COMMENT

ANALYZING THE URGE TO MERGE: CONVERSION OF INTANGIBLE PROPERTY AND THE MERGER DOCTRINE IN THE WAKE OF *KREMEN V. COHEN**

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I. INTRODUCTION

Flash back to the early days when the Internet was first being developed into a commonly used communication and commercial tool.[1] The National Science Foundation granted Network Solutions, Inc. ("NSI") the exclusive right to register domain names to individuals wishing to develop this new frontier.[2] Domain names were available at no cost on a first-come, first-serve basis.[3] One enterprising individual, Gary Kremen, took NSI up on this offer in May 1994, and with a simple electronic registration form, he became the first proud owner of "sex.com."[4] Although Kremen intended to turn the website into a "wholesome" enterprise devoted to sexual public health issues, he neglected to develop it in a timely manner.[5] Kremen later discovered that Stephen Cohen had taken over the domain name and was operating what was apparently a very successful pornography website.[6] To make matters worse, NSI voluntarily, and without question or investigation, gave Cohen the rights to the domain name upon receipt of a fraudulent letter purportedly from Kremen's company that relinquished the domain name.[7] Although Kremen was able to regain possession of the now-tainted name, he was unable to enforce his civil

1. *See* Juliet M. Moringiello, *Seizing Domain Names to Enforce Judgments: Looking Back to Look to the Future*, 72 U. CIN. L. REV. 95, 100 (2003) (discussing the early domain name registration process).

2. Kremen v. Cohen, 325 F.3d 1035, 1039 (9th Cir. 2003).

3. *See* Xuan-Thao N. Nguyen, *Commercial Law Collides with Cyberspace: The Trouble with Perfection*—In*security Interests in the New Corporate Asset*, 59 WASH. & LEE L. REV. 37, 63–64 (2002) (stating that NSI's first-come, first-serve registration process is a method for avoiding duplicate domain names).

4. *Kremen*, 325 F.3d at 1039.

5. *See* Cohen v. Carreon, No. CV-00-235-ST, 2001 WL 34047033, at *1 (D. Or. Mar. 9, 2001).

6. *Id.*; *Kremen*, 325 F.3d at 1039.

7. *Kremen*, 325 F.3d at 1039.

judgment against Cohen, who had apparently left the country along with his "sex.com" profits.[8]

Kremen's potential remedies against NSI were limited. His breach of contract claim failed because he did not provide consideration for the domain name.[9] Also, despite the potential value of "sex.com," intellectual property laws did not protect the name.[10] Kremen's last and best hope for a remedy against NSI was the aged tort of conversion—as applied to intangible property.[11]

The facts of *Kremen v. Cohen* illustrate why conversion remains relevant even in today's e-commerce society. Although intellectual property laws have developed to protect most types of intangible property,[12] there are other types, such as domain names and technological advancements yet to be envisioned, that do not meet the requirements for such protection.[13] But even as intangible property becomes increasingly valuable in our society,[14] conversion—sometimes the only remedy available for

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8. *Id.* at 1040; Kremen v. Cohen, 337 F.3d 1024, 1035 (9th Cir. 2003).

9. *Kremen*, 337 F.3d at 1028–29.

10. Because "sex.com" had not been developed into a website at the time of the conversion, it was not eligible for copyright protection. *See* ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 327 (3d ed. 2003) (stating that the Copyright Act of 1976 protects only "original works of authorship fixed in any tangible medium"). Rather, "sex.com" was either a generic mark or a descriptive mark that had not yet acquired a secondary meaning indicating its source. Kremen v. Cohen, No. C 98-20718 JW, 2000 WL 1811403, at *4–*6 (N.D. Cal. Nov. 27, 2000). The Lanham Act, a federal statute governing trademark law in the United States, requires proof that trademarks that are not inherently distinctive have a secondary meaning so that consumers know that the related products or services come from a single but anonymous source. MERGES ET AL., *supra*, at 546–47. In a related *Kremen* proceeding, the Northern District of California determined that even if "sex.com" was a descriptive rather than a generic mark, it was "not a valid and protectible trademark, with respect to a web site delivering pornography to the internet community." *Kremen*, 2000 WL 1811403, at *6.

11. *Kremen*, 337 F.3d at 1029–36.

12. Val D. Ricks, Comment, *The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wine*, 1991 BYU L. REV. 1681, 1700. A survey of the intellectual property remedies that are available to intangible property is beyond the scope of this Comment. For a brief overview, see MERGES ET AL., *supra* note 10, at 19–25 (providing a survey of trade secret, patent, copyright, and trademark law).

13. Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 143 (2004) [hereinafter Lipton, *Information Property*]; Jacqueline Lipton, *Protecting Valuable Commercial Information in the Digital Age: Law, Policy and Practice*, 6.1 J. TECH. L. & POL'Y 2, § 1 (2001), *at* http://grove.ufl.edu/~techlaw/vol6/issue1/lipton.html [hereinafter Lipton, *Protecting Information*].

14. *See* Lipton, *Protecting Information*, *supra* note 13, § 1 (stating that "there is a growing need within societies the world over effectively to protect valuable intangibles against unauthorized interference and use" due to the increasingly important role of information and services in business); *see also* 1 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 2.13, at 2:56 (3d ed. 1996) (observing that "[i]n today's economy property and wealth take an increasingly intangible form").

the misappropriation of intangibles—has not uniformly evolved in all jurisdictions to protect this form of valuable property adequately.[15] Yet, as one commentator has stated, "conversion inherited an obligation to make good the common law promise that for every wrong there is a remedy."[16]

Conversion of intangible property is a common-law intentional tort that varies significantly across jurisdictions in the United States.[17] Although some states allow conversion to apply to "'every species of personal property,'"[18] others do not recognize a remedy for conversion of intangible property at all—only tangible property is protected.[19] However, a good portion of jurisdictions fall somewhere between these two extremes. For example, currently many states either expressly or implicitly follow the lead of the Restatement (Second) of Torts ("Restatement") in their approach to tangible and intangible property.[20]

Section 242 of the Restatement requires a "merger," in which the intangible property rights must be merged into a document that effectively represents these rights.[21] But this requirement can create difficulties for modern courts as documentation becomes increasingly electronic and digital in nature.[22] This

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15. *See* 1 HARPER ET AL., *supra* note 14, § 2.13, at 2:56–2:57 (commenting on conversion's failure to keep pace with today's intangible property- and wealth-based economy). When the tort is confined to types of intangible properties previously recognized by a jurisdiction or to those intangible properties lucky enough to be formally represented by a tangible document, it stands to reason that the protection offered is narrower than the scope of validly possessed properties that could rely on conversion for a remedy.

16. 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, 533. In the words of Thomas Jefferson, "'laws . . . must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.'" Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 32, 41 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

17. William L. Prosser, *The Nature of Conversion*, 42 CORNELL L.Q. 168, 174 n.25 (1957); *see infra* Part V (surveying various jurisdictional approaches to conversion of intangible property).

18. *See, e.g.*, Kremen v. Cohen, 337 F.3d 1024, 1033 (9th Cir. 2003) (quoting Payne v. Elliot, 54 Cal. 339, 341 (1880)).

19. *See, e.g.*, Custom Teleconnect, Inc. v. Int'l Tele-Servs., Inc., 254 F. Supp. 2d 1173, 1182 (D. Nev. 2003) (declining to extend the Nevada tort of conversion to intangibles).

20. *See infra* Part V.B (reviewing the jurisdictions that follow the Restatement's merger requirements).

21. RESTATEMENT (SECOND) OF TORTS § 242 (1965).

22. *See* James A. Newell & Michael R. Gordon, *Electronic Commerce and Negotiable*

transformation was surely not a foreseeable occurrence between 1955 and 1965, when the Restatement was being drafted.[23] Although the comments to section 242 discuss documents such as "promissory notes, bonds, bills of exchange, share certificates, and warehouse receipts,"[24] the plain language of that section does not expressly require such documents to be tangible.[25] To the extent that courts still require the merger doctrine to be satisfied by tangible documentation, intangible property rights are not being protected to their fullest.[26]

This Comment argues that the Restatement's merger requirement essentially proves a valid right to possession of intangible property within the conversion context. In this era in which tangibility limitations have been relaxed by other areas of law,[27] courts should allow conversion to continue on its expansive path and allow electronic and digital "documents" to satisfy any common-law-imposed merger requirement or proof of right to possession. In order to create some uniformity between jurisdictions, courts should follow the lead of the Ninth Circuit's *Kremen v. Cohen* decision, which argued in dicta for this outcome.[28] Further, as the tort of conversion continues its common-law evolution, it should progress to allow a remedy for validly held intangible property rights, accompanied by clear evidence of ownership or right of possession, regardless of the inherent medium or form that evidence takes. By moving beyond

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Instruments (Electronic Promissory Notes), 31 IDAHO L. REV 819, 821 (1995) (stating that "[t]he conversion from paper-based documentation to electronic documentation in commercial transactions is well under way"); Christopher B. Woods, Comment, *Commercial Law: Determining Repugnancy in an Electronic Age: Excluded Transactions Under Electronic Writing and Signature Legislation*, 52 OKLA. L. REV. 411, 412 (1999) (observing that "[a]t present, technological advancements have brought new methods that are now poised to replace paper and ink"). As an example of such a difficulty, courts have both found and refused to find a merged electronic document in conversion of a domain name. *Compare Kremen*, 337 F.3d at 1033–34 (finding that the database associating domain names with particular computers was the merged document), *with* CICCorp., Inc. v. AIMTech Corp., 32 F. Supp. 2d 425, 430 n.9 (S.D. Tex. 1998) (finding that conversion could not be extended to cover a domain name under Texas law).

23. *See* Prosser, *supra* note 17, at 169 n.5.

24. RESTATEMENT (SECOND) OF TORTS § 242 cmt. b (1965).

25. *Id.* § 242; *see also Kremen*, 337 F.3d at 1034 n.11.

26. *See infra* notes 230–32 and accompanying text (discussing the jurisdictions that protect only those intangible property rights embodied in a document that has itself been converted).

27. *See infra* Part VI (surveying other areas of law that are in the process of loosening tangibility requirements to accommodate technological advances).

28. *Kremen*, 337 F.3d at 1033–34 ("It would be a curious jurisprudence that turned on the existence of a *paper* document rather than an electronic one. Torching a company's file room would then be conversion while hacking into its mainframe and deleting its data would not.").

tangibility requirements, valuable intangible property will be afforded the greatest possible protection—while still requiring some formalism in the evidentiary proof required to show a right of possession—regardless of what form future documentation technology might take.[29]

Part II of this Comment will trace the history of conversion from its beginnings, through its existence as an action in trover, to its modern common-law elements and the Restatement's approach to the conversion of tangible chattels and intangible property rights. Part III will discuss the essence of the intangible property right and the various possible policy reasons behind the old merger doctrine. Part IV will discuss the Ninth Circuit's analysis of intangible property, merger, and the issue of electronic documentation in *Kremen v. Cohen* and will consider the other forms of current and future intangible property that might require similar protection under an expanded form of conversion. Part V will survey the tort of conversion across jurisdictions in the United States, illustrating the lack of uniformity in approaches to the conversion of intangible property and the ways in which the various approaches either have handled or likely would handle the merger issue for electronic documentation. Part VI will explore developments in other areas of the law that anticipated the Ninth Circuit's reasoning with regard to electronic documentation and that embraced the changes technology brings our society. This Comment will conclude by arguing that the tort of conversion should move beyond the merger doctrine's tangibility restrictions to allow fuller protection of property rights, provided that the policy reasons behind the merger doctrine are satisfied.

II. THE TORT OF CONVERSION

A. The History and Evolution of the Tort

Conversion, which spans the outer boundaries of both tort and property law, has been described as "the forgotten tort"[30] and has generated little interest and commentary from scholars.[31] It

29. *See* Woods, *supra* note 22, at 411 ("Formalities serve an integral role in law by focusing on the rights and responsibilities of parties . . . . Examples of such formalistic prescriptions are laws requiring writings and signatures. . . . Nevertheless, ink on paper is not the only method of advancing these purposes.").

30. Prosser, *supra* note 17, at 168.

31. *Id.* at 168 & nn.1–2 (observing that conversion is covered only scantly by scholars and rarely discussed in law school curricula); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 88 (5th ed. 1984) (commenting that despite

is an ancient doctrine that has gone through a great deal of evolution over time.[32] Its origins date back to Anglo-Norman times, when a citizen had the right to a private action against a thief of personal property.[33] This action often led to a duel between the citizen and thief, with potentially deadly results.[34] The state finally became involved with the action during the twelfth century.[35] An apprehended thief would be punished directly by the Crown, and the recovered goods were then forfeited to the King, rather than returned to the owner.[36] Some of the basic rights now closely associated with conversion first arose during King Henry III's reign with the action of trespass *de bonis asportatis*.[37] Under this action, a plaintiff had to establish his right of possession, either as owner or bailee, of property stolen by one who lacked this personal right.[38] With trespass, the plaintiff was still considered the owner of the property, so even when possession was "interfered with or interrupted," the owner had to accept the property "when it was tendered back to him" 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."[39] An alternative, parallel remedy was also available in "detinue" for

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being "a fascinating tort," little has been written on conversion, perhaps due to its elusive common-law based definition); Hill, *supra* note 16, at 511 n.2 (noting the lack of scholarly commentary on trover and conversion).

32. Ricks, *supra* note 12, at 1709, 1711–12; *see also* Prosser, *supra* note 17, at 169 ("The hand of history lies heavy upon the tort of conversion."). For several in-depth discussions of the historical roots of conversion, see RESTATEMENT (SECOND) OF TORTS § 222A cmts. a, b (1965) (discussing conversion's descent from trover); 1 HARPER ET AL., *supra* note 14, § 2.7, at 2:25–2:30 (comparing trover and conversion to older actions); KEETON ET AL., *supra* note 31, at 89–90, (analyzing the action of trover and its development); J.B. Ames, *The History of Trover*, 11 HARV. L. REV. 277 (1897) (detailing the early progression of trover); Hill, *supra* note 16, at 511–19 (reviewing the progression of conversion from its historical roots to its modern elements); Prosser, *supra* note 17, at 169–73 (tracing the development of conversion through the *Restatement (Second) of Torts*); Ricks, *supra* note 12, at 1683–90 (analyzing the tort's historical reluctance to move beyond tangible property).

33. Ames, *supra* note 32, at 278–80.

34. *Id.* at 279; *see also* Ricks, *supra* note 12, at 1709 (discussing the option for wager of battle or jury).

35. Ames, *supra* note 32, at 280 (discussing the introduction of the public prosecution of crime by the Assize of Clarendon in 1166).

36. *Id.* at 280–81; *see also* Ricks, *supra* note 12, at 1709–10 (discussing the King's emerging involvement with crime prosecution).

37. Ames, *supra* note 32, at 282–83; *see also* Ricks, *supra* note 12, at 1710 (stating that the action arose to overcome procedural difficulties). *De bonis asportatis* is Latin for "the asportation of chattels." RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 638 n.1 (7th ed. 2000).

38. Ames, *supra* note 32, at 283.

39. Prosser, *supra* note 17, at 170.

wrongful detention (rather than taking, as with trespass) of a chattel.[40]

Trespass and detinue had unfortunate "gaps" and pleading limitations, and thus by the fifteenth century, both were inconsistently applied.[41] As a result, the common law evolved once again by creating the action of trover to protect against the "wrongful detention of chattels not found."[42] As with trespass, the plaintiff's right to possession of the chattel was a key element.[43] Trover differed from trespass, however, because it did not require the plaintiff to retake possession.[44] Rather, the defendant had to compensate the plaintiff for the "full value of the chattel at the time and place of the conversion" as if the defendant had bought the property from the plaintiff.[45] A concurrent remedy of "replevin" also became available but failed to compete effectively with trover, as it only provided for the return of the wrongfully detained property, not damages.[46]

Finally, the modern tort of conversion began its descent from trover in nineteenth-century England, a development that was soon adopted by the United States.[47] Conversion included the crucial element of dominion, thus further distinguishing it from trespass.[48] Under this new theory, the defendant not only had to deprive the plaintiff of possession of the chattel, but the interference had to be severe enough to deprive the plaintiff of "dominion or control over it," rather than merely cause minor interference.[49] As with trover, if the standard was met, the defendant would be liable for damages in the amount of the full value of the chattel.[50] However, the right to possession of the

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40. KEETON ET AL., *supra* note 31, at 89; Ricks, *supra* note 12, at 1710.

41. KEETON ET AL., *supra* note 31, at 89; Hill, *supra* note 16, at 514–15; Prosser, *supra* note 17, at 169.

42. Prosser, *supra* note 17, at 169. The word "trover" derives from the French word for "finding." *Id.*

43. *Id.* at 169–70 (explaining that the only litigatable issues in trover were "the plaintiff's right to possession and the conversion itself").

44. *Id.* at 170.

45. *Id.*

46. Ricks, *supra* note 12, at 1711.

47. Prosser, *supra* note 17, at 171–73.

48. RESTATEMENT (SECOND) OF TORTS § 222A cmt. a (1965); KEETON ET AL., *supra* note 31, at 90; Prosser, *supra* note 17, at 171.

49. Prosser, *supra* note 17, at 171–72 (discussing the English case of *Fouldes v. Willoughby*, 151 Eng. Rep. 1153 (Ex. 1841) and the American case of *Johnson v. Weedman*, 5 Ill. (4 Scam.) 495 (1843)); *see also* RESTATEMENT (SECOND) OF TORTS § 222A cmt. c (1965) (stating that the tort is limited only to serious interferences); KEETON ET AL., *supra* note 31, at 90 (analogizing the damages for conversion to a forced judicial sale).

50. Prosser, *supra* note 17, at 173; *see also* RESTATEMENT (SECOND) OF TORTS § 222A cmt. c (1965) (stating that conversion is limited "to those serious, major, and

chattel no longer needed to be immediate—future possessory rights qualified as well.[51] Therefore, the existence of conversion, rather than a lesser offense, depends on "the seriousness of the interference with the plaintiff's rights, which in turn will depend upon the interplay of a number of different factors, each of which has its own importance, and may, in a proper case, be controlling."[52]

The basic, black-letter elements of conversion for chattels are "universal"[53] and have been consistently applied by courts.[54] Conversion is generally defined as a "wrongful control or dominion over personal property in a way that repudiates an owner's right in the property in denial of or in a manner inconsistent with such right. . . . Such dominion is without the owner's consent and without lawful justification."[55] Implicit in this definition is the requirement that the property be rightfully owned or possessed before it can be converted by another. Therefore, to establish conversion, "the plaintiff must establish that he was in possession of the goods, or entitled to possession, at the time of the conversion."[56]

Because conversion is a strict liability intentional tort, the defendant's good faith is irrelevant.[57] "Thus, a person can be held

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important interferences with the right to control the chattel which justify requiring the defendant to pay its full value").

51. RESTATEMENT (SECOND) OF TORTS § 222A cmt. b (1965).

52. Prosser, *supra* note 17, at 173. The Restatement lays out these factors:

(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.

RESTATEMENT (SECOND) OF TORTS § 222A(2) (1965).

53. *See* P.M.F. Servs., Inc. v. Grady, 703 F. Supp. 742, 743 n.1 (N.D. Ill. 1989) (implying that in a choice-of-law issue, the governing state law is relatively unimportant due to the universality of the principles of conversion).

54. Prosser, *supra* note 17, at 168.

55. 18 AM. JUR. 2D *Conversion* § 1, at 154 (2004) (citations omitted); *see also* RESTATEMENT (SECOND) OF TORTS § 222A(1) (1965) ("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.").

56. KEETON ET AL., *supra* note 31, at 102–03.

57. *See* EPSTEIN, *supra* note 37, at 638 n.1; 18 AM. JUR. 2D *Conversion* § 3, at 156–57 (2004); *see also* 1 HARPER ET AL., *supra* note 14, § 2.1, at 2:6 (stating that good faith will not excuse conversion); Eric Kohm, *When "Sex" Sells: Expanding the Tort of Conversion to Encompass Domain Names*, 23 LOY. L.A. ENT. L. REV. 443, 449 (2003) (noting that conversion is classified as a strict liability tort).

liable to the true owner of stolen personal property for conversion notwithstanding that he or she acted in the utmost good faith and without knowledge of the true owner's title."[58] The only intent required is the "intent to exercise a dominion or control over the goods which is in fact inconsistent with the plaintiff's rights."[59]

Initially, protection by conversion was limited to tangible property.[60] This was due to its historical descent from trover, which focused on granting "a remedy against the finder of lost goods who refused to return them."[61] Because an action for trover had been accompanied by strict rules of pleading that focused on the tangibility of the item, courts were uncomfortable with the concept of applying such a remedy to intangible property.[62] Other reasons for this judicial reluctance came from the assumption that intangible property could not "be physically possessed" and lacked specificity and precise value.[63] "However, few will now dispute that intangibles have value, and the other reasons for denying recovery for converted intangibles are . . . holdovers from the old pleading requirements—hardly valid reasons to deny recovery today."[64]

B. The Modern Elements of Conversion of Intangible Property

The next major development in the tort of conversion began with judicial recognition that, due to the emergence of and society's growing dependence on intangibles, such property could be converted.[65] The expanded tort required that any converted intangible property right be "merged" with a document that also had been taken.[66] This requirement is best evidenced by the Restatement (Second) of Torts, section 242(1): "Where there is conversion of a *document in which intangible rights are merged*, the damages include the value of such rights."[67] This requirement was eventually partially discarded, as indicated in section 242(2): "One who effectively prevents the *exercise of intangible*

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58. 18 AM. JUR. 2D *Conversion* § 3, at 156–57 (2004) (citations omitted).

59. KEETON ET AL., *supra* note 31, at 92.

60. *Id.* at 90–91. Land, as real property, is not subject to conversion because it cannot be "lost and found" as required by trover. *Id.* § 15, at 90.

61. RESTATEMENT (SECOND) OF TORTS § 242 cmt. d (1965).

62. Ricks, *supra* note 12, at 1685.

63. Hill, *supra* note 16, at 527–31; Ricks, *supra* note 12, at 1686.

64. Ricks, *supra* note 12, at 1686.

65. Kohm, *supra* note 57, at 452 (offering stocks and bonds as examples of valuable intangible property).

66. *Id.*; Ricks, *supra* note 12, at 1712 (quoting Hill, *supra* note 16, at 526–27).

67. RESTATEMENT (SECOND) OF TORTS § 242(1) (1965) (emphasis added).

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*."[68] Thus, if a document typically exists to evidence a possessory right of such property, the "symbol" of the intangible property right need not actually have been taken.[69] The level of requisite documentation is still somewhat of an open issue among jurisdictions, with requirements ranging from documents that truly embody the rights, such as stock certificates,[70] to anything that indicates right of possession "incidentally or as a matter of convenience."[71] Finally, as one commentator observed, the latest stage of conversion is beginning to emerge, in which all forms of intangible property will be covered regardless of any merger requirement.[72]

The comments to section 242 can be read as amenable to the future expansion of the tort:

> *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 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.[73]

In 1965, the Restatement's concerns with merger were tied to negotiable and nonnegotiable "promissory notes, bonds, bills of exchange, share certificates . . . warehouse receipts . . . insurance policies . . . savings bank books . . . account books and receipts"—

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68. *Id.* § 242(2) (emphasis added).

69. Ricks, *supra* note 12, at 1712 (quoting Hill, *supra* note 16, at 526–27).

70. *See* Jeff C. Dodd, *Rights in Information: Conversion and Misappropriation Causes of Action in Intellectual Property Cases*, 32 HOUS. L. REV. 459, 476–77 (1995) (discussing the extension of conversion from chattels to rights "embodied within a tangible document"); *see also infra* notes 226–43 and accompanying text (reviewing cases requiring that the merged document is representative of the possessed intangible).

71. *See* Dodd, *supra* note 70, at 479 (using customer lists and marketing strategies as examples of documents that might satisfy the merger requirement); *see also infra* notes 226–30 and accompanying text (reviewing the approaches used by states that require only a vague connection to a document).

72. Ricks, *supra* note 12, at 1712 (quoting Hill, *supra* note 16, at 526–27).

73. RESTATEMENT (SECOND) OF TORTS § 242 cmt. f (1965) (emphasis added).

clearly prior to any conceptualization of e-commerce.[74] Comment f gives only examples of cases that were considered *improper* for conversion at that particular time, indicating that the extension of the tort might be appropriate for other "proper" intangible rights.[75] Comment b also recognizes that "[t]he law is evidently undergoing a process of expansion, the ultimate limits of which cannot as yet be determined."[76] Thus, one could argue that the Restatement was not intended to halt the tort's progression necessitated by societal change, but intended only to recognize its status as of 1965.[77]

The Reporter for the Restatement was William L. Prosser—so it should come as no surprise that courts have looked to his analysis of this area of law for clarification, particularly the *Prosser and Keeton on the Law of Torts* treatise.[78] The authors acknowledged that the "hoary limitation" of only allowing conversion for tangible chattels had been properly discarded.[79] However, in language that has been heavily relied on by courts, they observed:

> 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."[80]

If the Reporter of the Restatement was apparently open to the evolution of the tort, why have courts used this very language to limit the expansion of conversion in their jurisdictions? Perhaps the answer may be found in this quote's preceding passage. In their treatise, Prosser and Keeton outline the progress that conversion of intangible property has made: from no conversion initially permitted, to an allowance of conversion of

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74. *Id.* § 242 cmt. b.

75. *See* Ricks, *supra* note 12, at 1689 n.27 (offering possible interpretations of comment f).

76. RESTATEMENT (SECOND) OF TORTS § 242 cmt. b (1965).

77. Ricks, *supra* note 12, at 1714 (stating that the common law has always adapted to "changing times and practices"); *see infra* notes 269–72 and accompanying text (commenting that the common law must evolve as society changes).

78. Prosser, *supra* note 17, at 169 n.5; *see infra* notes 82–83, 217–28 and accompanying text (discussing Prosser and Keeton's impact on the tangibility requirement in the merger doctrine).

79. KEETON ET AL., *supra* note 31, at 91. *But see infra* notes 230–32 and accompanying text (discussing states that still require actual conversion of the merged document).

80. KEETON ET AL., *supra* note 31, at 92 (emphasis added) (citations omitted).

the actual document representing the rights (as in Restatement section 242(1)), to the most recent step of allowing conversion of the rights even when nothing tangible was taken (for example, "where a corporation refuses to register a transfer of the rights of a shareholder on its books"[81]). Although the plain language of the Restatement never implicitly imposed a tangibility requirement for the merged document, Prosser and Keeton state that the document or object to be converted must be tangible.[82] It is possible that courts, in light of the historical "taking and finding" requirements of the tort's predecessors and considering the intent of the drafters, have read this comment into the elements of the Restatement, thus making the tangibility of the document a necessity in some jurisdictions.[83]

"Changes in the theory of a tort are common enough."[84] Even after its early Anglo-Norman beginnings and its evolution through detinue, trespass, replevin, and trover, conversion has gone through four major eras of change: (1) its initial break from trover covering only chattels; (2) its foray into covering intangible property with conversion of an actual document that represented the inherent rights; (3) the expansion of allowing intangibles to be converted if one would expect the right to be merged into a representative document; and (4) the beginnings of a new era allowing conversion for any validly established intangible property right.[85] Even Prosser and Keeton, the apparent instigators of the tangible document requirement, concur that there is no valid reason why the tort's progression should not take place.[86] Conversion should be allowed to universally continue its evolution toward protecting intangibles by allowing any document to satisfy the merger doctrine, regardless of the medium it inhabits, as long as it carries with it some reliable indicia of the property owner's right to possession.[87] The merger doctrine effectively provides evidence of this right to possession, and even jurisdictions that do not follow the Restatement should

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81. *Id.* at 91.

82. *Id.* at 92.

83. *See infra* notes 217–29 and accompanying text (discussing the jurisdictions that require tangibility).

84. Ricks, *supra* note 12, at 1709.

85. Hill, *supra* note 16, at 525–27.

86. KEETON ET AL., *supra* note 31, at 92; *see* Hill, *supra* note 16, at 527 (suggesting that courts have too heavily relied on precedent over "reasoned analysis").

87. Of course, the action must nevertheless fulfill the other required elements of conversion. *See* Ricks, *supra* note 12, at 1712, 1714 (arguing that the expansion toward protecting all intangibles is in line with the tort's evolution).

still consider its underlying policies in their conversion analysis.[88] In light of the major changes the remedy has already undergone, this expansion "should not be an insurmountable obstacle."[89] Nonetheless, jurisdictions should take some additional issues into consideration in determining what property should be subject to the tort and whether to retain the merger doctrine.

III. TWO SIDES OF THE SAME COIN? INTANGIBLE PROPERTY RIGHTS AND MERGER

Before courts may consider the elements of conversion regarding a claimed intangible property right, they must cross the threshold issue of what constitutes property rights protected by the tort.[90] Although there is a lack of discussion of the policy reasons behind it, the merger doctrine can effectively serve some of the same basic purposes as the property rights determination.[91] An intentional tort like conversion, which carries with it the potential of significant damages,[92] needs to have some safeguard against its wide, unchecked application to any claimed intangible.[93] In order to satisfy the elements of conversion, intangible property must be rightfully possessed.[94] This possession can be evidenced through the document into which the intangible rights are merged so long as it defines the property right as one that is subject to conversion and gives notice of ownership or the right to possession.

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88. Even without a formal merger process, the property right must be validly possessed to be eligible for conversion, and courts must ensure that this element of conversion is met. *See supra* notes 55–56 and accompanying text (defining conversion as an act of dominion and control over another's validly owned or possessed property).

89. Ricks, *supra* note 12, at 1712.

90. *See supra* notes 55–56 and accompanying text (discussing the right to possession as the threshold issue in conversion).

91. For example, the merger requirement in *Kremen v. Cohen* was satisfied by the electronic DNS registry because this "document" gave notice that the domain name was owned by Kremen, and essentially defined the specific contours of this right. Kremen v. Cohen, 337 F.3d 1024, 1033–36 (9th Cir. 2003); *see infra* notes 104–17 and accompanying text (discussing the property determination tests for intangible property and their interactions with the merger doctrine).

92. *See supra* note 50 and accompanying text (stating that the damages for conversion can equal the full value of the property taken).

93. *See* Brunette v. Humane Soc'y of Ventura County, 40 Fed. Appx. 594, 597 (9th Cir. 2002) (observing that "not all intangible property is the proper subject of conversion").

94. *See supra* text accompanying note 56 (asserting that the right to possess property is implicit in the definition of conversion).

A. Determining the Intangibles Subject to Conversion

"Throughout history, technological and societal advances have led to the creation of new property rights."[95] However, unlike identifiable tangible property,[96] it is difficult to define the metes and bounds of the property rights inherent in intangible property.[97] To further complicate the issue, intangibles often lack specificity, are not subject to sole ownership, can be owned without being possessed, can be "used without being used up and can be sold without being given up."[98] These difficulties have caused courts to expand conversion's reach beyond the traditional dominion and control requirements to "include any unauthorized interference, thereby preventing the exercise of the property right whether tangible or intangible."[99]

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95. Moringiello, *supra* note 1, at 115.

96. *See* Andrew Beckerman-Rodau, *Are Ideas Within the Traditional Definition of Property?: A Jurisprudential Analysis*, 47 ARK. L. REV. 603, 604 (1994) (stating that "[p]roperty law provides a structural framework and a set of rules that specify and control the legal relationships between persons and things").

97. *See* Raymond T. Nimmer, *Information Age in Law: New Frontiers in Property and Contract*, N.Y. ST. B.J., May–June 1996, at 28, 28–29 (stating that the "approach [to] . . . the definition of property rights in an age where information systems dominate differs from the approach appropriate in the receding era where control over goods and real estate was the defining element of wealth, power and the ability to engage in commerce"); *see also* Dodd, *supra* note 70, at 460 (noting that "intellectual property law serves the same function as the property law for tangibles, defining the complex of relationships that are termed 'property' by mapping boundaries and contours").

98. Raymond T. Nimmer & Patricia Ann Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 LAW & CONTEMP. PROBS. 103, 105 (1992) (discussing the differences between goods and information); *see* Hill, *supra* note 16, at 528–29, 531 (stating that although some courts have offered conversion protection to ideas, others have found that intangibles lack the required specificity).

99. Hill, *supra* note 16, at 530; *see* Dodd, *supra* note 70, at 490 (discussing *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 302–04 (7th Cir. 1990), which permitted a claim of conversion for an act "inconsistent with the rights of the owner of the information").

Although civil courts are slow to blur the traditional distinction between tangible and intangible property in tort, it is interesting to note the more rapid changes that have occurred in the criminal law context regarding theft, larceny, and criminal conversion. Although only tangible property was subject to larceny under the common law, numerous state statutes now expressly define property subject to criminal penalties as "anything of value," including both tangibles *and* intangibles. *See, e.g.*, Illinois v. Zakarian, 460 N.E.2d 422, 425–26 (Ill. App. Ct. 1984) (relying on the state criminal code which defined property as "anything of value," and stating that "the test is not whether the property is corporeal or incorporeal or tangible or intangible. Rather, it is whether the property is capable of being taken and carried away by someone other than the owner."); *see also* ALA. CODE § 13A-8-1(10) (1994) (defining property subject to theft as "[a]ny money, tangible or intangible personal property"); ARIZ. REV. STAT. ANN. § 13-1801(A)(12) (West 2001) ("'Property' means any thing of value, tangible or intangible, including trade secrets."); ARK. CODE ANN. § 5-36-101(7) (Michie Supp. 2003) ("'Property' means severed real property or tangible or intangible personal property."); FLA. STAT. ANN. § 812.012(4)(b) (West Supp. 2005) (defining property as "anything of value," such as "[t]angible or

Although most of the debate has centered around various *kinds* of intangibles that should be considered convertible property,[100] the solution within the scope of conversion should not lie in categorization by property type. As is often the case, one court may recognize the conversion of a specific type of intangible, while others do not.[101] Courts waste resources and

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intangible personal property, including rights, privileges, interests, and claims"); IND. CODE ANN. § 35-41-1-23(a)(1)–(3) (Michie 1998) (enumerating a list of property defined as "anything of value," including personal property and intangibles); KAN. STAT. ANN. § 21-3110(16) (1995) ("'Property' means anything of value, tangible or intangible, real or personal."); ME. REV. STAT. ANN. tit. 17-A § 352(1)(B) (West 1983) (including tangible and intangible personal property in the enumerated list of things considered property under the criminal code); MO. ANN. STAT. §§ 556.063(13), 570.010(10) (West 1999 & Supp. 2004) (stating that under all criminal statutes, property can be any "tangible or intangible item of value"); MONT. CODE ANN. § 45-2-101(60)(k) (2003) (stating that recognized tangible and intangible property under the criminal code includes "item[s] of value relating to a computer, computer system, or computer network, and copies thereof"); NEB. REV. STAT. § 28-509(5) (1995) ("Property shall mean anything of value, including . . . tangible and intangible personal property."); N.H. REV. STAT. ANN. § 637:2(I) (1996) (stating that tangibles and intangibles are to be considered personal property in the criminal context); N.J. STAT. ANN. § 2C:20-1(g) (West Supp. 2004) (defining property to include tangible and intangible personal property, including "information, data, and computer software"); N.M. STAT. ANN. § 30-1-12(F) (Michie 2004) (explaining that "'anything of value' means any conceivable thing of the slightest value, tangible or intangible, movable or immovable, corporeal or incorporeal, public or private"); OR. REV. STAT. § 164.005(5) (2003) ("'Property' means any article, substance or thing of value, including . . . tangible or intangible personal property."); 18 PA. CONS. STAT. ANN. § 3901 (West 1983) (including both tangibles and intangibles in the criminal definition of property); S.D. CODIFIED LAWS § 22-1-2(35) (Michie Supp. 2003) (including tangible and intangible personal property in its criminal definition of property); TENN. CODE ANN. § 39-11-106(a)(28) (2003) (including tangibles and intangibles as things of value under the criminal definition of property); TEX. PENAL CODE ANN. § 31.01(5)(B) (Vernon Supp. 2004–2005) (defining property as "tangible or intangible personal property including anything severed from land"); UTAH CODE ANN. § 76-6-401(1) (2003) (including tangible and intangible property in the criminal code definition for property); WYO. STAT. ANN. § 6-1-104(a)(viii) (Michie 2003) ("'Property' means anything of value whether tangible or intangible, real or personal, public or private.").

Even when the penal code lacks such express specificity, some courts are willing to infer legislative intent to include intangible personal property. *See, e.g.*, California v. Kozlowski, 117 Cal. Rptr. 2d 504, 516–18 (Ct. App. 2002) (finding that a PIN code fits within the general concept of intangible property in the extortion context); Collins v. Nevada, 946 P.2d 1055, 1059 (Nev. 1997) (concluding that the legislature intended proprietary information such as security codes to be considered personal property under the theft statute, despite the fact that intangibles are not enumerated property types under the penal code).

100. *See generally* H.D. Warren, Annotation, *Nature of Property or Rights Other Than Tangible Chattels Which May Be Subject of Conversion*, 44 A.L.R.2d 927 (2003) (devoting extensive discussion to the types of intangibles allowed in the various jurisdictions within the United States).

101. For example, the conversion of ideas has been recognized in Pennsylvania, but not in New York. Ricks, *supra* note 12, at 1698 n.50. Business goodwill can be converted in Florida, but not in Michigan. *Id.* at 1699 n.58. In *Kremen*, the Ninth Circuit found the domain name "sex.com" to be convertible intangible property, overturning a lower court's determination to the contrary. Kremen v. Cohen, 337 F.3d 1024, 1028–36 (9th Cir. 2003).

time trying to determine whether a particular type of intangible property has previously been recognized in their jurisdiction.[102] Not only does this incongruity between jurisdictions fail to provide owners with adequate notice as to whether their property is protected by conversion, it limits the remedy via stare decisis, which will likely result in a failure to appropriately protect emerging forms of intangible property.[103]

Rather than focusing on the kinds of intangible property that are subject to conversion, the focus should be on applying the traditional elements of property ownership to intangibles and determining an evidentiary level needed to establish the right to possession. The basic elements for property ownership are generally defined as a "bundle of rights" that includes: the right to possess; the right to use and prevent others from using; and the right to alienate or dispose.[104] If an intangible property right clearly fits within this definition without further analysis, courts should consider it as eligible for conversion regardless of whether it is a type of property right previously recognized in that jurisdiction.[105] Without focusing exclusively on the kind of

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102. *See, e.g.*, Brunette v. Humane Soc'y of Ventura County, 40 Fed. Appx. 594, 597 (9th Cir. 2002) (holding that California law does not recognize a photographic image as intangible property protected by a conversion claim); Neles-Jamesbury, Inc. v. Bill's Valves, 974 F. Supp. 979, 981–82 (S.D. Tex. 1997) (relying on the lack of precedent regarding a trademark to justify not extending protection to that type of intangible property).

103. *See* Nimmer, *supra* note 97, at 31 ("Law customarily lags behind technology, but as the rate of social and technological change increases, the gaps become greater and greater.").

104. Beckerman-Rodau, *supra* note 96, at 606; A. Mechele Dickerson, *From Jeans to Genes: The Evolving Nature of Property of the Estate*, 15 BANKR. DEV. J. 285, 287–88 (1999); Xuan-Thao N. Nguyen, *Cyberproperty and Judicial Dissonance: The Trouble with Domain Name Classification*, 10 GEO. MASON L. REV. 183, 191 (2001); *see also* Dodd, *supra* note 70, at 473 ("[P]roperty is ultimately negative; it is the power to exclude others. . . . [T]he owner [is allowed] to exercise dominion over, and even exploit the object.").

105. Domain names fit this definition because the owner has the following rights: (1) to control the domain name; (2) to use the name in any way; and (3) to sell the name. Nguyen, *supra* note 104, at 191; *see also* Kohm, *supra* note 57, at 456–67 (tracing the legal analyses applied to domain names and intellectual property).

Criminal courts have also effectively used the property analysis to assist with the extension of theft liability to intangible property. In *New Hampshire v. Nelson*, for example, a landlord defendant was convicted of larceny for scanning intimate images into his computer, even though the actual photographs were returned to the tenant owners before they became aware they had been temporarily taken. 842 A.2d 83, 84 (N.H. 2004). The defendant argued that the scanned images were of his own creation and that he lacked the requisite intent to deprive the owners of their property, as required by the statute. *Id.* at 85–86. In affirming his conviction, the court found that although "the medium changed from photographic paper to a computer, the photographic images themselves remained 'property of another.'" *Id.* at 86. Further, because the owners of the photographic images had the right to possess, use, and enjoy the photographs, as well as

intangible property at issue, courts could instead focus their attention on "what proof is necessary to establish the existence of the allegedly converted property."[106] This requirement can be satisfied by one of the benefits of the merger doctrine—providing indications of the right to possession.[107]

A more complicated case arises in determining property rights for less defined potential property, such as amorphous ideas and information.[108] As ideas and information become increasingly relevant in the information age,[109] one commentator has appropriately suggested that an additional analysis for such intangible property rights can be found in the test articulated by the Ninth Circuit in *G.S. Rasmussen & Associates v. Kalitta Flying Services*.[110]

This three-part test would find property rights in any interest that is "[first,] capable of precise definition; second, . . . capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity."[111] The test's first prong would require that the rights be "defined in something . . . showing that someone, somewhere recognized those claims."[112] The merger doctrine could effectively assist in fulfilling this requirement by providing the "thing" in which the claim is defined. The second prong, requiring the capability of exclusivity, is not necessarily defeated by nonexclusive use of the idea or information[113]—a contract or

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to exclude access to them, the defendant's unauthorized retention of the images violated the criminal statute. *Id.*

106. Northcraft v. Edward C. Michener Assocs., 466 A.2d 620, 625 (Pa. Super. Ct. 1983).

107. *See supra* notes 56, 91 and accompanying text (explaining that the right to possession is necessary to establish conversion and using *Kremen v. Cohen* as an example of satisfaction of the merger doctrine).

108. Beckerman-Rodau, *supra* note 96, at 603–04; Nimmer, *supra* note 97, at 28–29.

109. Nimmer, *supra* note 97, at 28 ("[T]he information age entails exponential, accelerating social phenomena. The pace of change is increasing; its effects are more and more visible and urgent. Digital information systems dominate many aspects of business and most fields of communication, science, and entertainment. With that dominance comes inevitable effects on law.").

110. Dodd, *supra* note 70, at 480 (discussing G.S. Rasmussen & Assoc. v. Kalitta Flying Serv., 958 F.2d 896, 902–03 (9th Cir. 1992)).

111. *G.S. Rasmussen*, 958 F.2d at 903; Dodd, *supra* note 70, at 480.

112. Dodd, *supra* note 70, at 485. "[T]he distinctiveness of an intangible is a function of utility and boundaries; if the intangible has no specific use and no boundaries, then it is not 'solid' enough to protect." *Id.* at 481. As an example of claim recognition, Network Solutions, Inc. ("NSI") itself acknowledged that "the right to use a domain name is a form of intangible personal property" evidenced by the NSI registration and electronic database. *See* Network Solutions, Inc. v. Umbro Int'l, Inc. 529 S.E.2d 80, 86 (Va. 2000).

113. Nimmer & Krauthaus, *supra* note 98, at 123 (discussing the importance of retaining property rights in commercial information that is only useful when known).

license to use the idea or information only serves to substantiate the exclusive ownership right and could itself fulfill any merger requirement.[114] The third prong is satisfied by originality and effort—the degree of investment by the purported owner in developing a "'stake in the thing sufficient to warrant invoking the protections of the law of property.'"[115] This rationale has also been followed by the D.C. Circuit: "Where information is gathered and arranged at some cost and sold as a commodity on the market, it is properly protected as property. Where ideas are formulated with labor and inventive genius . . . they are protected. . . . [T]hose who develop them may gather their fruits under the protection of the law."[116] The three elements of the *G.S. Rasmussen* test—"third party identification of an idea or intangible with the putative owner, an identifiable idea or intangible, and identifiable efforts by the owner"—ensure that only limited, distinctive ideas that the owner has a right to possess are subject to conversion.[117] In conclusion, the essential inquiry within the scope of conversion should not be whether the type of property has been previously recognized by a jurisdiction, but whether the right fits the definition of property and there exists some reliable indicia of the right to possession.

B. The Merger Doctrine—Its Policies, Benefits, and Relevance

The merged document required by the Restatement can potentially provide reliable indications that property rights exist in an intangible.[118] However, the comments to the Restatement and the legal commentary of Professor Prosser do not explicitly discuss why this requirement was initially imposed.[119] Conversion's historical roots of trespass and trover and the old requirement of losing and finding chattel provide an obvious justification.[120] By continuing to impose a tangibility requirement via documentation, courts could maintain this legal fiction and

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114. Dodd, *supra* note 70, at 485–86.

115. *Id.* at 486 (quoting *G.S. Rasmussen*, 958 F.2d at 903 n.13).

116. Pearson v. Dodd, 410 F.2d 701, 707–08 (D.C. Cir. 1969) (citations omitted).

117. Dodd, *supra* note 70, at 464.

118. *See supra* note 91 and accompanying text (using *Kremen v. Cohen* as an illustration of how a domain name's DNS registry fulfilled both the merger requirement and gave notice of the property interest possessed).

119. *See generally* RESTATEMENT (SECOND) OF TORTS § 242 cmts. a–f (1965) (discussing the merger concept, but not its justifications); KEETON ET AL., *supra* note 31, at 92 (same).

120. *See* Hill, *supra* note 16, at 526–27, 532 (discussing the fiction of losing and finding and its significance).

justify extending the tort to intangibles.[121] As even Prosser and Keeton stated, however, it is no longer necessary for anything tangible to be taken.[122] If fictional tangibility were the sole benefit of the merger doctrine's existence, then one could agree with commentators who suggest that the time has come to scuttle the requirement.[123] One can argue, however, that in theory the merger doctrine has other justifications for its existence that can be inferred from other areas of the law. Therefore, merger can still play an important function within the law of conversion.[124]

As discussed previously, conversion is a strict liability tort and the converter's intent is irrelevant.[125] But where the boundaries of the right in question might be unclear to the potential converter, such inflexibility seems harsh. To address this concern, the merger doctrine can provide constructive notice of ownership analogous to the recording statutes required for real property.[126] Under the various approaches to recording real property interests, actual notice of a competing claim is not necessary, but interest holders must actually record their asserted property rights in order to put other potentially competing claims on "notice" and preserve their priority.[127] Although no widespread recording system exists for intangible personal property beyond intellectual property protection, the existence of a document indicating a right to possession can effectively provide constructive notice and potentially dissuade a "good faith" would-be converter from pursuing a mistaken "'claim of ownership . . . inconsistent with the original owner's.'"[128] As long as the document that evidences the right to possession theoretically can be produced, located, or known, notice should be deemed constructive.[129]

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121. *Id.*

122. KEETON ET AL., *supra* note 31, at 91.

123. Hill, *supra* note 16, at 527, 532 ("By admitting that the ultimate limits of conversion cannot be determined, the *Restatement* implies that expansion may be outside the merged-unmerged distinction."); Ricks, *supra* note 12, at 1712 (noting "that the change has already taken place to some degree").

124. Because the merged "document" can potentially serve the purpose of providing notice, formality, and evidence of the property right, it can thus fulfill the requirement for conversion.

125. *See supra* notes 57–59 and accompanying text.

126. *See, e.g.*, JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 685–87 (5th ed. 2002) (discussing the real property concepts of race statutes, notice statutes, and race-notice statutes).

127. *Id.*

128. Kohm, *supra* note 57, at 449 (quoting RICHARD A. EPSTEIN, TORTS § 1.12.1 (1st ed. 1999)).

129. For example, "[o]ne who alters title to a registered domain name is fairly on notice that he may be affecting someone else's property." Kremen v. Cohen, 325 F.3d

The statute of frauds has long existed in contract law, disallowing certain oral and nonwritten contracts.[130] According to the statute, certain agreements cannot be enforced without being formally reduced to a signed writing for authentication and proof purposes.[131] This formality was necessary due to the evidentiary function that the writing served in the transaction.[132] "A writing arguably provided parties and the courts with clear and interpretable evidence that an agreement may have been reached, and signatures provided an indication that parties assented to the terms of the agreement."[133] Just as the writing requirement provides evidence of a contract under the statute of frauds, the merger doctrine's document requirement authenticates the existence of the inherent right and the property's ownership, infusing some formality into the tort.[134]

Finally, the law of negotiable instruments has a merger doctrine of its own and has long relied on documentation.[135] For a debt to be transferred, it must be merged into a document "evidencing the claim."[136] The claim then can be conveyed by transferring the merged document.[137] One of the purposes behind this requirement is to guarantee the possessor of the document "priority over prior and subsequent assignees of the same claim. By taking and keeping possession of the instrument, the holder can effectively ensure that no competing claimant can achieve . . . priority."[138] The merged negotiable instrument also indicates the singularity and permanence of the right.[139] As with the policy underlying negotiable instruments, the merger doctrine ensures that true owners will be able to prove the permanence of their right to possession through the merged document and assert their priority over a converter's attempted dominion and control.[140]

1035, 1050 (9th Cir. 2003).

130. Woods, *supra* note 22, at 425–26.

131. *Id.*

132. *Id.*

133. *Id.* at 425.

134. *See infra* notes 245–52 and accompanying text (discussing the adaptations contract law is making in light of electronic documentation).

135. David Frisch & Henry D. Gabriel, *Much Ado About Nothing: Achieving Essential Negotiability in an Electronic Environment*, 31 IDAHO L. REV. 747, 747–49, 757 (1995).

136. *Id.* at 757.

137. *Id.* at 770.

138. *Id.* at 771.

139. Woods, *supra* note 22, at 449.

140. *See infra* notes 253–58 and accompanying text (discussing the policy reasons for why negotiable instruments should include electronic documents and the steps being

In summary, in addition to the assistance the merger doctrine provides to the property inquiry, there are many positive policy reasons for retaining a vestige of the merger requirement. Even if a jurisdiction does not expressly require merger, the same policy concerns underlying it should enter into the judicial analysis. Tangibility of the document should be inconsequential. The real inquiry should be whether media exist in relation to the intangible that gives a potential converter notice of the existing right of possession, while also authenticating and providing evidence of their right of possession—thus indicating the owner's priority over all other claims. The tort of conversion should be allowed to continue its evolution in order to protect properly owned or possessed intangibles, as long as there are some reliable indicia of the right to possession, whether provided by the merger requirement or other means.[141]

IV. *KREMEN V. COHEN* REVISITED—THE NINTH CIRCUIT'S CONVERSION CLARITY

The preceding issues regarding intangible property and merger were addressed in both stages of the *Kremen v. Cohen* litigation concerning the rights to a domain name—first in the U.S. District Court for the Northern District of California, then in the Ninth Circuit on appeal—but resulted in two very different rulings.[142] The case's journey though these two courts illustrates the confusion that exists both among and within jurisdictions on the application of conversion to intangible property and the merger doctrine. Despite Kremen's inability to enforce his judgment against Cohen and his dearth of options against NSI, the district court dismissed Kremen's conversion claim and granted summary judgment in favor of NSI.[143] The court determined that California law followed the merger doctrine and that a domain name could not be convertible intangible property due to its lack of merger into "a document or other tangible object."[144]

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taken to include them).

141. *See* Ricks, *supra* note 12, at 1712, 1714 (arguing that conversion should continue to extend to protect all intangible property).

142. Kremen v. Cohen, 337 F.3d 1024, 1026–36 (9th Cir. 2003) (holding that "[t]he evidence supported a claim for conversion"); Kremen v. Cohen, 99 F. Supp. 2d 1168, 1170–76 (N.D. Cal. 2000) (granting NSI's motion for summary judgment on plaintiff's conversion claim).

143. *Kremen*, 99 F. Supp. 2d at 1174.

144. *Id.* at 1173; *see* Kohm, *supra* note 57, at 453–54 (discussing the district court's treatment of the conversion claim).

The court, in analyzing the threshold issue of whether a domain name was convertible property, did not independently consider the property elements inherent in domain names.[145] Its inquiry was limited to analyzing and then distinguishing two cases that dealt with domain name property issues outside the context of conversion.[146] The court accepted NSI's contention that although a domain name was indeed intangible property, it was nonetheless property that failed to meet the merger requirements necessary for legal protection.[147]

Apparently relying solely on Ninth Circuit precedent, the court held that California common law followed the Restatement section 242.[148] In language reminiscent of Prosser and Keeton's treatise, the court stated that the expansion of conversion had halted with "'intangible rights customarily merged in or identified with some document.'"[149] The court thus determined that the domain name "sex.com" was not protected by the law of conversion.[150] In making this determination, the court ignored California's split conversion jurisprudence in which some courts required merger[151] while others allowed conversion to stand for "every species of personal property."[152] It is clear that under the bundle of rights theory, a domain name could be considered personal property due to the owner's right to exclusively use and control it, to exclude others from its use, and to transfer or dispose of it.[153] Had the district court recognized the other line of conversion doctrine established within the state, it would have

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145. *Kremen*, 99 F. Supp. 2d at 1172–74.

146. *Id.* at 1173 n.2 (discussing the trademark infringement issue in *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984–85 (9th Cir. 1999) and the garnishment proceeding in *Network Solutions, Inc. v. Umbro International Inc.*, 529 S.E.2d 80, 86 (Va. 2000), both finding that domain names were products of service contracts rather than property).

147. *Id.* at 1172–73.

148. *Id.* (citing only one case from the Ninth Circuit).

149. *Id.* at 1173 (quoting Berger v. Hanlon, 129 F.3d 505, 517 (9th Cir. 1997)).

150. *Id.*

151. *See* Adkins v. Model Laundry Co., 268 P. 939, 942 (Cal. Dist. Ct. App. 1928) (holding that there is no action for conversion of intangible interests in such things as laundry and newspaper routes); Olschewski v. Hudson, 262 P. 43, 46 (Cal. Dist. Ct. App. 1927) (requiring "evidence of a definite interest" for conversion to stand).

152. Payne v. Elliot, 54 Cal. 339, 341 (1880); *see also* A & M Records, Inc. v. Heilman, 142 Cal. Rptr. 390, 400 (Ct. App. 1977) (finding conversion of bootlegged music recordings); Palm Springs-La Quinta Dev. Co. v. Kieberk Corp., 115 P.2d 548, 550–52 (Cal. Dist. Ct. App. 1941) (allowing conversion of a customer list).

153. Kohm, *supra* note 57, at 456–57; *see also* Dickerson, *supra* note 104, at 304–05 (comparing the rights in a domain name to those of a tenant in a lease or of a business in a telephone number); Nguyen, *supra* note 104, at 190–92 (advocating the classification of domain names as property because they possess the requisite rights).

needed to apply the bundle of rights test to domain names, and the case may have turned out very differently.

The lower court, in explaining its decision not to extend tort protection to domain names, advanced three policy concerns.[154] The first concern was that conversion is a strict liability tort and threatens severe consequences without any consideration of intent.[155] The court feared that making NSI legally responsible for the wrongdoing of others could ultimately stifle the freedom of the registration process.[156] The court's second concern rested on its perception that California followed the Restatement's merger requirement as influenced by Prosser and Keeton.[157] Determining that the electronic document was insufficient, the court was "reluctant to construct the proverbial slippery slope" and "scrap any requirement of *tangibility* traditionally associated with the tort."[158] Its third and final consideration was that other "methods [were] better suited to regulate the vagaries of domain names," essentially leaving the issue for the legislature to decide.[159]

The Ninth Circuit seemingly did not want to confront this issue any more than did the Northern District of California.[160] When it certified the question to the California Supreme Court, the appellate court requested clarification of California law regarding whether domain names were property subject to conversion, whether California required merger into a tangible document, and whether this requirement could be satisfied by an electronic domain name.[161] The California Supreme Court denied the request and placed the ball back in the Ninth Circuit's court.[162]

The case had a very different outcome on appeal.[163] The Ninth Circuit employed reasoning that other courts faced with similar issues should follow.[164] Although the Ninth Circuit

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154. *Kremen*, 99 F. Supp. 2d at 1173–74.

155. *Id.*

156. *Id.* at 1174.

157. *Id.* (quoting KEETON ET AL., *supra* note 31, at 92, and noting that Prosser and Keeton prefer remedies other than expanding the tort of conversion).

158. *Id.* (emphasis added).

159. *Id.*

160. Kremen v. Cohen, 325 F.3d 1035, 1037 (9th Cir. 2003) (certifying the question of whether state conversion law applies to Internet domain names to the California Supreme Court).

161. *Id.* at 1038.

162. Kremen v. Cohen, No. S112591, 2003 Cal. LEXIS 1342, at *1 (Cal. Feb. 25, 2003) (en banc) (denying the certification request).

163. Kremen v. Cohen, 337 F.3d 1024, 1035 (9th Cir. 2003) (holding that a "domain name is protected by California conversion law").

164. *See id.* at 1033–36.

wavered considerably in its previous decisions regarding electronic documents and merger, sometimes demanding the Restatement's merger requirement[165] and at other times ignoring it altogether,[166] *Kremen v. Cohen* presented the court with an opportunity to set the conversion record straight. Not only did the court find that California's common law failed to expressly follow the Restatement, but it also recognized the supremacy of the elder strand of conversion jurisprudence advanced by the California Supreme Court's 1880 *Payne v. Elliot* decision: conversion will stand for "'every species of personal property'" regardless of any tangible-intangible distinction.[167]

The Ninth Circuit, unlike the district court, properly considered whether domain names could be property subject to conversion.[168] Even under the more stringent *G.S. Rasmussen* test for intangible property, the court determined that a domain name met the necessary requirements because domain names (1) are a well-defined interest,[169] (2) are capable of exclusive ownership,[170] (3) are valuable,[171] and (4) allow registrants to legitimately claim exclusivity due to the time and money invested in their development.[172] Therefore, Kremen "had an

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165. Kremen v. Cohen, 99 F. Supp. 2d 1168, 1172–73 (N.D. Cal. 2000) (following the Ninth Circuit's holding in *Berger v. Hanlon*, 129 F.3d 505, 517 (9th Cir. 1997)); *see also* Brunette v. Humane Soc'y of Ventura County, 40 Fed. Appx. 594, 597 (9th Cir. 2002) (finding a photographic image not subject to conversion due to lack of merger into a tangible document).

166. *Kremen*, 325 F.3d at 1046–47 (Kozinski, J., dissenting) (recounting the various decisions, including *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1089 (9th Cir. 2000), which recognized conversion of a domain name without discussion of merger).

167. *Kremen*, 337 F.3d at 1031 (quoting Payne v. Elliot, 54 Cal. 339, 341 (1880), which rejected any tangibility requirement for conversion). Dissenting to the certification order to the California Supreme Court, Judge Kozinski stated, "We are bound by the pronouncement of the state's highest court unless there are convincing reasons to believe that it would no longer adhere to its earlier rationale." *Kremen*, 325 F.3d at 1047 (Kozinski, J., dissenting).

168. *Kremen*, 337 F.3d at 1030.

169. *Id.* ("Someone who registers a domain name decides where on the Internet those who invoke that particular name—whether by typing it into their web browsers, by following a hyperlink, or by other means—are sent.").

170. *Id.* (observing that "[o]wnership is exclusive in that the registrant alone makes" the decision of what particular name will be used).

171. *Id.* (noting that "like other forms of property, domain names are valued, bought and sold, often for millions of dollars"). For further discussion on the valuation of domain names, see Nguyen, *supra* note 3, at 38–39. Nguyen observed that "[e]-companies have bought business.com for $7.5 million, jewelry.com for $5 million, and loans.com for $3 million. Others have estimated that sex.com is worth $250 million and that stock.com is worth $7.5 million." Nguyen, *supra* note 104, at 186–90 (citations omitted). "In the open market, domain names are commodities for monetary exchange . . . . In general, the more memorable [and short] a domain name, the more value it enjoys." *Id.*

172. *Kremen*, 337 F.3d at 1030 (arguing that "registrants have a legitimate claim to

intangible property right in his domain name, and a jury could find that [NSI] 'wrongful[ly] dispos[ed] of' that right to his detriment by handing the domain name over to Cohen."[173]

Even though the court found that California did not follow the Restatement, it nonetheless proceeded through the merger doctrine analysis and determined that even if some vestige of the requirement remained in the jurisdiction, it would still be satisfied in this case.[174] The right to own a domain name and to have the internet users seeking "sex.com" be sent to Kremen's site can be evidenced through the Domain Name System ("DNS") ".com" registry—the electronic database that associates a domain name with the computer on the Internet that hosts the website.[175] "It's essentially a ledger with domains in one column and IP addresses in another"[176] and is analogous to a corporate stock ledger. A stock ledger keeps track of which stocks belong to whom, and the ".com" register determines whose computer will be the recipient of Internet traffic.[177] The fact that the DNS "is stored in electronic form rather than on ink and paper is immaterial" because the Restatement does not require the merged document to be tangible.[178]

In clarifying the scope of conversion in California, the Ninth Circuit rejected the policy concerns of the district court.[179] The court indicated that although drastic, the strict liability nature of conversion was a better solution than letting NSI avoid liability altogether for negligently allowing Cohen to convert Kremen's intangible property.[180] Although NSI was less culpable than Cohen, NSI gave away the property right without making any effort to validate a transfer request for an

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exclusivity. Registering a domain name is like staking a claim to a plot of land at the title office. . . . Many registrants also invest substantial time and money to develop and promote websites . . . . Ensuring that they reap the benefits of their investments reduces uncertainty.").

173. *Id.* (quoting G.S. Rasmussen & Assocs. v. Kalitta Flying Serv., 958 F.2d 896, 906 (9th Cir. 1992)).

174. *Id.* at 1033–35 (finding that if "California retains some vestigial merger requirement, it is clearly minimal, and at most requires only *some* connection to a document or tangible object").

175. *Id.* at 1033–34; *see* Kremen v. Cohen, 325 F.3d 1035, 1047–48 (9th Cir. 2003) (Kozinski, J., dissenting) (claiming this procedure gave Kremen a right to associate the domain "sex" with his IP address).

176. *Kremen*, 325 F.3d at 1048 (Kozinski, J., dissenting).

177. *Id.* at 1048–49 (Kozinski, J., dissenting).

178. *Kremen*, 337 F.3d at 1034 & n.11.

179. *Id.* at 1035–36 (asserting that none of the policy concerns were sufficient to justify a departure from the common-law rule).

180. *Id.* at 1035.

obviously brandable domain name.[181] The lower court had also feared that litigation could have a stifling effect on internet registration.[182] The Ninth Circuit responded, "Given that [NSI's] 'regulations' evidently allowed it to hand over a registrant's domain name on the basis of a facially suspect letter without even contacting [the registrant], 'further regulations' don't seem like such a bad idea."[183] With respect to its third policy concern, the lower court chose to defer to the legislature.[184] The Ninth Circuit astutely commented that while the legislature is free "to fashion an appropriate statutory scheme," courts should "apply the common law until the legislature tells us other-wise. And the common law does not stand idle while people give away the property of others."[185]

Although the Ninth Circuit's analysis in *Kremen v. Cohen* focused solely on domain names, its reasoning should be extended to all types of intangible property subject to conversion. As long as there is a document—regardless of its form—that evidences the right to possess the property right converted, the merger requirement should be considered satisfied.[186] Although California does not require strict merger, the Ninth Circuit's merger analysis served to ensure that the policies behind the doctrine remained fulfilled. Courts might be reluctant to expand the tort for some of the same policy reasons voiced by the district court, but the common law has an obligation to adapt itself to the needs of society's customs.[187] A slight broadening of the scope of conversion is a less drastic and more realistic measure than judicially creating an entirely new remedy for the wrongful taking of intangible property.[188]

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181. *Id.*

182. *Id.* at 1035–36.

183. *Id.* at 1035.

184. *Id.* at 1036.

185. *Id.*

186. For example, "[o]ne who alters title to a registered domain name is fairly on notice that he may be affecting someone else's property." Kremen v. Cohen, 325 F.3d 1035, 1050 (9th Cir. 2003) (Kozinski, J., dissenting).

187. *See, e.g.*, Decatur Auto Ctr. v. Wachovia Bank, N.A., 583 S.E.2d 6, 9 (Ga. 2003) (stating that "'the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.' . . . [T]he common law springs from reason and necessity, shaping its rules to accomplish the ends of justice, in the light of usage and custom.").

188. Some scholars recommend fashioning a new cause of action for conversion of intangibles. *See* Ricks, *supra* note 12, at 1713–14 (recommending the creation of a new tort action and suggesting that it be called the "misappropriation of intangibles"); *see also* KEETON ET AL., *supra* note 31, at 106 (suggesting other remedies).

This expanded concept of conversion will be helpful in protecting not only domain names, but also other validly owned or possessed intangible property that falls through the cracks of intellectual property laws.[189] Such property might include

> (a) aspects of computer systems that are not protected by copyright or patent legislation for lack of originality or patentability;
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> (b) electronic forms of money and payment which may not meet statutory definitions of "money" for regulatory purposes;
>
> (c) telecommunications services;
>
> . . . .
>
> (e) valuable confidential information and trade secrets.[190]

Whether any of the above could be converted should depend on meeting the criteria of property within the concept of conversion and establishing an ownership right by either the merger doctrine or by equivalent judicial scrutiny.

In addition, granting wider protection of intangible property under a conversion theory serves the very same policies behind intellectual property protection.[191] When parties "cannot be certain that their interests will be adequately protected by laws and governments, this may create disincentives for development in relevant areas of commerce."[192] These parties, as rights-holders, should have the comfort of knowing that even if their valuable intangible property is not covered by traditional intellectual property laws—because the property is composed of unforeseeable technologies to which the legislature cannot always readily respond—they still have a civil remedy against the theft of their investment, and thus an incentive to keep pursuing advancement of intangible properties.[193]

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189. *See* Lipton, *Protecting Information*, *supra* note 13, § 1 (listing the types of intangibles that are denied intellectual property law protection).

190. *Id.* (citations omitted).

191. *See id.* (arguing for governmental protection of valuable information and ideas).

192. *Id.*

193. *See* Lipton, *Information Property*, *supra* note 13, at 143 (stating that there is a "significant amount of valuable information that is not necessarily protected by any specific intellectual property right" and that "[n]on-original data-bases are an obvious example").

V. JURISDICTIONAL APPROACHES TO CONVERSION OF INTANGIBLE PROPERTY

The saga of *Kremen v. Cohen* demonstrates the fact that despite the "universal" acceptance of the basic elements of conversion, even courts within the same jurisdiction can be widely divergent in their applications of conversion to intangible property. Therefore, it is not altogether surprising that jurisdictions across the United States follow a number of disparate approaches to conversion of intangible property, ranging from states that provide the greatest possible protection to others that flatly refuse to recognize this remedy for intangible property. Although the subtleties in the various approaches are too numerous to fit within the scope of this Comment, three broad categories emerge: (1) jurisdictions that protect all types of intangible property without imposing merger requirements;[194] (2) Restatement jurisdictions that recognize merger requirements;[195] and (3) jurisdictions that deny conversion protection for intangible property altogether.[196]

A. Category One—No Merger Required

Jurisdictions falling into the first category do not expressly require merger in order to demonstrate right of possession.[197] Rather, they approach conversion of intangible property either by casting the net wide and allowing conversion to apply to all forms of valid personal property[198] or by applying the basic elements of

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194. *See infra* Part V.A (discussing the approach to conversion taken by California and several other jurisdictions).

195. *See infra* Part V.B (dividing the jurisdictions following the Restatement into four subcategories by their respective approaches to merger requirements).

196. *See infra* Part V.C (discussing the approach of states such as Oklahoma, Nevada, and Tennessee).

197. Jurisdictions in this category include Alabama, Arkansas, California, the District of Columbia, Florida, Indiana, Maine, Massachusetts, Nebraska, and Pennsylvania.

198. *See, e.g.*, Plunkett-Jarrell Grocery Co. v. Terry, 263 S.W.2d 229, 232–33 (Ark. 1953) (stating that all personal property is subject to conversion); Payne v. Elliot, 54 Cal. 339, 341 (1880) (allowing conversion for any "species" of personal property in California); Benaquista v. Hardesty & Assocs., 20 Pa. D. & C.2d 227, 229 (Ct. Com. Pl. 1959) (explaining that convertible property rights lie within the idea behind architectural drawings); Evans v. Am. Stores Co., 3 Pa. D. & C.2d 160, 161–62 (Ct. Com. Pl. 1955) (finding that an idea is as capable of being converted as tangible property). This nondiscriminatory approach is also consistent with the changes that have occurred in criminal theft, larceny, and criminal conversion statutes, which broadly and expressly apply the crimes to both tangible and intangible personal property. *See* 18 U.S.C. § 641 (2000) (applying criminal conversion to any "thing of value of the United States"); United States v. Collins, 56 F.3d 1416, 1419 (D.C. Cir. 1995) (finding that 18 U.S.C. § 641 applies to both tangible and intangible property); *see also supra* note 102 (listing the states that

conversion to the property without consideration of its form.[199] Other courts have taken a piecemeal approach, accepting intangible property into the conversion fold type-by-type.[200] This approach is the least favorable within this category because it can lead to conflicts between jurisdictions and a lack of notice as to what property is protected by the tort.[201]

Even though this category rejects merger, there is still the need for notice and proof that the converted intangible is validly possessed property.[202] Beyond the example set by the Ninth Circuit in *Kremen v. Cohen*, there are other indications within this category that this property right may be evidenced by electronic means. For example, in Nebraska's *Mundy v. Decker*, the defendant was found liable for conversion after she erased her former employer's computer WordPerfect files.[203] The court found that the computers and the electronic files they contained were clearly the property of the employer and went on to state that the alternative availability of those files in hard copy form was "not determinative in any way on the question of whether there had been a conversion of the WordPerfect directory"—the electronic files alone were sufficient.[204] Jurisdictions within this category should continue this trend of allowing ownership to be evidenced by electronic means.

B. Category Two—Merger Required

Within the second category of jurisdictions, which either expressly or by implication embrace the Restatement, four basic approaches surface. The first subcategory follows the Restatement in spirit, yet seems to allow the merger requirement

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have enacted legislation for theft, larceny, or criminal conversion that expressly includes intangible property).

199. *See* Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F. Supp. 838, 848 (D. Mass. 1986) (finding conversion of a satellite television signal); Nat'l Surety Corp. v. Applied Sys., Inc., 418 So. 2d 847, 849–50 (Ala. 1982) (holding that conversion "makes no distinction between tangible and intangible personal property"); N.E. Bank of Lewiston & Auburn v. Murphy, 512 A.2d 344, 346–49 (Me. 1986) (finding that conversion elements were met for a failure to pay a settlement lien); Mundy v. Decker, No. A-97-882, 1999 WL 14479, at *2–*6 (Neb. Ct. App. Jan. 5, 1999) (finding that an act of deleting computer files amounted to conversion).

200. *See, e.g.*, *In re* Estate of Corbin, 391 So. 2d 731, 732–33 (Fla. Dist. Ct. App. 1980) (holding conversion applicable to business goodwill).

201. *See supra* notes 101–02 and accompanying text (highlighting specific conflicts between jurisdictions on the issue of intangible property protection).

202. *See supra* Part III.A (analyzing the property determination of intangibles and arguing against distinctions by property types).

203. *Mundy*, 1999 WL 14479, at *4–*5.

204. *Id.*

to be satisfied by any media. Although none have gone to the lengths of the Ninth Circuit in stating that electronic documents will suffice for the merger doctrine, these jurisdictions are in line with its reasoning.[205] Within this subcategory, Maryland has the strictest approach, refusing to venture past section 242(1) of the Restatement, and requiring that the relevant document itself be converted.[206] But as long as electronic data are admissible under the rules of evidence, no distinction will be made between the electronic data and hard copy documents for the sake of the merger requirement.[207] Although not expressly following the Restatement, but still requiring merger,[208] computerized book entries have been found to be sufficient documentation in the conversion of stock in Missouri.[209] New York has long been strict in requiring a tangible document to satisfy merger;[210] however, a 2003 federal district court case indicated a willingness to move toward this first subcategory.[211] In an action for conversion of an idea for a website, the court stated that an idea reduced to tangible expression or practice could be converted, indicating that the website in its electronic form fulfilled the tangibility requirement.[212] Other jurisdictions following the Restatement should take the lead of these courts and better protect intangible property by giving electronic evidence of the right to possession as much credence as they do tangible documentation.

The second subcategory also follows the Restatement in spirit, but only requires some vague connection between the right and something tangible to represent it—the document need not embody the right itself. A mere computer printout containing confidential information sufficed for the conversion of that information in Illinois, even though that printout provided only

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205. States in this category are Ohio, Maryland, and Missouri, with New York beginning to move in this direction.

206. Allied Inv. Corp. v. Jasen, 731 A.2d 957, 965 (Md. 1999); *see also* Sun v. Li, No. 99-1356, 1999 WL 1054148, at *1 (4th Cir. Nov. 22, 1999) (following *Jasen*'s reasoning).

207. *See* Medi-Cen Corp. v. Birschbach, 720 A.2d 966, 972 n.6 (Md. Ct. Spec. App. 1998) (employing the Maryland Rules of Evidence in a conversion action for accounts receivable data).

208. *See* CMLAV, Inc. v. Mueller, 896 S.W.2d 741, 743 (Mo. Ct. App. 1995) (requiring intangible rights to be merged with a document for conversion).

209. Lucas v. Lucas, 946 F.2d 1318, 1323–24 (8th Cir. 1991); *see also* Schafer v. RMS Realty, 741 N.E.2d 155, 185 (Ohio Ct. App. 2000) (inferring that Ohio follows Missouri law regarding electronic documentation).

210. Phansalkar v. Andersen Weinroth & Co., 175 F. Supp. 2d 635, 641–43 (S.D.N.Y. 2001); Liebowitz v. Maxwell, No. 91 CIV.4551(LLS), 1994 WL 517456, at *2–*3 (S.D.N.Y. Sept. 21, 1994) (applying Maryland law); *In re* Chateaugay Corp., 136 B.R. 79, 86 (Bankr. S.D.N.Y. 1992).

211. Astroworks, Inc. v. Astroexhibit, Inc., 257 F. Supp. 2d 609 (S.D.N.Y. 2003).

212. *Id.* at 618.

evidence of the rights, not an embodiment of them.[213] In Pennsylvania, a federal court recognized conversion of a marketing plan connected merely to marketing studies and customer lists,[214] but that jurisdiction has stopped short of recognizing conversion of a domain name because no document existed to identify the property rights.[215] A federal court in Delaware allowed a claim for conversion of proprietary information represented by plans and designs.[216] Because jurisdictions in this category have already recognized that the purpose of the merger doctrine can be satisfied by any document that provides evidence of the right to possession, they are poised to take the next step and recognize merger by electronic documentation, thereby giving intangible property greater protection.

The third subcategory follows the Restatement with the Prosser and Keeton tangibility "gloss," requiring that the intangible rights be merged into or identified with the *tangible* document that evidences title.[217] Not only are these jurisdictions importing an extra requirement that is not present in the plain language of the Restatement,[218] but they are failing to recognize that the policies of the merger requirement can be satisfied by proof other than by a representative document. Furthermore, tangible documentation is no longer necessarily preferable in commerce.[219] This requirement has led courts to deny claims for converted partnership interests,[220] operating accounts and trust funds,[221] business relationship interests,[222] unpatented

213. Conant v. Karris, 520 N.E.2d 757, 763 (Ill. App. Ct. 1987) ("Once confidential information is released, . . . it hardly can be said that the data is still confidential.").

214. Umbenhauer v. Woog, No. CIV. A. 90-5534, 1993 WL 134761, at *4 (E.D. Pa. Apr. 28, 1993).

215. Famology.com Inc. v. Perot Sys. Corp., 158 F. Supp. 2d 589, 591 (E.D. Pa. 2001).

216. Res. Ventures, Inc. v. Res. Mgmt. Int'l, Inc., 42 F. Supp. 2d 423, 439 (D. Del. 1999).

217. Jurisdictions that fall into this category include Virginia, Connecticut, New York, Minnesota, Rhode Island, Colorado, Michigan, Georgia, and Iowa.

218. *See supra* text accompanying note 82 (observing that the merger doctrine's tangibility requirement derived from Prosser and Keeton's analysis rather than the plain language of the Restatement).

219. *See, e.g.*, Nimmer, *supra* note 97, at 28 (discussing how the commodities of the information age are intangibles, not hard goods).

220. *See* Montecalvo v. Mandarelli, 682 A.2d 918, 929 (R.I. 1996); Holmes v. Golub, Nos. 50 49 31, 51 53 17, 1991 WL 188668, at *1–*3 (Conn. Super. Ct. Sept. 13, 1991).

221. Shenandoah Assoc. v. Tirana, 182 F. Supp. 2d 14, 23 (D.D.C. 2001).

222. Union Sav. Am. Life Ins. Co. v. N. Cent. Life Ins. Co., 813 F. Supp. 481, 494 (S.D. Miss. 1993) (relying on H.J., Inc. v. Int'l Tel. & Tel. Corp., 867 F.2d 1531, 1547–48 (8th Cir. 1989)).

inventions,[223] business ideas,[224] and trademarks,[225] without allowing ownership or right of possession to be evidenced through documentation other than a "stock certificate, promissory note, or bond."[226] These jurisdictions have limited convertible intangible property to such intangibles as a corporation's refusal to transfer shares of stock,[227] patent rights,[228] and checks.[229] These jurisdictions fail to protect intangible property rights adequately and should retreat from any tangibility requirement in the merger doctrine.

The fourth and final subcategory of jurisdictions fails to advance beyond section 242(1) of the Restatement and still requires that the actual document embodying the rights be converted. Texas, which is possibly the worst offender, requires the converted document to be tangible,[230] severely limiting the scope of what can be protected.[231] Maryland, however, has recognized that this document may be in electronic form.[232] Although that recognition is a step in the right direction, these jurisdictions should begin to embrace section 242(2) of the Restatement and allow intangible rights to be protected without reference to tangibles.

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223. Univ. of Colo. Found., Inc. v. Am. Cyanamid, 880 F. Supp. 1387, 1394–95 (D. Colo. 1995), *aff'd in part and vacated in part*, 196 F.3d 1366 (Fed. Cir. 1999).

224. Sarver v. Detroit Edison Co., 571 N.W.2d 759, 760–63 (Mich. Ct. App. 1997).

225. Big Time Worldwide Concert & Sport Club, LLC v. Marriott Int'l, Inc., 236 F. Supp. 2d 791, 806–07 (E.D. Mich. 2003).

226. United Leasing Corp. v. Thrift Ins. Corp., 440 S.E.2d 902, 906 (Va. 1994).

227. *Am. Cyanamid*, 880 F. Supp. at 1394; Calabrese Found., Inc. v. Inv. Advisors, Inc., 831 F. Supp. 1507, 1515 (D. Colo. 1993) (applying Minnesota law).

228. Miracle Boot Puller Co. v. Plastray Corp., 225 N.W.2d 800, 804 (Mich. Ct. App. 1975); *see* Pioneer Hi-Bred Int'l, Inc. v. Holden Found. Seeds, Inc., No. CIV. 81-60-E, 1987 WL 341211, at *33–*36 (S.D. Iowa Oct. 30, 1987) (granting conversion for a genetic message embodied in a patent), *aff'd*, 35 F.3d 1226 (8th Cir. 1994).

229. Decatur Auto Ctr. v. Wachovia Bank, N.A., 583 S.E.2d 6, 7–9 (Ga. 2003).

230. Express One Int'l, Inc. v. Steinbeck, 53 S.W.3d 895, 901 (Tex. App.—Dallas 2001, no pet.) (holding that an e-mail message does not satisfy the tangible document requirement of the merger doctrine); *see also* CICCorp., Inc. v. AIMTech Corp., 32 F. Supp. 2d 425, 430 n.9 (S.D. Tex. 1998) (finding that domain names are not subject to conversion in Texas).

231. Denied claims include those for a converted trademark, Neles-Jamesbury, Inc. v. Bill's Valves, 974 F. Supp. 979, 981 (S.D. Tex. 1997), and trade dress, Pebble Beach Co. v. Tour 18 I, Ltd., 942 F. Supp. 1513, 1569 (S.D. Tex. 1996), *aff'd*, 155 F.3d 526 (5th Cir. 1998). It is interesting to note that although Texas is one of the strictest jurisdictions in its tangibility requirement in the conversion context, it is also among the states that liberally allow theft to apply to all intangible personal property. TEX. PENAL CODE ANN. § 31.01(5)(B) (Vernon Supp. 2004–2005); *see also supra* note 102 (listing the jurisdictions with theft statutes that expressly apply to intangible property).

232. *See supra* text accompanying notes 206–07 (noting that although Maryland requires that the representative document be converted, the document may consist of electronic data).

C. Category Three—No Tort for Intangibles?

Surprisingly, there are still a few states that fail to recognize conversion of intangible property at all.[233] These jurisdictions have evidently found the extension of the tort unnecessary due to the availability of other remedies, such as those provided by intellectual property laws.[234] Yet other legal theories may not effectively protect the plaintiff's property. For example, in *Stratienko v. Cordis Corp.*, the court refused to grant the plaintiff relief for conversion of an intangible trade secret, holding that Tennessee's common-law trade misappropriation remedy sufficed.[235] The plaintiff was unable to meet the high evidentiary threshold of this alternative, however, and was left without an attainable legal option.[236] Another advantage of conversion is that damages may be recovered up to the converted property's full value.[237] Other remedies, such as trespass, allow relief only to the extent of the damage done to the property.[238] These jurisdictions should follow the trend of recognizing that intangible property rights are becoming increasingly valuable and thus need of the full legal protection that conversion offers.[239]

In summary, there are great disparities in how well conversion protects intangible property. As intangibles such as information and ideas become more crucial to society, and as technological advances continue to outpace intellectual property law's ability to protect them, conversion of intangible property should be more uniformly available to the holders of validly possessed intangible property rights. The merger doctrine and the policies behind it should continue to be used in determining whether the property right held is of the type subject to conversion and whether the right to possess such property can be authenticated. With the advancement of electronic and digital documentation technology, this authentication should be evidenced by any medium available, not just by tangible paper.

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233. These states include Oklahoma, Nevada, and Tennessee. *See* Beshara v. S. Nat'l Bank, 928 P.2d 280, 289–91 (Okla. 1996) (allowing a conversion claim for identifiable funds, but not for intangibles in general).

234. *See* Stratienko v. Cordis Corp., No. 1:02-CV-005, 2003 WL 23471546, at *6 (E.D. Tenn. Dec. 4, 2003) (refusing to extend conversion to a trade secret); Custom Teleconnect, Inc. v. Int'l Tele-Servs., Inc., 254 F. Supp. 2d 1173, 1182 (D. Nev. 2003) (declining to extend the scope of Nevada conversion law "beyond tangible property rights").

235. *Stratienko*, 2003 WL 23471546, at *6.

236. *Id.* at *3–*6.

237. *See supra* note 50 and accompanying text.

238. *See supra* text accompanying note 39.

239. *See* Nimmer, *supra* note 97, at 29 (stating that "the trend of legislative policy and case law tends toward greater rights in information assets").

By making this adjustment, courts will be able to protect emerging forms of intangible property without being bound by precedent revolving around recognition of property by type.

VI. ELECTRONIC DOCUMENTATION EMBRACED AND TANGIBILITY REQUIREMENTS REJECTED—OTHER AREAS OF THE LAW REVISITED

As previously discussed, various potential policy reasons behind the merger doctrine can be inferred from other legal disciplines.[240] These and other areas of the law are already ahead of conversion in adapting to the changes that electronic and digital technologies have brought to our society.[241] For example, the imported concept of notice comes from the recording system of real property. Although this system has been heavily paper-based, it has been argued that the mortgage industry is poised to transition into being primarily electronic document oriented.[242] Paper deeds and records once filed with the government would now be a series of electronic documents executed with digital signatures and deposited with a regulated clearing corporation.[243] The official note would be the stored electronic document, and any printouts would be considered nonnegotiable or nontransferable copies.[244]

Merger's benefit of authenticating ownership can be inferred from contract law's statute of frauds, which requires that certain agreements are in writing and evidenced by a signature in order to prove the validity of the transaction.[245] The issue with merger's electronic documentation is whether it provides the same level of evidentiary proof as the writing requirement of the statute of frauds.[246] Arguably, it does. "It is apparent that many forms of electronic writings and signatures satisfy the evidentiary purpose."[247] In fact, the proposed draft revisions to the Uniform Commercial Code Articles 2, 2A, and 2B, have removed any

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240. *See supra* Part III.B (analyzing the policies underlying real property's recording statutes, contract law's statute of frauds, and negotiable instruments law).

241. *See supra* note 99 (observing that criminal law theft, larceny, and criminal conversion statutes have embraced intangible property in a more timely fashion than civil courts have).

242. Newell & Gordon, *supra* note 22, at 821–26.

243. *Id.* at 827–28.

244. *Id.* at 828.

245. *See supra* notes 130–34 and accompanying text (discussing the evidentiary function of the statute of frauds in contract law).

246. Woods, *supra* note 22, at 435.

247. *Id.*

medium-biased language, replacing "writing" with "record," and "authentication" for any signature requirements.[248]

Contract law as a whole is undergoing a profound change in its authentication requirements in light of electronic documentation. The Uniform Electronic Transactions Act of 1999 (U.E.T.A.) provides that "[a] record or signature may not be denied legal effect or enforceability solely because it is in electronic form."[249] In addition, as Judge Posner stated in a recent opinion, "[t]he Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, provides that in all transactions in or affecting interstate or foreign commerce, . . . a contract or other record relating to the transaction shall not be denied legal effect merely because it is in electronic form" and instructs that electronic documents cannot be discriminated against in commerce.[250] These Acts seek to eliminate uncertainties as to the enforceability of electronic documents and give them full legal effect in commercial transactions.[251] As of 1999, "every state except North Dakota [had] enacted some form of legislation addressing electronic records and electronic or digital signatures," indicating the inroads this technology has made on our laws and society.[252]

Like conversion, negotiable instruments law has also required merger into a tangible instrument to evidence the singularity, permanence, and priority of the right.[253] Also like conversion, negotiable instruments law has been reticent to embrace electronic and digital documentation technology.[254] Yet, as one commentator has stated, "[l]egal recognition of electronic negotiable instruments is of necessity" in light of current commercial practices involving ATMs, check cards, wire transfers, and electronic fund transfers.[255] In fact, alternative approaches to negotiability are already underway to circumvent

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248. *Id.* at 447; *see* Nimmer, *supra* note 97, at 30–31 (discussing that proposed Article 2B would validate electronic records in place of a writing and abolish the statute of frauds).

249. UNIF. ELEC. TRANSACTIONS ACT § 7(a), 7A U.L.A., pt. 1, 252 (2002). At the time of publication, the U.E.T.A. had been adopted in forty-three states and the District of Columbia. UNIF. ELEC. TRANSACTIONS ACT, 7A U.L.A., pt. 1, 23 (Supp. 2004) (providing a table of jurisdictions where the Act has been adopted).

250. Cloud Corp. v. Hasbro, Inc., 314 F.3d 289, 295 (7th Cir. 2002).

251. *See* Woods, *supra* note 22, at 418 (discussing the Oklahoma Electronic Records and Signatures Act of 1998).

252. *Id.* at 419.

253. *Id.* at 449; *see supra* notes 135–40 and accompanying text (discussing the necessity of merged negotiable instruments in debt transfers).

254. Woods, *supra* note 22, at 449.

255. *Id.* at 450.

tangibility.[256] Section 16 of the U.E.T.A. prescribes a method by which control can be established for records which would fall under "article 3 notes or article 7 documents," but for being electronic in nature.[257] This system would effectively give electronic negotiable instruments an "'alternative to delivery, indorsement and possession, the three physical attributes of a negotiation.'"[258]

Another tort theory similar to conversion has begun to move beyond its historical tangibility requirements. "Trespass to chattels survives today . . . largely as a little brother of conversion."[259] This tort occurs when "'an intentional interference with the possession of personal property has proximately caused injury'" that does not quite rise to the level of conversion.[260] Like conversion, its roots involve interference with chattels, not intangible property.[261] Courts, however, gradually began to apply the remedy to intangibles such as "computer networks, telephone databases, electrical signals and other communications systems."[262]

Trespass to chattels has found a special new relevance in antispamming e-mail cases when the interference with intangible property is accomplished by intangible means.[263] For example, in *Thrifty-Tel, Inc. v. Bezenek*, the defendants were found liable for trespass to chattels when the electronic signals of recreational computer hacking overburdened the plaintiff's computerized phone network, causing injury to their business.[264] In *Intel Corp. v. Hamidi*, the plaintiff was unable to show enough injury from mass e-mail spamming to reach a trespass to chattels remedy, but the court discussed in dicta that unauthorized electromagnetic transmissions could give rise to trespass to land

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256. *Id.* at 455.

257. *Id.*; UNIF. ELEC. TRANSACTIONS ACT § 16(a)(1), (d), 7A U.L.A. pt. 1, 279–80 (2002).

258. Woods, *supra* note 22, at 455 (quoting Letter from David Whittaker, Senior Counsel, to Stephanie Heller, D. Benjamin Beard, and Patricia Brumfield Fry (Jan. 29, 1999), http://www.webcom.com/legaled/ETAForum/docs/020999fm.html).

259. KEETON ET AL., *supra* note 31, at 86.

260. Intel Corp. v. Hamidi, 71 P.3d 296, 302 (Cal. 2003) (quoting Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468, 473 (Ct. App. 1996)).

261. KEETON ET AL., *supra* note 31, at 85.

262. Michael R. Siebecker, *Cookies and the Common Law: Are Internet Advertisers Trespassing on Our Computers?*, 76 S. CAL. L. REV. 893, 913 (2003); *see also* Nimmer & Krauthaus, *supra* note 98, at 118–19 (discussing criminal computer trespass crimes).

263. *See* CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1020–23 (S.D. Ohio 1997) (finding that plaintiff established claim of trespass to chattels due to defendant's e-mail spam sent through plaintiff's network).

264. *Thrifty-Tel*, 54 Cal. Rptr. 2d at 471, 473.

if physical damage was caused to the property.[265] Internet "search robots" that search, copy, and retrieve data from websites without authorization have also been found to satisfy the elements of trespass to chattels.[266]

Despite the fact that its very name references tangible property, the tangibility requirement for trespass to chattels has "relaxed almost to the point of being discarded."[267] Courts have expanded the remedy to accommodate the new property rights created by technological advances.[268] Taking into account the precautions against overwide application as recommended in this Comment, there appears to be no reason why conversion could not do the same and give greater protection to intangible property rights. In short, policy reasons supporting the continued relevance of the merger doctrine to conversion can be drawn from other areas of the law that have recognized the permanence of electronic documentation and are adapting to the new e-commerce society. Conversion of intangible property should do the same and universally recognize that electronic documents are as legally sufficient as tangible ones.

VII. CONCLUSION

As stated by Justice Stephen of England in 1885: "'Laws ought to be adjusted to the habits of society, and not to aim at remoulding them. . . . Custom, and what is called common sense, regulate the great mass of human transactions. If . . . the law deviates from these guiding principles, it becomes a nuisance.'"[269] Although it is customary for the law to lag behind and then ride on the coattails of societal progress, the rapid evolution of technology threatens to make the gap between law and society increasingly wide.[270] The common law has always developed to accommodate society's changing needs,[271] and we must now

265. *Intel Corp.*, 71 P.3d at 309.

266. eBay, Inc. v. Bidder's Edge, Inc., 100 F. Supp. 2d 1058, 1060–61, 1069–70 (N.D. Cal. 2000); *see also* Register.com, Inc., v. Verio, Inc., 126 F. Supp. 2d 238, 244, 248–51 (2000) (holding that defendant's robotic searches of plaintiff's website were done without implicit authorization and caused enough harm to constitute trespass), *aff'd as modified*, 356 F.3d 393 (2d Cir. 2004); Siebecker, *supra* note 262, at 919–21 (discussing the *eBay* and *Register.com* cases).

267. *Thrifty Tel*, 54 Cal. Rptr. 2d at 473 n.6.

268. Siebecker, *supra* note 262, at 913.

269. James J. O'Connell, Jr., Comment, *Boats Against the Current: The Courts and the Statute of Frauds*, 47 EMORY L.J. 253, 255 (1998) (alteration in original) (quoting James Fitzjames Stephen & Frederick Pollock, *Section 17 of the Statute of Frauds*, 1 L.Q. REV. 1, 6 (1885)).

270. Nimmer, *supra* note 97, at 31.

271. Ricks, *supra* note 12, at 1714.

"adapt our concepts of law . . . to fit an entirely new era of commerce and commercial relationships."[272] Without an expansion of the tort to recognize our society's growing e-commerce habits, conversion could become even more forgotten in a time when the remedy could prove to be completely relevant and even necessary.

In select jurisdictions, conversion of intangible property has already struck the appropriate balance.[273] These states have set the remedy broadly enough to anticipate emerging forms of intangible property that may not be protected by intellectual property laws, while also confining remedies to valid personal property that has the clear possessory rights necessary to satisfy the elements of conversion. This balance has been achieved by courts that follow the Restatement's merger requirement but allow any clear evidence of ownership to suffice regardless of the type of medium. Courts that are not bound by the merger requirement but that nonetheless follow the policy reasons behind the doctrine have also helped maintain this balance. In light of these advancements, the courts in remaining states should look to these enlightened jurisdictions for guidance in interpreting intangible property law.

Courtney W. Franks

272. Nimmer, *supra* note 97, at 31.

273. *See supra* text accompanying notes 205–16 (applauding jurisdictions that have extended protection by conversion to all forms of valid personal property without strict merger requirements or that accept electronic documents for merger requirements).