

GAYLORD v. UNITED STATES, Appeal No. 2014-5020 (Fed. Cir. February 4, 2015).  
Before Moore, Reyna, and Taranto. Appealed from Fed. Cl. (Judge Wheeler).

Background:

Frank Gaylord created "The Column," a sculpture that forms a central part of the Korean War Veterans Memorial located in DC. The U.S. Postal Service, without seeking Gaylord's consent, used a photograph of "The Column" for a stamp commemorating the Korean War. Gaylord sued for copyright infringement in the Court of Federal Claims. The Federal Circuit had previously issued two opinions regarding this case. In *Gaylord I*, the Federal Circuit held that the government was liable to Gaylord for copyright infringement. In *Gaylord II*, the Federal Circuit vacated the Court of Federal Claims' decision awarding \$5,000 as the entire compensation to Gaylord, and remanded to determine the fair market value of a license for Gaylord's work based on a hypothetical negotiation with the government.

On remand, the Court of Federal Claims, after all other disputes were disposed of, determined that a 10% per-unit royalty was appropriate for the unused "The Column" stamps purchased by collectors. Based on a \$5.4 million determination for the revenue that the Postal Service received from the sold unused stamps, the court awarded Gaylord \$540,000. The government appealed.

Issue/Holding:

Did the Court of Federal Claims err in determining that a reasonable royalty for the unused "The Column" stamps is 10% per-unit? No, affirmed.

Discussion:

The Federal Circuit treats a royalty determination as a factual finding reviewed for clear error.

First, the Federal Circuit held that the Court of Federal Claims could reasonably find that a per-unit royalty, and not a one-time lump-sum payment, would have been the outcome of the negotiation. The hypothetical-negotiation determination must be tied to the particular work at issue. In the copyright context, the unique features of a particular work can be an important factor. Given that "The Column" is a distinctively recognized symbol of the Korean War for most Americans, the Court of Federal Claims could discount the government's evidence that it had never agreed to a per-unit royalty for stamps before.

Second, the Federal Circuit held that the finding of 10% per-unit award was reasonable, as this was the standard rate for Gaylord's other licenses related to "The Column." Because the revenue from the unused stamps was pure profit for the Postal Service, a 10% per-unit royalty actually gives the government a greater percentage of the profits than other licensees. Furthermore, based on the uniqueness of Gaylord's work, the Court of Federal Claims could reasonably discount the government's arguments that the royalty rate would have been lower based on the government's past negotiations. The Federal Circuit held that the government failed to present clear evidence of past similar licensing situations that could warrant overturning the trial court's finding regarding Gaylord's distinctive work.