# Bad Advice That Can Get You Sued for Software Copyright Infringement

In recent years, many software publishers began using software audits as a means to increase revenue by penalizing customers for perceived compliance issues, writes **Keli Johnson Swan**, an associate at **Scott & Scott**.

The text of her post on the firm's Software Audit Blog follows:

Software publishers often conduct direct audits, or audit through companies such as the BSA| The Software Alliance ("BSA"), or the Software & Information Industry Association ("SIIA"). Although many software users take advice about their audits from software vendors, authorized resellers, or other purported experts, the practice is not always recommended. Unfortunately, often these "certified partners" offer poor advice, costing businesses precious time and money. A growing number of businesses have learned the hard way to trust only an expert specializing in software copyright infringement to assist with software licensing and resolve software audits.

The following is a list of some of the worst advice we have heard for a company facing a software audit.

1. Immediately purchase all of the software necessary to remediate any compliance gaps, as it will be a sign of good faith.

Except for very particular circumstances, this might be the worst advice to a company facing an audit. The auditing entity typically sends the company a letter placing the company on notice that it must preserve all evidence of potential copyright infringement claims should litigation ensue and make

no changes to its network. Purchasing the software can jeopardize a company's ability to resolve the matter.

2. Uninstall all unlicensed software and ignore the audit.

Auditing publishers and third parties argue that failure to preserve all the evidence could constitute spoliation and entitle the publisher to damages for destruction of the evidence. Furthermore, it is rare for a company to be able to resolve an audit without a response. Once an audit is initiated, an auditor typically will not disengage absent a valid pre-existing release or overriding audit provision.

3. Purchase retail licenses for software that will ultimately be used for commercial hosting.

License agreements for software products vary widely, but typically retail license agreements specifically prohibit commercial hosting, which requires a specific type of license. Depending on the commercial hosting setup, the potential copyright infringement damages for purchasing the wrong license could be in excess of several hundred thousand dollars. Saving money on the front end by purchasing a cheaper license is not worth the potential copyright infringement penalties resulting from an audit.

4. Install all of the software you need and true up at the end of the year when you do not have an Enterprise Agreement.

Some software publishers offer license agreements that outline specific rights and obligations, including the right to audit, and an obligation to true up at the end of a specified period, such as a quarter or a year. However, these Agreements do not always cover all of the products a customer may have installed. The software products that are covered by the agreement are specifically listed as part of the agreement and any addenda. The Agreement outlines the terms by which a customer may true up and pay the difference between the number of users last reported and the number of new users on a pro-

rated basis at an agreed rate. If it is not explicitly stated in a license agreement, end users do not have the right to true up.

Some software vendors have mistakenly led companies to believe that they had true up rights where none existed. Based on this erroneous advice, companies downloaded the necessary software as staff continued to grow, with the assumption that they could pay the difference during the true up period. Instead, the companies were faced with an audit, a significant compliance gap, and costly copyright infringement penalties.

Despite receiving such poor advice, a company may be held liable for copyright infringement pursuant to The Copyright Act regardless of whether management was aware of the infringement. It is critical to seek advice from a legal expert with experience in software licensing in order understand all of the risks involved with various strategies when faced with a software audit.