

Unlicensed software use by businesses now a criminal offence

Introduction of the US Free Trade Agreement Implementation Act and the Copyright Legislation Amendment Act of 2004 from 1 January 2005 means that unlicensed software use in businesses is now a criminal offence for the first time, carrying major penalties and potentially gaol terms.

Chairman of the Business Software Association of Australia, Jim Macnamara, said that most directors, managers and employees of companies and organisations were not yet aware of the legislation and needed to take careful note of the new provisions.

The BSAA is launching a major awareness campaign to draw attention to the criminalisation of end user piracy and point out solutions to avoid legal risks including free information and software management tools on its Web site and offering free seminars.

Under the new legislation, illegal software does not have to be sold or distributed to constitute a criminal offence. Section 132 (1) (a) of the Copyright Act has been amended to make it a criminal offence if a person makes an infringing copy of software with the intention of obtaining a commercial advantage or profit and if the person knows or ought reasonably to know that the copy is infringing copyright.

Use of illegal software in a business or organisation can constitute a criminal offence as commercial advantage is inherent in using any software in a business or professional context and because commercial advantage has been derived from making an illegal copy of the software instead of buying a licence for it. Furthermore, the Explanatory Memorandum which accompanies the new Act states: The offences regime in Section 132 applies to all forms of activity referred to as business end-user piracy.

The FTA legislation also introduces a new offence relating to significant infringements of copyright whether or not these have any direct or indirect financial gain to cover situations such as large-scale piracy not in a commercial business and Internet piracy where illegal software may be distributed for free. Under new sections 132 (5) (DB) and (5) (DC) it is a criminal offence if a person engages in infringement of copyright on a commercial scale and it has a substantial prejudicial impact on the copyright owner.

An important aspect of the legislation is that it can be considered a criminal offence if a person knows or ought reasonably to know that software is infringing copyright. Mr Macnamara said company directors and managers needed to take careful note of this as their company could potentially be held liable even if they the directors are unaware or not directly involved in piracy. Company directors and managers in some circumstances can also be personally prosecuted.

The BSAA warns that companies and organisations should have software management procedures in place to avoid the serious risks of civil legal action and now possible criminal legal action.

In over 15 years experience, the BSAA has found that whenever there are not strict controls on the installation and downloading of software in an organisation, there is a 95 per cent likelihood that illegal software will exist, Mr Macnamara warned. Employees, either through nave enthusiasm or deliberate intent, copy software if it is available, exposing themselves and the organisation and its directors and management to serious risks.

Free Resources for Businesses

The BSAA has launched a dedicated section on its Web site to help businesses understand the new legislative changes. It also publishes freely available information on Software Asset Management on the Web site, including software audit forms, budgeting spreadsheets and templates for businesses to use.

Mr Macnamara said the risks from illegal software were quite easy to avoid through Software Asset Management measures such as restrictions on Internet downloading and user installation of software, periodic spot-checks and occasional software audits.

Mr Macnamara also said the criminalisation of business end user software piracy was fair and reasonable as it related to theft for commercial advantage and infringement on a commercial scale. The volume and value of infringing copies will be taken into account by a court in determining whether it was on a commercial scale, he said.

Internet Piracy

The FTA legislation also introduces a notice and takedown regime to deal with Internet piracy. Under the new take-down provisions, an Internet Service Provider (ISP) must act expeditiously to remove or disable access to material residing on its system as soon as it becomes aware the material is infringing copyright.

Penalties

Under the Copyright Act, individuals committing criminal offences are liable to fines up to \$93,500 and/or five years gaol and companies are liable to fines up to \$467,000 and/or five years gaol.

Users, organisations and directors also remain liable for civil legal action brought by copyright owners which can result in awards of damages of an unlimited amount.

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More information:

Toll-free hotline for public inquiries (anonymously if preferred): 1800 021 143

BSAA Web site: www.bsaa.com.au

About BSAA

The Business Software Association of Australia (BSAA) is affiliated with the Business Software Alliance (BSA), which operates globally in 65 countries. BSAA members include Adobe, Apple, Autodesk, Macromedia, Microsoft and Symantec.

The Business Software Alliance (www.bsa.org) is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce. BSA worldwide members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, CNC

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