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To the copyright chambers of the Regional Courts

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Munich, 9th November 2020

Our sign (please always quote): STIHS.0001/RDI

Protective brief

against a possible motion for a preliminary injunction by

PANArt Hangbau AG, Engehaldenstrasse 131, 3012 Bern, Switzerland

- Applicant 1) -

and/or

Mr. **Felix Rohner**, Engelhaldenstrasse 131, 3012 Bern, Switzerland

- Applicant 2) -

and/or

Mrs. **Sabina Schürer**, Engelhaldenstrasse 131, 3012 Bern, Switzerland

- Applicant 3) -

for: alleged infringement of copyright

Should one of the potential Applicants (hereinafter "Applicant") apply for a preliminary injunction with the content to order the defendant to cease and desist from

> offering "sound sculpture"s as shown below to the public by themselves or by third parties and/or to put them on the market themselves or by third parties and/or to produce them themselves or by third parties

and found its motion on its alleged copyright with regards to objects pursuant to the following sketch

in these particular designs

a) Prototype 1:

b) Prototype 2:

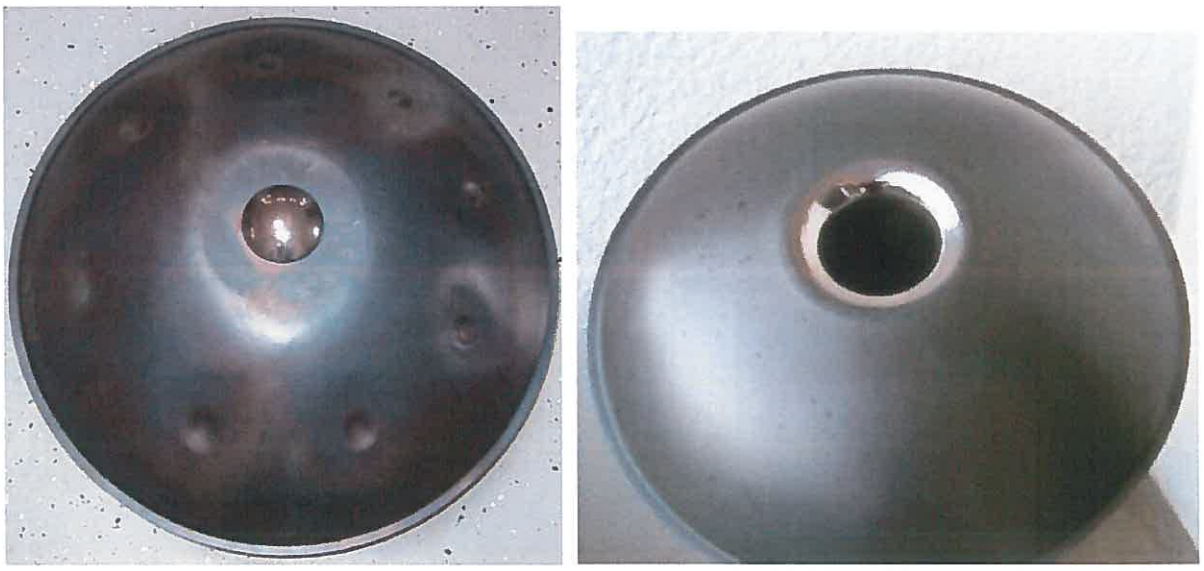
c) Prototype 3:

d) Prototype 4:

e) Prototype 5:

f) First generation Hang:

g) Low Hang:



h) Second generation Hang:

i) Integral Hang:

j) Free Integral Hang:

we would like to point out that the Applicant has no copyright on the instrument "*hang*" and the application must therefore be **rejected.** In any case, the application for a preliminary injunction shall not be decided without an **oral hearing**.

In this context, we would like to point out that we have not (yet) been mandated for any concrete potential defendant in such preliminary proceedings and are therefore not authorised to receive service.

However, the purpose of the present protective brief is to inform the court of the relevant facts of the case. The Applicants currently apply to various German courts for interim measures - often against Asian suppliers who do not defend themselves - and the courts then decide on the basis of the unilateral submission of the Applicants. This one-sided presentation is very incomplete, so that it is necessary to give the courts a better picture of the essential aspects of the case.

Reasons

The Applicant 1) is currently asserting the alleged copyright of Applicants 2) and 3) for the musical instrument called "*Hang*" in a large number of cases. The "*Hang*", however, is not a work of applied art within the meaning of Sec. 2 § 1 No. 4 of the German Copyright Act (UrhG). It lacks a personal intellectual creation within the meaning of Sec. 2 § 2 UrhG. The instrument is the result of a purely technical development and shows no personal creative traits of the Applicants 2) and 3). The applicants are therefore not entitled to any rights under Sec. 97 UrhG.

In detail:

I. Facts

1. The parties are all players in the *handpan* world. *Handpans* are a relatively young group of multi-tone percussion instruments made of (sheet) metal, which are played with the hands while sitting on the lap or (more rarely) standing on a stand:

2. Applicant 1), PANArt Hangbau AG (in the following also "PANArt"), is a public limited company incorporated under Swiss law, established in Bern. The corporate purpose of Applicant 1) is the development, production and distribution of musical instruments and their accessories. We submit as

- Annex R 1 -

an extract from the commercial register of Applicant 1) dated 19 October 2020.

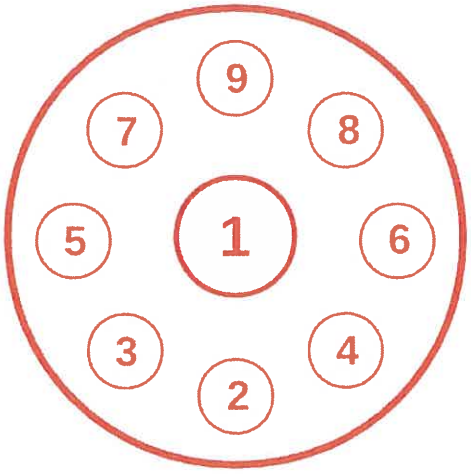
Applicant 2), Felix Rohner, and Applicant 3), Sabina Schärer, are members of the board of directors of PANArt. Both are resident in Bern.

3. Applicant 1) has distributed *handpans* in the past, which the Applicants now claim to be protected by copyright. According to the Applicants, Felix Rohner and Sabina Schärer are the holders of those copyrights and have granted PANArt an exclusive license.

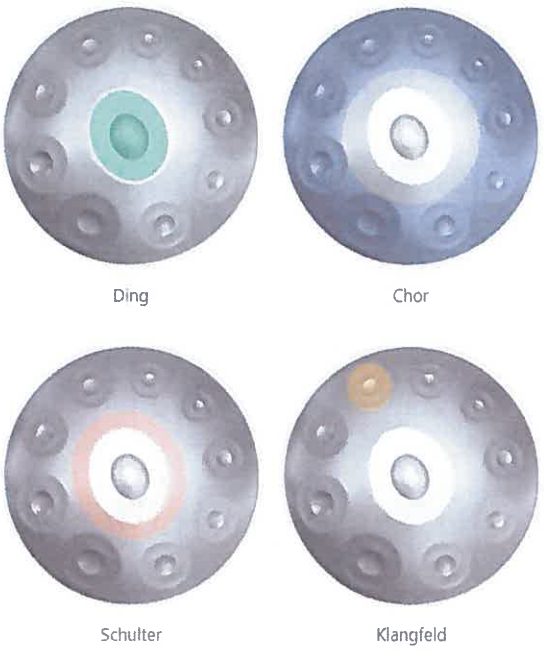
4. A *handpan* consists of two half-shells made of sheet metal, which are placed on top of each other and welded or glued together. This creates a lens-shaped body which contains a hollow space. The bottom side of the *handpan* has a hole in its center. The upper side of the instrument contains the central tone fields. The basic tone is tuned in a dome in the middle of the instrument. Around the dome there are individual, usually seven to nine tone fields (also called *sound fields*) arranged in a circle. Each tone field consists of a hollow beaten into the sheet metal, around which the sheet metal is flattened. For this we present an excerpt from the German Wikipedia on the "*Handpan*", from which this is derived as

- Annex R 2 -.

5. In the *handpan* world, the following vocabulary has become established with regards to the instrument: The central dome with the keynote is often called *"Dome"* (called "Ding" by the Applicants), around which the so-called shoulder of the *handpan* runs. Below this is the so-called *"Circle of Tone Fields"* (called "choir" by the Applicants) with the individual *tone fields,* which are usually arranged in a ring shape. The hollow (membrane) in the middle of the tone fields is called *"Dimple"*, the resonance hole on the underside is often called *"Port"* (called "*Gu*" by the Applicants).



Klangfeldanordnung von 1 (tiefster Ton) bis 9 (höchster Ton)



Source: https://handpan-portaLde/handpan-hang-drum/

We present excerpts from the websites http://paniverse.org/deep-inside-the-handpan-universe-deeper-understanding/,

- Annex R 3 -,

https://handpan-portal.de/handpan-hang-drum/,

- Annex R 4 -,

und http://www.lex.hangblog.org/de/die-zonen-des-hang.htm,

- Annex R 5 -,

from which this follows.

6. A *handpan* is played with the hands. We refer to the following three videos:

- Malte Marten playing the *handpan*, https://www.youtube.com/watch?v=YA2eACP3Ibk
- Manu Delago & London Symphony Orchestra Strings, https://www.youtube.com/watch?v=xjjoCCIbJGs
- Miguel's Lullaby – *handpan*, Bansuri, Lute-Guitar, https://www.youtube.com/watch?list=PL7F90A4714855798C&v=jAI-45BwrDI

in which it becomes very clear how *handpans* are played and which sound is produced.

7. The sound generation is based on two different systems, which the instrument combines.

a) The hollow body, which is created by gluing the two shells together, serves as a resonating body. It is a **Helmholtz resonator** in which a certain volume of air is enclosed in a vessel which has a resonance opening to the outside. The resonance hole is small in relation to the vessel. The resonance opening of the *handpan* is the *port*. If the air enclosed in the vessel is made to vibrate, for example by a blow from outside, sound waves are produced. These are reflected by the walls of the Helmholz resonator. The vibrating air is forced to exit through the resonance opening.

We present excerpts from the German Wikipedia on the Helmholz resonator, on sound and on reflection, as well as from the website https://newt.phys.unsw.edu.au/jw/Helmholtz.html, and the hang lexicon, a blog close to the Applicants, under http://www.lex.hangblog.org/de/helmholtz-resonanz.htm, from which this follows, as

- Annex volume R 6 -.

b) The base tone of the instrument is centred in the dome. On the outside, individual **sound fields** or *tone fields* are driven into the metal. Each tone field consists of a trough (*dimple),* which acts as a membrane and is hammered into the metal with a pre-formed hammer. Inside the *dimples,* the material presses against the edge of the trough. This creates a compression similar to that known from opening jars. If you now hit the *dimple* or the material around the *dimple* with your fingers, the sound field starts to oscillate and produces a sound. The bigger the *dimple*, the deeper the sound. This can be seen in the article submitted in the Annex R 4 under https://handpan-portal.de/handpan-hang-drum/.

c) A *handpan* traditionally has seven to nine tone fields. The way of playing with the hand limits their number, because you can only play a certain number of fields with your hand. We present an article by Prof. Dr. Anthony Achong, published under https://www.karibpan.com/blogs/news/dr-anthony-achong-tuner-extraordinaire-and-author-of-secrets-of-the-steelpan-comments-on-the-pan-hang-argument as

- Annex R 7 -.

Prof. Achong was a physics professor at the University of the West Indies with an interest in the physical conditions and the concrete technology of *steel pans*. Furthermore, the space on the instrument limits the number of tone fields. However, advanced instrument makers today are able to build *handpans* with up to about 20 notes.

d) The tone fields of a *handpan* can be tuned differently. There are numerous differently tuned instruments which vary in their tone scales. We submit an overview of a blogger close to the Applicants under http://www.lex.hangblog.org/de/klangmodelle.htm as

- Annex R 8 -.

e) The sound of a *handpan* is determined by the following criteria:
- Shape and size of the shells or the instrument;
- Shape of the individual tone fields and the dome;
- Space between the individual membranes;
- Shape and size of the resonance hole (*port*);
- Material of the instrument and its tension or elasticity;
- Treatment of the material (heating up to over 600°C).

The elasticity or dynamics of the material influences the tone generation of the tone fields. *Handpan*-makers generally use nitrided steel or stainless steel. The size of the instrument as well as the size of the resonance hole in turn influences the volume of air in the resonance body and thus the tones produced there. The size of the instrument varies, although it is naturally limited at the top to ensure that it can be played with the hands and on the lap. Most *handpans* have a diameter of 55 cm.

Evidence: Affidavit of Mr. Ralf van den Bor
Affidavit of Mr. David Kuckhermann

8. The *handpan* is a percussion instrument. Percussion is one of the oldest known forms of music. Percussion includes any form of sound production by means of any kind of blow. Even hand clapping is part of percussion. For this we present an excerpt from the German Wikipedia on percussion as

- Annex R 9 -.

Consequently, there are a multitude of instruments that can be "struck" and the presentation of which would go beyond the scope of this brief. It is in the nature of this musical genre that the individual instruments are constantly being developed. As a result of such a process, the *handpan* has been developed.

9. The *Steel Drum* or *steel pan*, of which we show a picture below, is considered a preliminary of the *handpan*:

The *Steel Drum* is the national instrument in Trinidad and Tobago. It was developed in the 1930s, based on various drums of African origin. For this purpose we present a Wikipedia excerpt of the "Steel Pan", from which this can be taken as

- Annex R 10 -.

The British colonial lords in Trinidad and Tobago prohibited drumming on African percussion instruments at the end of the 18th century. As a result, the population increasingly turned to everyday metal objects which **they transformed into drums. Oil barrels,** which were abundant in Trinidad and Tobago due to oil mining, were particularly suitable for this purpose. This is how the following instruments were made

(with a resonance hole in the middle and a convex bottom on the right), which were **played with hands or sticks:**



This follows from the articles submitted as Annex R 7 and as Annex R 10 as well as from the attached excerpt from the website https://steelisland.com/history.asp

- Annex R 11 -

and the printout from the website https://www.caribbean-steel-drums.com/steel-drums.html

- Annex R 12 -.

In the 1930s, musicians in Trinidad and Tobago discovered that different **tones** could be **worked into the flat lids of the oil barrels by** pressing dents of different sizes into the metal. These cavities were initially pressed outwards (left), but as they developed, they were increasingly pressed inwards (right):

This follows from the extract from the website https://steelisland.com/history.asp presented as Annex R 11.

This is how *steel pans* (in German: "Pfannen aus Stahl") were created. The *steel pan* is a concavely curved, round sheet metal, which is sometimes suspended on a resonating body. Individual membranes are driven into the hollow of the sheet metal. These membranes produce different sound fields (see Annex R 10):

10. In Trinidad and Tobago the *steel pan* is usually played in larger groups of musicians as pan orchestras. The *steel pans* are tuned differently and can be classified as soprano, alto, tenor, baritone and bass. Such pan orchestras carried the *steel pan* out into the world. We refer to the excerpt from Wikipedia on the Steel Pan (Annex R 10). We also present an excerpt from the website https://www.caribbean-steel-drums.com/steel-drums-steel-pan-family.html as

- Annex R 13 -.

At the beginning of the 1970s, the *steel pan* reached Switzerland. The English Steve Berg, who had settled in Fribourg, built what was probably the first Swiss *steel pan* in 1972:

For this purpose we present an excerpt from Wikipedia on the "Swiss Steelpan History",

- Annex R 14 -,

as well as an excerpt of the website of Applicant 1) https://panart.ch/en/skill/gallery,

- Annex R 15 -.

11. In the end of the 1970s, the instrument gained a foothold in Switzerland and became more popular in the 1980s. In the German speaking part of Switzerland alone, up to 70 *steel bands* were created, a number which was doubled in the 1990s (see Annex R 14 and Annex R 15).

12. In 1976, a *steel band* from Trinidad gave a concert at the “Berner Stadtfest”. Here, Felix

Rohner, Applicant)2, took notice of the instrument. The sound world of the *steel pan,* hitherto unknown to him, captivated him. The next day already he is said to have bought old barrels with friends and tried to build *steel pans* himself. He also founded the steel band "Berner Ölgesellschaft" with colleagues. As a result, the Applicant 2) became a pioneer of Swiss *steel pan* construction. In 1985 he and colleagues from his band founded the *Steel Pan*-Manufaktur, predecessor of PANArt Steelpan-Manufaktur AG, which was founded in 1993 (Applicant 1), which changed its name to PANArt Hangbau AG in 2003). This can be seen from the Wikipedia article on the history of Swiss steelpan (Annex R 14) and from the extract from the commercial register of Applicant 1) (Annex R 1).

Subsequently, Applicant 3), who knew Applicant 2) via the *steel band* Berner Ölgesellschaft, joined the Applicant 1) in 1995. Together they **studied the sheet metal** and, together with Hirsig Blechtechnik and Baumgartner Werkzeugbau AG, they **developed new shells for *steel pans*.** Together with other metal specialists, physicists, experienced tuners and musicians they worked on the raw shells to improve their sound and playability.

This can be taken from the Wikipedia article on the history of Swiss steelpan (Annex R 14) and from the website of the Applicant 1) https://panart.ch/de/geschichte/die-geschichte-der-panart,

- Annex R 16 -.

13. From the very beginning, the Applicant has invested heavily in **research into various sheet metals, bearing methods and forming technologies.** This was also due to the fact that the quality of the oil barrels had deteriorated. The carbon content decreased strongly, which led to a lower strength of the material and an increased detuning of the *steel pans*. The metal sheet of the barrels had become too weak, the sound too shrill and chaotic, which is why the Applicant developed a new sheet for the production of *steel pans*.

To this end, we present a copy of the Applicants' book "Hang. Blech Sound Skulptur." As

- Annex R 17 -

and refer to the explanations on pages 3 and 6.

The Applicant developed a so-called **"sandwich hardening" for the *steel pan* shells** during the **nitriding process** of sheet metal. The sheet metal is treated on both sides with an iron nitride needle structure, so that the outer sides harden while a softer core remains in the middle. This process was subsequently patented by Applicant 1) (see also point 39.). We also present an extract of the Applicant's Swiss patent no. CH 693 319

- Annex R 18 -

and refer to column 1, lines 25 to 34.

On the basis of this material, called "Pang" by the Applicants, they continued to build *steel pans*. To study the properties of the sheet metal, they also built other instruments such as gongs, bells and cymbals from this material in the second half of the 1990s (see also point 28).

14. In parallel to the above developments concerning the *steel pan,* the Indian instrument ***ghatam*** was imported in the 1970s by the percussionist Reto Weber to Switzerland:

a) The *ghatam* is a **bellied pot** fired out of red clay **with a round opening.** The *ghatam* is a classical Indian percussion instrument, which is usually played sitting on the lap or standing on a cushion and is struck with the fingers to produce sounds. A *ghatam* has no tone fields. For this we present an excerpt from the Wikipedia entry on the *ghatam* as

- Annex R 19 -.

b) The musician **Reto Weber** imported this instrument to Switzerland and began playing it at concerts in the early 1980s. He placed several *ghatams* of different sizes in a semicircle in front of him in order to play them simultaneously and to be able to produce different tones. He noticed three **disadvantages** of the instrument for his playing: (1) *ghatams* are **fragile,** which is particularly unsuitable for travelling musicians. (2) The *ghatam* produces the **sound exclusively in the Helmholtz resonator**. Different tones can therefore only be produced with instruments of different sizes. (3) For the same reason, if you want to produce different tones, you have to place several *ghatams* next to each other, which takes up a lot of space and makes playing awkward. Reto Weber therefore developed the **idea of** a **stable instrument made of metal,** which could be played like a *ghatam* with the hands and in a sitting position, but in which one could work **several tone fields into one.**

Evidence: Affidavit of Mr. Reto Weber
View the video "PANArt Hang History and Story of Felix Rohner and Sabina Schärer" at https://www.youtube.com/watch?v=R_4Qf5r7Ulg (minute 24:27 to 26:54)

We also refer to the website of the Applicant 1) at https://panart.ch/de/geschichte/die-geschichte-der-panart (Annex R 16).

c) Reto Weber knew Felix Rohner as a *steel pan* manufacturer, who occasionally tuned his *steel pans*. During an appointment at the Applicant's workshop in Bern in October 1999 Reto Weber brought a *ghatam* with him and showed it to the Plaintifs, who until then did not know the instrument. Reto Weber also expressed his **idea** of a similar **Instrument made of metal with different tone fields**.

Evidence: Affidavit of Mr. Reto Weber
View the video "PANArt Hang History and Story of Felix Rohner and Sabina Schärer" at https://www.youtube.com/watch?v=R_4Qf5r7Ulg (minute 24:27 to 26:54)

This is also shown on the website of the Applicant 1) under

https://panart.ch/de/geschichte/die-geschichte-der-panart (Annex R 16).

In an article published in 2007 ("History, Development and Tuning of the Hang"),

- Annex R 20 -,

the Applicants write:

> "The latest member of this family of nitrided steel instruments is the HANG. It was born in the year 2000, when a percussionist demonstrated a ghatam to us and expressed the dream of having our PANG sounds in a resonating body that could be played with the hands."

Reto Weber and the Applicants 2) and 3) then spontaneously began to work together. They placed two tuned *steel pan* shells from the workshop on top of each other and screwed them together. Thus, the following instrument (the **prototype 1)** was created in 1999:

and

We present as

- Annex R 21 -

The „Hangbroschüre“ written by the Applicants in 2008 and refer to the website of the Applicant 1) at https://panart.ch/de/geschichte/galerie (Annex R 15) and at https://panart.ch/de/geschichte/die-geschichte-der-panart (Annex R 16).

d) With a diameter of 60 cm the instrument was still too big to be played on the lap, which Reto Weber noted.

Evidence: Affidavit of Mr. Reto Weber
View the video "PANArt Hang History and Story of Felix Rohner and Sabina Schärer" at https://www.youtube.com/watch?v=R_4Qf5r7Ulg (minute 27:32 to 28:09)

15. Thus, the *handpan* is the result of a **fusion of two instruments,** the *steel pan* and the *ghatam*. The Applicants therefore first called the instrument **"Ghatpang"** - "Ghat-" from the *ghatam*, "-pang" from the metal they so designated (point 13 above), as can be taken from the attached article "Vom Hang zum Gubal", available at https://panart.ch/de/geschichte/vom-hang-zum-gubal

Later the Applicants renamed it "*hang*", in reference to the Bernese German word for "hand" with which the instrument is played.

16. The Applicants exhibited the instrument for the first time at the trade show "Exempla" at the International Trade Fair Munich on the subject of rhythm in March 2000. The Applicant 1) was awarded the Bavarian State Prize 2000 for **special technical achievement in craftsmanship.** This can be taken from the excerpt from the website of the Applicant 1), already submitted as Annex R 16, under https://panart.ch/de/geschichte/die-geschichte-der-panart.

17. However, the technical development of the *handpan* did not stop there. It was further developed after the first success at the trade fair. In the words of the Applicant 3), the further development represented a "path" that took "a long time" because it was a matter of understanding **how the instrument sounds.**

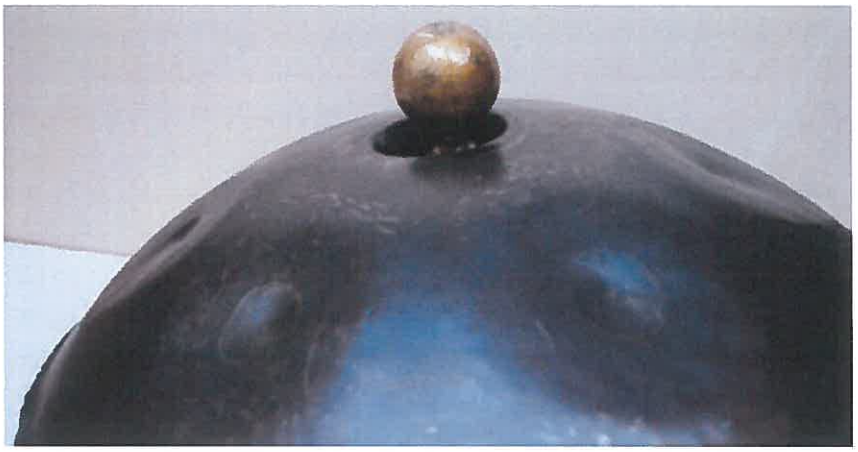
Evidence: View the video "PANArt Hang History and Story of Felix Rohner and Sabina Schärer" at https://www.youtube.com/watch?v=R_4Qf5r7Ulg (minute 28:05 to 26:25)

18. The Applicants 2) and 3) subsequently continued to experiment on the "*hang*". They organized exhibitions and conferences on the state of the art of research on the sounding of metal, in which well-known *tuners* and musicians took part and discussed the tuning process and the raw shells. According to the Applicants, there were "**several technical and acoustic problems of the prototypes**". The Applicants sought technical solutions to these technical problems. (Annex R 16, https://panart.ch/de/geschichte/die-geschichte-der-panart)

a) In the first year, four more prototypes were created one after the other with the participation of various people. Some of these had the resonance hole on the top, like the **prototype 2**

and

or the **Prototyp 3**, top with a plug in the resonance hole



and

b) The Applicants reduced the instrument to a diameter of 50 cm, the "measure a 'hug' so that the instrument could be played on the lap (see Annex R 20):

> "The prototype had to be reduced in diameter from 60 cm to 50 cm to make it possible to be played on the lap."

They also tried to include the resonance hole on the upper side (similar to the *ghatam*, see Annex R 15 (https://panart.ch/de/geschichte/galerie): "Try to reproduce the Ghatam ") to obtain a bass pulse. However, the Applicants found that the **resonance hole on the upper side led to instability of the**

instrument. They further attempted to develop the bass in the cavity resonance and to use a plug to make a membrane in the instrument vibrate (prototype 3).

c) This attempt also failed. The Applicants then put the resonance hole back on the bottom side of the instrument, as the **prototype 4** shows.

and

The Applicants continued to research the sound field with stiffening rings in the instrument and continued to search for the correct size of the resonance hole. It had to be large enough to allow to work on the instrument from the inside, but not too large to prevent instability.

d) For **prototype 5**, the Applicants used weld-riveted shell. However, these turned out to be too hard and the instrument broke apart when it fell onto the edge:

With regards to the development of the prototypes and the tests carried out by the Applicants we refer to the website of the Applicant 1) at https://panart.ch/de/geschichte/galerie (Annexe R 15).

e) In the course of the creation of these five prototypes, the Applicants met regularly with **scientists, instrument makers, physicists, engineers, metallurgists and ethnomusicologists.** They learned about the importance of the oscillation modes of resonating bodies and the feedback effects in closed systems. As the Applicants put it:

> "The PANArt tuners met with physicists, engineers, metallurgists, and ethnomusicologists. The most significant input came from two physicists, Thomas Rossing and Uwe Hansen, who taught us to

> understand the vibration modes of resonating bodies and the recoupling effects in such complex systems."

In addition, the Applicants met tuners from a company which was specialized in the acoustic tuning of cars. These tuners advised the Applicants as Helmholtz specialists on how the *port* had to be designed for optimum acoustics. This also results from an extract from the Applicant's website (Annex R 16).

The Applicants submitted that the further development of the prototypes were based on **physical findings.** In their book (Annex R 17, pp. 25 and 26, emphasis added) they wrote for instance:

> "We began to **do intense research on the sound of steel** [...].**Physics**, in particular insights concerning the interferometry and modal analysis, as well as the study of other meetal sounds, especially the musical saw, **allowed us to better understand the non-linear system in its complexity**."

or

> "It was not so easy to introduce this prestress. The appropriate geometry was required. In our case, it was neither about one of the well-known Euler Buckling modes, nor about a lateral-torsional buckling. It was about a special buckling case. The buckling of the sphere? We could not find enough information about that in scientific literature. For this reason we focused our investigations in the field of lightweight architecture. The Swiss civil **engineer Heinz Isler, one of the world's most important shell constructors, confirmed our assumption that the solution was to be sought in the saddle form.** The saddle, now applied to the dome, allowed us to introduce prestress selectively in the convex/concave landscape, fundamental for a harmonic fading away of the sound."

f) After a year of further development with physicists, engineers, metallurgists and musicians, the **first generation of the "*hang*"** was thus created, which was first sold at the Frankfurt Music Fair in March 2001 and then distributed by the Applicants between 2001 and 2004:

The instrument weighed 3.8 kilograms. It was 23.5 cm high, had an outer diameter (including the ring around the instrument) of 52.5 cm and an inner diameter (without the ring) of 50.5 cm. The diameter of the dome was a good 6.7 cm.

The instrument was well received - especially by musicians and percussionists. Subsequent attempts by the Applicants also made it possible to expand the musical scale of the instruments into 45 different tunings (see p. 8 of the Hang brochure 2008 submitted as Annex R 21).

19. The Applicants repeatedly took breaks from making "*hangs*" (what they called "Hangruhen"), which they used as research time on the instrument and its material. In 2004, they met the engineer and Professor Prof. Dr. Farshad of the ETH Zurich, who introduced the Applicants to the physical laws surrounding anticlastic geometry. They also met regularly with musicians and percussionists and listened to their feedback on the "*hang*". In 2005 they organized a "First International Hang Players' Meeting", at which, according to their own statements, about 200 "*hang*" owners arrived in Bern and exchanged ideas with the Applicants.

All this is shown from the extract of the Applicant's website (Annex R 16 at https://panart.ch/de/geschichte/die-geschichte-der-panart). We also refer to page 6 of the Applicants' book submitted as Annex R 17.

20. The musicians' feedback on the instrument showed a **need for deeper sounds.** In

2005, the Applicants met this need with the "*hang*" model called **"Low Hang"**:

This can be taken from the "Hang brochure 2008", presented as Annex R 21.

21. In addition, the Applicants continued to experiment with the bass tone of the resonance hole. They developed the **"Gudu Hang",** which had an additional resonance hole on the bottom side.

The second resonance opening could be closed with a magnetic disk to allow further sound effects. The Applicants also placed a wooden tube in the *port'si* opening to deepen the bass sound.

The "Gudu Hang" was available from 2004 to 2007. This can be taken from the Hang brochure 2008, already presented as Annex R 21.

22. The Applicants used further "Hangruhen" (research periods), in which they practiced brushing **brass into the surface of** the "*hang*". This **refined the sound of** the instrument. Furthermore, the Applicants henceforth surrounded the instrument with a brass ring for protection. This resulted in the **second generation of the "*hang*",** which was marketed in 2006 and 2007:

and

and

In this respect we refer again to the Hang brochure 2008, presented as Annex R 21. The instrument had an inner diameter of approximately 53.5 cm and an outer diameter of 55 cm. The dome had a diameter of 6.6 cm, the resonance hole had a diameter of about 8 cm.

23. In 2008 and 2009 the Applicants then marketed their new "*hang*" model, which they called "Integral Hang":

The instrument was about 22 cm high (plus the dome height), had an inner diameter of 53.2 cm and an outer diameter of about 54.7 cm. The dome had a diameter of 7 cm.

24. The Applicants then developed the **"Free Integral Hang"** in 2009, the dome of which no longer had a brass coating and was set off twice ("triple dome"). The brass ring which the "Integral Hang" had, was also no longer part of the "*hang*". From 2010 on, the "Free Integral Hang" was the only *handpan* that was still produced and sold by the Applicants:

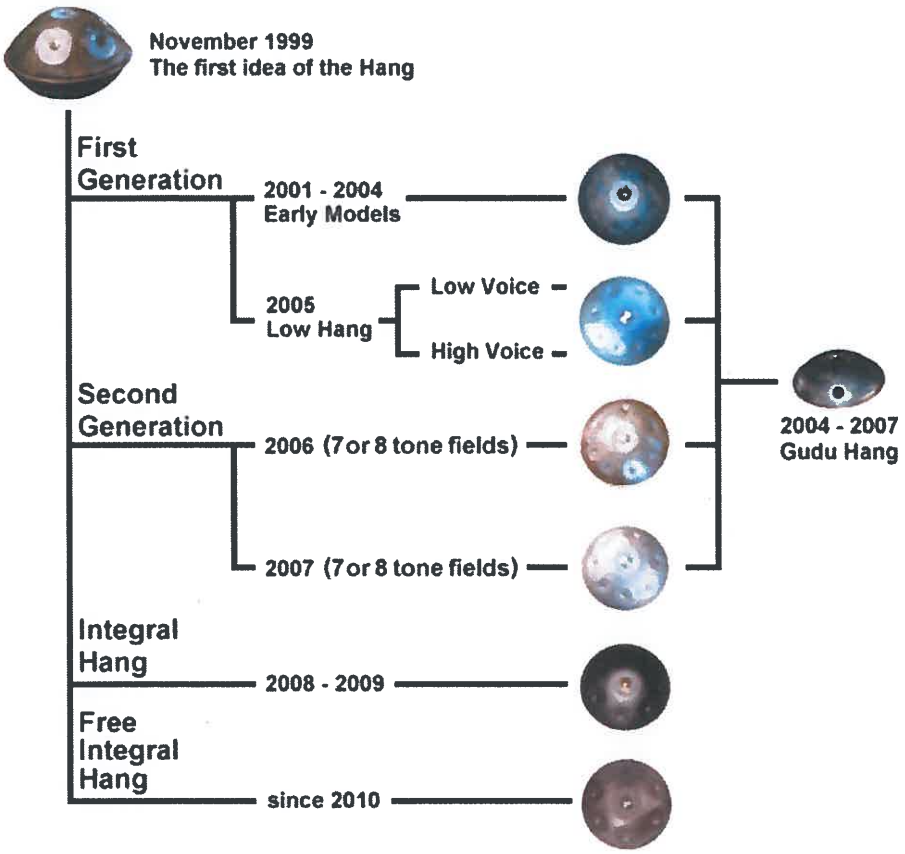
We refer to the Wikipedia excerpt on the "Hang" (musical instrument) as

- Annex R 23 -

and also present an excerpt from the website http://www.lex.hangblog.org/de/fotos-des-freien-integralen-hang.htm from which this can be taken as

- Annex R 24 -.

25. The following overview summarises the development of the "*hang*":



Source: https://www.hangblog.org/the-hang-lexicon/

26. The photo below shows the *ghatam* (front right) and various "*hang*"-models: In the front left you can see the first prototype of the "*hang*", built together with Reto Weber, in which, as described, two *steel pan* shells were simply assembled (see point 14 c) above). This was a purely handicraft activity, in which neither the Applicants expressed their individuality. The "*hang*" models from 2005, 2006 and 2007, which are shown at the back, differ from this first prototype essentially only in the dome placed on top and the flatter design, which is therefore somewhat closer to a lens. The first prototype, which was still somewhat raw, only became a really playable musical instrument as a result:

27. The result of the development described above, the *handpan is* a percussion instrument, more precisely a so-called (percussion) idiophone, a self-sounding instrument that is made to sound by tapping on it. From an instrumental point of view, the *handpan* is a *steel pan,* similar to the earlier versions of the instrument.

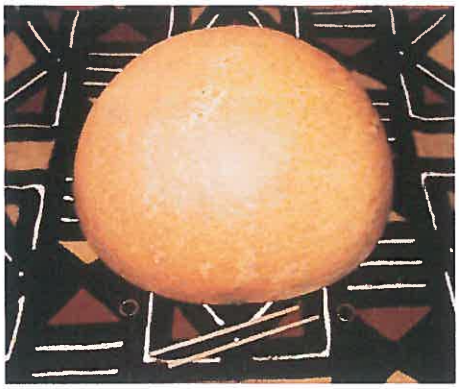
28. The essential characteristics of the *handpan* - dome, Helmholtz resonator with resonance hole, lens shape and sound fields - are not new. They are already known from a variety of other instruments:

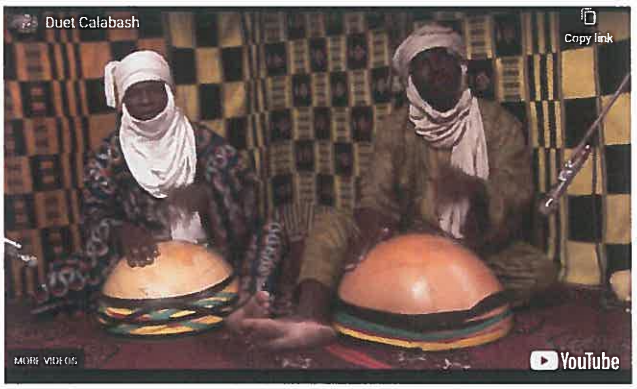
    a) We have already explained the origins of the *handpan* in the ***steel pans*** of Trinidad and the Indian ***ghatam*** (point 9 and 14 above). Lens shape, Helmholtz resonator and the incorporation of tone fields can already be found there.

    As previously mentioned, the development of the *steel pan* began with the desire of slaves in Trinidad to copy instruments from their homeland (see point 9 above). Among these instruments were the calabash gourd and the water drum:

    b) Calabashes are hollowed out and dried gourds which were used as vessels for storing and transporting liquids. One half of the calabash also served as a hand-

played drum. This instrument is therefore a **convex hollow body that is played with the hands.** The calabash is considered one of the oldest African instruments.





We submit excerpts from the German Wikipedia on the gourd and the calabash, as well as from the website https://www.djembe-art.de/djembe-trommeln-water-drums.htm, from which this is derived, as

- Annex volume R 25 -.

c) Individual tribes developed the so-called **water drum** on this basis. This instrument consists of two calabash halves, which are placed on top of each other in a water bath in a **lenticular shape** and can be played either with the hands or with sticks. Schematically this can be illustrated as follows:

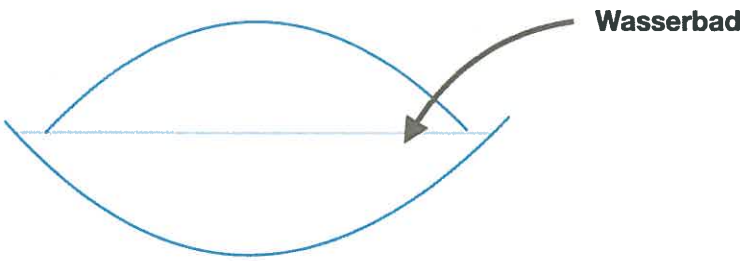


Abbildung: schematische Darstellung einer Water Drum

For this purpose we present an excerpt of the Wikipedia on the water drum as

- Annex R 26 -.

d) Besides the *steel pan* and the *ghatam* there were other instruments from which the "*hang*" is inspired. The (central) dome is mainly derived from the ***gong***, which has been known for centuries:

We submit an excerpt from the German Wikipedia on the gong (musical instrument) as

- Annex R 27 -.

It is used in various instruments, such as the "Gong Wong" from Thailand shown below

The dome is also used for percussion cymbals

The Applicants experimented with the dome for percussion instruments in the 1990s. They built the gong

and called it "Pung". In this regard, we refer to their statements at https://panart.ch/de/geschichte/die-geschichte-der-panart (Annex R 16) and at https://panart.ch/de/geschichte/galerie (Annex R 15).

The aim of the "*hang*" was precisely to use **these well-known elements.** As the Applicants stated (Annex R 20, History, Development and Tuning of the Hang, 2007):

> **"The challenge was to bring the Helmholtz resonator, the central gong-like sound, and the tone circle, into a unified musical conception."**
>
> (emphasis added)

29. The individual elements of the *handpan* all fulfil a **technical function.** They have been **determined by technical considerations** and do not reflect a creative decision of the Applicants.

a) The lens shape is created when **a surface is driven out of the sheet metal.** During the production of the raw shells, the sheet metal is driven out in a circle from outside to inside with a hammer. This automatically creates a lens shape, which is shown, for example, by the concave and convex playing surfaces of the *steel pan*. If the sheet metal were to be driven out in a different way and aimed at a (hemispherical) round shape, for example, there would be a risk of damaging the material and causing unwanted cracks. No more clay fields could then be formed at these points, which would make the raw form unusable.

Evidence: Affidavit of Mr. Ralf van den Bor

The lens shape is therefore automatically created by a **gentle expulsion of sheet metal** into raw forms. The Applicants did not invent this, it is the result of physical conditions. Nor did they have the idea of a lens-shaped or lentil-shaped instrument. The "*hang*" was created by screwing two *steel pans* together, which consist of the same - half-lens-shaped - shells. This form was not the expression of an artistic creation, but of mere craftsmanship (see point 26 above).

The lens shape is also by no means new. It was already known from to *calabash*,

the *water drum* and the *steel pan* (see point 28 above).

Above all, the lens shape is a **more pleasant shape for an instrument to be played on your lap**, with your hands hitting the tone fields on the top. A round or spherical shape would not provide any support. The higher the instrument would be, the more uncomfortable it would be to play. The central dome at the top and the tone fields on the side facing away from the musician would then be very difficult to play, and in some cases not playable at all. This is also illustrated by a picture of the Applicant with the prototype 1 (taken from the video "PANArt Hang History and Story of Felix Rohner and Sabina at https://www.youtube.com/watch?v=R_4Qf5r7Ulg, Min. 27:40):

The lens shape or convex shape of the two sides of the instrument is also necessary to balance the **blows that are applied** to the instrument during playing. To this end, the Applicants write (2007, Annex R 20, emphasis added):

> "From the architectural and engineering point of view, the arch geometry of the concave shell as well as the geometry of the convex shell are changed into a new structure that generates bending movements under a load (the impact of the player's touch). The construction has an **optimal utilization of forces in the concave supporting structure** as well as in the tone fields [...]."

Furthermore, the synclastic shape (convex curvature in the same direction) of the two sides also has an effect on the **propagation of sound waves in the instrument** and thus on the sound. Such forms are common for better resonance: From satellite dishes, to lamp reflectors, loudspeakers, kettledrums, violins and other instruments, they can be found everywhere. The reason for this is that (hemispherical) reflectors radiate light, radio and sound waves best:








The fact that the the lens shape of the "*hang*" has an effect on the sound is explained by the Applicants themselves:

> "The PANArt Tuners have returned to the lens shape of their successful sound sculpture Hang® Skulptur in 2018. **Their** lens-specific fading out (cathedral effect), this charming magical quality,

also has an additional **unifying** effect **in the collective play. "**

(emphasis added)

We submit an extract from the Applicants' website at https://panart.ch/de/instruments/hang-balu from which this can be taken as

- Annex R 28 -.

Finally, it should be noted that the Applicants also include a lens shape in one of their patents (EP 2 443 625 B1)

- Annex R 29 -

(see also point 39 below). The (dependent) claim 13 claims the following object of protection:

"Metal sound musical instrument according to one of claims 9 to 12, whereby the musical instrument is **lenticular**."

(emphasis added)

b) The **central dome** contains the fundamental tone of the instrument. The central arrangement on the upper side is firstly due to **considerations of playability.** The *handpan* is played with the hands, whereby the instrument usually rests in the lap of the musician or, much more rarely, (flat) on a stand in front of him. The central arrangement of the dome ensures that the thumb of each hand can easily reach and play the keynote. At least for musicians who are new to the instrument, this greatly simplifies *handpan* playing.

Evidence: Affidavit of Mr. Ralf van den Bor

The fact that the **frequently played notes** are **arranged in a central position because it is** easier to play them this way can be found in various other instruments. For example, the frequently played notes on the piano are also arranged in the middle of the keyboard, where they are easily accessible for the piano player.

The fact that a **dome** is placed **in the middle** is also found on several **well-known percussion instruments** such as the gong or the already shown Gong

Wong (see point 28 above).

In addition, the shape of the dome also contributes to the increased **stability of the sheet metal.** It increases the rigidity of the material. Tension and thickness of the sheet metal are greater in the middle than at the edge of the shells. The dome's central bulge means that the instrument's shoulder, i.e. the upper edges of the individual tone fields, all have the same tension and thickness. This affects the vibration of the individual tone fields.

Evidence: Affidavit of Mr. Ralf van den Bor

The Applicants dealt with these **findings of the theory of strength**. Their autodidactic studies of the dome also showed that it gave the basic tone more quality and stability (Annex R 17, p. 25):

> "The initial point for our development of a tension method for three-dimensional sheet structures dates back to the year 1997. While building a peng instrument, a **navel emerged in the center of the tone field when we buckled the shell. We discovered that this navel had a positive effect on the sound.** It seemed to stabilize the wave of the fundamental tone leading to a stronger fundamental tone. Thus, more energy could be retained for flowing into the overtones.
>
> (emphasis added)

The dome in the middle of the metal instrument therefore fulfils a technical function.

Evidence: Affidavit of Mr. Ralf van den Bor

c) The same applies to the *port*. Its necessity is obvious with the Helmholtz resonator (see point 7 e) above). During the first year of research on the "*hang*" (2000), the Applicants tried out many technical aspects of the form and the specific design of the *port* and obtained help from physicists and metallurgists. They came to the technical conclusion that a *port* on the **upper side of the instrument,** where the sound fields are also located, lead to **instability of** the instrument (see point 18 a) and b) above). The fact that they put the *port* back on the underside of the instrument was due to this technical realization, not to any creative work on their part.

The design of the *port* also **influences** the ability of the volume of air enclosed by the vessel to escape from it. Thus, it influences the **tuning of the instrument.** The Applicants came to the same conclusion. In addition to long research on the *port*, they also tried out an instrument that had a *port* that could be made smaller with a wooden tube (the "Gudu Hang", already mentioned under point 21). A **different location** for the *port* would furthermore **impair playability in different positions**, e.g. when an instrument with a lateral opening was turned and the Helmholtz resonator was then closed by the percussionist's body or covered by his legs. If the hole is in the middle, the player's legs can leave a gap for the *port* when the instrument is placed on the lap. The legs can then change the tone of the resonance hole by movement.

Evidence: Affidavit of Mr. David Kuckhermann

This was also pointed out by the Applicants:

> "The air resonance of the vessel described above appears when you have the Hang in front of you on your lap in the correct leg position. It then sounds at octave intervals to the DING. Open or close the lap while stimulating the DING: you will notice how the GU and the DING come together".

We submit a copy of the "Hangwegleitung" published in 2010 as

- Annex R 30 -.

The port is furthermore required as a **means of accessing the sound fields from inside.** On the one hand, this is necessary for *fine-tuning*, i.e. for the final tuning of the tone fields after the *handpan* shells have been glued together. The *tuner* has to be able to work on the sound fields from the inside and reach through a hole into the inside of the instrument (see video "PANArt Hang History and Story of Felix Rohner and Sabina Schärer" at https://www.youtube.com/watch?v=R_4Qf5r7Ulg, Min. 51:54 bis 52:43).

Handpans then also have to be retuned again and again. When retuning the instrument, it must again be possible to work on the tone field from the inside, as can be seen in the following picture. This requires a hole in the middle of the *handpan*, the size of a hand, from which each tone field can be accessed with the

inserted arm and a hammer:

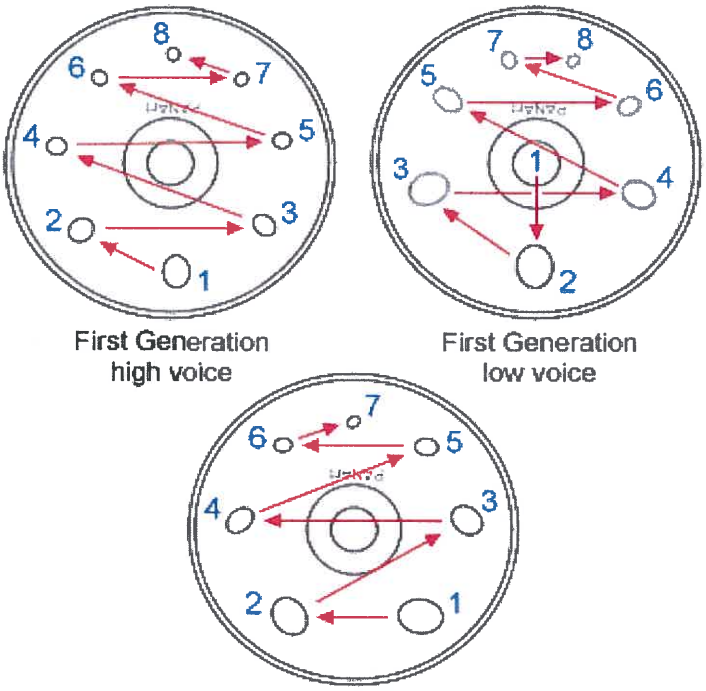
This is confirmed by the Applicants on their website (https://panart.ch/de/geschichte/galerie, Annex R 15; emphasis added):

> " Back of the prototype 1 1999
> With a **hole inside for voice work."**

and

> "Prototype 4 2000
> Back - Looking for the **right size of resonance hole.** The instrument **must be able to be worked on from the inside".**

d) The circular arrangement of the sound fields also follows a primarily technical purpose. It is most pleasant for the player and significantly facilitates intuitive playing if the tone fields are arranged regularly and can be reached with the hands in approximately the same way:



Source: https://www.hangblog.org/the-hang-lexicon/

e) The size of a *handpan* is also limited. The instrument originated from the idea of a percussionist who wanted an instrument that had several tone fields, was stable and could be played in a sitting position (see point 14 c) above). The first attempt at screwing two *steel pans* together proved to be too large at 60 cm in diameter because it exceeded the size of a hug, i.e. the reach of the arms of the individual musician (see point 14 d) above). Playing an instrument on the lap necessarily requires that the instrument fits on the lap in terms of size and center of gravity, otherwise it threatens to fall off. It is also imperative that the musician can reach the tone fields with his hands. These technical considerations have led to the diameter being reduced to around 50 cm (see point 18 b) above).

f) The brass ring around the instrument used in the second generation "*hang*" (see point 22 above) and the "Integral Hang" (see point 23 above) also has a clear function. On the one hand, it protects the instrument because it wraps around the two edges and thus provides a further "cushion" should the instrument fall on the edge. This prevents it from falling apart. The Applicants also rely on this protective aspect of the brass ring in their brochure 2008 (Annex R 21) on page 14. On the other hand, the brass ring improves the haptics of the instrument and protects the

musician from the partly sharp edges of the two shells glued / welded together.

g) It is clear from all this that the "*hang*" is subject to a variety of physical laws that prescribe technical necessities. The Applicants, in their letter from the Hangbauhaus in November 2009

- Annex R 31 -,

state the following:

> "We deepened our knowledge of acoustic instruments from the near and far east and reconstructed them to attain a better understand of how they functioned. The result was a series of interesting instruments whose acoustic qualities – especially the vitality of the sound – made us prick up our ears. **Through years of research we became familiar with the physical laws which led to the development of the Hang.** The gong revealed the purpose of the dome, the tabla refined our acoustic art decisively, the gatham led to the integration of air resonance, and the cymbals and pans introduced us to the world of sounds."
>
> (emphasis added)

30. The "*hang*" models of the first and second generation were very successful. In the early years, the Applicant 1) had gradually built up a **worldwide network of distributors** to whom it supplied the instruments for resale. The high demand for the instruments led to the fact that the Applicants could no longer keep up with production. They felt, in their own words,

> "the demand to produce so many Hanghang uncomfortable and the sheer pressure made [their] strength wane".

This follows from the letter from the Applicants from 2009, which has already been submitted as Annex R 31.

Thereupon, the Applicant 1) **terminated the cooperation with its distributors** in 2006. We hand over a copy of the Applicants' letter to their distributors dated 12.02.2006 as

- Annex R 32 -.

The Applicants cited the increasing pressure as the reason for this, and

> "that their work is not in satisfying demand, but in the constant development (reputation of the sheet metal)".

They wanted to devote themselves more to the study of sheet metal. In this regard, we refer to the excerpt from the Applicants' website at https://panart.ch/de/geschichte/die-geschichte-der-panart, presented as Annex R 16.

Interested **customers** now **had to travel to** the Applicant 1) in **Bern** to purchase an instrument. Payment had to be made in cash. However, an acquisition was only possible **after confirmed registration** by e-mail. Only those who had an appointment were allowed to enter the Applicants' workshop. The instrument was therefore **not accessible to everyone,** but only to the "chosen ones" of the Applicants. All this results from the letter written by the Applicants to their (potential) customers, published in March 2007 at http://www.hangblog.org/brief-vom-hangbauhaus-bern-ende-marz-2007/

- Annex R 33 -.

From 2008 on, the Applicants marketed their new "*hang*" model, the "Integral Hang" (see point 23 above). The Applicants tried to maintain control over who was allowed to own the instrument. Purchasers therefore had to notify the Applicants of any resale and grant the Applicants a right of first refusal with a contractual penalty in case that they wanted to sell their "*hang*" at a later date. This agreement is printed on pages 22 et seq. of the Hang brochure 2008, which is submitted as Annex R 21.

From 2010 onwards, only the "Free Integral Hang" (see point 24 above) was sold. Interested customers in an instrument had to submit a **written letter of motivation to the Applicants** and state that the intended use of the instrument was **in line with the ideologies of the Applicants.** The Applicants appeared to no longer agree to a use as a musical instrument for recordings and concerts but rather saw it as an object for meditation and self-discovery. The Applicants wrote (Annex R 31, Letter from November 2009):

> "The free-tuned Integral Hang is intended for individuals who yearn for balance and inner peace in a world that can be chaotic and unsettling. Our

> concepts, developments and implementations are far from the musical norms of modern times which require study, practice and performance. Playing with this Hang can lead to a form of freedom, an intimate conversation that can only unfold without pressure and coercion. If individuals are aware of this concept they will be strengthened by this Hang. Thoughtless use can weaken a person. We as Hangmakers and you as potential player need to be conscious of the importance of this fact. We were forced to accept definitions and activities around the previous generations of the Hang to which we could not agree. Treating it as a drum and promoting the name Hang Drum, for instance, has created a ripple effect of misinformation that leads to damaged instruments, physical injury, and mental and emotional turbulence. With the Free Integral Hang we have to exercise more caution."

31. In **2013,** the Applicants **stopped** the construction of the "*hang*" altogether. This can be taken from an extract of the Hanglexikon on the free integral Hang at http://www.lex.hangblog.org/de/freies-integrales-hang.htm#note-freiesintegraleshang-1

- Annex R 34 -

as well as an excerpt of the Applicant's website of 22.04.2017, retrieved through the "WaybackMachine"

- Annex R 35 -.

One can only speculate about the exact reasons for the construction stop. In 2013, the second Applicant's two sons joined the Applicant 1). The Applicants' interest shifted, they wanted to create coordinated musical instruments that could be played in a "pang ensemble". This follows from the article submitted as Annex R 16 (https://panart.ch/de/geschichte/die-geschichte-der-panart). In addition we submit an excerpt from the Hang lexicon "Die PANArt im Internet" at http://www.lex.hangblog.org/de/die-panart-im-internet.htm as

- Annex R 36 -.

33. Subsequently, the Applicants also increasingly refused to tune their own instruments already sold when necessary. As an example of the problems that interested customers had with the Applicants during this period, we blend in a conversation between the Applicant 1) and an owner of a "*hang*", which took place in 2013. The background was that this owner of a "*hang*" had purchased the instrument via the trading platform eBay

and asked the Applicants whether they could tune it. He received the following reply:

> "O God! An old Gong, overpaid, tuned by Schultz: We don't touch this item anymore, sorry - destroyed is the sculpture.
>
> Please buy our book, you need better information. This is no more our instrument. As you know we don't appre-ciate Ebay auctions.
>
> A virus got you! Be careful."

In a factual reply, the owner of the "*hang*" explained that he was aware of the fact that the Applicants were skeptical with regards to platforms like eBay aht therefore had deliberately asked the seller of the "*hang*" to meet in person. The Applicants replied:

> "Sorry, this is not a serious deal.
>
> Give it back to the owner. We don't who is it, we don't know the price, we don't know why you go on ebay...
>
> You got the virus and you lost control. Now you want a Gubal? What are you
> looking for? Give it back to the owner, a Spekulant. Why do you deal with such people?
>
> And: What did you measure with your I Phone? Which frequency of the cord? Read the book again and other texts we wrote: we don't tune notes. Schulz is
> tuning no-tes, but not PANArt. It is a sculpture and such pieces are not sold on Ebay and without knowledge. Sorry.
>
> The Hang has a Schulz bag - it was there to be tuned. Why the owner didn't ask PANArt for a box? Absolutely not a serious deal."

We present a copy of the entire conversation from the year 2013 as

- Annex R 37 -.

34. The *handpan* "*hang*" produced by the Applicants quickly became very **popular**. Over the years a large *handpan*-community developed. It extends to all five continents and ranges from esoterically inclined individuals who use the instrument for meditation purposes to successful professional musicians who play the instrument in accompanying bands of well-known musicians such as Björk. Most of them are, of course, normal musicians who have found their joy in this new sound instrument. For this purpose we present a (non-exhaustive) overview of the

worldwide *handpan* manufacturers and *handpan* sellers,

- Annex R 38 -.

from which the size of the *handpan* community can be taken.

There are several *handpan* festivals organized worldwide. At these festivals musicians give concerts on their ***handpans,*** and people who are enthusiastic about this instrument pass exchange ideas about new developments. Often workshops are offered at such festivals to introduce the instrument to newly interested people. For example:

We present an overview of these and similar *handpan*-festivals as

- Annex R 39 -.

As with all other musical instruments, the need for many people to be taught how to play the *handpan* arose over time. As a result, there are now a large number of *handpan* teachers and schools that offer individual lessons, courses and workshops for the players to learn or improve their *handpan* playing. The website www.masterthehandpan.com

- Annex R 40 -

offers online *handpan* classes, for example, and already has more than 7'000 students. A Google search for "Handpan School Switzerland",

- Annex R 41 -

results in about 32'200 hits today, one for "Handpan Schule Deutschland"

- Annex R 42 -

results even in 270'000 hits.

There are no official figures on how many people play *handpan* today. The fact that a Google search for "handpan"

- Annex R 43 -

today has more than 4 million hits, shows however quite impressively how widely spread this rather new musical instrument is today.

35. Spurred by the **great popularity of** the instrument and the **increasingly opaque and obscure sales modalities** of the Applicants, **numerous other *handpan* makers** have appeared over time. The Applicants even encouraged this (see Annex R 20):

> "It is impossible to satisfy the growing demand. Further collaboration between art and science is needed to make it possible that other hangmakers may exist in the future."

For a time, the Applicants also offered their own ***shells*** for sale so that other ***tuners*** could create their own sounds on them (see the Applicants' comments on page 34 of the book submitted as Annex R 17). The fact that such instruments would also have a lenticular shape was clear in view of the shells put on the market by the Applicants themselves.

With the Applicants' increasing refusal and, eventually, the cessation of distribution, more and more musicians and *tuners* with whom the Applicants had previously worked together for many years naturally took up the task of tuning their instruments themselves and, increasingly, building their own instruments. To date, **more than 200 makers of *handpans*** have developed this way worldwide (see the overview presented

as Annex R 38).

The Applicants were **aware of** the **developments in the international** *handpan* community from the outset, they initially even supported them (see also the Applicants' comments on pages 29 and 34 of their book submitted as Annex R 17).

36. With increasing, worldwide makers of *handpans*, different names developed for the instrument. The "*hang*" became the *hang drum*, the *pantam*, the *space drum*, or the *handpan*. The last name is the one that has established itself as a generic term in the scene over the years.

Evidence: Affidavit of Mr. David Kuckhermann

We also refer to the article already submitted as Annex R 4 at https://handpan-portal.de/handpan-hang-drum/ and the Wikipedia article on Handpan submitted as Annex R 2.

37. The constantly growing *handpan* community is now confronted with the fact that the Applicants, that through their obstructive behaviour are ultimately responsible for the its existence, now want to monopolize their much-loved instrument. This leads to an increasing insecurity in the world of *handpan* players. In their attempt, the Applicants rely on a whole bundle of protective rights which they have tried to build up over the years.

After various *handpan* makers had been established worldwide from 2006 onwards, the Applicants applied for protection of the Swiss trademark "Hang" on 09.01.2008, which they subsequently derived international protection from. We present an extract from the EUIPO database as

- Annex R 44 -.

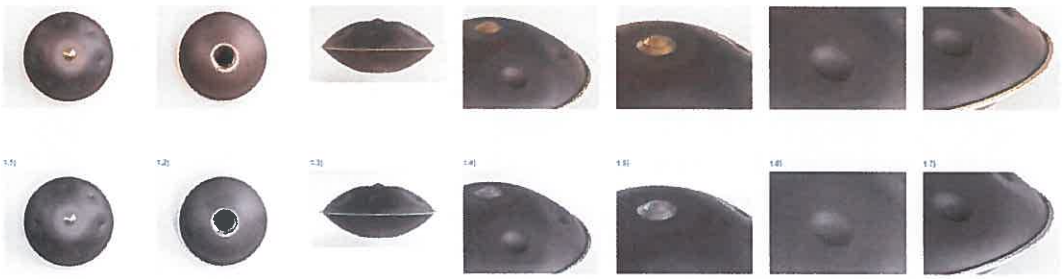
From then on, the Applicants forbade individual *handpan* makers of the developing *maker* community to call their instruments "*hang*". This may have been one of the reasons why many new names were developed, of which *handpan* has finally established itself as a generic term for the instrument.

38. When the first "*hang*" was developed, the Applicants were not yet interested in protecting the instrument. Apparently they understood it as what it was, namely a new

technical development. This is what the Applicants write in their book (Annex R 17, page 35):

> "At the end of year 1999, the hang was born. **[...] But it did not occur to us to protect this creation.** Nobody mentioned this issue, no one suspected that the hang would capture the spirit of the times in the way it did."
>
> (emphasis added)

The Applicant tried to make up for this in 2009. A good **ten years** after the Applicants had first exhibited the "*hang*" at the "Exempla" in Munich in March 2000, the Applicant 1) applied for an international design with effect for Switzerland and the EU for the "Integral Hang" on 16 April 2009:



We present the extract from the WIPO database as

- Annex R 45 -.

It is well known that such a design is an **unexamined property right.** It is obvious that it lacks the relevant novelty for design protection, especially since, according to the Applicants, *"the outer form of the hang has not changed"* since 2001 (see book Annex R 17, p. 10).

In their book (Annex R 17, p. 35), the Applicants explain why they applied for this design despite the clear lack of novelty: after the first "*hang*" copies appeared in 2009 and they subsequently contacted the trademark and patent attorneys of Bovard AG in Berne, that made the unsuccessful attempt to protect the "*hang*" design. The Applicants were thus seeking to strengthen their formal legal position vis-à-vis other *handpan* manufacturers.

39. As mentioned before, the Applicant applied for a patent for a process for the manufacture of sheet metal sound instruments in 1998, i.e. before the first *handpan* was developed in 1999 (Annex R 18).

On 16 June 2009, the Applicant also applied for a successor patent for a process for the manufacture of a metal sound musical instrument, protecting its new findings in the field of **nitriding sheet metal**; it moved from 'sandwich hardening' to the full nitriding of its sheets. The European Patent EP 2 443 625 B1,

- Annex R 46 -,

was granted in 2014.

As a result, the Applicants began increasingly to request material samples from other *handpan* makers in order to clarify the question of a possible patent infringement and to offer them a license for their material. The Applicants for instance asked for a material sample from EchoSoundSculpture GmbH from Rupperswil by mail dated 07.03.2014. The tests on this sample showed that EchSoundSculpture GmbH did not infringe the patent of the applicant to 1.

Evidence: Affidavit from Ezah Bueraheng

Mr. Ralf van den Bor in the Netherlands also received a request by the Applicants for material samples of his shells by e-mail dated 3rd June 2018. Mr. van den Bor then had various material samples tested by an independent laboratory in the Netherlands. That laboratory concluded that he **did not** infringe the Applicants' patent. He did not carry out a full nitriding of his blanks but applied a much shorter sandwich hardening of the sheet metal. Mr. Van den Bor sent this report

- Annex R 47 -

to the Applicants by e-mail of 04.04.2018. They replied the same day, saying

> "Thank you very much for your help. We are happy that you don't infringe our patent, that means we work in a completely different direction although you build more or less the same design.
>
> Our work is based on a composite and on hammer blows - in the tradition of the old tuners from Trinidad.

> If you become rich you could give us some dollars - because you take profit from our raw form. To build the lens with Ding and Gu was not so easy!
>
> Be careful not to support banality and mass production: this will be the end of the spirit of creativity."

A copy of the entire conversation from the year 2018 will be handed over as

- Annex R 48 -.

40. It is therefore clear that the Applicants had no objections to the design of the instruments at that time.

41. The trademark protection for the name *handpan* failed, the protection via patents was limited to certain materials and the design applied for was obviously invalid. It is probably for these reasons that the Applicants went over to taking action (in some cases in various proceedings) against manufacturers of *handpans* via a copyright injunction:

They failed in 2012 against both the Spanish manufacturer "Bellart" and the American manufacturer "Pantheon Steel". In this regard, we refer to the explanations on page 35 of the Applicant's book submitted as Annex R 17 and to the extract from the website of the Applicant 1) at https: //panart.ch/en/history/the-history of the panart https://panart.ch/de/geschichte/die-geschichte-der-panart (Annex R 16).

In an e-mail

- Annex R 49 -

dated 20.03.2019, the Applicants asked Mr. Ralf van den Bor, managing director of the *handpan* manufacturer "Ayasa Instruments", whether a certain shell came from his shop. They therewith threatened:

> "As you know in Switzerland we have quite a strong copyright. It is not the case in other countries."

It is unclear why the Applicants assumed that they owned a strong copyright in Switzerland. In any case, the Applicants themselves seemed to assume that they could

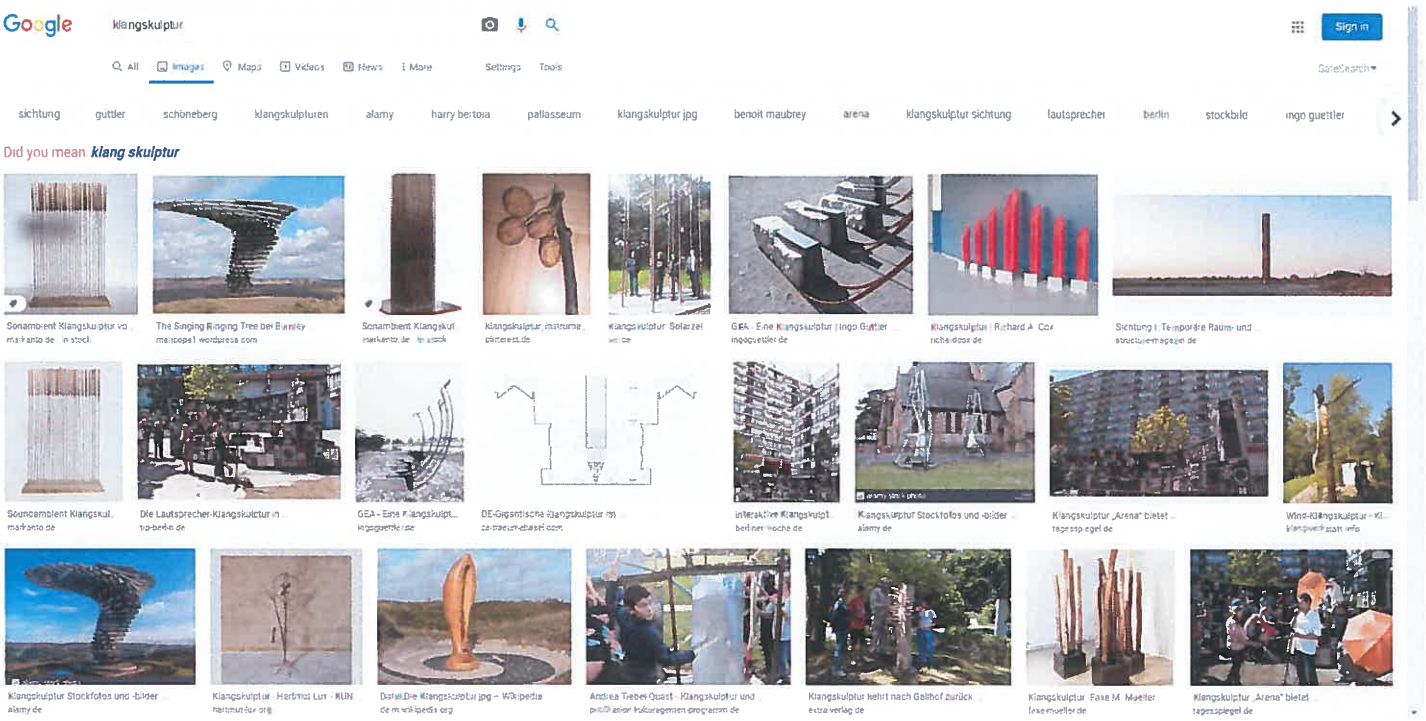
not claim copyright protection for their "*hang*" in other countries.

42. Nevertheless, the Applicants sent out **new warning letters** against mainly German selers in **2020.** However, the warning letters were also addressed to manufacturers outside Germany, including Mr. van den Bor and his company "Ayasa Instruments" in the Netherlands. These warning letters

- Annex volume R 50 -

are based on an alleged copyright on the "*hang*" without mentioning a concrete version of the "*hang*" for which protection is claimed. It is to be assumed that, in addition to the warning letters submitted, various other *handpan* manufacturers that have received a warning letter by the Applicants.

43. The Applicants are obviously aware of the weakness of their copyright position. They therefore have tried bring the "*hang*" at least close to a work of art as possible. Part of this strategy is to **call** the metal sound instrument "*hang*" exaggeratedly and increasingly a "**sound sculpture**", despite the fact that the "*hang*" has absolutely nothing to do with a sound sculpture. A "sound sculpture" does not refer to musical instruments, but to something completely different, namely **artistically produced objects** whose function it is to be exhibited and viewed as visual works of art, but which can also be made to sound or, when set in motion, produce sounds or noises. If you look at the results of a Google image search for "sound sculpture", you will find one or two images of a "*hang*" (because the Applicant calls it that way on its website). The "*hang*", however, obviously falls out of line and has little or nothing in common with true sound sculptures.



We present an excerpt from the Wikipedia on "sound art" as

- Annex R 51 -

as well as an overview of the results of the Google image search for "sound sculpture" as

- Annex R 52 -.

44. Finally, in previous statements, the Applicants have correctly identified what the "*hang*" is, namely not a sculpture, but a musical instrument, which is the result many years of (technical) research:

> "It is the **result of many years of research on the steelpan and study of the world's most important instruments:** gong, gamelan, drum, bells, singing saw, ghatam...
> It was the Swiss musician Reto Weber who, on a November day in 1999, revealed the **dream of an instrument**: a vessel of sounding brass, played with hands. **The essential components were ready:** Two hemispheres of good brass, one tuned with several notes, the other in raw form - the hang was born".
>
> (emphasis added)

This follows from an extract from the Applicants' website of 12.02.2005, obtained via the "Wayback Machine which we submit as

- Annex R 53 -.

The *handpan* is an instrument that was born from the idea of a musician - Reto Weber - and was created for musicians who wanted an instrument that could be played with their hands, with different tones. It was developed together with musicians, physicists, engineers and other scientists. The Applicants have also seen it that way on many different occasions (Letter 2009, Annex R 31):

> "**Percussionists were initially attracted to this fresh new instrument.** [...] **We found ourselves trying to meet the demands and wishes of a variety of people** and developed Hanghang with up to 10 tones, made a model with two openings, or with a shorter acoustic sound, and even one with a chromatic scale on both sides. In addition, we offered a wide range of scales from around the world."
>
> (emphasis added)

and

> "We were forced to accept definitions and activities around the previous generations of the Hang to which we could not agree. Treating it as a drum and promoting the name Hang Drum, for instance, has created a ripple effect of misinformation that leads to damaged **instruments**, physical injury, and mental and emotional turbulence. With the Free Integral Hang we have to exercise more caution."
>
> (emphasis added)

It is also apparent from the agreement which purchasers of the instruments had to conclude with the Applicant when purchasing the "*hang*" from 2008 onwards (see point 30 above) that the Applicants regarded the "*hang*" as an instrument and not as a sculpture and regarded themselves as instrument makers and not as sculpture makers:

> "The **musical instruments** of the company PANArt Hangbau AG are individually crafted creations produced by the Hang **instrument makers** on the basis of patent No. 693 319. The **instrument** makers are keen to foster and promote traditional musical expression with these new **instruments** and to make them available to a wide group of individuals, irrespective of their income or financial circumstances. For this reason, senior management at PANArt Hangbau AG has decided to enter into so-called droit de suite agreements with the buyers of **PANArt instruments**. This is intended to prevent the **instruments** being commercialised to the detriment of the maker and the institutions with which the maker is associated. By signing this Purchase Agreement, the undersigned Buyer acknowledges the following obligations: [...]"

(emphasis added)

Finally, this also results from the European Patent mentioned above (Annex R 46):

> "The invention relates to a process for the production of a metal sound **musical instrument,** in particular a so-called **Hang®".**
>
> (emphasis added)

45. More recently, the Applicants have increasingly and aggressively engaged against manufacturers of *handpans* and their distributors on the basis of their alleged intellectual property rights. The Applicants applied for preliminary injunctions against makers and sellers at the Regional Court of Hamburg, the Regional Court of Berlin and the Regional Court of Düsseldorf. The proceedings before the Regional Court of Hamburg (case no.: 310 O 160/20) concerned a German *handpan* seller, the proceedings before the Regional Court of Berlin concerned a manufacturer from Russia (case no.: 16 O 154/20), one proceeding before the Regional Court of Düsseldorf concerned another German seller (case no.: 14c O 138/20) and one proceeding also before the Regional Court of Düsseldorf concerned a probably Chinese seller of the instrument on Amazon (case no.: 14c O 118/20).

In addition, the Applicant 1), on the basis of the alleged copyright of the Applicants 2) and 3), issued a warning letter to the Dutch *handpan* maker Ayasa Instruments BV and its managing director Mr. Ralf van den Bor.

As a result, a meeting between the Applicants, their Swiss lawyers (Dr. Michael Ritscher and Dr. Stefan Schröter), Mr. van den Bor and the signatories took place in Zurich on 15.10.2020. This is hereby **legally insured.**

Following this meeting, the Applicants' representative stated to the left signatory that the Applicants would claim copyright to the design of the "*hang*", with the design features (i) lenticular basic shape consisting of two synclastic halves, (ii) central dome, (iii) opposite resonance hole, and (iv) sound fields arranged in a circle on the upper side of the instrument, according to the following sketch:

Furthermore, the Applicants' representative argued that the Applicants would no longer tolerate that Mr. van den Bor and Ayasa Instruments BV continued to produce and distribute instruments which infringed the applicants' copyrights. He further expressly stated that the applicants were asserting their copyright at least for the whole of Europe.

Mr. van den Bor and Ayasa Instruments BV, together with the German sellers of *handpans* that had already received a warning letter, brought an action for a negative declaratory judgment against the Applicants,

- Annex R 54 -

seeking a declaration that the Applicants do not have any copyright with regards to the "*hang*", alternatively that their instruments did not fall within the scope of that copyright protection.

This action is pending before the Cantonal Court of Bern. For this purpose, we are submitting a copy of the court's stamp of receipt as

- Annex R 55 -.

For the time being, we are only submitting **Annex R 38** with this protective brief, i.e. the overview of the various *handpan*-sellers and their products, which was also presented to the Applicants as a hard copy at the meeting on 15.10.2020 in Zurich. The applicants have therefore had positive knowledge of all the sellers listed in this overview since this day. They have not taken action until against them so far.

II. Legal assessment

1. The "*hang*" is not a work of applied art within the meaning of Sec 2 § 1 no. 4 German Copyright Act ("Urheberrechtsgesetz" – **UrhG**). It therefore does not enjoy copyright protection in Germany. It simply lacks a personal intellectual creation within the meaning of Sec. 2 § 2 UrhG. The elements characterising the "*hang*" are neither new and thus do not correspond to a creation, nor is there any creative, artistic "achievement" on the part of the Applicants. The "*hang*" does not meet the requirements of the level of creativity required by copyright law.

   a) A personal intellectual creation is only present when a product is based on an own artistic contribution that represents something peculiar due to its content, its form or its respective combination (BT-Drs. IV/270, p. 38; *Ahlberg,* in: BeckOK UrhG, 26 Ed. 2018, § 2, para 57). If qualitative considerations may not play a role due to the indefinable concept of art, it remains in any case necessary for the work to bear the author's signature. The work must have features of its author's own creativity and reach a certain level of design which allows the assumption of an artistic achievement. In the words of the FCJ (judg. of 13.11.2013, I ZR 143/12, GRUR 2014, 175, para 15 - *Geburtstagszug*; similarly FCJ, judg. of 12.05.2011, I ZR 53/10, GRUR 2012, 58, para 17 - *Seilzirkus*):

> "A personal intellectual creation is a **creation of individual character** whose aesthetic content has reached such a degree that, in the opinion of circles receptive to art and reasonably familiar with art, it can be called an **"artistic" achievement.**
>
> (emphasis added)

   b) Conceptually, a product can only be called a "creation" if it has a certain novelty. This is not the case if an object merely adopts known standards from existing works (FCJ, judg. of 21.05.1969, GRUR 1972, 38, 39 - *Vasenleuchter*; Higher Regional Court Erankfurt, judg. of 12.06.2019, 11 U 51/18, GRUR-RR 2019, 457, para 30 - *Logo;* Higher Regional Court Schleswig, judg. of 11.09.2014, 6 U 74/10, ZUM-RD 2015, 108, 111 f.; Regional Court Düsseldorf, judgement of 17.10.2019 - 14c O 68/18, GRUR-RS 2019, 36516, para 82 – *Unzulässige Nachahmung von Damenbekleidung*). Forms that are to be regarded as public property - which particularly includes basic designs - are also not taken into account when assessing a personal creation (*Ahlberg,* in: BeckOK UrhG, 26 Ed. 2018, § 2, para 62).

c) If one now looks at the "*hang*" and the forms known at the time of its first development, there is no "new creation" with the meaning of German copyright law. The Applicants base their alleged copyright of the "*hang*" in their warning letters (Annex R 50) on the following four features:

- lens shape or lentil shape
- central dome on the upper side of the instrument
- opposing resonance hole (*port*)
- tone fields arranged in a circle on the upper side of the instrument

These characteristics do not result from a creative achievement. All these elements were known well before 2001 and therefore do not constitute a creation within the meaning of German copyright law.

The lenticular basic shape of the "*hang*" was created by placing two *steel pans* on top of each other. The **raw forms of these *steel pans*** have always had a half-lens-shaped form due to technical reasons. After all, the shape is created by gently driving the sheet metal into a hemisphere. In addition, *steel pans* were previously played with a convex shape, i.e. with the curve facing outwards. The same applies to the *calabash* and the *water drum* shown above. Lens-shaped percussion instruments were therefore anything but new.

The same applies to the dome. The dome is the central element of the *gong*, which the Applicants certainly did not invent. They also admit themselves that their aim in creating the "*hang*" was to bring the "gong-like sound" into the instrument. They therefore merely used the well-known technical effect of the dome. This does not make it a new element.

The resonance hole (*port*) of the "*hang*" can also be found in the previously known forms. Every instrument based on a Helmholtz resonator has a resonance hole. The idea of a round resonance hole comes from one of the two predecessors of the "*hang*", the ***ghatam.*** The *ghatam* finally has a round resonance hole with a small neck, similar to what was later implemented in the "*hang*".

The circular arrangement of the tone fields is not new either. It comes from the ***steel pans*** that have one or more basic tones placed in the middle and the other tone fields placed in a circle around the middle tone. Two *steel pans* were screwed

together as a first realization of Reto Weber's idea of a new percussion instrument, which is why the first prototype of the "*hang*" also had the tone fields were also arranged in a circle on the top side of the instrument.

d) An object lacks the necessary novelty not only when it is the identical copy of another object. The decisive factor is rather whether the design has its own creative expressiveness (Higher Regional Court Schleswig, judg. of 11.09.2014, 6 U 74/10, ZUM-RD 2015, 108, 112 f.; *Ahlberg,* in: BeckOK UrhG, 26. Ed. 2018, § 2, para 64). The fact that the "*hang*" is a new percussion instrument, does not therefore lead to its novelty in the sense of a creation relevant to copyright. This holds all the more true since the basic form of the "*hang*" is per se already neither new nor protectable under copyright law (see above). In the words of the Higher Regional Court Schleswig (judg. of 11.09.2014, 6 U 74/10, ZUM-RD 2015, 108, 112):

> "A work protected by copyright does not have to be entirely new. What matters for copyright protection is the individuality of the product, not the fact that such a thing did not yet exist. **However, an individual creation is excluded if the product merely reproduces existing expressions** without giving the work personal features. It must be distinguished from other, older works by its design [...].
>
> (emphasis added)

The four key elements of "*hang*" mentioned above are not new and therefore do not constitute a creation within the meaning of Sec. 2 § 2 UrhG. Neither does their combination constitute a creative achievement of the Applicants.

The mere difference to the previously known objects and their forms achieved by combining individual elements of these previously known objects in one instrument is not sufficient to achieve the level of creativity required by copyright law *(Schulze,* in: Dreier/Schulze, UrhG, 6th ed. 2018, § 2, para 18). The Higher Regional Court Schleswig stated (judg. of 11.09.2014, 6 U 74/10, ZUM-RD 2015, 108, 112):

> "Elements which are based on well-known models are **not to be taken into account when examining** whether a new product has the **minimum degree of aesthetic content** required for a work of art, unless it is precisely their combination, either with each other or with a new element, that is considered to be a sufficient creative achievement for copyright protection.
>
> (emphasis added)

This was also confirmed by the FCJ when it stated (judg. of 13.11.2013, I ZR 143/12, GRUR 2014, 175, para 39 - *Geburtstagszug*):

> "An object may be eligible for design protection because of its difference from the previously known wealth of forms, without achieving the level of creativity required for copyright protection."

e) The "*hang*", or the combination of individual elements of different percussion instruments which can be recognized in it, does not represent a "creative" achievement which has the necessary copyright level. The "*hang*" is rather an expression of a technical, manual development of a musical instrument.

The level of creativity under copyright law requires that the aesthetic content of an object "*has reached such a level that, in the opinion of those circles receptive to art and reasonably familiar with art, it can be considered an "artistic" achievement*" (FCJ, judg. of 13.11.2013, I ZR 143/12, GRUR 2014, 175, para 26 - *Geburtstagszug*; FCJ, judg. of 12.05.2011, I ZR 53/10, GRUR 2012, 58, para 17 – *Seilzirkus*; FCJ, judg. of 19.01.1979, I ZR 166/76, GRUR 1979, 332, 336 - *Brombeerleuchte*; FCJ, judg. of 21.05.1969, GRUR 1972, 38, 39 - *Vasenleuchter*). Mere technically conditioned design features cannot justify copyright protection (FCJ, judg. of 12.05.2011, I ZR 53/10, GRUR 2012, 58, para 19 - *Seilzirkus*). In the words of the FCJ (judg. of 12.05.2011, I ZR 53/10, GRUR 2012, 58, para 22 - *Seilzirkus*):

> "However, only the design that is **based on an artistic achievement** is protected by copyright."
>
> (emphasis added)

This applies equally to works of applied art and other works. Admittedly, the demands made on the creative expression of a work of the applied arts must not be higher than for other works. Nevertheless, the principles of copyright law apply in the same way as with other works, namely that – in view of the long term of copyright protection – requirements may not be too low (FCJ, judg. of 13.11.2013, I ZR 143/12, GRUR 2014, 175, para 40 - *Geburtstagszug*).

Finally, the examination of the creative threshold of an object remains a question of the individual case. In the case of objects of use it must of course still be

examined to what extent their form is predefined by technical specifications and whether, in addition, an "artistic" achievement can be recognized *(Schulze,* in: Dreier/Schulze, UrhG, 6th ed. 2018, § 2, para 160). In the words of the FCJ (judg. of 13.11.2013, I ZR 143/12, GRUR 2014, 175, para 41 - *Geburtstagszug*):

> "Even if no higher requirements are to be placed on the design threshold of a work of applied art than in the case of works of art that are not for a specific purpose, it must be borne in mind when assessing whether such a work achieves the level of design required for copyright protection that **the aesthetic effect of the design can only justify copyright protection if it is not due to the purpose of use but is based on an artistic achievement** [...]. An author's own intellectual creation presupposes that there is scope for design and that the author uses it to express his creative spirit in an original way [...]. In the case of articles of daily use which must display design features dictated by the purpose of use, the scope for artistic design is regularly restricted. Therefore, the **question arises in particular whether they are artistically designed beyond their form dictated by their function** and whether this design reaches a level of creativity which justifies copyright protection.
>
> (emphasis added)

Products with a purpose, such as the "*hang*" as an instrument, only enjoy copyright protection if their content, which is appealing to the sense of standards, leads the relevant public to recognize them as a work of art or an artistic achievement and not merely as an object of use (FCJ, judg. of 27.2.1961, GRUR 1961, 635, 638 - *Stahlrohrstuhl;* Higher Regional Court of Erankfurt, judg. of 12.06.2019, 11 U 51/18, GRUR-RR 2019, 457, para 28 f. - *L*ogo). Taking into account the existing scope for design protection, the starting point for a copyright protection can be the question of how much imagination the author had to express in order to arrive at his work *(Ahlberg,* in: BeckOK UrhG, 26 Ed. 2018, § 2, para 70). When examining whether an artistic performance is present, the characteristics that have a technical function shall not be taken into account.

f) The Applicants did not have to use their imagination in developing the "*hang*". The "*hang*" is not an *artistic* achievement. The idea of such an instrument came from Reto Weber, not from the Applicants. The Applicants then developed the instrument further, certainly under their own direction. The essential features of the "*hang*" – lens shape, dome, resonance hole, circular arrangement of the tone fields are, however, technically conditioned and fulfil a technical function. In this respect we refer to our explanations above under point 29.

The combination of these features, which all fulfil a technical function, does not lead to an artistic input by the Applicants. The value created by the Applicants is on a craftsmanship, technical level. A striking example for this is the Bavarian State Prize for outstanding technical achievement in craftsmanship, which the Applicants received in 2000.

The lens shape of a raw shells is created by the gentle expulsion of sheet metal. To expel another form by machine would considerably increase the error rate in the manufacturing process of the raw shells and consequently make their production much more expensive. This form is therefore not only not new, it is also technically predetermined by the machine production of the raw shells. This is also shown by the fact that the first Applicant described the lens shape in its claims of patent EP 2 443 625. In addition, the lens shape enables an ideal sound propagation in the instrument. This is also the reason why it is often found in other instruments and objects that reflect waves (such as loudspeakers, light cones, etc.). Furthermore, the lens shape is also technically predetermined to the extent that the instrument made from the raw shells must be playable. The purpose of developing the "*hang*" was to create an instrument that could be played on the lap. For this it is absolutely necessary that it has a certain stability on the lap. The shape of the lens distributes the physical effects of the strokes ideally on both legs and thus ensures that the instrument remains stable on the lap when played. The center of gravity of the instrument is also centered on the lap so that the "*hang*" or *handpan* does not move too much when played.
The dome has also a technical function. It produces what the Applicants call the "gong-like sound", i.e. a certain sound of the instrument, which is sometimes perceived as sacral. The centrally located dome also leads to an increased stiffness of the material and causes an even tension and thickness of the sheet metal in the area of the shoulder of the "*hang*". This ensures that the individual tone fields vibrate evenly when the dome is arranged centrally. The location of the dome is also determined by the required playability of the instrument. A central dome ensures that the player can reach it with the fingers of both hands and can therefore play the keynote smoothly at all times.

The resonance hole also fulfils various technical functions for the instrument. In this respect, the Applicants have tried out a lot, especially in the first years of the development of the "*hang*". They have further developed the resonance hole with

the help of engineers and physicists, as their solutions were not technically convincing until then. The resonance hole is necessary for every Helmholtz resonator. The shape and location of the opening result from various technical considerations. On the one hand, the hole also serves to tune a *handpan*. It is therefore necessary to arrange it centrally in order to be able to reach the different sound fields with one arm. The hole must therefore also be big enough to fit an hand in it. In addition, the central arrangement of the resonance hole is the easiest and therefore cheapest alternative in production. Furthermore, a central resonance hole on the bottom side increases the playability of the instrument, as the opening cannot by mistake be covered by the player's body. The respective musician is on the other hand able to specifically cover the resonance hole with his or her legs and thus influence the sound of the instrument. The diameter of the opening has a decisive influence on the sound. If the resonance hole has to be arm-wide on the one hand, making it too large would have a negative effect on the sound on the other hand. If the opening is too large, the resonance effect in the instrument would be lost at some point.

The circularly arranged tone fields are also not only not new, but technically preconditioned. The question arises as to where the tone fields should be placed on an instrument that is played on the lap other than the top side. If the dome in the middle is technically predetermined, as explained above, the only option left is to place the tone fields around it in the choir. The incorporation of tone fields is done by hammer blows into the sheet metal and thus influences the metal's tension. This tension is evenly distributed if the tone fields are also worked in the metal evenly around the dome. This in turn affects the overtones that resonate and thus the sound of the instrument. In addition, the tones on a *handpan* are regularly arranged in a zigzag ascending or descending order, which is important for the playability of the instrument.

g) The essential elements of the "*hang*" therefore all fulfil a technical function. This also explains why the Applicants have worked with numerous physicists, engineers, metallurgists and other scientists over the years to refine their instruments. Although the creation of the "*hang*" was certainly a challenging task from the point of view of craftsmanship, in which the Applicants had to acquire a great deal of knowledge and fail in many experiments before they could find the right solution to individual problems, this does not mean that it is a personal intellectual creation within the meaning of Sec. 2 § 2 UrhG.

h) It is also irrelevant for German copyright law whether the alleged authors had a choice between different technically functional features. A choice between different technical features does not in itself constitute an artistic achievement.

Finally, the aim is to prevent an author from monopolizing technical solutions or characteristics of a product for himself, thereby preventing others from using a known technical solution or giving their products certain advantageous characteristics. Such technical solutions are either protected by special rights, such as patent or design rights, or – at least after a certain period of time - are in the public domain and can be used by anyone. The legislator clearly wanted to prevent monopolization of technical solutions.

The fact that there are other standards with which the same technical effect can be achieved is therefore irrelevant for the assessment of an object as artistic and thus protectable under copyright law. In contrast to competition law, where it can indeed matter whether a competitor can achieve the same result with another standard and thus avoid imitation, in copyright law the only question of relevance is whether there is an artistic performance going beyond technical choices. Functional elements, irrespective of the possibility of replacing them with other functional elements, do not constitute an artistic performance.

2. The injunctions issued so far do not have any binding effect on the court. They have furthermore not been accepted as a final decision on the substance of the case. Interim measures pursuant to Sec. 935 et seq. German Civil Procedural Code ("Zivilprozessordnung" – **ZPO**) only constitute provisional decisions. When issuing a preliminary injunction (PI), the court only has to make an initial assessment as part of a general balancing of interests. The requirements of proof are also reduced in such proceedings. It is sufficient for facts to be substantiated.
The decisions of the Higher Court of Düsseldorf and the Higher Court of Berlin were also taken ex *parte* and no reasons were given. Moreover, the only reasoned ruling (known to us) of the Higher Court of Hamburg deviated too far from the criteria of Sec. 2 UrhG mentioned above. The Higher Court of Hamburg seems to have been guided in particular by the idea that many metal objects sound the same when struck by hand. We would already like to question this general statement against the background that this was the opinion of the three judges, who - because they were in preliminary injunction proceedings - did not have to appoint an expert for this purpose.

However, this point misses the core question of the supposed copyright protection of the "*hang*" anyway. Even if a blow with the hand on the most different objects made of sheet metal may sound similar, it is not possible to reject the technical conditionality of the individual elements of the "*hang*". After all, the issue is - and was before the Higher Court of Hamburg - not the copyright protectability of a specific sound, but of a concrete object of use and its particular shape. When assessing the creative level of such an object, the question is not whether it sounds similar to another object, but whether its essential characteristics fulfil a functional and thus not artistic purpose for that object. That is the case with the "*hang*".

3. Finally, it cannot be deduced from the case law of the European Court of Justice (ECJ) that the "*hang*" would be eligible for copyright protection in Germany. The Applicants have repeatedly confirmed that they had not previously assumed that they owned a copyright in Germany but that their view changed with the new case law of the ECJ (ECJ, judg. of 11.06.2020, C-833/18, GRUR 2020, 736 - *Brompton Bicycle;* judg. of 12.09.2019, C-683/17, GRUR 2019, 1185 - *Cofemel*). However, the statements of the ECJ in the above-mentioned proceedings can be summarized quite simply: Copyright protection is reserved for any object that fulfils the conditions for copyright protection. This is not the case with the "*hang*" and the case law of the ECJ does not change this.

It is true that the ECJ assumes a harmonized concept of "work", which is to be interpreted uniformly and autonomously throughout the European Union (ECJ, judg. of 12.09.2019, C-683/17, GRUR 2019, 1185, para 29 - *Cofemel).* According to this, for an object to qualify as a "work", it must be an original that represents the author's own intellectual creation and consist of elements that express such a creation. The latter merely means that the "work" must be identifiable (ECJ, judg. Of 12.09.2019, C-683/17, GRUR 2019, 1185, para 32 - *Cofemel).* The first prerequisite of the concept of "work", the own intellectual creation, is therefore more important. This prerequisite is already found - under a slightly different designation, namely that of a "personal intellectual creation" - in German copyright law.

With regards to the category of objects of daily use as "works of applied art", German case law has in the past admitted stricter standards for the protectability of such articles under copyright law in order to distinguish them from design protection. They had to clearly outperform average designs (FCJ, judg. of 22.06.1995, I ZR 119/93, GRUR 1995, 581 - *Silberdistel*). However, the Federal Court of Justice abandoned this case law as early as 2013 and clearly admitted that works of applied art are subject to no other

requirements than the general copyright protection requirements of a "personal intellectual creation" (judg. of 13.11.2013, I ZR 143/12, GRUR 2014, 175, para 15 - *Geburtstagszug*). In its Cofemel ruling, the ECJ has now (six years after the change in German case law) also seen it this way (ECJ, judg. of 12.09.2019, C-683/17, GRUR 2019,1185, para 48 - *Cofemel*).

At the same time, however, the ECJ has stressed that the granting of copyright protection to objects which are actually subject to design law must not have the effect of undermining the objectives and the effectiveness of design law. In the words of Advocate General Szpunar (Opinion of 02.05.2019, C-683/17, ECLI:EU:C:2019:363, para 52 - *Cofemel),* which the ECJ has explicitly endorsed (ECJ, judg. of 12.09.2019, C-683/17, GRUR 2019,1185, para 51 - *Cofemel*):

> **"If it is too easy to obtain copyright protection for the same subject-matter, which is not subject to any formality, which is valid from the creation of the subject-matter without the requirement of novelty, and whose duration is practically infinite as regards the usability of the design for its owner, there is a risk that the copyright system will replace the sui generis system for designs. However, this suppression would have several negative effects: the devaluation of the copyright used to protect genuinely banal creations, the restriction of competition due to the excessive duration of protection, or even legal uncertainty** in that competitors would not be able to foresee whether a design whose sui generis protection has expired would not also be protected by copyright".
>
> (emphasis added)

The ECJ rightly concludes from this that copyright protection for such items is only available in very specific circumstances. The European legislator had made it clear through its different regulations,

> "that **subject matter protected as a design was not as general rule capable of being treated in the same ways as subject matter constituting works protected by Directive 2001/29**."
>
> (ECJ, judg. of 12.09.2019, C-683/17, para 40 – *Cofemel*; emphasis added)

The ECJ has established a clear rule-exception relationship. The copyright protection of articles of daily use is the exception (see also *Leistner,* GRUR 2019, 1114, 1119). A possible aesthetic effect which may emanate from such a model is not sufficient to confer copyright protection on the object (ECJ, judgement of 12.09.2019, C-683/17, GRUR 2019,1185, para 53 f. - *Cofemel*).

Contrary to what the Applicants claim, the ECJ therefore has strict standards for copyright protection of works of applied art. These strict standards are necessary in order not to undermine the scope of protection and the objective of design law as the very source of protection of these objects. It is also clear that not every object worthy of protection under design law should suddenly be able to claim a protection of regularly 70 years after the death of its author.

In its most recent judgment, the ECJ reaffirms these principles (ECJ, judg. of 11.06.2020, C-833/18, GRUR 2020, 736 - *Brompton Bicycle*). The case of this ruling was again at the interface of copyright law with other (industrial) property rights. The subject of dispute in the "Brompton" proceedings was a foldable bicycle previously protected by a patent. The patent protection for that technical solution expired and was then used by other bicycle manufacturers, which (probably) resulted in a somewhat similar bicycle shape. In those circumstances, the national court wondered whether an article of everyday use which was initially covered by another intellectual property right, in this case patent law, was capable of being protected by copyright if its shape was technically dictated. In essence, the question was therefore whether the technical nature of the shape of the object could preclude copyright protection from the outset. This question was rightly asked since it must be prevented,

> "that excessive protection" of copyright leaves intellectual property right "devoid of substance."
>
> (Opinion of Advocate General Campos Sänchez-Bordona of 06.02.2020, C-833/18, ECLI:EU:C:2020:79, para 45 - *Brompton Bicycle*)

The ECJ then clarified that a partially technical form would not exclude copyright protection from the outset. Such a form may rather be protected by copyright, provided that

> "the product is **an original work of intellectual creation** because the author of the work expresses his creative capacity in an independent way by choosing the shape of the product."
> "that product is **an original work resulting from intellectual creation**, in that, through that shape, its author expresses his creative ability in an original manner."
>
> (ECJ, judg. of 11.06.2020, C-833/18, para 38 - *Brompton Bicycle,* emphasis added)

An object of use is thus only protected by copyright if it fulfils the aforementioned requirements of originality and expression of its own intellectual creation. In this

context, the ECJ emphasizes that an own intellectual creation or an "original work" requires a free creative decision which may not be dictated by technical considerations (ECJ, judg. of 11.06.2020, C-833/18, GRUR 2020, 736, para 26 ff. - *Brompton Bicycle*). This has not changed after "Brompton". In the words of the ECJ (judg. of 11.06.2020, C-833/18, para 32 f. - *Brompton Bicycle*):

> "Even though there remains a possibility of choice as to the shape of a subject matter, it cannot be concluded that the subject matter is necessarily covered by the concept of "work" within the meaning of Directive 2001/29.
> Where the shape of the product is solely dictated by its technical function, that product cannot be covered by copyright protection."

In the view of the ECJ, the possibility of choosing between different forms **does not** constitute an **originality** of the object (ECJ, Judgement of 11.06.2020, C- 833/18, GRUR 2020, 736, para 35 - *Brompton Bicycle*).

This is what the ECJ stated in its "Brompton" judgment (judg. of 11.06.2020, C-833/18, GRUR 2020, 736, para 38 - *Brompton Bicycle*). According to all of this, the European Court of Justice therefore has **strict standards for copyright protection of objects of everyday use** as "works of applied art". The "*hang*" does not satisfy these conditions.

4. According to all of the above, the Applicants 2) and 3) have no copyright on the "*hang*". Consequently, they could not effectively transfer the exclusive rights of use to the Applicant 1).

5. If one wanted to presume copyright protection for the "*hang*", the instruments of the potential defendants would in any event not infringe it.

   a) A copyright infringement - in this case in the form of reproduction - requires that the imitation falls within the scope of protection of the original. It therefore cannot contain any creative expressions of its own. The scope of protection of the original is therefore crucial. For example, a reproduction within the meaning of Sec. 16 UrhG cannot be relevant if only unprotected, public domain elements are used (FCJ, judg. of 12.06.1981, I ZR 95/79, GRUR 1982, 37, 39 - *WK Dokumentation*; Higher Regional Court of Hamburg, judg. of 04.03.1999, 3 U 169/98, ZUM 1999, 481, 482 – *Bauhaus-Glasleuchte*). The sole criterion for determining a reproduction is the use of elements protected by copyright as the are to be regarded

as a creative contribution of the first work's author (*Schulze,* in: Dreier/Schulze, UrhG, 6th ed. 2018, § 24, para 6). The FCJ states (judg. of 08.07.2004, I ZR 25/02, GRUR 2004, 855, 857 - *Hundefigur*):

> "An infringement of copyright is only considered if the elements identified as "borrowed" meet the protection requirements of Sec. 2 UrhG."

The higher the creative input of these elements, the sooner a reproduction can be assumed and vice versa. In the words of the FCJ (judg. of 24.01.1991, I ZR 78/89, GRUR 1991, 531, 532 - Brown Girl I):

> "For the assessment of the question whether a permissible free use (§ 24 UrhG) or a dependent adaptation exists, **the creative threshold of the work used as a model is decisive.** The more conspicuous the peculiarity of the work used as a model, the less its adopted peculiarities will fade in the work created thereafter. **Conversely, however, the requirements for free use cannot be set too high if the work used as a model has only a low degree of inherent creativity.** A work of lesser individuality is more likely to be absorbed in the subsequently created work than a work of special individual character."
>
> (emphasis added)

The low creative particularities of a work therefore result in a narrow scope of protection. The features of a work which are more at the lower end of the copyright protection fade more quickly and easily than a highly independent, complex work. This is in line with the consistent case law of the FCJ (emphasis added):

> "Furthermore, it should be noted that **a low level of creativity, although it constitutes copyright protection, leads to a correspondingly narrow scope of protection of the work in question**." (BGH, judg of 13.11.2013, I ZR 143/12, GRUR 2014, 175, para 41 - *Geburtstagszug*)
>
> "However, **a low degree of peculiarity also** results in **a correspondingly narrow scope of protection** for the work in question." (FCJ, judg. of 01.06.2011, I ZR 140/09, GRUR 2011, 803, para 63 - *Lernspiele*)
>
> "It is therefore sufficient that an individual mental activity - which is different from the everyday work in the field of technical drawings - is expressed in the representational thought, even if the degree of peculiarity, of individual character, is low. **However, a low degree of peculiarity also implies a correspondingly narrow scope of protection for the work in question.**"
> (FCJ, judg. of 28.02.1991, I ZR 88/89, GRUR 1991, 529, 530 -

Explosionszeichnungen)

This applies in particular to works of applied art such as the present "*hang*" (Higher Regional Court of Nuremberg, GRUR 2014, 1199, 1202 – *Kicker-Stecktabelle).*

b) The elements of the "*hang*", which are technically specified, must therefore not be included when assessing an alleged reproduction. Correctly, it already follows from this that the "*hang*" is not a work eligible for copyright protection. At best, the colors of the instrument and the brass ring sometimes attached to it remain as elements that do not have a technical function, although this is not entirely true with regard to the latter. The ring around the instrument also has a technical function. It increases the stability of the instrument and improves its feel for the player.

c) If, however, one assumes copyright protection of the "*hang*", its scope of protection can only be limited to its respective very concrete model. Otherwise, the (permissible) free adaptation within the meaning of Sec. 24 UrhG would be rendered impossible.

d) The scope of protection of the "*hang*" would thus be limited at most to its identical imitation. If the potential defendants deviate from this in size, material, weight, size of the dome, dome shape, visibility of the shoulder, shoulder shape, shape of the sound fields, number of sound fields, visibility of the sound fields, colours etc., they would no longer be within the protected area of the "*hang*".

6. The copyright claims of the Applicants would be forfeited in any case pursuant to § 242 BGB. Forfeiture pursuant to § 242 BGB presupposes the existence of a time element and a circumstance element.

In terms of time, the Applicants watched as the instrument went around the world and as others, driven by its success, began to make *handpans* from 2006 onwards.

In this respect, the Applicants themselves have been instrumental in helping other *handpan* makers to develop. From 2006 onwards, they have made it considerably more difficult to get a "*hang*". In 2013 they stopped the production of the "*hang*" then finally

one. In addition, from 2008 onwards, they increasingly refused to re-tune instruments already sold by their previous customers. At the same time they continuously published their findings on how to best build the instrument.

The Applicants thus forced a situation in which their previous as well as potentially new customers had to turn to other producers. Since 2006, the Applicants have been aware that many other *handpan* makers had emerged alongside them. They have confirmed in various publications that they had anticipated this development. However, this has not stopped them from ending the production and the sale of their las "*hang*" model, the "Free Integral Hang".

The Applicants have then spent seven more years watching the growing, large *handpan*-community worldwide. People all over the world began to build, sell, play and learn the instrument. Over the years they have become accustomed to the structure of the instrument and its playing style. The Applicants not only watched this development, they also gave the impression to accept this movement. Over the years they asked at various *handpan* makers for material samples in order to be able to check whether they possibly infringe their patent. If they did not do so, the Applicants did not follow up with copyright claims. On the contrary, they expressed their acceptance of the respective *handpan* maker. We again cite the comment of the Applicants regarding Mr. Ralf van den Bor, after he cleared up that that he did not infringe the Applicant's patent:

> "Thank you very much for your help. We are happy that you don't infringe our patent, **that means we work in a completely different direction** although you build more or less the same design.
>
> Our work is based on a composite and on hammer blows-in the tradition of the old tuners from Trinidad.
>
> **If you become rich you could give us some dollars-because you take profit from our raw form.** To build the lense with Ding and Gu was not so easy!
>
> Be careful not to support banality and mass production: this will be the end of the spirit of creativity.
>
> All the best
> Felix and the PANArt Team"
> (emphasis added)

The Applicants have sent numerous e-mails similar to this one. They gave the impression that they did not want pursue copyright claims against *handpan* makers.

They now justify their actions in 2020 on the grounds that the case law of the ECJ has changed. This is already incorrect. Moreover, even a change in case law would not constitute a change in the legal situation. If the Applicants believe that they have a copyright on the "*hang*", they should have done so in the past. The legal situation has not changed since the Directive on the hamonisation of certain aspects of copyright and related rights in the information society (2001/29/EC).

For that reason alone, the makers and sellers of *handpans*, including the potential defendants, were entitled to assume in good faith that they were allowed to make *handpans*.

The Applicants act abusively when they spend years watching the world getting used to an instrument and then, after everyone has got used to it, want to monopolize its essential characteristics. If the Applicants had built the first piano, they could not, years later, demand that all other piano makers abandon the black keys of the instrument. These may not even be technically compulsory, but they are an essential part of any piano.

7. The Applicants furthermore do not meet the urgency requirement for obtaining a preliminary injunction. The presumption of urgency of Sec. 12 § 2 UWG does not apply to copyright law (Higher Regional Court of Munich, judg. of 2.2.2019, 29 U 3889/18, ZUM 2019, 592, 593 - *Wissenschaftsverlage*). The applicants would therefore have to demonstrate the urgency of the matter, which they will not be able to. They had effective knowledge of all the handpan sellers listed in Annex R 38 since 15.10.2020 at the latest. Since then they have not taken any action against these sellers.

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Rechtsanwalt

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