

Legal Update

October 2008

AN OUNCE OF PREVENTION . . . TIPS FOR AVOIDING AND SURVIVING A SOFTWARE AUDIT

What software is on your company's computer system? Is it licensed? What are the terms of that license? How many copies have been made? How many company employees are given access to the software? Are company employees downloading from the Internet? Are there clear guidelines and policies in place for the use of the company computer system? The Business Software Alliance ("BSA") may be asking your company these questions and many more as part of its increasing anti-piracy efforts on behalf of its member companies. The best defense against claims of copyright infringement by the BSA is a good offense, however, and there are strategies that your company can implement to minimize the chances of finding itself in costly litigation.

Liability for Copyright Infringement

The Copyright Act protects a copyright owner's right to, among other things, reproduce and distribute copies of a work, which can include a computer program. Infringement of those rights can happen in a number of ways. For example, where a company that has purchased a license for software exceeds the terms of that license (for example, by allowing more than the licensed number of employees to use a particular program) that company infringes the copyright owner's rights under the Act.

Copyright law also recognizes liability against persons or entities not directly liable for infringement of a copyright owner's rights under the theories of vicarious liability and contributory infringement. So, a company whose employee downloads an unlicensed copy of software to the company's computer network may be held liable for that infringement.



The law provides the copyright owner with a cause of action for that infringement and the remedies can include an injunction against further infringement, money damages of up to \$150,000 for each infringement, costs and attorneys' fees.

The BSA and Its Anti-Piracy Efforts

According to its website, the BSA is a software industry trade association formed to "promote the goals of the software industry and its hardware partners." Among other things, the BSA works to combat copyright infringement on behalf of its member organizations. The centerpiece of the BSA's anti-piracy efforts, its "Know it | Report it | Reward it" program, encourages the reporting (either online or by calling the BSA's hotline) of "a coworker, colleague or even an ex-employer" suspected of using or selling unlicensed software, offering a reward of up to a million dollars.

In 2008, the BSA expanded its focus to encompass the downloading of illegal copies of software from the Internet. Similar to other trade groups, the BSA uses an Internet "crawler" to identify instances of illegal downloading of software, and a recent report released by the BSA indicates that in the first half of 2008 it sent over 48,000 notices relating to illegal downloads.

A report of piracy received by the BSA generally will result in a letter from the BSA informing the target company that it is suspected of copyright infringement and giving that company the option of conducting a BSA lead software audit as a means to avoid litigation. At best, a BSA software audit requires the devotion of substantial resources to investigate and respond to charges of copyright infringement. At worst, claims of copyright infringement can result in litigation.

There are some strategies, however, that your company can implement to help avoid receiving a software audit letter from the BSA and assist in responding should the company receive such a letter.

Strategies for Avoiding a BSA Software Audit

1. Maintain Accurate Records

The company should maintain full and accurate records of software purchasing, including the retention of receipts, invoices, purchase orders, licenses, in an easily accessible and centralized location.

2. Conduct Your Own Software Audit

Periodically, the company should conduct its own software audit to ensure not only that it has an accurate understanding of the software that resides on its system and that it is in compliance with the terms of any software licenses but also to ensure that no unauthorized software has been downloaded to the company's computer system. If the

company has any particular concerns regarding the conduct or results of a software audit, it should seek legal advice.

3. Implement Policies and Guidelines

The company should implement clear policies and guidelines for the use of the company's computer system. Those policies and guidelines should be communicated to company employees and consistently enforced.

4. Comply With the Digital Millennium Copyright Act ("DMCA")

Any company with a website that provides its employees with access to the Internet and/or space on the company's computer network should ensure that it is in compliance with the DMCA, which can provide a safe haven for liability for claimed infringement by the company's employees.

Conclusion

Ensuring that your company has properly licensed all of the software that resides on its computer system and that it is in compliance with any such licenses will go a long way toward avoiding a BSA sponsored software audit and compliance with the DMCA will assist in minimizing any liability the company might have from acts of its employees.

QUESTIONS OR ASSISTANCE?

We are available to assist you in implementing the above-discussed strategies and are experienced in responding to charges of copyright infringement. If you have any questions, please feel free to contact Patrick Fahey at (860) 251-5824 or Susan Murphy at (860) 251-5707.

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