



Copyright Levies

Guidelines for manufacturers,
importers and distributors

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bitkom

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1 Introduction

Companies distributing IT products, consumer electronics or storage media in Germany will undoubtedly have come across the term »copyright levies« and the acronyms »ZPÜ« and »GEMA« – but what do they mean? Who is liable for the levies and what concrete obligations do they entail? These Guidelines with the clear focus on the German situation are designed to offer the manufacturers, importers and distributors whose products are subject to copyright levies an initial overview of the crucial yet complex issue of compliance.

2 What are copyright levies?

Flat-rate copyright levies are a compensation for the legal **private copies** that are made. Under certain circumstances, copyrighted pieces of music, films, photos or the written word may be legally copied for private and other purposes for personal use (see Section 53 German Copyright Act (UrhG)). Under this law, copyright holders are to receive a remuneration for this use. This remuneration is a compensation for the restriction of the creators' rights. According to the legislator's intent, the flat-rate levy on devices and storage media is a tax on consumers. When this system was introduced fifty years ago, however, consumers could not be required to pay directly. For reasons of practicality, the manufacturers, importers and distributors in Germany are thus required to pay, pricing in the levies and so passing them on to consumers.

Given that every modern device today is equipped with memory so that it can function in the digital world, the market for products is extremely dynamic and the cycles of innovation ever shorter, the future of device-specific levies is a matter of some dispute. When collecting societies call for levies on a new product, this then requires, in each case, independent negotiations or processes involving extensive and expensive studies, and leads to a wide spectrum of issues and problems. For this reason, Bitkom is calling for changing to an alternative regulation which is technology neutral. Some countries in Europe have already made this change and moved on from device-specific levies.

3 The Collecting Societies

3.1 What are collecting societies?

Collecting societies are institutions which, on behalf of the copyright holders or owners of neighbouring rights, manage the copyrights or neighbouring rights on a trustee basis for joint utilization. The classic example here is GEMA granting the rights to broadcast music on the radio. GEMA, the Society for Musical Performing and Mechanical Reproduction Rights, collects royalty payments from radio broadcasters and then distributes these payments to the rightsholders. Copyright holders and the holders of related rights can only assert their claim for certain rights via a collecting society. These include the copyright levy claims regulated under Sections 54 ff German Copyright Law (UrhG).

3.2 What is the ZPÜ?

The Central Organisation for Private Recording Rights (ZPÜ) is not itself a collecting society, but an affiliation of nine German collecting societies in the legal form of a company constituted under civil law (GbR). The ZPÜ's sole corporative objective is to collect the copyright levies for audio and audiovisual works from manufacturers, importers and distributors. In this sense, it has a similar task to the joint organisation of Germany's public service broadcasters which collects the licence fee. In other respects, the VG WORT and VG Bild Kunst collecting societies are charged with the collection of levies for reproductions of the written word and images.

The ZPÜ is entrusted with the task of asserting the rights to information, reporting and the payment of copyright levies. Since the collecting societies are, de facto, monopolists, the ZPÜ is obliged to follow the principle of equality of treatment. From its extensive and comprehensive observation of the market, it has to identify the affected manufacturers, importers and distributors and fully assert the claims against them. The comprehensive assertion of such claims is intended to ensure that all market participants fulfil their obligations and a distortion of competition is excluded.

In practice, if the ZPÜ registers a company as a new »customer«, it initially asks the company to report and make the requisite payment. Should the payments relate to levies under dispute (see below) which need to be legally clarified by the associations, the ZPÜ also asks, as a rule, the company to conclude a declaration waiving a claim under the statute of limitations. Failing this, the ZPÜ then initiates the process of legally asserting its claims.

4 Companies subject to copyright levies

4.1 Manufacturers and importers and their obligations

Under Sections 54 sub-section 1 and 54b subsection 1 of the German Copyright Act (UrhG), manufacturers and importers of devices and storage media which can typically be used for private copies are obliged to pay copyright levies.

The law does not define the term »**manufacturer**«. According to rulings by the Federal Court of Justice (BGH), the term is to be construed in a narrow sense. In a number of decisions in the mid-1980s, the Federal Court of Justice ruled that by definition a manufacturer can only be the natural or legal person who assembles the devices / storage media in the factory, i.e., actually produces them. In that sense, within the meaning of Section 54 German Copyright Act (UrhG), businesses are not manufacturers if they are providing the trademark for a product and organising the entire distribution, but otherwise have the products manufactured by businesses (separate under company law), for example, in Asia.

In contrast to the case of the manufacturer, the **importer** is defined under German law. As specified in Section 54b subsection 2, German Copyright Act (UrhG), an importer is the person introducing the devices or storage media, or who has them introduced, into Germany. Should the importing of these goods be based on a contract with a non-resident, the importer is solely the contracting party in Germany, providing that party is acting on a commercial scale.

If the goods are sold from outside Germany directly to German end users (e.g., via cross-border online trade), the vendor outside Germany is liable for the products sold in Germany. The analogue case also applies: if goods are sold from Germany to end users in other EU countries, the German vendors can then be held liable for the levies in those countries – and even in the case of products that are not subject to a levy in Germany.

In addition to the primary **obligation to pay** the levies, manufacturers and importers have the following obligations:

- Importers are obliged to provide the collection societies unsolicited and at regular intervals the details of how many and which devices or storage media they have imported to Germany (**Duty of disclosure** pursuant to Section 54e subsection 1 German Copyright Act (UrhG). (Details on the forms and deadlines below under »Report Forms«). Should those obliged to pay the levies fail to comply with their duty of disclosure, only providing incomplete information or details otherwise incorrect, they can be required to pay **twice the levy rate** (Section 54e sub-section 2 German Copyright Act (UrhG)).
- In addition, manufacturers as well as importers are obliged to provide **information** at the request of the collecting societies on the devices and storage media sold or otherwise placed on the market (Section 54f subsection 1 German Copyright Act (UrhG)). Here too, the collecting

societies can charge twice the levy rate where the information is not provided or only provided incompletely.

- Moreover, under the **obligation to make a reference** pursuant to Section 54d German Copyright Act (UrhG), invoices for sales to commercial buyers are required to include a reference to the copyright levy on the device or storage medium. Since the law does not prescribe any particular form for such references, this reference is usually made either by a note on the invoice stating that the copyright levies are included in the invoice sum or by specifically detailing the amount of levy due.

Should the companies in question fail to meet the obligation to pay levies in full to the collecting societies – for instance, in the case of disputed levies – they have the duty under commercial law to review the **accrual of financial reserves**. These are to be set at the level required by reasonable commercial assessment to meet the necessary settlement amount.

4.2 The obligations of the distributors

According to Section 54b subsection 1 German Copyright Act (UrhG), a distributor also bears a liability for copyright levies – i.e. each business which acquires devices or storage media commercially **within Germany** which are subject to levies and sells them on, irrespective of whether they are wholesalers or retailers. Hence, all the companies in the distribution chain bear liability de facto as joint and several debtors. The legislator included the distributors within the liability in the mid-1990s since, with the achievement of a single market and the related discontinuation of import control declarations, it no longer regarded the liability of manufacturers and importers as adequate.

In addition to the **obligation to pay levies** the distributor is also under an **obligation to provide information** should the collecting societies so require, and has an **obligation to make a reference** to the copyright levies in invoices to commercial buyers (see above). Distributors do not have a duty to report on products bought, as is the case for importers. Instead, unsolicited reporting is laid out as an incidental obligation, i.e. a provision of information in the distributor's own interest, since it excludes the liability to pay (see below for more details).

The legislator has included distributors within the obligation to pay levies to facilitate the assertion of claims by the collecting societies. This liability lapses accordingly where the levies can be collected in another way. Here, the legislator has provided for two instances of this under Section 54b subsection 3, German Copyright Act (UrhG):

1. The supplier of the distributor is bound by a Joint Agreement, or
2. The distributor notifies the collecting societies by 10 January or 10 July respectively for each preceding six months of a calendar year of the nature and quantity of the devices and storage media received as well as the source of the supply.

Where one of these cases is applicable, a joint liability of the distributor is excluded. Hence, the collecting societies can no longer demand that a distributor pay the levies for the particular period in question – even if they are unable to assert their right of collecting the levies from the importer. In the case of 1 above (supplier bound by a Joint Agreement), the distributor still continues to have at least an obligation to provide information.

Should the distributor have no knowledge of whether a supplier is bound by a Joint Agreement, the distributor can consult the list of members of the Joint Agreements on copyright levies on mobile phones, tablet computers and PCs which the ZPÜ publishes on its web page.

5 What are Joint Agreements – and which ones are there?

Originally, the amount of the copyright levies was set by the legislator. However, since it proved impossible for the legislator to keep up with technical developments, a system was introduced in 2008 whereby the parties involved agree on the appropriate remuneration themselves. Since then, the collecting societies GEMA, VG WORT, GVL and others negotiate with the trade associations (such as Bitkom) on the amount of remuneration asserted as levies on devices and storage media typically used for making reproductions (see Section 54 German Copyright Act (UrhG)). When the parties have reached an agreement, **Joint Agreements** are concluded. The collecting societies then publish the current copyright levies as tariffs on this basis. The collecting societies distribute the revenues to the holders of copyrights and related rights.

Bitkom has concluded Joint Agreements with the collecting societies on the following products:

- Mobile phones
- Tablet computers
- PCs
- Reprographic devices (copiers / multifunctional devices, scanners, faxes, printers)
- Remuneration due from operators of photocopiers (»making photocopies in return for payment«)

Viewed abstractly, a Joint Agreement is a framework contract between an association and collecting societies which regulates the amount of the copyright levies, defines the products, and determines the details on reporting and payment, the obligations incumbent on the collecting societies, and so on. Such contracts provide for simplified administrative procedures and more favourable conditions. However, simply in themselves, the Joint Agreements do not place a business under a legal obligation. Only when a company with the right to accede to the Joint Agreement (a manufacturer or importer of products and a member of an association) actually concludes that Joint Agreement does the company take on contractual obligations. Should the company decide not to accede to the Agreement, it is liable as specified under the statutory provisions.

6 Scales of levies (tariffs) and products affected

Drawing up the scale of the levies (tariffs) is the collecting societies' instrument for making their demands public. Here, one can distinguish between tariff scales applicable through concluding the Joint Agreements (see Joint Agreements above) and those established by collecting societies without the involvement of the trade associations.

Should no agreement be reached in the negotiations between the associations and the collecting societies (for example, USB flash drives and memory cards, external hard discs), the collecting societies in practice publish **scales of levies** which, in some cases, are also effective for past periods of time and, from the perspective of the industry, are unreasonably high. In this context, the collecting societies have indicated that *»the scales of levies set by the collecting societies are non-binding offers for the importers, manufacturers and distributors concerned and are subject to a full judicial review. In practice, such a review of the scales of levies is conducted in all cases and hence it is to be expected that the levies set by the courts will only be paid after this review has been concluded.«* (Press release ZPÜ 25 May 2012.) In fact, the associations conduct judicial proceedings on nearly all the contested levies.

With the Collecting Societies Law (Verwertungsgesellschaftengesetz) coming into force, the collecting societies have been subject to new regulations since 1 June 2016. Among other things, this law has amended the provisions for drawing up the scales of levies. Under this law, collecting societies may only publish new scales of levies when a neutral usage study – with, if appropriate, the involvement of the associations – has been conducted by the arbitration board in an independent process of gathering evidence.

Section 54 German Copyright Act (UrhG) defines which **products** are **affected** and hence subject to levies. On this basis, those devices and storage media are subject to levies where the type of device or storage medium is used on its own or together with other devices, storage media or accessories to make private copies. To that extent, rather than the particular use of individual devices being the key factor, it is how the type of device is used. Consumers therefore cannot argue that they do not make private copies with their own PC. Instead, the levy charged here is generalised, i.e., related to the PC as a type of device. The decisive factor is that this type of device in itself is actually used in a copyright related manner. Such a definition is intended to exclude those devices which could only theoretically be used for private copies (such as cameras or dictaphones, etc.).

Where such products – even if normally subject to levies – are unequivocally and demonstrably used in a way that has no relevance to the reproduction of copyrighted materials (e.g. a memory card for a smoke alarm / a professional audio recorder for musicians, etc.), the importer can ask the ZPÜ to verify the facts of the matter and be granted confirmation of an exemption from the levy charges limited to this device and its particular purpose. As a rule, the ZPÜ grants such a **release** under the proviso that it may be cancelled at any time.

At present, collecting societies in Germany claim the payment of levies for the following products (see [ZPÜ](#) or [VG WORT](#) web pages):

- Tablet computers
- Mobile phones
- PCs and workstations
- External burners
- External hard drives, multimedia hard drives and network hard drives
- USB flash drives / memory cards
- Blank CDs and DVDs
- Other blank media
- Consumer electronics (set-top box, mp3 / mp4 player, DVD and hard drive recorder, etc.)
- Scanners
- Fax devices
- Printers
- Multifunctional devices / photocopiers

7 Judicial review and implementation

The associations review the contested demands by the collecting societies in so-called Joint Agreement proceedings. At present, proceedings are ongoing before the arbitration board of the German Patent and Trade Mark Office (DPMA), the Munich Higher Regional Court and the Federal Court of Justice on, among other things, storage media and consumer electronics. Since these proceedings are significant for the sector in its entirety but otherwise do not have legal force directly for the companies, the ZPÜ asserts its claims in individual actions. Where proceedings by the associations on a levy are pending and a case is to be initiated against a company solely to prevent the alleged claims falling under the statute of limitations, to avoid unnecessary lawsuits the ZPÜ in practice frequently offers the company to conclude a declaration waiving the limitation period. In such a declaration, the company in question agrees to refrain from pleading the statute of limitations for a set period.

Where the ZPÜ is conducting proceedings against a company, it can pursuant to Section 107 of the Collecting Societies Act (VGG) from 2016 request a deposit of security from the company (e.g. a bank guarantee). The arbitration board rules on the type and amount of the security on the basis of a due assessment of the circumstances. A deposit of security may not be ordered if an appropriate part payment has already been made. There are as yet no known cases of this being applied.

8 Report forms

As a rule, manufacturers, importers and distributors fulfil their obligation to report by completing forms provided by the collecting societies. Where there are Joint Agreements, the report forms are available directly from Bitkom for those manufacturers and importers bound by the Agreements. In all other cases, the report forms can be downloaded from the web sites of the collecting societies (see the [↗ ZPÜ homepage](#)). The ZPÜ forms for manufacturers and importers are designed for reporting for the previous calendar quarter. Distributors report the products purchased within the domestic territory and for resale every six months.

9 Export

According to Section 54 subsection 2 German Copyright Act (UrhG), should devices or storage media be exported to other EU countries or to non-EU countries, the claim of the collecting societies lapses. Should levies on them already have been paid to the collecting societies, such payments can be reclaimed. To assert a claim for a refund, the claimant must be in possession of documents showing that the products were exported and the levies paid. The process of refunding levies varies depending on the type of product:

- At present, for audio/video products for which the ZPÜ collects the levies, only the importer or manufacturer – that is, the company which paid the levies – can assert a claim against the ZPÜ for a refund. If required, the company claiming the refund has to obtain the necessary documents from the downstream market levels which exported the products.
- In the case of reprographic products (printers, scanners, copiers, faxes), if the exporting company has the requisite proof, irrespective of the company's market level, it can apply directly to VG WORT.

10 Copyright levies in the EU

The present regulations on private copies and copyright levies are based on an EU Directive issued in 2001. Under this Directive, Member States have the option of allowing users, among other things, to make copies for private use or on paper. Many of the EU Member States have made use of this option and introduced copyright limitations and exceptions in favour of individual user groups.

10.1 Rulings by the ECJ

The European Court of Justice (ECJ) first had to rule on the underlying EU Directive in 2010. Since then, a number of rulings have been given which are binding for national courts and legislators. In many of the judgements, one aspect considered is who can be called on to pay the levies. Here, the »Padawan« and »Reprobel« judgements from the years 2010 and 2015 respectively are of particular relevance. In its judgements, the ECJ clarified that only the privileged group for whom the limitation or exception was designed have to pay the required remuneration. Accordingly, no claim could be asserted against third parties. Manufacturers, importers and distributors were only required to pay because they would have the possibility of pricing in the levies and so charge them to the end user. Since the privileged end users are at the end of the distribution chain and in manufacturing or importing the products, it is not clear which end user will buy it, there are still disputes pending at the ECJ intended to clarify how a differentiation can be made here. In the wake of the ECJ rulings, some countries have introduced refund regulations for commercial end users and authorities that are only acquiring the products for their own purposes and not for resale.

10.2 Regulations in other European countries

In many Member States, the compensation for rightsholders is arranged in very different ways. In some cases, as in Germany, levies are charged on devices, storage media and fee-based photocopying (copy shops). In other cases, the levies are only due on storage media, and not the devices. Finally, there are countries that have departed entirely from levies related to devices and established state funding to finance the payment of compensation to the rightsholders.

In those countries with levies on devices or storage media, there are completely different approaches to establishing the level of charges, for example, via state committees, through negotiations with the parties concerned, or by including an arbitration commission. The products which are subject to levies in one country may not be subject to a levy at all in another country and, moreover, such scales of levies vary and are, in some cases, many times higher.

Given this complexity and volatility, it would go far beyond the scope of these guidelines to provide a detailed overview of the situation. The companies which are active on the particular markets, or plan to be, ought to inform themselves on issues of liability and the particular requirements in the countries in question.

Certainly, it hardly seems realistic to expect harmonisation on this issue within the EU in the short term. The judgements pronounced by the ECJ only deal with individual aspects. Such comprehensive harmonisation could only be achieved by the European legislator, but this cannot be expected at present.

Bitkom represents more than 2,400 companies in the digital sector, including 1,600 direct members. With more than 700,000 employees, our members generate a domestic turnover of 140 billion Euros a year, exporting high-tech goods and services worth another 50 billion Euros. Comprising 1,000 small and medium-sized businesses as well as 300 start-ups and nearly all global players, Bitkom' members offer a wide range of software technologies, IT-services, and telecommunications or internet services. They produce hardware and consumer electronics or operate in the sectors of digital media and the network industry. 79 percent of the companies' headquarters are located in Germany with an additional amount of 9 percent in other countries of the EU and 9 percent in the USA as well as 4 percent in other regions. Bitkom supports an innovative economic policy by focussing the modernization of the education sector and a future-oriented network policy.

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