THYROFF V. NATIONWIDE MUTUAL INSURANCE COMPANY
864 N.E.2d 1272 (N.Y. Ct. App. 2007)

Graffeo, Judge:

The United States Court of Appeals for the Second Circuit has certified a question to us that asks whether the common-law cause of action of conversion applies to certain electronic computer records and data. Based on the facts of this case, we hold that plaintiff may maintain a conversion claim.

I

Plaintiff Louis Thyroff was an insurance agent for defendant Nationwide Mutual Insurance Company. In 1988, the parties had entered into an Agent's Agreement that specified the terms of their business relationship. As part of the arrangement, Nationwide agreed to lease Thyroff computer hardware and software, referred to as the agency office-automation (AOA) system, to facilitate the collection and transfer of customer information to Nationwide. In addition to the entry of business data, Thyroff also used the AOA system for personal e-mails, correspondence and other data storage that pertained to his customers. On a daily basis, Nationwide would automatically upload all of the information from Thyroff's AOA system, including Thryoff's personal data, to its centralized computers.

The Agent's Agreement was terminable at will and, in September 2000, Thyroff received a letter from Nationwide informing him that his contract as an exclusive agent had been cancelled. The next day, Nationwide repossessed its AOA system and denied Thyroff further access to the computers and all electronic records and data. Consequently, Thyroff was unable to retrieve his customer information and other personal information that was stored on the computers.

Thyroff initiated an action against Nationwide in the United States District Court for the Western District of New York, asserting several causes of action, including a claim for the conversion of his business and personal information stored on the computer hard drives. In response to Nationwide's motion to dismiss, District Court held that the complaint failed to state a cause of action for conversion because Thyroff did not allege that Nationwide exercised dominion over the electronic data to his exclusion and it was undisputed that Nationwide owned the AOA system. [All other causes of action also were dismissed.]

In his appeal to the United States Court of Appeals for the Second Circuit, Thyroff sought reinstatement of his conversion cause of action, along with other relief. Nationwide countered that a conversion claim cannot be based on the misappropriation of electronic records and data because New York does not recognize a cause of action for the conversion of intangible property. The Second Circuit determined that the issue was unresolved in New York and therefore certified the following question of law to this Court: is a claim for the conversion of electronic data cognizable under New York law?

II …

By 1252, … *trespass de bonis asportatis* [a Latin phrase meaning "trespass for carrying goods away"] was introduced [as a new cause of action]. It allowed a plaintiff to obtain pecuniary damages for certain misappropriations of property and, following a favorable jury verdict, the sale of the defendant's property to pay a plaintiff the value of the stolen goods. If, however, the defendant offered to return the property to its rightful owner, the owner had to accept it and "recovery was limited to the damages he had sustained through his loss of possession, or through harm to the chattel, which were usually considerably less than its value."

In the late 15th century, the common law was extended to "fill the gap left by the action of trespass" by providing a more comprehensive remedy in cases where a defendant's interference with property rights was so serious that it went beyond mere trespass to a conversion of the property. Known as "trover," this cause of action was aimed at a person who had found goods and refused to return them to the title owner, and was premised on the theory that:

> "the defendant, by 'converting' the chattel to his own use, had appropriated the plaintiff's rights, for which he was required to make compensation. The plaintiff was therefore not required to accept the chattel when it was tendered back to him;

> and he recovered as his damages the full value of the chattel at the time and place of the conversion… . The effect was that the defendant was compelled, because of his wrongful appropriation, to buy the chattel at a forced sale, of which the action of trover was the judicial instrument." …

Trover gave way slowly to the tort of conversion, which was created to address "some interferences with chattels for which the action of trover would not lie," such as a claim dealing with a right of future possession. The technical differences between trover and conversion eventually disappeared. The Restatement (Second) of Torts now defines conversion as an intentional act 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."

III

As history reveals, the common law has evolved to broaden the remedies available for the misappropriation of personal property. [With changes in society,] the courts became willing to consider new species of personal property eligible for conversion actions.

Conversion and its common-law antecedents were directed against interferences with or misappropriation of "goods" that were tangible, personal property. This was consistent with the original notions associated with the appeals of robbery and larceny, trespass and trover because tangible property could be lost or stolen. By contrast, real property and all manner of intangible rights could not be "lost or found" in the eyes of the law and were not therefore subject to an action for trover or conversion.

Under this traditional construct, conversion was viewed as "the 'unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights.'" … Thus, the general rule was that "an action for conversion will not normally lie, when it involves intangible property" because there is no physical item that can be misappropriated. …

Despite this long-standing reluctance to expand conversion beyond the realm of tangible property, some courts determined that there was "no good reason for keeping up a distinction that arose wholly from that original peculiarity of the action" of trover (that an item had to be capable of being lost and found) and substituted a theory of conversion that covered "things represented by valuable papers, such as certificates of stock, promissory notes, and other papers of value." *Ayres v. French,* 41 Conn 142, 150, 151 (1874). This, in turn, led to the recognition that an intangible property right can be united with a tangible object for conversion purposes. In *Agar v. Orda,* 264 NY 248, 251 (1934), which involved the conversion of intangible shares of stock, this Court applied the so-called "merger" doctrine because:

> "for practical purposes [the shares] are merged in stock certificates which are instrumentalities of trade and commerce…. Such certificates 'are treated by business men as property for all practical purposes.' … Indeed, this court has held that the shares of stock are so completely merged in the certificate that conversion of the certificate may be treated as a conversion of the shares of stock represented by the certificate."

More recently, we concluded that a plaintiff could maintain a cause of action for conversion where the defendant infringed on the plaintiff's intangible property right to a musical performance by misappropriating a master recording—a tangible item of property capable of being physically taken.

IV

We have not previously had occasion to consider whether the common law should permit conversion for intangible property interests that do not strictly satisfy the merger test. Although some courts have adhered to the traditional rules of conversion, others have taken a more flexible view of conversion and held that the cause of action can embrace intangible property.

A variety of arguments have been made in support of expanding the scope of conversion. Some courts have decided that a theft of intangible property is a violation of the criminal law and should be civilly remediable….

On the other hand, the primary argument for retaining the traditional boundaries of the tort is that it "seem[s] preferable to fashion other remedies, such as unfair competition, to protect people from having intangible values used and appropriated in unfair ways." Nonetheless, advocates of this view readily concede that "[t]here is perhaps no very valid and essential reason why there might not be conversion of" intangible property and that there is "very little practical importance whether the tort is called conversion, or a similar tort with another name" because "[i]n either case the recovery is for the full value of the intangible right so appropriated." The lack of a compelling reason to prohibit conversion for redress of a misappropriation of intangible property underscores the need for reevaluating the appropriate application of conversion.

V

"[I]t is the strength of the common law to respond, albeit cautiously and intelligently, to the demands of commonsense justice in an evolving society." That time has arrived. The reasons for creating the merger doctrine and departing from the strict common-law limitation of conversion inform our analysis. The expansion of conversion to encompass a different class of property, such as shares of stock, was motivated by "society's growing dependence on intangibles." It cannot be seriously disputed that society's reliance on computers and electronic data is substantial, if not essential. Computers and digital information are ubiquitous and pervade all aspects of business, financial and personal communication activities. Indeed, this opinion was drafted in electronic form, stored in a computer's memory and disseminated to the Judges of this Court via e-mail. We cannot conceive of any reason in law or logic why this process of virtual creation should be treated any differently from production by pen on paper or quill on parchment. A document stored on a computer hard drive has the same value as a paper document kept in a file cabinet.

The merger rule reflected the concept that intangible property interests could be converted only by exercising dominion over the paper document that represented that interest. Now, however, it is customary that stock ownership exclusively exists in electronic format. Because shares of stock can be transferred by mere computer entries, a thief can use a computer to access a person's financial accounts and transfer the shares to an account controlled by the thief. Similarly, electronic documents and records stored on a computer can also be converted by simply pressing the delete button.

Furthermore, it generally is not the physical nature of a document that determines its worth, it is the information memorialized in the document that has intrinsic value. A manuscript of a novel has the same value whether it is saved in a computer's memory or printed on paper. So too, the information that Thyroff allegedly stored on his leased computers in the form of electronic records of customer contacts and related data has value to him regardless of whether the format in which the information was stored was tangible or intangible. In the absence of a significant difference in the value of the information, the protections of the law should apply equally to both forms—physical and virtual.

In light of these considerations, we believe that the tort of conversion must keep pace with the contemporary realities of widespread computer use. We therefore answer the certified question in the affirmative and hold that the type of data that Nationwide allegedly took possession of—electronic records that were stored on a computer and were indistinguishable from printed documents—is subject to a claim of conversion in New York. Because this is the only type of intangible property at issue in this case, we do not consider whether any of the myriad other forms of virtual information should be protected by the tort.

Accordingly, the certified question should be answered in the affirmative.