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The Precedent: Bitmanagement Software GmbH v. United States

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In this edition of *The Precedent*, we outline the recent federal circuit decision in *Bitmanagement Software GmbH v. United States* (Fed. Cir. Jan. 7, 2025)

By: [Mitch Tobias](#) & [Brady Wilson](#)

Overview

The Federal Circuit upheld the Federal Court of Claims' calculation of copyright damages based on a hypothetical negotiation between the parties rather than a per-copy fee.

Issue

Whether the Court of Claims erred by failing to award copyright damages on a per-copy basis and instead awarding damages based on actual use of the copyrighted material.

Holding

The trial court properly awarded damages under the Copyright Act by basing its calculation on actual use, which took the form of a hypothetical negotiation between the parties.

Background and Reasoning

Bitmanagement Software GmbH (Bitmanagement) sued the United States Navy (the Navy) for copyright infringement of Bitmanagement's software, BS Contact Geo (the Software). The Navy used the Software to enable its employees to view virtual reality images of Navy installations, bases, and facilities. Bitmanagement and the Navy entered into a "floating license" agreement which provided that the Navy could place the Software on as many computers as it wished but could only have 20 active users at any given time. To ensure the Navy did not exceed this limit, the agreement required the Navy to use a tracking application called "Flexera," which limits additional users from accessing the Software when there are already 20 other users.

Ultimately, the Navy installed the Software on over 429,000 computers, but Flexera did not properly limit the number of simultaneous users. Bitmanagement then sued the Navy in the Federal Court of Claims. Bitmanagement prevailed on its claim and was awarded \$154,000 in damages. Bitmanagement appealed the award to the Federal Circuit arguing that it was entitled to over \$85 million based on a per-copy payment of \$200 for each computer that the Navy installed the program on.

The Federal Circuit began by rejecting Bitmanagement's argument that the Copyright Act requires that every award of copyright damages be on a per-copy basis. Instead, the Federal Circuit affirmed the trial court's decision on the basis that, when a plaintiff cannot show "lost sales, lost opportunities to license, or diminution in the value of the copyright," damages are based on the fair market value of a license covering the defendant's use, which itself should be calculated based on a hypothetical, arms-length negotiation between the parties.

Here, the Federal Circuit emphasized that the parties' existing license agreement was based on the number of simultaneous users, not the number of copies made. It reasoned, therefore, that damages should be based on the number of users in excess of the floating license. Following that framework, the Court of Claims had determined that the Navy would have licensed an additional 597 users at the cost of \$200 per user and another 100 users at a cost of \$350 per user. In total, this amounted to \$154,400. In justifying this amount, the Court of Claims reviewed the parties' actual discussions, their licensing histories, and the leverage that each would have been able to exert at the hypothetical negotiating table.

Finding no clear error in any of the Court of Claims' factual findings and no abuse of discretion in its damages judgment, the Federal Circuit affirmed the use of a hypothetical negotiation to determine damages under the Copyright Act.