shoots Harry's horse, burns his ship, or creates such interference on Harry's frequency that he can no longer use the radio frequency. In these cases, John has converted the horse, the ship, and the frequency rights. These situations can justifiably be called conversion, but the others described above cannot; they may be a trespass or some other tort, but they are not conversion. The distinction is whether dominion as defined in the *Fouldes* and *Weedman* cases—the general but not exclusive right to use the property at issue at all times and in all places—is sufficiently interfered with or not.[44]

If this analysis about *dominion* in conversion is correct, then it is impossible to convert an intangible without prohibiting all or very much of the use of it by the owner, at least for a significant period of time. Possession of a trade secret, for instance, by a non-owner does not interfere with the dominion over the secret which the owner has; even in such a case the owner retains general if non-exclusive use of and the right to use the information. It seems clear that courts will have to

44. Of course, interference with dominion is a matter of degree. *See, e.g.*, Prosser, *supra* note 1, at 173-74. This very fact ought to convince one that slight interference with use does not amount to interference with dominion sufficient to constitute conversion. Interference with use and dominion could be slight or egregious when dealing with tangible property, but intangible property is usually thought of as one of a bundle or rights rather than as an object. One can always characterize the right infringed such that there is interference with the dominion of it. For example, one can say that scratching my carriage is the conversion of my right not to have my carriage scratched. But holding that this constitutes conversion would make the tort wholly circular and meaningless; right and dominion are identical in that case and egregious interference with one is egregious interference with the other. The tort was meant to work from a conception of a particular object which constitutes something over which someone may have more or less dominion. Part of the problem with applying the tort to intangibles is that intangibles are thought of as one of a bundle of rights. In order for the tort to apply in such cases, the bundle of rights theory must be suspended and the intangible thought of as an object. The problem which arises at that point, as the hypotheticals above show, is that the interference with dominion is not nearly sufficient to constitute conversion.

change the concept of dominion in order to allow conversion in all cases of infringement on intangible rights.

B. Paying the Full Price of the Chattel

The initial adjudicator of the measure of damages for conversion was also thinking only of tangible property. Generally, the measure of damages for conversion is the full measure of the value of the chattel converted:

> The importance of the distinction between trespass to chattels and conversion, which has justified its survival long after the forms of action of trespass and trover have become obsolete, lies in the measure of damages. In trespass the plaintiff may recover for the diminished value of his chattel because of any damage to it, or for the damage to his interest in its possession or use. Usually, although not necessarily, such damages are less than the full value of the chattel itself. In conversion the measure of damages is the full value of the chattel, at the time and place of the tort. When the defendant satisfies the judgment in the action for conversion, title to the chattel passes to him, so that he is in effect required to buy it at a forced judicial sale. Conversion is therefore properly limited, and has been limited by the courts, to those serious, major, and important interferences with the right to control the chattel which justify requiring the defendant to pay its full value.[45]

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45. RESTATEMENT (SECOND) OF TORTS §§ 222A & 222A cmt. c (1977); *see* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 123 (1935); 18 AM. JUR. 2D *Conversion* §§ 105-16 (1985); 89 C.J.S. *Trover and Conversion* § 155 (1955); *e.g.*, Dressel v. Weeks, 779 P.2d 324, 328 (Alaska 1989); Welch v. Kosasky, 509 N.E.2d 919, 922 (Mass. App. Ct. 1987); Wiebold Studio, Inc. v. Old World Restorations, Inc., 484 N.E.2d 280, 287 (Ohio Ct. App. 1985) (dicta) ("[I]n an action for conversion of property, the true measure of damages is the value of the property at the time of the taking or conversion."); Northcraft v. Edward C. Michener Assocs., 466 A.2d 620, 628 (Pa. Super. Ct. 1983) ("The measure of damages in an action for conversion is the market value of the converted property at the time and place of conversion.").

Of course, slight variations in the measure of damages have been made when the value of a converted document lay in the value of the intangible property which the document embodied, but these measures still center around the value of the thing taken at the time and place it was taken. *E.g.*, Plunkett-Jarrell Grocery Co. v. Terry, 263 S.W.2d 229, 234 (Ark. 1953) (holding correct measure of damages for conversion of an account book to be the "fair market value of the accounts owing plaintiff by store customers"); Williams v. Chittenden Trust Co., 484 A.2d 911, 915 (Vt. 1984) (holding "correct measure of damages for conversion of architectural plans such as the plaintiff's is the cost to the architect of producing those plans").

This measure of damages seems adequate to compensate one who loses a horse, a house, money, or any other tangible object. However, this measure of damages is inadequate to compensate the conversion of much intangible property because the damage rule assumes as much interference with dominion as does the dominion element required; in the damages context, conversion assumes exclusive use by the possessor of converted property.[46]

The point deserves explanation. Possession of tangible property gives the possessor exclusive right to control of property. The plaintiff in an action for conversion of a horse must have lost all control or dominion of the horse to the defendant in order to recover.[47] Once that conversion has taken place, the defendant has exclusive use of the horse, having taken that right to himself. The defendant has gained exactly what the plaintiff has lost.

Not so with most intangible property. Consider, for exam-

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46. It may seem to some that this Comment claims conversion requires exclusivity in some areas and non-exclusivity in others, describing the tort as internally inconsistent. But that is not the claim this Comment makes. Exclusive use here by the possessor of the converted property—by the defendant, in other words—deprives the plaintiff of sufficient dominion that the defendant should be required to pay the full price of the chattel. Conversion assumes that the right to use by the plaintiff be non-exclusive but that the actual use by the defendant be exclusive. If such were not the case, the damages rule would require the defendant often to pay for more or less damage than he caused and more or less benefit than he gained, depending on the case; rarely will the amount correspond appropriately.

The arguments against dominion and the damages measure applying to intangibles may be seen as two facets of the same argument. Not only dominion has been limited to cases in which even the non-exclusive right to use property was infringed, but also the damages provision has been likewise limited. Thus, just as a defendant can only infringe on dominion by infringing on rights to non-exclusive use, a defendant can only be required to pay the full value of the chattel for infringing on rights to non-exclusive use. The two problems stem from the same characteristic of the tort of conversion, from the same underlying assumption. Both facets of the argument are better addressed as separate problems, however, since in conversion the two have always been kept analytically separate and the assumption of tangible property is addressed from different perspectives in each.

47. Total loss of the right to use was required in Fouldes v. Willoughby, 151 Eng. Rep. 1153 (Ex. 1841), and Johnson v. Weedman, 5 Ill. 495 (1843). In *Johnson*, as Prosser reports,

> a young lawyer named Abraham Lincoln succeeded in convincing the court that there was no conversion when a horse left with the defendant to be agisted and fed was ridden, on one occasion, for a distance of fifteen miles, since it was not a sufficiently serious invasion of the owner's rights.

KEETON, *supra* note 1, at 90; *Johnson*, 5 Ill. at 497.

ple, intangible rights such as patent, trademark, and copyright in the context of the following hypothetical. Freddy, an ingenious inventor, places his patented invention, an undentable fender, on the market under the name of Freddy's Fenders. In violation of Freddy's patent rights, Betty's Bumpers begins to make an identical fender. If conversion is applied to this situation, what should be the measure of damages Betty must pay for taking to herself Freddy's intangible rights?

The measure of damages for conversion is the value of the chattel taken. What is the cost of the property taken by Betty? Certainly not the cost of the patent. That would be an inappropriate measure because Betty has not converted Freddy's exclusive right, though she has deprived Freddy of it. What Freddy has lost—the exclusivity of the right—is more valuable than what Betty has gained. Betty's action warrants her paying Freddy more than "the full price" of what she has taken.

The same line of reasoning holds true for copyright and trademark rights. These are rights to exclusive control. But infringement of these rights does not give the infringer exclusive control; hence, the infringer has taken less than she has gained. The following example from the area of trade secret law shows this concept more strikingly. Suppose Freddy simply writes down how to make his fender and guards the written design closely. Freddy never registers the plans with the patent office but still reaps great profits in the fender market. Betty copies the plans and sells them to GM and Chrysler for $100,000. GM and Chrysler, innocent of Betty's wrongdoing but plagued with financial and labor troubles, decide to go on buying Freddy's fenders for a year rather than begin manufacturing their own. During this year, an engineer at GM with access to the stolen plans publishes an article on undentable fenders in a trade journal. Freddy's secrets thus become public knowledge. Freddy is put out of business the following year as a result. The plans, that information over which Betty has gained "dominion or control," were themselves only worth $100,000. Freddy's business, which Betty did not convert, may on the other hand have been worth millions. Freddy would go largely uncompensated under the current measure of conversion damages. In this case, Betty has converted Freddy's plans, and Betty has profited from the stealing, but it would help Freddy little to impose on Betty the liability for the value of the plans Betty took.

It is not difficult to see that the traditional measure of

damages for conversion assumed for good reason that the property converted was tangible.

III. The New Wine

Trover and conversion have held many old wines: wines pressed from factual situations that had been happening in Europe and America for hundreds of years. Most likely, ancient and eminently logical judges realized that new wines pressed from fact situations unlikely in the 1600s would burst the old trover/conversion bottle.

But modern society has developed many new wines, and not the least of these is intangible property rights.[48] As scientists, inventors, technicians, and professors began to make their ideas useful through technology, the worth of those ideas made them prime targets for theft.[49] There have hence been actions in conversion for ideas,[50] secret formulas,[51] patent rights,[52] rights to publish exclusively a written work,[53] oil royalties,[54] etc. Further evidence of general increase in the value of intangible property generally is found in actions for customer

48. "In today's economy property and wealth take an increasingly intangible form." HARPER, *supra* note 1, § 2.13, at 178.

49. *See, e.g.*, State v. McGraw, 459 N.E.2d 61, 63-64 (Ind. Ct. App. 1984), *vacated*, 480 N.E.2d 552 (Ind. 1985) (holding that the Indiana criminal theft statute—making criminal the exertion of unauthorized control of "property"—applied to the unauthorized use of a computer; the court cited as authority by analogy *National Sur. Corp. v. Applied Sys., Inc.*, 418 So. 2d 847 (Ala. 1982), which held that computer programs were property subject to the tort of conversion). For a discussion of the effect of this increase in intangible property on federal theft and larceny, see Ralph G. Picardi, Note, *Theft of Employee Services Under the United States Penal Code*, 23 SAN DIEGO L. REV. 897, 900-05 (1986).

50. *See* Matzan v. Eastman Kodak Co., 521 N.Y.S.2d 917, 918 (App. Div. 1987) ("[An idea] cannot be the subject of conversion."); Evans v. American Stores Co., 3 Pa. D. & C. 2d 160 (1955) (holding plaintiff stated a cause of action for conversion of a "novel sports promotional plan"—an idea).

51. *See* Roystone v. John H. Woodbury Dermatological Inst., 122 N.Y.S. 444 (N.Y. Sup. Ct. 1910) (holding that trover does not lie for an intangible property right).

52. *See* Miracle Boot Puller Co. v. Plastray Corp., 269 N.W.2d 496, 498 (Mich. Ct. App. 1978) (holding action alleging conversion of the "intangible right to benefit from a patent right" to be preempted by patent law).

53. Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1501 (5th Cir. 1990) (holding conversion claim preempted by copyright laws when defendant reproduced, distributed and displayed copyrightable material); Harper & Row Publishers, Inc. v. Nation Enters., 723 F.2d 195, 201 (2d Cir. 1983) (same).

54. Bell v. Bayly Bros., 127 P.2d 662 (Cal. Dist. Ct. App. 1942) (holding that an action for oil royalties was not an action in conversion because of the rule against converting intangibles).

lists;[55] laundry, newspaper, and bakery routes;[56] business secrets;[57] business goodwill;[58] and architectural and musical ideas.[59]

Understandably, courts refused to fill conversion and trover with much of this new brew. Trover and conversion, even in the opinions of many courts today, are based on the theory that the property converted was findable[60]—that the person walking through a potato field could come across the property, take it home for his mantle, and at last stand at his door and refuse to give it back to its owner. One simply does not find a potential architect searching a potato field for someone else's ideas for skyscrapers. This new wine would burst the old bottle of trover, making it internally inconsistent and rendering outdated many of its old rules and the traditions that had risen up around it.[61]

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55. *See* Illinois Minerals Co. v. McCarty, 48 N.E.2d 424 (Ill. App. Ct. 1943) (no cause of action in conversion for a list of customer names when no paper was transferred).

56. *See* Adkins v. Model Laundry Co., 268 P. 939, 942 (Cal. Dist. Ct. App. 1928) ("[T]here is no such property right in the intangible interest of an exclusive privilege to collect laundry . . . in a specific district, which will authorize damages in a suit at law for conversion or trover."); Brown v. Meyer, 580 S.W.2d 533 (Mo. Ct. App. 1979) (willing to consider a cause of action in conversion of a newspaper route); Stern v. Kaufman's Bakery, Inc., 191 N.Y.S.2d 734 (App. Div. 1959) (holding no cause of action in conversion of a bakery route).

57. Thompson v. Mobil Producing Co., 163 F. Supp. 402 (D. Mont. 1958) (no cause of action for conversion of confidential oil information).

58. *See* Powers v. Fisher, 272 N.W. 737, 739 (Mich. 1937) (holding trover "will not lie for the good will of a business"). *But see In re* Estate of Corbin, 391 So. 2d 731, 732 (Fla. Dist. Ct. App. 1980) ("Actions for conversion may properly be brought for a wrongful taking over of intangible interests in a business venture.") (citations omitted).

59. Norman Schuman Interiors, Inc. v. Sacks, 479 S.W.2d 200 (Mo. App. 1972) (no cause of action for conversion of interior decorating ideas); Sporn v. MCA Records, Inc., 462 N.Y.S.2d 413 (App. Div. 1983) (rights to a master recording of the hit song "Get a Job" ruled tangible and actionable in conversion because embodied in the master recording itself); Ippolito v. Lennon, 542 N.Y.S.2d 3, 5 (App. Div. 1989) (holding that composer and performer of piano music had no action in conversion against Yoko Ono for dubbing the composer's performance of his own piano music into a film of Yoko Ono playing the piano); *see* Williams v. Chittenden Trust Co., 484 A.2d 911, 915 (Vt. 1984) (holding correct measure of damages for conversion of architectural plans is the cost to the architect of producing those plans).

60. *See, e.g.*, Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235 (Iowa 1988); Sporn v. MCA Records, Inc., 462 N.Y.S.2d 413, 416 (1983); Stern v. Kaufman's Bakery, Inc., 191 N.Y.S.2d 734 (App. Div. 1959); Wiebold Studio, Inc., v. Old World Restorations, Inc., 484 N.E.2d 280, 287 (Ohio Ct. App. 1985); Lyon v. Bennington College Corp., 400 A.2d 1010 (Vt. 1979).

61. Other reasons were offered for not extending the tort to cover this new

To handle the overflow of this new wine without completely remaking the tort of conversion, legislators, courts, and the ALI introduced a number of urns and jugs to slop up the mess. The result has been comprehensive statutory schemes dealing with patents,[62] trademarks,[63] copyrights,[64] and trade secrets,[65] each code accommodating a special kind of intangible and each designed to protect the right of exclusive control to the intangible property involved. Also, courts have introduced such new torts as palming off and interference with business relationships.[66]

The jugs and urns, however, have not caught all the new wine, or at least have not done so completely enough that courts and litigants feel comfortable relying solely on these new actions. Consider the case of *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.*[67] In that case, one plaintiff, a cable television system operator, had the exclusive right to receive in Quincy, Massachusetts, the television transmission of various sports programs.[68] The plaintiff sold the programs via cable television services to the general public for a fee.[69] The three defendants owned taverns equipped with satellite dishes, and they intercepted television signals intended for the plaintiff and showed the sports programs to their customers without permission of or payment of fees to the plaintiff.[70] The plaintiff

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wine. These rules are summarized in the text accompanying note 20, *supra*. All of these justifications, however, amount to judicial distaste for wrenching the old tort from its historical foundations and rendering it logically incoherent.

62. 35 U.S.C. (1988).

63. 15 U.S.C. §§ 1051-1127 (1988).

64. 17 U.S.C. (1988).

65. UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS, 14 U.L.A. 433 (1990) (indicating that thirty-four states have adopted the uniform act since its approval by the Commissioners on Uniform State Laws in 1979).

66. As to palming off, see Thompson v. Youart, 787 P.2d 1255, 1258 (N.M. Ct. App. 1990) (holding that the Uniform Deceptive Trade Practices Act (in New Mexico the Unfair Trade Practices Act, N.M. STAT. ANN. §§ 57-12-1 to 57-12-22 (Michie Repl. Pamp. 1987 & Supp. 1991)) codified the common law of palming off). Palming off is "an attempt to make a purchaser believe that a product of a subsequent entrant is that of his better-known competitor, and, as related to creating confusion among purchasers as to the source of the product, palming off is simply a direct and more flagrant means of misleading customers." *Id.* at 1259 (citations omitted). As to interference with business relations, see American Medical Int'l, Inc. v. Scheller, 590 So. 2d 947 (Fla. Dist. Ct. App.); Leiderman v. Gilbert, 574 N.Y.S. 2d 714 (App. Div. 1991).

67. 650 F. Supp. 838 (D. Mass. 1986).

68. *Id.* at 840.

69. *Id.*

70. *Id.*

successfully countered a motion to dismiss causes of action for a violation of the Federal Communications Act, tortious interference with contractual and business relations, as well as the tort of conversion.[71]

So the new jugs and urns do not seem to hold all the new wine. In an effort to keep the courtroom floor so clean that no plaintiff could slip on this wine and fall from justice, many courts, like those in *Quincy Cablesystems, Inc.*, have begun funnelling this new wine into the old bottle of conversion and trover, despite the warnings of commentators[72]. The court in *Quincy Cablesystems, Inc.* concluded that the facts as alleged or shown were sufficient to constitute conversion, at least on a summary judgment motion.[73] Other courts have followed.[74]

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71. *See id.* at 839-48.

72. The warning of Professors Harper, James, and Gray is particularly insightful:

> In recent years there has been great growth in areas of the law that do accord protection to ideas, relationships, and even expectations of economic advantage . . . . The only question here is whether the concepts of conversion can make, a worthwhile contribution to this development. It is submitted that a more rational scheme of legal protection in these new fields is likely to take place if it is not encumbered with the incrustations of ancient lore associated with the tort of conversion. And procedural pitfalls need not snare the litigant who has sought to invoke the ancient remedy; under modern procedures courts will give whatever remedy is proper under the facts shown whatever the pleader's legal theory may have been.

HARPER, *supra* note 1, § 2.13 at 179; *see* Schaefer v. Spence, 813 S.W. 2d 92 (Mo. Ct. App. 1991) (suggesting it would be preferable to fashion other remedies, such as unfair competition, to protect intangible values from being used and appropriated in unfair ways). Harper, James, and Gray also note that "[t]he peculiar characteristic of conversion is the measure of damages (full value of the thing converted), . . . which is often quite inappropriate when applied to choses in action." HARPER, *supra* note 1, § 2.13 at 179 n.24.

73. *Quincy Cablesystems, Inc.*, 650 F. Supp. at 848.

74. *See, e.g.*, Charter Hospital of Mobile, Inc. v. Weinberg, 558 So. 2d 909, 910 (Ala. 1990) (affirming an award of compensatory damages for "conversion of a treatment program for people suffering from drug abuse or alcoholism"); National Sur. Corp. v. Applied Sys., Inc., 418 So. 2d 847 (Ala. 1982) (conversion of a computer program); A & M Records, Inc. v. Heilman, 142 Cal. Rptr. 390 (Ct. App. 1977), *cert. denied*, 436 U.S. 952 (1958) (conversion of recorded performances by a recording pirate); Blue Cross & Blue Shield of Conn., Inc. v. DiMartino, No. 30-06-42, 1991 WL 127094 (Conn. Super. Ct. June 25, 1991) (confidential information about customers, copied from a computer database); *In re* Estate of Corbin, 391 So. 2d 731 (Fla. Dist. Ct. App. 1980) (intangible interests in a business venture held convertible); Keys v. Chrysler Credit Corp., 494 A.2d 200 (Md. 1985) (conversion of a right to receive wages); Datacomm Interface, Inc. v. Computerworld, Inc., 489 N.E.2d 185 (Mass. 1986) (affirming an award of damages for conversion of a copy of a magazine circulation list); Tuuk v. Andersen, 175 N.W.2d 322 (Mich. Ct. App. 1969) (conversion of lease rights to bowling alley equipment); Vick v. Northwest

In this attempt to do justice in an age of intangible property, courts have remade the trover and conversion bottle in spite of the presence of jugs and urns.[75]

Publications, Inc., No. C3-90-978, 1990 WL 152696 (Minn. Ct. App. Oct. 10, 1990) (ordered unpublished) (noting that of all intangible property only trade secrets may be converted; analyzing whether a conversion had occurred and holding it had not under what is generally known to be the common law of trade secrets) (an erratic decision); DeLong v. Osage Valley Elec. Coop. Ass'n., 716 S.W.2d 320 (Mo. Ct. App. 1986) (conversion of electricity); Schnucks Twenty-Five, Inc. v. Bettendorf, 595 S.W.2d 279 (Mo. Ct. App. 1979) (conversion of the right to use the name "Bettendorf" to advertise groceries); Brown v. Meyer, 580 S.W.2d 533 (Mo. Ct. App. 1979) (willing to consider a case for conversion of a newspaper distribution area); Benaquista v. Hardesty & Assocs., 20 Pa. D. & C. 2d 227 (1959) (conversion of an idea for a house design); Evans v. American Stores Co., 3 Pa. D. & C. 2d 160 (1955) (conversion of a sports promotion idea); Becton Dickinson & Co. v. Reese, 668 P.2d 1254 (Utah 1983) (holding a claim for conversion of a discovery barred by the statute of limitations); *see* Maheu v. CBS, Inc., 247 Cal. Rptr. 304, 308 (Cal. Ct. App. 1988) (holding a claim for conversion of right to reproduce intangible, literary, or intellectual property to be preempted by copyright law); Nobel v. Bangor Hydro-Elec. Co., 584 A.2d 57 (Me. 1990) (same); Miracle Boot Puller Co. v. Plastray Corp., 269 N.W.2d 496 (Mich. Ct. App. 1978) (conversion of "the right to benefit from a patent right" held to be preempted by federal patent law and thus outside the jurisdiction of the state court).

75. It seems Professor Prosser, the reporter of the restrictive *Restatement (Second)* formulation and theory of the tort, advocated this remaking:

> Intangible rights of all kinds could not be lost or found, and the original rule was that there could be no conversion of such property. But *this hoary limitation has been discarded to some extent by all of the courts.* The first relaxation of the rule was with respect to the conversion of a document in which intangible rights were merged, so that the one became the symbol of the other—as in the case of a promissory note, a check, a bond, a bill of lading, or a stock certificate. This was then extended to include intangible rights to which a tangible object, converted by the defendant, was highly important—as in the case of a savings bank book, an insurance policy, a tax receipt, account books, or a receipted account. In all of these cases the conversion of the tangible thing was held to include conversion of the intangible rights, and to carry damages for it. The final step was to find conversion of the rights themselves where there was no accompanying conversion of anything tangible—as, for example, where a corporation refuses to register a transfer of the rights of a shareholder on its books.
>
> The process of expansion has stopped with the kind of intangible rights which are customarily merged in, or identified with some document. *There is perhaps no very valid and essential reason why there might not be conversion of an ordinary debt, the good will of a business, or even an idea, or "any species of personal property which is the subject of private ownership."*

KEETON, *supra* note 1, at 91-92 (emphasis added).

At least one court changing the rule against converting intangibles has cited Prosser and Keeton in support of the change. *In re* Estate of Corbin, 391 So. 2d 731, 732 n.1 (Fla. Dist. Ct. App. 1980).

IV. THE OLD BOTTLE BREAKS

And with the new wine the old bottle is beginning to burst.

A. *The Problem with* Control *or* Dominion *and* Chattel

An analysis of recent cases demonstrates how the trover and conversion bottle breaks apart under the strain of applying the tort to intangibles. The cases involving intangibles depart incorrigibly from the rigid assumptions conversion has carried from its past.

Consider *Charter Hospital of Mobile, Inc. v. Weinberg,*[76] in which the court affirmed an award of compensatory damages for the conversion of a doctor's drug and alcohol abuse treatment program.[77] The plaintiff, Dr. Weinberg, developed the program while at work at the charter hospital. When the doctor ceased working there, he began selling the program to other hospitals, but the hospital continued to use the program.[78] The doctor sued for conversion of the program.[79] The jury returned a verdict for the doctor, and the Alabama Supreme Court upheld the result against the hospital's appeal of the damage award.[80]

This case represents a departure from conversion's history. First and probably least distressing from a practical standpoint, a drug and alcohol abuse treatment program is not a chattel—not personal and movable property. True, the right to sell the program is probably personal property[81]; whether the

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76. 558 So. 2d 909 (Ala. 1990).

77. *Id.* at 912.

78. *Id.*

79. The hospital conceded that the jury could have concluded from the evidence that Dr. Weinberg has a copyright on the program. *Id.* at 911-12.

80. *Id.* at 912-13. The doctor also sued for wrongful termination and the jury returned to the doctor on this count as well. The judge, however, granted judgment notwithstanding the verdict on the wrongful termination verdict. *Id.*

81. An effort could be made to fit *Weinberg* under the rationale of the *Restatement (Second) of Torts* § 242(2), which outlines the rule for intangible property under the *Restatement (Second)* formulation, *see supra* text accompanying note 26. The comments to the *Restatement (Second)* rule make clear that subsection (2) contemplates debts and other intangibles besides securities and warehouse receipts (covered in subsection (1), *see supra* note 27 and accompanying text) which are represented by and merged in a document and excludes those that are not. RESTATEMENT (SECOND) OF TORTS § 242 cmt. f (1977). Marketable information may be documented in some cases, but more than information was at stake in *Weinberg*. Most likely what made the program saleable was the doctor's expertise in adapting the program to the hospital's circumstances and the training he and his agents

program is moveable is another matter. The information, expertise, reputation, and training skills of the doctor do not seem to be in any "place" from which they can be moved. Philosophers may debate this; courts should not.

Second, under the traditional understanding of *dominion* set out above, here there has been no interference with dominion. Since dominion and control do not imply exclusive use but only a general right to non-exclusive use, and here there has been no interference with that, there is no conversion. For there to have been conversion here, the hospital would have had to confiscate the doctor's papers or prohibit the doctor from selling or using the program possibly through fraudulently obtaining an injunction prohibiting that. As the case stands, even though the hospital had arguably taken something from the doctor, the doctor still retained the very information, expertise, and reputation that make up the program, and he remained able to train hospital personnel as he had done before. The doctor retains control and dominion—the non-exclusive use which conversion protects—so as to be able to sell the program now as before.[82] "Converting" information and training is outside anything the tort of conversion has before contemplated. Accordingly, applying conversion doctrine here rends the tort from its historical foundations.

Other cases produce similar results. Consider the conversion of lease rights in bowling alley equipment,[83] an exclusive right to a newspaper route,[84] rights to patents,[85] an exclusive right to receive television sports programming by satellite dish,[86] a sports promotion idea,[87] names of magazine subscribers,[88] confidential information about customers,[89] the

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gave to hospital personnel. The training, the information, the expertise, and the reputation of the doctor were a package deal.

82. *Deprivation of use* is an element of tortious conduct implied in the *Restatement (Second)* formulation of conversion: "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 (SECOND) OF TORTS § 222A(1) (1977) (emphasis added).

83. Tuuk v. Andersen, 175 N.W.2d 322, 327 (Mich. Ct. App. 1969).

84. Brown v. Meyer, 580 S.W.2d 533 (Mo. Ct. App. 1979).

85. Becton Dickinson & Co. v. Reese, 668 P.2d 1254 (Utah 1983) (considering whether a suit for conversion of patent rights was barred by the statute of limitations for actions based on taking and/or detaining personal property).

86. Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F. Supp. 838 (D. Mass. 1986).

87. Evans v. American Stores Co., 3 Pa. D. & C.2d 160 (1955).

88. Datacomm Interface, Inc. v. Computerworld, Inc., 489 N.E.2d 185 (Mass.

goodwill of a business,[90] the use of a surname in advertising,[91] computer programs,[92] the performance of a song.[93]

B. The Problem with the Damage Rule

Conversion cases involving intangibles also generate the problems with calculating damages examined *supra* in the Freddy's Fenders hypotheticals.

In *Benaquista v. Hardesty & Associates*,[94] the plaintiff allegedly created an original design for a home, sketched the design, and submitted it to an architect so that full plans could be prepared.[95] The plaintiff paid the architect $125 to draw the full sketches and to keep the design confidential.[96] Several weeks later the architect placed the design with a few sketches in a newspaper ad in which he claimed to be the original designer.[97] The ad offered to sell a complete set of plans to anyone willing to mail in $5.15.[98] The court held that the architect under these facts could be liable for the conversion of an "incorporeal idea which has taken definite form in the mind of its creator."[99]

1986).

89. Blue Cross & Blue Shield of Conn., Inc. v. DiMartino, No. 30-06-42, 1991 WL 127094 (Conn. Super. Ct. June 25, 1991) (confidential information about customers, copied from a computer database).

90. *In re* Estate of Corbin, 391 So. 2d 731 (Fla. Dist. Ct. App. 1980).

91. Schnucks Twenty-Five, Inc. v. Bettendorf, 595 S.W.2d 279 (Mo. Ct. App. 1979).

92. National Sur. Corp. v. Applied Sys., Inc., 418 So. 2d 847 (Ala. 1982).

93. A & M Records, Inc. v. Heilman, 142 Cal. Rptr. 390 (Ct. App. 1977), *cert. denied*, 436 U.S. 952 (1978) (holding the defendant liable in conversion for pirating performances of such songs as "We've Only Just Begun," "Guantanamera," and "Close to You").

94. 20 Pa. D. & C.2d 227 (1959).

95. *Id.* at 228.

96. *Id.* at 228-29.

97. *Id.*

98. *Id.* at 229.

99. *Id.* This court more than any other court cited herein seemed especially willing to extend the tort of conversion to all intangibles. The court noted in full,

> We are of opinion that plaintiffs' complaint does set forth a cause of action in trespass, to wit, the tort of conversion of a person's property. The creator of an unique intellectual production, such as a picture, a book, a play, a compilation of facts or an architectural plan, has a property right in the thing created. This property right attaches to the incorporeal idea which has taken definite form in the mind of its creator, as distinguished from the paper upon which it is portrayed or the material of which it is physically composed.

Id. at 229.

As was the case in the Freddy's Fenders hypothetical, the traditional measure of damages would be inappropriate in this situation.[100] The "full value" of the thing taken varies depending on the time that the value is measured. It might seem appropriate to measure the value of the idea before the idea was sketched and given to the architect—when the idea was simply an "incorporeal idea" (which is what the court held was converted in this case[101]). If the court measured the damages from that time, the plaintiffs would most likely be awarded nothing or close to that—few if any people would buy a design for a house from a non-architect, and the value of the idea might be measured accordingly.[102]

On the other hand, if the court measured the value of the idea when it was embodied in the confidential architectural plans, the plaintiff would most likely receive $125, the probable price of the embodiment of the plaintiffs architectural design.[103] A third idea would be to look at the value of the idea after the architect converted it. At that time, one could say that the idea was worth only $5.15, the price at which one could buy it after it was no longer the exclusive design of its owner's home. One could also say, though, that the idea was worth the gross receipts it brought in for the architect—assume, say $51.50 for ten sales. Neither of these last two measures would compensate the plaintiff for what the plaintiff lost: the exclusive use of the design. The exclusivity value of certain intangible property which is lost in the "conversion" is simply not considered in measuring the "full value" of the converted property under the traditional rule.[104]

Other cases allowing an action in conversion for intangibles with exclusivity value encounter similar problems. Con-

100. "Full value of the chattel" is the measure of damages cited in the *Restatement (Second) of Torts*. *See supra* note 45 and accompanying text.

101. *Benaquista*, 20 Pa. D & C.2d at 229.

102. Nominal damages for conversion of a trade name were awarded in Schnucks Twenty-Five, Inc. v. Bettendorf, 595 S.W.2d 279, 283 (Mo. Ct. App. 1979).

103. But to the plaintiffs their idea may have been worth much more than its embodiment in architectural plans because it carried emotional and sentimental value above that of its market price.

104. See International News Serv. v. The Associated Press, 248 U.S. 215 (1918), for the view that a valuable property right exists in the exclusive use of ideas and information. Of course, one can only destroy exclusive use of ideas, information, and other intangibles by taking them. Exclusive use of an idea can almost never be converted.

sider again some of the examples mentioned previously:[105] an exclusive right to receive television sports programming by satellite dish,[106] a sports promotion idea,[107] names of magazine subscribers,[108] confidential information about customers,[109] the goodwill of a business,[110] the use of a surname in advertising,[111] computer programs,[112] the performance of a song.[113]

V. A New Bottle

If the tort of conversion is to be extended to encompass intangibles, courts must take one of two ostensibly classifiable paths. They might do away with the old formulations of the theory of recovery and use broader language in describing the kind of circumstances in which recovery under conversion is appropriate. Alternatively, courts might call what quacks, waddles, sports feathers and a bill, flies south for the winter, and lays hard eggs a "duck" instead of a "fish," even though both swim: courts might "create" a "new tort."

One could argue that courts create a new tort whether they take either alternative. Either way courts make actionable a set of circumstances not previously thought actionable, circumstances not necessarily made actionable by allowing recovery in traditional conversion cases or even those on the fringe of the tort's logic. And either way, a new remedy will be necessary. Finally, under either alternative the theory of the tort of conversion is cut off from its history and some basic rules which have governed conversion must change if justice is to be done in the cases.

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105. *See generally supra* notes 83-93 and accompanying text.

106. Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F. Supp. 838 (D. Mass. 1986).

107. Evans v. American Stores Co., 3 Pa. D. & C. 2d 160 (1955).

108. Datacomm Interface, Inc. v. Computerworld, Inc., 489 N.E.2d 185 (Mass. 1986).

109. Blue Cross & Blue Shield of Conn., Inc. v. DiMartino, No. 30-06-42, 1991 WL 127094 (Conn. Super. Ct. June 25, 1991) (confidential information about customers, copied from a computer database).

110. *In re* Estate of Corbin, 391 So. 2d 731 (Fla. Dist. Ct. App. 1980).

111. Schnucks Twenty-Five, Inc. v. Bettendorf, 595 S.W.2d 279 (Mo. Ct. App. 1979).

112. National Sur. Corp. v. Applied Sys., Inc., 418 So. 2d 847 (Ala. 1982).

113. A & M Records, Inc. v. Heilman, 142 Cal. Rptr. 390 (Ct. App. 1977), *cert. denied*, 436 U.S. 952 (1978) (holding the plaintiff liable in conversion for pirating performances of such songs as "We've Only Just Begun," "Guantanamera," and "Close to You").

This Comment does not pretend to solve in a few short paragraphs the development of the law for the next twenty years. But merely pointing out a problem rarely solves it, so broad statements as to how a court might handle intangibles are here included to suggest what kinds of solutions will avoid past inconsistencies and still provide guidance to judges and attorneys.

A. *Extending the New Theory Under the Old Guise*

Some courts have formulated the elements of liability for conversion broadly enough to encompass actions for intangibles. The Illinois Supreme court in *In re Thebus*[114] set forth a quite loose formulation: "Conversion is any unauthorized act, which deprives a man of his property permanently or for an indefinite time."[115] Compare that with the following from the Nevada Supreme Court, which borrows the concept of "interference" from the old definitions[116] yet nonetheless seems to lack the assumption of tangible property: "A conversion occurs whenever there is a serious interference to a party's rights in his property."[117] Consider also the Alabama formulation, taken from the case in which Alabama held that an intangible computer program was a proper subject for conversion: "To constitute conversion, there must be a wrongful taking or a wrongful detention or interference, or an illegal assumption of ownership, or an illegal use or misuse."[118]

These broad formulations cast off the historical rigidity of concepts such as *chattel*, *control* or the *exercise of dominion* by the defendant, or the oft-made assumption that the plaintiff had to be *deprived of the use of the property* converted. Any attempt, however, to deal with the new wine of intangibles, whether in an old or new bottle, will have to deal with two problems these new definitions do not address. First, the theory of the new tort will be beyond the bounds of traditional conversion theory. Second, the measure of damages will remain problematic.

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114. 483 N.E.2d 1258 (Ill. 1985).
115. *Id.* at 1260.
116. *See supra* notes 23-24 and the accompanying formulation from the *Restatement (Second)*.
117. Bader v. Cerri, 609 P.2d 314, 317 (Nev. 1980).
118. National Sur. Corp. v. Applied Sys., Inc., 418 So. 2d 847, 849 (Ala. 1982).

1. *A Change in Theory: An Historical Perspective*

Changes in the theory of a tort are common enough. The tort of conversion itself developed through several changes in the common law form of case, by which case became adapted to situations formerly remedied by detinue, trespass, and replevin.[119] Professor Ames explained in 1898 that since the Norman conquest of England in 1066 recovery for lost or stolen chattels has been accomplished by means of several different actions, each with a different remedy and each requiring different procedures.[120] A short synopsis of this history demonstrates the breadth of the changes that have occurred in this area in which conversion eventually evolved.

Because there was no "public prosecution for crime" during the first one hundred years following the conquest, objects intentionally taken from their owners were recovered in private criminal suits called "appeals" for larceny and robbery.[121] The appellant would, laying his hand on the chattel, charge the appellee with the theft.[122] The appellee had the option of trial by wager of battle or by jury.[123] Also, the appellee could choose wager of battle and then claim that he held merely as vendee or bailee of another (nearly always, of course, a stronger) person, called a warrantor, who would step in and fight the appellant in place of the appellee.[124] Might made right: if the appellant was successful in the battle, he recovered his chattel.[125]

When the king began to prosecute crimes following the Assize of Clarendon in 1166,[126] procedural difficulties which developed in the appeal action forced litigants who wanted their property returned to take extreme care. If the king's agents instead of the appellant caught the thief, the stolen

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119. Ames, *supra* note 1, at 382-86; *see* Williams Management Enters., Inc. v. Buonauro, 489 So. 2d 160, 162 n.1 (Fla. Dist. Ct. App. 1986); Lawson v. Commonwealth Land Title Ins. Co., 518 A.2d 174, 175-76 (Md. Ct. Spec. App. 1987). *See* Simpson, *supra* note 1, for a discussion of how conversion developed out of case in the early 1500s to fill a gap in the common law forms of action.
120. Ames, *supra* note 1, at 277.
121. *Id.* at 278.
122. *Id.* at 279.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 280.

property was forfeited to the king.[127] And the king injected his own remedies into the private appeal action which frustrated litigants at times. In one case three appellants sued a thief at one time for three different thefts; the first suitor won against the thief and the thief was hanged. The goods of the other two appellants were forfeited to the king.[128]

In the face of these obstacles, litigants turned to trespass *de bonus asportatis*, which lacked the option of wager by battle.[129] Judgment was "satisfied by levy of execution and sale of defendant's property," but damages were actual loss, even though there was a hint in the early law that since trespass has replaced appeal the measure of damages should "naturally be the value of the stolen *res*."[130] There were procedural disadvantages to trespass as well. Trespass helped only those with an immediate right to possession; a plaintiff with title but not possession had no action.[131] Also, the "injured possessor had no action against the grantee of a trespasser."[132] For these and probably other reasons, litigants turned from trespass to trover, which offered recovery for the chattel's full value and could be had by an owner without possession.[133] Trover expanded to cover trespass.[134]

To recover bailments wrongfully retained by the bailee and damages as well, a plaintiff anciently had an action in detinue.[135] But detinue was plagued with more procedural difficulties than was trespass. Since detinue required a detention, if the defendant returned even ruined goods no action would lie.[136] Most significantly, detinue was subject to wager of law, a procedure whereby the defendant was allowed to go free if he would swear innocence by an oath and produce several other people who would swear they believed the defendant's

127. *Id.* at 280-81.
128. Y.B. 44 Edw. 3, fo. 44, pl. 57 (date); *see* Ames, *supra* note 1, at 281.
129. Ames, *supra* note 1, at 282.
130. *Id.* at 283, 285.
131. Hill, *supra* note 1, at 514-15.
132. *Id.* at 515.
133. *See id.*
134. Ames, *supra* note 1, at 384. In Bishop v. Viscountess Montague, 78 Eng. Rep. 1051, 1051 (C.P. 1604), the court held that "[e]ither trover or trespass will lie, at the election of the plaintiff, for goods taken by wrong, but in trover damages shall be given for the conversion only."
135. Hill, *supra* note 1, at 517.
136. Simpson, *supra* note 1, at 364; Hill, *supra* note 1, at 518-19.

oath.[137] Defendants widely abused their right to wager of law.[138] Prosser called the procedure "a form of licensed perjury."[139] To avoid these and other detriments, litigants turned to trover, which courts held applied in some cases of detinue, as detinue *sur trover*, as early as the late 1400s.[140] Within one hundred years, "trover became concurrent with detinue in all cases of misfeasance."[141]

Trover also became "concurrent with" replevin.[142] Replevin was as plagued with procedural difficulties as detinue. Replevin was only available against wrongful distress—the wrongful detention of property taken in satisfaction of a debt such as nonpayment of rent.[143] Also, replevin was subject to defense by wager of law.[144] Finally, a successful action in replevin merely obtained the return of the chattel—damages were unavailable.[145] It is no wonder litigants chose trover over replevin just as they chose trover over detinue.

This brief history points out that the remedy for factual situations now covered by the tort of conversion has undergone several major changes. As far as litigants were concerned, each major change constituted a change in the law that applied to their case, even though the older actions were still available. Where litigants could once recover their stolen chattel in an appeal action, and later they could merely get the amount of actual damages sustained, now they may recover the value of the chattel at the time it was taken. Surely another change in the law would not be without precedent, especially in response to the changes in the nature of property evident throughout the last one hundred years.

The history of conversion even in recent years has been described as following four stages of change:

> In Stage I, which arose from the action of trover, courts restricted conversion to tangible personal property since only

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137. Simpson, *supra* note 1, at 364-65; Hill, *supra* note 1, at 517 n.33.
138. Hill, *supra* note 1, at 517 n.33.
139. Prosser, *supra* note 1, at 169.
140. Ames, *supra* note 1, at 382. Fifoot may have thought political factors caused this change in part. *See* Hill, *supra* note 1, at 517 n.33.
141. Ames, *supra* note 1, at 384.
142. Tinkler v. Poole, 98 Eng. Rep. 396 (K.B. 1770); Ames, *supra* note 1, at 385.
143. Hill, *supra* note 1, at 516 and 516 n.28.
144. *Id.* at 516; *see generally supra* text accompanying notes 135-41 (describing wager of law and its role in detinue).
145. *Id.* at 516-17.

> such personalty could be lost or found.
>
> In Stage II, courts allowed conversion of certain intangibles represented by tangible symbols but only if the symbols were converted as well . . . .
>
> In Stage III, the *Restatement* recognized conversion of certain intangible rights even though the symbol itself was not converted, but limited the action to those intangibles "of the kind customarily merged in a document." . . .
>
> The final Stage IV, still in its incipiency, would allow conversion for all intangible property.[146]

It should be apparent that these stages are not all on the same par. Stages I-III remain true to the trover action's basic assumption that the property involved must be bound up with tangible property—in each stage one can find something in a potato field and keep it. Stage IV, however, departs from this assumption explicitly.

It should also be apparent, however, that Stage IV *is* on a par with the changes in theory involved in the evolution of trover from case, trespass, detinue, and replevin. Just as case became trover and the underlying theory of the tort changed and expanded to cover actions in trespass, detinue, and replevin, so when conversion is extended to cover intangibles the underlying theory of the tort changes. The change is major, but the cases cited herein show that the change has already taken place to some degree and that other courts need only recognize that change.[147] This change in basic theory should not be an insurmountable obstacle to the extension of the tort, or to the creation of a new tort, to cover intangibles.

2. *The Measure of Damages*

The damages issue is more problematic than the theory change, though here as well the old rule and rationale simply will not suffice. Whether courts fashion a new bottle or try to use the older bottle, courts will have to make room for fair damages.

The damages measure will have to be broad enough to cover the exclusivity value of some intangibles. The measure need not apply in all the situations that conversion has previ-

146. *Id.* at 526-27; *see* Lawson v. Commonwealth Land Title Ins. Co., 518 A.2d 174, 176 (Md. Ct. Spec. App. 1987) (recognizing that the law has expanded to the stage III which Hill describes).

147. *See, e.g.*, sources cited *supra* note 147.

ously remedied, but need only apply as an exception to the normal damages rule when property with exclusivity value is converted. Additionally, the measure should be of a kind which judges and juries can understand and which courts need give little attention to in order to implement.

The "damages proximately caused" measure seems a likely candidate. Courts are familiar with this rule and no obstacles stand in the way of applying it here. There is no reason but history for conversion to be considered distinguishable from torts in which that measure of damages has an appropriate place. Finally, such a change will not take much effort to implement: little judicial time need be extended in clarifying the standard or correcting errors made in lower courts. And it cannot be anything but just to allow recovery for damages caused. This damages measure can also easily apply in traditional conversion cases. If a man has sold another's horse, the man should pay the value of the horse, since the other has been proximately damaged to that amount. This measure of damages should apply equally well as part of a new tort theory created to deal with the problem of intangibles.

A difficulty remains, however, even if the historical concerns and the damages problem are resolved. With the inconsistencies in the old tort mended, courts will have replaced each part of the old, broken trover bottle one new piece at a time. In spite of all the effort to glue new pieces onto the old one, a new bottle will have been created. The theory of recovery for conversion will, in the case of intangibles, no longer be "conversion." It is inconsistent with what has historically been conversion, arises from different fact situations, and carries different results. Courts might therefore find the historical, theoretical, and practical changes in the old trover theory too entrenched to allow a change.

B. A New Theory

If courts find that misappropriations involving intangibles are too far distant from the trover case to call them conversion, this Comment recommends that courts recognize a new cause of action to deal with the situation. Considering the number of courts that have made conversion-like facts involving intangibles actionable under common law principles, courts should feel justified not only in making these new fact situations equally actionable but in renaming these new actions something other than "conversion." Of course, no place has been reserved in the

hornbooks for this new tort; no place has ever been reserved for a new tort. But one might place it near the other property torts and explain that what began as an expansion of the tort of conversion ended in a new and much more workable theory of recovery, dedicated to righting contemporary wrongs and not bound by hundreds of years of history.

The tort might be called "misappropriation of intangibles." Each case cited above granting a cause of action in conversion for intangibles made actionable wrongfully taking to oneself the intangible property rights of another.[148] The new tort seemingly need be no more complicated than this. And the tort as a part of the common law need only apply when not preempted by statutory schemes aimed at protecting intangible property rights.[149] Damages might be those proximately caused, as discussed above.[150]

A new theory of recovery has, above all, an element of intellectual integrity to add to the jurisprudence of property torts. The new tort would legitimate the efforts of courts mentioned herein to provide full justice for litigants who have come before them.[151] The tort would also make recent cases separate from and thus logically consistent with the tort of conversion and so preserve the old wine in the bottle wherein it has tasted best. The common law has for centuries developed to accommodate changing times and practices. Even in this age of statutes, the common law can adapt to govern justly without feeling burdened by the rigidity of its history.

VI. CONCLUSION

The tort of conversion is, as Prosser notes, encumbered

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148. *See* sources cited *supra* note 74.

149. The tort of conversion of intangibles was held preempted in Maheu v. CBS, Inc., 247 Cal. Rptr. 304, 308 (Ct. App. 1988) (by copyright laws); Nobel v. Bangor Hydro-Elec. Co., 584 A.2d 57 (Me. 1990) (same); Miracle Boot Puller Co., v. Plastray Corp., 269 N.W.2d 496 (Mich. Ct. App. 1978) (by patent laws).

150. Beyond a very broad statement of what actions should constitute liability this Comment dares not go—the courts mentioned herein have gone no further. The problems this Comment addresses are the result of recommendations for extensive reform of the tort of conversion, specifically addressing the actionability of intangibles and recommending that sweeping changes be made. *See supra* note 75 (recommendation of Professor Prosser). This Comment shows that that specific recommendation was perhaps hasty. Already a new tort is suggested here, and prudence dictates going no further than necessary to account for cases already decided.

151. *See* sources cited *supra* note 74.

with a "hoary limitation": the rule that no intangible may be converted. This rule springs from the history of the tort. Most formulations of the theory of recovery, including that in the *Restatement (Second) of Torts*, reflect that history: the use of concepts such as chattel, dominion, and the value of the chattel as the traditional measure of damages are longstanding and consistent corollaries to the rule against converting intangibles. Despite this history and the logical coherence of the older common law, some courts have held that intangibles may be converted. These cases cannot be made consistent with the current tort of conversion. In response to this inconsistency, courts should either discard the historical limitations common to the tort of conversion and express themselves in broader terms or create a new tort applicable to facts involving intangibles which the old tort cannot accommodate.

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