

If a copyrighted work is purchased, the purchaser has the right to transfer that copy under what is known as the "First Sale Doctrine." Specifically, the first sale defense allows the "owner of a particular copy" to sell or otherwise dispose of that copy. For example, a music CD or movie DVD can be purchased at Best Buy and then resold at a garage sale.

But software is different. Software is not sold, it is licensed. Someone who purchases a software license is not the "owner of a particular copy," they are an "owner of a license to use a copy" of the software. Thus, the first sale defense does not apply. Because most electronic content is also obtained through a license, the first sale doctrine would likewise not apply to that content because the user does not own a copy of the work, he only has access to it through the license. As a result, it is the terms of the software or content license that will control whether the software or content can be transferred and not the first sale defense or any other provision in the copyright law. Accordingly, licensees should consult the license agreement to determine whether the licensed copy may be re-distributed.

Sellers of OEM and academic software typically claim to be "buyers" of the software from liquidation sales, other auctions, high volume distributors, or other sources. They mistakenly assert their right to re-sell the software under the "first sale" defense of section 109 of the Copyright Act. When a vender sells OEM software without authorized hardware or sells academic software to non-qualified educational users, the vender is exceeding or violating the terms of its agreement with the software publisher and is engaging in a form of software piracy.

Importantly, the first sale doctrine applies only to copies that were lawfully made or obtained. If the content or software was a pirated copy, the purchaser does not have the right to subsequently transfer or sell that copy.