

No. _____

**In The
Supreme Court of the United States**

— ♦ —

OPENRISK, LLC,
Petitioner,

v.

**MICROSTRATEGY SERVICES
CORPORATION,**
Respondent.

— ♦ —

**ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

— ♦ —

PETITION FOR WRIT OF CERTIORARI

— ♦ —

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QUESTION PRESENTED FOR REVIEW

Under § 301 of the Copyright Act of 1976, “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title.” This Court held in *Dowling v. United States*, 473 U.S. 207 (1985) and the Fifth Circuit’s held in *United States v. Smith*, 686 F. 2d 234 (1982), that copyright infringement does not equate to theft under the National Stolen Property Act § 2314. The question presented here is:

Whether the Fourth Circuit erroneously held, in conflict with decisions of this Court in *Dowling* and the Fifth Circuit in *Smith*, that § 301 of the Copyright Act of 1976 preempts claims of theft, more specifically Virginia state law claims of embezzlement and larceny.

RULE 24.1(b) AND 29.6 STATEMENT

Pursuant to Supreme Court Rule 24.1(b), petitioner OpenRisk, LLC states that all parties to the proceeding below appear in the caption of the case on the cover page.

Pursuant to Supreme Court Rule 29.6, petitioner states that there is no parent or publicly held company owning 10% or more of the petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 24.1(b) AND 29.6 STATEMENT.....	ii
TABLE OF AUTHORITIES	x
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE	4
A. Facts Giving Rise To This Case.....	4
B. The District Court Proceedings	6
C. The Appellate Court Proceedings	6
REASONS WHY CERTIORARI SHOULD BE GRANTED	8

I.

REVIEW IS WARRANTED BECAUSE THE OPINION OF THE FOURTH CIRCUIT CONFLICTS WITH THE DECISION OF THIS COURT IN DOWLING V. UNITED STATES AND OF THE FIFTH CIRCUIT IN UNITED STATES V. SMITH ON A FUNDAMENTAL ISSUE OF THE SCOPE OF COPYRIGHT PROTECTION	8
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A. This Court in Dowling v. United States and the Fifth Circuit in United States v. Smith held that the “bundle of rights” conferred to the copyright owner by Section 106 of the Copyright Act are limited; such property rights are “distinct from the possessory interest” of the owner of property, thus do not equate to theft	11
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B.	The Fourth Circuit's preemption decision equates infringement of the "bundle of rights" conferred to the copyright owner by Section 106 of the Copyright Act with Larceny and Embezzlement under the Virginia Computer Crimes Act	13
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II.

THE POSSESSORY RIGHTS OF AN OWNER OF TANGIBLE OR INTANGIBLE PROPERTY ARE THE SAME AND ARE NOT EQUIVALENT TO THE "BUNDLE OF RIGHTS" CONFERRED BY SECTION 106 OF THE COPYRIGHT ACT AND THIS COURT SHOULD REVERSE THE FOURTH CIRCUIT'S DECISION.....	15
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A.	The Fourth Circuit Ineffectively Applied an “Extra Elements” Test to Decide That Section 301 of the Copyright Act Preempted Claims for Larceny and Embezzlement of the Property While Overlooking the Complete Deprivation of the Possessory Rights of the Owner At The Core of the Complaint	16
1.	Larceny and embezzlement of a copy are equivalent to copyright infringement but larceny and embezzlement of the “original” property are not equivalent to copyright infringement, thus the ‘Extra Elements’ Test is not properly applied to theft crimes	16

2.	The Fourth Circuit missed the critical acts that underpinned the computer fraud claims of larceny and embezzlement.	17
3.	OpenRisk was deprived of possession and control of its property	20
B.	The Ultimate and Admitted Destruction [Deletion] of All OpenRisk's Property by MicroStrategy Established Additional Liability and the Imposition by The Trial Court and Affirmation by the Fourth Circuit of a Duty Upon OpenRisk to Further Show It Needed Its Property for a Particular Purpose or That MicroStrategy Was Requested to Preserve or Return Its Property Has No Basis in Law or Fact	23

III.

Review is Warranted Because the Fourth Circuit Improperly Found That a State Law Claim for Computer Trespass by Deletion of Intangible Property Requires the Owner to Demonstrate a Need or Use for the Property and Does Not Apply in a Case Where the Parties Had a Business Contract.....	28
CONCLUSION	31
APPENDIX:	
Published Opinion and Judgment of The United States Court of Appeals For the Fourth Circuit entered November 13, 2017.....	1a
Judgment of The United States District Court For the Eastern District of Virginia entered August 1, 2016.....	27a
Order of The United States District Court for the Eastern District of Virginia Re: Dismissing Plaintiff's Motion for Reconsideration entered August 1, 2016.....	28a

Order of The United States District Court for the Eastern District of Virginia Re: Denying Plaintiff's Motion for Reconsideration entered July 25, 2016.....	30a
Order of The Honorable Anthony J. Trenga Re: Granting Joint Motion to Set Briefing Schedule entered June 24, 2016.....	32a
Oral Ruling on Cross Motion for Summary Judgment of The Honorable Anthony J. Trenga entered June 24, 2016.....	34a
Order of The United States Court of Appeals For the Fourth Circuit Re: Denying Defendant's Petition for Rehearing, and Rehearing en banc entered December 11, 2017	42a
17 U.S.C. § 301(a)	44a
Va. Code Ann. § 18.2 – 111.....	45a
Va. Code Ann. § 18.2 – 152.3(2)	46a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S. Ct. 2505 (1986).....	6, 30
<i>Britt v. Commonwealth</i> , 276 Va. 569, 667 S.E.2d 763 (2008).....	27
<i>Carter v. United States</i> , 530 U.S. 255, 120 S. Ct. 2159 (2000).....	27
<i>Dowling v. United States</i> , 473 U.S. 207 (1985).....	<i>passim</i>
<i>Harper & Row Publishers, Inc. v. Nation Enterprises</i> , 471 U.S. 539 (1985).....	12, 19
<i>Internet Archive v. Shell</i> , 505 F. Supp. 2d 755 (D. Colo. 2007)	10
<i>Rosciszewski v. Arete Assocs.</i> , 1 F.3d 225 (4 th Cir. 1993).....	15
<i>United States v. Bottone</i> , 365 F.2d 389 (2d Cir. 1966)	10
<i>United States v. Gottesman</i> , 724 F.2d 1517 (11 th Cir. 1984).....	9

<i>United States v. Minor</i> , 756 F.2d 731 (9 th Cir. 1985)	9
<i>United States v. Smith</i> , 686 F.2d 234 (1982).....	8, 10, 11, 13
<i>United States v. Whetzel</i> , 191 U.S. App. D. C. 184 589 F. 2d 707 (D.C. 1978)	9

STATUTES

17 U.S.C. § 106.....	<i>passim</i>
17 U.S.C. § 301.....	8, 10, 15, 16
17 U.S.C. § 301(a)	3
17 U.S.C. § 506(a)	9
18 U.S.C.S. § 2314	<i>passim</i>
28 U.S.C. § 1254(1)	3
Va. Code Ann. § 18.2–111.....	3
Va. Code Ann. § 18.2-152.2	11
Va. Code Ann. §§ 18.2 – 152.3 <i>et seq</i>	2, 29
Va. Code Ann. § 18.2 – 152.3(2)	4
Va. Code Ann. § 18.2-152.4.A.3.....	29
Va. Code Ann. § 18.2-152.8	11

OTHER AUTHORITIES

1 Melville B. Nimmer & David Nimmer, <i>Nimmer on Copyright</i> § 1.01[B][1][a][iii] (2017)	7
2 LaFave & Scott § 8.11	27

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner OpenRisk, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion and Judgment of the United States Court of Appeals for the Fourth Circuit entered November 13, 2017, is reported at *OpenRisk, LLC v. MicroStrategy Services Corporation*, 876 F.3d 518 (4th Cir. 2017) and is reprinted in the Appendix (“App.”) hereto at pp. 1a – 26a.

The order of the Fourth Circuit denying rehearing and rehearing *en banc*, entered December 11, 2017, is reprinted in the Appendix hereto at pp. 42a – 43a.

The oral ruling of the United States District Court for the Eastern District of Virginia of June 24, 2017, granting Respondent’s Motion for Summary Judgment is reprinted in the Appendix hereto at pp. 34a – 41a.

JURISDICTION

On November 4, 2015, Petitioner brought suit against Respondent in the United States District Court for the Eastern District of Virginia, alleging tortious conduct by Respondent that resulted in Petitioner ultimately losing its confidential business information and intellectual property. Petitioner asserted claims including multiple violations of the Virginia Computer Crimes Act, VA Code Ann. §§ 18.2 – 152.3 *et seq.* (the “VCCA”), and related conspiracy counts resulting from the permanent deprivation to Petitioner of Petitioner’s original data that Petitioner stored in Respondent’s cloud computing space configured for Petitioner pursuant to the terms of a \$1million contract between the Petitioner and Respondent - Petitioner provided a copy to another one if its customers known by Respondent to be a competitor of Petitioner and subsequently secretly destroyed the original without notice to Petitioner, permanently depriving Petitioner of its property.

On January 15, 2016, the Honorable Anthony J. Trenga, for the United States District Court for the Eastern District of Virginia, denied (through an oral ruling) Respondent’s motion to dismiss which motion argued among other things that Petitioner’s claims under the VCCA were preempted by the Copyright Act. On June 24, 2016, the Honorable Trenga granted (through an oral ruling) Respondent’s motion for summary judgment dismissing Petitioner’s claims under the VCCA (and corresponding conspiracy claims) based upon Copyright preemption. *See App.* at pp. 34a – 41a.

The Court of Appeals entered its judgment on November 13, 2017 and denied a petition for

rehearing and rehearing en banc on December 11, 2017. *See* App. pp. 1a – 26a and 42a – 43a. This Court’s jurisdiction to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

17 U.S.C. § 301(a) provides in pertinent part:

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

Va. Code Ann. § 18.2–111 provides in pertinent part:

If any person wrongfully and fraudulently use, dispose of, conceal or embezzle any money, bill, note, check, order, draft, bond, receipt, bill of lading or any other personal property, tangible or intangible, which he shall have received for another or for his employer, principal or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another or by any court, corporation or company, he shall be guilty of embezzlement. Proof of embezzlement shall be sufficient to sustain the charge of larceny. Any person convicted hereunder shall be deemed

guilty of larceny and may be indicted as for larceny and upon conviction shall be punished as provided in § 18.2-95 or § 18.2-96.

Va. Code Ann. § 18.2 – 152.3(2) provides in pertinent part:

Any person who uses a computer or computer network, without authority and:

1. Obtains property or services by false pretenses;
 2. Embezzles or commits larceny; or
 3. Converts the property of another;
- is guilty of the crime of computer fraud.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

OpenRisk’s proprietary information, much of it resulting from a collaboration with IBM, was not in the public domain – MicroStrategy was privy to it because it was hired by OpenRisk pursuant to a \$1 million contract to host this OpenRisk proprietary information on a portion of MicroStrategy’s cloud computing space that was specially configured for OpenRisk pursuant to OpenRisk’s requirements. JA 1183 – 1185, 1455, 1866, 2055 – 2076. That is, MicroStrategy set up an environment on its cloud for OpenRisk pursuant to OpenRisk’s specifications so OpenRisk could store and use its proprietary information via MicroStrategy’s cloud.

But instead of serving as a custodian to OpenRisk, MicroStrategy working with Co-conspirators and without OpenRisk’s knowledge or

consent, first transferred OpenRisk's proprietary information to the cloud space it designed for OpenRisk and then transferred a copy of it to another MicroStrategy client which was known by MicroStrategy to be a competitor of OpenRisk's and which was comprised of the Co-conspirators including former OpenRisk employees. JA 340 at ¶ 28; JA 314 at ¶ 12; 317 at ¶¶ 36, 37; 342 at ¶¶ 36, 37; 941:13-24; *See also* JA 1318-1320; JA 1268-1270; JA 686 ¶¶ 19-21; Opening Brief at 21; JA 1075 at ¶26; JA 422 at ¶ 34; JA 1013. Subsequent to the transfer of OpenRisk's property, which MicroStrategy effected by duplicating OpenRisk's information and transferring the duplicate, without OpenRisk's knowledge or consent, MicroStrategy destroyed the original, OpenRisk's only copy of its proprietary information which resided on the MicroStrategy cloud, permanently depriving OpenRisk of its property. *Id.*; 320 at ¶¶ 47,48.

OpenRisk brought claims against MicroStrategy including claims for embezzlement and larceny under the Virginia Computer Crimes Act (the "VCCA") as well as statutory business conspiracy and common-law conspiracy. JA 46 -54.

In the case below, these core preliminary facts -that OpenRisk's proprietary information was first moved unlawfully and without the knowledge and consent of OpenRisk by MicroStrategy and the Co-conspirators to the cloud space at MicroStrategy are alleged and supported by the record evidence submitted by the non-movant OpenRisk. JA 1318-1320; JA 1268-1270; JA 686 ¶¶ 19-21; Opening Brief at 21; JA 1075 at ¶26; JA 422 at ¶ 34; JA 1013. *See*

also discussion at footnote 3 below.¹ The core facts that MicroStrategy copied OpenRisk’s proprietary information (JA 317 at ¶¶ 36, 37; 342 at ¶¶ 36, 37), gave it to OpenRisk’s known adversaries (JA 314 at ¶ 12; JA 941:13-24), then destroyed the original (JA 320 at ¶¶ 47,48) - among others are either undisputed or judicially admitted.

B. The District Court Proceedings

The district court on summary judgment ruling from the bench held, as a matter of first impression, that OpenRisk’s claims of embezzlement and larceny under the V.C.C.A. in Count IV were preempted by federal copyright law finding the elements of those claims to be equivalent to the protections afforded under the Copyright Act. MicroStrategy raised substantially the same arguments on preemption in its motion to dismiss, but the district court rejected the preemption arguments at that time denying the motion.

C. The Appellate Court Proceedings

The Fourth Circuit Court of Appeals affirmed the district court’s ruling that OpenRisk’s computer fraud claims under the VCCA were preempted by the federal Copyright Act because “at their ‘core’ they seek to impose liability for the unauthorized copying and distribution of data on OpenRisk’s cloud environment [on the MicroStrategy cloud], and thus are not ‘qualitatively different’ from copyright infringement claims.” App. at p. 8a. The panel

¹ “The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986).

provided an example that “every song purchase on iTunes is accompanied by an electronic promise not to violate the exclusive rights set out in the Copyright Act – and if state-law actions to vindicate those agreements were deemed qualitatively different from copyright infringement claims, there would be little left of Copyright Act preemption. *See* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.01[B][1][a][iii] (2017) (state-law claim for violation of ‘shrinkwrap license’ agreement is attempt to ‘vindicate rights indistinguishable from those accorded by Copyright Act’ and thus preempted).” App. at 16a. MicroStrategy and the Co-conspirators, however, did not have a license through any contract with OpenRisk or otherwise to deprive OpenRisk of its proprietary information and to use OpenRisk’s proprietary information as the iTunes user had, and unlike the iTunes user, MicroStrategy’s destruction of OpenRisk’s property permanently deprived OpenRisk of its possession and use.

**REASONS WHY CERTIORARI
SHOULD BE GRANTED**

I.

**REVIEW IS WARRANTED BECAUSE THE
OPINION OF THE FOURTH CIRCUIT
CONFLICTS WITH THE DECISION OF THIS
COURT IN *DOWLING V. UNITED STATES* AND
OF THE FIFTH CIRCUIT IN *UNITED STATES
V. SMITH* ON A FUNDAMENTAL ISSUE OF
THE SCOPE OF COPYRIGHT PROTECTION**

On November 13, 2017, the Fourth Circuit issued an opinion holding that claims for larceny and embezzlement under the Virginia Computer Crimes Act are equivalent to the infringement of copyrights conferred under Section 106, and thus preempted under Section 301, of the Copyright Act of 1976. Although this Court held in *Dowling v. United States*, 473 U.S. 207 at 217 (1985), that the interstate shipment of copyright infringing goods was not theft for purposes of the National Stolen Property Act, 18 U.S.C.S. § 2314, the Supreme Court has never decided any case under § 301 of the Copyright Act of 1976, and more specifically has never decided whether a theft claim is preempted under § 301 as equivalent to copyright infringement. Review of the Fourth Circuit's decision is necessary and appropriate because it conflicts with the decision of this Court in *Dowling v. United States*, 473 U.S. 207 (1985) and a prior decision of the Fifth Circuit in *United States v. Smith*, 686 F.2d 234 (1982), both of which hold that crimes of theft and copyright infringement are not equivalent.

In *Dowling v. United States*, this Court reversed the Ninth Circuit's affirmance of a conviction for violation of the National Stolen Property Act, 18 U.S.C.S., § 2314, and held that the interstate transportation of bootleg phonorecords which concededly constituted copyright infringement in violation of 17 U.S.C. § 506(a), did not equate to the theft, conversion or fraud contemplated by Congress in enacting § 2314. *Dowling*, at 217. The physical bootleg phonorecords infringed the copyrights because of what was recorded on them, but the phonorecords themselves were not goods contended by the government to have been wrongfully acquired. *Id.* at 214. The rationale of *Dowling* used by this Court was that the language of § 2314 required that the "goods, wares, [or] merchandise" be "the same" as those "stolen, converted, or taken by fraud," and that this provision meant there was a required "identity" between those goods "unlawfully obtained and those eventually transported[.]" *Dowling*, at 216. Because the phonorecords themselves were not goods that were wrongfully taken, this Court held that such goods were not "the sorts of goods whose interstate shipment § 2314 makes criminal." *Id.* at 218 (footnote omitted).

The decision by this Court in *Dowling* in 1985 abrogated decisions in the Ninth, Eleventh, and District of Columbia Circuit Courts of Appeals which had held that copyright infringement and theft ("stolen, converted, or taken by fraud") were equivalent in National Stolen Property Act cases, 18 U.S.C.S. § 2314. See *United States v. Minor*, 756 F.2d 731, 735 (9th Cir. 1985); *United States v. Gottesman*, 724 F.2d 1517, 1519-1521 (11th Cir. 1984); and *United States v. Whetzel*, 191 U.S. App. D. C. 184, 187, n. 10, 589 F.2d 707, 710, n. 10 (D.C. 1978).

Also in the Fifth Circuit, three years before this Court's decision in *Dowling* the court in *United States v. Smith*, 686 F.2d 234, 241 (5th Cir. 1982), determined "it was not at liberty to find that copyright infringement -- at least the infringement involved in the case *sub judice* -- is the equivalent of stealing, converting, or taking by fraud." See also in the Tenth Circuit, *Internet Archive v. Shell*, 505 F. Supp. 2d 755, 764 (D. Colo. 2007) ("theft necessarily involves the permanent deprivation of the owner's property, a claim that is not part of copyright infringement").

In pertinent part, the *Smith* court held that "a copyright is independent of both its physical manifestation and the very thing that is copyrighted." *Smith* at 240, citing *United States v. Bottone*, 365 F.2d 389, 393 (2d Cir. 1966) (other citations omitted). Therefore, under the decisions of this Court in *Dowling*, of the Fifth Circuit in *Smith*, and in District Court decisions like *Internet Archive* in the Tenth Circuit, infringement of the copyright cannot possibly be the same as, or equivalent to, theft or stealing of property.

The Fourth Circuit's decision in *OpenRisk v. MicroStrategy* runs afoul of this operative premise in this Court's decision in *Dowling* and conflicts with these Circuit Court and District Court decisions. It is important to note too for purposes of maintaining a clear analysis that, in the Fourth Circuit's *OpenRisk* decision, the rationale underlying the holding that copyright infringement equated to larceny and embezzlement (thus preempting such claims under Section 301 of the Copyright Act) did not distinguish or rely in any way upon the fact that it was intangible property (stored computer data and software) that

was copied or stolen, and in fact, nowhere in the Fourth Circuit’s Opinion do the words “tangible” or “intangible” appear. App. 1a-24a. Moreover, the Virginia Computer Crimes Act (“VCCA”), which was the source of OpenRisk’s statutory embezzlement, larceny and conversion claims in Count IV of the Complaint, J.A. 51, prohibits the larceny, embezzlement and conversion of property, including computer data, computer programs and computer software, *regardless* of whether it is tangible or intangible. Va. Code Ann. § 18.2-152.2; § 18.2-152.8.

A. This Court in *Dowling v. United States* and the Fifth Circuit in *United States v. Smith* held that the “bundle of rights” conferred to the copyright owner by Section 106 of the Copyright Act are limited; such property rights are “distinct from the possessory interest” of the owner of property, thus do not equate to theft

In *Dowling*, this Court distinguished the limited rights of a copyright holder from the “possessory interest of the owner of simple ‘goods, wares, [or] merchandise” protected by the National Stolen Property Act and on that basis found that “interference with copyright does not easily equate with theft, conversion, or fraud.” *Dowling* at 217.

Dowling was of course a criminal case and on one side, the defense conceded and did not appeal the convictions that it had infringed copyright when it transported infringing goods interstate. *Id.* at 212. The defense did though appeal convictions for theft under the National Stolen Property Act, 18 U.S.C.S. § 2314 *id.* at 212, and argued that “the goods shipped were not ‘stolen, converted or taken by fraud.’” *Id.* at

214. On the other side, the Government maintained that though the defendant Dowling did not “wrongfully c[o]me by the phonorecords actually shipped or the physical materials from which they were made[,]” *Id.* at 214, “the shipments come within the reach of § 2314 because the phonorecords physically embodied performances of musical compositions that Dowling had no legal right to distribute.” *Id.* 214-215.

This Court summed up the Government’s position as “mak[ing] theft, conversion, or fraud equivalent to wrongful appropriation of statutorily protected rights [not goods] in copyright.” *Dowling* at 216. Further, the Court explained that: “[t]he copyright owner, however, holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections. ”Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright,” which include the rights “to publish, copy, and distribute the author’s work.” *Id.* at 216-217, *quoting Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546-547 (1985) and *citing* 17 U.S.C.S. § 106.

The Court then distinguished the rights of the copyright holder as “hav[ing] a character distinct from the possessory interest of the owner of simple ‘goods, wares, [or] merchandise,’ [because] the copyright holder’s dominion is subjected to precisely defined limits.” *Dowling* at 217. These rights of the copyright holder are subject to infringement but as this Court further explained, an infringer “does not assume physical control over the copyright, nor does he wholly deprive its owner of its use. While one may

colloquially link infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud.” *Id.* at 217-218. Thus, the Court held that the language of § 2314 — “stolen, converted or taken by fraud” — did not cover the infringing goods shipped by Dowling. *Id.* at 218.

Similarly, in *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982), the defendant had stipulated to facts establishing the commission of copyright infringement, but argued that “his copyright infringement is not the equivalent of having ‘stolen, converted, or taken by fraud’ as that phrase is used in the NSPA section 2314[]” and “that copyrights are not ‘goods, wares, [or] merchandise,’ such that the provisions of the NSPA are implicated.” *Smith* at 239. The Fifth Circuit concluded “that, at least under the facts of the case *sub judice*, copyright infringing activity is not covered by section 2314.” *Id.*

B. The Fourth Circuit’s preemption decision equates infringement of the “bundle of rights” conferred to the copyright owner by Section 106 of the Copyright Act with Larceny and Embezzlement under the Virginia Computer Crimes Act

The Fourth Circuit’s decision ultimately holds that copyright infringement by *copying* and transferring or distributing a *copy* of the OpenRisk computer data is equivalent to larceny or embezzlement of the OpenRisk property. App. 16a (embezzlement preempted by Copyright Act); 17a (larceny preempted by Copyright Act). Petitioner respectfully suggests that this holding is counter-

intuitive from the outset because copying and distributing copies does not entail taking *the* property or taking *the original* of the property. It is also respectfully submitted that the reason for this counter-intuitive holding is that the “extra elements” test employed by the Fourth Circuit is inapplicable to claims of interference with the possessory rights of property and thus with rights distinct from the rights of the copyright holder.

It is noted that the analysis of this Court in *Dowling*, as discussed above, did not employ an “extra elements” test to compare the elements of theft under the National Stolen Property Act § 2314 with the elements of copyright infringement, yet it was still able to decide that the theft under that Act was not equivalent to copyright infringement by discussing the limited rights of a copyright holder as “distinct” from the “possessory rights” of the owner of goods. Therefore, Petitioner respectfully submits that the Fourth Circuit decision should be reversed by this Court because the “extra elements” test should not be used to decide equivalence of claims to copyright infringement when it can be determined at the threshold that the claims interfere with “possessory rights” versus the limited rights of the copyright holder. *See Dowling* at 216-217.

II.

THE POSSESSORY RIGHTS OF AN OWNER OF TANGIBLE OR INTANGIBLE PROPERTY ARE THE SAME AND ARE NOT EQUIVALENT TO THE “BUNDLE OF RIGHTS” CONFERRED BY SECTION 106 OF THE COPYRIGHT ACT AND THIS COURT SHOULD REVERSE THE FOURTH CIRCUIT’S DECISION

The Fourth Circuit’s decision and *de novo* review held that OpenRisk’s computer fraud claims for larceny and embezzlement under the Virginia Computer Crimes Act (Claim IV, J.A. 51), were preempted by Section 301 of the Copyright Act. App. at 8a-17a. Each of these claims is determined to be equivalent to, or not qualitatively different from, a copyright infringement claim. App. at 16a, 17a. The court reached this conclusion by employing the “extra elements” test set forth in *Rosciszewski v. Arete Assocs.*, 1 F.3d 225, 229-230 (4th Cir. 1993); App. at 8a-17a.

A. The Fourth Circuit Ineffectively Applied an “Extra Elements” Test to Decide That Section 301 of the Copyright Act Preempted Claims for Larceny and Embezzlement of the Property While Overlooking the Complete Deprivation of the Possessory Rights of the Owner At The Core of the Complaint

- 1. Larceny and embezzlement of a copy are equivalent to copyright infringement but larceny and embezzlement of the “original” property are not equivalent to copyright infringement, thus the ‘Extra Elements’ Test is not properly applied to theft crimes.**

The Fourth Circuit applied an “extra elements” test to decide the issue of whether Section 301 of the Copyright Act of 1976 preempted OpenRisk’s claims of larceny and embezzlement under the Virginia Computer Crimes Act. App. 8a-17a. However, because the Fourth Circuit overlooked at the outset of its ruling the fact that OpenRisk complained of an initial unlawful transfer of its property [not a copy of it] to the MicroStrategy cloud in October 2011 and not just the unlawful transfer of a copy of the property to Spectant in December 2011, the analysis by the Fourth Circuit of the claims of larceny and embezzlement inexorably became an analysis of claims of larceny and embezzlement of *copies* of the property instead of larceny and embezzlement of *the property itself*. As a result of this misunderstanding and oversight, the larceny and embezzlement claims were deemed equivalent to the theft of mere copies of the property and thus equivalent to copyright

infringement. Thus, in retrospect, the application of the “extra elements” test should not have been applied by the Fourth Circuit, since that test of what the elements of a theft crime are cannot yield a *qualitative difference* between the theft crime and copyright infringement if the property understood to be stolen is a mere copy of the property but would yield a qualitative difference if the property understood to be stolen is the property itself.²

2. The Fourth Circuit missed the critical acts that underpinned the computer fraud claims of larceny and embezzlement.

In order to see how the court committed error in this case both in its review of the facts and in its conclusions of law, it is critically important to carefully examine the Fourth Circuit’s opinion for what it perceived and understood to be the acts that took place and to be at the “core” of the complaint. From that examination it will clearly be seen that the Fourth Circuit missed the critical initial acts in the complaint that underpinned the computer fraud claims of larceny and embezzlement. By missing these critical initial actions, the Fourth Circuit misperceived upon what in total OpenRisk was basing its claims of larceny and embezzlement. The result of that misperception is a failure by the Fourth Circuit to see that OpenRisk was complaining about

² In the context of intangible property such as computer data as in this case, Petitioner respectfully submits that the lack of possession of any copies by the owner and the complete deprivation of the possessory rights is what distinguishes the transfer of a copy of the property equivalent to copyright infringement from the transfer of “the property” in terms of possessory rights being violated. See Dowling at 217.

the interference with its possessory rights of an owner, which, as taught in the *Dowling* case, are distinguishable from the rights conferred on a copyright holder by Section 106 of the Copyright Act of 1976.

In just the second paragraph of the text of the Opinion, App. at 3a, the Fourth Circuit missteps and overlooks the critical initial act that took place which is also at the core of the complaint. It is this early misstep that unfairly dooms OpenRisk's larceny and embezzlement claims and incorrectly determines they are "equivalent" to copyright infringement

In that second paragraph of the Opinion, the court writes "*[i]n particular, OpenRisk alleges that at the direction of its recently departed officers and without its knowledge, MicroStrategy copied and transferred data from the OpenRisk cloud environment to a new environment established for Spectant. And then, according to OpenRisk, MicroStrategy deleted the data from OpenRisk's environment, without the notice of termination required by the parties' contract. When OpenRisk became aware of the copying and deletion of its data, it sued MicroStrategy for computer fraud under Virginia's Computer Crimes Act and for other state-law violations.*" App. at 3a (Emphasis added).

This foregoing highlighted paragraph in the Opinion clearly attempts to summarize the gist of the complaint at the outset prior to beginning the analysis. However, it is in this very summary that the Fourth Circuit commits a fundamental misstep because it skips over and fails to understand that OpenRisk is also complaining about what happened to its data *before* it was copied and transferred to

Spectant. By overlooking and not including in this summary paragraph what took place and what OpenRisk complained of *before* the copying and transfer to Spectant, it is almost inevitable that the Opinion's holding will be that the core of the complaint is the copying and transfer to Spectant, and, that the copying and transfer is simply equivalent to copyright infringement, because "Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright," "which include the rights to 'publish, copy and distribute [transfer] the author's work.'" *Dowling* at 216-217, *citing and quoting Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546-547 (1985); 17 U.S.C. § 106.

What exactly was this oversight? Specifically, the critical oversight made by the Fourth Circuit in this case is that OpenRisk also complained and alleged that *at the outset of events*, and *before* any copying and transferring of the copy to Spectant had occurred in December 2011, that OpenRisk's property was unlawfully transferred by MicroStrategy and the Co-conspirators *in October 2011* onto the cloud at MicroStrategy.

Thus, the Fourth Circuit overlooked the following critical facts alleged in OpenRisk's complaint: "[a]lthough OpenRisk did not the know it at the time, immediately after the Former Officers resigned, on or about October 12, 2011, MicroStrategy began to actively work with the Co-conspirators to unlawfully transfer OpenRisk's confidential intellectual property and confidential and proprietary business information and trade secrets onto the cloud provided by MicroStrategy pursuant to the Cloud Contract, by giving them unauthorized access to

OpenRisk's cloud environment which had been built by MicroStrategy in accordance with proprietary architectural drawings provided to MicroStrategy by OpenRisk. Included in the information that was transferred was OpenRisk's confidential customized MicroStrategy metadata, IBM/Netezza database dumps, and OpenRisk Web customizations." J.A. 38, Complaint ¶ 76.

3. OpenRisk was deprived of possession and control of its property.

In sum, the initial actions complained of which the Fourth Circuit overlooks are that, without OpenRisk's knowledge, MicroStrategy and the Co-conspirators *unlawfully transferred*, not a copy of OpenRisk's property, but the OpenRisk property *itself* onto the cloud. *Id.* It is that unlawful transfer of the original property which is at the core of the OpenRisk claims, including its claims for larceny and embezzlement. This feature of the claim that the original of OpenRisk's property was unlawfully transferred and that OpenRisk did not know that its property was transferred by MicroStrategy and the Co-conspirators onto the cloud on or about October 12, 2011, immediately after the Former Officers resigned, *is completely missing* from the Fourth Circuit Opinion and analysis.³ Without that feature of the complaint

³ OpenRisk's Opening Brief on appeal set forth a description of multiple pieces of evidence showing or providing the basis for a reasonable inference as the non-movant with respect to the grant of MicroStrategy's motion for summary judgment, that OpenRisk did not know that MicroStrategy had its property. OpenRisk's Opening Brief at 21. These pieces of evidence included: 1) OpenRisk sent a letter dated December 13, 2011 to MicroStrategy informing MicroStrategy that it had sued its

former employees in an effort to obtain its property. *Id.* MicroStrategy was silent on the fact that MicroStrategy at that point, not the employees, had OpenRisk's property. JA 1068-70. Why would OpenRisk sue its former employees in court in Boston to regain its property yet only write to MicroStrategy and inform MicroStrategy of that suit, without asking in the same letter that MicroStrategy return the property to OpenRisk? The reasonable inference why OpenRisk wrote such letter to MicroStrategy without asking MicroStrategy to return its property to it is simply that OpenRisk did not know MicroStrategy had the property yet this strong inference in favor of OpenRisk is not made or even discussed by the lower court or the Fourth Circuit each of which though presumed OpenRisk knew MicroStrategy had its property because each court determined that OpenRisk *should have told MicroStrategy that OpenRisk needed its property*. "But as the district court emphasized, OpenRisk did not request that MicroStrategy preserve or return the information in question." App. at 19a. This failure to infer in favor of the non-movant that OpenRisk did not know and instead presume that it did know MicroStrategy had its property is unfair and grounds for reversal. Additional pieces of evidence supporting that OpenRisk did not know MicroStrategy had its property were two false affidavits filed by two of the former employees filed in the Massachusetts litigation stating that MicroStrategy had refused to work with them, further enforcing OpenRisk's (erroneous understanding that MicroStrategy was not working with the former employees (and thus did not have the missing OpenRisk property either). Opening Brief at 21; JA 1075 at ¶26; JA 422 at ¶ 34. Finally, also supporting the fact that OpenRisk did not know MicroStrategy had its property *and that MicroStrategy knew OpenRisk did not know it had its property* is a letter that MicroStrategy's lawyer sent to OpenRisk dated March 5, 2013 which stated that MicroStrategy "did an investigation as to whether any data exists on the OpenRisk cloud environment and determined that no such data exists." Opening Brief at 21; JA 1013. This letter did not mention that the property had existed on the cloud environment but that it had been deleted and did not mention a copy had been given to Spectant. *Id.* This letter was not discussed by either of the lower court or the Fourth Circuit in their rulings and the obvious inference in favor of the non-movant that OpenRisk did not know that MicroStrategy had the property and that MicroStrategy knew OpenRisk did not

being understood by the Fourth Circuit, there is no way the claims for larceny and embezzlement could be understood either and there is no way that the partial understanding of the claims that the Fourth Circuit did have, namely that only a *copy* of OpenRisk's property was made and given to Spectant, could ever escape the Fourth Circuit's ultimate flawed conclusion that the claim was anything but the equivalent of copying and distributing of the copy akin to copyright infringement. Also critically related to this oversight of the unlawful transfer of the property itself in October 2011 to the cloud as distinguished from a mere copy being transferred from OpenRisk's cloud space to Spectant's cloud space in December 2011, is the additional oversight by the Fourth Circuit of the fact that "MicroStrategy and the Co-conspirators knew that *OpenRisk did not possess copies* of its confidential intellectual property and confidential and proprietary business information and trade secrets *and that their conduct deprived OpenRisk of possession and control of its property.*" J.A. at 30, ¶ 43 Complaint. (Emphasis added). The Fourth Circuit's Opinion is likewise completely devoid of any indication that it understood OpenRisk's claims included that it did not possess copies of its property following the unlawful transfer of its property in October 2012 and that the actions of MicroStrategy and the Co-conspirators had "deprived OpenRisk of possession and control of its property."

These facts overlooked by the Fourth Circuit are central to the proper analysis of OpenRisk's

know it had its property and, moreover no inference that the letter sought to conceal the facts that MicroStrategy had the OpenRisk property, that it copied and transferred the copy, and that it had deleted the original to conceal these facts was made by the two courts.

claims for embezzlement and larceny of its property and this Court should reverse the Fourth Circuit's decision on this ground alone.

B. The Ultimate and Admitted Destruction [Deletion] of All OpenRisk's Property by MicroStrategy Established Additional Liability and the Imposition by The Trial Court and Affirmation by the Fourth Circuit of a Duty Upon OpenRisk to Further Show It Needed Its Property for a Particular Purpose or That MicroStrategy Was Requested to Preserve or Return Its Property Has No Basis in Law or Fact

Another pointed passage in the Fourth Circuit Opinion also demonstrates and buttresses the above conclusion that the Fourth Circuit did not understand the actions and entire sequence of events complained of, resulting in a limited understanding of the facts which improperly doomed the larceny and embezzlement claims. This is the second passage showing the Fourth Circuit oversight. At App. 5a, the Opinion states “[s]pecifically, OpenRisk points in its complaint to two key acts by MicroStrategy. First, on December 13, 2011, just hours after receiving a cease-and-desist letter from OpenRisk urging it to “cease and refrain from doing any work and making any efforts to commercialize the OpenRisk property with [Ott, Mathai, and Murnane],” J.A. 1068-70, MicroStrategy copied the data from the OpenRisk cloud environment and transferred it to a new environment for Spectant. And second, on or around January 11, 2012, and after OpenRisk failed to make its first quarterly payment under the contract, MicroStrategy deleted the entire OpenRisk

environment and all of its contents from its servers.” (Brackets, internal citation in original; emphasis added).

Again, this demonstrates that what the Fourth Circuit understood to be the “two key acts by MicroStrategy” begins with the copying and transfer of the copy, which, as previously indicated, is what inevitably leads to a holding of equivalence of the larceny and embezzlement claims to copyright infringement. The Fourth Circuit overlooked that the transfer of the property itself, not a copy of it, was the earlier “key act” by MicroStrategy and this taking away of OpenRisk’s property by MicroStrategy is the foundation for a claim of larceny or theft by it of that property, in short, not an equivalency to copyright infringement’s copying and distribution rights, but an interference with a property owner’s possessory rights.

This is where *Dowling*’s discussion of the difference and limitation upon the rights of a copyright holder and the owner of property is critical. As stated in *Dowling* in pertinent part, “[t]hus the property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple “goods, wares, [or] merchandise,” for the copyright holder’s dominion is subjected to precisely defined limits....the infringer invades a statutorily defined province guaranteed to the copyright holder alone. *But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially link infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud. As a result, it fits but awkwardly*

with the language Congress chose—“stolen, converted or taken by fraud” – to describe the sorts of goods whose interstate shipment § 2314 makes criminal.” Dowling at 217-218 (Emphasis added).

OpenRisk’s claims thus are more correctly understood as having its possessory ownership interests being interfered with, of being “wholly deprived” of its property and being left without copies of their property. As in the complaint, OpenRisk “did not possess copies of its...property...and...[MicroStrategy’s and the Co-conspirators’] conduct deprived OpenRisk of possession and control of its property.” J.A. at 30. (Emphasis added).

This fuller understanding of the claims and what the key initial acts were underpinning the larceny and embezzlement claims, was also summarized in OpenRisk’s opening Appeal Brief as follows:

“OpenRisk’s proprietary data had been transferred to the cloud space established by MicroStrategy for OpenRisk *unbeknownst to OpenRisk* two days after [Former OpenRisk Chief Technology Officer] Mathai and the two others [Former OpenRisk President Ott and Former OpenRisk Chief Scientist Murnane] resigned.” OpenRisk’s Appeal Brief, p. 7. (Italics added).

“So with OpenRisk’s property transferred to Spectant, and subsequently modified, and with no copy, OpenRisk was deprived of its data that had been deposited onto MicroStrategy’s system.” OpenRisk’s Appeal Brief, p. 20.

The key oversight by the Fourth Circuit in this case is that OpenRisk was deprived of all of its property from the beginning of the transfer of the property to the cloud at MicroStrategy and had no copy or original to use. This key distinction, between complete deprivation of possessory ownership rights, and the infringement of copyholder rights, including the right to use, to publish and to distribute, provided under § 106 of the Copyright Act, is at the fundament of this Court's holding in *Dowling* that the Petitioner's shipment of bootleg phonorecords concededly infringed copyrights but did not constitute the theft of property, the "goods, wares, [or] merchandise" as contemplated by the National Stolen Property Act, § 2314. *Dowling*, at 217.

This same key distinction was missed by the Fourth Circuit below and as a result, the copying of OpenRisk's computer data, and the giving of it to the former employees of OpenRisk and their company was viewed essentially in isolation as copyright infringement, while missing the fact that OpenRisk had been deprived of its property and had no copy of it. It was not the case that a copy of OpenRisk's computer property was made, and given to someone else, while Openrisk was able to continue its business. Far from it. Rather, MicroStrategy *took control of OpenRisk's property* which had—unknown to OpenRisk—been stored in a "cloud space" provided by MicroStrategy, then MicroStrategy secretly made a copy of it, gave that copy away to the former employees and then deleted the original left in the cloud space. Petitioner respectfully submits that is a theft of the property as the facts alleged in the case include a taking of the property out of the control of OpenRisk, including any and all copies and originals of the computer data, thus wholly depriving OpenRisk

of any use or access to it. An item is taken, for purposes of larceny, when a defendant secures dominion or absolute control over the property. *Carter v. United States*, 530 U.S. 255, 279, 120 S. Ct. 2159, 2174 (2000), *citing and quoting* 2 LaFave & Scott § 8.11, at 439 ("Just as larceny requires that the thief both 'take' (secure dominion over) and 'carry away' (move slightly) the property in question, so too robbery under the traditional view requires both a taking and an asportation (in the sense of at least a slight movement) of the property."). "An item is taken, for purposes of larceny, when a defendant secures dominion or absolute control over the property." *Britt v. Commonwealth*, 276 Va. 569, 574, 667 S.E.2d 763, 766 (2008) (citations omitted). This is not a case of mere copyright infringement though treated as such in the Fourth Circuit's decision.

The result of the Fourth Circuit's oversight and misunderstanding of the facts of the case including OpenRisk being completely deprived of the property when it was unlawfully transferred to the cloud in October 2011, including not having any copies of it, resulted in a holding that "[t]he core of OpenRisk's claim remains the unauthorized copying and transfer of its data [to Spectant in December 2011], and that claim is 'equivalent to' a copyright infringement action and thus preempted." App. at 17a. As a result, Petitioner respectfully submits that the conflicting opinion by the Fourth Circuit is in error and that summary reversal of the decision is appropriate. Assuming this Court does not summarily reverse the decision, Petitioner respectfully submits that review by this Court is warranted.

III.

Review is Warranted Because the Fourth Circuit Improperly Found That a State Law Claim for Computer Trespass by Deletion of Intangible Property Requires the Owner to Demonstrate a Need or Use for the Property and Does Not Apply in a Case Where the Parties Had a Business Contract

The Fourth Circuit also erred by affirming the trial court's dismissal of OpenRisk's VCCA claim for the deletion of OpenRisk's computer data which was based on the finding that OpenRisk had not demonstrated its property was "needed by OpenRisk for any particular purpose or that MicroStrategy was told [OpenRisk] needed it for any particular purpose." Opinion at 17 quoting and citing the lower court at J.A. 528.

On appeal, OpenRisk argued that there was no "authority or precedent or any interpretation or terms in the [parties'] cloud contract" that existed or were even cited by the lower court for the dismissal of OpenRisk's VCCA deletion claim or for the premise that OpenRisk had some duty to show a need for its property or that it had told MicroStrategy of such a need. OpenRisk's Opening Brief at 49. In short, OpenRisk argued on appeal that the trial court had inserted a duty on the victim of the crime to notify the perpetrator of the deletion/destruction of property of a need for the property it owned, without any basis or authority. The Fourth Circuit implicitly affirmed the finding that there was such a duty on OpenRisk, yet did so without citation to any authority or express explanation for the source of the duty. App. at 19a.

The Fourth Circuit stated only that “[district court] made a fact-specific determination that in this case, OpenRisk had proffered no evidence that it had any use or need for the data in question at the time it was deleted. We agree with that assessment of the record.” *Id.* This simply repeats the inadequate reasoning of the district court. Moreover, it is sufficient to note that, nowhere in the language of the Virginia Computer Crimes Act is there a provision that exculpates a party for deleting the property of another if the owner does not show a need for its property for a particular purpose and the offense of deleting the property of another does not require that the victim of the crime show or inform the perpetrator of a need of the property for a particular purpose. Va. Code Ann. §§ 18.2-152.3 *et seq.*

The Fourth Circuit also affirmed the dismissal of the VCCA § 18.2-152.4.A.3 based upon the sheer fact that the parties had a contract, even though as OpenRisk correctly argued, the contract had no provision for deletion of the OpenRisk property. App. at 20a. The contract had a provision for deletion of the MicroStrategy metadata, which was licensed by OpenRisk, but the claim by OpenRisk that *OpenRisk’s property* was deleted in violation of the VCCA § 18.2-152.4.A.3 is not a “failure to comply with the terms” of the parties’ contract as the Fourth Circuit couched it. App. at 20a. Moreover, there is no term in the parties’ contract providing for the destruction or deletion of OpenRisk’s property and a complaint and claim that such deletion and destruction took place is criminal under the VCCA, Va. Code Ann. § 18.2-152.4.A.3, and the mere existence of a contract between the parties—a contract devoid of any terms allowing or even relating to deletion by the custodian-party of the owner-party’s property-- should not be the

basis for exonerating the perpetrator from commission of the crime.

It is also respectfully noted that, if the Fourth Circuit had understood, as discussed above, that the complaint and facts included at the outset an unlawful transfer on or about October 12, 2011 of OpenRisk's property to the cloud at MicroStrategy, then the deletion in January 2012 would be seen in a different light, and that the deletion in January 2012, could be inferred as an attempt to cover up the unlawful prior transfer in October 2011, instead of seen as a mere innocent discarding of property that MicroStrategy had not been notified was needed. OpenRisk, again, as discussed above, did not know of this unlawful transfer and was looking for it, as indicated in the cease and desist letter (JA 1068-70) referred to by the Fourth Circuit. App. at 5a. The Fourth Circuit's analysis and opinion assumed OpenRisk knew that its property was unlawfully transferred to MicroStrategy's cloud on October 12, 2011, but that assumption is unreasonable given the content of the cease and desist letter informing MicroStrategy that it had sued its Former Officers for the return of its property while it was sitting on the cloud at MicroStrategy,. As discussed above, OpenRisk did not receive the justifiable inference in its favor it should have with regard to the lack of knowledge of the unlawful transfer as required with respect to a non-movant on a summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986).

CONCLUSION

The petition for writ of certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Fourth Circuit Court of Appeals.

Respectfully submitted.

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