

Avoiding Spoliation of Evidence Claims in Software Audits

By Keli Johnson Swan

A software audit is a complex, arduous, and time-consuming process for the average company. Software auditing entities like the Business Software Alliance (“BSA”) and Software & Information Industry Association (“SIIA”) initiate software audits on behalf of software publishers to pursue potential copyright infringement claims arising out of software compliance issues.

The BSA and SIIA initiate software audits by sending letters to businesses advising of potential copyright infringement claims, and warning against destroying any potential evidence of software installations. Spoliation of evidence is a term commonly used to describe the destruction or disappearance of evidence that would otherwise be discoverable. For example, the target of a software audit is instructed by the auditing entity to refrain from making any changes to its network and software installations, deleting, decommissioning, or uninstalling any BSA-member or SIIA-member software during the pendency of the audit.

When the audit process stretches for months or sometimes years at a time, companies often need to replace broken computers, upgrade security software, or renew subscriptions for existing licenses. It is critical to preserve the software installation information as of the date the initial audit letter is received. Companies should immediately evaluate and inventory the network and maintain detailed records regarding any subsequent changes.

It is not typically advisable to make any significant purchases or changes to the network. However, if a company must replace a broken machine, it is important to consult with counsel to discuss the legal implications first.

The best way to avoid spoliation of evidence claims is to preserve the evidence. When in doubt, seek legal counsel experienced in defending against software audits.



About the author Keli Johnson Swan:

As an associate attorney at Scott & Scott, LLP, Keli is primarily focused on software licensing and copyright infringement matters. She advises clients in a variety of industries to ensure compliance with software licenses and develop strategies for maximizing the value of software licenses.

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