

## Point of view

### **Definition of the calculation basis for license fees<sup>1</sup> to game authors in publishing contracts**

According to Section 32 of the German Copyright Act (UrhG), game authors are entitled to an appropriate share in the success of their works. The sales-based remuneration of game authors is initially based on the number of games sold in the case of exploitation by the publisher. An important factor here is the **amount** of the percentage royalty rate to be agreed<sup>2</sup>. However, no less decisive is **the basis on which** this percentage is calculated. In other words, it makes a huge difference whether you get "a share of the whole cake" or "just a share of a slice". The definition of the calculation or assessment basis of royalties for the authors' percentage revenue share is therefore a central point in the formulation of contracts.

*The following statements are largely based on experience with publishers in Germany – but of course apply in principle. They are intended to make authors more aware of this issue and enable them to negotiate consistently and confidently when representing their point of view. At the same time, we expect publishers to engage in a thought process in the interests of fair, collaborative and sustainable cooperation. We will also present proposed solutions and an alternative to the current practice.*

When calculating royalties in the context of a publisher's own exploitation, a clear distinction must be made between what the **end customer** pays (gross sales or "gross retail price"), what remains after deduction of the VAT that accrues to the **state** (net sales or "net retail price"), what the **retailer** pays to a **wholesaler** after deducting his trade discount from the net retail price, what the **wholesaler or retailer** then pays to the **publisher** producing the game after deducting his remuneration, and from which of these stages the percentage **share** to which authors are entitled according to the contract with the publisher is finally calculated.

**Net sales at the checkout in the shop** would be the most transparent basis for calculation and is used by book publishers for print products, for which the fixed retail price set by the publisher, excluding VAT, applies. As there is no binding price fixing for games as in the German *Book Price Fixing Act*, it is not possible to calculate a uniform net retail price. In Germany, only a recommended retail price (RRP) may be issued for games. A few book publishers that also publish games calculate the license fees for games on this RRP basis.

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<sup>1</sup> The term "royalties" here refers to the remuneration paid to authors based on direct exploitation by the publisher. Pro rata royalties to authors from sublicenses to the publisher's licensing partners are not covered here.

<sup>2</sup> For members of the SAZ, the internal publication *SAZ Points 4A "Mirror of Terms and Royalties"* provides guidance.

## The practice of games publishers: the net selling price to retailers as the basis for calculation

This is currently the calculation basis used in most contracts with game publishers, even if the terms vary: "net sales", "net selling price", "net publishing revenue", "net merchandise price", "retailer purchase price", "net revenue", "invoiced amount", etc.

The calculation basis is often reduced by additional, unspecified items, which are deducted from the net selling price, e.g. **rebates, discounts, advertising costs subsidies (WKZ), retailer bonuses, export taxes, del credere insurances, commissions, transport and packaging costs** – and finally there are often unspecific and non-transparent additions such as "and similar costs". Some publishers also state a flat rate but at least clearly defined percentage of e.g. 3% for such deductions. Without such a definition, it is completely open and non-transparent how high such additional deductions from the calculation basis of the license fees are – it remains a black box.

### A comparison of the two calculation bases:

The two calculation bases – one for books based on the net retail price, the other for games based on net sales to retailers – differ in terms of amount and structure, so in several respects.

- Book authors regularly receive a percentage of the **net retail price**<sup>3</sup>. The amount of this percentage varies, but for literary works (hardcover) it is usually 10%. This price is a clearly defined and non-variable figure and is based on the fixed price, which enables a reliable calculation for all parties involved, as the following example shows:

Retail price for one book	29,98 €
Less reduced sales tax rate of 7%	1,96 €
Net retail price therefore	28,02 €
Sales revenue bookseller or wholesaler (assuming 50% discount from the publisher)	14,01 €
Turnover revenue Publisher	14,01 €
Author's fee (based on the net retail price – irrespective of discounts and other agreements between the publisher, wholesalers and booksellers) 10% is now a figure that cannot be achieved everywhere, even by book authors, although a number of publishers have signed such a remuneration agreement for hardcover editions with the <i>German Writers' Association in ver.di (VS)</i> . Bestselling authors can sometimes achieve more. For paperback editions, authors receive 5% up to 20,000 copies (this increases to 8% from 100,000 copies), but at 5% this would still be	<b>2,80 €</b>     <b>1,40 €</b>

<sup>3</sup> See also the [Joint Remuneration Rules \(GVR\) with parts of the book industry in Germany](#) and the *Kurt Wolff Foundation's* overview "[Who gets what from the book?](#)"

- If game authors were to receive **10% of net sales according to the retail price list** (i.e. excluding value-added tax), the following example calculation would result:

Unbound retail price for a game	29,98 €
less regular VAT rate of 19% <sup>4</sup>	4,78 €
Retailer sales revenue (assuming 50% discount in the retailer price list at the target or recommended retail price from the publisher)	12,60 €
Publisher's sales revenue (according to dealer price list without taking into account further discounts and other price-reducing conditions between publisher, wholesaler and retailer)	12,60 €
Author's license fee (based on the retailer price list - without taking into account further discounts and other agreements between publisher, wholesaler and retailer) with a theoretical 10% license fee	<b>1,26 €</b>
In reality, however, the percentage for game authors is mostly well below 10%. <b>Assuming a 6% license fee</b> , that would only be	<b>0,75 €</b>
If we now take into account further discounts etc. that publishers deduct and apply the average deduction of 23% from the price of the retail price list of a large German publisher, the 6% license fee leaves only	<b>0,58 €</b>

The example of this calculation basis shows that the fees of game authors are significantly lower than those of book authors and also depend heavily on the agreements between the trade and the publisher, which the game authors do not know and over which they have no direct influence. The publishers' retail price lists usually assume a basic discount of around 50% of the targeted or recommended retail price. However, the more assertive the retailer is, the higher the price-reducing conditions. This has a particularly strong effect on major customers such as Amazon. According to official invoices for a game from a major German publisher, these deductions from the retailer price list ranged between 21% and 27% in the years 2018-2022. This is not transparent for authors – it is a black box.

**A special case** are sales of entire print runs to foreign distribution partners, sometimes with extremely high discounts. This can result in license fees being more than halved compared to the publisher's own (national) distribution.

If authors were aware of such discounts in detail in advance, they would be able to adjust their percentage fee accordingly when negotiating the contract. It is problematic if rebates, bonuses, advertising cost subsidies or discounts are not known in advance or are not precisely defined or do not even appear on the respective customer invoices because they are usually based on a superordinate and secret publisher-dealer agreement for the entire publishing program and the total annual turnover.

In the [SAZ Model License Agreement between publishers and game authors](#), we have therefore specified this calculation basis in point 5.1 to provide clearer orientation under the given practice and to contractually limit or make transparent the proliferation of deductions during negotiations:

<sup>4</sup> The SAZ has long been calling for all cultural goods and artistic performances, i.e. including games, to be taxed at the current reduced rate of 7% (German rate), but this falls within the competence of the EU. However, this reduced rate already applies to some games: for example, role-playing games, which are not considered games by the tax authorities, but books, and are taxed at 7% like all books.

*5.1 The Publisher shall pay the Author a royalty in the form of a percentage of the net sales (**invoiced amount** excluding VAT) of the Work achieved through distribution in the respective distribution countries. The percentage rate is defined in Fig. 10. For direct sales to subsidiaries and other distribution partners abroad, the Publisher shall pay an increased royalty pursuant to Fig. 10, if applicable. In the case of crowdfunding projects, the basis of calculation is the net sales of all versions and additional equipment (goodies). If merchandising articles for the Work, such as mugs, T-shirts etc. are sold, an appropriate fee must be agreed in advance.*

**The economic success in marketing and trading our games should be distributed fair, appropriately and transparently:**

Game authors develop the game as an independent intellectual creation based on a basic idea, which thus acquires the character of a work under intellectual property rights. The months and years of work involved in the creative process, from the initial idea to the final prototype, must be appropriately reflected in their fee. Added to this is the effort involved in finding a publisher and the often years-long wait until the first royalty statement is issued. In this context, it is also important to point out the agreement of an appropriate advance fee payment.

The production of the game and the costs for this (illustrations, graphic design, materials, printing, etc.) as well as the distribution and the associated costs (including delivery and marketing) are the risk, responsibility and **obligation** of the publisher in accordance with Section 1 of the German Publishing Act. Of course, the publisher is also entitled to a proportionate share of the revenues from use. It must amortize its costs and acts with the aim of generating a profit.

However, flexible discounts, bonuses, advertising cost subsidies (WKZ)<sup>5</sup> etc. that the publisher grants in addition to its retailer price list are factors that are also the responsibility of the publisher – as are, for example, changing manpower and production costs. Such additional discounts to retailers must therefore not be at the expense of the authors. This is because if the publisher deducts these discounts from the basis for calculating the royalty, thus reducing this basis, the publisher shifts its risks to the authors. This would only be justifiable in exceptional cases if such deduction items were fully described in the contract and appropriately taken into account in the amount of the percentage remuneration.

The same applies to the contractual clause of a major German publishing house that wants to deduct the costs of a del credere receivables insurance policy, which serves to hedge a general entrepreneurial risk and is therefore unacceptable.

In this context, it is also worth mentioning the questionable attempt by another major publisher, clearly rejected by the SAZ, to share the costs of TV advertising with game authors. The corresponding contractual clause stipulates that game authors receive 1% less royalties in the case of TV advertising in the respective year and country, e.g. only 5% instead of the agreed 6%.

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<sup>5</sup> The term "advertising cost subsidy" already clearly states that such advertising and marketing costs are clearly attributable to the publisher's area of responsibility and services. The following three links provide information on the basic principle of WKZs: [Link A](#), [Link B](#), [Link C](#).

The contractual agreement on the amount of the percentage license fee and how this is calculated are individual agreements with the publisher. They are generally not subject to the general terms and conditions of §§ 305 ff. BGB (German Civil Code). As a result, however, a contract permitting the use of a work under German Copyright Law must provide for **reasonable remuneration** and, in addition, reasonable further participation in the event of an imbalance between the author's remuneration and the benefits from the use of the work (Sections 32 et seq. UrhG). If this is not the case, the contractual partner can be required to amend the contract and, if necessary, even demand a differential share from third parties (e.g. sublicense holders). In addition, according to Sections 32 d and e UrhG, the publisher and, if applicable, its (sub)license holders have duties of disclosure and accountability.

**As each contract is an individual agreement, no game author can be forced to accept a publisher's draft contract unchanged!**

## Conclusion:

Game designers enter a partnership with publishers because publishers have an expertise in editorial<sup>6</sup> and technical implementation, production, marketing and distribution! However, in this partnership based on the sharing of work and responsibilities, this also means that **all of** the publisher's individual marketing and distribution costs must also be borne by the publisher.

The traditional calculation of royalties based on net sales to retailers should therefore only be based on the invoiced amount. Only clearly defined and verifiable rebates, discounts, etc. that directly affect the product and are defined and taken into account in the contract with the game designers may be deducted. Such deductions must be disclosed transparently. All game authors should insist on this for both existing and new contracts. **There can no longer be a black box here!**

## Alternatives:

The most transparent solution for the games business (as there is no price fixing as in the book trade) would be to use the publishers' retail price list as the basis for calculating the license fees. This solution would be fair and technically uncomplicated to implement. In the interests of the game authors we represent, we therefore consider it important and necessary to initiate this discussion in the interests of fair and appropriate remuneration.

The aforementioned practice of some book publishers of using the recommended retail price (RRP) as a basis for calculation should also be discussed.

Another alternative would be fixed or minimum guaranteed fees per game sold on a euro basis. However, this requires transparency in the publisher's pricing as well as automatic and controllable escalation clauses in the event of price increases. This could also be a solution for sales of editions abroad to avoid considerable losses in license fees.

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<sup>6</sup> Inserted subsequently. Of course we also recognize the editorial competences.