

Software Licensing and Infringement– Both Knowingly and Unknowingly, a Clear and Present Danger for Canadian Businesses, “The BSA – Software Alliance”

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The claims of the BSA - the Software Alliance (the “BSA”) against Canadian businesses seem to be increasingly frequent and are becoming a clear and present danger to all types of businesses that utilize software programs. In other words, just about all businesses and especially those in the tech sector. The BSA is a U.S. based non-profit organization operating in more than 80 countries. Its members include major corporations such as Adobe, Apple, IBM and Microsoft.

The BSA is particularly interesting in investigating copyright infringement when software has been installed by users without first acquiring the requisite licence. It would appear that most investigations of the BSA target businesses that have been identified on its anti-piracy line or anonymous reporting via its website. As such, it would seem that the majority of reports come from current or former employees of these targeted companies. After receiving information alleging software infringement, the BSA contacts the business to investigate the matter and asks for the business to conduct a “software audit”. If the business cannot clear itself of the allegation of software infringement, the BSA invites it to negotiate a settlement. If a settlement cannot be reached, the BSA assigns the file to its lawyers and ultimately, if they cannot negotiate a settlement, the case may be litigated in court. Sometimes, the BSA will commence the initial investigation with the assistance of a law firm.

It should be noted that informers are also sometimes able to collect a reward for informing on software infringement. This is something that business managers and owners must be aware.

In Canada, the BSA utilizes the provisions contained in the *Copyright Act* (Canada) when it claims that a business has utilized software without a licence. The *Copyright Act* provides that when a person infringes the copyright owned or held by another person, the infringing person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court may consider just.

Moreover, since the June 2012 amendments to the *Copyright Act*, the holder of the infringed copyright may elect to claim, instead of damages and profits made by the

person who infringed the copyright in question, an award of statutory damages which are not less than \$500 and not more than \$20,000 per violation if the infringements are for commercial purposes and not less than \$100 and not more than \$5,000 in the case of violations for non-commercial purposes. As one can see, a business that uses software without the proper license is liable for a fine of between \$500 and \$20,000 per license violation.

In reviewing cases of alleged software infringement, the court will look at the i) the good/bad faith of the defendant, ii) the conduct of the defendant during the investigation and following, and ii) the need to deter other software license infringers. It is therefore of paramount importance for a business that has been accused of software infringement to take the necessary steps to cooperate and remediate any software infringement. Avoidance is not recommended. A negotiated settlement is the preferred course. The BSA usually publishes on its website the settlement agreements entered into with businesses. A reasonable, non-confrontational approach will usually facilitate the maintenance of confidentiality of a settlement.

It is therefore crucial that businesses put into place software and computer use policies to help mitigate the risk of software infringement liability. It is also recommended that employees explicitly agree to adhere to these policies. We also recommend that employment agreements also contain language on software and its use.

Nothing will totally prevent a rogue employee from downloading software. But the proper protocols and procedures may help mitigate the risk of severe fines.

The above information is meant to be informational and does not constitute binding legal advice. Special legal advice should be sought for your particular circumstances.



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