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8 **In the United States District Court**
9 **For the District of Arizona**

10 Michael J. Magnotta, directly and
11 derivatively on behalf of iColligo, LLC,
12 Plaintiff,
13 v.
14 Steven A. Serra et ux., et al.,
15 Defendants.

No. CV-18-02295-PHX-SRB

**DEFENDANTS' RESPONSE TO
MOTION TO REMAND**

16 **MEMORANDUM IN RESPONSE**

17 **1. Scope of Copyright Preemption**

18 **a. Controlling Statutes**

19 On and after January 1, 1978, all legal or equitable rights that are equivalent to any of
20 the exclusive rights within the general scope of copyright as specified by section 106 in
21 works of authorship that are fixed in a tangible medium of expression and come within the
22 subject matter of copyright as specified by sections 102 and 103, whether created before
23 or after that date and whether published or unpublished, are governed exclusively by this
24 title. Thereafter, no person is entitled to any such right or equivalent right in any such work
25 under the common law or statutes of any State.

26 17 U.S.C. § 301 (a).

27 The district courts shall have original jurisdiction of any civil action arising under any
28 Act of Congress relating to ... copyrights No State court shall have jurisdiction over
29 any claim for relief arising under any Act of Congress relating to ... copyrights.

30 28 U.S.C. § 1338 (a).

1 **b. When does a case or claim “arise under” the Copyright Act?**

2 The Second Circuit’s learned discussion of district court jurisdiction of cases “arising
3 under” various federal statutes in *T. B. Harms Co. v. Eliscu*, 339 F.2D 823 at 825-27 (2nd Cir.
4 1964) reflects that court’s consideration of federal jurisdiction of “copyright claims
5 apparently not involving infringement.” That discussion is preceded by the observation that
6 “the undoubted truth that a claim for infringement ‘arises under’ the Copyright Act does not
7 establish that nothing else can.” 339 F.2D at 825. If this “undoubted truth” applies, there is
8 no need to consider the more recondite aspects of the “*T.B. Harms* test.” Thus, once a claim
9 is identified as being effectively a claim for the alleged infringement of a right created by the
10 Copyright Act, it must be recognized as a claim of federal, and exclusively federal,
11 cognizance.

12 Under 17 U.S.C. § 106 (a), the owner of copyright under U.S.C. Title 17 has the
13 exclusive right “to reproduce the copyrighted work in copies,” or to authorize such
14 reproduction. “Copyright in a work created on or after January 1, 1978, subsists from its
15 creation,” 17 U.S.C. § 302 (a), and so the copying of such a work, without authorization by
16 the copyright owner, infringes the owner’s rights as created by the Copyright Act. If the
17 wrong complained of by a plaintiff is revealed as consisting of such a copying, then to that
18 extent his action must be classed as one for infringement of copyright, and thus one “arising
19 under” the Copyright Act.

20 **2. “Conversion” of Copyrightable Intellectual Property**

21 In the digital millennium, an “original” and its “copy” alike consist of a sequence of
22 electric or magnetic charges and as such are wholly indistinguishable. If both descend from
23 the initial creative act of a human author, it is pointless to debate their degrees of descent –
24 practically, or for purposes of copyright law:

25 “Copies” are material objects ... in which a work is fixed by any method now known
26 or later developed, and from which the work can be perceived, reproduced, or otherwise
27 communicated, either directly or with the aid of a machine or device. The term “copies”
28 includes the material object ... in which the work is first fixed.

1 17 U.S.C. § 101. As the Ninth Circuit recognized over a quarter-century ago, the use of
2 computer software “necessarily includes the loading of the software into the computer’s
3 random access memory (‘RAM’) by” the user. Despite its impermanent nature, the copy
4 “loaded into RAM” is a copy, the unauthorized making of which infringes the copyright
5 owner’s exclusive § 106 rights. *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2D 511,
6 517-18 (9th Cir. 1992), cert. dismissed 510 U.S. 1033 (1994).¹

7 Given the § 101 definition of “copies” as including the object “in which a work is *first*
8 fixed,” for copyright purposes there is no such thing as an “original.” This corresponds well
9 with digital reality, for today, when a programmer completes the final version of the source
10 code of software – what would correspond most nearly to an “original,” as traditionally
11 understood – it is almost always “fixed” as a series of charges or impulses residing on a hard
12 disk drive or other non-volatile storage device attached to some computer, though not
13 necessarily the one with which the programmer is directly interacting. (For that matter, the
14 same could probably be said of the last draft of most novels.) The series of charges or
15 impulses is a “copy” under the Copyright Act, and has usefulness of any kind, only because
16 there exists a machine or device with the aid of which the software so stored can be perceived,
17 reproduced, or otherwise communicated.

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1. This aspect of the technology was evidently not understood by Plaintiff when he commented –

To bolster their argument the conversion claim involves unauthorized copying, Defendants go on to suggest that Defendants are “necessarily making at least one copy each time the software is used,” but this is belied by Defendants’ own admission that the software is offered to customers as a service, otherwise known as “SaaS” (Ans., filed Jan. 23, 2018 ¶ 36, “Defendants admit that an initial, limited version of the ICS Software was operational by the end of 2008, at which time iColligo’s customers were given access to and the right to use [it], as SaaS (Software-as-a-Service)”). Thus, the software is not necessarily copied when it is accessed “in the cloud” by remote downstream users

Motion, 7:5-15. What iColligo marketed and appLega markets is the use of the ICS as SaaS “in the cloud,” but all this affects is where, and by what immediate agency, a copy of the software object code is loaded into some computer’s RAM whenever the software is used (or “run” or “executed”).

1 In their Notice of Removal, Defendants cited a number of authorities for the
2 proposition that a conversion claim will be preempted by the Copyright Act if the plaintiff
3 has alleged the unlawful retention of intellectual property rights rather than the unlawful
4 retention of a tangible object embodying the work.² The closest Plaintiff comes to addressing
5 these authorities is his discussion of an unreported decision of this Court, rendered on July
6 28, 2009 in the case of *Merchant Transaction Sys., Inc. v. Nelcela, Inc.*, No. CV 02-1954-
7 PHX-MHM. Even assuming Plaintiff's citation of this unpublished decision were
8 appropriate, it would provide scant support for Plaintiff's position, at best. To begin with,
9 the cited decision quotes *Firoozye v. Earthlink Network*, 153 F.SUPP. 2D 1115 (N.D. Cal.
10 2001) with approval twice: first, for the proposition that, to avoid preemption, "the 'extra
11 element' required by state law [must] change the nature of the action so that it is qualitatively
12 different from a copyright infringement claim,"³ and second, observing that "while a claim
13 for conversion typically involves tangible property and thus may be immune from
14 preemption, where a plaintiff is only seeking damages from a defendant's reproduction of a
15 work – and not the actual return of a physical piece of property – the claim is preempted."⁴

16 Moreover, in its July 28, 2009 unreported decision the *Merchant Transaction Sys.*
17 court expressly reaffirmed its unpublished decision of March 18, 2009, precluding a
18 conversion claim as preempted by the Copyright Act:

19 Conversion claims with respect to intellectual property arise from the reproduction,
20 copying and misuse of a work ... and are "clearly equivalent to [those of] a copyright
21 claim." Thus, to the extent that Nelcela alleges the conversion of copyrightable or

2. To wit, *OpenRisk, LLC v. Microstrategy Servs. Corp.*, 876 F.3D 518, 523-24 (4th Cir. 2017); *WJ Global LLC v. Farrell*, 941 F.SUPP.2D 688, 692 (E.D. N.C., 2013) *Dielsi v. Falk*, 916 F.SUPP. 985, 990 (C.D. Cal. 1996); *Kakizaki v. Riedel*, 811 F.SUPP. 129, 133 (S.D.N.Y. 1992); and *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F.SUPP. 1523, 1535 (S.D.N.Y. 1985).

3. 153 F.SUPP. 2D at 1125, quoted at slip decision 3:14-16.

4. 153 F.SUPP. 2D at 1130, quoted at slip decision 4:1-4.

1 otherwise noncopyrightable intellectual property contained within the Nelcela
2 software, the conversion claim is preempted by the Copyright Act.⁵

3 Finally, even the quote from *Merchant Transaction Sys.* which Plaintiff presents has
4 been artfully manipulated. Plaintiff's quote contains an ellipsis between "distribution" and
5 "In addition." That ellipsis conceals the mysteriously omitted sentence, explaining the
6 court's holding that one of the conversion claims there presented was not preempted:

7 But here, MTSI's conversion claim "requires [MTSI] to demonstrate that [the Nelcela
8 Parties] wrongfully obtained possession over a specific piece of property," i.e., the MTSI
9 software.

10 Slip decision 4:6-8. The paragraphs of Plaintiff's Motion for Partial Summary Judgment
11 describing what Defendants purportedly "converted" and how they did this (quoted in the
12 Notice of Removal at 3:4-13 and quoted again on page 7 of this Memorandum, below) make
13 it clear that what was allegedly taken is a copy of the ICS software as it was stored on one or
14 more Amazon Web Services ("AWS") servers and that Defendant Steve Serra accomplished
15 this "taking" by making or causing the making of such copy.

16 Plaintiff argues that Serra did this in order to "steal" from iColligo, while Serra
17 explains that prior to these actions – a distorted version of which is presented in the
18 paragraphs of the Motion for Partial Summary Judgment quoted in the Notice of Removal –
19 under the original AWS account (with respect to which his own company eUnify and not
20 iColligo was identified as the AWS customer) AWS was billing for servers⁶ used by both
21 iColligo and Serra's separate corporation, eUnify. Anticipating the likely appointment of a
22 receiver for iColligo, Serra caused the creation of a new AWS account, this one with iColligo
23 as the identified customer, and the removal of the iColligo servers and their associated stored
24 data to this account. The result was the segregation of the iColligo servers and data from the

5. *Merchant Transaction Sys., Inc. v. Nelcela, Inc.*, No. CV 02-1954-PHX-MHM, decision filed March 18, 2009, slip decision at 33:1-7 (citation and quotation signals omitted); reaffirmed July 28, 2009, slip decision at p. 4 n. 3.

6. More properly, "virtual servers." A virtual server is the functional equivalent of a separate, stand-alone computer and its associated data storage, although it is actually implemented by a "cloud" service provider through the operation of its network of powerful hardware servers.

1 eUnify servers and data, which was obviously a convenience for iColligo’s receiver as well
2 as for eUnify’s management.⁷

3 As is the case whenever electronically stored information is “moved,” what actually
4 happened is that ESI stored at location *A* was copied to location *B* and then deleted from
5 location *A*. Once the operation was completed it would be impossible to tell whether it was
6 the iColligo servers or the eUnify servers or both that had been replicated. What is significant
7 for purposes of the matter at hand (the application of the *Merchant Transaction Sys.* decision
8 of 07/28/2009, including the sentence mysteriously omitted from Plaintiff’s quote, to the case
9 at bar) is that there is no possible room for a suggestion that Serra “wrongfully obtained
10 possession over” the software in order to cause it to be replicated. Although it is not
11 mentioned in the two paragraphs of the Motion for Partial Summary Judgment quoted in the
12 Notice of Removal (and quoted again on page 7 of this Memorandum, below) elsewhere in
13 that paper it is made abundantly clear that Serra was and was acting as the manager of
14 iColligo.⁸ There were to begin with AWS servers supporting iColligo’s operation with a
15 copy of the ICS object code only because Serra, as iColligo’s manager, had made the
16 arrangements. What is certain is that the ICS source and object code, as in use in 2016, were
17 created by and in the possession of eUnify personnel, despite Plaintiff’s disputed claim to
18 contributory authorship of an earlier version.

7. Plaintiff’s characterization of the account to which the servers and data supporting iColligo operations had been transferred as a “dummy account” is a piece of pure editorializing, unsupported by any evidence. In fact, Plaintiff is not even self-consistent. How could it be a mere “dummy” when “a copy of iColligo’s software” (actually, a copy of the ICS object code) had been “deposited on” it?

Similarly, Serra’s control over the two AWS accounts and the servers hosted there, at the conclusion of the operations of 07/19/2016, was exactly the same as his control over the single account, and the servers hosted there (or rather, financially accounted for thereunder) had been prior to that date. He relinquished control over the new, higher-numbered account to the iColligo receiver promptly after the appointment of that officer. The assertion that he “usurped” control over the lower-numbered account, with respect to which eUnify had always been and remained the identified AWS customer, is merely a piece of creative writing.

8. Motion for Partial Summary Judgment f. 06/22/2018, 3:14, 3:15, 3:18-19, 4:1-9, 5:24-26, 9:8.

1 **3. The Nature of the Rights Plaintiff Seeks to Vindicate**

2 **a. Plaintiff’s Newly Revealed Contentions.**

3 The iColligo software⁹ was historically hosted on an AWS account ending in 4354
4 and paid exclusively by iColligo. (SOF ¶ 78.) On July 19, 2016, Serra opened a new AWS
5 account ending in 5419, deposited a copy of iColligo’s software on the 5419 account,
6 removed iColligo’s name from the servers on the original 4354 account, and purported to
7 turn over iColligo’s AWS account to the Receiver. (SOF ¶ 79.) In actuality, Serra provided
8 the Receiver with access to the “dummy” 5419 account and commandeered the 4354
9 account for himself. (SOF ¶ 80.)

10 ... To this day, Serra exercises exclusive control over iColligo’s software and
11 continues to “license” its use on behalf of eUnify for a fee of no less than \$30,000 every
12 month. (SOF ¶ 82.)

13 Motion for Partial Summary Judgment (f. 06/22/2018) 13:1-7, 10-12.

14 Since Defendant Serra “deposited a copy of [the ICS] software on the 5419 account”
15 and then turned that account over to the iColligo receiver, there is only one thing that could
16 give Serra (speaking broadly enough to include eUnify, the corporation of which he is the
17 sole shareholder) “exclusive control over” that software – the corporation’s ownership of the
18 copyright, which is evidenced by a certificate of registration. However, the truth is that the
19 receiver never made any use of the copy of the software provided to him, and that this was
20 probably not because he was concerned about violating eUnify’s copyright. In any event, it

9. The property referred to in the (Second) Amended Complaint as “the ICS Software” is referred to in the Motion for Partial Summary Judgment as “the iColligo software,” which Plaintiff there says, for the first time and without citation of any evidentiary support, “is also called ‘iColligo’ .”

Of course, Plaintiff’s reference to “iColligo software” is no indication that iColligo owns any intellectual property, not even when Plaintiff uses the possessive form of iColligo. Plaintiff’s assertion, further down on page 13 of the Motion for Partial Summary Judgment, that eUnify’s claim to own the software is “unsupported by a single piece of corroborating evidence” is remarkable in light of the fact that Plaintiff has been provided with a copy of eUnify’s copyright registration certificate for the ICS software. The certificate constitutes prima facie evidence of both the existence and the validity of eUnify’s copyright. 17 U.S.C. § 410 (c).

1 is irrelevant which of these indistinguishable electronic copies of the software Serra is
2 accused of misappropriating. Whichever set of servers – those for the use of which AWS
3 charges its account -4354 or those for the use of which AWS charges its account -5419 –
4 may house the copy which Plaintiff purports to find offensive, there is no “extra element”
5 that changes the nature of the action so that it is qualitatively different from a copyright
6 infringement claim.

7 To determine whether a plaintiff’s state-law claim seeks to assert rights that are
8 equivalent to those protected by the Copyright Act, a court must analyze the elements of
9 the state-law cause of action to see if the right defined by state law may be abridged by an
10 act which in and of itself would infringe one of the exclusive rights in the Act. Conversely,
11 if there is an “extra element” that is required in place of or in addition to the acts of
12 reproduction, performance, distribution, or display in order to constitute a state-law cause
13 of action, and the “extra element” required by state law changes the nature of the action so
14 that it is qualitatively different from a copyright infringement claim, the state-law claim is
15 not preempted.

16 *Firoozye v. Earthlink Network*, 153 F.SUPP.2D 1115, 1125 (N.D. Cal. 2001).

17 In Arizona, “[C]onversion is any act of dominion wrongfully exerted over another’s
18 personal property in denial of or inconsistent with his rights therein.” *Shartzler v. Ulmer*, 85
19 ARIZ. 179, 333 P.2D 1084, 1088 (1959). Where the personal property in question is intangible
20 and is actually a composition¹⁰ which exists and has ever existed only as a unit of
21 electronically stored information – a unit which can only be used, indeed, whose content can
22 be known only through the generation of a copy – a claim for the “conversion” of such
23 property seeks to assert rights that are equivalent to those protected by the Copyright Act.

10. “A computer program is a form of literary work, and thus is copyrightable.” *Greenberg v. National Geographic Soc.*, 533 F.3D 1244, 1262 n. 6 (11th Cir. 2008); “[A] computer program, whether in object code or source code, is a ‘literary work’ and is protected from unauthorized copying, whether from its object or source code version.” *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2D 1240, 1249 (3rd Cir., 1983).

1 **b. Plaintiff’s Requests for Relief.**

2 Plaintiff demands summary judgment for “[c]onversion against defendants Serra and
3 eUnify, with an order to return iColligo’s property and the amount of damages to be
4 determined following a damages hearing.” Motion for Partial Summary Judgment f.
5 06/22/2018, 1:24-26. In so doing he continues his tactic of speaking of the software as if it
6 were a tangible chattel and iColligo’s ownership of that chattel were established. He also
7 complains that Serra (actually, eUnify) exercises control over the copies of the software
8 retained by it and continues to license their use (specifically, to Defendant appLega, LLC)
9 for a substantial monthly fee. MPSJ 13:10-12.

10 Since Plaintiff himself states that the software was copied to an AWS account that
11 was turned over to the iColligo receiver, what can Plaintiff as iColligo’s representative mean
12 by demanding the “return” of this “property”? Plaintiff defeated the appLega Defendants’
13 suggestion of exclusive federal jurisdiction by insisting that he complains because
14 Defendants “literally took ... the actual software. ... It is akin to a thief stealing someone’s
15 actual book, not making an unauthorized copy of someone’s book”¹¹ and citing a Colorado
16 case from the report of which it cannot be determined exactly what the defendant was found
17 to have taken or how, but which held the defendant liable with the words

18 In the case of a novel, for example, a writer prepares an original manuscript of the work.
19 If another person exercises control over that manuscript under circumstances constituting
20 civil theft under Colorado law, he or she would be liable for theft of the manuscript
21 *Steward Software Co. v. Kopcho*, 266 P.3D 1085, 1088 (Colo. 2011), quoted in Plaintiff’s
22 Opposition to Applega Defendants’ Motion for Partial Judgment on the Pleadings f.
23 11/07/2017 at 7:16-19. Only Plaintiff knows exactly what he meant when he referred to the
24 “literal taking” of the “actual software,” but his argument certainly suggested that he intended
25 to prove the physical asportation and detention of a tangible chattel, an argument which, he

11. Plaintiff’s Opposition to Applega Defendants’ Motion for Partial Judgment on the Pleadings f. 11/07/2017, 6:7, 6:22-23.

1 correctly pointed out, is not inconsistent with the bare words of the conversion count of the
2 (Second) Amended Complaint.

3 Plaintiff's Motion for Partial Summary Judgment, however, revealed that there was
4 no physical taking nor any tangible chattel, but rather the objects of Defendants' alleged
5 misdeeds were electronic copies, and the "taking" was accomplished by Defendant Steve
6 Serra, either by having the software copied to a virtual server and then (nefariously?) turning
7 over control of the server to the iColligo receiver, or by leaving copies on servers that
8 remained in the control of eUnify. If any rights that iColligo may have in the software (a
9 work of authorship that comes within the subject matter of copyright) have been infringed by
10 the making, existence or use of these copies, they must clearly be equivalent to rights within
11 the general scope of copyright. See 17 U.S.C. § 301 (a).

12 What can iColligo's representative (the Plaintiff) mean by demanding the "return of
13 its property"? By his own account, iColligo *has* "its property," unless something has
14 happened to the copy which Plaintiff describes as having been "deposited on" a server that
15 was then put under the control of the iColligo receiver. And if something has happened to
16 that copy, all Defendants could possibly do for iColligo would be to make another one; there
17 is no tangible chattel to "deliver." Undoubtedly, what Plaintiff actually wants is for
18 Defendants to stop using (i.e., stop copying) the copies of the software which they now
19 possess. Again, if iColligo has any right to demand this, it is a right "equivalent to rights
20 within the general scope of copyright."

21 **4. Conclusion.**

22 It would be idle to deny that Defendants were from the outset suspicious of Plaintiff's
23 characterization of his conversion claim and doubted that the retention of a tangible object
24 would ever be shown. On their faces, however, the initial complaints, original and amended,
25 were not inconsistent with Plaintiff's "tangible chattel" characterization of his conversion
26 counts, and so the cases stated by these pleadings were not removable. The true nature of

1 the conversion claim, and that because of it the case was or had become removable, could
2 not be ascertained¹² until Plaintiff served his pending Motion for Partial Summary Judgment.

3 Other aspects of the Motion to Remand may be addressed briefly. Plaintiff correctly
4 observes that 28 U.S.C. § 1446(b)(2)(a) requires that all defendants join in *or* consent to the
5 removal of an action. It is not clear to what purpose he observes, also correctly, that the
6 Defendant Estate of Anthony M. Serra, Deceased, did not join but rather consented. (As for
7 his reference to Arizona ER 4.2, Plaintiff should know that Comment [1] to that Rule
8 expressly states that notwithstanding the Rule, “parties to a matter may communicate directly
9 with each other.”)

10 As for the question whether the Defendants lacked an objectively reasonable basis for
11 seeking removal, Defendants respectfully submit that it would be in the interest of judicial
12 economy to address that question if there is occasion to do so after the Motion to Remand is
13 decided, and hereby seek leave to brief this issue if and when Plaintiff’s Motion may be
14 granted.

15 DATED: August 10, 2018.

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12. WEBSTER’S NEW WORLD DICTIONARY defines the transitive verb “to ascertain” as meaning
“to find out with certainty.”

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