

ORIGINAL

FILED

JUL 15 2016

U.S. COURT OF
FEDERAL CLAIMS

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BITMANAGEMENT SOFTWARE GMBH,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Case No.

16-840 C

COMPLAINT

Plaintiff Bitmanagement Software GmbH (“Bitmanagement”), through its undersigned counsel, states and alleges as follows:

INTRODUCTION

1. This action arises out of the United States Navy’s willful infringement of copyrights owned by Bitmanagement through the Navy’s copying and installation of Bitmanagement’s 3D virtual reality software—known as BS Contact Geo—on hundreds of thousands of computers for which the Navy does not have a license.

2. In 2011 and 2012, Bitmanagement agreed to license its software to the Navy on a limited and experimental basis. Those individual PC-based licenses authorized the Navy to install BS Contact Geo on a total of just 38 computers for the purposes of testing, trial runs, and integration into Navy systems. In order to facilitate such testing and integration of the software on Navy computers in preparation for the large scale licensing desired by the Navy, it was necessary for Bitmanagement to remove the control mechanism that tracked and limited the use of the software.

3. Based on the quality and performance of BS Contact Geo—including the interactive functionality and high-quality graphics that make it particularly useful to large military organizations—the Navy determined that it would deploy the software on a larger scale, and began negotiations with Bitmanagement for the purchase of numerous additional licenses.

4. While those negotiations were ongoing, however, and without Bitmanagement’s advance knowledge or consent, the Navy installed BS Contact Geo software onto hundreds of thousands of computers. Bitmanagement did not license or otherwise authorize these uses of its software, and the Navy has never compensated Bitmanagement for these uses of Bitmanagement’s software.

5. The Navy’s actions constitute willful copyright infringement pursuant to 17 U.S.C. ch. 5 and 28 U.S.C. § 1498(b), for which Bitmanagement is entitled to recover not less than \$596,308,103 in damages.

PARTIES

6. Plaintiff Bitmanagement, a German corporation with its headquarters in Berg, Germany, develops and sells computer software and provides associated maintenance, support, and other professional services to commercial and government customers.

7. Defendant is the United States of America, including but not limited to the United States Department of Defense; United States Department of the Navy; United States Navy; and Naval Facilities Engineering Command (“NAVFAC”) (collectively, the “Navy” or the “Government”).

JURISDICTION AND VENUE

8. The Court has jurisdiction over this civil action as it arises under the Copyright Laws of the United States, in particular 28 U.S.C. § 1498(b), which is implicated “whenever the

copyright in any work protected under the copyright laws of the United States [is] infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government.”

9. 28 U.S.C. § 1498(b) provides that “the exclusive action which may be brought for” such infringement “shall be an action by the copyright owner against the United States in the Court of Federal Claims.”

FACTS

A. The Navy’s Initial Limited License and Testing of Bitmanagement’s Software

10. Founded in 2002, Bitmanagement is a pioneer in the development of virtual reality software with three-dimensional graphics. Among other products, Bitmanagement has developed BS Contact Geo, a computer software application that facilitates the visualization of 3D geographic information. BS Contact Geo uniquely enables interactive collaboration among multiple users in one virtual environment simultaneously, with high-quality graphics that appear crisp and sharp even on simple computers.

11. BS Contact Geo is the sole property of Bitmanagement and was developed by Bitmanagement exclusively at Bitmanagement’s expense.

12. The interactive functionality and high-quality graphics of BS Contact Geo make it particularly useful to large military organizations. The virtual reality it creates facilitates users’ visualization of a “virtual military base.” Accordingly, NAVFAC has acknowledged the capabilities of BS Contact Geo and its potential value to Navy operations.

13. Beginning in 2011, NAVFAC began using BS Contact Geo on a limited experimental basis to prepare for a large-scale rollout later. For this purpose, the Navy and

Bitmanagement's resellers executed contracts for limited licenses that allowed the installation of BS Contact Geo on a total of 38 Navy personal computers.

14. At the Navy's request, Bitmanagement removed the control mechanism that normally would track and limit the copying of the software. Bitmanagement agreed to this modification solely for the purpose of preparing for a large licensing rollout of BS Contact Geo.

15. Bitmanagement provided servicing and maintenance of the installed software for an additional fee and provided the Navy with some upgrading of the software.

B. The Navy Expresses Interest in Licensing BS Contact Geo on a Large Scale

16. Following extensive testing and trial runs, the Navy determined that BS Contact Geo satisfied the performance criteria necessary for its use on a wider scale, including compatibility with NAVFAC's important software application, known as SPIDERS.

17. NAVFAC acknowledged that additional licenses were necessary for it to distribute BS Contact Geo widely to its users. Accordingly, in preparation for a widespread deployment of BS Contact Geo, NAVFAC Deputy Program Manager Alexandre Viana engaged in extended written and oral discussions and negotiations with Bitmanagement. In these communications, Mr. Viana stated that the Navy was interested in deploying BS Contact Geo on a wide scale and expressly acknowledged that the Navy needed additional licenses in order to do so.

18. For example, in a July 18, 2013 email to Bitmanagement's chief executive officer, Mr. Viana attached a deployment schedule indicating the planned installation of BS Contact Geo on 558,466 Navy computers. In his email, Mr. Viana wrote: "Looks like there will be great opportunity to increase the number of BC Contact Geo licenses in the future. ;)."

19. In other communications with Bitmanagement, Mr. Viana made similar statements regarding the Navy's interest in purchasing licenses to enable the Navy to install BS Contact Geo on hundreds of thousands of machines.

20. In July 2015, the Navy issued a "Justification for Other than Full and Open Competition" document that recognized the uniquely valuable nature of the proprietary BS Contact Geo software, and the Navy's need for "software license procurement and technical support services" from Bitmanagement.

C. The Navy's Unauthorized Copying of Bitmanagement's Software

21. Even as it negotiated with Bitmanagement over the proposed large-scale licensing of its product, the Navy was simultaneously copying and installing that software, without Bitmanagement's advance knowledge or authorization, on a massive scale. Starting in or around August 2013, NAVFAC installed BS Contact Geo on hundreds of thousands of Navy personal computers. These installations took place without Bitmanagement's advance knowledge or consent and without any license to do so.

22. In October 2013, Bitmanagement executives received forwarded emails indicating that BS Contact Geo had already been deployed onto at least 104,922 Navy computers. This deployment was part of a larger rollout of the software onto at least 558,466 computers on the Navy's network. These installations were a surprise to Bitmanagement's executives, who had been negotiating the Navy's purchase of additional licenses with Mr. Viana and did not expect that the software would be deployed onto additional computers without first agreeing upon the applicable software license rights.

23. On information and belief, BS Contact Geo has been deployed onto at least 558,466 Navy computers. It is likely that this unauthorized copying has taken place on an even

larger scale. Bitmanagement has no control over the Navy's computers and cannot prevent further unauthorized copying of BS Contact Geo onto additional computers within or outside the Navy.

24. To make matters worse, starting in 2014, the "Flexwrap" software intended to track the Navy's use and duplication of BS Contact Geo on Navy computers was disabled. This change made it impossible for Bitmanagement to know the scope of the deployment and use of BS Contact Geo on unlicensed machines or to limit that use.

25. The disabling of Flexwrap was also a violation of the terms under which NAVFAC's limited-quantity PC licenses had been granted. The Navy's contract with Bitmanagement's reseller expressly provided that the software would be "ENABLED BY NAVFAC USING FLEXERA SOFTWARE'S FLEXWRAP."

26. At the time that the Navy made unauthorized copies of BS Contact Geo, Bitmanagement's commercial list price for a license authorizing the installation of BS Contact Geo onto a single PC was €800. At that time, on information and belief, €800 was equivalent to approximately US \$1067.76.

27. For years, Bitmanagement, both on its own and through designated advisors, has tried repeatedly to communicate with Navy officials to resolve this matter, including by negotiating payment for licenses equal to the number of copies that the Navy had made. Those efforts have been unsuccessful, and no software license has been executed to authorize the Navy's mass deployment of BS Contact Geo or to compensate Bitmanagement for the use of its property.

CAUSE OF ACTION

Copyright Infringement in Violation of 28 U.S.C. § 1498(b)

28. Bitmanagement incorporates by reference all the allegations set forth in the preceding paragraphs 1 through 27.

29. At a substantial investment of time, effort, and expense, Bitmanagement created, developed, tested, and marketed its software—including software called BS Contact Geo—to commercial customers and government agencies. Bitmanagement software consists of computer programs that are original works of authorship, expressed in words, numbers, and/or other verbal or numerical symbols or indicia.

30. The Copyright Act of 1976, as amended, protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a). Works of authorship include “literary works,” which are defined as “works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia.” *Id.* § 101. Such protected works include computer software.

31. Unauthorized copying and distribution of a copyrighted work violates a copyright owner’s exclusive rights to “reproduce the copyrighted work in copies” and to “to distribute copies . . . of the copyrighted work to the public.” *Id.* §§ 106(1), (3).

32. As the author of its software, Bitmanagement owns the copyright in these works.

33. BS Contact Geo is registered under United States copyrights TX-8-212-961, TX-8-212-988, and TX-8-213-004.

34. In addition, BS Contact Geo, which was created and first published outside the United States, is a non-“United States work” under 17 U.S.C. §§ 101 and 411(a) that is protected by United States copyright law. BS Contact Geo is a protected work under the Berne Convention, to which the United States and Germany are parties.

35. The Government purchased licenses for the installation of BS Contact Geo on a maximum of 38 personal computers. Bitmanagement was given to understand that the Government would eventually acquire hundreds of thousands of licenses of BS Contact Geo.

36. However, since 2013, on information and belief, the Government has copied and installed BS Contact Geo, including but not limited to version 8001 of BS Contact Geo, on at least 558,466 unlicensed machines. On information and belief, the Government continues to use BS Contact Geo without the required licenses.

37. In communications with Bitmanagement, the Government has acknowledged having installed Bitmanagement software on a far greater number of machines than those for which it had acquired licenses.

38. The Government knew or should have known that it was required to obtain a license for copying Bitmanagement software onto each of the devices that had Bitmanagement software installed. The Government nonetheless failed to obtain such licenses.

39. By copying, installing, and using Bitmanagement software without entering into software license agreements and paying the required license fees, the Government has willfully infringed, and on information and belief continues to willfully infringe, Bitmanagement’s exclusive rights under the Copyright Act. In so doing, the Government has subjected itself to liability under 28 U.S.C. § 1498(b).

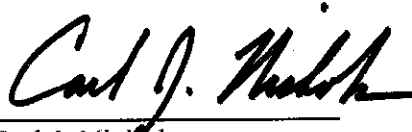
40. As a consequence of the foregoing infringement, Bitmanagement has suffered, and continues to suffer, substantial injury to its business and to its ownership rights in its software. Under 28 U.S.C. § 1498(b), Bitmanagement is entitled to recover damages for the infringements described herein.

WHEREFORE, Bitmanagement prays for the following relief:

- (1) Judgment against the Government awarding to Bitmanagement damages, including but not limited to lost profits, unpaid fees, development costs, all losses resulting from the infringement of Bitmanagement's intellectual property, and/or all damages available under the United States Copyright Law and other applicable law, in an amount not less than \$596,308,103 (the market value of unpaid licenses), exclusive of statutory damages, pre-judgment interest, post-judgment interest, punitive damages, costs, and attorney's fees; and
- (2) Such further relief as the Court deems just and proper.

Respectfully Submitted,

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Counsel for Bitmanagement Software GmbH

Dated: July 15, 2016

RULE 7.1 DISCLOSURE STATEMENT

Pursuant to Rule 7.1 of the Rules of the United States Court of Federal Claims, plaintiff Bitmanagement Software GmbH states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.