

# California Copyright Litigation: Software Reseller Cannot Rely on First Sale Doctrine

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The U.S. District Court for the Northern District of California recently ruled that an eBay reseller of [copyrighted software](#) could not rely on the first sale doctrine. The decision centered on the distinction between a sale and a license, as the Ninth Circuit previously held that the first sale defense is unavailable to licensees.

## *The Facts of the Case*

In *Adobe Systems Inc. v. Hoops Enterprise LLC*, the defendant purchased bundled computer hardware and software and then subsequently resold only the Adobe software on eBay. When Adobe filed a copyright infringement suit, the reseller attempted to raise a defense under the first sale doctrine, which allows the owner of a lawfully made copy of a copyrighted work to resell those copies.

## *The Court's Ruling*

In *Vernor v. Autodesk*, the Ninth Circuit held that the first sale doctrine does not apply to the resale of software by users that are licensees of a copy, rather than owners. Therefore, the court's decision turned on the reseller's status.

The court ultimately found that the Adobe software in question was licensed to the original purchasers (the computer manufacturer) rather than sold to them. When determining whether the software was licensed or sold, the court highlighted that the agreement between Adobe and the original purchasers (a) specified that it granted a license to the software, (b) significantly restricted the user's ability to transfer the software, and (c) imposed significant use restrictions on the software.

The court further relied on the precedent established by another Ninth Circuit case, *Omega S.A. v. Costco Wholesale Corp.*, which established that the first sale doctrine does not apply to software manufactured abroad.

## *The Message Software Vendors*

This case highlights that, in order to maintain copyright protection, software vendors should draft agreements that make it clear that the software is being licensed, not sold. For resellers, the distinction is equally as important because a reseller will not be protected by the first sale doctrine as a licensee.

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