

4 Lessons For Contractors From The Bitmanagement Saga

By **Daniel Wilson**

Law360 (January 10, 2025, 10:23 PM EST) -- A software company's damages award of just \$150,000 after years of litigation over the U.S. Navy violating a licensing deal offers several lessons for federal software contractors about carefully negotiating contractual terms and making sure they can adequately enforce those terms.

After more than eight years in court and two rounds of appeals, the Federal Circuit on Tuesday confirmed a Court of Federal Claims decision that Bitmanagement Software GmbH was owed only \$154,400 for the Navy's copyright infringement, far short of the \$85.9 million in damages it had sought.

The long-running case provides a stark example for commercial software companies working with the government of the importance of issues such as clearly defining licensing restrictions in their contracts, being able to reliably track government usage and clearly defining their perceived damages when the government breaches a contract.

Here are four lessons companies can learn from Bitmanagement's case that could help them better protect their rights in their own dealings with the government.

Find Reliable Ways To Track and Enforce Government Usage

According to the Federal Circuit, the key issue that allowed Bitmanagement's lawsuit to move forward was also an important reason behind the company's relatively small damages award: the Navy's failure to properly use specified Flexera software to track and limit the number of simultaneous users of the company's BS Contact Geo virtual reality software.

Without a reliable tracking mechanism, Bitmanagement couldn't explicitly prove the Navy's use of BS Contact Geo, leading Federal Claims Judge Edward J. Damich to determine damages based on a "hypothetical negotiation" of software licenses, using factors such as previous discussions and licensing histories.

That aspect of the ruling is a reminder to software companies selling to the government to build into their contracts reliable ways of tracking and enforcing licensing restrictions, such as clearly defined reporting requirements or mechanisms.

Although Flexera didn't work as intended in Bitmanagement's case, technological solutions such as a software feature that automatically reports to the vendor when installed can still be a viable option

when circumstances allow, according to Crowell & Moring LLP partner Jonathan Baker, who frequently advises government contractors on software rights.

"Obviously, there might be some limitations to those given the fact that it's the government on the other side, but that would be a possibility," Baker said.

If the government balks at technical solutions, there are also a range of offline license tracking and enforcement methods, such as requiring periodic reports of installations or authorized users, said Wiley Rein LLP partner Scott Felder, whose practice focuses on intellectual property issues faced by government contractors.

"So maybe you get an earlier warning [of potential license breaches] before you get to the point of a billion copies," he said.

Even where practicalities make it difficult to strictly track usage, such as when software is used as part of a military deployment or in a classified setting, it is "very rare" that some alternative enforcement mechanism can't be worked into a contract, according to Brian O'Shaughnessy, chair of the IP transactions and licensing group at Dinsmore & Shohl LLP.

That could include, for example, a liquidated damages clause stating that "we're not able to monitor your usage, and so therefore you agree you are going to pay us a certain dollar amount if the following conditions prevail," O'Shaughnessy said.

Make Sure Contractual Terms Are Clear

Another factor that cut against Bitmanagement's bid for a multimillion-dollar damages award was that its agreement with the Navy did not explicitly allow for the per-copy payments that the company argued should be the basis for determining damages.

The disputed 2012 deal, a follow-on from a 2008 deal that had allowed BS Contact Geo to be installed on 100 specific computers, was effectively reached through a series of emails rather than a formal contract, the Federal Circuit said in a February 2021 decision.

That implied "floating license" agreement allowed the Navy to make as many copies as it wanted, the Federal Circuit ruled, prompting Judge Damich's per-user damages calculation.

"I would say this a classic cautionary tale — allowing a stream of correspondence to substitute for a formal licensing agreement," O'Shaughnessy said. "They didn't abide by the normal corporate rigor of executing a formal, detailed, written licensing agreement, and it came back to bite them."

Although government-specific requirements limit how flexible federal agencies can be during the contracting process, the Federal Acquisition Regulation still allows agencies to consider standard commercial terms put forward by vendors when purchasing commercial software, according to Baker.

"Companies [need] to take a look at those license terms to help ensure that — assuming it meets the needs of their business — those license terms make clear that no further copies may be made, and [potentially] allow for fees to be calculated based on copies, regardless of whether they're used," he said.

Consider Alternative Remedies if Litigation Is a Possibility

Bitmanagement's litigation saga, along with other recent cases where software vendors have struggled to litigate alleged license breaches by the government, "are just screaming that litigation is not an effective way to enforce IP rights against the government," said Jenner & Block LLP partner Nathan Castellano, whose practice includes helping clients navigate IP rights in government contracts.

So government contracts attorneys, who understand the "unique realities" of working with the government and can help shape the contracting process to minimize the chances of litigation, need to be part of software vendors' teams when dealing with the government, alongside intellectual property experts and sales staff, Castellano said.

But even when a software contractor carefully shapes its licensing agreement with the government, it may find itself in a situation where it believes the government has breached that agreement and wants to seek a remedy. In those circumstances, seeking out an alternative with looser jurisdictional restrictions on claims and different evidentiary standards could ultimately lead to a better overall outcome for the company than a potentially yearslong litigation, he said.

"Informal alternate dispute resolution at the boards of appeal or the Court of Federal Claims might be a more successful middle ground," he said. "You can set aside the jurisdictional technicalities and just try to get down to the nuts and bolts of, what did the agency do wrong? What evidence do we have? What do the damages look like?"

Provide Clear Evidence of Damages

Bitmanagement's damages award could have been larger even under the disputed per-user damages model, but the company made a number of evidentiary missteps, the Federal Circuit said in its ruling.

After the Federal Circuit backed the government's argument that the relevant damages were per-user and not per-copy when it revived Bitmanagement's case in 2021, Bitmanagement **took the position** that the court's damages model, outlined in a footnote, was nonbinding dicta.

When Judge Damich asked for additional briefing on per-user damages on remand, the company declined, sticking to its argument that it should receive per-copy damages. But the judge ultimately found the weight of evidence regarding damages to be on the government's side.

Judge Damich made a rational damages calculation in light of available evidence, the Federal Circuit said in U.S. Circuit Judge Leonard P. Stark's ruling, calling out Bitmanagement's "evidentiary failings."

"On many points, Bitmanagement simply did not present competing evidence, instead limiting its efforts 'to only undermining [the government's damages expert]' and his theory that Bitmanagement did not suffer from unused copies of BS Contact Geo being installed on Navy computers," Judge Stark wrote.

The company also argued that the claims court wrongly overlooked the "convenience benefit" of the Navy having BS Contact Geo installed on thousands of computers. But Judge Damich had actually said he was "attracted to" that argument, and Bitmanagement didn't "quantitatively value" that benefit, Judge Stark wrote.

Those criticisms should be a warning to parties engaged in similar litigation that "you can't just sit there

and say the other side's case is weak," said Felder of Wiley Rein.

"You've got to have your own story to tell," he said. "A lot of the Federal Circuit decision is ... 'Bitmanagement takes issue with expert testimony, Bitmanagement takes issue with the government's position, but they didn't present any countervailing position, so what do we do?'"

--Editing by Alanna Weissman and Brian Baresch.

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