

CLIENT ALERT

Stopped in its Tracks: The Government's Failure to Track Software Use Constitutes Infringement Under 28 U.S.C. § 1498

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In *Bitmanagement Software GmbH v. United States*, the Federal Circuit vacated and remanded a decision by the Court of Federal Claims (COFC) that found the Navy was not liable for copyright infringement even though it was undisputed that the Navy made 429,604 copies of Bitmanagement's BS Contact Geo software when it only paid for 119 copies. The COFC reasoned that the Navy was not liable because it had an implied-in-fact license that permitted it to make copies. The Federal Circuit's majority agreed the Navy had an implied-in-fact license, but that the COFC's analysis should not have stopped there; rather, the COFC should have also considered whether the Navy complied with the terms of that implied license. The Navy did not. According to the Court, the implied license was conditioned on the Navy's use of a license-tracking software at the time of copying to monitor usage by limiting the number of simultaneous users of Bitmanagement's software. However, the Navy failed to use that license-tracking software. The Court held that the Navy's copying outside of the scope of the implied license created liability for infringement. In a concurring opinion, Judge Newman reached the same conclusion; however, she disagreed as to the existence of an implied license, simply finding that the Navy's "massive copying" infringed Bitmanagement's copyright.

The case was remanded to the COFC for the calculation of a reasonable royalty for the Navy's actual usage in excess of the licensed number of copies, which the burden is on the Government to prove.

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