

In the United States Court of Federal Claims

No. 16-840C

(Filed: September 9, 2019)

(Refiled: September 24, 2019)¹

**BITMANAGEMENT SOFTWARE
GMBH,**

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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* Copyright Infringement; Reproduction Rights;
* Distribution Rights; Authorization; Permission;
* Software; Licenses; 17 U.S.C. § 106; 28 U.S.C.
* § 1498(b); 17 U.S.C. § 501(a).

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Brent J. Gurney, Wilmer Cutler Pickering Hale and Dorr LLP, Washington DC, with whom were *Adam Raviv*, *Leon T. Kenworthy*, *Michael Carpenter*, *Allison Aviki*, and *Kevin Goldman*, Of Counsel, Wilmer Cutler Pickering Hale and Dorr LLP, for Plaintiff.

Scott Bolden, Deputy Director, and *Patrick C. Holvey*, Trial Attorney, Commercial Litigation Branch, *Gary L. Hausken*, Director, Civil Division, U.S. Department of Justice, and *Joseph H. Hunt*, Assistant Attorney General, U.S. Department of Justice, Washington DC, with whom were, *Richard J. Huber* and *Andrew P. Zager*, Of Counsel, Department of the Navy, for Defendant.

OPINION AND ORDER

DAMICH, Senior Judge.

On July 15, 2016, Bitmanagement Software GmbH (“Bitmanagement”) filed a Complaint in this Court alleging that the United States Navy (the “Navy”), through the Naval Facilities Engineering Command (“NAVFAC”), infringed on Bitmanagement’s copyrighted software, BS Contact Geo, when the Navy installed hundreds of thousands of copies of the software on Navy computers.

On November 11, 2016, the Government filed its Answer to Plaintiff’s Complaint. Thereafter, discovery commenced and was completed on May 18, 2018.

¹ The parties were directed to file any redactions to this opinion by September 20, 2019. As the parties indicated that no redactions were necessary, the Court reissues this unsealed opinion in its entirety.

On March 2, 2018, Bitmanagement filed a Motion for Partial Summary Judgment on Liability. On August 6, 2018, the Court denied Bitmanagement's motion for partial summary judgment.

The Court held a pretrial conference on April 12, 2019. Thereafter, trial was held in Washington DC, from April 22, 2019 through April 29, 2019.

At trial, the Court heard testimony from: (1) Peter Schickel, CEO and co-founder of Bitmanagement;² (2) Axel Koerfer, Financial Officer and co-founder of Bitmanagement, and Bitmanagement's point of contact for product sales; (3) David Colleen, CEO and founder of third-party reseller Planet 9 Studios; (4) Alex Viana, Deputy Program Manager, Facilities Integrated Product Support, United States Navy, NAVFAC; (5) Patrick "Sam" Chambers, Deputy Director for NAVFAC Information Technology Center; (6) Don Brutzman, computer scientist and associate professor at the Naval Postgraduate School and co-chair of the X3D Working Group for the Web3D Consortium; (7) Dean McCarns, Former Director of Computer-Aided Design Engineering Technology for NAVFAC; (8) Norman Vadnais, End User Services Lead Engineer at the Naval Information Warfare Command Pacific; and (9) George Graff, expert witness for Bitmanagement.

On May 31, 2019, Bitmanagement filed its Post-Trial Memorandum. ECF No. 116. On June 28, 2019, the Government filed its responsive Post-Trial Brief. ECF No. 121. On July 12, 2019, Bitmanagement filed its Post-Trial Reply Memorandum. ECF No. 126. Based on the evidence presented at trial and the post-trial briefs, the Court determined that closing arguments were unnecessary.

For the reasons set forth below, the Court finds that the United States is not liable for copyright infringement.

I. FINDINGS OF FACT

Bitmanagement is a German corporation headquartered in Berg, Germany that develops software for rendering three-dimensional graphics. Stip. ¶ 1. Since its founding in 2002, Bitmanagement's "core product" has been a three-dimensional renderer called BS Contact. Stip. ¶ 11; Tr. 84:8–19 (Schickel). In 2006, Bitmanagement released BS Contact Geo, an upgraded version of BS Contact that includes geospatial features for positioning objects with geographic

² On March 3, 2019, the Court granted Bitmanagement's motion to present Mr. Schickel's direct testimony in written form because Mr. Schickel is not a native English speaker and his testimony would cover technical issues that would be more clearly presented in written form. During cross-examination at trial, however, Mr. Schickel admitted that: (1) his attorneys drafted substantive portions of his written testimony, (2) he was unfamiliar with several facts asserted in his written testimony, and (3) he was unfamiliar with several documents cited in his written testimony. For these reasons, the Court finds Mr. Schickel's direct testimony questionable.

coordinates. Stip. ¶¶ 12–13; Tr. 87:5–23 (Schickel). Since then, Bitmanagement has offered numerous versions of BS Contact Geo to the public, including versions 7.204, 7.215, 8.001, 8.001 MSI,³ and 9.000. Stip. ¶ 13, 21; DX511.12–511.13 (Plaintiff’s Objections and Responses to Defendant’s First Set of Interrogatories). The version of BS Contact Geo at issue here—version 8.001—was published on January 24, 2012 and was registered with the Copyright office on July 6, 2016. Stip. ¶¶ 20–21.

BS Contact Geo, as provided by Bitmanagement, includes both a desktop executable file (EXE version) and a web browser plugin file (OCX version). Stip. ¶ 18. The standalone desktop executable version (EXE) allows users to launch the software as a standalone application to view three-dimensional data. Stip. ¶ 18. The plugin version (OCX) works in conjunction with a web browser, such as Internet Explorer, so that when a user accesses three-dimensional data on the internet, the BS Contact Geo plugin is programmed to automatically launch within the web browser to render data. Stip. ¶ 18. Bitmanagement typically sells its software on a “PC license”—also called “seat license”—basis, which “allows the installation of the licensed software on one computer for each PC license.”⁴ Tr. 104:4–16 (Schickel); Tr. 225:21–226:2 (Schickel); Tr. 885:11–886:7 (Chambers).

In 2005, Bitmanagement began working with David Colleen, head of software reseller Planet 9 Studios (“Planet 9”), to market and sell Bitmanagement’s products in the United States. Stip. ¶ 39. In July of 2006, Bitmanagement and Planet 9 entered into a Finder’s Fee Agreement, which provided “for support of the sales activities of [Bitmanagement] and for the sole compensation of [Planet 9] in respect of his activities regarding support of [Bitmanagement] sales activities.” Stip. ¶ 36; JX004 (Finder’s Fee Agreement). This agreement also stated that Planet 9 was “neither entitled to represent [Bitmanagement] in any legal or other transaction nor to make any binding or nonbinding statement on behalf of [Bitmanagement].” Stip. ¶ 36; JX004.2.

In 2006, the Navy began developing a software application called SPIDERS 3D, a web-based platform that provides a virtual reality environment for NAVFAC engineers and technicians to view and optimize configurations of Navy installations, bases, and facilities. Stip. ¶ 29; Tr. 899:1–18 (Viana). SPIDERS 3D is hosted on NAVFAC’s internal enterprise portal and can only be accessed by users with: (1) an appropriately-credentialed Department of Defense Common Access Card; and (2) NAVFAC-sponsored access permissions. *See* DX129.5 (SPIDERS 3D User Guide); Tr. 844:2–45:1 (Chambers). The primary point of contact for the development of SPIDERS 3D has been Alex Viana (“Viana”), a NAVFAC deputy program manager. *See* Tr. 946:12–15 (Viana).

³ The “MSI” designation included in some of the BS Contact Geo versions refers to “Microsoft installer,” which means that it is a software that installs software. Tr. 264:23–265:7 (Schickel).

⁴ Bitmanagement also offered “website” or “subdomain” licenses, which were priced based on the “general expected usage of the viewer in a specific time from a respective Internet or Intranet-address.” Stip. ¶¶ 25–26.

While developing SPIDERS 3D, the Navy recognized the need for a three-dimensional visualization software that could “render X3D content” in order to provide visualization of Naval facilities in SPIDERS 3D. Stip. ¶ 31. In order to find a product that would meet the Navy’s needs, Mr. Viana approached Mr. Colleen, who recommended Bitmanagement’s product BS Contact. Tr. 667:15–668:22 (Colleen); *See also* JX001.1 (“We propose to have a telephone call between you and Peter asap in order to agree on an offer for internal Navy Intranet.”).

Thereafter, the Navy procured software published by Bitmanagement on approximately three occasions—in 2006, 2008, and 2012. But the Navy never had a direct contractual relationship with Bitmanagement. Stip. ¶ 33. Instead, the Government contracted with Planet 9 to obtain Bitmanagement’s products. *See* Stip. ¶¶ 35, 37.

A. 2006 Purchase of One PC License of BS Contact Geo

Following Mr. Colleen’s recommendation that Bitmanagement’s product(s) would meet the Navy’s needs, the Navy purchased one PC license of BS Contact Geo version 7.000 from Planet 9 for \$990 in September 2006 for testing purposes. *See* PX068 (Sept. 2006 Reseller Agreement Between Bitmanagement and Planet 9); JX005.4 (email chain between Alex Viana, David Colleen, Peter Schickel, Axel Koerfer, and others). In order to facilitate this transaction, Bitmanagement and Planet 9 entered into a reseller agreement which provided, in relevant part, that Planet 9 was permitted to resell “1 PC License” of BS Contact Geo that “shall be enabled by the Licensor for PC with computername ‘.....’ (to be mutually agreed upon).” PX068.5. The agreement also provided that the license was “non-exclusive and non-transferable.” PX068.2.

Thereafter, Mr. Viana advised Planet 9 that Bitmanagement’s default licensing scheme would not work for the Navy’s secure environment, and Mr. Colleen relayed this information to Bitmanagement. *See* JX005.4–5. On November 24, 2006, Mr. Schickel responded, stating that “we [Bitmanagement] are open for any licensing scheme that suits the US Navy better and are willing to do our utmost to enable an other [sic] licensing functionality, if requested.” JX005.5. In response, Mr. Viana explained that NAVFAC needed an “application with its own license key (not PC specific)” and that if NAVFAC was successful in obtaining NMCI approval,⁵ “we [the Navy] anticipate the need for an initial 15 licenses, with a potential for as many as 100 or more licenses later on.” JX005.4. Bitmanagement then provided custom-designed licensing files to NAVFAC that were not PC specific. *See* JX005.1–4.

During 2006 and 2007, Bitmanagement and NAVFAC worked together to resolve certain technical issues with the deployment of BS Contact Geo and in May 2007, Bitmanagement provided the Navy with a version of BS Contact Geo equipped with a “silent installer” that was “intended for bulk installations.” DX010.1 (email from Peter Schickel to Alex Viana). Mr.

⁵ “NMCI” refers to Navy Marine Corps Intranet, which is “the largest private computer network in the world” and comprises all Navy computers in the continental United States. Stip. ¶ 81; Tr. 843:7–15 (Chambers); *see* Tr. 849:3–6 (Chambers) (“ONE-NET, for all intents and purposes, is a separate network which is quite simply an NMCI or the outside continental United States . . .”).

Schickel explained in an email to Mr. Viana that the silent installer “is helpful for an administrator to do installations on a large scale even on remote computers connected via intranet or internet.” *Id.*

B. 2008 Purchase of 100 PC Licenses

In 2008, the Navy determined that it needed additional licenses of Bitmanagement’s software in order to support the Navy’s SPIDERS 3D platform. Stip. ¶ 41. Therefore, on February 12, 2008, the Navy submitted a purchase order to Planet 9 for 100 seat licenses of BS Contact through Contract No. N00244-08-P-1039 (the “2008 Navy Purchase Order”). Stip. ¶¶ 42–43; JX006 (2008 Navy Purchase Order). Pursuant to the express terms of the 2008 Navy Purchase Order, the Navy Procured:

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0001	BIT MANAGEMENT BS CONTACT VRML AND X3D VIEWER-VERSION 7.038 RFS #104181, DADMS ID 49208 (ONE TIME LICENSE) POC IS ALEX VIANA 202-433-5516 FOB: Destination MILSTRIP: N6921880083021 PURCHASE REQUEST NUMBER: N6921880083021	100	Each	\$300.00	\$30,000.00

JX006.4; Stip. ¶ 43.

The 2008 Navy Purchase Order identified “ONE TIME LICENSE” but did not otherwise specify the type of licenses being procured. *See* JX006; *see also* Stip. ¶ 49 (“The 2008 Navy [Purchase Order] did not expressly contain the term “concurrent” or otherwise discuss concurrent use licenses.”). However, the Navy understood that it was purchasing 100 “seat licenses.” *See* Stip. ¶ 42 (“the Navy decided to purchase 100 seat licenses”).

In March 2008, Bitmanagement and Planet 9 executed a written reseller agreement for the resale of 100 non-exclusive licenses from Planet 9 to the Navy (“2008 Reseller Agreement”) in order to fulfill the 2008 Navy Purchase Order. JX007. The 2008 Reseller Agreement between Bitmanagement and Planet 9 provided, in relevant part, that Planet 9 was authorized to resell 100 PC license of BS Contact to the Navy. JX007.5.

On May 26, 2009, despite the 2008 Navy Purchase Order’s express reference to BS Contact VRML and X3D viewer version 7.038,⁶ and the 2008 Reseller Agreement’s express reference to BS Contact, Bitmanagement delivered *BS Contact Geo* version 7.204 to the Navy. Stip. ¶ 52 (emphasis added); Tr. 183:16–184:1 (Schickel).

C. Bitmanagement Upgrades 20 Undeployed PC Licenses

By 2010, the Navy had deployed 80 of the 100 licenses purchased through the 2008 Navy Purchase Order, leaving it with 20 undeployed licenses. Stip. ¶ 53. In September 2010,

⁶ BS Contact VRML and X3D viewer version 7.038 was a predecessor to BS Contact Geo version 8.001. Stip. ¶ 47.

Bitmanagement agreed to upgrade these 20 undeployed PC licenses to the newest version of BS Contact Geo—version 7.215—for an additional \$125 USD fee per license. JX10.1; Tr. 744:6–10 (Colleen); PX090; PX211.

D. 2012 Purchase of 18 Licenses

1. Preliminary Discussions

In April of 2011, the Navy engaged in discussions with Planet 9 and Bitmanagement about purchasing additional BS Contact Geo licenses to supplement the 20 undeployed licenses from the 2008 Navy Purchase Order. Stip. ¶ 54. At this time, the Navy was experiencing difficulty utilizing the licenses in situations where a hard drive failed, or a single user had multiple computers, and asked to “revisit the discussion of a floating license scheme similar to the way that their AutoDesk or ESRI products work.” See DX026.5 (Email chain between David Colleen and Bitmanagement). On April 21, 2011, Bitmanagement, through Peter Schickel, responded with three different licensing options:

Option 1: No limitation in the software at all. Licenses can be tracked by a word document or table stating the computer and/or person using it. Distribution to the Navy only.

Option 2: BS Contact client tracking: BS Contact checks at startup how many other BS Contact clients are running in the same sub-domain. If too many BS Contact client will notify the user.

Option 3: Server tracking: a 24/7 server in the domain/sub-domain maintains a counter. If the number of BS Contact clients is reached the BS Contact client requesting will notify the user.

DX026.3–4.

In June 2011, NAVFAC proposed using the Flexera license manager application in conjunction with Bitmanagement’s third proposed option. See DX026.2. “Flexera” is a server-based license manager that limits the number of simultaneous users that can access a “Flexera enabled” software program by allowing the program to run only if the number of persons using the program is less than the number of available licenses. See Tr. 850:22–853:2 (Chambers); Tr. 1042:3–1044:7, Tr. 1052:18–1053:7 (McCarns). Flexera-enabled software—also referred to as “FlexWrapped” software—is copied onto individual computers and functions by contacting a Flexera license management server whenever the software “starts up.” Stip. ¶ 55; Tr. 853:18–854:4 (Chambers); Tr. 1042:20–1043:3 (McCarns). When a FlexWrapped program is opened, the program alerts the license server that the program is in use, and when the FlexWrapped program closes, it alerts the license server that it is no longer in use. Stip. ¶ 55.

On June 8, 2011, Planet 9 relayed the Navy’s proposal to Bitmanagement, stating “they [NAVFAC] have an existing floating license server that is already being used for AutoCad . . . I have an order from them for 20 seats of BS Contact. May we try these 20 seats on the floating

license server to see how they work?” DX026.2. On June 10, 2011, Mr. Schickel, on behalf of Bitmanagement, agreed, stating “Let’s go for the floating license server approach.” DX026.1; *see also* DX022-TR (email chain between Peter Schickel and Axel Koerfer) (“Maybe we can introduce the Floating License and increase the price?”).

On October 23, 2011, Bitmanagement was informed that the Navy planned to “roll out . . . BScontact to the entire [N]avy realm.” DX034.1 (email chain between Synergy Software Design and Bitmanagement).⁷ On November 9, 2011, Mr. Viana directly contacted Bitmanagement, advising that NAVFAC planned “to get the current licenses of BS Contact Geo version 7.215 deployed with the server license management software. Then we will push it out to several of the NMCI realms to begin tracking the usage and demand signal of the 20 license keys.” J013.1.

In November 2011, the Navy repeatedly explained to Bitmanagement that the Navy would deploy the licenses of BS Contact Geo version 7.215 within the “Navy’s NMCI network” using a “server side license[] key management approach” in order to “track the usage and demand signal of the 20 license keys.” JX013.1–2 (Email chain between Alex Viana and Peter Schickel, with Axel Koerfer copied); PX39.2 (Email chain between Alex Viana and Axel Koerfer, with Peter Schickel copied). In particular, on November 24, 2011, Mr. Viana emailed Bitmanagement’s Axel Koerfer, stating:

Wanted to make sure we have the same understanding of our planned approach for BS Contact Geo with regards to the user’s agreement. We currently have 20 PC licenses of BS Contact Geo version 7.215 which we have not deployed and are requesting to manage from our Navy server. This will be accomplished by utilizing the software application AdminStudio by Flexera in conjunction with BS Contact Geo from our server. *This will allow us to track the use of the 20 licenses across a broad spectrum of the NMCI realm (versus having those 20 licenses mapped to individual PCs).* Once we have successfully implemented this approach, we will be able to document (through the AdminStudio) the usage of the 20 BS Contact Geo licenses and enable us to justify the purchase of additional BS Contact Geo licenses in the future.

DX040.2 (email chain between Alex Viana, Axel Koerfer, and Peter Schickel) (emphasis added). Later that day, Axel Koerfer replied, including Peter Schickel and David Colleen as recipients, stating “[t]hat is our understanding as well. The user agreement in principal covers your approach from our point of view.” DX040.1.

Thereafter, the parties exchanged draft vendor proposals, which were not executed. *See* PX057 (draft vendor agreement between Bitmanagement and NAVFAC); PX80 (draft agreement between Planet 9 and NAVFAC); PX083.80–86 (draft agreement between Bitmanagement and NAVFAC); Stip. ¶ 58.

⁷ Synergy Software Design (“Synergy”) worked with NAVFAC to develop SPIDERS 3D and also worked with Bitmanagement. Stip. ¶ 30; *see* Stip. ¶ 96.

On January 6, 2012, Planet 9 re-confirmed the “floating license system” approach with Bitmanagement:

The 20 old and 30 new copies of [BS Contact Geo] would be available in the Navy[‘s] floating license system. You can have a quarterly use report if you like. If this works for you, I’ll complete the agreement and invoice them.

DX053.2 (email chain between Peter Schickel, David Colleen, and Axel Koerfer). In response, Axel Koerfer replied “ok.” *Id.* On January 18, 2012, Alex Viana requested that the Planet 9 proposal recite “20 existing copies of BS Contact Geo version 7.215 to be network (concurrent) license enabled by NAVFAC using Flexera Software’s FlexWrap utility,” which Planet 9 agreed to. DX056.1–3 (email chain between Alex Viana and David Colleen).

On January 20, 2012, Planet 9 sent Alex Viana a revised proposal (the “January 2012 Planet 9 Proposal”), in which Planet 9 offered to provide:

<p>Deliverables</p> <p>This proposal is for the resale of the following Bitmanagement software products:</p> <ul style="list-style-type: none">• 20 existing + 18 new copies of BS Contact Geo version 7.215 to be network (concurrent) license enabled by NAVFAC using Flexera Software's FlexWrap utility of the AdminStudio software suite.

DX056.3.⁸ In addition, the January 2012 Planet 9 Proposal stated under the heading “Next Steps,” “Please forward your purchase order referencing this quote.” DX056.4.

Thereafter, Mr. Viana contacted NAVFAC’s contracting personnel—Stella Rizalla and Debra Buckley—to work on a formal contract. *See* Tr. 919:15–920:7 (Viana). On March 22, 2012, Stella Rizalla, a NAVFAC contract specialist, contacted Bitmanagement explaining that NAVFAC was interested in “Bit management [sic] BS Contact Geo Version 7.215 with network (concurrent) license keys” and inquiring as to whether Bitmanagement had any US distributors for that software. DX059 (email chain between Stella Rizalla and Axel Koerfer). In response, Bitmanagement directed Ms. Rizalla to Planet 9, Bitmanagement’s “key reseller” for the Navy. DX061.2 (email chain between Stella Rizalla, Axel Koerfer, and David Colleen); DX062 (same); *see also* DX063 (email between Peter Schickel and David Colleen).

2. Navy Purchase Order to Planet 9 Studios

On May 21, 2012, the Navy, through Stella Rizalla, Debra Buckley, and Alex Viana, issued a purchase order to Planet 9 through Contract No. N62583-12-P-0767 (the “2012 Navy

⁸ The number of “new” licenses procured by the Navy was reduced from 30 to 18 to account for Planet 9’s 30% reseller margin. DX053.1–2 (email chain between Peter Schickel, David Colleen, and Axel Koerfer).

Purchase Order”). JX016.24–38 (2012 Navy Purchase Order); Stip. ¶¶ 64–65. Through the 2012 Navy Purchase Order, the Navy procured:

ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0001	BS CONTACT GEO VERSION 7.215 LICENSES FFP ENABLED BY NAVFAC USING FLEXERA SOFTWARE'S FLEXWRAP UTILITY OF THE ADMIN STUDIO SOFTWARE SUITE. FOB: Destination	18	Each	\$505.00	\$8,490.00

JX016.27. In addition, in CLIN 0002 of the 2012 Navy Purchase Order, the Navy procured 75 hours of technical support for 2 years, which was “GOOD FOR UP TO 35 USERS”. JX016.27–29. CLIN 0001 of the 2012 Navy Purchase Order identified “LICENSES” and “ENABLED BY NAVFAC USING FLEXERA SOFTWARE’S FLEXWRAP,” but did not specify “copies,” or a specific type of license. See JX016.27–38. However, the contract file for the 2012 Navy Purchase Order included the January 2012 Planet 9 Proposal, which indicated that Planet 9 would resell “20 existing + 18 new copies of BS Contact Geo version 7.215 to be *network (concurrent) license[s]*.” JX016.49–50 (emphasis added). At trial, Mr. Viana testified that it was not the intent of the 2012 Navy Purchase Order to “allow for unlimited copies of BS Contact Geo.” Tr. 1022:20–1023:1 (Viana).

Before the 2012 Navy Purchase Order was executed, Bitmanagement, Planet 9, and the Navy had been working together to test and adapt BS Contact Geo for deployment on the NMCI network. See Stip. ¶ 72; DX067.1. Specifically, on May 7, 2012, the Navy informed Bitmanagement that BS Contact Geo version 7.215 “was not installed as a web browser plug-in as required, but as a standalone application.” Stip. ¶ 72. On June 8, 2012, the Navy reported that BS Contact Geo version 7.215 was not compatible with Windows 7. See JX019.6–7. A Navy IT contractor suggested to the Navy and Bitmanagement that the Navy obtain BS Contact Geo version 8 from Bitmanagement with either the source code or “have [the] license key embedded in vendor code for Enterprise needs.” Stip. ¶ 73.

3. Delivery and Deployment of BS Contact Geo Version 8.001

On June 13, 2012, Bitmanagement delivered a modified version of BS Contact Geo version 8.001 to NAVFAC with a “silent installer capability as requested for bulk installation,” explaining:

Bitmanagement confirms our concurrence to replace BS Contact Geo v7.215 with v8.001 as a “no cost” modification under the same terms of the recently awarded [BS Contact Geo] license procurement contract with NAVFAC.

We have provided an actual version of BS Contact Geo version 8.001 for you at your customer space. Please download the file “BS_Contact_Geo_Installer_8001_R1_x86_Admin_Silent.exe”.

Stip. ¶¶ 74–75. Bitmanagement billed its time in modifying BS Contact Geo as technical support pursuant to the terms of the 2012 Navy Purchase Order. Stip. ¶ 76.

On June 14, 2012, after it had delivered the software to the Navy, Bitmanagement sent Planet 9 a written reseller agreement (the “2012 Reseller Agreement”). JX017.1. The 2012 Reseller Agreement provided, in relevant part, that Planet 9 was authorized to resell 18 PC licenses of BS Contact version 7.215 or version 8.001, to NAVFAC. JX017.21. Under the “Purpose of Use” heading, the agreement stated, “BS Contact be enabled by the Licensor for 18 PCs.” *Id.* The 2012 Reseller Agreement also stated that the licenses were “non-exclusive.” JX017.17.

Planet 9 objected to the language of the reseller agreement referring to Planet 9 as an end user rather than a “Reseller.” JX021.1 (email between Peter Schickel and David Colleen). Consequently, in September 2012, Bitmanagement sent Planet 9 a revised reseller agreement that was substantively identical to the prior version but referred to Planet 9 as a reseller. *See* Stip. ¶ 77. Although the revised reseller agreement was never signed by Planet 9, the parties understood that they had reached an agreement, and Planet 9 paid Bitmanagement’s invoice. *See* JX017; Tr. 712:18–24 (Colleen); Tr. 329:23–330:3 (Schickel); PX089.4 (Bitmanagement invoice); PX076.2 (transaction history); PX048.2 (email between David Colleen and Axel Koerfer).

4. Post-Delivery Interactions and Deployment of BS Contact Geo Version 8.001

On July 3, 2012, the Navy contacted Bitmanagement about obtaining a different installation file for BS Contact Geo version 8.001 because the Navy was “testing multiple users on the install . . . and found that [the Navy] could only use one license at a time,” and discovered that Flexera would not work with the provided installation file. DX079.3 (email chain between Dean McCarns, Alex Viana, and Peter Schickel); Tr. 262:10–264:11 (Schickel). On July 23, 2012, Bitmanagement delivered a new installation file, BS Contact Geo v.8.001.MSI, so that the software could be FlexWrapped. DX079.1. Bitmanagement billed its time in modifying the software as technical support pursuant to the terms of the 2012 Navy Purchase Order. *See* Stip. ¶ 76; *see also* DX076.2 (“Peter, Looks like we will need to tap the hours for the .msi work under the support contract.”)

Between August 2012 and the Navy’s deployment of BS Contact Geo in July 2013, the Navy contacted Bitmanagement no less than five separate times, informing Bitmanagement of the “estimated timeline for Transitioning BS Contact Geo v8.001 out from NMCI testing & certification and deployment to all NMCI,” and that “[o]nce certified, [the Navy would] push the application to all 350,000+ NMCI computers, and [the Navy would] begin monitoring and reporting the usage through the Flex License Manager.” DX088; DX097.1; DX092; *see* DX081; DX084; JX025. In response, Bitmanagement replied “thank you for your encouraging email,” and “thanks for the good news!” DX084.1; DX092.1.

Beginning in July 2013, the Navy installed BS Contact Geo version 8.001 on all non-classified NMCI computers running Windows 7. *See* PX010.6–9. Prior to the Navy’s deployment of BS Contact Geo version 8.001 on the NMCI network, Bitmanagement cited the Navy’s planned deployment of its software in a July 2013 project offer to a potential customer:

US Navy: After five years of testing, approval for the use of the BS Contact Geo on 350,000 PCs of the US Navy took place in May 2013 and central distribution has begun. In a second step, the distribution of the BS Contact Geo on 800,000 PCs in the largest computer network in the world will take place.

DX103.32-TR; Stip. ¶ 79; DX014.1-TR. Bitmanagement continued to cite the Navy's deployment after the installations had begun. *See* DX131.11–17 (Bitmanagement presentation dated April 3, 2014); DX197; *see also* Tr. 320:5–323:17 (Schickel). In its talking points for presentations given between 2014 and 2016, Bitmanagement asserted that BS Contact Geo provided the Navy with a “simple interface for concurrent Usage for multiple users.” DX150.4, 150.27; DX151.6, 151.51; DX197.26, 197.75.

On September 15, 2015, NAVFAC submitted a purchase order to third-party reseller Synergy Software Design to provide NAVFAC with, *inter alia*, 88 “NMCI enterprise capable BS Contact Geo application license keys.” JX031.5, 31. This purchase order was never fulfilled, however. *See* Tr. 941:10–18 (Viana).

On June 21, 2016, counsel for Bitmanagement sent a letter to the Navy asserting that the Navy had infringed on Bitmanagement's copyrights in BS Contact Geo. *See* Stip. ¶ 98. On July 15, 2016, Bitmanagement filed the present suit. *See* Stip. ¶ 100; ECF No. 1.

In September 2016, the Navy uninstalled BS Contact Geo version 8.001 from all computers and subsequently reinstalled the software on 34 seats. *See* PX010.8 (Defendant's Responses to Plaintiff's Interrogatories); Def.'s Post-Trial Brief, ECF No. 121, at 21.

II. DISCUSSION

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.

Under the Copyright Act, a copyright owner has “exclusive rights to do and to authorize” certain delineated actions, including reproducing the copyrighted work and distributing it to the public. 17 U.S.C. § 106(1), (3). “Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 . . . is an infringer of the copyright.” *Id.* § 501(a). To establish a *prima facie* case of copyright infringement pursuant to 28 U.S.C. § 1498(b), a plaintiff must prove: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Gaylord v. United States*, 595 F.3d 1364, 1372 (Fed. Cir. 2010) (“*Gaylord I*”) (quoting *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991)).

Nevertheless, because a copyright owner has the right to “authorize” the exercise of any “exclusive rights” listed under 17 U.S.C. § 106, any such authorization constitutes an affirmative defense to a claim of copyright infringement. *See* RCFC Rule 8(c). Moreover, the list of “exclusive rights” set forth in section 106 is exhaustive, meaning that even “[a]n unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 447 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154 (1975).

Here, Bitmanagement has established a *prima facie* case of copyright infringement of its software BS Contact Geo version 8.001. It is undisputed that Bitmanagement, as the author of the software, is the sole owner of all intellectual property relating to the BS Contact Geo software. Stip. ¶ 19. Bitmanagement holds a United States copyright registration for BS Contact Geo version 8.001, Stip. ¶ 20, and the Government admits that it copied BS Contact Geo at least 429,604 times beginning in July 2013. PX10.8; Tr. 1113:17–23 (Vadnais); Tr. 884:10–13 (Chambers); Def.’s Post-Trial Br. at 1 (“The Navy’s deployment of BS Contact Geo 8.001 on hundreds of thousands of computers was not accidental.”). Accordingly, there is no real dispute that Bitmanagement has established a *prima facie* case of copyright infringement.

Although the parties spent considerable energy discussing the Navy’s “use” of BS Contact Geo, even “[a]n unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 447 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154 (1975). Thus, the issue is whether Bitmanagement authorized the Navy’s copying and distribution of BS Contact Geo version 8.001 across the Navy’s NMCI network, which the evidence indicates it did.

The term “authorize” is not defined in the Copyright Act. *See* 17 U.S.C. § 101. The common understanding of this term is that “authorization” is synonymous with “permission.” Indeed, Black’s Law Dictionary defines “authorize” as: “(1) To give legal authority; to empower; or (2) To formally approve; to sanction.” *Authorize*, Black’s Law Dictionary (11th ed. 2019). In the copyright context, “authorization” typically comes in the form of a written “license,” but that need not always be the case. *See Enzo APA & Son, Inc. v. Geopag A.G.*, 134 F.3d 1090, 1093 (Fed. Cir. 1998) (“a license may be written, verbal, or implied”); *Graham v. James*, 144 F.3d 229, 235 (2d Cir. 1998) (“nonexclusive licenses may . . . be granted orally, or may even be implied from conduct.”) (quoting 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 10.03[A][7], at 10–43).

In this case, the parties stipulated that “the Navy has never had a direct contractual relationship with Bitmanagement.” Stip. ¶ 33. As such, there was no express agreement authorizing the Navy’s copying of BS Contact Geo version 8.001, so the Court must look to the parties’ interactions to determine whether and when any such authorization was given. Looking to the evidence, it is clear that Bitmanagement authorized the Navy to deploy—i.e., copy—BS Contact Geo version 8.001 across the Navy’s NMCI network.⁹

⁹ In this analysis it is important to differentiate between “licenses” or “license keys,” which allow a user to access or “use” the software, and “authorization” to copy the software,

From the beginning of their relationship in 2005, Bitmanagement understood that the Navy was interested in a product that could be used throughout the Navy’s intranet. *See* JX001.1 (“We propose to have a telephone call between you and Peter asap in order to agree on an offer *for internal Navy Intranet.*”) (emphasis added). Thereafter, Bitmanagement and the Navy worked to find a version of Bitmanagement’s software that could be approved for use on the Navy’s NMCI network. *See* JX005; DX010.1; Stip. ¶ 74; DX079.1; DX026. This process required Bitmanagement to create custom-designed license files that were not PC specific, *see* JX005, a “silent installer” that was “intended for bulk installations,” DX010.1, Stip. ¶ 74, and a modified installation file that would allow the software to be used with the Flexera license manager application. DX079.1.

By June 2011, the Navy had tested several versions of BS Contact Geo and was nearing the final stages of obtaining NMCI approval. On June 10, 2011, Bitmanagement agreed to use a “floating license server approach,” which would allow a user to access—i.e., use—a pre-installed copy of BS Contact Geo only if a license was “available” on the license server. *See* DX026.1; DX022-TR; Tr. 850:22–853:2 (Chambers) (explaining how Flexera license manager software works); Stip. ¶ 55. This meant that the license keys, which authorize the use of a particular software, would be managed from a central server, rather than being mapped to individual, named computers. *See* Tr. 850:22–853:2 (Chambers); Tr. 1042–1044:7, Tr. 1052:18–1053:7 (McCarns); Stip. ¶ 55.

Thereafter, Bitmanagement was repeatedly informed that the Navy planned to deploy BS Contact Geo across the Navy’s NMCI network in order to determine “the usage and demand” of the existing license keys. JX013; PX039.2; DX040.2; *see also* DX034.1. In particular, on November 24, 2011, Alex Viana explained the Navy’s understanding of the planned deployment in an email to Bitmanagement’s Axel Koerfer, stating:

Wanted to make sure we have the same understanding of our planned approach for BS Contact Geo with regards to the user’s agreement. We currently have 20 PC licenses of BS Contact Geo version 7.215 which we have not deployed and are requesting to manage from our Navy server. This will be accomplished by utilizing the software application AdminStudio by Flexera in conjunction with BS Contact Geo from our server. *This will allow us to track the use of the 20 licenses across a broad spectrum of the NMCI realm (versus having those 20 licenses mapped to individual PCs).* Once we have successfully implemented this approach, we will be able to document (through the AdminStudio) the usage of the 20 BS Contact Geo licenses and enable us to justify the purchase of additional BS Contact Geo licenses in the future.

DX040.2 (email chain between Alex Viana, Axel Koerfer, and Peter Schickel) (emphasis added). Later that day, Axel Koerfer confirmed the Navy’s understanding in an email reply to Alex

which permits installation of the software on a computer that cannot be “used” or accessed without a “license” or “license key.”

Viana, which included Peter Schickel and David Colleen as recipients, stating “[t]hat is our understanding as well. The user agreement in principal covers your approach from our point of view.” DX040.1. On January 6, 2012, Planet 9 re-confirmed the “floating license system” approach with Bitmanagement, explaining: “The 20 old and 30 new copies of [BS Contact Geo] would be available in the Navy[’s] floating license system. You can have a quarterly use report if you like. If this works for you, I’ll complete the agreement and invoice them.” DX053.2 (email chain between Peter Schickel, David Colleen, and Axel Koerfer). In response, Axel Koerfer replied “ok.” *Id.*

After Bitmanagement delivered the modified versions of BS Contact Geo 8.001 in June 2012, the Navy continually apprised Bitmanagement of the progress of the “formal testing and certification” process and planned deployment—i.e., installation—of the software across “the NMCI enterprise.” *See* DX081 (email chain between Alex Viana, Peter Schickel, and David Colleen); DX084; DX088; DX097; JX025. Between August 2012 and the Navy’s deployment of BS Contact Geo in July 2013, the Navy contacted Bitmanagement no less than five separate times, informing Bitmanagement of the “estimated timeline for Transitioning BS Contact Geo v8.001 out from NMCI testing & certification and deployment to all NMCI,” and that “[o]nce certified, [the Navy would] push the application to all 350,000+ NMCI computers, and [the Navy would] begin monitoring and reporting the usage through the Flex License Manager.” DX088; DX097.1; DX092; *see* DX081; DX084; JX025. In response, Bitmanagement replied “thank you for your encouraging email,” and “thanks for the good news!” DX084.1; DX092.1.

Prior to the Navy’s deployment of BS Contact Geo version 8.001 on the NMCI network, Bitmanagement cited the Navy’s planned deployment of its program in a July 2013 project offer to a potential customer:

US Navy: After five years of testing, approval for the use of the BS Contact Geo on 350,000 PCs of the US Navy took place in May 2013 and central distribution has begun. In a second step, the distribution of the BS Contact Geo on 800,000 PCs in the largest computer network in the world will take place.

DX103.32-TR; Stip. ¶ 79; DX014.1-TR. Bitmanagement continued to cite the Navy’s deployment after the installations had begun. *See* DX131.11–17 (Bitmanagement presentation dated April 3, 2014); DX197; *see also* Tr. 320:5–323:17 (Schickel). In its talking points for presentations given between 2014 and 2016, Bitmanagement asserted that BS Contact Geo provided the Navy with a “simple interface for concurrent Usage for multiple users.” DX150.4, 150.27; DX151.6, 151.51; DX197.26, 197.75.

Together, these interactions unequivocally show that Bitmanagement was not only aware that the Navy planned to install BS Contact Geo “across a broad spectrum of the NMCI realm” but also that Bitmanagement authorized such installations. Specifically, when Alex Viana detailed the Navy’s proposed plan in an email to Bitmanagement on November 24, 2011, Axel Koerfer replied “[t]hat is our understanding as well. The user agreement in principal covers your approach from our point of view.” DX040. Then, after it was apprised of the Navy’s estimated deployment timeline, Bitmanagement responded positively and proceeded to cite to the planned

deployment in presentations to other potential customers. *See* DX084.1; DX092.1; DX103.32-TR; Stip. ¶ 79; DX014.1-TR; DX131.11-17; DX150.4, 150.27; DX151.6, 151.51; DX197.26, 197.75. In fact, between 2011 and 2015, Bitmanagement never questioned or objected to the Navy’s deployment, and never requested that the Navy uninstall the software from its networks. *See* Tr. 300:24-305:3 (Schickel); Tr. 645:24-646:24 (Koerfer); *see also* Tr. 934:7-935:3 (Viana). Moreover, once it was informed that the Navy was “testing multiple users on the install . . . and found that [the Navy] could only use one license at a time,” Bitmanagement created and delivered a modified installation file that would be compatible with Flexera. DX079.

Furthermore, the inherent practicalities of the parties’ licensing scheme support the conclusion that Bitmanagement authorized the Navy’s mass installation. By 2011, the Navy and Bitmanagement were coordinating to find a licensing system that was not PC specific, and by 2012, settled on a “floating license system” managed by Flexera. As explained above, Flexera allows a user to access—i.e., use—a pre-installed copy of software only if a license is available on the license server. *See* DX026.1; DX022-TR; Tr. 850:22-853:2 (Chambers) (explaining how Flexera license manager software works); Stip. ¶ 55. This means that rather than having license keys mapped to individual, named computers, the license keys would be managed from a central server, which the Navy had been requesting since 2006. *See* Tr. 850:22-853:2 (Chambers); Tr. 1042-1044:7, Tr. 1052:18-1053:7 (McCarns); Stip. ¶ 55; JX005. If the license keys for BS Contact Geo were intended to be mapped to individual, named PCs, as Bitmanagement insists, there would be no reason to use the Flexera program because only a computer with a license key mapped to that computer would be able to access the software. Were that the case, there would be nothing for Flexera to “manage.”

The more logical explanation is that Bitmanagement agreed to this licensing scheme because Flexera would limit the number of simultaneous *users* of BS Contact Geo, regardless of how many copies were installed on Navy computers. Without a valid license key, a user is unable to access the features of a particular software—i.e., use the software—despite having the program installed. Therefore, the number of copies of BS Contact Geo that were actually installed on the Navy’s computers would be largely irrelevant because, at most, only 38 users would be able to access or “use” the program at any one time.

This also explains why the Navy planned to use Flexera to track the “demand and usage” of the existing license keys to justify the purchase of additional licenses in the future. *See* JX013.1-2; PX039.2; PX042.2; PX242.1; JX025.1. Once the Navy could determine how many people accessed or tried to access BS Contact Geo after it was installed on the NMCI network, the Navy could purchase a proportionate number of licenses to meet that demand. Before that determination could be made, however, the Navy needed to install the software on all the computers in its NMCI network. Thus, in order to facilitate the “floating license” approach and thereby obtain certification for the software’s use on the Navy’s network, the Navy necessarily needed to install BS Contact Geo across its NMCI network. Despite Bitmanagement’s insistence that it did not understand what Flexera was or how it operated, or what a floating license was, Bitmanagement agreed to the “floating license server approach,” confirmed the Navy’s understanding of that approach, and authorized the Navy’s copying of BS Contact Geo version 8.001 throughout the NMCI network.

To the extent Bitmanagement's authorization to copy BS Contact Geo was dependent on some type of payment, the evidence indicates that such payment would take the form of license keys, which would control the Navy's use of the copies. *See* JX013.1–2; PX039.2; PX042.2; PX242.1; JX025.1. Normally, authorization to copy would imply authorization to use. Here, however, Bitmanagement separated these acts by authorizing the Navy to copy the software before finalizing an agreement on the scope of use. Although Bitmanagement and the Navy both anticipated a future purchase of additional licenses to cover the Navy's usage, this never occurred. *See* Tr. 939:16–941:18 (Viana) (explaining that the Navy's 2015 purchase order for 88 additional licenses was terminated before it was fulfilled). Since the authorization to copy was dependent on an event that never occurred, Bitmanagement's authorization terminated when there was no longer a possibility of agreeing on the license keys. Nevertheless, because the Navy's copying occurred before Bitmanagement's authorization was terminated, Bitmanagement cannot recover for copyright infringement. *See* 17 U.S.C. § 106; *see also Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 447 (1984) (“An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute.”).¹⁰

Therefore, because Bitmanagement authorized the Navy's copying of BS Contact Geo version 8.001, the Court finds that the United States is not liable for copyright infringement.

III. CONCLUSION

Although Bitmanagement established a *prima facie* case of copyright infringement, the evidence shows that Bitmanagement authorized the U.S. Navy's copying of BS Contact Geo version 8.001. Therefore, the Court finds in favor of Defendant, the United States, and Plaintiff's Complaint is hereby dismissed. The Clerk is directed to enter judgment accordingly. The parties are directed to file any redactions to this opinion **on or before Friday, September 20, 2019**.

IT IS SO ORDERED.

s/ Edward J. Damich
EDWARD J. DAMICH
Senior Judge

¹⁰ The Government admits that after the Navy uninstalled BS Contact Geo 8.001 from all computers in September 2016, the Navy reinstalled the software on 34 seats. *See* Def.'s Post-Trial Brief at 21; PX010.8. Although this reinstallation occurred after Bitmanagement's authorization to copy terminated, the Navy still had 38 licenses to use BS Contact Geo version 8.001 from the 2012 Navy Purchase Order. Therefore, the Navy's reinstallation does not constitute copyright infringement because the Navy had authorization to use BS Contact Geo version 8.001 on 38 computers.