

MANUFACTURE AND REFURBISHMENT; DEFINITION

Together with representatives of the industry parties subject to levies, Stichting de Thuiskopie has determined the following definitions which are used to determine whether products that have been 'refurbished' are subject to levies within the meaning of the Dutch Private Copying Regulations (*Thuiskopieregeling*).

MANUFACTURE

To manufacture, reassemble or arrange for the manufacture of an item within the meaning of Section 16(c) of the Dutch Copyright Act (*Auteurswet*) in such manner that this can be considered to be a complete product that is new to the market. This includes altering, renovating or reconstructing used items in such manner that they can be brought into the market as if they were new.

REFURBISHMENT

If an item is altered in such manner that this can be considered to be manufacturing within the meaning of the Dutch Copyright Act, the Private Copying Levy will be payable if this item is made available to a new buyer.

Explanation:

In principle, the Private Copying Levy is only payable once per item in accordance with the law. However, if an item that is sold or otherwise made available to a new buyer is altered in such manner that this can be considered to be manufacturing within the meaning of the Dutch Copyright Act, the Private Copying Levy will be payable. Within the context of the existing regulations, it would result in a distorted situation if consumers would not be obliged to pay any fee whatsoever in respect of a refurbished item whereas they would be using it in exactly the same manner as a consumer who receives a new item for which the statutory fee is paid.

This would also be contrary to the broad interpretation given by the European Court to the 'importer' concept and the fair balance that must be found in applying the Dutch Private Copying Regulations as well as the high level of protection the European Copyright Directive (*Auteursrechtlijn*) intends to offer. The obligation of result of the State entails that a fair compensation be paid by consumers who make private copies of items that have reached them by being imported and/or manufactured. Based on the law and case law, this fair compensation must be paid in the Member State where the private copying is done.

It will in any case need to be examined whether, prior to the moment of resale, the item has been changed/altered in such manner that this is considered to be manufacturing a new item within the meaning of the Dutch Copyright Act. No doubt exists in the following situations:

- In the event that an item, whether or not refurbished, is imported in the Netherlands for the first time, the Private Copying Levy is payable in every case;
- The Private Copying Levy applies in every case where used items are imported that come under Section 16(c) of the Dutch Copyright Act;
- In the event that a item originates from a professional user, who purchased the item levies excluded or who received a refund on account of professional use, and this item is subsequently sold to a consumer, whether refurbished or not, the Private Copying Levy is payable in every case.

No Private Copying Levy will be payable:

- where the situation cannot be considered to be manufacturing within the meaning of the above definition. In particular, this is the case where an item is repaired that is already owned by an existing customer;
- if used items are sold between private individuals/consumers;
- in the event of the commercial sale, within the country, of used items – in respect of which the Private Copying Levy has already been paid – which have not been altered and where this cannot be considered to be manufacturing within the meaning of the above definition.