

# Technology & Internet Alert

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## ***Business Software Audits: Is Your Company Prepared?***

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If your company uses any software made by Microsoft, Symantec, Adobe, Corel or other major software vendors, you need to be aware of, and prepared to deal with, the possibility that you may be audited. In a not-so-subtle recent mass-mailing to corporate employees, Microsoft asks: "WHERE DO YOU STAND ON SOFTWARE PIRACY?" against a background photo of business persons standing in a police station criminal line-up. If you are not aware of the Business Software Alliance ("BSA") and its aggressive software compliance auditing program, then read further. The BSA is a computer software trade group including most of the major software vendors, which acts as the enforcement arm for the software industry, and targets companies for audits to ensure compliance with all software licensing requirements.

### ***How Serious is a Software Audit?***

As BSA smugly puts it, "this is not a traffic ticket." Even one computer configured with a single unlicensed software application is a violation of the federal copyright laws. Under those laws, your company could be subject to up to \$30,000 in statutory damages (\$150,000 for willful infringement) for each unlicensed copy of each software program.

Once BSA begins the audit process, it will demand that you document all licenses for the software you are using, and may even come on site to your company to conduct a thorough examination of your computer systems (sometimes even through an unannounced "raid" based on a court order obtained without notice to the company). If your company is found to be using unlicensed software, BSA will not settle the matter until it has exacted a stiff monetary penalty in addition to payment of all license fees.

In New Jersey alone, BSA has exacted millions of dollars in settlements from small to large companies found through audits not to be in compliance with software licensing requirements. Such settlements are typically in the range of \$150,000 to \$300,000. New Jersey is on the "top ten" list of states in which BSA has discovered unlicensed software being used by otherwise legitimate businesses. A study commissioned by BSA found that over 17% of business software applications being used in New Jersey were unlicensed.

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### ***Can My Company Be Audited?***

Virtually every software license that your company has is likely to contain a "permission to audit" provision buried in the fine print. Moreover, the BSA targets companies of all sizes. It has publicly stated that it will even pursue audits of companies with fewer than 30 computers if it has reason to believe that unlicensed software is being used. The BSA has even targeted non-profit organizations and government entities. The City of Virginia Beach, Virginia, recently spent hundreds of thousands of dollars on the roughly 13% of its Microsoft programs for which it could not find receipts.

### ***How Does BSA Identify Its Audit Targets?***

In the word of a BSA executive (as quoted in BSA literature): "Unless you have no past or current unhappy employees, you're only one phone call away

from being the target of a BSA investigation.” Companies are targeted for audits primarily through tips and leads provided to BSA by company employees or software resellers who have dealt with the company. BSA has set up 1-800 “hotlines” for reporting such information anonymously, and has a continuing public relations/advertising campaign to elicit such reporting. In England, the BSA offers a £10,000 reward to anonymous informants. It is only a matter of time before such rewards are offered in the United States.

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To further encourage anonymous tips, in April of this year, Microsoft sent a mass e-mailing to computer system resellers, in which it announced a pilot program under which it will award prize points and prizes for turning customers over to the Microsoft license police. The e-mail informs vendors that the purpose of the program is to “help you help your customers be compliant.” One prize point is awarded for each non-compliant PC, with prizes ranging from “5 free Microsoft game titles” for 250 points, up to a “Fast Cook & Grill Combo and Travel Chair” for 1000 points.

### ***What Are The Consequences If My Company Is Caught With Unlicensed Software?***

If you are audited by BSA or Microsoft, here is what could happen:

- You may be liable for up to \$30,000 in statutory damages (\$150,000 if the infringement is found to be willful) under federal copyright laws for each unlicensed copy of each software title.
- In sufficiently egregious circumstances, criminal prosecution is a possibility (although that drastic consequence tends to be reserved for true “pirates” who make bulk copies for resale).
- BSA will require you to pay for all of its audit expenses, including the hourly fees charged, and all travel expenses

incurred by, representatives of each software vendor involved, any other auditors sent to your business, any BSA representative time spent, and all related legal fees incurred by them in connection with the audit.

- You will “pay” in lost productivity for the downtime your company incurs while the audit is performed.
- You will pay all costs associated with removing all unlicensed software from your systems and for a re-audit to ensure it has all been deleted.
- You will pay in time and personnel for all of your software to be reconfigured back onto your systems.
- If you settle with BSA, you will be required by the settlement to set up and maintain a corporate infrastructure devoted to remaining compliant in the future.
- You will be subjected to an embarrassing press release from BSA telling the world that your company was caught using pirated software.
- The image of your company and its responsible employees will be tarnished with the reputation of being a software pirate. In some market sectors, that could be particularly embarrassing.

### ***What Constitutes “Unlicensed” Software?***

“Unlicensed” software is software for which the company does not have a current, valid license covering the particular use being made of each copy of a program. When a company purchases software, unless specifically bargained and paid for, it does not get the right to make copies of the program to run on multiple machines. Each copy that runs on each machine must have its own license. Moreover, some licenses are restricted to specific hardware and cannot be transferred over to a new machine when the original is being replaced. In addition, your company may not even be aware that it is running unlicensed software on its computers, which was loaded by employees without company permission. One commentator has predicted that disgruntled

employees aware of BSA may seek revenge on their employers by loading unlicensed software on company systems and phoning in anonymous “tips,” to bring the wrath of BSA upon unsuspecting and otherwise license-compliant employers.

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In addition, even if you have purchased licensed software, you may still not be in compliance. The fine print in your licenses determines the extent of your rights to use the software, and those restrictions can be complex and sometimes counter-intuitive. As an example, under one recent Microsoft licensing program, a licensed user of Windows 95 who has upgraded to Windows 2000 is in breach of the license for Windows 2000 if it continues to also run the Windows 95 on the same computer, even though it has a license for the Windows 95 program. If you have any questions concerning the terms of or your company’s rights under its software licenses, the Technology and Internet Group at Lowenstein Sandler has attorneys experienced in software licensing who can counsel you on these issues.

### ***What Can My Company Do To Minimize The Risk of Being Audited?***

As a company with multiple computers running various software applications, to minimize your legal exposure, you should:

1. Make sure that your company’s written “policies and procedures” or employee handbook includes a section that sets forth the company’s position with respect to the use of unlicensed software on the company’s computers. Such a document should include, among other things, a reporting mechanism for employees aware of unauthorized software, as well as a clear explanation of the consequences to employees who violate company policy. If Lowenstein

Sandler prepared your company’s employee handbook, you should already have such a policy in place.

2. Conduct an internal audit in which you identify and catalog every software application, including each release or version, that is configured on every one of your company’s computers, including every hard drive (whether or not still in use). Various auditing tools are available to your company, including the freely-downloadable and aptly-named “GASP” program available from BSA at [www.bsa.org/usa/freetools/gasp](http://www.bsa.org/usa/freetools/gasp). The audit results, if done in conjunction with legal counsel “in anticipation of” a dispute with BSA or individual software vendors, may be protected against later disclosure in the event of a lawsuit, under the “litigation work product” privilege. Without such oversight by legal counsel, all audit results would likely be fully discoverable in litigation at a later date. Lowenstein Sandler can help you maximize the extent to which your audit results will be protected against future discovery.
3. Locate and document all of your software licenses and purchasing records. BSA and Microsoft take the position that if you cannot prove that you purchased the software with licenses and receipts, the software is unlicensed. In a lawsuit, as a practical matter, the burden would likely fall to your company to prove that your use of software is licensed. If you do not have receipts or licenses, you should try to obtain copies from the vendors from whom you have purchased the software. It is better to do this now, rather than wait to do it in “panic mode” once the BSA has knocked on your door.
4. Put in place a program, entrusted to a sufficiently-responsible employee, through which you ensure that software license

compliance is maintained, and that licenses and purchasing records are properly filed, to minimize any future problems.

### ***Why Shouldn't My Company Just Wait and Buy Licenses After It Is Audited?***

Deciding to bring your company into compliance with software licensing through a self-audit should be a no-brainer. If you are caught with unlicensed software by BSA, they will not let you simply purchase the licenses you need to come into compliance, but will insist on extracting a heavy money penalty in addition. If you are audited, you will end up doing more than a self-audit would have entailed, and pay a heavy fine to boot. Self-compliance is clearly the cheaper and more attractive option.

### ***What Should My Company Do If It Receives a Software Audit Request?***

A software audit request is a serious legal matter, for which you need legal counsel. If your company is

requested by BSA or a software vendor to comply with a voluntary software compliance audit, you should immediately contact the Technology and Internet Group at Lowenstein Sandler, so that we can guide you through this often painful process, help you protect your rights, and minimize your legal exposure to the greatest extent possible.

*For more information regarding software audits, software licensing, and other software-related legal issues, please contact Stephen R. Buckingham, a member of the firm and a member of the firm's Technology & Internet Group, at 973.597.2326, or you may e-mail him at sbuckingham@lowenstein.com. We would also be pleased to provide you with advice concerning your other technology-related legal needs. If we can be of assistance in this regard, please contact Mr. Buckingham, or Edward M. Zimmerman, Chair of the Technology and Internet Group, at 973.597.2568 or you may e-mail him at ezimmerman@lowenstein.com.*