

## Responding to an Audit from the BSA | The Software Alliance

By Robert J. Scott

If your company has received a letter from the BSA | The Software Alliance requesting a software audit, you are probably wondering whether you should cooperate or ignore the request. I have been handling BSA cases for almost a decade and advise my clients to cooperate but to do so in a manner that will not jeopardize their legal position in the event that cooperation does not result in an acceptable out-of-court settlement. After handling over 230 BSA cases I have learned that business clients almost universally seek a resolution that has the lowest total costs and the most predictability. In BSA audits, these costs are software licensing fees, fines payable to the BSA, attorney's fees, organizational impact, and the potential damage to brand associated with negative publicity. In my experience, a properly handled BSA audit can always be resolved for a lower total cost through cooperation than through litigation.

Most importantly, cooperation does not preclude litigation in the future if the BSA is unreasonable in its approach to settlement. In other words, you can always go to court if the out-of-court, lower total cost approach is not satisfactory. However, we have seen audit targets and other lawyers make several mistakes that actually detriment their legal position during negotiations with the BSA. The two critical success factors to properly handling a BSA audit are making sure that the information gathered during the process, which would not otherwise be discoverable in a court proceeding, is protected by attorney work-product and attorney client privileges. In addition, no information should be provided to the BSA unless and until the BSA agrees that the information is governed by Federal Rule of Evidence 408 which will ensure that the information will not be admissible in court if an out-of-court resolution is not reached with the BSA. If you have been contacted by the BSA, you should contact an experienced attorney to assist you with strategy before finalizing your response.



### About the author Rob Scott:

Robert represents mid-market and large enterprise companies in software license transactions and disputes with major software publishers such as Adobe, IBM, Microsoft, Oracle and SAP. He has defended over 230 software audit matters initiated by software piracy trade groups such as the BSA and SIIA. He is counsel to some of the world's largest corporations on information technology matters including intellectual property licensing, risk management, data privacy, and outsourcing. Robert ensures that Scott & Scott, LLP continues its focus on cost-effective strategies that deliver positive results.

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