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**Kyle C. Bisceglie on
Thyoff v. Nationwide Mutual Insurance Company
8 N.Y.3d 359 (2007)**

Cite as: Bisceglie, Kyle C. "Thyoff v. Nationwide Mutual Insurance Company." LexisNexis® Expert Commentary, (Insert date you accessed the document online).

New York Court of Appeals Okays Claim for Conversion of Electronic Data. In *Thyoff v. Nationwide Mutual Insurance Company*, [8 N.Y.3d 283](#) (2007), the Court of Appeals unanimously agreed that New York permits a claim for conversion of computerized electronic records. In so doing, the Court answered the previously open question that had been certified by the Second Circuit: whether New York law recognizes a claim for conversion of "certain electronic computer records and data." [Id. at 284](#).

Louis Thyoff was an insurance agent for Nationwide, who leased his computer equipment as an independent contractor under an agent's agreement from the company. Upon termination of the agreement, Nationwide confiscated its equipment, along with all of the information Thyoff had stored on his computer, including personal correspondence and email, customer information, personal documents and data, Microsoft Office, and other hardware and software programs. *Thyoff v. Nationwide Mutual Ins. Co.*, [460 F.3d at 403](#) (2d Cir. 2006).

Thyoff sued in the U.S. District Court for the Western District of New York, claiming, among other claims, that the taking of his electronic data constituted conversion. The Western District dismissed the action, holding that Thyoff was not "excluded" from his property by Nationwide, and, in any event, Nationwide owned the computer system. Thyoff appealed.

The *Thyoff* Court determined to "expand" the scope of conversion, finding "[i]t cannot be seriously disputed that society's reliance on computers and electronic data is substantial, if not essential." *Thyoff*, [8 N.Y.3d at 291](#). The Court noted the "ubiquitous" and pervasive use of computers and electronic data, including drafting and dissemination of the *Thyoff* opinion itself! [Id. at 292](#). On this basis, *Thyoff* accorded the supposedly intangible property at issue the same treatment as "a paper document kept in a file cabinet." [Id. at 292](#).

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Preliminaries: Elements of the Tort; Intangible v. Tangible Property and the Merger Doctrine. Conversion in New York requires the "unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." *Vigilant Ins. Co. of Am. v. Hous. Auth.*, [87 N.Y.2d at 44](#) (N.Y. 1995). Each of these elements must be met for a court to find conversion.

Traditionally, the term "goods" required "tangible" or "physical" property. *Sporn v. MCA Records*, [58 N.Y.2d at 489](#) (1983). Later, New York would permit conversion of certain types of intangible property. This distinction between tangible and intangible property is simple in theory only. The theory holds that tangible property is capable of actual possession, *Miller v. United States*, [78 U.S. at 329](#) (U.S. 1871), while intangible property "is not physical matter which can be located on a map." *Texas v. New Jersey*, [379 U.S. at 677](#) (1965). Intangible property represents value, and "creates a property right that may or may not be represented by something tangible, but that itself has no intrinsic value apart from the rights it represents." *United States v. Bellomo*, [263 F. Supp. 2d at 573](#) (E.D.N.Y. 2003).

According to Restatement (Second) of Torts § 242 cmt. b. (1965), intangible property may include "promissory notes, bonds, bills of exchange, share certificates, warehouse receipts...insurance policies and savings bank books." It does not include electronic data. So it was that before the Internet; intangible assets were typically intellectual property or payment rights, including stock certificates. See Juliet M. Moringiello, *False Categories in Commercial Law: The (Ir)Relevance of (In)Tangibility*, [35 Fla. St. U. L. Rev. 119](#) (2007) (discussing the history of intangible property). Modernity has further blurred the lines between tangible and intangible. Recent law from other jurisdictions finds intangible property encompasses a variety of interests not previously addressed, and suggests that the list will expand hand-in-hand with technological innovation. See, e.g., *Kremen v Cohen*, [337 F.3d 1024](#) (9th Cir. 2003) (Internet domain name); *Ali v. Fasteners for Retail, Inc.*, [2008 U.S. Dist. LEXIS 31436](#) (D. Cal. 2008) (emails and software source codes); *Mundy v. Decker*, [1999 Neb. App. LEXIS 3](#) (Neb. Ct. App. Jan. 5, 1999) (WordPerfect directory).

Moving beyond theory to application in *Thyoff*, the Court clearly viewed the electronic data as "intangible," despite likening it to "paper kept in a file cabinet" *Thyoff*, [8 N.Y.3d at 292](#). The electronic records in *Thyoff* meet definitions of tangible, since the records can "transform to literal form by the mere expedient of a printing key function" (*Shmueli v Corcoran Group*, [9 Misc. 3d at 592](#) (N.Y. Sup. Ct. 2005), or intangible (as the Court implies), since the data was only stored in virtual form. Perhaps realizing the futility and increasing irrelevance of this distinction, *Thyoff* appeared to just move on to whether

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the elements of conversion are met or not: “In the absence of a significant difference in the value of the information, the protections of the law should apply equally to both forms – physical and virtual.” *Thyoff*, [8 N.Y.3d at 292](#).

Thyoff also casts aside another namesake relic of the common law, the so called “merger doctrine.” Per the Restatement (Second) of Torts § 242 (1965), the merger doctrine applies when intangible property rights are “merged” with a document, so that transfer of the document will transfer the property right. An early and best example of the merger rule is that a share of stock was so merged in the stock certificate that conversion of the certificate resulted in damages for conversion of the shares as well. *Agar v Orda*, [264 N.Y. 248](#) (1934).

Jurisdictions vary in their application of the merger rule, with some courts following a literal interpretation of the Restatement, others disregarding the document requirement, and still others finding that there can never be conversion of intangible property. *Thyoff* mentions the history of the merger rule in New York case law, but ultimately suggests we may have outgrown it: “[I]t generally is not the physical nature of a document that determines its worth, it is the information memorialized in the document that has intrinsic value.” *Thyoff*, [8 N.Y.3d at 292](#).

Due to *Thyoff*, New York courts are now largely free of these doctrines when addressing conversion of electronic media. Practitioners should start with the following four cases in developing new conversion theories: *Thyoff*, *Astroworks, Inc. v. Astroexhibit, Inc.*, [257 F. Supp. 2d 609](#) (S.D.N.Y. 2003), *Shmueli v Corcoran Group*, [9 Misc. 3d 589](#) (N.Y. Supr. Ct. 2005), and a 9th Circuit decision, *Kremen v Cohen*, [337 F.3d 1024](#) (9th Cir. 2003).

Astroworks and Shmueli. In *Astroworks*, plaintiff and defendant intended to form a “web-based space-related business” together, but plaintiff eventually formed the website on his own, allegedly using defendant’s ideas. *Astroworks*, [257 F. Supp. 2d at 612](#). The Southern District of New York found that while defendant’s idea alone could not be converted, the “tangible expression or implementation of that idea can be,” and therefore plaintiff could be liable for conversion of the website. *Id.* at 617 (quoting *Matzan v Eastman Kodak Co.*, [134 A.D.2d at 864](#), 521 N.Y.S.2d 917 (4th Dept. 1987)

In *Shmueli*, plaintiff worked as an independent contractor, real estate broker. Similar to *Thyoff*, plaintiff was unable to access her computer files, particularly her electronic client list (composed of contacts made both within and outside of her scope of employment with Defendant) immediately subsequent to her termination. The Supreme Court

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of New York, Commercial Division found that a computerized client list constitutes convertible property. *Shmueli*, [9 Misc. 3d at 594](#). *Schmueli* was a widely-publicized and remarkable decision but, as the court itself noted, limited to a narrow type of property – electronic client lists.

Thyroff, *Astroworks* and *Shmueli* are all consistent decisions albeit with slightly different methodology and scope. *Thyroff* acknowledges that it was the first time this Court had addressed the issue of conversion of intangible property that does not “strictly satisfy the merger test.” *Thyroff*, [8 N.Y.3d at 290](#). The Court’s holding in *Thyroff* goes beyond the allowance of computerized client lists in *Shmueli*. While the holding in *Thyroff* is specifically limited by the Court to “electronic records that were stored on a computer and were indistinguishable from printed documents” ([Id. at 292](#)), the Court does not rule out the possibility, or even likelihood, that the category of intangible property covered by the tort of conversion will continue to develop and expand to eventually include the “myriad other forms of virtual information available.” [Id. at 293](#). As a federal case, *Astroworks* is not controlling law for New York and predates *Thyroff*, but, in countenancing a claim for conversion of a website, provides an example of the type of “other forms of virtual information” that are likely now convertible in New York as a result to *Thyroff*.

Possible Impact of *Kremen v Cohen*. In *Kremen v Cohen*, [337 F.3d 1024](#) (9th Cir. 2003), plaintiff registered the domain name sex.com to a company he owned called “Online Classifieds.” Defendant Cohen, described as a “con artist,” sent a letter to the Internet registrar, Defendant Network Solutions, stating Online Classifieds was transferring ownership of sex.com to him. Network Solutions, without further investigation (for example, inquiring as to why a company called “Online Classifieds” would mail a letter), transferred the domain name to Defendant Cohen. Plaintiff, unable to reach Defendant Cohen to secure damages, claimed that Network Solutions had converted his property, that is, the domain name. The Ninth Circuit agreed with plaintiff that a conversion action could stand.

This decision is significant because it explicitly eliminates the strict merger doctrine, and says the Restatement is not followed in California. *Id.* at 1033. At most, California may retain a “minimal” merger requirement that calls for “some connection to a document or tangible object – not representation of the owner’s intangible interest in the strict Restatement sense.” [Id. at 1033](#). Additionally, the Ninth Circuit suggests that conversion could be applied to ALL personal property, should the claim arise in future cases. [Id. at 1031](#).

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As discussed above, the New York Court of Appeals, similar to the Ninth Circuit in *Kremen*, indicates in *Thyroff* that the merger doctrine and “tangible/intangible” distinction is no longer strictly required in New York, so long as the other elements of conversion are met. One wonders whether or not New York will follow California’s lead and expand the tort of conversion to cover all personal property. *Thyroff*’s logic certainly suggests a domain name similar to the one in *Kremen* is subject to the tort in New York: “[S]ociety’s reliance on computers and electronic data is substantial, if not essential,” *Thyroff*, [8 N.Y.3d at 291](#), and “The lack of a compelling reason to prohibit conversion for a redress of a misappropriation of intangible property underscores the need for reevaluating the appropriate application of conversion.” *Id.* *Shmueli* and *Astroworks* opened the doors to conversion of intangible property apart from the strict merger requirement, *Thyroff* broadened the application of that right, and it appears that New York law might go so far as *Kremen* and beyond in future cases.

Application in Employment Law: *Thyroff* likely not available to employees. *Thyroff* provides little for employees seeking to reclaim electronic data left behind with an employer. It is commonplace for employees to use company technology, computers in particular, for their own personal uses. When they leave, they may try to take electronic data in one way or another – forwarding documents by email, or converting data to PST files and exporting to a thumb drive. Employees will not find much success in seeking to recoup the electronic data through a claim for conversion, because there are very little to no property rights for employees in New York. By definition, “An employer-employee relationship exists when the evidence demonstrates that the employer exercises control over the results produced by a claimant or the means used to achieve the results.” *Hertz Corp. v. Comm’r of Labor*, [2 N.Y.3d 733](#) (N.Y. 2004). *Shmueli* emphasizes plaintiff’s status as an independent contractor, and in fact, the *Shmueli* court explicitly denies extension of the rights to an employee because their work product is considered proprietary to the employer. *Shmueli*, [9 Misc. 3d at 595](#) (quoting *Pullman Group v Prudential Ins. Co. of Am.*, [733 N.Y.S. 2d 1](#) (1st Dept. 2001)). In other words, all work product is assumed to be within the scope of employment for salaried employees, and employees therefore do not retain a property interest in such work product.

While there is an academic argument for non-work product created in one’s place of employment, (See Lee Nolan Jacobs, *Is What’s Yours Really Mine?: Shmueli v Corcoran Group and Penumbra Property Rights*, 14 J.L. & Pol’y 837 (2006) (discussing the uncertainty surrounding individual property rights in the workplace), the tort of conversion requires exclusivity of ownership. Once information is placed on a company server, or on a computer other employees can access, an employee is no longer able to exercise exclu-

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sive control over the document, and there is no longer a cause of action for conversion. In addition, many employers require employees to sign a specific waiver of privacy expectations with regard to their computer usage as a condition of employment.

In narrow circumstances, conversion may still exist including where the employer explicitly allows for personal computer use, the employee guards it with security and/or an employee saves a personal document on the local drive only.

In sum, *Thyroff* should benefit employers who now have another claim against an employee who steals and destroys electronic data and computer records with them on the way out.

Application of *Thyroff* to Licensing, Independent Contractor or Third-Party Relations. The *Shmueli* court emphasizes that plaintiff was an independent contractor working with the defendant, and not just an employee. *Shmueli*, [9 Misc. 3d at 594](#). Alternatively, *Thyroff* was both a licensee and independent contractor, and *Astroworks* involved arms-length parties in an enterprise. Conversion claims will be much easier to sustain in third-party relations because it is easier to claim exclusivity or control over one's property. Of course, whether or not someone is an employee, an independent contractor or "other" is a sometimes difficult question that is beyond the scope of this commentary. The take away – *Thyroff*, *Astroworks*, *Shmueli*, and *Kremen* make conversion claims more viable in the context of licensing, independent contractors and third-parties.

Conclusion. *Thyroff* is another of the increasing number of cases of importance in how our legal system is responding to the explosion of electronic data. Conversion has its limits in the cyber-world simply because so often data is not "stolen" but "copied," and "copying" will not engender "conversion" without "exclusion." Subsequent opinions citing *Thyroff* suggest this result. See *A & G Research, Inc. v. GC Metrics, Inc.*, 2008 NY Slip Op 51016U (N.Y. Sup. Ct. May 21, 2008) (stating copied computer data does not exclude the proper owner); *Leser v. Karenkooper.com*, 2008 NY Slip Op 50135U (N.Y. Sup. Ct. 2008) (stating the use of an image from a webpage does not exclude the proper owner). Because so many data files are copied, this claim may be unavailable in certain circumstances. Practitioners – especially those representing employers – should look to the Computer Fraud and Abuse Act, [18 USC 1030](#), in cases involving copying of data without exclusion. Despite this limitation, as New York applies *Thyroff* to "the myriad" and exponentially growing "other forms of virtual information," *Thyroff*, [8 N.Y.3d at 293](#), practitioners should expect to see an increase in conversion claims following termination of licensing agreements, independent contractors and co-venturers.

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Cross-References

For more information on the tort of conversion, intangible property and employee property rights, see [1-2A Computer Law § 2A.11](#) (explaining *Thyroff's* role in the expansion of conversion); [1-4 New York Employment Law § 4.02](#) (discussing misappropriated employee work product); [1-7 Taxation of Intellectual Property § 7.02](#) (noting conversion of domain name in *Kremen*); Computer Fraud and Abuse Act, [18 USC 1030](#) (stating act of copying is not a deletion of original files); [2-249 Warren's Negligence in the New York Courts § 249.02](#) (noting apparent application of CPLR 5001 to intangible property as well); Juliet M. Moringiello, *False Categories in Commercial Law: The (Ir)Relevance of (In)Tangibility*, [35 Fla. St. U. L. Rev. 119](#) (2007) (discussing the history of intangible property); and Lee Nolan Jacobs, *Is What's Yours Really Mine?: Shmueli v Corcoran Group and Penumbral Property Rights*, 14 J.L. & Pol'y 837 (2006) (examining the uncertainty surrounding individual property rights in the workplace).

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