



Copyright\_Levies\_Reform  
Alliance

## Analysis of National Levy Schemes and the EU Copyright Directive

April 2006

### Executive Summary

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the “Copyright Directive”) sets forth several important rules relating to private copying and “fair compensation”. This analysis, prepared by the Copyright Levies Reform Alliance and its network of national counsels, looks at how 20 EU Member States with private copy levies regimes have implemented (or are proposing to implement) these rules.

Each country analysis provides an unofficial translation of the relevant national rules implementing Copyright Directive Article 5.2(b). Each analysis also provides background on the functioning of the national levy regimes in the various markets, and explores how the Copyright Directive’s levies-related provisions are being applied in practice.

### Key Findings

- **Many Member States have yet to implement the Copyright Directive’s mandate that fair compensation reflect the application of TPMs.**

Article 5.2(b) of the Copyright Directive provides that in assessing fair compensation, account must be taken of the application of technological protection measures (TPMs). While some Member States—including Belgium, Finland, Germany, Hungary, Italy, Lithuania and Spain (in its proposed implementation)—have transposed this language into national laws, many others have not.

- **Moreover, at practical level, TPMs do not appear to be systematically taken into consideration when assessing levies.**

In virtually all of the countries surveyed (including those that have transposed the Art. 5.2(b) language into national law), as a matter of practice it does not appear that levies are reduced where TPMs are applied. Only in the Netherlands did we find evidence of a systematic reduction of levies (on DVD-R+) in light of the application of TPMs.

- **Likewise, it does not appear that there has been any systematic assessment of the harm caused by private copying.**

Levies are intended to compensate for the harm inflicted on right holders by private copying. Accordingly, the Directive (Recital 35) indicates that harm is a valuable criterion in assessing the form and amount of fair compensation. Despite this, virtually none of the countries surveyed make a systematic effort to assess the actual level of harm incurred by right holders before fixing private copy levies.

- **There is a lack of transparency in the levy process.**

In most markets surveyed, while the requirement for fair compensation is established in the national copyright act, much of the detail of these regimes is left to secondary legislation and/or collecting societies to establish. For example, it appears that certain collecting societies offer discounts, which can be significant. These discounts do not appear to be clearly set forth in official publications, however; instead they are agreed separately and diverge from published tariffs.

### Conclusions

Contrary to clear rules in the EU Copyright Directive, national private copy levies regimes appear to operate without consideration for technological developments that impact private copying. Likewise, there has been a failure to consider the harm caused by private copying before calculating levies—suggesting that there may be little correlation between the impact of private copying and the levies collected. Finally, the lack of clarity with regard to the application of levies is an additional concern—and a potential obstacle to new business models, pan-EU businesses strategies and, ultimately, European competitiveness and innovation.

Each of these fundamental issues merits further scrutiny and concrete action by the EU.



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(Please click on the country name for the corresponding country)

<b>Austria</b>		<b>Italy</b>	
<b>Belgium</b>		<b>Latvia</b>	
<b>Czech Republic</b>		<b>Lithuania</b>	
<b>Denmark</b>		<b>The Netherlands</b>	
<b>Estonia</b>		<b>Poland</b>	
<b>Finland</b>		<b>Portugal</b>	
<b>France</b>		<b>Slovakia</b>	
<b>Germany</b>		<b>Slovenia</b>	
<b>Greece</b>		<b>Spain</b>	
<b>Hungary</b>		<b>Sweden</b>	

This study was prepared by the Copyright Levies Reform Alliance.



## AUSTRIA

### **Copyright Directive: Private Copying**

- ***Digital vs. Analogue Private Copying***

In implementing Art. 5.2(b) of the Copyright Directive, Austria has narrowed previously existing rules on private copying. The law imposes identical limitations on digital and analogue copying.

- ***Limiting Conditions of Article 5.2(b)***

Austria has implemented Art. 5.2(b) only partially. Article 42 of the Copyright Act provides as follows:

*(4) Every natural person may produce single reproductions of a work on another medium than stated in paragraph 1 for private use and not for direct or indirect commercial purposes.*

While Art. 42 does not address fair compensation, this is dealt with in a separate Article of the Copyright Act. The Austrian Copyright Act does not, however, implement the Art. 5.2(b) requirement that levies be adjusted to take account of the application of technological protection measures.

- ***The “Three-step” Test (Article 5.5)***

The “three-step” test of Art. 5.5 is *not* expressly implemented in the Copyright Act.

### **Levies: Background**

- ***Application and Scope***

Article 42(b) of the Copyright Act provides the basis for the application of copyright levies. Authors have the right to receive equitable remuneration, but neither the Copyright Act nor secondary legislation establish the system in detail. Instead, pursuant to the Copyright Act, collecting societies are empowered to set private, non-binding tariffs.

These collecting societies are supervised by a government body (*Staatskommissär*), which regulates whether the collecting societies are meeting their duties and functions as set forth in the Act on Collection Societies. A special arbitration board oversees the resolution of conflicts between collecting societies and user organizations; a second board (*Schiedsstelle*) oversees disputes concerning the amount of levies. Effective July 1, 2006, however, a new Collecting Societies Act (*Verwertungsgesellschaftengesetz*) will become effective. This Act will make changes regarding the structure and obligations of collecting societies toward their members. It will also alter the way in which collecting societies are now supervised. (The *KommAustria* (Communications Agency Austria) will be the new supervising body, with Appellate review conducted by a new “Copyright Senate” (*Urheberrechtssenat*)).

Levies are currently being applied to a variety of digital products including audio and data CD-R/RW and DVDs. Following a 2005 court decision, levies are also applied to the storage media for MP3 players. The Austrian Supreme Court, in *Gericom* (OGH 12.7.2005, 4 Ob 115/05y), held that storage media for MP3 players may be levied, but hard discs in personal computers may not. (In reaching this conclusion, the court reasoned that the primary and economically relevant usage of storage media today is to reproduce copyright protected works (music, film), whereas personal computers are widely used in many ways that are not related to copying of protected works).

▪ **Rates and Discounts**

As noted above, the Copyright Act does not specify the amount of levies. Instead, collecting societies publish their own private, non-binding tariffs. While industry groups may challenge the tariffs, any dispute between the industry group and the collecting societies must be resolved through court proceedings, in which the judge will determine the applicable levy in each case.

Levies can also be set through a general agreement between the respective collecting societies and the Austrian Chamber of Commerce, acting on behalf of their members. Such agreements are directly binding on the members. If the collecting societies and the Austrian Chamber of Commerce fail to agree on the rate of applicable levies, special arbitration proceedings may be initiated.

While there are no published discounts, collecting societies may conclude agreements with the Austrian Chamber of Commerce that provide for levies lower than the officially published tariffs. These discounted tariffs are then available to all members of the Austrian Chamber of Commerce.

The following sets forth certain published levies and those set by agreement with the Austrian Chamber of Commerce:

<b>Products</b>	<b>Published Tariff</b>	<b>Tariff According to the General Agreement</b>
Audio analogue-tape	€ 0.18 per hour	€ 0.12 per hour
Audio digital (Audio CD-R/RW, MiniDisc, DAT)	€ 0.27 per hour	€ 0.18 per hour
Data CD-R /RW	€ 0.255 per hour	€ 0.17 per hour
Integrated or changeable memory sticks of every kind in/for MP3-players/Jukeboxes and alike	€ 3.00 up to 256 MB € 6.00 up to 512 MB € 7.50 up to 1 GB € 12.00 for 1.1 – 6 GB € 18.00 for 6.1 – 30 GB € 24.00 for 30.1 – 60 GB € 30.00 for 60.1 – 100 GB	€ 2.00 up to 256 MB € 4.00 up to 512 MB € 5.00 up to 1 GB € 8.00 for 1.1 – 6 GB € 12.00 for 6.1 – 30 GB € 16.00 for 30.1 – 60 GB € 20.00 for 60.1 – 100 GB
Video analogue and digital (analogue and digital video tapes, DVD)	€ 0.27 per hour (DVD 4.7 GB = 2 playing hours)	€ 0.18 per hour (DVD 4.7 GB = 2 playing hours)
Hard disk in DVD recorders, in SAT receivers, and alike	€ 4.59 up to 40 GB € 9.20 up to 80 GB € 13.79 up to 120 GB	€ 3.065 up to 40 GB € 6.13 up to 80 GB € 9.19 up to 120 GB

	€ 18.39 up to 160 GB € 30.00 up to 250 GB € 45.00 up to 800 GB	€ 12.26 up to 160 GB € 20.00 up to 250 GB € 30.00 up to 800 GB
Hard disk in DVD recorders, in SAT receivers, and alike		
<b>Scanner</b>	€ 3.95 - 331.00/device depending of pages per minute	
<b>Fax</b>	€ 5.56 - 22.41/ device depending of product type	
<b>Printers (monochrome)</b>	0-12 ppm: € 6.00 13-35 ppm: € 10.50 36-70 ppm: € 18.00 > 70 ppm: € 52.50	The tariffs for color printing are double  The levies are claimed to be applied to the highest speed in normal print mode and if a device has more than one speed selection, the highest speed is the applicable one - i.e. draft mode.  Tariffs published unilaterally by collecting societies, but not agreed with industry.
<b>Multifunctional devices (colour)</b>	0 – 39 ppm: € 93.33 39-69 ppm: € 158.69 > 70 ppm: € 364.04 -	For multifunction devices, the function with the highest tariff is applicable, however it should be at least 150% of the lowest applicable tariff.  Tariffs published unilaterally by collecting societies, but not agreed with industry.
<b>Photocopiers</b>	From July 1, 2005	
	B&W 1-9 ppm:€ 10.80	
	B&W 10-19 ppm:€ 32.64	
	B&W 20-39 ppm:€ 93.33	
	Color 1-39 ppm: € 93.33	
	B&W/Color 40-69 ppm: € 158.69	
	B&W/Color >69 ppm: € 364.04	
<b>PC</b>	€ 18.00	

\* *Collecting Society Austro Mechana. Rates are valid from January 1, 2006.*

#### ▪ **Payment and Collection**

Levies are collected by a number of collecting societies, including Literar Mechana GmbH; Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte; AKM; Musikedition Gesellschaft zur Wahrnehmung von Rechten und Ansprüchen aus Musikeditionen, reg Gen mbH; LSG Wahrnehmung von Leistungsschutzrechten GmbH; LVG Literarische Verwertungsgesellschaft; VAM Verwertungsgesellschaft für audiovisuelle Medien;

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VBK Verwertungsgesellschaft bildender Künstler; VBT Verwertungsgesellschaft für Bild und Ton; VDFS Verwertungsgesellschaft Dachverband der Filmschaffenden Österreichs reg Gen mbH; and VGR Verwertungsgesellschaft Fundfunk.

Article 42(b)(3) specifies those responsible for payment of levies:

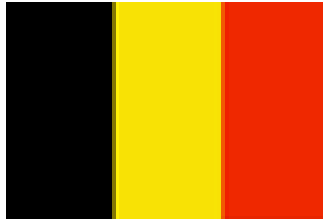
*1. blank cassette or appliance levy: the person who first makes the recording material or reprographic appliance commercially available for payment in Austria; the person who makes the recording material or reprographic appliance commercially available for payment in Austria, but is not the first to put it into circulation or offer it for sale, shall be liable as guarantor and payer; however, persons who within a six-month period, acquire audio recording media with not more than 5,000 hours playing time and video recording media with not more than 10,000 hours playing time shall be exempt from liability for the blank cassette levy. . . .*

### **Levies: DRMs and TPMs**

Current laws do not provide that levies must be reduced or phased out where DRMs or TPMs are available or applied. Further, there are no guidelines explaining how levies should be calculated where DRMs or TPMs are in place. This issue, however, may be considered on an ad hoc basis as part of general tariff negotiations between the Austrian Chamber of Commerce and collecting societies.

### **Levies: Harm**

Current laws do not require a showing of harm to the right holder before a levy will be imposed or increased. Further, they do not mandate that when there is only “minimal” harm, either no payment or a reduced payment is due. To date, no studies have been undertaken to assess the impact of levies, the level of harm to right holders caused by private copying, or the uptake of TPMs/DRMs.



## **BELGIUM**

### **Copyright Directive: Private Copying**

- ***Digital vs. Analogue Private Copying***

Belgium's Copyright Act (amended in May 2005 to implement the EU Copyright Directive) has separate provisions for analogue and digital private copying, but there are no significant differences between the two.

- ***Limiting Conditions of Article 5.2(b)***

Art. 22 para.1.5 of the amended Act permits "... reproduction of works other than on paper or similar media occurring in family circles and only intended therefore." Art. 55 of the Act requires that authors receive fair compensation. Finally, the Act introduces a new paragraph in Art. 56 which provides that "*in determining levies account shall be taken of whether or not technical measures are being applied to the works concerned.*" (In addition, Art. 56 of the Act states that "*the non-use of technical measures cannot prejudice the right to remuneration as defined in Art. 55*").

- ***The "Three-step" Test (Article 5.5)***

The "three-step" test of Art. 5.5 is not expressly implemented in the amended Act. The Act sets out separately numerous exceptions and within some of these provisions includes wording close to the three-step test, however. For example, in the case of libraries, reproduction may not prejudice the normal exploitation of the work.

### **Levies: Background**

- ***Application and Scope***

Belgium's Copyright Act provides the basis for levies (Art. 55). The details of products subject to levies and the relevant rates are determined by an advisory committee, incorporating relevant industry bodies. Products and rates are then published via Royal Decrees adopted under the Copyright Act. Notably, however, the Government is not obliged to follow the opinion of the committee when establishing rates.

Levies currently are applied to a variety of audiovisual media, including CD-R, CD-RW and DVD, and reprographic equipment, such as photocopiers and scanners, DVD recorders and MiniDisc recorders. The Copyright Act does not list specific IT products or rates, although the Act does refer to newly-introduced levies on "computers." The Act does not expand upon what the term "computer" will cover nor how levies on computers will work in practice.

- ***Rates and Discounts***

As noted above, rates are determined by Royal Decree and new rates will likely be set shortly.

<b>ANALOGUE EQUIPMENT</b>	
<b>Audio</b>	
Cassette recorder	3% of sales price to dealer
Cassette recorder combi.	1.5% of sales price to dealer
<b>Video</b>	
VHS and DVD recorders	3% of sales price to dealer
VHS recorder combi.	1.5% of sales price to dealer
<b>ANALOGUE MEDIA</b>	
<b>Audio</b>	
Audio tape	0.10 €/hr
<b>Video</b>	
Video tape 180 min.	0.10 €/hr
Video tape 420 min.	0.10 €/hr
<b>DIGITAL MEDIA</b>	
<b>Audio</b>	
CD-R/RW	0.23 €/hr
Mini Disc	0.23 €/hr
DVD	0.59 €/disk
<b>Data</b>	
CDR/RW	0.12 €/disk
<b>REPROGRAPHY</b>	
<b>Scanners</b>	Between € 1.67 and € 85.13, depending of resolution (dpi)
<b>Multifunctional devices, copiers and faxes</b>	
	< 6 ppm: € 4.25
	6 – 9 ppm: € 15.61
	10 – 19 ppm: € 51.08
	20 – 39 ppm: € 166.00
	40 – 59 ppm: € 275.25
	60 – 89 ppm: € 688.12
	> 89 ppm: € 1560.67

Art. 57 of the existing law establishes automatic discounts for a variety of entities, including producers of audiovisual works, broadcasters, schools, institutes for blind and disabled people as well as recognized prisons, hospitals and youth centers. The Act additionally provides that the Crown may determine further categories of natural and legal persons who may benefit from discounts. No discounts are available to manufacturers or importers of IT media or equipment. However, levies for exported products are refunded upon proof of export.



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- ***Payment and Collection***

Levies are collected by a number of collecting societies, including Auvibel for audio and video and Reprobel for reprography.

Under Art. 55 of the Act, manufacturers and importers are obligated to pay levies.

**Levies: DRMs and TPMs**

Art. 56 of the Act requires that the application of TPMs be taken into account when establishing tariffs. The law gives no guidance as to how this is to work in practice, however.

**Levies: Harm**

Belgium's Copyright Act does not require a showing of harm to the right holder before a levy will be imposed or increased. Nor does it mandate that no payment or a reduced payment is due when there is only "minimal" harm.

To date, no studies have been undertaken to assess the impact of levies, the level of harm to right holders caused by private copying or the uptake of TPMs/DRMs.



## **CZECH REPUBLIC**

\* *The Czech Parliament is currently discussing amendments to the Copyright Act, including potential changes to the provisions of the Act relating to levies. It is anticipated that these amendments will be adopted during the course of 2006.*

### **Copyright Directive: Private Copying**

#### ▪ **Digital vs. Analogue Private Copying**

Czech law does not impose any additional limitations on digital private copying.

#### ▪ **Limiting Conditions of Article 5.2(b)**

The Czech Republic has implemented Art. 5.2(b) only partially, in a manner that is not entirely consistent with the Copyright Directive. Article 30 of the Law No. 121/2000 Coll., on Copyright, Rights Related to Copyright and on the Amendment of Certain Laws (Copyright Act) states that:

(2) *Copyright shall . . . not be infringed by whoever:*

(a) *for his own personal use makes a recording, reproduction or imitation of a work*

While Art. 30 does not address the issue of fair compensation, this is dealt with in Arts. 25 and 104. The Act does not implement the requirement that such compensation take account of the application of TPMs, however.

#### ▪ **The “Three-step” Test (Article 5.5)**

The “three-step” test of Art. 5.5 is expressly implemented in Art. 29 of the Czech Copyright Act.

### **Levies: Background**

#### ▪ **Application and Scope**

Articles 25, 104 and the Annex to the Copyright Act set forth the basic rules applicable to levies. They provide that levies shall apply to technical devices used for making reproductions of audio and audiovisual “fixations,” devices for making printed reproductions, and blank audio and audiovisual media.

In relation to digital products, the situation is not entirely clear and appears to be largely a matter of interpretation. Local experience and communication with the Ministry of Culture and collective administrators suggests that levies apply to CDs, DVDs, CD-ROMs, Multifunctional devices and CD-burners. Collecting societies also appear to be collecting levies on PC hard drives although there is currently some question as to the legality of these efforts. There have been no regulations or communications clarifying the matter, however.

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As noted above, the Czech Parliament is now discussing amendments to the Copyright Act. If adopted, these amendments may lead to greater clarity in terms of what products are levied. The amendments will give the Ministry of Culture an enhanced role in this aspect; more particularly, the Ministry of Culture will set out by special decree the types of media and equipment that are subject to levies.

▪ ***Rates and Discounts***

The Annex to the Copyright Act sets out rates for levies. A fixed rate of 3% of the sale price is due on importation or first sale of devices used for making sound recordings, except radio and television sets enabling the recording of a broadcast for which the rate is 1.5% of the sales price. For audio and audiovisual media, the tariff is fixed at 4% of the sales price. If the proposed amendments are adopted, in future the Ministry will set tariffs for audio and audio-visual media, meaning that the 4% rate may be subject to modification.

▪ ***Payment and Collection***

Manufacturers and importers are obliged to pay levies at the time of importation or first sale. In addition, third party transporters or resellers of the relevant products will be liable to pay levies unless they can provide details identifying the importer or producer to the relevant collecting society.

The Ministry of Culture regulates the collection of levies, which is undertaken by the following collecting societies: OSA (Ochranný svaz autorský), representing authors; INTERGRAM, representing artists and producers of audiovisual recording; DILIA, representing authors of literary, dramatic and dramatic-musical works, and OOA-S and GESTOR (both representing authors of works of fine arts).

**Levies: DRMs and TPMs**

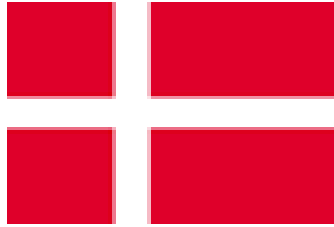
At present, the Art. 5.2(b) provisions relating to TPMs have not been implemented into Czech law and it appears that levies are payable in full regardless of the application of TPMs.

**Levies: Harm**

Czech law does not:

- require a showing of harm before allowing a levy to be imposed or increased;
- clarify that no payment or reduced payment is due where there is only minimal harm;
- or
- eliminate levies where right holders have already received compensation.

To the best of BSA's knowledge, no studies have been undertaken to assess the harm caused by private copying or the impact of DRMs on private copying, although parliamentary discussions have taken place in relation to copying and digital broadcasting within the Ministry of Culture, which have touched on the use of TPMS.



## DENMARK

\* In connection with the implementation of the EU Copyright Directive, the Danish Government concluded it would revisit the “blank levy system” in 2006. Accordingly, in January 2006 the Danish Ministry of Culture published a draft bill proposing amendments to sections of the Danish Copyright Act relating to levies on blank media. The bill, discussed in more detail below, includes some minor adjustments, but does not propose sweeping revisions. Instead, the Ministry of Culture has indicated that any broad revisions should await action by the EU Commission concerning the use of technological protection measures; the Ministry of Culture proposes revisiting the levies system once again, in fall 2007 at the latest.

### **Copyright Directive: Private Copying**

#### ▪ **Digital vs. Analogue Private Copying**

Danish law differentiates between digital private copying and analogue private copying. For example, under Art. 12 of the Danish Copyright Act, private copying of digital works is prohibited unless done exclusively for the personal use of the individual making the copy or for his/her household.

#### ▪ **Limiting Conditions of Article 5.2(b)**

Denmark has implemented Art. 5.2(b) only *partially*. Article 12 of the Copyright Act states:

*(1) Anyone is entitled to make or have made, for private purposes, single copies of works, which have been made public if this is not done for commercial purposes. Such copies must not be used for any other purpose.*

*(2) The provision of subsection (1) does not provide the right to . . . .*

*(v) make single copies in digital form ... unless this is done exclusively for the personal use of the copying person himself or his household.*

*(3) Notwithstanding subsection (2)(v) it is not permitted without the consent of the right holder to make copies of works in digital format on the basis of an exemplar lent or rented.*

While Art. 12 does not refer to “fair compensation,” this is dealt with in Art. 40, which establishes the basic rules applicable to levies. The Danish Copyright Act does not, however, implement the Art. 5.2(b) requirement that levies be adjusted to reflect the application of TPMs (although this requirement is referenced in the Explanatory Memorandum to the Copyright Act).

#### ▪ **The “Three-step” Test (Article 5.5)**

The “three-step” test of Art. 5.5 is not implemented verbatim in the Copyright Act; however, it is stated in the preparatory works of the Act that all exceptions must meet the “three-step” test. Danish legal tradition implies that the “three-step” test is implemented in practice by its inclusion in the preparatory works, although not expressly included in the Act.

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## **Levies: Background**

### ▪ ***Application and Scope***

Levies in Denmark have existed for over a decade. Levies on blank analogue tapes have been in place since 1993, and had been expanded to cover digital media prior to implementation of the Copyright Directive. Article 40 of the Copyright Act sets forth the basic rules applicable to levies.

Products that are levied include digital sound media (CD-R, CD-RW, CD-R Audio, DAT, MiniDiscs, and memory cards) and audiovisual media (A-DAT, DVD+R, DVD-R, DVD+RW, DVD-RW, and DVD-RAM 5 1/4.)

At present, levies are not imposed on IT equipment; however there has been a significant lobby recently for the extension of levies to such equipment. More particularly, demands have been made that levies be applied to “embedded” storage media (e.g., set top boxes, DVD recorders, MP3 players etc.). Pursuant to the draft bill now under consideration, the Ministry of Culture appears to be planning to put on hold discussions concerning the expansion of levies to equipment, but this issue will be revisited in fall 2007.

### ▪ ***Rates and Discounts***

Prior to the amendment of the levy system in 2003, levies on media were calculated based on per minute playing time. This has now been replaced by a fixed levy per item. Article 40 of the Copyright Act provides that levies be applied and remuneration be fixed, including as follows:

<b>Products</b>	<b>Published Tariff 2006</b>
Analogue sound media	€ 0.01 per minute playing time
Analogue image media	€ 0.01 per minute playing time
Digital sound media	€ 0.25 per exemplar
Digital image media	€ 1.35 per exemplar
Digital memory cards	€ 0.57 per exemplar

\* *Section 40, Act on Copyright, consolidated act No. 710 of 30 June 2004*

The above rates are adjusted annually according to a percentage established in the Act on Rate Adjustment Percentages and are published by the collecting society Copydan. It should be noted that the draft bill mentioned above (if adopted by Danish Parliament) will result in a reduction of the tariff per digital image media from € 1.35 to € 0.40. (The reasoning behind the proposed reduction is that the levy on digital image media results in a substantial increase to the resale price of DVDs—which leads to unfair competition and imports of DVD media from other EU countries where DVD prices are lower.)

No discounts are available under the Copyright Act. Certain uses are exempt, however. For example, levies are not imposed on: storage media distributed to another registered company (however the recipient company will then have to pay the remuneration unless an exception applies); exported storage media; storage media used for professional purposes (including education); and storage media used for visually handicapped and hearing-impaired persons. Further, the Ministry of Culture may exempt from levies storage media to be used for special purposes. No such exemptions have been granted to date, however.

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- ***Payment and Collection***

Manufacturers and importers are obliged to pay levies on the specified products manufactured or imported for commercial purposes. Levies are collected by Copydan, which is established under Art. 39 of the Copyright Act, and approved by the Minister of Culture. Importers and manufacturers must be registered with Copydan.

**Levies: DRMs and TPMs**

The preparatory documents of the Copyright Act state that TPMs should be considered when setting the level of levies to be paid, and that if TPMs become more widely used in the future then this may result in a reduction, or elimination of levies. That said, no decision has been made regarding how to implement such considerations in practice and there are no guidelines suggesting how levies should be calculated where DRMs or TPMs are available. As noted above with regard to the draft bill now under consideration, the Ministry of Culture appears to be awaiting further guidance from the EU Commission on this issue before taking further action.

To the best of BSA's knowledge, no studies have been undertaken to assess the impact of TPMS or DRMs on private copying.

**Levies: Harm**

Danish law does not explicitly:

- require a showing of harm before allowing a levy to be imposed or increased;
- clarify that no payment or reduced payment is due where there is only minimal harm; or
- eliminate levies where right holders have already received compensation.

However, the notion of harm has been mentioned in the preparatory works to the legislation. It is anticipated that the impact of harm (or lack thereof) on the levy system will be discussed in the context of the 2007 review.



## ESTONIA

### **Copyright Directive: Private Copying**

#### ▪ ***Digital vs. Analogue Private Copying***

Estonian copyright law imposes identical limitations on digital and analogue private copying. The law limits the overall scope of the private copy exception, by expressly stating in law that it does not apply to copying done for commercial purposes.

#### ▪ ***Limiting Conditions of Article 5.2(b)***

Estonia has only partially implemented Art. 5.2(b) of the Copyright Directive. Estonian law does not include the Art. 5.2(b) requirement that levies take account of the application of TPMs. Articles 18 and 26 of Estonia's Copyright Act provide as follows:

*Art. 18(1) A lawfully published work of another person may be reproduced by an individual for private use without the authorization of its author and without payment of remuneration. This reproduction may not pursue any commercial purposes.*

*Art. 26(1) Audiovisual works or sound recordings of such works may be reproduced for the private use (scientific research, studies, etc.) of the user without the authorisation of the author. The author as well as the performer of the work and the producer of phonograms shall have the right to obtain equitable remuneration for such use of the work or phonogram (Art. 27).*

#### ▪ ***The "Three-step" Test (Article 5.5)***

The "three-step" test of Art. 5.5 is expressly implemented in Art. 17 of the Copyright Act.

### **Levies: Background**

#### ▪ ***Application and Scope***

Article 27 of the Copyright Act sets out general rules on levies and the rates of levies. This Article was amended on 8 December 2005, with the amendments coming into force on 12 January 2006. In addition, the Estonian Government passed on 17 January 2006 *Regulation no 14* (which entered into force on 30 January 2006), setting out a broad list of media and equipment to be levied. Regulation no. 14 served to clarify confusion, as under prior law it was unclear exactly which products were levied.

*Government Regulation no 14* contains the following list of media and equipment to be levied:

- video cassettes (VHS);
- audio cassettes;

- 
- CD-R, CD-RW, DVD-R and DVD-RW;
  - MiniDiscs (MD);
  - VHS and DVD video recording devices;
  - audio recording devices that enable recording to audiocassettes, CD-R's and CD-RW's.

*Regulation no 14* provides that the above-mentioned list does not apply to devices that have been integrated into a computer or are used only through a computer, nor does it apply to microcassettes.

▪ ***Rates and Discounts***

The Copyright Act's recently-revised Article 27 sets forth the levy rates, as follows: 3 % of the value of recording devices and 8 % of the value of media products.

The Copyright Act does not make discounts available for specific industry groups.

▪ ***Payment and Collection***

Levies are to be paid by manufacturers, importers, and sellers of recording devices and blank media and by persons importing such devices and media from any other EU Member State into Estonia.

According to the revised Article 27 of the Copyright Act, the Minister of Culture is to appoint the collecting society that will collect and pay out the levies. In recent years — including 2005 — the levies have been collected by the Estonian Authors Society (Eesti Autorite Ühing). The Minister has not appointed the collecting society for collecting the levies in 2006 yet.

**Levies: DRMs and TPMs**

The Copyright Act does not require that levies be reduced or phased out where DRMs or TPMS are available or applied.

**Levies: Harm**

Current laws do not require a showing of harm to the right holder before a levy will be imposed or increased. Further, they do not mandate that when there is only "minimal" harm, either no payment or a reduced payment is due. BSA is unaware of any studies that have been undertaken to assess the impact of levies, the level of harm to right holders caused by private copying, or the uptake of TPMs/DRMs.





## FINLAND

\* *The Finnish Government in October 2004 adopted an Act, Hallituksen esitys Eduskunnalle laeiksi tekijänoikeuslain ja rikoslain 49 luvun muuttamisesta (HE 28/2004), amending the Copyright Act and implementing the EU Copyright Directive. While most of the amendments entered into force on 1 January 2006, others—including Section 26a, dealing with levies—do not take effect until 1 January, 2007.*

### **Copyright Directive: Private Copying**

#### ▪ ***Digital vs. Analogue Private Copying***

HE 28/2004 does not amend the existing provisions in the Act that impose identical limitations on digital and analogue copying.

#### ▪ ***Limiting Conditions of Article 5.2(b)***

Finland's earlier Copyright Act contained a private copying exception that only partially incorporated Art. 5.2(b). Art. 12 of the Copyright Act provided as follows:

*"Any person may make single copies of a disseminated work for his private use. Such copies may not be used for other purposes."*

HE 28/2004 updates this provision by changing authors' rights to compensation to "fair compensation," in accordance with the Directive, and stating that TPMs must be taken into account when determining levies as follows:

*"When determining the amount of levies, technical measures used to protect works available to the public from private copying shall be taken into account."*

#### ▪ ***The "Three-step" Test (Article 5.5)***

HE 28/2004 does not expressly implement the "three-step" test of Art. 5.5. However, an "Explanatory Memorandum" issued by the Government expressly mentions that the Directive's "three-step" test should be referenced for interpretation purposes.

### **Levies: Background**

#### ▪ ***Application and Scope***

Art. 26a of the existing Copyright Act provides the basis for the application of copyright levies. Levies are charged on "...audio or video tapes or any other devices on which a sound or image can be recorded and which are suitable for the copying for private use . . . ." The Ministry of Education has authority to identify the specific products levied and establish the rates annually via a separate decree. Accordingly, the Ministry publishes rates for levies on digital media and equipment, including recordable CDs and DVDs, digital audio recorders and digital video recorders. The collecting society publishes additional information to clarify which products are levied.

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As noted, the levy provisions of HE 28/2004 enter into force in January 2007. The provisions will not change the general rules on types of product levied, but will give examples including cassettes, videotapes, MiniDiscs, CD-R/ CD-RW, DVDs and MP3-players. The new provisions will also make clear, that products designed for professional use will not be levied, although it is unclear how "professional use" is to be defined or determined. Most likely, levies will not be applied to products that have no domestic or private use.

▪ ***Rates and Discounts***

Current levies rates are as follows:

Audio tapes:	€ 0.005 from every starting minute;
Video tapes:	€ 0.0076 from every starting minute;
Recordable CDs:	€ 0.0025 from every starting minute;
Recordable DVDs:	€ 0.00085 from every starting minute in relation to capacity to record audio and € 0.00125 in relation to capacity to record pictures;
Digital audio recorders:	€ 0.005 from every starting minute, but no more than € 15.00;
Digital video recorders:	€ 0.0076 from every starting minute, but no more than € 15.00.

These rates will likely remain in force until the levies provisions of HE 28/2004 take effect on 1 January 2007. The Ministry of Education will likely publish amended rates in late 2006. Notably, HE 28/2004 states that collecting societies, manufacturers and importers should be consulted when rates are determined

At present there are no published discounts available.

▪ ***Payment and Collection***

Levies are collected by the Teosto collecting society.

Art. 26a of the Copyright Act specifies those responsible for payment of levies to be manufacturers and importers. Under HE 28/2004, resellers may be liable to pay levies where they cannot demonstrate that levies already have been paid. These sums may then be demanded back from manufacturers or importers.

**Levies: DRMs and TPMs**

Finland's Copyright Act does not reference DRMs/ TPMs in relation to levies. HE 28/2004 provides that application of DRMs shall be taken into account when determining rates, however. The Explanatory Memorandum to HE 28/2004 states that media exclusively holding material protected by TPMs cannot be levied.

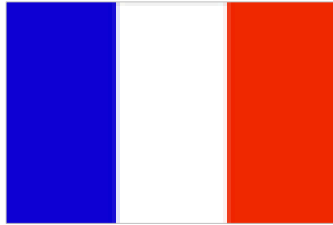
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### **Levies: Harm**

Neither the current Copyright Act nor the levies provisions of HE 28/2004 require a showing of harm to the right holder before a levy will be imposed or increased. However, the Explanatory Memorandum to the bill states that the level of harm caused should be taken into account when determining levy rates.

HE 28/2004 does refer to circumstances of "*very minimal harm*" where there likely would be no obligation to compensate. The Explanatory Memorandum to the bill states that right holders who already have received compensation will not be entitled to charge additional levies.

The collecting society has published studies concerning private copying in conjunction with the Ministry of Education.



## FRANCE

\* France has yet to implement the Copyright Directive. Responses below are based on draft implementing legislation, under consideration as of December 2005.

### **Copyright Directive: Private Copying**

#### ▪ ***Digital vs. Analogue Private Copying***

Existing French copyright law does not provide additional limitations on digital private copying.

#### ▪ ***Limiting Conditions of Article 5.2(b)***

France's draft implementing legislation does not modify the existing provisions on the exception for private use (Art. L.122.5(2) of the Intellectual Property Code (IPC) and Art. L.211.3(2) IPC for neighbouring rights). Art. L.122.5(2) states that:

*Once a work has been disclosed, the author may not prohibit:*

*.....*

*(2) copies or reproductions reserved strictly for the private use of the copier and not intended for collective use, with the exception of copies of works of art to be used for purposes identical with those for which the original work was created and copies of software other than backup copies made in accordance with paragraph II of Art. L.122.6(1), as well as copies or reproductions of an electronic database. . . .*

Accordingly, this would mean that France would not reflect all of the limiting conditions of Art. 5.2(b) in its Copyright Code—including the requirement that levies take account of the application of TPMs.

However, in December 2005 a series of amendments were proposed to the draft implementing legislation that could bring France into compliance with Art. 5.2(b) if adopted. Amendment n. 141, for example, provides that the author cannot prevent reproductions made on any medium from an online service by a natural person for his or her private use and for purposes which are not directly or indirectly commercial as long as these reproductions are remunerated as provided by article L. 311-4. Amendments n. 142, 153, 154, 155, 220 and 222 provide substantially the same. Amendment n. 175 proposes to add a sentence to art. L 311-3 of the IP Code to provide that remuneration shall take into account the impact on use by consumers of the effective use of technical measures provided in art. L. 331-5.

#### ▪ ***The "Three-step" Test (Article 5.5)***

The "three-step" test of Art. 5.5 is expressly implemented in Art. 1 of the proposed implementing legislation (and in Art. 2 for neighbouring rights).

### **Levies: Background**

▪ **Application and Scope**

The existing Arts. L. 311.1-311.8 set forth the general rules applicable to levies. The Code does not set out the precise products levied or the levy amounts, but does identify the categories of media covered, including digital recording media (Art. L.311.1). Details of the levy regime, including products covered, rates of remuneration and conditions of payment, are established by a commission (per Art. L.311.5). Levies are now imposed on audio and data CD-R and CD-RW, DVD-R and DVD-RW, and MiniDiscs, among other products.

▪ **Rates and Discounts**

2005 (December) rates for levies include as follows:

Rates for analog media:

<b>Decision of 4 January 2001</b>	<b>Amounts</b>	<b>Examples of unitary amounts</b>
Audio-cassette	28.51 € for 100 hours	0.4277 € for a C 90
Video-cassette	42.84 € for 100 hours	1.2852 € for a E 180

Rates for digital media:

<b>Decision n°1 of 4 January 2001 and n° 2 of 6 December 2001 Revised by decision n° 5 of 6 June 2005</b>	<b>Amounts and length or recording capacity</b>	<b>Unitary Amounts and normal recording capacities</b>
MiniDisc, CD-R and RW audio	43.73 € for 100 hours	0.5640 € for 74 minutes
DVD-R and RW video and DVHS	125.77 € for 100 hours	3.77 € for 180 minutes
CD-R and RW data	50.43 € for 100 000 Mo	0.3530 € for 700 Mo
DVD-Ram, DVD-R and RW data	27.02 € for 100 Go	1.27 € for 4,7 Go
Movable memories dedicated to audio	1.05 € for 100 Mo	0.336 € for 32 Mo

<b>Decision n° 3 of 4 July 2002</b>	<b>Tariff by slice of nominal recording capacity</b>
Hard drives integrated to TV decoders and digital tape recorders	<ul style="list-style-type: none"> <li>◆ 10.00 € until 40 Go</li> <li>◆ 15.00 € above 40 Go and until 80 Go</li> </ul>

<b>Decision n° 4 of 10 June 2003</b>	<b>Amount</b>
Three and a half inches - capacity 1.44 Mo	0.015 €

<b>Decision n° 6 of 22 November 2005</b>	<b>Amount by slice of nominal recording capacity</b>
Memories and hard drives integrated to a walkman or a "living room" device dedicated to the reading of works fixed on phonograms : (MP3 walkman with hard drive, audiophile USB key, HI-FI hard drive...)	<ul style="list-style-type: none"> <li>◆ 1.00 € until 128 Mo</li> <li>◆ 2.00 € above 128 Mo and until 256 Mo</li> <li>◆ 3.00 € above 256 Mo and until 384 Mo</li> <li>◆ 4.00 € above 384 Mo and until 512 Mo</li> <li>◆ 5.00 € above 512 Mo e and until 1 Go</li> <li>◆ 8.00 € above 1 Go and until 5 Go</li> <li>◆ 10.00 € above 5 Go and until 10 Go</li> <li>◆ 12.00 € above 10 Go and until 15 Go</li> </ul>

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	◆ 15.00 € above 15 Go and until 20 Go
	◆ 20.00 € above 20 Go and until 40 Go

\* Source: Ms Suissa El Baaz from the Ministry of Culture, *Commission de la copie privée*.

There are no published discounts on levies. However, Art. L.311.8 of the Code provides for a refund of the levy in various cases as follows:

*Remuneration for private copying shall be refunded when the recording medium is acquired for their own use or production by:*

- (1) audiovisual communication enterprises;*
- (2) phonogram or videogram producers and persons who carry out the reproduction of phonograms or videograms on behalf of the producers;*
- (2)(b) the publishers of works published on digital media;*
- (3) legal persons or bodies, of which the list shall be established by the Minister responsible for culture, that use recording media for the purpose of assisting persons with sight or hearing disability.*

#### ▪ **Payment and Collection**

Levies are paid by manufacturers and importers. Levies are collected by societies for the collection and distribution of authors' royalties. There are two societies: COPIE FRANCE (for audiovisual media) and SORECOP (for sound media).

#### **Levies: DRMs and TPMs**

The proposed implementing legislation does not include the Art. 5.2(b) provisions on TPMs. Absent any amendments, the law will not require that levies take account of the application of TPMs. (As noted, however, December 2005 amendments proposed to the implementing legislation would introduce this requirement).

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## **Levies: Harm**

Existing French law does not:

- require a showing of harm before allowing a levy to be imposed or increased;
- clarify that no payment or reduced payment is due where there is only minimal harm;  
or
- eliminate levies where right holders have already received compensation.

(Certain of the December 2005 amendments proposed to the implementing legislation would address these issues. For example, amendment n. 181 states that “the amount of compensation depends on the media, the duration of the recording it allows, and the reproduction made in view of the prejudice suffered by right holders . . . .”)

The CSPLA (Conseil supérieur de la propriété littéraire et artistique) produced a report on private copying in 2002. In 2003-2004, the “Commission de la copie privée”, under the Ministry of Culture, carried out confidential studies on private copying. This year, two studies are being carried out by SIMAVELEC and SECIMAVI (industrial groups). In addition, in 2006 a study on private copying and its link with TPMs will be undertaken by the CSPLA and should be available by year-end.



## GERMANY

\* The German Government is currently considering revisions to its Copyright Act (the "Second Basket" revisions). These revisions, which will impact the levy system if adopted, are addressed below. Adoption of any such amendments is not expected before summer 2006.

### Copyright Directive: Private Copying

#### ▪ **Digital v. Analogue Private Copying**

Germany's implementation of the Copyright Directive clarifies that digital private copying is permitted under German law.

#### ▪ **Limiting Conditions of Article 5.2(b)**

Germany has implemented Art. 5.2(b) in a manner that is largely consistent with the Copyright Directive. Articles 53 and 54 of the current German Copyright Act provide as follows:

*Art. 53(1) It shall be permissible for a natural person to make single copies of a work for private use on any medium provided that neither directly nor indirectly a commercial purpose is served and provided that no obviously unlawfully made model is used. A person authorized to make such copies may also cause such copies to be made by another person provided that no payment is received therefore or the copies are printed on paper or on a similar media by means of any photomechanic process or other processes with a similar effect.*

*Art. 54(1) Where the nature of a work makes it probable that it will be reproduced by the recording of broadcasts on video or audio recording media or by transfer from one recording medium to another in accordance with Art. 53(1) or (2), the author of the work shall be entitled to payment of equitable remuneration from the manufacturers*

- 1. of appliances and*
- 2. of video or audio recording media*

*that are intended for the making of such reproductions, in respect of the possibility of making such reproductions that is created by the sale of the appliances and of the video or audio recording media. In addition to the manufacturer, any person who commercially imports or reimports such appliances or such video or audio recording media into the territory to which this law applies or who deals therein shall be jointly liable. A dealer shall not be liable if he procures in one half calendar year video or audio recording media with less than 6,000 hours of playing time and less than 100 appliances.*

*Art. 54a (1) Where the nature of a work makes it probable that it will be reproduced in form of a copy of the work or by means of a similar method of comparable effect in accordance with Art. 53 (1) to (3), the author of the work shall be entitled to payment of equitable remuneration from the manufacturer of devices, that are intended for the making of such reproductions, in respect of the possibility of making such reproductions that is created by the sale of the devices. In addition to the manufacturer, any person who commercially imports or reimports such devices into the territory to which this law applies or who deals with them therein shall be jointly liable. A dealer shall not be liable, if he procures less than 20 devices in one half calendar year.*

In turn, Art. 13(4) UrhWG of the German Law on Collecting Societies provides:



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*In the structuring of tariffs that are based on Arts. 54 and 54a of the copyright law, account is also to be taken of the extent to which technical protection measures in accordance with Art. 95a of the copyright law are applied to the relevant works or other protected objects.*

Please note that these Articles will be amended shortly (see below).

- ***The “Three-step” Test (Article 5.5)***

The “three-step” test of Art. 5.5 is not expressly included in German Copyright law.

### **Levies: Background**

- ***Application and Scope***

German copyright law states that levies must be applied to all products that are “(obviously) intended” for the making of reproductions. Initially, specific levy rates for audio, video and reprographic devices and media were set forth by the legislator in an Annex to the 1985 copyright law. However, it became apparent that the rates did not fit all new categories of media and devices falling under Arts. 54 and 54a. Accordingly, the legislator agreed that collecting societies would establish and publish tariffs for the remuneration claimed on behalf of the rights they administered. Where separate agreement has been reached with the industries involved, however, the agreed levies will prevail.

Under the existing system, levies apply to a wide range of media and devices, including data/audio DVD, CD-R/RW and scanners. Levies have been claimed on PCs and printers, but amounts on these products have yet to be agreed. The Munich Appellate Court ruled recently that for each PC, a levy in the amount of € 12 must be paid. (OLG München, 29 U 1913/05). This judgment is under appeal, however.

The revision of the German Copyright Act (the so-called “Second Basket”), if adopted, will introduce new rules on how and by whom the tariffs are set up. More specifically, the Second Basket proposes the following:

**Article 54a subsection 1 of the draft expands the scope of levies, by extending their application from equipment that is “(obviously) intended” for making copies to equipment which is “actually used to a considerable extent” for making private copies. Article 13 of the law for collecting societies provides that the collecting societies have to conduct and**

- *publicize empirical studies to find out which products are actually used for making private copies and to what extent. According to the draft, equipment shall not be deemed “actually used to a considerable extent” for making private copies if not more than 10% of the use of the equipment occurred for making private copies.*
- *Article 54 a subsection 1 of the draft also provides that account is also to be taken of the extent to which technical protection measures are applied to the relevant works.*
- *Article 54 a subsection 2 of the draft provides that the total amount of levies for multifunctional devices that contain various appliances and media that are subject to levies has to be reasonable.*
- *Article 54 a subsection 3 of the draft provides that all relevant properties of the equipment and media, especially the performance of equipment and the capacity and of media and their rewrite- ability, must be taken into consideration.*

- *Article 54 a subsection 4 of the draft provides that levies may not unreasonably impact the producers of equipment and media. The tariff must bear an economically reasonable relation to the price of the levied product. Further, the total amount of levies requested by all collecting societies may not exceed 5 % of the retail price of the levied product. With regard to multifunctional devices, the total amount of levies must be lower than 5 % where the multifunctional device is predominantly used for purposes other than private copying.*
- *Before a collecting society establishes a tariff, it must allow the affected industries to comment on the proposed tariff.*
- *Where the collecting societies and the industry fail to reach an agreement, they may ask the Ministry of Justice to appoint a mediator who shall propose an amicable settlement. Any party may at any time discontinue the mediation and commence arbitration proceedings at the German Patent and Trademark Office. As in the past any party may appeal the decision of the German PTO through the normal judicial channels.*

As noted, for certain products, levies are published in an Annex to the Copyright Act. This Annex will remain applicable as long as the collecting societies have not set up tariffs under the new regime introduced by the Second Basket. These Rates include the following:

<b>Products</b>	<b>Published Tariff</b>
for each audio recording appliance	€ 1.28 (double if no extra recording medium needed)
for each video recording appliance with or without audio recording	€ 9.21 (double if no extra recording medium needed)
in respect of audio recording mechanisms, for each hour of playing time in normal utilisation	€ 0.0614
in respect of video recording mechanisms, for each hour of playing time in normal utilisation	€ 0.087
For any phono-recording device, for which an special carrier is not needed.	€ 2.56
für jedes Bildaufzeichnungsgerät, für dessen Betrieb nach seiner Bauart gesonderte Träger (Nummer 6) nicht erforderlich sind	€ 18.42
<b>Multifunctional devices</b>	The tariffs claimed for devices with <u>color</u> copying capabilities are <u>double</u> than those for devices with monochrome capabilities.
The Annex to the Copyright Act publishes levy rates for photocopiers. Collecting societies are trying to apply this tariff to MFDs. Claimed levies are therefore the following:	The collecting societies are assessing levies on the basis of the potentially fastest copying speed.
	B&W: 1-12ppm: € 38.35
	B&W 13-35 ppm: € 51.13
	B&W 36-70 ppm: € 76.70
	B&W > 70 ppm: € 306.78
<b>Printers</b>	tariffs published by VG Wort on April 1, 2001)
1-12 ppm	B&W 1-12 ppm: € 10.00
13-35 ppm	B&W 13-35 ppm: € 25.00
36-70 ppm	B&W 36-70 ppm: € 40.00
< 70 ppm	B&W > 70 ppm: € 150.00
<b>Scanners</b>	1-12 ppm: € 10.23 13-35 ppm: € 13.96 36-70 ppm: € 47.93 > 70 ppm: € 255.65

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PC (for video audio reproduction)	€ 18.42
PC (for making copies on paper)	€ 30.00

\* *Annex to Art. 54 (d) of the German Copyright Act.*

The law does not establish discounts on levy rates, although separate agreements established between collecting societies and bodies representing industry members may result in rates lower than those officially published.

▪ ***Payment and Collection***

Manufacturers of the relevant products are responsible for paying levies. However, pursuant to Arts. 54 and 54a, dealers and importers are jointly liable for such payments. Levies under Art. 54 are payable to the Central Agency for Private Copying Rights (ZPÜ), and then paid to collecting societies for distribution to authors and artists; levies under Art. 54a are payable directly to the collecting society VG Wort.

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### **Levies: DRMs and TPMs**

It is unclear whether levies will be reduced or phased out where DRMs or TPMs are applied. The German Law on Collecting Societies expressly states that account must be taken of applied TPMs when determining the levy amounts. That said, it does not appear that TPMs are being taken into account in practice when levy amounts are calculated. As noted above, Article 54 a subsection 1 of the draft Second Basket also provides that account is to be taken of the extent to which technical protection measures are applied to the relevant works.

### **Levies: Harm**

German law does not now require that harm be proven before a levy will be granted, nor does it take harm into account when assessing levy amounts. The Second Basket revisions do not explicitly require that harm be shown before a levy can be imposed.

To the best of BSA's knowledge, no studies have been undertaken to assess the harm caused by private copying or the impact of DRMs on private copying.



## GREECE

### **Copyright Directive: Private Copying**

#### ▪ **Digital vs. Analogue Private Copying**

Greek law does not distinguish between digital private copying and analogue private copying.

#### ▪ **Limiting Conditions of Article 5.2(b)**

Greece only partially implemented Art. 5.2(b) in Art. 18 of its already existing Copyright Act. For example, the Art. 5.2(b) rules requiring that levies take account of the application of TPMs have not been implemented. Article 18 provides as follows:

##### *Reproduction for private use*

*1. Without prejudice to the provisions laid down in the following paragraphs, it shall be permissible for a person to make a reproduction of a lawfully published work for his own private use, without the consent of the author and without payment. The term "private use" shall not include use by an enterprise, a service or an organization.*

#### ▪ **The "Three-step" Test (Article 5.5)**

The "three-step" test of Art. 5.5 is expressly implemented into Greek copyright law by Art. 18.2. and Art. 28C

### **Levies: Background**

#### ▪ **Application and Scope**

The Copyright Act provides the basis for levies. Levies extend to a wide variety of IT media and equipment, including digital storage media, multifunctional devices, digital audio and audiovisual equipment and scanners. Until 2002, this list included PCs; a 2002 change in the law abolished levies on PCs retrospectively, however, and provided greater clarity as to which media and equipment were covered by levies.

#### ▪ **Rates and Discounts**

The prior version of Greece's Copyright Act (1993) established a levy of 6% for audio and audiovisual recording devices, blank video and audio tapes etc.; and 2% for PCs. The 2002 amendment to the Act has changed these rules as follows (Copyright Act Art. 18):

- *The 2% levy on PCs is abolished;*
- *A new 4% levy on scanners and diskettes (with storage capacity under 200 MB) was added, which is distributed to authors and publishers of printed works; and*

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- *Audio and audiovisual devices and storage media including digital devices, which are not internal or cannot be incorporated in a computer are subject to a 6% levy.*
  - *In addition, pursuant to a 2003 amendment to the Act, multifunctional devices with a photocopying function (for example, devices combining scanning and printing) are also subject to a 4% levy*

All levies are calculated either on import price or on sales price if the items are produced in Greece.

Greek law does not extend discounts to specific industry groups.

- ***Payment and Collection***

Levies are paid by importers or manufacturers. They are collected by collecting societies operating on behalf of the rights holders including AEPI, OSDEL, ATHINA and FOIVOS.

**Levies: DRMs and TPMs**

Current law does not reduce or phase out levies where DRMs or TPMs are available or applied. Moreover, there are no guidelines explaining how levies should be calculated where DRMs or TPMs are available or applied, and no commission or similar ad-hoc group has been created or tasked with reviewing the relationship between levies and DRMs/TPMs.

**Levies: Harm**

Current laws do not require harm to the right holder to be demonstrated before a levy will be imposed or increased. Further, they do not mandate that when there is only “minimal” harm either no payment or a reduced payment is due. To date, no studies have been undertaken to assess the impact of levies, the level of harm to right holders caused by private copying, or the uptake of TPMs/DRMs.

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## HUNGARY

### **Copyright Directive: Private Copying**

- ***Digital vs. Analogue Private Copying***

Hungarian law does not expressly treat digital private copying differently from analogue private copying.

- ***Limiting Conditions of Article 5.2(b)***

Hungary has implemented Art. 5.2(b) in a manner largely consistent with the Copyright Directive Art. 35(1) of its Copyright Act states:

*(1) Any natural person is entitled to make copies of works for private purposes if such activity does not serve to generate or increase income in any way or form. This provision does not apply to architectural works, technical structures, software, computer-operated data banks, and the recording of public performances of works on video or audio media.*

While Art. 35 does not address fair compensation, this is addressed in Art. 21 of the Copyright Act. Article 20 also provides that such compensation “shall be determined consistent with effective technical measures. . . .”

- ***The “Three-step” Test (Article 5.5)***

The “three-step” test of Art. 5.5 is *not* expressly implemented in Hungary. However, the 1999 version of the Hungarian Copyright contains the following provision in Art. 33(2):

*(2) Use is allowed and can be done without remuneration even on the basis of the provisions pertaining to free use only to the extent that it is not injurious to the regular use of the works and it does not damage the author's legitimate interests without justification. Furthermore, use is allowed and can occur without remuneration if it fulfills the requirements of decency and its goal is not inconsistent with the purpose of free use.*

### **Levies: Background**

- ***Application and Scope***

Article 20 of the Copyright Act sets out the basic provisions relating to private copy levies and requires that levies are due on blank video and audio media. Collecting societies are left to determine the details of the levy system, which is set out in secondary legislation. Under these rules, levies are deemed to apply to CDs, DVDs and MiniDiscs, among other products. In addition, Decree 197/2004 (VI. 22) on the definition of reprographic machines lists the types of machines on which levies must be paid, stating that reprography machines include: copiers; printers; scanners that are multifunctional (i.e., capable of making scans, copies or printing); and telefaxes that are multifunctional. CD burners and hard drives are not included.

▪ **Rates and Discounts**

The collecting society, ARTISJUS, sets out annually the amounts of levies to be charged on products. The 2006 figures for levies include as follows:

<b>Products</b>	<b>Published Tariff</b>
Audio cassette <ul style="list-style-type: none"> <li>▪ up to 60 minutes in length</li> <li>▪ up to 90 minutes</li> <li>▪ more than 90 minutes</li> </ul>	€ 0.09 € 0.11 € 0.14
Video cassette <ul style="list-style-type: none"> <li>▪ up to 120 minutes</li> <li>▪ up to 180 minutes</li> <li>▪ up to 195 minutes</li> <li>▪ more than 240 minutes</li> </ul>	€ 0.22 € 0.28 € 0.30 € 0.40
raw material import <ul style="list-style-type: none"> <li>▪ audio media raw material</li> <li>▪ video media raw material</li> </ul>	€ 0.98 per 1000 m € 1.14 per 1000 m
DVD <ul style="list-style-type: none"> <li>• DVD-R/+R, DVD-RW/+RW, DVD-RAM up to 4,7 GB</li> <li>• DVD-R/+R, DVD-RW/+RW, DVD-RAM 4,7 GB</li> <li>• DVD-R/+R, DVD-RW/+RW, DVD-RAM more than 4,7 GB</li> </ul>	€ 0.06 € 0.44 € 1.00
CD-R <ul style="list-style-type: none"> <li>▪ CD-R and CD-RW up to 300 MB</li> <li>▪ CD-R and CD-RW/Data up to 700 MB</li> <li>▪ CD-R and CD-RW/Audio more than 700 MB</li> </ul>	€ 0.06 € 0.18 € 0.26
Music players with integrated storage unit, according to memory capacity (MP3 players, iPod, IRiver type music players) <ul style="list-style-type: none"> <li>▪ up to 128 MB</li> <li>▪ up to 256 MB</li> <li>▪ up to 512 MB</li> <li>▪ up to 1 GB</li> <li>▪ up to 4 GB</li> <li>▪ more than 4 GB</li> </ul>	€ 2.00 € 4.00 € 8.00 € 10.00 € 20.00 € 32.00
Memory cards to be used as video/audio media (card for MP3 players, CF, MMC, MS, Smart Media, SD,	



mini SD, xD, Microdrive type cards)	
▪ up to 128 MB	€ 0.80
▪ up to 256 MB	€ 1.60
▪ up to 512 MB	€ 3.20
▪ up to 1 GB	€ 4.00
▪ up to 4 GB	€ 8.00
more than 4 GB	€ 12.00
MiniDisc	€ 0.26
Printers and sheetfeed Multifunctional devices	€ 1.22 and € 61.22 for
Flatbed Multifunctional devices	Between € 13.87 and € 361.08 As of May 2005, the Hungarian Copyright Act provides that the maximum amount of the levy shall not exceed 2% of the selling price of such product. Because of the low prices of multifunctional devices when compared to photocopiers, such 2% cap is the one that is applied in practice to determine the applicable levies fees.

\* the notice on levies is issued by the ARTISJUS, approved by the Minister of National Cultural Heritage, Rates are valid from January 1, 2006

The law makes discounts available to those claimants who meet all of the following conditions a) the claimant has fulfilled entirely the obligation to provide data relating to the products, and b) the claimant has no debt concerning levies, and c) the claimant complied with the rules relating to the use of the ARTISJUS trademark and the claimant concludes an agreement with ARTISJUS/.

#### ▪ **Payment and Collection**

Generally, levies are paid by manufacturers or importers and must be remitted within eight days from the date of placing the product into the market. Levies are collected in Hungary by the Bureau for the Protection of Authors' Rights (a collective management organization of musical and literary authors), known as ARTISJUS.

#### **Levies: DRMs and TPMs**

Hungary has implemented the Art. 5.2(b) language on TPMs. In addition, Decree 197/2004 (VI. 22) (noted above) provides that if and when DRMs become sufficiently developed in Hungary to ensure individual rights management, the Decree may be reviewed. It is unclear what impact this has had on the practice of calculating levies, however.

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### **Levies: Harm**

Hungarian law does not:

- require a demonstration of the harm before allowing a levy to be imposed or increased;
- clarify that no payment or reduced payment is due where there is only minimal harm; or
- eliminate levies where right holders have already received compensation.

**To the best of BSA's knowledge, no studies have been undertaken to assess the harm caused by private copying or the impact of DRMs on private copying.**

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## ITALY

### **Copyright Directive: Private Copying**

- ***Digital vs. Analogue Private Copying***

In implementing the Copyright Directive, Italy amended its law to make clear that digital private copying is permitted—something that was unclear under prior law. Moreover, Italian law references the distinction between digital and analogue private copying (noting that fair compensation should reflect the differing impacts of each).

- ***Limiting Conditions of Article 5.2(b)***

Italy has implemented Art. 5.2(b) in a manner largely consistent with the Copyright Directive. Article 71 sexies of its Copyright Law provides as follows:

*Reproduction of phonograms or videograms on any medium made by an individual exclusively for personal use and not for lucrative purposes and for ends which are neither directly nor indirectly commercial is allowed on the condition that technological protection measures are respected.*

*The reproduction regulated by Para. 1 is not permitted by third parties. Supply of services aimed at reproduction under Para. 1 is forbidden if conducted for lucrative purposes and directly or indirectly for commercial gain.*

*Para. 1 does not apply to works and protected subject matter made available to the public in a way that members of the public may access them from a place and at a time individually chosen by them, when the work is protected by technological measures provided for by Art. 102-quater of the Copyright Law or when the access to the work is allowed under contractual clauses.*

*Except for that provided by Para. 3, right-holders are obliged to consent that, notwithstanding the application of technological measures provided for by Art. 102-quater of the Copyright Law, an individual that has acquired legitimate possession of copies of the work or of the protected subject matter, or that has had legitimate access to the same, may make a private copy—and/or analogue copy—for personal use, on the condition that this does not conflict with the normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of right-holders.*

Article 71 septies Para. 1 specifies that phonogram authors and producers, first producers of audiovisual works and videogram producers have the right to fair compensation for private copying referred to in Art. 71 sexies. Para. 2 specifies that determination of the compensation shall take into account whether TPMs have been applied, and also states that fair compensation should reflect “the impact of digital copying compared with analogue copying”.

- ***The “Three-step” Test (Article 5.5)***

The “three-step” test of Art. 5.5 is expressly implemented in Art. 71 sexies Para. 4 of Italy’s Copyright Law.

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## **Levies: Background**

### ▪ ***Application and Scope***

Article 71 septies of Italy's Copyright Law sets forth the basic rules applicable to levies. The Law provides that levies are to be applied to audio and video recording devices and to IT systems suitable for phonogram and videogram recording. Significantly, Italy's private copy levies scheme as introduced by Legislative Decree 68/2003 has already been amended twice, first, in 2004 and again in 2005. Under the 2004 amendments (Law No. 128/2004), levies were extended to digital memories capable of audio and video recording, devices designed for recording, and software used for "burning" activities (Art. 1 para 8). The 2005 amendments (Law No. 43 of 2005) reduced the range of digital products subject to levies. More precisely, digital memories as such are currently not subject to the payment of any private copy levy. Devices exclusively destined for DVD and CD burning, as well as software for burning activities, have also been eliminated from the list of products which are subject to the levy<sup>1</sup>.

### ▪ ***Rates and Discounts***

Article 39 of Legislative Decree 68/2003, providing for the temporary determination of private copy compensation, fixed levies under Art. 71 septies until December 31, 2005 as follows:

<b>Products</b>	<b>Published Tariff</b>
Analogue audio media	€ 0.23 for each recording hour
Dedicated digital audio media, such as MiniDiscs, audio CD-R and CD-RW	€ 0.29 for each recording hour (The compensation is increased proportionally for media having higher duration)
Non-dedicated digital media, suitable for phonogram recording, such as data CD-R and CD-RW	€ 0.23 per 650 MB
Analogue visual media	€ 0.29 for each recording hour
Non-dedicated digital visual media, such as DVHS, video DVD-R and DVD-RW	€ 0.29 per hour, equal to €0.87 for media having recording capacity of 180 minutes (Compensation is proportionally increased for media having a higher recording capacity)
Digital media suitable for phonogram and videogram recording, such as DVD-RAM, DVD-R and DVD-RW	€ 0.87 per 4.7 GB (Compensation is proportionally increased for media having a higher recording capacity)
Devices exclusively designed for analogue or digital audio or video recording	3% of the retail price to the reseller

\* *Legislative Decree 68/2003, as amended by Law No. 43/2005*

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<sup>1</sup> *Following the entry into force of Law No. 43/2005 the Italian Authors and Editors Society (Società Italiana degli Autori e Editori or SIAE) released the following official statement: "The private copy compensation is due also on memories, as provided for under Art. 71 septies, para 1 of Copyright Law. However, following the abrogation of letter d) of Art. 39 Law Decree 68/2003 by Law 43/2005, starting from April 2, 2005 the application of the above indicated rule is suspended, until the issuance of the decree of the Minister for Cultural Heritage, provided for under para 4 of the same Art. 71 septies. Consequently, memories shall continue to appear on the quarterly reports relating to the sales filed by resellers and importers, even if for the time being the private copy compensation shall not be paid".*

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Although the deadline provided for under Art. 39 has already expired, the Ministry for Cultural Heritage (which is in charge of the revision) has not yet officially commenced the revision process. It is anticipated that this process will not begin until summer 2006 at the earliest. The existing Art. 39 will continue to apply until the revised legislation is issued.

Existing law does not expressly provide for discounts for levies. In December 2003, however, SIAE entered into an agreement with the associations ANIE, ANDEC and ASMI (representing producers and distributors of media and devices) which provided for certain discounts (for example, subjecting CD and DVD burners to the payment of 50% of the total amount of the levy required under law). The agreement expired on December 31, 2005; there have been no new negotiations and it is unclear whether SIAE will continue to apply the relevant reductions.

#### ▪ **Payment and Collection**

Levies are to be paid by both importers and manufacturers, who must file a declaration with the Italian Authors and Editors Society on a quarterly basis (Società Italiana degli Autori e Editori or SIAE). SIAE collects levies pursuant to Art. 71 octies of the Copyright Law.

#### **Levies: DRMs and TPMs**

According to Art. 71 septies Para. 2 of the Copyright Law, fair compensation must take into account the application of TPMs. Despite this mandate, Art. 39 of Legislative Decree 68/2003 does not make any reference to TPMs, and it does not appear that they are taken into account when establishing the level of levies. Indeed, at present there are no specific guidelines for determination of compensation where DRMs/TPMs are available or applied.

The Government has created an "E-Content Commission," however, composed exclusively of government representatives, and tasked this Commission with reviewing the relationship between levies and TPMs. Following hearings with various industry representatives, the Commission published in March 2005 a white paper on distribution of content on-line and TPMs/DRMs. This document does not contain any conclusion in relation to the national private copy compensation scheme, however.

#### **Levies: Harm**

Notably, Art. 71 septies of the Copyright Law states that "*compensation shall take into account ... the impact of digital copying compared with analogue copying*". This would appear to introduce a harm element into the assessment of levies. That said, it does not appear that harm is considered in any systematic way when levies are actually set and, to the best of BSA's knowledge, no studies on harm have been conducted.



## LATVIA

### Copyright Directive: Private Copying

#### ▪ **Digital vs. Analogue Private Copying**

Latvian law does not impose any additional limits on digital private copying.

#### ▪ **Limiting Conditions of Article 5.2(b)**

Latvia has implemented Art. 5.2(b) in Art. 34 of its Copyright Act. Implementation is only *partial*, and does not reference the need to adjust fair compensation to take account of the application of TPMs. Article 34 provides as follows:

*(1) It is allowed without the permission of the author, but on payment of fair compensation (levy on recording media), to reproduce in one copy for private use and for ends that are neither directly nor indirectly commercial, works, which are included in legally obtained film or phonogram, as well as visual works. This provision shall not apply to computer programs and databases, as well as to reproduction of works reprographically.*

#### ▪ **The “Three-step” Test (Article 5.5)**

The “three-step” test of Art. 5.5 is expressly implemented in Latvia’s copyright law (Art. 18).

### Levies: Background

#### ▪ **Application and Scope**

Article 34 of the Copyright Act sets out the general provisions on levies. In turn, secondary legislation, the Rules of the Cabinet 2005 No. 321, identifies the products to be levied and fixes the amount. Products levied include: audiocassettes, videocassettes, MiniDiscs, CD-R, CD-RW, DVD-R, DVD-RW, sound recording equipment (excluding Dictaphones), video recorders, MP3 players with integrated hard disk, satellites that have data recording possibilities, CD and DVD writers (PC hard-disks, which were previously levied, have recently been excluded from the list).

#### ▪ **Rates and Discounts**

Rules of the Cabinet No 321 set out details on the rates of levies (and invalidate the previous calculation method based on the capacity of the media). The table below provides levy tariffs including:

Products	Published Tariff

Audiocassettes	€ 0.04
Videocassettes	€ 0.09
MiniDiscs	€ 0.04
CD-R	€ 0.14
CD-RW, DVD-R, DVD-RW	€ 0.29
Sound recording equipment, video recorders, MP3 players with integrated hard-disk, satellites that have data recording possibilities, CD and DVD writers	€ 1.40

\* *Rules of the Cabinet No. 321 of May 10, 2005, date of publication May 13, 2005.*

The law does not make discounts available. Levies are not due, however, if the equipment is imported for professional use by broadcasting organizations or if blank recording media are imported wholesale for commercial copying or if imported by natural persons for non-commercial use.

▪ **Payment and Collection**

Levies are to be paid by both importers and manufacturers. They are collected by a collecting society known as AKKA/LAA.

**Levies: DRMs and TPMs**

There is no requirement in Latvian law that levies be adjusted to reflect the application of DRMs or TPMs, nor are there any guidelines explaining how levies should be calculated where DRMs or TPMs are in place.

**Levies: Harm**

Latvian law does not:

- require a showing of harm before allowing a levy to be imposed or increased;
- clarify that no payment or reduced payment is due where there is only minimal harm; or
- eliminate levies where right holders have already received compensation.

To the best of BSA's knowledge, no studies have been conducted on the harm caused by private copying or the impact of TPMs on private copying. However, it appears that the Government is currently considering undertaking such efforts.



## LITHUANIA

\* *The Lithuanian Parliament is currently considering amendments to the Copyright Law, proposed by Lithuanian collecting societies (LATGA-A and AGATA) among others. The impact of these amendments on the existing levies regime are detailed below.*

### **Copyright Directive: Private Copying**

#### ▪ ***Digital vs. Analogue Private Copying***

Lithuanian law imposes identical limits on digital private copying and analogue private copying.

#### ▪ ***Limiting Conditions of Article 5.2(b)***

Lithuania has implemented Art. 5.2(b) in a manner largely consistent with the Copyright Directive. Article 20 of Lithuania's Copyright Law provides as follows:

*1. It shall be permitted for a natural person, without the authorization of the author or any other owner of copyright, to reproduce, exclusively for his individual use, not for direct or indirect commercial advantage, in a single copy a work published or communicated to the public in any other mode, where the reproduction is a single action.*

. . . .

*3. When reproducing an audiovisual work or a work recorded in a phonogram, the author of the work or his successor in title, together with the performers and the producers of the audiovisual works and phonograms or their successors in title, shall have the right to receive fair compensation established as a percentage of the wholesale price for blank audio or audiovisual recording media intended for personal reproduction (other than the media intended for export, professional needs and the needs of persons with hearing or visual impairment).*

. . . .

*5. Taking into consideration the application or non-application of technological measures determined in paragraphs 1 and 2 of Art. 74, the amount of compensation referred to in paragraph 3 of this Article, the conditions of distribution and payment thereof shall be established by the Government, after consultation with associations representing producers and importers of the said media and associations of collective administration of copyright and related rights. . . .*

#### ▪ ***The "Three-step" Test (Article 5.5)***

The "three-step" test of Art. 5.5 is expressly implemented in Art. 19 of Lithuania's Copyright Law.

### **Levies: Background**



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- **Application and Scope**

Article 20 of Lithuania's Copyright Law sets forth the basic rules applicable to levies, establishing levies in the market for the first time. The Law provides generally that levies are to be applied to various types of media.

More detailed rules on levies are provided in secondary legislation, including the *Resolution of the Government of the Republic of Lithuania on the approval of the procedure for the distribution and payment of remuneration for the reproduction of audiovisual works or works fixed in a phonogram for personal use No.1106 (Official Gazette No.84-3847, 29, August 2003)*. Among other things, this Resolution establishes the types of digital media to which levies apply. This includes: CDs, CD-Rs, CD-RWs, DVDs, as well as hard disk drives.

The amendments to the Copyright Law now under consideration by Parliament would expand the range of products covered to include "IT equipment", with the exception of computers and computer components used for private copying. The type of products covered by the term "IT equipment" is unclear as the proposal does not define the term, nor does the proposal include an Explanatory Memorandum that would provide further insight.

- **Rates and Discounts**

Under Lithuanian law, authors have the right to receive fair compensation in the amount of 6% of the "wholesale" price of blank media. The above-mentioned amendments now under consideration would change this basis to the "transfer" price, i.e. the price producers and importers receive following the first sale of blank media or IT equipment in the territory of Lithuania. If adopted, remuneration will be determined by 6 % of the transfer price of blank media and 3 % of the transfer price of IT equipment.

The law does not make discounts available for specific industry groups. Article 10 of the Resolution does permit the importer or producer to reach individual agreements regarding the payment of remuneration with the responsible association. However, these contracts relate primarily to the method of payment (for example, on a monthly basis) rather than to the amount to be paid.

In addition, under Article 13 of the Resolution exporters of media, broadcasting organisations and persons publishing copies for producers of audiovisual works or works fixed in a phonogram or any object of related rights; persons and undertakings or organisations established by persons with oral or visual disability, and associations representing these persons have a right to apply to the responsible collecting society—LATGA-A—for the repayment of remuneration. The proposed amendments would expand this list to include persons who acquire media for public security, public administration or for other non-personal purposes.

- **Payment and Collection**

Pursuant to Art. 20 of the Copyright Law, levies are to be paid by both importers and manufacturers. The proposed amendments described above would define importers as follows: "the persons who bring media and equipment into the territory of Lithuania". Notably, this definition would include those bringing products in to the territory from EC countries.

The levies are collected by one collecting society approved by the Ministry of Culture, LATGA-A, and distributed among two collective administration associations designated by the Ministry of Culture (LATGA-A and AGATA).

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### **Levies: DRMs and TPMs**

Article 20 of Lithuania's Copyright Law makes clear that TPMs should be taken into account when assessing levies. In turn, Art. 24 of the Resolution provides that where copyright holders apply technological measures that limit private copying, the remuneration (*not* the levy itself) to the right holder is halved. The remainder goes to a separate fund used for cultural programs. Where copyright holders apply technological protection measures that make private copying impossible, the right holder receives no remuneration; instead, the entirety funds cultural activities.

### **Levies: Harm**

Lithuanian law does not:

- require a showing of harm before allowing a levy to be imposed or increased;
- clarify that no payment or reduced payment is due where there is only minimal harm; or
- eliminate levies where right holders have already received compensation.

To the best of BSA's knowledge, no studies have been undertaken to assess the harm caused by private copying and the impact of DRMs on private copying.

However, in 2003 the Ministry of Culture conducted a study into the implementation of a levy system on the private copy exception, which indirectly considered the issue of harm.

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**NETHERLANDS****Copyright Directive: Private Copying****▪ *Digital v. Analogue Private Copying***

Dutch law imposes identical limits on digital and analogue copying. However, the Law does provide that fair compensation is not required for certain types of analogue private copying.

**▪ *Limiting Conditions of Article 5.2(b)***

The Netherlands has implemented Art. 5.2(b) in Art. 16 of the Copyright Act 2004. Article 16(c) states:

*(1) It shall not be deemed an infringement of the copyright in a literary, scientific or artistic work to reproduce the work or a part thereof, providing that the reproduction takes place without any direct or indirect commercial purpose and serves exclusively for private practice, study or use by the natural person that make the reproduction.*

*(2) For the reproduction set forth in paragraph 1, the producer or importer of a medium intended to reproduce owes a fair compensation in favor of the right holder or his heirs.*

.....

*(6) By secondary legislation further regulations can be established with regards to the objects for which the fair compensation as set forth in paragraph 2 is owed. Secondary legislation can also establish further provisions as to the amount, 'payability' and form of the fair compensation.*

While Art. 16 itself does not reflect all of the limitations of Art. 5.2(b), Art. 16 is supplemented by language in the Explanatory Memorandum accompanying the implementing legislation. Among other things, this memorandum provides that fair compensation applies to products that are "intended" for the reproduction of sound and image; that fair compensation must take into account whether right holders have been compensated in any other way; that fair compensation must take full account of the application of technical protection measures; and that, where damage is minimal, no compensation may be due. (Memorie van Toelichting 28482 nr. 3). The Memorie van Toelichting further provides that after September 2004, the Minister of Justice is to define the products subject to levies, in order to ensure that developments in the area of technical protection measures are taken into account.

**▪ *The "Three-step" Test (Article 5.5)***

The "three-step" test of Art. 5.5 is *not* expressly implemented into Dutch Law. It was decided by that this was not necessary because the "three-step" test would be applicable in any event to copyright exceptions. Consistent with this view, in March 2005 the District Court in The Hague applied the three-step-test, referring to the Directive. The Court concluded that the reproduction and distribution of digital clippings from newspapers involved in the case was impermissible, despite the existence of a press exception (Art. 15 of the Dutch

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Copyright Act), because it violated the three step test, which had to be applied when interpreting the relevant exception.

### **Levies: Background**

#### ▪ ***Application and Scope***

Levies, both in the analogue and digital contexts, are foreseen by the private copy exception in the Copyright Act (Art. 16). At present, levies extend to products intended for the reproduction of sound and image. These include a wide variety of digital media including audio CD-R and CD-RW, data CD-R and CD-RW and DVD-R and DVD-RW.

Equipment is not now levied. However, SONT, the government-appointed institute with the mandate to negotiate levies, can receive and negotiate new levy claims from the government-appointed beneficiary (Stichting Onderhandeligen Thuiskopievergoeding or STK). In light of the language extending levies to products intended for audio/visual reproduction, government experts have taken the view that hardware should be excluded from the levies regime. However, SONT/STK may nonetheless seek to impose levies on equipment. MP3 players have been one point of discussion. At present, these discussions appear to be on hold; the Minister of Justice recently advised the parties involved in negotiating the potential levy on MP3 players that they should refrain from introducing any new levies in anticipation of further initiatives of the European Commission.

#### ▪ ***Rates and Discounts***

Charges are as set out in the table below:

<b>Products</b>	<b>Published Tariff</b>
Video analogue	€ 0.33 per hour
Audio analogue (tapes)	€ 0.23 per hour
MiniDisc	€ 0.32 per hour
Audio CD-R and CD-RW	€ 0.42 per hour (€ 0.52 per 74 minutes)
Data CD-R and CD-RW	€ 0.14 per disk
DVD-R and DVD-RW	€ 0.60 per 4.7 GB
DVD+R and DVD+RW	€ 0.40 per 4.7 GB
HI MD	€ 1.10 per GB
Blanc DVD-RAM	free of levies

\* SONT (Stichting Onderhandeligen Thuiskopievergoeding) <http://www.cedar.nl/thuiskopie/info-gebruikers.html>

#### ▪ ***Payment and Collection***

Levies are paid by manufacturers and importers. Any seller of a levied product must show proof that the appropriate levy has in fact been paid or also face payment.

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Levies are collected by a legal entity appointed by the Minister of Justice, the Stichting Onderhandeligen Thuiskopievergoeding. This body includes right holders, importers and manufacturers.

Twenty percent discounts are available for members of the Stichting Overlegorgaan Blanco Informatiedragers (STOBI). Any manufacturer or importer of levied products can become a member. The discount is a negotiated discount, i.e. is not based on any specific law.

### **Levies: DRMs and TPMs**

As noted, while the Dutch Act does not include the Art. 5.2(b) limits, the Explanatory Memorandum accompanying the implementing legislation references the Art. 5.2(b) provisions relating to TPMs. Pursuant to these references, levy tariffs are to take account of the application of TPMs; the Minister of Justice is empowered to define the products that qualify for levies in order to ensure that TPMs are taken into account; and right holders are not to be rewarded via levies in cases where they choose not to deploy available TPMs.

At practical level, it appears that the application of TPMs has led to the reduction of levies in one specific instance: DVD levies. Prior to implementation of the Copyright Directive in Dutch law, SONT nonetheless took account of Art. 5.2(b) and applied a discount of 50% to DVD+RW/R (in contrast to DVD-RW/R levy tariffs) because of additional available TPMS. A subsequent decision by SONT in November 2004 (post-implementation) led to a further reduction (66%). See <http://www.cedar.nl/thuiskopie/info-gebruikers.html> (FAQ).

### **Levies: Harm**

As noted, the Explanatory Memorandum to the Dutch implementing legislation references the harm requirements of the EU Copyright Directive. To the best of CLRA's knowledge, however, no studies have been conducted on the harm caused by private copying.



## **POLAND**

### **Copyright Directive: Private Copying**

- ***Digital vs. Analogue Private Copying***

Polish law does not treat digital private copying differently from analogue private copying.

- ***Limiting Conditions of Article 5.2(b)***

Poland has implemented Art. 5.2(b) only partially. Art. 23 Sec. 1 states:

*(1) It shall be permitted to use free of charge an already disseminated work for purposes of personal use without the permission of the author . . . .*

Art. 23 Sec. 2 provides that *"the scope of the foregoing use shall include use of single copies of works by a circle of people having personal relationships, and in particular any consanguinity, affinity or social relationship."*

Among other things, the exception does not require that fair compensation reflect the application of TPMs.

- ***The "Three-step" Test (Article 5.5)***

The "three-step" test of Art. 5.5 is expressly implemented in Art. 35 of Poland's Copyright Law.

### **Levies: Background**

- ***Application and Scope***

Article 20 of Poland's Copyright Law sets forth the basic rules applicable to levies, and existed prior to implementation of the Copyright Directive. Under this law, levies—both in the analogue and digital contexts—are foreseen by the private copy exception.

Significantly, the scope of levies was clarified in 2003 through new legislation specifying products to be levied. This secondary legislation (adopted in June 2003) expands upon Art. 20 and sets out a detailed list of media and equipment on which levies are imposed, including CD-R, CD-RW, CD-DAT, MiniDiscs, DVD-R, hard drives, CD burners, computer CD burners, memory cards, and scanners. Prior to this legislation, references to devices were generic and it was not clear if IT media/devices were levied.

- ***Rates and Discounts***

The table below sets out the levies charged on particular products in percentage terms:

<b>Products - Audio</b>	<b>Levy - % of Sale Price</b>
Hifi with CD	2
Hifi with tape and CD-RW	1.5
Radio with tape and CD-RW	2
Radio with tape and CD; Radio with tape; Radio with MiniDisc and record function; Radio with CD and record function	1.5
CD player with record function	3
MiniDisc player with record function	3
Computer hard disk	1
Digital CD recorder	2
CD player	3
Tape player	3
Hifi	1.5
CD-R; CD-RW; CD-DAT; MiniDisc; Audio tape	3
Memory card	1
MP3 player	3

<b>Products - Video</b>	<b>Levy - % of Sale Price</b>
Video player; Video recorder; DVD recorder	3
TV with built in video player	2
TV with built in DVD and recorder	2
Non-professional private camera	1
DVD-R	3
VHS cassette	3
VHSD cassette	3
Non-professional private camera cassette (not VHS or VHSD)	1

<b>Products - Scanners</b>	<b>Levy - % of Sale Price</b>
Scanner/copier for 0 to 1 scans/copies per minute	1
Scanner/copier for 2 to 99 scans/copies per minute	1 + 0.02 % of the sales price of the product for each scan/copy the product can make per minute

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Scanner/copier for 100+ scans/copies per minute	3
Copy paper	0.001

\* Secondary legislation based on Art. 20 of the Copyright Act– Regulations of the Minister of Culture of June 2, 2003 (Journal of Laws of June 17, 2003, No. 105, Item 991) and Regulations of the Minister of Culture of June 27, 2003 (Journal of Laws of July 29, 2003, No. 132, Item 1232).

The law does not establish any discounts on levies.

▪ **Payment and Collection**

Pursuant to the June 2003 regulations, levies are to be paid by manufacturers and importers, as well as persons possessing reprographic equipment copying for gain for the private use of third parties (in the latter case, the levies amount to between 1% and 3% of the turnover generated by a person providing reprographic services). Levies are collected by specially designated collecting societies identified in secondary legislation, including ZAIKS for authors, ZPAV for audiovisual rights holders, and SAWP for musical rights holders.

**Levies: DRMs and TPMs**

At present, the Art. 5.2(b) provisions relating to TPMs have not been implemented into Polish law. It does not appear that levies are adjusted to reflect the application of DRMs or TPMs.

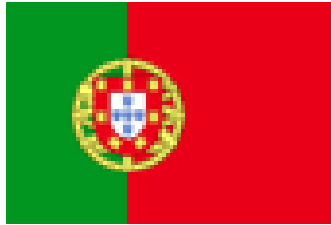
**Levies: Harm**

Polish law does not:

- require a showing of harm before allowing a levy to be imposed or increased;
- clarify that no payment or reduced payment is due where there is only minimal harm; or
- eliminate levies where right holders have already received compensation.

Moreover, to the best of BSA's knowledge, no studies have been undertaken to assess the harm caused by private copying or the impact of DRMs on private copying.





## **PORTUGAL**

### **Copyright Directive: Private Copying**

#### ▪ ***Digital vs. Analogue Private Copying***

The Copyright Directive has been transposed by Law number 50/2004 (August 24<sup>th</sup>, 2004). Portuguese law does not distinguish between digital private copying and analogue private copying, but provides a different compensation scheme for digital private copying and analogue private copying.

#### ▪ ***Limiting Conditions of Article 5.2(b)***

Portugal has implemented Art. 5.2(b) in a manner that is only *partly* consistent with the Copyright Directive. Art. 75(2)(a) of its Copyright Act states as follows:

*The following uses of the work are permitted, without the consent of the author:*

*(a) The reproduction of the work, exclusively for private purposes, on paper or similar media, executed by the use of any kind of photographic technique or process with similar results, with the exception of sheet music, as well as the reproduction by any means by an individual person for private use and without direct or indirect commercial purposes....*

While the provision does not refer to fair compensation, this is covered in a separate provision (Art. 82) of the Copyright Act. The Act does not include any requirement that such compensation reflect the application of TPMs, however.

#### ▪ ***The “Three-step” Test (Article 5.5)***

The “three-step” test of Art. 5.5 is expressly implemented in Art. 75(4) of Portugal’s Copyright Act.

### **Levies: Background**

#### ▪ ***Application and Scope***

According to article 2 of amended Law 62/98, article 82 of the Copyright Act generally applies levies:

- a) On mechanical, electronic and other devices which are only or mainly intended to enable the reproduction of works. No levies are applicable on digital devices.
- b) On analogue and digital media, excluding paper, listed in article 3.4<sup>o</sup> of Law 62/98.

As a result, levies are applicable to a wide range of media, including audio and data CD-R and CD-RW, DVD-R, DVD-RW and MiniDiscs, while digital / IT equipment is expressly excluded (i.e., computers and any other digital equipment).

Note that the reproduction does not need to be “digital” but the equipment has to be “digital”. Therefore, digital products that can be used to produce analogue copies are also excluded.

- **Rates and Discounts**

Secondary legislation (Law 62/98, as amended by Law 50/2004) sets out details of levy amounts as follows:

<b>Products</b>	<b>Published Tariff</b>
<b>Analogue media</b>	
Audio cassettes	€ 0.14
Video cassettes (VHS)	€ 0.26
<b>Digital media</b>	
CD-R audio	€ 0.13
CD-R data	€ 0.05
CD 8cm	€ 0.27
MiniDisc	€ 0.19
CD-RW audio	€ 0.19
CD-RW data	€ 0.14
DVD-R	€ 0.14
DVD-RW	€ 0.30
DVD-RAM	€ 1.00
<b>Analogue equipment</b>	
Devices mainly intended to enable the reproduction of works.	3% selling price from manufacturers / importers to wholesaler

As far as BSA is aware, no discounts are available on levies. Exemptions from levies do exist, however. For example, no levies are due when equipment is purchased by an audiovisual communications body or by a phonogram and videogram producer exclusively for their own productions.

- **Payment and Collection**

Levies are paid by the first purchasers (not importers or manufacturers) of relevant products, provided the device is not for export. An association for management of private copying has been established, AGECOP, which is charged with collection of levies and management of separate collecting agencies for each right holder group.

**Levies: DRMs and TPMs**

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While the Portuguese law has transposed article 6 of the Copyright Directive (new articles 217-222 of the Copyright Act), at present, the Copyright Directive article 5.2(b) provisions relating to TPMs have not been implemented into Portuguese law. Thus it does not appear that levies are adjusted where TPMs/DRMs are in place. However, such TPMs were present in the rationale followed behind the decision to exclude digital equipment from copyright levies under the new Portuguese Law.

**Levies: Harm**

Portuguese law does not:

- require a showing of harm before allowing a levy to be imposed or increased;
- clarify that no payment or reduced payment is due where there is only minimal harm;  
or
- eliminate levies where right holders have already received compensation.

To the best of BSA's knowledge, no studies have been undertaken to assess the harm caused by private copying or the impact of DRMs on private copying.



## **SLOVAKIA**

### **Copyright Directive: Private Copying**

- ***Digital vs. Analogue Private Copying***

Slovak law does not treat digital private copying differently from analogue private copying.

- ***Limiting Conditions of Article 5.2(b)***

Slovakia has implemented Art. 5.2(b) only partially. Article 24 of its Copyright Act states as follows:

*(1) A physical person may make a copy of a disclosed work for his/her private use and for ends that are neither directly or indirectly commercial without the authorization of the author; no obligation to pay remuneration to the author shall arise due to such use.*

....

*(4) An author of the work, a copy of which is made pursuant to Subsection (1), shall have the right to compensation by remuneration.*

The law makes no reference to the application of TPMs, or their affect on fair compensation.

- ***The "Three-step" Test (Article 5.5)***

The "three-step" test of Art. 5.5 is expressly implemented in Art. 38 of Slovakia's Copyright Act

### **Levies: Background**

- ***Application and Scope***

Article 24 of Slovakia's 2003 Copyright Act expands the preexisting rules on levies. Levies now apply to media wide range of digital media and equipment. This includes: CD-R, CD-RW, DVD-R, DVD+R, DVD-RW, DVD+RW, DVD RAM, audiovisual electronics, Multifunctional devices, DVD recorders, MP3 players and burners and hard disk drives and PCs.

- ***Rates and Discounts***

Rates include the following: 6% for blank media, 3% for devices used for making copies of phonograms or audiovisual recordings and reprographic devices. Where a device is an integral part of another product, the rate applies proportionally to the share of the price/import duty applicable to that device. A separate provision states that a rate of 0.5% applies to hard disks in personal computers. (Copyright Act No. 618/2003 Coll.)

The applicable legislation does not set forth discounts applicable to levy amounts.

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- **Payment and Collection**

Levies are paid by importers or manufacturers on the sale or import price of the product and by persons providing copy services for gain. Third party dealers in levied products are also liable to pay levies unless the importer or manufacturer is identified to the collecting agency.

Levies are collected by ISNA, an umbrella group of authors' collecting societies including SOZA, LITA, SLOVGRAM and OZIS.

**Levies: DRMs and TPMs**

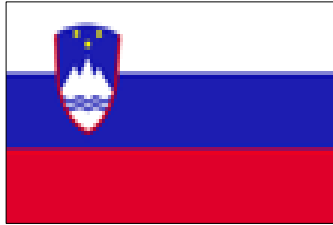
At present, the Copyright Directive Art. 5.2(b) provisions relating to TPMs have not been implemented into Slovak law. Accordingly, it appears that levies are payable in full regardless of the application of TPMs.

**Levies: Harm**

Slovak law does not:

- require a showing of harm before allowing a levy to be imposed or increased; or
- clarify that no payment or reduced payment is due where there is only minimal harm; or
- eliminate levies where right holders have already received compensation.

To the best of BSA's knowledge, no studies have been undertaken to assess the harm caused by private copying or the impact of DRMs on private copying.



## SLOVENIA

### **Copyright Directive: Private Copying**

#### ▪ ***Digital vs. Analogue Private Copying***

The implementation of the Copyright Directive has clarified that digital copying is permitted under Slovenian law. Digital and analogue copying are subject to the same limitations.

#### ▪ ***Limiting Conditions of Article 5.2(b)***

Slovenia has only partially implemented Art. 5.2(b), omitting the language on TPMs. Article 50 of its Copyright Law provides as follows:

*(1) Subject to Art. 37 [fair compensation], the reproduction of a disclosed work shall be free, if made in no more than three copies and provided that the conditions of paragraph 2 . . . of this Article are fulfilled.*

*(2) A natural person shall be free to reproduce works:*

- 1. on paper or any similar medium by the use of a photographic technique or by some other process having similar effect; and*
- 2. on any other medium if this is done for private use, if the copies are not delivered or communicated to the public, and if this is not done for direct or indirect economic advantage.*

The issue of “fair compensation” is dealt with separately, in Art. 37. The Act does not expressly require that such compensation be adjusted to reflect the application of TPMs, although this may be addressed in pending legislation, laying out the details of the levy regime.

#### ▪ ***The “Three-step” Test (Article 5.5)***

The “three-step” test of Art. 5.5 is expressly implemented in Art. 46 of Slovenia’s Copyright Law—although in a somewhat heightened form, as a five-step test. Limitations on copyright are permissible provided that they are determined in the Copyright Act, and that the extent of exploitation of the copyright work is limited by the intended purpose, is compatible with fair practice, does not conflict with normal use of the work, and does not unreasonably prejudice the legitimate interests of the author.

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## **Levies: Background**

### ▪ ***Application and Scope***

Article 37 of Slovenia's Copyright Act outlines the basic rules for fair compensation, including broad definitions of products that bear levies. The Government has been considering a draft decree that would clarify the details of the levy system (the proposal has recently been put on hold and it is unclear when discussions will restart). The proposed decree would extend levies to a wide range of media and devices, such as: digital devices designed exclusively for the reproduction of audiovisual works (CD-R/RW audio writers, DVD-R/RW/RAM audio/video writers, MiniDisc writers, MP3 players with integrated memory and other similar devices); digital devices that are not designed exclusively for the reproduction of audiovisual works, including CD-R/RW computer units, DVD-R/RW/RAM computer units; devices with integrated MP3 players; and other similar devices. Also included would be media designed exclusively for the reproduction of audiovisual works (i.e. CD-R/RW audio, DVD-R/RW/RAM video, and MiniDiscs) and other similar media; and media that are not designed exclusively for the reproduction of audiovisual works (data CD-R/RW, data DVD-R/RW/RAM, hard-discs, memory cards and other similar media).

### ▪ ***Rates and Discounts***

The draft Decree sets prices as follows:

<b>Products</b>	<b>Published Tariff</b>
Appliances for sound recording (tape recorder, magnetic recorder, other similar appliances)	€ 2.50
Appliances for visual recording (video recorder, other similar appliances)	€ 3.75
Audio cassette, video cassette, magnetic tape, or other similar media <ul style="list-style-type: none"><li>▪ up to 180 minutes</li><li>▪ more than 180 minutes</li></ul>	€ 0.06 € 0.08
Appliances designed exclusively for reproduction of audio and/or visual works	€ 8.33
Appliances that are not designed exclusively for reproduction of audio and/or visual works	€ 3.75
Media designed exclusively for recording audiovisual works <ul style="list-style-type: none"><li>▪ audio works, per every initial hour of recording time indicated on the medium</li><li>▪ video recording media, per every initial hour of recording time indicated on the medium</li></ul>	€ 0.125 € 0.375
Media that are not designed exclusively for the reproduction of audiovisual works <ul style="list-style-type: none"><li>▪ capacity of 20 GB or less (per every GB of capacity indicated on the medium)</li><li>▪ capacity of more than 20 GB (per every GB of capacity indicate on the medium)</li></ul>	€ 0.0625 € 0.02
Scanners and fax machines	€ 6.25

Copiers and MFDs	
Monochrome devices	Levies are double in case of color copying functionality
<ul style="list-style-type: none"> <li>• Up to 12 cpm = SIT 2,000 (approx. 8.3€)</li> <li>• Between 13-36 cpm = SIT 3,000 (approx. 12.5€)</li> </ul>	
Over 36 cpm = SIT 5,000 (approx. 20.9€)	

\* *Draft Decree on the amounts of remuneration for private or other internal reproduction.*

The Decree does not provide for discounts on levies.

▪ **Payment and Collection**

Levies are payable by both importers and manufacturers and collected on behalf of different collecting societies by the Copyright Agency of Slovenia, as a controlling agent.

**Levies: DRMs and TPMs**

At present, the Copyright Directive Art. 5.2(b) provisions relating to TPMs have not been implemented into Slovene Law. Levies are thus not adjusted where DRMs/TPMS are applied. This may, however, be addressed on the pending draft decree on the levies system.

**Levies: Harm**

Slovene law does not:

- require a showing of harm before allowing a levy to be imposed or increased;
- clarify that no payment or reduced payment is due where there is only minimal harm; or
- eliminate levies where right holders have already received compensation.

The Office of Intellectual Property has undertaken a study on the frequency of private copying and the percentage of Copyright works in the copied items.





## **SPAIN**

\* Spain is currently in the process of implementing the EU Copyright Directive, 2001/29/EC. This implementation entails the modification of Spain's existing IP Law, Royal Decree 1/1996 of 12 April (hereinafter "LPI"). A draft bill was approved by the Commission of Culture of the Spanish Congress on March 2<sup>nd</sup>; additional steps, lawmaking procedures that could eventually impact the final text should take place within the next 2-3 months.

### **Copyright Directive: Private Copying**

#### ▪ ***Digital vs. Analogue Private Copying***

Existing law (LPI Art. 25) does not establish different rules for digital versus analogue private copying. However, the draft implementing legislation imposes different levies regimes, depending on whether the copies are made using analogue devices/media (Article 25.5) or ones of a digital nature (Article 25.6). The term used previously, i.e. "remuneration" is amended and replaced by the term "compensation".

#### ▪ ***Limiting Conditions of Article 5.2(b)***

Existing Spanish Law (Article 31.1 of the LPI) provides that those works that have already been disclosed may be reproduced without the author's authorization for the private use of the copier as long as the copy will not be put to collective or profit making use. Article 25 of the LPI establishes the right holder's right to compensation for such private copying.

Consistent with Copyright Directive Art. 5.2(b), the proposed implementing legislation would amend the existing exception to extend to works in any medium and to prohibit copying when it is made for direct or indirect commercial aims. In addition, the proposed implementing legislation separately requires that when assessing levies, the availability, application, degree and effectiveness of TPMs is to be considered. Finally, it requires that the work that is the subject of the private copy is legal (this additional requirement is aimed to exclude/clarify that the private copying exception is not applicable in the context of "peer-to-peer" networks).

#### ▪ ***The "Three-step" Test (Article 5.5)***

The LPI already incorporates the three-step test in article 40 bis.

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## **Levies: Background**

### ▪ ***Application and Scope***

The rules relating to levies are set forth in Article 25 of the LPI and extend levies to equipment, apparatus and materials that are specially suitable (“idóneos”) for private copying reproduction. The LPI establishes a range of products and media to be levied and the relevant amounts. Digital media is governed by a separate July 2003 agreement between industry (Association for Multisectorial Spanish Electronic and Communications Companies or ASIMELEC) and certain collecting societies (see below). Media levied under this agreement include data and audio CD-R/RW and DVD-R/RW, among others. Collecting societies are pressing to extend levies to digital equipment, including MP3 players and CD and DVD burners.

There is also an agreement between the Spanish Collection Society CEDRO (representing book editors and authors) and ASIMELEC which provides the application of levies on flat-bed multifunctional devices and scanners.

The proposed implementing legislation distinguishes between levies on analogue devices and media, and levies on digital devices and media. The draft bill does not expressly establish levy tariffs or include a list of digital products to be levied. However, the draft does set forth a procedure by which such levies are to be determined. Under this procedure, which the Ministry of Culture and the Ministry of Industry will have to invoke every two years, the parties involved in the negotiation of levies (collecting societies and trade associations) shall have four months to reach agreement, following which the Ministry of Culture and Ministry of Industry will publish an Executive Order setting out the digital devices and media subject to levies and the levy tariffs. The Consumer and End-users Council has to be consulted in this process, as is the Ministry of Economy.

The proposed legislation contains a temporary provision effective until the time such Executive Order is approved, which provides the application of some levies on digital devices and media in broad terms. While such provision has been proposed and approved with the aim of keeping current levies on digital media and devices, some collecting societies show their intention to interpret it in broader terms and extend the scope of the digital products subject to levies even on a temporary basis.

The draft implementing legislation also sets forth various criteria which must be considered in establishing levies on digital products, as follows:

- a) The harm effectively caused to the right holders for the private copies, keeping into consideration that no payment will be due if harm is minimal;
- b) The degree of use of the equipment, devices and media for making private copies;
- c) The storage capability of the equipment, devices and media;
- d) The quality of the reproductions;
- e) The availability, application degree and effectiveness of the technological protection measures; and
- f) The ‘life span’ of the reproductions.

### ▪ ***Rates and Discounts***

The LPI establishes the following rates to be applied:

<b>Audio and Video Devices/Media</b>	<b>Current Levy</b>	<b>Proposed legislation</b>
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Phonogram reproduction equipment or materials	0.60 € per recording unit	No change
Video recording equipment or materials	6.60 € per recording unit	No change
Sound recording materials	0.18 € per recording hour (0.003 per minute)	No change
Visual or audiovisual recording materials	0.30 € per recording hour (0.005 per minute)	No change

Reproduction Equipment	Current Levy	Proposed legislation
1-9 cpm	45.08 €	16.67 €
10-29 cpm	135.23 €	114.95 €
30 – 49 cpm	180.30 €	153.26 €
50 cpm or more	222.37 €	189.01 €

As noted, the application of the LPI's rules to digital products has been adjusted by a July 2003 Agreement between ASIMELEC and certain collecting societies. According to the Agreement, the applicable levies for such digital products are:

Devices/Media	Levy
CD-R/RW, audio or similar	0.35 € per recording hour
DVD-R/RW, video or similar	0.70 € per recording hour
Other Media and materials:	
a) CD-R/RW data or similar	a) 2003: 0.13 € per recording hour 2004: 0.13 € per recording hour 2005: 0.16 € per recording hour
b) DVD-R/RW Data	b) 0.30 € per recording hour.

Similarly, the LPI's rules have been adjusted for multifunctional devices and scanners under the Agreement between ASIMEC and CEDRO, as follows:

Devices	Levy
Multifunctional devices with glass plate, weight lower than 17 kg and copying speed 1-29 cpm	16.67 €
Scanners	10.00 €
Copiers and other multifunctional devices with a copying speed 1-9 cpm	16.67 €

If the draft implementing legislation is adopted, these tariffs will remain in effect temporarily and ultimately will be adjusted under the procedure outlined above. As mentioned, the draft implementing legislation establishes a transitory scheme that will be enforceable from the time of the adoption of the draft legislation until the adoption of new tariffs under the above procedure. The transitory levies for digital devices and media are as follows:

Audio and Video Reproduction Digital Devices/Medium	Levy
- Phonogram reproduction digital equipment or materials	0.60 € per recording unit
- Video recording equipment or materials	6.6 € per recording unit
- Digital material media: discs or MiniDiscs	0.35 € per recording hour (0,006 per minute)
- Visual or audiovisual recording materials	0.70 € per recording hour (0,01 per minute)
- Media for visual and sound reproduction;	
a) Compact disks	a) 0.16 € per recording hour
b) Versatile disks	b) 0.30 € per recording hour

<b>Reproduction Digital Devices</b>	<b>Levy</b>
Scanners (mono-functional devices for reproduction of documents)	10.00 €
Desktop multifunctional devices with glass-plate, weight lower than 17 kg and copying speed from 1-29 cpm, which are suitable to perform at least 2 of the following functions: copy, print, fax or scanner.	16.67 €
Devices with up to 9 cpm coping capabilities	16.67 €
Devices with 10 - 29 cpm coping capabilities	114.95 €
Devices with 30 - 49 cpm coping capabilities	153.28 €
Devices with more than 49 cpm coping capabilities	189.91 €

▪ **Payment and Collection**

Under the LPI, Spanish manufacturers and importers are liable for levies. Resellers, wholesalers, retailers or other successive purchasers may also be liable where previous payment cannot be proven. Key collecting societies for these revenues include SGAE, EGEDA, AGEDI, CEDRO.

**Levies: DRMs and TPMs**

The proposed draft implementing legislation provides that the “availability, application degree and effectiveness” of technological protection measures is to be considered when assessing levies on digital products. It is not clear how this will work in practice, however.

**Levies: Harm**

The proposed draft implementing legislation provides that the harm actually caused to the right holders is to be considered when assessing levies. Further, it contains the principle provided in Recital 35 of the Copyright Directive that no payment will be due if harm is minimal.



## SWEDEN

### Copyright Directive: Private Copying

#### ▪ **Digital vs. Analogue Private Copying**

Sweden's Copyright Act (amended as of 1 July 2005) differentiates between the method of calculating levies on analogue and digital products, as set out below (per megabyte for digital products rather than per recordable minute). The basis for imposing levies, however, is no different.

#### ▪ **Limiting Conditions of Article 5.2(b)**

Sweden's Copyright Act does not implement all conditions of Copyright Directive Art. 5.2(b). Art. 12 of the Copyright Act provides as follows:

*"Anyone is entitled to make, for private purposes, single copies of works which have been made public. Such copies may not be used for other purposes."*

Art. 12 does not refer to "fair compensation" nor does it expressly state that TPMs will be taken into account when determining levies. The Act does state, however, that a company is entitled to a reduction in the levy if the levy is unreasonably high in light of "*circumstances pertaining to the device...or...market*". (Such a reduction is not automatic and can only be made through an agreement between the collecting society and relevant representatives of industry).

#### ▪ **The "Three-step" Test (Article 5.5)**

The "three-step" test of Art. 5.5 is not expressly implemented in the Copyright Act. (The March 2005 bill proposing amendments to implement the EU Copyright Directive considered whether the "three-step" test should be incorporated into Swedish law, but rejected the notion. The bill stated that the test may be used as a guide when making further enactments, but it is not clear whether further legislation would be passed expressly implementing the test, or whether this means that the test should be used for interpretation purposes.)

### Levies: Background

#### ▪ **Application and Scope**

Art. 26k of the Copyright Act establishes the basis for the application of copyright levies. The article provides that authors have no right to remuneration if the products are intended:

*"(i) to be used for purposes other than the making of copies of works for private purposes;*

*(ii) to be exported from the country; or*

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*(iii) to be used for the making of copies of works for persons who are visually or aurally handicapped."*

The Act further states that "...devices on which sound or moving pictures can be recorded and which are specifically designed for making copies of works for private use..." are to be levied.

#### ▪ **Rates and Discounts**

Levies are set out in the amended Act on analogue media, all digital media (including CD-Rs, CD-RWs, MiniDiscs, CD-R audio and DVDs) and some digital equipment (MP3-players and DVD-players with internal recordable memory) at the following rates:

- Analogue media (cassettes, VHS): € 0.0027/ recordable minute;
- Digital media on which recordings can only be made once (e.g., CD-R): € 0.00027 / MB;
- Digital media on which multiple recordings can be made (e.g., CD-RW, MP3-players, DVDs with internal recordable memory): € 0.0004 / MB.

Currently, some discounts are available on levies. These include 100% reductions on products sold to visually or hearing impaired persons, and no levies on products sold for business use. To benefit from these discounts, registration with the collecting society is required.

Historically, Swedish Copyright Law placed a € 0.64 cap per product. When Sweden implemented the Copyright Directive, it removed this cap and replaced it with the possibility of reducing the levy for a product should it become "unreasonably high" (new Art. 26 I). No detail is provided as to what is meant by "unreasonably high." Any reduction is to be negotiated between the collecting society and the relevant industry organization.

Consistent with this approach, the collecting society and industry have, during the autumn of 2005, negotiated an agreement regarding the level of the levies. The agreement is applicable from January 1<sup>st</sup> 2006 and will be in force for two years with a possibility of extension. The agreement adjusts the levies for some media and equipment compared to the Act and sets out the following rates:

- Digital media on which recordings can only be made once (CD-R, DVD-R): € 0.10 per *disk* of CD-R and € 0.35 per *disk* of DVD-R;
- Digital media on which multiple recordings can be made (CD-RW, DVD-RW): € 0.17 per *disk* of CD-RW and € 0.55 per *disk* of DVD-RW.
- MP3-players: The levies remain in accordance with the Act: € 0,0004/MB.
- DVD-players with internal recordable memory and similar devices; € 0,00035/MB with a cap of € 37.35 per product.

It should be noted that these discounts are only available for those companies which are members of the industry organizations that are parties to the agreement (a fairly extensive group). For those companies which are not covered by the agreement the levies mentioned in the Act are applicable.

#### **Payment and Collection**

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Levies are collected by the COPYSWEDE society and are paid by manufacturers and importers.

**Levies: DRMs and TPMs**

While the amended Copyright Act does not mandate that DRMs or TPMs be taken into account when assessing levies, it does state that certain "*circumstances pertaining to the device...or...market*" are to be considered when considering whether the levy for a product is unreasonably high. Such circumstances are likely to include the application of DRMs and TPMs, but this is not specifically mentioned in the text.

**Levies: Harm**

The Copyright Act does not require a showing of harm to the right holder before a levy will be imposed or increased. However, levies can be reduced where right holders already have received compensation.

To the best of BSA's knowledge, no studies have been undertaken to assess either the impact of DRMs / TPMs on private copying or the harm caused by private copying.

Contact:



**EICTA**

Rue Joseph II 20  
1000 Brussels  
Belgium  
Phone: +32 2 609 53 10  
[leo.baumann@eicta.org](mailto:leo.baumann@eicta.org)  
Web: [www.eicta.org](http://www.eicta.org)



**Business Software Alliance Europe**

Rue Wiertz 50  
1050 Brussels  
Belgium  
Phone: +32 (0)2 401 6808  
[kimonz@bsa.org](mailto:kimonz@bsa.org)  
Web: [www.bsa.org/eupolicy](http://www.bsa.org/eupolicy)



**European-American Business Council**

26, Rue de l'Industrie  
1040 Brussels  
Belgium  
Phone: +32 (0)2 513 38 72  
[sara@eabc.org](mailto:sara@eabc.org)  
Web: <http://www.eabc.org>



**RIAE**

Square de Meeûs, 35  
1000 Brussels  
Belgium  
Phone: +32 (0)2 282 0983  
[bonfantr@fleishmaneurope.com](mailto:bonfantr@fleishmaneurope.com)  
Web: [www.riae.org](http://www.riae.org)



**EDiMA**

214D Chaussée de Wavre  
1050 Bruxelles.  
Belgium  
Phone: +32 (0)2 626 1990  
[lucy.cronin@edima.org](mailto:lucy.cronin@edima.org)  
Web: [www.europeandigitalmediaassociation.org](http://www.europeandigitalmediaassociation.org)