

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

JOE HAND PROMOTIONS, INC.,)
a Pennsylvania corporation,)
Plaintiff,)

No. 03:11-cv-00065-HU

vs.)

RANDY JACOBSON, individually, and)
as the alter ego of PAR III, INC.,)
dba THE PORTERHOUSE RESTAURANT; and)
PAR III, INC., an Oregon domestic)
corporation, dba THE PORTERHOUSE)
RESTAURANT;)
Defendants.)

MEMORANDUM OPINION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

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1 HUBEL, Magistrate Judge:

2 The plaintiff Joe Hand Promotions, Inc. ("Joe Hand") brings
3 this action under the Federal Communications Act of 1934, 47 U.S.C.
4 §§ 553¹ and 605² (the "FCA"), alleging the defendants Randy Jacobson
5 ("Jacobson") and Par III, Inc. ("Par III"), doing business as the
6 Porterhouse Restaurant (the "Restaurant"), unlawfully exhibited the
7 "Ultimate Fighting Championship 93: Franklin v. Henderson Program"
8 (the "Program") at the Restaurant on January 17, 2009. Joe Hand
9 claims it paid for and received exclusive nationwide television
10 distribution rights for the Program, and it entered into
11 sublicensing agreements to show the Program with various commercial
12 enterprises throughout North America. Joe Hand claims the
13 defendants unlawfully intercepted, published, exhibited, and
14 divulged the Program for private financial gain without obtaining
15 a sublicense to do so from Joe Hand, in violation of the FCA. Joe
16 Hand also asserts a common-law claim for conversion of the Program.
17 Joe Hand seeks statutory damages up to \$100,000 for the defendants'
18 violation of 47 U.S.C. § 605; statutory damages up to \$50,000 for
19 the defendants' violation of 47 U.S.C. § 553; compensatory damages

21 ¹Section 553 prohibits the unauthorized reception or receipt
22 of "any communications service offered over a cable system, or
23 assisting in the unauthorized reception or receipt of such service.
24 47 U.S.C. § 553(a). Section 553 provides for a private right of
25 action for injunctive relief, damages, and attorneys' fees to "any
26 aggrieved party who prevails." 47 U.S.C. § 553(c).

27 ²Section 605 prohibits the unauthorized receipt, assistance in
28 receiving, transmitting, or assisting in transmitting, of communi-
cations by wire or radio. Prohibited practices include divulging
or publishing the intercepted communications for the benefit of the
recipient or of "another not entitled thereto." 47 U.S.C.
§ 605(a). Section 605 provides for a private right of action for
injunctive relief, damages, attorney's fees, and costs. 47 U.S.C.
§ 605(e).

1 to be proved at trial for conversion; and its attorney's fees and
2 costs. Dkt. #1.

3 The matter is before the court on the defendants' motion for
4 summary judgment. The defendants move for summary judgment on
5 three grounds, each of which is discussed below.

7 **Standards**

8 Summary judgment "should be rendered if the pleadings, the
9 discovery and disclosure materials on file, and any affidavits show
10 that there is no genuine issue as to any material fact and that the
11 movant is entitled to judgment as a matter of law." Fed. R. Civ.
12 P. 56(c)(2). In considering a motion for summary judgment, the
13 court "must not weigh the evidence or determine the truth of the
14 matter but only determine whether there is a genuine issue for
15 trial." *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th
16 Cir. 2002) (citing *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d
17 407, 410 (9th Cir. 1996)).

18 The Ninth Circuit Court of Appeals has described "the shifting
19 burden of proof governing motions for summary judgment" as follows:

20 The moving party initially bears the burden of
21 proving the absence of a genuine issue of
22 material fact. *Celotex Corp. v. Catrett*, 477
23 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d
24 265 (1986). Where the non-moving party bears
25 the burden of proof at trial, the moving party
26 need only prove that there is an absence of
27 evidence to support the non-moving party's
28 case. *Id.* at 325, 106 S. Ct. 2548. Where the
moving party meets that burden, the burden
then shifts to the non-moving party to
designate specific facts demonstrating the
existence of genuine issues for trial. *Id.* at
324, 106 S. Ct. 2548. This burden is not a
light one. The non-moving party must show
more than the mere existence of a scintilla of
evidence. *Anderson v. Liberty Lobby, Inc.*,

1 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed.
2 2d 202 (1986). The non-moving party must do
3 more than show there is some "metaphysical
4 doubt" as to the material facts at issue.
5 *Matsushita Elec. Indus. Co., Ltd. v. Zenith*
6 *Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct.
7 1348, 89 L. Ed. 2d 528 (1986). In fact, the
8 non-moving party must come forth with evidence
9 from which a jury could reasonably render a
10 verdict in the non-moving party's favor.
11 *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505. In
12 determining whether a jury could reasonably
13 render a verdict in the non-moving party's
14 favor, all justifiable inferences are to be
15 drawn in its favor. *Id.* at 255, 106 S. Ct.
16 2505.

17 *In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th
18 Cir. 2010).

19 **Discussion**

20 **A. Corporate Veil**

21 The defendants argue Joe Hand has not shown Jacobson had any
22 involvement in the alleged showing of the Program, and in any
23 event, he cannot be held individually liable for Par III's actions
24 solely on the basis that he is president of the corporation. Joe
25 Hand responds that Jacobson is listed on records of the Oregon
26 Secretary of State as the registered agent, president, and
27 secretary of Par III, Inc., with no other individual being listed
28 as an officer or shareholder of the corporation. Joe Hand asserts
29 Jacobson is solely responsible for the day-to-day operations of the
30 corporation (and, therefore, the Restaurant), giving rise to "an
31 inference that the corporation is his alter ego[.]" Dkt. #26 (Pl's
32 Memorandum), p. 3 (citing Jacobson's Declaration, Dkt. #24); see
33 Dkt. #24, Jacobson's Declaration, ¶ 2 & attachment). Joe Hand
34 claims, therefore, that issues of fact exist regarding Jacobson's

1 involvement in showing the Program, precluding summary judgment.
2 *Id.*

3 The defendants rely on *State ex rel. Neidig v. Superior*
4 *National Insurance Co.*, 343 Or. 434, 173 P.3d 123 (2007), in which
5 the Oregon Supreme Court discussed in detail the elements required
6 to pierce the corporate veil. The analysis begins with the Oregon
7 Supreme Court's decision in *Amfac Foods v. International Systems*,
8 294 Or. 94, 108-09, 654 P.2d 1092, 1101-02 (1982), where the court
9 explained an "exception to the rule of shareholder immunity":

10 "We state the exception to the rule as
11 follows: When a plaintiff seeks to collect a
12 corporate debt from a shareholder by virtue of
13 the shareholder's control over the debtor cor-
14 poration rather than on some other theory, the
15 plaintiff must allege and prove not only that
16 the debtor corporation was under the actual
17 control of the shareholder but also that the
18 plaintiff's inability to collect from the cor-
19 poration resulted from some form of improper
20 conduct on the part of the shareholder. This
21 causation requirement has two implications.
22 The shareholder's alleged control over the
23 corporation must not be only potential but
24 must actually have been exercised in a manner
25 **either causing the plaintiff to enter the**
26 **transaction with the corporation or causing**
27 **the corporation's default on the transaction**
28 **or a resulting obligation.** Likewise, the
shareholder's conduct must have been improper
either in relation to the plaintiff's entering
the transaction or in preventing or inter-
fering with the corporation's performance or
ability to perform its obligations toward the
plaintiff."

23 *Neidig*, 343 Or. at 454, 173 P.3d at 135 (emphasis added; quoting
24 *Amfac*, *supra*).

25 The *Neidig* court noted the *Amfac* test, "although easily
26 stated, may not be easily applied. . . . Indeed, each part of the
27 test - control, wrongful conduct, and causation - can present close
28 legal and factual questions that must be considered in reaching the

1 ultimate equitable determination as to whether the corporate veil
2 can be pierced." *Id.*, 343 Or. at 455, 173 P.3d at 136 (citations
3 omitted). The court quoted with approval from *Fletcher Cyclopedica*
4 *of the Law of Corporations* § 41.10, 143-47 (2006 rev.), noting
5 *Fletcher* "derives from the cases a three-part inquiry that is
6 consistent with *Amfac*, to-wit:

7 "While the factors that will justify
8 piercing the corporate veil vary from jurisdic-
9 tion to jurisdiction, a number of courts
10 will disregard the existence of a corporate
11 entity when the plaintiff shows: (1) control,
12 not merely majority or complete stock control,
13 but complete domination, not only of the
14 finances, but of policy and business practice
15 in respect to the transaction so that the
16 corporate entity as to this transaction had at
17 the time no separate mind, will or existence
18 of its own; (2) that such control was used by
19 the defendant to commit fraud or wrong, to
20 perpetrate the violation of a statutory or
21 other positive legal duty, or to commit a
22 dishonest and unjust act in contravention of
23 the plaintiff's legal rights; and (3) that the
24 aforesaid control and breach of duty proximately
25 caused the injury or unjust loss."

17 *Neidig*, 343 Or. at 455 n.16, 173 P.3d at 136 n.16 (quoting
18 *Fletcher, supra*).

19 Stated another way:

20 To pierce the corporate veil, . . . plaintiff
21 must make a *prima facie* showing that the
22 individual defendants controlled the corpora-
23 tions, that they engaged in improper conduct
24 in their exercise of control, and that their
25 improper conduct caused plaintiff's inability
26 to obtain an adequate remedy from the corpora-
27 tion.

25 *Aero Planning Int'l, Inc. v. Air Assoc., Inc.*, 94 Or. App. 143,
26 145, 764 P.2d 610, 612 (1988) (citing *Rice v. Oriental Fireworks*
27 *co.*, 75 Or. App. 627, 633, 707 P.2d 1250, 1255 (1985)). In *Aero*
28 *Planning*, the plaintiff alleged the individual defendants

1 improperly commingled the accounts and affairs of the corporate
2 defendants, "undercapitalizing them and 'milking' their assets,"
3 apparently to the point that the corporations could not respond to
4 a judgment. *Aero Planning*, 94 Or. App. at 146, 707 P.2d at 612.
5 The court found, however, the plaintiff had failed to establish
6 that, "as between the shareholders and the defendant corporations,
7 the shareholders disregarded the corporate entities." *Id.*

8 In the present case, Jacobson has submitted a Declaration in
9 which he states he "had no involvement in any alleged showing of a
10 UFC event on January 17, 2009, at the Porterhouse Restaurant."
11 Dkt. #24, ¶ 4. Joe Hand has offered no contrary evidence.
12 Likewise, it has offered no evidence that raises an issue of fact
13 regarding Jacobson's personal involvement in causing Joe Hand to be
14 unable to collect a judgment against the corporation. Joe Hand has
15 failed to meet its burden to "designate specific facts demon-
16 strating the existence of genuine issues for trial." *In re Oracle*
17 *Corp.*, 627 F.3d at 387. Therefore, the defendants' motion for
18 summary judgment as to Jacobson, in his individual capacity, is
19 **granted.**

20 21 **B. Timeliness**

22 The defendants argue Joe Hand's FCA claims are untimely under
23 both Federal Rule of Civil Procedure 4(m), and the FCA, as
24 interpreted by this court in *Kingvision Pay-Per-View Ltd. v. Shilo*
25 *Inn*, 05-cv-1065-HU, Dkt. #18, Findings & Recommendation (D. Or.
26 Mar. 1, 2006) (Hubel M.J.), adopted at Dkt. #25 (D. Or. Apr. 26,
27 2006) (Redden, J.).

1 Joe Hand responds that the Complaint was timely filed. It
2 asserts the filing deadline fell on a legal holiday - Martin Luther
3 King Day, January 17, 2011 - and the Complaint was filed the next
4 day, as allowed by "Federal Rule of Civil Procedure 6(c)" [sic]³.

5 In *Kingvision*, I noted the FCA does not, itself, contain a
6 limitations period for private actions by non-carriers for
7 violations of the "anti-piracy provisions." I analyzed relevant
8 case law, and concluded the federal Electronic Communications
9 Privacy Act (ECPA) is most analogous to the FCA, and the ECPA's
10 two-year statute of limitations is appropriate for private actions
11 brought under the FCA's anti-piracy provisions. My analysis was
12 adopted by Judge James A. Redden of this court, who applied the
13 two-year statute of limitations in a similar case. See *Kingvision*,
14 *supra*.

15 Nothing has occurred to change that analysis here. The two-
16 year statute of limitations in the analogous ECPA is appropriately
17 applied to Joe Hand's Complaint. The defendants' unauthorized
18 interception and transmission of the Program allegedly occurred on
19 January 17, 2009⁴, which would make the filing deadline January 17,
20

21 ³The actual applicable subsection is (a)(1)(C), rather than
22 "6(c)." Compare Fed. R. Civ. P. 6(a)(1)(C) with Fed. R. Civ. P.
23 6(c).

24 ⁴The Affidavit of investigator Steve Wilson submitted by Joe
25 Hand contains a discrepancy regarding the date the Program
26 allegedly was shown. On page one, Wilson states he saw the Program
27 being shown on January 17, 2007; on page two, he states the date
28 was January 17, 2009. At oral argument, Joe Hand's counsel
indicated Wilson's deposition has been taken, and Wilson explained
this was a scrivener's error; the correct date was 2009. Neither
party has submitted a copy of the deposition to the court, but the
defendants do not argue that the 2007 date was anything other than
a scrivener's error. For purposes of the defendants' motion for

1 2011. See Dkt. #26-1; Fed. R. Civ. P. 6. Under Federal Rule of
2 Civil Procedure 6, if the last day of the period falls on "a
3 Saturday, Sunday, or legal holiday, the period continues to run
4 until the end of the next day that is not a Saturday, Sunday, or
5 legal holiday." Fed. R. Civ. P. 6(a)(1)(C). January 17, 2011, was
6 a legal holiday; as a result, the filing period continued to run
7 until the end of the day on Tuesday, January 18, 2011 - the date
8 this case was filed. Therefore, the case was filed within the
9 applicable statute of limitations, and the defendants' motion for
10 summary judgment based on a violation of the statute of limitations
11 is **denied**.

12 The defendants also assert a second timeliness argument, based
13 on Joe Hand's failure to serve them within 120 days after the
14 Complaint was filed. The case was filed on January 18, 2011, and
15 a Scheduling Order was entered by the court. On June 29, 2011,
16 when no timely service of process had been made within 120 days as
17 required by Federal Rule of Civil Procedure 4(m), the court entered
18 an order requiring Joe Hand to show cause by July 28, 2011, why the
19 case should not be dismissed for failure to prosecute. Dkt. #4.
20 In response, Joe Hand's counsel submitted a letter outlining his
21 efforts to locate and serve the defendants, and to attempt to
22 obtain a waiver of service. Dkt. #5. The court accepted counsel's
23 explanation of his failure to effect service of process, and set a
24 new service deadline of September 16, 2011. Dkt. #6.

25 When, once again, service had not been made by the deadline,
26 the court entered another Order to Show Cause, directing Joe Hand
27
28 summary judgment, I accept the explanation that the date discre-
pancy was the result of a scrivener's error.

1 to show cause by October 26, 2011, why the case should not be
2 dismissed for failure to prosecute. Dkt. #7. In response, Joe
3 Hand's counsel had Summonses issued to the defendants on
4 October 12, 2011, Dkt. #8; the defendants were served on
5 October 13, 2011, Dkt. ##9-1 & 9-2; and Joe Hand filed a written
6 response to the court's Show Cause Order on October 26, 2011,
7 discussing efforts to determine, in advance of service, whether the
8 defendants were represented by counsel, and to obtain waivers of
9 service. Dkt. #9. The court reviewed Joe Hand's response to the
10 Show Cause Order, found that good cause had been shown, and ordered
11 the case to proceed. Dkt. #10.

12 The defendants argue the court erred in failing to dismiss the
13 case when Joe Hand failed to effect service of process earlier.
14 They argue there was no showing of good cause for Joe Hand's
15 failure to effect service prior to the original deadline, and the
16 court should reverse its order finding good cause had been shown.
17 The defendants claim Joe Hand's failure even to get Summonses
18 issued until October 12, 2011, showed a lack of diligence in
19 prosecuting the action. They further argue, without citation to
20 any supporting authority, that the court lacked authority to extend
21 the date for service a second time without good cause, and they
22 claim Joe Hand lacked good cause for its failure to effect service
23 of process sooner. Dkt. #25, pp. 24-26.

24 The defendants rely on Federal Rule of Civil Procedure 4(m),
25 which provides, in pertinent part:

26 If a defendant is not served within 120 days
27 after the complaint is filed, the court - on
28 motion or on its own after notice to the
plaintiff - must dismiss the action without
prejudice against that defendant or order that

1 service be made within a specified time. But
2 if the plaintiff shows good cause for the
3 failure, the court must extend the time for
service for an appropriate period. . . .

4 Fed. R. Civ. P. 4(m). On both occasions, the court found Joe Hand
5 had shown good cause for its failure to effect service on the
6 defendants sooner. Joe Hand was attempting to avoid the costs of
7 personal service by requesting a waiver, pursuant to Federal Rule
8 of Civil Procedure 4(d). When those efforts ultimately proved
9 unsuccessful, Joe Hand had Summonses issued and served the
10 defendants personally.

11 The court finds no reasons to disturb its prior rulings that
12 Joe Hand had shown good cause for failure to effect service sooner.
13 Further, the court rejects the defendants' argument that the time
14 to effect service may only be extended once under Rule 4(m). The
15 defendants' motion for summary judgment is **denied** on this basis.

17 **C. Conversion**

18 The defendants argue Joe Hand cannot show conversion occurred
19 under Oregon law, and even if the Program was shown, which they
20 deny, its showing would constitute "'no more than a trespass which
21 may be compensated by the actual damage inflicted upon the owner,
22 which would be covered by the reasonable value of the use to which
23 it was put.'" Dkt. #25, p. 5 (quoting *Jeffries v. Pankow*, 112 Or.
24 439, 448, 229 P. 903, 905 (1924)).

25 Joe Hand responds, first, that whether its "action is properly
26 styled conversion or trespass . . . matters less under notice
27 pleading than it would under Oregon law." Dkt. #26, p. 3. Joe
28 Hand asserts the defendants are on notice of the nature of the

1 claim, and can respond to it. *Id.* Second, Joe Hand argues the
2 defendants' actions do, in fact, meet the elements of conversion
3 under Oregon law. And third, Joe Hand asserts the defendants are
4 relying on an inappropriate definition of "chattel," taken from the
5 Oregon definition applicable to lien statutes. Joe Hand claims the
6 definition upon which the defendants rely "is not a statutory
7 definition of chattel for purposes of conversion." *Id.* However,
8 Joe Hand offers no alternative definition for "chattel" that it
9 claims the court should apply in this case.

10 Oregon defines the tort of conversion as the "'intentional
11 exercise of dominion or control over a chattel which so seriously
12 interferes with the right of another to control it that the actor
13 may justly be required to pay the other the full value of the
14 chattel.'" *Becker v. Pacific Forest Industries, Inc.*, 229 Or. App.
15 112, 116, 211 P.3d 284, 287 (2009) (quoting *Restatement (Second) of*
16 *Torts* § 222A (1965); citing *Mustola v. Toddy*, 253 Or. 658, 664, 456
17 P.2d 1004, 1007 (1969)). The *Becker* court listed the following
18 nonexclusive factors to be considered in determining whether a
19 conversion has occurred:

20 "(2) In determining the seriousness of the
21 interference and the justice of requiring the
22 actor to pay the full value, the following
23 factors are important:

24 "(a) the extent and duration of the
25 actor's exercise of dominion or
26 control;

27 "(b) the actor's intent to assert a
28 right in fact inconsistent with the
29 other's right of control;

30 "(c) the actor's good faith;

31 "(d) the extent and duration of the
32 resulting interference with the other's
33 right of control;

34 "(e) the harm done to the chattel;

35 "(f) the inconvenience and expense
36 caused to the other."

1 *Id.* (citing *Mustola v. Toddy*, 253 Or. 658, 666, 456 P.2d 1004, 1008
2 (1969)); accord *Scott v. Jackson County*, 244 Or. App. 484, 499-500,
3 260 P.3d 744, 752 (2011); *Briggs v. Lamvik*, 242 Or. App. 132, 255
4 P.3d 518 (2011). The *Becker* court noted that no one of these
5 factors is considered dispositive. *Id.* (citing *Beall Transport*
6 *Equipment Co. v. Southern Pacific*, 186 Or. App. 696, 707, 64 P.3d
7 1193 (2003)).

8 An actor can even commit conversion unknowingly, "if the actor
9 mistakenly believes that he or she is acting legally with respect
10 to the other person's property, . . . and even if the actor
11 innocently acquires the property from a knowing converter." *In re*
12 *Conduct of Martin*, 328 Or. 177, 184-85, 970 P.2d 638, 642 (1998)
13 (citing *Hemstreet v. Spears*, 282 Or. 439, 579 P.2d 229 (1978);
14 *Fredeen v. Stride*, 269 Or. 369, 525 P.2d 166 (1974)).

15 Here, the parties disagree as to whether the Program con-
16 stituted a "chattel" that was capable of being converted. The
17 defendants rely on the definition of "chattel" that applies in the
18 case of statutory liens; i.e., "movable objects that are capable of
19 being owned, but does not include personal rights not reduced to
20 possession but recoverable by an action at law or suit in equity,
21 money, evidence of debt and negotiable instruments." ORS § 87.142.
22 Joe Hand argues this definition does not apply for purposes outside
23 the statutory lien context.

24 "A chattel is '[m]ovable or transferable property; personal
25 property; esp. a physical object capable of manual delivery and not
26 the subject matter of real property.'" *Rapacki v. Chase Home*
27 *Finance LLC*, 797 F. Supp. 2d 1085, 1092 (D. Or. 2011) (Hernandez,
28

1 J.) (quoting *Black's Law Dictionary* 268 (9th ed. 2009)). Several
2 federal jurisdictions have considered the question of what
3 constitutes a "chattel" for conversion purposes in various
4 contexts. Historically, it was only tangible property that could
5 be converted. In 1959, in the context of the criminal prosecution
6 of a defendant for "conversion" to his own use of the labor and
7 services of a member of the armed forces during duty hours, the
8 Ninth Circuit discussed the "ordinary sense of the word 'convert,'"
9 and what type of property may be converted. The court observed
10 that the "words 'converts' and 'conversion' really have their
11 origin in the law of torts . . . [and] imply a dealing with goods
12 or personal chattels . . . limited to 'any tangible chattel.'" *Chappell v. United States*, 270 F.2d 274, 277 (9th Cir. 1959)
13 (quoting Harper & James, *The Law of Torts*, § 2.13). The court
14 noted Messrs. Harper and James had explained, "'Any tangible
15 chattel may be the subject of conversion. . . . Intangible
16 property relations may not be converted except in the case of an
17 action against a corporation for conversion of shares and in those
18 situations in which the owner of a document is, as such, entitled
19 to the advantages of the intangible relation.'" *Id.*, 270 F.2d at
20 277 n.6. The *Chappell* court accepted the proposition that
21 "intangible property relations may not be converted, as that term
22 is commonly used." *Id.*, 270 F.2d at 277.

24 The *Chappell* court cited, with approval, *Olschewski v Hudson*,
25 262 P. 43 (Cal. Ct. App. 1927), where the court considered whether
26 a list of laundry customers was a chattel capable of conversion.
27 *Id.*, 270 F.2d at 278. The *Olschewski* court likened the customer
28 list to "the good will of a business," and found a conversion

1 action "was not intended to reach so intangible, uncertain, and
2 indefinite a property right." *Olschewski*, 262 P. at 45. The court
3 observed, further, that "[t]he very meaning of the word
4 'conversion,' as it is used in this sense, is to 'change into
5 another form, substance or state; to transform, or change, as in
6 law, the wrongful appropriation to one's own use of the goods of
7 another.' The very definition of the word presupposes the
8 existence of tangible goods or chattels in a form capable of being
9 changed or transformed, turned over, delivered, or appropriated for
10 the use and benefit of the wrongdoer." *Id.* The *Olschewski* court
11 noted conversion, or trover, operates on "'property capable of
12 identification as being the actual property or thing wrongfully
13 taken and converted.'" *Id.* (quoting *Kerwin v. Balhatchett*, 147
14 Ill. App. 561, 566 (1909)). The court concluded that a conversion
15 action "lies only for the wrongful appropriation of goods,
16 chattels, or personal property which is specific enough to be
17 identified, and not to such indefinite, intangible, and uncertain
18 property rights as the mere good will of a business, or trade
19 secrets, or a newspaper route, or a licensed market stall for
20 transacting trade." *Olschewski*, 262 P. at 46.

21 As the nature of property interests began to change, so, too,
22 did the law relating to the type of property that is capable of
23 conversion. Over forty years ago, the United States Court of
24 Appeals for the District of Columbia Circuit observed the "tradi-
25 tional rule . . . that conversion will lie only for the taking of
26 tangible property, or rights embodied in a tangible token necessary
27 for the enforcement of those rights," had been "relaxed in favor of
28 the reasonable proposition that any intangible generally protected

1 as personal property may be the subject matter of a suit for
2 conversion." *Pearson v. Dodd*, 410 F.2d 701, 708 n.34 (D.C. Cir.
3 1969) (citations omitted); accord *United States v. Collins*, 56 F.3d
4 1416, 1419 (D.D.C. 1995) (citing *Pearson*). Recently, the Ninth
5 Circuit similarly observed that "[v]irtually every jurisdiction"
6 has, to some degree, discarded the traditional limitation that
7 applied conversion actions only to tangible goods. *Kremen v.*
8 *Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (interpreting California
9 law; holding plaintiff could maintain an action for conversion of
10 an internet domain name).

11 The Oregon courts do not appear to have considered whether an
12 intangible right, such as Joe Hand's license to distribute the
13 Program, constitutes a "chattel" capable of being converted, nor
14 have the Oregon courts ever expressly excluded intangible personal
15 property from the definition of a "chattel" for purposes of a
16 conversion action. In the context of property tax laws, Oregon
17 statutes define what constitutes "intangible personal property,"
18 distinguishing such property from "'[t]angible personal property'
19 [which] includes but is not limited to all chattels and movables.
20 . . ." ORS § 307.020(1). Intangible personal property includes,
21 *inter alia*, "contract rights." ORS § 307.020(1)(a)(F). In
22 general, "intangible personal property is not subject to assessment
23 and taxation." ORS § 307.030(2); see, e.g., *Northwest Natural Gas*
24 *Co. v. Dept. of Revenue*, 19 Or. Tax 367, 374, 2007 WL 4127669, at
25 *4 (Or. Tax Reg. Div. Nov. 19, 2007) ("[I]t could be said that the
26 statute defining *intangible* personal property [had], in essence,
27 operative effect in that ORS 307.030 had established the funda-
28 mental rule that intangible personal property was generally not

1 subject to tax[, and] [t]herefore, a statute defining some property
2 as intangible had the operative effect of rendering that property
3 exempt from taxation." Emphasis in original.); *Gall v. Dept. of*
4 *Revenue*, 19 Or. Tax 188, 191 n.3, 2006 WL 3487425, at *1 (Or. Tax
5 Reg. Div. Nov. 22, 2006) ("Tangible property is defined as 'all
6 chattels and movables,' as opposed to intangible property, which
7 includes, to name a few examples, shares of stock, computer
8 software, goodwill, and trade secrets. ORS 307.020.>").

9 In *Reynolds v. Schrock*, 197 Or. App. 564, 107 P.3d 52 (2005),
10 *rev'd on other grounds*, 341 Or. 338, 142 P.3d 1062 (2006), the
11 Oregon Court of Appeals had occasion to consider whether an
12 unrecordable security interest in real property that arose from a
13 settlement agreement between two adversaries was a chattel subject
14 to conversion. The court observed, "Often, the 'chattel' that is
15 the subject of a conversion action is tangible personal property."
16 *Reynolds*, 197 Or. App. at 578, 107 P.3d at 60 (citations omitted).
17 The court's use of the word "often" suggests that sometimes, the
18 "chattel" subject to conversion will not be "tangible personal
19 property." The *Reynolds* court cited a specific exception to the
20 general rule, noting that in 1938, "the Oregon Supreme Court . . .
21 recognized that an unrecorded mortgage on land to secure an
22 existing debt is also a 'chattel' capable of being converted; thus,
23 a mortgagor states a claim for conversion when the mortgagee sells
24 the burdened property to a third party, so as to deprive the
25 mortgagor of its security interest in the property." *Reynolds*, 197
26 Or. App. at 578, 107 P.3d at 60-61 (citing *Conley v. Henderson*, 158
27 Or. 309, 325, 75 P.2d 746, 753 (1938)). However, the *Reynolds*
28 court held the "unrecordable security interest" at issue in the

1 case actually never came into being; it was contingent on events
2 that never occurred, rendering it only a "potential security
3 interest" that was not a chattel capable of conversion. *Reynolds*,
4 197 Or. App. at 579, 107 P.3d at 61. See also *Willamette Quarries*,
5 *Inc. v. Wodtli*, 308 Or. 406, 413, 781 P.2d 1196, 1201 (1989) ("This
6 court has also held that '[o]ne must be entitled to immediate
7 possession of a chattel before he [or she] can successfully contend
8 that the actor's failure to yield possession constitutes con-
9 version.'" (quoting *Artman v. Ray*, 263 Or. 529, 531, 501 P.2d 63,
10 64 (1972), in turn citing *Restatement (Second), Torts* § 225
11 (1965)).

12 It thus appears there is no controlling precedent in the
13 decisions of the Oregon appellate courts as to whether the type of
14 property at issue here would fall within the definition of a
15 "chattel" capable of conversion. Nevertheless, I find it likely
16 the Oregon courts would conclude that a license or contractual
17 right to receive a transmitted signal; to rebroadcast the signal;
18 and to determine when, where, and by whom the program contained
19 within the signal can be displayed or exhibited, constitutes a
20 chattel that can be converted. This holding is consistent with
21 courts' treatment of the evolving state of property and property
22 rights. As Justice Stevens once observed, "The human condition is
23 one of constant learning and evolution - both moral and practical.
24 Legislatures implement that new learning; in doing so they must
25 often revise the definition of property and the rights of property
26 owners." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003,
27 1069, 112 S. Ct. 2886, 2921, 120 L. Ed. 2d 798 (1992) (Stevens, J.,
28 dissenting).

1 I find it likely the Oregon courts would concur with decisions
2 from other jurisdictions holding rights such as those claimed by
3 Joe Hand in this case are subject to conversion. See, e.g., *J&J*
4 *Sports Productions, Inc. v. Gamino*, slip op., 2012 WL 913743, at *4
5 (E.D. Cal. Mar. 16, 2012) (“exclusive right to distribute a
6 broadcast signal to commercial establishments constitutes a ‘right
7 to possession of property’ for purposes of conversion.”) (citing
8 *Don King Prods./Kingvision v. Lovato*, 911 F. Supp. 419, 423 (N.D.
9 Cal. 1995); *DIRECTV, Inc. v. Pahnke*, 405 F. Supp. 2d 1182, 1189
10 (E.D. Cal. 2005)); *DirectTV, Inc. v. Cantu*, 2004 WL 2623932, at *2
11 (W.D. Tex. Sept. 29, 2004) (noting other courts have “found that
12 broadcast signals are valuable property in and of themselves and
13 that plaintiffs may obtain damages for wrongful interception of
14 these signals without resort to the Copyright Act”) (citing cases
15 from the Eastern District of New York; and the Eighth Circuit Court
16 of Appeals, applying South Dakota law); *DIRECTV, Inc. v. McCool*,
17 339 F. Supp. 2d 1025, 1038 (M.D. Tenn. 2004) (holding DirecTV’s
18 encrypted satellite signals “are comparable to the confidential
19 telephone authorization codes used by MCI,” and are capable of
20 conversion; citing *Lovato, supra*); *In re Marriage of Langham and*
21 *Kolde*, 153 Wash. 2d 553, 564-65, 566, 106 P.3d 212, 218 (2005)
22 (finding stock options are chattels capable of conversion; citing
23 definition of “a chattel personal” in *Black’s Law Dictionary* 251
24 (8th ed. 2004), which defines the term as a “tangible good or an
25 intangible right (such as a patent)”; observing that “[t]he older
26 approach to conversion is misguided when applied to intangible
27 property”); but see *DirectTV, Inc. v. Chorba*, 2005 WL 3095067, at *2
28 n.3 (M.D. Pa. Nov. 18, 2005) (citing another unreported decision

1 from the same court, holding "satellite broadcast signals are not
2 tangible property subject to conversion under Pennsylvania common
3 law"); *Miller v. Hehlen*, 209 Ariz. 462, 104 P.3d 193 (2005)
4 (holding a customer list was neither tangible property, nor
5 "intangible property merged with a document in the same sense as a
6 stock certificate or an insurance policy," and therefore, the
7 customer list did not constitute a chattel subject to conversion).

8 The Tennessee Court of Appeals, in *Freedom Broadcasting of TN,*
9 *Inc. v. Tenn. Dept. of Rev.*, 83 S.W.3d 776 (Tenn. Ct. App. 2002),
10 made some illuminating observations about the character of broad-
11 cast signals. The case arose from the plaintiff taxpayers' appeal
12 from denial of their application for "an industrial machinery
13 exemption from taxes on certain broadcasting equipment," pursuant
14 to Tennessee law. An ALJ found that rather than "producing
15 tangible personal property," the taxpayers provided a service, and
16 therefore, the taxpayers were not entitled to the requested
17 exemption. *Id.*, 83 S.W.3d at 778. The chancery court reversed the
18 ALJ's decision, holding the taxpayers were entitled to the
19 exemption. The Tennessee Department of Revenue appealed.

20 The appellate court affirmed the chancery court's decision.
21 The court noted the Tennessee Code defines "tangible personal
22 property" as "'personal property, which may be seen, weighed,
23 measured, felt, or touched, or is in any other manner perceptible
24 to the senses.'" *Id.*, 83 S.W.2d at 783 (quoting Tenn. Code § 67-6-
25 102(29)). The court observed that many characteristics of
26 broadcast signals are measurable; for example, the signals' fre-
27 quency and amplitude. The signals also are perceptible to the
28 senses of anyone who has the appropriate receiver. The court held,

1 "Because the signals are capable of measurement and perceptible to
2 the senses, the broadcast signals, like electricity, meet the
3 definition of tangible personal property." *Id.*

4 In the present case, Joe Hand possessed a license or contract
5 right to the broadcast signal containing the Program. I find
6 persuasive the Tennessee court's conclusion that a broadcast signal
7 is, in some sense, tangible property. Joe Hand was contractually
8 entitled to determine when, where, and by whom the broadcast signal
9 containing the Program could be displayed to the viewing public.
10 An unauthorized showing of the Program would result in an exercise
11 of dominion or control over the broadcast signal constituting a
12 "failure to yield possession." I find, therefore, that the
13 broadcast signal was subject to conversion, and Joe Hand can
14 maintain its conversion action. As a result, the defendants'
15 motion for summary judgment on the conversion claim is **denied**.

16
17 **CONCLUSION**

18 In conclusion, the defendants' motion for summary judgment as
19 to Jacobson, in his individual capacity, is **granted**, and the motion
20 is **denied** on all other grounds.

21 IT IS SO ORDERED.

22 Dated this __7th__ day of June, 2012.

23 /s/ Dennis J. Hubel

24 _____
25 Dennis James Hubel
26 Unites States Magistrate Judge
27
28