

What is OEM Software?

OEM stands for Original Equipment Manufacturer. OEM, when used to describe software, is used to differentiate that version of the software which is bundled with specific hardware from that same software package sold on its own as a retail package. When OEM software is sold separately from the hardware, this is a violation of the distribution contract between the vendor and the software publisher and the copy of the software transferred from the vendor to the buyer is therefore an illegitimate copy.

How Can I Distinguish OEM Software From Non-OEM Software?

Although most software publishers use the term “OEM” to identify their software as OEM, some use other terms, such as “system builder.” These terms all mean the same thing – the software is OEM software and cannot be re-distributed without the authorized hardware.

Because the sale of OEM software is illegal, auction sellers rarely, if ever, advertise such software as “OEM.” If the software is not being advertised as OEM, the only other way to distinguish OEM from non-OEM software is to ask the seller before bidding on the software. Also, if the seller has provided a picture of the software you could look on the face of the CD or the packaging for an indication that the software is OEM.

How Can I Distinguish Legal From Illegal OEM Software?

There are basically three ways sellers try to sell illegal OEM software:

1. To avoid violating the conditions in the distribution contract, some auction sellers will sell OEM software with a token hardware device, such as an obsolete motherboard, single SIMM, or a cable splitter. However, many license agreements specify the type or types of hardware that must be sold with the software, and merely selling any type of token hardware will not magically transform the software from illegal to legal.
2. Many sellers attempt to pass off pirated software as "OEM software" (see SurfControl OEM of December 2003 report)
3. Many sellers do not even attempt to sell OEM software with any hardware. Instead they rely on the buyer not knowing the difference between OEM software and other software.

The only time OEM software is legally sold on an auction site is when the distribution contract between the software publisher and the seller allows for auction sales (which many do not) and the software is being sold with authorized hardware. Since buyers don't normally have access to these contracts there is usually no way for them to know if these conditions have been met. As a result, it is virtually impossible for the average consumer to distinguish legal from illegal OEM software. Since nearly all OEM software being sold on auction sites is illegal, a consumer's best course of action is simply not to buy OEM software through an auction site.

Is OEM Software the Same as Retail Version of the Software?

The packaging and legal rights that come with the OEM versions of a software package generally differ from what is provided with the retail versions. The functionality of the software is sometimes the same, but it is common for the OEM version to be a version with reduced functionality. In addition, it's possible that the OEM version of a particular software program may only be useable with the hardware specified in the license agreement. For example, some OEM software for burning CDs only functions with the same brand burner it was intended to be bundled with.

Legitimately obtained OEM software generally does not come with user manuals or the original retail packaging, and technical support is usually provided by the hardware provider. However, if you purchase illegal OEM software on an auction, you will not be eligible for technical support, software upgrades, service packs, or patches.

What is Academic Software?

Many software companies sell educational versions of their software to public schools, universities and other educational institutions. The price of this software is often greatly reduced by the publisher in recognition of the educational nature of the institutions. In order to sell academic software, the vender must be authorized by the software publisher. Furthermore, to purchase and use a license to any software identified as "Academic" or "Academic Edition," the purchaser must be a "Qualified Educational User." Also, in most cases, academic software is not transferable.

How Can I Distinguish Academic Software From Non-Academic Software?

Software publishers will usually identify that the software is an academic version on the software's package and/or CD. Auction sellers rarely advertise software as "academic" because they may not be authorized to sell academic software and because only "qualified educational users" may bid on such software. To be sure that you are not purchasing academic software you should ask the seller before bidding on the software. Also, if the seller has provided a picture of the software you could look on the face of the CD or the packaging for an indication that the software is an academic version.

Why is the Sale of OEM or Academic Software Illegal?

The following acts are illegal:

- selling OEM software with no hardware or unauthorized hardware.
- selling academic software to a person who does not qualify as a "qualified educational user."
- selling counterfeit OEM or academic software.
- selling OEM or academic software by an unauthorized reseller or by a person who does

not have the software publisher's authorization to sell OEM or academic software.

- selling OEM or academic software on an auction site when the distribution license prohibits the software from being sold on auction sites.

These acts are illegal because they violate either: (i) the software publisher's rights under the copyright law, or (ii) the terms of the distribution contract between the software publisher and the vender who that publisher authorized to distribute its software.

The copyright law grants the software publisher with the right to control the copying and distribution of its software, including the right to license others to make and distribute copies of its software. Someone who makes a copy of a software program or distributes the program without the software publisher's authority has committed a copyright infringement -- also referred to as software piracy. Similarly, someone who has a license with the software publisher that allows that person to copy or distribute software is guilty of piracy when they exceed or violate the terms of that license.

Software publishers often grant venders a limited right to make copies or to distribute copies of their software. For instance, a software publisher may allow a vender to distribute up to 50,000 copies of its software to "qualified educational users" located in the United States. If that vender makes or sells more than 50,000 copies or sells outside the United States or to persons who are not "qualified educational users," they will have exceeded the terms of their license with the publisher. Because the software publisher has not granted the vender the authority to engage in these acts, the vender will be liable for damages under the copyright law and perhaps the license as well. Furthermore, the software sold by the vender is considered to be illegal and anyone who obtains a copy of that software is in possession of contraband software.

Does the First Sale Doctrine Permit the Sale of OEM and Academic Software?

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. The first sale defense allows the "owner of a particular copy" to sell or otherwise dispose of that copy. For instance, under the first sale defense, a person who buys a movie on DVD from Barnes and Noble is allowed to sell the DVD or give it away without the copyright

owner's permission.

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. As a result, it is the terms of the software license that control whether the software can be transferred and not the first sale defense or any other provision in the copyright law.

Therefore, 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.

OK, So Selling Illegal OEM or Academic Software is Wrong, But What If I Merely Buy It, Have I Violated the Law?

A person who buys illegal OEM or academic software would likely not be liable for copyright infringement, unless they re-distribute the software or make copies of it. However, the buyer would still be in possession of illegal software.

Why Shouldn't I Buy Illegal OEM or Academic Software?

You may think that buying illegal software is not such a big deal. But buying illegal software is no different then buying any other stolen goods.

OEM and academic software piracy is wrong. Among other things, the use of illegal OEM and academic software undercuts publishers' ability to provide lower prices in a variety of consumer markets thereby driving up the costs for legitimate users. For example, knowing that a student's scope of use of a product normally will be different than a commercial user, the publisher can

set a lower price and tailor the license rights accordingly in that market, to the benefit of all. Without adherence to licenses, however, the lower-priced products simply would “leak” to all markets, the publisher would quit offering discounts, and consumers would lose. Similar considerations allow publishers to provide abundant OEM software pre-installed on personal computers and other hardware, at nominal cost to consumers.

There are several other reasons you should not buy the OEM version of a software program:

- The packaging and legal rights that come with the OEM versions of a software package generally differ from what is provided with the retail versions.
- You will not be eligible for technical support, software upgrades, service packs, or patches.
- It is common for the OEM version to be a version with reduced functionality.
- It is possible that the OEM version of a particular software program may only be useable with the hardware specified in the license agreement.