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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

DENNIS MONTGOMERY and the  
MONTGOMERY FAMILY TRUST,

Plaintiffs,

v.

ETREPPID TECHNOLOGIES, LLC;  
WARREN TREPP; and the UNITED  
STATES DEPARTMENT OF DEFENSE,

Defendants.

AND ALL RELATED MATTERS.

3:06-CV-00056-PMP-VPC  
BASE FILE

3:06-CV-00145-PMP-VPC

ORDER

Presently before the Court is Dennis Montgomery and the Montgomery Family Trust’s (“Montgomery”) Motion to Dismiss First Amended Complaint for Lack of Subject Matter Jurisdiction (3:06-CV-00145-PMP-VPC, Doc. #16, Ex. 1), filed on February 9, 2006 while this matter still was pending in Nevada state court. eTreppid Technologies, LLC (“eTreppid”) filed an Opposition (3:06-CV-00145-PMP-VPC, Doc. #16, Ex. 3) on February 16, 2006. Montgomery filed a Reply (3:06-CV-00145-PMP-VPC, Doc. #16, Ex. 5) on March 3, 2006.

This case concerns a dispute between eTreppid and Montgomery as to who owns certain computer software source code. eTreppid brought suit in Nevada state court against Montgomery, asserting claims for misappropriation of trade secrets, breach of contract, conversion, breach of fiduciary duty, bad faith, declaratory relief, and intentional

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1 interference with contract. (Pl. eTreppid Technologies, LLC’s First Am. Compl. [3:06-CV-  
2 00056-PMP-VPC, Doc. #15, Ex. 14].) While this matter was before the Nevada state  
3 court,<sup>1</sup> Montgomery moved to dismiss eTreppid’s First Amended Complaint, arguing the  
4 state court lacked subject matter jurisdiction because the Copyright Act preempts  
5 eTreppid’s state law claim for misappropriation of trade secrets. Montgomery argued  
6 eTreppid asserts ownership interests in Montgomery’s copyright-protected derivative works  
7 and to determine ownership the state court would have to decide copyright questions, and  
8 thus eTreppid’s trade secrets claim is preempted.<sup>2</sup>

9 eTreppid responds that its misappropriation of trade secrets claim is not  
10 preempted because it does not assert state law rights equivalent to copyright rights. In  
11 particular, eTreppid argues its misappropriation of trade secrets claim alleges the disputed  
12 source code qualifies as a trade secret and Montgomery breached fiduciary duties which  
13 makes eTreppid’s state law claim qualitatively different from a copyright claim.<sup>3</sup>

14 Section 301 of the Copyright Act preempts “‘any rights under the common law  
15 or statutes of a State that are equivalent to copyright and that extend to works, within the  
16 scope of the Federal copyright law.’” Laws v. Sony Music Entm’t, Inc., 448 F.3d 1134,  
17 1137 (9th Cir. 2006) (quoting H.R. Rep. No. 94-1476, at 130 (1976)); see also 17 U.S.C.  
18 § 301(a). The Copyright Act preempts a state law claim if (1) the state law claim’s subject

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20 <sup>1</sup> The United States Department of Defense removed the action to this Court upon being served  
21 with Montgomery’s First Amended Answer and First Amended Counterclaim. (Notice of Removal  
[3:06-CV-000145, Doc. #1].)

22 <sup>2</sup> The case having been removed to federal court, Montgomery’s argument that the state court  
23 lacked subject matter jurisdiction is moot.

24 <sup>3</sup> In the reply brief, Montgomery argues eTreppid’s claims for conversion, breach of fiduciary  
25 duty, breach of the implied covenant of good faith, declaratory relief, and intentional interference with  
26 a contractual relationship also are preempted. The Court will not consider issues raised for the first  
time in a reply brief. Fifty-Six Hope Road Music, Ltd. v. Mayah Collections, Inc., No. 2:05-CV-  
01059-KJDGWF, slip copy at 2, 2006 WL 1687451, \*2 (D. Nev. 2006).

1 matter falls within the subject matter of copyright as described in 17 U.S.C. § 102 and  
2 § 103<sup>4</sup> and (2) the asserted state law rights are equivalent to the rights contained in 17  
3 U.S.C. § 106, which sets forth a copyright holder's exclusive rights. Laws, 448 F.3d at  
4 1137-38; 17 U.S.C. § 106 (granting copyright owners the exclusive rights of reproduction,  
5 adaptation, publication, performance, and display). To avoid preemption, "the state cause  
6 of action must protect rights which are qualitatively different from copyright rights. . . .  
7 The state claim must have an 'extra element' which changes the nature of the action."  
8 Valente-Kritzer Video v. Pinckney, 881 F.2d 772, 776 (9th Cir. 1989) (quotation omitted).

9           The United States Court of Appeals for the Ninth Circuit has not addressed  
10 whether the Copyright Act preempts a claim for misappropriation of trade secrets under  
11 Nevada law. However, the Ninth Circuit has found the Copyright Act does not preempt a  
12 misappropriation of trade secrets claim pursuant to California's Uniform Trade Secrets Act  
13 because such a claim "does not involve a legal or equitable right equivalent to an exclusive  
14 right of a copyright owner under the Copyright Act, but only prohibits certain means of  
15 obtaining confidential information . . . ." S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1090  
16 n.13 (9th Cir. 1989); see also Cal. Civ. Code §§ 3426 et seq. In reaching this conclusion,  
17 the Ninth Circuit referred to California Civil Code § 3426.1's definition of  
18 "misappropriation" through "improper means." S.O.S., Inc., 886 F.2d at 1089 n.12 (citing  
19 Cal. Civ. Code § 3426.1). The Nevada Uniform Trade Secrets Act contains nearly identical  
20 language defining "misappropriation" and "improper means." Compare Cal. Civ. Code  
21 § 3426.1 with Nev. Rev. Stat. § 600A.030.

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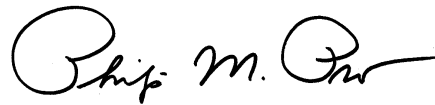
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24           <sup>4</sup> Section 102 affords copyright protection to "original works of authorship fixed in any  
25 tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise  
26 communicated, either directly or with the aid of a machine or device." Section 103 extends the  
copyright protection in § 102 to compilations and derivative works.

1           The Court therefore concludes the Copyright Act does not preempt a claim for  
2 misappropriation of trade secrets under Nevada’s Uniform Trade Secrets Act because such  
3 a claim protects rights qualitatively different from copyright rights by prohibiting certain  
4 means of obtaining confidential information. This conclusion is supported by several other  
5 circuit courts which have found the Copyright Act does not preempt various state law  
6 claims for misappropriation of trade secrets because they contain the extra element of  
7 establishing a trade secret and/or the breach of a confidential relationship. See Stromback  
8 v. New Line Cinema, 384 F.3d 283, 303-04 (6th Cir. 2004) (collecting cases).  
9 Accordingly, the Court will deny Montgomery’s motion to dismiss eTreppid’s state law  
10 trade secrets claim on the basis of preemption.

11           IT IS THEREFORE ORDERED that the Motion to Dismiss First Amended  
12 Complaint for Lack of Subject Matter Jurisdiction (3:06-CV-00145-PMP-VPC, Doc. #16,  
13 Ex. 1) is hereby DENIED.

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15 DATED: March 20, 2007.

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PHILIP M. PRO  
United States District Judge